CHAPTER VIII

THE GROWING INTERNATIONALIZATION OF LAW

1. Introduction

EVEN if the subject of human rights is the first and most important manifestation of the internationalization of law, it is not the only one. This chapter is aimed to contextualize that internationalization, before going into a detailed analysis of its other aspects.

2. Economic and Legal Supranational Reality at the Beginning of the XXIst Century

It often happens that those who study national law find it difficult to accept the notion of the supremacy of conventional supranational law, which is introduced here, over internal constitutional law[1].

Even if it is difficult for an interpretative conflict to arise between supranational norms and a national Constitution (because both are guarantors of human rights[2]), it is a moot point, in any event, as we have already explained how this question can be resolved in the framework of fundamental rights[3].

---

[1] With the addition of the denominating *jus gentium* mentioned by Art. 118 of the Constitution and Law 48 Art. 21.

[2] ZAFFARONI, RAÚL, The American Convention on Human Rights and the criminal system, *Revista de Derecho Público*, 2: 61, Buenos Aires, FDA, 1987, points out that the constitutional rules "can only be interpreted, in the future, in the sense compatible with the text of the Convention", even though "it seems to be about consequences that could have also been deduced from a correct and guarantying exegesis of our constitutional precepts."

[3] We explain one of the specific discussions in the book *Derechos Humanos*, Buenos Aires, FDA, 1999, 4th ed., chapter XII, *Los amparos de los arts. 43 y 75 inc. 22 de la Constitución nacional*. As PESCATORE said: "Legally, there is no return in the Community. It is not permitted to judge again the commitments once

The hesitant reader may find comfort to know that, in the most important country in the world, there are people who hesitate equally about supranational norms supplanting national rights. Towards this end, the United States often applies its jurisdiction to its inhabitants, even relating to their foreign activities (*e.g.*, for foreign corrupt practices)[4]. Also, the United States did not subscribe to the San José Pact, so as not to come under the supranational jurisdiction of a court seated in Costa Rica[5]. Nor did it adopt the UN Convention on the Law of the Sea for reasons of content and jurisdiction. The United States has, however, signed and ratified NAFTA, which, as with every integration treaty, leads to the creation of supranational rules. The United States has also signed the GATT, in whose supranational organism it only has one vote.

In the case of Argentina, its Constitution is extremely ambivalent about placing treaties over laws, and it does not, at least explicitly, place them over itself. It does, however, explicitly accept the jurisdiction of supranational authorities (Article 75, subsection 24) to prevail over the Constitution.

The tendency towards supranational legal integration is thus a good indicator of what we can expect in the near future. Add to that greater interdependence between countries, globalization of the economy, important increase of transnational companies around the world, and the continued chronic[6] indebtedness of nations, and it will become clear that the prioriti-

---

they were assumed; it is not admitted to nationalize again the sectors that have already been under the Community's authority." Thus, the Art. 27 of the Vienna Convention about Treaties Law, passed by Law 19.865, establishes that "a party will not be able to invoke the provisions of its internal law as justification for breach of treaty." PESCATORE, PIERRE, Aspectos judiciales del "acervo comunitario", *Revista de Instituciones Europeas*, Madrid, 1981, pp. 331 et seq., p. 336.

[4] It concerns law about foreign corrupt practices, *Foreign Corrupt Practices Act*, of 1977, that complements the law against mafia or law on corrupt organizations and unlawful business, Law *RICO*, *Racketeer Influenced and Corrupt Organizations*, 18. U.S.C. Secs. 1962 et seq.; another law contemplates the simple forfeiture of all the briberies (18. U.S.C. Sec. 3666), without prejudice to other concurrent penal figures. Our own Constitution leaves the judging of crimes against *jus gentium* committed outside our territory in the hands of a special law (Art. 118).

[5] HENKIN, LOUIS, International Human Rights and Rights in the United States, *in*: MERON, THEODOR (compiling), *Human Rights in International Law. Legal and Policy Issues*, Oxford, Clarendon Press, 1992, pp. 25 et seq., 50 et seq.

[6] Our *Tratado de derecho administrativo*, vol. 1, *Parte general*, Buenos Aires, FDA, 2000, reprint of 5th ed., chapters IV and XI, § 8.3 and its remissions; El con-

zation of conventional supranational rules will, to a certain degree, escape us. This will be the case, above all else, if we want to interact within the worldwide economy, because every time we adhere to a treaty (due to necessity, obligation or conviction), the principle of good faith prevents a party from afterwards opposing that treaty for violating internal law. Once a treaty has been signed, ratified and deposited, no rule of internal law of the signatory countries can, by definition, oppose it, including the rules of their own constitutions[7]. As a final observation, all of this makes the tendency towards regulating the deep sea, the high seas[8], and the environment[9] inexorable.

2.1. Individual Rights in Supranational Law

The Argentine Constitution empowers Congress to ratify international treaties that assign jurisdiction to supranational authorities, without obliging Congress to submit the treaties to popular vote (Art. 75 subsection 24). There is no right to popular initiative in regards to international treaties (Art. 39), even though the popular vote is not excluded in that respect (Art. 40).

This makes supranational law modify constitutional order without the direct participation of the people, who are, however, the sovereign holder of that order; that is, unless Congress decides to put a treaty to popular vote, which it should do out of principle.

We should highlight that international treaties, no matter if they are human rights treaties or treaties of integration, by their nature limit the internal and external power of the State. Consequently, treaties normally do not infringe upon individual rights as against the State. As an example, in 1995, the Supreme Court of Justice of Argentina held in *in re Giroldi* that the consultative opinions of the Inter-American Court of Human Rights of San José, Costa Rica, were binding on Argentine internal law. This decision came two years after the San José Court decided that the Inter-

---

trato de crédito externo, in the book *Después de la reforma del Estado*, Buenos Aires, FDA, 1998, 2nd ed., chapter IV.

[7] *Tratado*…, *op. cit.*, chapter VI; PESCATORE, *op. cit.*, p. 33.

[8] See ROZAKIS, CHRISTOS L. / STEPHANOU, CONSTANTINE A., *The New Law of the Sea*, Amsterdam, North-Holland, 1983; our *Tratado*…, vol. 1, *op. cit.*, chapter IV, pp. 54 et seq.

[9] AMAN JR., ALFRED C., *Administrative Law in a Global Area*, Ithaca, N. Y., Cornell University Press, 1992.

American Commission of Human Rights was competent to qualify *any* rule of internal law of a Party State as impinging upon the obligations it assumed when it ratified or joined the Convention[10].

Thus, in Argentina, it is no longer enough that the administration is subjected to the law and the law, in turn, to the Constitution, but rather that all internal law is subjected to supranational law in matters of human rights and public liberties.

For such reasons, individual rights today pre-exist the Constitution, judgments, governmental laws and regulations, etc. Laws can regulate individual rights by setting their scopes and limits; but even if no law were promulgated, individual rights would nevertheless exist by dint of the Constitution's dominion, the American Convention on Human Rights, and other international human rights agreements foreseen in subsection 22 of Article 75 of the Argentine Constitution.

2.2. The Coordination of National and International Legislation

Pursuant to Article 31 of the Argentine Constitution, "This Constitution, the national laws promulgated under it, and treaties with foreign powers constitute the supreme law of the Nation." Therefore, "it can be asserted that, in principle, the sole approval of international treaties, according to the procedure provided by the Constitution itself, incorporates them into the internal law of the Nation."[11] The Constitution of 1853-60 set out a hierarchical order for its territorial jurisdiction and, in accordance with the time of its promulgation more than a century later, that rule must be interpreted in light of the current hierarchy of the laws in force.

Several[12] solutions have arisen to help determine whether the normative content of a treaty may become internal legislation with no other requirement than congressional approval. These solutions depend on the particular features of the convention in question and the ratification law promulgated. However, the most important of these "solutions" is recognizing that, when a law ratifies a treaty, it establishes legal rules that exclusively refer to individual human beings (as with labor law, human rights, etc.). As such, there is no excuse to contend that ratification is valid only as

---

[10] This decision was handed down on July 16, 1993, in its consultative opinion number 13.

[11] PTN, *Dictámenes* [*Opinions*], 58: 222 (1956).

[12] Quoted decision; CSJN, *Fallos* [*Judgments*], 150: 84; 186: 258; 254: 500, *La República*, 1962.

against other States and not against one's own, because the ratification law turns those resolutions into internal legal rules[13].

The subject of treaties is also closely linked to the existence and reach of Latin American "community law." There, economic integration has not really formed part of the national strategies of these countries. For this reason, even though economic agreements between the countries have been accorded the character of a treaty, they have consistently lacked the dynamics of European Community treaties. Other reasons for the lack of dynamism are, for instance, that the Supreme Court used to interpret subsequent treaties of this sort as not prevailing over precedent national laws[14], and some Latin American community legal instruments lacked the legal force needed to be effective.

We will see later that the European debate between sovereign supranational rights supporters and quasi-federalism thesis followers came to Latin America pre-determined and "resolved." Nonetheless, this debate continues in Latin America, because it flows naturally from acceptance of the San José of Costa Rica Pact in 1983, and from progress attained in the integration process, as in the case of MERCOSUR.

2.3. Growing International Regulation

We have already seen that the human rights system is, at present, clearly supranational, and that there are some sectors of the economy that are virtually internationalized, such as the financial sector[15]. There are, in addition, other sectors in which international regulation is increasing, such as in the protection[16] of natural resources[17].

---

[13] LILICH, RICHARD B., / NEWMAN, FRANK C., *International Human Rights*, Boston, Little, Brown and Co., 1979; BUERGENTHAL, THOMAS, *International Human Rights*, Minnesota, West Publishing Company, 1988 and its references.

[14] *Fallos* [*Judgments*], 254: 500, *La República*, year 1962.

[15] We explained something about this in chapter IV of the 5th ed. of the vol. 1 of our *Tratado de derecho administrativo*, *op. cit.*

[16] ROZAKIS / STEPHANOU can be consulted, *The New Law of the Sea*, *op. cit.*; AMAN JR., ALFRED C., *Administrative Law in a Global Area*, Ithaca, New York, Cornell University Press, 1992. In an ideological perspective placed in another national and international reality, it was already commented on *Le nouvel ordre économique international et l'administration publique*, book coordinated by GÉRARD TIMSIT, Aire-sur-la-Lys, France, Unesco-IISA, 1983.

[17] Some examples: Laws 15.802 and 24.216, Antarctic Treaty; Law 18.590, Cuenca del Plata Treaty between Argentina, Bolivia, Brazil, Paraguay and Uru-

It is likely that there will be still further development in international regulation. As a matter of fact, nowadays, there are even some activities being carried out in international waters, which are beyond every country's jurisdiction. Reasons for increased international collaboration are, for example, floating casinos beyond the four-mile limit of United States jurisdictional waters, and radios installed out of the maritime jurisdiction of England to avoid national controls.

At the same time, perhaps a more pressing issue is that fishing in international waters has become cheaper with "factory ships," which perform the whole manufacturing process in international waters, beyond any State's jurisdiction. These ships do not always respect international agreements on limits of marine resources. There are also factory ships that, under "convenience flags," manufacture other products on the high seas, which puts them out of reach of tax and labor rules. This helps to lower costs, along with the fact that these ships do not even need to enter port: Other ships approach to take away the production, to change staff, etc.

In brief, all this increasing activity in international waters may reach sufficient economic importance so that nations may want to regulate it, control it, and force the payment of taxes, as well. It is reasonable to expect a slow but progressive advance in international regulation, to which all countries will be subjected.

3. Different Supranational Sources

3.1. Treaties in General

Argentina is, at present, subject to a supranational legal order established, in part, via the following:

a) Those compilations of rules that have a supranational judicial body of application, such as the San José of Costa Rica Pact;

b) Those human rights treaties incorporated by Article 75 subsection 22 of the Constitution that lack a supranational court;

c) Those treaties of integration authorized by subsection 24 of the same Article that do not have a supranational court, either. With the passing of time, it is likely that treaties of integration will have such courts, as is already happening in Europe. Those tribunals will surely extend their juris-

---

guay; Laws 21.836, 23.456 and 24.089, sea pollution; Laws 22.344 and 23.815, international commerce of threatened species of wild fauna and flora; Law 22.502, London Protocol on security of life at sea; Law 23.778, ozone layer.

diction to the XXI[st] century, which may lead such treaties to be classified together with the San José of Costa Rica Pact as creating more effective community rights, and;

d) The rest of the supranational rules, such as in the case of the very many conventions on the environment to which Argentina subscribes; almost fifty bilateral treaties for the protection of foreign investment, which provide for international arbitration, etc.

3.2. The Specific Case of the American Convention on Human Rights

In 1983, the Argentine Congress passed Law 23.054, which subjects Argentina to the American Convention on Human Rights and its supranational procedures[18]. In particular, once the treaty was formally deposited[19], this law submitted Argentina to the jurisdiction of the Inter-American Court of Human Rights, whose seat is in San José of Costa Rica. Subsequently, the 1994 Constitution granted this and other treaties "constitutional hierarchy."

We will give special emphasis to this pact since, for the moment, it is the only one with a supranational court. Of course, the fact that other pacts do not include a supranational court does not alter their compulsory nature in internal law; pacts and treaties can and must be applied by national courts. Regardless, it is necessary to recognize that, from a practical point of view, it is not the same when the interpretation of a treaty is limited to a country proper and cannot continue in front of an international or supranational court. As for treaties of integration, it seems evident that negotiation does not provide sufficient means for resolving disputes, because as integration progresses, the creation of independent courts becomes an essential complement for its effective functioning and application.

Getting back to the Convention on Human Rights, it enumerates important individual guaranties and public liberties, which is an advance over the previous state of legislation of the Party States. Furthermore, the Convention defines various civil rights more extensively than, for example, the

---

[18] TREJOS, GERARDO, Órganos y procedimientos de protección de los derechos humanos en la Convención Americana, *in*: HERNANDEZ, RUBEN / TREJOS, GERARDO, *La tutela de los derechos humanos*, San José, Costa Rica, Juricentro, 1977, pp. 59 et seq.

[19] With an unusual reservation by executive order: *Revista de Derecho Público*, *op. cit.*

Argentine Constitution[20]. In this sense, it has a practical importance in its normative purpose to materially increase the scope of freedom and the sphere of civil rights.

From this practical point of view, independent of how effective[21] its procedures are for actually determining international jurisdiction[22], the Convention's exclusive character in legitimizing jurisdiction for aggrieved[23] persons means an advancement in individual rights. As every person wishes to see his rights improve, we cannot deny that the Convention constitutes an important development in our legal order, and we must interpret and apply it consequently.

3.3. Other Human Rights Conventions

As I pointed out in 1990, the American Convention on Human Rights[24] came to take precedent over the Argentine Constitution in the order of priority of sources of law. In 1992, the Supreme Court of Justice of the Argentine Republic opened an important path[25] that is still developing[26] when it recognized supranational order in internal law. In 1994, the Constitution introduced this notion clearly, even though it did not explicitly use the hierarchy of rules we have employed here[27].

---

[20] Extending them, not reducing them, that is why a normative conflict exists. It can even be stated that the Convention merely explains what is already explained in the Constitution.

[21] We explain it *infra*, Chapter IX.

[22] Art. 44: "Any person or group of people, or non-governmental authority legally recognized in one or more Member States of the Organization, can present requests to the Committee containing reports or complaints of infringement to this Convention by a Party State."

[23] Art. 57: "The Commission will attend all the cases before the Court." And the Art. 61, subsection 1, concludes the restrictive ritual: "Only the Party State and the Commission are entitled to submit a case to the Court's decision."

[24] Our art. The operative supranationality of human rights in internal law, *in*: *La Ley Actualidad*, April 17th, 1990.

[25] *Ekmekdjian*, 1992; *LL*, 1992-C, 543; *ED*, 148: 338.

[26] *Fibracca*, *Fallos* [*Judgments*], 316: 1669; *Hagelin*, *Fallos* [*Judgments*], 316: 3176; *Cafés La Virginia*, *LL*, 1995-D-277; *Giroldi*, *LL*, 1995-D-462.

[27] We explain one of the several discussions in *Los amparos de los arts. 43 y 75 inc. 22 de la Constitución nacional*, chapter XII of the book *Derechos Humanos*, *op. cit.*; vol. 1 of our *Tratado...*, *op. cit.*, chapters VI and VII.

The question that the reader may ask himself is: why supranational? Is it not the Constitution the first and most important in the pyramid of legal sources? This is a question that can be answered little by little, and that will be satisfied only as time goes by. We will, in any event, attempt to explain this question through another lens, *infra*, Chapter IX.

3.4. Case Law and Supranational Consultative Opinions

The Supreme Court of Argentina has stated that the interpretation of the American Convention must be performed "as the quoted Convention governs in the international arena, and particularly considering its effective application of case law by the competent international courts to interpret and apply it"; "said case law must serve as a guide for the interpretation of the precepts of the Convention, as the Argentine State recognized the jurisdiction of the Inter-American Court to be acquainted with all cases related to the interpretation and application of the American Convention (National Constitution Art. 75, American Convention Arts. 62 and 64, Law 23.054 Art. 2)", including the consultative opinions of the court[28]. We will deal with this matter further on later.

For now, the salient point is that the judgments and consultative opinions of the Inter-American Court are not, as of yet, a quantitatively important legal source, but that their potential to be such a source has already been recognized in Argentina. This is, indeed, qualitatively a fundamental step.

Other supranational judicial bodies may eventually appear, as well, and, if multilateral and treaties of integration make progress, more regulations or secondary rules within the supranational legal system will arise. European integration followed this path, and it is the one we must follow if we are to make progress in the integration process.

For the moment, it is premature to ask ourselves how those secondary rules will be inserted into the local order, but it seems *prima facie* clear that internal law will have to yield to the supranational law created by the organisms to which a particular country belongs. Local judges, then, will have to concern themselves with applying such supranational law to render it immediately operative, based on international case law.

---

[28] *In re Giroldi*, *LL*, 1995-D-462; BUERGENTHAL, *op. cit.*, p. 166.

3.5. Transactions and International Compromises

We should not overlook the practical and legal importance of the compromises a country makes before the Inter-American Commission of Human Rights to avoid being taken to the Inter-American Court, whose judgments it must respect as its own. Unfortunately, these are not public compromises, but in the end we wind up finding out about them when the complaining party invokes a State's breach of its obligations. Surely, this is an issue that will evolve as decades go by, to the extent that supranationality continues to move forward.

We can see an example of the ramifications of such compromises in the *Birt* case. The disagreement between the judges regarding the grounds on which to adjudicate highlights the reasons behind the high incidence of countries entering into agreements before the Inter-American Commission of Human Rights.

The Supreme Court of Argentina was obliged to adjudge the manner in which an indemnification granted via executive order 70/91, amended by Law 24.043, was calculated[29]. In analyzing this issue, both the majority and dissenting opinions focused on the fact that the particular calculation standard used seemed applicable and appropriate in determining the amount of the remedy in a public sector case such as this one. Nonetheless, a majority of five votes affirmed the appeal, while three dissenting members approved of the remedy, but also upheld the appeal.

The ninth member of the Court, while admitting the remedy and affirming the appeal, grounded his judgment in the context of the problem - *in textu et contextu consideratam*[30] - in that the question presented had nothing to do with the public sector. The ninth vote explained that, instead, the purpose of the executive orders was to indemnify those who, in a hard

[29] The term established to claim the indemnifications of Law 24.043 was extended by Law 24.436 in 180 days as of its own promulgation (the 11-I-95); Law 24.321 about forced disappearence of people occurred until December 10th, 1983 does not set a term for the exercise of its actions and it may not be regarded as limited by Law 24.447. The indemnification of Law 24.411 by the forced disappearance of people had a term of 180 days from its effective date (it was published on 1-3-95); the Law 24.499 (O.B. 13-VII-95) extended this last term to five years. This gives an additional analogy foundation to extend the term to claim the indemnification of Law 24.043 and for the exercise of actions of Law 24.321.

[30] *Codici Iuris Canonici*, Art. 17.

period of Argentine history, had been deprived of their freedom[31]. The opinion continued to explain that those rules attempted to fulfill the promise made by the Argentine Government to the Inter-American Commission of Human Rights, in that it would confer certain benefits to the victims of that era. The judgment concluded by saying that the matter did not only concern respecting a commitment, but also avoiding international sanctions that the Argentine Republic could have suffered.

All that to say that while other cases may not have had the same direct legal repercussions, they have had journalistic repercussions and it seems that what goes on "behind the scenes" is more than we know[32].

4. General Characteristics

A good interpretation is ideally one that *a*) is realistic and sensible, *b*) is valuable or fair, *c*) is teleological or finalist, and *d)* considers the facts that determined our joining a particular convention[33]. Because this is an ideal, we cannot, in reality, do anything more than look for those methods of

---

[31] Such situation was analyzed in 1979 as follows: "When considering a particular act of violence or intimidation within a general political context, the problem concerning the limitation of the action by lapse of time or alternatively its expiry turns less clear: we think that the limitation or expiry can be calculated only from the moment in which the intimidation or violence have ceased. Well, the particular act of intimidation may cease, but the general environment of insecurity may go on. In that case, we understand that a wide criterion has to be adopted, and accept the action or remedy no matter how much time has passed from the concrete act of intimidation or violence": GORDILLO, AGUSTÍN, *Tratado de derecho administrativo*, vol. 3, *El acto administrativo*, Buenos Aires, Macchi, 1979, 3rd ed., chapter IX, p. 50; Buenos Aires, FDA, 2000, 5th ed., chapter IX, p. 52.

[32] When not so long ago a project that limited the freedom of the press tried to appear, we found out through the newspaper that a well-known journalist, condemned once for journalistic contempt to a member of our Court, had negotiated his claim in Washington in exchange for the formal commitment of the Argentine government to repeal the contempt figure. Having seen the press bill, the journalist went to Washington again, stating that the bill violated the text and the spirit of the international transaction. Before the compulsory strength of the transaction, the bill was duly abandoned. This fact would imply that the supranational mechanisms of transaction are working more efficaciously than what one would ordinarily assume.

[33] That it is not other than the previous insufficiency of such rights in their functioning or practical application.

interpretation that, in each case, assure the efficacy and effectiveness of such rules and principles.

The only finalist interpretation congruent with the Convention, human rights, and international "community law" is one that searches for solutions by asserting its effectiveness, guaranty of and immediate enforceability of individual rights, and regional integration. Interpretations that emphasize the defenselessness of individuals and their submission to the authority or government, thereby isolating the Convention from the international context, are not desirable[34].

It is clear that globalization, in terms of communications and the economy, and even regarding prevailing policies and ideologies, does not leave room for countries that choose to remain pariahs in the international community, because the price is too high.

4.1. Internal Law

One of the first assertions that seems inevitable to make is that the rules we have discussed are not only supranational, but *also* internal. This internal law, in turn, is effective, operative and applicable to frame any situation that falls within its norms, as long as those norms are not obviously and unquestionably inoperative.

In this way, the Convention and other supranational rules have a double character that implicate national authorities to apply them, without prejudice to the way in which the supranational legal authorities would apply them, as the case may be.

4.2. Repeal ipso jure

From the foregoing, it becomes clear that all contrary, pre-existing rules have automatically ceased to be effective, and that all previous legislative rules that directly or indirectly opposed these other rules have either been immediately repealed or become devoid of effectiveness as a function of subsequent legislation.

An interpretation that were to contend that these supranational pacts were unsusceptible to direct application by judges and not actionable by individuals would make a mockery of the legal order and of liberties and

---

[34] Some of the specific difficulties of the interpretation can be observed in *Los amparos de los arts. 43 y 75 inc. 22 de la Constitución nacional*, in our book *Derechos Humanos*, *op. cit.*, chapter XII.

public guaranties. While it is true that there have been in the past doctrines and judgments that inexplicably supported the inoperative character of the Convention, those were the first times the Pact was applied and just after democracy had returned. For their part, the current case law and doctrine have begun what seems to be a certain tendency towards change.

A subsequent legislative rule would also be inefficient as to separate a country from the Convention's rules, as long as the country does not withdraw from its adhesion and submission to the supranational law in question. If Congress wanted to separate from the supranational rules to which it validly subjected itself, it must first leave the international legal community concerned, pursuant to the established procedure. Such an act would, however, be perceived as a step away from barbarism, and, therefore, very difficult to do by any country in the current international context.

4.3. Legislative and Jurisdictional Application

As regards the Convention, the signatory States have agreed *ipso jure* "to respect the rights and liberties recognized in it" (Art. 1 subsection 1), and to "guarantee its free and full exercise" through jurisdictional guardianship and direct application of its provisions and principles. These responsibilities must be carried out without prejudice to the States' obligation to instrument them internally with complementary mechanisms[35], without, meanwhile, denying them power and direct and immediate application.

Not all legal writers have accepted or been receptive to this conclusion. Among them are those legislators who occasionally adopt laws, pretending that they are "creating" certain rights, but that are, in reality, already embodied in the Convention. In such a scenario, what results is nothing more than a search for better instrumentation and more effective operation of the clause in question. Any assertion that such clause lacked existence or effectiveness before passing a certain internal law does not hold any weight.

In the absence of a congressional law, judges must directly apply the Convention, as with any other constitutional matter.

---

[35] Art. 2º: "If the exercise of rights and liberties mentioned in Art. 1 were not already guarantied by legislative provisions or of other kind, the Party States agree to adopt, adjusting to their constitutional procedures and to the provisions of this convention, the legislative measures or of other nature, necessary to concrete such rights and liberties." It is clear that the San José Court is not the only interpreter that the convention applies, but the last in the cases submitted to its jurisdiction.

4.4. Supranational Character

The Convention and the rest of the acts of supranational law obviously eliminate the internal power of each country or government as being unconditional and unlimited. The price of being part of the *international* community is recognizing, *internally*, the respect the community gives to its norms. Even countries that have enough power to pretend to isolate themselves from the world end up admitting that they are not really interested in doing so.

There are no more unlimited national powers in a world so closely interconnected as the current one, and, in the future, there will be even fewer. In the case of Argentina, it is obvious that the role that befalls it is now markedly reduced in size. In part for such a reason, Argentina has explicitly recognized the jurisdiction of an international court of justice, competent to pass judgments against it, if it fails to recognize the minimal individual guaranties of its own inhabitants. This recognition has extended to consultative opinions and will inevitably encompass the case law of other courts, in particular, that of the European Court of Human Rights. The least we can say is that, from a teleological perspective, a real supranational law exists with all the suitable characteristics of a supreme legal order.

The characteristics that we explained regarding supranational law[36] within the Constitution as superior to internal law are applicable to the rules of the Convention as well. Regardless, many authors and interpreters refuse to consider it as *supranational* law. Perhaps, though, these are the ones that were already refusing to consider it *internal law*, or just plain *law* before the constitutional amendment. There are also some authors who denied that the Constitution itself was law[37]. These are, though, false conjectures that cannot confuse the scientific and political reasoning of the legal writer, who tries to interpret the best legal order through which to assure peace, justice, order, etc., in his country.

Overall, it seems obvious that there is no room for returning to "national barbarism," at least barbarism under the guise of legality. Whatever facts present themselves in a certain national community, it will be no longer

---

[36] Our *Tratado*…, *op. cit.*, chapter VI.

[37] We think that we have proved the mistake involving such conceptions from the 1st ed. of our *Introducción al derecho administrativo*, Buenos Aires, Perrot, 1962, and we deem the right time to formulate the subsequent hypothesis of legal progress.

possible to say in law "that the genocide, torture, or the imperial crime of a tyrant are internal matters exclusively, *of domestic jurisdiction.*"[38] Countries and the United Nations itself may not always have the political will to intervene multilaterally in, say, internal massacres, but no one will be able to pretend to recognize the legal nature as regards such aberrations. Indeed, "protecting the men in every part of the globe, contributes to the sake of humanity, whichever sovereignty the state is under … world peace is not the mere absence of wars, nor is it reduced to the sole balance of adversary forces, but it is the work of justice."[39]

4.5. No Unilateral Withdrawal

In *Cafés La Virginia* in 1994[40], the Supreme Court reminded us that, in the interpretation of treaties, the principle of good faith does not allow us to hold that a treaty "just creates an ethical but not a legal commitment", but that it creates authentic "rights and obligations" (paragraph 6), by which "the application by the Argentine governmental authorities of an internal rule that breaks a treaty, harms the principle of their supremacy over internal laws (paragraph 8), apart from constituting a breach of an international obligation," "a law disposing provisions contrary to a treaty or that turns its fulfillment impossible […] would be an act constitutionally invalid" (paragraph 10).

In that judgment, Justice BOGGIANO's vote looks like those of JOHN JAY, in holding that a treaty cannot be altered or cancelled unilaterally, but must be done by common consent (paragraphs 21 and 22) and denies *a fortiori* jurisdiction to Congress to repeal it by law (paragraph 23). As for the rest "pacts are made to be fulfilled; *pacta sunt servanda*", and, therefore, "it does not make sense to consider the possibility of its unilateral repeal as general principle. This carries with it a breach of the agreement" (paragraph 26); it also refers to the case law of the Court of Justice of the European Communities (paragraph 29).

The judgment as a whole follows the inevitable tendency to apply the new legal and world economic order, but BOGGIANO's vote goes a step further; even though the terminology takes a lot to understand, a suprana-

---

[38] ORTIZ PELLEGRINI, MIGUEL ANGEL, *Introducción a los derechos humanos*, Buenos Aires, Ed. Ábaco de Rodolfo Depalma, 1984, p. 63.

[39] ORTIZ PELLEGRINI, *op. cit.*, p. 63, who quotes in such sense *Gaudium et Spes*, P. II, c. 5, number 78.

[40] CSJN, *LL*, 1995-D-277.

tional legal order lies within it[41]. Little by little, we will have to get used to consulting the collections of supranational case law and we must not forget, either, that the consultative opinions of the San José Court are equally as compulsory on a domestic level.

5. The Coordination of National Justice with Supranational Justice

5.1. The Inter-American Court of Human Rights

Argentina had already validly submitted itself to the supranational and supraconstitutional jurisdiction of the Inter-American Court of Human Rights[42] when, in 1993, the Supreme Court declared the operative power of the Convention's clauses, even in the absence of legislative regulation[43].

Nevertheless, Art. 75, sub. 22, perfects this point by providing a very strict mechanism for elevating human rights treaties to constitutional status, even stricter than the mechanism established for treaties of integration in sub. 24. This clearly implies placing human rights under supranational and supraconstitutional control, which is virtually irrevocable in internal law, without prejudice to the fact that it is irrevocable in supranational law, as well.

At this point, let us not forget the constantly repeated principle of "the irreversibility of the communitarian compromises." It states that "legally, there is no going back to the Community. It is not permitted to revisit compromises once assumed; it is not admissible to nationalize again those sectors that have already been put under Community authority."[44]

Thus, Art. 27 of the Vienna Convention on Treaty Law, passed by Law 19.865, establishes that "one party will not be able to invoke the provisions of its internal law as a justification for breach of a treaty." It cannot only be reasonably applicable as regards international relations of the State, because otherwise there would be duplicity in its interpretation, contrary to good faith and the indispensable unity of legal order. Likewise, it is evi-

---

[41] In such sense, GORDILLO, *Tratado…*, *op. cit.*, vol. 1, Prologue and chapters VI to VII.

[42] Our article La supranacionalidad operativa de los derechos humanos en el derecho interno, *LL Actualidad*, April 17th, 1990.

[43] *Ekmekdjian, Miguel Ángel c. Sofovich, Gerardo y otros*, *Fallos* [*Judgments*], 308:647, *ED*, 148: 338; *Fibracca*, *Fallos* [*Judgments*], 316: 1669; *Hagelin*, *Fallos* [*Judgments*], 316: 3179; *Cafés La Virginia*, CSJN, *LL*, 1995-D-277.

[44] PESCATORE, Aspectos judiciales del "acervo comunitario", *op. cit.*, p. 336.

dent that, when referring to internal law as not opposing a treaty, "internal law" includes the Constitution. "It is in the moment when States prepare themselves to ratify treaties that they have or will have to consider and resolve problems of a constitutional nature that may arise. Each State is the owner of the solution given to it, but once an international compromise has been accepted freely, it becomes a historical fact that cannot be changed."[45] That is why it does not make sense to interpret the 1994 Constitution in any sense that makes it supposedly less of a guarantor than supranational law.

5.2. The "Effectiveness Terms" of the Treaties

We have already seen that in 1995, the Supreme Court of Justice of Argentina decided in the *Giroldi* case discussed earlier, that when the Constitution gives "constitutional hierarchy"[46] to treaties and accords "in the conditions of its effectiveness"[47], it means that it is "*as the quoted Convention effectively rules in the international arena, and particularly considering its effective application of case law by international courts competent to interpret and apply it*" (paragraph 11), "the above mentioned case law must serve as a guide for the interpretation of the precepts of the Convention, as the Argentine State recognized the jurisdiction of the Inter-American Court to be acquainted with all the cases related to the interpretation and application of the American Convention (*confr.* Art. 75 of the Constitution, Arts. 62 and 64 American Convention and Art. 2 Law 23.054)."[48]

---

[45] PESCATORE, "It is when getting ready to ratify the treaties that each State has or will have to consider and resolve the problems of constitutional nature that may arise. Each of them is owner of the solution it gives to them, but once the international commitment has been accepted freely, there is a historical fact that cannot be changed.", p. 348.

[46] The Constitution uses in the first paragraph of the Art. 75 subsection 22 the phrase "superior hierarchy of laws" and in the third "constitutional hierarchy". The first semantic choice could indicate an intermediate hierarchy between the law and the Constitution, the second choice is to accept, at least, the constitutional level of the treaty. The Court is explicit in choosing the second variant. We think that, with the passing of time, it will also recognize the supraconstitutional nature of such rules and principles, as we exposed in La supranacionalidad operativa de los derechos humanos en el derecho interno, *op. cit.*

[47] Art. 75, subsection 22, § 2.

[48] 11th ground, § 2.

5.3. Internal Effectiveness of the Consultative Opinions

What results is that the Argentine Supreme Court must apply treaties "under the above mentioned terms, since the opposite could imply the Nation's responsibility facing the international community."[49]

Our court integrates such *judgments and consultative opinions to the constitutional text* pursuant to the clause that states that treaties must be applied "under the conditions of their effectiveness." This includes current and future case law of the applicable international authorities.

The same criterion becomes applicable for the courts to be instituted in the future for treaties of integration such as the MERCOSUR, or the supranational authorities of other international treaties subscribed to and approved.

5.4. Prevailing over "Any" Rule of Internal Law

The Inter-American Court of Human Rights also decided in 1993 in its consultative opinion number 13 that the Human Rights Commission is competent to qualify *any* rule of internal law of a Party State as infringing the obligations that assumed upon ratifying or joining the Convention, and, therefore not even a local constitutional interpretation could oppose supranational case law.

5.5. Its Application via National Case Law

What was clarified in the quoted *in re Birt* opinion is complemented by the judgment of the Court *in re Giroldi*[50]. The internationalist or universalistic tendency that the Court has been adopting recently (*Ekmekdjian*[51], *Fibraca*[52], *Hagelin*[53], *Cafés La Virginia*[54]) is clear, and the Argentine Supreme Court of Justice remains correctly incorporated into the international system. In the first place, this integration is thanks to the Supreme Court employing the judgments and consultative opinions of the Inter-American Court of Human Rights, of course, without prejudice to

[49] 12th ground.
[50] *LL*, 1995-D-462.
[51] *Fallos* [*Judgments*], 308: 647; *LL*, 1992-C, 543; *ED*, 148: 338.
[52] *Fallos* [*Judgments*], 316: 1669.
[53] *Fallos* [*Judgments*], 316: 3176.
[54] CSJN, *LL*, 1995-D, 277.

American Court of Human Rights, of course, without prejudice to jurisprudence from other international tribunals. In the second place, the hierarchical organization of the national and supranational judicial power has lent to this assimilation. We have already seen that, apart from treaties, the transactional agreements entered into by Argentina in the face of claims before the Inter-American Commission of Human Rights can also be an increasing source of supranational and internal law.

5.6. Measures of "Another Nature"

The typical question about Party States is whether, when they agree to adopt legislative measures "*of another nature*" (American Convention Art. 2), they convene only to pronounce laws or also to pronounce judgments[55] that may compensate for a legislative omission. The Inter-American Court has already adopted a position in this regard in *in re Ekmekdjian*[56], that corrals the distant principles contained in the *Kot*[57] and *Siri* judgments[58]: that *the judges are also under an obligation to act, not only the legislator.* Such is the argumentative line that paragraph 12 of *Giroldi* adopts, when it asserts that "it corresponds to this Court, as a supreme organism of one of the Federal Governmental powers - as permitted by its jurisdiction - to apply the treaties…". The Argentine Supreme Court adds that Art. 1 of the Convention demands that the Party States must not only "respect" the rights and liberties recognized in it, but must also "guaranty" their exercise. It continues to specify that this is interpreted by the Inter-American Court in the sense that it "implies the duty of the State to take all the *necessary measures* to remove the obstacles that may exist in order to allow the individuals to enjoy the rights recognized by the Convention."[59]

---

[55] And administrative acts, in this case.

[56] *Ekmekdjian, Miguel Ángel c. Sofovich, Gerardo y otros*, *Fallos* [*Judgments*], 308:647; *ED*, 148: 338.

[57] *Fallos* [*Judgments*], 241:291; *LL*, 92:632.

[58] *Fallos* [*Judgments*], 239:459.

[59] Another interesting particularity in the judgment, is that it invokes explicitly not a judgment of the Inter-American Court but the consultative opinion n° 11/90 of 1990, that the due guaranty concerns "the duty of the Party States to organize all the governmental apparatus and, in general, all the structures through which the general exercise of public power is showed" (par. 23 of the consultative opinion, 12th ground "*in fine*" of the judgment here commented). The consultative opinion acquires, as it was exposed, a linking character for our country.

5.7. Right to Judgment within a Reasonable Term

In sum, the question becomes what the Supreme Court will do in other matters in which the legislator has been indolent, for example, in the creation of more administrative tribunals to prevent an infringement of Art. 8, which guarantees in subsection 1 the right to a judgment "within a reasonable term." The European Court of Human Rights, applying the same clause of the European Convention, condemned Switzerland for infringing upon the right to a judgment within a reasonable term. That case took almost three and a half years, not due to the magistrates' negligence, but the legislator's negligence in not creating courts that increased with the cases in due time. Maybe our Court must resort to a comparison with European case law, which has already interpreted the *same* clause that appears in the American Convention. It would not make sense to recognize the compulsory nature of *Inter-American* supranational case law, as we have done here, and then deny the *European* precedent, when the clause is the same and there is no different precedent of the Inter-American Court. Hence, we wait for the national version of *Zimmerman and Steiner* before the San José Court[60] explicitly condemns us.

[60] See our book *Derechos humanos*, *op. cit.*, chapter VII.