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In Judgment of Unit 731: A Comparative Study of Medical War Crimes Trials after World War II

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Abstract

The prosecution of the crimes of the Imperial Japanese Army's Unit 731 are often compared to the prosecution of the crimes of the Nazi doctors. These comparisons emphasize immunity for the Japanese, whereas the Nazis were prosecuted for their actions. However, this comparison is an inaccurate one. While both trials look similar on the surface, their composition, scope, and framework were different. Conscious of the fact they were establishing international criminal precedent, the United States' case against the Nazi doctors relied on military chain of command to prove strong legal responsibility for human experimentation crimes. In contrast, the United States avoided prosecuting Unit 731 because they could not replicate the same clear legal framework used to successfully prosecute the Nazis. The Soviet Union recognized the strategic implications of the United States' decision not to try Unit 731 and saw an opportunity to strike a moral blow, not only by convicting Japanese military members at the Khabarovsk Trial, but also by immediately publishing the court's proceedings internationally. Rather than focusing on the morality of who was punished by whom, understanding the military structures as identified through these different court proceedings could enable prevention of crimes against humanity.

Keywords

Imperial Japanese Army – World War II – war crimes – Nuremberg – Tokyo Trials – Medical Case – Nazis, medical experiments – Soviet Khabarovsk Trial – International Military Tribunal for the Far East (IMTFE) – International Military Tribunal (IMT) – Nuremberg Military Tribunal (NMT) – biological warfare – Doctors' Trial – chemical warfare – human experimentation

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To use the Nazi human medical trial as a template for possible prosecution of the Japanese human medical experiments during World War II is not an accurate precedent. Although there are significant similarities to the atrocities the Japanese committed, the core of the U.S. prosecution of the Nazi medical doctors revolved around the clear lines of responsibility linking their association with the Nazi party and military authority to the actions of human experimentation. Specifically, the United States developed a case that clearly traced Nazi human experimentation through the military chain of command (both the traditional armed services – *Wehrmacht* – and the paramilitary – *Schutzstaffel* (SS) (*Protection Squadron*).[1] Throughout the trial, successful prosecution rested on established military command and control structures, as well as legal military authority, to order acts of human experimentation. Such a clear line between orders and execution did not exist in the Japanese case. While trials presumably could find individuals guilty of individual acts of human rights abuses, the lack of formal military authority to order the experiments resulted in an inability to develop a strong, prosecutable case against the biological warfare (BW) activities of the Imperial Japanese Army (IJA). Therefore, application to the Japanese of the legal basis for prosecution of the Nazi medical doctors was not possible. This led to prosecutorial omission and subsequent immunity of the members of Unit 731 and Japanese BW during the International Military Tribunal for the Far East (IMTFE).

At the Nazi Doctors' Trial, the United States executed seven Nazis and found an additional nine guilty of "War Crimes and Crimes Against Humanity," but did not bring similar charges against Japanese medical personnel during the IMTFE. This discrepancy remains a topic of debate and is the origin of the comparisons between the Nazi and IJA medical experiments, which ultimately conclude that the United States acted immorally for not indicting the Japanese.[2]

1 "Such medical units of the Waffen [Arms] SS [*Schutzstaffel* (*Protection Squadron*)] as were assigned to the field, became subordinated to the Medical Service of the Army" thus directly linking the paramilitary with established military command structures. *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (*"Green Series"*), Vol. 2: *"The Medical Case" "The Milch Case"* (Washington, DC: U.S. Government Printing Office, n.d.), p. 186, https://tile.loc.gov/storage-services/service/ll/llmlp/2011525364_NT_war-criminals_Vol-II/2011525364_NT_war-criminals_Vol-II.pdf (accessed 3 August 2022).

2 See Jeanne Guillemin, *Hidden Atrocities: Japanese Germ Warfare and American Obstruction of Justice at the Tokyo Trial* (New York: Columbia University Press, 2017); Linda G. Holmes, *Guests of the Emperor: The Secret History of Japan's Mukden POW Camp* (Annapolis, MD: Naval Institute Press, 2010); Sheldon Harris, *Factories of Death: Japanese Biological Warfare 1932–45 and the American Cover-up* (New York: Routledge, 2002); Daniel Barenblatt, *A Plague upon Humanity: The Secret Genocide of Axis Japan's Germ Warfare Operations* (New York: HarperCollins, 2004); Yuki Tanaka, Tim McCormack, and Gerry Simpson (eds.), *Beyond Victor's Justice?: The Tokyo War Crimes Trial Revisited*, International Humanitarian Law Series, vol. 30 (Leiden: Martinus Nijhoff, 2011); Timothy L. H. McCormack and David A. Blumenthal (eds.), *The Legacy of Nuremberg: Civilising Influence or Institutionalised*

Although the Japanese and German militaries both conducted experiments on humans during World War II, the United States could not have tried the Japanese under the same legal process they used in the German case due to the structural differences of the militaries.

The International Military Tribunal (IMT) that an international agreement established did not prosecute the Nazi medical doctors.[3] Instead, the subsequent Nuremberg tribunals that the military order formed and the United States presided over exclusively heard the case.[4] Like Nuremberg, military order established the IMTFE,[5] but unlike Nuremberg, had judges from a larger, international bench.[6] Unlike the apparent international consensus at the IMT though, the IMTFE had numerous dissenting opinions, to include the most famous rejection of the trial coming from Justice Radhabinod Pal of India. Justice Pal's dissent argued that the trial applied *ex post facto* law for victor's justice. He particularly took umbrage that the Western colonial nations did not apply the same standards of conduct to themselves as they imposed on the Japanese, notably through the unwillingness to try Western colonial crimes.[7] Although it did not raise an issue in a dissenting opinion, the Soviet Union objected that Japanese BW was not included in the IMTFE trial. To rectify this, the Soviet Union conducted a similar unilateral trial to the Nuremberg

Vengeance?, International Humanitarian Law Series, vol. 20 (Leiden: Brill/Nijhoff, 2008); Jing-Bao Nie, Nanyan Guo, Mark Selden, and Arthur Kleinman (eds.), *Japan's Wartime Medical Atrocities: Comparative Inquiries in Science, History, and Ethics* (London: Routledge, 2010); William R. LaFleur, Gernot Böhme, and Susumu Shimazono (eds.), *Dark Medicine: Rationalizing Unethical Medical Research* (Bloomington: Indiana University Press, 2008).

3 "Charter of the International Military Tribunal," The Avalon Project, Documents in Law, History, and Diplomacy, Lillian Goldman Law Library, Yale Law School, New Haven, CT, https://avalon.law.yale.edu/imt/imtconst.asp (accessed 1 August 2022).

4 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (*"Green Series"*), Vol. 1: *"The Medical Case"* (Washington, DC: U.S. Government Printing Office, n.d.), https://hdl.loc.gov/loc.law/llmlp.2011525364_NT_war-criminals_Vol-I (accessed 1 August 2022).

5 "Charter of the International Military Tribunal for the Far East-19 January 1946," 19 January 1946, folder 1946, [IMTFE] (IPS) General Orders. Memoranda., Papers of Roy L. Morgan, box 1, The International Military Tribunal for the Far East [IMTFE] Digital Collection, University of Virginia School of Law, Charlottesville, VA, http://imtfe.law.virginia.edu/collections/morgan/1/4/charter-international-military-tribunal-far-east-19-january-1946 (accessed 1 August 2022).

6 *Judgment of the International Military Tribunal for the Far East*, November 1948, Library of Congress, Washington, D.C., https://tile.loc.gov/storage-services/service/ll/llmlp/Judgment-IMTFE-Vol-I-PartA/Judgment-IMTFE-Vol-I-PartA.pdf (accessed 1 August 2022).

7 Radhabinod Pal, *International Military Tribunal for the Far East: Dissentient Judgment of Justice Pal* (Tokyo: Kokusho-Kankokai, 1999), 32, 65–67, 73, 320, 678, 681–682; Timothy Brook, "The Tokyo Judgment and the Rape of Nanking," *Journal of Asian Studies* 60, no. 3 (August 2001): 673–700.

tribunals that sentenced twelve Japanese service members to confinement in labor camps for varied criminal acts associated with BW.[8]

Although the Nazi and Japanese medical cases had nominal similarities, they also had glaring differences. Where the United States tried medical doctors almost exclusively (13 percent non-medical personnel), the Soviets tried nearly three times as many non-medical personnel (33 percent non-medical personnel).[9] Of those convicted during the Doctors' Trial, sentencing focused primarily on association with the Nazi Party and the criminal organizations the IMT identified. Links between doctors and the actual medical experiments followed military chains of command and firmly established criminal culpability.

Unequivocal testimony and documentation attests to the existence of Japan's medical war crimes. However, rather than address the morality of human experimentation, this article looks at the military structures of the German and Japanese military medical services along with their relationship to civilian health and BW programs as a point of comparison. The United States framed its prosecution of Nazis during Nuremburg as the high mark of international justice. Subsequently, the omission of the Japanese human experimentation case at the IMTFE led to the Soviet Union exploiting the Khabarovsk War Crimes Trial at the beginning of the Cold War to undercut the U.S. narrative. Furthermore, to apply the knowledge and evidence which currently exists on the IJA's BW actions on decision makers immediately following the war is an historical anachronism.

While World War II marked the first international legal trial against war crimes, the concept had existed for centuries.[10] Beginning in the mid-1800s, the global community began to standardize laws and rules of warfare at the Hague and Geneva Conventions.[11] Although informal and observed through gentlemen's agreement, the Hague and Geneva Conventions set the gears in motion for international criminal war crimes cases. The first attempt at the application of international tribunals occurred after World War I. Under the Treaty of Versailles, the Allies had authorization to charge German soldiers

8 *Materials on the Trial of Former Servicemen of the Japanese Army Charged with Manufacturing and Employing Bacteriological Weapons* (Moscow: Foreign Languages Publishing House, 1950), https://elearning.trree.org/file.php/1/MaterialsTrial-JapaneseArmy-1950.pdf (accessed 1 August 2022).

9 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (*"Green Series"*), Vol. 2, pp. 184–89; *Materials on the Trial of Former Servicemen of the Japanese Army Charged with Manufacturing and Employing Bacteriological Weapons*, pp. 176–77.

10 William Schabas, *An Introduction to the International Criminal Court* (Cambridge, UK: Cambridge University Press, 2007), 1–2.

11 Ibid., pp. 2–3.

who committed acts in violation of the laws and customs of war.[12] However, compromise allowed the trials to occur in German courts, which led them to approximate military disciplinary hearings instead of the international criminal trials as the writers of the treaty desired.[13]

As international agreements outlined a code of conduct for armed forces in warfare, naturally, the individuals who established the IMT used the conventions as their template to criminalize certain actions. Specifically, the charter of the IMT outlined three crimes for which the tribunal could find major war criminals in Europe guilty – crimes against peace, war crimes, and crimes against humanity, all of which did not exist in either the Hague or Geneva Conventions.[14] Definitions of these crimes extended past the limits of individual participation. They included "leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes [as] responsible for all acts performed by any persons in execution of such plan."[15] This legal extension enabled the Allies to prosecute organizations and leaders who did not participate physically in war crimes, but who utilized the military command structure to order the newly defined crimes formally.

Unlike other post-World War II tribunals, such as Nuremberg, the IMTFE, and the Khabarovsk trial, which traced their legal justification to individual nation's jurisdiction, the IMT based its justification on an international agreement. Representatives for the United States, France, Britain, and the Soviet Union established the tribunal and conducted all formal documentation in English, French, Russian, and German.[16] While the legacy of the IMT remains a topic of debate, an undeniable key innovation was the utilization of simultaneous translation. Instead of translators who listened to a whole sentence or conversation and provided translation, simultaneous translation involves converting the language in real-time.[17] Still in use at the United Nations,

12 *Treaty of Peace with Germany* (Treaty of Versailles), 28 June 1919 (2 U.S.T. 43) [U.S. Treaty, *Treaties and Other International Agreements of the United States of America*, vol. 2, p. 43] https://tile.loc.gov/storage-services/service/ll/lltreaties//lltreaties-ustbv002/lltreaties-ustbv002.pdf (accessed 1 August 2022).

13 Schabas, *An Introduction to the International Criminal Court*, p. 4.

14 "Charter of the International Military Tribunal for the Far East-19 January 1946."

15 Ibid., Article 6.

16 Ibid., Article 25.

17 Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (New York: Oxford University Press, 2011), 2–3; McCormack and Blumenthal (eds.), *Legacy of Nuremberg*, p. 101; Kayoko Takeda, *Interpreting the Japanese War Crimes Trials: A Sociological Analysis* (Ottawa: University of Ottawa Press, 2010), 7.

simultaneous translation eliminated possible concerns that a translator could alter the translation to suit his/her own goals or biases.

Ultimately, the IMT sentenced twelve of the nineteen defendants to death, three to life imprisonment, and four to varying prison sentences. Additionally, it concluded that the Reich Cabinet, the leadership of the Nazi Party, the *Schutzstaffel* (SS), the *Sicherheitsdienst des Reichsführers-SS* (SD), the *Sturmabteilung* (SA), and the Gestapo represented criminal organizations.[18] In essence, the IMT successfully defined individual participation in the Nazi political and military organizations as sufficient grounds for criminality.

Armed with new criminal definitions from the IMT, the IMTFE stood up to run a similar trial for the Japanese in the Pacific Theater. Unlike the IMT, the IMTFE charter established the tribunal under a military order from General Douglas MacArthur, the Supreme Commander of the Allied Powers.[19] Ironically, the U.S.-established IMTFE had a more international judicial bench than its European counterpart.[20] In addition to the four countries from the IMT, the IMTFE also saw judges from Australia, Canada, the Netherlands, New Zealand, the Philippines, India, and China. The more international judicial bench added Dutch, Chinese, and Japanese to the translation mix. Unlike the Indo-European languages, Chinese and Japanese have little linguistic similarity between themselves, let alone with other Indo-European languages. However, where the IMT operated in four languages, the IMTFE only officially communicated in English and Japanese.[21]

Although the official bilingual court presumably could streamline translation, especially compared to the four languages of the IMT, translation represented a significant hurdle in reality. The IMTFE developed a tri-level translation structure to address the lack of native Japanese translators. Japanese citizens that the Japanese government appointed (including three former IJA soldiers and one son of a war crimes suspect) acted as initial translators. Due to the close association to the IMTFE's defendants, monitoring of the translators fell to four *Nisei* (second-generation Japanese-Americans, all but one of whom the U.S. government detained in internment camps during the war). Because many in the United States distrusted *Nisei,* a Final Language Arbitration Board

18 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (*"Green Series"*), Vol. 1, p. 28.

19 "Charter of the International Military Tribunal for the Far East-19 January 1946."

20 *Judgment of the International Military Tribunal for the Far East*, Vol. 1, Part A, p. 1.

21 Valentyna Polunina, "The Khabarovsk Trial: The Soviet Riposte to the Tokyo Tribunal," in *Trials for International Crimes in Asia*, Kirsten Sellars (ed.) (New York: Cambridge University Press, 2016), 123.

physically located in the prosecution's area that two white military officers of varied language proficiency headed approved all translations and documented the official transcription.[22] This complex translation structure placed value on the U.S. military translations before the accuracy of language. While this was not an ideal translation arrangement, further exacerbating the situation was the highly technical jargon needed to comprehend and translate medical information, military action, and legal definitions. Considering that all three of these fields require years of experience and formal schooling, it is doubtful that even the *Nisei* translators were up to the task of both translating and relaying the nuance requisite in a legal proceeding, let alone two white military translators with unknown language skill level.

On top of the complicated Japanese translation situation, the international judges, who spoke widely different languages, further complicated the proceedings of the IMTFE.[23] While it is unlikely that these linguistic factors determined the tribunal's more narrow legal focus, it undoubtedly contributed. Moreover, as part of this more narrow legal focus, the tribunal eliminated the ability to define the Japanese government or military as a criminal organization.[24] As a result, and a significant divergence from the IMT, the IMTFE eliminated the question of defining the political and military structures as a criminal organization and allowed the United States to abstain from trying Emperor Hirohito. This dual effect ensured that the United States could not prosecute Japanese medical personnel for war crimes associated with BW.

Unlike the IMT, though similar to the IMTFE, a military order established the subsequent Nuremberg tribunals to oversee lesser war crimes and crimes against humanity the IMT did not hear.[25] Due to a large number of criminal charges and indictments, the tribunals subdivided their caseload into eleven more manageable and thematic cases that dealt with individuals and organizations.[26] In the *Medical* case, also known as the Doctors' Trial, the United States charged 23 medical professionals with conspiracy, war crimes, crimes against humanity, and membership in a criminal organization, as outlined

22 Takeda, *Interpreting the Japanese War Crimes Trials*, pp. 2–3, 40. Current U.S. military linguists are considered proficient at a Defense Language Placement Test Level 2 (reading)/2 (listening) on a 0-4 scale, with 4 being the highest level. This equates to an Advanced-Low level with the American Council on the Teaching of Foreign Languages proficiency scale.

23 Ibid., pp. 32–38.

24 *Judgment of the International Military Tribunal for the Far East*, Vol. 1, Part A.

25 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (*"Green Series"*), Vol. 1, p. 5.

26 The cases were Medical, Milch, Justice, RuSHA, Pohl, Flick, Farben, Krupp, High Command, Hostage, and Ministries. See Kevin Jon Heller's *Nuremberg Military Tribunals* for legal and historical analysis of these individual cases.

in the IMT verdict. Fourteen specific war crimes[27] charged in the indictment involved medical experiments, seven of which the accused conducted "for the benefit of the German Armed Forces."[28] For every war crime, the Doctors' Trial charged the defendants with a corollary crime against humanity.

Of the 23 medical professionals that the IMT charged, twenty were medical doctors. Eight of those doctors were civilians, and fifteen were German military officers of generally senior rank.[29] Although not part of active military service, Germany had a conscription military that meant the civilian doctors had military training and, in some cases, required military service.[30] A conscription system, in general, maintains a small cadre of soldiers as full-time professionals that depends on minimal, occasional military training for males to bolster its ranks during periods of active warfare. For all intents and purposes,

27 High-Altitude Experiments, Freezing Experiments, Malaria Experiments, Mustard Gas Experiments, Sulfanilamide Experiments, Bone, Muscle, and Nerve Regeneration and Bone Transplantation Experiments, Sea-water Experiments, Epidemic Jaundice Experiments, Typhus Experiments, Experiments with Poison, Incendiary Bomb Experiments, Skeleton collection, Purposeful infection of Polish people with tuberculosis, and the Euthanasia program of "useless eaters."

28 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (*"Green Series"*), Vol. 1, pp. 10–17.

29 Military Members were (* indicates individual who were not medical professionals) Major General Karl Brandt, personal physician to Adolph Hitler and commissioner for health and sanitation; Lieutenant General Siegfried Handloser, chief of the Armed Forces Medical Services; Lieutenant General Oskar Schroeder, chief of Medical Service of the *Luftwaffe*; Major General Karl Genzken, chief of the Medical Department of the *Waffen* SS [*Schutzstaffel*]; Major General Karl Gebhardt, personal physician to Heinrich Himmler and chief surgeon of the SS and Police Staff; Colonel Rudolf Brandt*, personal administrative officer to Himmler; Senior Colonel Joachim Mrugowsky, chief hygienist for Physician SS and Police; Senior Colonel Helmut Poppendick, chief of staff of Physician SS and Police; Colonel Wolfram Sievers*, director of the Institute for Military Scientific Research (Ahnenerbe Society); Brigadier General Gerhard Rose, chief of the Department for Tropical Medicine; Senior Colonel Viktor Brack*, chief administrative officer of the Nationalsozialistische Deutsche Arbeiterpartei [NSDAP] (Nazi Party); Captain Hermann Becker-Freyseng, chief of the Department for Aviation Medicine; Lieutenant Colonel Georg August Weltz, chief of the Institute for Aviation Medicine; Captain Waldemar Hoven, chief doctor at Buchenwald. Civilian members were Paul Rostock, chief surgeon of the Berlin Surgical Clinic and advisor to the Army; Kurt Blome, deputy Reich health leader; Siegfried Ruff, director of the Department for Aviation Medicine; Hans Wolfgang Romberg, doctor on staff of the Department for Aviation Medicine; Konrad Schaefer, doctor on staff at the Institute for Aviation Medicine; Wilhelm Beiglboeck, consulting physician to the *Luftwaffe*; Adolf Pokorny, specialist in skin and venereal diseases; Herta Oberheuser, Ravensbrueck Concentration Camp physician and assistant physician to Major General Karl Gebhardt.

30 War Department, *Handbook on German Military Forces, 17 December 1941*, TM-E-30–450 (Washington, DC: U.S. Government Printing Office, 1941), 25–29.

every German citizen served as a life-long soldier for the state; technically, military service began at eighteen and ended at death. At eighteen, German men attended a muster where the government conducted assessments for suitability in the military and made an initial decision on placing them in which Corps (military specialty).[31] They began an initial two-year training and started active duty service at twenty if found suitable for military service. Following active service, a German remained a reservist until 35 or after twelve/thirteen years of reserve service. As they progressed in age, they shifted reserve categories that reduced the probability of call back into active service. Between 35 and 45, they received classification as *Landwehr* soldiers and, after 45, *Landsturm* soldiers.[32] All but two doctors undergoing trial during the NMT were over 45, and their status as *Landstrum* soldiers would mean they probably never would have served actively.[33]

Overall, the Doctors' Trial focused its case against medical professionals – that meant the lowest ranking active duty military officers it charged were army captains, and all the civilians representing heads of major medical institutions. While the military medical officers existed in a distinct chain of command, the civilian doctors had at least some military service as reservists on top of their duties as doctors in the German conscription force.[34] As medical professionals, military and civilian medical officers only could make recommendations to troop commanders. As advisors, they could direct medical services in accordance with commander's directives or instructions from superior medical officers.[35] This relationship is apparent in Robert Jay Lifton's account of SS doctor Ernst B. While at Auschwitz ("Dr. B."), an SS doctor who worked for the hygienic institute of *Waffen SS*, and reported directly to Senior Colonel Joachim Mrugowsky, the chief of the Hygienic Institute.[36] During the course of his work for the Hygenic Institute at Auschwitz, Dr. Eduard Wirths, an SS

31 Ibid., pp. 28–29.

32 Ibid., pp. 26–27.

33 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 ("Green Series")*, Vol. 2, pp. 36–37, https://tile.loc.gov/storage-services/service/ll/llmlp/2011525364_NT_war-criminals_Vol-II/2011525364_NT_war-criminals_Vol-II.pdf (accessed 3 August 2022).

34 While the International Military Tribunal [IMT] specified certain parts of the Nazi government as criminal, Omer Bartov in *Hitler's Army* has argued that the entire German military engaged and should be implicated in war crimes. Omer Bartov in *Hitler's Army: Soldiers, Nazis, and War in the Third Reich* (New York: Oxford University Press, 1991).

35 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 ("Green Series")*, Vol. 2, p. 279.

36 Robert Jay Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (New York: Basic Books, 1986), 305.

captain and the chief camp physician of Auschwitz, told Dr. B. to select prisoners for medical experimentation. As neither his superior medical officer (both were of similar SS rank) nor within his chain of command, Dr. Wirths could not order Dr. B. officially to make selections and instead attempted to compel him to make selections through his role as the chief medical doctor at Auschwitz. In response, Dr. B. reported directly to Senior Colonel Mrugowsky, his superior medical officer and direct military superior, who subsequently leveraged his military rank and command authority to protect the subordinate in his chain of command.[37]

In 1942, Hitler formally outlined the German health structure, which clearly defined the command structures for the SS, the *Wehrmacht*, and the civilian health sector, which placed all medical services and research under the control of one individual--Major General Karl Brandt.[38] With Nazi government leader Adolph Hitler having empowered him directly, Brandt served the dual role of active duty head of the military medical service and the civilian head of medical services. This position drew a clear and distinct chain of command through both the military and civilian medical establishments. With Major General Brandt at the center, the table of organization for health and medical services outlined two central offices and two chiefs of service – offices of Medical Science and Research and Medical Planning and Economy and the chiefs of Civilian Health Services and Medical Services of the *Wehrmacht*. Dr. Paul Rostock, the civilian head of the Office of Medical Science and Research, and Lieutenant General Siegfried Handloser, chief of Medical Services of the *Wehrmacht*, both received war crimes charges. On the other hand, neither Admiral Alfred Fikentscher, head of the Office for Medical Planning and Economy, nor Dr. Leonardo Conti, Chief of the Civilian Health Services, received any charges during the NMT.[39] To be fair, Dr. Conti committed suicide prior to the charges and Dr. Kurt Blome, Dr. Conti's deputy, received war crimes charges. Therefore, it is probable that Dr. Conti would have received charges had he not died prior to the trial. However, the case of Dr. Blome reinforces the notion that differences between civilian and military levels of responsibility existed.

The charges that the NMT levied against Drs. Rostock and Blome and Lieutenant General Handloser were nearly identical, with the only significant

37 Ibid., pp. 308–309; War Department, *Handbook on German Military Forces, 17 December 1941*, p. 187.

38 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (*"Green Series"*), Vol. 1, pp. 81–83.

39 Ibid,, p. 91.

difference being that Handloser was an active duty military officer.[40] Dr. Rostock, the trial found, lacked military authority to command and control human experiments, and prosecutors brought insufficient evidence against Dr. Blome to substantiate charges that he had committed war crimes.[41] While the suicides of prominent Nazi medical professionals ensured they never received charges, how the prosecution would have handled the individuals is an interesting "what if" question. However, there is significant evidence that the military chain of command clearly formed the core of the U.S. criminal case against the Nazi medical doctors. Therefore, the IMT appears to argue governments and military hold responsibility for committing war crimes as opposed to individual doctors.

Lack of civilian accountability could reflect the American desire to divert attention away from analogous human experimentation within the United States. During the trial, the key testimony of Dr. Andrew C. Ivy highlighted that the Nazi medical experiments had two significant components – humans did not give voluntary consent to the experiments and that experiments should not happen when there is the assumption of death or disablement.[42] By emphasizing these dual components, Jon M. Harkness has argued that Dr. Ivy attempted to deflect scrutiny from his human experiments on prisoners in Chicago, Illinois.[43] While the moral and ethical questions about the Doctors' Trial, along with the implication of the Nazi medical profession, have received significant debate, critical in most analysis is the argument that the Nazi medical community was integral to the genocide the Nazi regime perpetrated.[44] Ulf Schmidt surmised the issue in his prologue, where he states

40 Ibid,, pp. 198–207.

41 Ibid., pp. 208–210, 228–235.

42 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (*"Green Series"*), Vol. 2, pp. 181–82; Alexander Mitscherlich and Fred Mielke, *Doctors of Infamy: The Story of the Nazi Medical Crimes* (New York: Henry Schuman, 1949), ix-xiii.

43 Jon M. Harkness, "Nuremberg and the Issue of Wartime Experiments on US Prisoners: The Green Committee," *Journal of American Medical Association* 276, no. 20 (November 1996): 1672–75.

44 See Mitscherlich and Mielke, *Doctors of Infamy*; Lifton, *The Nazi Doctors*; Ulf Schmidt, *Justice at Nuremberg: Leo Alexander and the Nazi Doctors' Trial* (New York: Palgrave Macmillan, 2004); Paul Julian Weindling, *Nazi Medicine and the Nuremberg Trials* (New York: Palgrave Macmillan, 2004); Robert N. Proctor, *Racial Hygiene: Medicine Under the Nazis* (Cambridge, MA: Harvard University Press, 1988); Heller, *Nuremberg Military Tribunals*; McCormack and Blumenthal (eds.), *Legacy of Nuremberg*; Peter Maguire, *Law and War: International Law and American History* (New York: Columbia University Press, 2010); Michael H. Kater, *Doctors under Hitler* (Chapel Hill: University of North Carolina Press, 1989).

> what it was and how exactly it had happened was a matter of enormous complexity, far too complicated for a trial in which the instrument of new and untested international law was being applied. Even more problematic was the task of developing a mechanism that would prevent doctors from committing such crimes ever again.[45]

For the prosecution at Nuremberg, proof of war crimes derived from the established military chain of command, which exerted the legal authority to conduct criminal operations.

Following the tribunal, seven individuals received death sentences. All of these were German SS officers, and by extension, members of a criminal organization. Most had involvement in specific experiments, in addition to one or more of the war crimes counts not related to an experiment.[46] The only SS member not receiving a death sentence did not demonstrate any connections to the human experiments in his indictment. Instead, the United States relied on his affiliation with the SS to charge him with at least one criminal offense. Only two non-SS members received life sentences – Lieutenant General Handloser and his direct subordinate, the military chief of the *Luftwaffe*'s Medical Service.[47] Seven additional Nazis received prison sentences, with only two civilian doctors receiving sentences for war crimes. Of the seven acquittals, all but one of the recipients was a civilian.

The U.S. military's prosecution of both civilian and military medical personnel meant that it at least made nominal efforts to indict the whole of the Nazi's medical structure. Unlike Nuremberg, which focused its trial on higher-level medical doctors, both military and civilian, who conceived of and issued orders to conduct war crimes, the Khabarovsk trial limited its prosecution to Japanese military personnel that the Soviet Union had taken prisoner. While essentially a military tribunal, Khabarovsk operated under state direction.[48] Deviating from the U.S. streamlining of a large caseload at Nuremberg, the Soviet Union did not prosecute a unified series of cases under one tribunal. Instead, it conducted ad hoc trials around the country to address war crimes Japanese had

45 Schmidt, *Justice at Nuremberg,* p. 3.

46 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (*"Green Series"*), Vol. 2, pp. 171–300.

47 Ibid., p. 86.

48 *Materials on the Trial of Former Servicemen of the Japanese Army Charged with Manufacturing and Employing Bacteriological Weapons*, p. 3.

committed against the Soviet peoples.[49] Khabarovsk served as both a response to the IMTFE's decision not to try Japanese personnel involved with BW, as well as a deliberate propaganda move to undercut the U.S. moral justice narrative.[50] The Soviet Union tacitly affirmed the IMTFE's decision when it did not provide a dissenting opinion to the international court's final adjudication. As a *de facto* follow-on trial, Khabarovsk further indicted twelve members of the IJA with preparing and employing BW.[51]

As a direct result of the limited prosecutable pool, the Soviets put anyone associated with BW on trial. During the trial, defendants ranged from the commander in chief of the Kwantung Army to a laboratory orderly. The Soviet case against BW is unique among military tribunals because it directly reacted to the U.S. decision not to pursue the case during the IMTFE. Upon Japanese surrender, the United States had sent investigators from the Army Chemical Corps to ascertain the extent of the Japanese BW and chemical warfare programs, which resulted in two formal reports.[52] Soviet desire to raise BW during the IMTFE began with the interrogation of prisoner of war Major General Kawashima Kiyoshi, the production division chief of Unit 731, on 12 September 1946.[53] During this interrogation, Major General Kawashima specified that the "Ishii Detachment," another name for the infamous Unit 731, researched viruses and epidemics to manufacture possible biological weapons. Based on the formal investigations, Eugene D. Williams, the special assistant to chief counsel, did not believe there existed sufficient evidence to open a case against claims of BW.[54] Frank S. Tavenner Jr., the acting chief counsel, backed up this belief,

49 Jeremy Hicks, "'Soul Destroyers': Soviet Reporting of Nazi Genocide and its Perpetrators at the Krasnodar and Khar'kov Trials," *History* 98, no. 4 (October 2003): 530–47; Alexander Victor Prusin, "'Fascist Criminals to the Gallows!': The Holocaust and Soviet War Crimes Trials, December 1945-February 1946," *Holocaust and Genocide Studies* 17, no. 1 (Spring 2003): 1–30.

50 Polunina, "Khabarovsk Trial."

51 *Materials on the Trial of Former Servicemen of the Japanese Army Charged with Manufacturing and Employing Bacteriological Weapons*, pp. 523–30.

52 Harris, *Factories of Death*, p. 240.

53 "Doc. 9305 – Questionnaire," General Reports and Memoranda from December 1946, folder 1, Papers of Frank S. Tavenner Jr. and Official Records from the IMTFE, 1945–1948, box 3, University of Virginia Law Library [hereafter UVLL], Charlottesville, VA, http://imtfe.law.virginia.edu/collections/tavenner/3/1/doc-9305-questionnaire (accessed 4 August 2022).

54 Letter to Frank S. Tavenner Jr. from Eugene D. Williams, 4 December 1946, folder 7, ibid., https://imtfe.law.virginia.edu/collections/tavenner/3/7/trial-strategy (accessed 4 August 2022).

and informed the Soviet delegation that the United States would not pursue charges associated with BW during the IMTFE.[55]

Soviet pursuit of BW crimes occurred roughly during the start of the prosecution of the Doctors' Trial. Within six months, the question of the IMTFE hearing a case of BW again occurred, and corresponded within a month of when the hearing of evidence concluded during the Doctors' Trial. Colonel A. C. Carpenter, the commander of the Far East's Legal Section, requested clarification from Tavenner about why he did not open the BW case.[56] Tavenner's response outlined that, at the time of his decision, only circumstantial evidence existed.[57] After they received the complete and translated copies of the testimonies the Soviets conducted, Tavenner still believed that, while the manufacture of bacteria for weaponization occurred, only one of the affidavits implied that experiments had taken place and that the only human subjects the Japanese used were Manchurian prisoners with death sentences. Following Tavenner's assessment, in a "Top Secret" message, Colonel Carpenter informed the War Department's War Crimes Branch that the evidence against Major General Ishii Shiro was insufficient due to hearsay affidavits, anonymous letters, and rumors. However, in alignment with the U.S. legal case based on military command authority, Colonel Carpenter pointed out that they could hold Major General Ishii's direct military superior General Umezu Yoshijiro, commanding general of the Kwantung Army's from 1939 to 1944, legally accountable for the unit's actions.[58]

The Japanese defense bore some similarity to the Nazi's defense – that victims of medical experiments were prisoners with death sentences. This implied a general consensus that, following the punishment of death, the death did not need to be quick or humane, and that scientists could use prisoners as guinea

55 Memorandum to Major-General A. N. Vasilyev, 13 December 1946, "Bacteriological Warfare," ibid., http://imtfe.law.virginia.edu/collections/tavenner/3/7/bacteriological-warfare (accessed 4 August 2022).

56 Telegram from WAR WDSCA [War Department Staff Civil Affairs] (WC [War Crimes]) to CINFE [Commander in Chief Far East] (Carpenter Legal Sect.), 22 June 1947, "WAR 80671," General Reports and Memoranda from June 1947, folder 1, ibid., box 5, http://imtfe.law.virginia.edu/collections/tavenner/5/1/war-80671 (accessed 4 August 2022).

57 Telegram from Tavenner to Col. [A. C.] Carpenter, 30 June 1947, "Kawashima, Karawaza, Hata, King affidavits," ibid., http://imtfe.law.virginia.edu/collections/tavenner/5/1/kawashima-karawaza-hata-king-affidavits (accessed 4 August 2022).

58 Message from CINCFE (Carpenter, Legal Section, SCAP [Supreme Commander Allied Powers]) to WAR (WDSCA WC), 6 June 1947, "Message C 53169 reply to W 99277 [3 Jun 47]," entry 1901, Location 290/24/02/03, Records of Allied Operational and Occupation Headquarters, World War II, Record Group 331, box 1, U.S. Army Records, National Archives, Washington, DC.

pigs. It does not appear that either trial impacted either the defense of the experiments or the ethics that established the prosecutable offense. Dr. Ivy, who established the precedent for ethical human testing during the Doctors' Trial, only just outlined the general premise of American medical ethics in his expert testimony on 12 to 16 June 1947. Still, by then, the United States had made it clear that it did not intend to pursue crimes associated with BW. Even so, the United States located and brought subjects of BW into custody for the Soviet Union to interrogate. Over a month, Colonel Lev Smirnov, the acting associate prosecutor for the Soviet Union, questioned Major Murakami Takashi, the 2nd Section chief of Unit 731, Colonel Ota Kiyoshi, the "Ei" detachment commander of Unit 100, and Major General Ishii Shiro, the commanding general (March 1939-August 1942) of Unit 731.[59] Although the United States allowed the Soviets to interrogate these Japanese service members, it never transferred them into Soviet custody to stand trial at Khabarovsk.

While the United States drew clear lines of command authority during the Doctors' Trial, its investigation into the Japanese BW program did not allow it to make the same delineations of command and control. For example, the Epidemic Prevention and Water Purification Division of the Northern China Area Army had an Army surgeon (Colonel Nishimura Eiji) in command, directly subordinate to the Northern China Area Army Commanding General (General Okabe Naozaburō), an infantry officer. Unlike the example of Dr. B in the German military system, a military medical doctor (Dr. B.) was under the direct command of Senior Colonel Joachim Mrugowsky, another military medical doctor.

Due to the structure of the Imperial Japanese Army's medical service, military medical doctors did not have operational field commands, nor did they head civilian medical institutions. Like Nazi Germany though, Japan had a conscription military; however, unlike its Axis ally, it suffered through significant implementation issues. Before conscription, Japan's military had a social class of professionals called *samurai*. However, these military professionals had not engaged in armed conflict for hundreds of years. During the rise of the Japanese Emperor to power in 1868, the government desired a military

59 "Affidavit of Interrogation of Ishii, Shiro on 16 June 1947," 16 July 1947, folder 2, General Reports and Memoranda from July 1947, Tavenner Papers and IMTFE Official Records, box 5, UVLL, https://imtfe.law.virginia.edu/collections/tavenner/5/2/affidavit-interrogation-ishii-shiro-16-june-1947 (accessed 4 August 2022); "Affidavit of Interrogation of Ota, Kiyoshi on 16 May 1947," 14 July 1947, ibid., https://imtfe.law.virginia.edu/collections/tavenner/5/2/affidavit-interrogation-ota-kiyoshi-16-may-1947 (accessed 4 August 2022); "Interrogation of Murakami, Takashi," 10 June 1947, folder 1, ibid., https://imtfe.law.virginia.edu/collections/tavenner/5/1/interrogation-murakami-takashi (accessed 4 August 2022).

modeled on Western Europe and resulted in the adoption of the conscription service.[60]

Wildly unpopular, the Japanese government struggled to induct conscripts of suitable education and physical fitness, all the while battling the *samurai* class, which did not appreciate being stripped of its social status.[61] Although it struggled to implement conscription, by the Russo-Japanese War in the early 1900s, Japan had pioneered the effective use of preventative military medicine, with many Western militaries studying Japanese military medical practices for emulation during World War I.[62] Success in the Russo-Japanese War also calcified the IJA's structures and training, which, Edward J. Drea explains, included "rote memorization and constant repetition because a large percentage of the conscripts were either completely or functionally illiterate," "an uncritical adherence to the norm," and the division of military and civilian organizations during wartime where "the prime and foreign ministers were excluded from the headquarters and the army barred civilian ministers from officially attending IGHQ [Imperial General Headquarters] meetings."[63] Additionally, approval of separated Navy and Army General Staffs created "two parallel and independent chains of command whose chiefs reported directly to the emperor during peacetime [and] an imperial general headquarters directly under the emperor to control wartime operations."[64] However, the "combined" Imperial General Headquarters still barred civilian attendance during wartime. Where the Nazis consolidated control into one, streamlined command and control structure, the Japanese kept their commands separate and insular.

As specialty services, the medical and veterinary corps were under the command of the Ministry of War. This cabinet position oversaw the functions of administration, supply, and mobilization for the IJA. The operational processes of the Army fell under the Chief of the Army General Staff.[65] Therefore, a medical officer in the field acted as the advisor to the unit's commander, who reported medical actions through one chain of command while they requested medical personnel and supplies through a separate chain of command. This fractured command structure stands in stark contrast to Germany's

60 Edward J. Drea, *Japan's Imperial Army: Its Rise and Fall, 1853–1945* (Lawrence: University Press of Kansas, 2009), 10.

61 Ibid.; Hiroko Rokuhara, "Local Officials and the Meiji Conscription Campaign," *Monumenta Nipponica* 60, no. 1 (Spring 2005): 81–110.

62 Albert E. Cowdrey, *Fighting for Life: American Military Medicine in World War II* (New York: Free Press, 1994), 6.

63 Drea, *Japan's Imperial Army*, pp. 72–73, 102–103, 110.

64 Ibid., p. 77.

65 War Department, *Handbook on Japanese Military Forces, 15 September 1944*, TM-E 30–480 (Washington, DC: U.S. Government Printing Office, 1944), 11, 16–17, 27, 40–41, 51.

streamlining of medical functions.[66] In addition, a historically contentious relationship between the Army General Staff and the Japanese war minister throughout the development of the IJA complicated the situation.[67] Medical officers had to balance the orders of their field commanders, under the command of the Army General Staff, with their requests for personnel and supplies through the War Ministry.

As part of military command and control, commanders have legal authority to order actions. In the German medical case, legal authority was centralized in one military medical officer.[68] In the Japanese case, no medical professionals held legal authority.[69] Infantry and combat arms officers of field units retained legal command and control, and were subject to prosecution for their troops' actions, as General Yamashita Tomoyuki's trial demonstrated.[70] Unit 731, however, did not fall into this chain of command. Organizationally, Epidemic Prevention and Water Purification units sat below major field armies. Where the Northern China Epidemic Prevention and Water Purification Unit reported to the Northern China Area Army, Unit 731 reported directly to the Kwantung Army.[71] In this way, Khabarovsk was closer to the mark in its successful prosecution of General Yamada Otozō, the commander with the legal authority to order BW and, in the judgment of the German Medical Case, a "person in [a]

66 War Department, *Handbook on German Military Forces, 17 December 1941*, p. 19.

67 Drea, *Japan's Imperial Army*, pp. 63, 128–131, 147, 187, 211.

68 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 ("Green Series")*, Vol. 2, p. 188.

69 While less straight forward, the Soviet Trial shows how General Ishii Shiro did not exercise command authority. The fact that a higher ranking military official had to convince a lower ranking officer in charge of personnel matter for the larger Army highlights the command relationship. General Yamada Otozō, a military officer with no medical background, provided the military command authority to allocate personnel, resources, and deploy troops. General Ishii, a medical officer, could only request assets and did not hold command authority. *Materials on the Trial of Former Servicemen of the Japanese Army Charged with Manufacturing and Employing Bacteriological Weapons*, pp. 108–111.

70 A controversial trial, the conviction of General Yamashita Tomoyuki established the precedent that commanding generals were liable for prosecution for the actions of any of their subordinates.

71 "Gyōsei Shōhō (Detailed Report of Duties)," Chōsei-kan Rikugun Guni-taisa Nishimura Eiji (Prepared by Army Surgeon Colonel Nishimura Eiji), Greater East Asian War, North China, Northern China Area Army Epidemic Prevention and Water Purification Unit Detailed Report of Duties, 1 April 1944-20 September 1944, Army Records, China, The National Institute for Defense Studies, Ministry of Defense, Japan Center for Asian Historical Records, https://www.jacar.archives.go.jp/aj/meta/listPhoto?LANG=eng&BID=F201303211415054931 1&ID=M20130321141505493 14&REFCODE=C13032188100 (accessed 4 August 2022).

position of authority who under all principles of law [was] under the duty to know about these things" and could "order, sanction, permit, or approve" the experiments and presumably "take steps to terminate or prevent them."[72] A lack of clear command and control structure within the military (not to mention the structural similarities between the U.S. and Japanese medical services) prohibited the ability of the United States to try Japanese personnel of Unit 731.[73] Since the United States could not make the same case against the IJA that it did against the Nazis, and without the ability to indict Unit 731 formally, the U.S. government made the decision to offer an immunity deal – if it could not build a strong case against the perpetrators anyway, it reasoned that it then might as well at least gain important scientific data.

For some journalists and historians, the Khabarovsk trial highlighted the U.S. decision not to pursue a legal case against Unit 731 and represented either a gross oversight or criminal collusion.[74] Others point out that the looming Cold War tensions between the United States and the Soviet Union meant that the United States had to place political exigencies before justice.[75] Peter Maguire explicitly tackles this angle and characterizes the United States as weaponizing the legal system to achieve strategic goals.[76] A significant part of this tactic involved leveraging the "good versus evil" narrative to bolster the international image of the United States and give the country the ability to act unilaterally based on its moral goodwill.

Similarly, the Soviet Union looked to weaponize its war crimes trial. Unique among the Soviet tribunals, Khabarovsk's proceedings almost immediately emerged in publication and distribution internationally. The Soviet Ministry of Foreign Affairs hosted events to publish the proceedings of the Khabarovsk trial to enlighten the world of the Japanese crimes and U.S. collusion in not prosecuting them.[77] Heavily cited in Western European historiography as the major primary source of Japan's BW crimes, the *Materials on the Trial of Former*

72 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (*"Green Series"*), Vol. 2, p. 181.

73 See Military Intelligence Division (War Department), "Notes of Japanese Medical Services," *Tactical and Technical Trends*, No. 36 (21 October 1943): 32–33.

74 See Guillemin, *Hidden Atrocities*; Holmes, *Guests of the Emperor*; Harris, *Factories of Death*; Barenblatt, *Plague upon Humanity*; Tanaka, McCormack, and Simpson (eds.), *Beyond Victor's Justice?*.

75 See Heller, *Nuremberg Military Tribunals*; McCormack and Blumenthal (eds.), *Legacy of Nuremberg*; Maguire, *Law and War*.

76 Maguire, *Law and War.*

77 Viktoriya V. Romanova and Yaroslav A. Shulatov, "After the Khabarovsk Trials of 1949: The USSR, US and the Attempt to Organize a New Tribunal at the Far East during the Cold War," *History of Medicine* 4, no. 3 (2017): 263, 268.

Servicemen of the Japanese Army Charged with Manufacturing and Employing Bacteriological Weapons rarely appears in Russian historiography. Instead of a primary source, Viktoriya V. Romanova and Yaroslav A. Shulatov emphasize, the contents of this volume "are viewed solely as a result of the USSR's intention to restore justice and punish Japanese criminals, contrary to the US position."[78] The claims the Germans saw justice and the Japanese did not place value on the carefully crafted U.S. narrative over a Soviet narrative. Francine Hirsch, in her reexamination of Soviet involvement during the IMT, offers this judgment on the matter:

> No scholar who cares about international human rights wants to disparage Nuremberg and all that it symbolizes in our culture. But reconsidering Nuremberg in light of new evidence from the Soviet archive does not mean discounting the IMT's significance as a major foundational event of our era. Nor does it mean throwing out Nuremberg as a positive precedent. Instead, it means recognizing that the IMT, like other "principled interventions," was a combination of principle, self-interest, and compromise from start to finish. . . . The IMT showed that international legal principles, which were based on a hodgepodge of national laws and precedents, could transcend their origins. At the same time, the postwar era has also shown that universal principles, once established, can be used for ends that contradict their original intentions.

In the final analysis, Hirsch concludes, "Nuremberg was as much about politics as it was about justice – and it could not have been otherwise.[79]

Nominal similarities exist between the Nazi and Japanese medical cases. A unilateral tribunal tried and convicted both countries, albeit under different laws. In the Nazi case, trials found doctors guilty of war crimes and crimes against humanity, violations that the IMT established.[80] Japanese personnel the tribunal convicted at Khabarovsk did so under an article that the Soviet Presidium had dictated.[81] Both trials punished along lines of responsibility within a military chain of command; higher-ranking military officers and

78 Ibid., p. 262.

79 Francine Hirsch, "The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order," *American Historical Review* 113, no. 3 (June 2008): 729.

80 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 ("Green Series")*, Vol. 2, pp. 171–300.

81 *Materials on the Trial of Former Servicemen of the Japanese Army Charged with Manufacturing and Employing Bacteriological Weapons*, pp. 110–11.

civilian heads received the strictest sentences, and more junior individuals received less severe sentences.

The broad intentions of the United States and the Soviet Union in their prosecution also aligned. Both determined individual responsibility and association with the military contributed to the overall guilt of the defendants. However, while the United States judged individual responsibility as a deviation from the accepted Western medical norms, the Soviet Union judged personal responsibility in relation to the social defense of the State. The application of Article One of Decree of the Presidium demonstrated that the social defense of the State did not need to tie directly into the law, but that social defense could be applied whenever and wherever the State decided.[82]

Although the Doctors' Trial and the Khabarovsk trial focused on individual responsibility and association, the results of this played out very differently during the tribunals. The Nazi doctors saw the bulk of their convictions revolve around affiliation with the Nazi Party.[83] For all the grandstanding on medical ethics, the German medical establishment was not on trial. Michael Kater demonstrates that the Doctors' Trial had little impact on the structure and training within the German medical profession.[84] Contrary to the intentions of German doctor Alexander Mitscherlich, who hoped West German doctors would view the *Medical* case as a dispassionate lesson to consider how the medical profession contributed to the extermination of undesirables of the state and could change to forestall a similar event, the West German medical establishment made few, if any, structural changes.[85]

Based on the judgment of the Doctors' Trial, the United States placed the burden of war crimes and crimes against humanity essentially on the military and the criminal organization that comprised the upper echelons of Reich power. Of the 23 defendants, the tribunal acquitted only one military officer and convicted only two civilians.[86] The acquitted military officer never fell into the chain of command under which the human experiments took place. Conversely, the civilians receiving convictions for war crimes played a significant role in the chain of command that undertook human experimentations.

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82 Ruth Levush, "FALQs: Soviet Investigation of Nazi War Crimes," in *Custodia Legis* (blog), Law Librarians of Congress, 9 February 2015, https://blogs.loc.gov/law/2015/02/falqs-soviet-investigation-of-nazi-war-crimes/ (accessed 4 August 2022).

83 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 ("Green Series")*, Vol. 2, pp. 171–300.

84 Kater, *Doctors under Hitler.*

85 Mitscherlich and Mielke, *Doctors of Infamy*, pp. 149–65.

86 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 ("Green Series")*, Vol. 2, pp. 171–300.

In Khabarovsk's indictment, the Soviets attempted to establish a distinct chain of command between the Emperor and Major General Ishii with the actions of the members of Units 731 and 100, the latter being the research branch of the veterinary corps. However, because they only could prosecute the individuals they held in custody, they brought charges against all members of Units 731 and 100, regardless of their placement in the chain of command and ability to affect operations directly at a higher level of command authority.[87] Reiterating culpability of individuals in U.S. custody highlighted that the United States could act morally and prosecute the individuals if it desired. However, without clear evidence of orders flowing down a chain of command and without Japanese organizations legally defined as criminal, the United States was unable to build a strong legal case.

The Doctors' Trial focused on the prosecution of military medical members and the association to the Nazi Party. Almost entirely, it found Nazis guilty, first, as members of a criminal organization, and second as having a direct hand in at least one major human experiment. In a precarious position legally, the United States reiterated during the IMTFE that through interrogation, interview, and investigation, the case of IJA's human experimentation rested on circumstantial evidence.[88] Sheldon Harris disagrees with the circumstantial nature of the evidence, claiming that "much of [Unit 731's] work constituted blatant human rights violations as defined by the charters governing both the Nuremberg and Tokyo war crimes trials."[89] However, as the judgment of the Nazi doctors demonstrated, medical experimentation itself was insufficient grounds for prosecution. Instead, indicted personnel needed either association to a criminal organization or the command authority to order such experiments.

In the case of the civilian Dr. Rostock, who the trial conceded "doubtless knew that experiments on concentration camp inmates were being conducted . . . [and] that the experiments were dangerous and that further experiments would probably be conducted," ultimately acquitted him of all charges because "it does not appear that either Rostock or any subordinate of his directed the work done on any assignment concerning criminal experiments."[90] Conversely, Lieutenant General Handloser, brought up on similar charges as Dr. Rostock, received a verdict of guilty because "he failed to exercise any proper degree of

87 *Materials on the Trial of Former Servicemen of the Japanese Army Charged with Manufacturing and Employing Bacteriological Weapons*.

88 Letter to Tavenner from Williams, 4 December 1946, "Trial Strategy"; Telegram from Tavenner to Carpenter, 30 June 1947, "Kawashima, Karawaza, Hata, King affidavits."

89 Harris, *Factories of Death*, p. 258.

90 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (*"Green Series"*), Vol. 2, p. 209.

control over those subordinated to him who were implicated in medical experiments coming within his official sphere of competence." That Handloser held a command position was critical. "This was a duty which clearly devolved upon him by virtue of his official position," the tribunal concluded.[91]

Even though the trials of medical personnel during World War II resembled each other, the comparison is a false equivalency. The German military medical establishment structure allowed the United States to prosecute the Nazi medical doctors successfully. Over time, the Nazi medical service grew more streamlined and consolidated control in the hands of a single individual. That individual, Major General Karl Brandt, bore the command decisions across the medical community both through the military and civilian chains of command. Throughout the Doctors' Trial, the chain of command played an essential part in tracing responsibility for war crimes. When a clear chain of command did not exist, Nazis associated with both research and BW secured acquittal. Applying this standard to the IJA case during the IMTFE with no clear command structures to trace legal responsibility for human experimentation, the IMTFE could not try Unit 731.

The claim of prevention, the desire to ensure future generations do not commit the same or similar crimes, has been a central argument among historians that write about the Nazi medical trial and Unit 731. Immediately after the Nazi trial, Mitscherlich wrote an analysis of the Doctors' Trial's proceedings with the expressed purpose of helping prevent a recurrence.[92] Japanese historians, to this day, almost exclusively express the viewpoint that prevention is the only course of action to address the sins of the IJA. However, to break down the tribunals, neither the Doctors' Trial nor Khabarovsk seemed to place the medical experiments at the center of the prosecution. Instead, the criminal liability rested on the organization. If the organization was liable, then the conscription system in place at the time meant that individuals were guilty of war crimes, not because of individual action but rather arbitrary military order. The Doctors' Trial attempted to root membership in a criminal organization as a deliberate, personal choice, evident in the individuals it chose to prosecute – predominantly senior officers and civilians who had decision-making authority in the human experimentation.

If the desire is to analyze how the IMTFE dealt with Unit 731 as a means of prevention, then a clear delineation of the structures under which Unit 731 operated from its development and part within the wider IJA is required. Current research on Unit 731 conflates BW research and the unit's human

91 Ibid,, p. 207.

92 Mitscherlich and Mielke, *Doctors of Infamy*.

medical experiments as a single point of study, all within a vacuum without consideration of its context as a part of the IJA or the Japanese colonial government. In addition, the study of Japan's BW program links disparate and unaffiliated organizations to prove an interconnected network under the watchful eye of one evil man, a trend which treads into conspiracy territory.[93] A prime example of this is Unit 100, which most writers consider part of a more comprehensive network of BW research, all under the command of General Ishii Shiro.[94] Rather than parsing these two units as two independent organizations answering to different chains of command and undertaking different research and medical objectives, Unit 731 is presented as both a medical unit and a research organization with a command structure independent of the military.

If prevention is the goal, then one needs also to consider the global context of BW. Nazi Germany, Britain, the United States, and the Soviet Union all had programs that investigated the use of BW/chemical warfare weapons during World War II.[95] However, Unit 731 is used as the prime example to describe the evils of BW. Analysis of Unit 731 rarely extends beyond the program's existence and human experimentation to obtain its research. Moreover, writers treat BW programs worldwide irrespective of one another and rarely analyze them as an aggregate to define a general global trend in the interwar period of states that developed and researched BW.

In conjunction with understanding the IJA's structure, an understating of the global norms, societal impacts, and cultures that influence its development provides a critical lens for examining the unit's actions insightfully. To simply

93 The author does not believe it is a coincidence that this conspiracy thread is present in many English-language monographs on Unit 731. Peter Williams and David Wallace, Sheldon Harris, Hal Gold, and Daniel Barenblatt all discuss debunked allegations that the United States employed BW weapons during the Korean War. Focus on the immunity deal as a conspiracy to gain biological warfare (BW) knowledge for pernicious military ends rather than a decision to gain information even though the United States could not build an effective case breeds a self-reflective narrative of evil government. Peter Williams and David Wallace, *Unit 731: The Japanese Army's Secret of Secrets* (London: Hodder & Stoughton, 1989); Hal Gold, *Unit 731: Testimony* (Tokyo: Yenbooks, 1996).

94 Nie, Guo, Selden, and Kleinman (eds.), *Japan's Wartime Medical Atrocities*, p. 25.

95 See Joel Bozue, Christopher Cote, and Pamela J. Glass (eds.), *Medical Aspects of Biological Warfare*, Textbooks of Military Medicine (Houston: Office of the Surgeon General, Borden Institute, US Army Medical Department Center and School, Health Readiness Center of Excellence, 2018); Barton J. Bernstein, "Origins of the Biological Warfare Program," in *Preventing a Biological Arms Race*, Susan Wright (ed.) (Cambridge, MA: MIT Press, 1990): 9–25; R. V. Jones and J. M. Lewis, "Churchill's Anthrax Bombs: A Debate," *Bulletin of the Atomic Scientists* 43, no. 9 (November 1987): 42–45; Anthony Rimmington, *Stalin's Secret Weapon: The Origins of Soviet Biological Warfare* (New York: Oxford University Press, 2018).

state that today Germany recognizes and acknowledges its war crimes and Japan has not is an oversimplification. For historians concerned with World War II, war crimes, legal history, medical history, and international relations, the idea that the war crimes tribunals did not serve a universally held sense of justice is not revelatory.

However, the fact that IMTFE did not prosecute the Japanese, particularly Unit 731, remains a moral cudgel. When writers wield it against the Japanese, the argument reinforces the narrative that the Japanese escaped where the Nazis received appropriate justice. When they wield it against the United States, it denigrates the moral fortitude of the legal system without consideration of how strong the Nazi case rested on military command structure. To reiterate, elements of the IJA committed human rights abuses and conducted experiments on humans to gain scientific knowledge of diseases. However, to argue that the lack of prosecution of Unit 731 during the IMTFE was a sound legal decision does not absolve individuals of their crimes. The United States was legally correct in not bringing Unit 731 to trial because the case had a low probability of successful prosecution. Furthermore, bringing the case to court had the potential to uncomfortably highlight the same military structures which existed within the U.S. medical service. The German medical service stands apart from either the U.S. or Japan's medical model and enumerating the concept of consent could sidestep the similarities to the United States. The United States therefore made a strategic decision to offer the accused Japanese an immunity deal to extract scientific knowledge from individuals it could not prosecute anyway. This had the added benefit of providing extensive time to translate Japanese medical documents, something unachievable through the dubious translation system of the IMTFE.

Morally, the United States failed to protect the victims of the IJA's experiments. But focusing on the immunity deal does not help. Instead, continuing to argue the moral failings of the IMTFE reinforces a narrative rather than considering the information the decision makers had at the time and the brand new legal parameters under which the IMTFE operated. By pushing through the debate of moral and legal aspects of Unit 731/IMTFE and focusing on IJA's organization, one gains a template for evaluating how structures directly impact crimes against humanity and possibly can help prevent another state-run human experimentation program.

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