

## CHAPTER IX

### THE RESPONSIBILITY OF THE STATE IN INTERNATIONAL LAW

#### *1. The Qualitative and Quantitative Growth of International Law<sup>1</sup>*

MY personal experience in this subject has been one of a constant discovery. When I was still at University, international law was a subject completely alien to the world of the average lawyer. The situation has not improved, since today we can find lawyers who get a degree by studying the subject with the same book I used in the 1950's. Nonetheless, international law has changed, whether we realize it or not. The amount of operative treaties we have is beyond our comprehension, and we still often forget that today in Argentina, those treaties are superior to the Constitution, whether by means of fact or of law.

#### *2. The Evolution-Involution of Responsibility*

A very curious phenomenon is that while the internal responsibility of the State is decreasing (in opposition to the historic trend towards increased responsibility of the State), international responsibility is increasing. This is contradictory, because it is not cogent to have responsibility increasing in one area and decreasing in another.

At the internal level, the explanation for this can be found in what many countries have lived through, some of them some centuries ago: total or partial bankruptcy. As a measure to get out of bankruptcy, States have resorted to tax penury, which is focused on trying to increase taxes until there is no more money to collect, reducing expenditure until there is no

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<sup>1</sup> We are referring to chapters IV and VI of our *Tratado de Derecho Administrativo*, vol. 1, Buenos Aires, Fundación de Derecho Administrativo, 1998, 5<sup>th</sup> ed., reprint 2000; and chapter XX of vol. 2, *La defensa del usuario y del consumidor*, Buenos Aires, Fundación de Derecho Administrativo, 2000, 4<sup>th</sup> ed.

more possibility to limit it, and borrowing loans until the capacity of indebtedness is exceeded. What is left, then, is the heroic remedy of not paying all the debts but only some of them, or simply just delaying them.

Sometimes seemingly obsolete history books suddenly become terribly current. In 1840, MONSIEUR DE CORMENIN<sup>2</sup> wrote his two-volume *Administrative Law* and recounted how in the 1700's the French State spiraled downward. Argentina is tumbling now in the same way, over two centuries later. Also, many different rules arose at that stage regarding what categories of creditors were not to be paid, which led to the development of yet other categories, which finally led to a general exclusion. Indeed, the list of people excluded by the French State of that time covers the first fifty pages of that book. This, too, is similar to the situation Argentina is living today, but just in another context, with another language, and with other explanations.

### 3. Responsibility for Breaching Human Rights

The first place where the international responsibility of the State starts to come to light is under the aegis of human rights in the American Convention on Human Rights. When Argentina subscribed to that Convention, the Republic made a reservation through an executive order concerning the power of the Court to condemn the Argentine government for compensation. In any event, it is not the fact that a judgment would oblige the Argentine Republic to pay a certain amount of money that makes the international mechanism for the compensation of damages caused by the State work. It works in a much more informal way.

The interested parties - or even third parties, in a truly popular action - file a claim before the Inter-American Commission of Human Rights in Washington. Upon completion of the formalities, amicable solutions are frequently reached, in which the Argentine (or any other) government commits itself to create the necessary mechanisms to render itself responsible for the damages claimed. Alternatively, it may commit itself to a conviction report. Documents from both circumstances are initially reserved; the first one is of fact, the second is of law.

However, if the government does not give a satisfactory response and there is no amicable solution, the conviction report is published in the annual report of the Committee, whose delivery and circulation is limited. If

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<sup>2</sup> MONSIEUR DE CORMENIN, *Droit administratif*, vol. II, Paris, Thorel and Pagnere, 1840, 5<sup>th</sup> ed.

the government enters into a friendly agreement, the country will remain under the jurisdiction of the Committee, and if the agreement is not fulfilled, the Committee may file a suit before the Inter-American Court of Human Rights<sup>3</sup>. That point is not usually reached.

One of the problems of this mechanism is that resolutions are not published and there is no easy way to access them.

#### 4. In re Birt

The most internally well-known case concerning Argentina before the Inter-American Court of Human Rights is *Birt*. The name of this case comes from the first name in a collective claim, concerning the responsibility of the State towards those who were illegally deprived of their freedom during the last military government. As the internal legal system of Argentina requires that first a law be dictated to that effect and later decrees issued to implement them, there is a judgment of the Supreme Court of Argentina with the name *Birt* that applies the Inter-American case<sup>4</sup>. In that judgment, there were three groups of votes, and although the three of them held the same thing, they were grounded differently. The first two votes, signed by eight members of the Court, seem to be a mere debate about public administration and public sector salaries. The third vote, however, truly identified the issue in question when it stated that the Argentine Republic needed to pay damages to the aggrieved party, because the Republic committed itself internationally when it obliged itself before the Inter-American Commission to decide in good faith on problems stemming from the military dictatorship.

After this case, more laws came into force and new judgments of the Argentine Supreme Court were handed down that extended the statutes of limitation for filing a claim. This has meant a significant distribution from

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<sup>3</sup> Where we can be condemned. See CURIEL, ALICIA / GIL DOMÍNGUEZ, ANDRÉS, Corte Interamericana de Derechos Humanos: el primer fallo contra el Estado argentino, *Revista Jurídica del Centro de Estudiantes*, n° 8, 1996, pp. 36 et seq. See also, in general, MARTINS, DANIEL HUGO, Los Tratados Internacionales como fuente del Derecho Administrativo, in the collective book *Homenaje al Dr. Miguel S. Marienhoff*, Buenos Aires, Abeledo-Perrot, 1998, chapter I. See CURIEL, Corte Interamericana de Derechos Humanos: el caso "Guillermo José Maqueda vs. República Argentina", *LL*, 1997-E, 515.

<sup>4</sup> CSJN, *in re Birt*, we have commented in *LL*, 1995-D, 292. See also GORDILLO AGUSTÍN, *Cien notas de Agustín*, Buenos Aires, Fundación de Derecho Administrativo, 1999, § 2, "¿Una excepción a la ley 24.447?", pp. 33-36.

the State's coffers, which continues today. While this responsibility is apparently managed by lawmakers and internal judges, international mechanisms are its real engine.

## 5. In re Verbitsky vs. Belluscio

### 5.1. *Its Origin*

The case *Verbitsky vs. Belluscio*<sup>5</sup> exemplifies the informal force of proceedings before the Inter-American Commission of Human Rights. VERBITSKY was a journalist, accused by Justice BELLUSCIO of defamation. In the Argentine courts, the judge classified the unlawful act as contempt, and VERBITSKY was convicted on those grounds. VERBITSKY then resorted to the Inter-American Commission, where he entered into an amicable solution with the Argentine government, in which the latter committed itself to rectify the situation, *i.e.* repeal the contempt law from the books. The law was duly repealed but nobody was aware internally that this was done in compliance with that agreement. Nonetheless, it became an obligation internationally assumed that committed the State's responsibility.

### 5.2. *Residual Effects*

Later, when a so-called *censorship* law bill was going around, VERBITSKY appeared again before the Committee and complained that thus the spirit of the agreement was about to be breached. The Committee agreed with this, the Argentine Republic shelved the bill, and the matter was never mentioned again.

## 6. Mendoza

This was a case in which two people from Mendoza were murdered. There was a claim filed before the Inter-American Commission of Human Rights, and the Argentine Republic came to an agreement in which it accepted responsibility. The parties, upon mutual agreement, submitted the matter of compensation to a local *ad hoc* court. As the matter was delayed, one of the credits of the Province of Mendoza, which it was dealing with in another international agency separate from the Inter-American system

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<sup>5</sup> Case 11.012 (*Verbitsky vs. Belluscio*).

of human rights, was also delayed. The provincial representatives were informed that the international officers considered the idea of granting them credit as embarrassing, since there had been no solution to the indemnification case for the people murdered in Mendoza. A word to the wise...

The *ad hoc* committee fixed the indemnification amount. That decision was published in the local newspapers, but not in the ones of the rest of the country nor in the case-law collections that we know. We learned about it just by chance.

### *7. International Foreign Investments<sup>6</sup> Agreements*

There are more than forty bilateral treaties to protect foreign investments, which contemplate international arbitration for the disputes that might arise between a foreign investor, broadly defined, and the Argentine State.

The creation and the decision of an international arbitration tribunal are not necessarily published in any official publication or law review, and sometimes they get only brief mention in newspapers. However, these treaties and subsequent arbitrations are a clear source of international responsibility of the State.

### *8. Foreign Courts*

We occasionally come to know about transactional agreements before foreign courts or judgments condemning the Argentine State, but the information we receive is totally asystematic and might not exactly represent the total.

What is important to know is that we frequently accept foreign jurisdiction. In the official bulletin that publishes decisions of the Government of Argentina, we sometimes read about executive orders mentioning the Treasury Attorney of the Argentine Republic as lawyer of a suit pending abroad who is empowered to contract all the necessary local services. This is a great change in the traditional Argentine policy, designed by GOLDSCHMIDT, that did not require Argentina to answer complaints or even object to jurisdiction, because the idea was that objecting to jurisdiction was actually consenting to it. Although the country complained dip-

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<sup>6</sup> We explained the subject in chapter XVIII, "El arbitraje administrativo internacional" of vol. 2, *La defensa...*, *op. cit.*

lomatically, it remained in judicial default. Nowadays, however, complaints are answered, jurisdiction<sup>7</sup> is accepted, and we eventually reach an upper level court in the country in question, whether in trials or arbitrations.

Speaking of trials, there is a famous case that has two readings, one in American and one in Argentine jurisprudence. *Weltover vs. Argentine Republic* was decided by the Supreme Court of the United States, and it held Argentina liable for breach of contract. In Argentina, the judgment was published and commented at a level equivalent to the *Alvarez Machaín*<sup>8</sup> case. The case met with harsh criticism in Argentine legal circles, one article (amongst many) written on it even entitled “La república imperial”<sup>9</sup>. One of the authors of such an article asked with malice whether the plaintiffs could ever execute the judgment. The system does not, however, work that way, because if a country does not comply with an international judgment, its risk evaluated by five or six international private qualifiers increases, along with the floating interest rate that the country owes due to *all* its external debts<sup>10</sup>. In fact, if a State formally appeals a respectable judgment, that can end up being more expensive than actually paying the sentence.

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<sup>7</sup> Despite all this, the defense of the State in foreign tribunals in international arbitration is highly deficient: the State lawyers do not have instructions dealing with the content of the matter, and that is the reason why they principally or exclusively use formal defenses.

<sup>8</sup> It is the principle *male captus, bene detentus*: the offender has been wrongly caught in his country of residence (Noriega, Eichmann, etc.), but he is correctly arrested in the country that has caught him abroad so the country will apply its jurisdiction: *Alvarez Machaín*, 1992, published in *ED*, 148:155, with notes of ZUPPI, ALBERTO LUIS, Los Estados Unidos a contramano: el voto de Rehnquist en el caso *Alvarez Machaín*; OUTEDA, MABEL N., El fallo de la Corte Suprema de los Estados Unidos como violatorio de la integridad territorial y de la soberanía de los Estados, *ED*, 148:163; BIDART CAMPOS, GERMÁN J., Secuestro de presuntos delincuentes en un Estado extranjero y juzgamiento en Estados Unidos, *ED*, 148:170; BIANCHI, ALBERTO B., La Corte de los Estados Unidos ingresa a la lucha contra el narcotráfico, *ED*, 148:173; LEGARRE, SANTIAGO, ¿Es realmente monstruosa la sentencia *Alvarez Machaín*?, *ED*, 148:187.

<sup>9</sup> The case *Weltover*, published in *LL*, 1992-D, 1124, with note of ZUPPI, La inmunidad soberana de los Estados y la emisión de deuda pública, *LL*, 1992-D, 1118. Our opinion in *Después de la reforma del Estado*, Buenos Aires, FDA, 1998, 2<sup>nd</sup> ed., chapter IV.

<sup>10</sup> Because they are interconnected to a variable rate and have a *cross-default* clause.

### 9. External Credit Contracts<sup>11</sup>

There have been many local voices sustaining the unconstitutionality of the submission of the country to foreign jurisdiction. Certainly, the Argentine Civil Code states that contracts are ruled by the law and the jurisdiction of the place of execution. Nobody lends us money (except for our own local investors) unless the contract is executed in a developed country and the disbursements are carried out in the same place, by means of depositing the credit in a local agency of the Argentine Central Bank.

It is also in that country where promissory notes are signed, where jurisdiction is agreed upon, and where the Treasury Attorney of the Argentine Republic “agrees with the act,” stating by a reasoned, elaborate, and convincing advice that such contract is constitutional by our own system, legal, and enforceable in another country, and that the courts of our country would have no objections to such contract and to carrying out in the relevant country the litigation of breach of contract actions potentially arising from the case.

Due to the principle of good faith, the State will not be able later to object successfully to those breach of contract actions on the docket of foreign courts. Also, advices from the Treasury Attorney are getting more and more elaborate, because every time a creditor (or the debtor itself) thinks of a new counter argument about the matter, he asks the country to refute it in the next obligatory advice for a credit renewal.

### 10. How to Charge Accretions

All this is growing and it has a series of supporting mechanisms, which are not absolutely public. Every time a country has economic interests that are not duly fulfilled by the Argentine State, its ambassador *lobbies* intensely, and it does not matter if the ambassador is from a developed or dominant<sup>12</sup> country. We have heard about ambassadors from countries that

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<sup>11</sup> We explained the subject in our book *Después...*, *op. cit.*, chapter IV. It is not only that the country executes an external credit contract abroad: there, it receives the money and arranges its payment, so that it is undoubtedly the factual and legal base of the foreign jurisdiction that is also arranged. It also voluntarily submits itself to foreign authorities via other acts, such as enrolling public bonds at the SEC: executive order 395/97, O.B. 11-IX-97, p. 5, among others.

<sup>12</sup> This international practice is so widespread, that treaties' prohibition of it is quite useless. See Law 25.350, agreement with Guatemala, Art. IX, subsect. 6:

are not of central importance to us, who get the Argentine national or local government, according to the case, to yield to what it does not normally have to yield.

Summing up, in the current context, the international responsibility of the State is quite marked, although it is not fully evident in the case law. Meanwhile, a great paradox continues to develop, as internal responsibility is decreasing.

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“The Contracting Parties shall abstain from dealing with matters regarding disputes submitted to judicial procedures or international arbitration through diplomatic means, pursuant to this Article until the corresponding procedures are finished. Except in the case in which the other party of the dispute has not fulfilled the judicial judgment or the award of an Arbitration Tribunal according to the conditions set forth in the respective judgment or award.”