

The Wouter Basson Prosecution: The Closest South Africa Came to Nuremberg?

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I. Abstract

The 2005 trial of Wouter Basson, head of the biological and chemical warfare programme of the Apartheid state, was significant since it was the first prosecution of apartheid crimes that reached the South African Constitutional Court. This article discusses the decision of the Constitutional Court and focuses on the six conspiracy charges which involved conspiracy to commit crimes beyond the borders of South Africa. The article asks whether Basson could have been successfully prosecuted on the basis of international law, specifically on the basis of universal jurisdiction.

II. Introduction

The Wouter Basson trial was controversial and historic for many reasons. To date, it has been the only prosecution for acts committed by the apartheid state that has reached the South African Constitutional Court. The case illustrates the way the South African legal system currently approaches a criminal case with transnational elements. The crimes with which Basson was charged were so grotesque, they almost seemed imaginary. The most vivid example is the charge that he disposed of political prisoners by throwing them out of a helicopter into the sea off the coast of Namibia.¹ Basson, dubbed Dr. Death by the press,² has been compared to Joseph Mengele because of medical experiments he allegedly en-

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¹ Scientists who had been employed at the biological and chemical warfare facilities headed by Basson admitted during testimony to having developed murder weapons such as anthrax contaminated cigarettes and milk contaminated with botulinum toxin. Operators who were formerly part of clandestine units of the South African Defence Force (SANDF) have testified that they drugged South West African People's Organisation (SWAPO) prisoners of war. According to Chandre Gould, "The prisoners were given an overdose of the muscle relaxants, scoline and tubarine, before they were thrown out of an aircraft into the sea." Basson is alleged to have provided the operators with the drugs. Chandre Gould, More Questions Than Answers: The Ongoing Trial of Dr. Wouter Basson, November 2000, Disarmament Diplomacy 52, available at <www.acronym.org.uk/52trial.htm>.

² See for example "Apartheid regime's Dr. Death cleared", The Guardian, 12 April 2002, available on <www.theguardian.co.uk>.

gaged in as head of South Africa's chemical and biological warfare programme during the 1980's. Today Basson is a free man practicing medicine in Cape Town.³

The *Basson* case has a long and expensive history. The High Court trial alone took 300 trial days and produced 30 000 pages of transcript.⁴ 200 state witnesses gave evidence.⁵ It is estimated that over a period of ten years (commencing from the time of his arrest in 1997) the state spent R125 million on the trial.⁶ With all these resources at its disposal (and some argue, overwhelming evidence) why did the state's case fail? How could a man accused of atrocities comparable to that of the Nazi leaders escape punishment?

It will be argued that one of the reasons the state failed to successfully prosecute Basson was because it did not base its arguments on the principles of international law, in particular the principle of universal jurisdiction, in the early stages of the case. Since the National Prosecuting Authority is currently formulating its policy with regard to prosecuting perpetrators of apartheid crimes who did not receive amnesty, it is important to consider the pitfalls and mistakes of past prosecutions.

The web of deceit and criminality Basson was accused of being involved in spans decades and continents and exceeds the scope of an article. I will commence by discussing the facts of the case with particular reference to the nature of the conspiracy charges. I will focus on the two questions which received significant attention by the Constitutional Court, namely whether the trial judge should have recused himself and whether the conspiracy charges could have been prosecuted successfully on the basis of universal jurisdiction. In addition, I will draw a few comparisons with the trial of the apartheid era Minister of Defence, Magnus Malan.⁷

III. Background and Facts

The proceedings against Basson commenced in 1999 when he was charged in the High Court on 67 counts. These included 229 murders, conspiracy to murder, fraud totaling R36 million, and manufacturing, possessing and dealing in drugs. The majority of these offences were alleged to have been committed before 1994

³ At the time of writing this article, Basson had to appear in front of the Health Professions Council of South Africa (HPCSA) regarding the possible revocation of his license to practice medicine. *Legalbrief Today*, 27 February 2006.

⁴ *S v Basson* 2005 (12) BCLR 1192 (CC), Judgement of 9 September 2005 (hereinafter *Basson*) para. 40. The court described the trial as a "marathon trial".

⁵ Basson called only one witness (himself) in his own defence.

⁶ Chandre Gould of the Centre for Conflict Resolution believes this estimate is possible. "The Long and Costly Road to Acquittal", *Sunday Times*, 14 April 2002

⁷ *S v Peter Msane and Nineteen Others* (unreported) case number CC1/96 heard in the Durban and Coast Local Division of the Supreme Court of South Africa (the trial became known as the "Malan trial" after its most prominent defendant).

when Basson worked in the Civil Co-operation Bureau, a division of the South African Defence Force (SANDF).⁸ Basson worked as a doctor in the Special Forces of the SANDF. He was accused of participating in a large number of murders committed or planned by clandestine units of the SANDF as part of “Project Coast”.⁹ The murders Basson was accused of included: the mass murder of SWAPO detainees in Namibia; the murders of individual members of the SANDF and its allies in Namibia who were identified as security risks and the assassination of individual members of SWAPO and the ANC identified as “enemies of the apartheid state” in Namibia, Swaziland, Mozambique and London. Since the murders in question were committed outside the borders of South Africa, Basson was charged with conspiracy to commit murder.¹⁰

Wim Trengove, Senior Counsel for the prosecution in the Constitutional Court, explained that the reason for charging Basson with conspiracy was that the conspiracies were hatched in Pretoria, within the jurisdiction of the South African courts. The state alleged that Basson’s role in the conspiracies had been to provide the murderers with the poison they used to murder their victims. He was also accused of personal participation in some of the murders.¹¹ Basson was not charged with the murders but with conspiracy to commit these murders in terms of s 18 (2) of the Riotous Assemblies Act.¹² Section 18 (2) makes it a crime to conspire to commit “any offence” and renders a conspirator liable to the same punishment as that which may be imposed for the target offence.¹³ For the purpose of the crime of conspiracy it is immaterial whether the planned target offence – in this case murder – is committed or not.¹⁴

It is interesting that before the trial commenced in the High Court, the defence took exception to the conspiracy charges. It was argued that, although s 18 (2) of the Riotous Assemblies Act makes it a crime to conspire to commit “any offence”, it cannot literally mean any offence committed anywhere in the world. It was argued that South African criminal law does not extend beyond South African bor-

⁸ For a summary of the facts I relied on the judgement and the paper by Wim Trengove, *The Lessons of the Wouter Basson Prosecution*, unpublished Conference Paper presented at “A Tribute of Power to Reason”, Seminar on 4 March 2006 at the University of the Witwatersrand, Johannesburg.

⁹ The aim of this project or programme was to conduct highly secretive research into various aspects of chemical and biological warfare. Project Coast included the research and production of offensive and defensive chemical and biological warfare weapons. See <www.crimelibrary.com/notorious_murders/mass/south_africa/index.html>.

¹⁰ Trengove (note 8), 2.

¹¹ And administering sedatives to victims before they were murdered.

¹² Act 17 of 1956.

¹³ Section 18 (2) provides: “Any person who –
conspires with any other person to aid or procure the commission of or to commit; or
incites, instigates, commands, or procures any other person to commit, any offence, whether at common law or against a state or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.”

¹⁴ *S v Sibuyi* 1993 (1) SACR 235 (A) at 249 (e).

ders and s 18 (2) could not have been intended to make it a crime to conspire to commit acts abroad which do not constitute crimes justiciable in South Africa.¹⁵

The High Court held that murders committed beyond the borders of South Africa are not crimes justiciable in South Africa. It accordingly upheld the exception and quashed the conspiracy charges. Basson was acquitted of all counts in April 2002. The prosecution appealed to the Supreme Court of Appeal (SCA). The prosecution raised many points of law which included an attack on the trial court's quashing of the conspiracy charges. The SCA dismissed the appeal on 3 June 2003.¹⁶

The prosecution thereupon appealed to the Constitutional Court, relying on three grounds of appeal. The first ground was directed at quashing the conspiracy charges. The second ground concerned the question whether the trial court was wrong to exclude the evidence led in bail proceedings from the criminal trial and the third ground was directed at the acquittal on the remainder of the charges.¹⁷

When the case reached the Constitutional Court, the six charges of conspiracy to murder "enemies of the state" beyond the borders of South Africa were of particular interest. As regards the conspiracy charges, the prosecution accepted that s 18 (2) was confined to conspiracies to commit crimes justiciable in South Africa but submitted that the murders Basson had conspired to commit were indeed justiciable in South Africa. One of the grounds for this submission was that the murders constituted crimes under customary international law, which was part of South African law, and which conferred universal jurisdiction on the courts to try such crimes. The Constitutional Court overturned the quashing of the conspiracy charges on 9 September 2005.¹⁸ The prosecution was permitted to reopen the proceedings against Basson on the six charges. However, a few months after the trial, the National Prosecuting Authority decided not to prosecute Basson on these charges.¹⁹

IV. Relevance of International Law

Although the *Basson* case was not prosecuted primarily on the basis of international law, the case had different points of relevance for international law. The purview of this article does not permit a full analysis of the various aspects of the case which may be relevant to international law. One principle of international law

¹⁵ Trengove (note 8), 3.

¹⁶ *S v Basson* 2004 (1) SA 246 SCA.

¹⁷ *Basson*, para. 1.

¹⁸ Two hearings were held. *S v Basson* 2005 (1) SA 171 (CC) was the initial hearing on preliminary issues and *S v Basson* 2005 (12) BCLR 1192 (CC).

¹⁹ The NPA explained that the conspiracy charges could be met by a defence of *autrefois acquit* because of the overlap between these charges and a charge on which Basson had already been tried for and acquitted. See "Transitional Justice in the News", 31 October 2005 available at <www.ictj.org/en/news/newsletter/473.html>.

which did not receive sufficient attention in the judgment is the principle of double jeopardy.²⁰ The prosecution approached the Constitutional Court because it wished to re-indict Basson after he had already been acquitted by the Supreme Court of Appeal. The Constitutional Court made no determination on challenges posed by the principle of double jeopardy.²¹ It stated that an accused is only protected against a second prosecution if he was in jeopardy of conviction in the first prosecution. To establish a plea of *autrefois acquit*, the court stated, an accused must have been acquitted on the merits.²² The court was clearly of the opinion that the plea of *autrefois acquit* could not be raised since there had been no acquittal on the merits in respect of the quashed charges.²³ It took the view that, should the prosecution choose to recharge Basson, this issue would have to be determined by the trial court.²⁴ The state ultimately decided not to prosecute Basson because of his previous acquittal on charges of conspiracy.

Counsel for Basson relied on the right to a speedy trial. Section 35 (3) (d) of the South African Constitution reads: "Every accused has a right to a fair trial, which includes the right to have their trial begin and conclude without unreasonable delay". From time to time the judges (both in the trial court and in the Constitutional Court) referred to this right when deciding various procedural matters, for example, the decision whether to allow certain witnesses to testify.²⁵ Before the case even reached the Constitutional Court the trial had run for about 31 months (from 4 October 1999 to 11 April 2002).

It is important to appreciate that the prosecution in the *Basson* case did not base its case on international law. According to Trengove, counsel for the prosecution did not turn to international law when they formulated the charges against Basson. It only introduced international law on appeal to the Constitutional Court. One possible explanation for this is that international criminal law is still too "exotic" for South African lawyers.²⁶ However, it is not at all clear that the prosecution would have succeeded on the basis of international law. As will be illustrated below, the international law on various matters pertaining to the *Basson* trial was uncertain and the prosecution may have felt more comfortable relying on domestic law.²⁷

²⁰ The rule against double jeopardy is included in Article 14 (7) of the International Convention on Civil and Political Rights and Article 4 (1) of Protocol 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Section 35 (3) (m) of the South African Constitution provides that the right to a fair trial of every accused person includes the right "not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted."

²¹ *Basson*, para. 169.

²² *Ibid.*, para. 254.

²³ *Ibid.*, para. 256.

²⁴ Mariette le Roux, "State Allowed to Reopen Basson Case", 9 September 2005, Mail & Guardian, online at <www.mg.co.za/articlepage>. See para. 258 CC

²⁵ *Basson*, para. 79.

²⁶ Trengove (note 8), 1.

²⁷ *Ibid.*, 12.

V. The Allegation of Bias on the Part of the Trial Judge

A significant portion of the Constitutional Court judgment dealt with the question of alleged bias on the part of the trial judge. When the case reached the Constitutional Court the prosecution argued that the trial judge, Judge Willie Hartzenberg, should have recused himself. It was alleged that Hartzenberg had displayed bias in favour of Basson.

The prosecution based its contentions regarding bias on facts and allegations that may be divided into two categories. The first category concerned remarks and interventions made by Judge Hartzenberg during the High Court trial. The second category encompasses incorrect legal rulings and factual findings that he made in the course of his judgment.²⁸ As regards the first category, the prosecution argued that the remarks and allegations made by the judge gave rise to a reasonable apprehension of bias. The court discussed these two categories separately.

1. Remarks and Interventions by Judge Hartzenberg

The prosecution complained of nine interventions made by Judge Hartzenberg which cumulatively suggested that he was either subconsciously biased or that his conduct gave rise to a reasonable apprehension of bias. In South African law the requisite test is whether there is a “reasonable apprehension of bias”.²⁹ Judge Hartzenberg stated, for instance, that he was “bored” by the state’s evidence³⁰ and that counsel for the state was “confused”.³¹ In addition, he shared a laugh with the respondent’s counsel³² and allegedly made remarks indicating his sympathy with the accused.³³

The court stated that the presumption of judicial impartiality must be taken into account in considering an allegation of bias.³⁴ As regards remarks and interventions, it held that a court should bear in mind that during a long criminal trial a judge may make remarks that are inappropriate or display irritation.³⁵ To establish

²⁸ *Basson*, para. 38.

²⁹ *President of the Republic of South Africa v South African Rugby Football Union and Others (SARFU)* 1999 (4) SA 147 (CC), para. 36. In this case it was held that a judge who sits in a case in which he or she is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that the judge may be biased, acts in a manner inconsistent with section 34 of the Constitution and in breach of section 165 (2) of the Constitution. *Basson*, para. 25. Section 165 (2) states: “The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”

³⁰ *Basson*, para. 46.

³¹ *Ibid.*, para. 48.

³² *Ibid.*, para. 50, 51.

³³ *Ibid.*, para. 58-64.

³⁴ *Ibid.*, para. 41.

³⁵ *Ibid.*, para. 42.

bias it must be shown that the remarks were “of such a number or quality” as to go beyond mere irritation and establish a pattern of conduct that dislodges the presumption of impartiality. In the view of the court the remarks made by Judge Hartzenberg were of sufficient quantity or seriousness to dislodge this presumption.

2. Mistakes of Law and Fact

The second category of complaints raised by the prosecution consisted of arguments that some of the trial judge’s rulings were indicative of bias.³⁶ It referred to three kinds of rulings, namely rulings in which the judge made a mistake of law, rulings in which the judge refused to exercise a discretion in favour of the prosecution, and instances of rulings in which he assessed the facts erroneously. The prosecution complained of eight such incidents, including the judge’s refusal to call a certain witness, Mr Buffham,³⁷ the judges’s assessment of the evidence of Dr Basson and General Knobel, and his erroneous finding of fact regarding the conspiracy to murder Mr Dullah Omar.³⁸

In considering these complaints, however, the Constitutional Court pointed out that it is inevitable that from time to time a judge may make an error of law and that to assert that such an error provides evidence of bias would be to underestimate the difficulties of presiding as a judge in long trials.³⁹ For a mistake of fact to give rise to a reasonable apprehension of bias it must be established that the mistake is so unreasonable that it must have arisen from bias. The court could not conclude that this was the case.⁴⁰ It took the view that a judge’s refusal to exercise his discretion to call further witnesses does not provide weighty material to support a finding of bias.⁴¹ After an examination of all the allegations, the court did not find bias on the part of Judge Hartzenberg. It emphasized that the remarks and rulings complained of by the prosecution should be seen in the context of a “marathon trial” with all its complexities and frustrations.⁴²

³⁶ Ibid., para. 69.

³⁷ Ibid., para. 85.

³⁸ Ibid., para. 96. Basson was charged with conspiring to murder Mr Dullah Omar (a former Minister of Justice) by substituting his heart medication with poison. The state referred to evidence which demonstrated a plan that had been hatched to use a substance called Dioxin to poison Omar. The trial judge found that Dioxin is not a poison and that the plan was not feasible.

³⁹ Basson para. 69.

⁴⁰ Ibid., para. 101.

⁴¹ Ibid.

⁴² Ibid., para. 103. The court also considered the state’s complaint with regard to the correctness of the High court’s decision to exclude the bail record from the evidence in the trial. The High Court was of the opinion that admitting the bail record would render the trial unfair. The Constitutional Court concluded that because of the interlocutory nature of the ruling on the bail record the decision of the trial court cannot be said to not have been made judicially or that it was based on the wrong principles of law. The Constitutional Court dismissed this ground of appeal. See *Basson*, paras 104-123.

Despite this conclusion, it appears that the allegations of bias tainted the outcome of case and its reception by the public. Advocate Anton Ackermann, the advocate who headed the prosecution in the High Court, even withdrew from the case because of the behaviour of the trial judge. The debate surrounding the recusal of Judge Hartzenberg reflects a wider debate in South Africa regarding the legitimacy of the post-apartheid legal system in light of the fact that many apartheid-era judges remained on the bench after 1994. Although concerns of this kind have sometimes been well-founded it has also led to race-based prejudices about the objectivity of judges. Similar criticisms have been leveled at other senior apartheid-era judges presiding in high profile cases.⁴³ Such criticism needs to be assessed on a case by case basis. The fact that judges in criminal cases possess a great deal of discretion means that they risk being accused of bias whenever they exercise that discretion in a politically sensitive case.

VI. The Conspiracy Charges

In terms of South African common law, those who participate in planning an attempted or completed offence, or who otherwise assist the perpetrator, are guilty as accomplices or *socii crimini* and are liable to the same penalties as the principal offender.⁴⁴ However, if the offence has not been committed or attempted, conspiracy to commit an offence, other than treason, is not a crime. It was one of the purposes of s 18 (2) of the Riotous Assemblies Act to fill this lacuna in the common law and to criminalize conspiracy.⁴⁵ It is ironic that the Riotous Assemblies Act,⁴⁶ a notorious piece of legislation designed to prosecute “terrorists” and enemies of the Apartheid state, was used to prosecute Basson.

Basson was charged with six counts of conspiracy, including four charges of conspiracy to murder.⁴⁷ As stated above, the defence took exception to the con-

⁴³ Judge H e f e r, who headed the commission of enquiry into corruption, credentials were questioned because of the fact that he was an apartheid-era judge with a reputation of upholding the political status quo during apartheid. See “‘Activist’ Judge will be in the Spotlight at Contentious Inquiry”, available at <www.armsdeal-vpo.co.za/articles06/activist_judge.html>.

⁴⁴ For more on the offence of conspiracy in South African law see C.R. S n y m a n, *Criminal Law*, 4th ed. (2002), 292-295.

⁴⁵ *Basson*, para. 207.

⁴⁶ The Riotous Assemblies Act no 17 of 1956 prohibited any outside gathering that the Minister of Justice saw as a threat to public peace. It included banishment as a form of punishment. It was a clear case of suppressing freedom of speech and assembly, as both of these rights would disrupt the repressive system being enforced by the government. See John D u g a r d, *Human Rights and the South African Legal Order*, (1978), 137.

⁴⁷ Counts 31, 46, 54, 55, 58 and 61 are relevant in this regard. Count 31 concerned the conspiracy to murder SWAPO detainees. The quashed conspiracy charges allege that Basson used his medical knowledge not to treat the sick and wounded but to subject healthy prisoners in the hands of the SANDF to asphyxiation through poison followed by the disposal of their corpses from aircraft over the sea. (count 31) para. 182. Count 46 involved a conspiracy to murder Peter T a y e n g e n e K a - l a n g u l a in Namibia. Count 54 concerned the conspiracy to kill Pallo J o r d a n and Ronie K a s r i l s

spiracy charges before the trial even commenced. The High Court concluded that South African criminal law did not extend beyond the country's borders and that s 18 (2) could not have been intended to make it a crime to conspire to do things abroad which do not constitute crimes justiciable in South Africa.

In the Constitutional Court, the prosecution argued that this finding by the trial court constituted an error in law.⁴⁸ It contended that the extreme gravity of the charges against Basson and the "powerful national and international need to have these issues properly adjudicated" meant that the SCA should not have refused to rule on the charges of conspiracy.⁴⁹ It is important to bear in mind that the Constitutional Court was not asked to decide whether Basson was guilty of the charges against him. It was merely required to decide whether the state should be permitted to start a fresh prosecution on the basis of the conspiracy charges. Although the court upheld the state's attack on the quashing of the conspiracy charges, it did not do so on the basis that those charges could be brought in terms of customary international law, but on other grounds. It based its decision on an interpretation of the Defence Act and the Riotous Assemblies Act. In argument before the Constitutional Court, however, the prosecution emphasized that the target offences were crimes under customary international law. If this could be established, the crimes would be justiciable in South Africa as customary international law automatically constitutes part of South African law without the need for legislative incorporation.⁵⁰

VII. Customary International Law Arguments

The prosecution argued that, in addition to failing to consider the extreme nature of the charges, the Supreme Court of Appeal omitted to take cognizance of South Africa's international obligations to uphold the principles of international humanitarian law. The Constitutional Court commenced by emphasising the importance and wide dissemination of international law. The court highlighted the significance of humanitarian law by referring to the *Legality of the Threat of Nuclear Weapons*⁵¹ case and the *Tadic*⁵² case. According to the court, these cases illus-

in London. Count 55 concerned the conspiracy to murder Gibson M o n d l a n e and others in Mozambique. Count 58 concerned a conspiracy to murder an ANC operative, Enoch D l a m i n i in Swaziland. Count 61 alleged that Basson manufactured and provided cholera bacteria for the insertion in the water supply of persons regarded as opponents of the regime in Pretoria. Ibid.

⁴⁸ This was formulated as question 11; *Basson*, para. 124.

⁴⁹ *Basson*, para. 184.

⁵⁰ T r e n g o v e (note 8), 8

⁵¹ 1996 ICJ Reports 226, *Basson*, para. 174.

⁵² *Prosecutor v Dusko Tadic*, appeals Chamber, IT-94-1-AR72, 2 October 1995 cited in *Basson*, para. 175.

trated the “broadness of the sweep of international humanitarian law”.⁵³ It pointed out that South Africa was a party to the Geneva Conventions.⁵⁴

The court held that the growing overlap between international humanitarian law and international human rights law rendered it unnecessary to investigate the precise characterization of the conflict in Namibia.⁵⁵ It stated that “what matters is that regard had to be had by all those involved in the conflict to intransgressable principles based on elementary considerations of humanity”.⁵⁶ It stated further that there could be no doubt that the use of instruments of state to murder captives long after resistance had ceased “would have grossly transgressed even the most minimal standards of international humanitarian law”.⁵⁷ The same argument can be applied to the use of poison⁵⁸ and the provision of cholera bacteria for placement in water supplies (one of the charges against Basson).⁵⁹

In its heads of argument, the prosecution argued that Basson’s conduct constituted war crimes and that conspiracy to murder enemies of the state constituted the crime of apartheid. One of the biggest problems the prosecution had to grapple with was demonstrating that the definitions of these crimes covered Basson’s conduct. Since the indictment had not been drafted with customary international crimes in mind, the elements of those crimes had to be teased from the indictment.⁶⁰

It is not difficult to categorise Basson’s conduct as war crimes. The murders he was accused of conspiring to commit were committed in the context of the Namibian and South African liberation struggles and the associated armed conflicts between the South African security forces, on the one hand, and SWAPO and the ANC, on the other. The prosecution argued that the armed conflict in Namibia was of an international character but that, even if it was not, it could safely be argued that the target offences were serious violations of common article 3 of the Geneva Conventions.⁶¹

⁵³ *Basson*, *ibid.*

⁵⁴ South Africa ratified the Geneva Conventions in 1952, para. 177 CC. The court pointed out that even if South Africa was not a party to the Geneva Conventions it would have been obliged to respect the conventions “since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression”. As pointed out in *Nicaragua v United States of America*, 1986 ICJ Reports 14, in: *Basson*, para. 177.

⁵⁵ *Basson*, para. 179.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ The court referred to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction which entered into force on 26 March 1975.

⁵⁹ *Basson*, para. 180.

⁶⁰ *Trengove* (note 8), 6.

⁶¹ *Trengove*, *ibid.* See Applicant’s Heads of Argument para. 115.8.3 at <www.constitutional.court.org.za>.

Categorising Basson's conduct as a crime of apartheid under the customary law of the 1980's was more difficult.⁶² The prosecution had to satisfy the court that crimes of apartheid were crimes under customary international law. In its heads of argument, it referred to the 1973 UN Resolution declaring apartheid to be a crime against humanity as well as the 1976 International Convention on the Suppression and Punishment of the Crime of Apartheid.⁶³

In addition, it drew the court's attention to the Rome Statute which recognises apartheid as a crime in customary international law.⁶⁴ Since the Rome Statute only operates prospectively, it was not argued that it could be used to prosecute Basson. The Rome Statute was merely referred to since it reinforces the argument that apartheid is a crime under customary international law. As Theodor Meron has stated, the Rome Statute codifies many rules on international customary law.⁶⁵ It is doubtful whether the codification of the bulk of existing customary law⁶⁶ had already occurred in the 1980's.

It was difficult to prove that the charges of conspiracy to commit offences beyond the borders of South Africa constituted crimes of apartheid under the customary international law of the 1980's.⁶⁷ It was also difficult to prove that customary international law formed part of the law of apartheid in South Africa in the 1980's. Whereas the 1996 Constitution makes it clear that customary international law forms part of South African law,⁶⁸ it is less clear whether this was the case under the previous constitutions.⁶⁹

The Constitutional Court considered the Riotous Assemblies Act and the Defence Act and concluded that, as a member of the SANDF, Basson was subject to the Defence Act.⁷⁰ The court found that there was a real and substantial connection between South Africa and the crimes committed in Namibia and abroad. The conspiracies Basson was charged with were therefore triable in South Africa and the trial court was wrong to conclude that the charges disclosed no offence.

⁶² Dugard however argues that many judicial decisions held that customary international law did form a part of the law of South Africa during the apartheid era. See *International Law, A South African Perspective* 2005, 3rd ed., 51-53.

⁶³ *Basson*, paras 120.1 and 120.2.

⁶⁴ *Ibid.*, para. 120.5.

⁶⁵ Theodor Meron, Customary Law, in: David Rieff/Roy Gutman (eds.), *Crimes of War, What the Public Should Know*, (1999), 113.

⁶⁶ Cassese refers to this codification of customary law in his book *International Criminal Law*, (2003), 74.

⁶⁷ Trengove (note 8), 7.

⁶⁸ In terms of s 232 of the 1996 Constitution.

⁶⁹ Public international law was not mentioned at all in South Africa's 1961 and 1983 Constitutions. Republic of South Africa Constitution Act (32 of 1961), Constitution of South Africa Act (110 of 1983).

⁷⁰ *Basson*, para. 227.

VIII. Universal Jurisdiction

It is not clear why the prosecution went to such lengths to prove that Basson's alleged actions constituted war crimes. One would have expected the reason for this characterization to be that it is clear that universal jurisdiction can be exercised over war crimes. But the Constitutional Court never referred to the term "universal jurisdiction" and did not base its prosecution on Basson on universal jurisdiction.

To date, there has been no prosecution in terms of universal jurisdiction in South Africa. Like most common law jurisdictions, South African criminal law follows a system of territorial jurisdiction. In its judgment, the Constitutional Court referred to the presumption against extraterritorial jurisdiction in South African law.⁷¹

As a general rule, South African courts have declined to exercise jurisdiction over persons who commit crimes in other countries. Dugard has pointed out that this is an aspect of sovereignty which has given rise to the presumption against the extraterritorial operation of criminal law.⁷² The Constitutional Court stated that the basis for this principle is international comity.⁷³ It then alluded to the possibility of universal jurisdiction for the first time in paragraph 225, stating that the United Kingdom claims to punish its own subjects for extraterritorial offences and that "[o]ther countries go so far as to exercise universal jurisdiction over nationals who commit crimes in any country". The court conceded that there are exceptions to the territoriality rule in the cases of treason and transnational crimes.⁷⁴ It also stated that, as Namibia was not a sovereign state at the time the offences were committed (since it was administered by South Africa), the doctrine of comity did not apply.⁷⁵ The court took the view that comity required the prosecution of members of the military who committed grave offences.⁷⁶ Although it referred to the possibility of extraterritorial jurisdiction, it stopped short of using the term "universal jurisdiction" and felt more comfortable basing its decision on domestic legislation than on the foreign notion of universal jurisdiction.

Although it may be argued that universal jurisdiction is still novel in all jurisdictions, the position appears to be changing rapidly. Since 1994 almost a dozen countries have investigated and sometimes convicted non-nationals for crimes committed against non-nationals.⁷⁷ Although some scholars still oppose the idea of univer-

⁷¹ Ibid., para. 229.

⁷² The court quoted Dugard's textbook *International Law - A South African Perspective*, 2nd ed. (2000), 133. See *Basson*, 223.

⁷³ *Basson*, 232.

⁷⁴ *Basson*, para. 225.

⁷⁵ Ibid., para. 229.

⁷⁶ Ibid.

⁷⁷ Luc Reydam's, *Universal Jurisdiction: International and Municipal Legal Perspectives*, (2005), 1. Reydam's writes that more cases of "universal jurisdiction" have been reported in the last decade than throughout the whole history of modern international law.

sal jurisdiction,⁷⁸ the international human rights movement has embraced it as a means to promote accountability for gross human rights violations.⁷⁹ The most radical form of universal jurisdiction or “absolute universal jurisdiction”⁸⁰ consists of exercising jurisdiction in the absence of any jurisdictional link, for example, by prosecuting foreigners *in absentia* as has been done in Belgium.⁸¹ This form of universal jurisdiction exists almost nowhere. Even the progressive Spanish and Belgian legislation on universal jurisdiction has been amended to provide for conditional universal jurisdiction.⁸² Cassese has written that the death knell has sounded for absolute universal jurisdiction and has pleaded for the acceptance of conditional universality.⁸³ He has stated that universal jurisdiction may be employed precisely for the purpose of prosecuting leading politicians accused of very grave crimes.⁸⁴

The Constitutional Court’s conclusion that “there was no doubt that there was a real and substantial link between this country and the conspiracy to commit murders in Namibia”⁸⁵ means that it would not have been necessary to resort to absolute universal jurisdiction. The court also emphasized the fact that Namibia was not, at the times the alleged crimes were committed, a sovereign state but part of South Africa since it was administered by South Africa.⁸⁶ In addition, the Defence Act deemed Namibia to be part of South Africa.⁸⁷ The decision to use the Riotous Assemblies Act as the legal basis for the case (which makes provision for prosecuting “any offence”) also meant that the court could act in terms of South African legislation in exercising possible extraterritorial jurisdiction and did not have to take a leap into the unknown by resorting to universal jurisdiction.

Nonetheless, not all the charges involved conspiracies to commit crimes in Namibia. Counts 55 and 58 dealt with conspiracies to commit murder in Mozambique

⁷⁸ Notably George Fletcher, *Against Universal Jurisdiction*, (2003), *Journal of International Criminal Justice*, 1, and Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, *Foreign Affairs*, July/August 2001. See also Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, (2003), 1, 3; *Journal of International Criminal Justice*, 589.

⁷⁹ *Reydams* (note 77), 1.

⁸⁰ According to this notion of universality, a State may prosecute persons accused of international crimes regardless of their nationality, the place of commission of the crime, the nationality of the victim, and even of whether or not the accused is in custody or at any rate present in the forum State

⁸¹ See for example the case of *Abbas Hijazi et al v Sharon et al*, *Chambres de mises en accusation* of Brussels, 26 June 2002. Another case where no link existed between the accused and the country of prosecution was the case of *Public Prosecutor v Ndombasi et al*, *Chambre de mises en accusation* of Brussels, 16 April 2002 where the arrest warrant for the foreign minister of the DRC was issued *in absentia*.

⁸² With regard to the Belgian position see Law of 23 April 2003 published in *Monsieur Belge*, 7 May 2003, 24886 – 24853. With regard to the position in Spain see judgement in the *Guatemalan Generals* case of 25 February 2003, at <www.derechos.org/nizkor/guatemala/doc/gtmsent/html>, at 54.

⁸³ Cassese (note 78), 589.

⁸⁴ *Ibid.*, 595.

⁸⁵ *Basson*, para. 228.

⁸⁶ The court stated that the doctrine of comity and the presumption against extraterritorial jurisdiction did therefore not apply. *Basson*, para. 229.

⁸⁷ *Ibid.*, para. 229.

and Swaziland. Count 54 dealt with a conspiracy to commit murder in London. The court resolved this by stating that the Military Discipline Code (a schedule to the Defence Act),⁸⁸ which criminalizes certain conduct of Defence Force Members even where crimes were committed beyond the borders of South Africa, applied to these crimes. The Defence Act therefore provides for extraterritorial jurisdiction over South African soldiers. For a state to exercise jurisdiction over members of its armed forces however constitutes personal jurisdiction and not universal jurisdiction. The target offences of conspiracy would accordingly have been justiciable in a South African court.⁸⁹ This means that there was also no need to apply universal jurisdiction with regard to the crimes committed in Mozambique and Swaziland.

IX. Duty to Prosecute

Interestingly, the prosecution relied on the duty to prosecute for procedural reasons. Its appeal to the SCA had been procedurally and formally defective. The SCA had dismissed the appeal because these defects were serious and not worthy of condonation. In the Constitutional Court proceedings, the prosecution argued that one of the reasons the SCA ought to have condoned the procedural defects was that the importance of the international law duty to prosecute outweighed these defects.⁹⁰

The prosecution emphasized South Africa's duty to prosecute serious international crimes.⁹¹ It referred to classical texts by Orentlicher⁹² and Dugard⁹³ and pointed to the qualified duty to prosecute or extradite an offender.⁹⁴ In addition, it adverted to the recognition of this duty in s 5 (3) of the Rome Statute, which provides "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". The law with regard to the duty to prosecute is however unclear. No rule of international customary law has developed in this regard. The Geneva Conventions states that grave breaches of the Conventions give rise to a duty to prosecute or extradite. Since grave breaches can only take place in an international armed conflict⁹⁵ and since the conflict between

⁸⁸ Ibid., para. 210.

⁸⁹ Ibid., para. 219.

⁹⁰ T r e n g o v e (note 8), 9.

⁹¹ See Applicant's Heads of Argument paras 93-96, <at www.constitutionalcourt.org.za>.

⁹² Diane O r e n t l i c h e r, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, (1991), 100 *Yale Law Journal*, 2537.

⁹³ John D u g a r d, *Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question*, (1997), 13 *SAJHR*, 238. See also Michael S c h a r f, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 *Law and Contemporary Problems*, 44.

⁹⁴ The state referred to General Comment 31 adopted by the Human Rights Committee under the International Covenant on Civil and Political Rights on 29 March 2004.

⁹⁵ See Françoise H a m p s o n, *Jurisdiction, Universal*, in: Gutman/Rieff (eds.), (note 65), 222.

South Africa and Namibia was not an international armed conflict the grave breaches regime does not apply. This means that in terms of the current state of the law no duty to prosecute can flow merely from the fact that the alleged crimes can be defined as war crimes.⁹⁶

The duty to prosecute international crime not only exists in international law but also in South African domestic law. The Constitutional Court referred to the “constitutional obligation upon the state to prosecute those offences which threaten or infringe the rights of citizens”.⁹⁷ Although the National Prosecuting Authority elected not to re-indict Basson on the six conspiracy charges, it is to be hoped that it will be influenced by the duty to prosecute in exercising its discretion to prosecute perpetrators of international crime, including apartheid crimes of the past.⁹⁸

X. The *Malan* Trial

The *Malan* trial is another example of a controversial acquittal of a prominent member of the South African Defence Force. Magnus Malan, a former Minister of Defence in the cabinet of P.W. Botha, together with 19 other accused,⁹⁹ was charged with 13 counts of murder (including seven children) arising out of the KwaMakhuta massacre of 1987. The massacre was carried out by Inkatha members who had been trained by the South African Defence Force (SANDF) and deployed in support of Inkatha in the province of KwaZulu Natal.¹⁰⁰ In October 1996 all the accused were acquitted on all charges in the Supreme Court in Durban.

The *Malan* case, unlike the *Basson* case, did not place any reliance on international law. It was a similarly expensive and fairly lengthy trial. The proceedings in the Durban and Coast Local Division of the Supreme Court continued for seven months and cost the state millions of rands. According to some commentators, the acquittals in the *Malan* case have had the serious consequence of strengthening the

⁹⁶ However, it is arguable that the conflict in Namibia was international since Namibia was international territory. See para. 179 of *Basson*.

⁹⁷ *S v Basson* 2005 (1) SA 171 (CC), para. 32.

⁹⁸ For more on the exercise of such discretion in South Africa and other jurisdictions see Daniel Nserenko, *Prosecutorial Discretion before National and International Tribunals*, (2005), 3, 1 *Journal of International Criminal Justice*. Article 15 of the United Nations Guidelines on the Role of Prosecutors provides that “Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.” Report of the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders. U.N. Doc. A/CONF.144/28 (1990).

⁹⁹ Including two former chiefs of the SADF, a number of senior members of Military Intelligence and the deputy-secretary general of the Inkatha Freedom party

¹⁰⁰ At the time of the massacre however the massacre was portrayed by the media as a brutal terrorist attack carried out by the UDF/ANC in the course of the conflict in Natal. See Howard Varney/Jeremy Sarkin, *Failing to Pierce the Hit Squad Veil: An Analysis of the Malan Trial*, (1997), 10 SACJ, 141.

opinion of many South Africans that the present South African criminal justice system is deeply flawed due to its apartheid heritage.¹⁰¹ This concern was particularly great in the *Malan* case, as the Attorney General of Natal, Tim McNally, was accused of not using all the resources and information at his disposal in prosecuting Malan.¹⁰² Another serious consequence of such acquittals is that they may discourage perpetrators of crimes from applying for amnesty.¹⁰³ This means that the truth about the past, particularly in relation to the involvement of the members of the defence and security forces, will probably remain unknown.

Some have argued that cases such as the *Malan* case suggest that the South African criminal justice system is ill-equipped to handle cases of such a complex nature. It is well known that the South African police and prosecutorial staff are under-resourced, under-staffed and inexperienced in the investigation and prosecution of large complex criminal cases.

These cases also illustrate the problem with selective prosecutions.¹⁰⁴ To date, very few perpetrators of apartheid-era crimes have been prosecuted.¹⁰⁵ The problem of selectivity of prosecutions is magnified in the context of international trials. It has been argued that this inevitable selectivity has the consequence that international criminal trials have an “inescapable aura of arbitrariness” about them.¹⁰⁶ In addition, as the decision to prosecute is within the discretion of the National Prosecuting Authority, it is inevitably political. In South Africa the public outcry after the *Malan* acquittal was partially silenced when President Mandela stated that he supported the verdict and called on South Africans to respect it.¹⁰⁷ It is considered to be in the interest of national reconciliation not to be too critical of these verdicts and not to continue to open old wounds. One would have expected the South African public to insist on further prosecution of those who did not receive amnesty.

¹⁰¹ See Varney/Sarkin, *ibid.* See also Tim P. McNally, *The Attorney-General Responds*, (1997) 10 SACJ, 162. Meintjies and Mendez describe the prosecution as “incompetent” and “possibly even half-hearted”. Malan was so poorly prosecuted that the trial judge severely admonished the prosecutor. See Garth Meintjies/Juan E. Mendez, *Reconciling Amnesties with Universal Jurisdiction*, (2001), 3 *International Law Forum* 91.

¹⁰² Varney/Sarkin (note 100), 142. In their article Varney and Sarkin accuse McNally and the prosecution of failure to utilise the evidence available to it, the failure to present the documentary evidence coherently and systematically, the failure to call key witnesses and the failure to raise the key aspect of the accused’s foresight of the killings.

¹⁰³ Varney/Sarkin, *ibid.*, 141.

¹⁰⁴ See Alliston Marston Danner/Jenny S. Martinez, *Guilty Associations: Joint Criminal Responsibility, and the Development of International Criminal Law*, (2005), 93 *California Law Review* 97.

¹⁰⁵ Prominent examples are Eugene de Kock, Wouter Basson and Magnus Malan.

¹⁰⁶ Danner/Martinez (note 104), 97.

¹⁰⁷ “Ex Minister Charged with Apartheid Murders”, BBC News, 3 November 2006.

One explanation for the lack of such outcry¹⁰⁸ may be the fact that South Africans are routinely urged to “look to the future”.¹⁰⁹

XI. Conclusion

The result of the political decision, made in 1995, to establish a Truth and Reconciliation Commission¹¹⁰ which provided for conditional amnesty was that Nuremberg-style trials would not take place in South Africa. Many believe that the integrity of the TRC process will depend on how firm the ANC government remains in its commitment to prosecute those who did not apply for amnesty.¹¹¹ The *Basson* and *Malan* trials strongly indicate that the political will to prosecute apartheid offenders is lacking or withering. Of course, it does not follow that political will plus more “efficient” prosecutorial strategy will equal conviction. The accusation and possibility of judicial bias is unfortunate since it erodes faith in the judiciary at a time when the public should gain confidence in the judicial system.

It is disappointing that the prosecution relied on international law to such a limited degree and at such a late stage in the case. The judges of the Constitutional Court seemed awkward in their handling and assessment of international law. As *Trenogve* has pointed out, international law did seem “exotic” to the judges and lawyers and they preferred working with tried and tested domestic law. Moreover, since the international law on the matter is unclear, it was also safer for the prosecution and the court to resort to domestic law. Basing the case on international law would not necessarily have resulted in a conviction. However, in view of the seriousness of the charges, it would have been more appropriate and in accordance with the expectations of the international community. The existence of jurisdictional links (both territorial and personal) does not exclude the possibility of referring to universal jurisdiction. Applying universal jurisdiction in this case could have lent the appropriate status to the alleged crimes. It can also be asked whether international criminal law will develop as desired if universal jurisdiction is considered as a subsidiary form of jurisdiction: a form of jurisdiction a court will only resort to in the absence of all other jurisdictional links. Such a practice could also lend substance to the fear expressed in *Tadic* that “human nature being what it is,

¹⁰⁸ This could also explain the lack of public interest in the *Basson* trial. The public gallery was almost empty during the five day of the trial in February 2005.

¹⁰⁹ One explanation for the emphasis on “moving on” could be the fear or discomfort of some ANC officials of delving too deeply into the past, especially regarding the allegations of torture in its training camps. See Eddie Koch, *Go to the Truth Commission, ANC Tells Members*, Weekly Mail, 15 March 1996.

¹¹⁰ The TRC was established in terms of the Promotion of National Unity and Reconciliation Act, No 34 of 1995.

¹¹¹ *Meintjies/Mendez* (note 101), 92.

there would be a perennial danger of international crimes being characterized as ‘ordinary crimes’.¹¹²

The Constitutional Court also missed a perfect opportunity to acknowledge the proper status of international humanitarian law and customary international law in South Africa. Although the Rome Statute will not apply directly to the prosecution of apartheid crimes, its indirect effect on such prosecutions, as well as that of the legislation incorporating it,¹¹³ will be worthy of note. In the first *Basson* judgment, the Constitutional Court stated that the duty to prosecute was “not limited to offences which were committed after the Constitution came into force but also applies to all offences committed before it came into force”.¹¹⁴ The influence on future prosecutions of the duty to prosecute contained in the Statute, coupled with these matching Constitutional obligations, will no doubt be interesting to discern.

It may be argued that, despite the prosecutorial inadequacies of his trial, Basson was convicted by the media and the court of public opinion. However, during his five-day trial in the Constitutional Court, the longest constitutional trial to date, Basson remained calm, occasionally fiddling with his mobile phone. The truth of his activities during Project Coast will remain as elusive and enigmatic as the accused himself.

¹¹² *Prosecutor v Tadic*, IT-94-1-AR72, 2 October 1995, para. 58.

¹¹³ Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. For more on this legislation see Anton Katz, *An Act of Transformation: The Incorporation of the Rome Statute of the ICC into National Law in South Africa*, (2003), 12, 4 *African Security Review*.

¹¹⁴ *S v Basson* 2005 (1) SA 171 (CC), para. 32.