

1. With regard to the State of Argentina's request for an advisory opinion on the institution of the ad hoc judge, the International Human Rights Clinic of Seattle University's School of Law respectfully submits the present brief to the Honorable Inter-American Court of Human Rights. The brief's arguments are summarized as follows: a) the Court's long-standing practice allowing the participation of ad hoc judges in cases between individual petitioners and states constitutes a clear misinterpretation of the American Convention's text; b) the role of the ad hoc judge in the individual petitioner vs. state context subverts basic due process guarantees; and c) ad hoc judges do not even fulfill their purported objectives of a pragmatic nature.

2. Therefore, as neither legal reasons nor even practical justifications exist in support of the participation of ad hoc judges in state vs. individual petitioner proceedings, it is concluded that the Inter-American Court's practice of permitting ad hoc judges in such circumstances must be discontinued immediately.

### **I. The American Convention's Ordinary Meaning Has Been Misinterpreted**

3. As doubtlessly will be argued before the Tribunal in several briefs presented on this matter, the American Convention on Human Rights simply does not provide for ad hoc judges in cases between individual petitioners and states. The Court's long-standing practice allowing the participation of ad hoc judges in such circumstances constitutes a clear misinterpretation of the Convention's text. Relevant provisions of Article 55 establish as follows:

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. (Emphasis added.)

The references to "States Parties to the case" unequivocally demonstrate that ad hoc judges are to be utilized only in matters between states.

4. This *prima facie* reading is only reinforced when examining the pertinent text of the Inter-American Court's Rules of Procedure and Statute. Article 10 of the Statute replicates almost verbatim the above language of the Convention. Article 18 of the Rules of Procedure explicitly cites Article 55(2) and (3) of the Convention and the equivalent text of the Statute's Article 10.

5. When interpreting international treaties, an "ordinary meaning" standard is required. The Vienna Convention on the Law of Treaties, which codifies customary international law in the subject, establishes that an instrument "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their

context and in the light of its object and purpose.”<sup>1</sup> While the terms within the specific context of the American Convention’s provisions leave little room for doubt, it is also instructive to consider the wider international legal context for this language. The text for Article 55 of the Convention was modeled closely after Article 31 of the Statute of the International Court of Justice—a tribunal, of course, dedicated exclusively to interstate disputes.<sup>2</sup>

6. Since the American Convention text in question has an indisputable “ordinary meaning,” both the Vienna Convention and customary international law prevent the Inter-American Court from fashioning a different interpretation. Moreover, since the Court’s erroneous reading of Article 55 has deprived individual petitioners of due process guarantees, as shall be discussed below, its interpretation is in fact forbidden by Article 29 of the American Convention. Article 29 bars interpretations of the Convention that “suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or ... restrict them to a greater extent than is provided for” in the treaty.<sup>3</sup>

7. During the Court’s inaugural contentious cases, this mistake of interpretation first appeared after the Honduran judge, Jorge Hernandez-Alcerro, informed President Thomas Buergenthal that “pursuant to Article 19(2) of the Statute of the Court, he had decided to recuse himself from hearing the three [Honduran] cases.”<sup>4</sup> At this point, the Tribunal’s President should have referred to Article 19 of the Statute, the provision governing recusals and disqualifications. In such situations, “when one or more judges are disqualified pursuant to [Article 19], 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.”<sup>5</sup> This unintended error, owing to inexperience, should not be perpetuated by the current Court, a tribunal of significant experience and expertise. Thus, the Court should seize upon this opportunity to correct more than two decades of erroneous practice with regard to ad hoc judges.

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<sup>1</sup> Article 31(1) “General Rule of Interpretation,” Vienna Convention on the Law of Treaties (1969).

<sup>2</sup> Cf. Article 31(1)-(6), Statute of the International Court of Justice (1945).

<sup>3</sup> Article 29(a), “Restrictions Regarding Interpretation,” American Convention on Human Rights (1969).

<sup>4</sup> Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (ser. C) No. 1, para. 4 (June 6, 1987).

<sup>5</sup> Article 19, Statute of the Inter-American Court of Human Rights (1979). Note that an interim judge would not have been strictly necessary in Velásquez Rodríguez and the other cases, as the Court already had a quorum to issue a judgment.

## II. The Institution of the Ad Hoc Judge Violates Basic Due Process Guarantees

### A. Introduction: the National Judge in General

8. Article 52 of the American Convention and Article 4 of the Inter-American Court's Statute establish that all judges of the Court, including ad hoc judges, shall perform their duties "in an individual capacity." Thus, their decisions shall not contemplate their relationship to their home state or appointing state, nor any other entity. Toward this end, all judges take an oath of independence and impartiality.<sup>6</sup>

9. This oath recognizes the substantial tension that exists when judges sit in cases involving their own state. In this regard, the Permanent Court of International Justice noted, "of all influences to which men are subject, none is more powerful, more pervasive, or more subtle, than the tie of allegiance that binds them to the land of their homes and kindred." A 2005 study of the judgments of the International Court of Justice empirically demonstrates the strength of this "tie of allegiance": judges were found to vote in favor of their home states approximately 90 percent of the time.<sup>7</sup>

10. A series of factors may sway judges in this scenario.<sup>8</sup> Psychological and cultural lenses may distort their point of view, so that they can only perceive the dispute from the perspective of their native land. Economic reasons abound: if their performance is deemed unsatisfactory by state authorities, they may not be reappointed when their term expires. They also may be denied lucrative positions in government afterwards. Some critics charge that international judges are especially susceptible to these influences, since they allegedly have been drawn from a national pool of candidates already identified by their government as politically loyal and lacking independence.<sup>9</sup>

11. It must be stressed, however, that the International Court of Justice is not an international human rights tribunal. The ICJ often officiates commercial, boundary and diplomatic disputes; its objective is not to safeguard, in a direct manner at least, the integrity of the human person. The Inter-American Court of Human Rights, in contrast, presides over a collective system of human rights protection. Judges on the Tribunal, experts in human rights law, are charged to examine not bilateral relationships, but rather states' obligations *erga omnes*. In assessing these legal obligations of the highest order, a judge expectedly would be more inclined to rule against her home state.

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<sup>6</sup> See Article 11, Statute of the Inter-American Court of Human Rights.

<sup>7</sup> See Posner and de Figueiredo, "Is the International Court of Justice Biased?" 34 J. of Legal Studies 599 at 624 (2005).

<sup>8</sup> See, e.g., Kuijer, "Voting Behaviour and National Bias in the European Court of Human Rights and the International Court of Justice," 10 Leiden J. of Int'l Law at 51 (1997); *id* at 608.

<sup>9</sup> See, e.g., Posner and de Figueiredo, *supra* note 8, at 608.

12. Moreover, blind patriotic bias and saber-rattling nationalism should not be as commonplace where individual petitioners challenge a state, since the judge need not choose between foreigners and compatriots—“them” vs. “us”—as she would at the ICJ. Rather, the judge at the international human rights court, in a case against her home state, chooses between a compatriot (the petitioner) and the state.

13. Evidently, the human rights judge is not above psychological, material, and cultural predispositions. Also, the views of a judge in a case concerning her home state may be given disproportionate deference by her colleagues in deliberations. Despite these challenges, however, it is maintained that judges at international human rights tribunals are in inherently different circumstances than their counterparts at interstate forums. If a conflict of interest or cause for recusal arises in a particular human rights case, one must trust that the titular<sup>10</sup> judges, in exercise of their “highest moral authority,” would avail themselves of the appropriate procedures for removal or disqualification, such as those found in the Inter-American Court’s Statute.<sup>11</sup>

14. As a result, with respect to the State of Argentina’s second consultation, it is not considered necessary to prohibit a titular judge from participating *in all cases* between her home state and individual petitioners.

## **B. The Ad Hoc Judge in Particular**

15. On the other hand, the situation of the ad hoc judge is quite distinct. Appointed for a single case only, she suffers the psychological, economic, and cultural pressures noted above, only magnified many times. While the ad hoc judge in theory must possess the same professional and personal qualifications demanded for titular judges, the official selection and vetting process is almost non-existent in comparison. Ad hoc judges are unilaterally named by the state in a short process described as “manifestly political and nationally oriented.”<sup>12</sup>

16. States actively seek a person who would most serve their interests in the case at hand. Indeed, this unbridled opportunism has become such a problem in the European system that a specific amendment to the European Convention for the Protection of Human Rights and Fundamental Freedoms has been introduced by Protocol 14.<sup>13</sup> A state party will no longer be able to choose the judge who will hear a particular case. Instead,

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<sup>10</sup> Article 2(18) of the Court’s Rules of Procedure uses this term.

<sup>11</sup> The recused or disqualified judge must take care to completely separate herself from the proceedings and deliberations.

<sup>12</sup> Smith, “‘Judicial Nationalism’ In International Law: National Identity and Judicial Autonomy at the ICJ,” 40 Texas Int’l Law J. 197 at 207 (2005).

<sup>13</sup> Article 6 (amending Article 26), Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2004).

Protocol 14 will require states to issue an advance list of potential candidates from which the European Court's President shall select the appropriate judge.

17. It is true that there are procedural safeguards in the Inter-American system that allow parties to a case, or the Court itself, to object to the appointed ad hoc judge. Still, petitioners' limited resources and incomplete information supplied by the state diminish the feasibility and effectiveness of this option. Moreover, the titular members of the Court not only face the awkwardness of dismissing a colleague—even if only a temporary one—they may also wish to avoid offending the state, which at least nominally has cooperated with the Inter-American system by appearing before the Court.

18. To be sure, there are many compelling factors and circumstances that cast grave doubt upon the independence and impartiality of the ad hoc judge. Yet none is more obvious than the widely-acknowledged central purpose of this figure: to ensure that her appointing state's arguments are extensively considered and addressed by the court.<sup>14</sup> That is, this institution permits the appointing state to have an advocate behind the closed doors of the judicial chambers: one who forcefully expounds, yet again, the state's claims during the judges' confidential deliberations. As one commentator has remarked, "the whole institution of the ad hoc judge ... acknowledges an important role for partiality" in the international judicial process.<sup>15</sup>

19. Naturally, such a figure is less objectionable in interstate affairs, as the ad hoc judge would presumably have her arguments neutralized by her counterpart from the other state. While it is certainly recognized that the ad hoc judge indeed may not be proper for any court that strives for independence and impartiality, a full discussion of the appropriateness of this institution in interstate disputes falls out of the scope of this brief. What must be emphasized presently is that, in the petitioner vs. state scenario, the individual is denied "equality of arms" if an ad hoc judge is appointed.

20. Such a lack of "equality of arms," whereby one judge is dedicated to the presentation of the state's arguments, constitutes nothing less than a violation of the American Convention itself, the very treaty the Inter-American Court endeavors to uphold. The practice also patently disregards the Court's own case law on judicial guarantees, and a range of related legal norms and instruments, including the Burgh House Principles, which refer to necessary standards for the international judiciary.<sup>16</sup> Specifically, the

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<sup>14</sup> See, e.g., International Court of Justice, *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia), Judgment of December 17, 2002 (Dissenting Opinion Judge Frank at 693-94); Tomuschat, "National Representation of Judges and Legitimacy of International Jurisdictions: Lessons from ICJ to ECJ?" in *THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE* 183 (Nomos 2006).

<sup>15</sup> Falk, "The Independence and Impartiality of International Judges," 83 *Amer. Soc. of Int'l Law Proceedings* 508 at 517 (1989) (Comment in reference to the ICJ).

<sup>16</sup> The Burgh House Principles On The Independence Of The International Judiciary (2004) issued by the International Law Association Study Group on Practice and Procedure of International Courts and Tribunals, available at [www.ucl.ac.uk/laws/cict/docs/burgh\\_final\\_21204.pdf](http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf)

disruption of the Tribunal's balanced deliberations through the participation of the ad hoc judge contravenes the basic due process guarantees of Article 8 of the American Convention, which establishes the right to a hearing "with due guarantees...by a competent, independent, and impartial tribunal."

21. Thus, the role of the ad hoc judge as advocate and "illuminator" of the state's claims subverts judicial guarantees in the individual petitioner vs. state context. All factual assertions and legal arguments of the state must instead be presented during the proceedings before the Inter-American Court, while the petitioners and the Inter-American Commission are afforded the opportunity to controvert them.<sup>17</sup> This grants parties to a case the crucial procedural guarantees due to them. Furthermore, only in this fashion will the adversarial process achieve its purpose: an illustration for the Court of the full panorama of relevant facts and legal issues.

22. It is no surprise, then, that ad hoc judges at the European Court of Human Rights most often vote in favor of their appointing country.<sup>18</sup> Nevertheless, even in judgments where ad hoc judges have voted *against* their country one can find the unwelcome consequences of their bias. This is because unanimity is frequently achieved through consensus, which often leads to diluted legal standards and reduced remedies and reparations for victims.<sup>19</sup> In this way, the ad hoc judge may prejudice the victim before the Inter-American Court even if she never casts a vote against the petitioner.

23. In sum, privileging the state by allowing it access to judicial deliberations vis-à-vis an ad hoc judge violates basic principles of due process enshrined in the American Convention, as well as in numerous other international treaties and legal instruments. As a result, the Court's practice of permitting ad hoc judges in state vs. petitioner proceedings must be discontinued immediately.

### **III. Ad Hoc Judges Do Not Even Provide Pragmatic Advantages**

24. On the pragmatic side, it is acknowledged that the Court has limited incentive and insignificant political pressure to discontinue this practice, even if it were to recognize the role of the ad hoc judge in infecting judicial proceedings with partiality or perceived partiality. First of all, while petitioners may complain and object, their ability to change the institution is constrained. Disengaging entirely from the Inter-American system in

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<sup>17</sup> Even when the Court studies the possible violation of Convention provisions that have not been alleged in the pleadings submitted before it, it only does so "in the understanding that the parties have had the opportunity to express their respective positions with regard to the relevant facts." *See, e.g., Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 at para. 91 (June 15, 2005).

<sup>18</sup> *See* Kuijer, *supra* note 9, at 65 (1997).

<sup>19</sup> *See id.* at 62; Gordon, "The Independence and Impartiality of International Judges," 83 *Amer. Soc. of Int'l Law Proceedings* 508 at 510.

protest, for example, would be ill-advised, as it may offer victims the only remedy available.

25. Second, the Court may consider that the institution of the ad hoc judge both encourages state participation before it and enhances compliance with judgments. In this regard, commentators have stated that the ability to appoint an ad hoc judge increases a state's confidence that its interests will be represented in proceedings, rather than ignored by a panel of foreign jurists.<sup>20</sup>

26. However, while this inducement for state confidence and cooperation may well have been necessary at the Court's inception, it is simply superfluous now. The Court's legitimacy, authority and powers are well established and widely recognized by governments throughout the hemisphere. Indeed, a strong regional custom has emerged of states providing varied forms of redress to victims and undergoing significant national legislative reform, among many other measures, all in direct fulfillment of Court judgments and resolutions.<sup>21</sup>

27. Third, despite the taint of partiality, the Court may still consider the ad hoc judge to play a valuable role in elucidating questions of fact and law specific to her country of origin. Yet these benefits are almost certainly overstated, if not outright false. To begin, does the ad hoc judge have an authentic incentive to present such aspects of her country in an impartial, complete, and reliable way? Just as any advocate would deemphasize unfavorable arguments, so would one expect the ad hoc judge to conveniently frame her presentation.

28. Perhaps more importantly, even if an ad hoc judge were personally committed to impartiality and independence, would this person even be capable of adequately explaining nuances of national legislation, law enforcement, military practices, economics, juvenile justice, political history, indigenous culture—in short, all of those elements that an ad hoc judge may potentially be consulted upon? Of course not. The ad hoc judge's qualifications, as those of the titular judges, call for "recognized competence in the field of human rights."<sup>22</sup>

29. The development of facts concerning specialized fields often relevant before the Court—such as those previously mentioned—require the participation of expert witnesses, whose qualifications and conclusions may be appropriately debated by the parties to the case, well before the final judicial deliberations. Furthermore, the Inter-American Court's Secretariat consists of highly competent staff attorneys who closely examine and research a case's record and background information, and are always

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<sup>20</sup> See, e.g., Tomuschat, *supra* note 15, at 184; Posner and Yoo, "Judicial Independence in International Tribunals," 93 Cal L Rev 1 at 27 (2005).

<sup>21</sup> Evidence of state fulfillment of Court judgments is readily available if one examines resolutions on supervision of compliance, available at <http://www.corteidh.or.cr/supervision.cfm>.

<sup>22</sup> Article 52, American Convention on Human Rights.

available to the judges for consultations. Finally, the Tribunal's expansive powers of *prueba para mejor resolver* allows it to obtain, on its own motion, any important evidence lacking in the record.<sup>23</sup> According to that practice, the requested evidence is appropriately examined and controverted by the parties to the case before being duly assessed by the Court.

30. The institution of the ad hoc judge undermines the functioning of the Court in other ways as well. The Tribunal and the Secretariat certainly need not be reminded of the significant costs such persons incur, in travel expenses, per diem, logistics and opportunity. In addition, when parties to the case actually do object to the qualifications or background of an ad hoc judge, they are often forced to endure delays in Court proceedings while the matter is resolved—thus compounding due process concerns.

31. Therefore, as a practical matter, ad hoc judges do not currently fulfill their purported objectives: to increase state confidence in the Inter-American system and to explain adequately nuances of national law, state institutions, culture, economics and history.

#### **IV. Conclusion and Petition**

32. Thus, neither legal reasons nor pragmatic justifications exist in support of the participation of ad hoc judges in state vs. individual petitioner proceedings. In consequence, it is respectfully requested that the Honorable Tribunal hold in its opinion that ad hoc judges may only be appointed by states within interstate proceedings before the Inter-American Court.

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Professor Thomas Antkowiak

International Human Rights Clinic  
Seattle University School of Law  
901 12th Avenue, Sullivan Hall  
Seattle, WA 98122-1090  
Tel. 206-398-4111  
Fax 206-398-4136  
antkowit@seattleu.edu  
www.law.seattleu.edu

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<sup>23</sup> See Article 45, Rules of Procedure of the Inter-American Court of Human Rights.