Universidad de Los Andes
School of Law

Bogotá, January 26, 2009

Honorable
Inter-American Court of Human Rights

Ref.: *Amicus Curiae* regarding the Request for Advisory Opinion on the "interpretation of Article 55 of the American Convention on Human Rights," regarding the "institution of *ad hoc* judges."

Honorable Judges:

We, César A. Rodríguez-Garavito, holder of Identity Card 79.555.322 from Bogotá; Valentina Montoya-Robledo, holder of Identity Card 24.344.079 from Manizales; Nelson Camilo Sánchez, holder of Identity Card 11.203.155 from Chía; and Isabel Cavelier-Adarve, holder of Identity Card 52.865.273 from Bogotá; Director and Members of the Global Justice and Human Rights Program [*Grupo de Justicia Global y Derechos Humanos*] of Universidad de Los Andes Law School, with all due respect do hereby submit our opinion on the matter referred to above by means of this *Amicus Curiae* brief.

The purpose of this opinion is to contribute our comments to the Inter-American debate on whether the appointment of *ad hoc* judges should be admitted in contentious proceedings regarding human rights violations brought before the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court").

To that end, this report will consist of two sections. First, we will discuss general aspects regarding the institution of *ad hoc* judges, the cases in which this institution is applicable and the international practice that has developed regarding it. In the first place, we will review the application of this institution by the International Court of Justice, which has served as grounds for its subsequent adoption by the Inter-American Court, though in different cases. This discussion aims at pointing to the evident problems posed by this institution within the framework of cases originating in individual petitions about violations of human rights brought before the international system. In the second place, we will put forward our arguments regarding the consistency that there ought to be between the recommendations given to the domestic courts of the States Parties to the American Convention of Human Rights and the judgments of the Inter-American Court, on the one hand, and the practice of the Court, on the other. We will also discuss the principle of equality of arms that must prevail for the sake of safeguarding due process and why this principle, which is observed in contentious cases between States, does not prevail in cases originating in individual petitions. The foregoing will be discussed by making a comparison with the European System of Human Rights. Finally, we will present our conclusions.

1. *Ad hoc* judges in international practice

Ad hoc judges are those judges appointed in a particular case for administering justice only in that case.

The institution of the *ad hoc* judge has been adopted by the Inter-American Court based on the experience of the International Court of Justice. The latter, which is

competent only to hear contentious cases between States, was the first court to allow the appointment of *ad hoc* judges in cases in which one of the States Parties to the case did not have a national judge sitting on the court. The foregoing is contrary to the practice adopted in the field of human rights, particularly, by a court such as the Inter-American Court, which, though competent to hear cases between States, as set forth by the American Convention on Human Rights (hereinafter "the Convention"), hears mostly cases originating in individual petitions wherein there is no equality of arms between the parties and regarding which the Convention does not provide for the appointment of *ad hoc* judges. Hence, the clear difference that there is as to the grounds for the admissibility of this institution by both Courts, as the International Court of Justice hears contentious cases between States and the Inter-American Court hears mainly contentious cases brought by individuals against the State. This will be the grounds for the argument that the institution of the *ad hoc* judge is not in accord with the system of individual petitions.

The point is that that, even within the International Court of Justice, which has allowed the institution of the *ad hoc* judge as a result of the alleged equality of arms between States, said institution has been the object of criticism. In this regard, a prevailing pattern can be seen in which permanent judges have a greater sense of responsibility regarding the fulfillment of their duties than *ad hoc* judges, who are especially appointed for specific cases. Furthermore, what distinguishes most the behavior of a permanent judge from that of an *ad hoc* judge is the procedure through which they are appointed. While regular national judges are nominated by national groups within the Permanent Court of Arbitration or by Member States of the Court and are selected by the United Nations Security Council and General Assembly, *ad hoc* judges are appointed by the States which are parties to a specific case. Therefore, in terms of the impartiality of the proceedings it may be concluded that the procedure through which regular judges are appointed in the International Court of Justice is much better than the procedure through which *ad hoc* judges are appointed.[1]

Now, in the international sphere, this institution may be adopted in different cases.

The first one is within the framework of contentious cases between States. This is the case where one of the regular members of the court has the nationality of one of the States parties to the case, but no member of the court has the nationality of the other State. In this case, the State which has no judge of its nationality sitting on the court, appoints an *ad hoc* judge. This is the procedure currently adopted by the International Court of Justice, as well as by the Inter-American Court of Human Rights.

The second case is also within the framework of contentious cases between States, where one of the States parties has a national sitting on the court, but he has to refrain from hearing the case (as a result of a conflict of interests). In this case, the State may appoint an *ad hoc* judge. The other party may also appoint an *ad hoc* judge, if the judge having its nationality refrains from hearing the case or if no member of the court has its nationality. This situation has been admitted by the European Court of Human Rights (hereinafter "the European Court"), in cases such as *Cyprus v. Turkey* (2001), which will be discussed later. It is also common practice in the Inter-American Court of Human Rights.

Cf. [1] *Cf*. RO SUH, II. "Voting behavior of national judges in international courts. The American Journal of International Law. Vol. 63, 1969. In: http://heinonline.org/HOL/Page?handle=hein.journals/ajil63&div=25&collection=journals&set_as_curson=3&men_tab=srchresults&terms="ad/hoc/judges"&type=matchall HeinOnline.org. Last revision: January 19, 2009.

The last case is different from the other two inasmuch as it does not apply to contentious cases between States, but to cases originating in a petition filed by an individual against the State. In this case, if the State does not have a national judge sitting on the competent court, it may appoint an *ad hoc* judge. This case is common practice both in the Inter-American Court and in the European Court, as shown in the cases discussed below.

The practice of the Inter-American Court comes within the framework of the two latter cases. The appointment of *ad hoc* judges was started by the Court on the grounds of Article 10(3) of the Statute of the Court, when due to the self-disqualification of regular judge Jorge Hernández-Alcerro, a Honduran national, the Court allowed the State of Honduras to appoint an *ad hoc* judge in the cases *Velásquez-Rodríguez v. Honduras* (1988), *Fairén-Garbi and Solís-Corrales v. Honduras* (1989), and *Godínez-Cruz v. Honduras* (1989). In turn, in the judgment rendered by the Court in the case *Paniagua-Morales et al. v. Guatemala* (1995), the Court endorsed the institution of *ad hoc* judges as an independent and impartial organ, inasmuch as they do not represent any Government. The Court argued that this is so since *ad hoc* judges are not agents of a particular State, but members of the Court elected in their individual capacity, in accordance with Article 52 of the American Convention on Human Rights (hereinafter "the Convention") and Article 55(4) thereof.

Likewise, the Court has argued that *ad hoc* judges must fulfill the same requirements as regular judges.[2] It has further argued that, *ad hoc* judges have the same duties and rights as the regular members of the Court (Article 10(5) of the Convention). In the same order, Judge Montiel-Argüello issued a dissenting opinion on the institution of the *ad hoc* judge, arguing that this institution has been widely criticized in doctrine as not necessary in permanent international courts, as a possible source of partiality, and as a remainder of arbitration courts. Notwithstanding, he endorsed this institution, as the *ad hoc* judge must take an oath of honesty, independence, and impartiality and is not deemed to be an agent of the State which appointed him, as shown in numerous cases in which *ad hoc* judges have voted against the claims of the State which appointed them. Likewise, he argued that the *ad hoc* judge might contribute to the Court a sound point of view on the conditions inherent in his country, with a view to improving the understanding of the situation.

Despite the relevant arguments put forward by the Court endorsing the institution of the *ad hoc* judge, it is pertinent to note that the Court itself, in the above-mentioned order, admitted the potential partiality problems this institution might pose. Along these lines, this institution has been sharply criticized due to its practical inconveniences. On the one hand, doctrine has established that *ad hoc* judges have a strong bond with their homeland and country, wherefore they lose the neutrality required to perform their duties.[3] In turn, doctrine has considered

[2] Inter-American Court of Human Rights. Case of Paniagua-Morales et al. v. Guatemala (1995).

[3] *Cf*. *Op. Cit*. RO SUH, II. In international courts, when deciding a case, there should not be judges of the nationality of only one of the States Parties, as the other State would be at a disadvantage. Even more so, national judges as such (that is, those being nationals of one or both States Parties to a case) are sharply criticized. Most criticism against national judges of States parties to contentious proceedings has focused on general principles of justice over practical considerations. It has been said that allowing these judges to decide on their own States reduces the international nature of the *litis* and is contrary to the principle that nobody can be his own judge. It has been further said that it opposes the principle that no case may be heard by a judge having an interest therein. At the meetings of the Commission of Jurists of 1920 of the International Court of Justice, for example, M. De Lapradelle, from France, suggested that if both parties to a case were represented by a national judge, they could keep their seats, but, if on the contrary, one of the judges were of the same nationality as one of the contesting parties, without the other party being represented by one of its nationals, he should give up his seat. He even proposed that national judges should be replaced by advisors having advisory powers similar to those of the institution known as *ad hoc* judges.

that the participation of *ad hoc* judges may divide the decisions of the entirety of judges by introducing a dissenting view in the spirit of the court. Furthermore, various authors have also argued that *ad hoc* judges are similar to arbitrators and that as they serve on the court only temporarily, they lack the experience of a regular judge. Along these lines, the International Law Institute in 1952 severely criticized the institution of *ad hoc* judges, alleging that it is contrary to the division of powers established by Montesquieu,[4] attacking the Rule of Law itself, as there is no political balance which secures the protection of citizens from the arbitrariness of the State to which they are subordinated, or, in this case, from supranational bodies.

2. The lack of consistency of the Inter-American Court regarding the institution of the *ad hoc* judge

Here we will discuss how the practice of the Inter-American Court, despite its great achievements since it was created and though it has been exemplary in many aspects, upon admitting the institution of *ad hoc* judges in contentious cases originating in individual petitions may send an erroneous message to the States in relation to essential issues regarding judicial independence and impartiality, which have been properly treated in the Inter-American Court's jurisprudence.

2.1. The experience of the European Court of Human Rights

In the first place, we will discuss the way in which the European Court of Human Rights (hereinafter "the European Court"), similarly to the Inter-American Court, has dealt with the institution of the *ad hoc* judge, and the requirements it has imposed on the States regarding the composition of their courts. In this regard, the European Court has sought to establish clear regulations for States Parties regarding the impartiality and independence of judges in their domestic jurisdiction, but has failed to put said rules into practice, insofar as the European Court itself has included *ad hoc* judges in its composition. Thus, several examples will be given to show that the European Court has imposed clear regulations on the States regarding not only the institution of the *ad hoc* judge, but also regarding the relevance of judicial independence and impartiality for the sake of protecting due process.

Firstly, in the case of *Piersack v. Belgium* (1982), the European Court described its approach to the guarantee of impartiality. The facts of the case refer to the President of a domestic court who had been an official of the Public Prosecutor's Office. At the moment the pre-trial investigation proceedings were started, which were later brought before the above court to be heard, said official was in charge of the department which carried out the investigation. Though he did not take part personally in the investigation, he had ample supervision powers over the persons in charge of conducting it. In accordance with the foregoing, the European Court accepted as grounds for disqualification from hearing a case the existence of well-founded suspicion of partiality, even when it was shown later in the case that the facts did not justify such fear.

In this regard, the European Court decided to admit the position held by the petitioner, claiming that he had not had an impartial hearing. To reach this conclusion, the European Court based its arguments on the following considerations: a) impartiality is defined as absence of prejudice or bias and its existence is to be assessed both subjectively and objectively; b) whereas an

[4] *Ibid.*

objective approach aims at determining whether a judge offers sufficient guarantees to exclude any legitimate doubt in this respect, the subjective approach endeavors to ascertain the personal conviction of a judge in a case; and c) from the objective point of view, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw, for what is at stake is the confidence which the courts must inspire in the public.[5]

For its part, in the case of *Morris v. the United Kingdom* (2002), a military Judge Advocate and other officers were appointed on an *ad hoc* basis to sit on a Court Martial by another military judge advocate. In this case, the European Court examined the impartiality that is to be met by judges and reached the conclusion that the judges appointed in the case lacked the required independence.[6] It was argued that when confronting the full-time nature of the appointment of the Court Martial permanent President with the *ad hoc* nature of that of the officers, it was clear that the permanent President had an apparent experience and consolidated authority to which the junior officers were bound to defer. It was also argued that a court composed almost exclusively of officers trying charges brought by the institution where they perform other duties could not be impartial and independent, particularly when two of the three officers involved had been appointed on an *ad hoc* basis to hear a single case, which implied the existence of a conflict of interests.[7] In this regard, it can be noted that, in the first place, the Court emphasized the independence judges must have regarding the cases they are hearing, keeping a distance from the facts they must determine. Furthermore, it was contended that due to the *ad hoc* nature of their appointment, they were bound to defer to the person who appointed them, as their performance might be affected by the opinion of said person regarding that specific case.

From the foregoing a direct analogy with *ad hoc* judges of international courts can be derived, insofar as they might lose impartiality due to their deference to the experience of permanent judges. The point is that permanent judges who are exclusively devoted to performing their duties as such gain more experience and responsibility in the performance of their duties than judges who are only appointed temporarily to hear a single case and devote the rest of their time to other activities. The practice and experience of permanent judges allow them to have greater independence and impartiality, as they do not depend on the State which appointed them –as do *ad hoc* judges who are appointed by the States parties to a

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[5] *Cf*. *Case of Piersack v. Belgium* (1982). European Court of Human Rights.

[6] *Cf*. *Case of Morris v. the United Kingdom* (2002), European Court of Human Rights: "…the judge advocate was appointed solely on a case by case basis. As a result, there was no objective guarantee that his or her career as a military judge would not be affected by decisions tending in favor of the accused rather than the prosecution. A reasonable person might well have entertained an apprehension that a legal officer's occupation as a military judge would be affected by his or her performance in earlier cases ... [or] that the person chosen as judge advocate had been selected because he or she had satisfied the interests of the executive, or at least has not seriously disappointed the executive's expectations, in previous proceedings."

[7] *Cf. Ibid*. *Case of Morris v. the United Kingdom* (2002), European Court of Human Rights: "There were also no measures in place which could guarantee that the two serving officers would not be interfered with when executing their judicial functions. He identified a strong officer corps ethos in the British Army which recognised the importance of army discipline and of setting a deterrent to others in imposing terms of detention and which, he said, gave rise to an unavoidable conflict of interest at every court martial under the 1996 Act." "**¡Error! Sólo el documento principal.**. The applicant argues that the independence of the permanent president at the applicant's court martial could have been reinforced by formal security of tenure and by embodiment of his appointment in a legal instrument of some kind. However, the Court finds that the presence of the permanent president did not call into question the independence of the court martial. Rather, his term of office and *de facto* security of tenure, the fact that he had no apparent concerns as to future army promotion and advancement and was no longer subject to army reports, and his relative separation from the army command structure, meant that he was a significant guarantee of independence on an otherwise *ad hoc* tribunal."

contentious case-, but are bound to administer justice for the sake of preserving rights, beyond the influence of the States.

Furthermore, the European Court has found that courts who have *ad hoc* judges among its members do not adequately secure judicial independence, wherefore it accepts that permanent judicial officers sit on said courts with a view to solving the problem. Along these lines, in the case of *Grieves v. the United Kingdom* (2003), the European Court stressed the preponderance of judicial independence and of the safeguards aimed at preserving it. In said case the Court addressed, on the one hand, the appointment of judges exclusively on an *ad hoc* to sit on Courts Martial and, on the other, the appointment by civilians of a judge advocate in the Air Force. Thus, the European Court examined the difference between a judge serving on a Court Martial (a naval officer) and one of the Air Force (a civilian whose duties was the administration of justice),[8] all this on the basis of independence in the performance of the administration of justice. Thus, the Court reaffirmed that a civilian whose duties consist exclusively in administering justice has more independence than an *ad hoc* judge. In this regard, the Court concluded that, in the above case, there were no grounds upon which to question the independence of the Air Force Judge Advocate.[9] In turn, regarding the other *ad hoc* judges, it stressed the preponderance of safeguards aimed at preserving their independence, such as the presence of permanent judges and the presence of a permanent and full-time judicial officer as President of the Court Martial, which in the above case did not occur.

The foregoing shows how the European Court has clearly defined impartiality and independence, and the safeguards that must preserve both in the domestic courts of the States under its jurisdiction, particularly regarding *ad hoc* judges. Notwithstanding, how the Court has addressed this institution internally is to be discussed.

On the one hand, the European Court has shown how its members have sought impartiality and independence, disqualifying themselves from hearing a case where there is a conflict of interests. An example of this is the interstate case of *Cyprus v. Turkey* (2001), where the national judge from Turkey refrained from hearing the case on the grounds of his eventual partiality and, consequently, Turkey appointed an *ad hoc* judge. In turn, Cyprus appointed an *ad hoc* judge, as it had no national judge sitting on the court. The judge appointed by Cyprus refrained from hearing the case on similar grounds, wherefore Cyprus had the opportunity to appoint another *ad hoc* judge. In this case, the above-mentioned judges behaved honorably, refraining from hearing the case for the sake of preserving the safeguards which guarantee due process of law, thus legitimating the confidence of citizens in the system. Notwithstanding the foregoing, in many other cases self-disqualification has not taken place, thus clearly limiting the impartiality and independence of the Court.

[8] *Cf. Ibid. Case of Grieves v. the United Kingdom* (2003). European Court of Human Rights: "82. The Judge Advocate in a naval court-martial is a serving naval officer who, when not sitting in a court-martial, carries out regular naval duties. In contrast, the Judge Advocate in the Air Force is a civilian working full-time on the staff of the Judge Advocate General, himself a civilian."

[9] *Cf. Case of Grieves v. the United Kingdom* (2003). European Court of Human Rights. "Since he was a civilian appointed to the staff of the JAG by the Lord Chancellor (a civilian) and to a court-martial by the JAG (also a civilian). It was also found that the presence of a civilian with such qualifications and such a central role in court-martial proceedings constituted "one of the most significant guarantees" of the independence of those proceedings (the *Cooper* judgment, § 117). As to the Permanent President of courts-martial ("PPCM"), the Court not only found the PPCM appointed to the court-martial in the *Cooper* case to be independent, but also that the PPCM constituted an "important contribution" to the independence of an otherwise *ad hoc* tribunal (the *Cooper* judgment, § 118)

Despite the foregoing, which clearly points to a case where procedural guarantees were respected and which was in line with the provisions of the International Court of Justice which allows the appointment of *ad hoc* judges only in contentious cases between States, the European Court has admitted the participation of *ad hoc* judges in cases originating in individual petitions, without respecting the principle of equality of arms and, in many cases, disregarding the duty of impartiality and independence which has imposed on the States under its jurisdiction. To illustrate this point, in the case of *Ernst et al. v. Belgium* (1996), the Court allowed *ad hoc* judge Paul Lemmens, from Belgium, to participate in the hearing of a case originating in an individual petition. Along these lines, in the case of *N.Ö. v. Turkey* (1996), the appointment of *ad hoc* judge F. Gölcüklü by the State of Turkey was admitted, a case wherein an amicable solution was reached. Likewise, in the case of *Martínez-Sala et al. v. Spain* (2004), *ad hoc* judge Antonio Pastor Ridruejo was appointed by the State of Spain.

The issue regarding the appointment of *ad hoc* judges in cases originating in individual petitions is focused precisely on the fact that as individuals are not entitled to appoint an *ad hoc* judge, they are placed at a disadvantage vis-a-vis the power of the State. Furthermore, a violation of objective impartiality, as defined by the European Court itself in the case of *Piersack v. Belgium* (1982), might take place, insofar as there is a reasonable doubt regarding the objectivity with which *ad hoc* judges hear the specific cases for which they are appointed. As long as the State is entitled to appoint a judge to hear a single case, there will always be a reasonable doubt regarding a possible conflict of interests, as the judge may be clearly compromised by the interests of the State. Furthermore, insofar as the judge has to hear a single case, he is not bound by his legitimacy in the Court. In addition, his linkage with his place of origin may bias him in favor of the State which appointed him. What is to be stressed is that while there is an unquestionable violation of the principle of objective impartiality, the other party, that is, the individual, has no set-off possibility whatsoever.

2.2 Ad hoc judges in the Inter-American Court of Human Rights

After discussing the practice of the European Court regarding *ad hoc* judges, it is relevant to analyze the obligations that the Inter-American Court imposes on the States concerning the qualifications of national judges, which is not completely consistent with the practice of the Court regarding the judges that sit on it. The issue here is that the rules imposed by the Convention on the States regarding the impartiality and independence of the judges that sit on domestic courts, must be complied with both by the organs of the Inter-American system and the States themselves.

In order to analyze the foregoing, it should be noted that in the case of *Palamara-Iribarne v. Chile* (2005) the Court refers to judicial impartiality as a fundamental guarantee of due process. In this case, regarding the independence of judges, the Court argued that "the independence of the Judiciary from the other State powers is essential for the exercise of judicial functions,"[10] in accordance with the arguments regarding the matter of division of powers referred to above. In the Court's opinion, "the impartiality of a court implies that its members have no direct interest in, a pre-established viewpoint on, or a preference for one of the parties, and that they are not involved in the controversy."[11] This principle may not be guaranteed by the institution of *ad hoc* judges, since if what is sought is that they account for the situation of their own States, an opportunity is created for them to

[10] Inter-*American Court of Human Rights. Case of Palamara-Iribarne v. Chile (2005).*
[11] *Ibid*.

have a direct interest in the case, given their attachment to their country of origin, thus making the pressure that may be exerted thereon by the States which appointed them explicit.

In accordance with the Inter-American Court, "the judge or court must withdraw from a case brought thereto to be heard where there is some reason or doubt which is in detriment to the integrity of the court as an impartial body. For the sake of safeguarding the administration of justice, it must be secured that the judge is free from all prejudice and that no doubts whatsoever may be cast on the exercise of jurisdictional functions."[12] On account of the foregoing, in principle the participation of *ad hoc* judged should not be admitted either, as it allegedly impairs the impartiality of the court. As a matter of fact, inasmuch as the State appointing the judge may constrain him to a specific outcome, since he will hear a single case and then resume his general duties without any concerns for the legitimacy of the Court itself but for the interests at stake within a given time and space, it is clear that there may be fears regarding the quality in the performance of his duties as a judge.

In the same case, the Court recognized that military officers are not completely impartial insofar as they are hierarchically subordinated and, besides, "their appointment does not depend on their professional skills and qualifications to exercise judicial functions, they do not offer adequate guarantees that they will not be removed and they have not received the legal education required to sit as judges or serve as prosecutors."[13] Along these lines, it can be stated that precisely because they are appointed for a limited period to hear a single case, *ad hoc* judges do not have adequate guarantees that they will not be removed, which results in lack of independence and impartiality.

Lastly, the Court points out that independence and impartiality are requirements for all courts and that "the independence of any judge presumes that his appointment is the result of an appropriate process, that his position has a fixed term during which he will not be removed, and that there are guarantees against external pressures. This has also been endorsed by the UN Basic Principles on the Independence of Judges."[14] Hence, if rigid requirements are established regarding national judges, similar requirements should be established regarding the judges of the Court. As for *ad hoc* judges, it can be observed that their appointment process is not as strict as the appointment of permanent judges, insofar as they are appointed by the State party to the case. Nor are external pressures completely restrained, as it is the State party to the case which appoints *ad hoc* judges, which implies that they might be compromised, thus impairing the above-mentioned objective impartiality of the European Court.

In addition, in the case of *Apitz-Barbera et al. ("First Court of Administrative Disputes") v. Venezuela* (2008), the Court reaffirms the requirement of independence and impartiality of judges. Thus, it refers expressly to temporary judges in Venezuela, who perform similar duties as *ad hoc* judges. In this regard, it points out that "the States are bound to ensure that provisional judges be independent and, therefore, must grant them some sort of stability and permanence in office, for being provisional is not equivalent to being discretionally removable from office. […] Provisional appointments must be an exceptional situation, rather than the rule."[15] From the foregoing, it results that the

[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*
[15] Inter-American Court of Human Rights. *Case of Apitz-Barbera et al. (First Court of Administrative Disputes) v. Venezuela* (2008).

appointment of judges for a single case and for a limited period should not be the general rule.

As it had been put forward upon the creation of the Convention, the institution of *ad hoc* judges is also exceptional and only applicable in contentious cases between States, wherefore it cannot be analogously extended to cases originating in individual petitions, let alone become a usual practice. Exceptional rules should be restricted to the specific case for which they have been established, as they are not the general rule, and may not be extended to any case as the Court may, at any moment, deem relevant, if such case is not in line with the provisions of the instrument applicable by each court.

In turn, the Court argues that "… when provisional judges hold their position as such for a long time or when most judges are provisional, material hindrances to the independence of the judiciary are generated."[16] The same can be said of *ad hoc* judges whose provisional status may impair judicial independence.

Furthermore, the Court explains that "… one of the principal purposes of the separation of powers is to guarantee the independence of judges."[17] Said independence, as stated by the Court, refers both to the institutional and personal quality of a judge. This is also applicable to the institution of *ad hoc* judges, insofar as the independence of the Court as an institution, like the independence of the judge regarding the case, may be vitiated by possible interferences by related powers. Thus, when a State appoints a judge, not only puts the independence of individuals at risk, but also that of the Court itself, as a result of the influence and the power of decision it has.

Likewise, the Court established that "… impartiality demands that the judge acting in a specific dispute approach the facts of the case subjectively and 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."[18] This reinforces the fact that the judge appointed by the respondent State, as a result of his *ad hoc* status, may hold numerous prejudices, either for or against the respondent State, which prevents him from having the required impartiality and which may cast doubt on his decision.

2.3 *Ad hoc* judges in cases originating in individual petitions before the IACHR

Despite the arguments for and against the institution of the *ad hoc* judge in international contentious cases, in accordance with the foregoing, unanimity has been reached by international conventions to admit the institution of *ad hoc* judges under the alleged equality of arms between the States. Though there is always the possibility that *ad hoc* judges are not independent or impartial in the performance of their judicial duties, the will of the States upon the creation and subsequent ratification of the American Convention on Human Rights must be fully respected. Therefore, the consent of the American States has resulted in the application of the institution of the *ad hoc* judge only in contentious cases between States. The foregoing shows that the American Convention on Human Rights has adopted the tradition of such practice in the international sphere, in Courts such as the International Court of Justice, which hears contentious cases between States.

This clarification is relevant to understand that, in accordance with the will of the States upon ratifying the American Convention, this petition is restrained to the

[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.*

application of said institution by the Court exclusively in contentious cases between States. Though the appointment of *ad hoc* judges, as explained in the foregoing paragraphs, in general is not beneficial in any type of cases, in this type of cases specifically it is contrary to the principle of equality of arms. This is an a tenet of international law which holds that for an effective defense to be presented, among other things, the defense and the prosecution must be given the opportunity to present their case under equal conditions before the court, including the required resources and assistance, payment of fees to legal counsels, the capacity to litigate under equal conditions, the same procedural and evidentiary opportunities, etc.,[19] for the sake of protecting due process, as set forth by the Convention (Art. 8 and 25).

It is precisely because *ad hoc* judges lack impartiality and independence that they may tend to favor the State which appointed them, an advantage which is not given to individuals filing a petition and who, therefore, are placed at disadvantage vis-a-vis the State. Though it cannot be presumed that *ad hoc* judges act in bad faith, practice has shown that there are reasonable risks, wherefore their participation should be dispensed with. Impartiality, as pointed out above, must be predicated on objective conditions and beyond any doubts; the fact that *ad hoc* judges are transitorily appointed by a State detracts from their independence regarding it. The State which appoints the *ad hoc* judge may constrain him to a specific outcome, as the judge is restrained to hear a single case and may then may resume his usual activities without concerns for the legitimacy and authority of the Court, but with the interests at stake within a given time and space. Thus, the institution of *ad hoc* judges is barely acceptable in contentious cases between States, as both of them have the opportunity to have a judge –either the national judge or an *ad hoc* judge- sitting on the court who may be either favorable or unfavorable for their interests, which actually allows reaching equality of arms between the States. The foregoing conditions between them allow them to litigate at no apparent disadvantage.

In contrast, it is evident that the lack of impartiality and independence of *ad hoc* judges in individual petitions deepens lack of equality between the parties to the case. It must be understood that the principal passive subject in Human Rights courts is the individual, since, though petitions between States are admitted, as in the case of the American Convention, most cases brought before said courts are individual petitions and, therefore, what is to be sought is the protection of human beings. The difference between the State and the individual at all levels is evident; notwithstanding, these courts have been created to limit the evident power of the former vis-a-vis the latter. Admitting the institution of the *ad hoc* judge implies promoting a lesser level of protection of the individual as from the rationale of the proceedings. Lack of equality of arms between the parties to the case is evident. Therefore, as may be derived from the Convention itself, the appointment of *ad hoc* judges should not be admitted in cases originating in individual petitions.

3. Conclusion

Thus, it is evident that the institution of *ad hoc* judges, whose participation has been widely questioned even in contentious cases between States, is not definitely admissible in cases originating in individual petitions about violations of human rights. The argument which holds that said judges may provide a view on the reality of the State which appoints them is not strong enough to allow an exceptional institution to be applied analogously to factual cases which have not

[19] Cf. Essential notes to be met by a defense system before the ICC. In: *Unión Iberoamericana de Colegios y Agrupaciones de Abogados* [Ibero-American Union of Lawyers' Colleges and Associations]. In: http://www.uibanet.org/doc/CPI001.doc. Last revision: December 4, 2008.

been considered in the provision which sets forth the exception. Extending to cases originating in individual petitions an institution which the American Convention admits as an exception in contentious cases between States based on the practice of the International Court of Justice, is in violation of the Convention.

Furthermore, lack of independence and impartiality is a feature of the institution of *ad hoc* judges, both due to the manner in which they are appointed and to their bonds with the State that appoints them. Likewise, their temporary status prevents them from understanding proceedings within the Inter-American Court in depth.

Along these lines, it is evident that the individual is put at a disadvantage vis-a-vis the State, as the former is not entitled to appoint his own judge, which is in violation of the principle of "equality of arms" and, therefore, of the fundamental right of due process. Thus, when the Inter-American Court, in line with the European Court, urges the States to provide impartiality and independence in respect of due process, it should also do so within the framework of its own international jurisdiction. The example given by a higher authority is the first step toward the legitimacy of its judgments and the subsequent compliance therewith by the States and the individuals.

Finally, it is to be noted that, as a matter of fact, the discontinuance by the Court of the practice of admitting *ad hoc* judges in cases originating in individual petitions will not prejudice the protection of due process by courts. In fact, when the States parties to contentious cases do not appoint an *ad hoc* judge, equality of arms between the individual and the State will be greater, as neither party will have a judge who is specifically linked to a particular case and, therefore, a greater guarantee of impartiality and independence will be provided for the sake of promoting the confidence of citizens in the system for the protection of human rights.

We expect that the foregoing arguments are a useful contribution to the debate on human rights and, particularly, to the discussion regarding the issue of whether the institution of *ad hoc* judges should be admitted within the framework of contentious cases about violations of human rights brought before the Inter-American Court of Human Rights.

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