

## JOHN DUGARD LECTURE SERIES

# The Contemporary Significance of International Human Rights Law

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### Abstract

Judge Buergenthal argues that the increased acceptance by states of international human rights obligations proclaimed in UN and regional treaties, reinforced by the jurisprudence of international and regional tribunals, accounts for the substantial progress that has been made in the protection of human rights throughout the world. The resultant political significance of international human rights law and the international community's growing expectation of compliance with that law explain why states engaging in large-scale human rights violations increasingly risk serious political and economic consequences for such practices. A state's continuing non-compliance with its international human rights obligations tends also to lead to the gradual loss by its government of the national and international legitimacy it needs in order to govern, which may in time contribute to its fall.

### Key words

John Dugard; enforcement; human rights; legitimacy; political impact

## I. INTRODUCTION

I first met John Dugard in the United States at a human rights conference sometime in the early or mid-1970s. At the time South Africa was ruled by its apartheid regime. Those of us who were familiar with John's strong opposition to apartheid, and the hardships to which he was subjected in South Africa, urged him to remain in the United States. But John made us understand that he had an obligation to return to South Africa to fight apartheid. Many another person would have simply decided to stay out of South Africa, and many did, but not John Dugard. That is how I came to know and admire him – for his commitment to human rights, his scholarship, and his courage in confronting apartheid. That is also why I could not decline to deliver this lecture in his honour.

In reflecting on a topic for this lecture, I thought back to my first meeting with John Dugard and concluded that the 1970s provide a good starting point for a discussion of the evolution of international human rights law and its impact on the world in which we live. And that is what I propose to do this evening. Let me warn

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you at the outset, however, that as judge of the International Court of Justice, it would be improper for me to identify specific countries by name in referring to current or even some past human rights violations. Not long ago, when the ICJ was called upon to decide the case of *Bosnia Herzegovina v. Serbia*, I recused myself from hearing it because, before joining the Court and while serving as chairman of the Committee of Conscience of the United States Holocaust Memorial Council, I expressed strong views about the horrendous human rights violations being committed in the Balkans conflict. I do not want to find myself in a similar position in some future case and will therefore abstain from naming names this evening. I regret that, for it will make this lecture sound more academic than I would have liked it to be.

## 2. HUMAN RIGHTS IN THE 1970S

It is not unusual these days to hear people say that despite the many legal advances that have taken place in the international human rights field, little of practical consequence has been achieved. It is true, of course, that we are confronted almost daily with reports of massive violations of human rights in one part of the world or another. It is also true that effective international measures to stop or prevent these violations are even today not always taken. That is unsurprising because political or economic factors prompt many governments to put their perceived national interests ahead of considerations of morality and international law, which they hypocritically claim to support.

It is equally true, however, that governments can now no longer violate human rights with the same impunity they enjoyed in the 1950s, 1960s, or 1970s. Today governments know that they will invariably pay a political price not only for violating human rights on a large scale, but also, albeit to a somewhat lesser extent, for not supporting measures to prevent other governments from committing such violations. This development has led to a steady improvement of the human rights situation in many parts of the world, obviously not without setbacks from time to time. Of course, it would be naive not to expect such setbacks, but it would be equally wrong to assume that no progress has been made.

When John and I met, we lived in a world that was very different from the one it is today. Not only was South Africa's apartheid regime then still in power, it was also a regime whose policies some Western powers were at the time unwilling to confront. Millions of human beings were still dying in the gulags of the Soviet Union. Much of eastern Europe was under the sway of Soviet-imposed dictatorships. The greater part of Latin America – both Central and South America – was governed by dictatorial regimes. I could go on to other parts of the world, to Africa and Asia, for example, where the situation was not much better. In short, in the 1970s, the world was not very hospitable to human rights. That does not mean, of course, that all the states that have since then emerged from under oppressive regimes now have the type of government we had hoped they would have. Some certainly have not. By and large, however, we have made very substantial progress when it comes to the protection of human rights in the world. And this is due in part to the ever more important

role international human rights law is playing as a political force to be reckoned with.

### 3. THE GROWTH OF INTERNATIONAL HUMAN RIGHTS LAW

I do not claim, of course, that the progress we have made is due entirely to the development of international human rights law as we know it today. It is clear, however, that this law has played an important role in forcing governments to realize that they will pay an economic and political price for engaging in large-scale violations of human rights. The likelihood that there will be this price to pay has increased significantly over time. The growing importance of human rights as a political force, you might even say as an ideology, has made it possible for the international community to strengthen international human rights law by promulgating more legal norms and establishing new or additional international institutions and mechanisms designed to achieve its enforcement.

This development has created its own momentum because the world is today more aware of the existence of this law and increasingly less willing to tolerate its disregard. It is also a world in which the Internet and television have made it much harder to hide or deny that such violations are taking place. Public exposure leads to international condemnation and calls for measures to ostracize the offending government, with international human rights law serving to legitimate this action and the resulting punitive measures.

By the 1970s, the conceptual foundation of international human rights law had been laid. The UN Charter with its human rights provisions and the Universal Declaration of Human Rights were already in existence, and so was the Genocide Convention. But the International Covenants on Human Rights, which together with the Universal Declaration comprise the International Bill of Human Rights, did not go into effect until the second part of the 1970s. By then, moreover, only a relatively small number of states had ratified the Covenants. The most exciting development in the human rights field of the post-Second World War era was the adoption of the European Convention on Human Rights, which created the first ever international human rights court. Although it entered into force in the 1950s, the European Convention system did not come into its own until the late 1970s and early 1980s. And while the American Convention on Human Rights entered into force in 1978, its impact was not felt in the Americas until much, much later. Recall that the African Charter for Human and Peoples' Rights dates back only to the 1980s. Its influence on the protection of human rights in Africa unfortunately remains to be felt to the same extent.

By the early '70s, the UN General Assembly, the UN Economic and Social Council, and the UN Human Rights Commission had begun to condemn the policies of apartheid, racial discrimination, and other gross violations of human rights. They did so hesitatingly at first in the face of persistent claims by various governments, including some of the major Western powers, that these measures contravened the principle of non-intervention in the domestic affairs of states. The gradual, but ever more determined, rejection of this principle as a legally sound argument

against international action to deal with massive breaches of human rights greatly strengthened the ability of the UN to promote human rights by publicizing and condemning its non-observance. To this end, the UN established a system of human rights rapporteurs and various procedural mechanisms for the investigation of violations. These low-key measures, usually taken at the UN Human Rights Commission or its Sub-commission level, did at times make it possible to place particularly egregious human rights violations on the agendas of the Economic and Social Council and the General Assembly. The resulting public discussion of the charges helped to publicize and make people aware of the existence and political relevance of international human rights law, which in turn strengthened its political significance on the national and international plane.

These developments gained force with the entry into effect of major UN human rights treaties, including the Convention on the Elimination of All Forms of Racial Discrimination, followed by the two UN Covenants on Human Rights, the Convention against Torture, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child. These instruments continue to this day to be supplemented by numerous UN declarations and resolutions on specific problems. Over the years, the specialized agencies of the UN, particularly UNESCO and the ILO, also adopted a large number of conventions and declarations relating to rights within their spheres of competence.

A very large and ever increasing number of states has by now ratified almost all major UN human rights treaties as well as the human rights conventions of the specialized agencies. This vast body of international human rights law has been amplified by the human rights proclaimed in the three major regional human rights treaties; that is, the European and American Conventions on Human Rights and the African Charter on Human and Peoples' Rights. These treaties are now in force with regard to the overwhelming majority of states in each of the three regions. They guarantee many of the same human rights that are proclaimed in the universal human rights conventions. These treaties, taken together, amount to a vast body of international human rights law, a veritable human rights code that can in large part be deemed to have acquired the status of general international law.

This law is increasingly being interpreted and applied and, consequently, amplified by the judicial and quasi-judicial institutions established by the United Nations, its specialized agencies, and the regional organizations. In the forefront of this development is the vast jurisprudence of the European Court of Human Rights, followed by the growing case law of the Inter-American Court of Human Rights. The newly established African Court on Human and Peoples' Rights will in a few years no doubt also produce important decisions interpreting the African Charter. Within the United Nations, the six existing treaty bodies, established to monitor the implementation of these conventions, routinely interpret and apply them. The International Court of Justice has increasingly also been called upon to interpret and apply major UN human rights treaties as well as international humanitarian law instruments.

It is therefore not surprising that national courts and governmental agencies look with ever greater frequency to the jurisprudence of these courts and the rulings of

the treaty bodies when called upon to interpret and apply international and regional human rights treaties on the domestic plane. This dynamic judicial lawmaking process and the resulting interaction between national and international law enhances the legitimacy of international human rights law and forces governments to take this law into account when formulating their human rights policies. In the process, the public has become ever more aware of the existence of international human rights law and of their rights thereunder. That fact has political consequences, of course.

Recent developments in the field of humanitarian law should be added to the above legal mix. Particularly important, in this connection, is the establishment of the permanent International Criminal Court and the various ad hoc international criminal tribunals, particularly the International Criminal Tribunal for the former Yugoslavia and its sister institution, the International Criminal Tribunal for Rwanda. By applying and interpreting international humanitarian law, these tribunals contribute to the evolution of international legal principles that are designed to protect the human rights of individuals in armed conflict and provide the legal basis for punishing individuals responsible for massive violations of international criminal law, including genocide and crimes against humanity.

In addition to the Statute of the International Criminal Court, which has now been ratified by more than 100 countries, note should also be taken of the World Summit Outcome Resolution, adopted in 2005 by the General Assembly, which proclaims the 'Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'. Besides imposing this responsibility on states with regard to their own populations, the resolution recognizes the international community's responsibility to protect populations generally against these horrendous crimes. The General Assembly has thus mandated and legitimated this important humanitarian responsibility of states. Of course, I would be the last to deny that some states, while hailing this principle for propaganda purposes, today still either violate it or prevent its implementation in concrete cases. Regrettably, oil and other natural resources have become the latest obstacle to international action for the prevention of genocide and other serious international crimes. I am convinced, nevertheless, that the UN's resolution on the responsibility to protect will in the future become an important tool in fighting these international crimes.

The establishment of international criminal tribunals and regional human rights courts is, in my opinion, the most visible and promising development in the human rights field in recent decades. The fact that former heads of state and important government officials and military officers can now be charged with and be convicted for the violation of international humanitarian law are achievements that had not been seen since the Nuremberg trials. Equally telling is the existence and work of regional human rights courts. They have been finding governments responsible for breaches of human rights, requiring them to remedy the violations, to amend their countries' offending legislation and/or to pay reparations to the victims. And the fact that the International Court of Justice, the principal judicial organ of the UN, is now also frequently called upon to deal with international human rights issues shows how important this subject has become in relations between states. These

are all advances which strengthen the political significance of international human rights law and give it teeth.

It is rare today for major intergovernmental meetings and conferences not to have human rights issues on their agendas. Many governments have established human rights departments in their foreign ministries because of the growing foreign-policy implications and significance of the subject. Most international development agencies and donor governments increasingly tie the grant of economic assistance to the human rights performance of the states seeking aid. Violations of human rights even in far away countries tend to be widely reported in the media around the world and become the subject of debates in national parliaments. These developments strengthen the public's perception of the centrality of human rights and its belief that governments have legal obligations to respect human rights.

Recent decades have also witnessed the dramatic growth of national and international human rights non-governmental organizations. They operate in many parts of the world. Their ever more influential status is directly linked to the normative and institutional developments of international human rights law. That law provides NGOs with the legitimacy they need to function, making it more difficult for governments to restrict their activities. It empowers NGOs to promote and protect human rights; it also facilitates their efforts to publicize such violations and to lobby for effective legal and institutional changes to prevent violations in the future. Looking at the totality of their activities, it is clear that NGOs have played and continue to play a vital role in deepening the awareness of people around the world that they have human rights which governments have a legal obligation to respect.

#### 4. HUMAN RIGHTS AND LEGITIMACY

The international community has come a long way towards creating the institutional and political infrastructure needed to protect human rights. These developments have made people much more aware of the existence of international human rights law. They have also created the expectation of, and demand for, compliance by governments with their obligations to respect this law. The yearning of people for human rights has become a universal phenomenon. That is why governments today find it increasingly more difficult simply to shrug off the international human rights obligations that many of them assumed without ever expecting to have to honour them.

The international human rights revolution I have described – and it is truly a revolution when you look at the dramatic changes that have taken place – has transformed the way in which people around the world view their entitlement to the enjoyment of human rights. Never before have so many people in ever more countries heard about and come to believe that they have human rights and that they are entitled to have their rights respected. The worldwide publicity concerning the existence of human rights obligations internationally binding on governments has created strong demands for compliance with these obligations.

The failure of a government to live up to these obligations leads quite naturally to the conclusion today that governments which violate human rights violate 'the law'.

Whether that law is national law or international law is a question only international lawyers would be interested in asking. In terms of people's perceptions of right and wrong, ordinary human beings do not generally make these distinctions when they characterize human rights violations as illegal. What is important to them is the knowledge that their government's or another government's abusive policies are not only immoral but also illegal, and that they must stop.

This perceived illegality has a tendency gradually to erode the legitimacy of those governments that violate human rights on a large scale. Few countries will today be able to immunize themselves against the impact that massive human rights violations have on the attitude of the international community and the public in many parts of the world towards regimes responsible for such actions. In the long run this political reality begins to have a direct bearing on the legitimacy governments need to govern and on their standing internationally. It does not necessarily follow that these considerations will prompt the offending governments to stop their abusive practices or policies when confronted with claims that they are in breach of their human rights obligations. Some will and some will not; the outcome will obviously depend on many factors. But it is clear that over time the perceived illegality of their conduct is likely to have an effect on the behaviour of some governments and possibly also on their grip on power. It may encourage their domestic political opponents to challenge the continued right of these governments to govern. And it may also influence foreign governments and international organizations to change their policies towards the offending governments.

In short, the international political climate is today increasingly more sensitive to human rights violations, less and less willing to tolerate them, and more and more responsive to public and private pressures to prevent them. A regime which engages in serious violations of human rights will gradually find its legitimacy as a government questioned nationally and internationally. This emerging nexus between a government's human rights policies and the legitimacy it needs to govern is a contemporary phenomenon that is likely over time to lead to greater compliance by states with their international human rights obligations.

## 5. CONCLUSION

All in all, it is clear that the human rights revolution I have described has improved the human rights situation in many parts of the world. This is not to deny that elsewhere large numbers of human beings are still denied their human rights on a massive scale and that at least some governments continue to violate human rights with impunity. On the whole, however, human rights are today better protected than they were in the 1970s when I first met John Dugard. In short, we have come a long way, but, unfortunately, we still have a long way to go. It is therefore very important that we do not give up and that we continue the effort to improve human rights situations in all parts of the world.