



I. Introduction and Background

1. The members of the Seminar on the Inter-American System of Human Rights and International Humanitarian Law of the School of Law of the *Universidad Veracruzana*, based in Xalapa, Veracruz, Mexico, have the honor of filing this *Amicus Curiae* brief with the Court, in order to bring to this Court's attention some issues in connection with the questions contained in the request for advisory opinion filed by the Argentine Republic.

2. The Seminar on the Inter-American System of Human Rights and International Humanitarian Law is an education and training programme for students attending Law School at the *Universidad Veracruzana*. The purpose of the programme is to prepare lawyers to promote respect for human rights in the different aspects of their professional practice as well as to train them to use the Inter-American System as a tool for addressing human rights violations.

II. The reason for consultation

3. The appointment of *ad hoc* judges has been standard practice in proceedings before the Inter-American Court of Human Rights arising from individual petitions, in the event none of the judges called upon to hear and decide the case is a national of the defendant State. Article 55 of the American Convention on Human Rights provides for such appointment in inter-State proceedings. The request for advisory opinion filed by Argentina is concerned with:

- ✓ The *ad hoc* judge and equality of arms in the proceedings before the Court in the context of a case arising from an individual petition, and
- ✓ The nationality of the judges and the right to an independent and impartial judge.

4. In its request for advisory opinion, Argentina includes two specific questions in relation to the aforementioned issues:

- a) *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?*
- b) *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 case in order to guarantee a decision free of any potential bias or influence?*

5. **As regards the first question:** the appointment of *ad hoc* judges by defendant States and the subsequent acceptance by the Court is grounded on Article 55(3) of the American Convention as well as on Article 10(3) of the Court's Statute. However, in view of the language of both precepts, it is clear that these provisions apply to inter-State proceedings.



6. In fact, the institution of the *ad hoc* judge was modeled on that provided for in the Statute of the International Court of Justice, which is fully justified in that international forum insofar as the role of the ICJ is to settle disputes between sovereign States having equal rights.¹ This is not the case with the Inter-American Court, which, under the individual petition system, is called upon to rule on human rights violations alleged by an individual against a State.

7. Notwithstanding the foregoing, it is important to determine whether the practice adopted by the Inter-American Court could actually cause an imbalance incompatible with the principle of equality of arms in the proceedings. In this regard, it should be borne in mind that *ad hoc* judges must meet the same requirements as permanent judges; that is, they do not represent the appointing State, but rather are appointed to the Court in a personal capacity, precisely to protect the Court's independence and impartiality.²

8. Clearly, all judicial proceedings must provide sufficient safeguards to ensure that both parties are able to establish the elements of their causes of action as well as of their preliminary objections and defenses;³ that is, the parties must have an equal opportunity to present their cases as well as any evidence and arguments as may be relevant, avoiding giving any one party an unfair advantage over the other. It should be noted that the institution of the *ad hoc* judge was designed to maintain the procedural balance between the parties, and not to provide an undue advantage to one party.⁴ Thus, in furtherance of such procedural balance, if one party to the proceedings is not allowed to appoint an *ad hoc* judge, it seems unfair to give such advantage to the other.

9. In that regard, the participation of an *ad hoc* judge appointed by the State that is the defendant in the case, even when the appointed judge meets the criteria required by the Convention, seems, *prima facie*, to impinge on the judge's impartiality towards the appointing party.

10. Furthermore, the truth is that the Convention clearly limits the appointment of an *ad hoc* judge to cases arising from an inter-State petition where considered appropriate in light of the composition of the Court, in terms of the nationality of its members. The appointment of *ad hoc* judges in the context of individual petitions is the result of a practice adopted by the Court that has no basis in the American Convention or the Court's Statute.

11. **As regards the second question:** on a proper interpretation of Article 55(1) of the Convention and Article 10(1) of the Rules of Procedure of the Court, both applicable to inter-State proceedings, it is clear that a judge who is a national of one of the States

¹ Cf. Faúndez Ledesma, Héctor. *El Sistema Interamericano de Protección de los Derechos Humanos. Aspectos institucionales y procesales* (The Inter-American System of Human Rights. Institutional and Procedural Aspects), 3rd Edition. Instituto Interamericano de Derechos Humanos, San José, Costa Rica, p.1 82 et seq.

² IA Court HR. *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala*, Judgment of March 8, 1998. Series C No. 37, para. 22.

³ Supreme Court of Justice of Mexico. *Semanario Judicial de la Federación* (Judicial Weekly Journal of the Federation) and Gazette, December 2001, p. 376, Registration No. 188064.

⁴ Cf. Faúndez Ledesma, Héctor. *Op. Cit.* p. 184.



parties to a proceeding retains the right to hear the case and, in order to preserve the balance between them, the other party has the right to appoint an *ad hoc* judge.

12. However, in the context of individual petitions, which is substantially different from inter-State petitions, the fact that a judge that is a national of the defendant State sits on the Court may raise questions about the impartiality of the Court.

13. In a recent judgment, the Court referred to the impartiality required of judges and pointed out that impartiality demands that the judge hearing a specific dispute approach the facts of the case subjectively free of all prejudice and also offer sufficient objective guarantees to remove any doubt the parties or the community might entertain as to his or her lack of impartiality. It also stated that personal or subjective impartiality is to be presumed unless there is evidence to the contrary. In turn, the so-called objective approach test consists in determining whether the judge in question offered sufficient elements of conviction to dispel any legitimate misgivings or well-grounded suspicion of partiality on his or her part. That is so because the judge must appear as acting without being subject to any influence, inducement, pressure, threat or interference, direct or indirect, but only and exclusively in accordance with—and on the basis of—the law.⁵

14. Even though it is presumed that all the members of the Court are jurists of the highest moral authority elected in an individual capacity and, additionally, that the Statute of the Court provides for mechanisms to ensure, to the extent possible, the impartiality of its members by establishing grounds for incompatibility and the possibility for judges to recuse themselves from a case, the truth is that, in practice, the judges who are nationals of the defendant States do not always excuse themselves from hearing the case.⁶ In this connection, it is important to note that the nationality of a judge does not necessarily imply bias. However, this is not about questioning the moral authority or rectitude of a judge under such hypothesis but rather, as correctly stated by the Court, about providing assurance of the Court's impartiality to those who resort to it.

15. Moreover, as pointed out by Argentina in its request for advisory opinion, Article 55(1) of the American Convention clearly provides that the right of a judge that is a national of the defendant State to hear the case brought before the Court is limited to inter-State proceedings. Therefore, the Court's practice of leaving the decision on recusal in the hands of the national judge of the defendant State in cases arising from individual petitions has no basis in the American Convention.

⁵ Cf. IA Court HR. *Case of Apitz-Barbera et al. v. Venezuela*, Judgment on Preliminary Objection, Merits, Reparations and Costs of August 5, 2008. Series C No. 182, para. 156 et seq.

⁶ Cf. IA Court HR. *Case of Ximenes-Lopes v. Brazil*, Judgment of July 4, 2006. Series C No. 149; *Case of Claude-Reyes et al. v. Chile*, Judgment of September 19, 2006. Series C No. 151.



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