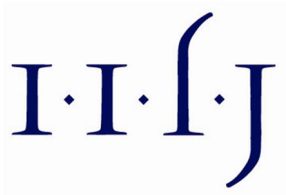

Institute for International Law and Justice

IILJ International Legal Theory Colloquium Spring 2011
Convened by Professor Joseph Weiler

Wednesdays 2pm-3:50pm on dates shown

NYU Law School
Vanderbilt Hall 208, 40 Washington Square South
(unless otherwise noted)

SCHEDULE OF SESSIONS:

February 9	Yitzhak Benbaji, *Bar-Ilan University* "The Moral Power of Soldiers to Undertake the Duty of Obedience"
February 16	Michael Walzer, *Institute for Advanced Study in Princeton / Tikvah and Straus Fellow at NYU School of Law* "Can the Good Guys Win"
February 23	No Colloquium
March 2	Doreen Lustig, *NYU School of Law* "Doing Business, Fighting a War: Non-State Actors and the Non State: the Industrialist Cases at Nuremberg"
March 9	Gabriella Blum, *Harvard Law School / Tikvah Fellow at NYU School of Law* "States' Crime and Punishment"
March 16	No Colloquium – SPRING BREAK
March 23	Matthew C. Waxman, *Columbia Law School* "Regulating Resort to Force: Form and Substance of the UN Charter Regime"
March 30	Paul Kahn, *Yale Law School* "Imagining Warfare, or I know It When I See It"
April 6	David Kretzmer, *Hebrew University of Jerusalem and Academic Center of Law and Business, Ramat Gan* "The Inherent Right to Self-Defense and Proportionality in Ius ad Bellum"
April 13	Andreas Zimmermann, *University of Potsdam,* and Philip Alston, *NYU School of Law* "Enforcing International Humanitarian Law in Asymmetric Armed Conflicts - the Case of Gaza"
April 20	No Colloquium
April 27	J.H.H. Weiler, *NYU School of Law* "Not So Quiet on the Western Front: Reflections on the Bellicose Debate Concerning the Distinction between Ius ad Bellum and Ius in Bello"

DOING BUSINESS, FIGHTING A WAR

NON-STATE ACTORS AND THE NON STATE: THE INDUSTRIALIST CASES AT NUREMBERG

Doreen Lustig, NYU School of Law*

(IILJ COLLOQUIUM PAPER)

"But if the National Socialist structure is not a state, what is it?..."

FRANZ NEUMANN, BEHEMOTH (1944).

Abstract

Academics have spent the past decade arguing whether we should apply existing doctrines (such as state responsibility or direct individual criminal liability) to address the problem of business accountability in international law or whether we ought to defer to corporations to self-regulate their conduct through mechanisms of corporate governance and other soft law regimes. Participants in this debate assume that the main challenge to business accountability in international law is the inclusion of businesses as subjects of international liability. In contrast, I argue that no notion of corporate liability under international law is complete or viable without attention to and application of a developed theory of the state. Close consideration of the involved state and the specific features of its regime are essential elements in meeting the challenge of holding corporate agents and entities accountable under international law. I form this argument against the backdrop of the three central cases in which the issue of business accountability in international law was tested, namely, the Industrialist Cases at Nuremberg. Drawing on unique archival materials, this examination demonstrates that competing theories of the totalitarian state lie at the core of the debate over the industrialist responsibility. Accordingly, I challenge the Nuremberg Tribunals' assumption of a functioning, monolithic state against alternative depictions of Nazi Germany as articulated by influential political theorists who were involved in or influenced the Nuremberg proceedings, such as Franz Neumann and Enrst Fraenkel. The Judges of the industrialist at Nuremberg missed an opportunity to adopt a more subtle understanding of the State and to recognize the implications of the organizational structure of the modern company for individual responsibility. Their failures had lasting rippling effects on the question of responsibility of economic actors in international law. This analysis demonstrates how uninformed assumptions about the state can limit the potential for holding businesses accountable for their crimes. Given the growing influence of business practices, we can conclude that more informed attention must be directed to the corporate structure of the state, business enterprises, and the relationship between them.

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Introduction

Why should a private enterprise be held responsible for its involvement in the war-effort of its country? Josiah DuBois, Chief Prosecutor of the Farben case, echoed these concerns in his recollection of a conversation with Colonel Mickey Marcus, Chief of the War Crimes Division in the War Department, before he left for Nuremberg:

> A lot of people in this Department are scared stiff of pinning a war plot on these men. There's no law by which we can force industrialists to make war equipment for us right now. A few American manufacturers were Farben stooges. And those who weren't can say, "Hell, if participating in a rearmament program is criminal, we want no part of it."[1]

[1] JOSIAH DUBOIS, THE DEVIL'S CHEMIST S 21(1952).

I argue in this article that the answer to Marcus's puzzle – how can we hold businesses liable for their involvement in a war and more broadly in violations of international standards? – depends on the theory of the state and its relationship with business actors. This article emphasizes the role that an application of theories of the state could play in an international legal framework for corporate responsibility. It does so through an examination of the influence that theories of the state had on the central precedent in the field of international adjudication of business enterprises: The Industrialist Trials at Nuremburg.

The greatest novelty of the International Military Tribunal at Nuremberg (IMT) was the recognition of individual responsibility under international law for the commission of international crimes –in particular for *political* leaders.[2] According to this historical precedent, "the screen between international law and the individual, normally constituted by state sovereignty, was pierced."[3] In contrast, the Industrialist Trials represent a less sweeping victory in the field of international legal accountability. In these cases, brought against the managers of three powerful German firms—Flick, Farben and Krupp, American prosecutors attempted to hold German industrialists responsible for various violations of international law. Although in most cases they lacked governmental capacity or title, the prosecution sought criminal sanction of the leaders of these companies under a legal framework designed to govern the accountability of political leaders. Thus, the attempt to hold individual

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[2] The Treaty of Versailles (1919) was a prominent milestone in this process. Article 227 of the treaty of Versailles established the individual criminal responsibility of the ex-German Emperor, Kaiser Wilhelm II; Article 228 provided for the prosecution of German Military personnel who committed war crimes. Despite these attempts, few trials were held and there were virtually no convictions. For an account of these failed national trials, see George Gordon Battle, *The Trials Before the Leipcig Supreme Court of Germans Accused of War Crimes*, 8 VA. L. REV. 1 (1921).

[3] Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. Int'l Crim. Just. 830, 840 (2006). In Justice Robert H. Jackson's words, "[I]t is quite evident that the law of the charter pierces national sovereignty and presupposes that statesmen of the several states have a responsibility for international peace and order, as well as responsibilities to their own states." ROBERT H. JACKSON, *Preface*, *in* REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS IX (London,1945), *available at* http://avalon.law.yale.edu/subject_menus/jackson.asp.

industrialists responsible for a war, war crimes, and horrible atrocities attributed to the Nazi regime was a groundbreaking application of international legal norms in the context of corporate accountability. Yet, as the outcome of the Industrialist cases demonstrates, it was an application that international law was not fully prepared for at the time. The accused were subject to mild judgments and soon thereafter returned to be central figures in the German industry.

Drawing on archival materials, I argue that the debate over the industrialist responsibility should be viewed as a struggle between competing theories of the *totalitarian state*. The theories of the state I am referring to are *operational theories;* namely, theories that were highly regarded at the time and proved to be influential on the Industrialist cases. The theories of Franz Neumann and Ernst Fraenkel, prominent scholars who were also German émigrés who fled from Germany because of their opposition to the Nazi regime, articulated the theories discussed in this article.

This paper will argue that the prosecutors at Nuremberg, influenced by the theories of Neumann and Fraenkel, chose to depict the Nazi regime as a "non-state" conspiracy that required the participation of both formal state actors and German industry alike – what Neumann conceptualized as the *Behemoth*. However the prosecutors' view was challenged and ultimately rejected by the judges of the Tribunals, as a result of the latter's' insistence that Nazi war crimes be viewed as having been perpetrated through a *Leviathan*-like notion of the state. The Tribunals' view of the Nazi state as a centralized, exclusively governmental entity failed to account for the special role and influence of the industry. The decision to avoid imposing individual liability on German industrialists in the majority of the Industrialist cases exposed international law's *default-position* in which the state is conceived to be a monolithic power that monopolizes violence. This traditional approach to the state

significantly limited the Tribunals' potential to scrutinize the practices of business actors since, under the monolithic view, such actors lack control and thus culpability. Thus, the Industrialist Trials demonstrate the importance of the theory of the *polity* for establishing the responsibility of business actors in international law and, accordingly, the need for reconsideration of that theory if corporate accountability is to be achieved under international law.

Part I of this article introduces the Industrialist Trials. Part II considers the influence of the Frankfurt School and Franz Neumann's *Behemoth* on the prosecution's innovative theory of the Nazi regime and the opportunity it provided for a finding of corporate *and individual* accountability for international legal crimes. The Tribunal's refusal to find guilt implies that the innovative *Behemoth* model was rejected in favor of a more static, traditional, and monolithic notion of the state rooted in realism. Having established these competing notions of state action, the remainder of the article applies these opposing notions of accountability to three central aspects of the theory of the modern state that were central in the attempt to hold the industrialists responsible under the Nuremberg framework: state monopoly over violence, distinctions between public and private, and the state bureaucracy as a monolithic governance structure.

In Part II, I consider the Nazi state in its crudest sense - monopoly over the exercise of violence. This examination focuses on the debate over the involvement and responsibility of the industrialists for the war. Part III considers the tension between allowing the inhabitants of occupied Europe to engage in business transactions in exercise of their private rights and the need to preserve such rights from infringement by the occupation regime through the prism of Ernst Franekel's distinction between the normative and the prerogative state. The Tribunals frequently considered *governmental* intervention in favor of German businesses as

the menace for the function of the private sphere, and hence for the preservation of the occupant's sovereignty. I argue that such reliance on a traditional notion of the state, which assumed a functioning *normative* state in occupied Europe, is the source of critical flaws in the Tribunal's judgment.

The conceptual challenge of corporate criminal liability in domestic contexts has been to resolve the discrepancies between the body of criminal law that developed to address the behavior of natural persons and the realities of the corporate entity, which involves organizational hierarchies, and a complex structure of human relations. Part IV demonstrates the specific feature of this challenge in the international context. I discuss the Tribunals' limited consideration of the bureaucratic elements and hierarchical disciplines that were central to both governmental and business operations in the Nazi regime. Disregarding these features allowed the complex structures of authority to diffuse responsibility.

I. Introducing the Industrialist Cases

After Germany's defeat, the Allied powers formed a control council consisting of representatives from the four victorious powers: The United States, The United Kingdom, France, and the Soviet Union. The allies convened the London Conference in August 1945 to decide on the means with which to punish high-ranking Nazi war criminals. Who could be included in this group of criminals was still unsettled at this point. The result was the most well known of all war crime trials - the Trial of the Major War Criminals before the International Military Tribunal at Nuremberg (IMT). The formal agreement produced at the London Conference defined the IMT Charter, set out the court's procedural rules, and

enumerated the charges to be adjudicated:[4] The Nuremberg Charter embodied the IMT to prosecute individuals for crimes against peace, war crimes, and crimes against humanity. The IMT was convened from November 14, 1945 to October 1, 1946.[5]

The story of the Industrialist Cases is not usually included as a central feature in accounts of the first Nuremberg Trial. On December 8, 1945, merely four months after the establishment of the London Charter, the four major allies in occupied Germany enacted a somewhat modified version of the Charter known as *Control Council Law No. 10* (hereinafter: "Control Council" or "CCL10").[6] CCL10 provided the legal basis for a series of trials before military tribunals, as well as, for subsequent prosecution by German Tribunals that continued for several decades.[7] These proceedings against what were known as "major war criminals of the second rank" are usually referred to as the "subsequent" Nuremberg proceedings. They were not the trials of *primary suspects*, rather trials of doctors, lawyers, industrialists, businessmen, scientists, and generals. The U.S. prosecutors generally targeted defendants who represented the major segments of the Third Reich, divided into four categories: SS; police and party officials; military leaders; bankers and industrialists. The judges on the American tribunals were American state judges, law school deans, or

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[4] The Charter of the International Military Tribunal at Nuremberg, Aug. 8, 82 U.N.T.S. 279 (hereinafter Nuremberg Charter or London Charter).

[5] For secondary sources on the International Military Tribunal Trial at Nuremberg (IMT), see, e.g., DONALD BLOXHAM, GENOCIDE ON TRIAL (2001); ROBERT E. CONOT, JUSTICE AT NUREMBERG (1983); Belinda Cooper, ed., WAR CRIMES: THE LEGACY OF NUREMBERG (1999); BRADLEY F. SMITH, REACHING JUDGMENT AT NUREMBERG (1997); LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT 1-65 (2001); BRUCE M. STAVE, et al. WITNESSES TO NUREMBERG: AN ORAL HISTORY OF AMERICAN PARTICIPANTS AT THE WAR CRIMES TRIALS (1998); TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS (1992); ANN TUSA and JOHN TUSA, THE NUREMBERG TRIAL (1983); NORMAN E. TUTUROW, WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS: AN ANNOTATED BIBLIOGRAPHY AND SOURCE BOOK (1986); ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW (1962).

[6] TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 250 (1949) [hereinafter TAYLOR, FINAL REPORT].

[7] The American regulation established to provide procedural guidelines was Military Government Ordinance No. 7. Ordinance No. 7, see MG Ord. No. 7, 18 Oct. 1946, Art. II (b). For a general discussion see Telford Taylor, *The Krupp Trial: Fact v. Fiction*, 53 COLUM. L. REV. 197, 201 (1953).

prominent practicing attorneys.[8] Since the trials were conducted under military law, their verdicts were subject to the Military Government's review and confirmation. The twelve American Nuremberg Trials included 185 defendants.[9]

The *subsequent* trials – and the indictment of the leading German industrialists – soon became an *American* endeavor. The American prosecution team depended on the British cooperation to retrieve evidence related to the Krupp case since most of the relevant materials were located in the British zone (e.g. the headquarters of the Krupp firm).[10] "So far as Sam Harris knows," reads a memo, "the British are doing nothing on further investigations concerning war crimes of Nazi industrialists in their area."[11] The prosecutors encountered further difficulties gathering evidence controlled by the other allies.[12] Despite these early hurdles, three industrialists were finally chosen from many other candidates[13] (e.g. Fritz

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[8] TAYLOR, FINAL Report, *supra* note 6, at 35.

[9] The Twelve war crime cases tried in the American Zone under the authority of Control Council Law No. 10 are found in approximately two dozen archives and research libraries. A substantially abbreviated but legally official edition was published in fifteen massive volumes, officially entitled *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (1949). This work is popularly termed the 'Green Series'. Unless otherwise specified, all citations to these cases hereinafter refer to the Green Series.

[10] In a letter to the British Property Control, Fred Opel, the U.S. Chief of Counsel for War Crimes expressed the office's interest in material supplying evidence against Krupp and his associates, and asked for permission to visit the former Krupp office located in the British sector. Letter from Fred M. Opel, OCCWC, to O'Grady, British Property Control (Dec. 9 1946), OCCWC Berlin Branch, at Group 238, no. 202, 190/12/35/01-02, NARA.

[11] Memorandum Drexel Sprecher, Director, Economic Division, OCCWC, to Staff, "Conference of 1 Feb. 1946: Some Tips Concerning Work on Subsequent Case against Nazi Industrialists" (Feb. 4, 1946), OCCWC 1933-1949, at Group 238, no. 159, 190/12/13/01-02, NARA. This note further describes how a British and American group managed to arrive at Essen and imprison about twelve of the principal Krupp leaders and principal witnesses.

[12] Memorandum from Leo M. Drachsler, Director, Economic Division, OCCWC, to Telford Taylor, Brigadier Gen., Chief of Counsel for War Crimes, US-OMGUS, and J.E.Heath, OCCWC (June 5, 1946) OCCWC, at Group 238, no. 159, 190/12/13/01-02, NARA (describing difficulty of acquiring documents from Russian representative).

[13] *See, e.g.*, Letter from Benjamin Ferencz to Drexel Sprecher, Director, Economic Division, OCCWC, "Target List of 72" (Nov. 1, 1946), World War II War Criminals Records, OCCWC 1933-1949, Group 238, no. 159, 190/12/13/01-02, NARA (requesting that list of financiers and industrialists subject to prosecution be forwarded to his office); *see also* Charles Winick, Chief of Documents Control Sec. Headquarters of the U.S. Forces, European Theater, to Telford Taylor, OCCWC, Subsequent Proceedings (June 19, 1946), Correspondence and Reports, World War II War Criminals Records, OCCWC 1933-1949, Group 238, no. 159, 190/12/13/01-02, NARA (providing information regarding 26 leading German industrialists chargeable with war crimes).

Thyssen,[14] Herman Roechling[15] and the Herman Göering Works)**.** The three industrial cases at the focus of this investigation are the Flick,[16] I.G. Farben,[17] and Krupp.[18]

This preparatory work to establish a case against the three industrialists began while the first Nuremberg Tribunal was underway.[19] The magnitude of work dedicated to their preparation and other evidence convey their importance to the Subsequent proceedings.[20] Data and analysis produced in different corners in the American administration and legislature proved essential for building the case against them.[21] The size of the companies involved and the scope of their activities resulted in amassing an insurmountable collection of

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[14] Fritz Thyssen (1873-1951) was a prominent German industrialist who initially supported Hitler but later opposed the war and subsequently fled to Switzerland. He was caught by the Vichy authorities and imprisoned in different concentration camps until the end of the war. On July 1947 Sprecher advised Taylor to release Thyssen because "It is now clear that (a) OCCWC cannot consider his role from 1923 to 1939 as a crime against peace; and (b) his utility as a witness to the truth is highly dubious[.]" Memorandum from D.A. Sprecher, Director, Economic Division, OCCWC, to Telford Taylor, Brigadier Gen., Chief of Counsel for War Crimes, US-OMGUS, "Fritz Thyssen: Recommended Handling of the Case" (July 1, 1947), Correspondence and Reports, World War II War Criminals Records, OCCWC 1933-1949, Group 238, no. 159, 190/12/13/01-02, NARA.

[15] Herman Roechling was tried in the French war crimes trials that were held under Control Council Law No. 10. A summary of the trial and appellate court decisions was published as *France v. Roechling*, 14 T.W.C. 1075 (Gen. Trib. of the Mil. Gov't 1948); *see also id.* at 1097 (Super. Mil. Gov't Ct. 1949).

[16] United States v. Friedrich Flick, VI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG [*SIC*] MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 11 (1950) [hereinafter *The Flick Case*].

[17] United States v. Carl Krauch, VII, VIII TRIALS OF WAR CRIMINALS BEFORE THE NURENBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1102 (1950) [hereinafter *The Farben Case I, II*, respectively].

[18] United States v. Alfried Krupp, IX TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1950) [hereinafter *The Krupp Case*].

[19] In the first few months of the Office of the Chief of Counsel for War Crimes (OCCWC), which began to function prior to its official creation on October 24, 1946, the trial work was divided among six divisions: The Military, Ministries, SS, and the Economics Divisions which prepared cases within the fields described by their respective titles. In addition, two special 'trial teams' were set up to prepare the IG Farben and Flick cases for trial. After final decisions were made with respect to the choice of cases, the Economic Division, headed by Drexel A. Sprecher, was eliminated and its personnel was reassigned to divisions established for the trials of these particular cases. TAYLOR, FINAL REPORT, *supra* note 6, at 39-40.

[20] *See* D.A. Sprecher, Director, Economic Division, OCCWC, to George Wheeler, Manpower Division, OCCWC (Feb. 8, 1946), OCCWC 1933-1949, Group 238, no. 159, 190/12/13/01-02, NARA (noting that OCCWC had put trying German industrialists as "priority one").

[21] In February of 1946, Alfred H. Booth requested that Taylor send him publications from any Senate committees, including the Kilgore Committee, which were investigating the actions of German industrialists. Booth wrote: [it] "seem[ed] indispensable for the prosecution of Nazi Industrialists to have . . . certain documentary material which should be easily obtainable in Washington D.C." Alfred H. Booth to Telford Taylor, Brigadier Gen., Chief of Counsel for War Crimes, US-OMGUS (Feb. 4, 1946), OCCWC 1933-1949, Group 238, no. 159, 190/12/13/01-02, NARA (on file with author); *see also* Memorandum from Albert G.D. Levy to I.G. Farben Trial Team, "Filing of Kilgore and Bernstein Exhibits" (Oct. 26, 1946), *Farben I* Trial Team, OCCWC, Group 238, no. 192, 190/12/32/07-12/33/01, NARA.

documents, scattered evidence, and missing witnesses. The prosecution teams were confronted with a labyrinth of details, and time was of the essence.

The disarray of these early days proved especially detrimental to the first industrialist case – the Flick case.[22] The trial of Friedrich Flick and five other officials of the Flick Concern was the first of the so-called Industrialists Cases tried in Nuremberg. The case began on February 8, 1947 and lasted until December 22 1947.[23] As Andy Logan, a *New Yorker* contributor observed: "[I]n one of the smaller tribunal rooms in the Nuremberg courthouse, Friedrich Flick, the munitions maker, and five of his accessories have been busy since April of this year trying to defend themselves against charges that they used and abused slave labor, exploited the resources of occupied countries, and helped finance the criminal activities of the SS."[24] The Flick case tells the "fantastic tale that begins with Flick's small start in the steel business during World War I."[25] The six defendants in the Flick trial were leading officials in the Flick concern or its subsidiary companies. They were charged with the commission of war crimes and crimes against humanity. The specific counts charged criminal conduct relating to slave labor, the spoliation of property in occupied France and the Soviet Union, and the Aryanization of Jewish industrial and mining properties.

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[22] *See e.g.* In a letter to Walter Rapp, Sprecher conveyed his dissatisfaction with the preliminary briefs prepared by attorneys on the Flick, Roechling, and Poensgen cases. *See* Letter from D.A. Sprecher, Director, Economic Division, OCCWC, to Walter Rapp, "Interrogations to Develop Materials in the Slave Labor Field" (July 16, 1946), "Interrogation Committee File," OCCWC 1945-1949, Group 238, no. 159, 190/12/32/07-12/33/01, NARA.

[23] Judge Charles B. Sears, formerly an associate judge of the New York Court of Appeals was the presiding judge. Judge William C. Christianson, formerly Associate Justice of the Minnesota Supreme Court and Judge Frank J. Richman, formerly of the Indiana Supreme Court, were members of the tribunal. Judge Richard D. Dixon, formerly of the North Carolina Supreme Court, was an alternate member of the Flick Tribunal.

[24] Andy Logan, *Letter from Nuremberg*, NEW YORKER, Dec. 27, 1947. Logan was married to Charles S. Lyon, The chief prosecutor in the Flick case. The trial of Friedrich Flick and five other officials of the Flick Concern was the first of the so-called Industrialists Cases tried in Nuremberg. The case began on February 8, 1947 and lasted until December, 22 1947.

[25] Dana Adams Schmidt, *German Steel Men Indicted for Crimes 'on a Vast Scale'*, N. Y. TIMES, February 9, 1947, at 1.

The Farben case was the first Nuremberg trial following the IMT case that included charges of *crimes against peace*. It was the largest case of all three Industrialist cases. Since 1916, eight of the German chemical firms (BASF, Bayer, and Hoeshst with five smaller manufacturers) were collaborated in what was called "a community of interest," known as *Interessen Gemeinschaften* [I.G.].[26] Unlike American law, German law encouraged combinations and centralized control of business enterprises. Indeed,

> from 1925 to 1945, Farben was the largest non-state-owned corporation in Germany and…the world's fourth largest such enterprise…the company produced an immense array of goods, from dyes and pharmaceuticals to aluminum, fuel, and rubber, and its well-funded research operations added constantly to the total, achieving such lastingly valuable discoveries as sulfa drugs, magnetic tape and a variety of synthetic fibers.[27]

Farben pioneered the production of synthetic nitrates, which were crucial components of explosives. This freed Germany from dependence on foreign imports.[28] The 23 defendants in the case were all individuals who served on the Farben Board of Directors (Vorstand). The case was conducted between August 12, 1947 and May 12, 1948.[29]

The third trial was that of the twelve officials of the Krupp concern, commonly referred to as "the Krupp case."[30] The Krupp firm's main concern was the production of metals and the

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[26] For further analysis of I.G. Farben and its involvement in World War II, see JOSEPH BORKIN, THE CRIME AND PUNISHMENT OF I.G. FARBEN (1978); JOSIAH E. DUBOIS, GENERALS IN GREY SUITS: THE DIRECTORS OF THE INTERNATIONAL 'I.G. FARBEN' CARTEL, THEIR CONSPIRACY AND TRIAL AT NUREMBERG (1953); BENJAMIN B. FERENCZ, LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION 33-67 (2002) (1979); Peter Hayes, *Introduction*, *in* FRANZ NEUMANN, BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM 1933-1944 vii (2009); DIARMUID JEFFREYS, HELL'S CARTEL: IG FARBEN AND THE MAKING OF HITLER'S WAR MACHINE (2008); STEPHAN H. LINDNER, INSIDE I.G. FARBEN: HOECHST DURING THE THIRD REICH (2008); RICHARD SASULY, I.G. FARBEN (1947); I.G. FARBEN, AUSCHWITZ, MASS MURDER (edited by a working group of Former prisoners of Auschwitz Concentration Camp of the committee of Anti-Fascist Resistance Fighters in the German Democratic Republic, 1964).

[27] LINDNER, *supra* note 26, at xiii.

[28] *The Farben Case II*, *supra* note 17, at 1086.

[29] The presiding judges were Judge Shake, from the highest state court in Indiana; Judge Morris, from the highest state court of North Dakota, and Judge Hebert, the Dean of Louisiana State University Law School.

[30] Krupp's operations were mainly concentrated in the Ruhr, which lay within the British zone of occupation. Nonetheless, the British were not bound to the indictment of Industrialists subsequent to the IMT trial. The British Foreign Office willingly transferred six industrialists, including Aflried Krupp, and three other suspects

processing of these metals into war materials, including ships and tanks. In 1903, Krupp changed into a corporation, known as Fried. Krupp A.G. and was a private, limited liability company. Expansion of the Krupp enterprises continued up to the outbreak of the First World War during which it became one of Germany's principal arsenals. The World War I gun, "Big Bertha," was named after the matriarch of the Krupp family. The Krupp Case began a few days after the Farben trial and was the third and last of the industrialist cases. Alfried Krupp and eight of the defendants were members or deputy members of the Vorstand (managing board) of the concern for varying periods of time, and the other three defendants held other important official positions in the firm.[31]

The indictments in these three cases contained four counts that were based closely on the Nuremberg Charter. The first count – Crimes against Peace – played a central role in both the case of Krupp and that of I.G. Farben. As Telford Taylor noted, "I directed that the staff … [to] concentrate a large share of its time and energy on the analysis of evidence and the preparation of charges relating to crimes against peace."[32] As suggested in paragraph 2(f) of article II of CCL10, a principle who held a high position in the "*financial, industrial or economic life*" is deemed, *ipso facto,* to have committed crimes against peace. Although this paragraph merely requires taking this fact under consideration, it served to refute the contention that private businessmen or Industrialists are excluded from the possibility of complicity in "crimes against peace."[33] The charge of slave labor was significant in all three

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for trial in the American proceedings. Other British prisoners were transferred as well. *See* Donald Bloxham, *British War Crimes Trial Policy in Germany, 1945-1957: Implementation and Collapse*, 42 J. BRIT. STUD. 91, 103 (2003).

[31] The case began on August 16, 1947 and the sentence was pronounced on July 31, 1948. The members of the tribunal included the Presiding Judge H.C. Anderson, Tennesee Court of Appeals, Judge Edward J. Daly, Connecticut Superior Court, and Judge William J. Wilkins, Superior Court of Seattle, Washington. *The Krupp Case*, *supra* note 18, at 1.

[32] TAYLOR, FINAL REPORT, *supra* note 6, at 66.

[33] Judge Hebert's concurring opinion on Crimes against Peace, *The Farben Case II*, *supra* note 17, at 1299-1300.

of the Industrialist Cases. The defendants in these cases were also charged with looting or expropriation of property in violation of the laws of war. The category of "Crimes against Humanity" played a part in all three of the trials.

II. Behemoth and the Relationship between Government and Business

The *New York Times* concluded on February 2, 1947 "it remains remarkable that capitalist America is going ahead with the trials of industrialists and financiers while socialist Britain, Communist Russia, and France have made no moves to do like-wise."[34] What led the Americans – more than the other allies – to launch a comprehensive legal attack against the German industry?[35] I believe some answers could be found in the work of scholars employed by the administration on Germany and the German Problem. Several prominent scholars of the exiled Frankfurt School were influential on policymaking at that time, especially Franz Neumann, Otto Kirschheimer, and Herbert Marcuse. In 1943, these three Jewish émigrés were employed in an intelligence organization that later became the Central Intelligence Agency, known then as– the Research and Analysis Branch of the Office of Strategic Services (hereinafter: R&A and the OSS respectively). Employed by the Central European Section of R&A/Washington, they investigated and interpreted German intentions and capabilities. Of particular importance was Neumann's 1942 study of the German Nazi regime, entitled *Behemoth*.

Beginning in the early 1940s, Franz Neumann utilized the concept of *Behemoth* to present his understanding of the Nazi regime and the role the industry played in it. Despite

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[34] Dana Adams Schmidt, Nazi Capitalists Face U.S. Charges, N.Y. TIMES, February 2, 1947 p. E5.

[35] One might suggest the New Deal and the antitrust sentiment as a plausible answer. For an elaborate discussion of the parallel route of the anti-trust campaign and its implications on the prosecution of the German industrialists at Nuremberg, see Doreen Lustig, *Criminality of Nazi-Era German Cartels: The Rise and Decline of Anti-Trust in American Approaches to International Criminal Law at Nuremberg* (manuscript, on file with author).

Behemoth's neo-Marxist and sociological underpinnings, it functioned "as a major source and reference book for both the OSS and the Nuremberg prosecutors."[36] Neumann's analysis of the Nazi regime and its relationship with the industry posed a challenge to the prevalent realist model of the state.

A. Franz Neumann's *Behemoth*

Neumann's analysis introduced a radical departure from the monolithic view of the totalitarian state and the premise of a concentrated monopoly over violence. Neumann's concept of *Behemoth* conveyed the non-state essence of the Nazi regime. Under National Socialism the political authority we identify with the state ceased to exist. Conversely, he described the Nazi regime as comprised of four ruling classes that govern Germany: the Nazi party, the army, the bureaucracy, and the industrialists. These four groups collaborated in a command authority structure that lacked systematic coherence and rule of law.

Neumann traced the origins of the Nazi regime back to the ills of the Weimar republic. He attributed much of the Republic's failure to the imperialism of German monopoly capital.

> The more monopoly grew, the more incompatible it became with the political democracy … Trusts, combines, and cartels covered the whole economy with a network of authoritarian organizations. Employers' organizations controlled the labor market, and big business lobbies aimed at placing the legislative, administrative, and judicial machinery at the service of monopoly capital. In Germany, there was never anything like the popular anti-monopoly movement of the United States under Theodore Roosevelt and Woodrow Wilson.[37]

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[36] MICHAEL SALTER, US INTELLIGENCE, THE HOLOCAUST AND THE NUREMBERG TRIALS SEEKING ACCOUNTABILITY FOR GENOCIDE AND CULTURAL PLUNDER 573 (volume 2, 2009). Salter's book traces the influence of the American intelligence agency in which Franz Neumann was working (the OSS) on the American postwar policy and particularly on the evidence of the Holocaust presented at the Nuremberg trial.

[37] FRANZ NEUMANN, BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM 1933-1944 14-15 (2009) [1942, 1944].

Neumann explained how the great depression led to the restoration of cartels and tariffs in a way that helped the economy in the short-run, but at the same time intensified the threat of monopolistic power to democracy. However, monopolies were not the only factors that led to the collapse of the Weimar Republic. Neumann cited, first, the weakening of labor and trade unions. Second, the growing power of judges at the expense of the parliament and their mild response to or even acquiescence with acts of treason, and revolt against the Weimar democracy. Third, the decline of the parliament and parliamentary supremacy, as Neumann explains, accrued to the benefit of the president and hence to the ministerial bureaucracy. "Even before the beginning of the great depression … the ideological, economic, social, and political systems were no longer functioning properly … The depression uncovered and deepened petrifaction of the traditional, social and political structure. The social contracts on which that structure was founded broke down."[38]

Neumann showed how the Weimar democracy sharpened antagonisms and led to the breakdown of voluntary collaboration, destruction of parliamentary institutions, suspension of political liberties, growth of a ruling bureaucracy, and renaissance of the army as a decisive political factor. Along with acquiescence of the masses, these deficiencies served as fertile ground for the imperialist charge of the National Socialists. This historical analysis of the Weimar Republic supported an argument implicit in Neumann's thesis: Rather than see the tragic consequence of the Weimar years - the Nazi regime - as a manifestation of Prussian militarism or Junker aristocracy, Neumann argued that it was a result of a redistribution of social and political power.

Additionally, Neumann emphasized the productive power of German industry as one of the pillars of the Third Reich. The importance of that power enabled businesses to sustain

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[38] *Id.* at 31.

significant influence at important junctures of policy decisions. This noted, Neumann challenged the identification of Germany's economic system as a form of *state capitalism*. "This school of thought," he wrote,

> believes that there are no longer entrepreneurs in Germany, but only managers; that there is no freedom of trade and contract; no freedom of investment; that the market has been abolished, and with it, the laws of the market … Economics has become an administrative technique. The economic man is dead.[39]

Conversely, "the organization of the economic system is pragmatic. It is directed entirely by the need of the highest possible efficiency and productivity required for the conducting of war." Neumann refuted the notion that National Socialism is organized according to corporative ideas:

> [National Socialism] has always insisted on the primacy of politics over economics and has therefore consciously remained a political party without any basic economic orientation … Moreover, the estate idea was quickly seized upon by the cartels in order to strengthen their power and to destroy outsiders and competitors. Immediately after the National Socialist revolution, many cartels introduced *the leadership principle* into their organizations. They appointed National Socialist managers and, with the power of the party behind them, compelled outsiders to join the cartel organization or be destroyed.[40]

Neumann characterized the German economy under the Nazi rule as having two characteristics: "It is a monopolistic economy and a command economy. It is a private capitalistic economy regimented by the totalitarian state." And he rejected any interpretation of National Socialism as a "non-capitalistic economy," rather he described it as "totalitarian monopoly capitalism."[41] This form of capitalism is driven by profit and is competitive, yet competition is not for markets but for quotas, permits, shares, patents, and licenses. It

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[39] *Id.* at 222.
[40] *Id.* at 233.
[41] *Id.* at 261.

consolidates power in the hands of a few, while smaller plants surrender their control. Indeed, Neumann described how National Socialism enabled or facilitated the rule of monopolies in Germany by creating the conditions that forced the whole economic activity of Germany into the network of industrial combinations run by the industrial magnates. By enacting a statute for compulsory cartelization, the National Socialist government maintained and solidified existing organizational patterns. Initially, the object in doing so was to secure the profits of the industrial combines even with the reduced volume of production. Economic policy changed to aim at achieving full employment and utilization of all resources for preparedness with enactment of the Four Year Plan.[42]

Neumann identified three types of economies in Nazi Germany: competitive, monopolistic, and command economies. Furthermore, monopolization of industry did not negate competition but in many ways asserted it. "The struggle for production or sales quotas within the cartel – for raw materials, for capital, for consumers – determines the character, the stability, and the durability of the cartel."[43] The Command Economy was embedded in state interference and regimentation but did not entail the nationalization of the private industry: "Why should it? ... German industry was willing to cooperate to the fullest…National Socialism utilized the daring, the knowledge, the aggressiveness of the industrial leadership, while the industrial leadership utilized the anti-democracy, anti-liberalism and anti-unionism of the National Socialist party."[44]

Neumann's theory of *Behemoth* was in direct contrast to the traditional *Leviathan* theory of the state. The German regime dissolved the 'state' and introduced an unfamiliar authority structure that lacked the essential elements of the modern state, most significantly, an

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[42] *Id.* at 267-68.
[43] *Id.* at 292.
[44] *Id.* at 361.

apparatus controlling the exercise of coercion. Indeed, the concept of the state in its *restricted sense* presupposes effective power. Theoretical accounts of the state usually depart from the descriptive premise that the state maintains the public order. This premise is termed as the *non-normative notion* or the *de facto* authority. It was Max Weber, one of Weimar's most influential figures, who introduced, perhaps, its most celebrated accounts. In the winter of 1918, Max Weber presented to an audience of students in the Munich University his lecture "Politics and Vocation." The lecture offered its audience a uniquely crystallized definition of the modern state. Weber's theory of the state is concerned with the conditions that underlie the possibility of an effective authority within the territory of the state. He addressed the essential characteristics of political rule in the modern state as that form of rule supported by the use of or threat to make use of physical force. Weber considered this characteristic to be an essential feature of the state but not a sufficient one:

> In the past the most diverse kinds of association- beginning with the clan – have regarded physical violence as a quite normal instrument. Nowadays, by contrast, we have to say that a state is that human community which (successfully) lays claim to the *monopoly of legitimate physical violence* within a certain territory, this "territory" being another of the defining characteristics of the state. For the specific feature of the present is that the right to use physical violence is attributed to any and all other associations or individuals only to the extent that the *state* for its part permits that to happen. The state is held to be the sole source of the "right" to use violence.[45]

Here we see that violence is an essential element in the Weberian formula.

> Violent social action is obviously something absolutely primordial. Every group, from the household to the political party has always resorted to physical violence when it had to protect the interests of its members and was capable of doing so… [However] the monopolization of legitimate violence by the politic-territorial association and its rational consociation into institutional order is nothing primordial, but a product of evolution.[46]

Indeed, it is in his theory of the *modern* state that Weber adds three additional elements to the monopoly over use of violence, namely – *legitimacy, and administration* within *a certain territory*. The Weberian theory of state is usually associated with realism or a notion of

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[45] MAX WEBER, POLITICAL WRITINGS 310-11 (Peter Lassaman & Ronald Speirs eds., 1994).
[46] MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY, 904-05 (Guenther Roth & Claus Wittich trans.,1968).

politics tied to the exercise or threat of violence. This view is often identified with Thomas Hobbes who, as early as 1651, compared the international realm with the state of nature in respect to the absence of a central authority.[47] It is further associated with the common distinction between internal uses of violence (policing, law and order), which are legitimized by internal political processes, and exercises of violence outside the boundaries of the state (e.g. wars and armed conflicts), which are legitimized externally.

The Hobbesian vocabulary is evidently present in Neumann's choice of *Behemoth* to describe the Nazi regime. By *Behemoth* Neumann sought to convey the non-state feature, the lack of a rule of law and coherent authority structure that he considered as the great fault of the Nazi regime. The tension between effective exercise of violence and its illegality are manifest in the circumstances presented by the Industrialist cases. The doctrinal framework applied in these cases focuses on the state and assumes a strong link between war and the state. This assumption overlooks the historical contingency of the modern state's monopoly over violence. Weber reminded his readers:

> The procurement of armies and their administration by private capitalists has been the rule in mercenary armies, especially those of the Occident up to the turn of the eighteen century. In Brandenburg during the Thirty Years War, the soldier was still the predominant owner of the material implements of his business … Later on, in the Prussian standing army, the chief of the company owned the material means of warfare, and only since the peace of Tilsit [in 1807] has the concentration of the means of warfare in the hands of the state definitely come about … Semiofficial sea-war ventures (lie the Genoese manoe) and army procurement belong to private capitalism's first giant enterprises with a largely bureaucratic character. Their "nationalization" in this respect has its modern parallel in the nationalization of railroads.[48]

B. Behemoth at Nuremberg

Barry M. Katz described three phases of Frankfurt scholars' influence on American policy makers. First, while engaged in defining their task in 1943, most of their research

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[47] THOMAS HOBBES, LEVIATHAN, ch. XIII (Richard Tuck ed., rev. student ed. 1996) (1651).
[48] *Id.* at 982. See Generally CHARLES TILLY, COERCION, CAPITAL AND EUROPEAN STATES, AD 990 – 1992 (1993).

focused on analysis of the Nazi New Order and occupation regime. Second, the Frankfurt scholars shifted their attention to postwar era preparations for occupation and peace in 1944. In the third phase, from 1945, they participated in preparations for prosecution of Nazi war criminals.[49] It is this third phase that ties the knot of our story and inserts the already influential thesis of Behemoth into the drafts being prepared for the Nuremberg trials.

While Neumann's intellectual prestige was an important factor in the thesis's impact, Behemoth's influence was also due to his government activities, where his work at the OSS "strongly influenced the formulation of America's goals for postwar Germany." For example, his "four Ds," identified the colluding groups involved in four key processes: "denazification, democratization (including recruitment of civil servants), demilitarization, and decartelization."[50]

Neumann became a member of the prosecution team preparing for the Nuremberg Trials of major war criminals immediately after the war. The Central European Section worked closely with Telford Taylor and others in the legal department of the Office of the Secretary of War.[51] "In preparing this trial [the IMT]," noted one of the legal counsels, "OSS has been delegated the major responsibility for collecting and integrating the proof on the charge that the major war criminals engaged in a common master plan to enslave and dominate first

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[49] BARRY M. KATZ, FOREIGN INTELLIGENCE: RESEARCH AND ANALYSIS IN THE OFFICE OF STRATEGIC SERVICES 1942-1945 34-61 (1989).

[50] Hayes, *supra* note 39, at vii.

[51] See, e.g., Memorandum from James B. Donovan, General Counsel, OCCWC Office of Strategic Serv. (April 12, 1945), OCCWC 1933-1949, Group 238, no. 159, 190/12/32/07-12/33/01, NARA (describing lead-up to formation of war crimes program); Memorandum from James B. Donovan, General Counsel, OCCWC Office of Strategic Serv. to file (April 30, 1945), OCCWC 1933-1949, Group 238, no. 159, 190/12/32/07-12/33/01-02, NARA (listing categories of offenses in which OCCWC was interested in investigating); Memorandum from James B. Donovan, General Counsel, OCCWC Office of Strategic Serv. to Sidney S. Alderman, "Progress Report on Preparation of Prosecution" (May 30, 1945), OCCWC 1933-1949, Group 238, no. 159, 190/12/32/07-12/33/01-02, (describing work undertaken by Research & Analysis branch).

German, then Europe, and ultimately the world, using whatever means necessary."[52] Neumann's emphasis on the ramifications of the breakdown of the trade-unions and the empowerment of the Nazi regime, as well as, the importance he attributed to the socialist movement for the future of Germany, and other themes in his work found their way into the lawyers' preparations for the trials.[53] During the summer of 1945, Neumann and his colleagues prepared briefs on German leaders such as Himmler and Goering, on Nazi organizations involved in the commission of the war, and on Nazi plans to dominate Germany and Europe.[54] "The structure of their case [the IMT indictment at Nuremberg] against the Nazi Behemoth grew out of Neumann's claim that it was a tightly integrated system… managed by an interlocking directorate of political, military, and economic leaders."[55]

By presidential order, the OSS ceased to function on October 1, 1945 a few days before the opening of the IMT at Nuremberg. However, the work of the émigrés left lingering effects that echoed through the corridors of the Palace of Justice long after their return to the academia. For example, Telford Taylor opened the first Industrialist case with a Neumannesque formula to describe the industry in the Third Reich: "[t]he third Reich dictatorship was based on this unholy trinity of Nazism, militarism, and economic imperialism."[56] Raul Hilberg, Neumann's student and later a Holocaust historian, reviewed Neumann's thesis's continuing influence on the subsequent trials, and noted that in the

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[52] Letter from William H. Coogan, Office of the General Counsel, to David S. Shaw, Labor Desk, S.I., Office of General Counsel, and Dr. Franz Neumann (June 27. 1945), OCCWC, Group 238, no. 159, 190/12/13/01-02, NARA.

[53] For example, while investigating the Industrialist cases, William H. Coogan of the OCCWC asked the head of the labor desk in the Office of General Counsel for any available evidence of the circumstances surrounding Nazi efforts to break up trade unions. *Id.*

[54] Interoffice Memorandum on Trial Preparations to the Executive Counsel Trial Team in *Farben I* (May 16, 1945), Executive Counsel of *Farben I* Trial Team, OCCWC, Group 239, no. 192, 190/12/32/07-12/33/01, NARA.

[55] KATZ, *supra* note 49, at 54.

[56] *The Flick Case*, *supra* note 16, at 32-33.

subsequent trials documentary records were grouped into four series: Nazi government; party organizations, including the SS; the high command of the armed forces; and industrial documents. "Does this scheme not sound familiar?" Hilberg asks – "Those are Neumann's four hierarchies."[57]

Reports prepared by the OSS proved useful in providing essential information on potential defendants in subsequent Industrialist trials. In his instructions to establish a dossier collection on each individual in the OSS list as a basis for the Industrialist cases, Sprecher wrote: "The OSS biographies appear to me to be one of the best studies in our possession, particularly upon recalling that they were drawn up before the Nazi collapse."[58] The acting chief of the War Crimes Branch, concluded in a similar manner in a letter attached to the transmittal of OSS R&A reports: "It is felt that these reports may prove helpful as rebuttal testimony in the trials of the industrialists, if any of the listed individuals appear as witnesses for the defense."[59]

The influence of Neumann and his colleagues on the trial is also related to a debate among historians regarding some of the trial's more problematic implications. Following in the step of their IMT predecessors, prosecutors of the Industrialists emphasized *the war* as their main crime, rather than crimes of slavery and concentration camp atrocities.[60]

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[57] Raul Hilberg, *The Relevance of* BEHEMOTH *Today*, 10 CONSTELLATIONS 256, 262 (2003).

[58] Memorandum from D.A. Sprecher, Director, Economic Division, OCCWC, to Alfred Booth and Samuel Malo, "Nazi Industrial Case: Some Initial Research Procedure" (Feb. 4, 1946), OCCWC 1933-1949, Group 238, no. 159, 238/1/90/12/13/01-02, NARA.

[59] Memorandum from Cecil F. Hubbert, Acting Chief, War Crimes Branch, OSS, to Office of the U.S. Chief of Counsel, "Transmittal of OSS Research and Analysis Report" (May 23, 1947), OCCWC 1933-1949, Group 238, no. 159, 238/1/90/12/13/01-02, NARA (regarding "Sixty-five Leading German Businessmen"). The OSS report to the preparation of the Industrialist trials is mentioned as a fruitful source of evidence in other correspondence. See, e.g. Memorandum from D.A. Sprecher, Head Prosecutor, *Farben* Trial Team, OCCWC, to File (Jan. 21, 1946), OCCWC 1933-1949, Group 238, no. 159, 238/1/90/12/13/01-02, NARA (referencing "the OSS study containing biographies of leading industrialists which may be useful on giving leads on this subject").

[60] This emphasis is all the more problematic when read in the context of Neumann's Spearhead Theory of Anti-Semitism. Shlomo Aronoson's comprehensive study of the influence of Neumann's spearhead theory on the Nuremberg trials is a prominent voice in this line of argument. Shlomo Aronson, *Preparations for the*

Furthermore, the Neumannesque emphasis on conspiracy, cartelization, and his three pillars approach worked well with the American inclination to use antitrust doctrine to prosecute businesses. In several of the prosecutors' memos, they discussed how to apply the conspiracy element in the context of corporate responsibility. These memos address the potential of organizational liability and charging corporations as entities for the industrialist trials.[61] While on the one hand, businesses acted as independent co-conspirators in a non-state regime, on the other hand, business managers served hybrid roles as both private executives and leaders in public economic institutions. The latter position undermined the responsibility of business actors *per se*, and conveyed a more conservative interpretation of the Nazi totalitarian state.

In a memorandum from August 1946, one of the lawyers working on the trials[62] advised his colleagues to distinguish the subsequent trials from the IMT by reversing the story-line: "The big German industrialists dreamed dreams of economic conquest of the world; that, to this end, military conquest was a pre-condition; and Hitler was created by these same industrialists as their political arm and puppet to achieve this objective."[63] He mentioned Farben officials alongside Krupp and others. Eventually, Farben was described primarily as the instrumentality of the Nazi regime, while the Krupp prosecutors followed this advice and described an independent plan that preceded Hitler. The argument of Farben's instrumentality and the focus of its directors' integration in the Four Year Plan were reminiscent of an

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Nuremberg Trial: the O.S.S., Charles Dwork, and the Holocaust, 12 HOLOCAUST AND GENOCIDE STUDIES 257 (1998). Michael Salter challenged some aspects in Aronson's analysis. *See* SALTER, *supra* note 36, at 589-699.

[61] For a comprehensive discussion on different corporate theories suggested for the prosecution of the industrialist see Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1130-49 (2009).

[62] Abraham Pomerantz, a New York commercial lawyer and deputy for the Nuremberg economic cases recruited to serve as a trial manager and a big-picture strategist, For further details see Bush, *supra* note 61, at 1149.

[63] Memorandum from Abraham L. Pomerantz, Deputy Chief Counsel, OCCWC, to Telford Taylor, Brigadier General, Chief of Counsel for War Crimes, U.S.-OMGUS, "The Proposed Indictment of the Nazi Industrialists—A New Approach" (Aug. 22, 1946), Berlin Branch, OCCWC, Group 238, no. 202, 190/12/35/01-02.

institutional position (i.e., close affiliation between industry and government).[64] Conversely, the argument for Krupp's *independent* conspiracy described a rather autonomous operation of the Krupp officials. When the Tribunals were called upon to address these different approaches to relations between government and business, they redefined the puzzle of these relations in terms of initiative and control. It is to these "two conspiracies" and the Tribunals' response that we now turn.

C. Followers and Not Leaders: Two Comapanies, Two Conspiracies

1. I.G. Farben's Crimes of Aggression

The *New York Times* reported in February 1947 that "the theory that German industrialists and financiers were the men who pulled the strings behind the Nazi regime, brought it to power, profited by it and were fundamentally responsible for its aggressions and other crimes will be put to judicial test."[65] Indeed, the Farben indictment accused the defendants [frequently referred to by organization and not each individually] of becoming an indispensable part of the German war machine, for initiating cartel agreements, and intensified production for its own empowerment. Their main challenge was to provide a convincing theory, backed by evidence, for such concerted effort between government and industry. The prosecutors' choice of narrative and strategy soon revealed their anti-trust orientation and convoluted the conspiracy to wage war with cartelization practices to the Judges' dismay.

The prosecution's opening statement described the parallel routes of Farben's independent growth and Hitler's rise to power. The indictment began when the routes

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[64] Memorandum from L.M. Drachsler, Prosecutor, OCCWC, to J.E. Heath, "Indictment of the Industrialists" 11 (Sept. 28, 1946) OCCWC 1933-1949, Group 238, no. 159, 238/1/90/12/13/01-02, NARA.
[65] Dana Adams Schmidt, *Nazi Capitalists Face U.S. Charges*, N. Y. TIMES, Feb. 2, 1947, at E5.

converge and related the following account: At 18:00 on February 20, 1933, a group of about 25 businessmen attended a private meeting with Hitler, the Reich Chancellor, in the Berlin villa of Hermann Goering, president of the Reichstag. Leaders of German industry present included Georg von Schnitzler (chief of the Vorstand Commercial Committee of IG Farben and second in command to the chairman of the Board of Directors) and Krupp von Bohlen. Hitler spoke at length about the importance of fighting communism and preservation of the principle of private ownership: "Private enterprise cannot be maintained in the age of democracy; it is conceivable only if people have a sound idea of authority and personality."[66] Goering followed Hitler with a request for financial support. Von Schnitzler reported to the Farben officials on the meeting and they decided to contribute 400,000 marks to Hitler's campaign. This was "the largest single contribution by a firm represented at the meeting."[67] "This meeting in Berlin," wrote one of the prosecutors in his memo, "must be shown as the connecting link or connective tissue that ties all the cases together into an intelligible unity […] Here is the perfect setting for a conspiracy. All major actors are present. All ingredients the law requires to establish "concert of action" are here."[68]

Some 60 years later, the historian Adam Tooze offered a sober perspective on the meeting's importance.

> [I]t was the donations in February and March 1933 that really made the difference. They provided a large cash injection at a moment when the party was severely short of funds and faced, as Goering had predicted, the last competitive elections in its history… Nothing suggests that the leaders of German big business were filled with ideological ardor for National Socialism, before or after February 1933. Nor did Hitler ask Krupp & Co. to sign up to an agenda of violent anti-Semitism or a war of conquest … But what Hitler and his

[66] The prosecution quoted Hitler's speech as it was summarized by Krupp von Bohlen. The latter's notes were presented as evidence before the Tribunal. *The Farben Case I*, *supra* note 17, at 122-23.
[67] *Id.* at 124.
[68] Memorandum from L.M. Drachsler, Prosecutor, OCCWC, to J.E. Heath, *supra* note 64.

> government did promise was an end to parliamentary democracy and the destruction of the German left and for this most of German big business was willing to make a substantial down-payment.[69]

This meeting served as the starting point from which the prosecution began building its case for a sophisticated alliance between Farben, Adolf Hitler, and his Nazi Party. Following this critical election of March 1933, Farben made numerous financial contributions to Hitler and the Nazi party ranging over a period from 1933 to 1944. However, this was hardly the only link between the commercial giant and the Nazi regime. The prosecution thoroughly described the spider's web of alliances through which Farben synchronized its industrial activities with the military plans of the German High Command and participated in the rearmament of Germany and in the creation and equipping of the Nazi military for wars of aggression.[70] Further, the indictment alleged that Farben entered into cartel arrangements with U.S. companies (e.g., DuPont and Standard Oil) and used the information strategically in dealing with foreign countries to weaken them. It included aspects of American suspicions of the cartel's involvement in espionage activities.[71] In addition, it accused Farben of engaging

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[69] ADAM TOOZE, THE WAGES OF DESTRUCTION 101 (2006).

[70] *The Farben Case I*, *supra* note 17 at 19-28. The prosecution also charged Farben with participating in formation of transnational cartels to weaken Germany's potential enemies. Moreover, it accused Farben of engaging in propaganda, intelligence, and espionage activities. *Id.* at 29-39. The prosecution's allegations about Farben's extensive pre-war ties with U.S companies attracted most of the attention in the United States. The indictment alleged that Farben entered into cartel arrangements with U.S. companies and used the strategic information on foreign countries to weaken them. The Court dismissed most of the evidence in this context.

[71] Though prominent, I.G. Farben was not the only German enterprise accused of espionage. The activities of German-owned enterprises in Latin America were also subject to investigation by the State Department. *See* Memorandum from Samuel Melo to Telford Taylor, Brigadier General, Chief of Counsel for War Crimes,U.S.-OMGUS, "Report on Espionage Activities" (Feb. 6, 1946), OCCWC 1933-1949, Group 238, no. 159, 190/12/13/01-02, NARA.

in espionage on behalf of the German government.[72] These accusations were not incidentally reminiscent of the Justice Department's anti-trust campaigns.[73]

The prosecution's allegations about Farben's extensive pre-war ties with U.S companies attracted most of the attention in the United States. For example, the *Chicago Daily Tribune's* headline on its report of the Farben indictment stated: "U.S. Indicts 24 Farben Chiefs for War Crimes: Charges Cartels Sought to Weaken America."[74]

The prosecutors built a case for an ever-growing alliance between the industry and the Nazi regime. What began on February 20th in Goering's villa was advanced by establishing a special organization in Farben (Vermittlungstelle W), headed by Krauch, which had the declared objective of "building up a tight organization for armament in the IG, which could be inserted without difficulty into the existing organization of IG and the individual plants."[75] Krauch was appointed Chief of the Department of Research and Development in the Office of the Four Year Plan in 1936.[76] Some of the other defendants became members of different industrial organizations that exercised governmental powers in the planning of the German mobilization for war. The indictment quotes Albert Speer's remarks on Farben as an entity

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[72] For further discussion on the count of Aggressive War in the Industrialists' cases, which focuses on these aspects of the charge and the discussion it garnered in the United States, see Allison Marston Danner, *The Nuremberg Industrialist Prosecutions and Aggressive War,* 46 VA. J. INT'L L. 651, 661-66 (2006).

[73] This argument is also developed by Mark E. Spicka, *The Devil's Chemists on Trial" The American Prosecution of I.G. Farben at Nuremberg*, 61 THE HISTORIAN 865, 871 (1999); *see also* Interview by Richard D. McKinzie *with* Josaiah E. Dubois, Jr., Dep. Chief of Counsel for War Crimes in charge of I.G> Farben Case, Nuremberg, Germany, 1947-48 in Camden, N.J. (June 29, 1973), *available at* http://www.trumanlibrary.org/oralhist/duboisje.htm.

[74] Josiah Dubois, head of the I.G. Farben prosecution team, forcefully advocated this strategy. Dubois worked during the war for the Legal Department of the Treasury Department and was part of the team in charge of seizing I.G. Farben's assets in Latin America. During this time he also served on the War Refugee Board. Most importantly, Dubois worked with Secretary Morgenthau on the issue of reparations and wrote several of the draft chapters to Morgenthau's book, HENRY MORGENTHAU JR., GERMANY IS OUR PROBLEM (1945) *See U.S. Indicts 24 Farben Chiefs for War Crimes: Charges Cartels Sought to Weaken America*, CHI. DAILY TRIB., May 4, 1947, at 20.

[75] *The Farben Case I*, *supra* note 17, at 20.

[76] Carl Bosch, then president of the Farben, recommended to Goering that he retain the defendant Krauch to advise him in the planning and control of the chemical sector of the rearmament program.

that was "promoted to governmental status" and was frequently referred to as the "state within the state."[77]

The prosecution considered additional aspects of Farben operations as crimes against peace. First, its contribution to making Germany's army self-sufficient in regard to three crucial war materials essential to waging an aggressive war - nitrates, oil, and rubber. Further, when asked to order material essential to German warfare preparations, "Farben put its entire organization at the disposal of the Wehermacht." In addition to direct involvement in facilitating the war, the concern was also engaged in economic warfare aimed at weakening Germany's potential enemies: "Farben's international affiliations, associations, and contracts," argued the indictment, were carefully destined to "[w]eaken the United States as an arsenal of democracy"[78] and led Great Britain to "a desperate situation with respect to magnesium at the outbreak of the war."[79] In summary, these are but a few of key categories of evidence presented by prosecutors to demonstrate Farben officials' support in strengthening Germany's war capabilities and potential.[80]

Despite its great zeal, the prosecution sensed it was losing the case on Crimes against Peace. During the trial, Josiah Dubois, Chief Prosecutor of the IG Farben Case, asked his colleagues in Washington for help:

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[77] *The Farben Case I*, *supra* note 17, at 25. Peter Hayes provides a more nuanced account: "Both Krauch and his subordinates rapidly identified with their new tasks, not their old employers, even when private corporations continued to pay their salaries." PETER HAYES, INDUSTRY AND IDEOLOGY: IG FARBEN IN THE NAZI ERA 176-178 (1987). Furthermore, Hayes challenged the prosecution's implicit claim – that the Four Year Plan began as or became an IG Farben Plan. Conversely, he argued that, "…[t]here occurred in Germany after 1936, not a Farbenization of economic policy making, but a steady militarization of IG Farben." *Id.* at 184-85.

[78] *The Farben Case I*, *supra* note 17, at 29-30.

[79] *Id.* at 30.

[80] Historians such as Richard Overy and Peter Hayes contest the general view that economic circles supported and pressed the Nazi leadership to war. Hayes argued that the war entailed weighty risks and costs for the concern. "There is little support that IG Farben sought, encouraged, or directed the Nazi conquest of Europe." HAYES, *supra* note 77, at 213. The combine reacted opportunistically and defensively to the regime's diplomatic and military triumphs, but IG did not foment them." *Id.* at 216-18

> We are specifically interested in discussions relating to the meaning of aggressive war and the criminal liabilities of so-called private persons as distinguished from government officials. The motion filed by the defense […] was based on the argument that what we have proved does not fall within Control Council Law No. 10, which must be interpreted in the light of the London Charter and findings of the IMT.[81]

Joseph Borkin remarked later that "the way the prosecution began to develop the case seemed to play into the hands of the defense. The prosecution introduced organizational charts, cartel arrangements, patent licenses, correspondence, production schedules, and corporate reports, as is done in antitrust cases, not at a trial of war criminals charged with mass murder."[82]

The court's disapproving sentiment is well captured in Dubois' description of the trial's proceedings:

> From the very beginning the prosecution had trouble convincing the court that our method of proof was appropriate. On a stand facing the court, we had set up panoramic charts of the Farben empire, showing banking houses from Bern to Bombay, production facilities on five continents… [t]he tribunal didn't like this method…. [t]his was only the third day, and already the court was impatient.[83]

Dubois further recalled in his book the appeal of Emanuel Minskoff, one of the lawyers in the prosecution team, to change the order and direction of the prosecution case. He argued it would be more effective to open with the charge of slavery and mass murder, otherwise "the court just can't believe these are the kind of men who would be guilty of aggressive war."[84]

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[81] Transcript of Teleconference, Washington to Nuremberg (Dec. 17, 1947), War Crimes Branch, Judge Advocate General (JAG), Group 153, No. 132, 270/1/4/03, NARA.
[82] JOSEPH BORKIN, THE CRIME AND PUNISHMENT OF I.G. FARBEN 141 (1978).
[83] DUBOIS, *supra* note 1, at 76-77; *see also The Farben Case* I, *supra* note 17, at 583.
[84] Dubois could not follow Minskoff's suggestion since he was obliged to proceed according to the sequence of the counts in the indictment. DUBOIS, *supra* note 1, at 99. Nonetheless, this troubling start forced the prosecution to change its approach. *Id.* at 77.

Sam Harris made a similar suggestion while preparing the Krupp case.[85] Minskoff and Dubois's concerns were eventually substantiated. The Farben Tribunal dismissed the charges of Crimes against Peace. The Farben judgment exonerated Farben's pre-war contacts with U.S. companies and, implicitly, the conduct of the American firms.[86]

The judges interpreted the IMT judgment as setting a high standard of proof for the analysis of the aggression charges, namely the need for *conclusive* evidence "of both knowledge and active participation."[87] Accordingly, the Farben Tribunal opened its discussion on Crimes against Peace by discussing how the IMT regarded few of the defendants guilty of this charge and approached the finding under them "with great caution."[88] This analysis led the Tribunal to conclude that Carl Krauch, one of four men in charge of research and development of the Four Year Plan managed by Göring, did not knowingly participate in the planning, preparation, or initiation of an aggressive war. It was especially difficult for the Tribunal to hold the Farben defendants responsible on this count, first, due to the IMT precedent according to which rearmament in and of itself was not a crime unless carried out as part of a plan to wage aggressive war; and, second, in light of its acquittal of officials who held economic positions in the Nazi government.[89] The Tribunal answered the prosecution's assertion that "the magnitude of the rearmament efforts was such

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[85] Transcript of Teleconference, Conway to Thayer (Sept. 24, 1947), Teleconference Copies, Jan. 29, 1947 – Dec. 30, 1947, Correspondence and Reports, OCCWC, Group 238, no. 159, 190/12/13/01-02, NARA.

[86] For further discussion on this point see Danner, *supra* note 72, at 663.

[87] *The Farben Case II*, supra note 17 at 1102.

[88] *Id.* Indeed, the IMT found parties guilty under Count One and Two only when the evidence of both knowledge and participation was conclusive. No defendant was convicted unless he was, as was the defendant Hess, in a very close relationship with Hitler or attended at least one of the four secret meetings at which Hitler disclosed his plans. *Id.*

[89] The lawyers working on the industrialist trials had hoped that the indictment of Speer and Funk would provide some basis for trying the industrialists. *See* Memorandum from Leo M. Drachsler, Prosecutor, OCCWC, to J.E. Heath, *supra* note 64. However, with the acquittal of Speer, as noted by Judge Hebert in his dissenting opinion in *Farben II*, "it would not be logical in this case to convict any or all of the Farben defendants of the waging aggressive war in the face of the positive pronouncement by the International Military Tribunal that war production activities of the character headed by Speer do not constitute the 'waging' of aggressive war." *The Farben Case II*, *supra* note 17, at 1306.

as to convey that knowledge [the personal knowledge needed to establish responsibility]," as follows: "None of the defendants, however, were military experts […] The field of their life work had been entirely within industry," and the evidence doesn't support their knowledge of the plan of rearmament or its scope."[90] Further, the Tribunal dismissed the prosecution's February 20th conspiracy claim that donations made by Farben to the Nazi party in the early years of the regime indicate an alliance between the two.[91] And, the Tribunal concluded that the prosecution's charges of propaganda, intelligence and espionage on behalf of the German government were in "reference to industrial and commercial matters."[92]

The Tribunal responded to the interpretation of waging aggressive war by making reference to the IMT decision and its limited definition, which confided it to only to principals.[93] Indeed, it did include industry in the concept of major war criminals as follows: "Those persons in the political, military, [or] *industrial* fields ... who [was] responsible for the formulation and execution of policies' qualified as a leader."[94] But it added another aspect to the limitations derived from the concept of major war criminals; namely, Crimes against Peace are allegedly committed by sovereign states. Since international crimes are committed "by men, not by abstract entities…[t]he extension of the punishment for crimes against peace by the IMT to the leaders of the Nazi military and government, was therefore, a logical step." In comparison: "In this case we are faced with…men of industry who were not makers of policy but who supported their government in the waging of war."[95] Thus, *men of industry* could be held responsible for the crime of aggression only if they are policymakers. Whether

[90] *The Farben Case II*, *supra* note 17, at 1113.
[91] *Id.* at 1117-19.
[92] *Id.* at 1123.
[93] "There is nothing [the London agreement] or in the attached Charter to indicate that the words 'waging a war of aggression,' as used in Article II(a) of the latter, was intended to apply to any and all persons who aided, supported, or contributed to the carrying of an aggressive war." *Id.* at 1124.
[94] *Id.* at 1124 (emphasis added). *S*ee Kevin John Heller, *Retreat from Nuremberg: the Leadership Requirement in the Crime of Aggression*, 18 EUR. J. INT'L L. 477, 483-84 (2007)..
[95] *The Farben Case II*, *supra* note 17, at 1125.

such scenario could ever include private businessmen outside the context of a privatized governmental industry seems to be quite far-reached.[96] In its concluding remarks in reference to Waging War of Aggression, the Tribunal stated the need to avoid mass punishment.[97] It concluded:

> The defendants now before us were neither high public officials in the civil government or 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.[98]

2. The Krupp Independent Conspiracy

When the allegations of Crimes against Peace came before The Krupp Tribunal, it acquitted the defendants on counts one and four - participating in wars of aggression and crimes against peace – and focused exclusively on slave labor and spoliation of property. In the *Krupp* case, the Tribunal again considered "policy-making" essential to any finding of responsibility of private persons.

Krupp was a historic name in the European war mythology. Throughout the 19th century it grew to become "the largest and most notorious armament enterprise of all time" and was considered "Germany's principal arsenal' during World War I."[99] During the Second World War, Krupp was the principal German manufacturer of artillery, armor, tanks, and other munitions, and a prominent producer of iron and coal. But the evidence establishing

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[96] *Cf.* Heller, *supra* note 94, at 486-88 (suggesting the prosecution lowered the threshold from the *leadership* requirement to *involvement at the policy level* in planning, preparing or initiating the war). Heller advocated for the *shape and influence* requirement, rather than the *control or direct test*. He analyzed the *shape and influence* test as it appeared in the High Command Case, in which 14 high ranking officers in the German military were put to trial, and the *Ministries* case, in which 21 high-ranking officials in the Nazi government and Nazi party were charged with various crimes against peace. *Id.*

[97] *The Farben Case II*, *supra* note 17, at 1124-25.

[98] *Id.* at 1126 (emphasis added).

[99] *The Krupp Case*, *supra* note 18, 62-63.

responsibility for the first count was not only based upon Krupp's involvement in the rearmament of Germany. As Thayer, the principal researcher for the Krupp case, wrote:

> [it is] imperative that you secure release of Krupp Nirosta documents and send them here as rapidly as possible … Since the Krupp trial starts November 1st with the Aggressive War count. Allegations as to economic penetration rest exclusively on these documents as summarized in the Department of Justice report.[100]

We find early traces of these allegations in Henry Morgenthau's book - *Germany is Our Problem.*[101]

The Krupp ruling on the aggressive war count was published on April 5, 1948 and preceded the Farben decision.[102] Similar to the Farben Tribunal, the question posed was whether the Krupp defendant participated in or knew of the Nazi conspiracy to wage aggressive war? More specifically, it brought to the fore the question of the link between the business of *making arms* and the crime of aggression. In his concurring opinion, Judge Anderson explained the prosecution's distinction between the conspiracy charge in the indictment before the IMT and the Krupp case:

> The contention is in substance that whereas in the indictment before the IMT the conspiracy charged was that originated by Hitler and his intimates, for convenience called the "Nazi Conspiracy", the conspiracy here is *a separate and independent* one originated in 1919 by Gustav Krupp and then officials of the Krupp concern, long before the Nazi seizure of power.[103]

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[100] Transcript of Teleconference, Thayer to Conway (Sept. 24, 1947), *supra* note 85.

[101] Morgenthau described how the Krupp firm used its organization of the Krupp-Nirosta company to maintain Germany's influence in Latin America. HENRY MORGENTHAU JR., GERMANY IS OUR PROBLEM 39 (1945). For further discussion on Henry Morgenthau's influence on American attitudes towards the German industry after the Second World War, see Doreen Lustig, *Criminality of Nazi-Era German Cartels: The Rise and Decline of Anti-Trust in American Approaches to International Criminal Law at Nuremberg* (manuscript, on file with author).

[102] *The Krupp Case*, *supra* note 18, at 390.

[103] *The Krupp Case*, *supra* note 18, at 407.

Indeed, the prosecution argued the Krupp aggressive motivations "antedated nazism, and have their own independent and pernicious vitality which fused with Nazi ideas to produce the Third Reich."[104]

In rejecting the argument of an independent Krupp conspiracy, Judge Anderson wrote: "Under the construction given the former by the IMT the conspiracy to commit crimes against peace involving violations of a treaty is confined to a concrete plan to initiate and wage war and preparations in connection with such plan."[105] Indeed, Anderson concluded:

> [T]he defendants were private citizens and noncombatants … None of them had any voice in the policies, which led their nation into aggressive war; nor were any of them privies to that policy. None of them 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.[106]

Judge Wilkins wrote a concurring opinion that was more favorable to the prosecution's case.[107] Wilkins noted, "the prosecution built up a strong *prima facie* case, as far as the implication of Gustav Krupp and the Krupp firm is concerned."[108] It was the benefit of doubt that kept him from opposing dismissal.[109] As he later wrote in his memoirs, "[H]ad Gustav *or the Krupp firm, as such,* been before us, the ruling would have been quite different."[110] Despite the gravity attributed to this count by the American prosecution, neither the conspiracy element nor the notion of Crimes against Peace were focal points of the IMT

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[104] *Id.* at 131.
[105] *Id.* at 419. Anderson argued that the acquittal of Speer on the charge of *waging* war was particularly relevant to the Krupp managers' responsibility. *Id.* at 447-48.
[106] *Id.* at 449-50 (emphasis added).
[107] *Id.* at 455-66.
[108] *Id.* at 456.
[109] Wilkins wrote, "Giving the defendants the benefit of what may be called a very slight doubt, and although the evidence with respect to some of them was extraordinarily strong, I concurred that, in view of Gustav Krupp's overriding authority in the Krupp enterprises, the extent of the actual influence of the present defendants was not as substantial as to warrant finding them guilty of crimes against peace." *The Krupp Case*, *supra* note 18, at 457-58.
[110] WILLIAM J. WILKINS, THE SWORD AND THE GAVEL 209 (1981) (emphasis added).

decision. Indeed, it had been nearly completely diminished when it came before the American Tribunals who tried the Industrialists.

Viewed through the lenses of Crimes against Peace and conspiracy, the prosecutorial strategies of the Farben and Krupp indictments put forth competing theories of conspiracy. In the Farben indictment, the defendants were depicted as part of the war machine, complicit in the grand scheme of war initiated by the Nazi government. In the Krupp indictment, the defendants resembled a group of conspiring pirates. Thus, the framing of the Krupp Conspiracy was as a bunch of organized gangsters conspiring to achieve their aims by unlawful means. The prosecution failed to prove its case in both instances.

In both the Farben and Krupp decisions, the Tribunals stressed the importance of the link to the policy realm. This reaffirmed the nature of the Crime of Aggression as a crime committed by the state and its organs. The underpinning rationale of Crimes against Peace relates to the violation of sovereign borders[111] or international treaties. Paradoxically, though clearly interfering within the sovereign's prerogative to wage war, it reaffirmed the state as the core subject of international law.[112]

The count of Crimes against Peace limited the perception of the international crime to traditional inter-state relations. The state's monopoly over violence was reestablished through the insistence that only a close link to the policy-making realm can provide grounds for criminal responsibility. Thus, the decisions decried the limitations of the doctrine of Crimes against Peace and its constraints in a context of diffused responsibility. Despite the shift towards individual criminal responsibility, the nature of violence scrutinized by the Tribunals

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[111] This argument was developed by David Luban in LEGAL MODERNISM 336-44 (1997).
[112] *Id.* at 337.

was only that which could be linked to the apparatus of the State. These results could be attributed to an impoverished conception of the Nazi state.

E. *Behemoth* and *Leviathan*: Business Responsibility and Competing Theories of the State

Neumann concluded *Behemoth* with the assertion that National Socialism has no political theory of its own:

> But if National Socialism has no political theory, is its political system a state? If a state is characterized by the rule of law, our answer to this question will be negative, since we deny that law exists in Germany. It may be argued that state and law are not identical, and that there can be states without law. … A state is ideologically characterized by the unity of the political power that it wields. I doubt whether even a state in this restricted sense exits in Germany… It is doubtful whether National Socialism possesses a unified coercive machinery, unless we accept the leadership theory as a true doctrine. The party is independent of the state in matters pertaining to the police and youth, but everywhere else the state stands above the party. The army is sovereign in many fields; the bureaucracy is uncontrolled; and industry has managed to conquer many positions.[113]

This incoherent structure, however, doesn't defy a shared objective. Neumann conveyed in *Behemoth* the emphasis on the war that the prosecution picked up later. "National Socialism has coordinated the diversified and contradictory state interferences into one system having but one aim: the preparation for imperialist war…. This means that the

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[113] NEUMANN, *supra* note 37, at 467-68. Hannah Arendt referred to Neumann upon reaching similar conclusions a few years later: "What strikes the observer of the totalitarian state is certainly not its monolithic structure. On the contrary, all serious students of the subject agree at least on the co-existence (or the conflict) of dual authority, the party, and the state. Many, moreover, have stressed the peculiar 'shapelessness' of the totalitarian government." HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 514 (2004). Further, Arendt noted how "above the state and behind the facades of ostensible power, in a maze of multiplied offices, underlying all shifts of authority and in chaos of inefficiency, lies the power nucleus of the country." *Id.* at 543.

automatism of free capitalism, precarious even under democratic monopoly capitalism, has been severely restricted. But capitalism remains.[114] Neumann's analysis suggested a reality full of contradictions. While the industry often operated freely and out of self-interest, its operations were restricted by incorporation into a monopolistic structure and some aspects of the state bureaucracy. More generally, Neumann argued that,

> Under National Socialism …[,] the whole of the society is organized in four solid, centralized groups, each operating under the leadership principle, each with legislative, administrative, and judicial power of its own… The four totalitarian bodies will then enforce it with the machinery at their disposal. There is no need for a state standing above all groups; the state may even be a hindrance to the compromises among the four leadership…It is thus impossible to detect in the framework of the National Socialist political system any one organ which monopolizes political power.[115]

Neumann thus regarded the four bodies, which comprise the Nazi authority – the government, the party organizations, the army and the industry – as the "non-state."

The Tribunals' opposition to the non-state structure of the Nazi regime was evident in their decisions on the crime of aggression. The judges' decisions were based on the premise of government control over the war. The Industrialists' culpability could be proven only if they were to become policy-makers, principals of decision-making in the Nazi state. Neumann's theory was in clear tension with what he considered to be the familiar theory of the state: "States, however, as they have arisen in Italy, are conceived of rationally operating machineries disposing of the monopoly of coercive power. A state is ideologically characterized by the unity of the political power that it wields. I doubt whether a state in this restricted sense exists in Germany."[116]

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[114] NEUMANN, *supra* note 37, at 360-61.
[115] *Id.* at 468-69.
[116] *Id.* at 467.

The decisions of the Tribunals presupposed the Weberian imagery of the modern state as a default position. The notion of the Industrialists as equal partners in the crime of aggression was rejected, as they were assumed to be merely "followers and not leaders."[117] In their refusal to accept even a light version of Neumann's description of the Nazi modus operandi, the judges reinstated the *realist* position of states' monopoly over violence.

Viewed from a normative perspective, Neumann's argument undermined the possibility of conceiving Germany as a state and therefore entailed a serious destabilizing risk for international lawyers of his time. Neumann asked his readers:

> But if the National Socialist structure is not a state, what is it? …I venture to suggest that we are confronted with a form of society in which the ruling groups control the rest of the population directly, without the mediation of that rational though coercive apparatus hitherto known as the state. This new social form is not yet fully realized, but the trend exists which defines the very essence of the regime.[118]

Though the judicial verdict was clear, historians continued to deliberate on the nature of the relationship between businesses and government in the Third Reich. The imagery of an alliance between equals - industry and government - proved difficult to reconcile with the shift towards greater political direction and influence on the course of the war and economic policy from 1936. But, as Peter Hayes observed, "[i]f the primacy of politics reigned …an amorphous and unpredictable Behemoth ruled."[119] Governmental authorities responsible for the German production leading towards the war were diffuse and rather in flux: "Not even 'total war' could cure Nazism's congenital inclination to multiply competencies, confuse lines of authority, and ordain competing objectives."[120]

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[117] *The Farben Case II*, *supra* note 17, at 1126.
[118] NEUMANN, *supra* note 37, at 470.
[119] HAYES, *supra* note 77, at 319.
[120] *Id.* at 320.

Does the fact that governmental decision-making over war and peace was diffuse and incoherent necessarily undermine the Tribunals' rationale that requires a link to the policy-making realm to establish responsibility? Both the historical debate and the tribunals' decision share the assumption that political leaders initiate, manage, and control policies of war and peace. This premise assumes that wars always result from well-organized decision making processes, orchestrated and managed by a clearly defined circle of leaders. This preferred scenario, however, is an *ought* that should not be confused with the political reality under consideration - the *is*. Put differently, does the Hobbesian political *ideal* of war being solely conducted and decided upon by political leaders necessarily lead to the assumption that the crime of aggression is a 'crime of leadership'? Alongside the possibility of Industrialist sharing the decision-making table where the deliberations on waging a war of aggression are taking place, there are specific economic measures that could plausibly be considered as crimes of aggression. The allegations according to which the industrialists used cartelization practices to weaken their future enemies' economies present the possibility of an *economic* war.

One element contributing to the Tribunals' decision not to find the Industrialists responsible for Crimes against Peace was the coincidence between the change in the power balance between industry and government after 1936 in favor of the latter and the Tribunals' decision to limit their jurisdiction to post-1939 events. The allegations against the industrialists' responsibility for the Crime of Aggression focused primarily on the early Nazi period, when the alleged conspiracy was established. Therefore, it is not surprising that the Krupp and Farben Tribunals' decision to limit their jurisdiction to post-1939 events pulled the carpet from under this count. Yet, while economic leaders enjoyed much greater influence on state economic policy during these early years of the Nazi regime than in future years,

historians, too, have been reluctant to attribute responsibility for the rise of Nazism to power to German business leaders and consider their influence in the negative sense; as in Overy's claim of "their widespread disillusionment with the parliamentary system and their failure to give democracy any moral support."[121]

[E. Historical Perspectives and the Theory of Behemoth *omitted from IILJ version]*

III. The Normative State as the Private Sphere: Revisiting Ernst Fraenkel's Dual State Theory in Nuremberg

The relationship between the responsibility of the industrialists and the theory of the state was not relevant only for the crime of aggression. The crimes of Aryanization, plunder, and spoliation similarly engaged the tension between crimes considered, in essence, to be 'political' with involvement of private actors in their commission. The jurisprudence of the Industrialist cases concerning the crime of aggression raised the question of private actors' responsibility for the political crime of waging a war. Interestingly, the discussion on spoliation penetrated a realm that is closer to private actors' conventional practices - the realm of business transactions. It turned the tables on the question of the 'political' crime, asking when will *private* transactions, even if conducted in the shadow of war and occupation, be regarded criminal. Such inquiry required further understanding of the Nazi state, one that includes an analysis of the relationship between the public and private spheres in the Nazi regime.

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[121] RICHARD J. OVERY, WAR AND ECONOMY IN THE THIRD REICH 12 (1994).

[A. Aryanization and Crimes against Humanity: The Exclusion of Plunder Within State Borders – *omitted from the IILJ version]*

A.Spoliation in Occupied Territories

The war presented the Tribunals with "a relatively new development affecting the property rights of private individuals in German-occupied parts of Europe."[122] The Tribunal indicated that Farben's administrators formed "corporate transactions well calculated to create the illusion of legality" but their objective of pillage, plunder, and spoliation clearly stands out. In the case of Farben's activities in Poland, Norway, and France, the Tribunal found established proof that Farben at times through "negotiations" with private owners at others following the confiscation of the Reich authorities proceeded transactions of property contrary to the wishes of its owners. Further, these unlawful acquisitions were not meant to maintain either the German army or the occupied population. Instead, Farben was motivated by a desire to enhance and to enrich its enterprise. As noted by the Tribunal: "When private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law."[123] Thus, business initiatives and governmental influence were central considerations in the Tribunals' discussion of unlawful property transactions.

1. Initiative

The Farben Tribunal distinguished between spoliation practices initiated by the Reich (e.g., Nordisk-Lettmetall in Norway) and others initiated by Farben (as in the case of plants in

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[122] GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 189 (1957).

[123] *The Farben Case II*, *supra* note 17, at 1132-33. Five of the Farben directors were held criminally liable for the plunder.

Poland and in France). In each conquered country, Farben's motto, according to the prosecutors, was *combine and rule*: "Farben endeavored to amalgamate the more valuable segments of its chemical industries into a single large combine, dominated by Farben, and to close down the rest altogether."[124] Internal correspondence among the Nuremberg lawyers shows their concern with the nature of proof required to show that such initiative was indeed taken by the enterprise.[125]

Early correspondence suggests they conceived the industry as complicit in governmental spoliation rather than as an independent violator.[126] The division based on the initiative criteria corresponded, to some extent, with the distinction between eastern and western occupied territories.[127] Later historical accounts distinguish between the early occupation of Austria and Czechoslovakia and the ones that followed under the New Order. Most firms did not attain much from the early expansions, with the important exception of I.G. Farben. The giant chemical concern was closely integrated into the industrial dimension of the Four Year Plan and used its prominence to gain from the expanding empire. Farben reacted to the conquests and sought to retain its power and control in both the eastern and western territories. In most cases of occupied territories in the *East*, the Reich organized directly the

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[124] *The Farben Case I*, *supra* note 17, at 181. The indictment includes the story of one Mr. Szpilfogel who was a director of an important factory in Wola. All of Mr. Szpilfogel's property – business and personal – was confiscated by Farben soon after the capture of Warsaw. His plea from the Warsaw ghetto to the defendant von Schnitzler, whom he knew from previous business encounters, was never answered.

[125] Memorandum from Abraham L. Pomerantz, Deputy Chief Counsel, OCCWC, to Telford Taylor, Brigadier Gen., Chief of Counsel for War Crimes, U.S.-OMGUS, "Expropriation of the Property of the Nazi Opposition and the Aryanization of Jewish Property" (Aug. 14, 1946), Berlin Branch, OCCWC, Group 239, No. 202, 190/12/35/01-02.

[126] Sprecher instructed researchers in the OCCWC's spoliation department to "complete a basic memorandum brief on the organizations, pseudo-government agencies, and party agencies which had connections to plunder and spoliation, showing how the spoliation activities of private individuals and concerns related thereto." Memorandum from D.A. Sprecher, Director, Economic Division, OCCWC, to Sadi Mase, Chief, Spoliation Branch, OCCWC (Oct. 23, 1946), Administrative Records, Executive Counsel, Economic Division, OCCWC, Group 238, no. 165, 190/12/13/1, NARA.

[127] For a discussion of the two distinct patterns concerning spoliation - the Eastern and the Western pattern, see Memorandum from Executive Counsel, I.G. Farben Trial Team #1, OCCWC, "I.G. Farben—Spoliation", OCCWC, Group 238, no. 192, 190/12/32/07-12/33/01, NARA.

confiscated properties and Farben's involvement was mainly derivative. One historian described its imperialism as the sort that *followed* the flag.[128]

The prosecutors argued that when the *Western approach* was applied in France, the German government supported and encouraged the industry's plundering of property, but it was the industry's initiative and leadership that designed the course of action.[129] This division between the derivative form of spoliation and the direct one is later echoed in the Tribunal's decision,[130] which concluded that the defense of necessity is not available when the actions under scrutiny were the defendants' own initiative. Hence, the defense is not available because they cannot claim to be deprived of moral choice.[131] Later historical accounts offer a more nuanced reading of the *initiative* criteria emphasizing the *responsive* mindset of businesses to the Nazi expansionism. Nevertheless, Peter Hayes concluded that "[t]he defensive pattern of the combine's behavior offered little consolation to those victimized by it in 1940-4 and would not have shielded their successors. But that pattern does clarify, at least, the problem of distinguishing between cause and effect in the Nazi conquest of Europe."[132]

2. Control and the Presence of Governmental Authority

The Tribunals were not only interested in the question of initiative:

> In those instances in which Farben dealt directly with the private owners, there was the ever present threat of forceful seizure of the property by the Reich or other similar measures; such, for

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[128] HAYES, *supra* note 77, 264-65.
[129] "In subjugating the French chemical industry, Farben acted in closest cooperation with but by no means under the leadership of, the Nazi government. The initiative was Farben's. Farben drafted the plan to eliminate French competition once and for all, to become master in the French house …. The Nazi government had favorably received Farben's 'New Order' plan, and from then on gave its support but no instructions." *The Farben Case I*, *supra* note 30, at 187; *see also* HAYES, *supra* note 77, at 281-82.
[130] "In these property acquisitions which followed confiscation by the Reich, the course of action of Farben clearly indicates a studied design to acquire such property. In most instances the initiative was Farben's." *The Farben case II*, *supra* note 17, at 1140.
[131] The Farben case II, *supra* note 17, at 1179.
[132] HAYES, *supra* note 77, at 317.

example, as withholding licenses, raw materials, the threat of uncertain drastic treatment in peace treaty negotiations, or other effective means of bending the will of the owners.[133]

The Farben Tribunal emphasized that an action of the owner would not be considered voluntary if it was obtained by threats, intimidations, and pressure of exploiting the position of *power of the military*, although it could not serve as an exclusive indication of the assertion of pressure. Further, it held that commercial transactions in the context of a belligerent occupation should be closely scrutinized.[134] In most of the cases reviewed by the Tribunal, "the initiative was Farben's"[135] backed by the threat of the state's use of violence: "The power of military occupant was the ever-present threat in these transactions, and was clearly an important, if not a decisive, factor."[136] This resulted in the enrichment of Farben.[137]

The Krupp Tribunal followed a similar approach, emphasizing the Krupp firm's reliance upon governmental officials to assist it in acquiring properties in the occupied territories.[138] The Flick Tribunal posed an even higher threshold, requiring that spoliation practices be *systematic*.[139] Thus, the Tribunals differed in the gravity they attributed to such crimes from a lenient position towards Flick to a harsher one in the Krupp case. The issue of initiative - to what extent was the government a *driving force* in these transactions remains unclear through the decisions.

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[133] *The Farben case II*, *supra* note 17, at 1140.
[134] *Id.* at 1135.
[135] *Id.* at 1140.
[136] *Id.*
[137] In reference to its transactions in occupied France, the Farben Tribunal held, as follows: "Farben was not in a position to enlist the Wehrmacht in seizure of the plants or to assert pressure upon the French under threat of seizure of confiscation by the military . . . . The pressure consisted of a possible threat to strangle the enterprise by exercising control over necessary raw materials. It further appears that Farben asserted a claim for indemnity for alleged infringements of Farben's patents, knowing well that the products were not protected under the French patent law at the time of the infringement. This conduct of Farben's seems to have been wholly unconnected with seizure or threats of seizures, expressed or implied, and while it may be subject to condemnation from a moral point of view, it falls far short of being proof of plunder either in its ordinary concept or as set forth in the Hague regulations, either directly or by implication." *Id.* at 1152.
[138] *The Krupp Case*, *supra* note 18, at 1338-73.
[139] *The Flick Case, supra* note 16, at 1208.

B. Initiative and Control in the Dual State

Christoph Buchheim and Jonas Scherner argued that "despite extensive regulatory activity by an interventionist public administration, firms preserved a good deal of their autonomy even under the Nazi regime. As a rule, freedom of contracts, that important corollary of private property rights, was not abolished during the Third Reich, even in dealings with state agencies."[140] The Third Reich used various techniques to induce private industry to undertake war-related productions and investments while not violating private property rights and entrepreneurial autonomy. But the initiative generally remained with the enterprises:

> Even with respect to its own war-and autarky related investment projects, the state normally did not use power in order to secure the unconditional support of industry. Rather, freedom of contract was respected. However, the state tried to induce firms to act according to its aims by offering them a number of contract options to choose from.[141]

Furthermore, "very often that could be done only by shifting the financial risk connected to an investment at least partly to the Reich. For this purpose the regime offered firms a number of contract options to choose from implying different degrees of risk-taking by the state."[142]

Ernst Fraenkel, one of Neumann's closest colleagues famously described this feature - of a functioning private sphere - in his work on National Socialism, *The Dual State.* For Neumann, the jurisprudential ramifications of the rise of Behemoth were, inter alia, manifested in the deformalization of law. Monopolies used these arbitrary powers to pursue

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[140] Christoph Buchheim and & Jonas Scherner, *The Role of Private Property in the Nazi Economy: Tthe Case of Industry*, 66 J. ECON. HIST. 390, 394 (2006).
[141] *Id.* at 395.
[142] *Id.* at 403. For example, I.G Farben concluded a contract with the Nazi government, which guaranteed its sales for a fixed minimum price (*Wirstschaftlichkeitsgarantievertrag*) for its first plant to produce Buna in 1937. *Id.* at 409.

their interests.[143] Fraenkel's thesis challenged this description of total arbitrariness and offered an alternative description of a system in which some legal mechanisms still function in the sphere of civil law.[144] The Nazi deformalized legal practices of the "prerogative state" are supreme but nonetheless operate alongside the "normative state":

> By the Prerogative State we mean that governmental system which exercises unlimited arbitrariness and violence unchecked by any legal guarantees and by the Normative State an administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the courts and activities of the administrative agencies.[145]

Fraenkel further noted that the essence of the Prerogative State "lies in its refusal to accept legal restraint, i.e. any 'formal' bonds. The Prerogative State claims that it represents material justice and that it can therefore dispense with formal justice."[146]

Franekel described how scholars like Carl Schmitt, who supported the idea that the state is a pre-legal political entity, which might act outside the limits of the rule of law, were inspired by the distinction between the international and domestic legal orders: "[T]he concept which permitted an unlimited sovereignty to ignore international law is the source of the theory that political activity is not subject to legal regulation. This was the presupposition for the theory of the Prerogative State."[147] The difference between the Prerogative State and the Normative State is not a matter of degree but a qualitative difference. Actions of an agency, which exceeds its jurisdiction in the normative state, will be declared null and void in proceedings before the ordinary courts. Conversely, the organs of a Prerogative State are not

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[143] Neumann shared Weber's views on this legal development but rather than pointing to the affinity between deformalized law and the rise of the welfare state he argued that such "legal standards of conduct [blanket clauses] serve the monopolist" and emphasized the advantages of deformalized legal modes for the privileged and powerful. *See* WILLIAM E. SCHEUERMAN, BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW 126-27 (1994).
[144] ERNST FRAENKEL, THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP (1941).
[145] *Id.* at xiii.
[146] *Id.* at 46.
[147] *Id.* at 65-66.

so limited to their jurisdiction. Nevertheless, the Normative State is not identical with a state in which the Rule of Law prevails (i.e. with the Rechstaat of the liberal period). The Normative State is a necessary complement to the Prerogative State and can be understood only in that light. Consideration of the Normative State alone is not permissible.

Fraenkel's discussion of the Normative State was dedicated to what we often consider to be the private sphere of the law:

> According to National Socialism, the freedom of the entrepreneur within the economic sphere should in principle be unconfined. Questions of economic policy are usually regarded as falling within the domain of the Normative State…In spite of existing legal possibilities for intervention by the Prerogative State where and whenever it desires, the legal foundations of the capitalistic economic order have been maintained.[148]

Following his survey of court decisions in key private law fields that demonstrate how courts have successfully maintained the legal system necessary for the functioning of private capitalism, Fraenkel concluded:

> Although the German economic system has undergone many modifications it remains predominantly capitalistic. [It is a form of] organized private capitalism with many monopolistic features and much state intervention… a mere continuation, a somewhat more developed phase, of the 'organized capitalism' of the Weimar period.[149]

Fraenkel emphasized two main exceptions to the 'normative' function of the private sphere in Nazi Germany: First, in the field of labor, the destruction of all genuine labor organizations and the persecution of labor leaders as 'enemies of the state'. Second, since Jews are regarded enemies of the Third Reich, "all questions in which Jews are involved fall

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[148] *Id.* at 72-73.

[149] *Id.* at 171-72; *id.* at 184-85 (summarizing Nazi economic system as one in which "the Normative State functions as the legal frame-work for private property, market activities of the individual business units, all other kinds of contractual relations, and for the regulations of the control relations between government and business…legal ways of defining and protecting individual rights against other members of the economy and against the encroachment of state authorities are still open and used").

within the jurisdiction of the Prerogative State."[150] Andrew Arato elaborated, further, how the dual structure offered by Fraenkel served as a condition for the institutionalization of the Nazi regime.[151] In the complex reality of occupied Europe, it is probably more accurate to follow Arato's interpretation of Fraenkel's distinction as a *tension* or *struggle* between the Prerogative and Normative State.[152]

The Industrialist decisions sought to retain the sovereignty of the occupied territories by applying the laws of war and criminalizing coerced private property transactions. Judge Wilkins (of the Krupp Tribunal) emphasized how the essence of the Hague regulations is to keep intact the economy of the belligerently occupied territory. The main objective was to prevent the state from forcing inhabitants of the occupied territory "to help the enemy in waging the war against their own country or their own countries allies…Beyond the strictly circumscribed exceptions, the invader must not utilize the economy of the invaded territory for his own needs within the territory occupied."[153]

The Farben Tribunal distinguished between lawful and unlawful transactions under international law. The latter were considered to be plunder and spoliation, acquisitions of property incompatible with the laws of war; the former were business deals of purchase through agreement that may or may not be in violation of domestic private law. This distinction assumed that a certain degree of legality prevailed in the "private sphere" of occupied Europe. This required answering the following question: How can the illegal occupation of Europe in a *total war* be reconciled with a presumption of a functioning normative state in the private sphere? A few years after the trials Hersch Lautepracht

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[150] *Id.* at 89.
[151] Andrew Arato, *Dictatorship Before and Beyond Totalitarianism*, 69 SOC. RES. 473, 495-96 (2002).
[152] Arato revisited Hannah Arendt's analysis of totalitarianism through the prism of Fraenkel's Dual State framework. *Id.* at 496.
[153] *The Krupp Case*, *supra* note 18, at 1341-43.

challenged the logic of applying this rationale in the context of an illegal "total war."[154] He pointed to the problem of allowing any transfer of title, even if it was made in accordance with the laws of war, to become lawful in the context of an illegal war. He pointed out the tension between adherence to the laws of war in this context "for the sake of humanity and the dignity of man" and "the principle that an unlawful act ought not to become a source of benefit and title to the wrongdoer."[155] While Professor Lauterpacht was worried that legal scrutiny based on the laws of war would incidentally legitimize actions that were exercised in a broken legal order,[156] he also stressed his reluctance "to augment the evil by encouraging the abandonment of the normal consequences of the law of war in this – or other— spheres."[157]

For Fraenkel, the idea of the Prerogative State did not lie in the *presence* of the state apparatus or its *direct influence*.[158] Rather, it focused on the way power is exercised in the name of the law; that is, whether it is or is not constrained by it. The *prerogative* nature of spoliation practices derived from the lack of constraint on the Industrialists engaging in these transactions. This feature was often fostered, supported, and even materialized by the cooperation with state officials or an organization, but this was not what made it part of the Prerogative State.

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[154] *See* Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT'L L. 206, 224-233 (1953).
[155] *Id.* at 224-33.
[156] "[T]he various authorities of the Allies held on a number of occasions that booty and other property required by German forces validly transferred title to Germany – occasionally with the incidental result that such property subsequently recaptured by the Allies from Germany in turn transferred title to the Allies, so that the title of the original owners was deemed to be extinguished." *Id.* at 230.
[157] *Id.*
[158] *See, e.g.*, *The Krupp* Case, *supra* note 18, at 1372 (discussing spoliation and noting that the "initiative for the acquisition of properties, machines, and materials in the occupied countries was that of the Krupp firm and that it utilized the Reich government and Reich agencies whenever necessary to accomplish its purpose, preferring in some instances… to remain in the background").

The Industrialist decisions did not identify the crimes of spoliation with the concept of the prerogative state, but rather reiterated the normative state by assuming a functioning private sphere in the occupied territory. A different interpretation, inspired by Fraenkel's theory, would claim that once these rights could be infringed upon without legal constraint, other than the whim of the occupier, the principles of the laws of war were infringed upon and undermined. Furthermore, the Tribunals' interpretation distinguished similar practices within and outside state borders. Aryanization practices – as mentioned by Fraenkel – manifest the clear involvement of the Prerogative State. The decision to exclude these practices from the Tribunal's jurisdiction implicitly endorsed the Schmittian understanding of the relationship between domestic and international law – situating the state beyond the rule of international law. Ultimately, the state not only manifests its influence through violence in supporting spoliation practices in occupied territories, but exerts its power when persons residing in its jurisdiction lack the potential for seeking remedy for their lost possessions. Such is the loss of the juridical person, the person as a subject of rights. That was the case of citizens stripped of their rights in the early 1930's in Nazi Germany and the fate of many who were governed by the Nazi occupation regime.[159]

Against the refusal to accept the theory of Behemoth stands an implicit assumption of the Leviathan. Hobbes presented a liberal theory in *The Leviathan*. The liberal attributes of autonomy and freedom in the private sphere echo in the Tribunals' assumed distinction between the public and private in the Nazi regime. On the one hand, the Tribunals equated

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[159] As Arendt explained,

> [t]his was done, on the one hand, by putting certain categories of people outside the protection of the law and forcing at the same time, though the instrument of denationalization, the non-totalitarian world into recognition of lawlessness; it was done, on the other, by placing the concentration camp outside the normal penal system, and by selecting its inmates outside the normal judicial procedure in which a definite crime entails a predictable penalty.

ARENDT, *supra* note 113, at 577.

the Nazi regime with the Hobbesian ideal of a monolithic structure of concentrated authority. On the other hand, they reinstated a Hobbesian/liberal conception of the state that is compatible with conceiving the private sphere as both free and yet constrained by the rule of law.

Fraenkel would probably consider many of the private transactions reviewed by the Tribunals as governed by a prerogative state. Yet, the crucial question is prerogative to whom? Without an assumption of the industrialist's free will there is no basis to establish their guilt. Since historians document how businesses enjoyed considerable freedom in their operations in the occupied zones, it is plausible to assume they experienced their practices as governed by the normative state. However, as Fraenkel emphasized, their freedom or the normative sphere of their operations was always in relation to or in the shadow of the prerogative state, though not necessarily governed by it. The residents of the occupied territories experienced a different kind of relationship with the governing authorities, which is plausibly more compatible with the Prerogative State. This distinction between the relationship of the state vis-à-vis businesses and the residents of occupied Europe translated to the power relations between the two sides of the transaction. Both the nature of these power relations and the presence of the prerogative state as Fraenkel defined it are missing from the decisions.

The Tribunals' decisions put a disproportionate emphasis on the *violence* of the Nazi state as the criteria for the illegality of certain business transactions. The focus on direct violence rather than the loss of a functioning legal system ignored the prerogative features of occupied Europe. Ignoring these features undermined the preservation of private rights of the occupied population and ultimately the preservation of their sovereignty.

Indeed, a different understanding of the Industrialist' crimes would consider their profiting from the loss of the rule of law as a threat to sovereignty in an occupied territory. Hannah Arendt regarded the loss of the juridical person as a first step on the road to total domination: "The destruction of a man's rights, the killing of the juridical person in him, is a prerequisite of dominating him entirely."[160] It is to the realm most notably identified with total domination that we now turn: the industrialist involvement in the atrocities of the camps.

IV. Between Public and Private Bureaucracy: The Structure of Disaggregated Responsibility

Buna
Torn feet and cursed earth,
The long line in the gray morning.
The Buna smokes from a thousand chimneys,
A day like every other day awaits us.
The whistles terrible at dawn:
'You multitudes with dead faces,
On the monotonous horror of the mud
Another day of suffering is born.'
Tired companion, I see you in my heart.
I read your eyes, sad friend.
In your breast you carry cold, hunger, nothing.
You have broken what's left of the courage within you.
Colorless one, you were a strong man,
A woman walked at your side.
Empty companion who no longer has a name,
Forsaken man who can no longer weep,
So poor you no longer grieve,
So tired you no longer fear.
Spent once-strong man.
If we were to meet again
Up there in the world, sweet beneath the sun,
With what kind of face would we confront each other?

Primo Levi, 28 December 1945[161]

The survey of statistics on foreign workers in Germany in the final year of the war indicates that fully one quarter of all those employed in the German economy were foreigners: "[T]he deployment of millions of foreign workers and prisoners of war during World War II made it possible for Nazi Germany to continue the war effort long after its own

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[160] *Id.* at 581.
[161] PRIMO LEVI, THE COLLECTED POEMS OF PRIMO LEVI 5 (Ruth Feldman & Brian Swann, trans., 1988). Levi, a Jewish-Italian chemist and a Holocaust survivor, was a critically acclaimed author who wrote extensively on his experiences from the Holocaust. Because of his expertise, he was put to work at the Farben plant Buna-Monowitz (Auschwitz III), the synthetic rubber factory.

labor resources had been depleted."[162] The distinction between free labor and compelled labor diminished throughout the war as the possibility to leave one's employment was followed by a charge of breach of contract and frequently a punishment in a camp maintained by the Gestapo.

Germany achieved effective domination over a vast population by the end of 1941. According to the IMT decision, there was an effort during the early stages of the war to obtain foreign workers for the German industry on a voluntary basis. But this system proved insufficient to maintain the volume of production deemed necessary by the German government and compulsory deportation of laborers to Germany began. On March 21, 1942, Fritz Sauckel was appointed Pleni-potentiary General for the Utilization [Allocation] of Labor. Under his leadership, the Labor Mobilization Program became effective during the spring: "Manhunts took place in the streets, at motion picture houses, even at churches, and at night in private houses"[163] in the occupied countries to meet the demands of the Reich. The IMT concluded that at least 5,000,000 persons were forcibly deported from the occupied territories to support Germany's war efforts.

Again, business enterprise initiatives and governmental control were key elements in the analysis of Industrialist responsibility for the atrocities committed against prisoners of the concentration camps. In this regard, we find that the Flick and Krupp Tribunals presented opposing views in their application. The Flick Tribunal regarded governmental influence and control over the slave-labor program as mitigating circumstances: "The evidence indicates that the defendants had no actual control over the administration of such program [the slave-

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[162] ULRICH HERBRET, A HISTORY OF FOREIGN LABOR IN GERMANY, 1880-1980 153 (1990). Estimates are that during World War II, the Nazis forced between eight and ten million people to work in factories and camps in Germany, Austria, and throughout occupied Europe. *See* Michael J. Bazlyer, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L. 11, 22 (2002).

[163] 1 IMT, *supra* note 10, at 259.

labor program] even where it affected their own plants. On the contrary, the evidence shows that the program created by the state was rigorously detailed and supervised."[164]

Furthermore, the Tribunal found:

> [T]he evacuation by the SS of sick concentration camp laborers from the concentration camp at the Groeditz plant for the purpose of "liquidating" them was done despite the efforts of the plant manager to frustrate the perpetration of the atrocity and illustrates all to graphically the extent and supremacy of the control and supervision vested in and exercised by the SS over concentration labor camps and their inmates.[165]

There was one exception to this general conclusion - the Linke-Hofmann Werke plant owned by the Flick concern. The Tribunal concluded that in this case the prosecution proved "the active participation of the defendant Weiss (Flick's nephew and one of his three principal executives) with the knowledge and approval of Flick, in the solicitation of increased production quota and large number of prisoners of war for work in this plant."[166]

Nonetheless, the Tribunal rejected prosecution claims of inhuman conditions as well as cruel and atrocious treatment in the plants controlled by the defendants. However, the Flick Tribunal found that the control of the Reich presented a c*lear and present danger*: "The defendants lived within the Reich. The Reich, through its hordes of enforcement officials and secret police, was always 'present'."[167] Accordingly, this made the *defense of necessity* applicable to most of the defendants.

The Krupp Tribunal described how the Krupp firm aggressively pursued concentration camp labor. Workers held in concentration camps were brought each morning to work at the

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[164] *The Flick Case*, *supra* note 16, at 1196.
[165] *Id.* at 1197.
[166] *Id.* at 1198. The active steps taken by Flick and Weiss in relation to the Linke-Hoffmann Werke plant deprived them of the defense of necessity. The attempt to keep the plant operating at near full capacity production as possible in order to meet the requirements of the war efforts was not a *governmental* attempt and thus fell outside the protection of the necessity defense.
[167] *Id.* at 1201.

plants of the Krupp firm.[168] The Tribunal provided lengthy descriptions of the horrendous conditions that prevailed in these camps.[169] The reports on the physical conditions of the Soviet civilian workers and the POWs came from all over the Reich a short time after the arrival of first transports from the East. The Krupp firm itself reported to the government in April 1942:

> Among the Civilian Russian workers – who, aside from a few exceptions, arrived here in excellent physical condition – the typical edemas due to lack of proper nourishment have likewise already begun to appear…their physical decline is due exclusively to the inadequate nourishment they are receiving. In this connection, we would like to emphasize that the rations we provide them are strictly in keeping with official regulations.[170]

In 1943, some of the eastern children employed by Krupp were aged 12 to 17. In 1944, children as young as six years of age were assigned to work.[171] As one of the testimonies quoted in the decision suggests, "it was general knowledge in the plant that the management tried to keep up with the work discipline by the most incisive measures, that is, even physical maltreatment."[172]

In April 14, 1942, Erich Mueller, later a defendant before the Krupp Tribunal, proposed and received permission to set up a plant to produce automatic AA guns in a concentration camp, and the Krupp Auschwitz project was part of this program. In June 1943, the Krupp firm started to employ concentration camp inmates in Auschwitz, though the unexpected

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[168] The Krupp firm controlled two camps: Dechenschule and Neerfeldschule.
[169] Documentary evidence indicated that, between 1940 and 1945, 81 separate Krupp plants within greater Germany employed 69,898 foreign civilian workers, 4,978 concentration camp inmates, and 23,076 prisoners of war. The great majority were brought forcibly to Germany and detained under compulsion throughout the period of their service. *The Krupp Case*, *supra* note 18, at 1374.
[170] *The Krupp Case*, *supra* note 18, at 157 (quoting Fred.Krupp AG Essen to Rüstungskommando Essen, April 2, 1942, BA/MA RW 19 WI/IF 5/176, fol. 79).
[171] *The Krupp Case*, *supra* note 18, at 1409.
[172] *Id.* at 1410.

progress of the Russians led Krupp to relinquish the plant.[173] Compulsory labor camps were set up and maintained by the Krupp firm and its employers in other plants.[174] The Krupp defendants claimed that governmental authorities allocated the slave labor and were responsible for the conditions under which the labor was confined. Work was directed by concentration camp commanders in the case of the civilians and by the army in the case of prisoners of war.

The Krupp Tribunal rejected the *claims of necessity*; such as, the need to meet the quotas, the scarcity of manpower, and the probable consequences if these are not met. It further distinguished this case from the Flick case, in which the defendants did not desire to employ foreign labor or prisoners of war. It provided numerous evidence of the willing attitude of the Krupp officials toward the employment of concentration camp inmates: "[t]he most that any of them had at stake was a job."[175]

Thus, the Flick and Krupp Tribunals presented opposing views of Industrialist responsibility for the atrocities of the camps. The former regarded governmental influence and control over the slave-labor program as mitigating circumstances. The Krupp Tribunal distinguished its case from Flick by focusing on the Krupp managers' desire and eager pursuit of concentration camp employment. The judges in the Farben case reached similar conclusions to their colleagues in the Flick judgment. For the Farben Tribunal it was "clear that Farben did not deliberately pursue or encourage an inhumane policy with respect to the

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[173] A bombing of the Essen plant led to moving production to Auschwitz. Reiff was authorized to submit this plan to the competent government officials.

[174] On the Bertha Works and the Berthawerk plants, see *The Krupp Case*, *supra* note 18, at 1422-23. Similar evidence was found in reference to other camps.

[175] *The Krupp Case*, *supra* note 18, at 1444. The Tribunal further established the view that the fear of the loss of property cannot make the defense of duress available.

workers. In fact, some steps were taken by Farben to alleviate the situation."[176] Accordingly, it accepted the *necessity* claim in most cases; namely that the defendants were compelled to utilize involuntary labor to satisfy production quotas and therefore lacked criminal intent.

These elements of initiative and control were further complicated by *hierarchical* considerations. The structure of governance of the Flick Company facilitated the defendants' claim for lack of control:

> It clearly appears that the duties of the defendants as members of the governing boards of various companies in the Flick Concern required their presence most of the time in the general offices of the concern in Berlin. Thus, they were generally quite far removed from day to day administration and conduct of such plants and labor conditions therein.[177]

The Farben Tribunal followed a similar logic:

> [I]t is evident that the defendants *most closely connected with the Auschwitz construction project* bear great responsibility with respect to the workers…Responsibility for taking the initiative in the unlawful employment was theirs and, to some extent at least, they must share the responsibility of mistreatment of the workers with the SS and the construction contractors.[178]

In another case, the Farben Tribunal concluded that Carl Krauch, as Plenipotentiary General for Special Questions of Chemical Production, dealt with the distribution of labor allocated to the chemical sector by Sauckel. The Tribunal concluded that Krauch knowingly participated in the allocation of forced labor to Auschwitz and other places where such labor was utilized within the chemical field: He was a "willing participant in the crime of enslavement."[179] However, the fact that Krauch supported the use of prisoners of war in the

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[176] *The Farben Case II*, *supra* note 17, at 1175 ("There can be but little doubt that the defiant refusal of a Farben executive to carry out the Reich production schedule or to use slave labor to achieve that end would have been treated as treasonous sabotage and would have resulted in prompt and drastic retaliation.").

[177] *The Flick Case*, *supra* note 16, at 1199.

[178] *The Farben Case II*, *supra* note 30, at 1185 (emphasis added).

[179] Carl Krauch, however, as Plenipotentiary General for Special Questions of Chemical Production, was involved in the allocation of involuntary foreign workers to various plants, including Auschwitz. The court held that "in view of what he clearly must have known about the procurement of forced labor and the part he

war industry "is not sufficient to warrant a finding of guilty for the commission of war crimes under count three."[180]

In another example, the Farben Tribunal concluded that it cannot establish that the members of the TEA [Technical Committee] were informed about or knew of the initiative being exercised by other defendants to obtain workers from the Auschwitz concentration camp. The discussion of TEA members' responsibility begins with a quote from the testimony of the Director of the Office of the Technical Committee: "The members of the TEA certainly knew that IG employed concentration-camp inmates and forced laborers. That was common knowledge in Germany but the TEA never discussed these things. TEA approved credits for barracks for 160,000 foreign workers for IG."[181] The Tribunal followed this testimony by the following analysis:

> The members of the TEA…were plant leaders. *Under the decentralized system of the Farben enterprise each leader was primarily responsible for his own plant and was generally uninformed as to the details of operations at other plants and projects*. Membership in the TEA does not import knowledge of these details…we are not prepared to find that members of the TEA, by voting appropriations for construction and housing in Auschwitz and other Farben plants, can be considered as knowingly authorizing and approving the course of criminal conduct.[182]

As for the Vorstand, the Tribunal concluded that its members "all knew that slave labor was being employed on an extensive scale under the forced labor program of the Reich. [However]…this evidence does not establish that Farben was taking the initiative in the illegal employment of prisoners of war."[183]

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voluntarily played in its distribution and allocation, activities were such that they impel us to hold that he was a willing participant in the crime of enslavement." *The Farben Case II*, *supra* note 17, at 1189.

[180] *Id.*

[181] *Id.* at 1193.

[182] *Id.* at 1193 (emphasis added).

[183] The Tribunal held that insufficient evidence existed to demonstrate that Vorstand officials had based their decision to locate the plant in Auschwitz on the availability of labor from the concentration camp. Similarly, the

Eventually, the Tribunal convicted the defendants Krauch, ter Meer, Buetfisch, and Duerrfeld due to proof of their initiative in procurement of slave labor for the construction of Farben's Buna plant at Auschwitz because it was in their immediate sphere of concern. In all other respects, the slave labor charges were dismissed.

The court found the I.G. Auschwitz and Fuerstengrube, a nearby I.G. coal mine where slave labor was used to be "wholly private projects …operated by Farben, with considerable freedom and opportunity for initiative on the part of Farben officials connected therewith."[184]

The Farben Tribunal judge, Louisiana State University Law School Dean, Paul Hebert, issued a "withering blast at his Midwestern colleagues, accusing them of bias in favor of the accused,"[185] concluding

> from the record that Farben, as a matter of policy, with the approval of the TEA and the members of the Vorstand, willingly cooperated in the slave labor program, including concentration-camp inmates … It was generally known by the defendants that slave labor was being used on a large scale in the Farben plants, and the policy was tacitly approved.… despite the existence of a reign of terror in the Reich, I am, nevertheless convinced that compulsion to the degree of depriving the defendants of moral choice did not in fact operate as the conclusive cause of the defendants' actions, because their will coincided with the governmental solution of the situation, and the labor was accepted out of desire for, and not only means of, maintaining war production.[186]

Judge Hebert refused to acknowledge the disappearance of free will in the cooperation between Farben and the Nazi regime in the slave labor program. He emphasized the oddity of the Tribunal's rationale that only in cases where *initiative* constituting willing cooperation by Farben with the slave labor program is proved criminal responsibility could be established.

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court found evidence of criminal responsibility for the "mistreatment of labor" in the Farben plants to be wanting. *See The Farben Case II*, *supra* note 17, at 1193.

[184] *Id.* at 1186-87.

[185] CONOT, *supra* note 5, at 517. For further analysis on Judge Hebert's involvement in the Farben cases, see Albreto L. Zuppi, *Slave Labor in Nuremberg's I.G. Farben Case: The Lonely Voice of Paul M. Hebert*, 66 LA. L. REV. 495 (2005-2006).

[186] *The Farben Case II*, *supra* note 17, at 1204.

No criminal responsibility resulted for *participation* in the utilization of slave labor. "Under this construction Farben's complete integration into production planning, which virtually meant that it set its own production quotas, is not considered as 'exercising initiative.'"[187] He rejected the *necessity* claim and asserted: "Farben and these defendants wanted to meet production quotas in aid of the German war effort.

Judge Hebert rejected the majority opinion's conclusion that the Vorstand members did not know of the plans to use concentration-camp labor in their Auschwitz plant.[188] In addition, he rejected the majority's rationale to hold Krauch responsible, unlike the other Vorstand members, because he was also a governmental official.[189]

> From the outset of the project it was known that slave labor, including the use of concentration camp inmates would be a principal source of the labor supply for the project.[190]

Judge Hebert's dissent concluded that all the members of Farben's vorstand should be held guilty under Count Three (slave labor) of the indictment.[191] He asserted that Farben the corporation was actively engaged in continuing criminal offenses which constituted participation in war crimes and crimes against humanity on a broad scale and under

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[187] *Id.* at 1311.
[188] *Id.* at 1312-13 (Hebert, J., dissenting) (describing the use of slave labor in the camps as a matter of *Farben* corporate policy).
[189] *The Farben Case II*, *supra* note 17, at 1313 ("[T]he mere fact that Krauch was a governmental official operating at a high policy level is insufficient, in my opinion, to distinguish his willing participation exhibited by the other defendants according to their respective roles within Farben.")..
[190] *Id.* at 1312-13. Hebert argued that "the conditions at Auschwitz were so horrible that it is utterly incredible to conclude that they were unknown to the defendants, the principal corporate directors, who were responsible for Farben's connection with the project." He further noted what he viewed to be an abundance of evidence from which knowledge of the widespread participation by Farben as a matter of official corporate policy: "For example, the Vorstand and its subsidiary committees had to approve the allocation of funds for the housing of compulsory workers. This meant that members of the Vorstand had to know the extent of Farben's willing cooperation in participating in slave-labor program and had to take an individual personal part in furthering the program." *Id.* at 1316.
[191] *Id.* at 1308.

circumstances "such as to make it impossible for the corporate officers not to know the character of the activities being carried on by Farben at Auschwitz."[192]

Indeed, the division of authority between the different corporate officials in the Farben enterprise was translated to a division of responsibility in the Tribunal's decision. Each member was made exclusively responsible to the limited scope within his designated authority; such a fragmented conception of the corporate function ignored the integration of different parts. Absent a cohesive notion of the corporate actor, responsibility was either attributed to individuals affiliated with the state (such as Krauch)[193] or to those who were directly engaged in the commission of crimes.

Hebert's influence was somewhat diluted by the late publication of his opinions. But, "late though these opinions are," reported Sprecher in his weekly report to General Taylor "they both add much strength to the sum total of the purpose and results of the Nuremberg effort. We wonder how the German press will react?"[194]

In his final statement, defendant Dürrfeld stated:

> The concentration camp and IG have been two entirely different spiritual worlds, outwardly and manifestly they are joined by the same name, but there is a deep abyss between the two. Over there you have the concentration camp; here you have reconstruction by IG. There orders of lunacy; here you have creative achievement. Over there you find hopelessness; here you find the boldest hopes. Over there you find degradation and humiliation; over here you find concern for the individual man. Over there you find death; here you encounter life.[195]

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[192] *Id.* at 1324.

[193] **"**If we emphasize the defendant Krauch in the discussion which follows," argued the Farben Tribunal, "it is because the prosecution has done so throughout the trial and has apparently regarded him as the connecting link between Farben and the Reich on account of his official connections with both." *The Farben Case II*, supra note 17, at 1109.

[194] Memorandum from Drexel A. Sprecher, Acting Chief of Counsel, OCCWC, to Telford Taylor, Brigadier Gen., Chief of Counsel for War Crimes, US-OMGUS, "Weekly Report" (Jan. 5, 1949), WWII War Criminals Records, OCCWC 193301949, Group 238, no. 159, 190/12/13/01-02, NARA.

[195] *The Farben Case II*, supra note 17, at 1076.

The reality of fragmented responsibility provides a plausible immanent explanation to the impunity of the Farben defendants. It resonates with an established failure of the First Nuremberg decision – the failure to capture bureaucratic crime, which is, by now, established in the literature (though not yet fully reconstituted in juridical terms).[196] The Farben Tribunal portrayed the reality of the camp as divided between two spheres of formal rationality. Max Weber considered formal rationality a central characteristic of both the modern state and the modern business corporation:

> Normally the very large modern capitalist enterprises are themselves unequalled models of strict bureaucratic organization. Business management throughout rests on increasing precision, steadiness, and above all, speed of operations… Calculable rules … is the most important one [principle] for modern bureaucracy…Bureaucracy develops the more perfectly, the more it is "dehumanized", the more completely it succeeds in eliminating from official business love, hatred, and all purely personal, irrational, and emotional elements which escape calculation. This is appraised as its special virtue by capitalism. The more complicated and specialized modern culture becomes, the more its external supporting apparatus demands the personally detached and strictly objective *expert*, in lieu of the lord of older social structures who was moved by personal sympathy and favor, by grace and gratitude.[197]

According to Stephen Kalberg, as decisions are arrived at in the bureaucracy, "sheer calculation in terms of abstract rules reigns … without regard to person." In the political context, this orientation rejects all arbitrariness, aims at nothing but calculating the most precise and efficient means for the resolution of problems. In the economic sphere, formal rationality increases to the extent that all technically possible calculations within the laws of

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[196] For further discussion, see Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. U.N. L. 1, 19-20 (2002). One important doctrinal attempt to address the systematic nature of the crime except from crimes against humanity is the development of the concept of Genocide. *See* Raphael Lemkin, *Genocide as a Crime under International Law*, 41 AM. J. INT'L L. 145 (1947) (discussing origins of the concept of genocide).

[197] WEBER, *supra* note 46, at 974-75.

the market are universally carried out, regardless of the degree to which they may violate ethical substantive rationalities.[198]

Avoiding the bureaucratic aspect of the crime in non-economic cases (e.g. the Eichmann trial) did not preclude the recognition of the criminal behavior. In the Farben and to some extent the Flick case, however, the complex bureaucracy led to a more acute result: The decisions' attempted to reconstitute the distinction between the private and public spheres implicitly reconstructed Fraenkel's distinction between the Normative and the Prerogative State as a stable and viable distinction in the reality of the concentration camp. The Tribunals used the structures of formal rationality as evidence for a functioning capitalist logic operating within this system. But, as noted by Hannah Arendt, as an institution, the concentration camp "was not established for the sake of any possible labor yield; the only permanent economic function of the camps has been the financing of their own supervisory apparatus; thus from the economic point of view the concentration camps exist mostly for their own sake."[199]

The structures of hierarchy and division of labor that characterize the modern business enterprise and the function of the modern state alienated the defendants from the crimes and defended them from bearing responsibility for their commission. Accepting these structures allowed "the corporate instrumentality to be used as a cloak to insulate the principle corporate officers who approved and authorized this course of action from any criminal responsibility."[200] Judge Hebert emphasized it does not matter whether, under the division of labor employed by I.G. Farben, supervision of the Auschwitz project fell in the sphere of immediate activity of certain of the defendants. "Essentially," he wrote, "we have action by a

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[198] Stephen Kalberg, *Max Weber's Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History*, 85 AM. J. OF SOC. 1145, 1158-59 (1980).
[199] ARENDT, *supra* note 113, at 573.
[200] *The Farben Case II*, supra note 17, at 1313-14.

corporate board, participated in by its members, authorizing the violation of international law by other subordinate agents of the corporation."[201] Hebert concluded that

> International law cannot possibly be considered as operating in a complete vacuum of legal irresponsibility – in which crime on such a broad scale can be actively participated in by a corporation exercising the power and influence of Farben without those who are responsible for participating in the policies being liable therefore.[202]

Absent a utilitarian rationale to follow, could the industrialist still be considered 'business enterprises'? Like the structure of Behemoth to the Leviathan, the operation and function of German businesses challenged established assumptions on the structure and function of businesses and basic presumptions we have on the function of the private sphere. Rather than insisting upon the existence of a separation between the private and the public spheres, the judges could have exposed the industrialists' crimes in their responsibility for its loss.

Conclusion

In 1953, Tilo Freiherr von Wilmowsky, a Krupp relative and a one-time executive in the Krupp industries published a book on the 'Krupp affair' - *Warum Wurde Krupp Verurteilt?*. Professor Heinrich Kronstein of the Georgetown Law School concluded his review of the book with the following telling remarks:

> But, hope on the side, can we allege that an "international" or even western principle exists which imposes mandatory social responsibilities on those enjoying "private" power positions?... *Admittedly we are only at the beginning of a full study of these relationships in modern society…I do not believe that the Military Tribunal established such principles, either post factum or in future... A much deeper problem is involved: the responsibility of the men who exercises factual power in society, even though they be subject to political power*. Until

[201] *Id.* at 1315.
[202] *Id.* at 1324.

> this problem is clarified, even outspoken critics of private power, like the reviewer, will feel very badly about certain hypocritical attitude disclosed by the Tribunal. [203]

Indeed, what could have been considered a remarkable moment of progressivism in international law was lost to a conservative understanding of the totalitarian state as a mega-Leviathan. Arguably, this limited perception of the Nazi state influenced other jurisprudential developments. Hitler's Germany was the villain whose menace urged the promotion of an effective human rights regime.[204] It is the background against which numerous controversies about the relationship between morality and the law are held, as famously captured in the Harvard Law Review Hart/Fuller debate and the commentary it has engendered ever since.[205]

The lessons from the Nazi experience justifiably haunted legal theorists who attempted to establish principles, institutions, theories, and rules that would stand in the way of similar future threats. Like the Nuremberg decisions, these debates often emphasized governmental and public abuse of power and frequently assumed a monolithic effective state. This presumption of a functioning ideal type of the 'modern state' diluted the growing power of private enterprises. More curiously it missed the opportunity to address the importance of a *functioning state* as a critical factor in curtailing and regulating the behavior of businesses in the international terrain.

Applying a theory of responsibility on the structure of Behemoth, rather than a state, required a radical departure from the statist logic, or even the more basic assumption of the international legal order as comprised of autonomous, self-governing states. One may aspire to a Weberian functioning state as a condition that each state should follow. Indeed, "one of

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[203] Heinrich Kronstein, Book Review: Warum Wurde Krupp Veruteilt?, 53 Colum. L. Rev. 139, 144-145 (1953) (emphasis added).
[204] For an early discussion, see HERSCH LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MEN 3-15(1945).
[205] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

the most basic and highly provocative arguments within *Behemoth* is that some version of an identifiably modern state apparatus controlling the exercise of coercion remains a civilizational achievement worth defending."[206] Recalling arguments made by Neumann, Duncan Kelly argued: "[T]he key point for Neumann was that under National Socialism the 'state' *per se* has ceased to exist, and without the state there was simply a decisionistic, situation-specific, deformalized or dematerialized law that owed little, if anything, to the general rule of law he sought to defend."[207]

The challenge presented by the Behemoth alternative was a reality that failed to correspond with the realist model. Thus, while the Tribunals' resistance to an alternative model to the Weberian theory of the state might be compatible with a basic notion of political justice, absent a more nuanced recognition of the Behemoth elements in the Nazi regime it created a distinction between private violence that is not cognizable to international law and public violence that corresponds with the realist model.

The Tribunals' analysis of Industrialist business transactions in occupied Europe followed a similar rationale. Here the presumption of a functioning private sphere led them to emphasize the importance of *state coercion* in regarding certain transactions unlawful. The prerogative, and thus unlawful, behavior of the state, was identified with its unlawful influence on the private sphere, rather than the absence of a rule of law in the occupied areas. But it is the reality of the camps that provides, perhaps, the most acute example of the Tribunals' insistence on the presence and link to public power as a basis for responsibility in international law. The division of labor between the government and the industry in the administration of the camps was translated to a division of responsibility: "Over there you

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[206] WILLIAM E. SCHEUERMAN, BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW 196 (1994).

[207] DUNCAN KELLY, THE STATE OF THE POLITICAL: CONCEPTIONS OF POLITICS AND THE STATE IN THE THOUGHT OF MAX WEBER, CARL SCHMITT AND FRANZ NEUMANN 296 (2003).

find hopelessness; here you find the boldest hopes."[208] Furthermore, the company of Farben, that was the most sophisticated and bureaucratized of the three, diffused the responsibility of its agents.[209] Hence, both the division of labor within Farben and the division of labor between Farben and the government divided the responsibility between them leaving only the managers who were directly involved in the daily management of the camp to bear the responsibility.

Neumann's critique in *Behemoth* reinstated the need of an even minimalist version of a state: The importance of a central, coherently organized institution with a capacity to resolve conflicts by coercion as a condition for the rule of law. Nazi Germany was interpreted as an example of the great ills presented by the pre-Hobbesian framework. Paradoxically, the judges answered the challenge portrayed in Neumann's imagery of the Nazi polity not by lamenting the absence of a functioning state but by insisting upon its existence.

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[208] *The Farben Case II*, supra note 17, at 1076.

[209] For further discussion on the ramifications of Farben's bureaucratic structure, see Doreen Lustig, *The Tradition of Krupp, the Charisma of Flick and the Bureaucracy of Farben: Corporate Structures, Sociological Legitimacy and the Question of Business Accountability in International Law* (manuscript, on file with author).