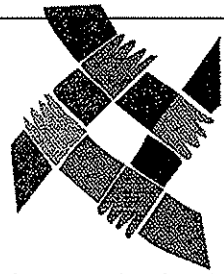

The Bernard and Audre
RAPOPORT CENTER
For Human Rights and Justice

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Austin, 26 de enero de 2009

Estimado Sr. Secretario:

Tengo el agrado de dirigirme a Usted en representación del Bernard and Audre Rapoport Center for Human Rights and Justice de la Escuela de Derecho de la Universidad de Texas, a fin de presentar un amicus brief en la solicitud de opinión consultiva presentada por la República Argentina sobre la "interpretación del artículo 55 de la Convención Americana sobre Derechos Humanos", en relación con "la figura del juez *ad hoc* y la igualdad de armas en el proceso ante la Corte Interamericana en el contexto de un caso originado en una petición individual", así como respecto de "la nacionalidad de los magistrados [del Tribunal] y el derecho a un juez independiente e imparcial".

De conformidad con el Reglamento de la Corte Interamericana, indico a los fines de la recepción oficial de todas las comunicaciones y notificaciones que el Tribunal envíe los siguientes datos:

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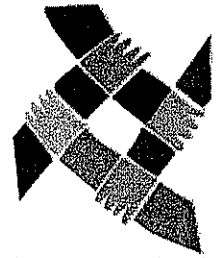
Agradeciendo desde ya la atención al presente escrito, me suscribo expresando mi más alta consideración y estima.

Ariel E. Dulitzky



The Bernard and Audre
RAPOPORT CENTER
For Human Rights and Justice
The University of Texas at Austin
School of Law

Presents Amicus Curiae

Ariel Dulitzky, Kaleema Al-Nur, Mario Franke, Bridgett Mayeux, and Kelly Stephenson, on behalf of the Bernard and Audre Rapoport Center for Human Rights and Justice, present this amicus brief to the Honorable Inter-American Court of Human Rights.

Interest of the Amicus Curiae

The central mission of the Bernard and Audre Rapoport Center for Human Rights and Justice is to create an interdisciplinary community engaged in the study and defense of human rights in order to promote the political and economic advancement of groups and peoples throughout the world. In this sense, the Center has a special interest in the strengthening of the Inter-American Human Rights system.

Purpose of the Amicus

We request that the Honorable Inter-American Court of Human Rights accept the Rapoport Center as Friends of the Court in order to submit for its consideration arguments relating to the Argentine Republic's request for an advisory opinion, seeking "interpretation of Article 55 of the American Convention on Human Rights" in relation to "the person of *ad hoc* judge in the context of a case arising from an individual petition," as well as to "the nationalities of the magistrates [of the Inter-American Court] and the right to an independent and impartial judge."

Summary of Argument

Amici assert that the proper interpretation of Article 55 precludes the appointment of *ad hoc* judges in *individual* cases; thereby limiting the practice of*ad hoc* appointment to cases of inter-State complaints. This interpretation is consistent with the text of the American Convention on Human Rights[1], the Court's Statute, international practices, the 2001 Rules of Procedure, and the Court's role to promote and protect human rights in the Inter-American system.
It is a commonly accepted value among domestic and international legal communities that justice presupposes that everyone has a right to a fair and public trial before a competent, independent

[1] Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

and impartial court.[2] This value has been referred to as 'the triple crown of the judiciary'[3]. In the current evolution of the Inter-American system such value requires the limitation of the *ad hoc* appointments to inter-State complaints.

Furthermore, the rules and practice of recusals demonstrates that the Court has adequate procedural safeguards in place to guarantee a competent, impartial and independent trial and its rules are consistent with international norms and the practices of similar courts regarding disqualification or ineligibility of judges. However, to further strengthen the Court's judicial safeguards, it may wish to consider amending its Rules to follow the example of the Commission and automatically disqualify a Judge who is national of the State party to the case. Alternatively, the Court may provide an avenue to petition for recusal, or a motion for disqualification available to victims and counsel. Additionally, the Court may wish to consider drafting an Inter-American Resolution on Judicial Ethics to provide benchmarks or to articulate the principles underlying the American Convention, the Statute, and Rules of the Court.

Background on the Practice of *Ad hoc* Appointments

The Court was in the early stages of its development when the Honduran cases of 1986, the first individual complainant cases, reached it. In the case of *Velásquez-Rodríguez v. Honduras,* when the Honduran judge disqualified himself, the Court decided to give the government of Honduras a right to appoint an *ad hoc* judge,[4], instead of following the interim judge procedure. Given the circumstances, the Court's decision at this time was understandable; it was the Court's first line of contentious cases, and it was at this time that the Court and the Commission were still developing their procedures and establishing legitimacy within the region.[5] However, more than twenty years have passed and the way in which the Court handled the recusal of the Honduran sitting judge requires a new examination considering the clear language of the American Convention, the Statute of the Inter-American Court and the developments of the Inter-American System.

The Honduran judge, Jorge R. Hernández Alcerro "informed the President of the Court that, pursuant to Article 19(2) of the Statute of the Court, he had "decided to recuse (him)self from hearing the three cases that . . . were submitted to the Inter-American Court." By a note of that same date, the President informed the Government of its right to appoint a judge *ad hoc* under Article 10(3) of the Statute of the Court. The Government named Rigoberto Espinal Irías to that position by note of August 21, 1986."[6] If a judge recuses himself per Article 19(2) of the Statute,

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[2] Hans Corell, Under Secretary General for Legal Affairs, The Legal Counsel of the United Nations "Ethical Dimensions of International Jurisprudence and Adjudication, "Keynote Address, June 10, 2002.

[3] "The triple crown of integrity of the judiciary is stated in those words: competence, independence and impartiality." Honorable Justice Michael Kirby,' Judicial Integrity – A Global Contract,' The Judicial Group on Strengthening Judicial Integrity, Third Meeting, Colombo, Sri Lanka (2003).

[4] I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1

[5] JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 13 (Cambridge University Press 2003).

[6] I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 4

then 19(4) automatically applies.[7] Article 19(4) states "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." (italics added)

Perhaps the Court interpreted the "*may* request" language to mean *that it had the option of* replacing Article 19(4) (interim judge) procedures with Article 10 (*ad hoc*) procedures. However, the "*may*" language, read in "good faith" is better interpreted to mean that the President does not have to replace the judge with an interim judge. Rather, the Court may choose to hear a case with as few as five judges on the bench,[8] or the President may initiate the procedure for appointing an interim judge.

The Court was likely motivated by the belief that Honduras would be more willing to cooperate with the Tribunal if it had a national sitting as a Judge. The Honduran cases were, after all, the first individual complainant cases before the Court and there was no precedent to follow. The Court also needed to establish its legitimacy and a procedure that both in substance and in appearance assured the Tribunal's impartiality, the right of the defense of the State, and the Government's engagement with the proceedings.

The Court not only permitted, but gave Honduras a "right" pursuant to Article 10(3) of the Statute, to unilaterally and with few limitations.[9] appoint a judge *ad hoc.* [10] This "right" was subsequently transferred to *all* cases of individual complainants, starting with the case of *Aloeboetoe et al. v. Suriname*,[11] whether or not a national judge was sitting. The Court has maintained the practice of granting a "State right" to appoint an *ad hoc* judge in cases where there is an individual complainant. However, a textual interpretation of Article 55 of the Convention and Article 10 of the Statute, using principles of "ordinary meaning," weighs against maintaining the practice.

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[7] Article 19 Disqualification: Statute of the Inter-American Court of Human Rights.

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.
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.
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.

[8] Inter-American Court, Rules of Procedure of the Court, Article 13, 2001.

[9] Statute of the Inter-American Court of Human Rights. Article 10(5) The provisions of Articles 4, 11, 15, 16, 18, 19 and 20 of the present Statute shall apply to ad hoc judges.

[10] I/A Court H.R., *Case of Velásquez-Rodriguez v. Honduras*. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1

[11] I/A Court H.R., *Case of Aloeboetoe et al. v. Suriname*. Merits. Judgment of December 4, 1991. Series C No. 11

Textual Interpretation of Article 55

A textual interpretation of Article 55 of the American Convention,[12] (which serves as the foundation for Article 10 of the Statute[13] and Article 18[14] of the Court's 2001 Rules of Procedure), reveals that the practice of granting defendant States a "right" to appoint a judge *ad hoc* has no textual basis. Under rules of statutory interpretation, the American Convention expressly grants States this power only in state-versus-state cases.[15]

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[12] Article 55 of the Convention of the Inter-American Court of Human Rights:

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.

[13] Article 10 Ad hoc Judges: of the Statute of the Inter-American Court of Human Rights:

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 is a national of one of the States Parties to the case, any other State Party to the case may appoint a person to serve on the Court as an ad hoc judge.
3. If among the judges called upon to hear a case, none is a national of the States Parties to the case, each of the latter may appoint an ad hoc judge. Should several States have the same interest in the case, they shall be regarded as a single party for purposes of the above provisions.
In case of doubt, the Court shall decide.
4. The right of any State to appoint an ad hoc judge shall be considered relinquished if the State should fail to do so within thirty days following the written request from the President of the Court. 5. The provisions of Articles 4, 11, 15, 16, 18, 19 and 20 of the present Statute shall apply to ad hoc judges.

[14] Article 18. Judges Ad hoc: Rules of Procedure of the Inter-American Court of Human Rights

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.

[15] JUAN E. MENDEZ, *The Inter-American System of Protection: Its Contributions to the International Law of Human Rights*, Eds. SAMANTHA POWER AND GRAHAM ALLISON, REALIZING HUMAN RIGHTS 128 (St. Martin's Press New York 2000).

To properly interpret the text of Article 55 of the Convention, international norms of treaty interpretation set forth in the Vienna Convention on the Law of Treaties, 1969 are essential. Article 31(1) of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[16] Article 32 provides that:

> [r]ecourse may be had to supplementary means of, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

The Court has invoked the Vienna rules of interpretation when interpreting the language of the American Convention. In the Court's advisory opinion *Restrictions to the Death Penalty*,[17] it applied the Vienna rules of interpretation, explaining that this method of interpretation "respects the principle primacy of the text, that is, the application of objective criteria of interpretation."[18] The Court further explains:

> [I]n the case of human rights treaties, moreover, objective criteria of interpretation that look to the texts themselves are more appropriate than subjective criteria that seek to ascertain only the intent of the Parties. This is so because human rights treaties, as the Court has already noted, "are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States;" rather "their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States."[19]

Article 55 of the American Convention appears to be drawn from Article 31 of the Statute of the International Court of Justice (ICJ).[20] The substantive parts of Article 55(2) and 55(3), have been

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[16] Article 31 of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, adopted 22 May 1969, entry into force 27 January 1980.

[17] I/A Court H.R., *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*. Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3

[18] *Id* at para. 50.

[19] I/A Court H.R., *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*. Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 50.

[20] Article 31 of the Statue of the International Court of Justice.

> 1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.
> 2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.
> 3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.
> 4. The provisions of this Article shall apply to the case of Articles 26 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such, or if they are unable to be present, to the judges specially chosen by the parties.
> 5. Should there be several parties in the same interest, they shall, for the purpose of the preceding

adopted in other instruments regulating the operations of the Inter-American Court, including Article 10(2) and 10(3) of the Statute of the Court, and Article 18 of the Court's 2001 Rules of Procedure; all of which have incorporated the concept of *ad hoc* judge appointments from the ICJ.

But there are strong differences between the ICJ and the Inter-American Court that require limiting the use of *ad hoc* judges to inter-State complaints. In effect, the ICJ hears only cases of inter-State conflict. The structure of the ICJ's statute illustrates its single mandate – to resolve disputes between States. This is fundamentally different from the Inter-American Court's mandate, which derives from the Convention, and is to resolve disputes not only between States but also to resolve disputes between individuals and States. "The drafters of the American Convention had the foresight to give individuals the right to petition," through the Commission.[21] The structure of Article 10 and Article 19 reflect the Court's dual mandate to hear both inter-state and individual complaints. Article 10, which deals with inter-state cases, allows both States to be represented before the Court. Article 19, by contrast, is broad enough to deal with cases of disqualification in both individual complaint cases and inter-state conflicts.

From its inception, the ICJ was structured to hear only inter-State complaints. Whereas, the Inter-American Court was structured to hear both inter-State complaints *and* individual complaints. Importantly, when the drafters used the language of the ICJ's Article 31 to write Article 55 of the American Convention, they did not use any language particular to individual complainants. Rather, Article 55 clearly refers to "*States* Parties." In contrast, the ICJ did not need to specify *States* Parties in their language because States are the only parties before the ICJ. At the Inter-American Court this is not the case, which is why the drafters had to specify *States* Parties in the language. Furthermore, the Rules of the Court reinforce this point when it defines at 23 that the expression "parties to the case" refers to the victim or the alleged victim, the State and, only procedurally, the Commission. Thus, "parties to the case" and "state parties" are understood as distinct, that is, they are not to be conflated.

Comparing the sections of the two parallel Articles of the ICJ and the American Convention line-by-line reinforces this point:

> **ICJ Article 31(1)**: Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.
>
> **American 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.

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provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court.

6. Judges chosen as laid down in paragraphs 2, 3, and 4 of this Article shall fulfill the conditions required by Articles 2, 17 (paragraph 2), 20, and 24 of the present Statute. They shall take part in the decision on terms of complete equality with their colleagues.

[21] JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 13 (Cambridge University Press 2003), at 5.

Note that 31(1) refers to "*parties*" as compared to 55(1), which refers to "*State Parties*." This distinction necessarily had to be made because of the Inter-American Court's unique mandate of hearing both inter-State and individual complaints.

Compare the ICJ and the Inter-American Court articles on the use ad hoc judges:

> **ICJ Article 31(2)**: If the Court includes upon the Bench a judge of the nationality of one of the *parties*, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.
>
> **American American Convention 55(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.

Again, note the distinctive reference to "State Party" in the language of 55(2) of the American Convention. Therefore, at the Inter-American Court, a State Party may certainly appoint an *ad hoc* judge, but only when the opposing party is a "State Party" to the case. If the drafter's intended it to be otherwise, they would not have inserted the "State Party" language from the text of 55(2), and instead merely used the language of "party" as does the ICJ. Understandably, "party" in the context of the Inter-American Court would include both States and individual petitioners, and if it was intended for a State to retain the right to appoint an *ad hoc* judge in an individual petitioner case, then "State Party" would not have been clarified.

Again, a plain meaning or textual interpretation of Article 55 as applying exclusively to "State Parties" is supported through a comparison of the relevant ICJ and Inter-American Court articles and their clauses:

> **ICJ Article 31(3)**: If the Court includes upon the Bench no judge of the nationality of the *parties*, *each* of *these parties* may proceed to choose a judge as provided in paragraph 2 of this Article.
>
> **Inter-American Convention 55(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.

Note that 31(3) states "no judge of the nationality of the *parties*, each of these *parties* may proceed to choose a judge" as compared to 55(3), which states that if none of the judges is a national "of any of the *State Parties* to the case, *each* of the *latter* may appoint an *ad hoc* judge." As with 55(2), inserting "State" before "Parties" is clear intention that 55(3) was to apply to inter-State cases alone. "The plain meaning of the wording chosen in the Convention is equally

clear and the use of the plural is not gratuitous. The term "each of the latter" alludes to both Parties to the litigation, which as the text indicates, are solely States."[22]

The foregoing textual interpretation based on the Vienna Convention Article 31 on statutory interpretation is reinforced by the application of the Vienna Convention Article 32 to the non-statutory documents discussing the original drafting of Article 55 of the Convention.

The original drafts of the American Convention did not include the incorporation of *ad hoc* judges. Likewise, the original project, following the practice of the Inter-American Commission, established that no judge could participate in issues regarding their country. The draft prepared by the Inter-American Commission in 1968 regulated the institution of *ad hoc* judges in a completely different manner than what it was finally adopted and the way in which the Court has come to interpret Article 55. In effect, article 46.2 of the Commission's draft provided that the national judge of the State will be substituted by an *ad hoc* judge. This draft was sent to the States to formulate their own observations. The United States expressed that in order to maintain the stability of the Court, it was convenient to avoid the naming of judges *ad hoc*. During the Inter-American Conference that finally adopted the Convention, Commission II, in charge of discussing the structure of the Court drafted current Article 55. Commission II's rapporteur explained that Article 55 differed completely from the draft Article 46 in regards to the *ad hoc* judges, following the text of Article 31 of the State of the International Court for Justice. In sum, the traveaux preparatoire support our assertion that the Convention followed in this point the Statute of the ICJ dealing with inter-state complaints.

The practice of the State in an individual complainant case having a "right" to appoint an *ad hoc* judge has persisted for over two decades. However, it is important to remember, in the words of Honorable Justice Buergenthal, "ten years in the life of an international institution is nothing. It is a fleeting moment."[23] Continual restructuring of operations is necessary in the early stages of an international institution. "[I]t has only been in the last 10 years that the Court has really begun to examine large numbers of individual petitions," Those words are still valid today and the procedural advancements of the Court, particularly those granting autonomous representations to the alleged victim provide additional reasons for why *ad hoc* in this context should be reconsidered.[24]

Comparison to Other International Human Rights bodies

The Inter-American Court has a history of giving respectful and deliberate consideration to the opinions and practices of other international human rights courts.[25] By engaging in international

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[22] Mónica Feria Tinta, *"Dinosaurs" in Human Rights Litigation: The Use of Ad hoc Judges in Individual Complaints Before the Inter-American Court of Human Rights*, 3 LAW & PRAC. OF INT'L CTS. & TRIBUNALS 83 (2004).

[23] Lynda E. Frost, *The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges*, 14-2 HUM. RTS. Q., 171, 204 (May, 1992).

[24] Livingston Harrison, *The Inter-American System of Human Rights*, p. 422.

[25] See e.g. I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18 citing the International Court of Justice, the European Court of Human

dialogue, the Court has been able to influence the evolution of international human rights law and has enjoyed the fruits of the debate by critically analyzing its own methods and adopting international practices and interpretations when appropriate. In light of this history, a comparison between the practice of *ad hoc* appointment at the Inter-American Court and the practice of the European Court of Human Rights is appropriate.[26] But first, the Court should take into consideration the analogous practices of other major international human rights bodies.

The Inter-American Commission on Human Rights and the Human Rights Committee

The United Nations Human Rights Committee and the Inter-American Commission take strong and clear positions to prevent their members from participating in cases involving the State which appointed them. The Inter-American Commission's Rules of Procedure prohibit members from participating in "on-site observations"[27] and "discussion, investigation, deliberation or decision of a matter submitted to the Commission...if they are nationals of the State which is the subject of the Commission's general or specific considerations."[28] Similarly, the United Nations Human Rights Committee's Rules of Procedure prevent members from participating in the "examination of state reports," or "the discussion and adoption of concluding observations" that involve the State which appointed them.[29]

These decisions by the Commission and the Committee represent a principled opposition to even the inference of bias. By prohibiting the involvement of any members associated with the State under revision, the Commission undermines any arguments that it acted in favor of the State because of the overt or latent allegiance of the associated members. This approach also has the benefit of neutralizing the opposite argument that the associated member acted in a hostile

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Rights, the African Commission of Human and Peoples' Rights, the Human Rights Committee, Committee for the Elimination of Racial Discrimination.

[26] It is inappropriate to make an extensive comparison to the African Court of Human and People's Rights because that body has not yet rendered a judgment. However, the Protocol to that Court provides that "if the judge is a national of any State which is a party to a case submitted to the Court, that judge shall not hear the case," which is consistent with changes advocated in this brief. Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, Art. 22, 1 Jan. 2004. Comparison to the ICJ is not appropriate because that court is solely concerned with inter-State cases and therefore could not address the issue of ad hoc appointments in individual cases. Comparison to ad hoc criminal tribunals is inappropriate because of the limited jurisdictions of those tribunals and the fact that States are not parties.

[27] Rules of Procedure, Inter-American Commission on Human Rights, Art. 52, 25 July 2008. "A member of the Commission who is a national of or who resides in the territory of the State in which the on-site observation is to be conducted shall be disqualified from participating in it."

[28] Rules of Procedure, Inter-American Commission on Human Rights, Art. 17(2) (a) (b), 25 July 2008. "Members of the Commission may not participate in the discussion, investigation, deliberation or decision of a matter submitted to the Commission in the following cases:

> a. if they are nationals of the State which is the subject of the Commission's general or specific consideration, or if they were accredited or carrying out a special mission as diplomatic agents before that State; or,
>
> b. if they have previously participated in any capacity in a decision concerning the same facts on which the matter is based or have acted as an adviser to, or representative of any of the parties interested in the decision."

[29] Rules of Procedure, United Nations Human Rights Committee, Rule 70(4), 24 April 2001. "No member of the Committee shall participate in the examination of state reports or the discussion and adoption of concluding observations if they involve the State party in respect of which he or she was elected to the Committee."

manner to their State. Further, it demonstrates the Commission's respect for individual applicants who believe they have been treated unfairly by their State. Moreover, individuals who feel that their rights have been violated by their State might be hostile to anyone who could be seen as a representative of that State and are more likely to feel that their rights are being respected when members of that State are not involved. The need to show respect for the individuals' concerns and perceptions is particularly important since the Commission and the Court will often represent the first and last opportunity for individuals to present their case in a forum outside of their State's control.

The procedures of both the Committee and the Commission address the problems outlined above and serve to insulate both organizations from accusations of bias. The principles of neutrality and fairness underlying those decisions are *a fortiori* more applicable to the Court because of its role as a neutral forum of last resort adjudicating an adversarial process..

The European Court of Human Rights

Relative to the European Court and based on its current practice of ad hoc judge appointments, the Inter-American Court will have a greater frequency of cases in which one judge on the panel is unelected and could have been appointed based solely on his or her State-friendly views on a specific subject before the court. Therefore, the *ad hoc* practice at the Inter-American Court is much more susceptible to plausible accusation of bias. The comparison as well as its historical roots, reveal that the Court is fully justified in changing its *ad hoc* appointment practices and that changes are appropriate in order for the Court to give full effect to its mission of promoting human rights in the Americas.

The European Court of Human Rights, like the Inter-American Court, makes provisions to ensure that whenever a State is a party to a dispute that State may have a "national judge" [30] sit on the panel that hears the case[31] unless the State chooses otherwise.[32] But the similarity in the

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[30] "National judge" is short hand for, "the judge elected in respect of the Contracting Party concerned" or "judge who [sits] in respect of the State Party concerned". See e.g., Rule 26(a) & Rule 24(d). The term does not imply that the judge is designated to act on behalf of the nation that appointed him or her. In both courts the judges are required to act independently of their nominating nation. See Inter-American Convention, Art. 52 (referring to "individual capacity"); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), Art. 21.2 (referring to "individual capacity."). The term "national judge" is found in the index of the European Rules, under "Judges" on pg. 74, and is commonly used. See e.g. Caflisch, at 173. However, the so-called national judge need not be a national of the country which nominates him or her. For example, the current judge elected in respect of Liechtenstein, Hon. Mark Villiger, is Swiss. *Composition of the Court*, European Court of Human Rights, available on-line at:
<http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/Composition+of+the+Court/>. Last updated 20 October 2008.

[31] Lucius Calfisch, Independence and Impartiality of Judges: The European Court of Human Rights, 2 LAW AND PRACTICE OF INT'L HUMAN RIGHTS 169, 173 (2003). (Referring to the ECHR, "The national judge of the defendant State will always be present for any decision in a case involving that State.") ; Convention Article 27 § 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."; An exception occurs if State parties "have a *common interest*." The States may "agree to appoint a single judge", but if they cannot agree, then a single judge will be chosen "by lot from the judges proposed by the parties." Rules of the Court 30. (All emphasis added.)

final composition of the trial benches in both the Inter-American Court and the European Court obscures the fundamental differences in the significance of the *ad hoc* appointments.

In the European system where each member state has a judge serving on the court,[33] the national judge's participation in the trial bench is principally achieved by designating the "national judge" as an *ex officio* member of the Grand Chamber and Chamber, and by assigning the case to the Section in which the national judge is a member and then assigning the national judge to the Chamber which will hear the case.[34] It is important to emphasize that the European Court is a body in which every individual member nation will have a national judge as a full-time member of the Court. Typically, *ad hoc* judges will be used when a national judge "is unable to sit in the Chamber, withdraws, or is exempted, or if there is none [currently serving with the Court]."[35] Therefore, the situation in which a national judge is not available will be an anomaly, perhaps in a case in which a judge exits the Court suddenly. In other words, in most situations, the national Judge is already serving at the European Court on a permanent basis.

By contrast and given that there are only seven part-time judges, to give the possibility that a national judge hears each case[36], the Inter-American Court relies on *ad hoc* appointment whenever a national judge is not a member of the Court at the time the case is ready for hearing. Since not every member state will have a national judge serving at the Inter-American Court, it is much less likely that a national judge will be serving in the Court and the *ad hoc* appointment will be needed on a regular basis. In contrast, at the European Court, it will be extremely rare that a member nation will not have a national judge assigned to the Court.

The structural divergence between the two courts creates an important difference in the significance of the *ad hoc* appointments. The *ad hoc* appointment process followed by the Inter-American Court lacks the guarantees of independence and impartiality that secures the European system. In effect, a national judge in a European Court case will almost always be a judge who was nominated by the State at a time when the State party was unaware of what cases that judge might hear. Furthermore, the judge will have been subjected to the full nomination and election

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[32] At the European Court the State party has thirty days to indicate "...whether it *wishes* to appoint to sit as judge either another elected judge or an ad hoc judge...". Rules of the Court 29(1)(a) (emphasis added); The right is waived when the State party fails to respond in the time allocated by the Chamber and in situations in which the State party "twice appoints as ad hoc judge persons who the Chamber finds do not satisfy the conditions" of basic qualification. Rules of the Court 29(2).

[33] European Convention, Art. 20. "The Court shall consist of a number of judges equal to that of the high Contracting Parties."

[34] Rule 24(2) (b). "The judge elected in respect of the Contracting Party concerned or, where appropriate, the judge designated by virtue of Rule 29 [the ad hoc rule] or Rule 30[the common interest rule] shall sit as an *ex officio* member of the Grand Chamber in accordance with Article 27 §§ 2 and 3 of the Convention."; Rule 26(1)(a). "the Chamber shall in each case include...the judge elected in respect of any Contracting Party concerned. If the latter judge is not a member of the Section to which the application has been assigned..., he or she shall sit as an *ex officio* member of the Chamber in accordance with Article 27 § 2 of the Convention.";Convention Article 27 § 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."

[35] Rule 29(1)(a)

[36] It is important to keep highlight that there is no conventional requirement to have a national judge serving in a particular case. In fact, in some instances, the State had decided not to use the Court's invitation to appoint an *ad hoc* judge.

procedures of the European Court. Conversely, to meet the same goal of ensuring that a national judge is always present, *ad hoc* judges are appointed at the Inter-American Court without the full process of election—they are merely appointed by the State. Moreover, the appointing state will be able to choose a judge knowing the facts of the case and issues of lawwhich that judge will hear.

Because the State has knowledge of the specific factual and legal matters the Court is likely to hear at the time it appoints an *ad hoc* judge, valid challenges to the Inter-American Court's adherence to the principles of equality of arms and impartiality of the judiciary can arise. Challenges to these fundamental principles of human rights, justice, and equality are particularly acute considering the mission of the Court—to protect and promote human rights—and the context—the individuals' last chance to present their case to an impartial body.

Procedural Changes in the Inter-American System

Evolution toward Greater Participatory Rights

The Inter-American System has evolved towards greater participatory rights of the individual complainant. In 2001, the Rules of Procedure for the Commission were amended to streamline cases and improve the procedural fairness and transparency of the system.[37] The most significant amendment affecting the relationship between the Commission and the Court was to Article 44,[38] where for the first time, the Commission articulated standards for deciding whether or not a case should be transmitted to the Court.[39] An individual who alleges that a State party to the American Convention has violated international human rights obligations must initially file a petition with the Inter-American Commission.[40] But, the 2001 amendments have lead to an increasing number of individual cases being referred to the Inter-American Court[41] because Article 44 specifies that if States do not comply with the Inter-American Commission's recommendations, the case *shall* be sent to the Court for review.

This fundamental development was accompanied by the Court's amendment of its Rules of Procedure;. The most significant amendment was to Article 23, granting greater autonomy to alleged victims, by allowing them to submit their pleadings, motions and evidence through chosen counselthroughout the proceedings.[42] In addition, the new rules state that "the expression

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[37] Dinah Shelton, *New Rules of Procedure For The Inter-American Commission on Human Rights*, 22 Hum. Rts. L.J. 169, 169 (2001).

[38] Article 44 provides that if the state has not complied with the Inter-American Commission's recommendations as set forth in the merits report on the case, the case shall be sent to the Inter-American Court of Human Rights, unless four members of the Commission take a reasoned decision that it should not be sent.

[39] Dinah Shelton, *New Rules of Procedure For The Inter-American Commission on Human Rights*, 22 Hum. Rts. L.J. 169, 171 (2001).

[40] American Convention at Art. 44.

[41] Cases submitted by the Commission to the Inter-American Court of Human Rights: 1997: 2, 1998: 3, 1999: 7, 2000: 3, 2001: 5, 2002: 7, 2003: 15, 2004: 12, 2005: 10, 2006: 14, 2007: 14 (available at http://www.cidh.org/annualrep/2007eng/Chap.3d.htm).

[42] Inter-American Court of Human Rights Rule of Procedure Art. 23 (1) (2001).

'parties to the case' refers to the victim or the alleged victim, the State and, *only procedurally, the Commission.*"[43] The direct participation of the victim in proceedings is a significant innovation for the Court, since it gives the victims and their chosen counsel direct access to Court rather than having to use the Commission as an intermediary. These changes essentially liberate the Commission of its historical role as the petitioner-advocate in Court proceedings, thereby locating it in a more impartial space between petitioner and State. Thus, the trend of increased individual petitions is mitigated by the new role of the Commission, which is that of the neutral party taking the State's interest into more balanced account, since it no longer has the designated role of the 'petitioner-advocate' if a friendly settlement fails.

The amended rules have established the autonomy of the individual petitioner throughout the entirety of the proceedings and thereby fundamentally changed the role of the Commission before the Inter-American Court. The dispute is now between the purported victim and the state in a more directly adversarial setting. The Commission is only party in the procedural sense and is no longer transformed into the primary advocate of alleged victims before the Inter-American Court. These procedural changes, which balance the playing field, clearly call for a change in the *ad hoc* appointment process. If there was any justification to maintain the ad hoc practice in a contentious case litigated by the Commission, today that need is not present. Currently, the disputes are between the alleged victim and the State with the presence of an autonomous body such as the Commission. As such, the inter-State rationale behind the *ad hoc* system is out of place and time.

Awareness of Domestic Ramifications of Court Decisions

There is a significant vetting process that offers protection to member States from baseless claims. The Commission reviews the incoming petitions, solicits information from the parties, allows or disallows the petition, and attempts to bring forth a friendly settlement amongst the parties involved.[44] Thus, there is ample opportunity for State parties to have their interests, protected at the Commission level and later on in front of the Court. Thus, there is not sufficient need for an *ad hoc* judge to protect a State's interest at trial.

Note that the Commission "shall refer the case to the Court, unless there is reasoned decision by an absolute majority of members of the Commission to the contrary."[45] Article 44 goes on to list factors that the Commission should consider in making that determination, including: the position of the petitioner; the nature and seriousness of the violation; the need to develop or clarify case-law of the system; *the future effect of the decision within the legal systems of the member States*; and the quality of the evidence available.[46]

Lastly, States have argued that the presence of an *ad hoc* judge as part of the proceedings is necessary in order to provide the Court with an understanding of the law and judicial system of the defendant-State ("domestic ramifications"). Article 44 of the Commission's Rules

[43] Inter-American Court of Human Rights Rule of Procedure Art. II (23) (2001).
[44] JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (Cambridge University Press 2003) at 6.
[45] Rules of Procedure of the Inter- American Commission of Human Rights, Art. 44.
[46] *Id.*

specifically mentions "domestic ramifications" as a factor when deciding the referral of the case to the Court, thereby forcing the Commission to take this concern into account. This concern is not only addressed by the language of Article 44, but can also be addressed by the advocate representing the State or through expert witness testimony.[47] Furthermore, the knowledge inculcated by the *ad hoc* judge is of limited use given that the proceedings largely deal with international norms and not domestic law.[48]

Independence and Impartiality

Ad hoc judges may very well be independent and impartial, but perception that they are not, by individuals and member States, is of paramount importance "a judge must be and *appear* to be independent. As the subjective element – that of intrinsic independence – is difficult to appreciate, the objective element – the *appearance* of independence in the eyes of the parties and the public – takes pride of place."[49] Hans Corell, Legal Counsel for the UN, said "International judges are operating under the eyes of the whole world, and the impression they give and the way in which they perform their work will directly reflect on the standing of the institution that they serve."

The individual petitioner's perception of impartiality and independence is particularly important in cases in which the petitioner has accused the State of human rights violations. From this perspective, the sole power of States in individual petitioner cases to appoint *ad hoc* judges is an unacceptable procedural advantage. In effect, the State is in the position "to appoint a person of its confidence not only to have a vote on the outcome of the case but also, basically, to be a lobbyist in a very effective position."[50] From this perspective, the sole power of the States in individual petitioner cases to appoint *ad hoc* judges is an unacceptable procedural advantage.

A strong rationale for the ICJ judge *ad hoc* provision is that in cases where a judge *ad hoc* is appointed by one of the State Parties, the other State Party need not feel itself in "a weaker position."[51] This rationale is not appropriate in the context of an individual petitioner. Not only is the individual in a factual weaker position to the State in terms of human and financial resources

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[47] See e.g. I/A Court H.R., Case of Apitz-Barbera et al. ("First Court of Adminstrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182 at 12.h (Jesús María Casal Hernández testifying inter alia on the Venezuelan domestic law governing the Judiciary); Case of Yvon Neptune v. Haiti. Merits, Reparations and Costs, Judgment of May 6 2008. Series C No. 180 (Serge Henry Vieux providing expert testimony about the Haitian judicial system and criminal proceedings) and Case of Salvador-Chiriboga v. Ecuador. Preliminary Objections and Merits. Judgment of May 6, 2008 Series C No. 179 (Julio Raúl Moscoso Álvarez, expert in Ecuadorian law, referring to the nature of the declaration of public utility, on the requirements needed to carry out a condemnation and the ways to challenge such legal concepts).

[48] Faundez Ledesma, Héctor; *El Sistema Interamericano de Protección de los Derechos Humanos. Aspectos institucionales y procesales;* Instituto Interamericano de Derechos Humanos; 2004 at185.

[49] Lucius Caflisch, *Independence and Impartiality of Judges: The European Court of Human Rights*, 2 L.& PRAC. INT'L CTS. & TRIBUNALS 169, 169-170 (2003).

[50] JUAN E. MENDEZ, SAMANTHA POWER AND GRAHAM ALLISON, REALIZING HUMAN RIGHTS 128 (St. Martin's Press New York 2000).

[51] Gilbert Guillaume, Some Thoughts on the Independence of International Judges Vis-à-Vis States, THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 164 2: 163-168, 2003.

but up to now, the individual is legally in a weaker position because she cannot appoint an *ad hoc* judge on her behalf, nor can she decide to refer the case to the Court if the Commission decides not to do so.

Analyzing on a case-by-case basis how *ad hoc* judges have performed is unnecessary, as there have been instances of both impartiality and partiality. It is possible to find examples of *ad hoc* judges appointed by Honduras, Suriname and Peru(Espinal Irías, Cançado Trindade, and Vidal)- who voted with the majorities to condemn the state that appointed them. In contrast, we can point to the extreme example in the *Neira Alegria v. Peru* case, where the *ad hoc* judge Mr. Orihuela, tried by all possible means to impede the Court's judgment.[52] However, the voting record and written judgments cannot possibly reveal the full impact of a judge in all cases. It is impossible to know by the record the ways in which the *ad hoc* judge may have influenced deliberations. Even without that factual record, the mere appearance of undue partiality of the *ad hoc* judge calls into question the existence of such a practice within a human rights tribunal.

"Independence represents aspiration to the rule of law, the notion that adjudication should remain – almost uniquely – separate from politics."[53] Certainly, the use of *ad hoc* judges, whether they were perceived as partial or not, was important to ensuring that member States adapted to the Court's new mandate. Just as with the European experience, the courts and tribunals had to permit states to adjust and respond to the mechanisms of supranational adjudication. It was "only after States develop a level of comfort with these mechanisms – and with complying with unfavorable outcomes in specific disputes – is it feasible to enhance and extend the architecture of the system itself."[54] But after three decades of functioning of the Court and two since it heard its first contentious cases, the time has come to believe that the architecture of the Inter-American Court to promote individual rights would certainly be enhanced if the Court interprets Article 55 to exclude *ad hoc* judges in individual cases, thereby removing any possible perception of *ad hoc* judge's bias in favor of the defendant State.

Equality of Arms

Equality of arms is generally considered to be part of the right to a fair trial and the right of due process. Despite the widespread acceptance of the principle, the term rarely appears in conventions or constitutions.

The European Court of Human Rights has found the origin of equality of arms in Article 6 of the European Convention, titled "right to a fair trial," and has used "equality of arms" explicitly for over 40 years.[55] The Appeals Chambers for the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda have also found that the

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[52] JUAN E. MENDEZ, SAMANTHA POWER AND GRAHAM ALLISON, REALIZING HUMAN RIGHTS 141 fn. 49 (St. Martin's Press New York 2000).

[53] BARRY FRIEDMAN, HISTORY, POLITICS AND JUDICIAL INDEPENDENCE, JUDICIAL INTEGRITY 99 (Martinus Nijhoff Publishers, Leiden / Boston 2004).

[54] Laurence R. Hefler and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, THE YALE LAW JOURNAL, 107 Yale L.J. 273, 367, No. 2 (Nov 1997).

[55] Neumeister v. Austria, Chamber, Judgment (Merits), 27 June 1968, para. 22.; Delcourt v. Belgium, Chamber, Judgment (Merits), 17 January 1970, para. 18.

principle of equality of arms is part of the right to a fair trial contained in their statutes.[56] The United Nations Human Rights Committee has similarly recognized equality of arms under the International Covenant on Civil and Political Rights (ICCPR).[57]

The Inter-American Court, while not referring to the term equality of arms, has said that "for 'the due process of law' a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants."[58] The development of the Court's equality of arms jurisprudence can be traced back over 20 years. The *Velázquez Rodriquez* case, *Fairén Garbi and Solís Corrales* case, and the *Godínez Cruz* case all announce that it is "essential that the conditions necessary for the preservation of the procedural rights of the parties not be diminished or unbalanced."[59] A balanced procedural process is at the heart of equality of arms.

The term equality of arms is meant to be flexible and represents a broad notion of fairness in which both parties in an adversarial setting have equal opportunity to engage the court. In civil cases before the European Court, the term has been said to "impl[y] that each party must be afforded a reasonable opportunity to present his case—including his evidence—under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."[60]

There is consensus that equality of arms relates to procedural fairness, but the scope of the principle can seem to vary, as can the scope of the term "procedure" in a given context. In the European Court's judgment in *Öcalan v. Turkey*, the right could appear to be narrow; the court seems to conceive of the right in the limited frame of equitable access to evidence before trial in a State proceeding.[61] A broader application can be observed in *Steel & Morris v. United Kingdom*, in which the European Court extended the right to include considerations of the defendants' financial ability to present their defense in a civil case. Since the State did not provide legal aid, the defendants were forced to represent themselves and rely on their own very limited wealth, fundraising, and volunteer legal services to defend a libel claim made against

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[56] Prosector v. DuškoTadic, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 44; Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Appeals Chamber Judgment (Reasons), June 1, 2001, para. 67.

[57] Human Rights Committee, *General Comment No. 32 Article 14: Right to Equality Before Courts and Tribunal and to a Fair Trial*, 90th Session, 23 August 2007, para. 13.

[58] I/A Court H.R., The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16 at 117. Stefania Negri, *The Principle of "Equality of Arms"*, 5 INT'L CRIM. L. REV. 513, 531 (2005).

[59] Velasquez Rodriquez Case, Preliminary Objections, Judgment, 26 June 1987, Series C No. 1, para. 33; Fairén Garbi and Solís Corrales, Preliminary Objections, Judgment, 26 June 1987, Series C No. 2, para. 38; Godínez Cruz Case, Preliminary Objections, Judgment, 26 June 1987, Series C No. 3, para. 36. Each case uses identical language: "...the Court must first address various problems concerning the interpretation and application of the procedural norms set forth in the Convention. In doing so, the Court first points out that failure to observe certain formalities is not necessarily relevant when dealing on the international plane. What is essential is that the conditions necessary for the preservation of the procedural rights of the parties not be diminished or unbalanced and that the objectives of the different procedures be met."

[60] Dombo Beheer B.V. v. the Netherlands, Chamber, Judgment (Merits and Just Satisfaction), 27 October 1993, para. 33

[61] Öcalan v. Turkey, Grand Chamber, Judgment, 12 May 2005, para 140. "The Court further considers that respect for the rights of the defence requires that limitations on access by an accused or his lawyer to the court file must not prevent the evidence being made available to the accused before the trial and the accused being given an opportunity to comment on it through his lawyer in oral submissions."

them by the international restaurant chain McDonalds, who were very well represented and well funded.[62] The defendants were not only at a disadvantage in terms of legal counsel; they also lacked financial resources for administrative costs such as photocopying, purchasing transcripts, and other related expenses.[63] The court concluded that while States are not required to "ensure total equality of arms" and need not provide legal aid in all circumstances, "the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms."[64] *Steel & Morris* shows that the concept has broad reach that extends even beyond the walls of the court room. Far from contradictory, these rulings reveal that equality of arms is a broad principle. The apparent contradiction only results because of the Court's desire to narrow its holding to the case and issues before it.

The Inter-American Court has analyzed the scope of equality of arms within its own procedures--not just within State court's procedures. In fact, the Court has "usually invoked the principle...when dealing with issues pertaining to the procedure before the Inter-American Commission or before the Court itself, rather than in connection to domestic trials."[65] The likely explanation for such a focus is the Court's laudable respect for the rights of individuals,[66] and the Court's position as a forum of last resort for individuals seeking to redress violations of fundamental human rights.

Once again, the Court is being asked to address its own procedure in light of the equality of arms principle. We maintain that the *ad hoc* practice implicates the equality of arms principle. *First*, it gives one of the parties in the case, the State, the power to affect the composition of the tribunal itself. The Inter-American Court's *ad hoc* practice creates a situation where the parties and issues are known to the Court before the bench trial is set—and more importantly, known to the State who appoints the *ad hoc* judge. Such a situation creates a fundamental disadvantage to the individual appearing in front of the Court because they have no corresponding and equivalent power.

At the Inter-American Court, the adversarial process has already begun before the State appoints an *ad hoc* judge. In fact, the State's appointment of an *ad hoc* judge is one of the first procedural acts in the adversarial process at the court. Recent practice of the Court makes this clear. For instance, the Court's judgments have described the appointment of the *ad hoc* judge under the heading "Proceedings before the Court."[67] *Ad hoc* appointments are one of the first procedural acts, and are concurrent with informing parties of their filing deadlines.[68] Thus, appointment of ad hoc judges implicates due process safeguards and principles of equality [of arms].

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[62] Steel & Morris v. United Kingdom, Chamber, Judgment, 15 February 2005, para 16.
[63] Steel & Morris v. United Kingdom, Chamber, Judgment, 15 February 2005, para 16.
[64] Steel & Morris v. United Kingdom, Chamber, Judgment, 15 February 2005, paras. 61, 62, 71.
[65] Stefania Negri, *The Principle of "Equality of Arms"*, 5 INT'L CRIM. L. REV. 513, 532 (2005).
[66] Stefania Negri, *The Principle of "Equality of Arms"*, 5 INT'L CRIM. L. REV. 513, 532-533 (2005).
[67] *See e.g.* Case of Pueblo Bello Massacre v. Columbia, Judgment (Merits, Reparations, and Costs), 31 January 2006, paras. 21-23.; Case of the "Mapiripán Massacre v. Columbia, Judgment (Merits, Reparations, and Costs), 15 September 2005, para. 16.; Case of Maritza Urrutia v. Guatemala, Judgment (Merits, Reparations, and Costs), 27 November 2003, para. 12.
[68] Case of Pueblo Bello Massacre v. Columbia, Judgment (Merits, Reparations, and Costs), 31 January 2006, paras. 21-23.; Case of the "Mapiripán Massacre v. Columbia, Judgment (Merits, Reparations, and Costs), 15 September

Second, equality of arms is a principle with intrinsic value; it should not be considered as a mere tool or instrument needed to help achieve a fair trial. Equality of arms is fundamental to values of equality and justice that are cornerstones of human rights; those values are undermined when a failure to adhere to equality of arms is permitted to exist. Even if the Court could achieve the "correct result" every time, without adhering to the principle of equality of arms, the result would not be a completely just outcome. A completely just outcome requires the parties to face each other as equals and to thereby acknowledge the other's dignity. An imbalance of the magnitude of *ad hoc* national judge appointments indicates a higher status for the States in the procedural aspects of the Court and diminishes the status of the alleged victim.
For the aforementioned reasons, it is necessary to reform the practice of *ad hoc* appointments in individual cases in order to conform to the principle of equality of arms.

Judicial Economy

There is common agreement among the different actors of the Inter-American system that the OAS inadequately funds the Court and the Commission which has lead to a shortage of staff attorneys, fewer or postponed Court sessions, inadequate resources to deal efficiently with its the ever-increasing workload. The OAS experiences continual shortfalls itself and thus is in a poor position to increase funding.[69] In order to better address the promotion and protection of human rights we believe that the Court can save valuable financial resources and time by dispensing with the *ad hoc* judge procedures.

First, the *ad hoc* judge practice places an additional financial strain on the already underfunded Court by forcing the Court to pay for the emoluments of the *ad hoc* judges plus per diem and travel costs.[70] This economic burden on the Inter-American Human Rights System is substantial in light of the fact that the Court often needs to compensate eight rather than seven judges. Given the increased number of cases referred to the Court since the 2001 amendment of the Commission's Rules, this additional cost is not insignificant.

It also needs to be considered that the Court's new Rules allowing alleged victims direct access to the Court has increased the number of challenges to the *ad hoc* practice. The example of the *Gómez Paquiyauri Brothers* case[71] was the first in which the family of the alleged victims used its access to the Court to oppose the appointment of the *ad hoc* Judge.[72] The issue of *ad hoc* appointments in individual cases will be much more contentious now that the new rules give individual parties much more autonomy. In its new role and after the *Gómez Paquiyauri Brothers* case, the Commission began to challenge the practice of appointment of *ad hoc* judges in every single case, instead of challenging the appointment of a particular *ad hoc* judge. Those

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2005, paras. 16-17.; Case of Maritza Urrutia v. Guatemala, Judgment (Merits, Reparations, and Costs), 27 November 2003, para. 12.
[69] *Id.* at 347.
[70] Statute of the Inter-American Court on Human Rights at Art. 17 (1992).
[71] Mónica Feria Tinta, *"Dinosaurs" in Human Rights Litigation: The Use of Ad hoc Judges in Individual Complaints Before the Inter-American Court of Human Rights*, 3 L. & PRAC. OF INT'L CTS. & TRIBUNALS 79, 95 (2004).
[72] *Id.* at 96.

challenges to the *ad hoc* process have taken up the courts precious time and economic resources in the form of additional procedures and hearings.

Taking into consideration the increasing workload of the Court, economic efficiency becomes critical to the pursuit of justice. Resources that are currently allocated to the *ad hoc* practice could be used to better address the substantive issues in a case and increase the number of cases that are handled by the Court. The elimination of the practice of *ad hoc* appointments in individual cases will both increase the perception of impartiality of the Court and will help the Inter-American Human Rights System deal efficiently with its caseload.

Practice of Recusal

That justice presupposes that everyone has a right to a fair and public trial before a competent, independent and impartial court is a commonly accepted value among domestic and international legal communities.[73] This value, 'the triple crown of the judiciary,'[74] is reflected in the United Nations Universal Declaration of Human Rights (1948); the International Covenant on Civil and Political Rights (1966); and the Basic Principles on the Independence of the Judiciary, adopted by the Economic and Social Council of the UN (1989).[75] Other instruments significant to the strengthening of judicial institutions and the rule of law have been the: Burgh House Principles on the Independence of the International Judiciary (1985), the Bangalore Principles of Judicial Conduct (2002), and the Resolution on Judicial Ethics of the European Court of Human Rights (2008).[76]

Competent and Independent

The Court is composed of seven independent jurists representing the diversity of the OAS membership which appoints them. Judges are selected from 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 which they are nationals or of the state that proposes them as candidates."[77] Any member state of the OAS, not just the State of nationality, may nominate candidates for a final vote by an absolute majority

[73] Hans Corell, Under Secretary General for Legal Affairs, The Legal Counsel of the United Nations "Ethical Dimensions of International Jurisprudence and Adjudication, "Keynote Address, June 10, 2002.
[74] "The triple crown of integrity of the judiciary is stated in those words: competence, independence and impartiality." Honorable Justice Michael Kirby,' Judicial Integrity – A Global Contract,' The Judicial Group on Strengthening Judicial Integrity, Third Meeting, Colombo, Sri Lanka (2003).
[75] "Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establishing conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination." Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, endorsed by General Assembly, December 1985.
[76] The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, the Hague, November 25-26, 2002).
[77] American Convention, Article 52.

of State parties.[78] In fact, when a slate of 3 candidates is proposed, at least one of the candidates must be a national of a State other than the nominating State. Thus, it is wholly possible that while a judge may share nationality with a State party, she was never nominated or even voted for by that State party.

Article 5 of the Statute of the Inter-American Court, stipulates that judges of the Court are elected for a term of six years and "shall continue in office until the expiration of their term."[79] Thus, the Court also guarantees judges security of tenure until the expiry of their term, thereby addressing independence and freedom from possible interference.

Impartiality

The Court has adequate safeguards in place to guarantee a fair trial and its rules are consistent with international norms and the practices of similar courts. In particular, Article 19 of the Court's statute governs recusal in cases before the Court. As asserted [*supra*], when read properly, Article 55 of the American Convention, Article 10 of the Statute of the Court and Article 18 of the Rules of the Court, which explicitly refer to "States parties," apply exclusively to inter-State cases. Therefore, the sole provision applicable to individual complaint cases governing recusal is Article 19 of the Statute of the Court ('Disqualification').

Under 'Disqualification,' the Court makes a distinction between functional [automatic] and ethical [professional] recusal. Clause (1), which begins with: "Judges *may not* take part in matters [...]," directs the automatic disqualification of a judge (italics added) under certain circumstances. Article 19 (1) describes grounds for automatic recusal wherein the judge or members of her family have "a direct interest in the case" because 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." In effect, such circumstances create a presumption of bias which automatically disqualifies the judge. Thus, similar to the statute of the International Court of Justice, grounds for disqualification are based on specific and tangible conflicts of interest, rather than shared nationality between judge and state parties. Both the International Court of Justice [ICJ] [80] and the European Court of Human Rights [ECHR] embrace similar approaches.[81]

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[78] American Convention, Article 53 ('Organization'); Statute of the Inter-American Court of Human Rights, Articles 4 ('Composition') and 7 ('Candidates').

[79] American Convention, Article 5 (1) and (3) ('Judicial Terms').

[80] ICJ, Articles 17 and 24. Article 17 states:

1. No member of the Court may act as agent, counsel, or advocate in any case.
2. No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.
3. Any doubt on this point shall be settled by the decision of the Court.

While Article 24 states:

1. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.
2. If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly.

Beyond automatic recusal, Article 19, clause 2 addresses self-disqualification where "for some other appropriate reason," the judge "considers that he should not take part in a specific matter" and "advises the President of his disqualification." Correspondingly, Clause 3 empowers the President of the Court to initiate recusal of a judge either due to (1) or "some other pertinent reason." The ample wording of Clauses 2 and 3 provide for other professional or ethical dilemmas that may prevent a guarantee of an independent and impartial trial, to be addressed through recusal.

Note that pursuant to article 19, in the matter of disqualification of members of the bench in cases involving individual complainants, the ultimate decision lies with the Court. That is, even if the judge does not voluntarily recuse herself or disagrees that there is grounds for her disqualification, the Court reserves the final power to decide. Such a provision further intimates an *institutional*, objective decision, rather than a personal, subjective choice of the jurist. It is noteworthy that the Court has a procedure in place whereby fellow judges, specifically the President can decide on concerns about whether a potentially biased judge should be removed from the case. An additional assurance of impartiality is that the Court itself, an autonomous judicial institution, appoints that President.[82]

In *Karttunen v. Finland*,[83] the UN Committee on Civil and Political Rights (CCPR) defined 'impartiality' as a term which "implies that judges must not harbor preconceptions about the matter before them, and that they must not act in ways that promote the interests of the parties." Article 19 (1) of the Statue of the Court directly confronts the very possibility of an idea, opinion or sympathy being formed in advance about issues or facts of the case, by mandating disqualification where a judge or her direct family members have been previously exposed to the case "in any capacity."[84] Under such circumstances, a judge's impartiality could reasonably be questioned by parties or observers to the case, thereby affecting the judicial integrity of the Court. Thus, by implementing an objective standard, the Court takes active measures to remove judges before appearances of impartiality can arise. Such provisions also precisely conform to the specific Burgh House Principles (enshrining fundamental principles of judicial independence and modeling the "United Nations Basic Principles on the Independence of the Judiciary") on Past Links to a Case (9.1-9.2)[85]; Past Links to a Party (10)[86]; and Interest in the Outcome of a Case (11.1-11.3)[87].

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3. If in any such case the member Court and the President disagree, the matter shall be settled by the decision of the Court.

[81] "Judges shall exercise their function impartially and ensure the appearance of impartiality. They shall take care to avoid conflicts of interest as well as situations that may be reasonably perceived as giving rise to a conflict of interest." Resolution on Judicial Ethics, Council of Europe, ECHR (2008).

[82] Article 3 of Rules of the Court.

[83] *Karttunen v. Finland*, Human Rights Committee, Communication No/ 387/1989, 23 October 1992.

[84] "Judges may not take part in matters in which, on 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, counsels or advocates, or as members of a national or international court or an investigatory committee, or in any other capacity."

[85] 9.1 Judges shall not serve in a case in which they have previously served as agent, counsel, adviser, advocate, expert or in any other capacity for one of the parties, or as a member of a national or international court or other dispute settlement body which has considered the subject matter of the dispute.
9.2 Judges shall not serve in a case with the subject-matter of which they have had any other form of association that may affect or may reasonably appear to affect their independence or impartiality.

The language of recusal in Article 19 is nationality-neutral. Instead, it relies on automatic, self and court disqualification protocols based on tangible criterion like previous contact or familiarity; and other sources of bias or influence, reserving the option of final intervention. This oversight function of the Court is consistent with its institutional duty to maintain judicial integrity in the promotion and protection of human rights. Moreover, Article 19, read in conjunction with other provisions of Court instruments form a web of guarantees to support a trial free of bias and influence. For instance, Article 18 ['Incompatibilities'] specifically naming positions and activities that are incompatible with the position of judge; as well as generally referring to "[a]ny others that might prevent judges from discharging their duties, or that might affect their independence or impartiality, or the dignity and prestige of the office."

The Court provides brightline rules for disqualification based on specific instances of conflict of interest and then provides an avenue for recusal on a case by case basis. In contrast, the Commission embraces a strict and automatic disqualifier based on the presumption of bias in cases of common nationality.[88] Significantly, that clear and automatic disqualifier is not present in the Commission's Statute.

The aforementioned tends to demonstrate that the Court has adequate procedural safeguards in place to guarantee a competent, impartial and independent trial and its rules are consistent with international norms and the practices of similar courts regarding disqualification or ineligibility of judges. However, to further strengthen the Court's judicial safeguards, it may wish to consider amending its Rules to follow the example of the Commission and automatically disqualify a Judge who is national of the State party to the case. Alternatively, the Court may provide an avenue to petition for recusal, or a motion for disqualification available to victims and counsel. Additionally, the Court may wish to consider drafting an Inter-American version of the ECHR's 'Resolution on Judicial Ethics,' 2008[89] to provide benchmarks or to articulate the principles underlying the American Convention, the Statute, and Rules of the Court.

Consequences of This Interpretation

Based on our prior considerations, we present to the Court the argument that it is necessary to reform the practice of *ad hoc* appointments in individual cases to conform to the letter of the

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[86] Judges shall not sit in any case involving a party for whom they have served as agent, counsel, adviser, advocate or expert within the previous three years or such other period as the court may establish within its rules; or with whom they have had any other significant professional or personal link within the previous three years or such other period as the court may establish within its rules.

[87] 11.1 Judges shall not sit in any case in the outcome of which they hold any material, personal, professional or financial interest.

11.2 Judges shall not sit in any case in the outcome of which other persons or entities closely related to them hold any material, personal, professional or financial interest.

11.3 Judges must not accept any undisclosed payment from a party to the proceedings or any payment whatsoever on account of the judge's participation in the proceedings.

[88] Article 17.2.a of the Rules of the Commission state that "Members of the Commission may not participate in the discussion, investigation, deliberation or decision of a matter submitted to the Commission... if they are nationals of the State which is the subject of the Commission's general or specific consideration..."

[89] See: http://www.echr.coe.int/NR/rdonlyres/1F0376F2-01FE-4971-9C54-EBC7D0DD2B77/0/Resolution_on_Judicial_Ethics.pdf

Convention, the traveaux preparatoires, to the principle of equality of arms and to better exercise judicial economy.

We believe that the Court should amend its Rules to remove the practice of *ad hoc* appointments in individual cases altogether and make clear that *ad hoc* judges could be appointed only in inter-State proceedings. We maintain that the fundamental problem with *ad hoc* appointments in individual cases is not that judges nominated by the State party participate in that State party's case; rather, the problem is that the State is able to appoint an *ad hoc* judge to hear a specific case and that there is not equivalent power for the individual.

Ad hoc judges will not even be needed in the case of a recusal. When judges recuse themselves, the Court should either: (1) hear the case with the remaining judges or; (2) use the interim judge procedure to fill the vacancy. The first option will be better in most cases because it does not create a potential opportunity for States to influence the composition of the bench after the case has been submitted to the Court. Furthermore, it will prevent the Court from engaging in additional procedure and expense.

Appropriateness of an Advisory Opinion on the Court's Own Procedure

The long-standing practice of appointing *ad hoc* judges in individual cases was challenged, among other cases in the *Brothers Gómez Paquiyauri* case. The Commission, in that case and in subsequent ones, espoused the view that "the object and purpose of the American Convention supported the inadmissibility of appointing *ad hoc* judges for claims originating from individual petitions". The IACHR advocated "restricting the institution for judge *ad hoc* to just inter-State litigation, which went back to the very *travaux préparatoires* of the Convention."[90] The Court decided not to alter its long-standing practice, but did so based on the determination that it would be inappropriate to decide the issue in the context of a case that had already begun.

Because of the best time to decide this would be in an advisory opinion request such as the one before the Court. In its first advisory opinion, the Court decided that
[t]he advisory jurisdiction of the Court is closely related to the purposes of the Convention. This jurisdiction is intended to assist the American States in fulfilling their international human rights obligations and to *assist the different organs of the inter-American system to carry out the functions assigned to them* in this field. It is obvious that any request for an advisory opinion which has another purpose would weaken the system established by the Convention and would distort the advisory jurisdiction of the Court.[91]

We believe that the advisory jurisdiction should not exclude the possibility of assisting the Court itself in the way its carry out the functions assigned to it by the American Convention. In particular, we do not see any risk that rendering an advisory opinion on its own procedure, is

[90] Tinta, *supra* note 1, at 97-98.
[91] *"Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 25.

"likely to undermine the Court's contentious jurisdiction or, in general, to weaken or alter the system established by the Convention, in a manner that would impair the rights of potential victims of human rights violations"[92]. To the contrary, we believe that there are strong reasons to support the need for this advisory opinion in the current evolution of the Inter-American system and particularly in light of preserving the rights of potential victims of human rights violations.

The Court has reiterated several times that it should evaluate its power to render an advisory opinion in light of the circumstances of each request. In the *Gomez Paquyauri* case, the Court decided not to rule on the issue of *ad hoc* judges, due to the fact that it was a general practice that transcended the scope of an individual case. Those reasons demonstrate how appropriate the mechanism of the advisory jurisdiction is to address precisely this situation. The tribunal has stated that:

> 25. The advisory jurisdiction of the Court differs from its contentious jurisdiction in that there are no "*parties*" involved in the advisory procedure nor is there any dispute to be settled. The sole purpose of the advisory function is "*the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states.*" The fact that the Court's advisory jurisdiction may be invoked by all the Member States of the OAS and its main organs defines the distinction between its advisory and contentious jurisdictions.
> 26. The Court therefore observes that the exercise of the advisory function assigned to it by the American Convention is multilateral rather than litigious in nature, a fact faithfully reflected in the Rules of Procedure of the Court, Article 62(1) of which establishes that a request for an advisory opinion shall be transmitted to all the "*Member States*", which may submit their comments on the request and participate in the public hearing on the matter. Furthermore, while an advisory opinion of the Court does not have the binding character of a judgment in a contentious case; it does have undeniable legal effects. Hence, it is evident that the State or organ requesting an advisory opinion of the Court is not the only one with a legitimate interest in the outcome of the procedure.

The Court has in this advisory opinion request the possibility of providing "guidance, both to the Commission and to the parties that appear before it, on important procedural aspects of the Convention, without jeopardizing the balance that must exist between legal certainty and the protection of human rights"[93]. As a jurisdiction without parties, with a multilateral scope, with the opportunity provided to every Member State to submit its comment on the request and to participate in the public hearing on the matter, it is the ideal setting for the Court to address a situation that will have an impact on its contentious jurisdiction in every single case afterward. In fact, the Court recently stated that the institution of *ad hoc* judges will be analyzed in this Advisory opinion and not in an individual case[94].

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[92] Idem, para. 31.

[93] I/A Court H.R., Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights). Advisory Opinion OC-15/97 of November 14 1997. Series A No. 15, para. 41.

[94] Order of the Inter-American Court of Human Rights, October 30, 2008, Gonzalez Banda and others case ("Campo Algodonero") vs. Mexico, cons. 11.

Petition

It was in 1992 that Honorable Justice Espinal of Honduras stated "if we assume that the conduct of the Court we have observed in the past will continue in the future, I think that the Court will become the tribunal with the greatest ethical and moral authority and justice in the Latin American region."[95] The Court is now the tribunal with the greatest ethical and moral authority and justice in Latin America, and reinterpreting Article 55 as inapplicable with individual petitioner cases, in light of other procedural changes, would consolidate this status.

For the foregoing reasons, hoping that our input can contribute to the consideration of the advisory opinion before the Court, we ask the Honorable Inter-American Court of Human Rights to:

1. Accept the Bernard and Audre Rapoport Center for Human Rights and Justice as a Friend of the Court in this case, and

2. Consider the arguments presented in this brief and rule accordingly.

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[95] Lynda E. Frost, *The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges*, 14-2 HUM. RTS. Q., 171, 201 (May, 1992).