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Conspiracy and Cognate Doctrines at the Tokyo War Crimes Tribunal

Neil Boister

1. Introduction

The aim of this paper
This paper examines the evolution of the doctrine of conspiracy during the course of the trial at the International Military Tribunal for the Far East, the Tokyo Tribunal.

Why bother?
The Tokyo Tribunal is a neglected foundation of international criminal law, long in the shadow of Nuremberg, condemned as victor's justice because of the prosecution of Japanese war time leaders for crimes against peace. Professor Cherif Bassiouni's comment is typical:

> Tokyo...was a precedent that legal history can only consider with a view not to repeat it.[1]

I am currently involved with Dr Robert Cryer of the University of Nottingham in writing a reappraisal of the trial.

Relevance
One of the areas of the trial's relevance to modern international criminal law is in respect of the crime of conspiracy. This relevance flows from the fact that aggression is part of the substantive jurisdiction of the recently established International Criminal Court [ICC] and conspiracy and aggression were intimately linked at Tokyo.

2. Historical Background

The Potsdam Declaration
With respect to the war in the Far East, the first step towards punishing Japanese aggression was taken when the leaders of the US, China, and Great Britain adopted the Potsdam Declaration on 26 July 1945 (later adhered to by the USSR).[2] It provides in Principle 10:

> We do not intend that the Japanese people shall be enslaved as a race or destroyed as a nation, but *stern justice shall be meted out to all war criminals* including those who have visited cruelties upon our prisoners. [3]

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[1] MC Bassiouni, 'Nuremberg Forty Years After' 1986 Proc ASIL, 64.
[2] The Report of the Tripartite Conference of Berlin, 17 July to 2 August 1945, (1945) 39 AJIL Supplement, 245, 251.
[3] The complete transcript of the Tokyo Trial is reproduced in R.J. Pritchard (ed.), *The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East with an Authorised*

The Instrument of Surrender

In the instrument of surrender[4] signed on 2 September 1945, the Japanese Government undertook to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders the Supreme Commander Allied Powers, General Douglas Macarthur, required in order to give effect to the Declaration. [5]

The SWNCC directive to MacArthur

On 6 October 1945 the US State War Navy Co-ordinating Committee, largely responsible for US policy on Japan, directed MacArthur to arrange the trial of major Japanese war criminals[6] for inter alia the

> [p]lanning, preparation, initiating, or waging of a war of aggression in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.[7]

General MacArthur's establishment of the Tokyo Tribunal by Special Proclamation

Without receiving express direction from the by then operative Far Eastern Commission, the Allied policy control group for Japan, on 19 January 1946, MacArthur by special proclamation established an 'International Military Tribunal for the Far East' for the purpose of

> the trial of those persons charged individually or as members of organizations or in both capacities with offences which include crimes against peace.[8]

The Tokyo Charter

The Tribunal's Charter declared that the Tribunal was

> established for the just and prompt trial and punishment of the major war criminals in the Far East.[9]

Commentary and Comprehensive Guide (Lewiston, Lampeter, Queenston: Edwin Mellen Press, 1998-2005, 124 volumes) (hereinafter, Transcript). For this reference see Tokyo Transcript, 48417; Annex A-1 of the Judgment.

[4] Japanese Instrument of Surrender, 2 September 1945, (1945) 39 AJIL supp. 264, 13 State Dept. Bull. 364; Text in *Occupation of Japan: Policy and Progress* (State Department, Washington, 1946), 62.

[5] 48417, Annex A-2 of the Judgment.

[6] The *Directive on the Identification, Apprehension and Trial of Persons Suspected of War Crimes,* no date or serial number, is attached to FEAC 8, 24 October 1945, File no. EA 2 106/3/22, Part 1, Archives New Zealand.

[7] Para. 1(a) of the *Directive on the Identification, Apprehension and Trial of Persons Suspected of War Crimes,* no date or serial number, attached to FEAC 8, 24 October 1945, File no. EA 2 106/3/22, Part 1, Archives New Zealand.

[8] Transcript, 48418-9; Annex A-4 of the Judgment. For a copy of the Special Proclamation and the Charter of the IMTFE see TIAS 1589, reprinted in (10 March 1946) 14 *Department of State Bulletin* 361.

[9] Article 1, Charter of the IMTFE, TIAS 1589, reprinted in (10 March 1946) 14 *Department of State Bulletin* 361.

These major war criminals faced eleven judges from eleven allies involved in the war in the Pacific: the President Sir William Webb from Australia, McDougall from Canada, Mei from China, Bernard from France, Jaranilla representing the Philippines, Röling from the Netherlands, Northcroft from New Zealand, Zaryanov from the USSR, Lord Patrick from the UK, Pal from India and Higgins from the US (later replaced by Cramer).

3. Conspiracy: The Conceptual Background

Crimes against Peace

The idea of prosecuting Axis war-time leaders for starting the Second World War – with crimes against peace - thus emerged fairly late in the war. The initial focus had been entirely on responsibility for atrocities against civilians and PoWs.

Conspiracy

One of the legal instruments chosen to do so was conspiracy. Conspiracy, a doctrine of English criminal law, was principally the invention of the Star Chamber, and spread through the common law world. It is the result of an agreement to commit crime. Once the agreement is reached, the conspiracy is completely committed. The crime is inchoate - frustration or failure of the plan have no effect on guilt.[10] One of the features of the doctrine was its ability to net "big fish"; the major criminals directing operations.

Conspiracy and Crimes Against Peace – Chanler and Bernays

The linking of conspiracy to commit crimes against peace was made in the US. William C. Chanler,[11] a former Wall Street lawyer in Stimson's War Department, argued that the Kellogg-Briand Pact of 1928, which prohibited war 'as an instrument of national policy', had changed the legal position of individuals who if they engaged in an unlawful war lost the protection of the *ius in bello* and became unlawful belligerents, open to prosecution for common offences such as murder. Murray Bernays from the Department of Justice argued that violations of the Pact although not criminal could nevertheless be construed as part of a criminal conspiracy to commit murder and other crimes of violence.[12] Once the conspiracy was established each act of every member of the conspiracy would be imputable to all the other members.[13]

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[10] G. Williams, *Criminal Law: The General Part* (2ed) (London: Stevens and Sons, 1961), 663.

[11] J.A. Bush, '"The Supreme … Crime" and its Origins: The Lost Legislative History of the Crime of Aggressive War' (2002) 102 *Columbia Law Review* 2324.

[12] A.J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill and London: University of North Carolina Press, 1998), 207. See also S. Pomorski, 'Conspiracy and Criminal Organization' in G. Ginsburgs and V. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (Dordrecht: Martinus Nijhoff, 1990), 213, 215. A. Tusa and J. Tusa, *The Nuremberg Trial* (New York, 1983), 53, note Bernays' experience in the Securities and Exchange Commission which relied heavily on conspiracy.

[13] B.F. Smith (ed.), *The American Road to Nuremberg: The Documentary Record 1944-1945*, (New York, 1982), Doc. 16, 35, cited by Pomorski, n12, 215.

The London Charter

At the negotiation of the London Charter, which was to establish the Nuremberg International Military Tribunal (IMT)**,** the US attempted to include conspiracy as a stand alone crime, separate from, preceding and in a sense encompassing the preparation for crimes against peace, war crimes and crimes against humanity. However, they ran into opposition from in particular the French who considered it a barbarous legal mechanism used to punish people collectively.[14] In the final compromise it lost the stand alone status it had enjoyed in the US drafts and was linked apparently only to crimes against peace.[15] But, importantly, a stand alone paragraph relating to complicity was retained at the end of Article 6 which ensured that the parties to the conspiracy were explicitly responsible for the actions of other participants in the conspiracy. A separate draft Article 9 provided that 'organizers, instigators and accomplices who participate in the formulation or execution of a common criminal plan or in the perpetration of individual crimes are equally responsible with all other participants in the crimes.' This dual structure was followed until a US suggestion limited the common plan concept to aggression but included a final paragraph in draft Article 6 making it clear that any person party to the common plan was personally responsible for the violations of war crimes and what became crimes against humanity.[16] On the final day of discussion Sir David Maxwell-Fyfe recognised that '[t]his concluding paragraph would take the place of [draft] Article 9'[17] even though the former went further in that it provided that the accused were not merely equally responsible but explicitly that they were responsible for the acts of others. Jackson's response was that this was necessary 'in order to reach some of these things'. What this suggests is that as the Bernays plan for an over-arching conspiracy was slowly restricted, the complicity provision was substituted by the US delegation to ensure that the idea of responsibility through participation in the conspiracy for all of the executed offences was maintained.

Conspiracy at Nuremberg

At Nuremberg the US prosecutors tried to revive their idea by charging a grand conspiracy in count 1 but the Tribunal responded negatively to this,[18] abandoning it for many smaller conspiracies, applying conspiracy only to crimes against peace and not war crimes or crimes against humanity, and adopting a restrictive view of the elements of the inchoate offence.[19] The Tribunal's conservative approach resulted in only eight of the twenty two accused being convicted on the conspiracy count.

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[14] See Pomorski, n12, 219; Smith, n13, 51.

[15] See Pomorski, n12, 219; Smith, n13, 60.

[16] US Draft definition of Crimes, 30 July 1945, available at 'International Conference on Military Trials, London, 1945: Revised Definition of Crimes, Submitted by the American Delegation, July 30, 1945', the Avalon Project at Yale Law School, Nuremberg War Crimes Trials, <http://www.yale.edu/lawweb/avalon/imt/jackson/jack54.htm> (last accessed 28 May 2007).

[17] London Conference Minutes, 2 August 1945, available at 'International Conference on Military Trials, London, 1945: Minutes of Conference Session 2 August', available at, the Avalon Project at Yale Law School, Nuremberg War Crimes Trials, <http://www.yale.edu/lawweb/avalon/imt/jackson/jack59.htm> (last accessed 28 May 2007).

[18] The official records of the trial are published as *Trials of the Major War Criminals before the International Military Tribunal* (42 vols, Nuremberg: IMT, 1947-9) (hereinafter IMT). For this reference see IMT, Vol. XXII, 467 et seq.

[19] IMT, Vol. XXII, 467-8.

4. Conspiracy in the Tokyo Charter

The issues dealt with in London and Nuremberg in respect of conspiracy had to be dealt with again at Tokyo. The Tokyo Charter provides in Article 5 (an almost exact copy of Article 6 of the Nuremberg Charter):

> Article 5: Jurisdiction over Persons and Offenses. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses *which include crimes against peace*. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
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> a. Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, *or participation in a common plan or conspiracy for the accomplishment of any of the foregoing*;
> b. Conventional War Crimes: Namely, violations of the laws and customs of war;
> *c.* Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane act committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. *Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all the acts performed by any person in execution of such plan.*

There are three aspects of the Charter worth noting in this regard:

- The Charter makes it clear that any person indicted would have to be charged with crimes against peace.
- Article 5(a) includes amongst the crimes against peace 'a common plan of conspiracy for the accomplishment of any of the foregoing'.
- Article 5(c) peculiarly has an extra sentence which provides on its face that leaders etc participating in the formulation of a common plan or conspiracy are responsible for all the acts performed by any person in execution of the plan.

5. The Tokyo Indictment

The Class A charges

At Tokyo, the conviction and punishment of the persons responsible for the policy of waging wars of aggression became the most important objective of the trial.[20] The 36 counts of crimes against peace, laid against the 28 Class A accused who were variously civil and military leaders through the period of Japan's expansionism, were designed to achieve this result. Two charges were used in the thirty-six counts: conspiracy to commit

[20] Brigadier R H Quilliam, *Report on the Proceedings of the International Military Tribunal for the Far East*, p.15, File no. EA 106/3/22, Part 7, Archives New Zealand.

aggression, and aggression itself, which included planning, preparing, initiating or waging war.

The conspiracy charges
The conspiracy charges (counts 1-5) related to specific historical events. Count 1 began:

> All of the Defendants together with divers other persons, between the 1st January, 1928, and the 2nd September, 1945, participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy, and are responsible for all the acts performed by themselves or by any person in execution of such plan.[21]

The indictment went on to outline a broad conspiracy over eighteen years with the objective of securing 'the military, naval, political, and economic domination of East Asia and of the Pacific and Indian Oceans, and of all countries and islands therein and bordering thereon….'. [22] In the other counts the grand conspiracy was broken down into its constituent parts to avoid the possibility of acquittal because the grand conspiracy was stated too broadly.

The other charges
They were preceded in the Indictment, although the Charter did not explicitly give the Tribunal jurisdiction and in the absence of any precedent in international law, by sixteen counts of 'murder', three counts of which were charged as conspiracies. The class B and C offences, war crimes and crimes against humanity, were largely an afterthought. War crimes and crimes against humanity were relegated to only three counts, and one of those was charged as a conspiracy!

Conspiracy as a vehicle for total collective responsibility
As a whole, the Indictment's use of conspiracy in respect of all four categories of crime charged reflects a clear connection with the US policy originating with Chanler and Bernays of total collective responsibility for all harm attaching to those who conspire to start illegal wars – responsibility for starting the war, for breaches of the ius in bello that followed and for breaches of domestic criminal laws of the states invaded!

6. The Prosecution Case

The inchoate offence
The prosecution's use of conspiracy at Tokyo was divided into two phases. In opening, for want of authority the prosecution argued that conspiracy was in fact a general principle of international law, a lowest common denominator of Chinese, French, German, Japanese, Anglo-American and Soviet law. To justify its use they drew the analogy between conspiracy in national law protecting the peace and security of the state,

[21] Full text of the Indictment reproduced in the *Nippon Times*, 1-9 May 1946, Northcroft Archive, MacMillan Brown Library, University of Canterbury, New Zealand.
[22] Ibid.

and conspiracy in international law protecting the peace and security of the family of nations.[23] Drawing on US authority for definitional purposes, they argued that conspiracy was the result of an agreement, not the agreement itself, and thus the existence of a formal agreement was unnecessary. The agreement could be established by 'a concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose'. Any Japanese leader who joined in was guilty even though he did not authorize or actually participate in the preparation of the ultimate unlawful act, as long as he failed expressly to withdraw from the evil combination. As you can imagine, this approach would implicate many within Japan's Government.

The cognate doctrine

However, on summation, because of Nuremberg's restriction of conspiracy to crimes against peace and rejection of the idea of a grand conspiracy in Europe, the prosecution was forced to try to use conspiracy in a unique way. They ran an argument entitled 'The Law of Conspiracy and Cognate Doctrines'.[24] They submitted that the final sentence of Article 5 made for 'common responsibility for those engaged in a common plan'; this was not an offence but a form of 'proof of responsibility.'[25] They argued the doctrine had two important elements, recognised by most states and thus general principles of international law: A joint offender or accessory before the fact could be tried and convicted as a principal; and any person who joined in the conspiracy at any time was, from that moment until the end, responsible for all acts and words of his fellow conspirators.[26] That meant that a conspirator would be guilty of the various substantive counts – planning, preparing, initiating and waging specific aggressive wars – even without evidence of direct participation.[27] This responsibility for all subsequent unlawful acts flowed unless the accused made an 'affirmative act of withdrawal'.[28] Objecting but allowing oneself to be overruled did not amount to withdrawal. Nor did differences of opinion as to the direction of aggression and tactics, geographical distance, hierarchical distinction, and lack of knowledge of all the co-conspirators. Only resignation in protest at the particular decision was the path to absolution![29]

The defence response

The defence was alive to what was at stake. They argued that this doctrine of 'criminal implied agency' was peculiar to Anglo-American law and not a general principle of international law.[30] The final sentence in Article 5 of the Charter applied only to conspiracy to commit crimes against the peace as the Charter did not define any other separate crime of conspiracy. Leaders were therefore not responsible for the commission of any unlawful act committed during the execution of an aggressive war.[31]

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[23] Transcript, 48324.
[24] Transcript, 39036.
[25] Transcript, 30936.
[26] Transcript, 39038-9.
[27] Transcript, 39052-3.
[28] 61 S.Ct. 1121, 85 LEd. 118F(2d) 178, cited at Transcript, 39056.
[29] Transcript, 39977.
[30] Transcript, 42247-42249.
[31] Transcript, 42354.

The nature of this cognate doctrine

This 'cognate doctrine' resembles the '*Pinkerton* conspiracy' doctrine of complicity unique to US law,[32] which is similar to the English common law 'joint enterprise' or Australian 'common purpose' doctrine whereby all parties to the common purpose are liable for all the offences jointly contemplated. The distinguishing feature of the US *Pinkerton* conspiracy is that liability for crimes committed in furtherance of the agreement is based on a simple negligence standard;[33] while the English joint enterprise doctrine insists on a subjective state of mind for such liability.[34] It appeared from their summations that the prosecution thought mens rea was required. A further distinction between US and English law is that in US law anyone who joins a conspiracy is jointly responsible for any act of a co-conspirator, irrespective of whether such act was committed before or after he joined the common enterprise, whereas in English law the accused is only liable for those acts committed after he or she become a participant.[35] Again the prosecution appear to have adopted the English position. The rule that only withdrawal prior to commission of the actual offence would negate liability appears to be shared by both US and English doctrines.

The authority for this submission

The final sentence of Article 5 suggests that the authors of the Charter did provide for a separate basis for responsibility for substantive offences, even though this did not reflect international law. It was an open question as to how the Tribunal would respond:

- Would it convict on the basis of inchoate conspiracy?
- Would it rely on the *Pinkerton* conspiracy/joint enterprise doctrine to convict the accused of the choate offences of initiating and waging war, and perhaps also of crimes against humanity, war crimes and murder?

7. Lord Patrick's draft opinion

On 30 January 1948, the British member of the Tribunal, Lord Patrick, circulated among the members of the Tribunal a paper entitled *"Planning" and "Conspiracy" in Relation to Criminal Trials, and Specially in Relation to the Trial*, which he stated was the result of consultation with some of his brother judges.[36] In his view the common law tradition contained two kinds of conspiracy:

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[32] See R.S. Clark, 'Nuremberg and Tokyo in Contemporary Perspective' in T.L.H. McCormack and G.J. Simpson (eds), *The Law of War Crimes: National and International Approaches* (The Hague: Kluwer, 1997), 171, 173, fn 11.

[33] *Pinkerton v. United States*, 328 U.S. 640 (1946).

[34] Joint enterprise was treated by English scholars like Glanville Williams simply as an example of aiding and abetting resting on intention, although intention may not be required in respect of incidental to the joint design but foreseen – see G. Williams, *Criminal Law: The General Part* (2ed) (London: Stevens and Sons, 1961), 394 et seq.

[35] M. Koessler, 'Borkum Island Tragedy and Trial' (1956-1957) 47 *Journal of Criminal Law, Criminology and Police Science* 183, 194.

[36] W. D. Patrick, Member for the United Kingdom, *"Planning" and "Conspiracy" in Relation to Criminal Trials, and Specially in Relation to the Trial*, 30 January 1948, Papers of William Flood Webb, Series 1, Wallet 14, 3DRL/2481, Private Records, Australian War Memorial, Canberra.

- The 'naked' conspiracy, the conspiracy to commit a crime never in fact committed.
- The 'executed' conspiracy, where the accused was convicted not of conspiring to commit the crime but of the actual crime.

The executed conspiracy

When referring to the 'executed conspiracy' Patrick described what the late Professor Sir John Smith terms the "basic" joint enterprise doctrine – all are responsible for every unlawful act falling within the common purpose. Patrick is at pains to distinguish the "parasitical" version of the doctrine, where something unlawful occurs which is incidental to, but not part of, the common purpose, but for which the accused are responsible if they foresaw it. This was in Patrick's view a special feature of English law and not of concern to the Tribunal because no count of the Indictment charged that in the execution of planned crimes some other and different crime was committed.[37] But it was clear that in every count of the Indictment which alleged conspiracy it was also alleged that the conspiracy was executed. Thus in Count I it is charged that "All the defendants participated … in the formulation or *execution* of a common plan or conspiracy" to commit what is alleged to be a crime. All counts charged execution of the conspiracies, and in his view if both planning and execution of the plans was proved, both planners and executants would be liable as participators.[38] It appears that the prosecution argument for joint enterprise liability had not fallen on deaf ears.

The naked conspiracy

However, Lord Patrick thought it was open to convict, in addition, on the basis of 'naked' conspiracy because all counts alleged both formulation and execution of alleged crimes. The 'naked' conspiracy would not have to be merged into the executed crimes. But like Nuremberg, he also rejected the counts of 'naked' conspiracy to commit war crimes and crimes against humanity.[39] In his view Article 5(a) was an exact description of a "naked" conspiracy.[40] The final sentence of Article 5 on the other hand referred to 'formulation or execution' and had no application whatever to a "naked" conspiracy, for in a "naked" conspiracy there has been no *execution of the crime*. He concluded that as many systems of law did not recognise a "naked" conspiracy as a crime, under the Charter a "naked" conspiracy to commit war crimes or crimes against humanity was not a crime.[41]

8. President William Webb's view

In his draft judgment the President, William Webb, disagreed. He challenged Patrick's view that there was a crime of naked conspiracy:

> It may well be that naked conspiracy to have recourse to war or to commit a conventional war crime or crime against humanity should be a crime, but this Tribunal is not to determine what ought to be but what is the law. Where a crime

[37] See, n36, 3.
[38] See, n36, 3-4 (emphasis in the original).
[39] See n36, 5.
[40] See n36, 6.
[41] See n36, 7.

> is created by international law, this Tribunal may apply a rule of universal application to determine the range of criminal responsibility, but it has no authority to create a crime of naked conspiracy based on the Anglo-American concept; nor on what it perceives to be a common feature of the crime of conspiracy under various national laws. The national laws of many countries treat as a crime of naked conspiracy affecting the security of the state but it would be nothing short of judicial legislation for this tribunal to declare that there is a crime of naked conspiracy for the safety of the international order.[42]

But Webb did recognise the validity in international law of the common purpose doctrine.[43] In August 1948 he said:

> Any of the accused who is found to have participated as leader, organiser, instigator or accomplice, in the formulation or execution of a common plan or conspiracy to commit a crime against peace is responsible for all acts performed in execution of such common plan; in other words if war is waged he is criminally responsible and so guilty for waging it. Then I suggest it is sufficient to find him guilty of waging the war without specifying the relevant counts of conspiracy, or planning and preparation, or of instigating. If the majority think that the Tribunal's jurisdiction extends to conspiracies not followed by war then it will hold the Charter is something more than the expression of international law. International law goes no further than the Pact of Paris as regards crimes against peace, and the Pact of Paris only makes recourse to aggressive war criminal. If there is no recourse to war there is no crime.[44]

The important point about his view, was that he was suggesting to the other judges the radical option of convicting for 'waging' war on the basis of common purpose. He carried this through into his drafts on individual convictions. For example, he argued that if Accused no. 1 was guilty on count no. 1 then he would in Webb's view be responsible for waging of all the wars that took place in pursuit of the conspiracy after he joined it.

9. The Majority Judgment

Naked Conspiracy

In its judgment the Majority of the Tribunal, including Lord Patrick, held that in the Charter conspiracy was only a crime in respect of crimes against peace, and thus the counts of conspiracy to commit murder and war crimes lay outside the jurisdiction of the Tribunal [not complete rejection].[45] But it did uphold the conspiracy charge finding on

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[42] Sir William Webb's [draft] Judgment, Vol. I, Rev. 9/17/48, Papers of William Flood Webb, Series 2, Wallet 1, 3DRL/2481, Australian War Memorial, 18-19. It is worth pointing out that while the plurality of the US Supreme Court in *Hamsdan v Rumsfeld* 126 S.Ct. 2749 (2006) agrees, the dissenters and US Congress do not – the latter has made naked conspiracy a crime in its Military **C**ommissions Act 2006.

[43] Webb, separate opinion, 8-9.

[44] Memorandum to the Members for the United States, Canada and New Zealand, From The President, 18 August 1948, Papers of William Flood Webb, Box 1, Wallet 9, 3DRL/2481, Private Records, Australian War Memorial. He cites *R v Boulton* 12 Cox 87.

[45] Judgment, 48,447.

the facts that a grand conspiracy to conquer East Asia and the Pacific alleged by the prosecution had existed. The leading American historian of modern Japan, Marius Jansen[46] throws cold water on the prosecution's basic thesis:

> The prosecution charged defendants with carrying out a single, consistent plan of aggression that began in 1931, but neither the documentary basis nor the nature of Japanese politics, in which the prosecutors were neophytes, supported this.[47]

It seems that in finding a master plan existed the Majority were the victims of a process which had as its major elements the regional dominance of the US, their lead in setting up the Tribunal, and their propensity to a conspiratorial view of history, with the Nazi conspiracy as looming precedent.[48]

Executed conspiracy

In what is a largely ignored feature of their judgment, the majority took a further step. It noted that Count 1 alleged both 'formulation and execution of a common plan or conspiracy.'[49] The majority distinguished between the 'conspiracy to wage a war of aggression or the waging of a war of aggression', the former threatening international security, the latter actually disrupting it.[50] And finally it held that 'All of those who at any time were parties to the criminal conspiracy or who at any time with guilty knowledge *played a part in its execution* are guilty of the charge contained in Count I.'[51] In other words, Lord Patrick's forms of conspiracy, "naked" and "executed", appear to have been punished by findings of guilt of all but three of the accused on Count 1.

Full application of the joint enterprise doctrine?

Was the Majority, however, prepared to go as far as the prosecution asked and use the common purpose to convict the accused of consequential crimes?

Evidence of the parasitical form?

There is no evidence of the 'parasitical form' of common purpose liability. Guilt in respect of war crimes, crimes against humanity and murder was not attributed to the accused on the basis of their being party to the common purpose to wage a grand war of aggression.

Evidence of the basic form?

What then of the basic form, that being party to a common purpose to wage war would result in the imputation of the actual waging of war? Proof of participation in the conspiracy did serve to establish mens rea for the actual offence of waging. This is confirmed by the fact that Matsui, who was found not to be guilty of conspiracy under

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[46] Marius B Jansen, *The Making of Modern Japan* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 2000), p626.
[47] See Jansen n46, 673.
[48] See D.C. Watt, 'Historical Introduction' in R.J Pritchard and S.M. Zaide (eds), *The Tokyo War Crimes Trial: Index and Guide, Volume I* (New York : Garland, 1987), vii, xviii.
[49] Transcript, 49762.
[50] Transcript, 49,768-9.
[51] Transcript, 49,770.

count 1, could not be found guilty under count 27 despite his military service in China because the prosecution had failed to 'tender evidence which would justify an inference that he had knowledge of the criminal character of the war.' But did it also establish the conduct element when the accused did not participate directly themselves in waging aggressive war? A close examination of the individual verdicts suggests that this is not the case. Araki, for example, was convicted on count 1, and of count 27 because of direct involvement in the field in China, but not of the other counts of waging war because of an absence of direct involvement. However, there are examples relating to the Nomonhan incident where ex Prime Minister Hiranuma and then War Minister Itagaki, although they had not been aware of the attacks when made, were guilty of waging war on the USSR because they had authorised the conflict.[52] They were party to the conspiracy.[53] The individual verdict against Itagaki notes he 'was still war minister during the fighting at Nomonhan', that against Hiranuma only that he was a member of the conspiracy. [54] Fox argues that actually General Ueda, commander of the Kwantung Army, and Lt General Komutsubara, Commander of the 23rd Division initiated the war, but Itagaki and Hiranuma were found 'guilty by association in spite of the inconclusiveness of the evidence against them.'[55] This appears to be a straightforward application of the common purpose doctrine, where participation in the conspiracy absolves the prosecution from responsibility for proving direct involvement in the actual count.

The Judgment's precedents

One can conclude that the Majority judgment is a precedent for:

- The inchoate or naked conspiracy
- The executed conspiracy when charged as a conspiracy
- But not for the parasitical
- There is evidence that suggests the basic form of the common purpose doctrine was used when direct evidence of waging was absent

Why did the majority not accept the prosecutions submission in this regard, and the view of their President William Webb, given that the Charter in the final sentence of Article 5 appeared to authorise them to do so?

- The underlying flaw that joint enterprise, like naked conspiracy, was neither a general principle nor a custom of international law at the time, had not bothered them in respect of the naked conspiracy. The prosecution's and Webb's views were entirely consistent with the common law.
- Once the Majority accepted the "executed" conspiracy doctrine they should logically and consistently have accepted the joint enterprise doctrine.
- The final sentence of Article 5 was not limited like naked conspiracy to crimes against peace – it could be applied to 'any of the foregoing crimes' including crimes against humanity and war crimes. Thus the Charter authorised both the

[52] Transcript, 49401-2.
[53] Transcript, 48448.
[54] Transcript, 49797-8.
[55] G.C. Fox, *The Nomonhan Conflict in the Tokyo International War Crimes Trial* (University of Oregon MA, 1965, published by University Microfilms, Ann Arbor, Michigan, 1970), 120.

basic form of common purpose – in respect of crimes against peace - and a limited version of the parasitical form – in respect of war crimes and crimes against humanity.

With respect to the parasitical form Clark notes that the argument may have had troubling implications in that it could have lead to convictions for murder on the basis of participating in aggressive war, rather than for participation in war crimes, and thus may have scared the judges off.[56] I would argue, however, that the fact the majority did not reject the murder charges, or the conspiracy counts to commit war crimes and crimes against humanity, but simply declined to rule on them because in their view the Charter did not authorise these charges, is one the main reason why the majority did not accept the prosecution's argument in respect of the parasitical form of common purpose.

The reason for the rejection of the basic form is more elusive. It may be that the majority foresaw the dangers for due process of group guilt and convictions based on passive association rather than positive conduct and recoiled from the full extent of acceptance of the doctrine.[57] Moreover, it would have exposed the weakness of their factual finding of the existence of the conspiracy if they were then to hang a number of convictions for waging different wars on that finding. But it seems likely that they did not apply it because the Indictment did not ask them to do so.

The Charter as Precedent

Thus we have the odd result that the Tokyo judgment serves as a precedent for conspiracy but not somewhat illogically for common purpose. Only the charter arguably serves as a precedent in this regard, because GA Res 95I of 11 December 1946 affirmed the Principles of the Nuremberg Charter and Judgment, and the Tokyo and Nuremberg Charters share identical provisions.

10) Post-war development in respect of Joint Enterprise

Three recent developments point to a potential rerun of the prosecution and Webb's arguments on joint enterprise:

Inclusion of Aggression within the jurisdiction of the ICC

As a result ironically of strong German pressure aggression was incorporated, undefined, in Article 5 of the Rome Statute of the International Criminal Court which sets out the ICC's substantive jurisdiction. Moreover, strong efforts are being made to achieve a consensus definition of the offence which can be included in Article 5 and such a definition appears to be promised in 2008 by the Princeton Working Group.

Tadic

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[56] R.S. Clark, 'Nuremberg and Tokyo in Contemporary Perspective' in T.L.H. McCormack and G.J.Simpson (eds), *The Law of War Crimes: National and International Approaches* (The Hague: Kluwer, 1997), p.171, p.183, footnote 54.

[57] In the same way that Judge Francis Biddle would have nothing of the notion of criminal organisations spawning individual guilt at Nuremberg – see J.A. Bush, 'Respondents: Lex Americana: Constitutional Due Process and the Nuremberg Defendants' (2001) 45 *St. Louis L.J.* p.515, p.534.

The joint enterprise doctrine was revived by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Prosecutor v Tadić.*[58] In the absence of statutory authority, the Appeals Chamber found authority in many post-World War II cases concerning war crimes.[59] It classified three categories of join enterprise: the basic form,[60] a concentration camp form (which is a species of the basic form) [61] and a mob violence form (the parasitical form).[62] The Appeals Chamber concluded that the notion is customary international law,[63] a decision confirmed in a number of more recent decisions.[64] Critics have pounced on the failure of the ICTY to show generality and consistency of practice and the formulation of an *opinio iuris*[65] and have concluded that prior to the decision 'this form of liability did not exist in international criminal or humanitarian law.'[66] Koessler writing in the 1950s argues, however, that the doctrine is within the ambits of the principle of criminal guilt generally recognized by all civilized systems of law.[67]

The Rome Statute

The doctrine of joint enterprise also finds expression in Article 25(3)(d) of the Rome Statute which provides that

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: … (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such

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[58] *Prosecutor v. Tadic*, Case No. IT-94-1-T, (Trial Chamber II, 7 May 1997); *Prosecutor v Tadic,* Case No. IT-94-I-A, (Appeals Chamber Judgment, 15 July, 1999). This and other ICTY decisions cited below are available on the Tribunal's website at http://www.un.org/icty/cases-e/index-e.htm.

[59] Tadić Appeals Chamber, para. 195.

[60] Tadić Appeals Chamber, para. 196 et seq, citing inter alia as examples *Trial of Otto Sandrock and three Others*, British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland, 24-5th November, 1945, UNWCC, vol. I, p.35; *Trial of Gustav Alfred Jepsen and others*, Proceedings of War Crimes Trials held at Luneberg, Germany 13-23 August, 1946, Judgment on 24 August 1946; *The United States of America v. Otto Ohlenforf et al*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No.10, United States Government Printing Office, Washington, 1951, vol. IV, p.3 (the *Einsatzgruppen* case).

[61] Tadić Appeals Chamber, para. 202, citing as examples the *Trial of Martin Gottfried Weiss and thirty-nine others*, General Military Government Court of the United States Zone, Dachau Germany, 15th November – 13th December, 1945, UNWCC, vol. XI., p.5 (*Dachau Concentration Camp case*); *Trial of Josef Kramer and 44 others*, British Military Court, Luneberg, 17th September-17th November, 1945, UNWCC, vol.II, p.1 (*Belsen case*).

[62] Tadić Appeal Chamber, para.220. They summarise all three requirements.

[63] Tadić Appeals Chamber, para. 220; 226.

[64] *Prosecutor v. Brdjanin and Talic*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para 27; *Prosecutor v Krnojelac*, IT-97-25-T, Trial Chamber II Judgment, 15 March 2002, para. 74; *Prosecutor v. Milutinovic et al,* IT-99-37-AR72, Appeals Chamber Decision, para. 23.

[65] A. Bogdan, 'Individual Criminal Responsibility in the Execution of a "Joint Criminal Enterprise" in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia' (2006) 6 *International Criminal Law* 63, 110-1.

[66] Bogdan, n65, 118.

[67] M. Koessler, 'Euthanasia in the Hadamar Sanatorium and International Law' (1952-1953) 43 *Journal of Criminal Law, Criminology and Police Science* 735, 742.

contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.

According to Professor Roger Clark, most of the delegates thought they were voting for the inclusion of conspiracy but instead they got joint enterprise![68] Strong efforts are currently being made expressly to exclude crimes against peace from the application of Article 25(3)(d) but that has yet to happen.

12) Closing remarks

Dovetail of Joint Enterprise and Aggression
The revival of the joint enterprise doctrine and the revival of aggression, in Article 5 of the Rome Statute, may dovetail nicely if the largely forgotten judgment at Tokyo is re-examined by eager prosecutors. Joint enterprise could be used in combination with aggression to achieve the Chanler/Bernays goal of holding leaders who engineer wars of aggression responsible for all their unlawful consequences – the concept of collective total responsibility for illegal wars. Is this a good idea?

Arguments for
The argument for the application of the doctrine is that those who act through others should be held responsible for their actions. This is one certain way of reaching the "big fish" thought to be ultimately responsible for international crimes. Moreover, at a pragmatic level joint enterprise is a prosecutor's helpmeet.

Against the parasitical form
The arguments against the parasitical form are various. The primary objection is that it does not rely on the accused intending the conduct; it dilutes the mens rea requirement to less purposive forms of subjective fault including recklessness. Thus, for example, if George Bush orders the illegal invasion of Iraq he does not intend the war crimes that occur at Abu Ghraib, and should not be held responsible for them even if he foresees the possibility of some form of war crime or crime against humanity being carried out by US military personnel. Command responsibility may provide otherwise but we are dealing with the consequences of a primary charge of aggression.

Against the basic form
The arguments against the basic form of the doctrine are more subtle.

- Unlike ordinary accessorial liability which rests on proof that the accused assisted another to perform a crime, under the joint enterprise doctrine the accused is being held liable not for his conduct, but for the conduct of others. Criticism of the doctrine focuses on its dispensing with the requirement of a causal nexus between the accused's actions and the criminal result or behaviour, the basis for attribution. If the law is going to dispense with the requirement of causation or

[68] Personal communication with author.

participation, the law had better have a strong and clear basis for the attribution of liability.[69] Attribution can only take place on the basis of the accused's subjective consent to be bound by the acts of another, if the accused has voluntarily assumed responsibility for the acts of the actual perpetrator.[70] Without such voluntary assumption the accused to whom the act is attributed is not blameworthy. Such attribution can be based on express or implied agreement, but not on something less than that. Mere association is not good enough, as quite frequently we associate ourselves with actions for which we do not wish to assume responsibility.[71]

- I would argue that the government of a state and military high commands are per se situations of collective action where the basis of collectivity is insufficient to dispense with causation, precisely because its hierarchical nature means it frequently involves association rather than voluntary assumption of responsibility. Even if some consent, others may not. Drawing the parameters of this consent may prove extremely difficult. Membership of organizations will lead to attribution without proof of individual commitment to aggressive actions. If a doctrine understands the individual in terms of the collective entity to which he belongs, rather than in terms of his own actions, it has no place in the criminal law.[72] The "almost" precedent of Tokyo illustrates that attribution of guilt in virtue of membership of the government is wrong in terms of a criminal law wedded to methodological individualism- international criminal law is after all founded on the notion of individual criminal responsibility. We should reject this doctrine if it reappears linked to aggression and use ordinary principles of accessorial liability which have a much stronger claim to being recognised as general principles of international law.

[69] D. Unterhalter, 'The Doctrine of Common Purpose: What makes one Person Liable for the Acts of Another?' (1988) 105 SALJ 671.
[70] Ibid, 674.
[71] Ibid, 675.
[72] Ibid, 676-7.