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A JANUS-FACED CONCEPT: NUREMBERG'S LAW ON CONSPIRACY *VIS-À-VIS* THE NOTION OF JOINT CRIMINAL ENTERPRISE

ABSTRACT. The scope and nature of conspiracy liability under international criminal law have long provoked controversy among scholars and practitioners alike. The questions whether this notion is a crime, or a form of criminal participation, or both, and what is its relation to the theory of joint criminal enterprise, have been at the core of these debates. The UN *ad hoc* Tribunals have routinely held that conspiracy is strictly an inchoate crime and is, therefore, fundamentally different from joint criminal enterprise responsibility. This line of reasoning, however, has been challenged by many in the commentariat who continue to argue that the international legislative origins of conspiracy in post-World War II documents and jurisprudence also defined this notion as a mode of liability. Far from being merely theoretical, this debate has been fuelled by a very practical consideration: the argument that since the concept of conspiracy has been shunned in international criminal law ever since the Nuremberg process, the joint criminal enterprise theory should also be repudiated. This article will thoroughly review the Nuremberg-era law on conspiracy in order to evaluate the conflicting interpretations of its legal nature. It will demonstrate that although this notion was originally construed to have a bifurcated function, it was then gradually refined and distinguished already back in those days from the underlying principles of the joint criminal enterprise theory.

I INTRODUCTION

Conspiracy is a legal construct which has been widely eschewed in contemporary international criminal law. It was excluded *in toto* from the ICC Rome Statute¹ and was adopted by the UN *ad hoc* Tribunals' strictly as an inchoate crime and solely in relation to geno-

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¹ K. Ambos, *Treatise on International Criminal Law* (Oxford: Oxford University Press, 2013), 166, 173; P. Gaeta, *The UN Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009), 221–222.

cide.² One would expect that in this limited context there would be little, if any, debate on the meaning and nature of this concept. Instead, it has often drawn the attention of scholars and practitioners, largely on account of allegations that it is analogous to the theory of joint criminal enterprise ('JCE').³ An argument that has been recurrently raised is that if the two notions are, indeed, conceptually the same, then JCE should be expunged from international criminal law just as conspiracy has been. The exact relationship between these doctrines remains contested, seeing that this issue was also brought up in some of the latest ICTY judgments.⁴ Indeed, as recently as January 2014, the ICTY *Đorđević* Appeals Chamber was seized with this particular matter after the Defence submitted in its appeal brief that, with one particular exception, the notion of conspiracy was rejected in the Judgment of the International Military Tribunal at Nuremberg ('IMT') and that, therefore, the ICTY/R should also cease applying the JCE doctrine:

In other words, when rejecting conspiracy as applied to crimes against humanity and war crimes, the IMT rejected common plan liability as well. Therefore, the IMT explicitly declined to rely on JCE or anything similar in order to convict accused of war crimes or crimes against humanity. It eschewed imposing such sweeping liability... There is, therefore, nothing in the London Charter or IMT Judgement that supports JCE as applied by the Appeals Chamber. The most authoritative WWII tribunal declined to utilise JCE or anything similar.⁵

² Article 4(3)(b) ICTY Statute and Article 2(3)(b) ICTR Statute establish solely the crime of "conspiracy to commit genocide" and do not recognize any other use of this notion. Fletcher thus viewed these provisions as "the afterglow of a dying concept". G. Fletcher, *Amicus Curiae Brief of Specialists in Conspiracy and International Law in Support of Petitioner [Conspiracy – Not a Triable Offense]*, at 12, filed in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

³ See e.g. K. Ambos (n 1 above), 173; H. Van Der Wilt, 'Joint Criminal Enterprise and Functional Perpetration', in: H. Van Der Wilt and A. Nollkaemper (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009), 164; G. Fletcher and J. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', (2005) 3(3) *Journal of International Criminal Justice* 539, 544, 548–549; A. Danner and J. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', (2005) 93(1) *California Law Review* 75, 110.

⁴ *Prosecutor v. Đorđević*, (Appeal Judgment) IT-05-87/1-A (27 January 2014), paras. 28, 32–34; *Prosecutor v. Prlić et al.*, (Trial Judgment, Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti) IT-04-74-T (29 May 2013), at 100 *et seq.*

⁵ *Prosecutor v. Đorđević*, (Vlastimir Đorđević Appeal Brief) IT-05-87/1-A (15 August 2011), paras. 41, 43, 45; *Prosecutor v. Đorđević* (n 4 above), paras. 32–34.

The present article submits that the continuing debates on this topic are largely caused by the ambiguous manner in which conspiracy was construed in World War II-era documents and jurisprudence. In particular, it is still questionable whether this construct was defined and applied strictly as an independent crime, and as such is inherently different from JCE, which is a mode of liability, or whether it was also used to impute responsibility for substantive crimes. Moreover, if the latter is true, does this mean that a sign of equality could be put between the two notions and, respectively, that the asserted IMT's rejection of such a sweeping use of conspiracy constitutes a tacit rejection of the present-day JCE theory? In order to address these questions, a review of the origin and evolution of the law on conspiracy in the Nuremberg-era context will be offered. This in turn will help to meaningfully compare it to the JCE doctrine and test the contention that they are akin to each other and, therefore, ought to share the same fate. The article will start by briefly sketching out the conflicting arguments that have been raised in legal practice and scholarship on this particular issue, thus explaining the nature of the problem at hand. Afterwards, the main part of the research will trace and analyse the conspiracy notion from the point of its first formulation in the field of international criminal law, through the heated debates on its legal meaning during the drafting of the London Charter of the International Military Tribunal ('IMT Charter'), to its application/rejection in the IMT Judgment and the subsequent Nazi trials. This systematic review will ultimately serve to: (i) explain the opposing views that continue to be expressed on the nature and scope of conspiracy liability; (ii) assess the merits of either proposition; and (iii) conclude on the questioned relationship between conspiracy and JCE liability.

II THE CONTROVERSY OVER JCE AND CONSPIRACY

It is nowadays well known that JCE is a mode of liability that was first introduced in the field of modern international criminal law by the ICTY *Tadić* Appeals Chamber.⁶ It has been applied in cases where a crime is committed by a group of individuals who coordinate efforts in pursuance of a common criminal plan. In such scenarios, the theory is used to reciprocally attribute the acts of each participant

⁶ *Prosecutor v. Tadić*, (Appeal Judgment) IT-94-1-A (15 July 1999), paras. 185–225.

in the plan to the other JCE members, so that at the end they could all be held equally liable for the committed crime(s) of the enterprise (even though only one or some of the JCE members physically committed the said crimes). The international tribunals have confirmed that the notion has three variants, generally labelled as the ‘basic’ (JCE I), the ‘systemic’ (JCE II) and the ‘extended’ (JCE III) form.⁷ In a nutshell, to convict an accused under any of them, three objective requirements have to be met: (i) the existence of a plurality of individuals; (ii) a common plan that is aimed at or involves the commission of crimes; and (iii) the accused’s contribution to the criminal plan.⁸ It is the requisite *mens rea* that distinguishes the three categories of JCE. JCE I liability requires that the accused shares the common intent to commit the concerted crime.⁹ For JCE II liability – which applies when the common plan is ‘institutionalized’ (*viz.* it takes place in a system of ill-treatment, such as a concentration camp) – it must be established that the accused had knowledge of the said system and intended to further its criminal purpose.¹⁰ Finally, JCE III liability allows imputing to the accused responsibility for crimes that were committed outside the original plan but were nevertheless a natural and foreseeable consequence of its execution.¹¹ This requires

⁷ *Ibid.*, paras. 195–207; *Prosecutor v. Stakić*, (Appeal Judgment) IT-97-24-A (22 March 2006), para. 65; *Prosecutor v. Đorđević*, (Trial Judgment) IT-05-87/1-T (23 February 2011), paras. 1864–1865; *Prosecutor v. Simba*, (Appeal Judgment) ICTR-01-76-A (27 November 2007), paras. 76–80; *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, (Appeals Chamber) STL-11-01/I/AC/R176bis (16 February 2011), paras. 237–239.

⁸ *Prosecutor v. Tadić* (n 6 above), para. 227; *Prosecutor v. Brđanin*, (Appeal Judgment) IT-99-36-A (3 April 2007), para. 430; *Prosecutor v. Brima, Kamara and Kanu*, (Appeal Judgment) SCSL-2004-16-A (22 February 2008), para. 75; *Prosecutor v. Munyai*, (Appeal Judgment) ICTR-97-36A-A (28 September 2011), para. 160; *Prosecutor v. Kaing Guek Eav alias Duch*, (Trial Judgment) 001/18-07-2007/ECCC/TC (26 July 2010), para. 508.

⁹ *Prosecutor v. Tadić* (n 6 above), para. 228; *Prosecutor v. Kvočka et al.*, (Appeal Judgment) IT-98-30/1-A (28 February 2005), para. 82; *Prosecutor v. Stanišić & Simatović*, (Trial Judgment) IT-03-69-T (30 May 2013), para. 1255; *Prosecutor v. Sesay, Kallon and Gbao*, (Appeal Judgment) SCSL-04-15-A (26 October 2009), para. 474; *Prosecutor v. Duch* (n 8 above), para. 509.

¹⁰ *Prosecutor v. Tadić* (n 6 above), para. 228; *Prosecutor v. Krnojelac*, (Appeal Judgment) IT-97-25-A (17 September 2003), para. 89; *Prosecutor v. Kvočka et al.* (n 9 above), para. 82; *Prosecutor v. Sesay, Kallon and Gbao* (n 9 above), para. 474.

¹¹ *Prosecutor v. Tadić* (n 6 above), para. 204; *Prosecutor v. Kvočka et al.* (n 8 above), para. 83; *Prosecutor v. Sesay, Kallon and Gbao* (n 9 above), paras. 474–475; *Prosecutor v. Duch* (n 8 above), para. 509.

evidence that the incidental crime was a *foreseeable* consequence of the execution of the original plan and the accused *willingly took that risk* by continuing his participation in the JCE.¹² This *mens rea* standard has often been referred to as *dolus eventualis* or advertent recklessness.¹³ For the purposes of this research, it bears noting that JCE responsibility is not explicitly provided in the statutes of any of the international *ad hoc* tribunals, but has been applied on the basis of its purported status as a rule of customary international criminal law: *i.e.* its adoption in Nuremberg-era documents and jurisprudence. For this reason, the latter body of law has often been reviewed when raising challenges to this mode of liability.

It was several years after the *Tadić* Appeal Judgment that parallels between the theory of joint criminal enterprise and the conspiracy notion were first brought up in a pronounced attempt to undermine JCE's conceptual soundness and the legal basis for its application in international criminal law. In the ICTY *Ojdanić* case, the Defence submitted that JCE is in fact 'a euphemism for conspiracy,'¹⁴ and argued that since the latter concept was repudiated from the ICTY Statute, so should the former be excluded from criminal proceedings before the Tribunal.¹⁵ It was pointed out that the ICTY Statute 'drew from the experience at Nuremberg' and that the IMT rejected the use of conspiracy for the prosecution of war crimes and crimes against humanity.¹⁶ The Appeals Chamber rejected the Defence's arguments

¹² *Prosecutor v. Tadić* (n 6 above), para. 228; *Prosecutor v. Kvočka et al.* (n 9 above), para. 83; *Prosecutor v. Sesay, Kallon and Gbao* (n 9 above), para. 475; *Prosecutor v. Duch* (n 8 above), para. 509; STL *Interlocutory Decision* (n 7 above), para. 239.

¹³ *Prosecutor v. Milutinović et al.*, (Trial Judgment *Vol. I*) IT-05-87-T (26 February 2009), para. 96; *Prosecutor v. Sesay, Kallon and Gbao* (n 9 above), para. 475; STL *Interlocutory Decision* (n 7 above), para. 248.

¹⁴ *Prosecutor v. Šainović and Ojdanić* (General Dragoljub Ojdanić's Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise) IT-99-37-PT (29 November 2002), para. 6. The Defence further argued that conspiracy is "precisely the basis of liability for joint criminal enterprise". *Prosecutor v. Milutinović et al.*, (Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise) IT-99-37-AR72 (21 May 2003), para. 14.

¹⁵ *Prosecutor v. Milutinović et al.*, (General Ojdanić's Appeal from Denial of Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise) IT-99-37-AR72 (28 February 2003), para. 20; *Prosecutor v. Milutinović et al.* (Motion Challenging Jurisdiction) (n 14 above), para. 23.

¹⁶ *Prosecutor v. Ojdanić* (Appeal) (n 15 above), paras. 24–35.

after stressing that JCE and conspiracy are materially distinct concepts:

Whilst conspiracy requires a showing that several individuals agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, in addition to such a showing, that the parties to that agreement took action in furtherance of that agreement. In other words, while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise. Thus, even if it were conceded that conspiracy was excluded from the realm of the Tribunal's Statute, that would have no impact on the presence of joint criminal enterprise as a form of 'commission' pursuant to Article 7(1) of the Statute.¹⁷

Conspiracy was defined as a substantive crime of which the accused could be found guilty, while JCE was clearly construed as a mode of liability that allows holding the accused responsible for crimes resulting from the execution of a common criminal plan. The judges concluded, therefore, that even if conspiracy was, indeed, eschewed from the ICTY Statute, this could have no impact on the application of the JCE doctrine in the Tribunal's criminal proceedings.¹⁸

The *Ojdanić* Appeals Chamber's reasoning on this point has been cited with approval in academia¹⁹ and has also been affirmed in the subsequent case law of the ICTR, SCSL and STL.²⁰ Yet the matter was never put to rest, considering that at present there remain many

¹⁷ *Prosecutor v. Milutinović et al.* (Decision on Motion Challenging Jurisdiction) (n 14 above), para. 23.

¹⁸ *Ibid.*

¹⁹ A. Cassese, *Cassese's International Criminal Law* (Oxford: Oxford University Press, 2013), 163; H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford: Hart Publishing, 2009), 34; C. Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Berlin: Springer, 2008), 188, 191–193; A. Sanders, 'New Frontiers in the ATS: Conspiracy and Joint Criminal Enterprise Liability after Sosa', (2010) 28(2) *Berkley Journal of International Law* 619, 631–632.

²⁰ The STL Appeals Chamber confirmed that "the notions of conspiracy... and joint criminal enterprise are distinct: the former is a substantive crime, the latter is a mode of criminal responsibility." See STL *Interlocutory Decision* (n 7 above), para. 203. A nearly identical finding was made by the SCSL Appeals Chamber when it held that "conspiracy and JCE are legally distinct concepts. Most obviously, conspiracy is an inchoate offence whereas JCE is a mode of liability." *Prosecutor v. Sesay, Kallon and Gbao* (n 8 above), para. 397. For ICTR case law on this matter, see e.g. *Prosecutor v. Mpambara*, (Trial Judgment) ICTR-01-65-T (11 September 2006), para. 13; *Gatete v. the Prosecutor*, (Appeal Judgment) ICTR-00-61-A (9 October 2012), para. 263.

scholars who argue that JCE is akin to conspiracy responsibility.²¹ This contention even received support from within the UN *ad hoc* Tribunals when Judge Schomburg wrote in a separate opinion to the ICTY *Martić* Appeals Judgment that:

While the Appeals Chamber has in the past explicitly stated that ‘criminal liability pursuant to a joint criminal enterprise is not liability for mere membership or for conspiring to commit crimes,’ the constant expansion of the concept of JCE in the jurisprudence of the International Tribunal suggests the contrary.²²

Thus, while one camp in this debate has firmly rejected the argument that JCE can be equated to conspiracy, the other has persistently argued the opposite. This discord can be explained with the different views that scholars and practitioners hold regarding the nature of the latter concept. In particular, while the international tribunals have consistently regarded it as an independent crime, critics have dismissed this conclusion and contended that a close inspection of this notion reveals that it has also been defined as a mode of liability, both in Nuremberg-era law and in US national criminal law.²³ In their

²¹ See e.g. K. Ambos (n 1 above), 173; A. Chouliaras, ‘Discourses on International Criminality’, in: A. Smeulers (ed.), *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* (Antwerp: Intersentia, 2010), 84; H. Van Der Wilt, *System Criminality* (n 3 above), 164; M. C. Bassiouni, *Introduction to International Criminal Law* (Leiden: Martinus Nijhoff Publishers, 2d edn., 2013), 313; J. Ohlin, ‘Joint Intentions to Commit International Crimes’, (2011) 11(2) *Chicago Journal of International Law* 693, 695, 702–703; N. Boister, ‘The Application of Collective and Comprehensive Criminal Responsibility for Aggression at the Tokyo International Military Tribunal: The Measure of the Crime of Aggression?’, (2010) 8(2) *Journal of International Criminal Justice* 425, 436–437; G. Fletcher and J. Ohlin (n 3 above), 544, 548–549; A. Danner and J. Martinez (n 3 above), 110.

²² *Prosecutor v. Martić*, (Appeal Judgment, Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić) IT-95-11-A (8 October 2008), para. 5. The latest example of this discourse could be seen in the ICTY *Prlić et al.* Trial Judgment where Judge Antonetti, writing in a separate opinion, pointed out that JCE is seen by many as an outgrowth of the conspiracy notion and went on to examine the origins and scope of these constructs. *Prosecutor v. Prlić et al.*, (Judge Antonetti Separate Opinion) (n 4 above), 100 *et seq.*

²³ Danner and Martinez, for instance, have argued that “international judges fail to acknowledge that conspiracy is not only a substantive crime but also constitutes a liability theory in its own right.” A. Danner and J. Martinez (n 3 above), 119. Similarly, Ohlin has argued that there is “substantial historical support for the idea that common purpose liability [i.e. JCE] and conspiracy liability are one and the same”. J. Ohlin (n 21 above), 702–703. See also e.g. H. Van Der Wilt, *System Criminality* (n 3 above), 164; H. Van Der Wilt, ‘Joint Criminal Enterprise: Possibilities and Limitations’, (2007) 5(1) *Journal of International Criminal Justice* 91, 96.

view, the JCE theory is merely a new label for precisely this formulation of conspiracy. The argument then goes that the IMT's rejection of the latter construct materially detracts from the conclusion that JCE has a legal basis in customary international law. Therefore, it is important to find out what exactly was the legal framework of conspiracy under Nuremberg-era law, which aspects of it were rejected by the IMT and how does that affect the JCE doctrine.

III THE NUREMBERG LAW ON CONSPIRACY

Towards the end of World War II, the Governments of France, the United Kingdom, the Soviet Union and the United States of America ('the Allies') struggled to agree on how to best deal with the Nazi criminals after the war. The fear that the abysmal scale of the Nazi crimes and the sheer number of perpetrators will cast an insurmountable obstacle to prosecution by traditional means was shared by many at the time.²⁴ It was evident that if mass impunity or extrajudicial executions were to be avoided in favour of judicial action, a prosecutorial strategy had to be developed that would account for the practical difficulties of trying nationwide, systemic war criminality. It is in this context that the notion of conspiracy was first construed as a legal tool for the prosecution of international crimes.

3.1 *Introducing Conspiracy: Bernays' Prosecutorial Strategy*

The first person to devise a concrete plan on how to prosecute the major Nazi war criminals and their subordinates was a lawyer called Murray Bernays, who worked at the then U.S. Department of War. In a memorandum to his superiors, dated 15 September 1944, he proposed a two-winged prosecutorial strategy which would eventually leave a visible mark on the IMT Charter.²⁵ He recognized the practical difficulties of applying traditional legal notions to try the Nazis and thus suggested the adoption of two concepts that were unknown to international law at the time: conspiracy and membership in a criminal organization.²⁶ He argued that the Allies' first step

²⁴ B. F. Smith, *The American Road to Nuremberg: The Documentary Record, 1944–1945* (Stanford: Hoover Institution Press, 1982), 41.

²⁵ *Subject: Trial of European War Criminals (by Colonel Murray C. Bernays, G-1)*, 15 September 1944, re-printed in *ibid.*, 33–37.

²⁶ *Ibid.*, 35–36. The 'membership in a criminal organization' concept falls outside the scope of this paper and, for reasons of brevity, will not be addressed here.

in a judicial process should be to start an international mega-trial against the most nefarious organizations of the Third Reich and their respective leaders:

9. The following is therefore recommended for consideration:

- a. The Nazi Government and its Party and State agencies, including the SA, SS, and Gestapo, should be charged before an appropriately constituted international court with *conspiracy to commit murder, terrorism, and the destruction of peaceful populations in violation of the laws of war*.
- b. For the purposes of trial, the prosecuting Nations should bring to the bar only such individual defendants, considered to be representative of the defendant organizations, as they elect.²⁷

The idea was thus to charge both the Nazi leaders and the organizations which they headed with ‘conspiracy to commit murder, terrorism and the destruction of peaceful populations’. Bernays explained that for an adjudication of guilt, the court ‘would require no proof that the individuals affected participated in any overt act other than membership in the conspiracy’.²⁸ In other words, by merely agreeing to the Hitlerite conspiracy, one became guilty of it. The scope of this concept was then further expanded in paragraph 10b, which held that ‘once the conspiracy is established, each act of every member thereof during its continuance and in furtherance of its purposes would be imputable to all other members thereof’.²⁹ As explained in detail below, this structure altered the classical meaning of conspiracy as an inchoate crime and turned it into an expansive mode of liability: one that the prosecution could use to link every major Nazi war criminal to virtually the entire spectre of crimes committed by the regime during the war. In a nutshell, by solely proving the existence of an agreement among the accused leaders to ‘commit murder, terrorism, and the destruction of peaceful populations,’ each one of them could be convicted not only of conspiracy as an anticipatory crime, but also of all the substantive crimes that subsequently resulted from it. Thus, the law did not require proof that the accused himself participated, through personal acts or omissions, in the furtherance of the said conspiracy in order to hold him liable for its substantive crimes: it sufficed to prove that he agreed to them with the other co-conspirators. This approach was designed

²⁷ *Ibid.*, 36 (*emphasis added*).

²⁸ *Ibid.*

²⁹ *Ibid.*, 37.

to resolve the evidentiary difficulties that were expected to occur if the Prosecution had to personally link each accused at the apex of the Nazi military and state apparatus to all the crimes committed in distant corners of Europe.

3.2 *Reviewing Bernays' Conspiracy: The US Inter-Departmental Debates*

Bernays' plan was innovative and offered compelling solutions to the practical impossibilities of prosecuting the Axis war criminals, which is why it managed to gain considerable support from other senior US officials.³⁰ However, its doctrinal foundations suffered from legal defects which were so fundamental that they immediately attracted criticism. The highlights of the ensuing US inter-departmental debates on this plan are explored here in order to explain the meaning and the incoherencies of the concepts that Bernays construed.

Being a US lawyer, it was only natural that Bernays drew heavily from Anglo-American law when drafting his proposal on the Nazi prosecutorial strategy. Conspiracy, in particular, is a common law concept which was largely unknown in European legal culture.³¹ At the time, courts had construed it strictly as an inchoate crime which is completed when two or more persons form an agreement to engage in unlawful conduct.³² Its *actus reus* is thus the very act of agreeing with other individuals to commit a crime and its *mens rea*, the intent to

³⁰ *Ibid.*, 52–53.

³¹ S. Pomorski, 'Conspiracy and Criminal Organization', in: G. Ginsburgs and V. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (Dordrecht: Martinus Nijhoff Publishers, 1990), 218; G. Fletcher, *Rethinking Criminal Law* (Oxford: Oxford University Press, 2000), 219; E. Van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012), 179; A. Danner and J. Martinez (n 3 above), 115.

³² *Mulcahy v. R.* (1868) LR 3 HL 306, 317; *United States v. Hirsch*, 100 U.S. 33 (1879), 34; *Pettibone v. United States*, 13 S.Ct. 542 (1893), 545; *United States v. Falcone*, 61 S.Ct. 204 (1940), 207. See also A. J. Harno, 'Intent in Criminal Conspiracy', (1941) 89 *University of Pennsylvania Law Review* 624, 628; H. Wechsler et al., 'The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy', (1961) 61(6) *Columbia Law Review* 957, 958; G. Fletcher (n 31 above), 218; T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Knopf, 1992), 36; D. Ormerod et al., *Smith and Hogan's Criminal Law* (Oxford: Oxford University Press, 13th edn., 2011), 423–424.

agree and to carry out the said substantive crime.³³ Accordingly, for an adjudication on conspiracy guilt, it is wholly immaterial whether the agreement was ultimately executed, *i.e.* whether the projected crime was committed or not.³⁴ If it was, then the responsibility of the conspirator for this crime is independent from the conspiracy charge and is determined using the principles of complicity. Following this rationale, an accused may be found guilty both of conspiracy to commit murder *and* of, for instance, aiding and abetting murder; however, it could also happen that the judges convict him of the conspiracy charge but acquit him of the substantive crime.³⁵

Bernays' conspiracy was a notably different kind of creature, a controversial amalgam of conspiracy proper and accomplice liability that several years later was introduced in US national criminal law and became widely known as the 'Pinkerton doctrine/conspiracy'.³⁶

³³ A. J. Harno (n 32 above), 628, 631 *et seq*; A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2d edn., 2008), 227; D. Ormerod et al. (n 32 above), 426; As part of the *actus reus* element, some jurisdictions also require an "overt act in furtherance of the criminal agreement," *i.e.* an act, no matter how insignificant, carried out in furtherance of the conspiracy by one of the co-conspirators. See P. Johnson, 'The Unnecessary Crime of Conspiracy', (1973) 61(5) *California Law Review* 1137, 1142–1143; H. Wechsler et al. (n 32 above), 1003. It has been noted, however, that "overt acts can be entirely innocent ones and are therefore not difficult to make out. Many [US] state and federal statutes, and the common law version of conspiracy, do not even require proof of an over act". D. Luban et al., *International and Transnational Criminal Law* (New York: Aspen Publishers, 2010), 879.

³⁴ As Ormerod explains, "[o]nce the parties have agreed [to commit a crime], the conspiracy is complete, even if they take no further action because, for example, they are arrested". The conclusion of the agreement marks the commission of the offence, and if one of the parties immediately after that repents and withdraws from the plan, he is still guilty of conspiracy – a feature which Ormerod calls "the crucial distinction between inchoate offending and liability as a secondary party". See D. Ormerod et al., *Smith and Hogan Criminal Law* (Oxford: Oxford University Press, 12th edn., 2008), 400, 402.

³⁵ A. Cassese (n 33 above), 227; A. Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide', (2007) 5(4) *Journal of International Criminal Justice* 875, 880; H. Wechsler et al. (n 32 above), 960; P. Johnson (n 33 above), 1150–1151; L. Schleicher and D. Stoldt, 'Federal Criminal Conspiracy', (1993) 30(3) *American Criminal Law Review* 685, 685–686.

³⁶ In June 1946, almost two years after Bernays wrote his memorandum where he formulated his expansive views on conspiracy liability, the US Supreme Court adopted this approach in the case of *Pinkerton v. United States*. Walter and Daniel Pinkerton were two brothers indicted with the crime of conspiracy and with ten substantive crimes which resulted from that conspiracy. The judges recognized that "[t]here is... no evidence to show that Daniel participated directly in the commission

Pursuant to it, a Nazi leader who agreed to the Hitlerite plan, *without taking any further steps to participate in its realization*, could be found guilty of: (i) the crime of conspiracy to commit murder, terrorism, and the destruction of peaceful populations; *and* (ii) all the underlying crimes that followed from this conspiracy and could be attributed to at least one of its other members.³⁷ In other words, the only inquiry that had to be made to impute liability for the substantive offences of the conspiracy was whether the accused was a co-conspirator: *i.e.* it was unnecessary to ask any questions regarding the conduct of the accused in relation to these crimes. This aspect of Bernays' conspiracy notion was particularly troubling because it sought to impute

Footnote 36 continued

of the substantive offenses... although there was evidence to show that these substantive offenses were in fact committed by Walter in furtherance of the unlawful agreement or conspiracy existing between the brothers". The majority decided that this was a sufficient basis to find Daniel guilty not only of conspiracy but also of the substantive crimes committed by his brother. Justice Rutledge wrote a strong dissenting opinion in which he criticized this reasoning and even questioned its constitutionality. He restated that there was no proof "to establish that Daniel participated in [the substantive crimes], aided and abetted Walter in committing them, or knew that he had done so. Daniel in fact was in the penitentiary, under sentence for other crimes, when some of Walter's crimes were done". The only evidence against Daniel was that he had earlier formed an agreement to commit a crime with his brother, leading Justice Rutledge to observe that "because of that agreement without more on his part Daniel became criminally responsible as a principal for everything Walter did thereafter in the nature of a criminal offense of the general sort the agreement contemplated". This, in Justice Rutledge view, was an unacceptable expansion of the traditional limits of the conspiracy doctrine, and he dreaded "[t]he looseness with which the charge may be proved, the almost unlimited scope of vicarious responsibility for others' acts which follows once agreement is shown". In his dissent, Justice Rutledge was also joined by Justice Frankfurter. See, *Pinkerton v. United States*, 328 U.S. 640 (1946), 645, 648, 650, 651. The Pinkerton doctrine proved to be extremely controversial and the influential US Model Penal Code, which has been cited with approval by the majority of US states rejecting the Pinkerton rule, criticised it by stating that the "law would lose all sense of just proportion if simply because of the conspiracy itself each [co-conspirator] were held accountable for thousands of additional offenses of which he was completely unaware and which he did not influence at all". American Law Institute, *Model Penal Code and Commentaries (Official Draft and Revised Commentaries): With Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962* (Philadelphia: American Law Institute, 1985), 307. It should also be noted that *Pinkerton* liability has not been accepted in any other common law jurisdictions. See G. Singer and J. Q. La Fond, *Criminal Law: Examples & Explanations* (Austin: Wolters Kluwer/Aspen Publishers, 4edn., 2007), 328–329; D. Luban et al. (n 33 above), 880.

³⁷ See text, notes 27–29 above. S. Pomorski (n 31 above), 216.

accomplice liability without upholding the basic requirements for doing so: *viz.* that the accused, through a positive act or omission, assists (participates) in the actual perpetration of the projected crime.³⁸ The act of merely agreeing to the execution of a criminal plan does not satisfy this requirement. Among the first ones to notice this legal anomaly in Bernays' plan and criticise it was Herbert Wechsler, the US Assistant Attorney General at the time. He addressed this very issue in a memorandum which he sent to his superior, Francis Biddle: the Attorney General who less than a year later was appointed as the US judge in the International Military Tribunal.³⁹ Wechsler wrote:

In connection with multiple liability, it should be noted that some confusion may be engendered by the terminology of [Bernays' plan]... I should suppose that what is really to be condemned as criminal is not the inchoate crime of conspiracy but rather the actual execution of a criminal plan... The point is rather that *multiple liability for a host of completed crimes is established by mutual participation in the execution of the criminal plan.* The Nazi leaders are accomplices in a completed crime *according to the concepts of accessory liability* common, I believe, to all civilized legal systems.⁴⁰

Wechsler essentially rose two important objections: (i) the Nazi elite had to be prosecuted not for some grand anticipatory offence (*i.e.* the Hitlerite conspiracy) but for the substantive crimes that ensued from it; and (ii) mere agreement to commit these crimes was not a sufficient legal basis for imputing liability for their commission: it had to be established that the said ringleaders mutually participated in the execution of the criminal plan.

It should be noted that Wechsler's critical analysis on this point was, if not 'common... to all civilized legal systems,' certainly consistent with how civil law jurisdictions interpreted the concepts which Bernays conflated in his memorandum. This was a relevant consideration to take into account when suggesting a novel legal construct for trying German nationals. August von Knieriem, a lawyer and a

³⁸ See *e.g.* *Prosecutor v. Akayesu*, (Trial Judgment) ICTR-96-4-T (2 September 2008), paras. 525–548; *Prosecutor v. Semanza*, (Trial Judgment) ICTR-97-20-T (15 May 2003), paras. 393, 395; *STL Interlocutory Decision* (n 6 above), paras. 218–227. See also, F. Giustiniani, 'The Responsibility of Accomplices in the Case-Law of the Ad Hoc Tribunals', (2009) 20(4) *Criminal Law Forum* 417, 426–427.

³⁹ *Memorandum for the Attorney General (Francis Biddle) from the Assistant Attorney General (Herbert Wechsler)*, 29 December 1944, re-printed in Smith (n 24 above), 84–90.

⁴⁰ *Ibid.*, at 87 (*emphasis added*).

defendant in one of the subsequent Nazi trials,⁴¹ addressed this same issue a few years after his acquittal in a manner akin to Wechsler's reasoning:

Nor does what is called plot or gangsterism constitute participation. A plot is the agreement between several persons to commit a specific crime. Gangsterism is the association of several persons to commit crimes which are as yet indefinite. If the crimes planned are actually committed, they are punished according to the general rules concerning principals or accessories, as the case may be. If six persons have made a plot to commit a murder and two of them then actually commit the murder jointly, these two are punished for murder as co-actors. Whether or not the other four are criminally responsible for the murder depends on whether they are in any way accessories. The agreement itself does not constitute participation, unless it actually constitutes an instigation of the as yet undecided actors. Nor do the acts of some members of a gang result in the punishment of those associates who have not participated in these acts. Insofar as plotting and gangsterism are considered punishable at all, they are defined as special crimes. In such cases any member can be punished for plotting and gangsterism as such, but not for the crimes actually committed by others.⁴²

Wechsler's criticism gained momentum and on 22 January 1945 the Attorney General, joined by the Secretaries of State and War, signed and sent to President Roosevelt the so-called 'Yalta memorandum', which preserved Bernays' vision of a two-staged prosecution but replaced his contentious conspiracy concept with what they called 'joint participation in a broad criminal enterprise which included and intended these crimes, or was reasonably calculated to bring them about'.⁴³ Seeking to avoid prosecution based on novel and obscure legal constructs, the authors recommended that the Nazi leaders be tried with the help of this mode of liability, which was in their view:

firmly founded upon the rule of liability, common to all penal systems and included in the general doctrines of the laws of war, that those who participate in the formulation and execution of a criminal plan involving multiple crimes are jointly liable

⁴¹ August von Knieriem was one of the 23 defendants in the *Farben* case. See Military Tribunal VI, *United States of America v. Carl Krauch et al.* ("The *Farben* Case"), Case No. 6 (27 August 1947–30 July 1948) in: *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuremberg, October 1946–April, 1949*, Vols. VII and VIII (1952).

⁴² A. Knieriem, *The Nuremberg Trials* (Chicago: H. Regnery, 1959), 204.

⁴³ *Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminals*, 22 January 1945, re-printed in B. F. Smith (n 24 above), 120.

for each of the offenses committed and jointly responsible for the acts of each other.⁴⁴

Wechsler's rebuttal of Bernays' conspiracy–complicity obviously struck a chord. In essence, the drafters of the Yalta memorandum recommended a concept of multiple liability which came very close to the modern JCE theory. It is more than the analogical labelling, *i.e.* 'joint (participation in a broad) criminal enterprise': there is an overlap of the underlying principles. The proposal described a plurality of individuals who *mutually* execute a pre-agreed plan. The plan aims at the commission of crimes: an intent, which unites all its participants and determines their subsequent cooperation in carrying out this plan. This is the legal basis on which the acts of any one of them can be reciprocally imputed to the others in the group.

The proposal drafted by the US Attorney General and the Secretaries of State and War was far from the last one on this issue. Nevertheless, its definition of the principles of liability to be applied against the Nazi war criminals was reiterated *verbatim* in the proposal that the United States ultimately presented to its European Allies at a conference held in San Francisco in April 1945.⁴⁵ While this seemed to put an end to all talks regarding the conspiracy concept, the truth of the matter turned out to be quite different.

⁴⁴ *Ibid.* (emphasis added).

⁴⁵ The San Francisco Conference was convened by the US in an effort to reach a common understanding that the Nazi arch-criminals should be subjected to a judicial process, rather than summary executions. The prosecutorial strategy which the US proposed to the British, Soviet and French delegations eschewed the notion of conspiracy altogether and instead clarified that the trials against the Nazi war criminals will be based on "the rule of liability, common to most penal systems and included in the general doctrine of the laws of war, that those who participate in the formulation and execution of a criminal plan involving multiple crimes are jointly liable for each of the offenses committed and jointly responsible for the acts of each other". It was further explained that the highest ranking German leaders will be charged before an international military tribunal "with complicity in the basic criminal plan," which would require an adjudication on "the nature and purposes of the criminal plan, the identity of the groups and organizations guilty of complicity in it, and the acts committed in its execution". *Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders*, 25–30 April 1945, re-printed in B. F. Smith (n 24 above), 165–166.

3.3 *The Travaux Préparatoires* of the IMT Charter and Its Conspiracy Provisions

Two months after the San Francisco Conference, where the decision was reached to try the Nazi elite before an international tribunal, the delegations of the United States of America, France, the United Kingdom and the Soviet Union met again at a conference in London: this time to discuss and draft the principles of substantive and procedural criminal law that would be enshrined in the Charter of the International Military Tribunal at Nuremberg.⁴⁶ The US delegation was headed by Robert H. Jackson, the future Chief Prosecutor at the IMT. Prior to travelling to London, he took charge of a number of revisions of the US prosecutorial strategy, some of which watered down the formulation of the principles of liability proposed to the European Allies at the San Francisco Conference.⁴⁷ When Jackson met his colleagues from the Soviet, French and British delegations at the London Conference, he then told them that the notion of conspiracy lay at ‘the heart of our proposal’.⁴⁸ The record of the ensuing negotiations could help us understand how the delegates at the London Conference viewed the notion of conspiracy and, thus, provide a reliable indicator of the legal meaning that they attributed to it under what ultimately became Article 6 IMT Charter.

The preparatory works of the IMT Charter clearly show that Robert Jackson was the main force behind the inclusion of the conspiracy concept in Article 6, yet they also reveal a somewhat confusing account on the exact meaning that he had in mind for it.

⁴⁶ The London Conference took place between 26 June and 9 August 1945 and transcripts of the negotiations and various legal proposals that were made during the conference were prepared by the United States Chief Prosecutor at the IMT Trial, Robert Jackson. See, R. H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945* (Washington, D.C.: Dept. of State, Division of Publications, Office of Public Affairs, 1949).

⁴⁷ B. F. Smith (n 24 above), 141. In particular, in a 19 May 1945 redraft of the American prosecutorial strategy, Jackson and his staff struck out references to “participation in the commission of crimes and in the execution of criminal plans” and instead held that those who participate in the formulation *or* (deliberately striking out “and”) the execution of a criminal plan, are to be held liable for the acts of each other. *Executive Agreement Relating to the Prosecution of European Axis War Criminals (Drafts 3 and 4)*, 19 May 1945, re-printed in B. F. Smith (n 24 above), 205–206.

⁴⁸ *Minutes of Conference Session of July 2, 1945*, Document XX, in R. H. Jackson (n 46 above), 129.

On the one hand, he explicitly stated its nature as a substantive crime,⁴⁹ as did the British delegation, which initially argued that ‘the chief crime of which it is alleged that the leaders in Germany are guilty is the common plan or conspiracy to dominate Europe’.⁵⁰ On the other hand, however, at times Jackson also spoke of ‘the principle of conspiracy by which one who joins in a common plan to commit crime becomes responsible for the acts of any other conspirator in executing the plan’.⁵¹ The latter interpretation seemed to bring back the conspiracy–complicity concept which, as originally defined in Bernays’ memorandum, treated the sole act of agreeing to a criminal design (*viz.* joining it) as a sufficient legal basis to also impute liability for the substantive crimes committed in pursuance of the said conspiracy. However, a more careful study of Jackson’s statements during this period shows that it is unlikely that he actually sought to implement Bernays’ views on conspiracy into the Charter of the IMT.

It is well known that during the London negotiations the civil law allies were determined to exclude any reference to the conspiracy concept from the IMT Charter. Jackson himself stated several years after these events that ‘there was a significant difference of viewpoint concern[ing] the principles of conspiracy as developed in Anglo-American law, which are not fully followed nor always well regarded by Continental jurists’.⁵² Bradley Smith, who was an eminent historian and commentator of the Nuremberg process, offered a more vivid and often quoted narrative of the French and Soviet disapproval of the conspiracy concept:

During much of the discussion, the Russians and French seemed unable to grasp all the implications of the concept; when they finally did grasp it, they were genuinely shocked. The French viewed it entirely as a barbarous legal mechanism unworthy of modern law, while the Soviets seemed to have shaken their head in wonderment – a reaction, some cynics may believe, prompted by envy. But the main point of the Soviet attack on conspiracy was that it was too vague and so unfamiliar to the French and themselves, as well as to the Germans, that it would lead to endless confusion.⁵³

⁴⁹ *Minutes of Conference Session of July 19, 1945*, Document XXXVII, in *ibid.*, 87.

⁵⁰ *Amendments Proposed by the United Kingdom, June 28, 1945*, Document XIV, in *ibid.*, 296.

⁵¹ R. H. Jackson (n 46 above), at ix (Preface).

⁵² *Ibid.*, at vii (Preface).

⁵³ B. F. Smith, *Reaching Judgement at Nuremberg: The Untold Story of How the Nazi War Criminals Were Judged* (New York: Basic Books, 1977), 51.

The French reacted by submitting a counter-proposal which left out the conspiracy concept in its entirety and instead stated that the Tribunal will have jurisdiction to try individuals who ‘in any capacity whatsoever, *directed the perpetration and conduct of* international crimes.’⁵⁴ Professor Gros, who led the French delegation, further elaborated on this draft by explaining that the Nazi senior officials ‘who have planned invasions and atrocities are responsible for all the atrocities which have been committed in execution of that plan. They are the instigators of the crimes’.⁵⁵ It is evident that the French sought to avoid the ambivalent conspiracy construct in favor of more traditional modes of liability that stress the accused’s active participation in the formulation and direction of crimes. They rejected the idea of imputing crimes to an individual on the mere basis that he had agreed to their commission and they also did not accept that such an agreement could in itself be a crime.

The French proposal paved the way for a series of new drafts on the principles of liability to be included in the IMT Charter. The British, who at first were supportive of the US conspiracy strategy,⁵⁶ also proposed a text that left out this concept and instead built on the French draft. In particular, it stated that the future tribunal would exercise jurisdiction over those individuals who ‘in any capacity whatever directed or participated in the planning, furtherance, or conduct of any or all of the following acts, designs, or attempts’ to commit the international crimes listed in the Charter.⁵⁷ The Soviet delegation fully supported the French draft and initially decided to abstain from submitting its own proposal on this issue, explaining that ‘[w]e did not submit a text of our own, not only not to provoke a fresh discussion, but in order to be able to come to an agreement quickly’.⁵⁸ Nevertheless, they eventually also handed in a proposal that avoided any reference to conspiracy and stressed the acts of

⁵⁴ *Draft Article on Definition of “Crimes”, Submitted by French Delegation*, 19 July 1945, Document XXXV, in R. H. Jackson (n 46 above), 293 (*emphasis added*).

⁵⁵ *Minutes of Conference Session of July 19, 1945*, Document XXXVII, in *ibid.*, 301.

⁵⁶ *Amendments Proposed by the United Kingdom*, 28 June 28 1945, Document XIV, in *ibid.*, 87.

⁵⁷ *Proposed Revision of Definition of “Crimes” (Article 6), Submission by the British delegation*, 20 July 1945, Document XXXIX, in *ibid.*, 312.

⁵⁸ *Minutes of Conference Session of July 19, 1945*, Document XXXVII, in *ibid.*, 298.

directing and participating in the preparation and execution of international crimes.⁵⁹

Jackson, however, was not ready to give in and accept a complete exclusion of the notion of conspiracy from the IMT Charter. His reaction to the above-described French proposal and the explanation given by Professor Gros was to observe that it seemed to be ‘embodying our concept of conspiracy [but] my difficulty is that an American judge would not be certain to recognize it in that dress’.⁶⁰ Jackson expressed the view that Anglo-American and Continental criminal law systems only had some ‘technical differences’ on this point that could be addressed by replacing the word ‘conspiracy’ with ‘common plan’.⁶¹ It is unlikely that Jackson, having seen the proposal of the French and of the British delegation, would have made such a statement if he regarded the concept of conspiracy in the same manner Bernays did. There is simply too much of a difference between what the British and French were proposing in the above-cited drafts and Bernays’ plan. Indeed, when Jackson explained to the other delegates his view on conspiracy, he did so in a way that – contrary to Bernays’ memorandum – emphasized the accused’s conduct and participation in the criminal plan as an essential prerequisite for finding him guilty of the concerted crime:

The American proposal is that we utilize the conspiracy theory by which a common plan or understanding to accomplish an illegal end by any means, or to accomplish any end by illegal means, renders *everyone who participated* liable for the acts of every other.⁶²

If taken on their face value, these statements rather indicate that when Jackson advocated for the adoption of conspiracy responsibility in the IMT Charter, he actually viewed it along the lines of the general rules of complicity, as stated in the Yalta and the San Francisco memorandums.⁶³ He, thus, did not seem to share Bernays’ contention that by virtue of being a co-conspirator – *i.e.* by merely

⁵⁹ *Redraft of Definition of “Crimes”, Submitted by Soviet Delegation*, 23 July 1945, Document XLIII, in *ibid.*, 327.

⁶⁰ *Minutes of Conference Session of July 19, 1945*, Document XXXVII, in *ibid.*, 301.

⁶¹ *Minutes of Conference Session of July 25, 1945*, Document LI, in *ibid.*, 387.

⁶² *Minutes of Conference Session of July 2, 1945*, Document XX, in *ibid.*, 129 (*emphasis added*).

⁶³ See text, notes 43–44 above.

agreeing to the projected crimes – an individual can be held liable for the crimes resulting from the execution of the said conspiracy. This is an important conclusion because it tells us that the conspiracy–complicity construct, as elaborated in Bernays’ original memorandum, was in fact not really discussed at the London Conference.

The above analysis on Jackson’s take on conspiracy is confirmed by the manner in which he subsequently pled before the IMT the responsibility of the senior Nazi accused for the crimes committed in pursuance of the Hitlerite criminal plan. In particular, in his closing address to the Tribunal, Jackson argued that ‘each defendant played a part which fitted in with every other, and that all advanced the common plan [to wage an aggressive war in Europe]’.⁶⁴ He then proceeded to describe the individual contribution of each accused to this plan and concluded that:

The parts played by the other defendants, although less comprehensive and less spectacular than that of [Göring] were nevertheless integral and necessary contributions to the joint undertaking, without any one of which the success of the common enterprise would have been in jeopardy.⁶⁵

As well as that:

Each of these men made a real contribution to the Nazi plan. Every man had a key part. Deprive the Nazi regime of the functions performed by a Schacht, a Sauckel, a von Papen, or a Goering, and you have a different regime... Is there one [among the accused] whose work did not substantially advance the conspiracy along its bloody path towards its bloody goal?⁶⁶

Thus, in contrast to Bernays’ conspiracy–complicity notion, Jackson in fact viewed the accused’s coordinated contribution to the advancement of the Hitlerite conspiracy as an essential ingredient for imputing liability for the resulting crimes. In fact, a few years after the Nuremberg Trial, this time sitting as a US Supreme Court judge in the *Krulewitch* case, he explicitly denounced the underlying rationale of the *Pinkerton* theory (*i.e.* the manifestation of Bernays’ conspiracy in US law):

⁶⁴ Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*. Supplement A (Washington, D.C.: United States Government Printing Office, 1947), 25.

⁶⁵ *Ibid.*, 26.

⁶⁶ *Ibid.*, 38.

A recent tendency has appeared in this Court to expand this elastic offense and to facilitate its proof. In *Pinkerton v. United States*, 328 U.S. 640, it sustained a conviction of a substantive crime *where there was no proof of participation* in or knowledge of it, upon the novel and dubious theory that conspiracy is equivalent in law to aiding and abetting.⁶⁷

Although the above statements were made after the London Conference, they constitute a reliable indicator that Jackson did not follow Bernays' vision of conspiracy when advocating for the adoption of this notion in the IMT Charter. Like Bernays, he also saw the Nazi plan to wage an aggressive war as an independent crime (*viz.* an inchoate crime of conspiracy)⁶⁸ but his views on the liability of the Nazi leaders' for the substantive crimes resulting from this conspiracy were different from Bernays' and mirrored more closely those expressed in the Yalta memorandum. It is unfortunate that Jackson still used the term 'conspiracy' in the latter context but, as explained further below, it is likely that he did this only to emphasize that the act of agreeing to a crime is a crime in itself, rather than as an effort to establish that such an act alone can be the sole basis on which an accused may be held responsible for the substantive crimes committed by others in the execution of the said conspiracy.

3.4 *Article 6 IMT Charter and the Compromise on Conspiracy*

Time was pressing the Allies at the London Conference and they appeared to have reached an impasse on the conspiracy issue. Jackson was adamant that 'nothing except the common plan or conspiracy theory will reach' certain top level Nazi war criminals,⁶⁹ while the head of the Soviet delegation, General Nikitchenko, openly disagreed and stated that more traditional provisions on organizing and instigating war crimes could serve to convict just as well.⁷⁰ The frustration from going back and forth to this debate and never reaching an agreement was on the rise, a testimony of which is Nikitchenko's remark that '[i]f we start discussion on that again, I am afraid the war criminals will die of old age'.⁷¹ The compromise that Sir Maxwell

⁶⁷ *Krulewitch v. United States*, 336 U.S. 440 (1949), 451.

⁶⁸ *Nazi Conspiracy and Aggression*, Supplement A (n 64 above), 17.

⁶⁹ *Minutes of Conference Session of July 16, 1945*, Document XXX, in Jackson (n 46 above), 254.

⁷⁰ *Ibid.*

⁷¹ *Minutes of Conference Session of July 25, 1945*, Document LI, in Jackson (n 46 above), 389.

Fyfe, chairman of the London Conference, suggested and was eventually accepted was to merge the proposals of the civil law Allies with the American conspiracy text.⁷²

By the end of the London Conference, the Allies had thus agreed on the following text of Article 6 of the IMT Charter, defining the Tribunals' jurisdiction:

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

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, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) **WAR CRIMES:** namely; violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) **CRIMES AGAINST HUMANITY:** namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious 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 acts performed by any persons in execution of such plan.

One can easily spot the patchwork of compromises that shape this article. First of all, conspiracy *as an inchoate offence* was recognised solely under sub-paragraph (a): *i.e.* only when the criminal agreement is aimed at the commission of crimes against peace. However, if the accused persons formed an agreement to commit war crimes or crimes against humanity under sub-paragraphs (b) or (c), the IMT Charter did not provide a basis to charge and convict them for conspiracy, as an anticipatory crime. On this point, Pomorski pointed out that "[o]ne is at a loss to understand why conspiracy to prepare an aggressive war should be a crime per se while

⁷² *Ibid.*, 379.

conspiracy to set up a death camp should not be'.⁷³ It appears that this adoption of conspiracy as an independent crime (only in relation to crimes against peace) was the midway between not using it at all and using it for all three categories of international crimes established under the Charter.

The very last sentence of Article 6 IMT Charter contained further reference to the term conspiracy but this time in the context of the rules of liability applicable to all the crimes listed in sub-paragraphs (a) to (c). In the spirit of compromise, it was merged with the legal notions that the Soviet and French delegations proposed at the London Conference for ascribing liability to the Nazi leadership.⁷⁴ Due to the lack of definition, however, it was unclear what the exact limits and constituent elements of conspiracy liability were under this provision. The phrase 'accomplices participating in the formulation or execution of a common plan or conspiracy' could at first look be interpreted as a codification of Bernays' conspiracy–complicity construct (*Pinkerton* liability). Indeed, this view has often been expressed in academia⁷⁵ and the IMT's restrictive interpretation of this particular provision, discussed further below, has thus been seen as an explicit rejection of Bernays' expansive concept of conspiracy and, by analogy, of the modern-day JCE doctrine.⁷⁶ In the author's view, however, neither the plain text, nor the *travaux préparatoires* of Article 6 IMT Charter support such a conclusion. First of all, if the said last sentence was intended to codify the expansive, bifurcated construction of conspiracy as defined in Bernays' original memorandum, it would make no sense that Article 6(a) would then explicitly, and in contrast to sub-paragraphs (b) and (c), state that participating in a conspiracy to wage a war of aggression is a crime: such a text would simply be redundant in light of the suggested meaning of this article's last sentence. More importantly, however, as the above research demonstrated, none of the delegates at the London Conference, not even Jackson, ever proposed that responsibility for substantive offences could be imputed on the sole basis of agreeing to a common plan to commit them: *i.e.* this defining feature of Bernays' conspiracy was not envisioned in the IMT Charter.⁷⁷ To

⁷³ S. Pomorski (n 31 above), 222.

⁷⁴ See text, notes 54–59 above.

⁷⁵ For scholars who have adopted such an interpretation, see *e.g.* A. Danner and J. Martinez (n 3 above), 114–115; S. Pomorski (n 31 above), 223–224; H. Van Der Wilt (n 23 above), 93–94; G. Fletcher (n 2 above), 14.

⁷⁶ *Prosecutor v. Đorđević* (n 5 above), paras. 34–43.

⁷⁷ See text, notes 54–68 above.

be sure, Jackson did use the word conspiracy to also denote a form of criminal participation, but he did so in a way consistent with the traditional rules of complicity which require that the accused actively participated in the criminal plan. Therefore, this author submits that the better interpretation of the said last sentence of Article 6 is that it used the word ‘conspiracy’ merely as a synonym of ‘common plan’ – *i.e.* not as a distinct legal construct with its own specific meaning – and, thus, that this provision codified the universally accepted rule of joint liability, as formulated in the Yalta and in the San Francisco memorandums.⁷⁸ In this vein of thought, Jackson submitted in his closing arguments in the IMT that:

The Charter forestalls resort to... parochial and narrow concepts of conspiracy taken from local law by using the additional and non-technical term, ‘common plan’. Omitting entirely the alternative term of ‘conspiracy’ the Charter reads that ‘leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan to commit’ any of the described crimes ‘are responsible for all acts performed by any persons in execution of such plan’.⁷⁹

As explained below, the Nuremberg Tribunal ultimately interpreted the last sentence of Article 6 in this very manner: it omitted the conspiracy language and found that this provision establishes the separate and distinct concept of joint liability for those who *mutually participate* in a criminal plan.

3.5 *The IMT Judgment: Judicial Interpretation of Conspiracy*

The Nuremberg Trial commenced on 20 November 1945 and the Prosecution had indicted 24 senior military and political officials of Nazi Germany,⁸⁰ as well as the six most notorious Nazi organizations.⁸¹ The charges were grouped in four counts which roughly followed the structure of Article 6 IMT Charter: crimes against peace (Count Two),

⁷⁸ See text, notes 43–44 above.

⁷⁹ *Nazi Conspiracy and Aggression*, Supplement A (n 64 above), 30.

⁸⁰ Two of the accused, however, were eventually not prosecuted: Robert Ley (committed suicide a few days after being indicted) and Gustav Krupp (his health condition rendered him unfit to stand trial). Therefore, in total 22 accused stood trial, one of whom, Martin Bormann, was tried *in absentia*. *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*. Vol. I. Nuremberg, Germany, 1947, 27.

⁸¹ *Ibid.* The six indicted organizations were: the Reich Cabinet, the Leadership Corps of the Nazi Party, the SS, the Gestapo, the SA, and the General Staff and High Command of the German Armed Forces.

war crimes (Count Three), crimes against humanity (Count Four) and grand conspiracy to commit all the above (Count One).⁸²

Pursuant to the agreed division of tasks amongst the Allies, the Americans took charge of drafting Count One of the Indictment.⁸³ The allegations of conspiracy guilt were thus formulated by none other than Robert Jackson, who had already been appointed as Chief U.S. Prosecutor at the International Military Tribunal. In doing so, he and his team adopted a wide interpretation of the relevant text of Article 6 IMT Charter. Notably, Count One alleged that the defendants were guilty of ‘conspiracy for the accomplishment of Crimes against Peace; of a conspiracy to commit Crimes against Humanity... and of a conspiracy to commit War Crimes’.⁸⁴ Thus, the defendants were accused of three distinct counts of conspiracy as an inchoate crime, which strongly suggests that the reason why Jackson was so determined during the London Conference to have this term in the last sentence of Article 6 IMT Charter was because he saw its inclusion there as a statutory basis for charging the Nazi defendants with the inchoate crime of conspiracy to commit each and every category of crimes listed under the Charter.⁸⁵ Aside from this, Count One of the Indictment also alleged that, having participated in the formulation or execution of the conspiracy to commit crimes against peace, war crimes and crimes against humanity, the defendants are ‘individually responsible for their own acts and for all acts committed by any persons in the execution of such plan or conspiracy’.⁸⁶ While one may be tempted to conclude that this presents Bernays’ concept of conspiracy–complicity, such an assertion would be incorrect because Count One did not allege automatically that the accused incurred liability for the substantive offences of the conspiracy on the sole basis of being its members. Rather, it specifically referred to the individual contributions of every accused to the execution of the charged common plan or conspiracy,⁸⁷ stated in detail in a separate

⁸² *Ibid.*, 29–68.

⁸³ S. Pomorski (n 31 above), 227; H. Leventhal et al., ‘The Nuernberg Verdict’, (1947) 60 *Harvard Law Review* 857, 859.

⁸⁴ Office of United States Chief of Counsel for Prosecution of Axis Criminality. *Nazi Conspiracy and Aggression*. Vol. I (Washington, D.C.: United States Government Printing Office, 1946), 29.

⁸⁵ G. Fletcher (n 2 above), 15.

⁸⁶ *Nazi Conspiracy and Aggression* (n 84 above), 15.

⁸⁷ *Ibid.*, 29.

appendix to the Indictment.⁸⁸ Furthermore, as already explained above, when Jackson addressed the IMT in his closing arguments, he once again described the role of each defendant and emphasized that they all made ‘integral and necessary contributions to the joint undertaking, without any of which the success of the common enterprise would have been in jeopardy’.⁸⁹ It is, thus, rather clear that Bernays’ idea to hold the members of a conspiracy liable for its substantive crimes solely by virtue of having agreed to it, was not pled in the IMT Indictment.

Jackson’s formulation of the conspiracy charge, and particularly the decision to charge all defendants with the inchoate crime of conspiracy to commit the crimes listed in the IMT Charter, faced an onslaught during the judicial deliberations on Count One. The four judges were divided on the concept conspiracy and two of them called for its complete dismissal, while the other two favoured it.⁹⁰ In this deadlock situation, the solution that they crafted was to keep the conspiracy charge but limit its scope and impact on the case, which is why the part in the IMT Judgment that addresses this notion, titled ‘The Law as to the Common Plan or Conspiracy’, is just three pages long and was used to convict only eight of the 24 accused individuals.⁹¹

The IMT judges made several important findings on conspiracy law. To begin with, they found that Article 6(a) IMT Charter recognizes *as a separate crime* the formation of a conspiracy to commit crimes against peace.⁹² The Tribunal did not clearly construe the legal elements of this inchoate offence⁹³ but it clearly viewed the existence

⁸⁸ *Ibid.*, 57–68.

⁸⁹ *Nazi Conspiracy and Aggression*, Supplement A (n 64 above), 25.

⁹⁰ The French judge, Donnedieu de Vabres, and the US judge, Francis Biddle, opposed the use of this concept, while the Soviet judge, Nikitchenko, and the British judge, Lawrence, supported it. B. F. Smith (n 53 above), 121–123; S. Pomorski (n 31 above), 229–230.

⁹¹ Trial of the Major War Criminals (n 80 above), 224–226. The defendants who were found guilty under Count One were Goering, Hess, Ribbentrop, Keitel, Rosenberg, Raeder, Jodl and Neurath. *Ibid.*, 279–336.

⁹² *Ibid.*, 226.

⁹³ The judges did not explicitly define a legal framework for conspiracy but only set certain limitations to it:

Conspiracy is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party program, such as are found in the 25 points of the Nazi Party, announced in 1920, or the political affirmations expressed

of an agreement to wage an aggressive war as the key component of this construct. In particular, to establish this charge, the judges required evidence of specific meetings between Hitler and his close aides, in which the invasion of other European countries was discussed and arranged.⁹⁴ Conspiracy guilt was then reserved for those few accused who attended these meetings and who ‘with knowledge of [Hitler’s] aims, gave him their co-operation’.⁹⁵ From this point onwards, however, the Prosecution’s case under Count One of the Indictment hit a dead end. Crucially, the IMT rejected *in toto* the charges on conspiracy to commit war crimes and conspiracy to commit crimes against humanity.⁹⁶ Thus, it confirmed that while agreeing with other persons to wage a war of aggression is an international crime, agreeing with others to commit war crimes, or crimes against humanity, is not an act that in itself could be defined as criminal. In reaching this conclusion, the judges found that the additional reference to the term conspiracy in the very last sentence of Article 6 IMT Charter ‘[does] not add a new and separate crime to those already listed [but is] designed to establish the responsibility of persons participating in a common plan’.⁹⁷ They thus rejected the assertion that the latter provision offers a legal basis to also charge the defendants with conspiracy to commit war crimes and conspiracy to commit crimes against humanity. Rather, the IMT judges interpreted the problematic notion of ‘participating in the formulation or execution of a common plan or conspiracy’ strictly as a mode of liability that is separate and distinct from the concept of conspiracy.

Those who subscribe to the view that the last sentence of Article 6 IMT Charter codified Bernays’ conspiracy–complicity concept, consider this latter finding of the IMT to be a rejection of the expansive use of conspiracy and, by analogy, of the modern JCE doctrine.⁹⁸

Footnote 93 continued

in *Mein Kampf* in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan. (*Ibid.*, 225).

⁹⁴ An example is the 5 November 1937 meeting in Berlin which was attended by Hitler’s Supreme Commanders and discussed the invasion of Austria and Czechoslovakia – plans that materialized just a few months later. *Ibid.*, 865–867.

⁹⁵ *Ibid.*, 226. See also S. Pomorski (n 31 above), 233.

⁹⁶ Trial of the Major War Criminals (n 80 above), 226.

⁹⁷ *Ibid.*

⁹⁸ *Prosecutor v. Đorđević* (n 5 above), paras. 34–45. See also e.g. M. Osiel, ‘The Banality of Good: Aligning Incentives against Mass Atrocity’, (2005) 105 *Columbia Law Review* 1751, 1791–1794.

This assertion forms the crux of the problem examined in the present article and should be carefully considered here. First of all, as was already pointed out above, neither Article 6 IMT Charter, nor Count One of the Indictment, actually contained the particular construction of conspiracy that Bernays first proposed in his original memorandum.⁹⁹ Therefore, since this distinct construct was not squarely put before the IMT, it is rather inaccurate to consider that the Tribunal specifically rejected it. Be that as it may, the judges' restrictive interpretation of the scope and meaning of conspiracy could still be constructively viewed as an implicit rejection of the underlying rationale behind Bernays' conspiracy–complicity (*Pinkerton* conspiracy). To be sure, the idea that the sole act of agreeing to a criminal plan makes one responsible for 'all acts committed by any persons in the execution of such plan or conspiracy' was not endorsed in the IMT Judgment. Notably, none of the accused who were found guilty under the aggressive war conspiracy charge was also *automatically* found liable for the substantive crimes that resulted from the execution of this conspiracy. Indeed, for a conviction under Counts Two to Four of the Indictment, the judges always required evidence of the accused's active participation in the furtherance of the conspiracy, leading to the commission of the alleged substantive crime. An apposite example is the conviction of Rudolf Hess, who was charged under all four counts in the Indictment. The IMT held that Hess 'was the top man in the Nazi Party' and that as the Deputy Fuehrer he was privy to Hitler's secret plans to wage a war of aggression in Europe.¹⁰⁰ His knowing acceptance of these designs made him guilty of the charge of conspiracy under Count One. Subsequently, Hess was also convicted under Count Two for the substantive crime of waging a war of aggression (crimes against peace), but only after the judges cited evidence of his participation in the furtherance of Hitler's

⁹⁹ See text, notes 74–79 and 83–89 above.

¹⁰⁰ The evidence did not directly establish that Hess attended the several conferences where Hitler discussed with his closest henchmen the plans to wage an aggressive war, but the Tribunal held: "Hess was Hitler's closest personal confidant. Their relationship was such that Hess must have been informed of Hitler's aggressive plans when they came into existence". Trial of the Major War Criminals (n 80 above), 284.

plan.¹⁰¹ Crucially, however, Hess was found *not guilty* of Counts Two and Three of the Indictment because the IMT ‘[did] not find that the evidence sufficiently connects Hess with these crimes to sustain a finding of guilt’.¹⁰² If the Tribunal had followed Bernays’ conspiracy–complicity notion, Hess would undoubtedly have been found guilty of the war crimes and crimes against humanity that resulted from the execution of the Hitlerite grand conspiracy, since he was a member in it/he had agreed to the plan to wage an aggressive war in Europe.¹⁰³ The IMT judges did not adopt this approach and their restrictive reasoning could rightly be regarded as an implicit rejection of Bernays’ expansive formulation of conspiracy. The question thus arises: what impact does this finding have on the application of the JCE doctrine in contemporary international criminal proceedings?

IV DISTINGUISHING NUREMBERG’S CONSPIRACY FROM THE UN *AD HOC* TRIBUNALS’ JCE DOCTRINE

As pointed out at the beginning of this article, since the passing of the IMT Judgment the concept of conspiracy has been, by and large, jettisoned from the field of international criminal law, which in turn has often prompted critics of the JCE theory to draw parallels between these two notions and argue that their fate ought to be the same. The UN *ad hoc* Tribunals’ response to this line of reasoning has been to maintain that JCE and conspiracy are inherently different concepts because the former is a mode of liability and the latter is a substantive crime: a conclusion that has proven to be rather unconvincing, seeing that it has not quelled the controversy. The main difficulty with the ICTY/R’s reasoning on this point has been that it does not properly appreciate the crux of the argument that JCE opponents have put forward: namely, that Nuremberg law (*viz.* Bernays’ plan and Article 6 IMT Charter) defined conspiracy broadly

¹⁰¹ The judges held that Hess was “informed of Hitler’s aggressive plans when they came into existence [and] he took action to carry out these plans whenever action was necessary”. To mention a few examples of Hess’s participation in the execution of the aggressive war plan, the judges stated that he “signed a decree setting up the government of Sudetenland as an integral part of the Reich,” or that he “arranged with Keitel to carry out the instructions of Hitler to make the machinery of the Nazi Party available for a secret mobilization,” etc. *Ibid.*, 283, 285.

¹⁰² *Ibid.*, 284.

¹⁰³ On this point, see also G. Fletcher (n 2 above), 15, 20.

and identically to what we nowadays call JCE liability. The argument then goes, as seen most recently in the ICTY *Dorđević* case, that the IMT's ultimate rejection of such a sweeping formulation of conspiracy liability must be regarded as a rejection of the modern JCE theory.¹⁰⁴ The above research can help us to understand why the relationship between the notions of JCE and conspiracy has continued to be such a divisive issue among scholars and practitioners in this field of law. More importantly, however, it provides us with enough information to reassess the ICTY/R's conclusions on this matter.

The present divergence of opinions could be largely explained by the fact that the concept of conspiracy did not have a single, consistent legal definition in the post-World War II context. Instead, its scope and nature were defined differently from the moment of its first formulation in Bernays' original memorandum to the point of its application in the IMT Judgment. Being such a multifaceted concept, it can be rather complicated to compare it to the JCE theory and when the ICTY *Ojdanić* Appeals Chamber first did so its analysis turned out to be somewhat incomplete. To be sure, the judges were right to stress that the nature of conspiracy as a substantive crime in its own right makes it materially distinct from JCE responsibility. Indeed, the IMT Judgment did ultimately define the former concept strictly as an inchoate offence and distinguished it from the modes of liability listed in Article 6 IMT Charter.¹⁰⁵ In fact, one could even distil an evolutionary pattern in the Nuremberg law on conspiracy, where this concept was initially defined excessively broadly in Bernays' original memorandum and was then gradually refined in the above-identified subsequent stages, until it was eventually adopted by the Nuremberg Tribunal only in its form as a crime. This conclusion, however, raises another fundamental question that the *ad hoc* Tribunals have overlooked: if the sweeping use of conspiracy that was first suggested by Bernays (and was *subsequently* also introduced in US domestic criminal law in the *Pinkerton* case) was rejected by the IMT, does this also mean that the IMT Judgment practically denounced the legal framework of the modern JCE doctrine? This is where the analysis of the ICTY *Ojdanić* Appeals Chamber comes short and where the persisting controversy on this topic stems from. Those who subscribe to the view that JCE is simply a byword for conspiracy do not refer to conspiracy proper (*i.e.* the inchoate crime), but to Bernays' conspiracy–complicity construct/the US *Pinkerton*

¹⁰⁴ *Prosecutor v. Dorđević* (n 5 above), paras. 41, 43, 45.

¹⁰⁵ See text, notes 92–103 above.

theory.¹⁰⁶ If a sign of equality could, indeed, be put between these two notions, then it would truly be logical to infer, as the *Đorđević* Defence did, that the IMT's rejection of such expansive use of conspiracy responsibility should be viewed as an *ipso facto* rejection of the JCE doctrine.¹⁰⁷

In this author's view, the IMT's (implicit) refusal to apply the notion of conspiracy in the manner envisioned in Bernays' memorandum can have no bearing on the application of the JCE doctrine in modern international criminal law because, contrary to what has often been suggested in academia, Bernays'/*Pinkerton* conspiracy and JCE are still two materially distinct notions. As the above review of Bernays' memorandum has revealed, the former provided that a person who agreed with others to commit a crime could be held liable for the crime of conspiracy and for the actual product crimes of that agreement, irrespective of whether he participated in their execution or not.¹⁰⁸ This feature of Bernays' version of conspiracy was distinguished and criticised already by his contemporaries¹⁰⁹ and has, indeed, also been highlighted in the US *Pinkerton* doctrine. To cite Fichtelberg on this point:

[T]he dramatic legal consequences of conspiracy become highlighted even further in light of the *Pinkerton* rule, that asserts that an individual may be prosecuted for a crime *that he or she played no role in carrying out*, provided that it can be shown that the criminal act was part of the actual conspiracy... This means that an individual who is part of a conspiracy may be charged with all of the crimes that comprise the conspiratorial enterprise *without actually proving that the accused had anything to do with the carrying out of the actual crime itself*.¹¹⁰

This aspect marks the first crucial difference with the JCE theory which *always* requires that the accused either directly participated in the commission of the collective crime or that he otherwise contributed to

¹⁰⁶ See e.g. H. Van Der Wilt, *System Criminality* (n 3 above), 164; J. Ohlin (n 21 above), 702–703; A. Danner and J. Martinez (n 3 above), 117, 119; H. Van Der Wilt (n 23 above), 96.

¹⁰⁷ *Prosecutor v. Đorđević* (n 5 above), paras. 34–43.

¹⁰⁸ See text, notes 27–29, 36–38 above.

¹⁰⁹ See text, notes 39–45 above.

¹¹⁰ A. Fichtelberg, 'Conspiracy and International Criminal Justice', (2006) 17 *Criminal Law Forum* 149, 156 (*emphasis added*). See also e.g. E. Van Sliedregt (n 31 above), 132. This same observation was also made by Justice Jackson in his separate opinion to the *Krulewitch v. United States* (n 67 above).

the furtherance of the common design.¹¹¹ The ICTY/R has further emphasized that although the accused's contribution need not be *sine qua non* for the successful execution of the JCE, 'it should at least be a significant contribution to the crimes for which the accused is to be found responsible'.¹¹² Even the most far-reaching variant of this theory, *i.e.* JCE III liability, still requires proof that the accused *significantly* contributed to the original common design before he can be held guilty of the deviatory crimes.¹¹³ A JCE member who agrees to the common plan but subsequently does nothing to contribute to it cannot, *under any of the doctrine's variants*, be held liable for the crimes that resulted from the execution of the plan. In fact, he cannot be held liable even if it could be established that he provided some minimal assistance to the common purpose. By contrast, *Pinkerton*/Bernays' conspiracy puts forward only one objective inquiry for imputing liability for the substantive crimes of a conspiracy: *viz.* it only asks whether the accused *agreed to* the criminal.¹¹⁴ The question whether he actually contributed to/participated in the furtherance of the conspiracy through any positive acts or omissions is, as Bernays argued, legally irrelevant. This distinction between the two notions cannot be overemphasized, it marks a crucial difference between them and a major point of doctrinal criticism against Bernays'/*Pinkerton* conspiracy. To be sure, there exists some uncertainty as to whether JCE responsibility requires that the accused contributed at the *execution* stage of the common plan or whether significant contributions at the *preparatory* stage of the JCE could suffice to hold him liable under this doctrine.¹¹⁵ Nonetheless, even if the latter is true, this would not detract

¹¹¹ *Prosecutor v. Tadić* (n 6 above), para. 227; *Prosecutor v. Kvočka et al.* (n 9 above), paras. 96, 99.

¹¹² See *e.g.* *Prosecutor v. Brđanin* (n 8 above), paras. 430; *Prosecutor v. Martić*, (Appeal Judgment) IT-95-11-A (8 October 2008), para. 172; *Gatete v Prosecutor* (n 20 above), para. 96; *Ndahimana v Prosecutor*, (Appeal Judgment) ICTR-01-68-A (16 December 2013), para. 199, n. 526. See also A. Cassese (n 19 above), 163.

¹¹³ *Ngirabatware v Prosecutor* (MICT-12-29-A), Judgment, Appeals Chamber, 18 December 2014, para. 251. As explained above, the *actus reus* of the three JCE categories is the same: *i.e.* they all require that the accused contributes to the common purpose. See n 8 above.

¹¹⁴ See text, notes 29, 36–38 above.

¹¹⁵ This issue was recently raised in the ICTY *Kanyarukiga* case, where the Trial Chamber found that the Accused only participated in the planning of the destruction of a church, and no evidence that he contributed in any way to the actual attack on the church. According to the Trial Chamber, this kind of assistance was insufficient to constitute a contribution within the meaning of JCE's participation requirement. To this end, the Trial Chamber referred to a number of ICTY and ICTR appeals

from the above finding because in either case the JCE doctrine requires that the accused *significantly contributes* to the common purpose: *i.e.* mere acquiescence to it without any subsequent contribution to the preparation and/or execution of the said plan is not enough to incur JCE liability. To give an example, if the leader of state A devises a plan to invade state B, gathers his generals in a secret meeting to reveal to them this plan and to assign to them various tasks for the successful completion of the plan, each general who agrees to that plan becomes liable of conspiring to commit a crime against peace and, pursuant to Bernays' sweeping notion of conspiracy, of the substantive crimes committed in the execution of the said conspiracy.¹¹⁶ Under the JCE theory, the said general cannot be held liable of anything unless the Prosecution can prove *inter alia* that he *significantly contributed* to the common purpose through acts or omissions carried out either in preparation (*e.g.* mobilizing forces, acquiring weapons) or in execution (*e.g.* ordering and coordinating the invasion of state B) of the said plan. As August von Knieriem observed, merely agreeing/acquiescing to the plan could qualify as neither of these forms of contribution,¹¹⁷ yet it is enough to trigger the notion of conspiracy.

A second fundamental distinction between Bernays' expansive formulation of conspiracy and the JCE doctrine lies in the fact that the former is still in part an inchoate crime: *i.e.* pursuant to it, a person who joins a criminal agreement is held guilty of the very act of agreeing to commit a crime.¹¹⁸ As explained in detail above, this

Footnote 115 continued

judgment which contain language to the effect that, under the JCE doctrine, the accused's contribution need not involve the commission of a specific crime but may also take the form of any other assistance to the *execution* of the common plan. See *Prosecutor v Kanyarukiga*, (Trial Judgment) ICTR-2002-78-T (1 November 2010), para. 643. The Prosecution appealed this finding of law, submitting before the ICTR Appeals Chamber that it does not seek to invalidate the trial judgement on this point, but requested a clarification on an issue of law that is of general importance for the JCE jurisprudence. The Appeals Chamber took notice of this ground of appeal but, interestingly, refused to pronounce on the issue. *Kanyarukiga v. Prosecutor* (Appeal Judgment), ICTR 02-78-A (8 May 2012), paras. 264–268. Writing in a separate opinion to this appeal judgment, Judge Pocar observed that “the [ICTY/R] jurisprudence does not specify what form the participation of an accused in the common purpose of a joint criminal enterprise must take.” *Ibid.*, (Separate Opinion of Judge Pocar), para. 4.

¹¹⁶ See Section III, 3.1. and 3.2 above.

¹¹⁷ See text, note 42 above.

¹¹⁸ See text, notes 27–28, 36–37 above.

notion thus has a distinctly bifurcated nature since it can be used to hold a person who joins a criminal agreement: (i) guilty of the crime of agreeing to the commit a crime (an idea that is largely foreign to Continental European law);¹¹⁹ and (ii) liable for the subsequent commission of any substantive crimes by his confederates in pursuance of that agreement. The JCE doctrine, on the other hand, lacks the entire first limb of Bernays’/Pinkerton conspiracy: *i.e.* one who agrees to a JCE aiming at, or involving, the commission of crimes is not guilty of anything.¹²⁰ In other words, joining/becoming a member of a JCE is not an act that this doctrine defines as a crime in its own right.

In view of the above differences, it becomes quite evident that if Bernays’ conspiracy and the JCE doctrine can be said to share any common feature, it is that both constructs deal with the criminal responsibility of persons sharing a common plan to commit a crime: a similarity that, on its own, makes Bernays’ legal notion as akin to joint criminal enterprise responsibility, as it is to any other theory of co-perpetration. Be that as it may, this author is convinced that the two major differences discussed above sufficiently show that the JCE doctrine is materially different from Bernays’/Pinkerton conspiracy. Therefore, the argument that the latter was ultimately denounced by the Nuremberg Tribunal cannot be used to challenge the legal basis for applying JCE liability in modern international criminal proceedings. In fact, if anything, the IMT Judgment can be cited as early jurisprudential support of the joint criminal enterprise doctrine since it first nuanced the conspiracy notion from what the judges called ‘participating in a common plan’ liability.¹²¹ This particular finding of the Nuremberg Tribunal was subsequently elaborated in the trials of ‘lesser’ Nazi war criminals, conducted under the authority of Control Council Law No. 10. Specifically, in the first three cases brought before the US Military Tribunals in Nuremberg – *i.e.* the *Medical*, *Justice* and *Pohl* cases – the Prosecution charged the accused

¹¹⁹ See *e.g.* G. Fletcher (n 2 above), 9. See also n 31 above. It should be noted, however, that civil law jurisdictions have gradually also come to endorse in their legislation notions that in some aspects resemble the common law concept of conspiracy. For a detailed research on German, French, Spanish and Italian legislation and case law on such similar legal constructs, see J. Okoth, *The Crime of Conspiracy in International Criminal Law* (Dordrecht: Springer, 2014), 46–73.

¹²⁰ Such a person becomes responsible *only* when the JCE is executed and *only* provided that he contributed to the common purpose. *Prosecutor v. Milutinović et al.* (Decision on Motion Challenging Jurisdiction) (n 14 above), para. 23.

¹²¹ See text, note 97 above.

with a count, titled ‘The Common Design or Conspiracy’, which in each of these cases read:

[A]ll of the defendants herein, acting pursuant to a common design, unlawfully, willfully, and knowingly did conspire and agree together and with each other and with divers other persons, to commit war crimes and crimes against humanity, as defined in Control Council Law No. 10, Article II.¹²²

And then continued on to say that all the accused were ‘individually responsible for their own acts and for all acts performed by any person or persons in execution of the said common design, conspiracy, plans, and enterprises’.¹²³ The judges reiterated the findings of the IMT and held that:

It is the ruling of this Tribunal that neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crime against humanity as a separate substantive crime; therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense.

Count I of the indictment, *in addition to the separate charge of conspiracy*, also alleges unlawful *participation in the formulation and execution of plans* to commit war crimes and crimes against humanity which actually involved the commission of such crimes. We, therefore, cannot properly strike the whole of Count I from the indictment, but insofar as Count I charges the commission of the alleged crime of conspiracy as a separate substantive offense, distinct from any war crime or crime against humanity, the Tribunal will disregard that charge.¹²⁴

This ruling in the *Medical* case clearly confirms the earlier finding of the IMT that the concept of conspiracy under international criminal law is: (i) strictly a substantive crime and only in relation to crimes against peace; and (ii) different from the notion of ‘common design liability’, which is a separate form of liability applicable in cases of ‘participation in the formulation and execution of plans’ to commit international crimes and which nowadays is cited as the jurispru-

¹²² Military Tribunal I, *United States of America v. Karl Brandt et al.* (“The *Medical* Case”), Case No. 1 (9 December 1946–19 August 1947), in: *Trials of War Criminals* (n 41 above), Vol. I (1949), 10; Military Tribunal III, *United States of America v. Josef Altstötter et al.* (“The *Justice* Case”), Case No. 3 (5 March 1947–4 December 1947) in: *ibid.*, Vol. III (1951), 17; Military Tribunal II, *United States of America v. Oswald Pohl et al.* (“The *Pohl* Case), Case No. 4 (8 April 1947–3 November 1947) in: *ibid.*, Vol. V (1950), 201.

¹²³ *Ibid.*

¹²⁴ The *Medical* Case (n 122 above), 122.

dential ancestor of the JCE doctrine.¹²⁵ This line of reasoning was also echoed in legal scholarship during the first years after the Nuremberg-era trials.¹²⁶

V CONCLUSION

If the post-World War II legislation and case law on the notion of conspiracy can be described in a few words, ‘controversial’, ‘confusing’ and ‘complex’ would likely top the list. This article has shown that at different times, different actors offered different interpretations of the meaning and nature of this legal concept. As a result of this chaotic legacy, nowadays, both those who contend that conspiracy is solely a substantive crime and those who argue that it is also a form of criminal participation can review the Nuremberg-era documents that evince the birth of this concept under international criminal law and find support for their respective view. Indeed, this kind of reviews have permeated the present-day debates on the relationship between the notion of conspiracy and the JCE doctrine. One argument that has continued to resonate among scholars and practitioners, and that has been left largely unaddressed by the ICTY/R, is that when the International Military Tribunal ultimately restricted the scope of conspiracy, it in fact rejected the excessive use of this notion originally envisioned in Bernays’ memorandum and subsequently propounded in Article 6 IMT Charter. By equating Bernays’ conspiracy to JCE, it has thus been argued that the Judg-

¹²⁵ *Prosecutor v. Brđanin* (n 8 above), paras. 393, 399–404; *Rwamakuba v. Prosecutor*, (Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide) ICTR-98-44-AR72.4 (22 October 2004), paras. 15–23; *Prosecutor v. Ieng Sary, Ieng Thirith and Khieu Samphan*, (Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)) 002/19-09-2007-ECCC/OCIJ (20 May 2010), paras. 65–68.

¹²⁶ M. Koessler, ‘American War Crimes Trials in Europe’, (1950–1951) 39 *The Georgetown Law Journal* 18, 82. Koessler, who was an attorney of the US Department of the Army in the war crimes trials in occupied Germany, wrote that: ‘Concerning forms of participation in a crime, charges in the Dachau trials were at least on their face based upon the general principles regarding kinds of complicity recognized among all civilized nations rather than on anything which is particular to the Anglo-American systems of law, as for instance, charged based merely on an agreement to commit a crime, without any materialization thereof, at least in the form of an attempt (conspiracy). No exception from this general approach were the so-called common design charges which must not be confused with a conspiracy charge even though they were often loosely referred to by the last mentioned term.’

ment of the Nuremberg Tribunal practically denounces the underlying rationale of the latter doctrine: a contention that detracts from the customary basis for applying it in modern international criminal law.

This article has sought to establish a comprehensive account of the legislative origins and development of the conspiracy notion in post-World War II law, in order to understand its actual legal meaning, examine its refinement and use in the Nuremberg process and, ultimately, address the above-stated contention. In doing so, the research has distinguished three evolutionary stages in the construction of conspiracy under international criminal law: (i) Bernays' memorandum and the US interdepartmental debates on it; (ii) the London Conference and the preparatory works of Article 6 IMT Charter; and (iii) the IMT Judgment (and the subsequent Nazi trials). It was shown that this notion was defined excessively broadly in Bernays' prosecutorial plan which formulated it both as a substantive crime and as a mode of liability. Almost immediately, however, this two-faced construct was criticised by some of Bernays' contemporaries, and most notably by Herbert Wechsler, who recognized that it breached the basic rules of accomplice liability. This initiated a process of review which sought to bring Bernays' proposal in better conformity with the general principles of law, recognised by all civilised nations. The crucial differences between conspiracy and the underlying principles of the contemporary JCE concept were highlighted already in those days and it is astonishing that 70 years later the relationship between the two notions continues to cause confusion. Importantly, by the time conspiracy liability reached the Nuremberg Tribunal, it had undergone a gradual process of refinement which narrowed down Bernays' original vision of the scope and nature of this concept. Contrary to what has often been said in academia, the above research has argued that it is unlikely that Article 6 IMT Charter at all propounded the bifurcated nature of conspiracy from Bernays' memorandum. In any event, the IMT Judgment, and later the Nazi trials conducted under Control Council Law No. 10, ultimately defined this concept strictly as an inchoate crime and strongly distinguished it from the distinct mode of liability they referred to as participation in the furtherance of a common plan/design. Inasmuch as this presents a final determination on the legal scope/nature of conspiracy under international criminal law, the ICTY *Ojdanić* Appeals Chamber rightly concluded that conspiracy and JCE are two inherently distinct

constructs and the exclusion of the former from modern international criminal law could have no bearing on basis for applying the latter.

The above conclusion, however, does not address the distinct and more subtle question of whether the IMT's narrow interpretation of conspiracy, and *ipso facto* rejection of Bernays' wide formulation of this notion, also constitutes a rejection of the modern-day JCE theory. This article has submitted that such an assertion lacks in merit because even if one compares Bernays' notion of conspiracy–complicity – known in US criminal law as *Pinkerton* conspiracy – to the doctrine of joint criminal enterprise, it is still impossible to put a sign of equality between them. Crucially, it was first explained that, unlike Bernays' conspiracy concept, JCE is never an independent crime: *i.e.* a JCE member who shares with other individuals a yet-unexecuted common plan, purpose or design to commit a crime is not guilty of anything. Perhaps even more fundamentally, JCE could never be used, under any of its three variants, to impute liability to an accused who solely agreed to a criminal purpose without contributing in any way to its furtherance. This marks an important difference from Bernays'/*Pinkerton* conspiracy which allows holding the accused responsible for the substantive crimes of the conspiracy on the sole basis that he agreed to them and irrespective of whether he participated, through any act or omission, in their execution. It is, thus, concluded that the IMT's implicit rejection of the sweeping use of conspiracy that was originally defined in Bernays' plan, could not be regarded as a rejection of the underlying rationale of the JCE theory because these two constructs are materially distinct.

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