

Bolivarian Government of Venezuela
Ministry of Popular Power for Foreign Affairs
Office of the State Representative for Human Rights

AGEV/000036

Caracas, January 26, 2009

Mr. PABLO SAAVEDRA
EXECUTIVE SECRETARY
INTER-AMERICAN COURT OF HUMAN RIGHTS
San Jose, Costa Rica.

I, **GERMÁN SALTRÓN NEGRETTI**, in my capacity as State Representative for Human Rights before the Inter-American and International System, do hereby submit the observations of the Venezuelan State on the request for advisory opinion filed by the Argentine Republic regarding the interpretation of Article 55 of the American Convention on Human Rights, in relation to the institution of the *ad hoc* judge and the right to equality of arms in the proceedings before the Inter-American Court, in the context of a case originating in an individual petition, as well as to the nationality of the members of the Court and the right to an independent and impartial hearing.

In view of the foregoing and in reply to the invitation made by the President of the Inter-American Court, below are the arguments of the State:

§ I

AD HOC JUDGE

Article 55 of the American Convention on Human Rights enshrines the right of the States to appoint an *ad hoc* judge in the cases brought before the Inter-American Court of Human Rights where no member of the Court is a national of the respondent State in a case submitted to the Inter-American Court. In fact, the above-mentioned Article 55 expressly provides as follows:

- 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.*

The above-mentioned provision of the American Convention recognizes a practice of international law which derives from the Statute of the International Court of Justice, whose Article 31 provides as follows:

- 1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.*
- 2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.*
- 3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.*
- 4. The provisions of this Article shall apply to the case of Articles 26 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such, or if they are unable to be present, to the judges specially chosen by the parties.*
- 5. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court.*
- 6. Judges chosen as laid down in paragraphs 2, 3, and 4 of this Article shall fulfill the conditions required by Articles 2, 17 (paragraph 2), 20, and 24 of the present Statute. They shall take part in the decision on terms of complete equality with their colleagues.*

As stated by the Argentine Republic in its request for advisory opinion, the Inter-American Court of Human Rights has accepted the appointment of *ad hoc* judges since the first cases were brought before it, acknowledging the States' right set forth in Article 55 of the Convention.

In fact, the Inter-American Court has repeatedly adopted the practice of acknowledging the right of the States to appoint an *ad hoc* judge in the cases submitted by the Inter-American Commission of Human Rights. This usual and uniform practice, adopted by a subject of international law as the Inter-American Court, has been traditionally acknowledged by the States as valid and has been deemed to be the recognition of a right granted by an international Convention.

The appointment of an *ad hoc* judge in cases submitted by the Inter-American Commission constitutes a right of the States arising, in the first place, from the American Convention and, in the second place, from customary international law, developed through the usual and repeated practice adopted by the Inter-American Court and the standard recognition of its validity by the American States.

The foregoing argument should suffice to determine that the institution of the *ad hoc* judge must not be restricted to interstate contentious cases. Notwithstanding, it is relevant to highlight some additional considerations concerning it.

The institution of the *ad hoc* judge is a fundamental contribution to the proper development of proceedings before the Inter-American Court of Human Rights. The

ad hoc judge, whose nationality is that of the respondent State before the Court, is cognizant of the social reality and domestic rules of the country, which adds to a better understanding of the facts and the applicable law. This is to the advantage of the fair administration of justice by the Inter-American system. By the same token and as has been recognized by Dr. Fernando Vidal-Ramírez:

"The institution of the ad hoc judge is recognized by International Courts and Tribunals, as it serves an advisory function regarding the domestic legislation."¹

Likewise, Honorable Judge of the Inter-American Court, Dr. Sergio García-Ramírez, in referring to the institution of the *ad hoc* judge, pointed out as follows:

"[T]he institution of the ad hoc judge seems to be derived from the notion that it is essential –or at least advisable– that the court has among its members a judge having the nationality of the respondent State, either to strengthen the objectivity of the court or to increase its knowledge about the circumstances concerning the State involved."² (Emphasis added)

In addition, and with all due respect, we would like to express our dissent from the criterion according to which the institution of the *ad hoc* judge allegedly affects equality of arms in the proceedings, putting the Commission and the alleged victims at a disadvantage compared to the State, as they are not entitled to appoint their own *ad hoc* judge.

In our opinion, this argument does not take into account the nature of the institution of the *ad hoc* judge. It is important to remember that the appointment of an *ad hoc* judge is personal and the appointed judge does not represent the State which proposed him, but performs his duties independently, honestly and impartially. The Inter-American Court itself has pointed out that the nature of the *ad hoc* judge is similar to that of the other judges, as he does not represent the government which proposed or appointed him, is not its agent and performs his duties personally.³

Almost all *ad hoc* judges appointed in the Inter-American System, have performed their duties with unquestionable objectivity and impartiality. Even more so, some of these *ad hoc* judges were later elected as members of the Inter-American Court of Human Rights.

Now, if equality of arms in the proceedings before the Inter-American Court of Human Rights is to be discussed, it is essential to remember that since the amendment to the Rules of Procedure of the Court, which allowed for the direct participation of the victim, equality of arms has been impaired to the detriment of the respondent State, which has to litigate against two parties simultaneously.

The respondent State before the Inter-American Court must, among other things, reply two briefs containing the charges, disprove the evidence proposed by the

¹ Cf. Fernando Vidal-Ramírez. *Ad Hoc Judges. The Inter-American System for the Protection of Human Rights on the Threshold of the Twenty-First Century*, report on the Seminar held by the Inter-American Court of Human Rights in November 1999, volume 1, second edition, page 592.

² Cf. Sergio García-Ramírez. *La Jurisdicción Interamericana sobre Derechos Humanos* [The Inter-American Jurisdiction on Human Rights], Universidad Autónoma de México, page 300. Cited in *The Inter-American System for the Protection of Human Rights on the Threshold of the Twenty-First Century*, report on the Seminar held by the Inter-American Court of Human Rights in November 1999, volume 1, second edition, page 594.

³ Cf. Inter-American Court of Human Rights. *Case of Paniagua-Morales v. Guatemala*, Order of September 11, 1995.

IACHR and the alleged victim, and counterclaim at a hearing the arguments of two parties simultaneously. Consequently, it does not seem possible to contend that as a result of the exercise by the State of its right to appoint an *ad hoc* judge, "equality" of arms in the proceedings is disrupted.

In conclusion, the institution of the *ad hoc* judge constitutes a right of the State, which is part of the practice of international Courts and Tribunals (customary international law), aimed at increasing the knowledge of the Court about the circumstances concerning the respondent State and which in no way affects equality of arms in the proceedings, inasmuch as the *ad hoc* judge does not represent the State which proposed him, but serves his duties with independence and objectivity.

Therefore, there are no reasons or arguments which justify its exclusion from the proceedings submitted by the Inter-American Commission to the Honorable Inter-American Court and we do expect that it be so declared.

§ II

LEGAL CLAIMS

Therefore, the Venezuelan State requests the Inter-American Court of Human Rights:

- A) To convene the hearing provided for in Article 63(4) of the Rules of Procedure of the Court, allowing the participation of the Bolivarian Republic of Venezuela.
- B) To ratify the usual and uniform practice of admitting the appointment of an *ad hoc* judge in the applications submitted by the Inter-American Commission.
- C) To acknowledge that the appointment of an *ad hoc* judge in the applications submitted by the Inter-American Commission constitutes a right of the States, pursuant to Article 55(3) of the American Convention and international customary law.
- D) To ratify the right of that judge of the Inter-American Court who has the nationality of the respondent State to hear and adjudicate the case originating in an individual petition, pursuant to Article 55(1) of the American Convention.

Caracas, January 26, 2009.

GERMÁN SALTRÓN NEGRETTI

State Representative for Human Rights before the Inter-American and International System.

