The Truth-O-Meter Says:

" ... following World War II war crime trials were convened. The Japanese were tried and convicted and hung for war crimes committed against American POWs. Among those charges for which they were convicted was waterboarding."

John McCain on Thursday, November 29th, 2007 in a campaign event in St. Petersburg

History supports McCain's stance on waterboarding

The morning after the CNN/YouTube debate in St. Petersburg, John McCain remained firm in his stand against the use of an interrogation technique called "waterboarding." He cited solid history to buttress his position.

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"I forgot to mention last night that following World War II war crime trials were convened. The Japanese were tried and convicted and hung for war crimes committed against American POWs. Among those charges for which they were convicted was waterboarding," he told reporters at a campaign event.

"If the United States is in another conflict ... and we have allowed that kind of torture to be inflicted upon people we hold captive, then there is nothing to prevent that enemy from also torturing American prisoners."

McCain is referencing the Tokyo Trials, officially known as the International Military Tribunal for the Far East. After World War II, an international coalition convened to prosecute Japanese soldiers charged with torture. At the top of the list of techniques was water-based interrogation, known variously then as "water cure," "water torture" and "waterboarding," according to the charging documents. It simulates drowning.

R. John Pritchard, a historian and lawyer who is a top scholar on the trials, said the Japanese felt the ends justified the means. "The rapid and effective collection of intelligence then, as now, was seen as vital to a successful struggle, and in addition, those who were engaged in torture often felt that whatever pain and anguish was suffered by the victims of torture was nothing less than the just deserts of the victims or people close to them," he said.

In a recent journal essay, Judge Evan Wallach, a member of the U.S. Court of International Trade and an adjunct professor in the law of war, writes that the testimony from American soldiers about this form of torture was gruesome and convincing. A number of the Japanese soldiers convicted by American judges were hanged, while others received lengthy prison sentences or time in labor camps.

We find McCain's retelling of history to be accurate, so we give him a True.

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About this statement:

Published: Tuesday, December 18th, 2007 at 12:00 a.m.

Sources:

Interview with R. John Pritchard, author of The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East, 1981

Interview with Yuma Totani, history professor at the University of Nevada-Las Vegas

Columbia Journal of Transnational Law, "Drop by Drop: Forgetting the History of Water Torture in U.S. Courts," May 2007

Written by: John Frank
Researched by: John Frank
Edited by: Amy Hollyfield

Articles about this statement:
History is not their best subject

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Selected footnotes to Case No. 33: Trial of General Tanaka Hisakasu and Five Others. Source: Law Reports of Trials of War Criminals. Selected and Prepared by the United Nations War Crimes Commission. Volume VI, London: HMSO, 1948

Other, shorter footnotes, in main law report.

(**1, p.73**)

It was apparently claimed by the Defence in, for instance, the trial of Harukei Isayama and others (see pp. 60-4 of this volume) that the victims were tried under the same procedure as would a Japanese soldier (see p. 62 and see also p. 3). Even this plea, if it were true, would not constitute a complete defence, however, if the trial did not fulfil certain fundamental requirements ensuring elementary justice to the accused. The principle, in so far as peace time is concerned, is well established. Speaking no doubt with peace-time conditions more particularly in mind, Professor Verdross has said that the general principle of international law that foreigners must be granted equality of treatment with nations in matters of judicial procedure may " suffer an exception in favour of the foreigner if the judicial procedure established bv the State of sojourn does not achieve the standard to be expected of a normally organized State. . . . The tribunals must, therefore, be organized and function according to a normal standard of civilized States " (*Les Réles Internationalles Concernant le Traitment des Etrangers*, in the Hague *Receuil les Cours*, 1931,III, Vol. 37, pp. 334 *et seq*.). Similarly, it has been said that : " It is a well-established principle that a State cannot invoke its municipal legislation as a reason for avoiding its international obligations. For essentially the same reason a State, when charged with a breach of its international obligations with regard to the treatment of aliens cannot validly plead that according to its Municipal Law and practice the act complained of does not involve discrimination against aliens as compared with nationals. This applies in particular to the question of the treatment of the persons of aliens. It has been repeatedly laid down that there exists in this matter a minimum standard of civilization, and that a State which fails to measure up to that standard incurs international liability." (Oppenheim-Lauterpacht, *International Law*, Vol. I, Sixth Edition, p. 316.)

The language used by these two authorities seems wide enough to cover denial of justice to a foreigner, not only in the capacity of a litigant but also in that of an accused, and here will be agreement, at any rate as far as war crime trials are concerned, with the claim of the Prosecutor in the trial of Willi Bernhard Karl Tessmann and others before a British Military Court at Hamburg, lst-24th September, 1947 :

> " Countries that exist at peace and in comity with each other in general respect the decisions of each other's Courts. In the part of international law that deals with the conflict of laws there is the doctrine known as " denial of justice," which is a method whereby the national of one country who is thwarted by the methods available of litigation in another country may eventually claim reparation or compensation from the country in the courts of which he has been so thwarted. That is, of course, an exception to the general rule of the

respect of the courts of one country and the recognition of their verdicts by another. Is not there something analogous to the doctrine of denial of justice in a conflict of laws when one is dealing with foreigners in a country who are punished after being subjected to a criminal jurisdiction which is either nugatory or at any rate extremely inadequate ? "

1, p.74

See p. 12, regarding the findings of the Commission in the trial of Shigeru Sawada and others. In that trial, it was shown that accused allied airmen were tried for offences against a Japanese enactment which was not law at the time of the alleged offence and that the evidence brought against the victims had consisted mainly, if not entirely, of statements made by them before trial, but under torture ; it may be added that, in the trial of Harukei Isayama and others, it was shown that the evidence brought against the victims was falsified and that little or no evidence connecting the victims with the alleged illegal bombing was produced apart from these falsified statements (see p. 65) ; and that, in the trial of Tanaka Hisakasu and others, the evidence proved that no witnesses had appeared at the purported trial of the victims apart from the Major himself, and that his evidence, in which he had denied intentionally attacking a civilian boat was ignored by the tribunal, since, despite that evidence, they found him guilty of an offence against the " Enemy Airmen Act " (see p. 71). In the *Wagner Trial*, held before a French Permanent Military Tribunal, it was alleged that various accused had been implicated in the passing and carrying out of a death sentence on I3 Alsatians on a charge of shooting a German frontier guard, when in fact there was no evidence to support the charge ; Wagner and three others were found guilty of premeditated murder for their parts in the death of the 13 victims (see Vol. III of this series, pp. 31-32 and 40-42).

2, p.74

See p. 12. It will be recalled that the failure to provide a Defence Counsel in the purported trial of allied victims was also proved against various of the accused in the trials by Australian Military Courts of Shigeru Ohashi and others (see p. 31). and of Eitaro Shinohari and others (see p. 36). and in the trials by United States Military Commissions of Harukei Isayama and others (see p. 65) and of Tanaka Hisaku [should be Hisakusa-editor] and others (see p. 71).

4, p.76

See pp. 43 and 57. Similarly in the trial of Colonel Satoru Kikuchi before an Australian Military Court at Rabaul, 28th-29th March, 1946, it was shown that in October, 1944, a Chinese prisoner held by Japanese was beheaded by Sgt.-Maj. Inagaki on a written order from Colonel Kikuchi. No court-martial or other formal trial had been held but it was claimed by the Defence that there had been an investigation by Inagaki of alleged war crimes and acts of hostility by the Chinese victim against the Japanese. The accused admitted that he had ordered the death of deceased but maintained there was suficient evidence for him to be satisfied of the guilt of the Chinese and that he had carefully examined that evidence. He

alleged that the serious war situation justified his order, though no court-martial was held and that the investigation made by Inagaki and his decision constituted a summary trial which was legal under Japanese military law. This plea was also unsuccessful, and the accused was sentenced to death, his penaliy being commuted to seven years' imprisonment by higher military authority.

6, p.76

In the trial before a British Military Court at Hamburg, lst-24th September, 1947, of Willi Bernhard Karl Tessmann and others, it was stated in the second charge that four of the accused were guilty of committing a war crime in that they, " in violation of the laws and usages of war," were concerned in the killing of eleven Allied nationals, formerly interned in Fuhlsbuttel Prison." In his summing up, the Judge Advocate stated : " Mr. Barnes for the Prosecution has advanced very clearly, and, if I may be allowed to say so, most helpfully, an argument as to what constitutes a legal killing, what preliminary formalities must in a civilized society be established : a fair trial, legal assistance and an impartial tribunal. That will help the court. But he has also invited the court to view this matter in the way of commonsense. I feel that the Court will be anxious to view this matter humanely and practically and to ask themselves : On that early morning of February or March, 1944, had those who were parties to this shooting any right to question ? Had they any power to decline to do that which they were required to do ? " After quoting the well-known passage from the *Manual of Military Law*, which has already been quoted (see p. 14), he added : " An application of those principles in the second charge, I suggest is this. If this were an illegal execution-and I do not think you will regard it as a deliberate murder-then were the orders received by the subordinates so plainly unlawful that they should, whatever the consequences, have declined to act upon them ? " The words of the Prosecutor to which the Judge Advocate was making reference were the following :-

> " I put what I conceive to be the three minimum requirements of a fair criminal court, a criminal court the decisions of which international law will respect as being worthy of legal validity. The first requirement is that there shall be an impartial judge or tribunal. I say ' or tribunal ' because it does not matter whether the judge is a single individual or a panel of judges. The second requirement is, in my submission, a hearing at which the accused must be present and at which he must be allowed to make out his own defence and possibly to call witnesses. The third requirement is facilities for the preparation of his defence and for the calling of witnesses in his defence, and those facilities include expert legal advice.
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> " If one compares the kind of legal proceedings which are alleged to have taken place regarding the victims of charge 2 to persons charged with capital crimes in England, there is, of course, an enormous contrast : the proceedings for committal to trial, the immediate allocation of defence counsel and solicitors, and eventua!ly, after a lot of time and a lot of formality, a full dress trial before judge and jury.
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> " Dealing with international law, I do not suggest that the details of

> any domestic criminal jurisdiction should be required. One requires only the basic minima which would show that the verdict of the court in question may have been a fair one. But these three minimum requirements (and I am omitting now the detail of whether there is a jury or a committal for trial and all those other procedural matters), an impartial judge, a hearing at which the accused is present and is allowed to make out his own defence, and facilities for the preparation of his defence, are in my submission the minimum requirements for any trial the legal validity of which should be recognized by a tribunal which, like this tribunal, is administering international law."

1, p.77

This avenue cannot be explored to the full in these pages but reference should be made to *Information Concerning Human Rights arising from Trials of War Criminals*, a Report prepared by the United Nations War Crimes Commission in accordance with a request by the Human Rights Secretariat of the United Nations, November, 1947, Chapter III, pp. 3 17-329. Here, the Charters of the International Military Tribunals of Nuremberg and Tokyo, together with the law and practice of the various Allied nations whose courts have tried war criminals after the Second World War, have been analysed to show how accused war criminals have in general been guaranteed, as aspects and illustrations of the general right to a fair trial, the following : the right to know at a reasonable time before the commencement of trial the substance of the charge made against them ; the right to be present at their trial and to give evidence ; the right to enjoy the aid of Counsel ; the right to have the proceedings made intelligible by interpretation ; and the right of appeal or of review by some higher authority. Much of the information set out in these pages of the Report is also available in the volumes of the present series, and particularly in the annexes dealing with the war crimes laws of individual States.

3, p.79

See p. 4. Sawada also admitted having had jurisdiction over the prison where certain of the victims had been incarcerated under the conditions described on p. 6. Counsel for Sawada attempted to distinguish the charge against that accused from the charges that had been made against General Yamashita (see Vol. IV of this series, pp. I et seq.) ; in the course of his argument appear the following passages : " The Commission will notice an extreme difference in the way Yamashita was charged and the way General Sawada was charged. General Sawada is charged that he did appoint a Commission, that he did direct a Commission, that he did direct and authorise cruel and brutal atrocities, that he did confine and deny the status of prisoners of war. In other words, it is charged in this case that General Sawada himself did these acts ; not that he permitted others to do it. If we now try to find him guilty of permitting others to do these things, we find him guilty of an entirely different offence than what he is charged with in the specifications. I will go farther, however, and say even if charged with permitting it should not make any difference. The Yamashita case involves as I mentioned some 123 different atrocities involving the death of 25,000 innocent people. This

case involves a trial and a conviction. There is no comparison as to the extensiveness of the Yamashita charges and the charges in this case. None whatsoever. In the Yamashita case it was pointed out that the atrocities were and the words are from the decision itself-" wide-spread and extensive." We cannot say the acts that took place in Shanghai regarding these fliers were widespread and extensive. It was not the type of act that shows complete negligence of General Sawada to perform his duties. He did not completely fail as commander. . . . I submit, therefore, the Yamashita case is no authority for this case. The Yamashita case fails, and I know of no other authority or decision of any type which says that command responsibility is the same as criminal responsibility." It will be noted, nevertheless, that in its findings the Commission which tried Sawada struck out the words " knowingly " and " and wilfully " from the charge made against him, and its conclusions also show that it regarded the accused's guilt as arising from negligent omission rather than deliberate action. (See pp. 7-8.)

4, p.80

See pp. I, 2, 6, 7 and 8. During the course of the trial the Defence claimed that the Commission should not require Tatsuta to have questioned his orders to execute the prisoners ; Counsel argued as follows : " What about Tatsuta ? He was an executioner and a jailer. Is he supposed to go behind the court sentences, behind the orders of the 13th Army, Nanking Headquarters, on up to Tokyo ? " Here is what the American Law says of a person who acts pursuant to a court sentence : In Law Reports Annotated, page 4199, para. 68, the case of Erskine v. Huhnbach, a U.S. Supreme Court case is cited, and I quote : " An order or process issued by an officer or tribunal having jurisdiction over the subject matter upon which judgment is passed, and with power to issue the same, if regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, will give full and entire protection to a ministerial officer in its regular enforcement, against any prosecution which the party aggrieved thereby may institute against him.

" In 26 American Jurisprudence, para. 110, we find this statement : ' The execution of a death sentence pursuant to official duty and in obedience to law can constitute no offence, since it is in the advancement of justice, it is deemed justified.' " In the case of Stutsman County v. Wallace, Vol. 142, U.S. Reports 293, 12th Supreme Court Reports 227, I quote this Supreme Court decision : ' Ministerial officers acting in obedience to process regular on its face, and issued by an officer or tribunal having jurisdiction of the subject matter and power to issue the process, are not liable for its regular enforcement, although errors may have been committed bv the officer or tribunal which issued it.'

" What does all this mean ? It means that Tatsuta, if he had done the same acts in the United States, no U.S. court could have touched him because he acted pursuant to a lawfully appointed constituted tribunal of his own country. We have to protect such persons in our country in order to advance justice, in order that a court's sentence or court's decision can be put into effect and force right away. It could never be a binding decision of the court otherwise. We are asking Tatsuta to be held to higher standards than we are asking our own people to abide by.

" The Defence claimed that the Japanese tribunal had been lawfully constituted and had had the requisite jurisdiction, and that, even if its decision was improper, Tatsuta had no authority to examine whether it was proper or not.

4, p.81

See p. 89. According to Article 233 of the Norwegian Civil Criminal Code, a person who wilfully causes another person's death or is an accomplice to such an act, is punishable with imprisonment for up to six years. If the act was done not only wilfully but with premeditation, or if it was committed in order to facilitate or conceal another crime or to avoid pumshment for such other crime, life imprisonment may be inflicted. The same applies in cases of repeated violations and when other particularly aggravating circumstances are present. Article 239, however, provides as follows : " He who inadvertently causes another person's death, shall be punished by imprisonment for a period of up to three years. In particularly aggravating circumstances, imprisonment for a period of up to six years may be imposed. In particularly mitigating circumstances fines only may be imposed."

Stuart.Stein@uwe.ac.uk
Last Updated 29/01/07 18:46:20
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Faculty of Humanities, Languages and Social Science