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The Nuremberg Military Tribunals and the origins of International Criminal Law
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CHAPTER 8: Crimes Against Peace

INTRODUCTION

Article II(1)(a) of Law No. 10 recognized "each of the following acts" as crimes against peace:

> Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

The OCC charged defendants with crimes against peace in four cases: *Farben*, *Krupp*, *High Command*, and *Ministries*. In each case, the prosecution alleged both that the defendants had participated in a "common plan or conspiracy" and had planned, prepared, initiated, and waged aggressive wars and invasions.

Taylor himself was ambivalent about the crimes against peace charges. He had first expressed skepticism about their legal merit when he worked for Justice Jackson, noting in June 1945 that "[t]he thing we want to accomplish is not a legal thing but a political thing" and that it was "an interesting question" whether crimes against peace "is presently a juridically valid doctrine."[1] He also recognized, as noted in Chapter 3, that it was much more difficult and time-consuming to prove crimes against peace than war crimes and crimes against humanity. He nevertheless brought the charges in the NMT trials "[o]ut of strong personal conviction no less than because it was my official duty to enforce the provisions of Law No. 10 – including its proscription of war-making."[2] In retrospect, Taylor's skepticism was warranted: the crimes against peace charges failed completely in *Farben*, *Krupp*, and *High Command*, and although five defendants were convicted of planning, preparing, and waging invasions in *Ministries*, Tribunal IV set aside von Weizsaecker and Woermann's convictions after they filed motions to correct the judgment.

The tribunals generally followed the IMT's approach to analyzing whether a defendant had committed crimes against peace. They began by determining whether the particular aggressive wars or invasions identified in the indictment did, in fact, qualify as such crimes. They then asked whether the defendants themselves were individually criminally responsible for them either directly or by participating in a common plan or conspiracy.[3] That analytic framework structures this chapter. Section 1 focuses on the acts of aggression at issue in the trials, explaining why the tribunals extended crimes against peace to include invasions as well as wars. Section 2 discusses the elements of planning, preparing, initiating, and waging aggressive

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[1] SELLARS, 28.

[2] TAYLOR, FINAL REPORT, 66.

[3] See, e.g., Ministries, XIV TWC 336-37. For sake of readability, I will refer to the "common plan or conspiracy" simply as "common plan."

wars and invasions: the leadership requirement, the *actus reus*, and the *mens rea*. Finally, Section 3 explains why the tribunals uniformly rejected allegations that defendants had conspired to commit crimes against peace.

I. AGGRESSIVE WARS AND INVASIONS

Unlike the London Charter, which criminalized only wars of aggression, Law No. 10 criminalized both wars of aggression and "invasions." That difference led the NMTs to take a much broader approach to crimes against peace than the IMT.

A. Aggressive Wars

The IMT held that ten of the Nazis' armed attacks qualified as wars of aggression: Poland, Yugoslavia, Greece, Denmark, Norway, Belgium, the Netherlands, Luxemburg, the Soviet Union, and the United States. None of the tribunals questioned those determinations. The *Ministries* tribunal did, however, clarify a curious ambiguity in the IMT judgment concerning the Nazis' attacks on the U.K. and France. Count Two of the IMT indictment described those attacks as "wars of aggression," and the IMT judgment noted in passing that it had decided "certain of the defendants planned and waged aggressive wars against *twelve* nations."[4] But the IMT judgment only discussed the criminality of the ten wars of aggression mentioned above – it said nothing about the attacks on the U.K. and France, although they had to be the other two, given that the indictment described Austria and Czechoslovakia not as aggressive wars but as "aggressive actions." The Tribunal rectified that oversight by specifically holding that the attacks on the U.K. and France were, in fact, aggressive wars.[5]

B. Invasions

The IMT also addressed what it called the "invasion"of Austria and the "seizure"of Czechoslovakia. It considered those attacks, which had not resulted in armed conflict, "acts of aggression" instead of aggressive wars.[6] That distinction had significant legal consequences for the defendants. The Tribunal held that planning, preparing, initiating, or waging a *war* of aggression constituted a crime against peace under Count Two of the indictment. By contrast, it held that planning, preparing, initiating, or waging an *act* of aggression did not constitute a crime against peace under Count Two, but could be criminal under Count One of the indictment, which prohibited conspiring to commit crimes against peace.[7] No defendant, therefore, was ever convicted under Count Two for participating in the attacks on Austria or Czechoslovakia.

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[4] Id. at 36.
[5] Ministries, XIV TWC 336-37.
[6] IMT JUDGMENT, 17, 106.
[7] The distinction emerges most clearly in the IMT's acquittal of Schacht. After noting that the invasions of Austria and Czechoslovakia were not charged as "aggressive wars," making him ineligible for conviction under Count Two, it acquitted him under Count 1 because his participation in those invasions "was on such a limited basis that it does not amount to participation in the common plan." Id. at 106.

Because Law No. 10 criminalized "invasions" as well as war of aggressions, the tribunals took a very different approach to the attacks on Austria and Czechoslovakia. In particular, the *Ministries* tribunal not only held that those attacks qualified as invasions, it convicted two defendants for participating in them: Lammers for his role in the invasion of Czechoslovakia; Keppler for his role in the invasions of both Czechoslovakia and Austria.

Those convictions were only possible, of course, because the *Ministries* tribunal concluded that Germany's attacks on Austria and Czechoslovakia qualified as "invasions." Law No. 10 did not specify what distinguished aggressive wars from invasions; it simply made clear that they were different kinds of attacks. And the IMT neither defined the term nor used it consistently, referring to the attacks on Denmark, Norway, Belgium, the Netherlands, and Luxemburg as "invasions" although it considered them aggressive wars and referring to the attack on Czechoslovakia as a "seizure."

The *Ministries* tribunal was not, however, writing on a completely blank slate. Tribunal V had provided a definition of "invasion" in *High Command*, albeit in dicta because it had dismissed the crimes against peace charges – as discussed below – on the ground that the defendants did not satisfy the leadership requirement. According to the *High Command* tribunal, the difference between an aggressive war and an invasion was that the latter did not involve armed resistance:

> [A]n invasion of one state by another is the implementation of the national policy of the invading state by force even though the invaded state, due to fear or a sense of the futility of resistance in the face of superior force, adopts a policy of nonresistance and thus prevents the occurrence of any actual combat.[8]

The majority in *Ministries* adopted *High Command*'s definition of invasion, noting – rightly – that there was no legal or political rationale for assuming "that an act of war, in the nature of an invasion, whereby conquest and plunder are achieved without resistance, is to be given more favorable consideration than a similar invasion which may have met with some military resistance."[9] The two judges thus had little problem determining that the attacks on Austria and Czechoslovakia qualified as invasions and were crimes against peace under Law No. 10. With regard to Austria, they emphasized that "armed bands of National Socialist SA and SS units" had taken control of the Austrian government even before German troops crossed the border.[10] With regard to Czechoslovakia, they emphasized that Hitler had coerced Hacha into consenting to German occupation by threatening to destroy Prague by air and had "started his armed forces on the march into Bohemia and Moravia" even before Hacha had given that consent.[11] With regard to both, they noted that "[t]he fact that

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[8] High Command, XI TWC 485.
[9] Ministries, XIV TWC 330.
[10] Id.
[11] Id. at 332.

the aggressor was here able to so overawe the invaded countries, does not detract in the slightest from the enormity of the aggression in reality perpetrated."[12]

Judge Powers dissented from the majority's criminalization of the attacks on Austria and Czechoslovakia. He offered three basic arguments in defense of his position, none of which are compelling. To begin with, he argued that because the London Charter was made an "integral part" of Law No. 10,[13] the Tribunal had to assume that the drafters of Law No. 10 did not intend to "substantially alter or change" the London Charter's definition of crimes against peace.[14] This was the same argument that both the *Flick* and *Ministries* tribunals had previously relied on to ignore Law No. 10's elimination of the nexus requirement from crimes against humanity, an issue discussed in more detail in Chapter 10. Suffice it to say here that the argument renders Article II(1)(a)'s use of the term "invasion" moot, thereby violating the basic canon of statutory construction that "every word and clause must be given effect,"[15] even though there is no evidence that the drafters of Law No. 10 did not intentionally distinguish between aggressive wars and invasions.

Perhaps aware of that problem, Judge Powers then argued that even if the two meant different things, "[a]n analysis of the language of Law 10 and its grammatical construction does not support the contention that a mere invasion is a violation of its terms." Law No. 10 referred to "initiation of invasions of other countries *and* wars of aggression"; according to Judge Powers, the use of the conjunctive meant that only an invasion that led to an aggressive war qualified as a crime against peace.[16] That is a very strained reading of Law No. 10, one that finds no support in the drafting history and that reads the use of the word "and" in a very idiosyncratic way. There is nothing unusual about criminalizing different actions conjunctively; indeed, Article II(1)(c)'s defined crimes against humanity as "atrocities and offenses, including but not limited to…" Judge Powers' canon of construction would mean that all crimes against humanity had to involve both one of the enumerated offenses and atrocities, a reading that would have decriminalized a wide variety of persecutions, such as the program of aryanization that Judge Powers' own tribunal held criminal in *Ministries*.[17] Judge Powers did not dissent from that conclusion.

Finally, Judge Powers simply argued that the majority's definition of invasion – and thus, by implication, *High Command*'s definition, as well – was incorrect. In his view, there was a reason that the drafters of Law No. 10 referred to "crimes against peace" instead of to "crimes of aggression": they wanted to emphasize that aggressive acts were only criminal if they actually breached the peace.[18] This argument suffers from the same flaw as the first: it renders the term "invasion" superfluous. The IMT almost certainly considered the attacks on Austria and Czechoslovakia to be aggressive acts instead of as aggressive wars because they did not involve actual

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[12] Id. at 331.
[13] See Law No. 10, art. I.
[14] Ministries, Powers Dissent, XIV TWC 880.
[15] See, e.g., Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 404 (1950).
[16] Ministries, Powers Dissent, XIV TWC 881.
[17] See, e.g., the conviction of Darre. Id. at 557.
[18] Id. at 882, Powers Dissent.

armed conflict. Requiring invasions to result in armed conflict thus collapses the distinction between invasions and aggressive wars. That is not only an implausible reading of Article II(1)(a), it contradicts the plain meaning of "invasion" – as the majority pointed out, dictionaries at the time defined an invasion as simply "a warlike or hostile entrance into the possessions or domains of another," a definition that does not require the invaded state to resist.[19]

C. Self-Defense

The *Ministries* tribunal also expanded upon the IMT's rejection of the idea that the Nazis' attacks were justified acts of self-defense. The defendants at the IMT had argued, for example, that "Germany was compelled to attack Norway to forestall an Allied invasion, and her action was therefore preventive." The Tribunal had disagreed, holding that preventive attacks were justified only where there was "an instant and overwhelming necessity for self-defense leaving no choice of means, and no moment of deliberation," which was not the case in Norway.[20]

The defendants made the same argument regarding Norway in *Ministries*, alleging that "newly discovered evidence proves that Germany was not the aggressor."[21] The *Ministries* tribunal rejected that claim, but not on the ground that the attack failed self-defense's necessity requirement. Instead, it held that Germany forfeited the right to claim self-defense once it committed an act of aggression, because "[i]t thereby became an international outlaw and every peaceable nation had the right to oppose it without itself becoming an aggressor."[22] It repeated that argument with regard to Germany's declaration of war against the U.S., which the defendants claimed was justifiable self-defense in light of American support for the countries Germany had occupied. "A nation which engages in aggressive war," the Tribunal held, "invites the other nations of the world to take measures, including force, to halt the invasion and to punish the aggressor, and if by reason thereof the aggressor declares war on a third nation, the original aggression carries over and gives the character of aggression to the second and succeeding wars."[23]

II. INDIVIDUAL CRIMINAL RESPONSIBILITY

Once the tribunals determined which Nazi attacks qualified as crimes against peace, they then had to determine which defendants were criminally responsible for planning, preparing, initiating, or waging those attacks. As summarized by Judge Powers in *Ministries*, such responsibility required an affirmative answer to 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?

[19] Id. at 331.
[20] IMT JUDGMENT, 28.
[21] Ministries, XIV TWC 323. Von Weizsaecker did not do them any favors, because he freely admitted that all twelve of the attacks were criminal.
[22] Id. at 336.
[23] Id.

2. Did he know that the war to be initiated was to be a war of aggression?

3. Was his position and influence, or the consequences of his activity, 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?[24]

Because the tribunals treated it as a threshold consideration, it is appropriate to begin with the third element – the so-called "leadership requirement."

A. The Leadership Requirement

The idea that crimes against peace could only be committed by defendants who had the authority to influence Nazi policy originated with the NMTs. Neither the London Charter nor Law No. 10 imposed a leadership requirement on such crimes; they simply prohibited participating in them.

1. The Development of the Requirement

The leadership requirement was first adopted by the *Farben* tribunal with regard to waging aggressive war. The problem, according to the Tribunal, was that Article II(2) of Law No. 10 criminalized "any person" who was a principal or an accessory to one of the crimes in Article II(1), which included crimes against peace. Applied literally, Article II(2) meant that "the entire manpower of Germany could, at the uncontrolled discretion of the indicting authorities, be held to answer for waging wars of aggression," including "the private solder in the battlefield, the farmer who increased his production of foodstuffs to sustain the armed forces, or the housewife who conserved fats for the making of munitions." The Tribunal believed that such "collective guilt" was "unthinkable"; it thus held – extrapolating from the IMT judgment – that only "leaders" could be convicted of waging aggressive war:

> 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… Here let it be said that the mark has already been set by that Honorable Tribunal in the trial of the international criminals. 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… [I]ndividuals who plan and lead a nation into and in an aggressive war should be held guilty of crimes against peace, but not those who merely follow the leaders.[25]

Tribunal V then significantly expanded the leadership requirement in *High Command*. Nothing in *Farben* indicated that the leadership requirement applied to the other

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[24] Id. at 889, Powers Dissent. Powers disagreed with the majority's application of the test; he did not disagree with the test itself.
[25] Farben, VIII TWC 1126.

forms of participation in crimes against peace; on the contrary, as discussed below, the *Farben* tribunal held that it was criminal for anyone to contribute to preparing, planning, or initiating an armed attack that he knew was aggressive. The *High Command* tribunal, however, held that no individual below the "policy level" could be convicted of *any* form of participation in a crime against peace:

> 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.[26]

Although the *High Command* tribunal did not specifically address its rejection of *Farben*, it did explain why it believed that the leadership requirement applied to all forms of participation in crimes against peace. First, the Tribunal claimed that because the "lawfulness or unlawfulness" of an attack was determined by the policy behind it – an unlawful attack being one motivated by a policy "criminal in its intent and purpose" – it made sense to limit individual criminal responsibility to those who helped determine that policy.[27] Second, the Tribunal said that although it was convinced that crimes against peace were consistent with the principle of non-retroactivity, it believed that customary international law "had not [yet] developed to the point of making the participation of military officers below the policy making or policy influencing level into a criminal offense in and of itself."[28]

2. The Requirement Defined

Having embraced a leadership requirement, the tribunals then had to define it. The *Farben* tribunal was rather vague, simply suggesting that anyone "in the political, military, and industrial fields" who was "responsible for the formulation and execution of policies" qualified as a leader.[29] The *High Command* tribunal was more specific, holding that "[i]t 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."[30] Tribunal IV then adopted *High Command*'s "shape or influence" standard in *Ministries*, holding that Koerner could be convicted of crimes against peace because the evidence indicated that "the wide scope of his authority and discretion in the positions he held… enabled him to shape policy and influence plans and preparations of aggression."[31]

Four aspects of the "shape or influence" standard are important to note. First, a defendant's ability to shape or influence policy could not simply be inferred from his

[26] High Command, XI TWC 491.
[27] Id. at 486.
[28] Id. at 489.
[29] Farben, VIII TWC 1124.
[30] High Command, XI TWC 489 (emphasis added).
[31] Ministries, XIV TWC 425.

position in the Nazi hierarchy. That was an important qualification, because Article II(2)(f) of Law No. 10 "deemed" a defendant guilty of a crime against peace "if he 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." Judge Hebert noted in his concurrence that, "literally construed," Article II(2)(f) imposed strict liability for crimes against peace.[32] The tribunals rejected that idea, as the quote from *High Command* indicates. The OCC also disclaimed it,[33] although the prosecution did argue in *Farben* – unsuccessfully – that a defendant who held one of the specified "high positions" had "the burden of countering" the "legitimate and reasonable inferences" that could be drawn from his status.[34]

Second, a defendant's ability to "shape or influence" policy was not all-or-nothing. Some defendants were sufficiently powerful that they could be convicted of any crime against peace in which they knowingly participated. Paul Koerner, who was Goering's plenipotentiary in the Four Year Plan, is an example.[35] Other defendants, however, satisfied the leadership requirement for some crimes against peace but not others. The *Ministries* tribunal held, for example, that von Weizsaecker had the ability to shape or influence the invasion of Czechoslovakia,[36] but not the invasions of Denmark and Norway.[37]

Third, the tribunals were divided over whether a defendant had to *actually* influence Nazi policy in order to satisfy the leadership requirement. The *Farben* tribunal defined a leader as someone who was "responsible for the formulation and execution of policies," implying that the mere *ability* to influence policy was not enough. The *High Command* and *Ministries* tribunals, by contrast, assumed that any substantial participation in a crime against peace was criminal as long as the defendant had the ability to influence policy. In *High Command*, for example, Tribunal V wrote that "[t]hose who commit the crime are those who participate at the policy making level in planning, preparing, or in initiating war. After war is initiated, and is being waged… [t]he crime at this stage likewise must be committed at the policy making level."[38] More concretely, in *Ministries*, Tribunal IV convicted Koerner of the attack on Russia because he "participated in the plans, preparations, and execution of the Reich's aggression against Russia" while being at the policy level, not because he shaped or influenced the policy itself.[39]

Fourth, although no industrialist was convicted of crimes against peace, the tribunals consistently emphasized that they were not excluded as a matter of law from the policy-making level. As noted earlier, the *Farben* tribunal held that anyone "in the political, military, and industrial fields" could qualify as a leader. The *Krupp* tribunal echoed that position, insisting when it dismissed the crimes against peace charges that

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32 Farben, Hebert Concurrence, VIII TWC 1299.
33 TAYLOR, FINAL REPORT, 72.
34 Farben, Prosecution Opening Statement, VII TWC 118.
35 Ministries, XIV TWC 425-26.
36 Id. at 354.
37 Id. at 370.
38 High Command, XI TWC 490.
39 Ministries, XIV TWC 434.

"[w]e do not hold that industrialists, as such, could not under any circumstances be found guilty upon such charges."[40] Their position was sound – after all, Article II(2)(f) specifically extended crimes against peace to include individuals who "held high position in the financial, industrial or economic life" of a country involved in aggression.

3. The Effect of the Requirement

The leadership requirement had a profound influence on the trials. In *Farben*, Tribunal VI's decision to adopt the requirement for waging an aggressive war doomed the crimes against peace charges, because it concluded that "[t]he 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."[41] That conclusion was questionable, to say the least. Von Schnitzler himself, the chairman of Farben's Commercial Committee, provided the prosecution with numerous affidavits detailing the extent to which Farben influenced Hitler's aggressive plans; indeed, he freely admitted that "[f]or twelve years the Nazi foreign policy and the I.G. foreign policy were largely inseparable" and expressed his belief that "I.G. was largely responsible for Hitler's foreign policy."[42] The Tribunal simply ignored von Schnitzler's damning admissions, attributing them to "mental confusion" caused by the war and perversely citing his willingness to cooperate with the prosecution as evidence that the admissions had "questionable evidentiary value."[43] Judge Hebert, however, drew essentially the same conclusions as von Schnitzler in his concurrence, rejecting Farben's claims of duress on the ground that they were "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."[44]

The crimes against peace charges in *Krupp* also failed because of the leadership requirement. Tribunal III dismissed the charges at the close of the prosecution's case because – in the words of Judge Anderson – none of the defendants "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."[45] Notably, Judge Wilkins stated in his concurrence that he would have been willing to conclude that *Gustav* Krupp – whom the OCC had not charged because he had still not recovered his mental faculties – qualified as a leader for purposes of crimes against peace.[46]

The leadership requirement proved no less insuperable in *High Command*. Having held that the requirement applied to all of the forms of participation in crimes against peace, Tribunal V summarily dismissed those charges on the ground that the

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[40] Krupp, IX TWC 393.
[41] Farben, VIII TWC 1126.
[42] DuBois, Generals, 54.
[43] Farben, VIII TWC 1120.
[44] Id. at 1298, Hebert Concurrence (emphasis added).
[45] Krupp, Anderson Concurrence, IX TWC 449.
[46] Id. at 465-66, Wilkins Concurrence.

defendants "were not on the policy level."[47] That conclusion, however, is difficult to reconcile with the IMT judgment. As Taylor later asked rhetorically, "[w]ere Keitel (convicted by the IMT), Hitler's military administrative assistant, with little or no influence on strategy, and Doenitz (also convicted by the IMT), a rear admiral in command of submarines, 'policy makers' any more than Admiral Schniewind… the Chief of the Naval War Staff within which the plan for the invasions of Norway and Denmark originated?"[48]

B. *Actus Reus*

In addition to qualifying as a leader, a defendant also had to satisfy the *actus reus* of crimes against peace: planning, preparing, initiating, or waging an aggressive war or invasion. Such participation had to be substantial; Tribunal IV held in *Ministries* that "[t]o say that any action, no matter how slight, which in any way might further the execution of a plan for aggression, is sufficient to warrant a finding of guilt would be to apply a test too strict for practical purposes."[49] The Tribunal took that requirement seriously, acquitting Woermann of helping prepare the invasion of Czechoslovakia because his actions – which involved little more than ordering the seizure of equipment and files in the Czech Foreign Office – though knowing, were simply too *de minimis* to justify conviction.[50]

Before examining the four forms of direct participation in a crime against peace, it is important to emphasize that, because they took the position that a defendant did not have to actually influence policy to satisfy the leadership requirement, both the *High Command* and *Ministries* tribunals each held that an omission could satisfy the "substantial participation" requirement. In *High Command*, for example, Tribunal V held that "[i]f after the policy to initiate and wage aggressive wars was formulated, a defendant came into possession of knowledge that the invasions and wars to be waged were aggressive and unlawful, then he will be criminally responsible if he, being on the policy level, could have influenced policy and failed to do so.[51] Similarly, Tribunal IV emphasized in *Ministries* – in the context of acquitting von Weizsaecker with regard to the war against the Soviet Union – that "[w]e are not to be understood as holding that one who knows that a war of aggression has been initiated is to be relieved from criminal responsibility if he thereafter wages it, or if, with knowledge of its pendency, he does not exercise such powers and functions as he possesses to prevent its taking place."[52]

The *Ministries* tribunal emphasized, however, that the duty to protest was not unlimited. Most importantly, a protest did not have to have an actual effect. For example, although the *Ministries* tribunal recognized that von Weizsaecker's protests failed to "prevent the catastrophe" brought about by the invasion of Poland, it nevertheless insisted that "his lack of success is not the criteria."[53] The duty to protest

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47 High Command, XI TWC 491.
48 TAYLOR, FINAL REPORT, 222.
49 Id. at 966, Motion for Correction.
50 Id. at 392-93.
51 High Command, XI TWC 488-89.
52 Ministries, XIV TWC 383.
53 Id. at 369.

was also a purely internal one; the Tribunal specifically held – with regard to von Weizsaecker and the invasion of the Soviet Union – that "the failure to advise a prospective enemy of the coming aggression in order that he may make military preparations which would be fatal to those who in good faith respond to the call of military duty does not constitute a crime."[54]

Even those limits were not enough for Judge Powers. He dissented from the majority's omission argument in *Ministries*, insisting that the failure of a defendant "to do anything to prevent the proceedings, even if he had had an opportunity, cannot be regarded as a crime. He does not commit a crime against peace in any event, by inaction. Something affirmative is required."[55]

1. Planning, Preparing, Initiating

The tribunals normally discussed planning, preparing, and initiating an aggressive attack separately from waging an aggressive war or invasion, an analytic framework that Judge Anderson believed was consistent with the IMT's approach to crimes against peace.[56] In many cases, the tribunals did not even distinguish between the three preliminary stages of the crime; the *Ministries* tribunal, for example, simply convicted Koerner for participating "in the plans, preparations, and executions of the Reich's aggression against Russia."[57] The tribunals did, however, highlight some important differences between the three stages.

a. Planning

The key issue with planning – the earliest stage of a crime against peace – is whether the tribunals believed that there was a difference between planning as a part of a "common plan" to commit a crime against peace and planning as form of direct participation in a particular aggressive war or an invasion. The London Charter and Law No. 10 each referred to both "planning" and the "common plan," implying that the two were different. The IMT, however, effectively treated them as synonymous. The traditional interpretation of the judgment is that the Tribunal distinguished between Count One and Count Two in terms of specificity of planning: whereas "common plan" under Count One involved "making long-term plans and arrangements for waging wars of aggression in the future"[58] and required either a close relationship with Hitler (Hess)[59] or presence at one of the four key meetings held by Hitler between 1937 and 1939 at which he disclosed his aggressive intentions (Goering),[60] "planning" under Count 2 involved the "specific planning… of an aggressive war against a specific country."[61] In fact, all of the IMT defendants who were convicted of *planning* specific wars of aggression under Count Two were also

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[54] Id. at 383.
[55] Id. at 893, Powers Dissent.
[56] Krupp, Anderson Concurrence, IX TWC 426.
[57] Ministries, XIV TWC 434.
[58] UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 248 (1948).
[59] Id. at 87.
[60] IMT JUDGMENT, 14-17.
[61] UNWCC HISTORY, 249.

convicted of participating in the common plan under Count One; the four defendants who were convicted under Count Two because they had *prepared* or *waged* aggressive war – Funk, Frick, Doenitz, and Seyss-Inquart – were each acquitted under Count One. Funk had participated "the economic preparation" for the attack on the Soviet Union[62]; Frick and Seyss-Inquart had waged aggressive war by administering the occupied territories[63]; and Doenitz had waged aggressive war with his submarine fleet.[64]

The *Farben* tribunal also treated "planning" and "common plan" as synonymous. It began by noting that, to be guilty of a crime against peace, "it must be shown that the [defendants] were parties to the plan, or, knowing of the plan, furthered its purpose and objective by participating in the *preparation* for aggressive war"[65] – a formulation that leaves no room for planning independent of the common plan. It then acquitted Krauch (the only Farben defendant it discussed concerning planning) on the ground that "[n]o opportunity was afforded to him to participate in the planning, either in a general way or with regard to any of the specific wars charged in count one," because "[t]he plans were made by and within a closely guarded circle. The meetings were secret. The information exchanged was confidential. Krauch was far beneath membership in that circle."[66] The *Farben* tribunal clearly believed, therefore, that all of the planning for aggressive war was carried out by the members of the Nazi "common plan"; anyone who was not a member of that common plan had simply "prepared" aggressive war.

The *Ministries* tribunal, by contrast, held that a defendant could plan an aggressive attack even if he was not part of the common plan. That distinction is most evident concerning Lammers, who was convicted of being "a criminal participant in the *formulation*, implementation and execution of the Reich's plans and preparations of aggression" against seven different countries.[67] Lammers had, for example, played an active role in determining how the occupying authorities would deal with the "Jewish question" in Poland within weeks of the 23 May 1939 meeting at which Hitler announced his intention to invade the country.[68]

The Tribunal's conviction of Koerner is also instructive. It emphasized that Koerner was Goering's deputy in the Four Year Plan, which was "an instrumentality for the planning and carrying on of aggressions,"[69] and was Deputy Chairman of the General Council, which "became a very important and active agency for certain phases of planning in connection with subsequent invasions and other aggressions."[70] Specifically, the Tribunal convicted Koerner of "the planning… of the aggression against Russia" because, once the decision to invade the Soviet Union had been made,

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[62] IMT JUDGMENT, 103.
[63] Id. at 99 (Frick), 120 (Seyss-Inquart).
[64] Id. at 107.
[65] Farben, VIII TWC 1108 (emphasis added).
[66] Id. at 1110.
[67] Ministries, XIV TWC 416 (emphasis added).
[68] Id. at 408.
[69] Id. at 421.
[70] Id. at 402.

he and Goering had created an "economic staff" to manage the economic affairs of Operation Barbarossa.[71]

The *Ministries* tribunal, in short, adopted a broader definition of planning than either the IMT or the *Farben* tribunal. The latter considered an individual to have planned a crime against peace only if he was involved in Hitler's decision to launch an aggressive war or invasion against that country. The former, by contrast, expanded planning to include individuals who were not involved in the decision to launch an aggressive attack, but formulated the policies necessary to ensure that the attack succeeded – what the IMT and the *Farben* tribunal would have considered "preparing."

b. Preparing

The second stage of a crime against peace, "preparing," began where planning (however defined) ended: once the decision to launch an aggressive war or invasion had been made. Preparing, in other words, involved "implementing" aggressive plans, not formulating them. That distinction is evident in the *Ministries* tribunal's acquittal of Woermann for the invasion of Yugoslavia, which it justified on the ground that the evidence did not show "that Woermann either initiated or implemented the plans for such aggression."[72] The Tribunal particularly emphasized what it called "diplomatic preparations" for aggression – efforts by the defendants to deceive other countries into believing that Hitler's aims were not aggressive.[73] Such efforts were at the heart of von Weizsaecker's conviction, later reversed on factual grounds,[74] for the invasion of Czechoslovakia. The Tribunal acknowledged that von Weizsaecker "did not originate this invasion, and that his part was not a controlling one," but it insisted that he had helped prepare for the invasion through diplomatic negotiations designed to knowingly deceive Czechoslovakia, France, and Britain into believing that Germany did not intend to invade.[75]

The *Farben* tribunal dealt with preparation in the context of the company's participation in the rearmament of Germany prior to the invasion of Austria. The Tribunal ultimately acquitted Krauch and the other defendants because they lacked *mens rea*, but it made clear that "by contributing to her economic strength and the production of certain basic materials of great importance in the waging of war," Farben had prepared Germany for aggressive wars and invasions.[76]

c. Initiating

The tribunals rarely referred to the third stage of a crime against peace, "initiating" an aggressive war or invasion. The *Farben* tribunal refused to convict Krauch of initiating any of the wars of aggression or invasions because "he was informed of

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[71] Id. at 432.
[72] Id. at 398.
[73] Id. at 396.
[74] Id. at 955, von Weizsaecker Order.
[75] Id. at 354.
[76] Farben, VIII TWC 1112.

neither the time nor the method of initiation."[77] That statement suggests that a defendant was guilty of initiating aggressive wars or invasions if he helped determine either "the strategic moment for their execution"[78] or the precise manner in which they would begin. Keppler's conviction for the invasion of Austria is likely an example of the latter form of initiation: the *Ministries* tribunal convicted him because he delivered Hitler's ultimatum to President Miklas that the Germany army would invade unless Seyss-Inquart was appointed Chancellor the Germany army.[79] It was that ultimatum that led Schuschnigg to resign and the Austrian National Socialists to assume power.[80]

2. Waging

"Waging" referred to the final stage of a crime against peace – actions taken after a war or invasion had been initiated that furthered the aggressive purposes of the attack. The *Ministries* tribunal cited a number of different ways in which defendants like Lammers and Koerner "waged" war: signing decrees that altered the legal status of occupied territory, such as the decree that that incorporated Poland into the Reich[81]; establishing Nazi authority over an invaded country, such as installing Frank as the Governor-General of Poland[82]; and taking steps to ensure that occupied territory would be economically exploited, such as transforming the economic staff that planned Operation Barbarossa into an organization responsible for "extracting the maximum quantities of goods required for the war effort."[83] The *Krupp* and *Farben* tribunals discussed waging in the context of the rearmament, which obviously continued even after Germany invaded Poland, making clear Hitler's aggressive aims.[84]

The key issue with waging an aggressive war or invasion was not what actions qualified as waging, but under what conditions a defendant could be held responsible for that particular form of participation in a crime against peace. The *High Command* and *Ministries* tribunals simply held that – as with all forms of participation – a defendant could only be convicted of waging an aggressive war or invasion if he satisfied the leadership requirement. In *High Command*, recall, Tribunal V held that "after war is initiated, and is being waged… [t]he crime at this stage likewise must be committed at the policy making level." The *Ministries* tribunal did not make that requirement explicit, but it is evident in its decisions concerning individual defendants. Lammers, for example, was convicted of waging aggressive war because he signed the decree that installed Frank as Governor-General of Poland. Stuckart, by contrast, was acquitted of waging aggressive war even though he not only actually held "many responsible positions in the administration of the occupied territories, but

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[77] Id.
[78] Ministries, XIV TWC 378.
[79] Id at 387.
[80] IMT JUDGMENT, 18.
[81] Ministries, XIV TWC 408.
[82] Id.
[83] Id. at 434.
[84] See Farben, VIII TWC 1125; Krupp, Order Acquitting the Defendants of the Charges of Crimes Against Peace, 5 Apr. 1948, IX TWC 398.

also "drafted or assisted in the preparation of decrees related to them."[85] The difference between the two was that Lammers, unlike Stuckart, had the ability to shape and influence Nazi policy.[86]

The *Farben* tribunal also emphasized the leadership requirement when it discussed whether rearmament qualified as waging an aggressive war or invasion. As noted earlier, however, the *Farben* tribunal – unlike the *High Command* and *Ministries* tribunals – held that the *ability* to shape or influence policy was not enough; the defendant had to actually be "responsible for the formulation and execution of policies." That difference had an important practical effect: it meant that an industrialist could not be convicted of waging an aggressive war or invasion unless he had previously played a role in planning, preparing, or initiating that war or invasion. In the absence of that nexus, rearmament was simply "in aid of the war effort in the same way that other productive enterprises aid in the waging of war."[87]

The *Krupp* tribunal, by contrast, adopted a broader conception of waging. In its order dismissing the crimes against peace charges, Tribunal III simply – and unhelpfully – stated that "[i]f Speer's activities were found not to constitute 'waging aggressive war' we most certainly cannot find these defendants guilty of it."[88] Judge Anderson's concurring opinion, however, makes clear that the Tribunal was not holding that rearmament could never qualify as "waging aggressive war." Instead, it indicates that the Tribunal believed that rearmament qualified as waging as long as that rearmament began *before* the aggressive war was initiated and the defendant *knew at the time* that it was aggressive. As Judge Anderson said, although he could understand "how a private citizen can be held indictable if he was privy to the plans which led his country into a war that he knew would be a war of aggression and aided in the execution of those plans," he did not believe that "a citizen not privy to the prewar plans, but who after the war has begun is called upon to aid in the war effort, must determine in advance and at his peril whether the war is a justifiable one and refuse his aid if he concludes that it was not."[89]

Both the *Farben* and *Krupp* tribunals believed, in short, that the responsibility of an industrialist for post-war rearmament depended on his actions prior to the war. The two differed only in terms of what actions were required: the *Farben* tribunal held that the industrialist had to actually influence the formulation and execution of the policies that led to the aggressive war or invasion, while the *Krupp* tribunal assumed that it was enough for the industrialist to be involved in pre-war rearmament knowing that his arms would be used for aggressive purposes – a much less restrictive standard.

C. *Mens Rea*

The IMT paid much little attention to the *mens rea* of crimes against peace. The judgment clearly indicates, though, that a defendant could only be convicted of

[85] Ministries, XIV TWC 416.
[86] Compare id. at 406, with id. at 416.
[87] Farben, VIII TWC 1126-27.
[88] Krupp, Order Acquitting the Defendants, IX TWC 398.
[89] Id. at 449, AC.

planning, preparing, initiating, or waging an aggressive war if he was aware of the war's aggressive nature – a *mens rea* of knowledge. The IMT convicted von Neurath because he participated in various acts of aggression "with knowledge of Hitler's aggressive plans"[90] and Hess because his relationship with Hitler was such that he "must have been informed of Hitler's aggressive plans when they came into existence."[91] Conversely, the IMT acquitted Schacht because the prosecution had failed to prove "that Schacht did in fact know of the Nazi aggressive plans"[92] and acquitted Bormann because the evidence did not show "that Bormann knew of Hitler's plans to prepare, initiate or wage aggressive wars. "[93]

The NMTs also adopted knowledge as the *mens rea* of crimes against peace, with one minor exception discussed below. The *Ministries* tribunal stated that "[o]ur task is to determine which, if any, of the defendants, knowing there was an intent to so initiate and wage aggressive war, consciously participated in either plans, preparations, initiations of those wars, or so knowing, participated or aided in carrying them on."[94] The *High Command* tribunal held that, to convict a defendant of a crime against peace, "[t]here first must be actual knowledge that an aggressive war is intended and that if launched it will be an aggressive war."[95] And the *Farben* tribunal described the "question of knowledge" as the issue that was "decisive of the guilt or innocence of the defendants" for the charged crimes against peace.[96]

1. The Definition of Knowledge

The IMT treated the definition of "knowledge" as self-evident. The *Ministries* tribunal, by contrast, explored the definition in some detail. To begin with, it emphasized that knowledge required a defendant to be virtually certain that a war or invasion was aggressive – "it is not sufficient that he have suspicions that the war is aggressive."[97] The Tribunal took that requirement seriously, acquitting Dietrich, the Reich press chief, of crimes against peace even though it considered it "entirely likely that he had at least a strong inkling of what was about to take place." The Tribunal emphasized that such suspicion, "no matter how well founded, does not take the place of proof."[98]

Judge Hebert, it is worth noting, agreed with the *Ministries* tribunal that "knowledge" required virtual certainty that a war or invasion was aggressive. He stated in his *Farben* concurrence that the prosecution had been able to prove that the defendants had participated in the rearmament of Germany "on a gigantic scale with reckless disregard of the consequences, under circumstances strongly suspicious of individual knowledge of Hitler's ultimate aim to wage aggressive war." He nevertheless

[90] IMT JUDGMENT, 125.
[91] Id. at 87.
[92] Id. at 106-07.
[93] Id. at 128.
[94] Ministries, XIV TWC 337.
[95] High Command, XI TWC 488.
[96] Farben, VIII TWC 1113.
[97] Ministries, XIV TWC 337.
[98] Id. at 417.

concluded that the defendants had to be acquitted, because recklessness "does not meet the extraordinary standard" required by the IMT judgment.[99]

The *Ministries* tribunal also insisted, almost certainly speaking for all of the tribunals, that "knowledge" required a defendant to make a *legal* evaluation of the war or invasion in question. It was not enough for the defendant to know that the Nazis intended to use armed force against another country; he also had to subjectively recognize that the intended attack would violate international law. The Tribunal thus held that, in contrast to war crimes or crimes against humanity, a defendant could argue mistake of law as a defense to a crime against peace:

> While we hold that knowledge that Hitler's wars and invasions were aggressive is an essential element of guilt under count one of the indictment, a very different situation arises with respect to… war crimes and crimes against humanity. 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.[100]

The *Ministries* tribunal applied that knowledge requirement strictly. Although it acknowledged that many of Schwerin von Krosigk's activities as Reich Minister of Finance "dealt with waging war," for example, the Tribunal nevertheless held that "in the absence of proof that he knew these wars were aggressive and therefore without justification, no basis for a judgment of guilty exists."[101]

2. The *Mens Rea* of Rearmament

The only disagreement between the tribunals concerning the *mens rea* of crimes against peace involved rearmament. The *Farben* and *Krupp* tribunals did not distinguish between rearmament and other preparations for crimes against peace; they simply applied the regular knowledge requirement. The *Farben* tribunal, for example, held that "the rearmament of Germany was not a crime on the part of any of the defendants in this case, unless that rearmament was carried out, or participated in, with knowledge that it was a part of a plan or was intended to be used in waging aggressive war."[102] And the *Krupp* tribunal asked simply – if rather awkwardly – whether it could 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?"[103]

The *Ministries* tribunal, by contrast, specifically held that rearmament was criminal only if a defendant both *knew* that his arms production would be used for aggressive purposes and *intended* them to be used in that way. That higher *mens rea* emerges clearly in the Tribunal's acquittal of Pleiger, the head of the Hermann Goering Works. According to the Tribunal, "rearmament, in and of itself is no offense against

[99] Farben, Hebert Concurrence, VIII TWC 1213.
[100] Ministries, XIV TWC 339.
[101] Id. at 418.
[102] Farben, VIII TWC 1112-13.
[103] Krupp, Order Acquitting Defendants, IX TWC 396.

international law. It can only be so when it is undertaken with the intent and purpose to use the rearmament for aggressive war."[104]

Although the *Ministries* tribunal's position was in the minority, it was supported by judges in both *Krupp* and *Farben*. In his concurrence in *Krupp*, Judge Anderson insisted – contra the majority – that "activities relied upon as constituting waging war must have been pursued with knowledge of the criminal objective and with the intention of aiding in its accomplishment."[105] Similarly, in his concurrence in *Farben*, Judge Anderson said that the critical issue regarding crimes against peace was whether the prosecution had proved "that the acts of the defendants in preparing Germany for war were done with knowledge of Hitler's aggressive aims and with the criminal purpose of furthering such aims."[106] Neither judge ever explained, however, why industrialists should be held to a different *mens rea* than other types of defendants.

3. The Effect of the *Mens Rea* Requirement

Like the leadership requirement, the *mens rea* requirement had a profound impact on the trials. The *Ministries* tribunal acquitted a number of defendants of crimes against peace on the ground that they were unaware of the Nazis' aggressive plans. Dietrich's acquittal has already been mentioned; other acquitted defendants included Ritter, the liaison between the High Command and the Foreign Office, and Schwerin von Krosigk, the Reich Minister of Finance. Lack of knowledge played a particularly important role in Schwerin von Krosigk's acquittal, because the Tribunal acknowledged "that many of his activities and those of his department dealt with waging war."[107]

The *mens rea* requirement also doomed the crimes against peace charges in *Farben*. Tribunal VI categorically rejected the prosecution's contention that the defendants knew the Nazis intended to use Farben's industrial production for aggressive purposes. The Tribunal not only held that "common knowledge of Hitler's plans did not prevail in Germany, either with respect to a general plan to wage aggressive war, or with respect to specific plans to attack individual countries,"[108] it also held that none of the defendants had individual knowledge of those plans, describing the prosecution's proof as "mere conjecture." The Tribunal was particularly derisive of the idea that it should infer the requisite knowledge from the "magnitude of the rearmament effort." The defendants were not "military men," the Tribunal pointed out, and thus could not be expected to know at what point rearmament for defensive purposes turned into rearmament for aggressive war.[109]

Judge Hebert ultimately concurred with the acquittal of the Farben defendants, but he planned on dissenting until nearly the day before the judgment was announced.[110] His

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[104] Ministries, XIV TWC 435.
[105] Krupp, Anderson Concurrence, IX TWC 448.
[106] Farben, Hebert Concurrence, VIII TWC 1217.
[107] Ministries, XIV TWC 418.
[108] Farben, VIII TWC 1107.
[109] Id. at 1112.
[110] Zuppi, 514.

private notes are replete with references to his belief that the defendants were aware that Hitler intended to use their weapons to commit aggression. On one occasion, he stated that he could not "reach any conclusion but that this was known to persons in the position of these defendants."[111] On another, he reminded himself that it was not even necessary "to rely upon the inference of knowledge established from the nature and scope of their activities and from the positions which they held," because "[t]he record establishes that knowledge of plans for aggressive war in which they were participating was brought home in a more direct fashion on a number of occasions."[112] Indeed, Judge Hebert went so far as to draft a dissenting opinion when he believed that his colleagues intended to grant the motion to dismiss the crimes against peace charges that the defendants filed when the prosecution rested.[113]

In the end, though, a number of factors convinced Judge Hebert to concur instead of dissent: the IMT's acquittal of Schacht and Speer; the decision of France's General Tribunal to acquit high-ranking Roechling officials of planning and preparing aggressive war; Tribunal III's acquittal of the Krupp defendants; and "a most liberal application of the rule of reasonable doubt."[114] His concurrence, however, made clear that he believed his colleagues were far too credulous toward the Farben defendants' claim to have been innocent dupes of Hitler. He described the evidence, for example, as "truly so close as to cause genuine concern as to whether or not justice has actually been done."[115] And he suggested that "[i]f a single individual had combined the knowledge attributable to the corporate entity and had engaged in the course of action under the same circumstances as that attributable to the corporate entity, it is extremely doubtful that a judgment of acquittal could properly be entered."[116]

Unlike the *Farben* tribunal, the *Krupp* tribunal did not specifically rely on the *mens rea* requirement to dismiss the crimes against peace charges. The two concurrences, however, both discussed the defendants' knowledge. Judge Anderson emphasized that there was no evidence in the record to suggest that the defendants knew their arms would be used for aggressive purposes. In particular, echoing the *Farben* tribunal, he emphasized that the requisite knowledge could not be inferred "from the inherent nature and extent of the Krupp firm's activities in the rearmament field," such as the fact that Krupp had primarily produced offensive weapons for the Nazis. In Judge Anderson's view, that was "not of determinative significance," because "[o]ffensive warfare and aggressive war are not the same thing. Offensive weapons may be, and frequently are, employed by a nation in conducting a justifiable war."[117]

Judge Wilkins was more sympathetic to the prosecution. He believed that it was "inescapable" that "the Krupp firm under the leadership of Gustav Krupp played a vital and very substantial role in preparing Germany for its wars of aggression, as well as in the waging of these wars, and that, prior to the attack on Poland in September

111 Hebert archives, Exhibit 196.
112 Id., Exhibit 241.
113 Id., Exhibit 54. The Tribunal ultimately decided to delay ruling on the motion until the judgment.
114 Farben, Hebert Concurrence, VIII TWC 1212.
115 Id.
116 Id. at 1214.
117 Krupp, Anderson Concurrence, IX TWC 439.

1939, the huge armament production of the firm was contemplated to be used for purposes of aggression." He nevertheless concluded that there were two fatal flaws with the crimes against peace charges. First, and most obviously, Gustav Krupp was not on trial. Second, although the evidence that some of the defendants shared Gustav's knowledge of the Nazis's aggressive aims was "well nigh compelling," he agreed with the Tribunal that – as discussed earlier – none of the charged defendants satisfied the leadership requirement.[118]

III. COMMON PLAN OR CONSPIRACY

As noted, the prosecution alleged a common plan or conspiracy in all four of the cases that involved crimes against peace. The tribunals did not have to determine whether such a common plan existed; the IMT had already held that it did, a determination that the tribunals accepted as *res judicata* under Article X of Law No 10.[119] The only issue, therefore, was whether the individual defendants had participated in the common plan. Such responsibility, according to the tribunals, required the prosecution to prove that a defendant had knowledge of the plan and took steps to carry it out.[120] The requisite knowledge could be established by proof that a defendant was either "in such close relationship with Hitler that he must have been informed of Hitler's aggressive plans… or attended at least one of the four secret meetings at which Hitler disclosed his plans for aggressive war"– a standard that the tribunals derived from the IMT judgment.[121]

The "common plan or conspiracy" charges were summarily dismissed in *High Command* and *Farben*. Once the *High Command* tribunal concluded that none of the defendants satisfied the leadership requirement for planning, preparing, initiating, and waging aggressive wars or invasions, it was a foregone conclusion that they could not be convicted of participating in the common plan; indeed, Tribunal V did not even address those charges.[122] Similarly, given that the *Farben* tribunal equated "planning" and "common plan," it had to dismiss the common-plan charges once it concluded that none of the defendants had participated – much less knowingly participated – in planning any of the Nazis' aggressive wars or invasions.[123]

The *Ministries* tribunal also dismissed the "common plan or conspiracy" charges, holding that "[n]o evidence has been offered to substantiate a conviction of the defendants in a common plan and conspiracy."[124] That conclusion is open to question, however, given that Tribunal IV convicted both Koerner and Lammers of planning crimes against peace. Koerner's acquittal is the more defensible of the two. First, he did not participate in any of the four conferences at which Hitler revealed his aggressive aims. And second, although he held extremely significant positions in the Nazi government, he did not seem to have the "close relationship" with Hitler that led to Hess's conviction. Indeed, Koerner's situation seems almost precisely analogous

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[118] Id. at 456-57, Wilkins Concurrence.
[119] See, e.g., Farben, VIII TWC 1127; Krupp, Anderson Concurrence, IX TWC 435.
[120] See, e.g., Farben, VIII TWC 1102.
[121] Id.
[122] See High Command, XI TWC 491.
[123] Farben, VIII TWC 1128.
[124] Ministries, XIV TWC 436.

to Funk's, given that both worked under Goering in the Four Year Plan and both were members of the Central Planning Board. If Funk could not be convicted of participating in the common plan, it is difficult to see how Koerner could have been.

Lammers, however, is a different story. Although he did not attend any of the four conferences, the Tribunal recognized that, as Reich Minister and Chief of the Reich Chancellery, Lammers "occupied a position of influence and authority through which he collaborated with and greatly helped Hitler and the Nazi hierarchy in their various plans of aggression and expansion." Indeed, it noted that Hitler and Goering had personally asked him to help draft the Four Year Plan, a fact that it said "indicates graphically how dependent they were upon him for the proper formulation and efficient implementation of that and following schemes."[125] He also participated in numerous conferences at which plans for specific aggressive wars and invasions were discussed, including conferences concerning Austria, Czechoslovakia, Poland, Denmark, the Low Countries, and the Soviet Union.[126] The "common plan or conspiracy" case against Lammers thus seems at least as strong, if not actually stronger, than the case against von Ribbentrop, who was convicted on Count One of the IMT indictment because his "diplomatic efforts were so closely connected with war that he could not have remained unaware of the aggressive nature of Hitler's actions."[127]

The "common plan or conspiracy" charges fared no better in *Krupp*. Tribunal III dismissed the charges – and the crimes against peace charges as a whole – prior to the defense case, stating simply that it could not find the defendants guilty even if it assumed that all of the prosecution's evidence was credible.[128] There was, however, a unique angle to the prosecution's allegations against the Krupp defendants: it not only claimed that the defendants had participated in the *Nazis'* conspiracy to commit aggressive wars and invasions, it also argued that the defendants had engaged *conspired among themselves* to do so. As the prosecution wrote in its response to the defendants' motion to dismiss, "[t]he conspiracy charged here is not the 'Nazi conspiracy' charged in count one of the indictment filed before [the IMT], with which its judgment deals, but is a conspiracy to do the acts of the character charged under count two of that indictment," namely, preparing and waging aggressive war.[129]

The prosecution's argument concerning the defendants' responsibility for a separate "Krupp conspiracy" had two basic elements. To begin with, it claimed that the members of the Krupp firm had independently conspired to prepare Germany for aggressive war from the end of World War I until the Nazis came to power, at which point in time the Krupp conspiracy and the Nazi conspiracy merged.[130] It then argued that, under basic principles of conspiracy, "Alfried Krupp, Loeser, and other defendants who dominated the Krupp firm and controlled it in the latter years of the conspiracy, are as liable for those activities as those of the defendants who were in the

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[125] Id. at 401.
[126] Id. at 406-15.
[127] IMT JUDGMENT, 190.
[128] Krupp, Order Acquitting Defendants, IX TWC 393.
[129] Id. at 371, Prosecution Response.
[130] Id. at 369, Prosecution Response.

conspiracy from the beginning."[131] That was a critical claim, because only three of the defendants in Krupp had been with the firm in 1919 and the prosecution conceded that "none of them occupied a sufficiently important position to justify charging them with the responsibility for decisions taken at the end of 1920."[132]

The prosecution's argument was creative but unsuccessful: Tribunal III refused to conclude "that there were two or more separate conspiracies to accomplish the same end, one the 'Nazi conspiracy' and the other the 'Krupp conspiracy'."[133] The Tribunal did not explain why the prosecution's argument failed in its order dismissing the crimes against peace charges. Instead, both Judge Anderson and Judge Wilkins addressed that issue in their concurring opinions.

Judge Anderson focused on the first element of the prosecution's argument, the existence of a Krupp conspiracy dating back to 1919. He argued that the alleged conspiracy was best understood not a conspiracy to wage aggressive war, but a conspiracy to preserve Krupp's armament potential in case "some future government embarked upon a rearmament program in support of a national policy of aggrandizement."[134] Such a conspiracy could not be considered criminal, however, because the IMT had specifically held that a conspiracy had to be "clearly outlined in its criminal purpose" and could not be "too far removed from the time of decision and of action."[135] Judge Anderson then pointed out that even if the Krupp conspiracy could be considered criminal, the crime itself was complete in 1919, when the members of Krupp agreed to rearm Germany. But if that was the case, the conspiracy presented "a serious question of jurisdiction" – not even the most liberal interpretation of Law No. 10 criminalized actions taken more than two decades before the Nazis came to power.[136]

Judge Wilkins, in turn, focused on the second element of the prosecution's argument, the idea that the defendants could be held liable for the actions of their predecessors. He was much more sympathetic to the prosecution's argument than Judge Anderson. He believed, for example, that it had established that Krupp had knowingly and intentionally supported the Nazis' aggressive aims during the early years of Hitler's regime.[137] He also acknowledged that had the Tribunal adopted the "widely accepted, less conservative theory of conspiracy" that the prosecution had proposed, the defendants would likely have been convicted, because he believed that the defendants were fully aware of Krupp's support for the Nazis when they assumed positions of importance in the company. He nevertheless supported the Tribunal's decision to dismiss the conspiracy charges, agreeing with his brethren that a more conservative approach to the doctrine of conspiracy was warranted because the Tribunal was acting "in a comparatively new field of international law."[138]

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[131] Id. at 371, Prosecution Response.
[132] Krupp, Anderson Concurrence, IX TWC 411.
[133] Id. at 400, Order Acquitting Defendants.
[134] Id. at 412, Anderson Concurrence.
[135] IMT Judgment, 43.
[136] Krupp, Anderson Concurrence, IX TWC 420-21.
[137] Id. at 457, Wilkins Concurrence.
[138] Id.

CONCLUSION

The crimes against peace charges in the trials were a spectacular failure: of the 66 defendants who faced such charges, only three were ever convicted. The tribunals nevertheless made a number of important contributions to the development of what the IMT called "the supreme international crime." First, unlike the IMT, the tribunals systematically identified the crime's four essential elements: a state act of aggression; sufficient authority to satisfy the leadership requirement; participation in the planning, preparing, initiating or waging of the aggressive act; and *mens rea*. Second, although Lammers' and Keppler's convictions likely violated the principle of non-retroactivity, the tribunals established that a bloodless invasion qualified as an act of aggression. Third, the tribunals provided a clear and workable definition of the leadership requirement – and made clear that, the acquittals notwithstanding, private economic actors could be complicit in aggression. Fourth, and finally, the tribunals disentangled the various forms of participation in an act of aggression, particularly with regard to "waging."