THE ARGENTINE REQUEST BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Authors: Ligia Galvis Ortiz[*] and Ricardo Abello Galvis[**]

SUBJECT-MATTER OF THE REQUEST

The participation of *ad hoc* judges in inter-State proceedings as well as in proceedings arising from individual or group petitions, and filed by the Inter-American Commission on Human Rights.

The questions put before the Inter-American Court of Human Rights are as follows:

First Question

"According to the provisions of Article 55(3) of the American Convention on Human Rights, should the possibility of appointing an ad hoc judge be limited to those cases in which the application filed before the Court arises from an inter-State petition?" (Document, pg. 5)

Second Question

"In cases arising from an individual petition, should a judge who is a national of the defendant State recuse himself from taking part in the consideration and decision of the

[*] Law Degree from the *Universidad Externado de Colombia*; PhD in Philosophy from the Catholic University of Leuven (Belgium). She has been a professor at the Externado, Andes and Rosario universities and is currently a professor at the Doctorate Program in Social Sciences, Childhood and Youth of the *Universidad de Manizales* and CINDE. Former Colombian diplomat before the United Nations Office in Geneva, Switzerland; Human Rights and Justice Independent Consultant.

[**] Professor of Public International Law and Coordinator of the International Law area at the *Facultad de Jurisprudencia* of the *Universidad Colegio Mayor de Nuestra Señora del Rosario* (Bogotá – Colombia); M/Phil (DES) in International Law and International Relations from the Graduate Institute of International Studies (IUHEI) (Geneva – Switzerland); Director of *Anuario Colombiano de Derecho Internacional* (ACD).

case in order to guarantee a decision free of any potential bias or influence?" (document, pg. 6)

THE CONTEXT OF THIS OPINION

The Argentine request has an interesting context from the point of view of the efficiency of the international human rights justice system developed by our continent sixty years ago. The development of the Inter-American Court has been, without a doubt, the slowest process insofar as its consolidation is linked to the recognition of the Court's jurisdiction by the members of the Organization of American States. To that end, it was first necessary to break with the traditions that linked national sovereignty with territorial independence. This notion is particularly important to Latin American countries which, once free from the Spanish yoke, had to preserve their recently acquired independence from potential new colonialist aspirations of old and new expansionist States. The Inter-American regional integration system and, especially, the human rights system are based, among others, on the principle of non-intervention in domestic matters at the international level and the domestic monopoly on justice as one of the essential purposes of the National State. Recognizing an international justice system means, to a certain extent, forgoing that distinguishing feature of national sovereignty, i.e. the administration of justice in the name of national law and according to the procedures established by the domestic legal system.

Therefore, the development of the jurisdiction of the Inter-American Court has been the slowest process in the Inter-American human rights system given that it represents a transformation of the notion of national sovereignty which is based more on abstract notions of State autonomy than on territorial defense. In order to recognize an international jurisdiction, it is necessary to establish certain criteria to ensure the domestic autonomy of States to be ruled by their own domestic systems –even if such systems have been modeled on foreign ones- in a manner such that domestic security issues are first resolved by the authority of their domestic justice system. This is a determining factor in the sovereignty of national States and in order to ensure such sovereignty at the international level the following criteria were established: the primacy of domestic legal systems, the principle of subsidiarity in the context of international justice, the principle of equality in relation to the implementation of the

procedure established under the international system and the independence of the experts appointed to the two specialized organs: the Inter-American Commission and the Inter-American Court of Human Rights.

The first two characteristics represent principles governing the admissibility of petitions and complaints in all cases. The principles of equality and independence of judges are also enshrined in the Convention, the Statute and the Rules of Procedure of the two organs, though not in a desirable express manner. In fact, neither the Statute nor the Rules of Procedure expressly provide for the independence of the judges of the Court, and the Convention does so only indirectly in Article 71, which sets forth that “The position of judge of the Court or member of the Commission is incompatible with any other activity that might affect the independence or impartiality of such judge or member, as determined in the respective Statutes.” However, independence is a universal principle of law applicable to domestic legal systems as well as to public international law.

Consequently, this principle applies to the Inter-American justice system. Thus, the judges elected by the OAS are independent judges despite being nominated by the States Parties to the Convention. Similarly, the principle of equality is another imperative of public international law and, therefore, of international human rights law. This guiding principle can be found in Article 10 of the Charter of the Organization of American States in relation to States, which provides that “States are juridically equal, enjoy equal rights and equal capacity to exercise these rights, and have equal duties. The rights of each State depend not upon its power to ensure the exercise thereof, but upon the mere fact of its existence as a person under international law.” And it is also enshrined in Article 1 of the American Convention on Human Rights, which sets forth as follows: “1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. 2. For the purposes of this Convention, "person" means every human being.” Likewise, the principle of equality before the law is embodied in Article 24 as

follows: “All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.” These guiding principles provide the legal context of our analysis and the basis for our opinion. The Inter-American human rights system rests on the pillars which support representative and participatory democracy such as the autonomy, equality, independence and sovereignty of States in pursuance of their essential purposes.

ANALYSIS OF THE QUESTIONS POSED IN THE REQUEST

The first question posed by the Argentine Government refers to the provisions set out in Article 55(2) and 55(3). In addition, these provisions are included in the Court’s Statute and Rules of Procedure in substantially the same terms.[1] From these provisions, we take the following elements of analysis:

a. The provisions clearly indicate those entitled to appoint an *ad hoc* judge, i.e. the States parties to the case submitted to the jurisdiction of the Court.
b. There are three main ideas for analysis, which are as follows: If a judge is a national of any of the States Parties to a case submitted to the Court, he retains his right to

[1] Art. 55 of the Convention. 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.

Article 10 of the Statute. *Ad Hoc* Judges. 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. Should several States have the same interest in the case, they shall be regarded as a single party for purposes of the above provisions.

Art. 18 of the Rules of Procedure. In a case arising under Article 55(2) and 55(3) of the Convention and Article 10(2) and 10(3) of the Statute, the President, acting through the Secretariat, shall inform the States referred to in those provisions of their right to appoint a Judge *ad hoc* within 30 days of notification of the application. 2. When it appears that two or more States have a common interest, the President shall inform them that they may jointly appoint one Judge *ad hoc*, pursuant to Article 10 of the Statute. If those States have not communicated their agreement to the Court within 30 days of the last notification of the application, each State may propose its candidate within 15 days. Thereafter, and if more than one candidate has been nominated, the President shall choose a common Judge *ad hoc* by lot, and shall communicate the result to the interested parties.

hear that case; if none of the judges called upon to hear a case is a national of one of the States Parties to the case, such State Party may appoint an ad hoc judge; and if among the judges called upon to hear a case none is a national of any of the States Parties to the case, each State may appoint an ad hoc judge.

c. The three ideas, which are to be taken together for purposes of interpretation, relate to the need to preserve equality between those involved in the case, i.e. the States.

These are the elements extracted from the Article referred to in the request and expressly stated in the provisions mentioned above. Therefore, we conclude that all the judges of the Inter-American Court of Human Rights may take part in all cases and are only subject to the incompatibilities prescribed in Article 71 of the Convention, the incompatibilities and grounds for disqualification provided for in Articles 18 and 19 of the Statue and Article 19 of the Rules of Procedure of the Court, which refer specifically to offices held by the judge in the executive branch of government of his home country or in international organizations, or to a conflict of interest arising from the judge's prior participation in the case in some specific capacity. Therefore, except for the aforesaid incompatibilities and impediments, the judges of the Court are qualified to hear all cases that come before the Court, either by an application filed by the Inter-American Commission on Human Rights or by petitions brought directly by the States.

Next, it is necessary to examine the party entitled to make such appointment according to the provisions under analysis. As stated before when listing the summary ideas extracted from the provisions (Article 55 of the Convention, Article 10 of the Statute and Article 18 of the Rules of Procedure), the States have the right to appoint an *ad hoc* judge under the circumstances described above; that is, when they are parties to cases within the jurisdiction of the Court. However, what is not so clear is when an *ad hoc* judge should be appointed. Is it only in inter-State proceedings? Or is the right to appoint *ad hoc* judges applicable to all cases coming before the Court? And this is the question posed by the Argentine Government given that the Court, in its interpretation, has extended States' right to appoint *ad hoc* judges to inter-State proceedings as well as to cases brought by the Commission. This interpretation may result from a slight shortcoming of Article 55 of the Convention and, consequently, from the provisions contained in the Statute and the Rules of Procedure insofar as they provide that States may appoint an *ad hoc* judge when they are parties to a case but fail to expressly specify

in which cases, i.e. whether in inter-State proceedings only or in all cases. Let us consider both situations independently.

Inter-State Proceedings

Given the language of Article 55(2) and 55(3), we can infer that such appointment is only applicable to inter-State proceedings insofar as the purpose of such provisions is to establish equality in relation to the standard by which the Court's work is measured. If there is a judge that is a national of one of the States parties to a case, the other State has the right to appoint an *ad hoc* judge. So far, we can agree that these provisions seek to ensure the principle of equality of arms between States established in the OAS Charter (Art. 10). It is also possible to understand that, in order to reaffirm this principle, the State parties to inter-State proceedings appoint an *ad hoc* judge in the event none of the judges of the Court are nationals of those States, even when this has its pros and cons. It is an advantage because it is yet another guarantee of the principle of equality of arms between States. However, this safeguard raises doubts about the independence and impartiality of the judges of the Court. Some authors have emphasized its benefits by asserting that through the appointment of such judges the Court is able to render a decision based on full knowledge of the domestic legal systems of the States Parties and their enforcement mechanisms. We believe that this information may be obtained by other means in order to completely avoid undermining the principle of independence and impartiality of judges. The Court may obtain information from the investigations undertaken by its assistants or directly from the agents designated by the States. This way, the Court's independence is guaranteed without compromising the principle of equality of arms between States. Therefore, the right to appoint *ad hoc* judges could be suppressed when none of the judges of the Court is a national of either State Party to the case.

As regards the potential inequality that may arise from the participation of a judge who is a national of one of the States parties to a case, the solution adopted by the Convention, the Statute, and the Rules of Procedure is for the other State to appoint an *ad hoc* judge. However, another possibility would be to extend the impediments and to consider that the existence of a judge who is a national of one of the States parties to a case may disrupt the necessary balance to ensure the impartiality of the Court's decision and, consequently, the existence of a conflict of interest. Therefore, the appropriate

solution would be for the judge in question to recuse himself from the case and for the Court itself to decide whether to appoint an *ad hoc* judge in order to maintain a quorum.

These considerations are relevant in the context of inter-State proceedings. It is perfectly legitimate to guarantee the equality of arms between States as required by Article 10 of the OAS Charter. However, we believe that said guarantee would be best accomplished and the Court would operate with greater independence if *ad hoc* judges were appointed by the Court itself instead of by the States, by extending the meaning of conflict of interest to include the judge who is a national of the State party to a case and by transferring the power to appoint the *ad hoc* judge to the Court. The reason behind the fact that this power is currently given to the State that is a party to a case is political and consists in allowing States to participate more directly in the composition of the court that will try their cases, which in turn is based on the States' interest in preserving their sovereignty and the principle of non-intervention, which premises are enshrined in the OAS Charter itself. But the progress of these principles towards considering Sovereignty as an expression of multilateral negotiation autonomy and in pursuance of the obligations undertaken in multilateral treaties and conventions may suggest that, nowadays, it is possible to place more trust in the Court by reinforcing its independence and impartiality through other mechanisms than the ones mentioned here. For example, extending the impediments to prevent national judges from hearing cases, instead of granting States the right to appoint *ad hoc* judges, and transferring such power to the Court or providing for the Court to have a list of *ad hoc* judges or co-judges, as prescribed by the Colombian legal system, are possibilities that should be considered.

Cases brought by the Inter-American Commission on Human Rights

The interpretation of the aforesaid provisions is clearly applicable to inter-State proceedings and they serve the purpose of ensuring equality of arms between States parties to a case within the jurisdiction of the Court. But the same is not true in cases arising from individual petitions submitted to the jurisdiction of the Court by the Inter-American Commission on Human Rights. This section makes reference to the second question posed by the Argentine Government.

As regards individual petitions, the principle of equality is also the guiding principle of the Inter-American human rights system. This premise is enshrined in the American

Convention on Human Rights. The States must respect the human rights of all persons subject to their jurisdiction "without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition" (Art. 1). Likewise, the Pact of San José provides that "all persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law" (Art. 24). These are the two most important expressions of equality from a human rights perspective in the American human rights system.

With this background, we will analyze the participation of *ad hoc* judges in cases arising from individual petitions brought before the Court. In such cases, the parties involved in the proceedings before the highest American Court are the Commission[2] and the States. The victims may only act directly and independently during the reparations stage. At all other stages of the proceedings, they may act indirectly as assistants to the delegate of the Commission.

In cases arising from individual petitions, the Court has interpreted Article 55 of the Convention in favor of the States parties to a case given that the Court accepts, as a matter of course, that the State party to a case appoints an *ad hoc* judge when none of the judges of the Court is a national of that State. That is to say, it extends the right of the States to appoint an *ad hoc* judge to all cases in favor of the States pursuant to the principle of equality of all States in judicial proceedings. But what happens then with the principle of equality in relation to the other parties to the proceedings? What happens with the Commission? And what about the victims?

The interpretation of the Court is consistent with the principle enshrined in the OAS Charter but does not seem to take into account the principles of universality of rights and equality of all persons before the law, which is also a universal principle of law.

[2] Article 57 of the Convention. The Commission shall appear in all cases before the Court.
Article 28 of the Statute. The Inter-American Commission on Human Rights shall appear as a party before the Court in all cases within the adjudicatory jurisdiction of the Court, pursuant to Article 2(1) of the present Statute. Article 22 of the Rules of Procedure. The Commission shall be represented by the Delegates it has designated for the purpose. The Delegates may be assisted by any persons of their choice. 2. If the original claimant or the representatives of the victims or of their next of kin are among the persons selected by the Delegates of the Commission to assist them, in accordance with the preceding paragraph, that fact shall be brought to the attention of the Court, which shall, on the proposal of the Commission, authorize their participation in the discussions.

International proceedings are not exempt from these principles. Therefore, in order to ensure equality in the Inter-American human rights system, it is important not only to respect and guarantee the human rights of all persons at the national level, but also to ensure equality before the law in the proceedings conducted before American international organs.

In this context, we analyze the participation of *ad hoc* judges based on the following elements: the first one is that the purpose of the Inter-American system is to protect and promote human rights in the American region and the Caribbean. The second one is the principle of equality of rights and equality before the law in relation to all persons subject to the jurisdiction of the States and, therefore, residents in or visitors to the Continent and the Caribbean. The third one is that universality applies to rights as well as to access to justice and legal proceedings and this is valid for both the domestic legal system and the international justice system. The application of the principle of equality before the law at the international level concerns both the Inter-American Commission and the Inter-American Court of Human Rights. Therefore, the possibility of granting victims legal standing throughout the proceedings should be considered. This is an issue that calls for more detailed analysis if a reform of the procedures applied by American human rights organs is to be considered.

The right of the States to appoint an *ad hoc* judge in cases arising from individual petitions suggests, in a way, a disruption of the balance that ensures the principle of equality of arms between the parties to proceedings. First, it is necessary to consider the participation of the victims in the proceedings before the Court given that during most of the proceedings only the Commission is a party thereto and the victims may only appear to present their own arguments during the reparations stage. Therefore, if the States may appoint an *ad hoc* judge, in pursuance of the principle of equality of the parties before the Court, the Commission should also have the same right if none of the judges called upon to hear the case before the Court is a national of the victims' country. However, this would lead to greater procedural complexity which would necessarily affect the independence and impartiality of the highest international court in our region and the expedition of proceedings. The cultural affinities that exist in our region and the common characteristics of our legal systems that are becoming more relevant day by day is sufficient to trust the independence of the judges elected by the

General Assembly of the Organization of American States and to reinforce even further the idea of resorting to the incompatibilities and impediments, as applied by the Commission, to ensure the independence of the Court's decisions. It is more practical for the national judge of a State party to a case to recuse himself from it than to allow the parties to the case to appoint *ad hoc* judges.

Therefore, we propose that an expeditious procedure be applied to the appointment of *ad hoc* judges in a manner consistent with the principle of orality and the predominance of substantive provisions over procedures. To that end, we suggest that the Court, in the answer to the question posed by Argentina, clarify the meaning of Article 55 of the American Convention on Human Rights –Pact of San José- in a manner such that the right to equality before the law in relation to the States as well as to the victims and the Commission be guaranteed throughout the proceedings. In the near future, the possibility of amending the Statute and the Rules of Procedure of the Court should be considered so as to extend the impediments (recusals) and to empower the Court to appoint *ad hoc* judges, either in each specific case or based on a list of co-judges previously elected by the Court *en banc* in order to ensure that all guiding principles mentioned above are met: the sovereignty of States and their equality before the law, the independence and impartiality of the highest court of justice of the region, equality of arms in the proceedings and equality before the law and equal access to justice for all victims coming before the Court. Thus, any progress made in the procedures will also indicate progress in the observance of the rights in the American Region and the Caribbean.

Bogotá, December 8, 2008.

LIGIA GALVIS ORTIZ **RICARDO ABELLO GALVIS**