

# **The Independence of International Human Rights Courts: The Case of the Inter-American Court of Human Rights**

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## **1. Introduction**

The inquiry about the independence of the Inter-American Court of Human Rights (IACtHR) forms part of a broader project on the independence of international courts, which is still in its preliminary stages. Thus, this paper truly is a work in progress.

Since the end of the Second World War, international courts have flourished throughout the world. As the number of international courts has increased to more than twenty, the scope of their jurisdiction has expanded. These courts decide on a broad range of issues, from commercial agreements to human rights. At the same time, the impact of international courts' decisions on domestic policies and legislation has deepened. The growing number of courts and the diversification of issues under their jurisdiction have buttressed the fragmentation of the international legal order.<sup>1</sup> The increasing influence and power of international courts has raised concern regarding their legitimacy, which to some extent mirrors the broader concern regarding the democratic deficit of international governance.<sup>2</sup> The legitimacy of international courts, much like domestic ones, is premised to a large extent on their independence.<sup>3</sup> The notion of **judicial independence** can be broadly understood as the capacity to make decisions free from the interference of other actors, mainly the executive, but also international institutions, or political, and social pressure groups.

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<sup>1</sup> M. Koskenniemi, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", *Report of the Study Group of the International Law Commission*, United Nations, 2006.

<sup>2</sup> A. von Bogdandy & I. Venzke, "In Whose Name? "An Investigation of International Courts' Public Authority and its Democratic Justification", 23 *European Journal of International Law* 2012, 7-41; J.L. Gibson & G.A. Caldeira, "The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support", 89 *American Political Science Review* 1995, 356-376.

<sup>3</sup> R. Mackenzie & P. Sands, "International Courts and Tribunals and the Independence of the International Judge", 44 *Harvard International Law Journal* 2003, 271-285; M. Bühlmann & R. Kunz "Confidence in the judiciary: Comparing the independence and legitimacy of judicial systems" 34 *West European Politics* 2011, 317-345; von Bogdandy & Venzke *supra* n 2.

When considering the independence of international courts there is a previous question that needs to be addressed: *Should the independence of international courts be treated in the same way as that of domestic judges, or is there something qualitatively different about the international judiciary?*<sup>4</sup> From the perspective of classic international law, governmental control over international judges is not necessarily seen as illegitimate. Over time, the reasons why states set up international courts have diversified. If before international courts were mainly conceived as conflict-resolution bodies, now they are expected to contribute to enhancing norm-compliance, to the credibility of international commitments, or the maintenance of cooperative regimes.<sup>5</sup>

While the independence of domestic courts has been profusely analyzed by an extensive body of literature, the international judiciary's independence remains largely unexplored. Only in the last decade, with the proliferation of international courts, have some scholars paid increasing attention to the independence of the international judiciary.<sup>6</sup>

Yet, independence is not a monolithic concept,<sup>7</sup> and the degree of desirable independence might vary according to the distinct goals of each type of court. For instance, conflict resolution bodies that decide on bilateral disputes between States might not need the same level of independence as courts within multilateral cooperative regimes or human rights' courts. The notion of international judicial independence

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<sup>4</sup> Mackenzie & Sands, *supra* n 3.

<sup>5</sup> L.R. Helfer & A.M. Slaughter, "Toward a Theory of Effective Supranational Adjudication", 107 *Yale Law Journal* 1997, 273; Y. Shany, "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary", 20 *The European Journal of International Law* 2009, 73.

<sup>6</sup> Mackenzie & Sands, *supra* n 3; Helfer & Slaughter, *supra* n 5; D. Terris, C. Romano, L. Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World's Cases*, OUP, 2007; E. Voeten, "The Impartiality of International Judges: Evidence from the European Court of Human Rights", 102 *The American Political Science Review* 2008, 417; C.J. Carrubba, M. Gabel & C. Hankla, "Judicial Behavior under Political Constraints: Evidence from the European Court of Justice", 102 *American Political Science Review* 2008, 435; E. Benvenisti & G.W. Downs, "Prospects for the Increased Independence of International Tribunals", 12 *German Law Journal* 2011, 1057; Y. Shany, "Judicial Independence as an Indicator of International Court Effectiveness: A Goal-Based Approach", 2011 <http://www.effective-intl-adjudication.org/admin/Reports/1e1b35f6296fbda531d87a32c066707bChapter%2016%20-%20Shany.pdf>; A. Stone Sweet & T. L. Brunell, "The European Court of Justice, State Noncompliance, and the Politics of Override" 106 *American Political Science Review* 2012, 204. A Project on International Courts and Tribunals (PICT) was established in 1997 at New York University <http://www.pict-pcti.org/>

<sup>7</sup>S.B. Burbank, "What Do We Mean by 'Judicial Independence'?", 64 *Ohio State Law Journal* 2003, 323.

needs to be sensitive to the normative, institutional, and political environment in which international courts operate. At the international level, there is a pervasive tension between the aspiration for independence, on the one hand, and accountability towards the expectations and interests of key stakeholders, on the other.

In this context, the main goal of my overall project will be to assess the independence of several international courts by systematizing the mechanisms that condition judicial independence and to provide a set of normative principles to guide institutional design and practice. The project will analyze diverse international and regional tribunals and panels from a comparative and interdisciplinary standpoint: i) *Human rights courts*: European Court of Human Rights and Inter-American Court of Human Rights; ii) *Integration courts*: Court of Justice of the European Union, Court of Justice of the Andean Community, and MERCOSUR Permanent Review Tribunal; iii) *Commercial courts and panels*: WTO Appellate Body, NAFTA arbitral panels, and the International Centre for the Settlement of Investment Disputes; iv) *Global courts*: International Criminal Court, and International Court of Justice.

This paper will focus on human rights courts, and particularly on the IACtHR. First, I will reflect upon the notion of judicial independence as applied to the IACtHR. Second, I will identify and systematize the variables that might condition the degree of judicial independence. Next, the independence of the IACtHR will be assessed in light of those variables. Finally, I will conclude with some remarks from the perspective of the checks and balances principle.

## **2. The Notion of Judicial Independence at the International Level**

Independence is not conceived of as an end in itself, but rather as an instrument that enhances **legitimacy** from an institutional perspective.<sup>8</sup> From a *normative* standpoint, legitimacy refers to the conditions or reasons that justify the claim of authoritativeness. Normative legitimacy aims to determine why the law or a particular institution should be obeyed. On the other hand, in a *descriptive* sense, legitimacy implies that a legal system or institution is perceived as legitimately binding by those

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<sup>8</sup> Bühlmann & Kunz *supra* n 3.

under its jurisdiction, thus making a justified claim to obedience.<sup>9</sup> If an institution fulfills the conditions for normative legitimacy, the perception of legitimacy might be enhanced. In turn, the perception of legitimacy might promote effectiveness. The more a system or institution is perceived as legitimate, the more effective it is likely to be.<sup>10</sup> As such, legitimacy is certainly relevant for the effectiveness of an institution and the stability of a legal system. There is a widespread agreement among social and legal theorists that it would not be possible to secure the stability of a legal system solely on the basis of fear.<sup>11</sup> Given the lack of coercive mechanisms at the disposal of international courts, the perception of legitimacy is the more relevant.

It is certainly true that there are other reasons that determine the effectiveness<sup>12</sup> of international courts other than the perception of legitimacy, but here I will focus on independence as an element that might further the legitimacy and credibility of international courts, and in particular human rights' courts.<sup>13</sup>

If judicial independence is broadly understood as the capacity to decide free from pressures or interferences that distort the decision-making process,<sup>14</sup> the next question to be answered would be: *independence from whom?*<sup>15</sup>

The immediate answer is **state governments**, since the main function of international human rights courts is to monitor States' compliance with the respective human rights' treaties.

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<sup>9</sup> J. Steffek, "The Legitimation of International Governance: A Discourse Approach", 9 *European Journal of International Relations* 2003, 249, 253–254.

<sup>10</sup> M. Weber, *I Economy and Society*, Bedminster Press, 1968, 31.

<sup>11</sup> T. R. Tyler, *Why People Obey the Law*, Yale University Press, 1990, 22.

<sup>12</sup> In turn, much could be said about the notion of effectiveness, see Shany *supra* n 6. Effectiveness is not just limited to compliance, but it is also related, for instance, to the use that the relevant actors make of the system.

<sup>13</sup> D. Shelton, "Legal Norms to Promote the Independence and Accountability of International Tribunals", 2 *The Law and Practice of International Courts and Tribunals* 2003, 27-62, 27.

<sup>14</sup> For a discussion of the pressures that are deemed to be "undue", see J.A. Ferejohn & L.D. Kramer, "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint", 77 *New York University Law Review* 2002, 962, 972: "judicial independence seeks first and foremost to foster a decision-making process in which cases are decided on the basis of reasons that an existing legal culture recognizes as appropriate."

<sup>15</sup> S. Shetreet, "Standards of Conduct of International Judges: Outside Activities", 2 *The Law and Practice of International Courts and Tribunals* 2003, 127, 129.

At the same time, state governments are the authors of those treaties and courts. Some scholars have pointed out the puzzle that creating independent international courts poses from the perspective of state sovereignty.<sup>16</sup> Why would States set up independent courts that check human rights compliance by state public authorities?

In response to realist and ideational perspectives, Moravcsik developed a “republican liberal” theory to explain why states set up international human rights treaties. According to this theory, “creating a quasi-independent judicial body is a tactic used by governments to ‘lock in’ and consolidate democratic institutions, thereby enhancing their credibility and stability vis-à-vis nondemocratic political threats.”<sup>17</sup> Thus, instead of coercing others to comply with fundamental rights or ideationally committing to those values and principles, the main motivation of state governments would be to lock in particular preferred domestic policies in the face of future political uncertainty.<sup>18</sup> According to this view, primary supporters of reciprocally binding human rights obligations would be governments of newly established democracies, instead of well established ones. In any event, this argument responds to the question about the incentives to setting up independent human rights’ courts in the first place, but it does not address its future effectiveness and stability when governments change.

From a broader perspective, in response to Posner and Yoo,<sup>19</sup> Helfer and Slaughter strive to explain why it might be in the States’ interest to set independent international courts. They argue that delegating authority to independent international courts serves the interests of the States to the extent that delegation enhances the credibility of their international commitments.<sup>20</sup> In particular, this would be the case of treaties that create rights for private parties.<sup>21</sup>

In any event, be it to lock in preferred domestic policies or to promote credibility and compliance by others, States might have interests in setting up independent

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<sup>16</sup> A. Moravcsik, “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe”, 54 *International Organization* 2000, 217, 219; Helfer & Slaughter *supra* n 5, 33.

<sup>17</sup> Moravcsik, *supra* n 16, 220.

<sup>18</sup> *Id.* 226

<sup>19</sup> E.A. Posner & J.C. Yoo, “Judicial Independence in International Tribunals”, 93 *California Law Review* 2005, 1

<sup>20</sup> Helfer & Slaughter, *supra* n 5, 33-34.

<sup>21</sup> *Id.* 41-42.

international human rights courts. And yet, they might be reluctant to renounce to any capacity of influence and thus design mechanisms to be able to exert some form of control, such as the selection and appointment of judges.<sup>22</sup>

The tension between state sovereignty and the international protection of human rights is evident regarding the evolution of the European Court of Human Rights (ECtHR) and the IACtHR. The latter was set up by the American Convention of Human Rights (ACHR), signed in San José de Costa Rica in 1969, under the auspices of the Organization of American States (OAS).

The Inter-American Commission of Human Rights (IACHR) had already been created in 1960 as an autonomous body to promote respect for fundamental rights. In 1965, individuals acquired the ability to lodge individual petitions before the IACHR. The drafting of a convention and the corresponding court kept being postponed for several reasons.<sup>23</sup> Eventually, the Convention included a catalogue of rights, the Commission (on the same terms as the existing one) and the Court. The reluctance towards a judicial mechanism for monitoring human rights at the regional level was only overcome by refusing individual standing before the Court and its compulsory jurisdiction.<sup>24</sup>

Not until 1978 did the Convention enter into force, when it was ratified by eleven States.<sup>25</sup> Over time, out of 35 member States to the OAS, 25 ratified the Convention.<sup>26</sup> Trinidad and Tobago denounced it in 1988. Notably, Venezuela also did

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<sup>22</sup> In that regard, Helfer & Slaughter developed a theory of “constrained independence” for international courts, *Id.* 44.

<sup>23</sup> R. K. Goldman, “Historia y acción: el Sistema Interamericano de Derechos Humanos y el papel de la Comisión Interamericana de Derechos Humanos”, en A. Covarrubias Velasco y D. Ortega Nieto (eds.), *La protección internacional de los derechos humanos: un reto en el siglo XXI*, El Colegio de México, México D.F., 2007, 171-121.

<sup>24</sup> S. García Ramírez, “Raíz, actualidad y perspectivas de la jurisdicción interamericana de derechos humanos”, 20 *Cuestiones Constitucionales* 2009, 149; Goldman, *supra* n 23, 122.

<sup>25</sup> Colombia, Costa Rica, Ecuador, El Salvador, Grenada, Guatemala, Haití, Honduras, Panama, Republica Dominicana, and Venezuela.

<sup>26</sup> Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haití, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela,  
[http://www.corteidh.or.cr/denuncias\\_consultas.cfm](http://www.corteidh.or.cr/denuncias_consultas.cfm)

so on September 6, 2012.<sup>27</sup> Most of those States that ratified the Convention, also accepted the jurisdiction of the Court.<sup>28</sup>

The IACtHR began to function in 1979,<sup>29</sup> but was dependent on cases being brought forward by the States or the Commission. Over the first years, very few contentious cases reached the Court (actually, none until 1986). In 2003, the number of cases doubled, and since then the Court has received around 14 cases per year.<sup>30</sup>

The risks to judicial independence might also come from **OAS political bodies**, as the recent process of so-called “enhancement” of the Inter-American system has shown, in particular with respect to the Commission. Actually, the General Assembly is made up of state government representatives (but not all OAS member States are parties to the Convention).

The process of reform was launched by several States who were discontent with certain decisions of the Commission.<sup>31</sup> In this context, at the request of the General Assembly, the Permanent Council set up a Working Group to formulate proposals for the “enhancement” of the system (June 2011). One year later, a Resolution of the General Assembly<sup>32</sup> endorsed the Report of the Working Group and asked the Permanent Council to formulate proposals to for its application, which would be submitted to the General Assembly in the first term of 2013.<sup>33</sup>

A large group of scholars, including several SELA members, argued against the unilateral amendment of the IACHR Statute by the General Assembly.<sup>34</sup> On the basis of Articles 22 of the IACHR Statute and 39 ACHR, they held that the IACHR Statute may

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<sup>27</sup> According to Article 78 ACHR, the denunciation shall have effect after one year.

<sup>28</sup> There are 21 States that have recognized the jurisdiction of the Court: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haití, Honduras, Mexico, Nicaragua, Panamá, Paraguay, Peru, Suriname, Uruguay, and Venezuela [http://www.corteidh.or.cr/denuncias\\_consultas.cfm](http://www.corteidh.or.cr/denuncias_consultas.cfm)

<sup>29</sup> T. Buergenthal, “Recordando los inicios de la Corte Interamericana de Derechos Humanos”, 39 *Revista IIDH* 2004, 11, very graphically, describes the difficulties faced by the Court at the beginning of its existence.

<sup>30</sup> 2012 Annual Report, 12, <http://www.corteidh.or.cr/informes.cfm>

<sup>31</sup> Notably Brazil, regarding the interim measures ordered in *Belo Monte*; and Ecuador and Venezuela. with regard to the activities of the *Relatoría Especial para la Libertad de Expresión*.

<sup>32</sup> AG/RES. 2761, 5 June 2012.

<sup>33</sup> Regarding the process of reform, see <http://www.reformasidh.org/>

<sup>34</sup> *The legal limits to amendments of the Statute of the Inter-American Commission on Human Rights (IACHR)*, March 2013

not be modified without the proposal for reform being initiated within the IACHR itself.<sup>35</sup> They concluded that “In the case of the Commission, it is clear that its position would be weakened if the reform of the Statute was decided unilaterally by the Member States of the Organization.”<sup>36</sup> Eventually, in March 2013, the General Assembly accepted the reply by the Commission and its proposals for amending the Rules of Procedure.<sup>37</sup>

The role of the **IACHR** should also be taken into account when analyzing the independence of the IACtHR. The Commission is a sort of quasi-judicial body that has the capacity to issue recommendations to the States to redress the violation of human rights. This is not to argue that the Commission exerts “undue pressure” over the Court, but since the IACHR decides the kind of cases that will reach the Court, in a way the Commission enjoys the power to set the Court’s agenda.

Moreover, one should bear in mind that the members of the IACHR shall be elected by the General Assembly of the OAS from a list of candidates proposed by the governments of the States parties to the OAS, regardless of whether they ratified the Convention or accepted the jurisdiction of the Court. For instance, at present, out of seven commissioners, three are nationals of States that did not ratify the Convention (USA), or did not accept the jurisdiction of the Court (Jamaica), or denounced it (Trinidad and Tobago).<sup>38</sup>

Finally, the role of **NGOs** should also be considered. Without any doubt, NGOs have played a key role in providing assistance and furthering the access of the victims

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<sup>35</sup> Also, they argued that the current proposals to reform the powers of the Commission could not be achieved through the amendment of the Statute. Instead, the ACHR and the IACHR Rules of Procedure would need to be modified.

<sup>36</sup> *The legal limits to amendments of the Statute of the Inter-American Commission on Human Rights (IACHR)*, March 2013, para. 67.

<sup>37</sup> At the same time, the dialogue about the reform was left open in order to reach an agreement with the States that had pushed for deeper reforms, which actually sought to weaken the regional monitoring system. See AG/RES. 1 (XLIV-E/13), *Resultado del proceso de reflexión sobre le funcionamiento de la Comisión Interamericana de Derechos Humanos para el fortalecimiento del Sistema Interamericano de Derechos Humanos*, 22 de marzo de 2013.

<sup>38</sup> Rose-Marie Belle Antoine is a dual citizen of Trinidad and Tobago and Santa Lucía.



before the Inter-American bodies. They have promoted the discussion of different issues and legislative changes at the domestic level.<sup>39</sup>

At the same time, it has been pointed out that the participation in the Inter-American system is in the hands of an elite group of very specialized NGOs.<sup>40</sup> Notably, one single NGO has represented the victims in most of the cases submitted to the Court.<sup>41</sup>

In short, at the international level, judicial independence needs to be secured vis-à-vis state governments, but also other actors that are relevant at that level.<sup>42</sup>

### 3. The Variables to Assess Judicial Independence

In order to be able to assess the independence of international courts, *what are the conditions that enhance (or detract from) judicial independence? How can they be conceptualized and measured?* While legal studies tend to focus on judicial appointment and tenure, several works have pointed out a diversity of elements, such as legal discretion and control over material and human resources;<sup>43</sup> diverse formal and political mechanisms;<sup>44</sup> threats of non-compliance and legislative overrides;<sup>45</sup> procedural and outcome-related factors;<sup>46</sup> or interstate and inter-branch competition.<sup>47</sup> Also, the literature on domestic courts might be relevant in terms of factors potentially conditioning judicial independence.<sup>48</sup>

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<sup>39</sup> V. Krsticevic, “El papel de las ONG en el Sistema Interamericano de Protección de los Derechos Humanos” en *El sistema interamericano de protección de los derechos humanos en el umbral del siglo XXI* Tomo I, CorteIDH, San José, 2003

<sup>40</sup> R. Cuéllar, “Participación de la sociedad civil y Sistema Interamericano de Derechos Humanos en contexto”, en *El sistema interamericano de protección de los derechos humanos en el umbral del siglo XXI*, Tomo I, Corte Interamericana de Derechos Humanos, San José, 2001, 349, 351.

<sup>41</sup> Krsticevic, *supra* n. 39, 409, fn 3.

<sup>42</sup> Shetreet, *supra* n 15, 129.

<sup>43</sup> R.O. Keohane, A. Moravcsik, A.M. Slaughter, “Legalized Dispute Resolution: Interstate and transnational”, 54 *International Organization* 2000, 457

<sup>44</sup> Helfer & Slaughter, *supra* n 5.

<sup>45</sup> Carruba, Gabel & Hankla, *supra* n 6; Stone Sweet & Brunell, *supra* n 6.

<sup>46</sup> Shany, *supra* n 6.

<sup>47</sup> Benvenisti & Downs, *supra* n 6.

<sup>48</sup> L.P. Feld & S. Voigt, “Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators”, 19 *European Journal of Political* 2003, 497; J. Ríos Figueroa & J.K. Staton, “Unpacking the Rule of Law: A Review of Judicial Independence Measures” (April 26, 2009), CELS 2009 4th Annual Conference on Empirical Legal Studies Paper, available at SSRN: <http://ssrn.com/abstract=1434234>; Bühlmann & Kunz 2011, *supra* n 3.

In what follows, a tentative taxonomy is provided.<sup>49</sup> The factors that might condition the level of independence are grouped into two categories: *ex ante* and *ex post*.<sup>50</sup> The first group includes mechanisms that might promote or constrain judicial decision-making before the decision is taken while the second group includes factors related to the reaction to and actual enforcement of international judicial decisions. Since international courts do not enjoy enforcement powers, prospects of non-compliance might influence their approach to particularly sensitive cases.<sup>51</sup> Each factor will be broken up into several variables, which will be approached from both a *de iure* and a *de facto* perspective.<sup>52</sup>

### 3.1. *Ex ante* mechanisms

*Structural factors:* judicial selection and appointment procedures, tenure, re-appointment, removal, and incompatibilities are all relevant from the perspective of judicial independence.

*Composition of the court:* the court's composition, such as whether judges may sit on cases against the state of their respective nationalities, or attempts at interfering with the allocation of judges to specific cases might also be relevant. In the ECtHR, the national judge is always present, whereas in the Court of Justice of the European Union (CJEU) the composition of the court cannot be modified on the basis of the presence or absence of the national judge.

*Procedural factors:* standing, *amicus curiae*; publicity of judicial processes. Whether only States or also individuals have access to the court is vital from the perspective of the level and expectations of judicial independence.

*Economic resources:* judges' salary and court budget. The ability to alter salaries and interfere with the overall budget of the court might condition judicial independence.

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<sup>49</sup> A significant part of my research will be devoted to identifying, systematizing, and thoroughly examining the factors that have an impact upon the degree of independence on the part of the international judiciary.

<sup>50</sup> Helfer & Slaughter, *supra* n 5.

<sup>51</sup> Ríos-Figueroa & Staton, *supra* n 48.

<sup>52</sup> Feld & Voigt, *supra* n 48.

*Legal reasoning:* dissenting opinions; cross-citation and judicial dialogue. The reasoning of the court is important to show how the law is interpreted and applied to a specific case. Cross-citation and judicial dialogue might promote judicial cooperation and independence from other actors, while creating other forms of epistemic dependence.<sup>53</sup> The lack of dissenting opinions might shield judges from external pressure, but at the same time might detract from clarity and transparency, since competing arguments may not be expressed.

### **3.2. *Ex post* mechanisms**

*International supervisory mechanisms:* mechanisms for supervising the enforcement of international courts' decisions. What institutions are in charge of supervising enforcement? Are they effective? To what extent do they contribute to enhancing the court's authority?

*Domestic enforcement mechanisms:* domestic rules and practice regarding the enforcement of international court decisions and domestic actors involved. Threats of non-compliance from the executive, legislative or judicial branches may constrain judicial decision-making.

*Exit or legislative override:* the rules governing the "right to exit" from the jurisdiction of the court, or from the corresponding organization, as well as the rules for amending substantive or procedural norms. Have state governments threatened to withdraw from the jurisdiction of the court or actually done so? What is the likelihood of legislative override? Have procedural or substantive rules been amended after an adverse court decision?

## **4. Assessing the Independence of the IACtHR from an Institutional Perspective**

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<sup>53</sup> L.R. Helfer & A.M. Slaughter, "Toward a Theory of Effective Supranational Adjudication", 107 *Yale Law Journal* 1997, 273; O. Saldías, "¿Refugiándose en redes epistémicas? El Tribunal de la Comunidad Andina y la independencia judicial", in M. Hernández, M. Zelaia, & A. Torres, *Tribunales en Organizaciones de Integración: MERCOSUR, Comunidad Andina y Unión Europea*, Aranzadi, 2012.

In this section, the foregoing factors will be applied to the analysis of the independence of the IACtHR. Given the boundaries of this paper, only the *ex ante* elements linked to the institutional design of the Court will be analyzed (in a non-comprehensive form), i.e., structural, composition, procedural, and economic resources.

#### **4.1. Structural factors**

##### *4.1.1. Judicial selection*

The IACtHR is composed of **seven judges** elected by the absolute majority of the State parties to the Convention in the General Assembly.<sup>54</sup> Thus, in contrast to the ECtHR, the IACtHR is not governed by the rule of one judge per state.<sup>55</sup> Each of the States parties to the Convention may propose up to three candidates. In that case, one of them must be of a different nationality from the proposing State (Article 53(2) ACHR). Generally, state governments tend to propose just one candidate, usually of the respective nationality.<sup>56</sup>

There are no rules regarding the **geographical distribution of judges**, beyond the requirement that they must be nationals of any of the States parties to the OAS (Article 52(1) ACHR), and that there cannot be two judges of the same nationality (Article 52(2) ACHR). Thus, there could be a judge of the nationality of a State that is a member to the OAS, but did not ratify the Convention, such as the case of Judge Buergenthal, a US national proposed by the government of Costa Rica when the Court was first set up.

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<sup>54</sup> Articles 52-54 ACHR, and 4-9 IACtHR Statute.

<sup>55</sup> Actually, the selection process was inspired by the International Court of Justice, J. Schönsteiner, "Alternative appointment procedures for the commissioners and judges in the Inter-American System of Human Rights", 46 *Revista IIDH* 2007, 195, 201.

<sup>56</sup> H. Faúndez Ledesma, "La independencia e imparcialidad de los miembros de la Comisión y de la Corte: paradojas y desafíos", in J. Méndez & F. Cox, *El futuro del sistema Interamericano de los Derechos Humanos*, IIDH, San José, 1998, claimed for a change of the current practice of nominations. States should effectively nominate three candidates, and thus the General Assembly would have more options.

There are no rules on gender balance regarding the composition of the Court or the selection process. The numbers speak for themselves: out of 35 judges, only four have been women, and there are none in the current Court (see Appendix 1).<sup>57</sup>

Article 52(1) ACHR sets out the **requirements** that candidates need to fulfill. They must be:

- “jurists of the highest moral authority”
- “of recognized competence in the field of human rights”
- “who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates.”

The first and second requirements are quite broad, while the third might vary across the States.<sup>58</sup> The second and third are mainly aimed at securing candidates’ capacity and expertise in the field of human rights. Only the first could be regarded as loosely aimed at securing independence.

These requirements leave a wide margin of discretion to the state governments. Governments will tend to select candidates who are close to their ideology and values. The concerns arise when the candidates are diplomats or members of the executive or the legislative branches, particularly if they actively participated in authoritarian regimes.<sup>59</sup> In fact, several of the elected judges to the IACtHR had been members of the government, even ministers, or diplomats. In any event, there is no mechanism to evaluate that the foregoing requirements, such as the competence in the field of human rights, are met.

The **election** corresponds to the absolute majority of States party to the Convention in the General Assembly by secret ballot. Faúndez Ledesma has strongly denounced that the fact that the election is the outcome of vote trading among state

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<sup>57</sup> S. Kenney, “Breaking the silence: Gender Mainstreaming and the Composition of the European Court of Justice”, 10 *Feminist Legal Studies* 2002, 260.

<sup>58</sup> O. Ruiz-Chiriboga, “The Independence of the Inter-American Judge”, 11 *The Law and Practice of International Courts and Tribunals* 2012, 111, 115-117.

<sup>59</sup> CEJIL, *Aportes para el proceso de selección de miembros de la Comisión y la Corte Interamericanas de Derechos Humanos*, Washington, 2005, 9, 11, indicates that the action of civil society managed to exclude from the process candidates who did not fulfill minimum requirements of moral authority given their active participation in authoritarian or dictatorial governments.

governments, rather than merit or competence. As such, governments will support the candidate of another State in exchange for its support to the respective candidate to other international bodies.<sup>60</sup>

States that have been more successful in appointing judges have been Costa Rica, Colombia, and Venezuela (four judges each), followed by Mexico and Chile (see Appendix 1).<sup>61</sup> In contrast, others have never managed to place a judge on the Court, such as Bolivia, El Salvador, Guatemala, or Paraguay.

Hence, the selection process is highly politicized. Several scholars and organizations have advocated for more transparency and participation both at the national and international level.<sup>62</sup>

At the **international level**, Schönsteiner proposed the creation of an expert advisory committee.<sup>63</sup> The goal would be to secure the requirements of expertise and independence. She envisaged a tripartite committee, in which one-third of the members would be elected, respectively, by state representatives to the Committee of Legal and Political Affairs, by NGOs recognized before the Inter-American system, and by former members of both Inter-American bodies. This committee would review the candidate CVs, request further information, if needed, and possibly carry out interviews with them.

The *Centro por la Justicia y el Derecho Internacional* (CEJIL) also supported the creation of an independent advisory body within the OAS.<sup>64</sup> This body should comprise independent experts with experience in the field of human rights (members of international associations of lawyers, international NGOs and academics). This advisory body would examine the candidates and issue a non-compulsory report about their

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<sup>60</sup> Faúndez Ledesma, *supra* n 56, 187; CEJIL *supra* n 59, 9.

<sup>61</sup> One should bear in mind that the several States have joined the Convention at different moments in time and those who ratified it from the beginning have had more opportunities to propose judges.

<sup>62</sup> Faúndez Ledesma, *supra* n 56; Schönsteiner, *supra* n 55; Ruiz-Chiriboga, *supra* n 58; CEJIL *supra* n 59.

<sup>63</sup> Schönsteiner, *supra* n 55, 212-214.

<sup>64</sup> CEJIL, *Aportes para la reflexión sobre posibles reformas al funcionamiento de la Comisión Interamericana y de la Corte Interamericana de Derechos Humanos*, 2008, 19.

suitability and qualifications. In addition, CEJIL suggested that the States should be required to spell out the process that was followed at the national level.<sup>65</sup>

With regard to transparency and participation of the civil society, in 2005, the General Assembly passed a Resolution<sup>66</sup> asking the General Secretary to publish candidate CVs on the OAS website.<sup>67</sup> In 2006, a subsequent Resolution reiterated the need to publish the CVs, and required the General Secretary to issue a press release notifying the publication of the CVs, to make sure that civil society was adequately informed.<sup>68</sup>

Nonetheless, this process does not guarantee that all candidates will be examined, in particular candidates from countries in which the civil society is less mobilized.<sup>69</sup>

At the **national level**, the process of selection rests solely in the hands of state governments. The 2005 General Assembly Resolution invited the member States to consider the possibility of consulting civilian organizations to help propose the best candidates. The 2006 Resolution explicitly pointed out the role of NGOs in the functioning of the Inter-American system and reiterated the invitation to the member States to take into account the opinion of civilian organizations in the process of selecting their candidates.<sup>70</sup>

Faúndez Ledesma argued that state governments could adopt a practice according to which they would select candidates among those proposed by NGOs, law schools, or political science departments of national universities, after being examined

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<sup>65</sup> CEJIL, *supra* n 59, 15-16; CEJIL, *supra* n 64, 18-19. Also, this NGO proposed holding public hearings before the Committee of Legal and Political Affairs or the Permanent Council, available through the internet.

<sup>66</sup> AG/RES. 2120 (XXXV-O/05), *Presentación de los candidatos y candidatas para integrar la Comisión Interamericana de Derechos Humanos y la Corte Interamericana de Derechos Humanos*, 7 June 2005.

<sup>67</sup> *Id.* para. 3.

<sup>68</sup> AG/RES. 2166 (XXXVI-O/06), *Presentación pública de los candidatos y candidatas para integrar la Comisión Interamericana de Derechos Humanos y la Corte Interamericana de Derechos Humanos*, 6 June 2006, para. 3

<sup>69</sup> Schönsteiner, *supra* n 55, 200.

<sup>70</sup> CEJIL *supra* n 64, 18.

by the national Parliament.<sup>71</sup> CEJIL asked for public announcements to allow for proposals from the civil society or bids from the potential candidates.<sup>72</sup>

Generally, the process of selecting judges for international courts tends to be dominated by the executives and develop behind closed doors. Nonetheless, given the increasing influence of some international courts, more attention has been devoted to selection processes. In recent years, screening bodies, and more open and participatory procedures have been set up. For instance, with regard to the ECtHR, in addition to the interviews held by the corresponding Subcommittee of the Parliamentary Assembly, an Advisory Panel of Experts was created in 2010 to assess the suitability of the candidates.<sup>73</sup> Moreover, the state governments are required to explain the process that was followed to nominate the three respective candidates. This requirement might create incentives for the States to set up such procedures when they did not previously exist. Actually, in some States public calls for applications are advertised in official journals, newspapers or governmental websites. Also, specific committees of diverse composition to assess or propose candidates have been set up at the national level. Regarding the IACtHR, the process remains in the exclusive hands of state governments. Given the increasing influence of the Court, some safeguards should be introduced to secure the expertise and independence of the candidates selected. The potential arrangements both at the national and international level are diverse, from setting up new screening bodies to assess the candidates' competences to new practices to improve the transparency of the process.

#### *4.1.2. Tenure and reappointment*

IACtHR judges are elected for terms of **six years** and may be **reelected once** (Article 54 ACHR). The short term in office and the possibility of reelection might undermine their independence. Judges might be tempted to please the State that

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<sup>71</sup> Faúndez Ledesma, *supra* n 56, 188.

<sup>72</sup> CEJIL *supra* n 59, 14-15; CEJIL *supra* n 64, 18.

<sup>73</sup> Resolution CM/Res(2010)26 *on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights*, 10 November 2010.



proposed them (and others involved in the process) in order to be reelected.<sup>74</sup> In practice, around one-third of the judges have been reelected (see Appendix 1).

Recently, Protocol 14 amended the ECHR in order to extend the length of the judges' mandate from 6 to 9 years and ban the possibility of reappointment. The Explanatory report emphasizes that this amendment is aimed at strengthening the independence and impartiality of the Court.<sup>75</sup>

Scholars tend to agree on the risks posed by reelection from the perspective of independence.<sup>76</sup> At the same time, life tenure tends to be rejected for international courts to secure renewability and some sort of geographical representation, which might be considered to be also at odds with the notion of independence. In any event, since the election process is not addressed to secure independence and merit, life tenure would not be adequate. For these reasons, long, nonrenewable terms are the most advisable.

#### 4.1.3. *Incompatibilities*

Very broadly, Article 71 ACHR sets forth that the position of judge is “incompatible with any other activity that might affect the independence or impartiality.” Article 18 IACtHR Statute specifies that being a judge is incompatible with being:

- a. Members or high-ranking officials of the executive branch of government, except for those who hold positions that do not place them under the direct control of the executive branch and those of diplomatic agents who are not Chiefs of Missions to the OAS or to any of its member states;
- b. Officials of international organizations;
- c. Any others that might prevent the judges from discharging their duties, or that might affect their independence or impartiality, or the dignity and prestige of the office.

Several scholars have pointed out the risks of this regulation. According to the exceptions in paragraph (a), judges could hold positions within the executive branch

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<sup>74</sup> Faúndez Ledesma *supra* n 56, 191, pointed out that there are decisions that are postponed until the General Assembly has voted the new composition of the Court. He recommended abandoning the practice of reelection.

<sup>75</sup> *Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human rights and Fundamental Freedoms, amending the control system of the Convention*, par. 50: “The judges’ terms of office have been changed and increased to nine years. Judges may not, however, be re-elected. These changes are intended to reinforce their independence and impartiality, as desired notably by the Parliamentary Assembly in its Recommendation 1649 (2004)”

<sup>76</sup> Terris, Romano & Swigart, *supra* n 6, 155; Mackenzie & Sands, *supra* n 3, 279.

provided that they are not under the “direct” control of the executive branch, without it being clear what should be understood by “direct”. Also, judges may be diplomatic agents, as long as they are not Chiefs of Missions to the OAS or any of its member States. Nonetheless, as has been argued, diplomatic agents need to rely on the trust of the President, and judges may still be diplomats before the UN or other international organizations or countries.<sup>77</sup> As such, the appearance of independence would be put at risk.<sup>78</sup> Moreover, there is no explicit reference to the incompatibility with positions within the judicial or legislative power.<sup>79</sup> Still, paragraph (c) could be interpreted so as to include those situations.

In any event, it should be borne in mind that the position of judges of the IACtHR is part-time, and thus they cannot be prevented from performing other remunerated activities. Yet, the exercise of public power of any kind should be excluded.

It is for the Court to decide about the incompatibilities. If this is not resolved, the judge could be removed.<sup>80</sup> The final decision corresponds to the General Assembly, by a two-thirds majority vote of the States parties to the Convention, but only at the request of the Court. The fact that the decision cannot be taken unilaterally by the General Assembly, but only at the initiative of the Court, provides a safeguard for independence vis-à-vis the OAS political bodies.

#### **4.2. The Court’s composition**

In some contexts, the presence on the bench of judges of the respective nationality might enhance the credibility of international courts in the eyes of the States.<sup>81</sup> Nonetheless, when it comes to international human rights courts, which monitor compliance with human rights by state authorities, national judges sitting on their countries’ cases might detract from the appearance of independence of the Court.

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<sup>77</sup> Faúndez Ledesma, *supra* n 56, 200.

<sup>78</sup> Ruiz-Chiriboga, *supra* n 58, 127.

<sup>79</sup> Faúndez Ledesma, *supra* n 56, 201; Ruiz-Chiriboga, *supra* n 58, 126.

<sup>80</sup> Article 18(2) of the Statute refers to Articles 73 ACHR and 20(2) of the Statute

<sup>81</sup> Terris, Romano & Swigart, *supra* n 6, 153.

With regard to the IACtHR, Article 55 ACHR sets forth:

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.

#### 4.2.1. *Judges ad hoc*

On the basis of Article 55(3) ACHR, States were allowed to nominate a judge ad hoc, even in cases brought forward by individuals. As several scholars pointed out, this provision only made sense in the context of inter-state complaints.<sup>82</sup> The institution of the “judge ad hoc” had been taken from the Statute of the International Court of Justice, which exclusively deals with inter-state cases. The possibility to nominate a national judge in the context of individual cases endangered the independence of the court.<sup>83</sup> Furthermore, since the victims were not allowed to appoint an additional judge, the principle of equality of arms was not respected.<sup>84</sup>

Eventually, it was requested that the Court issue an Advisory Opinion about Article 55.<sup>85</sup> In a unanimous decision, the Court held that Article 55(3) ACHR was only applicable to inter-state cases and that it may not be interpreted as granting a similar right to state parties in cases originally brought by individuals.

#### 4.2.2. *The judge of the nationality of the respondent state*

With regard to Article 55(1) ACHR, some claimed that national judges should not sit in cases against the respective State, since the perception of independence and impartiality might be undermined. At the same time, others argued that judges do not act as representatives of the State, and thus their presence ought not to be excluded.

In the Advisory Opinion above mentioned, the IACtHR interpreted that the judge of the nationality of the respondent State shall not take part of the Court in cases

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<sup>82</sup> Faúndez Ledesma, *supra* n 56, 194.

<sup>83</sup> *Id.* 195-199

<sup>84</sup> Ruiz-Chiriboga *supra* n 58, 124.

<sup>85</sup> Opinión Consultiva OC-20/09, de 29 de septiembre de 2009, solicitada por la República Argentina.

filed by individuals. The Court argued that according to the text, goal, and the authors' will, Article 55(1) shall only apply to inter-state complaints. The text refers to judges of "any of the State parties" in plural, and thus the goal was to guarantee the equilibrium between States.

The Court rejected the argument according to which the goal of allowing the participation of the national judge was to secure a better knowledge of the legal system of that State, since then the same guarantee would not exist for other States that did not happen to have a judge in the Court. Also, the IACtHR noted that judges had already tended to excuse themselves in those circumstances. Eventually, the IACtHR Rules of Procedure were amended in November 2009 to incorporate the Opinion of the Court.<sup>86</sup>

### **4.3. Procedural Factors**

The rules (and practice) regarding standing before the court, and other forms of intervention, might also have an impact on the degree of independence of international courts. As Helfer and Slaughter argued, there is a correlation between access and independence. As they observed, highly independent tribunals are likely to exercise supranational jurisdiction over cases filed by private parties.<sup>87</sup> To the extent that individuals have standing before international courts, States lose control over the kind of cases that might reach the court and the audience broadens. If courts want to attract cases from individuals, they should avoid being perceived as dependent on state governments. Individual access will both increase the opportunities and the expectations of independence.

#### *4.3.1. Individual standing before the IACtHR*

As is well known, individuals are not granted access before the IACtHR. They may lodge a petition before the IACHR, and in those circumstances only the IACHR may take the case before the Court. Thus, the Commission becomes the gatekeeper.

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<sup>86</sup> Articles 19 and 20 of the Rules of Procedure.

<sup>87</sup> Helfer & Slaughter, *supra* n 5, 30.

NGOs have claimed that very few cases are submitted to the Court, even in the case of serious violations of rights and lack of compliance with the recommendations of the Commission.<sup>88</sup> The lack of legal certainty regarding the criteria to decide which cases are submitted to the Court contributes to undermining the perception of independence of the system.<sup>89</sup>

Actually, the impartiality of the Commission has been questioned by the States for submitting to the Court only those cases in which the interests of the Commission and the victims coincide.<sup>90</sup>

In contrast to the lack of individual standing before the Court, access to the Commission is recognized in quite broad terms. Any person, group of persons, or NGOs may submit petitions to the Commission, on their behalf or on behalf of third parties<sup>91</sup> Hence, there is no requirement of any “individual interest”, or even the authorization of the victims for an NGO to file a petition.<sup>92</sup>

#### 4.3.2. *The status of individuals before the Court*

Besides lacking access to the Court, until 2000, individuals were not granted the status of parties in cases that were effectively brought by the Commission before the IACtHR. The Commission and the respondent State would be the parties before the Court. This situation posed two main problems.

First, the double role of the Commission as a decision-making body issuing recommendations to the States and as a party before the Court might subvert the authority and autonomy of the IACHR from the perspective of the States.<sup>93</sup>

Second, the IACHR does not necessarily represent the victims’ interests. The Commission and the victims might have different views regarding the rights that have

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<sup>88</sup> Krsticevic, *supra* n 39, 413-415.

<sup>89</sup> *Id.*

<sup>90</sup> CEJIL, *supra* n 64, 23.

<sup>91</sup> Article 44 ACHR, Article 23 IACHR Rules of Procedure.

<sup>92</sup> Krsticevic, *supra* n 39, 409, fn 4.

<sup>93</sup> CEJIL, *supra* n 64, 23.

been violated and the corresponding reparatory measures. Divergences of strategy might undermine the interests of victims.<sup>94</sup>

In practice, the legal representatives of the victims were integrated in the delegation of the Commission as “assistants”,<sup>95</sup> and were allowed to actively participate in the process.<sup>96</sup> However, this was not considered to be enough. Many claimed that alleged victims should have an autonomous voice before the IACtHR and thus the ability to present and defend their own arguments.<sup>97</sup> Also, this situation created a procedural imbalance, since those who suffered the violation of fundamental rights were not even recognized as parties to the process and thus the principle of equality of arms was ignored.<sup>98</sup>

The IACtHR Rules of Procedure were first amended in 1996 to allow the representatives of the victims to present their own arguments and evidence autonomously in the reparatory stage.<sup>99</sup> Thereafter, in 2000, the Rules of Procedure were amended again to grant individuals the status of “autonomous parties” before the Court.<sup>100</sup>

Currently, the Commission, the respondent State, and the victims are parties before the Court.<sup>101</sup> States have denounced an imbalance since they need to confront “two parties.” The Court responded attributing the States twice the time for answering the complaint, cross-examination, and oral arguments.<sup>102</sup> This practice has been denounced since the claims of the IACHR and the victims do not necessarily coincide. It might be that the Commission does not uphold all the alleged violations, and thus will agree with the State on certain points.<sup>103</sup> Furthermore, state governments have at their

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<sup>94</sup> Krsticevic, *supra* n 39, 418.

<sup>95</sup> A.G. Cançado Trindade, “Las cláusulas pétreas de la protección internacional del ser humano: el acceso directo de los individuos a la justicia a nivel internacional y la intangibilidad de la jurisdicción obligatoria de los tribunales internacionales de derechos humanos”, 33; Krsticevic *supra* n 39, 412-413.

<sup>96</sup> CEJIL Aportes reforma p. 23

<sup>97</sup> M.E. Ventura Robles, “La Corte Interamericana de Derechos Humanos: camino hacia un tribunal permanente”, 32-33 *Revista IIDH* 2000-2001, 301-302; Krsticevic, *supra* n 39, 419.

<sup>98</sup> Cançado Trindade, *supra* n 95, 35

<sup>99</sup> Cançado Trindade, *supra* n 95, 34-35; Krsticevic, *supra* n 39, 419-422.

<sup>100</sup> Cançado Trindade, *supra* n 95, 30.

<sup>101</sup> Ventura Robles, *supra* n 97, 301-302.

<sup>102</sup> CEJIL, *supra* n 64, 24.

<sup>103</sup> P.A. Acosta Alvarado, Tribunal Europeo y Corte Interamericana de derechos humanos: “¿Escenarios idóneos para la garantía del derecho de acceso a la justicia internacional?”, 2007, 35

disposal vast material and human resources, which are not available to the victims.<sup>104</sup> Thus, procedural advantages for the States are perceived as unjustified and might contribute to detracting from the perception of independence of the Court.

In any event, several scholars and judges still claim that individuals should be granted the right to lodge a complaint before the Court. As the holders of the rights enshrined by the Convention, individuals should be given the right to have a day in court.<sup>105</sup>

In addition to the arguments from the perspective of individual protection, there are also arguments in favor of individual access from the perspective of judicial independence, as indicated at the beginning of this section. Furthermore, the possibility for individuals to bring their claims before the Court would undermine the role of the IACHR in “setting the agenda” of the Court.

Since the IACtHR is not a permanent court, however, granting individual standing, or even just increasing the number of cases submitted to the Court, would require further institutional reforms for the Court to be able to cope with the increasing caseload.

#### **4.4. Economic Resources**

As has been put, “every international court is highly dependent on one crucial aspect: the money and resources that it takes for it to function.”<sup>106</sup> The possibility to tamper with judges’ salaries could be a way of exercising pressure over the Court. Also, the terms of compensation are relevant to ensure the independence of judges.<sup>107</sup> If fully remunerated and adequately paid, the incentives to carry out other activities would reduce. For part-time courts, the issue of salaries becomes trickier.<sup>108</sup>

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<http://www.eplo.eu/alfaII/docs/Grant%20Holders/Paola%20Andrea%20Acosta%20Alvarado.pdf> argued that there are advantages in the participation of the Commission from the individual perspective, since many times the alleged victims will lack the resources to defend their case before the Court

<sup>104</sup> CEJIL *supra* n 64, 24.

<sup>105</sup> Cançado Trindade, *supra* n 95, 37-38; Krsticevic *supra* n 39, 411.

<sup>106</sup> Terris, Romano & Swigart, *supra* n 6, 160.

<sup>107</sup> Montreal Declaration. Universal Declaration on the Independence of Justice, 1983, sec. 1.14.

<sup>108</sup> Shelton, *supra* n13, 39.

IACtHR judges are not full time and thus they do not receive a regular **salary**. According to Article 72 ACHR: “The judges of the Court and the members of the Commission *shall receive emoluments and travel allowances* in the form and under the conditions set forth in their statutes, *with due regard for the importance and independence* of their office” (emphasis added).

Generally, judges meet between eight and ten weeks per year, distributed over four ordinary sessions.<sup>109</sup> The sessions at the Court are mainly devoted to hearings, advisory opinions, decisions, and reparatory measures. As several judges have pointed out, in addition to the time spent at the Court, they need to devote time to preparing for the cases beforehand.<sup>110</sup> Cançado Trindade eloquently claimed that the work of judges becomes a “true apostolate”, since they need to keep up with their permanent professional activities in their respective countries.<sup>111</sup>

In this context, the flexible system of incompatibilities is linked to the lack of stable salaries. It is understood that judges will need to perform other jobs to earn a living. Ventura Robles supported the creation of a permanent court, in which the judges would be prevented from performing other professional activities and paid accordingly to their responsibilities, as the only way in which an international human rights court can satisfactorily comply with its obligations.<sup>112</sup>

Regarding the **budget** of the Court, Article 72 ACHR sets forth that the Court shall draw up its own budget and submit it to the General Assembly, which may not introduce any changes.<sup>113</sup> The sources coming from the OAS represent a little bit more than half of the budget of the Court.<sup>114</sup> The rest comes from extraordinary sources: international cooperation, donations by the States parties, and other institutions. As

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<sup>109</sup> 2012 Annual Report, IACtHR, <http://www.corteidh.or.cr/informes.cfm>

<sup>110</sup> A.A. Cançado Trindade, “El derecho de acceso a la justicia internacional y las condiciones para su realización en el sistema interamericano de protección de los derechos humanos” 37 *Revista IIDH* 2003, 57; M. E. Ventura Robles, “La Corte Interamericana de Derechos Humanos: la necesidad inmediata de convertirse en un tribunal permanente”, 1 *Revista CEJIL*, 2005, 12-13.

<sup>111</sup> Cançado Trindade, *supra* n 110, 57.

<sup>112</sup> Ventura Robles, *supra* n 110, 12.

<sup>113</sup> Article 72 ACHR: “[...] Such emoluments and travel allowances shall be determined in the budget of the Organization of American States, which shall also include the expenses of the Court and its Secretariat. To this end, the Court shall draw up its own budget and submit it for approval to the General Assembly through the General Secretariat. The latter may not introduce any changes in it”.

<sup>114</sup> According to the respective Annual Reports, in 2012, the resources coming from the OAS amounted to 58.39% of the total budget; and in 2011 to 51.70% <http://www.corteidh.or.cr/informes.cfm>



stated in the IACtHR 2012 Annual Report, the fact that around half of the regular expenses of the Court are financed by voluntary donations is worrisome.<sup>115</sup>

The risks for the well-functioning and autonomy of the Inter-American system were very much present in the recent process of reform. Some member States sought to ban donations to specific goals.<sup>116</sup> The Assembly General, in the Resolution that finalized the process, stated the commitment to achieving full financing of the Inter-American system through regular sources of the OAS. In the meantime, the Assembly General invited States and other organizations to keep making voluntary contributions that were “preferably” not earmarked.<sup>117</sup>

## 5. Concluding Remarks

Beyond the specific reasons that led state governments to set up international human rights courts, such as the IACtHR or the ECtHR, in the first place, their main function is to monitor state authorities for compliance with fundamental rights. Thus, international courts provide an external check to state action, which undermines state sovereignty.

The credibility of international courts in the eyes of the States, particularly dispute settlement courts with jurisdiction over inter-state claims, might have been sought through some form of national “representation.”<sup>118</sup> Nonetheless, international human rights courts, which hear individual complaints within the framework of multilateral treaties, are not only under the scrutiny of state governments, but also NGOs, the academy, the media, and individuals, who ultimately should benefit from international protection.<sup>119</sup> While all these constituencies might have different expectations, the credibility and legitimacy of the court will depend, to some extent, on its independence, that is, the ability to decide free from other actors’ pressures and influences.

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<sup>115</sup> 2012 Annual Report, p. 93.

<sup>116</sup> This proposal was led by Ecuador, backed up by others, with regard to the *Relatoría Especial para la Libertad de Expresión*.

<sup>117</sup> AG/RES. 1 (XLIV-E/13), *Resultado del proceso de reflexión sobre el funcionamiento de la Comisión Interamericana de Derechos Humanos para el fortalecimiento del Sistema Interamericano de Derechos Humanos*, March 22, 2013, para. 5.

<sup>118</sup> Terris, Romano, Swigart, *supra* n 6, 153.

<sup>119</sup> *Id.*

The main threat for judicial independence comes from state governments, but the leverage of other actors in the context of the Inter-American system, such as the OAS political organs, the Commission, or powerful NGOs should not be ignored.

The assessment of the IACtHR in light of the *ex ante* institutional indicators of independence displays a disturbing picture. The process for selecting judges remains purely governmental both at the national and international level. There are no mechanisms to secure the candidates' expertise and independence, and the election is highly political. The short term in office and the possibility of reelection only adds to the risks of governmental influence. Individuals are not granted standing and thus the kind of cases that reach the IACtHR will depend on the IACHR. The lack of individual access to the Court is combined with broad access to the Commission, which shows the preference for a political rather than a judicial monitoring mechanism. Besides, since the IACtHR is not permanent, judges do not receive full salaries, and the regime of incompatibilities is rather flexible.

At the same time, some timid steps have been taken to further the independence of the IACtHR. The claims for transparency have led to the publication of the candidate CVs on the internet. In addition, the possibility of appointing judges ad hoc and the ability of the national judge to sit in cases against the respective State have been ruled out.

The fact that the IACtHR is not permanent constrains the proposals for change and might explain some of the current institutional arrangements and practices. The claim for individual standing clashes with the reality of a part-time court that can hardly cope with the increasing caseload.<sup>120</sup> The regime of incompatibilities leaves room for improvement, but there are limits deriving from the fact that judges do not receive full salaries.

In this context, many have claimed for a permanent Court. The design of a permanent court would require rethinking the selection process, tenure, reelection,

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<sup>120</sup> Ventura Robles, *supra* n 97.

incompatibilities, standing, and salaries. All these elements could be revised in order to improve the independence of the Court. A permanent court would need to reinforce its authority and legitimacy in the eyes of a broad audience.

At the same time, the legitimacy of international courts might be conditioned by other variables. There is a pervasive tension between the power exercised by international courts and democratic legitimacy.<sup>121</sup> As von Bogdandy and Venzke put it, “in whose name” do international courts exercise their authority? Particularly in the domain of human rights, the interpretation given to a specific right by an international court might clash with the interpretation given by a democratic political community.<sup>122</sup> As the cases diversify beyond killings, torture, and forced disappearances, the scope for reasonable disagreement in rights interpretation might broaden. The countermajoritarian difficulty is exacerbated at the international level, since international courts are not embedded within an institutionalized system of checks and balances constraining power.

The principle of checks and balances invites us to think about mechanisms of collaboration and control among diverse actors with different institutional interests. Instead of isolating international courts, and since it is difficult to supersede the link to the States (and there might be good reasons to preserve such a link), the checks and balances principle might promote forms of mutual collaboration between different institutions to avoid absolute control by any of them. In this context, it is important to take into account that the States are not reduced to the executive, although this is the main actor at the international level. The potential of this principle should be explored in two dimensions: horizontal, within the domestic and international regimes; and vertical, in the interaction between international and domestic actors.

Hence, when thinking about the independence of international courts from the perspective of institutional design, instead of simply focusing on the mechanisms to

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<sup>121</sup> Benvenisti & Downs, *supra* n 6.

<sup>122</sup> R. Gargarella, “Justicia penal internacional y deliberación democrática. Algunas notas sobre el caso ‘Gelman’”, <http://es.scribd.com/doc/102274883/Justicia-Penal-Internacional-y-Deliberacion-Democratica-Gargarella>; G.L. Neuman, “Import, Export, and Regional Consent in the Inter-American Court of Human Rights”, 19 *The European Journal of International Law* 2008, 101; C. Binder, “The Prohibition of Amnesties by the Inter-American Court of Human Rights”, in A. von Bogdandy & I. Venzke (eds.), *International Judicial Lawmaking*, Springer, 2012.

shield them from the influence of state governments, we might consider how to incorporate international courts in a broader institutional setting in light of the checks and balances principle.

## Appendix 1: The IACtHR Judges

Judge	State	Term
Eduardo Ferrer MacGregor	Mexico	2013-2018
Roberto de Figueredo Caldas	Brazil	2013-2018
Humberto Antonio Sierra Porto	Colombia	2013-2018
Alberto Pérez Pérez	Uruguay	2010-2015
Eduardo Vio Grossi	Chile	2010-2015
Rhadys Abreu Blondet	Dominican Republic	2007-2012
Margaretta May Macaulay	Jamaica	2007-2012
Leonardo A. Franco	Argentina	2007-2012
Diego García Sayán	Peru	2004-2009 / 2010-2015
Manuel Ventura Robles	Costa Rica	2004-2009 / 2010-2015
Cecilia Medina Quiroga	Chile	1998-2003 / 2004-2009
Sergio García Ramírez	Mexico	1998-2003 / 2004-2009
Carlos Vicente de Roux Rengifo	Colombia	1998-2003
Antonio A. Cançado Trindade	Brazil	1995-2000 / 2001-2006
Alirio Abreu Burelli	Venezuela	1995-2000 / 2001-2006
Oliver H. Jackman	Barbados	1995-2000 / 2001-2006
Asdrúbal Aguiar Aranguren	Venezuela	1992-1994
Alejandro Montiel Argüello	Nicaragua	1992-1997
Máximo Pacheco Gómez	Chile	1992-1997 / 1998-2003

Hernán Salgado Pesantes	Ecuador	1992-1997 / 1998-2003
Julio A. Barberis	Argentina	1990-1991
Orlando Tovar Tamayo	Venezuela	1989-1991
Sonia Picado Sotela	Costa Rica	1989-1994
Policarpo Callejas	Honduras	1989-1991
Jorge R. Hernández Alcerro	Honduras	1986-1989
Héctor Gros Espiell	Uruguay	1986-1990
Héctor Fix-Zamudio	Mexico	1986-1991 / 1992-1997
Rafael Nieto Navia	Colombia	1982-1988
Thomas Buergenthal	Costa Rica (EEUU)	1979-1985 / 1986-1991
Pedro Nikken	Venezuela	1979-1989
Rodolfo E. Piza Escalante	Costa Rica	1979-1989
Máximo Cisneros Sánchez	Peru	1979-1985
Carlos Roberto Reina	Honduras	1979-1985
Huntley Eugene Monroe	Jamaica	1979-1985
César Ordóñez Quintero	Colombia	1979-1982

(Authors: Karlos Castilla, Aida Torres, and Jorge Roa, on the basis of the information provided by <http://www.corteidh.or.cr/composicion.cfm>)