

# Aggression at the Tokyo War Crimes Trial

By Neil Boister\*

## 1. Introduction

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 (hereinafter the Tokyo Trial). The Tokyo Trial 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.<sup>1</sup>

Bassiouni's comment, however, is an invitation not to ignore the trial but to learn from its mistakes. The trial's treatment of conspiracy is particularly relevant today because conspiracy was intimately linked to the crime of aggression at Tokyo, and aggression is part of the substantive jurisdiction of the International Criminal Court (ICC).

## 2. The Background to the Trial

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).<sup>2</sup> 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.<sup>3</sup>

In the Instrument of Surrender<sup>4</sup> 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.<sup>5</sup>

On 6 October 1945 the US State War Navy Co-ordinating Committee (SWNCC), largely responsible for US policy on Japan, directed MacArthur to arrange the trial of major Japanese war criminals<sup>6</sup> for inter alia the

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<sup>1</sup>MC Bassiouni, 'Nuremberg Forty Years After' 1986 Proc ASIL, 64.

<sup>2</sup>The Report of the Tripartite Conference of Berlin, 17 July to 2 August 1945, (1945) 39 AJIL Supplement, 245, 251.

<sup>3</sup>Tokyo Transcript, 48417; Annex A-1 of the Judgment.

<sup>4</sup>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.

<sup>5</sup>48417, Annex A-2 of the Judgment.

<sup>6</sup>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.

[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.<sup>7</sup>

Without receiving express direction from the by then operative Far Eastern Commission (FEC), 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.<sup>8</sup>

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.<sup>9</sup>

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

### **3. Conspiracy: The Conceptual Background**

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

The first difficulty with the notion of crimes against peace was the concept of criminal liability itself for the breach of prohibitions against the use of force by states. William C. Chanler,<sup>10</sup> a former Wall Street lawyer in Henry Stimson’s US 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..

The second difficulty was reaching the ‘big fish’ – the Axis leaders. The legal principles chosen for this purpose was conspiracy. Based on a simple agreement to commit crime or tort, conspiracy, a doctrine of English criminal law, it had spread through the common law world because it could be used against those who plot behind

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<sup>7</sup> Para. 1(a).

<sup>8</sup> 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.

<sup>9</sup> Article 1.

<sup>10</sup> 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.

the scenes.<sup>11</sup> US Department of Justice lawyer Murray Bernays argued that violations of the Kellogg-Briand Pact although perhaps not criminal could nevertheless be construed as the object of a criminal conspiracy along with murder and other crimes.<sup>12</sup> He argued that once the conspiracy was established each act of every member of the conspiracy would be imputable to all the other members.<sup>13</sup>

The synthesis of Chanler's and Bernay's theses, which became in effect the US position, rendered agreement to engage in an unlawful war a crime and linked those who engaged in an unlawful war with responsibility for all consequential harm, stripping them of any protections under the laws of war. This is a view with striking parallels to the current US position in the war on terror – the imposition of collective guilt and the removal of international legal protections.

#### **4. Conspiracy: The Legislative Background**

At the London Conference which established the Nuremberg IMT, the US attempted to include conspiracy as a stand alone crime, separate from, preceding and encompassing the preparation for crimes against peace, war crimes and crimes against humanity. However, the French resisted; for them conspiracy was a barbarous legal mechanism used to punish people collectively.<sup>14</sup> In the final compromise conspiracy lost the stand alone status it had enjoyed in the US drafts and was linked in Article 6 of the Nuremberg Charter only to crimes against peace.<sup>15</sup> But a stand alone paragraph relating to complicity but having some bearing on conspiracy, was retained at the end of Article 6.

The drafting history of this paragraph is worthy of closer examination. In an early draft of the Charter the general conspiracy crime was included in draft article 6(d).<sup>16</sup> 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 conspiracy to aggression.<sup>17</sup> However, it included a final paragraph in draft Article 6 which read: 'Leaders, organizers, instigators and accomplices participating in the formulation or instigation of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in furtherance of such plan.'<sup>18</sup> On the final day of discussion Conference Chair Sir David Maxwell-Fyfe recognised that '[t]his

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<sup>11</sup> G. Williams, *Criminal Law: The General Part* (2ed) (London: Stevens and Sons, 1961), 663.

<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> See Pomorski, n12, 219; Smith, n13, 51.

<sup>15</sup> See Pomorski, n12, 219; Smith, n13, 60.

<sup>16</sup> The 11 July Drafting Sub-Committee Draft, see n?.

<sup>17</sup> US Draft definition of Crimes, 30 July 1945.

<sup>18</sup> US Draft definition of Crimes, 31 July 1945.

concluding paragraph would take the place of [draft] Article 9<sup>19</sup> even though it 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. US delegate Justice Robert H Jackson's response was that this was necessary 'in order to reach some of these things'. It appears that when the US plan for an over-arching conspiracy was slowly restricted, the US beefed up the complicity provision to ensure Charter contained the rule that participation in the conspiracy lead to responsibility for all of the executed offences.

At Nuremberg the US prosecutors tried to revive their idea by charging a grand conspiracy in Count 1, but the IMT responded negatively,<sup>20</sup> abandoning the grand conspiracy 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.<sup>21</sup> The Tribunal's conservative approach resulted in only eight of the twenty two accused being convicted on the conspiracy count.

## 5. Conspiracy in the Tokyo Charter

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:

- 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.***

Those parts in bold italics relate directly to conspiracy. Three aspects of the Charter are 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 as one of the crimes against peace 'a common plan of conspiracy for the accomplishment of any of the foregoing'.

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<sup>19</sup> Conference Minutes, 2 August 1945.

<sup>20</sup> IMT, Vol. XXII, 467 et seq.

<sup>21</sup> IMT, Vol. XXII, 467-8.

- Article 5(c) has an extra sentence which provides on its face that leaders and so forth 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.

## 6. The Tokyo Indictment

The punishment of the persons responsible for wars of aggression became the most important objective of the Tokyo trial.<sup>22</sup> The 36 counts of crimes against peace or Class A offences, 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 aggression, and aggression itself, which included planning, preparing, initiating or waging war.

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 1<sup>st</sup> January, 1928, and the 2<sup>nd</sup> 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.<sup>23</sup>

Count 1 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....'.<sup>24</sup> In the other counts the grand conspiracy was broken down into its constituent parts to avoid the possibility of acquittal because Count 1 stated the grand conspiracy too broadly. Elsewhere in the Indictment conspiracy was used in one of the three counts for war crimes/crimes against humanity (Class B and C crimes) and in three counts of 'murder', even though the latter had no basis in the Charter or international law.

The Indictment's use of conspiracy reflects the US policy 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.

## 7. The Prosecution's Shifting Use of Conspiracy

The prosecution's use of conspiracy at Tokyo was divided into two phases. In the opening phase the prosecution concentrated on establishing the conspiracy's validity as a crime in international law and the legitimacy of its use in protecting international peace and security.<sup>25</sup> Drawing on US authority for definitional purposes, they argued that

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<sup>22</sup> 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.

<sup>23</sup> Full text of the Indictment reproduced in the *Nippon Times*, 1-9 May 1946, Northcroft Archive.

<sup>24</sup> Full text of the Indictment reproduced in the *Nippon Times*, 1-9 May 1946, Northcroft Archive.

<sup>25</sup> Tokyo Trial Transcript, 48324. 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*

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.

However, on summation, the prosecution responded to Nuremberg’s restriction of conspiracy to crimes against peace and rejection of the idea of a grand conspiracy in Europe, by running an argument entitled ‘The Law of Conspiracy and Cognate Doctrines’.<sup>26</sup> They submitted that the final sentence of Article 5 of the Tokyo Charter did not provide for an offence but for a form of ‘common responsibility for those engaged in a common plan’.<sup>27</sup> They argued the doctrine had two important elements, recognised by most states and thus general principles of international law: (i) A joint offender or accessory before the fact could be tried and convicted as a principal; and (ii) 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.<sup>28</sup> Thus a conspirator would be guilty of the various substantive counts – planning, preparing, initiating and waging specific aggressive wars – even without evidence of direct participation.<sup>29</sup> The accused was responsible unless he made an ‘affirmative act of withdrawal’.<sup>30</sup> Objecting but allowing oneself to be overruled did not amount to withdrawal, and 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 constituted effective withdrawal.<sup>31</sup> The defence was alive to what was at stake. They responded that this doctrine of ‘criminal implied agency’ was like conspiracy peculiar to Anglo-American law and not a general principle of international law.<sup>32</sup>

This ‘cognate doctrine’ resembles the ‘Pinkerton conspiracy’ doctrine of US law<sup>33</sup> and the English ‘joint enterprise’ or Australian ‘common purpose’ doctrines in that all parties to the common purpose are liable for the offences jointly contemplated. It is probably more akin to the latter, however, as in Pinkerton conspiracy provides for liability for crimes committed in furtherance of the agreement on a simple negligence standard<sup>34</sup> while the prosecution at Tokyo like the English and Australian doctrine

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East with an Authorised Commentary and Comprehensive Guide (Lewiston, Lampeter, Queenston: Edwin Mellen Press, 1998-2005, 124 volumes) .

<sup>26</sup> Transcript, 39036.

<sup>27</sup> Transcript, 30936.

<sup>28</sup> Transcript, 39038-9.

<sup>29</sup> Transcript, 39052-3.

<sup>30</sup> 61 S.Ct. 1121, 85 LEd. 118F(2d) 178, cited at Transcript, 39056.

<sup>31</sup> Transcript, 39977.

<sup>32</sup> Transcript, 42247-42249.

<sup>33</sup> 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.

<sup>34</sup> *Pinkerton v. United States*, 328 U.S. 640 (1946).

appeared to insist on a subjective state of mind for such liability.<sup>35</sup> Moreover, Pinkerton conspiracy provides that anyone who joins a conspiracy is responsible for any act of a co-conspirator whether committed before or after he joined the common enterprise, whereas the prosecution at Tokyo took the English law position that the accused is only liable for those acts committed after he or she become a participant.<sup>36</sup>

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

- Would it convict for inchoate conspiracy to commit crimes against peace?
- Would it rely on the 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?

### **8. 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.<sup>37</sup> In his view the common law tradition contained two kinds of conspiracy: the 'naked' conspiracy, the conspiracy to commit a crime never in fact committed; and the 'executed' conspiracy, where the accused was convicted not of conspiring to commit the crime but of the actual crime.

When referring to the 'executed conspiracy' Patrick described the "basic" joint enterprise doctrine – all are responsible for every unlawful act falling within the common purpose. Patrick distinguished 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 his 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.<sup>38</sup> 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.<sup>39</sup> It appears that the prosecution argument for joint enterprise liability had not fallen on deaf ears.

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<sup>35</sup> 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 acts incidental to the joint design but foreseen – see G. Williams, *Criminal Law: The General Part* (2ed) (London: Stevens and Sons, 1961), 394 et seq.

<sup>36</sup> M. Koessler, 'Borkum Island Tragedy and Trial' (1956-1957) 47 *Journal of Criminal Law, Criminology and Police Science* 183, 194.

<sup>37</sup> 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, Australian War Memorial.

<sup>38</sup> See, n37, 3.

<sup>39</sup> See, n37, 3-4. Emphasis in the original.

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. However, like Nuremberg, he also rejected the counts of ‘naked’ conspiracy to commit war crimes and crimes against humanity.<sup>40</sup> In his view Article 5(a) was an exact description of a “naked” conspiracy.<sup>41</sup> 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.<sup>42</sup>

### **9. President William Webb’s view**

In his draft judgment the President, William Webb, challenged Patrick’s view that there was a crime of naked conspiracy even if only limited to crimes against peace:

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 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.<sup>43</sup>

But in August 1948 he made it clear that while he rejected the naked conspiracy he approved the joint enterprise doctrine:

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.

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<sup>40</sup> See n37, 5.

<sup>41</sup> See n37, 6.

<sup>42</sup> See n37, 7.

<sup>43</sup> 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 *Hamdan v Rumsfeld* 10 USC 836 agrees, the dissenters and US Congress do not – the latter has made naked conspiracy a crime in its Military commissions Act 2006.

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.<sup>44</sup>

He carried through his approval of convicting for ‘waging’ war on the basis of common purpose into his drafts on individual convictions. For example, he argued that if Accused no. 1 was guilty on Count 1 then he would in Webb’s view be responsible for the waging of all the wars that took place in pursuit of the conspiracy after he joined it. In his separate judgment Webb recognised the validity in international law of the joint enterprise doctrine, but did not explore its impact on individual convictions.<sup>45</sup>

### **10. The Majority Judgment**

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.<sup>46</sup> But it did uphold the conspiracy charge finding on 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 throws cold water on this 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.<sup>47</sup>

However, in what is a largely ignored feature of their judgment, the Majority took a further step. After noting that Count 1 alleged both ‘formulation and execution of a common plan or conspiracy’,<sup>48</sup> the Majority held that ‘[a]ll 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.’<sup>49</sup> In other words, Lord Patrick’s two forms of conspiracy, “naked” and “executed”, were both punished by findings of guilt of all but three of the accused on Count 1.

### **11. The Judgment’s precedential value in re the joint enterprise doctrine**

The Majority judgment did not approve the ‘parasitical form’ of joint enterprise liability. In other words, 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. This is difficult to understand given that the provision in

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<sup>44</sup> 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, Australian War Memorial. He cites *R v Boulton* 12 Cox 87.

<sup>45</sup> Webb, separate opinion, 8-9.

<sup>46</sup> Judgment, 48,447.

<sup>47</sup> M.B. Jansen, *The Making of Modern Japan* (Cambridge, Mass.: Harvard University Press, 2000), 673.

<sup>48</sup> Judgment, 49762.

<sup>49</sup> Judgment, 49,770 (my emphasis).

the final sentence of Article 5 which provided for attribution of liability was not limited to crimes against peace – it could be applied to ‘any of the foregoing crimes’ including crimes against humanity and war crimes. Clark notes that the argument may have had troubling implications in that in addition to convictions of war crimes and crimes against humanity it could have led to convictions for murder on the basis of participating in aggressive war and thus may have scared the judges off.<sup>50</sup> There are two further possible reasons. First, the Charter only partly authorised the parasitical form in that the final sentence of article 5 only referred to attribution of liability based on the joint enterprise for Article 5 crimes, i.e. war crimes and crimes against humanity. Second, and more importantly, the prosecution never actually as Lord Patrick pointed out charged the parasitical form. Although invited to do so by the drafters of the Charter, the Majority was probably wise to stay away from the parasitical form. While it is debateable whether those who conspire to wage an unlawful war may be subjectively aware that that war might be waged in an unlawful manner, it is unlikely that it will be possible to prove that they foresaw the particular atrocity.

The Majority judgment did, however, accept the “basic form” of joint enterprise liability, that being party to a common purpose to wage war would result in the imputation of the actual waging of war. But it only did so if this was made specific in the charge. It did not clearly accept the extension of this principle, that being party to the common purpose alleged in the conspiracy counts also made one liable for all the counts of actually waging aggressive war. There is evidence that proof of participation in the conspiracy also served to establish mens rea for the actual offence of waging.<sup>51</sup> But a close examination of the individual verdicts suggests that being party to the common purpose was not used to establish the conduct element of waging war when the accused did not participate directly in waging war.<sup>52</sup> There is a counter-example relating to the Nomonhan Incident, a border conflict between the USSR and Japan in 1939, initiated by Japan. Prime Minister Hiranuma and War Minister Itagaki, were found to be party to the grand conspiracy.<sup>53</sup> Although they had not been aware of the attacks at Nomonhan which were initiated by local commanders, they were also found guilty of waging war on the USSR on the basis that they had authorised the conflict.<sup>54</sup> 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.<sup>55</sup> Fox argues that Itagaki and Hiranuma were found ‘guilty by association in spite of the inconclusiveness of the evidence against them.’<sup>56</sup> This may be read as an unarticulated application of the basic

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<sup>50</sup> 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.

<sup>51</sup> When, for example, General Matsui, was found not to be guilty of conspiracy on Count 1, he was also found not guilty on Count 27 for waging war in China 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.’

<sup>52</sup> General 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.

<sup>53</sup> Judgment, 48448.

<sup>54</sup> Transcript, 49401-2.

<sup>55</sup> Judgment, 49797-8.

<sup>56</sup> 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.

joint enterprise doctrine, where participation in the conspiracy absolved the prosecution from responsibility for proving direct involvement in the actual count of waging war.

Why did the Majority not wholeheartedly embrace the full application of the application of the basic form of the common purpose doctrine, given the prosecution's positive submission and President William Webb's supportive view? The underlying flaw that joint enterprise was neither a general principle nor an international custom, had not bothered them in respect of the inchoate conspiracy. Moreover, the prosecution's and Webb's views were entirely consistent with the common law and the Tokyo Charter. 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.<sup>57</sup> 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 most likely that they did not do apply it because the Indictment did not ask them to do so; had it done so, I believe they would have sanctioned the doctrines broader application.

In result the Tokyo judgment serves as a precedent for inchoate conspiracy to commit crimes against peace, and for a restricted interpretation of the joint enterprise doctrine. It is worth recalling that the Tokyo Charter serves as a broader precedent for the joint enterprise doctrine. Moreover, has arguably got a stronger claim to reflecting international law given that in Resolution 95I of 11 December 1946 the UN General Assembly affirmed the Principles of the Nuremberg Charter and Judgment, and the Tokyo and Nuremberg Charters share the provision relating to the joint enterprise doctrine.

## **12. Post-war development in respect of Joint Enterprise**

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

As a result 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. Strong efforts are currently 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 Ad-Hoc Working Group, hopefully for adoption by the first conference of the parties to the Rome Statute to possibly be held in 2009.

The joint enterprise doctrine was revived by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Prosecutor v Tadić*.<sup>58</sup> In the absence of statutory authority the Appeals Chamber found authority in many post-World War II cases concerning war crimes.<sup>59</sup> It classified three categories of join enterprise: the basic

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<sup>57</sup> 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.

<sup>58</sup> *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).

<sup>59</sup> *Tadić Appeals Chamber*, para. 195.

form,<sup>60</sup> a concentration camp form (a species of the basic form)<sup>61</sup> and a mob violence form (the parasitical form).<sup>62</sup> The Appeals Chamber concluded that the notion is customary international law,<sup>63</sup> a decision confirmed in a number of more recent decisions of the ICTY.<sup>64</sup> Critics have pounced on the failure of the ICTY to show generality and consistency of practice and the formulation of an *opinio iuris*<sup>65</sup> and have concluded that prior to the decision ‘this form of liability did not exist in international criminal or humanitarian law.’<sup>66</sup> Koessler writing shortly after the Second World War argued, however, that the doctrine is within the ambits of the principle of criminal guilt generally recognized by all civilized systems of law.<sup>67</sup>

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 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.

This provision was borrowed from the Terrorist Bombings Convention<sup>68</sup> and according to Clark most of the delegates thought they were voting for the inclusion of conspiracy but instead they got joint enterprise! Strong efforts are currently being made to expressly

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<sup>60</sup> 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, 24-5<sup>th</sup> 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).

<sup>61</sup> 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, 15<sup>th</sup> November – 13<sup>th</sup> December, 1945, UNWCC, vol. XI., p.5 (*Dachau Concentration Camp case*); *Trial of Josef Kramer and 44 others*, British Military Court, Luneberg, 17<sup>th</sup> September-17<sup>th</sup> November, 1945, UNWCC, vol.II, p.1 (*Belsen case*).

<sup>62</sup> Tadić Appeal Chamber, para.220. They summarise all three requirements.

<sup>63</sup> Tadić Appeals Chamber, para. 220; 226.

<sup>64</sup> *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.

<sup>65</sup> 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.

<sup>66</sup> Bogdan, n65, 118.

<sup>67</sup> M. Koessler, ‘Euthanasia in the Hadamar Sanatorium and International Law’ (1952-1953) 43 *Journal of Criminal Law, Criminology and Police Science* 735, 742.

<sup>68</sup> GA Res., 52/164. UN doc. A/RES/52/164.

exclude crimes against peace from the application of Article 25(3)(d) but that has yet to happen.

### **13. Conclusion**

The revival of the joint enterprise doctrine and the revival of crime of aggression 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 original US 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?

The argument for the application of the doctrine is that those who act through others should be held responsible for their actions. The doctrine provides one 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.

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, it cannot be inferred from the mere fact of that George Bush ordered the illegal invasion of Iraq that he was party to a joint enterprise along with the perpetrators of the war crimes that occurred at Abu Ghraib to commit those crimes. Moreover, he should not be held responsible for those crimes even if he foresaw the possibility of some form of war crime being carried out by US military personnel incidental to their joint enterprise of invading Iraq. Command responsibility may provide otherwise but we are dealing with the incidental consequences of complicity in a primary charge of aggression, not a war crime.

There are more subtle arguments against the basic form of the doctrine, i.e. where the accused shares a common purpose with others to engage in aggression, but does not actually engage in waging a war of aggression, the waging of such a war should not be imputed to him:

- 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 participation, the law had better have a strong and clear basis for the attribution of liability.<sup>69</sup> 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.<sup>70</sup> 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

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<sup>69</sup> D. Unterhalter, ‘The Doctrine of Common Purpose: What makes one Person Liable for the Acts of Another?’ (1988) 105 SALJ 671.

<sup>70</sup> Unterhalter, n69, 674.

associate ourselves with actions for which we do not wish to assume responsibility.<sup>71</sup>

- I would argue that the government and military high command of a state comprises a situation 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 members of this hierarchy consent to be bound by the actions of others, other members may not. Drawing the parameters of this consent may prove extremely difficult. Membership per se cannot 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.<sup>72</sup> At Tokyo the prosecution submitted and the Majority of the Tribunal accepted, using the joint enterprise doctrine as the legal structure, the factual thesis that the government and military high Command could be collectively regarded as a joint enterprise to wage unlawful war. This limited precedent 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. It is arguable that given proof of individual voluntary assumption of responsibility for the actions of others, the basic form of the joint enterprise doctrine still has a role in international criminal law. But the problem at Tokyo was that the absence of such proof led the prosecution to fall back on membership. This problem of proof is certain to re-emerge in any future prosecution of the crime of aggression. We should reject the basic form of the joint enterprise 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, and which require the prosecution to establish some link between the secondary party and the principal's conduct.

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<sup>71</sup> Unterhalter, n69, 675.

<sup>72</sup> Unterhalter, n69, 676-7.