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Interviewee: John Dugard | Session #1 (video)

Interviewer: Len Morris | Johannesburg, South Africa

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Q: Before we actually begin our discussion, since Geoff [Geoffrey Budlender] has just left, you told a wonderful anecdote about the -- I imagine it's post-conference from the second [Carnegie Corporation] Inquiry, a trip that you took. Could you relay that?

Dugard: Yes. After the Cape Town conference, poverty conference, David [A.] Hamburg and Helene [L.] Kaplan and other trustees went on a tour of the resettlement camps in the Eastern Cape, and I was asked to conduct the tour, together with Steve [Stephen] Biko's sister. And we drove through the Eastern Cape. It was quite clear that no prior arrangements had been made as to which settlements we would visit.

We were driving toward a particular settlement, and I said to her, because I knew the Eastern Cape, it would be good to visit this little village, and she said it wouldn't be a good idea. But eventually we went there, and it was quite clear that it was not prearranged, because the community leaders were not readily available.

Eventually we rounded them up and we brought them into, I think, the local hotel, and we started to speak to them about the problem of resettlement, because there were many resettlements in that area. And the community leaders told us about all the difficulties they'd had over many years, and at a certain point they said, "But then all our problems were resolved when we met Geoffrey Budlender from the Legal Resources Centre [LRC],

and he started to advise us on how to use the law to assist us in coping with resettlement problems."

And obviously that had a major impact on David Hamburg and others. I think they realized that Carnegie funded operations that really had an impact on people.

Q: But in the beginning, Carnegie's money and -- was risk capital, as John [W.] Gardner's fond of calling it, wasn't it? I mean, 1978 is when you got started with CALS [Centre for Applied Legal Studies]?

Dugard: Yes. Perhaps I could go back a few years. In 1973, The Ford Foundation funded a very important conference on legal aid at the University of Natal, and thereafter, Ford Foundation officers visited South Africa and spoke to Felicia Kentridge and me and Geoff Budlender and others about setting up public-interest law programs in South Africa, but they seemed to be unprepared to seize the initiative and actually set up programs.

Then in 1977, David [R.] Hood visited South Africa for the Carnegie Corporation. And 1977 was a particularly difficult year, because that was the year in which Steve Biko was killed, and the year in which there was a major clamp-down following the Soweto uprising. There were discussions between Carnegie and Ford and Rockefeller Brothers [Fund] about setting up public-interest law in South Africa. At this stage it was realized by all three foundations that this was an important area and that there would be collective action, but as I understand it, Ford and Rockefeller Brothers were uncertain.

And at this stage, David Hood went to the Carnegie board of trustees and persuaded the board to make a grant to the University of the Witwatersrand to set up the Centre for Applied Legal Studies, with one of its early tasks the establishment of the Legal Resources Centre. So that meant that in 1978 we received funding for public education in the field of law, but with one of the main functions the establishment of the Legal Resources Centre. And thereafter, Arthur Chaskalson and I visited the United States to raise funds for the Legal Resources Centre, and in the following year the Legal Resources Centre was set up with funding from Ford Foundation, Rockefeller, and Carnegie.

But I think it's important to realize that without that initial step taken by David Hood, that the establishment of public-interest law in South Africa, Legal Resources Centre and CALS, might have been delayed for several years.

Q: How did you arrive at the shape of the proposal, if you will, meaning the structure for CALS, the idea of the -- I mean, was it a dialogue with Carnegie and the funders? Was it something that was generated almost entirely on this side, the South African side?
Dugard: David Hood played a major role in this. David had joined the Carnegie Corporation after several years as dean of the University of Hawaii Law School, so he had -- he told me at this stage that there was a feeling on the part of the Carnegie board of trustees that he was likely to push a legal project, and he did not want to be seen to be doing that. But he said that when he visited South Africa, it was so clear to him that there was a need for public interest law in South Africa and for institutions like CALS and LRC, that he felt that he had to push.

At that stage the structure was uncertain. Arthur Chaskalson at this time was a member of the Johannesburg bar, and he was not involved in the discussions. It was mainly Felicia Kentridge, Geoff Budlender, and a number of other people involved in labor relations, and myself, that held discussions with the funders. David suggested that an institution should be set up, linked to the university. And so that was how CALS came about as a research institution attached to a university. That certainly was not my idea; it was his.

The Legal Resources Centre, which was modeled to a large extent on the Legal Defense Fund, was a more obvious structure, but the difficulty there was that there was no clear leader, no person with stature capable of leading the Legal Resources Centre. We spoke about people, and Arthur Chaskalson's name was mentioned. I did not think that we would persuade him to accept the position. Then Felicia and Sydney Kentridge had a discussion with Arthur, and, much to our surprise and joy, he accepted. And thereafter, it meant that the idea of Legal Resources Centre became viable, but that was very modeled on the Legal Defense Fund, and that was emphasized by the fact that the first American visitor who was brought out to South Africa was Jack Greenberg, who had been director of the Legal Defense Fund, or at that stage was still director of the Legal Defense Fund. And he and Arthur Chaskalson became firm friends. So that really explains why the Legal Resources Centre had that particular structure.

But as far as the Centre for Applied Legal Studies is concerned, I don't think there was any real precedent for such a structure. It was largely David Hood's idea.

Q: Was there a protective aspect, though, to the notion of connecting CALS with the University, much the same way that -- well, not in the same way, but the trustee structure for the LRC enabled Arthur Chaskalson to put people in place, other high-profile attorneys there, which would make it less likely that the LRC would be banned or run into difficulty. Did the university afford some similar protection for CALS?

Dugard: Yes, that was quite clear. But, of course, at that time the whole issue was so sensitive that we spoke about calling the institution The Centre for Human Rights, but we realized that we would have been banned immediately had we used the word human rights in our title. So that was why we decided to call it the Centre for Applied Legal Studies, to give it a very bland name.

Fortunately, the vice chancellor of the University, Sonny [Daniel J.] du Plessis, who was a medical -- was a surgeon, rugged Afrikaner, who had not really been previously engaged in political matters, saw the virtue of this, and he and David Hood became good friends, too. And I think that right from the outset we had the full support of the University, particularly from Sonny du Plessis, who was a very misunderstood man in many respects, perhaps not a very popular vice chancellor, but he was a man of principle and conviction, and he was always very supportive of the Centre for Applied Legal Studies. I think you're right; it would have been difficult to close down, to ban an operation with the name of Centre for Applied Legal Studies, which purported to be a research center, and was a research center in many ways.

Q: What does a research center do, particularly in a political atmosphere where people -- such an oppressive atmosphere where people are detained and banned, and at that point there's violence, armed struggle is under way? How do you take your real objective, which is to promote justice and human rights, and move it forward with research? What steps did you take?

Dugard: It was applied legal studies. We did carry out normal academic research activities. We wrote in the field of human rights for existing legal publications. We also wrote in the press about human rights violations, but from a scholarly point of view. But there came a time when we realized that some of the ideas that we had about the law were ideas that ought to be implemented, and that is why CALS became involved in litigation. We became very involved in litigation in the field of labor relations, in the Group Areas Act, and in the pass laws.

And many of those undertakings were preceded by research. For instance, if I could just refer to the subject of the pass courts. I don't know how much you know about the pass laws, but under the apartheid system every black African required a document, an identity document, and a document providing evidence of the fact that she or he had permission to be in a particular urban area. And every African was required to carry that pass all the time. Failure to produce a pass was a criminal offense. And so many Africans were simply picked up off the streets or there were raids into homes, they were arrested and then taken off to court, and they were brought before the pass courts. The pass courts were really a travesty of justice, because there was no legal representation, and the whole process was a very quick one.

So we carried out a survey of what was actually happening in the pass courts, and we went there with stopwatches, and we timed them. Sometimes the trial would last for forty seconds, and a person would be convicted and sentenced to ten days' or two weeks' imprisonment. And this was going on all the time.

And we did publish a small pamphlet on the subject, but then we took it one step further and we set up a system, together with a group called Lawyers for Human Rights, to provide for free legal assistance in the pass courts. And when that happened, the system no longer worked, because all it required was for one person to go to court and to defend a person so that the trial would no longer last one minute, but a couple of hours. And the system became inoperative. And so that was an obstructive strategy that was premised on research.

Similarly, we brought a challenge to a proclamation zoning Central Johannesburg white for the purposes of residence. There, too, we carried out research on the circumstances in which one might challenge a proclamation on the grounds it was unreasonable and discriminatory. I was particularly interested in introducing international law arguments into proceedings before South African courts, and so when we had prepared to research the matter, we challenged the validity of a proclamation zoning Central Johannesburg white. We failed. We knew we would fail, but the consequence of that was that all prosecutions under the Group Areas Act were suspended for two years while the matter went through the courts.

Q: This was a very specific -- this was the Werner case that you're --

Dugard: Yes.

Q: Could you put the human face on that case for the benefit of this interview? What was involved with the Werner case?

Dugard: Well, Mr. Werner was a young colored man, in South African terms, who, together with his family, had moved into an apartment in Central Johannesburg which was an area declared zoned as being for exclusive white occupation under the Group Areas Act. He was duly charged with being in a white area, together with several -- I think there were five or six hundred families, mainly colored and Indian, that were prosecuted for living unlawfully in Central Johannesburg. And at this stage, lawyers, again acting largely under the auspices of Lawyers for Human Rights, which was a group of human rights lawyers, started to provide legal defense for people.

And a whole range of defenses or arguments were raised, mainly on the merits of the case, each case, but we decided to challenge the validity of a proclamation, the proclamation zoning Central Johannesburg white. So we argued that while our courts did not have the power to review acts of Parliament, they did have the power to review proclamations issued by the state president, and that a court could review a proclamation where it was unreasonable, unreasonable in that it was discriminatory. This was an old common law rule which had managed to survive the apartheid regime.

So we went to court and we argued that it was unreasonable in its implementation. We led evidence about the circumstances in which colored and Indian families lived in Johannesburg, the overcrowding in the colored and Indian townships, the fact that there was no other alternative accommodation for them. And then we raised the argument that South Africa, as a signatory to the charter of the United Nations [U.N.], was obliged to comply with its obligations not to discriminate under the U.N. charter. So we had a fairly respectable legal argument, which meant that we could launch a tenable challenge to the proclamation, and that succeeded in suspending prosecutions for two years.

During that time there were major political changes. The government decided to try to work more closely with colored and Indians in the political field, and so the prosecutions, as a result of this case and a number of other cases, were brought to an end.

Q: Did you similarly get involved in -- there's a pamphlet that I read, "Do Blacks Have a Right to Family Life?" an examination of ordinary -- the concept of ordinary residence. I think it's part of a challenge to the Urban Areas Consolidation Act of 1945.

Dugard: Yes.

Q: Migrant control.

Dugard: Yes. Those were matters, hearings brought before the pass courts.

Q: Still influx control, basically.

Dugard: Influx control, yes. To a large extent, that law was killed by a judge, Judge [John] Didcott, in a decision in Natal about this time. I think it's important to realize that public interest law had a major impact on the thinking of some judges, a minority of judges.

One of CALS' most important functions was to hold closed seminars for judges and lawyers, where we discussed important issues. And there's no doubt that we did influence the thinking of many judges so that most of the important -- all of the important progressive judicial decisions of this time were taken by judges who had been at our seminars. They were held at a hotel called Mount Grace, and so they were known as the Mount Grace seminars.

So it was all part of a concerted effort. CALS was engaged in public education. The Legal Resources Centre was a proper public interest law firm with an emphasis on litigation. Lawyers for Human Rights, which, incidentally, was also set up by CALS. I think that's important to record, that in 1979 the Ford Foundation funded a human rights conference in Cape Town, and flowing out of that, Lawyers for Human Rights was set up. But in order to set it up, someone had to do the setting up and administration. And again it fell to CALS to establish Lawyers for Human Rights, and we managed it for several years, and then it developed a life of its own.

Q: Did Carnegie support that effort?

Dugard: No, but they supported it indirectly because they supported CALS, and we set up Lawyers for Human Rights.

Q: I see.

Dugard: And then later we were charged with the task, together with the LRC, of setting up the Black Lawyers Association. So it was also part of the whole process.

Q: To what extent would press relations fall into the area of public education in the context of your work? How important was it to --

Dugard: Well, I took the view that it was very important that lawyers should comment on matters affecting the administration of justice. Professional lawyers were reluctant to comment because they interpreted their professional rule that they were not permitted to comment on legal matters very broadly. I believe that the professional rule precluded them from commenting on matters that affected their own particular clients, but generally they interpreted it to preclude them from commenting on general matters. And so that meant it was left to academics. And, of course, there were a number of law professors, including myself, who had commented on matters affecting the administration of justice before the establishment of CALS.

But after the establishment of CALS, I and my colleagues saw this as an important part of our work, and we developed good relations with particular journalists, editors, and so we were generally approached for comment on matters that involved human rights violations.

Q: And did this make your position uncomfortable in terms of -- I mean, we're in a period of South African history where this type of activity could produce a banning.

Dugard: I'd been a law professor at Wits [Witwatersrand] University since 1969, and I had been engaged in the task of commenting on matters of this kind. I think I had greater difficulties before 1978. There were some threats directed at my family, but that was largely because of the criticism of the police force, but that was before 1978. But it certainly didn't make us popular either with the government or with the legal profession.

Q: The tension here really depends upon what period you're talking about, doesn't it? It's very fluid.

Dugard: Yes. Well, it was -- the late seventies were a particularly difficult period. And then, of course, the situation changed very much in the 1980s, after the establishment of the United Democratic Front, when there was much more political activity, but again we were involved in representing people at that time. But, yes, press comment was a very important part of our function.

Q: In the area of labor, that was an area of litigation for CALS.

Dugard: Yes.

Q: Were there test cases there that moved into important areas? Would you comment on that?

Dugard: Well, perhaps I could just set the context. When CALS was established, there was a -- blacks were not allowed to form trade unions. At that time there was, however, a Commission of Inquiry into the whole system of black trade unions. And in 1979 a report was produced, the Wiehahn [Nicholas Wiehahn] Report, which recommended that black trade unions be permitted.

So there was no -- that said, there were very few labor lawyers in South Africa, but we realized that labor would be a very important aspect, and so the first person I appointed as an assistant was [Michael] Halton Cheadle, who was a labor lawyer. We then proceeded to focus on labor law, and at one time we had, I think, probably the top labor lawyers in the country were Cheadle, Halton Cheadle, Clive Thompson, Paul Benjamin, and Fink Haysom. These were the top labor lawyers in the country.

And we conducted research into the field of labor relations, but at the same time we saw it as our function to give legal advice to black trade unions. And we -- so that became important, and from legal advice inevitably flowed litigation. This was conducted mainly through a firm of attorneys called Cheadle Thompson & Haysom, which was, in polite terms, a front for the Centre for Applied Legal Studies.

Q: Can you give me an example of the areas where trade unions would need counsel of this kind?

Dugard: Well, we started off in the field of health and safety. It was quite clear that mines, gold, coal, all the mines were very slack about health and safety matters. And so that was our initial focus, and we made representations in the early years at a Commission of Inquiry into a disaster in one of the coal mines, to which we brought experts from abroad to testify about the inadequacy of the safety measures adopted. And thereafter, that was one of the most important features of our work.

We also educated shop stewards about legal matters. We used to conduct seminars and simulated plays. One of the actors that worked at CALS for some time is now one of South Africa's best-known black actors, Ramolao Makhene. So he was also part of the publication, or the public education program.

So the legal profession did not permit the Legal Resources Centre to act on behalf of trade unions. Legal Resources Centre was obliged to represent individual workers who had grievances. Because we did not have the approval of the legal profession to set up CALS, and we were required, we were obliged to set up this front firm of Cheadle Thompson & Haysom, we were able to perhaps be a bit more imaginative in representations for black trade unions.

[END TAPE ONE, SIDE ONE; BEGIN TAPE ONE, SIDE TWO]

Q: We were discussing the documentation Centre and some of the publications, how that might be useful to these new black trade unions, the leadership of the new black trade unions. Could you tie that in with the original purpose of CALS then?

Dugard: Yes. It was important to provide the new black trade unions and their leaders with access to information about labor matters, and so we published a number of brochures, wage-regulating measures, eventually the *Industrial Law Journal*, which were designed to assist union leaders and labor lawyers in responding to the new situation, because the 1979 change in labor dispensation had important consequences for South Africa. Before then, there were no black -- registered, recognized black trade unions. Now this became an important feature of public life in South Africa, particularly in the late seventies and early eighties, before the creation of the United Democratic Front, when there was no political opposition. So much of the opposition to apartheid was conducted through trade unions. Complaints about labor relations, labor circumstances inevitably had a political flavor.

Q: Reserved jobs.

Dugard: Yes. And one of the people that we worked very closely with at this time was Cyril Ramaphosa, who then went on to play a major role in the transition process and the interim and final constitutions, and now he's one of the prominent black capitalists in South Africa.

Q: Shall we discuss censorship momentarily? Another area that you were very much involved in. To begin with, how was censorship set up in the apartheid regime?

Dugard: Essentially there were two regimes. There was the Internal Security Act, previously the Suppression of Communism Act, which was designed to silence individuals

and also to restrict publications. Then there was the Publications Act, which was -- had a broader focus, which dealt with publications, movies, documentaries, that were obscene but were also politically undesirable. And we did not concentrate on obscenity, because publications that -- obscene publications could normally afford their own lawyers if they wanted to appeal to the Publications Appeal Board against the banning of an obscene publication.

But when it came to the banning of poetry or novels or documentaries, it was -- the affected parties often lacked the funds to appeal to the Publications Appeal Board, and there were no lawyers who focused on censorship, so there was no coherent strategy. Fortunately, shortly after CALS was set up, there was a change in the chairmanship of the Publications Appeal Board. A professor from the University of Pretoria was appointed as chairman, and he turned out to be very progressive and enlightened, and he was receptive to the arguments that we raised. Most of our arguments were comparative. We relied very heavily on the jurisprudence of the United States Supreme Court on what was undesirable. And even so, we succeeded in securing the unbanning of most, or many, of the writings by black authors. At this stage it's bizarre if one recalls that the whole of the Heinemann's African Writer Series was banned in South Africa, and we appealed against that, and we succeeding in obtaining in one appeal the lifting of the ban on all these writers from Nigeria and Uganda and Kenya. I think there were about twenty books that were affected. Of course, there were books by black authors in South Africa itself and by white authors. We appealed a ban on a television series of Nadine Gordimer's short stories.

So there we were very successful, but there too we conducted research. We published the decisions of the Publications Appeal Board, which are not published in the ordinary law reports. They were considered to be too insignificant because they did not emanate from a court of law, which meant that lawyers had no access to standards and precedent. We published the decisions of the Publications Appeal Board, which meant that it was possible for us to ensure that the Publications Appeal Board followed its own previous decisions, and we succeeded in persuading them that books that had previously been regarded as undesirable for political or racial reasons were not a threat to the survival of the white state.

Q: The state of emergency also produced circumstances that the Centre was involved in. I'm thinking of police conduct, challenging police conduct, detentions, bannings under the Internal Security Act. I mean, they had such broad sweeping powers. In this most invasive time, what direction did you chart?

Dugard: Yes. Detention without trial was a matter of special interest to us. One of my staff, Fink Haysom, who later became legal advisor to President [Nelson] Mandela, was responsible for setting up the Detainees Support Committee, but then he himself was detained for several months.

Our work during the emergency focused very much on the Eastern Cape area, where there was very little legal representation. One of the most important cases concerned a case in which a young white doctor, Wendy Orr, who had treated prisoners who had been held under the emergency laws, detention without trial, provided evidence of torture of

detainees, and this had a major impact at the time. Again, this was litigation handled by the Centre for Applied Legal Studies. There was a Commission of Inquiry into some of the events in the Eastern Cape, in which we played a major role.

But in this respect, I suppose one could summarize by saying that we published widely on the subject of security legislation. In 1982, when the legislation was substantially amended, we held a seminar of concerned lawyers about the new security laws, which resulted in a collective condemnation of the new laws, and thereafter there were many publications about security measures. And at the same time we embarked on litigation in this field, designed to protect detainees. And there were, as I say, a number of Commissions of Inquiry into the emergency measures at this time, in which we played an important role.

Q: Would you testify for those Commissions? Is that how that would work? Or you would submit an opinion?

Dugard: I testified personally before the Commission of Inquiry into security legislation. My evidence had little influence. But there were several Commissions of Inquiry into police brutality in the Eastern Cape, at which we succeeded in collecting evidence to present at the hearing. But then this was Haysom and Cheadle acting as attorneys in this matter.

Q: In one they won the right to actually cross-examine the police.

Dugard: Yes.

Q: And that would have been unthinkable. There was simply no precedent for that.

Dugard: I think it's important at this stage to mention that South African judges became more and more concerned about human rights issues in South Africa, and I think that Legal Resources Centre and CALS succeeded in generating this new concern. It became particularly apparent in the case of the Natal judges, where the Natal judge president, John Milne, and other judges like John Didcott and Andrew Wilson, started to -- became open to arguments challenging the emergency regulations. And so lawyers in South Africa started to challenge emergency regulations, and with great success. And CALS played an important role in those challenges as well. We didn't handle all the cases by any means; we handled some of the cases. But this was part of a whole new way of thinking about the law in South Africa.

Q: I think that's a very important area. Could you talk about that? I mean, obviously there's a fabric of coercive law, of law made without the representation of the majority of the population that have to live under it. How does the work of the human rights community, including CALS and the LRC, then over time affect the majority's view of law? The irony being that the law, at least initially, is an instrument of punishment, of subordination. Did you find that you were able to change that over time, that the law could offer some hope?

Dugard: Yes. When apartheid came into existence, and particularly in the early 1960s, lawyers and judges tended to view law simply as the command of the legislature, which

they were required to accept. It was not their function to challenge the law, to question its morality, to question whether it complied with human rights. Human rights was an unknown term in South Africa at that stage.

And gradually, lawyers changed their attitude towards the law, so that by the end of the 1980s, at the time of the political transition, there was a substantial group of what one might loosely describe as human rights lawyers in South Africa. I think that was why we got the kind of constitution that we did, with a bill of rights and protection for human rights, because it was now accepted by lawyers that a society required a bill of rights. Our previous constitution had no bill of rights at all.

And I think it's very clear that institutions like CALS, Legal Resources Centre, Lawyers for Human Rights, played an important part in that exercise. Here was the Legal Resources Centre challenging apartheid legislation before the courts. Here was CALS, in its publications and in its other work, challenging the philosophy, legal philosophy, of the apartheid legislation. And that gradually spread.

As I mentioned earlier, I think that the Mount Grace seminars, which we held annually, involving judges and lawyers, had an important impact in thinking about the law. Certainly when I started off as a young academic in the 1960s, there was very little questioning about the role of law in South Africa, in society in South Africa. That had changed completely by the end of the 1980s.

Q: What changed you? Where in the curve from the young academic, where there's no dialogue, as it were, at what point did you feel the need to create the change?

Dugard: Well, I was disaffected from my days as a student in the 1950s. I came from an unusual background. My parents had both been teachers at a black school, Healdtown, where Mandela and others had studied. So I grew up in an unusual situation, which -- my father was involved in African education. So I, from my early days, had not accepted apartheid. But as a lawyer, I think I only began to question the direction of our law in the 1960s, and I began to find it very difficult, as a lawyer, to accept what was happening.

And so as a teacher and then later as director of CALS, I was preoccupied with the law, not with broader political issues. I wanted to assist in changing attitudes towards law, changing the nature of the law. And so I suppose the new constitution which we now have is essentially what we were all aiming for, and at that stage we never believed this would come about, obviously.

Q: I was going to ask you what degree of surprise did you greet the change, the fundamental change in South Africa.

Dugard: I never believed it could happen. I gave a talk, I think on the first of February 1990, to a group of U.S. foundation officers on what Mr. [F.W.] De Klerk was going to say the next day in his major speech in Parliament, and I predicted he would move to the right. [Interruption -- airplane noise]

Q: Just as we were getting that answer, they sent the Air Force.

Dugard: It wasn't very important. I was simply saying that on the first of February 1990, I addressed a group of U.S. foundation officers, visiting foundation officers, on what Mr. De Klerk would say in his speech in Parliament the next day, and I predicted he would move to the right. And in fact, this was the occasion in which he announced the abandonment of apartheid. So it came as a surprise to me and to most people. I certainly had not expected to see change of this kind in my lifetime.

Q: You mentioned earlier that you had a particular interest in trying to find ways to use or apply international law, standards of international law, to the work here of dismantling apartheid law. Are there other areas where you were able to do that, that come to mind, where you were able to utilize that? For instance, was it of use in the whole nationality issue around the homelands and the denationalization?

Dugard: Well, I'm an international lawyer, and so I tended to see apartheid laws through the spectacles of an international lawyer, the extent to which apartheid laws were out of line with human rights norms. And so I tried to develop this theme as much as possible, so in respect of the so-called independent homelands and the policy of denationalization, I published a number of articles in which I argued that the denationalization of eight or nine million people on grounds of race was contrary to international law, pointing to the precedents of Nazi Germany and Stalinist Russia, which also involved denationalization on grounds of race and which were generally accepted as illegal. And so that was a theme I developed in my publications, in a book I wrote on recognition of states, and in pamphlets.

And then one of the more interesting cases I argued was in 1988, when there was an attempt at an abortive coup in the independent homeland of Bophuthatswana, and about two hundred army officers were then charged with treason. And of course, treason is a crime against the state in our law, and I argued that under international law, Bophuthatswana was not a state, so this gave me an opportunity to argue in court that the whole homelands policy was contrary to international law.

Q: Now those same independent homelands were not recognized by a single Western country, were they? Nor by the United Nations?

Dugard: Yes. Well, that was the basis for the challenge.

The other international law argument that I was involved in was the argument that members of national liberation movements should be treated as prisoners of war, and that at the very least they should not be sent to death and executed. And that was an argument that I raised in a number of cases as a witness in Namibia and in South Africa. In one case it was rejected and three men were sentenced to death and executed, but in other cases the argument had some impact in the sense that they were not sentenced to death. So we were concerned about trying to prevent members of national liberation movements arrested in South Africa from being executed.

There were a whole range of other international law arguments that we raised. I think generally one can say that what characterized both the litigation of the Legal Resources

Centre and the Centre for Applied Legal Studies is that we were more creative and more imaginative than the average professional lawyer. Many of the arguments that we raised were initially condemned by our professional colleagues as being far-fetched and ridiculous, and so we took some pleasure in the fact that on occasion we succeeded.

For me, one of our great successes was in the late 1980s when the government wanted to create a fifth independent homeland, KwaNdebele, and in order to achieve that, it wished to incorporate another adjacent territory occupied by members of another language group, and the members of this community, Moutse, were vigorously opposed to incorporation. So we challenged the incorporation of Moutse into KwaNdebele on the grounds that this was contrary to apartheid policy, which was there to set up ethnic homelands for people belonging to one language group.

And of course, there we were using the apartheid argument in order to challenge the creation of an independent state. Most of my colleague lawyer friends said this was a ridiculous argument, but we eventually succeeded in the appellate division, and that meant that the homeland of KwaNdebele was never brought into existence. So I think that because we were not acting on instructions from clients, we were able to plan our litigation more carefully, more strategically, and that was evident in many of the cases brought by the LRC and CALS during this period.

Q: And does the funder somehow remain a client? Through all these years of work and through all of the political tension that you create with your work, are they happily forking over the next round of funding? Are they presenting the final grant?

Dugard: No. Well, initially we were funded only by Carnegie, and until the end of my stay as director we were funded by Carnegie. Ford, Rockefeller Brothers also gave us grants, particularly Ford later. And American funders were wonderful. They were generous, they were interested in what we were doing, and they continued to fund us. And this was particularly true of Carnegie. Carnegie foundation officers visited South Africa regularly, inquired about what we were doing, approved what we were doing, and so we had full support.

But, of course, we had great difficulty in raising funds locally, particularly because of our support for black trade unions. This meant that South African corporations were reluctant, understandably, to fund any of our projects, because our work was tainted by giants. So insofar as the Carnegie Corporation was our client, it was a satisfied client.

Q: As you look back now at twenty years later, what do you see as the major accomplishment of CALS and the LRC? I suppose they should be joined, really. They're part of the same vision, don't you think?

Dugard: Yes. I've already said that for me I think the important thing was that we did succeed in changing attitudes towards the law on the part of lawyers and politicians. I believe that without the work that we did in that period, it would have been very difficult for the politicians in the early nineties to agree upon a constitution which contained a bill of rights.

It was interesting that it was accepted by all parties when they met in 1993 at Kempton Park, that a bill of rights would be part of the new constitution, yet although the ANC [African National Congress] had been committed to the freedom charter from the mid 1950s, until the early 1990s it hadn't really formulated ideas about a bill of rights. The National Party, on the other hand, had rejected a bill of rights in 1984, when we got a new constitution, as being a humanist institution that was unacceptable to South Africa. So there had been a complete change in thinking on the part of lawyers and on the part of politicians, and I'm not sure of what significance our contribution was, but I have no doubt that we did make some contribution in that respect.

And one sees it today, that there's a completely different attitude towards law in South Africa. Law now is seen as being closely related to justice, whereas during the apartheid years, law was simply seen as the instrument of the state, instrument of the apartheid state.

Q: And now with the structural change and the change in attitude that you've pinpointed, what would be the challenge for future work?

Dugard: Well, the structure is there, but I think we have to make it work. It's very important that non-governmental organizations like LRC and CALS continue, to continue with work in the field of human rights so that they can ensure that the constitutional proscriptions become part of the daily life of people in South Africa. There's still a lot to be done.

And one of my criticisms of the present constitutional dispensation, constitutional order, is that non-governmental organizations have not brought enough cases, particularly in the field of social and economic rights, before the Constitutional Court. The Constitutional Court has heard a large number of cases involving the rights of white-collar criminals, because white-collar criminals can pay to take their cases to the Constitutional Court, whereas there's a need for non-governmental organizations to take, or to ensure that the basic rights of the indigents are advanced before the Constitutional Court.

Q: We're right back to basic public interest law.

Dugard: Exactly. There's still a need for public interest law, but at least the structure's there. When we operated, there was no structure, so we really had to, as it were, create our own structures within the existing apartheid framework, use the interstices of the law, as it were, to develop new arguments. And by means of creative, imaginative lawyering, I think we did make some inroads.

Q: Professor Dugard, I don't have any additional questions, but if you have some other area that you would like to remark upon or something else that you'd like to say, this would be the time.

Dugard: I think that I've covered everything. [Interruption]

Mary Marshall Clark: Judge Chaskalson said something this morning about the role of your work on the law in terms of being critical to the weakening of the apartheid system. Would you agree with that? I'd be interested to hear your comments.

Dugard: Yes. Well, undoubtedly the work that we did weaken the apartheid system, because to some extent we challenged the ideological basis of the apartheid system. We showed that apartheid was out of line with current international attitudes towards the law, that it was simply a policy that was morally and legally unacceptable. So, yes, we did make some contribution there.

Q: We thank you, sir. Are we getting you out on time?

Dugard: And, of course, you have to be at the airport.

[END OF INTERVIEW]