

Bram Fischer Memorial Lecture 2011
Delivered at Rhodes House, Oxford on 24 February, 2011
By George Bizos SC

The struggle in South Africa was a struggle for human rights for all. One of the champions of that struggle was Bram Fischer QC, who was a devout believer in the rule of law, in the independence of the judiciary and a social democratic state.

Bram died in prison about fifteen years before the advent of democracy in South Africa in 1994. Nelson Mandela delivered the first Legal Resources Centre's Bram Fischer Lecture in Johannesburg in 1995. He said that as he stood at the voting booth next to him were the late Bram Fischer, Oliver Tambo, Chris Hani and Chief Albert Luthuli. Bram did not see the Promised Land for which he dedicated both his private and professional life.

Nelson Mandela said of him:

Bram was a courageous man who followed the most difficult course any person could choose to follow. He challenged his own people because he felt that what they were doing was morally wrong. As an Afrikaner whose conscience forced him to reject his own heritage and be ostracised by his own people, he showed a level of courage and sacrifice that was in a class by itself. I fought only against injustice not against my own people.

When terminally ill, the apartheid regime "released" him in the custody of his brother Paul, but declared his brother's home a prison to prevent Bram's relatives, comrades, colleagues and friends from visiting him.

Only four of us from the Johannesburg Bar led by Isie Maisels QC, doyen of the Bar, went to Bloemfontein to his memorial service. The funeral oration was to be delivered by André Brink, a young prominent Afrikaner writer who had regularly attended Bram's trial to the annoyance of the security police, who due to unforeseen circumstances was unable to do so. Arthur Chaskalson delivered the oration.

At the airport we saw Chief Justice Frans Rumpff, who had been appointed ahead of others because of his loyalty to the regime. He asked us what we were doing in the judicial capital of South Africa whilst his court was in recess. When we told him that we had come to Bram Fischer's memorial, he surprised us by saying, "He will be remembered long after all of us will be forgotten." His prophecy was fulfilled.

There are main roads, a township in Soweto, and two buildings, in the centre of Johannesburg mainly occupied by lawyers, named after him. Books have been written, films have been made and memorial lectures have been delivered on his life and work. President Nelson Mandela, four Chief Justices, Ismail Mohamed, Arthur Chaskalson, Pius Langa, Margaret H. Marshall of Massachusetts and Deputy Chief Justice Dikgang Moseneke have delivered the Legal Resources Centre's Bram Fischer Lectures. Lord Joel Joffe and Constitutional Court Justice Albie Sachs have delivered lectures in Bram's name at New College, Oxford, his alma mater. His schools Grey College in Bloemfontein and the University of the Witwatersrand (Wits), and other institutions have honoured him.

As a junior colleague of Bram, who was a family friend, and my mentor, who chose me to be part of the team to represent Nelson Mandela and others at the Rivonia Trial and who chose me, led by Sydney Kentridge QC, to defend him, I appreciate the opportunity to deliver this lecture in his honour. I thank Lord Joel Joffe, Professor Nic Cheeseman, Warden Don Markwell, New College, Rhodes House, Oxford University and others who made it possible for me to speak to you this evening. I have chosen to speak about the man, his beliefs and the high price he paid for pursuing his ideals.

Bram was of patrician Afrikaner stock, whose grandfather and father had played important roles in the history of South Africa. Before he chose to identify himself with the oppressed, it was widely believed that he would one day be either the Prime Minister or Chief Justice of South Africa. He enjoyed great respect amongst his colleagues. He put it to good use. His requests to leading members of the Bar to make themselves available for those charged with political offences or who had espoused unpopular causes were hardly ever refused.

In the first Legal Resources Centre's Bram Fischer Lecture, President Nelson Mandela said:

With that background he could not but have become an Afrikaner nationalist, as we became African nationalists thirty years later as a result of our oppression by whites. Both of us changed. Both of us rejected the notion that our political rights were to be determined by the colour of our skins. We embraced each other as comrades, as brothers, to fight for freedom for all in South Africa, to put an end to racism and exploitation.

I was a beneficiary of Bram's assistance. I was refused South African citizenship because of my radical behaviour as a student at Wits. My lack of South African citizenship posed a problem in relation to my admission to the Bar, putting into question my right to practice law in South Africa.

I discussed my problem with Joe Slovo, who was born in Lithuania and who had also been refused South African citizenship. He advised me that he was admitted because Lithuania was no more. I asked Joe if he would move my application and he replied, "For a Lithuanian Jew and a Communist at that, to submit that there was nothing wrong for a Greek to take an oath of allegiance to her Majesty the Queen, would be a submission not likely to be accepted." He suggested it would be better if a more senior barrister, preferably an Anglo Saxon, was asked to do it.

Joe told me that Bram had arranged with Rex Welsh, then a prominent senior junior at the Bar, to move my application. Because Welsh was not available on the day of the application, he arranged for H C Nicholas to do it. Nicholas was delighted when we saw on the court roll that Judges Lucas Steyn and Frans Rumpff were to hear the matter. He said that these judges had to take an oath to the British Crown when they were admitted. Because they were Afrikaner nationalists they probably crossed their fingers when doing so. He was proved right. It was not necessary for him to argue the matter. Judge Steyn asked if I was in court and said I must come forward to take the oath.

Shortly after my admission, I was briefed as Bram's junior on a matter concerning the expropriation of land owned by an Indian family contrary to the provisions of the *Group Areas Act*. I received my first lesson on the use of legal language, which has no room for adjectives and adverbs.

On June 26th, 1955, at the Congress of the People in Kliptown the Freedom Charter was adopted by thousands of multi-racial delegates. It declared that, "South Africa belongs to all who live in it, black and white." Professor Z K Matthews, an African devout Methodist Christian, originally proposed that such a document should be adopted to set out many of the human rights enunciated in the Universal Declaration of Human Rights. The propagandists of the regime called it a communist document inspired by the Communist Party, which had been declared an unlawful organization in 1950.

One hundred and fifty-six of the leaders of the African National Congress (ANC), the Indian Congresses of Natal and Transvaal, the Congress of Coloured People and the Congress of Democrats, the last of which was alleged to be a front for the Communist Party, were arrested in December 1956 on a charge of treason.

Bram persuaded half a dozen of the leaders of the Bar to appear at the preparatory examination of the accused, at the army headquarters in Johannesburg. It had been converted into a courtroom, in which a cage

had been constructed to accommodate the accused. The legal representatives threatened to withdraw and that the accused would not take part in the proceedings if the cage was not removed. It was removed overnight. All the accused were committed for trial, even though Vernon Berrangé exposed serious weaknesses in the state's case.

Bram played an important role in the trial, which lasted for almost four years. He arranged for a number of other members of the Bar to appear for the accused. They included Isie Maisels QC, Vernon Berrangé, Rex Welsh, H C Nicholas, Sydney Kentridge, Chris Plewman and solicitor Michael Parkington. Amongst the accused were Nelson Mandela, Walter Sisulu, Duma Nokwe, Helen Joseph, Joe Slovo and others. Some of us at the Bar, who were not briefed to appear, assisted the team. Particularly in unearthing provisions in various countries with democratic constitutional provisions, similar to those contained in the Freedom Charter. The defence of the accused was that the Freedom Charter was a blueprint for a democratic South Africa and not a communist dictatorship, as alleged by the state.

The accused were separated into groups, and only thirty-two were involved in what was to be the first of a number of trials. They were eventually acquitted in June 1961. A pyrrhic victory because the ANC was declared an unlawful organization after the Sharpeville Massacre in March 1960, in which sixty-nine people died and hundreds were wounded.

On December 16, 1961, the Manifesto of Umkhonto we Sizwe (MK) was published and acts of sabotage were committed against symbols of apartheid. In its Manifesto it declared:

Umkhonto we Sizwe fully supports the national liberation movement, and our members jointly and individually, place themselves under the overall political guidance of that movement.

The purpose of the carefully drawn statement was to protect the tens of thousands of members of the ANC and other organizations from being vicariously liable for the acts of MK. It later became known that Bram played an important role in formulating the Manifesto in order to persuade Chief Albert Luthuli and other non-violent supporters of the liberation movement that MK would be kept as a separate organization. It did not help. The government promulgated a proclamation to the effect that the one included the other.

The Manifesto further states:

The time comes in the life of any nation when there remain only two choices: submit or fight. That time has now come to South Africa. We shall not submit and we have no choice but to hit back by all means within our power in defence of our people, our future and our freedom.

The government policy of force, repression and violence will no longer be met with non-violent resistance only! The choice is not ours; it has been made by the Nationalist government which has rejected every peaceable demand by the people for rights and freedom and answered [every] such demand with force and yet more force!

We of Umkhonto we Sizwe have always sought – as the liberation movement has sought – to achieve liberation without bloodshed and civil clash. We do so still. We hope – even at this late hour – that our first actions will awaken every one to a realisation of the disastrous situation to which the Nationalist policy is leading.

It was also made clear that the violence would be against symbols of apartheid with special care being taken that there should be no loss of life.

The regime welcomed the development. Its apologists cried from the rooftops that they were right in saying that the ANC was a violent revolutionary organization. It had now showed its true colours. They said that

they were right in branding it as a terrorist organization, no different than the Italian Red Brigades of Italy, the Baader-Meinhof gang of Germany and the PLO of Palestine.

Laws were enacted to equate sabotage with treason and provided for the imposition of the death sentence. They introduced detention without trial for ninety days. Later increased to one hundred and eighty days and finally for an indefinite period. Detainees were tortured to reveal those involved in MK or furthering the objects of the unlawful ANC and the Communist Party. Some were chosen to give evidence against their relatives, friends, comrades and co-conspirators. Failure to give evidence led to imprisonment for a number of years. Numbers in the security forces were increased.

On July 11, 1963, a thunderbolt struck Lilliesleaf Farm, located in an outer suburb of Johannesburg, where the leadership of the ANC, Walter Sisulu, Govan Mbeki, Ahmed Kathrada, Raymond Mhlaba, Denis Goldberg, Rusty Bernstein and Bob Hepple were arrested. Photographs in chaplinesque disguises were published. The statement released by the security police hailed it, "As a major breakthrough in the elimination of subversive organizations." They also announced that they had discovered many incriminating documents, amongst them Nelson Mandela's diary containing entries which proved that he was the leader of MK, he had undergone military training and canvassed support in the newly independent African states and other European and Asian countries.

Hilda Bernstein, the wife of Rusty, turned to Bram to arrange legal representation, not only for her husband but also for all the others. Joel Joffe, a former member of the Bar and thereafter a solicitor and now a member of the House of Lords, had temporarily taken over the practice of James Kantor. Kantor was arrested as an act of revenge for his brother-in-law Harold Wolpe, who was involved, escaping from custody. Bram approached Joffe to postpone his emigration to Australia to represent what become known as the Rivonia accused, who at the time were in incommunicado detention for a period of ninety days. Joel and Arthur Chaskalson, later a Chief Justice of South Africa, were close friends. Arthur was in Bram's group of advocates. Arthur volunteered to join the team. Bram wrote to Vernon Berrangé, who had played a very important role in the Treason and other trials, but was out of the country. He also asked me to join.

We could not see our clients. We did not know what they were going to be charged with. But we inferred from the numerous statements made by the security police, the Minister of Justice John Vorster and the Prime Minister Hendrik Frensch Verwoerd, who was known as the apostle of apartheid, that those arrested at Rivonia and some of their accomplices would not only be convicted but sentenced to death. The *sub judice* rule was ignored.

Joel, Arthur and I assumed that the leader of the team would be Bram. He informed us that he could not be without explaining why not. Arthur Chaskalson said that no one else at the Bar could tell the judge and the world at large that the people in the dock did nothing different than what the Afrikaners did and more particularly what General C R de Wet, the hero of the Boer forces during the Anglo-Boer war, had done in 1914. He led a rebel force against the government that entered World War I. He was sentenced to a short period of imprisonment, even though a few hundred people had died. We eventually persuaded Bram to lead the defence team. None of us at that time knew that he was involved as the leader of the Communist Party in the underground struggle.

It later became clear that the security police, the prosecutor and the government knew of Bram's involvement. They deliberately chose not to make it public except on a couple of occasions when titbits of evidence were led which suggested that it was so. Their probable motive may have been that if it became known that a leading Afrikaner played an active part in the liberation movement, their branding of it as a terrorist organization would not be readily accepted.

On their release from incommunicado detention to become awaiting trial prisoners, we were surprised that Nelson Mandela was among the accused. He had been serving a term of imprisonment for leaving South Africa unlawfully. He came to the consultation room in prisoner's attire. The other accused, who had not seen him for more than a year, were delighted to be united with him. The warders were surprised by the collegiality amongst the accused and their lawyers.

An indictment was served, which was carefully scrutinized by Bram and Arthur. It named the National High Command as accused number one. Bram and Arthur drew a request for further particulars to the indictment. The state's response was slovenly. It was decided to take an exception against the indictment on the grounds that it was vague and embarrassing.

The trial became known as the Rivonia Trial and later the Trial of the Century. It attracted the attention of the world at large.

Early in October 1963, before sunrise Bram drove down our driveway in his noisy Volkswagen. He was in an excited state and he handed me three copies of the Rand Daily Mail newspaper with a banner headline that the United Nations had resolved to call for the end of the Rivonia Trial. Bram knew I was going to visit the accused in Pretoria later that morning. As he was handing over the newspapers to me, he exclaimed, "Take these with you and tell them that they dare not hang them now!"

The exception succeeded. The indictment was quashed. Bram's argument in his usual quiet and incisive manner was accepted. Percy Yutar, the overzealous prosecutor appealed to Judge Quartus de Wet not to quash the indictment and that he would comply with any order made by the court as to how the indictment should be rectified and what particulars should be given. The judge curtly said, "It is not the function of the court to guide the prosecution as to how to draw an indictment."

During the course of argument Bram drew attention to prosecutor's answer that the accused knew what the particulars were. In the judgment the court said that the answer presupposed that the accused were guilty. An unusual and impermissible allegation.

Quashing the indictment did not prevent the security police from re-arresting the accused, which they did immediately after the judge left the courtroom. Some of the media within and outside South Africa, not concerned with legal niceties, called for the release of the accused. Letters, telegrams and telexes came from governments particularly from the Non-Aligned Movement, trade unions, freedom loving organizations advocating the implementation of the doctrine of universal human rights and calling for the release of the accused and all political prisoners in South Africa. Despite these calls, the prosecution served a new indictment.

Bram was appearing before the Privy Counsel in London and Vernon Berrangé had not yet returned to South Africa. The trial commenced in their absence. Joel, Arthur and I appeared for the accused. The prosecution led a number of witnesses who were mainly Africans who worked at Lilliesleaf farm and had been detained.

They gave evidence that Nelson Mandela had lived on the farm before his arrest along with some of the other accused and that some of them met at the farm from time to time. We were instructed not to challenge their evidence, except Rusty Bernstein's denial that he had put up the radio transmitter on which Walter Sisulu addressed the nation shortly before their arrest.

We confined our questions as to whether the witnesses had been given any reasons for being detained and held in solitary confinement and whether or not they asked to be released. The prosecutor was offended by

our questions and blurted out that they were not in detention but in “protective custody”. He must have felt that the media would want an explanation.

His embarrassment did not end there. Thomas Mashefane, the senior worker at the farm, at the end of his evidence asked the judge for permission to speak. He asked, “Did the police have the right to assault him if he had done no wrong?” This question became headline news. The judge asked the prosecutor to investigate the allegation. On the next day, the prosecutor assured the judge that he personally had fully investigated the matter. He was satisfied that it was not true and he added, “Thomas did not want the matter to be taken any further.”

After Bram’s first arrest, it was alleged that he deliberately absented himself during the period that farm workers were giving evidence for fear he may be identified by one or other of them. A rumour endorsed by the security police and the prosecution.

Before the beginning of the trial, it was agreed by the accused and Bram, as our leader, that the crux of our defence would not be to put into issue what they and their organization had done. Instead, as a general strategy they would become the accusers. They gave effect to it. When asked by the clerk of the court:

Accused Number One, Nelson Mandela, how do you plead to the indictment served upon you?

The government should be in the dock, not me. I plead not guilty.

Accused Number Two, Walter Sisulu, how do you plead?

It is the government which is guilty, not me....

The others followed suit, despite the judge’s injunction that they should confine their answers to guilty or not guilty. Only James Kantor, who was not involved, followed the practice by saying, “I am not guilty.”

Bram strongly believed that Nelson Mandela, as leader of the movement, should make a statement from the dock. He felt it should cover what the liberation movement stood for, how hard it tried to achieve its objectives by peaceful means and to deny the scurrilous allegations that it was a terrorist organization under the influence of communists and the Soviet Union. These were allegations that found favour by many, particularly those in the West who divided the world according to East and West during the height of the Cold War.

The defence’s case commenced with Nelson’s statement from the dock. He stated:

The ideological creed of the ANC is, and always has been, the creed of African Nationalism.

It is true that there has often been close cooperation between the ANC and the Communist Party. But cooperation is merely proof of a common goal – in this case the removal of white supremacy – and is not proof of a complete community of interests.

During my lifetime I have dedicated myself to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die.

Bram knew Walter Sisulu well. He was confident that Walter would be an excellent witness, who would withstand the cross-examination of the prosecutor. Despite his lack of formal education, Walter was considered to be the wise man of the liberation movement. He was thoughtful, articulate, with a deep-seated belief in the rightness of the movement’s cause.

Joel and I were seconded to precognize Walter of the issues and produce a full statement, from which Bram was to lead him when he entered the witness box. Bram guided us as to the issues that Walter should deal with. I often drove Bram from Johannesburg to Pretoria either to consult or attend court.

Not everyone on our team, particularly Joel, was in favour of Walter giving evidence under oath. He feared that Walter would not do well under cross-examination and that no useful purpose would be served. The counter-argument at the insistence of Walter himself prevailed.

Walter would emphatically deny that Operation Mayibuye had been adopted to engage in guerrilla warfare, as it was contrary to the long non-violent policy of the movement. He did so during his evidence. Bram patiently and meticulously conducted the final consultations with Walter. He and Vernon precognized Walter on the issues he was likely to be questioned by the prosecutor. The answers given during consultations persuaded all of us that Walter would win the day.

He certainly did. Particularly when the prosecutor suggested that the ANC did not represent the African people and their grievances put forward were unfounded, and when the judge suggested that there was no evidence suggesting Africans desired to vote, Walter had ready answers.

He only lost his temper once, when speaking about his son's arrest and detention outside the courthouse for failing to have a pass, which was not even required at his age. Walter said to Yutar, "I wish you could be a black man for only one day in your life and then you would stop talking about alleged grievances." Then on a lighter note, when it was put to him that he and others were pawns of white communists he snapped back, "Has it occurred to you that the white communists may be our pawns?"

So keen was Yutar to advance the regime's propaganda throughout his cross-examination that he failed to cross-examine Walter on his emphatic denials that Operation Mayibuye had not been adopted. An elementary omission, not worthy of his seniority and experience.

Bram was a communist who believed that there should be an egalitarian democratic society. He rejected the document Operation Mayibuye, which he felt was unduly influenced by the apparent success of the Cuban Revolution as envisioned by Che Guevara and his intellectual French guru, Jules Régis Debray. Bram and Walter Sisulu described the document as an adolescent aberration.

The Cold World War from the late 1940s to the early 1960s expected western countries and their citizens to reject any form of socialism. Two Americans, Thomas Karis and Gwendolyn Carter, who were in South Africa to assess apartheid policies, came to court to observe the Rivonia Trial. Gwendolyn was intrigued by Bram, but she could not understand how he could be a communist. I suggested to her that at the time when Bram joined no other political party or group advocated political rights and equality for the African people. On our drive to court the next morning, Bram said to me, "George, do not ever apologise to anyone for my political beliefs."

There were members of the Bar who could not understand why he should be a communist. He refused to discuss his political beliefs, particularly because the Communist Party was an unlawful organization from 1950. This did not however prevent his colleagues at the Bar from voting for him as a member of the Bar Council ten times and even its chairman in 1961. The revelation of Stalin's oppression of the people of the Soviet Union was a matter of great concern to him. As was the foreign policy of Khrushchev, particularly in relation to Hungary, Czechoslovakia and other Eastern European countries.

Those outside the struggle for freedom apparently did not understand the pact of those involved in it, that your political, religious and personal views were not as important as the solidarity of all concerned with the primary objective of defeating apartheid. Thus, the alliance of religious leaders such as Chief Albert Luthuli and Archbishop Desmond Tutu (Nobel Peace Prize winners), Professor Z K Matthews, Bishop Reeves, Father Trevor Huddleston, and Beyers Naudé (a Calvinist Afrikaner), could make common cause with

devout communists, Marxists like Joe Slovo, Yusuf Dadoo (a leading member of the Indian Congress and the Communist Party), Michael Harmel, and humanists and feminists like Helen Joseph, Lillian Ngoyi (president of the ANC Women's League), Ruth First (a journalist), Mary Benson, Sheena Duncan (head of Black Sash), Helen Suzman (sole member of the Progressive Party in Parliament) and Winnie Madikizela-Mandela in the main they considered themselves as members of a broad church. Whatever their ideological differences may have been they were staunch fighters for the establishment of a democratic government and just society. In the words of Oliver Tambo, a devout Christian, "If you are drowning and somebody throws you a rope, you don't stop to ask about his political beliefs".

Uppermost in our minds, both lawyers and the accused, was the probability that a death sentence would be passed. Bram raised the question as to whom we should approach to give evidence in mitigation. He approached a number of prominent persons most of whom declined. A few tried to soften the blow by saying that they would be prepared to sign a petition for clemency if and when a death sentence was passed. Others maintained that they did not know the accused personally. Alan Paton, the head of the Liberal Party and celebrated author of *Cry, The Beloved Country*, when asked by Bram agreed to do so even before the inevitable conviction of most of the accused was decided.

Nelson Mandela, Walter Sisulu, Govan Mbeki, Denis Goldberg and others were convicted. James Kantor was acquitted at the end of the state's case. Rusty Bernstein was acquitted at the end of the defence's case. I took the judgment to Alan Paton and consulted with him at length on what he was prepared to say in mitigation of sentence. The consultations took place at the home of the British Consulate General, Leslie Minford.

I wrote out a statement of what Alan Paton agreed to say. He spoke about the struggle of the African people to acquire political rights and Mandela, Sisulu and Mbeki's deep devotion to the cause of their people. When speaking about the use of violence by the movement, he referred to the Afrikaners' use of violence to fight the British. This did not please the judge.

For reasons not clear to us, Bram insisted that the plea in mitigation should be presented by Harold Hanson, the doyen of the Johannesburg bar, whom Bram considered a great and fearless advocate. Nelson Mandela had written out the night before what points he would make if asked what he wanted to say before the sentence of death was to be passed on him.

He wrote:

1. Statement from the dock.
2. I meant everything I said.
3. The blood of many patriots in this country has been shed for demanding treatment in conformity with civilised standards.
4. The army is beginning to grow.
4. [*sic*] If I must die, let me declare for all to know that I will meet my fate like a man.

He did not have to use the notes. The convicted accused were sentenced to life imprisonment.

After the conviction and sentence of the eight leaders, the accidental death of Bram's wife, Molly Krige, was a devastating event for Bram. Bram, who was the driver of the vehicle, blamed himself.

In September 1964, Bram and thirteen others were arrested for contravening the *Suppression of Communism Act*. He was admitted to bail by the magistrate despite the state's opposition. The fact that he was a leading member of the Bar, that he had recently been granted a passport to enable him to argue a case before the Privy Council and his unequivocal undertaking to return to stand trial were held to be sufficient to grant him bail. The magistrate described him as "a son of the soil." He did come back.

Evidence was led particularly by an informer, Gerard Ludi, who had infiltrated the Communist Party, and also by Piet Beyleveld, an Afrikaner leading member of the Communist Party. Bram was confident that the latter would never give evidence against him and his co-accused. He was wrong. Beyleveld later explained his actions by saying:

I wanted to be released from the 90-day detention. My liberty became very important to me. I can think of nothing but my liberty and I am prepared to forsake my life-long principles for it. I have no other principle but to obtain my own liberty.

By the end of 1964, after the long adjournment of the trial, Bram was wrestling with himself as to what he should do. Whilst he was still in London, the leaders of the movement in exile urged him to estreat his bail and go into exile, from where he may continue the struggle. He rejected the suggestion.

I was not involved in his trial. We nevertheless discussed it. I inferred that Bram was thinking of estreating his bail from his questions in relation to the morality of disobeying unjust laws. We discussed Prometheus' defence that he had stolen fire from the gods for the benefit of mankind; Antigone's violation of the decree that no one was to bury her brother; Solon's fragment as to what honour was to be given to the tyrannoktonos (the killer of the tyrant); Mahatma Gandhi's defiance of colonial laws; the 1914 Boer rebellion; and Nelson Mandela's defiance of unjust laws in the early 1950s, in whose case the court held that there was no moral turpitude in his participating in the defiance campaign.

On the Friday before the Monday on which he was to appear in court, he came to my chambers. Fearing that my office may be bugged he beckoned me to the passage. He told me that he had come to say goodbye. He feared that members of his family, in particular his daughter Ilse, may be detained or face other difficulties with the authorities. He requested that I should do whatever I could to assist. We embraced and said nothing more. Knowing that I was being watched, I inferred that I was not to communicate with him.

On Monday morning, Bram's counsel Harold Hanson appeared in court and read out a letter written by Bram in which he said, "I can no longer serve justice in the way I have attempted to do during the past thirty years. I can do it only in the way I have now chosen."

John Vorster, then Minister of Justice, was highly critical of the Johannesburg Bar's criticisms of the apartheid regime for its abrogation of the rule of law and particularly the introduction of detention without trial and its appointments of political supporters as judges. He challenged the Johannesburg Bar to show its respect for the rule of law by dealing with the lawlessness of one its senior leaders. With what some of us described as indecent haste, the Bar Council resolved to apply to court to have Bram struck off the roll of advocates soon after he went underground.

Sydney Kentridge and Arthur Chaskalson appeared to oppose the application. Three Judges, De Wet, Hill and Boshoff, heard the application. Bram's counsel relied on a number of cases in support of the submission that political offences did not lead to the striking off of the offenders from the legal profession. The court distinguished these cases. Judge de Wet, who had also presided at the Rivonia Trial said:

It is clear that the respondent made full use of his status as a senior counsel in inducing the magistrate to grant bail, and his breach of his solemn assurance can clearly be stigmatised as dishonest conduct.

If the respondent were to apply for readmission at some future time, similar considerations may apply. It is impossible for this Court to foresee what will happen in the future. We are concerned with the laws in force at the present time and with the structure of society as it exists in this country at the present time...

The authors of a chapter in a book on the history of the Johannesburg Bar, GJ Marcus SC and J Kentridge wrote that:

...the application was unjust, not because it was motivated by political considerations, but because it left out of account the moral and political considerations which took Fischer's conduct out of the realm of a dishonourable and self-serving deception and made it instead a supreme moral sacrifice.

I recall a senior security police officer seated on a bench outside a courthouse that I was about to enter aggressively asking me, "Where is your friend Bram, George?" I responded, "He is Mr. Fischer to you and he is in my backyard." Our home was not searched.

By the time of his re-arrest approximately ten months later his co-accused in the suppression of communism trial had been convicted and sentenced. The prosecution converted that trial into a preparatory examination at which further evidence of Bram's underground activities was lead. He was charged with further offences including sabotage. I represented Bram at the preparatory examination in the magistrate's court. We decided that we would not at that stage challenge any of the evidence that was lead.

The prosecution produced an album of photographs mainly of the people who had been detained after his second arrest. The investigating officer handed me a copy. I paged through it and saw my own photograph. I waited until the mid-day adjournment of the court and showed it to Bram. He was furious. He suggested that I should draw the magistrate's attention and complain. I persuaded him that I should not do that. There was no better way of showing our contempt for the security police and the prosecution than when we ignored them. They probably hoped that some witness might identify me as having been in contact with Bram.

Bartholomew Hlopane, who had been a member of the Central Committee of the Communist Party since 1962, gave the most devastating evidence. He was able to give evidence of its workings. He cracked under interrogation when detained. What upset Bram most was that he did not confine himself to the truth. The effect of what he said was that the Communist Party was in control of both the ANC and MK and that Bram himself was a supporter of unbridled violence. Hlopane also falsely said that the Christian Institute and its director Beyers Naudé, the Defence and Aid Fund and the Institute of Race Relations were involved in the communist conspiracy. He repeated what Bruno Mtolo had said at the Rivonia Trial. Bram shook his head in disbelief that a person that he considered a loyal comrade had succumbed to lying under pressure.

As expected, Bram was committed for trial.

He chose Sydney Kentridge to lead me at his trial to be held in Pretoria in the beginning of 1966. Bram was transferred from the Johannesburg Fort Prison, where the Constitutional Court is now located, to the Pretoria Local Prison. I was ushered to the same room that our Rivonia Trial consultations had taken place. I looked onto the courtyard where we had been told by Bram that Jopie Fourie, an Afrikaner nationalist military officer in the South African army who refused to participate in an attack on German Southwest Africa, had been executed in 1914. Bram was struggling to dry himself with a towel no bigger than two handkerchiefs after a cold shower. I turned my head away.

I thought that the practice of inviting judges from other divisions to deal with matters where other judges or leading lawyers were involved would be followed. Bram told me that it would not happen and that there would a volunteer from our division. He named W G Boshoff. He was right, but would not tell me why he thought so.

The prosecution team lead by J H Liebenberg assisted by Klaus Von Lieres und Wilkau, proud of his aristocratic German origins, followed Yutar's example in not only being satisfied with a conviction but sought to discredit Bram.

When Bram's chambers were searched on his arrest a draft copy of the Programme of the South African Communist Party entitled, "The Road to South African Freedom" was found. The printed copy was put in as exhibit 39 at his trial. The prosecution did not draw attention to the following portions:

The Party does not dismiss all prospects of non-violent transition to the democratic revolution.

The main content of this revolution is the national liberation of the African people. Its fulfillment is, at the same time, in the deepest interests of the other non-White groups, for in achieving their liberty the African people will at the same time put an end to all forms of racial discrimination. It is in the interests of the White workers, middle class and professional groups to whom the establishment of genuine democracy and the elimination of fascism and monopoly rule offers the only prospect of a decent and stable future.

The patience of the people is not endless. They are determined to win freedom in our lifetime. They would prefer to achieve their liberation by non-violent means. But today they are left with no alternative but to defend themselves and hit back; to meet violence with violence.

The possibility would be opened of a peaceful and negotiated transfer of power to the representatives of the oppressed majority of the people.

We decided that Bram would follow Nelson Mandela's lead by pleading not guilty and making a statement from the dock. He would not deny that he had committed many of the acts set out in the indictment, but would explain the reasons why he had chosen to lead the underground struggle. Bram stated:

I am on trial, my Lord, for my political beliefs and for the conduct which those beliefs drove me to.

My Lord, when a man is on trial for his political beliefs and actions, two courses are open to him. He can either confess to his transgressions and plead for mercy, or he can justify his beliefs and explain why he has acted as he did. Were I to ask for forgiveness today, I would betray my cause. That course, my Lord is not open to me. I believe that what I did was right...

My Lord, there is another reason, and a more compelling reason for my plea...I accept, my Lord, the general rule that for the protection of a society laws should be obeyed. But when the laws themselves become immoral, and require the citizen to take part in an organized system of oppression...then I believe that a higher duty arises.

My conscience, my Lord, does not permit me to afford these laws such recognition as even a plea of guilty would involve. Hence, though I shall be convicted by this Court, I cannot plead guilty. I believe that the future may well say that I acted correctly.

He was convicted and sentenced to life in imprisonment.

Apartheid ruled supreme. There were separate jails for white and black political prisoners. Blacks were on Robben Island and whites were in a specially constructed annex to the Pretoria prison, electronically controlled. Some whites, like Bram, were singled out to receive demeaning treatment reserved for traitors. The Afrikaner warders' behaviour was spiteful.

In some respects the condition of whites was worse than blacks on Robben Island. Leading members of the Bar, such as Isie Maisels, Sydney Kentridge and others were refused permission to visit Bram. The warden in charge tried to prevent a visiting judge from having a private conversation with him. Two of his fellow prisoners Hugh Lewin and Denis Goldberg have written books describing the prison conditions and the impact on Bram specifically. They describe the conditions as the most brutal they would ever be, particularly for Bram. He was not allowed to attend his son's funeral nor his daughter's wedding.

The medical care provided was more than inadequate. Bram's terminal cancer was misdiagnosed and not properly treated. Shortly after he was transferred to his brother's home in Bloemfontein he died. His body was not handed to his family. He was cremated. His ashes were not given to his family. The family believes that they were lied to when much later the authorities said that the ashes were kept in a safe place.

After the democratic elections in 1994, the family and a number of Bram's friends wanted his name as an advocate to be restored onto the roll. There was doubt as to whether a deceased person's name could be restored. Bram was not the only lawyer disbarred for political reasons. Representations were made to the newly appointed Minister of Justice Dullah Omar for the passing of an act of Parliament authorizing the courts to restore the names of lawyers who were removed from the roll of advocates for political reasons. Eventually, the necessary legislation was enacted. We approached Judge President Ngoepe of the Transvaal Provincial Division to appoint a full bench of three judges to hear an application on behalf of Bram's daughters, Ruth and Ilse. He readily responded that he would preside at such an application and that he would appoint two other judges to constitute a court, the composition of which would have pleased Bram. He being an African asked a white Afrikaner woman, Judge Snyders, who wrote the judgment for the court, and an Indian male, Judge Ponnann.

Judge Snyders wrote:

The application of Abram Fischer's removal was heard by a Full Bench of this Division. It was, in our view, therefore appropriate that the application for his reinstatement also [be heard] before a Full Bench; but even more appropriately, before a Court as representative of the diversity of our society as possible. This is the kind of society that Fischer fought for. The future time to which reference is made in the judgment for his striking off has now arrived. The Society of Advocates recognises that Mr Fischer was a fit and proper person to continue to practise as an advocate. Mr Epstein, supported by Mr Van der Linde on behalf of the General Council of the Bar of South Africa, submitted that a grave injustice was done to Abram Fischer. It fell to this Court to rectify that injustice. In the result and for the reasons stated, it took little urging from Mr Bizos, on behalf of the applicants, to persuade us to grant the order we made on 16 October 2003 for the reinstatement of Abram Fischer's name on the roll of advocates.

Much of what Bram Fischer lived, fought and died for has been achieved in South Africa. The South African Constitution and the South African Constitutional Court's protection of human rights would have pleased him. And yet he would have been disappointed that poverty, inequality, criminality, corruption, lack of proper education, inadequate healthcare, lack of housing and land redistribution are still with us. South Africa is not yet the egalitarian society that he believed in. He often said, "Nobody has ever been condemned for having tried but failed." He was a pragmatist who believed that injustices over a period of three and a half centuries could not be remedied within a few decades.

Some of his contemporaries may have considered him a failure. Even most of them now accept that he was not. He was one of the main pillars upon which a bloody revolution was avoided. He was a senior partner of Nelson Mandela in their efforts to avoid a bloody civil war. This is how he is and will continue to be remembered.

Thank you!

Bram Fischer Memorial Lecture 2011
Delivered at Rhodes House, Oxford on 24 February, 2011
By George Bizos SC

Sources

Books

Stephen Clingman, *Bram Fischer: Afrikaner Revolutionary*, University of Massachusetts Press, April 15, 2000

Martin Meredith, *Fischer's Choice: A Life of Bram Fischer*, Jonathan Ball Publishers (PTY) Ltd, 2002

Nelson Mandela, *Long Walk to Freedom: The Autobiography of Nelson Mandela*, Macdonald Purnell (PTY) Ltd., 1994

Anthony Sampson, *Mandela: The Authorized Biography*, Knopf, August 31, 1999

Joel Joffe, *The State vs. Nelson Mandela: The Trial That Changed South Africa*, Oneworld Publications, August 25, 2007

Luli Callinicos, *Oliver Tambo: His Life and Legacy*, David Philip Publishers, 2004

Hugh Lewin, *Bandiet Out of Jail*, Random House, October 2002

Hilda Bernstein, *The World That Was Ours*, Persephone Books Ltd, June 22, 2004

Denis Goldberg, *The Mission – A Life for Freedom in South Africa*, STE Publishers, May 2010

Mark Gevisser, *Thabo Mbeki: The Dream Deferred*, Jonathan Ball Publishers, January 2007

George Bizos, *Odyssey to Freedom*, Struik Publishers, February 20, 2009

John Dugard, *Human Rights and South African Legal Order*, Princeton University Press, 1978

The Johannesburg Bar: 100 Years in Pursuit of Excellence, LexisNexis Butterworths, 2002

Lectures

Legal Resources Centre

President Nelson Mandela, *The First Bram Fischer Memorial Lecture*, Market Theatre, Johannesburg, South Africa, June 9, 1995

Chief Justice Ismail Mahomed, *The Second Bram Fischer Memorial Lecture*, House of Assembly, Cape Town, South Africa, February 3, 1998

Chief Justice Arthur Chaskalson, *The Third Bram Fischer Memorial Lecture: Human Dignity as a Foundational Value of our Constitutional Order*, 2000

Deputy Chief Justice Dikgang Mosenke, *The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication*, The Nelson Mandela Civic Theatre, Johannesburg, South Africa, April 25, 2002

Chief Justice Pius Langa, *The Fifth Bram Fischer Memorial Lecture: The Emperor's New Clothes: Bram Fischer and the Need for Dissent*, 2007

Chief Justice Margret Marshall, *The Sixth Bram Fischer Memorial Lecture*, Gordon Institute of Business Science, Illovo, Johannesburg, South Africa, November 13, 2009

Oxford

Lord Joel Joffe, The First Bram Fischer Memorial Lecture

Justice Albie Sachs, The Second Bram Fischer Memorial Lecture

Cases

R v Adams & Others 1959 (3) SA 753 (AD)

S v National High Command, 1964 (1) S.A. 1(T)

S v. National High Command, 1964 (3) S.A. 462 (T)

Mbeki v Afrikaanse Pers-Publikasie (Edms) Bpk, 1964 (4) 618 (AD)

Society of Advocates of SA (Witwatersrand Division) v Fischer [1966] 1 All SA 346 (T)

Rice and Another v Society of Advocates of South Africa (Witwatersrand Division) 2004 (5) SA 537 (W)

Other

Freedom Charter <http://www.anc.org.za/show.php?include=docs/misc/1955/charter.html>

Manifesto of Umkhonto we Sizwe

<http://www.anc.org.za/77>

Programme of the South African Communist Party: The Road to South African Freedom

<http://amadlandawonye.wikispaces.com/1962,+SACP,+The+Road+to+South+African+Freedom>

Thanks

I am indebted to Parvinder Kaur Sahota Hardwick, an attorney at the Legal Resources Centre Constitutional Litigation Unit, for her assistance in preparing this lecture.