INTERNATIONAL LAW IN DOMESTIC SYSTEMS

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Answers

1. Constitutional and legislative texts

1.1 What are the provisions of the national Constitution that refer to international agreements or treaties?

The Executive Power shall have power to make treaties (Article 99 (11) in accordance with the principles of public law established in the Constitution (Article 27). The Congress shall approve or reject treaties (Article 75 (22) and (24).

1.2 What are the provisions of the national Constitution that refer to customary international law or the law of nations?

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Article 118 states that the Congress shall have power to pass laws regarding judgement and punishment for offences committed beyond the border of the Nation against the Law of Nations.

1.3 What mention, if any, is made in the Constitution to other sources of international law, e.g. general principles of law, the decisions of international tribunals, or declarative texts like the Universal Declaration of Human Rights?

The Universal Declaration of Human Rights and the American Declaration of Human Rights and Duties are mentioned in Article 75 (22) as a complement to the rights and guarantees enshrined in the Constitution.

Article 75 (24) mentions the approval by the Congress to treaties establishing international organizations with delegation of jurisdictional powers.

1.4 Are there any legislative provisions or regulations that call for the application of international law within the national legal system?

Articles 2 and 10 of Federal Law 26200 implementing the Rome Statute of the International Criminal Court establish that crimes under Articles 6, 7 and 8 of the Statute and Article 85 (3) (c) and (d), and (4) (b) of the First Additional Protocol of 1977 to the Geneva Conventions of 1949 are crimes within the national legal system as they are under those international treaties and in the Elements of the Crimes of the Rome Statute.

1.5 For federal systems, do the constitutions of the component parts of the system (states, provinces, cantons) refer to international law? And 1.6 For federal systems, are there constitutional or statutory provisions at the federal level addressing federal authority over matters concerning international law?

Article 31 of the Constitution establishes the authority of

federal law over the law of the provinces. Thus, when a rule of international law is in force in the country it is federal law and legally-binding to the provinces.

2. Treaties and Other International Agreements

2.1 How do domestic courts define "treaty" and distinguish legally-binding international texts from political commitments? Do they rely on domestic or international law in deciding issues of treaty law?

The Argentine Republic is a State party to the Vienna Convention on the Law of Treaties, and hence when deciding issues of treaty law the reference is Article 2 (1) (a) of the Convention. In *Dotti, Miguel A., Fallos: 321:1226,* the Supreme Court said:

> *"...El Acuerdo de Recife, derivado del Tratado de Montevideo de 1980, como un acuerdo de alcance parcial, es un tratado internacional en los términos del art. 2 inc. 1 apart. a. de la Convención de Viena sobre Derecho de los Tratados..."*
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> ("...The Recife Agreement, derived from the Montevideo Treaty of 1980, as a partial scope agreement, is an international treaty in terms of art. 2(1)(a) of the Vienna Convention on the Law of Treaties..." [1]

2.2 Do the courts recognize as legally-binding those international agreements that have not been formally approved as

[1] Note: The translation of this Argentine Supreme Court decision related to Constitutional Law, as well as the subsequent ones, and to articles of the National Constitution are not official.

treaties through the constitutional ratification process, e.g. presidential agreements, memoranda of understanding, etc.?

In *Dotti, Miguel A., Fallos: 321:1226*, quoted in 2. 1, the Supreme Court added:

> *"....el consentimiento del Estado argentino en obligarse por tal acuerdo se manifestó en forma simplificada, es decir sin la intervención del Congreso de la Nación, a través del acto federal que culmina con la aprobación del citado Tratado de Montevideo por ley 22.354. .La imperatividad y vinculación jurídica internacional de los acuerdos simplificados y de alcance parcial, en el caso el Acuerdo de Recife para la promoción del comercio, emana del Tratado de Montevideo de 1980 que autoriza su celebración..."*
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> ("....the consent of the Argentine State to be bound by such agreement was expressed in a simplified manner, i.e., without the intervention of the National Congress, through the Federal act that ends with the approval of the aforementioned Montevideo Treaty as provided in Law No. 22.354. The imperativeness and international legal enforcement of simplified and partial-scope agreements, in the case of the Recife Agreement for trade promotion purposes, is derived from the Montevideo Treaty (1980) which authorizes their conclusion...")

2.3 Are ratified treaties automatically accepted into domestic law or must they be incorporated, through legislation following formal approval, to become part of the domestic legal system?

Article 31 of the Constitution makes the Constitution, laws passed in pursuance thereof, and treaties internationally bounding to the State the supreme law of the land.

2.4 Do domestic courts recognize the doctrine of self-executing and non-self-executing treaties? If so, what test is applied

to distinguish a self-executing treaty from a non-self-executing one?

Article 31 must be regarded as enacting a general principle. Some treaties require legislative action before they take effect in domestic courts.

The Supreme Court in *Gregorio Alonso c. Haras Los Cardos, Fallos: 186:258*, said:

> *"...la única forma de hacer efectiva la reparación de los accidentes de trabajo en la agricultura es por medio de una ley que reglamente en forma clara y concreta los derechos y obligaciones de los asalariados agrícolas. No parece dudoso entonces, que la Conferencia de Ginebra al adoptar el proyecto de convención requiere ese acto futuro de parte de los países soberanos que la ratifiquen...(ello) resulta patente al votarse en el Senado el proyecto de la ley 12.232 (aprobatoria de convenciones adoptadas por la Conferencia Internacional de Trabajo en 1921), cuyo despacho de comisión consignaba: 'Una vez aprobados estos convenios por ambas Cámaras y ratificados formalmente por el Poder Ejecutivo...corresponderá al Congreso proceder a las consiguientes reformas de los textos legislativos nacionales para ajustarlos a las normas previstas en los convenios'... "*
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> ("...compensation for agriculture work hazards can only become effective by means of a law that clearly and specifically regulates the rights and obligations of agricultural employees. Thus, it is not unreasonable that the Geneva Conference, when adopting the draft of the convention, requires this future act by those sovereign countries that ratify it ... (this) was evident when the Senate voted the project of the law No. 12.232 (which approved the conventions adopted by the International Labor Conference in 1921), whose report stated: "Once these conventions are approved by both the House of Representatives and the Senate, and are formally ratified by the Executive Power ..., the Congress shall proceed to the resulting reforms of the

national legislative texts, so as to adjust them to the norms provided for in the conventions"...)

2.5 Under what conditions or circumstances can treaties be invoked and enforced in litigation by private parties (please discuss issues of standing and private rights of action)? Do the courts apply different tests to determine standing and private rights of action when the issue involves a treaty than they apply when a party is relying on a statute or other domestic law?

Those treaties which do not require any legislation to become operative can be invoked and enforced in litigation by private parties without any difference with other domestic laws. In *Quebrachales Fusionados, c. el capitán, armadores y dueños del vapor nacional "Aguila", Fallos:* 150: 84, the Supreme Court said:

> *"...Que si bien es cierto que en la sentencia apelada se han aplicado reglas establecidas en un tratado internacional (art. 6 Convención de Bruselas), éstas fueron incorporadas de hecho al Código de Comercio por la ley aprobatoria respectiva, 11.132, siendo dicho código el que en definitiva ha interpretado el tribunal para resolver el caso..."*
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> ("...Although it is true that some rules set forth in an international treaty (art. 6 of the Brussels Convention) have been applied in the appealed judgment, these were, in fact, incorporated into the Commercial Code by means of the respective law approving thereof (No. 11.132). The Chamber has ultimately interpreted this Code to solve the case...")

2.6 Do the courts defer to the views of the government or legislature in interpreting a treaty provision or do the courts determine treaty matters without deference to the political branches? Do courts apply international rules of treaty interpretation? Do they cite to the Vienna Convention on the Law of Treaties?

The courts determine treaty matters without deference to the political organs and they apply the Vienna Convention on the Law of Treaties. In *Ekmekdjian, Miguel Angel c. Sofovich, Gerardo y otros*, *Fallos:* 315:1492, the Supreme Court said:

> *"...la Convención de Viena sobre el derecho de los tratados...confiere primacía al derecho internacional convencional sobre el derecho interno... La convención es un tratado internacional, constitucionalmente válido, que asigna prioridad a los tratados internacionales frente a la ley interna en el ámbito del derecho interno, esto es, un reconocimiento de la primacía del derecho internacional por el propio derecho interno. ... (El) fundamento normativo radica en el art. 27 de la Convención de Viena, según el cual 'una parte no podrá invocar las disposiciones de su derecho interno como justificación del incumplimiento de un tratado'...Cuando la Nación ratifica un tratado que firmó con otro Estado, se obliga internacionalmente a que sus órganos administrativos y jurisdiccionales lo apliquen a los supuestos que ese tratado contemple, siempre que contenga descripciones lo suficientemente concretas de tales supuestos de hecho que hagan posible su aplicación inmediata. Una norma es operativa cuando está dirigida a una situación de la realidad en la que puede operar inmediatamente, sin necesidad de instituciones que deba establecer el Congreso..."*
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> ("...the Vienna Convention on the Law of Treaties... grants primacy to conventional international law over municipal law... This Convention is an international treaty, constitutionally valid, that grant priority to international treaties vis-á-vis municipal law within the domestic jurisdiction. That is, the acknowledgement of the primacy of international law over municipal law by a domestic rule of law... (The) argument grounded on Art. 27 of the Vienna Convention, which sets forth that a party may not invoke the

provisions of its internal law as justification for its failure to perform a treaty. ... When a Nation ratifies a treaty signed with another State, it is internationally bound to require its administrative and jurisdictional bodies to apply such a treaty to the events contemplated by it, provided it contains sufficient descriptions of those events so as to allow for immediate enforcement. A rule is considered operative when it addresses a real situation in which it can be immediately applied, with no need for institutions to be established by Congress..."

2.7 Do the courts have power to decide whether a statement attached by the government or legislature during treaty approval is a reservation? Can the courts determine the scope or legality of a reservation?

Article 75 (22) of the Constitution states that international treaties are part of domestic law '*en las condiciones de su vigencia*' (under conditions of their own.). Thus, according to the conditions specified by the government when it has consented to be bound by the treaty and when the treaty enters into force internationally, in accordance with Articles 2 (1) (d), and 19 to 25 of the Vienna Convention on the Law of Treaties. The courts have the power to determine the legality of a treaty as well as other domestic rules in relation to the principles of public law enshrined in the Constitution. In *Cafés La Virginia S.A., Fallos:* 317-3:1282, The Supreme Court said:

> *"...el art. 27 de la Convención de Viena sobre Derecho de los Tratados impone a los órganos del Estado argentino - una vez resguardados los principios de derecho público constitucionales- asegurar primacía a los tratados ante un conflicto con una norma interna contraria pues esa prioridad de rango integra el orden jurídico argentino y es invocable con sustento en el art.31 de la Carta Magna..."*

("...Art. 27 of the Vienna Convention on the Law of Treaties requires Argentine State bodies – once principles of constitutional public law are safeguarded – to guarantee the primacy of treaties when a conflict with a contrary domestic rule arises, given that this hierarchy is part of the Argentine legal system and it can be invoked based on Art. 31 of the Constitution...."

2.8 Do courts make reference to treaties to which the state is not a party in interpreting or applying domestic law, including constitutional matters?

No, as far as I know they don't.

2.9 For federal systems, can and have state or local authorities adopted the substantive provisions of ratified or ungratified treaties into law?

International law is part of federal law and Article 75 of the Constitution establishes matters over which the Congress exercises exclusive legislation, denying that power to the local authorities.

3. Customary international law

3.1 Is customary international law automatically incorporated into domestic law?

International custom, as evidence of a general practice accepted by the State as law, is automatically incorporated into domestic law.

3.2 Do the courts apply customary international law in practice?

Article 116 of the Constitution establishes that the Judicial Power shall extend to all cases affecting Ambassadors, other public Ministers and Consuls. In *D. Rufino Basavilbaso c. Ministro Plenipotenciario de Chile, Dr. Diego Barros Arana, Fallos:* 19:108, the Supreme Court said:

> *"...Los Ministros Diplomáticos están exentos, por el derecho de gentes, de la jurisdicción del país en que residen, aunque pueden renunciar a este privilegio con autorización del Gobierno que representan y someterse a la jurisdicción local.."*
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> ("...Diplomatic Ministers are exempt by the Law of Nations from the jurisdiction of the country where they reside, although they may waive this privilege with authorization from the Government of the state they represent, and be subject to local jurisdiction.")

3.3 Do the courts defer to the government or legislature on the existence or content of customary international law?

No, as far as I know they don't.

3.4 Do judges take judicial notice of customary international law or must it be proved by the party asserting the norm?

The judges take judicial notice of customary international law.

3.5 What are the primary subject areas or contexts in which customary international law has been invoked or applied?

The rules of international law governing diplomatic and consular relations were the primary areas in which customary international law was invoked and applied until the law was codified

by the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.

4. Hierarchy

4.1 Where do treaties and customary international law rank in the hierarchy of legal norms in the domestic legal system?

Article 27 of the Constitution states that the principles of the Constitution are superior, paramount law unchangeable by treaties negotiated by the Federal Government and Article 75 (22) states the supremacy of treaties in force over domestic laws. There is not any rule related to the hierarchy of customary international law.

4.2 Have the courts developed any presumptions or doctrines to reconcile or conform domestic law to international law?

At present the reference is always to the Constitution which was modified in 1994 to give supremacy to treaties in force over domestic laws and to establish a special status for a certain international instruments in the field of International Human Rights Law.

4.3 Have the courts recognized the doctrine of *jus cogens* norms? If so, how has the doctrine been applied and what is the impact of the doctrine in practice?

The doctrine has been recognized by the Supreme Court in matters of International Criminal Law related to International Human Rights Law. In *Priebke, Erich, Fallos*: 318:2148, the Supreme Court said:

> *"...la calificación de los delitos contra la humanidad no depende de la voluntad de los estados requirente o requerido en el proceso de extradición sino de los principios del ius*

cogens del Derecho Internacional. En tales condiciones no hay prescripción de los delitos de esa laya y corresponde hacer lugar sin más a la extradición solicitada..."

("...the qualification of crimes against humanity does not depend on the will of the requiring or required States in the extradition process, but on the ius cogens principles of International Law. In such conditions, there is no statute of limitations for this kind of crime, and the required extradition shall be observed without further action...")

4.4 To what extent do the courts use international law to interpret constitutional provisions, such as those guaranteeing individual rights?

The Universal Declaration of Human Rights, the American Declaration of Human Rights and Duties, the American Convention on Human Rights. The International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights and the Optional Protocol, the Convention on Prevention and Punishment of the Crime of Genocide, the International Convention on All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child are mentioned in Article 75 (22) of the Constitution modified in 1994 as a complement to rights and guarantees enshrined therin. The same status was conferred by law 25.778 passed by the Congress, on the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

4.5 Have the courts indicated any higher status for any specific part of international law, e.g. human rights or UN Security Council decisions?

In *"Monges, Amalia c/ Universidad de Buenos Aires", Fallos: 319:3148*, in relation with the Article 75 (22) of the Constitution and the special status of the International Covenant on Economic, Social and Cultural Rights the Supreme Court said:

> *"...los constituyentes han efectuado un juicio de comprobación, en virtud del cual han cotejado los tratados y los artículos constitucionales y han verificado que no se produce derogación alguna, juicio que no pueden los poderes constituidos desconocer o contradecir...Que de ello se desprende que la armonía o concordancia entre los tratados y la Constitución es un juicio constituyente. En efecto, así lo han juzgado al hacer la referencia a los tratados que fueron dotados de jerarquía constitucional y, por consiguiente, no pueden ni han podido derogar la Constitución puesto que esto sería un contrasentido insusceptible de ser atribuido al constituyente, cuya imprevisión no cabe presumir..."*
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> (...The members of the Constitutional Assembly made a verification judgement, which the constituent powers can neither ignore nor contradict. They compared the treaties with a constitutional hierarchy and constitutional articles and verified that there is no repeal whatsoever... As a result, the harmony or concordance between the treaties and the Constitution is a decision of the Constitutional Assembly. Indeed, the members have so decided when making reference to the treaties granted constitutional hierarchy, and consequently, they cannot, and have never been able to, repeal the Constitution as this would be a contradiction in terms which cannot be attributed to the members of the Constitutional Assembly, whose lack of foresight cannot be assumed...")

5. Jurisdiction

5.1 Do the courts exercise universal jurisdiction over international crimes?

The Argentine Republic is a State party to the Geneva Conventions of 1949 and Additional Protocol I of 1977 as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment where universal jurisdiction is established.

5.2 Do the courts exercise jurisdiction over civil actions for international law violations that are committed in other countries?

Under domestic law the principle is territorial jurisdiction. Exceptions are possible through international agreement.

6. Other International Sources

6.1 To what extent do the courts view non-binding declarative texts, like the UN Standard Minimum Rules on the Treatment of Prisoners, as authoritative or relevant in interpreting and applying domestic law?

Some non binding texts in the field of Human Rights, such as Reports of the International Committee on Human Rights or of the Inter- American Commission on Human Rights, can be considered relevant in interpreting domestic law.

6.2 Have the courts been asked to apply or enforce a decision of an international court or tribunal? If so, how have the courts responded? Do they view such decisions as legally-binding? Where do such decisions sit in the hierarchy of domestic law?

The Argentine Republic has accepted the jurisdiction of the Inter American Court on Human Rights, the judicial organ of the American Convention on Human Rights. The decisions has been accepted by the State and the implementation is, in general, of the responsibility of the Federal Government. Nevertheless in Cantos, Fallos: 326-2:2968, related to a decision of the Inter American Court on Human Rights that established the violation of Articles 8 (1) and 25 of the American Convention on Human Rights, the Supreme Court said:

> *"...la reducción del monto de los honorarios fijados por este Tribunal a favor de los profesionales intervinientes sin darles siquiera la posibilidad de resistir una eventual petición del interesado en tal sentido... vulneraría elementales garantías constitucionales de los afectados. Ello, por cuanto los profesionales beneficiarios de esos derechos creditorios no han sido parte en el procedimiento desarrollado ante la instancia internacional... (así obrar) importaría la violación de garantías judiciales y del derecho de propiedad, expresamente tutelados por la Constitución Nacional (arts. 17 y 18).*
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> ("...the reduction in the amount of the fees established by this Court in favor of the intervening lawyers, without even giving them the opportunity to oppose a potential request from the interested party in that vein... would be detrimental to the fundamental constitutional rights of the affected parties. This would be so given that the professionals benefiting from such creditor's rights have not been involved in the proceedings filed with the international body... (and hence) it would imply violating judicial and property rights guarantees, which are expressly protected by the National Constitution (Art. 17 and Art.18).

6.3 Have the courts been asked to apply or enforce a decision or recommendation of a non-judicial treaty body, such as a Conference or Meeting of the Parties to a treaty? If so, how have

the courts responded? Do they view such decisions as legally-binding?

No, as far as I know they have not been asked to apply or enforce a decision or recommendation of a non-judicial treaty body.

7. Please provide any other relevant information about international law as it applies within the national system.

Article 116 of the Constitution establishes that the Judicial Power shall extend to all cases arising under the Constitution, the laws of the Nation and treaties made under their Authority. Nevertheless, if judges of any courts are the primary interpreters of the Constitution, the final and authoritative interpretation is in the hands of the Supreme Court. In *Peláez, Victor, Fallos*: 318:1967, the Supreme Court said:

> *"...Planteada una 'causa', no hay otro poder por encima de esta Corte para resolver acerca de la existencia y los límites de las atribuciones constitucionales otorgadas a los departamentos Legislativo, Judicial y Ejecutivo, y del deslinde de atribuciones de éstos entre sí y con respecto a los de las provincias. No admite excepciones, en esos ámbitos, el principio reiteradamente sostenido por la Corte, ya desde 1864, en cuanto a que ella 'es el intérprete final de la Constitución' (Fallos: 1:340)..."*
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> ("... Once a "case" is filed, there is no power above that vested in this Court to adjudicate upon the existence and limits of the constitutional powers, duties and functions granted to the Legislative, Judicial and Executive bodies, and to the division of such powers, duties and functions between each other and with respect to the provinces. In this realm, the principle, as repeatedly sustained by the Court since 1864, admits no exceptions, as it is the 'final interpreter of the Constitution' (Fallos: 1:340)...").