



ORGANIZATION OF AMERICAN STATES

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

**Observations of the Commission on the
Request for Advisory Opinion OC-21
submitted by the Argentine Republic**

***The institution of Ad Hoc Judges and equality of
arms in the proceedings before the Inter-American
Court in the context of a case originating in an
individual petition***

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I. INTRODUCTION

1. On August 14, 2008, the Illustrious State of Argentina (hereinafter “the requesting State” or “the State”), pursuant to the provisions of Article 63(1) of the Rules of Procedure of the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”), submitted a request for advisory opinion (hereinafter “the request”), whereby it sought the Court’s opinion about the following matters:

1. In accordance with 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 submitted to the Court has originated in a complaint between States?¹

2. In cases originating in an individual petition, should the judge who is a national of the respondent State disqualify himself from hearing and deciding the case for the purpose of securing an unbiased or uninfluenced decision?

2. On September 8, 2008, the Secretariat of the Court forwarded a copy of the request for advisory opinion to the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) and informed it that December 9, 2008 would be the deadline for the submission of observations and other relevant documents regarding said request. Due to the extension of such term granted by the Court on November 28, 2008, the final time limit for filing said documents was January 26, 2009.

3. The Inter-American Commission, represented by its delegates, Commissioner Paolo Carozza and Executive Secretary Santiago A. Canton, and its legal advisors, Elizabeth Abi-Mershed and Lilly G. Ching, does hereby submit to the Court its observations on the above-mentioned request.

II. MERITS

A. Request submitted to the Court

4. Regarding the institution of *ad-hoc* judges and the principle of equality of arms in the proceedings brought before the Court in the context of a case originating in an individual petition, the requesting State pointed out that the interpretation of Article 55 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”)

seems to suggest that the possibility of appointing an *ad-hoc* judge, which is a procedural mechanism typical of international contentious cases between States, would unequivocally indicate that such provision may only be invoked in cases where the Court should do so.

¹ Brief of the requesting State of August 14, 2008, p.5.

5. In this regard, the Commission notes that the practice of appointing an *ad hoc* judge was started by the Inter-American Court since its first cases, when due to the disqualification of one of its regular members, its then President, invoking Article 10(3) of the Court's Statute,² authorized the State to appoint an *ad hoc* judge.³ Since then, the Court has included *ad hoc* judges in all cases brought before it, when among its members none is a national of the respondent State.⁴

6. Taking into consideration the provisions of Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which enshrine the generally accepted principles of international law on the interpretation of said instruments, the Commission will first examine the text of Article 55 of the American Convention. Then it will examine the arguments related to the object and purpose of the American Convention, and finally it will refer to the considerations used as the basis for the preparatory work of the above-mentioned article.

B. Examination of the legal grounds of Article 55 of the Convention

7. Article 31 of the Vienna Convention on the Law of Treaties 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."

8. Pursuant to the provisions of Article 61(1) of the American Convention, "only the States Parties and the Commission shall have the right to submit a case to the Court, whereas Article 61(2) of said treaty provides that "in order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed."

9. Furthermore, the Convention acknowledges two categories of persons or entities having legal standing to start a proceeding before the Commission which may thereafter result in the procedures set forth in Articles 48 to 50 of the Convention: one of such categories is set forth in Article 44 of the Convention when it provides that "any person or group of persons, or any nongovernmental entity [...]"; the other is the one referred to in Article 45 of said instrument, which provides as follows:

² Article 10(3) of the Statute of the Court provides that "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."

³ Due to the disqualification of regular judge Jorge Hernández-Alcerro, a Honduran national, the President of the Court authorized the State of Honduras to appoint an *ad hoc* judge in the cases Velásquez-Rodríguez, Fairen-Garbi and Solís-Corrales. In this regard, see: Court H.R., Case of Velásquez-Rodríguez. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 4; Court H.R., Case of Fiarén-Garbi and Solís-Corrales. Preliminary Objections. Judgment of June 26, 1987. Series C No. 2, para. 4; and Court H.R., Case of Godínez-Cruz. Preliminary Objections. Judgment of June 26, 1987. Series C No. 3, para. 4.

⁴ See, for example, among the first cases: Court H.R., Case of Aloeboetoe et al. Judgment of December 4, 1991. Series C No. 11, para. 6; Court H.R., Case of Gangaram-Panday. Preliminary Objections. Judgment of December 4, 1991. Series C No. 12, para. 6.

Article 45

1. Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.

2. Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration.

3. A declaration concerning recognition of competence may be made to be valid for an indefinite time, for a specified period, or for a specific case.

10. From the concurrent interpretation of Articles 44 and 45 of the Convention it results that a proceeding before the Inter-American Commission may be started with a complaint filed by one or several persons or by a nongovernmental organization, against a State Party which previously ratified the American Convention. A proceeding before the Commission may also be started as a result of a complaint filed by a State Party to the American Convention against another State Party to said treaty. In the latter case, not only must both States (claimant and respondent) be parties to the American Convention, but also both of them should have expressly declared that they recognize the competence of the Commission to "receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention," without prejudice to the eventual acceptance of the competence of the IACHR to hear interstate complaints which might be filed by States in specific cases.

11. In such a case, if after completing the procedures set forth in Articles 48 to 50 of the American Convention, the respondent State does not comply with the recommendations made by the IACHR, the matter may be brought before the Court, provided that the respondent State has accepted the contentious jurisdiction of the Court, pursuant to the provisions of Article 62 of the American Convention.

12. The provision that has served as grounds for the Court to order that in the cases submitted by the Commission the respondent State be entitled to appoint an *ad hoc* judge is Article 55 of the Convention, which provides as follows:

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 provision. In case of doubt, the Court shall decide.

13. Article 55 of the American Convention would be applicable to a case only after this has been submitted to the Court and according to the following procedures: pursuant to paragraph 2 of said Article, "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." Accordingly, in an interstate case, if only one of the regular judges of the Court is a national of any such States, the other State involved may appoint an *ad hoc* judge.

14. If, instead, none of the regular judges of the Court is a national of either State Party involved, both States may appoint an *ad hoc* judge, pursuant to the provisions of paragraph 3 of Article 55 of the American Convention, according to which "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."

15. From the foregoing analysis of paragraphs 2 and 3 of Article 55 of the American Convention, it results clearly that the appointment of an *ad hoc* judge is in order only in interstate petitions.

16. Therefore, the wording of Article 55 of the Convention indicates that the appointment of an *ad hoc* judge is in order only in contentious cases in which both parties are States.

17. It is to be noted that the text of Article 10 of the Statute of the Court and that of Article 18 of the Court's Rules of Procedure basically reproduce the text of Article 55 of the American Convention and do not provide for the appointment of an *ad hoc* judge in cases other than contentious cases between States Parties to the Convention.

C. Inadmissibility of *ad hoc* judges in cases originating in complaints about violations of human rights submitted by individuals

18. Article 31 of the Vienna Convention on the Law of Treaties also provides that upon interpreting treaties their object and purpose must be taken into consideration. In this regard, and having in mind the object and purpose of the American Convention on Human Rights, the Commission considers that there are specific aspects which advise excluding the appointment of an *ad hoc* judge in cases originating in complaints about violations of human rights submitted by individuals.

19. In fact, the legal standing acknowledged by the international law of human rights to individuals to submit complaints against States as a result of human rights violations is a dramatic change in the field of international law, and implies that some of its classical institutions may not be applied to the new reality, as they were envisaged for different circumstances, as is the case of *ad hoc* judges.

20. The international law prior to World War II did not regulate, except for a restricted number of cases, the manner in which the States were to consider their own nationals. Besides, according to the classical theories, when a State caused damage to a national of another State, the latter, under certain circumstances, was entitled to claim for compensation from the former, through an international interstate proceedings, but, in any case, it was an issue between States, wherein the injured person did not play any role in the international proceeding.

21. Thus, the legal standing acknowledged to individuals to submit petitions against States to international bodies of human rights implies a new model of international relations, a dramatic change in international law. As pointed out by a former member of the Court, the right of individual petition is a definite conquest of the International Law of Human Rights. The contraposition between individual complainants and the respondent States in cases of alleged violations of protected rights is "of the essence itself of the international protection of human rights."⁵

22. The institution of *ad hoc* judges was conceived in the field of international law for traditional international proceedings between two States equally sovereign.⁶ Therefore, extending such institution to an international human rights proceeding originating in a complaint submitted by an individual against a State, implies applying it in a completely different context from that for which it was conceived.

23. Another aspect which highlights the inappropriate manner in which the institution of the *ad hoc* judge has been applied in the Inter-American system of human rights is its partial application. In fact, typically there are two parties to international legal proceedings, which are two States being equally sovereign and both having the right to appoint an *ad hoc* judge in the proceeding if none of the regular judges is a national of those States. Instead, in the proceedings brought before the Inter-American system of human rights only one of the parties –the State- (and, as a matter of fact, there are three parties, namely, the State, the victim and the IACHR) is entitled to appoint an *ad hoc* judge.

24. Thus, as the institution of the *ad hoc* judge was conceived exclusively for contentious cases between States, it should not be extended to international proceedings brought before the Inter-American Court where the petitioner is not another State Party.

25. In view of the foregoing considerations, there are sufficient reasons to state that the institution of the *ad hoc* judge is not applicable in cases originating in complaints about violations of human rights submitted by individuals, as it further implies disrupting equality of arms for one of the parties, since the other parties could not objectively be entitled to appoint their own *ad hoc* judge.

⁵ Court H.R., Case of Castillo-Petrucci et al. Preliminary Objections. Judgment of September 4, 1998. Series C No. 41, concurring opinion of Judge Antônio A. Cançado Trindade, paras. 6, 7 and 5.

⁶ See in this regard Article 31(2) and 31(3) of the Statute of the International Court of Justice and Article 31 of the Statute of the Permanent Court of International Justice.

D. Further arguments regarding the restriction of the institution of the *ad hoc* judge to contentious cases between States

26. Article 32 of the Vienna Convention on the Law of Treaties provides as follows:

Supplementary means of interpretation. Recourse may be had to supplementary means of interpretation, including the preparatory work of 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: a) leaves the meaning ambiguous or obscure; or b) leads to a result which is manifestly absurd or unreasonable.

27. Taking into consideration the provisions of said article, and even where the interpretation of the text of Article 55 of the American Convention and its object and purpose confirm that the institution of the *ad hoc* judge should only be applicable in contentious cases between States, the Commission will put forward some further arguments regarding the historical circumstances which gave rise to Article 55 of the American Convention, including the preparatory work of said treaty, which reinforces the conclusion reached herein.

28. In this regard, it should be noted that the origin of *ad hoc* judges in international courts may be traced to the institution of arbitration, "blending the diplomatic and conciliatory functions of arbitrators with the strictly jurisdictional duties of judges."⁷

29. The institution of *ad hoc* judges was included in the Statute of the International Court of Justice with a view to keeping the confidence of both parties and equality of arms between them, so that either of them should always have an *ad hoc* judge participating in the hearing and adjudication of the case, thus serving the purpose of reaching greater equity in the cases where one of the judges sitting in the court is a national of one of the State Parties to the case, but none of the judges has the nationality of the other Party; or to creating a condition of nominal equality between both States in a contentious proceeding where none of the judges sitting in the court is a national of neither State.

30. Article 31 of the Statute of the International Court of Justice is, as will be discussed below, the immediate antecedent of Article 55 of the American Convention. Said article provides as follows:

Article 31

1. Judges of the nationalities of each of the parties shall retain their right to sit in a case before the Court.

2. If the Court includes upon the Bench a judge of the nationality of one of the party, any other party may choose a person to sit as judge. Such person shall

⁷ Faúndez-Ledesma, Héctor, The Inter-American System for the Protection of Human Rights, Institutional and Procedural Aspects, Inter-American Institute of Human Rights, 2nd edition, page 154 and Court H.R., Case of Paniagua-Morales et al., Order of the Court of September 11, 1995, para. 3.

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 on the decision in terms of complete equality with their colleagues.

31. In this regard, it is to be noted that pursuant to Article 34(1) of the Statute of the International Court of Justice, "only States may be parties to cases before the Court." Therefore, the immediate antecedent of Article 55 of the American Convention is the Statute of the International Court of Justice, an instrument which is exclusively applicable to international contentious cases between States.

32. In view of the foregoing, the Commission considers that the above-mentioned arguments, which were taken into consideration when drafting the Statute of the International Court of Justice regarding the appointment of *ad hoc* judges, are not relevant to proceedings before the Inter-American Court, except, maybe, for those between States.

33. Regarding the preparatory work of the American Convention, it is to be emphasized that the examination of the wording of Article 55 of the American Convention also reveals that the Draft Convention did not provide for the appointment of *ad hoc* judges by the respondent State. Rather, the preliminary draft provided that no judge could hear cases involving their own countries.

34. In this regard, it is relevant to remember that the Draft Inter-American Convention on Human Rights prepared by the Inter-American Commission in 1968,⁸ envisaged the institution of the *ad hoc* judge in a completely different manner from the way it was finally adopted when the Convention was ratified and

⁸ The Second Inter-American Specialized Conference held in Rio de Janeiro from November 17 through November 30, 1965, entrusted the Council of the Organization with updating and completing the Draft Convention on Human Rights prepared by the Inter-American Council of Jurists in 1959. By Resolution of May 1, 1968, the Council of the Organization entrusted the Inter-American Commission on Human Rights with drafting the complete and revised text of the Draft Convention. Said draft was sent to the Council of the Organization on July 18, 1968. OAS Inter-American Conference on Human Rights, San Jose, Costa Rica, November 7-22, 1969, Official Documents. General Secretariat of the Organization of American States, Washington, D.C., OEA/Ser. K/XVI/1.2, page 30.

equally different from the way in which the Court has interpreted such provision.

35. As a matter of fact, Article 46 of the Draft Convention on Human Rights, which was prepared by the Inter-American Commission on Human Rights, provided as follows:

Article 46

1. The presence of at least five judges 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 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.⁹

36. Said draft was forwarded to the Member States of the Organization so that they submitted their observations thereon. The United States filed the following observation on the proposed provision:

For the sake of keeping the stability of the Court, it would be advisable to avoid the appointment of *ad hoc* judges. This provision is not necessary to constitute a quorum, as long as judges are discreet regarding their absences and a limit is set on the number of judges who disqualify themselves from hearing a case.¹⁰

37. Consequently, said State suggested that Article 46 be drafted as follows:

Article 46 – Quorum

1. The presence of a majority of the members of the Court plus one shall constitute a quorum for the transaction of business thereof.
2. The Court shall sit *en banc*, except as otherwise provided for in this Convention or in the Rules of Procedure of the Court.
3. The Rules of Procedure of the Court may provide that its judges disqualify themselves from hearing a case when they deem that they have a personal interest which might affect the impartiality of the judgment, inasmuch as a quorum is maintained.¹¹

38. Such observations, like those submitted by the other States, were collected in a document prepared by the IACHR, which was submitted for consideration to the Inter-American Specialized Conference on Human Rights, held in

⁹. OAS, Inter-American Specialized Conference on Human Rights, *op. cit.*, page 1.

¹⁰ *Id.*, page 81.

¹¹ *Id.*, page. 96.

San Jose, Costa Rica, from November 7 through November 22, 1969. On that occasion, Commission II, which was entrusted with discussing all matters related to "Organs of Protection and General Provisions," undertook the study of the document prepared by the IACHR.¹² During said study, the provision regarding *ad hoc* judges was amended, so that the text approved by the Specialized Conference is the text of current Article 55 of the American Convention.

39. In its analysis of the above-mentioned article regarding *ad hoc* judges (Article 55 of the final text), approved by its members as Article 56, the report of Commission II, entrusted with discussing all matters related to "Organs of Protection and General Provisions," states that:

Article 56 is completely different from Article 46 of the Draft on *ad hoc* judges, as the Court must include upon the Bench judges of the nationality of the States Parties in a specific case. This practice is in line with the provisions of Article 31 of the Statute of the International Court of Justice.¹³

40. The original draft of the American Convention aimed at preventing judges from hearing cases regarding their country and provided that where cases involving a State of which one of the judges was a national were brought before the Court, said judge should disqualify himself from hearing the case and only under such circumstances would the appointment of an *ad hoc* judge by the other judges of the Court (and not by the respondent State) be admissible in order to constitute a quorum of five judges.

41. Even if the original wording of Article 55 was amended and replaced by another based on the terms of Article 31 of the Statute of the International Court of Justice, the final text approved did not include any provision allowing the appointment of *ad hoc* judges in applications submitted to the Court by the Inter-American Commission, which could have never been possible based on the Statute of the International Court of Justice, which pursuant to its Article 34, is only competent to hear contentious cases between States, and not applications against a State submitted by organs such as the Inter-American Commission on Human Rights.

42. In view of the foregoing arguments, the American Commission holds that the analysis of the origin of Article 55 of the American Convention also reveals that the provision regarding *ad hoc* judges was conceived exclusively for contentious cases between States, taking into consideration that it is a useful institution on the grounds that an *ad hoc* judge may compensate for the lack of knowledge of the regular judges of the Court about the laws of the country that is a party to the case, which is the one to appoint him.¹⁴

¹² Doc. 13. Draft Inter-American Convention on Human Rights and Observations and Recommendations of the American Governments, September 22, 1969. Document 13.

¹³ Report of Commission II: "Organs of Protection and General Provisions," Rapporteur: Robert J. Redington (United States of America), Doc. 71 Rev.1, of January 30, 1970, at: OAS; Special Inter-American Conference on Human Rights, *op. cit.*, p. 375.

¹⁴ To the contrary, in its Chapter Functioning of the Commission, the Rules of Procedure of the Inter-American Commission on Human Rights provides that: "Article 17, Discussion and Voting....2. The members of the Commission may not participate in the discussion, deliberation or decision of a matter submitted to the Commission in the following cases: a. if they are nationals of the State which is the

III. CONCLUSION

43. The Commission has put forward its arguments regarding the inadmissibility of the appointment of *ad hoc* judges in cases other than contentious proceedings between States. In this regard, and taking into consideration the provisions concerning the interpretation of treaties of Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which embody generally accepted principles of international law on the interpretation of treaties, the Commission has shown that the analysis of the text of Article 55 of the Convention does not support the practice of the Court of including *ad hoc* judges in cases other than contentious proceedings between States. Taking into consideration the object and purpose of the American Convention, the Commission has put forward specific arguments for the exclusion of the institution of *ad hoc* judges in cases originating in complaints about violations of human rights submitted by individuals against States.

44. The Commission has further referred to reasons related to the preparatory work and the historical circumstances regarding the signing of the American Convention, which further support the thesis of the inadmissibility of the institution of the *ad hoc* judge in cases other than contentious proceedings between States.

45. The institution of the *ad hoc* judge is absolutely exceptional and, as such, its application must be restrictive. Such institution is not admissible in cases where the complainant is not a State. The incorporation of *ad hoc* judges in cases other than petitions submitted by one State against another, is neither allowed by the American Convention on Human Rights nor by the Statute or the Rules or Procedure of the Inter-American Court.

46. In view of the current strengthening of the Inter-American system of human rights and the evolution of the amendments to the Rules of Procedure of the Court, which can be seen in the wider access of individuals to the Court independently, the Commission deems that the reasons which years ago might have led the Court to start the practice of incorporating *ad hoc* judges in circumstances which are not contemplated in the American Convention, the Statute of the Court or its Rules of Procedure, no longer persist.

Finally, regarding the second matter raised by the Illustrious Argentine State in its Request for Advisory Opinion, that is, whether "the judge having the nationality of the respondent State should disqualify himself from hearing and adjudicating the case in order to secure an unbiased or uninfluenced decision," the Commission does not have an institutional posture, wherefore it will not make any observations thereon.

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subject of the Commission's general or specific consideration, or if they were accredited or carrying out a special mission as diplomatic agents before the State."