“DINOSAURS” IN HUMAN RIGHTS LITIGATION: THE USE OF AD HOC JUDGES IN INDIVIDUAL COMPLAINTS BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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I. INTRODUCTION

The new rules of procedure of the Inter-American Court of Human Rights – in force since 2001 – introduced important developments in the Inter-American system of protection of human rights. In particular, the system today allows victims of alleged violations of human rights to make direct representations before the Inter-American Court of Human Rights (hereinafter “the Court”).1 However, this fundamental development contrasts with another feature of the system which, in the view of this author, undermines fundamental principles of due process, equality of

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1 Article 23.1 (Participation of the alleged victims) reads: “When the application has been admitted, the alleged victims, their next of kin or their duly accredited representatives may submit their requests, arguments and evidence, autonomously, throughout the proceeding. […]” Article 35.4 (Notification of the Application) reads: “When the application has been notified to the alleged victim, his next of kin or his duly accredited representatives, they shall have a period of 30 days to present autonomously to the Court their requests, arguments and evidence.” On 25 November 2003, at the time that this article was in the process of being printed, the Court issued an order introducing minor changes in the Rules in force since 2001. Article 23 remains unchanged. Article 35.4 has been reformed and has now become Article 36 which reads as follows: “Article 36 (Written Brief Containing Pleadings, Motions and Evidence). 1. When the application has been notified to the alleged victim, his next of kin or his duly accredited representatives, they shall have a period of 2 months, which may not be extended, to present autonomously to the Court their pleadings, motions and evidence.”
arms of the parties, and legality, in certain proceedings before the Court, to 
the detriment of the victims. I am referring to the up to very recently 
unchallenged practice of the Court (in the context of individual complaints 
where the nationality of the respondent State is not represented in its 
Bench) to allow one party only in the proceedings – the alleged violator 
State – to appoint an *ad hoc* judge to join the panel of judges to sit in 
judgment in the case. The following article firstly assesses the legality of 
such a practice under the American Convention on Human Rights, the 
Statute of the Court and its new Rules of Procedure in accordance with the 
general rules of interpretation of the Law of Treaties. Secondly, it 
discusses the unsuitability of the institution of *ad hoc* judges in the context 
of individual petitions – and moreover its use in a manner that 
discriminates in favour of one of the parties in the proceedings only – 
within the general framework of the International Protection of Human 
Rights. It is submitted that not only does the use of *ad hoc* judges in these 
instances find no legal basis in the Inter-American instruments applicable 
to the proceedings before the Court and is therefore unjustified, but, 
moreover, that this institution, devised for specific cases of inter-State 
litigation and borrowed from areas of public international law where State 
interests have traditionally played a central role, when taken to the context 
of human rights litigation in individual complaints (and for the benefit of 
the alleged violator State only) becomes a “fossil” clearly at odds with 
fundamental principles of international human rights law. It is further 
submitted that should the system aim to act in accordance with its own law 
and to reassure victims of human rights violations in their trust in the 
independence, impartiality, and proper constitution of the Court to sit in 
judgment in their cases, the Inter-American system faces the challenge to 
remove such a feature from its current practice.

II. THE INSTITUTION OF THE JUDGE *AD HOC* IN THE INTER-
AMERICAN INSTRUMENTS OF HUMAN RIGHTS: THE 
AMERICAN CONVENTION, THE STATUTE OF THE COURT 
AND ITS RULES OF PROCEDURE

A. The “plain meaning” of the text of the American Convention (and 
related instruments) with respect to the cases where ad hoc judges 
may be appointed to hear a case: the absolutely exceptional role of 
this institution in the context of the Inter-American treaties

In accordance with the Vienna Convention on the Law of Treaties (1969) 
which codified the principles of treaty interpretation in the area of public 
international law “a treaty shall be interpreted in good faith *in accordance*