

## IN MEMORIAM

### IN MEMORIAM THOMAS BUERGENTHAL (1934–2023)

In his best-selling memoir, *A Lucky Child*, Tom Buergenthal reflected on how his experience as a child caught up in the horrors of the Holocaust influenced his later career as a preeminent scholar and practitioner in the field of human rights, carrying him all the way to a seat on the International Court of Justice (ICJ). He said that his past “equipped me to be a better human rights lawyer, if only because I understood, not only intellectually but also emotionally, what it is like to be a victim of human rights violations. I could, after all, feel it in my bones.”<sup>1</sup>

In his bones indeed. Born in Lubochna (then Czechoslovakia) on May 11, 1934, Tom began his life at a small hotel run by his father Mundek, a Polish Jew, and mother Gerda, a German Jew. In 1938, the local fascist party confiscated the hotel, prompting the family to flee to Poland. Although they acquired visas to emigrate to England as political refugees, Germany invaded Poland on the day they were scheduled to depart, cutting off the family’s escape. Tom spent the next few years confined to the Jewish ghetto of Kielce in Poland, where he witnessed severe overcrowding, massacres, hunger, and disease. In August 1942, the ghetto was liquidated: those unable to move were shot; some 20,000 were transported to and massacred at Treblinka; all others, including the Buergenthals, were placed in work camps. Tom and his parents spent two years in such camps before being transported to Auschwitz.

Ironically, Tom often said he was lucky to get into Auschwitz. Normally, groups were screened upon arrival and children (as well as the elderly and disabled) were “selected” to be sent immediately to the gas chambers. But because Tom’s train was coming from a work camp, it was assumed that all were able-bodied, and there was no selection. At Auschwitz, however, Tom was separated from his mother; he and his father were tattooed (Tom was B-2930) and placed in barracks, sometimes located near the gas chambers, where Tom could hear screams and pleas for help. In October 1944, Tom’s father was taken during a “selection,” later to perish at Buchenwald.

In January 1945, Auschwitz was evacuated as the Soviet army approached, with the prisoners forced on a three-day, forty-four-mile “death march” over roads covered with snow and ice. Those who could not endure were shot by SS guards and left in roadside ditches; Tom was just one of three children to survive. The prisoners were then placed in open freight cars for a ten-day journey to Sachsenhausen concentration camp in Germany. Again, Tom survived, but with such severe frostbite that two of his toes had to be amputated. In April 1945,

<sup>1</sup> THOMAS BUERGENTHAL, *A LUCKY CHILD: A MEMOIR OF SURVIVING AUSCHWITZ AS A YOUNG BOY* xvii (2007) (reviewed in this *Journal* by Lori Fisler Damrosch at 104 *AJIL* 307 (2010)).

Sachsenhausen was liberated by Polish and Soviet troops. After a brief stint as a “mascot” for a Polish army company, Tom was placed in a Jewish orphanage,<sup>2</sup> where a year later he was tracked down by his mother, who had survived the war. They were reunited in December 1946 and settled in Gerda’s hometown of Göttingen, Germany.

Finding that he was not comfortable living in Germany, Tom emigrated to the United States in December 1951, at the age of seventeen, knowing little English. Living with an aunt and uncle as he finished high school in New Jersey, he attended Bethany College in West Virginia (B.A., 1957), New York University Law School (J.D., 1960), and Harvard Law School (LL.M., 1961 and S.J.D., 1968).

At Harvard, Tom studied international law under Professors Richard Baxter and Louis Sohn, who turned the youthful victim of human rights atrocities toward being a scholar. Tom completed his S.J.D. thesis under Baxter’s supervision<sup>3</sup> and then crafted with Sohn the first ever casebook on human rights,<sup>4</sup> which dramatically increased awareness and interest in the field for an emerging generation of human rights lawyers.

Tom served on the faculties of SUNY/Buffalo (1962–1975), Texas (1975–1980), and Emory (1985–1989)<sup>5</sup> law schools, and as Dean of the American University Washington College of Law (1980–1985), before finishing his academic career at George Washington University (1989–2000 and 2010–2015). He taught and mentored countless students, authored or co-authored numerous law review articles and a dozen books, and became viewed as one of the architects of the post-war human rights regime. When this *Journal* commissioned articles for its 100th anniversary, it was natural to turn to Tom to explain the system of human rights.<sup>6</sup> Likewise, when the UN audiovisual library sought a lecture on the history of human rights law, it turned to Tom.<sup>7</sup>

The scholar doubled as a practitioner. Tom was nominated by Costa Rica to serve as one of the first seven judges of the Inter-American Court of Human Rights, founded in 1979. The only U.S. judge ever elected to the Court (and its president from 1985 to 1986), he served for two six-year terms (1979–1991) during the Court’s emergence as a force for protecting human rights in the Western Hemisphere. Recalling novel doctrines developed in cases such as *Velasquez-Rodriguez*,<sup>8</sup> Tom once remarked that the Court’s initial judges felt a bit like they were John Marshall. Moreover, demonstrating a fierce commitment to protection

<sup>2</sup> Having arrived at the orphanage not knowing how to read or write, years later Tom would advise young parents not to worry too much about their child missing a few days of school, “because I lost seven years of school and it didn’t stop me from becoming a lawyer.”

<sup>3</sup> THOMAS BUERGENTHAL, *LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION* (1969) (reviewed in these pages by Oliver Lissitzyn, 64 AJIL 976 (1970)).

<sup>4</sup> LOUIS B. SOHN & THOMAS BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (1973). For the challenges in developing such a pathbreaking casebook, see Thomas Buergenthal, *A Casebook on the International Protection of Human Rights*, 65 AJIL 246 (1971).

<sup>5</sup> While at Emory, Tom was Director of the Human Rights Program at the Carter Center, working closely with former President Jimmy Carter.

<sup>6</sup> Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AJIL 783 (2006).

<sup>7</sup> UN Audiovisual Library of International Law, *Human Rights: Judge Thomas Buergenthal, A Brief History of International Human Rights Law* (2009), at [https://legal.un.org/avl/ls/Buergenthal\\_HR.html#](https://legal.un.org/avl/ls/Buergenthal_HR.html#). My interview with Tom about his life and career appears as a two-part video available at the same webpage.

<sup>8</sup> *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (ser. C) No. 4 (1988). The case identified important elements for establishing a government’s responsibility for forced disappearances, in some circumstances shifting the burden to the government to disprove its responsibility.

of the vulnerable, Tom did not hold back during his time on the Court from criticizing the U.S. government's support for autocratic regimes in the region.

From 1992 to 1993, Tom served as one of three commissioners of the UN Truth Commission for El Salvador, issuing a report that recounted in depth the large-scale human rights atrocities during that country's twelve-year civil war, including the assassination of Archbishop Oscar Romero.<sup>9</sup> From 1995 to 1999, he was the first U.S. national to serve as a member of the UN Human Rights Committee. From 1997 to 2000, he was an arbitrator and vice chairman of the Claims Resolution Tribunal for Dormant Accounts in Switzerland, which was established to identify and help return some \$1 billion to the owners or heirs of unclaimed Holocaust-era accounts.

As the capstone to such practice, Tom was elected and re-elected to the ICJ,<sup>10</sup> serving from 2000 until 2010 and participating in thirty-eight substantive decisions. Whether voting with the majority in a case against his own government,<sup>11</sup> crafting a stirring and influential concurring opinion on universal jurisdiction,<sup>12</sup> or casting lone "against" votes in an advisory opinion concerning Israel,<sup>13</sup> Tom was widely admired for his independence, integrity, and commitment to the rule of law.<sup>14</sup> Even so, he and his wife Peggy left The Hague before Tom's second term had expired, desiring to spend more time in the United States with their children and nine grandchildren.

Tom received many awards and honorary doctorates throughout his life, including the American Society of International Law (ASIL)'s Goler T. Butcher Medal (1997) for outstanding contributions to the field of human rights; ASIL's Manley O. Hudson Medal (2002) (its highest honor); the Gruber Foundation International Justice Prize (2008); and the United States Holocaust Memorial Museum's Elie Wiesel Award (2015) (a co-recipient with Benjamin Ferencz). The last of these institutions in 2018 produced a documentary on Tom's life entitled *Peace Through Justice*. This *Journal* and ASIL benefited greatly from Tom's energy, knowledge, and enthusiasm; he served on the *Journal's* Board of Editors for many years, was a vice-president and honorary president of ASIL, and served on ASIL's executive council.

Tom Buergenthal—a Holocaust survivor; a ground-breaking scholar, teacher, and mentor; and a practitioner who scaled the heights of his profession—died at his home in Miami on

<sup>9</sup> Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497 (1994).

<sup>10</sup> Tom was nominated not just by the U.S. national group, but by those of nineteen other states when first elected in 2000 and by those of thirty-two other states when re-elected in 2006. On his first election, see Lori Fisler Damrosch, *The Election of Thomas Buergenthal to the International Court of Justice*, 94 AJIL 579 (2000).

<sup>11</sup> See LaGrand (Ger. v. U.S.), 2001 ICJ Rep. 466, 514–16, para. 128 (June 27) (Tom dissented only on the admissibility of Germany's third submission); Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 ICJ Rep. 12, 70–73 (Mar. 31).

<sup>12</sup> Arrest Warrant of 11 April 2000 (D.R.C. v. Belg.), 2002 ICJ Rep. 3, 64 (Feb. 14) (joint sep. op. Higgins, Kooijmans, and Buergenthal, JJ.).

<sup>13</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136, 201–02 (July 9) (on one issue he was joined by Judge Kooijmans).

<sup>14</sup> On Tom's ICJ legacy, see Kenneth Keith, *Thomas Buergenthal: Judge of the International Court of Justice (2000–10)*, 24 LEIDEN J. INT'L L. 163 (2011); THEODOR MERON, *THE MAKING OF INTERNATIONAL CRIMINAL JUSTICE: THE VIEW FROM THE BENCH: SELECTED SPEECHES* 239 (2011) (chapter entitled "Judge Thomas Buergenthal and the Development of International Law by International Courts").

May 29, 2023.<sup>15</sup> To his end, Tom well understood that despite great progress in the field of human rights, much remained to be done, and that sadly many atrocities continued across the globe. Yet he urged others to turn away from cynicism. “The task ahead is to strengthen these tools, not to despair, and to never believe that mankind is incapable of creating a world in which our grandchildren and their descendants can live in peace and enjoy the human rights that were denied to so many of my generation.”<sup>16</sup> Through his extraordinary accomplishments, Tom Buergenthal played his part in creating such a world.

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<sup>15</sup> Sam Roberts, *Thomas Buergenthal, Holocaust Survivor and Judge, Dies at 89*, N.Y. TIMES (June 2, 2023), at <https://perma.cc/X9KT-BV3V>; U.S. Holocaust Museum, *In Memoriam—Judge Thomas Buergenthal (1934–2023)*, at <https://perma.cc/4SVE-39NJ>; *Thomas Buergenthal*, WIKIPEDIA, at <https://perma.cc/PWH3-MHSH> (last visited July 18, 2023).

<sup>16</sup> BUERGENTHAL, *supra* note 1, at 225.