

Treasonable conspiracies at Paris, Moscow and Delhi

The legal hinterland of the Tokyo Tribunal

KIRSTEN SELLARS

It is widely held that the idea of transplanting ‘conspiracy’ from domestic law into international criminal law was first conceived by an American working in the US War Department in the final year of the Second World War. It is true that in September 1944, Lt-Colonel Murray Bernays began to construct the framework for a case against the Nazi Party’s top echelons, encompassing the orchestration of crimes against both Allied nationals and Axis civilians. It is also true that Bernays, inspired by a Californian bootlegging case, *Marino v. United States*, found a unifying concept in the common law doctrine of criminal conspiracy. He suggested that the proposed tribunal should try, first, the Nazi leaders and, second, Nazi Party organisations for participating in a vast conspiracy to ‘commit murder, terrorism and the destruction of peaceful populations’.¹ Even though it required a leap of the imagination to equate Californian bootlegging with German extermination policies, and even though jurists would later criticise Bernays’ approach for trivialising Nazism by equating it with gangsterism, the idea was transported to the London Conference and incorporated into the Nuremberg Charter.

Yet this account is not the whole truth. It is merely a part – and an atypical part at that – of a much bigger story that had begun a full quarter of a century earlier. Discussion about internationalised modes of liability had first arisen during the closing phase of the First World War, when French lawyers had grappled with the problem of prosecuting Wilhelm II and his circle; and it developed further during the

¹ Bernays (15 September 1944), reprinted in B.F. Smith, *The American road to Nuremberg: the documentary record 1944–1945* (Stanford: Hoover Institution Press, 1982), p. 36.

Second World War, when Soviet lawyers contemplated similar actions with respect to Hitler and his ministers. Both groups nursed the idea of applying the concept of complicity to international crimes, and drew their ideas from domestic security law (not the revenue law that had inspired Bernays): the French borrowing concepts from the 1918 treason trials of the 'Bonnet Rouge gang' and Louis Malvy, and the Soviets from the Moscow trials of the 'old Bolsheviks' in 1936–1938. In their view, international criminal law was simply a projection of criminal law into the international arena, with the attendant theories of liability being transmitted from one to another. This civil law approach made more sense than the Americans' conceptual leap from *Marino* to the Nuremberg Charter, and more accurately reflected the climate of realism that gave rise to international criminal law.

Why did they look to security law in particular? Domestic security law and international criminal law both arose out of a singular preoccupation with security – the former with the punishment of offences against the state, and the latter with the punishment of offences against the international order. For this reason, in the formative years of international criminal law, the prosecuting powers almost instinctively created a hierarchy of international crimes, with the crime of aggression at the top (because this crime most directly threatened the global order), and the crimes purportedly devolving from aggression – namely, war crimes and crimes against humanity – in a supporting role. In addition, domestic security law offered enticing models for potential international modes of liability, such as complicity and conspiracy, which enabled prosecutors to tie civilian and military leaders into crimes planned by groups of people or carried out by subordinates. What can be seen, then, is the transposition of the law governing crimes against the security of the state – *treason* – into international criminal law, and the emergence of the idea that international crimes represented *international treason* against the global order.

Trying the ex-Kaiser

The threads of domestic and international security were first drawn together in the closing months of the First World War. In November 1918, David Lloyd George and Georges Clemenceau publicly launched the idea of trying the just-abdicated Kaiser for aggression and war crimes. Thus, a few weeks after the Armistice on 11 November, Lloyd George, electioneering for his coalition government, declared,

The Kaiser must be prosecuted. The war was a crime. Who doubts that? It was a frightful, a terrible crime. It was a crime in the way in which it was planned, in the deliberate wantonness with which it was provoked. It was also a crime in its action . . . Surely the war was a crime!²

This was a radical departure from the more traditional approach to the conduct of war embodied in the Geneva and Hague Conventions, and contained within it the innovative idea that embarking upon an aggressive war was a crime, for which a head of state could be held personally responsible. And yet this innovation was advanced entirely in the service of orthodoxy: the underwriting of the new post-war (and Prussian-free) *status quo* in Europe. As the author of a British Foreign Office telegram stated: ‘justice requires that the Kaiser and his principal accomplices who designed and caused the War with its malignant purpose or who were responsible for the incalculable sufferings inflicted upon the human race during the war should be brought to trial and punished for their crimes.’³ Moreover, ‘it will be impossible to bring to justice lesser criminals . . . if the arch-criminal, who for thirty years has proclaimed himself the sole arbiter of German policy, and has been so in fact, escapes condign punishment’.⁴ The final and most important reason for prosecution derived from the entente’s concern about the future security of Europe: ‘the certainty of inevitable personal punishment for crimes against humanity and international right shall be a very important security against future attempts to make war wrongfully or to violate international law, and is a necessary stage in the development of the authority of a League of Nations.’⁵

When coming to this decision, the entente leaders were furnished with one of the first officially sanctioned legal reports making the case for the ex-Kaiser’s indictment: Ferdinand Larnaude and Albert Geouffre de Lapradelle’s *Examen de la responsabilité pénale de l’empereur Guillaume II*, produced under the auspices of the French War Ministry in November 1918. In it, the authors argued that Wilhelm II, who had exercised constitutional power until his abdication that same month, was criminally responsible for crimes committed over the course of the war. But under what jurisdiction could he be prosecuted? Believing domestic avenues to be closed to them, they turned to the international sphere. It was apparent to them that the old approaches to crimes of war – which

² ‘Coalition policy defined, Mr. Lloyd George’s pledges’, *The Times* (6 December 1918), 9.

³ Foreign Office to Washington and New York (2 December 1918): FO 608/247, The National Archives, United Kingdom (TNA).

⁴ *Ibid.* ⁵ *Ibid.*

had emerged in response to the old conception of war ‘as simply a means of political coercion’⁶ – were no longer adequate. New legal instruments had to be created, and in the process, they declared, ‘A new international law is born.’⁷

New law to meet changed circumstances

Of the proposed charges, the greatest departure from previous practice was the attempt to hold the ex-Kaiser responsible for embarking on a ‘premeditated and unjust war’. Here, Larnaude and de Lapradelle made an intriguing link between existing domestic law and the proposed international law:

Given that *the violation of the public peace of a state gives rise to the gravest of penalties*, it would not be understandable that an attack on the peace of the world might go unpunished. The corporeal responsibility of the emperor, if one might call it that, presents itself first and foremost, and we must seize upon it – as we emerge from war – lest we should fail to bring about from this new international law its most necessary consequences.⁸

This equating of ‘the violation of the public peace of a state’ with ‘an attack on the peace of the world’ is one of the first clear attempts to connect treason against the state with treason against the global order. At the time, the authors’ reference to ‘public peace’ would have immediately called to mind a series of French court cases dealing with allegedly treasonable conspiracies with Germany during the war. These trials, instigated by Clemenceau and Léon Daudet, the royalist editor of *Action Française*, against leading Radical-Socialist politicians and the ‘defeatist’ anti-militarist movement, had already produced convictions. Paul Bolo and Émile-Joseph Duval, who had handled German funds, had been court-martialled and shot in mid-1918 for subsidising anti-war propaganda within France. And three people involved with the anarchist paper *Le Bonnet Rouge* had been sentenced to hard labour for complicity in treasonable attempts to undermine the war effort.

Larnaude and de Lapradelle would have been particularly interested in the trial of Louis Malvy, the once-powerful Radical-Socialist Minister of

⁶ F. Larnaude and A. de Lapradelle, *Examen de la responsabilité pénale de l'empereur Guillaume II* (Paris: Ministère de la Guerre, November 1918), p. 12: data.decalog.net/enap1/liens/fonds/F8G90.pdf. Thanks to Julien Anglade for translating the report.

⁷ *Ibid.* ⁸ *Ibid.*, pp. 16–17. Emphasis added.

the Interior. After being publicly denounced, first by Clemenceau (who accused him of failing to stop the spread of ‘abominable’ left-wing propaganda among the troops⁹) and then by Daudet (who accused him of high treason and complicity in high treason), Malvy demanded that his parliamentary immunity be lifted so he might stand trial before his political peers – the Senate sitting as a high court – rather than a court martial.

At the Senate hearing, which began on 16 July 1918, the public prosecutor presented evidence that focused less on Malvy’s personal activities and more on the Interior Ministry’s financial support for *Le Bonnet Rouge*, his subordinates’ refusal to arrest leading militants and pacifists, and their obstruction of others’ efforts to curb their activities. All this, the prosecution claimed, had undermined public morale and army discipline, and had led to the mutinies of summer 1917. In the event, Malvy was convicted not of treason, but for actions that ‘ignored, violated and betrayed his duty’ as minister, amounting to the crime of ‘forfeiture’ – defined in Article 166 of the Penal Code as being ‘any crime committed by a public functionary in the exercise of his functions’.¹⁰ As a result, he was banished from France for five years, and lost his seat in the Chamber of Deputies. This sentence raised several intriguing possibilities that were later explored in international criminal law: first, that an official could be stripped of his immunity and held personally responsible for crimes committed in the name of the state; and second, that he could be found guilty not only for his own actions but also for those of subordinates whom he had failed to control.

Complicity in treason

Many of the treason charges brought at these trials alleged *complicity* between the defendants or between the defendants and the Germans, and this caught the attention of Larnaude and de Lapradelle, who contemplated charging the ex-Kaiser for complicity in plans to embark on war and orchestrate war crimes. They wrote,

Criminologists might ask themselves if complicity – which . . . must entail *an abuse of power* constituting an incitement to commit a *special act* – can still be applied in regard to the German emperor who, manifestly, was only giving a general order. To which they will no doubt reply that, for

⁹ ‘German propaganda in France’, *The Times* (24 July 1917), 6.

¹⁰ ‘Paris relieved by Malvy verdict’, *New York Times* (8 August 1918), 8.

complicity, the necessary and sufficient condition is the *relation between cause and effect* between the accomplice and the principal perpetrator, a relation that clearly exists between the order or directives emanating from the German emperor and the charges made against such-and-such officer or soldier within his troops: the leader of a band of brigands is their accomplice as soon as he gives the general order to commit theft, murders, set light or pillage, even if he hasn't specifically ordered this or that murder or arson.¹¹

All the same, they admitted that there were difficulties in bringing complicity charges against groups of people for acts committed in the course of the war. Even if the entente powers managed to capture both the ex-Kaiser who had given the general orders and the military personnel who had carried them out, this might prove to be counterproductive, because 'we would only manage, and not without difficulty, to restrict the scope of [Wilhelm II's] personal responsibility by limiting it to a few specific cases, where in fact these cases are countless, and make him appear to be an accessory when in fact he holds a principal role'.¹²

There was one final lesson to be learned from Louis Malvy's trial. His case had been heard by the Senate, convened as a high court under the terms of Article 12 of the Constitutional Act, 16 July 1875, which states: 'Le Sénat peut être constitué en cour de justice par un décret du président de la République, rendu en conseil des ministres, pour juger toute personne prévenue d'attentat contre la sûreté de l'État.'¹³ In other words, this was a special court constituted to deal with special 'political' crimes – those committed against the security of the state. Questions were raised during the Malvy proceedings about its status and jurisdiction. Did the Senate, convened as a court, have the status of a sovereign court? And if so, was it able to dispense justice without adhering strictly to the Penal Code? The answer was affirmative, because it deployed what *The Times* called the 'elastic procedure of French justice' by choosing not to deliver a verdict on Léon Daudet's initial charges of treason.¹⁴ Instead, a verdict was delivered on the public prosecutor's charge (submitted after the trial had begun) of 'culpable negligence and criminal disregard of the duties of the Minister of the Interior'.¹⁵ The wide jurisdictional latitude that the Senate granted itself did not go unnoticed. Larnaude and de Lapradelle, while contemplating a special international court to consider

¹¹ Larnaude and de Lapradelle, *Examen*, p. 9. Original emphases. ¹² *Ibid.*, p.10.

¹³ Constitution de la III^e République.

¹⁴ 'The Malvy verdict', *The Times* (8 August 1918), 5.

¹⁵ 'Malvy charges modified', *New York Times* (18 July 1918), 9.

special ‘political’ international crimes, drew the parallels between their enterprise and the handling of the Malvy ‘affair’:

As to the sentence, we have to be sure that the rule of *nulla poena sine lege* only completely applies to internal criminal law as applicable to a common law crime. This rule bends to adapt itself to exceptional circumstances in public law, for instance, in its application to political issues. So it is that in France, in a recent affair, the Court of Justice was able to proclaim its sovereignty and draw from this sovereignty the discretionary powers to determine and choose the applicable sentence. This example is not unique . . . Thus, if the various High Courts hold this right in the instance of important political issues, surely all the more reason for it to be recognised at an international level in the prosecution of important international trials.¹⁶

A few months after Malvy’s exile, Clemenceau’s and Daudet’s campaign against ‘defeatism’ netted the biggest catch of all. On 29 October 1918, the French Senate went through the preliminaries of charging the former Radical Party Prime Minister Joseph Caillaux, along with another Deputy, Louis Loustalot, and his alleged accomplice, Paul Comby, with having conspired against the security of France. While these dramatic events, which eventually led to the prosecution and conviction of a former head of government, were taking place in Paris, Larnaude and de Lapradelle grappled with the unsettling implications of going even further and placing a *foreign* head of state on trial before an *international* court. This is perhaps why the two authors went only halfway to making the case for stripping him of his sovereign rights. On the one hand, they reasoned, the German emperor enjoyed the international rights of legal immunity, honours and precedence. On the other, he bore international responsibilities – ‘*Ubi emolumentum, ibi onus esse debet.*’¹⁷ They did not proceed any further with this argument, instead leaving the reader to draw the logical conclusion: that in renouncing his responsibilities he thereby lost his privileges and could thus be compelled to account for himself in a court of law.

The creation of Article 227

When the entente powers convened at the Paris Peace Conference in January 1919 to deliberate over the peace terms with Germany, the members of the Council of Four – David Lloyd George, Georges

¹⁶ Larnaude and de Lapradelle, *Examen*, pp. 22–23. ¹⁷ *Ibid.*, p. 17.

Clemenceau, Woodrow Wilson and Vittorio Orlando – quarrelled over how to deal with the ex-Kaiser. Lloyd George and Clemenceau saw his disposal through the mechanism of a trial as being an essential component of the post-war settlement, while Wilson feared a trial would ignite a revolution in Germany (thereby necessitating his nation's further engagement in Europe) as well as establishing an unwelcome international precedent. Yet both desired European stability and a strictly ad hoc trial, and they were able to agree a statement on penalties, which provided the basis for Article 227 of the Versailles Treaty. This announced the formation of a 'special tribunal' to try the ex-Kaiser once the Netherlands had surrendered him for 'a supreme offence against international morality and the sanctity of treaties'.¹⁸

This Article summoned a gaseous cloud of morality and politics – 'international morality', 'international policy' and 'international undertakings'¹⁹ – while carefully avoiding any reference to 'international law'. The modes of liability that might have linked the ex-Kaiser to the alleged crimes were of course left to the discretion of the prosecutors, while his punishment was left to the discretion of the judges. The legal basis on which they were expected to adjudicate remained an open question, for as the American Secretary of State Robert Lansing observed, 'Manifestly the tribunal . . . is not a court of legal justice, but rather an instrument of political power which is to consider the case from the viewpoint of high policy and to fix the penalty accordingly.'²⁰ But although this 'special tribunal' was never convened, the French trials of former politicians and their associates for treason at the end of the war had already proved what Lansing had tried to deny: that tribunals could be both courts of legal justice *and* instruments of political power. It was this beguiling combination that most attracted jurists when, in the depths of the Second World War, they returned to the idea of trying enemy leaders for international crimes.

¹⁸ 'Outline suggested with regard to responsibility and punishment', signed by Clemenceau, Lloyd George, Orlando, Wilson and Saionji, undated, with cover note, Hankey to Dutasta (10 April 1919): FO 608/247, TNA. Emphasis added.

¹⁹ Treaty of Peace between the Allied and Associated Powers and Germany (signed 28 June 1919, entered into force 10 January 1920), *Consolidated Treaty Series*, C. Parry (ed.) (Dobbs Ferry: Oceana Publications, 1969–1981), vol. 225, p. 285.

²⁰ R. Lansing, 'Some legal questions of the Peace Conference', *American Journal of International Law* 13 (1919), 647.

The renewed search for security

When the 'Big Three' Allied powers – the United States, Soviet Union and Britain – began to develop policies for dealing with the German and Japanese leaders after the conflict was over, their approach, as always, was governed by an overriding concern for security. This was most clearly illustrated by the Soviets, who during the war years gravitated towards the idea of a trial as a means of removing future threats to the Soviet Union. In the process, they proposed German criminal responsibility for aggression and war crimes, and also suggested the modes of liability through which they might be prosecuted.

The Soviets had first begun to consider the protections that international criminal law might afford them when they had been compelled to respond to the growing threats posed by Germany and Japan in the 1930s. Evgenii Pashukanis, director of the Institute of Soviet Construction and Law, along with his many followers, had hitherto advanced a 'negationist' approach to law. But Pashukanis' influence was waning, and, after his disgrace and execution in 1937, Andrei Vyshinskii (one of the architects of his downfall) assumed Pashukanis' post at the Institute. Vyshinskii was highly mindful of external security risks to the Soviet Union, and moved towards the idea of convening an international tribunal to try leaders of hostile powers, modelled on the 1936–1938 Moscow trials at which he had prosecuted Zinov'iev, Kamenev, Bukharin and scores of other 'old Bolsheviks' for treasonable conspiracies against the Soviet state. The modes of liability used at the Moscow trials for dealing with 'counter-revolutionary' crimes would later be transplanted into Nuremberg and Tokyo law to deal with German and Japanese 'crimes against peace'.

In July 1938, Vyshinskii set out his vision for the future of Soviet legal doctrine – both domestic and international – in a *Pravda* article entitled, 'About tasks of the Soviet socialist law science'.²¹ He stated that his aim was to eliminate 'the consequences of the wrecking activities that were carried out by the despicable Trotskyite-Bukharin gang' in the field of the Soviet legal science.²² This gang, Vyshinskii wrote, included Evgenii Pashukanis and Nikolai Krylenko, whose efforts 'were directed to prove

²¹ A.I. Vyshinskii, 'O zadachakh nauki sovetskogo sotsialisticheskogo prava', *Pravda* (26 July 1938), 3. Thanks to Valentyna Polunina of the 'Asia-Europe' Cluster of Excellence, Heidelberg University, for her translation of, and assistance with, Vyshinskii's *Pravda* article and Trainin's book on complicity.

²² *Ibid.*

that Soviet theory of law cannot and should not exist', and who was therefore responsible for 'the most shameless falsification of Marxism'.²³ He continued, 'Wreckers ranted that our law is not only moribund but also bourgeois. They implanted an idea of bourgeois law as the culminating point in the development of law.'²⁴

This, he maintained, was wholly wrong. Whereas bourgeois legality brought stagnation and conservatism, socialist legality was 'a creative force promoting social development, helping toilers in their advance forward'.²⁵ So law not only continued to play an essential role in Soviet society, but it assumed its most developed form within it:

[The] law gets its solid ground and its genuine development not in the heyday of bourgeois-capitalist relations but in the heyday of socialist relations. The era of socialism is the time of the greatest development of law and the greatest development of the rule of law; it is the triumph of law and legality.²⁶

This ascendancy of socialist law brought with it many benefits, including the legal instruments necessary for rooting out internal threats to Soviet society. The doctrine of complicity, in particular, had proved to be an extremely useful legal tool in the struggle against the alleged Trotskii-led conspiracies. Vyshinskii argued that this doctrine was neither, as some argued, merely a combination of criminal activities nor, as others claimed, a legal theory of only academic interest. Rather, he wrote,

[It] plays a huge role in our circumstances, when the enemies of the Soviet people, vile agents of foreign intelligence services, are resorting to conspiratorial activities, organising the stinking criminal anti-Soviet underground. The vulgar understanding of complicity as a combination of criminal activities in the narrow sense of the term has outlived its time. Complicity has assumed a new and extremely urgent character as a form of political struggle.²⁷

Vyshinskii stated that the forces hostile to socialism did not attempt to carry out their criminal activities in isolation, but instead tried to leverage their criminal efforts by joining forces with others through conspiracies. By the same token, the forces defending socialism did not just rely on the criminal law applicable to individuals, but were developing tools for

²³ Ibid. ²⁴ Ibid.

²⁵ S. Kucherov, *The organs of Soviet administration of justice: their history and operation*, quoting from A.I. Vyshinskii, 'Revolutionary legality in the present period of socialist construction' (1932), p. 661.

²⁶ Vyshinskii, 'O zadachakh', 3. ²⁷ Ibid., 4.

dealing with collective criminal enterprises – tools that could be applied in a practising lawyer's everyday work. So the doctrine was not just of theoretical interest but also of practical importance, 'arming practicing lawyers with a theoretical weapon needed in their judicial, prosecutorial and investigative activities'.²⁸

Addressing the problem of *external* threats to the Soviet Union, Vyshinskii encouraged the development of a Soviet doctrine of international law, which should proceed from the 'leading role of the Leninist-Stalinist foreign policy in the struggle for peace, for collective security . . . against the forces of reactionism, fascism and war'.²⁹ He argued that particular attention should be paid to the problem of international aggression, a definition of which, Vyshinskii reminded readers, had first been advanced by 'Soviet diplomacy'.³⁰ He also called for the formation of institutions to further the international struggle 'against terrorism, against international provocations, and against attempts to adapt international law to the needs and interests of fascist aggressors'.³¹

This approach, broadcast through *Pravda* from Vyshinskii's position as Procurator General, had been constructed over the previous five to six years. Originally a Menshevik, Vyshinskii spent the post-revolutionary period working his way up the Soviet judicial hierarchy, never wholly endorsing the negationist approach to the law espoused by other Soviet jurists during the upheavals of the late 1920s and early 1930s. Instead, he kept his powder dry, anticipating that sooner or later the regime would look to the law once again when it wished to consolidate its gains. It was not until 1932–1933, when the shockwaves caused by forced collectivisation had begun to diminish, that his moment finally arrived. By this time, Stalin was keen to limit the upheavals in the countryside and silence the many critics of his collectivisation policies. He was therefore particularly receptive to Vyshinskii's suggestions that the law – long derided by colleagues as the residue of bourgeois society – could play an important role as an instrument of social control. For the first time in years, the law mattered, and Vyshinskii set himself the task of using it to first sideline and then destroy more powerful figures on the judicial scene (including Evgenii Pashukanis and Nikolai Krylenko), thereby positioning himself as Stalin's oracle on the Soviet legal system.

From 1934 onwards, having softened the ground with a few speeches and articles about socialist legality, Stalin and Vyshinskii turned to the courts to destroy the political opposition. At the time, the 'old Bolshevik'

²⁸ Ibid. ²⁹ Ibid. ³⁰ Ibid. ³¹ Ibid.

critics of Stalin's regime had much to object to. As well as the chaos of the collectivisation period, the Communist Party's leadership was now openly sloughing off its Leninist legacy by entering alliances with capitalist powers, advocating 'socialism in one country', abandoning the bread-card system, accepting post-Stakhanov wage differentials, and resurrecting campaigns against abortion and divorce. But the pretext for the regime's judicial assault on the opposition ostensibly had nothing to do with these issues: instead it was the murder of Sergei Kirov, the Leningrad politician (who, had he lived, might have replaced Stalin), in December 1934, that opened the floodgates for the full-scale purge of all Stalin's foes, real or imagined.

The three Moscow 'purge' trials – conducted in 1936, 1937 and 1938 respectively – were by no means the first to convict people for political crimes against the Soviet state, but they were distinct from earlier trials in a number of ways. First, the regime used these trials to target people who were (or once had been) at the very pinnacle of the Party hierarchy; second, precisely *because* they were such senior figures it could be claimed that they posed uniquely grave threats to the Soviet state; and third, the regime broadcast the proceedings and verdicts widely in order to justify further repression and deter future dissent.

The first trial, of the 'Trotskyite-Zinovievite Terrorist Centre', opened on 19 August 1936 to try sixteen oppositionists. Two of the defendants, Grigorii Zinov'iev and Lev Kamenev, were former Politburo members who, after forming the 'New Opposition', had been expelled from the Party in 1927. Allegedly inspired by the exiled Leon Trotskii, all were accused of conspiring to commit treason and terrorism – namely, plotting to assassinate Stalin and his ministers (Kirov purportedly being the first) in order to seize power for themselves. The second, more ambitious and wide-ranging trial, of the 'Anti-Soviet Trotsky Centre', opened on 23 January 1937 to try seventeen recanted oppositionists, including economic leaders such as Y.L. Pyatakov and Y.A. Livshitz, Commissar of heavy industry and Deputy Commissar of the railways. As well as being charged with conspiring to commit treason and terrorism, they were also accused of espionage, wrecking and diversion, with the aim of restoring capitalism in the Soviet Union. The final, most expansive trial of all, of the 'Anti-Soviet Bloc of Rights and Trotskyites', opened on 2 March 1938 to try twenty-one defendants, including surviving critics from the 'Right Opposition', such as Lenin's deputy Aleksei Rykov and *Pravda* editor Nikolai Bukharin. At this last trial, all were tried for conspiring to commit treason, terrorism, espionage, wrecking and diversion, as well as for

undermining the Soviet Union's military power and prompting foreign states – namely, Germany, Japan, Britain and Poland – to attack it.³²

The transcripts of the proceedings, translated into a number of foreign languages, chronicle how the defendants confessed to extraordinary and outrageous crimes, denounced former colleagues and fellow defendants, and begged for hard labour instead of the bullet. But behind these stormy spectacles, methodical, even pedantic, didactic forces were at work. The educational function of the trial was never in doubt, for as the jurist Max Radin pointed out at the time, almost all of the defendants had admitted their guilt at the outset so there was really no need to go through a trial process simply to establish their guilt all over again.³³

At each successive trial, the prosecution, led by Vyshinskii, alleged ever-widening circles of conspiracy directed against the Soviet Union, which demanded a response from the regime. There was, of course, some truth in this – Germany and Japan were indeed conspiring against the Soviet Union – but this truth was refracted through the prism of the trials, which were designed to eviscerate domestic opponents as well. So it was alleged at the first trial that Leon Trotskii (by then in exile) and a handful of the defendants had contacts with Gestapo agents; by the second, that more defendants had taken instructions from the German and Japanese intelligence agencies; and by the third, that almost all of the defendants were working hand in glove with the German, Japanese, Polish and British intelligence services.

The doctrine of complicity played a central role at each trial. At the first two, the prosecution relied on the 1926 Russian Criminal Code (amended in 1930). Article 17 outlined the basic concept of complicity, which identified three types of participant: 'instigators', 'accomplices' and 'perpetrators':

Measures of social protection of a juridical-reformatory character are applied not only to persons who have committed the crime (the perpetrators), but also to persons who have participated in it (instigators and accomplices).

Those persons are considered instigators who have induced the perpetrator to commit the crime.

Those persons are considered accomplices who have contributed toward the commission of the crime by advice, directions, making

³² See also, W. Chase, 'Stalin as producer: the Moscow show trials and the construction of mortal threats', in S. Davies and J. Harris (eds.), *Stalin: a new history* (Cambridge University Press, 2005), pp. 40, 43.

³³ M. Radin, 'The Moscow trials – a legal view', *Foreign Affairs* (October 1937), 66.

means available, or elimination of obstacles, or by concealing the culprit or the traces of the crime.³⁴

And yet Article 17, with its three categories of participant – ‘instigator’, ‘accomplice’ and ‘perpetrator’ – did not quite capture the magnitude of the alleged crimes. Leon Trotskii, for example, had to be more than a mere ‘instigator’; he was surely the *arch*-conspirator. After the second trial, in March 1937, the journal *Sotsialisticheskaia Zakonnost’* (Socialist Legality) reported the drafting of a new draft criminal code which showed a new line of thinking about the complicity doctrine.³⁵ A fourth category of conspirator would be added to the list – ‘organiser’ – who would be punished more harshly than a ‘perpetrator’, even if the crime was not carried out.³⁶ This was a refinement of the premise, apparent throughout the trials, that planning a crime was just as serious as perpetrating one, which is why most of the defendants were sentenced to death, even though the Soviet leadership had not been assassinated and the Soviet Union had not been broken up and returned to capitalism.

At the 1938 trial, Vyshinskii expounded more fully on the question of complicity. He began by asking to what extent the accused would be held answerable for the crimes committed by the conspiracy, and answered: ‘Fully. Why? Each of the accused must be held answerable for the sum total of the crimes as a member of a conspiratorial organization whose criminal objects and aims, and whose criminal methods of carrying out these aims, were known to, approved of and accepted by each of the accused.’³⁷ Then he addressed the problem of intent. Although the aforementioned draft code of 1937 had specified that intent or negligence was a necessary component of a crime, thereby readmitting the concept of fault into Russian jurisprudence, Vyshinskii was having none of it. He wrote,

There is an opinion current among criminologists that in order to establish complicity it is necessary to establish common agreement and an intent on the part of each of the criminals, of the accomplices, for each of the crimes. This viewpoint is wrong. . . . Life is broader than this

³⁴ ‘Russian Criminal Code . . .’, p. 8: State Department, Judicial Branch of Government, 861.04: www.fold3.com.

³⁵ For a summary of this article, see ‘Recent tendencies in Soviet law’ (14 September 1937), p. 27: State Department, Judicial Branch of Government, 861.04: www.fold3.com.

³⁶ *Ibid.*

³⁷ *Report of court proceedings in the case of the anti-Soviet ‘bloc of rights and Trotskyites’: heard before the Military Collegium of the Supreme Court of the U.S.S.R., Moscow, March 2–13, 1938* (Moscow: People’s Commissariat of Justice of the U.S.S.R, 1938), p. 694.

viewpoint. Life knows of examples when the results of joint criminal activity are brought about through the independent participation in such activity by individual accomplices, who are united only by a single criminal object common to all of them.³⁸

To prove complicity, then, one was not required to prove intent, but only a common purpose – a united will to commit a crime – among the conspirators.

To establish complicity, we must establish that there is a common line uniting the accomplices in a given crime, that there is a common criminal design. . . . If, say, a gang of robbers . . . set fire to houses, violate women, murder and so on, in one place, while another part of the gang will do the same in another place, then even if neither the one nor the other knew of the crimes committed separately by any section of the common gang, they will be held answerable to the full for the sum total of the crimes, if only it is proved that they had agreed to participate in this gang for the purpose of committing the various crimes.³⁹

It was this framing of the idea that would be taken up by the Soviet criminologist Aron N. Trainin and transmitted to the Nuremberg and Tokyo trials.

Trainin on complicity

Inspired directly by Vyshinskii's aforementioned *Pravda* article, Trainin began work on the first book on the Soviet theory of complicity, *Uchenie o souchastii* (Doctrine of complicity), published three years later in 1941.⁴⁰ Trainin's academic career had begun during the tsarist era, but after the revolution he established himself as one of the leading commentators on Soviet criminal law. After being appointed Chair of Criminal Law at Moscow University in 1920, he published a series of articles, entitled 'Etiudy po ugovnomu pravu' ('Studies on criminal law'), in which he set out the new state's approach to punishment. This, he argued, served not as 'revenge for a crime committed' but as 'a means of protecting society from criminal infringements'.⁴¹ In 1925, he published the first textbook on the 'special part' of the Russian Criminal Code

³⁸ Ibid., pp. 694–695. ³⁹ Ibid., p. 695.

⁴⁰ A.N. Trainin, 'Uchenie o souchastii' in N.F. Kuznetsova (comp.), *Trainin, Izbrannye proizvedeniia* (St. Petersburg: Iuridicheskii tsentr Press, 2004).

⁴¹ The studies appeared in the journal *Pravo i zhizn'* in 1923 (no. 9–10) and 1925 (no. 7–8); M. Traynina, 'A.N. Traynin: a legal scholar under the Tsar and Soviets', *Soviet Jewish Affairs* 13 (1938), 48.

dealing with offences against the state, entitled *Ugolovnoe pravo RSFSR. Chast' osobennaya: Prestupleniia protiv gosudarstva i sotsialnogo poriadka* (Criminal law of the RSFSR. Special part: Crimes against the state and social order).⁴²

Taking up the threads of Vyshinskii's *Pravda* piece, Trainin focused on the role that the complicity doctrine might play in the management of internal threats. He defined complicity as 'a joint participation of several persons in committing the same crime, provided each has both guilt and connection to the criminal result'.⁴³ It only exists, he explained, when two conditions are met: first, that two or more people are involved in the commission of a crime; and second, that these people have entered into a subjective relationship with each other in order to carry it out. '[C]omplicity is not an isolated criminal activity of several individuals,' he wrote, 'liability for complicity requires a certain subjective link between conspirators.'⁴⁴ This subjective link, he suggested, was that conspirators were 'serving one goal'.⁴⁵

Hitherto, he argued, legal theorists had misinterpreted the scope of the doctrine. On the one hand, there were those who wrongly claimed that a 'simple fact of intentional participation of several persons in commission of a crime [was] sufficient to be regarded as complicity'.⁴⁶ He cited as an example the pre-revolutionary jurist Pyotr Pustoroslev, who in 1912 had addressed 'intentional complicity in a criminal offence without any agreement between the parties, without one participant's knowledge about the participation of another'.⁴⁷ Pustoroslev's approach, Trainin argued, would 'turn complicity from an organic unity to a simple *combination of several persons* guilty of committing the same crime'.⁴⁸

On the other hand, Trainin did not believe that complicity necessarily required prior agreement, or indeed *any* agreement, between the conspirators, provided they were all acting to achieve a common purpose. He stated that 'the *overestimation* of subjective connection as an element of complicity' was a common fault in tsarist-era literature,⁴⁹ and had even found its way into the works of Soviet legal scholars such as A. Laptev, who had written in 1938: 'Complicity in Soviet criminal law can be

⁴² A.N. Trainin, *Ugolovnoe pravo RSFSR. Chast' osobennaya: Prestupleniya protiv gosudarstva I sotsialnogo poriyadka* (Leningrad: Gosudarstvennoe izdatel'stvo, 1925).

⁴³ Trainin, 'Uchenie o souchastii', p. 265. ⁴⁴ *Ibid.*, p. 364. ⁴⁵ *Ibid.*, p. 286.

⁴⁶ *Ibid.*, p. 256.

⁴⁷ *Ibid.*, p. 255. Trainin quotes from P. Pustoroslev, *Russkoe ugolovnoe pravo: obshchaia chast'* (1912), pp. 431–432.

⁴⁸ *Ibid.*, p. 256. Original emphasis. ⁴⁹ *Ibid.*, p. 257. Original emphasis.

defined as participation of several persons, *based on agreement*, in committing one or several offences.⁵⁰ Trainin responded,

One cannot deny that quite often conspirators are bound by a prior agreement. Nevertheless, this frequent *actual* combination of a prior agreement and complicity cannot be equated to the legal *principle*: complicity is imaginable also without a prior agreement between conspirators and even without *any* agreement between them.⁵¹

He therefore criticised what he saw as two 'extreme' theories of complicity:⁵² on the one hand, the denial of the need for *any* agreement between the conspirators, and on the other, the requirement for at least a preliminary agreement between them. Both these approaches, he argued, distorted the nature of complicity by either excessively expanding or narrowing its scope.⁵³ But while Trainin presented himself as occupying the middle ground, this middle ground is exceedingly broad, denying Laptev's contention that prior agreement is necessary, while admitting most of Pustoroslev's position that aggression required no agreement (provided, Trainin stressed, the participants had a common goal).

Finally, when dealing with the existing literature, Trainin stated that he was not of the view that complicity covered only acts of commission. He opposed the opinion expressed by the jurist Georgii Kolokolov, for example, that 'complicity can only take place in the form of an affirmative action, and not in the form of a simple abstention from action'.⁵⁴ In his view, the conspirator could contribute to the crime through inaction as well as through action. He wrote,

It is well known that inaction may also cause criminal result ... In practice, these cases are quite possible and often take place. For example, a switchman in agreement with robbers does not switch the rail points so as to cause a crash and to facilitate a robbery; a watchman in agreement with a thief does not lock a storehouse, and so on. The switchman and the watchman both are responsible as conspirators.⁵⁵

In Trainin's view, there were three types of complicity, distinguished by the level of danger they posed to society: simple complicity, complicity with a prior agreement between accomplices, and 'special complicity *sui generis*'.⁵⁶ Of these, simple complicity was the least dangerous.⁵⁷ 'In this case,' he wrote, 'the connection between the conspirators does not exceed

⁵⁰ Ibid., p. 259. Trainin quotes from A. Laptev, 'Souchastie po sovetskomu ugovnomu pravu', *Sovetskaia Iustitsiia* (23–24, 1938), 13. Original emphasis.

⁵¹ Ibid. Original emphasis. ⁵² Ibid., p. 259. ⁵³ Ibid., p. 260. ⁵⁴ Ibid., p. 264. ⁵⁵ Ibid.

⁵⁶ Ibid., p. 267. ⁵⁷ Ibid.

the minimum necessary for complicity' – the actors were aware that other people were participating in the commission of a crime, 'but there is no prior conspiracy to commit an offence, no prior agreement between individual actors'.⁵⁸ Such situation might arise if people joined a riot on the spur of the moment. 'Of course,' he explained, 'among the participants may be and are people who previously agreed to arrange a "riot" – people whom the law identifies with good reason as being organisers.'⁵⁹ But simple complicity pertained not to the organisers, but to those who joined the criminal activity spontaneously, without prior agreement with the others, even though they shared with the organisers the common goal of engaging in a riot.⁶⁰

The second and more common type of complicity – complicity with the prior agreement between conspirators – was, in Trainin's view, a greater danger to society. He observed that this more dangerous form was recognised by the Russian Criminal Code,⁶¹ which penalised, among other things: failure to pay taxes and compulsory insurance on time and despite ability to pay, especially if 'committed by a number of persons according to a previous agreement or (even without previous agreement) by persons who are connected with . . . agricultural operations' (Article 60);⁶² failure to pay the special military tax on time and despite ability to pay, especially 'by a number of persons according to previous agreement' (Article 60 again);⁶³ refusal to perform public duties (such as work on behalf of the state) 'if committed by a number of persons in accordance with previous agreement' (Article 61);⁶⁴ and the theft of personal property, or state property from warehouses or storage places, involving 'planning with other persons' (Article 162).⁶⁵ Throughout the Code, crimes carried out by groups of people attracted higher tariffs than those carried out by individuals. Article 62(1), dealing with attempts to hoodwink the taxman, made a clear distinction between 'leaders and organisers' (who attracted a higher punishment) and 'other persons' party to the common agreement:

Systematic concealment of or false statements concerning amounts of articles subject to taxation or inventory, in accordance with common agreement, involves: for the organizers and leaders, imprisonment for not more than two years[,] or compulsory labour for not more than one year, with or without partial confiscation of property[;] for the other

⁵⁸ Ibid. ⁵⁹ Ibid., p. 268. ⁶⁰ Ibid. ⁶¹ Ibid., p. 269.

⁶² 'Russian Criminal Code . . .', p. 44: State Department, Judicial Branch of Government, 861.04: www.fold3.com.

⁶³ Ibid., p. 45. ⁶⁴ Ibid. ⁶⁵ Ibid., p. 84.

persons involved, a fine of not more than five times the amount of the payments due.⁶⁶

But the most dangerous and complex type of all was ‘special complicity *sui generis*’ – namely, participation in an organisation or gang created for the purpose of committing crimes.⁶⁷ Here Trainin mentioned the ‘Right-Trotskyite bloc’ and other anti-revolutionary movements and organisations purportedly operating against the Soviet state and the Soviet people. The very existence of such gangs, he believed, represented a substantial threat to society, which is why their actions were considered ‘the highest level of a joint criminal activity’.⁶⁸ How so? In a case of special complicity, the conspirators were connected not just by a simple or fleeting agreement but by a compact that had assumed a definite organisational form. This form of complicity – a ‘*readymade human machine* for committing crimes’ – was more durable and cohesive than the other types, which is why he argued that ‘a criminal organisation represents a socially dangerous phenomenon already by the fact of its existence’.⁶⁹

Consequently under socialist law, liability for *being a member of a criminal organisation* is equal to liability for *committing crimes at the organisation’s behest* – each being seen as equally socially dangerous. The fact that an individual member of a criminal organisation may not know all the other members, and may not be aware of the acts committed by them, is of no moment: ‘Members of a criminal community are united not by reciprocal knowledge of each other and not by reciprocal awareness of each other’s actions but by serving one goal.’⁷⁰ All that was required was ‘knowledge of the association’s goals’ – which was the ‘substance of the conspirator’s criminal intent’ and the ‘subjective basis of liability for the activities of the whole association’.⁷¹ The member was responsible not just for his or her own criminal actions but also, by dint of being a member of a criminal organisation, for the actions of the organisation as a whole.

Complicity internationalised

In his book on complicity, Trainin was primarily interested in the doctrine’s deployment against internal threats to the Soviet state. But no sooner was it published than the Germans invaded the Soviet Union, and he began to consider the potential uses of the doctrine against such

⁶⁶ Ibid., pp. 45–46. ⁶⁷ Trainin, ‘Uchenie o souchastii’, p. 269. ⁶⁸ Ibid., p. 270.

⁶⁹ Ibid. Original emphasis. ⁷⁰ Ibid., p. 286. ⁷¹ Ibid.

external threats. On 26 August 1943, the Soviets broadcast a radio piece entitled ‘The responsibility for Nazi crimes’, based on an article Trainin had written for the journal *War and the Working Class*; the following day, the Soviet foreign press agency Tass distributed an English-language transcript through its Soviet embassies abroad.⁷² The Soviets were clearly sending up a trial balloon to the Allies about some of the legal concepts that might be deployed in the future handling of the German leaders.

Trainin argued that although material and political responsibility for waging aggressive wars resided with the state, *criminal* responsibility must necessarily rest with the leading individuals vested with its authority. Hitler, his cabinet and the heads of the German government were the ‘most dangerous and most vicious body of international offenders’⁷³ because, he wrote, they ‘took the lead in preparing, organising and perpetrating the most heinous crime in the history of the human race, the perfidious attack on the Soviet Union’.⁷⁴ In other words, Trainin grasped the essential point that waging war was a crime necessarily committed by *leaders*.

Moreover, in addition to the politicians and ministers, Trainin also listed the financial and industrial magnates who had used their economic clout to underwrite the Nazi regime, and it was in relation to them that he broached the doctrine of complicity. Using the same formula that had been advanced at the Moscow trials and reiterated in his book on complicity, he argued that irrespective of whether the magnates had direct personal connections with the Nazi leadership, the ‘individual members of a gang or group may not be known to one another and may yet be responsible for all the crimes the gang or group commits’.⁷⁵ Trainin’s amalgam of ideas, which highlighted both the criminality of aggressive war and the German elite’s conspiracy to commit it, was highly significant. By fusing together the charge of aggression with an internationalised mode of liability, he laid the groundwork for the trial of *groups of national leaders* for embarking on aggressive war. It was precisely these two linked concepts that were later instituted at the Nuremberg and Tokyo tribunals as ‘crimes against peace’ and ‘common plan or conspiracy’.

A year after the broadcast, the Soviets relaunched Trainin’s proposals, this time as a book, *Ugolovnaia otvetstvennost’ gitlerovtsev*, published in

⁷² A. Farrin [Trainin], ‘The responsibility for Nazi crimes’, *Soviet Monitor* (27 August 1943): FO 371/34377, TNA. See also on this broadcast, K. Sellars, ‘Crimes against peace’ and *international law* (Cambridge University Press, 2013), pp. 51–52.

⁷³ *Ibid.*, pp. 2–3. ⁷⁴ *Ibid.*, p. 3. ⁷⁵ *Ibid.*

Moscow in July 1944 (and translated into English the following year as *Hitlerite responsibility under criminal law*). With the end of the war in sight, Western officials were beginning to consider the problem of how to deal with the German leaders, and started to focus on Trainin's work. What especially caught their interest was the prominence he gave to the offence he now called 'crimes of the Hitlerites against peace'.⁷⁶ He reiterated his point that these were crimes for which the Germans were individually responsible and added that those who planned and carried out aggression were committing 'the most dangerous international crime' of them all.⁷⁷

He admitted that existing international criminal law provided little guidance for handling crimes such as aggression, ascribing the 'extreme meagreness' of this area of law to the 'aggressive imperialist rulers who had the cause of peace under constant menace'.⁷⁸ But if international law were to be used in conjunction with national criminal law, then there would be sufficient legal basis for the punishment of the 'Hitlerite clique' for their international crimes of aggression and war crimes. Soviet criminal law, for example, provided a useful model for prosecuting groups of people. He observed that the complicity doctrine had been used successfully against 'the anti-Soviet bloc of Right Wing and Trotskyites' at the Moscow purge trials of 1936–1938,⁷⁹ and even quoted Vyshinski's aforementioned comments about the theory at the trial of Bukarin, Rykov and others in 1938.⁸⁰ Soon enough, the doctrine of complicity – used against those accused of committing treason against the Soviet state – was put to work against the German and Japanese leaders accused of committing treason against the society of states.

'Waging war against the King'

As has been shown, powerful states preoccupied by the problem of international security took inspiration from domestic security law. Treason trials provided a template for international tribunals, and in the process, the latter spawned new charges of international treason. Interaction between the different bodies of law created the potential for ideas to travel both ways, and this is exactly what happened at the British-run treason trials convened at the Red Fort in Delhi in 1945–1946 to deal

⁷⁶ A.N. Trainin and A.Y. Vishinski (ed.), *Hitlerite responsibility under criminal law*, A. Rothstein (tr.) (London: Hutchinson, 1945), p. 42. See also, Sellars, 'Crimes against peace', pp. 55–57.

⁷⁷ *Ibid.*, p. 37. ⁷⁸ *Ibid.*, pp. 10, 11. ⁷⁹ *Ibid.*, p. 84. ⁸⁰ *Ibid.*

with senior figures in the Indian National Army, which had fought alongside the Japanese. After the war, the British authorities, concerned about instability in their most important colony, convened these courts martial in order to maintain morale and discipline among the 'loyal' Indian troops under their command. This strategy backfired, and the trials instead became a lightning rod for the Indian independence movement.

The events addressed by the Red Fort trials had begun some four years earlier, on 16 February 1942, the day after Yamashita's Twenty-Fifth Army broke through the British lines and compelled Percival to surrender Singapore to the Japanese. While the British and Australian prisoners of war were marched off to prisons and internment camps, some 40,000 Indian troops from the defeated British Army were gathered together at Farrer Park in south-central Singapore. There, the Japanese gave them a stark choice: either take their chances as prisoners of war or switch their allegiance to the Indian National Army, which would fight on the same side as the Japanese. According to testimony given at the trial, around half of them chose the latter option.

Thereafter, the Indian National Army went through two incarnations. The first was under Mohan Singh, a career officer who was elevated to commander-in-chief in April 1942 and then, after disagreeing with the Japanese over the Army's status and independence, was relieved of his command and imprisoned by the Japanese. The second was under Subhas Chandras Bose, a former Congress politician who, after arriving in Singapore and assuming the leadership of the Army in July 1943, proclaimed the *Ārzī Hukūmat-e-Āzād Hind* (the Provisional Government of Free India), and then declared war on Britain and the United States. Bose was killed in an air crash at Formosa in the final weeks of the war.

After the conclusion of the war, the British, compelled to settle accounts with the Indian National Army, convened a series of trials of some of its former officers in late 1945 and early 1946. The first and most important of these commenced on 5 November 1945 in a British Army barracks inside Delhi's Red Fort. The British had chosen the three defendants – Shah Nawaz Khan, Prem Saghal and Gurbakhsh Singh Dhillon – from among second-tier commanders who, as well as switching their allegiance from the British Indian Army to the Indian National Army, were also alleged to have been involved in the commission of crimes against their subordinates. All three were charged with 'waging war against the King' – the equivalent of treason, set out in Section 121 of

the Indian Penal Code. In addition, Dhillon was charged with murder, and Khan and Saghal with 'abetment of murder'.

At first, this appeared to be a straightforward domestic case of treason. As Advocate General Sir Naushirwan Engineer, the chief prosecuting counsel, informed the court:

The prosecution will submit that any plea that they [the accused] were bound or justified by law in doing what they did cannot avail them. Joining with rebels in an act of rebellion or with enemies in acts of hostility makes a man a traitor. An act of treason cannot give any sort of rights nor can it exempt a person from criminal responsibility for the subsequent acts. Even if an act is done under a command where the command is traitorous, obedience to that command is also traitorous.⁸¹

But Engineer faced a significant tactical problem. In order to establish his case for treason, he had to present evidence of the existence of the Indian National Army – news of which the British wartime censors had done their utmost to suppress. So in the process of presenting battle reports, operation orders, command structures, reorganisation policies, intelligence summaries, situation reports, disciplinary notes, supply manifests, staff allotments, security passwords, diary entries and witness statements, Engineer also managed to conjure up victories and defeats, retreats under fire, captures of arms and casualties in battle.⁸² In short, he transformed what had been a ghost army, a chimera, into the real thing.

This, of course, had an electrifying effect on Indian public opinion. The evidence laid out by the prosecution showed that Indians, under the nose of the embattled imperial authorities, had formed their own tens-of-thousands-strong army, commanded by their own nationals, which had fought, and sometimes beaten, the British in Burma. This was a thrilling message. The trial of the three accused – who, fortuitously, happened to be Hindu, Moslem and Sikh – not only became a rallying cry for the already aroused independence movement but also managed to temporarily unite this movement across political and religious lines. As Jawaharlal Nehru wrote the following year,

The legal issues were important enough, involving as they did questions of that rather vague and flexible body of doctrine known as International Law. But behind the law, there was something deeper and more vital . . .

⁸¹ M. Ram (ed.), *Two historic trials in Red Fort: an authentic account of the trial* (New Delhi: Moti Ram, 1946), p. 19.

⁸² For a fuller account, see P.W. Fay, *The forgotten army: India's armed struggle for independence, 1942–1945* (New Delhi: Rupa & Co, 1994), pp. 476–477.

Those three officers and the Indian National Army became symbols of India fighting for her independence. . . . The trial dramatised and gave visible form to the old contest: England *versus* India.⁸³

In other words, the proceedings, conceived by the British to convey a strong condemnatory message, had precisely the opposite effect.

It was in this febrile atmosphere that the chief defence counsel Bhulabhai Desai took the floor. Over the course of two days he delivered a speech, without notes, which effectively turned the case on its head. His argument was that the issues at hand were matters for public international law, not British Indian municipal law. He argued, first, that the Indian National Army was a properly constituted and self-governing army, run by Indian officers, with its own disciplinary code, ranks, uniforms and regalia, just like the British-run Indian Army, on which it was closely modelled. It had two aims: the liberation of India from British rule, and the protection of Indian populations in Burma and Malaya, especially during the war. So contrary to the prosecution's claims, it was not just a Japanese-run fifth column.

Furthermore, Desai argued, the Provisional Government of Free India, which Bose had proclaimed in 1943, was a properly constituted government, with command over resources and territories, including the Andaman and Nicobar islands, which had been ceded to it by Japan. These features amounted to statehood – and this statehood was recognised by Japan and a number of its allies, such as Burma, Croatia, Manchukuo and Siam. This government had then declared war on Britain and the United States, and thereafter assumed the rights of a belligerent, including the right to impose military discipline within its own army. In summary, the Indian National Army and the Provisional Government of Free India were operating within the bounds of public international law, the sitting court had no jurisdiction over relations between belligerent states, and the defendants, having acquired the rights and immunities endowed on them by the laws of war, had no case to answer.

In the course of making these arguments, Desai returned repeatedly to the question of *allegiance* that was at the heart of the trial. Both the accused and witnesses had stated that the fall of Singapore had convinced them that Britain was incapable of protecting Indian interests and had therefore forfeited its claim to their allegiance: 'I felt like one deserted by the British,' Gurbakhsh Singh Dhillon told the court.⁸⁴ The decisive moment, as the defence pointed out, was the gathering at Farrer Park,

⁸³ J. Nehru, Foreword, in Ram (ed.), *Two historic trials*, iii. ⁸⁴ *Ibid.*, p. 118.

when the surrendered Indian troops were presented with a choice between loyalty to Britain and loyalty to India. Shah Nawaz Khan testified that when forced to choose between King and Country, 'I decided to be loyal to my country'.⁸⁵ The value of the loyalty so peremptorily commanded by the Raj, and so summarily punished if abandoned, was first questioned, and then denied.

It was precisely this issue of loyalty that had defined Bulabhai Desai's own career. In 1928, when an advocate in Bombay, he appeared before the Broomfield Committee on behalf of Gujarati farmers involved in the civil disobedience campaign, Bardoli Satyagraha. Two years later, he spoke at a meeting protesting the conviction of its leader, Vallabhbhai Patel, where – rehearsing points he would make again fifteen years later at the Red Fort – he proclaimed, '[I]f it is patriotic to lay down one[']s life that Germany may not govern England, how can it be less patriotic if any one of us may lay down his life that another may not govern India (prolonged cheers)!'⁸⁶ After joining the Indian National Congress, he took part in civil disobedience activities and was imprisoned in 1932. After his release, he rose through the ranks of Congress, eventually serving as majority leader in the Central Assembly. His political career faltered badly earlier in 1945, when he brokered a secret power-sharing deal with the Muslim League, known as the Desai-Liaquat Ali Pact, and it was only his commanding performance at the trial that silenced some of the critics in his own party.

The arguments Desai put forward were remarkable for being so unlike the usual defences presented against treason charges. These normally accepted that national security was paramount, and insisted that the accused had acted in good faith or in ignorance – the sort of line put forward in the Malvy and Caillaux cases. Desai took a completely different tack. He challenged the very premise of treason, by arguing that during a war of liberation the justice of the challenger eclipsed the security of the challenged. Under these circumstances, formal allegiances could be renounced. He did this by calling on international law to support his claims. Before the twentieth century, international law permitted only sovereign and independent – in other words, not colonised – states to legitimately declare or wage war: 'Of course that created a vicious circle, that a subject race will remain in perpetuity a subject race. It can

⁸⁵ Ibid., p. 110.

⁸⁶ 'Speech of Mr. B.J. Desai, Advocate' (1930), p. 3: Bulabhai Desai papers, 1st and 2nd part, Nehru Memorial Library.

never be made a legitimate war for the purpose of liberating itself.⁸⁷ But, he argued, modern international law had moved on, and now accepted the legitimacy of wars of national liberation:

The position now is that international law has reached this stage that if liberty and democracy are to have any meaning all over the world, and not merely just for a part of it, and this is not politics, it is law – any war made for the purpose of liberating oneself from foreign yoke is completely justified by modern international law. And it will be travesty of justice if we were to be told as a result of any decision arrived at here or otherwise, that the Indian may go as soldier and fight for the freedom of England against Germany, for England against Italy, for England against Japan, and yet a stage may not be reached when a free Indian State may not wish to free itself from any country, including England itself.⁸⁸

Turning the charges back against the prosecution, Desai thus argued that the case was not really about treason at all: ‘What is now on trial before the Court is the right to wage war with immunity on the part of the subject race for their liberation.’⁸⁹ Thus, from within a treason trial itself emerged a legal critique of the supremacy of domestic security law.

Needless to say, the defence arguments failed to persuade the court. On 31 December 1945, it found all three men guilty of ‘waging war against the King’ and one guilty of ‘abetment to murder’, and sentenced them all to transportation – subsequently reduced to cashiering and forfeiture of arrears of pay and allowances. Yet Desai’s speech nonetheless had a profound impact on the Indian struggle for independence, and strongly influenced Indian advocates and judges, one of whom, Radhabinod Pal, would take these arguments about security and justice to the International Military Tribunal for the Far East, which was established in Tokyo a few weeks later.

The grand conspiracy

The Tokyo Tribunal was designed, first and foremost, to meet concerns about international security. As the Potsdam Declaration on Japan stated, ‘a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world’.⁹⁰ The Charter and Indictment thus laid heavy emphasis on the linked charges of ‘crimes against peace’ and ‘common plan or conspiracy’. Indeed, the lack of

⁸⁷ Ram (ed.), *Two historic trials*, p. 153. ⁸⁸ *Ibid.* ⁸⁹ *Ibid.*, p. 141.

⁹⁰ Potsdam Declaration, *FRUS 1945 The Conferences of Berlin (The Potsdam Conference)* (Washington, DC: Government Printing Office, 1960), vol. 2, p. 1475.

evidence connecting the defendants to the alleged ‘crimes against peace’ compelled the prosecutors to rely more heavily on ‘common plan or conspiracy’ than had their Nuremberg counterparts. Aiming to shift the burden of proof away from personal responsibility and towards participation in a criminal conspiracy, they tried to establish guilt by indirect means: first, alleging the existence of a conspiracy; second, establishing an individual’s connection to the conspiracy; and finally, using membership of the conspiracy to indicate personal responsibility for substantive crimes. As the Australian Court President William Webb (who was himself troubled by the scope of ‘common plan or conspiracy’) explained to a defence lawyer, ‘Conspirators need not know each other, they need not know of each other’s existence, let alone exchange words.’⁹¹ Webb was probably not aware of it, but he was echoing the very idea crafted by Trainin in Moscow.

When Radhabinod Pal, a former judge at the Calcutta High Court, arrived in Tokyo in May 1946, a month or so after the other judges, he immediately questioned the validity of the ‘crimes against peace’ charge.⁹² This altered the dynamic between the other judges, and in time three of them – William Webb, Bernard Röling of the Netherlands and Henri Bernard of France – also began to express reservations about the ‘crimes against peace’ and ‘common plan or conspiracy’ charges. The prospect of a unanimous judgment began to dwindle.⁹³ Those judges who were committed to endorsing the Nuremberg line (led by William Patrick of Britain, Stuart McDougall of Canada and Erima Harvey Northcroft of New Zealand) observed this process with alarm. They believed that the crimes set out in the Tokyo Charter were not open for debate. The sole reason for setting up what Patrick called ‘this portentous institution’ was to declare that war was a crime and that individuals could be held responsible for it.⁹⁴

William Patrick was particularly nettled by Pal’s approach. ‘He has made his position quite clear since first he was appointed,’ he wrote, ‘so why the Government of India ever nominated him . . . is difficult to see.’⁹⁵ The simple truth was that the government in question had sought Indian takers for the Tokyo job, and, having already had a few refusals,

⁹¹ IMTFE, vol. 59, p. 28279. Webb addressed ‘common plan or conspiracy’ in his Separate Opinion at end of the trial.

⁹² Patrick to Normand (c. January 1947), p. 5: LCO 2/2992, TNA.

⁹³ B.V.A. Röling and A. Cassese (ed.), *The Tokyo trial and beyond: reflections of a peacemonger* (Cambridge: Polity Press, 1993), pp. 28–29.

⁹⁴ Patrick to Normand (c. January 1947), p. 1: LCO 2/2992, TNA. ⁹⁵ *Ibid.*

was evidently relieved when someone suitable finally accepted the appointment.⁹⁶ That person was Pal, and even though his stance may have been more radical than many at Tokyo might have wished, it was wholly in accord with Indian, and especially Bengali, sentiment in the late 1940s.

Pal, like Desai, took as his starting point the differing interests of the powerful states and their colonies. He argued that the criminalisation of aggression was premature because it presupposed the existence of a genuine international community united by common interests and capable of offering alternatives to war as a method of resolving disputes.⁹⁷ In the absence of this community, states would continue to pursue their partisan national interests by force of arms. He was of the view that the Allies' motives for creating the new charge of 'crimes against peace' were therefore highly suspect, especially considering their own history of violence towards the non-Western nations.⁹⁸ Instead of promoting universal values, these nations were perhaps merely serving their own narrow interests, such as maintaining the *status quo* – 'the very *status quo*', he noted, 'which might have been organized and hitherto maintained only by force by pure opportunist "Have and Holders"'.⁹⁹

If this was the case, then there was good reason to be concerned about the implications of the 'crimes against peace' charge for the 'dominated' nations. Pal drew particular attention to the American chief prosecutor Robert Jackson's statement at the Nuremberg Tribunal that 'whatever grievances a nation may have, however objectionable it finds the *status quo*, aggressive warfare is an illegal means for settling those grievances or for altering those conditions'.¹⁰⁰ In other words, aggressive wars were treasonable acts against the international order. This, as Pal recognised, was effectively a call for the paralysis of international affairs, and by implication the criminalisation of the struggle against colonialism. He considered this too high a price to pay for mere security, because, he wrote, the dominated nations 'cannot be made to submit to eternal

⁹⁶ Duke (9 October 1946): 306-FEA (1946), National Archives of India (NAI).

⁹⁷ IMTFE, Pal Dissent, vol. 105, p. 103. For a more detailed appraisal of Pal's position, see Sellars, *Crimes against peace*, pp. 236–238, 250–251.

⁹⁸ *Ibid.*, p. 70. ⁹⁹ *Ibid.*, p. 239.

¹⁰⁰ International Military Tribunal, *Trial of the major war criminals before the International Military Tribunal*, 'The Blue Series', 42 vols. (Nuremberg: IMT, 1947–1949), vol. 2, p. 149.

domination only in the name of peace'.¹⁰¹ This, of course, was precisely Desai's point.

When it came to issuing judgment, Pal, following the logic of his rejection of 'crimes against peace' charges and the 'common plan or conspiracy' idea, rejected the authority of the Tribunal *in toto*, stating that all the charges brought against the accused were illegitimate, and that '*each and every one of the accused must be found not guilty of each and every one of the charges*'.¹⁰² At the Tribunal, the Canadian judge Stuart McDougall complained that Pal had come to Tokyo with the express aim of 'torpedoing' any judgment against the defendants.¹⁰³

Back in India, Jawaharlal Nehru's government, which had recently won power from the British, was dismayed and embarrassed by Pal's stance. Senior ministers were aghast when he sent a copy of his opinion back to New Delhi (four months *before* the Majority Judgment was read out in court). They knew that he intended to dissent – he had told them so¹⁰⁴ – but they had not expected him to dissent on such all-encompassing grounds. Nehru said outright, 'In this judgment wild and sweeping statements have been made with many of which we do not agree at all.'¹⁰⁵ K.P.S. Menon counselled that Pal's views were his own, not the government's, but that 'however extreme the view . . . and however unfortunate the language in which he has couched his views, it would not be expedient for the Government of India to interfere with his judgment'.¹⁰⁶ Krishna Menon telegraphed to say that nonetheless 'it is most desirable that we take some steps to disassociate ourselves from the views of Justice Pal which [are] not shared by us and may well put us in the wrong' with the other prosecuting powers at Tokyo.¹⁰⁷ And P.A. Menon indicated that 'if the reactions in the U.S.A. and other countries proved to be bitter' the Department would issue a statement 'making it clear that Mr. Justice Pal's views were not those of the Government'.¹⁰⁸ As it turned out, the other powers chose to ignore Pal's dissent, and this took the pressure off the government in New Delhi. There the matter rested.

¹⁰¹ IMTFE, Pal Dissent, vol. 105, p. 239.

¹⁰² IMTFE, Pal Dissent, vol. 108, p. 1226. Original emphasis.

¹⁰³ Gascoigne to Dening (25 November 1948): DO 35/2938, TNA.

¹⁰⁴ Pal to K.P.S. Menon (4 May 1948): 489-CJK/49 (1948), NAI.

¹⁰⁵ Nehru to West Bengal Governor-General (29 November 1948): 489-CJK/49 (1948), NAI.

¹⁰⁶ K.P.S. Menon (20 July 1948): 489-CJK/49 (1948), NAI.

¹⁰⁷ V.K.K. Menon to K.P.S. Menon (4 August 1948): 489-CJK/49 (1948), NAI.

¹⁰⁸ P.A. Menon (6 December 1948): 489-CJK/49, NAI.

Conclusion

The concept of treasonable conspiracies entered the vocabulary of international criminal law at the instigation of the French, the Soviets and, finally, the Americans. It made its international debut in Asia at the Tokyo Tribunal. But Indian jurists questioned the very premise of treason – in both domestic and international forms – asserting the right of the colonised to wage war against the coloniser. As it turned out, it was Bulabhai Desai, not the British authorities, who framed the argument about allegiance in the dying days of the Raj. And it was Radhabinod Pal, not his many detractors, who was vindicated over the soon-to-be-abandoned ‘crimes against peace’ charge. Their argument that ‘treason’ was a justified response to unjust circumstances would be both popularised and acted upon. They heralded a new non-aligned perspective that demanded a radical reordering of global priorities, with justice taking precedence over security, rather than security taking precedence over justice.