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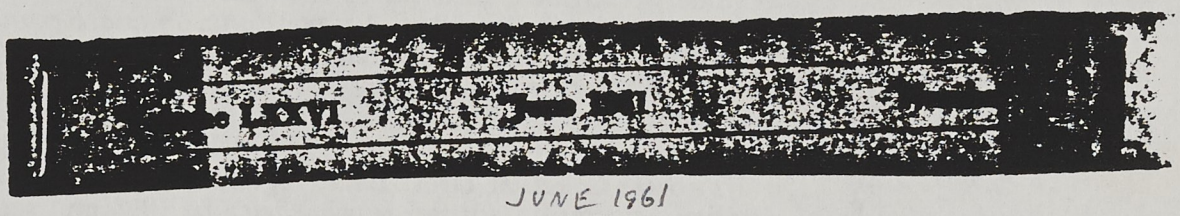

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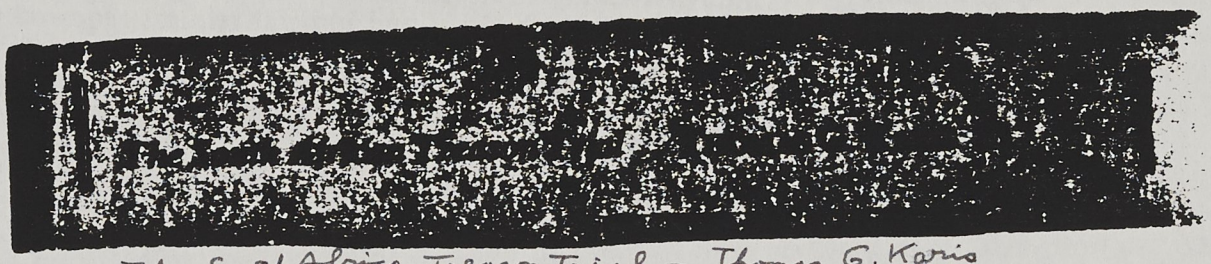

The South African Treason Trial — Thomas G. Karis

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THE SOUTH AFRICAN TREASON TRIAL*

ON December 5, 1956, and some days later, 156 Africans, Whites, Indians and Coloreds were arrested by the government of South Africa, accused of being members of "a country-wide conspiracy" inspired by international communism to overthrow the state by violence.[1] Of the trial that has followed, a British observer has said: "Not since the burning of the Reichstag in Berlin in 1933—with the notable exception of the special trials at Nuremberg—has a trial attracted such international attention."[2]

Yet the trial has presented no special problem of legal correctness or, except during the emergency that followed the shooting at Sharpeville in March, 1960, of judicial impartiality. Some substantive questions regarding the meaning of treason in South African law are involved in it, but these are of minor interest. What does make the trial interesting and important is its political meaning, the question of its effect on the prospects

* The author is grateful to Professor Gwendolen Carter, Dean Erwin Griswold, Dr. Waldemar B. Campbell, and friends in South Africa for their comments and suggestions. They bear no responsibility, of course, for what follows.

This article deals with events through 1960. The trial ended on March 29, 1961, when a verdict of not guilty was announced. See pages 239-240.

1 This article is based largely on documents of public record in the special criminal court in Pretoria, personal observation during 1957-1959, and reports in *The Star* (Johannesburg) and *New Age* (Johannesburg). In South African nomenclature, *Africans* are Bantu Negroes, called "Natives" by most Whites, "Bantu" by the Government, and "Africans" by the politically conscious among themselves and by liberals. *Whites* are "Europeans," Afrikaans-speaking and English-speaking in proportions of 3 to 2. *Coloreds* are racially mixed. *Indians*, or Asians, are mainly Hindus. In the Union's population of 15,841,000 (1960), there are roughly 10.8 Africans to 3.1 Whites to 1.5 Coloreds to .5 Indians.

2 L. J. Blom-Cooper, "The South African Treason Trial: R. v. Adams and Others," *The International and Comparative Law Quarterly*, January 1959, p. 59. Another British observer wrote in mid-1957 that the trial was "unique in legal history, unique in the number of accused, in the weight of the documents, in the length of the proceedings and, not least, in the extraordinary width of the laws applicable." Gerald Gardiner, "The South African Treason Trial," *Journal of the International Commission of Jurists*, Autumn 1957, pp. 42, 58. For reports of other observers, see *Bulletin of the International Commission of Jurists*, December 1958 and August 1959.

for racial reconciliation in South Africa. This article is concerned mainly with this question.

The Accused

The arrests were aimed at the leaders of the extraparliamentary opposition to South Africa's racial policies.[8] The accused were a racially mixed and ideologically diverse group. Approximately two-thirds of them (104 or 105) were Africans. Forty-four were Whites and Indians (nearly the same number of each), and seven or eight were Coloreds. Of the non-Africans, a few were Communists. But the views of the rest ranged from ideological identification with the communist world peace movement to humanitarian identification with Africans. Some of the Indians were followers of Ghandi.

Among the Africans arrested there were only a few who had been members of the Communist party. The most important organizations represented by the accused were the African National Congress (ANC), whose leading officials were arrested, and certain bodies allied with it in the movement known as the Congress of the People. The policies of the ANC were to become the focus of the Prosecution's case. Among ANC leaders who were arrested were ex-Chief Albert Luthuli, a Christian leader who was then and still is President-General, Professor Z. K. Matthews, academically the most distinguished African in the Union, and his son, Joe, a brilliant younger leader.

The ANC had been formed in 1912 by a tiny and conservative class of educated Africans in coöperation with tribal chiefs. Gradually it moved from a conservative African nationalism to militant nationalism and a policy of multi-racial coöperation to attain its ends. In 1952, it waged a country-wide campaign of passive resistance and disobedience to the "unjust laws" of apartheid. As a result, ANC membership grew from 15,000 or

[8] The fullest and most acute analysis of South African politics since 1948 is Professor Gwendolen Carter's *The Politics of Inequality* (New York, 1958), which contains a comprehensive bibliography. The most valuable history of African politics is Edward Roux's *Time Longer than Rope* (London, 1948). Anthony Sampson's *The Treason Cage* (London, 1958), is a short history of the African National Congress and its leaders. See also Edgar H. Brookes and J. B. Macaulay, *Civil Liberty in South Africa* (Cape Town and London, 1958) and Leo Kuper, *Passive Resistance in South Africa* (London, 1956).

20,000 to 100,000; and about 8,500 volunteers, including some Indians, Coloreds and Whites, went to jail. Rioting and violence occurred before the campaign died down by the end of the year, but, according to Professor Gwendolen Carter, the riots "were neither stimulated nor condoned by the African National Congress."[4] The period that was to be covered by the trial's indictment—October 1, 1952, to December 13, 1956—began a few days before the first riots.

New legislation passed early in 1953 seriously increased the risks to be run in future campaigns of protest. Administrative restrictions on the activities of non-White and radical opponents became more and more severe during the indictment period, and police surveillance amounted to harassment. The tactics of opposition shifted from disobedience to demonstration, and multi-racial coöperation grew closer. Of the campaigns of protest that were loudly proclaimed, however, many were abortive or were deflected in various ways by the government.

The climactic demonstration by the ANC and its allies was a so-called Congress of the People, held near Johannesburg on June 25-26, 1955, and attended by nearly 3,000 delegates of all races. The Congress was planned by representatives of the ANC, by the South African Indian Congress, and by two organizations formed during the preceding year: the South African Congress of Democrats (largely dominated by communist sympathizers), and the South African Colored People's Organization. The latter two, each with only a few hundred members, supplied the White and Colored spokes of the four-spoke wheel that symbolized the Congress of the People.[5]

On June 26, 1955, the Congress of the People adopted a manifesto called the Freedom Charter that was to be the key document in the Prosecution's case. The Charter was largely free of communist phraseology although it displayed traces of com-

[4] Carter, *op. cit.*, p. 374. The Prosecution has not alleged any direct connection between the ANC and the riots.

[5] Other organizations allied to the Congress movement and figuring in the treason arrests were formed during the two years preceding June, 1955: the South African Peace Council, the South African Indian Youth Congress, the Federation of South African Women, and the South African Congress of Trade Unions.

munist style.[6] In the main, it rang the changes on one theme: all racial discrimination must be abolished and equal rights must be guaranteed for all. This theme had recurred at least since 1943, when a new ANC constitution had proclaimed as an aim "the freedom of the African people from all discriminatory laws whatsoever." The Charter asserted that "our people have been robbed of their birthright" but attempted no historical explanation of the status quo, suggested no philosophy of social change, and proposed no program of action. "These freedoms we will fight for," it concluded, "side by side, throughout our lives, until we have won our liberty." "Freedom in Our Lifetime" appeared on banners at the rally but not in the Charter itself. Some delegates were reported to have said "freedom in the lifetime of Luthuli," who was about fifty-seven and had had a heart attack.

Although communist influence was evident in the trappings and slogans at the June 1955 rally, its importance was limited.[7] The Communists never won control of the ANC. Luthuli has always insisted that he would accept their coöperation only so long as they were not in control. Communist influence was greater among Indians than among Africans. A professed Communist, Dr. Yusuf Dadoo, who was not arrested in December, 1956, was president of the South African Indian Congress. But

[6] The Charter, officially adopted by the ANC early in 1956, promised public ownership of mineral wealth, banks, and monopoly industry, and redivision of the land among those who worked it. Otherwise, it envisioned a social welfare state in which industry and trade were "controlled" for the public welfare, workers were free to form trade unions and to make wage agreements with employers, "no one shall go hungry," and "rest, leisure, and recreation shall be the right of all." Except for a few generalities, the Charter ignored international affairs. The text is in Carter, *op. cit.*, and Sampson, *op. cit.*

[7] Communists have been influential among Africans largely to the extent to which they have avoided ideology and identified themselves with popular protest or shared the burden of governmental repression. Militant nationalism inspired most of the younger, politically-minded Africans in the 1940's. But in the 1950's, ANC leaders tended to coöperate with Communists of various races, partly in response to the common threat of the loosely-defined Suppression of Communism Act of 1950, which greatly enlarged ministerial power to control the activity of suspected individuals. The Communist party, whose membership was about 2,500, about half of whom were White or Indian, ostensibly dissolved itself a few days before final passage of the Act that outlawed it.

other important Indian leaders, especially in Natal, were not Communists.

For some years prior to the December 1956 arrests, the police had attended meetings and conducted numerous raids, taking verbatim notes and collecting evidence that was to be grist for the Prosecution in the treason trial. There were a thousand of these raids in a few months following the June 1955 meeting. "Everything still has to be correlated," the Minister of Justice told Parliament in April, 1956, "but it is expected that about two hundred people will be charged" with treason and other offenses. Presumably, the arrests occurred only when at last everything had been "correlated"—at least to the satisfaction of the Special Branch.

Yet there were numerous anomalies in the lists of accused and co-conspirators and in the permutations (described below) of the lists.[8] The most difficult to understand was the dismissal, about a year after the arrests, of Luthuli and Oliver Tambo, the ANC's second ranking official. Their dismissal seemed inexplicable when it later became clear that the ANC itself was alleged to be a party to the conspiracy, its program the essence of that conspiracy.

The Trial

The South African law of high treason is imprecise, nor are its precedents directly applicable to the present case since they have arisen in circumstances of war or rebellion. It derives from Roman-Dutch common law, which is vaguer and less restrictive than English statutory definitions or the even more rigid definition in the United States constitution: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." "High Treason" in South Africa, according to the standard treatise on criminal law, "is committed by those who with a hostile intention disturb, impair or endanger the

[8] For example, some leading Communists were not included. Other Communists among the accused were dismissed or transferred to the list of co-conspirators. On the other hand, the co-conspirators in the first (but not the second) indictment included Dr. A. B. Xuma, the anti-communist President-General of the ANC from 1940 to 1949. Minor African politicians, including one African politically emasculated by Moral Re-Armament, were also involved in the trial.

independence or safety of the State, or attempt or actively prepare to do so."[9] As in England and the United States, it is punishable by death.

The Prosecution's argument relies on manifestations of hostile intent in peacetime circumstances. The major questions it raises may eventually be answered by the Appellate Division of the South African Supreme Court. In the meantime, the court that has been hearing the case ruled on March 2, 1959, against certain contentions of the Defense. The Defense had questioned the nature of overt acts on which the Prosecution could rely in showing hostile intent. If the overt acts were spoken or written words, the Defense argued, such words in the absence of an external enemy should at the very least amount to an incitement to violence or sedition. Following the test of intent and tendency, though referring also to circumstances, the Court disagreed, "provided the words, in the circumstances, manifest the hostile intent and provided they tend toward the accomplishment of the criminal design."

The course of the trial appears bewilderingly complex because of the great bulk of the evidence, the seemingly endless series of further particulars and amendments to the indictment, the discharge without explanation of two-fifths of the accused, the split of the remaining accused into separate groups, the Court's dismissal of a new indictment against one group, and anomalies in the inclusion of some persons and exclusion of others among those arrested, discharged, or regrouped. On August 5, 1959, after describing the fairness of the proceedings as the trial's "one bright spot," the *Times* of London observed that "for the rest, darkness and confusion prevail."

Much of the delay and procedural complexity can be explained by the circumstances of an unprecedented mass trial in a legal system whose procedure is based mainly on English law. The anomalies and permutations in the lists of the accused and co-conspirators can be largely explained by legal considerations of evidence and joinder and the practical difficulties of handling a large number of defendants. The legal issues are clear, although poorly illuminated by precedent, and have become narrower as the trial has progressed. The trial has had six phases:

[9] F. G. Gardiner and C. W. H. Lansdown, *South African Criminal Law and Procedure* (Capetown, 1957), Vol. II, p. 987.

December 1956–January 1958. The preparatory inquiry occupied some nine months in Johannesburg and was concluded when the presiding magistrate found "sufficient reason for putting the accused on trial on the main charge of high treason."[10] In December, 1957, however, the Attorney-General had announced that he was withdrawing charges against 61 of the accused (including Luthuli).

August–October 1958. A three-judge special criminal court in Pretoria heard legal argument on the adequacy of the indictment. During this phase, there were 91 accused, four having been discharged in addition to the 61. Proceedings were temporarily suspended when the Prosecution withdrew the indictment (an occurrence unparalleled in English legal history, according to Blom-Cooper).[11]

Before the indictment was withdrawn, its scope had been narrowed. Originally it had charged that the accused were guilty of high treason because they had conspired and acted "in concert and with common purpose" to overthrow the State by violence. The indictment also had included two alternative charges of contravening the Suppression of Communism Act. (These charges were concerned with the furtherance of "communism" rather than, as in high treason, acting with hostile intent to subvert the State.) The Court quashed one of the two alternative charges and ordered the Prosecution to supply additional particulars regarding the other. The Court also ordered the Prosecution to tell each accused how he was affected by the difference between allegations of "conspiracy" and allegations of "concert and common purpose." The Prosecution's response was to drop the remaining charge under the Suppression of Communism Act, leaving only the main charge of high treason, and

10 On the inquiry, see Sampson, *op. cit.*, and, for a sentimental account, *The South African Treason Trial* (London, 1957), by Lionel Forman (a young Communist, one of the accused, who died in 1959) and E. S. Sachs. Despite the gravity of the charge, the accused were soon released in December, 1956, on bail that was nominal: £250 for Whites, £100 for Indians and Coloreds, and £50 for Africans.

11 Bail conditions came to an end. Since then, except while detained during the emergency in 1960, the accused have been free. Their obligation to attend Court has been in response to a summons to do so. After the emergency, the Prosecution applied to the Court to order the re-arrest of the accused. The Court held it had no power to do so since bail had lapsed.

to delete the words "acting in concert and with common purpose," leaving only the allegation of conspiracy. Both the Court and the Defense still assumed that, if conspiracy was not proved, the Prosecution would attempt to establish the guilt of each accused for separate overt acts of high treason. But on September 29 the leader of the Prosecution announced that he was relying (to begin with) on one overt act—"conspiracy pure and simple." "If the Crown fails to prove conspiracy," he said, "then all the accused go free."

During argument, the Court appeared to side with the Defense in its view that the planning of violence was necessary for treason and that the Prosecution should supply particulars of the facts upon which it relied in its inference that the accused intended to act violently. The Prosecution, on the other hand, accused the Defense and indirectly the Court of failing to coöperate in "streamlining" the indictment. The Prosecution may have avoided a quashing of the indictment by withdrawing it.

January–June 1959. The trial was resumed in a more manageable form under a second indictment against only thirty defendants. Under the new indictment, the issues of the trial were narrowed still further. The Prosecution's case was now, and for the remainder of the trial, limited to proving the intention of the accused to act violently. The crux, according to the particulars, was narrower yet: whether or not the policy of the ANC and its allied organizations, to which the thirty accused belonged, was violence. Therefore, although the thirty accused were distinguished by the more violent tone of their rhetoric, Luthuli and other ANC leaders who testified for the Defense were as much on trial as the thirty.[12]

Legal argument on the adequacy of the indictment was concluded, and on March 2 the Court refused to dismiss the indict-

[12] Of the 91 accused, fifteen had been members of the Communist party and thirty were Whites or Indians, but only two of the former and five of the latter were included among the thirty accused. Only a few of the African accused were ANC leaders of importance. The alleged adherence of the thirty to the conspiracy covered a shorter period of time than that covered by the original indictment (instead of October 1, 1952, the period began on February 1, 1954, running until December 13, 1956), but the Prosecution's evidence against the thirty covered the longer period and included speeches and documents of the persons originally accused and the co-conspirators. No particular conspiracy by the thirty was alleged.

ment. The ruling was referred to the Appellate Division of the Supreme Court, and the trial was postponed. Such an appeal at this stage had no precedent in South African (and probably none in British) legal history.[18] In mid-June the Appellate Division ruled that it had no jurisdiction on questions of law arising from an unconcluded trial.

August 1959—March 1960. Two years and eight months after their arrest, the thirty accused were at last arraigned. Each pleaded not guilty. What was presumably the last phase of the trial began, except for appeal to the Appellate Division if the accused were convicted. For over two months, some 150 witnesses for the Prosecution testified about more than 4,000 documents, and for nearly six weeks the witness stand was occupied by Andrew Murray, professor of Philosophy at the University of Cape Town, the Prosecution's expert witness on communism. The Prosecution concluded on March 10. The Defense called its first witness a few days later and began the examination of Luthuli on March 21.

March 21—August 1960. The trial entered a new phase after the shooting at Sharpeville on March 21, the declaration of a national emergency, and the outlawing of the ANC. (See below, pages 236-238.) The accused (except one, who disappeared) were among some 1,900 political suspects arrested in early morning raids. (Tambo, the ANC's second ranking official, escaped and

[18] Meanwhile, an event occurred that was an aberration from the normal course of events, although it was hailed by the trial's critics at home and abroad as a victory. The official announcement in November, 1958, that the trial would proceed against only thirty of the accused had stated that the remaining 61 would also be re-indicted on a charge of treason and that their trial would begin on April 20, 1959 or afterwards. Presumably they were to be tried after the conclusion of the trial of the thirty. But on April 20, no later date having been set, the 61 appeared in court. They had been divided into two groups, each facing an indictment (covering different periods of time) that was essentially the same as that faced by the thirty in January but lacking in particulars similar to those ordered by the Court since January. Because of this failure, the Court quickly and surprisingly granted the Defense motion to dismiss the indictment. The 61 still faced re-indictment.

Speaking on May 12, 1959, about "the ordinary course of justice," the Minister of Justice said, "This trial will be proceeded with, no matter how many millions of pounds it costs. . . . What does it matter how long it takes?"

has visited the United States.) The Court adjourned. When it met again late in April, the Defense counsel withdrew at the request of the accused after the Court had overruled protests that witnesses would be imperiled if they testified during the emergency. "We do not believe," said Duma Nokwe, an African of left-wing sympathies among the accused and the first African to become a barrister in the Transvaal, "that a political trial can be properly conducted under conditions amounting virtually to martial law."

Nokwe and others among the accused continued to examine witnesses. Many questions were asked by Mr. Justice Rumpff, the presiding judge. With the easing of emergency conditions and at the request of the accused, the Defense counsel returned on July 18. Late in August, the Defense for the first time challenged the impartiality of one of the judges, Mr. Justice Rumpff, on the ground that the cumulative effect of his interventions gave the impression of unfairness. The judge rejected the challenge, and the Court granted permission to appeal if the verdict were guilty.

Since September 1960. With the ending of the emergency on August 31 (though the ANC was still outlawed) and the release of the accused from jail on that day, the proceedings were almost back to normal. The Defense closed its case on October 7. On November 7, the Prosecution began the final argument.

The Prosecution

The Prosecution's argument has a simplicity so grand that one can understand the exasperation with the Defense occasionally shown by Oswald Pirow, Q.C., the chief prosecutor.[14] "The essence of the crime" of high treason, said Pirow, was "hostile intent." Such intent was evident in the demands of the accused for full equality. They knew, the second indictment alleged, that to

[14] Pirow, one of the ablest men in South African public life, had been recalled from semi-retirement to lead the Prosecution. As Minister of Justice in 1929 and the early 1930's, he had been a severe opponent of left-wing activity. During the War, which he opposed entering, he founded the New Order, an authoritarian group opposed to parliamentary democracy. He died in October, 1959.

achieve the demands of the Freedom Charter "in their lifetime" would "necessarily involve the overthrow of the State by violence." Or "in any case the accused must have known," said Pirow, "that the course of action pursued by them would inevitably result in a violent collision with the State resulting in its subversion."

The Prosecution found the hostile intent of each accused in his adherence to a conspiracy. The accused believed, said Pirow, that the Congress movement was "the vanguard" of the so-called National Liberatory Movement in South Africa. "The essence of the case" was the fact that the Liberatory Movement was part of an international communist-inspired movement "pledged to overthrow by violence all Governments in non-communist countries where sections of the population did not have equal political and economic rights." The importance of communism in the trial, said, Pirow, was that it illuminated the nature of the conspiracy and the conspirators' intent.

How did the Prosecution seek to prove the existence of a treasonable conspiracy? By "an irresistible inference," said Pirow, from the history of the world-wide communist movement and the history of the extraparliamentary opposition in South Africa. Pirow admitted that the Prosecution's case was "intricate" and included "voluminous particulars"—all kinds of evidence of spoken and written words, attendance at meetings, possession of documents, and so on—many of which appeared innocent. Although the Prosecution based its case on one overt act of conspiracy, these particulars also were overt acts, done "in pursuance and furtherance" of the conspiracy, said the indictment, and necessary as proof of individual adherence to it. The "unifying element" was the Liberatory Movement. No facet of the case could be isolated from it, and all the activities of the accused were referable to it. In short, Pirow argued, there was no doubt about the existence of a treasonable conspiracy if one looked at each fact in the light of all the facts.

The context in which each fact should be seen was given its most comprehensive statement by Pirow in his opening address on August 10, 1959, from which the quotations above are taken. The address was, in part, an analysis of a document called the "Summary of Facts" that served explicitly as a key to the documentary evidence. By 1959 the documents had been reduced

from nearly 10,000 to about 5,000, and the number of accused was down to thirty. Yet Pirow's argument and the "Summary" taken together encompassed world communism at least since 1949, the extraparliamentary movement in South Africa since 1952, other events occurring "many years" prior to the period covered by the indictment, and the activities of persons not listed even among the many alleged co-conspirators. Thus, the Prosecution linked the African National Congress, the World Peace Council, and opposition to the foreign policies of Western European countries and the United States. Also said to be communist-inspired was the entire range of the tactics of protest, including agitation over minor grievances. All these techniques, said Pirow, were regarded by the accused as a "prelude to the ultimate revolutionary offensive."

By looking at all the facts, one also found the essential element of hostility. "Insistence upon violence," said Pirow, "runs through the case in an unbroken thread." Especially in the early stages, the Prosecution suggested that advocacy of bloody violence was not necessary in establishing hostile intent. But the Prosecution based its second indictment on such advocacy and selected thirty accused whose speeches, said Pirow, "bristle with references to the spilling of blood."

The key document was the Freedom Charter, the basic Congress manifesto. In the Prosecution's argument, however, the accuseds' intent illuminated the Charter more than the Charter illuminated their intent.[15] The Prosecution also relied upon

[15] At the close of the preparatory inquiry in January, 1958, Pirow had described the Charter as communist on its face and had treated it as the cornerstone of the Prosecution's case. The full text was printed in the first indictment. In later stages, however, the Charter was given less emphasis. During 1958, a statement of testimony to be given by a foreign expert on communism said about the Charter only that "it is most probably Communist in origin." The second indictment specified five Charter demands that were concerned mainly with public ownership and redivision of the land. Pirow's opening address in August, 1959, stressed that the accused understood the Charter as "a revolutionary document," embodying aims to be achieved "in their lifetime" and therefore involving "the complete smashing of the entire State apparatus in its present form." In answering a request for particulars, the Prosecution had alleged earlier that "in their lifetime" meant five years from June 26, 1955, the date of adoption of the Freedom Charter. The allegation was withdrawn later.

quotations from speeches and publications that leave nothing to the imagination. In referring to motivations that have deeper and wider roots than ideological communism, Pirow said that the accused were "inspired by communist fanaticism, Bantu nationalism and racial hatred in various degrees." The observer of the trial faces no problem in selecting a lurid example of advocacy, whatever may be its inspiration, because one quotation stands unchallenged as the prime exhibit.

It is from a speech made by Robert Resha, chief of the ANC's so-called Freedom Volunteers. Resha's speech can virtually be duplicated by many public speeches, but it has a sensational quality because it was made thirteen days before the arrests at a secret meeting recorded by a hidden microphone. "When you are disciplined and told by the organization not to be violent, you must not be violent," Resha said, but "if you are a true volunteer and you are called upon to be violent, you must be absolutely violent, you must murder, murder."

For illumination of intent, the Prosecution looked also at the circumstances in which words were uttered. Intent "or what could reasonably have been intended," said Pirow, could partly be determined by "gauging the probable reaction of the people who formed, for example, the bulk of the audience at meetings of the ANC." The Prosecution had evidence to demonstrate that "the bulk of the country's non-European population is likely to respond more quickly, more irresponsibly, and more violently to illegal agitation than would be the case with a group whose general standard of civilization is higher."[16]

The Prosecution also looked at intent in the penumbra of circumstances of clear and present danger. Adducing such circumstances was not necessary to the legal argument, but the gravity of the charge appears to have required the justification of imminent revolt. Thus, Pirow argued that the situation at the time of the arrests was "explosive."[17] Nevertheless, intent

[16] The Prosecution did not introduce such evidence.

[17] An allegation in the first indictment that the words of the accused "did in fact" promote discontent and hostility was dropped, following a request by the Defense for particulars. No evidence of violent actions that had been described in detail during the preparatory inquiry (burning of schoolhouses, wrecking of buses, and so on) was introduced during the trial. The "hostile and overt acts" alleged in the indictment constituted, as noted above, the entire range of extraparliamentary agitation and tactics.

remained of the essence. The second indictment stressed incitement and preparation for violence but did not allege that any consequences resulted that constituted an attempt to overthrow the State. Only in passing did Pirow argue in his address that the accused sought to exploit "susceptibilities" and "passions" and "succeeded in so doing."

The Defense

The Defense confronted the Prosecution's most sensational exhibit when the secret recording of the "murder, murder" speech was played in the courtroom on May 18, 1960, in the presence of Luthuli. Luthuli, a man of imposing dignity, denied that the speech expressed ANC policy. Earlier he had testified that since the ANC was an "omnibus" organization, whose members ranged in opinion from conservative to communist, he was not surprised that deviationist speeches were made. But non-violence was the ANC's basic policy, and the ANC in practice was a restraining influence. The "militancy" of the 1949 "Program of Action" meant work stoppages, non-violent defiance of unjust laws, and other demonstrations intended to draw attention to African suffering. No one at the branch or national level had suggested adoption of a policy of violence. If someone had, said Luthuli, he would have opposed it on personal and practical grounds: his Christian belief and his belief that violence would be suicidal. Furthermore, the examples of India, Ghana, and Nigeria had shown him the efficacy of non-violence.

Resha himself admitted later that he had made the speech but insisted that it was clearly outside ANC policy. When questioned by a senior member of the ANC he had explained that he was merely trying to give an example of extreme discipline. He had sometimes expressed doubts about the ANC's policy of non-violence, he said, but agreed with it in his calmer moments.

Luthuli's testimony supported the conception of the ANC held by the Defense: the ANC was a loosely-organized movement encompassing many points of view but held together by common grievances and aspirations and officially committed to non-violence. Subtle but sharp differences from the approach of the Prosecution distinguished the approach of the Defense to the facts in the case. For the Prosecution, African grievances had been exploited by agitators. Realistically, in the estimation of

the Prosecution, the primary significance of African aspirations lay in the means which they implied in the circumstances of South Africa. For the Defense, African grievances were to be expected in the circumstances of South Africa, and it was realistic to accept the fact that moderate and responsible African leaders saw in the Freedom Charter, as in the Universal Declaration of Human Rights, a vision of the future. Where the Prosecution stressed the power of the accused to start a conflagration, the Defense stressed the power of the State and the inability of the accused to do more than demonstrate their disaffection. For the Prosecution, the "murder, murder" speech was a revelation of intent made by a leader in circumstances in which the usual camouflage of non-violent affirmation was unnecessary. For the Defense, the speech was an example of irresponsible and rather incoherent demagoguery by a flamboyant individual, for whose words no accused could be held responsible in the absence of convincing evidence of endorsement. For the Prosecution, sophistication about communist-inspired conspiracy required one to judge the complicity of an individual by relating his activity to a complex pattern of seemingly innocent facts. For the Defense, the Prosecution's attitude from the outset had been, according to I. A. Maisels, Q.C., "Let's throw in everything the police have been able to find and see what comes out at the end."[18] In place of vague allegations, said Maisels, each individual among the accused was entitled to particulars that informed him precisely about the nature and extent of his adherence to the alleged conspiracy.

In short, the Defense denied the existence of a true conspiracy motivated by hostile intent. It denied the Prosecution's assumption that no middle ground existed between the ballot box and treason. The activities of the accused, it maintained, were characteristic of extraparliamentary and non-violent movements in countries that excluded a large section of the population from

[18] Maisels, perhaps the most brilliant advocate in South Africa, is the anti-communist leader of a Defense team, only two of whose members (A. Fischer, Q.C., and V. C. Berrange) have strong communist sympathies, which they have not disguised. Legal fees for the Defense, set far below the normal scale, are paid by the Treason Trials Defense Fund. The Fund is controlled and sponsored mainly by White liberals, churchmen, and other opponents of the government. It has issued the mimeographed *Treason Trial Bulletin* irregularly since February, 1958.

the political process. Such movements tended to be amorphous and undisciplined. Their leaders, more than the leaders of Western political parties, could not be held accountable for everything said by their followers. The Prosecution had selected for its case only a small proportion of all the speeches made. Furthermore, the Defense suggested, the cohesiveness of the alleged conspiracy was doubtful in the light of the grab-bag nature of the arrests, the discharge later of major leaders, and the presence of minor personalities among the thirty accused.

These interpretations of the political activity of the accused underlay the argument of the Defense, but its major effort lay in challenging the Prosecution's legal argument and the relevance of each piece of evidence. The Defense also challenged the reliability of reports of speeches. In leading an expert legal course marked by thoroughness and tenacity, Maisels acted in contrast to the course followed during the preparatory inquiry. The leader of the Defense at that time had denounced the proceedings as politically motivated and demanded that the law be interpreted in the framework of "democracy" rather than "fascism." Under Maisels, major legal questions have been raised. How much "concert and common purpose" is required to constitute conspiracy? Can conspiracy exist without agreement and be known by inference? Can intent constitute treason in the absence of war or rebellion? Can hostile intent be demonstrated by spoken or written words that fall short of incitement to violence? How strictly must one construe the criteria for proving adherence to a conspiracy?

The Trial's Political Meaning

Without imputing motives to the government, one can appreciate the logic of the trial. By it, the accused are tied up; those who might be accused are intimidated; the nature and breadth of the extraparliamentary opposition is demonstrated at home and to the world; and the demonstration is performed in accordance with the forms prescribed by a highly respected judicial system. The government is vindicated if it wins. If it loses, it can blame defeat on the law's inadequacy and extol the meticulous standards of the judiciary. On the final decision it can base either further prosecutions or the need for new legislation.

Nevertheless, the trial has been of little value to the government in its appeal to the White electorate, of doubtful value in dealing with the non-White opposition, and an embarrassment abroad. The Prosecution's failure to make dramatic disclosures at an early stage; the facelessness, for most Whites, of the body of the accused; the tedious, complex, and protracted nature of the proceedings; and the setbacks to the Prosecution—all these have made it difficult to exploit the trial politically. Whites generally have found the affair a murky business, characterized either by Defense technicalities or by governmental fumbling yet probably directed at fire under the smoke. Partly because of South Africa's strict *sub judice* rules, the press has done little to clarify the trial's issues for the public.

The trial has immobilized or preoccupied many leaders of the African National Congress and diverted them from large-scale campaigns of protest. It has probably boosted the prestige of the ANC's leaders, strengthened solidarity with multi-racial allies, and blurred the distinction between long-standing aspirations and communist aims. It has hastened the emergence of younger leaders. But by partly isolating some of the leading proponents of multi-racialism and gradualism, the trial has also weakened resistance to rising pressures for greater militancy, racial assertiveness, and identification with pan-Africanism. It has therefore put the ANC's leaders on the defensive on two fronts. In the longer run, however, it probably has contributed to the polarization of Afrikaner nationalism and all anti-government Africans.

The trial has partly drained the energies of White liberals, who have accepted the burden of obligation to provide for the Defense and care of the accused. The liberals include members of the Liberal party, in particular, which has competed with Whites on its left in seeking African acceptance. Meanwhile, White and Indian pro-Communists, sitting day after day in the unsegregated dock of the segregated courtroom, have found the trial itself a means of closer identification with the African opposition.

Despite the Prosecution's effort to stress communist influence, hardly any foreign observers or editorial commentators have accepted the trial as a justifiably anti-communist proceeding. It has failed to promote acceptance abroad of the claim of Dr. Hendrik Verwoerd, the present Prime Minister, that South

Africa is the West's "best friend and most faithful ally on the African continent."[19] Comment has mainly impugned the government's motives and sympathized with the tribulations of the accused. In a judgment that is widespread, the Manchester *Guardian* said on November 15, 1958, that the trial was "a political trial, pursued with pitiless pertinacity."

Foreign criticism has been directed at the following: the injustice of prolonged delay and uncertainty and the possibility that the trial (and successive trials) can be practically interminable; the near-impossibility of dealing fairly with individuals in a mass trial in which no single act of conspiracy nor any act of violence is alleged; the vagueness and openness to abuse of the definition of treason; the carelessness in preparing evidence and apparent arbitrariness in selecting the accused and co-conspirators; the absence of any revelations about conspiracy or any convincing evidence of attempt to overthrow the government; and the severity of personal and family hardship as a result of delay and uncertainty and inadequate provision for the accused or compensation for the dismissed. No one, to the writer's knowledge, has made the charge that the trial is staged or rigged. The regularity of the trial's procedure has been highly praised but sometimes has been regarded as meaning little to the individual accused.[20] The judges have also been praised, although sometimes in an invidious context.[21]

The trial poses two far-reaching questions, or one question seen from two vantage points. For unenfranchised and dissatisfied non-Whites, the question is: does the breadth of the Prosecution's argument leave open any extraparliamentary outlets for

[19] *The Times* (London), March 28, 1960, p. 10.

[20] Dean Griswold has summarized the difficulties of doing justice in a mass trial. *The Times* (London), September 25, 1958. Supporters of the Government have occasionally cited his favorable judgment on the fairness of the proceedings, although he has also described "the underlying legal situation" as "deeply unsound."

[21] The *New Statesman and Nation* of April 25, 1959 praised the judges for dismissing the indictment against the 61 accused, again showing, it said, that "the judiciary in an autocratic country may sometimes be prepared to put law before political expediency."

free speech or agitation?[22] For Whites seeking contact with these non-Whites, the question is: does the involvement in the trial of men like ex-Chief Luthuli and Professor Matthews mean that contact is possible only with Africans who are in basic agreement with official policy?

Regarding the latter question, it appears that all outlets and contacts not approved by the government are subject to being closed. Meanwhile, White anxiety about race relations has grown and with it, intellectual ferment and open-mindedness among both supporters and opponents of the government. Although their premises vary widely, these Whites base their hope for eventual African consent on the preliminary step of African consultation. The trial, in showing with clarity the government's attitude toward leaders like Luthuli and Matthews, has cast a cloud on White efforts to promote consultation with such men.

Especially notable efforts to attain this end were made by pro-government Afrikaner intellectuals who are members of the South African Bureau of Racial Affairs (SABRA), after the National party won a third term of five years at the general election of April, 1958. Despite Dr. Verwoerd's opposition to contact with outside official channels, SABRA leaders have held an unprecedented series of private meetings with a wide cross-section of articulate Africans. These included Luthuli and others involved in the trial and African nationalists who opposed the ANC's alliance with White and Indians and were out-

[22] By requiring the presence of hostile or violent intention, the Prosecution may argue that it leaves free speech for all, regardless of color, unimpaired. Although quoting the dictum of the highly respected Mr. Justice Schreiner, that "there is no intermediate course between constitutional action through the ballot box and treasonable action through illegal use of force," the Prosecution affirms that changes "however radical and far-reaching" may be sought by "legitimate and constitutional means." Presumably such means include speech that is intended to influence those who do have the vote. For critics of the government, however, the area between ballot box and treason is risky to enter. Its limits may be easily constricted under the historic "intent and tendency" test, which the Prosecution follows although it talks also of circumstances of clear and present danger. Nevertheless, Africans are not likely to abandon what the Prosecution describes as "a long and flexible process involving boycotts, strikes, civil disobedience and stoppage of work." Such pressures go beyond speech and may appear to be advocacy of "revolution," which the Prosecution defines as "the consummation of" the process described above.

spokenly anti-communist. The latter formally established the Pan-African Congress (PAC) in April, 1959.

On March 21, 1960, "the old book of South African history was closed at Sharpeville," Mr. Paul Sauer, the senior member of the Cabinet, has said.[23] On that day the police killed 69 Africans and wounded about 180 in a crowd that was demonstrating its support for a new defiance campaign against the carrying of passes and, according to the police, was threatening to overrun them. The campaign that occasioned these and later disturbances was initiated by the PAC, headed by Robert Sobukwe. After the shooting, Luthuli called for a stay-at-home Day of Mourning and made the defiant gesture of burning his pass.

The government, seeking a showdown, took action during the next few days that eclipsed the trial. In assuming emergency power for the first time under the Public Safety Act of 1953 and in freeing itself from the restrictions of habeas corpus, the government made South Africa a quasi police state. By the enactment of legislation that outlawed both the ANC and the PAC, the government took one of the major actions that probably would have followed the successful prosecution of the trial. By arresting about 1,900 persons in early morning raids, the government, acting in a less discriminating way than in 1956, cracked down on political suspects whose names were apparently on a standing list but against whom no case or evidence was prepared. Included among those indefinitely detained were most if not all of the persons arrested in December, 1956, and also members of the once-existent Communist party who had not been arrested for treason (presumably because of lack of evidence) after 1950. By jailing leaders of the anti-communist Liberal party without explanation and for the first time, the government acted in a manner predicted by critics who had seen in the Prosecution's argument danger to all opponents of official policy. And by convicting the PAC leaders during the first six weeks after Sharpeville for incitement and by imposing penalties ranging from whipping to three years in jail, the government again demonstrated its ability to act effectively in cutting down African leadership.

[23] *The Star* (Johannesburg), June 2, 1960, p. 23. For background and events to May 24, 1960, see *Days of Crisis in South Africa,* A Fact Paper, and *Addendum,* compiled by Muriel Horrell, South African Institute of Race Relations, Johannesburg.

The trial took on a new importance. The government, maintaining that a communist-inspired conspiracy was behind Sharpeville, looked upon the trial as a partial substitute for the judicial inquiry demanded by the parliamentary opposition. No major commission of inquiry will be appointed before the trial is concluded, the Prime Minister said on May 20, 1960, the last day of Parliament, ". . . as this trial itself has in part the character of an inquiry into the causes of disturbances."[24] Earlier, in explanation of the "reign of terror which threatens public safety," the Minister of Justice quoted from Resha's "murder, murder" speech and other evidence for the Prosecution, adding, "I shall . . . suppress the names of the speakers, in view of the fact that there is a case pending."

Meanwhile, leading Whites, including supporters of the government and representatives of commerce and industry, made the most urgent appeals for "consultation" with Africans ever heard in South Africa. In Parliament, a Liberal party spokeswoman gave Luthuli, Matthews, and Sobukwe as examples of "chosen leaders." In reply, the Minister of Bantu Administration and Development identified Luthuli as one of the "agitators" who incited revolt and then issued "pious statements" in favor of non-violence. The ANC and the PAC, according to the Minister of Justice, had a combined membership of only about 70,000—"a small coterie of terrorists" who want "our country."

The meaning of treason has grown as threats to White supremacy have appeared to become more serious. Following the end of the emergency on August 31, the surface of South African life resumed the appearance of normality, including a resumption of extraparliamentary activity by the Congress movement. The ANC, however, remained underground, where it may be joining forces with the PAC. Proposals to consult with ANC-PAC leaders tended to be characterized by the government as traitorous. The charge of treason is likely further to pervade and dampen politics, especially as foreign pressures deepen White anxiety about White supremacy and lend aid and comfort to non-

[24] For this and other statements below by members of Parliament, see Union of South Africa, *House of Assembly Debates* (Cape Town), 1959: columns 5673-5675; 1960: columns 4210-4211, 4302-4303, 4306-4310, 4319, 4330, 8343.

Whites.[25] But rational and uninhibited political debate is hardly to be expected in circumstances in which the stakes are believed to be life or death. A few days after Sharpeville, the Minister of Justice quoted a speaker for the ANC Youth League as having said, "De Wet Nel [Minister of Bantu Administration] must bear in mind that the day we achieve our freedom we shall charge him with high treason."

Conclusion

Three differing conclusions may be drawn about the trial's political importance, each of which has some validity. The Afrikaner Nationalist sees the trial as necessary. It stigmatizes subversive forces that are undermining racially separate development, the only policy that can prevent the submergence of Whites by Blacks. The liberal or multi-racialist sees the trial as tragic. It excommunicates moderate forces with whom Whites must consult if they are to bring about the conciliation and eventually win the consent that is the only hope for multi-racial peace. The realist or defeatist sees the trial as symptomatic. It epitomizes the conflict of Afrikaner nationalism and African nationalism—or more ominous, White racialism and Black racialism—forces that cannot be separated or reconciled.

The Prosecution's insight is elementary: the Freedom Charter undoubtedly undermines White supremacy and, given the facts of White power, any attempt to realize its aims in the lifetime of Luthuli would require or bring on violence. A trial for treason is logical. If succeeded by what Mr. Justice Holmes has described as "persecution for the expression of opinions," this development would be "perfectly logical." "If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition."

But for the observer who cannot avoid the conclusion that separate development is illusory, consultation with Africans appears urgently necessary. To be effective, it can hardly exclude African leaders like Luthuli who are among the accused

[25] *Dagbreek en Sondagnuus,* the Nationalist Sunday newspaper in Johannesburg, said on July 31, 1960, that advocacy of "intervention" or "takeover" by the United Nations [the policy of Alan Paton] was "equal to high treason" and should be made punishable as such by Parliament.

and alleged co-conspirators (or who are among those probably destined to be accused). If the writer may claim the parliamentary privilege exercised by Ministers of the South African Crown and judge a matter that is *sub judice,* Luthuli is a moderate if moderation means genuinely non-violent in intent. But if it means willingness to accept less than fairly rapid movement toward full political equality in an integrated economy, "moderation" among leaders like Luthuli has been a myth for perhaps a decade.

The trial, in short, epitomizes the alienation of Whites in political power from Africans who demand a share and eventually control of that power. Is it possible to foresee "graceful acquiescence" by Whites? (This is the alternative to "annihilation" in the judgment of the Roman Catholic Archbishop of Durban.) Visiting the Union in June, 1960, C. W. de Kiewiet received the "impression . . . that the point of no return has not yet been reached in South Africa's internal relations."[26] If White good will and power and the tactic of trials can forestall movement to the point of no return, perhaps South Africa can have a period of grace in which new generations of Whites and Blacks may arise between whom there can be accommodation.

Meanwhile, in 1961, the Special Court or the Appellate Division may finally reach a judgment for the Defense. The irrelevance of such a judgment to the larger contest of political and racial forces suggests the incidental nature of the trial, a dramatic and continuing sideshow, notable for its removal of certain major actors from the main arena.

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Note: The trial came to an end suddenly on March 29, 1961, while the Defense was in the fourth week of its final argument. Mr. Justice Rumpff announced that the three judges were unanimous in finding the twenty-eight accused not guilty. (One had died earlier in the month.) The Court found it impossible, he said, to conclude that the ANC had "acquired or adopted a

[26] *The Star* (Johannesburg), July 7, 1960.

policy to overthrow the state by violence—that is in the sense that the masses had to be prepared or conditioned to commit direct acts of violence against the state." The Court would prepare a full statement of its reasons. *The Times* (London), March 30, 1961, p. 12. Since the verdict was on a question of fact and not on law, the Prosecution cannot appeal.