Urs Matthias Zachmann

Heart of Darkness: Japanese Military Justice on the Road to Nanjing, 1937

Introduction

Law and violence are often seen as archetypical opposites. Law is supposed to act as a "gentle civiliser" in armed conflicts between nations and, for that matter, in domestic strife at home.[1] But what if law *is* violence, either by structuring the better and more efficient use of force or by constituting a form of law itself?

Classical theories see law as an external constrain on violence, limiting its legitimate use, whether by the state against the individual or by citizens amongst each other.[2] Of course, this idea of law arises from a situation of internal peace, where there is a monopoly of power and the use of force is only ever considered in exceptional circumstances.[3] The application of the same concept of law to the international arena has thus increasingly been criticised as an "enchanted" view of law,[4] as no such monopoly of power exists among nations nor, necessarily, peace. Particularly in a state of armed conflict, where violence is the default state and protection from it the exception, law becomes an integral part of this violence by structuring its legitimate form rather than limiting it. Early codices of the law of war (*ius in bello*) already recognised this inverted situation under the heading of "military requirements", most famously in the preamble to the 1907 Hague Convention (IV) and its so-called Martens Clause, which provides for exceptions to military violence even in the absence of specific rules for certain groups (civilians and prisoners of war).

As the codification of military law has progressed since then, both at the domestic and international level, the high density of legal standardisation of military violence has recently led to the notion of so-called "lawfare", indicating the

1 See Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: Cambridge University Press, 2002).

2 Ian Hurd, *How to Do Things with International Law* (Princeton, NJ: Princeton University Press, 2017), 4, 11, citing Locke.

3 On the exercise of power under the principle of rule of law, see Tim Bingham, *The Rule of Law* (London: Penguin Books, 2010), 60–65; on rule of law in the international order, see Hurd, *How to Do Things*, 110–129.

4 Hurd, *How to Do Things*, 11.

https://doi.org/10.1515/9783110989588-009

extent to which legal planning and interpretation has become an integral part of modern warfare.[5] While military law still retains its original function as a "permissive constraint" in this process, notorious examples since the 1990s of an overly generous and sophistical interpretation of its rules demonstrate that it can be, and all too often is, used to create "plausible legality", i.e. a thin veneer of legitimacy for otherwise blatant abuses of military force.[6] This is not entirely new, and it has been argued, in the case of the Philippine-American War (1899–1902) for example, that international legal interpretation has long been an integral part of imperial wars.[7]

Given the often mercurial nature of legal interpretation, it is clear that military lawyers – practitioners of military law in any professional capacity – play a central role in mediating law and military violence. Thus, rather than looking at the law itself in isolation, its true meaning can only be grasped by taking into account the professional and collective identity of military experts, as well as their personal idiosyncrasies in individual cases.[8] The focus of this sociological approach to military law is therefore the "habitus" of these legal experts, which could be defined as the sum of the professional, social and cultural attitudes and practices common to this group within the specific power constellations in which they work.[9] This habitus gives lawyers cohesion as a group and confers on them a particular authority, centred on Max Weber's notion of "formal rationality",

5 The term "military law", while non-technical, is used here to subsume all laws and regulations – domestic and international – that govern the rights and duties of national military forces and their members in the execution of their functions. See David Kennedy, "Lawfare and Warfare," in *The Cambridge Companion to International Law*, ed. James Crawford, Martii Koskenniemi and Surabhi Ranganathan (Cambridge: Cambridge University Press, 2012): 158–184.

6 Rebecca Sanders, "(Im)Plausible Legality: The Rationalisation of Human Rights Abuses in the American 'Global War on Terror,'" *The International Journal of Human Rights* 15.4 (2011): 605–626.

7 Will Smiley, "Lawless Wars of Empire? The International Law of War in the Philippines, 1898–1903," *Law and History Review* 36.3 (2018): 511–550.

8 For recent studies of the role of military lawyers (albeit exclusively focused on the US-American context), see e.g. Craig Jones, *The War Lawyers: The United States, Israel, and Juridical Warfare* (Oxford: Oxford University Press, 2021); Fred L. Borch, *Judge Advocates in the Great War* (Washington DC: The Judge Advocate General's Corps, US Army, 2021); Bernard J. Hibbitts, "Martial Lawyers: Lawyering and War-Waging in American History," *Seattle Journal for Social Justice* 13 (2014): 405–458; Fred L. Borch, *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti* (Washington DC: Office of the Judge Advocate General and Center of Military History, 2001).

9 Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings Law Journal* 38.5 (1987): 814–853.

which creates general consent to the particular application of the law.[10] This authority *qua* formal rationality is particularly, even existentially important for the legal profession that typically operates in a situation of constant chaos and disorder, namely, military lawyers in combat.

Military jurisprudence during and around the Nanjing Massacre would be a particularly fertile ground to test these observations historically. The Second Sino-Japanese War (1937–1945) has been described as "the most enormous, expensive and deadly" conflict ever fought by Imperial Japan and the Nanjing Massacre of December–January 1937 as the most notorious event of its early phase, which set the pattern for many acts of mass violence yet to come.[11] However, despite the intense historiographical scrutiny that the event itself has received, many aspects of it still remain unclear, most notably the actual causes of the massive escalation of violence on the way to and in the city of Nanjing. Historians agree that no single cause could account for it, but rather a multitude of factors.[12] Among the causes mentioned are the breakdown of logistics, the unexpected fierce resistance of the Chinese Nationalist and Communist forces, the high number of casualties on the Japanese side (albeit much higher on the Chinese side still) and the resulting thirst for revenge and the brutalising effect of these battles on the surviving soldiers, as well as a lack of discipline or even outright insubordination.[13] Moreover, the crimes had not only begun in Nanjing, but had already started on the way there, so that the carnage in the city was only the final crescendo of a movement that had begun much earlier.[14]

10 Bourdieu, "Force of Law", 825; Richard Terdiman "Translator's Introduction: The Force of Law," *Hastings Law Journal* 38.5 (1987): 809.

11 Akira Fujiwara, "The Nanking Atrocity: An Interpretive Overview," in *The Nanking Atrocity, 1937–38: Complicating the Picture,* ed. Bob Tadashi Wakabayashi (New York, NY: Berghahn Books, 2007), 33. See also Daqing Yang, "Convergence of Divergence? Recent Historical Writings on the Rape of Nanjing," *The American Historical Review* 104.3 (1999): 842–865; Joshua A. Fogel (ed.), *The Nanjing Massacre in History and Historiography* (Berkeley, CA: University of California Press, 2000); Wakabayashi, *The Nanking Atrocity*. Note: Japanese names in the main text are given in the traditional order, i.e. family name first; for bibliographic data, however, all names are given with the family name last.

12 Daqing Yang, "Atrocities in Nanjing: Searching for Explanations," in *The Scars of War: The Impact of Warfare on Modern China*, ed. Diana Lary (Vancouver: UBC Press, 2001), 93.

13 Satoshi Hattori (with Edward J. Drea), "Japanese Operations from July to December," in *The Battle for China: Essays on the Military History of the Sino-Japanese War of 1937–1945*, ed. Mark Peattie, Edward Drea, and Hans van de Ven, (Stanford, CA: Stanford University Press, 2011), 179 with further references.

14 Fujiwara, "Nanking Atrocity," 34.

In light of this, a study of military justice on the road to Nanjing and the habitus of the military lawyers involved would be a compelling choice. Historically, research on Japanese military justice has been hampered for a number of reasons, among which the prohibitive scarcity of archival sources has been an important one.[15] But this does not apply to the Nanjing case, as many important military justice sources have been preserved and subsequently published, albeit under unusual circumstances. When the military lawyer Ogawa Sekijirō (1875–1966) was appointed Head of the Tenth Army Legal Department in October 1937 and went with his army to Nanjing, Ogawa made a private copy of the official field diary (*jinchū nisshi*) of the Tenth Army Legal Department as well as of most of the court martial verdicts (*hanketsu-sho*) handed down during his time there. These copies were published posthumously in a source volume in 1982.[16] Ogawa also kept a private diary of the events, which was also published after his death under the title "The diary of a certain legal officer".[17]

These materials, the public and private records combined, provide a rare insight into the practices of Japanese military justice at a most crucial juncture of the Sino-Japanese War, as well as into the attitudes of one of the most distinguished legal officers of the Japanese army at the helm of these affairs. Such a study would shed light on one of the central questions raised above, that is, the extent to which military justice was a factor in condoning or contributing to the escalation of violence on the road to Nanjing (or, on the contrary, played a mitigating, "civilising" role).

Of course, more research beyond this is needed: not only, for example, on the practices of the Shanghai Expeditionary Army Legal Department to clarify this question for Nanjing, but also on other legal departments throughout the war in order to contextualise and truly establish something like a general habitus of Japanese military lawyers during the war. In this sense, the present micro-study is only a first contribution to this endeavour. But as such, it should also provide ad-

15 Yutaka Yoshida, "Fukuinkyoku / rikugun gunpō kaigi haishi ni kan suru tenmatsu-sho," *Sensō sekinin kenkyū* 37 (2002): 77–86; Hiroaki Kita, "Gunpō kaigi no bunken ni kan suru mondai," *Gunji shigaku* 145 (2001): 101–106. This situation has been remedied in the recent decade, as many files have been transferred into the collection of the National Archives, see Kei Nakano, "Gunpō kaigi to 'Gunpō kaigi kankei bunsho' ni tsuite," *Kitanomaru* 53 (2021): 81–106. However, a number of important sources are still being kept under seal at the National Institute for Defense Studies.

16 For the field diary, see "Dai jū-gun hōmubu jinchū nisshi," in *Gunji keisatsu*, ed. Masae Takahashi (Tokyo: Misuzu shobō, 1982), 1–119; for the verdicts, see also Takahashi, *Gunji keisatsu*, 149–182. Ogawa's copy of the field diary is now stored at the Amashi Miwa rekishi minzoku hakubutsukan at Nagoya. The original field diary is housed at National Institute for Defense Studies, Tokyo, but is not open to the public.

17 Sekijirō Ogawa, *Aru hōmukan no nikki* (Tokyo: Misuzu shobō, 2000).

ditional historical data to address a more general question, namely, the complex relationship between law and military violence in armed conflict, as well as the central role of military lawyers in mediating between the two seemingly antagonistic poles.

In order to answer the question of whether military justice contributed to the escalation of military violence towards and in Nanjing, the next sections, after a brief introduction to the historical background, will first take a closer look at the attitudes of Ogawa Sekijirō as the leading figure in the group of military experts who went to Nanjing. In a third part, we will examine how these attitudes, being likely part of a more general habitus, impacted on the actual practices of the Tenth Army Legal Department.

1 Historical Background: The Japanese Military Justice System, Ogawa's Career, and the Outbreak of the Second Sino-Japanese War

The history of military justice in Japan is as old as its modern military services. The new government of the Meiji era (1868–1912) was quick to establish disciplinary institutions for its newly created army and navy in the 1870s. Considering that the new leadership had itself come into power by a coup d'état among the old warrior class (the "Meiji Restoration" of 1868), it is not surprising that they placed a premium on discipline within the new army. After all, military justice not only serves to enforce compliance of soldiers in wartimes abroad, but also to deter from revolts in peacetimes.[18] However, the new elite was only moderately successful in doing so, as the ebb and flow of political assassinations and unrest originating from the military during the course of modern Japanese history shows.[19]

As Tino Schölz in this volume traces the institutional development of the Imperial Japanese Army's justice system in detail, let it suffice here to just highlight the position of the legal expert in this system. Already from the beginning of the Japanese courts martial system in the 1880s, procedural law based on the French model provided for a legal expert, the so-called auditor (*riji*), who held civilian status and was merely there to advise and aid the judges, all of them military offi-

18 Rain Liivoja, "Military Justice," in *The Oxford Handbook of Criminal Law,* ed. Markus Dübber and Tatjana Hörnle (Oxford: Oxford University Press, 2014), 329.

19 Cf. Danny Orbach, *Curse on This Country: The Rebellious Army of Imperial Japan* (Ithaca, NY: Cornell University Press, 2017).

cers, in their decisions. Thus, except for a brief period, the auditor was never part of the military court himself. This changed in 1922 when, after mounting critique from the public, the system was revised and "professionalised". The latter intention particularly manifested in the new role of the legal experts as "legal officers" (*hōmukan*) who structured legal procedure in that they in turn conducted preliminary investigations, acted as prosecutors, and sat as one of five judges (in wartimes three judges) on the bench. A legal department (*hōmubu*) attached to an army or military unit thus regularly had three legal officers so that each could assume one of these functions in a single case. However, they were still outsiders in the military since they continued to hold the status of civil servants (*bunkan*). This also showed in their uniform, with its white gorget patches and white hat ribbons, and their not having the right to carry arms, even in wartime at the front.[20] As legal officers were appointed for life, they were given some independence and protection from interference. This consequently changed in 1942, when legal officers were made regular military officers and thus became subject to military command. Although the shift may have been dramatic from an individual perspective, one could argue that from a procedural point of view this did not change much. Tino Schölz in his chapter has demonstrated that the Japanese military justice system made no exception to the global standard of its time in that it was highly commander-centred throughout: Commanders appointed the prosecutors and judges, confirmed the court judgements, and had the power to close the case before it even came to an indictment. The figure of the commander as an "overlord" of legal officers thus looms large in Ogawa's case.

When war broke out in China in 1937, Ogawa Sekijirō was an experienced and highly esteemed military lawyer already near the end of his illustrious career.[21] Born in Aichi Prefecture in 1875, from early on Ogawa developed a liking for literary composition (especially *haikai*), a fact which might explain his decision to keep such a vivid and detailed journal of his wartime experiences. He entered Meiji University Law School in Tokyo in 1898 and was appointed legal trainee at the Yokohama District Court in 1904. At that point, Ogawa was still on course to become a judge in the general court system, and his next postings at various district courts followed this pattern. However, in 1907, he was appointed by the Army Ministry as a member of the legal department of the 16th Division in Kyoto and thus, effectively, became a military auditor (*riji*) in the system de-

20 Shin'ichi Nishikawa, "Gun-hōmukan kenkyū josetsu: Gun to shihō no intāfēsu e no sekkin," *Seikei ronsō* 81.5/6 (2013): 154; Ogawa, *Aru hōmukan*, 43.

21 For biographic information on Ogawa and his career, see Nishikawa, "Gun-hōmukan," 156–157; Ogawa, *Aru hōmukan,* 205–235; Miwa-machi rekishi minzoku shiryōkan, *Ni-niroku jiken Amakasu jiken Gunpō kaigi saibankan Rikugun hōmukan Ogawa Sekijirō* (Tokyo: Kyōsei, 1999).

scribed above. What triggered this switch from the general to the military justice system, and whether this was even Ogawa's choice, remains unclear. However, during the next thirty years of his career, he stayed on this track and gradually but steadily rose through the ranks to the top of his profession. In 1922, Ogawa was appointed legal officer (*hōmukan*) and judge at the Army Supreme Court Martial (*Rikugun kōtō gunpō kaigi*), thus attaining one of the highest positions as military lawyer in the newly revised system.

Ogawa subsequently participated in many politically charged high-profile cases that dealt with the assassinations and revolt attempts by officers mentioned above. Thus, he sat as judge in the so-called Amakasu Case of 1923 (the killing of anarchists by marauding soldiers in the wake of a big earthquake), the Aizawa Case 1935 (the murder of a high-ranking army bureaucrat by a lieutenant colonel) and, most famous of all cases, the trial of the insurgents of the 26 February 1936 revolt (tried in 1937). All of these cases had in common that many defendants received rather light sentences for their crimes, which critics saw as yet another example of the inefficiency of courts martial to pass judgement among peers, as well as of the creeping co-optation of radical elements in the military by Japanese politics.[22] Whatever the case, the appointment of Ogawa as Head of the Tenth Army Legal Department on the outbreak of the Second Sino-Japanese War in 1937 can only be interpreted as a reward for loyal services rendered. The appointment was particularly prestigious, a sort of quick "victory lap" before retirement, if viewed from the Japanese expectations that the military and the general population had for this conflict in the beginning. This is also reflected in Ogawa's visions of himself as a member of the victory procession returning to Japan.[23]

The Second Sino-Japanese War began with a local skirmish near Beijing in July 1937, and only gradually escalated into full-out war, of which the capture of Nanjing in early December 1937 marked its erstwhile tragic milestone.[24] Originally, Japan only had two large forces stationed in North China to protect Japanese interests and ca. 13,000 citizens residing there, specifically, the China Garrison Army near Beijing and the so-called Kwantung Army in Manchuria.[25] However, since the resurgence of China's Nationalist government in 1928 and the Japanese occupation of Manchuria in 1931, tension had been gradually building up. In a typical security dilemma, both sides considered the other's manoeuvres

22 Shunji Taoka, "Gunji no 'jōshiki' to 'hi-jōshiki'," *Keizaikai* 969 (2012): 114–115.

23 Ogawa, *Aru hōmukan,* 137.

24 For an overview of the early phase of the Sino-Japanese War until December 1937, see Hattori/Drea, "Japanese Operations," 159–180.

25 Edward J. Drea, "The Japanese Army on the Eve of War," in Peattie, Drea and van de Ven, *The Battle for China,* 106.

as preparing for future conflict so that, in the summer of 1937, it was arguably but a matter of time that they would clash. However, on the Japanese side, there never existed a coherent operational policy for such a case.[26] The army leadership constantly quarrelled about proper strategy, with an influential faction arguing that any conflict with China should be met, and won, by quick, small-scale engagements with limited objectives, based upon the traditional military doctrine of *sokusen sokketsu* (rapid battle, decisive victory).[27] However, unlike during the First Sino-Japanese War (1894–1895), the Chinese troops (Nationalist and Communist) put up fierce resistance so that, contrary to initial plans to keep this engagement limited, the Japanese government had to send more and more troops as reinforcements over the course of the following months. Thus, the Japanese general staff mobilised the Tenth Army in late October 1937, composed of three divisions.[28] This army, led by Lieutenant General Yanagawa Heisuke (1879–1945), was the army with which Ogawa subsequently went to Nanjing.

The problem was that, in the absence of a coherent operational policy, there was ample room for discussion regarding which limited objective could most rapidly achieve victory for Japan. On this, field commanders like Yanagawa invariably claimed better knowledge due to their being on the ground.[29] By September 1937 then, commanders pressed to go further into China and, eventually, that capturing Nanjing would be the "one decisive blow" that would force China unto its knees and end the conflict for good.[30] In a pattern that would repeat itself time and again over the course of the following eight years in North and Southeast Asia, the general staff at first baulked at the idea of escalating the conflict but would later approve of it as *fait accompli* or, allegedly, lacking alternatives. Thus, on 15 November 1937, Yanagawa demanded an all-out war to capture Nanjing and unilaterally decided to put his army in motion on 19 November. Since Matsui Iwane (1878–1948), Commander of the Shanghai Expeditionary Army, was also intent on claiming the honour of capturing Nanjing, this set off a race towards the capital for which neither army was logistically equipped in any way. Only on 1 December 1937 did the Army General Staff actually approve the attack on Nanjing, which then took place between 8–13 December 1937.[31] However, against expecta-

26 Drea, "Japanese Army on the Eve of War," 126.

27 Drea, "Japanese Army on the Eve of War," 108, 112.

28 Edward J. Drea and Hans van de Ven, "An Overview of Major Military Campaigns during the Sino-Japanese War, 1937–1945," in Peattie, Drea and van de Ven, *The Battle for China*, 30; Hattori/Drea, "Japanese Operations," 176.

29 Hattori/Drea, "Japanese Operations," 168; Fujiwara, "Nanking Atrocity," 30.

30 Hattori/Drea, "Japanese Operations," 163.

31 Hattori/Drea, "Japanese Operations," 176–179.

tions, this attack and the horrendous carnage that followed did not deliver the "decisive blow". On the contrary, it hardened Chinese resolve and initiated the second phase of the war as a conflict of attrition that would last for another eight years.

2 Attitudes and Factors Shaping the Tenth Army's Judicial Practice on the Road to Nanjing

2.1 The Status of Legal Officers and the Role of Military Justice in the Tenth Army

In order to assess the role of military justice in the campaign to capture Nanjing and its place in the hierarchy of the Tenth Army, we could start by looking at the precise local position of Ogawa's legal department in the Tenth Army's troop formation: it was always at the back, lagging far behind the commander and his staff officers.[32] Ogawa and his small staff always witnessed the war from afar, travelling through roads and landscapes that Yanagawa's troops had long since passed, observing the destruction and horror left behind, as if an anonymous natural disaster had struck the population. Of course, this was the usual case for legal departments, which were not involved in the actual fighting and only witnessed the results of violence, whether legitimate or criminal, after the fact. However, Ogawa's department seemed to have been particularly neglected, and Ogawa often complained about this. Sometimes, even the veterinarian, with whom the legal department was usually billeted, received orders to move forward earlier than the legal department. At one point, Ogawa noted, he had been left behind with the sick and completely defenceless against a guerrilla attack, as they were not allowed to carry weapons.[33] On other occasions, the headquarters would simply move on without informing the legal department, even though Ogawa routinely needed the commander to confirm verdicts or give instructions on how to proceed with a case. This already indicates the priority given to military justice in the Tenth Army.

The association with the veterinarian department gives an additional clue, as it suggests that the legal department was clearly part of the army's "combat service support" and as such looked down upon by the combat troops. It has been

32 Ogawa, *Aru hōmukan,* 59–64.
33 Ogawa, *Aru hōmukan*, 64.

observed with regard to logistics and supply units that these were the least desirable placements and were particularly unpopular with soldiers and officers.[34] This was one reason why logistics remained a constant weakness of the Imperial Japanese Army throughout its history, with dire consequences as we shall see. The same could be said of the legal departments, which were not necessarily the first choice of law school graduates, but rather a "fallback position" in the absence of better options in times of economic hardship (or due to poor exam results).[35]

Compounding this low regard for legal officers as "non-military" outsiders was their status as civil servants (*bunkan*), a fact which Ogawa was keenly aware of and which he cited as of one the reasons for their being discriminated against and treated as a "nuisance".[36] Elsewhere, however, Ogawa stated clearly that this low regard (*keishi*) was more closely related to the work of the legal department itself, which was seen as outside interference.[37] Ogawa had thus lamented the dilemma of the legal officer:

> As for our job, when there are few cases and we have free time, people always say that legal officers are useless and look down on us. But if we have a lot of cases and are busy, this is surely no cause for happiness either, because then we are criticised for being overzealous. Either way, no one is in a more unfortunate position than we are.[38]

This dilemma affected not only the way the legal officers went about their work, but also their psychological disposition. Ogawa at least seemed to compensate for the perceived lack of respect for his department in the eyes of the military by an even more stubborn insistence on status and prestige. He jealously guarded his access to Commander Yanagawa, insisted that he must always be close to his headquarters, and proudly noted in his diary that the commander treated him well, always followed Ogawa's legal recommendations and even addressed him as "excellence" (*kakka*) in front of others.[39] This last detail points to Ogawa's obsession with status formalities, which appears throughout the diary, be it in the concern for the quality of his accommodations that had been taken from rich Chinese, his means of transport (boat or, even more prestigious, plane) or the way people generally addressed him. The latter detail also suggests that those around

34 Edward J. Drea, *Japan's Imperial Army: Its Rise and Fall, 1953–1945* (Lawrence, KS: University Press of Kansas, 2009), 50.
35 Nishikawa, "Gun hōmukan," 158–59.
36 Ogawa, *Aru hōmukan*, 109.
37 Ogawa, *Aru hōmukan*, 85–86, 98.
38 Ogawa, *Aru hōmukan*, 85–86.
39 Ogawa, *Aru hōmukan*, 49.

him did not take him as seriously as he would have liked and probably mocked him for his vanity. In any case, Ogawa's status-consciousness reveals a deep need to be accepted by his military environment which, as we shall see eventually, proved fatal to his understanding of the role of military justice in war.

2.2 Semi-Colonial Attitude Towards China and its People

It has been observed that the attitude of the Imperial Japanese Army was one of contempt and condescension towards China as a modern nation, its army, and its people.[40] This also led its leadership to underestimate the conflict and to expect that all that was needed was a quick and limited military operation to settle the issue.[41] The popular discourse agreed, and Ogawa was no exception. Thus, at the beginning of his diary in October and November 1937, Ogawa noted that with all of Japan's war machinery, its land and sea power, but even more its air power, it would only take one "kick" and China would be finished.[42] This sanguine attitude changed somewhat as the months went by, until the imposition of martial law (*gunritsu*) in the occupied territories and the establishment of "comfort women" stations (*ian setsubi*) signalled that the Japanese army was preparing for a prolonged period of war and occupation.[43]

Nevertheless, Ogawa's general view of the Chinese remained fairly constant. He continued to characterise them as a backward nation of peasants, essentially good-natured and docile, but unfortunately easily misguided by their leadership. Throughout his diary, Ogawa reproduced stereotypes of uncleanliness (for example, that Chinese only bathed once a year) and laziness, such as that early mornings were the safest for the Japanese because Chinese soldiers tended to sleep in.[44] He marvelled at the docility of the Chinese men who were conscripted for transport or other duties, not blind to the fact, however, that they would be "dealt with" (*yarareru*) on the spot at the slightest sign of resistance.[45] Similarly, he took pleasure in the pro-Japanese sentiments of the "good people" (*ryōmin*) who greeted the Japanese army waving Japanese flags and meekly declared their willingness to help, continuing the next sentence with the observation "Of course, all

40 Fujiwara, "Nanking Atrocity," 36, 41.
41 Drea, "Japanese Army on the Eve of War," 133.
42 Ogawa, *Aru hōmukan,* 9, 13.
43 Ogawa, *Aru hōmukan*, 79, 123–124.
44 Ogawa, *Aru hōmukan*, 50, 104.
45 Ogawa, *Aru hōmukan*, 105.

the houses along the way are completely burnt down without exception".[46] Elsewhere he observed that the people in worst-hit areas were the most obedient.[47] This already hints at the fact that the Japanese army viewed all Chinese, especially men of fighting age, as potential enemies or plain-clothes soldiers.[48] The population therefore had an existential interest in proving themselves to be meek and obedient "good people", not out of conviction, but for the sake of survival. Ogawa, too, was in constant fear of plain-clothes soldiers, having likened them to nasty insects, small, but potentially deadly (as carriers of disease).[49] Finally, Ogawa never missed an opportunity to denigrate the Chinese leadership, accusing them of cowardice and greed, betraying their people for material gain (Ogawa reported, for example, the rumour that Chiang Kai-shek had vast sums of money stashed away in foreign bank accounts).[50]

Ogawa also blamed the Chinese leadership for inciting such unreasonable hatred against them among the populace through anti-Japanese education and propaganda.[51] He found this most unfortunate, as what struck Ogawa most about China was how perfectly suited it appeared to be as a *Lebensraum* for Japanese settlers, and the Chinese population as their colonial subjects. Throughout the diary, Ogawa marvelled at the fertility of the land, too fertile, in fact, for the Chinese people who were unaccustomed to hardship and discipline and, therefore, incapable of governing themselves.[52] In his view, they would, however, have made excellent subjects for colonial rule by the Japanese. In fact, Ogawa compared them to the Japanese in feudal, medieval times. For this reason, too, it would be unreasonable to govern them with modern institutions, implying colonial rule.[53] Shortly before Nanjing came under attack by Japanese bombers, Ogawa fantasised about the new possibilities that aircraft technology might open up for colonial rule from afar. In this sense, China was not even a foreign country to him.[54]

46 Ogawa, *Aru hōmukan*, 105.
47 Ogawa, *Aru hōmukan*, 120.
48 Hattori/Drea, "Japanese Operations," 176, 179.
49 Ogawa, *Aru hōmukan*, 38.
50 Ogawa, *Aru hōmukan*, 121, 131.
51 Ogawa, *Aru hōmukan*, 59. This was also the general army opinion, which attributed anti-Japanese sentiment to the Kuomintang's machinations, see Drea, "Japanese Army on the Eve of War," 132.
52 Ogawa, *Aru hōmukan*, 79, 92.
53 Ogawa, *Aru hōmukan*, 74–75.
54 Ogawa, *Aru hōmukan*, 85.

2.3 Into the Heart of Darkness: From Voyage Surprise to Total War

The two elements described above, Ogawa's urge to be accepted as an equal by his military peers, in addition to his semi-colonial attitude towards the Chinese population, formed a poisonous mixture that sent him down a spiral of rapid desensitisation and corrosive cynicism which severely affected his role as a military lawyer.

At the beginning of the diary, we meet Ogawa as a man excited by his mission like someone setting out on a memorable pleasure trip. In fact, he regretted early on that he could not take his camera with him to record this once-in-a-lifetime experience.[55] Instead, he started a diary, as so many Japanese soldiers did during the war.[56] But, given his penchant for literary composition, he wrote in unusual and extraordinarily vivid detail. On the transport to China, for example, he was awed by the majestic sight of the Japanese fleet stretching in single-file formation across the boundless sea and beyond the horizon, with Ogawa exclaiming that such a great force was probably unprecedented and would never be seen again.[57] As the sea glistened under the early November sun, the epic scene that he described could be likened to that of the mighty Achaean fleet making its way to the shores of Troy.

The tone of the setting changes quickly after they made landfall in China. It takes on a much darker aspect and gradually becomes more and more sinister until the troops and Ogawa reached the heart of darkness, the city of Nanjing. Yet, Ogawa never tired of extolling the exquisite uniqueness of his experience. In fact, "spectacle" (*sōkan* or *kōkei*) is the word that is most consistently applied to what he sees, from the epic beginning to the very apocalyptic end in Nanjing. Having arrived in the city and reported to headquarters, General Yanagawa lent him his binoculars and sent him to the roof to enjoy the view. There, like a Roman emperor, Ogawa watched the burning city and was once again awed by the mighty power of the Japanese army, which had conquered the city in only three days. Observing the smoke rising everywhere, Ogawa exclaimed: "Only in war can you see such a spectacle [*kōkei*]. The opportunity to witness the reality of war with one's own eyes is truly a once-in-a-lifetime chance."[58]

55 Ogawa, *Aru hōmukan*, 21, 24.

56 On soldiers keeping war diaries, see Aaron Moore, *Writing War: Soldiers Record the Japanese Empire* (Cambridge, MA: Harvard University Press, 2015).

57 Ogawa, *Aru hōmukan,* 12–13.

58 Ogawa, *Aru hōmukan*, 112.

Nor do the "realities" in any way diminish his opinion of the righteousness and grandeur of the war. From the outset, and against the official warnings not to use the word, Ogawa called it a "great war" (*dai-sensō*).[59] Entering Nanjing and viewing the "raw battlefield" where heavy fighting had taken place only the day before, he declared that this victory against all odds should be seen as a manifestation of the "Japanese spirit" (*Nippon-damashi*).[60] Finally, on the occasion of his participation in the end-of-the-year Shinto ceremonies, he was so moved that he compared this campaign to the legendary battle of Jimmu Tennō, the mythical ancestor of the imperial line, against the barbarians of the East: "I feel that this war is the work of the gods."[61]

Nationalist sentiments aside, it is clear that Ogawa's active affirmation of the war was also the result of a gradual desensitisation, or routinisation of violence, and a creeping identification with his fellow soldiers at the front. At the beginning of the campaign, for example, Ogawa was outraged by even minor instances of wanton destruction, such as the demolition of a bookstore or apothecary, not believing that Japanese soldiers would even be capable of such acts.[62] The further they travelled into the hinterland, however, the more Chinese corpses they saw by the roadside, many of them in civilian clothes, a fact that Ogawa noticed, but left largely uncommented upon. Finally, after entering Nanjing, he saw the full extent of the destruction:

> I saw a large number of corpses of Chinese lying on the battlefield. Among them, I saw the bodies of ten or more people piled on top of each other so that one could say that there were mountains of corpses all around. [. . .] The Japanese soldiers seem to be completely insensitive to the fact that the streets are littered with corpses at their feet. Among them, I saw soldiers who simply stepped over smouldering corpses because the streets were so crowded that it was impossible to walk. It was as if they had long since lost all feelings for human corpses.[63]

His only frame of reference for such horrific destruction was the Great Kantō Earthquake of 1923, which Ogawa himself witnessed. But rather than being repulsed by the sight or the callous insensitivity of the soldiers, he too boasted that he had become so completely inured to the sight of so many dead Chinese that it was no different to coming across "the corpse of a dead cat" in Japan.[64]

59 Ogawa, *Aru hōmukan*, 11.
60 Ogawa, *Aru hōmukan*, 112.
61 Ogawa, *Aru hōmukan*, 138.
62 Ogawa, *Aru hōmukan*, 36.
63 Ogawa, *Aru hōmukan*, 111–112.
64 Ogawa, *Aru hōmukan*, 107.

It has often been observed that the routinisation of, and consequent desensitisation to, violence was a necessary conditioning factor for "ordinary men" to be able to participate in mass murder.[65] The process of brutalisation through constant exposure to violence ultimately leads to a dehumanisation of the enemy, as seen in Ogawa's cat observation above.[66] Of course, strictly speaking, it is not Ogawa who does the killing, so the desensitisation is more indirect and vicarious. Thus, the pride and bravado that shine through Ogawa's boasting speak more to his creeping identification with "real soldiers" and his desire to be recognised as their equal. This identification, incidentally, was a permanent one and continued even after the end of the war. When Ogawa was asked to provide written testimony for the International Tribunal for the Far East (Tokyo Trial), therefore, he perjured himself by stating that "[a]t that time I saw only six or seven corpses of Chinese soldiers and no other. [. . .] During my stay in Nanking, I neither heard any rumours of illegal conduct of the Japanese soldiers nor were there any indictments for illegalities."[67] This absolute identification with the military goals of the army was fateful for Ogawa's understanding of his role as a legal officer and the military justice practice of the Tenth Army's Legal Department.

3 The Legal Practice and Habitus of the Tenth Army Legal Department's Officers

The practical as well as psychological and ideological factors outlined above had a direct impact on the way in which Ogawa's legal department and the Tenth Army's court martial handled criminal cases. As we shall see presently, it operated with a very limited remit and at a glacial pace, almost as if it were still peacetime. Its decisions manifested a clear hierarchy of crimes and protected interests that solely privileged military objectives to the detriment of individual or civilian concerns. This was accentuated by the assumption of total war which, taken to its logical extreme, reduced the whole enterprise of military justice to absurdity.

65 James Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Murder* (2nd ed., New York, NY: Oxford University Press, 2007), 244–246; see also Christopher Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York, NY: HarperCollins, 1992).

66 On the dehumanisation aspect, see Waller, *Becoming Evil*, 206–211.

67 International Tribunal for the Far East, *Transcript of Proceedings*, 7 November 1947, 32, 676. Available online in the ICC Legal Tools Database, accessed 19 June 2025, https://www.legal-tools.org/doc/3904e0/.

And yet, throughout the chaos, the habitus of the legal officers of the Tenth Department remained that of cool-headed bureaucrats absolutely committed to the highest standards of administrative rationality and accountability.

3.1 The Limited Scope and Glacial Speed of Japanese Military Justice

On 8 December 1937, after arriving in Nanjing and just before the formal occupation ceremony, Ogawa proudly noted in his diary that his department had been extremely busy, handling a total of 26 suspects accused of crimes and offences in one month.[68] He gloatingly contrasted this record with that of the other army in Nanjing, the Shanghai Expeditionary Army, whose legal department had handled only ten cases in over four months. But then, Ogawa continues, the head of department there, Tsukamoto, was notorious for his passivity, so much so that Tokyo had already offered to replace him.[69] By the end of 1937, when Ogawa left the Tenth Army to take up his new post as Head of the Central China Area Army Legal Department, the case list of the Tenth Army Legal Department records a total of 32 suspects that had been processed.[70]

Considering the chaos that was going on all around, this is by no means a high number. It becomes even less impressive when we consider that the majority of the suspects went scot-free and never saw a judge. Thus, the charges against 22 suspects (out of 32) were simply dropped without any punishment (Article 310, Army Court Martial Law; *Rikugun gunpō kaigi-hō*). Commanders, often on the recommendation of their legal officers, had wide discretion to order charges to be dropped (Article 308, Army Court Martial Law), even when the facts of the crime were undisputed. The Tenth Army made extensive use of this option. In the end, only 10 of the 32 suspects were brought to trial. However, since a case often involved several suspects, the Tenth Army Court Martial actually tried only five separate cases by the end of 1937.

Thus, the Tenth Army Legal Department operated on a very limited scale, with glacial speed and often with permissive results. This contradicts the rather

68 Ogawa, *Aru hōmukan,* 98. Ogawa uses the term *hikoku jiken*, which would translate correctly as "defendant's case". However, as we shall see presently, the majority of suspects were never formally charged as defendants.

69 This refers to Tsukamoto Kōji (1879–?), Head of the Shanghai Expeditionary Force Legal Department. He, too, gave witness at the Tokyo Trial. Accessed 19 June 2025, https://obladioblako.hatenablog.com/entry/2022/01/14/030130.

70 Takahashi, *Gunji keisatsu*, 112–117.

gruesome image that the general public in Japan today has of wartime courts martial.[71] Ironically, it also contradicts the *raison d'être* of wartime military justice itself, since the reduced procedural design (smaller bench, no defence council, no right of appeal) was put in place so that the courts martial could deliver "swift and stern justice" in a wartime situation in order to quickly restore order and discipline.

There were many reasons for this slowness: For one thing, the Tenth Army's legal department was staffed with only three lawyers and three clerks, which was the normal number of staff for such departments.[72] In effect then, six men were responsible for an army composed of three divisions, i.e. more than 100,000 soldiers. In addition, the army was constantly on the move, rushing towards Nanjing which, according to Ogawa, made it impossible to work properly.[73] As a result, the Tenth Army Court Martial did not convene until December, after the fall of Nanjing. More importantly, the initiative to investigate was the sole responsibility of the military police (*kenpei*). Thus, Ogawa constantly came across cases of plunder, arson, assault, or murder of civilians on the road to Nanjing but, despite his role as military lawyer, he never lost a thought as to the legality of any of this, let alone to pointing out any possible wrongdoing to investigators. Thus, the legal department only became active when cases were brought to them, which Ogawa then discussed with the head of the military police unit attached to the Tenth Army, Kamisago Shōshichi (1890–1956).[74] However, it is clear from these discussions that even then, the Tenth Army would only take up a fraction of the cases. For example, in December 1937, Kamisago complained to Ogawa that the military police had been arresting soldiers for rape, often caught in the act, and submitting these cases to the legal department, which was simply ignoring them (i.e. not even filing them). Ogawa replied that, given the real crime rate, which could be enormous, it would simply be unfair to prosecute those who had the misfortune to be caught as opposed to those who had not.[75]

Apart from all the practical reasons mentioned above, however, Ogawa also seems to have *deliberately* kept the numbers low for more practical, political rea-

71 On the popular imagination of courts martial in contemporary Japan, see NHK shuzaiban and Hiroaki Kita, *Senjō no gunpō kaigi* (Tokyo: NHK shuppan NHK, 2013), 28–31; Nobuhiko Kasumi, *Gunpō kaigi no nai "guntai"* (Tokyo: Keiō gijuku daigaku shuppankai, 2017), 2–5.

72 See the staff list in Takahashi, *Gunji keisatsu*, 3. On the quota system for lawyers, see Nishikawa, Gun-hōmukan, 165–169.

73 Ogawa, *Aru hōmukan,* 110.

74 Kamisago also authored a memoir on his wartime experiences (*Kenpei sanjūichi-nen*, Tokyo: Tōkyō raifu-sha, 1955) which, however, is not particularly enlightening on his time in the Tenth Army.

75 Ogawa, *Aru hōmukan,* 127–128.

sons. Indeed, the diary entry of 8 December in which he so proudly reports the figures in contrast to those of the Shanghai Expeditionary Army in fact ends with the above-mentioned reflections on why the army despised military lawyers: too passive, they were considered useless, but too involved, they were criticised as overzealous.[76] Acceptance by their military peers therefore had a bearing on how many cases the legal department would take on.

3.2 The Hierarchy of War Crimes

Although few in number, the way in which the 32 suspects' cases were handled under Ogawa's leadership reveals a clear hierarchy of crimes and protected interests that was driven solely by military objectives and routinely disregarded individual interests, whether of soldiers or, even more blatantly, of non-combatant victims of soldiers' crimes.[77]

The hierarchy is most evident in the decision to dismiss a case under Article 310 of the Army Court Martial Law. Thus, theft and looting were routinely dismissed, as was usually the case with simple arson.[78] The reason for this, as noted above, was that the original mission of the armies sent to China in 1937 had never been to take Nanjing. They were therefore logistically ill-equipped to do so, either in terms of arms and ammunition or food and other essentials. As a result, combat units were encouraged to be self-sufficient, which led to widespread looting and pillaging.[79] Even Ogawa himself, after some initial complaints, began to "requisition" items (especially bedding) from the homes of rich Chinese in which he was billeted.[80] In addition, it was routine practice on both sides to burn down houses along the way so as to deny the other side shelter and convenient ambush positions.[81] To a certain extent, therefore, arson was recognised as military necessity, even by the legal department.[82]

76 Ogawa, *Aru hōmukan*, 85–86.

77 For a more general overview and statistics of crimes and their punishment in the Japanese army, see Tino Schölz, "Silent enim leges inter arma? Die Militärjustiz im Kaiserlich Japanischen Heer während des Asiatisch-Pazifischen Krieges (1937–1945)," in *Kriegsschauplatz Asien: Historische und globale Perspektiven,* ed. Takuma Melber and Kersting von Lingen (Paderborn: Brill / Schöningh, forthcoming). Schölz demonstrates that in most cases, judges chose punishments that were at the lower end of what was prescribed by law.

78 See the respective decisions for each case in Takahashi, *Gunji keisatsu*, 112–117.

79 Hattori/Drea, "Japanese Operations," 177–178.

80 Ogawa, *Aru hōmukan,* 81, 93f.

81 Hattori/Drea, "Japanese Operations," 177.

82 Ogawa, *Aru hōmukan,* 102, 125.

This leniency contrasts sharply with the much harsher punishment for crimes relating to discipline and army property. The case of Private First Class Orixxx illustrates this in an exemplary way. The defendant had accompanied a supply convoy from Nanjing to another location and on a narrow road had met another supply train coming in the opposite direction. The defendant managed to negotiate that his train would move first. However, when his superior, a corporal, passed by without acknowledging him, he flew into a rage, fired his pistol in the air and threatened the corporal. The Tenth Army Court Martial sentenced him to five years penal servitude for threatening a superior with an army weapon.[83] In a similar case, the court sentenced Private First Class Koxxx to 18 months penal servitude for assaulting a superior officer. While stationed in the city of Nanjing, he and his fellow guards had obtained alcohol and, drunk, started a brawl. When a passing second lieutenant tried to stop them, Koxxx grabbed him by the lapels and slapped him repeatedly. The crime was aggravated by the fact that, since in Nanjing, it had happened "in front of the enemy".[84] Thus, sentencing even minor infractions of discipline was not only out of military necessity, but also to protect the honour of the army.

While the life and limb of superiors were sacrosanct for soldiers, the same was not true for non-combatants. Here, the considerations were gendered and related to occupation policy. For example, of the nine rape cases that actually made it into the files, five were dismissed under Article 310.[85] Ogawa in his diary notes on 23 December 1937:

> Regarding rape cases, I have hitherto followed the policy of initiating trials only in the most heinous cases but otherwise dealing with them as passively as possible. But as these cases continue to occur so frequently, I think I must reconsider my policy somewhat.[86]

When Kamisago came to Ogawa to complain about this passiveness, Ogawa replied that rape was mostly a psychological side-effect of heavy fighting, and that since the fighting would soon be over and, moreover, the new "comfort facilities" (*ian setsubi*) would be set up, this problem would disappear of its own accord (which it did not).[87] However, it is quite transparent that both men were not concerned about the victims themselves, but only about the military objectives of the

83 See Takahashi, *Gunji keisatsu,* 173–174 for the full verdict and 205 for a summary.

84 See Takahashi, *Gunji keisatsu,* 170–171 for the full verdict.

85 On the massive occurrence of rape in Nanjing, see Fujiwara, "Nanking Atrocity," 47ff. On Japanese-perpetrated rape during the Asia-Pacific War in general, see Yuki Tanaka, *Hidden Horrors: Japanese War Crimes in World War II* (Boulder, CO: Westview Press, 1996), 79–109.

86 Ogawa, *Aru hōmukan,* 125.

87 Ogawa, *Aru hōmukan*, 128.

army. For example, Kamisago's main concern was that if the rapes continued, "in the future, when the fighting stops, there will be even more trouble, and this could have a negative impact on our pacification efforts."[88] Rape was therefore only prosecuted when it threatened to incite the local population against the occupiers. This threshold seemed to have been reached for Ogawa when it was combined with or led to murder, which was then routinely prosecuted, as the one case (with four suspects) that actually made it into court shows.[89]

The same threshold did not apply to male Chinese citizens, who were generally suspected of being potential guerrilla or plain-clothes soldiers. In particular, the Commander of the Tenth Army, Yanagawa, warned his men of this danger and urged them to "deal firmly with all the Chinese civilians suspected of aiding the enemy".[90] One of the most egregious cases of this policy combined with blatant racism is the Yoshixxx et al. murder case.[91] In this case, Second Lieutenant Yoshixxx led his unit of 26 co-defendants to a village in Jinshan where it was reported that a group of Chinese were engaging in "disturbing behaviour" (*fuon no gendō*) and stealing public property. They arrested 26 Chinese men and took them to the nearest military police station. On the way, however, "because some of the Chinese were planning to escape", they killed 21 of them, either by shooting or stabbing them. Ogawa led the investigation into the case and interrogated the unit's leader, Lieutenant Yoshixxx:

> Not only did he [the defendant Yoshixxx] fail to coordinate with his superior, but he also admitted that he acted upon the idea [*kannen*] that he wanted to kill Chinese out of simple curiosity. This unit had not fought at the front, so he admits that he was driven by a peculiar idea to kill Chinese. It is quite common for such an intention to arise in the battlefield. It also seems to stem from a lack of respect for the Chinese as human beings.[92]

Despite the professed murderous intent, which should have made Ogawa, as legal officer, at least somewhat suspicious about whether the Chinese men really wanted to flee, the case against all suspects, including Yoshixxx, was dropped under Article 310. This was nothing unusual, in fact, *all* murder cases involving Chinese men were routinely dismissed in this way.

Out of context, Ogawa's comment above about the "lack of respect for the Chinese as human beings" might sound mildly censorious. However, as we have

88 Ogawa, *Aru hōmukan*, 128.

89 The Shimaxxx et al. case, see Takahashi, *Gunji keisatsu*, 174–178 for the full verdict. This is actually one case, but with four defendants.

90 Quoted in Hattori/Drea, "Japanese Operations," 176.

91 See Takahashi, *Gunji keisatsu*, 67–68, 115–116 and Ogawa, *Aru hōmukan*, 129–130.

92 Ogawa, *Aru hōmukan*, 130.

seen, by the time Ogawa conducted the interview (27 December 1937), he had already confessed to having become completely insensitive to the death of Chinese men. Thus, Ogawa recorded no particular qualms about dismissing this or any other case.

3.3 The Rule of Law Under the Assumption of Total War

From the above, it can be seen that the prosecuting authorities in the army had maximum discretion in deciding upon the outcome of each investigation. Formally, it was the president (*chōkan*) of the court martial, i.e. the military commander, who made the decision (Article 308 *Rikugun gunpō kaigi-hō*), but according to Ogawa, General Yanagawa "always" followed his recommendation.[93] The decision to prosecute or dismiss the case did not require giving any reasons. However, it seems quite clear that, since military necessity was the guiding principle, fundamental assumptions about the nature of the war being fought would influence this decision, as would the question of what law, if any, was applicable. And although Japan officially did not fight a war with China, let alone a "total war" in any form or substance, General Yanagawa seemed to think otherwise.[94] In the two audiences that Ogawa recorded in his diary, Yanagawa expanded on the "absoluteness" (*zettai-sei*) of the war, which dictated everything else. It was only natural, he argued, that the absoluteness of such a war should produce such a large number of casualties. The public, as outsiders, had no understanding of this.[95]

Ogawa, who greatly admired Yanagawa and supported his unilateral decision to march on Nanjing, seemed to agree with his commander.[96] On several occasions, Ogawa waxed philosophical about the nature of war and how it should be "studied" more from an anthropological and philosophical perspective.[97] Moreover, he observes:

> It has been said that there is nothing as interesting as war. [. . .] Interesting may be an altogether wrong choice of words. But that war means killing people without thinking, setting

93 Ogawa, *Aru hōmukan*, 108.

94 On the "total war" debate in Japan, particularly among international lawyers, see Urs Matthias Zachmann, *Völkerrechtsdenken und Außenpolitik in Japan, 1919–1960* (Baden-Baden: Nomos, 2013), 261–278.

95 Ogawa, *Aru hōmukan,* 125–126, 135–136.

96 See Ogawa, *Aru hōmukan,* 96, for his defence of Yanagawa.

97 Ogawa, *Aru hōmukan*, 86.

> fires with equanimity and taking as many things from people as one wants, that is certainly true. To study how war relates to human life in general should be an interesting question.[98]

It is obvious that under such assumptions the application of law becomes a selective and somewhat arbitrary business. This pertains to the application of international law, which in Ogawa's diary only ever comes into question in relation to Western powers, never in relation to the Chinese.[99] Whether this was due to the legalistic pretence that Japan was not fighting a declared war with China, or to Ogawa's more fundamental assumptions about the backward nature of the Chinese who could not be governed by "modern institutions" (see above) remains unclear.[100]

It seems, however, that the assumption of total war had a much more corrosive effect, eventually making law seem dispensable altogether. On 11 December 1937, at the height of Ogawa's Nanjing frenzy, observing the universal destruction of everything, he makes another observation in his diary that echoes the above, but in a much more radical way: "War is the definition of doing whatever you want. In any case, doing anything and everything at will is a spectacle that can only be seen on the battlefield".[101] Probably no other statement could be more anathema to the role of a military lawyer than this.

3.4 The Habitus of Bureaucratic Rationality

And yet, despite all this, Ogawa steadfastly defended the public ethos of his profession and praised the morale of his department. Thus, on 3 December 1937, Ogawa once again complained about the dilemma of the legal officer who was despised by everyone no matter what he did. However, he continued:

> But we have been established as an institution that is absolutely necessary to uphold and protect the interests of the army [*gun no rieki*]. Therefore, it is our duty to exert ourselves with the firm conviction that we must fight for the army and do our duty night and day, regardless of praise or criticism. At the moment, we are in a situation where we have to work hard until almost 10 o'clock.

98 Ogawa, *Aru hōmukan*, 97.

99 See, for example, Ogawa, *Aru hōmukan*, 124, on the question whether Japan could attack British ships that delivered Chinese troops from Nanjing.

100 See Smiley, "Lawless Wars of Empire," 511–550, for parallel considerations of US-American lawyers in the Philippine War.

101 Ogawa, *Aru hōmukan*, 107.

It is obvious that the legal practice of the Tenth Army Legal Department served to protect the interest of the army, i.e. its functionality and honour. However, given that only five cases were brought to court and the rest were dismissed, the question is: What actually kept Ogawa's staff up until so late at night?

A study of the department's official field diary (*jinchū nisshi*) provides a first clue, as it records in often excessive minutiae the mundane details of the department's work.[102] Apart from the constant worry of moving the department's considerable luggage, Ogawa's men were always busy attending daily briefings, writing reports, keeping the diary, making clean copies of it and other reports to send back to Tokyo and to sister departments, sending and receiving communications, registering them, etc. Indeed, one of the first tasks Ogawa undertook as head of the new department was to draw up the "Detailed Regulations for the Conduct of Business of the Tei Group Legal Department", Article 9 of which will give the reader an idea of the level of bureaucracy involved in just sending out a document:[103]

> The department member responsible drafts the outgoing documents and, after approval by the Head of Department, has a clean copy made by the clerk responsible. After reviewing it, he will hand it over to the clerk in charge of dispatches.
>
> In the case of joint responsibility with another department, said member will, upon approval by the Head of Department, send the document to the relevant department as soon as possible. Having obtained their agreement, he will proceed as described above.
>
> On receipt of the document, the clerk in charge of dispatch will make the necessary entries in the Register of Dispatch Numbers. He then carries out the shipping procedures.[104]

Drawing on Max Weber's concept of "formal rationality", Pierre Bourdieu argued that formalisation is a key element of the legal habitus. It gives coherence to legal practice and lends it an aura of neutral rationality, even when there was little or none. It thus creates the impression of not only formal, but also *material* correctness and hence of authority.[105] It is therefore no coincidence that Ogawa's "Regulations" are devoted almost exclusively to the formalisation of clerical duties and are silent on the material application of the law itself. Thus, while many of the decisions of Ogawa's department seem dubiously permissive in their material legality and fairness, the documents that "papered" them were always of impecca-

102 For the full diary, see Takahashi, *Gunji keisatsu*, 3–118.
103 Takahashi, *Gunji keisatsu*, 26–28. Tei Group was the code name of the Tenth Army.
104 Takahashi, *Gunji keisatsu*, 27.
105 Bourdieu, "Force of Law," 828.

ble neatness and correctness, creating the impression of a department that was humming with bureaucratic efficiency.

Conclusion

Returning to our initial question of the extent to which military justice might have contributed to the escalation or, conversely, to the containment of violence on the road to Nanjing and in the city itself, it is difficult to argue that the Tenth Army's Legal Department had any direct impact either way. This is because the scope and pace of its jurisdiction precluded any measurable contribution, negative or positive, as it only began to process cases late, after Nanjing had been captured, and did so with glacial speed. Of course, this omission in itself may have contributed to the escalation, as soldiers must have assumed that most of their actions were unlikely to come under legal scrutiny. All the more so as the characteristic military disdain for military lawyers, their relatively small numbers, their position at the rear of the army and the fact that they only acted, if at all, when prompted by the military police, made it unlikely that any soldier would have come into contact with them at any point during the campaign.

Even if they did become the subject of an investigation, the cases of the Tenth Army Legal Department show that only a fraction of them made it into court, while the rest were dismissed. There was also a clear hierarchy, dictated by military necessity, which made it fairly predictable which crimes would be prosecuted and which would not: those that directly harmed the army because they affected its chain of command, its property or its honour were prosecuted to the full and with relatively severe punishments. Those that affected the citizens, their lives, limbs, and property, were only prosecuted if they reflected back on the army and harmed its military objectives. Thus, theft, looting, arson and the killing of Chinese men went unpunished. Nor was rape, unless it was combined with the murder of the women, which was punishable for fear of inciting the Chinese population against the Japanese. In this sense, the cases of the Tenth Army Legal Department (and of any other legal department during the war) are instructive because they so clearly demonstrate the army's inherent "value system". As long as soldiers conformed to the behaviour implied by this value system, they had little to fear from the law. Clearly, then, the mass killings of Chinese men and the rape of women on the way to and in Nanjing were *not* a matter of lack of discipline (because this was enforced), but the logical outcome of a permissive system structured only by military necessity.

It should be emphasised that it was not primarily military justice that enforced this system of values but rather the other way around: the system of values *informed* the decisions through the broad discretionary powers of the courts martial president, in other words, the commander and the legal officers who advised him. In this sense, Ogawa's practice manifests the typical habitus, not of the jurist in general, but more specifically of the *military* jurist of his time. While insisting on formal routinisation and professionalism, as did his peers in the civil field, he nevertheless showed considerable flexibility in the applying the laws and codes of military justice in the interests of the army. Again, this was his role as prescribed in the Army Courts Martial Law. Nonetheless, in the case of Ogawa, one gets the impression that his idiosyncratic attitudes, i.e. the isolated role of the military lawyer in the army that he wanted to overcome and the respect of his military peers and superiors that he craved, as well as the typical semi-colonial attitude towards China that he shared with many Japanese, made him more willing to oblige his commander than he probably would have needed to. In this respect, the somewhat lacklustre attempts in 1922 to "civilianise" the court martial system by introducing the role of the legal officer as key figure in the proceedings, while retaining his civil status, may even have backfired.

Finally, on the even more abstract question of the relationship between law and military justice in general, it seems clear that, for the reasons given above, it was still military violence that structured the law, not the other way around. Moreover, it would probably be anachronistic to speak of "lawfare" at this point in time, for the simple reason that there was never any need for Ogawa to bend the law to serve military ends. Apart from the selective application of international law, military law gave Ogawa every procedural permission, or discretion, to apply it in the interests of the army and its violent pursuit of capturing Nanjing. Thus, while it may still be correct to characterise Japanese military justice as "permissive constraints", these were so selective that they certainly did not prevent but rather enabled the carnage that ensued.