German prisoners of war line a funeral procession for one of their own at a POW camp in Fort Bend County, Texas, during the Second World War. (Photo courtesy of Fort Bend County Libraries/University of North Texas Libraries)

Option 17

Military Law and Vigilante Justice in Prisoner of War Camps during World War II

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In the movie *Stalag 17*, American prisoners in wartime Germany suspect a traitor in their midst. Having no recourse to the normal systems of military justice, the prisoners themselves conducted an investigation. The evidence was collected and compared, the guilty party was identified, and justice took its course when the collaborator—Peter Graves in a most un-*Mission Impossible* role—was sent to his death.[1] It would be understandable if most people believe that if and when this situation arises, as it has on numerous occasions in modern wars, the result is similar: the senior officer among the prisoners convenes an ad hoc trial, witnesses are heard, the accused has some sort of representation and the right to both speak and question the witnesses, and then judgment is rendered. The American military's Code of Conduct might lay the foundation for such a course of action. In the close confinement of a prisoner-of-war (POW) camp, there may as well be no other choice than to silence the informant and to protect the lives of other prisoners and families back home. But is it legal?

As it happens, the answer to the question is a surprising "no"—it is not legal, but the reasoning is conflicted and contradictory and goes against the obvious exigent circumstances of captivity in enemy territory during wartime. There are several cases during World War II and afterward that serve as precedents for self-help among prisoners. They may or may not clarify the central questions: What was (and is) the law in such extreme situations? Can, or should, prisoners punish other prisoners for treason and collaboration? Is there a meaningful difference between what is necessary, what is legal, and what is done?

Machinist Werner Drechsler

In 1943, German submarine U-118 was attacked and sunk off the U.S. coast.[2] There were but a few survivors, one of whom was machinist Werner Drechsler. Unlike his other shipmates, Drechsler repudiated his allegiance to Germany and quickly indicated a willingness to help U.S. Naval Intelligence. For seven months, Drechsler "worked" at the Joint Interrogation Center in Fort Hunt, Virginia, where he had many aliases as he bounced from cell to cell, telling incoming German submarine crewmembers that he was one of them and encouraging them to reveal the kind of sensitive information that they might only share with a comrade. In March 1944, Drechsler was abruptly transferred to Army control and sent to the internment camp at Papago Park, Arizona. There is some speculation that this was done with full knowledge of the danger to Drechsler, who had outlived his usefulness as an informant. The Navy said later that they specifically stamped his file with the notation, "Do not intern with U-boat men."[3] If that were the case, the Army disregarded it; Papago Park was the primary POW camp for U-boat crews. Drechsler was recognized immediately by some of his former cellmates, each of whom knew the same man by different names. He lived for six hours after his arrival. Prisoners found him the next morning badly beaten and hanging from a makeshift noose in the shower room.

Army investigators focused their attention on the 125 men in Drechsler's barracks, particularly those in the immediate vicinity of his bunk, where the assault seemed to have started. Some crewmembers of the U-615 and the U-352 had bruises they could not explain. Suspects were polygraphed, interrogated at length, and subjected to other "enhanced" techniques. Once Otto Stengel broke and gave names to the interrogators, other confessions followed.

The defendants maintained that they were German sailors following German military law, which they believed to be in force during captivity, and that the killing of Drechsler was a matter of self-defense. Drechsler was a proven traitor and collaborator; his presence at Papago Park could only be interpreted by the sailors as another attempt to adduce treason, and he had to be stopped. Reporting Drechsler's past actions on behalf of the Americans to American camp authorities was obviously absurd (he had been spying for the Americans after all), and the Germans concluded they had no other way to handle the situation. Drechsler had committed the capital

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Junior members of U-118's crew arrive 20 June 1943 for physical examination and initial POW processing at Naval Operating Base Norfolk Hospital in Norfolk, Virginia. The POWs are (*front row, left to right*) Herman Polowzyk, Gustav Behlke, Walter Schiller, and Wilhelm Bort, and (*back row, seated left to right*) Werner Drechsler, Paul Reum, Erhard Lenk, and Klaus Preuss. (Photo courtesy of the U.S. Navy)

crime of treason, and the U-boat crews merely applied the just penalty to one of their own. There was some evidence suggesting that the U-boat men had presented their proof to the senior noncommissioned officer and that this was a "sanctioned" operation.

The court-martial panel rejected these assertions. Drechsler was murdered, not executed by the legal authority of National Socialist Germany, which, in any case, did not apply in captivity. The panel found that Drechsler's past was irrelevant and sustained prosecution motions to exclude most of that evidence. The court applied the 1929 Geneva Convention, then in force, which permitted the detaining power to try prisoners for offenses that, if committed by their own forces, were punishable by death.[4] Nothing in the convention recognized the right of prisoners to stand as judge, jury, and executioner, regardless of what the victim did or did not do. Although there was no probative physical evidence against any of the defendants—the only evidence of any kind was their own statements—the panel sentenced all defendants to hang for murder. The sentence was kept secret from them, and they only learned of it a year later when they were informed of their upcoming execution.

Cpl. Johannes Kunze

Drechsler's case was not unique. In 1943, German prisoners at Camp Tonkawa, Oklahoma, found themselves in a similar quandary.[5] One of their

fellow detainees, Cpl. Johannes Kunze, who had long expressed his antipathy toward the German army (he was captured while involuntarily serving with 999th Light Afrika Division in Tunisia) and National Socialist Germany, visited the camp infirmary and presented the American doctor with a note in German; Kunze spoke no English. The doctor could not make sense of it and gave it to a German orderly to return to Kunze. The orderly read the note that described places in Hamburg, Germany, and suggested targets that the Allies should bomb. The prisoners were aware that the city was almost obliterated in a series of Royal Air Force (RAF) firestorm raids in July 1943, which caused more than forty thousand civilian deaths.

Werner Drechsler (*left*), recovering from a bullet wound to his right knee, disembarks USS *Osmond Ingram* 20 June 1943 at Naval Operating Base Norfolk, Virginia, assisted by Herman Polowzyk. (Photo courtesy of the U.S. Navy)

At Papago Park and Camp Tonkawa, and at most other internment camps, lackadaisical American standard practice allowed the Germans to run the interior camp themselves, and they efficiently took care of all administrative and health/welfare functions for their fellow prisoners. When shown the incriminating note, the senior German prisoner in the Tonkawa subcamp, Sgt. Walther Beyer, launched an investigation, compared the writing on the note with handwriting on outgoing mail, and then called a prisoners-only meeting in the mess hall to present the evidence. He first read aloud the "Hamburg letter." Realizing that his identity was about to be revealed, Kunze became frightened and started running from the building. German prisoners followed and started beating and kicking him. He made it a short distance outside and fell, and he either died from a previous blow or was struck by an object once outside. Americans would find his body the next day.

Just as with Papago Park, the homicide investigation focused on those prisoners who had traces of blood on their clothing, and they were pressured and encouraged to make statements implicating others. While this worked well at Papago Park, none of the Camp Tonkawa witnesses implicated Beyer beyond stating that he had called the prisoners' meeting. Beyer freely admitted this and added that he had tried to regain control once the crowd started after Kunze; this was corroborated by other testimony. Despite the fact that the cause of death could not be conclusively established by the Army pathologist, Beyer and four other prisoners were arrested and put on trial for felony murder—that is, for a death that occurs in connection with a felony crime. The Army's case was that the felony (inciting a riot) directly led to the death (from whatever cause), and that the death was a murder because it was the direct result of the riot (that Beyer caused). Under the Articles of War, the penalty was death.

Geneva Convention

The 1929 Geneva Convention states in article 46 that "prisoners of war shall not be subjected by the military authorities or the tribunals of the detaining Power to penalties other than those which are prescribed for similar acts by members of the national forces," and article 66 allows for the prisoners to face the death penalty, if other aspects of article 46 (and others) have been complied with.[6] By the same token, the Germans understood that they were still subject to their own military

laws, particularly the *Militärstrafgesetz* (Military Penal Code) § 7 of 1940, which (1) provides the death penalty for treason and (2) explicitly allows soldiers to assume disciplinary enforcement functions in the absence of a commissioned officer in the chain of command.[7] In the German view, everyone is a safety officer when it comes to soldiers committing treason.

Is it legal for soldiers to assume special functions when they are separated from their normal, recognized chain of command? Yes, sometimes they can, as American law recognizes. Title 32 of the Code of Federal Regulations (which also existed in this form during World War II) states, "It is conceivable that most unusual and extraordinary circumstances may arise in which the relief from duty of a commanding officer by a subordinate becomes necessary … but such action shall never be taken without [Senior Command] approval, *except when reference to such higher authority is undoubtedly impractical because of the delay involved or for other clearly obvious reasons* [emphasis added]."[8] While the U.S. Code (and Navy Regulations, in this instance) certainly does not green-light vigilante justice or drumhead court martial, it does at least recognize that exigent circumstances in war can sometimes mean playing by a different set of rules.

It follows what the Germans might consider the fair administration of justice against a traitor who would be viewed quite differently by his American captors. Contemporary political pressure undoubtedly played a role in the American decision to investigate, try, and sentence the German prisoners to hang. Several national newspapers focused unwelcome attention on rampant "Nazification" in the German POW camps, and that discipline (at least the United States-administered kind) was breaking down. When twenty-five prisoners escaped from Papago Park in December 1944, the Army was forced to reimpose discipline on German prisoners who, the public and politicians believed, had gone wild.[9] Newspaper stories claimed as many as two hundred extrajudicial murders among German prisoners suspected of collaboration; the actual number was five.[10] Perhaps out of sympathy with the internees' predicament, Americans often chose to look the other way, accepting that the camps ran smoother when the Germans governed themselves.

Holland

The Allied position on prisoner-administered justice was inconsistent.[11] Following the surrender of some 150,000 German troops in Holland in 1945, the victorious Canadians thought it necessary for many thousands of German forces to continue with their normal duties, as per the surrender agreement, and the German commanding general, Johannes von Blaskowitz, was charged to be "responsible for the maintenance and discipline of all German troops in Western Holland."[12] The Canadians classified German prisoners as "surrendered enemy personnel," rather than POWs, to allow more flexibility vis-à-vis the new arrangement. Blaskowitz continued to give orders to subordinate formations, with the formality of first routing those communications through the I Canadian Corps. When two German navy deserters (Bruno Dorfer and Rainer Beck) were returned—via the Dutch Resistance and the Seaforth Highlanders of Canada—to German custody on 13 May 1945, the senior German camp officer notified the Allies that he intended trying the returned fugitives, with the expectation of a death sentence if convicted.

The accused were represented by German military lawyers and the trial, all fifteen minutes of it, was held before an audience of almost two thousand prisoners. Under questioning from the presiding judge—who was, in fact, a military judge (*Marineoberstabsrichter*)—the defendants did not attempt to deny their actions and both were sentenced to death. The German commandant then asked the Canadians for weapons and ammunition to carry out the executions.

Previous instructions from the 21st Army Group advised that German field courts remained responsible for "internal discipline within their own forces under the supervision and control of the Allied Military Authorities," with the stipulation that any sentence over two years required confirmation by the Canadian authorities.[13] Messages sent by 2nd Canadian Infantry Brigade to higher headquarters (1st Canadian Infantry Division) about the Beck and Dorfer case went unanswered. The Canadian brigade thereupon issued the Germans eight captured rifles and sixteen rounds of ammunition, and the prisoners were shot.

Perhaps feeling uneasy at their conduct, the Canadians afterward adopted a more strict policy of classifying German deserters as POWs and not returning them to unsupervised German control. Nevertheless, the Canadians acknowledged that within certain limits, what happened in the German camp

stayed in the German camp, including lethal punishment of those who violated German law.

Geneva Revisited

Further exploration of these inconsistent results—forbidding prisoner-administered judicial action on the one hand and allowing it on the other—came to an end with World War II. The next significant event was the creation of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. Whereas the 1929 Convention was silent on the subject of command and discipline among the prisoners, it allowed that "the senior officer prisoner of the highest rank shall be recognized as intermediary between the camp authorities and [the prisoners]."[14] By contrast, the 1949 Convention showed awareness of at least some of what happened behind prison wire during World War II and showed an equal determination to limit future occurrences. In a commentary to the articles, the drafters specifically state, "During the Second World War, some camp commanders permitted disciplinary powers to be exercised [in cases of offenses committed by one prisoner of war against his fellow prisoners of war] by the prisoners' representatives or even by a tribunal composed of prisoners of war. This practice is now forbidden."[15]

That determination creates certain real-world difficulties. In the only scholarly examination of this question, the *Military Law Review* concludes that "there is no means for the Senior to punish PWs who refuse to obey his lawful orders; punishment, if appropriate, must await repatriation."[16] Several articles of the Uniform Code of Military Justice (UCMJ) are applicable, to wit: article 92 (Failure to Obey Order or Regulation), article 104 (Aiding the Enemy), article 105 (Misconduct as Prisoner), and article 134 (General Article). During time of war, article 104 carries the death penalty.

The Code

This makes it all the more curious when, in 1955, President Dwight D. Eisenhower promulgated the Code of Conduct, which is specifically designed to prescribe acceptable conduct by American servicemen when captured by enemy forces—a direct response to prisoner misconduct during the Korean War. Article IV of the Code states, "If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information nor take part in any action which might be harmful to my comrades**.** *If I am senior, I will take command.* If not I will obey the lawful orders of those appointed over me [emphasis added]."[17] Further, "Informing or any other action to the detriment of a fellow prisoner is despicable and is expressly forbidden … *the responsibility of subordinates to obey the lawful orders of ranking American personnel remains unchanged in captivity* [emphasis added]."[18]

Prisoner of War Medal. (Photo by Jim Varhegyi, U.S. Air Force)

In a nod to the previously discussed provisions in Navy Regulations, the Code of Conduct goes on to say, "As with other provisions of this code, *common sense and the conditions of captivity will affect the way in which the senior person and the other POWs organize to carry out their responsibilities.* [emphasis added]."[19] The Code of Conduct acquired quasi-legal significance when it was issued as Department of Defense (DOD) Directive No. 1300.7 and was further strengthened by Executive Order 12633.[20] While it is not a federal law recognized under the U.S. Code, failure to follow the DOD directive would be a prima facie violation of UCMJ article 92 (Failure to Obey Order or Regulation).[21]

What then of the obvious conflict between the Geneva Convention and the Code of Conduct? The Convention (which became federal law once ratified by the United States in 1955) specifically forbids the notion of command in a POW setting, while the Code of Conduct mandates "I will take command."[22] The distinction is vital. If a command relationship exists among prisoners, the wording of the Code of Conduct implies that prisoners may be subject to discipline for infractions during captivity, rather than having to wait for an end to hostilities and delayed justice after the war; it would effectively encourage "self-help" inside a POW camp in a way that is quite apart from the captor/captive relationship set out in the Geneva Convention.

Conclusion

In the complete absence of any case in U.S. law that touches on prisoner-administered justice, there is an uncertain road map for future conflicts. Prisoner misconduct (as defined by the Code of Conduct and UCMJ article 105 [Misconduct as Prisoner]) is a constant, with allegations of it as recent as the Iraq War in 2003, and can reasonably be expected to resurface. The legal supremacy of the 1949 Geneva Convention trumping DOD Directive 1300.7 as it relates to discipline in captivity should, in theory, make the answer plain—that there is no contemporary recourse when prisoners collaborate with the enemy.

This answer is unsatisfactory. A review of the two cases of German POWs highlights why. Drechsler was an informant and a traitor, but the damage he could have caused was limited and based exclusively on what he could have learned from other prisoners. While it is understandable that fellow U-boat sailors would want him punished, he could instead be ostracized and kept away from sensitive information. This might push him closer to the American enemy but at little cost to Germany; the Geneva Convention rules would work just fine. Kunze is a different story. His willingness to offer information about his hometown to the Allies to destroy it constituted a more insidious and immediate threat. Ostracism would not suffice to stop it, and it constituted an exigent and existential threat to both German soldiers in Camp Tonkawa and to German civilians back home. Even if, as seems likely, Kunze's information was of little practical use, the leak had to be sealed, and there was only one way to do that.

Neither the Drechsler nor Kunze cases are textbook and are distinguishable from the case in liberated Holland. There was no court, no judge, no law books, no defense and prosecution, and no impartial jury in the POW camps in the United States. The Drechsler and Kunze cases were less about the law of nations and more about the law of survival in the jungle. Drechsler was assaulted and murdered, and an ad hoc determination that he deserved it does not lessen the crime. It is unclear how and when Kunze died or who might have delivered the fatal blow, if there even was a single causation. In that case, spontaneous anger and fear were ignited and events took on a life of their own, seemingly without intent or plan. The first is a case of vigilantism and the second a case of a group reacting spontaneously to the worst provocation imaginable—and with a deadly result.

Is there a balancing point between the calming rules of the Geneva Convention, the imperative that soldiers in captivity are answerable for crimes they commit while prisoners, and the simple need for self-preservation? At the very least, the Code of Conduct should be rewritten in accord with the controlling language of the Geneva Convention, and other language in the code should be changed to reflect the ideal that prisoners do not have disciplinary power over other prisoners, regardless of circumstances.[23] Whether that is sufficient to deter and regulate future prisoner misconduct or criminal behavior in captivity remains to be seen. At the very least, we should make it clear up and down the force that the Code of Conduct is not what it at first glance appears to be. ■

Notes

1. *Stalag 17* (Los Angeles: Paramount, 1953), DVD.

2. Meredith Adams, *Murder and Martial Justice: Spying and Retribution in World War II America* (Kent, OH: Kent State University Press, 2011), 23.

3. Kenneth Knox Collection, D-547, University of California at Davis, General Library, Department of Special Collections. The crime scene is today subsumed by the Phoenix Zoo and Botanical Garden.

4. "Geneva Convention of 27 July 1929 Relative to the Treatment of Prisoners of War," International Committee of the Red Cross, 6 April 1988, accessed 12 July 2019, https://www.icrc.org/eng/resources/documents/misc/57jnws.htm.

5. Adams, *Murder and Martial Justice*, 13.

6. "Geneva Convention of 27 July 1929 Relative to the Treatment of Prisoners of War"; Convention Relative to the Treatment of Prisoners of War, 27 July 1929, 118 L.N.T.S. 343 (entered into force 19 June 1931). Article 61 of this convention states that "no prisoner shall be compelled to admit that he is guilty of the offence of which he is accused," a provision that was, arguably, not followed either at Camp Tonkawa, Oklahoma, or Papago Park, Arizona, following interrogation by Army intelligence.

7. *Militärstrafgesetz* (Military Penal Code) § 7 (Berlin: E. G. Mittler and Sohn, 1940), 13.

8. United States Navy Regulations, 32 C.F.R. § 700.867 (1974). This section figured prominently in the book and movie, *The Caine Mutiny*.

9. It took over a month to recapture the escapees. The senior escaped German, Capt. Jürgen Wattenberg of the *Kriegsmarine*—who had previously escaped Uruguayan captivity in 1939 and returned to Germany—finally walked into Phoenix and was apprehended when a street sweeper detected his accent and called the police.

10. Adams, *Murder and Martial Justice*, 156–57.

11. Chris Madsen, "Victims of Circumstance: The Execution of German Deserters by Surrendered German Troops under Canadian Control in Amsterdam, May 1945," *Canadian Military History* 2, no. 1 (1993).

12. Ibid.

13. Ibid.

14. 118 L.N.T.S. 343 (1929), art. 43.

15. Jean S. Pictet, ed., *The Geneva Convention of 12 August 1949, Commentary III, Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva: International Committee of the Red Cross, 1960), 460.

16. Elizabeth Smith, "The Code of Conduct in Relation to International Law," *Military Law Review* 31 (Department of the Army Pamphlet 27-100-31, January 1966): 117.

17. Proclamation No. 10,631, 20 Fed. Reg. 6057 (17 August 1955).

18. Ibid.

19. Code of the U.S. Fighting Forces (Washington, DC: Department of Defense, 1988), § IV.

20. Department of Defense Directive 1300.7, *Training and Education to Support the Code of Conduct (CoC)* (Washington, DC: U.S. Government Printing Office, 8 December 2000, certified current 21 November 2003); Proclamation No. 12,633, 53 Fed. Reg. 11355 (30 March 1988).

21. Following the Korean War, five Americans were charged and convicted under article 104 for unauthorized communication with the enemy. See *U.S. v. Batchelor*, 22 C.M.R. 144, 7 USCMA 354 (1956). Cpl. Claude Batchelor, in addition to even worse outrages against U.S. prisoners, participated in the trial of a fellow prisoner, conducted by Chinese captors and American prisoner collaborators. Batchelor was sentenced to life, but that sentence was reduced to twenty years, and he served three years.

22. Proclamation No. 10,631.

23. The Code of Conduct has never been used as the basis of a criminal prosecution under any Uniform Code of Military Justice article, although it is technically possible to do so.