

## ◎ PROFILE

Thomas Buergenthal,  
United States

*Judge of the International  
Court of Justice*



In 1995, Thomas Buergenthal<sup>1</sup> began a speech at the U.S. Holocaust Museum with these words:

*A few days ago, I reread an article about the Death March out of Auschwitz that I had written in 1956, only eleven years after the event. It was all still so vivid for me then: the cold Polish winter, the terrible cold, the exhausting three day march to Gliwice where we were stuffed into open railroad cars, the roadside shootings of those who could not walk anymore, my own temptation to simply sit down and get it over with, how three children—two of my friends and I—evaded being shot with the rest of the small group of children who left Birkenau with us, the tightly packed railroad car that emptied out as the dead were thrown overboard while the train moved towards Germany.<sup>2</sup>*

In his work as an international judge, Buergenthal has not had to imagine how it feels to be the victim of abuse and injustice. His childhood experiences have provided him with a perspective that most of his colleagues will never have on human rights violations and crimes committed by states. His adult convictions have led him to put this perspective to singular use as a member of the international judiciary.

Thomas Buergenthal was born in Lubochna, Slovakia, grew up in the Jewish ghetto of Kielce, Poland, and spent several years in the concentration camps of Auschwitz and Sachsenhausen. After World War II, he was reunited with his mother, from whom he had been separated in Auschwitz,

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and he emigrated to the United States in 1951. His higher education all took place in the United States, ending with LL.M. and S.J.D. degrees in international law from Harvard Law School. Between 1961 and 2000, he taught law at a number of eminent American institutions, including the University of Pennsylvania, the University of Texas, American University, Emory University, and George Washington University. Buergenthal has served on numerous committees and delegations dealing with the development and promotion of human rights and international law, and he is the recipient of an impressive number of awards and honors.

Buergenthal found himself drawn to the field of human rights law early on, when it was just coming into the consciousness of the legal community in the United States. He comments on the trajectory that was eventually to lead him to the position of judge on the Inter-American Court of Human Rights:

*I must say, I had never thought of a career as a judge until it happened. When you're young, when you're a student, you dream you'd love to be on this court or that court, but it wasn't something I really thought of. I got to the Inter-American Court just by what I think was sheer accident.*

*It all began in 1978 with the entry into force of the American Convention on Human Rights. I was teaching at the University of Texas Law School in Austin at the time. One of the courses I taught was a seminar on international human rights law in which I also dealt with the inter-American human rights system and would regularly point out that, since the United States had not ratified the Convention, the U.S. would not be able to nominate candidates for the Court. Although I would explain that U.S. citizens could nevertheless be nominated by any other State that had ratified the Convention, I seriously doubted that this would ever happen and never missed a chance to say so. As it turned out, I could not have been more wrong.*

*One afternoon in early 1979 I received a telephone call from a person who identified himself as the Ambassador of Costa Rica to the United States and the Organization of the American States (OAS). His reason for calling, he explained, was the forthcoming election of judges to the soon to be established Inter-American Court of Human Rights ["the Court"]. He went on to say that he was instructed by his Government to ask whether I would allow Costa Rica to nominate me to the Court. Convinced that this was a hoax and that the caller was a student in my seminar, I thanked the caller and asked him for his phone number, ostensibly to enable me to call him back after I had had a chance to discuss the matter with*

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*my wife. I still could not quite believe it when the number proved to be that of the Costa Rican Embassy in Washington. A few months later, I was elected to the Court.<sup>3</sup>*

Being a founding member of a new international court generated excitement, but also presented unforeseen obstacles.

*Once the Court was constituted—it was formally inaugurated in San José, Costa Rica, on September 3, 1979—our work began in earnest. Among our initial tasks was the preparation of a draft Statute for the Court, which had to be approved by the OAS General Assembly. We also had to submit a draft budget to the Assembly.*

*First, however, we had to overcome an unexpected obstacle. Following the Court’s festive inauguration, with all the pomp and ceremony Costa Rica could muster, we faced a sad reality: While our official seat was in that lovely country, its Government had not provided us with a place of our own—not even a suite of offices. As a result, we held our first working session in the bathhouse of the Costa Rican bar association. Here the voices of children swimming and jumping into the association’s pool often drowned out our early drafting efforts, hardly an auspicious beginning for those of us who thought of ourselves as modern-day John Marshalls. Some time later, we moved to temporary offices in Costa Rica’s Supreme Court building and eventually to permanent quarters.<sup>4</sup>*

Buergenthal was a judge with the Inter-American Court of Human Rights from 1979 to 1991 and served as vice president and president for four of those years. It was an exciting if frustrating time to be with the court, as it was just beginning its work and faced many challenges. The first case that came to the court, Buergenthal recalls, was “unique in the annals of international jurisprudence”:

*Labeled Costa Rica v. Costa Rica, the most apt description of the case, its official name, is In the Matter of Viviana Gallardo et al. Viviana Gallardo was a young Costa Rican woman who, with some other individuals, had been arrested by the Costa Rican police following a shoot-out in which one policeman was killed. Shortly after her arrest, while being held in a police station, Gallardo was shot dead by an off-duty policeman who was a friend of the dead officer. These events caused great consternation in Costa Rica, a country that prides itself—with good reason—on being a democracy committed to the rule of law and human rights. Fearing for Costa Rica’s international reputation, the President of Costa Rica, who had earlier participated in the Court’s inauguration, concluded that the ideal solution would be to submit the matter to the*

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*Court. After all, the Court had its seat only a few blocks from the Presidential Palace, so why not take advantage of its presence in the country and put it to work?*

*Although we appreciated the Costa Rican President's confidence in the Court, we had no choice but to reject the very first contentious case referred to us—assuming it could properly be described as a contentious case. The problem was that, although the exhaustion of domestic remedies requirement provided for in the Convention could in principle be waived, this was not true of the proceedings before the Inter-American Commission, which Costa Rica had also sought to waive. Unlike before the Court, individuals have standing in the Commission to present their case on equal footing with the States Parties. To allow a State to unilaterally waive a right that was designed in part to protect the interests of individuals was, in the Court's view, incompatible with the balance the Convention sought to achieve. The Court therefore ruled the case inadmissible and transferred it to the Commission, but Ms. Gallardo's family refused to pursue the matter there. So much for our first case.<sup>5</sup>*

It took some time for important cases to reach the IAHCR. But once they did, they proved to be landmark events. Of these, among the most significant were the so-called Honduras Disappearance Cases, involving more than three hundred people in that Central American nation.

*Both the admissibility and the merits phases of the Honduran Disappearance Cases presented many novel legal issues. These were, after all, the first disappearance cases ever to be referred to an international court. One difficult evidentiary issue with which the court had to deal is attributable to the fact that a government is not responsible for a person's disappearance simply because he or she disappeared in the country it governs. Responsibility for forced disappearances is therefore very difficult to attribute to governments, which is precisely why some governments engage in the practice. The court concluded, however, that this evidentiary problem can be overcome if evidence of other disappearances fitting a common pattern points to a general practice. The court accordingly ruled that, if the commission could prove that a practice of disappearances existed in Honduras and if it could show that the people disappearing in that country had engaged in similar activities or had similar backgrounds considered subversive by the government, a rebuttable presumption will have been established linking the practice to the disappearance in the specific case. The burden would then shift to the government to show that it had no part in the specific disappearance.*

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*In two of the three cases comprising the Honduran Disappearance Cases—the Velasquez Rodriguez case and the Godinez Cruz case—the government did not meet its evidentiary burden and was held responsible for the individuals' forced disappearances and likely death. In the Fairen Garbi and Solis Corrales cases, Honduras successfully rebutted the presumption of its involvement because there was nothing in the backgrounds of the victims—they were Costa Ricans traveling to Mexico to visit a relative—to suggest that the Honduran authorities suspected them of anti-state activities. There was also some doubt as to whether the two Costa Ricans had in fact disappeared in Honduras, rather than in El Salvador or Guatemala. The inquiry on this issue was not helped by the failure of El Salvador and Guatemala to cooperate with the court and by the court's lack of power to compel them.<sup>6</sup>*

The court did find the government of Honduras responsible for the forced disappearances in two of the cases and awarded damages to the families. This was followed by a squabble between the court and the government over the timing and the amount of payments, an indication of the continuing difficulty that some international courts have with respect to issues of enforcement. Indeed, the matter remained unresolved until a former judge of the court, Carlos Roberto Reina, became president of Honduras. “The moral of the story,” Buergenthal jests, “is that, when it comes to the enforcement of human rights judgments, it helps when former international human rights judges become presidents of their countries.”

As judges on the Inter-American Court serve only in a part-time capacity, Buergenthal continued throughout this period to teach and carry out other professional activities. He served as dean at the American University Law School, among other academic posts. Although Buergenthal has since left the Inter-American Court and joined the bench of the International Court of Justice, he continues to feel a special enthusiasm for dealing with human rights issues.

*What it means to suffer human rights violations is something I feel in my bones. I don't have to be told what happens in a massacre, what it is like to be disappeared or to be tortured. These are not academic subjects for me.*

*The View from the International Court of Justice*

In 2000, Buergenthal was working in Switzerland as vice chair of the Tribunal on Dormant (Holocaust) Accounts when he received a phone call.

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Stephen Schwebel, the U.S. judge who had sat on the bench of the International Court of Justice since 1981 and was then serving as court president, wished to resign his position after completing two years of his third nine-year term. The United States had begun to consider who might replace him. As an international law expert with experience on international courts, Buergenthal's name was quickly suggested.

*I received a call from the legal adviser of the State Department, who said to me, "You probably know that we've drawn up a list of people, individuals like you, who might be qualified for the court, but you are the only one who didn't nominate himself. Are you interested in being on the court?" Who would not be interested in being on the court? So I said, "Yes." Well, then I came home to my wife, and I said, "Don't count on it. They'll never name somebody who has not been an employee of the State Department or Justice Department."*

*As time went on, I kept hearing that the list was getting shorter and shorter, and that I was still on it. People were lobbying the State Department for their candidates, and I also had some friends supporting me. Then, I was called to an interview while I was still in Switzerland. I had my first interview by phone with the selection committee, the U.S. national group, and the first question I was asked was, "You know all of the people who are on this list, of course. What distinguishes you from them?" I replied, "Well, I've served on two other international courts before," since I had also served on the Administrative Tribunal of the Inter-American Development Bank [in addition to serving on the Inter-American Court for Human Rights]. That helped my candidacy, I think, because it did distinguish me from the others.*

Buergenthal arrived in The Hague to take up his position as a member of the ICJ bench in March 2000. "I thought I knew something about this court and about international law before I came," he recalled in 2005. "But I can tell you that I've learned more international law in the last five years here than I did in the thirty-odd years I used to teach the subject. In teaching, you deal with the problems you like to deal with. Here you have no choice. Something is thrown at you, and you may not know anything about the subject, and you have to immerse yourself in it."

The general experience of serving on the ICJ, the oldest and most prestigious international judicial institution in the world, also strikes a contrast with Buergenthal's time at the Inter-American Court. At the ICJ, one feels the "weight of tradition," which can limit judicial creativity:

*On the Inter-American Court, you were relatively free to strategize about judicial policy, focusing on the policy implications of a case.*

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*That is not how the ICJ works. At the Inter-American Court we did not have the large body of precedent that the ICJ has built up over the many decades of its existence and we were therefore freer to be more creative. The ICJ is much more formal and to some extent formalistic in its judicial approach.*

At the same time, Buergenthal is enthusiastic about some of the time-honored traditions of the ICJ, like that of “writing notes.” This practice requires each judge to write a preliminary opinion after the oral legal arguments have been heard in the case. These opinions are then circulated to all the other judges. The group then proceeds to arrive at a judgment through long and painstaking deliberations, taking each judge’s arguments into account. The ICJ is famous for its judgments; cases are decided by a majority opinion, which is often accompanied by several dissenting or separate opinions. The deliberation process, Buergenthal says, “is something that I must say I have been genuinely impressed with.”

*[W]hen I came here, I thought the whole business of writing notes was a waste of time. But I have come to realize its real value, for it forces every judge to carefully study the case. And that’s very important on the world court that the ICJ is. The process has many disadvantages, if only because it takes time for us to render a judgment. But it ensures that the views of all judges from all regions of the world have been taken into account, and that has great value.*

*Of course, this system also tends to produce many separate or dissenting opinions since it is easy for judges to transform their notes into individual opinions if they feel that the judgment does not fully reflect their particular views in the case. Sometimes I feel that too many such opinions are written and that we should only resort to them when we conclude that important principles were not taken into account in the majority opinion.*

Buergenthal’s experience with other international courts and his openness to having a dialogue with other international judges are reflected in his recognition of the value of other courts’ jurisprudence.

*Contrary to what one would think, we at the ICJ do read decisions of other courts that bear on what we are doing. And even though we don’t cite them—I’ve written and said we should cite them, but we don’t cite them—we do read them, and we take different views into account when they are relevant. The same is true of important national court decisions. The argument for not citing other court decisions or academic writings is that it avoids criticism that we are influenced by the views of one or the other region of the world. There is always the question, for example, that if we cited the European*

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*Court of Human Rights, somebody from Africa or Asia might say, “Why are they only relying on this European Court of Human Rights as the authority?” We don’t cite authors because [people would] say, “How come you cited X and you didn’t cite Y?” On the Inter-American Court, we did cite the ICJ and we cited the European Court of Human Rights, and initially we even cited academic authorities. Eventually, though, we decided not to cite academic authorities in order to avoid criticism from a variety of quarters. But in my opinion there is no good reason for not citing the judgments of other international courts.*

One of the striking characteristics of international courts is the diversity of the people who work in them. They are of different nationalities, language groups, religions, political systems, and, of course, professional training and experience. Buergenthal comments on the misunderstanding that this diversity sometimes creates in the mind of the public:

*The question I get very often, and what I think the public should know, is that what unites international court judges is the fact that we are trained in the international legal system. Contrary to what some people believe, international law is a distinct legal system not unlike the civil law or common law system. That is, we share a common theoretical approach to the legal problems before us. In our analysis of a legal problem, we draw on the doctrines and methodologies of the international legal system. That unites us, regardless of where we judges come from. Moreover, most of my colleagues have studied international law not only in their countries but also in the major teaching centers of our field in the world. That, too, is a unifying factor.*

*Not the Typical American*

Thomas Buergenthal is “the American judge” at the ICJ, and his nationality was noteworthy at the Inter-American Court of Human Rights, since the United States is not a party to that institution. His life story and his experience as a professor and judge have contributed to Buergenthal’s deep convictions about the importance of U.S. ideals and the rule of law, but he also brings a distinctly cosmopolitan perspective to his work.

*I’m an American in the sense that I love America and feel like an American. We immigrants probably have a greater attachment to America than the native-born Americans. We were taken in by America and we were made part of it. And I am here as an American*

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*on this court, and that means a tremendous amount to me because I know there are not many countries in the world that would nominate a naturalized citizen to serve on such a court. At the same time, having been born in Europe, I don't think like an American from the Midwest, the West, or even from New York, for example. It is therefore probably easier for me to understand how my colleagues, who come from different countries, think.*

Buergerthal has shown himself willing to speak out boldly on the role of the United States in world affairs—of course, on matters that are not before the court. At commencement at American University in Washington, D.C., in 2002, he offered an unsparing critique of U.S. policy. He recalled that he was in The Hague on September 11, 2001; in the aftermath of the attack on the World Trade Center and the Pentagon, he felt an outpouring of support from the Dutch and other Europeans. This warmth stands, he continued, in stark contrast to the “great disappointment” that followed more recent U.S. policies.

*It is a disappointment that I share because I believe that these actions are misguided and not in the interest of the United States. They undermine what I have always believed to be our commitment to a world where the rule of law, the protection of human rights and democracy are the core building blocks of our foreign policy. [These actions] undermine the ideological and moral force of the policies of interest we seek to promote. That is why some of our actions are so difficult for our friends around the world to understand, and why they are so harmful to America's long-term political, economic and social interests.*

*The most recent example . . . is the administration's announcement two weeks ago withdrawing the United States' signature from the Rome Treaty establishing the permanent international criminal courts.<sup>7</sup> Since we have not ratified this treaty, the withdrawal of our signature is designed to express our opposition to the court in the strongest terms, and what is more significant, to allow us to pressure other countries, particularly those who rely on U.S. aid, not to ratify or to operate with the court, which is the real and professed objective of this action. . . . But our almost messianic and fanatical opposition to the International Criminal Court is a manifestation of a negative unilateralism on the part of the U.S. that hurts our image abroad and prevents us from playing a constructive role in the promotion of international legal norms consistent with the ideals this country stands for. What is so objectionable about this attitude is not necessarily our opposition to this or that treaty provision or collective measure—reasonable people can differ on the*

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*need or wisdom of one or the other—what is objectionable is that we are pursuing these policies without giving serious thought to their consequences in undermining the international rule of law. One has the feeling that those responsible for these policies could not care less. This is our new, in-your-face diplomacy. It is bad for the United States and bad for the world, which we are part of whether we like it or not. It is a world that we need as much as it needs us.<sup>8</sup>*

Reflecting later about his outspokenness on U.S. policy, Buergenthal traces his depth of feeling to his personal history:

*I am very emotional about it because I came to America in 1951, roughly during the McCarthy period, and the country survived it. What followed was this tremendous blossoming of the civil rights movement. And despite or maybe even because of Vietnam, what followed was the implementation of a U.S. foreign policy, for which the Carter administration deserves much of the credit, that gave priority to human rights considerations and gave impetus to the contemporary human rights revolution. And now we're just throwing it away by focusing on the "war" on terrorism without realizing that it cannot be won if we do not safeguard the human rights of our adversaries.*

Buergenthal addressed U.S. policy again in 2004 in a commencement address at George Washington University. “Unlike in the past,” he said, “American lawyers can today no longer afford to leave matters relating to international law and international relations to diplomats, political scientists or politicians. . . . America has much to give to the world and much to learn from it, and we lawyers have an important role to play in the process. It is critical, therefore, that America not weaken its commitment to the rule of law, to human rights, to democracy, to tolerance, and its compassion for the suffering of others.”<sup>9</sup> Buergenthal’s outspokenness on that occasion was of particular note because it came just a year before the process of his reelection to the ICJ was slated to begin. He was, however, renominated by the Bush administration, and then reelected by the UN General Assembly and Security Council in November 2005. His term on the ICJ continues until 2015.