

INTER ARMA ENIM SILENT LEGES: THE IMPUNITY OF JAPAN'S SECRET BIOLOGICAL WARFARE UNIT¹

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I. INTRODUCTION

The period following the end of the Second World War is seen as the beginning of the modern era of human rights law. Victorious Allied armies had defeated the Axis Powers in the most destructive conflict that mankind had ever seen. The aggressors were tried and convicted for their crimes by the Nuremberg Tribunal and the Tokyo Trials. Unfortunately, tensions were steadily increasing between the two major powers that emerged from World War II: the United States and the Soviet Union were entering into the Cold War. Even as the last war was ending, forces were marshalling on both sides for the approaching struggle.

This is part of the story of Imperial Japan's elite, super-secret bio-chemical warfare unit: Unit 731. Unlike their tamer Nazi counterparts in Europe, the members of Unit 731 were largely able to escape the justice of the Allies in the Pacific War.² Instead of facing charges of crimes against humanity before the International Military Tribunal for the Far East (a/k/a "The Tokyo Trials"), Unit 731 as a group was able to make arrangements with the occupying American military to escape the "victor's justice" for their wartime activities.³ The one exception to this is an obscure minor footnote in history of the 1949 Soviet trial of twelve captured Unit 731 soldiers for war crimes.⁴

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¹ "In times of war, the law falls silent."

² See Ralph Blumenthal, *Comparing the Unspeakable to the Unthinkable*, N.Y. TIMES, Mar. 7, 1999. "But while Nazi scientists like Josef Mengele conducted hideous experiments on concentration camp prisoners, their lesser-known Japanese counterparts, led by Gen. Shiro Ishii, were waging full-scale biological warfare and subjecting human beings to ghastly experiments of their own – and on a far greater scale than the Germans." *Id.*

³ See Ralph Blumenthal, *After Years of Denial, Japan is Urged to Acknowledge the 'Asian Holocaust' of World War II*, THE ORANGE COUNTY REG., Mar. 8, 1999, available in 1999 WL 4288457 [hereinafter "Years of Denial"]. "With the Japanese surrender in 1945, the Soviet Union and the United States competed to snare Ishii's data. The Americans won, promising immunity from war-crimes prosecution."

⁴ See Blumenthal, *supra* note 2. "As early as 1949, the Soviet Union convicted 12 Japanese for biological war crimes. Although the published transcript contained exhaustive details of Unit 731's crimes, the accounts were largely ignored or dismissed in the West as Communist propaganda. The Allies did, however prosecute 5,570 Japanese,

Unit 731 occupies a special place in the history of the development of human rights law. The year 1945 marks the genesis of the institution of the United Nations, the seeds of which would eventually bloom into the adaptation of the Universal Declaration of Human Rights and the Genocide Convention three years later.⁵ At a time when the civilized nations of the world held the perpetrators of aggressive war and crimes against humanity to task for their crimes, Unit 731 somehow escaped the scrutiny of justice.

The larger questions that Unit 731 raises are these: can human rights law ever take a position of prominence when confronted with the necessities of geopolitics? If the United States unofficially endorses a policy of *Inter Arma Enim Silent Leges* in the context of Unit 731's activities, what hope is there that the other nations of the world will follow the publicly agreed upon norms of human rights? Or rather is the body of human rights law merely rhetoric which is to be employed when some more pressing agenda requires the guise of higher moral authority? Perhaps these questions have no answer, or worse, rather these are merely rhetorical questions that no one would seriously consider answering.

II. UNIT 731

Our God-given mission as doctors is to challenge all varieties of disease-causing micro-organisms; to block all roads of intrusion into the human body; to annihilate all foreign matter resident in our bodies; and to devise the most expeditious treatment possible. However, the research upon which we are now about to embark is the complete opposite of these principles, and may cause us some anguish as doctors. Nevertheless, I beseech you to pursue this research based on the double medical thrill; one, a scientist to exert effort to probing the truth in natural science and research into, and discovery of, the unknown world, and two, as a military person, to successfully build a powerful military weapon against the enemy.⁶

but none for biological warfare.”

⁵ See generally U.N. CHARTER, June 26, 1945, 59 Stat. 1031, T.S. No. 993; Universal Declaration of Human Rights, Dec. 10, 1948, U.N. G.A. Res. 217 (III 1948); and Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, U.N.T.S. 277.

⁶ PETER WILLIAMS & DAVID WALLACE, UNIT 731: JAPAN'S SECRET BIOLOGICAL WARFARE IN WORLD WAR II 37-38 n.16 (1989). (Statement made by an unknown member of Unit 731 in 1936.)

A. *The History of Unit 731*

Japan's ultra-secret biological warfare unit was the brainchild of Ishii Shiro, an Imperial Army officer who eventually rose to the rank of major general.⁷ Ishii created the unit in 1932 and operated largely in the Japanese occupied Manchuria region of China.⁸ Fascinated by the destructive potential of historical European plagues, Ishii sought to develop an arsenal of biological weapons, which would decimate the enemies of the Empire.⁹ As a trained medical doctor, Ishii was attracted to the concept of a weapon that was capable of large-scale destruction and concealable as to its origin.¹⁰ With the support of his superiors, Ishii went on to plan and design a biological warfare development program that is infamous in the science of slaughter.¹¹

B. *Logs, Lumber Mills, and "The Forgotten Holocaust of World War II in Asia."*

By 1936, Ishii's unit was officially designated the Epidemic Prevention and Water Supply Unit of the Kwantang Army, or simply Unit 731.¹² The operational strength of Unit 731 eventually reached twenty thousand members.¹³ With the aid of special Japanese Army troops, known as *Kenpeitai*, human test subjects were procured for Unit 731's bio-warfare research and development.¹⁴ At the main Unit 731 laboratory facility in Pingfang, outside the city of Harbin, China, four main topics of research were conducted: (1) cholera testing and development; (2) epidemic haemorrhagic fever testing

⁷ See HAL GOLD, UNIT 731: TESTIMONY 23-26 (1996).

⁸ See *id.* at 29.

⁹ See WILLIAMS & WALLACE, *supra* note 6, at 21.

¹⁰ See *id.*

¹¹ Unit 731 was established by the order of Japanese Emperor Hirohito. See *Japanese Soldiers Unveil New Eyewitnesses on WWII Bio-Warfare*, XINHAU ENGLISH NEWSWIRE, Jul. 1, 1998, available in 1998 WL 12168941. See WILLIAMS & WALLACE, *supra* note 6, at 79. "Another member of the Imperial family, the Emperor's cousin Prince Takeda, held executive responsibility over Unit 731."

¹² See WILLIAMS & WALLACE, *supra* note 6, at 16.

¹³ See GOLD, *supra* note 7, at 48. It is interesting to note that Unit 731 was a "mixed" force comprised of civilians and military personnel. "In defense to some of the people recruited, it must be acknowledged that not all of them knew what they were getting into and were themselves used by Ishii and his henchmen. There were also students who were pressured by their professors to go work with Ishii's organization. Defying a professor in Japan's strict academic hierarchy was (and remains even today) equivalent to career suicide." *Id.* at 60.

¹⁴ See WILLIAMS & WALLACE, *supra* note 6, at 15. The *Kenpeitai* were the Japanese Army's equivalent of the German *Schutzstaffel* (SS) soldiers, responsible for counterinsurgency and population pacification in Manchuria. See also GOLD, *supra* note 7, at 30.

and development; (3) plague research; and (4) the effects of frostbite and its treatment.¹⁵ Ironically, Unit 731's other claim to fame was the development of a portable water filtration system which could accompany the Japanese infantry into the field.¹⁶

Other scientific testing conducted by Unit 731 included experiments to determine the effects on humans of dysentery; typhus infection; the study of various venereal disease infections; prolonged dehydration; prolonged heat exposure; burns; ballistic injuries; prolonged malnutrition; sleep deprivation; electrocution; pressure extremes; boiling; prolonged x-ray exposure; and infusion of humans with various types of animal blood.¹⁷ Unit 731 doctors followed a pattern of deliberate infection with disease or infliction of wounds on prisoners, which could be scientifically tracked from inception to the termination of the subjects. The prisoners were mainly Chinese in origin, but as the war progressed, test subjects included U.S. prisoners of war, as well as captured Commonwealth soldiers.¹⁸ At times, prisoner test subjects were not allowed to die, but were instead vivisected in order for Unit 731 scientists to obtain fresh infected internal organ samples.¹⁹ Members of Unit 731 sardonically referred to their human guinea pigs as *maruta*, the Japanese term for wooden logs.²⁰ Reports of the above activities are not from Unit 731 victim survivors, but from Unit 731 members' own accounts.

Besides the main Unit 731 headquarters facility in Harbin, subunits operated throughout the Japanese sphere of influence. An open air testing ground for biological weapons was created in Anda, China.²¹ In Xinjing, Unit 100 was responsible for the

¹⁵ See GOLD, *supra* note 7, at 70-85.

¹⁶ See *id.* at 63.

¹⁷ See WILLIAMS & WALLACE, *supra* note 6, at 41-42, 47-49, 58-59.

¹⁸ Bataan Death March prisoners recount their suspicion of being experimented upon by Japanese medical personnel. Later Unit 731 members admit that their teams had visited Mukden, the major prison site where Allied POWs were interned, in order to discern if any racial differential existed regarding disease susceptibility. See *id.* at 57-58. See also Jason Keyser, *Probe of Japan's Germ Warfare Sought War Criminals Say GIs Were Victimized*, THE WASHINGTON TIMES, July 5, 1998, available in 1998 WL 3452349; and Russell Watson & Hideko Takayama, *Crimes and Misdemeanors (Japanese Reluctantly Accept Guilt for World War II Crimes)*, NEWSWEEK, Mar. 27, 1995, available in 1995 WL 14496971.

¹⁹ Whether or not anesthesia was given depended on the discretion of the researcher conducting the experiment. See GOLD, *supra* note 7, at 44-45.

²⁰ *Id.* at 40. "As the massive Pingfang installation was under construction, local people began to ask what it was. The glib answer supplied was that the Japanese were building a lumber mill. Regarding this reply, one of the researchers joked privately, 'And the people are the logs.' From then on, the Japanese term for log, *maruta*, was used to speak of the prisoners who whose last days were spent being torn apart or gassed by Japanese researchers."

²¹ See *id.* at 48-49.

study and development of diseases, which would infect domesticated farm livestock.²² In Guangzhon, Unit 8604 experimented with water contaminants and raised rats as plague carriers.²³ In Beijing, Unit 1855 conducted separate infection research experimentation while Unit 9420 studied the feasibility of fleas as disease carriers in Singapore.²⁴ Unit 1644, stationed in Nanjing, conducted tests to determine human susceptibility to a variety of harmful stimuli ranging from infectious diseases to poison gas.²⁵ All experiments used captive human test subjects resulting in an estimated total three thousand deaths.²⁶ Unit 731 disposed of their spent victims by burning their bodies using large incinerators similar to those used in Nazi concentration camps.²⁷

Along with Unit 731's medical experimentation activities, the unit has also been linked to the scandalous "comfort women" used by the Imperial Japanese Army.²⁸ During the war, the Japanese Army forced 20,000 non-Japanese women into "sexual slavery" as prostitutes servicing the needs of their field soldiers.²⁹ Unit 731 became involved with mass prostitution after an initial large-scale venereal disease breakout occurred in 1937.³⁰ From that point on, the regulation of prostitutes came under the auspices of Ishii's unit. With the threat of sexually transmitted diseases decimating the effectiveness of the Japanese Army, Unit 731 began to use "comfort women" in their

²² See *id.* at 49.

²³ See *id.* at 50.

²⁴ See *id.* at 51-54.

²⁵ See Peter McGill & Roy K. Akagawa, *War Crimes: Consumed by the Devil's Gluttony*, ASAHI EVENING NEWS, Oct. 18, 1997, available in 1997 WL 14781352.

²⁶ See GOLD, *supra* note 7, at 9. Japanese professor Keiichi Tsuneishi estimates those death figures being as high as 5,000 victims between 1932 and 1945. See also *Researcher Finds Evidence of Cover-Up by Japanese Germ-Warfare Unit*, AGENCE FRANCE-PRESSE, Jan. 7, 1997, available in 1997 WL 2036112.

²⁷ See GOLD, *supra* note 7, at 41. "Pingfang was equipped for disposing of its consumed human lab materials with three large incinerators – calling them crematoria would bestow undue dignity upon them. A former member [of Unit 731] who assisted in the burning commented, 'The bodies always burned up fast because all the organs were gone; the bodies were empty.'"

²⁸ See David Bouling, *Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?*, 32 COLUM. J. TRANSNAT'L L. 533 (1995).

²⁹ See *Unit 731 Atrocities*, KOREA TIMES, Sept. 23, 1997, available in 1997 WL 11666941.

³⁰ GOLD, *supra* note 7, at 164. "The Marco Polo Bridge Incident and the Rape of Nanjing took place in 1937. There were twenty thousand recorded incidents of rape against Russian women during the period [in the five-month span] between those events alone. With the spread of venereal disease among the ranks and its threat to the discipline and efficiency of the army, it was natural for the high command to look to an army medical unit for a solution to the problem, and Unit 731 was called upon."

disease studies.³¹ It was not until 1992 that the Japanese government officially recognized that such activities involving comfort women had ever occurred.³²

The exact loss of life caused by Unit 731 is unknown.³³ The first field action conducted by Ishii's unit was in 1939, contaminating water supplies in order to aid the retreat of the Japanese forces fleeing the Soviet Army.³⁴ There are four recorded battlefield actions involving Unit 731 against Chinese cities involving fleas as plague carriers.³⁵ It is also known that the Japanese conducted bio-warfare campaigns against the Chinese population throughout the war.³⁶ The People's Republic of China has

³¹ See *id.* "A male and female, one infected with syphilis, would be brought together in a cell and forced into sex with each other. It was made clear that anyone resisting would be shot. Once the healthy partner was infected, the progress of the disease would be observed closely to determine for example how far it advanced the first week, the second week, and so forth. Instead of merely looking at external signs, such as the condition of the sexual organs, researchers were able to employ live dissection to investigate how different internal organs are affected at different stages of the disease." *Id.*

³² See *Years of Denial*, *supra* note 3. "It was only in 1992 that the government officially acknowledged that the Japanese Army forced several hundred thousand Korean women into prostitution in World War II, and it was only last year that a Japanese Court ordered the government to pay \$2,300 each to three plaintiffs. By contrast, Germany has dealt unflinchingly with its past and has paid victims reparations now amounting to about \$80 billion, with private industry planning to pay billions more."

³³ See *GOLD*, *supra* note 7, at 112-13. Unit 731's loss was widespread. "[Major Tomio] Karazawa also repeated information he had heard from Ishii about how he had experimented with cholera and plague on the mountain bandits of Manchuria, and that in 1942, when the Japanese army was retreating in central China, the Ishii group infected the vicinity of Chuxian and Yushan with typhoid and plague bacilli. Further testimony claimed that on several occasions during 1943 and 1944, the Japanese *kenpeitai* had furnished as fodder for human experimentation with plague and anthrax bacilli Manchurians 'who had been sentenced to death.'"

³⁴ See *id.* at 64. "In 1938 and 1939, the Soviet and Japanese armies clashed in two full-scale encounters at the Manzhouguo border and former Mongolian border. The later battle, which came to be known as the Nomonhan Incident, resulted in an overwhelming defeat of Japanese forces. The clash, which saw the first field operation of the biological warfare unit, occurred in a desert region where water was scarce."

³⁵ See *Japan Unit Conducted Germ Tests*, THE ORANGE COUNTY REG., Aug. 30, 1997, at A 30, available in 1997 WL 7440946. "There are records of four actual battle operations Unit 731 conducted against Chinese cities, using fleas infected with bubonic plague and typhus bacteria."

³⁶ IRIS CHANG, THE RAPE OF NANKING 216 (1997). "Here as well as elsewhere during the war, entire cities and regions were targeted for disease. We now know that Japanese aviators sprayed fleas carrying plague germs over metropolitan areas like

estimated that Unit 731 attacks resulted in 80,000 deaths during WWII.³⁷ Other reports speculate that Chinese casualties from germ warfare totaled approximately 200,000.³⁸

C. *War's End: The Great Cover-up*

August 1945: The Americans had dropped atomic bombs on Hiroshima and Nagasaki. The Soviet army was sweeping across Manchuria and Korea. The Japanese army was in retreat. Ishii and his followers knew that the war was ending, and that they were going to come up on the short end of the stick. Realizing this, the order was given to destroy the evidence of Unit 731's activities before final capitulation.³⁹

Allied intelligence agencies had clues of the Japanese biological warfare unit as early as 1942.⁴⁰ Reports of Japanese bio-warfare in China surfaced in 1943.⁴¹ Suspicion increased when the Japanese successfully conducted an air balloon delivery vehicle test on U.S. soil in 1944.⁴² Fortunately, the 200 balloon bombs did not contain any of Ishii's deadly diseases.⁴³ The U.S. Army's fledgling Chemical Warfare Service (now the Chemical Corps) provided an assessment of how potentially dangerous the situation was to America.⁴⁴ U.S. intelligence officers also knew that the Soviets wanted Unit 731.⁴⁵

Shanghai, Ningpo, and Changteh, and that flasks of disease-causing microbes – cholera, dysentery, typhoid, plague, anthrax, paratyphoid – were tossed into rivers, wells, reservoirs, and houses. The Japanese also mixed food with deadly germs to infect the Chinese civilian and military population. Cakes laced with typhoid were scattered around bivouac sites to entice hungry peasants; rolls syringed with typhoid and paratyphoid were given to thousands of Chinese prisoners of war before they were freed.”
Id.

³⁷ See Renee Schoof, *Trial to Hold Japan Accountable for WWII Poison Gas Weapons*, FT. WORTH STAR TELEGRAM, Mar. 23, 1997, at 10, available in 1997 WL 483036.

³⁸ See *China: New Evidence Found on Notorious Unit 731*, CHINA DAILY, Feb. 13, 1998, available in 1998 WL 7594171.

³⁹ See WILLIAMS & WALLACE, *supra* note 5, at 84-86. See also IRIS CHANG, *THE RAPE OF NANKING* 164 (1997).

⁴⁰ See *id.* at 95.

⁴¹ See GOLD, *supra* note 7, at 102.

⁴² See WILLIAMS & WALLACE, *supra* note 5, at 124-125. The balloons “were built so that they would travel the Pacific in between thirty and sixty hours at the optimum height to be carried by the prevailing winds. If they went too high, a gadget released a little helium from the sac and the balloon resumed its steady course to the United States.” These balloons were found in Montana, Alaska, and Canada.

⁴³ See *id.* at 124-126.

⁴⁴ Colonel Murray Sanders, MD, USA: “I told them if that if we found Japanese B-encephalitis [footnote omitted] on any of the balloons we were in real trouble. Mosquitoes were the best vectors [carriers] – and we had plenty of those in the States –

September 2, 1945: the United States began its occupation of the Japanese mainland.⁴⁶ Ishii and many of his top personnel eluded capture by the Soviets and secretly approached the Americans with a tempting proposition. From the end of 1945 to early 1946, the “Kamakura Conference” worked out the details of an arrangement where Unit 731 members would trade medical research results and biological warfare information for amnesty from prosecution as war criminals.⁴⁷ A secret report made by the U.S. State-War-Navy (Departments) Coordinating Committee concluded:

- c) The value to the U.S. of Japanese BW [biological warfare] data is of such importance to national security as to far outweigh the value accruing from “war crimes” prosecution.
- d) In the interests of national security it would not be advisable to make this information available to other nations as would be the case in the event of a “war crimes” trial of Japanese BW experts.
- e) The BW information obtained from Japanese sources should be retained in intelligence channels and should not be employed as “war crimes” evidence.⁴⁸

World War II may have ended, but the Cold War was just heating up. Unit 731 members escaped prosecution during the International Military Tribunal for the Far East.⁴⁹

To further hide the activities of Unit 731, the members of Ishii’s organization swore among themselves to keep their wartime experiences forever secret.⁵⁰ Our Cold

and our population had no defenses against B-encephalitis. We had no experience of the disease in this country. We were totally vulnerable to it. And four out of five people who contracted it would have died in my view.” *Id.* See also *Green Cross Founder hid Info About Unit 731: Letter*, JAPAN ECONOMIC NEWSWIRE, Aug. 14, 1998.

⁴⁵ See GOLD, *supra* note 7, at 103 “The Soviets were interested in Ishii and his organization for three important reasons. One was the proximity of the unit of the unit’s operations to Soviet territory. Next, of course, was the desire for revenge for Japan’s use of biological warfare against Soviet soldiers. The third motivation was the prospect of obtaining grist for the propaganda mill.” *Id.*

⁴⁶ See WILLIAMS & WALLACE, *supra* note 6, at 113. The Japanese formally surrendered on August 17, 1945. See WILLIAMS & WALLACE, *supra* note 6, at 113.

⁴⁷ See *id.* at 160-161. The “Kamakura Conference” was named for a series of meetings between senior U.S. officials and Unit 731 members conducted in a restaurant in Kamakura, Japan.

⁴⁸ *Id.* at 210.

⁴⁹ See GOLD, *supra* note 7, at 103. “Joseph B. Keenan, chief of the International Prosecution Section (IPS), had received reports of biological warfare activities. Nonetheless, no action had yet been taken to investigate whether any of the participants in Japan’s biological warfare atrocities should be called up before the tribunal.” *Id.*

War enemy conducted the only prosecution that involved Ishii's unit. At Khabarovsk between December 25th and 30th, 1949 the Soviet Union tried twelve members of Unit 731.⁵¹ Yet, the West dismissed the trials as communist propaganda and not much attention was paid to the proceedings.⁵²

The American authorities secured the data they coveted and the members of Unit 731 living under U.S. occupation in Japan quietly returned to their lives as doctors and scientists. It was not until 1984, upon the discovery of a cache of 731 documents that the aging, surviving members of Ishii's unit began confessing.⁵³

III. A COMPARISON TO THE NAZI COUNTERPARTS OF UNIT 731

The war crimes trials of Nazis during the International Military Tribunal gave birth to what is now commonly known as the "The Nuremberg Code." The Nuremberg Code outlines ten major tenets of human medical experimentation. These are:

- (1) The voluntary consent of the human subject is absolutely essential;
- (2) The experiment should be such as to yield fruitful results for the good of society;
- (3) The experiments should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease or other problem under study that the anticipated results will justify performance of the experiment;
- (4) The experiment be so conducted as to avoid all unnecessary physical and mental suffering and injury;
- (5) No experiment should be conducted where there is an a priori reason to believe that death or disabling injury will occur; except, perhaps, in those experiments where the experimental physicians also serve as subjects;
- (6) The degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment;

⁵⁰ See *id.* at 93. Ishii issued an order before the final Japanese surrender that members of Unit 731 were to "take the secret to the grave." *Id.* Though many years later members broke their obedience to that order, it is surprising how many did not. *Id.*

⁵¹ See WILLIAMS & WALLACE, *supra* note 6, at 220-227.

⁵² See GOLD, *supra* note 7, at 114-115. "America wanted Ishii, Ishii's group, and the emperor protected. More than that, it wanted secrecy and exclusivity. The Soviets pressed to bring them all to trial, so that the secrets America had obtained from the Japanese could be made available to everyone (especially them). America won." *Id.*

⁵³ See WILLIAMS & WALLACE, *supra* note 6, at 3-4.

- (7) Proper preparation should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death;
- (8) The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment of those who conduct or engage in the experiment;
- (9) During the course of the experiment the human subject should be at liberty to bring the experiment to an end if he has reached the physical or mental state where continuation of the experiment seems to him to be impossible; and
- (10) During the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probable cause to believe, in the exercise of good faith, superior skill and careful judgment required of him that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.⁵⁴

It is unlikely that the men of Unit 731 would have escaped punishment if they were brought to trial at the Tokyo Trials and their actions measured by the Nuremberg Code. But, as in the case of Unit 731, the United States traded amnesty from prosecution with many German war criminals who possessed valuable scientific expertise in a classified program known as “Project Paperclip.”⁵⁵ The most famous of the “white-washed” Paperclip Nazis is Wernher Von Braun, who went from designing the V-2 rockets which terrorized London during the Blitz, to becoming the chief architect of the American space program.⁵⁶ With the passage of time and the declassification of once secret documents, the reality is the war crimes tribunals after the Second World War were more show than substance.

⁵⁴ The Nuremberg Code, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Nuremberg, October 1946 – April 1949, Washington, D.C.: U.S. G.P.O. 1949-1953, available in The United States Holocaust Memorial Museum (visited Apr. 18, 1998) <http://www.ushmm.org/research/doctors/Nuremberg_Code.htm>.

⁵⁵ See Memorandum from the Advisory Committee Staff to the Members of the Advisory Committee on Human Radiation Experiments, regarding Post-World War II Recruitment of German Scientists--Project Paperclip, (April 5, 1995). Project Paperclip was a postwar and Cold War operation carried out by the Joint Intelligence Objectives Agency (JIOA). See generally TOM BOWER, *THE PAPERCLIP CONSPIRACY: THE HUNT FOR NAZI SCIENTISTS* (1987). See also LINDA HUNT, *SECRET AGENDA* (1991).

⁵⁶ See HUNT, *supra* note 55, at 44.

IV. THE PRESENT

A group of Unit 731 veterans known as “Chu-Ki-Nren” have begun touring the home nations of many of their victims seeking to publicly apologize for their actions.⁵⁷ Their tour of nations has achieved little success due to the reluctance of nations, including the United States and Canada, to allow admitted war criminals to enter their soil.⁵⁸ The U.S. Department of Justice announced in 1996 that it had compiled a list of twelve Japanese war criminals prohibited from entering the United States.⁵⁹ This list includes the names of Unit 731 “Chu-Ki-Nren” who wish to publicly express their regret concerning their involvement in wartime atrocities.⁶⁰ In spite of this, the “Chu-Ki-Nren” has spread its message with the aid of the Simon Wiesenthal Center in the United States and modern telecommunications technology.⁶¹

The Japanese Government continues to resist cooperating in this area or even acknowledging the existence of Unit 731. The Japanese Government has repeatedly rebuffed efforts by the U.S. Department of Justice to gather information regarding suspected Japanese war criminals.⁶² Furthermore, culturally Japan seems to be in a state of “Holocaust denial,” refusing to admit the existence of any crimes or atrocities being committed by their forces during the Second World War.⁶³ The Chinese Government

⁵⁷ See James Willwerth, *Sorrow and Pity Contrition Goes Online as War Criminals Repent*, TIME, Aug. 3, 1998, available in 1998 WL 14835005. “Chu-Ki-Nren” means “Those Who Returned From China.”

⁵⁸ See Ronald J. Ostrow, *U.S. Blocks Japanese Veterans Who Admit to War Atrocities*, THE SEATTLE TIMES, June 25, 1998, available in 1998 WL 3159551; and Juliet Hindell, *Anti-War Lecturers Banned By the U.S.*, THE DAILY TELEGRAPH (LONDON), available in 1998 WL 3026847.

⁵⁹ See Gavan McCormack, *Japan’s Uncomfortable Past*, HISTORY TODAY, May 1, 1998, available in 1998 WL 13337392. “In other words, fifty years after the event, Washington had decided to place Japanese actions on the same level as Nazi war crimes, so exceptionally heinous that suspected perpetrators should not enjoy any protection from the lapse of time.”

⁶⁰ See *id.*

⁶¹ See Ralph Blumenthal & Judith Miller, *Japan Keeps Stonewalling on WWII Bio-Research Atrocities*, PITTSBURGH POST-GAZETTE, Mar. 7, 1999, available in 1999 WL 5260388. See also James Wilwerth, *Sorrow and Pity Contribution Goes Online as War Criminals Repent*, TIME, Aug 3, 1998, available in 1998 WL 14835005.

⁶² See *id.* Eli M. Rosenbaum, director of the Office of Special Investigations in the Justice Department, said the dispute between Tokyo and Washington over suspected war criminals has been quietly building for three years. *Id.*

⁶³ See McCormack, *supra* note 59 quoting Nobakatsu Fujioka, an advocate of introducing historically accurate textbooks in Japanese schools: “The call for the construction of a correct and edifying (in contrast to masochistic) Japanese history means that Japan would have to reject the histories of its neighbors, (in so far as they choose to

plans to preserve the site of Unit 731's China headquarters as a reminder of past Japanese aggression.⁶⁴

V. ANALYSIS

International tribunals and truth commissions have four primary purposes: “(1) to establish an historic record; (2) to obtain justice for the victims; (3) to facilitate national reconciliation; and (4) to deter further violations and abuses.”⁶⁵ Assuming that the above goals are valid, then the case of Unit 731 signals a dark future for human rights law. There exists no comprehensive public history of the activities of Unit 731 for the future generation to look upon. Justice, in any reasonable form, continues to elude the surviving victims of Unit 731 atrocities. Japan remains unwilling to confront its own past, while tensions between her neighbors simmer beneath the veneer of normal international relations. And possibly worst of all, there is no deterrent value gleaned from the experience of Unit 731. The U.S. has effectively prevented the prosecution of war crimes in order to further its global agenda of combating Communism. Now that the Cold War has been won, no one seems to want to set any proper record of what has transpired. The U.S. government has never officially admitted that they granted *de facto* pardons to Japanese war criminals. What little action is being taken appears to be on the initiative of private citizens. The governments of the two nations who conspired to keep the crimes of Unit 731 hidden have effectively done nothing to rectify this situation.

A. *U.S. Violations of International Law*

Let it first be said that the U.S. did not commit the war crimes and human rights abuses of Unit 731. What the U.S. did was to grant immunity from prosecution to these men in exchange for their scientific research and expertise. In this manner the U.S. technically became a *de facto* accessory to the acts of international war criminals under the complicity doctrine. The most reasonable defense of the U.S. decision to violate international norms is a modification and expansion of the military necessity doctrine that allows for actions which, while normally are criminal in nature, are excusable during times of war.

B. *The Complicity Doctrine*

The complicity doctrine in international law holds that state actors violate

recount their memory of Japanese imperialism, aggression and war) as ‘incorrect’.”

⁶⁴ See *China to Preserve Japanese Chemical Warfare Laboratory*, XINHAU ENGLISH NEWSWIRE, June 6, 1998, available in 1998 WL 12161899.

⁶⁵ See Michael P. Scharf, *The Case For A Permanent International Truth Commission*, 7 DUKE J. COMP. & INT’L L. 375, 379 (1997).

international norms when:

[B]y the omission to take adequate measures for the purpose of punishing crime, the State renders itself an “accomplice” of the actor, or an “accessory after the fact”, becoming responsible for the original wrong. That the failure to punish the delinquent individual established a certain “solidarity” between the respondent State and the criminal actor, the inaction of the former being interpreted as a tacit acquiescence in the act and a voluntary assumption of responsibility therefor.⁶⁶

Under this theory, the United States has assumed responsibility of the crimes of Unit 731 through a combination of lack of affirmative action (prosecution of known war criminals) and the passage of time. It is unlikely however, that any such charges will be asserted against the United States government as accomplices to war crimes and crimes against humanity.

C. *The Military Necessity Doctrine*

The doctrine of military necessity is a defense that is often raised by defendants of war crimes proceedings. The United States *Lieber Code* defines the doctrine as: “Military necessity... consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”⁶⁷

This particular formulation is further defined as allowing “all direct destruction of life and limb of armed enemies, and other persons whose destruction is incidentally unavoidable in the armed contests of the war...”⁶⁸ There are other formulations of the doctrine existing throughout the world, with various emphases on what is considered allowable.⁶⁹ Military necessity is often pleaded as a defense in war crimes trials, but is

⁶⁶ ALWYN V. FREEMAN, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* 370 (1970).

⁶⁷ JORDAN J. PAUST ET AL., *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* 1011 (1996) quoting Art. 14, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (1863) (the Lieber Code).

⁶⁸ *Id.* quoting Art. 15, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (1863) (the Lieber Code).

⁶⁹ MYRES S. MCDUGAL ET AL., *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 672 (1961), in HOWARD S. LEVIE, *TERRORISM IN WAR – THE LAW OF WAR CRIMES* 497 (1993). The usual controversies in this area focus about two opposing views. *Id.* The first view is embodied in the German doctrine of *Kriegsraison*, which it has become customary and even *de rigueur* for publicists to deplore and flagellate. *Id.* In capsular form, this doctrine is to the

rarely viable. The reluctance to accept this defense is due to the proscriptive nature of international law.⁷⁰

The International Military Tribunal (IMT) rejected the defense of military necessity in *The High Command Case* stating:

It has been the viewpoint of many German writers and to a certain extent has been contended in this case that military necessity includes the right to do anything that contributes to the winning of a war. We content ourselves on this subject with stating that such a view would eliminate all humanity and decency and all law from the conduct of war and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilized nations.⁷¹

It does not seem possible to reconcile the stated position of the IMT regarding military necessity with the U.S. decision to spare Japanese war criminals in return for technical data in the Cold War.

There are three factors that can be used to explain this discrepancy. First, World War II was a declared, overt war waged by massive armies throughout the globe. In contrast, the Cold War was fought on a multitude of levels, but never exploded into overt conflict between the United States and the USSR. Instead, the superpowers battled through competing policies, ideologies, technological races, and proxy states with the threat of nuclear annihilation hanging over the entire world. So in the traditional sense,

effect that military necessity or, as it is sometimes called, the necessities of war (*Kriegsraison*) overrides and renders inoperative ordinary laws and customs of war (*Kriegsmanier*). *Id.* Military necessity is, in this view, conceived as a kind of resolutive condition implied in all the particular prescriptions of the law of war. *Id.* The second and opposing view would deny all importance to military necessity, narrowly conceived, save where it has been explicitly written into the conventional formulations of the rules of warfare. *Id.* Under this view, military necessity is said to be unavailable as a legal excuse for violation of the rules of warfare, except where the specific rule alleged to have been violated verbally incorporates a qualifying reference to military necessity. *Id.*

⁷⁰ See PAUST et al, *supra* note 67, at 23 quoting the International Military Tribunal in *United States v. Von Leeb* (The High Command Case), U.S. Military Tribunal, 1948, XI Trials of War Criminals 462 (1950) “International law operates as a restriction and limitation on the sovereignty of nations. It may also limit the obligations which individuals owe to their states, and create for them international obligations which are binding upon them to an extent that they must be carried out even if to do so violates the positive law or directive of the state.”

⁷¹ HOWARD S. LEVIE, *TERRORISM IN WAR – THE LAW OF WAR CRIMES* 497 (1992), quoting the International Military Tribunal in *United States v. Von Leeb* (The High Command Case), U.S. Military Tribunal, 1948, XI Trials of War Criminals 541 (1950).

the Cold War was not a “war,” but a period of extreme tensions between the superpowers.

Second, even during the darkest days of WWII, the worst threat faced was the domination and fall of nations. The advent of atomic bombs and their progeny changed the nature of warfare forever. The fear in the Cold War was the destruction of all life on the planet. In this way the Cold War was unlike any other conflict in the history of man. No longer would huge armies battle across the landscape for fear of escalation to exchanges of nuclear weapons by both sides.

Third, the military necessity doctrine is a defense that is invoked by individuals not state actors. Usually military commanders on the losing side of a war resort to the doctrine as a mitigating factor to diminish the full wrath of a victor’s justice being brought to bear against them. Though the military necessity doctrine is inappropriate in the context of the Cold War, it is mentioned here because in it can be seen the roots of a possible rationale to explain the treatment of Unit 731 accorded by the United States. The concept is the same, but the difference is in the scale and manner of conflict.

VI. CONCLUSION

If any lesson can be taken away from this history of Unit 731, it is that governments will pursue a policy contrary to human rights law as long as they can morally justify to themselves that some higher priority goal is being served. During the Cold War, the U.S. wanted every weapon available to combat Soviet aggression and expansionism. Unit 731 was just another tool for the U.S. in its struggle against the USSR. The norms of customary international law would have to be sacrificed in order for the U.S. to win the Cold War, in effect: *Inter Arma Enim Silent Leges*.