

ANOTHER MEANING OF TREASON:
THE LEGACY OF THE RED FORT TRIALS IN INTERNATIONAL LAW

*Kirsten Sellars*¹

In September 1945, the British journalist Rebecca West took her place in the gallery of the Old Baily to report for the *New Yorker* on the treason trial of William Joyce — ‘Lord Haw-Haw’ — the notorious broadcaster of German propaganda during the European war. A few months later, she covered another hearing, this time of John Amery, the son of a former Cabinet Minister, who, among other things, had formed a tiny unit of pro-German turncoats known as the British Free Corps. These two cases were to form the core of West’s book, *The Meaning of Treason*, published in 1947. Some seventeen years later, in 1964, she followed this up with *The New Meaning of Treason*, adding the atomic scientists and the members of the Cambridge Spy Ring to the roster of mid-century British traitors.

In *The Meaning of Treason*, West argued that the traitors who turned against Britain and towards Germany were maladjusted men who not only wreaked destruction on the society that had produced them, but also managed to destroy themselves (Amery’s chaotic existence on the margins of power in fascist Spain and Germany, followed by his suicidal plea of ‘guilty’ to treason, seemed to bear this out). In *The New Meaning of Treason*, West, a committed Cold Warrior, offered a steelier appraisal of the more professional and ideologically driven Soviet moles. But at the end of this book, she also made an important point: ‘if we do not keep before us the necessity for uniting care for security with determination to preserve our liberties, we may lose our cause because we have fought too hard.’² Indeed, if societies become over-preoccupied with threats to their security — imposing draconian laws and jettisoning civil liberties — they are in danger of replicating on a grand scale the self-destructive tendencies of traitors themselves. Bearing this in mind, we here consider trials for treason, and their influence on trials for another sort of treason: the ‘international treason’ of embarking on aggressive wars.

¹ Assistant Professor, Faculty of Law, Chinese University of Hong Kong. This chapter is an abridged version of ‘Treasonable conspiracies in Paris, Moscow and Delhi: the legal hinterland of the Tokyo Tribunal’ in Kirsten Sellars, ed., *Trials for international crimes in Asia* (Cambridge: Cambridge University Press, 2015).

² Rebecca West, *The new meaning of treason* (New York: Viking, 1964), 370.

Trying the ex-Kaiser

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 was the one that most directly threatened the global order) and the crimes purportedly devolving from aggression — 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.

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. 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 postwar (and Prussian-free) status quo in Europe.

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 for a solution. It was apparent to them that the old approaches to crimes of war — which had emerged in response to the old conception of war ‘as simply a means of political coercion’³ — were no longer adequate. New legal instruments had to be created, and in the process, they declared, ‘A new international law is born.’⁴

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.⁵

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 party 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

³ Ferdinand Larnaude and Albert Geouffre de Lapradelle, *Examen de la responsabilité pénale de l'empereur Guillaume II* (Paris: Ministère de la Guerre, 1918), 12. Thanks to Julien Anglade for translating the report.

⁴ Ibid.

⁵ Ibid., 16-7. Emphasis added.

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.

Of all these trials, Larnaude and de Lapradelle would have been particularly interested in the trial of Louis Malvy, the once-powerful Radical-Socialist Minister of 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 troops⁶) 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 for treason, but instead 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’.⁷ 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

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

⁷ ‘Paris relieved by Malvy verdict’, *New York Times*, August 8, 1918, 8.

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 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.⁸

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'.⁹

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.' 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

⁸ Larnaude and de Lapradelle, *Examen*, 9. Original emphases.

⁹ *Ibid.*, 10.

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.¹⁰ 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’.¹¹ 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 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.¹²

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. Although Wilhelm II had abdicated a few weeks later,

¹⁰ ‘The Malvy verdict’, *The Times* August 8, 1918, 5.

¹¹ ‘Malvy charges modified’, *New York Times* July 18, 1918, 9.

¹² Larnaude and de Lapradelle, *Examen*, 22-23.

prosecuting him was nevertheless still a colossal step. 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.*’¹³ 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.

Although a tribunal to try the former Kaiser was never convened, the French trials of former politicians and their associates for treason at the end of the war had already proved 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.

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),

¹³ Ibid., 17.

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'.¹⁴ 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.¹⁵ This gang, Vyshinskii wrote, included Evgenii Pashukanis and Nikolai Krylenko, whose efforts 'were directed to prove that Soviet theory of law cannot and should not exist', and who was therefore responsible for 'the most shameless falsification of Marxism'.¹⁶ 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.'¹⁷

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'.¹⁸ So law not only continued to play an essential

¹⁴ A.I. Vyshinskii, 'O zadachakh nauki sovetskogo sotsialisticheskogo prava', *Pravda* July 26, 1938, 3. Thanks to Valentyna Polunina, PhD candidate at the 'Asia-Europe' Cluster of Excellence, Heidelberg University, for her translation of, and assistance with, Vyshinskii's *Pravda* article.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ S. Kuchеров, *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), 661.

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.¹⁹

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 Trotsky-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.²⁰

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 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'.²¹

Addressing the problem of *external* threats to the Soviet Union, Vyshinskii encouraged

¹⁹ Vyshinskii, 'O zadachakh', 3.

²⁰ Ibid., 4.

²¹ Ibid.

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'.²² 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'.²³ 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'.²⁴

This approach, broadcast through *Pravda* from Vyshinskii's position as Procurator General, had been constructed over the 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 late 1920s and early 1930s. Instead, he kept his powder dry, anticipating that sooner or later the regime would look to the law 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 first to sideline and then to 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. 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

²² Ibid.

²³ Ibid.

²⁴ Ibid.

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 mass repression and deter future dissent.

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 means available, or elimination of obstacles, or by concealing the culprit or the traces of the crime.²⁵

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 surely was 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.²⁶ 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.²⁷ This was a refinement of the premise, apparent throughout the trials, that planning a crime was just as serious as

²⁵ State Department, Judicial Branch of Government, 861.04, ‘Russian Criminal Code...’, 8: www.fold3.com.

²⁶ For a summary of this article, see State Department, Judicial Branch of Government, 861.04, ‘Recent tendencies in Soviet law’ (14 September 1937), 27: www.fold3.com.

²⁷ Ibid.

perpetrating one.

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.'²⁸ 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 re-admitting 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 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.²⁹

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. It was this framing of the idea that would be taken up by the Soviet criminologist, Aron N. Trainin, and transmitted to the postwar international military tribunals convened by the Allies at Nuremberg and Tokyo.

Complicity internationalised

²⁸ Moscow: People's Commissariat of Justice of the U.S.S.R., 1938, *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*, 694.

²⁹ Ibid., 694-5.

With Vishinsky's encouragement, Trainin began to develop a Soviet doctrine of international law from the mid-1930s onwards, but it was not until 1943 that his work began to attract attention abroad. On 26 August, 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 published the translated transcript in *Soviet Monitor*, which was distributed by Soviet embassies abroad.³⁰ In this, 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'³¹ 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'.³² In other words, Trainin grasped the essential point that waging war was a crime, it 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, Trainin 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'.³³ 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 linked concepts that were later inscribed as 'crimes against peace' and 'common plan or conspiracy' in the charters governing the Nuremberg and Tokyo tribunals.

³⁰ The National Archives London (hereafter TNA), FO 371/34377, A. Farrin [Trainin], 'The responsibility for Nazi crimes', *Soviet Monitor*, August 27, 1943.

³¹ *Ibid.*, 2-3.

³² *Ibid.*, 3.

³³ *Ibid.*

A year after the broadcast, the Soviets relaunched Trainin's proposals, this time as a book, *Ugolovnaia otvetstvennost' gitlerovtsev*, published in 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'.³⁴ 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.³⁵

Trainin 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'.³⁶ 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,³⁷ and even quoted Vyshinskii's aforementioned comments about the theory at the trial of Bukarin, Rykov and others in 1938.³⁸ Soon enough, the doctrine of complicity — used against those accused of committing treason against the Soviet state — was put to work by the Allies against the German and Japanese leaders accused of committing treason against the society of states.

'Waging war against the King'

³⁴ A.N. Trainin and A.Y. Vishinski, eds., *Hitlerite responsibility under criminal law*, Andrew Rothstein trans. (London: Hutchinson, 1945), 42. See also, Kirsten Sellars, *'Crimes against peace' and international law* (Cambridge: Cambridge University Press, 2013), 55-7.

³⁵ *Ibid.*, 37.

³⁶ *Ibid.*, 10-1.

³⁷ *Ibid.*, 84.

³⁸ *Ibid.*

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 New Delhi in 1945-1946 to deal 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 surrendered 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 Nawaz 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.³⁹

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.⁴⁰ In short, he transformed what had been a

³⁹ Moti Ram, ed., *Two historic trials in Red Fort: an authentic account of the trial* (New Delhi: Moti Ram, 1946), 19.

⁴⁰ For a fuller account, see Peter W. Fay, *The forgotten army: India's armed struggle for independence, 1942-1945* (New Delhi: Rupa & Co, 1994), 476-7.

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 ... 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.⁴¹

In other words, the proceedings, conceived by the British to convey a 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.

⁴¹ Jawaharlal Nehru, Foreword, in Ram, ed., *Two historic trials*, iii.

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, ‘free’ China, Croatia, Manchukuo, and Siam. This government had then declared war on Britain and the United States, and thereafter had assumed the rights of a belligerent state, 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,’ Dhillon told the court.⁴² The decisive moment, as the defence pointed out, was the gathering at Farrer Park, 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’.⁴³ 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 Bhulabhai 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

⁴² Ram, ed., *Two historic trials*, 118.

⁴³ *Ibid.*, 110.

life that another may not govern India (prolonged cheers)!'⁴⁴ 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 never be made a legitimate war for the purpose of liberating itself.'⁴⁵ 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

⁴⁴Nehru Memorial Library, Bhulabhai Desai papers, 1st and 2nd part, 'Speech of Mr. B.J. Desai, Advocate' (1930), 3.

⁴⁵Ram, ed., *Two historic trials*, 153.

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.⁴⁶

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.'⁴⁷ 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'.⁴⁸ 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 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

⁴⁶ Ibid.

⁴⁷ Ibid., 141.

⁴⁸ Potsdam Declaration, *FRUS 1945 The Conferences of Berlin (The Potsdam Conference)*, vol. 2, (Washington DC: Government Printing Office, 1960), 1475.

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 the theory to a defence lawyer: 'Conspirators need not know each other, they need not know of each other's existence, let alone exchange words.'⁴⁹ 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.⁵⁰ 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.⁵¹ 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.⁵²

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.'⁵³ The simple truth was that the government in question had sought Indian takers for the Tokyo job, and, after having already had a few

⁴⁹ International Military Tribunal for the Far East, *The Tokyo major war crimes trial*, R. John Pritchard ed., 124 vols. (Lewiston: Edwin Mellen Press, 1998) (hereafter: IMTFE), vol. 59, 28279. Webb addressed 'common plan or conspiracy' in his Separate Opinion at end of the trial.

⁵⁰ TNA, LCO 2/2992, Patrick to Normand (c. January 1947), 5.

⁵¹ Bernard V.A. Röling and Antonio Cassese, eds., *The Tokyo trial and beyond: reflections of a peacemonger* (Cambridge: Polity Press, 1993), 28-9.

⁵² TNA, LCO 2/2992, Patrick to Normand (c. January 1947), 1.

⁵³ Ibid.

refusals, was evidently relieved when someone suitable had finally accepted the appointment.⁵⁴ 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.⁵⁵ 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.⁵⁶ 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"'.⁵⁷

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'.⁵⁸ 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

⁵⁴ National Archives of India (hereafter, NAI), 306-FEA (1946), Duke (9 October 1946).

⁵⁵ IMTFE, Pal Dissent, vol. 105, 103. For a more detailed appraisal of Pal's position, see Sellars, '*Crimes against peace*', 236-8, 250-1.

⁵⁶ Ibid., 70.

⁵⁷ Ibid., 239.

⁵⁸ 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, 149.

wrote, the dominated nations ‘cannot be made to submit to eternal domination only in the name of peace’.⁵⁹ 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*’.⁶⁰ 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.⁶¹ Back in India, Jawaharlal Nehru’s government, which had recently won power from the British, was dismayed and embarrassed by Pal’s stance.

Senior Indian 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 so⁶² — 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.’⁶³ 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’.⁶⁴ 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.⁶⁵ 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

⁵⁹ IMTFE, Pal Dissent, vol. 105, 239.

⁶⁰ IMTFE, Pal Dissent, vol. 108, 1226. Original emphasis.

⁶¹ TNA, DO 35/2938, Gascoigne to Denning (25 November 1948).

⁶² NAI, 489-CJK/49 (1948), Pal to K.P.S. Menon (4 May 1948).

⁶³ NAI, 489-CJK/49 (1948), Nehru to West Bengal Governor General (29 November 1948).

⁶⁴ NAI, 489-CJK/49 (1948), K.P.S. Menon (20 July 1948).

⁶⁵ NAI, 489-CJK/49 (1948), V.K.K. Menon to K.P.S. Menon (4 August 1948).

‘making it clear that Mr. Justice Pal’s views were not those of the Government’.⁶⁶ 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.

Conclusion

The concept of treasonable conspiracies entered the vocabulary of international criminal law at the initial instigation of the French and the Soviets, inspired by cases against Radical-Socialist ministers and ‘old Bolsheviks’. The idea made its international debut in Asia at the Tokyo Tribunal. But it was at this time, and in this part of the world, that Rebecca West’s warning against sacrificing freedom for security was especially pertinent. The Indian jurists questioned the very premise of treason — in both its domestic and international forms — by asserting the right of the colonised to wage war against the coloniser. And, as it turned out, it was Bhulabhai Desai, not the British authorities, who was vindicated over colonialism in India; and it was Radhabinod Pal, not his many detractors, who was vindicated over the soon-abandoned ‘crimes against peace’ charge. Their argument that ‘treason’ was a justified response to unjust circumstances would be both popularised and acted upon, for 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.

⁶⁶ NAI, 489-CJK/49, P.A. Menon (6 December 1948).