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## International Law: A South African Perspective, by John Dugard [book review]

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**INTERNATIONAL LAW – A SOUTH AFRICAN PERSPECTIVE –**  
by John Dugard, 1994. Juta and Company Ltd., P.O. BOX 14373,  
Kenwyn 7790, 372 pages.

**Reviewed by Muna Ndulo\***

The book, *International Law – A South African Perspective*, provides an introduction to the rules and principles of international law. In its analysis of the law it takes account of both international and South African sources of international law. The book is comprised of twenty chapters. In chapter 1 it defines international law and discusses the history, sources, the enforcement and the old question of whether international law is law or not. While acknowledging that entities other than States participate in the contemporary international legal order, it emphasizes that States and intergovernmental organizations are the main actors in the international community and the only entities with true international personality and the principal creators of rules of international law.

In chapter 2 the book focuses on South Africa and International Law. It argues that International law is the product of the European State system that came into being in the Sixteenth Century. Until the Nineteenth Century it was in reality a European law of nations. This system of law, rooted in conventions of European superiority, accorded little recognition to the political organizations of Africa, whatever their level of sophistication. The chapter also examines the role South Africa played in the League of Nations and in the establishment of the United Nations.

In chapter 3 the book discusses the sources of international law listed in article 38(1) of the Statute of the International Court of Justice. Chapter 4 deals with the place of international law in South African municipal law. In the pre-1994 period, under South African law, a treaty was required to be incorporated by legislation into local law before a court could take cognisance of it. While examining the manner in which South African courts applied rules of international law, the author observes that, whenever possible, rules of international law were applied directly as part of domestic law. But where domestic rules of constitutional law required statutory

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transformation, as in the case of treaties, the courts did not apply international law until it had been enacted into domestic law.

In chapter 5 the book considers the rules relating to the recognition and non-recognition of states. It concludes that self-determination of peoples, which has become a primary value in contemporary international law, has led to a relaxation of some of the requirements of Statehood. While requirements of permanent population and defined territory remain intact, others, such as effective government and independence, are no longer strictly insisted on where they run counter to developments in international law regarding the right of self determination. Once a state is admitted to the United Nations, its acceptance as a state for all purposes, is assured. In chapter 7 the author discusses how recognition is to be proved and whether the rule that no effect should be given to the acts of an unrecognized State or government is absolute. In chapter 8, he examines the requirement of a defined territory as an element in the recognition of states. He does this in the context of the dispute between South Africa and Namibia over Walvis Bay and the Penguin Islands. In chapter 9 the book examines the issue of jurisdiction and international crimes. It observes that the achievement of consensus on the substantive definition of international crimes is of little value, if it is not accompanied by effective enforcement. The book argues that the recognition of multiple bases of jurisdiction for international crimes is therefore an important development in the evolution of international law.

Chapter 10 examines extradition in international law. The book notes that international law does not recognize any general duty on the part of States to surrender criminals. In practice therefore, the return of criminals is secured by means of extradition agreements between States. The treaties invariably do not include crimes of a political nature among the extraditable offenses. In the context of South Africa, the concept of "political offenses", assumed great importance after the abandonment of apartheid and the unbanning of the ANC and other liberation movements in 1990, in order to decide who should be pardoned or granted indemnity under the Indemnity Act of 1990, to allow exiles to return home and convicted political offenders to be released. Chapter 11 examines the question of immunity from jurisdiction of a foreign sovereign. In its consideration of situations in which persons or property are exempt by international law from legal liability or immunity from the observance of the local law, the book observes that there is a growing body of support for diplomatic asylum on humanitarian grounds. It suggests that customary law may be evolving in the direction of a rule in favour of diplomatic asylum for fugitives from oppressive regimes.

Chapter 12 deals with the topic of State responsibility for injuries to aliens. While examining the rule that where a State commits an international wrong against another State it incurs international responsibility and an obligation to make reparation, the book observes that during the apartheid era South African courts failed to apply this principle in the cases that came before them in a clear attempt to maintain the security of the apartheid state.

Chapter 13 focuses on human rights and international law. As the author observes, the concern by international law for the treatment of aliens did not until recently extend to the treatment of individuals by their own States. Early international law dealt with the suffering of individuals other than aliens lawfully admitted to the injuring State only to a limited degree. These weaknesses in the legal status of human rights clauses, the author observes, were vigorously exploited by South Africa as it sought to exclude debate, and later action by the United Nations on South Africa's racial policies. South Africa became the testing ground for the battle between human rights and domestic jurisdiction. It forced States to choose between supremacy of domestic jurisdiction and human rights. By choosing human rights, they took international law into a new era.

Closely related to the debate over domestic jurisdiction was the dispute over the legal status of the human rights provisions in the United Nations Charter. Until 1971, South Africa and other States, questioned the legal force of the human rights provisions, arguing that they were a mere Statement of ideals and did not impose any legal obligations on States. This controversy was resolved in the context of apartheid when the International Court of Justice, in its 1971 Namibia opinion, held that apartheid – as extended to Namibia – violated the Charter. The author observes that international human rights norms have increasingly received recognition in municipal law. The prohibition of torture, cruel, inhuman and degrading treatment or punishment, the norm of non-discrimination and the right not to be deprived of one's liberty without a fair trial have been recognized as customary international rules by municipal courts in several countries.

For decades South Africa distanced itself from the jurisprudence of human rights. As a result its courts ignored large areas of international law. The adoption of a bill of rights in the 1993 Constitution inspired by international human rights Conventions will change this. Human rights and international law will play a substantial role in the new South African legal order. Chapter 14 examines the law of the Sea; Chapter 15 air and space law; Chapter 16 the law of treaties; Chapter 17 international adjudication with special reference to the International Court of Justice and the European Court of Human Rights and Chapter 18 examines the United

Nations and the maintenance of peace. The five chapters analyze and explain international law principles and recent developments in these areas of the law. In chapter 19 the book discusses the use of force by States in international law. In this context, the legality of the military support given by South Africa's neighbours to liberation movements and South Africa's intervention in Angola and its incursions in Southern African States, raise interesting legal questions in international law. Chapter 20 examines the principal sources of humanitarian law and the status of this branch of law in South African municipal law. This is an area of law where South Africa contributed significantly to the development of international law in relation to the debate on the treatment of captured combatants from liberation forces as prisoners of war.

In the postscript, the book, updates the reader on the new constitution and political developments in South Africa. In November 1993 South Africa adopted a Constitution to serve the country until a democratically elected Constitutional Assembly draws up South Africa's final constitution. The interim Constitution was approved by the tricamera Parliament in December 1993 and came into force on 27 April 1994. The place of treaties in South African law is radically altered by the 1993 Constitution. Under the new Constitution, the President, is authorized to negotiate and sign international agreements, parliament is empowered to ratify the international agreements signed by the President or the accession to such agreements. Unlike the situation with the pre-1993 constitutional position, where Parliament agrees to the ratification of or accession to an international agreement, such international agreement shall form part of the municipal law of South Africa, provided Parliament so provides and such agreement is not inconsistent with the Constitution. The book argues that Chapter 3 of the Constitution containing the Bill of rights shows the clear influence of international human rights conventions. Several of its provisions are modelled on those of the International Covenant on Civil and Political Rights and the provisions dealing with property rights contains an expropriation clause that reflects international standards.

The book, however, observes that South Africa's Bill of rights fails to address certain issues of particular importance to international law. First it contains no provision protecting aliens against arbitrary expulsion. Article 13 of the International Covenant on Civil and Political Rights provides that an alien lawfully in the territory of a signatory State may only be expelled in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed and be represented for the purpose before, the competent authority. The second issue of

considerable sensitivity concerns the question of indemnity for international crimes. Apartheid was designated as an international crime, and as a crime against humanity by the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. The Convention attaches international criminal responsibility to those individuals guilty of implementing the worst features of apartheid. The International Covenant on Civil and Political Rights and the European Convention on Human Rights provide that the prohibition on respective criminal statutes shall not prejudice the trial and punishment of any person for any act or omission which at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations. The South African Bill of Rights contains no such qualification in its prohibition of trial or punishment for "any act or omission which was not an offence at the time it was committed". The transfer of Walvis Bay to Namibia entails a genuine case of State succession as Walvis Bay is removed from the sovereignty of one State and placed under the sovereignty of another State. The book points out however that the legislation effecting the transfer contains no provision dealing with succession to treaties.

As the book demonstrates, South Africa's contribution to the development of international law, has been enormous, although unintended. New rules of international law to promote human rights, racial equality, and decolonization evolved as a result of international opposition to apartheid. The prohibition on interference in the domestic affairs of States, enshrined in article 2 (7) of the Charter, was substantially weakened by a succession of resolutions condemning apartheid. Notions of Statehood were re-assessed as a result of the United Nations refusal to recognize the homelands of Transkei, Bophuthatswana, Venda and Ciskei as independent States. Humanitarian law was rewritten to confer prisoner of war status on combatants belonging to the African National Congress (ANC) and the other liberation movements. In addition, South Africa's six appearances before the International Court of Justice over South West African/Namibia enabled the court to formulate new rules of law on the status of international territories, the powers of the United Nations, human rights, and self determination.

The book explores the issues, the case law and State practice with great thoroughness and clarity in both style and presentation. It presents a clear and well written description and analysis of the various topics of international law discussed. The book is to be welcomed as an excellent exposition of principles of international law and the contribution of South Africa to international law. The discussion on the contribution of South

Africa to international law is done while fully acknowledging that South Africa's contribution was unintended and that South African court decisions interpreting international law principles were often biased in favour of the apartheid State. This is an excellent book and should commend itself highly to researchers, scholars, students as well as practitioners of international law.