

**POLEMICS & PERSUASION –
THE USE OF INTERNATIONAL
LAW BY NGOs**

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Argument

- UN Charter
- Increasing influence of international law on municipal law
To an extent almost unimaginable even thirty years ago, national courts in this and other countries are called upon to consider and resolve issues turning on the correct understanding and application of international law, not on an occasional basis, now and then, but routinely, and often in cases of great importance.
(Lord Bingham)
- Legitimate role of NGOs in influencing that process

**International Human Rights and
Humanitarian Law**

- States and individuals
- Rights and liabilities
 - *ius cogens*
 - Treaty or instrument
- Immunities
 - States - UN Convention on State Immunity
 - The problem of fragile and post-conflict states
 - Individuals – *Pinochet*

Nuremberg and after

- Nuremberg
- The hiatus
 - International law and the prerogative in domestic law
- ICTY, ICTR
- Rome Statute & ICC

The Role of NGOs

- Historical – who are they?
 - Justice
 - Amnesty
- The campaign against impunity.
- More recent NGOs

Essential qualities

- integrity,
- independence,
- accuracy and
- thorough research.

How NGOs apply international law (or should)

- Identify facts amounting to violation of human rights
- Identify what right has been violated
- Identify whether state is directly responsible, or is responsible by default (e.g. impunity; failure to provide access to justice or an effective remedy)
- Understand different status of norms in international law – no use claiming that a violation is of a customary norm of international law if it is not.

How NGOs apply international law (or should) [2]

- Is the state concerned a party to the particular instrument? Has it ratified if ratification is required?
- Has the state incorporated into domestic law the instrument or its norms?
- Does the state have a written constitution guaranteeing rights?
- Does the state have a working judicial system with an independent judiciary?
- Is there any relevant jurisprudence from that state or other states with a comparable legal system?

Making it work

- Go from particular to general – i.e. from domestic law which encapsulates international law norms to regional instruments, to international covenants to international declarations: - “funnel effect” start with the nozzle and work up.
- Campaign of embarrassment – attitude of EU and non-EU states’ desire for trade.
- Where practical, litigation.
- Teaching – professionals especially; but others too.

Some successes

- Rome Statute
- *S v. Makwanyani* (death penalty)
- *Pratt & Morgan v. A-G for Jamaica* (death penalty)
- *Roper v. Simmons* (juvenile death penalty)
- *Public Committee Against Torture in Israel v The State* (torture)
- *Ocalan v. Turkey*. August 2002 Turkey abolished death penalty except in times of conflict.
- *Hilaire* [IACtHR] (death penalty)
- *Winston Caesar* [IACtHR] (flogging with cat o' nine tails)
- *Pinochet*
- *Susan Kigula v A-G of Uganda* (mandatory death penalty)

And some failures

- *Watson* (Jamaica)
- *Matthew* (Trinidad)
- *Boyce* (Barbados)
- *Rasul v Bush* - judgment confined to interpretation of domestic *habeas corpus* legislation
- States' response to litigation successes

The limits of international law in domestic proceedings

- ...it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.
Sir Sydney Kentridge
- Express drafting of statutes – *IJCHR v A-G of Jamaica*; *Public Committee Against Torture in Israel v The State*
- Limits of extraterritorial extent of human rights protection - *Al-Skeini* and *Al-Jedda*

Some problems

- UNSC resolutions
 - *Al-Jedda*
 - Judicial review?
 - Which forum?
- incompatibility between human rights law and humanitarian law
 - *R. v. Jones*

Conclusions

- International law should be used, not usurped
- NGOs play a legitimate role in enhancing the effect of international law and in doing so change its nature by increasing its reception in municipal courts.
- There is nothing inherent in theories of international law that preclude the development of its application as well as the norms contained within it.

Conclusions [2]

- Maverick governments
 - Are there effective legal restraints?
 - Or effective remedies?
