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Water and Terrorism: The Liability of the Government from the Argentine Public Law Point of View

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“WATER AND TERRORISM: THE LIABILITY OF THE GOVERNMENT FROM THE ARGENTINE PUBLIC LAW POINT OF VIEW”

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INTRODUCTION

A terrorist event can be analyzed from many different points of view (political, ideological, social, religious, moral, economic, etc.) and in every case, it is a highly complex and delicate matter. Legally, the issue of pecuniary responsibilities resulting from acts of terrorism is of particular interest since the perpetrators are often unidentifiable. Even if the perpetrators could be identified, they are unwilling to pay for the substantial damages that they incur. As a result, when terrorist acts

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occur, it is impossible to avoid looking to the government for compensation, as it is the only entity that will help people recover their damages and losses. People look to the government, not only because of the magnitude of money involved, but also because of the potential liability of the government, as it is the entity responsible for the safekeeping of its people.

The topic becomes even more important when it affects an essential public service like the supply of drinking water. What would happen if an act of terrorism contaminated the drinking water or destroyed the plants that process the supply of drinking water? Does the government have the absolute obligation of supplying or of guaranteeing the supply of drinking water? Does the government have to compensate its citizens for damages and losses that an incident of terrorism may cause? These are some of the questions that this article will try to address. It is obvious that the physical and human consequences that might result from a terrorist attack are unimaginable. Are the legal consequences related to this problem equally incomprehensible?

1. LEGAL AND REGULATORY FRAMEWORK OF THE SUPPLY OF DRINKING WATER

A. LEGAL AND REGULATORY FRAMEWORK OF THE SUPPLY OF DRINKING WATER DRINKING WATER AS A HUMAN RIGHT

The law treats safe access to drinking water not only as a right, but also as an obligation. Legal scholars maintain that, on the one hand, individuals have a natural right to the water necessary to quench their thirst,¹ also called a "thirst right."² On the other hand, legal scholars also maintain that it is a humane duty and a natural law to allow people to have the water they need.³ The basis for this responsibility, or right to water, also stems from the "right to health," since the right to access drinking water is implicit in the right to health. The basis of the right to water also stems from the quintessential "right to life," which provides the basis for all other rights.⁴

The Constitution of Argentina holds that certain international treaties should apply with as much force as the constitution itself.⁵ Some of these treaties, including the Convention on the Rights of the Child; the

1. See PETER GLEICK, PACIFIC INSTITUTE FOR STUDIES IN DEVELOPMENT, ENVIRONMENT, AND SECURITY, THE HUMAN RIGHT TO WATER 3 (1999), http://www.pacinst.org/reports/basic_water_needs/human_right_to_water.pdf.

2. See HENRI BRUNO, CONTRIBUTION À L'ÉTUDE DU RÉGIME DES EAUX EN DROIT MUSULMAN 27 (Arthur Rousseau ed., Paris 1913).

3. M. LUCAS-CHAMPIONNIÈRE, DE LA PROPRIÉTÉ DES EAUX COURANTES, DU DROIT DES RIVERAINS, ET DE LA VALEUR ACTUELLE DES CONCESSIONS FÉODALES, OUVRAGE CONTENANT L'EXPOSE COMPLET DES INSTITUTIONS SEIGNEURIALES ET LE PRINCIPE DE TOUTES LES SOLUTIONS DE DROIT QUI SE RATTACHENT AUX LOIS ABOLITIVES DE LA FÉODALITÉ 7 (Charles Hingray, ed., Paris 1846).

4. See GLEICK, *supra* note 1, at 5-7.

5. CONST. ARG. art. 75, ¶ 22. Although certain international treaties apply with constitutional force, they do not annul any part of the Constitution, and are treated as offering rights complimentary to those guaranteed by the Constitution. *Id.*

American Convention on Human Rights, "Pact of San José, Costa Rica"; and the International Covenant on Economic, Social and Cultural Rights, grant the rights to health, personal safety, and life.⁶ Argentine domestic law specifically considers access to drinking water a human right, as well as a social and cultural asset.⁷ Indeed, like any other right, its exercise is attached to the laws that regulate it⁸ and establish the corresponding conditions and restrictions for it.⁹

B. THE LEGAL AND REGULATORY FRAMEWORK FOR THE SUPPLY OF DRINKING WATER: LAW NO. 26,221

Argentina has always considered the supply of drinking water to be an essential service for communities;¹⁰ the government has declared this supply to be a "public service" through Law No. 26,221.¹¹ In other words, the federal government has assumed ownership of the service (*publicatio*) and the responsibility of providing water to its users. This service must meet the basic requirements of any public service: obligation, regularity, generality, constancy, and egalitarianism.¹² In addition, such declaration implies the submission of this service to an intense framework of regulations under public law.

At the same time, the Argentine federal government also assumed control of this public service in the city of Buenos Aires and its surrounding areas, through Agua y Saneamientos Argentinos ("AYSA"), a government-owned company, which Decree No. 304/2006 created.¹³ Until 2006, the government delegated delivery of this public service to a private company, Aguas Argentinas S.A., when concession contract Decree No. 303/2006 then terminated.¹⁴ Throughout the rest of the country, private companies, state-owned companies, or cooperatives

6. Convention on the Rights of the Child, G.A. Res. 44/25, Art. 3, U.N. Doc. A/44/49 (Sept. 2, 1990), available at <http://www1.umn.edu/humanrts/instreet/k2csrc.htm>; Organization of American States, American Convention on Human Rights, "Pact of San José, Costa Rica," Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, arts. 4, 13, 15-16, 22; International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A, arts. 11-12, U.N. Doc. A/6316 (Jan. 3, 1976) available at <http://www1.umn.edu/humanrts/instreet/b2esc.htm>.

7. Decree No. 303/2006, Mar. 21, 2006, [30871] B.O. 1, available at <http://infoleg.mecon.gov.ar/infolegInternet/verNorma.do?id=114865>; see Law No. 26,221, Feb. 28, 2007, [31107] B.O. 1, Annex 2 Pmbl., available at <http://infoleg.mecon.gov.ar/infolegInternet/verNorma.do?id=125875>.

8. The right to use water, like any other right, is subject to the State's ruling capacity. See Law No. 26,221 at Art. 2, Annex 2 Arts. 59-61.

9. *Id.* at Annex 2 Art. 81.

10. See Decree No. 304/2006, Mar. 21, 2006, [30871] B.O. 4, available at <http://infoleg.mecon.gov.ar/infolegInternet/verNorma.do?id=114866>.

11. Law No. 26,221, Feb. 28, 2007, [31107] B.O. 1, Art. 2, available at <http://infoleg.mecon.gov.ar/infolegInternet/anexos/125000-129999/125875/norma.htm>.

12. *Id.* at Annex 2 Pmbl., Annex 2 Arts. 1, 7.

13. *Id.* at Art. 2, Annex 2 Pmbl., Annex 2 Art. 2.

14. Decree No. 303/2006, Mar. 21, 2006, [30871] B.O. 1, available at <http://infoleg.mecon.gov.ar/infolegInternet/verNorma.do?id=114865>; Law No. 26221 at Annex 1.

have concession agreements with corresponding provincial governments to supply the drinking water.¹⁵ Law No. 26,221 approved the regulatory framework for the concession of the drinking water supply, with the main goal of ensuring delivery of this public service, defined as the collection, processing, transportation, distribution, and marketing of drinking water.¹⁶

In terms of the regulatory framework, the law states that providers must ensure the supply of drinking water as a public service, under conditions that guarantee its continuity, regularity, generality, and quality.¹⁷ In addition, the law requires providers to supply drinking water to every property, residential or otherwise, located in pre-established areas in the regulatory framework.¹⁸ The law specifies a number of highly demanding technical requirements that the concession holder must meet¹⁹ in order to ensure the safety and health of its users.

Regarding the continuity of service, Law No. 26,221 establishes that, under normal conditions, concession holders must supply water without interruption, ensuring its availability twenty-four hours a day.²⁰ The concession holder must minimize any interruptions in service and reestablish the supply of water as quickly as possible if there is an interruption.²¹ In the case of a scheduled interruption of service, the concession holder must give affected users advance notice.²² In any case, if the service interruptions are longer than eighteen hours, the concession holder must supply water through an emergency service.²³ In case of "*force majeure*" that leaves no other choice but restricting the supply of drinking water, the concession holder has the obligation to notify users through the media about the measures to be applied.²⁴ Finally, Law No. 26,221 establishes that the concession holder must have civil liability insurance to cover possible damages that property or people (including users) may incur as a consequence of any activities related to the service.²⁵

15. See The Government of Argentina, Public Services, Water and Sewage, <http://www.argentina.gov.ar/argentina/portal/paginas.shtml?pagina=377> (last visited Oct. 30, 2009).

16. Law No. 26,221, Feb. 28, 2007, [31107] B.O. 1, Annex 2 Art. 1, available at <http://infoleg.mecon.gov.ar/infolegInternet/verNorma.do;jsessionid=4BA7D5CF49CD67126EBF9ECEACFCE920?id=125875>

17. *Id.* at Annex 2 Art. 7.

18. *Id.* at Annex 2 Art. 10 Exh. 2.

19. See, e.g., *id.* at Annex A, C.

20. *Id.* at Annex 2 Arts. 9(d), 15.

21. *Id.* at Annex 2 Art. 15.

22. *Id.* at Annex 2 Art. 9(e).

23. *Id.* at Annex 2 Art. 15.

24. *Id.* at Annex 2 Art. 9(e).

25. *Id.* at Annex 2 Art. 112.

2. INTERNATIONAL TERRORISM IN ARGENTINA AND GOVERNMENT LIABILITY

A. HISTORY OF INTERNATIONAL ACTS OF TERRORISM IN ARGENTINA

Aside from the terrorist incidents suffered some decades ago, especially during the 1970's until 1994, no significant acts of terrorism had taken place in Argentina. One might attribute the lack of terrorism to the effective use of government intelligence and governmental prevention forces, yet the true cause has been a lack of interest that international terrorist groups have had in Argentina. However, in 1992 and 1994, two significant terrorist attacks, resulting in more than one hundred victims, took place against the Embassy of Israel and the Israelite Mutual Association (AMIA).²⁶ The justice system has not been able to identify those responsible for the attacks, even though there are suspicions regarding the involvement of international terrorist groups with local connections.

In Argentina, there have been no terrorist attacks where the main target has been the manipulation of water or its supply, nor have there been attacks with similar characteristics (e.g., chemical or environmental targets). Consequently, this article analyzes the existing precedents related to the aforementioned attacks of the 1990's. This article establishes points of connection with water terrorism and considers the jurisprudence of the Supreme Court of Justice of Argentina regarding the liability of the government.

B. CASE LAW AGAINST THE LIABILITY OF THE GOVERNMENT IN THE ATTACK TO THE EMBASSY OF ISRAEL

In relation to the attack on the Embassy of Israel, individuals and institutions brought a number of lawsuits against the federal government to obtain compensation for damages incurred.²⁷ They claimed the government was extra-contractually liable on account of its wrongful omission, particularly with reference to the government's failure to comply with its legal obligation to ensure the safety of its citizens through the adoption of reasonable preventive measures, pursuant to international standards for the protection of the Embassy of Israel.

The Federal Court of Appeals provided the most important precedent related to this subject.²⁸ The court held that the government was not liable for the damages incurred in the attack to the Embassy of

26. Jewish Virtual Library, Terrorist Bombings in Argentina, <http://www.jewishvirtuallibrary.org/jsource/Terrorism/argentina.html> (last visited Oct. 21, 2009).

27. Beatriz Gurevich, *Passion, Politics and Identity: Jewish Women in the Wake of the AMIA Bombing in Argentina* 26-27, 29 (2005), <http://www.brandeis.edu/hbi/pubs/wp14.pdf>.

28. See Cámara Nacional de Apelaciones en lo Federal y Contencioso-administrativo de la Capital Federal [CNFed.], 7/3/2000, "Lienau de Elowson, Solueig v. National state et alius," Lexis Nexis Jurisprudencia Argentina [J.A.] (No. 70012155) (Arg.).

Israel, since its wrongful omission had not been planned and because the damages were caused by a situation of "*force majeure*" that excludes the responsibility of the government.²⁹ The court continued to note that even though the government must provide for the protection of its citizens from acts of terrorism, the government cannot serve as an "insuring entity" by guaranteeing that such events will not happen.³⁰ Furthermore, the court stated that the government is not liable for damages caused by individuals who are outside of its immediate control.³¹ The court added that it is difficult to know what measures the government could have adopted to prevent the terrorist attack, even if its prediction was hypothetically accepted.³²

The court based its judgment on the traditional jurisprudence of the Supreme Court of Justice of Argentina regarding the liability of the government for wrongful omissions.³³ Therefore, the court concluded that the government's public safety obligations do not include the prevention of international acts of terrorism. Furthermore, international acts of terrorism are situations of "*force majeure*," which signify the non-existence of a causal relationship between the conduct and the violation of the civil rights of the citizens.

C. RECOGNITION OF LIABILITY OF THE FEDERAL GOVERNMENT IN THE AMIA CASE

Regarding the attack on AMIA, there is an important, written precedent on the record signed in 2005 by the federal government in the Inter-American Commission on Human Rights, which acknowledged the liability for the failure to comply with measures for the prevention of the attack.³⁴ The record took into account the attack on the Embassy of Israel, which occurred two years earlier, as well as the subsequent failure of the judicial investigation.³⁵ Decree No. 812/2005 adopted the above-mentioned record, and proposed a law to allow for compensatory damages to benefit of all the victims of the attack.³⁶ So far, the National Congress has not passed this into law; however, the executive branch submitted in 2008 a bill that establishes compensation for the victims' relatives and for those seriously injured.³⁷ Meanwhile, a recent judgment of the Federal Court of Appeals ordered the government to

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. See Corte Suprema de Justicia [CSJN], 7/11/1989, "Ruiz, Mirtha E. v. Provincia de Buenos Aires," Lexis Nexis Jurisprudencia Argentina [J.A.] (1991-I-102) (Arg.).

34. Press Release, Inter-American Commission on Human Rights, IACR Expresses Satisfaction at the Argentine State's Acknowledgment of Liability in the AMIA Case, No. 5/05 (March 4, 2005), available at <http://www.cidh.org/comunicados/english/2005/5.05eng.htm>

35. *Id.*

36. Decree No. 812/2005, July 12, 2005, [30694] B.O. 1, available at <http://infoleg.mecon.gov.ar/infolegInternet/verNorma.do?id=107751>.

37. The bill was submitted by Message P.E. No. 698/08 (April 23, 2008). The message and the bill are available at <http://www.senado.gov.ar/web/proyectos/numexpe.php>

pay compensatory damages to the relatives of one victim of the AMIA attack, based on the terms of Decree No. 812/2005 where the government acknowledged its liability.³⁸

Although the AMIA case had certain peculiarities, without the precedent of the record signed by the government and the Decree No. 812/2005, no Court of Justice would have recognized the liability of the federal government. Despite that a similar attack against another emblematic building of the Jewish community (the Embassy of Israel) two years earlier represented a threat, it is still not easy to identify the specific preventative measures the federal government should have adopted to prevent a new attack, and when the federal government should have implemented such preventative measures. In addition, under these conditions, the attack represented a situation of "*force majeure*," which releases the federal government from any liability.

3. A TERRORIST EVENT RELATED TO THE SUPPLY OF DRINKING WATER: PERSPECTIVE ON THE LIABILITY OF THE GOVERNMENT

Next, this article will analyze whether the federal government could be held responsible for possible damages derived from a terrorist attack affecting the supply of drinking water, such as the contamination of drinking water, or an attack on the water treatment plants. Considering the severity and the extent of such an event, a terrorist attack of this kind could have terrible consequences that would most surely endanger the health, personal safety, and, potentially, the life of hundreds or millions of people. Unlike the previously mentioned attacks, a terrorist incident affecting the supply of drinking water would not only have an effect on the role of the federal government as the protector of its citizens, particularly in connection with the prevention of acts of terrorism, but also on its role as the owner and supplier of drinking water to the public. Although this seems to reinforce the commitment and liability of the federal government in this respect, a claim against it for compensation of damages caused by a terrorist incident affecting the supply of drinking water would hardly succeed.

Regarding the federal government's role with respect to the safekeeping of its people and the prevention of terrorist attacks, the observations made in the previous section would apply to the case at hand. A court of justice would likely reiterate that the federal government's public safety obligations could not include the prevention of international terrorist attacks, due to their particular characteristics. Although the federal government has the obligation to provide preventative measures, it cannot guarantee that terrorist attacks will not occur. Further, since terrorist attacks are unpredictable and are not usually preceded by threats or hints that the government can easily detect, it would be very unlikely for a court of justice to hold that the

38. Cámara Nacional de Apelaciones en lo Federal y Contencioso-administrativo de la Capital Federal [CNFed.], 23/10/2008, "Alche de Ginsberg, Laura Edith v. Estado Nacional", La Ley [L.L.] (Arg.).

government breached a duty to the public in a matter of such complexity.

Moreover, with respect to terrorist attacks that affect the supply of safe drinking water, one must stress the aspect of unpredictability, considering how unusual and unforeseeable an attack of this kind would be, not only at the national level, but also at the international level. In addition, an attack would be even more unpredictable in a country like Argentina, which no longer seems to be the center of attention for international terrorism.

In a case of water terrorism, the Federal Supreme Court of Justice would apply traditional case law regarding the liability of the government for its wrongful omissions.³⁹ This doctrine holds that the government is liable only when its agents do not comply with an expressed or implicit legal obligation⁴⁰ that constitutes a concrete, rather than a generic or vague, duty,⁴¹ such as the prevention of an attack on the water supply. In addition, this doctrine excludes the obligation of the government to accept liability for the interruption that occurs when there is a fortuitous event or a situation of "*force majeure*," such as a terrorist attack. Furthermore, this doctrine rejects the proposition that the government can become an "insuring entity" that protects citizens from any damages that can result as a consequence of third party acts.⁴²

As a result, the ruling of the Federal Court of Appeals in the case of the Embassy of Israel,⁴³ would apply to the case at hand. On the other hand, it is not likely that the government would admit its own liability, even though it did so in the AMIA case.⁴⁴ In addition, the AMIA case had so many peculiarities that it will hardly ever be repeated.

Regarding the enforcement of the government's duties as the owner of drinking water and the supplier to the public, the regulatory framework contemplates the possibility of interruptions in the service caused by situations of "*force majeure*." When interruptions occur, the government only has to notify users regarding the measures adopted.⁴⁵ Although the regulatory framework establishes the obligation to restore the service as quickly as possible, or to provide an emergency supply in case that the interruption is prolonged,⁴⁶ courts should analyze the scope of such duty within the context in which the concession holder is involved, evaluating the extent and the magnitude of the attack.

39. See Corte Suprema de Justicia *supra* note 33.

40. Code Civil [C. civ.] art. 1074 (Arg.).

41. JUAN C. CASSAGNE, DERECHO ADMINISTRATIVO 301 (6th éd., Abeledo Perrot 1998), available at <http://forodelderecho.blogcindario.com/2008/01/00139-derecho-administrativo-juan-carlos-cassagne-tomo-i-y-ii.html>.

42. *Id.* at 301-302 & n.16.

43. See *supra* Part 0.

44. See Jewish Virtual Library, *supra* note 26, at 3.

45. Law No. 26,221, Feb. 28, 2007, [31107] B.O. 1, Annex 2 Art. 9(e), available at <http://infoleg.mecon.gov.ar/infolegInternet/verNorma.do;jsessionid=4BA7D5CF49CD67126EBF9ECEACFCE920?id=125875>

46. *Id.* at Annex 2 Art. 15.

Therefore, in the case of a terrorist attack, which affects or risks the supply of drinking water or the compliance with the technical requirements for water quality, the concession holder should immediately interrupt the supply of polluted water to avoid damages, and immediately notify users regarding the situation and the measures adopted or to be adopted.

As long as the government enforces the previously mentioned preventive measures, the government, as the concession holder, would not be responsible for the damages resulting from an attack of this kind. In addition, such damages cannot be considered insured by the concession holder's policy, since such insurance only covers actions directly related to the service provided by the concession holder. Also, as it is frequently the case in the insurance industry, the insurance policy does not cover damages caused by acts of terrorism.

CONCLUSION

Obviously, this article is only theoretical, and one would hope that the need would never arise for a specific debate on the actual liability of the government for damages caused by such a terrible act of terrorism. Nevertheless, should a terrorist attack happen in Argentina that affects the supply of drinking water, a court of justice, based on Argentina's public law and the case law on the responsibility of the government for wrongful omissions, would be unlikely to sustain the pecuniary liability of the government for damages. Certainly, it would be necessary to evaluate the details of the attack, as well as whether it was predictable or avoidable, but it is highly improbable that the government would be held responsible in its capacity as the holder or supplier of this public service, or for its failure to comply with its duty of prevention.

