



Panel: Law in the Domestic Courts of Other Nations

International Law in the Decisions of the Supreme Court of Argentina

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Summary

Since the year 1992 there has been an expansion of the legal basis on which judicial decisions are made in Argentina. Up until that year, decisions had usually been based only on the Argentine Constitution and the domestic laws. In 1992, the Supreme Court of Argentina (hereinafter, the Supreme Court) recognized that the international treaties on Human Rights are self-executing (except, of course, in the event such treaties include any clauses providing for specific implementation of legislation), and also recognized that, in general, all international treaties must be complied with, and that the provisions therein contained must be abided by within the country, provided such treaties have been entered into in pursuance of the relevant constitutional principles, regardless of the Argentine legal provisions on the matters to be decided.

The above criteria became widely accepted, and were included in the Constitutional amendment of 1994.

In 1995, the Supreme Court also recognized the applicability of the *jus cogens* to decide on crimes against humanity, particularly, regarding the grant of extradition requests.

In essence, the same principles have been upheld by the current members of the Supreme Court, specifically with regard to the dismissal of motions relating to the expiration of the statutory limitation periods on crimes committed during the military regime, as such offenses were also qualified as crimes against humanity (although the legal descriptions of the criminal charges were the ones in force under the Argentine criminal law at the time such crimes were committed).

Historical Criteria on the Application of International Treaties

On February 14, 1889, the Supreme Court had its first opportunity to hear a case in which the outcome could vary depending on whether the matter brought before it was solved under the Argentine legislation or under an international treaty. It was a case involving an extradition request, in which the party concerned claimed that the foreign extradition request did not meet all the formal requirements established by the domestic legislation on extradition. The Supreme Court upheld the arguments laid down in the decision of the Federal Court,

pointing out that the national legislation on extradition invoked by the appellant had been enacted after the relevant treaty came into effect, and that the legislation in question had not modified nor could modify any preexisting treaties, “since a treaty is an act originating in an agreement between two nations, thus taking precedence over the extradition legislation invoked in the case under consideration, which legislation constitutes a unilateral act.” (¹Fallos: 35:207).

Such a simple, straightforward line of argument lay at the core of the Argentine judicial decisions for many years, provided that the treaty in question had been entered into in accordance with the applicable constitutional principles and was currently in force.

However, at a certain point there was a substantial shift in the above-mentioned criterion, the new criterion taking root in 1963 and lasting until 1992. During this second stage, the precedence of international treaties over national laws was no longer recognized.

During this period the Supreme Court expressed that the provisions of the Constitution were clear as regards their preeminence over any other rule, and that the international treaties formed part of the country’s legal system along with the domestic laws, emphasizing, however, that such constitutional provisions made no reference to any hierarchical order between international treaties and domestic laws.

Based on the foregoing premise, the Supreme Court concluded that, since the Constitution did not specify any order of precedence between international treaties and the Argentine laws, then the general legal principles should be applied under which subsequent laws override prior ones, and specific laws override general ones (Fallos: 257:99 and 271:7, among others).

The Present Stage in the Application of International Law

On July 7, 1992, in deciding the case entitled *Ekmedjian, Miguel Angel vs. Sofovich, Gerardo, et al.* (Fallos: 315:1492), the Supreme Court shifted back to the original criterion, recognizing the precedence of international treaties over domestic laws, although doing so based on different grounds (even though the opinions of the nine justices who then formed the Court were not uniform, they did agree on this specific matter under analysis).

In this case, the plaintiff invoked a right that was not contemplated or regulated by any Argentine laws, although it was contemplated by the Inter-American Convention on Human Rights (also known as the San José Pact [Costa Rica]). The nine justices agreed that the case had to be decided on the basis of the assumption that the Treaty was to be regarded as the supreme law of the land, although they did not agree on other aspects of the case.

The five justices forming the majority expressed the following:

¹ Judicial decisions. For searching purposes www.csjn.gov.ar (Spanish).

[A]n international treaty may be violated either through the passing of domestic laws providing for conducts which are in open contradiction of the treaty in question, or through the failure to lay down rules that enable compliance with such treaty. Both situations would be in contradiction of the prior ratification of the relevant treaty. . . .

. . . an international treaty, entered into in pursuance of the provisions of the National Constitution, including its international ratification, constitute acts of an inherently federal nature, since it is the National Executive Branch that enters into and signs the treaty . . . , it is the National Congress that approves the treaty through the passing of a federal law . . . , and it is the National Executive Branch, again, that ratifies the treaty so approved by the passing of a law, thus granting a federal act of a national hierarchy. The abrogation of an international treaty by an act of Congress constitutes a breach of the division-of-powers principles laid down in the National Constitution itself, since a law could thus override a complex federal act such as the one constituting the execution of a treaty. [Such legislative act] would constitute an unconstitutional encroachment by the National Legislative Power on the authority of the National Executive Branch, which is entrusted, on an exclusive basis, with the conduct of the Nation's foreign affairs,

. . . the Vienna Convention on the Law of Treaties—. . . in force since January 27, 1980—recognizes the preeminence of international conventional law over domestic legislation. Now, this preeminence principle has been incorporated into the Argentine legal system. The Convention is a constitutionally valid international treaty, in pursuance of which international treaties take precedence over domestic laws, within the scope of the domestic legal systems, thus recognizing the preeminence of International Law over domestic legislation.

This Convention has modified the situation of the Argentine legal system as per Fallos: 257:99 and 271:7 above, since the legal position under which “there is no legal grounds to give precedence to an international treaty over domestic laws” is no longer sustainable. The current legal position is based on Section 27 of the Vienna Convention, under which “parties may not invoke any provisions of their domestic laws in justification of their failure to comply with an international treaty.”

. . . the necessary application of Section 27 of the Vienna Convention compels the organs of the Argentine State to give precedence to treaties in the event of potential conflicts with domestic laws; the same rationale applies to those cases in which the domestic legislation fails to establish certain provisions ensuring the application of the relevant treaties, a situation which would also amount to an event of noncompliance

The foregoing . . . is in accordance with the international cooperation, harmonization, and integration requirements accepted by the Argentine Republic, and concerns the potential liability of the State in connection with the acts of its organs, a matter that is not alien to the jurisdiction of this Court to the extent this Court can prevent the breach of the above mentioned principles in pursuance of the provisions laid down in the Constitution. In this respect, the Court must ensure that the country's foreign relations are not affected by acts or omissions originating in the Argentine legal system, which in the event of bringing about such disruptive consequences, would give rise to relevant federal cases.

. . . when the Nation ratifies a treaty entered into with another nation, it assumes an international obligation that its administrative and judiciary agencies shall apply such treaty in those cases that fall within the purview of the treaty, provided the treaty in question sufficiently defines those situations in which its provisions are immediately applicable. A legal rule is self-executing when it contemplates a real situation to which such rule is immediately applicable, without the need for the legislative authorities to establish any special institutions for that purpose.

... furthermore, the Pact (San José, Costa Rica) must be interpreted in harmony with the judicial precedents of the Inter-American Court of Human Rights. . . .
... judicial precedents must be included among the legal instruments available to ensure that the purposes of the Pact are fulfilled

Equally important from a case law standpoint were the considerations made by three other justices concerning the particular characteristics of Human Rights treaties. Following are some excerpts of the judicial arguments:

[T]his question becomes clearer when viewed from the standpoint of the International Law principles concerning the protection of Human Rights. In fact, one of the characteristics of this Law is the need to distinguish international treaties on human rights from any other kind of international treaties.

The legal grounds for this position lies in the fact that human rights treaties are not instruments used to strike reciprocal balances between the interests of different states; on the contrary, it is their purpose to establish a common public order whose intended subjects are not the states, but the human beings inhabiting within the territories of such states. This legal position is shared by Europe and America. In fact, the European Human Rights Commission has expressed the following . . . “ . . . the obligations undertaken by the signatories of this Convention (the European Convention on Human Rights) have an essentially objective nature, and have been designed to protect the fundamental rights of human beings . . . rather than to create subjective rights of a reciprocal nature between the signatory states.”

. . . The Inter-American Court of Human Rights has held that Human Rights treaties are not multi-lateral treaties of the traditional kind, under which signatories engage in a reciprocal exchange of rights for their mutual benefit. The objective and purpose of the former are the protection of human beings’ fundamental rights, regardless of their nationality, against both their own states and the other signatory states. By signing Human Rights treaties, states become subject to a legal order under which they undertake, for the achievement of the common good, a number of obligations, not to other states, but to the individuals under their jurisdiction.

. . . given the particular characteristics of these rights and their undoubted relevance, states can be subject to potential claims brought before international bodies engaging in the protection of such rights. . . .

. . . the difference between the two categories of treaties being established, we need to point out that one of the consequences of such distinction is that the self-executing nature of the provisions contained in international human rights treaties is presumed. In other words, . . . the above-described provisions recognize rights which, given the presumption of their existence, can be invoked, exercised and protected without any implementing legislation being required. This principle is based on the general duty to respect humankind’s rights, an axiom which lies at the core of the International Law of Human Rights. . . .

One year later, in a case concerned with a treaty not dealing with Human Rights, the Supreme Court unanimously ratified the precedence of international treaties over domestic laws, on the one condition that the relevant constitutional law principles be abided by (Fallos: 316:1669).

The foregoing criteria became widely accepted, and were incorporated into the National Constitution when amended in 1994. The recognition of the suprem-

acy of international treaties in general, and the recognition of the self-executing nature of Human Rights treaties in particular, are mostly perceived as a guarantee in Argentina, a country where the constitutional order has been disrupted on several occasions.

Now, the National Constitution specifically established in Section 75, Subsection 22, that international treaties take precedence over domestic legislation.

Furthermore, a distinction was included regarding Human Rights treaties: ten specifically-designated Human Rights treaties were recognized constitutional hierarchy as such treaties were valid and in force at the time of the amendment; explicit reference being made to the fact that such treaties must be considered complementary to the rights and guaranties recognized by the Constitution.

Only subject to prior approval—by such number of members of Congress as is required for the passing of convocation for constitutional amendments—can the Executive Branch repudiate the above mentioned Human Rights treaties. On the other hand, in the event new Human Rights treaties are approved by two thirds of the total members of Congress, such treaties will acquire the same constitutional hierarchy (two more treaties have been approved under such condition since the amended constitution came into force).

In the year 1995, the Supreme Court had to decide on the extradition request for Erich Priebke, who had been charged with participating in a particularly cruel episode which occurred in March 1944, during the German occupation of Northern Italy (Italy being the country that made the extradition request). Allegedly, Priebke had taken part in the selection of three hundred and thirty five victims who were killed in a particularly inhumane manner (seventy five of whom had been specifically selected for being Jewish) and personally killed two of these people.

The lower courts had denied the extradition request based on the following grounds: a) by application of the terms of the treaty subscribed with Italy, the courts deemed it essential that the facts also be considered from the perspective of the Argentine criminal laws; b) based on the specific charges stated in the Italian request, the crime in question was homicide; and c) the statutory limitation period established for the foregoing category of crime—homicide—was also applicable to the case under consideration.

The Supreme Court understood, however, that the alleged facts constituted *prima facie* the crime of genocide (there is no reference to the crime of genocide in the Argentine Criminal Code). The decision was grounded as follows:

[T]he qualification of crimes against humanity does not depend on the discretion of the nation issuing the extradition request or the one receiving such request, but on the jus cogens

. . . under the stated conditions, no statutory limitations apply to such heinous crimes, and the extradition requested must be granted without any further discussion.

The decision was made by a majority of six justices, three of whom further elaborated individually on the matter under discussion; with all six justices agreeing on the application of the *jus cogens*, as well as on the non-applicability of statutory limitations to crimes against humanity (Fallos: 318: 2148).

The majority of the current members of the Supreme Court have adopted the same criterion, as specifically evidenced by its ruling of August 24, 2004. In this ruling, which contained several references to the *Priebke* case, the Court decided against the applicability of the statutory limitations to crimes against humanity which affected political opponents of the Pinochet regime, who were exiled in Argentina (*Arancibia Clavel, Enrique Lautaro*).

Similar criteria were also adopted by the majority of the justices currently forming part of the Supreme Court, on August 14, 2005, when the Court decided to confirm the annulment—which had been previously declared by law passed by Congress—of the national laws benefiting military and police personnel charged with the commission of crimes during the military regime, between March 1976 and December 1983. Furthermore, the Court decided against the applicability of the statutory limitations to such crimes, qualified by the Court as crimes against humanity, even though the criminal definitions on which the charges were based are the ones laid down in the Criminal Code in force at the time the crimes were committed (*Simón, Julio H. et al.*).

In the latter case, in particular, several justices put forward other arguments that had been suggested on other occasions. These arguments were based on the principle of universal jurisdiction, in connection with legal actions brought in other countries against Argentine citizens for crimes committed in Argentine territory. An argument commonly put forward is that the country must regain sovereignty and prosecute within its territory certain crimes which would otherwise be prosecuted abroad.

Of all the current seven justices of the Supreme Court (there are two vacancies), only one sustains that *jus cogens* does not preclude the validity of the domestic legislation which benefits, through statutory limitations and an amnesty, those armed forces and police personnel who have been charged with the commission of crimes during the military regime. He is the only justice who has held his position since the country reverted back to democracy in 1983.

Both the present members of the Supreme Court, and the justices who formed the Supreme Court during the previous decade, used international treaties to recognize broader rights, and *jus cogens* to deny the benefits deriving from domestic legislation, on criminal cases involving Human Rights.

Two examples of cases in which certain rights and remedies were recognized which were not contemplated by the domestic legislation are the above mentioned case of *Ekmedjian*, and the case entitled *Giroldi, Horacio D. et al. on appeal*, in which the Section of the Criminal Procedural Code which limits the right to appeal was declared unconstitutional; this decision of the Supreme Court im-

plied a full recognition of the double jurisdictional level contemplated by the Inter-American Convention on Human Rights (Fallos: 318: 514).

On the other hand, in the cases of *Priebke*, *Arancibia Clavel*, and *Simón*, the *jus cogens* were applied to qualify certain crimes as crimes against humanity, thus refusing defendants the statutory limitations and amnesty benefits resulting from the Argentine laws.

In general terms, the foregoing criteria seem to have raised more consensus than criticism in the Argentine academic community; with disagreements usually hinging on specific situations rather than on general criteria, even though there is certainly no uniformity of opinion regarding the matters under discussion.