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Def. Doc. No. 3037

DEFENSE SUMMATION

on

PERSONAL RESPONSIBILITY

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DEFENSE SUMMATION ON PERSONAL RESPONSIBILITY

Mr. President and Members of the Tribunal,

1. The object of this summation is to analyze the alleged criminal responsibility of all the defendants from the point of view of modern criminal law.

The Chief Prosecutor said in his opening statement as follows:

> "Since the usual definition of murder in civilized countries is the intentional killing of a human being without legal justification, we should perhaps see what constitutes legal justification. This justification is usually limited to the defense of one's person or property or, perhaps, in the case of an execution, that he was merely carrying out the order of a properly constituted court." (1)

The question of legal justification is, of course, important, but such can be understood only when the question of "intention" is taken into consideration at the same time. Unfortunately, however, the Chief Prosecutor left the latter entirely out of his discourse, as if the criminality of the defendants' intention is taken for granted.

2. Even in the case where an act has come within the purview of certain conditions defining a crime and was done without any cause of legal justification, mentioned by the Chief Prosecutor, still the person who committed the act will incur no criminal responsibility, unless

(1) Tr. 425

three more requirements are fulfilled: that is, (a) he has been mentally competent to take such responsibility, (b) the act was committed with criminal intent (as a rule) or through criminal negligence (in exceptional cases), and (c) there existed, at the time of commission of the act, a possibility of expecting him not to commit such an act. I shall hereunder consider the said three requirements seriatim.

3. In reference to the defendants in the present trial, it will not be necessary to dwell upon their mental competency to take responsibility for their acts, except the case of OKAWA. There is no doubt that each of them has had "the competency to discern the illegality of his conduct or to act according to his discernment of illegality of the conduct".(2)

4. As to criminal intent and negligence, Professor Sayer deplores in his treatise on "Mens Rea":

"It is almost hopeless to give an accurate definition of the term mens rea because of the diversity of its construction in judicial decisions and theories."(3)

In view of this remark, I wish, first of all, to determine the basis of my argument by briefly reviewing legislations of those countries which have adopted the most up-to-date principles of criminal law.

5. Article 38 of the present Japanese Criminal Code provides in Paragraph 1:

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(2) Article 10, Swiss Criminal Code
(3) Sayer: "Mens Rea", Harvard Law Review, Vol. 45, 1931-32, p. 974.

"No act done without criminal intent shall be punished, except in the case where it is otherwise provided specifically by law."

Paragraph 3 of the same article reads:

"Ignorance of law cannot be invoked to establish the absence of criminal intent, but the punishment may be reduced in consideration of the extenuating circumstances."

The said Paragraph 1 is the codification of the maxim: "Actus non facit reum nisi mens sit rea", while the said Paragraph 3 is the embodiment of the saying: "Ignorantia juris non excusat." Moreover, the said Paragraph 1 is derived from Article 77, Paragraph 1, of the old Japanese Criminal Code, which was almost similar in the wording,(4) and the said Paragraph 3 is a modification of Article 77, Paragraph 4, of the old code.(5) Since Article 77 of the old code provided in its paragraph 2 that: "No person shall be punished in the case where he committed a crime without knowing the facts which constitute the crime", the term "criminal intent" has been construed by the majority of judicial decisions as "knowledge of facts which constitute a crime".

(4) "No act done without criminal intent shall be punished, except in the case where its punishment is provided specifically by law or regulations."

(5) "Ignorance of law or regulations cannot be invoked to establish the absence of criminal intent."

6. According to this interpretation, criminal intent is established where the person in question knew the facts which constituted the crime, i. e., his act and the natural and probable consequence thereof, but, when such knowledge is once proved, it is not necessary to further enquire whether or not he was aware of the illegality of his act. As the result of this interpretation also, mistake of fact is sharply divided from mistake of law. In the former case, criminal intent is entirely precluded. In the latter case, while mistake of criminal law does not preclude criminal intent, mistake of non-criminal law does so preclude, on the presumption that mistake of non-criminal law is nothing but mistake of fact. For illustration of this interpretation, a judgment of the Japanese Supreme Court is quoted as follows:

> "When a person destroyed the seal and markings of attachment affixed to an attached object in the mistaken belief that the attachment had lost its effect by his payment of debt, his intention to commit the crime (of Article 96 of the Criminal Code) is precluded."(6)

7. In the above-mentioned case, there is no doubt that the act was committed by mistake of civil law. Can we, however, so hastily conclude as to say that the act was done without knowledge of the facts which constitute the crime? Is it not more natural to construe that criminal intent is precluded, not because mistake of civil law has brought about ignorance of facts which constitute the

(6) Judgment of Feb. 22, 1926, by the Second Criminal Division, Supreme Court. Report, Criminal, Vol. V, p. 97.

crime, but because, in spite of the offender's knowledge of such facts, mistake of civil law has amounted to ignorance of illegality of his act?

8. Professor Hafter of the Zurich University, after discussing the theories and judicial decisions in Switzerland upon the subject of criminal intent, remarks as follows:

> "Illegality is the essential element in the conception of crime. It does not matter whether it is expressly stated as legal constituent of each crime. If we couple this principle with another that criminal intent must be related with every factor of a crime, we cannot but arrive at the conclusion that the criminal must be conscious of the illegality of his action. To deny this is to surrender to the tyranical force which belittles mistake of law. In this connection, a brief explanation will be required. Consciousness of illegality of one's act does not mean the knowledge of his acting contrary to certain provisions of law. - - - - It is quite unnecessary that he should be aware of any particular norm of criminal law. It is necessary, however, that <u>his idea as layman, i. e., his sense of law, should inform him</u> that he is committing an act which is not permissible. - - - - Only when a person has such consciousness of illegality, may he be adjudged guilty on the ground that his act was done with criminal intent. The axiom of no punishment without responsibility

demands this. Though it will seldom happen in the commission of a crime, in the case where a person had no knowledge of his act being contrary to his duty and not permissible and where the impossibility of having such knowledge is actually proved in consideration of his whole personality, it is a shame to adjudge him guilty, however light the punishment may be."(7)

9. Professor Hafter further contends:

"All attempts are futile to make distinction between mistake of fact and mistake of law. Much more so, between mistake of criminal law and mistake of non-criminal law. It is too difficult to draw a line between the two. From the viewpoint of criminal responsibility, mistake as to the criminal nature of one's act must be taken into consideration. In the case where an abductor did not know the age of the abducted girl, or where a person was not aware of the fact that he was harboring a murderer, or where a school teacher mistakenly exercised his right of discipline, - - - - no criminal intent should be recognized, if his bona fides is proved beyond reasonable doubt. On the other hand, we need not consider his mistake in the punishability of his act, or its legal nature, e.g. whether larceny or embezzlement, or the degree or conditions of punishment, or the existence of certain requirements of legal proceedings, etc."(8)

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(7) Hafter: "Lehrbuch des Schweizerischen Strafrechts", allg. teil, 1926, S. 117, S. 118.
(8) Hafter: Op. Cit. S. 184.

10. The above-mentioned case of abduction will be illustrated by R. V. Prince of 1875 in England. Prince had abducted from her father a girl under the age of sixteen; but in the belief, on adequate grounds, that she was eighteen, in which case the abduction would not have been a crime. The great majority of the judges agreed, however, in the view that "an intention to do anything that is wrong legally", even as a mere civil tort and not as a crime at all, would be a sufficient mens rea. Some judges went even beyond this; laying down a view, according to which there is a sufficient mens rea wherever there is "an intention to do anything that is wrong morally", even though legally it be quite innocent, both criminally and civilly.(9) Although Professor Sayer criticizes this case as having confused and unsettled the law more than any other upon the subject,(10) can we not interpret the said opinions of the English judges as their recognition of the knowledge of illegality to be the essential factor of mens rea?

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(9) Kenny: "Outlines of Criminal Law", 14th Ed., 1933, pp. 41-42.

(10) Sayer: Op, Cit. p. 1025

11. This idea will become more clear, if we look into the question of negligence. According to Professor Kenny, "the mere fact that there was some degree of negligence on the parent's part will not suffice. There must be a wicked negligence, a negligence so great as to satisfy a jury that the prisoner did not care whether the child died or not."(11)

He remarks further that "when motorists are sued in civil actions for negligence, the verdict is usually against them, but is rarely so in prosecutions of them for manslaughter. There must be a wicked negligence — such disregard for the life and safety of others as to deserve punishment."(11)

It follows, therefore, that negligence, punishable under criminal law, is not a simple carelessness, but must be wicked or blameworthy. In this sense, it may be said that the difference between criminal intent and criminal negligence is only a matter of degree of knowledge of illegality.

12. In my submission, the above-mentioned views of the English jurists are the positive side of a principle of the modern criminal law, that is to say, that mens rea should be determined by the presence of knowledge of illegality; while the said opinion expressed by Professor Hafter forms the negative side of the same principle, that is to say, that mens rea will be precluded in the absence of knowledge of illegality. If we read again, with this consideration in mind, the maxim of Ignorantia juris non excusat,(12) it will mean: (a) a person shall be punished for his act, if he was aware of the illegality of his act, in spite of his ignorance of law, (b) even in the case where he was not aware of the illegality of his act, he shall be punished, if he was negligent in having been unaware of the illegality

(11) Kenny: Op. Cit., p. 122, 123.
(12) Japanese Criminal Code, Article 38, Paragraph 3.

of his act and if such negligence is blameworthy, and (c) in the case where he was not negligent or, if negligent, not sufficiently blameworthy for such negligence in having been unaware of the illegality of his act, he shall not be punished, even though he had knowledge of the facts which constitute a crime.

13. Professor Radin remarks as follows:

"Mens rea in English law was never held to mean that ignorance of criminal law was an excuse. In the German common law down to the end of the 19th century, the rule was error juris non excusat. Under the influence of Feuerbach, the excuse was later actually admitted for several decades with the result that there set in a sharp reaction, which has restored the old rule in modern German law. In France, exceptions are made in very unusual circumstances. The Norwegian Code, however, provides that where there is a mistake of law the punishment may be decreased or even abrogated altogether. In fact, many of the continental theorists are in favor of abrogating or at least modifying the generally prevailing old rule, and some of the recent drafts of penal codes provide for milder punishment."(13)

14. In stating this, Professor Radin must have had in mind the draft of the Swiss Criminal Code in 1918. However, almost every legislation of the later date provides that mistake of illegality may be the ground not only for the reduction but for the exemption of punishment. It is true that Article 18 of the said Swiss draft recognized only mitigation in the case of mistake of illegality.(14) But

(13) Radin: "Intent" in Seligman's Encyclopaedia of the Social Sciences, Vol. VIII, p. 129.

(14) "If a person committed a crime in the belief that he had a right to do the act, punishment may be reduced."

the actual Criminal Code, promulgated in 1937, provides in Article 20 as follows:

"Where a person committed an act with a good reason to believe that he had a right to do the act, punishment may be reduced or remitted at the discretion of the judge."(15)

15. Looking back to the Chinese Tentative Criminal Law which existed prior to 1928, Article 13, Paragraph 2, provided as follows:

"Ignorance of law cannot be invoked to establish the absence of criminal intent, but punishment may be mitigated by one or two degrees in consideration of the extenuating circumstances."

The above was amended by the old Criminal Code of 1928, Article 28 of which read as follows:

"Ignorance of law shall not discharge any person from criminal responsibility; provided however that punishment may be reduced by one half in consideration of the extenuating circumstances."

Now, the present Chinese Criminal Code, which has come into force since 1935, provides in Article 16 as follows:

"Ignorance of law shall not discharge any person from criminal responsibility; provided however that punishment may be reduced in consideration of the extenuating circumstances. In the case where a person believed that his act was permissible by law and where there was a good reason for him so to believe, punishment may be remitted."

(15) This Article 20 of the Swiss Criminal Code follows literally the provisions of Article 17 of the Swiss Military Ciminal Law of 1927.

The above changes in Chinese law clearly demonstrate the gradual transition from the formal interpretation of ignorance of law to the real understanding of the principle of non-cognizance of illegality.

16. The reason why I have in the above discussed at length this rather elementary principle of criminal law is because Professor Kenny maintains that a mistake of law, even though inevitable, is not allowed in England to afford any excuse for crime. He states:

"The utmost effect it can ever have is that it may occasionally, like drunkenness, rebut the existence of the peculiar form of mens rea which some particular kind of crime may require. Thus larceny can only be committed when a thing is stolen without even the appearance of right to take it; and, accordingly, a bona fide and reasonable mistake, even though it be of law — like that of a woman who gleans corn in a village where it is the practice to do so — will afford a sufficient defense. Similarly a mortgagor who, under an invalid but bona fide claim of right, damages the fixtures in the house which he has mortgaged, will not be guilty of 'malicious' damage. Apart, however, from such exceptional offences, the rule which ignores mistakes of law is applied with rigour."(16)

17. On the other hand, he remarks:

"But I know of no reported decision which extends this rule to mere municipal by-laws. Both in England and in the United States (Porter v. Waring, 69 N.Y. 250) a

(16) Kenny: Op. Cit. pp. 69-70

judge would require legal proof of a bye-law before enforcing it. Should the law attribute to ordinary people a greater legal knowledge than to the judge?"(17)

Admitting that this Honorable Tribunal might take judicial notice of the fact that there is a large body of international law, known at different times and by different writers as the "common law" or "general law" or "natural law" of international law,(18) I respectfully submit that it is a law less clear and definite than a nation law and that acts in contravention of international law are deemed by any national law not sufficiently blameworthy to incur criminal responsibility, except in a few cases. According to Professor Kenny, it is expounded as follows:

"The student must bear in mind that, though it is sometimes said that 'International Law is part of the laws of England,' this is true only in that loose historical sense in which the same is also said of Christianity. But an indictment will not ~~be~~ lie for not loving your neighbor as yourself. Equally little will it ~~be~~ lie for trading in contraband ~~or~~ of war, or for the running of a blockade. Both these acts are ~~vitiated~~ visited by International Law with the penalties of confiscation; but neither of them constitutes any offence against the laws of England, or is even sufficiently unlawful to render void a contract connected with it."(19)

18. The above submission will be opposed by the contention that international law is a law sui juris and can punish any act, which it deems fit upon the ground entirely

(17) Kenny: Op. Cit. p. 68, Note 4
(18) Mr. Keenan, Opening Statement, T. 405-6
(19) Kenny: Op. Cit. pp. 334-325. As to the question of trading with the enemy, see P. 335, Note 1.

different from any national law. It is said, however, by Lord Wright and quoted by the Chief Prosecutor as follows:

"In my earlier essay I pleaded to have it recogniz that International Law was the product, however imperfec of that sense of right and wrong, of the instincts of justice and the humanity which are the common heritage of all civilized nations. This has been called for many ages 'Natrual Law'; perhaps in modern days it is simpler and truer merely to refer to it as flowing from the instinctive sense of right and wrong possessed by all decent men, or to describe it as derived from the principles common to all civilized nations. This is, or ought to be, the ultimate basis of all law." (20)

In other words, even though "the source of International Law must * * * be sought elsewhere than in the acts of a national law-making authority," (20) it must have a foundation in the instinctive sense of right and wrong, common to all law. It must not be the law of the mighty or the conqueror.

19. The heretofore accepted definition of "international law" is that it governs relations between independent States. (21) It has been a matter of common sense to understand that: "Public international law is the body of rules which control the conduct of independent States in their relations with each other. It is altogether different in its nature from law in the narrower sense of the word, namely, law capable of judicial enforcement, for that

(20) T. 407-8
(21) The S. S. Lotus (France v. Turkey), Permanent Court of International Justice, Sept. 7, 1927, Cited in Hackworth: "Digest of International Law," 1940, Vol. I, p. 2.

implies a force superior to both the litigants or disputants; and as independent States have no recognized common superior, the rules by which their conduct is governed are incapable of enforcement except by war."(22)

Even the Chief Prosecutor admits that "the personal liability of these high ranking civil officials is one of the most important, and perhaps the only new question under international law to be presented to this Tribunal."(23)

20. According to the Chief Prosecutor, it is said that the prosecution will "show that each and every one of the accused named in this indictment played an important part in these unlawful proceedings; that they acted with full knowledge of Japan's treaty obligations and of the fact that their acts were criminal."(24) In my submission, here lies the fallacy of his contention, for knowledge of treaty obligations is entirely a different question from knowledge of criminality of their acts. No modern national law would punish an individual for any breach of contract, whether be it intentional or unintentional. No international law has ever criminally punished an individual for any breach of treaties except perhaps in cases of the so-called convential war crimes and pirates. Even then, the prosecution admits that "the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders."(25)

(22) Byrne's Law Dictionary, 1923, p. 487
(23) T. 435
(24) T. 422
(25) T. 39,007

21. Evidence adduced either by the prosecution or by the defense has definitely established the fact that all the defendants did their level best to carry out whatever treaty obligations they had to deal with in their respective capacities, not because they were aware of their criminal responsibility for not doing so, but because they wanted to keep the sanctity of the treaty itself. Any breach of treaty obligations, alleged by the prosecution, has been proved to have resulted from inevitable but unforeseen circumstances. All acts of the defendants, as indicted before this Tribunal, were done in pursuance of the laws of their country. If Professor Hafter is right in saying that "it is necessary that his idea as layman, i.e. his sense of law, should inform him that he is committing an act which is not permissible,"(26) how could the defendants have been informed by their sense of law that their acts were not permissible under international law, at the same time when their very sense of law was telling them that their acts were permissible under their national law?

22. The learned judges in the McNaughton's case stated as follows:

"We are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time

(26) See Para. 9 supra

of committing such crime that he was acting contrary to law: by which expression we understand to mean the law of the land."(27) If there was any conflict between the law of the land and international law, the judges would not hesitate to answer the superiority of the former. So would the defendants. But what I wish to emphasize is that not only the defendants had legal justification for their acts under their national law, but they honestly & reasonably believed that their acts were justified under international law.

23. The prosecution contends, in its summation upon conspiracy, as follows:

"If he was in office at that time, allowed his scruples to be overruled, and continued in office, we submit that quite clearly he should be convicted, and that in a moral point of view his case is at least as bad as that of one who had no such scruples."(28)

And further it maintains, in its summation upon individual responsibility, in particular, of a cabinet minister, that:

"He always had alternative of resigning instead of casting his affirmative vote for, or expressing his acquiescence in an aggressive measure. If he did not resign despite his personal convictions because he felt it more important that he or the Cabinet continue in office, he is legally just as responsible and morally more responsible than an all-out proponent of the aggressive policy, since he deliberately chose to approve the policy

(27) McNaughten's Case, 1843, cited in Wilshere: "Leading Cases on Criminal Law," 3rd Ed., 1935, p. 31.
(28) T. 39,057

with full cognizance and conviction of its evil."(29)

24. Such an accusation misses the mark entirely, so far as the defendants are concerned. During the period of the indictment, i.e., from January 1928 to September 1945, 17 Cabinets rose and fell, the average life of a Cabinet was being only one year. How can we expect any consistent national policy, either aggressive or defensive, under these circumstances? The trouble with the defendants was not that they clung to their prominent posts despite their personal convictions, but that they foresook such posts too readily, because of their sensitiveness to political responsibility, to carry out their policies. Did or should their sense of law inform them, at the time of their resignation, that they would be also responsible criminally under international law, if they did not resign? No sane man, even the most learned scholar of international law, would dream of such a fantasy, but this will be the only conclusion to be drawn from the logic of the prosecution. Whatever may be the case, the evidence adduced before the Tribunal has proved that the defendants believed that their acts were permissible both by the law of their land and by the laws of nations and that they had good reasons so to believe. Even if they are to be adjudged by an ex post facto law as criminally liable under international law, their punishment should be remitted, should the principle embodied in the aforesaid Article 18 of the Chinese Criminal Code(30) be adopted.

(29) T. 40,554-5
(30) See Para. 15, supra

25. Leaving aside for a moment the question of international law, I should like to discuss briefly the principle of criminal responsibility, which requires the existence, at the time of commission of an alleged offence, of a possibility of expecting the offender not to commit such an act. Article 34 of the Swiss Criminal Code of 1937 is the best illustration of this principle and provides as follows:

> "No person shall be punished for his act done in order to avert any impending and otherwise unavoidable danger to his right, in particular, to life, body, liberty, honor or property, if he is not responsible for the occurrence of such danger and if it is impossible to expect him to abandon his endangered right in view of the circumstances".

26. Article 37 of the Japanese Criminal Code reads as follows:

> "No person shall be punished for his act inevitably done in order to avert any impending danger to his or any other person's life, body, liberty or property, if the evil arising out of his act does not exceed the degree of evil which he tried to avert; provided however that punishment as to the act in excess of such degree may be reduced or remitted in consideration of the extenuating circumstances".

The underlying thought of this provision is the same as that of the Swiss Code above referred to, i.e., criminal responsibility shall not be attributed to the case where it is impossible to expect a person to avert the evil by anything short of the commission of the offence in question.

27. Professor Kenny states as follows:

> "The defence of necessity, however, can only be important where, as in capital offences, there is a prescribed minimum of punishment. For in all others every English judge would take the extremity of the offender's situation into account, by reducing the sentence to a nominal penalty. Yet where immediate death is the inevitable consequence

> of abstaining from committing a prohibited act, it seems futile for the law to continue the prohibition, if the object of punishment be only to deter. For it must be useless to threaten any punishment, the threat of which cannot have the effect of deterring. Hence, perhaps, it is that in the United States the defence of Necessity seems to be viewed in favor".(31)

Although it may not be so prevalent as in continental countries, the English defence of Necessity is based, in the final analysis, on the same principle as mentioned above in reference to Swiss and Japanese laws.

28. As a further application of this principle, I refer to Article 105 of the Japanese Criminal Code, which provides as follows:

> "In the case where a crime mentioned in this Chapter (i.e. harboring a criminal or suppression of evidence) is committed by a relative of a criminal or a fugitive for the benefit of the criminal or the fugitive, punishment may be remitted".

The harboring or suppression of evidence by a parent or a wife for the benefit of his or her child or her husband is, indeed, an inevitable manifestation of humanity, as expressed by Confucius in his Analects that "the true justice exists where a father conceals for the sake of his child and a child for his father". It would be unreasonable and against human nature to expect him to act otherwise. A similar kind of law is found in England. If a husband who has committed a crime is received and sheltered by his wife, she is not regarded by the law as becoming by such "bare reception" an accessory after the fact or a participator in his treason; for she is bound to receive him.(32)

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(31) Kenny: Op. cit. pp. ~~77-78~~ 78-79.

(32) Kenny: Op. cit. pp. 73-74
But a husband enjoys no similar exemption when he assists a felonious wife; he becomes accessory to her felony (Kenny: Op. Cit. p. 89).

29. As another example of the same principle, Article 76 of the old Criminal Code of Japan provided as follows:

> "A person, who has performed his official duty under his superior's order, shall not be punished".

The present Criminal Code has deleted such a provision on the ground that it is included in Article 35, which reads as follows:

> "No act is punishable, which is done in accordance with the provisions of law or regulations or in pursuance of a legitimate business".

It corresponds to Article 32 of the Swiss Criminal Code of 1937 which provides as follows:

> "Any act, which is required by law or by an official or business duty or permitted or declared not punishable by law, is neither felony nor misdemeanour".

30. In the Chinese Tentative Criminal Law, there was no such provision, but in Article 35 of the old Chinese Criminal Code of 1928, it was provided:

> "No act is punishable, which is done in the course of an official duty under the order of one's superior officer".

Then, in Article 21 of the present Chinese Criminal Code of 1935, Articles 34 and 35 of the old Code are combined as follows:

> "No act is punishable, which is done in accordance with law or regulations.
>
> "No act is punishable, which is done in the course of an official duty under the order of one's superior officer, except the case of a person who has known clearly the illegality of such order".

The said Article 21, Paragraph 2, of the Chinese Code implies obviously the following two points: Firstly that no crime will be constituted by any act of a subordinate done under a legal order of his superior, and secondly that a subordinate shall not be held

responsible for any act done under an illegal order of his superior, unless the subordinate knew clearly the illegality of the order.

31. In this connection, the French Criminal Code provides in Article 327 as follows:

> "Murder, wounding or assault committed under the provisions of law and ordered by a lawful authority shall constitute neither felony nor misdemeanour".

And in Article 114, it is provided:

> "A public official, agent or employee of the government shall be deprived of his civil rights in the case where he has ordered or committed any arbitrary act, or any act inimical to the individual liberty or to the civil rights of one or more citizens or to the Constitution.
>
> "If, however, he proves that he has acted under the order of his superiors concerning matters within their jurisdiction, in which matters he is bound to the superiors by a chain of subjugation, he shall be exempted from punishment, etc."

32. In reference to criminal responsibility of a subordinate, Professor Donnedieu de Vabres enumerates three points of view: (a) The theory which maintains the irresponsibility of a subordinate on the ground that he is not allowed to criticize the legality of his superior's orders; (b) the so-called "la theorie des baionettes intelligentes", prevalent in the courts of the United States(33), which have repeatedly refused to recognize any such irresponsibility at all on the ground that a subordinate has the right (and duty ?) to criticize the legality of his superior's orders; and (c) the theory which admits mitigation of punishment in the case where the content of such order was apparently legitimate and its formality was satisfactory.(34)

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(33) Kenny: Op. Cit. p. 73

(34) Donnedieu de Vabres: "Traite elementaire de droit criminel", 1937, pp. 246-247. He seems to agree with the third view.

33. According to Professor Kenny, the official British Manual of Military Law admits it to be still "somewhat doubtful" (Ch. VIII, par. 95) how far a superior officer's specific command, even not ~~obviously~~ obviously improper, will excuse a soldier from acting illegally.(35) Compared to such legislation, the said Chinese Criminal Code (Article 21, Paragraph 2) sweeps away any doubts by stating that punishment will be imposed only upon a subordinate who has acted with a clear knowledge of illegality of his superior's order. It follows, therefore, that in case there existed any ambiguity as to illegality of the order, he shall not be responsible, even if he carried out the order. Since the basic principle of officialdom lies in the chain of command and subjugation, especially in the case of the army and navy, it is according to the thinking of Chinese law, unreasonable to expect him to act contrary to his superior's order, even when he was not quite sure of its being either legal or illegal.

34. On the other hand, Professor Liszt contends that "so long as the absolute binding power of a superior's order is acknowledged by law, such an order will preclude the illegality of his subordinate's act done in accordance therewith", on the ground that "an act done in pursuance of one's duty is never illegal"(36). This contention is erroneous, because since the superior is held responsible for the execution of his illegal order, "the punishment cannot be linked with a legal act"(37). If the superior's order is illegal, we have to admit that the subordinate's act is also illegal. However, the impossibility of expecting him to act other-

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(35) Kenny: Op. Cit. p. 73
(36) V. Liszt: "Lehrbuch des Dentschen Strafrechts", 21-22 aufl., 1919, § 35, s. 146.
(37) M. E. Mayer: "Der allgemeiner Teil des deutschen strafrechts", 1915, s. 334.

wise will exempt him from any wickedness or blameworthiness and hence from any criminal responsibility.

35. According to Professor Sayer, "the conception of blameworthiness or moral guilt is necessarily based upon a free mind voluntarily choosing evil rather than good; there can be no criminality in the sense of moral shortcoming, if there is no freedom of choice or normality of will capable of exercising a free choice".(38) The Nurenberg Judgment ruled that "the true test....is not the existence of the order, but whether moral choice was in fact possible".(39) In my submission, these words are nothing but the enunciation of the principle of impossibility of ~~expect'on~~ expectation (Nichtzumutbarkeit).

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(38) Sayer: Op. Cit. p. 1,004
(39) Nurenberg Judgment, p. 16,881

36 The Nuremberg Judgment has brought this principle of criminal law into the field of international law. The relevant provisions of law considered by that Tribunal are articles 7 and 8 of its Charter which in combination correspond to article 6 of the Charter governing this honorable Tribunal. The difference between the said provisions of the two charters is that while in the Nurenberg Charter the official position of defendants, whether as heads of states or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment, and only the fact that they acted pursuant to order of their government or of their superiors may be considered in mitigation, the Tokyo Charter provides that both their official positions and the fact that they acted pursuant to order may be taken into consideration, if the Tribunal determines that justice so requires.

37. Now, the prosecution contends in its summation as follows:

> "The defendants may be divided into three categories: (1) those defendants who had the ultimate duty or responsibility for policy formation fixed by the law of Japan; (2) those defendants, although they do not have the ultimate duty or responsibility, had the duty or responsibility for policy formation in a subordinate or intermediate capacity fixed by the law of Japan; and (3) those defendants who, although they had no duty or responsibility fixed by the law of Japan, have by their acts and statements placed themselves on the policy-making level and are therefore chargeable with responsibility in fact."[40]

40 T.40,542-3.

As to the defendants of the first category, I have already shown in the above that their acts, done in accordance with the law of Japan and in the honest and reasonable belief that such acts would also be justified under international law, preclude any knowledge of illegality and, therefore, their punishment should be remitted.(41)

38. It is further submitted that under such circumstances as existed during the period of 17 years since 1928, no man could have acted otherwise than what the defendants did, should he have been placed in their stead. It was, indeed, humanly impossible for them to stop successive explosions of the long pent-up national sentiments, either at home or abroad. It was also humanly impossible for them to carry out direct control and supervision over numerous subordinates in remote corners of Manchuria, China and elsewhere. In short, can we expect them to exercise their authority and care to such an extent as to turn the tide of national destiny and to prevent the inevitable consequences of sanguine hostilities?

39. As to the defendants of the second category, there was in Japan the so-called Regulations for the Duty of Government Official,(42) which provided as follows:

> "Article 1. Government officials shall, pledging their allegiance and assiduous services to His Majesty the Emperor and the Emperor's Government, obey laws and orders and discharge their respective duties.

(41) See Para. 24, supra.
(42) Ex. 3510, T. 34,003.

> "Article 2. Government officials shall, with respect to their duties, observe the orders of their superior officials to whom they are assigned, provided however that they may express their opinions to such orders."

In the case of military men, a more special and vigorous duty was imposed upon them for the observance of their superior's orders. Those who opposed or did not comply with such orders were severely punished as guilty of the crime of defiance under the Army Criminal Code (Arts. 57-59) or the Navy Criminal Code (Art. 55-57).

40. In any case, once a decision or an order was given by his superiors, a civil official or military officer was not allowed to act contrary thereto, whatever his personal opinion might have been. To expect him to act otherwise was, indeed, impossible. Even the Ministers of State and Commanders-in-Chief of various armies and fleets were, in that sense, subordinates to the Emperor. If an Imperial Sanction was issued, they could do nothing but obey it. That is why the Chiefs of Army and Navy General Staffs exercised a great influence not only in military affairs but in political matters by having direct access to the Throne.

41. Even if we assume, for the sake of argument, the existence of some criminal responsibility either under international law or under national law upon somebody in the political or military circles of Japan, it is impossible to attribute such responsibility to any person or body of persons, because in

the 20th century Japan nobody has ever succeeded in obtaining a single post, much less power in the Government, by plots, revolutions and other unlawful means, such as seen in the history of Germany after the First World War. All plots and attempts of revolution were either nipped in the bud or suppressed. By whom? By the very defendants who now stand in the dock. Every one of them was appointed to his post in due course of his career and in pursuance of the laws and customs of Japan. None of them exceeded his authority or was negligent of his duties, prescribed by the regulations of his office. It is true that they belonged to the higher grade in the hierarchic structure of Japan, but it is also shown by evidence that there was no Hitler, no Mein Kampf, no Nazi Party or criminal organization among them.

42. As to the defendants of the third category, whatever popularity and influence they had were derived not from governmental or military sources, but from ordinary citizens at large. They never were powerful enough to be able to force their will upon the politics of Japan. All they could do was to voice the people's sentiments in opposition to the then prevailing bureaucracy. Perhaps they dreamed about the Great East Asia Co-Prosperity Sphere and Asia for Asiatics, but their talks were puerile compared to the nation-wide movement of anti-foreignism in China. If the latter was not treated as an international crime even by the Lytton Report, why should the former be so condemned? If freedom of thought is

to be one of the human rights under national law, why should international law try to stop it?

43. The underlying thought of the prosecution in thus accusing the defendants of the above-mentioned three categories is that a state is a fictitious existence, to which no criminal responsibility can be attributed.(43) The Chief Prosecutor declares that:

> "Nations as such do not break treaties, nor do they engage in open and aggressive warfare. The responsibility always rests upon human agents."(44)

and also that:

> "All governments are operated by human agents, and all crimes are committed by human beings. A man's official position cannot rob him of his identity as an individual nor relieve him from responsibility for his individual offences."(45)

Such a thought follows the maxim:

> "Societas delinquere non potest",

but according to Professor ~~Kearny~~ Kenny,

> "it is now settled law that corporations may, in an appropriate court, be indicted by the corporate name, and that fines may be consequently inflicted upon the corporate property."(46)

(43) Prosecutor Jackson: "The Case Against the Nazi War Criminals," 1946, P.82.
(44) Mr. Keenan, Opening Statement, T.473.
(45) Mr. Keenan, T. 434-435.
(46) Kenny: Op. Cit., pp. 65-66.

44. In England, the Interpretation Act, 1889 (52 and 53 Vict. c. 63, S.2) provides that in the construction of every statutory enactment relating to an offence, whether punishable on indictment or on summary conviction, the expression 'person' shall, unless a contrary intention appears, include a body corporate. In the United States, the Criminal Code of New York of 1882 (Article 13) provides that in all cases where a corporation is convicted of an offence for the commission of which a natural person would be punishable with imprisonment, as for a misdemeanor, such a corporation is punishable by a fine of not more than five hundred dollars, as for a felony by a fine of not more than five thousand dollars. The Criminal Code of California of 1901 (Article 26a) provides that corporations are capable of committing crimes in the same manner as natural persons. This legislation is explained by a text book as follows:

> "Under the theory that a corporation is in the language of Chief Justice Marshall 'an artificial being, invisible, and existing only in contemplation of law', it was doubted whether a corporation could be guilty of crime. The modern view tends to regard a corporation as a reality, a group of human beings, authorized by law to act as a legal unit, endowed for some purpose with legal personality."(47)

And further:

> "Where conduct is sanctioned by the directors or officers in whom the corporate powers are vested, their intent should be considered the intent of the corporation. Such persons are more than agents for a natural principal. They embody and exercise the mental element essential for corporate action."(48) In other words, whenever a director's act is deemed to have been done for the interest of his corporation, his intention being also to act on its behalf, such act will be absorbed by the corporation and become its act, losing the identity of any individual's act.

(47) Clark and Marshal: "A Treatise on the Law of Crimes", 4th ed., 1940, pp. 140-143.
(48) Ibid., p. 140.

45. There is no doubt that a State is a juristic person under either national law or international law, while a corporation is such under national law. If a corporation, which is nothing but a body of persons bound by a certain economic or social tie, can be a reality, competent to bear criminal responsibility, why cannot a State be more real and more competent than a corporation? Hackworth states as follows:

> "The terms state and nation are frequently used interchangeably. The term nation, strictly speaking, as evidenced by its etymology (nasci, to be born), indicates relation of birth or origin and implies a common race, usually characterized by community of language and customs. The term state--a more specific term--connotes, in the international sense, a people permanently occupying a fixed territory, bound together by common laws and customs into a body politic, possessing an organized government, and capable of conducting relations with other states."[49]

46. A corporation has no territory nor people, over which it can exercise its sovereignty, nor any natural affinity to bind them together, except a certain specific purpose which may be changed or given up at any time. On the other hand, a State is a foreordained existence and follows a course, which no single man, not even the seventeen cabinets in succession within seventeen years, can change or give up. A shareholder may sell out his shares of a corporation whenever he likes to do so, but the defendants could not back out from their duties imposed by

49. Hackworth Op. Cit., Vol. I, p. 47

their State. Any international obligations are executed or miscarried not only in the name of the State but by the predestined course it takes. If it is defeated in a war, indemnities will be paid or territory be ceded. Are not such measures punishment for its responsibility under international law? Admitting that the sovereignity of a State should be subject to international law, it is respectfully submitted that no responsibility under international law should be attributed directly to any individual because of the following grounds.

47. The Japanese Law No. 125 of 1947, called as the State Redress Law (Article 1), provides as follows:

> "If a public official entrusted with the exercise of the public power of the State or of a public entity has, in the conduct of his official duties, inflicted illegally with intent or through negligence any damage on other person or persons, the State or the public entity concerned shall be under obligation to make compensation therefor.
>
> "If in the case referred to in the preceding paragraph the public official has perpetrated the act intentionally or through gross negligence, the State or the public entity concerned shall have the right to obtain reimbursement from the said public official."

The above provisions of the Japanese law are introduced for the purpose of democratization of the Japanese legal and political systems, but they do not recognize any direct claim against an official by an afflicted party for any damage inflicted illegally in the course of the official's duties.

This interpretation of the law is confirmed by the fact that the annexed rules to the said Law abolished as from October 27, 1947, Article 6 of the Public Notary Law, Article 4 of the Household Registration Law, Article 13 of the Real Property Registration Law, and Article 532 of the Civil Procedure Code, which provided a direct responsibility of a public notary, mayor of city or village, registration official or bailiff towards a party who suffered damage by an intentional or gravely negligent act of the former.

48. On the other hand, in the case of Johnstone v Pedlar, 1921, Vicount Finlay said in the judgment of the British House of Lords:

> "It is the settled law of this country, applicable as much to Ireland as to England, that if a wrongful act has been committed against the person or the property of any person the wrongdoer cannot set up as a defense that the act was done by the command of the Crown. The Crown can do no wrong, and the Soverign cannot be sued in tort, but the person who did the act is liable in damages, as any private person would be.
>
> "This rule of law has, however, been held subject to qualification in the case of acts committed abroad against a foreigner. If an action be brought in the British Courts in such a case it is open to the defendant to plead that the act was done by the orders of the British Government, or that after it had been committed it was adopted by the British Government. In any such case the act is regarded as an act of State of which a Municipal Court cannot take cognizance. The foreigner who has sustained injury must seek redress against the British Government through his own Government by diplomatic or other means. This was established in 1848 in the well-known case of Buron v. Denman (2 Ex. 167.)"[50]

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50. 2 A. C. 262, 271, 272, 275, cited in Hackworth: Op. Cit., Vol. II, p. 16

49. In Finck v. Minister of the Interior the plaintiff, a German who had been engaged in the business of bookselling in Cairo, Egypt, prior to October 1914, brought an action against the Egyptian Government for damages resulting from the sequestration of his property and the arrest and deportation of his agents. He alleged, inter alia, that the decision of the Council of Ministers of Egypt, on August 6, 1914, calling upon the Commander-in-Chief of the British troops in Egypt to undertake the defense of Egypt against any aggression of a power at war with Great Britain was ultra vires. The Court of First Instance of Cairo of the Mixed Tribunals of Egypt rejected the claim for damages, stating that the decision of the Council of Ministers resulted in Egypt's being at war with Germany, that a declaration of war is in law an act of the sovereign power, that such power vested in the sovereign is exercised through its ministers, that therefore the decision emanated from the only authority competent to make it, that in law acts of this nature are called "acts of State," and that in principle such an act cannot be made the basis of an action for damages in respect to the injury it causes.[51]

50. This principle of acts of State should in no way be different whether the case is a civil action or a criminal action. According to the preliminary articles of the Hague Convention IV of 1907 (Article 3), a belligerent party that violates

51. 15 Gazette des Tribunaux Mixtes d'Egypte (Nov. 1924-Oct. 1925)82; British Year Book of International Law (1925) 219; cited in Hackworth: Op. Cit., Vol. II, p. 19

the provisions of the regulations respecting the Laws and Customs of War on Land shall, if the case demands, be liable to pay compensation and that it shall be responsible for all acts committed by persons forming part of its armed forces. According to the judgment of In re Piracy Jure Gentium, 1934, it is expounded as follows:

> "With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of the criminals, are left to the Municipal law of each country."[52]

51. It is respectfully submitted, therefore, that even if the defendant had been guilty of a criminal intent or of gross negligence in carrying out their official duties, all the accepted authorities upon international law would not recognize any direct responsibility upon them vis-a-vis foreign States or foreigners. How can international law impose any responsibility upon those who have done their duties in accordance with the laws of their land and in the honest and reasonable belief that their acts were also in conformity with the prevailing rules of international law? In this connection, I should like to refer to the Statute of the Permanent Court of International Justice (Article 38), which provides:

> "The Court shall apply:
>
> "1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

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52. A. C. 586, 589; cited in Hackworth, Op. Cit., Vol. I, p. 38

"2. International custom, as evidence of a general practice accepted as law;

"3. The general principles of law recognized by civilized nations;

"4. Subject to the provisions of Article 57, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

"This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."

52. If these defendants must at any cost, be adjudged directly under international law for acts done in their official capacities, although there exists no such precedent,[53] it is my sincere wish that the Tribunal would take into their consideration "the general principles of law recognized by civilized nations," in particular, those elementary principles of criminal law which are submitted in the above. Professor Holdsworth remarks that, "primitive man is like the civilized State" and compares the criminal law of ancient times with the present state of international law.[54] I am convinced, however, that the international law which would be administered by this honorable Tribunal would be in no wise contrary to the sense of law developed by criminal ~~legislators~~ legislations of modern civilized States.

53. Mr. Keenan: T. 459

54. Holdsworth: "History of English Law," 3rd ed. 1923, Vol. II, p. 43.