Leiden Journal of International Law, 24 (2011), pp. 163–171
 doi:10.1017/S0922156510000671

INTERNATIONAL COURT OF JUSTICE

Thomas Buergenthal: Judge of the International Court of Justice (2000–10)

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Abstract

Thomas Buergenthal retired as a judge of the International Court of Justice in September 2010 after ten years of service and participating in 38 substantive decisions. This tribute to a member of the Court who arrived with outstanding and formidable scholarly qualifications, especially but not only in the field of international human rights, also draws on his earlier tragic, harrowing, and 'lucky' years. On the basis of the public record, for much of the work of the Judges as members of a collegial body is not public, the article emphasizes Thomas Buergenthal's commitment to the independence of judicial office, as demonstrated particularly in cases brought against his own country; to the sound administration of justice; to the indispensability of courts in any system of ordered government, national or international; and more generally to principle.

Thomas Buergenthal, who has just retired after ten years as a judge of the International Court of Justice, came to the Court, like his colleagues, with extensive and outstanding scholarly and practical qualifications. For reasons well known to many readers, this tribute to the judge will also draw on his earlier tragic, harrowing, and 'lucky' years.

In 2000, when the General Assembly and Security Council of the United Nations elected Thomas Buergenthal as a judge, he was a member of the Human Rights Committee, elected by the states parties to the International Covenant on Civil and Political Rights, the first US national to hold that office; an arbitrator and vice-president of the Claims Resolution Tribunal for Dormant Accounts in Switzerland; and the Lobinger Professor of Comparative Law and Jurisprudence at George Washington University Law School (a chair to which he has now returned). Following graduation from Bethany College and NYU School of Law and graduate study at Harvard Law School in the 1960s, Professor Buergenthal taught at major US law schools, held important positions in the American Society of International Law (marked by his honorary presidency from 2001 to 2009), and wrote extensively, with major emphasis on the international protection and promotion of human rights.

That commitment to human rights was demonstrated by Thomas Buergenthal's election, on the nomination of Costa Rica, the United States not being a party to the American Convention on Human Rights, as an inaugural member of the

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Inter-American Court of Human Rights and its first president – a role that was critical to the successful launch of that important body. That service was followed by his membership of the United Nations Truth Commission for El Salvador and, as mentioned, the Human Rights Committee.

That emphasis on the international protection of human rights, while essential to Tom Buergenthal's very being, must be seen in a wider context. He has for many years produced a very popular nutshell on international law, its quality and popularity recognized by its four editions (and translations into Chinese, German, and Spanish languages).[1] His first major publication, in 1969, was on law-making in the International Civil Aviation Organization.[2] That subject was chosen at the urging of Professor Louis Sohn, another great human rights expert, who has recounted that 'There was an initial contretemps. Having become an expert on human rights, Tom wanted to write a thesis on that subject. I objected, arguing that he should not become a "Johnny one-note". After some hesitation he followed that advice'.[3]

That research was supervised by Professor Richard Baxter, who provided a seminar on international civil-aviation law in which, in 1965, I first studied with Tom. That book, like the work of other great scholars including his mentors, is based on scrupulous attention to detail and a real grasp of the bigger context in which the law is being applied and developed.[4] The book, I might say, was of great value to the New Zealand Court of Appeal, nearly four decades on, when that Court had to determine the impact in New Zealand law of ICAO standards, rules, and recommendations relating to the investigation of air accidents. The Court relied on the book as 'a thorough scholarly study'.[5]

With that formidable experience and background, Professor Buergenthal became Judge Buergenthal, ten years after the end of the Cold War (as he has often remarked), at a time when the International Court of Justice was increasingly presented with cases from all regions of the world on a widening variety of topics. One contrast is with 1965, when Tom and I were in that seminar with future judge Richard Baxter. In that year, the *South West Africa* cases[6] were argued and *Barcelona Traction*[7] was the only other case before the Court. For different reasons, the decisions in those cases were heavily criticized, with the judgment in the former having severely adverse consequences for the Court. But by March 2000, when the new judge arrived in The Hague, 19 cases were pending (the figures include the cases brought by Serbia and Montenegro against eight states based on NATO's 1999 bombing campaign), and in mid 2010, as he leaves the Court, the figure is 16, including the remedies phases in two cases. The first decision in which Judge Buergenthal participated

1 T. Buergenthal and S. Murphy, *Public International Law in a Nutshell* (2007).
2 T. Buergenthal, *Law-Making in the International Civil Aviation Organization* (1969).
3 L. B. Sohn, 'Tom Buergenthal: My Student, Colleague and Cherished Friend', (1984), 34 AULR XV.
4 For another example from that time, see R. R. Baxter and T. Buergenthal, 'Legal Aspects of the Geneva Protocol', (1970) 65 AJIL 853.
5 *New Zealand Air Line Pilots Assn Inc. v. Attorney-General* [1997] NZLR 269, at 276. The book was earlier cited by Judges Dillard and Arechega in *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment of 18 August 1972, [1972] ICJ Rep. 46, at 97 and 142.
6 *South West Africa (Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966, [1966] ICJ Rep. 6.
7 *Barcelona Traction, Light and Power Company (Belgium v. Spain)*, Second Phase, Judgment of 5 February 1970, [1970] ICJ Rep. 3.

was from the Gulf, the *Qatar Bahrein Maritime Delimitation and Territorial* case,[8] the last from the Balkans, the *Kosovo* Advisory Opinion proceeding,[9] in which over 40 states participated, with representatives of all five of the permanent members of the Security Council presenting oral argument for the first time. Other decisions in the ten years related to Africa, Asia, the Caribbean and Latin America, Eastern Europe, and Western Europe or were intercontinental – for instance, the case brought by the Democratic Republic of the Congo against Belgium about the immunity of a foreign minister,[10] the first case filed after the new judge joined the Court, and Australia's application against Japan about whaling in the Antarctic, a case filed as he was leaving The Hague.[11]

The 38 substantive decisions in which Judge Buergenthal participated, including decisions on provisional measures, jurisdiction, revision, and interpretation, concerned matters that have traditionally come before the Court – territorial sovereignty and maritime delimitation, and diplomatic protection – and extended to less familiar areas for inter-state adjudication such as the use of force, international humanitarian law and human rights, the jurisdiction of national courts and immunities from them, and the rights of foreign nationals who are subject to criminal process to consular assistance.

That last group of cases, all concerned with foreign nationals on death row in the United States, provides one public insight into Judge Buergenthal's contribution to the Court. As with other members of the Court, the notes he distributed to colleagues in advance of deliberations; his membership of drafting committees; his written comments on draft judgments and opinions; and his contributions in the lengthy deliberations on the judgments, opinions, and orders must all remain confidential, as the Statute and Rules of the Court require. But the record in the Court's reports of the *LaGrand* case brought by Germany against the United States and of the *Avena* case brought by Mexico in four distinct phases[12] does give a real sense of Judge Buergenthal's understanding of the judicial role and of the independence of the judge. The emphasis in this tribute on the judge's consideration of his role as a judge is partly a result of the public record of his work on the Court, but also results from reflections on the different roles lawyers play – professing, inquiring, judging, among them – and of earlier assessments of his contributions in other areas.[13]

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8 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment of 16 March 2001, [2001] ICJ Rep. 40.

9 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep.

10 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Beligium)*, Judgment of 14 February 2002, [2002] ICJ Rep. 3.

11 The application was filed on 1 June 2010. One valuable development over judge Buergenthal's time at the Court to which he made a major contribution was the establishment of a corps of clerks to the judges. As he arrived, the system of university trainees supported at first by one university and later by ten or more was just being established. As he leaves, in addition to that pool, every judge has one clerk each.

12 *Avena and Other Mexican Nationals (Mexico v. United States of America)*, provisional measures 2003, merits 2004, provisional measures 2008, interpretation 2009, [2003] ICJ Rep. 72, [2004] ICJ Rep. 112, [2008] ICJ Rep. 311, [2009] ICJ Rep. 3.

13 E.g., A. A. Cançado Trinidade (ed.), *The Modern World of Human Rights: Essays in Honour of Thomas Buergenthal* (1996).

In the substantive decisions in both *LaGrand* and *Avena*, Judge Buergenthal voted in favour of the Court's holdings against the United States, while some of his colleagues dissented. In *LaGrand*,[14] he agreed that the United States had breached its obligations by failing to inform the two brothers of their rights to seek consular assistance and by not permitting the review and reconsideration of the convictions and sentences; further, he joined with the Court's ruling that by failing to take all measures to ensure that Walter LaGrand was not executed pending the Court's final decision, the United States had breached its obligation under the provisional-measures order made at the outset of the proceeding.[15] In the *Avena* case, in the initial substantive judgment, he agreed with the Court's similar findings of breach by the United States.[16] In the final phase of the *Avena* case, in which Mexico unsuccessfully sought an interpretation of the 2004 substantive judgment, he was party to a unanimous holding that the United States had breached its obligation arising from the provisional-measures order earlier in that process.[17]

Judge Buergenthal did dissent, with two other judges, from the Court's holding in the *LaGrand* cases that the German submission about breach of the provisional-measures order was admissible.[18] Holding the submission admissible was, in his view, incompatible with procedural fairness and the sound administration of justice. The manner in which Germany proceeded in obtaining the Court's order amounted to procedural misconduct prejudicial to the interests of the United States as a party to the proceedings. Notwithstanding this dissent, he agreed, as noted above, with the Court's substantive finding that the United States had breached the order.

That concern with the sound administration of justice appeared on three occasions in 2004. In the first, in dissenting from an order concerning the composition of the Court in the *Wall* case,[19] Judge Buergenthal expressed the opinion that Judge Elaraby should not sit because of views he had expressed in an interview he had given after leaving Egyptian government service and before joining the Court; the fair and proper administration of justice requires not only that justice be done, but also that it be seen to be done. The related power and obligation of the Court to decide about its composition are implicit in the very concept of a court of law charged with the fair and impartial administration of justice. What Judge Elaraby had said, in Judge Buergenthal's view, created an appearance of bias that should have precluded his participation in the proceedings.[20] Judge Buergenthal may be seen as applying that principle to himself in the decisions he made to sit or not to sit in the various phases of the cases relating to the Balkans, given his role and statements about that region as a member of the United States Holocaust Memorial Council between 1996 and 2000.

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14 *LaGrand (Germany v. United States of America)*, Judgment 2001, [2001] ICJ Rep. 466.
15 Ibid., at 515–16.
16 *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment 2004, [2004] ICJ Rep. 12, at 71–2.
17 Ibid., at 61(2).
18 *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001, [2001] ICJ Rep. 466, at 548 (Judge Buergenthal, Dissenting Opinion).
19 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 January 2004, [2004] ICJ Rep. 3, at 7 (Judge Buergenthal, Dissenting Opinion).
20 Ibid., at 7–11. Note the final words of the opinion: 'I have no doubts whatsoever about the personal integrity of Judge Elaraby for whom I have the highest regard, not only as a valued colleague but as a good friend.'

He had earlier applied the principle as a member of the Human Rights Committee, which was considering a complaint from a person convicted of Holocaust denial:

> As a survivor of the concentration camps of Auschwitz and Sachsenhausen, whose father, maternal grandparents, and many other family members were killed in the Nazi Holocaust, I have no choice but to recuse myself from participating in the decision in this case.[21]

His second demonstration, in 2004, of his understanding of the proper administration of justice appeared in his vote against the decision of the Court to exercise its discretion to give an opinion in the *Wall* case. The Court, in his view, 'did not have before it the requisite factual bases for its sweeping findings; it should therefore have declined to hear the case'.[22] He was guided by what the Court had said in *Western Sahara*. One critical question for the exercise of its discretion to give an opinion is:

> whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character.[23]

At the end of 2004, the third manifestation of the judge's understanding of the sound administration of justice appeared in his joining with six colleagues (of a bench of 15) in a declaration in the *Use of Force* cases[24] expressing profound disagreement with the reasoning employed by the Court to reach a conclusion – holding that it was without jurisdiction to proceed to the merits – with which they all agreed. The seven judges stated three criteria that must guide the Court in choosing between the available grounds for deciding that it was without jurisdiction:

> First, in exercising its choice, it must ensure consistency with its own past case law in order to provide predictability. Consistency is the essence of judicial reasoning. This is especially true in different phases of the same case or with regard to closely related cases. Second, the principle of certitude will lead the Court to choose the ground which is most secure in law and to avoid a ground which is less safe and, indeed, perhaps doubtful. Third, as the principal judicial organ of the United Nations, the Court will, in making its selection among possible grounds, be mindful of the possible implications and consequences for the other pending cases.[25]

The seven judges elaborated their reasons for finding that in their opinion, none of the criteria had been satisfied by the choice of ground made by the Court.

Judge Buergenthal's concern about the proper exercise of the judicial function had also appeared in 2002. He agreed with the Court that provisional measures should not be ordered in the *Armed Activity* case between the Democratic Republic of

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21 *Faurisson v. France*, CCPR/C/58/D 550/1993, 16 December 1996.

22 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, at 240 (Judge Buergenthal, Declaration). See also his consideration of fact-finding in *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, [2003] ICJ Rep. 161, at 283–9 (Judge Buergenthal, Separate Opinion).

23 *Western Sahara*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 12, at 28–9, para. 46.

24 *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment of 15 December 2004, [2004] ICJ Rep. 279, at 330 (Judges Ranjeva, Guillaume, Higgins, Kooijmans, Al Khasawneh, Buergenthal and Elaraby, Joint Declaration).

25 Ibid., at 330–1.

https://doi.org/10.1017/S0922156510000671 Published online by Cambridge University Press

Congo and Rwanda[26] because the Court had ruled it lacked prima facie jurisdiction, but he disagreed with the inclusion by the Court in its order of certain 'high-minded propositions' about the obligations of the parties: 'The Court's function is to pronounce itself on matters within its jurisdiction and not to voice personal sentiments or to make comments, general or specific, which, despite their admittedly "feel-good" qualities, have no legitimate place in this Order'.[27]

Judge Buergenthal's concern about the judicial role and its protection in the interests of the parties and the Court took a different form in a 2007 declaration relating to an order made by the Court refusing provisional measures in the *Pulp Mills* case between Argentina and Uruguay.[28] This was a most unusual case, for it was the respondent, Uruguay, and not the applicant that was seeking the order. Judge Buergenthal expressed his regret that the Court had missed the opportunity to address fully a second ground on which provisional measures could be ordered, in addition to the ground of preventing irreparable harm or prejudice to the rights in dispute. The other ground first invoked in 1939 was:

> to 'ensure that no step of any kind is taken capable of prejudicing the rights claimed by the Belgian Government or of aggravating or extending the dispute submitted to the Court' (*Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79*, p. 199). In asserting its power to order the aforementioned provisional measures, the Permanent Court of International Justice emphasized, moreover, that Article 41 of its Statute
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> 'applies the principle universally accepted by international tribunals . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute' (*P.C.I.J., Series A/B, No. 79*, p. 199).[29]

He mentioned a number of other orders to similar effect and stated that the Court must have the requisite powers vested in courts generally to ensure that the orderly adjudication of cases pending before it is not aggravated or undermined by extra-judicial coercive measures resorted to by one party to the dispute against the other. The matter was one of the inherent powers of judicial institutions generally, and not simply a matter of statute or rule.[30]

Judge Buergenthal's belief in the centrality, indeed the indispensability, of courts in any system of ordered government may be seen in another opinion in which he joined with two of his colleagues: the *Arrest Warrants* case.[31] They considered that they first had to address an issue integral to the structure of the law governing

26 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Provisional Measures, Order of 10 July 2002, [2002] ICJ Rep. 219.
27 Ibid., at 258.
28 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 23 January 2007, [2007] ICJ Rep. 3.
29 Ibid., at 21.
30 Ibid., at 22–5.
31 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, [2002] ICJ Rep. 3.

courts. The Democratic Republic of Congo asked the Court to rule that Belgium had acted unlawfully by issuing an arrest warrant against a serving foreign minister, in breach of his immunity from criminal jurisdiction. The Court so ruled. It did not rule on whether Belgium had jurisdiction over war crimes and crimes against humanity allegedly committed outside Belgium, by a foreign citizen, who was not at any relevant time in Belgium, the victims being non-Belgians. That matter had originally been put in issue by the DRC and was at first disputed by the parties, but they indicated to the Court that it need not be resolved. Judge Buergenthal and his two colleagues considered that it was necessary for the Court to rule on that matter, for several reasons:

> 'Immunity' is the common shorthand phrase for 'immunity from jurisdiction'. If there is no jurisdiction *en principe*, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise. The Court, in passing over the question of jurisdiction, has given the impression that 'immunity' is a free-standing topic of international law. It is not. 'immunity' and 'jurisdiction' are inextricably linked. Whether there is 'immunity' in any given instance will depend not only upon the status of Mr. Yerodia [the foreign minister] but also upon what type of jurisdiction, and on what basis, the Belgian authorities were seeking to assert it.[32]

The judges accordingly addressed the issue of jurisdiction, considering national legislation and decisions, treaty texts and their drafting history, and the writings of eminent jurists, distinguishing between the power and an obligation to prosecute, and trials with the accused present and trials *in absentia*. As they saw the situation, 'the international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play'. A state exercising such jurisdiction over the crimes alleged has to ensure that in this case, certain safeguards are in place. 'They are absolutely essential to prevent abuse and to ensure that the rejection of impunity does not jeopardise stable relations between States.'[33]

For the three judges, the increasing recognition of the importance of ensuring that the perpetrators of serious international crimes do not go unpunished had had its impact on the immunities traditionally enjoyed:

> Now it is generally recognized that in the case of such crimes, which are often committed by high officials who make use of the power invested in the State, immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility. . . . [A] trend is discernible that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited. The law of privileges and immunities,

32 Ibid., at 64. They discuss the (non-)*ultra petita* rule (66–8) – a matter also addressed by Judge Buergenthal in *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, [2003] ICJ Rep. 161, at 270–4 (Judge Buergenthal, Separate Opinion).

33 Ibid., at 80.

> however, retains its importance since immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system.[34]

But they agreed with the Court that the immunity did exist for a *serving* foreign minister.

In that opinion is to be seen Judge Buergenthal's lifelong commitment to the protection and promotion of human rights through law and legal institutions but within the limits imposed by the law – limits that have evolved amazingly in his professional lifetime to provide greater protection. That commitment must arise directly from his extraordinary and, to repeat, his tragic, harrowing, and 'lucky' years from five to 11, so simply and movingly recalled in his recent memoir.[35]

Also to be seen in Tom Buergenthal's work as a judge and more broadly is an unswerving commitment to principle. That has been demonstrated in recent years in public addresses in which he criticized the policies of the US government. In May 2002, in a commencement address in Washington, he discussed the recently adopted US policy towards the International Criminal Court that had engendered 'a great sense of disappointment around the world':

> The [60 or more] ratifications [of the ICC Statute] reflect a belief in the need for a permanent [court] to serve as a warning to all tyrants and war criminals that their crimes will not go unpunished. But our almost messianic and fanatical opposition to the International Criminal Court is a manifestation of a negative unilateralism on the part of the U.S. that hurts our image abroad and prevents us from playing a constructive role in the promotion of international legal norms consistent with the ideals this country stands for. What is so objectionable about this attitude is not necessarily our opposition to this or that treaty provision or collective measure – reasonable people can differ on the need or wisdom of one or the other – what is objectionable is that we are pursuing these policies without giving serious thought to their consequences in undermining the international rule of law. One has the feeling that those responsible for these policies could not care less. This is our new, in-your-face-diplomacy. It is bad for the United States and bad for the world, which we are part of whether we like it or not. It is a world that we need as much as it needs us.[36]

He said much the same two years later, when the matter of his nomination for a further term on the Court was about to be addressed:

> We have grown very arrogant in recent years. As a result, we have made enemies at a time when we need friends. Unbecoming of our democratic tradition, we seem to have become intoxicated with our military might, forgetting that even super powers need friends. It is not enough to preach democracy, human rights and the rule of law. We must be seen to practice what we preach, not only at home but also abroad. Lately we have been doing too much of the latter and too little of the former.[37]

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34 Ibid., at 85.

35 Thomas Buergenthal, *A Lucky Child: A Memoir of Surviving Auschwitz as a Young Boy*, originally published in 2007, as *Ein Glückskind*, English edition 2009, valuably reviewed by Lori Fishler Damrosch in (2010) 104 AJIL 307.

36 www.media.american.edu/speeches/buergenthal.htm (last accessed 4 August 2010).

37 www.gwu.edu/~newsctr/newscenter/commencementø4/buergenthal_remarks.html/.

That commencement speech was made at George Washington University, to which Tom now returns with the idealism, a product of his early years, and the discipline of an outstanding scholar, lawyer, and judge. He has never ceased to teach, by his example, his friendliness, his intellect, his experience, his research, and his writing – qualities that have greatly enriched the institutions in which he has served, including most recently the International Court of Justice.

https://doi.org/10.1017/S0922156510000671 Published online by Cambridge University Press