

International Criminal Prosecution of Physicians: A Critique of Professors Annas and Grodin's Proposed International Medical Tribunal

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I. INTRODUCTION

Society benefits from physicians who seek truth and healing for the good of humanity.¹ Despite ethical admonishments to “do no harm,”² however, physicians have caused some of the most appalling human rights abuses of the twentieth century.³ Physicians, alone or in concert with the state, have willfully abused their medical knowledge and debauched their profession in furtherance of human rights violations. Compounding their crimes, physicians often have been complicit in following oppressive regimes in abusive practices against their citizens. Ironically, it is their knowledge of this healing art that allows physicians to take part in this injurious conduct; and it is this knowledge that states seek to harness in buttressing

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¹ E.g., CHARLES FRIED, MEDICAL EXPERIMENTATION: PERSONAL INTEGRITY AND SOCIAL POLICY 147-48 (1974) (control of polio); Donald A. Henderson, *Smallpox—Epitaph for a Killer?*, 154 NAT'L GEOGRAPHIC 796 (1978) (worldwide eradication of smallpox); Fiona Fleck, *WHO Says SARS Outbreak Is Over, But Fight Should Go On*, 70 BMJ 327 (2003) (containment of Severe Acute Respiratory Syndrome (SARS)).

² The most famous and lasting of physician ethical oaths, the Hippocratic Oath, charges graduating medical students to “abstain from harming or wrongdoing” in their work. M.B. ETZIONY, THE PHYSICIAN'S CREED 13 (1973); K.C. Calman & R.S. Downie, *Ethical Principles and Ethical Issues in Public Health*, in 1 OXFORD TEXTBOOK OF PUBLIC HEALTH 391, 392 (3rd ed. 1997) (noting that medical ethics have long imposed duties on physicians, which “have traditionally been thought of as those of not harming the patient (non-maleficence) and of helping the patient (beneficence)”).

³ E.g., Eva Mozes-Kor, *The Mengele Twins and Human Experimentation: A Personal Account*, in GEORGE J. ANNAS & MICHAEL A. GRODIN, THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION 53 (1992) (experiments with children at the Auschwitz concentration camp); Claire Alida Milner, *Gulf War Guinea Pigs: Is Informed Consent Optional During War?*, 13 J. CONTEMP. HEALTH L. & POL'Y 199, 218-223 (1996) (intentional LSD exposure of uninformed and non-consenting subjects).

violative policies. In fact, for nations bent on violating human rights, it is “much easier for governments to adopt inherently evil and destructive policies if they are aided by the patina of legitimacy that physician participation provides.”⁴

There is widespread international agreement that physicians can and should be held accountable for their involvement in human rights abuses. The Doctors’ Trial of 1946-47, in which Nazi physicians were tried at Nuremberg for war crimes and crimes against humanity, remains the only international criminal prosecution of physicians for violations of human rights. Despite the success of the Doctors’ Trial, and the medical ethics codes that have derived from it, physicians continue to participate in human rights violations, often outside the reach of criminal prosecution. Condemning such acts and preventing future abuses of medicine have become a focus for lawyers, doctors, and human rights practitioners.

Beginning in 1992, professors George Annas and Michael Grodin⁵ have advocated the creation of an “International Medical Tribunal” to prosecute physicians who violate human rights.⁶ Even after the successes and failures in the creation of the International Criminal Court (“ICC”), Annas and Grodin continue to believe that “[t]he arguments for a permanent international medical tribunal are every bit as compelling as those for [an International Criminal Court].”⁷ Yet, the International Medical Tribunal lacks many of the advantages of the ICC while retaining many of its disadvantages.

On July 17, 1998, representatives of more than 160 nations met in Rome, Italy and adopted an international treaty to govern a permanent international criminal court, the Rome Statute of the International Criminal Court (“Rome Statute”).⁸ The ICC, created by the Rome Statute, has subject matter jurisdiction over the so-called “core crimes” of genocide, crimes against humanity, war crimes, and, once defined, aggression.⁹ Within this jurisdiction will fall crimes committed by physicians and non-physicians alike. This permanent criminal court, built upon the ad hoc tribunals of Nuremberg and beyond,¹⁰ came into effect in 2002 and has just begun to adjudicate its first case.¹¹

⁴ GEORGE J. ANNAS, *SOME CHOICE: LAW, MEDICINE, AND THE MARKET* 253 (1998).

⁵ George J. Annas is the Director of the Law, Medicine & Ethics Program at the Boston University Schools of Medicine and Public Health; Michael A. Grodin is an Associate Director of the Law, Medicine & Ethics Program at the Boston University Schools of Medicine and Public Health.

⁶ George J. Annas & Michael A. Grodin, *Medical Ethics and Human Rights: Legacies of Nuremberg*, 3 HOFSTRA L. & POL’Y SYMP. 111, 119 (1999) (citing Grodin et al., *infra* note 113, at 8-12).

⁷ Annas & Grodin, *supra* note 6, at 118.

⁸ Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. No. A/CONF.183/9, reprinted in 37 I.L.M. 999, 1012 (1998) [hereinafter Rome Statute].

⁹ Rome Statute art. 5(1). Before any prosecutions can be heard under the crime of aggression, an amendment to the Rome Statute will first be needed to define the crime of aggression and set out the conditions under which the ICC could exercise jurisdiction. Rome Statute art. 5(2). The Rome Statute specifically allows for the future definition of the crime of aggression, which would take place at a review conference seven years after the entry into force of the Rome Statute, April 11, 2009. See Rome Statute arts. 121, 123.

¹⁰ Benjamin Ferencz, *The Experience of Nuremberg*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 3, 9 (Dinah Shelton ed., 2000) (“What was done in the International Military Tribunal [at Nuremberg] and reinforced in the twelve subsequent trials is the basis for the current efforts to build a permanent International Criminal Court and other institutions to hold individuals responsible for their criminal acts.”).

¹¹ Kristina D. Rutledge, “Spoiling Everything”—But for Whom? *Rules of Evidence and International Criminal Proceedings*, 16 REGENT U. L. REV. 151, 161 (2004) (noting that “the legacy of the World War II trials and the recent experiences of the ad hoc tribunals have influenced the

This article analyzes professors Annas and Grodin's proposed International Medical Tribunal in light of the international community's experiences in creating the ICC. Part II describes the actions of Nazi physicians during World War II and the trial of these physicians at Nuremberg. Part III explains how, contrary to expectations of those at Nuremberg, physicians continue to take part in widespread violations of human rights. Part IV details Annas and Grodin's proposed International Medical Tribunal and their arguments in favor of its creation. Part V critiques the International Medical Tribunal. Specifically, Part V argues that there is no longer a valid justification for establishing a separate international court for physicians now that the ICC has been formed to prosecute perpetrators of human rights violations; if such an International Medical Tribunal were created, it would fail to achieve Annas and Grodin's purported goals. Only when nations have codified the rights of victims can national and international tribunals enforce these rights under international criminal law. Part VI advocates the prosecution of medical crimes within the ICC framework, where possible; and, where the Rome Statute is silent as to the harm suffered by a victim of medicine, advocates that nations adopt the laws necessary to transmute human rights norms into international criminal law. This article concludes that scholars must reengage a human rights framework to protect the forsaken victims of medicine, setting the stage for future prosecution of criminal physicians.

II. NUREMBERG

A. NAZI MEDICINE

The Nazi atrocities committed during World War II,¹² enabled by German eugenics and human research programs, constituted a complete disregard for the value of human life and the inherent rights of research subjects.¹³ Beginning in 1933, the German Reich advanced eugenics theories as the basis for promulgating the Law for the Prevention of Genetically Diseased Offspring, which outlined the processes for the voluntary and mandatory sterilization of myriad "hereditary defects."¹⁴ Pursuant to these so-called "racial hygiene" programs, German physicians sterilized between 300,000 and 400,000 German citizens prior to the war,¹⁵ often using vague sterilization criteria as a pretext for political persecution.¹⁶

development of the International Criminal Court's rules of procedure and evidence" (quoting THEODOR MERON, *WAR CRIMES LAW COMES OF AGE* 297 (1998)).

¹² For an historical survey of medical crimes prior to World War II, see generally M. Cherif Bassiouni et al., *An Appraisal of Human Experimentation in International Law and Practice: The Need for International Regulation of Human Experimentation*, 72 J. CRIM. L. & CRIMINOLOGY 1597, 1598-1600 (1981).

¹³ See Telford Taylor, *Opening Statement of the Prosecution, December 9, 1946*, reprinted in ANNAS & GRODIN, *supra* note 3, at 67 ("The defendants in this case are charged with murders, tortures, and other atrocities committed in the name of medical science To their murderers, these wretched people were not individuals at all. They came in wholesale lots and were treated worse than animals.").

¹⁴ Matthew Lippman, *The Nazi Doctors Trial and the International Prohibition on Medical Involvement in Torture*, 15 LOY. L.A. INT'L & COMP. L.J. 395, 406 (1993) (citing Law for the Prevention of Hereditarily Diseased Offspring (July 14, 1933), in 2 NAZISM 1919-1945: A HISTORY IN DOCUMENTS AND EYEWITNESS ACCOUNTS, THE NAZI PARTY, STATE AND SOCIETY 1919-1939, at 457 (J. Noakes & G. Pridham eds., 1984)).

¹⁵ Victor W. Sidel, *The Social Responsibilities of Health Professionals: Lessons from Their Role in Nazi Germany*, 276 JAMA 1679, 1679 (1996); Jeremiah A. Barondess, *Medicine Against Society:*

At the onset of war, the Nazi medical establishment moved from sterilization to euthanasia of those deemed to be “incurably ill.”¹⁷ During the war, with eugenics and euthanasia receiving widespread acceptance in the state medical establishment, German physicians voluntarily aided in theorizing, planning, and operating Nazi killing programs, which had then expanded from patients of German state hospitals to inmates of Nazi concentration camps.¹⁸ Founded upon debased notions of public health and welfare, physicians exterminated populations of thousands *en masse* to prevent the spread of purported diseases.¹⁹ Rather than questioning the ethical propriety of their actions, these physicians enthusiastically performed acts of genocide, acting under a strong, albeit perverse, belief that they were acting in accordance with the sound medical principle of “healing the state.”²⁰ As the concentration camps made way for extermination camps, physicians voluntarily “performed the selections, supervised the killing in the gas chambers, and decided when the victims were dead.”²¹ The genocidal horrors of the Holocaust would not have been possible without the direct assistance and participation of physicians.

Lessons from the Third Reich, 276 JAMA 1657, 1657-60 (1996) (noting that the German Medical Association, in accordance with the German Sterilization Law of 1933, published a journal to guide physicians and special “eugenical courts” in determining which patients were appropriate subjects for sterilization).

¹⁶ Lippman, *supra* note 14, at 407 (noting that sterilization criteria “served as pretexts to justify the sterilization of Bohemians, rebels, and deviants” (citing MICHAEL BURLEIGH & WOLFGANG WIPPERMANN, *THE RACIAL STATE: GERMANY 1933-1945*, at 253 (1991))).

¹⁷ Lippman, *supra* note 14, at 408 (noting that “[b]y August 24, 1941, the completion of the initial phase of the euthanasia initiative, over 70,000 patients from more than one hundred German hospitals had been killed” (citing ROBERT PROCTOR, *RACIAL HYGIENE: MEDICINE UNDER THE NAZIS* 177 (1988))); Matthew Lippman, *The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany*, 3 IND. INT’L & COMP. L. REV. 1, 22 (1992) (“The euthanasia program involved the systematic execution of Germans in medical institutions—the aged, crippled, infirm, insane and incurably ill by lethal injection, gas and other means This program served as the first step towards the wholesale extermination of Jews, Gypsies and Slavic populations.”).

¹⁸ Barondess, *supra* note 15, at 1660.

¹⁹ Lippman, *supra* note 17, at 22 (“Between May 1942 and January 1944, tens of thousands of Polish internees who allegedly were infected with tuberculosis were executed in order to ensure the public health and welfare.” (citing *United States v. Brandt*, in II TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 179 (1950))).

²⁰ Michael J. Malinowski, *Choosing the Genetic Makeup of Children: Our Eugenics Past, Present, and Future?*, 36 CONN. L. REV. 125, 152-54 (2003) (noting the medical establishment’s “commitment to healing and strengthening the German state and belief in social Darwinism” as reasons for the actions of German physicians); Lippman, *supra* note 14, at 420 (“This was the ‘healing-killing paradox,’ the belief that the German people would be healed and protected by annihilating the virus of racial inferiority.” (citing ROBERT JAY LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE* 202 (1986))). For an examination of the psychological motives of Nazi physicians, see LIFTON, *supra*, at 434-55.

²¹ LIFTON, *supra* note 20, at 434-55; Sidel, *supra* note 15, at 1679 (“Physicians were essential elements in running the death camps, deciding on the admission ramps who was fit enough to be permitted to live temporarily to perform forced labor and who should be promptly killed; in some instances health personnel participated directly in the murder of camp inmates . . .”).

The police did not control [the gas chambers]. Instead, in every instance, medical doctors operated the chambers. This procedure was in accordance with the Nazi view that these were medical operations. The slogan often repeated was that “the syringe belongs in the hand of a physician.” The gas chamber was portrayed as an advance in medical technology, which satisfied the humane requirements of medicine, as well as the practical needs of the state.

Lippman, *supra* note 14, at 409-10 (citations omitted).

In addition to the wholesale extermination of millions, German doctors also performed fatal experiments on otherwise healthy patients.²² In the aftermath of the war, it was found that Nazi physicians took part in “medical experiments without the subjects’ consent, upon civilians and members of the armed forces of nations then at war with the German Reich . . . in the course of which experiments the[y] committed murders, brutalities, cruelties, tortures, atrocities, and other inhuman acts.”²³ Led by Dr. Karl Brandt, Hitler’s personal physician, these experiments included, *inter alia*, freezing experiments,²⁴ malaria experiments,²⁵ sulfanilamide experiments,²⁶ transplantation experiments,²⁷ typhus experiments,²⁸ radiation experiments,²⁹ and poison experiments.³⁰ The subjects of these experiments often were prisoners of concentration camps,³¹ who neither benefited from such treatments nor gave voluntary consent to them.³² Physicians conducted these experiments with the expectation, often morbidly correct, that their subjects would die.³³

The Nazi infamy was not caused merely by the depravity of a few crazed, psychologically twisted practitioners. Rather, documentary evidence attests to over

²² William E. Seidelman, *Whither Nuremberg?: Medicine’s Continuing Nazi Heritage*, 2 MED. & GLOBAL SURVIVAL 148 (1995), available at <http://www.ipnw.org/MGS/V2N3Seidelman.html> (“Having been defined as ‘life without value’ the inmates of the concentration camps were considered appropriate subjects for deadly research.”). Ironically, many Jewish refugees who escaped the Holocaust were unable to escape involuntary medical experimentation, finding themselves deliberately infected with malaria while interned in British refugee camps in Australia. See Elli Wohlgelemerter, *Report: Australian Army Experimented on Jews in WWII*, JERUSALEM POST, Apr. 20, 1999, at 1.

²³ *United States v. Brandt*, in TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS (1948), reprinted in JAY KATZ, EXPERIMENTATION WITH HUMAN BEINGS: THE AUTHORITY OF THE INVESTIGATOR, SUBJECT, PROFESSIONS, AND STATE IN THE HUMAN EXPERIMENTATION PROCESS 296 (1972) [hereinafter *Nuremberg Trials*].

²⁴ Subjects were forced to remain in a tank of ice water for periods up to 3 hours to examine hypothermic processes. *Nuremberg Trials*, *supra* note 23, at 293.

²⁵ Subjects were deliberately infected with malaria to investigate immunization procedures. *Id.*

²⁶ Subjects were deliberately wounded with wood shavings and ground glass or infected with bacteria such as streptococcus, gas gangrene, and tetanus, and then treated with sulfanilamide to determine its effectiveness. *Id.*

²⁷ Subjects had their bones, muscles and nerves transplanted with those of other subjects. *United States v. Brandt*, in TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS, *supra* note 23, at 176-77.

²⁸ Subjects were deliberately infected with spotted fever virus or *Rickettsia typhi* to keep the virus alive or assess untested treatments. *Nuremberg Trials*, *supra* note 23, at 294-96.

²⁹ Subjects were deliberately subjected to high-dose radiation to assess the efficiency of mass sterilization. *Id.* at 295.

³⁰ Subjects were deliberately shot with poisoned bullets then promptly killed to permit autopsies. *Id.* at 294-95.

³¹ The most heavily documented of the experiments on human prisoners are those that took place at the Auschwitz concentration camp under the direction of Dr. Joseph Mengele. See generally LIFTON, *supra* note 20, at 147-416. Among Dr. Mengele’s gruesome experiments, his experiments with twins, mostly children, stands out as his most horrific, in which only 160 individuals out of at least 3,000 survived. See generally LUCETTE MATALON LAGNADO & SHEILA COHN DEKEL, CHILDREN OF THE FLAMES: DR. JOSEF MENGELE AND THE UNTOLD STORY OF THE TWINS OF AUSCHWITZ (1992).

³² See *Nuremberg Trials*, *supra* note 23, at 297 (Opening Statement of the Prosecution by Brigadier General Telford Taylor: “None of the victims of the atrocities perpetrated by these defendants were volunteers, and this is true regardless of what these unfortunate people may have said or signed before their tortures began.”).

³³ Barondess, *supra* note 15, at 1660. In fact, death was often the explicit intention of these experiments, with physicians using their experiments to discover more efficient ways to exterminate life. In the Doctors’ Trial, prosecutors referred to this not as medical science but as “thanatology,” “the science of producing death.” *United States v. Brandt*, in I TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL NO. 10, at 38 (1950).

two hundred German physicians participating directly in medical war crimes and several hundred more acquiescing to the dictates of the German medical community.³⁴ Founded upon the work of then-respected Nazi eugenicists,³⁵ who professed the genetic determination for all human conduct, German medical and public health theory became intertwined with nascent Nazi ideology.³⁶ Long before the war or the rise of the National Socialist Party, German physicians had developed a burgeoning racial hygiene movement, which professed the ominous goal of eradicating “life unworthy of life.”³⁷ When the chance arose, German physicians joined the ranks of the *Schutzstaffel* (“SS”) more frequently than any other profession, abusing their eugenics training “to embrace the dogmas of Nordic supremacism and to accept the protocols of Nazi racial hygiene.”³⁸ This “radicalization” of the eugenics movement gave legitimate cover to Nazi euthanasia policies, allowing the most respected medical establishment in the world to be willingly co-opted by those seeking to do harm and “providing an early foundation for the chain of events that became the Holocaust.”³⁹ The silence of the German medical community and the breakdown of ethical protections in the face of such atrocities amounted to complicity by the entire profession,⁴⁰ highlighting the lack of

³⁴ Andrew C. Ivy, M.D. (Medical Consultant to the Prosecution, Military Tribunal No. 1, Nuremberg), *Statement*, in Alexander Mitscherlich, *DOCTORS OF INFAMY: THE STORY OF THE NAZI MEDICAL CRIMES* (Heinz Norden trans., 1949) [hereinafter *DOCTORS OF INFAMY*].

What happened to the medical profession of Germany is stern testimony to the fact that acceptance of or even silence before anti-Semitism and the rest of the trappings of racism, acquiescence in or even silence before the violation of sacred professional ethics, the service by medical men of any goal but truth for the good of humanity, can lead to dishonor and crime in which the entire medical profession of a country must in the last analysis be considered an accomplice.

Id. at xii-xiii.

Following the war and its resulting trials, the German medical community continued to deny its complicity in the crimes of the Nazi regime, with “[t]he (West) German medical organization assert[ing] that only a very small number of members of the profession were involved in the crimes” and arguing that “[r]esponsibility was laid with a ‘criminal minority . . . entrusted with power over life and death.’” Seidelman, *supra* note 22 (quoting 1 *WMA BULLETIN* (1949)). Even today, the Federal Chamber of Physicians of Germany continues to deter historical revision of this prevailing German view of Nazi physicians. *Id.*

³⁵ Eric Stover, *In the Shadow of Nuremberg: Pursuing War Criminals in the Former Yugoslavia and Rwanda*, 2 *MED. & GLOBAL SURVIVAL* 140 (1995), available at <http://www.ipnw.org/MGS/V2N3Stover.html> (“Most [Nazi physicians] had studied eugenics, a body of pseudo-biological theory that regarded persons such as the feeble-minded, the mentally diseased, and the deformed as inimical to the human race. Eugenicists held that physicians should destroy ‘life devoid of value,’ so as to ‘purify’ the Aryan race.”); David Woods, *Half of German Doctors Were Nazis*, 313 *BMJ* 900, 900 (1996) (defining the Nazi ideology underlying eugenics as “an ideology that venerated Aryan purity and viewed as subhuman and ‘dispensable’ mentally retarded or physically handicapped people, homosexuals, gypsies, and Jews”). For a history of the global eugenics and race hygiene movements, see Barondess, *supra* note 15, at 1657-60.

³⁶ Lippman, *supra* note 14, at 400-05.

³⁷ Sidel, *supra* note 15, at 1679.

³⁸ Barondess, *supra* note 15, at 1658 (noting the extensive involvement of physicians in the National Socialist Party in 1930s Germany); PROCTOR, *supra* note 17, at 66 (noting that 46,000 physicians, approximately half of the total physicians in Germany, had joined the National Socialist Party by 1943).

³⁹ Barondess, *supra* note 15, at 1659; Lippman, *supra* note 14, at 421 (noting that physician “involvement in experimentation, torture, and genocide was essential for preserving the Nazi myth that the National Socialist regime was engaged in medicine rather than murder” (citing LIFTON, *supra* note 20, at 460)).

⁴⁰ *DOCTORS OF INFAMY*, *supra* note 34, at xi. (“[F]ar from opposing the Nazi state militantly, part of the German medical profession cooperated consciously and even willingly, while the remainder acquiesced in silence.”); see also Woods, *supra* note 35, at 900 (noting that although

any meaningful legal or ethical regulation of physicians. Although few physicians were ever prosecuted for their crimes,⁴¹ few physicians were without blame.

B. THE DOCTORS' TRIAL

The Doctors' Trial became the first international tribunal to apply criminal law to physician activity.⁴² Based upon the successful efforts of the International Military Tribunal,⁴³ the Doctors' Trial involved the American prosecution of German physicians who had taken part in the aforementioned Nazi medical experiments.⁴⁴ The trial, lasting 139 days, focused on twenty-three defendants, facing charges of conspiracy, war crimes, crimes against humanity, and membership in a criminal organization.⁴⁵ On August 19, 1947, the Court rendered its judgment in the case of *United States v. Karl Brandt*.⁴⁶ The Court found that "beginning with the outbreak of World War II, criminal medical experiments on non-German nationals, both prisoners of war and civilians, including Jews and 'asocial' persons, were carried out on a large scale in Germany and the occupied countries."⁴⁷ Addressing

German medical codes proscribed nonconsensual human experimentation, German physicians nevertheless "failed to challenge 'the rotten core of Nazism . . . there was no speaking out, no resistance, no sabotage'" (quoting Dr. Robert Proctor); Lippman, *supra* note 14, at 405 ("While perhaps only 350 doctors are known to have committed medical crimes, the vast majority of doctors tolerated the expulsion of their Jewish colleagues from the medical profession and accepted the Nazi's dubious racial theories." (citing LIFTON, *supra* note 20, at 43-44)).

⁴¹ William E Seidelman, *Nuremberg Lamentation: For the Forgotten Victims of Medical Science*, 313 BMJ 1463, 1464 (1996) ("Absent from the dock [at Nuremberg] were the leaders of the medical profession of the Third Reich, in particular the academic and scientific elite. It was this [sic] elite who legitimized the devaluation of human life and set the stage for medical crimes--crimes in which leading academics and scientists were either principals or accomplices.").

⁴² Although the Allied Powers conducted an International Military Tribunal for the Far East, this tribunal neglected to prosecute Japanese physicians accused of human rights violations. As one author laments,

[t]he prestige of the Tokyo trial has [] been severely damaged because it failed to prosecute Japanese military doctors who had performed horrific experiments in a secret germ warfare factory on the Manchurian Plain. Doctors at the facility injected captured Chinese and Korean soldiers with bubonic plague, cholera, syphilis, and other deadly germs to compare the resistance of various nationalities and races to disease. . . . But the incident never made it before the court. American military authorities intent on keeping the information for themselves and eager to prevent it from falling into the hands of the Soviets promised immunity to the Japanese involved in these crimes in exchange for the information.

Stover, *supra* note 35.

⁴³ Under Control Council Law No. 10, the Allied Control Council of Germany intended to "establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal." PUNISHMENT OF PERSONS GUILTY OF WAR CRIMES, CRIMES AGAINST PEACE AND AGAINST HUMANITY, CONTROL COUNCIL LAW NO. 10 (1945), *reprinted in* VI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at XVIII (1952). For a thorough analysis of the twelve ancillary trials following the International Military Tribunal at Nuremberg, see Lippman, *supra* note 17, at 10-82.

⁴⁴ II TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, *supra* note 19, at 171; *see also* Nuremberg Trials, *supra* note 23, at 293-94.

⁴⁵ II TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, *supra* note 19, at 173-81.

⁴⁶ Nuremberg Trials, *supra* note 23, at 328.

⁴⁷ II TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, *supra* note 19, at 181.

the magnitude of the experimental horrors that had occurred at the hands of the physician-defendants, the Court summarized:

In every single instance appearing in the record, subjects were used who did not consent to the experiments; indeed, as to some of the experiments, it is not even contended by the defendants that the subjects occupied the status of volunteers. In no case was the experimental subject at liberty of his own free choice to withdraw from any experiment. In many cases experiments were performed by unqualified persons, were conducted at random for no adequate scientific reason, and under revolting physical conditions. All of the experiments were conducted with unnecessary suffering and injury and but very little, if any, precautions were taken to protect or safeguard the human subjects from the possibilities of injury, disability, or death. In every one of the experiments the subjects experienced extreme pain or torture, and in most of them they suffered permanent injury, mutilation, or death, either as a direct result of the experiments or because of lack of adequate follow-up care.⁴⁸

To establish standards by which the defendants would be judged, the Court first had to codify international law for medical practice.⁴⁹ After elaborating the international law governing the defendants' conduct, the Court found that "all of these experiments involving brutalities, tortures, disabling injury, and death were performed in complete disregard of international conventions, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, and Control Council Law No. 10."⁵⁰ In its holding, the Court enumerated ten universal standards governing medical practice, the first and foremost proclaiming a nonderogable right of informed consent.⁵¹ The ten standards laid out by the Nuremberg Court have come to be known as the Nuremberg Code.⁵²

⁴⁸ *Id.* at 183.

⁴⁹ Lippman, *supra* note 14, at 395 ("The decision clearly established that medical professionals possess ethical and international legal duties that transcend the demands of domestic law.").

⁵⁰ II TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, *supra* note 19, at 183. Control Council Law No. 10 defines "crimes against humanity" as "[a]trocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated." PUNISHMENT OF PERSONS GUILTY OF WAR CRIMES, CRIMES AGAINST PEACE AND AGAINST HUMANITY, ALLIED CONTROL COUNCIL LAW No. 10, at Art. II(c) (1945), *reprinted in* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 590 (1992).

⁵¹ The Nuremberg Code, *reprinted in* ANNAS & GRODIN, *supra* note 3, at 2. The first principle, in full, states:

The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment. The duty and responsibility for ascertaining the quality of the consent rests upon

In rendering its verdict, the Court rejected defenses of state policy, superior orders, necessity, and the victims' inevitability of death, "rul[ing] that those high medical officials who possessed both knowledge of the experiments and the authority to modify or halt them were criminally liable."⁵³ The Court found sixteen of the physicians and scientists guilty and sentenced seven to death for war crimes and crimes against humanity.⁵⁴

III. FAILURE AT NUREMBERG—PHYSICIAN ABUSES OF HUMAN RIGHTS CONTINUE TODAY

Nuremberg has had limited effect on worldwide medical practice. Although physicians drafted international codes of medical ethics to augment the Nuremberg Code,⁵⁵ these unenforceable codes did little to proscribe physician conduct.⁵⁶ Medical schools failed to educate their students in medical ethics.⁵⁷ Professional organizations declined to censure wayward physicians acting in violation of rights.⁵⁸ Even former Nazi doctors, only a small percentage of whom ever were tried or censured, went back to their work.⁵⁹ An enforceable international legal structure to govern physicians has never been developed.⁶⁰ Physicians—individually or as

each individual who initiates, directs, or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.

Id.

⁵² *Id.* Further, many of the standards laid down in the International Military Tribunal at Nuremberg formed the basis for the Universal Declaration of Human Rights. Ferencz, *supra* note 10, at 8.

⁵³ Lippman, *supra* note 19, at 23 (citing II TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, *supra* note 19, at 193).

⁵⁴ In addition, there were nine sentences of confinement and eight acquittals. ANNAS & GRODIN, *supra* note 3, at 120. Of the nine sentenced to prison, all had their sentences commuted to sentences of no more than twenty years. *Id.* The Court awarded no financial compensation to either the victims or their families.

⁵⁵ WMA, *The Hippocratic Oath Formulated at Geneva, reprinted in* EXPERIMENTATION WITH HUMAN BEINGS: THE AUTHORITY OF THE INVESTIGATOR, SUBJECT, PROFESSIONS, AND STATE IN THE HUMAN EXPERIMENTATION PROCESS 312 (Jay Katz ed., 1972).

⁵⁶ ANNAS & GRODIN, *supra* note 3, at 313.

⁵⁷ Ole Vedel Rasmussen, *The Involvement of Medical Doctors in Torture: The State of the Art*, 17 J. MED. ETHICS: SUPP. 26, 27 (1991); Neil McIntyre & Karl Popper, *The Critical Attitude in Medicine: The Need for a New Ethics*, 287 BMJ 1919, 1922 (1983). Although select Western medical schools have used human rights documents to oblige students not to "use . . . medical knowledge contrary to the laws of humanity," these documents have become nothing more than vacuous incantation for medical students, repeated at graduation but never taught or explained in the classroom. Sidel, *supra* note 15, at 1680 (noting that "US medical schools have not fully incorporated international human rights into their required curricula"); Jeffrey Sonis et al., *Teaching of Human Rights in US Medical Schools*, 276 JAMA 1676, 1677 (1996).

⁵⁸ See Lippman, *supra* note 14, at 440.

⁵⁹ LIFTON, *supra* note 20, at 457 ("Even Nazi doctors who had been directly involved [in murder] could initiate or resume medical practice in their home areas and become conscientious, much-admired physicians."). Among those acquitted at Nuremberg, several were subsequently recruited by the U.S. military via "Project Paperclip," through which the United States exploited the knowledge obtained through Nazi experiments by bringing these physicians to the United States to continue their work for government and private science facilities. LINDA HUNT, SECRET AGENDA: THE UNITED STATES GOVERNMENT, AND THE PROJECT PAPERCLIP, 1945 to 1990, at 78-93 (1991); TOM BOWER, THE PAPERCLIP CONSPIRACY: THE HUNT FOR NAZI SCIENTISTS 124-32 (1987).

⁶⁰ See Lippman, *supra* note 14, at 441 ("The United Nations should commemorate the fiftieth anniversary of the Universal Declaration of Human Rights by adopting a binding Declaration on the responsibility of doctors and other professionals to protect universal human rights and to refrain from involvement in international criminal activity, such as the practice of torture."); Erwin Deutsch, *Medical Experimentation: International Rules and Practice*, 19 VICTORIA U. WELLINGTON L. REV. 1, 4 (1989); Annas & Grodin, *supra* note 7, at 121.

agents of the state—continue to use their medical expertise to violate the human rights of their patients and subjects without fear of regulation or prosecution.⁶¹

Prominent physicians have viewed the Doctors' Trial as a limited response to the "aberrant" actions of Nazi doctors.⁶² The standards created by it are perceived to be "too uncompromising and too inhospitable to the advancement of science."⁶³ As such, physicians have disregarded the Nuremberg Code's significance to other Western research and treatments.⁶⁴ Without binding international law, no structural changes were put in place at the global level to prevent the medical profession from again becoming an instrument of harm.

Since Nuremberg, physicians have continued to perpetrate and facilitate human rights violations.⁶⁵ Physicians have been directly involved in the torture of prisoners,⁶⁶ as well as activities that facilitate torture.⁶⁷ In addition, physicians have abused psychiatry for political motives, involving psychological torture, false psychiatric diagnosis, and commitment of political dissidents under the guise of

⁶¹ Lippman, *supra* note 14, at 441 ("The Doctors Trial, however, did not deter various contemporary doctors from involving themselves in torture despite the international community's affirmation that doctors have a special responsibility to refrain from involving themselves in the abuse and torture of prisoners and detainees."); *see generally* HENRY K. BEECHER, RESEARCH AND THE INDIVIDUAL: HUMAN STUDIES (1970) (detailing legal and ethical rights violations by U.S. physicians); M.H. PAPPWORTH, HUMAN GUINEA PIGS: EXPERIMENTATION ON MAN (1968) (detailing legal and ethical rights violations by British physicians).

⁶² *See* Jay Katz, *The Consent Principle of the Nuremberg Code: Its Significance Then and Now*, in ANNAS & GRODIN, *supra* note 3, at 228.

⁶³ *Id.* at 235.

⁶⁴ *Id.* at 228; *see also* Evelyn Shuster, *The Nuremberg Code: Hippocratic Ethics and Human Rights*, 351 LANCET 974, 975 (1998) ("Physicians, perhaps understandably, did not readily perceive the [Nuremberg] Code as applying to themselves.").

⁶⁵ The Author notes that physicians have also suffered as victims of human rights violations, sometimes for nobly refusing to become accomplices of the state in human rights violations. *See generally* AMNESTY INT'L, HARMING THE HEALERS: VIOLATIONS OF THE HUMAN RIGHTS OF HEALTH PROFESSIONALS, AI INDEX: ACT 75/02/00 (2000) (documenting cases of repressive measures imposed on health workers simply for performing their professional activities); Torsten Lucas & Christian Pross, *Caught Between Conscience and Complicity: Human Rights Violations and the Health Professions*, 2 MED. & GLOBAL SURVIVAL 106 (1995), available at <http://www.ipnw.org/MGS/V2N2Lucas.html> (noting the persecution of health professionals for their exercise of "the professional ethic, which puts health workers in conflict with lawlessness and social injustice and requires that they speak out against human rights abuses of which they have knowledge").

⁶⁶ AMNESTY INT'L, MEDICINE AT RISK: THE DOCTOR AS HUMAN RIGHTS ABUSER AND VICTIM, AI Index: ACT 75/01/89, at 2-4 (1989); *cf.* Lippman, *supra* note 14, at 431 ("Unlike their Nazi predecessors, contemporary doctors tend to aid and abet those who practice torture and rarely inflict pain directly on detainees and prisoners.").

⁶⁷ BRIT. MED. ASS'N (BMA), MEDICINE BETRAYED: THE PARTICIPATION OF DOCTORS IN HUMAN RIGHTS ABUSES 21-30 (1992). Activities indirectly facilitating torture include "the examination and assessment of 'fitness' of prisoners to be tortured, the monitoring of victims while being tortured, the resuscitation and medical treatment of prisoners during torture, as well as falsification of medical records and death certificates after torture." ANNAS, *supra* note 4, at 252; Rasmussen, *supra* note 57, at 26 (categorizing the participation of physicians in torture through (1) making diagnoses, (2) treating the victim, and (3) "creating and inventing new sophisticated types of torture: punitive amputations; carrying out the death penalty, and in abuse of psychiatry").

As an example of an activity facilitating torture, Portuguese prison doctors used photographs of prisoners taken during interrogation to study the effects of torture. Leonard A. Sagan & Albert Jonsen, *Medical Ethics and Torture*, 294 NEW ENG. J. MED. 1427 (1976). These experimentations crossed the line into torture because no useful scientific purpose was served and the subjects were transformed into suffering victims. *See* Bassiouni et al., *supra* note 12, at 1602 n.33.

treatment for mental illness.⁶⁸ As state actors, physicians have violated human rights by taking part in forcible sterilization, force-feeding of hunger strikers, flogging, prolonged solitary confinement, and punitive amputation and mutilation.⁶⁹ Using their medical training in prisoner interrogations, physicians have taken a role in the forcible administration of nontherapeutic medications intended to reduce prisoner resistance.⁷⁰

Numerous studies have documented the role of physicians in human rights abuses. Physicians had long collaborated with torturous regimes throughout the world, including Turkey,⁷¹ Egypt,⁷² Chile,⁷³ and Iraq.⁷⁴ Although predominantly confined to police states, democracies are not without incidence of physician abuse, most notably by the French in Algeria, the British in Northern Ireland, the Israelis in the Palestinian Territories, and the Spanish in the Basque region.⁷⁵

In the past year, it has become clear that physicians have taken an active role in violating rights in the course of the United States' ever-expanding "War on Terror." Studies, based upon interviews with prisoners and soldiers and a review of existing government documents, have begun to uncover the role of U.S. military medical personnel in the human rights abuses of prisoners in Afghanistan, Iraq, and Guantanamo Bay, Cuba.⁷⁶ Including physician collaboration in coercive interrogations, falsification of injury reports, and withholding of basic medical services, these reports depict circumstances in which U.S. military physicians acted in deliberate contravention of international human rights and the Geneva Conventions.⁷⁷ In light of these abuses, analysts have renewed their injunctions against physician complicity in human rights violations, admonishing that "Abu Ghraib should serve as an eleventh hour wake-up call for the western world to

⁶⁸ ANNAS, *supra* note 4, at 252; Lucas & Pross, *supra* note 65, at n.1 (providing examples throughout the world of the continued use of psychologists and psychoanalysts in torture and training of those who commit torture).

⁶⁹ MEDICINE BETRAYED, *supra* note 67, at 4-5; ANNAS, *supra* note 4, at 252.

⁷⁰ AMERICAN ASS'N FOR THE ADVANCEMENT OF SCI. (AAAS), THE BREAKING OF BODIES AND MINDS: TORTURE, PSYCHIATRIC ABUSE, AND THE HEALTH PROFESSIONS 24-29 (Eric Stover & Elena O. Nightingale eds., 1985).

⁷¹ PHYSICIANS FOR HUMAN RTS. (PHR), TORTURE IN TURKEY & ITS UNWILLING ACCOMPLICES: THE SCOPE OF STATE PERSECUTION AND THE COERCION OF PHYSICIANS (1996).

⁷² Scott Long, *When Doctors Torture: The Anus and the State in Egypt and Beyond*, 7 HEALTH & HUM. RIGHTS 114, 116-24 (2004) (detailing the role of Egyptian forensic doctors in forced anal examination of men who engage in homosexual acts).

⁷³ Eric Stover & Elena O. Nightingale, *Introduction: The Breaking of Bodies and Minds*, in AAAS, *supra* note 70, at 1, 17.

⁷⁴ Chen Reis et al., *Physician Participation in Human Rights Abuses in Southern Iraq*, 291 JAMA 1480, 1482 (2004).

⁷⁵ Eric Stover & Michael Nelson, *Medical Action Against Torture*, in AAAS, *supra* note 70, at 101, 102 (citations omitted).

⁷⁶ E.g., Steven H. Miles, *Abu Ghraib: Its Legacy for Military Medicine*, 364 LANCET 725 (2004); Robert Jay Lifton, *Doctors and Torture*, 351 N. ENG. J. MED. 415 (2004).

⁷⁷ Miles, *supra* note 76, at 726-27 (noting that the torture and degrading treatment of prisoners violated various human rights instruments and U.S. military internment and interrogation policies (citations omitted)). The "Geneva Conventions" include: Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Feb. 2, 1956); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Feb. 2, 1956); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Feb. 2, 1956); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Feb. 2, 1956).

rediscover and live by the values enshrined in its international treaties and democratic institutions.⁷⁸

Beyond their clearly criminal participation in torture, physicians also take part in less truistic violations of human rights, including human experimentation on unwilling subjects;⁷⁹ advisement on and participation in corporal and capital punishment;⁸⁰ research on banned biological and chemical weapons;⁸¹ and denial of and discrimination in the provision of health services.⁸² Although such injurious actions do not engender the same prosecutorial response as those falling within the international torture framework, they nevertheless implicate physician participation in the violation of human rights.

Finally, physicians facilitate human rights violations through silence. By treating victims of these violations while remaining silent as to the cause of their plight, physicians aid repressive regimes by allowing nations to shield their human rights violations from public scrutiny.⁸³ Physicians who fail to document the injuries of human rights victims prevent the abuse from being proved, thereby making physicians accomplices in the further victimization of these individuals.⁸⁴ Specifically, in prison abuse cases, “[d]octors and nurses . . . are often an abused prisoner’s only contact with the outside world,” and thus, “must assume a weighty responsibility as potential accessories. But they are pressured by members of intelligence organizations, the police, or the military to keep quiet or to document the ‘natural’ deaths of victims who have died as a result of torture.”⁸⁵

A physician’s passive facilitation of human rights abuses does not extend only to physical harm. Physicians tacitly encourage systematic human rights violations

⁷⁸ Editorial, *How Complicit Are Doctors in Abuses of Detainees?*, 364 LANCET 637, 638 (2004).

⁷⁹ For example, the AIDS epidemic has driven desperate African nations to permit U.S. physicians to test experimental vaccines on unwilling and uninformed patients. See generally Ronald Bayer, *The Debate Over Maternal-Fetal HIV Transmission Prevention Trials in Africa, Asia, and the Caribbean: Racist Exploitation or Exploitation of Racism?*, 88 AM. J. PUB. HEALTH 567 (1998); Joanne Roman, Note, *U.S. Medical Research in the Developing World: Ignoring Nuremberg*, 11 CORNELL J.L. & PUB. POL’Y 441 (2002); Barry R. Bloom, *The Highest Attainable Standard: Ethical Issues in AIDS Vaccines*, SCIENCE, Jan. 9, 1998, at 186; David Brown, *Medical Group Condemns U.S. AIDS Drug Tests in Africa for Using Placebo*, WASH. POST, Apr. 23, 1997, at A14.

⁸⁰ Council on Ethical & Judicial Aff., AMA, *Physician Participation in Capital Punishment*, 270 JAMA 365, 367 (1993). Although beyond the scope of the present article, the author acknowledges that punitive amputation and mutilation could also fall into this ethically ambiguous category in states where such punishments are carried out under the color of law.

⁸¹ See Michael P. Scharf, *Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force, and Criminalization*, 20 MICH. J. INT’L L. 477, 504-06 (1999) (noting that 18 U.S.C. § 2332a “does not cover production or stockpiling; it covers only the use of biological or chemical weapons”).

⁸² AAAS & PHR, HUMAN RIGHTS AND HEALTH: THE LEGACY OF APARTHEID 39-49 (Audrey R. Chapman & Leonard S. Rubenstein eds., 1998); see also Seidelman, *supra* note 41, at 1464 (“In poor and rich countries physicians participate in structures of social choice and access to health care that variously blunt or sharpen the ethical issues in selection.”).

⁸³ Lucas & Pross, *supra* note 65 (noting government “attempt[s] to legitimize torture and the death penalty by supposedly humanizing these acts and integrating doctors into the process”). As noted in the case of Nazi Germany, “[t]he Nazi leadership found in medicine a scientifically legitimate vehicle for the achievement of their political goal of racial purification.” Seidelman, *supra* note 22; see also *supra* notes 4, 35-39 and accompanying text.

⁸⁴ E.g., Lippman, *supra* note 14, at 433 (“Chilean doctors also regularly issued certificates of good health before torture victims left the detention center. These certificates helped conceal the abuse that was inflicted on detainees and lent credence to the Chilean regime’s claim that allegations of torture were contrived efforts to embarrass the government.” (citing ERIC STOVER, THE OPEN SECRET TORTURE AND THE MEDICAL PROFESSION IN CHILE 29-31 (1987))).

⁸⁵ Lucas & Pross, *supra* note 65.

merely by treating the psychic and social effects of state repression without condemnation of the causes of these harms.⁸⁶ While the scale and breadth of physician crimes is impossible to fix with any precision, it is clear that such activity is not merely the result of an “aberrant” minority.⁸⁷

A. DOCTORS HAVE BEEN IMMUNE FROM PROSECUTION

Individual nations lack the capacity to punish physicians for human rights abuses under their domestic laws.⁸⁸ Countries, including the United States, cannot punish their military physicians because such violative treatment “is often justified on the basis of national security or military necessity,”⁸⁹ creating “a framework in which monetarily compensating ‘victims’ of modern medical progress is accepted as the appropriate governmental response.”⁹⁰ In fact, many state physicians throughout the world who have openly participated in torture have nevertheless continued to practice medicine without repercussion.⁹¹ Even where national security is not at issue, national courts are reluctant to impose criminal sanctions against physicians based on an intractable belief that physicians, regardless of the result, always act in their patients’ “best interests.”⁹² In many prominent cases of medical abuse, physicians have not faced civil or criminal penalties for violating their patients’ right to informed consent.⁹³ Moreover, while many developed nations fail to follow

⁸⁶ *See id.*

⁸⁷ For a survey of contemporary physician participation in gross human rights abuses internationally, see generally BMA, *supra* note 67.

⁸⁸ ANNAS, *supra* note 4, at 252-53; AMNESTY INT’L, INVOLVEMENT OF MEDICAL PERSONNEL IN ABUSES AGAINST DETAINEES AND PRISONERS, AI Index: ACT 75/08/90, at 1 (1990) (noting that physicians undertake “activities which, while legal under domestic law in some countries, constitute violations of human rights and can involve health professionals in infringements of medical ethics”).

⁸⁹ Annas & Grodin, *supra* note 7, at 118; Jonathan D. Moreno, *Lessons Learned: A Half-Century of Experimenting on Humans*, HUMANIST, Sept./Oct. 1999, at 9, 10 (noting the existence of the Feres Doctrine, which bars members of the military from “suing the United States for injuries incurred ‘incident to service,’” but criticizing that “[w]hat little regulation applied to military-medical experiments seemed largely worthless”); e.g., *United States v. Stanley*, 483 U.S. 669 (1987) (barring a serviceman from suing the United States for injuries suffered as a result of uninformed and nonconsensual exposure to LSD); *In Re Cincinnati Radiation Litigation*, 874 F. Supp. 796 (S.D. Ohio 1995) (finding that a U.S. Department of Defense study exposing nonconsenting subjects to doses of radiation was justified by “national security”).

Although the end of the Cold War brought about a temporary reprieve from this threat of physician harm under the auspices of national security, fear of renewed experimentation has heightened with evidence of violative conduct by the United States during its “War on Terror.” *See* Moreno, *supra*, at 14 (“The need to keep secrets from terrorist organizations can easily substitute for the former need to keep secrets from the Soviets Confronted with several small-scale hot wars, the environment of national security research could easily slide again into the mentality demonstrated during much of the Cold War.”).

⁹⁰ Larry I. Palmer, *Paying for Suffering: The Problem of Human Experimentation*, 56 MD. L. REV. 604, 608 (1997) (drawing attention to the inadequacy of monetary compensation in redressing the harms of human experimentation) (citing FINAL REPORT OF THE ADVISORY COMMITTEE ON HUMAN RADIATION EXPERIMENTS 178-88 (1996)).

⁹¹ Rasmussen, *supra* note 57, at 26-27 (arguing that doctors who are at “high risk” of participation in torture should be reminded of their ethical obligations).

⁹² Palmer, *supra* note 90, at 622 (“It is unlikely that criminal sanctions are going to be enacted in this country [U.S.A.], as we are all so dependent upon physicians.”); *see Barber v. Superior Court*, 195 Cal. Rptr. 484, 488-89 (Ct. App. 1983) (holding that cessation of life support was not an unlawful killing). In an extreme example, Argentine courts freed Dr. Jorge Antonio Berges after previous courts had found him guilty of actively participating in torture and had sentenced him to six years in prison. Lucas & Pross, *supra* note 65.

⁹³ Palmer, *supra* note 90, at 606-08. No physicians were held accountable in the United States for the Tuskegee syphilis study, in which the U.S. Public Health Service tracked a group of 400

established law governing physician behavior, many developing nations have yet to enact *any* systematic legislation regulating physicians.⁹⁴

B. FAILURE OF PHYSICIAN SELF-REGULATION

In the aftermath of the Nazi horrors, physicians from thirty-two national medical associations met in London in 1946 to form the first international medical organization, the World Medical Association (“WMA”). The WMA has since burgeoned to become the world’s preeminent physician organization. While the following discussion focuses on the WMA, the intent herein is to abstract from WMA behavior certain generalities common to many organizations of physician self-regulation.⁹⁵

The WMA, like other self-regulating national and international associations of health professionals, has repeatedly shown that its *raison d’être* is the protection of physicians, not the protection of patients. Although the WMA quickly “condemned the crimes and inhumanity committed by doctors in Germany and elsewhere against human beings,”⁹⁶ it established the potentially conflicting objective of “protect[ing] the interests of the medical profession.”⁹⁷ The WMA “has never sought or exercised any authority to identify, monitor, or punish either physicians or medical societies who violate their ethical principles.”⁹⁸

In 1981, the WMA—at the urging of representatives from the United States, Japan, and the Federal Republic of Germany—admitted the Medical Association of South Africa, a predominantly white physician organization that had colluded with the apartheid government of that country.⁹⁹ As a corollary to this move, the WMA further served the South African apartheid regime by admitting the Transkei Medical

African American males from the early 1930s into the 1970s to ascertain the course of syphilis if left untreated, despite the existence of a proven treatment for the disease. No informed consent was obtained in this study, and many of the subjects in the study were led to believe that they were receiving treatment, dissuading them from seeking outside care. ARNOLD J. ROSOFF, INFORMED CONSENT, A GUIDE FOR HEALTH CARE PROVIDERS 258 (1981).

⁹⁴ INTERNATIONAL SUMMIT CONFERENCE ON BIOETHICS, TOWARDS AN INTERNATIONAL ETHIC FOR RESEARCH WITH HUMAN BEINGS 39 (1987) [hereinafter CONFERENCE ON BIOETHICS]. Developing nations have shunned physician regulation out of a fear that such legislation, and resulting lawsuits against physicians, could have a chilling effect on beneficial medicine. Jonathan Todres, *Can Research Subjects of Clinical Trials in Developing Countries Sue Physician-Investigators for Human Rights Violations?*, 16 N.Y.L. SCH. J. HUM. RTS. 737, 767 (2000).

⁹⁵ Rand E. Rosenblatt, *The Four Ages of Health Law*, 14 HEALTH MATRIX 155, 163-66 (noting weaknesses in the professional authority model of physician regulation).

⁹⁶ Editorial, 1 WMA BULLETIN 6 (1949). Among other early acts, the WMA revised the Hippocratic Oath and adopted the Declaration of Geneva as an international code of medical ethics. Declaration of Geneva, in THE WORLD MEDICAL ASSOCIATION HANDBOOK OF DECLARATIONS 3 (1985); Stover, *supra* note 35.

⁹⁷ T.C. Routley, *Aims and Objects of the World Medical Association*, 1 WMA BULLETIN 19 (1949). Nowhere do the WMA’s objectives list the regulation or evaluation of physicians as an objective of the organization. *See id.*

⁹⁸ ANNAS, *supra* note 4, at 251. An exception to the WMA’s fixation on expanding the authority of physicians is found in the WMA’s 1975 Declaration of Tokyo, in which the organization prohibited physicians to “countenance, condone or participate in the practice of torture or other forms of cruel inhuman or degrading procedures, whatever the offence of which the victim of such procedures is suspected, accused or guilty . . .” WMA, Declaration of Tokyo, *reprinted in* AMNESTY INT’L, ETHICAL CODES AND DECLARATIONS RELEVANT TO THE HEALTH PROFESSIONS, AI Index: ACT 75/01/85 (1985), available at <http://www.cirp.org/library/ethics/tokyo>.

⁹⁹ Winfried Beck, *The World Medical Association Serves Apartheid*, 20 INT’L J. HEALTH SERVS. 185, 186 (1990) (describing the Medical Association of South Africa’s role in the apartheid government’s torture and murder of Steve Biko, the leader of the Black Consciousness Movement).

Association, the medical body of Bantusta, an unrecognized apartheid-created state established solely to remove seventy-five percent of blacks from South Africa.¹⁰⁰ In doing so, the WMA clearly “placed the issue of medical ‘fraternity’ above the issue of human rights” and acted to support doctors whose medical association affirmatively harmed the health of black South Africans.¹⁰¹ As a result of the admission of the Medical Association of South Africa, the World Health Organization withdrew its consultative status to the WMA.¹⁰²

The moral decline of the WMA culminated in 1992 with the election of Hans-Joachim Sewering, a former Nazi physician, as WMA president.¹⁰³ Although Sewering claimed no knowledge of or involvement in the Nazi euthanasia program, there is substantial evidence to the contrary.¹⁰⁴ As noted by Professor Annas, “[i]f electing a Nazi physician involved in the euthanasia program as president does not disqualify an organization to set the ethical standards for the world’s physicians, what would?”¹⁰⁵ Although Sewering resigned when the American Medical Association produced documents that actually showed his personal connection to the euthanasia experiments,¹⁰⁶ the press release announcing his departure from the WMA, while failing to address any of the specific claims, paradoxically displayed little sensitivity to the particular charges levied against him: “[I]t is now my duty to protect the World Medical Association from severe damage that could result from the threats of the Jewish World Congress.”¹⁰⁷

C. INTERNATIONAL CODES OF MEDICAL ETHICS ARE NOT ENFORCEABLE

International codes of medical ethics, including the Nuremberg Code,¹⁰⁸ the Declaration of Tokyo,¹⁰⁹ and the Helsinki Declarations,¹¹⁰ are not legally binding

¹⁰⁰ *Id.* at 187-89 (discussing the WMA’s role in South Africa’s “Bantustan Policy,” which allowed “the South African regime [to] be able to claim that it has done away with apartheid, as all the blacks live in their own ‘self-governing’ areas”).

¹⁰¹ *Id.* at 190 (noting that the WMA’s actions effectively supported Apartheid).

Apartheid and health, . . . are incompatible and mutually exclusive In every group of diseases there is marked social and racial stratification which exceeds anything so far known in the epidemiology (causation) of human disease. This stratification is directly and unequivocally related to the policies of apartheid and hence is the product of design and purpose.

Id. (quoting WHO, Conference in Brazzaville, *Apartheid and Health* (1981)).

¹⁰² *Id.* at 185.

¹⁰³ See ANNAS, *supra* note 4, at 251-52; see also Seidelman, *supra* note 41, at 1466 (noting that “[t]he leadership of the World Medical Association has, in fact, included physicians with direct links to the very organisations responsible for the horrors which brought about the enunciation of the Nuremberg code”). In his role as Treasurer of the WMA and representative of the German Medical Association, Sewering had previously used his influence in 1981 as one of the primary advocates for admission of the Medical Association of South Africa. Beck, *supra* note 99, at 187, 190.

¹⁰⁴ Beck, *supra* note 99, at 190 (noting Sewering’s membership in the Nazi party, *Schutzstaffel* (SS), *NS-Volkswohlfahrt* (Nazi People Welfare Association), and *NS-Altherrenbund* (Nazi Elderly Men’s Association)).

¹⁰⁵ ANNAS, *supra* note 4, at 252; see also Seidelman, *supra* note 22 (“As a consequence of the Sewering Affair there is no credible international organization that serves as guardian for patient rights.”).

¹⁰⁶ Michael Franzblau, *Investigate Nazi Ties of German Doctor*, S.F. CHRON., Dec. 29, 1993, at A17.

¹⁰⁷ Seidelman, *supra* note 22 (citing Press Release, *Pressestelle der Deutschen Arzteschaft* (Jan. 23, 1993)).

¹⁰⁸ The Nuremberg Code, *reprinted in* ANNAS & GRODIN, *supra* note 3, at 2.

¹⁰⁹ WMA, Declaration of Tokyo, *reprinted in* AMNESTY INT’L, *supra* note 98.

documents capable of placing legally-enforceable obligations on individual physicians.¹¹¹ International ethical guidelines, often drafted by the same suspect medical organizations discussed above,¹¹² have proven to be illusory tenets in the practice of medicine. They are not widely accepted or followed by physicians.¹¹³ As recognized by Annas and Grodin, these codes and guidelines provide “virtually no enforcement of research rules, and therefore no penalties for those who violate them and no compensation for their victims.”¹¹⁴ It remains unclear how states should incorporate these principles, if at all, into their national law.¹¹⁵ In fact, in analyzing the legal propriety of U.S. prisoner treatment in the War on Terror, neither the Justice Department nor the Defense Department Working Group mentioned any code of medical ethics.¹¹⁶ Because these codes have no enforcement mechanisms, legal or medical, they have little practical effect on the legal or ethical propriety of medical practice.¹¹⁷

For example, both the Nuremberg Code and the Declaration of Helsinki “lack specificity and are therefore susceptible to definition and interpretation by the

¹¹⁰ WMA, Declaration of Helsinki (1964) (amended 2000), available at www.wma.net/e/policy/b3.html; WMA, Declaration of Helsinki (1964) (amended 1989), reprinted in ANNAS & GRODIN, supra note 3, at 339-42; WMA, Declaration of Helsinki (1964) (amended 1983), reprinted in 30 WORLD MED. J. inside front cover (1984); WMA, Declaration of Helsinki (1964) (amended 1975), reprinted in ANNAS & GRODIN, supra note 3, at 333-36; WMA, Declaration of Helsinki (1964), reprinted in 8 WORLD MED. J. 281, 281 (1964).

Prior to the Declaration of Helsinki, the World Medical Association adopted the Principles for Those in Research and Experimentation, which include the principle that “informed consent must be in writing for experimentation on both sick and healthy patients.” WMA, *Principles for Those in Research and Experimentation*, 2 WORLD MED. J. 14 (1955) [hereinafter WMA Principles]. The WMA Principles, like the Nuremberg Code, specifically state that they are binding on physicians, as compared with subsequent international standards, which state that they merely serve as recommendations. Bernard Dickens, *The Challenge of Equivalent Protection*, in NAT’L BIOETHICS ADVISORY COMM’N, ETHICAL AND POLICY ISSUES IN INTERNATIONAL RESEARCH: CLINICAL TRIALS IN DEVELOPING COUNTRIES, VOLUME II: COMMISSIONED PAPERS AND STAFF ANALYSIS A-1, A-3 (2001), available at <http://www.georgetown.edu/research/nrcbl/nbac/clinical/Vol2.pdf>.

¹¹¹ See Deutsch, supra note 60, at 4. But see George J. Annas, *The Changing Landscape of Human Experimentation: Nuremberg, Helsinki, and Beyond*, 2 HEALTH MATRIX 119, 119-40 (1992) (arguing that the Nuremberg Code has achieved binding status similar to that of a treaty).

¹¹² The World Medical Association drafted and adopted the Declaration of Tokyo and various Declarations of Helsinki to govern respectively physician participation in torture and human experimentation. Although the World Medical Association believed the WMA Principles adequate for physician regulation, supra note 110, it nevertheless adopted the first Helsinki Declaration in 1964 “following a series of scandals involving grossly unethical experimentation on human subjects.” Lori A. Alvino, *Who’s Watching the Watchdogs? Responding to the Erosion of Research Ethics by Enforcing Promises*, 103 COLUM. L. REV. 893, 897 (2003).

¹¹³ CONFERENCE ON BIOETHICS, supra note 94, at 39; Michael A. Grodin et al., *Medicine and Human Rights: A Proposal for International Action*, HASTINGS CENTER REP., July-Aug. 1993, at 8, 8 (noting that the Nuremberg Code “has been widely recognized, if not always followed by the world community”).

¹¹⁴ ANNAS & GRODIN, supra note 3, at 313.

¹¹⁵ Heidi P. Forster et al. *The 2000 Revision of the Declaration of Helsinki: A Step Forward or More Confusion?*, 358 LANCET 1449, 1449 (2001) (noting that while the 2000 revision of the Declaration of Helsinki claims primacy over national law, “[t]he authority and practical meaning of this self-proclaimed status is unclear”).

¹¹⁶ Miles, supra note 76, at 725 (citations omitted).

¹¹⁷ E.g., Forster et al., supra note 115, at 1452 (“Unfortunately, there is no mechanism, adjudicative or otherwise [in the 2000 Declaration of Helsinki], for resolving ambiguities in interpretation and understanding.”).

investigator according to his own experiences.”¹¹⁸ Further, the Declaration of Helsinki fatally weakened the Nuremberg Code’s charge that “[t]he voluntary consent of the human subject is absolutely essential.”¹¹⁹ Whereas the Nuremberg Code explicitly banned experimentation with incompetent persons and other persons unable to provide legally valid consent, the Declaration of Helsinki relaxed this by permitting the substitute consent of a legal guardian.¹²⁰ The Declaration of Helsinki further clouded the sweeping prohibitions of the Nuremberg Code by distinguishing between “non-therapeutic clinical research” and “clinical research combined with professional care.”¹²¹ This distinction created a loophole through which physicians have performed human experimentation without the informed consent of their subjects simply by labeling their experiments “therapeutic.”¹²² Moreover, the ethical guidelines embodied in the Helsinki Declaration lack judicial enforceability and therefore represent a step backward from the unequivocal prohibitions of the Nuremberg Code.¹²³ In 1964, the WMA ratified the Declaration of Helsinki, shifting the focus of human rights from the informed consent standard to a standard of physician responsibility, thus undermining subject consent in the Nuremberg Code and displacing it with paternalistic notions of the physician-subject relationship.¹²⁴

D. INTERNATIONAL LAW DOES NOT ADDRESS PHYSICIAN ABUSE

States have not created international law to protect individuals from the wrongful acts of physicians. International law governs relations between states, which express their consent to be bound by a principle of international law through treaty ratification.¹²⁵ No international legal instruments speak explicitly to the

¹¹⁸ Bassiouni et al., *supra* note 12, at 1611; *see also* Forster et al., *supra* note 115, at 1452 (“Although laudable in many respects, the most recent revision of the Declaration of Helsinki is imprecise and ambiguous, possibly the result of a flawed drafting process.”).

¹¹⁹ Jay Katz, *The Nuremberg Code and the Nuremberg Trial: A Reprisal*, 276 JAMA 1662, 1665 (1996); Kevin M. King, *A Proposal for the Effective International Regulation of Biomedical Research Involving Human Subjects*, 34 STAN. J. INT’L L. 193, 195-96 (1998).

¹²⁰ David N. Weisstub et al., *Establishing the Boundaries of Ethically Permissible Research with Vulnerable Populations*, in RESEARCH ON HUMAN SUBJECTS: ETHICS, LAW AND SOCIAL POLICY 355-56 (David N. Weisstub ed., 1998); *see also* WMA, Declaration of Helsinki (1964) (amended 2000), *supra* note 110, § I-11, at 335. “The draft version [of the Helsinki Declaration] also would not allow those children in institutions who were not under the care of relatives or those persons residing in mental hospitals or in hospitals for mental defectives to be subjects of human experimentation.” Bassiouni et al., *supra* note 12, at 1645; *see also* WMA, *Draft Code of Ethics on Human Experimentation*, 2 BMJ 1119 (1962).

¹²¹ Declaration of Helsinki, WMA 18th Assembly (1964), *reprinted in* 8 WORLD MED. J. 281, *supra* note 110.

¹²² *See* Robert J. Levine, *Clarifying the Concepts of Research Ethics*, HASTINGS CENTER REP., June 1979, at 21-22 (noting that placebo-controlled drug trials “cannot be defined as either therapeutic or nontherapeutic”); *see also* Katz, *supra* note 119, at 1665 (noting that the quality of informed consent in the Declaration of Helsinki was “ambiguous, confusing, and surely not as stringent as that articulated in the Nuremberg Code”).

¹²³ Contrary to the Declaration of Helsinki, the Nuremberg Code has been found to have legally enforceable prohibitions, upon which civil actions may be brought in U.S. courts. *See, e.g.*, In re Cincinnati Radiation Litigation, 874 F. Supp. 796, 821 (S.D. Ohio 1995).

¹²⁴ ANNAS, *supra* note 4, at 251; Seidelman, *supra* note 41, at 1467 (noting rationalizations indicating that “Helsinki modified Nuremberg because the World Medical Association considered the Nuremberg code as applying to Nazi crimes with the World Medical Association declarations correcting that ‘error’” (citing William Refsauge, *The Place for International Standards in Conducting Research on Humans: Proceedings of International Conference on Role of Individual and Community in Research, Development, and Use of Biologicals*, 55 WHO BULLETIN 133 (1977))).

¹²⁵ LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 28 (1995).

actions of physicians. Further, those international treaties capable of protecting patients and subjects lack effective implementation provisions.¹²⁶ For example, the implementation provision of the International Covenant on Civil and Political Rights (“ICCPR”),¹²⁷ which contains specific provisions addressing the physician abuse exposed in the Doctors’ Trial,¹²⁸ provides for the creation of a Human Rights Committee.¹²⁹ This Committee interprets articles within the treaty, examines state reports, and considers complaints by one state that another has not fulfilled its obligations.¹³⁰ In addition, the United Nations drafted an Optional Protocol to the ICCPR, which, for those states that have ratified both the ICCPR and its protocol, permits an individual to file a complaint for adjudication by the Human Rights Committee.¹³¹ Unfortunately, this procedure has not protected patients and subjects from physician abuse, has never been utilized by an individual whose rights have been violated, and has been criticized as highly complicated, ineffective in inciting change, and subject to long delays.¹³² Although the United Nations has attempted to craft principles of medical ethics, in particular as they relate to torture,¹³³ these declarations do not amount to legal obligations on states, and as such, can be considered as no more authoritative than the aforementioned ethical codes.¹³⁴

¹²⁶ Bassiouni et al., *supra* note 12, at 1657.

¹²⁷ International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at arts. 28-45, U.N. Doc. A/6316 (1996) [hereinafter ICCPR].

¹²⁸ Article 7 of the ICCPR specifies that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” *Id.* at art. 7.

¹²⁹ *Id.* at arts. 28-39.

¹³⁰ *Id.* at art. 28.

¹³¹ Optional Protocol to the ICCPR, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966); *see also* MANFRED NOWAK, THE U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS 580-616, 647-723 (1993). The Convention Against Torture has established a similar process for individual petition. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at art. 22, U.N. Doc. A/RES/39/46 (1984), *reprinted in* 23 I.L.M. 1027 [hereinafter Convention Against Torture].

¹³² Bassiouni, *supra* note 12, at 1657 n.294. The Human Rights Committee notes in Comment 20 to the ICCPR that “the reports of States parties generally contain little information on this point [free consent to medical or scientific experimentation]” and admonishes states that “[m]ore attention should be given to the need and means to ensure observance of this provision.” ICCPR, *supra* note 127, at General Comment 20.

¹³³ *See Principles of Medical Ethics Relevant to Health Professionals, Particularly Physicians, in the Protection of Prisoners from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, discussed in AMNESTY INT’L, MEDICINE AT RISK: THE DOCTOR AS HUMAN RIGHTS ABUSER AND VICTIM, AI Index: ACT 75/01/89, at 1 (1989). Pursuant to Principle 2 of the UN Principles of Medical Ethics:

It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment.

Id. at cover page.

¹³⁴ *See* Lippman, *supra* note 14, at 440, stating:

The General Assembly declared that the resolution [Principles of Medical Ethics Relevant to Health Professionals, Particularly Physicians, in the Protection of Prisoners from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] be circulated among medical and paramedical organizations and intergovernmental and non-governmental organizations. Professional associations and states were granted primary responsibility for enforcing the ethical strictures. Unfortunately, these entities have not yet proven that they are able to deter medical involvement in torture. Thus, a stronger enforcement mechanism is required.

Id.

Without international consensus, there can exist no customary international law concerning the practice of medicine.¹³⁵ Customary international law, deriving from the “general and consistent practice of states followed by them from a sense of legal obligation,”¹³⁶ binds a nation regardless of whether or not it has bound itself by treaty.¹³⁷ Without treaty obligations to embody and memorialize international consensus, restrictions specific to the activities of physicians are unlikely to take root in customary law, human rights, or criminal prohibition.¹³⁸

IV. INTERNATIONAL MEDICAL TRIBUNAL—A PERMANENT NUREMBERG

To prevent physician abuse in the absence of enforceable international regulation, Annas and Grodin have proposed the creation of an “international medical tribunal” with “authority to judge and punish the physician violators of international norms of medical conduct, as well as an independent body to conduct ongoing surveillance and develop a rapid response capacity.”¹³⁹ They argue that such an International Medical Tribunal should be “established with the sanction and authority of the United Nations”¹⁴⁰ and could be modeled after the International Criminal Court.¹⁴¹ To maintain political neutrality, they argue that the tribunal should have proportional funding and representation from member states¹⁴² and be “composed of a large panel of distinguished judges.”¹⁴³

¹³⁵ Bassiouni et al., *supra* note 12, at 1662 (“[A]sserting the need for a convention may also imply that the essential elements of customary law . . . may be lacking.”). *But cf.* Grodin et al., *supra* note 113, at 8 (stating that there is “universal condemnation of physicians who engage in . . . involuntary human experimentation under government auspices”).

¹³⁶ THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

¹³⁷ See SIR ROBERT JENNINGS & SIR ARTHUR WATTS, OPPENHEIM’S INTERNATIONAL LAW 27-29 (9th ed. 1992).

¹³⁸ See Anthony D’Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT’L & COMP. L. 47, 96 (1996) (noting that because widely accepted multilateral treaties create legal obligations incorporating consistent state practice, “provisions in treaties transmute into norms of customary law”); see also *Continental Shelf (Libya/Malta)*, I.C.J. REP., June 3, 1985, at 29 (finding that multilateral conventions “may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them”).

¹³⁹ Annas & Grodin, *supra* note 7, at 118. Professors Annas and Grodin were not the first to argue for the creation of an international tribunal to investigate and judge physicians. In 1991, the Montevideo group—composed of the medical associations of Uruguay and Denmark and the Rehabilitation Centre for Torture Victims in Copenhagen—drafted a constitutive statute for the creation of a tribunal to judge physicians and attorneys responsible for crimes against humanity. Ole Esperson, *Statutes for the International Tribunal for Investigation of Torture*, 17 J. MED. ETHICS 64 (1991). Although the Montevideo group attempted to gain international support for this tribunal, it was never formally created.

¹⁴⁰ ANNAS, *supra* note 4, at 253. Annas offered, in the alternative, that such a tribunal could be privately-sponsored. *Id.* The author notes at the outset that, unlike the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda, the International Medical Tribunal could not be established by mere Security Council resolution, pursuant to Chapter VII, because such a tribunal would have little bearing on the maintenance of international peace and security. Even if the Security Council could create such an International Medical Tribunal, professors Annas and Grodin presumably would, like the ICC, seek independence from the Security Council.

¹⁴¹ Annas & Grodin, *supra* note 7, at 119. Annas offered, in the alternative, that such a tribunal need not punish with criminal sanctions. ANNAS & GRODIN, *supra* note 3, at 313 (advocating that the tribunal have both criminal and civil powers).

¹⁴² ANNAS & GRODIN, *supra* note 3, at 313 (noting that funding could come from “a percentage of the human research budget of member states”).

¹⁴³ ANNAS, *supra* note 4, at 254; Annas & Grodin, *supra* note 7, at 119-20.

Annas and Grodin first introduced the International Medical Tribunal to physicians and lawyers in 1992.¹⁴⁴ Although the idea was discussed, it failed to gain U.N. support. At the time that this tribunal was introduced, the prospect of any international criminal court was still tenuous.¹⁴⁵

In 1996, Annas and Grodin created Global Lawyers & Physicians,¹⁴⁶ a non-profit human rights organization run through the Boston University School of Public Health, to bring together lawyers and physicians, *inter alia*, to further their goal of creating the International Medical Tribunal. Although they have yet to achieve legislative success, Annas and Grodin continue to promote the idea of an International Medical Tribunal.¹⁴⁷ They believe that

[t]he medical profession is the most promising candidate to take a leading role here because it has an apolitical history, it has consistently argued for at least some neutrality in wartime to aid the sick and wounded, it has a basic humanitarian purpose for its existence, and physician acts intended to destroy human health and life are a unique betrayal of both societal trust and the profession itself.¹⁴⁸

While deemed to be a “radical proposal” for addressing the crimes of physicians,¹⁴⁹ no independent scholar has yet analyzed the possibility of an International Medical Tribunal.

V. INTERNATIONAL MEDICAL TRIBUNAL—FAILURE IN PRINCIPLE AND PRACTICE

Annas and Grodin make the case that the arguments for an International Medical Tribunal are similar to those for the ICC. The ICC, an international criminal tribunal independent of the United Nations, has jurisdiction to prosecute the crimes of genocide, war crimes, crimes against humanity, and, once it is defined, aggression.¹⁵⁰ Although the Rome Statute, the treaty forming the ICC, was opened for signature in 1998, it did not gain the sixty ratifications necessary for its entry into force until April 11, 2002.¹⁵¹ Further, it was not until April 2003 that the ICC finally selected its chief prosecutor.¹⁵² The ICC judicial process has yet to be tested, and it

¹⁴⁴ Grodin et al., *supra* note 113, at 11.

¹⁴⁵ *Id.* at 8 (“[W]e recognize that it may be decades before the international community agrees to establish such a [permanent international criminal court].”).

¹⁴⁶ Global Lawyers and Physicians, *Mission Statement*, at <http://www.glphr.org> (last visited Apr. 12, 2004).

¹⁴⁷ Annas & Grodin, *supra* note 7, at 119 (“The establishment and support of such a tribunal is a worthy project for the world’s physicians and lawyers.”).

¹⁴⁸ ANNAS, *supra* note 4, at 253.

¹⁴⁹ Victoria Orłowski, Note, *Promising Protection Through Internationally Derived Duties*, 36 CORNELL INT’L L.J. 381, 407 (2003).

¹⁵⁰ Because of fears that the process of defining a crime of aggression would extend negotiations *ad infinitum*, aggression was initially left out of the Rome Statute, with the assumption that the Rome Statute would be amended at such a time when the ICC working group is able to gain consensus on a definition. Hermann Von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 79-85 (Roy S. Lee ed., 1999); see also Rome Statute, *supra* note 8.

¹⁵¹ *International Criminal Court Statute Comes Into Force*, U.N. CHRON. June 1, 2002, available at 2002 WL 21468371.

¹⁵² The ICC officially elected Argentine lawyer Luis Moreno Ocampo on April 21, 2003. Ocampo was sworn in as chief prosecutor on June 16, 2003. Nikki Tait, *Prosecutor Takes Over at World War Crimes Court*, FIN. TIMES, June 16, 2003, available at 2003 WL 20040129.

is unclear whether it will bring to fruition its founders' vision of an independent and impartial tribunal for promoting global justice and deterring international conflict.

Whereas the ICC may yet find success, the reasons underlying its creation do not apply equally well to the justifications for an International Medical Tribunal. An international tribunal for physicians is unnecessary, and even if such a tribunal were created, it would fail to fulfill the goals of its founders.

A. THERE IS NO NEED FOR AN INTERNATIONAL MEDICAL TRIBUNAL

1. Gross Human Rights Violations Will Be Punished Without an International Medical Tribunal

Although Annas and Grodin have, at times, restricted the Medical Tribunal's jurisdiction to war crimes and crimes against humanity,¹⁵³ this limitation itself would defeat the need to have a separate tribunal for physicians. Torture is torture, regardless of the perpetrator. To the extent that torture is the *actus* for a war crime or crime against humanity, there would be no distinction between the crimes of the physician and the crimes of the warlord.¹⁵⁴ Such torturous acts, despite being committed by physicians, would nonetheless constitute gross human rights violations prohibited by various international treaties¹⁵⁵ and *jus cogens* norms¹⁵⁶ of

¹⁵³ Annas & Grodin, *supra* note 7, at 118.

¹⁵⁴ This is similar to the argument presented in the prosecution's closing argument in the Doctors' Trial:

[T]hese defendants are, for the most part, on trial for murder It is only the fact that these crimes were committed in part as a result of medical experiments on human beings that makes this case somewhat unique. And while considerable evidence of a technical nature has been submitted, one should not lose sight of the true simplicity of this case.

Michael A. Grodin, *Historical Origins of the Nuremberg Code*, in ANNAS & GRODIN, *supra* note 3, at 121, 136-37 (quoting Trials of War Criminals, Closing Argument for the United States of America by James M. McHaney, July 14, 1947, transcript pp. 10718-96).

In a modern-day example of physician prosecution, Milan Kovacevic, a Bosnian Serb physician, was indicted for genocide by the International Tribunal for Crimes in the Former Yugoslavia for his role in establishing three prison camps at which Croat and Bosnian inmates were raped, tortured and killed. Associated Press, *Serb Denies War Crimes*, WASH. POST, July 31, 1997, at A20.

¹⁵⁵ Torture is widely held to constitute a gross violation of human rights. For example, the Universal Declaration of Human Rights holds that "[n]o one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Universal Declaration of Human Rights, G.A. Res. 217 A, at art. 5, U.N. Doc. A/810 (1948); *see also* ICCPR, *supra* note 127, at art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").

The Convention Against Torture And Other Cruel Inhuman Or Degrading Treatment Or Punishment defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention Against Torture, *supra* note 131, at art. 1.

¹⁵⁶ A *jus cogens* norm is a rule of international law "recognized by the international community of states as peremptory, permitting no derogation." LOUIS HENKIN ET AL., HUMAN RIGHTS 301 (1999). For an explanation of the role of *jus cogens* in international law, see IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 514 (5th ed. 1998).

customary international law.¹⁵⁷ As such, these crimes would trigger universal jurisdiction, allowing the ICC or any country to try the defendants responsible.¹⁵⁸

By expanding those crimes that constitute crimes against humanity and adding specificity to the elements necessary to prove the offense,¹⁵⁹ the Rome Statute ensures that any crime against humanity would fall under the subject matter jurisdiction of the ICC.¹⁶⁰ Should a medical offense satisfy the elements of a crime against humanity, the ICC would elevate the physician's criminal act to an offense under international criminal law.¹⁶¹ Under the Rome Statute, "crimes against humanity" encompasses acts committed by both official or non-state actors in times of peace or in times of armed conflict "pursuant to or in furtherance of a State or

¹⁵⁷ Rome Statute, *supra* note 8, at art. 7(1)(f).

¹⁵⁸ *E.g.*, Regina v. Bartle (the Pinochet case), 381 I.L.M. 581, 589 (House of Lords, Mar. 24, 1999), in JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 653, 655 (2000) ("The *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed."). For these "universal crimes," every state has the authority "to apply its laws to prosecute and punish such offenses, even in cases where the state has no links of territory with the offense and no links of nationality with either the offender or the victim." Clarence J. Dias, *Toward International Human Rights Crimes: An Asian Perspective on Human Rights and International Criminal Law*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 10, at 35, 38; M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 96-100 (2001). As stated in the Preamble to the Rome Statute, "it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes." Rome Statute, *supra* note 8, at Preamble; *see also infra* note 167 and accompanying text (noting the principle of complementarity in the Rome Statute, which allows national prosecution of any crime under the ICC's jurisdiction).

¹⁵⁹ According to Article 7 of the Rome Statute:

'[C]rime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Rome Statute, *supra* note 8, at art. 7(1).

¹⁶⁰ *See* Lucas & Pross, *supra* note 65 (advocating the ICC as a means of addressing violations of human rights by physicians). The Rome Statute is the first international treaty to elaborate the elements of crimes against humanity. Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 SAN DIEGO INT'L L.J. 73, 75-76 (2004).

¹⁶¹ Badar, *supra* note 160, at 91-122 (discussing the jurisdictional elements necessary to "elevate an ordinary act under domestic prosecution to a crime against humanity under international criminal law").

organizational policy.”¹⁶² Although the dominant discourses surrounding crimes against humanity have previously limited the constituent crimes, required a discriminatory intent, and depicted war as a prerequisite to international prosecution,¹⁶³ the plain language of the Rome Statute clearly expands its definition. For example, the statute explicitly enumerates torture, rape, and other crimes of sexual and gender violence, providing for the investigation of such crimes “when committed as a part of widespread or systematic attack directed against any civilian population.”¹⁶⁴ Moreover, crimes against humanity includes a catch-all provision in article 7(1)(k), allowing for the prosecution of “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health,”¹⁶⁵ which the prosecutor may invoke in prosecuting a physician for a human rights violation not specifically enumerated as a crime against humanity.¹⁶⁶

As a concession to state sovereignty, the Rome Statute permits individual states to try defendants for any of its enumerated crimes under the ICC’s concurrent jurisdiction, resulting in prosecution at the international level only where the national system is unable or unwilling to do so.¹⁶⁷ Pursuant to this “complementary” approach, however, a feedback loop is created, through which human rights are advanced at the national level; rather than find themselves in a situation where they would be unable to prosecute a suspect and thereby have to surrender him or her to

¹⁶² Rome Statute, *supra* note 8, at art. 7(2)(a); *see also* John F. Murphy, *The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court*, 34 INT’L LAW 45, 54 (2000) (noting the preconditions for jurisdiction over crimes against humanity).

¹⁶³ Although Allied Control Council Law No. 10 did not require a nexus between German crimes against humanity and either crimes against peace or war crimes, the United Nation’s International Law Commission, created after the Second World War to codify international law, held such a connection necessary in establishing a *prima facie* case for crimes against humanity. *Compare* PUNISHMENT OF PERSONS GUILTY OF WAR CRIMES, CRIMES AGAINST PEACE AND AGAINST HUMANITY, ALLIED CONTROL COUNCIL LAW NO. 10, *supra* note 50, at Art. II, with Report of the International Law Commission, Principle VI(c), U.N. GAOR, 5th Sess., Supp. No. 12, ¶ 123, U.N. Doc. A/1316 (1950) (“Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.” (emphasis added)); *see also* Badar, *supra* note 160, at 91 (noting that “[t]he decision to reject a requirement of a nexus with armed conflict evidences the erosion of the traditional approach to State sovereignty” (citing Margaret McAuliffe de Guzman, *The Road from Rome: The Developing Law of Crimes Against Humanity*, 22 HUM. RTS. Q. 335, 354 (2000))).

¹⁶⁴ Rome Statute, *supra* note 8, at art. 7(1) (emphasis added); *see* Dias, *supra* note 158, at 40 (noting that the use of the phrase “widespread or systematic” rather than “widespread and systematic” lowers the threshold for investigating crimes, providing that “either a pattern (systematic) or quantitative (widespread) element will suffice to commence an investigation”); *see also* Pam Spees, *Women’s Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power*, 28 SIGNS 1233, 1248-49 (2003); *see also* Badar, *supra* note 160, at 90 (noting that article 7’s “when committed as a part of widespread or systematic attack directed against any civilian population” language “constitute[s] the international or jurisdictional element that transforms the specific crimes listed in (a) to (k) from domestic crimes to a category of international crimes”).

¹⁶⁵ Rome Statute, *supra* note 8, at art. 7(1)(k).

¹⁶⁶ For an example of the rhetorical expansiveness of the definition of crimes against humanity, *see* THE INTERNATIONAL CRIMINAL COURT: THE BEIJING PLATFORM IN ACTION—PUTTING THE ICC ON THE BEIJING+5 AGENDA, THE WOMEN’S CAUCUS FOR GENDER JUSTICE 13 (2000) (finding that “withholding abortion from raped women should be explicitly defined as a war crime and a crime against humanity . . .”).

¹⁶⁷ Rome Statute, *supra* note 8, at art. 17.

the ICC, states have enacted wide-reaching changes to their domestic criminal laws to bring them in line with the Rome Statute.¹⁶⁸

The ICC and complementary national tribunals, through their adjudication of war crimes and crimes against humanity, will provide ample opportunity to prosecute physicians for torture, rape, crimes of sexual and gender violence, and “other inhumane acts.” Creating a competing international tribunal would be detrimental to international support for the ICC and serve to frustrate national efforts to bring domestic legislation in line with the Rome Statute. Without a compelling reason to do so, there is no need to create an International Medical Tribunal that would have overlapping jurisdiction with the ICC.

2. Medical Exceptionalism—What Makes Doctors So Special?

While physicians should face criminal prosecution for their crimes, there is no justification for the creation of a separate criminal tribunal solely for physicians. First, Annas and Grodin argue that physicians require a separate international tribunal because crimes by physicians are “a unique betrayal of both societal trust and the profession itself.”¹⁶⁹ This argument, however, applies equally to all professions that engage in some degree of self-regulation. While it may be true that physicians provide legitimacy to oppressive regimes,¹⁷⁰ this same legitimacy is also provided by judges, lawyers, politicians, police officers, and soldiers. When lawyers or judges act unjustly, often leading to far greater societal harm than that done by physicians, this too is a betrayal of the profession itself. Yet, even though lawyers and judges were tried in a separate tribunal in Nuremberg, no one in the wake of the ICC has proposed an international criminal tribunal unique to any other profession. To assume that physicians should be held to a different judicial standard, to be judged by physicians alone and not society as a whole, is to follow the flawed logic of medical exceptionalism that led criminal physicians to believe that they were somehow “above the law.”

Second, centralized specialization is not necessary to prosecute physicians. No nation currently prosecutes physicians in a specialized court, nor has any nation attempted such a particularized undertaking. It disparages professional jurists to presume that medical issues and concomitant medical testimony are too esoteric to be comprehended by lay legalists. Judges throughout the world have long relied on expert testimony.¹⁷¹ There is no reason to assume that ICC judges would be incapable of understanding medical documents or testimony, as clearly they will already be required to consider scientific evidence in assessing the guilt of almost all defendants.¹⁷² To find necessary at the international level what is wholly unnecessary at the national level is to invite the charge of legislative overreaching.

¹⁶⁸ Helen Duffy, *National Constitutional Compatibility and the International Criminal Court*, 11 DUKE J. COMP. & INT'L L. 5, 19 (2001); Dias, *supra* note 158, at 41 (“The claim to decline international jurisdiction for reasons of sovereignty is unmasked as sheer hypocrisy if it is accompanied by a refusal to accept and exercise national jurisdiction. Hence, a cardinal national legislative task is to incorporate fully definitions of international (universal) crimes into national law.”).

¹⁶⁹ Annas & Grodin, *supra* note 7, at 119.

¹⁷⁰ See *supra* notes 4, 35-39 and accompanying text.

¹⁷¹ M. Neil Browne et al., *The Perspectival Nature of Expert Testimony in the United States, England, Korea, and France*, 18 CONN. J. INT'L L. 55, 76-100 (2002).

¹⁷² See, e.g., Patricia M. Wald, *General Radislav Krstic: A War Crimes Case Study*, 16 GEO. J. LEGAL ETHICS 445, 449 n.13 (2003) (noting, in describing the investigation of the genocide at Srebrenica, that “[t]he Trial Chamber [of the International Criminal Court for the Former Yugoslavia]

Third, Annas and Grodin argue that “[t]he medical profession is perhaps the best candidate to take a leading role here because it has an apolitical history.”¹⁷³ The medical profession, however, is not, nor has it ever been, apolitical. In the Nazi regime, for example, the medical profession played a significant political role in validating the “racial inferiority” of the Jewish people.¹⁷⁴ Today, physicians are known to take part in gross violations of human rights. The WMA remains a political organization even after its multiple transgressions, with leaders of the organization advocating greater political activism as a necessity for physicians.¹⁷⁵ Members of the myriad politically active physician organizations, including Annas and Grodin’s own Global Lawyers & Physicians,¹⁷⁶ would chafe at the notion that physicians should be apolitical. Few medical decisions are made in a political vacuum, nor should they be.

Lastly, though politically active, physicians take part in the decision and policy-making processes of oppressive regimes far less than other professions. Although the ICC attempts to invoke command responsibility in selecting defendants,¹⁷⁷ this would be difficult with the International Medical Tribunal. Annas and Grodin fail to take into account the institutional arrangements within which many physicians operate.¹⁷⁸ In the case of torture, corporal punishments, and other medical crimes, those who dictate the specific human rights violations are often not physicians themselves, leaving the physician torn by his or her “dual loyalties” to patient and country.¹⁷⁹ Although the physician adds legitimacy to the punitive process, the physician is often an agent peripheral to the instigator of harm. In many cases, physicians who participate in violations of human rights do so only out of fear for the repercussions of insubordination, often viewing themselves only as the bureaucratic arm of a state policy outside their control.¹⁸⁰ Such culpability, often mitigated by irresistible pressures to participate, cannot warrant international prosecution in the face of a handicapped international justice system already straining to punish even the most high-ranking and culpable war criminals.

heard eight expert witnesses of varying nationalities who analyzed the remains, including ballistics, soil and material witnesses, as well as medical doctors”).

Based upon precedent established at the International Criminal Court for the Former Yugoslavia, it is well understood that doctor-patient confidentiality will extend to patient-doctor communications but not to physician records. Rutledge, *supra* note 11, at 174.

¹⁷³ Annas & Grodin, *supra* note 7, at 119.

¹⁷⁴ *Supra* notes 34-40 and accompanying text. Professors Annas and Grodin themselves argue that “[i]t is much easier for governments to adopt inherently evil and destructive policies if they are aided by the patina of legitimacy that physician participation provides.” Annas & Grodin, *supra* note 7, at 119.

¹⁷⁵ Victor W. Sidel, *Doctors and Political Activism*, 35 NEW PHYSICIAN 28, 28 (1986).

¹⁷⁶ Global Lawyers and Physicians, *supra* note 146 and accompanying text.

¹⁷⁷ Rome Statute, *supra* note 8, at art. 33.

¹⁷⁸ See Palmer, *supra* note 90, at 616 (noting the problems of assigning legal responsibility to physicians in the context of institutional arrangements).

¹⁷⁹ Miles, *supra* note 76, at 727 (citing International Dual Loyalty Working Group, *Dual Loyalty & Human Rights in Health Professional Practice; Proposed Guidelines & Institutional Mechanisms*, http://www.phrusa.org/healthrights/dual_loyalty.html (last visited July 29, 2004)); Seidelman, *supra* note 22 (commenting that “the past 50 years have seen the enhancement of the power of the state in health care and the exercise of that power through fiscal control”).

¹⁸⁰ AMNESTY INT’L, *supra* note 66, at 3-4; see also *id.* at 5-8 (noting human rights violations directed against health professionals); Lucas & Pross, *supra* note 65 (noting that many physicians who engage in human rights abuses do so out of fear for their own lives should they resist their government); cf. Palmer, *supra* note 90, at 613 (“Before commending or condemning professional behavior, we should better understand the forces, particularly the conceptions of knowledge, that drive professional behavior.”).

B. THERE IS NO BASIS FOR AN INTERNATIONAL MEDICAL TRIBUNAL

1. No Consensus on International Criminal Law for Physician Abuses

Annas and Grodin see an International Medical Tribunal as a step to “prevent governments from using physicians as instruments of killing, torture, persecution (on racial, political, or religious grounds), and involuntary human experimentation.”¹⁸¹ Although there is universal consensus that physicians cannot participate in widespread killing or torture, there is not widespread condemnation of other physician-perpetrated human rights violations.¹⁸² An International Medical Tribunal is not the place to develop crimes heretofore unknown under international law.

Outside of the gross human rights violations discussed *supra* Part V.A.1, the present international legal framework governing physician crime is woefully deficient. International law remains ambiguous in its prohibitions of physician participation in corporal and capital punishment or physician discrimination in the provision of health services.¹⁸³ Neither physicians nor legalists have reached a consensus on the legality and morality of physician-assisted suicide.¹⁸⁴ While many non-binding codes of ethics exist for research with human subjects, the medical landscape is devoid of a uniform legal standard for human experimentation, with even the Nuremberg Code’s absolute right of informed consent falling into disuse.¹⁸⁵ Compounding the harms of this regulatory inconsistency, there exists no global consensus on the use, composition, or procedures of using institutional review boards as a means of ethical self-regulation for medical research.¹⁸⁶ Thus, despite lobbying from health and human rights organizations, the Rome Statute includes no physician-specific crimes within its definition of “crimes against humanity.”¹⁸⁷

Like the ICC, an International Medical Tribunal cannot be effective without having subject matter jurisdiction over a clearly defined set of crimes. The core crimes punishable by the ICC, and for which it has automatic jurisdiction—genocide, crimes against humanity, and war crimes—have long been prohibited by international conventions and customary international law.¹⁸⁸ Yet, there were many

¹⁸¹ Grodin et al., *supra* note 113, at 8.

¹⁸² *Supra* Part III.D.

¹⁸³ *Supra* notes 80-82 and accompanying text.

¹⁸⁴ As argued by Dr. Jack Kevorkian in advancing human rights as a basis for physician-assisted suicide, “[t]he Nuremberg Tribunal said the first thing you do is check the morality of the law and if it’s immoral, you disobey it. Ladies and Gentlemen, I do that. You pass any law against assisted suicide . . . and I will disobey it.” Don Gonyea, CNN: MORNING EDITION: *Prosecutor Expects Suicide Doctor to be Acquitted Again* (CNN television broadcast, Feb. 15, 1996), *quoted in* Alison C. Hall, Note, *To Die with Dignity: Comparing Physician Assisted Suicide in the United States, Japan and the Netherlands*, 74 WASH. U. L.Q. 803, 817 n. 85 (1996).

¹⁸⁵ *E.g.*, Council of Europe, Convention on Human Rights and Biomedicine and Explanatory Report, Apr. 3, 1997, at art. 2, *reprinted in* 36 I.L.M. 817, 821 (1997) (establishing standards for human experimentation within the European Union). Even in the United States, there exists no uniform state criminal law concerning human experimentation. ANNAS & GRODIN, *supra* note 3, at 312-313.

¹⁸⁶ Chris Beyrer & Nancy E. Kass, *Human Rights, Politics, and Reviews of Research Ethics*, 360 LANCET 246, 249-50 (2002) (advocating the incorporation of domestic politics and human rights into institutional review board analyses).

¹⁸⁷ Rome Statute, *supra* note 8, at art. 7(1).

¹⁸⁸ Juan E. Méndez, *International Human Rights Law, International Humanitarian Law, and International Criminal Law and Procedure: New Relationships*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 10, at 65, 73 (noting that “the frame of mind of the drafters [of the Rome Statute] seems to have been, for the most

other crimes with universal prohibition that were not included in the Rome Statute. The 1994 draft statute for the ICC contained a far more expansive list of crimes, including, *inter alia*, terrorism, hijacking of civil aircraft, apartheid, hostage taking, and drug trafficking.¹⁸⁹ Based upon various delegations' positions on these crimes, including vociferous objections from the United States, the International Law Commission restricted the ICC's subject matter jurisdiction to only three core crimes. Even when there developed international consensus concerning the crimes over which the ICC has jurisdiction, the ICC nevertheless took time to define these crimes in a way acceptable to the signatories of the Rome Statute.¹⁹⁰ In the end, consensus still could not be reached even on the crime of aggression, forcing the delegates to postpone defining this crime until a later date.¹⁹¹ After over a decade of discussion and debate, only three crimes gained international consensus for international prosecution before the ICC.

Annas and Grodin envision that the International Medical Tribunal would act to correct problems caused by a lack of international law or physician self-regulation, using the Tribunal's jurisprudence to develop universal norms of medical conduct.¹⁹² Unlike international treaties, however, the International Medical Tribunal could not develop binding law *ex nihilo*, but rather would act as an interpreter of existing international law.¹⁹³ Although the international medical community is devoid of universal legal norms of medical conduct, the International Medical Tribunal would not have the independent authority to create them.

Criminal prosecution is not the best way to develop emerging norms of international law, as various legal and political difficulties would arise from the expeditious advancement of ill-defined rights through a criminal framework.¹⁹⁴ Because violative medical crimes currently lack universal prohibition in national criminal law, international conventions, or customary international law¹⁹⁵—unlike the core crimes of the ICC¹⁹⁶—an International Medical Tribunal would not have an easily-defined set of crimes over which it could exercise jurisdiction. As a result, such a tribunal would be forced into the extralegal situation of legislating norms of medical conduct. In so doing, the tribunal would, in effect, establish crimes *nullen crimen*,¹⁹⁷ violating international law and inviting innumerable challenges to the basic jurisdiction of the tribunal.

part, the need to develop a consensus, and therefore, declare the law as it is rather than to legislate anew").

¹⁸⁹ United Nations International Law Commission: Report of the Working Group on a Draft Statute for an International Criminal Court, U.N. GAOR 48th Sess., Supp. No. 10, at 265, U.N. Doc. A/CN.4/L.490 (1993), reprinted in 33 I.L.M. 253 (1994).

¹⁹⁰ For a discussion of the debates surrounding contentious definitions of crimes in the Rome Statute, see Murphy, *supra* note 162, at 53-54.

¹⁹¹ See Rome Statute, *supra* note 8, at art. 5.

¹⁹² Grodin et al., *supra* note 113, at 11 ("Without such a tribunal, we are left where we began before Nuremberg: international norms of medical conduct are relegated solely to the domain of ethics. Without the possibility of judgment and punishment, there is no international law worthy of the name, only international ethics.").

¹⁹³ Professors Annas and Grodin envision that the International Medical Tribunal would develop an international code. *Id.*; ANNAS & GRODIN, *supra* note 3, at 313 (envisioning that "[t]he tribunal would also be responsible for developing an international common law on human experimentation").

¹⁹⁴ See *infra* Part VI.

¹⁹⁵ *Supra* Part III.D.

¹⁹⁶ See generally Rome Statute, *supra* note 8.

¹⁹⁷ *Nullen crimen sine poena* (no crime without punishment), a corollary to the U.S. prohibition on applying justice *ex post facto*, has been incorporated into international law through the Universal Declaration of Human Rights to require that national criminal laws be defined in detail before anyone is prosecuted

2. Lack of State Support for International Tribunals

Annas and Grodin envision widespread support for an International Medical Tribunal, with member states voluntarily pooling their political and financial resources to create and maintain the tribunal.¹⁹⁸ However, such a view does not comport with the political realities involved in building support for an international court, particularly where, as in this case, national governments are reluctant to prosecute those in the medical profession at the domestic level.¹⁹⁹

National delegations drafted the Rome Statute over a ten-year period, with many compromises to accommodate recalcitrant states.²⁰⁰ There were many years during which the fate of the ICC was in doubt, as national governments were reluctant to have their sovereignty over criminal law usurped by international tribunals.²⁰¹ An International Medical Tribunal would amplify such sovereignty-based intransigence. Without universal prohibition of human rights violations by physicians, developing nations could refuse to adhere to this undertaking based upon notions of cultural relativism.²⁰² There is already great concern among developing nations that the ICC, piercing the veil of sovereignty to regulate individual behavior, treads heavily upon notions of cultural relativism.²⁰³ Without the support of developing nations, such a

under them. Walter Gary Sharp, Sr., *The International Criminal Tribunal for the Former Yugoslavia: Defining the Offenses*, 23 MD. J. INT'L L. & TRADE 15, 17 (1999). The author notes that such charges of *nullen crimen* were also levied against the Nuremberg Military Tribunal for its prosecution of the then-unprohibited "crime against peace." United States v. Alstoetter et al., in III TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 954, 963-71 (1947); Dias, *supra* note 158, at 38 (noting the criticisms of 1940s international legal scholars).

¹⁹⁸ *Supra* notes 140-143 and accompanying text.

¹⁹⁹ *Supra* notes 92-93 and accompanying text; see also David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 131 (2004) (noting that, "as a matter of principle, states owe it to their people to favor national interests over cosmopolitan ones--and so states will advance international human rights only to the extent that the advancement of human rights is widely perceived by their people as a national interest").

²⁰⁰ For a discussion of the drafting and negotiating process of the Rome Statute, see generally M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L.J. 443 (1999); see also *supra* notes 189-191 and accompanying text.

²⁰¹ John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 1 (1999).

²⁰² As an example, African physicians, desperate to perform Zidovudine (AZT) experimentation on African subjects in the early 1990s, argued that the doctrine of informed consent is based on Western cultural notions of individual rights and autonomy. Under a theory of cultural relativism, they argued that African notions of community should take precedence for research taking place in Africa and that protections for the subject are not necessary in these communities. *A Growing Dichotomy: The Gap Between Therapeutic Haves and Have-Nots*, AIDS ALERT, Jan. 1, 1998, available at 1998 WL 9747452 (in which Hoosen Coovadia remarked, "What works in the United States, which values individual rights, may not work in developing countries where the community needs supersede individual ones."); Elysa Gordon, Note, *Multiculturalism in Medical Decisionmaking: The Notion of Informed Waiver*, 23 FORDHAM URB. L.J. 1321, 1322 (1996) (arguing that "in some non-Western cultures, individuals expect and desire that others will make decisions about their medical care and that individuals do not want to receive information on which such decisions will ultimately be based"). Therefore, African physicians bitterly opposed the informed consent standard, arguing that Westernized notions of informed consent are a form of "ethical imperialism" on developing nations. Ileana Dominguez-Urban, *Harmonization in the Regulation of Pharmaceutical Research and Human Rights: The Need to Think Globally*, 30 CORNELL INT'L L.J. 245, 280 (1997).

²⁰³ E.g., Charles W. Colson, *Truth, Justice, Peace: The Foundations of Restorative Justice*, 10 REGENT U. L. REV. 1, 3 (1998) ("By charging anyone with 'crimes against humanity,' nations implicitly reject notions of moral and cultural relativism, and declare a universal moral standard that transcends political boundaries and supercedes national sovereignty."); Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, 15 EMORY INT'L L. REV. 391, 411 n.57 (2001) (noting the

tribunal may be perceived as “ethical imperialism” by those nations that would view the tribunal’s standards as solely the product of Western thinking.

Further, just as the international community has been unwilling to fund any international criminal tribunal since the signing of the Rome Statute,²⁰⁴ donor nations would be reluctant to fund the International Medical Tribunal. The difficulties in setting up ad hoc tribunals in Cambodia and Sierra Leone further highlight the international community’s unwillingness to wrest sovereignty over criminal prosecution from individual nations. For example, states refused to offer financial support for the creation of an international criminal tribunal for Sierra Leone despite widely-publicized atrocities occurring during that country’s civil war.²⁰⁵ The United Nations, in fact, rejected a recommendation that the tribunal be funded by mandatory assessments, and although U.N. Secretary-General Kofi Annan lobbied states for voluntary pledges, he had raised less than \$1 million by the end of 2001, well short of the tribunal’s estimated \$47 million yearly operating costs.²⁰⁶

Compounding this lack of Western support, the United States would refuse to participate in or provide support for such an International Medical Tribunal for many of the same reasons that it initially voted against²⁰⁷ and now refuses to ratify the Rome Statute.²⁰⁸ First, such a medical tribunal would not further U.S. values, which often conflict with the medical ethics of international allies.²⁰⁹ Second, unlike the Rome Statute, the International Medical Tribunal lacks international consensus, which would allow the United States to refuse to sign any constitutive agreement without weakening relations with its allies. Third, a tribunal would evoke the objections of U.S. medical associations similar to the successful objections voiced by the U.S. military in opposition to the ICC.²¹⁰

Without state support, an International Medical Tribunal would be hard pressed to wrest jurisdiction over individual defendants from recalcitrant states.²¹¹ The

Arab League’s “deployment” of cultural diversity in the debate on sexual and gender rights advanced in the Preparatory Commission on the International Criminal Court).

²⁰⁴ At the time of this writing it is unclear what role, if any, the international community will play in funding and directing any criminal prosecutions in U.S.-occupied Iraq.

²⁰⁵ *UN Unsuccessful So Far in Funding Sierra Leone War Crimes Tribunal*, CAN. PRESS, Apr. 18, 2001, at 1; Elizabeth M. Evenson, Note, *Truth and Justice in Sierra Leone: Coordination Between Commission and Court*, 104 COLUM. L. REV. 730, 739 (2004) (noting that the “UN’s reservation to the amnesty provisions opened a door into a future for Sierra Leone where the truth commission and criminal prosecutions could proceed side-by-side”).

²⁰⁶ *UN Unsuccessful So Far in Funding Sierra Leone War Crimes Tribunal*, supra note 205, at 1.

²⁰⁷ Alessandra Stanley, *U.S. Dissents, But Accord Is Reached on War-Crime Court*, N.Y. TIMES, July 18, 1998, at A1.

²⁰⁸ On May 6, 2002, the Bush administration took the nearly unprecedented step of withdrawing its signature for the ICC. The United States has further moved to deny military aid to those states that refuse to grant immunity for U.S. soldiers, thereby prohibiting these states from extraditing Americans to the International Criminal Court. Peter Slevin, *U.S. May Cut Aid Over Court Immunity; About 35 Nations Could Lose Funds*, WASH. POST, July 1, 2003, at A7. For a comparison of U.S. objections to the ICC before and after the Rome Statute, compare David J. Scheffer, *U.S. Policy and the International Criminal Court*, 32 CORNELL INT’L L.J. 529 (1999) with David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J. 47 (2002).

²⁰⁹ American medical law differs dramatically from that of other countries in many respects, including, *inter alia*, immunity for government physicians who violate patients’ rights during military experiments. See supra note 89 and accompanying text. In addition, U.S. physicians routinely violate their domestic codes of ethics, and possibly international law, through their participation in state-sanctioned executions. W.J. Curran & W. Cassel, *The Ethics of Medical Participation in Capital Punishment*, 302 NEW ENG. J. MED. 226, 227 (1980).

²¹⁰ Murphy, supra note 201, at 1.

²¹¹ Méndez, supra note 188, at 67 (noting that, in the absence of the ICC, “human rights cases may require the application of extradition treaties and law, a matter fraught with technical complexities that never

Rome Statute qualifies personal jurisdiction before the ICC with the preconditions of territoriality or nationality. That is, the ICC lacks truly universal jurisdiction, exercising personal jurisdiction over individual defendants only if either the state where the crime was committed or the state of nationality of the individual is a party to the statute.²¹² Thus, even for crimes that warrant universal jurisdiction,²¹³ it would remain unclear whether the International Medical Tribunal could exercise personal jurisdiction over defendants. Without the ability to punish individual defendants, any utilitarian or retributive justifications for an International Medical Tribunal would be lost.

Annas and Grodin acknowledge the impossibility of obtaining jurisdiction over physician-defendants in the absence of an international extradition agreement,²¹⁴ a highly unlikely prospect for the aforementioned reasons. Yet, Annas and Grodin's solution is to continue without defendants but with appointed defense counsel, believing that deterrence of the crimes would be served merely "through publication of their brutality and through international condemnation of them."²¹⁵ The only possible repercussions for individual physicians would occur, at best, through notification of "relevant professional organizations and the board or agency responsible for licensing the physician or physicians involved."²¹⁶

Without defendants physically appearing before the tribunal, continued support for the tribunal's "symbolic" victories would fade quickly. If physicians' organizations are currently reluctant to censure physicians, there is no reason to presume that notification by the International Medical Tribunal would make them any more likely to take action. By relying only on national remedies, the International Medical Tribunal would be hindered by the same factors that currently prevent the domestic prosecution of physicians. In effect, the International Medical Tribunal would become a chronicler of medical wrongs, another non-governmental advisory organization in a crowded field vying for the world's attention.

VI. FROM HUMAN RIGHTS TO CRIMINAL LAW

While international law governing the conduct of physicians cannot stand still, the credibility of such law demands that rights not be proclaimed without adequate consensus. International treaties, legislation created through multilateral consensus, have the capacity to carry far more normative weight than judicially-crafted rights, as such extra-legal rights have not been created through legitimate political discourse and democratic processes.²¹⁷ Annas and Grodin's International Medical Tribunal expresses a needed dynamism in human rights, but their innovative approach to preventing harm to patients and subjects, challenging the jurisprudential stasis of international medical law, may come at the expense of the integrity of the

previously had much to do with human rights enforcement").

²¹² Rome Statute, *supra* note 8, at art. 12. In the alternative, a state can give its consent to ICC jurisdiction on an *ad hoc* basis. *Id.*

²¹³ See *supra* note 158 and accompanying text.

²¹⁴ Annas & Grodin, *supra* note 7, at 120 n.24.

²¹⁵ *Id.*

²¹⁶ Grodin et al., *supra* note 113, at 12. A rare success for a medical association is found in Uruguay, where the National Uruguayan Commission for Medical Ethics expelled former military physicians who had engaged in torture during the rule of Uruguay's military dictatorship. Lucas & Pross, *supra* note 65.

²¹⁷ See Seidelman, *supra* note 41, at 1463-64.

human rights tradition.²¹⁸ By advancing such a mammoth expansion of rights before these rights have been fleshed out in academic discourse and matured, there is a risk that the litany of rights protecting victims will be unnecessarily trivialized.²¹⁹ Although there is an impulse in human rights scholarship to push for the elevation of goals as human rights,²²⁰ such rights promotion should not come at the expense of the very rights sought to be protected.

Before international prosecution of physicians can begin, there must first be international consensus as to what is and is not permissible. From the distortion of medicine by the Nazi regime²²¹ to the attempted legitimation of torture at Abu Ghraib and elsewhere,²²² it is clear that the content of prohibited acts, and therefore the rules governing medical ethics, are not immutable, often bending to accommodate political ideology. The Nuremberg Tribunal was tasked with codifying existing international law for medical practice by which to judge Nazi physicians.²²³ A similar effort is necessary now. What an international tribunal lacks in prosecuting physicians is the stable law on which to base its decisions and thereby give concrete meaning to treaty norms.

Underlying each criminal prohibition in the Rome Statute is the human right sought to be advanced by the application of international criminal law.²²⁴ The Rome Statute goes to painstaking lengths to reflect as accurately as possible the current state of human rights and international criminal law.²²⁵ By defining the specific details of the various offenses, the Rome Statute “can rightfully be quoted as declarative of the present state of the law as understood by a great majority of nations.”²²⁶

While consensus exists to prosecute some of the human rights violations committed by physicians,²²⁷ other violations remain in a vague periphery of international proscription. For a prohibition to rise to the level of an international crime, and thus be sanctioned by the law of nations, it must first be recognized under various sources of international law, including:

- (1) existing international conventions which define the act in question as an international crime;
- (2) customary international law which recognizes that certain conduct constitutes an international crime;

²¹⁸ See Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 609 (1984) (recognizing a balance between the integrity and credibility of the human rights tradition and the need to adopt a dynamic approach to human rights to address modern crises).

²¹⁹ *Id.* at 614 (proposing criteria for establishing a goal as a human right).

²²⁰ E.g., Benjamin Mason Meier, *International Protection of Persons Undergoing Medical Experimentation: Protecting the Right of Informed Consent*, 20 BERKELEY J. INT'L L. 513 (2002) (theorizing the existence of a human right to informed consent and advocating an international treaty to codify this “right”).

²²¹ *Supra* notes 34-41 and accompanying text.

²²² Lifton, *supra* note 76, at 416 (“American doctors at Abu Ghraib and elsewhere . . . brought a medical component to what I call an ‘atrocious-producing situation’—one so structured, psychologically and militarily, that ordinary people can readily engage in atrocities.”); see also *supra* note 76 and accompanying text.

²²³ See *supra* note 49 and accompanying text.

²²⁴ Dias, *supra* note 158, at 37 (“Human rights were not forgotten in the process [of drafting the Rome Statute] but often were *sub silentio*.”).

²²⁵ See *supra* notes 189-191 and accompanying text.

²²⁶ Méndez, *supra* note 188, at 73.

²²⁷ James A. Filkins, “*With No Evil Intent*”: *The Criminal Prosecution of Physicians for Medical Negligence*, 22 J. LEG. MED. 467 (2001).

- (3) general principles of international law which recognize that certain conduct should be deemed violative of international law and about which there is a pending draft convention before the United Nations; and
- (4) international conventions which prohibit certain conduct, though not specifically stating that it constitutes an international crime, and which is also recognized in the writing of scholars as such.²²⁸

Among the prohibitions likely to be applied to physicians, scholars have found torture and unlawful medical experimentation to meet the above criteria.²²⁹ While these crimes lack an international or transnational element to justify their universal condemnation, they are nevertheless prohibited at the international level for policy-motivated reasons of “[i]nternational necessity,” wherein “the world community has recognized that it must criminalize certain conduct on an international level for effective control.”²³⁰ Yet, despite the normative similarities between them, torture is specifically enumerated as a crime against humanity in the Rome Statute whereas unlawful medical experimentation remains absent.

The distinction between torture and unlawful medical experimentation highlights the methodological duality advanced herein. To the degree that medical crimes can be pursued before the ICC, they can and should be pursued by the prosecutor as he or she would pursue any other crime. But the Rome Statute necessarily limits the breadth and gravity of human rights violations advanced through the ICC. Only where the ICC is completely silent in protecting a human right does the need arise to create a body of international law to address the human right sought to be advanced.

Although torture was once confined to the realm of human rights,²³¹ international consensus now exists for the international criminal prohibition of torturous acts.²³² Beginning with the human rights protections against torture in the Universal Declaration of Human Rights,²³³ these protections were extended to criminal law through the United Nations’ adoption of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.²³⁴ Only through this subsequent pronouncement, explicitly mandating that each “State Party shall ensure that all acts of torture are offences under its criminal law,”²³⁵ did torture move from human rights to the purview of international criminal law. As such, torture is specifically enumerated in the Rome Statute as an underlying element of a crime

²²⁸ M. Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT’L L. 27, 28 (1983).

²²⁹ *Id.* The other crimes considered by Bassiouni to have international validity are: aggression, war crimes, unlawful use of weapons, genocide, crimes against humanity, apartheid, slavery and slave-related practices, piracy, hijacking, kidnapping of diplomats, taking of civilian hostages, unlawful use of the mails, drug offenses, falsification and counterfeiting, theft of national and archeological treasures, bribery of public officials, interference with submarine cables, and international trafficking in obscene publications. *Id.* Barbara Yarnold adds to this list the crimes of environmental damage and the theft of nuclear weapons and materials. Barbara M. Yarnold, *Doctrinal Basis for the International Criminalization Process*, 8 TEMP. INT’L & COMP. L.J. 85, 111 (1994) (citations omitted).

²³⁰ Yarnold, *supra* note 229, at 91 (analyzing the existence of guiding principles for raising conduct to the level of an international crime); *see also id.* at 96-98 (discussing the international criminal elements of torture and unlawful medical experimentation).

²³¹ *See supra* note 155.

²³² Lippman, *supra* note 14, at 435.

²³³ Universal Declaration of Human Rights, *supra* note 155, at art. 5.

²³⁴ *See* Convention Against Torture and Other Cruel Inhuman or Degrading Treatment, *supra* note 131.

²³⁵ *Id.* at art. 4.

against humanity, obviating the need for additional advocacy in holding physicians criminally responsible for their torturous acts.

However, as distinguished from torture, unlawful medical experimentation, despite having met the human rights requirements necessary to move from human rights to international criminal law,²³⁶ remains independently unenumerated in the Rome Statute. In such a case, a primary avenue for prosecuting unlawful medical experimentation would be to find space in either the human rights or humanitarian law of the ICC under which such crimes could be prosecuted: article 5's prohibition of war crimes;²³⁷ article 7(1)(k)'s catch-all prohibition of an "inhumane act[] . . . intentionally causing great suffering, or serious injury to body or to mental or physical health,"²³⁸ or future articles considered by the ICC Review Conference.²³⁹ Through this established process, proponents could use and amend the ICC to flesh out the scope of medical rights, developing these rights for criminal prosecution and human rights advancement. But, should the ICC deny redress for unlawful medical experimentation, it becomes necessary for proponents to build an independent human rights foundation for criminal prohibition, using criminal prosecution at the national level and scholarship on the elements of these crimes to advance these rights to a point at which future international prosecutions could occur.²⁴⁰

In these cases beyond prosecution at the ICC, binding human rights standards are necessary to protect the patient and subject from physicians seeking to do harm. Whether through international treaty or binding code of conduct, it is for the international community—with the participation of all stakeholders—to create universal norms of medical practice that include respect for human rights.²⁴¹ Building on the Universal Declaration of Human Rights, and the various international treaties and ethical codes deriving from it, a human rights framework would empower victims and leave a lasting mark on physician practice. A single, comprehensive human rights-based treaty is necessary to bind together all those

²³⁶ Bassiouni, *supra* note 228, at 28.

²³⁷ Medical experimentation would be considered a war crime under the plain language of the Rome Statute where such experiments constitute a "grave breach" of the Geneva Conventions. Rome Statute, *supra* note 8, at art. 8(2)(a)(ii).

²³⁸ *Id.* at art. 5. In fact, Ratner and Abrams suggest that medical experimentation is among the many possible uses of article 7(1)(k)'s catch-all provision. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 74 (2d. ed. 2001) (noting that the judgment in the Doctors' Trial employed the Control Council Law No. 10 definition of "other inhumane acts" to find that the Nazi medical experimentation constituted a crime against humanity).

²³⁹ As an example of possible future crimes, see Resolution E adopted at the Rome Conference, which recommends that the Review Conference "consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court." Resolution E, *reprinted in* CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 104-05 (1998); *see also* M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM; MULTILATERAL CONVENTIONS (1937-2001) 18 (2001) (defining terrorism to include unlawful medical experimentation).

²⁴⁰ To assure the incorporation of nascent human rights into international criminal jurisprudence under the ICC, the author notes that a Review Conference will convene in 2009 to consider amendments to, *inter alia*, the list of crimes prosecutable under the Rome Statute. *Supra* note 9; Rome Statute, *supra* note 8, at art. 123.

²⁴¹ In advancing a human right to be free from unlawful medical experimentation, human rights advocates have achieved legislative success in Comment 14 to the International Covenant on Economic Social and Cultural Rights (ICESCR), through which the Committee on Economic, Social, and Cultural Rights, the monitoring and interpreting body for the ICESCR, has found that the human right to health includes a right to be free from "non-consensual medical treatment and experimentation." The Right to the Highest Attainable Standard of Health, CESCR General Comment 14, U.N. Committee on Economic, Social and Cultural Rights, 22d Sess., ¶ 8, Agenda Item 3, U.N. Doc. E/C.12/2000/4 (2000).

crimes committed by physicians. International legislation can mainstream these human rights into medical practice, with implementation mechanisms that permanently reframe physician accountability to achieve enduring criminal prohibition on those who would cause injury to their patients and subjects.

VII. CONCLUSION

Professors Annas and Grodin have a worthy goal: to stop those who use their healing art to cause harm. Bringing iniquitous physicians to justice would deter future offenders and bring vindication and rehabilitation to those who have suffered at the hands of these criminals. Yet, Annas and Grodin's international criminalization approach to achieving this goal does not adequately consider the legal and political difficulties in creating and maintaining an international criminal tribunal concurrent with the ICC. With the untested ICC still in its infancy, there is no need for a bold new initiative such as the International Medical Tribunal. Inasmuch as the ICC is able to act toward international criminal prosecutions, it will provide ample opportunity to prosecute physicians within its mandate.

While the arguments in favor of an International Medical Tribunal may have had merit prior to the signing of the Rome Treaty, the creation of the ICC provides a forum for prosecuting many of the most extraordinary evils that Annas and Grodin seek to address. In the absence of any coordinated medical effort to violate human rights, like that employed by the Nazi regime during World War II, it is unnecessary to establish an international medical tribunal to preside over medical crimes better left to the ICC, national courts, and professional organizations. Should such an unfortunate need arise, an ad hoc tribunal, like that employed in Nuremberg, would adequately preside over prosecution of these medical crimes. At the present time, however, an International Medical Tribunal would fail to punish physicians and deny justice to the victims hurt by those who took solemn oaths to do no harm; it would fail to achieve Annas and Grodin's stated goals.

Rather than focusing on the creation of an international tribunal to punish individuals, Annas and Grodin's goals would be better served by supporting and informing the ICC, encouraging its prosecutor to examine the crimes of physicians as it would any other crime. In cases where the ICC is silent as to a particular human right, physicians should come together with lawyers to create a body of international law addressing an individual's right to be free from physician harm. As part of a small cadre of legal scholars attempting to advance patient autonomy and health through a human rights framework, Annas and Grodin have made immeasurable strides in protecting the rights of the individual patient and subject. They should not now shift their focus to punishing individual actors when such attention comes at the expense of advancing human rights.