THE ROLE OF AMICUS CURIAE IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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The Inter-American Court of Human Rights, during its short history, has broadened international legal procedure in at least one area –the liberal admission of amicus curiae briefs in its proceedings.[1]

Created in 1978 on the entry into force of the American Convention on Human Rights, the Court was formally installed in its seat of San José, Costa Rica on September 3, 1979. The first seven judges to comprise the Tribunal were elected in May 1979 by the States Parties to the Convention at a Special Session of the General Assembly of the Organization of American States (OAS). The Court and the Inter-American Commission on Human Rights make up the OAS's protective system of human rights, generally considered the most successful of the Organization's activities.

Any history of the early years of the Court would emphasize the area of its advisory jurisdiction. Since its installation, the Court has been given only one opportunity to apply its adjudicatory jurisdiction.

Ironically, the first matter presented to it was a *sui generis* case[2] in which the Government of Costa Rica brought directly to the Court a complaint against itself in which it attempted to waive

both the exhaustion of domestic legal remedies and the procedure[3] before the Inter-American Commission. Inasmuch as the procedure before the Commission was considered essential in order to protect the interests of the victim, the Tribunal decided that it was not competent to deal with the case at that stage and, therefore, sent the matter to the Commission as the Government had asked in the alternative.

In view of the fact that the Court disposed of the petition on procedural grounds, it did not inform the other States Parties to the Convention nor did it hold the public hearing envisioned in its Rules of Procedure[4] to hear the views of the Commission or of the States concerned. The circumstances of this case did not permit either notification or sufficient time for interested organizations to present amicus curiae briefs to the Court.

Neither the American Convention nor the Court's Statute of Rules of Procedure specifically mention amicus briefs, although there is language in Article 34 (1) of the Rules of Procedure[5] which could be construed to allow their consideration.[6] This Article reads as follows:

> The Court may, at the request of a party or the delegates of the Commission, or *mutu propio,* decide to hear as a witness, expert, or in any other capacity, any person whose testimony or statements seem likely to assist it in carrying out its functions.

It was with the first advisory opinion request[7] that the Court began to receive amicus briefs. That request dealt, appropriately enough, with the scope of the advisory jurisdiction of the Court. For the first time, the Court received the observations of various governments and organs of the OAS, in response to inquiries pursuant to Article 52 of its Rules of Procedure.

It might be instructive to consider here, by way of example, the different responses received by the Court with respect to its first request for an advisory opinion. It is interesting to note that the observations received were not unanimous; in fact, they were rather evenly split between the idea of a narrow concept of its jurisdiction and a broader scope.

The observations of the governments[8] submitted with reference to the first advisory opinion can be divided into two camps. The Governments of Costa Rica and Ecuador recommended that the Court decide on a narrow interpretation limited to treaties adopted within the framework of the Inter-American system. On the other hand, the Caribbean Governments of Dominica and Saint Vincent each suggested that the Court adopt the widest possible interpretation given the advisory nature of the opinion. The Gov-

ernment of Peru, which submitted the request, did not offer its opinion and the Government of Uruguay simply informed the Court that it was not a party to the American Convention. The latter position did not take into account the fact that the advisory jurisdiction of the Court is open to all Member States of the OAS regardless of whether they have ratified the Convention.[9]

With respect to the OAS organs that replied, the Permanent Council merely thanked the Court for the information provided while the Department of Legal Affairs provided a historical analysis of the drafting of the Convention and favored limiting the advisory jurisdiction of the Court to regional multilateral treaties whose specific purpose is the protection of human rights. For its part, the Inter-American Juridical Committee (IAJC) claimed that, under the Charter of the OAS, the Court did not have the right to ask the Committee's opinion and that it was not advisable that the IAJC give its opinion, as there would then be two advisory opinions on the same subject. The Committee therefore refrained from giving its opinion in order to give the Court complete freedom, within its own jurisdiction, to render an advisory opinion about a very specific aspect in the area of human rights set forth in the Convention. The Pan-American Institute of Geography and History supported a narrow interpretation. Finally, the Inter-American Commission, which according to Article 57 of the Convention appears before the Court in all cases, sent a list of the precedents in which it had invoked treaties other than those drafted under the auspices of the Inter-American System. This information was used in the opinion of the Court.

On the other hand, the amicus briefs of non-governmental human rights organizations demonstrated a clear tendency for liberal interpretation, a position eventually adopted by the Court. These groups are apprised of the requests for advisory opinions through press releases issued by the Court upon receipt of the requests.

The Inter-American Institute of Human Rights[10] submitted one of the amicus briefs that the Court received from non-governmental organizations (NGO's) on the first advisory opinion request. The author[11] of the brief set up a range of twelve hypothetical types of treaties of which he discarded half for being completely outside the competence of the Court. An example of the latter would be non-American regional multilateral treaties on human rights such as the (European) Convention for the Protection of Human Rights and Fundamental Freedoms. He concluded that the request of Peru should be answered in line with option (c) set out in the request: "all treaties in which one or more American States are parties" with the clarification that it be an American State, member of the OAS.

The International Human Rights Law Group, based in Washington, argued for a broad interpretation and suggested that the

Court should consider the text of the Convention in conjunction with a wide range of international instruments and generally accepted international standards pertaining to human rights. It pointed out that other regional and international norms of human rights were taken into account in the drafting of the Convention and that it should be interpreted in that context. The Law Rights Group noted that the Court looked to the European Court in its decision in the Viviana Gallardo case[12] and further argued that Article 29 directs the Court to construe other conventions and declarations when interpreting the American Convention and that it must not do so restrictively. According to the Law Group, the Preamble, Article 29 and the preparatory work of the Convention refer to international human rights treaties and customary international law which contributed to the articulation of human rights in the American Convention. Finally, it was of the opinion that a broad interpretation of its consultative jurisdiction would serve the purpose of the American Convention, which is to promote and protect human rights in the American States, thereby realizing the inherent dignity of all human beings and furthering the principles of liberty and justice.

In a joint brief, the International League for Human Rights and the Lawyers Committee for International Human Rights, both located in New York, argued for a broad interpretation of the Court's advisory jurisdiction. These NGO's employed the object and purpose clause found in Article 31 of the Vienna Convention as a basis for their position, which they argued was supported by the preparatory work of the Convention.

The Urban Morgan Institute of the University of Cincinnati Law School also cited the Vienna Convention in claiming that the ordinary or plain meaning rule supports a broad interpretation. As in other briefs, it found that the Preamble and Article 29 of the Convention gave support to the idea of a liberal interpretation, should the request be presented as a disguised contentions case. It also argued that the Court could always decline jurisdiction under its discretionary powers, citing decisions of the Permanent Court of International Justice and the International Court of Justice to that effect.

The NGO amicus briefs presented with respect to the subsequent requests for advisory opinions have not deviated fundamentally from this first experience, although the positions are not always uniform. The ensuing years, have resulted in a broadening of the Court's policy with respect to amicus briefs. For example, a positive development occurred recently when the Court accepted the brief of an Argentinian law professor who did not claim any affiliation with an NGO.

There has also been an interesting development in the oral procedure of advisory opinion requests presented under Article 64 (2)

of the Convention. In the first of the two instances where that clause has been invoked, the Court invited prominent persons from the requesting State who had a special knowledge of the issue to present their views at a public hearing convoked by the Court.[13] In the second instance,[14] an NGO with an interest in the issue was invited.[15] Inasmuch as Article 64 (2) opinions deal with the compatibility of a domestic law with the Convention, the Court has felt it wise to clear the invitees with the Governments concerned, which also have the opportunity to participate in the hearings.

The briefs received to date have dealt exclusively with legal issues. The Court has not yet been presented with a brief in which a political point of view dominates. Although there is no formal procedure for the rejection of a brief, a political presentation would be out of order. A brief that contains legal arguments and at the same time reflects a particular political point of view would probably be accepted for its juridical content.

As the Court engages in the exercise of its contentious jurisdiction, it will be interesting to note if the amicus brief plays as large a role as it has during the Court's first years, which were devoted to issuing advisory opinions. Non-governmental organizations may well have a direct participation, in coordination with the Agents of the Commission, in these cases as the representatives of the victims before the Court. Judge Thomas Buergenthal raises this and other points in his article on the advisory practice of the Court.[16]

Until the beginning of 1983, the European Court of Human Rights had no statutory authority to admit amicus briefs. The revised Rules of the Court,[17] which entered into force on January 1, 1983, contains a new clause, Rule 37 (2), which reads as follows:

> The President may, in the interest of the proper administration of justice, invite or grant leave to any Contracting State which is not a Party to the proceedings to submit written comments within a time-limit and on issues which he shall specify. He may also extend such an invitation or grant such leave to any person concerned other than the applicant.

It should be noted that this rule leaves to the discretion of the President the authority to "invite or grant leave". It is uncertain whether this covers the disposition of amicus briefs that arrive "over the transom."

This liberalization of the written procedure of the Rules vis-à-Avis the role of the individual before the Court follows the trend established with respect to the oral procedure wherein the victim or his representative can now be said to be treated on an almost equal basis as the European Commission of Human Rights, which originally had been the sole representative of the victim before the Court.

Amicus briefs have been accepted by the European Court especially in cases where the organization filing can show a sufficient interest.

The liberalization of the European Court's Rules may lead to a cottage industry of human rights organizations created to, among others, file amicus briefs. One such example might be Interights, which recently submitted an amicus brief on behalf of the International Press Institute in a case involving the scope of political free speech.[18]

By the beginning of 1986, the Court had received eight amicus briefs, of which three had been accepted, three rejected and two remain under discussion.

The rejection of briefs was due in one case to late arrival,[19] in another because it was from a private person who had raised the same issue to the Commission,[20] and the third because there was no justifiable link between the brief presented and the case.

Before that date, when the new rule had not taken effect, there had been attempts to file and in one case,[21] the Government of Great Britain was held entitled to file but had to do so through the Commission.

The Court of Justice of the European Communities, the purpose of which is to ensure respect for the law in the interpretation and application of the Community treaties, has a different structure than the other international tribunals. Among its components is the Legal Service of the executive Commission of the Communities, which "determines the position of the Commission as plaintiff, defendant, or *amicus curiae* before the Court."[22] The Commission is entitled to submit oral statements or written observations to the Court in cases governed by Article 177, when a national tribunal refers a case to the Court of Justice, under Article 20 of the Protocol of the Court's Statute. The term *"amicus curiae"* is used in the text in a general sense only.[23]

The International Court of Justice, for its part, does not receive briefs from non-governmental organizations or similar petitions presented by individuals. The Hague Court is guided, in contentious cases, by Article 34 of its Statute, which reads:

> 1. Only States may be parties in cases before the Court.
> 2. The Court, subject to and in conformity with its Rules, may request of *public international organizations* information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative. (Emphasis added).

Advisory opinions fall under Chapter IV of the Statute of the International Court of Justice. Of particular interest to this study is Article 66, which reads:

1. The Registrar shall forthwith give notice of the request for an advisory opinion to all States entitled to appear before the Court.
2. The Registrar shall also, by means of a special and direct communication, notify any State entitled to appear before the Court or *international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question,* that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.
3. Should any such State entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such State may express a desire to submit a written statement or to be heard; and the Court will decide.
4. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other States or organizations in the form, to the extent, and within the time-limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to the States and organizations having submitted similar statements. (Emphasis added).

While it is true that any State not consulted by the ICJ may ask to present its views, it is rare that the Court allows organizations other than the requesting State to present statements in advisory proceedings. In one instance,[24] an inter-governmental organization made a request and was heard.

The case of non-governmental organizations is a bit more confusing. In 1950 the International League for the Rights of Man asked to participate by oral and written statements in the proceedings of the South-West Africa matter after the appropriate notices had been sent out in accordance with the aforementioned Article 66.[25]

The Registrar cabled the League that the ICJ would accept "a written statement of the information likely to assist the Court in its examination of legal questions put to it in the Assembly request concerning South-West Africa."[26] The Registrar placed particular emphasis on the legal aspect of the submission by admonishing the League not to present "any statement of facts which the Court has not been asked to appreciate."[27] He finished by stating that there was to be no further resort to the League.

As it happened the League missed the deadline for the written submission and therefore it was not taken into account. This is the only instance where the ICJ has permitted a non-governmental organization to submit a written statement.

Had the League's statement arrived on time and been included in the proceedings, a precedent would have been established that probably would have had an effect on other international tribunals in this regard.

At the same time, the League requested permission to present material in a contentious proceeding.[28] The Registrar, in this instance, denied the request citing the differences in wording between Article 34 of its Statue (public international organizations) and Article 66 (international organizations).

Twenty years later the League was summarily refused permission to participate in another advisory proceeding. Other NGO's that have attempted to participate have been rejected on the basis that none was an international organization within the meaning of Article 66.

Dr. Héctor Gros Espiell, in his study on the appeal to the International Court of Justice of the decisions of international administrative tribunals[29] manifests the opinion that under the UN Charter and the Statute of the ICJ, non-governmental organizations should be able to submit information to the Court. He quotes a report of his fellow Uruguayan and former President of the World Court, Eduardo Jiménez de Aréchaga, to the effect that

> further reflection and study of the question leads to the conclusion that the adjective 'public' was not utilized in Article 66, in contrast to Article 34, in order to permit the Court also to invite a non-governmental international organization, provided the Court considers that this organization is likely to furnish useful information on the question under advice.

After studying the history of the question since 1929, he concluded:

> It may be objected that use is made only of 'travaux préparatoires'. However, a contextual interpretation of Article 71 of the Charter, Articles 34 and 66 of the Statute and 85 (2) of the Rules, would lead to the conclusion that in Article 66, paragraphs 2 and 3, the omission of the qualification 'public' was deliberate and was designed to include non-governmental organizations in these particular provisions. This seems to have been the position taken by the Court when it allowed the International League for the Rights of Man to present a statement in the *Status of South West Africa* Advisory Opinion.[30]

According to another author,[31] the international organizations referred to in Article 66 are intergovernmental organizations. With respect to organizations of private international law, he cites the case of the Application for Review of Judgement N° 158 of the United Nations Administrative Tribunal[32] in which the Federation of Associations of International Civil Servants was refused permission to present their views as was the New York law firm which represented the Federation. The author does acknowledge that the League was once authorized to present a written statement.

It comes as no surprise that individuals have failed in their attempts to present written submissions. In attempting to gain authorization to be heard in a case, Professor Michael Reisman, of Yale University Law School, explained to the International Court of Justice the purpose of an amicus brief.

> In common law countries, the *amicus curiae* brief has been an institution which has provided useful information to courts, permitted private parties who were not litigating to inform the court of their views and the probable effects the outcome might have on them and, overall, has served as a means for integrating and buttressing the authority and conflict-resolving capacities of domestic tribunals.[33]

The restrictive attitude of the ICJ is not one of the characteristics it inherited from its predecessor, the Permanent Court of International Justice. That Tribunal, in its first Advisory Opinion,[34] decided to permit participation by any unofficial organization which expressed the desire to be heard. The PCIJ went so far as to publish a list of international organizations admitted to furnish information on one or more questions.

In the first advisory opinion request presented to the Inter-American Court of Human Rights, as in those that followed, the amicus briefs were mostly from international human rights groups located in the United States. All claimed to have had experience before the domestic courts of the United States. This is not surprising because although the roots of the amicus curiae brief can be traced to Roman law,[35] it has reached full flower in the courts of the United States. Few there are who would be willing to dispute the effect that these briefs have had on important decisions of the United States Supreme Court, especially in the area of human rights. This role has not been confined to non-governmental organizations as one might expect but "the practice of governmental appearances in significant public causes, where very broad social problems and a generalized public interest are involved, has become standard procedure" especially in the question of racial discrimination and in the areas of education, housing and voting rights.[36]

It has been stated that "the function of the Amici (is) to take up and emphasize those points which are novel or which if stressed in the main brief, might dilute or weaken the main forceful arguments."[37] Other functions that might be mentioned are lending the prestige of the group presenting this brief, presenting a legal view different than that of the main party because of a recognized difference of interests.

The presentation of amicus briefs is governed by the U.S. Supreme Court's Rule 42, the second paragraph of which stipulates:

> A brief of an amicus curiae in cases before the court on the merits may be filed only after order of the court or when accompanied by written consent of all parties to the case and presented within the time allowed for the filing of the brief of the party supported.

This requirement of written consent does not apply to federal and state governments.

The U.S. Supreme Court has become increasingly liberal in granting motions for leave to file amicus briefs, provided they are timely. The Solicitor General, who appears on behalf of the Government before the Court, in cases involving the United States, has generally consented to the filing of amicus briefs when good reason is demonstrated. Amicus briefs are even allowed in support or opposition to preliminary procedural issues such as granting certiorari.[38]

With respect to participation in oral argument, the amicus is seldom allowed to be heard. He must obtain special leave of the U.S. Supreme Court, and the party supported by the amicus must consent to sharing some of that party's argument time.

Finally, the Supreme Court "may appoint or invite an attorney to brief and argue a case pending before it as an amicus curiae 'in support of the petitioner' or 'in support of the judgment below.'"[39]

CONCLUSION

The amicus curiae brief, although known in Roman law, has reached its fullest development under the common law system. The Inter-American Court of Human Rights has accepted amicus briefs from the time of its first advisory opinion request even though almost all of its members are nationals of countries adhering to the civil law system. The European Court of Human Rights modified its Rules in 1983 to permit acceptance of amicus briefs.

As the individual gains increasing access to international human rights tribunals, it follows that greater attention will be paid to the views of non-governmental organizations, which would gener-

ally support the position of the individual, thus aiding the individual to achieve a more equal basis with the State.

Perhaps this explains why the International Court of Justice, to which the individual does not have even indirect access, has not accepted, except in one long-ago case, amicus briefs.

Although there is nothing in its normative framework that mentions amicus briefs, the Inter-American Court liberally accepted them when they were presented in connection with the initial request for an advisory opinion. Almost all of the briefs have come from well-known international human rights non-governmental organizations, which had experience in presenting briefs to courts in the United States on human rights matters. The Court has recently broadened its practice on amicus briefs by accepting a brief on an advisory opinion request from an unaffiliated professor of law. In requests filed under Article 64 (2) of the Convention, whereby a State may inquire on the compatibility of any of its internal laws with the Convention, the Court has invited and heard individuals and NGO's with an interest in the matter. To date, only OAS Member States and organs, those entitled to request advisory opinions, are heard at the public hearings held for requests filed under Article 64 (1) regarding "the interpretation of (the) Convention or of other treaties concerning the protection of Human Rights in the American States."

There is no doubt that the amicus brief has been a valuable aid to the Court during its early years when it has been served by a very small staff and has not had access to a first-rate legal library.

FOOTNOTES

(1) See generally, T. Buergenthal, "The Advisory Practice of the Inter-American Court of Human Rights," Amer. J. Intl. Law, Vol. 79, N° 1, January 1985, at 1.

(2) I/A Court H.R., In the Matter of Viviana Gallardo et al., N° G 101/81, Series A.

(3) American Convention on Human Rights, Articles 48-51.

(4) Rules of Procedure, Article 32.

(5) This provision applies to the Court's contentious proceedings but can be applied to advisory proceedings through Article 53 of the Rules.

(6) The Urban Morgan Institute for Human Rights cited Article 25 of the Statute and Articles 34 and 53 of the Rules of Procedure in arguing for the receipt of its brief. I/A Court H.R., "Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982, Series B, p. 151.

(7) "Other Treaties", *op. cit.*, Series A N° 1.

(8) The observations of the Governments as well as those of the OAS organs and the amicus briefs are published in the Series B (Pleadings, Oral Arguments and Documents) of the publications of the Court.

(9) Convention, Article 64.1

(10) The Institute is an independent international academic institution dedicated to teaching, research and promotion in the area of human rights. It was established in 1980 by means of a constitutive agreement between the Government of Costa Rica and the Inter-American Court of Human Rights.
(11) Dr. Héctor Gros Espiell, now a judge of the Inter-American Court of Human Rights.
(12) "Viviana Gallardo et al.," *op. cit.*
(13) I/A Court H.R., Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984. Series A N° 4. See Series B for transcript of public hearing.
(14) I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985. Series A N° 5.
(15) The Inter-American Press Association.
(16) T. Buergenthal, *op. cit.*
(17) Revised Rules of Court, Council of Europe, Court (82) 107 (Dec. 2, 1982).
(18) Eur. Court H.R., Lingens Case (12/1984/84/131).
(19) Eur. Court H.R., Goddi, Judgment of 9 April 1983. Series A N° 76.
(20) Eur. Court H.R., Ashingdane, Judgment of 28 May 1985 Series A N° 93.
(21) Eur. Court H.R., Winterwerp, Judgment of 24 October 1979. Series A N° 33.
(22) See generally, E. Stein, "Lawyers, Judges and the Making of a Transnational Constitution," Amer. J. Int'l Law, Vol. 75, N° 1 (January 1981) at 1.
(23) *Ibid.* n3 at 2.
(24) Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971.
(25) See generally, R. Clark, "International League for Human Rights and South West Africa" Human Rights Quarterly Vol. 3, N° 4 at 101.
(26) *Ibid.*, p. 117.
(27) *Ibid.*
(28) Asylum Case (Colombia-Perú) (1950) I.C.J. 266.
(29) H. Gros Espiell, "El Recurso ante la Corte Internacional de Justicia contra las Sentencias de los Tribunales Administrativos Internacionales", Anuario de Derecho Internacional. Vols. 1979-1980-1981. Facultad de Derecho, Universidad de Navarra, España. pp. 302-303.
(30) Revision of the Rules of the Court, Draft Report, Rules of the Court on Advisory Opinions, Prepared by Judge Jiménez de Aréchaga, 19 June 1970, Rules Committee, Working Document 70/15, pp. 27-31.
(31) M. Dubisson, Cour Internationale de Justice, París 1964. p. 314.
(32) Application for Review of Judgement N° 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 166.
(33) I.C.J., Pleadings, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) Volume II at 636-37).
(34) Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference, Advisory Opinion, 1922, P.C.I.J., Series B, N° 1.
(35) E. Angel, "The Amicus Curiae. American Development of English Institutions," 16 Int'l and Comp. L.Q. 1017 (1967) at 1017.
(36) S. Krislov, "The Amicus Curiae Brief: From Friendship to Advocacy, "72 Yale Law Journal 694 (1963), p. 706.
(37) C. Abrams, quoted in Krislov, *op. cit.*, p. 712.
(38) Article 42.1
(39) Article 44.7