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Rebuttal Statement Made by the Prosecution at the Closing

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REBUTTAL STATEMENT MADE BY THE PROSECUTION AT THE CLOSING OF CASE NO. XI ON 18 NOVEMBER 1948

For more than six days defense counsel have been engaged in delivering closing arguments to the Tribunal. Undoubtedly the prosecution does not stand alone in feeling that there has been much able argument offered by learned counsel for the defense. But after studying the closing arguments of the defense, we find no reason to modify or to supplement in any substantial way the arguments we made in our closing statement of 9 November. With your permission we will reply briefly to a few matters raised by the defense in the last week. Our total time for closing, rebuttal included, will amount to approximately the full day originally allowed us for final argument. We will give some attention to some of the most fundamental legal arguments of the defense and some emphasis, by several examples, to what we believe to be distortions, probably arising as a result of understandable zeal on the part of defense counsel. We suggest that most of the analogies drawn by defense counsel do not pay sufficient attention to such important elements as the full facts, the context of a sentence, the context in which events transpired, the dates, the times, the places and the order of events. The defense in its closing arguments have made an all-out attack on the basic moral and legal principles which underlie the charges in this indictment.

Counsel for the defendant KOERNER spearheaded this attack. His point of attack is that conditions have changed since the IMT rendered its judgment in the Fall of 1946. Therefore, Dr. Koch concludes on page 3 of the Koerner closing:

> "This honorable Tribunal will have to deal with the new law which has meanwhile come into being."

And again at page 6 this same counsel states:

> "The happenings of the last year adequately illustrate the extent and speed with which the world is changing, and it is the natural duty of the Tribunal to adjust itself to these changes and to verify the true contents of international law at the time judgment is passed."

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Now, what are the true contents of international law to which the defendants ask this Tribunal to conform? As to the Crimes against Peace, the defense says: "We have no alternative but to affirm the legal status prevailing today that aggressive wars are not criminal, or at least that they no longer are." (KOERNER Plea, p.14).

As to spoliation charges of War Crimes and Crimes against Humanity, the defense remind us that this is the first time, since the IMT, that "the total economic process of the utilization of territories occupied by Germany is to be judged." (KOERNER Plea, p.24). They point out that the other cases at Nurnberg were individual cases of private industrialists who had private interests, whereas here we deal with the high government officials engaged in what they term "the total economic process" of the utilization by Germany of occupied territory. We agree with the defense that this case affords a distinction between government officials and private industrialists, but we see no comfort in this distinction for these defendants.

What is the new international law which they ask this Tribunal to pronounce on the law of belligerent occupancy? The defense argues that modern total war has made the prohibitions of the Hague Rules obsolete and that under the "new" international law "any considerations for the individual, the non-combatant, as well as the combatant, recede into the background." (KOERNER Plea, p.28).

As to the "new" international law on slave labor, the defense says: (KOERNER Plea, p.36)

> "This Tribunal would make an important contribution to the future development of international law, if it were to repudiate, on legal grounds, any conviction on the charge of forced labor. There is a great difference between regarding forced labor as abominable on humanitarian grounds and being permitted to punish it on legal grounds."

This "new" international law urged by the defense runs in opposite directions at the same time. This is well illustrated by their arguments on the law with respect to aggressive war as compared with

the law limiting conduct during a belligerent occupation. With respect to aggressive war, the defense argues that the outlawry war as an instrument of national policy came too late to offer a basis for the punishment of aggressors. Here the contention is made that international law with respect to Crimes against the Peace crystallized and took form too late to establish standards by which these defendants may be judged. However, when we come to the charges involving spoliation and slave labor, we find the defense makes an about face. Here they claim that international law, as codified in the Geneva and Hague Conventions, is too old and that the crystallization of the principles of the conventions is completely unfitting for the modern world. Hence, they say that these conventions are out of date as a guide in determining whether these defendants committed crime. Of course, the defense is again merely saying that there is no enforceable international law, and that anarchy alone prevails when nations come into conflict.

CRIMES AGAINST PEACE

During the last week we have heard the defense argue that in spite of the London Charter, Control Council Law No.10, the IMT judgment and other Nurnberg decisions, aggressive war is not really a crime at all. This Tribunal, in effect, is asked to accept this challenge to its jurisdiction and to declare that the most basic part of the law establishing the jurisdiction of this Tribunal should be declared null and void. Such argument is not new to this Tribunal. Motions and extensive memoranda were filed by the defense during the course of the trial, attacking the jurisdiction of the Tribunal. Needless to say, after due consideration, the defense motions were denied in each instance. The defense gave a somewhat strange twist to an old argument by another assertion. They claim that even if aggressive war were cognizable as a crime in 1945 when the London Agreement was signed, it is no longer a crime because of

developments in the relations between nations since 1945. Of course, these and related arguments have been made to other Tribunals in Nurnberg with no effect. Less than a month ago Tribunal No.IV in its judgment in Case No.XI reaffirmed that aggressive war was the supreme crime in international law. However, last week counsel for the defendant KOERNER said: "Who is still going to maintain today that aggressive warfare is prohibited? ... Even had aggressive warfare been banned at the time the IMT judgment was passed, this is certainly not the case today by virtue of the general usage practised by the community of nations ... since the IMT judgment was passed, nowhere throughout the wide world has the attempt been made to prosecute any person guilty of one of the crimes established as liable for punishment by the Charter and Control Council Law No.10 ... The IMT, which described him (Goering) as the driving force behind wars of aggression, is completely mistaken. If there was anyone who was against all wars, and again and again worked for peace, it appears to have been Goering ... Propinquity to Goering does not argue in favor of readiness for war but readiness for peace." No doubt there will be further efforts by some to make Goering appear to be the true Prince of Peace. As Dr. Koch was making these statements before this Tribunal last week, the International Military Tribunal for the Far East, composed of judges from many nations, was pronouncing judgment that certain indicted Japanese leaders were guilty of Crimes against Peace as well as guilty of a conspiracy to commit Crimes against Peace.

The defense, however, remind us of the political situation existing in the world today, and in cavalier fashion they parade before our eyes some of the problems which are now before the United Nations. The defense asserts that the fact of the existence of political disputes and civil war is proof that today aggressive war is permissible. This is curious reasoning, indeed. The existence of strife and civil war in certain areas of the international community is proof, the defense argues, that there is no law in the international community, notwithstanding

the fact that efforts are being made to resolve the political disputes by means other than the resort to arms. This Tribunal is hardly in a position to consider the legal aspects of these political disputes. But even if these disputes may involve violations of international law, the point of the defense is not well taken. To be consistent the defense would have to maintain that there is no municipal criminal law, for they could just as well point to the calendar before any criminal court in any country to show that the law is being violated every day in the domestic field. We hardly believe the defense would make that analogy or that they would be so rash as to argue that because all the violators of local criminal standards have not been brought to justice, that this indicates the absence of standards to which the individual is bound to adhere.

We suggest that the principles relating to individual responsibility for Crimes against Peace, principles painfully evolved through past decades, do not lose their validity because today questions of infringement of the peace are being presented in world councils. On the contrary, every reason is thereby given for a resounding affirmation of the basic rule that aggressive war may not be used as an instrument of national policy without individual criminal responsibility.

What the defense contends is that a state today has the right, without any restrictions at all, to be the sole judge of when to launch a war of aggression. To test the application of the defense contention in the light of the facts developed here in Nurnberg, the defense are inviting a situation where the high officials of any government might say with impunity:

> "We shall engulf State A; there is of course no question of sparing State B; since we shall establish a principle of national and racial supremacy, we must for that purpose take over States C, D or E, and resettle or exterminate the inhabitants of those states for the purification of our "master" race. These are our war aims and as a matter of military necessity we will deport the civilian population of countries we occupy to work for us as our slaves, and we will use the economy of the countries we occupy for our military economy."

This legal argument of the defense is not surprising, for it is the only way these defendants can hope to exculpate themselves from responsibility. Such legal theories could lead us to overlook the facts. The experience of the last war, how it was planned, prepared, initiated and waged, cannot be so lightly brushed aside.

In our brief entitled "Legal Principles Applicable to Crimes against Peace", we have called attention to the analysis by Professor Goodhart in the International Law Quarterly, a British publication (Winter, 1947, p.545). Professor Goodhart said:

> "We must not forget that belief that certain acts are criminal has always had a compelling influence on the actions of people because there is an inherent tendency to be law-abiding. The enforcement of law follows on the recognition of law. By driving home the lesson that aggressive war is a crime, the Nurnberg trials have made it less easy for a fanatic to lead his people into such an adventure."

We conclude this part of the discussion by referring to the analysis of Professor Jessup, now the deputy delegate of the United States to the United Nations. In writing on the subject, "The Crime of Aggression and the Future of International Law", this learned authority states (62 Political Science Quarterly, 1, 4):

> "Inaction by the whole society of nations from now on would constitute a repudiation of the precedent with the consequence that the last state of the world would be worse than the first. It would constitute an assertion that aggressive war is not a crime and that the individual who was guilty of endangering the international public repose is not to be treated as criminal."

LIMITATIONS ON BELLIGERENT OCCUPATION

The closing statements on behalf of the defendants KOERNER, PLEIGER and KEHRL offer a proper sampling of the extended arguments of the defense on the law concerning the charges of spoliation and slave labor. These arguments run to the effect that because of the very nature of modern war the historic limitations of belligerency are void; all considerations of humanity fade out of the picture when the belligerent invokes the magic words "military necessity";

there are no limits upon the requirements of military necessity except those which the belligerent may choose to impose upon himself; everything is permissible in dealing with the economy or the manpower of the occupied country which has any relation to the military economy of the occupant; briefly, the territory occupied during war and the human beings who live in occupied territory become an integral part of the economic sphere of the occupant with which he may do as he chooses; the title of the owners of property may be divested at will by the belligerent and its value later debited to "the loser" of the war when the treaty is drawn; war is the most ruthless of all human business and it is absurd for society to attempt to enforce any limitations upon its conduct.

To this kind of argumentation we can provide no better reply than has been made by the Krupp Tribunal (Opinion and Judgment, Case No. [redacted], pp.17-18):

> "... the contention that the rules and customs of warfare can be violated if either party is hard pressed in war must be rejected on other grounds. War is by definition a risky and hazardous business ... It is an essence of war that one or the other side must lose and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short these rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly -- and at the sole discretion of any one belligerent -- disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely."

We hear the further argument that the Allies during the post-war occupation have adopted the principles and the methods of Nazi Germany, in one respect or the other, and therefore no Tribunal consisting of members of one or more of the Allied powers can properly declare that individual Germans are guilty of violations of international law. Similarly, it is argued that the Allies have cast assunder the principles of the Hague and Geneva Conventions by their conduct after Germany's defeat. Here again the process of apology and rationalization goes all the way to reductio ad absurdum.

On the basis of these arguments, the defense declares that neither this nor any other Tribunal can properly draw distinctions with respect to the permissible conduct of a belligerent occupant. This argument has been repeated again and again, in other cases quite as well as this one - and from the decision of the IMT onwards, no Tribunal has given any support to such assertions. We consider it fair to suggest that at least some of this constantly repeated argument is not calculated to persuade you of the ultimate conclusions at which the defense arrives. That objective has failed too often. Certainly one element of some of the defense argument is to make your honors believe that the field of belligerent occupation is one in which there is no chart or compass; that since the field has offered some complications to the learned jurist, the judicial function cannot appropriately function; that the law abdicates to become no law where there are some refinements of criminal conduct susceptible of debate; and that even if a defendant is guilty of a crime, he should be dealt with lightly since at least the Germans did not take international law as seriously as it turned out to be. In this rebuttal argument we shall treat these matters briefly. For a more extended treatment, we refer your honors to our brief filed 4 November 1948, entitled "Prosecution Brief on the General Principles of Law Applicable to Count VI (Plunder and Spoliation)", and to the decisions of other Nurnberg Tribunals. For present purposes our argument can be divided roughly into four major points:

1. Belligerency with Contesting Armies in the Field. The Hague and Geneva Conventions were adopted to confine and limit the horrors of war. It is strange that the defense keep trying to make something else out of the Hague and Geneva Conventions. For example, the Hague Convention No.4 of 18 October 1907 (Document No.NM-019) states in its preamble that while the parties seek "means to preserve peace and prevent armed conflict between nations, it is likewise necessary

to bear in mind the case where the appeal to arms has been brought". The very title of the convention makes our point clear: "Convention Respecting the Laws and Customs of War on Land". The convention seeks to govern the conduct of belligerents when there are still enemies in the field. This basic principle is re-emphasized by the IMT at page 254 of the official English text under a heading entitled: "The Law Relating to War Crimes and Crimes against Humanity".

2. The Law Concerning Occupation if there are no longer Contesting Armies in the Field. The IMT stated at page 218 of the official English text: "The countries to which the German Reich unconditionally surrendered" have the "undoubted right ... to legislate for the occupied territories". This condition admits of no such restrictions as the restrictions imposed upon an occupying power during a state of belligerency. Similarly, Tribunal No.III in Case No.III (the Justice Case), after citing numerous authorities on this question, declared at page 10,620 of the transcript: "The Four Powers are not now in belligerent occupation or subject to the limitations set forth in the rules of land warfare." The law may some day provide that other powers than the principal victors may control the nature of a post-war occupation or that an appropriate international body of many nations control the nature of a post-war occupation. Indeed, today, numerous matters directly relating to Germany are the subject of both debate and action by various bodies of the United Nations Organization.

In any event, the defense claims that the limitations upon belligerent occupation are likewise applicable to post-war occupation are based upon a failure to regard the basic differences between the two types of occupation. It has been traditional for an occupying power after a complete and final subjugation of its enemies to seek reparations for the injuries suffered during belligerency. The history following the Franco/Prussian war and the First World War is in point. Of course, in the Second World War the injuries to

the occupied countries at the hands of the German and Japanese aggressors were immeasurably greater in both scope and degree than the sufferings inflicted on occupied countries and the citizens of occupied countries in other recent wars. Any preventative or retributive measures taken by the Allies in the day of reckoning with the Axis aggressors are not to be confused as a matter of law with the illegal measures of occupation which Germany applied and enforced whilst her victims still fought back to restore their lands from occupation by the invader. Whether the measures of reparation the Allies have taken turn out to be wise or unwise, these steps certainly have not been a blow to the conscience of the civilized world. And if reparations were increased a hundred fold, they would still be but scant reparation for the damage inflicted. Moreover, much, if not most, of the acts of Allied occupation to which defense counsel point are a part of a program which was calculated to prevent the military revival of the principal aggressor, Germany. The world has learned from hard lessons much about the potentialities of this nation which has launched a number of wars against its neighbors in the last century.

It would be particularly unfortunate if aggressors were led to believe that international law prevented the exercise of legislative power over a defeated aggressor nation. This would be to destroy another factor restraining aggressors. Another great difference between the two kinds of occupation, whether we are considering the use of property or the treatment of labor, is the fact that the use of property and manpower in a post-war occupation does not make the citizens of the occupied country feel like traitors. The reason is that citizens affected know that their country is no longer at war. There is a significant difference between the case where German prisoners of war still work in France to repair the devastation which Germany wrought during the recent war and the case where Germany deported Frenchmen during the war. In the latter case, the French deported laborer knew that the

armament work he furthered for Germany was a contribution to Germany's total war economy and hence directed against the forces attempting to restore the independence of France.

3. "Military Necessity" and Changes in the Practices and Usage of Warfare. It is indeed true that international law with respect to the usages and practices in the conduct of war did not become fixed and final in every respect and for all time after the Hague and Geneva Conventions were adopted. Particularly with respect to the development and use of more deadly weapons in inflicting damage upon the enemy, there have been changes. It is probably beside the point to mention which of the more terrible weapons of modern warfare were first employed by nations of the Axis and which by nations of the Allies. But since the defense has raised the point, we need only recall the order in which events took place - the use of the submarine, the use of the dive bomber against civilians in Poland, the unrestricted bombing of Warsaw and Rotterdam, the London blitz - all these events took place before the Allies replied in kind and ultimately in full measure. But, in any event, it is principally to the destruction of life and property in modern aerial warfare to which the defense counsel point in asserting that German leaders should not now be held responsible for what they did in calm deliberation to the property and to the people of the countries which occupied.
Germany / On this subject Dr. Lauterpacht has written an article in the British Year Book of International Law 1945, entitled "The Law of Nations and the Punishment of War Crimes". The following quotation is taken from that article. The quotation was incorporated in the judgment of Tribunal No.VI in its discussion of the law of spoliation (Tr., Case No.VI, pp.15710-15730 at page 15725):

> "Moreover, it does not appear that the difficulties arising out of any uncertainty as to the existing law have a direct bearing upon violations of the rules of war which have provided the impetus for the almost universal insistence on the punishment of war crimes. Acts with regard to which prosecution of individuals

> for war crimes may appear improper owing to the disputed nature of the rules in question arise largely in connection with military, naval and air operations proper. No such reasonable degree of uncertainty exists as a rule in the matter of misdeeds committed in the course of military occupation of enemy territory. Here the unchallenged authority of a ruthless invader offers opportunities for crimes the heinousness of which is not attenuated by any possible appeal to military necessity, to the uncertainty of the law, or to the operation of reprisals."

We think that these defendants can find little succor from the authorities or from the decisions of other Tribunals to sustain their conclusion that the conduct we charge as criminal is permissible and legal because in modern warfare high explosives and aerial bombardment have been employed against the civilian population and the industrial cities of the enemy.

Counsel for the defendant KEHRL, in Document Book 1A and B, has presented documentary excerpts to show that traditional American occupation practices demonstrate the same disregard for law as Nazi practices. We have examined the texts to which defense counsel have made reference and we have found that the defense arguments are simply gross distortions of the statements of the text. To illustrate, counsel for KOERNER has quoted one of the documents as establishing the principle that military necessity overrides all humane considerations in occupied areas. In fact, the text observed that military necessity is <u>subject to</u> considerations of humanity.

Furthermore, we suggest that when the Tribunal examines these documents on American practices as evidence of the international laws of war, it is necessary to distinguish between belligerent occupation and post-war occupation, to distinguish between manuals for "Military Government" and manuals on the Hague Regulations (FM 27-10), and to distinguish between the limited meaning of the term "military necessity" in American usage and the all-embracing content which German counsel put into the same words, in accordance with German practices.

4. The "Tu Quoque" Doctrine. The defense has gone to great pains to allege cases where some representative or some agency of one or the other of the Allied powers allegedly stepped beyond the prescribed limits of belligerent occupation before the unconditional surrender. But even these assertions are isolated instances. They fall very short of showing a pattern of general conduct which would indicate that international law has been altered by custom and usage with respect to the conduct we charge as criminal. Unless it can be shown that the law has changed, it is of course no defense to say that someone else has also erred and committed evil. The doctrine of "you too" (tu quoque) stands out sharply in the law for good reason. If every criminal could avoid his accounting with society merely by saying that another is guilty, we would soon return to the law of the jungle - and we suggest that this argument of the defense is but another example of their effort to state that there is no applicable law whatsoever. Moreover, it is one thing to refer to a local instance as an isolated case. It is another thing where the conduct was a part of a systematic program of persecution and systematic exploitation with no or little regard for the most elementary concepts of decency.

THE RULE OF LAW

Society finds its way toward the extension of the rule of law in the domestic field as well as in the field of international law by travelling a troubled road. The legal machinery for bringing evildoers to account is normally some little way behind the acceptance by an overwhelming majority of higher standards of decency and human conduct by which the law grows. But to say that all evildoers are not brought to bar is not to say that there are no moral principles or that there is and should be no law. This is familiar ground. The defense asserts that we seek to apply two kinds of international law, one which is applicable to certain categories of Germans, and one which

is applicable to the citizens of the balance of the community of nations. This is false. International law is international law whether Germany, America, the Soviet Union, or any other country is involved. This does not mean the legal machinery is either universal or perfect. But strides are being made toward the perfection and extension of the judicial process in international law. It is quite true that it was the emphatic reaction of the civilized community to the incomparably shocking travesties of the Second World War which led to the establishment of legal mechanisms to enforce international law as against major Axis offenders and that these offenders principally have been citizens of the three main Axis powers, Germany, Italy and Japan. Discussions in the various bodies of the United Nations show efforts to attain judicial as well as other machinery to perfect the working of international law. At the beginning of this month the International Court of Justice at the Hague opened a case involving a dispute between Great Britain and Albania over the sinking of British vessels after 1945. It is obvious that international law is becoming more and more extensive in its actual enforcement by the community of nations. The difficulties and the imperfections in the application of international law to concrete situations offer no basis to assert its non-existence. Concerning the concrete situation before your honors, the Tribunal has clear jurisdiction and the machinery for the enforcement of the law is at hand. In applying the law to the facts, we petition the Tribunal that justice be done and right be vindicated.