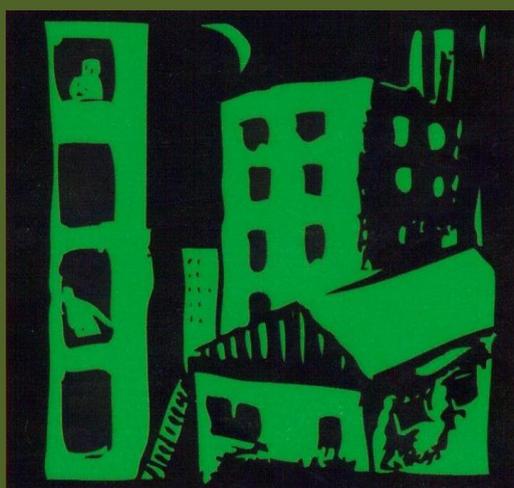


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## Litigating human rights in South Africa: The experience of the Centre for Applied Legal Studies

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### 1 INTRODUCTION

This article aims to show, through an overview of the experience of the Centre for Applied Legal Studies ('CALs'), that international law forms an integral part of human rights litigation in South Africa. It is apparent from the experience of CALs that international law, including international human

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\* The author would like to thank Lucy Geddes, an intern at CALs from January to March 2013, for her assistance in writing this article. The author has attempted to provide an overview of the work of an organisation that has been in existence for over three decades, but cannot possibly do justice to all the hard work of those who have been at CALs during its rich history. For further information, especially in relation to the early days of CALs, see "Interview between John Dugard and Len Morris" 7 August 1999. Available at [http://www.columbia.edu/cu/lweb/digital/collections/oral\\_hist/carnegie/pdfs/john-dugard.pdf](http://www.columbia.edu/cu/lweb/digital/collections/oral_hist/carnegie/pdfs/john-dugard.pdf) (accessed 4 April 2013).

rights law, in its various forms, such as, case law, international conventions and treaties, as well as guiding principles, has a key role to play in aiding domestic courts to interpret constitutionally recognised rights. The experience of CALS further illustrates that these international laws and principles have an important role to play in assisting litigators and individuals in arguing for the basic recognition of rights that may not be recognised in domestic jurisdictions.

International and regional laws, principles and guidelines are applied in human rights litigation in a direct as well as an indirect manner. The manner in which these international laws, principles and guidelines are used may vary. This spectrum of use ranges from informing research which influences the legal strategy adopted in cases to the direct application of international laws and principles in pleadings and argument before courts of law. The South African Bill of Rights<sup>1</sup> draws heavily from international instruments, including the Universal Declaration of Human Rights, 1948; the International Covenant on Civil and Political Rights, 1966 (“ICCPR”); and the International Covenant on Economic, Social and Cultural Rights, 1966 (“ICESCR”), which form the basis of the so-called “International Bill of Rights.” Regional human rights instruments influence national law and decisions in domestic courts, such as the African Charter on Human and Peoples' Rights, 1981 (African Charter). It follows then, that international law should also have a role to play in the interpretation of these rights. Indeed, the work of CALS demonstrates that utilising international law in human rights litigation can result in progressive and wide-reaching change, which further ensures a higher level of rights protection in South Africa. Despite significant changes in the South African legal landscape over the past 35 years, it can be seen from this article that CALS has in the past used international law to fight for the recognition, respect and protection of human rights, a methodology still employed today, albeit under a transformed legal system.

## 2 BACKGROUND TO THE CENTRE FOR APPLIED LEGAL STUDIES

CALS was founded in 1978 by Professor John Dugard as an applied research centre within the School of Law at the University of the Witwatersrand.<sup>2</sup> It was founded at a time when public interest groups did not exist in South Africa and assisted in the establishment of other public interest organisations. CALS was a pioneer in the development of human rights in South Africa during the apartheid years. The initial primary objective of CALS - to promote human rights through research and education - soon expanded to include a wide range of public impact litigation.

The use of detailed research undertaken by CALS combined with the elements of public education and impact litigation created a successful methodology that was used to fight the many injustices of the apartheid government. During its first 12 years, CALS was involved in crucial litigation initiatives designed to hold the apartheid government

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<sup>1</sup> Chapter 2 of the Constitution of the Republic of South Africa 1996.

<sup>2</sup> Macleod F *Fighting for justice* (1991).

accountable to those principles of South African common law that provided some possibility of protection for the oppressed, while also creating the space for democratic activity to take place.<sup>3</sup> Detailed research was conducted to expose the implications of government policy and law, particularly in the areas of security legislation and policing, as well as engaging in extensive education programmes within and outside of the legal profession. These educational programmes often contained elements of human rights law and principles.

The year 1990 was the dawn of a new era in South Africa. In this new era, CALS continued to play an important role to effect change through research, education, and litigation as well as other means, such as, participation before commissions of inquiry.<sup>4</sup> CALS also participated and played a central role in the writing of the new Constitution and in many areas of the proliferation of legislation that accompanied the new dispensation. The work of CALS also diversified during this era, seeing several research programmes emerge focusing on key areas of human rights.

After 1994, CALS was involved in significant public impact litigation cases, bringing amicus curiae applications in many early constitutional cases. By the early 2000s, considerable progress had been made in entrenching rights in policy and legislative frameworks. However, the more complex problems of implementing these rights in the face of limited resources, insufficient state capacity and massive inequalities in distribution of wealth in South Africa, revealed the systemic problems that face our democracy. Increasingly CALS is focusing on issues of implementation and enforcement of human rights law. This has also generated a renewed emphasis on impact litigation, particularly in the context of socio-economic rights, gender and the rule of law. In accordance with CALS's vision to dismantle systemic harm, ensure the meaningful implementation of human rights, and a rigorous dedication to justice, CALS continues to strive towards the attainment of an equal society for all.

### **3 LITIGATING HUMAN RIGHTS WITHIN A CONSTITUTIONAL FRAMEWORK**

The Constitution of the Republic of South Africa 1996 ("Constitution") recognises South Africa as one sovereign, democratic state founded on the values of human dignity, achievement of equality and the advancement of human rights and freedoms.<sup>5</sup> South Africa is founded on the supremacy of the Constitution and the rule of law.<sup>6</sup>

Chapter Two of the Constitution contains the Bill of Rights, recognised as a cornerstone of democracy in South Africa.<sup>7</sup> "It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."<sup>8</sup>

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<sup>3</sup> Macleod (1991).

<sup>4</sup> Including the Hiemstra Commission of Inquiry into Alleged Illegal or Irregular Conduct in regard to Certain Security Matters and the Harms Commission of Inquiry into Certain Alleged Murders.

<sup>5</sup> S 1 of the Constitution.

<sup>6</sup> S 1 of the Constitution.

<sup>7</sup> S 7(1) of the Constitution.

<sup>8</sup> S 7(1) of the Constitution.

The state is under an obligation to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>9</sup> Any court, tribunal or forum when interpreting a right contained in the Bill of Rights is mandated to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.<sup>10</sup> A court is further mandated to consider international law when interpreting the Bill of Rights and may consider foreign law.<sup>11</sup> The Constitution further mandates that “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.<sup>12</sup>

South Africa’s Constitution incorporates elements of and recognises the importance of international law in a democratic society which recognises fundamental rights and freedoms, and provides a framework wherein human rights litigation incorporating international principles and norms can take place.

## **4 THE EXPERIENCE OF THE CENTRE FOR APPLIED LEGAL STUDIES**

### **4.1 The pre-democracy experience in litigating human rights in South Africa**

Apartheid South Africa designed systems to oppress the rights of the majority of persons. During this time, when human rights were not recognised and instead were violated and dismissed by all structures of government, CALS persevered in the fight to protect the dignity and rights of all.

One of the mechanisms available to lawyers at the time was the use of international law principles before the courts to enforce the rights of persons. This was a strategy that was used frequently, but often with little success. Despite the few successful cases, practitioners continued to bring international expectations and principles to the attention of the judiciary. International law was used directly by CALS before the courts in human rights litigation. CALS also raised awareness within the legal fraternity of these innovative strategies that could be employed to promote human rights. Educating others on principles of international law served to influence change in an indirect manner and with the outcome of direct application by other institutions and individuals.

#### **4.1.1 Examples of the use of international law in apartheid South Africa**

As an example of the direct use of international law to protect the human rights of individuals during apartheid South Africa, CALS argued many cases to confer prisoner of war status on African National Congress (“ANC”) guerrillas in order to afford them specific protection. In these instances, South Africa’s ratification of the Geneva

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<sup>9</sup> S 7(2) of the Constitution.

<sup>10</sup> S 39(1)(a) of the Constitution.

<sup>11</sup> S 39(1)(b) and (c) of the Constitution.

<sup>12</sup> S 233 of the Constitution.

Conventions of 1949<sup>13</sup> and the status of the two Additional Protocols to the Geneva Conventions<sup>14</sup> as customary international law were used as a means to protect persons from the having death sentence imposed in criminal trials. At the time, South Africa's domestic law was in conflict with these international principles; indeed, the majority of the law at the time conflicted with international principles. As a minimum, CALS lawyers argued that moral blameworthiness was reduced where an accused regarded himself as a soldier engaged in an internationally recognised conflict and that this served as an extenuating circumstance for the death penalty not to be imposed. This argument at the time was often rejected by South African courts but was successful in the Namibian Supreme Court.<sup>15</sup>

CALS also advanced arguments that international developments in administrative law had to be considered in applications brought under the Group Areas Act<sup>16</sup> and in support of an application involving the re-instatement of the revoked passport of (then) Bishop Desmond Tutu. At its inauguration, CALS declared that one of its primary goals was to encourage co-operation among lawyers for the purpose of advancing human rights through law. CALS held many seminars and educational initiatives, which incorporated aspects of international human rights law and principles.

## **4.2 Post 1994: litigating human rights in South Africa within a new legal framework**

### **4.2.1 Introduction**

Today, the South African people and human rights practitioners are more fortunate. No longer do arguments have to be presented to persuade a court to consider international or regional laws, as the courts are constitutionally obliged to do so when interpreting the Bill of Rights.<sup>17</sup> The South African Constitution includes provisions on the role of international law with regard to the interpretation of the Bill of Rights and statutory interpretation.<sup>18</sup> The provision in section 39(1)(b) that courts “must consider international law when interpreting the Bill of Rights” is an important one on the influence of international law on domestic law in the South African Constitution. Section 233 of the Constitution further provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with

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<sup>13</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in the Armed Forces in the Field of 12 August 1949; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949; and Geneva Convention relative to the Protection of Civilian Persons in time of War of 12 August 1949.

<sup>14</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1949.

<sup>15</sup> See Dugard J *International law: A South African perspective* (2005) at 541.

<sup>16</sup> Act 41 of 1950 (repealed on 5 June 1991).

<sup>17</sup> S 39 of the Constitution.

<sup>18</sup> S 233 of the Constitution.

international law to any alternative interpretation that is inconsistent with international law.

International law specifies obligations which all states are bound to respect. By becoming a party to international treaties, South Africa assumes obligations and duties under international law to respect, to protect and to fulfil the human rights principles contained in those treaties.<sup>19</sup> This means that South Africa must refrain from interfering with or curtailing the enjoyment of human rights, must ensure there is protection of individuals and groups against human rights abuses and must take positive action to facilitate the enjoyment of basic human rights.

Through the ratification of international human rights treaties, the South African government undertakes to put into place domestic measures and legislation compatible with its treaty obligations and duties.<sup>20</sup> Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual complaints or communications are available at the regional and international levels to help ensure that international human rights standards are indeed respected, implemented, and enforced at the local level.

In *S v Makwanyane and Another*,<sup>21</sup> the Constitutional Court considered the relevance of international law in the interpretation of the Bill of Rights. In its judgment, Chaskalson P stated the following in terms of the applicability of international law:<sup>22</sup>

The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention. They may also have to be considered because of their relevance to section 35(1) of the Constitution.<sup>23</sup>

It is from this foundation that the South African courts utilise international law as an intrinsic element of the South African legal framework and as an aid in the interpretation of human rights.<sup>24</sup> In the case of *Government of the Republic of South Africa and Others v Grootboom and Others*,<sup>25</sup> reference was made to the role and the relevance of

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<sup>19</sup> When a state is a signatory to an international agreement or a treaty, it is obliged to refrain from acts which would defeat the object and purpose of the treaty until it has made its intention clear not to be bound by the treaty. A state is bound by a treaty or international agreement that it has ratified or acceded to. See Dugard (2005) at 408.

<sup>20</sup> S 231 of the Constitution contains provisions on the negotiating and signing of all international agreements and further stipulates when an international agreement becomes law in South Africa.

<sup>21</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

<sup>22</sup> *Makwanyane* at para 34.

<sup>23</sup> The case was decided under the interim Constitution of 1993. Section 35(1) of the interim Constitution stated that “[i]n interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law”.

<sup>24</sup> See *Kaunda and Others v President of the Republic of South Africa and Others* 2004 (10) BCLR 1009 (CC) at 1017 at paras 33-35 and 151-171.

<sup>25</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC).

international law in the interpretation of constitutionally entrenched rights, as had been considered by the Court in *S v Makwanyane*.<sup>26</sup> Yacoob J stated:<sup>27</sup>

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.

It is evident that international law does have a key role to play within the South African legal system, but it is also clear that its function as an interpretive tool must be applied within the South African context, and in particular, in light of the fact that the Constitution is the supreme law. These developments have further reinforced the relevance of employing international law in domestic human rights litigation.

The hard work and efforts of many have paved the way and created a constitutional democracy founded on the values of human dignity, equality, the advancement of human rights, the supremacy of the Constitution, and the rule of law.<sup>28</sup> Although the past and present are different, they are not dissimilar. International law has both a direct and an indirect role to play in human rights litigation in South Africa. No longer is there a need for creative argument for courts of law to recognise or to consider international law in human rights litigation. Today, it is the implementation of a constitutional dispensation that is often at the forefront of human rights litigation. The start and often end-point in litigating human rights cases is the Constitution of the Republic of South Africa. In addition to the Constitution, there are various pieces of legislation that further seek to promote these values and human rights.

South Africa has a legislative system that on the whole aims to uphold, respect and protect human rights. In line with CALS's mission,<sup>29</sup> international and regional law informs all research, advocacy and litigation. This combined use of research, advocacy and litigation ensures that international law is best utilised, in a direct and indirect manner. CALS litigation forms part of a process that begins with research and continues through advocacy. Through research, CALS continually engages principles of international and foreign law to better inform cases and the strategy invoked. It develops and informs all programme areas.<sup>30</sup> This use of international law in research and advocacy informs all work and often argument before courts of law, although it may not always be seen explicitly.

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<sup>26</sup> *Grootboom* at para 23.

<sup>27</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 26. Section 231(4) of the Constitution states that “[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

<sup>28</sup> Ss 1 and 2 of the Constitution.

<sup>29</sup> CALS's mission includes using the law to implement and protect the human rights of individuals to facilitate the speedy development of a politically and economically just and sustainable society through a combination of litigation, advocacy and research, to challenge systems of power and act on behalf of the vulnerable, and to act with courage against impunity.

<sup>30</sup> CALS's current programme areas include: basic services, business and human rights, education, environment, gender, and the rule of law.

One of CALS's strengths is its capacity to engage in rigorous research as the basis for effective rights based strategies. Litigation and legal advocacy may be used to clarify and fill the gaps in domestic legislation. When used appropriately, human rights litigation can broadly impact the law by challenging existing legal interpretations which do not conform to international human rights standards nor enforce the rule of law. Through research, CALS is able to integrate international human rights standards into domestic litigation and legal policy advocacy, craft new case strategies, and develop innovative legal arguments to address human rights violations. In this way, international standards are used to create new interpretations of domestic laws that address the harsh realities of the lives of many individuals in South Africa. Having a thorough understanding of international human rights norms and standards helps CALS to identify deficiencies in current domestic laws or procedures and to initiate strategic litigation to overcome these shortcomings. As has been outlined, the South African legal framework offers a strong level of rights based protection, yet implementation of this framework remains a critical problem. The gaps and lack of clarity in domestic legislation create a rich opportunity for litigation and legal advocacy to fill these gaps by creating debate and argument about what the law is, or should be, from the perspective of international standards and principles. International human rights standards are but one tool that CALS has successfully employed in various ways, to litigate for meaningful judicial relief for those who have experienced rights violations.

#### **4.2.2 Examples of the “indirect use” of international law in human rights litigation**

CALS uses international law not only in litigation, but research informs the way in which these norms and standards can be integrated into advocacy before other domestic advisory, investigatory, and judicial bodies. These might include national human rights commissions, consultative councils, government departments and entities, ombudspersons, and permanent and ad hoc commissions. Courts in South Africa have often used international, regional and comparative law, including international and regional guidelines, to interpret the breadth of domestic constitutional and statutory rights especially when there is no relevant domestic jurisprudence. Examples of domestic court cases applying, observing the spirit, or referring to international conventions as an interpretive tool to promote rights are increasing and CALS has played and continues to play a critical role in this process.

For instance, CALS entered as *amicus curiae* before the Constitutional Court in the matter of *Dudley Lee v Minister of Correctional Services*<sup>31</sup> in August 2012. The case formed part of CALS's work on criminal justice and remand detention in its Rule of Law Programme. This case aimed, among others, to realise remand detainees' right to dignity<sup>32</sup> and the right to access to health care.<sup>33</sup> In particular, the case related to the high rate of infection of tuberculosis (“TB”) in prisons in South Africa. The litigant was

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<sup>31</sup> [2012] ZACC 30.

<sup>32</sup> S 11 of the Constitution.

<sup>33</sup> S 27 of the Constitution.

Dudley Lee (“Lee”), who entered Pollsmoor Prison in November 1999 charged with fraud, counterfeiting and money laundering. The living conditions in Pollsmoor Prison are notorious. During Lee’s time there, the prison was significantly overcrowded, at 230% capacity. Long lock-up times, up to 23 hours a day, and inadequate ventilation result in prisoners re-breathing air contaminated with TB for prolonged periods of time. Furthermore, three- to four-month delays in accessing medical care also exacerbate the spread of the disease. Lee was healthy when he entered Pollsmoor, as a remand detainee. In June 2003, he was diagnosed with TB and in September 2004, over four years after entering prison, he was acquitted of the charges against him and released. He then claimed damages from the Minister of Correctional Services in the Western Cape High Court (“High Court”) for negligently causing him to become infected with TB.

CALS, in partnership with the Wits Justice Project (“WJP”), the Treatment Action Campaign (“TAC”) and SECTION 27, as the attorneys of record, entered as amici curiae when Lee took the matter on appeal from the Supreme Court of Appeal to the Constitutional Court.<sup>34</sup> The majority of the Constitutional Court found in Lee’s favour that the Department of Correctional Services (“DCS”) had in fact negligently caused him to become infected with TB while detained in Pollsmoor. The judgment is important for a number of reasons and highlights the responsibility of the state to protect and safeguard the rights of detainees.<sup>35</sup>

CALS’s strategy in the Lee matter and decision to intervene as an amicus were, in part, informed by the research it has conducted in the areas of remand detention and the criminal justice system. The case formed part of a broader strategy, which aims to bring about necessary change in the system of remand detention in South Africa. This intervention serves as an example where international law principles provide guidance in human rights litigation in an “indirect manner.” Research of international norms and standards, including their use in foreign jurisdictions, influences litigation strategies employed by CALS in domestic litigation and interventions, even if they are not directly applied.

International law and principles also find both direct and indirect application in strategies of advocacy and are used as a tool to protect, ensure respect for and to enforce human rights in South Africa. International and regional mechanisms are used through different measures of engagement with international and regional bodies, institutions and committees. The use of international law and principles both inform and guide advocacy measures and result in direct application of international principles in, for example, submissions on Bills before Parliament.<sup>36</sup>

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<sup>34</sup> The amici’s heads of argument as well as the amici application before the Constitutional Court are available at <http://www.section27.org.za/2012/08/24/documents-in-the-dudley-lee-v-minister-of-correctional-services-concourt-hearing-28-august-2012/> (accessed 1 April 2013).

<sup>35</sup> The judgment is available at <http://www.saflii.org.za/za/cases/ZAWCHC/2011/13.html> (accessed 1 April 2013).

<sup>36</sup> See “CALS submission on the Prevention and Combating of Torture of Persons Bill.” Available at [http://www.wits.ac.za/files/9a2qr\\_580034001343749127.pdf](http://www.wits.ac.za/files/9a2qr_580034001343749127.pdf) (accessed 3 April 2013).

Where litigation may become necessary to protect or enforce a right, the indirect use of international law and principles is present throughout the process of research and advocacy leading up to and informing the litigation.

#### 4.2.3 Examples of the “direct use” of international law in human rights litigation

The obvious form of direct application of international law in human rights litigation in South Africa today is when these principles are relied on directly before courts of law, for example, as a basis for the relief we seek in litigation; in illustrating similar experiences; and by providing content to the rights contained in the Constitution. There are many examples of cases over the years that CALS has been involved in where international principles were used in a direct form to influence change in the law and to ensure the protection of human rights. A few examples will be discussed briefly.

CALS entered as amicus curiae in the matter of *Carmichele v Minister of Safety and Security and Another*,<sup>37</sup> a case heard by the Constitutional Court, which primarily dealt with the development of the common law delictual duty to act.<sup>38</sup> The case concerned the duty of the police to prevent sexual violence against women. CALS, as amicus, relied on various international instruments, most notably the Convention on Elimination of all forms of Discrimination Against Women, 1979 (“CEDAW”) as well as recommendations made by the United Nations Committee on the Elimination of Discrimination Against Women.<sup>39</sup> It was argued that:

South Africa had a duty under international law to prohibit all gender based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights.<sup>40</sup>

CALS’s strategy was further influenced by a number of United Nations Guidelines. As well as employing these international conventions, CALS also relied upon a significant amount of comparative jurisprudence that was subsequently referred to in the final judgment, including decisions from the European Court of Human Rights (“ECtHR”), the United Kingdom, Australia, Canada and the United States. Legal commentator Neville Botha states in reference to the Constitutional Court’s judgment in this case that:

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<sup>37</sup> 2001 (10) BCLR 995 (CC).

<sup>38</sup> S 8(3) of the Constitution provides: “When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).”

<sup>39</sup> CALS brought it to the Court’s attention that South Africa signed the Convention on 29 January 1993 and ratified on 15 December 1995. CALS further brought recommendations of The United Nations Committee on the Elimination of Discrimination Against Women, which was established under the Convention, to the Court’s attention. One such recommendation included that “. . . States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.” See General Recommendation 19, U.N. GAOR, Committee on the Elimination of Discrimination Against Women, 11th sess. (1992).

<sup>40</sup> At para 62.

The Constitutional Court has shown clearly that the spirit, purport and objects of the bill of rights- which reflects the underlying precepts of the Constitution and the fabric of South African society – are inextricably linked to international law and the values and approaches of the international community and international role players.<sup>41</sup>

The *Carmichele* case is fundamental in demonstrating the importance and efficacy of utilising international law and comparative jurisprudence to further develop the South African common law, in a way that continues to promote and protect human rights. Here CALS was successful in argument to convince the Constitutional Court that South Africa also has a duty under international law to prohibit all gender based discrimination that has the effect of impairing the enjoyment, by women, of fundamental rights and freedoms, and to take reasonable and appropriate measures to prevent the violation of those rights. The Court held that the police were responsible as one of the primary agencies of the state responsible for the protection of the public in general, and women and children in particular, against the invasion of their fundamental rights by perpetrators of violent crime.

The Aids Law Project, a project formed at CALS, when it was still based at CALS entered as amicus curiae in the matter of *Hoffmann v South African Airways*,<sup>42</sup> a case that was before the Constitutional Court and dealt with employment discrimination against an employee with Human Immunodeficiency Virus (“HIV”). The Court held that the refusal by an airline company to employ an HIV-positive individual as a cabin attendant violated the right to equality and freedom from discrimination as guaranteed by section 9 of the Constitution. The Aids Law Project was admitted as amicus curiae and presented medical and other evidence relevant to the matter as a result of which South African Airways conceded that its employment practice was unjustified. The Court analysed the need to eliminate unfair discrimination as arising out of international obligations on South Africa and discussed, among others, the African Charter on Human and Peoples’ Rights, 1981 (“African Charter”), CEDAW, the ICCPR, and the International Convention on Elimination of all Forms of Racial Discrimination, 1966. The Court also considered the SADC Code of Conduct on HIV/AIDS and Employment, 1997 and the ILO Convention 111, Discrimination (Employment and Occupation) Convention, 1958. In this case, it is clear that the use of international law, together with regional and domestic laws was instrumental in assisting the Court to come to a decision that discrimination on the basis of HIV status in employment was unconstitutional.

There are various instances of human rights litigation where CALS has worked toward ensuring that international law and principles are properly placed before the court. These principles have been considered and incorporated into judgments directly and have influenced judgments in an indirect manner as well. This has resulted in changes to law, policy and practice that amounted to a violation of human rights.

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<sup>41</sup> Botha N “The role of international law in the development of South African common law” (2001) 26 *SAYIL* 253

<sup>42</sup> 2000 (11) BCLR 1235.

## 5 CONCLUSION

CALS has throughout its 35-year history used international law and principles in various ways to assist in the recognition, protection, promotion and enforcement of human rights. It is certain that the use of international law cannot be separated from human rights litigation. From the above it is also clear that while the legal system in place has a strong influence on the extent of the consideration of international principles, it does not change the fact that these principles are inseparable from domestic human rights litigation.

From CALS's experience, international law and principles find indirect and direct application in human rights litigation. This direct and indirect application covers all forms of its work in the area of human rights and the law, from research through advocacy and including litigation before courts of law and other tribunals.<sup>43</sup> CALS has been involved in many seminal cases that have used international and regional law as a means to ensure that human rights are enforced. This has resulted in a consistent practice where international law forms a part of the everyday work undertaken at CALS.

## BIBLIOGRAPHY

### Books and reports

Dugard J *International law: A South African perspective* Cape Town: Juta (2005)

Macleod F *Fighting for justice* Johannesburg: University of the Witwatersrand (1991)

### Journal articles

Botha N "The role of international law in the development of South African common law" (2001) 26 *SAYIL* 253

### Statute

The Constitution of the Republic of South Africa, 1996

### International instruments

Protocol Additional to the Geneva Conventions of 12 August 1949

Protocol Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1949

Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in the Armed Forces in the Field of 12 August 1949

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<sup>43</sup> Such as, the international principles on the protection of the right to life during demonstrations that CALS has brought before the Marikana Commission of Inquiry.

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949

Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949

Geneva Convention relative to the Protection of Civilian Persons in time of War of 12 August 1949

### **Cases**

*Carmichele v Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC)

*Dudley Lee v Minister of Correctional Services* 2012 ZACC 30

*Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC)

*Hoffmann v South African Airways* 2000 (11) BCLR 1235

*Kaunda and Others v President of the Republic of South Africa and Others* 2004 (10) BCLR 1009 (CC)

*S v Makwanyane and Another* 1995 3 SA 391 (CC)

### **Electronic sources**

“CALs submission on the Prevention and Combating of Torture of Persons Bill”. Available at [http://www.wits.ac.za/files/9a2qr\\_580034001343749127.pdf](http://www.wits.ac.za/files/9a2qr_580034001343749127.pdf) (accessed 3 April 2013)

“Interview between John Dugard and Len Morris on 7 August 1999”. Available at [http://www.columbia.edu/cu/lweb/digital/collections/oral\\_hist/carnegie/pdfs/john-dugard.pdf](http://www.columbia.edu/cu/lweb/digital/collections/oral_hist/carnegie/pdfs/john-dugard.pdf) (accessed 4 April 2013)