

THE NATURE OF THE NAZI STATE AND THE
QUESTION OF INTERNATIONAL CRIMINAL
RESPONSIBILITY OF CORPORATE
OFFICIALS AT NUREMBERG:
REVISITING FRANZ NEUMANN'S CONCEPT OF
BEHEMOTH AT THE INDUSTRIALIST TRIALS

DOREEN LUSTIG*

I.	INTRODUCTION	966
II.	INTRODUCING THE INDUSTRIALIST CASES	970
III.	BEHEMOTH AND THE RELATIONSHIP BETWEEN GOVERNMENT AND BUSINESS	978
	A. <i>Franz Neumann's "Behemoth"</i>	979
	B. <i>Behemoth at Nuremberg</i>	985
	C. <i>Followers and Not Leaders: Two Companies, Two Conspiracies</i>	990
	1. <i>I.G. Farben's Crimes of Aggression</i>	990
	2. <i>The Krupp Independent Conspiracy</i>	998
	D. <i>"Behemoth" and "Leviathan": Business Responsibility and Competing Theories of the State</i>	1001
	E. <i>Historical Perspectives and the Theory of Behemoth</i>	1005
IV.	THE NORMATIVE STATE AS THE PRIVATE SPHERE: REVISITING ERNST FRAENKEL'S DUAL STATE THEORY IN NUREMBERG	1008
	A. <i>Aryanization: The Exclusion of Plunder Within State Borders</i>	1009
	B. <i>Spoliation in Occupied Territories</i>	1012
	1. <i>Initiative</i>	1016

* J.S.D Candidate, IILJ Scholar, NYU School of Law. The author is deeply indebted to Benedict Kingsbury, Martti Koskenniemi and J.H.H Weiler for discussions on this project. Many thanks to Julian Arato, Olivier Barsalou, Arianne Renan-Barzilay, Eyal Benvenisti, Nehal Bhuta, Leora Bilsky, Carlos Closa, Yaniv Friedman, Alma Fuentes, Colin Grey, Dan Heath, Umut Özsü, Herlinde Pauer-Studer, Galia Rivlin, Arie Rosen, Guy Sinclair, Michael Walzer, the participants of the IILJ Colloquium at NYU Law School and the JILP editorial team for their comments on different versions of this article.

2. *Control and the Presence of Governmental Authority* 1018

C. *Initiative and Control in the Dual State* 1019

V. BETWEEN PUBLIC AND PRIVATE BUREAUCRACY: THE STRUCTURE OF DISAGGREGATED RESPONSIBILITY... 1026

VI. CONCLUSION 1040

I. INTRODUCTION

German industrialists did terrible things during Nazi rule. Yet, they were not held responsible for most of these acts at the subsequent trials at Nuremberg.¹ History provides several explanations for this impunity gap. In this article I focus on the influence of a conceptual gap on this result. This article explores how various conceptions of the Nazi totalitarian state influenced the prosecution and decisions of the Industrialist Trials at Nuremberg. Drawing on archival materials, I argue that the debate over the Industrialist responsibility could be read as a struggle between competing theories of the *totalitarian state*.

This paper exposes how Franz Neumann (1900-1954), who was involved in the Nuremberg trials during its early stages, informed central elements in the prosecutors’ theory of business responsibility at Nuremberg.² Inspired by the

1. The impunity gap at Nuremberg is manifested, *inter alia*, by the mild judgments and lenient sentences in the industrialist trials. On January 31, 1951 John McCloy, the High Commissioner of Occupied Germany, freed one third of the Nuremberg prisoners immediately and commuted most of the outstanding death sentences to prison terms. The industrialists were prominent beneficiaries of the High Commissioner’s decisions. See Office of the US High Commissioner for Germany, Landsberg: a Documentary Report, January 31 1951, Frankfurt Germany. Record Group 466, High Commissioner for Germany, General Records 1949–1952 Decimal 321.5–321.6 466/250/68/10/5 box 12 “German War Criminals” file. Other authors share this critical view of the Trials. See, e.g., PETER MAGUIRE, LAW AND WAR 206–08 (2000) (explaining why the Nuremberg trials often failed to reach a just result); Florian Jessberger, *On the Origins of Individual Criminal Responsibility under International Law for Business Activity* 8 J. INT’L CRIM. JUST. 783, 799 (2010) (attributing the lenient sentences received by industrialists to the political climate).

2. Franz Neumann was a political scientist and a member of the Frankfurt School. Neumann was born to a Jewish family on May 23, 1900, in Kattowitz in Silesia. Upon completion of his doctoral dissertation and qualification for legal practice, he became a prominent labor lawyer and leading counsel for the building trade union and the Social Democratic Party. His

Hobbesian terminology, Neumann used the antinomy of the Behemoth archetype as a contrast to the common understanding of the modern state as a Leviathan. For Neumann, like many others, the Hobbesian Leviathan embodied a conventional conception of the modern state. In that conception, the state is the sole entity which exercises monopoly over violence within a specific territory. In its totalitarian form, the Leviathan exercise of control is cohesive and absolute. Unlike the understanding of the Nazi state as a Leviathan, the Behemoth model lacked a centralized control over violence and was characterized by competing authorities.

These conflicting theories of the Nazi regime proved highly consequential for the allocation of business responsibility at Nuremberg. The prosecution, who followed central aspects in Neumann's theory of the Nazi state as Behemoth, argued that the industrialists were equal partners with other groups such as the party and the military in the decision to go to war and in practices of spoliation and enslavement. In terms of structure and operations, the Behemoth theory of the totalitarian state focused on its incoherence and lack of rule of law. The judgments of the Tribunals, though different from one case to another, chose to depict Nazi Germany as a mega-Leviathan. These epistemological choices translated to different theories of responsibility. In the Neumanesque scheme, businesses shared responsibility equally with other actors. In the

endeavors forced him to leave Nazi Germany in 1933 to England, where he studied at the London School of Economics with Harold Laski and Karl Manheim. He earned his second doctorate there in political theory. His dissertation, *The Governance of the Rule of Law*, was directed against the national socialist jurist Carl Schmitt. In 1936 Neumann joined the Frankfurt Institute of Social Research in New York. In 1941, Neumann was recruited to the U.S. Board of Economic Warfare and, in July 1942, he became the chief economist in the Intelligence Division at the Office of the U.S. Chief of Staff. In 1943, Neumann was transferred to the Office of Strategic Services (OSS), where he became the deputy chief of the Central European Section. In 1949, Neumann became a professor in the Department of Public Law and Government at Columbia University in New York City. His analysis of the Nazi regime in *BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM 1933-1944* (Ivan R. Dee 2009) (1942) is often regarded as his most important work. See David Kettler, *Neumann, Franz 1900-1954*, in 5 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 481-83 (William A. Darity, Jr., ed. 2008). For further biographical information, see Harold Marcuse, *Franz Neumann (1900-1954)*, MARCUSE.ORG, <http://www.marcuse.org/herbert/neumann/FranzNeumann.htm> (last updated Aug. 24, 2009).

strong Hobbesian state, envisioned by the Tribunals' decisions, the companies were subordinates of the state, both in the decision to go to war and later in the involvement in its crimes. But the judges at the Industrialist Trials also followed the Neumannesque lead, conveyed by the prosecution. Though choosing to regard the Nazi state as *Leviathan*, they implicitly accepted the importance of the state as a key to establishing criminal responsibility in international law. The emphasis on the state and its structure is evident in their reasoning, but departs from a description of the Nazi state as *Behemoth*. Instead, the decisions described the Nazi totalitarian state as reminiscent of the Hobbesian Leviathan; a state characterized by complete control, coherence, and authority over the Industrialist actors.

The judges' choice of the Hobbesian theory was not incidental. The notion of the state as a monolithic power that monopolizes violence is often a default-position in the theory of international legal responsibility. But the Hobbesian model of the state is an ideal-type. Neumann's critique sought to expose the extent to which the Nazi regime deviated from this ideal-type model. The Tribunals' insistence on a functioning Leviathan in Nazi Germany significantly limited their ability to scrutinize the practices of business actors. Regarding the ideal-type of the Leviathan as an assumed reality undermined its normative significance. At the same time, the prosecutors' use of Neumann's *Behemoth* ran the risk of interpreting his critique as an acceptance of this model as a basis for responsibility under international law. My critique, therefore, is not a call to follow the prosecutors and adopt Neumann's model as a basis for international criminal responsibility. Rather, Neumann's critical analysis is examined here to expose the need for an informed understanding of the state, and the political regime more broadly, in a theory of responsibility in international law.

The state is not the only corporate structure considered in this article. Alongside the theory of the state, I expose the disregard of the company itself, its corporate structure and governance as well as its relationship with the institutions of the state. The article critically examines the ramifications of this disregard. I argue that understanding these corporate structures (of the state and the company as well as the relationship between them) is essential for a theory of individual responsi-

bility of business officers in international law. Indeed, 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.³ According to this historical precedent, “the screen between international law and the individual, normally constituted by state sovereignty, was pierced.”⁴ However, the attempt to “pierce the sovereign veil” of the corporate entity of the state, and later the company in the Industrialist Trials, without an informed understanding of the structure of authority that constituted them, had the problematic consequence of reifying both.

Part II of this article introduces the Industrialist Trials. Part III considers the influence of the Frankfurt School and 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 Behemoth model was rejected in favor of a more static, traditional, and monolithic notion of the state. Having established these competing notions of the Nazi state, the remainder of the article applies these opposing notions of accountability to three central aspects of trials: the crime of Aggression, the crimes of spoliation and plunder and the atrocities of enslavement, torture and extermination.

In Part III, I consider the debate over the involvement and responsibility of the industrialists for the war as a debate

3. 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 former 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 Leipzig Supreme Court of Germans Accused of War Crimes*, 8 VA. L. REV. 1 (1921).

4. 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, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS: LONDON, 1945 (1945), *available at* http://avalon.law.yale.edu/subject_menus/jackson.asp.

over the Nazi state monopoly over violence. Part IV considers the tension between allowing the inhabitants of occupied Europe to engage in business transactions in the exercise of their private rights and the need to preserve such rights from infringement by the occupation regime. I use the theory of Franz Neumann's contemporary, Ernst Fraenkel, to elaborate on the distinction between the public and private spheres under the Nazi regime. Fraenkel's theory of the Nazi polity as a Dual State defined the distinction between public and private under the Nazi rule as a distinction between the normative and the prerogative state. The Tribunals frequently considered governmental intervention in favor of German businesses as a menace to 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 Tribunals' 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 V 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.

II. 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. At this point, who could be included in this group of criminals was still unsettled. 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:⁵ The Nuremberg Charter enabled the IMT to prosecute individuals for crimes against peace, war crimes, and crimes against humanity. The IMT convened from November 14, 1945 to October 1, 1946.⁶

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 Nuremberg 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").⁷ 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.⁸ These proceedings against those 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, but rather trials of doctors, lawyers, industrialists, businessmen, scientists, and generals. The U.S. prosecutors generally targeted defendants who

5. The Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945, 59 Stat. 1544,82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

6. 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); WAR CRIMES: THE LEGACY OF NUREMBERG (Belinda Cooper ed., 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 & 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).

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

8. The American regulation that was established to provide procedural guidelines for the military tribunals was Military Government Ordinance No. 7. See Mil. Gov't Ordinance No. 7, art II (b) (Oct. 18, 1946). For a general discussion of CCL10, Military Government Ordinance No. 7, and the Nuremberg Tribunals, see Telford Taylor, *The Krupp Trial: Fact v. Fiction*, 53 COLUM. L. REV. 197, 201 (1953).

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 rarely, if ever, prominent jurists. They included American state judges, law school deans, or practicing attorneys.⁹ 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.¹⁰

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.¹¹ “So far as Sam Harris [one of the legal counsels at the Nuremberg proceedings] knows,” reads a memo, “the British are doing nothing on further investigations concerning war crimes of Nazi industrialists in their area.”¹² Despite these early hurdles, industrialists of three companies were finally chosen from many other candidates.¹³

9. TAYLOR, FINAL REPORT, *supra* note 7, at 35.

10. The twelve war crime cases tried in the American Zone under the authority of Control Council Law No. 10 were substantially abbreviated in the legally official edition that was published in fifteen massive volumes, entitled TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 (1949-53) [hereinafter T.W.C]. This work is popularly termed the “Green Series.” Unless otherwise specified, all citations to these cases hereinafter refer to the Green Series.

11. 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, Office of Chief Counsel for War Crimes (OCCWC), to O'Grady, British Property Control (Dec. 9 1946), OCCWC Berlin Branch, Group 238, no. 202, 190/12/35/01-02, National Archives and Records Administration (NARA).

12. Memorandum from Drexel Sprecher, Dir., Econ. Div., OCCWC, to Staff, “Conference of 1 Feb. 1946: Some Tips Concerning Work on Subsequent Case against Nazi Industrialists” (Feb. 4, 1946), OCCWC 1933-1949, 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 as, *inter alia*, material witnesses and potential criminals.

13. See, e.g., Letter from Benjamin Ferencz to Drexel Sprecher, Dir., Econ. Div., 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 pro-

Amongst those who were often mentioned but eventually not chosen to be tried by the American tribunals were Fritz Thyssen¹⁴ and Hermann Röchling.¹⁵ The chosen *Industrialist Cases* at the focus of this paper are the *United States v. Friedrich Flick* (“Flick”),¹⁶ *United States v. Carl Krauch* (“I.G. Farben”),¹⁷ and *United States v. Alfred Krupp* (“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 the prepara-

eduction be forwarded to his office); Letter from 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).

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. In July of 1947, Sprecher advised Taylor to release Thyssen because “[i]t 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, Dir., Econ. Div., 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. Hermann Röchling 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. Roehling*, 14 T.W.C., *supra* note 10, at 1075 (Gen. Tribunal of the Military. Gov’t 1948); *see also France v. Roehling*, 14 T.W.C., *supra* note 10, at 1097 (Superior Military Gov’t Ct. 1949).

16. *United States v. Friedrich Flick (The Flick Case)*, 6 T.W.C., *supra* note 10, at 11 (1952).

17. *United States v. Krauch (The Farben Case)*, 7 T.W.C., *supra* note 10, at 1102 (1953).

18. *United States v. Krupp (The Krupp Case)*, 9 T.W.C., *supra* note 10 (1950).

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 the Military, Ministries, SS, and Economics Divisions. In addition, two special ‘trial teams’ were set up to prepare the I.G. 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 reas-

tion of the Industrialist trials and other evidence convey their relative 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 the industrialists.²¹ The size of the companies involved and the scope of their activities resulted in the amassing of an enormous collection of 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 Industrialist Cases tried in Nuremberg. The case began on February 8, 1947 and lasted until December 22, 1947.²³ “[I]n one of the smaller tribunal rooms in the

signed to divisions established for the trials of these particular cases. TAYLOR, FINAL REPORT, *supra* note 7, at 39–40.

20. See Letter from D.A. Sprecher, Director, Econ. Div., OCCWC, to George Wheeler, Manpower Div., 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.” Letter from 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; 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.

22. 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, Dir., Econ. Div., 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 (noting that the preliminary briefs were “very scanty”).

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 Su-

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,” reported Andy Logan for the *New Yorker*.²⁴ Indeed, 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.

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

preme Court, was an alternate member of the Flick Tribunal. *The Flick Case*, 6 T.W.C., *supra* note 10, at 8 (1952).

24. Andy Logan, *Letter from Nuremberg*, THE NEW YORKER, Dec. 27, 1947, at 40. Logan was married to Charles S. Lyon, the chief prosecutor in the Flick case.

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

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 (1st ed. 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 (First Indiana Univ. Press 2002) (1979) (discussing legal action taken by Auschwitz survivors against I.G. Farben); PETER HAYES, INDUSTRY AND IDEOLOGY: IG FARBEN IN THE NAZI ERA (1987).; DIARMUID JEFFREYS, HELL'S CARTEL: IG FARBEN AND THE MAKING OF HITLER'S WAR MACHINE (2008); STEPHAN H. LINDNER, INSIDE IG FARBEN: HOECHST DURING THE THIRD REICH (Helen Schoop trans., 2008); RICHARD SASULY, IG FARBEN (1947).

from 1925 to 1945 the I.G. Farbenindustrie AG was the largest non-state-owned corporation in Germany and . . . the world's fourth largest such enterprise [T]he 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 helping to free Germany from dependence on foreign imports.²⁸ The twenty-three defendants in the case were all individuals who served on the Farben Board of Directors (or *Vorstand*, in German). 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 company, commonly referred to as "the Krupp case."³⁰ The Krupp company was known for its production of metals and the 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 functioned as a private, limited liability company. Expansion of the Krupp enterprises continued up until 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 I.G. Farben trial and was the third and last of the Industrialist Cases. Alfred Krupp and eight of the defendants were

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

28. *The Farben Case*, 8 T.W.C., *supra* note 17, at 1086 (1952).

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. *The Farben Case*, 7 T.W.C., *supra* note 10, at 6 (1953).

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

members or deputy members of the Vorstand 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 . . . 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 principal holding a high position in the "financial, industrial or economic life" is "deemed, *ipso facto*, to have committed crimes against peace."³³ Although this paragraph merely requires taking this fact under consideration, it repudiated the contention that private businessmen or industrialists cannot be held responsible for "crimes against peace."³⁴ Although the American prosecutors considered the war as the main crime of the industrialists, the charge of slave labor was significant in all three 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.

In the following part, I analyze the role and influence of competing theories of the Nazi State on the Industrialist Cases' jurisprudence of Crimes against Peace. This analysis begins by analyzing key features of Neumann's description of the Nazi state as Behemoth and continues with his direct involvement in the Nuremberg proceedings. I then turn to examine the echoes of his ideas in the prosecutors' arguments and the Tribunals' decisions on the Industrialists' responsibility for the war itself.

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, Tennessee Court of Appeals, Judge Edward J. Daly, Connecticut Superior Court, and Judge William J. Wilkins, Superior Court of Seattle, Washington. *The Krupp Case*, 9 T.W.C., *supra* note 18, at 1 (1950).

32. TAYLOR, FINAL REPORT, *supra* note 7, at 66.

33. *The Farben Case*, 8 T.W.C., *supra* note 17, at 1299 (Herbert, J., concurring) (1953).

34. *Id.* at 1299-1300.

III. BEHEMOTH AND THE RELATIONSHIP BETWEEN GOVERNMENT AND BUSINESS

Should a private enterprise be held responsible for its involvement in the war-effort of its country? Josiah DuBois, Chief Prosecutor of the I.G. 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."³⁵

The answer to Marcus's puzzle—that is, how to hold businesses liable for their involvement in a war and more broadly in violations of international standards—depended, *inter alia*, on the theory of the state and its relationship with business actors.³⁶ Such theory 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 Kirchheimer, 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*.

35. JOSIAH DUBOIS, *THE DEVIL'S CHEMISTS* 21 (1952).

36. One might suggest the New Deal and the antitrust sentiment as an additional explanation. 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* (unpublished manuscript) (on file with author).

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. Although Behemoth was undergirded by neo-Marxist ideology, it “functioned as a major source and reference book for both the OSS and the Nuremberg prosecutors.”³⁷ Neumann’s analysis of the Nazi regime and its relationship with the industry posed a challenge to the prevalent model of the state. In the following section, I explore the features of this challenge.

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 often identified 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.

37. MICHAEL SALTER, *US INTELLIGENCE, THE HOLOCAUST AND THE NUREMBERG TRIALS: SEEKING ACCOUNTABILITY FOR GENOCIDE AND CULTURAL PLUNDER 573* (2009). Salter’s book traces the influence of the American intelligence agency where Franz Neumann worked on American postwar policy and particularly on the evidence of the Holocaust presented at the Nuremberg trial.

In Germany, there was never anything like the popular anti-monopoly movement of the United States under Theodore Roosevelt and Woodrow Wilson.³⁸

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 the decline of the parliament and parliamentary supremacy. He writes, "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 petrification of the traditional, social and political structure. The social contracts on which that structure was founded broke down."³⁹

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 the 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 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,

38. NEUMANN, *supra* note 2, at 14–15.

39. *Id.* at 30.

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.⁴⁰

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.⁴¹

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.”⁴² He also rejected any interpretation of National Socialism as a “non-capitalistic economy” and, instead, described it as “totalitarian monopoly capitalism.”⁴³ 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 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

40. *Id.* at 222.

41. *Id.* at 232–33.

42. *Id.* at 261.

43. *Id.*

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.⁴⁴

Neumann mentioned several factors that were vital to the process of monopolization of the Nazi economy, including: *Aryanization*, which led to the expansion of industrial combines, such as that led by Friedrich Flick who acquired Rawack & Grünfeld; *spoliation*, which facilitated attachment of all business in conquered territories; and, *allocation of state financial assistance* to industry. Neumann added that, even though the state became indispensable for the survival of businesses, it did not nationalize new industries.

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."⁴⁵ 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."⁴⁶

Neumann's theory of Behemoth challenged 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, a unified apparatus controlling the ex-

44. *Id.* at 267–68.

45. *Id.* at 292.

46. *Id.* at 361.

ercise 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 what are 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.⁴⁷

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

47. MAX WEBER, POLITICAL WRITINGS 310–11 (Peter Lassaman & Ronald Speirs eds., 1994).

monopolization of legitimate violence by the politic-territorial association and its rational consociation into institutional order is nothing primordial, but a product of evolution.⁴⁸

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 a notion of 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.⁴⁹ It is further associated with the common distinction between internal uses of violence, 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. Neumann's description demonstrated the historical contingency of the modern state's monopoly over violence. Weber similarly 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 eighteenth 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 (like the Genoese *ma-*

48. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY*, 904-05 (Guenther Roth & Claus Wittich eds., 1978).

49. THOMAS HOBBS, *LEVIATHAN* 100-111 (Richard Tuck ed., Cambridge University Press, 1996) (1651).

noe) 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.⁵⁰

The industrialists' involvement in the war brought the historical contingency of the state's monopoly over violence to the courtroom. For Neumann, the role of businessmen in the war was not a thing of the past. It was a contemporary feature of the Nazi regime and operations before and during the war. The American prosecutors, laboring to devise a theory of responsibility to hold Nazi businessmen responsible for crimes against peace, were in need of such departure from the common understanding of war and politics. I now turn to Neumann's involvement in the design and conceptualization of the Nuremberg proceedings.

B. *Behemoth at Nuremberg*

How did ideas from Neumann's *Behemoth* find their way to the Prosecution of the Industrialist Trials? Barry M. Katz described three phases of the Frankfurt scholars' influence on American policy makers. First, while engaged in defining their task in 1943, most of the Frankfurt scholars' research 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 the prosecution of Nazi war criminals.⁵¹ 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 Neumann's government activities; his work at the OSS "strongly influenced the formulation of America's goals for postwar Germany." For example, Neumann's "four Ds," iden-

50. MAX WEBER, *supra* note 49, at 981–82. See generally CHARLES TILLY, *COERCION, CAPITAL AND EUROPEAN STATES, AD 990–1992* (1993) (discussing the state's monopoly over violence throughout history).

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

tified the colluding groups involved in four key processes: “denazification, democratization (including recruitment of civil servants), demilitarization, and decartelization.”⁵²

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 of the OSS worked closely with Telford Taylor and others in the legal department of the Office of the Secretary of War.⁵³ “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 German, then Europe, and ultimately the world, using whatever means necessary.”⁵⁴ 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.⁵⁵ During the summer of 1945, Neumann and his colleagues prepared briefs on German leaders such as Heinrich Himmler and Hermann Göring, on Nazi organizations involved in the commission of the war, and on Nazi plans to dominate Germany and Eu-

52. Hayes, *Introduction* to Neumann, *supra* note 2, at vii.

53. *See, e.g.*, Memorandum from James B. Donovan, Gen. Counsel, OCCWC Office of Strategic Serv. (Apr. 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, Gen. Counsel, OCCWC Office of Strategic Serv. to file (Apr. 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, Gen. 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 the Research & Analysis branch).

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

55. 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.*

rope.⁵⁶ “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.”⁵⁷

By presidential order, the OSS ceased to function on October 1, 1945, a short while 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 Neumanesque formula to describe the industry in the Third Reich: “The Third Reich dictatorship was based on this unholy trinity of Nazism, militarism, and economic imperialism.”⁵⁸ Raul Hilberg, Neumann’s student and later a Holocaust historian, reviewed the continuing influence of Neumann’s thesis on the subsequent trials, and noted that in the 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. He then responds, “Those are Neumann’s four hierarchies.”⁵⁹

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.”⁶⁰ The acting chief of the War Crimes Branch, concluded in a similar manner in a letter attached to the trans-

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

57. KATZ, *supra* note 51, at 54.

58. *The Flick Case*, 6 T.W.C., *supra* note 16, at 32–33 (1952).

59. Raul Hilberg, *The Relevance of Behemoth Today*, 10 CONSTELLATIONS 256, 262 (2003).

60. Memorandum from D.A. Sprecher, Dir., Econ. Div., OCCWC, to Alfred Booth & 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.

mittal 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."⁶¹ 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 steps of their IMT predecessors, prosecutors of the industrialists emphasized *the war* as their main crime, rather than crimes of slavery and concentration camp atrocities.⁶²

The Neumanesque emphasis on conspiracy and cartelization worked well with the American inclination to use anti-trust doctrine to prosecute businesses. Several of the prosecutors' memos 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.⁶³ 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. This oscillation from independence to hybridity led to inco-

61. Memorandum from Cecil F. Hubbert, Acting Chief, War Crimes Branch, OSS, to OCCWC, Transmittal of OSS Research and Analysis Report (May 23, 1947), OCCWC 1933–1949, Group 238, no. 159, 238/190/12/13/01-02, 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.").

62. This emphasis is more problematic when read in the context of Neumann's Spearhead Theory of Anti-Semitism. Shlomo Aronson's comprehensive study of the influence of Neumann's spearhead theory on the Nuremberg trials represents a prominent example of this line of argument. Shlomo Aronson, *Preparations for the Nuremberg Trial: The O.S.S., Charles Dwork, and the Holocaust*, 12 HOLOCAUST & GENOCIDE STUD. 257 (1998). But see SALTER, *supra* note 37, at 589–699 (challenging some aspects of Aronson's analysis).

63. For a comprehensive discussion of different corporate theories suggested for the prosecution of the industrialists, 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).

herence in some of the prosecution's arguments as evident in the different theories presented in the Krupp and the I.G. Farben cases discussions on crimes against peace.

In a memorandum from August 1946, one of the lawyers working on the trials⁶⁴ 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 that Hitler was created by these same industrialists as their political arm and puppet to achieve this objective."⁶⁵ He mentioned Farben officials alongside Krupp and others. His views on the primacy of the industrialist conspiracy were only partially adopted by the prosecution. Eventually, the prosecutors of Farben described it primarily as the instrumentality of the Nazi regime. The Krupp prosecutors, however, 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 institutional position (i.e., close affiliation between industry and government).⁶⁶ 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.

64. Abraham Pomerantz, a New York commercial lawyer and deputy for the Nuremberg economic cases, was recruited to serve as a trial manager, as well as a big-picture strategist. For further details regarding Pomerantz's role, see *id.* at 1149.

65. Memorandum from A.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.

66. 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 [hereinafter Memorandum from Drachsler to Heath].

C. *Followers and Not Leaders: Two Companies, Two Conspiracies*

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

"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," hailed the *New York Times* in February 1947.⁶⁷ Indeed, the Farben indictment accused the defendants (who were frequently referred to by organization and not individually) of becoming an indispensable part of the German war machine, for initiating cartel agreements, and for intensifying production for their own empowerment. The prosecution's 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 converged and related the following account: at 18:00 on February 20, 1933, a group of about twenty-five businessmen attended a private meeting with Hitler, the Reich Chancellor, in the Berlin villa of Hermann Göring, president of the Reichstag. Leaders of German industry present included Georg von Schnitzler (chief of the Vorstand Commercial Committee of I.G. Farben and second in command to the chairman of the Board of Directors) and Gustav Krupp (von Bohlen und Halbach). 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."⁶⁸ Göring 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 contri-

67. Dana Adams Schmidt, *Nazi Capitalists Face U.S. Charges*, N.Y. TIMES, Feb. 2, 1947, at E5.

68. *The Farben Case*, 7 T.W.C., *supra* note 10, at 122 (1953).

bution by any of the firms represented at the meeting.”⁶⁹ “This meeting in Berlin,” wrote one of the prosecutors in a 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.”⁷⁰

Some sixty 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 election in its history. . . . Nothing suggests that the leaders of German big business were filled with ideological ardour 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 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.⁷¹

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 planning 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 ag-

69. *The Farben Case*, 7 T.W.C., *supra* note 10, at 124.

70. Memorandum from Drachsler to Heath, *supra* note 66.

71. ADAM TOOZE, *THE WAGES OF DESTRUCTION* 101 (2006).

gression.⁷² 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.⁷³ These accusations were not incidentally reminiscent of the Justice Department's antitrust campaigns.⁷⁴

The prosecutors built a case for an ever-growing alliance between the industry and the Nazi regime. What began on February 20 in Göring's villa was advanced by establishing a special organization in Farben (Vermittlungsstelle Wehrmacht), headed by Krauch, which had the declared objective of "building up a tight organization for armament in the I.G., which could be inserted without difficulty into the existing organization of I.G. and the individual plants."⁷⁵ Krauch was appointed Chief of the Department for Research and Develop-

72. *The Farben Case*, 7 T.W.C., *supra* note 10, at 19–28 (1953). 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. *Id.* at 29–31.

73. *Id.* at 29–31. 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.

74. 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 *HISTORIAN* 865, 871 (1999). See also Interview by Richard D. McKinzie with Josiah E. Dubois, Jr., Dep. Chief of Counsel for War Crimes in charge of I.G. Farben Case, Nuremberg, Ger., 1947–48, in Camden, N.J. (June 29, 1973), available at <http://www.trumanlibrary.org/oralhist/duboisje.htm> (describing Dubois' work for the Treasury Dep't prior to his involvement in the Farben prosecution) (Dubois worked for the treasury department but the Justice department conducted the antitrust campaigns).

75. *The Farben Case*, 7 T.W.C., *supra* note 10, at 20 (1953).

ment 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 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 Wehrmacht." 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 the key categories of evidence presented by prosecutors to demonstrate Farben officials' support in strengthening Germany's war capabilities and potential.⁸⁰

76. *Id.* at 23. See also *id.* at 22 ("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.")

77. *The Farben Case*, 7 T.W.C., *supra* note 10, at 25 (1953). 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." Hayes, *supra* note 26 at 176–178. Furthermore, Hayes challenged the prosecution's implicit claim—that the Four Year Plan began as or became an I.G. 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*, 7 T.W.C., *supra* note 10, at 29–30 (1953).

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, *supra* note 26, at 213–18. Hayes argued that the war entailed weighty risks and costs for the concern. "There is little support that IG

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 I.G. Farben Case, asked his colleagues in Washington for help:

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 later remarked 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. . . . The Tribunal did not like this method. . . . This was only the third day, and already the court was impatient.⁸³

Farben sought, encouraged, or directed the Nazi conquest of Europe." *Id.* at 213. "The combine reacted opportunistically and defensively to the regime's diplomatic and military triumphs, but IG did not foment them." *Id.* at 218.

81. Transcript of Washington to Nuremberg Teleconference (Dec. 17, 1947), War Crimes Branch, JAG, Group 153, No. 132, 270/1/4/03 at item D-23, NARA.

82. JOSEPH BORKIN, *THE CRIME AND PUNISHMENT OF I.G. FARBEN* 141 (1978).

83. DUBOIS, *supra* note 35, at 76-77. Also see *The Farben Case*, 7 T.W.C., *supra* note 10, at 583 (1953), for an exhibit illustrative of the prosecution's approach.

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's 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 could have been guilty of aggressive war."⁸⁴ Sam Harris made a similar suggestion while preparing the Krupp case.⁸⁵ Minskoff and Dubois' 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 any such findings "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

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 35, at 99 (quoting Minskoff). Nonetheless, this troubling start forced the prosecution to modify its approach. *Id.* at 77.

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 at WD-29, NARA [hereinafter Teleconference, Conway to Thayer].

86. For further discussion on this point, see Allison Marston Danner, *The Nuremberg Industrialist Prosecutions and Aggressive War*, 46 VA. J. INT'L L. 651, 662–63 (2006). While the defendants were exonerated on counts of preparing & waging wars of aggression, some were convicted of counts II & III: Plundering & Spoilation, and Slavery & Mass Murder. See discussion *infra* in sections III and Section IV.

87. *The Farben Case*, 8 T.W.C., *supra* note 10, at 1102 (1952).

88. *Id.* Indeed, the IMT found parties guilty under counts 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.*

not knowingly participate in the planning, preparation, or initiation of an aggressive war.⁸⁹

It was especially difficult for the Tribunal to hold the Farben defendants responsible on the count of crimes against peace, 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.⁹⁰ The Tribunal answered the prosecution's assertion that "the magnitude of the rearmament efforts was such 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 . . . [t]he evidence does not show that any of them knew the extent to which general rearmament had been planned, or how far it had progressed at any given time."⁹¹ Further, the Tribunal dismissed the prosecution's February twentieth conspiracy claim that donations made by Farben to the Nazi party in the early years of the regime indicate an alliance between the two.⁹² Finally, the Tribunal concluded that the prosecution's charges of propaganda, intelligence and espionage on behalf of the German government were not in reference to military or armament matters, but rather only to industrial and commercial matters⁹³

The Tribunal responded to the interpretation of waging aggressive war by making reference to the IMT decision and its

89. *Id.* at 1227.

90. 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 Drachler to Heath, *supra* note 66. However, with the acquittal of Speer, as noted by Judge Hebert in his dissenting opinion in *Farben*, "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*, 8 T.W.C., *supra* note 10, at 1306 (1952).

91. *The Farben Case*, 8 T.W.C., *supra* note 10, at 1113 (1952).

92. *Id.* at 1117-19.

93. *Id.* at 1123.

limited definition, which confined it only to principals.⁹⁴ Indeed, it did include industry in the concept of major war criminals as follows: “Those persons in the political, military, [or] *industrial* fields . . . who [were] responsible for the formulation and execution of policies” qualified as a leader.”⁹⁵ 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.”⁹⁶ Thus, men of industry could be held responsible for the crime of aggression only if they are policy-makers.⁹⁷ In its concluding remarks in reference to Waging War of Aggression, the Tribunal stated the need to avoid mass punishment.⁹⁸ It concluded:

The defendants now before us were neither high public officials in the civil government nor high military officers. Their participation was that of followers and not leaders. If we lower the standard of participa-

94. “There is nothing [in 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.

95. *Id.* at 1124 (emphasis added). See Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 EUR. J. INT’L L. 477, 483–84 (2007) (discussing the Tribunal’s finding that industrialists complicit in a state’s act of aggression could be liable for the crime of aggression).

96. *The Farben Case*, 8 T.W.C. *supra* note 10, at 1125 (1952).

97. For further discussion see Heller, *supra* note 95, 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*. *Id.* at 496. He analyzed the *shape and influence* test as it appeared in the High Command Case, in which fourteen high ranking officers in the German military were put to trial, and the *Ministries* case, in which twenty-one high-ranking officials in the Nazi government and Nazi party were charged with various crimes against peace. *Id.* at 486–87.

98. *The Farben Case*, 8 T.W.C., *supra* note 17, at 1124–25 (1952).

tion 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.⁹⁹

2. *The Krupp Independent Conspiracy*

In the *Krupp* case, the Tribunal again considered “policy-making” essential to any finding of responsibility of private persons. 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.

Krupp was a historic name in the European war mythology. Throughout the nineteenth 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.¹⁰⁰ 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.¹⁰¹ But the evidence establishing 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.¹⁰²

We find early traces of these allegations in Henry Morgenthau’s book, *Germany Is Our Problem*.¹⁰³

99. *Id.* at 1126.

100. *The Krupp Case*, 9 T.W.C., *supra* note 10, at 63 (1950).

101. *Id.* at 11, 16, 404.

102. Teleconference, Conway to Thayer, *supra* note 85.

103. 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). *See also* Doreen Lustig, *Criminality of Nazi-Era German Cartels: The Rise and Decline of Anti-Trust in American Approaches to International Criminal Law at Nuremberg*

The Krupp ruling on the aggressive war count was published on April 5, 1948 and preceded the Farben decision.¹⁰⁴ 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.¹⁰⁵

Indeed, the prosecution argued that Krupp's aggressive motivations "antedated nazism, and have their own independent and pernicious vitality but which fused with Nazi ideas to produce the Third Reich."¹⁰⁶

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."¹⁰⁷ 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 had any

(unpublished manuscript) (on file with author) (discussing Henry Morgenthau's influence on American attitudes towards the German industry after the Second World War).

104. *The Krupp Case*, 9 T.W.C., *supra* note 10, at 390 (1950).

105. *Id.* at 407.

106. *Id.* at 131.

107. *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.

*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.*¹⁰⁸

Judge Wilkins wrote a concurring opinion that was more favorable to the prosecution's case.¹⁰⁹ Wilkins noted that "the prosecution built up a strong *prima facie* case, as far as the implication of Gustav Krupp and the Krupp firm is concerned."¹¹⁰ It was the benefit of doubt that kept him from opposing dismissal.¹¹¹ As he later wrote in his memoirs, "Had Gustav or the Krupp firm as such been before us, the ruling would have been quite different."¹¹²

Despite the gravity attributed to this count by the American prosecution, neither the conspiracy element nor the notion of crimes against peace was a focal point of the IMT 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.

108. *Id.* at 449 (emphasis added).

109. *Id.* at 455–66.

110. *Id.* at 456.

111. 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." *Id.* at 457–58.

112. WILLIAM J. WILKINS, *THE SWORD AND THE GAVEL* 209 (1981) (emphasis added).

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 borders¹¹³ 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.¹¹⁴

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 was only that which could be linked to the apparatus of the State. As elaborated in the following section, these results could be attributed to an impoverished conception of the Nazi state.

D. "*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 exists 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 indepen-

113. See DAVID LUBAN, *LEGAL MODERNISM* 336–44 (1997) for a development of this argument.

114. See *id.* at 337–39.

dent 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.¹¹⁵

This incoherent structure, however, does not 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 automatism of free capitalism, precarious even under democratic monopoly capitalism, has been severely restricted. But capitalism remains.¹¹⁶ 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,

[u]nder 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 leaderships. . . . It is thus impossible to detect in the framework of the National Socialist

115. NEUMANN, *supra* note 2, 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 TOTALITARISM* 395 (1994). Further, Arendt noted how “[a]bove the state and behind the façades 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 420.

116. NEUMANN, *supra* note 2, at 360–61.

political system any one organ which monopolizes political power.¹¹⁷

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 as 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.”¹¹⁸ 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.”¹¹⁹

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.¹²⁰

Though the judicial verdict was clear, historians continued to deliberate on the nature of the relationship between

117. *Id.* at 468–69.

118. *Id.* at 467.

119. *The Farben Case*, 8 T.W.C., *supra* note 10, at 1126 (1952).

120. NEUMANN, *supra* note 2, at 470.

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, “If the primacy of politics reigned . . . an amorphous and unpredictable Behemoth ruled.”¹²¹ 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.”¹²²

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. 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’?

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

121. HAYES, *supra* note 26, at 319.

122. *Id.* at 320.

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."¹²³ This post-1936 shift towards the primacy of politics is expanded upon in the following section.

E. *Historical Perspectives and the Theory of Behemoth*

The prosecution tried to argue in both the Farben and the Krupp cases that economic actors' support of the initiation of the war (e.g. economic support and lobbying for the Nazi party) amounted to a concerted effort, a conspiracy, between business enterprises and the Nazi regime. This theory on the role of the industry in the Nazi state has become a source of a heated debate among historians of the period. Influenced by the ideological clouds of the Cold War, this debate was polarized between those who argued for the supremacy of the capital interests in the Nazi regime (i.e. primacy of economics) and others who argued for the clear supremacy of politics over the industry.¹²⁴

Initial historical accounts of the relationship between big business and National Socialism tended to focus on the extent to which the financial support of German corporations facilitated the rise of the Nazis to power during the Weimar years. During 1933-1936, similar (but not completely identical) interests shared by the Nazi bloc, big businesses, and the army led to their cooperation. Although big businesses were divided in their attitudes towards the rearmament plans, the work creation program and the profits derived from armament sales

123. R.J. OVERY, *WAR AND ECONOMY IN THE THIRD REICH* 12 (1994).

124. See Francis R. Nicosia & Jonathan Huener, *Introduction: Business and Industry in Nazi Germany in Historiographical Context*, in *BUSINESS AND INDUSTRY IN NAZI GERMANY* 1, 1-14 (Francis R. Nicosia & Jonathan Huener eds., 2004) (discussing scholarship on the relationship between German professionals and the Nazi regime); Volker R. Berghahn, *Writing the History of Business in the Third Reich: Past Achievements and Future Directions*, in *BUSINESS AND INDUSTRY IN NAZI GERMANY*, *supra*, at 129, 129-130 (describing the academic debate over the political responsibility and moral culpability of German businessmen under the Nazi regime).

drove them closer to the government.¹²⁵ The dictatorship's relative weakness in its early years placed businesses in a strong position. This was reflected in the extremely powerful position that Hjalmar Schacht—former President of the Reichsbank and from 1934 Minister for Economics—held in the Nazi State.¹²⁶ Overy observed that “under his careful guidance the position of the large German firms was strengthened. Cartelization was extended further at the expense of small businesses; output and profits rose under the stimulus of government-induced demand.”¹²⁷

Historical investigations conducted after the Nuremberg trials suggest that the closely interwoven aims and interests of Nazi leadership and of German capital mutually influenced and affected one another, thus “making it difficult to separate a specifically ‘political’ and specifically ‘economic’ sphere and therefore to distinguish a clear ‘primacy’.”¹²⁸ Some historians’ view of the relationship between business enterprises and the Nazi regime is reminiscent of what the architects of the Nuremberg trials envisioned. Ian Kershaw suggested we perceive the position and role of big businesses within the context of the complex and changing multidimensional (polycratic) power structures in the Third Reich.¹²⁹ Kershaw advised his readers to follow Franz Neumann in breaking away from the totalitarian model of a centralized command economy and

125. See DAN P. SILVERMAN, *HITLER'S ECONOMY: NAZI WORK CREATION PROGRAMS, 1933–1936*, at 6–8 (1998) (describing how German industrialists who initially opposed the Nazi work creation program came to support it). Silverman's study suggests that partially effective work creation programs worked with a number of other factors to produce a rapid recovery of Germany's labor market under the Nazis. *Id.* at 245.

126. IAN KERSHAW, *THE NAZI DICTATORSHIP: PROBLEMS AND PERSPECTIVES OF INTERPRETATION* 59 (4th ed. 2000).

127. OVERY, *supra* note 123, at 94–95.

128. IAN KERSHAW, *supra* note 126, at 56. The historical debate on the involvement of business enterprises in the Nazi regime grapples with two main issues: the issue of political responsibility of German business enterprises under the Nazi regime (“how far they had a hand in the rise and consolidation of Hitler's power”) and that of moral and criminal culpability. Berghahn, *supra* note 124, at 129. Criminal responsibility is defined according to the international law and the Nuremberg Tribunals jurisprudence. Indeed, as the history of the scholarship in this context suggests, at the war's end, “preoccupation with criminal culpability pushed the question of political responsibility into the background.” *Id.* at 129–30.

129. KERSHAW, *supra* note 126, at 47–68.

monolithic state in the hands of Hitler and his clique of Nazi leaders. Kershaw also encouraged his audience to eschew the alternative, almost equally monolithic, model of the Nazi State as the direct representative and most aggressive form of rule of finance capital. Conversely, “[D]espite the rationing and licensing activities of the state, [private firms in the Third Reich] still had ample scope to devise their own production and investment profile. . . . There occurred hardly any nationalization of private firms under the Third Reich. In addition, there were few enterprises newly created as state-run firms.”¹³⁰

Following Neumann’s formulation, Kershaw described the Nazi regime “as an unwritten ‘pact’ (or ‘alliance’) between different but interdependent blocs in a ‘power-cartel.’”¹³¹ This triad was composed of the Nazi bloc (comprising the various component parts of the Nazi movement), big businesses (including large landowners), and the army. Despite some important differences, Kershaw’s description is surprisingly reminiscent of the prosecutors’ approach. Kershaw’s historical description of such an alliance “focused on organized capitalism, namely ‘industrial organizations,’ cartels, and trusts such as the companies of heavy industry of I.G. Farben.”¹³²

Although blocs in the power cartel remained intact until the end of the Third Reich, their inter-relationship and relative weight within the cartel altered during the course of the dictatorship.¹³³ Internal conflicts among big businesses changed the balance of power between government and industry after the first phase of the Third Reich (until 1936) toward relative dominance of the Nazi party. Economic policy shifted during the course of 1936 toward an accelerated rearmament and autarkic policy as preparation for war and imperial expansion. Schacht resisted the change and was soon replaced by Göring as the dominant figure in the economy.

130. Christoph Buchheim & Jonas Scherner, *The Role of Private Property in the Nazi Economy: The Case of Industry*, 66 J. ECON. HIST. 390, 390–391 (2006).

131. KERSHAW, *supra* note 126, at 58.

132. Buchheim & Scherner, *supra* note 130, at 391.

133. KERSHAW, *supra* note 126, at 58. Other historical accounts go even further in challenging a coherent description of the industry/government relationship, revealing complex power structures within the Third Reich. See, e.g., JOHN R. GILLINGHAM, *INDUSTRY AND POLITICS IN THE THIRD REICH: RUHR COAL, HITLER AND EUROPE* (1985); HAYES, *supra* note 26; OVERY, *supra* note 123.

This shift reduced constraints on industry for the Nazi leadership: “[H]owever sympathetic to the business world and however dependent on it, the Nazi government had its own interests which it was prepared to pursue.”¹³⁴ Following this shift, businesses “could still profit from the system, [but] they were forced to do so on the party’s terms. Profit and investment levels were determined by the state, on terms much more favorable to state projects.”¹³⁵ Thus, while some historians concluded that politics took primacy over the economy after the first period,¹³⁶ German businesses were not entirely powerless through this period and differed in their reaction and resilience to the shifting balance of power. Indeed, Nazi policies after 1936 were aimed at ‘recruiting’ the economy for empire and conquest. Accordingly, the next section focuses on the industrialists’ activities in the age of empire.

IV. 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 as criminal. Such inquiry required further understanding of the Nazi state, one that in-

134. Alan Milward, *Fascism and the Economy*, in *FASCISM: A READER’S GUIDE*, 409, 434 (Walter Laqueur ed., 1979).

135. OVERY, *supra* note 123, at 106.

136. This argument is most identified with Mason. Tim Mason, *The Primacy of Politics—Politics and Economics in National Socialist Germany*, in *NAZISM AND THE THIRD REICH* 175, 175-200 (Henry A. Turner ed., 1972).

cludes an analysis of the relationship between the public and private spheres in the Nazi regime.

A. *Aryanization: The Exclusion of Plunder Within State Borders*

1936 marked a change in direction as the German economy moved to autarky and armament. The Nazi policy was aimed at transforming the economy in the service of empire and conquest. Under these new conditions the “business community was characterized by defensive opportunism in the face of state power.”¹³⁷ The substance of German capitalism remained intact, but entrepreneurial independence was limited. The plan was to evict non-German capital from central-eastern Europe and to build up a new state-supervised German zone dedicated to war production.¹³⁸ As noted by Mark Mazower, “Firms like chemicals giant I.G. Farben joined in. They had not been especially in favour of the war. But once it broke out, they too took full advantage of it.”¹³⁹ Farben’s conduct brought to the fore the question of the German industrialists’ responsibility for the economic imperialism and military conquests of the Nazi regime.

Indeed, the crimes in the count of Aryanization and spoliation were described by the Flick prosecutors as “intimately connected with the preparation by Germany for an aggressive war.”¹⁴⁰ The war, the prosecutors argued, facilitated Flick officials’ efforts to acquire Jewish property. Count three of the Flick indictment charged three defendants in the Flick concern (including Flick himself) with the commission of crimes against humanity by criminal participation in prosecutions on racial, religious, and political groups, including, in particular, “Aryanization” of properties belonging in whole or in part to Jews.¹⁴¹

137. OVERY, *supra* note 123, at 17.

138. MARK MAZOWER, *HITLER’S EMPIRE* 265 (2008).

139. *Id.*

140. *The Flick Case*, 6 T.W.C., *supra* note 10, at 92 (1952). Correspondence between the prosecutors and Raphael Lemkin conveys the importance they attributed to this link. Washington to Nuremberg Teleconference (March 25, 1947), Nuremberg Teleconferences, June 29, 1947–Feb. 26, 1947, War Crimes Branch, JAG, Group 153, no. 132, 240/1/4/06-7, NARA.

141. “Aryanization refers to the forced transfer of Jewish-owned businesses to German ‘Aryan’ ownership.” *Aryanization*, CENTER FOR HOLOCAUST & GENOCIDE STUDIES, UNIV. OF MINN., <http://www.chgs.umn.edu/educational/>

In a teleconference between the Judge Advocate General (JAG) in Washington and the trials team at Nuremberg, one of the lawyers asked to base the Aryanization count on a similar rationale used in American extortion cases: “We vaguely remember a recent New York Civil Action (Flamm v. Noble we believe) where a private citizen threatened a radio station with government action unless this station was sold to him. . . . This case might be good for us because of its factual similarity to our cases (Aryanization count).”¹⁴² This brief communication succinctly captures the prosecutors’ understanding of Flick’s strategy in gaining control over properties in Germany before the war by using the potential threat of government intervention.¹⁴³

brokenThreads/aryanization.html (last visited Apr. 21, 2011). The Aryanization process (*Arisierung*) had two stages: the so-called “voluntary” stage, from 1933–1938 during which Jews were gradually removed from German economic life and the “compulsory” stage that began immediately after the Kristallnacht. In this final stage, all Jewish-owned businesses that had not already been “Aryanized” were forcibly confiscated. *Id.* For a concise overview, see THE SHOAH RESEARCH CTR., INT’L SCH. FOR HOLOCAUST STUDIES, *Aryanization*, http://www1.yadvashem.org/odot_pdf/Microsoft%20Word%20-%205775.pdf (last visited Apr. 23, 2011); For a more elaborate discussion, see MARTIN DEAN, *ROBBING THE JEWS: THE CONFISCATION OF JEWISH PROPERTY IN THE HOLOCAUST, 1933–1945* 17–171 (2008).

142. Washington to Nuremberg Teleconference (June 25, 1947) Letters Received 1944-1951, War Crimes Branch, JAG, Group 153, no. 132, 270/1/4/03, NARA.

143. In one such instance, Flick negotiated his control over the Ignaz Petschek brown-coal mines in central Germany by pressuring the German government to allow no one but him to negotiate its sale. Mr. Hans Petschek, who fled to London and then New York in 1938, provided the prosecutors with valuable information on this transaction. For the correspondence between the prosecutors, Petschek, and other involved officials see Kempner’s Materials, (Jan. 22, 1947) WWII War Criminals Records, OCCWC 1933-1949, Group 238, no. 159, 190/12/13/01-02, NARA. L.M. Stallbaumer, who studied the Friedrich Flick concern’s involvement in the Aryanization of Jewish property, stressed the opportunistic motivation of business leaders under Nazi rule. L.M. Stallbaumer, *Big Business and the Persecution of the Jews: the Flick Concern and the “Aryanization” of Jewish Property before the War*, 13 HOLOCAUST AND GENOCIDE STUDIES 1, 15-16 (1999). The lawyers preparing for the trial initially included the Dresdner Bank as an additional firm to be indicted at Nuremberg. The Dresdner bankers’ involvement in Aryanization practices was particularly notorious. *Cf.* Expropriation of the Property of the Nazi Opposition and the Aryanization of Jewish Property, Memorandum from Abraham L. Pomerantz, Deputy Chief Counsel, OCCWC, to Telford Taylor, Brigadier Gen., Chief of Counsel for War Crimes, US-OMGUS (Aug.

On February 19, 1947, one month before the Flick proceedings ended, Telford Taylor asked his colleagues in the JAG office in Washington for advice on how to proceed given that the IMT restrictive decision took cognizance of crimes against humanity, only if they were committed after September 1939:¹⁴⁴

The further, more delicate question is, however, whether crimes against humanity committed within Germany against German nationals can be considered as international law, and therefore punishable on the footing of international law as announced in the London agreement and elsewhere.¹⁴⁵

Taylor's concerns were soon substantiated. The Flick Tribunal decided to follow the IMT narrow interpretation and thus ruled that it lacked jurisdiction on crimes committed prior to the initiation of World War II. The Krupp and I.G. Farben Tribunals followed this decision. The Flick Tribunal further grappled with the question of whether the appropriation of property, on racial or religious grounds, without com-

14, 1946) OCCWC Berlin Branch, OCCWC, Group 238, No. 202, 190/12/35/01-02 (explaining the origin of the Dresdener Bank's involvement). Karl Rasche, a high ranking official of the Dresdner Bank, was later tried in the Ministries Case at Nuremberg. Rasche was found guilty under count six for his participation in spoliation in Bohemia-Morava and Holland. See United States v. Ernst von Weizaecker, et al. (*The Ministries Case*), 14 T.W.C., *supra* note 10, at 772-784 (1949-1953). He was further charged with providing loans to businesses, knowing that the money would be used to finance businesses utilizing slave labor. The Tribunal found him not guilty. See United States v. Ernst von Weizaecker, et al. (*The Ministries Case*), 14 T.W.C., *supra* note 10, at 621-22 (1949-1953).

144. Taylor noted, further, that the language upon which the IMT based its decision appeared in Article 6 of the Nuremberg Charter, but was not included in Article 2 of the CCL10. /1/4/03, Transcript of Teleconference (Feb. 19, 1947) Letters Received 1944-1951, War Crimes Branch, JAG, Group 153, no. 132, 270 NARA ("We have no doubt that we are in sound legal footing under [C]ontrol [C]ouncil [L]aw No. 10, inasmuch as it is certainly within the legitimate powers of the occupying countries to set up special courts for the punishment of acts which clearly were crimes under German Law prior to the Nazis and were under any civilized system of law. In view of the fact that there is no central government of Germany, the occupying powers are in many ways exercising de facto sovereignty in Germany.").

145. *Id.* Taylor repeated this line of reasoning in the opening statement of the Flick case, which began April 19, 1947. Taylor clarified that Law No. 10 covers crimes against humanity committed prior to the attack on Poland in 1939. *The Flick Case*, 6 T.W.C., *supra* note 10, at 82 (1952).

pensation, by the use of pressure and duress, amounts to a crime against humanity. It concluded that a person does not become “guilty of crimes against humanity merely by exerting anti-Semitic pressure to procure by purchase or through state expropriation of industrial property owned by Jews.”¹⁴⁶ It further held that crimes against humanity cannot be properly interpreted to include “[c]ompulsory taking of industrial property, however reprehensible.”¹⁴⁷

The puzzle of the reach of international legal scrutiny over coercion exercised by private businesses was further complicated by the discussion over practices of plunder and spoliation in the territories occupied by the Nazi regime. When will such transactions be regarded illegal under international law? What are the ramifications of war and occupation to these questions? These queries lead our discussion in the next section.

B. *Spoliation in Occupied Territories*

The Flick Tribunal confined the doctrinal basis for the crime of plunder and spoliation to War Crimes as defined and embodied in the Hague Regulations.¹⁴⁸ The doctrine prevailing at the time of the war was far from clear in reference to practices involving private entities. Though directly engaging with these issues, the decisions of the Nuremberg Tribunals did not provide further clarity. If at all, the Hague Regulations suffered a major setback from the conduct of World War II occupants. At the same time that the IMT in Nuremberg described these rules as being declaratory of customary international law, “they effectively lost their normative value.”¹⁴⁹ As noted by Von Glahn in 1957, “In the absence of conventional law rules, both military manuals and the actual practices of modern occupants indicate clearly that the latter possess far-

146. *Id.* at 1215.

147. *Id.*

148. For further discussion, see Michael Bothe, *War Crimes*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 379, 383 (Antonio Cassese et al. eds., 2002).

149. EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 98 (2004). As Benvenisti writes, “Ultimately, this phase culminate[d] with the introduction of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, which reformulated several aspects of the law of occupation in response to the experience of the recent war.” *Id.* at 59.

reaching powers as respects the control of nonbanking business enterprises.”¹⁵⁰ This ambiguity benefited the Industrialist defendants.

The IMT deduction from articles 48, 49, 52, 55 and 56 of the Hague Regulations of 1907 concluded, “[U]nder the rules of war, the economy of the occupied country can only be required to bear the expense(s) of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear.”¹⁵¹ Accordingly, the Flick Tribunal declined the prosecution’s allegations of Flick’s disproportionate use of resources in the occupied territories: “If after seizure the German authorities had treated their possession as conservatory for the rightful owners’ interests, little fault could be found with the subsequent conduct of those in possession.”¹⁵²

However, in one incident, Flick alone was found guilty of exploiting a seized factory in an occupied territory.¹⁵³ The Tribunal stressed that even though Flick’s involvement violated Hague Regulation 46, “[H]is acts within his knowledge did not intend to contribute to a program of ‘systematic plunder’ conceived by Hitler regime.”¹⁵⁴ The Court found him guilty under this count, but indicated that his ignorance of the applicable law and the circumstances under which he acted might mitigate his punishment.

150. GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION* 207 (1957).

151. *The Flick Case*, 6 T.W.C., *supra* note 10, at 1204 (1952).

152. *Id.* at 1206.

153. This was the case of the Rombach plant in Lorraine. Consisting of blast furnaces, Thomas works, rolling mills and cement works, this enterprise was administered by a special commissioner of the Reich and then immediately transferred by a contract to the Flick firm as its trustee. Goering’s intention was to exploit it to the fullest extent for the German war effort. Flick had a different plan; he was interested in extending his organization through the acquisition of additional plants, such as this one. *The Flick Case*, *supra* note 10, at 1205-08.

154. *Id.* The *New York Times* reported that Hermann Röchling, another leading German industrialist, attempted to sabotage the transfer of the Rombach ore enterprises to Flick asserting that it should be transferred to him instead. “Röchling insisted that his own services to Germany constituted a better claim to the valuable property than those of Flick.” *Nazi Rivalry on Loot Shown in Flick Trial*, N.Y. TIMES, Apr. 22, 1947, at 23.

The Krupp Tribunal adopted a much stronger opposition to the practice of plunder and spoliation of private firms during the war. It opened its decision by quoting the following testimony:

On May 18, 1940, the defendant, Alfred Krupp, and three other industrialists were gathered around a table intently studying a map while listening to a broadcast of German war news over the radio. . . . At the conclusion of the broadcast the four men talked excitedly and with great intensity. They pointed their fingers to certain places on the map indicating villages and factories. One said, "this one is yours, this one is yours, that one we will have arrested, he has two factories." They resembled, as the witness Ruemann put it, "vultures gathered around their booty." We are satisfied that this incident occurred as portrayed by the witness . . . and that it clearly indicates the attitude of the defendant Alfred Krupp during the period of Germany's aggressions.¹⁵⁵

The court referred to several plants in which unlawful seizure of property was involved. All were declared to be violations of the Hague regulations. As stated by the Tribunal, "The Krupp firm not only took over certain French industrial enterprises. It also considered occupied France as a hunting ground for additional equipment."¹⁵⁶ Similar conclusions were drawn in reference to Krupp's involvement in other occupied territories.¹⁵⁷

Farben, as noted by the IMT Tribunal, "marched with the Wehrmacht and played a major role in Germany's program for acquisition by conquest."¹⁵⁸ According to the Farben Tribunal, "The Hague Regulations do not become inapplicable because the German Reich 'annexed' or 'incorporated' parts of

155. *The Krupp Case*, 9 T.W.C., *supra* note 10, at 1347-48 (1950).

156. *Id.* at 1361.

157. *Id.* at 1372. As concluded by the court, "[T]he acquisition of properties, machines, and materials in the occupied countries was that of Krupp firm and that it utilized the Reich government and Reich agencies whenever necessary to accomplish its purpose." *Id.*

158. *The Farben Case*, 8 T.W.C., *supra* note 10, at 1129 (1952) (quoting from the general findings of the IMT).

the occupied territory into Germany.”¹⁵⁹ The Hague Regulations are broadly aimed at preserving the inviolability of property rights to both public and private property during military occupancy. Nonetheless, private civilians of the nation of the military occupant, as the judgment suggests, may enter into agreements relating to the purchase of industrial enterprises or interests equivalent thereto, even during time of military occupancy, if the owner’s consent is voluntarily given.

The war presented the Tribunals with “a relatively new development affecting the property rights of private individuals in German-occupied parts of Europe.”¹⁶⁰ 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.¹⁶¹ 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.¹⁶² As noted by the Tribunal, “Where 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.”¹⁶³ Thus, business initiatives and governmental control were central considerations in the Tribunals’ discussion of unlawful property transactions. In the following paragraphs, I discuss these criteria of initiative and control at some length.

159. *Id.* at 1137.

160. VON GLAHN, *supra* note 150, at 189.

161. *The Farben Case*, 8 T.W.C., *supra* note 10, at 1140 (1952)

162. *Id.*

163. *Id.* at 1132–33 (1952). Five of the Farben directors were held criminally liable for the plunder. *Id.* at 1205–10.

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 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."¹⁶⁴ 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.¹⁶⁵ Early correspondence suggests they conceived the industry as complicit in governmental spoliation rather than as an independent violator.¹⁶⁶ The division based on the initiative criteria corresponded, to some extent, with the distinction between eastern and western occupied territories.¹⁶⁷

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

164. *The Farben Case*, 7 T.W.C., *supra* note 10, at 181 (1953). 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. *Id.*

165. Expropriation of the Property of the Nazi Opposition and the Aryanization of Jewish Property, *supra* note 143.

166. 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, Dir., Econ. Div., OCCWC, to Sadi Mase, Chief, Spoliation Branch, OCCWC (Oct. 23, 1946), Admin. Records, Exec. Counsel, Econ. Div., OCCWC, Group 238, no. 165, 190/12/13/1, NARA.

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

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 confiscated properties and Farben's involvement was mainly derivative. One historian described its imperialism as the "sort that *followed* the flag."¹⁶⁸

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.¹⁶⁹ This division between the derivative form of spoliation and the direct one is later echoed in the Tribunal's decision,¹⁷⁰ 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.¹⁷¹ 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."¹⁷²

168. HAYES, *supra* note 26, 264–65 (emphasis added).

169. "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*, 7 T.W.C., *supra* note 10, at 187 (1953); see also HAYES, *supra* note 77, at 281–82 (discussing the Farben's role in French dye companies).

170. "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*, 8 T.W.C., *supra* note 10, at 1140 (1952).

171. *The Farben Case*, 8 T.W.C., *supra* note 10, at 1178–79 (1952).

172. HAYES, *supra* note 26, at 317.

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 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.¹⁷³

The Farben Tribunal emphasized that an action of the owner would not be considered voluntary if it was obtained by threats, intimidations, and pressure from 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.¹⁷⁴ In most of the cases reviewed by the Tribunal, "the initiative was Farben's"¹⁷⁵ 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."¹⁷⁶ This resulted in the enrichment of Farben.¹⁷⁷

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 territo-

173. *The Farben Case*, 8 T.W.C., *supra* note 10, at 1140 (1952).

174. *Id.* at 1135-36.

175. *Id.* at 1140.

176. *Id.*

177. 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 1151-52.

ries.¹⁷⁸ The Flick Tribunal posed an even higher threshold, requiring that spoliation practices be systematic.¹⁷⁹ 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. The two criteria of initiative and control embody a familiar tension in liberal theory. The requirement of initiative assumes a realm of freedom within which businesses can freely pursue their commercial endeavors. The state existence is essential for such transactions to take place. The deviation from the liberal model, alluded to in the requirement of state control, is its control and biased influence over the transaction itself. The involvement of public violence in the private transaction renders it illegal. The need for the latter public element elucidates the challenge presented by the case for international lawyers: can private coercion, regardless of the state coercive involvement, be regarded illegal in international law?

C. *Initiative and Control in the Dual State*

Historians in later decades struggled to determine the extent to which the German industry preserved its autonomy under the Third Reich. 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 contract, that important corollary of private property rights, was not abolished during the Third Reich, even in dealings with state agencies.”¹⁸⁰ 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

178. *The Krupp Case*, 9 T.W.C., *supra* note 10, at 1373 (1950).

179. *The Flick Case*, 6 T.W.C., *supra* note 10, at 1208 (1950).

180. Buchheim & Scherner, *supra* note 130, at 394.

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.¹⁸¹

Furthermore, “[v]ery 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.”¹⁸²

Ernst Fraenkel, one of Neumann’s 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.¹⁸³ Neumann’s critical account of the Nazi state began with the absence of the rule of law (“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”).¹⁸⁴ But went even further to deny it of any rationality or monopoly over the exercise of violence.¹⁸⁵ Fraenkel’s thesis challenged this description of total

181. *Id.* at 395.

182. *Id.* at 403. For example, I.G Farben concluded a contract with the Nazi government, which guaranteed its sales for a fixed minimum price (*Wirtschaftlichkeitsgarantievertrag*) for its first plant to produce Buna in 1937. *Id.* at 409.

183. For a brief overview of Neumann’s theory on the proliferation of amorphous, deformalized standards, see WILLIAM E. SCHEUERMAN, *BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW* 126–27 (1994). 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. *Quoted in id.* at 127.

184. NEUMANN, *supra* note 2, 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, *supra* note 115, at 395 Further, Arendt noted how “[a]bove 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 420.

185. NEUMANN, *supra* note 2, at 467–68.

arbitrariness and offered an alternative description of a system in which some legal mechanisms still function in the sphere of civil law.¹⁸⁶ The Nazi deformed 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.¹⁸⁷

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.”¹⁸⁸

Fraenkel 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:¹⁸⁹ “[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.”¹⁹⁰ 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 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 Rechtsstaat of the liberal period). The Normative State is a necessary complement to the Prerogative State and can be understood

186. See generally ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (1941).

187. *Id.* at xiii.

188. *Id.* at 46.

189. *Id.* at 65–66.

190. *Id.*

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:

[A]ccording 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.¹⁹¹

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.¹⁹²

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. Second, since Jews are regarded enemies of the Third Reich, "all questions in which Jews are involved fall within the jurisdiction of the Prerogative State."¹⁹³ Andrew Arato elaborated, further, how

191. *Id.* at 71-72.

192. *Id.* at 171-72; *see id.* at 184-85 (summarizing the 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. . . . [L]egal 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.").

193. *Id.* at 89.

the dual structure offered by Fraenkel served as a condition for the institutionalization of the Nazi regime.¹⁹⁴

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.¹⁹⁵ 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 country's 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."¹⁹⁶

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 Fraenkel's normative sphere, namely that a certain degree of legality prevailed in the "private sphere" of occupied Europe. A few years after the trials, Hersch Lauterpacht challenged the logic of applying this rationale in the context of an illegal "total war."¹⁹⁷ 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."¹⁹⁸ While

194. Andrew Arato, *Dictatorship Before and Beyond Totalitarianism*, 69 *Soc. Res.* 473, 495–96 (2002).

195. Arato revisited Hannah Arendt's analysis of totalitarianism through the prism of Fraenkel's Dual State framework. *Id.* at 496.

196. *The Krupp Case*, 9 T.W.C., *supra* note 10, at 1341–43 (1950).

197. See Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 *BRIT. Y.B. INT'L L.* 206, 224–233 (1953).

198. *Id.* at 240.

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,¹⁹⁹ 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.”²⁰⁰ If we were following Fraenkel’s description—of conceiving the private sphere as a normative one—we could potentially avoid the Lauterpachtian dilemma. The illegality of the war or the prerogative nature of the Nazi regime stops at the gate of the private sphere. Such conclusion, however, defines the prerogative in the same way coercion was often defined by the Tribunals: as related to the physical presence and influence of the government. But, for Fraenkel, the idea of the Prerogative State did not lie in the presence of the state apparatus or its direct influence.²⁰¹ Rather, Fraenkel 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.

A different interpretation, inspired by Fraenkel’s theory, would claim that once 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

199. “[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.

200. *Id.* at 233.

201. See, e.g., *The Krupp Case*, 9 T.W.C., *supra* note 10, at 1372 (1950) (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”).

to exclude these practices from the Tribunal's jurisdiction implicitly situated 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.²⁰²

Against the Tribunals' 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 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

202. As Arendt explained,

This 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 115, at 447.

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 criterion 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."²⁰³ It is to the realm most notably identified with total domination that we now turn: the industrialist involvement in the atrocities of the camps.

V. BETWEEN PUBLIC AND PRIVATE BUREAUCRACY: THE STRUCTURE OF DISAGGREGATED RESPONSIBILITY

*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.*

—Primo Levi, 28 December 1945²⁰⁴

203. *Id.* at 451.

204. 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.

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 labor resources had been depleted.”²⁰⁵ 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”²⁰⁶ 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

205. ULRICH HERBERT, *A HISTORY OF FOREIGN LABOR IN GERMANY, 1880-1980*, at 153 (William Templar trans., 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. Michael J. Bazylar, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT’L L. 11, 22 (2002).

206. *Proceedings, 27 August 1946—1 October 1946*, 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 488 (1947) [hereinafter I.M.T.].

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-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."²⁰⁷

Furthermore, the Tribunal found:

[T]he evacuation by the SS of sick concentration camp laborers from the concentration labor 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 too graphically the extent and supremacy of the control and supervision vested in and exercised by the SS over concentration labor camps and their inmates.²⁰⁸

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 freight car production quota . . . [and that] Weiss took an active and leading part in securing an allocation of Russian prisoners of war" for work in this plant.²⁰⁹

Nonetheless, the Tribunal rejected prosecution claims of inhuman conditions as well as cruel and atrocious treatment in the plants controlled by the defendants. The Flick Tribunal found that the control of the Reich presented a clear and present danger: "The defendants lived within the Reich. The Reich, through its hordes of enforcement officials and secret police, was always 'present.'"²¹⁰ Accordingly, this made the defense of necessity applicable to most of the defendants.

207. *The Flick Case*, 6 T.W.C., *supra* note 10, at 1196 (1952).

208. *Id.* at 1197.

209. *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.

210. *Id.* at 1201.

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 plants of the Krupp firm.²¹¹ The Tribunal provided lengthy descriptions of the horrendous conditions that prevailed in these camps.²¹² 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.²¹³

“In 1943, Krupp employed eastern children as young as 12 years old, and in 1944, the firm employed children as young as six.”²¹⁴ 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.”²¹⁵

In April 14, 1942, Erich Müller, 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 concen-

211. *The Krupp Case*, 9 T.W.C., *supra* note 10, at 1399 (1950).

212. Documentary evidence indicated that, between 1940 and 1945, eighty-one separate Krupp plants within greater Germany employed 69,898 foreign civilian workers, 4,978 concentration camp inmates, and 23,076 prisoners of war. “[T]he great majority were forcibly brought to Germany and detained under compulsion throughout the period of their service.” *Id.* at 1374.

213. HERBERT, *supra* note 205, at 157 (quoting Fred. Krupp AG Essen to Rüstungskommando Essen, Apr. 2, 1942, BA/MA RW 19 WI/IF 5/176, fol. 79).

214. *The Krupp Case*, 9 T.W.C., *supra* note 10, at 1409 (1950).

215. *Id.* at 1410.

tration camp inmates in Auschwitz, though the unexpected progress of the Russians led Krupp to relinquish the plant. Compulsory labor camps were set up and maintained by the Krupp firm and its employers in other plants.²¹⁶ 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: "The most that any of them had at stake was a job."²¹⁷

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 workers. In fact, some steps were taken by Farben to alleviate the situation."²¹⁸ 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.²¹⁹

216. On the Bertha Works and the Berthawerk plants, see *id.* at 1422–23. Similar evidence was found in reference to other camps.

217. *Id.* at 1444. The Tribunal further established the view that the fear of the loss of property cannot make the defense of duress available.

218. *The Farben Case*, 8 T.W.C., *supra* note 10, at 1185 (1952).

219. *Id.* 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.").

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 at Berlin. Thus, they were generally quite far removed from day to day administration and conduct of such plants and labor conditions therein.²²⁰

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.²²¹

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."²²² However, the fact that Krauch supported the use of prisoners of war in the war industry "is not sufficient to warrant a finding of [g]uilty for the commission of war crimes under count three."²²³

^{220.} *The Flick Case*, 6 T.W.C., *supra* note 10, at 1199 (1952).

^{221.} *The Farben Case*, 8 T.W.C., *supra* note 10, at 1185 (1952) (emphasis added).

^{222.} Carl Krauch, 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 "[i]n view of what he clearly must have known about the procurement of forced labor and the part he 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." *Id.* at 1189.

^{223.} *Id.*

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 I.G. 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."²²⁴ 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. . . . [W]e 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.²²⁵

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 Third Reich. [However] . . . this evidence does not establish that Farben was taking the initiative in the illegal employment of prisoners of war."²²⁶

Eventually, the Tribunal convicted the defendants Krauch, ter Meer, Bütefisch, and Dürrfeld due to proof of their initiative in procurement of slave labor for the construc-

224. *Id.* at 1193.

225. *Id.* at 1193-94.

226. *Id.* at 1195. 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 court found evidence of criminal responsibility for the "mis-treatment of labor" in the Farben plants to be wanting. *Id.*

tion of Farben's Buna plant at Auschwitz and 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."²²⁷

The Farben Tribunal judge and 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,"²²⁸ 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.²²⁹

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. No criminal responsibility resulted for participation in the utilization of slave labor. "Under this construction Farben's com-

227. *Id.* at 1186–87.

228. CONOT, *supra* note 6, at 517. For further analysis on Judge Hebert's involvement in the Farben cases, see Alberto L. Zuppi, *Slave Labor in Nuremberg's I.G. Farben Case: The Lonely Voice of Paul M. Hebert*, 66 LA. L. REV. 495 (2006).

229. *The Farben Case*, 8 T.W.C., *supra* note 10, at 1204–05 (1952).

plete integration into production planning, which virtually meant that it set its own production quotas, is not considered as ‘exercising initiative.’”²³⁰ He rejected the necessity claim and asserted: “Farben and these defendants wanted to meet production quotas in aid of the German war effort.”²³¹ Judge Hebert further 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.²³² In addition, he rejected the majority’s rationale to hold Krauch responsible, unlike the other Vorstand members, because he was also a governmental official.²³³

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.²³⁴

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.²³⁵ He asserted that Farben “was actively engaged in continuing criminal offenses which constituted participation in war crimes and crimes against humanity on a broad scale and under circumstances such as to make it impossible for the corporate officers not to know the

230. *Id.* at 1311 (Hebert, J., dissenting).

231. *Id.* at 1309.

232. *See id.* at 1312–13 (describing the use of slave labor in the camps as a matter of Farben corporate policy).

233. *Id.* 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.”).

234. *Id.* 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.” *Id.* at 1322. 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 the slave-labor program and had to take an individual personal part in furthering the program.” *Id.* at 1316.

235. *Id.* at 1308.

character of the activities being carried on by Farben at Auschwitz.”²³⁶

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)²³⁷ 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?”²³⁸

In his final statement, defendant Dürrfeld stated:

The concentration camp and IG have been two entirely different spheres, two 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 the IG plant; over there you have destruction; 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 indi-

236. *Id.* at 1313.

237. “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.” *Id.* at 1109.

238. 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 1933–1949, Group 238, no. 159, 190/12/13/01-02, NARA.

vidual man. Over there you find death, and over here you encounter life.²³⁹

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).²⁴⁰ 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. . . .

[C]alculable rules . . . is the most important [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.²⁴¹

According to Stephen Kalberg, as decisions are arrived at in the bureaucracy, “sheer calculation in terms of abstract

239. *The Farben Case*, 8 T.W.C., *supra* note 10, at 1076 (1952).

240. 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).

241. WEBER, *supra* note 48, at 974–75.

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 the market’ are universally carried out, regardless of . . . the degree to which they may violate ethical substantive rationalities.”²⁴²

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’ attempt 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 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.”²⁴³ 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.”²⁴⁴ “Essentially,” he wrote, “we have action by a corporate board, participated in by its members, authorizing the violation of international law by other subordinate agents of the corporation.”²⁴⁵ Hebert concluded,

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

242. Stephen Kalberg, *Max Weber’s Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History*, 85 AM. J. OF SOC. 1145, 1159 (1980).

243. *The Farben Case*, 8 T.W.C., *supra* note 10, at 1313–14 (1952).

244. *Id.* at 1314.

245. *Id.* at 1315.

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.²⁴⁶

The impunity gap Judge Hebert described resulted, *inter alia*, from the absence of the corporate entity as a subject of responsibility at Nuremberg. The issue of collective and corporate responsibility in criminal law remains controversial in different jurisdictions and has not been resolved in international law.²⁴⁷ The Industrialist decisions demonstrate how the absence of a clear theory of the corporate entity led the Tribu-

246. *Id.* at 1324.

247. For general discussion on the question of corporate criminal responsibility and lack of consensus on this issue, see, for example, Thomas J. Bernard, *The Historical Development of Corporate Criminal Liability* 22 CRIMINOLOGY 3 (1984); BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY (1993); JONATHAN CLOUGH & CARMEL MULHERN, THE PROSECUTION OF CORPORATIONS (2002); JAMES GOBERT & MAURICE PUNCH, RETHINKING CORPORATE CRIME (2003); Pamela H. Bucy, *Corporate Ethos: A Standard For Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1992); WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY (2006). Corporate criminal responsibility has had a long history in common law jurisdictions but it is relatively new in states that follow the continental legal tradition. For a succinct comparative overview see Thomas Weigend, *Societas, Delinquere non Potest? A German Perspective*, 6 J. INT'L CRIM. JUST. 927 (2008). On the question of international legal obligations of companies see, for example, Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91 (2002); ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006); LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000); Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45 (2002); Carlos M. Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927 (2005); Special Representative of the Secretary-General, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie); Wolfgang Kaleck & Mirian Saage Maaß, *Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and Its Challenges*, 8 J. INT'L CRIM. JUST. 699 (2010); INT'L COMM. OF THE RED CROSS, BUSINESS AND INTERNATIONAL HUMANITARIAN LAW: AN INTRODUCTION TO THE RIGHTS AND OBLIGATIONS OF BUSINESS ENTERPRISES UNDER INTERNATIONAL HUMANITARIAN LAW (2006); Erik Møse, *Corporate Criminal Liability and the Rwandan Genocide*, 6 J. INT'L CRIM. JUST. 973 (2008).

nal to either reify the company as an abstraction incapable of becoming a subject of responsibility (“the instrumentality of Farben”) or to ignore the corporate entity altogether, referring to its officers as unrelated individuals. While the former position constituted an impunity gap, the latter led the Tribunals to attribute responsibility only to those who had a direct and clear link with the commission of atrocities in the camps. Indeed, the Tribunals may have had additional considerations to maintain such impunity gap.²⁴⁸ Yet, absent a principled approach to the corporate structure, their position left the door open for future epistemological biases to navigate the theory of responsibility of the firm in international law.

The theory of the modern firm doesn’t merely regard it as a structure of hierarchies and formal rationality. One of the main features of the modern business enterprise lies in its adherence to a capitalist logic. It is doubtful whether the concentration camp had such economic function or logic. Some have argued it existed merely to maintain its own operation.²⁴⁹ Absent a utilitarian rationale to follow, could the industrialist companies still be considered ‘business enterprises?’ Like the structure of Behemoth to the Leviathan, the operation and function of German businesses in the concentration camps challenged established assumptions on the structure and func-

248. Alongside the stated wish to avoid mass punishment, circumstances significantly changed in the months during which the Industrialist Trials were underway. The Cold War had become a menacing reality. In addition, the announcement of the Marshal Plan and the turn away from retribution to rehabilitation probably played a role in the choice of rather lenient decisions and sentences. One may add the chilling effect a harsh decision on the German industry could have had on American businesses as well as its symbolic force in the ideological war against the Soviet Union. For further discussion, see FRANK M. BUSCHER, *THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946-1955*, at 29–31, 115–164 (1989); JOHN LEWIS GADDIS, *THE COLD WAR: A NEW HISTORY* (2006); MICHAEL HOGAN, *THE MARSHAL PLAN: AMERICA, BRITAIN AND THE RECONSTRUCTION OF WESTERN EUROPE 1947–1952* (1987); TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945*, at 13–128 (2005); MAGUIRE, *supra* note 1, at 159–78; MARK MAZOWER, *DARK CONTINENT: EUROPE’S TWENTIETH CENTURY* 212–249 (1998).

249. Hannah Arendt described how 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.” ARENDT, *supra* note 115, at 444.

tion of businesses and basic presumptions we have on the function of the private sphere.

VI. 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 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.*²⁵⁰

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.²⁵¹ It is the background for numerous controversies about the relationship between morality and the law, as famously captured in the Harvard Law Review

250. Heinrich Kronstein, *Warum Wurde Krupp Verurteilt?*, 53 COLUM. L. REV. 139, 144-45 (1953) (book review) (emphasis added).

251. For an early discussion, see HERSCH LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 3-15 (1945).

Hart/Fuller debate and the commentary it has engendered ever since.²⁵²

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, and from the even 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 the most "basic and highly provocative arguments" within *Behemoth* is that "[s]ome version of an identifiably modern state apparatus controlling the exercise of coercion remains a civilizational achievement worth defending."²⁵³ Recalling arguments made by Neumann, Duncan Kelly argued: "The 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, deformed or dematerialized law that owed little, if anything, to the general rule of law he sought to defend."²⁵⁴

The challenge presented by the Behemoth alternative was a reality that failed to correspond with the Leviathan model. Thus, while the Tribunals' resistance to an alternative model to the Weberian theory of the state is compatible with a basic notion of political justice, they failed to acknowledge its contingency and role as an ideal against which regimes should be

252. 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).

253. SCHEUERMAN, *supra* note 183, at 196.

254. 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).

scrutinized. The Prosecution was caught in a different bias; one that equated Neumann's critique of the Nazi state as a model of responsibility. The use of Behemoth as a theory of responsibility (rather than as a political theory or a critique) assumed that international crimes are related to the state. As a result, it requires a theory of the state that is faithful to the reality in which the crimes were committed. To the extent the international crime is so conceived, Neumann's insistence on the need to understand the Nazi political regime is essential. But by conceiving the Nazi businessmen as part of an anomaly—a 'non-state'—the prosecution abstained from facing the challenge of developing a theory of responsibility of businessmen operating as such. What are the international responsibilities of businesses when they are conducted 'as usual' before, despite, and because of the war or the Nazi rule? Fraenkel and Neumann showed how the realm of 'business as usual'—the normative state—was continuously tainted by the Nazi regime. Yet, both of them insisted upon a certain scope of freedom and choice of those involved in commercial and industrial endeavors. One may go even further to conclude that the private sphere is never free and thus shift the question away from the endless quest we find in the cases for a link to politics and policy. By insisting upon such a link, the prosecution and the Tribunals failed to meet the normative challenge presented in the Industrialist trials: what "'international" or even western principle exists which imposes mandatory social responsibilities on those enjoying "private" power positions?"²⁵⁵

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 administra-

255. Kronstein, *supra* note 250.

tion of the camps was translated to a division of responsibility (“Over there you find hopelessness; here you find the boldest hopes.”).²⁵⁶ Furthermore, the company of Farben, that was the most sophisticated and bureaucratized of the three, diffused the responsibility of its agents.²⁵⁷ 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.

The alternative model offered by Neumann departed from the conventional understanding of the modern state and yet reinstated the conventional requirement of a link between the actors and the decision making table as a condition to establish responsibility. The industrialists, under this model, were responsible because of their partnership and cooperation as navigators of the Nazi regime. The prosecutors argued for the industrialists’ shared leadership with other groups they conspired with. The Tribunals’ equation—followers, not leaders and thus not responsible—was not rejected by the prosecutors. The historical shift after 1936 complicated the prosecutors’ Neumannesque line of argument. From that time onwards, and especially in the context of plunder and slave labor, businesses were described as opportunistic rather than leaders and initiators. Their enthusiastic followers’ mindset during those years raises another set of questions: What kind of responsibility should we impose on ‘followers and not leaders’ for such crimes? Should there be a special rule or moral obligation on businesses who are involved in the commission of such crimes? Or, more broadly, what kind of legal and moral constraint should we impose on businesses in times of war, occupation, and in the context of international crimes?

Although Nuremberg is celebrated for putting individuals in the dock, holding them accountable for international crimes, it ended up equating the notion of the individual with political leadership. The individual responsibility as such was not seriously addressed. In the context of crimes against

256. *The Farben Case*, 8 T.W.C., *supra* note 10, at 1076 (1952).

257. For further discussion on the ramifications of Farben’s bureaucratic structure, see Doreen Lustig, *The Business of International Law* (unpublished J.S.D. dissertation, New York University School of Law) (on file with author).

peace, it led the tribunals to allocate responsibility only to those they identified as part of the leadership circle; the political leadership, so to speak. With regard to atrocities committed in the camps, responsibility was allocated only to those with direct, physical link to the crimes.

The state as such was never on the dock at Nuremberg. The aspiration of the Nuremberg architects was to hold men rather than abstract entities accountable for international law.²⁵⁸ Yet, the call to pierce the corporate veil of the state assumed such piercing could be done with no theory of the structures of authority at stake and led to a limited and incomplete allocation of responsibility.

Neumann's critique in *Behemoth* reinstated the need for at least a 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. This study thus retells the story of the 'shift' towards the individual after the Second World War as, at best, incomplete.

258. United States v. Göring, 1 I.M.T., *supra* note 206, at 223 (1947) (explaining, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.").