Buenos Aires, January 26, 2009.

To the President of the Inter-American Court of Human Rights

Dr. Cecilia Medina-Quiroga

At her Office.

We are pleased to address these presents to you with reference to the advisory opinion requested by the Argentine Republic to the international court which you preside.

In such sense, in our capacity as researchers with the Law School of the Pontifical Catholic University of Argentina and in the framework of the cooperation agreement subscribed by both our institutions, we request you may be pleased to admit the written comments we attach hereto in order to consider them when determining on the issue raised by the State.

Yours most sincerely.

Siro Luis De Martini Alejo Amuchástegui Joaquín Mogaburu

WRITTEN COMMENTS TO THE REQUEST FOR AN ADVISORY OPINION REGARDING THE "INTERPRETATION OF ARTICLE 55 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS", IN CONNECTION WITH "THE *AD HOC* JUDGE CONCEPT AND EQUALITY OF ARMS IN THE PROCEDURE BEFORE THE INTER-AMERICAN COURT IN THE CONTEXT OF A CASE ORIGINATING IN AN INDIVIDUAL PETITION", AS WELL AS CONCERNING "THE NATIONALITY OF (COURT) JUDGES AND THE RIGHT TO AN INDEPENDENT AN IMPARTIAL JUDGE."

Signed by:

Siro L. De Martini

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Joaquín Mogaburu.-

In the framework of the cooperation agreement entered into between the Law School of the Pontifical Catholic University of Argentina and the Inter-American Court of Human Rights.

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INTRODUCTION

On last August 14, the Argentine Republic, under the provisions in Art. 64 of the American Convention on Human Rights (AHR Convention), requested from the Inter-American Court of Human Rights (hereinafter the "IAHR Court" or "the Court") an advisory opinion for the purpose of clarifying two issues regarding the interpretation and the scope to be given Art. 55 of the AHR Convention.

The first one of them bears a relation to the *ad hoc* judge and to the equality of arms principle, for it has been upheld that the possibility the respondent State has of appointing a judge for the specific case would leave the victims and their representatives, as well as the Inter-American Commission on Human Rights ("IAHR Commission" or "the Commission"), that do not participate in such election or have any intervention in it, in a disadvantageous position, and consequently the aforementioned principle would be infringed.

The second one, in its turn, underscores that the right to an independent and impartial tribunal, which must be respected in all proceedings – and more so in cases where human rights violations are investigated – could be impaired when judges sitting on an adjudicatory case brought by an individual against the State of their nationality, do not decline intervention therein.

Beyond the foregoing, the advisory opinion request was put forth in the following terms:

1) "Pursuant to the provisions in Article 55(3) of the American Convention on Human Rights, must the possibility of appointing an *ad*

hoc judge be restricted to the cases where the application be originated in a petition by one State regarding another?" and;

2) "In the cases originating in a petition by an individual, should judges who are nationals of the prosecuted State excuse themselves from participating in the processing and in the decision thereof in order to guarantee a judgment devoid of all possible partiality or influence?."

This has been, essentially, the request made by our country to the IAHR Court.

INTEREST OF THIS WRITTEN COMMENT

The mission the tribunal has, in the framework of its advisory role, focuses on considering the *ad hoc* judge concept, and on doing so specifically in the light of Article 55 of the American Convention and of the role played by such a notion in the history of its case law.

In order to carry out such task, we understand that in the first place a definition of what should be encompassed by the concept of a judge would be in order and, within it, two of the main qualities thereof, those relating to the impartiality and to the independence which should be inherent to the judicial function, are to be analyzed, in order to proceed from there on to consider the notion at issue.

For such purpose, our proposal or, as better stated when we were called for it, our "comment" is to sketch – in the light of the thinking of classical philosophers of law (I) – some basic notions about the legal concept of a judge.

After doing so, and as a complement along the same guideline, we will review the concepts of the independence and the impartiality of judges, with special reference to precedents drawn from the case law of the Court, of the Commission and of the European Court of Human Rights (II).

On the other hand, we will note the central elements of the principle requiring equality of arms among the parties, as regards both its concept and its construction and enforcement under the case law of the international human rights organizations and tribunals mentioned in the preceding paragraph, and we will briefly relate it to the *ad hoc* judge concept (III).

Finally, some concise considerations about the subjects presented will serve a conclusion for this written comment (IV).

I. THE NOTION OF A JUDGE FROM A CLASSICAL STANDPOINT

Since we consider it pertinent – as it has been expressed – that what is meant by a judge must be defined first, in order to then proceed to debate whether the *ad hoc* judge is pertinent or not and, as we realize our limitations for delving into such a profound subject, we will neither attempt to dwell on the issue to its full extent, nor to develop sophisticated theories, but rather we will be content simply to present what two great authors have said about our topic. In an attempt to keep faith to our identity as the Catholic University of Argentina, we will refer to Saint Thomas Aquinas and to Francesco Carnelutti.

The former has been the main reference in all Christian philosophy from the XIIIth Century of our era onwards, and therefore in the

philosophy of law, and has been greatly commended for the depth and the simplicity of his thinking. It has been Pope Leo XIII who coined the phrase that Thomas would have been the saintliest among all the wise and the wisest among all the saints. He will help us explain the scope of the judicial function and the main characteristics of all suits.

From the Italian jurist we will draw his metaphorical explanation of judicial dignity, springing from his considerations about wearing the robe.

We will finally turn to specific matters of judicial ethics, in order to focus the presentation on the duties of a judge in the course of proceedings.

As we have already mentioned, we do not claim to be final in our presentation, but rather our proposal is to roughly sketch what such authors have said – trusting that they will be able to express in the best possible manner what we ourselves want to convey – so that from their interrelation the tribunal may later reach some definition which will afterwards enable the study of the principles in dispute regarding the inclusion of an *ad hoc* judge.

a) *Judicial powers according to Saint Thomas Aquinas*

In the Summa Theologica by Saint Thomas Aquinas questions regarding the judge are dealt with in two great parts: in that dwelling on law and grace, and in that devoted to prudence and justice as cardinal virtues[1].

One of the first things about which he raises questions regarding human laws — according to the method then in use for matters in dispute, *disputatio*, at medieval universities — is whether it had been really useful for laws to be framed by men[2], or if human affairs were better just left for judges to direct. He will answer in agreement with Aristotle that it is better that all things be regulated by law, than left to be decided by judges, and this on the strength of three reasons. First, because it is easier to find a few wise men competent to frame right laws than to find the many who would be necessary to judge aright of each single case; second, because those who make laws consider long beforehand what laws to make; whereas judgment on each single case has to be pronounced as soon as it arises; and finally, because lawgivers judge in the abstract and of future events; whereas those who sit in judgment find about things present, towards which they are affected by love, hatred, or some kind of cupidity. From the foregoing he concludes that since the animated justice of the judge is not found in many men, and furthermore is quite deflectable, it is therefore necessary to frame laws to determine how to judge, and for very few matters to be left to the decision of men[3]. Hence, then, the first duty of the judge, consisting in abiding by the law and in enforcing it upon others.

Question 60 is devoted exclusively to judgment, as an act of justice, a virtue consisting — in coincidence with the classic definition by Ulpian — in giving everyone their due. That is why he will say that the judgment is but the statement or decision of the just or right[4]. And after asking himself whether it be lawful for man to judge, he answers that it is lawful in so far as it is an act of justice, but at the same time three conditions are requisite: first, that it proceed from

the inclination of justice; second, that it come from one who is in authority; third, that it be pronounced according to the right ruling of prudence. If any one of these requisites be lacking, the judgment will be faulty and unlawful: when it is contrary to the rectitude of justice, and then it would be called unjust; when a man judges about matters wherein he has no authority, this is called judgment by usurpation; and when the reason lacks certainty, as when someone, without any solid motive, forms a judgment on some doubtful or hidden matter, it is called judgment by "suspicion" or "rash" judgment[5].

We also want to include question 67 of the same part of the Summa, devoted by Aquinas, paradigmatically, to the justice and the injustice of the judge, in judging. He distinguishes in the first place five manners of injustice in court proceedings, according to the persons participating in them, to wit: the judge, the accuser, the defendant, the witness and the lawyer. He here focuses on the figure of the judge, putting together a true legal deontology code, for even though he draws on sources of law which are different – bearing in mind medieval institutions – from those that are current nowadays, he furnishes eternal moral and forensic natural law principles, which are applicable to any judge in any place and time.

The act specific to judges would be the judgment, the judicial sentence dominating and ending all proceedings; more than any other state official, judges are the ones who represent authority, who personify the preeminence and the coercitive power of public authority. But before they can act, certain requisites must be met, the first of which is that the persons invested have ordinary or delegated public authority over those approaching them to seek help.

A second requisite Thomas puts forth is the legal knowledge the judge must have. However, the author acknowledges *impartiality* to be the quality and duty most specific to the judicial profession. All judges should be aware of the dignity with which they are invested, and of their role as public persons, for they are not private individuals, but representatives of public authority, who must settle the dispute in strict justice and in the name of the community[6]. It is not by mere chance that such role be considered something sacred and compared to priesthood, or that Aristotle in Book V of his Ethics has called it *animated justice*. It is by virtue of such impartiality principle, therefore, that judges must postpone all personal regards, friendships, hatreds, self-interests and political passions, detaching themselves from them in order to be able to make the right decision choices.

Finally, regarding criminal procedure, Aquinas tells us that court proceedings must needs be between a prosecutor and a defendant, and that "in criminal cases the judge cannot sentence a man unless the latter has an accuser"[7], to prosecute or to take some legal action against him, so that he can answer to clear himself. It is the contention between two parties that the judge must settle by means of the judgment.

b) The symbology of the robe according to Carnelutti

In order to picture the importance of the figure of the judge and the dignity attending it, Carnelutti turns to the colorful use of the robe which, although it has fallen out of practice in our country long ago, is still current in other countries, and even in the Inter-American Court. He acknowledges that it is

the first thing which impresses any layman entering a courtroom. In order to be able to explain the background of such tradition he uses two apparently different expressions: *group emblem* and *uniform*.

Group emblem, because what the robe does is precisely to divide, distinguish and separate – just like military attire – the group of those exercising authority (since such is the implication of a group emblem) from the group of those over whom it is exercised, adding that "it is for the same reason that priests also wear robes; and, more so, when they perform liturgical roles, they don sacred vestments"[8].

And at the same time he speaks of a *uniform*, something that, to the contrary of a group emblem, renders the idea of unity: mainly among the judges who are members of the same bench, but such uniform also explains why the public prosecution and the members of the bar use it, for what they do "is done for the service of authority; they are apparently divided but they are really united in their individual efforts to achieve justice"[9] and he also derives therefrom the importance of the parties in criminal proceedings.

This is why the fourth chapter of the book on which we have been dwelling is devoted to the relation existing between the judge and the parties, for the purpose of underscoring the role of preponderance that the adjudicator must have, and which binds him to act with strict impartiality. Judges are at the top of the scale, their office is paramount, their dignity towers above all others'; the parties appear before them, and they must determine at the end of the proceedings who is right and who is not. That is why Carnelutti speaks about the

drama of the judge, consisting in that he himself is also a man and has to pass judgment on other men.

c) *Ethical implications of judicial work*

After having attempted some sort of a definition of what is meant by judge and considered the role and dignity attending the notion, we will now stop to dwell concisely on the ethics of judges.

For such purpose we will draw on the ideas put forth by Rodolfo Luis Vigo, Jr. in his paper *Ética de la magistratura judicial* (Judicial Ethics). The author starts by clarifying the scope of ethical science, although he focuses his analysis in the special ethics of judges that is "special morals trying to establish standards or rules of conduct that, even though aimed at perfecting human beings, bear a relation to a specific role that persons may develop in society, that is being judges" [10].

He considers there several ethical positions which deny the possibility of ethics, and finally circumscribes himself to the ethical demands contained in proceedings, although he will later consider the ethical questions of judgments, the inquiry into which is beyond our purpose. Let us just consider proceedings as the way leading up to a just judgment, the final goal of the judges' work.

We will here underscore the list Carnelutti draws of the duties the judge has, according to our author and to many codes of judicial ethics. They are:[11]

a) *Impartiality:* he here quotes Aristotle, who says that while the judgment by the lawgiver does not make reference to a particular case, nor to the present time, but rather deals with the future and universal, the judge judges immediately on things present and determined, to which love, or hatred, are frequently attached, so that it is not possible to adequately see the truth, but personal pleasure in itself dulls judgment, as we have seen Saint Thomas Aquinas repeated. On account of such obligation the judge must play his role as representative of the community, avoiding any friendship or malevolence towards the parties. As a corollary thereof, positive law has created the possibility of judges excusing themselves or being disqualified, in order to separate them from proceedings when they appear interested in the outcome of the case;

b) *Concern about the truth of the case:* Which implies the judge is not a passive figure in proceedings, but rather has a dynamic role, not to make up for negligence by the parties, but to get to know the real truth about the matter to be determined;

c) *Appropriate time-limits for reaching decisions:* All delay implies an injustice for, as said colloquially, slow justice is no justice.

d) *Full exercise of judicial authority:* Because the judicial function is part of the power of the State, and because the judges are therefore invested with coercitive powers, disobeying them seriously attains the common good of the community.

e) *Behavior becoming their dignity:* Judges are public officials and their dignity "derives from the authority they exercise in the name of the community,

rendering its members and society as a whole their due, something which demands a behavior becoming such preeminent role within the community, so that individuals may turn to the judges with trust, seeking their decisions to reveal the rectitude proper to law and justice"[12]. For such reason Malem considers that judges, in order to be able to judge aright must be "sober, balanced, patient, hard-working, respectful, capable of knowing how to listen to the arguments the parties advance in the proceedings, and having enough skill to overcome their own personal limitations"[13].

f) *Acting on legal grounds:* We refer here mainly to the judgment that ends the proceedings, but also to all other material decisions that cannot be derived from the personal discretion of the judge, but have to be based on adequate legal grounds and have to be logically aimed at the final judgment.

Having made the foregoing considerations about the figure of the judge, we will go on to consider hereinafter – within the limits imposed by this kind of presentations – the independence and impartiality of the judge as it has been dealt with by international human rights organizations case law and jurisprudence.

II. THE INDEPENDENCE AND THE IMPARTIALITY OF JUDGES

Court procedure is structured on the idea of the due process of the law or fair trial, and on the various procedural principles stemming therefrom. Two of the most important ones are those guaranteeing the parties that the courts called upon to settle the matters which they submit will be both impartial

and independent. In order to be able to speak about respect for the due process of the law, the parties must have standing to act and defend their claims on equal terms with their adversaries and, above all, to do so in an effective and specific manner, for which purpose there must previously exist an impartial and independent adjudicator.

Therefore, the respect for such guarantee appears as one of the major questions both in domestic law and in international human rights law, bearing on all proceedings, be they criminal, civil, administrative, labor or of any other kind[14].

At the domestic level, the independence and the impartiality of judges has been established as a mechanism aimed at avoiding intrusion by the executive branch and by the legislative branch in the area privy to the judiciary. It is therefore said that: "judges are, as far as the discharge of their duties is concerned, and in order to apply the law to the specific case, independent from all the other powers of the State"[15].

Judges are part of the judiciary, being appointed for such position through a series of constitutional processes, and the decisions they deliver in the framework of the proceedings in which they are called upon to act cannot be overruled or reviewed by the other powers of the State (with very few exceptions, of course, such as amnesty or pardon). The aforementioned guarantee is established, therefore, not only in favor of the judges or of the courts as regards intrusion by other branches of government in their working area, but it also and essentially concerns the parties as it is included in their right to access justice and in the various guarantees that conform the rules of due process.

The independence and impartiality of the judges, as a guarantee, is regulated in various treaties and supranational rules: in the AHR Convention it is provided in Article 8(1)[16], while at the European level it is provided in Art. 6(1) of the European Convention on Human Rights: On the other hand, at the universal level, Art. 10 of the Universal Declaration of Human Rights also considers it, as well as the United Nations Covenant on Civil and Political Rights. Likewise, it is to be found at the Inter-American level in the United Nations Basic Principles on the Independence of the Judiciary and the Inter-American Democratic Charter, just to quote but those closest to us.

Now, therefore, we will consider the impartiality with which courts must act, in order to proceed later to do the same with their independence. Specifically, as far as the impartiality of the adjudicator is concerned, we will emphasize one of the topics that from our viewpoint it is of paramount importance to bear in mind in order to answer the question posed by the State. It is the one pivoting around the trust courts and judges must inspire when they perform their role in the framework of a democratic society.

One of the axis around which the due process of the law pivots is precisely the impartiality of the judge or court, that must be devoid of interests related to those of the parties or to the subject matter of the case and that may not, naturally, have a pre-established opinion about them.

Impartiality can be seen not only from a subjective point of view (reserved to the inner thoughts of judges), but also from and objective perspective (implying that an “appearance of impartiality” be given) – we

understand that it is on this latter point that the question about this subject must be basically centered.

When trying to establish the meaning that must be given to impartiality, we consider it advisable to search IAHR Court case law. Thus, the Court mentioned hereinbefore, in the "Case of Palamara Iribarne v. Chile", held it to be: "...the quality of the adjudicator as a third party with no interest in the matter."

Likewise, in this same case, it added: "The Court considers that the right to be tried by an impartial judge or court is a fundamental guarantee of due process. In other words, it must be ensured that the judge or court hearing a case does so based on the utmost objectivity. Furthermore, the independence of the Judiciary from the other State powers is essential for the exercise of judicial functions."

And it went on to say: "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."[17]

It had previously pointed out in the contentious "Case of Herrera Ulloa vs. Costa Rica" that: "…the right to be tried by an impartial judge or court is a fundamental guarantee of due process. In other words, the person on trial must have the guarantee that the judge or court presiding over his case brings to it the utmost objectivity. This way, courts inspire the necessary trust and confidence in the parties to the case and in the citizens of a democratic society."[18]

Thus far, some elements worth pointing out have appeared: impartiality of the judges as one of the most relevant guarantees in the due process of the law; the independence of the tribunal from other State powers and the trust the judges must inspire the parties and the citizens of a democratic society.

On the other hand, la IAHR Commission has added that: "Impartiality presumes that the court or judge do not have preconceived opinions about the case *sub judice*."[19] Judges must be take up a neutral position about the dispute they are to settle and they cannot have an interest in any of the parties or any relation therewith.

Judges are said to be impartial when: "they act with equanimity (impartiality of judgment), when they are indifferent (not inclined on their own to one thing rather than to another), neutral (between two contending parties, they remain uninclined to both; not siding with one or the other of them)."[20] We can add they must neither have a "special" relationship with the parties nor have had prior contact with them in any other proceedings.

In such sense, European Court of Human Rights case law is very abundant on the matter, as the precedents hereinafter transcribed will show. [21]

Thus, it has been held that: "The Court reiterates that impartiality must be assessed both by means of a subjective test, which consists of seeking to determine the personal conviction of a particular judge in a given case, and by means of an objective test, which consists of ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect" (cf. Thomann v. Switzerland, Judgment of 10 June 1996, Pescador Valero v. Spain, Judgment of 17 June 2003 and Hauschildt v. Denmark, Judgment of 24 May 1989).

It further stated that: "There thus remains the objective test. Here, what must be determined is whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of some importance. What is at stake is the confidence which the

courts in a democratic society must inspire in the public — the underlining is ours — (Castillo Algar v. Spain, Judgment of 24 May 1989).

Along the same lines, it was also added: "This court recalls that the impartiality guaranteed by Article 6(1) del of the Agreement is assessed by means of two tests: in the first place, the personal convictions of a specific judge in a given case; in the second place, it must be made sure that the procedure offers guarantees enough to put this matter beyond all legitimate doubt" (Gautin *et al.* v. France, Judgment of 20 May 1998).

Or also: "In its Piersack Judgment of 1 October 1982, the Court specified that impartiality can "be tested in various ways": a distinction should be drawn "between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect" (De Cubber v. Belgium, Judgment of 26 October 1984).

And then that: "However, it is not possible for the Court to confine itself to a purely subjective test; account must also be taken of considerations relating to the functions exercised and to internal organisation (the objective approach). In this regard, even appearances may be important; in the words of an English maxim (…) "justice must not only be done: it must also be seen to be done". As the Belgian Court of Cassation has observed on 21 February 1979, 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 in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused…" — the underlining is ours — (Piersack v. Belgium, Judgment of 1 October 1982).

We therefore believe, sharing what is said in the quotations hereinabove transcribed and mentioned, that the trust the parties must have in a court when they plead before it becomes a fundamental principle not to be lightly set aside, and therefore in an international human rights tribunal, such as the IAHR Court, on account of the very nature of the matters with which it is to deal, as well as on the basis of the very specific characteristics such matters have, it must be respected and promoted.

On the other hand, the impartiality of a tribunal or of a judge implies, in its turn, their independence from all power, from all political or media pressure; it can be concluded, in brief, that action by the judges must not be affected by any kind of intrusion attempting to tip the scales to one side or another.

On such specific matter, the IAHR Commission has expressed: "The independence and impartiality of the courts must be tested on the basis of whether there are any guarantees in place against external pressures exerted on the Judiciary" [22] and also "The basic principles regarding the independence of the judiciary establish that there should be no inappropriate interference with the judicial process."[23]

As regards the IAHR Court, it had the opportunity to consider such issues in the contentious "Case of the Constitutional Court v. Peru." It there said that "independence" meant the freedom of the court to perform its functions without interference by pressure groups nor by other branches of government [24]. According to the aforementioned Court, the mere appointment of judges does not imply they perform such role in the terms of the Convention, but that they rather must have independence to begin with. That is so because such condition keeps judicial action exempt from various types of pressure. [25]

Indeed, in the case quoted in the preceding paragraph, the IAHR Court considered that: "... one of the principal purposes of the separation of public powers is to guarantee the independence of judges and, to this end, the different political systems have conceived strict procedures for both their appointment and removal."[26]

We therefore think that, when speaking about independence, two questions must be distinguished: on the one hand, the independence of the Judiciary as a whole and on the other hand that of the judge, seen from an individual standpoint.

In the first case, independence is considered outwards, as regards the other branches of government. That is independence from the intrusion the Judiciary might undergo by the executive or by the legislative; to which must be added, in our view, the pressure that may be exerted by lobbies or the media.

On the other hand, we have the independence of the judge regarding the specific case to be adjudged. At this point, the one which interests us most, we will say that there is an inside standpoint and an outside one, as far as the independence of the judge is concerned. On the inside, it is shown with regard to: a) their seniors; b) the disciplinary bodies; c) legislation and d) the parties. On the outside, it regards a) the other branches of government; b) the mass media and c) society at large.

In conclusion, we understand impartiality and independence of the tribunal and of the judge to be a guarantee established in favor of the parties that becomes all-important in the case of an international

human rights tribunal — as it has been presented — in view of the circumstance that before it the respondent is the stronger party and the victim always appears in an inferiority position.

In such a way that, bearing in mind the different precedents mentioned hereinabove, the judges called upon to determine cases wherein their own countries appear as respondents, for the purpose of "inspiring the trust" that international courts must command in the victims of human rights violations, shall excuse themselves from sitting.

III. THE PRINCIPLE OF EQUALITY OF ARMS AMONG THE PARTIES AND ITS RELATION WITH THE POSSIBILITY A RESPONDENT STATE HAS OF APPOINTING AN *AD HOC* JUDGE WHEN A COMPLAINT HAS BEEN BROUGHT BY AN INDIVIDUAL

Bearing in mind that one of the questions posed in the request for an advisory opinion by filed by the Argentine Republic is centered on the *ad hoc* judge concept and on its connection with the equality of arms principle in the contentious proceedings instituted before the IAHR Court on the basis of petitions by individuals, we consider it fit to present the central characteristics of such principle and of the way it is applied both at the domestic level and in the context of an international human rights tribunal, especially at the IAHR Court.

Another one of the principles deriving from the due process of the law concept is that of equality of arms. Certainly, it originates the idea that loyalty among the parties is one of the axis around which procedure is to be centered [27]. On such matter, the European Court of Human Rights (ECHR) has

said that the equality of arms principle is but one more aspect within the wider notion of the due process of the law, which is to be considered in the light of the *pro homine* principle28.

The equality of arms principle consists in "giving equal opportunities in equal conditions to all those who take part in the proceedings"; that is to say it means that the parties must be afforded equal treatment as far as offering and producing evidence is concerned, consequently trying to give them the same possibilities to take part. It has also been said that it hinges on "securing for the accused the opportunity to defend themselves in the best possible conditions when faced by the accusing official, whose means are greater than theirs" [29]. For indeed the defense of the accused must be effected in conditions equal to the ones enjoyed by the accusing body, something which necessarily implies the idea of equality of arms among the parties [30].

The State, at the domestic level, as the one bearing the public right in action, is the one who must criminally prosecute offenses on its own motion. Thus, we have State bodies (the Office of the Public Prosecutor, law enforcement forces, etc.) carrying on such tasks in a situation we could call of predominance over the citizens accused of committing crimes. From such standpoint, it would look like matching the power vested on the State for such purpose would be really impossible, given the material and human resources available therefor, for which reason it has been upheld that to reach equality between the State in pursuit and the accused who is being pursued is an ideal unattainable in practice.

Even though it be true that from such an approach equality among the parties would be impossible to achieve, it would be possible indeed to try and narrow such gap, reducing it to a minimum. One of the specific possibilities to achieve such equality, or at least to try to, is giving the accused rights to take part in the proceedings equivalent to those the accusing bodies have. That is to say, the equality imperative "demands the position of the parties to the proceedings to be as balanced as possible by virtue of the equality of arms principle, even when the expression "equality of arms" be, to say the least, misleading, for a true equality of arms would not be compatible with our procedural structure..."[31]

Such lack of proportion, at the domestic level — and in criminal law, where it can be observed more clearly — is quite more outstanding during the inquest or preliminary enquiry, for at such point access to the file by the defense of the person charged, just to state an example, is many times restricted or excluded. Once the preliminary enquiry is closed, and the matter goes on trial, where argument takes place, the ideal of giving equal opportunities to the person charged and to the accuser appears to its full extent.

And it is worth mentioning here that it is the accusing body that must destroy the state of innocence the person prosecuted has. So that it all the grounds for the charges brought against the accused have to be shown, without the slightest hesitation. Such circumstance could possibly make up for the difference between the accuser and the accused that appears at the enquiry stage[32]. In fact, it has been said that the innocence principle — provided in Art. 8 of the AHR Convention — is an attempt at putting the inequality of such situation back

on a level [33] and so is the duty on the State to bear the burden of accusing and of proving the accused guilty, regardless of the action the latter may take[34].

Likewise, procedural acts must tend to strike a balance among the parties, as shown by the equal opportunities they have to perform and to control them, as well as by the need to serve them upon the other party.

As jurisprudence has it, the adversarial or adversary principle — which is closely related to that of equality of arms — guarantees that in criminal proceedings both the person charged and the defense attorney be given both the opportunity and the possibility of controlling the evidence for the prosecution produced by it; of questioning the witnesses or other persons appearing in court[35]; of securing the presence of the witnesses for the defense and that they be questioned under the same conditions as those for the prosecution, powers they also have regarding other persons taking part in the proceedings, for instance, regarding expert witnesses[36].

It then follows therefrom that respect for the adversarial principle would come to restore the balance among the parties, expressed in the equal opportunities to act and to control evidence; and further shown in the necessity of communicating to the acting parties the evidence produced by their counterparts.

It does not go unnoticed to us that the aforementioned equality would rather be an ideal to which we must aspire, but what is important from our point of view is that such idea be gradually gaining momentum domestically and, above all, at the international level. It is self-evident that the

resources a State can marshal cannot be matched by a private individual, and less so at the international level, as we will express further on. In short, we could point out that the starting point is a situation of inequality that must be reduced by granting equal opportunities to act before the courts[37].

Along such lines, the European Court of Human Rights held that: "...the equality of arms principle imposes the duty not to force one of the parties to appear in court in a situation of clear disadvantage in comparison with the other one; consequently, there also was a violation of Art. 6(1). of the ECHR, wherein the right to a fair trial is guaranteed" (see *Boletín de la Secretaría de Investigación y Derecho Comparado de la Corte Suprema de Justice de la Nación Argentina* [Newsletter by the Clerk for Research and Compared Law of the Supreme Court of the Argentine Nation], European Court of Human Rights, 22-9-94, 3/1994, p. 305).

And also: "Equality of arms imposed affording the interested parties the possibility to appear with the attorney so that they could reply to his conclusions. The lack of adequate participation by the party acting at a stage decisive for maintaining or lifting detention renders the Greek legal system in force at the time and in the way it was enforced in the instant case non-complying with the requirements in Art. 5.4. of the ECHR." (cf. *Boletín de la Secretaría de Investigación y Derecho Comparado de la Corte Suprema de Justice de la Nación Argentina* [Newsletter by the Clerk for Research and Compared Law of the Supreme Court of the Argentine Nation], European Court of Human Rights, 13-7-95, 2/1995, p. 253).

We have hitherto set forth some considerations about the "equality of arms" concept and its derivations in the domestic legal systems,

mainly in the criminal law area. We will hereinafter do the same but with reference to contentious matters submitted to the IAHR Court.

In the international human rights area and more precisely where matters proceeding before the IAHR Court are concerned, when a complaint is instituted on the basis of a petition by an individual, the respondent — that is to say a State — is the one favored by a superior position, for the difference in terms of its material and human resources, when compared with those of the petitioner, appears at a glance. Let what has been already said suffice for the moment, along with the promise to say more of that later.

The gathering of evidence in the contentious cases before the IAHR Court is divided in three clear-cut stages, based on the adversarial principle and on the equality of arms principle, which effectively guarantee the right to a fair trial[38].

As it was mentioned above, the equality of arms principle in the proceedings instituted before the domestic courts, tends to narrow the gap between the procedural possibilities of the parties and, in such manner, to reduce the situation of inequality generated by the State.

On the other hand, and we think it is important that this be properly underscored, the differences existing between the accuser and the accused at the domestic level, seem to increase in an international human rights tribunal — inversely, of course. It is certain that the economic resources implied in taking a complaint before an international tribunal[39]; the technical advice and the legal counsel a State can marshal; the setbacks individuals may face in order to come by pieces of evidence at the domestic level that eventually can be used

against their own country, among others, seem to make the differences which, in the normal course of events, exist between one party and the other even greater.

Seen from such a standpoint, the Rules of Procedure of the IAHR Court, as well as the Statute, and the tribunal itself, tend to achieve equality among the parties. In such sense, the circumstance that the witnesses, the expert witnesses and any other person the IAHR Court decides to hear may be questioned and cross-questioned by the agents of the respondent State, by the delegates of the IAHR Commission and by the alleged victims, their next of kin or their representatives — Arts. 21, 22 and 23 of the Rule of Procedure of the IAHR Court — would seem be steps in such direction.

Likewise, in paragraph (1) of Art. 44 of the IAHR Court Rules of Procedure, wherein the procedural opportunity to file evidence, pleadings and motions is provided, it is allowed that the pieces of evidence filed by one of the parties be contested by the other, thus respecting the adversarial principle and that of equality of the parties, for in such manner all of them are given equal opportunities.

On the same subject, we feel it would be interesting to transcribe what was stated in the case of "Cantoral Huamaní and García Cruz", on July 10, 2007, wherein it was determined:

"Furthermore, the Court deems that the State's right to defense and to adversarial proceedings was guaranteed since Peru was able to submit the observations it considered pertinent when the evidence was provided, as well as on the statement made by Mr. Espinoza-Montesinos. Based on the above, the Court incorporates

this statement into the body of evidence in this case and assesses it, taking into account the State's observations on its content, and according to the rules of sound criticism."[40]

Along this same line of argument, in paragraph 67 of the Judgment in the contentious "Case of Almonacid Arellano" dated September 26, 2006, it has been said that: "The adversary principle, which respects the right of the parties to defend themselves, applies to matters pertaining to evidence. This principle is embodied in Article 44 of the Rules of Procedure, as regards the time at which the evidence should be submitted to ensure equality between the parties.[41]"

On the other hand and closely connected with such points, there appears the question of the burden of proof or *onus probandi*. As it has been said, at the domestic level it is borne by the State through its accusing bodies, that are the ones with the duty to achieve the degree of conviction necessary to destroy the state of innocence in which the accused is presumed to be, until the contrary be proven. It should be added to the foregoing that the presumption of innocence principle is considered a fundamental right, set forth among the due process guarantees and, on account of its being a state in which a prosecuted subject is presumed to be, the duty to disprove it falls upon the accuser, and therefore, at the domestic level, it is imposed on the State. Therefore, until a conviction judgment finds the accused persons guilty, they must be presumed innocent.

On the other hand, in the proceedings instituted before an international human rights tribunal, given their special characteristics, such standards do not apply, it being remarked that the burden of proof is borne by the respondent, that certainly is the stronger party.

Indeed, the respondent State cannot be a prosecuted party in the sense given to such notion at the domestic level, wherefrom it is derived that not all the guarantees the accused has may benefit the State against which a complaint has been brought for human rights violations (let it be remarked, however, that according to the principle of contradiction and to the equality of arms principle, the State has all the procedural rights on matters of evidence provided in the AHR Convention, and the IAHR Court Statute, and the Rules of Procedure of the IAHR Court).

Therefore, the IAHR Court has said time and time again that the State cannot allege the difficulties a complainant may have to produce evidence in a case. Such shortcomings in the accusers (that is to say the victims, their representatives and the IAHR Commission), on account of the fact that the matters have been brought before an international human rights tribunal, where the weaker party is the accuser and the stronger party is the respondent, inure to the detriment of the latter, to wit:

"The State controls the means to verify acts occurring within its territory. Although the Commission has investigatory powers, it cannot exercise them within a State's jurisdiction unless it has the cooperation of that State."[42]

Or also: The Court feels that it is not up to the Inter-American Commission to determine the whereabouts of the three persons to whom these proceedings refer, but instead, because of the circumstances at the time, the prisoners and then the investigations were under the exclusive control of the Government, the burden of proof therefore corresponds to the defendant State. This evidence was or should have been at the disposal of the Government had it acted with the diligence required."[43]

That is to say that we can conclude that the equality of arms principle, inasmuch as it concerns cases processed before the IAHR Court, must tend to narrow the gap which, naturally enough, exists between the State reported and the accusing party[44].

Now, after having presented the general aspects of the equality of arms principle, we will consider hereinafter such principle and its connection with the *ad hoc* judge concept in the contentious proceedings brought before the IAHR Court.

The AHR Convention, in certain situations, affords the possibility of adding to the membership of the IAHR Court at the time, an *ad hoc* judge elected by the States Parties and, as the denomination points out, for the specific case.

As far as the status of the *ad hoc* judge is concerned, the IAHR Court in the Judgment dated March 8, 1998, delivered in the contentious "Case of the White Van (Paniagua Morales et al.) v. Guatemala", has said:

[t]hat an *ad hoc* judge is similar in nature to other judges on the Inter-American Court, in that he does not represent a particular government, is not its agent and sits on the Court in an individual capacity, as stipulated in Article 52 of the Convention, and in accordance with Article 55(4). An *ad hoc* judge is required to meet the same prerequisites as permanent judges. The provision for all permanent and *ad hoc* judges to sit on the Court in an individual capacity is based on and must always allow for the need to protect the independence and impartiality of an international court of justice;…"[45]

In that same judgment, likewise, it was upheld that the Statute of the IAHR Court provides that all judges sitting on such Court have the

same rights, duties and responsibilities, regardless of whether they hold permanent tenure or they are *ad hoc*[46], it being necessary therefore to conclude that they all enjoy equal standing.

The circumstances in which an *ad hoc* judge can be appointed are three, and the two first ones are provided in Art. 55 of the AHR Convention.

Thus, in the first place, paragraph (2) in the aforementioned Article provides that: "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."

Then, paragraph (3) provides that: "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."

Such two alternatives, it is worth saying, were complemented with the provisions in Arts. 10(2) and 10(3) of the IAHR Court Statute.

Finally, the third circumstance in which an *ad hoc* judge may be appointed, is when among the judges called upon to hear a case, none is a national of the respondent State, for which reason it can appoint one[47]. Even though it is true that such mechanism is not expressly provided in the AHR Convention, in its Statute or in its Rules of Procedure, – as Fernando Vidal Ramírez takes upon himself to mention[48]– it derives from the harmonizing construction of Arts. 5(3) and 55(1) of the AHR Convention and 10(1) of the Court Statute.

Regarding the appointment of such judges, it is restricted to a specific case and effected in an individual capacity, even though it be made by a State Party.[49] Now, the fact that they act in an individual capacity means that they are not deputy agents of the State[50], and must not represent it or, much less, be committed to or interested in it, but on the contrary they must act in an impartial and independent manner, so that the human rights violations set forth in the complaint against a State Party be correctly adjudged, as they swear to do when taking their office.

We therefore consider it important to underscore that the origin of the *ad hoc* judge seems to be more related to disputes among States, in the framework of which it was understood that when a country did not have a judge of its nationality on the bench, the equality that had to exist between it and the rest could be affected. That is why the election of an *ad hoc* judge was allowed, in order to balance the position of such State with that of those that did have a judge of their nationality in the tribunal[51].

Along this same line of thinking, the former IAHR Court Judge Nieto Navia, takes up the position that the concept we have been considering is more in place when an international tribunal settling disputes among States – such as, for instance, the International Court of Justice – is concerned, rather than a tribunal hearing cases initiated by private individuals prosecuting States for human rights violations[52].

It must be added to the foregoing that when there is a conflict between a private individual and a State, the logic concerning the balance that must be the rule when adjudging a dispute among countries cannot be applied,

for the natural inequality existing between those two parties — let the abovementioned remarks on the point be recalled — would be compounded with the possibility the stronger party would have of appointing an *ad hoc* judge to hear the case wherein it is the respondent[53].

Faúndez Ledesma advances an opinion along the same lines, for he considers that the mechanism with which we are dealing would not be advisable for an international human rights tribunal hearing matters initiated by private individuals against a State, for since they do not have any part in the appointment of the *ad hoc* judge, the IAHR Commission, the victim and its representatives would be at a clear disadvantage when facing the respondent State[54].

Furthermore, it has also been said that: "By instituting *ad hoc* judges it has been sought to attract the trust of the States and in order to achieve such purpose some compromise has been made regarding the composition of the adjudging body, that has thereby seen its independence jeopardized."[55]

In view of the foregoing, it would seem that to grant the respondent State the opportunity to appoint a person of its choice to judge it — albeit along with the permanent membership of the tribunal — could tip the scales in its favor to the detriment of the interests of the victims, of their representatives and of the IAHR Commission that fosters and promotes the pertaining complaints[56] and, ultimately, of American society as a whole.

The foregoing not withstanding, it would not seem fair to us not to mention that *ad hoc* judges act in their "individual capacity" and that in

principle they do not represent the interests of the State appointing them, something which there are no grounds to suspect — as it has been evidenced by various judges throughout the years — even though the possibility they have to take part in deliberations, and to present their opinions and their considerations on the cases they were appointed to hear, could suggest a *prima facie* risk of partiality.

It is also true that the *ad hoc* judge introduces in the various activities of the Court knowledge about the legislation of the respondent country, about its current situation and about other circumstances that are important to achieve a broad and complete view at the time of deliberating and adopting a decision, although such role rather befits an expert witness, which the parties may offer as a source of evidence.

Thus, we share the position that considers that *ad hoc* judges, because they are appointed by one of the parties to the dispute (in this case, the State), could generate a certain feeling of distrust in international public opinion.

IV. CONCLUSION

The central ideas we think could help the tribunal consider and construe the *ad hoc* judge concept in question, and the possibility that the Court judges who must pass judgment on the State of which they are nationals excuse themselves from hearing such cases, have been presented; both have been the subject-matter of the request for an advisory opinion by the Argentine Republic. To conclude, the main ones among such ideas have been the following.

In the first place, for the purpose of construing the American Convention, as required, the meaning of “judge” — with the main

characteristics implicit in such role – should be first determined, in order to proceed from there on to discuss the questions on which the IAHR Court is to give its opinion. For such purpose, we consider the thinking and the reflections of both Aquinas and the Italian legal scholar.

In such sense, it has been said that impartiality would be the most specific quality and the most characteristic duty judges have. That furthermore, the first obligation of the judge consists in abiding by the law and enforcing it, and that the act of justice must proceed from the inclination of justice, must come from one who is in authority and must be pronounced according to the right ruling of prudence.

Likewise, that all judges should be aware of the dignity with which they are invested, something Carnelutti illustrates so well in his comments on the use of the robe, on the basis of notions such as those of *group emblem* and *uniform*.

Then, that impartiality must benchmark the relations between the judges and the parties, for there is no office higher nor a more imposing dignity than that of the judges, since they are to determine at the end of the proceedings which one of the parties is right.

That the duties of the judges must be, besides impartiality, to worry about the truth of the case, to decide timely, to exercise their authority fully, to behave in a manner becoming their dignity and to act according to the law.

As regards the fundamental concepts of impartiality and independence, these should be understood as guarantees essentially

extended to the parties as a right to access justice and the various guarantees imposed by due process.

That impartiality, besides being considered from a subjective point of view, must also regarded from an objective standpoint, which implies giving an “appearance of impartiality”, for the trust courts and judges must inspire when they perform their role is of the utmost importance. With respect to independence, it must imply that the acts of judges cannot be affected by any kind of interference whatsoever, whereby an attempt might be made to tip the scales to one side or the other.

That, although we understand that the independence and impartiality of judges is to be presumed, for in such a high role the aforementioned guarantees should be implicit, action by judges with the characteristics of the ones in question or the refusal of the judges hearing cases against their States to excuse themselves, could create a risk of “partiality” (however, it must be pointed out that even though in many contentious cases the States have proposed *ad hoc* judges, the Court found them internationally responsible in all of them; and that the judges choose not to sit on most matters in which their country of origin is the respondent).

That the fact that one of the judges who is going to sit on the tribunal hearing the specific case be appointed by one of the parties to the dispute would seem to break away from all notion of impartiality and could infringe certain basic principles of due process, for which reason the distinction there must be between the Judge and the parties becomes of the very essence.

Also, that the differences that in the normal course of events could exist among the parties to certain proceedings would not be reduced, but rather increased, when the questioned concept is applied, for one of the central mainstays in all proceedings is to vie for equality of arms. This must consist, according to the foregoing presentation, in "affording equal opportunities in equal conditions to all those taking part in the proceedings." For indeed, the respondent State — the stronger party in IAHR Court proceedings — would appear to be able to avail itself of a possibility, such as electing a judge, that neither the Commission nor the victim or its representatives have.

On the other hand, the circumstance of their being judges who, in principle, are familiar with various relevant aspects of the State that chose them, should not be held as a point in their favor, since one of the fundamental characteristics in all such proceedings is that judges must know about a case what they learn in the course thereof; if that were not so, they could lose objectivity and represent a risk of "partiality." In order to achieve such purpose, it will suffice to appoint an expert witness to brief the tribunal on the specific matters.

And there is still more. The impression of independence and impartiality the IAHR Court must give American society could also be affected, for citizens observe how the victims of human rights violations by a State are judged precisely by a judge chosen by that very State, or how the judges who are nationals of the respondent country do not excuse themselves from hearing the case.

Therefore, as regards both the instance of *ad hoc* judges hearing cases brought by private individuals and that of judges who are

nationals of a respondent State and who have not excused themselves – let it be noted that, as it has been said, the judges generally choose not to hear the case –, the ideas of independence and impartiality and of equality of arms among the parties must be placed above all other considerations, since they are guarantees for the complainants.

To conclude, we think that the questions raised by the Argentine Republic should be considered in the light of the *pro-homine* principle, whereby international human rights treaties must be construed in the broadest manner when recognizing rights to individuals and in the most restrictive way when limiting them.

Siro Luis De Martini Alejo Amuchástegui Joaquín Mogaburu

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[1] For a more detailed consideration of criminal justice in Saint Thomas Aquinas, see: CODESIDO, Eduardo Alberto and DE MARTINI, Siro M.A., *El concepto de pena y sus implicancias jurídicas en Santo Tomás de Aquino*, Buenos Aires, 2005, El Derecho.-
[2] SAINT THOMAS AQUINAS, *Summa Theologica*, I-II, q.95, Art. 1°.-
[3] *Ibidem*.-
[4] SAINT THOMAS AQUINAS, op. cit., II-II, q.60, Art. 1.-
[5] SAINT THOMAS AQUINAS, op. cit., II-II, q.60, Art. 2.-
[6] SAINT THOMAS AQUINAS, op. cit., II-II, q.67, Art. 1.-
[7] SAINT THOMAS AQUINAS, op. cit., II-II, q.67, Art. 3.-
[8] CARNELUTTI, Francesco, *Las miserias del proceso penal*, Buenos Aires, 2006, Librería El Foro, p. 18.-
[9] CARNELUTTI, Francesco, op. cit., p. 20.-
[10] VIGO, Rodolfo Luis, *Ética de la magistratura judicial* in: AA.VV. *La función judicial*, Buenos Aires, 1981, Depalma, p. 64.-
[11] VIGO, Rodolfo Luis, op. cit., pp. 79-83.-
[12] VIGO, Rodolfo Luis, op. cit., p. 82.-
[13] MALEM, J, *La vida privada de los jueces* in AAVV, *La función judicial*, Barcelona, 2003, Gedisa, p. 170.-

[14] ABREU BURELLI, Alirio, *Independencia Judicial (Jurisprudencia de la Corte Interamericana de Derechos Humanos)*, article published by the *Instituto de Publicaciones Jurídicas de la Universidad Nacional Autónoma de México*, www.juridicas.unam.mx.-

[15] BINDER, Alberto Martín, *Introducción al Derecho Procesal Penal*, Buenos Aires, 2005, Edit. Ad-Hoc., page 149 ss.-

[16] (1) Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

[17] IAHR Court, *Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs.* Judgment of November 22, 2005. Series C No. 135, para. 145 ss.-

[18] IAHR Court, *Case of Herrera Ulloa v. Costa Rica. Preliminary Exceptions, Merits, Reparations and Costs.* Judgment of July 2, 2004. Series C No. 107, para. 171 ss.-

[19] IAHR Commission, Report 5/96, case 10,970.-

[20] Cf. CAFFERATA NORES, José Ignacio, *Proceso Penal y Derechos Humanos*, Buenos Aires, 2007, Editores del Puerto, pages 37 ss.-

[21] See LOPEZ BARJA de QUIROGA, Jacobo y GARCIA COMENDADOR ALONSO, León, *Doctrina del Tribunal Europeo de Derechos Humanos*, Valencia, 2008, Editorial Tirant lo Blanch, page 53.-

[22] IAHR Commission, Report 1/95, case 11,006.-

[23] IAHR Commission, Report 35/96, case 10,832.-

[24] IAHR Court, *Case of the Constitutional Court v. Perú. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 71, paras. 72 to 75.-

[25] REMOTTI CARBONELL, José Carlos, *La Corte Interamericana de Derechos Humanos —estructura, funcionamiento y jurisprudencia—*, 2004, Lima, Editorial IDEMSA, page 355 ss.-

[26] IAHR Court, *Case of the Constitutional Court v. Perú*, supra note 24, para. 73.-

[27] GARCIA, Luis M., *El principio de igualdad de armas y los nuevos requerimientos*, article published in *"Prudentia Iuris"*, Issue No. 50, a publication of the *Universidad Católica Argentina*.-

[28] Cf. ECHR, *Case of Monnel and Morris v. United Kingdom.* Judgment of 2 March 1987.-

[29] ROXIN, Claus, *Derecho Procesal Penal*, 2003, Buenos Aires, Editores del Puerto, page 80 ss.-

[30] IAHR Commission, Report 50/00.-

[31] ROXIN, Claus, op. cit. note 28, page 80.-

[32] Cf. MAIER, Julio, *Derecho Procesal Penal I. Fundamentos*, 2004, Buenos Aires, Editores del Puerto, page 577 ss.-

[33] There is an interesting study on the matter carried out by Alberto Martín Binder in the work quoted in note 15, pages 123 ss.-

[34] IAHR Commission, Report 5/96.-

[35] We will dwell on this point later, bearing in mind that it would appear not to be achieved effectively in the course of the proceedings where statements by witnesses and by expert witnesses are filed in written form, with the attending impossibility of cross-questioning and requiring precisions on some points.

[36] CAFFERATA NORES, José Ignacio, *La Prueba en el proceso penal*, 2003, Buenos Aires, Edit. Lexis Nexis Depalma (5th. ed.), page 227.-

[37] Cf. CAFFERATA NORES, José Ignacio, op. cit. note 20, page 124 ss.-

[38] See IAHR Court, *Case of Baena Ricardo et al. v. Panamá. Merits, Reparations and Costs.* Judgment of February 2, 2001. Series C No. 72, para. 68; *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs.* Judgment of August 31, 2001. Series C No. 79, para. 86; *Case of the "Five Pensioners" v. Perú. Merits, Reparations and Costs*. Judgment of February 28, 2003. Series C No. 98, para. 64; *Case of Juan Humberto Sánchez v. Honduras. Preliminary Exception, Merits, Reparations and Costs*. Judgment of June 7, 2003. Series C No. 99, para. 28; *Case of Bulacio v. Argentina. Merits, Reparations and Costs.* Judgment of September 18, 2003. Series C No. 100, para. 40; *Case of Myrna Mack Chang v. Guatemala. Merits, Reparations and Costs.* Judgment of November 25, 2003. Series C No. 101, para. 118; *Case of Maritza Urrutia v. Guatemala. Merits, Reparations and Costs.* Judgment of November 27, 2003. Series C No. 103, para. 46; *Case of Almonacid Arellano et al. v. Chile. Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of September 26, 2006. Series C No. 154, para. 67; *Case of Ximenes Lopes v. Brazil. Merits, Reparations and Costs.* Judgment of July 4, 2006. Series C No.

149, para. 42; *Case of the Ituango Massacres v. Colombia. Preliminary Exception, Merits, Reparations and Costs.* Judgment of July 1, 2006. Series C No. 148, para. 106; *Case of Baldeón García v. Perú. Merits, Reparations and Costs.* Judgment of April 6, 2006. Series C. No. 147, para. 60; among scores of many others.-

[39] On this matter, we understand that at some point in time the IAHR Court should consider different options to make access by an individual bringing a complaint against a State easier and simpler.-

[40] IAHR Court, *Case of Cantoral Huamaní and García Santa Cruz v. Peru. Merits, Reparations and Costs.* Judgment of July 10, 2007. Series C No. 167, para. 45.-

[41] IAHR Court, *Case of Almonacid Arellano v. Chile,* quoted *supra* note 38, para. 67.-

[42] Cf. IAHR Court, *Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 136.-

[43] *Case of Neira Alegría et al. v. Peru. Merits.* Judgment of January 19, 1995. Series C No. 20, para. 65.-

[44] An interesting difference can be noticed in this matter. On the one hand, in proceedings before an international human rights tribunal the respondent is usually a State Party and as such is bound to provide evidence that is to be used against it. Such circumstances are not obviously to be found in a case heard by an domestic tribunal.-

[45] IAHR Court, *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits.* Judgment of March 8, 1998. Series C No. 37, para. 22.-

[46] IAHR Court, *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala*, supra note 45, para. 22.-

[47] On this aspect we can mention as and example participation by Dr. Ricardo Gil Lavedra in the *Case of Bulacio v. Argentina* or by Dr. Julio Barberis in *Maqueda v. Argentina*.-

[48] VIDAL RAMIREZ, Fernando *La Judicatura Ad Hoc*, in the compilation of the Seminar held in San José de Costa Rica on November 23 and 24, 1999, published in Book I of the *"Sistema Interamericano de Protección de los Derechos Humanos en el S. XXI"*, 2003, San José de Costa Rica, pages 589/94.-

[49] The procedure for such election is provided in the IAHR Court Rules of Procedure, Article 18, wherein it is ruled that 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 States referred to in those provisions shall be informed of their right to appoint an *ad hoc* Judge within 30 days of notification of the application. Then, should the State fail to exercise its right within the time limits established in Art. 18(3) of the Rules of Procedure of the IAHR Court and Art. 10(4) of the Statute of the IAHR Court, it shall be deemed to have waived that right.-

[50] Although it is true that the *ad hoc* judge has in common with the deputy agent that they are both appointed by the State, the roles each other play are exactly the opposite.-

[51] See, at the European level, the presentation by FLAUSS, Jean-Francois, *"Le Protocole Nro. 11: Cote Cour"*, quoted by ROLANDO GIALDINO in *La Nueva Corte Europea de Derechos Humanos - Protocolo Nro. 11-*, in the publication by the *Secretaría de Investigación y Derecho Comparado de la Corte Suprema de Justice de la Nación Argentina* [Clerk for Research and Compared Law of the Supreme Court of the Argentine Nation], 1 (1999).-

[52] NIETO NAVIA, Rafael, *El sistema interamericano de derechos humanos*, a contribution for collective work No. II. *Jornadas Colombo-Venezolanas de Derecho Público*, 1996, Bogotá, published by the *Universidad Externado de Colombia* and others, pages 558/9.-

[53] Cf. BOREA ODRIA, Alberto, *Propuesta de Modificación a la legislación del Sistema Interamericano de Protección de los Derechos Humanos*, in *"El Sistema Interamericano de Protección de los Derechos Humanos en el umbral del siglo XXI —Memoria del Seminario Noviembre de 1999"*, San José de Costa Rica, 2003, published by the Inter-American Court of Human Rights (second edition).-

[54] FAUNDEZ LEDESMA, Héctor, *La Independencia e Imparcialidad de los Miembros de la Comisión y de la Corte: Paradojas y Desafíos",* a contribution to the collective work *"El futuro del Sistema Interamericano de Protección de los Derechos Humanos"*, 1998, San José de Costa Rica, published by the *Instituto Interamericano de Derechos Humanos*, pages 195/8.-

[55] OTEIZA, Eduardo, *La protección procesal de los derechos humanos*, published in *La Ley*, Buenos Aires, T. 1986-E, pages 1201/30.-

[56] Cf. BOREA ODRIA, Alberto, quoted *supra* note 53.-