

NUREMBERG AND THE CRIME AGAINST PEACE

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INTRODUCTION

Article 5 (1) of the Rome Statute of the International Criminal Court (“ICC”) states that the “crime of aggression” is one of the four “crimes within the jurisdiction of the Court.”¹ Article 5 (2) provides, however, that the Court may not exercise that jurisdiction until a “provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.”² It adds that “[s]uch a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”³ Having spent a great deal of time in recent years on the negotiations to make Article 5 operational,⁴ I thought it might be useful, on this occasion for retrospective thoughts, to review Justice Jackson’s Report on the London Conference at which the Nuremberg Charter was finalized⁵ and the Nuremberg Judgment itself to examine their approach to the crime against peace.⁶ Perhaps if one views them through the prism of the current negotiations something useful might emerge. Not surprisingly, I discovered that many of the issues on the table then are very much on the table now.

In particular, in London in 1945 and now, one might characterize the fundamental drafting issue as whether there should be a detailed *mens rea* and *actus reus* for the offense or whether it is enough to leave the judges

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1. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) (“Rome Statute”).

2. *Id.*

3. *Id.*

4. See generally Roger S. Clark, *The Crime of Aggression and the International Criminal Court*, in THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOR OF PROFESSOR IGOR BLISHCHENKO (Jose Doria et al. eds. (forthcoming 2007)). The Special Working Group on the Crime of Aggression expects to finish its work in time for the first Review Conference on the International Criminal Court in 2009. See Rome Statute, *supra* note 1, art. 123.

5. ROBERT H. JACKSON, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS (Dep’t of State 1945) [hereinafter JACKSON REPORT].

6. *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT’L L. 172 (1947) [hereinafter *Nuremberg Judgment*]. For a very helpful foray into this material, see John F. Murphy, *Crimes against Peace at the Nuremberg Trial*, in THE NUREMBERG TRIAL AND INTERNATIONAL LAW 141 (George Ginsburgs & V.N. Kudriavtsev eds., 1990).

with at most some general references to relevant sources they might take into account. Or indeed, whether it is enough to leave them to figure it out with nothing more than minimal language. This general consideration translates into a number of specific issues, such as the following. One of the basic elements of the crime is an internationally wrongful act by a State—how should that act be described? As a “war of aggression?” and, if so, what is that? Aggression is executed by individuals in the name of the State—how is the connection between the State act and a particular actor to be described? What defenses are open to the defendant—only those personal to him (such as mistake), or may he raise the question of the basic legality or illegality of the State’s allegedly aggressive act itself? For example, claiming that the State was acting in self defense? How far should the drafters anticipate and cut off defenses that an accused might otherwise raise? (The London drafters, ultimately, left working out the defenses to the judges; the Nuremberg judges did not enlighten us as much as they might have.)

A significant feature of the current landscape is that the definitions of the other crimes in the Rome Statute, especially war crimes, are much more detailed than was the case at Nuremberg.⁷ Moreover, the Rome Statute, for the first time in an international criminal law treaty, also contains a comprehensive general part⁸ which deals with such issues as principles of complicity, mental elements, mistake and other “grounds for the exclusion of responsibility.”⁹ How should changes in drafting style with respect to genocide, crimes against humanity and war crimes (generated at least in part by a different approach to the implications of the principle of legality) affect the drafting for the crime of aggression?¹⁰

7. War crimes were defined in seven and a half lines in the Nuremberg Charter, Charter Int’l Military Tribunal art. 6(b) [hereinafter Nuremberg Charter]. In the Tokyo Charter, the brevity was stunning, “[C]onventional war crimes: [n]amely, violations of the laws or customs of war;” Charter Int’l Military Tribunal for the Far East art. 5(b). The Rome Statute devotes six pages to war crimes. Rome Statute, *supra* note 1, art. 8. The Elements of Crimes that spell them out in even more detail take up about 25 pages. Elements of Crimes, Int’l Crim. Court (2002).

8. In contrast, Part II of the Nuremberg Charter, comprising articles six through thirteen, is headed “Jurisdiction and General Principles.” Nuremberg Charter, *supra* note 7. In less than two pages it: (1) describes crimes within the jurisdiction of the Tribunal; (2) delineates the responsibility of leaders, organizers and accomplices; (3) denies the defenses of official position and superior orders; (4) deals with declarations that a group or organization is a criminal organization; (5) makes clear that the jurisdiction is concurrent with that of national military or occupation courts that have appropriate competence; (6) permits trial in absentia; and (7) provides for the Tribunal to draw up its rules of procedure. *Id.* No attempt is made to deal with the inclusion or exclusion of other defenses than those mentioned and there is no attempt to deal with mental issues. In short, the “general part” of the Nuremberg Charter was slim indeed.

9. Rome Statute, *supra* note 1, arts. 22–33.

10. Another significant current difference from Nuremberg arises from the reference to the U.N.

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There are always some risks in trying to glean insights from Conference proceedings, as I have learned from the ICC negotiations. Justice Jackson's description of the hazards are illuminating:

Much of these conference minutes will impress the reader as embodying vain repetition. And much of the exposition of rival legal systems is too cryptic and general to be satisfying to the student of comparative law. How much of the obvious difficulty in reaching a real meeting of minds was due to the barrier of language and how much to underlying differences in juristic principles and concepts was not always easy to estimate. But when difference was evident, from whatever source, we insisted with tedious perseverance that it be reconciled as far as possible in the closed conferences and not be glossed over only to flare up again in the public trials.¹¹

Nonetheless, I think the payoff from reading the material critically is well worth risking the hazards!

Article 6 of the Nuremberg Charter¹² provided, in relevant part:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes Against Peace: namely, 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; . . .

“War of aggression” is left completely undefined. So is the question whether all Germans might be potentially liable for committing the crime or only some of them. At numerous points in the London Conference, Justice Jackson tried to achieve a more precise definition of aggression

Charter in Article 5 of the Rome Statute. Does this mean, as some think, that there is no aggression unless an organ of the U.N.—the Security Council, the General Assembly or the International Court of Justice—first says so? Or does the Security Council alone have power here? Is any such decision by a U.N. organ conclusive and not open to further debate in the criminal proceedings? How does that fit within the definition of crime? These questions are for another day. *See generally* Clark, *supra* note 4.

11. JACKSON REPORT, *supra* note 5, at VI.

12. Nuremberg Charter, *supra* note 7, art. 6.

itself, both from the viewpoint of the prosecution's *prima facie* case (which includes what the state does and what the individual actor does) and from that of possible defenses that the accused might raise.¹³ His final effort at being comprehensive was this "suggested text for addition to article 6" in Conference Document L of the London conference:

An aggressor, for the purposes of this article, means that state which is first to commit any of the following actions:

1. Declaration of war upon another State.
2. Invasion by its armed forces, with or without a declaration of war, of the territory of another State.
3. Attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State.

No political, military, economic or other considerations may serve as an excuse or justification for such actions, but exercise of the right of legitimate self-defense, that is to say, resistance to an act of aggression, or action to assist a State which has been subjected to aggression, shall not constitute a war of aggression.¹⁴

13. JACKSON REPORT, *supra* note 5, at 374, 375, 379–89. Neither Jackson nor any of the other participants explained their concept of the structure of a crime. Were there no criminal lawyers in the bunch? I think it is a reasonable inference from Jackson's approach that he saw the structure as a combination of the elements that the prosecution must establish simply to get to first base (what I have called the "prima facie case"). Then there are issues of justification or excuse that the defense might raise, called "grounds for excluding responsibility" in the Rome Statute. Rome Statute, *supra* note 1, art. 31. All the participants in London agreed that it was necessary to cut off the possible defenses that are dealt with and precluded in articles 7 and 8 of the Nuremberg Charter. Nuremberg Charter, *supra* note 7. Jackson also correctly anticipated that the accused would inevitably raise other issues concerning State or individual justification or excuse. He therefore sought to preclude certain possible justifications of state responsibility. JACKSON REPORT, *supra* note 5, at 305–06. He was correct, for example, in expecting that the defense would raise the argument that the German invasion of Norway was necessary to forestall a British move. *Id.* at 306. *See also* Britain's Sir David Maxwell Fyfe, *id.* at 303. Ultimately, in the absence of guidance from the drafters, the Tribunal listened to the argument and then found that the defense failed on the facts. Nuremberg Judgment, *supra* note 6, at 203–07. Nobody in London asked about the necessary *mens rea*. Was knowledge of the facts enough? Knowledge of illegality? Or was some kind of intent required? Nor did anyone delineate the appropriate *actus reus*. The Tribunal, as we shall see, seems to have ducked a precise answer to these questions also.

14. JACKSON REPORT, *supra* note 5, at 375. An earlier U.S. draft, in addition to the three "actions" quoted in the text, included these two:

- (4) Naval blockade of the coasts or ports of another state;
- (5) Provision of support to armed bands formed in its territory which have invaded the territory of another state, or refusal, notwithstanding the request of the invaded state, to take

It will be noticed that the attempt here is to define what a State does in order to be considered an aggressor. In the draft definition of crimes that Document L accompanied, the basic crime by the individual actor was described as “[l]aunching a war of aggression” and the Tribunal had “power and jurisdiction to convict any person who committed [that and other listed crimes] on the part of the European Axis Powers.”¹⁵ “Launching” and “committed” were very general verbs to make the connection between an individual accused and what the State did!¹⁶ How much involvement was required and at what level of the State’s machinery must someone function in order to be classed as having “committed” the “launching” of a war of aggression? Presumably the likes of foot soldiers and janitors in the Ministry of Foreign Affairs are not in the “launching” business, but who between them and Hitler was in this business remained a mystery.

It is surprising that the Soviet Union did not take the bait and support this definition (or perhaps insist on Jackson’s earlier more expansive version of it). The language can be found verbatim in the London Treaty of July 3, 1933, in which the Soviet Union, Afghanistan, Estonia, Latvia, Persia, Poland, Romania and Turkey agreed upon a definition of aggression to amplify the Kellogg-Briand Pact.¹⁷ That treaty also

in its own territory, all the measures in its power to deprive those bands of all assistance or protection.

Id. at 294. Speaking of this earlier draft, Jackson said:

That is a draft from what was used in one treaty to which the Soviet Union was a party. There is another treaty of nonaggression that was the subject of a great deal of consideration, and I call attention to the other treaty, the London nonaggression treaty of July 4, 1933, the language of which is followed closely.

Id. at 302. This original draft has some close parallels with the General Assembly’s definitions. G.A. Res. U.N. Doc. 3314 of 1974. (The Definition of Aggression, which has played a prominent role in the ICC negotiations.) The preference to omit some of the particular instances of the 1933 definition is echoed again in the ICC negotiations. See Clark, *supra* note 4, at nn.80–86 and 94. Time will tell whether the whole of G.A. Res. 3314 of 1974 will follow the text of the 1933 treaty to outer darkness.

15. JACKSON REPORT, *supra* note 5, at 374. In what must have been an attempt to try a range of formulas so that the others would agree to at least some, the draft also included “[i]nvasion, attack or initiation of war against another state in breach of treaties, agreements or assurances, or otherwise in violation of International Law” and “[e]ntering into a common plan or enterprise aimed at subjugation of other nations, which plan or enterprise did involve or was reasonably likely to involve in its execution any of the foregoing acts or a combination of such acts with lawful ones.” *Id.* (The “foregoing acts” included what, in the final version, were labeled war crimes and crimes against humanity.) While Jackson wanted precise language in order to avoid arguments at trial, he seems to have been convinced that at least some of his drafts represented the current state of general international law, regardless of particular treaty provisions.

16. There is an echo of this in one of the current drafts that speaks of an individual “engaging” the State in an act of aggression. Clark, *supra* note 4, at nn. 124–25.

17. Convention for the Definition of Aggression, signed at London, July 3, 1933, text in BENJAMIN B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE*

contained the caveat that Jackson wanted: no political, military, economic or other consideration could serve as an excuse or justification for aggression.¹⁸

However, a draft submitted by the Soviet delegation on the same date as Jackson's final effort at definition took a narrower approach.¹⁹ One of the three crimes within the jurisdiction of the Tribunal, as they stated it, was "[a]ggression against or domination over other nations carried out by the European Axis Powers in violation of treaties, agreements and assurances; . . ."²⁰

The accused would have been connected to this and the other crimes in this way:

Any person who is proved to have in any capacity whatever directed or participated in the preparation for or carrying out of any of the

255 (Oceana Publications, Inc. 1975). See generally GEORGE GINSBURGS, *MOSCOW'S ROAD TO NUREMBERG, THE SOVIET BACKGROUND TO THE TRIAL 15* (Kluwer Law International 1996). Jackson's comment that the "Soviet Union was a party" understates how important the issue had been to Soviet foreign policy in the late 1920s and early 30s. *Id.* at 18–23. It was a Soviet initiative to go one better than Kellogg-Briand, of which the Soviet Union had not been invited as a founding member. Ginsburgs discusses tentative efforts in the Soviet legal literature from 1935 onwards, especially in the writings of Professor A.N. Trainin, a future Soviet representative in London, to conceptualize aggression as a crime subject to individual criminal responsibility. *Id.* The thinking included a remarkable foreshadowing of the "complementarity" approach of the Rome Statute:

The last thing left to decide was where to vest the right to exercise jurisdiction over the designated sample of international crimes. National criminal legislation was expected to continue to play a major role in policing the traffic and, accordingly, national courts would normally get first crack at enforcing the applicable laws. At the same time, the source made clear that national courts would not enjoy a monopoly of this market and that the creation of a suitable international criminal law tribunal was a prime desideratum—to accommodate instances where the custodian state might well prefer to turn the matter over to an international court or the state otherwise competent to stage the trial cannot be trusted to do so in light of demonstrated sympathy for the alleged motives of the accused.

Id. at 22. Unlike western nations, the Soviet Union long made it a crime under domestic law to commit aggression. The current version is in Art. 353 of the Criminal Code of the Russian Federation, translation in *CRIMINAL CODE OF THE RUSSIAN FEDERATION* (William Butler trans., 2004). I am not aware of any prosecutions.

18. Convention for the Definition of Aggression, *supra* note 17, art. III.

19. JACKSON REPORT, *supra* note 5, at 373.

20. *Id.* The reference to the "European Axis Powers" reflects Jackson's disagreement with the Soviet Delegation. He wanted a *definition* that applied to everyone and would thus serve as precedent along with a *jurisdictional* provision in the Charter that gave this particular Tribunal competence only over actions done on behalf of the Axis Powers. *Id.* at VII–VIII, 299 (definition) and text accompanying *supra* note 15 (jurisdiction). A constant Soviet theme was that the determination of German criminality had already been made at high level Allied meetings. *Id.* at 298, 303. The only issue left was how to punish the guilty. "The fact that the Nazi leaders are criminals has already been established. The task of the Tribunal is only to determine the measure of guilt of each particular person and mete out the necessary punishment—the sentences." *Id.* at 303. There are some echoes here of those who want to regard a determination of the Security Council, or other U.N. organ, as a "given" in the subsequent ICC trial, so that the only issues are which officials and what penalty.

above-mentioned acts shall be personally answerable therefor and for each and every violation of international law, of the laws of humanity and of the dictates of the public conscience committed in the course of carrying out the said acts, designs or attempts or any of them by the forces and authorities whether armed, civilian or otherwise in the service of any of the European Axis Powers.²¹

The references in the Soviet draft to “the European Axis Powers” and to “violation of treaties, agreements and assurances” reflected a dance that had gone on between Justice Jackson and the Soviet and French delegations throughout the time in London. The French were reluctant to accept the proposition that aggression was a crime giving rise to individual responsibility.²² The Soviets were amenable to individual responsibility, but perhaps ultimately reluctant to ascribe it to general international law, as Jackson wanted. One might have thought that obvious common ground was to make a specific reference to the Kellogg-Briand Pact²³ (to which all

21. JACKSON REPORT, *supra* note 5, at 373. This draft suggests that the Soviet Union was not totally opposed to mentioning international law and, in this instance, the rather general “Martens clause” of the Fourth Hague Convention.

22. *Id.* at 295. Professor Gros of the French Delegation said:

We do not want criticism in later years of punishing something that was not actually criminal, such as launching a war of aggression. The judges would be in a very difficult position if we insist on that fact. The subject was often up for discussion in the League of Nations. It is said very often that a war of aggression is an international crime, as a consequence of which it is the obligation of the aggressor to repair the damages caused by his actions. But there is no criminal sanction. It implies only an obligation to repair damage.

Id. In further insult to Jackson, Professor Gros added:

It certainly was the state of the law in 1919 that the acts which brought about a war would not be charged against officers or made the subject of procedure before a tribunal. And the Germans will take for a precedent what is still worse for our object—the report of James Brown Scott and Robert Lansing to show that we have no legal basis to say that launching a war of aggression shows criminal responsibility of the people who launched that war.

Id. at 297. Jackson was forced to respond defensively:

I must say that sentiment in the United States and the better world opinion have greatly changed since Mr. James Brown Scott and Secretary Lansing announced their views as to criminal responsibility for the first World War At least in the United States we have moved far from it with such measures as lend-lease and neutrality. As I have understood Professor Trainin’s book, which I have read carefully in the effort to understand the Soviet views, I gather that his view comes very close to the view which we entertain in the United States.

Id. at 299. Jackson is referring to A. N. TRAININ, HITLERITE RESPONSIBILITY UNDER CRIMINAL LAW (1945).

23. Kellogg-Briand Pact (1928), *available at* <http://www.yale.edu/lawweb/avalon/imt/kbpact.htm>. Indeed, a few days later, Jackson included a reference to that Pact by suggesting “a war in violation of any international treaty, agreement, or assurance, or in particular, of the General Treaty for the Renunciation of War” JACKSON REPORT, *supra* note 5, at 395. This apparently was either unacceptable to others or Jackson changed his mind because it did not appear in the final version of the definition of “Crimes” in the Charter, *supra* note 7. The diplomat’s drafting technique of inserting an

relevant players had become parties before 1939). It was, after all, a “treaty or agreement,” but the Soviet representatives seem to have been thinking more of bilateral relations such as the August 1939 non-aggression pact between Germany and the Soviet Union, rather than multilateral ones. They may have also shared a knee-jerk antipathy to customary law found in contemporary Soviet international law doctrine.²⁴ Nonetheless, I find it surprising that they did not grasp their earlier treaty handiwork and join the Americans in ganging up on the French, as Jackson must have hoped when he made complimentary remarks about Soviet sources.²⁵

Justice Jackson underscored a political imperative of his position on the general illegality of aggressive war and the limitations on justifications for it in these words:

Germany did not attack or invade the United States in violation of any treaty with us. The thing that led us to take sides in this war was that we regarded Germany’s resort to war as illegal from its outset, as an illegitimate attack on the international peace and order. And throughout the efforts to extend aid to the peoples that were under attack, the justification was made by the Secretary of State, by the Secretary of War, Mr. Stimson, by myself as Attorney General, that this war was illegal from the outset and hence we were not doing an

“in particular” allows drafters to be simultaneously specific and open-ended. It makes some criminal lawyers cringe.

Equally unsuccessful was the British draft of July 20, which spoke of “[d]omination over other nations or aggression against them in the manner condemned or foresworn in (*inter alia*) the following Pacts or Declarations” JACKSON REPORT, *supra* note 5, at 312. Presumably the detailed list was to be supplied later. For a recent suggestion to “define” by referring to a list of sources, see Benjamin Ferencz, *Enabling the International Criminal Court to Punish Aggression* (in this volume).

24. In what seems his last effort to retain the reference to international law, Jackson commented that:

I think it would be better to say “initiating a war of aggression or initiation of war in violation of treaties, agreements, or assurances”, and we had added “or otherwise in violation of international law”. Going to war without a declaration is a violation and has been for many years, and we want to get all of these recognized violations in if possible; so we think we should not drop “or otherwise in violation of international law” in order to have available the repeated cases in which these people want to war without declaration, et cetera.

JACKSON REPORT, *supra* note 5, at 387. “International Law” disappeared, without explanation, between a July 30 American Revision and the revision of July 31. Compare *id.* at 393 with 395. Jackson comments in his Preface that “[w]hile the Soviet authorities accept the reality and binding force of international law in general, they do not submit themselves to the general mass of customary law deduced from the practice of western states.” *Id.* at VI. There is something a little self-righteous in referencing “western states” as the makers of the rules. Jackson’s insistence, moreover, on Soviet intransigence does not fit perfectly with the Soviet draft referring in an open-ended way to both international law and the Martens Clause. *Id.* at 373.

25. See *supra* note 22.

illegal thing in extending aid to peoples who were unjustly and unlawfully attacked. . . . No one excuses Germany for launching a war of aggression because she had grievances, for we do not intend entering into a trial of whether she had grievances. If she had real grievances, an attack on the peace of the world was not her remedy. . . . I am not here to confess the error nor to confess that the United States was wrong in regarding this as an illegal war from the beginning and in believing that the great crime of crimes of our century was the launching of a needless war in Europe.²⁶

Jackson was ultimately to get the alternatives of “war of aggression” and “war in violation of international treaties, agreements or assurances” into the Charter, but he lost the reference to international law and the detailed list of ways in which aggression could be carried out.

Leaving out his list and referring in both phrases to a “war” (but not to an “invasion”)²⁷ makes one wonder why some nagging person at the London Conference did not ask what a *war* was. I like to think that I would have been that annoying had I been there. Take the invasions (chronologically) of Austria, Sudetenland and the remainder of Bohemia and Moravia. These all appear to be examples of the second of Jackson’s specific categories (“Invasion by its armed forces, with or without a declaration of war, of the territory of another State.”).²⁸ “Invasion” does not seem to require shooting, and the victims in each of these cases realized that shooting or other self-defense was in vain. But when the prosecution and Nuremberg Tribunal came to examine those situations, they must have found themselves confronted with the ultimate question of whether these could be described as entailing a war. Ultimately, the Tribunal, following the prosecution’s lead, appears to have distinguished between these events, which it characterized as “acts of aggression,” and the invasion of Poland (and others that followed), which was “an

26. JACKSON REPORT, *supra* note 5, at 383–84. Jackson, as Attorney-General, had sounded the same themes in an address written for delivery to the American Bar Association, Havana, Cuba, March 27, 1941, reproduced in 41 AM. J. INT’L L. 349 (1941).

27. Compare Jackson’s reference to both wars and invasions, text accompanying note 14. A cynic might note that some of the Nuremberg Four were legally vulnerable on the invasion front. *See GINSBURGS, supra* note 17, at 128:

Meanwhile, the Kremlin relied on a combination of political and military intimidation to add the Baltic states, Bessarabia and Northern Bukovina, and Carpatho-Ukraine to its domain. The process of occupation and incorporation of those lands into the USSR never assumed war-like proportions and thus managed not to fall within the ambit of the Nuremberg canon.

See also id. (discussing the USSR, Finland and Poland).

28. JACKSON REPORT, *supra* note 5, at 375. *See* text accompanying note 14.

aggressive war.”²⁹ I can find nothing in the London proceedings or in the Judgment that fully explains this distinction. It must, in context, turn on the existence of contesting armies in what might be called “a shooting war”—perhaps reaching a “certain” level. Evidently the drafters of Control Council Law No. 10 realized the point, because their definition of the crime against peace covers not only wars of aggression and wars in contravention of treaties, agreements and assurances, but also “invasions of other countries”³⁰ and, in at least one of the subsequent U.S. prosecutions at Nuremberg, the *Ministries Case*, there was a conviction for the invasions of Austria and Czechoslovakia.³¹

Also important to Justice Jackson throughout the London Conference (and in his trial strategy at Nuremberg) was the reference to conspiracy.³² Interestingly, conspiracy does not appear in any of the proposals currently on the table in the ICC negotiations.

The word “conspiracy” appears ultimately in paragraph (b), in the phrase “or participation in a common plan or conspiracy for the

29. For example, observe the difference in language of these two passages. “By March 1939 the plan to annex Austria and Czechoslovakia, which had been discussed by Hitler at the meeting of 5 November 1937, had been accomplished. The time had now come for the German leaders to consider further acts of aggression, made more possible of attainment because of that accomplishment.” *Nuremberg Judgment*, *supra* note 5, at 197. “The Tribunal is fully satisfied by the evidence that the war initiated by Germany against Poland on 1 September 1939 was most 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.” *Id.* at 203.

30. Some of those participating in the current ICC negotiations continue to insist (based on the Nuremberg Charter) that only “wars of aggression” are criminal. However, they do not offer any clear definition of war. See Clark, *supra* note 4, at nn.78–84. Thus, the matter is of significant contemporary interest.

31. The *Ministries case*, No. 11 in the Series of Trials of German War Criminals by the American Military Tribunal in Nuremberg. Telford Taylor, Chief Prosecutor in the *Ministries case* (U.S. v. Ernst von Weizsaecker), comments that:

The case does establish . . . that the conquests of Austria and Bohemia were “crimes against peace” (Judge Powers dissenting), and this holding lays at rest the notion that a great power can, with legal impunity, mass such large forces to threaten a weaker country that the latter succumbs without the necessity of a “shooting war.”

Telford Taylor, *The Nuremberg War Crimes Trials*, 27 INT’L CONCILIATION 243, 340–41 (1949). The conviction was of Wilhelm Keppeler, State Secretary for Special Assignments from 1938 to 1945. He played an important role in the annexation of Austria. Michael Walzer points out that in the *Ministries Case*, Ernst von Weizsaecker, State Secretary of the German Foreign Ministry from 1938 to 1943, was also “initially convicted [of crimes against peace], but the conviction was reversed upon review.” MICHAEL WALZER, JUST AND UNJUST WARS 293 (Basic Books 1977) (citing Sanford Levinson, *Responsibility for Crimes of War*, 2 PHIL. & PUB. AFF. 244, 270 (1973)).

32. For excellent discussions of conspiracy and the Nuremberg Charter and Judgment, see Stanislaw Pomorski, *Conspiracy and Criminal Organizations*, in Ginsburgs & Kudriavtsev eds., *supra* note 6, at 213; SHANE DARCY, COLLECTIVE RESPONSIBILITY AND ACCOUNTABILITY UNDER INTERNATIONAL LAW 198–226 (2007).

accomplishment of any of the foregoing,”³³ which seems to state a second version of a crime against peace. It also appears in the last paragraph of article 6,³⁴ a paragraph which must modify each of the paragraphs numbered (a), (b) and (c).

American criminal law contains two versions of conspiracy, what I shall call the “inchoate” version and the “parties” version. The inchoate version (inherited fairly directly from English law)³⁵ contemplates a crime that is complete with the agreement to commit a crime in the future, although the actual object of the agreement (a killing or burglary, say) does not take place, or even reach the attempt stage. In short, inchoate conspiracy doctrine pushes responsibility further back into criminal planning than attempt doctrine permits. The fact that two or more people are logically necessary for a conspiracy is thought to make it especially dangerous.

The parties version of conspiracy (not so readily recognizable in English law) asserts that a conspirator is criminally responsible for crimes committed in furtherance of the conspiracy, even if not specifically anticipated by him. It is a way to capture in the criminal net more of those who contribute to criminal activity than is possible by standard theories such as aiding and abetting. In particular, it ensnares people who make only a minimal contribution and often on a basis closer to negligent rather than intentional or knowing participation.³⁶

I am not at all sure after reading his Report several times that I know which version of conspiracy Jackson was espousing in London. For the

33. Nuremberg Charter, *supra* note 7, art. 6(b).

34. *Id.* art. 6: “[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in the execution of such plan.”

35. English common law also has a doctrine that some things that may not be criminal in themselves when done by a single person, but which are nevertheless immoral or tortious, may be prosecuted as a conspiracy when done by two or more persons. *See Shaw v. Dir. of Pub. Prosecutions*, [1962] A.C. 220 (Eng.). This has found a home in some American federal and state statutes and perhaps in common law. At one point in the London discussions, Sir David Maxwell Fyfe mentioned this doctrine and I read him as trying to suggest to Jackson that this might be the way to turn the “illegality” of a breach of Kellogg-Briand into a “crime” committed by the conspirators. Jackson did not seem to get the point and Maxwell Fyfe did not pursue it. JACKSON REPORT, *supra* note 5, at 296–97.

36. Some variant of the parties version of conspiracy has found its way into Article 25 (3) (d) of the Rome Statute, which speaks of “a group of persons acting with a common purpose.” Rome Statute, *supra* note 1, art. 25 (3)(d). Its relevance to the crime of aggression remains a point of contention. The Rome Statute does not have the inchoate version of conspiracy, even with respect to the crime of genocide, notwithstanding that such a conspiracy doctrine appeared in the Genocide Convention of 1948 on which the relevant provisions of the Rome Statute are based.

most part, it seems to be the conspirator as party.³⁷ At one point, though, the following colloquy occurred between Jackson and the British representative, Sir David Maxwell Fyfe:

SIR DAVID MAXWELL FYFE: Mr. Justice Jackson, just to clarify the discussion, could your point be fairly put this way: that you want the entering into the plan to be made a substantive crime?

MR. JUSTICE JACKSON: Yes. The knowing incitement and planning is as criminal as the execution.³⁸

This appears to be an inchoate conspiracy theory. The French and Soviet delegations had little appreciation for either version of this doctrine, although, in the end, they accepted living with some version of it, and the Tribunal itself interpreted it narrowly.³⁹

I now turn to the Tribunal's decision.

37. This has to be what is going on in the final paragraph of Article 6 of the Nuremberg Charter. Nuremberg Charter, *supra* note 7, art. 6(c). But the language in Article 6 (a) must have been intended to refer to the inchoate theory. *Id.* art. 6(a).

38. JACKSON REPORT, *supra* note 5, at 376. In English and American criminal law, an inciter becomes a party to the completed offense (or attempt). Sometimes incitement itself is defined as an offense. Jackson does not seem to be using "incitement" in either of these ways. Rather, he is talking of conspirators. Of course, in the American version of conspiracy as complicity, the concepts lead to the same result—criminal responsibility for the acts of another. In some jurisdictions, American criminal law permits a cumulative penalty for the conspiracy and the underlying offense. Jackson may have had in mind either stacking penalties by charging an accused with both the inchoate offense of conspiracy and also with the completed offense when it had been executed. He may also have had in mind catching those who conspired to foster aggression but then withdrew from the conspiracy in such a way as not to be liable for the actual aggression. Frankly, the more I read, the more difficulty I have in understanding what his strategy was.

39. Jackson comments:

Another point on which there was a significant difference of viewpoint concerned the principles of conspiracy as developed in Anglo-American law, which are not fully followed nor always well regarded by Continental jurists. Continental law recognizes the criminality of aiding and abetting but not all the aspects of the crime of conspiracy as we know it. But the French and Soviet Delegations agreed to its inclusion as appropriate to the kind of offenses the charter was designed to deal with. However, the language which expressed this agreement seems not to have conveyed to the minds of the judges the intention clearly expressed by the framers of the charter in conference, for, while the legal concept of conspiracy was accepted by the Tribunal, it was given a very limited construction in the judgment.

Id. at vii. On the Tribunal's "limited construction," see *infra* at notes 64–69.

THE GENERAL PART OF THE TRIBUNAL'S DECISION

The structure of the Tribunal's Judgment is worth examining. After a few formal comments, its substance begins with forty or so pages⁴⁰ of discussion on the history of the Nazi regime. This culminates in roughly two pages devoted to violations of treaties. Particular reference is made to the Hague Conventions,⁴¹ the Treaty of Versailles,⁴² numerous Treaties of Mutual Guarantee, Arbitration and Non-Aggression,⁴³ and the Kellogg-Briand Pact.⁴⁴ It is quite clear from the context that the latter Pact is the central feature of the argument. The Tribunal comments that "in the opinion of the Tribunal this Pact was violated by Germany in all the cases of aggressive war charged in the Indictment."⁴⁵ The Judgment then turns to what is headed "The Law of the Charter."⁴⁶ Most of the argument here is devoted to the criminality of aggressive war. After conceding that "[t]he law of the Charter is decisive and binding upon the Tribunal"⁴⁷ it adds:

The Charter is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.⁴⁸

The Judgment then turns to the argument made for the defense on the basis of the principle of legality—*nullum crimen sine lege, nulla poena sine lege*.⁴⁹ It rejects the application of the principle in these words:

In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a

40. *Nuremberg Judgment*, *supra* note 6, at 175–216.

41. *Id.* at 214. Notably provisions dealing with peaceful settlement of disputes and declarations of war. *Id.* at 214–15.

42. *Id.* at 215. Various breaches in connection with re-armament and annexations such as Austria, Bohemia and Moravia and Danzig. *Id.*

43. *Id.* at 215–16. Various treaties were signed with Belgium, France, Great Britain, Italy, Czechoslovakia, Poland, Netherlands, Denmark, Luxembourg and Russia. *Id.*

44. *Id.* at 216.

45. *Id.* at 216. It adds that "[i]t is to be noted that on 26 January 1934 Germany signed a Declaration for the Maintenance of Permanent Peace with Poland, which was explicitly based on the Pact of Paris, and in which the use of force was outlawed for a period of 10 years." *Id.*

46. *Id.*

47. *Id.*

48. *Id.* It adds: "But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the Prosecution and the Defense, and will express its view of the matter." *Id.* at 217.

49. *Id.* at 217.

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 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.⁵⁰

The Tribunal goes on to insist that “[t]his view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned.”⁵¹ Here it refers to the Kellogg-Briand Pact and quotes the first two articles:

Article I. 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 to one another.

Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or whatever origin they may be, which may arise among them, shall never be sought except by pacific means.⁵²

This is the language of state responsibility. The Tribunal makes the dramatic leap to individual criminal responsibility.

In the opinion of the Tribunal, 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

50. *Id.* I could not locate any explicit finding in the Judgment about which defendants “knew” about the treaties and which did not. Is “ought to have known” enough? What does “must” mean here?

51. *Id.*

52. *Id.* at 218.

plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.⁵³

To rationalize this jump, the Tribunal finds it necessary to respond to the argument that “the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars.”⁵⁴ The argument is twofold. In the first place, the Tribunal makes an analogy with the Hague Conventions:

The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offenses against the law of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention. In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure.⁵⁵

53. *Id.* Nuremberg is ultimately about individual criminal responsibility. This is not to deny that there may be state responsibility for the same events. The Rome Statute, *supra* note 1, art. 25 (4) captures this nicely: “No provisions in the Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.” The International Law Commission toyed for some years with the notion that the most egregious of international wrongs committed by states could be characterized as criminal. It finally settled for describing them in terms of preemptory norms and obligations to the international community as a whole. *See generally* George Ginsburgs, *Nuremberg and the Concept of the Criminal State*, in *KONTINUITAT UND NEUBEGINN, STAAT UND RECHT IN EUROPA ZU BEGINN DES 21. JAHRHUNDERTS. FESTSCHRIFT FÜR GEORG BRUNNER* 591(2001); EDWARD M. WISE, ELLEN S. PODGOR & ROGER S. CLARK, *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* 56-8 (2d ed., 2004); *INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC’S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY* (Joseph H.H. Weiler, Antonio Cassese & Marina Spinedi eds., 1989).

54. *Id.*

55. *Id.* at 218–19.

Secondly, the Tribunal turns to a series of drafts and other efforts leading up to Kellogg-Briand which used the words “international crime.”⁵⁶ Most of these, to my taste, could be read as dealing with state responsibility, the gravity of which is attested by the epithet “criminal.”

The Tribunal does have a couple of precedents for individual responsibility that strike home. One is the Treaty of Versailles.⁵⁷ Article 227 of that treaty provided for the creation of a special Tribunal to try the former German Emperor “for a supreme offense against international morality and the sanctity of treaties.”⁵⁸ Article 228 contained a German recognition of the right of the Allied Powers (never exercised) to “bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.”⁵⁹ Then there was the 1942 case of the German saboteurs in the United States,⁶⁰ which contains a lengthy discussion of cases “where individual offenders were charged with offenses against the laws of nations, and particularly the laws of war.”⁶¹

The Tribunal’s rhetoric then reaches a crescendo with the aphorism that “[c]rimes 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.”⁶² A few remarks follow about the inapplicability of defenses such as acting for the state or superior orders. Neither of these defenses relieves a Defendant of responsibility under either the law of the Charter or under customary law.⁶³

The Judgment then turns to “The Law as to Common Plan or Conspiracy.”⁶⁴ It notes that the Charter defines the crime of aggressive war as “planning, preparation, initiation, or waging of a war of aggression, ‘or participation in a Common Plan or Conspiracy for the accomplishment . . . of the foregoing.’”⁶⁵ Underscoring the “or” in the formulation, the Judgment notes that allegations of aggression had been made in two counts:

56. *Id.* at 219.

57. *Id.* at 220.

58. *Id.*

59. *Id.*

60. *Id.* at 220 (discussion of *Ex Parte Quirin*, 317 U.S. 1 (1942)).

61. *Id.* at 220–21.

62. *Id.* at 221.

63. *Id.* While the discussion is brief, the Tribunal is at pains to insist that these two articles reflect the current state of general international law, a debated issue. *Id.*

64. *Id.*

65. *Id.* at 222 (emphasis added). The Judgment here omits the reference in the Charter to a war in violation of treaties, agreements or assurances. *Id.*

Count One charges the Common Plan or Conspiracy. Count Two charges the planning and waging of war. The same evidence has been introduced to support both counts. We shall therefore discuss both Counts together, as they are in substance the same. The defendants have been charged under both Counts, and their guilt under each Count must be determined.⁶⁶

The Prosecution's theory covered a quarter of a century, from the foundation of the Nazi Party in 1919 to the end of the war, and it sought to wrap all of this up into a giant war conspiracy.⁶⁷ The Tribunal was not prepared to go so far and it suggested that "the evidence establishes with certainty the existence of many separate plans rather than a single conspiracy embracing them all."⁶⁸

In the opinion of the Tribunal, 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 the 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.⁶⁹

Beyond that, the general discussion is not illuminating. What else it is possible to glean from the Tribunal's opinion about the elements of the conspiracy and of the crime of aggression itself has to be teased out of the decisions in the case of particular individuals to which I now turn.

66. *Id.* Counts Three and Four were for War Crimes and Crimes against Humanity, respectively. Count One also charged the conspiracy to commit War Crimes and Crimes against Humanity. *Id.* at 223. In a sensible effort to reconcile the references to conspiracy in Article 6 (a) and in the last paragraph of that Article, the Tribunal noted that "the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war." *Id.* The closing words are "designed to establish the responsibility of those participating in a common plan." *Id.* at 224. This is plainly treating the second reference in the Article as one to conspiracy as complicity. I am not sure what the Tribunal means by "they are in substance the same." As we shall see, some defendants were acquitted of Count One but convicted of Count Two, which suggests some difference. The reference in the last sentence quoted above to "each Count" perhaps gets this point across.

67. *Id.*

68. *Id.* at 223.

69. *Id.*

THE JUDGMENT AND PARTICULAR INDIVIDUALS

Of the twenty-two defendants for whom a judgment was delivered, eight were convicted of both Counts One and Two and three of Count Two only.⁷⁰

Among those convicted of both was Göring, who was also convicted on Counts Three and Four.⁷¹ The Judgment does not distinguish clearly the evidence on the two counts. It addresses his involvement with the Nazi Party since 1922, his actions in bringing the Nazis to power and the development of the Gestapo and the Luftwaffe.⁷² It adds:

Göring was one of the five important leaders present at the Hossbach Conference of 5 November 1937, and he attended the other important conferences already discussed in this Judgment. In the Austrian Anschluss he was indeed the central figure, the ringleader. . . . The night before the invasion of Czechoslovakia and the absorption of Bohemia and Moravia, at a conference with Hitler and President Hacha he threatened to bomb Prague if Hacha did not submit. . . .

Göring attended the Reich Chancellery meeting of 23 May 1939 when Hitler told his military leaders “there is, therefore, no question of sparing Poland,” and was present at the Obersalzberg briefing of 22 August 1939. And the evidence shows that he was active in the diplomatic maneuvers which followed. . . .

He commanded the Luftwaffe in the attack on Poland and throughout the aggressive wars which followed.

. . . .

. . . . [T]here can remain no doubt that Göring was 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.⁷³

Hess, likewise convicted on Counts One and Two, had also been with Hitler from the 1920s.⁷⁴ He is described as “an informed and willing

70. *Id.* at 272–331.

71. *Id.* at 275.

72. *Id.* at 223.

73. *Id.* at 272–73.

74. *Id.* at 275.

participant in German aggression against Austria, Czechoslovakia, and Poland.”⁷⁵ In fact, “[u]ntil his flight to England, 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.”⁷⁶

Von Ribbentrop was Ambassador to Britain from 1936 to 1938 and then Minister of Foreign Affairs.⁷⁷ As such, he was deeply involved in the diplomatic activity surrounding the invasions of Austria, Czechoslovakia, Poland, Norway, Denmark, the Low Countries, Greece, Yugoslavia and the Soviet Union.⁷⁸ He was found guilty on all four counts.⁷⁹

Keitel became Chief of the High Command of the Armed Forces early in 1938.⁸⁰ From then on he was closely involved in all relevant events.⁸¹ He, too, was convicted of all four counts.⁸²

Kaltenbrunner, on the other hand, was indicted under Counts One, Three and Four but acquitted on the first Count.⁸³ As an Austrian Nazi, he was “active in the Nazi intrigue against the Schuschnigg Government.”⁸⁴ Nevertheless, there was “no evidence connecting Kaltenbrunner with plans to wage aggressive war on any other front. The Anschluss, although it was an aggressive act, is not charged as an aggressive war, and the evidence against Kaltenbrunner under Count One does not, in the opinion of the Tribunal, show his direct participation in any plan to wage such a war.”⁸⁵

Then, there was Frick:

Before the date of the Austrian aggression Frick was concerned only with domestic administration within the Reich.⁸⁶ The evidence does not show that he participated in any of the conferences at which Hitler outlined his aggressive intentions. Consequently the Tribunal takes the view that Frick was not a member of the common

75. *Id.* at 276.

76. *Id.* at 276–77.

77. *Id.* at 278.

78. *Id.* at 277–80.

79. *Id.* at 280.

80. *Id.*

81. *Id.* at 280–83.

82. *Id.* at 283. *See also id.* at 286–88 (discussing Rosenberg).

83. *Id.* at 283, 286.

84. *Id.* at 283.

85. *Id.* at 284.

86. *Id.*

plan or conspiracy to wage aggressive war as defined in this Judgment.⁸⁷

Six months after the seizure of Austria, however, Frick became General Plenipotentiary for the Administration of the Reich, and was responsible for the Reich Ministries of Justice, Education, Religion and the Office of Spatial Planning.⁸⁸ He was responsible for setting up German administration in Austria and signed the laws incorporating Sudetenland, Memel, Danzig, the eastern territories (West Prussia and Posen) and Eupen, Malmedy and Moresnot.⁸⁹ He was in charge of establishing German administration over these territories and signed the law establishing the Protectorate over Bohemia and Moravia.⁹⁰ He was acquitted of Count One, but convicted on the other three counts.⁹¹ The prosecution had failed to prove that he was part of the wider conspiracy but did succeed on its fallback position that his activities amounted to waging the war.

Streicher, known as “Jew-Baiter Number One,”⁹² was indicted on Counts One and Four.⁹³ He was executed on the basis of Count Four, but acquitted of Count One.⁹⁴

There is no evidence to show that he was [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 when Hitler explained his decisions to his leaders. Although he was a Gauleiter [of Franconia 1925–40] there is no evidence to prove that he had acknowledged [sic.] of those policies. In the opinion of

87. *Id.* at 291–92.

88. *Id.* at 292.

89. *Id.*

90. *Id.*

91. *Id.* 293. *See also id.* at 297 (discussing Funk):

Funk was not one of the leading figures in originating the Nazi plans for aggressive war. His activity in the economic sphere was under the supervision of Göring as Plenipotentiary General of the Four Year Plan. He did, however, participate in the economic preparation for certain of the aggressive wars, notably those against Poland and the Soviet Union, but his guilt can be adequately dealt with under Count Two of the Indictment.

Id. Funk, economic adviser to Hitler from 1931, took office as Minister of Economics and Plenipotentiary General for War Economy in early 1938 and President of the Reichsbank in January 1939. *Id.* at 296. He was convicted under Count Two. *Id.* at 298. His “economic preparation” to effect the wars of aggression counted as “waging”.

92. *Id.* at 294.

93. *Id.* at 293.

94. *Id.* at 296.

the Tribunal, the evidence fails to establish his connection with the conspiracy or common plan to wage aggressive war. . . .⁹⁵

Schacht was an active supporter of the Nazi Party before it ascended to power.⁹⁶ He served as Commissioner of Currency and President of the Reichsbank from 1923 to 1930, was appointed President of the Bank in 1933, Minister of Economics in 1934 and Plenipotentiary for War Economy in May 1935.⁹⁷ “He resigned from these two positions in November 1937, and was appointed Minister without Portfolio. He was reappointed as President of the Bank for one year in 1937 and for a four year term on 9 March 1938, but was dismissed in January 1939.”⁹⁸ He was dismissed as Minister without Portfolio in January 1943.⁹⁹ Indicted only under Counts One and Two, he was acquitted of both.¹⁰⁰ The Tribunal comments:

It is clear that Schacht was a central figure in Germany’s rearmament program, and the steps which he took, particularly in the early days of the Nazi regime, were responsible for Nazi Germany’s rapid rise as a military power. But rearmament of itself is not criminal under the Charter. To be a Crime against Peace under Article 6 of the Charter it must be shown that Schacht carried out his rearmament plan as part of the Nazi plans to wage aggressive wars. . . .¹⁰¹

Schacht was not involved in the planning of any of the specific wars of aggression charged in Count Two. His participation in the occupation of Austria and the Sudetenland (neither of which are charged as aggressive wars) was on such a limited basis that it does not amount to participation in the common plan charged in Count One. He was clearly not one of the inner circle around Hitler which was most closely involved with this common plan. . . . The case against Schacht therefore depends on the inference that Schacht did in fact know of the Nazi aggressive plans.¹⁰²

95. *Id.* at 294.

96. *Id.* at 299.

97. *Id.* at 298–99.

98. *Id.*

99. *Id.*

100. *Id.* at 298, 302.

101. *Id.* at 300.

102. *Id.* at 301.

The Tribunal did not find enough evidence to make that inference.¹⁰³

Dönitz was acquitted of Count One but convicted of Count Two:¹⁰⁴

Although Dönitz built and trained the German U-boat arm, the evidence does not show that he was privy to the conspiracy to wage aggressive wars or that he prepared and initiated such wars. He was a line officer performing strictly tactical duties. He was not present at the important conferences when plans for aggressive wars were announced, and there is no evidence he was informed about the decisions reached there. Dönitz did, however, wage aggressive war within the meaning of that word as used by the Charter. Submarine warfare which began immediately upon the outbreak of war, was fully coordinated with the other branches of the Wehrmacht. It is clear that his U-boats, few in number at the time, were fully prepared to wage war.

. . . The U-boat arm was the principal part of the German fleet and Dönitz was its leader. . . . [T]he real damage to the enemy was done almost exclusively by his submarines as the millions of tons of Allied and neutral shipping sunk will testify.¹⁰⁵

103. *Id.* at 302. Note also the acquittal on Count One of Von Schirach. *Id.* at 311. He was leader of the Nazi Youth movement until 1940, when he became responsible for the administration of Vienna and was deeply involved in the deportation of Jews from there. *Id.* at 309–10. The Tribunal comments that “[d]espite the warlike nature of the activities of the Hitler Jugend, however, it does not appear that Von Schirach was involved in the development of Hitler’s plan for territorial expansion by means of aggressive war, or that he participated in the planning or preparation of any of the wars of aggression.” *Id.* at 310. Note this interesting analysis in convicting him of Crimes against Humanity:

Von Schirach is not charged with the commission of War Crimes in Vienna, only with the commission of Crimes against Humanity. As has already been seen, Austria was occupied pursuant to a common plan of aggression. Its occupation is, therefore, a “crime within the jurisdiction of the Tribunal,” as that term is used in Article 6 (c) of the Charter. As a result, “murder, extermination, enslavement, deportation, and other inhumane acts” and “persecutions on political, racial, or religious grounds” in connection with this occupation constitute a Crime against Humanity under that Article.

Id. Why was that not also “waging” aggressive war? *See also id.* at 318 (discussing Seyss-Inquart, an Austrian attorney). He “participated in the last stages of the Nazi intrigue which preceded the German occupation of Austria, and was made Chancellor of Austria as a result of the German threats of invasion.” *Id.* at 319. For his ruthless subsequent activities in Austria and then in Poland and the Netherlands, he was convicted of Counts Two, Three and Four but acquitted without explanation on Count One. *Id.* at 321. The best explanation I can think of is that he just does not seem to have been close enough to the conspiracy. Did the Tribunal feel comfortable convicting him of Count Two because he added Poland and the Netherlands to the locales of his depredations, whereas Von Schirach’s sphere was “merely” Austria?

104. *Id.* at 306.

105. *Id.* at 302.

The acquittal of Speer on both Counts One and Two (especially Two) is something of a mystery. A close personal confidant of Hitler from 1934 on, he took over as Minister for Armaments and Munition in 1942 and Armaments and War Production after September 2, 1943.¹⁰⁶ He was deeply involved in the slave labor program, for which he was convicted under Counts Three and Four.¹⁰⁷ One might have thought that, given the fundamental role that slave labor played in the Nazi war machine, his involvement there also supported a finding that he “waged” the war of aggression. The Tribunal held, however:

The Tribunal is of opinion that Speer’s activities do not amount to initiating, planning, or preparing wars of aggression, or of conspiring to that end. He became the head of the armament industry well after all of the wars had been commenced and were under way. His activities in charge of German armament production were in aid of the war effort in the same way that other productive enterprises aid in the waging of war; but the Tribunal is not prepared to find that such activities involve engaging in the common plan to wage aggressive war as charged under Count One or waging aggressive war as charged under Count Two.¹⁰⁸

Can one glean some general propositions from this?

CONCLUSION

Regarding conspiracy, while it is not entirely distinct from the “waging” theory, it was found mainly for those who were part of the “plan” from early on, who attended the relevant meetings in the 1930s and who planned the takeover of Austria, Bohemia and Moravia, all the while harboring the concept of further aggressions to come. They were high officials, but being a high official was not, in itself, enough. Some input on policy was needed. Nor, although this is less clear, was mere knowledge enough. Some kind of purpose appears to have been necessary. The Judgment is frankly, totally unsatisfactory as a piece of criminal law on this front. From Poland onward, though, most of these people also became “wagers.”

106. *Id.* at 321.

107. *Id.* at 323–24.

108. *Id.* at 321.

As to “waging,” being a high official again seemed necessary but so did some significant participation.¹⁰⁹ I cannot quite put my finger on it, and it fits awkwardly with criminal theory,¹¹⁰ but some kind of “guilty” mind was again required. A person just doing his job, even if it contributed to the war economy and to war-like activities, was not one of the criminals unless his contribution was very significant. It is all very rough and ready, both in the general explanations and in applying the Charter to the individuals.

The ultimate challenge that Nuremberg leaves us with in respect of the crime against peace is whether twenty-first century drafters can do better than those in London sixty-one years ago. It is still a daunting task.

109. These thoughts are captured in the current ICC drafts by speaking of one who “being in a position effectively to exercise control over or direct the political or military action of a State . . . orders or participates actively in the planning, preparation, initiation or execution of an act of aggression” In a recent study, Kevin Jon Heller makes the point that in the subsequent American trials at Nuremberg the key test for individual responsibility was whether the accused was in a position to shape or influence the political or military action of a state. Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 *EUROP. J. INT’L L.* (forthcoming 2007). In indicting Gustav Krupp, the IMT prosecutors wished to assert that some industrialists could be so close to the machinery of government that they could be conspirators or wagers of war. Krupp was found not fit to be tried. While in subsequent trials by the US and France no one seems to have been ultimately convicted on this theory, the relevant tribunals accepted that it might be possible. See Clark, *supra* note 4, at 71–72.

110. The drafters of the Rome Statute avoided the term “specific intent,” which has shifting meanings in most systems that use it, but something like that must have been what the Tribunal had in mind.