

## Prisoner Rights and International Law: Japanese and American Responsibility From World War II to Guantanamo

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by Jess Bravin

*[This posting consists of a two part article by Wall Street Journal Correspondent Jess Bravin on the rights, and abuses of those rights, of POWs under the Japanese in World War II and under the United States in Afghanistan, Iraq, and Guantanamo Bay, and the pertinent legal and criminal issues. The analogy should be a chilling one for a nation that pioneered, in the wake of World War II, in pressing charges of prisoner abuse and insisting on responsibility both of the immediate perpetrator of violations of human rights, on up through the chain of command to the highest authority. See also the article by Utsumi Aiko (<http://japanfocus.org/article.asp?id=276>) a leading specialist on World War II POW issues which addresses Japan's policies toward prisoners.*

During World War II, the American strategic bombing campaign targeted Tokyo and other Japanese cities. The U.S. considered the tactic legitimate, and eventually secured Japan's unconditional surrender by destroying the cities of Hiroshima and Nagasaki with atomic bombs.

But Japan saw the bombing of its cities as the deliberate targeting of civilians--and employed summary proceedings to punish captured American flyers as war criminals. Following the war, American military authorities concluded that treating Americans as war criminals was itself a war crime, because the Japanese procedures didn't meet the due-process standards of international law. At U.S. military commissions convened at Yokohama, Japan, in the late 1940s, U.S. Army officers carefully reviewed the level of due process the enemy had afforded American prisoners, and harshly punished them for falling short of what the U.S. decided was required.

A Japanese officer stood trial in 1946 for war crimes, in one of hundreds of such proceedings.

Lt. Yuri Kei was accused of directing his guards to bayonet to death an American soldier and forcing others to watch.

That history may now come back to haunt the Bush administration, as advocates for prisoners held at Guantanamo Bay, Cuba, argue that, like Japan in World War II, the U.S. today is punishing prisoners without affording them sufficient due process.

In November, a federal judge in Washington shut down military commissions the administration convened to try prisoners at Guantanamo Bay, Cuba, finding that they fell short of international legal standards. Today, a federal appeals court in Washington will hear the government's appeal -- and find that the long-forgotten history of the World War II commissions is suddenly at issue.



Guards watch prisoners from Afghanistan at Guantanamo Bay Prison

"Our military prosecuted the Japanese officials who devised specious rationales to deny court-martial protections and 1929 Geneva Convention protections of our captured servicemen tried in Japanese military commissions," says Neal Katyal, a Georgetown University law professor who is representing Salim Hamdan, a Guantanamo prisoner facing trial. "The government today has launched prosecutions at Guantanamo that mirror those Japanese prosecutions, despite the fact that the Geneva Conventions and court-martial protections for defendants have gotten far stronger, instead of weaker, in the years since World War II. That is the essence of our claim before the federal

courts."

The current military commission is unlawful, Mr. Katyal argues, because it affords defendants fewer rights than American soldiers receive before courts-martial, in particular by denying defendants the right to confront all witnesses or see all evidence against them.

Mr. Hamdan, a Yemeni captured in Afghanistan after the U.S. invasion in fall, 2001, is accused of conspiracy to commit murder and terrorism and faces a maximum penalty of life in prison. He denies the charges, but acknowledges serving as Osama bin Laden's driver.

The government's primary claim is that courts have no authority to second-guess the treatment of enemy prisoners. But the administration also contends its military commission will offer a fair trial. President Bush's November 2001 order authorizing the commission called for "full and fair" trials, and officials say they have been reviewing the procedures with an eye to making them resemble courts-martial more closely. Nonetheless, the administration maintains that special courts are needed to try international terrorism suspects because of the grave threat they pose to the U.S. Under current rules, commissions can sentence convicts to any term or, on vote of a unanimous seven-member panel, death.

According to the U.S. military's World War II records, Japanese officials also devised special procedures to deal with what they considered an extraordinary threat. American flyers "who do not violate international law will be treated as prisoners of war," but those "suspected of being felonious war criminals" would face Japanese military tribunals. Offenses "subject to military punishment" included "bombing, strafing and other acts of attack aimed at threatening and inflicting casualties on civilians," "damaging and destroying private property which has no military significance" and "any atrocious brutal acts that disregard humanity." The maximum penalty was death by firing squad.

Like the Bush administration's military commissions, the Japanese courts could consider evidence extracted through coercive interrogations. But laws passed by the Japanese Diet and regulations issued by the Imperial Army spelled out procedures intended to ensure that prisoners weren't punished arbitrarily.

As the war wore on, however, the Japanese deviated from their regulations, using samurai swords to behead convicted flyers because ammunition was too scarce to waste on firing squads. Dozens of Americans were executed after summary hearings with no right of appeal.

Prosecuted by the U.S. after the war, Japanese officials said their harsh acts were dictated by

military necessity.

Col. Onishi Hajime, charged with presiding over the execution of U.S. flyers in June, 1945, argued that "the indiscriminate bombings had killed 20,000 people and wounded 30,000 in his territory, most of whom were noncombatants, and, therefore, the thought of the disposition of 27 airmen was a small incident compared with these facts," records say. "The criminal code and international law were secondary matters when compared with military operations of the supreme command."

Defense lawyers argued that offering full-blown trials for American flyers was impossible in the war's waning months, as Japan suffered under relentless U.S. attacks. Besides, such procedures "would not have given the crew members any greater rights or protections than they received under the abridged procedure, and that it constituted a trial under international law." In any event, defense lawyers argued, the "crew members had no rights as they were not prisoners of war."

Perhaps surprisingly, U.S. Army reviewers concluded in 1949 that "a Japanese tribunal could have reasonably found there was indiscriminate bombing" and that "in the course of a legal trial might well have found the [American] crew members guilty." Moreover, they acknowledged that Japanese legal procedures, although based

on inquisitorial judges rather than the adversarial system used in the U.S., cannot be considered "automatically illegal."

But the abridged procedures employed as the war wore down violated the flyers rights, the U.S. found. "These men were not informed they were being charged with indiscriminate bombing and, except in the intelligence investigation, where they might reasonably be expected to give as little information as possible, they were not given a chance to make a statement." The flyers weren't permitted to attend the hearings where they were convicted and sentenced, the Army reviewers found.

Col. Onishi was sentenced to life at hard labor, although, on review, the sentence was recommended for reduction to 30 years.

Advocates for the Guantanamo prisoners acknowledge that procedures the Japanese used against American flyers were far less fair than the Bush administration has issued for its current trials of enemy prisoners. But they argue that the point of U.S. trials of the Japanese was that enemy prisoners can't be tried according to lower standards of fairness than America's own soldiers are entitled to.

Lt. Cmdr. Charles Swift, a Navy lawyer assigned to defend Mr. Hamdan, says that the U.S. is railroading his client the same way the Japanese

unfairly prosecuted Americans during World War II. "One cannot help but be struck by the insincerity of a prosecution that purports to enforce the law of war by violating it," says Lt. Cmdr. Charles Swift, a Navy lawyer assigned to defend before the Guantanamo military commission.

A Pentagon spokesman, Air Force Maj. Michael Shavers, declined to comment on the World War II precedents, but said the new military commissions established by President Bush "provide a valid, more flexible way in which to hold those who violate international laws of war accountable while providing them their day in court and preserving national security."

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### **What War Captives Faced In Japanese Prison Camps, And How the U.S. Responded**

After his B-24 Liberator crashed into the Pacific Ocean in May 1943, U.S. Army Capt. Louis Zamperini spent 47 days on a life raft before being rescued by a Japanese patrol boat. Then his ordeal really began.

Shipped through a succession of prison camps, he finally arrived at Japan's secret Ofuna interrogation center. There, prisoners thought to

hold critical intelligence were placed under a strict regimen designed to make them break. Solitary confinement, blindfolding and compulsory calisthenics were routine. Prisoners were shaved and stripped, forbidden from speaking to each other and made to stand at attention or assume uncomfortable positions for interrogations. Cooperate, and treatment might improve. Violate the rules and you might be slapped or beaten -- or worse.

"There was no such thing as international law, just Japanese law," says Mr. Zamperini, now 88 years old. Japan had never ratified the Geneva Conventions, and Ofuna inmates were told they had no treaty protections -- such as the right to reveal nothing but name, rank and serial number.

Upon Tokyo's surrender, however, the U.S. declared that international law did apply -- and held accountable much of the Japanese hierarchy, from prison guards to cabinet ministers. U.S. military prosecutors brought hundreds of cases for mistreatment of captured Americans, failure to classify them as prisoners of war and hiding them from delegations of the International Committee of the Red Cross. Offenses as minor as failing to post camp rules or holding up a prisoner's meal were considered war crimes. A single count could bring a year at hard labor.

"The defendants in these cases, as you would expect in most contexts of war, believed that the

circumstances justified what they were doing," says Prof. David Cohen of the University of California, Berkeley, who has been collecting trial records from around the world for a War Crimes Studies Center<sup>1</sup> he founded in 2000.

### Summary Executions

Although Nuremberg and other postwar tribunals largely are remembered for prosecuting the Nazi leadership for crimes against humanity, the trials originated in the mistreatment of prisoners of war. It was the German practice of summarily executing downed Allied flyers that in 1944 led Washington to begin planning for war-crimes prosecutions.

Ofuna prison camp, where American prisoners were interrogated during World War II. Image courtesy "Devil at My Heels," the memoir of POW Louis Zamperini.

Other than the flyers, Prof. Cohen says, American and British soldiers captured by the Germans usually received adequate treatment. (Russian POWs fared far worse, under Nazi racial policies that considered Slavs subhuman.)

Prisoners of the Japanese, however, faced grueling treatment across the board. Forced labor, meager rations and poor medical care were the rule, along with occasional beheadings by samurai sword and even incidents of

cannibalism.

But as the U.S. saw it, mistreatment didn't have to rise to the level of torture to merit punishment. For conditions that fell short of torture, prosecutors brought charges under the sweeping Geneva provision that barred "any unpleasant or disadvantageous treatment of any kind."

Along with routine beatings, Japanese interrogators had used solitary confinement, sleep deprivation, blindfolding, head shaving, restricting meals, uncomfortable positions and other techniques to make prisoners talk. Japan failed to register some prisoners or facilities with the Red Cross, delayed delivering their mail or Red Cross packages and denied some Americans POW privileges without full-blown judicial proceedings.

Japanese regulations required that prisoners of war "be humanely treated and in no case shall any insult or maltreatment be inflicted." In a February 1942 diplomatic note, Tokyo told Washington that while Japan held "no obligations" under the Geneva Conventions, it nevertheless intended to apply "corresponding similar stipulations of the treaty" to captured Americans. When complaints arrived from the foreign governments or the Red Cross, which then as now was the only independent group allowed to visit prisoners, officials forwarded them to military authorities.

## Soda Pop and a Biscuit

Mr. Zamperini, who still lives in his hometown of Los Angeles, says his first encounters with Japanese interrogators were hardly pleasant, but to his surprise, "they didn't beat you to get information out of you" -- at least not always.

After subsisting on a diet of plain rice, Mr. Zamperini was led before "naval officers in white suits with gold braid" who sat feasting at "a table full of goodies." Refuse to answer and they sent "you back to your cell more miserable than when you started." To get some of the food, Mr. Zamperini says he used a ruse, pretending to crack under pressure and then offering misleading information about the location of U.S. airstrips. "I got a soda pop and I got a biscuit, so I won," he says.

U.S. military commissions classified practices like these as war crimes. "Any corporal punishment, any imprisonment in quarters without daylight and, in general, any form of cruelty is forbidden," an Army judge advocate explained.

Government-appointed defense attorneys protested the vagueness of some charges. Threatening prisoners with "unpleasant or disadvantageous treatment · does not constitute any war crime," one argued. "It does not allege any specific act." The attorney recalled his own World War I experience as a U.S. interrogator.

"We tried by all manner of words and all manner of inducements -- I will not go beyond that -- to attempt to glean information which would be helpful in our operations against the enemy," he said, and no one considered it a war crime.

"We looked this up very carefully," the prosecutor replied. "When you start to threaten a man, of course you violate the provisions of the Rules of Land Warfare." The commission ruled for the prosecution.

The World War II defendants insisted that they hadn't received proper training, or that prisoners exaggerated their mistreatment, or that any problems resulted from cultural misunderstandings or were appropriate punishment for breaking camp rules. Low-ranking guards claimed they were following superior orders, while top officers and cabinet ministers blamed rogue subordinates. Defense lawyers argued that Japan wasn't legally bound by the Geneva Conventions and, even if it were, many prisoners, such as Allied flyers, had no right to treaty protections because they committed such war crimes as sabotage or "indiscriminate bombing" of cities.

## Hundreds of Trials

While the international tribunals at Tokyo and Nuremberg focused on a handful of high-ranking Axis defendants, hundreds of lower-profile

national military commissions tried the small fry. For instance, in November 1945, a British military court at Wuppertal, Germany, sentenced three German officers to terms of up to five years for crimes at a Luftwaffe interrogation center. The central offense: "excessive heating of the prisoners' cells · for the deliberate purpose of obtaining from the prisoners of war information of a kind which under the Geneva Convention they were not bound to give," according to the summary published in 1948 by the United Nations War Crimes Commission.

At Yokohama, Japan, meanwhile, the U.S. Army conducted more than 300 war-crimes trials through 1948. More than 90% involved prisoner mistreatment, says Berkeley's Prof. Cohen. American prosecutors focused on Ofuna, a secret interrogation camp run by the Imperial Navy for pilots and other high value prisoners, including Col. Gregory "Pappy" Boyington, the Marine Corps flying ace. Using affidavits and testimony from former prisoners, prosecutors depicted a grim world where men were broken through physical and psychological cruelty.

When Japan failed to cooperate with the Red Cross, the U.S. considered it a war crime. Lt. Gen. Tamura Hiroshi, head of prisoner management, was sentenced to eight years hard labor for, in part, "refusing and failing to grant permission" to the Red Cross to visit prison camps, denying Red Cross delegates "access to all premises" where

prisoners were held and refusing to let prisoners speak to the Red Cross without Japanese observers present.

Japanese authorities told Ofuna prisoners that they weren't POWs but unarmed "belligerents" who weren't entitled to Geneva's protections. Navy aviator James Balch testified that an interrogator "explained to me that I wasn't a registered prisoner of war, that I was a special prisoner of the Greater East Asia Co-Prosperity Sphere and was, as far as the Japanese were concerned, still a combatant."

Lawyers for the Japanese defendants argued that since some captured Americans "lost the status of POWs in that they were saboteurs," it was no war crime to withhold POW privileges from them, Army records say. A military commission rejected that argument as "untenable" because "there is no evidence of any judicial proceedings against the · victims for the alleged acts of sabotage by which they would be deprived of their status" as POWs.

### **The 'Ofuna Crouch'**

Japanese interrogators put captured Americans in painful contortions for periods of 30 minutes to several hours. One hated position, the so-called Ofuna crouch, involved "standing on the ball of your foot, knees half bent and arms extended over the head," Navy Lt. Cmdr. John



Fitzgerald said in a deposition.

In an affidavit, Navy Capt. Arthur Maher recounted his treatment after his ship, the USS Houston, was sunk in February 1942 off Indonesia. Captured after swimming to Java, Capt. Maher said Japanese officers "promised that we would be treated in accordance with international law."

Upon reaching Ofuna, things were different. "As we entered the camp gates, the utter stillness was noticeable." The Americans were told not to speak, locked in nine-by-six-foot cells and put to a stultifying routine of closely timed meals, exhausting calisthenics and limited chances to wash up. Prisoners were given just one cigarette a day and had to smoke it immediately, Capt. Maher said. Many of the guards, he said, "were sadists, some obviously cowards who did not wish to see battle," he said. "A few were definitely decent and tried to alleviate our condition."

During interrogations, "prisoners were required to sit at rigid attention and were never allowed to relax," Capt. Maher said. "At times, a cigarette would be offered in an attempt to throw you off guard. Interrogators used different tactics to obtain results. Some tried flattery, cajolery and sympathy; others used threats of violence. But the prisoner was never allowed to forget that he was in a subservient position and there was

nothing that he could do about it," he said.

Mail between prisoners and their families was restricted to a trickle of censored letters, Capt. Maher said. "This flagrant violation of international law caused great anxiety on the parts of the relatives of all prisoners in Ofuna. The Japanese frequently referred to the fact that we could write as soon as we left Ofuna, using that as an added incentive to talk and be rewarded by being sent to a regular prisoner-of-war camp."

At trial, Japanese officials insisted they had done nothing wrong. The chief of naval intelligence, Rear Adm. Takeuchi Kaoru testified that he had ordered that prisoners be treated well.

"I had a pamphlet named 'How to Interrogate Prisoners of War' compiled," he said. "The main points in the book" were "to respect international law. Not to mistreat prisoners of war. And to conduct the interrogation in a free, conversational manner." To make sure staff got the message, he had these passages "printed in gothic letters and underlined it with a black line," he said. Moreover, abusing the prisoners was ineffective. "Since Anglo-Saxons would not betray their countries, it would be no use to force them to talk," the admiral testified.

Officers were held liable for their subordinates' mistreatment of prisoners -- even if they tried to

stop the abuse. Camp commander Takata Suichi "took immediate action and investigated all complaints made by the POW officers as to abuses committed upon POWs, reprimanding the guilty," and also "tried to correct the food situation and living conditions in the camp," concluded Army reviewer George Taylor. Two former prisoners -- the senior American and British officers held there -- wrote letters recommending clemency. In view of such "mitigating circumstances," Mr. Taylor recommended that Mr. Takata's punishment be reduced -- to 15 years at hard labor, from the original sentence of 40 years.

Half the time, Army reviewers found the commissions too lenient and recommended that harsher sentences be imposed. On occasion, though, they accepted defense arguments. Prison guard Kikuchi Masatomo was convicted of compelling prisoners "to practice saluting and other forms of arduous military exercises on their rest days and at other times when they were tired." The reviewer concluded that "drilling a detail of men for 15 or 30 minutes · is so universally utilized in the armies of the world to teach discipline and for exercise that it would be unjust and unreasonable to consider it a war crime."

### 'No Serious Injury'

Moreover, the reviewer found that the

commission had overreached in convicting Mr. Kikuchi of two "beatings." In fact, testimony showed "that the mistreatment consisted of a series of slappings." Since "no serious injury was sustained by any of the POWs as a result of his mistreatment," Mr. Kikuchi's sentence was cut to eight years hard labor, from 12.

Cmdr. Yokura Sashizo, an Ofuna interrogator, testified that he opposed beating American prisoners, even though beatings commonly were used to discipline Japanese soldiers. He said he had learned from an interpreter who studied in the U.S. that, while "the Japanese think that beating is the simplest punishment when someone violates a regulation, · the Americans consider beatings as the greatest humiliation." Moreover, he said, beatings were counterproductive, as prisoners wasted interrogators' time bemoaning their treatment.

Prosecutors, however, contended that Cmdr. Yokura had subtly signaled guards to soften up prisoners for interrogation. Specifically, they introduced evidence that in December 1944, Cmdr. Yokura delayed the meal of a captured B-29 flyer, Maj. H.A. Walker, and forced him to perform *kampan soji*, an awkward floor-cleaning exercise using a no-handle mop that typically was used to discipline Japanese sailors. These acts, prosecutors argued, contributed to Maj. Walker's "death by inches" nine months later, after he had been severely beaten by guards and

denied medical attention.

Cmdr. Yokura's defense attorney, Michael Braun, challenged this theory in his closing argument. "We all regret the death of Maj. Walker, just as we regret the deaths of 250,000 to 300,000 other Americans who died in the past war," he said. "But the fact that a man died in a Japanese prisoner-of-war camp does not automatically mean that any Japanese brought to trial theoretically for his death is guilty of it." Cmdr. Yokura denied holding up Maj. Walker's meal, but even if he had, Mr. Braun argued, he would have been justified because Maj. Walker refused to give his name, rank and serial number, as required by the Geneva Conventions. The U.S. Army's own Rules of Land Warfare authorized "food restrictions as punishment," he observed.

Mr. Braun urged the military commission not to apply a double standard. "The eyes of the world are focused on what America does here," and "whatever we do is going to be carefully read, carefully scanned, carefully measured against the principles we enunciate."

The commission sentenced Cmdr. Yokura to 25 years at hard labor.

### **Post-War Lessons**

In 1949, the lessons of World War II trials were incorporated into international law. But

following Sept. 11, 2001, Bush administration lawyers reexamined the degree of force and cruelty that could be used to interrogate prisoners captured in the war against terrorism. An April 2003 interrogation policy approved by Defense Secretary Donald Rumsfeld listed permissible methods including 20-hour interrogations, "dietary manipulation," "isolation," "sleep deprivation," "face slap/stomach slap," and "prolonged standing."

Mr. Zamperini, the former Japanese prisoner, says that in today's war on terrorism, severe treatment of the enemy might be called for.

"You've got a bunch of religious cutthroats that don't follow rules and regulations," he says, and "if it's a question of saving a lot of lives, then torture would be in keeping" with the country's best interest. "This is a whole new ballgame," he says.

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