Ad Hoc Judges and Nationality of Judges in the Inter-American Court of Human Rights

Regarding the Request for an Advisory Opinion filed by the Argentine State

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1. Introduction

On August 14, 2008, the Argentine State filed a Request for an Advisory Opinion[1] before the Inter-American Court of Human Rights (hereinafter referred to as "the Court" or the "IACHR"). Said request refers to the "interpretation of Article 55 of the American Convention on Human Rights" with respect to "the *ad hoc* judge and equality of arms in the proceedings before the Court in the context of a case arising from an individual petition", and to the "the nationality of the judges of the Court and the right to an independent and impartial judge."

The purpose of this work is to analyze the topics introduced by the Request for an Advisory Opinion and to outline a possible posture regarding the questions posed by the Argentine State.

The terms in which the Request for an Advisory Opinion was submitted shall be briefly explained, and the admissibility thereof shall be analyzed in the light of the criteria traditionally used by the Court.

For practical purposes, the development of the main issues is divided into two sections, according to the two questions presented by the Argentine State: the *ad hoc judicature* and the *nationality of the judges.* At all times, the principle of equality of arms shall be taken into account, as well as the specific role of the judges in the Inter-American Court and the right of every person to a fair and impartial trial. The close relationship between both sections shall be easily noticed.

In the final summary, an answer to the Request for an Advisory Opinion shall be drafted.

The main instruments used for the analysis are the American Convention on Human Rights (hereinafter referred to as "the Convention"), the Statute and the Rules of Procedure of the Inter-American Court of Human Rights, and its advisory and adversarial case law. Furthermore, the basic texts of the European System for the Protection of Human Rights shall be taken into account, as well as the national and international doctrine regarding the issues addressed.

[1] Available at http://www.corteidh.or.cr/docs/opiniones/solicitud_OC_21.pdf

2. Request for an Advisory Opinion filed by the Argentine State

For the first time since the creation of the Court, the Argentine State requested an Advisory Opinion on August 14, 2008. Through its Embassy in San José de Costa Rica, the Argentine government forwarded the request to the Secretary of the Inter-American Court of Human Rights, as established by Article 64 of the American Convention on Human Rights.

2.1 Admissibility

The advisory jurisdiction of the Court is provided for in Article 64 of the Convention, which reads as follows:

> Article 64
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> "1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.
>
> 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments."

The Request for an Advisory Opinion was submitted before the Court by Argentina, a State Party to the American Convention and a Member State of the American States Organization. Furthermore, both questions presented in the Request aim to the interpretation of Article 55 of the Convention.

Thus, the Request is framed in subparagraph 1 of Article 64, but not only because Argentina especially claims so. When requesting the interpretation of a provision of the Convention itself (Article 55) with respect to the regulations therein contained as a whole and to the purpose of the Convention, it is clear that it does not constitute the case of subparagraph two of Article 64.

The answer to this advisory opinion shall have special relevance, as whatever the solution, it shall bring consequences for the Inter-American System for the Protection of Human Rights itself. This is so because what is expected to be analyzed is a provision with respect to the adversarial proceedings before the Inter-American Court, which affects the protection of the persons under the jurisdiction of all the States which have accepted the Court's adversarial jurisdiction, or which could do so in the future (that it to say, the "American States").

Therefore, the petition must be admitted and the requested Adversarial Opinion must be issued.

2.2 Content of the Advisory Opinion

The Request for an Advisory Opinion was submitted in the following terms:

a) 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?

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

In the document forwarded, before exposing the rationale preceding each of the questions posed, general considerations were made, which are summarized in the following paragraph:

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

When referring specifically to the questions posed, the Argentine State divided its request into two parts: "The *ad hoc* judge and equality of arms in the proceedings before the Court in the context of a case arising from an individual petition" and "The nationality of the judges and the right to an independent and impartial judge."

The main grounds expressed for the first part were the following:

- The reading of Article 55 of the Convention seems to suggest that the possibility of appointing an *ad hoc* judge -a concept of purely inter-State international procedural mechanisms- would unequivocally lead to understand that said provision would be claimable only in those cases in which the Court had to adjudicate justice in an application filed by one State Party against another State Party, in accordance with Article 45 of the Convention. It is true that the practice of the system allows to verify that the Court has traditionally acknowledged this right to the respondent government within the context of a case arising from an individual petition.
- Although the unequivocal practice of the Court seems to validate the criteria that the States enjoy this right in all circumstances, the analysis of said institute in the context of the treaty and in the light of the present status of the law would seem to suggest that this traditional interpretation should be reexamined, setting limits for the States to appoint an *ad hoc* judge in those cases in which the application filed before the Court arises from an inter-State petition.
- It seems clear that the reason that nourishes the concept of the *ad hoc* judge itself -traditionally accepted in the context of international courts-, is supported only to the extent that the Court is to hear a case submitted before its jurisdiction where one State has instituted proceedings against another due to the eventual non-fulfillment of its

international obligations. Without the inter-State origin, the legal justification to accept the designation of an *ad hoc* judge is susceptible of being challenged and, eventually, of being discarded due to the fact that such a right in favor of the State - in a case brought before the Court arising from an individual petition- would generate an evident prejudice of the right to equality of arms in the proceedings, among the alleged victim - material plaintiff before the Court-, the IACHR itself - formal or procedural plaintiff- and the respondent government.

As to the second question, the following observations were presented:

- It is necessary to adopt measures tending to guarantee, insofar as possible, a decision exempt from any direct or indirect influence that could arise in a specific case as a result of the nationality of a judge of the Court.
- The Argentine State considers that it would be healthy for the system that any judge who is a national of a State that is a party to an application before the Inter-American Court of Human Rights should disqualify himself from taking part in the deliberation of the case and in the decision that the Court adopts, as has occurred in the most recent practice of the Court.
- The potential effect of a judge of the Court being a national of the defendant State is an unnecessary risk that could be rapidly neutralized by the adoption of the disqualification criterion, as at present occurs in the context of the proceedings before the Commission.
- Furthermore, from a point of view a similar to that of the first question, the Argentine State suggests that Article 55(1) of the Convention, interpreted in harmony with the other provisions of the Convention and in the light of the criterion contemplated in Article 29 of the Convention, seems to leave no doubt that the right of the judge who is a national of the defendant State to continue to hear the case would be limited to inter-State petitions and not to cases arising from an individual petition.

3. Presented issues

The issues approached by the Request for an Advisory Opinion submitted by the Argentine State shall be analyzed in this section. The same is organized in two subdivisions, according to the posed questions: The *Ad Hoc Judicature* and *Nationality of the Judges*. Both matters shall be focused on the hypothesis of cases arising from an individual petition. In order to arrive to a positive answer regarding both questions, the study of several aspects which can be considered essential shall be included.

However, as warned in the introduction, both matters are closely related, reason for which this section must be understood as an indivisible aggregate. Inevitably, there shall be cross references, and the partial conclusions presented in the first subdivision shall influence the approach of the second.

3.1 The Ad Hoc Judicature

In order to start the analysis of the first question, it is necessary to cite Article 55 of the Convention:

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.

3.1.1 What is the use of the participation of an *ad hoc* judicature in adversarial cases arising from an individual petition?

The question posed by the Argentine State is motivated by a core argument: the *ad hoc* judge concept is a legal institute typical of inter-State cases and is grounded in the principle of equality of arms, that is to say, in the possibility that both parties have the same procedural tools when it comes to

intervening in the different stages of an adversarial dispute. Thus, as there is no inter-State dispute, the concept has no reason to exist.

It is true that the *ad hoc* judge concept finds its origin in inter-State controversies. Initially, in dispute resolution proceedings and eventually in jurisdictional systems, there were people appointed by each of the States involved in the dispute. Furthermore, the legal concept has been generally conceived as a means to keep the equality of arms between the parties. Thus, the designation of an arbitrator or a judge on the part of each State has worked as a reinsurance for the States, but has also become a useful tool so that to make the States accept the Courts jurisdiction.

Then, the arising question is whether it corresponds to interpret the existence and the intervention of the *ad hoc* judge within the context of the American Convention in the same way.

The criterion adopted by the Court from its very beginning can not be set aside. In its Advisory Opinion OC-2/82[2], the Court emphasized that "…modern 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…" In the light of this conception of the Convention, if the *ad hoc* judge concept is thought as a tool which existence is only valid in the context of an inter-State dispute, said figure immediately losses its usefulness. In fact, it should have never been used.

But the Court has chosen to use it. That is because the *ad hoc* judge concept can be much more than a tool to maintain the equality of arms. And, specifically in the case of human rights protection, its usefulness is given by completely different reasons, which set aside that "procedural" conception and which are consistent with the different vision that has to be adopted when analyzing a modern human rights treaty.

The *ad hoc* judge fulfills an important consultancy function with respect to domestic legislation. Being said judge a jurist of the highest moral authority and of recognized competence in the field of human rights, who possesses the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which he/she is national or of the state that proposes him/her as candidate, who better than the *ad hoc* judge to actively intervene in the Court deliberations? His/her presence shall enable the Court to have a standpoint which contemplates an additional profoundness regarding the domestic provisions of the respondent government and that at the same time maintains impartiality.

José M. Bandres Sánchez-Crizat[3] argues that with respect to the knowledge of the domestic law of the country in question, the exercise of the defense on the part of the agents and the counselors appointed by the respondent government, as well as by the State attorneys, is enough. He further argues that the presence of the *ad hoc* judge implies an unacceptable doubt on the legal knowledge by the full incumbent judges.

This objection included, on the one hand, an inadequate assimilation of the *ad hoc* judge role to that of the agents or attorneys of the respondent government and, on the other hand, an underestimation of the advantages of his/her participation.

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[2] See Paragraphs 29 to 33, OC-2/82.

[3] Bandres Sánchez-Crizat, José M. *El Tribunal Europeo de los Derechos del Hombre [The European Human Rights Court]*. Bosch, Barcelona, 1983, p. 23. Quoted in: Vidal Ramírez, Fernando. *La Judicatura Ad Hoc [The Ad Hoc Judicature]*. In: *Seminar Records "El sistema interamericano de protección de los derechos humanos en el umbral del siglo XXI" [The Inter-American System for the Protection of Human Rights in the threshold of the 21st Century]*. Inter-American Court of Human Rights, San José, Costa Rica, 2003, pp. 589-594.

The task of the attorneys and agents of the respondent government is to present the position of that State, that is, to represent it. The presentation they make of the domestic legislation and the arguments they use, in general shall tend to benefit the State they represent. That is their main function, as the State has the right to be defended before the Court. In contrast, the *ad hoc* judge performs his/her task in an individual capacity, and must be completely unbiased and independent in the exercise thereof.

On the other hand, stating that the presence of the *ad hoc* judge implies to challenge the legal knowledge of the permanent judges is an pointless argument. When it comes to protecting human rights, the Court can not be deprived from the possibility of having a member who is jurist with deep knowledge of the domestic legislation of the respondent government. It is not admissible that the *ad hoc* judge participation may result counterproductive for the protection system as that implies admitting that said judge may have a deeper knowledge as to the legislation of a specific country. As some jurists specialize in certain areas of law and when designating the Court composition that can be taken into account, it is not illogical to think that the person appointed by one State to perform in the capacity as *ad hoc* judge may contribute from a different perspective, which may be valuable for a better resolution of a case.

Moreover, the *ad hoc* judge contribution is not limited to the legal aspect: the *ad hoc* judge shall also have a deeper knowledge of the social, cultural and economic situation and shall be able to provide a broader vision of the circumstances of the respondent government and their possible influence in the case in question. To sum up, the *ad hoc* judge participation shall enable a contextualized analysis of better quality.

3.1.2 The *Ad hoc* judicature: impartiality and independence

A second criticism is presented by renown jurist Héctor Faúndez-Ledesma[4], who affirms that the *ad hoc* judge appointment has no sense whatsoever in the human rights field and contravenes the purpose of the institute itself, which is to seek equality between the parties and not an advantage for the respondent government. “The objection is then grounded in the fact that neither the victim whose rights have been violated nor the Commission have representation in the Court, and neither can they appoint an *ad hoc* judge nor be present during the debate of the issues prior to the decisions to be rendered.”[5] Ledesma explains that if the Court is a judicial body and its members are elected in their individual capacity having to act with absolute independence and impartiality, it is unacceptable that a State Party may appoint a judge it chooses to hear the controversy and to participate in the adoption of a decision, which is supposed to be the result of an impartial assessment of the arguments of

[4] Fáundez-Ledesma, Héctor. *La Independencia e Imparcialidad de los Miembros de la Comisión y de la Corte: Paradojas y Desafíos* [The Independence and Impartiality of the Members of the Commission and the Court] In: *El Futuro del Sistema Interamericano de Protección de los Derechos Humanos* [The Future of the Inter-American System for the Protection of Human Rights]. Inter-American Institute of Human Rights, San José, Costa Rica, 1998, p. 195. Quoted in: Vidal Ramírez, Fernando. *La Judicatura Ad Hoc* [The *Ad Hoc* Judicature] in *Seminar Record “El sistema interamericano de protección de los derechos humanos en el umbral del siglo XXI” [The Inter-American System for the Protection of Human Rights in the threshold of the 21st Century]*. Inter-American Court of Human Rights, San José, Costa Rica, 2003, pp. 589-594.

[5] Vidal Ramírez, Fernando, *La Judicatura Ad Hoc* [the *Ad Hoc* Judicature], in *Seminar Record “El sistema interamericano de protección de los derechos humanos en el umbral del siglo XXI” [The Inter-American System for the Protection of Human Rights in the threshold of the 21st Century]*. Inter-American Court of Human Rights, San José, Costa Rica, 2003, pp. 589-594.

fact and of law. He concludes that the right acknowledged to the State Party to a lawsuit to appoint an *ad hoc* judge is contrary to the letter and the spirit of the Convention.

As already mentioned, the justification of the *ad hoc* judge role in proceedings arising from an individual petition is not related to the principle of equality of arms (see point 3.1.1). The criticism described regarding the impartiality and independence of the *ad hoc* judges in office is analyzed below.

3.1.2.1 The appointment of the *ad hoc* judge

It is necessary to remember the manner in which the State must carry out the *ad hoc* judge appointment. Subparagraph four of Article 55 of the Convention sets forth that an *ad hoc* judge shall possess the qualifications indicated in Article 52.

> Article 52
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> 1. The Court shall consist of seven judges, nationals of the member states of the Organization, elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates.
>
> 2. No two judges may be nationals of the same state.

So, the *ad hoc* judge exercises his position *in an individual capacity, must be a jurist of the highest moral authority and of recognized competence in the field of human rights and must possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates*. For instance, should Argentina appoint an *ad hoc* judge, that person should possess the qualifications set forth in order to be appointed a member of the Supreme Court, namely: be a lawyer with eight years of practice, be of 30 years of age and have completed six years as a national citizen.[6] In the case of Peru, the candidate should comply with the following requirements to be a member of the Supreme Court or the Constitutional Court: be of Peruvian nationality, be a citizen and be older than 45 years of age, having been a judge of the High Court or High Prosecutor for 10 years or having practiced as a lawyer for 10 years or as a university professor in a legal subject for 15 years.[7]

[6] The text of Article 111 of the National Constitution, which sets forth the requirements to be a judge of the National Supreme Court, refers to the requirements necessary to be a Senator, set forth in Article 55 of the Constitution. Of course, there are certain conditions to be a Senator which are irrelevant to be appointed Judge. Thus, the condition of "being a natural of the Province which elects him, or with two years of immediate residence therein" is not applicable. On the other hand, "receive an annual income of two thousand pesos fuertes" is a condition in disuse. The majority of the doctrine considers that a *contra legem* costume has annulled this requirement.

[7] Vidal-Ramírez, Fernando, *op.cit.*

But apart from the general requirements set forth by the Convention, the Court Rules of Procedure adds other provisions of great relevance. Thus, *ad hoc* judges must take the same oath as all the judges of the Court.[8]

On the other hand, the same regime of incompatibilities, impediments and disqualifications is applicable to them. Said regime is set forth in Articles 18 and 19 of the Court Statute:

Article 18. Incompatibilities

> 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.
>
> 2. In case of doubt as to incompatibility, the Court shall decide. If the incompatibility is not resolved, the provisions of Article 73 of the Convention and Article 20(2) of the present Statute shall apply.
>
> 3. 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.

Article 19. Disqualification

> 1. Judges 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.
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> 2. 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.
>
> 3. If the President considers that a judge has cause for disqualification or for some other pertinent reason should not take part in a given matter, he shall advise him to that effect. Should the judge in question disagree, the Court shall decide.

[8] Article 11 of the Statute: "1. Upon assuming office, each judge shall take the following oath or make the following solemn declaration: "I swear" - or "I solemnly declare" - "that I shall exercise my functions as a judge honorably, independently and impartially and that I shall keep secret all deliberations."

4. When one or more judges are disqualified pursuant to 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.

Some supplementary provisions are included in Articles 18 and 19 of the Court Rules of Procedure:

Article 18. Judges *Ad Hoc*

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.

Article 19. Impediments, excuses and disqualification

1. Impediments, excuses and disqualification of Judges shall be governed by the provisions of Article 19 of the Statute.

2. Motions for impediments and excuses must be filed prior to the first hearing of the case. However, if the grounds therefore were not known at the time, such motions may be submitted to the Court at the first possible opportunity, so that it can rule on the matter immediately.

3. When, for any reason whatsoever, a judge is not present at one of the hearings or at other stages of the proceedings, the Court may decide to disqualify him from continuing to hear the case, taking all the circumstances it deems relevant into account.

There are numerous examples in the Court history which show how these mechanisms have worked, guaranteeing that the *ad hoc* judge function is exercised with total impartiality and independence.

In the case of Paniagua Morales *v.* Guatemala[9], the Court had the chance to refer to some aspects of the *ad hoc* judicature which had not been addressed before. The State of Guatemala had appointed Edgar Enrique Larraondo-Salguero as Judge *Ad Hoc* and four months later it informed the Court the designation of Alfonso Novales-Aguirre to replace him. Then the Court issued an order in which it rejected the request for substitution for the following reasons:

- The *ad hoc* judge, in terms of his/her nature, is similar to the other judges of the Inter-American Court as he/she does not represent a government in particular and is part of the Court in an individual capacity. Therefore, the *ad hoc* judge must comply with the same requirements as the full incumbent judges. This is so due to the need of protecting the independence and impartiality of an international court of justice.
- The Statute of the Court sets forth the same rights, duties and responsibilities for all the judges, whether they are permanent or *ad hoc* (Article 10(5)[10], pursuant to Chapter IV of the Statute).
- For the specific case of *Ad Hoc* Judge Edgar Enrique Larraondo-Salguero, after having been appointed and after having sworn, he joined the Court as judge and even participated in the activities related to the case. At that time, the Court had no knowledge of any factor which may have prevented him from serving as *ad hoc* judge. In those circumstances, he could not be replaced.
- On the other hand, the Court noticed that the candidate proposed by the government as a substitute had also been appointed as Government Assistant for the public hearing of preliminary objections. This fact would have constituted sufficient grounds for establishing the incompatibility with the exercise of the judge position, in accordance with Article 18 of the Statute.

A similar case occurred when Oscar Luján-Fappiano was designated *ad hoc* judge for the case of Carpio Nicolle[11]. At that time, with the proceedings already started, the Guatemalan State requested an authorization to substitute Fappiano for Alejandro Sánchez-Garrido. The Court rejected the substitution based on identical grounds as those argued in the case of Paniagua Morales. It further argued that the *ad hoc* judge functions begin the moment the Court accepts the position and takes the oath established in Article 11 of the Court's Statute. In this case, Oscar Luján-Fappiano had already forwarded his sworn statement accepting the position, had incorporated to the Court and had received the pertinent documentation.

Furthermore, there were multiple occasions in which the Court admitted the disqualification or resignation submitted by the already appointed *ad hoc* judge himself:

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[9] IACHR. **Case of "Panel Blanca" (Paniagua Morales *et al*) *v*. Guatemala.** Merits. Judgment of March 8, 1998. C Series, No. 37. Available at: http://www.corteidh.or.cr/casos.cfm

[10] **Article 10. *Ad hoc* judges** "… 5. The provisions of Articles 4, 11, 15, 16, 18, 19 and 20 of the present Statute shall apply to ad hoc judges."

[11] IACHR. C Series, No. 117. Available at: http://www.corteidh.or.cr/casos.cfm

For instance, the case of David Pezúa-Vivanco, who was elected by the Peruvian government to hear the case of Cesti Hurtado.[12] After his appointment, Pezúa-Vivanco informed the Court that his designation was incompatible with his position as Executive Secretary of the Executive Committee of the Peruvian Judicial Power. The resignation was accepted by the Court.

In order to hear the case of Baena[13], Panama chose Rolando Adolfo Reyna-Rodríguez, who informed the Court that he had been somehow involved in the case of "Jorge A. Martínez *v. Instituto de Recursos Hidráulicos y Electrificación* (Institute of Hydraulic Resources and Electrification)" as President of the Conciliation and Decision Meeting No. 4, and rejected the position on the grounds of lack of jurisdiction, without taking up the case. He further informed that he would develop his activities in a position at the International Maritime Affairs of the Republic of Panama. Consequently, he further requested the Court to affirm whether these facts constituted grounds for an impediment. The Court then ordered the Secretariat to request Reyna-Rodríguez information on the characteristics and objectives of the above mentioned judicial proceedings and on the position –within the structure of the State of Panama- of the office or department of International Maritime Affairs. In response, Reyna-Rodríguez informed that the proceedings in which he had participated as President of the Conciliation and Decision Meeting No. 4 were part of a labor lawsuit submitted by several dismissed workers. He further informed that the Panamanian Maritime Authority is an independent institution that deals with all the affairs regarding merchant vessels. Finally, the Court decided that Reyna- Rodríguez could not exercise the *Ad Hoc* Judge position.

On the other hand, some people have been prevented from exercising the *ad hoc* judge position after the submission of objections presented by the Commission or the claimants representatives:

Guatemala appointed Francisco Villagrán-Kramer as *ad hoc* judge to hear the case of Myrna Mack Chang.[14] The representatives of the victims next of kin forwarded a report to the Court in which they objected said appointment. The State then decided to replace him by Arturo Martínez-Gálvez.

In the case of *19 Comerciantes* (19 Traders) *v.* Colombia[15], the State appointed Rafael Nieto-Navia as *Ad Hoc* Judge. Two years later, the Inter-American Commission on Human Rights forwarded the Court a brief attaching a copy of a communication issued by the *Comisión de Juristas Colombianos* (Commission of Colombian Jurists), the entity which represented the victims and their next of kin. In that brief, the Commission informed its opinion regarding the existence of some supervening impediments for the exercise of the *ad hoc* judge position by Nieto Navia in the case in question. The Court suspended the proceedings and sent a copy of the Commission request to the *ad hoc* judge, who answered that he did not consider that there were any impediments for him to perform in that capacity, but that for the sake of transparency, he agreed to let the Colombian government decide the appointment of another judge. Subsequently, the Court President ordered the Secretary to

[12] IACHR. **Case of Cesti Hurtado *v.* Peru.** Interpretation of the Judgment on the Merits. Judgment of January 29, 2000. C Series No. 65. Available at: http://www.corteidh.or.cr/casos.cfm

[13] IACHR. **Case of Baena Ricardo *et al v.* Panama.** Merits, Reparations and Costs. Judgment of February 2, 2001. C Series No. 72. Available at: http://www.corteidh.or.cr/casos.cfm

[14] IACHR. **Case of Myrna Mack Chang *v.* Guatemala.** Merits, Reparations and Costs. Judgment November 25, 2003. C Series No. 101 Available at: http://www.corteidh.or.cr/casos.cfm

[15] IACHR. **Case of 19 Comerciantes *v.* Colombia.** Merits, Reparations and Costs. Judgment of July 5, 2004. C Series No. 109. Available at: http://www.corteidh.or.cr/casos.cfm

grant a term of 30 days to designate a new judge *ad hoc*. Ernesto Rey-Cantor was finally appointed.

On the other hand, the Dominican government selected Ambassadress Rhadys Abreu de Polanco for the case of Niñas Yean y Bosico[16] (Yean and Bosico Girls), and indicated that her functions were not incompatible with her appointment. The claimants representatives presented an objection to that appointment stating that there was an incompatibility situation and conflict of interests. Abreu de Polanco submitted a note rejecting the objection. The Commission also forwarded its opinion to the Court, which decided that the Ambassadress participation in the proceedings before the Inter-American Commission with regard to the case constituted an impediment for the exercise of the *ad hoc* judicature.

Finally, the Court has also rejected appointments that were made after the expiration of the term set forth by the Rules of Procedure. That was the case, for instance, of Oscar Luján-Fappiano, who was appointed by the Guatemalan State for the case of Molina Theissen.[17]

A similar situation took place in the case of Apitz-Barbera.[18] The Venezuelan State had requested a term extension for the appointment, which was granted by the Court. When the extended term expired, the Commission stated that "the appointment of an *ad hoc* judge is only pertinent when a State files a petition against another State." Finally, after the term set forth had expired, Venezuela designated Juan Vicente Ardilla for the task. The Commission then requested the Court to consider that the State had not exercised its right to appoint an *ad hoc* judge. The Court rejected the appointment as it was not made within the fixed term, but it did not admit the initial statement made by the Commission.

It is clear, then, that the mechanism of impediments and disqualifications, as well as the incompatibilities, are taken into account and duly respected. Any system for the appointment of judges implies risks, but we can say that in the case of the Inter-American Court, the limitation system herein explained, has reduced to the minimum possible extent the possibility that the *ad hoc* judicature is exercised by people who do not honor the impartiality and independence oath.

3.1.2.2 Exercise of the *ad hoc* judicature

Next, the way in which the *ad hoc* judicature has been exercised by individuals who complied with the necessary requirements to be appointed and who had no incompatibilities or impediments whatsoever to take up the position will be analyzed. In order to do so, a study of the adversarial cases adjudicated by the Court from its beginning until the case of

[16] IACHR. **Case of the Yean and Bosico Girls *v.* Dominican Republic.** Preliminary Objections, Merits, Reparations and Costs. Judgment of September 8, 2005. C Series No. 130. Available at: http://www.corteidh.or.cr/casos.cfm

[17] IACHR. **Case of Molina Theissen *v.* Guatemala.** Merits. Judgment of May 4, 2004. C Series No. 106. Available at: http://www.corteidh.or.cr/casos.cfm

[18] IACHR. **Case of Apitz-Barbera *et al* ("Corte Primera de lo Contencioso Administrativo"- First Administrative Adversarial Court) *v.* Venezuela** Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. C Series No. 182. Available at: http://www.corteidh.or.cr/casos.cfm

"Heliodoro Portugal *v.* Panama"[19] [20] shall be conducted. It is worth mentioning that all the cases arose from an individual petition.

In order to summarize, the analysis shall be limited to the participation of *ad hoc* judges in the judgments on the merits and preliminary objections (only when adjudicated separately). Other types of judgments shall be totally set aside, whether they are interpretation, costs and reparation judgments (when adjudicated separately).

Table No. 1 indicates the 42 *ad hoc* judges appointed to hear 60 cases.[21] [22] For different reasons -some of which were already analyzed in the section above-, in fifteen of those cases the *ad hoc* judge did not finally exercise his/her position in the preliminary objections stage or when rendering the judgment on the merits. Thus, of those 42 judges, only 31 effectively exercised their position. One person did so in four opportunities (Fernando Vidal-Ramírez); three in three occasions (Alejandro Montiel-Argüello; Julio Barberis and Rigoberto Espinal- Irías); six did so twice (Alejandro Sánchez-Garrido; Antonio A. Cançado-Trindade; Arturo Martínez-Gálvez; Ernesto Rey-Cantor; Javier de Belaunde-López de Romaña and Hernán Salgado-Pesantes); and other twenty-one persons performed as *ad hoc* judges only once. Only in one case did one person exercise the *ad hoc* judicature in the preliminary objections instance and the other, when rendering the judgment on the merits.

It is interesting to notice that out of those 31 *ad hoc* judges, five were members of the Court as full incumbent judges, whether before or after the exercise of the position as *ad hoc* judges. We refer to Julio Barberis; Antonio A. Cançado-Trindade; Alejandro Montiel-Argüello; Rafael Nieto-Navia and Héctor Salgado-Pesantes.

Furthermore, not always has the *ad hoc* judge been a national of the respondent government which appointed him for that position. That is the case of judge Antonio Augusto Cançado-Trindade, a Brazilian citizen elected to be an *ad hoc* judge in two occasions by the government of Surinam. Also the case of Julio Barberis, an Argentine citizen, who acted as *ad hoc* judge appointed by his country of origin but also by Colombia. Also, Alejandro Montiel- Argüello, who was born in Nicaragua, was appointed twice by his country and other two times by El Salvador (exercising the position only once of these last two occasions).

Additionally, the participation of the *ad hoc* judges shall be analyzed through the opinions they issued. For that purpose, the judgments on the merits shall be computed on the one side and, on the other, the judgments on preliminary objections.[23] It is worth mentioning that those judgments which are also part of the decision on the preliminary objections shall be computed only as judgments on the merits (the position reflected in these cases is, invariably, the same in both aspects of the judgment).

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[19] IACHR. **Case of Heliodoro Portugal *v.* Panama.** Preliminary Objections, Merits, Reparations and Costs. Judgment August 12, 2008. C Series No. 186. Available at: http://www.corteidh.or.cr/casos.cfm

[20] After the execution of the statistic analysis, the Court issued judgments on the merits in four other cases: **Case of Bayarri *v.* Argentina; Case of Tiu Tojín *v.* Guatemala; Case of Ticona Estrada *et al v.* Bolivia; Case of Valle-Jaramillo *et al v.* Colombia**. Only Guatemala appointed an *ad hoc* judge for the case. Argentina and Bolivia omitted the appointment, while Colombia expressly waived that possibility. These cases have not been taken into account for the elaboration of tables and charts, and neither have they been considered for the statistic analysis.

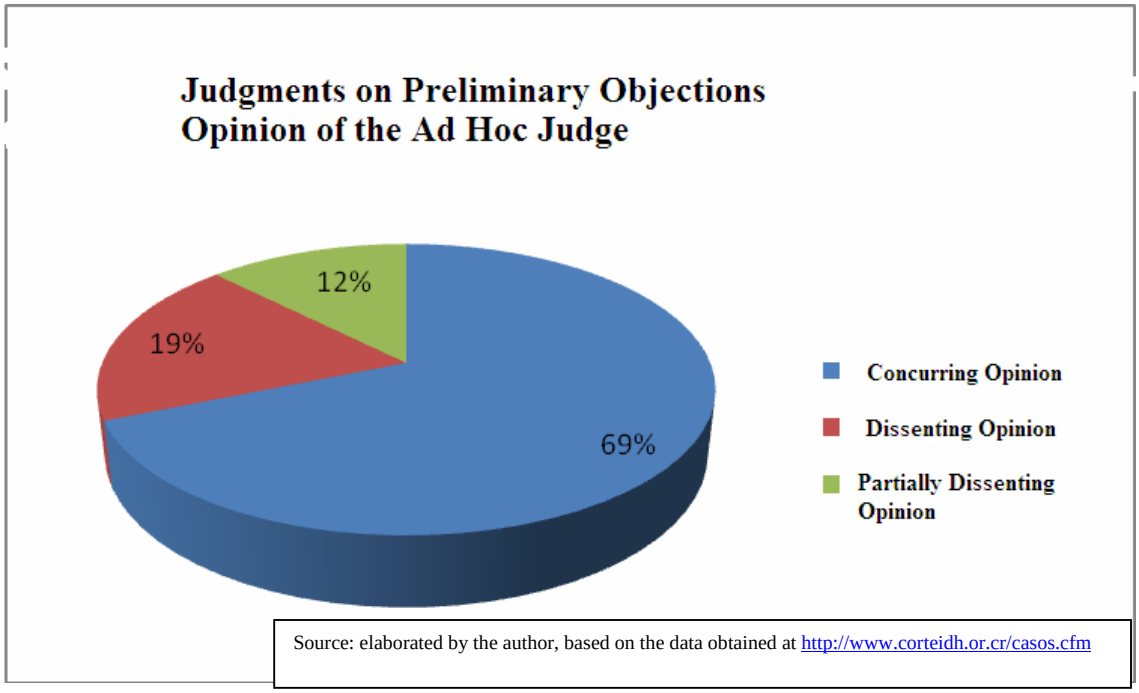
[21] See Annex No. 1: Adversarial Cases in the Inter-American Court of Human Rights (until "Heliodoro Portugal *v*. Panama")

[22] See Annex No. 2: List of *Ad Hoc* Judges designated to act in the Inter-American Court of Human Rights (until "Heliodoro Portugal *v*. Panama").

[23] See Annex No. 1.

Sixteen judgments on preliminary objections had the participation of an *ad hoc* judge. In eleven occasions, the *ad hoc* judge issued a concurring opinion in agreement with the majority of the Court. Only in one of those eleven occasions the majority rejected the preliminary objections as a whole and decided to shelve the case file.[24] On the other hand, there were three dissenting opinions and two partially dissenting opinions.

Graphic No. 1



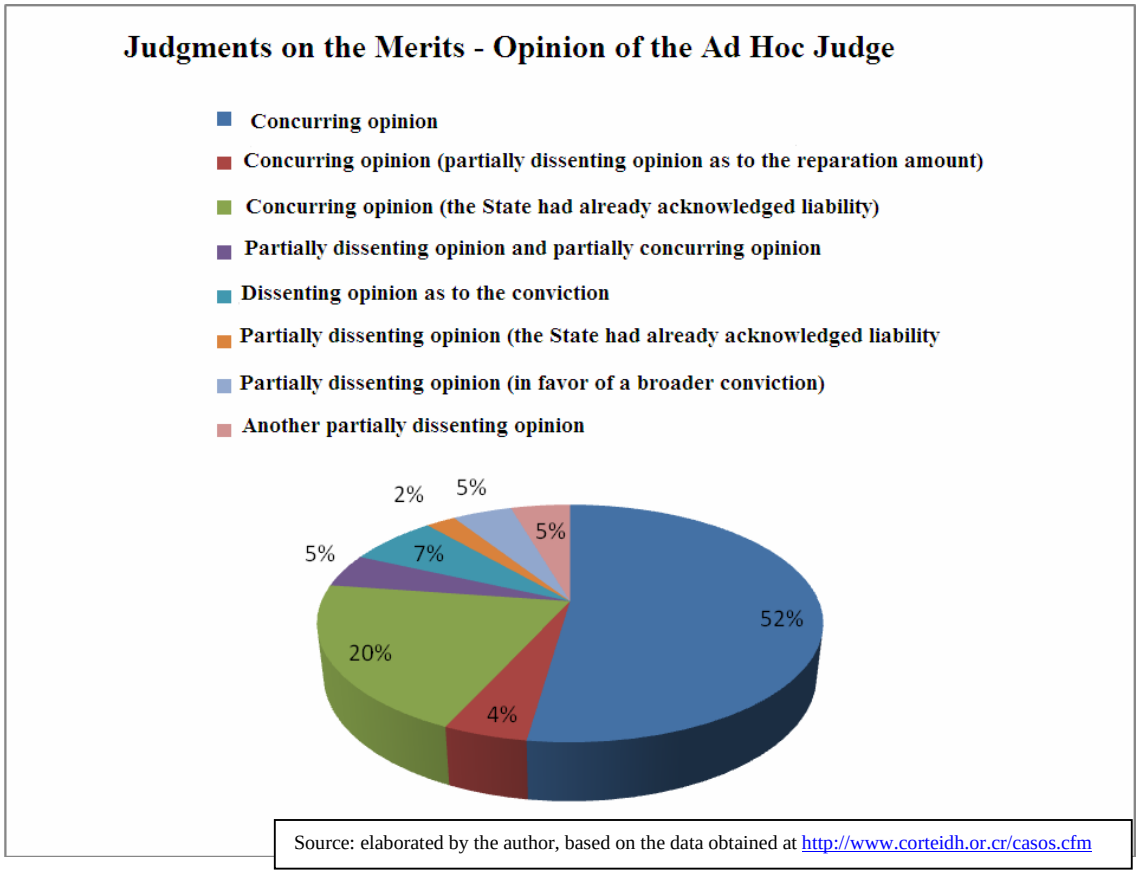
Source: elaborated by the author, based on the data obtained at http://www.corteidh.or.cr/casos.cfm

Forty-four of the 45 cases in which an *ad hoc* judge participated had judgments on the merits (only in Cayara *v.* Peru the Court decided to set the case file aside in the judgment on preliminary objections). In 34 occasions, the *ad hoc* judge issued a concurring opinion in agreement with the majority of the Court. It is worth mentioning that in nine of them, the respondent government had already acknowledged its liability for human rights violations at different stages of the proceedings before the Court. Other two opinions of this group are partially dissenting, but only as to the amount set forth as reparations that had to be paid by the respondent governments. The remaining ten cases were divided in the following manner: two partially dissenting opinions and partially concurring opinions as to the violations by which the State had to be convicted; three dissenting opinions regarding the conviction and five partially dissenting opinions as to the violations mentioned as grounds for the conviction. It is important to mention that one of the partially dissenting opinions was issued by Judge *Ad*

[24] IACHR. **Case of Cayara *v.* Peru.** Preliminary Objections. Judgment of February 3, 1993. C Series, No. 14. Available at: http://www.corteidh.or.cr/casos.cfm

Hoc Jorge Santistevan de Noriega in the case of García-Asto and Ramírez Rojas *v*. Peru[25], where the Peruvian government had already acknowledged its liability for the violations, reason for which the dissenting opinion was on how to interpret said acknowledgement. On the other hand, other two partially dissenting opinions issued by *Ad Hoc* Judge Cançado-Trindade, in the cases of Aloeboetoe *v*. Surinam[26] and Gangaram Panday *v*. Surinam[27], stated that the State had to be convicted for the violations the majority of the Court had not considered proven.

Graphic No. 2



Source: elaborated by the author, based on the data obtained at http://www.corteidh.or.cr/casos.cfm

[25] IACHR. **Case of García-Asto and Ramírez Rojas *v*. Peru.** Preliminary Objection, Merits, Reparations and Costs. Judgment of November 25, 2005. C Series No. 137. Available at: http://www.corteidh.or.cr/casos.cfm
[26] IACHR. **Case of Aloeboetoe *et al v.* Surinam.** Merits. Judgment of December 4, 1991. C Series No. 11. Available at: http://www.corteidh.or.cr/casos.cfm
[27] IACHR. **Case of Gangaram Panday *v.* Surinam.** Merits, Reparations and Costs. Judgment of January 21, 1994. C Series No. 16. Available at: http://www.corteidh.or.cr/casos.cfm

It is clear –and this argument is reinforced by the reading of the judgments- that in the great majority of the cases, the *ad hoc* judges have exercised their position in an unbiased and independent manner. It is not expected to ascertain herein that the proper exercise of the *ad hoc* judicature implies to issue concurring opinions with the rest of the Court, but the statistics presented shows that the *ad hoc* judges do not systematically vote in favor of the State which has appointed them. In 88% of the judgments on the merits, the *ad hoc* judge agreed –totally or partially- with the conviction of the respondent government.

3.1.3 Practice of the Inter-American Court

In the case of Castañeda-Gutman *v*. Mexico[28], at the time of the appointment of *ad hoc* judge Claus Werner von Wobeser Hoepfner, the IACHR repeated the argument it had presented in the case of Apitz-Barbera *v*. Venezuela. It then stated that the *ad hoc* judge concept is not applicable to cases arising from petitions regarding human rights violations filed by individuals. That is precisely the essential point of the question posed by the Argentine State in its Request for an Advisory Opinion. This section has tried to show several reasons why such an ascertainment should be discarded and different facts which evidence that the criticism regarding the practice of the Court is not duly justified.

But also, the practice itself constitutes a critical argument. Even though the appointment of *ad hoc* judges in cases filed by individual petitioners does not arise from the text of the Convention, its Statute or its Rules of Procedure, it is true that the Inter-American Court of Human Rights has been very clear from its very beginning: the respondent government may, in any case (provided there is not a national of the State involved among the members of the Court), designate an *Ad Hoc* Judge in the conditions set forth by convention and by statute. The present context does not justify in any manner whatsoever the reexamination of the interpretation traditionally applied by the Court. Practice has shown that the *ad hoc* judge concept is compatible with the cases which are not inter-State. When analyzing the cases in which *ad hoc* judges have participated, it can be observed that they have effectively assumed their role in an individual capacity and, in general, keeping their independence and unbiasedness. And when this has been at stake, both the Court and the Commission have rapidly act to safeguard the proper protection of human rights. It does not seem that the right of equality of arms during the proceedings is affected when the *ad hoc* judges participation is exercised pursuant to the terms of the Convention, the Statute and the Rules of Procedure.

On the other hand, we can not forget the rules of interpretation set forth by the Vienna Convention on the Law of Treaties, 1969[29]:

Interpretation of Treaties

31. General rule of interpretation

[28] IACHR. **Case of Castañeda Gutman *v.* Mexico.** Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008. C Series No. 184. Available at: http://www.corteidh.or.cr/casos.cfm

[29] U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, enforced on January 27, 1980. Available at: http://www.derechos.org/nizkor/ley/viena.html

1. 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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

The interpretation the Court has given to the American Convention, from its beginning, is the most adequate according to the context of the Treaty and taking its aim and purpose into account. The advantages of the *Ad Hoc* judicature have already been presented for the better adjudication of the cases brought before the Court. And the special interpretation the Convention deserves has to be remembered, as a modern treaty on human rights which imposes the obligation of not setting aside institutes which may enrich the resolutions which tend to protect human rights contributing with different versions.

Moreover, if we observe paragraph 3(b) of Article 31 of the Vienna Convention on the Law of Treaties, it can be noticed that, together with the context, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account." From the first adversarial case brought before the Court ("Velásquez-Rodríguez *v.* Honduras") until the last one, the practice has been consistent, allowing the respondent government the possibility to appoint an *Ad Hoc* judge. In fact, fifteen of the 24 countries which are parties to the Convention and, specifically, of the 21 countries which have acknowledged the adversarial jurisdiction of the Court, have appointed, at least once, an *Ad Hoc* judge to act before the Court in an adversarial case arising from an individual petition.[30]

So far, no State Party has objected that practice. It is true that, in recent cases (including three of the last four heard by the Court), some States have decided not to appoint

[30] Honduras, Surinam, Peru, Guatemala, Argentina, Panama, Bolivia, Nicaragua, Colombia, Costa Rica, Paraguay, Ecuador, El Salvador, Dominican Republic and Mexico designated at least once an *Ad Hoc* Judge to act in the Court. Apart from these fifteen countries, Chile, Uruguay, Barbados, Venezuela, Brazil and Haiti have also acknowledged the adversarial jurisdiction of the Court, although they have never appointed an *Ad Hoc* Judge (in the case of Uruguay, it has never been a party to a case before the Court).

an *ad hoc* judge or have expressly waived such a prerogative. However, we do not consider that this contradicts a practice which has consisted, precisely, in the existence of the possibility of appointing an *ad hoc* judge and not in the obligation to do so. That possibility of the State choosing not to appoint an *ad hoc* judge shall always remain, according to the text of the Convention and the practice of the Court: that is precisely how that institute has been provided for in the Inter-American system.

3.2 The nationality of the judges

Doubting on the jurists capacity to exercise the judicature in an independent and unbiased manner based exclusively on a nationality criterion is, at least, questionable. Not only has it been observed that there are cases in which the States have not appointed nationals to exercise the position, but also how those who have been designated can exercise their role in a responsible way, and even disqualify themselves in view of the slightest perception of vulnerability of the impartiality and independence of the members of the Court. Of course that there is always a margin for mistakes. And that is why there is a control system –already analyzed- which allows both the Commission and the representatives to present objections, and the Court itself to decide on the admissibility of the participation of a certain person in the role of *ad hoc* judge.

Additionally, the nationality of the Inter-American Court full incumbent judges must be analyzed. Once again, the second question posed by the Argentine government:

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

Article 55(1) of the Convention sets forth that: "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."

Although there are no doubts as to the interpretation of that provision in the sense that the judge is to decide whether to hear the case or not, the posing of the question makes sense in consistency with the first question posed. That is why, apart from the arguments already presented in the first part dedicated to the *ad hoc* judicature, other specific issues regarding the nationality of the judges are added.

The rationale presented in paragraphs 3.1.1 (What is the use of the participation of an *ad hoc* judge in adversarial cases arising from a petition submitted by an individual?) and 3.1.2 (The *ad hoc* judicature: impartiality and independence), specifically as to the requirements to be appointed judge, are totally applicable to this second question. That is to say, if due to the nationality of the Court judges, these are assimilated –as expected by the question posed- to *ad hoc* judges, the aspects already noticed on the matter must not be disregarded.

Thus, if a permanent judge of the Court is a national of the respondent government, his hearing of the case evidently presents the same advantages already pointed out for the case of the *ad hoc* judicature. Furthermore, not only does judge comply with the requirements

set forth by the Convention in order to act in that position, but also has been elected to exercise it pursuant to the procedure established for that matter in Article 53[31] of said instrument. Additionally, the judge has the possibility to disqualify himself, according to the above described procedure, should he/she consider he/she must not take up the case.

3.2.1 Judges who are nationals of a State Party to a case arising from an individual petition and their exercise in the Inter-American Court.

In accordance with Article 55(1) of the Convention, 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. In the study of the adversarial cases brought before the Inter-American Court[32], it is observed that the Court has had –among its members- twelve judges who were nationals of the respondent government[33], in 32 different cases. In sixteen cases, there were both disqualifications and agreements to hear the case. Ten of the sixteen times in which they presented a self disqualification, an *ad hoc* judge was appointed. On the other hand, at least once, the national judge who declined did not do so due to his nationality[34], but to the incompatibility arising from the fact of having participated in proceedings before the IACHR.

On the other hand, judges who did not decline had to assign the Court Presidency in two different occasions in order to hear the case. That was the case of judges Nieto-Navia and García-Ramírez, in the cases of Caballero-Delgado and Santana *v.* Colombia[35], and Alfonso Martín del Campo-Dodd *v.* Mexico[36], respectively. Additionally, in the case of Carcazo[37], judge Arilio Abreu-Burelli, who had not disqualified himself, informed the Court that, due to force majeure reasons, he could not participate in the deliberations and the signature of the judgment.

Next, the participation of national judges of the Inter-American Court in adversarial cases arising from an individual petition shall be analyzed (until the case of "Heliodoro Portugal *v.* Panama"). The opinions regarding judgments on the merits and on preliminary objections (when treated separately) shall be taken as a reference.

As to the judgments on preliminary objections, four of them had the participation of a member of the Court who is a national of the respondent government. In all the cases, they

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[31] Article 53: 1. The judges of the Court shall be elected by secret ballot by an absolute majority vote of the States Parties to the Convention, in the General Assembly of the Organization, from a panel of candidates proposed by those states. 2. Each of the States Parties may propose up to three candidates, nationals of the state that proposes them or of any other member state of the Organization of American States. When a slate of three is proposed, at least one of the candidates shall be a national of a state other than the one proposing the slate.

[32] See Annex No. 1.

[33] See Annex No. 3: List of Judges of the Inter-American Court, nationals of a State Party to a case arising from an individual petition, throughout the exercise of their position (until "Heliodor Portugal *v.* Panama")

[34] IACHR. **Case of La Cantuta *v.* Peru.** Merits, Reparations and Costs. Judgment of November 29, 2006. C Series No. 162. Available at: http://www.corteidh.or.cr/casos.cfm. Judge Diego García-Sayán.

[35] IACHR. **Case of Caballero-Delgado and Santana *v.* Colombia.** Merits. Judgment of December 8, 1995. C Series No. 22. Available at: http://www.corteidh.or.cr/casos.cfm

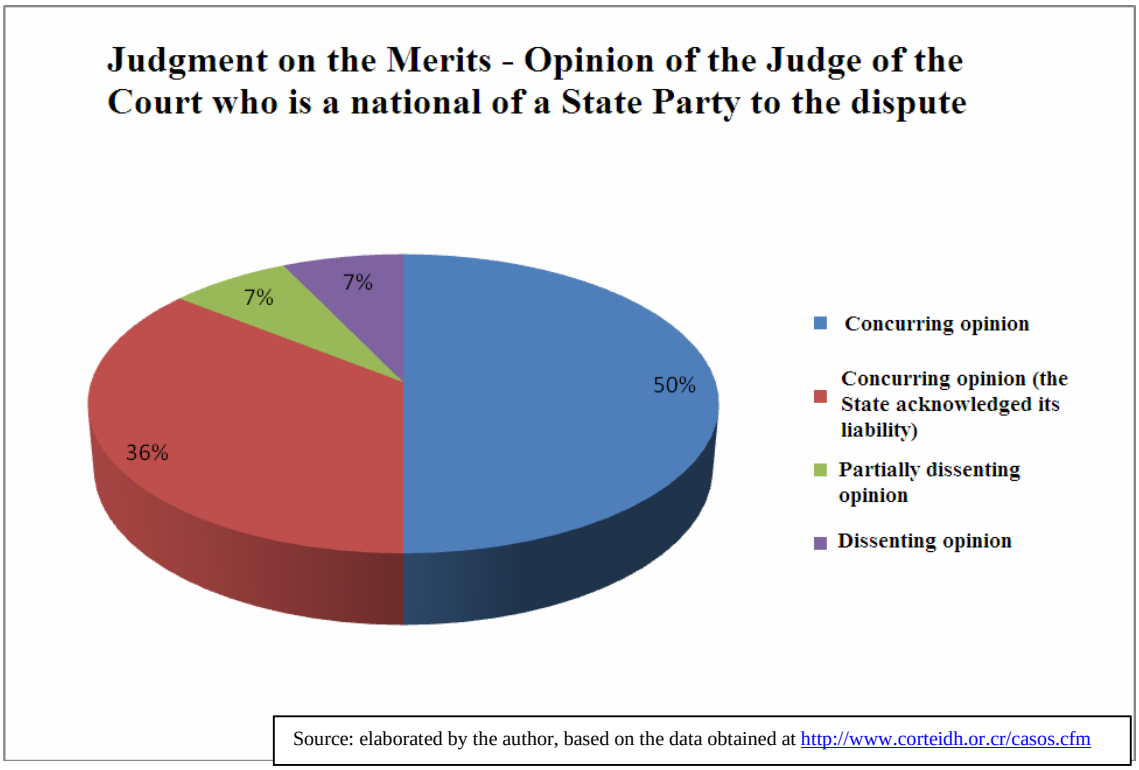
[36] IACHR. **Case of Alfonso Martín del Campo Dodd *v.* Mexico.** Preliminary Objections. Judgment of September 3, 2004. C Series No. 113. Available at: http://www.corteidh.or.cr/casos.cfm

[37] IACHR. **Case of *El Caracazo* *v.* Venezuela.** Merits. Judgment of November 11, 1999. C Series No. 58. Available at: http://www.corteidh.or.cr/casos.cfm

issued a concurring opinion, in agreement with the majority of the Court. In one occasion, the opinion was in favor of the respondent government, and the Court decided to shelve the case ("Alfonso Martín del Campo-Dodd v. Mexico").

There were fourteen judgments on the merits with the participation of a Court judge who was a national of the State party to the case. In twelve of them, the judge issued a concurring opinion. There was one dissenting opinion and a partially dissenting opinion. In five of the twelve concurring opinions, the State had already acknowledged its liability for violations against human rights. Only in the case of Noegueira de Carvalho[38] did the majority decide in favor of the State.

Graphic No. 3



Source: elaborated by the author, based on the data obtained at http://www.corteidh.or.cr/casos.cfm

[38] IACHR. **Case of Nogueira de Carvalho *et al* v. Brazil.** Preliminary Objections and Merits. Judgment of November 28, 2006. C Series No. 161. Available at: http://www.corteidh.or.cr/casos.cfm

So, it is clear that the Court judges nationality has not changed the judgments in any manner whatsoever. In fact, every time the judge himself has considered he should not hear the case, he disqualified himself.

The presence of judges who are nationals of the State Party to the dispute does not represent a risk: there is no evidence of any type of direct or indirect influence which may affect their independent and unbiased role in the Court. Furthermore, as already mentioned in the section referred to the *ad hoc* judicature, an adequate interpretation of a modern treaty on human rights implies the integration of the tools which present the greatest advantages for the protection of those rights.

3.2.2 Nationality of the judges in the European Court of Human Rights

The judge nationality may even constitute an advantage. That is how it has been considered in the European System for the Protection of Human Rights. The provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms[39] are described below:

Article 20 . Number of Judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

Article 21 – Criteria for office

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
2. The judges shall sit on the Court in their individual capacity.
3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

Article 22 – Election of judges

1. The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.
2. The same procedure shall be followed to complete the Court in the event of the accession of new High Contracting Parties and in filling casual vacancies.

Article 24 – Dismissal

[39] Text revised in accordance with Protocol No. 11. Secretariat of the European Court of Human Rights. September, 2003. Available in Spanish at: http://www.echr.coe.int/NR/rdonlyres/1101E77A-C8E1-493F-809D-800CBD20E595/0/SpanishEspagnol.pdf

No judge may be dismissed from his office unless the other judges decide by a majority of two-thirds that he has ceased to fulfil the required conditions.

Article 27 . Committees, Chambers and Grand Chamber

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.
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.

In the first place, notice that all of the High Contracting Parties to the European Convention have the possibility to appoint a slate of three candidates based on which the European Parliamentary Assembly shall elect each of the judges of the European Court of Human Rights (at present 46, because the position of San Marino is vacant). However, judges are part of the Court in their individual capacity and must possess qualifications similar to those set forth by the American Convention.

Furthermore, Article 27 of the European Convention sets forth that 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. It is important to clarify that the expression “in respect of the State Party concerned” does not mean that the judge, in any manner, stops acting in his individual capacity. The use of these words is precisely related to the fact that each High Contracting Party to the European Convention shall appoint a judge from a slate of three candidates. But this judge must always exercise his position in an unbiased and impartial manner. After the amendment of the European Convention through the enforcement of Protocol No. 11, in 1998, it was considered convenient that when a State concerned was a party to a lawsuit, the judge appointed by that State should participate.

Moreover, the *Ad Hoc* judge concept was also included. Thus, whenever the judge appointed by the State can not intervene or upon his absence, that State may designate a person who shall act as judge.

The presence of a judge appointed by a State which is a party to a lawsuit is so important that his presence is admitted along with that of the President of the Chamber in the exceptional proceedings set forth by Article 43 of the European Convention, for the hypothesis of referral to the Grand Chamber of a case for which there has already been a judgment rendered.

The European system for the protection of human rights is the biggest in terms of number of countries which are a part of it and also as to the amount of cases it hears. The organization adopted by the European Court of Human Rights, which gives a great degree of importance to the presence of a judge appointed by a State in the adjudication of a case to

which it is a party, is not a minor detail. The Inter-American Court has also interpreted the relevance of such a participation in the same way.

4. Answer to the Request for an Advisory Opinion

The questions posed by the Argentine State are the following:

a) 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?

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

Pursuant to the considerations exposed herein, the answers are the following:

1) As to the first question:

The possibility of appointing an *ad hoc* judge must not be limited to those cases where the application has been filed before the Court as the result of an inter-State petition. The practice of the Inter-American Court has been consistent when admitting the appointment of an *ad hoc* judge in all the adversarial cases brought before the Court, including those arising from an individual petition. This has shown the multiple advantages that the *ad hoc* judicature presents for the proper protection of human rights. This is also imposed by the present interpretation of the American Convention on Human Rights as a whole, which implies to incorporate and integrate the greatest possible amount of tools to strengthen the protection system.

2) As to the second question:

For the cases arising from an individual petition, the judge who is a national of the respondent government should not disqualify himself from hearing and deciding the case, should he not consider so pertinent pursuant to the provisions set forth for disqualification in the Court Statute and the Rules of Procedure. According to Article 55(1) of the American Convention on Human Rights, 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. This provision is applicable to the cases arising from an individual petition. That is the current interpretation of the American Convention on Human Rights as a whole. Making a distinction based on the judges nationality would imply to ignore the advantages that their presence may confer to the correct resolution of a case and the consequent protection of human rights.

Annex No. 1: Adversarial Cases before the Inter-American Court of Human Rights

	Case	Was there a judge national of the respondent government?	Was an *ad hoc* judge appointed?	Opinion – Preliminary Objections	Opinion - Merits	Remarks
1	Velásquez - Rodríguez *v*. Honduras	YES – Hernández-Alcerro – He disqualified himself	YES – Rigoberto Espinal-Irías	Majority	Majority	
2	Fairén Garbi y Solís *v*. Honduras	YES – Hernández-Alcerro – He disqualified himself	YES – Rigoberto Espinal-Irías	Majority	Majority (Honduras)	
3	Godínez-Cruz *v*. Honduras	YES – Hernández-Alcerro – He disqualified himself	YES – Rigoberto Espinal-Irías	Majority	Majority	
4	Aloeboetoe *v*. Surinam	NO	YES – Antonio A. Cançado-Trindade		Partially Dissenting Opinion	This dissenting opinion implied a conviction of the State for violations the majority of the Court did not impute.
5	Gangaram Panday *v*. Surinam	NO	YES – Antonio A. Cançado-Trindade	Majority (concurring opinion)	Partially Dissenting Opinion	This dissenting opinion implied a conviction of the State for violations the majority of the Court did not impute.
6	Neira Alegría *v*. Peru	NO	YES – Jorge E. Orihuela-Iberico	Dissenting Opinion	Issued no opinion	
7	Cayara *v*. Peru	NO	YES – Manuel Aguirre-Roca	Majority	-	The Majority admitted the objections and shelved the case.
8	Caballero-Delgado and Santana *v*. Colombia	YES – Rafael Nieto-Navia – Did not decline	NO	Majority	Dissenting Opinion	Judge Nieto Navia did not decline but assigned the presidency to Judge Picado-Sotela.
9	Maqueda *v*. Argentina	NO	NO			
10	El Amparo *v*. Venezuela	NO	NO			
11	Genie Lacayo *v*. Nicaragua	YES – Alejandro Montiel Argüello – Did not decline	NO	Majority	Majority	
12	Paniagua Morales *v*. Guatemala	NO	YES – Edgar E. Larrondo-Salguero	Dissenting Opinion	Majority	Guatemala requested to replace Judge Larrondo-Salguero during the proceedings, and the Court rejected the request.
13	Castillo-Páez *v*. Peru	NO	NO			
14	Loayza Tamayo *v*. Peru	NO	NO			
15	Garrido and Baigorria *v*. Argentina	NO	YES – Julio Barberis		Majority	Argentina acknowledged its liability for the violations before the Court
16	Blake *v*. Guatemala	NO	YES – Alfonso Novales-Aguirre	Majority (concurring opinion)	Majority (concurring opinion)	
17	Villagrán-Morales *v*. Guatemala	NO	NO			
18	Suárez-Rosero *v*. Ecuador	YES – Hernán Salgado-Pesantes – Did not decline	NO		Majority	
19	Benavides-Cevallos *v*. Ecuador	YES – Hernán Salgado Pesantes – Did not decline	NO		Majority	Ecuador acknowledged its liability for the violations before the Court.
20	Cantoral-	NO	YES –	Dissenting	Partially	

	Benavides *v*. Peru		Fernando Vidal- Ramírez	Opinion	Dissenting Opinion and Concurring Opinion	
21	Castillo-Petruzzi *v*. Peru	NO	YES – Fernando Vidal- Ramírez	Partially Dissenting Opinion	Partially Dissenting Opinion and Partially Concurring Opinion	
22	Cesti Hurtado *v*. Peru	NO	YES – David Pezúa-Vivanco			David Pezúa-Vivanco subsequently resigned due to incompatibilities with his position in the Peruvian Judicial Authority.
23	Durand and Ugarte *v*. Peru	NO	YES – Fernando Vidal-Ramírez	Dissenting Opinion	Majority	
24	Caracazo *v*. Venezuela	YES – Juez Arilio-Burelli – Did not decline				Due to force majeure reasons, judge Burelli was not present at the deliberations and the signature of the judgment.
25	Baena *v*. Panama	NO	YES – Rolando Adolfo Reyna			Rolando Reyna informed on possible incompatibilities and the Court decided he could not exercise the judicature.
26	Trujillo-Oroza *v*. Bolivia	NO	YES – Charles N. Brower		Majority	Bolivia acknowledged its liability for the violations before the Court.
27	Mayagna (Sumo) Awas Tingni Community *v*. Nicaragua	NO	YES – Alejandro Montiel-Argüello	Majority (concurring opinion)	Dissenting Opinion	
28	Las Palmeras *v*. Colombia	YES – Carlos Vicente de Roux-Rengifo – He disqualified himself	YES – Julio Barberis	Majority	Majority	
29	Bámaca Velásquez *v*. Guatemala	NO	NO			
30	Olmedo Bustos *v*. Chile	YES – Máximo Pacheco-Gómez – Did not decline			Majority	
31	Barrios Altos *v*. Peru	NO	NO			
32	Hilaire *v*. Trinidad and Tobago	NO	NO			
33	Benjamin *v*. Trinidad and Tobago	NO	NO			
34	Constantine *v*. Trinidad and Tobago	NO	NO			
35	Cantos *v*. Argentina	NO	YES – Julio Barberis	Majority	Majority	
36	Merchants *v*. Colombia	YES – Carlos Vicente de Roux-Rengifo – He disqualified himself	YES – Rafael Nieto-Navia / Ernesto Rey-Cantor	Majority (Nieto Navia)	Majority (Rey Cantor)	During the proceedings, the IACHR informed on supervening impediments for the exercise of the ad hoc judicature by Rafael Nieto - Navia. He was replaced by Ernesto Rey-Cantor.
37	Five pensioners *v*. Peru	NO	YES – Javier de Belaunde López de		Majority	

			Romaña			
38	Juan Humberto Sánchez *v*. Honduras	NO	NO			
39	Bulacio *v*. Argentina	NO	YES – Ricardo Gil-Lavedra		Majority	Argentina acknowledged its liability for the violations before the Court
40	Myrna Mack-Chang *v*. Guatemala	NO	YES – Francisco Villagrán-Kramer / Arturo Martínez-Gálvez		Majority (Martínez Gálvez)	When Villagrán-Kramer was appointed, the claimants representatives objected. Arturo Martínez-Gálvez was designated instead. The vote includes a partially dissenting opinion as to the amount of the reparations.
41	Martiza Urrutia *v*. Guatemala	NO	YES – Arturo Martínez-Gálvez		Majority	The vote includes a partially dissenting opinion as to the amount of the reparations.
42	Plan de Sánchez Massacre *v*. Guatemala	NO	YES – Alejandro Sánchez-Garrido		Majority	Guatemala acknowledged its liability for the violations before the Court
43	Molina-Theissen *v*. Guatemala	NO	YES – Oscar Luján-Fappiano			The Court decided that the appointment was not effected within the corresponding term.
44	Herrera-Ulloa *v*. Costa Rica	NO	YES – Marco Antonio Mata-Coto		Majority	
45	Gómez - Paquiyauri Brothers *v*. Peru	NO	YES- Francisco José Eguiguren-Praeli		Majority (concurring opinion)	
46	Ricardo Canese *v*. Paraguay	NO	YES – Emilio Camacho-Paredes		Majority	
47	Juvenile Reeducation Institute *v*. Paraguay	NO	YES – Víctor Manuel Núñez-Rodríguez		Majority	
48	Alfonso Martín del Campo-Dodd *v*. Mexico	YES – Sergio García Ramírez – Did not decline	NO	Majority		García-Ramírez assigned the presidency to Arilio Abreu-Burelli. The majority vote admitted the objections and the case was shelved.
49	Tibi *v*. Ecuador	NO	YES – Hernán Salgado-Pesantes		Majority	
50	De la Cruz-Flores *v*. Peru	YES – Diego García Sayán – He disqualified himself	YES – César Rodrigo Landa-Arroyo			Landa-Arroyo informed the Court on a supervening incompatibility. The Court informed the State that it could designate another *ad hoc* judge, but there was no designation.
51	Carpio Nicolle *v*. Guatemala	NO	YES – Oscar Luján-Fappiano		Majority	Guatemala acknowledged its liability for the violations before the Court and requested to replace Fappiano, but the Court rejected the request.
52	Serrano Cruz Sisters *v*. El Salvador	NO	YES – Alejandro Montiel-Argüello	Partially Dissenting Opinion	Dissenting Opinion	
53	Lori Berenson-Mejía *v*. Peru	YES – Diego García-Sayán – He disqualified himself	YES – Juan Federico D. Monroy-Gálvez		Majority	

54	Huilca Tecse *v*. Peru	YES – Diego García Sayán – Did not decline	NO		Majority	Peru acknowledged its liability for the violations before the Court.
55	Mapiripán Massacre *v*. Colombia	NO	YES- Gustavo Zafra-Roldán	Majority	Majority	
56	Caesar *v*. Trinidad and Tobago	NO	NO			
57	Moiwana Community *v*. Surinam	NO	YES – Freddy Kruisland			The Court requested the dismissal of Kruisland due to a prior participation in legal proceedings related to the case.
58	Yakye Axa Indigenous Community *v*. Paraguay	NO	YES – Ramón Fogel-Pedroso		Partially Dissenting Opinion and Partially Concurring Opinion	
59	Fermín Ramírez *v*. Guatemala	NO	YES – Alejandro Sánchez-Garrido / Arturo Alfredo Herrador-Sandoval		Majority (concurring opinion) (Herrador Sandoval)	Sánchez-Garrido disqualified himself, after which Herrador-Sandoval was appointed.
60	Yatama *v*. Nicaragua	NO	YES – Alejandro Montiel-Argüello		Dissenting Opinion	
61	Acosta-Calderón *v*. Ecuador	NO	YES – Hernán Salgado Pesantes		Majority	
62	Yean and Boscio Girls *v*. Dominican Republic	NO	YES – Rhadys Abreu de Polanco			The claimants representatives objected the designation of Polanco. The Court decided that his appointment was incompatible with his prior participation in proceedings before the IACHR.
63	Gutiérrez-Soler *v*. Colombia	NO	YES – Ernesto Rey-Cantor		Majority	Colombia acknowledged its liability for the violations before the Court.
64	Raxacó Reyes *v*. Guatemala	NO	YES – Alejandro Sánchez-Garrido		Majority	
65	Palamara-Iribarne *v*. Chile	YES – Cecilia Medina Quiroga – She disqualified herself	NO			
66	Gómez-Palomino *v*. Peru	YES – Diego García Sayán – Did not decline	NO		Majority	Peru acknowledged its liability for the violations before the Court.
67	García-Asto and Ramírez Rojas *v*. Peru	YES – Diego García-Sayán – He disqualified himself	YES – Jorge Santistevan de Noriega		Partially Dissenting Opinion	Peru acknowledged its liability for the violations before the Court.
68	Blanco-Romero *v*. Venezuela	YES – Arilio Abreu Burelli – Did not decline	NO		Majority	Venezuela acknowledged its liability for the violations before the Court.
69	Ximenes-Lopes *v*. Brazil	YES – Antonio Augusto Cançado-Trindade – Did not	NO	Majority	Majority (concurring opinion)	

		decline				
70	Pueblo Bello Massacre *v*. Colombia	NO	YES – Juan Carlos Esguerra-Portocarrero		Majority	
71	López-Álvarez *v*. Honduras	NO	NO			
72	Acevedo-Jaramillo *v*. Peru	NO	YES – Javier de Belaunde López de Romaña		Majority	Peru acknowledged its liability for the violations before the Court.
73	Sawhoyamaxa Community *v*. Paraguay	NO	YES – Ramón Fogel			The Court did not accept the appointment of Ramón Fogel as it was made after the expiration of the corresponding term.
74	Baldeón-García *v*. Peru	YES – Diego García-Sayán – Did not decline	NO		Majority	Peru acknowledged its liability for the violations before the Court.
75	Ituango Massacres *v*. Colombia	NO	YES – Jaime Enrique Granados-Peña			Granados-Peña informed the Court that he could not attend the case deliberations due to force majeure reasons.
76	Montero-Aranguren *v*. Venezuela	YES – Alirio Abreu-Aranguren – Did not decline	NO		Majority	
77	Claude Reyes *v*. Chile	YES – Cecilia Medina Quiroga – Did not decline	NO		Partially Dissenting Opinion	
78	Servellón - García *v*. Honduras	NO	NO			
79	Goiburú *v*. Paraguay	NO	NO			
80	Almonacid Arellano *v*. Chile	YES – Cecilia Medina Quiroga – She disqualified herself	NO			
81	Vargas-Areco *v*. Paraguay	NO	NO			
82	Aguado-Alfaro *v*. Peru	YES – Diego García Sayán – Did not decline	NO		Majority	
83	Miguel Castro Castro-Prison *v*. Peru	YES – Diego García-Sayán – He disqualified himself	NO			In this case it is made clear that García-Sayán declined because of not having attended a preliminary hearing, not because of his nationality.
84	Nogueira de Carvalho *v*. Brazil	YES – Antonio Augusto Cançado-Trindade – Did not decline	NO		Majority	The Court decided in favor of Brazil, on the grounds of lack of evidence.
85	La Cantuta *v*. Peru	YES – Diego García-Sayán – He disqualified himself	YES – Fernando Vidal- Ramírez		Majority (concurring opinion)	García-Sayán disqualified himself due to having participated as an agent for the Peruvian government in proceedings before the IACHR.
86	Rochela Massacre *v*. Colombia	NO	YES – Juan Carlos Esguerra-Portocarrero			Esguerra-Portocarrero disqualified himself, which was accepted by the Court.
87	Bueno-Alves *v*. Argentina	YES – Leonardo Franco – He disqualified himself	NO			
88	Escué-Zapata *v*. Colombia	NO	YES – Diego Eduardo López- Medina		Majority	
89	Zambrano-Vélez *v*. Ecuador	NO	YES			The appointment was rejected as it was not made within the corresponding term.

90	Cantoral Humaní and García Santa Cruz *v*. Peru	YES – Diego García-Sayán – He disqualified himself	NO			
91	García-Prieto *v*. El Salvador	NO	YES – Alejandro Montiel-Argüello			Montiel-Argüello communicated his resignation on grounds of force majeure.
92	Boyce *v*. Barbados	NO	NO			Barbados requested an instance to appoint an ad hoc judge. The Court rejected the requirement as it was presented after the expiration of the corresponding term.
93	Chaparro-Álvarez and Lapo-Íñiguez *v*. Ecuador	NO	YES – Diego Rodríguez - Pinzón			The designation of Rodríguez-Pinzón was made after the expiration of the corresponding term.
94	Albán Cornejo *v*. Ecuador	NO	YES			The appointment was rejected because it was made after the expiration of the corresponding term.
95	Saramaka People *v*. Surinam	NO	YES – Alwin Rene Baarh			Baarh informed that he could not attend the case deliberations due to force majeure reasons.
96	Kimel *v*. Argentina	YES – Leonardo Franco – He disqualified himself	NO			
97	Salvador Chiriboga *v*. Ecuador	NO	YES – Diego Rodríguez-Pinzón		Partially Dissenting Opinion	
98	Yvon Neptune *v*. Haití	NO	NO			
99	Apitz-Barbera *v*. Venezuela	NO	NO			The State requested an extension of the term to appoint an ad hoc judge. The Court granted it but the State exceeded the term. The IACHR observed that the appointment is only viable in inter-State cases. The Court rejected the appointment, as it was made after the expiration of the term.
100	Castañeda-Gutman *v*. Mexico	YES – Sergio García Ramírez – He disqualified himself	YES – Claus Werner von Wobeser-Hoepfner		Majority	The IACHR repeated its opinion in the sense that the *ad hoc* judge appointment is only applicable to inter-State cases. The Court accepted the appointment.
101	Heliodoro Portugal *v*. Panama	NO	YES – Juan Antonio Tejada-Espino			The claimants representatives presented observations against the appointment of Tejada-Espino. The Court dismissed them. Tejada-Espino disqualified himself.

Annex No. 2: List of Ad Hoc Judges appointed to exercise in the Inter-American Court of Human Rights (until the case of "Heliodoro Portugal *v.* Panama")

1. Alejandro Montiel-Argüello – appointed in three occasions
2. Alejandro Sánchez-Garrido – appointed in two occasions
3. Alfonso Novales-Aguirre
4. Alwin Rene Baarh – never exercised the position
5. Antonio A. Cançado-Trindade – appointed in two occasions
6. Arturo Alfredo Herrador-Sandoval
7. Arturo Martínez-Gálvez – appointed in two occasions
8. César Rodrigo Landa-Arroyo – never exercised the position
9. Charles N. Brower
10. Claus Werner von Wobeser Hoepfner
11. David Pezúa-Vivanco – never exercised the position
12. Diego Eduardo López-Medina
13. Diego Rodríguez-Pinzón
14. Edgar E. Larrondo-Salguero
15. Emilio Camacho-Paredes
16. Ernesto Rey-Cantor – appointed in two occasions
17. Fernando Vidal-Ramírez – appointed in four occasions
18. Francisco José Eguiguren-Praeli
19. Francisco Villagrán-Kramer – never exercised the position
20. Freddy Kruisland – never exercised the position
21. Gustavo Zafra-Roldán
22. Hernán Salgado-Pesantes – appointed in two occasions
23. Jaime Enrique Granados-Peña
24. Javier de Belaunde López de Romaña – appointed in two occasions
25. Jorge E. Orihuela-Iberico
26. Jorge Santistevan de Noriega
27. Juan Antonio Tejada-Espino – never exercised the position
28. Juan Carlos Esguerra-Portocarrero
29. Juan Federico D. Monroy-Gálvez
30. Julio Barberis – appointed in three occasions
31. Manuel Aguirre-Roca
32. Marco Antonio Mata-Coto
33. Oscar Luján-Fappiano
34. Rafael Nieto-Navia
35. Ramón Fogel-Pedroso
36. Rhadys Abreu de Polanco
37. Ricardo Gil-Lavedra
38. Rigoberto Espinal-Irías – appointed in three occasions
39. Rolando Adolfo Reyna
40. Víctor Manuel Núñez-Rodríguez
41. and 42. Two appointed judges who were not identified in the judgment and who did not exercise their position.

Annex No. 3: List of Judges of the Inter-American Court of Human Rights who are nationals of a State Party to a case arising from an individual petition during the exercise of their position (until the case of "Heliodoro Portugal *v.* Panama")

1. Hernández-Alcerro
2. Nieto-Navia
3. Montiel-Argüello
4. Salgado-Pesantes
5. Abreu-Burelli
6. Roux-Rengifo
7. Pacheco-Gómez
8. García-Ramírez
9. García-Sayán
10. Medina-Quiroga
11. Cançado-Trindade
12. Franco

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