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Military Justice and its Potential for Violence towards Civilians Under Wartime Occupation: The Imperial Japanese Army in China, 1894–1941

Introduction

Wartime occupation precipitates major upheavals in the daily life of civilians residing in territories under the rule of enemy belligerents. Since 1874, the laws of war have obliged occupiers to take steps to minimise the impact of this disruption and to safeguard civilian lives and property by, first and foremost, maintaining public order. The exercise of legislative and judicial powers is a central component of this.[1] In the absence of regular, civilian government, military authorities can ensure some degree of normalcy and security for civilians by either enabling the continued enforcement of existing laws and the regular functioning of local courts or, if necessary, substituting such with military equivalents. The preservation of peace and order is also of vital importance to the protection of armed forces in occupied enemy territory, as well as to the securing of military interests and overall success in prosecuting war. Unrest, disobedience, and resistance, if not a direct threat, can certainly act as a serious impediment by causing resources and manpower to be diverted away from the main war effort. However, peacetime legal frameworks are not always well-adapted to the specific challenges and demands of administering justice in wartime. For this reason, belligerents have long held the right to enact (martial) laws to supplement existing legislation, to undertake disciplinary measures and to establish military courts to punish violations in occupied territory.[2] Today, this authority is clearly delineated within international law which imposes restrictions and provides judicial guarantees for civilians based on legal principles that have been widely accepted as uni-

1 Marco Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers," *The European Journal of International Law* 16.4 (2005): 662–663; Marco Longobardo, *The Use of Armed Force in Occupied Territories* (Cambridge: Cambridge University Press, 2018), 169–76.

2 Gerhard von Glahn, *The Occupation of Enemy Territory* (Minneapolis: University of Minnesota Press, 1957), 100–101, 110–114; Edmund Schwenk, "Legislative Power of the Military Occupant under Article 43, Hague Regulations," *The Yale Law Journal,* 54.2 (1945): 393–395.

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versal human rights. Denial of these rights has also been formally criminalised.[3] In the late nineteenth and early twentieth century, however, as detailed in Kelly Maddox and Tino Schölz's introduction to this volume, legal experts and military authorities generally understood that the right of belligerents to establish a military justice system in occupied areas was rooted in, and therefore predominantly constrained by, the doctrine of necessity.[4] As such, codified international law provided few formal limitations imposed on occupiers in this respect and, as Daniel Marc Segesser has shown in his chapter, the form that military justice would take was largely left to the discretion of individual nations.[5]

In the absence of a clear articulation of the universal principles to be assured in the exercise of legislative and judicial power over civilians, (military) judicial practices adopted in occupied territories during this time could be quite different from those employed in a civilian, peacetime setting. Through declaring martial law, for example, belligerents could impose additional restrictions on the daily lives and activities of civilians in support of policies which, though not necessarily repressive, were not usually inclined to prioritise the welfare of civilians over the interests of the military. Procedures followed in military courts tasked with adjudicating violations of martial law in the field were often substantially abridged, did not always uphold normal judicial safeguards, and were staffed by military judges and legal officers who tended to give precedence to wartime demands. Thus, while the administration of (military) law and justice could play an important role in restraining the use of force by occupying powers through minimising the perceived necessity of enacting additional control measures (e.g. reprisals or punitive operations), there was a potential for military justice to be wielded as an

3 For further discussion, see: Jennifer DePiazza, "Denial of Fair Trial as an International Crime: Precedent for Pleading and Proving it under the Rome Statute," *Journal of International Criminal Justice* 15 (2017): 265–273.

4 For examples, see: William Hall, *International Law* (Oxford: Clarendon Press, 1880), 400–406; Thomas Erskine Holland, *The Laws of War on Land (Written and Unwritten)* (Oxford: Clarendon Press, 1908), 14–17; Lassa Oppenheim, "The Legal Relations between an Occupying Power and the Inhabitants," *The Law Quarterly Review* (1917): 363–370; Francis Lieber and G. Norman Lieber, *To Save the Country: A Lost Treatise on Martial Law*, ed. Will Smiley and John Fabian Witt (New Haven: Yale University Press, 2019); *US Army Field Manual, FM 27–10: Rules of Land Warfare* (US Govt. Printing Office: Washington DC, 1940), 77; *Manual of Military Law, 1929: Amendments No. 12* (London: HMSO, 1940), 69.

5 Only Articles 30, 43 and 50 of the Hague Convention imposed constraints in regard to the legislative and judicial powers of belligerents, see: "Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land" (18 October 1907), accessed 19 June 2025, https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907.

instrument of power which contributed to and facilitated violence towards civilians in occupied territories in a variety of ways.[6]

The prosecution of war crimes involving summary judicial practices and unfair trials during the post-war tribunals in the aftermath of the Second World War, for instance, reveals significant deviations in practice from the international standards which we accept and value today. More importantly, it exposes the systemic and structural forms violence could take during occupation. For example, the trial of Josef Altstötter and others involving members of the German Justice Ministry, known as the "Justice Case" or the "Judges' Trial," demonstrated how law and justice was systematically weaponised in support of the Nazi regime by enacting and upholding discriminatory policies that contributed to the persecution, harm and extermination of certain peoples and opponents both within Germany and occupied territories.[7] Many other chapters in this volume, like that of Maria Fritsche, as well as Sarah Maya Vercruysse and Nina Janz, similarly highlight the diverse ways in which justice has been instrumentalised in service to both military and state during wartime. The handful of post-war trials that dealt with or touched upon the issue of Japanese military justice over civilians in occupied Asia tended to centre on ostensible break-downs in the judicial practices normally employed by Japanese forces due to adverse and deteriorating circumstances towards the end of the war. Inadvertently, however, the issues raised by Allied prosecutors and judges in these trials underscored that the denial of legal and judicial rights, which formed the context of charges of unlawful killings or executions, were in fact systemic.[8] The lack of impartiality, the failure to permit access to defence counsel, the inability of defendants to appeal decisions, etc., were all rooted in the regulatory framework and foundations of the military justice system and the flexible, military-centric spirit in which it was meant to be enforced.

With this in mind, this chapter examines the legal framework established by the Imperial Japanese Army (IJA) in China and its evolution during the First Sino-Japanese War (1894–95) and the so-called "China Incident" (1937–1941), the first four years of the Asia-Pacific War (1937–1945). During the former conflict, Japanese forces developed a mostly respectable reputation for their conduct, despite a large-scale massacre of Chinese soldiers and civilians at Port Arthur in November 1894, while during the "China Incident," the IJA became infamous for widespread mili-

6 Peter Stirk, *The Politics of Military Occupation* (Edinburgh: Edinburgh University Press, 2009), 184–186.

7 United Nation's War Crimes Commission, *Law Reports of the Trials of War Criminals* (hereafter *Law Reports*), Vol. 6 (London: HMSO, 1948–1949), 1–110.

8 For select cases, see *Law Reports*, Vol. 5, 25–36.

tary brutality, as exemplified by the massacre at Nanjing in December 1937. It adopts a comparative approach as a means of identifying and reflecting on the potential for violence within the regulatory structure of the system during two wars featuring very different degrees of violent conduct by the IJA. Aside from the obvious differences in the ways in which war was fought, it compares and contrasts these wars for two reasons. Firstly, the First Sino-Japanese War was the first international conflict in which the IJA imposed martial law and administered justice in occupied territories; the systems of subsequent wars were based and later expanded upon the principles and procedures established during this war making it an excellent starting point for comparison. And secondly, these were the only two wars in which the IJA occupied enemy territory. Although occupied territory during other conflicts (e.g. the Russo-Japanese War and the First World War) was technically enemy territory, the local populations were considered primarily neutral and treated as such. This raised different challenges to military rule and presents other interesting dynamics which are beyond the scope of this chapter.[9]

The fact that it stops in 1941 is a question of available sources. A large quantity of wartime material was destroyed by the Japanese military immediately following surrender in 1945. This includes arrest and investigation reports, case files and other documents prepared by *kenpei*,[10] members of the infamous "Kenpeitai," as well as court judgements, court diaries and other materials composed by members of legal departments. However, the military justice system was extremely bureaucratic. Notifications, reports and copies of verdicts were circulated between armies and to authorities in Tokyo. Using digital archives, it has thus been possible to locate relevant documents, sometimes in the most unlikely of places. Martial law regulations for the China Expeditionary Army, for instance, were unexpectedly found in a history of military scrip during the "China Incident" prepared in 1943.[11] Military documents were also captured and utilised by the Allies both during the war and in the immediate aftermath.[12] The vast majority of these were

9 For insights into these different dynamics and challenges, see Kelly Maddox, "An Instrument of Military Power: The Development and Evolution of Japanese Martial Law in Occupied Territories, 1894–1945," *Law and History Review,* 42.2 (2024): 367–391.

10 Literally meaning "law soldiers," *kenpei* were responsible for military policing, law enforcement and counter-intelligence duties in occupied areas.

11 "Dai 3-shō, dai 6-han, 4: Kensatsu satsu jō no sochi oyobi genron tōsei," Japan Center for Asian Historical Records (JACAR) Ref.C11110839000, in *Shina jihen gunpyōshi, Dai 2-kan, Shōwa 12-nen – 18-nen* (Bōeishō, Bōei kenkyūjo), 1777–1790.

12 Greg Bradsher, "The Exploitation of Captured and Seized Japanese Records relating to War Crimes, 1942–1945," in *Researching Japanese War Crimes Records: Introductory Essays*, ed. Edward Drea et al. (Washington DC: United States Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group, 2006), 151–168 for further discussion.

eventually returned to Japan and while some key resources remain closed to the public, a large proportion of military justice related material has been made accessible.[13] Utilising these surviving materials, especially laws, regulations, guidance, instructions and manuals, it is possible to reconstruct the history of the establishment of the military justice system in 1894 and 1937 and gain insight into its character and the spirit in which it was intended to be utilised. Surviving statistics, though piecemeal in nature, also give insights into the way in which the system functioned in practice. Thus, by using these sources to identify key changes and continuities in the legal and regulatory frameworks established during conflicts characterised by different objectives and military conduct, this chapter seeks to trace the locus of military justice's violent potential and determine the factors which shaped the ways in which this potential could be (and was) realised in practice.

1 The First Sino-Japanese War (1894–1895)

On 21 November 1894, Japanese troops perpetrated a massacre of Chinese soldiers and civilians immediately after the capture of Lüshunkou (Port Arthur). This incident occurred several months into war with China, the outbreak of which can be briefly summarised as resulting from a long-standing competition for influence in Korea as part of Japan's evolving national defence strategy.[14] This violence was something of an aberration in a conflict in which respectable military conduct and the fair treatment of civilians had been prioritised. Indeed, demonstrating strict military discipline in compliance with the laws and customs of war was central to the Japanese leadership's overarching aim of improving Japan's international standing by showcasing the nation's advancement since the Meiji Restora-

13 Greg Bradsher, "A 'Constantly Recurring Irritant': Returning Captured and Seized Japanese Records, 1946–1961" in *Researching Japanese War Crimes*, 169–195. For instance, bulletins detailing captured documents prepared by the Pacific Military Intelligence Research Service indicate that over 11,000 pages of material from the 16th Army Legal Department in Java were seized by Allied forces. Unfortunately, this material containing complete case files, court judgements, etc., remains closed to the public at the National Institute of Defense Studies (Bōeishō, Bōei kenkyūjō), with the exception of one volume of correspondence. Verdicts and statistics on punishment prepared by the 14th Army in the Philippines are similarly closed. Select *kenpei* police documents are also inaccessible at the time of writing, though a large proportion have been opened.

14 For a more detailed account of the origins of the war, see Stewart Lone, *Japan's First Modern War: Army and Society in the Conflict with China, 1894–5* (London: Macmillan, 1994), 12–50 and Sarah Paine, *The Sino-Japanese War of 1894–1895: Perceptions, Power and Primacy* (Cambridge: Cambridge University Press, 2003), 3–106.

tion. Soldiers had been specifically instructed that their behaviour must be above reproach, that civilians were not their enemies and that those who offered no resistance were to be treated as kindly as possible.[15] This was crucial to successfully framing the war as a clash between civilisation, to be upheld by the IJA as the new face of modern Japan, and barbarism as understood to be reflected in the more traditional practices employed by Chinese forces.[16] Despite the massacre at Port Arthur, rationalised as a momentary lapse following the brutal mutilation of Japanese soldiers, this was largely successful and Japan won praise after the war in international circles for its model conduct.[17] Efforts to accentuate Japan's civilised status had a significant impact on the character of the military justice system which was imposed over civilians in this conflict. Military authorities developed the nation's first occupation policies and established the first regulations for the administration of law and justice over civilians in occupied areas with a view to winning the respect of Western powers. This meant complying with the (albeit limited) obligations placed upon them under the nascent law and customs of belligerent occupation.

During the first months of war, fought in the neutral territory of Korea, commanders dealt with civilian crime on a case-by-case basis as incidents were encountered, and only when essential for the maintenance of public order in rear areas. Upon the advice of international law experts, such as Ariga Nagao, proclamations warning that military punishments would be imposed for certain acts which might harm Japanese forces were also distributed.[18] These cases were tried informally in the field following, Ariga assured in his post-war treatise, standards of justice commensurate with internationally accepted customs.[19] After the invasion and subsequent occupation of areas of China in late 1894, the General Staff in Tokyo under Imperial Prince Komatsu Akihito began drafting regulations to formalise military authority in the maintenance of public order and the handling of crimes committed by civilians in areas of China which came under occupation.

15 Lone, *Japan's First Modern War*, 145–146; Paine, *Perceptions, Power and Primacy*, 209–210.

16 Lone, *Japan's First Modern War,* 142. Douglas Howland, "Japan's Civilized War: International Law as Diplomacy in the Sino-Japanese War (1894–1895)," *Journal of the History of International Law* 9 (2007): 179–201; see also Shogo Suzuki, *Civilization and Empire: China and Japan's Encounter with European International Society* (London & New York, NY: Routledge, 2009), 161–176.

17 See praise for Japan in Thomas Erskine Holland, "International Law in the War between Japan and China," *Fortnightly Review* (1895): 915–916.

18 Name order for Japanese names in this chapter 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.

19 More detailed overview of this early system given in Ariga Nagao, *Nisshin sen'eki kokusaihō ron* (Tokyo: Rikugun Daigakkō, 1896), 270–275.

After consulting on the first drafts, the legal expert Shimizu Ichitarō prepared a set of regulations clarifying the fundamental principles to be followed in the administration of occupied territory.[20] According to this, the commander-in-chief of the occupying army should have the power to issue any appropriate orders as deemed necessary for the preservation of public safety and social order, as well as the realisation of wartime objectives. In line with obligations under international law, however, it was also stipulated that existing Qing laws continue to be enforced and should only be modified or suspended when unavoidable. Furthermore, trials involving civil or criminal offences which were not related to the military were to be adjudicated within local courts.[21] Shortly thereafter, civil administrations (*minseichō*) were established to take over duties in regard to the maintenance of peace and order in support of the IJA and its activities in occupied areas.[22]

A set of draft regulations detailing the responsibilities ascribed to civil officials noted that this would include the handling of civil and criminal proceedings under the direction of the commanders of the respective occupying army or navy garrison which held jurisdiction over a given area.[23] Civil administrators were to be supported in this endeavour by *kenpei* units, initially a military police force modelled on the French gendarmerie which held wide functions, including law enforcement and judicial policing duties, in occupied territories.[24] It was also advised that in hearing civil cases, local procedure and customs should be adhered to for the benefit of the populace.[25] Though not formally enacted, the ideas and principles expounded in these earlier draft regulations contributed to the final

20 Ono Hiroshi, "Meiji kokka ni okeru senryōchi gunseihō: Nisshin sensōki kara Shiberia shuppeiki made o chūshin ni," *Hō to bunka no seidoshi* 3 (2023): 40–42.

21 See drafts in "1, sho-kisoku (3)" JACAR Ref.C11080095400, in *Kōbun shorui, dai 2-kan, Meiji 27, 8-nen* (Bōeishō, Bōei kenkyūjo), 0870–0872. For obligations under international law see "Project of an International Declaration concerning the Laws and Customs of War" (27 August 1874), Articles 2 and 3, accessed 19 June 2025, https://ihl-databases.icrc.org/en/ihl-treaties/brussels-decl-1874?activeTab=undefined.

22 "Dai 20-hen: Senryōchi gyōsei," JACAR Ref.C14020395000, in *Meiji 27 – 8-nen, Sen'eki tōkei gekan* (Bōeishō, Bōei kenkyūjo), 0502.

23 "Meiji 27-nen, rin gi 1069-gō: Kinkyū chokurei an, senryōchi jinmin ni kansuru kitei, Shinkoku senryōchi minsei chōkan sei," JACAR Ref.C06061251300, in *Meiji 27-nen 10-gatsu 28-nichi, Meiji 28-nen, 1-gatsu, 24-nichi (rin-gi shorui tsudzuri-sho)* (Bōeishō, Bōei kenkyūjo), 0909.

24 On the establishment of the *kenpei* see Kōketsu Atsushi, *Kenpei seiji: Kanshi to dōkatsu no jidai* (Tokyo: Shin Nihon Shuppansha, 2008), 17–59. For a brief overview of their activities in occupied areas during the First Sino-Japanese War and the Russo-Japanese War, see Ogino Fujio, *Nihon kenpeishi: Shisō kenpei to yasen kenpei* (Otaru: Otaru Shōka Daigaku Shuppankai, 2018), 6–13.

25 JACAR Ref.C06061251300, Article 22, 0912.

version of the Ordinance for the Punishment of People in Occupied Areas (*Senryōchi jinmin shobun rei*) (hereafter the Ordinance). This was promulgated by Imperial General Headquarters on 23 February 1895 after several weeks of consultation and liaison between various government ministries. It was introduced in an effort to standardise and streamline the procedures which would be adopted for the administration of criminal justice over civilians, in view of the expansion of occupied territories under Japanese control.[26]

Under the Ordinance, local laws and customs were still to be respected and were to be consulted, particularly in criminal cases involving acts which disturbed the peace or impacted the lives and livelihoods of civilians. However, it was decided that Japanese legislation should also be enforced and should serve as a baseline in dispensing justice to the local population because there was an inclination for brutal, cruel customs to be practiced in "inferior, uncivilised countries" (*rettō mikai no kuni*).[27] At the same time, it was understood that peacetime civilian laws and customs were not well-suited to the specific demands and requirements of wartime. The Ordinance, then, was created to act as a supplement to existing legislation which would provide for greater flexibility and adaptability in the administration of justice to meet the mutable military needs and demands of wartime. This was accomplished by simultaneously simplifying and expanding the scope of peacetime civil laws to prohibit a range of acts not normally considered criminal (e.g. the spreading of rumours or careless making of noise), by authorising the use of harsher penalties (i.e. death) for an enumerated list of offences which either harmed the IJA or adversely affected its interests, and by permitting military courts to try all cases involving civilians following an accelerated judicial process, regardless of the law under which they were charged.[28] This latter jurisdictional point had been the subject of some debate.

During the drafting process, two proposals had been submitted. The first suggested that offences impacting the military would be tried in courts martial, while those which disturbed the peace would be tried by civil administrations. The second proposed the establishment of a separate category of military courts (*gunji hōin*) which would have jurisdiction over all cases. It was eventually decided that this option was more practicable. Aside from the logistical challenges of sending civilians for trial in courts martial which moved with each army's headquarters, having to distinguish between types of criminal cases would add

26 "Horyo oyobi hokaku-sen shobun nami senryōchi jinmin shobun," JACAR Ref.C08040745400, in *Meiji 27/8-nen, senji shorui, kan 12, Meiji 28-nen* (Bōeishō, Bōei kenkyūjo), 0386–0388

27 JACAR Ref.C08040745400, 0396.

28 JACAR Ref.C08040745400, 0386–0388 and 0392–0394.

unnecessary complication to a system that was designed to expedite the administration of justice.[29] Furthermore, it was decided that judicial organs in the field would not (and could not) be as they were in Japan. And, while the administration of justice would ideally be guided by the principles underpinning the Japanese civilian judiciary, the disposition and procedure for trials in occupied territory should ultimately be determined in the field by respective army commanders as they considered appropriate and befitting the military situation.[30]

In meting out penalties, judges were also given latitude to pronounce sentences commensurate with army needs based on their evaluation of the circumstances of the offence, of wartime conditions and of the value of imposing a specific punishment. It was thought, for instance, that in some cases, the corporal punishments usually prescribed by Qing laws might be more effective than more "civilised" penalties. Emphasising the deterrent function envisioned for military justice, it was also stressed in the explanatory notes to the Ordinance that judges need not punish every crime. Rather it was important to punish offenders (including conspirators and accomplices) in a manner which would serve as a warning to others and cultivate a wider sense of awe for military authority among civilians. While death sentences were regarded as beneficial in the intimidation of the more "defiant, dishonest elements" within the population, to punish so severely with no consideration of mitigating circumstances was considered to be unjust. As such, if no harm had been done and there was no apparent advantage in making an example of an offender, judges had discretion to commute sentences or issue pardons as they deemed salutary.[31]

Between November 1894 and December 1895, when Japan returned control of the Liaodong Peninsula to China, the civil administration (with the aid of the *kenpei* units) handled tens of thousands of police incidents (*keisatsu jiko*) involving both Japanese and Chinese civilians.[32] A total of 2,384 civilians (224 Japanese and 2,160 Chinese) were either arrested, indicted or received a citation during this period.[33] Of these, 721 were tried in military courts where twelve were acquitted, eight found not-guilty and the remaining 701 received punishment.[34] Despite the emphasis on enforcing Japanese legislation, as Table 1 shows, the vast majority of these civilians were tried either under Qing laws (69.6%) or the aforementioned Ordinance (22.4%). Only 56 persons (8%) were adjudicated under the Japanese

29 JACAR Ref.C08040745400, 0396–0399.
30 JACAR Ref.C08040745400, 0400–0401.
31 JACAR, Ref.C08040745400, 0392–0394.
32 JACAR Ref.C14020395000, 0502–0503, 0509–0510.
33 JACAR Ref.C14020395000, 0511–0512.
34 No breakdown of nationality was provided in these statistics.

Penal Code or other national laws, presumably these were Japanese civilians who were subject only to domestic laws in occupied areas.

Table 1: Number of punishments in military courts (Nov. 1894 – Dec. 1895).[35]

	Military Ordinance	Japanese Laws	Qing Laws	Total
Serious Crimes	11	3	153	167
Minor Crimes	146	44	335	525
Trivial Infractions	–	9	–	9
Total	**157**	**56**	**488**	**701**

Offences were extremely varied, categorised into serious crimes (*jūzai*) and minor crimes (*keizai*). Serious crimes punished under the Ordinance included espionage, severing electrical lines and obstruction of military supplies, while minor offences involved more mundane violations like refusing to obey officials, forging military passes and misrepresenting oneself to pass sentry posts or check points. Offences tried under Japanese national legislation included theft with a deadly weapon and wounding a robber as serious crimes, alongside misdemeanours such as trespassing, gambling and making false accusations. Under the Penal Code, offenders were also punished for other acts, like performing a burial without declaring the death or violating rules for the prevention of infectious diseases, which constituted more trivial infractions (*ikeizai*). The widest range of acts, however, were punished under Qing laws. This included serious offences such as premeditated murder, manslaughter, arson, assault and, as more minor crimes, things like harbouring fugitives, possessing military weapons, attempted murder, slander, making threats and urinating on the street. The most commonly encountered crimes across all of the aforementioned laws were related to theft (stealing someone's property, theft with a deadly weapon and threatening or assaulting someone to steal their belongings) which accounted for approximately 45%, 12.3% and 11% of all offences for which penalties were imposed respectively.[36]

Punishments, as depicted in Table 2, were meted out depending on the law under which the person was tried and, as a result, were similarly diverse. Under the Ordinance, civilians could be subject to the death penalty (*shikei*), imprisonment with hard labour (*jū-kinko*), fines (*bakkin*) and haircutting (*danpatsu*). All serious offences received the death penalty which amounted to 7% of the 157 civilians who

35 JACAR Ref.C14020395000, 0512.

36 Calculated by the author based on statistics in JACAR Ref.C14020395000, 0512–0515.

Table 2: Sentences according to severity of crime and applicable law (Nov. 1894 – Dec. 1895).[37]

	Military Ordinance		Japanese Laws			Qing Laws		Total
	Serious Crimes	Minor Crimes	Serious Crimes	Minor Crimes	Trivial Infractions	Serious Crimes	Minor Crimes	
Death	11	0	–	–	–	153	0	164
Penal Servitude	0	0	3	0	0	0	17	20
Imprisonment	0	122	0	44	0	0	56	222
Fines	0	13	0	0	4	0	0	17
Detention	0	0	0	0	5	0	0	5
Corporal Punishments	–	–	–	–	–	0	262	262
Haircutting	0	11	0	0	0	0	0	11

were adjudicated in accordance with it. The overwhelming majority of minor offences received terms of imprisonment without hard labour (*kinko*). Of these sentences, 97.5% were for a period of six months or less, with the most common term (72.1%) for a period under one month. Fines, most of which were for a sum less than ten yen, were imposed on 8.3% of civilians tried, while haircutting accounted for a further 7% of punishments for these more minor crimes.

The penalties prescribed under Japanese legislation were more restrictive since they were set by the Japanese Penal Code. Serious offences tried under these national laws, of which there were only three, received an indefinite term of penal servitude (*muki tokei*), as well as light(er) terms of penal servitude (*keichōeki*). This amounted to 5.4% of the 56 civilians tried according to such laws, while 78.6% of those who were tried for minor offences were sentenced to imprisonment with hard labour. Sentences of no more than six months were pronounced for 93.2% of these persons and the most frequently imposed term (40.9%) was for one to three months. Those found guilty of more trivial infractions were punished with administrative fines (*karyō*) and short terms of detention (*kōryū*). These were the only penalties which could be imposed for this type of crime and amounted to 7.1% and 8.9% of punishments pronounced under Japanese laws.

Sentences pronounced for offences tried under Qing laws were comparatively harsher. All persons convicted of serious offences (153 out of 488) received the death penalty amounting to 31.5% of punishments given under these laws. Forms of imprisonment were much less common. Only 3.5% of persons found guilty of minor offences received terms of penal servitude (*tokei*) for one to five

37 Compiled by the author based on statistics in JACAR Ref.C14020395000, 0519–0522.

years, for example, while only 11.5% were given a term in prison (*rōgoku*). Instead, judges tended to impose corporal punishment, including beating with a heavy stick (*tsue-kei*), beating with a light stick (*chi-kei*) and use of the cangue (*kase-gō*), on the majority of those convicted of minor crimes. While the most severe of these, beating with a heavy stick, was more commonly prescribed, sentences trended towards the lower end of the scale with 54.4% of persons receiving less than 60 strikes and just over 4.2% receiving the maximum of 100 strikes. Figure 1 depicts the distribution of punishments imposed on civilians tried by Japanese authorities during this war. On the whole, 23.4% of civilians received the death penalty, although exclusively for having committed serious offences. Of the offenders found guilty of less serious crimes, 35.2% received a sentence involving some form of incarceration (imprisonment and penal servitude), while corporal punishments were meted out to 37.4% of persons and the less common sentences of fines or haircutting were pronounced to 2.4% and 1.6% of civilians respectively.[38]

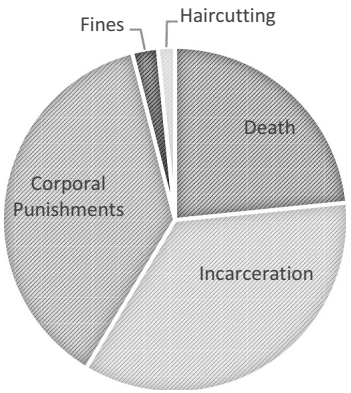

Figure 1: Military punishments during the First-Sino Japanese War (Nov. 1894–Dec. 1895).

Kenpei took responsibility for the enforcement of all sentences. Although civil administrations handled the adjudication of trials in military courts, prior to carrying out a death sentence, *kenpei* officers were to seek permission from whichever army or base commander held jurisdiction in that given area prior to carrying out a death sentence.[39] For punishments involving forms of imprisonment, this

38 Discussion based on calculations by the author using statistics in JACAR Ref.C14020395000, 0519–0522.

39 JACAR Ref.C14020395000, 0502.

meant utilising and supervising Qing prisons. When occupation came to an end, offenders were released regardless of whether they had served their sentence in full.[40] This might account for the tendency to deliver relatively light terms of imprisonment.

As official statistics compiled post-war with inherent bias and at the discretion of the military leadership, the insights into the character of military justice in occupied China, as drawn from this data, are limited. In the absence of detailed judgements, it is difficult to qualify the severity and proportionality of punishments meted out to civilians. Interpreted tentatively and in comparison to data from the "China Incident," however, these figures are representative of a balanced approach to the administration of military justice during this conflict. That said, there was a high potential for indifference to the judicial rights of civilians within an ad hoc system which prioritised military needs in the adjudication of cases and followed streamlined procedures established at the discretion of those in the field. Indeed, considerable latitude was given to those on the ground to administer justice as they thought best for the IJA and the realisation of its objectives. During this conflict, these objectives involved demonstrating model conduct, adherence to the laws and customs of war and the proper treatment of civilians. As a result, the military justice system was to observe, as far as possible, common principles of justice and an even-handed approach to punishment was advocated. The statistics suggest that those involved in administering justice observed and practiced these ideals. The different priorities and objectives in Japan's second war with China had a similar impact in shaping the character of military justice as imposed over civilians in enemy occupied territories.

2 The "China Incident" (1937–1941)

Japan's second war in China was a very different conflict. It began as a local clash between Japanese and Chinese soldiers at Lugou Bridge (Marco Polo Bridge) on the outskirts of Beijing on 7 July 1937. Over subsequent months, fighting escalated into a multi-front war of attrition fought against guerrilla, as well as regular, combatants which lasted until 1945.[41] As a consequence, military occupation lasted

40 JACAR Ref.C14020395000, 0502.

41 For overview see Edward Drea and Hans Van De Ven, "An Overview of Major Military Campaigns during the Sino-Japanese War, 1937–1945," 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: Stanford University Press, 2011), 27–47.

much longer, was far more involved and presented greater challenges than it had during the First Sino-Japanese War. The conduct of the IJA in this conflict was also drastically different. While the massacre of Chinese soldiers and civilians at Nanjing in December 1937 somewhat echoed that at Port Arthur in 1894, such violence had not been an aberration in this war. The IJA in China had been described as an "army of locusts" by the Chinese population for the unprecedented scale of the destruction, looting and killing inflicted during the march through the Yangtze Delta.[42] Having said that, with the exception of the more systematic forms of violence (the "comfort women" system, medical experimentation and scorched-earth policies, etc.), the conduct of soldiers was considered to be problematic from the perspective of those in Tokyo because it might damage the IJA's reputation.[43] In the context of the so-called "break with the West" in the 1930s, the Japanese leadership had not sought to impress Western powers in the same sense as their predecessors had in 1894. Nonetheless, they remained conscious that any overt deviations from the established rules and customs of war would damage the nation's international relations.[44] This was important because the maintenance of amicable relations, especially with trade partners, was understood to be a vital pre-condition of the nation's long-term defence plans.[45] Thus, while some within the leadership had viewed the skirmish in July as an opportunity to extend Japanese influence in north China following the success of the Manchurian Incident in 1931, others were more cautious that Japan avoid a protracted conflict and any resulting damage to the nation's international standing. For these reasons, until 1941, the leadership eschewed a formal declaration of war.[46]

Much as the specific objectives informing war had shaped the development of the military justice system in 1894, the framing of conflict as an "incident" in 1937 had implications in regard to the authority of Japanese commanders to impose martial law and employ measures to maintain public order in areas that fell

42 Kasahara Tokushi, "Massacres outside Nanjing City," in *The Nanking Atrocity, 1937–38: Complicating the Picture,* ed. Bob Tadashi Wakabayashi (New York, NY: Berghahn Books, 2008), 64.

43 See, for example, a proclamation on the issue from Prince Kan'in Kotohito, Chief of Staff of the IJA in "Gunki fūki ni kansuru ken," JACAR Ref.C04120161000, in *Shi ju dai nikki (mitsu) sono 2, Shōwa 13-nen 1-gatsu 14-nichi kara 10-gatsu 26-nichi made* (Bōeishō, Bōei kenkyūjo), 1774–1779.

44 JACAR Ref.C04120161000; "Dai 15-shō kita-shi senryōchi kankei sho mondai," JACAR Ref. B02130114900, in *Shitsumu hōkoku Shōwa 12-nendo Tōa-kyoku dai 1-ka* (Tōa-2) (Gaimushō, Gaikō shiryōkan), 640–693; see Eri Hotta, *Pan-Asianism and Japan's War, 1931–1945* (Basingstoke: Palgrave Macmillan, 2007), 75–106 for discussion of Japan's "break with the West."

45 Michael Barnhart, *Japan Prepares for Total War: The Search for Economic Security* (Ithaca: Cornell University Press, 2013) provides more information on this aspect of the conflict.

46 For further details see Barnhart, *Japan Prepares*, 77–90; Rana Mitter, *China's War with Japan, 1937–1945: The Struggle for Survival* (London: Allen Lane, 2013), 49–91.

under army control. Military authorities in Tokyo, in consultation with the Foreign Ministry, for example, initially instructed those in the field not to declare martial law because the establishment of military government in any form would be premature and may have negative repercussions.[47] Consequently, the preservation of peace and order, including legal and judicial matters, was largely to be left to Chinese authorities who would be aided by dedicated public order maintenance associations (*chian iji kai*) established in occupied areas by the IJA and staffed with Japanese-approved Chinese officials.[48] It was, nevertheless, agreed that commanders had the right to enact "necessary measures" (*hitsuyō naru sochi*) to suppress and control crimes committed by civilians until a formal policy for the administration of occupied territory had been decided.[49] Proclamations were circulated warning the local population that they would be subject to severe military punishment for certain acts which endangered the safety of Japanese forces. However, no judicial organs were established. While commanders could entrust the adjudication of cases to local or consular courts, extrajudicial punishments could be meted out at their discretion.

Such practices were not new in 1937. Discretionary measures, including "special battlefield killing" (*rinjin kakusatsu)* and "severe punishment" (*genjū shobun),* both euphemisms for summary executions, had been sanctioned in Manchuria in the early 1930s under such regulations as the "Temporary Law for Punishing Bandits" (*Dankō chōji tōhi hō*) introduced in September 1932.[50] According to Ōnishi Satoru, a *kenpei* officer who had been involved in the massacres of Chinese civilians in Singapore in 1942, the authorised extension of such practices into the rest of China had been only natural during an "incident" which was "outside the limits of international law" (*kokusai hō no rachigai*).[51] In the absence of a declaration of war and an accompanying military judicial mechanism then, commanders in the field relied on informal methods for handling offences perpetrated by civilians in occupied China.

By mid-September, however, the battlefield had considerably expanded. Following the Ōyama Incident in Shanghai in early August, Japanese troops were

47 JACAR, Ref. B02130114900, 669–671.

48 Details of these associations can be found in JACAR, Ref. B02130114900, 640–659.

49 Policy outlined in JACAR, Ref. B02130114900, 671–672.

50 "Dankō chōji tōhihō, Manshū teikoku nichi-yaku keisatsu kankei hōki," JACAR, Ref. C12120844200; (Bōeishō, Bōei kenkyūjo), 1046–1048; discussed in Zenkoku Ken'yūkai Rengōkai (ed.), *Nihon kenpei seishi* (Tokyo: Hatsubaimoto Kenbun Shoin, 1976), 888–891.

51 Ōnishi Satoru, *Hiroku Shōnan kakyō shukusei jiken* (Tokyo: Kongō Shuppan, 1977), 91; the same argument is given in the following memoirs: Ōtani Keijirō, *Kenpei: Moto tōbu Kenpeitai shireikan no jidenteki kaisō* (Tokyo: Kōjinsha, 2006), 303; Kamisago Shōshichi, *Kenpei 31-nen* (Tokyo: Tōkyō Raifusha, 1955), 81.

fighting a gruelling battle with Chiang Kai-Shek's best trained units signalling that the "incident" had progressed to a *de facto* war.[52] In view of the enlargement of occupied territory and the necessity of controlling the activities of civilians residing in that territory, military authorities in China requested permission to establish military courts to adjudicate violations of their proclamations and other criminal acts. With (eventual) consent and some guidance from the senior leadership in Tokyo, staff officers in the field drafted formal martial law regulations (*gunritsu*) which were promulgated under the authority of the commanders of the North China Area Army (NCAA) and the Central China Area Army (CCAA) on 5 October and 1 December 1937 respectively.[53]

Immediately afterwards, summary measures were prohibited. Now that martial law had been declared, civilians, without exception, were to be sent to military commissions (*gunritsu kaigi*) for trial.[54] Essentially, military justice was not utilised, or even viewed, as a means to legitimise extrajudicial violence; martial law did not allow for commanders to inflict punitive measures upon civilians arbitrarily or with impunity. On the contrary, law and justice were used to sanitise military conduct by providing a formal, lawful mechanism through which to punish civilians and prevent the continuation of "battlefield measures" which were considered inappropriate once combat had ceased.[55]

From this point on, military justice became central to the safeguarding of military interests and played an important complimentary role in the endeavour of pacifying the civilian population in occupied China.[56] However, due to efforts on the part of the leadership to avert any potential criticism of Japan's involvement in government, martial law was limited only to those acts (war treason, espionage, damaging railroads, etc.) which directly harmed the IJA or impeded its ac-

52 Mitter, *China's War*, 75–78.

53 "Gunritsu shikō no ken," JACAR Ref.C04120049000, in *Shi ju dai nikki (mitsu) sono 8 15-satsu no uchi, Shōwa 12-nen 10-gatsu 28-nichi kara 11-gatsu tsuitachi made* (Bōeishō, Bōei kenkyūjo), 0294–0303 and regulations printed in Takahashi Masae (ed.) *Gunji keisatsu: Kenpei to gunpō kaigi* (Tokyo: Misuzu Shobō, 1982), 194–195, For overview of drafting process and this early system see: Kita Hiroaki, "Shina hōmen kantai no baai o shutosuru gunritsu ni tsuite," *Bōei-hō kenkyū,* 9 (1985): 180–205; Kita Hiroaki, *Nitchū kaisen: Gun-hōmukyoku bunsho kara mita kyokoku itchi taisei e no michi* (Tokyo: Chūō Kōronsha, 1994), 54–59.

54 See a notification to this effect in JACAR Ref.C04120049000, 0301.

55 Ogawa Sekijirō, *Aru gun hōmukan no nikki* (Tokyo: Misuzu Shobō, 2000), 90. See also instructions on the impropriety of *kenpei* extrajudicial practices in in 'Dai 3: Fukumu ni tsuite', JACAR Ref.C11110638700, in *Shina chūton kenpeitai keimu kankei shorui* (Bōeishō, Bōei kenkyūjo), 0243.

56 JACAR Ref.C11110638700; see also "Dai jū-gun hōmubu jinchū nisshi" printed in Takahashi (ed.), *Gunji keisatsu*, 51–52.

tivities.[57] The military justice system was not to be involved in adjudicating disturbances of the peace and, unlike the First Sino-Japanese War, would not take over the administration of Chinese laws. Indeed, the maintenance of public order was to be left to local authorities (or at least seen as such) and the Chinese judiciary appears to have been relatively independent of military control in this respect.[58] Furthermore, in the handling of cases involving third-country nationals, greater caution was to be exercised. The *kenpei* who, as in the First Sino-Japanese War, assumed pivotal law enforcement and judicial functions, were to collect indisputable material evidence in these cases and army commanders were to approve all trials in advance, in addition to confirming sentences pronounced.[59] Initially, then, military justice had a more limited role in this conflict, mobilised exclusively as necessary for the protection of the military and in view of the overall objective of resolving conflict swiftly, favourably and with no lingering detriment to international relations.

However, military needs and objectives changed. Towards the end of 1938, the Japanese leadership announced a new longer-term policy for the construction of a New Order in East Asia (*Tōa shin chitsujo*) incorporating a transformative element to occupation plans. In addition, while a stalemate with regular Chinese forces had set-in, guerrilla fighting with irregular troops in occupied areas had intensified, becoming a serious drain on resources. Consequently, in 1940, there was a shift in focus to the consolidation and exploitation of occupied territory which necessitated greater involvement in the administration of these areas in concert with military operations for the suppression of guerrilla resistance. This precipitated an adaptation of the military justice system which included expanding the jurisdiction and scope of martial law substantially.

In June that year, a new set of regulations were established by the China Expeditionary Army which permitted military commissions to punish Imperial subjects (though the death penalty was not sanctioned) for acts which disturbed the peace, disrupted the economy or financial stability and were not ordinarily punishable under Japanese laws. This was enacted because the disrespectful attitude and misconduct of so-called "delinquent overseas residents" (*furyō hōjin*) was believed to be inciting the hostility of the Chinese populace and undermining the

57 JACAR Ref.C04120049000, 0295–0298 and *Zoku gendaishi shiryō 6,* 194–195.

58 See for example Xiaoqun Xu, "The Chinese Judiciary under the Japanese Occupation: Criminal and Civil Justice in Jiangsu, 1938–1945," *The Chinese Historical Review* 22.2 (2015): 120–140.

59 JACAR Ref.C04120049000, 0302.

establishment of a New Order based on friendship and cooperation.[60] Notifications to the populace warned that severe military punishments commensurate with the needs of wartime would henceforth be inflicted for a range of acts, irrespective of nationality, including, among other items, slandering the military or criticising its policies, activities which impeded pacification and propaganda efforts, as well as any disturbances of the peace, the economy or financial stability. Military commissions would be aided in adjudicating such crimes by consular courts (in the case of Imperial subjects or third-country nationals) and Chinese courts under the supervision of the newly established Wang Jingwei puppet regime.[61]

As a result of these changes in 1940, martial law was utilised not just for the protection of Japanese forces, but more decidedly as a tool of occupation to actively support military policies and long-term goals. Aimed as they were to exploit this territory and reconstruct it in service to Japan's war effort, such policies could indirectly exacerbate shortages of food or other basic necessities, loss of jobs, financial difficulties, deprivation and deteriorating living conditions; in other words, the quotidian and inadvertent hardships associated with the turmoil of wartime occupation. In this respect, martial law had the potential to contribute to structural forms of violence by establishing constraints on the daily activities of those residing in occupied areas and forcing compliance with military policies through issuing threats of severe military punishment for violation of the prohibitions imposed. It achieved this through rigorous, but selective, enforcement which, at least at the institutional level, failed to uphold judicial standards and prioritised military interests.

The enforcement of martial law was a role which fell first and foremost to members of *kenpei* units who were invested with vast authority in this capacity. Upon completion of their investigations, which routinely involved the use of torture to force confessions, *kenpei* officers had the discretion to decide whether to refer the case to a military commission, to pass to local or consular courts or whether to release the suspect (especially if they could be co-opted as intelligence agents).[62] In determining the best course of action, *kenpei* were advised that the

60 JACAR Ref.C11110839000, 1777–1779, 1788–1790. For problem of "delinquent overseas residents", see "Furyō hōjin no torishimari taisaku ni tsuite," JACAR Ref.C11110637900, in *Shina chūton kenpeitai keimu kankei shorui* (Bōeishō, Bōei kenkyūjo).

61 JACAR Ref.C11110839000, 1760.

62 References to such methods of torture can be located in *kenpei* memoirs, for example: Inoue Genkichi, *Senchi kenpei* (Tokyo: Tosho Shuppansha, 1980), 107 and throughout the official histories: *Nihon kenpei seishi* and Zenkoku ken'yūkai rengōkai (ed.) *Nihon kenpei gaishi* (Tokyo: Hatsubaimoto Kenbun Shoin, 1983). For further detail, see also Ogino, *Nihon kenpei-shi,* 279 and Ikō

first measures taken would set the standards for the future and so should keep in mind that severe punishment (*genbatsu*) at the outset was "remarkably effective" as a deterrent.[63] Until 1940, military punishment, severe or otherwise, could only be meted out in military commissions. However, in this year, new regulations were enacted permitting commissioned *kenpei* officers with command authority to pass summary judgements on minor offences committed by Chinese people after reviewing evidence collected by investigators and hearing the statement of the accused.[64] In exercising these powers, commanders could only sentence offenders with a term of up to 90 days detention or impose fines up to 100 yen.[65]

Summary executions were not permitted under this regulation. However, sources indicate that the aforementioned practice of "*genjū shobun*" did continue. At a conference for *kenpei* commanders in August 1938, for instance, Colonel Ōno Kōichi had observed that "considerable numbers" of Chinese offenders since the outbreak of the incident had been summarily executed with permission sought from senior commanders.[66] Statistics detailing arrests made by *kenpei* and measures taken in handling Chinese civilians included in an article by Lieutenant Colonel Nakamura Michinori published in the periodical *Ken'yū* reveal that, between April and September 1940, 1,900 persons received "*genjū shobun*" as a punishment. This exceeded the number of persons summarily judged (592) under the aforementioned regulation and the number sent for trial (752) combined during this period.[67] Nakamura's article, as well as post-war memoirs, indicate that summary executions were undertaken by some as a means of bypassing military judicial organs which were increasingly seen as cumbersome and unfit for purpose in wartime.[68] While no longer a formally sanctioned policy, the continuation of this practice was nevertheless tolerated at senior levels in certain "unavoidable" circumstances. The field handbook, for instance, acknowledged that the death of suspects during investigations was an inescapable result of "expedient, necessary measures" (*rinki hitsuyō no sochi*) taken if offenders resisted arrest, attempted to flee or adamantly refused to submit to questioning. However, it also warned that human rights must be respected, and that arbitrary punishment of innocent peo-

Toshiya, "Kenpei no sensō hanzai to Chūgoku BC-kyū senpan saiban (jō)," *Sensō sekinin kenkyū* 88 (2017): 59–60.

63 *Yasen kenpei hikkei* (Tokyo: Rikugun Kenpei Gakkō, 1942?), 138.

64 "Shinajin 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, Bōei kenkyūjo), 1068–1069.

65 JACAR Ref.C04121789500, 1068–1069.

66 JACAR Ref.C11110638700, 0243.

67 Nakamura Michinori, "Senchi ni okeru gun shihō ni tsuite," *Ken'yū* 35.12 (1941): 78.

68 Nakamura, "Senchi," 67–78; *Nihon kenpei seishi*, 890; Ōnishi, *Hiroku*, 90.

ple would become a cancer on public order of the *kenpei*'s own making. Therefore, superiors were to exercise control over subordinates who were equally instructed to pay particular attention to implementation and strive towards limiting errors by referring cases to legal departments for formal trial in a military commission.[69]

These departments were astonishingly small given that legal officers were responsible for handling all cases involving soldiers, enemy captives and civilians within their respective army's area of jurisdiction.[70] Having received the file (inc. all statements, interrogation transcripts, evidence and a recommendation for punishment by the investigator) from the *kenpei*, an assigned legal officer reviewed the case. If that officer felt it warranted, he could request or himself carry out further examination of witnesses and the accused but, if satisfied with the thoroughness of the investigation, he would submit a report recommending prosecution or dismissal to the army commander in his capacity as head of all military commissions which came under his command jurisdiction.

With permission to prosecute, the legal department would then convene a military commission. As in the First Sino-Japanese War, military commissions gave precedence to the expeditious adjudication of cases in support of military objectives. Like martial law, trial regulations detailing the constitution and procedure of these courts were drafted and issued in the field under the authority of the army commander. Courts were staffed with judges (two commissioned officers, one legal officer), a prosecutor (also a legal officer), clerks, guards and (if possible) interpreters.[71] Unlike the First Sino-Japanese War, the commander did not have full discretion to determine trial procedure. This was to follow the provisions for special courts martial (*tokusetsu gunpō kaigi*) as detailed in the Army Courts Martial Law (*Rikugun gunpō kaigi hō*).

As a simplified version of courts martial utilised in the field during wartime, many of the judicial safeguards prescribed in the aforementioned law did not apply in these special courts.[72] Civilians were, therefore, not treated differently from soldiers meaning that the accused had no access to legal advice, no right to produce evidence or call witnesses and no opportunity to appeal judgements

69 *Yasen kenpei*, 140.

70 For an overview, see Nishikawa Shin'ichi, "Senzen-ki Nihon no gun hōmu-kan no jittai-teki kenkyū: Gun hōmu-kan 193-nin no jitsumei to sono haizoku-saki o megutte," *Meiji Daigaku Shakai Kagakukenkyūjo Kiyō* 53.1 (2014): 73–117.

71 JACAR Ref.C04120049000, 0299–0300.

72 "Rikugun gunpō kaigi hō" JACAR Ref.A03021304500, in *Go-shomei genpon / Taisho 10-nen / Hōritsu dai-85-gō / Rikugun gunpō kaigi hō* (Kokuritsu Kōbunshokan) for further detail. Translated and summarised for the author by Tino Schölz.

once pronounced. This was problematic for two main reasons. Firstly, while legal officers reviewed *kenpei* investigations prior to submitting their recommendation to the commander, they did not necessarily have to (and perhaps had limited time to, given the extent of their duties) conduct further examinations of witnesses or defendants. Much was based, then, on the information provided and evidence collected by the *kenpei* who, as mentioned, were known for their use of torture. Commanders were to confirm death sentences prior to enforcement, but there was no other review process regarding trials in the field. Secondly, Japanese military courts had historically tended to assume guilt in wartime and made it incumbent on the accused to prove otherwise.[73] Indeed, judges were advised to place greater weight on military needs and to take the wartime context into consideration when delivering sentences; as a matter of course, justice in wartime was understood to be more exacting than in peacetime.[74] As in previous conflicts, it had not been necessary to adjudicate cases for the sake of punishment, but rather to "guide" the behaviour of civilians.[75] While this did not necessarily equate to automatically harsh punishments since judges had latitude to commute sentences or even offer pardons in light of mitigating circumstances, there was an inherent lack of impartiality to the administration of justice in this system. In sum, the exercise of justice in military commissions and through the summary powers of the *kenpei* after 1940 had a high potential for systemic forms of violence since there were practically no judicial safeguards in place and no recourse for the accused to challenge judgements pronounced. Defendants had to rely on the personalities, the sense of fairness and the agendas of the *kenpei*, legal officers and judges – those responsible for enforcing law and administering justice – who, with the permission of their respective army commanders, had discretion to either punish strictly or to reduce sentences, or perhaps even pardon offenders, as it suited the military and the wartime situation.

It was recognised that, as enforcers of martial (as opposed to civilian) law, these agents of the judiciary held the "power of life and death" (*seisatsu yodatsu no ken*).[76] However, the system was not intended or expected to permit despotic or excessive exercise of judicial powers. During a handful of post-war trials touching on the issue of "denial of justice" to civilians by Japanese authorities, the defence represented (not unsuccessfully) the view that the military justice system

73 Acknowledged, for example, in Ariga Nagao, *Nichiro rikusen kokusaihō ron* (Tokyo: Tōkyō Kaikōsha, 1911), 640.

74 "Hōmen gun sanbōchō kōen yōshi sōfu no ken," JACAR Ref.C04122206300, in *Riku shi mitsu dai nikki, dai 24-gō 1/3, Shōwa 15-nen* (Bōeishō, Bōei kenkyūjo), 0382–0385.

75 *Yasen kenpei*, 138.

76 *Yasen kenpei*, 138.

had, if not complied with, at least not contravened the laws and customs of war in this respect.[77] The explanatory notifications which accompanied the regulations in 1940 further show that there was a conciliatory dimension underlying the changes to the military justice system in occupied territories. In fact, the new ordinance permitting *kenpei* commanders to take on-the-spot punitive measures had been introduced to appease, and therefore cultivate a better relationship with, the Chinese populace. It was meant to do this, firstly, by accelerating the handling of trivial cases and, thereby, alleviating the overburdened courts after criticism of the excessively long periods of detention for those awaiting trial. Secondly, by offering more lenient punishments to address accusations that judgements pronounced in military commissions for less serious acts were overly harsh and disproportionate to the offence. The regulations regarding the recording of such punishments make clear that this judicial authority was not to be exercised arbitrarily.[78] It was also stressed in the handbook for field *kenpei* that officers were to take particular care to establish a certain and consistent standard in their judgements and were to ensure that leniency and severity in their punishments was carefully balanced to nurture a better relationship with the populace.[79] The fragmentary statistics which were prepared by the Head of the Army Legal Bureau, Lieutenant-General Ōyama Ayao, and the Judicial Legislation Research Department of the Ministry of Justice for the post-war trials suggest that judges within military commissions were following a similar approach.

According to these statistics, between 1938 and 1941, military commissions tried 7,048 non-Japanese civilians, about ten times more than during the First Sino-Japanese War, and (after July 1940) 150 Japanese residents. In the first year or so of war, only 487 non-Japanese civilians were tried. However, subsequent years saw a dramatic increase reflecting the expansion and changing nature of conflict, as well as the evolution of occupation policy. In 1939, for instance, 1,934 civilians were investigated by legal departments and, of these, 1,583 were prosecuted. These numbers, as highlighted in Table 3, grew year on year. With 2,045 of the 2,272 civilians and 23 of the 47 Japanese residents investigated tried in military commissions in 1940, and 2,933 of the 3,272 civilians and 127 of the 168 Japanese residents investigated prosecuted in 1941 respectively.[80]

In these statistics, the offences were not detailed, referred to only as "violations of martial law" (*gunritsu ihan*). For Japanese residents, this meant acts

77 Some of these cases were summarised in *Law Reports*, Vol. 5, 25–36.

78 JACAR Ref.C04121789500, 1072–1075.

79 *Yasen kenpei*, 614–616.

80 Statistics derived from various tables published in Kita Hiroaki, ed., *Tōkyō saiban Ōyama Ayao kankei shiryō* (Tokyo: Fuji Shuppan, 1987), 8–13, 16–17 and 20–21.

Table 3: Number of persons punished during the "China Incident" (1938–1941).[81]

Year	Persons not prosecuted (non-Japanese)	Persons Prosecuted (non-Japanese)	Persons not prosecuted (Japanese)	Persons Prosecuted (Japanese)
1938	79	487	–	–
1939	351	1583	–	–
1940	227	2045	24	23
1941	339	2933	41	127
Total	**996**	**7048**	**65**	**150**

which disturbed the peace or disrupted the economy (things like profiteering, currency trading and unauthorised transportation of restricted goods).[82] A report compiled by the North China Area Army Legal Department for a wartime quarterly (s*enji jūnpō*) submitted to Tokyo in September 1938 indicates that "violations" by other civilians mainly included acts of harm to the security of the IJA, anti-Japanese activities, espionage, rebellion and theft of military supplies.[83]

Two tables of statistics prepared after the war by the Judicial Legislation Research Department of the Ministry of Justice provide a more comprehensive overview of crimes, including a breakdown of punishments for the years 1940 and 1941, which offers more insight. According to this document, offences encountered in these years were quite diverse, though not as extensive as those found in statistics for the First Sino-Japanese War. Crimes, as shown in Table 4 and Table 5, ranged from killing of military personnel, damaging railroads, arson, and theft of military supplies to distributing anti-Japanese newspapers. Using forged military scrip and tearing down military proclamations were also recorded as possible crimes, though neither were represented in the statistics for 1940 and 1941. The most commonly punished offences were membership in an anti-Japanese organisation or plain-clothes unit (41.2% in 1940, 69.6% in 1941), followed by espionage (16.8% in 1940, 8.5% in 1941), disturbances in rear areas (16.2% in 1940, 10.3%) and acts which benefitted the enemy (10.5% in 1940, 4.4% in 1941).

81 "Shina jihen-kan gunritsu kaigi shokei jin'inhyō," in *Kyū Rikugun no keibatsu ni kansuru shohyō (bassui)*, (Kokuritsu Kōbunshokan).

82 For select examples of violations, see the annual military policing report for 1941," Rikugun gunji keisatsu nenpō (Shōwa 16-nen)," JACAR Ref. C07092226800, in *Riku shi fu dai nikki dai 9-gō 2/2 Shōwa 17-nen* (Bōeishō, Bōei kenkyūjo), 0908–0910.

83 "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* (Bōeishō, Bōei kenkyūjo).

Table 4: Number of persons (excluding Japanese) punished in military commissions (1940)

	Death	Confinement								Fines	Total
		Life	15+ years	9+ years	7+ years	5+ years	3+ years	1+ year	-1 year		
Killing military personnel	1	–									**1**
Attacking the IJA	9			1				1			**11**
Taking military personnel captive	1										**1**
Espionage	209			28	19	29	26	24	8		**343**
Damaging railroads	13		1	1		2					**17**
Cutting or stealing communication lines	2							2			**4**
Tearing off or damaging Japanese military proclamations											**0**
Printing and distributing anti-Japanese newspapers					1						**1**
Assassinating pro-Japanese important persons	17										**17**
Activities in anti-Japanese organisations or plain clothes units	596	4	5	21	14	36	74	80	12		**842**
Disturbances in the rear areas of the Japanese Army	96		4	21	3	42	37	84	35	10	**332**
Secretly selling or handing over hand grenades or incendiary bombs	4			4	1			4			**13**
Arson	3		2			1					**6**
Stealing weapons or military equipment	11		1	2			5	8	9		**36**
Damaging military buildings / constructions											**0**
Stealing items from trains for use by the Japanese military											**0**
Stealing secret military documents											**0**
Acts which benefit the enemy	78		3	10	1	25	10	76	10	1	**214**
Using forged military scrip											**0**
Other	80		2	23	7	25	20	32	7	11	**207**
Total	**1120**	**4**	**18**	**111**	**45**	**161**	**172**	**311**	**81**	**22**	**2045**

Table 5: Number of persons (excluding Japanese) punished in military commissions (1941)

	Death	Confinement						Exile	Fines	Total
		15+ years	10+ years	5+ years	3+ years	1+ year	-1 year			
Killing military personnel	22									**22**
Attacking the IJA	21	1		1						**23**
Taking military personnel captive	0									**0**
Espionage	107		1	34	52	45	9			**248**
Damaging railroads	29	1	1					7		**38**
Cutting or stealing communication lines	5			2	6					**13**
Tearing off or damaging Japanese military proclamations										**0**
Printing and distributing anti-Japanese newspapers	1		1	1	3	5				**11**
Assassinating pro-Japanese important persons	6			1						**7**
Activities in anti-Japanese organisations or plain clothes units	924	9	28	209	151	275	81	358	9	**2042**
Disturbances in the rear areas of the Japanese Army	66		2	29	64	52	44	14	30	**301**
Secretly selling or handing over hand grenades or incendiary bombs	2									**2**
Arson	8			2		2				**12**
Stealing weapons or military equipment	26		1	3	5	12		9		**56**
Damaging military buildings / constructions									1	**1**
Stealing items from trains for use by the Japanese military										**0**
Stealing secret military documents										**0**
Acts which benefit the enemy	65		4	11	18	20	4	4	3	**129**
Using forged military scrip										**0**
Other	2	1		5	6	10	12		1	**28**
Total	**1284**	**10**	**38**	**298**	**305**	**421**	**141**	**392**	**44**	**2933**

Sentences pronounced in military commissions were similar in substance to those employed during the First Sino-Japanese War with two exceptions; the introduction of a fixed term of exile (*tsuihō*) and the absence of corporal punishments since these were not permitted under Japanese military or civil legislation. As depicted in the aforementioned tables, the death penalty was the predominant sentence meted out in both 1940 and 1941, with 54.8% and 43.8% of civilians receiving this penalty in each of those years respectively. The highest proportion of death sentences was given for membership to anti-Japanese associations or plainclothes units (53.2% in 1940, 72% in 1941), followed by espionage (18.7% in 1940, 8.3% in 1941). Confinement with labour (*kankin*) was imposed upon 44.2% of civilians in 1940 and 41.4% of civilians in 1941, the terms of which ranged from a period of one month to life. The sentences tended to be harsher than those pronounced during the First Sino-Japanese War with the most frequently prescribed term being 1–3 years (34.4% in 1940, 34.7% in 1941), followed by 3–5 years (19% in 1940, 25% in 1941) and 5–7 years (17.8% in 1940, 24.6% in 1941). Fines were imposed in 1% of cases in 1940 and 1.5% of cases in 1941 and tended to be of a value greater than 100 yen, likely because any minor acts warranting of smaller amounts could be handled summarily by *kenpei* units at this time. In 1941, exile, which typically involved expelling someone from a specified area for a period of no less than one year, was pronounced to 13.4% of all persons tried. As depicted in Figure 2, the total proportion of civilians that received death sentences in military commissions in these two years amounted to 48.3%. Confinement accounted for the majority of other sentences pronounced in these years (42.5% of civilians), while just 7.87% and 1.32% of civilians were sentenced to exile and fines.[84]

As in the First Sino-Japanese War, sentences were enforced by *kenpei* who carried out death sentences by shooting. They received instructions from the respective legal department which, in turn, had to seek permission from the army commander in advance. Executions were usually carried out the same day as the sentence or soon thereafter.[85] During this conflict, prisoners were detained in field prisons (*shūkinjō*), rather than local prisons, which were similarly overseen by members of *kenpei* units who undertook duties as superintendents and guards. According to the Kenpei Field Handbook, since these were field prisons established in wartime, their main purpose was to defend army interests and so re-

84 Statistics derived and calculated by the author from "Shōwa 15-nen gunritsu kaigi shobatsusha (jo Nihonjin) hanzai oyobi jin'inhyō"; "Shōwa 15-nen gunritsu kaigi shobatsusha (Nihonjin) hanzai oyobi jin'inhyō"; "Shōwa 16-nen gunritsu kaigi shobatsusha (jo Nihonjin) hanzai oyobi jin'inhyō" and "Shōwa 16-nen gunritsu kaigi shobatsusha (Nihonjin) hanzai oyobi jin'inhyō" in *Kyū Rikugun no keibatsu ni kansuru shohyō (bassui)*, (Kokuritsu Kōbunshokan).

85 See, for example, "Dai jū-gun hōmubu jinchū nisshi," 100.

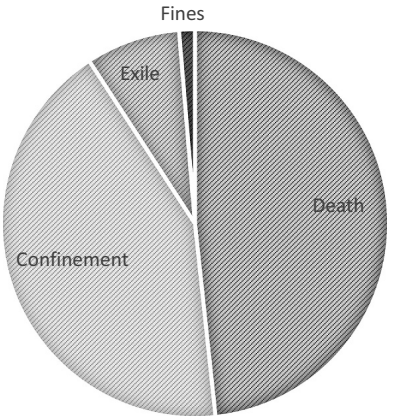

Figure 2: Military punishments during the "China Incident" (1940–1941).

form goals which might be undertaken in peacetime were to have no place.[86] Generally, the administration of prisons was to comply with the Order for Army Prisons (*Rikugun kangoku rei*) and Detailed Regulations for the Enforcement of the Order for Army Prisons (*Rikugun kangoku rei shikō saisoku*). However, *kenpei* were supervised by senior legal officers who had discretion to issue additional instructions as necessary.[87]

This data is piecemeal, incomplete and, particularly in respect to the breakdown of punishments, presents just a snapshot of the situation on the ground in 1940 and 1941. In view of this, and the fact that these statistics were prepared post-war for the war crimes trials, it is difficult to make direct comparisons or draw concrete conclusions. What might be said, however, is that the statistics depict a much harsher system in practice than that during the First Sino-Japanese War. This, of course, reflects the different nature and challenges presented in this conflict – the prolonged war of attrition that emerged and the rise of fierce, guerrilla-style resistance alongside regular offensives – as well as the diverse and mutable circumstances informing military objectives and long-term goals. It reveals that the increased harshness of the system, compared to the First Sino-Japanese War, was relative to the very different character of this war and to the shifting political and military objectives the system was designed to prioritise and protect.

86 *Yasen kenpei*, 120.

87 See "Shukinjō fukumu saisoku" for more information regarding their operation, printed in *Yasen kenpei*, 646–655.

Conclusion

The military justice system imposed in areas of China which came under Japanese rule during the First Sino-Japanese War and the "China Incident" was consistently utilised as one of the primary control mechanisms in the maintenance of peace and order and the overall administration of civilian populations. The evolving legal framework, as represented in regulations, orders and instructions analysed in this chapter, highlights, on the one hand, a restraining function for military justice in respect to fulfilling this role. The system was first introduced, for example, against the backdrop of a conflict in which model conduct was prioritised, as a legitimate, formal disciplinary mechanism which standardised existing informal, summary procedures employed by commanders in the field. The same is somewhat true of the "China Incident." While martial law was officially declared and military commissions established towards the end of 1937 primarily in the interests of the military, the introduction of a formal system was meant to replace ongoing "battlefield measures" and extrajudicial punishments which had been utilised during this undeclared conflict. In short, the military justice system did not legitimise direct, summary violence towards civilians, although its perceived cumbersome nature and logistical shortcomings do appear to have influenced the willingness of some *kenpei* in bypassing it through tacitly sanctioned summary practices.

On the other hand, this legal framework accentuates the role that military justice played as an instrument of military power and the accompanying potential for other indirect forms of violence embedded within this system when serving the military. In both conflicts, (martial) law was utilised to impose restrictions on the daily lives of civilians and coerced obedience by threatening and enacting "severe" punishments in courts which lacked impartiality, prioritised wartime military needs and interests, followed streamlined procedures and did not guarantee normal judicial safeguards. Aside from the systemic violence associated with the deprivation of civilian legal rights, liberties and even lives with no avenue of redress or recourse to protest, military justice also had the potential to facilitate structural forms of violence by upholding military rule and supporting policies which were predisposed to placing military interests over civilian welfare possibly contributing to, if not exacerbating, the myriad of privations and devastations of war.

As underscored by this comparative analysis, there were multiple faces, and indeed, potentialities for (military) justice in occupied territory, especially in regard

to violence towards civilians.[88] The ways in which this potential was realised, as shown by the surviving statistics, depended on two factors. First, the mutable and fluid macro-, meso- and micro-level circumstances which influenced the legal and judicial frameworks established by the military, shaped the way in which it evolved and informed the specific concerns of those responsible for administering law and justice in occupied areas. In contrast to the over-representation of property crime during the First Sino-Japanese War, for example, crimes during the "China Incident" were heavily tied to the context of protracted, guerrilla warfare and the concomitant challenges of maintaining order which undoubtedly had an impact on the ways in which military justice was utilised as a means of controlling civilians during this conflict. A second factor is the activities and practices of the enforcers and administrators of law and justice – the *kenpei*, the legal officers, the judges and especially the commanders – who were responsible for, and had considerable latitude in respect to, wielding military justice as an instrument of military power and unleashing its violent potential. In other words, the legal framework of the military justice system offered few institutional protections for civilians processed through it and, whether that resulted in miscarriages of justice or abuses of legal authority, depended on the wider historical frame which informed the conduct of key actors and, in doing so, shaped the dynamics of violence towards civilians under wartime occupation.

88 Peter Stirk has also observed the different faces of justice in occupied territory, see *Politics of Military Occupation*, 184.