CEJIL

CENTER FOR JUSTICE AND INTERNATIONAL LAW
CENTRO POR LA JUSTICIA Y EL DERECHO INTERNACIONAL
CENTRO PELA JUSTIÇA E O DIREITO INTERNACIONAL

1630 CONNECTICUT AVENUE, NW, SUITE 401, WASHINGTON, DC 20009
TEL: (202) 319-3000 • FAX: (202) 319-3019

TO / PARA: Dr. Pablo Saavedra-Alessandri		FROM / DE: CEJIL	
ORGANIZATION / ORGANIZACIÓN: I/A Court H.R.		DATE / FECHA 1/26/2009 8:33:00 PM	
FAX: 506 22340584		PAGES INCLUDING COVER SHEET / PÁGINAS INCLUYENDO LA CUBIERTA: 23	
□ URGENT □ URGENTE	□ FOR REVIEW □ PARA REVISAR	□ PLEASE REPLY □ FAVOR DE RESPONDER	□ RESEND □ RECICLAR

OTHER COMMENTS / OTROS COMENTARIOS:

Dr. Saavedra
Dear Sir,

Please find attached to this cover sheet CEJIL's *amicus curiae* brief regarding one of the two issues submitted to the consideration of the Inter-American Court via the request for an advisory opinion filed by the Argentine Republic in connection with the role of *ad hoc* judges.

Respectfully,

By: [signature]
Viviana Krsticevic
Executive Director
CEJIL

CEJIL

AMICUS CURIAE

THE *AD HOC* JUDGE AND EQUALITY OF ARMS IN PROCEEDINGS BEFORE THE COURT IN THE CONTEXT OF CASES ARISING FROM INDIVIDUAL PETITIONS

A. Introduction

The Center for Justice and International Law (CEJIL) is an organization for the defense and promotion of human rights in the American hemisphere. CEJIL's main objective is to achieve the full implementation of international human rights norms in the member States of the Organization of American States (OAS) through the effective use of the Inter-American System of Human Rights and other international protection mechanisms.

Starting in 1993, CEJIL has submitted *amicus curiae* briefs every time the Inter-American Court of Human Rights (hereinafter, the "Inter-American Court" or the "Court") invited the interested parties to provide their comments regarding advisory opinions requested to the Court. Accordingly, CEJIL is now again submitting to the Inter-American Court an *amicus curiae* brief concerning the Request for Advisory Opinion filed by the Argentine Republic regarding *ad hoc* judges.[1]

Argentina's request was made in the current context of reforms to the Inter-American System for the protection of human rights. In turn, according to the State itself, it arises from the need that "any initiative taken to strengthen the system must, above all, guarantee an enhanced and more effective protection of human rights."[2]

From such standpoint, it is the State of Argentina's view that the current reform process appears as the proper context to request the Court to provide an advisory opinion on two issues that relate to the composition of the Inter-American Court. According to the State, such aspects "are contrary to the object and purpose of the American Convention." The first of these two issues concerns "the *ad hoc* judge

[1] Said request was filed with the Inter-American Court on August 14, 2008, under Article 64(1) of the American Convention on Human Rights (hereinafter, "American Convention" or "Convention"), which allows OAS member States to request the Court's opinion on the interpretation of the Convention or of other human rights protection treaties in the American States.

[2] *See* Request for Advisory Opinion filed by the Argentine Republic on August 14, 2008, p. 2.

and equality of arms in the proceedings before the Court in the context of a case arising from an individual petition." The second one has to do with "the nationality of the judges and the right to an independent and impartial judge." Both aspects are dealt with in Article 55 of the American Convention, which is the subject-matter of the advisory opinion requested to the Court.

Upon receiving the request, and in reliance on Article 63(3) of the Rules of Procedure, the Inter-American Court invited all interested parties to submit their opinions on the topics that are covered by said request.

On a preliminary note, we will again express our position as maintained in the process of reforms of the rules of procedure of the Inter-American Commission on Human Rights (hereinafter, the "Inter-American Commission" or the "Commission") and the Inter-American Court, to the effect that any reform must be the subject of as broad a discussion as possible, and any disagreement must be worked out in a manner such that the practical effectiveness of protection is preserved, without neglecting legal certainty and the necessary procedural balance.[3]

It is in that context that we submit our considerations regarding the first issue raised by the Argentine Republic, namely: "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?"[4]

First, we will analyze the origin of the constant practice of the Inter-American Court of interpreting Article 55 of the Convention in a manner such that *ad hoc* judges may be appointed in cases other than inter-State cases. On that basis, we will develop a hermeneutic interpretation of Article 55 leading us to the conclusion that such interpretation does not by itself support the appointment of *ad hoc* judges in cases involving individual petitions. Then, we will analyze whether, leaving the text and context of Article 55 aside, the appointment of *ad hoc* judges in cases involving individual petitions is consistent with the object and purpose of the American Convention. Lastly, we will provide our final thoughts supporting the discontinuation of the Court's practice of appointing *ad hoc* judges in cases other than inter-State petitions.

---

[3] CEJIL. *Aportes para la Reflexión sobre Posibles Reformas al Funcionamiento de la Comisión Interamericana y la Corte Interamericana de Derechos Humanos*, October 2008.

[4] *See* Request for Advisory Opinion filed by the Argentine Republic on August 14, 2008, p. 5.

B. Appointment of *Ad Hoc* Judges

Ad hoc judges are dealt with in Article 55 of the American Convention, Article 10 of the Statute of the Inter-American Court[5] and Article 18 of the Court's Rules of Procedure.[6]

The Argentine Republic submitted its request for an advisory opinion based on the discrepancies between the terms of Article 55 of the American Convention and the constant practice of the Court in the use of *ad hoc* judges. Indeed, Article 55 appears to suggest that the appointment of *ad hoc* judges applies only to cases submitted to the Court by State Parties to the Convention. However, in practice, since its first contentious case, the Inter-American Court has allowed the defendant States in cases arising from individual petitions the opportunity to appoint *ad hoc* judges where no judge on the bench is a

---

[5] Pursuant to Article 10 of the Statute of the Inter-American Court,

1. 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.
2. If one of the judges called upon to hear a case is a national of one of the State Parties to the case, any other State Party to the case may appoint a person 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 the States Parties to the case, each of the latter may appoint an ad hoc judge. Should several States have the same interest in the case, they shall be regarded as a single party for the purposes of the above provisions.

   In case of doubt, the Court shall decide.
4. The right of any State to appoint an ad hoc judge shall be considered relinquished if the State should fail to do so within thirty days following the written request from the President of the Court.
5. The provisions of Articles 4, 11, 15, 16, 18, 19 and 20 of the present Statute shall apply to ad hoc judges.

[6] Pursuant to Article 18 of the Rules of the Inter-American Court,

1. In a case arising under Article 55(2) and 55(3) of the Convention and Article 10(2) and 10(3) of the Statute, the President, acting through the Secretariat, shall inform the States referred to in those provisions of their right to appoint a Judge ad hoc within 30 days of notification of the application.
2. When it appears that two or more States have a common interest, the President shall inform them that they may jointly appoint one Judge ad hoc, pursuant to Article 10 of the Statute. If those States have not communicated their agreement to the Court within 30 days of the last notification of the application, each State may propose its candidate within 15 days. Thereafter, and if more than one candidate has been nominated, the President shall choose a common Judge ad hoc by lot, and shall communicate the result to the interested parties.
3. Should the interested States fail to exercise their right within the time limits established in the preceding paragraphs, they shall be deemed to have waived that right.
4. The Secretary shall communicate the appointment of Judges ad hoc to the other parties to the case.
5. The Judge ad hoc shall take an oath at the first meeting devoted to the consideration of the case for which he has been appointed.
6. Judges ad hoc shall receive honoraria on the same terms as Titular Judges.

national of the defendant State.

The Court first used an *ad hoc* judge in 1987, when Honduran judge Jorge Hernández-Alcerro recused himself under Article 19(2) of the Statute of the Court[7] in three cases arising from individual petitions against Honduras.[8] Even though neither Article 55 of the Convention nor Article 10 of the Statute of the Court set the disqualification of a judge who is a national of the defendant State as grounds for the appointment of an *ad hoc* judge by said State, the Court nevertheless considered that, under Article 10(3) of the Statute of the Court, Honduras was entitled to appoint an *ad hoc* judge to hear and determine those three cases.[9]

Later on, in the cases of Aloeboetoe and Gangaram-Panday v. Surinam, the Court allowed Surinam to appoint an *ad hoc* judge, and the State thus appointed Professor Antônio Cançado Trindade.[10] Even though the legal basis the Court relied on to allow Surinam to appoint the *ad hoc* judge in said case is not quite clear, assuming that the Court relied on Article 55(3) of the Convention, *i.e.* it acted with a view to having the judges hearing the case include one appointed by the defendant State, it is worth noting that the candidate selected by the State was not one of its own nationals.

Following these early cases, the Inter-American Court has allowed the appointment of *ad hoc* judges in every case submitted to it via an individual petition where the judges do not include a national of the defendant State.

The Court itself has acknowledged that the appointment of *ad hoc* judges in those cases "is based on an interpretation of Article 55 of the Convention and a practice which the Court has maintained since its first contentious cases."[11] This is precisely the reason why the issue under consideration here needs to be analyzed in the light of the

---

[7] Pursuant to Article 19(2) of the Statute, "If a judge is disqualified from hearing a case or for some other appropriate reason considers that he should not take part in a specific matter, he shall advise the President of his disqualification. Should the latter disagree, the Court shall decide."

[8] The documents available on the Court's web site do not provide the exact reason why Judge Hernández-Alcerro informed his decision to recuse himself. *See* I/A Court H.R., *Case of Velásquez-Rodríguez.* Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 4; I/A Court H.R. *Case of Fairén-Garbi and Solis-Corrales.* Preliminary Objections. Judgment of June 26, 1987, Series C No. 2, para. 4; I/A Court H.R. *Case of Godinez-Cruz.* Preliminary Objections. Judgment of June 26, 1987. Series C No. 3, para. 4.

[9] *Ibid*.

[10] I/A Court H.R. *Case of Aloeboetoe et al.* Judgment of December 4, 1991. Series C No. 11, para. 6; I/A Court H.R. *Case of Gangaram-Panday.* Preliminary Objections. Judgment of December 4, 1991, Series C No. 12, para. *6.*

[11] I/A Court H.R. *Case of Gómez-Paquiyauri.* Order of November 18, 2002, p. 3.

interpretation of Article 55 of the Convention.

Even though the appointment of *ad hoc* judges in cases arising from individual petitions has been brought into question by several actors of the international community,[12] the Court has purported not to find "reasons to change – by examining the issue as an incidental matter in the context of a specific contentious case - its constant practice" on the subject.[13] Accordingly, Argentina's initiative – in its capacity as a State Party to the Convention - to have the Court rule on the subject via an advisory opinion creates a unique opportunity for the Court to revisit its practices in the light of the Convention. The issue of an advisory opinion presents various actors with the opportunity to express their positions on the matter. In turn, this mechanism allows the Court to make a general determination that entails a deviation in its interpretation of a conventional rule that will produce a result that is valid for all cases.[14]

As explained in this *amicus* brief, an interpretation of Article 55 of the Convention must, first of all, take consideration of the means of interpretation recognized by customary international Law and enshrined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969.

Regard should also be had to the fact that, as per the order of prevalence of the sources of International Law,[15] treaties prevail over other sources of law such as judicial practice, which is considered an ancillary source of law.

Additionally, it is also necessary to consider the evolving interpretation required for international instruments as, according to the Court itself,

---

[12] *See ¡nfra* footnotes 79 to 81.

[13] I/A Court H.R. *Case of Gómez-Paquiyauri.* Order of November 18, 2002, considering clause no. 6.

[14] In this regard, a change in the Court's practice would not affect the decisions rendered in specific cases in which judges *ad hoc* were involved, since, by analogy to Article 18(3) of the Statute of the Court, "Incompatibilities may lead only to dismissal of the judge and the imposition of applicable liabilities, but shall not invalidate the acts and decisions in which the judge in question participated."

[15] Pursuant to Article 38(1) of the Statute of the International Court of Justice,

"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

> The *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating the relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law.[16]

This approach is materially important in interpreting the Convention, since the role of the victim in the Inter-American System has evolved to a point where the individual holds a privileged position in the defense of their rights before the system. As recognized by the Court itself, such progress also entails a new model of international relations that differs from the existing inter-State relations.[17]

C. Hermeneutic Interpretation of Article 55 of the American Convention

Article 31 of the Vienna Convention on the Law of Treaties of 1969 provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Accordingly, an interpretation of Article 55 should have the analysis of the terms of such provision as its starting point. Pursuant to Article 55,

> 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. *(Emphasis added.)*

The grounds for the appointment of an *ad hoc* judge are laid down in Article 55(2) and (3). Under Article 55(2), if one of the judges called

---

[16] I/A Court H.R. *Juridical Condition and Rights of the Undocumented Migrants.* Advisory Opinion OC-18/03, of September 17, 2003. Series A No. 18, para. 120.

[17] I/A Court H.R. *Case of Paniagua-Morales et al.* Order of the Court of September 11, 1995, Concurring Opinion of Judge Candado Trindade, para. 3.

upon to hear the case is a national of a State party to the dispute, any other State party to the case may appoint a person of its choice to serve as an *ad hoc* judge; there is no room for doubt that the very text of this provision refers only to cases in which the parties are two or more States Parties to the Convention.

Article 55(3) is precisely the provision that has been relied on by the Court to allow the appointment of *ad hoc* judges in cases arising from individual petitions. Under said provision, if among the judges called upon to hear a case none is a national of any of the State Parties to the case, each such State may appoint an *ad hoc* judge. This provision also contains an express acknowledgment of the existence of two or more State parties to the case before the Court; however, conversely to Article 55(2), in this case none of the judges on the bench is a national of such States, and these are thus allowed to appoint an *ad hoc* judge to sit in the Court for the purposes of the specific case at hand, maintaining procedural equality in the case.

The text of Articles 55(2) and (3) does not leave room for interpretation errors as to the fact that the situations provided for as grounds for the appointment of *ad hoc* judges apply only to inter-State cases. Articles 10(2) and (3) of the Statute of the Court not only support such interpretation but they are even more explicit in providing that:

> 2. If one of the judges called upon to hear a case is a national of one of the States Parties to the case, any other State Party to the case may appoint a person 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 the States Parties to the case, each of the latter may appoint an ad hoc judge. Should several States have the same interest in the case, they shall be regarded as a single party for purposes of the above provisions.
>
> In case of doubt, the Court shall decide. *(Emphasis added.)*

Therefore, Article 10 explicitly provides that the States parties referred to therein are parties to the same case, and thus deals with inter-State disputes.

Based on the above, the text of Article 55 do not allow a conclusion that, in cases arising from individual petitions, the defendant States are entitled to appoint *ad hoc* judges.[18] This notwithstanding, based on Article 32 of the Vienna Convention on the Law of Treaties[19] - which

---

[18] IACHR. Case 11.681. *The Las Dos Erres Massacre.* Position of the Inter-American Commission on Human Rights on *Ad Hoc* Judges, July 30, 2008, para. 11.

[19] Pursuant to Article 32 of the Vienna Convention,

Recourse may be had to supplementary means of interpretation, including the preparatory work for the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to article 31:

provides for various supplementary means of interpretation - we will now engage in a brief analysis of the preparatory works that preceded the drafting of Article 55 of the Convention, in order to determine whether the intent of the drafters of said provision was different from that reflected by the very text of the Article.

As regards the historical precedents for *ad hoc* judges, Judge Antônio Cançado Trindade argued that "the origin of *ad hoc* judges in international tribunals can be traced back to arbitration, 'in a confusion of the diplomatic, conciliatory role of the arbitrator with the strictly jurisdictional role of judges.'"[20]

As explained below, this would also seem to be the origin of Article 55, the text of which was apparently inspired by the text of Article 31 of the Statute of the International Court of Justice (hereinafter, "ICJ"). As per Article 31 of the Statute of the ICJ, the role of *ad hoc* judges is to maintain procedural balance between the parties, or to create nominal equality between the litigating States when none of them has a national acting as a judge on the Bench of the Court.[21] In any event, as established in the Statute of the ICJ, only States can be parties to cases brought before it.[22] Therefore, the historical reasons that justify the existence of *ad hoc* judges in international litigation are rooted in inter-State litigation, and cannot be extrapolated to litigation intended to determine the international responsibility of a State for human rights violations.

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

[20] IACHR. Case 11.681. *The Las Dos Erres Massacre.* Position of the Inter-American Commission on Human Rights on *Ad Hoc* Judges*,* July 30, 2008, para. 17. *See also* I/A Court H.R. *Case of Paniagua-Morales et al.* Order of the Court of September 11, 1995. Concurring Opinion of Judge Cancado Trindade, para. 3.

[21] Pursuant to Article 31 of the Statute of the ICJ:

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.

[22] Article 34 of the Statute of the ICJ.

In the Inter-American System, both the Inter-American Commission and the Court have stated that "recognizing individuals' standing to file petitions against States before international human rights organizations entails a new model of international relations, a radical change in international Law."[23] Accordingly, the international resolution of cases where an individual files suit against a State for the violation of their fundamental rights cannot be likened to the resolution of disputes between sovereign States, as both contexts are essentially different from one another.

In this regard, the Inter-American Commission has repeatedly analyzed the preparatory works that preceded the current text of Article 55 of the Convention, to conclude that the draft convention did not make provision for the incorporation of *ad hoc* judges but rather provided that no judge could participate in matters in which their own national State was involved.[24]

Thus, Article 46 of the draft Inter-American Convention of 1968 provided as follows:

> 1. The presence of at least five members shall constitute a quorum for the transaction of business by the Court.
>
> 2. If a member is a national of a State which is a party to a case submitted to the Court, he shall be replaced by an *ad hoc* judge possessing the qualifications set forth in Article 42, elected by the absolute majority of the other members of the Court, whenever it is necessary to do so in order to constitute the quorum prescribed in paragraph 1 of this Article.[25]

Accordingly, it appears that the option considered in this early draft was to exclude from the case those judges who were nationals of the States parties to the case, and have them replaced by *ad hoc* judges appointed not by the States but by the Court's judges themselves.

Later on, the text of the provision dealing with *ad hoc* judges was changed to the current version of Article 55 (Article 56 at the time). The Commission in charge of discussing such change noted that:

> Article 56 completely differs from Article 46 of the Draft on *ad hoc* judges in that judges of the same nationality of the States Parties to a specific case must be included as members of the Court. This practice is consistent with the provisions of Article 31 of the Statute of the International Court of

---

[23] IACHR. Case 11.681. *The Las Dos Erres Massacre.* Position of the Inter-American Commission on Human Rights on *Ad Hoc* Judges, July 30, 2008, para. 17; I/A Court H.R. *Case of Castillo-Petruzzi.* Preliminary Objections. Judgment of September 4, 1998. Series C No. 41. Concurring Opinion of Judge A.A. Cançado Trindade.

[24] *See, e.g.,* IACHR. Case 11.681. *The Las Dos Erres Massacre.* Position of the Inter-American Commission on Human Rights on *Ad Hoc* Judges, July 30, 2008, para. 29.

[25] Specialized Inter-American Conference on Human Rights. San José, Costa Rica, November 22, 1969, Actas y Documentos. Office of the Secretary General of the OAS, Washington, D.C., OEA/Sr.K/XVI/1.2, p. 1.

Justice.[26]

Accordingly, the preparatory works for Article 55 show that the drafters did not intend to entitle defendant States to appoint *ad hoc* judges in cases arising from individual petitions but rather to bring the Court's practice in line with that of the ICJ, *i.e.* to allow *ad hoc* judges to be appointed in inter-State disputes.[27]

Based on the above, neither an analysis of the text nor one of the context, historical precedents and preparatory works of Article 55 can be used as legal basis for the appointment of *ad hoc* judges in the context of applications filed with the Court by the Inter-American Commission as a result of individual petitions.

In the remaining sections of this *amicus* brief we will analyze the main arguments raised in support of the appointment of *ad hoc* judges in cases arising from individual petitions to determine whether such arguments are consistent with the object and purpose of the American Convention and Article 31 of the Vienna Convention on the Law of Treaties.

D. The Appointment of *Ad Hoc* Judges in the Light of the Object and Purpose of the American Convention

Both the Preamble of the American Convention and the articles thereof and the constant case-law of the Court show that the object and purpose of the Convention is to achieve the effective protection of the rights enshrined in said instrument, for the sole benefit of human beings, as stated in Article 1 thereof. Accordingly, the Convention is intended to guarantee the protection of the basic rights of human beings, irrespective of their nationality. In this regard, the Court has acknowledged that:

> [M]odern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but

[26] Report of Commission II: "Órganos de la Protección y Disposiciones Generales," Rapporteur: Mr. Robert J. Redington (United States of America), Doc. 71, Rev. 1, March 30, 1970. OAS, Specialized Conference, *op. cit.*, p. 375.

[27] IACHR. Case 11.681. *The Las Dos Erres Massacre.* Position of the Inter-American Commission on Human Rights on *Ad Hoc* Judges, July 30, 2008, paras. 37 and 38.

towards all individuals within their jurisdiction.[28]

In this regard, the Court's case law is consistent with the decisions of other international tribunals. Both the International Court of Justice[29] and the European Court of Human Rights[30] have equally recognized that the States parties to human rights protection treaties do not seek to serve their own interests but the achievement of the purposes that are the *raison d'être* of those treaties.

Under Article 29(a) of the American Convention, no provision of the Convention may be interpreted as permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in the Convention or to restrict them to a greater extent than is provided for therein. In the light of said article, we maintain that the specific object and purpose of the American Convention is in direct conflict with the appointment of *ad hoc* judges by defendant States in cases arising from individual petitions, as thoroughly explained below.

1. Impartiality and Independence

One of the arguments raised in support of the appointment of *ad hoc* judges in cases arising from individual petition revolves around the fact that the *ad hoc* judge appointed by the defendant State does not undermine the independence and impartiality of the Court, as *ad hoc* judges act on their own personal behalf and are subject to the same technical and moral qualification requirements as permanent judges. The Court itself has ruled on this subject in some of the contentious cases brought before it.[31]

Next we analyze whether, in spite of the Statute requirements that *ad hoc* judges must meet in order to be appointed, there are arguments to maintain that such judges do not meet the required standards of independence and impartiality.

a) Judicial Independence

---

[28] I/A Court H.R. *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*; Advisory Opinion OC-2/82 of September 24, 1982, para. 29; I/A Court H.R. *Case of Ivcher-Bronstein*. Competence. Judgment of September 24, 1999. Series C, No. 54. para. 43.

[29] International Court of Justice. *Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951.

[30] European Commission of Human Rights, Decision on the Admissibility of Application No. 788/60. *Austria vs. Italy* case, *Yearbook of the European Convention of Human Rights,* The Hague, M. Nijhoff. 1961, p. 140; European Court of Human Rights, *Ireland vs. United Kingdom* case, judgment of 18 January 1978, Series A no. 25, para. 239.

[31] I/A Court H.R. *Case of Paniagua-Morales et al.* Order of September 11, 1995, considering paragraphs 1 and 2.

The principle of judicial independence stems from the basic principle of the rule of law and, particularly, the separation of powers doctrine.[32] Also, the various international conventions on human rights allow persons the right to a fair trial before an independent and impartial tribunal.[33]

Principle 2 of the UN Basic Principles on the Independence of the Judiciary[34] provides that "the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason." Moreover, Principle 6 entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected. Such independence requires that neither the judiciary nor the judges in the judiciary be subordinated to other branches of government.[35]

In this regard, the Inter-American Commission has maintained that judicial independence "necessitates that courts be autonomous from the other branches of government, free from influence, threats or interference from any source and for any reason, and benefit from other characteristics necessary for ensuring the correct and independent performance of judicial functions, including tenure and appropriate professional training."[36] Likewise, the UN Human Rights Committee has stated that delays in the payment of salaries, job instability, and the lack of independent mechanisms for the appointment of judges and the imposition of disciplinary measures represent restrictions on judicial independence.[37] Also, in examining cases involving issues of judicial independence, the European Court of Human Rights considered the importance of the mechanisms for the appointment of judges, the existence of guarantees against external pressure and the preservation of the appearance of independence.[38]

---

[32] International Commission of Jurists. International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors. ICJ, Practitioners' Guide Series No. 1, 2004, p. 16.

[33] *See, inter alia,* Art. 10 of the Universal Declaration of Human Rights; Art. 8 of the American Declaration of the Rights and Duties of Man; Art. 8 of the American Convention on Human Rights; Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[34] General Assembly of the Untied Nations, Resolutions 40/32 of December 13, 1985, and 40/16 of December 13, 1985.

[35] *Ringeisen v. Austria,* ECHR judgement of 16 July 1971, Series A13, para. 95.

[36] IACHR. *Report on Terrorism and Human Rights.* OEA/Ser.L/V/II.116. Doc. 5 rev. 1 corr. of October 22, 2002, para. 229.

[37] *Concluding Observations of the Human Rights Committee on Georgia*. UN document CCPR/CO/74/GEO para. 12; *Concluding Observations of the Human Rights Committee on Congo*, UN document CCPR/C/79/Add.118, para. 14.

[38] *Incal v. Turkey,* ECHR, judgment of 9 June 1998, Series 1998-IV, paras. 67-73: *Findlay v.*

Because of the importance that judicial independence carries as a basic condition for the credibility and effectiveness of the administration of justice and the institutions for the protection and promotion of human rights, having the Inter-American Court made up of members of the highest professional and moral standing is a guarantee of justice for the parties to any case.

In the context of the Inter-American System, the importance of the independence of the judges that make up the Court is reflected by the existence of a number of incompatibilities that are enshrined in the Convention, the Statute and the Rules of Procedure. Thus, Article 18(1) provides for certain types of activities and positions that are automatically incompatible with the position of judge of the Court, as follows:

> 1. The position of judge of the Inter-American Court of Human Rights is incompatible with the following positions and activities:
>
> a. Members or high-ranking officials of the executive branch of government, except for those who hold positions that do not place them under the direct control of the executive branch and those of diplomatic agents who are not Chiefs of Missions to the OAS or to any of its member states;
>
> b. Officials of international organizations;
>
> c. Any others that might prevent the judges from discharging their duties, or that might affect their independence or impartiality, or the dignity and prestige of the office.

Additionally, Article 19(1) of the Statue, which deals with impediments, excuses and disqualification, provides that "[j]udges may not take part in matters in which, in the opinion of the Court, they or members of their family have a direct interest or in which they have previously taken part as agents, counsel or advocates, or as members of a national or international court or an investigatory committee, or in any other capacity."

Even though the general criteria reflected by said articles apply to *ad hoc* judges *mutatis mutandi*,[39] they do not explicitly provide a solution to every potential situation of conflict, either for permanent judges or for *ad hoc* judges of the Court.

An exhaustive analysis of the subject of the independence of judges calls for an analysis of the mechanisms for their appointment, their training, their functional dependence on other branches of Government, the lack of external pressure and other factors. Even

---

The United Kingdom, ECHR, judgement of 25 of February 1997, Series 1997-1, paras. 74-77. *See also* I/A Court H.R. *Case of the Constitutional Court.* Judgment on Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 71, para. 75.

[39] Article 10(5) of the Statute of the Inter-American Court.

more relevant are such considerations in the case of *ad hoc* judges, as the latter are unilaterally appointed by States which are the defendant in the dispute before the Court, for the purposes of hearing and determining a specific case.

Some of these factors also carry implications as far as judicial impartiality is concerned, given the close connection between independence and impartiality, as the former is an inevitable requirement in order for the latter to exist.[40]

As to the abovementioned factors, a relevant consideration is the manner in which *ad hoc* judges are selected and appointed by defendant States in cases arising from individual petitions, given the important role which selection mechanisms play in the preservation of the judges' independence.[41]

Despite being subject to the same requirements as permanent judges, *ad hoc* judges are not appointed via the same formal procedure as permanent judges are. In this regard, the selection procedure laid down in Article 53 of the Convention entails a stricter standard, as candidates to the position of permanent judge must be appointed upon the vote of an absolute majority of all the States Parties to the Convention. *Ad hoc* judges, however, are nominated by the defendant States without a formal voting mechanism for the rest of the States that are parties to the Inter-American System of protection and - based on the collective guarantee the Convention represents - have a direct interest in the matter.

Thus, the procedure for selecting *ad hoc* judges differs not only from the procedure to select permanent judges but also from the procedure laid down in Articles 6(3) and 19(4) of the Statute for the appointment of interim judges, as these must be appointed by the State Parties at a meeting of the OAS' Permanent Council.[42] Accordingly, the unilateral

---

[40] I/A Court H.R. *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights).* Advisory Opinion OC 9-87 of October 6, 1987. Series A No. 9, para. 24; I/A Court H.R. *Case of the Constitutional Court v. Peru*. Judgment on Merits, Reparations and Costs. Judgment of January 31, 2001. Series A No. 71. To the same effect, former Court Judge Alirio Abreu-Burelli stated that "the absence of judicial independence, which necessarily entails a lack of impartiality and, accordingly, a violation of Article 8 of the Convention, represents an obvious lack of equality for one of the litigating parties." *See Independencia Judicial (Jurisprudencia de la Corte Interamericana de Derechos Humanos),* Alirio Abreu-Burelli, p. 641, at www.juidicas.unam.mx

[41] Parliamentary Assembly, Council of Europe. *Nomination of Candidates and the Election of Judges to the European Court of Human Rights*. Doc 11767, 1 December 2008, para. 3.

[42] Pursuant to Article 6(3) of the Statute, "If necessary in order to preserve a quorum of the Court, the States Parties to the Convention, at a meeting of the OAS Permanent Council, and at the request of the President of the Court, shall appoint one or more interim judges who shall serve until such time as they are replaced by elected judges."

Pursuant to Article 19(4) of the Statute, "When one or more judges are disqualified pursuant to

appointment of an *ad hoc* judge, with no vote by the States Parties to the Convention, to sit in a specific case arising from an individual petition seems to be a situation that finds no precedent in the Court's very own rules.

In the European Court of Human Rights, member States may appoint *ad hoc* judges only when there is no *ex officio* judge of the nationality of the State concerned sitting as member of the chamber or when such member is unable to sit.[43] In such situations, even though the process for the selection and appointment of *ad hoc* judges is similar to that used in the Inter-American Court, the Parliamentary Assembly of the Council of Europe recently stated that the direct appointment of *ad hoc* judges by member States without the involvement of the Assembly undermines the legitimacy and independence of the institution.[44] Accordingly, new Protocol 14 to the European Convention for the Protection of Human Rights[45] introduces a new article that is intended to materially reduce the member State's discretion to appoint *ad hoc* judges.[46]

In contrast to the practice of the European Court and the Inter-American Court, neither the African Court nor the International Criminal Court provide for the possibility of member States appointing *ad hoc* judges who are their own nationals to sit in specific cases.[47]

Consequently, the current mechanism of unilateral selection of *ad hoc*

---

this article, the President may request the States Parties to the Convention, in a meeting of the OAS Permanent Council, to appoint interim judges to replace them."

[43] Pursuant to the current text of Article 27 of the Convention,

> 1. To consider cases brought before it, the Court shall sit in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.
>
> 2. There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the State Party concerned or, if there is none or if he is unable to sit, a person of its choice who shall sit in the capacity of judge. *(Emphasis added.)*
>
> 3. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the State Party concerned.

[44] Parliamentary Assembly. Council of Europe. *Nomination of Candidates and the Election of Judges to the European Court of Human Rights*, Doc 11767, 1 December 2008, para. 33.

[45] Ratification by the Russian Federation is pending for new Protocol 14 to come into force. *See:* http://assembly.coc.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID--3715

[46] New Article 26(4), which replaces Article 27(2) of the Convention, provides as follows:

> 4. There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge. *[Emphasis added.)*

[47] Parliamentary Assembly. Council of Europe. *Nomination of Candidates and the Elections of Judges to the European Court of Human Rights*. Doc. 11767, 1 December 2008, para. 34.

judges by the defendant State without a voting by the States Parties to the American Convention or even by the very own members of the Court affects the independence of said judges, which may in turn undermine the independence and legitimacy of the Court as a whole.

b) Impartiality

Impartiality is key to maintaining confidence in, and the moral authority and thus persuasive capacity of, any system of justice. Moreover, the jurisdictional system of protection of human rights is required to adopt the greatest safeguards of its independence and impartiality so as to strengthen its ability to guarantee the enforcement of its decisions and the implementation of its standards at the domestic level.

The Inter-American Court itself has stressed the material role of judicial impartiality in holding that

> The right to be tried by an impartial judge or court is a fundamental guarantee of due process. In other words, the person on trial must have the guarantee that the judge or court presiding over his case brings to it the utmost objectivity. This way, courts inspire the necessary trust and confidence in the parties to the case and in the citizens of a democratic society.[48]

Furthermore, the UN Special Rapporteur on the Independence and Impartiality of the Judiciary stated that the absence of impartiality and independence of the judiciary leads to a denial of justice and makes the credibility of the judicial process dubious, and such principles are more "a human right of the consumers of justice"[49] than a privilege of the judiciary for its own sake.

As to the definition of impartiality, the Inter-American Court has noted that impartiality "demands that the judge acting in a specific dispute approach the facts of the case subjectively free of all prejudice and also offer sufficient objective guarantees to exclude any doubt the parties or the community might entertain as to his or her lack of impartiality."[50]

The Inter-American Court has thus adopted an interpretation of the doctrine of impartiality that covers both subjective and objective aspects, based on concepts developed in the case law of the European

---

[48] I/A Court H.R. *Case of Herrera-Ulloa.* Judgment of July 2, 2004, Series C No. 107, para. 171.

[49] *UN Special Rapporteur on the Impartiality and Independence of the Judiciary*. CN.4/Sub.2/1985/18 and Add. 1-6, para. 75.

[50] I/A Court H.R. *Case of Apitz-Barbera et al.* Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 56.

Court.[51] Both aspects should be taken into consideration, as not always will partiality and/or bias for one of the parties to the dispute be manifest but rather, at times, it will merely be apparent.[52] Therefore, not only the existence of impartiality but also the appearance of impartiality must be considered.[53] Indeed, the appearance of lack of impartiality can be the result of subjective issues, such as the expression of personal prejudice or the manifestation of discriminatory attitudes, or objective issues, such as where the same person acts in the capacity of both judge and party, or prosecutor and judge, or due to other situations that might create doubt about judicial impartiality.[54]

Subjective impartiality is presumed unless there is concrete evidence to the contrary.[55] Conversely, as far as objective impartiality is concerned, the judge will be automatically disqualified if there are circumstances so warranting, or in situations that create doubt as to the possibility of bias, it will become necessary to assess the existence of legitimate circumstances warranting such doubt as to the impartiality of the tribunal or judge.

An assessment of objective impartiality requires that the doubt be raised by a party to the proceeding; that it be evaluated in the specific context of the case, and that an informed third party may have objective reasons to entertain such doubt; in other words, the test is the assessment of a rational observer with knowledge of the circumstances.[56]

In this regard, it should be noted that mere work experience or active prior involvement in human rights issues does not automatically rule out the objective impartiality of members of the Inter-American System. Likewise, impartiality is not undermined by the judges' holding of government offices or provision of advisory services to international organizations prior to their appointment. Such situations call for a

---

[51] *Tierce and Olhers v. San Marino,* ECHR, Judgement of 25 July 2000, Series 2000-IX, para. 75; *Daktaras v. Lithuania.* ECHR, Judgment of 10 October 2000. Series 2000-X. para. 30; *Padovani v. Italy.* ECHR. Judgement of 26 February 1993, Series A257-B, para. 25.

[52] *International Commission of Jurists. International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*. ICJ Practitioners' Guide Series No 1, 2004, pp. 28-29.

[53] Both the appearance of impartiality and the appearance of independence are part of the principle of appearance of justice, as "not only must Justice be done, it must also be seen to be done."

[54] International Commission of Jurists. *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors.* ICJ Practitioners' Guide Series No 1; 2004. pp. 28-30.

[55] I/A Court H.R. *Case of Apitz-Barbera et al. v. Venezuela.* Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 56; ECHR, *Thorgeir Torgeirson v. Iceland.* Judgment of 25 June 1992, para. 50.

[56] Judge Easterbrook, *In re Mason* 916 F.2d 284 (7th Cir. 1990).

case-by-case evaluation of whether conditions exist that keep impartiality uncompromised, analyzing whether the relationship to the party involved in the specific cases has ended;[57] whether the relationship was compensated or not; the extent of involvement; or whether the judge has previously informed of their relationship to the party to the dispute.[58]

Litigation before the Inter-American Court has seen self-disqualifications and recusals of *ad hoc* judges appointed by a State in individual cases where, due to different circumstances, the principle of impartiality was compromised.

One of these situations took place more recently in the case of Heliodoro Portugal v. Panama, in which the petitioning organization filed to have the *ad hoc* judge proposed by the defendant State recused upon learning that such judge had been directly involved in the domestic processing of the case then brought before the Court.[59] By Order of May 10, 2007, the Court rejected the disqualification requested by the representatives.[60] Later on, CEJIL advised the Court of the existence of a draft agreement whereby the State undertook to make payment of a sum of money for the services of the *ad hoc* judge. The contract also provided for a number of obligations to be performed by the *ad hoc* judge, such as the submission of monthly reports to the State regarding progress in the exercise of the judges' duties.[61] In view of this situation, the *ad hoc* judge himself asked the President of the Court for his own disqualification, which request was allowed.[62] Not only did this situation conflict with the provisions of Article 18 of the Rules of the Court[63] but it also serves as an example of the external pressures – also monetary in nature, in this particular case – to which *ad hoc* judges may be subjected by the appointing States and which materially conflict with the principles of judicial impartiality and

---

[57] Judge Easterbrook, *In re Mason* 916 F.2d 284 (7th Cir. 1990). See also the IACHR's position in Case 12.360, *Santander Trisián Donoso v. Panama,* letter of the IACHR of September 12, 2008.

[58] In the case of former dictator Augusto Pinochet, he successfully challenged the participation of one of the judges on account of the fact that said judge had failed to timely inform of his current involvement with one of the complainants in the proceeding. *See* The United Kingdom Parliament, House of Lords. Opinions of the Lords of Appeal for Judgement in the Cause In the Pinochet, Oral Judgment, 17 January 1999. Opinion of Lord Browne-Wilkinson, http://www.parliament.the-stationery-office.co.uk/pa/Id199899/Idjudgmt/jd990115/pino01.htm

[59] CEJIL letters to the Inter-American Court dated April 11 and May 2, 2007.

[60] I/A Court H.R. *Case of Heliodoro Portugal.* Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 186, para. 6.

[61] CEJIL letters to the Inter-American Court of February 13 and 25, 2008.

[62] I/A Court H.R. *Case of Heliodoro Portugal.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 186, para. 6.

[63] Pursuant to Article 18(6) of the Rules of Procedure of the Court, judges *ad hoc* shall receive honoraria on the same terms as Titular Judges.

independence.

In this regard, some of the individuals who sat as *ad hoc* judges addressed and/or proved the dilemmas between the role of an *ad hoc* judge and the principle of impartiality.

In his separate opinion in the case of Trujillo-Oroza, *ad hoc* Judge Charles N. Brower addressed his role in such capacity, and shared "the views expressed by a distinguished Judge *Ad Hoc* of the International Court of Justice regarding the role of the Judge *Ad Hoc:* While 'exercis[ing] his powers impartially and conscientiously," he has

> The special obligation lo endeavour to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected –though not necessarily accepted - in any separate or dissenting opinion that he may write.[64]

Judge Brower's opinion puts in writing what, in practice, has been the role of a material number of *ad hoc* judges before the Inter-American Court who, at least on public record, have expressed and validated via dissenting or partially concurring opinions a significant part of the arguments of the defendant State who nominated them.[65]

In this regard, former *ad hoc* judge Fernando Vidal Ramírez has admitted to having had to "overcome national sentiment in taking part in the proceeding that concluded with a Court judgment declaring the military proceeding against terrorists invalid and ordering a new proceeding to be carried out before the ordinary courts."[66] Vidal Ramírez, who sat as *ad hoc* judge in three cases brought against Peru, wrote dissenting opinions in the three judgments on preliminary objections supporting most of the arguments raised by the State to have the cases dismissed.[67] This situation has not been infrequent in the history of the Court.[68] Vidal Ramírez concludes with his comment

---

[64] I/A Court H.R. *Case of Trujillo-Oroza v. Bolivia.* Reparations and Costs. Judgment of February 27, 2002. Series C No. 92.

[65] It should be noted that, in spite of it, several renowned jurists showed a great degree of independence in the performance of their office.

[66] Fernando Vidal Ramírez, *La Judicatura Ad hoc*, in *Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI*, Inter-American Court of Human Rights, 2001, p. 594.

[67] I/A Court H.R. *Case of Cantoral-Benavides.* Preliminary Objections. Judgment of September 3, 1998. Series C No. 40; I/A Court H.R. *Case of Castillo-Petruzzi et al.* Preliminary Objections, Judgment of September 4, 1998. Series C No. 41; I/A Court H.R. *Case of Durand and Ugarte.* Preliminary Objections. Judgment of May 28, 1999. Series C No 50.

[68] Something similar happened with *ad hoc* judge Alejandro Montiel-Arguello, who issued dissenting opinions in support of the arguments of the State in three cases in which he sat in an *ad hoc* capacity. *See* I/A Court H.R. *Case of the Mayagna (Samo) Awas Tingni Community.* Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79; I/A Court H.R.,

that "[a]s far as [he] know[s], the experience with *ad hoc* judges has been a positive one, as only a few failed to honor their seat and disregarded the duty to act in an independent and impartial manner."[69] (Emphasis added.) Such statement seems to allow for cases in which *ad hoc* judges have failed to show the required impartiality in their actions.

The abovementioned cases are just a few examples illustrating the tension between the appointment of *ad hoc* judges in individual cases and the principles of impartiality and independence.[70] Additionally, it should be noted that the representation of the State's interests as a party to the dispute by *ad hoc* judges entails an alteration of procedural equality, as described below.

2. Procedural Equality

As is well known, under Article 61 of the Convention, contentious cases can be submitted to the jurisdiction of the Court by the Inter-American Commission or by those States Parties to the Convention which have recognized the jurisdiction of the Court. Accordingly, in order for a case arising from an individual petition to reach the Court, it is first necessary to complete the proceedings before the Commission provided for in Articles 48 to 50 of the Convention.

In the latter case, once the proceeding before the Court has been instituted, the victims are allowed to participate in the proceeding in an autonomous capacity by virtue of Article 23 of the Rules of Procedure of the Court,[71] continuing the key role they play at the initial stage of the proceeding. Accordingly, in cases arising form individual petitions, the parties include, at the jurisdictional stage, the Commission, the victims and the defendant State.

Whereas in inter-State litigation all States parties to the case are

---

Case of the Serrano-Cruz Sisters. Merits, Reparations and Costs. Judgment of March 1, 2005. Series C No. 120; I/A Court H.R. *Case of Yatama.* Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127.

[69] *Ibid.*, p. 594.

[70] This phenomenon does not relate exclusively to the Inter-American Court of Human Rights. The former President of the ICJ has argued that there are studies evidencing that, in most cases, the judges who are nationals of the State that appointed them vote in that State's favor, but that situation is more commonly found in connection with *ad hoc* judges. *See* Guillaume G. *Thoughts on Independence of International Judges Vis-à-vis States,* The Law and Practice of International Courts and Tribunals 2: 163-168, 2003. *See also* Il Ro Suh, *Voting Behavior of National Judges in International Courts,* American Journal of International Law, 1969.

[71] The rights and powers of victims in litigation before the Inter-American System have evolved to the present date; since the entry into force of the Rules of Procedure of the Court in 2001, such Rules recognize the victim's standing as a party to the proceeding in allowing the victim to independently file motions, arguments and evidence, and to participate at public hearings. See Articles 23, 35(4) and 40(2) of the Rules of Procedure.

allowed the opportunity to appoint *ad hoc* judges under Article 55, in cases arising from individual petitions only the defendant State seems to enjoy such right. The Court has applied this interpretation, never allowing the Commission or the victims to appoint judges of their preference to sit in specific cases. Accordingly, the current practice in the appointment of *ad hoc* judges upsets procedural balance for the benefit of one of the three parties involved in the contentious proceeding before the Court. This is an utterly serious situation, as the violation of the equality principle favors precisely the party to the proceeding that is being sued for human rights violations committed to the detriment of the victims, thus leaving the latter in a position of procedural inferiority.

Indeed, the desire to protect human dignity, embracing the dichotomy between the individual holder of rights and the state machinery that is required to guarantee those rights, is at the very essence of the human rights system. The relationship between these two is distinguished by the imbalance stemming from the very nature of the parties involved: State and individuals. It is for this reason that we are treading in a field that does not address relationships between equal parties, either substantively or formally. A victim of human rights violations is facing a state structure that holds a monopoly of action in various broad fields of public activity, and which also has a political, economic and material and human resources structure that is incomparably superior to that of its opponent in the dispute.[72]

Therefore, subject to the observance of substantive and procedural guarantees and legal certainty, it is clear that basing rules and mechanisms on the idea of two subjects facing in each other in the dispute on an equal footing means building them on a false reality in contradiction with the foundation of human rights law.[73] *Au contraire,* it is based on the recognition of such real imbalance that the useful effect of protection must be guaranteed.[74]

However, the application of Article 55 to inter-State cases would not entail a violation of the principle of procedural equality. On the contrary, Sections 55(2) and (3) ensure procedural equality between the litigating States by allowing them all to appoint judges of their choice to sit in a specific case.

---

[72] CEJIL. *Aportes para la Reflexión sobre Posibles Reformas al Funcionamiento de la Comisión Interamericana y la Corte Interamericana de Derechos Humanos*, October 2008, p. 20.

[73] I/A Court H.R. *Case of Blake.* Reparations, 1999, Separate Opinion of Judge A.A. Cançado-Trindade, para. 5 et seq.

[74] CEJIL. *Aportes para la Reflexión sobre Posibles Reformas al Funcionamiento de la Comisión Interamericana y la Corte Interamericana de Derechos Humanos*, October 2008, p. 20.

3. Knowledge of municipal law

One of the arguments put forth in support of the presence of *ad hoc* judges in cases other than inter-State cases is that an *ad hoc* judge can make sure that the Court will have full knowledge of the domestic laws and may better assist in the processing and outcome of the case.[75]

However, an examination of the history of the Court shows that such argument does not apply in each and every case, as not all defendant States choose to appoint one of their own nationals to serve as *ad hoc* judge in the dispute.[76]

In addition to such consideration, in cases arising from individual petitions, both the defendant State and all other parties to the dispute have an opportunity to make sure, by submitting written and oral arguments and appointing expert witnesses, that the Court is in possession of the required information to have sufficient knowledge of the domestic legal system to make the fairest decision in the case. The Court itself is allowed to act on its own initiative during the proceeding and request that the parties provide it with such additional information as it may deem relevant, including expert testimony and expert reports.[77]

A relevant consideration here is that, even though in other international jurisdictions such as international *ad hoc* criminal courts or the International Criminal Court legal issues that pertain to the domestic laws or institutions of the countries were the relevant violations took place are constantly analyzed, the statutes of such tribunals do not allow their judges to be nationals of the countries involved.

Because of the adversarial principle, in connection with the principles of impartiality and objectivity, the role of the judges sitting in the Court must be to impartially assess the factual and legal arguments raised by all parties to the dispute.[78] In this regard, the appointment by a single

---

[75] Fernando Vidal Ramírez, *La Judicatura Ad hoc,* in *Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI,* Corte Interamericana de Derechos Humanos, 2001, p. 592. Regarding this argument before the ICJ, *see also* http://www.icj-cij.org/court/index.php=p1=1&p2=5

[76] Among many other cases, in the Case of Trujillo-Oroza, Bolivia appointed an American *ad hoc* judge; in the Cases of Aloeboetoe and of Gangaran-Panday, Surinam appointed a Brazilian *ad hoc* judge, and in the Case of Salvador Chiriboga, Ecuador appointed a Colombian *ad hoc* judge.

[77] *See* Articles 42 and 45 of the Rules of Procedure of the Court.

[78] Héctor Faúndez Ledesma, *La Independencia e Imparcialidad de los Miembros de la Comisión y de la Corte: Paradojas y Desafíos,* in *El Futuro del Sistema Interamericano de Protección de los Derechos Humanos.* Instituto Interamericano de Derechos Humanos, San José, 1998, pp.

party – the defendant State - of a judge of its choice is very likely to undermine such principles.

To sum up, the presence of *ad hoc* judges appointed by the defendant States in the context of individual petitions unquestionably creates an appearance of bias which, rather than adding to, undermines the legitimacy of the Inter-American System of protection of human rights governed by the *pro persona* principle.

E. Conclusion

The examination of the subject under analysis, which is the first of the issues submitted to the consideration of the Court by the Argentine Republic, calls for the analysis and interpretation of Article 55 of the Convention to determine whether said provision allows the appointment of *ad hoc* judges in cases arising from individual petitions.

Throughout this *amicus curiae* brief we have shown that an analysis of Article 55 in the light of the means of interpretation recognized by International Law does not support the practice of appointing *ad hoc* judges in cases other than inter-State cases.

Additionally, the appointment of *ad hoc* judges in cases arising from individual petitions adversely affects the impartiality and independence of the Court, procedural equality in litigation and the legitimacy of any decisions rendered by the Court. Such has been the perception of some of the actors with a certain incidence in the Inter-American System of Protection, such as the Inter-American Commission,[79] the victims[80] and legal scholars.[81]

The considerations set out above all support a conclusion that the presence of *ad hoc* judges in litigation other than in inter-State cases is detrimental to the best and most effective protection of the human rights recognized by the Convention.

Based on the above, it is our position that the current practice of

---

196 to 198.

[79] I/A Court H.R. Case 11.681. *The Las Dos Erres Massacre.* Position of the Inter-American Commission on Human Rights on *Ad hoc* Judges, July 30, 2008; I/A Court H.R. *Case of Gómez-Paquiyauri.* Order of November 18, 2002.

[80] I/A Court H.R. *Case of Heliodoro Portugal.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 186, para. 6; I/A Court H.R. *Case of Gómez Paquiyauri.* Order of November 18, 2002.

[81] *See, e.g.*, Héctor Faúndez Ledesma, *La Independencia e Imparcialidad de los Miembros de la Comisión y de la Corte: Paradojas y Desafíos*, in *El Futuro del Sistema Interamericano de Protección de los Derechos Humanos*. Instituto Interamericano de Derechos Humanos. San José. 1998, p. 195.

allowing States brought to Court by the victims of human rights violations to appoint judges of their choice to serve in specific cases which are not inter-State cases should be abandoned.