

## Thomas Buergenthal

Thomas Buergenthal was born in 1934 as the child of German-Polish Jews in Czechoslovakia. He and his parents were forced into the Jewish ghetto of Kielce, Poland at the start of the Second World War, and in mid-1944 were deported from there to Auschwitz. After the war Buergenthal lived for a few years with his mother, in the north-central German town of Göttingen before moving to the United States at the age of seventeen. There he studied law and took up a university career. He belonged to a small group of international law specialists in the U.S. who in the 1970s undertook to lend new meaning to the issue of human rights. He advised the founding of the Inter-American Court of Human Rights and was appointed to it as a judge by Costa Rica in 1979. He served as a member of the Truth Commission for El Salvador appointed by the United Nations in 1992, and as a judge of the International Court of Justice at The Hague from 2000 to 2010.

## Interview

Prof. Dr. Claus Kreß, Director of the Institute for International Peace and Security Law of the University of Cologne, first met Prof. Dr. Buergenthal in April 2014 and asked him at the time if he would submit to a biographical interview. The interview took place on March 4, 2015 in Prof. Buergenthal's office at George Washington University. Prof. Kreß and Dr. Daniel Stahl, coordinator of the Study Group »Human Rights in the 20th Century«, interviewed the legal scholar for eight hours, with a break of one hour. Prof. Buergenthal spoke deliberately and took frequent pauses to reflect and recollect the events he describes.

### Daniel Stahl:

You have written about your childhood, and in the past you have given biographical interviews about that time of your life.<sup>[1]</sup> So I recommend we begin with the period after the war, in the town of Göttingen. It would interest me to know if, during this time after 1945, you spoke to anyone about your experiences during the war years.

### Thomas Buergenthal:

I had the great advantage of having a wonderful private teacher when I first arrived in Göttingen, because I was not ready to enter a school, given that I had no real schooling before. And so I had a retired Studienrat, a secondary school teacher from the East, with whom I spent a whole year. Biedermann was his name. We met every day for two hours. He taught me how to read, how to write. And we also talked a lot about politics and everything else. I learned a lot. I asked him a lot of questions, which apparently surprised him, because he told my mother that I was a child who doesn't know how to read or write, but his awareness of world politics seems to be very substantial. Of course, there was also my mother, and initially also my mother's second husband, Dr. Leon Reitter, who had been in the camp with us, a physician who was the only doctor who had survived in the Kielce ghetto. They were sort of influences on me and Odd Nansen<sup>[2]</sup> in Norway. He was the son of

Fridtjof Nansen, the explorer, who was also in the camp. He wasn't Jewish. I met him shortly before the end of war, in Sachsenhausen, while I was in the hospital. He started to help me.

**Stahl:**

Can you tell us something about your teacher's background?

**Buergenthal:**

He came from Upper Silesia. He had not been a member of the Nazi party. When I met him, he must have been close to 70, although at my age then, everybody seemed to be that old. But he was retired. He had been refugee and settled in Göttingen. He had a daughter and a wife. And he was a lovely man. This was sort of my first contact after the war with Germans who were not trying to kill me. He was nice. And I could have nice conversations with him.

**Stahl:**

What did you talk with him about?

**Buergenthal:**

About whatever was happening in the world. I had to write an essay every morning when I came in, in German first and then a little later in English about whatever I saw in the streets in Göttingen. And after a while, there was very little left to report about Göttingen. Even then it wasn't a big city. So, we talked about things that I heard on the radio. For example, this was the period when the Nuremberg judgements came out, and I talked to him about it. I listened to the trial. And he did not like Poland particularly, and I had just come from Poland, so we also talked about Poland. I really don't remember anymore, but I always asked why people became members of the party, all of those things, and he explained that. That is about all I can remember. He was the man who also got me interested in reading. Of course, my best reading was Karl May. I don't think my teacher recommended these books, although he wanted to find something that would interest me to read. We also talked about things I heard on the radio.

**Stahl:**

Did you tell him what you had experienced during the war?

**Buergenthal:**

Yes.

**Stahl:**

What was his reaction?

**Buergenthal:**

His reaction was one that to me, as a child, struck me as being a very honest reaction. Because the usual reaction in those days in Germany was immediately apologetic: »I had nothing to do with it.« He simply said, how terrible he felt and that they had seen some things. And then, of course, he also pointed out that because of the Russians they lost their homes. I don't know where he had lived, but I also knew that the Russians mistreated the Germans.

**Stahl:**

Did you talk with him about Nuremberg? What was his opinion about the trials?

**Buergenthal:**

I don't remember but I'm sure we did. We must have discussed it. And of course at that time I told him the trials were wonderful; they should have prosecuted many more. But he was a sort of a grandfatherly type, and honest in his views, so that I could talk with him very, very freely. I learned a lot from him, not only to read and write, but about what was going on in Germany, the attitudes of people – much more than I learned later from my teachers in the Gymnasium.

**Claus Kreß:**

Can you still recall your reactions when you heard the Nuremberg judgments?

**Buergenthal:**

I was delighted because I kept hearing »by hanging«. You know, this was still the time when I had just come out of the camps. And I don't remember the time how I heard it on the radio, because I must have heard it after 1946 or the beginning of 1947.

**Kreß:**

In 1946.

**Buergenthal:**

I didn't get to Göttingen until December of 1946, so it must have been some time later. I didn't change my mind about my hatred of the Germans for a number of years. That happened mainly through the influence of Odd Nansen. I think I describe it in my book. I met him again a few years after we had met in Sachsenhausen. I heard that he had published a diary.<sup>[3]</sup> That's how I got in contact with him again. The first conversation that started was, when he sent me his book, the German edition. It indicated that he had given the income from the German edition to German refugees. I said to him: Why would you give it to them? Look what they've done to us. This started a conversation about reconciliation, about hatred. When I first came to Göttingen, I had this vision of standing on the balcony where we lived with a machine gun. And when the families would walk by on the weekends, I wanted to just give them all back what they had done to my father and my

grandparents. Nansen helped a great deal.<sup>[4]</sup> And just living in Göttingen and going to school with children who obviously had nothing to do with the Holocaust made a big difference. Here, we would say, I mellowed in my hatred.

**Stahl:**

What arguments did he have that convinced you to change your mind?

**Buergenthal:**

His basic point was that hatred doesn't lead to anything. On the contrary, it just creates a cycle of violence. Hatred creates hatred. And I started to think about it. So, by the time I came to the United States when I was 17 years old, I had already reached that conclusion. I was surprised when I got there and stayed with my uncle and aunt. My uncle was my mother's brother from Göttingen. He had left Germany in 1938, and his wife was from Berlin. And they hadn't experienced anything, from my point of view. But they were still very much full of hatred. They wouldn't speak German in the house, even though their English was not particularly good. My aunt and uncle gradually also mellowed, but my uncle never went back to Göttingen, even for a brief visit.

One teacher started to talk about the bombing of Hamburg. I said in class something that in those days you didn't really dare to say to teachers: »Why don't you mention what happened to people in the concentration camps?« He got quite angry.

**Stahl:**

How was the situation in the Gymnasium? Did you talk about the Nazi dictatorship?

**Buergenthal:**

Well, what happened there, I was in the Realgymnasium in Göttingen. There were some teachers who were still, at least from what my mother told us, »alte Nazis«. I had a wonderful teacher in English who had been a prisoner of war in Britain. The one experience I had with one teacher who started to talk about the war. The history they taught in school in those days was not contemporary history. But at one point this teacher started to talk about Hamburg and the bombing of Hamburg. And I said in class something that in those days you didn't really dare to say to teachers: »Why don't you mention what happened to people in the concentration camps?« He got quite angry and at that point I just walked out of the class. Remember, I don't know how old I must have been, 14 years old or something, maybe 13. And I just walked out and went home. There I told my mother what happened. She, of course, went to the school and complained. That was the only negative thing that I experienced. When my book came out, somebody who had been in the same

school, a retired Oberlandesgerichtsrat in Braunschweig, wrote to some of my classmates and asked: »Did you know Buergenthal?« And one of them said: »Yes, I know him well.« »Did you speak with him?« »Oh, no, I couldn't. My father was a big Nazi and I didn't dare to talk to him.« So, that was sort of the atmosphere.

**Stahl:**

Did you realize it during this time?

**Buergenthal:**

No, not at all. The advantage I had was that I was very good in sports. And then the kids would often look at me and say: »You don't really look like a Jew.« So, they still had the Nazi Stürmer caricatures of Jews in mind, even the children.

**Stahl:**

Did you talk with your friends about your experiences?

**Buergenthal:**

Not really. It's interesting that even when I came to the US nobody asked me about it in those days.

**Stahl:**

How did they react when you left class? Did they ask you later?

**Buergenthal:**

They were all scared. Afterwards they said: Yes. But I'm sure this was because they thought it was nice to teach this teacher a lesson, not because of my heroics.

**Stahl:**

Did you talk with your mother about the situation in Germany?

**Buergenthal:**

Strangely, and I'm trying to recall, we did not talk so much about what was going on in Germany. Although we talked that some people still hadn't learned. The Denazification wasn't really taking place, and there were complaints. There were still people who had been Nazis and they were back teaching. But my mother and I talked about our experiences because I was separated from her in Auschwitz, which was in 1944, and I didn't meet her again until December of 1946. So, there was a lot of time in between that she wanted to know what happened and everything else. Of course, it was very hard for her to be in Göttingen. This was her hometown. My grandparent's store and house was on the

Gronerstraße, one of the major streets. This was the town, where – when the Nazis came to power – all of her friends from the Lyceum would cross the street in order not to greet her. This is what she came back to. But there were some good people who had helped my grandparents in Göttingen. We lived in the house that belonged to a family named Schügl who had a jewelry shop. He was a very believing Catholic and had never been a Nazi.

**Stahl:**

Did you meet any people who had resisted actively?

**Buergenthal:**

No.

**Stahl:**

Then, at the age of 17, you moved to the United States. What were your plans for the future at that time?

**Buergenthal:**

I actually thought I would come back to Germany within a year. I was just curious about America, like most of my fellow students in Göttingen in those days. By that time, America was a place of big cars, chewing gum, movies. I really thought I would go back to Germany, and probably go on to Israel. But once I came to the United States I wasn't going to leave.

**Stahl:**

What did you think you might do in Israel? What ideas did you have about it?

**Buergenthal:**

Earlier somebody who had come to Göttingen told me that I could go to a diplomatic academy there. The idea about the diplomatic service sounded interesting. Once I came to America, I went for a year and a half to high school because I hadn't finished school in Germany. The difference was just striking. Everything was voted on. In Göttingen the teachers would tell you what to do. Here, everything was voted on. That was democracy. And the freedom appealed to me. You could laugh at your teachers. And there were open discussions about things. I was very active also in sports at the time. I liked the high school very much. Rather than give me a placement exam, they had me meet with the heads of the different departments; the school language department, English department, math department. I would meet with them for about half an hour or an hour and they would talk to me and ask me questions. On the basis of these conversations, they decided that I needed only a year and a half in high school.

The kids in school never asked me: »What happened to you during the war?« Nothing. It

was a period in America when nobody was interested in it. Not even Jews. Everybody wanted to forget the past.

**Stahl:**

Did you have a desire to speak about it?

**Buergenthal:**

Only when I finally got to college did I write an article about the Auschwitz death march. And nobody thought that it was real because it was a literary magazine. They thought it was an imaginary trip out of Auschwitz. I had some very good teachers, we had conversations but there was really no interest at that time, in the past.

**Stahl:**

What were your own interests during this time?

**Buergenthal:**

I was always interested in politics and in writing. I even at one point thought that journalism would be something I would be interested in. But then I came to the conclusion, erroneously, I think, that an immigrant could not become a good English-language journalist, which I've since realized is not the case. This was a very anti-communist period in the United States, especially once I got there. Senator McCarthy was there. What also struck me was the racism that was still very strong in the US. I went then to a small college in West Virginia, Bethany College. There were no black students in the college, it was total discrimination. Back then, the college had sort of a speaker service. Some social organizations like the Kiwanis Clubs, for example, in small towns that were interested and asked the university to send them somebody who could give a talk about foreign countries. At Bethany we had students of different nationalities, including a Korean student. He and I would sometimes be invited. He would speak about Korea and I would speak about Germany or Europe. In one place I was asked about the anti-communist policies of the US. That was the time when a delegation from the US Congress was sent to all of the US government libraries in Europe to remove communist books and I said, it reminded me of the Nazi book burning. That started a veritable uprising in the hall with some in the audience supporting the congress and others who opposed what was being done. I used to get paid about ten dollars for my speeches. But this time I collected 25 dollars. Obviously there were people who agreed with me.

Having been liberated by Soviet troops, it took me a long time to believe that communism was a real threat to democracy.

**Stahl:**

What were the issues on which you spoke?

**Buergenthal:**

Usually I would be asked to describe what was happening in Germany at the time – by which time, of course, I was a great expert. They were interested in the political parties in Germany, whether there was a danger that a Nazi party would arise again. And of course everybody was terribly afraid of communism. That was the period of the Cold War.

**Stahl:**

What would you tell them?

**Buergenthal:**

First of all, that there was no danger. At least for the time being, there wasn't any danger of Nazis coming back. Having been liberated by Soviet troops, it took me a long time to believe that communism was a real threat to democracy. That came later, when I began to see communism and the real threat.

**Kreß:**

Was the Israeli-Arab-conflict an issue for you at that time? Did you follow the developments closely, or have a particular interest?

**Buergenthal:**

No, I think this was just the beginning. All of us, I think, were very pleased and proud of the fact that there was a Jewish state. But I had no desire at that point anymore to go to Israel.

**Stahl:**

Were there teachers who made a difference for you?

**Buergenthal:**

Yes, there were about three teachers. One younger teacher who had lost a leg in the landing at Normandy, a political scientist. He was very good. And the head of the department was a professor of Classics, specializing really on Greek and Roman history; and my German and French teacher. Those three were people with whom I talked a lot, and from whom I learned a lot.

**Stahl:**

How did they influence your thinking?



**Buergenthal:**

At that point, I became very interested in American politics and international politics.

**Stahl:**

Which years?

**Buergenthal:**

This is from 1953 to 1957, when I graduated, a four-year period. That was a very interesting period in the politics in the United States with the Korean War and the McCarthy period.

**Stahl:**

What did your teachers think?

**Buergenthal:**

Well, these teachers were actually quite opposed to McCarthy and some were afraid that they might lose their jobs. I remember, when I was in Washington on a semester program, I sent a postcard to one of my professors who was quite leftist and said: Senator McCarthy has been asking for you. And he suggested that I not do that in the future!

**Stahl:**

And your own political convictions?

**Buergenthal:**

At that point I knew already enough about communism, but this was not something I was interested in. I couldn't vote yet, I don't think. Adlai Stevenson was running for president and he lost twice against Eisenhower. He was a liberal governor of Illinois, a very interesting man. He reflected my political orientation.

**Stahl:**

When did you start seeing communism as a danger or at least as something you weren't interested in?

**Buergenthal:**

By 1956, of course, you had Hungary already.<sup>[5]</sup> And that was a telling political event. But before that one got a lot of information about what was going on, about Stalin and the Gulag, and what was happening to people who had been courageous during the war. All that had an impact on me.

**Stahl:**

Did you follow the discussion about the Jews in the Soviet Union?

**Buergenthal:**

Only to the extent, if I remember, that in 1953 there were killings of quite a number of Jewish doctors by, Stalin, I think. For a while, of course, a number of Jewish communists were very high up in the Soviet regime. But they disappeared. I think 30 or so Jewish medical doctors were executed in the Soviet Union around that period. But it was not something that I was very much interested in.

**Stahl:**

Did you, besides that, have some contact to the Jewish community in the US?

**Buergenthal:**

Well, first of all, I think, just to fit in. I mentioned to you that I spent a semester in Washington while I was in Bethany. Here, you had to write a major seminar paper. And I decided to write about the Jewish lobby in the United States at the time. It shows you my political interest. I wanted to see how lobbying evolved. And that was something that interested me.

**Stahl:**

Did you experience any kind of anti-Semitism?

**Buergenthal:**

Not at all. I was very much accepted by my fellow students. The only experience I had where that issue even came up was in my second or third year. I became a proctor for the dorm where the first year students lived. Bethany was a religious college, the Disciples of Christ, which is a very liberal American religious denomination, a Protestant one. But drinking was strictly prohibited and if you were caught drinking, you would immediately be thrown out of college. Three miles down the road was sort of a bar where you could go and drink. But as proctor, my responsibility was to keep the place quiet. And I remember one student coming in totally drunk and I tried to get him to bed because I was afraid that he was going to be thrown out. Sometimes the dean of students would make tours. And as I was pushing the student in, he said: »You dirty Jew, what the hell are you doing...« He was totally drunk. So, it came out. But that was the only time I ever had even a sense that it made a difference.

**Stahl:**

When did you decide to study law?

**Buergenthal:**

Already in college. I was drawn to law because my father had studied law. My father studied in Krakow, and then he went to Berlin. I don't think he ever finished his legal studies. In Berlin he worked for a private Jewish bank before Hitler. But at home the notion always was that if you study law you can do anything you want to do – which isn't true in America. So, I had no doubt by the time I was in my first or second year in college that I wanted to study law and that I wanted to do something in the international law field. And that was driven in part by the fact because of my languages. In those days, still in this country, much less so today, hardly anybody spoke any other language, at least not the college people. The immigrants did, of course, but all of the immigrants' kids wanted it not to be known that they spoke the language. I believed in those days that international law was the thing where I could do something important. And I still believed that international law could prevent wars and human rights violations. I was very idealistic at the time but I still believe it's true, in a more limited way.

**Stahl:**

Did you realize while in college that the environment in the United States was not as friendly to international law as it had been during the forties?

**Buergenthal:**

Not really. You know, there was the McCarthyism, of course.

**Stahl:**

Bricker Amendments<sup>[6]</sup>?

**Buergenthal:**

The Bricker Amendments. But the people I knew, with whom I was together, that was not the real America. Bricker came from Ohio. But mainly, the right-wing in the US at the time, the anti-Communist movement was in the South. The anti-black movement was also in the South and to some extent in the midwest. That was the sort of right-wing, anti-foreigner, anti-internationalist period. But no, that didn't have any sort of effect on me. The only thing that affected me was when I was in law school and at one point thought I should apply for the diplomatic service, and then I found out that you had to take the diplomatic exam for the admission, but that you had to be under 30 and be a citizen for ten years already. And I couldn't qualify. I was stupid because I should have challenged it in the Supreme Court. A few years later somebody challenged it and it was ruled unconstitutional.

**Stahl:**

When you got to law school, did you occupy yourself with international law from the start?

**Buergenthal:**

Yes, except that in those days law schools were not the law schools that we have today. At the time, almost all law school courses were required courses which mean that you couldn't even take a course in international law until your third year. So, in many ways that's why I decided to go to Harvard, because I wanted to specialize in the field.

**Stahl:**

When did you go to Harvard?

**Buergenthal:**

I went to Harvard in 1960, immediately after I graduated from NYU. When I was graduating from Bethany College, they recommended me for the Rhodes Scholarship. And I won the Rhodes competition for West Virginia. Now, the interesting thing was that I wasn't even a citizen yet when I was being recommended. And the person in West Virginia, who was in charge of that committee, was a lawyer and I think a former FBI agent, who said: »Don't worry about it. We'll get you citizenship in two weeks.« And so that's what happened. The country was divided into four or five regions where you were selected. I think one or two persons from each region. The chairman of my selection committee happened to be the brother of President Eisenhower, Milton Eisenhower. It was quite clear that I had no chance of winning when I walked in, the first question basically was: »Why do you want to go to England? You just came to the United States.« And I had no answer to it. As I walked out, one of the members of the panel handed me a piece of paper and said: »If you're interested, there is a very good scholarship at NYU and I'd be glad to recommend you.« It was the Root-Tilden Scholarship. Everything was paid for, including 70 dollars spending money. So, even though I got into Yale and Chicago, I went to NYU. I didn't apply to Harvard yet, because the admission deadline was later and I didn't have 45 dollars for it.

**Kreß:**

Who was the international lawyer at NYU?

**Buergenthal:**

It's somebody you probably never heard of. Professor Cecil Olmstead.<sup>[7]</sup> Tom Franck<sup>[8]</sup> was coming but not there yet when I was there. Olmstead was basically a practitioner, who represented various oil companies while teaching.

**Kreß:**

So, that was not yet the beginning of your career as international lawyer.

**Buergenthal:**

No. At one point I thought possibly of practicing. It never really interested me, but I had some friends in different big law firms in New York who would say: »Come and interview at least.« The advisors would say: »Don't tell them that you're interested in international

law because they'll think you like to travel.« So, that was the advice you got from our own law school.

**Stahl:**

When did you first come in touch with international human rights law?

**Buergenthal:**

Well, actually at Harvard, with Professor Louis B. Sohn and Professor Richard Baxter, who later served as judge at the International Court of Justice. Harvard had a great faculty in international law at the time. Basically, I took some courses with professor Sohn. Then I got my LL.M. degree. By then I had already received a job as an assistant professor at the State University of New York in Buffalo. Every summer I would go back to Harvard, because Buffalo had no international law library. In 1965, I went back to Harvard to do my doctorate.

**Stahl:**

International law or human rights law?

**Buergenthal:**

Well, both.

**Kreß:**

Who was your international law teacher there? Was there a moment, a time when you can say in retrospect influenced your later approach to international law?

**Buergenthal:**

There were two persons. One was Louis Sohn<sup>[9]</sup> who was a wonderful, charismatic teacher. He taught some seminars that nobody else at no university in the US would ever teach. Four of us were in a course on international administration. It was about how international organizations operate. On his first day in class he said, »I expect a paper and I want an outline on this day and then the paper is due.« There were only four students in the whole class. On the day when the outline was due, he said: »Who brought his outline?« I was the only one to raise his hand. He took one look at my outline, put away all of his books, and started tearing it apart. He destroyed me totally. I went home and told my wife: »That son of a bitch, I'm never going to go back.« After a few days, I realized that he was right. I wrote the paper without first submitting a second outline to him. When I received the paper back, Professor Sohn noted on it: »You should publish this.« My paper was about the European Court of Justice and the appeal for annulment. In those days, cases were beginning to come that interested me. And I actually published two articles based on that paper in the American Journal of Comparative Law.<sup>[10]</sup>

Richard Baxter was an expert on international aviation law among others. And he taught public international law as well. And there was also Professor Milton Katz, who is not very well known today. He used to head the International Law Department, and he had been a legal advisor for the Marshall Plan. Those were basically the people I worked with. I wrote my doctoral dissertation on law making in the International Civil Aviation Organization. Why would I write about this organization if I was interested in something else? Because Louis Sohn told me: »I don't want you to write anything about human rights and I don't want you to write anything about any organization you know something about. I want you to write about one international governmental organization you know nothing about at this point.« So, I thought for a minute and I said: »I don't know anything about the International Civil Aviation Organization.« This dissertation became a book, *Lawmaking in the International Civil Aviation Organization*, Syracuse University Press, 1969. But I never touched the subject again. It didn't interest me. But I learned a lot about the internal practices of international organizations that proved very useful to me in my teaching and judicial practice.

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**Stahl:**

Can you recall the first time when you became more involved in human rights law, when it wasn't just one issue among others, but something you especially focused on?

**Buergenthal:**

I am trying to think whether I had a course from Louis Sohn specifically in human rights or whether that came later. I think, I had the course from him on United Nations law, which of course in those days also was something very new. In one of those courses that Louis Sohn taught, there was a lot of emphasis on human rights. And in this period, incidentally, what caught my interest was the European Convention on Human Rights. Everybody was talking about it in the literature. If you opened any journal, you found things about the European Convention on Human Rights. That caught my interest. In 1962 or 1963, I decided to research how the European Convention on Human Rights operated. After looking at all of the literature at the time, I found the one subject that wasn't really touched was the domestic application of the European Convention on Human Rights. I decided to write an article about that. I published the article in the *Buffalo Law Review*, which was not a very important journal. It was seen by the International Commission of Jurists, and they republished it. They had in those days a very important journal in four languages.<sup>[11]</sup> And so my career was made. As a result of that article, I was invited to a meeting in England, and then to a meeting in Vienna, and I became known in this field. This was just the beginning of the European Convention of Human Rights.

**Stahl:**

What about the Universal Declaration of Human Rights? Did you focus on other conventions, or did you focus on the European Convention only?

**Buergenthal:**

I thought the Universal Declaration was a nice statement but it was not having the effect of a treaty and was not very important. Today I think differently about it. It was not until much later that I came to believe that in many ways it was more important that we had the Universal Declaration, more important than if it had been a treaty that nobody ratified, for example.

**Stahl:**

Did you follow the negotiations about the two Covenants<sup>[12]</sup>?

**Buergenthal:**

No, but I followed the drafting of the American Convention on Human Rights that started at the end of the sixties. I had a friend at the OAS who would send me all of the documents. I realized that they were making the same mistakes that had been made in the drafting of some articles of the European Convention of Human Rights. Article 6 of the European Convention, for example. In some countries the assumption predominated that the convention only applied to civil rights and not to administrative rights. And so I suggested some revisions, which found their way into the American Convention, see Article 8(1) of the Convention.

**Stahl:**

Were the Jews in the Soviet Union an issue for you? There were some Jewish organizations that already talked about these problems during the sixties and called them human rights' violations.

**Buergenthal:**

Yes. In 1971, the American Jewish Committee founded the Jacob Blaustein Institute which has been devoted to human rights. The head of the Institute at the time was a man by the name of Sidney Liskofsky.<sup>[13]</sup> He asked me to join the Institute. We drafted the declaration, the so-called Uppsala Declaration on the Right to Leave and the Right to Return.<sup>[14]</sup>

**Stahl:**

Were you involved in other political actions or activities?

**Buergenthal:**

No, at one point when I was in Buffalo where I taught, I was involved in the local

Democratic campaign. The Congressman we had decided to run for the Senate lost. And so the Congressional seat was open. I thought I could run for it. This was a county with a large Polish, Jewish and Italian population. I thought with that group, I had a chance to get elected to the Congress. I went to speak to the people I worked with in the Democratic committee, and they said: »Yes, we will support you but you have to first win the primary.« To win the primary in those days, you needed 60,000 dollars. By then I already had three children and on my salary I would have had to work two years to get it. That was the end of my political ambitions.

**Stahl:**

Did you follow the Civil Rights Movement?

**Buergenthal:**

No. I mean, I followed their activities and I was always very supportive, but I felt I didn't know enough about it and that this was much more a problem for native born Americans.

**Stahl:**

You didn't see any connections to human rights' issues?

**Buergenthal:**

Of course, I did. Except that I then realized that if you really want to achieve something in an area, you stay away from other issues because otherwise you weaken what you're trying to achieve. It was hard enough in the US, for example, to put an end to de jure segregation. And it was even harder to do anything with the UN and human rights at the time. If you decided to get involved with both you wouldn't have any sort of impact. I had never really been in the South of the US where there was real issues to which I could make a contribution were international human rights issues.

From 1972 to 1974, I was the chairman of the Human Rights Committee of the ABA. I testified before Congress on the ratification of various instruments. I also worked very hard to get the US to ratify the Genocide Convention. I finally left the ABA, because I said: »We're just wasting our time. They're never going to ratify the Genocide Convention, and I have other things to do with my time.« One of my students then began to work for the American Bar Association. Years later, it was in the middle of the night, I got a call from the student who said: »See, you were totally wrong. Reagan is going to ratify it.«

**Stahl:**

Were you also involved in the hearings held by Congressman Fraser<sup>[15]</sup> in 1973 on human rights issues?



**Buergenthal:**

Yes. I also appeared before the Fraser committee. Fraser was a wonderful man. That was one of the most important developments we had, which preceded the Jimmy Carter efforts. Carter takes all of the credit. But Fraser managed to pull together almost everybody who had been working in human rights in the US at the time, in support of various treaties. We testified before him. I don't know what I testified on at the time. In one of my books I pointed out that Fraser deserved in many ways more credit than Carter when it came to making the country realize that there were international human rights treaties. That was a significant breakthrough, because suddenly there was recognition at least by somebody in government that international human rights were important.

**Stahl:**

How did you come in contact with Fraser? Did he know about you, or did you apply to him?

**Buergenthal:**

I think it could have been at the time when I was already working with the ABA or with the Blaustein Institute Committee on Human Rights. I was publishing on human rights already quite extensively.

**Stahl:**

But do you remember if he came to ask these organizations to cooperate, or if it was the reverse?

**Buergenthal:**

No, I was invited to appear before this committee. There was one person working for him, a young man, who is still in town.<sup>[16]</sup> I ran into him not long ago. He advised him on who the people were that he should invite. And I think that's how it came about. A very unassuming young man, who was very good in knowing what was going on, and he helped Fraser immensely.

**Stahl:**

I was reading an article by you, I think it appeared in 1974. It was about international human rights law. You took up some arguments Fraser had made before Congress.<sup>[17]</sup> So, I was wondering if you took Fraser's arguments, or if Fraser took your arguments? One argument in your article was that there were no institutions, no departments in the American bureaucracy to deal with international human rights.

**Buergenthal:**

I recommended that. It was to establish the position of the assistant secretary of human rights. At about that time (in 1974) I was named to the US National Commission for UNESCO and in 1976 elected as chairman of its Human Rights Committee. In that capacity, I was

responsible for representing the US at UNESCO on issues relating to human rights. Nobody in the departments seemed to know anything about the subject. So, for all practical purposes I could draft my own instructions.

**Stahl:**

Which issues did you deal with?

**Buergenthal:**

I became the chairman of a very small American delegation to a UNESCO meeting to draft a UNESCO declaration on human rights education. And this got me into a position of some standing in this field, at least officially. We drafted the declaration and, of course, the US government decided not to support it. The other thing was, one of the members of my delegation was a professor of psychology and education. We organized some meetings with her people to promote international human rights education in American schools. During that period I had this wonderful experience of being sort of the intermediary between East German and West German delegations. They didn't talk to each other. So, they would talk to me, and then I would pass it on.

**Stahl:**

How would you judge the role of the legal expert organizations in which you were involved: the American Society of International Law, the International Institute of Human Rights, and the Blaustein Institute?

**Buergenthal:**

The American Society of International Law had received a big grant from the MacArthur Foundation and they had established a number of research committees. But there was none on human rights. Louis Sohn suggested that I write a memo to the society, and urge the establishment of a committee on human rights. And that happened. I became the rapporteur of that committee. A professor, Frank Newman, a former dean at Berkeley, became the chairman of that committee. For a number of years, as long as the money lasted, we helped to publicize human rights education, in the United States.

**Stahl:**

Education in schools?

**Buergenthal:**

Basically law schools. Political Science to some extent, but mainly international law.

**Stahl:**

You issued some publications, or did you have any programs implemented?

**Buergenthal:**

We published an interesting colloquium in the Texas Law Review on different human rights issues.<sup>[18]</sup> Besides, there were some individuals writing articles on different subjects that we discussed. But basically the big work of the committee was a publication on different aspects of human rights, written by Sohn and me.<sup>[19]</sup>

There were no materials on human rights issues.

**Stahl:**

Did it have an impact?

**Buergenthal:**

In some ways you can say nothing had an impact politically in the United States at the time. It had an impact in the US because you could encourage the teaching of human rights law. But until the Sohn and Buergenthal book came out, there were only three of us teaching human rights in American law schools. Louis Henkin,<sup>[20]</sup> Louis Sohn and I. At that time, I was focusing mainly on the European Convention on Human Rights. Louis Sohn was focusing on the UN. I don't remember what Henkin was doing, but I imagine he also did more on the UN and possibly also on US constitutional law, which was his main field. There were no materials. This was one reason why we wanted to get this book out as soon as possible. Therefore, we did it initially in mimeograph form. Then we sent it out to 13 people – two of them in Europe and the rest in the United States. We asked them to try out the material. They did so and gave us some advice on what we should do. Then they all started teaching in the the field and gradually others did so too.

**Kreß:**

Who were your scholarly partners outside the United States at the time?

**Buergenthal:**

Schermers.<sup>[21]</sup> In Germany Rudolf Bernhardt,<sup>[22]</sup> and Hermann Mosler.<sup>[23]</sup> I was on the Encyclopedia of the Max Planck Institute earlier on, when Mosler was still in charge of the Institute. Incidentally, that was one of the fascinating experiences, those Monday morning meetings at the Max Planck Institute. International law institutes was something that we didn't have in this country, still we don't. They would bring together their various assistants who were working at the Institute, and each of them had to deliver an interesting paper. That was a fascinating colloquium for me to listen to. That is missing here. We don't have it really. We should have it. Those panels that were established by the American Society were supposed to do that, but we didn't have an institute, so we couldn't do it.

I also was involved with the International Institute of Human Rights in Strasbourg. I was there almost from the very beginning. It was founded by René Cassin. And I was brought in by Karel Vašák,<sup>[24]</sup> who became the executive director of the institute for many years and then also became the legal advisor of UNESCO at some point. In many ways when I founded the Inter-American Institute of Human Rights, which was my baby, it was based on the Cassin Institute. When I was elected to the Inter-American Court, at the first session I suggested to the court that we establish an institute.

**Stahl:**

How did this International Institute work?

**Buergenthal:**

It was the first time that young professors and graduate students were brought to Strasbourg for summer courses on international human rights, and legal scholars in the field to teach them. I taught there a number of times in the early years of the Institute. Quite a number of people who were our students there have become very well known. And every so often you still run into people who were my students there. For example, one of the Chilean women who was my student there, later became my colleague in the UN Human Rights Committee. It was a very important catalyst really in the field. The problem was that they never really published anything, at least not in my day. Maybe it was less important in Europe to publish, but unlike the Academy of International Law in The Hague where the lectures are published and they carry a certain weight, that was never done in Strasbourg. It was just a teaching institution. As a matter of fact, one of my colleagues here, Professor Dinah Shelton, who is well known in the human rights field, was my student there already.

The Strasbourg Institute was much more Europe oriented at the time. I supported the European Convention on Human Rights and tried to get it to reach different parts of the world. Although I found, to my great surprise, that despite all the things that were being said about it, it had very limited effect domestically at the time. To me that was something that one needed to work on. In those days, by the time you got a case to the European Court you would grow a big long white beard. Therefore it was important to be able to invoke the Convention, domestically. That was sort of my involvement. I wrote a number of articles on the Convention. I gave some talks at the American Society of International Law. When I was a student at NYU, we had a professor from Germany, Gerhard Mueller. He was very interested in comparative criminal law, and so he started a series of foreign criminal codes. He gave me a hundred dollars to translate the German criminal code. I actually learned more German criminal law than American in working on the translation because we only had two hours of American criminal law and I had a whole year working on the translation.

**Kreß:**

May I ask one question about human rights law and the law of armed conflict? Nowadays it

is very much part of the debate, how those two bodies of law should interact. What was your opinion at that rather early moment? First of all, in those days was it kept entirely separate from the other issues? How did your interest develop? Did you see that as a distinct area? I was thinking about Vietnam, when you thought about it?

**Buergenthal:**

On Vietnam, I decided to teach a seminar on the Vietnam War and international law in the early days of the war.

**Stahl:**

How did you teach about Vietnam? Was it a very critical seminar?

**Buergenthal:**

No, I wanted to teach it by focusing on the international law and the extent to which it was being violated? To what extent was it relevant?

**Stahl:**

What was your conclusion?

**Buergenthal:**

I don't remember. I should tell you though that not long afterwards, Richard Baxter and I wrote an article together, urging the US ratification of the Geneva Protocol on chemical warfare. I had to testify before the Senate on that subject. To answer your question: I was, initially, much more interested in human rights. I had some doubts to what extent international criminal law and law of war was really relevant, until I served on the Truth Commission for El Salvador.<sup>[25]</sup>

**Stahl:**

So, it seems that in this Vietnam seminar, you did not combine human rights law with law of war.

**Buergenthal:**

I really don't remember. I don't remember what I taught. I'm not even sure if it was so much human rights as it was about the legitimacy of the effort. All I remember is that I felt it was very important to teach that. But remember that goes back to the sixties.

**Stahl:**

I saw that you have this chapter on humanitarian intervention in your book, *The International Protection of Human Rights*. How did you come to work on this issue in the

late sixties, early seventies?

**Buergenthal:**

I think for those of us who started in this business early, it was always an important topic because in many ways it was one of the few recognized themes in international law that dealt with human rights issues. But humanitarian intervention has been more misused, than used properly.

**Stahl:**

Was this a discussion among international lawyers or with NGOs?

**Buergenthal:**

At the time, there were no NGOs, really. It will surprise you. I was just telling my students the other day, there was only one human rights NGO in the United States in the early seventies. Amnesty International was created in 1961 in England. We had in New York City the International League for Human Rights. It was initially organized in Europe by Jewish groups as an international organization. All of these human rights NGOs started much, much later. I often thought, once we've established that international human rights is law, then you can have NGOs.

**Stahl:**

But there were some humanitarian NGOs like the International Red Cross.

**Buergenthal:**

I never saw it in those days as a human rights NGO. A lot of Jewish organizations did humanitarian work. But they didn't see themselves as a human rights organization.

**Stahl:**

When did you start to get in contact with NGOs?

**Buergenthal:**

I should tell you, I barely got in contact with them at all. I always had problems with NGOs, let me tell you why. My experience with the NGOs has been that they are driven, and I'm not criticizing, by the need for funds. When I was on the UN Human Rights Committee, we would get from them extensive documents. But what we needed was a five-page letter with questions to ask the government. We never got it. Why? Because that's not what they could submit to the foundation and say: »This is our work.« So, it's continuously work that for the most part is not useful to those who are in the field. That has been my experience. When I was on the Inter-American Court, I talked to the human rights organizations in this country, friends of mine. I said: »Don't just send us cases that the government has to lose. Send us at

least one case that the government can win, because when they can win a case, they're going to make big publicity that they won. That's something we need. So, the next time we hit them, they won't be able to accuse us of being communist.« Do you think we ever got that? No.

I think they're doing a good job. They're needed, but they weren't any help to what we were doing. Not when I was on the human rights court, not when I was on the Salvador Truth Commission, and not when I was involved with UNESCO, or with the Human Rights Committee, or the International Court of Justice. One thing that worries me about them always is that they're not responsible to anybody. You know, you don't know for whom they're working. And I'm not suggesting that they're working for some left-wing or right-wing-thing. They're not. But they're deciding themselves what they want to do. You would expect NGOs to come to you if you're in the Human Rights Committee and say to you: »What do you need?« I had to go to them and say what I needed. I never got what I needed. I would say, for example: »Don't send me a 1,000-page document when I arrive in Geneva. Send it to me before I leave for Geneva, so I can read it.« I never got it.

**Stahl:**

In 1978 and 1979 you were member in the President's Commission on Holocaust and later, from 1996 to 2000, member of the United States Holocaust Memorial Council.

**Buergenthal:**

I was also the chairman of the Committee on Conscience at the end of the nineties.

**Stahl:**

When did you start to engage on behalf of Holocaust memory? When was the first time you took this issue up?

**Buergenthal:**

I was appointed out of the blue by President Carter to be on that initial Holocaust Commission that was supposed to decide what we should do. I don't know why I was appointed. In this country, you only get appointed if somebody knows you and you know somebody. But I didn't even know what was being created, and I was teaching at Texas at the time. And when you're in Texas, you're in the wilderness. I was appointed to it, and then basically the decision was made to build the museum. That was mainly what the Committee was all about. I objected to the museum. I'm glad they didn't listen to me. But I said: »I think you should build it in Germany, if you're going to build something. Don't build it here in this country.« At that time there was nothing in Germany yet. Why build it here? Well, I changed my mind totally on it now because it proved very useful. I've never gone through the museum, incidentally. I cannot. But when I used to go to the meetings, and I would see all the children lined up that are going every morning, and a lot of military people, also. I think it performs a valuable pedagogic purpose being here. But at the time I

thought it wasn't really necessary.

**Stahl:**

Was it the first time that you got involved in this question of Holocaust memory?

**Buergenthal:**

Yes. I'm trying to think about whether I was involved in anything earlier. No, I think it's. Yes.

I always believed that a part of my human rights work was motivated one way or another in believing that the law could have been used to prevent what happened to us in the thirties.

**Stahl:**

Did you see back then a connection between your work on human rights and the Holocaust?

**Buergenthal:**

Only indirectly. In the sense that I always believed that a part of my human rights work was motivated one way or another in believing that the law could have been used to prevent what happened to us in the thirties. I had doubts about too much involvement with the Holocaust, which to me was in the past. And I was much more concerned about the future.

**Stahl:**

Some members of this Commission also went to Eastern Europe, to Auschwitz and some other concentration camps. Did you go with them?

**Buergenthal:**

No. I was invited just the other day to go to Auschwitz. I like to do those things on my own. I don't like to be there with a group of speechmakers.

**Stahl:**

In 1979 you were nominated as a judge at the Inter-American Human Rights Court.<sup>[26]</sup> Why?



**Buergenthal:**

I was nominated by Costa Rica. The US is not a party of the American Convention on Human Rights, so I couldn't be nominated by the US. It came out of the blue to me. I was in Texas at the time. I got a telephone call, somebody with a Spanish accent introduced himself as the ambassador of Costa Rica, and said that Costa Rica would be greatly honored if they could nominate me to the court. I was sure it was one of my students playing a joke, because I was teaching a seminar on the subject and every time we dealt with the American Convention, I would say: »The problem is, the US isn't going to ratify this instrument. And if it doesn't, it won't have a judge in the court. And as a result, it won't have any influence.« Therefore, I was sure when I got this call that this wasn't the ambassador, but it was one of the students playing games with me. That is why I didn't accept right away and said: »Let me speak to my wife.«

Costa Rica, where the convention was drafted, where it was signed, was very concerned that it would become a banana republic document, that only the small Latin American countries would become parties to it. That is why they wanted either a Brazilian or an American in the court. They asked for names in the USA, and they kept getting my name.

Since then there has been no US judge on the Inter-American Court. I was told that this will be the last one, until the US ratifies. I think the US is foolish for not becoming a party to the convention to strengthen the Convention. It is one of the most exciting experiences I've had in the human rights field, because we were establishing a court out of nothing in a region that was occupied by dictatorial regimes. There were only three democracies in the region at that time if you leave out the Caribbean countries. It was basically Costa Rica, Colombia and Uruguay.

**Stahl:**

Uruguay?

**Buergenthal:**

No. To give you an example of the atmosphere at the time, in the beginning, the president of the Court, who was Costa Rican by tradition, was elected because he was the Costa Rican. He and I were delegated by the Court to go to the meeting of the OAS general assembly in La Paz, to get a budget for the court and to get our statute approved. So, we wrote our draft statute and our rules. We didn't get a budget. The budget of the Court lost by one vote, because the Nicaraguan ambassador supposedly fell asleep. That's how it started.

**Kreß:**

How did you react on a very practical basis since the Court did not have a budget at the time?

**Buergenthal:**

Well, first of all we got some help from Costa Rica. At the next session of the OAS general assembly we received some money. Every year from then on we had a budget.

**Kreß:**

Did you think that you received an appropriate measure of support from those states who had publicly pledged to support the Court? Not just financially but in general – was there support for making the Court into a successful institution, and not just having it on paper?

**Buergenthal:**

In the beginning we had support from Venezuela, Colombia, Costa Rica and some of the Caribbean countries. Most of the political support, sentimental support, did not really come from any other country. What was interesting, and it's something I learned, is that it was easier to deal with dictatorial regimes than so-called democratically elected regimes. The dictatorial regimes don't want to look bad, so they try to cooperate. But when you try to show that some so-called democratic country is violating human rights, they say: »This is terrible, you are interfering in our domestic affairs« and so forth. I thought it would be just the other way around. These new democracies thought they had a monopoly on goodness.

The US was very supportive in certain things. I was authorized by the court to be the liaison to the US government, even though the US was not a party. But if we had any problems it was useful to see whether you could get the support of the US government to talk to some government that was noncomplying. We got a lot of support even from the Reagan administration. For example, if I talked to them about Uruguay or Chile, they were very helpful. But if I wanted to talk to them about Guatemala, El Salvador, or Honduras. I never got any support.

**Stahl:**

Why were Chile and Argentina not considered a problem, but only El Salvador and Guatemala?

**Buergenthal:**

I don't know. I always thought they were obsessed with the Domino Theory, Central American was too close to the U.S. If we had a problem with some other country in the south and needed assistance, this particular person with whom I worked in the State Department would say: »Well, I'll try to see what I can do.« And he did help.

**Stahl:**

You have mentioned Costa Rica several times now. It seems like the government of Costa Rica played a key role in the establishment of the Inter-American Court and the Institute. What interest did the government of Costa Rica have to promote the cause of human rights?

**Buergenthal:**

Costa Rica thinks of itself, rightly so, as being the only democracy in Central America, if not in the entire region. It believes that it's better than anybody else. But they actually also believe in human rights. And they wanted to have something that showed off what Costa Rica can do. To have a country that had, at that time, 2.5 million, 3 million people, for it to have the Inter-American Court of Human Rights and the Institute. That was a big thing for the country. But Costa Rica is not only politically democratic, but also emotionally so.

**Kreß:**

When you drafted the Courts statute, did you follow a model? Did you look at the European statute?

**Buergenthal:**

We used the statute of the European Court of Human Rights and of the International Court of Justice (ICJ) as our models. They were both very helpful.

**Stahl:**

What was the work like during the first six years? Without a case, what did you do?

**Buergenthal:**

We had a number of advisory opinions and requests from the commission and some states. Actually, some of the best initial work was done with advisory opinions. The ICJ also has advisory opinions, and they carry as much weight as contentious cases in general. We got quite a number of interesting cases where we could lay down some important concepts. For example, one case that was important involved a death penalty request from the Commission. In Guatemala General Ríos Montt was in power.<sup>[27]</sup> He came to power with a coup, like many others before him, and he faced a guerrilla movement. He decided to deal with it. Whenever they captured somebody, they had a ten-minute trial and then they executed him. It was really terrible, what was happening there.

The commission sent us a request for an advisory opinion on that subject regarding Guatemala. Therefore, we invited Guatemala to come and present its position on the Commission's request. Guatemala argued that a reservation they had made allowed them to execute people. The Deputy Foreign Minister of Guatemala argued that because of the reservation the Commission had no jurisdiction to intervene. He closed his plea book and we thought, he's just getting to go up and leave. But then he said: »May it please the Honorable Court, I should like to advise you that the government of Guatemala decided to suspend all executions.« This was an example of one of those things where we had some impact.

**Stahl:**

So, you had to go to the governments and ask if you could give your advisory opinions?

**Buergenthal:**

No. The governments and the Commission would come to us. But sometimes some governments might have wanted the help. Then we had the first contentious case, a disappearance case, the Velásquez Rodríguez Case, which is famous now. We had three of those cases. We basically had to develop a theory for dealing with disappearance cases, in situations where the idea of a disappearance is for the state to make sure that it is not seen to be connected with the disappearance.

So, how do you deal with that from a legal point of view? We couldn't find a precedent. Therefore, we developed a theory of how to deal with it. Basically the position we took is that if the Commission can show that in a country there is a practice of disappearance, and if the person who disappeared fit the type of people who kept disappearing in that country, then the burden shifts to the government to show that they are not involved. That was the basic theory of the approach we adopted. In two of the cases they all came together against Honduras. It was clear that the government had made them disappear.

In the third case the government could prove that they had no involvement. Put it another way, it wasn't clear whether they disappeared in Guatemala, or whether they disappeared in Nicaragua. It was clear that they seem not to have disappeared in Honduras.

**Stahl:**

Nowadays we have the Convention against Disappearances. But back then it was not defined as a crime. How did you deal with this problem?

**Buergenthal:**

Well, that's what the government argued: »It's not a crime. Your convention doesn't say anything about disappearance.« Then we would say: »But it deals with murder and torture and restriction of liberty.«

**Stahl:**

Could you imagine back then that disappearances would become defined as a crime internationally?

**Buergenthal:**

First of all, at that point there were already 30,000 if not more people who had disappeared in Argentina at the time. We were less concerned whether it was defined as a crime or not, because we really had no conceptual problem, saying that this is a disappearance. That's

what happened, and it doesn't matter what you want to call it.

**Stahl:**

Later, some human rights activists argued that it was necessary to define it as a crime.

**Buergenthal:**

Those are games. A disappearance is a composite of many crimes that are in violation with human rights treaties, murder, torture, etc. so making it a separate crime is not really necessary, although it does help.

**Stahl:**

When was the shift that more and more cases came to the Court?

**Buergenthal:**

In my second period. I was elected – you're only elected to two six-year terms – in 1979 to 1985 and then 1985 to 1991. Once the disappearance cases were decided, the floodgates to some extent opened. The governments also kept changing in the region.

Among the judges of the Inter-American Court of Human Rights, there were four who had been in prison for different reasons.

**Kreß:**

I would imagine that in such a situation, the personality of individual judges is even more important, and their energy, their dedication. Did you find yourself among so to speak congenial minds? Or were there some among you who vigorously took the lead?

**Buergenthal:**

There were four of us who had all been in prison for different reasons. Three for political reasons, and I for whatever reasons you want to call it. The relationship was excellent. We had the same view on the subject, and we worked together very well. That helped immensely. We had no people on the court who were sort of government lackeys; none of these. Even the ones who were not even good lawyers. They were people who wanted to help, and who believed in human rights. That was quite important. Without that, it would never have worked.

**Stahl:**

Did the relationship between the Court and the Commission improve at some point?

**Buergenthal:**

It didn't become any better until much later. Now the Court is complaining that it has too many cases; that the Commission shouldn't be sending them all. It changed when the Commission finally decided to amend its own rules. I think that was done in 1991, when it was decided that every case that has some merit will automatically go to the Court. That made a big difference. After that some very good people became members of the Commission, like Professor Grossman<sup>[28]</sup> who is the dean at the American University, Professor Reisman<sup>[29]</sup> from Yale, two or three Venezuelans who were very good; a younger group.

**Kreß:**

So tell us about the Institute. It seems to have been important during this initial phase.

**Buergenthal:**

Yes, you're very right. When I arrived at the court, I went to the library of the university in Costa Rica, which is very close to where we were sitting. And I realized that they had only one shelf of books on international law. I thought: »Not only do we need an institute to teach. We need an institute that will help us get the books, and that will help us raise money for travel and other purposes. The OAS is not going to give us ever enough money, not as long as you have all of these dictatorial regimes in power. So, we have to have our own independent nongovernmental way to raise money.« That led to the establishment of the Institute. The court at the first session voted for the establishment of the Institute, and empowered me to bring it about it. I managed to get money from the Ford Foundation, and from the USAID.<sup>[30]</sup>

We also got a little help from Venezuela which was a democratic and very wealthy country at the time. Its government gave us some money but they never gave us as much as the U.S. did. And there were usually no strings attached to the money from the US. I wouldn't take money if they told me they wanted something. I would go to the Institutes' board. The board consisted of people from the whole region. I would submit to them and if they agreed to take it, good. As far as I know, we never got any CIA money, but in the US government it's never easy to know where some of the money comes from. Actually, we got much better assistance from the US government, from people who are very much committed, than we got even from the Ford Foundation. I needed money to hire an executive director to fund conferences and hire more personnel.

Since then the Institute has become an institution with about 50 employees and a new building, which I got from Germany.

The Institute was formally established by a treaty or an agreement between the Court and the government of Costa Rica, establishing a nongovernmental institution with diplomatic status in Costa Rica. It has immunities and everything else. The foreign employees don't have to pay taxes. It also has a section on election supervision.

We just hired a new executive director. I chaired the search committee. The first executive director was a Chilean, by the name of Montealegre.<sup>[31]</sup> That didn't work out very well at all. Then we had Gros Espiell,<sup>[32]</sup> from Uruguay, who was quite well known. For about ten years we had a Costa Rican, Sonia Picado.<sup>[33]</sup> For a while she had been ambassador. She was dean at the law school in Costa Rica when I asked her to become the director of the Institute.

**Stahl:**

Do you still recall what you had to say to the American government to get funding?

**Buergenthal:**

No, the government had a policy statement that you have to follow. In 1988, we also got money from the US government, a million dollars for the election campaign in Chile. Pinochet thought he was going to win the plebiscite.<sup>[34]</sup> I got a call from the US government and they said to me: »I understand you're looking for money to support the elections.« I said: »Yes.« »We can give you a million dollars but you need to accept it now.« And I said: »I can't accept such funding without checking with my board. I'll have a board meeting and we will meet and decide.« A day later they came back and said: »How much time do you need?« The worst thing you can do in Latin America if you get a million dollars, is not to check with all of your people, because everyone will say: »It's CIA money.« I wanted this to be transparent.

**Kreß:**

Do you feel able to identify one particularly important moment in your time as a judge there, and one particularly challenging moment?

**Buergenthal:**

The first was the Court's decision in Velasquez Rodriguez v. Honduras, its first disappearance case and its first contentious case. It also reached the Court while I was President of the Court. In this case the Court developed a legal theory enabling it to hold governments responsible in disappearance cases even though that practice was not as such listed as a violation of the American Convention. The case ruled that if the existence in the state of a practice of disappearances had been proved by the Commission and if the person who disappeared fell into the category of persons who were disappearing, the burden of proof shifted to the state to show that it was not responsible for the disappearance in question. Without such a theory, it would be very difficult to deal effectively with the practice of disappearances because it was employed by governments to hide their responsibility for the disappearance.

Second, after I had already left the Court and while serving on the UN Truth Commission for El Salvador, I was reminded of the Velasquez Rodrigues case. During one of our trips to a mountainous and difficult to access part of that country, the President of the Commission, another Commission member and I interviewed various witnesses about the atrocities that had allegedly been committed there by government troops. One of our interviewees was an old farmer who told us that his son was among the men who had disappeared in his village. In telling us about the disappearances and what he wanted us to do in the case, he repeatedly insisted that it was our obligation to apply »la ley de Velasquez Rodriguez« (the Velasquez Rodriguez law) to the case of his son. When our President interrupted the witness and asked whether he knew that one of my colleagues present here with us served on the court that decided the Velasquez case, the farmer paid no attention to the President and continued to refer to the »Velasquez law«. Afterwards my colleagues and I wondered how this old man could have heard about »a law« that was decided in faraway Costa Rica. This episode reminded me of similar stories I had heard in Europe in the early days of the European Convention of Human Rights when prison inmates were said to know more about the existence of the Convention and their rights under the Convention than their lawyers. A similar phenomenon could be observed in the Soviet Union after the adoption of the Helsinki Final Act<sup>[35]</sup> when a Russian scientist recognized the political and legal significance of the human rights provisions of that instrument long before Russian lawyers did.

**Stahl:**

How do you judge the role of the Court in the process of democratization in Latin America that took place in the eighties?

**Buergenthal:**

During my period on the Court, I don't think we had very much of an impact at all. I mean, we decided those cases, but particularly in Latin America and the Caribbean, news did not get to all regions. Now, with television it's a little better. But a decision of the Inter-American Court would not be something that would get wide attention in the region. So, to answer your question – we had a minimal effect. It was an institution that played a role. But I think the Institute in many ways played a more important role, because it played an educational role. Costa Rica was the one place where you could come and talk human rights. You couldn't do that in Argentina, you couldn't do that in many other places, because you were immediately identified as a leftist, communist, or whatever they wanted to call it.

I think the push of the Carter administration and the implementation of the laws that were pushed by Congressman Fraser were more important than the Court. The laws required US government officials, US directors of the World Bank and the IMF not to vote in favor of any loans or have the US government provide weapons and loans to governments who committed certain violations of human rights. That achieved a lot, because they needed money, and they thought they needed weapons. So, in that sense, the Carter government pushed some of these things. Patricia Derian and Mark Schneider were very active in this, and Carter himself. He sent Mrs. Carter to get some of the countries to ratify the American



Convention. He tried to get it ratified by the U.S. and he sent it to the Senate, but it didn't work. Carter's impact internally in the US was not what Fraser's was. But Carter would send people out from different offices into various countries in Latin America, trying to push for changes all over, and that worked.

From 1985 to 1989, I worked for former President Carter at the Carter Center. He offered me a position as director of human rights.

**Stahl:**

When did you get in contact with him? How did this relationship with him develop?

**Buergenthal:**

I really don't know. When I was leaving American University in 1985, I got an offer to come to Emory University as a professor. They had a special chair established in human rights to which I was named, and then he got in touch with me. It had been up to that point, there was no human rights program at the Carter Center, so he wanted me to start it.

**Stahl:**

In 1991 you were named as a member of the UN Truth Commission for El Salvador.

**Buergenthal:**

December of 1991, and we started working in 1992.

**Stahl:**

Had you been involved in the process that led to the foundation of the Truth Commission?

**Buergenthal:**

No. But one of my former colleagues on the court, Pedro Nikken of Venezuela must have recommended me.<sup>[36]</sup> He was working together with the then assistant to the UN secretary general. I think that's how I got on that Commission. The strange thing was: I received a telephone call in Norway, and the weather was terrible in Norway in November. All I could think about was the warmth in Central America, and I accepted on the spot just to get out of rainy Norway in November.

**Stahl:**

How did the Truth Commission work?

**Buergenthal:**

The president of the Truth Commission was a former president of Colombia, Belisario Betancur.<sup>[37]</sup> Somebody said, and I think correctly so: »If he had gone into the priesthood he would be the first Latin American pope.« He was a very broadly educated, very skillful politician, who could talk to a president and a peasant. A great politician and a wonderful man. And Reinaldo Figueredo, former foreign minister of Venezuela in a democratic government of Venezuela. We got along extremely well. I had been warned about becoming a member. I was told that I was going to be squeezed between two politicians, and would be very unhappy because they will want to politicize everything. It proved not to be the case. We never had any disagreement about what we wanted to do. We worked extremely well. I was basically the lawyer of the three members. We had a staff of young lawyers. We had no Salvadorans on the staff. That made it much easier, because the work was hard and dangerous.

**Stahl:**

How did you get the information about the violations that you worked on?

**Buergenthal:**

We interviewed hundreds of people, many alleged perpetrators and victims.

**Stahl:**

In a hearing or secretly?

**Buergenthal:**

We had many people we invited to come, but many of them were afraid to come. We would meet them in different places. They knew that if it was known that they were talking to us, they would be dead. We would oftentimes put them in a car, cover them up with a blanket, and drive to one of the friendly embassies, mainly Mexico, Colombia or Venezuela. There we could interview them. We would send our young staff members up to different places in the mountains, interview as many people as were willing to talk. And we would force some of the military to come.

**Stahl:**

How could you force them?

**Buergenthal:**

It's surprising how you can force people to do things, when you really don't have any power. We asked them: »Do you really want to become a figure known in the world as somebody who refused to talk to this Commission, established by the UN?« I was surprised how little they knew about the world. We gave everybody the right to have a lawyer but the machismo was: I don't need a lawyer! Therefore, we ended up getting a lot of information from victims and perpetrators. We would invite the generals, colonels and they always

would come. If there was a question whether they would come, our president would get on the telephone, and suddenly the witness would appear. It was to me an eye-opener. The biggest eye-opener to me was, coming from the environment that I'm used to in this country, one day we decided we were going to the prison where they were holding the colonel responsible for leading the attack that killed the Jesuit priests.<sup>[38]</sup> He was in prison at that point. We had UN bodyguards, and we had five cars. We drove up to the penitentiary outside of San Salvador, and came to the gate. The guard went out and said: »I have here the members of the UN commission, open the door!« And they opened the door. »We want to speak to so and so. Where can we interview?« »Oh, you can use the director's office. He's not here right now.« Where in the world could you do this? »We want to see this prisoner. Bring him out.« You know, these dictatorial regimes in a sense are used to obey authority.

**Stahl:**

Did you also get some documents from the archives?

**Buergenthal:**

Those in the Salvadorian archives were supposedly burned. But we didn't need them because we could speak to them directly and get a lot of information. I was then asked by the Truth Commission to be the liaison with the US government, and the US government had appointed a liaison to me, a deputy assistant secretary of the State. He was supposed to provide me with the information I needed. Except that the information wasn't always coming that I wanted to get. I wanted to have access to the files. The US government had established a committee of FBI, CIA, Department of Justice, different groups to provide information to a person in the State Department, who would give me the information. But it wasn't happening the way I needed it. So, I said that I want to talk to them and explain what I'm doing and get the documents. This took weeks to get but eventually I was able to meet with the group.

Thereafter I was authorized to have access to all the documents that were secret. I could go through everything. First of all I realized, the US government knew even less than we did in many cases. They had some things that were useful, but we already had much of that information. They often had information that I could already tell them was wrong, because we had received the same information and found out that it was wrong.

Where I failed was to get permission for my assistant, a former law clerk of a US federal judge, to get the information for me. I never got permission, and that made my job much harder in terms of what I could see and what I couldn't see because I had little time.

Where it got dangerous... The country was run by a few generals and colonels. And colonels of those countries are really important. They are the heads of the brigades. Once we had all of the brigade heads and the minister of defense meet with us. The Commission President said to them »we've been having some problems getting information from you. But I think

you should know that Professor Buergenthal has his own sources of information.« They immediately figured: »This is CIA information.« They of course assumed that the US knew much more than the guerrillas knew. At that point I really became quite worried, because I thought that this would be an easy way to get rid of me and then say, it must have been the guerrillas who killed me, not the generals of course. But nothing happened. We were heavily guarded. It was quite a tense situation all the time.

**Stahl:**

Were any of your witnesses murdered?

**Buergenthal:**

No. Unlike in the disappearance cases, when two of our witnesses were murdered. In that connection, let me you one little story: about a young lieutenant, who was involved in the killing of the Jesuits. He didn't want to talk. This was just the two of us together. I thought, I'll make this up and see what happens. I said to him: »You think that you are safe because the higher-ups will protect you. Have you ever heard of the Nuremberg trials? Do you know what happens to people like you? You're not going to be protected by your people once we take our report out of the country and pass it on to an international court.« He started to talk. If you had told me that story, I would say: »No, this is impossible.« Such is the educational level at some of these military academies from which these people graduate.

In our report on the human rights violations in San Salvador we cited statements of two American officials because we had evidence that this type of statements were leading to atrocities being committed against innocent people.

**Stahl:**

With regards to the American archives, did you ever wonder when you looked at the files there of CIA, FBI, that you would get some information about American involvement in these atrocities?

**Buergenthal:**

We knew that there was some US involvement. And incidentally, we – the Commission – had made a decision that we wouldn't investigate US involvement, or that of Cuba. We would report to the Congress. And it was for the US Congress to deal with this problem. The US involvement that you would think of, Americans themselves doing the killing, we didn't come across any of that. What would be known would be that the US may have been involved or knew about it.

But we made two exceptions. We decided to list two Americans in the report. One of them was Jeanne Kirkpatrick.<sup>[39]</sup> She was the US ambassador to the UN. And she was an expert on Latin America. What happened was that, at one point, four American nuns were raped and killed in El Salvador by the government people. When that information was brought to Kirkpatrick she said publicly that »the good nuns« were working together with the communist of Nicaragua, and they couldn't expect any better treatment than that. We decided to reprint that. The other was Secretary of State Alexander Haig,<sup>[40]</sup> who had made some statement that we also reprinted. We cited them because we had evidence that because this type of statements by US Government officials were leading to atrocities being committed against innocent people, because the military thought they had the support of important American officials, for some of the policies.

**Stahl:**

The task of the Truth Commission was to investigate a series of acts of violence that had occurred since 1980. Violations of human rights always occur within a certain framework, and that forms part of the truth. So why didn't you analyze the American involvement more deeply in your report?

**Buergenthal:**

If we investigated the US, we would have had also to investigate Cuba and Nicaragua. That would have had to be evenly done. Nothing would have been gained really from it, If we had gone that way, all the focus of our finding would have been on US involvement and Castro's involvement. And the poor people who died would have been totally forgotten. We thought, let the politicians of the world take care of those other things. I should tell you, too, that the only involvement that had some evidence related to the murder of the Jesuit priests. We were shown the garden where they were killed. And the information we had is that from that place, you could look into where the Americans were, and that the American CIA, or whoever was there, they would have seen what was happening. We had no evidence of their direct involvement. But we knew that they, in all likelihood, knew what was happening, assuming they were where we were told they were.

**Stahl:**

When you were planning, as a commission, which issues you would address, did you take into account the work of other commissions that had done the same work before you, like in Argentina, CONADEP, or in Chile?<sup>[41]</sup>

**Buergenthal:**

No, not really. We were a very different commission. We were a foreigner commission. All the others were national commissions. It's a very different environment. In Salvador, we were foreigners. There have been a number of commissions, and all of them were accused of being not objective, of having no interest to investigate. We wanted to investigate, without any involvement of Salvadorans in any possible way. And there was really nothing to be learned from the other commissions.

**Stahl:**

But there were also some similarities between these commissions.

**Buergenthal:**

Yes in a very general way. And I must say to this day, I don't know what we would have learned from them, because we faced a very different situation than they faced. The issue never even came up to try to see what they did. We were aware, I think, what they were doing.

**Stahl:**

Have you ever met people from these commissions, like José Zalaquett?

**Buergenthal:**

No, I met José Zalaquett<sup>[42]</sup> later. He criticized me very severely because he thought we didn't give due process rights to people we named. He said that we shouldn't have named names. We named people who we believed had committed these offences. He said, you should never have done that, because we denied them due process. We did it, for one very simple reason. We knew that as soon as our report was adopted, the government would declare an amnesty for everybody, which they did. We figured if they do that, our report is useless. The people of Salvador will not get the truth that they needed. We wanted to make sure that the people of El Salvador knew who the people were that we accused. If that's a violation of due process, we will take our punishment for that. But we thought that this was important enough to do and we had safeguards. We named names only if we felt 95 percent sure about the guilty party. We would not mention names if we were not 95% sure.

**Stahl:**

What did you see as your own contribution to the work of the commission?

**Buergenthal:**

I think the legal aspect. The deciding, for example, what our legal obligations were, what rights we had, what rights we didn't have, how we should proceed, how we should anticipate, from a legal point of view, what the government was likely to do or not to do, and the 95% requirement regarding naming of names. One big thing is also how to get information from the government, from other sources outside. For example, we tried to get information from the International Committee of the Red Cross. Now, the government of El Salvador had declared openly to the UN that it would provide all assistance to us on every subject. I asked the government, and the ICRC, for information. They said: »No, we can't give it.« So I said: »Well, you've got the permission of the government to give every information.« »No, we can't do that.« We got that information in some other ways, but why, at least after the war is over, and after the governments make a complete commitment to provide every information, why would they not provide information in that situation? I'm

all in support of the ICRC not giving information, but there are times when there is no valid reason for withholding the information.

**Stahl:**

Maybe they thought the principle of impartiality was affected by giving information.

**Buergenthal:**

How? They have a policy, a rule, that they will make things public if a government does not cooperate. Here we have a government that made a general commitment.

**Stahl:**

You had just six months for the entire work?

**Buergenthal:**

Yes. We were given three months, which is a guarantee of failure so we took six.

**Stahl:**

Later on truth commissions became a hot topic in the human rights movement, and there were more and more commissions. Did you get involved in these discussions, or was the issue of truth commissions finished for you with El Salvador?

**Buergenthal:**

I was invited to come and meet with the South African Commission, when it was being established. I got sick, and I couldn't go. One of our people went.

**Stahl:**

Was it the meeting in Cape Town in 1994?

**Buergenthal:**

I think so, yes. I always find, I learn something from all of these terrible things, like the El Mozote Massacre.<sup>[43]</sup> About 500 or 600 women, children and old men were killed. One survivor, a woman, started to talk, and within a few minutes I could tell her what happened, because it was what I remembered happened in the evacuation of the Ghetto of Kielce. It was the same thing, the killings, you know, people running. And I suddenly realized how we humans are so good at repeating the same cruelty, every time. We don't have any creative imagination when it comes to cruelty. We always do the same thing to each other, which is a frightening discovery to make. Whether I want them to be original, I don't know, but I was struck by the fact that it's always the same.

**Stahl:**

Do you think while you were doing this work you were also somehow influenced by your own personal history?

**Buergenthal:**

Oh, I'm sure.

**Stahl:**

In which way?

**Buergenthal:**

I don't know what you mean by influenced, but memories would come back to me. For example, when we went to the garden where the Jesuit priests were killed, the guide, I already mentioned, pointed out and said: »That's from where the Americans could observe everything.« We asked: »Where's the tower that you could see?« And the priest who was with us said: »Over there, but it's hard to see now because of the grass and the plants that are growing here now.« And it brought back memories of Auschwitz. And when I first visited Auschwitz in May 1991, it was not the place I remembered, because there was grass, there were birds flying. In Auschwitz during my time, the smoke from crematoriums was such that no bird would fly there. And no grass, it was mud. Never ending. And the air was filled with the stench of burning human bodies, and it just came back to me, what I remember of Auschwitz. And it all in a muddled way, came back to me. This is how the world covers up everything. The grass grows again, and the flowers grow. Who cares whatever happened on that ground? And that struck me with the Jesuits. Totally innocent people killed.

**Kreß:**

I would assume there have been moments when you felt exhausted. Also you mentioned one situation when one might have felt frightened. At those moments, did you draw the energy to go on from your own personal experience? Or is that even for you a matter of speculation?

**Buergenthal:**

All I can tell you, I was often scared in El Salvador... We couldn't bring our wives because it was considered too dangerous, because the government that had committed all of these things was still in power. The generals were still in office. We were sitting in the restaurant cafeteria one evening, and suddenly the lights went out. Our bodyguards didn't have flashlights and they're sitting there with matches, trying to see what was going on. We thought we were under attack. That was one of the scariest moments there.

No, I think my problem has been throughout my life that I'm not that introspective. I don't



philosophize. I live and I'm shocked by things and I'm fascinated by things, but I don't philosophize emotionally. And that's probably what helped me survive the camps, too, and not come out and end up in an insane asylum. In El Salvador I had one other moment where the president of the supreme court of Salvador comes to this place where some mention 500 people were killed, as I had been killed. We had Argentinian forensics, anthropologists helping us. And he stands there in boots, the president of the Supreme Court, and he sees there are some things left in the soil, some clothing and he pushes it aside with his foot. These are remains of people. And that brought back, you know, what I saw when people were just being killed in the camps, the brutality.

**Stahl:**

You also worked for international financial institutions.

**Buergenthal:**

I have?

**Stahl:**

The Inter-American Development Bank.

**Buergenthal:**

Oh, yes. No, you scared me. No, I was on the administrative tribunal of the Inter-American Development bank. Like so many other organizations, they have an administrative tribunal that basically deals with claims that are brought against the organization and by employees of the organization for violation of their employment rights. I was there for two terms and served as president for one term.

**Stahl:**

Did human rights play any role in this work?

**Buergenthal:**

Yes. For example, I remember a case of a woman accusing the management that the reason she was not promoted or she was fired was because she didn't comply with the sexual wishes of the boss. She brought this case to us and we upheld her. That was the only sort of really important case. It was the first sexual harassment case, I think. This was also the place where, for the first time, I realized that oral proceedings are very important. I always thought it's really not important necessarily to have oral proceedings. But here, the documentary evidence pointed one way, but when you heard the witnesses, the result was very different.

I think by that time I probably had more standing than anybody else in the US when it came to human rights, and a few enemies.

**Stahl:**

From 1995 to 1999, you were a member of the United Nations Human Rights Committee. What were the main issues you had to deal with?

**Buergenthal:**

Well, first of all, I should tell you that I was the first American nominated to the Committee, once the US had ratified the Covenant and could nominate. There had been nobody before me. I was the first, and I considered that a great honor. It's a Committee of the UN that has made, over the years, long before I came on board, some important achievements. It was a very solid group of people, a large group, but on the whole very good work was being done. Rosalyn Higgins<sup>[44]</sup> was on there. David Kretzmer.<sup>[45]</sup> Klein<sup>[46]</sup> was on there with me.

Unfortunately, I thought that the committee, and I want this to be understood, devoted too much time to death penalty issues in Jamaica. There were so many other issues to be considered. Maybe not as important as death, but in terms of what we could achieve or not. If we had spent a little less time on what was going on in Jamaica, where we achieved very little, if anything. We should have focused on a lot of other issues than death penalties, issues where we could have had some impact. But on the whole it was a very professionally run institution. None of the criticism that one gets of UN institutions were justified in the context of the Committee. I was very pleased to be there. And I resigned only because I was asked to go to Switzerland, to serve on another body, which was more important to me, the Swiss Holocaust Bank Accounts.

**Stahl:**

Why did the choice fall on you?

**Buergenthal:**

I think by that time I probably had more standing than anybody else in the US when it came to human rights, and a few enemies. I think that's also important. The person who was running against me in some ways was Louis Henkin, a friend and great scholar<sup>[47]</sup>

**Stahl:**

What was your work like, in this Committee?

**Buergenthal:**

I was very happy there. I found the work interesting with some interesting cases. We even had a Holocaust denial case, in which I wrote a recusal statement that has become very well-known. It was about a French Holocaust denier, who said that Auschwitz hadn't existed as an example. I wrote a recusal, by saying that, »due to the fact that I'm a survivor of the Holocaust, both Auschwitz and Sachsenhausen, that my father died in the Holocaust, and my grandparents died in the Holocaust, and my mother was a survivor of Auschwitz and Ravensbrück, I don't think I can, in all fairness, take part in his case.« I thought it said everything I wanted to say. I really don't believe in Holocaust deniers going to prison. I don't think that it's a good idea. It's easier to let them tell what they want to say. Those of us who survived, we can take care of ourselves. The truth is something that is a little stronger than to say that people were not killed in Auschwitz.

**Stahl:**

Was there an issue that you were especially interested in?

**Buergenthal:**

There were quite a number of interesting issues that came before us, including also the Pinochet case. There were two proceedings, and I think this was the first one, in England. Because that one was set aside then. The House of Lords reversed itself. And I think it dealt with the first one, where a judge in Spain, Baltasar Garzón,<sup>[48]</sup> who was working on the Pinochet case, wanted Pinochet to be extradited to Spain. I was on the subcommittee that was working on it when I received a call from Garzón. He was helpless. Supposedly, he had to deal with the British case. He didn't know how to deal with it. He didn't say it in that many words, but it was clear: Would I help him? I said: »Sorry, I can't. My wife and I are just getting ready to see the French countryside.« »Oh, no, you have to help.« So we spent the next two days writing a memorandum for him, without books or anything. So I had to recuse myself from the sub-committee, which would have been an interesting case. But I felt I had to help him.

**Stahl:**

I wonder if your background as an expert in human rights law had an effect on your work at the International Court of Justice in The Hague.

**Buergenthal:**

Not really, because The Hague, contrary to what people think, is not really a human rights court at all. There are some cases that touch on human rights issues. And there were a number of us who were considered human rights specialists. One was Rosalyn Higgins, who was in the court with me and Pieter Kooijmans.<sup>[49]</sup> And then Bruno Simma<sup>[50]</sup> joined us. So, you had four people who really had worked in the field. And that helped in some situations, but it didn't make any big difference. All I can say is that there was never any sort of serious human rights issue in my day on the court, where I would have felt that I had something to contribute that others didn't, or where I felt very much in disagreement.

The difficult case for me in some ways, but not as difficult as people think, was the case of the Israeli wall case. And there, I thought my colleagues failed to understand that it's very important for a court sometimes not to take cases than to take cases. And I thought the wall case and a later case with Kosovo were two cases where the Court should have used the power it had, the discretion not to decide a case because of the political implications of the case. All legal cases have some political implication, but not all have major political implications. First of all, I wrote two opinions in that case. One is not known at all, where I challenged my Egyptian colleague, Nabil Elaraby, to sit on the case.<sup>[51]</sup> Elaraby had been the Egyptian ambassador to the UN. In that capacity, he of course had to say what an ambassador is told what to say. I had no problems with that. And obviously he said a lot of anti-Israeli things. But then when he retired from his position as ambassador, he went back to Egypt and then he gave a very lengthy interview, a very anti-Israeli interview. And I felt that that justified recusing himself. I should tell you, he was really in many ways my closest friend on the Court. It was very difficult for me to do this. My colleagues didn't agree with me. That was fine. But I wanted to be on record on that issue.

The other thing that I wanted to be on record, I felt that the court was wrong in deciding that the wall as a whole was a violation of international law. To me, what you had to do is look at the segments of the wall and see, which parts of the wall were clearly not for any defense purposes and others where they were justified. The way I would have looked at the case, was to look at different segments of the wall and see whether this segment is one, which Israel has a right to have a wall, or some protection against missiles. Or when there was no basis other than just to take land away from the Palestinians.

**Kreß:**

When you wrote this, and you knew that you were a lone voice at the Court, did you fear that you would disappoint the human rights community? Did that affect you somehow?

**Buergenthal:**

No, I was too old already for that. I think if you reads the opinion, you'll see that I'm very much concerned about it the rights of the Palestinians. For example, I come out and I say that the settlements are illegal. I point out that the suffering of the Palestinian people is something that is connected to the settlements. The Spanish newspaper El País attacked me from a human rights point. First of all, they had everything wrong about me, except for the fact that I was a Jew. Everything else was wrong. That bothered me.

**Kreß:**

Coming back here again to the moment of your nomination. Were you surprised that you beat out the other American candidates? Because the ICJ was not and continues not to be perceived as a human right court, as you said yourself.

**Buergenthal:**

I was never perceived only as a human rights professional, I was an international lawyer. I taught more international law courses than human rights law; I had a book on public international law, besides a book on human rights law but I thought that there were better people qualified for the job than I. Tom Franck<sup>[52]</sup> was one, I thought. But there was a list. Tom Franck was on the list, I was on the list, Michael Reisman,<sup>[53]</sup> and John Norton Moore.<sup>[54]</sup> But the two people I thought who had the right to be more than I were Tom Franck and Mike Reisman. And where I had an advantage that they didn't have was that I had international judicial experience that they did not have.

**Kreß:**

Perhaps it was because of your human rights qualifications, on top of your general international legal expertise. Was that appealing? Was it a factor that was appealing to the United States government at the time, so to speak for you to inject a bit more openness into the ICJ?

**Buergenthal:**

No, I don't think so, because the US had one case pending against it, the LaGrand case.<sup>[55]</sup> And the US also knew that I took a position that was contrary to the US position. That was something the State Department knew, because I said so at some meetings I had with them, long before this issue came up. They knew that I wasn't going to take one position if I think it was wrong, just because the US was involved. And as you probably noticed, in the three cases that I sat on in which the US was a party, I voted against the US twice. In the third one, this was against Iran, I thought the US was right and Iran was wrong. But in the two other cases, in the case of LaGrand and in the Mexican cases, I voted against the United States. And I told one of my colleagues. The nice thing was, nobody in the State Department even so much as said anything to me about those votes.

**Kreß:**

I've heard that a lot of energy went into your separate opinion in the arrest warrants case. And in a way, it allowed you to touch upon one issue that would have been within your ICJ agenda, meaning universal jurisdiction for crimes under international law. Would you agree that this was perhaps the most important separate opinion that you wrote or co-wrote during your time at the ICJ?

**Buergenthal:**

I should give more credit to my other two colleagues, because at the time this was written, I was in the US. They had already prepared a draft, which they sent to me. I added some things, and we had some long conversations about changing some things. But I think they deserve most of the credit for that. In many ways, I'm much more proud of my separate opinion in the wall case.

**Stahl:**

Would you mind comparing your time at the Inter-American Court with that at the ICJ?

**Buergenthal:**

On the ICJ for one thing, when you have a court of 15 judges, one more or one less judge doesn't make much of a difference. On the Inter-American Court we were seven judges. Some of them initially came in without any background in human rights law. One could make a real contribution. And the issues were very important to me as a human rights lawyer. Many of the issues before the ICJ are important from governmental, inter-governmental, political things, but they are not human lives necessarily in the same way as the disappearance cases, and the impact you can have in a region. So, no, that to me was much, much more satisfactory. The ICJ was also a learning experience. When I got to the ICJ I thought that I knew everything there was to know about international law. I didn't. And every time a new case came up, I realized how little I knew and how impressive some people are who appeared before the court, like Crawford or Pellet.<sup>[56]</sup> That was impressive to see. No, it was a great experience to be on the ICJ. When my wife and I decided that ten years were enough because our grandchildren were growing up, and we didn't see them, they were really more important to us in the long run.

The regional human rights tribunals are much closer to the people, to the region.

**Kreß:**

To conclude, I would like to touch upon an observation you made earlier about regional criminal courts and their possible usefulness within what you have called this emerging system of international criminal justice. If you could elaborate a little bit more on that vision? Perhaps you could also tell us more generally, because this is also part of your professional life, how you see the relationships between truth commissions, international courts, and criminal courts, especially in moments of tension?

**Buergenthal:**

On this last point, just before I lose it: I've always thought that the one mistake that was made in Germany after the war was that we didn't also have a truth commission. A tribunal like the one in Nuremberg really does not capture the whole of the story. It is too sporadic. A good truth commission at the time would have caused Germans to look at what really happened in Germany, how it happened, why it happened. It could have been a useful contribution, not only to the history of the Third Reich but to the future. In other countries as well, to see how these things can happen. I don't accept a theory that Germany was just a killer nation, and not others. To me, these things can happen in many countries. Just with the right constellation of facts, it can happen. I think it would have been useful to have both a court and a truth commission. And I also thought, the same thing would have been useful

with the Yugoslav Tribunal, to have something beside. Of course, I understand that the judges on the Yugoslav Tribunal didn't want it.

I've always been a great supporter of regional human rights tribunals. I don't believe in having a world human rights court. I wouldn't be opposed to it, but the regional human rights tribunals, if they are honest, are much closer to the people, to the region. And they socialize the governments in the region to human rights, to their obligations in human rights. Much easier than something that is far away. I think the same thing, that if we really want to develop a truly effective international criminal law system. We would need, in addition to the International Criminal Court, regional international criminal courts that deal with slavery issues, certain types of drug gangs, and some things that are within the jurisdiction of the ICC, but important on a lower level of importance.

For example, this whole criticism by Africa of the ICC would probably be less if you had an African court of criminal justice. Maybe they would have been smarter in choosing which countries to go after. The ICC is immediately identified as a foreign court, not their own. So, I believe that we need two things in the world today: We need regional human rights courts and regional criminal courts.

**Kreß:**

So, these were examples for missing elements from your perspective. Is there also an over-proliferation of human rights treaties? The whole thing is becoming too nuanced. Everyone is losing sight of the essentials.

**Buergenthal:**

If you're saying that we have too many human rights treaties on too many smaller and smaller issues, I agree. With the Racial Convention, the Genocide Convention, and the Covenants, we basically have enough. We don't need more and more conventions. The Refugee Convention is something that is needed. But the more of these smaller and smaller pieces we create, the more we weaken the major human rights issues. I agree with that.

**Kreß:**

One thing that is fascinating about your biography is that you are a distinguished scholar, and yet you have undertaken an immense series of different activities in practice. I was wondering whether you yourself feel that this intense encounter with practice has somehow influenced or shaped your scholarly approach to international human rights law?

**Buergenthal:**

I think it's the other way around. For example, just sitting on the ICJ, I often thought how useful it was that I took Louis Sohn's course in international administration. A lot of things that I learned proved useful. I never could tell it to him because he had already died. I would have loved to tell him that. Let me put it another way: I think I could have been a

greater scholar if I had focused on scholarship alone. But maybe I couldn't have, and that's why I didn't. I was emotionally and intellectually more interested in a judicial action. Because if I had only spent the time writing, I could have written more, I could have thought more, I could have probably come up with some more profound things to say. But maybe I wasn't capable of doing it. I needed the practical side to feel that I was doing something useful. And feeling that I was doing something useful may have meant that I felt probably that my scholarship was less useful.

**Kreß:**

This brings me to my last question, and there are probably very few international lawyers who are better equipped to answer it. You touched upon it earlier: the progressive force of international law. Its impact, its potential to improve conditions, to bring progress. I recall that at an early time of your life you were very optimistic and hopeful about that. Now, at a much later point in your career, when you ask yourself this question again, has your attitude developed, fundamentally changed, become more nuanced?

**Buergenthal:**

I've probably become more patient, in a sense that I know that things take time. Louis Sohn would always say it's like building a wall. You have to put one brick at a time. I think that's also true of international law. It's a slow process that one cannot simply give up on because something has not worked. But I've not become pessimistic about it at all. For one thing, I don't feel that I'm allowed to be pessimistic. I have to be optimistic about what international human rights can do, what human rights courts can do. That's very important to me. And I believe much can be achieved. I know it will take time. As I get older I am much more patient, but not discouraged.

**Kreß:**

It's a wonderful conclusion.



## Fußnoten

1. Thomas Buergenthal: *A Lucky Child. A Memoir of Surviving Auschwitz as a Young Boy*. London 2009; Oral history interview with Thomas Buergenthal, 27 November 2001, United States Holocaust Memorial Museum
2. Odd Nansen (1901-1973) founded the Nansen Society to Aid Refugees and Stateless Persons in 1936. He was imprisoned by the National Socialists from 1942 to 1945, during the German occupation of Norway, and was eventually taken to the Sachsenhausen concentration camp. In 1946 he became a co-founder of UNICEF.
3. Odd Nansen: *From Day to Day*. New York 1949.
4. On the relationship between Thomas Buergenthal und Odd Nansen see, Odd Nansen: *Tommy. En sannferdig fortelling*. Oslo 1970.
5. Soviet troops intervened to suppress what is called the Hungarian people's uprising of 1956.
6. Named for its sponsor, Senator John W. Bricker of Ohio, a conservative Republican, the proposed Bricker Amendment to the United States constitution was initiated in the Congress in several versions during the 1950s. It would have placed restrictions on the scope and ratification of international treaties and executive agreements entered into by the United States government.
7. Cecil Olmstead (1920-2013) was a professor of international law at New York University School of Law and served the oil company Texaco (now part of Chevron) as counsel and executive from 1961 to 1980.
8. Thomas Franck (1931-2009) was professor of international law at NYU School of Law starting in 1962 (see also n. 52).
9. Louis Sohn (1914-2006) was a professor of international law at Harvard Law School from 1961 to 1981. In 1945 he participated in the drafting of the United Nations Charter.
10. Thomas Buergenthal: *Appeals for Annulment by Enterprises in the European Coal and Steel Community*, *The American Journal of Comparative Law* 10:3 (1961), 227-252; Thomas Buergenthal: *The Private Appeal against Illegal State Activities in the European Coal and Steel Community*, in: *The American Journal of Comparative Law* 11:3 (1962), 325-347.
11. Thomas Buergenthal: *The Domestic Status of the European Convention on Human Rights*, in: *Buffalo Law Review* 13 (1964), 354-392. Reprinted in *Journal of the International Commission of Jurists* 7:1 (1966), 55-96.
12. The two pacts, on civil and political rights and on economic, social and cultural rights, were passed by the UN General Assembly in 1966 after many years of negotiations and came into force in 1976.
13. Sidney Liskofsky (1918-2005) took part in the 1948 efforts to anchor human rights in the UN Charter. He directed the Blaustein Institute until 1992.
14. At a June 1972 conference in Uppsala, Sweden, legal and human rights experts from twenty-five countries agreed on the declaration guaranteeing every individual the right to leave from and return to the state of which they are a national citizen.

15. Congressman Donald M. Fraser (b. 1924), a Democrat of Minnesota, chaired the Subcommittee on International Organizations and Movements in the early 1970s. In 1973, Fraser held a series of hearings with which he attempted to make human rights into a major issue of United States foreign policy for the first time.
16. While working for the American Association of the International Commission of Jurists, John Salzberg pressed for the passage of the Genocide Convention before joining Fraser's congressional staff in 1972.
17. Thomas Buergenthal: International Human Rights: US Policy and Priorities, in: Virginia Journal of International Law 14:4 (1974), 611-621.
18. Texas International Law Review, Vol. 12, 1977.
19. Louis Sohn, Thomas Buergenthal: International Protection of Human Rights. Indianapolis 1973.
20. Louis Henkin (1917-2010), professor of international law at Columbia Law School from 1963 to 1988, had served as a member of the Permanent Court of Arbitration at The Hague in 1953 to 1969 (see also n. 47).
21. Henry Schermers (1928-2006), Professor of the Law of International Organizations at the Universities of Amsterdam and Leiden.
22. Rudolf Bernhardt (b. 1925) was professor for international law at the University of Heidelberg and director of the Max Planck Institute for Comparative Public Law and International Law from 1970 to 1993 (until 1976 as co-director with Hermann Mosler, then as sole director until 1981, and as a member of a governing council until 1993).
23. Hermann Mosler (1912-2001), director of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg from 1954 to 1980, served as a judge at the European Court of Human Rights from 1959 to 1980 and was the first German judge at the International Court of Justice at The Hague from 1976 to 1985.
24. Karel Vašák (1929-2015) was a French international lawyer, from 1969 until 1980 first Secretary General of the International Institute of Human Rights in Strasbourg.
25. The Commission on the Truth for El Salvador was appointed by the United Nations in 1992 to investigate war crimes during the country's civil war in the period from 1980 to 1992.
26. The Inter-American Human Rights Court was founded by the Organization of American States in 1979.
27. José Efraín Ríos Montt (b. 1926) was president of Guatemala from 1982 to 1983.
28. Claudio Grossman (b. 1947) was a member of the Inter-American Commission on Human Rights from 1993 to 2001.
29. Michael Reisman (b. 1939) was a member of the Inter-American Commission on Human Rights from 1990 to 1995.
30. United States Agency for International Development (USAID).
31. Hernán Montealegre (b. 1937) was executive director of the Inter-American Institute of Human

Rights from 1980 to 1985.

32. Héctor Gros Espiell (1926-2009) was executive director of the Inter-American Institute of Human Rights from 1985 to 1989.
33. Sonia Picado (b. 1936) was executive director of the Inter-American Institute of Human Rights from 1989 to 1994.
34. The Chilean national plebiscite of 1988 asked citizens to choose between another eight years in power for General Augusto Pinochet or an open democratic presidential election the next year.
35. Signed in 1975, the Helsinki Final Act obligated signatory states from both the East and West blocs to protect human rights.
36. Pedro Nikken served as a judge at the Inter-American Court on Human Rights from 1979 to 1989, from 1990 to 1992 as a legal adviser to the UN Secretary-General on El Salvador, and from 1992 to 1995 as a UN independent expert on El Salvador
37. Belisario Betancur (b. 1923), was president of Colombia from 1982 to 1986. During his administration he initiated peace talks with several Colombian guerilla groups.
38. On November 16, 1989, a special unit of the Salvadoran armed forces killed six Jesuit scholars and priests, their housekeeper and her daughter at the campus of the Universidad Centroamericana in San Salvador.
39. Jeane Kirkpatrick (1926-2006) was the US ambassador to the UN from 1981 to 1985.
40. Alexander Haig (1924-2010) served as the United States secretary of state from 1981 to 1982.
41. After the end of the 1976-1983 military dictatorship in Argentina, newly elected President Raúl Alfonsín appointed the Comisión Nacional sobre la Desaparición de Personas (CONADEP) to investigate the fate of the Desaparecidos, persons who had been disappeared. In Chile, the National Commission on Truth and Reconciliation was called to life by the government in 1991 to investigate serious human rights violations during the time of the 1973-1990 dictatorship.
42. Until his arrest in 1975, José Zalaquett (b. 1942) served as a defense counsel for victims of the Pinochet regime in Chile. He went into exile in the United States in 1976. He later served on the Chilean truth commission, which was largely based on his own ideas.
43. Salvadoran government troops murdered 900 civilians during a counter-insurgency offensive in rural areas on December 10-12, 1981.
44. Rosalyn Higgins (b. 1937), a lawyer from the United States, served from 1985 to 1995 as a member of the Committee on Human Rights under the International Covenant on Civil and Political Rights.
45. David Kretzmer (b. 1943), an Israeli lawyer, served from 1995 to 2002 as a member of the Committee on Human Rights under the International Covenant on Civil and Political Rights.
46. Eckart Klein (b. 1943), a German lawyer, served from 1995 to 2002 as a member of the Committee on Human Rights under the International Covenant on Civil and Political Rights.
47. Louis Henkin (1917-2010) international law professor at Columbia University (1963-1988), co-

founded the Institute of Human Rights in 1978. He was a member of the Advisory Committee on International Law at the State Department from 1993 to 2010 (see also n. 20).

48. In the course of investigations into human rights violations under the 1973-1990 Chilean dictatorship, Spanish magistrate Baltasar Garzón (b. 1955) issued an extradition order in October 1998 on the former dictator, Augusto Pinochet, invoking the principle of universal jurisdiction. Pinochet was in London at the time and was held by the British government for a year and a half before finally being released in March 2000.
49. Pieter Kooijmans (1933-2013), an international lawyer from the Netherlands, served as a judge at the International Court of Justice at The Hague from 1996 to 2006.
50. Bruno Simma (b. 1941), German-Austrian international lawyer, served as a judge at the International Court of Justice at The Hague from 2003 to 2012.
51. Nabil Elaraby (b. 1935), served as a judge at the International Court of Justice at The Hague from 2001 to 2006.
52. Thomas Franck (1931-2009) directed the Center for International Studies at NYU School of Law from 1965 to 2002 and was president of the American Society of International Law from 1998 to 2000 (see also n. 8).
53. Michael Reisman (b. 1939) has been a professor of international law at Yale Law School since 1965.
54. John Norton Moore has been a professor at the University of Virginia School of Law since 1966.
55. German citizens Walter Bernhard LaGrand and Karl-Heinz LaGrand were sentenced to death in the United States and executed in 1999. The Federal Republic of Germany sued the U.S. at the International Court of Justice (ICJ) because they had not been informed about their rights to counsel from the German embassy. In 2001 the court found in favor of the German suit, ruling that the U.S. had violated international law.
56. James Crawford (b. 1948), British expert in international law, and Alain Pellet (b. 1947), French expert in international law, both served as counsel in many cases before the ICJ.

## Zitation

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