

Bogotá, D.C. January 26, 2009-

**To PABLO SAAVEDRA-ALESSANDRI , Esq.  
Secretary of the Inter-American Court of Human  
Rights**

**Ref. CDH-OC-21/0101**

Greeting:

Pursuant to the request for comments of the Honorable Inter-American Court regarding the request for an advisory opinion submitted by Argentina on August 14, 2008, for the interpretation of article 55 of the American Convention on Human Rights about the figure of the *ad hoc* judge and the equality of the parties in the process before the Inter-American Court in a case originated pursuant to an individual petition; and further, about the nationality of the Judges and the right to an independent and impartial judge; the ***Asociación de Familiares de Detenidos Desaparecidos ASFADDES ^ Colombia (Association of next of kin of detainees and disappeared persons ^ Colombia)*** respectfully submits its comments to this High Court regarding the issues subject matter of the request.

Firstly, we must make reference to the wording of article 55.3 of the Inter-American Convention on Human Rights, with the purpose of analyzing the questions raised and our own reasoning.

### **Article 55**

1. If a judge is a national of any of the States Parties to a case submitted to the Court, he shall retain his right to hear that case.

2. If one of the judges called upon to hear a case should be a national of one of the States Parties to the case, any other State Party in the case may appoint a person of its choice to serve on the Court as an *ad hoc* judge.

**3. If among the judges called upon to hear a case none is a national of any of the States Parties to the case, each of the latter may appoint an *ad hoc* judge.**

4. An *ad hoc* judge shall possess the qualifications indicated in Article 52.

5. If several States Parties to the Convention should have the same interest in a case, they shall be considered as a single party for purposes of the above provisions. In case of doubt, the Court shall decide.

**I. PURSUANT TO THE PROVISIONS OF ARTICLE 55.3 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS, SHOULD THE POSSIBILITY OF APPOINTING AND AD HOC JUDGE BE LIMITED TO THOSE CASES IN WHICH THE PETITION FILED BEFORE THE COURT HAS BEEN ORIGINATED BY AN INTERSTATE COMPLAINT?**

The Inter-American system for the protection of human rights guarantees the effective protection of the fundamental rights of human beings; these principles stand above the premises of state existence. Therefore, the obligation of a State is to give priority to the superior values of its associates in order to materialize the enjoyment and protection of the minimum fundamental rights.

Pursuant to the provisions of article 55.3, and based on the exegetic interpretation of the norm, the appointment of the *ad hoc* judge is established in terms of conflicts between states, which do not include individual petitions.

Although it is true that the Convention does not incorporate such appointment, articles 44 to 46 have to be considered, since they establish the procedure to submit

the individual petitions that guarantees the full exercise of the right of defense and its legal effects regarding the adversarial proceeding.

In this sense, the American Convention disregards the possibility of appointing an *ad hoc* judge in the cases originated by individual petitions. This implies an affectation or limitation to the right of equality between the parties within the process for the victim, his or her next of kin or the petitioners.

In fact, this procedural inequality is clear when we observe that only the State can use this legal means by invoking the right that it has been granted by the American Convention itself; having this right not been regulated for those cases originated pursuant to an individual petition.

Thus, there are two possible legal interpretations, on the one hand, the American Convention must be applied strictly as provided in article 55.3 or, on the other, it must be regulated in the American Convention the possibility to resort to an *ad hoc* judge in individual petitions with the purpose of achieving equality between the parties.

## **II. FOR THOSE CASES ORIGINATED PURSUANT TO AN INDIVIDUAL PETITION, MUST A JUDGE NATIONAL OF A DENOUNCED STATE EXCUSE HIMSELF TO HEAR IN A CASE IN ORDER TO GUARANTEE AN ABSOLUTELY IMPARTIAL DECISION?**

### **Article 55**

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2. If one of the judges called upon to hear a case should be a national of one of the States Parties to the case, any other State Party in the case may appoint a person of its choice to serve on the Court as an *ad hoc* judge.

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4. An *ad hoc* judge shall possess the qualifications indicated in Article 52.

5. If several States Parties to the Convention should have the same interest in a case, they shall be considered as a single party for purposes of the above provisions. In case of doubt, the Court shall decide.

We consider that it is convenient to refer here to the rules of procedure for individual petitions and to point out the rights that the American Convention has established for the same, in order to determine an interpretation in the light of the impartiality and independence that judges must have as fundamental principles of the rule of law.

The procedure followed in the case of individual petitions is ruled by the guarantees that secure the parties the exercise of the right of defense in the proceeding. Such guarantees are: a) those related to the conditions of admissibility of petitions (articles 44 to 46 of the Convention), and b) those related to the principle of rebuttal (article 48 of the American Convention)[1]

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**procedural equality**. Likewise, it is necessary here to invoke the **principle of legal certainty** (article 39 of the Commission Rules of Procedure.)

Indeed, article 55.1 of the American Convention reserves the right that a judge has to hear cases submitted for the consideration of the Court, even if he is a national of the State which is a party to the controversy. This power granted to the Judge, on the basis of the abovementioned article, brings about legal implications such as the possible vulnerability of principles such as procedural equality and legal certainty.

This unnecessary risk could be remedied by applying a disqualification criterion such as that currently applied to the proceedings followed in the Commission. Furthermore, another question to be taken into account is to consider the issue in the light of article 29 of the Convention, which limits the right of the Judge -who is a national of the State against which the complaint has been filed- to continue hearing the case in interstate complaints and those cases

involving an individual petition, as contemplated in the powers granted in article 55.1

In this sense, the ***Asociación de Familiares de Detenidos Desaparecidos ASFADDES ^ Colombia*** (**Association of next of kin of detainees and disappeared persons ^ Colombia**) submits for your consideration the comments made upon your request and hopes that such comments may contribute to the debate and to arrive at the best decision by the Honorable Inter-American Court of Human Rights.

We remain available for any requests or comments that may be deemed proper.

Respectfully submitted,

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