INTRODUCTION

Although the International Criminal Court has jurisdiction over the crime of aggression, its jurisdiction is contingent upon the Assembly of States Parties adopting a definition of the crime. To that end, the Assembly established a Special Working Group on the Crime of Aggression (SWG) in 1998 that is responsible for “prepar[ing] proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime.” The SWG has met regularly since its inception, most recently in June 2006 at an informal intersessional meeting held in Princeton, New Jersey.

The SWG’s negotiations have often been quite contentious, particularly concerning the definition of an “act of aggression.” It has always agreed, however, that aggression is a “leadership” crime that can only be committed by individuals in a position to “exercise control over or
to direct the political or military action of a State.” A leadership clause based on the “control or direct” requirement was included in the 1998 Draft Statute for an International Criminal Court, in the Coordinator’s 1999 Consolidated Text of Proposals on the Crime of Aggression and July 2002 Discussion Paper, and in the SWG’s 2005 Report. It is also present in both proposals currently being considered by the SWG, as illustrated by the text of Proposal B:

For the purpose of the present Statute, “crime of aggression” means
[directing] [organizing and/or directing]
[engaging a State/the armed forces or other organs of a State in]
an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations, when being in a position effectively to exercise control over or to direct the political or military action of a State.

No delegation has ever questioned the leadership requirement itself, which dates back to Justice Jackson’s opening argument at Nuremberg. There have been suggestions, however, that limiting the

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6 See, e.g., Hans-Peter Kaul, The Crime of Aggression: Definitional Options for the Way Forward, in MAURO POLITI & GIUSEPPE NESI, THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 46 (2004) (“[T]here seems to be agreement that aggression is, by definition, a leadership crime. This is currently reflected by the formula “a person who is in a position to exercise control or capable of directing political/military action in his State against another State.” Here one gets the impression that this formula seems to be by and large uncontroversial.”).

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

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

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


11 2006 Report, supra note 4, annex I. Proposal A contains the same leadership clause. See id.

12 See Opening Statement at Nuremberg by Robert H. Jackson, Chief Prosecutor for the United States, in United States v. Göring, 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 105 (1946) (stating that the
category of “leader” to individuals who can control or direct a State’s political or military action might unnecessarily restrict the scope of the crime. In July 2002, for example, Colombia submitted a proposed leadership clause that would have extended liability for aggression to those “in a position to contribute to or effectively cooperate in shaping in a fundamental manner political or military action by a State.” Similarly, at the 2006 intersessional meeting, a delegate suggested that “shape or influence,” and not “control or direct,” was the appropriate leadership standard.

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

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

The IMT and NMT’s jurisprudence, however, tells a different story. As this essay demonstrates, the IMT and NMT not only assumed that the crime of aggression could be committed by two categories of individuals who could never satisfy the “control or direct” requirement –

Prosecution had “no purpose to incriminate the whole German people,” and intended to reach only “the planners and designers, the inciters and the leaders, without whose evil architecture the world would not have been for so long scourged with the violence and lawlessness… of this terrible war.”).

13 Proposal Submitted by the Delegation of Colombia, PCNICC/2002/WGCA/DP.3 (July 1, 2002).

14 See COALITION FOR THE INTERNATIONAL CRIMINAL COURT, REPORT OF THE CICC TEAM ON THE CRIME OF AGGRESSION 30-31 (2005) [hereinafter “CICC Report”]; see also 2006 Report, supra note 4, at para. 88 (noting that “the view was expressed that the leadership clause should refer to the ability to influence policy”) (emphasis added).

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

**THE PRECEDENT**

1. **International Military Tribunal**

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

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

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

Although no businessman was ever tried by the IMT, the Tribunal’s acquittal of the two defendants who were most responsible for

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17 See Secretariat’s Historical Review of Developments Relating to Aggression, PCNICC/2002/WGCA/L.1, at 15 [hereinafter “Historical Review”].
18 See id. at 16.
Germany’s rearmament – Hjalmar Schacht and Albert Speer – figured prominently in the *Industrialist* cases, in which the NMT specifically held that private economic actors could commit the crime of aggression. Schacht and Speer’s acquittals, therefore, are worth briefly examining.

**a. Schacht**

Hjalmar Schacht was President of the Reichsbank from 1933-39, Minister of Economics from 1934-37, and Plenipotentiary General for War Economy from 1935-37. Schacht was “a central figure in Germany’s rearmament programme”\(^{21}\) who used his position at the Reichsbank to finance weapons production and his authority as Minister and Plenipotentiary General to smooth Germany’s transition to a war economy.\(^{22}\) As early as 1936, however, he began to lose authority over the rearmament programme to Herman Goering, and by 1939 he held no important governmental position. Indeed, Schacht was later arrested by the Gestapo and sent to a concentration camp, where he remained until the end of the war.\(^{23}\)

Schacht was charged and acquitted on both Count 1 and Count 2.\(^ {24}\) The Tribunal acknowledged that “the steps he took, particularly in the early days of the Nazi regime, were responsible for Nazi Germany’s rapid rise as a military power.”\(^ {25}\) It held, however, that his rearmament efforts were only criminal if he had taken part in the Nazis’ common plan to wage aggressive war or had known about that plan.\(^ {26}\) Schacht was acquitted because the Prosecution failed to prove either point:

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

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\(^{20}\) Gustav Krupp, the head of the Krupp manufacturing conglomerate, was initially indicted on both Count 1 and Count 2, but the charges were later dismissed because of his ill health. *See* Ruling of the Tribunal on 15 November 1945 in the Matter of the Application of Counsel for Postponement of the Proceedings Against this Defendant, 1 NAZI CONSPIRACY AND AGGRESSION 91, 92 (1946).

\(^{21}\) IMT Judgment, *supra* note 19, at 308-09.

\(^{22}\) *See* Historical Review, *supra* note 17, at 38.

\(^{23}\) *Id.* at 39.

\(^{24}\) *Id.* at 38.

\(^{25}\) IMT Judgment, *supra* note 19, at 308-09.

\(^{26}\) *Id.* at 309.
inference has not been established beyond a reasonable doubt.\(^\text{27}\)

b. Speer

Best known as the Third Reich’s chief architect, Albert Speer was a member of the Reichstag from 1941-45 and became Reich Minister for Armaments and a member of the Central Planning Board in 1942.\(^\text{28}\) Like Schacht, he was charged and acquitted on both Count 1 and Count 2.\(^\text{29}\) The Tribunal acquitted Speer on Count 1 because he became head of Germany’s armaments industry long after the Nazis’ conspiracy to commit crimes against peace had been formulated, and thus could not have been part of the conspiracy.\(^\text{30}\) And it acquitted him on Count 2 – with no additional explanation – because it did not believe that his efforts to rearm Germany qualified as “waging” aggressive war: “[h]is activities in charge of German Armament Production were in aid of the war effort in the same way that other productive enterprises aid in the waging of war.”\(^\text{31}\)

2. Nuremberg Military Tribunal

The IMT, in short, never questioned the idea that non-governmental actors could commit the crime of aggression. On the contrary, it assumed that anyone who either participated in the Nazi conspiracy to commit aggression or knew about the conspiracy and intentionally furthered it was guilty of the crime. The only qualification to that general rule concerned “waging” aggressive war, where the Tribunal implied – anticipating the NMT’s Industrialist cases\(^\text{32}\) – that rearmament efforts could not be considered criminal if they were initiated after the Nazis’ aggressive wars had already begun.

Two months after the IMT defendants were sentenced, the Allied Powers enacted Control Council Law No. 10 (Law No. 10), which authorized each country to establish military tribunals within their respective zones of occupation “for the prosecution of war criminals and other similar offenders, other than those dealt with” by the IMT.\(^\text{33}\) Codifying the underlying principles of the IMT Judgment, Law No. 10

\(^{27}\) Id. at 309-10.
\(^{28}\) See Historical Review, supra note 17, at 41.
\(^{29}\) See IMT Judgment, supra note 19, at 331.
\(^{30}\) Id.
\(^{31}\) Id.
\(^{32}\) See text accompanying note 57, infra.
\(^{33}\) Allied Control Council Law No. 10, 20 December 1945, Preamble, 15 TRIALS OF WAR CRIMINALS BEFORE THE NUERMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1951) [hereinafter “Law No. 10”].
specifically provided that both private economic actors and third-State accomplices could be convicted of crimes against peace:

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

The NMT, established by the United States in accordance with Law No. 10, conducted 12 trials between 1946 and 1949, four of which involved crimes against peace. Because of the NMT’s broad jurisdiction, the Tribunal not only had to interpret the scope of Paragraph 2(f), it also had to adopt a specific leadership standard. Two of the Industrialist cases, Farben and Krupp, addressed the first question, holding that private economic actors could indeed be convicted of aggression. Two later cases, High Command and Ministries, addressed the second question, adopting the “shape or influence” requirement.

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34 Id., art. II, para. 2(f). Although (a) through (f) are disjunctive in the text, implying that holding a high position is sufficient for guilt, Judge Herbert noted in his Concurrence in Farben that “[n]o such literal interpretation could be permitted. Paragraph 2(f) merely requires that the fact that a person held such a high position to be taken into consideration with all of the other evidence in determining the extent of individual knowledge and participation in crimes against peace.” See Opinion and Judgment of the United States Military Tribunal VI, 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1299 (1952) (Herbert Concurrence) [hereinafter “Farben Judgment”].

35 See Historical Review, supra note 17, at 44.

36 Farben Judgment, supra note 34, at 1204.


38 United States v. von Leeb et al., Military Tribunal XII, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1950) [hereinafter “High Command Judgment”].

a. Farben

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

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

Some reasonable standard must… be found by which to measure the degree of participation necessary to constitute a crime against peace in the waging of aggressive war. The IMT fixed that standard of participation high among those who lead their country into war.

The defendants now before us were neither high public officials in the civil Government nor high military officers. Their participation was that of followers and not leaders. If we lower the standard of participation to include them, it is difficult to find a logical place to draw the line between the guilty and the innocent among the great mass of German people.

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

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40 Farben Judgment, supra note 34, at 1216 (Herbert Concurrence).
41 See id. at 1204.
42 Id. at 1126.
43 Id. at 1124.
44 Id. (emphasis added). The Tribunal did not specify what level of authority made a defendant “responsible” for formulating and executing Nazi policy. It implied, though – following the IMT, and perhaps anticipating High Command’s adoption of the “shape or influence” standard – that any defendant who was important enough to take part in the
defendants had not actually participated in the formulation and execution of Nazi policy. 45

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

If the defendants, or any of them, are to be held guilty under either count one or five or both on the ground that they participated in the planning, preparation, and initiation of wars of aggression or invasions, it must be shown that they were parties to the plan or conspiracy, or, knowing of the plan, furthered its purpose and objective by participating in the preparation for aggressive war. 46

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

The evidence falls far short of establishing beyond a reasonable doubt that their endeavours and activities were undertaken and carried out with the knowledge that they were thereby preparing Germany for participation in an aggressive war or wars that had already been planned either generally or specifically by Adolf Hitler and his immediate circle of Nazi civil and military fanatics. 47

relevant discussions possessed sufficient authority. See id. at 1126-27. (“Strive as we may, we are unable to find, once we have passed below those who have led a country into a war of aggression, a rational mark dividing the guilty from the innocent…. [H]ere let it be said that the mark has already been set by [the IMT]. It was set below the planners and leaders… and above those whose participation was less and whose activity took the form of neither planning nor guiding the nation in its aggressive ambitions.”) (emphasis added).

45 See id. at 1123.

46 See id. at 1108. It is also worth noting that Judge Herbert believed the IMT had itself approved such convictions. See id. at 1304 (noting that, according to the Judgment of the IMT, “rearmament of itself is not a crime unless carried out as part of a plan to wage aggressive war”).

47 Id. Judge Herbert’s Concurrence reinforces the conclusion that the defendants were acquitted because of lack of knowledge, not lack of influence. After noting that “[t]he issues of fact are truly so close as to cause genuine concern as to whether or not justice has actually been done because of the enormous and indispensable role these defendants were shown to have played in the building of the war machine which made Hitler’s aggressions possible,” he concluded that the acquittals were nevertheless
Despite acquitting the Farben defendants, then, the Tribunal assumed that in the right circumstances industrialists could be convicted of any form of participation in aggression. Indeed, the Tribunal believed that the opposite conclusion was foreclosed by the plain language of Law No. 10, which specifically permitted the prosecution of individuals who held “high position in the financial, industrial, or economic life” of Germany or one of its allies. As Judge Herbert noted in his Concurrence, Paragraph 2(f) “served to refute the contention that private businessmen or industrialists are excluded from the possibility of complicity in ‘crimes against peace’ as a matter of law.”

b. **Krupp**

In *Krupp*, 12 high-level officials of the Krupp firm were charged with committing crimes against peace and participating in a common plan or conspiracy to commit crimes against peace. Krupp was the principal German manufacturer of artillery, armor, tanks, and U-boats during WWII, making it “one of the most valuable single contributors to the German war effort.” Despite this, the NMT directed a verdict of acquittal for the defendants at the close of the Prosecution’s case.

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

The defendants were private citizens and noncombatants… None of them had any voice in the policies that led their nation into aggressive war; nor were any of them privies to

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48 Law No. 10, *supra* note 33, art. II, para. 2(f).
49 *Farben* Judgment, *supra* note 34, at 1299-1300 (Herbert Concurrence).
50 *Krupp* Order, *supra* note 37, at 391.
51 *Id*. at 404 (Anderson Concurrence).
52 *Id*. at 400.
53 *Id*. at 396; *see also id*. at 435 (Anderson Concurrence) (“The offense of planning, preparation, and initiation of aggressive wars is, in practical effect, the same as the conspiracy. Here the determinative question is whether with the requisite guilty knowledge the evidence was sufficient to show that the defendants were guilty of participating in the planning, preparation, and initiation of the particular wars charged in the indictment.”).
that policy. None had any control over the conduct of the war or over any of the armed forces; nor were any of them parties to the plans pursuant to which the wars were waged and so far as appears, none of them had any knowledge of such plans.\(^54\)

As the quote indicates, the Tribunal assumed that industrialists could be convicted of aggression. The defendants were acquitted because of their lack of knowledge, \emph{not} because their status as private economic actors excluded them as a matter of law from the crime. “We do not hold,” the Tribunal emphasized, “that industrialists, as such, could not under any circumstances be found guilty upon such charges.”\(^55\)

Indeed, in one important respect, the \textit{Krupp} Tribunal went beyond \textit{Farben}. As we have seen, \textit{Farben} implied that industrialists could be convicted of waging aggressive war only if they were also involved at the policy level in planning, preparing, or initiating the war; in the absence of pre-war involvement, arms production simply aided the war effort “in the same way that other productive enterprises aid in the waging of war.”\(^56\) The \textit{Krupp} Tribunal was less generous: although it agreed with \textit{Farben} that producing arms after war was initiated did not qualify as waging aggressive war, it held that pre-war rearmament qualified as waging as long as the industrialist knew that the arms would be used for aggressive purposes; actual participation in planning, preparing, or initiating the war of aggression was not required.\(^57\)

c. \textit{High Command}

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

\(^{54}\) \textit{Id.} at 488 (Anderson Concurrence).

\(^{55}\) \textit{Id.} at 393.

\(^{56}\) \textit{Farben} Judgment, supra note 34, at 1126-27, quoting IMT Judgment, supra note 19, at 331.

\(^{57}\) \textit{See}, e.g., \textit{Krupp} Order, supra note 37, at 450 (noting, regarding the waging of aggressive war, that “only those responsible for a policy leading to initiation and waging of aggressive war \textit{and those privy to such a policy}… are criminally liable”) (emphasis added).
The *High Command* case, in which fourteen high-ranking officers in the German military were acquitted of crimes against peace and conspiring to commit crimes against peace,\(^{58}\) radically transformed that equation. For the first time, the NMT held that the crime of aggression could only be committed by individuals at the policy level:

When men make a policy that is criminal under international law, they are criminally responsible for so doing. This is the logical and inescapable conclusion. The acts of commanders and staff officers below the policy level, in planning campaigns, preparing means for carrying them out, moving against a country on orders and fighting a war after it has been instituted, do not constitute the planning, preparation, initiation and waging of war or the initiation of invasion that international law denounces as criminal.\(^{59}\)

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

> It is not a person’s rank or status, but *his power to shape or influence the policy* of his State, which is the relevant issue for determining his criminality under the charge of crimes against peace.\(^{60}\)

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

1. **Knowledge.** “There first must be actual knowledge that an aggressive war is intended and that if launched it will be an aggressive war.”\(^{61}\)

2. **Ability to shape or influence policy.** “But mere knowledge is not sufficient to make participation even by high-ranking military officers

\(^{58}\) See Historical Review, *supra* note 17, at 50-51.

\(^{59}\) *High Command* Judgment, *supra* note 38, at 490-91.

\(^{60}\) *Id.* at 489. The Tribunal also noted that “[i]nternational law condemns those who, due to their actual power to shape and influence the policy of their nation, prepare for, or lead their country into or in an aggressive war.” *Id.* (emphasis added).

\(^{61}\) *Id.* at 488.
in the war criminal. It requires in addition that the possessor of such knowledge, after he acquires it, shall be in a position to shape or influence the policy that brings about its initiation or its continuance after initiation, either by furthering, or by hindering or preventing it.\(^{62}\)

3. **Action in furtherance of the policy.** “If he then does the former, he becomes criminally responsible; if he does the latter to the extent of his ability, then his action shows the lack of criminal intent with respect to such policy.”\(^{63}\)

The Tribunal then applied that three-part test to the defendants, concluding that their inability to shape or influence Nazi policy required their acquittal:

Regardless of whether they had at any time had or had not [sic] actual knowledge of, or were involved in, concrete plans and preparations for aggressive wars or invasions, it was established by the evidence that there were not in a position which enabled them to exercise any influence on such a policy. No matter what their rank or status, it was clear from the evidence that they had been outside the policy-making circle close to Hitler and had no power to shape or influence the policy of the German State.\(^{64}\)

d. **Ministries**

The NMT also adopted the “shape or influence” requirement in the Ministries case, in which 21 high-ranking officials in the Nazi government and Nazi Party were charged with various crimes against peace.\(^{65}\) As the Secretariat notes in its historical review of the crime, the Tribunal convicted Paul Koerner, Goering’s Deputy and Plenipotentiary for the Four Year Plan, of planning and preparing wars of aggression because he knowingly used his ability to shape and influence Nazi policy to further the illegal invasions of Czechoslovakia, Poland, and Russia:

The Tribunal also found that the evidence did not support Koerner’s assertion that he had no real authority or discretionary power in his high positions. The Tribunal concluded that the evidence established “the wide scope of

\(^{62}\) Id. (emphasis added).
\(^{63}\) Id.
\(^{64}\) Id.
\(^{65}\) See Historical Review, supra note 17, at 56.
his authority and discretion in the positions he held, and which enabled him to shape policy and influence plans and preparations of aggression.\textsuperscript{66}

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

He was not a mere bystander, but acted affirmatively, and himself conducted the diplomatic negotiations both with the victim and the interested powers, doing this with full knowledge of the facts. Silent disapproval is not a defence to action. While we appreciate the fact that von Weizsäcker did not originate this invasion, and that his part was not a controlling one, we find that it was real and a necessary implementation of the programme.\textsuperscript{67}

4. International Military Tribunal for the Far East

Even the IMTFE, which was established by a Special Proclamation of the Supreme Allied Commander “to try and punish Far Eastern war

\textsuperscript{66} Id. at 80, quoting Ministries Judgment, supra note 39, at 425 (emphasis added). In his Concurrence, Judge Powers adopted a three-part test for crimes against peace that was equivalent to the one in High Command:

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

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

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

Ministries Judgment, supra note 39, at ___ (Powers Concurrence) (emphasis added).

\textsuperscript{67} Id. at 354 (emphasis added). The Tribunal later reversed von Weizsäcker’s conviction on the crime against peace count, but “nonetheless upheld the general principles that led to” it. Historical Review, supra note 17, at 68.
adopted the “shape or influence” standard. Although it was clear that all of the defendants charged with crimes against peace were at the policy level at some point during the war, the Tribunal had to determine the precise date that General Kenryo Sato, a member of the Military Affairs Bureau, qualified as a policy-maker. The Tribunal applied the “shape or influence” test, concluding that Sato reached the policy level in 1941, when he became Chief of the Bureau’s Military Affairs Section:

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

The Tribunal had little trouble finding that Sato knew of Japan’s aggressive plans by 1938. It thus convicted him of conspiring to commit wars of aggression and of waging aggressive wars against China, the U.S., the U.K., and the Netherlands.

**IMPLICATIONS OF REJECTING THE “SHAPE OR INFLUENCE” STANDARD**

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

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

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70 See Historical Review, supra note 17, at 110.
71 See, e.g., 2005 Annex, supra note 10, para. 29.
however, adopting the “control or direct” requirement also entails rejecting the principle – central to both the IMT and NMT – that non-governmental actors can commit the crime of aggression, because neither private economic actors nor third-State accomplices could ever be in a position to control or direct a State’s political or military action.

1. Private Economic Actors

The SWG’s current proposals adopt what is known as the “differentiated” approach to the crime of aggression, wherein “the definition of the crime would be focused on the conduct of the principal perpetrator, and other forms of participation would be addressed by article 25, paragraph 3, of the [Rome] Statute.”\(^72\) In keeping with that approach, Proposal B, quoted above,\(^73\) defines the perpetrator’s conduct as “[directing] [organizing and/or directing]” or “[engaging a State/the armed forces or other organs of a State in] an act of aggression,” conduct verbs that focus specifically on the acts of the principal perpetrator(s).\(^74\) Similarly, Proposal A defines that conduct as “[leads] [directs] [organizes and/or directs] [engages in] the planning, preparation, initiation or execution of an act of aggression.”\(^75\) The proposal that is ultimately adopted would then be supplemented by adding the following paragraph to Article 25 of the Rome Statute, which governs the liability of secondary perpetrators:

In respect of the crime of aggression, paragraph 3, subparagraphs (a) to (d), apply only to persons who are in a position effectively to exercise control over or to direct the political or military action of a State.\(^76\)

Proposed paragraph 3(d) would make clear that individuals can be convicted of aggression for soliciting, inciting, aiding and abetting, or participating in a joint criminal enterprise to commit an aggressive act.\(^77\) As the leadership clause indicates, however, secondary liability would be limited to individuals who are themselves “in a position effectively to exercise control over or to direct the political or military action of a State.” Individuals with less authority would be excluded from the crime as a

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72 2006 Report, supra note 4, para. 84.
73 See text accompanying note 11, supra.
74 2006 Report, supra note 4, Appendix I.
75 Id.
76 Id.
77 See Rome Statute, supra note 2, art. 25.
A few delegations have expressed concern that requiring secondary perpetrators to satisfy the “control or direct” requirement could exclude private economic actors from the crime of aggression. In June 2002, for example, Samoa suggested mentioning in the Elements that the perpetrator “need not formally be a member of the Government or the military,” in order to make clear that “it may be possible to convict non-governmental actors for a crime against peace” — a proposal with which Cuba, Venezuela, and Russia agreed. Similarly, Cuba introduced a proposal in 2003 that would have extended the definition of leader to include all persons “in the position of effectively controlling or directing the political, economic, or military actions of a State.”

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

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

79 See ELSA REPORT, supra note 5, at 75.

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

81 See, e.g., Antonio Yanez-Barnuevo, The Exercise of the International Criminal Court’s Jurisdiction over the Crime of Aggression: Short Term and Long Term Prospects, in POLITI & NESI, supra note 6, at 111 (“At the last session of the PrepCom there was unanimity… in considering aggression as a ‘leadership crime’ involving only those who, because of their political or military leadership of a State, can and do take decisions directly relevant to the commission of an act of aggression by the State.”). But see Roger S. Clark, The Crime of Aggression and the International Criminal Court, in DORIA ET AL., THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT 32 (2006) (“One who comes along later (an industrialist or general for example) and supplies the know-how for an ongoing enterprise may come within the ambit of the article.”).

82 Mauro Politi, The Debate Within the Preparatory Commission for the International Criminal Court, in POLITI & NESI, supra note 6, at 46.

83 Danner, supra note 15, at 19. A French military tribunal established pursuant to Law No. 10 convicted Hermann Roechling, the head of a large steel conglomerate and president of the Reich Association Iron, of crimes against peace, concluding that his efforts to increase the Reich’s iron and steel production constituted waging aggressive war. The Supreme Military Government Court for the French Occupation Zone later reversed his conviction, holding that he had not rearmed Germany with the “intention and
The SWG, however, appears to disagree. Consider the following account of the debate over “shape or influence” at the 2006 intersessional:

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

Unfortunately, the SWG’s position is almost certainly incorrect. The Compact Oxford English Dictionary defines “control” as “to have command of,” and “direct” as “to control the operations of.” That is a very restrictive standard, as the International Law Commission (ILC) explained in its Draft Articles on Responsibility of States for Internationally Wrongful Acts, which also use the “control or direct” requirement:

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

It is difficult to see how a private economic actor could ever be said to either: (1) “have command of” or “dominate” a State’s political or military machinery; or (2) “control the operations of” or “operatively direct” that machinery. Consider, for example, the critical role Farben –

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84 CICC REPORT, supra note 14, at 30-31 (emphasis added).
85 COMPACT OXFORD ENGLISH DICTIONARY (2005) ("control").
86 Id. ("direct").
87 INTERNATIONAL LAW COMMISSION, COMMENTARIES TO THE DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, art. 17, para. 7 (2001) (emphasis added) [hereinafter “Commentary to Draft Articles”].
the prototypical private defendant – played in the Nazis’ wars of aggression:

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

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

This defense argument made insistently at the trial is at variance with the true facts as revealed by overwhelming evidence showing sustained and continued initiative by Farben in the armament field, and is further at variance with numerous instances of Farben’s ability to influence the course of events where such action was deemed to be in the

\(^{88}\) *Farben Judgment, supra* note 34, at 1297 (Herbert Concurrence).
\(^{89}\) *Id.* at 1215-16.
interest either of Farben or of the government program as a whole.\textsuperscript{90}

Read literally, then, the “control or direct” requirement would exclude private economic actors from the crime of aggression even if – as was the case with Farben – the political or military leaders of a State could not and would not have committed the underlying aggressive act without their help. That result directly contradicts both Law No. 10\textsuperscript{91} and the NMT’s repeated insistence that accessories are no less liable for the crime than principals.\textsuperscript{92}

2. Third-State Accomplices

a. Exclusion

As noted earlier, Paragraph 2(f) of Law No. 10 specifically provided that accomplices could be convicted of aggression “without regard to nationality” as long as they held a high “a high political, civil or military… position” in their country of origin.\textsuperscript{93} The “control or direct” requirement, however, would exclude third-State accomplices from the crime as a matter of law.

The ILC’s Draft Articles on the Responsibility of States identify three situations in which a State can incur responsibility for another State’s internationally wrongful act: (1) where State 1 “aids or assists” State 2\textsuperscript{94}; (2) where State 1 “controls or directs” State 2\textsuperscript{95}; and (3) where State 1 “coerces” State 2.\textsuperscript{96} There is little question that the “control or

\textsuperscript{90} Id. at 1298.
\textsuperscript{91} See Law No. 10, supra note 33, art. II, para. 2(f) (“Any person… is deemed to have committed a crime… if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission.”).
\textsuperscript{92} See, e.g., Ministries Judgment, supra note 39, at 338 (“He who knowingly joined or implemented, aided or abetted in their commission as principal or accessory cannot be heard to say that he did not know the acts in question were criminal.”). This is, it is important to add, not merely a semantic argument. Even if the SWG sincerely believes that there is no practical difference between “shape or influence” and “control or direct,” the starting point for interpreting a treaty is the ordinary meaning of its text; preparatory work is relevant only if textual interpretation leads to an ambiguous or unreasonable result. See Vienna Convention on the Law of Treaties, art. 31(1), 32 1155 U.N.T.S. 331 (May 23, 1969). Limiting the category of “leader” to those who can control or direct a State’s political or military action may be inconsistent with the Nuremberg principles, but it is neither ambiguous nor unreasonable.
\textsuperscript{93} Law No. 10, supra note 33, art. II, para. 2(f).
\textsuperscript{94} COMMENTARY TO DRAFT ARTICLES, supra note 87, art. 16.
\textsuperscript{95} Id., art. 17.
\textsuperscript{96} Id., art. 18.
The “control or direct” requirement would cover the second and third categories: by definition, the officials in State 1 who were responsible for State 2’s act of aggression would have been in a position to control or direct State 2’s political and military action.

The first category, however, is a different story. Given that the ILC specifically distinguished between aiding or assisting and directing or controlling, an official in State 1 who encouraged State 2 to commit an act of aggression – by providing it with financial or material support, for example – could never be described as having been “in a position effectively to exercise control over or to direct the political or military action of” State 2. As the ILC itself pointed out, “the term “controls” refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern.” The “control or direct” requirement would thus prevent such complicit officials from being held liable as accomplices in State 2’s aggressive act.

Excluding third-State accomplices from the crime of aggression would have significant negative consequences. Consider, for example, China’s decision in 1949 to return more than 50,000 Chinese fully-equipped soldiers of Korean descent to North Korea, an influx of manpower that “played a crucial role in the North Korean invasion of the South.” There is no question that China’s support for the invasion was itself an act of aggression; the General Assembly later passed a resolution to that effect. Had the crime of aggression existed in its current form in 1950, however, China’s political leaders would have been immune from prosecution. They clearly “shaped or influenced” North Korea’s decision to invade South Korea: their willingness to return the Korean soldiers not only greatly increased North Korea’s offensive capacity, it led North

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97 Typical forms of aiding and assisting, according to the ILC. See id., art 16, paras. 1, 7.
98 Id., art. 17, para. 7 (emphasis added).
99 See William A. Schabas, The Unfinished Work of Defining Aggression: How Many Times Must the Cannonballs Fly, Before They Are Forever Banned?, in DOMINIC McGOLDRICK ET AL., THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 137 (2004) (noting that the control or direct requirement “might well have the consequence of excluding accomplices from liability under the Statute, such as powerful allies of a small State that might encourage it to attack another country in what might be little more than a proxy war”).
100 See CHEN JIAN, CHINA’S ROAD TO THE KOREAN WAR 110-11 (1994).
101 Id. at 110.
103 JIAN, supra note 100, at 110.
Korea to “accelerate preparations to attack the South.”  Nevertheless, unlike the Soviets – for whom North Korea was “a satellite in the fullest sense of the word” China’s political leaders did not “control or direct” North Korea’s political or military actions: although they had advance knowledge of the invasion and wanted it to occur, they “lacked direct responsibility for its initiation or outcome.” Indeed, North Korea never even informed China of its “military plan, let alone the date of the action.”

It is not difficult to identify additional situations in which a State’s complicity in another State’s act of aggression would lead to State liability but not – because of the control or direct requirement – individual criminal responsibility. Possible examples include the Ford administration’s authorization of Indonesia’s invasion of East Timor and South Africa’s collusion in Southern Rhodesia’s repeated acts of aggression toward Zambia. Blaming States but exculpating individuals in such situations is fundamentally inconsistent with the animating principle of international criminal law that – in the words of the IMT – “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

b. Proposed Paragraph 3(d)

The argument that the “control or direct” requirement excludes third-State accomplices, it is important to note, is based on the assumption that an individual qualifies as a leader only if he is in a position to control or direct the political or military machinery of the State that actually commits the act of aggression. If it is enough for an individual to control or direct the political or military machinery of the complicit State, the problem obviously disappears.

Interestingly, both current proposals use the less restrictive formulation. Recall the proposed text of paragraph 3(d):

In respect of the crime of aggression, paragraph 3, subparagraphs (a) to (d), apply only to persons who are in a

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Id. at 112-13.


Id. at 45.

Id. at 46.

JIAN, supra note 100, at 112.

See Schabas, supra note 99, at 137.


IMT Judgment, supra note 19, at 110.
position effectively to exercise control over or to direct the political or military action of a State.\(^{112}\)

Because it only requires the ability to control or direct the political or military action of “a State,” an individual could satisfy the 2006 version of paragraph 3(d) even if he did not hold a leadership position in the State that commits the underlying act of aggression. As long as he qualified as a leader of the complicit State – “a State” – his complicity would be criminal.

Despite the wording of the 2006 proposals, the SWG almost certainly intends to adopt the more restrictive “the State” leadership requirement, which would exclude third-State accomplices from the crime of aggression as a matter of law. In the 2005 Report, for example, one of the proposals for paragraph 3(d) used the more restrictive requirement:

In respect of the crime of aggression, only persons being in a position effectively to exercise control over or to direct the political or military action of the State shall be criminally responsible and liable for punishment.\(^{113}\)

The earliest incarnation of the leadership requirement, Article 16 of the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, also limited the crime to leaders of the State that committed the act of aggression,\(^{114}\) as did one version of Article 5 in the Draft Statute for the International Criminal Court.\(^{115}\) A number of proposals introduced at PrepCom used the more restrictive formulation,\(^{116}\) including the initial one

\(^{112}\) 2006 Report, supra note 4, annex I (emphasis added).

\(^{113}\) 2005 Annex, supra note 10, appendix I (Proposal B).

\(^{114}\) International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind, art. 17 (1996) (“An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.”).

\(^{115}\) Draft Statute, supra note 7, art. 5 (Option 2) (“1. [For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, against another State.]”) (emphasis added).

\(^{116}\) See, e.g., Proposal Submitted by Cameroon, A/Conf.183/C.1/L.39 (July 2, 1998) (“the use of armed force by that State against the sovereignty, territorial integrity, or political independence of another State”) (emphasis added); Proposal Submitted by Algeria et al., A/Conf.183/C.1/L.56* (July 8, 1998) (“[T]he crime of aggression is committed by a person who is in a position of exercising control or is capable of directing political/military actions in his State, against another State.”) (emphasis added).
introduced by Egypt and Italy.  And the more restrictive formulation is an integral part of the proposed Elements.

It is possible, of course, that the SWG intends to adopt the less restrictive “a State” leadership requirement. Absent a statement to that effect, however, the exclusion of third-State accomplices remains problematic.

INCORPORATING THE “SHAPE OR INFLUENCE” STANDARD

If the SWG wants to adopt a definition of the crime of aggression that is consistent with the Nuremberg principles, it needs to incorporate the “shape or influence” standard into the crime’s leadership clause. That change would not be difficult; because private economic actors and third-State accomplices would always be secondary perpetrators of an act of aggression, the definition of the crime would remain the same. Instead, the new paragraph 3(d) could simply be rewritten as follows:

In respect of the crime of aggression, paragraph 3, subparagraphs (a) to (d), apply only to persons who are in a position effectively to shape or influence the political or military action of a State.

That minor change would not only make clear that secondary perpetrators only have to be in a position to shape or influence a State’s political or military action, it would also eliminate the need to decide whether paragraph 3(d) should read “a State” or “the State.” Limiting the crime of aggression to secondary perpetrators who can “control or direct” the action of “the State” that actually commits the act of aggression is only problematic because private economic actors and third-State accomplices cannot satisfy that requirement. The same would not be true of a leadership clause that limited the crime to secondary perpetrators who can “shape or influence” the action of “the State” that actually commits the act of aggression; as the Farben and China examples indicate, both private economic actors and third-State accomplices could satisfy that less-restrictive standard. Neither the “a State” nor the “the State” formulation, therefore, would categorically exclude such secondary perpetrators from the crime of aggression.

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

118 2006 Report, supra note 4, annex II (“1. The perpetrator was in a position effectively to exercise control over or to direct the political or military action of the State which committed an act of aggression.”) (emphasis added).
CONCLUSION

The Special Working Group has expressed the opinion that the jurisprudence of the Nuremberg tribunals codified customary international law regarding the crime of aggression.119 As this essay has demonstrated, however, those Tribunals not only specifically rejected the SWG’s “direct or control” requirement in favor of the less-restrictive “shape or influence” standard, they assumed that the crime of aggression could be committed by private economic actors and third-State accomplices, two categories of individuals who could never satisfy the “control or direct” requirement. The SWG’s current definitions of the crime of aggression, therefore, represent a significant retreat from the Nuremberg principles, not their codification.