WRITTEN OBSERVATIONS REGARDING ARGENTINA'S REQUEST FOR AN ADVISORY OPINION ON *AD HOC* JUDGES, AND THEIR NATIONALITY, INDEPENDENCE AND IMPARTIALITY.

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Since 1980, with each judgment, the Inter-American Court – which in its early years was branded as a communist institution by the chiefly military governments in the region – has de-politicized human rights[1] and has created and continues to develop its case law through various international legal instruments, namely: judgments rendered in individual cases of human rights violations committed by the States in breach of the protection afforded in American conventions; extremely broad and revolutionary advisory opinions; and provisional measures, which have come to save many lives that were in obvious danger. These all make up a body of case law which, in principle, is perfectly capable of being exported to other regions. Compliance with the judgments by the respondent States whose international responsibility has been engaged is broad and massive, but not full or perfect.[2]

Less than some two hundred judgments, a slightly higher number of provisional measures and nineteen advisory opinions have managed to create this *corpus* of case law which may be lacking in size but is great in quality. The Court has interpreted the regional human rights treaties in place in the Americas that are a part of the domestic legal systems of most of the thirty-five nations[3] that make up the Organization of American States (OAS), developing an *American* human rights *public order*. Likewise, it has given shape to concepts and definitions which domestic courts do and will find of use in their work. Among other subjects, it interprets the requirements of due process; the reasonable periods of detention; the concept of forced disappearance; torture and degrading and inhumane treatment; extra-legal executions; amnesty laws and their unlawful nature where they cover up international crimes; the scope of the States' obligation to guarantee the enjoyment of human rights; the weight of evidence and evidence assessment standards; freedom of expression and freedom of association; the

[1] Both statements were made by North American Judge Thomas Buergenthal, who was a judge of the I/A Court HR for many years and is currently a judge of the ICJ, at a symposium held at the George Washington University School of Law, in D.C., on March 20, 2008.

[2] When submitting his 2005 Report to the OAS Permanent Council on March 10, 2006, I/A Court HR Judge García-Ramírez, Sergio said that "a review of the areas that still remain to be complied with continues to be a major debt in connection with the judgments rendered. Compliance with judicial orders is pending in various respects, particularly as regards the investigation of facts and responsibilities. The Court cannot declare a case closed if there are aspects that are still to be complied with. Accordingly, only 11.9% of the total number of contentious cases has been closed…" He expressed the same idea a year later, when submitting the 2006 Report.

[3] Usually described as 34 + 1, due to Cuba's exclusion.

illegality of prior censorship; the strength and scope of the reparations ordered by the Court;[4] the right to a child's name and birth registration;[5] the right to indigenous peoples' ownership of their land, their political rights and respect of their uses and customs; the labor rights of undocumented persons; the right of access to consular assistance as part of due process; and judicial guarantees and habeas corpus in states of emergency.

In Europe it is established case-law that the European Convention on Human Rights is "a living instrument which […] must be interpreted in the light of present-day conditions;"[6] this is also the case with the American Convention on Human Rights.

It is the Convention that vests the Court with its contentious and advisory jurisdiction. The International Community has a fundamental guiding principle: the voluntary nature of international jurisdiction. It is because of this principle that, for instance, the States are not given standing to request an, *avis*, advisory opinion to the International Court of Justice as the main judicial organ of the United Nations. Otherwise there would be a mandatory international jurisdiction of sorts which, even if ideally desirable, would not be peacefully accepted by the States.

However, it is the American Convention on Human Rights which stands as an exception to the above principle, by allowing all organs and member states of the Organization of American States (OAS) – whether or not they are parties to the Pact – to turn to the Inter-American Court of Human Rights for an advisory opinion. The Court itself has stressed that its broad advisory role is one of a kind in today's international law, as it "permit[s] Member States […] to seek advisory opinions […] and offers an alternate judicial method of a consultative nature, which is designed to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process."[7]

Advisory opinions may concern the American Convention or other human rights treaties between American states, and the compatibility of the domestic laws with such international instruments. So far, the Court has issued nineteen advisory opinions. Advisory Opinions represent one of the most flexible mechanisms to create soft law, i.e. the set of non-binding and quasi-legal rules that explain the non-consolidated trend of international law regarding a given matter. States take part in the process with no doubts as to the question being put forth, as they are aware that they are fostering a set of beliefs which, in the future, will become international rules. The broad scope of the material and jurisdictional aspects in the Inter-American System is huge, both as regards the parties authorized to request the opinions – the parties with standing therefor – (any country that is a member of the System and the Inter-American Commission), and as regards the possible subject matters (any Human Rights Treaty, and the compatibility of laws or bills with the American Convention on Human Rights).

The subject-matter jurisdiction of the African Court on Human and Peoples' Rights – which is made up of eleven judges and has its seat in Addis Abeba, the capital of Ethiopia, and is currently awaiting its merger with the unborn African Court of Justice

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[4] Peraza Parga, Luis "Las reparaciones de la Corte Interamericana de Derechos Humanos" La insignia, October 23, 2004. http://www.lainsignia.org/2004/octubre/der_018.htm

[5] March 9, 2007 meeting of the OAS Permanent Council on the full right to child identity in the hemisphere.

[6] Tyrer v. United Kingdom, judgment of April 25, 1978, Series A No. 26.

[7] Advisory Opinion OC-3/83 Restrictions to the Death Penalty (Arts. 4(2) and 4(4) ACHR). http://www.unifr.ch/derechopenal/jurisprudencia/cidh01.pdf

to become one of the tribunals boasting the most ambitious jurisdiction the world over – for the purposes of advisory opinions is quite broad, as such opinions may concern any legal matter related to the Charter or any other relevant human rights instruments, provided that the matter is not being examined by the African Commission. Standing lies with the Organization of African Unity and the OAU's organs, its member states and any African organization recognized by it. The standing is really amazingly broad, and this will, without question, lead to a highly dynamic advisory role. In the Inter-American System of Human Rights, the member states of the Organization of American States and the Inter-American Commission on Human Rights can request such opinions; in the European System in place under the European Convention, opinions can be requested only by a wide majority of the ancestral Committee of Ministers of the Council of Europe; and, as far as the International Court of Justice is concerned, only the specified organs and specialized agencies of the United Nations are allowed to do so. Affording this possibility to organized civil society is simply a revolutionary step, even more so if we bear in mind the fact that, along with individuals, they can refer cases directly to the Court, provided, however, that the respondent state agrees via an express declaration. In spite of this last requirement, there is no question that these provisions of the Protocol bring civil society and individuals closer to the concept of a full and integral subject of international Law. The Court thus becomes the most avant-garde International Court, at least insofar as this material aspect is concerned.

Moreover, under Protocol II – in force since September 1970 – to the European Convention on Human Rights, the European Court of Human Rights has advisory jurisdiction over legal matters related to the interpretation of the Convention and any protocols thereto, at the request of the Committee of Ministers. The scope of these opinions has been, quite honestly, restricted, as they may not concern the context or scope of the protected rights and freedoms, in addition to which the favorable vote of two thirds of the Committee is necessary for a request to succeed. European judges are faced, on the one hand, with a request that is otherwise rejected[8] on being found to be outside of the court's advisory jurisdiction.

On the other hand, on February 12, 2008, it issued its first Advisory Opinion,[9] with the 17 judges of the Grand Chamber unanimously concluding that the failure to allow a list of candidates for the election of judges of the European Court of Human Rights on the mere ground that the list contained no woman is incompatible with the European Convention and thus entails its violation. It also requested that the exceptions to the principle that lists are required to contain at least one candidate of the under-represented sex be defined as soon as possible. The story behind it has to do with Resolution 1366, of 2004, and Resolution 1426, of 2005, whereby the Assembly established that it would not consider lists of candidates for the election judges that did not contain at least one candidate of the under-represented sex. The list submitted by the Maltese government was rejected on such ground, and the matter was thus referred to the Committee of Ministers. The ECHR concluded that the failure to allow exceptions to this principle renders the practice of the Assembly incompatible with the European Convention on Human Rights, as the country concerned took all appropriate and necessary measures,

[8] Judgment of the Grand Chamber of June 2, 2004, requested for the first time ever by the only organ qualified therefor, *i.e.* the Committee of Ministers of the Council of Europe, regarding the coexistence of the European Convention and the Human Rights Convention of the Community of Independent States (the successor of the old USSR) in force since August 11, 1998.

[9] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=828910&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

albeit unsuccessfully, to make sure that the list would include one candidate of the under-represented sex. It also followed all of the Assembly's recommendations for an open and transparent procedure in the search for candidates.

Since 1959, when European human rights judges actually started to operate, the court has only decided matters between States on three occasions. These are Ireland v. the UK, in 1978; Denmark v. Turkey, in 2000; and a year later Cyprus v. Turkey. It is, however, true that the soft case-law of the late Commission settled seventeen matters. The Inter-American Court has never determined a case between States, even though the Commission has indeed ruled occasionally in matters involving inter-State complaints, such as in the case of Nicaragua v. Costa Rica, in February 2006, which the Commission dismissed on March 8, 2007. Accordingly, Argentina's proposal regarding ad hoc judges only in the case of inter-State applications is ineffective in practice.

A standard to assess the positive qualities of regional human rights conventions as amended by their annexed protocols consists in determining whether the new procedures are victim-oriented, whether all of the human rights are positively affected, and whether all other treaties and rules in force in the area are strengthened by this new contribution. The answer to these three questions, as far as Argentina's request is concerned, is affirmative, as it does contribute something new to the universal system of human rights protection; it might not provide new rights, but it does create new and perfected procedures to enforce those rights.

Contrary to the considerations of the Inter-American Court in the case of Paniagua Morales et al, Order of September 11, 1995:

That ad hoc judges are, in nature, similar to the other judges of the Inter-American Court in that they do not represent a given Government, they are not agents of such Government and they sit on the Court in their personal capacity, as established in Article 52 of the Convention.

and to the separate opinion of Judge A.A. Cançado Trindade:

So much so that in the history of the Inter-American Court there are cases involving ad hoc Judges who voted in agreement with the titular or permanent judges, against the respondent State.

we have identified cases as disastrous as the December 9, 2002 dissenting opinion of Jean-Yves de Cara, the ad hoc judge nominated by Congo to the International Court of Justice in the case of Congo v. France, justifying that the president of an African country represents the nation and that the circumstances and fragile condition of a state where civil peace slowly progresses warrant Congo's resort to the world court. He claims that a domestic criminal proceeding has been instituted in connection with the same facts and that the fact that criminal proceedings remain pending in France entails a violation of the principle that no person can be judged twice in connection with the same facts. He describes the French proceedings as a violation of the independence, sovereignty and due dignity of Congo, supporting the position put forth by Congo's representative at the public hearing. His view is that all requirements have been met for the Court to order provisional measures, concluding that such is the only way to keep the conflict from aggravating further by maintaining the statu quo without altering the balance between both parties' rights. In a slim favor to those of us who believe that most times, luckily and owing to the required objectivity and impartiality, the direction of his opinion does not match the interests of the country that appointed him ad hoc

judge, the International Court of Justice did, however, fully refuse to order the requested provisional measures.[10]

Articles 76 and 77 of the American Convention on Human Rights establish the proper, lawful and legitimate path to materialize Argentina's noble aspirations as reflected by its two questions, i.e. through amendments and/or additional Protocols.

Article 76

1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General.

2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification.

Article 77

1. In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection.

2. Each protocol shall determine the manner of its entry into force and shall be applied only among the States Parties to it.

It is our view that an Advisory Opinion is not the proper way to modify the procedural aspects of the Convention.

[10] http://www.icj-cij.org/icjwww/idocket/icof/icoforder/icof_iorder_20030617.pdf