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# Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression

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## Abstract

*The International Criminal Court's Special Working Group on the Crime of Aggression (SWG) is currently considering two different proposals for a definition of the crime. Although different in many respects, both proposals agree that aggression is a 'leadership' crime that can be committed only by 'persons who are in a position effectively to exercise control over or to direct the political or military action of a State'. According to the SWG, the 'control or direct' standard is consistent with – and required by – the jurisprudence of the International Military Tribunal, Nuremberg Military Tribunal, and International Military Tribunal for the Far East. In fact, that jurisprudence tells a different story. These three tribunals not only assumed that the crime of aggression could be committed by two categories of individuals who could never satisfy the 'control or direct' requirement – private economic actors such as industrialists, and political or military officials in a state who are complicit in another state's act of aggression – they specifically rejected the 'control or direct' requirement in favour of a much less restrictive 'shape or influence' standard. The SWG's decision to adopt the 'control or direct' requirement thus represents a significant retreat from the Nuremberg principles, not their codification.*

## 1 Introduction

Although the International Criminal Court (ICC) has jurisdiction over the crime of aggression, its jurisdiction is contingent upon the Assembly of States Parties (ASP)

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adopting a definition of the crime.<sup>1</sup> To that end, the ASP established a Special Working Group on the Crime of Aggression (SWG) in 1998 that is responsible for ‘prepar[ing] proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime’.<sup>2</sup> The SWG has met regularly since its inception, most recently in January 2007 at the resumed Fifth Session of the ASP.<sup>3</sup>

The SWG’s negotiations have often been quite contentious, particularly concerning the definition of an ‘act of aggression’.<sup>4</sup> It has always agreed, however, that aggression is a leadership crime that can only be committed by individuals in a position to ‘exercise control over or to direct the political or military action of a State’.<sup>5</sup> A leadership clause based on the ‘control or direct’ requirement – which the SWG recently vowed to maintain in its current form<sup>6</sup> – was included in the 1998 Draft Statute for an International Criminal Court,<sup>7</sup> in the Coordinator’s 1999 Consolidated Text of Proposals on the Crime of Aggression<sup>8</sup> and July 2002 Discussion Paper,<sup>9</sup> and in the SWG’s 2005<sup>10</sup> and 2006<sup>11</sup> Reports. It is also present in the proposal that emerged from the 2007 meeting as the clear favourite, known as ‘Variant (a)’:

The Court shall have jurisdiction with respect to the crime of aggression when committed by a person being in a position effectively to exercise control over or to direct the political or military

<sup>1</sup> Statute of the International Criminal Court, Art. 5, UN Doc A/Conf.183/9 (1998) (hereinafter Rome Statute).

<sup>2</sup> Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc A/CONF.183/10 (1998) Resolution F, para. 7.

<sup>3</sup> *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/5/SWGCA/3 (31 Jan. 2007) (hereinafter 2007 Report).

<sup>4</sup> See, e.g., European Law Students Association, *Report on the Assembly of State Parties to the Rome Statute of the International Criminal Court* (2003) (hereinafter ELSA Report), at 75.

<sup>5</sup> See, e.g., Kaul, ‘The Crime of Aggression: Definitional Options for the Way Forward’, in M. Polit and G. Nesi (eds), *The International Criminal Court and the Crime of Aggression* (2004), at 46 (‘[T]here seems to be agreement that aggression is, by definition, a leadership crime. This is currently reflected by the formula “a person who is in a position to exercise control or capable of directing political/military action in his State against another State”. Here one gets the impression that this formula seems to be by and large uncontroversial.’).

<sup>6</sup> See 2007 Report, *supra* note 3, para. 13 (‘It was suggested that the leadership clause in paragraph 1 should also capture persons outside the military and political leadership, who had the power to shape or influence the actions of a State.’).

<sup>7</sup> Draft Statute for the International Criminal Court, A/CONF.183/2/Add.1 (14 Apr. 1998) (hereinafter Draft Statute), Art. 5 (‘[A]n individual [who is in a position of exercising control or capable of directing political/military action in a State]’).

<sup>8</sup> Consolidated Text of Proposals on the Crime of Aggression, PCNICC/1999/WGCA/RT.1 (9 Dec. 1999) (‘[A]n individual who is in a position of exercising control or directing the political or military action of a State.’).

<sup>9</sup> *Discussion Paper Proposed by the Coordinator*, PCNICC/2002/WGCA/RT.1/Rev.2 (11 July 2002) (‘[P]osition effectively to exercise control over or to direct the political or military action of a State.’).

<sup>10</sup> *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/4/SWGCA/1 (1 Dec. 2005), Annex II.A (hereinafter 2005 Annex), para. 18 (‘[B]eing in a position effectively to exercise control over to direct the political or military action of a State.’).

<sup>11</sup> Informal Intersessional Meeting of the Special Working Group on the Crime of Aggression, ICC-ASP/5/SWGCA/INF.1 (5 Sept. 2006) (hereinafter 2006 Report) (‘[B]eing in a position effectively to exercise control over or to direct the political or military action of a State.’) (Proposal B).

action of a State. For purposes of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution of an act of aggression/armed attack.<sup>12</sup>

No delegation has ever questioned the leadership requirement itself, which dates back to Justice Jackson's opening argument at Nuremberg.<sup>13</sup> There have been suggestions, however, that limiting the category of 'leader' to individuals who can control or direct a state's political or military action might unnecessarily restrict the scope of the crime. In July 2002, for example, Colombia submitted a proposed leadership clause that would have extended liability for aggression to those 'in a position to contribute to or effectively cooperate in *shaping* in a fundamental manner political or military action by a State'.<sup>14</sup> At the 2006 intersessional meeting, a delegate suggested that 'shape or influence', and not 'control or direct', was the appropriate leadership standard.<sup>15</sup> Finally, at the most recent 2007 meeting, Samoa distributed a position paper written by this author that argued in favour of the 'shape or influence' standard.<sup>16</sup>

The SWG rejects the 'shape or influence' standard because it believes that the International Military Tribunal (IMT) and Nuremberg Military Tribunal (NMT) applied the more restrictive 'control or direct' requirement. The following statement by Belgium, Cambodia, Sierra Leone and Thailand is emblematic:

Since it is already given and supported by the jurisprudence of the Nuremberg Tribunal and the Tribunals established pursuant to Control Council Law No. 10 that the crime of aggression is a leadership crime which may only be committed by persons who have effective control of the State and military apparatus on a policy level, it is crucial to reflect this principle in the definition of the Crime of Aggression; otherwise it might be subsequently diluted.<sup>17</sup>

As this essay demonstrates, however, the IMT and NMT's jurisprudence actually tells a different story. Those tribunals not only assumed that the crime of aggression could be committed by two categories of individuals who could rarely if ever satisfy the 'control

<sup>12</sup> 2007 Report, *supra* note 3, Annex.

<sup>13</sup> See Opening Statement at Nuremberg by Robert H. Jackson, Chief Prosecutor for the United States, in *United States v. Göring et al.*, 2 Trial of the Major War Criminals Before the International Military Tribunal (1946) 105 (stating that the Prosecution had 'no purpose to incriminate the whole German people', and intended to reach only 'the planners and designers, the inciters and the leaders, without whose evil architecture the world would not have been for so long scourged with the violence and lawlessness ... of this terrible war').

<sup>14</sup> Proposal Submitted by the Delegation of Colombia, PCNICC/2002/WGCA/DP.3 (1 July 2002).

<sup>15</sup> See Coalition for the International Criminal Court, *Report of the CICC Team on the Crime of Aggression* (2005) (hereinafter *CICC Report*), at 30–31; see also 2006 Report, *supra* note 11, at para. 88 (noting that 'the view was expressed that the leadership clause should refer to the ability to *influence* policy') (emphasis added).

<sup>16</sup> See Coalition for the International Criminal Court, *Observations about the Discussion Paper Proposed by the Chairman*, ICC-ASP/5/SWGCA/2 (25 Jan. 2007) (hereinafter *CICC Observations*), at 5.

<sup>17</sup> Proposal submitted by Belgium, Cambodia, Sierra Leone and Thailand, PCNICC/2002/WGCA/DP.5 (8 July 2002). Academic commentators agree. See, e.g., Nsereko, 'Defining the Crime of Aggression' [2003] *Acta Juridica* 256, at 279 (noting that the 'control or direct' requirement, 'though worded differently, is in essence consistent with the Nuremberg and Tokyo precedents'); Danner, 'The Nuremberg Industrialist Prosecutions and Aggressive War', 46 *Virginia J Int'l L* (2007) 651, at 675 (noting that the control or direct requirement 'essentially represents a codification of the Nuremberg standard').

or direct' requirement – private economic actors such as industrialists, and political or military officials in a state who are complicit in another state's act of aggression – both the NMT and the International Military Tribunal for the Far East (IMTFE) specifically rejected the 'control or direct' requirement in favour of the 'shape or influence' standard. The SWG's decision to adopt the 'control or direct' requirement thus represents a significant *retreat* from the Nuremberg principles – not their codification.

## 2 The Precedent

### A *International Military Tribunal*

The Allied Powers created the IMT for 'the just and prompt trial and punishment of the major war criminals of the European Axis'.<sup>18</sup> The IMT tried 22 defendants on four different charges, two of which involved crimes against peace – the Nuremberg-era term for the crime of aggression. Count 1 of the indictment accused all 22 defendants of participating in the Nazis' common plan or conspiracy to commit crimes against peace,<sup>19</sup> and Count 2 charged 16 defendants with planning, preparing, initiating, or waging wars of aggression.<sup>20</sup> The conspiracy charge proved less successful: 12 of the 16 defendants were convicted on Count 2, while only 8 of the 22 defendants were convicted on Count 1.

Because the Nuremberg Charter limited the IMT's jurisdiction to major war criminals, the Tribunal did not have to adopt a leadership standard. It insisted, however, that the crime could be committed by individuals who were not formally part of the Nazi state. As it famously said:

Hitler could not make aggressive war by himself. He had to have cooperation of statesmen, military leaders, diplomats, and business men.<sup>21</sup>

Although no businessman was ever tried by the IMT,<sup>22</sup> the Tribunal's acquittal of the two defendants who were most responsible for Germany's rearmament – Hjalmar Schacht and Albert Speer – figured prominently in the *Industrialist* cases,<sup>23</sup> in which the NMT specifically held that private economic actors could commit the crime of aggression. Schacht and Speer's acquittals, therefore, are worth briefly examining.

<sup>18</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, with annexed Charter of the International Military Tribunal, 8 Aug. 1945, 59 Stat. 1544, 82 UNTS 279, Art. 1.

<sup>19</sup> See *Secretariat's Historical Review of Developments Relating to Aggression*, PCNICC/2002/WGCA/L.1 (24 June 2002) (hereinafter *Historical Review*), at 15.

<sup>20</sup> See *ibid.*, at 16.

<sup>21</sup> Judgment, *United States v. Goering et al.*, International Military Tribunal, 1 Oct. 1946, *Nazi Conspiracy and Aggression: Opinion and Judgment* (1947) (hereinafter *IMT Judgment*), at 223.

<sup>22</sup> Gustav Krupp, the head of the Krupp manufacturing conglomerate, was initially indicted on both Counts 1 and 2, but the charges were later dismissed because of his ill health. See Ruling of the Tribunal on 15 November 1945 in the Matter of the Application of Counsel for Postponement of the Proceedings Against this Defendant, 1 *Nazi Conspiracy and Aggression* (1946), at 91, 92.

<sup>23</sup> See text accompanying note 59 *infra*.

## 1 Schacht

Hjalmar Schacht was President of the Reichsbank from 1933 to 1939, Minister of Economics from 1934 to 1937, and Plenipotentiary General for War Economy from 1935 to 1937. Schacht was 'a central figure in Germany's rearmament programme',<sup>24</sup> who used his position at the Reichsbank to finance weapons production and his authority as Minister and Plenipotentiary General to smooth Germany's transition to a war economy.<sup>25</sup> As early as 1936, however, he began to lose authority over the rearmament programme to Herman Goering, and by 1939 he held no important governmental position. Indeed, Schacht was later arrested by the Gestapo and sent to a concentration camp, where he remained until the end of the war.<sup>26</sup>

Schacht was charged and acquitted on both Count 1 and Count 2.<sup>27</sup> The Tribunal acknowledged that 'the steps he took, particularly in the early days of the Nazi regime, were responsible for Nazi Germany's rapid rise as a military power'.<sup>28</sup> It held, however, that his rearmament efforts were criminal only if he had taken part in the Nazis' common plan to wage aggressive war or had known about that plan.<sup>29</sup> Schacht was acquitted because the Prosecution had failed to prove either point:

He was clearly not one of the inner circle around Hitler which was most clearly involved with this common plan. He was regarded by this group with undisguised hostility.... The case against Schacht therefore depends on the inference that Schacht did in fact know of the Nazi aggressive plans. On this all-important question... [the Tribunal] comes to the conclusion that this necessary inference has not been established beyond a reasonable doubt.<sup>30</sup>

## 2 Speer

Best known as the Third Reich's chief architect, Albert Speer was a member of the Reichstag from 1941 to 1945 and became Reich Minister for Armaments and a member of the Central Planning Board in 1942.<sup>31</sup> Like Schacht, he was charged and acquitted on both Count 1 and Count 2.<sup>32</sup> The Tribunal acquitted Speer on Count 1 because he became head of Germany's armaments industry long after the Nazis' conspiracy to commit crimes against peace had been formulated, and thus could not have been part of the conspiracy.<sup>33</sup> And it acquitted him on Count 2 – with no additional explanation – because it did not believe that his efforts to rearm Germany qualified as 'waging' aggressive war: '[h]is activities in charge of German Armament Production were in aid

<sup>24</sup> IMT Judgment, *supra* note 21, at 308–309.

<sup>25</sup> See *Historical Review*, *supra* note 19, at 38.

<sup>26</sup> *Ibid.*, at 39.

<sup>27</sup> *Ibid.*, at 38.

<sup>28</sup> IMT Judgment, *supra* note 21, at 308–309.

<sup>29</sup> *Ibid.*, at 309.

<sup>30</sup> *Ibid.*, at 309–310. Interestingly, Schacht admitted after the war that he had raised funds for Germany's rearmament knowing that Hitler intended to invade Russia. See T. Bower, *Blind Eye to Murder: Britain, America, and the Purging of Nazi Germany—A Pledge Betrayed* (1981), at 14.

<sup>31</sup> See *Historical Review*, *supra* note 19, at 41.

<sup>32</sup> See IMT Judgment, *supra* note 21, at 331.

<sup>33</sup> *Ibid.*

of the war effort in the same way that other productive enterprises aid in the waging of war'.<sup>34</sup>

## B Nuremberg Military Tribunal

The IMT, in short, never questioned the idea that non-governmental actors could commit the crime of aggression. On the contrary, it assumed that anyone who either participated in the Nazi conspiracy to commit aggression or knew about the conspiracy and intentionally furthered it was guilty of the crime. The only qualification to that general rule concerned 'waging' aggressive war, where the Tribunal implied – anticipating the NMT's *Industrialist* cases – that rearmament efforts could not be considered criminal if they were initiated after the Nazis' aggressive wars had already begun.

Two months after the IMT defendants were sentenced, the Allied Powers enacted Control Council Law No. 10 (Law No. 10), authorizing each country to establish military tribunals within their respective zones of occupation 'for the prosecution of war criminals and other similar offenders, other than those dealt with' by the IMT.<sup>35</sup> Codifying the underlying principles of the IMT Judgment, paragraph 2(f) of Law No. 10 specifically provided that both private economic actors and complicit third-state officials could be convicted of crimes against peace:

Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime ... if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission [and] (f)... held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country'.<sup>36</sup>

The NMT, established by the United States in accordance with Law No. 10, conducted 12 trials between 1946 and 1949, four of which involved crimes against peace.<sup>37</sup> Because of the NMT's broad jurisdiction, the Tribunal not only had to interpret the scope of paragraph 2(f), it also had to adopt a specific leadership standard. Two of the *Industrialist* cases, *Farben*<sup>38</sup> and *Krupp*,<sup>39</sup> addressed the first question, holding

<sup>34</sup> *Ibid.*

<sup>35</sup> Allied Control Council Law No. 10, 20 Dec. 1945, 15 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1951) (hereinafter Law No. 10), Preamble.

<sup>36</sup> *Ibid.*, Art. II, para. 2(f) (emphasis added). Although (a) to (f) are disjunctive in the text, implying that holding a high position is sufficient for guilt, Judge Herbert noted in his concurring judgment in *Farben* that '[n]o such literal interpretation could be permitted. Paragraph 2(f) merely requires that the fact that a person held such a high position to be taken into consideration with all of the other evidence in determining the extent of individual knowledge and participation in crimes against peace'. See Opinion and Judgment, *United States v. Krauch et al.*, Military Tribunal VI (hereinafter *Farben* Judgment), 8 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1952) 1299 (Herbert Concurrence).

<sup>37</sup> See *Historical Review*, *supra* note 19, at 44.

<sup>38</sup> *Farben* Judgment, *supra* note 36.

<sup>39</sup> Order of the Tribunal Acquitting the Defendant of the Charges of Crimes Against Peace, *United States v. Krupp Von Bohlen und Halbach et al.*, Military Tribunal III (hereinafter *Krupp* Order), 9 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1950).

that private economic actors could indeed be convicted of aggression. Two later cases, *High Command*<sup>40</sup> and *Ministries*,<sup>41</sup> addressed the second question, adopting the ‘shape or influence’ requirement.

### 1 *Farben*

In *Farben*, 24 members of I.G. Farben’s managing board were charged with planning, preparing, initiating and waging wars of aggression (Count 1) and with participating in a common plan or conspiracy to commit crimes against peace (Count 5). By all accounts, Farben’s massive production of synthetic rubber, gasoline, light metals, explosives and chemical weapons was critical to the Nazis’ aggressive plans; according to Judge Herbert, ‘Farben largely created the broad raw material basis without which the policy makers could not have even seriously considered waging aggressive war’.<sup>42</sup> Nevertheless, the NMT acquitted all of the defendants.<sup>43</sup>

On both counts, the Tribunal drew a sharp distinction between waging aggressive war and planning, preparing or initiating it. The Tribunal began by holding that the defendants could not be convicted of waging aggressive war because they were ‘followers and not leaders’:

Some reasonable standard must ... be found by which to measure the degree of participation necessary to constitute a crime against peace in the waging of aggressive war. The IMT fixed that standard of participation high among those who lead their country into war. The defendants now before us were neither high public officials in the civil Government nor high military officers. Their participation was that of followers and not leaders. If we lower the standard of participation to include them, it is difficult to find a logical place to draw the line between the guilty and the innocent among the great mass of German people.<sup>44</sup>

The Tribunal did not hold, however, that industrialists could *never* be convicted of waging aggressive war. On the contrary, although it believed that waging aggressive war was a leadership crime,<sup>45</sup> it insisted that anyone ‘in the political, military, [or] industrial fields ... who [was] responsible for the formulation and execution of policies’ qualified as a leader.<sup>46</sup> The problem with the Prosecution’s case was that the Farben

<sup>40</sup> *United States v. von Leeb et al.*, Military Tribunal XII (hereinafter *High Command Judgment*), 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1950).

<sup>41</sup> *United States v. von Weizsäcker et al.*, Military Tribunal XI (hereinafter *Ministries Judgment*), 14 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1949).

<sup>42</sup> *Farben Judgment*, *supra* note 36, at 1216 (Herbert Concurrence).

<sup>43</sup> See *ibid.*, at 1206–1209.

<sup>44</sup> *Ibid.*, at 1126.

<sup>45</sup> *Ibid.*, at 1124.

<sup>46</sup> *Ibid.* (emphasis added). The Tribunal did not specify what level of authority made a defendant ‘responsible’ for formulating and executing Nazi policy. It implied, though—following the IMT, and perhaps anticipating *High Command*’s adoption of the ‘shape or influence’ standard—that any defendant who was important enough to take part in the relevant discussions possessed sufficient authority. See *ibid.*, at 1126 (‘Strive as we may, we are unable to find, once we have passed below those who have led a country into a war of aggression, a rational mark dividing the guilty from the innocent ... [H]ere let it be said that the mark has already been set by [the IMT]. It was set below the planners and leaders ... and above those whose participation was less and whose activity took the form of neither planning nor guiding the nation in its aggressive ambitions.’) (emphasis added).

defendants had not actually participated in the formulation and execution of Nazi policy.<sup>47</sup>

The Tribunal took an even broader approach toward planning, preparing or initiating aggressive war. According to the Tribunal, the defendants could be convicted of those forms of participation in the crime even if they did *not* qualify as leaders; the only question was whether they had participated in the Nazi conspiracy to wage aggressive war or had rearmed Germany knowing that they were furthering the conspiracy:

If the defendants, or any of them, are to be held guilty under either count one or five or both on the ground that they participated in the planning, preparation, and initiation of wars of aggression or invasions, it must be shown that they were parties to the plan or conspiracy, or, knowing of the plan, furthered its purpose and objective by participating in the preparation for aggressive war.<sup>48</sup>

The Tribunal had already concluded that the defendants did not participate in the Nazi conspiracy. It now concluded that they were also unaware of the Nazi's aggressive plans:

The evidence falls far short of establishing beyond a reasonable doubt that their endeavours and activities were undertaken and carried out with the knowledge that they were thereby preparing Germany for participation in an aggressive war or wars that had already been planned either generally or specifically by Adolf Hitler and his immediate circle of Nazi civil and military fanatics.<sup>49</sup>

Despite acquitting the Farben defendants, then, the Tribunal assumed that in the right circumstances industrialists could be convicted of *any* form of participation in aggression. Indeed, the Tribunal believed that a different conclusion was foreclosed by the plain language of Law No. 10, which specifically permitted the prosecution of individuals who held a 'high position in the financial, industrial, or economic life' of Germany or one of its allies.<sup>50</sup> As Judge Herbert noted in his Concurrence, Paragraph 2(f) 'served to refute the contention that private businessmen or industrialists are excluded from the possibility of complicity in "crimes against peace" as a matter of law'.<sup>51</sup>

## 2 *Krupp*

In *Krupp*, 12 high-level officials of the Krupp firm were charged with committing crimes against peace and participating in a common plan or conspiracy to commit

<sup>47</sup> See *ibid.*, at 1123.

<sup>48</sup> See *ibid.*, at 1108. It is also worth pointing out that Judge Herbert believed the IMT had itself approved such convictions. See *ibid.*, at 1304 (noting that, according to the judgment of the IMT, 'rearmament of itself is not a crime unless carried out as part of a plan to wage aggressive war').

<sup>49</sup> *Ibid.*, at 1123. Judge Herbert's concurring judgment reinforces the conclusion that the defendants were acquitted because of lack of knowledge, not lack of influence. After noting that '[t]he issues of fact are truly so close as to cause genuine concern as to whether or not justice has actually been done because of the enormous and indispensable role these defendants were shown to have played in the building of the war machine which made Hitler's aggressions possible', he concluded that the acquittals were nevertheless justified, because 'clear unequivocal proof of exact knowledge of the decision of the regime to initiate and wage wars of aggression is not established beyond reasonable doubt': *ibid.*, at 1212–1213.

<sup>50</sup> Law No. 10, *supra* note 35, Art. II, para. 2(f).

<sup>51</sup> *Farben Judgment*, *supra* note 36, at 1299–1300 (Herbert Concurrence).



crimes against peace.<sup>52</sup> Krupp was the principal German manufacturer of artillery, armour, tanks and U-boats during World War II, making it ‘one of the most valuable single contributors to the German war effort’.<sup>53</sup> Despite this, the NMT directed a verdict of acquittal for the defendants at the close of the Prosecution’s case.<sup>54</sup>

Echoing *Farben* (and the IMT Judgment), the Tribunal framed the issue as one of participation in or knowledge of the Nazi conspiracy to wage aggressive war, asking simply – if awkwardly – ‘[c]an it be said that the defendants in doing whatever they did do prior to 1 September 1939 did so, knowing they were participating in, taking a consenting part in, aiding and abetting the invasions and wars?’<sup>55</sup> According to the Tribunal, the answer was ‘no’:

The defendants were private citizens and noncombatants... None of them had any voice in the policies that led their nation into aggressive war; nor were any of them privies to that policy. None had any control over the conduct of the war or over any of the armed forces; nor were any of them parties to the plans pursuant to which the wars were waged and so far as appears, none of them had any knowledge of such plans.<sup>56</sup>

As the quote indicates, the Tribunal assumed that industrialists could be convicted of aggression. The defendants were acquitted because of their lack of knowledge, *not* because their status as private economic actors excluded them as a matter of law from the crime. ‘We do not hold’, the Tribunal emphasized, ‘that industrialists, as such, could not under any circumstances be found guilty upon such charges.’<sup>57</sup>

Indeed, in one important respect, the *Krupp* Tribunal went beyond *Farben*. As we have seen, *Farben* implied that industrialists could be convicted of waging aggressive war only if they were also involved at the policy level in planning, preparing, or initiating the war; in the absence of pre-war involvement, arms production simply aided the war effort ‘in the same way that other productive enterprises aid in the waging of war’.<sup>58</sup> The *Krupp* Tribunal was less generous: although it agreed with *Farben* that producing arms after war was initiated did not qualify as waging aggressive war, it held that pre-war rearmament qualified as waging as long as the industrialist *knew* that the arms would be used for aggressive purposes; actual participation in planning, preparing, or initiating the war of aggression was not required.<sup>59</sup>

<sup>52</sup> *Krupp Order*, *supra* note 39, at 391.

<sup>53</sup> *Ibid.*, at 404.

<sup>54</sup> *Ibid.*, at 400.

<sup>55</sup> *Ibid.*, at 396; see also *ibid.*, at 443 (Anderson Concurrence) (‘The offense of planning, preparation, and initiation of aggressive wars is, in practical effect, the same as the conspiracy. Here the determinative question is whether with the requisite guilty knowledge the evidence was sufficient to show that the defendants were guilty of participating in the planning, preparation, and initiation of the particular wars charged in the indictment.’).

<sup>56</sup> *Ibid.*, at 449 (Anderson Concurrence).

<sup>57</sup> *Ibid.*, at 393.

<sup>58</sup> *Farben Judgment*, *supra* note 36, at 1126–1127, quoting IMT Judgment, *supra* note 21, at 331.

<sup>59</sup> See, e.g., *Krupp Order*, *supra* note 39, at 450 (noting, regarding the waging of aggressive war, that ‘only those responsible for a policy leading to initiation and waging of aggressive war *and those privy to such a policy*... are criminally liable’) (emphasis added).

### 3 High Command

At the close of the *Industrialist* cases, then, aggression was a crime of *knowledge* and *participation*, not a crime of *leadership*. In theory, even the least important industrialist could be convicted of planning, preparing or initiating aggression if he was a member of the Nazi conspiracy or was aware of its aggressive ends. Conversely, not even the most important industrialist could be convicted of waging aggressive war if he was not a member of the Nazi conspiracy and was unaware of its aggressive ends.

The *High Command* case, in which 14 high-ranking officers in the German military were acquitted of crimes against peace and conspiring to commit crimes against peace,<sup>60</sup> radically transformed that equation. For the first time, the NMT held that the crime of aggression could only be committed by individuals at the policy level:

When men make a policy that is criminal under international law, they are criminally responsible for so doing. This is the logical and inescapable conclusion. The acts of commanders and staff officers *below the policy level*, in planning campaigns, preparing means for carrying them out, moving against a country on orders and fighting a war after it has been instituted, do not constitute the planning, preparation, initiation and waging of war or the initiation of invasion that international law denounces as criminal.<sup>61</sup>

Critically, however, the Tribunal did not restrict the ‘policy level’ to individuals who could ‘control or direct’ a state’s political or military action. On the contrary, it held that the ability to ‘shape or influence’ that action was sufficient:

It is not a person’s rank or status, but *his power to shape or influence the policy* of his State, which is the relevant issue for determining his criminality under the charge of crimes against peace.<sup>62</sup>

As the quote implies, the Tribunal believed that the ‘shape or influence’ standard applied to all of the forms of participation in aggression. Indeed, the general test it adopted for the crime was constructed around that standard:

- 1 *Knowledge*. ‘There first must be actual knowledge that an aggressive war is intended and that if launched it will be an aggressive war.’<sup>63</sup>
- 2 *Ability to shape or influence policy*. ‘But mere knowledge is not sufficient to make participation even by high-ranking military officers in the war criminal. It requires in addition that the possessor of such knowledge, after he acquires it, shall be *in a position to shape or influence the policy* that brings about its initiation or its continuance after initiation, either by furthering, or by hindering or preventing it.’<sup>64</sup>
- 3 *Action in furtherance of the policy*. ‘If he then does the former, he becomes criminally responsible; if he does the latter to the extent of his ability, then his action shows the lack of criminal intent with respect to such policy.’<sup>65</sup>

<sup>60</sup> See *Historical Review*, *supra* note 19, at 50–51.

<sup>61</sup> *High Command* Judgment, *supra* note 40, at 490–491 (emphasis added).

<sup>62</sup> *Ibid.*, at 489. The Tribunal also noted that ‘[i]nternational law condemns those who, due to their actual power to *shape and influence the policy of their nation*, prepare for, or lead their country into or in an aggressive war’: *ibid.* (emphasis added).

<sup>63</sup> *Ibid.*, at 488.

<sup>64</sup> *Ibid.* (emphasis added).

<sup>65</sup> *Ibid.*

The Tribunal then applied that three-part test to the defendants, concluding that their inability to shape or influence Nazi policy required their acquittal.<sup>66</sup>

#### 4 Ministries

The NMT also adopted the 'shape or influence' requirement in the *Ministries* case, in which 21 high-ranking officials in the Nazi government and Nazi Party were charged with various crimes against peace.<sup>67</sup> As the Secretariat notes in its historical review of the crime of aggression, the Tribunal convicted Paul Koerner, Goering's Deputy and Plenipotentiary for the Four Year Plan, of planning and preparing aggressive wars because he knowingly used his ability to shape and influence Nazi policy to further the illegal invasions of Czechoslovakia, Poland and Russia:

The Tribunal also found that the evidence did not support Koerner's assertion that he had no real authority or discretionary power in his high positions. The Tribunal concluded that the evidence established 'the wide scope of his authority and discretion in the positions he held, and which enabled him to *shape policy and influence plans and preparations of aggression*'.<sup>68</sup>

Equally important, in convicting Ernst von Weizsäcker, the State Secretary of the German Foreign Office, for his role in the invasion of Bohemia and Moravia, the Tribunal specifically *rejected* the idea that aggression could only be committed by individuals who had the ability to control or direct a state's political or military action:

He was not a mere bystander, but acted affirmatively, and himself conducted the diplomatic negotiations both with the victim and the interested powers, doing this with full knowledge of the facts. Silent disapproval is not a defence to action. *While we appreciate the fact that von*

<sup>66</sup> *Ibid.* In its report on the trial, the United Nations War Crimes Commission also emphasized that the Tribunal acquitted the defendants because of their lack of influence over Nazi policy:

Regardless of whether they had at any time had or had not actual knowledge of, or were involved in, concrete plans and preparations for aggressive wars or invasions, it was established by the evidence that they were not in a position which enabled them to exercise any influence on such a policy. No matter what their rank or status, it was clear from the evidence that they had been outside the policy-making circle close to Hitler and had no power to shape or influence the policy of the German State.

United States Military Tribunal at Nuremberg, *Trial of Wilhelm von Leeb and Thirteen Others*, the United Nations War Crimes Commission, 12 Law Reports of Trials of War Criminals (1949) 12 (emphasis added).

<sup>67</sup> See *Historical Review*, *supra* note 19, at 56.

<sup>68</sup> *Ibid.*, at 80, quoting *Ministries Judgment*, *supra* note 41, at 425 (emphasis added). In his dissenting judgment, Judge Powers endorsed a three-part test for crimes against peace that was equivalent to the one in High Command:

As to each defendant ... we must seek the answer to the following three questions:

- (1) Did he knowingly engage in some activity in support of a plan or purpose to induce his government to initiate a war?
- (2) Did he know that the war to be initiated was a war of aggression?
- (3) Was his position and influence, or the consequences of his capacity, such that his action could properly be said to have had some influence or effect in bringing about the initiation of the war on the part of his government?

Only if all of these questions are answered in the affirmative will we be justified in finding a Crime against Peace has been committed.

*Ministries Judgment*, *supra* note 41, at 889 (Powers Dissent) (emphasis added).

*Weizsäcker did not originate this invasion, and that his part was not a controlling one*, we find that it was real and a necessary implementation of the programme.<sup>69</sup>

### ***C International Military Tribunal for the Far East***

Even the IMTFE, which was established by the Supreme Allied Commander ‘to try and punish Far Eastern war criminals’,<sup>70</sup> adopted the ‘shape or influence’ standard. Although it was clear that all of the defendants charged with crimes against peace were at the policy level at some point during the war, the Tribunal had to determine the precise date that General Kenryo Sato, a member of the Military Affairs Bureau, qualified as a policy-maker. The Tribunal applied the ‘shape or influence’ test, concluding that Sato reached the policy level in 1941, when he became Chief of the Bureau’s Military Affairs Section:

It was thus not until 1941 that Sato attained a position which by itself enabled him to *influence the making of policy*, and no evidence has been adduced that prior to that date he had indulged in plotting to influence the making of policy. The crucial question is whether by that date he had become aware that Japan’s designs were criminal, for thereafter he furthered the development and execution of those designs so far as he was able.<sup>71</sup>

The Tribunal had little trouble finding that Sato knew of Japan’s aggressive plans by 1938. It thus convicted him of conspiring to commit wars of aggression and of waging aggressive wars against China, the US, the UK, and the Netherlands.<sup>72</sup>

## **3 Implications of Rejecting the ‘Shape or Influence’ Standard**

Considered as a whole, the relevant jurisprudence of the Nuremberg tribunals establishes three basic principles: (1) non-governmental actors can commit the crime of aggression; (2) aggression is a policy-level crime; and (3) an individual is at the policy level if he is in a position to ‘shape or influence’ a state’s political or military action.

Although the Special Working Group has adopted the policy-level requirement, it has replaced the NMT’s ‘shape or influence’ standard with the ‘control or direct’ requirement. That, by itself, is cause for concern: the SWG has not only consistently looked to the IMT and NMT for guidance, it has even expressed the opinion that their jurisprudence codified customary international law.<sup>73</sup> As this section demonstrates, however, adopting the ‘control or direct’ requirement also entails rejecting the

<sup>69</sup> *Ibid.*, at 354 (emphasis added). The Tribunal later reversed von Weizsäcker’s conviction on the crime against peace count, but ‘nonetheless upheld the general principles that led to’ it: *Historical Review*, *supra* note 19, at 68.

<sup>70</sup> Special Proclamation: Establishment of an International Military Tribunal for the Far East, TIAS No 1589 (19 Jan. 1946).

<sup>71</sup> Judgment of the International Military Tribunal for the Far East, reprinted in R. Pritchard (ed), *The Tokyo Major War Crimes Trial* (1998), at 1190–1191 (emphasis added).

<sup>72</sup> See *Historical Review*, *supra* note 19, at 110.

<sup>73</sup> See, e.g., 2005 Annex, *supra* note 10, para. 26.

principle – central to both the IMT and NMT – that non-governmental actors can commit the crime of aggression, because no private economic actor and very few complicit third-state officials could ever be in a position to control or direct an aggressive state's political or military action.

### A *Private Economic Actors*

The SWG's current proposals adopt what is known as the 'differentiated' approach to the crime of aggression, wherein 'the definition of the crime would be focused on the conduct of the principal perpetrator, and other forms of participation would be addressed by article 25, paragraph 3, of the [Rome] Statute'.<sup>74</sup> In keeping with that approach, Variant (a), reproduced above,<sup>75</sup> defines the perpetrator's conduct as simply 'the planning, preparation, initiation or execution of an act of aggression/armed attack'.<sup>76</sup> Variant (a), which would be inserted into the Rome Statute as Article 8 *bis*,<sup>77</sup> would then be supplemented by adding the following paragraph 3 *bis* to Article 25, which governs the liability of secondary perpetrators:

With respect to the crime of aggression, the provisions of the present article shall only apply to persons being in a position effectively to exercise control over or to direct the political or military action of a State.<sup>78</sup>

Paragraph 3 *bis* would make clear that although individuals can be convicted of aggression for soliciting, inciting, aiding and abetting, or participating in a joint criminal enterprise to commit an aggressive act,<sup>79</sup> secondary liability would be limited to individuals who are themselves 'in a position effectively to exercise control over or to direct the political or military action of a State'. Individuals with less authority would be excluded from the crime as a matter of law, even if their actions were otherwise criminal under Article 25.

A few delegations have expressed concern that requiring secondary perpetrators to satisfy the 'control or direct' requirement could exclude private economic actors from the crime of aggression. In June 2002, for example, Samoa suggested mentioning in the Elements that the perpetrator 'need not formally be a member of the Government or the military', in order to make clear that 'it may be possible to convict non-governmental actors for a crime against peace'<sup>80</sup> – a proposal with which Cuba, Venezuela and Russia agreed.<sup>81</sup> Similarly, Cuba introduced a proposal in 2003 that would have extended the definition of leader to include all persons 'in the position

<sup>74</sup> 2006 Report, *supra* note 11, para. 84.

<sup>75</sup> See text accompanying note 12 *supra*.

<sup>76</sup> See 2007 Report, *supra* note 3, Annex.

<sup>77</sup> See Discussion Paper Proposed by the Chairman, ICC-ASP/5/SWGCA/2 (16 Jan. 2007) (hereinafter 2007 Discussion Paper), at 3.

<sup>78</sup> 2007 Report, *supra* note 3, Annex.

<sup>79</sup> See Rome Statute, *supra* note 1, Art. 25.

<sup>80</sup> Proposal Submitted by Samoa, PCNICC/2002/WGCA/DP.2 (21 June 2002). As the discussion below indicates, I do not believe that this modification would actually permit the conviction of private economic actors.

<sup>81</sup> See ELSA Report, *supra* note 4, at 75.

of effectively controlling or directing the political, *economic*, or military actions of a State'.<sup>82</sup>

Most scholars believe that private economic actors would never be able to satisfy the 'control or direct' requirement.<sup>83</sup> Mauro Politi, for example, has insisted that because 'aggression is a crime perpetrated by those who have decision-making power on behalf of a State ... it is not a crime that can be committed by people acting in a private capacity'.<sup>84</sup> Similarly, Allison Marsten Danner has concluded that the requirement 'makes it unlikely that future weapons makers will face a repetition of the experience of the *Krupp, Farben, and Roehling* defendants'.<sup>85</sup>

The SWG, however, disagrees. The following account of the debate over 'shape or influence' at the 2006 intersessional meeting is illustrative:

In the course of the debate at the meeting, the proponent of the 'policy level' requirement explained the different ways in which it had played a role in case law. Essentially, the accused would have to be in a position to shape or influence policy ... The proponent of the policy level requirement explained that it would be wider than the leadership clause. It would reach beyond the high command and cover also involved industrialists and financiers. *In answer, the Chair pointed out that it had been always understood that the leadership clause would reach just as far and that it had never been limited to heads of state or individuals in the military.*<sup>86</sup>

<sup>82</sup> Proposal Submitted by Cuba, ICC-ASP/2/SWGCA/DP.1 (4 Sept. 2003) (emphasis added). These proposals were introduced before the SWG settled on the differentiated approach, so they did not utilize the 'principle perpetrator'/'secondary perpetrator' distinction.

<sup>83</sup> See, e.g., Yanez-Barnuevo, 'The Exercise of the International Criminal Court's Jurisdiction over the Crime of Aggression: Short Term and Long Term Prospects', in Politi and Nesi, *supra* note 5, at 111 ('At the last session of the PrepCom there was unanimity ... in considering aggression as a "leadership crime" involving only those who, because of their political or military leadership of a State, can and do take decisions directly relevant to the commission of an act of aggression by the State.'). But see Clark, 'The Crime of Aggression and the International Criminal Court', in J. Doria *et al.*, *The Legal Regime of the International Criminal Court* (2006), at 32 ('One who comes along later (an industrialist or general for example) and supplies the know-how for an ongoing enterprise may come within the ambit of the article.').

<sup>84</sup> Politi, 'The Debate Within the Preparatory Commission for the International Criminal Court', in Politi and Nesi, *supra* note 5, at 46.

<sup>85</sup> Danner, *supra* note 17, at 19. A French military tribunal established pursuant to Law No. 10 convicted Hermann Roehling, the head of a large steel conglomerate and president of the Reich Association Iron, of crimes against peace, concluding that his efforts to increase the Reich's iron and steel production constituted waging aggressive war. The Supreme Military Government Court for the French Occupation Zone later reversed his conviction, holding that he had not rearmed Germany with the 'intention and aim' to permit the Nazis to wage aggressive war: see *Historical Review*, *supra* note 19, at 83–84.

<sup>86</sup> CICC Report, *supra* note 15, at 30–31 (emphasis added). The Chair reiterated that position at the 2007 meeting in response to the author's position paper: 'Roughly, the objective had been to replace the phrase "being in a position ... to exercise control over or to direct" with "being in a position ... to shape or influence" and to thus assure in particular the inclusion of private economic actors such as industrial leaders ... The Chair pointed out that it had always been understood that the "control or direct" formula covered this group in any event': CICC Observations, *supra* note 16, at 5. This is not merely a semantic argument. Even if the SWG sincerely believes that there is no practical difference between 'shape or influence' and 'control or direct', the starting point for interpreting a treaty is the ordinary meaning of its text; preparatory work is relevant only if textual interpretation leads to an ambiguous or unreasonable result: see Vienna Convention on the Law of Treaties, 1155 UNTS 331 (23 May 1969), Art. 31(1). Limiting the category of 'leader' to those who can control or direct a state's political or military action may be inconsistent with the Nuremberg principles, but it is neither ambiguous nor unreasonable.

Unfortunately, the SWG's position is almost certainly incorrect. As the International Law Commission (ILC) has noted, 'control or direct' is an extremely restrictive standard:

[T]he term 'controls' refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, *still less mere influence or concern*. Similarly, the word 'directs' does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind.<sup>87</sup>

It is difficult to see how a private economic actor could ever be in a position to 'dominate' or 'operatively direct' a state's political or military machinery. Consider, for example, the critical role Farben – the prototypical private defendant – played in the Nazis' wars of aggression:

In summary, facts in the record abundantly support the assertions made by the prosecution that Farben and these defendants (members of the Vorstand), acting through the corporate instrumentality, furnished Hitler with substantial financial support which aided him in seizing power and contributed to keeping him in power; that they worked in close cooperation with the Wehrmacht in organizing and preparing mobilization plans for the eventuality of war; that they participated in the economic mobilization of Germany for war including the performance of a major role in the Four Year Plan; [and] that they carried out activities indispensable to creating and equipping the Nazi war machine.<sup>88</sup>

The Tribunal clearly believed that the Farben defendants' willing rearmament of Germany had been a 'but for' cause of the Nazis' multiple crimes of aggression, even though their lack of knowledge of the conspiracy required their acquittal; as noted earlier, 'Farben largely created the broad raw material basis without which the policy makers could not have even seriously considered waging aggressive war'.<sup>89</sup> It is equally clear, however, that the Tribunal never believed that Farben had been in a position to 'control or direct' the Nazi state: Farben 'aided' Hitler's rise to power and 'contributed' to keeping him there; 'worked in close cooperation' with the Wehrmacht on critical mobilization plans; performed 'a major role' in the Four Year Plan; was 'indispensable' to the Nazi war machine; and so on. That is the language of 'shape or influence', not the language of 'control or direct'. As Judge Herbert said in rejecting the defendants' argument that they had been coerced into supporting the Nazis:

This defense argument made insistently at the trial is at variance with the true facts as revealed by overwhelming evidence showing sustained and continued initiative by Farben in the armament field, and is further at variance with numerous instances of Farben's ability *to influence the course of events* where such action was deemed to be in the interest either of Farben or of the government program as a whole.<sup>90</sup>

<sup>87</sup> International Law Commission, *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) (hereinafter *Commentary to Draft Articles*), Art. 17, para. 7 (emphasis added). This argument assumes, of course, that the Court will follow the ILC definitions of 'control' and 'direct'. It seems likely that it will, given that the SWG has made no attempt to provide different ones.

<sup>88</sup> *Farben Judgment*, *supra* note 36, at 1297 (Herbert Concurrence).

<sup>89</sup> *Ibid.*, at 1215–1216.

<sup>90</sup> *Ibid.*, at 1298 (emphasis added).

Paragraph 3 *bis*'s 'control or direct' requirement, in short, would exclude private economic actors from the crime of aggression even if – as was the case with the Farben executives – the political or military leaders of a state could not and would not have committed the underlying aggressive act without their help. That result directly contradicts both Law No. 10<sup>91</sup> and the NMT's repeated insistence that accessories are no less liable for the crime than principals.<sup>92</sup>

## B *Complicit Third-State Officials*

### 1 *Exclusion*

Paragraph 3 *bis* would also dramatically limit the ICC's ability to prosecute complicit third-state officials. As noted earlier, paragraph 2(f) of Law No. 10 specifically provided that accomplices could be convicted of aggression 'without regard to nationality' as long as they held 'a high political, civil or military ... position' in their country of origin.<sup>93</sup> Paragraph 3 *bis* adds an additional requirement: the complicit third-state official must also be in a position 'to exercise control over or to direct the political or military action' of the state that commits the act of aggression. In other words, under paragraph 3 *bis*, an official in a third state can only commit the crime of aggression if he is able to 'control or direct' the political or military machinery of *both his state and the aggressive state*.

That modification of the Nuremberg jurisprudence would effectively immunize third-state officials from prosecution for aggression. Analogizing to the ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts,<sup>94</sup> we can distinguish three different ways in which an official could be complicit in another state's act of aggression:

- 1 Where the official 'aids or assists' the other state's act of aggression. In these situations, the official in the third state plays a 'supporting role' in the aggressive act, usually by providing the other state with financial, material or logistical assistance.<sup>95</sup>
- 2 Where the official 'controls or directs' the other state's act of aggression. Here, 'the term "controls" refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or

<sup>91</sup> See Law No. 10, *supra* note 35, Art. II, para. 2(f) ('Any person ... is deemed to have committed a crime ... if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission.').

<sup>92</sup> See, e.g., *Ministries Judgment*, *supra* note 41, at 338 ('He who knowingly joined or implemented, aided or abetted in their commission as principal or accessory cannot be heard to say that he did not know the acts in question were criminal.').

<sup>93</sup> Law No. 10, *supra* note 35, Art. II, para. 2(f).

<sup>94</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001).

<sup>95</sup> See *Commentary to Draft Articles*, *supra* note 87, Art. 16, para. 1.



concern. Similarly, the word “directs” does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind’.<sup>96</sup>

- 3 Where the official ‘coerces’ the other state’s act of aggression. In these situations, the official compels the other state to commit the aggressive act through ‘the threat or use of force’,<sup>97</sup> or through ‘economic pressure’ serious enough to deprive it of the ability not to comply.<sup>98</sup>

An official who was able to ‘control or direct’ or ‘coerce’ another state into committing an aggressive act would always satisfy paragraph 3 *bis*’s leadership requirement, because such power is effectively synonymous with ‘being in a position to exercise control over or to direct’ the other state’s political or military action. An official who only ‘aided or assisted’ another state’s act of aggression, by contrast, would *never* satisfy that leadership requirement, because – as the ILC emphasized in its comments on the Draft Articles – the ‘control or direct’ standard ‘connotes actual direction of an operative kind’; ‘mere influence’ or ‘mere incitement or suggestion’ is not enough.

If most complicit third-state officials fell into the second and third categories, the SWG’s insistence on requiring secondary perpetrators to satisfy aggression’s leadership requirement would not be problematic. But that is not the case. Regarding coercion, for example, although it is certainly true that states have always coerced each other through the use or threat of force, an act of aggression has far more often been the *source* of that coercion than its *object*. Indeed, it is difficult to think of a historical situation in which a state coerced another state into committing an aggressive act on its behalf.<sup>99</sup>

A similar criticism applies to ‘control or direct’. The ILC mentions two examples of a ‘control or direct’ relationship: colonial dependency<sup>100</sup> and belligerent occupation.<sup>101</sup> The former is an anachronism,<sup>102</sup> and the latter will nearly always be the *result* of an act of aggression, not its *cause* – if only because occupied states are rarely in a position to commit aggressive acts of their own. The only ‘control or direct’ relationship likely to occur in the context of aggression, therefore, is a superpower’s use of a client state to fight a proxy war – a situation that certainly existed during the Cold War,<sup>103</sup> but is extremely uncommon now.<sup>104</sup>

<sup>96</sup> See *ibid.*, Art. 17, para. 7.

<sup>97</sup> See *ibid.*, Art. 18, para. 2.

<sup>98</sup> See *ibid.*, Art. 18, para. 3.

<sup>99</sup> The Secretariat’s historical review of aggression, e.g., does not contain an example of such a situation. See generally *Historical Review*, *supra* note 19.

<sup>100</sup> See Commentary to Draft Articles, *supra* note 87, Art. 17, para. 2.

<sup>101</sup> See *ibid.*, Art. 17, para. 5.

<sup>102</sup> See *ibid.*, Art. 17, para. 2.

<sup>103</sup> See, e.g., Kahn, ‘Nuclear Weapons and the Rule of Law’, 31 *NYU J Int’l L & Pol* (1999) 349, at 402 (noting that ‘during the years of the Cold War ... the Permanent Members [of the Security Council] protected their client states and pursued each other in proxy wars’).

<sup>104</sup> See, e.g., Kelly, ‘Can Sovereigns Be Brought to Justice? The Crime of Genocide’s Evolution and the Meaning of the Milosevic Trial’, 76 *St John’s L Rev* (2002) 257, at 299 (noting that ‘[a]fter the Cold War, client states were generally released from their fealty to the superpowers’).

Situations in which a state has ‘aided or assisted’ another state’s act of aggression, by contrast, have always been common. Examples include China’s return of 50,000 soldiers of Korean descent to North Korea prior to the Korean War,<sup>105</sup> the US government’s authorization of Indonesia’s invasion of East Timor,<sup>106</sup> and South Africa’s collusion in Southern Rhodesia’s repeated acts of aggression toward Zambia.<sup>107</sup> It is also likely that aiding and assisting will continue to be the primary form of State complicity in aggression: encouraging a like-minded state to commit an aggressive act by providing it with financial, material, or logistical support is much easier – and much less politically dangerous – than blackmailing a reluctant state or seizing control of its government.

Herein lies the fundamental problem with paragraph 3 *bis*’s leadership requirement. Under normal principles of secondary liability – which are part of customary international law<sup>108</sup> – any official who aided or assisted another state’s act of aggression would be criminally responsible for complicity in that act.<sup>109</sup> Paragraph 3 *bis*, however, would condition the liability of those complicit third-state officials on their ability to control or direct the political or military action of the aggressive state – a requirement that, by definition, they could never satisfy. Paragraph 3 *bis*’s leadership requirement would thus categorically exclude complicit third-state officials who aid and assist from the crime of aggression. If there is a rationale for such a dramatic constriction of complicity in aggression, the SWG has yet to articulate it.

Nor is that all. Although paragraph 3 *bis* would prevent complicit third-state officials from being held *individually* responsible for their aid and assistance, the third states themselves would still incur *state* responsibility. Immediately after North Korea’s invasion of South Korea, for example, the General Assembly passed a resolution condemning China’s assistance to North Korea as itself an act of aggression.<sup>110</sup> Such an outcome – punishing a state but exculpating its officials – is fundamentally inconsistent with the animating principle of international criminal law that, in the

<sup>105</sup> See C. Jian, *China’s Road to the Korean War* (1994), at 110–111.

<sup>106</sup> See Schabas, ‘The Unfinished Work of Defining Aggression: How Many Times Must the Cannonballs Fly, Before They Are Forever Banned?’, in D. McGoldrick *et al.* (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (2004), at 137.

<sup>107</sup> See SC Res. 455 (1979), para. 2.

<sup>108</sup> See *Prosecutor v. Tadic*, Case No. IT-94-1, Judgment (7 May 1997), para. 666 (‘The concept of direct individual criminal responsibility and personal culpability for assisting, aiding and abetting, or participating in, in contrast to the direct commission of, a criminal endeavour or act ... has a basis in customary international law.’).

<sup>109</sup> See, e.g., *Prosecutor v. Vasiljevic*, Case No. IT-93-32-T, Judgment (29 Nov. 2002), paras 70–71 (‘An accused will incur individual criminal responsibility for aiding and abetting a crime ... where it is demonstrated that the accused carried out an act which consisted of practical assistance, encouragement or moral support to the principal offender of the crime ... To establish the mens rea of aiding and abetting, it must be demonstrated that the aider and abettor knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender.’).

<sup>110</sup> GA Res 498(V), UN GAOR, 5th Sess., Supp. No. 20A, UN Doc. A/1775/Add.1 (1950), para. 1 (concluding that China, ‘by giving direct aid and assistance to those who were already committing aggression in Korea ... itself engaged in aggression in Korea’).

words of the IMT, 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.<sup>111</sup>

## 2 Paragraph 3 bis and the 'A State'/'The State' Distinction

As noted above, the argument that applying the 'control or direct' requirement to secondary perpetrators would effectively exclude nearly all complicit third-state officials is based on the assumption that an individual qualifies as a leader only if he is in a position to control or direct the political or military machinery of the state that actually commits the act of aggression. If it is enough for an individual to be in a position to control or direct the political or military machinery of the complicit state, the problem obviously disappears.<sup>112</sup>

Interestingly, paragraph 3 bis uses the less restrictive formulation. Recall the proposed text of the paragraph:

With respect to the crime of aggression, the provisions of the present article shall only apply to persons being in a position effectively to exercise control over or to direct the political or military action of a State.<sup>113</sup>

Because it only requires the ability to control or direct the political or military action of 'a State', an individual could technically satisfy paragraph 3 bis even if he did not hold a leadership position in the state that committed the underlying act of aggression. As long as he qualified as a leader of the complicit state – 'a state' – his complicity would be criminal.

Despite the wording of paragraph 3 bis, however, the SWG clearly intends to adopt the more restrictive 'the state' leadership requirement, which would exclude most complicit third-state officials from the crime of aggression. First, the earliest incarnation of the leadership requirement, Article 16 of the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, limited the crime to leaders of the state that committed the act of aggression,<sup>114</sup> as did one version of Article 5 in the Draft Statute for the International Criminal Court<sup>115</sup> and all but one of the proposals

<sup>111</sup> IMT Judgment, *supra* note 21, at 110.

<sup>112</sup> Cf. Coalition for the International Criminal Court, *The Crime of Aggression and General Principles of Criminal Law According to Part 3 of the Statute*, VWG-2 (8 May 2006), at 2 (noting that '[w]ith the attachment of the leadership clause to Art. 25, it becomes more difficult to reach the secret service superiors of the third country, except ... if the leadership clause in Art. 25 were understood to cover also leaders of a country other than the aggressor state').

<sup>113</sup> 2007 Report, *supra* note 3, Annex.

<sup>114</sup> International Law Commission, *Draft Code of Crimes Against the Peace and Security of Mankind* (1996), Art. 17 ('An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.').

<sup>115</sup> Draft Statute, *supra* note 7, Art. 5 (Option 2) ('1. [For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, against another State.]') (emphasis added).

introduced at PrepCom,<sup>116</sup> including the initial proposal presented by Egypt and Italy.<sup>117</sup> Second, the original proposal for a differentiated definition of aggression specifically used the more restrictive ‘the state’ formulation in its version of paragraph 3 *bis*.<sup>118</sup> Third, and finally, the more restrictive formulation has always been an integral part of the proposed Elements.<sup>119</sup>

#### 4 Incorporating the ‘Shape or Influence’ Standard

If the SWG wants to adopt a definition of the crime of aggression that is consistent with the Nuremberg principles, it needs to incorporate the ‘shape or influence’ standard into the crime’s leadership clause. That change would not be difficult: because private economic actors and complicit third-state officials would always be secondary perpetrators of an act of aggression, the definition of the crime would remain the same. Instead, the new paragraph 3 *bis* in Article 25 could simply be rewritten as follows:

With respect to the crime of aggression, the provisions of the present article shall only apply to persons being in a position effectively *to shape or influence* the political or military action of a State.

That minor change would not only make clear that secondary perpetrators only have to be in a position to shape or influence a state’s political or military action, it would also eliminate the need to decide whether paragraph 3 *bis* should read ‘a state’ or ‘the state’. Limiting the crime of aggression to secondary perpetrators who are able to

<sup>116</sup> See, e.g., Proposal Submitted by Cameroon, A/Conf.183/C.1/L.39 (2 July 1998) (‘the use of armed force *by that State* against the sovereignty, territorial integrity, or political independence of another State’) (emphasis added); Proposal Submitted by Algeria *et al.*, A/Conf.183/C.1/L.56\* (8 July 1998) (‘[T]he crime of aggression is committed by a person who is in a position of exercising control or is capable of directing political/military actions *in his State*, against another State.’) (emphasis added); Proposal Submitted by Bahrain *et al.*, PCNICC/1999/DP.11 (26 Feb. 1999) (‘[T]he crime of aggression is committed by a person who is in a position of exercising control or is capable of directing political/military actions *in his State*, against another State.’) (emphasis added). But see Revised Proposal Submitted by a Group of Interested States Including Germany, A/AC.249/1998/DP12 (1 Apr. 1998) (‘The crime of aggression means either of the following acts when committed by an individual who is in a position of exercising control or capable of directing political or military action *of a State*.’) (emphasis added).

<sup>117</sup> See Proposal Submitted by Egypt and Italy on the Definition of Aggression, A/AC.249/1997/WG.1/DP.6 (21 Feb. 1997) (limiting leaders to those in a ‘position to exercise control or capable of directing political/military actions *in his State* against another State’) (emphasis added).

<sup>118</sup> See 2005 Annex, *supra* note 10, para. 30 (noting that the original para. 3 *bis* was Proposal B, which provided that ‘only persons being in a position effectively to exercise control over or to direct the political or military action of the State shall be criminally responsible and liable for punishment’) (emphasis added); see also *ibid.* (Proposal B, Definition) (‘For the purpose of this Statute, ‘crime of aggression’ means engaging a State, when being in a position effectively to exercise control over or to direct the political or military action of *that State*.’) (emphasis added). Later versions of para. 3 *bis* used the less restrictive ‘a State’ formulation, including Proposal A in 2005. See *ibid.* (Proposal A). There is no indication in any of the preparatory work, however, that the change was designed to expand secondary liability to high-ranking officials in states other than the one that actually committed the act of aggression—strong circumstantial evidence that, in fact, the change in language was inadvertent.

<sup>119</sup> 2006 Report, *supra* note 11, annex II (‘1. The perpetrator was in a position effectively to exercise control over or to direct the political or military action *of the State which committed an act of aggression*.’) (emphasis added).

'control or direct' the action of 'the state' that actually commits an act of aggression is only problematic because no private economic actor and very few complicit third-state officials could satisfy that requirement. The same would not be true of a leadership clause that limited the crime to secondary perpetrators who are in a position to 'shape or influence' the action of 'the state' that committed the act of aggression: as the *Farben* and China examples indicate, both private economic actors and complicit third-state officials could satisfy that less restrictive standard. *Neither* the 'a state' nor the 'the state' formulation, therefore, would categorically exclude such secondary perpetrators from the crime of aggression.

## 5 Conclusion

The Special Working Group has taken the position that the jurisprudence of the Nuremberg tribunals codified customary international law regarding the crime of aggression.<sup>120</sup> As this essay has demonstrated, however, those Tribunals not only specifically rejected the SWG's 'direct or control' requirement in favour of the less-restrictive 'shape or influence' standard, they assumed that the crime of aggression could be committed by private economic actors and complicit third-state officials, two categories of individuals who will rarely if ever satisfy the 'control or direct' requirement. The SWG's current definitions of the crime of aggression, therefore, represent a significant *retreat* from the Nuremberg principles – not their codification.

<sup>120</sup> See, e.g., 2005 Annex, *supra* note 10, para. 26.