
Twenty-Five-Years of Dugard's International Law: A Lasting Impression

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In 2018, the fifth edition of *Dugard's International Law: A South African Perspective* (hereinafter *Dugard's International Law*) was published. When the book was first published in 1994, a few months after the country's first democratic elections, the 372-page publication essentially provided a retrospective on the role and relevance of international law in South Africa before the advent of democracy. In so doing, it followed the structure of traditional textbooks on international law, illuminating the basic principles of international law with reference to the main sources of international law over the course of 20 chapters. Simultaneously, the analysis was placed within the context of South African state practice, judicial decisions and legislation on international law (at vii). By the fifth edition published in 2018, the book had developed into 26 chapters (comprising 878 pages) that also took account of some developments at the African Union level (ch. 13).

The evolution of the content of the book was accompanied by an expansion and diversification of authorship. While the 1994 edition was the sole work of John Dugard, the fifth edition also includes Max du Plessis, Tiyanjana Maluwa and Dire Tladi as co-authors and co-editors. An additional seven individuals (including three female scholars) contributed single- or multi-author chapters to the book.¹ Yet, the influence of Dugard remained significant, as he singlehandedly wrote nine of the 26 chapters and co-authored an additional 13. Amongst these are chapters that reveal his intimate knowledge of the intertwinement of South Africa's troubled history with the international law of statehood and recognition (ch. 5), as well as international humanitarian law (ch. 25). The chapter on state responsibility, diplomatic protection and the treatment of aliens reflects Dugard's first-hand experience as a member of the United Nations International Law Commission during the finalization of some of its most influential recent projects, namely the Responsibility of States for Internationally

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¹ Eshed Cohen, Andreas Coutsoudis, Jackie Dugard, Rosalind Elphick, Anton Katz, Kholofelo Kugler, Arnold Pronto.

Wrongful Acts 2001² and the Draft Articles on Diplomatic Protection of 2006 (of which he was the Rapporteur).³

To many scholars of international law, this book might at first sight seem a standard textbook on international law which (as is typical of multi-author textbooks) has some strengths and weaknesses in terms of chapter composition, coherence and rigour. Yet, closer scrutiny reveals that the various editions, when taken in their totality, represent much more than a sum of individual contributions. First, until 2013, the book was the only legitimate ‘homegrown’ English-language textbook in South Africa.⁴ Until 1994, South African scholars and practitioners of international law who did not want to rely on materials produced by individuals close to the apartheid regime had to rely on textbooks written mainly by prominent scholars from the United Kingdom and the United States. Whatever the merits of these sources, they tended to be far removed from the realities of the region and reflected a limited understanding of the long-term effects of colonialism on the international law governing (in particular, albeit not exclusively) statehood, acquisition of territory and colonial boundaries. In addition, they tended to neglect the contribution of African state practice to the development of international law.

However, with the advent of the first edition of *Dugard’s International Law* in 1994, scholars and practitioners in Southern Africa encountered for the first time a contextualized narrative, written by a highly acclaimed scholar from the African continent. Moreover, they were exposed to the perspective of someone who actively pursued international law as an instrument for promoting human dignity and fairness, including through his involvement in court cases before the South African and Namibian courts during the apartheid regime.⁵

At the time the book was first published, I was not yet aware of its historic relevance or how important it would become as a teaching tool in my own practice. Having recently arrived in Europe from South Africa and in the process of shifting my research focus from comparative constitutional law to international law, I was preoccupied with finding my way around continental sources on international law. It was only in June 2010, when travelling with John Dugard from Amsterdam to Ethiopia for a workshop pertaining to the Rome Statute of the International Criminal Court, that I started to reflect on the authenticity of the book as a teaching tool in a South African context. During the course of several days we had extremely interesting discussions about the attitude of the South African executive branch and the courts to international law in the pre-democratic era, as well as Dugard’s own role in invoking international law before the courts at the time.

² GA Res 56/83, 12 December 2001.

³ Report of the International Law Commission, 58th Session, UN Doc. A/61/10 (1 May–9 June and 3 July–11 August 2006), available at <https://bit.ly/3nPm5AS>.

⁴ In that year, another textbook written by South African-based authors was published. See T. Bennett and J. Strug, *An Introduction to International Law* (2013). See also H. Strydom et al., *International Law* (2016).

⁵ ‘Curriculum Vitae and Publications of John Dugard’, 20 *Leiden Journal of International Law (Leiden JIL)* (2007) 983, at 984.

One example dates back to 1968, when John Dugard was involved in challenging the validity of apartheid security laws in Namibia, arguing that South Africa's mandate in South West Africa had been terminated by the United Nations General Assembly.⁶ Prominent cases in the 1980s included a challenge to the revocation of Archbishop Desmond Tutu's passport, on the basis that the revocation violated the fundamental right to leave one's country;⁷ as well as the claim that captured members of Southern African liberation movements should be treated as prisoners of war and not criminals.⁸ Even though these arguments did not necessarily meet with the approval of a judiciary that mirrored the hostility towards international law pervasive in the executive branch (at 26–27), they underscored the potential of international law standards to provide redress against injustices of the domestic legal system at the time.

The cases thus illuminated a positive potential of international law for South Africa and the region, despite international law's colonial roots and their lasting consequences for the continent. This realization significantly shaped my own approach to teaching international law when I returned to South Africa a year later. It opened a pathway to allow me to contextualize international law to students in a manner that spoke to the regional realities in question. In particular, it inspired me to emphasize the humanizing role that international law can have within a domestic legal system over time. Legal arguments that at first may seem far-fetched can in due course gain traction within the judicial discourse and contribute to re-shaping the domestic legal order.

In addition, the evolution of *Dugard's International Law* over five editions assisted me in illustrating to students how domestic courts (in this case in South Africa) can contribute to the development of international law, if litigants invoke international law in a manner that is well reasoned and convincing. The five editions published since 1994 reveal a remarkable evolution in the approach of the South African courts towards international law, before and after the adoption of the 1996 Constitution of the Republic of South Africa.⁹ While the new constitutional dispensation preserved the country's dualist tradition, its emphasis on international-law-friendly interpretation in Sections 39 and 232 of the Constitution resulted in a sustained change in the attitude of the judiciary (if not necessarily the executive branch) towards international law. The extent to which the highest courts in the land invoke, in particular, international human rights law standards as interpretative guidelines stood in contrast to their reluctance to do so during the apartheid era.

This new openness towards international law initially related primarily to the interpretation and application of the Bill of Rights in the new constitutional dispensation.

⁶ *S. v. Tuhadeleni and others* 1969 (1) South African Law Reports (SALR) 153 (A).

⁷ *Tutu v. Minister of Internal Affairs* 1982 (4) SALR 571 (T); Du Plessis, 'Professor John Dugard: A South African Perspective', 20 *Leiden JIL* (2007) 955, at 961.

⁸ *S. v. Sagarius* 1983 (1) SALR 833 (SWA) A667 (A); 'Curriculum Vitae and Publications of John Dugard', *supra* note 5, at 985.

⁹ South African Constitution, Act 108 of 1996, available at www.gov.za/sites/default/files/images/a108-96.pdf.

However, litigators have since become increasingly adept at invoking international law arguments outside the human rights context. This is vividly illustrated in the chapter devoted to ‘International Criminal Courts, the International Criminal Court, and South Africa’s Implementation of the Rome Statute’ (ch. 10). The chapter was co-authored by Max du Plessis,¹⁰ who played a prominent role during the domestic litigation triggered by the visit of former President Bashir of Sudan to South Africa in June 2015. The chapter illuminates how arguments pertaining to the international law on immunities of state officials played a significant role during the domestic litigation of the *Bashir* case (at 297ff).¹¹ In so doing, it serves as a useful tool to alert students to the fact that the more frequent and thorough the use by council and/or *amicus curiae* of international law in domestic litigation, the greater the chance that these arguments will shape the reasoning of the court. This in turn strengthens not only the relevance of international law in the domestic order, but also the role of domestic courts from all regions in the development of state practice.

The book also instilled in me the importance of explaining to students the historical context in which certain international law principles developed, in order to fully appreciate their contemporary relevance (or lack thereof). This realization grew from the manner in which various chapters of the book address the ‘inadvertent and unintended’ impact that South Africa had on the development of international law during the apartheid era.¹² Progressive developments pertaining to the promotion of human rights and decolonization were part and parcel of an international response to South Africa’s apartheid policy that it also imposed on Namibia (then still South West Africa). For example, the position that human rights violations within a state were a purely domestic matter covered by Article 2(7) of the UN Charter was significantly weakened by a series of United Nations resolutions against apartheid (at 457ff). South Africa thus became the battleground where states had to choose between entrenching an expansive definition of ‘internal affairs’ and recognizing human rights as a matter of international concern. By choosing the latter, they propelled international law into a new era.¹³

Further, the criteria applicable to statehood and recognition were shaped by the international community’s refusal to recognize the so-called ‘homelands’ of Transkei, Bophuthatswana, Venda and Ciskei as independent states (at 126ff). In the field of international humanitarian law, the 1977 First Additional Protocol to the Geneva Conventions of 1949 attributed prisoner-of-war status to combatants belonging to national liberation movements. This was in part a response to the armed struggle by the African National Congress (ANC) and the South West Africa People’s Organisation

¹⁰ With Eshed Cohen.

¹¹ *Southern African Litigation Centre v Minister of Justice and Constitutional Development* 2015 (5) SA 1 (GP); *Minister of Justice and Constitutional Development v Southern African Litigation Centre* 2016 (3) SA 317 (SCA).

¹² Cf. Ndulo, ‘Book Review of *International Law: A South African Perspective* by John Dugard’, 3 *African Yearbook of International Law* (1995) 435, at 439.

¹³ *Ibid.*, at 437.

(SWAPO) against apartheid (at 790ff). In addition, South Africa's involvement in the 1960s and 1970s in the series of cases before the International Court of Justice (ICJ) regarding South West Africa/ Namibia significantly influenced the law on the status of international territories, the powers of the United Nations principal organs and self-determination (at 23). On a negative note, the South West Africa / Namibia cases were also the catalyst for the ICJ's restrictive understanding of the notion of legal interest, and led to the Court's controversial reversal on the admissibility of the claims of Ethiopia and Liberia in 1966 (at 682ff). These chapters were immensely helpful to me personally in developing a better understanding of the context in which post-1945 international law had developed. This applies in particular to the first-hand account of the impact of developments in South Africa (and Namibia) on international law in areas such as self-determination, human rights and statehood.

Finally, the various editions of the book also served to remind me that the humanizing potential of international law can easily become undone and should never be taken for granted. Sustaining its humanizing capacity and its impact therefore requires a sustained effort – a message that I also try to convey to students. Subsequent to its return to the international community in 1994, the South African government initially played a leading role in international and regional organizations, while pursuing a universal human rights policy domestically and abroad. It also played an enormous role during the negotiations leading up to the adoption of the Statute of the International Criminal Court (ICC) in July 1998 (at 299ff). However, the (fallout of the) ill-advised visit of former President Bashir of Sudan to South Africa in 2015 has come to illustrate a systematic policy reversal on the part of the executive branch. Ironically, it also placed South Africa once again at the centre of an international law debate, this time concerning the scope of customary immunities of state officials.

In conclusion, *Dugard's International Law* has now, for almost 25 years, provided readers with insights into the dynamics of international law in a region whose voice remains under-represented in the international discourse. It also remains one of very few textbooks written by scholars from the region with unique access to the local state practice. I have found it to be an extremely valuable teaching tool, especially (although not exclusively) during the almost 10 years during which I was involved in undergraduate teaching in South Africa. It demonstrated to me the importance of the invocation of international law in a domestic setting as a vehicle for strengthening international law's relevance and enhancing its development. The book served as a constant reminder that a proper application of international law principles requires an understanding of their historical roots. Finally, it convinced me that it is not a contradiction in terms to acknowledge the shortcomings of international law, while also underscoring its humanizing potential and persistently striving to actualize it.