

**EMBASSY OF THE  
ARGENTINE REPUBLIC  
COSTA RICA**

San José, August 14, 2008  
Note: OI 41/08

To the Secretary of the  
Inter-American Court of Human Rights  
Pablo Saavedra Alessandri  
San José

Sir,

I have the honor of addressing you in order to transmit a copy of a request for an advisory opinion (attached), as established in Article 64(1) of the American Convention on Human Rights. This request was sent to the Embassy by Minister Silvia A. Fernández, Director General for Human Rights, of the Argentine Ministry of Foreign Affairs.

[Signed]  
Juan José Arcuri  
Ambassador

Cc; file  
Attachment: as indicated

**MINISTRY OF FOREIGN AFFAIRS,  
INTERNATIONAL TRADE, AND WORSHIP**

**The Government of the Argentine Republic has the honor of addressing the Inter-American Court of Human Rights in order to file this request for an advisory opinion.**

To the Inter-American Court:

I have the honor of addressing the Court on behalf of the Argentine Government in order to submit an official request for an advisory opinion, as established in Article 64(1) of the American Convention on Human Rights, and according to the procedure stipulated in Articles 63 to 65 of the Rules of Procedure of the Inter-American Court of Human Rights, based on the following legal and factual grounds.

**I. Designation of an Agent, Deputy Agent, and address for service of process for the purpose of this request for an advisory opinion**

To comply with the provisions of Article 60(2) of the Court's Rules of Procedure, the Argentine Government has designated the undersigned, Minister Silvia Fernández, as its Agent, and Andrea Pochak as Deputy Agent.

Furthermore, the address for service of process will be:

Ministry of Foreign Affairs, International Trade, and Worship of the Argentine Republic located at Calle Esmeralda 1212, 8<sup>th</sup> floor (General Directorate for Human Rights), Postal Code 1007, Buenos Aires, Republic of Argentina.

The e-mail addresses to be used are as follows: [saf@mrecic.gov.ar](mailto:saf@mrecic.gov.ar), and [apochak@cels.org.ar](mailto:apochak@cels.org.ar); and the fax number is (54-11) 4819-8217.

**II. Introduction**

The Inter-American system for the protection of human rights is currently the subject of far-reaching discussions concerning the necessity and advisability of adopting various measures in relation to its operation. Essentially, these discussions are focused on the introduction of procedural reforms, and, more specifically, on the Rules of Procedure of both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

In this regard, although the process of reflection on the possible need for reform is not new,<sup>1</sup> there has recently been a significant increase in specific proposals – made in different

---

<sup>1</sup> The most relevant preliminary steps in this process were the seminar on the Inter-American System for the Protection of Human Rights on the Threshold of the Twenty-first Century, held in San José, Costa Rica, in 1999 (an important event during which discussions were held on the system's experience over its 20 years of operation and the challenges in strengthening it) and, fundamentally, an important process of reflection that has been taking place and continues today within the framework of the Organization of American States.

contexts and circumstances and with a varying degree of publicity, discussion, and openness towards the users of the system – to resolve the increasing difficulties that the continued evolution of the mechanism has brought to light.

In the course of these discussions, several proposals have been made concerning possible reforms to the system that relate to legitimate concerns of those who litigate within it, such as the need for greater certainty in the proceedings, greater clarity of criteria in relation to admissibility, merits, and the forwarding of cases to the Court and, at times, improved guarantees as regards equality of arms. The Argentine Government believes that these proposals are a positive factor, and constitute a valuable contribution to the collective discussion on the scope of possible reforms.

Nevertheless, the Argentine Government observes that the substance of the proposed reforms only partially encompasses the global need for reform. The essence of this reform should not lose sight of the fact that the object and purpose of the Convention's international protection system is the effective protection of the rights that it embodies, recognizing that its sole and legitimate beneficiary is the individual, without detriment to the subsidiary nature of the mechanism, as well as the right of the State to due process in the international sphere within a reasonable time.

From this perspective, it seems clear that any reform of the system should be designed to provide increased and improved international protection to the persons subject to the jurisdiction of the States of the hemisphere. This does not preclude the introduction of reforms that facilitate improving the conduct of the proceedings and total respect for the right of defense of the States. However, a reform that only considers the latter aspect would necessarily be incomplete and would not respond to the principles that inspired the international community to adopt human rights as superior values, which the American States undertook to respect and guarantee.<sup>2</sup>

Consequently, any initiative taken to strengthen the system must, above all, guarantee an enhanced and more effective protection of human rights. In this task, the system's evolution does not necessarily depend on the introduction of normative reforms. In specific scenarios, the interpretation of the available corpus of law by the organs of the Convention, especially by its only jurisdictional organ, the Inter-American Court of Human Rights, could be an appropriate tool to develop and improve the international protection system.

It is well known that invoking the advisory jurisdiction of the Inter-American Court of Human Rights has furnished positive results as regards the normative interpretation of the obligations arising from the American Convention on Human Rights and their impact on the domestic law of the States Parties.

In this regard, the Argentine Government believes that the process of discussion on the future of the Inter-American human rights system is an appropriate framework for invoking the advisory jurisdiction of the Inter-American Court of Human Rights. It thus submits to the Court this request for a legal opinion on two matters that, within the framework of the system's current practice, are contrary to the object and purpose of the American Convention on Human Rights, in the opinion of the Argentine Republic.

---

<sup>2</sup> Cf. Article 3 of the Charter of the Organization of American States, Article 1(1) of the American Convention on Human Rights.

### III. Request for an advisory opinion

#### 1. 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

Article 55 of the American Convention on Human Rights states:

“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.”

In this regard, although the norm transcribed above seems to suggest the possibility of appointing an *ad hoc* judge (a practice characteristic of international procedural mechanisms that are solely inter-State), it is clear that this provision may only be invoked in those cases in which the Court must decide an application filed by a State Party against another State Party, as provided for in Article 45 of the Convention. Nevertheless, it can be seen from the practice of the system that the Court has habitually recognized the right of the defendant State to appoint an *ad hoc* judge in the context of a case arising from an individual petition.

Indeed, an examination of the Court’s continuous and unaltered practice to date reveals that, historically, it has accepted that if none of the judges who compose the Court is a national of the defendant State in a case submitted to it, the State would have the right to appoint an *ad hoc* judge to act on an equal footing with the permanent judges in the deliberation and deciding of the case, citing Article 55(3) of the American Convention on Human Rights in this regard.<sup>3</sup>

Even though the unequivocal practice of the Court appears to validate the criterion that the States enjoy this right in all circumstances – in other words, irrespective of whether an application arises from an individual petition timely filed by a person, a group of persons, or a non-governmental organization in accordance with the provisions of Article 46 of the American Convention on Human Rights, or from an inter-State petition – an assessment of this institution in the context of the Convention, in light of the current state of the law, appears to suggest that this habitual interpretation should be re-examined, limiting the right of the States to appoint an *ad hoc* judge to those cases in which the application filed before the Court originates from an inter-State petition.<sup>4</sup>

---

<sup>3</sup> Cf. Article 18 of the Rules of Procedure of the Inter-American Court of Human Rights.

<sup>4</sup> Alberto Borea Odria made a similar affirmation, when he stated that “... The presence of an *ad hoc* judge is appropriate when there is a dispute between two States and one of them has a member in the Court who – although involuntarily – may tend towards the interpretation proposed by his country.” (Cf. Borea Odria, Alberto, proposal to modify the legislation of the Inter-American system for the protection of human rights, in “*El Sistema*

In this regard, it seems clear that the rationale for the concept of *ad hoc* judge, habitually accepted in the context of the traditional international courts (those called upon to decide a dispute between States), is validated only when the Court must decide a case submitted to its jurisdiction in which a State has accused another State of a possible failure to comply with its international obligations.

If a case does not originate from an inter-State dispute, the legal justification for accepting the designation of an *ad hoc* judge is susceptible of being questioned and possibly rejected because, in the scenario described above – the case before the Court arising from an individual petition – this right of the State would evidently generate an adverse affect on the right to equality of arms in the proceedings between the presumed victim (the material complainant before the Court), the Inter-American Commission (the formal or procedural complainant before the Court), and the defendant State

It seems evident that, over and above the fact that the designation of an *ad hoc* judge calls for the same technical and moral qualities required of the permanent judges, he or she is chosen by a State in the context of a specific case, deliberates on an equal footing with the permanent judges, and has the right to a vote.

However, neither the alleged victim nor the Commission has the right to appoint an *ad hoc* judge; it is therefore reasonable to infer that the exercise of this right should be limited to those cases in which the application is filed by one State against another State. In this context, it is clear that both of them can exercise this right, if this is appropriate in relation to the composition of the Court in terms of the nationality of its members, but not in cases arising from individual petitions, at the risk of gravely affecting the principle of equality of arms, as well as the right of the alleged victim and of his next of kin to the dispute being decided by independent and impartial judges.

In brief, the specific question that the Argentine Government considers it opportune to submit to the Inter-American Court of Human Rights on this point is as follows:

*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?*

## **2. The nationality of the judges and the right to an independent and impartial judge**

Additionally, this is an appropriate moment to reflect on the possible need to adopt measures tending to guarantee, insofar as possible, a decision exempt of any direct or indirect influence that could arise in a specific case as a result of the nationality of a judge of the Court.

In this regard, it should be emphasized that the independence and impartiality of the judges are fundamental pillars that support the very essence of the rule of law.

In this belief, the Argentine Government opportunely promoted in its internal sphere a complex process of changes in relation to the appointment of the justices of the Supreme Court of Justice, which were put into effect by the promulgation of Decree 222/03. This

norm, adopted by the National Executive, was designed to guarantee greater transparency in the process of appointment of justices of the Supreme Court, encouraging the active participation of civil society, and to establish a limiting mechanism that would introduce some objective standards with respect to the technical qualifications that could be required and the commitment of the candidates to democratic values. Today, the Republic of Argentina is proud to have a Supreme Court of Justice that has proved itself reliable, independent and impartial.

From this perspective, the Argentine State considers that it would be healthy for the system that any judge who is a national of a State that is a party to an application before the Inter-American Court of Human Rights should disqualify himself from taking part in the deliberation of the case and in the decision that the Court adopts, as has occurred in the most recent practice of the Court.

Without losing sight of the fact that Article 55(1) of the Convention stipulates that "... *If a judge is a national of any of the State Parties to a case submitted to the Court, he shall retain his right to hear that case,*" or that the Convention itself establishes the requirement that those jurists called on to become members of the Court must be "independent experts" who act in their own name and not by mandate or in representation of the State that has proposed their candidacy or any other, the potential effect of a judge of the Court being a national of the defendant State in the terms mentioned in the preceding paragraph is an unnecessary risk that could be rapidly neutralized by the adoption the principle of recusal, as occurs actually in the context of the proceedings before the Commission.

In this regard, and from a similar perspective to that set out in the previous point, Article 55(1) of the Convention, interpreted in harmony with the other provisions of the Convention and in light of the criterion contemplated in Article 29 of the Convention, seems to leave no doubt that the right of the judge who is a national of the defendant State to continue hearing the case would be limited to inter-State petitions and not to cases arising from an individual petition.

Consequently, the second specific question that the Argentine Government considers opportune to formulate to the Inter-American Court of Human Rights on this matter is as follows:

*"In cases arising from a individual petition, should a judge who is a national of the defendant State disqualify himself from taking part in the deliberation and deciding of the case in order to guarantee a decision free of any possible bias or influence?"*

#### **IV. Conclusions**

Based on the above, the Government of the Republic of Argentina formally requests the Court to admit this request for an advisory opinion as established in Article 64(1) of the American Convention on Human Rights and to follow the procedure established in Articles 63 to 65 of the Court's Rules of Procedure.

[Signed]  
Silvia A. Fernández  
(illegible)  
Director General for Human Rights