

A black and white portrait of John Pace, a middle-aged man with short, dark hair, wearing a dark suit jacket over a dark shirt. He is looking slightly to the left of the camera with a neutral expression. Behind him is a large, light-colored graphic of the United Nations logo, which features a world map within a circular frame, flanked by two olive branches.

# Human Rights Law and International Order

## An interview with John Pace

For 33 years, international lawyer, JOHN PACE, worked for the United Nations. For several years, he was Secretary of the Commission of Human Rights, the UN body where international human rights law is drafted. He was also responsible for the first UN human rights investigative procedures, and he conducted fact-finding missions on human rights abuses in Chile, South Africa, Palestine, Poland, Cuba and Afghanistan. He is a Visiting Fellow at the Australian Human Rights Centre, part of the Faculty of Law of the University of New South Wales where he lectures on Human Rights Law. He is currently in Geneva researching a book with the provisional title "International Human Rights Law, Evolution, Structure and Content". OLGA YOLDI met him in Sydney, where he spoke about the refugee convention, Australia's treatment of asylum seekers, globalisation and a broad notion of human rights - all in the context of international law.

### **Is the detention of asylum seekers legal under international law?**

Detention is a deprivation of the right to liberty. International law is designed to protect asylum seekers and refugees; it would neither contemplate nor authorise the detention of asylum seekers, and certainly not for an indefinite duration. However, it is accepted that a state can take measures to control its borders and some people may be detained for purposes of checking the veracity of their documents, or for having access to the individual while they process a claim, but it would be a short detention and not in conditions of incarceration. When that process is finished and if it is found that the person does not qualify for any kind of protection under international law, or national law, then he or she may be deported, as it is presumed that the applicant can return to his or her country of origin. If a person has left his country because of circumstances that render the continuation of living there impossible, it is presumed that he would need some form of protection.

### **There are international conventions that protect the rights of children, however children are being detained in Australia now. Is detention of children illegal under international law?**

There aren't many conventions that protect the rights of children. If you look at the history of the conventions that the Commission on Human Rights produced, there is the Convention on the Rights of the Child. It took 18 years to develop this convention, and it has been ratified by a record number of governments; yet, it has some drawbacks and there are areas that are not adequately addressed. The expert body [Committee on the Rights of the Child] that monitors how

governments are putting their obligations into effect has done good work in expanding the jurisdiction within the parameters of the convention itself, even though some child protection related problems have not been specifically addressed.

### **Can asylum seekers in detention, who have been refused status but cannot be repatriated, be protected in any way under international law? At present they are in interim detention until the political situation of the country of origin changes. Change, however may never occur in which case they will be indefinitely detained.**

Human rights law does not allow mandatory detention, as it is not consistent with international human rights law. If Australia has ratified the International Covenant on Civil and Political Rights then the government is contravening their obligations under that Covenant.

### **Shouldn't the Refugee Convention be broadened to account for environmental and economic refugees?**

Yes the Refugee Convention should be broadened. The Convention is old, outdated. It doesn't work for most people. It only works for small groups of people. When the Convention was drafted in 1951, it was responding principally to the needs of refugees of World War II in Eastern Europe.

The whole regime of international law was geared to protect persons who had to leave their country for political reasons, because of discrimination or persecution. The protection of refugees under international law does not address problems of economic, cultural and social rights. That is why many people believe today that the so-called

economic refugees should not enjoy the protection offered to political refugees, because they cannot prove that they have a deep seated fear of persecution. I do believe, however, that the covenant on social and cultural rights should be applied to protect those people.

Last week the Migrant Workers Convention came into force. Guatemala was the twentieth country that ratified the convention, and that completed the number of countries required to bring the convention into force – to make it applicable. Migrant workers is a classic case of denying economic rights. It took much longer than most conventions just to bring out the 20 states to ratify it for it to become legally binding. Because, in spite of its intrinsic merits, there was a great deal of political unwillingness among governments to extend the protection of social and economic rights to migrant workers.

Poverty and inequitable distribution of resources are contributing to the denial of economic and social rights and that has to be addressed. Twenty one million people are moving around the planet today. People don't leave their country for the joy of it. Most people, given the choice, would stay in their own country. The only reason they leave is because of survival. It is that deprivation of their economic rights that causes most conflicts.

Governments try to protect their borders, their societies, but sending them back does not solve the problem. Those people that were sent back to Afghanistan are trying to survive in a country that is still hostile and dangerous.

Parallel to the convention we have the Statute of the High Commission for Refugees, which includes a mechanism for applying the convention in a

# Human Rights Law and International Order

manner that makes it more elastic, so over the years the provisions of the Refugee Convention of 1951 have been stretched, but the convention cannot be stretched anymore. It is not addressing the so-called economic refugees. That is where the problem lies. Political persecution today is marginal. In Afghanistan people left because of religious persecution, not because of political persecution.

**It may take a long time before economic refugees are accepted and protected by international law.**

It is unfortunate that the law is always following the reality and not leading it.

I really do hope that economic and social rights will be implemented alongside civil and political rights, because these two sets of rights form one set of standards that enable individuals to live with a certain amount of dignity, which forms the basis for social order and peace. So much so that the Universal Declaration of Human Rights incorporates all these rights in one single document. Unfortunately, for historic reasons, economic and social rights were separated from civil and political rights and each set was made the subject of a covenant or pact. So even if each covenant is part of international human rights law, the fact that they are separated weakens both.

The Universal Declaration of Human Rights which, as I said, incorporates all human rights in a single document, defined these rights in a generic fashion. These same rights were defined more specifically and they became legally binding obligations in the two covenants. Then there is the large number of other conventions and declarations, standards and guidelines geared for specific groups: such as protection of children, women,

indigenous people, as well as guidelines for sectors of society such as judges, prosecutors, law enforcement officials, lawyers and social welfare workers, and other groups.

The problem started at the

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**Nobody thinks about the right to work, to health, to education and the right to shelter.”**

top where the division took place in 1952. You have to understand that at that time the notion of protection was limited to civil and political rights. When you talk to government officials or people in the street about human rights they think of torture and arbitrary detention. Nobody thinks about the right to work, to health, to education and the right to shelter.

It is interesting to recall, anecdotally, that the first draft declaration of human rights to be proposed to the UN in 1946 was by Cuba, followed shortly thereafter by a second proposed draft submitted by Panama. The Latin American countries were well prepared at that time. Indeed, they had had a meeting in Mexico shortly before the charter was drafted. In fact, the

Latin American countries were the first developers of human rights. A human rights treaty for the region, the Treaty of San Jose, was signed in 1938 in Costa Rica.

After World War II there was a movement that pushed to put together an international system that was more durable than the League of Nations had been. Under the charter of the UN, there was a mandate to set up a commission of human rights which had the mandate to develop international human rights standards. The Universal Declaration of Human Rights was adopted in 1948. At the time the Declaration did not have the effect of law. Thus, the General Assembly of the UN decided that a human rights convention would be drafted that would be legally binding for governments, and work started on the drafting of this convention in 1948. But by 1950 the Commission on Human Rights, which was drafting this convention, was experiencing problems keeping all human rights together in one unitary convention, and by 1952 the Assembly reluctantly agreed to separate civil, political rights from social and economic rights. When the drafting of these binding laws was finished in 1966, it took another 10 years for 35 governments to ratify them, by accepting the legal obligations and its implementation. Such governments from then on would be obliged to report to a body elected by the States who would have become party to the covenant. This body, known as The Human Rights Committee, is made up of individual experts – not government representatives, as in the case of the Commission on Human Rights - elected by the governments who have ratified the Covenant, and whose task is to monitor the conduct of governments, and to point out

what measures governments should or shouldn't take to make their national laws and practices consistent with their international obligations.

It took 30 years, from 1948 to 1978, for international human rights law to start being implemented and even then it was only limited to those states that had ratified the Convention. A very slow process indeed! There are others, but those don't have a mechanism for implementation for there is no supervision.

### Who is this group of experts that form the regulatory body for the implementation of human rights?

The Human Rights Committee is made of a few members from each region, elected by those governments who have ratified the covenant. This Committee supervises the implementation of the international Covenant on Civil and Political Rights. They meet three months a year, they focus on individual cases, hear complaints about governments, receive reports from governments on the way in which they say they have implemented their obligations, such as, how they have adapted their judiciary systems, and so on. Not only governments provide feedback but also non-government organisations (NGOs) such as Amnesty International, MSF [Doctors without Borders] and others also submit reports to complement the information provided by governments. It is not a perfect process and it doesn't always work as well as it should, because when these treaties were done it was not expected they would be so popular today.

Ironically, if you measure the success of a treaty by the number of governments that have ratified it, then you can say that the success of the treaty has also

been the cause of its inefficiency. Governments are expected to report only every few years; that, of course, is not good enough, there are however measures that can be taken in between. The Commission can also hold extraordinary sessions to focus on specific countries, in parallel to the usual convention or treaties.

Also, many governments simply do not submit reports. Therefore the committees have had to develop a procedure whereby if a government doesn't report to the committee, then the committee is empowered to make an assessment of the situation in that country, even in the absence of a government report. The committee will do so from the information available from NGOs or other UN human rights bodies, and, from the so-called Special Rapporteurs, or by using extra conventional mechanisms. In the 1960s, in addition to the treaties, the Commission on Human Rights developed a second parallel system of implementation of human rights. This is known as the Extra-Conventional System, which is based on the principle of fact finding, or investigation, under specific resolutions of the Commission on specific situations in certain countries.

For instance, when the coup took place in Chile in 1973 the Convention on Torture didn't exist. But there was such a public outcry about human rights violations perpetrated by the Pinochet's military junta that the Commission decided to conduct an *ad hoc* investigation into these allegations. During that period the Rapporteur in Chile was reporting to the Commission about the government of Chile. This is a good example of how the UN, in parallel to the legislative process, can also undertake *ad hoc* measures. The Commission has been accused of not taking steps

in relation to other human rights violations perpetrated in other countries where the situation was as bad as in Chile.

A short time later, a proposal was tabled in the Commission on Human Rights, against the Argentinean junta, who decided to cooperate in the drawing up of the resolution. A compromise was reached when a mandate to conduct a collective investigation on disappearances (not necessarily related to Argentina) was carried out. Of course, the emphasis was on Argentina and indeed the Commission set up an infrastructure to, among other things, record the names of those people who had disappeared. When a civilian government was elected in Argentina years later, it came to us to seek the records to enable them to track down the people who had disappeared.

When we speak about implementation of human rights, you have got to take into account that these are standards that have been set up as a result of the collective political interaction of governments. It is not perfect because governments always negotiate with each other on the basis of national interests. However, the platform of consensus and agreement among governments has consolidated itself; today, it is possible not only to denounce but also to prosecute the perpetrators. There is such a thing as a human rights crime, the so-called crimes against humanity, it is the subject of jurisdiction set out in the Rome Statute, setting up the International Criminal Court; something that not so long ago was simply not possible. It wasn't possible to talk about human rights crimes because the political consensus didn't allow it. We have had a constant evolution, hardly noticeable, because what we see is essentially the denial of human rights.

# Human Rights Law and International Order

There are countries that are consistent and countries that aren't. The force of international law lies in the international collectivity and not the individual country itself. In some countries it fails, however other countries have an interest in making sure that it doesn't fail because the denial of human rights in some countries may have repercussions on others.

**However human rights continue to be violated, we see and read about them everyday**

The genocide of Rwanda for example, people hardly remember that it was the third genocide that had taken place in the last 30 years in the same region. Tutsis against Hutus and vice-versa. Before it was not possible to have a trial about the genocide in Rwanda; now it is possible because of the International Criminal Tribunal on Rwanda. It may not be working with the utmost efficiency, but it is working. A number of people are being convicted of these crimes. Up to 10 to 15 years ago you had impunity. Even Pinochet was considered to be untouchable until a Spanish magistrate issued an extradition request to the judiciary of the UK, on behalf of a Spanish citizen who claimed his rights had been violated in Chile, while Pinochet was in power. From a legal point of view, Pinochet was held responsible for crimes that had been committed in violation of the Convention against Torture to which Spain, Chile and the UK were parties. That would never have been possible a few years before. He got away, but in Chile he was deprived of the immunity he had as a senator. Even the courts in Chile took up the case.

Milosevich is answerable to a court. He may be found guilty or not, but Idi Amin got away, Bocassa, the Shah of Iran and

Mengistu got away because the international legal system had not yet been developed to the level it is today. Although the present system is far from satisfactory and there is a long way to go, the fact is, it is a process that is constantly acquiring strength and momentum.

**“The temporary notion of asylum is inconsistent with the spirit of the Convention.”**

**Is the issuing of Temporary Protection Visas legal? Is this temporary notion of asylum within the spirit of the convention?**

Yes, they are legal to the extent that they are the result of a national law but they are also inconsistent with international law. The temporary notion of asylum is inconsistent with the spirit of the Convention. The convention has very strict principles of *non-refoulement* under international law. Those governments that receive asylum seekers are not to send them back. On the other hand, they can only be given refugee status if they conform to international law. Protection under international law is only possible if governments have agreed to certain criteria, certain standards, which are embodied in the convention.

**The Refugee Convention says that you are a refugee if you cannot return home. Under the Convention it is irrelevant if the situation in the country of origin changes. Refugees who came to Australia in the 1950s from Germany or Russia were never sent back when the situation in their countries did change. At the**

**moment many asylum seekers' lives are being put on hold because they don't know whether they will be sent back or not and when that will happen, if ever. Is it reasonable to repatriate refugees if the situation in their country of origin changes after applicants have been processed?**

The question of repatriation of refugees after the situation in their country of origin changes is an artificial one, because the circumstances that would have caused people to leave will not only change if the political situation changes, but if the social and economic conditions change. You can have another government in Afghanistan, but in reality, that government may not have addressed the conditions that caused people to flee.

The policy of refugees in Australia has always been on the generous side. It was never as restrictive as we see it today. But what has happened in the last few years is the result of the hysteria, which is understandable if you take into consideration the huge number of people moving around the world. Australia receives a symbolic fraction of asylum seekers coming in this direction. But if we look at Europe, the flow between Africa and Europe is massive with boats crossing from Africa to Southern Europe constantly. However they don't detain them. The same happens with the Mexico-US border. They may not qualify as refugees but they are not sent back. Migration from impoverished to developed countries is a big tragedy and has not been addressed sufficiently by the international community. We cannot close the door to these people because if they don't come by boat they will come by plane or by foot.

The purpose of development is to create conditions that eliminate the causes that oblige

people to flee. When people leave it impacts on the economy of their own countries, often-rich countries as in the case of Angola for instance. Angola has one of the richest lands. It is blessed by fertile grounds, by rich mineral deposits, by oil, diamonds etc, yet people are starving because the economy has been destroyed as a result of decades of civil war and by the colonial system, which had no interest whatsoever in developing countries. Unfortunately, colonialism, at least in many cases, never helped to build solid political structures and solid economies. Colonialism only developed dependent economies. Countries rich in natural resources supplying to developed countries.

**Globalisation, the internationalisation of trade is a modern phenomenon. Has it contributed to human rights violations or economic exploitation?**

Today markets are no longer limited to borders. The internationalisation of trade is ironically helping the realisation of economic and social rights. Unfortunately multinationals only speak about the maximisation of profits and don't take sufficiently into account the need to respect economic rights. However there is a strong indication they are moving in this direction. The freedom of making profits at all costs is being limited by the recognition of the need to respect international law. The respect of human rights is in the best interest of trade. Corporations that have a short-sighted policy will collapse. They may make a lot of money in a short term, but then most businesses are increasingly recognising the need for long-term survival and in order to do that they need to ensure that people to whom they are selling, employing and providing

resources, have their economic and social rights respected under international law.

If we look at Indonesia for instance, the changes are quite phenomenal. It is a country that is big, that has an impossible geography, a wide variety of cultures, and is rich in natural resources. In recent years they have been reorganising their economy in such a way so as to have a more equitable distribution of resources. Until recently they

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had an autocratic government, the economy was deteriorating, however the younger generation of Indonesians are engaging in the task of reorganising the basis of their society to make it consistent with these international standards.

I will give you another example, Chad is a country with a long tradition of internal conflict. There is a project aimed at helping the people of Chad, who have long suffered as a result of this internal conflict. The project developed last year includes three parties: the government of Chad, a consortium of oil and gas companies from a number of countries, and the World Bank. Under an agreement, the oil companies extract the oil, the resources from that exploitation are going to the World Bank, the World Bank only releases

those moneys to the government, directly taking care of the bills for the construction of projects that strengthen the economic and social infrastructure of the country, such as schools, hospitals, staff training etc. Only a small percentage goes to the government. This is a way in which the international system is seeking to strengthen the infrastructure of the country. Eventually the government will have a society that is better protected. It won't be necessary for it to continue to repress its citizens and may instil a culture of respect to its own individuals within its own jurisdiction.

The World Bank is serving a purpose, the multinational corporations are making their profits but the people of Chad are getting the benefits. This project could address some of the long term problems by strengthening the economy and making it possible for an equitable distribution of the wealth of the country, thus enhancing the basis for stability.

The private sector is assuming this responsibility more and more. You have the sort of projects happening now such as the Global Compact, which is a concept that it is still in its infancy, aimed at raising awareness in international corporations, in regard to the implementation of human rights standards, including international labour and environment standards. The UN Secretary General announced the Global Compact in the 1999 World Economic Forum in Davos Switzerland. Since then a number of international companies and NGOs have been co-operating together to bring the international human rights agenda closer to the private sector. Many corporations are moving in that direction, which is something that was inconceivable

# Human Rights Law and International Order



not so long ago. Having said that, we must emphasise that there is still a long way to go, and many corporations have still to fully understand the logic of endorsing a human rights agenda.

The multinational corporations were traditionally associated with economic exploitation of colonies. They were tools of the colonisation process. Today, they are competing with each other to look better. Some still consider this as a pure public relations exercise, but many of them have begun the process of injecting this culture inside their corporations as part of their values.

**If you see the current social and political state of our world there is a long way to go in the implementation of human rights.**

The implementation of treaties by countries has a long way to go but it is moving. I have worked in the UN for 33 years. When I started it was almost like science fiction. It was paper pushing. Today in the UN we speak about investigations, about the international criminal court, we speak of the efforts to fight impunity. These are concepts that were totally foreign not long ago. So, although there is a long

way to go we have been making considerable advances.

Human rights are not something that you win or lose. Human rights are a way of life. They work if you have institutions in the country that are able to provide the individual with the possibility of addressing problems of human rights and believe in them. So, if the courts are functioning well, if the individual has the opportunity to be assisted to find a remedy to a problem then that is fine. But if you don't have those institutions the individual has no way of seeking protection. Then you are in trouble and the international system is there to encourage and strengthen those institutions and those mechanisms at the national level.

Asylum seekers are like a barometer; they show us to what extent we need to address the causes that create asylum seekers in the first place. Until that is addressed we will have a problem and the international law can only continue to create this natural fibre, tissue, material that minimises the chances of abuse.

The protection of the individual is the primary responsibility of the state. Some states fail to protect its citizens. When states fail the institutions have a duty to intervene. Intervening does not mean short-term solutions, but providing support to strengthen the economy and the social and political institutions so that the state can survive as an entity on its own merits.

International law is like a chain, a chain is as strong as its weakest link. It can only work to the extent that it is applied. If you have a regime that is corrupt, that doesn't respect the rights of its citizens, then international law remains weak. On the other hand, those states that have

institutions that have a tradition, a culture of human rights, have a duty to export that culture to assist people who don't have that benefit. That can be done by creating the conditions in that country that will enable it to strengthen its institutions and economy.

International law is a process that relies heavily on its components and the components are governments. But now there aren't only governments, civil society is strong. You have organisations such as the International Committee of the Red Cross, Amnesty International, Medecins sans Frontiere, World Council of Churches. Governments also listen to them. The nature of civil society has also changed, from one of purely denouncing to one of doing. The protection of civilians is directly linked to these organisations. So, you have governments and civil society. You have international systems working, helping and educating people on human rights. International entities work together and complement one another not only to protect individuals, but convict the perpetrators.

So, today international law is a much more sophisticated process than it used to be. It is no longer simply a reaction to a violation but a productive process. We still have a long way to go. New generations make stronger claims and some have a global culture mentality. Look at the reaction to the war that took place in Iraq. You saw the persistence and insistence of people including the new generations who are trying to do something about it, and that is important.

International law is necessary to ensure world order – international human rights law is necessary to ensure world peace. ■