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Military Justice: Contemporary, Historical and Comparative Perspectives

Revue Internationale de Droit Pénal
International Review of Penal Law
Revista internacional de Derecho Penal
Международное обозрение уголовного права
刑事法律国际评论
المجلة الدولية للقانون الجنائي
Revista Internacional de Direito Penal
Rivista internazionale di diritto penale
Internationale Revue für Strafrecht

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THE TWO FACES OF MILITARY JUSTICE IN OCCUPIED TERRITORIES: JAPANESE MILITARY JUSTICE DURING THE ASIA-PACIFIC WAR, 1937-45

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Abstract

This paper explores the ways in which the Imperial Japanese Army (IJA) negotiated its rights and responsibilities as an occupying power during the Asia-Pacific War (1937-1945) by examining the establishment and evolution of the military justice system as utilised to maintain order in occupied territories.

1 Introduction

In wartime, military justice may be imposed over civilians by belligerents in occupied territory as a means of maintaining peace and order. Under international law, occupying powers are obliged to ensure the safety of civilians and to minimise, as far as possible, the disruption of war on life in the territories that fall under their control during conflict. If local judicial organs cease to function, belligerents may rely upon military judicial mechanisms to adjudicate crime and uphold existing laws as a means of providing some degree of stability or normalcy. Occupiers may also enact military regulations, often under the rubric of martial law, which impose restrictions on day-to-day activities (e.g. curfews, blackouts, restrictions on movement, etc.) as a means of protecting civilians in view of ongoing operations. Violations of such may be adjudicated in military courts specially established for this task. Belligerents also exercise legal and judicial powers in occupied areas as a matter of military necessity. Maintaining order is vital for the safety of occupying forces and the realisation of military objectives. In addition to imposing reasonable constraints on populations that aim to directly ensure their protection, occupying powers have a long-established right to prohibit and punish acts of detriment to their position (e.g. rebellion, espionage, the carrying of weapons, distribution of propaganda, etc.) regardless of established criminality under existing local laws.[1] This means then that there

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[1] For a detailed overview of the contemporary law of occupation, see Eyal Benvenisti, *The International Law of Occupation* (2nd edn, OUP, 2012), Yutaka Arai Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Martinus Nijhoff Publishers, 2009), Gerhard von Glahn, *The Occupation of Enemy Territory* (University of Minnesota Press, 1957) 94-105, Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' [2005] 16(4) *EJIL* 662-3 and Peter Stirk, *The Politics of Military Occupation* (Edinburgh Uni-

are two dimensions or 'faces' to the administration of military justice in occupied areas. While not inherently incompatible, conflicts can arise between these faces as belligerents negotiate their own rights and needs with their established obligations vis-à-vis civilian populations against the backdrop of the realities of war. To borrow Geoffrey Best's phrasing, it requires a 'juggling act' on the part of occupiers.[2]

Currently, international law enumerates a range of penal provisions which narrows the scope of belligerent discretion to subordinate the legal rights of civilians to belligerent rights and perceived military necessity during conflict.[3] However, judicial guarantees (e.g. impartiality and independence of courts, the right to a fair trial, the opportunity and means of defence, the possibility of appeal, etc.) were not clearly articulated under the Hague Conventions which required only that that laws in occupied territory be respected 'unless absolutely prevented' , that spies receive trials prior to punishment (though did not specify the form that trials must take) and that collective punishments not be inflicted for individual crimes.[4] Historically then, tensions between ensuring the security of occupying forces and upholding what are now (but were not then) held to be basic, indisputable human rights in wartime could prove more problematic. Indeed, the administration of military justice in occupied territories was constrained only by the principle of military necessity, a principle which had no concrete definitions and was subject to competing interpretations regarding its role within international law at this time.[5] The war crimes tribunals held in the aftermath of the Second World War exposed the implications of this in respect to the (mis)treatment of civilians in occupied territories.

This paper explores the ways in which the Imperial Japanese Army (IJA) negotiated its rights and responsibilities as an occupying power during the Asia-Pacific War (1937-1945) by examining the establishment and evolution of the military justice system as utilised to maintain order in occupied territories. It draws attention to the dynamic nature

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versity Press, 2009) 175-202. A note on Japanese names in this text: Name order follows Japanese convention with family name given first, unless the work cited is an English publication in which name order was given in accordance with Western convention.

[2] Geoffrey Best, *War and Law since 1945* (Clarendon Press, 1994) 118-9.

[3] David Weissbrodt, 'International Fair Trial Guarantees' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP, 2014) 410-40 and Yutaka Arai-Takahashi, 'Law-Making and the Judicial Guarantees in Occupied Territories' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP, 2015) 1421-53 offer a useful overview of these rights.

[4] Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907> accessed 22 April 2024, Articles 30, 43 and 50. On the legal rights of belligerents in historical perspective, see Lassa Oppenheim 'The Legal Relations between an Occupying Power and the Inhabitants' (1917) LQR, 363-70 and Edmund Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (1945) 54(2) YLJ, 393-416.

[5] William O'Brien, 'The Meaning of "Military Necessity" in International Law' [1957] 109 *World Polity* 118-36. Conflicting ideas are described in Isabel Hull, '"Military Necessity" and the Laws of War in Imperial Germany', in Stathis Kalyvas, Ian Shapiro and Tarek Masoud (eds), *Order, Conflict, and Violence* (Cambridge University Press, 2008) 352-77.

of this system, showing how it was modified and expanded upon at various stages according to mutable wartime circumstances, as well as changing policies, military needs and priorities. It argues that while the Japanese military justice system was fundamentally designed to prioritise military necessity and interests in occupied territory, this did not entail a complete disregard for civilian welfare. However, when faced with a prolonged, challenging conflict which saw the military justice system increasingly strained and which over time saw the capacity of the IJA to enforce law and administer justice in accordance with its own standards diminish, civilian rights were increasingly subordinated to perceived military necessity. In other words, the ideals enshrined in international law as it stood at that time became a casualty of the realities of war.

2 Military Justice during the 'China Incident' (1937-1941)

2.1 Outbreak of War and Establishment of the System

The Asia-Pacific War began as a local incident between Chinese and Japanese soldiers at Luguo Bridge (also known as Marco Polo Bridge) on 7 July 1937. The outbreak of fighting was used by men on-the-ground as a pretext to invade and thereby realise long-standing ambitions of expanding Japanese influence over areas of northern China. Japanese forces advanced swiftly, capturing Beijing and Tianjin by the end of the month.[6] Controlling civilians in areas that came under military control presented something of a problem. The conflict was characterised as an 'incident' by the Japanese leadership which, though divided on specific political and military goals at this time, was in agreement that fighting should be contained and resolved swiftly lest it endanger longer-term national defence planning.[7] It was understood, however, that in the absence of a declaration of war from either side, the Japanese military had limited formal authority in administering occupied territory.[8] Thus, in August 1937, authorities in Tokyo advised that the establishment of military government, including a declaration of martial law and the setting up of military courts to handle violations of such, would be premature. Relations between China and Japan had not been completely severed and overt involvement in the administration of occupied areas might further strain the nation's international relations, especially after the successive encroachments upon Chinese territory by the Japanese military

[6] For a comprehensive account of various aspects of the military history of this conflict, including longer-term origins, see the chapters in Mark Peattie, Edward Drea and Hans van de Ven (eds) *The Battle for China: Essays on the Military History of the Sino-Japanese War of 1937-1945* (Stanford University Press, 2011).
[7] For discussion of disagreements among the leadership, see: Hata Ikuhiko, 'The Marco Polo Bridge Incident, 1937' in James Morley (ed), *The China Quagmire: Japan's Expansion on the Asian Continent, 1933-1941* (Columbia University Press, 1983) 243-86 and James Crowley, *Japan's Quest for Autonomy: National Security and Foreign Policy, 1930-1938* (Princeton University Press, 1966) 301-78. On Japan's national defence policy, see Michael Barnhart, *Japan Prepares for Total War: The Search for Economic Security* (Cornell University Press, 2013) 77-90.
[8] This issue was touched on in 'Dai 15-shō kita-shi senryōchi kankei sho mondai', Japan Center for Asian Historical Records (hereafter JACAR) Ref. B02130114900, in *Shitsumu hōkoku Shōwa 12-nendo Tōa-kyoku dai 1-ka* (tōa-2) (Gaimushō, Gaikō shiryōkan) <https://www.jacar.go.jp/> accessed 22 April 2024, 669-672.

in the early 1930s.[9] Maintaining order in occupied areas then, was to be left to Chinese authorities, although it could be guided by the military behind the scenes. In view of the disruption of war having hindered the adequate functioning of local government in some areas, Public Order Maintenance Associations (*Chian iji-kai*) were established by the IJA in northern China and staffed with approved Chinese officials to aid in this.[10]

Regarding the matter of crimes directed at Japanese forces, it was decided that commanders could take disciplinary measures on-the-spot as deemed necessary until a formal policy had been determined. There was no question that extrajudicial practices, such as summary executions, would be undertaken in regard to Chinese civilians. However, summary measures for third country nationals were also permitted after some deliberation between military and foreign ministry officials provided that the offenders were caught in the act. In other instances, such nationals were to be arrested and subsequently handed over to Chinese authorities or, if there was an extraterritoriality agreement in place, to their respective consulates for trial and punishment. Proclamations making a list of prohibited acts known to the populace were issued, but no military courts were established to enforce such prohibitions at this point.[11]

The 'incident', however, did not end as quickly as the Japanese leadership anticipated. In mid-September, Chiang Kai-shek, the leader of the nationalist Guomindang, used a local incident between Chinese and Japanese soldiers in Shanghai (known as the Ōyama Incident) to open a new front which precipitated an escalation of the conflict. The ensuing battle was particularly fierce and marked the transition to *de facto* war.[12] With the ongoing expansion of operational and occupied areas, Japanese commanders in the field revisited the problem of maintaining order and submitted a proposal for permission to formally impose martial law and establish military courts in September 1937. On this occasion, authorities in Tokyo consented, but with some caveats. Commanders were advised that they could declare martial law (*gunritsu*) in order to enact certain restrictions on civilians in operational and rear areas and could establish military commissions (*gunritsu kaigi*) to adjudicate violations of such, but only in so far as those acts directly harmed the military or its interests. Cautious to maintain the outward neutrality of the US, as well as European powers with interests in China, emphasis was placed on ensuring care when exercising legal and judicial authority over third country nationals.[13] Martial law was subsequently declared by the North China Area Army (NCAA) on 5 October 1937

[9] For an overview of Japan's longer-term involvement in and encroachments upon China, see Crowley (n 7), Peter Duus, Rayon Myers and Mark Peattie (eds) *The Japanese Informal Empire in China, 1895-1937* (Princeton University Press, 1989), Shimada Toshihiko, 'Designs on North China, 1933-1937' in Morley (n 7) 11-230.

[10] Further detail on these associations can be found in JACAR Ref. B02130114900, 640-59.

[11] JACAR Ref. B02130114900, 671-4.

[12] On Chiang Kai-shek's reasoning and the ensuring battle, see Rana Mitter, *China's War with Japan, 1937-1945: The Struggle for Survival* (Allen Lane, 2013) 92-102.

[13] JACAR Ref. B02130114900, 671-4.

with the Central China Area Army (CCAA)'s declaration following later that year on 1 December, after the conclusion of the Battle of Shanghai in November.

Since martial law was understood to be a form of emergency legislation rooted in the 'right of military defence' (*gun ei no ken*) under international law and the 'right of supreme command' (*tōsuiken*) enshrined in Article 11 of the Meiji Constitution, regulations were drafted uniquely for this conflict, as they had been in previous wars, by staff officers (primarily from legal departments) in the field.[14] Under martial law, commanders were typically empowered to enforce measures that would ensure the safety of Japanese forces, preserve the peace and would facilitate effective military administration in occupied territories.[15] In view of the aforementioned caveats from authorities in Tokyo, however, the scope of substantive martial law as established in 1937 was limited. The military was not to be seen to be involved in policing ordinary crimes or acts which disturbed the peace. Martial law, therefore, covered just war treason, espionage and acts which threatened the security of the IJA, benefitted its enemies or otherwise impeded military activities.[16] Proclamations issued to the populace clarified that such acts might entail, though were not limited to: damaging railway lines, telegraph poles, roads, bridges, waterways or other means of transportation and communication; inflicting injury upon persons attached to the army; stealing weapons, ammunition or other military supplies; and disseminating poisons or bacteria for the purpose of harming the IJA.[17]

Martial law applied to all civilians in occupied territories, though not to civilian personnel attached to the military (*gunzoku*) who were subject to domestic legislation and tried alongside military personnel in courts martial (*gunpō kaigi*). Imperial subjects (*teikoku shinmin*) or Japanese civilians residing overseas (*hōjin*), were also initially exempt from martial law as the question of allowing commanders to exercise punitive powers over Japanese nationals under the "right of supreme command" had long been debated as a constitutional issue. As such, until 1940, they remained subject only to existing Japanese military and civil legislation and their crimes were adjudicated in either the courts martial or the consular courts depending on which law had been violated.[18] The supervision

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[14] *Senji kinmu kyōtei-an* (Shina chūton kenpeitai kyōshū-tai, 1941) (Bōeishō, Bōeikenkyūjo) 39, Kita Hiroaki, *Nitchū kaisen: Gun hōmu-kyoku bunsho kara mita kyokoku itchi taisei e no michi* (Chūō kōronsha, 1994) 54-9 offers an introduction.

[15] *Keibatsu-hō kyōtei* (Naka-shina haken kenpeitai kyōshū-tai 1943) (Bōeishō, Bōeikenkyūjo) 227-8; For a longer-term overview of the character and use of martial law by the IJA in wartime, see Kelly Maddox, 'An Instrument of Military Power: The Development and Evolution of Japanese Martial Law' [2024] 42(2) *LHR* 367-91 and Ono Hiroshi 'Meiji kokka ni okeru senryōchi gunsei-hō – Nis'shin sensō-ki kara Shiberia shuppei-ki made o chūshin ni', [2023] 3 *Hō to bunka no seido-shi* 40-2.

[16] 'Gunritsu shikō no ken', JACAR Ref.C04120049000, in *Shi-ju dai nikki (mitsu) sono 8 15-satsu no uchi, Shōwa 12-nen ji 10-gatsu 28-nichi shi 11-gatsu tsuitachi* (Bōei-shō, Bōei kenkyūjo) for NCAA regulations. Those for the CCAA are printed in Takahashi Masae (ed) *Zoku gendaishi shiryō 6: Gunji keisatsu: Kenpei to gunpō kaigi* (Misuzu Shobō, 1982) 194-5.

[17] Copy of proclamation in JACAR Ref.C04120049000, 0303.

[18] This had been debated during the Russo-Japanese War, as discussed in Shinoda Jisaku, *Nichiro sen'eki kokusai kōhō* (Hōsei Daigaku, 1911) 389-92. For a brief explanation of the problem during the Asia-Pacific War, see 'Hōgaku', in *Gaiji-hō kankei sankō tsudzuri* (Bōeishō, Bōeikenkyūjo) 3. Violations of military penal

and policing of Imperial subjects was a task entrusted to consular police, though in coordination with the military in areas without existing consulates. These officials were authorised to restrict travel to China and deport problematic residents as necessary.[19]

The enforcement of martial law over other civilians in occupied territories fell to members of *kenpei* (lit. 'law soldiers') units. Established in 1881, these units were originally recruited from among Japanese police superintendents and military officers. However, after the establishment of a training institute in 1899 (created after the First Sino-Japanese War (1894-1895) had exposed severe shortages of *kenpei* manpower and deficiencies in the 'in house' style training they had previously received), candidates were exclusively drawn from among officers of the army branches.[20] They came under the jurisdiction of the Army Minister and were mainly responsible for military policing, although they also undertook additional judicial or administrative policing tasks as directed by the Justice Minister, Interior Minister or Navy Minister.[21] During the 1930s, *kenpei* duties expanded to include higher and foreign affairs policing (involving so-called 'thought-control') for which they developed a reputation for repressive policing practices.[22] When operating outside of Japan and its colonies during wartime, *kenpei* carried out additional 'security duties' (*hoan kinmu*) as directed by the respective commanders of the army to which they were attached and whose authority they came under in the field. This involved a range of duties related to public order and pacification work performed with the stated aim of 'facilitating the accomplishment of military objectives'.[23]

Investigating violations of martial law or other hostile acts was chief among these tasks. In this endeavour, *kenpei* established extensive intelligence networks, inspected correspondence, monitored communications and surveilled suspects. They were empowered to make summary, pre-emptive arrests, staged late night raids and conducted periodic

codes were tried in courts martial, while violations of civilian law were adjudicated through consular courts.

[19] For more information on the consular policing system, see: 'Dai 2-shō: Keisatsu kankei sho mondai' JACAR Ref.B02130119400, in Shitsumu hōkoku, Shōwa 13-nendo Tōa-kyoku dai 2-ka (tōa-4) (Gaimushō, Gaikō shiryōkan).

[20] Zenkoku Ken'yūkai Rengōkai (ed.), *Nihon kenpei seishi* (Zenkoku Ken'yūkai Rengōkai, Hatsubaimoto Kenbun Shoin, 1976), 1382-1385, 1393-4.

[21] The full extent of the duties ascribed to these units was determined by the military's extensive legal regulatory framework, especially the *Kenpei* Ordinance (*Kenpei-rei*) and the *Kenpei* Duty Regulations (*Kenpei fukumu kitei*), see: 'Dai 2-shū: Kenpei no fukumu oyobi shōbatsu ni kansuru hōki no taiyō' JACAR Ref.C12120709600, in *Kenpei hōki ruishū dai 1-kan, Shōwa 18-nen 12-gatsu* (Bōeishō, Bōeikenkyūjo) for a compilation of these regulations.

[22] For more on this, see Kōketsu Atsushi, *Kenpei seiji: Kanshi no dōkatsu no jidai* (Shin Nihon shuppansha, 2008) and Ogino Fujio, *Nihon kenpei-shi: Shisō kenpei to yasen kenpei* (Otaru Shōka Daigaku shuppankai, 2018).

[23] Aside from orders issued by army commanders, duties for *kenpei* in the field were prescribed by the *Jinchū yōmu-rei* established in 1924 and later the provisions in part 3 of the *Sakusen yōmu-rei* which was added in 1940. The most comprehensive overview of responsibilities in the field, however, was provided in separate regulations drafted in 1942: 'Yasen kenpeitai kinmu-rei seitei no ken', JACAR Ref.C01000504400, in *Shōwa 17-nen (Riku-a-mitsu dai nikki dai 31-gō 1/4)* (Bōei-shō, Bōei kenkyūjo).

round-ups of local inhabitants during which an informant would be used to point out 'anti-Japanese elements'. Much like any police force, they questioned witnesses, examined crime scenes, collected and analysed evidence (for which they received training in forensic science) and interrogated suspects, often with the aim of extracting confessions.[24] Torture as a means of forcing information or confession was formally prohibited in most cases, but these units nevertheless became infamous for their extensive mistreatment of civilians.[25]

Once an investigation had been completed, *kenpei* had some discretion to determine how to proceed. They might opt to simply release offenders, especially if there was deemed to be insufficient evidence, but also if the offence had been trivial (such as possessing propaganda leaflets) and the suspect was largely harmless and/or potentially useable. In other words, if they could be co-opted, coerced or persuaded to work for the *kenpei* as an informant and used to enhance their intelligence network. More serious offenders might also be released if they could somehow serve the military, though such decisions were to be undertaken in consultation with members of the military commission to which violators of martial law were typically to be referred. Alternatively, *kenpei* could avail upon local Chinese authorities if they had determined that the case had not directly or adversely impacted the military or was otherwise minor in nature. While third country nationals were to be tried in military commissions for violating martial law, they could also be referred to local or consular courts as appropriate.[26]

Though invested with latitude, *kenpei* were not supposed to act unilaterally in making such decisions. They were required to report details of arrests and investigations, with their opinions and recommendations, up within the *kenpei* chain of command and directly to the army commander, awaiting orders or confirmation prior to taking action.[27] Wartime diaries and post-war memoirs also reveal ongoing consultation and dialogue between *kenpei* investigators and officers within their assigned army's legal department.[28] That said, they had a significant degree of control over the flow of information to those reviewing cases and making the final decisions on whether to prosecute based upon their reports, meaning that they played an important role in the judicial outcome for civilians.

Such was acknowledged within textbooks and manuals, like the Field *Kenpei* Handbook which cautioned that *kenpei* wielded power over life and death (*seisatsuyodatsu no ken*)

[24] A general overview of duties in the field, including investigative procedures, can be located in *Senji kinmu* and *Yasen kenpei hikkei* (Rikugun kenpei gakkō c1942).

[25] Ikō Toshiya, 'Kenpei no sensō hanzai to Chūgoku BC-kyū senpan saiban (ue),' *Sensō sekinin kenkyū* 88 [2017] 88 54-62 and Ikō Toshiya, 'Kenpei no sensō hanzai to Chūgoku BC-kyū senpan saiban (shita),' *Sensō sekinin kenkyū* 89 [2017] 51-59 offers a comprehensive overview of *kenpei* war crimes in China.

[26] Yasen kenpei, 138-42.

[27] See section on reporting in the field regulations, JACAR Ref.C01000504400, 0054-5.

[28] For instance: Kamisago Shōshichi, *Kenpei 31-nen* (Tokyo Raifu-sha 1955); Ogawa Sekijirō, *Aru gun hōmukan no nikki* (Misuzu Shobō 2000).

and that the exercise of such power would have a tremendous influence on military interests, *kenpei* prestige, the attitude of the populace and civilian welfare.[29] It was made clear that in the enforcement of law, *kenpei* had a duty to act in the interests of the military and were instructed to reflect on the situation in occupied territories, to consider the intentions of their superiors and the wider objectives of martial law (i.e. the protection of Japanese forces and the maintenance of order) in carrying out their duties. However, guidance also emphasised the need for a careful and considered approach which balanced severity and leniency. Severe punishments (*genbatsu*) at the outset might be an effective deterrent which prevented similar offences emerging. Yet, it was considered to be equally important that civilians be 'comforted and consoled' (*suibu shitaru*) in order that they continue their day-to-day activities and to avoid provoking hostility.[30]

Textbooks created in the field by special training units established in China in 1938 to address a shortage in *kenpei* numbers offered detailed guidelines on the responsibilities and obligations of *kenpei* in occupied areas. These included a basic overview of the scope of belligerents' authority in occupied territory and the relevant prescriptions in the Hague Conventions regarding civilian rights. Trainees were advised that in view of the lack of a formal declaration of war, there was no need to apply international law in full which meant, for example, that they could confiscate private property for military use if necessary.[31] Broadly speaking, however, they were urged to comply with the spirit of international law and to respect civilian lives, as well as local laws, customs and religion, albeit only to the extent that this would not conflict with military interests.[32] An awareness of international law was deemed necessary because, while legal experts were on hand to offer advice within army headquarters, *kenpei* were assigned across occupied territory making it unfeasible to rely on support from legal departments.[33]

Indeed, each army typically had just one legal department located within, and which consequently moved with, command headquarters. These departments were quite small (staffed with on average just three or four legal officers and two or three clerks) relative to their assigned responsibilities which included the handling of all legal matters involving soldiers, civilians and enemy captives in the field. This meant providing legal advice to commanders, liaising with *kenpei* regarding investigations and judicial duties and supervising the administration of prisons, among other bureaucratic tasks. Conducting trials was one of the legal department's main duties. Upon receiving the investigation file from the *kenpei*, an assigned legal officer was to review and evaluate the strength of the case. In doing so, the reviewing officer could opt to re-examine witnesses, visit crime scenes or re-question suspects as he perceived necessary. But, this was not a requirement, meaning that civilians might not have an opportunity to address any issues of mistreat-

[29] Yasen kenpei, 139.
[30] Senji kinmu, 39; Yasen kenpei, 138-9.
[31] *Senji kinmu*, 35-9; 'Hōgaku', 13-4.
[32] Senji kinmu, 27.
[33] Senji kinmu, 35-6.

ment or injustice experienced during the investigation until trial. It also meant that decisions made by senior commanders regarding prosecution could depend solely upon the documents prepared and handed over by investigators. Legal officers were required to submit a report recommending prosecution or dismissal of the case after completing their review to the army commander who, as formal head of the military commission, had to give permission prior to proceeding with a trial.[34]

Although the legal basis for military commissions (trial regulations enacted under the 'right of supreme command') was different from that of courts martial for soldiers (the Army Courts Martial Law - *Rikugun gunpō kaigi-hō*), there was little material difference regarding the constitution of courts and trial procedure adopted for civilians.[35] Military commissions were to follow provisions for the special courts martial (*tokusetsu gunpō kaigi*) in the aforementioned law. These were a streamlined version of the regular courts martial that aimed to expedite trials in the field during wartime by permitting a reduction in the number of judges (from five to three), removing provisions related to defence (such as the right to access counsel, present evidence or call witnesses), omitting the right to appeal judgements and reducing other bureaucratic requirements relating to the documentation, reporting and review of cases. In other words, the legal safeguards enshrined in the Army Courts Martial Law in peacetime did not have to be upheld in wartime for soldiers as well as civilians.[36]

Trials were convened periodically and surviving sources indicate that several cases (involving civilians of all nationalities) were heard on the same day as court martial proceedings.[37] Prior to opening, a military commission was to be staffed by three judges (two commissioned officers and one legal officer) who were appointed by the army commander, as well as a prosecutor (also a legal officer), clerks, guards and (if necessary and available) interpreters. Sentences which could be pronounced included death, confinement with labour, exile and fines, with confiscation permitted as a supplement to other punishments. Regulations established some parameters regarding such penalties (e.g. exile must be for a period of no less than one year, fines could not exceed 1000yen), but

[34] A general impression of the duties of staff members and the inner workings of these departments is given in two court martial battlefield diaries published in Takahashi, *Zoku Gendaishi*, 3-218. For more information, see Nishikawa Shin'ichi, *Aru gun hōmu-kan no shōgai: Horiki Jōsuke rikugun hōmu-kan shūsō retsujitsu-ki, Ise, Asahikawa, Zentsūji soshite Manshū* (Fūbai-sha, 2023), 13-31 and Nishikawa Shin'ichi, 'Gun hōmu-kan kenkyū josetsu – gun to shihō no intāfeisu e no sekki', (2013), *Seiki ronsō* 81, 145-192.

[35] This is not to suggest that there was no difference in actual practice, but rather to emphasise that at an institutional level, it was not intended that the treatment of civilians be differentiated from that of that soldiers.

[36] 'Rikugun gunpō kaigi-hō' JACAR Ref.A03021304500, in *Go-shomei genpon / Taisho 10-nen / Hōritsu dai-85-gō / Rikugun gunpō kaigi-hō* (Kokuritsu kōbun shokan); for an English translation of this law, see National Archives of Australia (NAA): A471, 81957 – *Trial of Yamawaki and Others*, 338-441.

[37] Highlighted, for instance, in the legal department's section of the NCAA's ten-day wartime reports: 'Senji junpō sōfu no ken (7)', JACAR Ref.C04120683900; 'Senji junpō sōfu no ken (8)', JACAR Ref.C04120684000; 'Senji junpō sōfu no ken (9)', JACAR Ref.C04120684100; 'Senji junpō sōfu no ken (10)', JACAR Ref.C04120684200, in *Shi-ju dai nikki (mitsu) Sono 71, 73-satsu no uchi, Shōwa 13-nen 12-gatsu 21-nichi* (Bōei-shō, Bōei kenkyūjo).

also permitted discretion on the part of judges to either impose sentences in full, commute them or even to waive punishment completely as they deemed appropriate in view of mitigating circumstances, the wartime situation and the perceived value of punishment.[38] It was not viewed as necessary to punish for the sake of justice, but rather as a means of 'guiding' the behaviour of civilians. This could mean imposing harsh penalties to reinforce and emphasise military authority and the dangers of disobedience or it might mean employing a more lenient approach to impress the populace with a sense of benevolence and to foster a more amicable relationship between occupier and occupied.[39]

To summarise then, the military justice system established in China upon the outbreak of war was one which was designed at an institutional level to facilitate military objectives, safeguard military interests and prioritise military necessities. Those involved in enforcing law and administering justice were advised to take care in this task and to be aware of civilian rights under international law, but ultimately had, from the outset, an overriding responsibility to act to the advantage and convenience of the military. As war continued and military policy in China evolved, the military justice system was modified to address perceived deficiencies highlighting further the primacy of military necessity and the role of war in shaping the administration of justice.

2.2 Addressing Perceived Deficiencies and the Demands of Wartime Justice

Despite initial efforts to win a swift, decisive victory, Japanese forces found themselves embroiled in a war of attrition in China. After the Battle of Wuhan in 1938, nationalist forces had relocated to Chongqing, a city with strong natural defences which made it difficult for the IJA to continue launching direct assaults and fighting large-scale pitched battles. Guerrilla-style resistance from remnant nationalist soldiers, Chinese Communist Party forces and militias had emerged in rear areas over the course of that year.[40] Faced with a prolonged conflict, the Japanese leadership had begun to seek more political solutions to an end to the fighting.[41] In November, a longer-term regional strategy for the construction of a 'New Order in East Asia' (*Dai Tōa shin chitsujo*) rooted in pan-Asian ideals was announced.[42] As part of this, efforts were undertaken to establish a puppet government under the Nationalist politician, Wang Jingwei which came to fruition in March 1940. On the front, stalemate had set in, especially by late 1939 when Chinese troops successfully thwarted assaults on Changsha and Guangxi. Military efforts in China, therefore, shifted more towards the consolidation of territory, with an emphasis

[38] JACAR Ref.C04120049000, 0297-8; Takahashi, *Zoku gendaishi*, 194-5.
[39] Yasen kenpei, 138-9; Senji kinmu, 39.
[40] Described in Yang Kuisong, 'Nationalist and Communist Guerrilla Warfare in North China' in Peattie, Drea and van de Ven, *Battle for China*, 308-27.
[41] Kitaoka Shin'ichi, *From Party Politics to Militarism in Japan, 1924-1941* (Eng edn, Lynne Riener Publishers 2021), 259-61; Usui Katsumi 'The Politics of War, 1937-1941' in Morley, *China Quagmire*, 309-435 offers a detailed overview of these efforts.
[42] For an overview of the conceptual development of this idea, see Eri Hotta, *Pan-Asianism and Japan's War, 1931-1945* (Palgrave Macmillan 2007), 141-76.

on economic and industrial development and so-called 'security warfare' (*chian-sen*), particularly in northern China.[43] Against the backdrop of these developments, a number of changes were made to martial law and the military justice system.

In 1940, for instance, a new regulation was introduced by the China Expeditionary Army[44] which made a range of acts that disturbed public sentiment and peace, or which disrupted finance and the economy committed by Imperial subjects punishable in military commissions.[45] This was a response to the growing problem of so-called 'delinquent overseas residents' (*furyō hōjin*). These were persons from Japan or its colonies who engaged in dishonest, but not necessarily criminal, behaviour.[46] The outbreak of fighting in 1937 had resulted in an influx of Imperial subjects travelling to the continent and the consular system had been ill-equipped to police such numbers. The 'delinquent overseas residents' were considered problematic because their activities – perceived to be motivated by self-interest and a misplaced 'sense of superiority' (*yūetsukan*) – caused tensions with Chinese civilians, undermined the construction of a 'new order' founded on cooperation and friendship, and obstructed the execution of the war.[47]

Earlier efforts to address the issue included expanding the pre-war consular policing system, imposing restrictions on travel, inspecting new arrivals, monitoring known criminals and extra provisions to facilitate deportation.[48] This new regulation would assist such efforts by permitting punishment for acts which violated wartime restrictions imposed by the military (e.g. unjust criticism of the nation's policies in China; obstructing or interfering with pacification, propaganda or security operations; words or deeds which defamed the military; profiteering from currency exchange; smuggling of restricted goods; and making undue proceeds by misrepresenting oneself as military personnel, etc.) which were either not criminal under, or inadequately covered by, existing

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[43] Detailed in Lincoln Li, *Japanese Army in North China: Problems of Political and Economic Control* (OUP 1975). For 'security warfare' (meaning anti-guerrilla or counter-insurgency warfare), see Kasahara Tokushi, *Nihongun no chian-sen: Nihon sensō no jissō,* (Iwanami Shoten 2010) and Ikō Toshiya, 'Nitchū sensōki Kahoku senryōchi ni okeru minshū dōin to shihai' (2023) *Nenpō Nihon gendai-shi* 28, 1-39.

[44] Raised in September 1939, the China Expeditionary Army subsumed the Central China Expeditionary Army (formerly the CCAA) and the NCAA, though the latter remained a separate, if subordinate, unit.

[45] Regulations in 'Dai 3-shō, dai 6-han, 4: Ken-satsu satsu jō no sochi oyobi genron tōsei', JACAR Ref.C11110839000, in *Shina jihen gunpyō-shi, Dai 2-kan, Shōwa 12-nen – 18-nen* (Bōei-shō, Bōei kenkyū-jo), 1777-80.

[46] 'Watari-shi hōjin torishimari jōkyō/furyō bunshi no watari-shi torishimari-hō ni kansuru ken', JACAR Ref. A06030112800, in *Watari-shi hōjin torishimari jōkyō/furyō bunshi no watari-shi torishimari-hō ni kansuru ken* (Kokuritsu kōbunshokan); 'Furyō Nihojin torishimari ni kansuru ken' JACAR Ref.C04121177100 in Riku-shi-ju dai nikki (mitsu) dai 34-gō, Shōwa 14-nen (Bōei-shō, Bōei kenkyū-jo), 0841-2; 'Furyō hōjin no torishimari taisaku nit suite', JACAR Ref.C11110637900, *Shina chūton kenpeitai keimu kankei shorui* (Bōei-shō, Bōei kenkyū-jo), 0181-3.

[47] JACAR Ref.C11110637900, 0181; JACAR Ref.C11110839000, 1784-90; 'Hōgaku', 5.

[48] JACAR Ref.A06030112800; JACAR Ref.C11110637900; 'Furyō Nihonjin torishimari kuchiku ni kansuru mōshiawase no ken', JACAR Ref.C04120804700, in *Riku-shi dai nikki (mitsu), dai 13-gō 2/2, Shōwa 14-nen* (Bōei-shō, Bōei kenkyū-jo).

military and civil penal codes.[49] There was a particular emphasis on offences which would disgrace or discredit the military's reputation and especially on economic or finance-related crimes. An annual military policing report for 1941, for example, noted that 94% of the 32 violations by Imperial subjects tried in military commissions that year had involved a form of economic disruption. The most serious of these involved offenders posing as military personnel to divest civilians of property and other acts of intimidation or extortion for financial gain.[50]

A proclamation issued to the public on 11 June 1940 explained that Chinese civilians and third country nationals would also be subject to punishment for violating this more extensive list of offences marking a departure from the earlier approach which had focused only on those acts which directly harmed the military.[51] Hereafter, the IJA became more openly involved in policing disturbances of the peace as a means of aiding military policy in China. To the public, military authorities also made a point of highlighting the principle of non-discrimination – civilians would now be subject to punishment in military commissions regardless of nationality. However, behind-the-scenes, punishments for Imperial subjects were limited to just confinement, exile, fines and confiscation (as a supplementary penalty); they could not be sentenced to death as other civilians could.[52] Furthermore, the aim of this regulation was for the *kenpei* to focus only on the so-called 'big fish' whose actions directly impacted the military and the 'delicate' economic situation; minor acts that had not harmed public order were not a concern and any offence otherwise punishable under Japanese civil penal codes should be sent for trial by consular courts.[53]

This was because it was generally understood that the military judiciary was already overwhelmed. In January that year, for instance, the Ordinance for the Summary Judgement of Chinese People (*Shinajin ni taisuru sokketsu shobun-rei*) had been introduced by the NCAA in northern China (extended to central China by the CEA in June 1940) as a means of reducing the large number of cases that had caused congestion within the military's overstretched judicial organs. According to instructions on this new ordinance, long periods of detention in *kenpei* custody for violators of martial law awaiting trial had, alongside 'unreasonable' judgement of minor acts, contributed to the ongoing hostility of the Chinese populace toward the military.[54] To address this, commissioned *kenpei* officers with command authority over units, squads or detachments were empowered to issue sentences on-the-spot for minor offences (e.g. possession of propaganda leaflets,

[49] JACAR Ref.C11110839000, 1784-88; *Keibatsu-hō*, 239-244.
[50] 'Rikugun gunji keisatsu nenpō (Shōwa 16-nen)', JACAR Ref. C07092226800, in *Riku-shi-fu dai nikki dai 9-gō 2/2 Shōwa 17-nen* (Bōei-shō, Bōei kenkyū-jo), 0881-2, 0908-10.
[51] JACAR Ref.C11110839000, 1784-90; 'Hōgaku', 5; *Keibatsu-hō*, 230-32.
[52] JACAR Ref.C11110839000, 1778.
[53] Yasen kenpei, 142.
[54] 'Shina-jin ni taisuru sokketsu shobun-rei seitei no ken', JACAR Ref. C04121789500, in *Riku-shi-mitsu dai nikki dai 5-gō 2/3, Shōwa 15-nen* (Bōeishō, Bōeikenkyūjo), 1072-3; also discussed in 'Hōgaku', 10-1.

buying or selling of restricted military goods, etc.) which were deemed to have harmed the IJA or military interests within their areas of jurisdiction.[55]

It was observed in textbooks that legalising and expediting summary punishments for acts of harm which were not necessarily serious but, in the interest of public order, could not be left unpunished, would alleviate some of the weaknesses of the existing system and have a positive impact on popular sentiment.[56] Thus, *kenpei* commanders were to establish guilt quickly and pronounce judgement in keeping with the spirit of a trial by reviewing evidence collected by investigators and hearing the statement of the accused. This was based on similar principles of expedient punishment permitted by the Ordinance for the Summary Judgement of Misdemeanours (*Ikeizai sokketsu-rei*), a procedural law introduced in Japan in 1885. One key difference, however, was that Chinese civilians were not afforded the opportunity to appeal summary judgements by requesting a formal trial. This was acknowledged and rationalised in a *kenpei* legal reference book as characteristic of a military criminal strategy based on expediency.[57]

Such powers were not intended to be exercised arbitrarily or excessively. *Kenpei* were warned in guidance not to dismiss or make light of investigations just because they would not result in trials and to be careful in regard to assessing evidence so that no 'innocents' were unjustly punished. Since one objective was to restore the people's confidence in the judiciary, *kenpei* were also to keep in mind that those summarily punished would be released into society meaning that they could spread news of any perceived mistreatment or injustice.[58] They were also reminded of the importance of a balance between severity and leniency and punishments which could be meted out under this ordinance were limited to no more than 90 days detention (which included labour), fines up to 100yen or, in central China, closure of business for up to ten days.[59] Furthermore, in order to avoid arbitrary decisions, *kenpei* commanders authorised to carry out summary punishments were encouraged to set a standard for sentences, ideally based on the Police Offences Punishment Ordinance (*Keisatsu-han shobatsu-rei*), as well as examples of verdicts from military commissions, consular, and local courts.[60] Senior commanders were to supervise the implementation of the ordinance, making special enforcement regulations as necessary, and were to ensure that the issuance of sentences was not delegated to non-commissioned officers or other lower-ranking investigators not authorised to take such measures. Detailed records of punishments were to be kept with the issuing

[55] JACAR Ref. C04121789500, 1067-77.
[56] JACAR Ref. C04121789500, 1072-3; 'Hōgaku', 9-10.
[57] 'Hōgaku', 10-1.
[58] Yasen kenpei, 140-1.
[59] JACAR Ref.C04121789500, 1070; JACAR Ref.C11110839000, 1780-83, *Yasen kenpei*, 615-6.
[60] This regulation was enacted in 1908. It acted as a supplement to the newly modified civilian penal code (*keihō*) by outlining punishments for minor offences and complemented the Ordinance for the Summary Judgement of Misdemeanours.

unit and were to be reported to the army commander and *kenpei* unit commander as a matter of course.[61]

For some, like Lieutenant Colonel Nakamura Michinori, an instructor at the Kenpei School who had field experience as a commander within the North China Garrison Kenpeitai Headquarters, these new measures did not go far enough. In an article published in the *kenpei* periodical *Kenyū* in December 1941, Nakamura outlined key practical and conceptual issues with the system as exposed by experiences in China. Summarised briefly, his argument centred on the apparent incongruity of strict adherence to law and the rights enshrined within it in view of the need for expediency and flexibility during wartime.[62] This idea that peacetime judicial mechanisms were incompatible with military needs during conflict was similarly reflected in a speech delivered to judges and legal officers in June 1940 by the NCAA Chief of Staff, Lieutenant General Kasahara Yukio in which he had stressed the importance of considering the military situation and the 'special characteristics of wartime' when making judicial decisions.[63] It had also been the main impetus behind drafting separate regulations for the punishment of civilians during the First Sino-Japanese War (1894-5), the IJA's first modern conflict.[64]

In regard to the situation faced by the IJA in China, Nakamura observed that the scale and length of this conflict was unprecedented and that the scope of cases encountered by the *kenpei* had outstripped that which could normally be handled by the peacetime military judiciary.[65] In support of such assertions, he presented statistics on arrests and measures taken towards Chinese persons over a six-month period in 1940. This data showed that between April and September, 23,865 Chinese persons had been arrested. Of these, 12,550 had been subsequently released, 2835 had been reported to Chinese authorities, 752 had been referred to military commissions, 592 received summary punishments and the majority of the rest remained at various stages of investigation.[66]

Interestingly, it also revealed that 1900 persons had been dealt with by means of 'severe punishment' (*genjū shobun),* a euphemistic term used by the kenpei to denote summary executions. Extrajudicial practices, including 'special battlefield killing' (*rinjin kakusatsu*), had been introduced and sanctioned during the pacification of Manchukuo in 1932 under the Temporary Law for Punishing Bandits (*Dankō chōji tōhi-hō*).[67] According to post-war memoirs, like that of Major Ōnishi Satoru, it was used as an expeditious means of dealing

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[61] *Yasen kenpei*, 140-1; 614-6.

[62] Nakamura Michinori, 'Senchi ni okeru gun shihō ni tsuite', (1941) 35(12) *Kenyū*, 67.

[63] 'Hōmen gun sanbō-chō kōen yōshi sōfu no ken', JACAR Ref.C04122206300, in *Riku-shi-mitsu dai nikki, dai 24-gō 1/3, Shōwa 15-nen* (Bōei-shō, Bōei kenkyū-jo), 0389-91.

[64] For further detail, see Maddox, 'An Instrument of Military Power', 370-5 for discussion of these regulations.

[65] Nakamura, 'Senchi', 68.

[66] Nakamura, 'Senchi', 78.

[67] 'Dankō chōji tōhi-hō, Manshū teikoku nichi-yaku keisatsu kankei hōki', 1046-8. JACAR Ref.C12120844200; discussed in *Nihon kenpei seishi*, 888-91.

with the large number of arrests because it was believed that prolonging the judicial process by going through tedious investigative procedures or holding lengthy trials far away from the place of the crime would have caused unnecessary unrest.[68] After the declaration of martial law in October 1937, summary executions had been formally prohibited.[69] Wartime and post-war sources indicate that the practice continued, however, largely because *kenpei* had taken the view that during this conflict, it was not necessary to fully observe international law.[70] For instance, Ōnishi recalled that the subsequent extension of 'severe punishment' to the rest of China in 1937 had been viewed as natural during an 'incident' which was 'outside the limits of international law' (*kokusaihō no rachigai*).[71]

Nakamura did not advocate for increased use of extrajudicial measures. However, he did urge a rethink of ideas about how military justice should function, especially during the second phase of occupation, when operations had ceased and efforts to restore order were underway.[72] He recognised that military justice could not be as flexible as permitted during combat, but emphasised that until order had been fully restored, judicial procedure could not yet approximate that used in peacetime. In addition to suggestions for improving the quality of investigators and reducing the heavy workload associated with completing the paperwork required during investigations, Nakamura thus proposed a streamlining of the trial process, the convening of courts day and night, the use of mild torture (depending on the 'civilisation' of the local population) and a simplification of the composition of the trial at this stage of the conflict.[73]

This notion that the administration of justice should be approached differently depending on the situation in occupied territories echoed somewhat a brief comment on the declaration of martial law in Ogawa Sekijirō's wartime diary. Head of the 10th Army Legal Department in December 1937, Ogawa had noted that while appropriate punishment may be taken immediately during combat, once the enemy's operations had ceased, punishing at one's own discretion, was no longer reasonable.[74] This thinking is also visible in *kenpei* guidance which set parameters of acceptable conduct according to different circumstances. To give one example: In the Field *Kenpei* Handbook, it was broadly advised that respect for human rights was paramount regardless of differences in peacetime or wartime, though the nature of these rights was not clearly articulated, and *kenpei* were cautioned that summary executions once an investigation had been completed were forbidden. But, in the same paragraph, it was also observed that, during the course of an investigation, death might be an unavoidable consequence of 'necessary, expedient measures' (*rinki hitsuyō no sochi*) taken when a suspect resisted arrest, attempted to flee

[68] Ōnishi Satoru, *Hiroku Shōnan kakyō shukusei jjiken* (Kongō Shuppan 1977), 91.
[69] For example, see a copy of a notification on the topic in JACAR Ref.C04120049000.
[70] Discussed in 'Dai 3: Fukumu ni tsuite', JACAR Ref.C11110638700, in Shina chūton kenpeitai keimu kankei shorui (Bōei-shō, Bōei kenkyū-jo), 0243; Kamisago, *Kenpei 31-nen,* 81; Ōtani Keijirō, *Kenpei: Moto tobu Kenpeitai shireikan no jidenteki kaiso* (Kojinsha 2006), 303.
[71] Ōnishi, *Hiroku Shōnan,* 90-1.
[72] Nakamura, 'Senchi', 69.
[73] Nakamura, 'Senchi', 71-7.
[74] Ogawa, Aru gun hōmu-kan, 90.

or adamantly refused to submit to questioning[75]In other words, in certain 'necessary' or 'unavoidable' circumstances, extrajudicial punishments would be tolerated.

The changes made in 1940, a result of pressure on the system in a larger-scale and longer-lasting war than the IJA had previously fought, expanded military jurisdiction over people (Imperial subjects) and punishable acts (disturbances of the peace, etc.). *Kenpei* were also invested with judicial powers that enabled them to bypass the court system in minor cases. Guidance to *kenpei* reiterated the importance of human rights and a judicious approach to summary judgements, but did, nevertheless, afford considerable interpretive discretion to officers. And, as represented by Nakamura's concerns, there were some underlying tensions between the ideals espoused by senior authorities at the centre and those faced with administering justice against the backdrop of the realities of war. In fact, instructions to those enforcing law in the field tacitly tolerated extrajudicial practices in certain 'unavoidable' or 'necessary' circumstances. After the outbreak of war in the Pacific and the subsequent occupation of Southeast Asia in 1942 that year, logistical difficulties and strain on the military justice system intensified leading, especially in later years of conflict, to the increasing use of summary judicial procedures.

3 The Occupation of Southeast Asia (1942-45)

3.1 Expansion of War and the Role of Military Justice

The decision to invade Southeast Asia and, consequently, go to war with the US and Britain in 1941 was a strategic one. Occupation of the region came to be viewed as a means of ending war with China; seizing access to the Burma Road would provide a new entry-point to the continent and decisively cut off Allied support for Chiang Kai-shek's resistance efforts. More importantly, it would offer an avenue for securing access to vital resources, like oil and rubber, which successive trade restrictions and embargoes imposed on Japan by the US and its allies had jeopardised.[76]

Occupation policy, as devised by the leadership in Tokyo in 1941, focused on these wartime objectives, emphasising the importance of acquiring raw materials and self-sufficiency for Japanese forces as key tenets in the administration of Southeast Asia. In view of this, the third key tenet – the restoration and maintenance of public order – became especially important.[77] Dealing with unrest would have added to the logistical strain of fighting a multi-front war against several enemies, as well as the specific challenges encountered in the occupation of Southeast Asia. Indeed, in 1942, the size of territory under

[75] Yasen Kenpei, 140.

[76] Nobutaka Ike, Japan's Decision for War: Records of the 1941 Policy Conferences (Stanford University Press 1967) offers further detail on this; see also the essays in James Morley (ed.), The Fateful Choice: Japan's Advance into Southeast Asia, 1939-1941 (Columbia University Press 1980).

[77] See 'Essentials of Policy Regarding the Administration of the Occupied Areas in the Southern Regions', cited in Ike, *Japan's Decision*, 251-2.

military rule increased considerably and was geographically and climatically very different from that in China, where the IJA had a longer history of military engagement.[78] Japanese forces were faced with occupied populations that were culturally and linguistically diverse and about which they knew very little having had only limited pre-war engagement with this region. These territories were also colonies at various levels of institutional development in 1941. While some areas had enjoyed some active participation in government from local populations (e.g. the Philippines and Burma) allowing for a more hands-off approach, in others the existing colonial apparatus struggled to function in the absence of colonial officials (e.g. the Dutch East Indies and British Malaya) necessitating greater involvement from the military administration.[79]

Military strategy in respect to public order included a more collaborative approach with efforts undertaken to cooperate with local elites. Pan-Asian inspired propaganda including promises of 'liberation', 'brotherhood' and an 'Asia for the Asiatics' was also mobilised in an attempt to persuade Asian populations to support the Japanese war effort and endure the temporary burdens of wartime occupation.[80] Like in China, the leadership alluded to longer-term political goals in respect to the construction of the Greater East Asia-Co-Prosperity Sphere (*Dai Tōa Kyōeiken*), though the specifics of this regional plan remained undetermined until 1942.[81] Whilst a conciliatory approach was generally advocated, in policy documents it was also stipulated that local populations must endure the hardships associated with military exploitation of the region and that requests from the perspective of pacification would be permitted only to the extent that they would not hamper military objectives.[82] In other words, military goals would take priority.

More so than in China, the military justice system was utilised to uphold occupation policies as the scope of martial law imposed by the Southern Army (the senior command authority in this theatre) was expanded to include a range of acts which might hinder economic objectives (e.g. obstructing the production and circulation of goods, throwing the financial and economic markets into disarray, making abnormal profits, destroying or concealing clothing, provisions, livestock, fuel and other items of military importance

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[78] Mark R. Peattie, 'Nanshin: The "Southward Advance," 1931-1941, as a Prelude to the Japanese Occupation of Southeast Asia' in Peter Duus, Ramon H. Myers and Mark R. Peattie (eds) *The Japanese Wartime Empire, 1931-1945* (Princeton University Press 1996), 189-242.

[79] Gregg Huff, *World War II and Southeast Asia: Economy and Society under Japanese Occupation* (Cambridge University Press 2020), 74; for overview of different approaches taken to military administration, see Iwatake Teruhiko, *Nanpō gunsei ronshū* (Gan'nandō Shoten 1989).

[80] Ken'ichi Goto, Tensions of Empire: Japan and Southeast Asia in the Colonial and Postcolonial World (Eng edn, Ohio University Press 2003), 77-103; Nakano Satoshi, Japan's Colonial Moment in Southeast Asia 1942-1945: The Occupiers' Experience (Routledge 2019).

[81] For a detailed overview, see Jeremy Yellen, *The Greater East Asia Co-Prosperity Sphere: When Total Empire met Total War* (Cornell University Press 2019); Hatano Sumio, *The Pacific War and Japan's Diplomacy in Asia* (Eng edn, Japan Publishing Industry Foundation for Culture 2021).

[82] 'Essentials of Policy' in Ike, *Japan's Decision*, 251-2 and Nanpō sakusen ni tomonau senryōchi tōchi yōkō, Shōwa 16-nen 11-gatsu 25-nichi', JACAR Ref.C12120137500, in *Gun meirei oyobi jōsei handan-sho genbun mata wa utsushi teishutsu yōkyū no ken kaitō Shōwa 16-nen, 11-gatsu 15-nichi – Shōwa 20-nen 1-gatsu 27-nichi* (Bōei-shō, Bōei kenkyū-jo).

to avoid commandeering by military authorities, as well as any other acts of resistance to military policies). Violating prohibitions issued periodically by army commanders was also punishable under martial law. These prohibitions imposed understandable constraints in the form of curfews, restrictions on movement and bans on the possession of weapons and long-range communication devices. However, they also enabled greater levels of military control over daily life in occupied territory. To give a few examples: wages and prices were fixed, the sale and consumption of goods was regulated, a rationing system (inc. electricity and water in some areas) was imposed, and every household was obliged to register and report their property, including quantities of important supplies such as fuel or rice. Civilians were also required to keep their houses tidy, to receive compulsory inoculations and to follow strict guidelines regarding other quotidian matters, like waste disposal.[83]

For the most part, however, the system functioned in the same manner as in China and regulations were largely identical to those in force on the continent in 1941, with three key exceptions. Firstly, Imperial subjects became punishable under the same regulations as other civilians, though if the act was also punishable under Japanese legislation, Japanese civilian law should take precedence.[84] This was part of a more concerted effort to restrain the behaviour of 'delinquent overseas residents' which was seen to be undermining Japan's image as self-proclaimed leader of Asia. Occupying armies enacted a range of other supplementary regulations to improve the discipline of Imperial subjects, including rules for deportation and, in the Philippines, summary judgement of trivial acts, like face-slapping, public nudity and drunk and disorderly conduct.[85] Secondly, likely reflecting the added logistical challenges and pressure on the military justice system in this region, violations of martial law could be tried in existing local courts or in specially established military administration courts (*gunsei hōin*) as deemed expedient or necessary.[86] Military administration courts were convenient because, while overseen by the military (ideally by legal officers), they could be staffed by local officials and judicial staff instead of military personnel.[87] To facilitate this, army commanders could enact administrative orders and supplementary regulations to limit the discretion afforded to local judges given the flexible nature and wide scope of martial law.[88] Military advisors

[83] Examples of proclamations in Singapore can be seen in: *The Good Citizen's Guide* (Shōnan Shinbun 1943) and in the Philippines in: *The Official Journal of the Military Administration in the Philippines* (hereafter *Official Journal*), 12 Vols. (Manila Shinbun-sha 1942-3).

[84] 'Nanpō-gun gunritsu', JACAR Ref.C14020744000, in *Dai 14-gun gunpō kaigi kankei shorui tsudzuri, S16.12.27 – 19.3.29* (Bōei-shō, Bōei kenkyū-jo).

[85] For example: 'Hi-ken-kei dai 126-gō: Furyō hōjin sōkan ni kansuru ken tsūchō, Shōwa 17-nen 12-gatsu tsutachi, ta', JACAR Ref.C14020743200, in *Dai 14-gun gunpō kaigi*, 1376-9 and various regulations in *Dai 16-gun hatsu raikan tsudzuri (gunritsu kankei)*, (Bōei-shō, Bōei kenkyū-jo), 2290-4, 2537-48, 2690-4; for regulations on summary punishment, see 'Watari-hō dai 81-gō: Watari shūdan hōjin hii sokketsu shobun-rei seitei no ken tsūchō, Shōwa 18-nen 5-gatsu yokka, ta' JACAR Ref.C14020743500, in *Dai 14-gun gunpō kaigi*.

[86] JACAR Ref.C14020744000, Art. 1.

[87] On this see regulations and correspondence about military administration courts in *Dai 16-gun hatsu*, 2314-6, 2361-8.

[88] For discussion of this provision, see *Dai 16-gun hatsu*, 2413-4.

were also assigned to supervise the adjudication of cases and local judges and prosecutors were advised to follow military principles of justice which emphasised the 'speedy resolution' of cases, the greater 'culpability' of crime in wartime and the important deterrent function of severe punishments.[89] Thirdly, as a means of further reducing the burden on military commissions, civilians were made collectively responsible for each other's conduct through the establishment of neighbourhood associations (*tonari-gumi*) which enforced self-policing and provisions under martial law that permitted the imposition of fines upon corporations, associations or organisations, in addition to the joint punishment of representatives of such, when one of their members committed an offence in connection with their business.[90] While it was acknowledged that international law technically prohibited collective punishments (*renza-batsu*), they had long been viewed as an effective preventive measure.[91]

The observable differences between martial law and the military justice system in China and Southeast Asia are representative of the greater precedence given to military objectives at this time, in addition to the practicalities of administering justice in a much larger, more diverse region using a system that was already overstretched prior to the expansion of conflict in 1941. This situation became even more tenuous as fighting continued and progressed badly for Japan.

3.2 The Radicalisation of Judicial Practice

After a series of military failures, beginning with the Battle of Midway in June 1942, the Japanese military found itself on a defensive footing as Allied powers began counter-offensives in the Pacific Theatre. Bombardment and submarine activities saw transportation and communication lines compromised, making it increasingly difficult to reinforce troops and to transport vital supplies to occupied territories which had a particular impact in areas that were dependent on imports for food and other basic necessities.[92] In 1943, the leadership turned again to more political solutions. Burma and the Philippines were, for instance, granted (nominal) independence later that year and an international conference of Asian leaders was held at which a joint declaration of mutual cooperation

[89] For example, see a speech to Malayan judges and magistrates in 1943 quoted in Paul Kratoska, *The Japanese Occupation of Malaya: A Social and Economic History* (University of Hawaii Press 1997), 77-9 and instructions regarding the Department of Justice printed in *The Official Gazette of the Japanese Military Administration of the Philippines,* Vol. 1(2) (Philippine Executive Commission 1942), 39.

[90] JACAR Ref.C14020744000, Art. 13; regulations outlining the neighbourhood associations in the Philippines are in *Official Gazette*, Vol. 1(8), 441-4; for the system in Malaya, see Kratoska, *Japanese Occupation of Malaya*, 79-83; and for Java see Peter Post et al. (eds), *Encyclopedia of Indonesia in the Pacific War* (Brill 2010), 106-8.

[91] *Yasen kenpei*, 93; on the approach to the use of collective punishments in the Russo-Japanese War, see Ariga Nagao, Extracts from La Guerre Russo-Japonaise au Point de Vue Continental et le Droit International: d'après les Documents Officiels du Grand État-Major Japonais (Division of International Law of the Carnegie Endowment for International Peace, 1942), 10-15.

[92] Discussed, for example, in Huff, *World War II*, 247-304.

and determination in the liberation of the region was made.[93] Deteriorating living standards, however, undermined the rhetoric of co-prosperity and unfavourable developments on the war front saw unrest increase across the region as local populations anticipated Japanese defeat. The military justice system came under increasing strain due to an apparent rise in subversive, underground activities at a time when numbers of adequately trained legal personnel were declining, logistical difficulties in transferring defendants to courts were rising and manpower and resources were increasingly redirected towards defensive operations.[94] In response to such challenges, commanders adopted more summary, extra-judicial procedures in some instances.

In Java, for instance, due to an alleged increase in sabotage, espionage and other anti-Japanese conspiracies, *kenpei* had been instructed in July 1943 to carry out mass arrests of suspected conspirators prior to an anticipated Allied attack on the island as part of an operation referred to as the '*ji* operation' (*ji kōsaku*).[95] Investigations had been mostly completed by the end of September 1943 and arrests were then made from 1 November. According to the *Nihon kenpei seishi*, the official history of the *kenpeitai*, there had been too many suspects for the courts to handle as swiftly as the wartime situation demanded, *kenpei* suffered time constraints and the usual judicial process was hindering efforts to quash anti-Japanese activities.[96] Thus, another operation, the '*ki* operation' (*ki kōsaku*), was put into effect. As part of this operation, detailed in a post-war statement made by Major Katsumura Yoshio, commander of a *kenpei* squad at Bogor, *kenpei* were ordered to report their investigations directly to army headquarters with a recommendation for punishment (summary execution). After reviewing the case, headquarters would give permission to proceed and, as a result, Katsumura estimated that around 239 persons were executed without a formal trial process.[97] The operation continued until January 1944, after which more arrests were made and the usual military legal procedures resumed.[98]

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[93] On the conference, see Hatano, *The Pacific War*, 243-86; Yellen, *Greater East Asia*, 141-68.

[94] Described in *Dai 16-gun hatsu*, 2594-6.

[95] It is questionable whether the reported concerns of the *kenpei* had much basis in reality, for discussion, see Louis de Jong, *The Collapse of Colonial Society: The Dutch in Indonesia during the Second World War* (KITVL Press 2002), 219-25. 'Anti-Japanese Activities in Java' available online at the Netherlands Institute for War Documentation (NIOD) Archives: <https://proxy.archieven.nl/298/21FE75B1004087C9E0538A77ABC22FE9> accessed 27 September 2024, 6-7.

[96] *Nihon kenpei seishi*, 1031-3; an English translation can be located in Barbara Shimer and Guy Hobbs (trns.) *The Kenpeitai in Java and Sumatra: Selections from the Authentic History of the Kenpeitai* (Cornell University Press 1996), 32-40.

[97] 'Interrogation of Maj. Katsumura Yoshio' available at the NIOD Archives: <https://proxy.archieven.nl/298/21FE75B101B487C9E0538A77ABC22FE9> accessed 22 April 2024.

[98] 'Anti-Japanese Activities in Java', 6-7; on the processing of cases in January and February 1944, see 'Survey of Arrests of Underground (Intelligence) Personnel and Communists' available online at the NIOD Archives: <https://proxy.archieven.nl/298/21FE75B1199087C9E0538A77ABC22FE9> accessed 22 April 2024.

In testimony given during Katsumura's trial for the execution of three Australian prisoners of war under the procedures adopted during the '*ki* operation', Lieutenant General Harada Kumakichi (commander of the 16th Army stationed in Java) confirmed Katsumura's claims that the accused had received a 'trial by document' prior to execution. He explained that, with sanction from the Commander-in-Chief of the Southern Army, Count Terauchi Hisaichi, he had made a temporary amendment to the enforcement of regulations to permit trials in absentia carried out during the '*ki* operation' due to the extraordinary circumstances in Java at the time.[99] Katsumura was subsequently found not guilty by the Australian military court, though was later prosecuted and sentenced to death for his involvement in 'systematic terrorism and unlawful executions' of civilians during the same operation by the Dutch.[100] Since Harada and Katsumura's testimony during trial conflicted with their earlier statements, and court records for the 16th Army and *kenpei* reports on operations in 1943/4 held in Japanese military archives remain closed to the public, it is difficult to determine whether this framing of the '*ki* operation' as the product of a formal change to regulations is accurate, particularly so since it is depicted as a temporary sanctioning of the previously discussed practice of '*genjū shobun*' in the *Nihon kenpei seishi*. However, it is clear that between July 1943 and January 1944, the military justice system had been bypassed in Java as a means of expediting the handling of, and thereby suppressing, alleged conspiracies.

A similar approach was also undertaken in New Guinea in 1944. According to the precis of evidence during the trial of Lieutenant General Itō Takeo, commander of the 40th Independent Mixed Brigade based on New Ireland, the *kenpei* were ordered to investigate possible espionage activity and had made a large number of arrests over the course of the year. Since the nearest military commission was at the headquarters of the 8th Area Army in Rabaul, New Britain and transportation between islands had become dangerous due to intensive bombardment, Itō had adopted what he referred to as 'quasi-judicial proceedings'. According to his testimony, this had involved the investigator submitting a report to Captain Ōtsuka Masanori, commander of the *kenpei* squad on the island, who reviewed it before submitting to Itō via his chief of staff, Lieutenant Colonel Satō Tadahiko who also examined the strength of the case. Itō then reviewed the case and gave orders to either release or punish the offender with execution or whipping. Although uncertain of the exact numbers, the accused estimated that around 40 civilians were executed following this procedure. It was rationalised as the only possible recourse available due to serious logistical challenges, the lack of a legal department and the shortage of *kenpei* (reportedly the squad was composed of just 6 to 8 men) in this remote region

[99] NAA: A471, 81241: War Crimes Proceedings of Military Tribunal – Maj. Katsumura Yoshio and Others, 63-5.

[100] Fred Borch, Military Trials of War Criminals in the Netherlands East Indies, 1946-1949 (OUP 2017), 124-5.

which made referral to a military commission impossible and the maintenance of custody problematic at this juncture in the war.[101]

Practical considerations also led to the adoption of more streamlined and extrajudicial procedures in the Philippines toward late 1944 and early 1945. The circumstances in the islands had been very different from those in other areas of Southeast Asia. The Filipino people had already been granted independence (to come into effect in 1946) and were generally less receptive to the military's pan-Asian overtures.[102] Fierce guerrilla resistance had emerged across the islands in mid-1942 and remained a problem for the duration of the occupation.[103] When US forces landed at Leyte in October 1944 and began the campaign to retake the islands, Japanese forces anticipated that guerrillas and their civilian sympathisers would assist.[104] Alongside ongoing defensive preparations and subjugation operations, *kenpei* were ordered to carry out extensive arrests of suspects in and around Manila. As a result, hundreds of suspects were subsequently detained in Fort Santiago, *kenpei* headquarters, and with cells already at capacity prior to this wave of arrests, between 400-500 detainees were reported as later suffocating due to overcrowding.[105] According to the testimony of Colonel Nishiharu Hideo, head of the 14th Area Army Legal Department, trying the remaining prisoners through the usual judicial process had presented a dilemma because army headquarters (and with it the legal department) had been planning to retreat from Manila to the mountains of Baguio at the end of December 1944. Nishiharu alleged that after consultation with General Yamashita Tomoyuki and his chief of staff, Lieutenant General Mutō Akira (both of whom denied this in court), it was decided that streamlined trials in the presence of one legal officer acting as prosecutor and one acting as judge would be conducted to swiftly adjudicate these cases.[106] He estimated that around 600 persons were executed following such procedures. While incomplete, surviving court documents from December 1944 captured by American forces support Nishiharu's claim that guerrilla suspects were judged and sentenced to death by just one legal officer.[107]

Summary executions were subsequently sanctioned in March 1945 with *kenpei* units across the Philippines receiving orders that, for the time being, violators of martial law

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[101] Account summarised based on transcripts and statements in NAA: A471 81030 - *War Crimes Proceedings of Military Tribunal – Lt. Gen. Ito Takeo and Others*.

[102] Gotō, Tensions of Empire, 89-93.

[103] For an overview of the security situation in the Philippines, see: Tachikawa Kyōichi, 'The Japanese Army's Measures against Guerrilla Activities in the Philippines in the First Half of the Pacific War' (2022) *2 Security and Strategy*, 99-116.

[104] Hayashi Hirofumi, 'Nihon-gun no meirei/denpō ni miru Manira-sen' (2010) *48 Jizen ningen shakai*, 69-95.

[105] Ishida Chūshirō, *Aru kenpei kashikan no zakkicho* (Yūbunsha Shuppan Kikakushitsu 1990), 144-8; Satake Hisashi, *Hōfutsu taru Ruson sensen* (Misaki shobō 1973), 129-30.

[106] Discussed in *USA vs Tomoyuki Yamashita*, Public Trial Vol. 30, beginning at 3760, available online at < https://www.legal-tools.org/doc/f9dbd4/> accessed 22 April 2024.

[107] Court Material (Japanese military court); Records of the General Headquarters Supreme Commander for the Allied Powers (SCAP), Records of the SCAP Legal Section, Investigation Division — Entry 1362: Miscellaneous File, 1945-1949; National Archives and Records Administration, College Park, MD.

were not to be referred to the military commission, unless there was a political reason for doing so. Instead, offenders were to be released or given 'severe punishment' (*genjū shobun)*.[108] This was not meant as a *carte blanche*. Instructions on the matter issued by the headquarters of the Philippines *Kenpeitai* stressed that this was a temporary, but necessary measure in view of the circumstances then prevailing in the islands. The instructions warned that summary executions could make the public more hostile to Japanese forces, becoming potentially detrimental to military activities and defence policy. Summary executions, therefore, were to be carried out only when unavoidable, such as during military subjugation (*tōbatsu*) operations and, prior to taking such action, a summary of the offence and intended measure must be reported and permission obtained from the army commander.[109]

By May 1945, the worsening wartime situation was such that the Southern Army enacted a formal change to trial regulations in order to address mounting practical challenges to the administration of justice. In a notification circulated by the Southern Army Legal Department to inform subordinate armies of the changes and clarify the reasoning behind such, it was explained that because war had entered a 'decisive phase' (*kessen dankai*) and the situation was especially serious, the judicial process was to be simplified to alleviate obstacles to the prompt handling of cases, the number of which was expected to grow as Allied offensives in the region continued.[110] Due to difficulties in transportation and a reduced number of trained legal experts at this stage of the conflict, regular officers could replace legal officers in their role as judges and prosecutors. Trials in absentia based upon documentary evidence were also permitted if it proved impossible to transfer defendants to the military commission, so long as the punishment was not expected to be a death sentence. Where legal officers were present, they were permitted to pass judgements without convening a court in cases in which the sentence was expected to be equal to or lower than ten years confinement. To ease administrative burdens caused by paperwork and what was perceived to be 'red tape', rules for detailing evidence, for notifying defendants of sentences and for transmitting enforcement orders were substantially abridged. Provisions permitting local courts to adjudicate violations of martial law were also removed to simplify the classification of cases.[111] Instructions on the implementation of the new regulations strongly emphasised military necessity, reasoning that it had become extremely difficult for the judiciary to carry out its normal functions and that in the current tense situation, exceptional measures were required to expedite the handling of cases, as well as to save human and material resources. At this point, little consideration was given as to upholding or safeguarding civilian rights within this much streamlined judicial process.

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[108] See notification on the matter in *Kabanatsuan kenpei buntai keimu raikan tsudzuri* (Bōei-shō, Bōei kenkyū-jo), 0714.
[109] 'Keimu shiji dai 1-gō' in *Kabanatsuan kenpei*, 0700-1.
[110] Dai 16-gun hatsu, 2594-5.
[111] Dai 16-gun hatsu, 2579-83.

4 Conclusion

From the outset, the military justice system established by the IJA during the Asia-Pacific War prioritised military needs and interests. Flexibility and speed were central to the handling of cases and, as a result of wartime adjustments, the judicial safeguards embedded within the peacetime court martial system, upon which military justice for civilians was based, did not apply. This meant that legal rights were not protected at an institutional level. Instead they were to be upheld in the field at the discretion of those responsible for the administration of justice; in other words, the commanders who were empowered to enact or modify regulations according to perceived military needs, as well as the *kenpei* and the legal officers who enforced those regulations and, in so doing, made 'life or death' decisions to the advantage of the military. Though framed primarily in respect to the potentially detrimental impact on public order that injustice or mistreatment of 'innocent' persons might have, orders, instructions and guidance issued to those at the heart of the military justice system over the course of the war did nevertheless refer to the need to conform to international law, to respect human rights and to strike a balance in judgements. However, guidance also stressed the primacy of military interests and set parameters of acceptable conduct which, in certain 'unavoidable' or 'necessary' circumstances, tolerated extrajudicial practices. The tendency toward utilising summary judicial measures became more pronounced as the system became increasingly overwhelmed and struggled to function effectively in view of ongoing logistical challenges. While civilian rights were not disregarded completely and, even under dire circumstances toward the end of the war, army commanders continued to try to afford civilians some form of streamlined judicial process, if not a formal and fair trial by contemporary standards, they were progressively subordinated to military interests and civilians were deprived of life and liberty with no real recourse for justice as we would understand it today.

Military justice is an essential aspect of a nation's defence system, rooted in a rich historical context that is intertwined with wider legal, political and social developments. Its importance has increased in the 21st century due to the changing nature of war, the need to protect civilians, the need to deal with misconduct by soldiers and to protect victims. It is essential to understand the historical development of military justice in order to grasp its complex legal and ethical dimensions, and avoid past mistakes.

Military justice serves to address misconduct within the armed forces, and to ensure discipline and compliance with ethical and international standards. Ongoing training in military law is mandatory to prevent illegal actions and foster a culture of respect for legal standards. One of the main objectives of military justice is also to protect civilians during armed conflicts. International humanitarian law, including the Geneva Conventions, requires the protection of non-combatants, and military justice systems help to ensure compliance with these laws. Investigating and prosecuting violations, particularly those that endanger civilians, helps to ensure accountability and maintain the legitimacy of military operations. In the same way, advances in military technology, such as the use of drones and artificial intelligence, pose new challenges for military justice. Legal frameworks must evolve to take account of legal and ethical implications of these technologies. Additionally, warfare has significantly transformed in recent years, with cyber warfare, private military companies and counter-insurgency operations. Finally, contemporary military operations often involve coalitions of multiple countries, requiring harmonized approaches to military justice to ensure consistency across different legal systems.

The International Military Justice Forum (IMJF) provides a platform for global discussions on military justice, bringing together academics, practitioners, and military personnel. It fosters comparative analysis of international military justice systems and explores their historical and current evolution.
This volume brings together major contributions to the 2nd International Military Justice Forum, which convened on 8 and 9 November 2023 in Stellenbosch, South Africa.

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ISBN 978-90-466-1277-4