SOUTH AFRICA AND INTERNATIONAL LAW: A TRIBUTE TO JOHN DUGARD

James Crawford*

1 Introduction

It is a great honour and privilege to be invited to give the inaugural John Dugard Lecture in International Law, in the presence of John Dugard himself. For me, this occasion is an intermingling of the professional and the personal, so much so that I hardly know where the one stops and the other begins.

My first acquaintance with John Dugard was as a writer on international law with special reference to southern Africa. He was the outstanding legal critic of the apartheid policy, as applied within South Africa itself and in the mandated territory of South West Africa (Namibia), and he was a critic in his own country, combining scholarship with courage in a way that few scholars need to do, and fewer still would actually do, if placed in such a situation. His focus was on human rights,[1] but he also and inevitably combined that with consideration of the issues of legal status raised by apartheid. That began with discussion of South West Africa, and his criticism of the International Court's lamentable decision in the *South West Africa* cases in 1966.[2] It extended to a consideration of the status and collective non-recognition of Rhodesia post its unilateral declaration of independence in 1965,[3] to the International Court's alternate vision for South West Africa in the *Namibia Opinion* in 1971,[4] and to the status and non-recognition of the so-called independent bantustans, after the first of these – Transkei – was created in 1976.[5] From 1972 to 1977, I was working in Oxford and Adelaide on issues of statehood and self-determination, edging towards the thesis that the creation and

* AC; Judge, International Court of Justice; Whewell Professor Emeritus, University of Cambridge. My thanks to Rosalind Elphick for her great assistance with this piece.

1 See eg J Dugard *Human Rights and the South African Legal Order* (1978).

2 J Dugard 'South West Africa cases, second phase, 1966' 1966 (83) *South African Law Journal* 429.

3 J Dugard *Recognition and the United Nations* (1987) 90–98.

4 J Dugard 'The Opinion on South West Africa (Namibia): The teleologists triumph' 1971 (88). *South African Law Journal* 460; J Dugard 'Namibia (South West Africa): The court's opinion, South Africa's response and prospects for the future' 1972 (11) *Columbia Journal of International Law* 14; J Dugard & EM Grosskopf *South West Africa and the International Court. Two Viewpoints on the 1971 Opinion* (1974).

5 See Dugard (n 3 above) 98–108.

continuation of states were not simply a matter of fact of unmediated force or power, but incorporated international legal elements.[6] Statehood is an 'ought', not simply an 'is'. Southern Africa was the laboratory above all others of that thesis. John got to that idea before I did, and gave me written encouragement to articulate and extend it.

It was no accident that many of the case studies for the thesis emanated from southern Africa. The founding fathers (they were all men) of South Africa grew up with a strong legal tradition, largely that of Roman-Dutch law, of which Grotius himself was a leading expositor, when he was not writing about theology or the law of nations. They sought legal justifications, or at least the cover of law, for their conduct. But they faced a difficult situation domestically, as a small minority in South Africa and an even smaller one in South West Africa and Rhodesia, in holding on to power. They also faced serious problems internationally, what with the 'sacred trust' of Smuts' idea, the mandate system,[7] and more generally, after 1945, the rise of universal human rights and of the principles of equality and self-determination of peoples.

Against these developments, the reserved domain of domestic jurisdiction in article 2(7) of the Charter was of limited help. But they could take advantage of international law as well. For example, the principle of state consent; the Charter might have preserved the rights of the people of the mandated territory, but it did not, the International Court held in 1950, require their transfer to the trusteeship system without a trusteeship agreement with the former mandatory power.[8] It took no less than six decisions of the court to establish the legal status of the territory, and a further 20 years after the last of these decisions, *Namibia* in 1971, to achieve self-determination for its people.[9]

The South African government also used international law in other ways. In the traditional understanding, human rights are not prior to the state, they are rights against the state. If the citizens of a state must be treated equally and without discrimination, it is the state and not international law which defines who its citizens are. A state can discriminate against aliens: pass laws for citizens may be repugnant

6 J Crawford *The Creation of States in International Law* (1979); see now 2 ed (2006) 338–348 (bantustans); 129–131 (Southern Rhodesia); 591–598 (Namibia).

7 Article 22 of the Covenant of the League of Nations (1919). Smuts' proposal for the mandate system is to be found at JC Smuts 'The League of Nations: A practical suggestion' reprinted in DH Miller *The Drafting of the Covenant* (1928) 11.

8 *International Status of South-West Africa, Advisory Opinion:* 1950 ICJ Reports 128.

9 For the story of these cases (in all of which South Africa participated) see J Crawford & P Mertenskötter 'The South West Africa cases 1949–1971' in E Bjorge & C Miles (eds), *Landmark Cases in Public International Law* (2017) 263. For a contemporary account see J Dugard *The South West Africa/Namibia Dispute* (1973).

to human rights, but aliens can be required to hold and show their passports, and if they misbehave, may be deported to their home state, even if they have never been there before. So, if you cannot in the long run maintain power as a minority, you may be able to become a majority by converting the rest of the population into foreigners. This ultimate logic of the bantustan system was a reflection, distorted no doubt, of international law ideas.

I give these examples, and there are others, to show how the above-ground struggle against apartheid was in key respects a *legal* struggle, and it is one in which John Dugard was, for the first part of his career, a major participant. I will shortly detail some of the many ways in which he participated. However, there was also a second part of his career, in which for me the personal element entered. I first got to know him well in 1991, when he was Visiting Professor of Law at the University of New South Wales. Our friendship deepened when he spent some years at Cambridge, as the Arthur Goodhart Visiting Professor of Legal Science, and as co-director of the Lauterpacht Centre for International Law. We were also colleagues at the International Law Commission (ILC), where our terms overlapped. He participated in the work on state responsibility, then led the work on the cognate topic of diplomatic protection, bringing it to a successful conclusion in 2006. He remained a member of the ILC until 2011. Meanwhile he had become Professor of Public International Law at the University of Leiden and was active at the international level with inquiries and reports, notably on Palestine, while maintaining his close links with South Africa.[10] In the remainder of this lecture I propose to deal in turn with the legal struggle against apartheid (Section 2); and then with some issues arising during the second phase of John's career, after the end of the apartheid regime (Section 3), before concluding.

2 The Struggle Against Apartheid and the Bantustans

John's legal career began as the South African government's legal project of apartheid was being finalised. By this time, apartheid laws and policies were already firmly in place. This included the Land Act, the Group Areas Act, the Bantu Authorities Act and the Separate Amenities Act. These segregationist laws aimed to ensure that white and black South Africans would not share common spaces or use the same facilities. In his own words, speaking in 1991 (in my native Australia), John described that

[10] See his own account of these years and tasks in J Dugard *Confronting Apartheid: A Personal History of South Africa, Namibia and Palestine* (2018).

'[b]y 1960 the *apartheid* legal order had been finally enacted … The Rule of Law was replaced with Rule *by* Law.'[11]

> Prior to apartheid, the attitude of the judiciary to international law, captured by the opinion of Kotze CJ in *CC Maynard v The Field Cornet of Pretoria*, was that [domestic law] must be interpreted in such a way as not to conflict with the principles of international law … It follows from [this], as put by Sir Henry Maine, "that the state which disclaims the authority of international law places herself outside the circle of civilized nations". It is only by a strict adherence to these recognised principles that our young state can hope to acquire and maintain the respect of all civilised communities, and so preserve its own national independence.[12]

In the early years of apartheid, the judiciary 'stood firm' against apartheid legislation by interpreting the laws of apartheid so that they 'did as little harm as possible' to principles of equality and individual freedom. John wrote of this era that:

> Ambiguous racist statutes were interpreted in favour of equality; ambiguous repressive laws were interpreted to accord with individual freedom. Delegated legislation was struck down when it was unreasonable; administrative action was set aside when it offended notions of natural justice.[13]

However, by the 1960s these forms of resistance from within the judiciary had fallen away.[14] As Dugard described it:

> The Appeal Court judges who had resisted *apartheid* in the 1950s had died or reached the mandatory retirement age of seventy. There were new judges on the bench … [and] [t]he courts, led by the Appeal Court, now acquiesced in the *apartheid* legal order.[15]

Hugh Corder referred to the next 30 years of South African jurisprudence as an era of 'unquestioning deference' bordering on 'abdication'.[16] As the

---

11 J Dugard 'Human rights, *apartheid* and lawyers. Are there any lessons for lawyers from common law countries?' 1992 (15) *University of New South Wales Law Journal* 441.

12 1894 (1) SAR 214, as cited in J Dugard *International Law: A South African Perspective* 2 ed (2000) 45.

13 Dugard (n 11 above) 442.

14 See further LW Potts 'Law as a tool of social engineering: The case of the Republic of South Africa' 1982 (5) *Boston College International and Comparative Law Review* 15; C Forsyth 'The judiciary under *apartheid*' in C Hoexter & M Olivier (eds) *The Judiciary in South Africa* (2014) 29.

15 Dugard (n 11 above) 442.

16 H Corder 'From despair to deference: Same difference?' in G Huscroft & M Taggart (eds) *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (2006) 330.

former Chief Justice Mohamed described it: 'Good and sensible lawyers were simply concerned with what the law was, not what it ought to be'.[17]

The evolution of the courts' application of the principle of non-discrimination demonstrates this trajectory.[18] Early decisions of South African courts show that discrimination was circumscribed to cases where the legislation was express as to its discriminatory intent.[19] At the inception of apartheid, responding to the introduction of a range of expressly discriminatory legislation, the doctrine of 'separate but substantially equal' was developed to frustrate the government's scheme of segregating public facilities along colour lines. Christopher Forsyth describes this doctrine as a 'significant thorn in the side' of the apartheid authorities.[20] In *R v Abdurahman*, for example, the Appellate Division held that the relevant legislation (the Railways and Harbours Regulation and Control Act 22 of 1916) did not authorise partial or unequal treatment. The court held that the relevant legislation:

> must not be construed to confer this power to do unreasonable things unless such power is specifically given ... The State has provided a railway service for all its citizens irrespective of race and it is unlikely that the Legislature intended that users of the railways should, according to their race, have partial or unequal treatment meted out to them.[21]

By 1961, however, the Appellate Division had fallen in line with the apartheid project.[22] In *Minister of Interior v Lockhat*,[23] the question was whether the Group Areas Act empowered the executive to discriminate by according partial and unequal treatment as between members of different racial groups. No such power was given expressly in the statute. Nevertheless, the Appellate Division sanctioned discrimination in the application of the Act – ignoring the presumption that in passing legislation the legislature intends a just and reasonable result – on the grounds that that intent was clearly implied. Holmes JA explained the reasoning in the following terms:

---

17 I Mohamed 'Tribute to John Dugard on his retirement from the University of the Witwatersrand' 1998 (14) *South African Journal on Human Rights* 495.

18 See further Potts (n 14 above) 15.

19 See further Forsyth (n 14 above) 39.

20 Ibid. For examples in the case law see *R v Abdurahman* 1950 (3) SA 136 (A); *Tayob v Ermelo Local Road Transportation Board* 1951 (4) SA 440 (AD); *R v Lusu* 1953 (2) SA 484 (A).

21 *R v Abdurahman* (n 20 above) 149.

22 For other cases where the Appellate Division in the early 1960s turned down clear opportunities to give rulings that favoured individual liberty, see *Laza v Police Station Commander Durbanville* 1964 (2) SA 545 (A); *Rossouw v Sachs* 1964 (2) SA 551 (A); *Schermbrucker v Klindt* 1965 (4) SA 606 (A).

23 1961 (2) SA 597 (A).

> The Group Areas Act represents a colossal social experiment and a long-term policy. It necessarily involves the movement out of Group Areas of numbers of people throughout the country. Parliament must have envisaged that compulsory population shifts of persons occupying certain areas would inevitably cause disruption and, within the foreseeable future, substantial inequalities. Whether all this will be for the common weal of all the inhabitants, is not for the Court to decide … The question before this court is the purely legal one whether this piece of legislation impliedly authorises, towards the attainment of its goal, the more immediate and foreseeable discriminatory results complained of in this case. In my view, for the reason which I have given it manifestly does.[24]

John himself, acting as counsel in *S v Adams; S v Werner*, invited the Appellate Court to reconsider the application of the 'separate but substantially equal' doctrine to the Group Areas Act in 1981, but was met with a negative response.[25]

The developing pro-establishment attitude within the judiciary, and the legal community more generally, was the focus of John's attention at the time.[26] In his inaugural lecture given at the University of Witwatersrand in 1971, John came out guns blazing – albeit 'in all humility' – to condemn the judiciary's approach, and to offer an alternative view of the role of the courts in enforcing apartheid legislation.[27] He argued that the separation of law from morality had resulted in 'the largely quiescent attitude of the legal profession towards statutes invading individual liberty [… and] the mechanical search of the judiciary for the intention of the legislature in these same statutes'.[28] He claimed that a strictly positivist approach to the judicial function in human rights cases was 'a façade':

> Judges do not mechanically declare the law in cases where there are competing interpretations, precedents, authorities, and principles; instead they create new law by selecting one authority in preference to another. And in exercising this choice, in making this selection, a judge is inevitably influenced by his own perception of the needs of social policy, of the expectations of society and, perhaps, by inarticulate, subconscious factors which constitute part of the make-up of each judge.[29]

---

24 Id 602.

25 1981 (1) SA 187 (A).

26 See eg J Dugard 'The judiciary in a state of national crisis – with special reference to the South African experience' 1987 (44) *Washington and Lee Law Review* 477; J Dugard *Human Rights and the South African Legal Order* (1978); J Dugard 'The judicial process, positivism and civil liberty' 1971 (88) *South African Law Journal* 182.

27 Dugard (n 26 above) (1971) 182.

28 Id 186.

29 Dugard (n 26 above) (1978) 303.

He encouraged judges to acknowledge the leeway which was open to them in statutory interpretation, even under apartheid laws, to 'be guided by accepted traditional legal values' in the exercise of their discretion.[30] The 'enlightened' legal values that John encouraged judges to draw upon were in fact basic human rights norms: freedom from arbitrary arrest and detention without trial; freedom from cruel and unusual punishment; the right to legal representation when the individual's liberty is at stake; the right to be heard in one's own defence before one's liberty is curtailed; equality before the law; freedom of speech and literary expression; freedom of the Press; freedom of assembly; and freedom of movement.[31]

John made this speech at a time when an appeal to international law was 'seen in many quarters as unpatriotic and unprofessional'.[32] He was careful therefore to couch his approach in terms of the common law and South Africa's Roman-Dutch traditions, sources which were more accessible to the judiciary at that time. Later he would write that, historically, South African jurisprudence had displayed a great concern for, and familiarity with, the precepts of international law and that 'the integration of international law and municipal law was so complete that judges did not deem it necessary to state the obvious: that customary international law [was] part of South African law'.[33] He sought a revival of this historical connection. His writing sparked scholarly debate and prompted several to follow him into the academy.[34] These included Etienne Mureinik (John's colleague at Wits) and David Dyzenhaus (a former student) who, following the work of Ronald Dworkin, argued that law, properly so called, contains certain universal features.[35] So the voices calling for the incorporation of civil liberties and human rights into the South African legal order grew. These ideas had an impact on the work of lawyers and the thinking of judges at the time.

---

30 Dugard (n 26 above) (1971) 195.

31 Id 197.

32 J Dugard 'John W Turner lecture – The implications for the legal profession of conflicts between international law and national law' 2005 (46) *South Texas Law Review* 582.

33 J Dugard 'The South African judiciary and international law in the *apartheid* era' 1998 (14) *South African Journal on Human Rights* 111.

34 C Forsyth & J Schiller 'The judicial process, positivism and civil liberty II' 1981 (98) *South African Law Journal* 218; J Dugard 'Some realism about the judicial process and positivism – a reply' 1981 (98) *South African Law Journal* 372; D Dyzenhaus 'Positivism and validity' 1983 (100) *South African Law Journal* 454; DM Davis 'Positivism and the judicial function' 1985 (102) *South African Law Journal* 103; R Wacks 'Judges and injustice' 1984 (101) *South African Law Journal* 266. See further J Dugard 'Should judges resign? A reply to Professor Wacks' 1984 (101) *South African Law Journal* 286.

35 D Dyzenhaus *Hard Cases In Wicked Legal Systems: South African Law in Perspective of Legal Philosophy* (1991) 263. See especially D Dyzenhaus 'Dugardian legal theory' in T Maluwa, M du Plessis & D Tladi (eds) *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard* (2017) 3; also E Mureinik 'Dworkin and *apartheid*' in H Corder (ed) *Essays in Law and Social Practice* (1998) 181.

The anti-apartheid struggle is an exemplar of the use of lawyers as agents of change. Some significant success stories centre around the system of 'pass laws': apartheid laws segregated urban areas along racial lines and criminalised black persons who did not produce a 'pass' – essentially a passport for internal use – demonstrating their lawful presence in a white area.[36] 'Pass courts' were set up to enforce these laws. Operating on a presumption of guilt, they imprisoned 'offenders' following speedy trials (often lasting just a few seconds) conducted without translation or legal representation.[37] In the 1970s, public interest lawyers began assisting in a mass movement of peaceful resistance against the implementation of these laws by ensuring that arrestees were properly represented in the pass courts. Their efforts meant that the pass courts were no longer able to process convictions quickly, which, together with the volume of black defiance against pass laws, rendered the pass system inoperable by the 1980s.[38] The pass laws were also challenged in the higher courts, with two major successes. In *Komani NO v Bantu Affairs Administration Board, Peninsula Area*[39] the court granted requested improvements to the system of influx control. In *Oos-Randse Administrasieraad v Rikhoto*,[40] the court found that the regulations unlawfully restricted the freedom of movement of black South Africans and extended the right of migrant workers to acquire permanent residence in urban areas. In *In re Duma*, the court effectively nullified a law providing for the 'deportation' to the 'homelands' of 'idle and undesirable' blacks from urban areas. [41]

It is telling that 'most, if not all of the important progressive judicial decisions of this time' were taken by judges who had been at seminars organised by the Centre for Applied Legal Studies, founded and run by John.[42]

Human rights norms may have had an effect even in cases where they seemed at first blush to have failed. John describes how, when acting as counsel in cases where the international law aspect of a case was in direct conflict with domestic legislation, 'we owed it to our clients to appeal to international law even though we knew that such an appeal

---

36 The Natives (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952, commonly known as the Pass Laws Act; the Black (Urban Areas) Consolidation Act 25 of 1945.

37 SL Lentz '*Apartheid* goes to court' 1985 (12) *Human Rights* 17; L Morris *The Reminiscences of John Dugard: Oral History* (1999) 7, http://www.columbia.edu/cu/lweb/digital/collections/oral_hist/carnegie/pdfs/john-dugard.pdf.

38 Morris (n 37 above).

39 1980 (4) SA 448 (A).

40 1983 (3) SA 595 (A).

41 1983 (4) SA 469 (N).

42 Morris (n 37 above) 10.

was unlikely to succeed'.[43] The strategy was one of obstruction – a novel use for human rights law at the time.[44] Referring to his experience as counsel in the *Werner* case, John said:

> I was particularly interested in introducing international law arguments into proceedings before South African courts ... We failed. We knew we would fail, but the consequence of that was that all prosecutions under the Group Areas Act were suspended for two years while the matter went through the courts.[45] It is also noteworthy that, following this case – and although the human rights arguments failed *in casu* – prosecutions under the Act were effectively stopped. The human rights argument was later picked up by Richard Goldstone, a judge in one of the provincial courts at the time, and applied to render the application of the Group Areas Act practically impossible.[46]

International law arguments may have had other unseen impacts. For example, in 1968 John provided the legal foundation for a challenge to the validity of apartheid security laws in Namibia on the ground that the mandate for South West Africa had been lawfully terminated by the General Assembly of the United Nations.[47] This argument failed to prevent the conviction of the defendant, yet the judge, 'clearly under international pressure' (following the Security Council's demand to that effect) did not impose the death penalty.[48]

A particularly important area of strategic litigation in which John worked centred on the 'bantustan' policy. These were areas, identified as traditional black 'homelands', that were carved out of South Africa's territory, where distinct African ethnic groups were to reside and which were destined for independence or self-governing status.[49] The creation of separate

---

43 Dugard (n 32 above) 582.

44 Morris (n 37 above) 7.

45 Id 10.

46 *S v Govender* 1986 (3) 960 (T). The case concerned an elderly Asian woman who had been charged under the Group Areas Act with unlawfully occupying premises in a white urban area. She pleaded guilty. In mitigation she explained that there was no accommodation available in an area in which Asians could lawfully reside and that she had exhausted every avenue in her quest for a lawful residence. The magistrate nevertheless granted an order ejecting the accused and her family from their home. Goldstone J held that on a proper interpretation of the legislation, the making of an ejection order was discretionary. See further R Goldstone *Do Judges Speak Out?* (1993) 21–22.

47 *S v Tuhadeleni* 1969 (1) SA 153 (A).

48 Dugard (n 32 above) 582.

49 This in terms of the Bantu Authorities Act 68 of 1951 and the Promotion of Bantu Self-Government Act 46 of 1959 (subsequently renamed the Promotion of Black Self-Government Act, and later the Representation between the Republic of South Africa and Self-governing Territories Act). A further development of this Act was introduced with the Bantu Homelands Constitution Act of 1971, in terms of which a number of homelands were granted independence between the years 1976 and 1981.

'homelands' paved the way for the South African government to deprive black South Africans of their citizenship, or, in international law terms, their nationality. The National States Citizenship Act 26 of 1970 assigned all black South Africans to the citizenship of one of ten 'homelands'. Once a territory became 'independent', the citizens attributed to that territory lost their South African citizenship.[50] No longer South African nationals, the government calculated, they could be discriminated against with impunity: it is not unlawful under international law to distinguish between nationals and non-nationals, for example, for purposes of immigration control, the right to work or liability to deportation.

The 'Bantustan' policy met with widespread popular resistance. A notable example arose in Moutse, a district of South Africa north-west of Pretoria. During the 1980s, the apartheid state by proclamation attempted to expand the newly created KwaNdebele homeland to incorporate Moutse.[51] The extension of the homeland's 'territory' to Moutse, coupled with the South African government's declaration of KwaNdebele's independence, sparked mass protest. The 115th Battalion of the South African Defence Force was deployed to Moutse in 1987 to suppress the resistance, a curfew was imposed and journalists were prohibited from entering the area.[52]

Ultimately, this standoff was successfully challenged (at least for the people of Moutse) in *Mathebe v Government of the Republic of South Africa.*[53] John ('[w]orking closely with the local community and their traditional leaders', 'ably assisted' by Edwin Cameron)[54] successfully challenged the proclamation. Then, in 1989, in the case of *S v Banda,* John challenged the lawfulness of the Bantustan 'state' of Bophuthatswana on the ground that its creation violated norms of international law (this was relevant to the accused's charge of treason, an offence which can only be committed against a state).[55] This became the leading case on recognition of statehood in South Africa, when the court appealed directly to international law to adopt the concept of territorial sovereignty coined in the *Island of Palmas Arbitration* by Max Huber.[56]

Reflecting on the role that the law played in the struggle against the apartheid regime, John wrote:

---

50 See eg Status of Transkei Act 100 of 1976, Status of Ciskei Act 110 of 1981, Status of Bophuthatswana Act 89 of 1977, and Status of Venda Act 107 of 1979.

51 Transvaal Rural Action Committee, 'Moutse – Restoring Old Boundaries', Newsletter no 29 (November 1994) 3.

52 Id 4.

53 1988 (3) SA 667 (A).

54 C Lewis 'A tribute to John Dugard – teacher, academic colleague, outstanding jurist and friend' 2010 (26) *South African Journal on Human Right*s 184.

55 *S v Banda* 1989 (4) SALR 519 (B).

56 Id 524–525.

> Law played a pivotal role in the *apartheid* state … These legal rules, abhorrent as they were, provided some opportunities for relief. Some good was to be found in the interstices of *apartheid*. This meant that while the law generally served as an instrument of oppression, on occasion it might present salvation for the oppressed. It was both foe and friend. Such was the anomaly of the *apartheid* state.[57]

Ultimately, however, John admits that international law in South Africa was 'marginalised by a process of neglect and diminution' during the apartheid era.[58] This does not, however, undermine the significance of his contribution to the struggle. Through his legal writings, his teachings, and his work as an advocate for the oppressed, John threw light on this encroaching attitude of acquiescence and breathed new life into the struggle of lawyers, judges and scholars. In the words of former Chief Justice Mohamed, speaking in a tribute to John upon his retirement from Wits in 1998, John 'began to subject this whole culture to fresh critique and re-examination … he gave to international law and to domestic public law a fresh focus and relevance in Southern Africa'.[59] Edwin Cameron wrote that:

> The work of Dugard … changed the perceptions of generations of lawyers about the role of the judiciary in enforcing *apartheid* legislation. They also recast the debate about the role of the law and the leeway lawyers and judges have in interpreting statutes to ensure just outcomes to cases.[60]

Carole Lewis (speaking at a symposium organised in Dugard's honour in 2009) recalled that:

> For many years he was largely alone in this enterprise, supported by only occasional forays from [other] academics … Eventually, in the late seventies and eighties, he was joined by those whom he had taught and with whom he had worked. John's courage in this regard has never been sufficiently recognised.[61]

---

57 J Dugard 'Foreword' in RL Abel *Politics by Other Means: Law in the Struggle Against Apartheid 1980–1994* (1995) viii.

58 Dugard (n 33 above).

59 Mohamed (n 17 above) 496.

60 E Cameron 'Dugard's moral critique of *apartheid* judges: Lessons for today' 2010 (26) *South African Journal on Human Rights* 312.

61 Lewis (n 54 above) 184.

3 Developments after 1990

I turn to discuss two arenas where John worked in the years after 1990 – the International Law Commission (ILC) and the International Court of Justice (ICJ).

3.1 The International Law Commission

As I have said, John was elected as the first South African member of the ILC in 1996, taking up the office in 1997. He was twice re-elected and served until 2011. During this important period in the ILC's life, he played his quietly effective role, promoting and supporting consensus where appropriate, criticising and politely opposing when aroused. He contributed much to the ILC's successes during this period. Not least did he do so as the second Special Rapporteur on Diplomatic Protection, leading that project to a successful conclusion in 2006.[62]

Under his leadership, the Commission adopted, on first reading in 2004, a set of 19 draft articles on diplomatic protection, which were transmitted to governments for comments and observations. His *Sixth Report on Diplomatic Protection* dealt with the clean-hands doctrine (a doctrine that has recently re-emerged, if that is the right word, before the International Court).[63] The *Seventh Report* in 2006 examined the draft articles in the context of comments, criticisms and suggestions by governments and jurists, leading to the final adoption of the text.[64]

One issue of systemic importance, given John Dugard's position as an advocate of human rights in international law, was whether the established doctrine of diplomatic protection as a right of the state of nationality and not the injured individual should be maintained. As the Permanent Court said in *Mavrommatis Palestine Concessions*:

> By taking up the case of one of its subjects and by resorting to diplomatic protection or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.[65]

---

62 J Crawford 'The ILC articles on diplomatic protection' 2006 (31) *South African Yearbook of International Law* 1; J Crawford, 'The International Law Commission's articles on diplomatic protection revisited' in Maluwa, Du Plessis & Tladi (n 35 above) 135.

63 In his *Sixth Report* (A/CN.4/546, 2004) para 18, Dugard concluded that a provision on 'clean hands' … would clearly not be an exercise in codification and is unwarranted as an exercise in progressive development in the light of the uncertainty relating to the very existence of the doctrine and its applicability to diplomatic protection.

64 See also J Dugard 'Diplomatic protection and human rights: The draft articles of the International Law Commission' (2005) 24 *Australian Yearbook of International Law* 75. The final text is available at http://legal.un.org/docs/?symbol=A/CN.4/L.684 (accessed on 20 October 2019).

65 *Mavrommatis Palestine Concessions*, PCIJ Ser A No 2 (1924) 12.

From this flows the basic requirement of nationality of claims: a state can only protect some person or entity from breaches of international law if that person or entity was a national of that state at relevant times.

Diplomatic protection thus reconciled the need for protection of aliens abroad with the then-accepted proposition that only states could be actors and have rights and duties under international law. But international law is largely based on accretion and assimilation: new institutions and rules come into existence alongside and not in substitution for older ones. Diplomatic protection undoubtedly continues to be practised,[66] even though some of the assumptions on which it was based have changed.

An initial question facing the ILC was how this older mechanism should be conceived in light of subsequent developments in international law. The international law of human rights, based primarily on multilateral treaties, involves rights of individuals at the international level, and many of these (eg rights to physical security, due process, non-discrimination and protection of property against expropriation) overlap with claims that can be brought by way of diplomatic protection if the injured individual is a national of the claimant state. Furthermore, individuals can have rights under international law whether or not these are classified under the rubric of human rights. In the *LaGrand* case, the International Court of Justice (ICJ) held that a detainee's right to be informed without delay under article 36(1) of the Vienna Convention on Consular Relations is an individual right, though one that could be invoked by the national state: it saw no need to categorise it as a human right.[67]

Another relevant development is the multitude of bilateral and multilateral investment protection agreements which give individual investors the right to have direct recourse to international arbitral tribunals (in most cases without any need to exhaust local remedies). If individual investors can invoke these rights without any need to rely on the state of nationality to espouse their claim, does it remain useful to view them as substantive rights of the state at all? On one view, diplomatic protection was better seen as 'a mechanism or a procedure for invoking the international responsibility of the host State', and the *Mavrommatis* principle as an outdated fiction.[68] In Dugard's words:

> The right of a State to assert its own right when it acts on behalf of its national is an outdated fiction which should be discarded – except,

---

66 See eg *Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo) (Preliminary Objections)* 2007 ICJ Reports 582; *(Merits)* 2010 ICJ Reports 639; *(Compensation)* 2010 ICJ Reports 324.

67 See 2001 ICJ Reports 466, 492–494 (paras 75–78).

68 This was the view taken by Bennouna, Preliminary Report (A/CN.4/484 1998) para 10.

> perhaps, in cases in which the real *national* interest of the State is affected.[69]

He identified two flaws in the ICJ's argument. First, it was not a ground for dismissing diplomatic protection that it involved the legal fiction of adoption by states of claims that, functionally, were those of its nationals; most legal systems use legal fictions of one kind or another. Second, it was an exaggeration to say that international protection of human rights has developed so far as to render diplomatic protection obsolete. While the European Convention on Human Rights provides real remedies, other regional conventions have not achieved the same success, and the majority of the world's population, in Asia, is not yet covered by any regional convention.[70] For these reasons the current state of international human rights law did not justify discarding diplomatic protection.[71]

Dugard thus proposed that the ILC codify the principle of diplomatic protection in its traditional form, although (in his characteristic pragmatic way) he made no attempt to justify the traditional view as based on a consistent or coherent doctrine:[72]

> The present report is more concerned with the utility of the traditional view than its soundness in logic … [D]iplomatic protection, albeit premised on a fiction, is an accepted institution of customary international law, and one which continues to serve as a valuable instrument for the protection of human rights. It provides a potential remedy for the protection of millions of aliens who have no access to remedies before international bodies and it provides a more effective remedy to those who have access to the often ineffectual remedies contained in international human rights instruments.[73]

On that basis the ILC went on to address the standard range of issues associated with diplomatic protection, including the content and scope of the rule of exhaustion of local remedies; nationality of claims; statelessness and dual nationals. But Dugard noted that the identity of the holder of the right of diplomatic protection had important consequences:

> If the holder of the right is the State, it may enforce its rights irrespective of whether the individual himself has a remedy before an international forum. If, on the other hand, the individual is the holder of the right,

---

69 *First Report* para 17, emphasis in original, references omitted. See also J Dugard 'Diplomatic protection' in J Crawford, A Pellet & S Olleson (eds) *The Law of International Responsibility* (2010) 1052.

70 Dugard *First Report* paras 18, 22–32.

71 Id para 32.

72 Id paras 67–73.

73 Id para 68, references omitted.

> it becomes possible to argue that the State's right is purely residual and procedural, that is, a right that may only be exercised in the absence of a remedy pertaining to the individual.[74]

In Dugard's view – and consistent with his pragmatic approach – the articles should not preclude the possibility of a claim being pursued by an individual independently. At the same time, they should place no restraint on the state of nationality itself intervening. This enabled the ILC to avoid or at least defer discussion of issues associated with individual rights and standing under international law while preserving the traditional doctrine.

Within the ILC, Dugard was fortunate to have a relatively confined topic, a relatively clean sheet on which to write, and time in plenary to debate his work. He responded – as one would have expected – with his combination of good sense and good humour, dealing with his topic efficiently, responsively and within a decent time-frame. The result – whatever positions may be taken on individual issues – is a lucid and workable text, a real contribution to the field and to the ILC's reputation.

3.2 South Africa and the International Court of Justice

When it comes to international courts, the position is less positive. As concerns the ICJ, John himself has told the unhappy story of his campaign for election in 2002.[75] Nominated by the South African National Group for a winnable African seat, the government chose not to support him, and although individual merit is relevant (or at least not irrelevant) in ICJ elections, it is clearly not enough by itself; government support (eg in the form of vote swapping) is indispensable. Considering the lack of support, John did not do badly in the vote, but another candidate was elected. In his memoir, he ruefully claims 'the dubious distinction of being the only candidate who has ever conducted an election campaign on his own in the United Nations without the support of his government'.[76]

John nonetheless remains so far the only South African to have sat in more than one case in the ICJ.[77] He was appointed as an ad hoc judge in no fewer than five cases, by Rwanda, Malaysia (three times) and Costa Rica, and performed that equivocal role with distinction and integrity. For the court, not having him as a permanent judge is most unfortunate; for South Africa, it was a missed opportunity.

---

74 *First Report* para 69.

75 Dugard (n 10 above) ch 21.

76 Ibid. In 2008 he was again nominated by the South African National Group but not supported by the government.

77 Judge ad hoc Van Wyk served in the *South West Africa* cases.

Going beyond issues of personnel, there is the question of South Africa's commitment to the peaceful settlement of disputes at the international level.

On 18 September 1929, South Africa signed a declaration accepting the compulsory jurisdiction of the Permanent Court of International Justice,[78] ratified in 1930.[79] In April 1940, South Africa's original declaration was terminated and replaced by a fresh declaration, not subject to ratification. The new declaration included the statement that the declaration would remain in force 'until notice of termination is given'. South Africa was the first country to introduce such phrasing to its optional clause declaration, making the declaration 'immediately terminable from the very first moment of its signature … [introducing] a possible method of subscribing to compulsory jurisdiction under the Optional Clause with an absolute minimum of actual commitment to submit to jurisdiction'.[80] The new declaration also excluded the court's compulsory jurisdiction over 'disputes arising out of events occurring during any period in which the Union of South Africa is engaged in hostilities as a belligerent'. The 1940 declaration remained in force until it was terminated and replaced with yet another new declaration in 1955.[81]

In 1967, South Africa withdrew its declaration with the following statement:

> In the light of the changed circumstances, *inter alia* the fact that South Africa was no longer a member of the Commonwealth as stated in the declaration of the 12th September, 1955, the South African Government is considering a revision of that declaration, which should therefore, with effect from the date of this letter, be regarded as withdrawn and terminated.[82]

Commentators claim that this withdrawal was in fact motivated by fear that 'South Africa might be brought to Court over *apartheid*'.[83]

South Africa has not since accepted the compulsory jurisdiction of the ICJ. In 2013, the Department of International Relations and Cooperation issued the following explanation for this decision:

South Africa has not accepted the compulsory jurisdiction of the Court as it is of the view that states should first attempt to settle disputes with

---

78 Permanent Court of International Justice 'Optional clause of article 36 of the statute of the court', (1939) 20 *League of Nations Official Journal* 407.

79 Ibid.

80 CHM Waldock 'Decline of the optional clause' (1955–1956) 32 *British Yearbook of International Law* 269.

81 216 UNTS 115 (1955).

82 595 UNTS 363 (1967).

83 J Dugard & R Elphick 'International adjudication' in J Dugard, M du Plessis, T Maluwe & D Tladi *Dugard's International Law: A South African Perspective* 5 ed (2018) 675.

other states by means of negotiation, and only once such attempts are exhausted, should the parties to the dispute resort to judicial settlement mechanisms.[84]

Dugard and Elphick have criticised the 'failure' of post-apartheid South Africa to resubmit to the compulsory jurisdiction of the court on these grounds, noting that:

> [I]t would be possible to attach a reservation to an acceptance of the optional clause to the effect that South Africa does not accept the Court's jurisdiction in respect of disputes that have not been the subject of prior negotiation. In these circumstances South Africa's failure to accept the optional clause may be construed as a lack of commitment to the rule of law in international relations.[85]

With this implicit attitude may be contrasted the strongly pro-international law provisions of the South African Constitution, 1996. Under section 232, customary international law is the law in South Africa 'unless it is inconsistent with the Constitution or an Act of Parliament'; and the interpretation clause (s 39(1)(b)) stipulates that, when interpreting the Bill of Rights, 'a court, tribunal or forum … *must* consider international law' (own emphasis).[86] Further, under section 233, the Constitution states that '[w]hen 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'. International law has been referred to quite frequently by the courts, and for a variety of purposes.

For example, in *Kaunda v President of the Republic of South Africa* the Constitutional Court referred to *Barcelona Traction Light and Power Company* to determine whether, under international law, a duty to exercise diplomatic protection was enforceable against the South African government. The court found that:

> The practice of imposing a legal duty to exercise diplomatic protection for an injured national or a national threatened by an injury by a foreign state, upon the national's request, is a victim of this irony. Despite

---

84 Department of International Relations and Cooperation 'Status on why has South Africa made [*sic*] a declaration under Article 36(2) of the Statute of the International Court of Justice with reference reply to question 1210 on June 2013' (2013) http://www.dirco.gov.za/docs/2013pq/pq1584.html (accessed on 20 October 2019).

85 Dugard & Elphick (n 83 above) 676. See further J Dugard, 'Twenty years of human rights scholarship and ten years of democracy' 2004 (20) *South African Journal on Human Rights* 350.

86 See J Dugard 'International law and the South African Constitution' 1997 *European Journal of International Law* 85 with regard to the role of international law in the interpretation of the Constitution.

> numerous countries which impose this legal duty in their constitutions, there is still a reluctance to recognise this practice as a rule of customary international law. It remains a matter of an exercise in the progressive development of international law.[87]

In *Fuel Retailers Association v Director-General: Environmental Management* the Constitutional Court referred with approval to a passage of the court's judgment in *Gabčíkovo-Nagymaros Project* to support the importance of the concept of sustainable development. The court also noted the separate opinion of Vice-President Weeramantry, in which he expressed the view that the concept of sustainable development is part of customary international law.[88]

In *Minister of Justice and Constitutional Development v Southern African Litigation Centre*, the Supreme Court of Appeal referred to the *Arrest Warrant* case and held that this case 'correctly reflects customary international law in respect of the immunity *ratione personae* of heads of state'.[89]

For its part, the Constitutional Court emphasised the importance of the effective prosecution of war crimes, stating as follows:

> The rules of humanitarian law constitute an important ingredient of customary international law. As the International Court of Justice [the ICJ] has stated, they are fundamental to the respect of the human person and 'elementary considerations of humanity'. The rules of humanitarian law in armed conflicts are to be observed by all states whether or not they have ratified the Conventions that contain them because they constitute intransgressible principles of international customary law. The ICJ has also stressed that the obligation on all governments to respect the Geneva Conventions in all circumstances does not derive from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.[90]

Koyabe v Minister for Home Affairs arose from the withdrawal of residence permits granted to non-South Africans. It raised questions about the right to just administrative action, more particularly about

---

87 2005 (4) SA 235 (CC) paras 149–150.

88 2007 (6) SA 4 (CC) n 64; separate opinion of Judge Weeramantry at 207. See also *BP Southern Africa (Pty) Limited v Member of the Executive Council for Agriculture, Conservation, Environment & Land Affairs* (03/16337) [2004] ZAGPHC 18 (31 March 2004).

89 2016 (3) SA 317 (SCA) para 75.

90 *S v Basson* 2005 (1) SA 171 (CC) para 122, citing *Legality of the Threat of or Use of Nuclear Weapons* 1996 ICJ Reports 228 para 79; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v USA)* 1986 ICJ Reports 14 para 220.

the circumstances in which internal remedies must be exhausted before applications for judicial review can be made. The court drew an analogy between domestic rules requiring just administrative action and 'the customary international law duty to exhaust available domestic remedies before approaching an international tribunal' and referenced the *Interhandel* case, where the ICJ held that:

> The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law ... Before resort may be had to an international court ... it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.[91]

The diversity of these cases demonstrates the broad impact that recourse to international law has on statutory interpretation and the development of the common law in modern South Africa.

John continues to bring international law to South Africa's domestic courts. He does so both directly – acting as *amicus curiae* – and through the courts' use of his scholarship.[92] A recent example of John's participation is found in the case of *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre*.[93] John assisted the court by filing an *amicus brief* on the domestic operation of the principle of universal jurisdiction over the crime of torture. The case considered whether the South African Police Service is required to investigate allegations that high-ranking government and security officials in Zimbabwe committed acts of torture in Zimbabwe, against Zimbabweans. The Constitutional Court found that there is an obligation on the Police Service to pursue the investigation of international crimes allegedly committed in Zimbabwe. In this regard, the court noted that:

> Because of the international nature of the crime of torture, South Africa, in terms of sections 231(4), 232 and 233 of the Constitution and various international, regional and sub-regional instruments, is required, where appropriate, to exercise universal jurisdiction in relation to these crimes as they offend against the human conscience and our international and domestic law obligations.[94]

The court noted further that this obligation 'is most pressing in instances where those crimes are committed ... within the territory of countries

91 2010 (4) SA 327 (CC) para 41 n 39 citing *Interhandel* (*Switzerland v United States of America) (Preliminary Objections)* 1959 ICJ Reports 27.
92 See eg *S v Basson* (n 90 above) paras 223–225.
93 2015 (1) SA 315 (CC).
94 Paragraph 40.

that are not parties to the Rome Statute, because to do otherwise would permit impunity',[95] a nice application in reverse of the principle of complementarity.

4 Conclusion

I am conscious that much of what I have said will already be known to this audience, and indeed that younger auditors may perhaps regard these issues as essentially transitional ones, part of a now remote history – in effect, as memories of yesterday's men. But it is important to know and understand one's history, especially given our present troubled times. Trouble and transition are nothing new to this country, and in moving forward we should still praise the achievements of those who confronted and eventually overcame such difficulties with insight and courage. John Dugard stands high among these, and not only in South Africa. He is without doubt the finest international lawyer your country has yet produced. I hope that among this audience there are those who will in their turn achieve great things in our discipline, and that in doing so you will recall that you stand on the shoulders of giants – even quiet and modest ones such as my friend, Professor John Dugard.

95 Paragraph 32.