The crime of aggression and public international law

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Chapter II. Nuremberg and Crimes against Peace

2.1 Introduction

The IMT, which commenced in late November 1945, marked one of the most significant landmarks in history.[169] The major war criminals of World War II stood trial and were prosecuted for their participation in a common plan or conspiracy to commit, or the commission of the crimes which were defined in Article 6 of the IMT Charter: crimes against peace; war crimes; and crimes against humanity.[170] After the Nuremberg Trial, the subsequent NMT, which were established pursuant to Control Council Law No.10,[171] and the Tokyo Trials at the IMTFE,[172] had also indicted and convicted individuals for crimes against peace.

Although the historical origins and efforts to criminalise aggression may have originated before the Nuremberg Trial,[173] this chapter argues that the norms criminalising aggression did not exist prior to the Trial. It was the subsequent affirmation of the IMT Charter and the judgment of the Nuremberg Trial, i.e. the Nuremberg principles,[174] which gradually led to the crystallization of the norms that criminalise aggression under customary international law. As established in the previous chapter, individuals are not the duty-bearers or the rights-holders with respect to the norms that prohibit aggression under international law. States are the duty-bearers that must comply with primary obligations to refrain from an act of aggression and the rights-holders of the enjoyment of compliance of these obligations.

The criminalisation of aggression means that norms under international law confer direct obligations on individuals to refrain from specific proscribed conduct relating

[169] Guénaël Mattraux, *Perspectives on the Nuremberg Trial* (Oxford University Press 2008).
[170] The Indictment is available at http://avalon.law.yale.edu/imt/count.asp.
[171] See Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press 2012).
[172] See Neil Boister and Robert Cryer, *Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgments* (Oxford University Press 2008).
[173] Merkhel evaluates the failed first bases for an international criminal law after the First World War, in particular, it should be noted that he submits 'a provision in international law against war was […] not created in Versailles', Reinhard Merkhel, 'The Law of the Nuremberg Trial: Valid, Dubious, Outdated', *Perspectives on the Nuremberg Trial* (Oxford University Press 2009) 558–562; Bert VA Röling, 'The Nuremberg and Tokyo Trials in Retrospect' in Guénaël Mattraux (ed), *Perspectives on the Nuremberg Trial* (Oxford University Press 2009) 467–477; see also Sellars (n 10) 1–46.
[174] GA Resolution 95(1) 1946.

to the state act of aggression. The breach of these norms results in sanctions, which are executable directly against the individual for the breach of primary obligations. It is therefore the IMT, which was the starting point of the criminalisation of aggression.

As already clarified in the introduction, there is an apparent change in terminology where international law now recognises the 'crime of aggression' in lieu of 'crimes against peace'.[175] However, this does not mean there have been any changes to the substantive constituents of the definition of the crime as any changes are purely nomenclature.[176] Both of these terms will be used interchangeably in this chapter.

This Chapter will first look at the IMT (section 2.2), followed by the NMT (section 2.3). As the latter were directly bound by the judgment of the former,[177] the case law is helpful in understanding the scope of the legal construct of crimes against peace pursuant to the Nuremberg Principles. When studying the IMT and NMT, there are primarily two main questions, which are relevant to understanding the contours of the crime of aggression under customary international law. First, what is the state act element that constitutes a crime against peace? In other words, which acts of aggression committed by Germany gave rise to individual criminal responsibility? Second, what are the elements of the crime pertaining to individual conduct that allow one to be liable for crimes against peace? In the light of these findings, this chapter will continue to examine how the Nuremberg principles gradually attain customary international law status (section 2.4), and the contours of the crime of aggression (section 2.4.3).

2.2 The International Military Tribunal at Nuremberg: The Nuremberg Trial

At the Nuremberg Trial, the Indictment contained two counts for crimes against peace:

[175] Article 16, Draft Code of Crimes; Article 5(1), Rome Statute; The Kampala Amendments, Resolution RC/Res.6.
[176] In the R v Jones, Lord Bingham of Cornhill stated that it had not been suggested that there was "any difference of substance' between a crime against peace and a crime of aggression and that as a matter of convenience he would refer to the latter. [2006] UKHL [4].
[177] Military Government – Germany, United States Zone, Ordinance No.7, Trials of War Criminals before the Nuernberg Military Tribunals, United States Government Printing Office, 1951, vol.III, p.XXIII (hereinafter "Ordinance no.7").

> Count One included *inter alia* a 'common plan or conspiracy to commit, or which involved the commission of, crimes against peace.'[178]
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> Count Two alleged that all the defendants participated in the planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances.[179]

Article 6(a) of the IMT Charter defined crimes against peace as:

> the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances […].

In my view, the definition should be demarcated into two separate substantive components:

i) the planning, preparation, initiation or waging of […]

ii) a war of aggression, or a war in violation of international treaties, agreements or assurances.

The first component refers to conduct of an individual, whilst the second component is the act of aggression committed by a state. The former is acknowledged as the elements of the crime pertaining to individual conduct, and the latter, the state act element of the crime. The approach of the Tribunal had been to first ascertain that Germany had committed wars of aggression, i.e. the state act element before assessing the conduct of each defendant, i.e. elements of the crime pertaining to individual

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[178] Count one described the following acts committed against 12 countries: the planning and execution of the plan to invade *Austria* (1937-1938) and *Czechoslovakia* (1938-1939); formulation of the plan to attack *Poland*: preparation and initiation of aggressive war (1939); expansion of the war into a general war of aggression: Planning and execution of attacks on *Denmark, Norway, Belgium, the Netherlands, Luxembourg, Yugoslavia and Greece* (1939-1941); the invasion of the *U.S.S.R* territory in violation of the Non-Aggression Pact of 23 1939; collaboration with Italy and Japan and the aggressive war against the *United States* (1939-1941); The common plan or conspiracy embraced the commission of crimes against peace, in that the defendants planned, prepared, initiated and waged wars of aggression, which were also wars in violation of international treaties, agreements or assurances; available at http://avalon.law.yale.edu/imt/count1.asp.

[179] The wars referred to were as follows: against *Poland* (1939); against the *United Kingdom* and *France* (1939); against *Denmark* and *Norway* (1940); against *Belgium, the Netherlands* and *Luxembourg* (1940); against *Yugoslavia* and *Greece* (1941); against the *U.S.S.R* (1941); against the *U.S.A* (1941). Reference was also made to Count One of the indictment for allegations charging that these wars were wars of aggression on the part of the defendants; available at: http://avalon.law.yale.edu/imt/count2.asp.

conduct. [180]As the conduct of two different legal subjects were assessed, it can be inferred that there are two separate components within the definition of the crime that need to be assessed for a successful conviction of crimes against peace. The order is to first establish the state act element, followed by considering the elements of individual conduct.

2.2.1. The state act element of crimes against peace

According to Article 6(a) IMT Charter, the state act element of crimes against peace is:

- a war of aggression [or]
- a war in violation of international treaties, agreements and assurances

As the conjunctive 'or' is used, the state act element of the crime can be established upon one of these two variants of war.

A. War of aggression

A 'war of aggression' is not defined in the IMT Charter. Thus, it is in the discretion of the Tribunal to determine a war of aggression. It should be noted that the Tribunal had differentiated between an act of aggression and a war of aggression.[181] It found that Germany had committed acts of aggression against Austria and Czechoslovakia.[182] As these acts did not amount to wars of aggression, no defendants were charged or convicted for crimes against peace in relation to Austria and Czechoslovakia. It is worth examining the factual basis why the acts committed by Germany were considered as acts of aggression and not wars of aggression, as this will delineate the constituents of the state act element of crimes against peace.

The German attacks on Austria and Czechoslovakia were both referred to as 'acts of aggression' under Count One and named as 'seizures' in the IMT judgment.[183] In examining the facts, it becomes apparent that there was no actual use of armed force

[180] Conduct of Germany against other nations 186-214; conduct of defendants 272-331, 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[181] The Tribunal acknowledged that ''The first acts of aggression referred to in the Indictment are the seizure of Austria and Czechoslovakia; and the first war of aggression charged in the Indictment is the war against Poland begun on September 1939', ibid 186.
[182] ibid 192–197.
[183] ibid.

by Germany or armed resistance or counterforce by Austria[184] or Czechoslovakia.[185] However, despite the lack of armed force, both countries were annexed by Germany. The internal political structures of both countries were changed and they were incorporated into Germany as a result of duress from the series of threats backed with the use of force. [186] The annexation of both countries amounted to acts of aggression because 'the methods employed to achieve the object were those of an aggressor. The ultimate factor was the armed might of Germany ready to be used if any resistance was encountered.'[187]

Therefore, it is the threat of the use of force that gives rise to the aggressive element, but the lack of military force that prevents such acts from being considered a war of aggression. Nevertheless, these acts were part of the 'participation in a common plan or conspiracy' under Article 6(a) which is why the acts committed against Austria and Czechoslovakia were considered under Count One of the Indictment and not Count Two. As a result, defendants could not be convicted for committing aggressive wars against Austria or Czechoslovakia (Count Two) but only for the common plan or conspiracy to commit aggressive acts (Count One);[188] the element of which was fulfilled by the duress and threats of the use of force in order to achieve the political means desired by Germany.

In contrast to the acts committed against Austria and Czechoslovakia, Germany initiated the use of force against the other countries in the indictment (Poland, UK, France, Denmark, Norway, Belgium, the Netherlands, Luxembourg, Yugoslavia, Greece, U.S.S.R.) and made a formal declaration of war against the U.S.[189]

Poland was the first act of aggression identified by the IMT.[190] Despite a German-Polish declaration of non-aggression, Hitler declared 'there will be war'[191]

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[184] ibid 192.
[185] ibid 194–197.
[186] It was held 'this was premeditated and carefully planned, and was not undertaken until the moment was thought for it to be carried through as a definite part of the pre-ordained scheme and plan', ibid 187.
[187] ibid 197.
[188] Göring (272-273); Hess (275-277); von Ribbentrop (278-279); Keitel (281-282), Rosenberg (286-287); Raeder (306-308); Jodl (314-315) and von Neurath (324-325),'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[189] ibid 192–214.
[190] ibid 197.
[191] On the 23 May, at a meeting where Göring, Raeder and Keitel were amongst those who were present, Hitler announced his decision to attack Poland and gave his reasons and

and was determined for the destruction of Poland [192] as a necessity for Germany to enlarge her living space and secure her food supplies.[193] Such invasions led to war with the objective of annexation and occupation of territory. Fully aware of the existence of a pact of mutual assistance between Great Britain and Poland and an undertaking between France and Poland for mutual assistance, Hitler was determined to carry out his plans for annexation and occupation knowing that 'this intention would lead to war with Great Britain and France as well'[194] as there was the reality of counterforce by these two countries. He was of the opinion that if the isolation of Poland could not be achieved, Germany should attack Great Britain and France first, or should concentrate primarily on the war in the West, in order to defeat Great Britain and France quickly, or at least to destroy their effectiveness.[195] The IMT held:

> [B]y the evidence that the war initiated by Germany against Poland on 1 September 1939 was plainly an aggressive war, which was to develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war, and against humanity.[196]

The IMT stated 'the aggressive war against Poland was but the beginning. The aggression of Nazi Germany spread quickly from country to country.' [197] The next two countries to suffer were Denmark and Norway. [198] This showed that a 'war of aggression' could also encompass invasions with the objective of gaining military advantage of adversaries.[199] The underlying reason for the invasions of Denmark and Norway appeared to be for preventing British encroachment on

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discussed the effect the decision might have on other countries. He admitted it was necessary for Germany to enlarge her living space and secure food supplies, "there is therefore no question of sparing Poland, and we are left with the decision to attack Poland at the first suitable opportunity. We cannot expect a repetition of the Czech affair. There will be war. Our task is to isolate Poland. The success of the isolation will be decisive… the isolation of Poland is a matter of skilful politics", ibid 200.

[192] ibid 201.
[193] ibid 199.
[194] ibid 203.
[195] ibid 200.
[196] ibid 203.
[197] ibid.
[198] ibid 203–207.
[199] ibid 204.

Scandinavia and the Baltic, and for gaining bases in Norway in order to make effective attacks on England and France.[200] Unlike the acts committed against Austria and Czechoslovakia, there did not appear to be a change of internal policy of the governments of Denmark or Norway. However, there was nonetheless, occupation of both countries as German possessions for further purpose of aggression against other countries, and a 'breach of international treaties, agreements or assurances' as there was a Treaty of Non-Aggression between Germany and Denmark, and a solemn assurance of peace to Norway.[201]

The Defence had put forward an argument that Germany was compelled to attack Norway to forestall an Allied invasion, and thus her action was preventive.[202] However, the IMT rejected this as 'it is clear that when the plans for an attack on Norway were being made, they were not made for the purposes of forestalling an imminent Allied landing, but, at the most, that they might prevent an Allied occupation at some future date"[203] and that "Norway was occupied by Germany to afford her bases from which a more effective attack on England and France might be made, pursuant to plans prepared long in advance of the Allied plans which are not relied on to support the argument of self-defence.'[204]

Thus, the IMT concluded that 'in the light of all the available evidence, it is impossible to accept the contention that the invasions of Denmark and Norway were defensive, and in the opinion of the Tribunal they were acts of aggressive war.'[205]The breach of neutrality of Belgium, Netherlands and Luxembourg was for purposes of obtaining air bases to gain military advantage over the United Kingdom and France.[206] In May 1939, when Hitler foresaw the possibility at least of a war with England and France in consequence of the attack against Poland, he said "Dutch and Belgian air bases must be occupied … Declarations of neutrality must be ignored."[207] The IMT held that 'the invasion of Belgium, Holland, and Luxembourg was entirely

[200] ibid 205–207.
[201] Denmark entered a Treaty of Non-aggression on 31 May 1939, signed by von Ribbentrop. However, Germany invaded Denmark on 9 April 1940. Germany had also sent a solemn assurance to Norway on 2 September 1939 to respect her territory. However, on 9 April 1940, Norway was invaded by Germany, ibid 203-204.
[202] 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4) 205.
[203] ibid 206.
[204] ibid.
[205] ibid 207.
[206] ibid 207–209.
[207] ibid 207.

without justification. It was carried out in pursuance of policies long considered and prepared, and was plainly an act of aggressive war. The resolve to invade was made without any consideration that the advancement of the aggressive policies of Germany.'[208]

The IMT considered the wars of aggression against Yugoslavia and Greece together,[209] where Hitler said to one of the defendants, von Ribbentrop that 'the best thing to happen would be for the neutrals to be liquidated one after the other. This process could be carried out more easily if on every occasion one partner of the Axis covered the other while it was dealing with the uncertain neutral. Italy might well regard Yugoslavia as a neutral of this kind." [210] The attempt to persuade Italy to enter war on Germany's side against Yugoslavia was unsuccessful. As for Greece, when asked for confirmation that the 'whole of Greece will have to be occupied, even in the event of a peaceful settlement,' Hitler replied "the complete occupation is a prerequisite of any settlement."[211] It can be assumed that the breach of neutrality of Yugoslavia fulfilled the agenda to liquidate one neutral after another, presumably for purposes of military advantage against the growing adversaries:

> It is clear from this narrative that aggressive war against Greece and Yugoslavia had long been in contemplation, certainly as early as August of 1939. The fact that Great Britain had come to the assistance of the Greeks, and might thereafter be in a position to inflict great damage upon German interests was made the occasion for the occupation of both countries.[212]

Once again, despite a non-aggression pact, Germany invaded the U.S.S.R for purposes of political, military and economic exploitation for the enlargement of German territory to the east.[213] The IMT held that 'Germany had the design carefully thought out, to crush the U.S.S.R as a political and military power, so that Germany might expand to the east according to her own desire.'[214]

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[208] ibid 209.
[209] ibid 209–211.
[210] ibid 209.
[211] ibid 210.
[212] ibid 211.
[213] ibid 211–213.
[214] The IMT held that 'the plans for the economic exploitation of the U.S.S.R. for the removal of masses of the population, for the murder of Commissars and political leaders, were all part

In the case of the U.S., Germany made a formal declaration of war in the light of the Tripartite Pact between Germany, Italy and Japan (1940).[215] Germany agreed to support Japan for an attack against the U.S, despite the fact that under this Tripartite Pact, Italy and Germany were only to assist Japan if she was attacked. Four days after the attack launched by the Japanese in Pearl Harbour, Germany declared war on the U.S.[216] The IMT held:

> Although it is true that Hitler and his colleagues originally did not consider that a war with the United States would be beneficial to their interest, it is apparent that in the course of 1941 that view was revised, and Japan was given every encouragement to adopt a policy which would almost certainly bring the United States into the war. And when Japan attacked the United States fleet in Pearl Harbor and thus made aggressive war against the United States, the Nazi Government caused Germany to enter that war at once on the side of Japan by declaring war themselves on the United States.[217]

B. War in violation of international treaties, agreements or assurances

As the Tribunal had found that the defendants planned and waged aggressive wars against 12 nations, it was rendered 'unnecessary to discuss the subject in further detail, or even to consider at any length the extent to which these aggressive wars were also "wars in violation of international treaties, agreements, or assurances."'[218] It was also considered unnecessary to 'consider the other treaties referred to in the Appendix, or the repeated agreements and assurances of her peaceful intentions entered into by Germany.'[219] Indeed, most of the wars of aggression were also in violation of bilateral agreements and assurances of peace between the particular aggressed state and Germany.

Nevertheless, "wars in violation of international treaties, agreements or assurances" is still part of the state act element of the crime of aggression under

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of the carefully prepared scheme launched on 22 June without warning of any kind, and without the shadow of legal excuse. It was plain aggression', ibid 213.
[215] ibid 213–214.
[216] ibid 214.
[217] ibid.
[218] ibid.
[219] ibid 216.

Article 6 of the IMT Charter. The IMT had acknowledged that the following international treaties, agreements or assurances were of principal importance: the Hague Conventions, Versailles Treaty, Treaties of Mutual Guarantee, Arbitration and non-aggression between Germany and the other Powers, and the Kellogg-Briand Pact.[220] At the time of the events on trial, these instruments were representative of the normative framework that governed the prohibition of the use of force under international law. The violation of these instruments resulting in war, is indicative of a breach of the prohibition of the use of force. Thus, this variant of war implies that a violation of the prohibition of the use of force may amount to crimes against peace.

2.2.2. Observations

The first and foremost underlying requirement appears to be that there must be an actual use of force, as evident by how the judgment dealt with the acts committed against Austria and Czechoslovakia. An annexation was not sufficient to be considered as a war of aggression without the use of force to achieve those means despite the threat of the use of force (which nevertheless qualified the methods employed to achieve such means as being aggressive in nature). The use of force may be accompanied with: the objective of annexation and occupation of territory, and perhaps annihilation (Poland); the objective of occupation for furthering purposes of aggression against other countries (Belgium, The Netherlands, Luxembourg, Yugoslavia, Greece); the objective of gaining military advantage over other adversaries by preventing them from assisting a previously aggressed state (Denmark, Norway); the expansion of territory (USSR).

The common underlying factor appears to be that a war of aggression will typically involve the initiation of the use of force by the aggressor state, leading to a partial or full occupation of the invaded territory. The exception was the war of aggression against the U.S. where there was a formal declaration of war, for the purposes of assisting in Japan's war of aggression.

However, upon a deeper analysis, I submit that a "war of aggression" is predicated upon two separate elements – an objective element and a subjective element. The former is the initiation of armed force by the aggressor state, i.e. Germany. The latter refers to the intention behind the armed force, the 'aggressive

[220] ibid 214–216.

intention' or *animus aggressionis.* In relation to the list above, each war of aggression comprises of the objective element of the use of force by Germany (with the exception of the US), accompanied with the *animus aggressionis*, e.g. gaining military advantage over other adversaries, or expansion of territory. I argue that the *animus aggressionis* is a necessary part of a "war of aggression", as the objective component is limited only to the violation of the Kellogg-Briand Pact by virtue of recourse to war, which may amount only to a "war in violation of international treaties, assurances and agreements."

In 1951, Special Rapporteur Spiropolous in the *Annex on the possibility and desirability of a definition of aggression* of his Second Report on a Draft Code of Offences Against the Peace and Security of Mankind [221] explained the concept behind the *animus aggressionis*:

> In the absence of a positive definition of aggression provided for by an international instrument and applicable to the concrete, this case, international law, for the purpose of determining the "aggressor" in an armed conflict, is assumed to refer to the criteria contained in the "natural" notion of aggression.[222]

The 'natural' notion according to him consists of both an objective and subjective criteria. The former is the first act of violence, whilst the latter is that the violence committed must be due to aggressive intention.[223] The link between the objective and subjective can be seen here:

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[221] Yearbook of the International Law Commission 1951, Vol II, Second report by Mr. J. Spiropoulos, Special Rapporteur (A/CN.4/44).

[222] ibid para.52.

[223] He submits that only if both objective and subjective criteria are taken together, may it be possible to decide 'which State, in an international armed conflict, is to be considered as "aggressor under international law". The (natural) notion of aggression is a concept per se, which is inherent to any human mind and which as a primary notion, is not susceptible of definition. Consequently whether the behavior of a State is to be considered as an "aggression under law" has to be decided not on the basis of a specific criteria adopted a priori but on the basis of the above notion which, to sum it up, is rooted in the "feeling" of the Government concerned', ibid para. 153.

> The mere fact that a State acted as first does not, per se, constitute "aggression" as long as its behavior was not due to: aggressive intention (Subjective element of the concept of aggression). That the *animus aggressionis* is a constitutive element of the concept of aggression needs no demonstration. It follows from the very essence of the notion of aggression as such.[224]

Perhaps this is the reason the Tribunal found that Germany committed a war of aggression against the US despite the lack of armed force, i.e. its Declaration of War represented the *animus aggresssionis* – the intention to assist a third state in an aggressive war. Here, the *animus aggressionis* is the aggressive intention to commit war against another state(s). Others have also considered the state act element for the crime of aggression to encompass the *animus aggressionis,* [225] e.g., Cassese argued 'the illegal use of force must be directed to the acquisition of the territory, the coercion of the victim state to change its government or its political regime, or else its domestic or foreign policy, or to the appropriation of assets belonging to the victim state';[226] while McDougall submits that the State act element of the crime must include: (i) war with the object of the occupation or conquest of the territory of another State or part thereof; (ii) war declared in support of a third party's war of aggression; (iii) war with the object of disabling another State's capacity to provide assistance to (a) third State(s) victim of a war of aggression initiated by the aggressor.[227]

2.2.3. Elements of the crime pertaining to the conduct of the individual

In accordance with Article 6(a) IMT Charter, the substantive component of the definition of the crime pertaining to the conduct of the individual is the 'planning, preparation, initiation and waging' […]. In my view, this can be interpreted as the material element of the crime – or *actus reus* of the crime, as it is representative of

[224] Ibid.
[225] See Gerhard Werle, *Principles of International Criminal Law* (TMC Asser Press 2005) 395; Oscar Solera, *Defining the Crime of Aggression* (Cameron May Ltd 2007) 427.
[226] Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2004) 160.
[227] McDougall (n 7) 3.

perpetration by an individual in relation to the state act element of the crime, i.e. the wars of aggression or in violation of international treaties, agreements or assurances. As all other crimes, there is also the mental element, i.e. *mens rea* that must be satisfied in addition to the *actus reus.* In addition to the *actus reus* and *mens rea* of the crime, there is one additional issue that should be examined in relation to the elements of crime pertaining to the conduct of individuals. This additional element is the "leadership element" as this suggests that the perpetrator needs to have attained a sufficiently authoritative position within the hierarchy of state and/or the military and can realistically play a role in facilitating the state act of aggression.

There is no explicit reference to a leadership element in the definition of the crime in Article 6(a) IMT Charter. However, the Kampala Amendments have incorporated an explicit leadership element in the substantive definition of the crime of aggression (Article 8 *bis*). Understanding the approach of the IMT in ascertaining the scope of perpetrators that may be liable for crimes against peace is important to evaluate the extent to which the leadership element in the Kampala Amendments reflects the legal construct of the crime under customary international law.

Thus, there are three main elements that need to be focused upon: i) the scope of perpetrators; ii) the *actus reus*; iii) the *mens rea.* The elements pertaining to the conduct of the individual for crimes against peace at Nuremberg will be analysed under these headings, in accordance with the findings of the Tribunal under Count One and Count Two.

i. Count One: Conspiracy or Common plan

From the evaluation presented by the IMT, it can be observed that planning and preparation relating to aggressive war had been carried out systematically. The IMT held that "planning and preparation are essential to the making of war."[228] Once again the tribunal reiterates "we shall therefore discuss both Counts together, as they are in substance the same. The defendants must have been charged under both Counts, and their guilt under each Count must be determined."[229]

[228] 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4) 221.
[229] ibid 222.

The IMT found eight defendants guilty under Counts one: Göring, Hess, von Ribbentrop, Keitel, Rosenberg, Raeder, Jodl and von Neurath.[230] These defendants were also found guilty under Count Two. Six other defendants were charged only under Count One, and they were subsequently acquitted: Kaltenbrunner, Frank, Streicher, von Schirach, Fritzsche and Bormann.[231] Four defendants were indicted only under Counts One and Two: Schacht, Sauckel, von Papen and Speer, and all of them were acquitted under both counts.[232]

The Prosecution had put forward that 'any significant participation in the affairs of the Nazi Party or Government is evidence of a participation in a conspiracy that is in itself criminal.'[233] However, the Tribunal adopted a narrower approach by examining whether a concrete plan to wage war existed, followed by the determination of the participants in the concrete plan. It was also held that 'it is not necessary to decide whether a single master conspiracy between the defendants has been established by the evidence'[234] and that 'the evidence establishes the common planning to prepare and wage war by certain of the defendants. It is immaterial to consider whether a single conspiracy to that extent and over the time set out in the Indictment has been conclusively proved. Continued planning, with aggressive war as the objective, has been established beyond doubt.'[235] Therefore, the Tribunal did not need to be satisfied that a single master conspiracy existed, but instead, there could be several conspiracies or common plans.

The IMT also rejected the argument that such common plan cannot exist where there was a complete dictatorship as:

> A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to

[230] Göring (272-273); Hess (275-277); von Ribbentrop (278-279); Keitel (281-282); Rosenberg (286-287); Raeder (306-308); Jodl (314-315) and von Neurath (324-325),'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[231] Kaltenbrunner (283-284); Frank (288-289); Streicher (293-294); von Schirach (309-310); Fritzsche (326-327); Bormann (328), ibid.
[232] Schacht (298-302); Sauckel (311-312); von Papen (316-318); Speer (321), ibid.
[233] ibid 222.
[234] ibid.
[235] ibid 223.

> have the cooperation of statesmen, military leaders, diplomats and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here anymore than it does in the comparable tyranny of organized domestic crime.[236]

Thus, the Tribunal broadened the scope of perpetrators beyond the Head of State by the acknowledgement that 'statesmen, military leaders, diplomats and business men' could be held criminally responsible if they had knowledge of his aims, cooperated and became parties to the common plan.

A. Scope of perpetrators

In examining the eight defendants who were convicted under Count One, five held high governmental positions, whilst three held high military positions. In particular, Göring was the second most prominent man in the Nazi regime after Hitler, and had 'tremendous influence' with Hitler. He had a governmental position as Plenipotentiary for the Four Year Plan and economic dictator, as well as a military position where he was Commander-in-Chief of the *Luftwaffe.*[237] Hess, the Deputy Führer, was Hitler's closest personal confidant and 'their relationship was such that Hess must have been informed of Hitler's aggressive plans when they came into existence. And he took action to carry out these plans whenever action was necessary'[238] as he was responsible for handling all Party matters. He also had the authority to make decisions in Hitler's name on all questions of Party leadership. He was also Reichminister without Portfolio where he had the authority to approve all legislation before its enactment as law.[239]

[236] ibid.
[237] ibid 272.
[238] ibid 277.
[239] ibid 275.

Von Ribbentrop was Minister Plenipotentiary at Large, Ambassador to England and Reichminister for Foreign Affairs.[240] Rosenberg was recognized as the Party's ideologist, as he developed and spread Nazi doctrines in newspapers. His governmental positions included Reichsleiter and Reich minister for Eastern Occupied Territories.[241] Von Neurath served as a professional diplomat, as the German Ambassador to Great Britain (1930 – 1932), Minister of Foreign Affairs in the von Papen Cabinet, and was made Reich Minister without Portfolio, President of the Secret Council Cabinet, and a member of the Reich Defence Council after he resigned and was Reich Protector for Bohemia and Moravia on 18th March 1939.[242]

The other three defendants did not have political or governmental roles; instead they held high positions in the military. Keitel was the Chief of the High Command of the Armed Forces.[243] Raeder was made Gross-Admiral and member of the Reich Defense Council. He built and directed the German navy in the 15 years he commanded it.[244] Jodl was Chief of the Operations Staff of the High Command of the Armed Forces and reported directly to Hitler on operational matters. In the strict military sense, he was the actual planner of the war and responsible in large measure for the strategy and conduct of operations.[245]

Therefore, those who were convicted under Count One held high governmental or military positions. They had the authority to make decisions on behalf of the state. Not only did these defendants know Hitler on a personal basis, but also had a good relationship with him. From this, it can be presumed that they were in a position where Hitler would inform them about his plans. This can be inferred by the acquittal of Schacht for Count One who 'was clearly not one of the inner circle around Hitler which was most closely involved with this common plan. He was regarded by this group with undisguised hostility,'[246] and the acquittal of Fritzsche who had never achieved 'sufficient stature to attend the planning conferences which led to aggressive war' and had never had a conversation with Hitler.[247]

[240] ibid 277.
[241] ibid 306.
[242] ibid 297–298.
[243] ibid 280.
[244] ibid 306.
[245] ibid 313.
[246] ibid 301.
[247] ibid 328.

It appears that the Tribunal did not hold these individuals responsible for the common plan or conspiracy to commit aggression based on their official titled position, but rather from their relationship with Hitler. This is because only those within Hitler's 'inner circle' were in the position to know about his plans, discussed his plans which may or may not have influenced some of his decisions and carried out his plans.

B. Conduct

The IMT placed paramount significance on four secret, high level conferences held on 5 November 1937 and 23 May, 22 August and 23 November 1939 which were crucial in facilitating the common plan or conspiracy, as Hitler outlined his aggressive plans for the future. [248] One common factor between the eight defendants that were successfully convicted under Count One was that they attended one or more of these conferences where Hitler disclosed his decisions to his leaders or other important conferences in which other decisions were made relating to his plans for aggressive wars. Therefore, those who attended these conferences would have acquired the knowledge of Hitler's intent to commit these acts and wars of aggression, making them a part of the common plan or conspiracy.

This can be demonstrated by the following acquittals. Bormann was acquitted, as he 'attended none of the important conferences when Hitler revealed piece by piece these plans for aggression.'[249] Frick was acquitted because 'the evidence does not show that he participated in any of the conferences at which Hitler outlined his aggressive intentions,'[250] Streicher was acquitted as 'there is no evidence to show that he was in ever within Hitler's inner circle of advisers; nor during his career was he closely connected with the formulation of the policies which led to war. He was never present, for example, at any of the important conferences which Hitler explained his decisions to his leaders,' therefore 'the evidence fails to establish his connection with the conspiracy or common plan to wage aggressive war.'[251] Donitz was also acquitted of Count one as 'he was not present at the important conferences where plans for aggressive wars were announced, and there is no evidence that he was informed about

[248] ibid 188.
[249] ibid 329.
[250] ibid 291.
[251] ibid 294.

the decisions reached there.'[252] Kaltenbrunner and von Papen were acquitted because there was no evidence to connect them with plans to wage aggressive war on any other front.[253] The grounds for the acquittal of Frank, von Shirach, Sauckel and Speer were vague.[254]

C. Mental Element

It can be inferred that all of the defendants who were convicted under Count One had knowledge of Hitler's aggressive plans because they attended one or more of the four conferences, and had a relationship with Hitler which allowed them to be informed about his plans, or even participate in discussions in shaping or formulating them. For example, the Tribunal observed that 'Hess was Hitler's closest personal confidant. Their relationship was such that Hess must have been informed of Hitler's aggressive plans when they came into existence. And he took action to carry out these plans whenever action was necessary.'[255]It is submitted that knowledge was the underlying *mens rea* for being a part of the common plan or conspiracy to wage aggressive war.

ii. Count Two: planning, preparing, initiating or waging aggressive war

The following defendants were acquitted on both Count One and Count Two: Schacht, Sauckel, von Papen and Speer.[256] The following defendants were acquitted under Count One, but guilty of Count Two: Frick, Funk, Donitz and Seyss-Inquart.[257] These defendants appeared to be acquitted of Count One because they did not participate in any of the conferences at which Hitler outlined his aggressive intentions. However, the evidence showed that their actions still amounted to guilt under Count Two.

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[252] ibid 302.
[253] Kaltenbrunner (284); von Papen (318), 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[254] Frank (289); von Shirach (310); Sauckel (311); Speer (321) ibid.
[255] ibid 276–277.
[256] Schacht (301-302); Sauckel (312); von Papen (318); Speer (321),'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[257] Frick (291-291,293); Funk (296-297); Donitz (302-303); Seyss-Inquart (319-321), ibid.

A. Scope of perpetrators

The IMT Charter was silent on the scope of perpetrators for crimes against peace. Thus, the Tribunal did not have the mindset of an established scope of perpetrators when assessing individual criminal responsibility,[258] but appeared to create one from assessing each individual as to whether they could be liable under Counts One and/or Two. First, the relationship of the individual and the Head of State, i.e. Hitler, was examined. The nature of this relationship was either professional or personal – or even somewhat interlinked. The next step was to consider the official position of the individual with respect to his position and role in the government or military. Emphasis should not be placed strictly upon the official title as such, but rather upon the scope of powers within the role pertaining to the official position.

This was demonstrated in relation to Donitz, where the Tribunal acknowledged that although his official position entailed him doing tactical tasks, he actually had a leadership role in the army, as Hitler consulted him somewhat 120 times throughout the war.[259] Therefore, the official title of position of the individual was not as important as the scope of their powers. Other factors that were taken into consideration included whether the individual had the authority to make official decisions on behalf of the government, sign laws or decrees, sign or initial directives and letters of memorandum.

B. Conduct

It is not entirely clear what the difference was between each of the modes of perpetration, 'planning, preparing, initiation or waging' wars of aggression. The judgment did not really create an obvious distinction between the different modes of participation committed by the defendants under Count Two. However, it is important to note that "planning, preparing, initiation" were considered together, whilst "waging" considered on its own. It is also important to note that the defendant did not

[258] McDougall (n 7) 172.

[259] It should be noted that the significance of his position rather than his official title was concentrated upon by the Tribunal as 'he was no mere army or division commander. The U-boat arm was the principal part of the German fleet and Donitz was its leader', see 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4) 302.

necessarily have to commit all four modes of perpetration to be convicted under Count Two.

It is rather difficult to differentiate between 'planning' as part of the 'common plan' and 'planning' as one of the modes of perpetration for an aggressive war. Frick, Funk, Donitz and Seyss-Inquart who were acquitted under Count One were not held to be responsible for 'planning' under Count Two.[260] As for those who were also convicted of planning as part of the conspiracy or common plan, they were found to have participated in the planning of certain aggressive wars under Count Two, e.g. Göring was found to be 'the moving force for aggressive war, second only to Hitler. He was the planner and prime mover in the military and diplomatic preparation for war which Germany pursued.'[261] The IMT therefore considered "planning" a war of aggression synonymous with the "common plan" to carry out an aggression.

Acts which amounted to 'planning' under Count Two appear to include: diplomatic manoeuvers which included false assurances of peace (Göring,[262] von Ribbentrop[263]); diplomatic pressure with the object of occupying the remainder of Czechoslovakia and inducing the Slovaks to proclaim their independence (von Ribbentrop[264]); diplomatic activity leading to attacks (von Ribbentrop[265]); signing directives and memoranda concerning aggressive plans (Keitel[266], Jodl[267]); initialing documents containing aggressive plans (Keitel[268], Jodl[269]); issuing a timetable for the invasion (Keitel[270]); originating the plan to attack Norway (Rosenberg[271], Raeder[272]); preparing occupation plans (Rosenberg[273]); discussions with Hitler concerning plans or preparations for aggression (Raeder[274]).

Although the defendants acquitted under Count One were not found liable for 'planning', some of them were nevertheless held liable for preparation. Frick was held

[260] Frick (291-291,293); Funk (296-297); Donitz (302-303); Seyss-Inquart (319-321), ibid.
[261] ibid 273.
[262] ibid 272–273.
[263] ibid 278–279.
[264] ibid 278.
[265] ibid 278–279.
[266] ibid 281–282.
[267] ibid 314–315.
[268] ibid 281.
[269] ibid 314–315.
[270] ibid 281–282.
[271] ibid 286–287.
[272] ibid 307.
[273] ibid 287.
[274] ibid 307–308.

liable for participating in the preparation for aggressive war by the numerous laws he drafted, signed and administered to abolish all opposition parties, thereby preparing the way for the Gestapo and their concentration camps to extinguish all individual opposition.[275] Funk was held liable for participating in the economic preparation such as transferring into gold all foreign exchange resources available to Germany, economic preparation for certain aggressive wars, such as Poland, and plans for printing ruble notes in Germany before the attack on the Soviet Union to serve as occupation currency.[276] Other acts which amounted to preparation included preparing the Yugoslavian and Greek campaigns (Göring[277]); signing the law establishing compulsory military service (Hess[278]); arranging conferences in December 1939 between Hitler and the traitor Quisling which led to the preparation of the attack on Norway (Rosenberg[279]); preparing plans for occupation by attending numerous conferences (Rosenberg, Keitel, Raeder, Göring, Funk, von Ribbentrop[280]); preparing several drafts of instructions concerning the setting up of the administration in the Occupied Eastern Territories (Rosenberg[281]).

It is not clear what the Tribunal held 'initiation' to be. Perhaps the execution of a plan was considered as the initiation, e.g. executing the Yugoslavian and Greek campaigns (Göring[282]); formulation and execution of occupation policies in the Occupied Eastern Territories (Rosenberg[283]). The only time 'initiation' was explicitly mentioned was in relation to Donitz, that he was held not guilty of planning, preparing or initiating aggressive war because he was a line officer carrying out strictly tactical duties and was not present at any of the important conferences, nor was there supporting evidence that he was informed about the decisions reached there.[284]

Thus, as mentioned above, waging appears to be separate from planning, preparing and initiation because one can be convicted solely on waging (Donitz,

[275] ibid 291.
[276] ibid 296.
[277] ibid 273.
[278] ibid 275–276.
[279] ibid 286–287.
[280] Rosenberg (286-287); Keitel (281-282); Raeder (306-308); Göring (272-273); Funk (296-297); von Ribbentrop (278-279); 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[281] ibid 287.
[282] ibid 273.
[283] ibid 287.
[284] ibid 302.

Seyss-Inquart.[285]) Acts which appear to amount to waging of aggressive war include: direct participation such as commanding the *Luftwaffe* in the attack on Poland and subsequent aggressive wars (Göring[286]); signing laws incorporating Austria into the German Reich (Hess, Frick[287]); signing decrees setting up the Government of the Sudetenland in Czechoslovakia (Hess[288]) signing laws incorporating other occupied territories into the Reich (Frick[289]) establishment of German administration in occupied territories (Frick[290]) participation in administration of annexed/occupied territories (Hess, Rosenberg, Seyss-Inquart[291]) giving permission to attack Russian submarines before the invasion of the Soviet Union (Raeder[292]) commanding the U-boats (Donitz[293]); being solely responsible for the submarine warfare that damaged and sank millions of tons of Allied and neutral ships (Donitz)[294]; directing army units to carry out economic directives for the exploitation of Russian territory, food and raw materials (Keitel[295]).

Therefore, the level of participation of the individual should be considered when determining individual criminal responsibility. To summarize, the modes of participation can be broadly categorized into two different categories 'planning, preparing and initiation' and 'waging'. Planning, preparing and initiation appear to be inter-related, whilst waging can be carried out separately. One does not necessarily have to participate in all four modes to be convicted. Therefore, upon closer examination, the scope of perpetrators for both categories may be slightly different. In relation to the former, there is a narrower scope of perpetrators, whilst the latter may perhaps be slightly broader.

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[285] Donitz (302-303); Seyss-Inquart (319-321),'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[286] ibid 273.
[287] Hess (276); Frick (291-291), 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[288] ibid 276.
[289] ibid 291–292.
[290] ibid 291.
[291] Hess (276-277); Rosenberg (287); Seyss-Inquart (319-321), 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[292] ibid 308.
[293] ibid 302.
[294] ibid 302–303.
[295] ibid 282-283.

C. Mental Element

The IMT did not appear to pay too much attention to any particular mental element, apart from knowledge being the pre-requisite for conviction for crimes against peace. Knowledge appears to be the underlying *mens rea.* Thus, it can be inferred that there is no need to prove beyond reasonable doubt any aggressive intention – or *animus aggressionis* on the part of the defendants.

Those who were convicted under Count One were held to be liable for planning specific acts or wars of aggression, whilst on the other hand, those who were acquitted were not held liable for planning under Count Two. It can therefore be deduced that the knowledge of Hitler's plans for aggressive war was a pre-requisite for conviction of planning aggressive war under Count Two. 'Preparing' and 'initiating' were the subsequent modes of participation after 'planning' and it can be assumed that there was knowledge of the plans for aggressive war. Thus, although the perpetrator may not necessarily have been involved in planning any specific aggressive wars, they still had knowledge of the aggressive plans (Frick, Funk[296]) and had carried out preparations for certain aggressive wars.

A defendant could be convicted under Count Two for waging aggressive war even if he did not have knowledge of the aggressive plans. However, it was necessary that he had knowledge that the nature of war is aggressive. For example, because Hitler consulted Donitz somewhat 120 times during the course of the war, it was satisfied that he knew the war was of an aggressive nature.[297] As for Seyss-Inquart, 'he assumed responsibility for governing territory which had been occupied by aggressive wars and the administration of which was of vital importance in the aggressive war being waged by Germany.'[298] This implies that he had knowledge that the war being waged was an aggressive war. Evidence of such knowledge may include participation in high-level government conferences or meetings where decisions are discussed. This is where the relationship between the individual and head of state should be considered, as it is likely that if one was in a close professional relationship with the

[296] Frick (291-291, 293); Funk (296-297),'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[297] ibid 303.
[298] ibid 319.

head of state, then there is a strong assumption that knowledge has been acquired of aggressive plans.

It is not entirely clear whether knowledge needed to be from a factual or legal basis. Would the defendant need to have knowledge of the existing legal framework pertaining to how states should conduct recourse to force and deliberately planned, prepared, initiated or waged a war contrary to the laws on the use of force? Or would it suffice that the defendant was aware of the factual circumstances that the war being committed can be considered to be aggressive?

At the time of the events, the prohibition of the use of force relied mainly on the Kellogg-Briand Pact and treaties and agreements of non-aggression between Germany and respective countries. To require legal knowledge that the war was aggressive in nature would entail knowledge of the provisions and obligations within the Kellogg-Briand Pact and/or treaties and agreements of non-aggression between Germany and the respective intended victim States, and that the war being waged was in breach of such provisions and obligations.

The requirement of factual knowledge can be satisfied if the defendant was aware that Germany had entered into such instruments with the intended victim States and that the plans to commit war were contrary to this. Here, knowledge could be said to be both legal and factual, as the defendant was simultaneously aware that: i) Germany entered into such an agreement with the intended victim State (factual knowledge); ii) such war would violate the legally binding agreement between both states parties (legal knowledge).

However, other factors can also demonstrate factual knowledge that the wars committed were aggressive in nature. This may include *inter alia* knowledge that the state is initiating the use of force against another State, i.e. the first use of armed force against another State; that the war against the intended victim state was unprovoked; the magnitude of the scale of the war against the intended victim state; the plans for occupation, annihilation and annexation; the plans for gaining military advantage of adversaries; assisting in an aggressive war by a third State.

It must be appreciated that in the light of the present UN framework of collective security, the rules of *jus ad bellum* are rather complex, thus it may now be more difficult than during the pre-UN Charter era to expect the defendant to have simultaneous legal and factual knowledge that the use of force will amount to an act of aggression.

2.2.4. Observations

The analysis above has discussed three constituents of the elements pertaining to the conduct of the individual: the leadership element; the modes of perpetration (*actus reus*); the mental elements of the crime (*mens rea*). The IMT appears to be rather silent on the leadership element in both the IMT Charter and the judgment. Instead, each individual was assessed as to whether they could be liable under Counts One and/or Two by first examining the relationship of the individual and Hitler, followed by considering the official position of the individual. The former could be either professional or personal, or interlinked, but the general assumption was that those within Hitler's inner circle were in a position to effectively play a substantial role in one of the modes of perpetration that gave rise to the war(s) of aggression. With respect to the latter, the emphasis was not necessarily on the official position or title of the perpetrator but rather on the scope of underlying powers that the position entailed. The underlying determining factor that created the scope of perpetrators was that each individual had a close relationship with Hitler. Naturally, each one was in a position where Hitler would confide in them and tell them of his plans. Furthermore, as they also consulted with him, discussed and influenced his plans, they would have held an influential position in either the government or the military.

With respect to the modes of perpetration, "planning, preparing, initiation" can be considered separately from "waging" [a war of aggression]. There appeared to be no particular distinctive feature that defined each mode of perpetration. It should be noted that "common plan or conspiracy" (Count One) and "planning" (Count Two) were regarded as synonymous. That said, those who were held liable for planning aggressive war needed to be in a highly influential position where they have knowledge of the government policies and plans for aggressive wars, and to be able to participate in this planning. It can be assumed that they would need to have authority to make decisions/laws/policies/sign or initial directives, memoranda and make decisions in the name of the state.

At Nuremberg, those held liable included deputy Heads of State (Göring, Hess), ministers or heads of departments of foreign affairs (von Ribbentrop, Rosenberg, von Neurath), Command leaders in military (Keitel, Raeder, Jodl). Those who potentially could be held liable for preparing and initiation would not need to have participated in the planning of aggressive war, but must nevertheless have obtained knowledge of the

aggressive plans. Thus, it can be inferred that the perpetrators that were held liable for planning are more limited than those that can be held for the other modes of perpetration because a narrower scope of perpetrators were convicted under Count One.

The underlying mental element that must accompany the leadership element and the modes of perpetration is knowledge. Such knowledge need not necessarily be legal, but may encompass an awareness of the factual circumstances of the aggressive plans and/or that the war being waged displays the attributes of a war of aggressive nature.

2.2.5. Individual criminal responsibility for crimes against peace: the question of the legal basis of the Nuremberg Trial

The legal basis of Article 6(a) IMT Charter is questionable,[299] as opined by Poltorak:

> either the verdict of the international tribunal, having condemned aggression and aggressors, has a solid legal basis or its basis is unlawful because in establishing the guilt of the accused for aggression it cannot cite any norms of international law.[300]

In my view, it is questionable as to whether at the time of the formation of the IMT Charter and the Nuremberg Trial, norms under international law had criminalised aggression. The underlying issue is whether international law had placed obligations directly on individuals to refrain from the crime of aggression. This requires an examination of the international instruments that existed at the time of the events in order to understand the nature of the underlying norms and obligations in relation to the use of force, with particular reference to the rightful duty-bearer of these norms.

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[299] Otto Kranzbuhler, 'Nuremberg Eighteen Years Afterwards' in Guénaël Mattraux (ed), *Perspectives on the Nuremberg Trial* (Oxford University Press 2009) 441; for a different view see Poltorak, 'The Nuremberg Trials and the Question of Responsibility of Aggression' in Guénaël Mattraux (ed), *Perspectives on the Nuremberg Trial* (Oxford University Press 2008) 445-454; Stefan Glaser, 'The Charter of the Nuremberg Tribunal and New Principles of International Law' in Guénaël Mattraux (ed), *Perspectives on the Nuremberg Trial* (Oxford University Press 2008) 67-69; see also Hans Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law' (1947) 1 International Law Quarterly 153.
[300] Poltorak (n 299) 447.

The source primarily relied upon by the Tribunal was the Kellogg-Briand Pact. Article 1 stipulates:

> The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.

Article 2 states:

> The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

As can be seen, the obligations under these Articles pertain to the High Contracting Parties that have signed the Pact. These states are the duty-bearers with respect to the obligations under the Pact. This suggests by default that individuals are inherently excluded from any obligations under this Pact. A further observation of the Pact indicates there are no apparent sanctions with respect to the breach of the obligations. Jackson acknowledges:

> Secretary Kellogg said that it was out of the question to impose any obligation respecting sanctions on the United States. The Senate proceedings make clear that its ratification was due only to the assurance that it provided no specific sanctions or commitment to enforce it.
>
> This treaty, however, was not wholly sterile despite the absence of an express legal *duty* of enforcement. It had legal consequences more substantial than its political ones. It created substantive law of national conduct for its signatories and there resulted a right to enforce it by the general sanctions of international law.[301]

[301] Robert H Jackson, 'The Challenge of International Lawfulness' in Guénaël Mattraux (ed), *Perspectives on the Nuremberg Trial* (Oxford University Press 2008) 7.

The general sanctions of international law refer to the remedies of self-help, whereby one contracting party may resort to wrongful measures against another for the wrongful conduct.[302] Such sanctions do not refer to criminal sanctions executable against individuals, as correctly pointed out by Merkhel:

> the Briand-Kellogg Pact did not establish a set of criminal sanctions for the case of its violation. For the case of a war-like aggression, its preamble merely drew the simultaneously weak and logical conclusion that an attacker could no longer invoke the other parties' duty to keep the peace governed in the pact.[303]

Poltorak, who is critical of those who do not view that the Pact gives rise to criminaity of aggression observes:

> the legal importance of the pact when applied to the problem of the criminalization of aggressive war can be reduced to zero on the basis that there is no categoricalness in the formulations, and in particular, the words 'illegality and criminality' are missing.[304]

However, it is not the lack of the words 'illegality and criminality' *per se* which is the reason why the Pact does not give rise to criminal responsibility. Rather it is the non-applicability of the provisions to individuals and the lack of enforcement measures within the Pact that undermine any basis for individual criminal responsibility for aggression.[305] Yet, a view persists that individuals are somehow duty-bearers of the obligations of the Pact and sanctions can be executed directly against them. Poltorak submits that:

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[302] Jackson states that 'the fact that Germany went to war in breach of its treaty discharged our own country from what might otherwise have been regarded as a legal obligation of impartial treatment towards the beligerents', ibid 6; for a different view see Kranzbuhler (n 299) 441.
[303] Merkhel (n 173) 562.
[304] Poltorak (n 299) 452.
[305] Poltorak acknowledges that critics of the Nuremberg principles argue that the 'Briand-Kellogg Pact was so legally flawed that it cannot be taken seriously as a basis for criminal responsibility for aggression', ibid 446–447.

> one can often conclude that only the illegality of aggression can be deduced from the pact but not criminality which, of course, is not the case. (…) Modern war, with its ever-developing destructive technology threatens the life of all peoples. Under these conditions, there is no basis for creating a distinction between illegality and criminality for such an infringement of an agreement which leads to war.[306]

His premise rejects any distinction between norms that prohibit aggression and norms that criminalise aggression. However, his supporting argument that the infringement of a common international treaty should not be compared with an infringement of an agreement, which is based on the protection of international law, is weak and bears little legal relevance. The point is that the duty-bearers of the obligations of this treaty are states, regardless of whether the agreement is based on the protection of international law.

In my view, it is important to demarcate between norms that prohibit conduct and norms that criminalise conduct, as this is representative of the existing international legal framework and the correct conferral of obligations upon the relevant legal personalities. It is precarious to argue that sanctions under international law are executable against individuals for the breach of this Pact, especially in the light of the fact that the Pact applied only towards signatory states and not towards individuals. Only the former were duty-bearers to comply with the provisions of the pact. Therefore, the IMT was wrong when it held:

> the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.[307]

[306] ibid 452.
[307] 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4) 218.

The Tribunal attempted to justify its approach by relying on customary international law:

> The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing. The view which the Tribunal takes of the true interpretation of the Pact is supported by the international history which preceded it.[308]

Poltorak has criticised the opponents of the Nuremberg principles, for recognizing only the Briand-Kellogg Pact as a source of international law (applied to the problem of aggression) hereby reducing its international legal importance to zero, and for firmly denying the importance of any other international legal acts in the period from 1919-1939.[309] He continues to examine the legal instruments that existed at the time, e.g. Article 2 of the Geneva Convention on the Protocol on the Peaceful Settlement of International disputes (declared that 'aggressive war' is an international crime), the Declaration of 21 American Republics on the Sixth Havana Conference ('aggressive war is an international crime against the human species', the General Convention on the Peaceful Settlement of Disputes (condemnation of war as an instrument of national policy).[310] His opinion is that these instruments suffice to provide a legal basis for an argument that existing customary international law conferred obligations directly on individuals to refrain from conduct pertaining to aggression – the crime of aggression. Glaser shares the same opinion, arguing that 'the idea that such war would constitute an international crime had reappeared continually in international acts and in the doctrine of the law of nations. One could say without exaggeration, that it has been adopted by the universal conscience of civilised nations.'[311] Thus, he finds no fault with the legal basis of the IMT Charter:

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[308] ibid 219.
[309] Poltorak (n 299) 448–449.
[310] ibid 451–452; see also Glaser (n 299) 67–68.
[311] Glaser (n 299) 68.

> well before the outbreak of the Second World War, the consideration that a war of aggression constitutes a crime against the law of nations had developed in the conscience of peoples and in international relations to such an extent that one must recognize that an international custom had been formed in this regard, and in consequence that this consideration had already acquired the significance of a principle of international law.[312]

The Tribunal itself held:

> All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of pacts and treaties to which the Tribunal has just referred.[313]

I disagree. The legal nature of the majority of the instruments that he referred to were soft-law with no legal binding effects as only agreements or conventions have legal binding effects on signatory parties, which in turn may gradually crystallise into customary international law. Thus, the IMT had erred in submitting:

> Although the Protocol (1924 Geneva Protocol) was never ratified, it was signed by the leading statesmen of the world, representing the vast majority of the civilized states and peoples, and may be regarded as strong evidence of the intention to brand aggressive war as an international crime.[314]

Indeed, declarations and unratified protocols are considered as soft-law and are insufficient to provide a legal basis for criminalisation. Therefore, Poltorak is incorrect in submitting the existing instruments as proof that 'the idea of establishing criminal responsibility for aggression has taken deep root in the legal awareness of

[312] ibid; see also Poltorak (n 299) 451–452.
[313] 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4) 220.
[314] Ibid 219.

people and this has allowed the development of a process of creating an international legal norm for the criminal and legal prohibition of aggression. […] even before 1939, that is prior to the start of WWII, an international legal standard had formed in international law which put aggressive war beyond [sic] the law and declared it an international crime.[315]

My view is that at the time of the Trial, there were no existing obligations on individuals to refrain from criminal conduct amounting to crimes against peace, as rightly said by Judge Röling:

> It is beyond doubt that before World War II, there had been no question of individual criminal responsibility for a violation of the Kellogg-Briand pact. Neither this treaty nor the resolutions of the League of Nations or the abortive treaties in which it was stated that aggression was an international crime had the effect of creating international criminal law.[316]

At the Trial, the defence raised the issue of *nullum crimen sine lege, nulla poena sine lege.* It was submitted that 'ex post facto punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.'[317] To which, the Tribunal responded:

> it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the Government of

[315] Poltorak (n 299) 451–453.
[316] Röling (n 173) 455, 459–460; for a different view see Glaser who argues that the Charter has 'done nothing more than confirm a principle that had already been well established in public international law', Glaser (n 299) 69.
[317] 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4) 217.

> Germany, the defendants or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes, they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.[318]

There has been a divide in opinion as to whether *nullum crimen sine lege* was applicable at the Trial. Glaser and Poltorak for example, believe that the principle is not applicable in international law.[319] Kelsen, on the other hand, argues that it is applicable.[320] This debate need not be discussed here.[321] It is worth mentioning however that the debate encompasses an interesting interplay between arguments from a natural law and positive law approach.

Glaser for example submits that 'the real source of the idea which forms the essene of the law – the idea of justice – is natural law: that law is made of eternal moral truths which are born with mankind, which each of us has in his conscience, and which are immutable.'[322] Judge Röling, on the other hand, submits that 'positive international law did not recognise the crime of aggressive war for which individuals could be punished.'[323]

As the war had truly shocked the conscience of mankind, it brought forth the struggle between morality and legality with respect to punishing the perpetrators for aggressive war, as submitted by Jackson: 'it is clear that by 1939 the world had come to regard aggressive war as so morally wrong and illegal that it should be treated as criminal if occasion arose.'[324] Donnedieu de Vabres submits:

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[318] ibid.
[319] Glaser (n 299) 62–64; Poltorak (n 299) 446–447; see also Henri Donnedieu de Vabres, 'The Nuremberg Trial and the Modern Principles of International Criminal Law' in Guénaël Mattraux (ed), *Perspectives on the Nuremberg Trial* (Oxford University Press 2009) 225-226, 271.
[320] Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law' (n 299) 171.
[321] Merkhel (n 173) 569; see also Donnedieu de Vabres (n 319) 224–227.
[322] Glaser (n 299) 70.
[323] Röling (n 173) 460.
[324] Robert H Jackson, 'Nuremberg in Retrospect: Legal Answer to International Lawlessness' in Guénaël Mattraux (ed), *Perspectives on the Nuremberg Trial* (Oxford University Press 2009) 369; see also Merkhel (n 173) 570.

> it is wrong to present as unjust the punishment inflicted on those who, in contempt for solemn commitments and treaties have, without prior warning, assaulted a neighbouring state. In such cases, the aggressor knows the odious character of his action. The conscience of the world, quite far from being offended if he is punished, would be shocked if he was not. […] the defendants knew that was of aggression were outlawed by most of the states of the world, including Germany itself; it was in full awareness of the situation that they violated international law when they deliberately followed their aggressive intentions with their plans for invasion. [325]

Merkhel, who generally appears to find the legitimacy of the Tribunal problematic, attempts to reconcile the two different positions by submitting:

> the punishment of the perpetrators was still the right to do; however, the construction foisted on it was wrong a more courageous and above all more honourable establishment would have openly acknowledged the breach of the prohibition of retroactive effect – and justified it, for there were conclusive arguments for it. [326]

Indeed, there is merit in the middle ground that despite the questionable legal basis of the Tribunal with respect to the crime of aggression, the prosecution of the perpetrators for the atrocities committed by Germany was nevertheless justifiable from a moral perspective. Be that as it may, the Charter and Judgment of the Trial at Nuremberg marks the cornerstone in international law whereby sanctions were enforced against individuals for their conduct in relation to aggression by the State they serve.

Although it is questionable as to whether these individuals had acted in breach of conduct directly attributable to them under international law, the legal construct of the crime pursuant to Article 6(a) of the IMT Charter is now referred to as the substantive source of law that confers obligations on individuals to refrain from planning, preparation, initiation or waging of the state act of aggression. Thus, emerging developments in international law have provided legitimacy to the legal premise applied by Nuremberg. This will be examined further below.

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[325] Donnedieu de Vabres (n 319) 226–227.
[326] Merkhel (n 173) 568.

This section has endeavoured to signify that the IMT Charter and Nuremberg judgment represent the turning point in international law, which propagated the emergence of norms that criminalise aggression. Prior to the Nuremberg Trial, international law did not provide norms that criminalise aggression.

2.3. The Tribunals established pursuant to Control Council Law No.10: The Nuremberg Military Tribunals

After the Nuremberg Trial, the US established military tribunals as part of the occupation administration for the American zone in Germany pursuant to Control Council Law No.10,[327] which was also known as the Nuremberg Military Tribunals, ("NMT").[328] 12 trials were held from 1946 to 1949: four of which dealt with crimes against peace: United States of America v Carl Krauch et al (the "I.G. Farben case");[329] United States of America v Alfried Felix Alwyn Krupp von Bohlen and Halbach, et al (the "Krupp case");[330] United States of America v Wilhelm von Leeb et al (The "High Command case")[331]; United States of America v. Ernst von Weizsacker et al. (the "Ministries Case").[332]

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[327] Control Council Law No.10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity; reprinted in Trials of War Criminals before the Nuernberg Military Tribunals, United States Government Printing Office, 1951, Vol.III, p.XVIII (hereinafter "Control Council Law No.10").

[328] See Kranzbuhler (n 299) 434.

[329] Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No.10, Nuernberg, October 1946- April 1949, United States Government Printing Office, 1952, vol. VIII, (hereinafter "The I.G. Farben Case"); available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-VIII.pdf; in the Indictment, 24 individuals who were high-level officials of I.G. Farben were charged under Count One with planning, preparation, initiating and waging wars of aggression and invasions of other countries; and Count five for participating and executing a common plan or conspiracy to commit such crimes against peace; Indictment available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf

[330] Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No.10, Nurenberg, October 1946- April 1949, United States Government Printing Office, 1950, vol. IX, (hereinafter "the Krupp Case"); available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-IX.pdf; in the Indictment, 12 officials of the Krupp firm who held high-level positions in management or other high official positions in the business. They were charged under Count one for committing crimes against peace and Count four for participating in a common plan or conspiracy to commit such crimes.

[331] Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No.10, Nuernberg, October 1946- April 1949, United States Government Printing Office, 1950, Vol.XI, (hereinafter "The High Command Case"); available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XI.pdf; in the

Control Council Law No.10 was the legal basis for which the NMT were carried out.[333] According to Article X of Military Ordinance No.7:

> The determinations of the International Military Tribunal in the judgments In Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary.

Thus, the NMT were legally bound by the Charter and judgment of the Nuremberg Trial. Article II(1)(a) of Control Council Law No.10 defined crimes against peace as:

> 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 of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing *(Emphasis added)*.

Article II(2)(f) stipulates that any person without regard to nationality or the capacity in which he acted, is deemed to have committed crimes against peace 'if he held a high political, civil or military (including General Staff) position in Germany or in

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Indictment, 14 officers who held high-level positions in the German military were charged under Count One for crimes against peace and Count four for conspiracy to commit such crimes.

[332] Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No.10, Nuernberg, October 1946- April 1949, United States Government Printing Office, [No publication date available] Volume XIV, (hereinafter "the Ministries Case"); available at: http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XIV.pdf; in the Indictment, 17 out of the 21 defendants were charged under Count two for planning, preparing, initiating and waging wars of aggression and invasions of other countries and under Count Two for participating in a common plan or conspiracy to commit such crimes.

[333] Control Council Law No.10, available at: http://avalon.law.yale.edu/imt/imt10.asp.

one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.'

As can be seen, the NMT adopted a broader scope of crimes against peace than the IMT because the definition of the crime in Article II(1)(a) Control Council Law no.10 included the 'initiation of invasions of other countries.' Furthermore, as emphasised, the definition in Control Control Law No.10 is non-exhaustive. Article II (2)(f) had put forward a scope of perpetrators that may be potentially prosecuted for crimes against peace, whilst the IMT Charter was non-explicit on this matter.

In a similar approach to the IMT, the NMT Tribunals first determined the existence of the state act element, followed by examining the conduct of the individual. Yet, there are a couple of preliminary points, which should be made. From the outset, three differences between the NMT and the IMT can be observed. First, the Ministries tribunal had convicted two defendants for the invasions of Austria and Czechoslovakia.[334] This was of course in contrast to the IMT, where no defendants were convicted under Count Two for crimes against peace with respect to these two states. Second, unlike the IMT, the NMT Tribunals provided definitions for invasions and wars of aggression.[335] Third, unlike the IMT, the NMT also elaborated upon the scope of perpetrators who could be liable for crimes against peace.[336]

2.3.1. The state act element of crimes against peace

There are two immediate differences between the definition in the IMT Charter and Control Council Law No.10. First, the definition in the latter includes 'invasions' as crimes against peace. Second, Law No.10 contains the phrase 'including but not limited to' to expressly indicate a non-exhaustive nature. Both of these differences amount to a broader scope for crimes against peace than held at the IMT.

The tribunals in Farben and Krupp accepted the determination of the IMT with regard to the invasions and wars of aggression and held that the alleged acts that the

[334] Ministries Case, (n 332) 867, 869.
[335] High Command Case, (n 331) 485; Ministries Case, (n 332) 330-331.
[336] see Kevin Jon Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression' (2007) 18 European Journal of International Law 477, 480–488.

accused participated in were aggressive.[337] The High Command and Ministries Case re-examined the findings of the IMT in relation to the nature of the acts committed.[338] The High Command Tribunal sought to define 'war.' It held:

> war is the exerting of violence by one State or politically organized body against another. In other words, it is the implementation of a political policy by means of violence.[339]

It subsequently sought to define an invasion, holding that:

> [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 non-resistance and thus prevents the occurrence of any actual combat.[340]

It can be inferred that war (implementation of a political policy by means of violence) is an escalated form of hostilities in comparison to an invasion (implementation of the national policy of the invading state by force). The key point is that an invasion does not require resistance from the victim state or any actual hostilities. The Tribunal continued:

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[337] I.G. Farben Case, (n 329) 1096-1097; Krupp Case (n 330) 157.
[338] High Command case (n 331) 485; In the Ministries Case, the Tribunal stated 'Notwithstanding the provisions in Article X of Ordinance No.7, that the determination of the International Military Tribunal that invasions, aggressive acts, aggressive wars, crimes, atrocities, and inhumane acts were planned or occurred, shall be binding on the Tribunals established thereunder and cannot be questioned except insofar as the participation therein and knowledge thereof of any particular person may be concerned, we have permitted the defense to offer evidence upon all these matters. In so doing we have not considered this article to be a limitation on the right of the Tribunal to consider any evidence which may lead to a just determination of the facts. If in this we have erred, it is an error which we do not regret, as we are firmly convinced that courts of justice must always remain open to the ascertainment of the truth and that every defendant must be accorded an opportunity to present the facts,' (n 332) 317.
[339] High Command Case (n 331) 4.
[340] High Command Case (n 331) 485.

> Whether a war be lawful, or aggressive and therefore unlawful under international law, is and can be determined only from a consideration of the factors that entered into its initation. In the intent and purpose for which it is planned, prepared, initiated and waged is to be found in lawfulness or unlawfulness.[341]

This is indicative of the *animus aggressionis*, which was subsequently affirmed in the following dictum:

> As long as there is no aggressive intent there is no evil inherent in a nation making itself militarily strong.[342]

Thus, the state act element of crimes against peace consists of:

- the exertion of violence by one State against another or the implementation of the national policy of the invading State by force
- the *animus aggressionis*.

The Ministries Tribunal viewed an invasion as 'the use of force'[343] with respect to its examination of the attacks against Austria and Czechoslovakia and held:

> the invasions were hostile and aggressive. An invasion of this character is clearly such an act of war as is tantamount to, and may be treated as, a declaration of war. It is not reasonable to assume that an act of war, in the nature of an invasion, whereby conquest and plunder are achieved without resistance, is to be given more favourable consideration than a similar invasion which may have met with some military resistance. The fact that 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. The

[341] Prior to this, the Tribunal observed that 'the initiation of war or an invasion is a unilateral operation. When war is formally declared or the first shot is fired the initiation of that war has ended and from then on there is a waging of war between the two adversaries. Whether a war be lawful, or aggressive and therefore unlawful under international law, is and can be determined only from a consideration of the factors that entered into its initiation', High Command Case (n 331) 486.
[342] High Command Case (n 331) 488.
[343] It relied on the definition of invasion from Webster's Unabridged Dictionary as 'act of invading, especially a warlike or hostile entrance into the posessions or domains of another; the incursion of an army for conquest or plunder', Ministries Case (n 332) 331.

> invader here employed an act of war. This act of war was an instrument of national policy.[344]

By establishing that such attacks were aggressive invasions, and thus the state act element, the Ministries Tribunal was able to convict Lammers for his role in the invasion of Czechoslovakia;[345] and Keppler for his role in the invasions of both Austria and Czechoslovakia.[346]

2.3.2. Observations

The NMT adhered to a broader interpretation of the state act element of crimes against peace than the IMT. Unlike the IMT, the High Command Tribunal had sought to define wars and invasions. From the definitions provided by the High Command Tribunal, the state act element of the crime can be inferred as 'the exertion of violence by one State against another or the implementation of the national policy of the invading State by force'[347] in conjunction with the *animus aggressionis*. The immediate difference from the IMT is that there was no need for an actual use of force for the act to fulfil the state act element of the crime. Thus, there was a lower threshold for the state act element at the NMT than the IMT.

In the absence of actual use of force, it can be inferred that the *animus aggressionis* was the ultimate determining factor whether the act may be considered as an invasion or an aggressive war. Furthermore, the substantive content of an invasion appears to be reflective of the aggressive intentions identified by the IMT with respect to Austria and Czechoslovakia, which suggests that the common underlying factor is indeed the *animus aggressionis.*

Thus, according to NMT case law, the absence of armed force by the alleged aggressor state does not detract from individual criminal responsibility for crimes against peace. The implementation of national policy by force will suffice, provided that the underlying criterion of the *animus aggressionis* is present.

Three main points of comparison can be made between the NMT and the IMT with respect to the state act element of crimes against peace. First, the definition of

[344] Ministries Case (n 332) 331.
[345] Ministries Case (n 332) 867.
[346] Ministries Case (n 332) 869.
[347] High Command Case (n 331) 485.

the crime under Article II(1)(a) Control Council Law no.10 encompassed invasions as part of the state act element of crimes against peace. Immediately, this is broader than the definition under Article 6(a) IMT Charter. Second, the indictment at the IMT had excluded acts of aggression (Austria and Czechoslovakia) from Count Two of the indictment, which related to charges of crimes against peace. By contrast, the NMT did not exclude the acts committed against Austria and Czechoslovakia from the charges relating to crimes against peace. This implies that the IMT determined that aggressive wars were committed against twelve countries, whilst the NMT determined that aggressive invasions or wars were committed against fourteen countries. Third, the Ministries tribunal had convicted two defendants for crimes against peace for the invasions against Austria and Czechoslovakia.[348] This immediately departs from the judgment at Nuremberg.

2.3.3. Elements of the crime pertaining to the conduct of the individual

A. Scope of perpetrators

Control Council Law no.10 did not contain a specific leadership element requirement.[349] The first tribunal that attempted to delineate a scope of perpetrators was the Farben Tribunal. It suggested:

> to depart from the concept that only major war criminals-that is, those persons in the political, military, and industrial fields, for example, who were responsible for the formulation and execution of policies-may be held liable for waging wars of aggression, would lead far afield.[350]

[348] Ministries Case, (n 332) 867, 869.
[349] This was observed by the High Command Tribunal which stated, 'no matter how absolute his authority, Hitler alone could not formulate a policy of aggressive war and alone implement that policy by preparing planning and waging such a war. Somewhere between the Dictator and the Supreme Commander of the Military Forces of the nation and the common soldier is the boundary between the criminal and the excusable participation in the waging of an aggressive war by an individual engaged in it. Control Council Law No.10 does not definitely draw such a line', High Command Case (n 331) 486.
[350] I.G. Farben Case (n 329) 1124.

Here, it can be inferred that the scope of perpetrators must be persons in the political, military and industrial fields who were responsible for the "formulation and execution" of policies. To depart from this scope of perpetrators would 'result in the possibility of mass punishments,'[351] the Tribunal held that 'some reasonable standard must, therefore, be bound by which to measure the degree of participation necessary to constitute a crime against peace in the waging of aggressive war.'[352] It held:

> 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 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. […]
>
> 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. […] To find the defendants guilty of waging aggressive war would require us to move the mark without finding a firm place in which to reset it. We leave the mark where we find it, well satisfied that individuals 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.[353]

As can be seen, this marked the emergence of the 'leadership element.' It can be inferred that this leadership element is representative of a position in the political, military or industrial fields, which confers the power to "formulate and execute" policies. The leadership element was further developed in the High Command Tribunal, where it was held:

> Wars are contests by force between political units, but the policy that brings about their initiation is made and the actual waging of them is done by individuals. What we have said thus far is equally as applicable to a just as to

[351] I.G. Farben Case (n 329) 1125.
[352] I.G. Farben Case (n 329) 1125-1126.
[353] I.G. Farben Case (n 329) 1126; see also High Command Case, (n 331) 486.

> an unjust war, to the initiation of an aggressive and therefore, criminal war as to the waging of a defensive and, therefore, legitimate war against criminal aggression. The point we stress is that war activity is the implementation of a predetermined national policy.[354]

If it is national policy which gives rise to a war, it is only logical that those who can be criminally responsible for war are the individuals that participate on the policy level:

> If the policy under which it is initiated is criminal in its intent and purpose, it is so because the individuals at the policy-making level had a criminal intent and purpose in determining the policy. If war is the means by which the criminal objective is to be attained, then the waging of war is but an implementation of the policy, and the criminality which attaches to the waging of an aggressive war should be confined to those who participated in it at the policy level.[355]

The Tribunal continued, 'it is self-evident that national policies are made by men. 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.'[356]Here, the Tribunal appears to suggest that the *animus aggressionis* is attributable to individuals at the policy-making level by placing emphasis on the 'criminal intent and purpose' and 'criminal objective' in relation to the waging of war – which is an implementation of the policy.

As discussed earlier, the *animus aggressionis* is part of the state act element of the crime, but appears in the present context to also be a part of individual conduct as a mental element of the crime. From this, two points can be deduced. First, the *animus aggressionis* is key component to an aggressive invasion or war and is part of the substantive definition of the crime. Second, this *animus aggressionis* stems from individuals who are on the policy level.

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[354] High Command Case (n 331) 485.
[355] High Command Case (n 331) 488.
[356] High Command Case (n 331) 490.

The Tribunal continues to qualify the scope of perpetrators in relation to crimes against peace:

> lf and as long as a member of the armed forces does not participate in the preparation, planning, initiating, or waging of aggressive war on a policy level, his war activities do not fall under the definition of crimes against peace. 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.
> […]
> International 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. But we do not find that, at the present stage of development, international law declares as criminals those below that level who, in the execution of this war policy, act as the instruments of the policy makers. Anybody who is on the policy level and participates in the war policy is liable to punishment. But those under them cannot be punished for the crimes of others.[357]

From the High Command Case, it is inferred that the leadership element is predicated upon a position to "shape or influence" policy. As a result, all of the accused were acquitted for crimes against peace because they were not on the policy level:

> 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.
> […]
> Under the record we find the defendants were not on the policy level, and are not guilty under count one of the indictment. With crimes charged to have been committed by them in the manner in which they behaved in the waging

[357] High Command Case (n 331) 491.

> of war, we deal in other parts of this judgment. It is important to note that this Tribunal held the leadership element as a necessary requirement for all modes of participation in crimes against peace, i.e. planning, preparing, initiation and waging.[358]

The Ministries Tribunal appeared to adopt the "shape or influence" standard from the High Command Tribunal.[359] The Tribunal examined each defendant's liability according to each separate invasion/war. A defendant's guilt revolved greatly around his positions and activities (e.g. Koerner's position as deputy to Goring.[360]) As a result, some defendants were ultimately held liable for certain invasions and aggressions: Keppler (Austria, Czechoslovakia[361]); Woermann (Poland, although he was eventually aquitted[362]); Lammers (Czechoslovakia, Poland, Norway, Belgium, the Netherlands and Luxembourg, Russia[363]); Koerner (Czechoslovakia, Poland, Russia[364]).

Keppler was given full authority over the direction of the Nazi Party's activities in Austria and became the direct representative of Hitler.[365] Woermann was originally convicted for aggressive war against Poland, but a defence motion was subsequently granted to set aside this conviction, thus acquitting him.[366] Nonetheless, his roles were the Ministerial Director and chief of the Political Division of the Foreign Office from

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[358] ibid.

[359] The tribunal acknowledge that the perpetrators had to be 'men holding positions of authority in the various departments of the Reich Government charged with the administration or execution of such programmes.' Heller (n 171) 185.

[360] Ministries Case (n 332) 21-22.

[361] The Ministries Tribunal found 'the defendant had knowledge of Hitler's plan for aggression against Czechoslovakia, knew that it was indefensible, and that he willingly participated in it. We find him guilty under count one in connection with the aggression against Czechoslovakia,' Ministries Case (n 332) 389.

[362] The Ministries Tribunal found 'on the evidence adduced with respect to the charges against Woermann in connection with the aggression against Poland, the Tribunal finds the defendant guilty under count one', (n 332) 398; The Tribunal, with presiding Judge Christianson dissenting, set aside this conviction by an order of 12 December 1949.

[363] The Ministries Tribunal established beyond a reasonable doubt that the defendant Lammers
was a criminal participant in the formulation, implementation and execution of the Reich's plans and preparations of aggression against those countries. It found the defendant Lammers guilty under count one, Ministries Case, (n 332) 416.

[364] The Ministries Tribunal found the defendant Koerner guilty under count one, Ministries Case (n 332) 435.

[365] Ministries Case (n 332) 386.

[366] The Tribunal, with presiding Judge Christianson dissenting, set aside this conviction by an order of 12 December 1949.

1938-1943 (Under State Secretary). Therefore, he carried out important duties 'which often involved the exercise of a wide discretion and had a bearing on the plans and policies which were being considered or were in the process of execution.'[367]

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.'[368] There was evidence that he 'held and exercised wide discretionary powers'[369] and had 'great importance and influence'[370] in the higher Nazi circles in the distinctly policy making sphere, thus indicating his 'great activity and contribution to the furtherance and implementation of the Nazi aggression against other countries generally.'[371] Koerner was permanent deputy to Goring, and had a 'wide scope of his authority and discretion in the positions he held, and which enabled him to shape and influence plans and preparations of aggression.'[372]

On the other hand, von Weizsacker was acquitted from aggression against Poland because 'he had no part in the plan for Polish aggression; he was not in the confidence of either Hitler or von Ribbentrop. While his position was one of prominence and he was one of the principal cogs in the machinery, which dealt with foreign policy, nevertheless, as a rule, he was an implementer and not an originator. He could oppose and object, but he could not override.' [373] It can thus be inferred that in addition to being able to 'shape or influence' policy, the individual must have been a part of originating the aggressive policy.

As the Ministries Tribunal had only convicted three defendants for specific invasions or wars of aggression, this implies that the role of an individual to 'shape or influence' state policy should be assessed on a case-by-case basis to see if in each particular situation they had either shaped or influenced the aggressive policy. There was no general assumption that they were able to 'shape or influence' state policy in every single invasion or war. Thus, it was not necessarily the official ranking or

[367] Ministries Case (n 332) 392.
[368] Ministries Case (n 332) 401.
[369] Ibid.
[370] Ministries Case (n 332) 406.
[371] Ibid.
[372] Ministries Case (n 332) 425.
[373] The Ministries Case (n 332) 357.

position of the individual at all, but the ability to shape or influence policy in each circumstance leading to aggressive invasion or war. [374]

B. ***Mental Element***

Just like the IMT, the NMT adopted knowledge as the underlying *mens rea* of crimes against peace.[375] The indictments for crimes against peace in all four tribunals had also included a common plan or conspiracy. The NMT appeared to use the same standard that was derived from the IMT judgment, where the 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."[376]The charges were summarily dismissed in both Farben and High Command, and dismissed by the Krupp and Ministries Tribunals.[377]

Upon analysing Count Two relating to crimes against peace, the Farben Tribunal stated that 'the question of knowledge'[378] was the decisive factor of guilt or innocence of the defendants. It had cautioned earlier against viewing the conduct of the defendants in retrospect, as determination was meant to take into consideration 'their state of mind and their motives from the situation as it appeared, or should have appeared, at the time.'[379]

The Tribunal drew a distinction between common knowledge and personal knowledge.[380] The former implied a common or general knowledge of Hitler's plans and purpose to wage aggressive war throughout Germany, whilst the latter revolved

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[374] Heller submits that there are four aspects of the "shape or influence" standard which are important to note: i) a defendant's ability to shape or influence policy could not simply be inferred solely from his position in the Nazi hierarchy; ii) a defendant's ability to "shape or influence" policy was not all-or nothing; iii) the tribunals were divided over whether a defendant had to actually influence Nazi policy in order to satisfy the leadership element; iv) although no industrialist was ever convicted of crimes against peace, the tribunals consistently emphasized that industrialists could satisfy the leadership requirement, Heller (n 171) 186.
[375] ibid 194.
[376] The I.G. Farben Case (n 329) 1102; ibid 199.
[377] Heller argues that this conclusion is open to question in the light of the fact that both Koerner and Lammers were convicted for planning crimes against peace, ibid 200.
[378] I.G. Farben Case (n 329) 1113.
[379] I.G. Farben Case (n 329) 1108.
[380] I.G. Farben Case (n 329) 1102-1110.

around knowledge imputable to individual defendants.[381] The former was held not to exist, as there was no such common knowledge in Germany,[382] whilst the latter could not be imputed to the defendants as they were not military experts and could not reasonably have been expected to know about the extent of general rearmament plans or the armament strength of neighbouring nations.[383]

Knowledge, or "actual knowledge" to be more precise, was the first criterion the High Commands Tribunal put forward for individual criminal responsibility for crimes against peace. It held:

> If a defendant did not know that the planning and preparation for invasions and wars in which he was involved were concrete plans and preparations for aggressive wars and for wars otherwise in violation of international laws and treaties, then he cannot be guilty of an offence. If, however, 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 such policy and failed to do so.[384]

Two things can be pointed out. First, the requirement of knowledge that the wars were "aggressive and unlawful" implies that such knowledge must be both factual and legal. Second, guilt appears to be predicated upon knowledge. The Ministries Tribunal also adopted a high standard of knowledge:

> Our 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. […] One can be guilty only where knowledge of aggression in fact exists, and it is not sufficient that he have suspicions that the war is aggressive.[385]

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[381] I.G. Farben Case (n 329) 1102-1107.
[382] I.G. Farben Case (n 329) 1107.
[383] I.G. Farben Case (n 329) 1108-1110.
[384] High Command Case (n 331) 489.
[385] Ministries Case (n 332) 337.

The defendant needs to have actual knowledge that the wars were of an aggressive nature as 'no man may be condemned for fighting in what he believes is the defence of his native land, even though his belief to be mistaken. Nor can he be expected to undertake an independent investigation to determine whether or not the cause for which he fights in the result of an aggressive act of his own Government.'[386] The test is that 'one can be guilty only when knowledge of aggression in fact exists, and it is not sufficient that he have suspicions that the war is aggressive.'[387]

(i) The Industrialists

The *mens rea* requirement of the knowledge resulted in the acquittal of the industrialists for crimes against peace.[388] Heller writes that the *mens rea* requirement 'doomed the crimes against peace charges' for the Farben Tribunal. [389] The defendants in the Farben and Krupp Tribunals were high-level officials of industry, i.e. industrialists. The fact that they were charged with crimes against peace demonstrates that industrialists were not entirely excluded from the scope of perpetrators.

Although both tribunals did not convict any of the industrialists for crimes against peace, this was not because they did not meet the requirement for the Leadership Element, but rather because they lacked knowledge. The Farben Tribunal concluded that 'there was no such common knowledge in Germany that would apprise any of the defendants of the existence of Hitler's plans or ultimate purpose.'[390]

It also held that the defendants could not have personal knowledge of the magnitude of the rearmament efforts because they were not military experts.[391] The Krupp Tribunal had found that the prosecution had failed to prove each defendant guilty beyond a reasonable doubt upon the two counts in the Indictment relating to crimes against peace, yet was careful to emphasize that its decision to acquit the

[386] Ibid.
[387] The Tribunal held that 'any other test of guilt would involve a standard of conduct both impracticable and unjust', Ministries Case (n 332) 337.
[388] Heller observes that the Ministries Tribunal held a higher standard of mens rea than the Farben and Krupp tribunals. The latter did not distinguish between rearmament and other preparations for crimes against peace, and applied the regular knowledge requirement. However, the former 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', Heller (n 171) 196.
[389] ibid 197.
[390] I.G. Farben Case (n 329) 1113.
[391] Ibid.

defendants for crimes against peace should not be interpreted as industrialists being excluded from the scope of perpetrators:

> We do not hold that industrialists, as such, could not under any circumstances be found guilty upon such charges. [392]

C. Conduct: the Actus Reus

The definition for crimes against peace in Article II(1), Control Council Law No.10 is the 'planning, preparing, initiation or waging' [of an aggressive war or a war in violation of international treaties, agreements or assurances]; or the 'initiation' [of invasions of other countries]. The four modes of perpetration are identical to the definition of crimes against peace in the IMT Charter.

From the analysis in the sections above, the NMT jurisprudence suggests that the first and foremost requisite element of individual conduct is actual knowledge that there are plans and intention for an (aggressive) war and that the nature of this war if waged, is aggressive. This could be seen in the *Farben* and *Krupp* tribunals where the defendants were acquitted based on lack of knowledge. The point is that the *mens rea* of knowledge must be satisfied before it can be considered whether the defendants facilitated any modes of perpetration.

In addition to the requisite knowledge, the individual must be in a position to "shape or influence" policy (*High Command, Ministries* tribunals). As such, knowledge of the aggressive plans or aggression is a necessary pre-requisite to determine participation when one is in a position to "shape or influence" policy. Subsequent to acquiring such knowledge, an individual who fulfils the leadership element either participates in a substantial manner or omits to hinder or frustrate the aggressive plans.

This was the view of the *High Command* Tribunal, as cited earlier, where a defendant, who satisfies the leadership element requirements, can be liable for crimes against peace if he knew about the plans for invasions and aggressive wars 'could have influenced policy and failed to do so.'[393] Thus, it can be inferred that if a

[392] The Krupp Case (n 330) 393; Heller observes that there was no explanation as to why industralists were held to a different *mens rea* than other types of defendants, Heller (n 171) 196.
[393] High Command Case (n 331) 489; see also Ministries Case (n 332) 381-383.

defendant is on the policy level, participation in crimes against peace can either be: i) direct participation; ii) omission.

(i) Direct participation: Planning, preparing, initiating, waging

Like the IMT, the NMT considered "planning, preparing, and initiating" separately from "waging."[394] This could be seen in the *Ministries* Tribunal, where Ritter, Berger, and Schwerin von Krosigk were found to have participated in the 'waging' of aggressive war, without taking part in or being informed of Hitler's plans of aggression.[395] Also, like the IMT, the *Farben* tribunal treated "common plan" and "planning" as synonymous.[396] However, Heller observes that the *Ministries* Tribunal regarded both counts separately and adopted a broader definition of planning than either the IMT or the *Farben* Tribunal as the latter considered an individual to have planned a crime '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 individual who were not involved in the decision to launch an aggressive attack, but formulated the policies to ensure that the attack succeeded – what the IMT and the Farben tribunal would have considered "preparing."'[397]

As the Ministries Tribunal was the only Tribunal that convicted defendants for crimes against peace, examining the judgment may shed some light to understand how it was satisfied that a defendant participated in a substantial way in one of the modes of perpetration. First and foremost, the Ministries Tribunal held 'to say 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,'[398] which suggests that participation in any of the modes of perpetration must be substantial.

Keppler was convicted under Count One because of his knowledge of Hitler's plans and the important role he played in carrying them out in relation to Austria and

[394] Heller (n 171) 189.
[395] Ritter (398-399); Berger (417); Schwerin von Krosigk (418), Ministries Case (n 332).
[396] See Heller (n 171) 189 .
[397] Heller writes that 'the latter considered an individual to have planned a crime '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 individual who were not involved in the decision to launch an aggressive attack, but formulated the policies to ensure that the attack succeeded – what the IMT and the Farben tribunal would have considered "preparing"', Heller (n 171) 191.
[398] Ministries Case (n 332) 966.

Czechoslovakia. This included delivering an ultimatum to President Milkas in Austria,[399] being present at the conference between Hacha and Hitler, as well as negotiating and concluding a treaty of friendship and defence with Slovakia (the separation of Slovakia from the Czechoslovakian State was an important and an integral part of Hitler's plan of aggression).[400] Thus, the acts he committed were: delivering an ultimatum, negotiating and concluding bilateral treaties.

Lammers was called by Hitler and Goring to edit the Four Year Plan, translated decrees and ordinances the wishes and plans of Hitler in connection with the Nazi programme pertaining to aggression against other countries; signing decrees with Hitler and Goring establishing the Ministerial Council for Reich Defence.[401] He was not charged with the invasion of Austria because although he had knowledge of plans and preparations, there was no indication that he played 'an active role in the formulation or implementation of such plans.'[402] Rather, his acts were related to the administration of the seized territory as he signed a number of decrees concerning the reunion of Austria with the German Reich. However, it is not clear as to why the Tribunal did not find this to be an act of 'waging' aggressive invasion.

He was nonetheless convicted for the 'formulation, implementation and execution of the Reich's plans and preparations of aggression against Czechoslovakia, Poland, Norway, Holland, Belgium, Luxembourg and Russia.'[403] His actions included attending the meeting of Hitler and Hacha and drafting and signing the decree establishing the Protectorate of Bohemia and Moravia and signing the following decrees: incorporation of Poland into the Reich; concerning the Government of occupied Norway immediately after its invasion; central control of questions concerning Eastern European region and issuing and informing a limited number of high-level officials about a decree approved by Hitler concerning preparations for the occupation of Belgium, the Netherlands and Luxembourg; decree providing for central control of questions concerning the Eastern European region. Thus, the acts he committed were: attending high-levelled meetings, drafting and signing decrees.[404]

[399] Ministries Case (n 332) 132.
[400] Ministries Case (n 332) 134-136.
[401] Ministries Case (n 332) 406-416.
[402] Ministries Case (n 332) 406.
[403] Ministries Case (n 332) 415-416.
[404] Ministries Case (n 332) 406-416.

Koerner played a 'leading role in the planning, coordination, and execution of an economic program to prepare the German Reich for the waging of aggressive war, and that he was further responsible for coordinating the economic exploitation of the occupied territories in furtherance of the waging of aggressive war.'[405] He also directed the office of the Four Year Plan, which was held as an instrumentality for the planning and carrying on of aggression. He was held to have participated in the plans, preparations and execution of the Reich's aggression against Russia because *inter alia* he was informed by Goering of the coming attack against the Soviet Union and he subsequently attended and advised the conferences which were convened to consider the scope and method of German exploitation of the eastern economies.[406] Nevertheless, it is still difficult to identify a clear distinction between each mode of perpetration.

(ii) Omission

The High Command implied that an omission could amount to criminal liability if the individual was on the policy level and gained knowledge of the aggressive plans but failed to reversely influence the policy somehow.[407] The Ministries Tribunal had made similar implications when determining the individual conduct of von Weizsacker in relation to a war of aggresson committed against the Soviet Union:

> We 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. But we are firmly convinced 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.[408]

[405] Ministries Case (n 332) 419.
[406] Ministries Case (n 332) 418-435.
[407] High Command Case (n 331) 488-489.
[408] Ministries Case, (n 332) 383.

From this, it can be inferred that inner disapproval is not sufficient, as the individual must somehow display an adverse reaction to the aggressive plans or policies. The acquittal of von Weizsacker may be insightful. The Tribunal aimed 'to ascertain what he did and whether he did all that lay in his power to frustrate a policy which outwardly he appeared to support.'[409] It found that 'instead of participating, planning, preparing or initiating the war against Poland, the defendant used every means in his power to prevent the catastrophe.'[410] Such means included warning the other powers, trying to bring pressure on other powers to intervene, advising against the aggressive action.[411] This part of the judgment is important:

> Although these efforts were futile, his lack of success is not the criterion. Personalities, hesitation, lack of vision and the tide of events over which he had no control swept away his efforts. But for this he is not at fault.[412]

This indicates that the attempts to hinder or frustrate the plans do not need to have any real results. Whilst considering aggression against Russia, this statement of the judgment is useful:

> we are firmly convinced 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.[413]

This implies that the question of defendant's involvement with foreign powers is not to be made a determining factor for a basis of guilt, because it may not be reasonable to expect an individual to warn a prospective enemy of an invasion. Therefore, disapproval can be expressed in an internal domestic matter, where the individual is measured only by whether he had voiced out or advised against the upcoming aggression. Whether or not the advice will be taken into consideration or followed is irrelevant.

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[409] Ministries Case (n 332) 356.
[410] Ministries Case (n 332) 369.
[411] Ministries Case (n 332) 369.
[412] Ministries Case (n 332) 369.
[413] Ministries Case (n 332) 383.

It is somewhat surprising that the Tribunals held that omissions to adversely shape or influence aggressive policy to frustrate or hinder the aggressive plans would amount to criminal liability for crimes against peace. [414] As submitted above, at the time of these trials, there were no existing obligations under international law on individuals to refrain from conduct amount to crimes against peace. Individuals were thus under a duty to obey national law and could not reasonably be expected to know that international law was holding them to a standard whereby they had to not only refrain from conduct amounting to crimes against peace, but upon acquiring such knowledge had a duty to adversely influence policy, of which he/she had a role in shaping or influencing. Suffice it to say, international law did not impose any of such duties directly on the individual to hinder/frustrate aggressive policies of the state.

2.3.4. Observations

There appear to be three components, or elements of the crime, that must be satisfied in relation to the conduct of the individual: i) actual knowledge of the aggressive plans and that the nature of such invasion(s) or war(s) is aggressive; ii) the leadership element, i.e. being on the policy level; iii) a substantial participation or omission to frustrate/hinder the aggressive plans.

These three components appear to be interlinked: knowledge is the first and foremost determining factor *(Farben, Krupp*). Upon the defendant's actual knowledge of the aggressive plans, the Tribunals then examined whether the leadership element was satisfied. The *Farben* Tribunal held the leadership element as an individual in position to "formulate and execute" policies, whilst on the other hand, the *High Command* and *Ministries* Tribunal interpreted the leadership element as an individual in position to "shape or influence" policies. When satisfied that a defendant had fulfilled both of these elements, it was examined whether the defendant participated in one of the modes of perpetration. The leadership element applied in every mode of perpetration (*High Command*).

The NMTs did not rule out the possibility of industrialists, and thus private economic actors from satisfying the leadership element. As the IMT did not explicitly establish or develop a leadership element, it is likely that when examining the scope of perpetrators under customary international law or existing case law –the NMT will

[414] See Kranzbuhler (n 299) 438.

be considered. Thus, it can be asserted that customary international law or existing case law does not necessarily exclude private economic actors from being able to "shape or influence" policy to give rise to individual criminal responsibility for crimes against peace.

2.3.5. The Tribunals established pursuant to Control Council Law No.10 and customary international law

Perhaps one of the factors that may have contributed to diminishing the judicial precedential value of the principles within the judgment of the NMT is the question of *ex post facto* law in relation to crimes against peace. The issues that were discussed above in relation to the question of *ex post facto* law for crimes against peace at the IMT also arise in the context of the NMT. They do not need to be repeated here. Instead, a related issue will be examined.

In accordance with Article X of Military Ordinance No.7, the NMT were legally bound by the judgment and decisions of the IMT. The question is whether the NMT had acted *ultra vires* in departing from the determinations of the judgment of the IMT with respect to convictions for crimes against peace in relation to Austria and Czechoslovakia. Under Article X, the powers of judicial review of the NMT appear to be limited only to questioning insofar as the participation therein or knowledge thereof by any particular person may be concerned. It is thus questionable as to whether the NMT had the legal competence to judicially review the determinations of the IMT in relation to the acts committed by Germany.

Overall, the NMT had played an undeniable role in further developing crimes against peace by 'clarifying and further elaborating the principles of international law contained therein;'[415] in particular, the leadership element and the potential liability of private economic actors. However, the extent to which the NMT case law may be relied upon as customary international law is uncertain. As Heller points out:

> Although international and domestic courts have consistently relied on the NMT judgments to determine the state of customary international law, they have exhibited considerable uncertainty about their authority. A number of courts have simply finessed the issue, stating that the judgments "contribute"

[415] Historical Developments relating to aggression, PCNICC/2002/WGCA/L.1, 45.

> to customary international law without identifying the weight of their contribution. [416]

Nevertheless, the case law of the NMT gives rise to an interesting study and is helpful in understanding the *corpus* of crimes against peace, and may perhaps be ultimately considered as a 'subsidiary means' for determining the rules of international law.[417]

2.4. The Nuremberg principles and customary international law

The Nuremberg Trial marks the cornerstone upon which the present paradigm of international criminal law and international criminal justice has developed from. As dicussed in section 2.2.5, the legal basis of the IMT Charter and judgment is questionable, especially in the context of crimes against peace. Nevertheless, GA Resolution 95(1) 1946, affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal, i.e. the Nuremberg Principles.

This is indicative of confirmation by the international community of the principles found in the IMT Charter and the Nuremberg judgment. However, this does not mean that the Nuremberg Principles have attained customary international law status. At the time of adoption by the General Assembly, the Resolution was only an affirmation of the Nuremberg principles. A further resolution, GA Resolution 177(II), was adopted, which entrusted the formulation of the principles of international law recognized in the Charter of the Nuremberg Tribunal and the judgment of the Tribunal to the International Law Commission ("ILC"); whereby the Commission was directed *inter alia* to formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.

In the process, the Commission had questioned whether to examine the extent to which the principles contained in the Charter and judgment constituted principles of international law. It concluded:

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[416] Heller also states 'other courts have viewed the judgments as evidence of U.S. practice, no more important than the decisions of any national court. And still others have treated the judgments as the decisions of an international tribunal, entitling them to considerably more authority than national decisions', Heller (n 171) 375.

[417] See Article 38(1)(d), Statute of the International Court of Justice.

> since the Nuremberg principles had been affirmed by the General Assembly in resolution 95 (I) of 11 December 1946, the task of the Commission was not to express any appreciation of these principles as principles of international law but merely to formulate them. [418]

Therefore, the customary international law status of the envisaged Nuremberg principles was still not clear at this point in time. Nevertheless, the Commission continued with the task of formulating these principles, which was subsequently adopted during its second session in 1950.[419] The Nuremberg principles as elaborated by the Commission were actually never formally adopted by the General Assembly. Instead, GA Resolution 488(V) (1950) had invited the "Governments of Member States to furnish their observations accordingly."[420]

In parallel to the work on formulating the Nuremberg Principles, the ILC was also directed to work on compiling a Draft Code of Crimes against the Peace and Security of Mankind. [421] The first draft of 1951, comprised of five Articles, of which the crimes defined in Article 2 were considered as crimes under international law, for which the responsibility individuals shall be punished.[422] This included Article 2(1):

> [a]ny act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.[423]

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[418] See Report of the International Law Commission to the General Assembly, Formulation of the Nürnberg principles and preparation of a draft code of offences against the peace and security of mankind 1949 Yearbook of the International Law Commission, A/CN.4/SER.A/1949 (1949), 282.
[419] See Yearbook of the International Law Commission 1951, Vol II, Second report by Mr. J. Spiropoulos, Special Rapporteur (A/CN.4/44).
[420] See Observations of Governments of Member States relating to the formulation of the Nürnberg principles prepared by the International Law Commission, Extract from the Yearbook of the International Law Commission 1951 Vol. II., A/CN.4/45*, A/CN.4/45 & Corr.1, Add.1 & Corr.1 & Add.2.
[421] GA Resolution 177(II) 1950.
[422] Article 1, Draft Code of Crimes against Peace and Security of Mankind 1951, Yearbook of the International Law Commission, 1951, vol.II, 58-59.
[423] See Commentaries on the Draft code of Crimes against Peace and Security of Mankind, Yearbook of the International Law Commission, 1954, vol. II, 135.

There is a shift in terminology from 'crimes against peace' to 'act of aggression.' Despite the absence of a definition for the 'act of aggression',[424] Article 2(1) nevertheless reflects the framework of *jus ad bellum* and principles of collective security pursuant to the UN Charter.

In the later version of the Draft Code of Crimes against Peace and Mankind, which was adopted in 1996 ("Draft Code of Crimes"), Article 16 proscribes the crime of aggression. Here, another shift in terminology can be seen, i.e. from 'crimes against peace' to 'crime of aggression.' As clarified in the introduction, the difference in terminology has no substantive impact on the underlying constituents of the crime. As such, both terms are interchangeable.

The legal status of the Draft Code of Crimes and the GA Resolutions were unclear. However, the positive opinions generally expressed by Governments with respect to the Nuremberg principles are nevertheless indicative of the political will of States to embrace the Nuremberg principles as a substantive source of law. Thus, positive opinions, affirmations and multilateral international instruments suggest the formation of customary international rules with respect to the Nuremberg principles.

Yet, it is not entirely clear when the actual crystallisation of the Nuremberg principles as customary international law had occurred. My view is that it was a rather gradual process. Thus, it must be understood that the principles within the Nuremberg Charter, and the judgment of the Tribunal did not create any form of instant customary international law rules contrary to the opinion expressed by Sayapin:

> the Tribunal confirmed in its Judgment the validity of (then quite recent) treaty-based rules prohibiting an aggressive use of force by one State against another, and bestowed those international legal prohibitions addressed to States with individual criminal sanctions addressed to officials acting as organs of States. In that sense, the Nuremberg Tribunal testified to the formation of an "instant custom" on the subject.[425]

Instead, the crystallisation process was gradual, as the Nuremberg principles were affirmed and gradually accepted by the international community through positive

[424] See Yearbook of the International Law Commission 1951, Vol II, Second report by Mr. J. Spiropoulos, Special Rapporteur (A/CN.4/44), 262.
[425] Sayapin (n 12) 160.

declarations and multilateral instruments. There are two particular aspects of the Nuremberg Principles which are relevant to this Chapter: i) individual criminal responsibility (Principle I); ii) crimes against peace (Principle VI(a)).

2.4.1. Individual criminal responsibility for international crimes

Principle I of the Nuremberg Principles reads 'any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.' The premise of this principle can be traced back to Article 6 of the IMT Charter, which had bestowed individual responsibility for the crimes within the jurisdiction of the Tribunal: crimes against peace, war crimes and crimes against humanity. At the time, the Defence had submitted:

> international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State.[426]

The Tribunal rejected both of these submissions and held that 'international law imposes duties and liabilities upon individuals as well as upon States.'[427] The underlying rationale can be seen in the subsequent famous statement:

> 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.[428]

This is arguably the most frequently cited dictum in the context of individual criminal responsibility for international crimes. It implies that prosecution, and the subsequent criminal punishment of individuals for international crimes is a type of enforcement to ensure that individuals comply with their obligations to refrain committing international crimes.

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[426] 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4) 220.
[427] ibid.
[428] ibid 221.

That said, the argument raised by the Defence is not without merit, as conduct committed by individuals as part of the organ of the state should be attributed to the state, and not the individual. It is the rationale of the Tribunal, which is questionable as to whether international law had recognised individual as a personality of international law at the time of the events as they happened.

Thus, it is debatable as to whether international law actually imposed duties and liabilities upon individuals in addition to states as proclaimed by the Tribunal. This debate need not be revisited here – the point is that it is rather uncertain as to whether international law had conferred obligations directly on individuals with respect to personal conduct and provided concomitant sanctions for the breach thereof.

As such, the judgment can be interpreted as follows. By acknowledging that individuals commit international crimes, not only does the judgment initiate a shift in paradigm from the recognition of states as the only personality under international law to individuals also being personalities under international law, but it also indicates a dichotomy between the act of state and the act of an individual. Glaser submits that:

> The Charter has pierced through the principle, or even the idea, of state sovereignty. Two facts lead us to this conclusion: first of all, the Charter recognized individuals as subjects of international law – that is, as subjects of international rights and obligations; second, the Charter broke with the doctrine of immunity for what is called an act of state.'[429]

Therefore, the Nuremberg Trial gave rise to the emergence of a new phenomenon: individual criminal responsibility for international crimes under international law.[430]

2.4.2. Crimes against peace: the norms that criminalise aggression

Principle VI (a) of the Nuremberg Principles reflects Article 6(a) of the IMT Charter.[431] As discussed in 2.2.5, crimes against peace did not exist prior to the

[429] Glaser (n 299) 55.
[430] See Article 7, ICTY Statute; Article 6, ICTR Statute; Article 25, Rome Statute.
[431] For a comparative study on national legislation pertaining to the crime of aggression, see Astrid Reisinger Coracini, 'National Legislation on Individual Responsibility for Conduct Amounting to Aggression' in Roberto Bellelli (ed), *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (2010) 547–578; see also McDougall (n 7) 142.

Nuremberg Trials. In other words, there was no individual criminal responsibility for aggression. Judge Röling affirms that:

> Until recently, traditional international law had regarded the *jus ad bellum* as one of the prerogatives of the sovereign state.[432]

Therefore, the Nuremberg Trial is representative of the turning point in international law where sanctions may be executed directly against individuals for wrongful conduct under international law. The gradual crystallisation of the Nuremberg principles into customary international law suggests that the legal definition of crimes against peace within Article 6(a) IMT Charter now confers primary obligations directly on individuals to refrain from the proscribed conduct. The breach of these obligations entails direct legal consequences against the individual under the secondary rules of individual criminal responsibility, governed by international criminal law.

The customary international law rule pertaining to the crime of aggression has not appeared to develop past the Nuremberg Principles. As will be examined in the next chapter, even though the Kampala Amendments now provide a definition of the crime of aggression in the Rome Statute, this definition is only for the purposes of prosecution at the ICC.

2.4.3. Crimes against peace and customary international law

The present scope of the crime of aggression under customary international law is predicated upon the legal definition of crimes against peace according to the Nuremberg Principles. As clarified in the introduction, the change in terminology does not necessarily affect the substantive components of the crime. The state act element of the crime and the elements of the crime pertaining to the conduct of individuals with respect to crimes against peace under customary international law will now be examined.

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[432] Röling (n 173) 456.

A. The state act element of the crime

Under customary international law, the state act element of the crime of aggression is a 'war of aggression' or a 'war in violation of international treaties, agreements or assurances.' Wilmshurst argues that:

> as far as international customary law is concerned, it is only a "war of aggression" which constitutes the crime of aggression in international law. [433]

However, as the definition of Article 6(a) IMT also encompasses a war in violation of international treaties, agreements or assurances, it is only logical that this variant is retained in the crystallisation of the legal construct of the crime into a rule of customary international law. Indeed, the reason why the latter was not considered in the judgment appeared to be for the purposes of procedural convenience, and not because it was irrelevant.[434] Yet, she is not wrong that 'the consequence of this is that there may be a violation by a State of an international law rule against the use of force which does not give rise to individual criminal culpability for the crime of aggression.'[435] Perhaps her position can be clarified by submitting that the threshold for the state act element under customary international law is that the violation of the rule against the use of force must be of sufficient magnitude to amount to a 'war.' This way the second variant of the state act element need not be discarded.

Pursuant to the Nuremberg judgment, the state act element of the crime can be understood as:

- the initiation of the use of force, accompanied by *animus aggressionis*

or

- a violation of the prohibition of the use of force, which is of sufficient magnitude to be considered as war.

How would these two variants of the state act element of the crime apply in the current paradigm of international law? Although international law has shifted away

[433] Elizabeth Wilmshurst, 'Definition of the Crime of Aggression: State Responsibility or Individual Criminal Responsibility' in Mauro Politi and Giuseppe Nesi (eds), *The International Criminal Court and the Crime of Aggression* (Ashgate 2004) 95.
[434] 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4) 186.
[435] Wilmshurst (n 433) 95.

from the use of the word 'war' as terminology to describe the use of force, the substantive elements of a 'war of aggression' or a 'war in violation of international treaties, agreements or assurances' is nevertheless retained under customary international law.[436]

The latter is relatively more straightforward. The international treaties, agreements or assurances referred to in the Nuremberg Trial are reflective of the normative framework that prohibits the use of force. As examined in Chapter I, the core international treaty that currently regulates the use of inter-state force is the UN Charter (Article 2(4)). Thus, this variant of the state act element of the crime can be understood as a 'war' in violation of the Article 2(4) UN Charter and other instruments under international law.[437] It shall be presumed that the intended violation must be of sufficient magnitude that it may be normatively perceived as 'war.'

The former is slightly more complex, as it encompasses the *animus aggressionis.* Not only is this a subjective concept, but it is also a rather natural concept, which *prima facie* is incompatible with a positive approach to the *jus ad bellum*. As discussed in Chapter I, determining the legality of the use of force or the existence of an act of aggression is subject to the methodological interpretation of the existing rules of *jus ad bellum.* The relevance of the *animus aggressionis* will depend on the approach taken with respect to interpreting the legal rules within *jus ad bellum*. If a positive international law approach is taken, it is likely that the *animus aggressionis* will not be considered in the determining process, and the situation will be assessed objectively in accordance with the existing legal framework.

This suggests that the *animus aggressionis* may no longer be necessarily relevant in the light of the present framework of *jus ad bellum.* In my view, there should indeed be caution in accepting that the legality of the use of force is dependent upon its intent and purpose. However, it should not be forgotten that at the time of the events, there was only a normative framework in place that prohibited the use of force. Thus, it is understandable that in the absence of a legal framework, the *animus*

[436] McDougall (n 7) 151.

[437] e.g. GA Resolution 2625 (1970) *The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*; and GA Resolution 3314 (1974), *The Definition of Aggression.*

aggressionis may play a role in determining the legality of the use of force in question.

Be that as it may, it should be noted that considering the *animus aggressionis* is for the purposes of establishing the state act element of the crime to prosecute an individual for crimes against peace, and *not* for determining the existence of an act of aggression committed by the alleged aggressor state for the purposes of invoking consequences under state responsibility. The latter can be done in an objective manner without the need to consider any mental element of the aggressor state.[438]

B. The elements of the crime pertaining to individual conduct

The elements of the crime pertaining to the conduct of the individual are:

- the material elements of 'planning, preparation, initiation or waging' [a war of aggression];
- the mental element of knowledge (and not necessarily intent).

It is likely in a situation of prosecution either at the ICC or domestic courts, the approach of the IMT (and perhaps NMT) will be considered with respect to these elements of the crime pertaning to individual conduct.

There is no explicit component within the definition of the crime that puts forward a scope of perpetrators that can be prosecuted. Nevertheless, from the Nuremberg judgment and the case law of the NMT, a scope of perpetrators may be formulated.[439] Although the definition of the crime within the Kampala Amendments contains a specific leadership element, it can be assumed that the judges would nevertheless take the Nuremberg principles into account when interpreting the leadership element.'[440]

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[438] See Article 2 ARSIWA 2001; See André Nollkaemper, 'Concurrence Between Individual Responsibility and State Responsibility In International Law' (2003) 52 International and Comparative Law Quarterly 615, 633.

[439] McDougall writes that 'obviously state acts of aggression can never be completed by a single individual. In all states, however, it is only a handful of individuals who have the ability to control the State's political and military activities. As such, it is proper that only those same individuals are able to be charged with crimes of aggression. Sophisticated critiques of international criminal law more generally express concern that punishing an individual is wholly inadequate in the face of great tragedy, and that a focus on individuals may unfairly exonerate the collective. […] in such circumstances it seems particularly appropriate that individual leaders be punished for their decisions and actions, rather than any blame being placed on an entire people', McDougall (n 7) 46–47.

[440] SWGCA Report 2007 (December) para.9.

On the national level of prosecution, states which have the crime of aggression in their criminal codes appear to be rather silent on the leadership element.[441] Thus, it can also be assumed that the judges of the national courts would consider the Nuremberg principles when determining whether an individual is in a position to be a perpetrator for the crime of aggressive war.

2.5. Conclusion

Despite its many and varied flaws,[442] it cannot be disputed that the Nuremberg Trial has bestowed a legacy to international law and a platform for individual criminal law to develop and flourish. Out of the sorrow and ashes of war marked the turning point where the Nuremberg Trial signified the promise that mass atrocities and violations of international law committed by individuals are no longer tolerated as they may be brought personally to trial and punished accordingly for their crimes. The phenomenon of individual criminal responsibility was applied to the wars of aggression committed by Germany against twelve nations, resulting in the conviction of the relevant perpetrators for crimes against peace.

This chapter had illustrated how the legal basis of Article 6(a) IMT and the Nuremberg judgment with respect to crimes against peace was rather questionable because at the time of the events, the existing norms under international law had only prohibited – and not criminalised – aggression. States were the only rights-holders with respect to the norms that prohibit aggression. Thus, prosecution and conviction of individuals for crimes against peace at the Nuremberg Trial is indicative of executing sanctions (deprivation of liberty and life) directly against them for wrongful conduct, which was not attributable to them (at the time) under international law.

Be that as it may, the subsequent affirmation of the IMT Charter and the Nuremberg judgment into the "Nuremberg Principles" represent the international community's acceptance, and the gradual crystallisation of individual criminal responsibility and the crime of aggression into customary international law. Thus, at

[441] Reisinger Coracini, 'National Legislation on Individual Responsibility for Conduct Amounting to Aggression' (n 431) 553.

[442] Such criticisms include *inter alia,* the *legal foundation of the IMT Charter and Tribunal*, Kranzbuhler (n 299) 437; Merkhel (n 173) 565; George A Finch, 'The Nuremberg Trial and International Law' (1947) 41 American Journal of International Law 20, 26;*"Tu quoque" argument*, Merkhel (n 173) 570–571; Poltorak (n 299) 446; *Ex post facto law*, Merkhel (n 173) 567; Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law' (n 299).

present there are norms under international law that criminalise aggression, by placing obligations directly on individuals to refrain from proscribed conduct relating to the crime of aggression, and attaching concomitant sanctions for the breach of these obligations.

This chapter also delineated the contours of the crime of aggression under customary international law. This is highly valuable for several reasons. First, this will help place into perspective the obligations that customary international law confers on individuals with respect to the crime of aggression. Second, the relationship between the aggressor state and the perpetrator of the crime may be clarified in the light of the dichotomy between the state act element of the crime and the elements of the crime pertaining to individual conduct. These two points will be examined further in Chapter IV. Third, it can be assessed whether the definition of the crime of aggression in the Kampala Amendments for the purposes of prosecution at the ICC reflects or departs from the definition under customary international law. A direct comparison between the definition of the crime in the IMT Charter and the Kampala Amendments will be conducted in the next chapter.