The Inter-American Court of Human Rights (hereinafter, the "Inter-American Court", or "the Court"), pursuant to Article 64 of the American Convention on Human Rights (hereinafter, the "Convention" or the "American Convention") and Articles 64, 65 and 66 of the Rules of Procedure of the Court [FN1] (hereinafter, the "Rules of Procedure"), delivers the following Advisory Opinion.

[FN1] In conformity with Article 72(2) of the Rules of Procedure of the Inter-American Court, whose last amendments entered into force on March 24, 2009, "cases pending resolution shall be processed according to the provisions of these Rules of Procedure, except for cases in which a hearing has already been convened upon the entry into force of these Rules of Procedure; such cases shall be governed by the provisions of the previous Rules of Procedure." Consequently, the Rules of Procedure of the Court mentioned in the instant Opinion correspond to the instrument approved by the Court during its XLIX Period of Ordinary Sessions, held from November 16 to 25, 2000 and partially amended by the Court during its LXXXII Period of Ordinary Sessions, held from January 19 to 31, 2009.

I. PRESENTATION OF THE REQUEST

1. On August 14, 2008 the Republic of Argentina (hereinafter "Argentina" or "the requesting State"), based on the terms of Article 64(1) of the American Convention on Human Rights and pursuant to the provisions of Article 64(1) and 64(2) of the Rules of Procedure of the Inter-American Court, submitted a request for an Advisory Opinion (hereinafter the "request" or the "consultation") on the "interpretation of Article 55 of the American Convention on Human Rights", in relation to the "institution of the Judge ad hoc and the equality of arms in the proceeding before the Inter-American Court within the context of a case arising from an

individual petition," as well as regarding the "nationality of the judges [of the Court] and the right to an independent and impartial judge."

2. Argentina stated the considerations that gave rise to the request and, among these, it indicated that:

The Inter-American System for the Protection of Human Rights is currently the subject of far-reaching discussions concerning the need and advisability of adopting various measures in relation to its operation, which mainly focus on the introduction of procedural reforms, specifically on the framework of the Rules of Procedure of both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.
[…] In the course of these discussions, several proposals have been made concerning possible reforms to the system that relate to legitimate concerns of those who litigate within it, such as the need for greater certainty in the proceedings, greater clarity of criteria in relation to admissibility, merits, and the forwarding of cases to the Court and, at times, improved guarantees on the equality of arms. […]
[A]ny initiative taken to strengthen the system must, above all, guarantee an enhanced and more effective protection of human rights. In this task, the evolution of the system does not necessarily depend on the introduction of normative reforms. In specific scenarios, the interpretation of the available body of law by the organs of the Convention, especially by its only adjudicatory organ, the Inter-American Court of Human Rights, could be an appropriate tool to develop and improve the international protection system.
[…] In this regard, the Government of Argentina believes that the process of discussion on the future of the Inter-American Human Rights System is an appropriate framework for invoking the advisory jurisdiction […] of the Inter-American Court of Human Rights. It thus submits to the Court the instant request for a legal opinion on two matters that, in the opinion of the Republic of Argentina, and within the framework of the system's current practice, are contrary to the object and purpose of the American Convention on Human Rights.

3. Based on the foregoing, the State asked the Court the following questions:

[1]. In accordance with the terms of Article 55(3) of the American Convention on Human Rights, should the possibility of appointing a Judge ad hoc be limited to those cases in which the application submitted to the Court arises from an inter-state petition?
[2.] For those cases arising from an individual petition, should a Judge who is national of the respondent State Party disqualify himself from taking part in the deliberation and decision of the case in order to guarantee an impartial and unbiased decision?

4. The rules on which Argentina requested the Court's interpretation are the following: regarding the first request, Article 55(3) of the American Convention and, regarding the second request, Article 55(1) thereof.

5. Minister Silvia Fernández was appointed as the Agent and Andrea Pochak, attorney, as the Deputy Agent. [FN2]

[FN2] On November 24, 2008, Gastón Chillier, Executive Director of the Center of Social and Legal Studies (CELS), submitted a brief whereby he informed the Court that Ms. Andrea Pochak, Deputy Agent appointed by the Republic of Argentina, is also joint director of said Center, and that it has been an institutional decision of this organization to present her in said request, in order to support "the State's presentation, collaborating in the drafting and fully agreeing with its terms."

II. PROCEEDING BEFORE THE COURT

6. By means of notes dated September 8, 2008 the Secretariat of the Court (hereinafter, the "Secretariat"), in conformity with the terms of Article 67(1) of the Rules of Procedure of the Court, communicated the request to all the Member States of the Organization of American States (hereinafter, the "OAS"), to the Secretary General of the OAS, to the President of the OAS Permanent Council and the Inter-American Commission on Human Rights. In said communications, it also informed them of the deadline of December 9, 2008 established by the President of the Court (hereinafter "the President"), in consultation with the other judges of the Court, for submission of written observations or other relevant documents regarding this request. In addition, following the instructions of the President and in conformity with the terms of Article 67(3) of said Rules of Procedure, the Secretariat, by means of the notes from October 2, 2008 and in the Inter-American Court's web site, invited different organizations and civil society in general, academic institutions in the region, as well as any interested person, to submit their written opinion on the aspects of the request within the aforementioned term. The previously established term was later extended until January 26, 2009.

7. The established term expired and the Secretariat received the briefs containing the observations of: the Republic of Bolivia (hereinafter "Bolivia"), the Federal Republic of Brazil (hereinafter "Brazil"), the Republic of Colombia (hereinafter "Colombia"), the Mexican United States (hereinafter "Mexico"), the Republic of El Salvador (hereinafter "El Salvador"), the Bolivarian Republic of Venezuela (hereinafter "Venezuela"), and the Inter-American Commission on Human Rights. Furthermore, the Secretariat received the amici curiae briefs presented by: Coordinadora Nacional de Derechos Humanos [National Human Rights Coordinator Committee], Centro de Asesoría Legal del Peru [Legal Counsel Center of Peru], Instituto de Defensa Legal [Institute of Legal Defense], Asociación por los Derechos Civiles [Civil Rights Association], Comisión Colombiana de Juristas [Colombian Jurists Commission], Organización Justicia Global (Justiça Global) [Global Justice], Centro por la Justicia y el Derecho Internacional (CEJIL) [Center for Justice and International Law], Asociación de Familiares de Detenidos Desaparecidos (ASFADESS) [Association of Relatives of Disappeared Detainees], International Human Rights Clinic, Seattle University School of Law, the members of the Seminario sobre el Sistema Interamericano de Derechos Humanos y Derecho Internacional Humanitario de la Facultad de Derecho de la Universidad Veracruzana de México [Veracruz University Law School Seminar on the Inter-American Human Rights System and International Humanitarian Law], a group of students and academics affiliated with Notre Dame University; Facultad de Derecho de la Pontificia Universidad Católica Argentina [Law School of the Pontifical Catholic University of Argentina], members of the Cátedra de Derechos Humanos de la Facultad de Derecho de la Universidad Nacional de Cuyo , Argentina, [Human Rights Chair at

Cuyo National University], Legal Clinic of the University of San Francisco de Quito, Ecuador, The Bernard and Audre Rapoport Center for Human Rights and Justice of the University of Texas at Austin, School of Law, USA, the Director and members of the Global Justice Group and Human Rights at the Universidad de los Andes in Colombia, Human Rights and International Disputes Studies Group, affiliated with the Caldas University of Colombia Legal and Social Sciences School, Mr. Alberto Bovino and Juan Pablo Chirinos, Mr. Carlos Rafael Urquilla, Ms. Elisa de Anda Madrazo and Mr. Guillermo José García Sánchez, Mr. Luis Peraza Parga, Mr. Carlos Eduardo García Granados, Ms. Ligia Galvis Ortiz and Mr. Ricardo Abello Galvis, Mr. Augusto M. Guevara Palacios and Mr. Marcos David Kotlik.

8. Upon conclusion of the written proceedings, on April 17, 2009, the President, in conformity with the terms of Article 67(4) of the Rules of Procedure, issued an Order whereby she convened a public hearing and invited the OAS member States, its Secretary General, the President of the Permanent Council, the Inter-American Commission on Human Rights and all members of the different organizations, civil society, and academic institutions, and all individuals who submitted amicus curiae briefs, in order to present to the Court their oral comments regarding the request.

9. The public hearing was held on July 3, 2009 at the seat of the Court. [FN3]

[FN3] There appeared before the Court: For Argentina: Silvia Fernández, Agent; Andrea Pochak, Deputy Agent; Alberto Javier Salgado, Advisor; Jorge Cardozo, Advisor and Juan José Arcuri, Ambassador of Argentina to Costa Rica. For Barbados: Charles Leacock, Agent and Director of the office of the public prosecutors, and David S. Berry, Deputy and Senior Lecturer of the Law School of University of West Indies. For Colombia: Ángela Margarita Rey Anaya, Director of Human Rights and International Humanitarian Law of the Ministry of Foreign Affairs; Luis Guillermo Fernández Correa, Ambassador of Colombia to Costa Rica, and Álvaro Francisco Amaya Villareal, Advisor of the Inter-institutional Operative Group of the Ministry of Foreign Affairs. For El Salvador: Milton José Colindres Uceda, Ambassador of El Salvador to Costa Rica. For the Mexican United States: María del Carmen Oñate Muñoz, Ambassador of Mexico to Costa Rica. For Guatemala: Delia Marina Dávila Salazar, Coordinator of the Oversight Department of International Cases related to Human Rights of the Coordinating Presidential Commission of the Executive's Policy on Human Rights (COPREDEH) and Dora Ruth del Valle Cóbar, President of the Coordinating Presidential Commission of the Executive's Policy on Human Rights (COPREDEH). For Inter-American Commission on Human Rights: Clare Kamau Roberts, Commissioner; Lilly Ching, Advisor, and Juan Pablo Albán, Advisor. For the Center for Justice and International Law (CEJIL): Alejandra Vicente, Advisor and Ariela Peralta, Advisor. For the Colombian Jurists Commission: Gustavo Gallón Giraldo, Director, and Luz Marina Monzón Cifuentes, Advisor. For the Human Rights Department of the Law Faculty of Universidad Nacional de Cuyo: Diego Jorge Lavado, Head Professor at the Human Rights Department and, María José Ubaldini, Advisor. For the Human Rights Clinic of the Law School of the University of Seattle: Thomas Antkowiak, Assistant Professor; Garrett Oppenheim, student and Marsha Mavukel, student . Also present as observers: Elisa de Anda Madrazo and Guillermo José García Sánchez, and Luis Peraza Parga and Miguel Ángel Lugo Galicia.

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10. On August 4, 2009 the Republic of Guatemala (hereinafter "Guatemala") presented its closing written arguments in relation to the request for opinion. On August 7, 2009, the closing arguments of the Inter-American Commission, the Republic of Barbados (hereinafter "Barbados"), and the Mexican United States were received. On August 8, 2009 the team of professors and students, members of the Human Rights Area of the Faculty of Law of the Universidad Nacional de Cuyo submitted their closing written arguments. On August 10, 2009, the Republic of Argentina submitted its closing written arguments regarding the request.

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11. The Court will now summarize the written and oral comments of the requesting State, the participating States and the Inter-American Commission, and also the briefs and oral arguments presented by different non-governmental organizations, universities and individuals as amici curiae:

The requesting State: In its written arguments and during the public hearing, Argentina stated, among other issues, that:

Regarding the first question of the request (supra para. 3)

[E]ven though the reading of [Article 55 of the Convention] seems to suggest that the possibility of appointing an ad-hoc judge, a characteristic of international procedural mechanisms that are purely inter-State, would unequivocally refer to the fact that such provision could exclusively be invoked in those cases in which the Court must decide on an application filed by a State Party against another State Party, according to the terms of Article 45 of the Convention [... . T]he examination of the Court's continuous and unaltered practice to date [...] reveals that, historically, it has accepted that if none of the judges who compose the Court is a national of the respondent State in a case submitted before it, the State would have the right to appoint an 'ad-hoc' judge to act on an equal footing with the permanent judges in the deliberation and decision of the case, invoking Article 55(3) of the American Convention on Human Rights to such end.
Even though the unequivocal practice of [… the] Court appears to validate the criteria whereby States enjoy such right in all circumstances, [...] an assessment of this institution in the context of the Convention[,], in light of the current rule of law, would seem to suggest that this traditional interpretation should be re-examined [...].
In this sense, it seems clear that the rationale for the concept of an ad-hoc judge, traditionally accepted in the context of the traditional international Courts, that is, those called upon to decide a dispute among States, is validated only when the […] Court must decide a case submitted to its jurisdiction in which a State has filed a complaint against another State for possible non-compliance with its international obligations.
If a case does not originate from an inter-state dispute, the legal justification for accepting the designation of an ad-hoc judge is susceptible to being questioned and, possibly, rejected considering that, in the described scenario – the case before the Court arising from an individual petition- this right of the State would evidently generate an adverse effect on the right to equality of arms in the proceeding, between the alleged victim – material complainant before the Court-

the Inter-American Commission, formal or procedural complainant before the Court, and the respondent State.
It seems evident that, apart from the fact that the appointment of an ad-hoc judge calls for the same technical and moral qualifications required for the permanent judges, he or she is chosen by a State in the context of a specific case, deliberates on an equal footing with the permanent judges and has the right to a vote.
However, neither the alleged victim nor the Commission have the right to appoint an ad-hoc judge; therefore, it is reasonable to infer that the exercise of this right should be limited to those cases in which the application is filed by one State against another State. In this context, it is clear that both of them can, eventually, exercise this right [...] but not in cases arising from individual petitions, at the risk of seriously affecting the principle of equality of arms, as well as the right of the alleged victim and of his or her next-of-kin to the dispute being decided by independent and impartial judges.

Regarding the second question of the request (supra para. 3)

[t]his is an appropriate moment to reflect on the possible need to adopt measures tending to guarantee, to the extent possible, a decision exempt from any direct or indirect influence that could arise in a specific case as a result of the nationality of a judge of the Court.
In this sense, it is worth emphasizing that the independence and impartiality of the judges are fundamental pillars that support the very essence of the rule of law.
[…] From this point of view, the State of Argentina considers that it would be healthy for the system that any judge who is a national of the State that is a party to an application before the […] Inter-American Court of Human Rights should disqualify himself from taking part in the deliberation and in the decision that the Court adopts, as has occurred in the most recent practice of th[e…] Court.
[…] In this regard, and from a similar perspective to that mentioned in the above paragraph, Article 55(1) of the Convention, interpreted in harmony with the other provisions of the Convention and in light of the criterion contemplated in Article 29 of the Convention, seems to leave no doubt that the right of the judge, who is a national of the respondent State, to continue hearing the case would be limited to inter-state petitions and not to cases arising from an individual petitioner.

Moreover, in the brief presented on August 10, 2009 (supra para. 10) Argentina mentioned that:

It is clear that the purpose of the request for advisory opinion filed by the State of Argentina is not to determine whether, in the past, the Judges ad hoc or the judges who were nationals of the respondent State, have behaved adequately. […] The goal is to define whether the interpretation made by the Inter-American Court, thus far, of Article 55 of the American Convention of Human Rights has been correct, or, on the contrary, if it differs from the object and purpose of the Convention and needs to be corrected.
[…] The mere possibility that the designation of a Judge ad hoc by the respondent State or the role of a national judge could jeopardize the procedural balance between the parties, could constitute a sufficient reason to be inclined towards the denial to authorize such power. […]
[T]he current interpretation of appointing a Judge ad hoc in those cases arising from an individual petition or the maintenance of a judge, who is a national of the respondent state,

implies an unacceptable and incompatible advantage to the object and purpose of the American Convention on Human Rights, which was designed, precisely, to protect the individual from the State's authority.

Barbados

In its written [FN4] and oral comments, Barbados indicated that:

[FN4] Brief of observations submitted by Barbados on August 7, 2009 in relation to the request for an advisory opinion submitted by the State of Argentina. (Secretariat's translation)

Regarding the first question of the request (supra para. 3)

[…] The institution of the Judge ad hoc provides a fundamental guarantee that the membership of the Inter-American Court of Human Rights will include at least one judge with an in-depth understanding of the intricacies and values of the national legal system under consideration.
[… In this regard,] the ad hoc system represents only one of many ways to ensure a representative composition of the Court[;] and the State is not fundamentally opposed to the replacement of the ad hoc system with an alternative one.
[… However,] any replacement system must guarantee that for every case involving a Commonwealth Caribbean State a judge from our region who understands our legal system must be available to sit in the Court. Only in this manner will the composition of the Court include a judge who is both (1) well versed in the intricacies of the common law legal systems, and (2) understands the legal, social, economic, and cultural values of the States […].
Since such a replacement mechanism is not yet available, the State believes that dissolving the system of the Judge ad hoc in the context of individual petitions (which make up all of the contentious cases that come before this […] Court), would substantially impair the rights of the State to due process, a proper defense, and equality of arms as protected under the Inter-American system of human rights.

Regarding the second question of the request (supra para. 3)

[… F]or the same reasons that require that the composition of the Court be representative of the different legal systems of the Americas, Barbados cannot accept that a national judge should be required to be excuse himself/herself in a case involving the state that he/she is a national of. Such a suggestion not only discriminates against the judge on the basis of nationality, it also contradicts the clear and express text of Article 55(1) of the American Convention on Human Rights and Article 10(1) of the Statute of the Inter-American Court of Human Rights. Of course if there is a conflict of interest then any judge must disqualify himself or herself. But if there is no such conflict the judge should remain as a member of the Court precisely to make up for the lack of knowledge of the other judges regarding the law of the country that is party to the litigation.

Barbados draws the Court's attention to the fact that the Commission has refused to take an institutional position on the second question, that of the disqualification of national judges. This silence speaks volumes about the unacceptability of this argument.

Bolivia:

In its written comments, Bolivia stated, among other issues, that:

Regarding the first question of the request (supra para. 3)

[… With] the institution of Judges ad hoc, inasmuch as it is a possibility and not an obligation, to be used by the States based on their ample faculties to defend themselves in contentious proceedings, creates equality of arms in the proceeding, since both the victims and their next-of-kin have the possibility to autonomously participate in the process [and], moreover[,] count on the work performed by the Inter-American Commission on Human Rights in its capacity as international public prosecutors' office.
[…] In this regard, the Bolivian State considers that there is a need to clarify the circumstances under which Judges ad hoc may be appointed. That is, to establish if such appointment would only apply to inter-state [...] and/or individual complaints.

Regarding the second question of the request (supra para. 3)

[… In order to overcome the conventional difficulty], it would be healthy for the Inter-American system that any judge who is a national of a State that is a party to an application should disqualify himself from participating in the deliberation and decision on the case [...].

Brazil

In its written comments, Brazil indicated that: [FN5]

[FN5] Brief of observations submitted by the Federal Republic of Brazil on February 9, 2009 in relation to the request for an advisory opinion submitted by the State of Argentina. (Secretariat's translation)

Regarding the first question of the request (supra para. 3)

[… T]he practice of States to appoint a Judge ad hoc upon invitation by the Secretariat of the Inter-American Court, in proceedings arising from individual petitions, have helped the Court in elucidating the domestic legal systems […as well as in the] clarification of complex issues. […]
[…] The multiplier effect that the participation of a Judge ad hoc would have on the perception and dissemination of the Inter-American system, together with the decision-making bodies and the domestic academic circles should not be underestimated.
[… A]n empirical analysis of the performance of Judges ad hoc [...] allows inferring that most of their votes favored the arguments presented by the Inter-American Commission and the victims'

representatives. Said fact proves the independence and impartiality that guide the performance of Judges ad hoc, as well as the good faith of the States when they appoint such a judge. […]
The possibility of appointing judges ad hoc also addresses the need of national societies to see their cultures and values represented in the Inter-American System. […]
[…] Impartiality is a prerequisite that provides legality and legitimacy to the adjudicatory function. [… Therefore, it is no]t enough that the Judge ad hoc acts impartially. It is important that the parties believe in his or her impartiality. For the victims and next-of-kin, the impartiality of a Judge ad hoc may be affected by the fact that he or she is appointed by one of the parties (the State), in order to try a pre-existing case.
[…S]aid representativeness of the "institution of the Judge ad hoc" must, in this line of thought, be consistent with the just expectation of the victims' representatives regarding the impartiality of the members of the Court. Hence, Article 55 of the American Convention should be interpreted in the sense that the election of a Judge ad hoc by the respondent State must be subjected to a dialogue with the domestic civil society, in accordance with the principle of objective good faith.

Regarding the second question of the request (supra para. 3)

[… T]he participation of a judge in a case concerning the State of which he or she is a national, would allow a greater level of representativeness in the proceeding. [… However,] the legitimacy of a judge who is a national of the respondent State derives from the joint willingness of the Member States that elected him or her to allow it to hear all the cases submitted before the Court, from the moment the judge takes office. [… Hence] a judge of the Court is, in fact, the natural judge of the system and must, in that capacity, fully exercise his o her ability to decide.
[… F]ostering domestic dialogue seems appropriate in order to identify the candidates for judge […] who have outstanding legal knowledge of human rights. [… T]he fact that a candidate has broad internal support contributes to strengthening [said] legitimacy conferred by the OAS General Assembly.

Colombia:

In its written comments, during the public hearing and in its closing arguments, Colombia indicated that:

Regarding the first question of the request (supra para. 3)

[… W]ithin the broad process of reflection regarding the future and present of the Inter-American system of human rights […] Colombia has given priority to the principles of equality of arms and procedural balance in the proceedings subjected to the […] Inter-American Commission and the […] Court on any other consideration […] on the grounds that full respect and observance of these two fundamental principles strengthens the system and reinforces the legitimacy of the decisions and actions of that system. In this regard[, …] Colombia considers that if there is reasonable doubt that the institution of the Judge ad hoc could affect [...] two fundamental principles [equality of arms and procedural balance …], then the Court must guarantee such principles, above any discussion or debate. Colombia acknowledges that, by reading the written observations of the civil society, it has understood the scope of its concerns.

Therefore […] Colombia has confidence in the wisdom of the […] Court and in its sound judgment to solve this consultation [...] and, consequently, it shall respect the Court's claims.

Regarding the second question of the request (supra para. 3)

[I]n the matters in which the national Judge has supported the decisions favorable to his or her country of origin, it cannot be asserted [...] per se that his or her opinion is biased due to his or her nationality. [... Criticizing] per se as mistaken the opinion of a Judge who is a national of the respondent State and votes consistent with the interests of his country of origin, presumes the conclusion that the Court's opinion is always right, and this is not always true […].
[… The] adjudicatory function […] is presumed to be independent and impartial, on the basis of the principle of good faith [... and] any observation in that regard needs to be proven, not as a generic affirmation, but within the proceeding in which it is alleged and for such case in particular. […]
[The judicial activity of the Judge who is a national of the respondent State is more linked to his or her personal and professional qualities than to his nationality in the sense o]f numeral 1 of Article 52 of the [Convention].
[… Moreover,] the process for selection of the members of the Court […] is governed by Article 53 of the Convention [… and] should any of the eligibility requirements be missing[,…] any of the Member States to the OAS may claim the candidate's lack of suitability. […] Furthermore, […] this selection process ends when the judge takes office, in which [… in conformity] with Article 11 of the Court's Statute, he or she takes a solemn oath of independence and impartiality -among other- for the exercise of his or her adjudicatory functions. […] The foregoing is evidence, then, of the thorough and demanding selection process.
In any event, despite the technical and political evaluation made by the OAS by means of the process of selection of the candidates to be Judges of the Court […], there are also other mechanisms to disqualify them from hearing a proceeding in such cases where their impartiality and independence in a specific case are in question. […T]he proposal made by the State of Argentina […] would create a factual presumption according to which the nationality of the judge is, by itself, a sufficient element to consider his or her position to be biased and subjective[,disregarding…] the provisions on disqualification […].
[…] For this reason, […] to require a judge to excuse himself from participating in the deliberation and the decision of a case in which his country of origin is the respondent State disavows the logical regulation proposed by the Convention and other consistent norms, contradicts the principle of good faith and disregards the specific circumstances of each matter subjected for consideration of the […] Court, favoring general presumptions.

El Salvador

In its written and oral comments, El Salvador indicated, among other issues, that:

Regarding the first question of the request (supra para. 3)

[… T]he appointment of a Judge ad hoc by a State cannot be limited to cases arising from inter-state complaints filed before the Court [… T]his right […] can be found in different bodies of law of courts competent to hear matters of a nature different from the protection of human rights;

however, it is not less important to consider this institution […] as part of the due process established in favor of States[…].
Article [55 of the American Convention …] expressly provides the right of every State to appoint a Judge ad hoc. […] The Court's practice in the application of the aforementioned rule to individual petitions[,…] can be traced back over twenty years. [This, in addition] has been accepted by all operators of the System for the Protection of Human Rights with no exceptions […]to date, guaranteeing the parties involved the due process required.
[T]he Judge ad hoc, like any permanent judge, acts in an 'individual capacity,' meaning, he or she does not represent the State he or she is a national or the State who nominates them […]. [T]he provisions related to the permanent judges are also applicable to Judges ad hoc guaranteeing their independence and moral authority [… .Moreover,] they have to take an oath at the moment they take office, in order to perform their duties [...] with honesty, independence and impartiality [... and] shall not disclose the matters submitted for consideration.
[T]he clarity of the Court as to the exercise of Judges ad hoc is such that, by understanding the different legal system of the OAS Member States, it has deemed appropriate to count on a well-known professional of the State, whose case is under the Court's consideration, in order to act not as lawyer of the State, but by virtue of the in-depth knowledge of the national legal system of his country of origin to clarify, in the deliberations, those doubts or consultations that may arise from the analysis of the case by the other Permanent Judges of the Court. [… Far from placing one of the parties to a disadvantage, this appointment brings fairness to the proceeding and guarantees that the decisions to be adopted by the Court shall be based on all the necessary elements so that such decision is well-founded.
Moreover, […] the possibility to appoint a Judge ad hoc contributes to increase the participation of the Member States of the OAS in the Inter-American Court […] and prevents their participation from being restricted to the election of seven judges for periods of six years each one, […] making the system more transparent and strengthening it.

Regarding the second question of the request (supra para. 3)

[… Due to] the nature of the Judge and […]the election criteria for the office, [... they] do not act as representatives or advisors of a certain Government, on the contrary, […] they act for the benefit of the protection of human rights [... .] There is no risk that a judge [who is a national of the respondent State], who is hearing a specific petition, could negatively affect the protection of human rights. […] However, in the event that a situation of [this] nature is detected […] both the Court's Statute and Rules of Procedure […], provide the mechanisms whereby an appointed judge can be disqualified or can disqualify himself from his office, on the grounds of [...] incompatibility, disqualification, resignation, and disabilities […].

Guatemala

During the public hearing and in its closing written arguments, Guatemala indicated, among other issues, that:

Regarding the first question of the request (supra para. 3)

In the Inter-American system of Human Rights, Articles 55 of the American Convention on Human Rights, 10 of the Court's Statute and 18 of its Rules of Procedure confer upon the States Parties in a conflict submitted before the jurisdiction of the Court, the right to appoint a Judge ad hoc in the event none of the judges hearing the case is a national of the State party to the case, specially considering the fact that the […] Court is only composed of seven permanent judges.
According to the practice of the […] Inter-American Court, […] in individual petitions, [… it] has requested the respondent States to appoint Judges ad hoc[… . T]his is a common law rule that must be recognized as such, and continue resorting to it.
The participation of a judge, national of the respondent state, in the context of a case arising from an individual petition is a suitable and necessary resource the Court has to depend on […] to have sufficient elements that will allow it to make a much more objective appraisal, according to the particular circumstances of the domestic legal system and the political, economic and social context of the State in question. Hence, the participation of the judge [...] is beneficial for the alleged victims [...]. Therefore, instead of considering it as inequality of arms in the proceeding, it must be seen as a significant contribution to such case […].
[A]n Judge ad hoc does not represent the State that nominated it; instead, he or she acts with total independence and impartiality [...] [T]he provisions related to permanent judges are also applicable to Judges ad hoc.

Regarding the second question of the request (supra para. 3

[… T]he permanent judge in a case involving his or her state of nationality […] should not disqualify himself from hearing the case, [... given that] he or she does not lose the impartiality or independence in the assessment of the facts for being a national of the State party to a case. On the contrary, instead of entailing risk for the principle of equality of arms in the legal proceedings, the analysis of the case shall be more objective inasmuch as the judge is linked to the real context that exists in his or her country; helping, at the same time, to promote the legislative, administrative and judicial changes in the country that nominated such judge, for the benefit of all the actors of the Inter-American system of human rights.
[…]Nevertheless, the parties to a case of this nature may always resort to the rule contained in Article 10 of the Court's Statute that governs the institution of disqualification[. …But,] a judge […] must disqualify himself from hearing a certain case not because of his nationality, but because he or she considers there is a reason for disqualification or a direct interest in the matter.

Mexico

In its closing written and oral comments, Mexico stated that:

Regarding the first question of the request (supra para. 3)

[A]rticles 55 of the [American Convention], 10 of the Statute [of the Court] and 18 of the [Court's] Rules of Procedure grant the States party to a conflict submitted before the [Court's] jurisdiction, the right to appoint a Judge ad hoc only when none of the judges to that case are of its nationality. [This] right protects […] the fair balance between the protection of human rights - final purpose of the system– and the legal certainty and procedural balance that ensure stability and confidence of the international protection. [… Additionally,] there is a regional generalized

practice regarding the institution of the Judge ad hoc during the processing of cases arising from individual petitions, cases that constitute the basis of the functioning of the system.
[… In this regard,] it is necessary to take into consideration that both elements [of the customary international law] are fully met in the case under consideration […]: the State practice and conviction of those States that such practice falls within the context of an international legal obligation (opinion juris sive necessitatis).
The fact that the [Court] consists of 7 judges, and that no two judges may be nationals of the same State [in conformity with Article 4 of the Court's Statute] cannot be a reason for legal disadvantage for such State party in an international conflict in which no national judge of the country in question, has been appointed to participate in the deliberation of the case. On the contrary, considering that the order that the Court will eventually adopt shall inevitably affect the domestic legal system [...] of the respondent State, the right to appoint an independent and impartial national to collaborate with the Court is a fundamental right within the context of public international law.
It is evident that the provisions related to the selection process and the term of office are more complex for the permanent judges. Nevertheless, this situation does not imply that the participation of Judges ad hoc affects the independence and impartiality of the Court or the legal certainty of the parties. [T]he nature of the role of […] Judges ad hoc calls for a less formal selection process in which the position is limited to the deliberation of a specific matter and its most important issues, subject to the approval of the representatives of the alleged victims, as well as of the Commission and the Court [...].
[… T]he appointment in an individual capacity and the judicial role […] are subject to a very specific standard of rights, duties and responsibilities applicable to all the permanent and Judges ad hoc. [… F]urthermore, upon assuming office, the judge shall take a solemn oath or declaration [in conformity with Article 11 of the Court's Statute] and shall possess the same qualifications required for permanent judges [Article 10(5) of said Statute…]. [T]he fact that the Court, after the corresponding assessment process, accepts the participation of the Judge ad hoc proves that the characteristics of impartiality and independence […] are full satisfied. […]
The participation of a judge who is a national of the respondent state in the context of a case arising from an individual petition, is a suitable and necessary resource the Court has to depend on sufficient elements that will allow it to make a more objective appraisal, according to the particular circumstances of the domestic legal system and the political, economic and social context of the State in question.

Regarding the second question of the request (supra para. 3)

[T]he general rule of interpretation [… of] Article 31(1) of the Vienna Convention on the [L]aw of [T]reaties, 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 light of their object and purpose. [Based on such rule], Article 55(1) of the [American Convention] provides that 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 and, […] that he has the right to abstain from hearing the case.
The foregoing needs to be considered together with criteria on disqualification established in Article 19 of the [Court's] Statute, which could be invoked by the judge himself as well as by the President of the Court, in order to give consideration to the fundamental principles of

impartiality and independence that guarantee the performance of adjudicatory duties of the international bodies of administration of justice and, therefore, of the judges that comprise them.
[…] In the practice of the Inter-American system of human rights, the possibility of a judge to disqualify himself from hearing the case in which he or she is a national of the respondent State, has been exercised on several occasions; however, in a considerable number of cases in which said judges did not abstain from hearing the case, they voted against their own country's petitions.
The general practice has been conclusive to prove that the main reason for the judge's recusal or, if applicable, the parties' motion to disqualify a judge is the preexisting closed relationship of the judge in question to the specific case. Therefore, the possibility to self-disqualify […] has applied to judges of other nationalities who, in some way or the other, have been previously exposed to the case.
[…] The right of a judge to participate in the deliberation of a case related to his country of origin rests upon the statutes, the preparatory works and the several orders issued by the most important international Courts, such as the extinct Permanent Court of International Justice, the current International Court of Justice, the Inter-American and European Courts of Human Rights and the International Court on Maritime Law.

Venezuela:

In its written comments, Venezuela indicated, among other issues, that:

Regarding the first question of the request (supra para. 3)

The American Convention on Human Rights, in Article 55 [...] contemplates the practice of international law, which comes from the Statute of the International Court of Justice [...]. [T]he Inter-American Court of Human Rights, since its [inception], has accepted the participation of Judges ad hoc […] in the petitions filed with the Inter-American Commission […].
The appointment of a Judge ad hoc, in the case of a petition filed by the Commission[, ...] constitutes a right of the States[…] which derives from[,] in the first place, the American Convention, and in second place, from the international legal practice, formed by the generalized and regular practice of the Court [...] and the constant recognition of validity by the States of the American continent.
[…] This judge, national of the respondent country before the Court, knows the social reality and the domestic rules of the State subjected to a proceeding, which contributes to a better understanding of the facts and the applicable law. […]
On the other hand, [… it differs] from the opinion according to which the institution of a Judge ad hoc […] alters the balance of the parties to a proceeding [...]. [T]his argument disavows the nature of the institution of a Judge ad hoc, [which is] similar to that of other judges, in the sense that they do not represent the government that proposes or appoints them, they are not the agent of such country and that they act in an individual capacity.
Almost all of the Judges ad hoc who have acted before the Inter-American system have performed their duties under unquestionable objective and impartial conditions. Even, some of them [...] have been, later on, elected to be permanent judges of the Inter-American Court [...]

Based on the foregoing, […] the appointment of a Judge ad hoc in cases of claims filed by the Inter-American Commission, constitutes a right of the States […], in conformity with Article 55(3) of the American Convention and international customary law.

Inter-American Commission

In its written comments, during the public hearing and in its closing arguments, the Inter-American Commission indicated, among other issues, that:

Regarding the first question of the request (supra para. 3)

[… T]he practice of incorporating judges ad hoc was initiated by the Inter-American Court since its first cases. As of that moment, the Court has incorporated Judges ad hoc in all the cases submitted for its consideration, when none of the judges composing the Court is a national of the respondent State.
[…] Article 55 of the American Convention [on Human Rights] has been the basis for the Court to order the respondent State, in those actions initiated by the Commission, to appoint a Judge ad hoc. [I]t is clearly evidenced from numerals 2 and 3 of Article 55 [of that provision…] that the institution of the Judge ad hoc only applies to inter-State petitions. [… A]rticles 10 of the Court's Statute and 18 of its Rules of Procedure basically reproduce the content of Article 55 of the Convention […], and do not authorize either the appointment of Judges ad hoc in cases other than petitions between States party to the Convention.
[…] Another aspect that [...needs to be emphasized…] is [the …] partial application [of the institution of the Judge ad hoc]. In effect, in international legal proceedings, in general, there are two parties, which are both sovereign States and both have the right to appoint a Judge ad hoc in the proceeding if none of the permanent judges is a national of said States. Instead, in the Inter-American processes of human rights[,...] only one of the [parties] - the State- is entitled to appoint a Judge ad hoc [... which] creates [...] imbalance for one of the parties [...].
Regarding the preparatory works on the American Convention, […] the original draft established that no judge could participate in matters involving his or her country of origin [...], and that when the judges called upon to hear a case should be a national of one of the States Parties to the case, he had to disqualify himself from hearing the case and only then it would be possible for any other judge of the Court (and not the respondent State) to appoint a Judge ad hoc in order to complete the bench with five judges.
Even when the original drafting of Article 55 was replaced with a drafting based on Article 31 of the Statute of the International Court of Justice, the approved final text did not include any provision authorizing the appointment of Judges ad hoc in the cases of complaints submitted before the Court by the Inter-American Commission and this could also been based on the Statute of the International Court of Justice, which [...] has only jurisdiction over disputes submitted to it by States [...].
[…Finally] and taking into consideration of the provisions related to the interpretation of treaties contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, […] the textual analysis of Article 55 of the [American] Convention does not establish grounds for the practice of the Court to include Judges ad hoc in those cases that do not involve disputes between States. […] the institution of Judges ad hoc is absolutely exceptional and as such, it must be restrictively applied. […]

Civil Rights Association

In its amici curiae brief it indicated that:

Regarding the first question of the request (supra para. 3)

[… T]he practice of Judges ad hoc in the institutional history of the Court […] shows a tendency that, at least, does not confirm the fears of partiality that the Argentina State reasonably puts forward. This speaks highly of those people who have acted as Judges ad hoc up to this date. […] However, […] there are sound reasons to believe that the practice […] be abandoned in those cases not involving inter-State disputes [...].
The intervention of a Judge ad hoc […] would intend to ensure that the Court includes a necessary overview to fully understand the […] legal system, in general, [of the State party to the case] and specific aspects relevant to understandinh the facts of the case. […] Hence, it could be argued that a Court completely composed of judges of a different nationality from the State party in a contentious case […] would generate suspicion of partiality against said [S]tate.
[…] Hence, it is tru[e…] that the Court needs to be legitimate and that its organization and structure seek the greater representativeness possible, not only from the [S]tates but also from the population groups in respect of whom it adopts a decision. Nevertheless, they do not necessarily lead to the institution of Judges ad hoc.
[…] The need to include, in the deliberations of the Court, the necessary perspective so that the judges learn about the specific realities of each country at the time of adopting a decision that will affect their interests, it is satisfied with the intervention of expert witnesses and the attorneys designated by the parties [...].
[… It must take into account that i]n Article 8, the American Convention protects the right of every person to a fair trial. […] [… which] must be applied to all on an equal footing and not discriminating. These rules govern what has been called the due process of law, that is, those guidelines that need to be fulfilled so that any proceeding can be considered fair. Even though these rules are addressed to establish the conditions that the States must comply with in their domestic systems of administration of justice [… also, i]n the SIDH [Inter-American system], equality of arms is a principle within the due process of law. […] In this way, the fact that one party to the case (the State) is able to appoint a Judge ad hoc and that the other party to the case (petitioner or the Inter-American Commission) is not entitled to that right, violates [said] principle. […]
[…B]efore the Court appear victims that are 'inevitably, in an unequal position towards the respondent State.' Hence, the rule of Article 55(3) of the [Convention] could not include the cases in which victims seek to convict the States that have allegedly violated their rights within those cases in which a Judge ad hoc can be appointed. That would only amount to a new inequality – this time, procedural- in the already mentioned inequality between [S]tates and victims.
The writing of Article 55 of the [American Convention] confirms [… that] the appointment of Judges ad hoc [corresponds] only to cases of conflict between different States. […] This becomes more evident by noting that […] the drafting of Article 55 of the Convention was drawn (and taken almost literally) from the Statute of the International Court of Justice […].

Regarding the second question of the request (supra para. 3)

The American Convention does not establish the obligation for the judges of the [Inter-American] Court to disqualify them from hearing a case in which they are a national of the State to the case. […] However, […] the drafting of Article 55 of the Convention [… i]n particular, numeral 1 – under question in here- makes reference to the judge who is a national 'of the States Parties to a case submitted to the Court.' The use of the plural form […] seems to refer to cases of inter-State disputes.

[…] Even though the judges of the [Inter-American] Court are not appointed by the States of which they are nationals but by the OAS General Assembly, and though they do not act on behalf o the States, it is true that they are appointed based on the States' proposal. This, coupled with the fact that their term of office is not for life (or permanent) […], there seems to be no sufficient statutory guarantees to ensure a total independence and impartiality of the judges at the time of making decisions that may affect the States of which they are nationals, which do not only decide about the designation or maintenance in the office but they shall also relate possibly to other decisions regarding the professional career of the judges once they end their terms in the [Inter-American] Court.

Hence, it is also true that it is difficult to establish a general rule according to which the partiality of any judge in a case related to the State of which he is a national can be presumed. […]

Moreover, the mechanisms of disqualification established in Article 19 of the Statute of the [Inter-American] Court guarantee that, in specific adversarial proceedings, those judges, who are under circumstances that creates aggravations or inclinations regarding their decision or that lead to a reasonable fear of partiality in the petitioners, may be disqualified or can disqualify themselves from hearing the case.

[…] The way to guarantee that the judges, whichever nationality they are, shall be impartial and independent upon the deliberation and resolution of cases involving complaints against the States that fostered their appointment, is through an adequate system of appointment of judges [… with] processes that are […] sufficiently open, transparent [and] participative […].

[The j]udges elected through the appropriate selection process in order to form part of a representative regional Court, recognized and legitimated by means of public procedures, cannot be considered as mere nationals of one State or the other; through the legitimacy of origin, based on the selection method and the lawfulness of the exercise, based on the reasoned and public grounds of their decisions, they become the guardians of human rights in all the region.

[… Based on the foregoing, e]ven though the request for the existence of a duty of the judges, who are nationals of the State party to the case arising from individual petitions, to disqualify is based on good reasons, there are not legal grounds to support a general rule establishing its necessary disqualification. [However, t]he concern revealed by the second request of the State of Argentina must be appraised and considered in order to foster new reforms in the process of selection of candidates and the appointment of judges of the Court […].

Association of Relatives of Disappeared Detainees (ASFADESS)

In its amici curiae brief it indicated that:

Regarding the first question of the request (supra para. 3)

In accordance with the provisions of Article 55(3) [of the American Convention on Human Rights], and considering the exegetical interpretation of the rule, the appointment of a Judge ad hoc is established in terms of inter-State conflicts, which do not include individual petitions [..., insofar as] that entails an abridgement or limitation to the right to equality of arms within the proceedings of the victims, relatives or petitioners. [… T]his procedural disadvantage becomes noticeable when we observe that the State is the only one that can resort to this legal instrument [...].
In this sense, there are two legal alternatives of interpretation; on the one hand[,] the American Convention must be applied in the strict sense of Article 55(3) or[,] on the other hand, the possibility to resort to the Judge ad hoc in cases arising from individual petitions, must be regulated, in order to be on an equal footing with the opposing party.

Regarding the second question of the request (supra para. 3)

[… A]rticle 55(1) of the American Convention reserves the right that the judge has to hear the cases brought to the Court's consideration, […] if the judge is a national of the State party to the case[. T]his indulgence or power granted to the Judge […] gives rise to implications related to the legal system like the possible abridgment of the principles of, for instance, procedural equality and legal certainty. […] This unnecessary risk may be remedied with the application of a criteria for disqualification [,] as it currently occurs within the framework of the procedure before the [Inter-American] Commission [on Human Rights…].

Center for Justice and International Law (CEJIL)

In its amicus curiae brief and during the public hearing, it indicated that:

Regarding the first question of the request (supra para. 3)

[… T]he interpretation of Article 55 of the Convention must be made, in the first place, taking into account the means of interpretation acknowledged in customary international law and embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969. Under the hierarchy of sources of International Law, treaties prevail over other sources of law, such as judicial case-law, which is regarded as an auxiliary source of law.
Moreover, it is important to [… make a] progressive interpretation [….] of the international instruments […] within the framework of the evolution of the fundamental rights of the human being under contemporary international law. [… T]he role of the victim in the Inter-American system has advanced until achieving a privileged position in the defense of his rights before the system. […S]aid progress also implies a new model of international relationship different from the existing inter-State relationships […T]he appointment of Judges ad hoc is only applicable to cases between States [according to what is inferred from the interpretation o]f numerals 2 and 3 of Article [55 of the American Convention and] 10 of the Statute of the Court.
[… In] the preparatory works […] of Article 55 [... it] was established that no judge could participate in matters involving his or her country of origin [... and that they would] be replaced by a Judge ad hoc designated by the judges of the Court themselves, instead of the States. […T]he preparatory works of Article 55 show that the intention of the drafters was not to give the respondent States the prerogative to appoint Judges ad hoc in cases arising from individual

petitions, but, in any event, to put the practice on the same footing as the ICJ [International Court of Justice], that is, to allow the appointment of Judges ad hoc in inter-State conflicts.
[… T]he States Parties to treaties on the protection of human rights do no seek the achievement of personal interests, but the objectives of such treaties. [… Hence,] the objective and purpose […] of the American Convention [, which is to achieve the effective protection of the rights] is directly inconsistent with the appointment of Judges ad hoc by the respondent States in the cases arising from individual petitions [...].
One of the arguments in favor of the appointment of Judges ad hoc in those cases arising from individual petitions has been based on the fact that the Judge ad hoc [...] does not compromise the independence and impartiality of the Court, since [...] he or she acts in an individual capacity and is subject to the same technical and moral qualities required for the permanent judges.
[Even though t]he Judges ad hoc, […] are subject to requirements identical to the ones required for permanent judges, they are not appointed following the same formal process [… T]he candidates for permanent judges must obtain an absolute majority of votes of the States Parties to the Convention. In the case of Judges ad hoc, however, the judges are proposed by the respondent States, and they do not have to follow a formal voting mechanism of the rest of the States that form part of the Inter-American system [...].
[Moreover,], only the respondent State shall be given [the] prerogative [to appoint Judges ad hoc]. The Court […] has never allowed the Commission or the victims to do it […]. In this way, the current practice in the appointment of Judges ad hoc violates the procedural balance in favor of one of the three parties to the case […]. This situation is very serious, insofar as the violation of the principle of equality favors, precisely, the party to the adversarial proceeding in respect of whom a petition has been filed for the violation of human rights to the detriment of the victims, placing the victims in at a procedural disadvantage.
One of the arguments sustained to defend the presence of Judges ad hoc in cases not involving States is that [... this judge] could contribute with the Court with in-depth knowledge of the national rules and therefore, in a better processing and resolution of the case. […] Nevertheless, by evaluating the history of the Court, […] not all the respondent States to a case have decided to elect one of their nationals to act as judge ad hoc in a dispute.
Moreover […], in the cases arising from individual petitions, the respondent State as well as the other parties to the case have the opportunity to guarantee, by means of the submission of written and oral arguments and the appointment of expert witnesses, that the Court has the necessary information to learn about the national legislative system in order to take a fair decision in the case. The Court itself has the authority to act, at its own discretion, during the processing of the case to request the parties the additional information its considers appropriate, including expert opinions and experts' reports.
[… T]he Court must rectify the practice regarding the appointment of Judges ad hoc in cases not arising from inter-State petitions, considering the words of the Convention itself, its objective and purpose, the principles of equality of arms, the judicial independence and impartiality, […] and taking into account that it is in the interest of the inhabitants of the region, and [of] the States pursuant to the principle of collective guarantee, for the Court to modify its practice whenever that implies a progress in the protection guaranteed by the Convention.

Colombian Jurists Commission

In its amicus curiae brief and during the public hearing, it indicated that:

Regarding the first question of the request (supra para. 3)

[…] The Judge ad hoc carries out the same functions that a permanent judge, but only for a specific case and always considering the exceptions established in three numerals of Article 55 of the Convention
[…] The institution of the Judge ad hoc has its origin in the classic practice of arbitration. In this scenario, the parties to a case have the possibility to appoint an arbitrator or a group of arbitrators who shall listen and decide the dispute. In keeping with the equality of arms, the two parties of a dispute have the same capacity to influence on the composition of an arbitrary group. […]
[…I]t is evident that the institution of the Judge ad hoc introduces an unacceptable procedural imbalance between the parties in the proceedings submitted before the Inter-American Court [… if] only one of the parties of the case has the right to appoint a Judge ad hoc, and the other party has no right. […] The scenarios are completely different, therefore the more logical and appropriate interpretation of Article 55 of the American Convention would allow the appointment of a Judge ad hoc only in those concerning litigant States.
[…] If stress were laid on said possibility [for the States], the Court […] should also have to acknowledge the right to appoint a Judge ad hoc of the petitioners. Not to do it, would be contrary to [said] principle [...]. To do that would be contrary to the principle of impartiality, since it would entail admitting that all the parties […] would have a judge representing them in each proceeding, which, apart from being absurd, denature the role of the administrator of justice attributed to the Court and turn it into a negotiating instance between two unequal parties.

Regarding the second question of the request (supra para. 3)

[… T]he analysis regarding the independence and impartiality of a judge or a Court must be done considering the objective criteria as well as the subjective criteria. [… E]ven appearances are important. Hence, the presence in the Court of a judge that is […] a national of the respondent State, which has been generally appointed by such State, constitutes a factor that […] shakes the confidence a party may have in the impartiality and independence of the Court[. …] Then, in view of the negative effect that the participation of a judge who is a national of the respondent State has […], we need to ask if there is really any reason or advantage why the Court must keep allowing his or her participation.
[…] The reason most frequently heard is that a judge, who is national of a State, who has the local knowledge and perspective, may help the other judges to better understand the national context in order to adopt to a more understanding decision of the internal situation. However, this reason is not legitimate, since it is an obligation of the respondent State, as one of the parties to the case, to fully explain and sustain its position. The State has the possibility to do it and cannot wait for external help. On the contrary, that would constitute a violation of the procedural balance between the parties.
Besides, […] in this scenario, we are dealing with universal human rights rules that, as a result, are applied using an universal criteria and not in view of bilateral or multilateral relationships between States in order to determine which of the States has the paramount right, as would be the classic disputes regarding territorial boundaries or non-compliance with contractual obligations between States. The decision that an international human rights court may adopt as to whether torture was committed or not against one person, [for example], does not require the presence or

the specialized knowledge of a judge who is national of the respondent State [...] but wisdom of the international judge based on his or her knowledge of international human rights obligations [...] and on the impartiality to detect the situations in which said obligations are violated or not.
[… T]he effective and appropriate channel to guarantee an independent and impartial Court would be to declare the disqualification of the judge, who is a national of the respondent State, in all the individual cases. [… I]f the Inter-American Court does not select this option in this moment, it would be convenient for it to adopt other measures to ensure the impartiality and independence of the Court, […, needing to] maximize the requirements to select the judges of the Court.

Global Justice

In its amici curiae brief it indicated that: [FN6]

[FN6] Brief of observations submitted by Justicia Global (Justiça Global) on January 26, 2009 in relation to the request for an advisory opinion submitted by the State of Argentina. (Secretariat's translation)

Regarding the first question of the request (supra para. 3)

[… In relation to the] appointment of Judges ad hoc to hear cases arising from individual petitions, [it seems adequate to analyze] the due process of law; specially, the principle of equality of arms in the development of international proceedings. […] If more effective and powerful resources are provided to only one of the parties, the procedural relationship is unbalanced.
[…] The presence of Judges ad hoc creates unbalance in the procedural relationship between the State, the Inter-American Commission and the victims' representatives [...] inasmuch as: i) only the respondent State is entitled, following the current interpretation of the Inter-American Court, to resort to this institution; ii) the Judge ad hoc by the State is appointed after notice of the petition is served, with a prior knowledge of the facts, evidence and requests; iii) as a judge appointed by the State itself (and not elected), it is possible that the State may exert political influence by means of the institution of the Judge ad hoc. [… Therefore,] the Court [can only] authorize the institution of the Judge ad hoc only for inter-state disputes.

As to the second question of the requestm(supra para. 3)

[… T]he institution of judicial impartiality […] is essential to ensure the respect for the due process of law, understood as an autonomous right and an instrument and guarantee of other rights […].
Judicial impartiality consists of two aspects: subjective impartiality and objective impartiality. The first one examines the personal convictions of the judge […] and establishes that none member of the Court may assume discriminatory attitudes. It is presumed that all the members of the judiciary act with subjective impartiality, unless evidence to the contrary. Moreover, the Courts must seem to be impartial in front of a reasonable observer […] which is called

'appearance of justice' […, and is] justified in the need to maintain the public trust in the operation of the courts. This trust is considered to be fundamental for the support of democratic institutions that guarantee […] the public order.
In order to […] strengthen the 'appearance of justice' in the proceedings before the […] Court and in its decisions, [… it is adequate to establish] the impossibility for a national judge to participate in the proceedings conducted against his respective.

Human Rights National Coordinator Committee, Legal Counsel Center of Peru and Legal Defense Institute

In its amici curiae brief, they indicated that:

Regarding the first question of the request (supra para. 3)

[..W]hen referring to the institution of Judges ad hoc, present in […] the PCIJ and ICJ [Permanent Court of International Justice and the International Court of Justice], that it is considered to be a set-back of the institution of arbitration […]. [Nevertheless, and i]n accordance with […] usual case-law […], the international solution of cases concerning human rights […] does not admit analogies with the peaceful resolution of international disputes in purely inter-State adversarial proceedings […].
[…Moreover, we should not forget that] international justice differs from arbitration in that judges are not elected by the parties […], but are selected based on their personal qualifications. [… A]s a general rule, the composition of supreme courts […] has an intense selection process under certain regulation. […] The nationality of the members is very important, insofar as the process values the representativeness that, in some cases, extends to the area and the gender. […] In the Inter-American system, the Judges ad hoc, even though they must possess the same moral and professional qualifications that the permanent judges of the Court […] pursuant to Article 52 of the Convention, do not go through the exhaustive process of selection of the other members of the Court [...].
[…W]ithin the framework of a judicial proceeding, States enjoy a privileged position as opposed to individuals. However, protected by the right to due process, the procedural rules must be interpreted with the intention to create a scenario (fictitious at least) of equality. That is[,…] the capacities of the individuals are different, but when dealing with a judicial proceeding, they should be treated equally. […T]he principle of equality of arms includes the notion of the procedural parties being afforded resources to attack and defend on an equal footing. […] The possibility for a State to be able to modify the composition of the Court and for the individuals not to exercise this right corrupts said principle and intensifies the situation of disadvantage of the individual towards the State. […] In this sense, the only possible interpretation o[f Article 55 …] is to establish that its application can only be authorized for those cases in which no inequality of treatment is created disavowing the right enshrined in the Convention […].

Regarding the second question of the request (supra para. 3)

[…I]n proceedings arising from individual petitions, the existence of the composition of the Court, of a judge who is a national of the respondent State, threatens the equality that needs to exist between the parties to the case (the victims and the State). [… T]o be of the same

nationality of the respondent State must truly be considered, if not with absolute certainty, with a highest level of reasonable doubt, as a factor of incompatibility.
[… A]rticle 19(1) of the Court's Statute establishes an impediment for a judge to act as such, in those cases where he or his next-of-kin have a direct interest. Even though the nationality cannot be equal to being part of a family group, it is certainly a pretty strong link that, in some cases, can create, on the judges, the perception that they are obliged to defend their State, or at least, take special considerations in the case before them.
The foregoing makes more sense if we compare the existent incompatibility system of the Court to the one of the Inter-American Commission on Human Rights. [… T]he rule of Article 4(1) of the Rules of Procedure of the Commission […] establishes that the nationality of the member of the Commission could be one of […the] causes that affect the impartiality and independence. […I]t is not clear why the same reasoning does not apply to the case of the Judges of the Court.
[… H]aving the nationality of the respondent State might be an element that threatens the independence and impartiality of a judge; [t]herefore, in case of doubt, it is better to avoid these circumstances.

Teachers and Students of the Human Rights Chair at Universidad Nacional de Cuyo, Argentina

In its amici curiae brief, oral arguments and closing arguments, expressed that:

Regarding the first question of the request (supra para. 3)

[…] A literal interpretation of paragraphs 2 and 3 of Article 55 of the American Convention, in line with Article 10 of the [Inter-American] Court's Statute and Article 18 of the Court's Rules of Procedure[…], seems to indicate that the institution of Judges ad hoc is only applicable to cases arising from inter-state disputes, [...] as in the situation in which one of the judges [...] is a national of [... any of the] State[s] Parties [...], as when none of the States has a judge of its nationality. […T]he writing chosen to reflect these rules uses the plural form to refer to parties to a proceeding who can exercise this power - 'States Parties'- which would indicate the unequivocal willingness of the conventionalists so that this institution could only be exercised in disputes involving two or more States and not in cases arising from individual petitions [...]. [T]he purpose of this rule has been to guarantee the interest of the States, including the respect for the sovereign equality principle among them […].
[… Regarding the argument of] the need to create a trusting environment for the States for which the appointment of a Judge ad hoc would be helpful, [and related to] the guarantee of procedural balance, […] these reasons were invoked in order to justify the institution of a Judge ad hoc in multilateral treaties and that they cannot extend and be applicable to the modern international treaties on human rights and, specially, the American Convention on Human Rights, since their goal is not [..…] the reciprocal exchange of rights for the mutual benefit of the contracting States, but their object and purpose are the protection of the fundamental rights of the human beings […].
[… In relation to the argument that] the systematic use of Judges ad hoc would constitute a legal source as international custom, […] it is necessary to take into account that the treaties must be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context . […I]n its origins, the provisions regarding Judges ad hoc were exclusively contemplated for inter-State disputes. Due to its exceptional nature, the institution of

Judges ad hoc must be restrictively interpreted. In addition, in consideration of the current strengthening of the Inter-American system of human rights, the reasons to use the institution of Judge ad hoc in cases arising from individual petition[s] seem to have disappeared, if they had ever existed. Also, the disregard that may exist on the part of some of the other judges that could act on behalf of the national judge [...] can be overcome by the parties' interest or the interest of the Court itself by means of the submission of evidence.
[Regarding] the principle of equality of arms, [such is defined] as such balance that must exist in all proceeding between the parties, in order to avoid situations of inequality or injustice […T]o achieve its goals, the proceeding must acknowledge and resolve the real unequal factors of those who are brought before the court[,which ...] makes it necessary to adopt measures of compensation to contribute to reduce or eliminate obstacles and deficiencies that impede or hinder the effective defense of one's interests. Should there be no means of compensation […] it could not be said that those who were placed at a disadvantage do really have a true access to justice [...T]he appointment of a Judge ad hoc, [when the petitioner is the one who files the complaint], far from promoting balance of powers, would reinforce the more powerful party, the State, to the detriment of the weaker. […]
Based [on the foregoing] […] the power to appoint a Judge ad hoc [...] under no circumstance, must be applicable to those cases arising from individual petitions.

Regarding the second question of the request (supra para. 3)

[… B]eing a national of the respondent State is not a sufficient ground for a judge to disqualify himself from participating in the processing and the decision of the dispute. […]
[…] The permanent judges of the Court […] follow a selection process clearly established in Article 53 of the [Convention. …I]n this process, the States Parties elect the permanent judges, not only based on their personal and technical qualifications but also as a result of the consensus reached in relation to the candidate […]. Therefore, […] the independence and impartiality of the permanent judge is guaranteed, objectively and subjectively, in the complex selection process.
[…Moreover,] the circumstance of being a national of the respondent State does not necessarily imply an advantage for him and an inequality for the other parties, since his appointment has been decided before the filing of the complaint and not for the specific case, in contrast with what happens with Judges ad hoc […].

Human Rights Clinic Law School of Seattle University, of the United States of America

In its amici curiae [FN7] brief and oral arguments, it indicated that:

[FN7] Brief on observations submitted by the International Human Rights Clinic, Seattle University School of Law, on December 10, 2008 in relation to the request for an advisory opinion submitted by the State of Argentina (Secretariat's translation).

Regarding the first question of the request (supra para. 3)

[…] The Vienna Convention on the Law of Treaties, which codifies customary international law in the subject, provides [in its Article 31.1] that a treaty 'hall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.'
[…T]he American Convention on Human Rights simply does not provide for Judges ad hoc in cases between individual petitioners and States. The Court's long-standing practice allowing [said] participation […] constitutes a clear misinterpretation of the Convention's text. […] […The terms o]f Article 55 […] unequivocally demonstrat[e] that Judges ad hoc are to be utilized only in matters between States. […] This prima facie reading is only reinforced when examining the pertinent text of the Rules of Procedure of the Inter-American Court [Article 18] and Statute [Article 10].
[…] The text of Article 55 of the Convention was modeled closely after Article 31 of the Statute of the International Court of Justice –a court […] dedicated exclusively to interstate disputes. […T]he Court's erroneous reading of Article 55 has deprived individual petitioners of due process guarantees[…], its interpretation is in fact forbidden by Article 29 of the American Convention.
[…] While the Judge ad hoc in theory must possess the same professional and personal qualifications demanded for titular judges, the official selection and approval process is almost non-existent in comparison. Judges ad hoc are unilaterally named by the State in a short process [...].
[… T]here are many compelling factors and circumstances that cast grave doubt upon the independence and impartiality of the Judge ad hoc. Yet none is more obvious than the widely-acknowledged central purpose of this figure: to ensure that his appointing state's arguments are extensively considered and addressed by the [C]ourt. […] Naturally, such a figure is less objectionable in interstate affairs, as the Judge ad hoc would presumably have his arguments neutralized by his counterpart from the other [S]tate.
[… W]hen a judge ad hoc is appointed in the context [of contentious cases including] a petitioner vs. the State, the individual is denied 'equality of arms' [… which] constitutes […] a violation of the American Convention [… given that] it contravenes the basic due process guarantees of Article 8 [of the American Convention].
[… Regarding the argument that] the capacity of appointing a judge ad hoc increases the [S]tates confidences that its interests are being represented in the proceedings, […] although this incentive for confidence and cooperation by the State may have been necessary at the Court's inception, now it is superfluous. The Court's legitimacy, its authority and powers are well established and widely recognized by governments throughout the hemisphere. […] In sum, the Court's practice of permitting Judges ad hoc in State vs. individual petitioner proceedings must be discontinued immediately.

Regarding the second question of the request (supra para. 3)

Article 52 of the American Convention and Article 4 of the Inter-American Court's Statute establish that all judges of the Court, including Judges ad hoc, shall perform their duties 'in an individual capacity.' […] For this purpose, all judges take an oath of independence and impartiality (Article 11 of the Statute).
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." […] In this scenario, a series of factors may influence the judges. 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 [...]. 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.
It must be stressed [… that t]he Inter-American Court of Human Rights […] presides over a collective system of human rights protection. Judges […], experts in human rights law, are charged to examine not bilateral relationships, but rather states' obligations erga omnes. [… T]he judge need not choose between foreigners and fellow countrymen —'them' vs. 'us'— as would happen at the International Court of Justice. […]
Evidently, the human rights judge is not above psychological, material, and cultural predispositions [… but definitely,] judges at international human rights Courts are in inherently different circumstances than their counterparts at interstate forums. [… Consequently,] it is not considered necessary to prohibit a titular judge from participating in all cases between his home state and individual petitioners.

San Francisco De Quito University, Legal Clinic, of the Republic of Ecuador

In its amici curiae brief, it expressed that:

Regarding the first question of the request (supra para. 3)

[…] The possibility that a State member can include a Judge ad hoc in a proceeding involving a private individual as a party to the case, must not be seen as a sign of partiality of lack of equality of arms. […] The Statute of the Inter-American Court of Human Rights, in its Article 11(1) establishes the oath the judges have to take at the moment of […] taking up [office. Furthermore], Article 52(1) of the Convention impliedly contemplates the principles of impartiality and independence that the judges must comply with when referring to the fact that the judges serve in the Court in an individual capacity[,...] therefore, the inclusion of a Judge ad hoc does not necessarily imply their submission to the nominating States.
[…T]he purpose of the possibility to appoint a Judge ad hoc, […] far from looking for an advantage for the State over an individual, is for the States and the citizens, parties of said State, to trust and legitimate the international body - in this case, the Court- so that this body is acknowledged as a legitimate means for the resolution of disputes.
Even though it is true that the drafting of the corresponding Articles of the Convention, the Statute and the Rules of Procedure of the Court, refer to the State powers, this, in no way, means that these powers are limited to conflicts between them, but simply that this power is reserved to States.

As to the second question of the request (supra para. 3)

[… Based on] Article 55(1) of [the American Convention…] on Human Rights], [...] the judge should not be disqualified from hearing and resolving a case in which his country of origin is the respondent State. Nevertheless, this discussion is focused on the relevance of such provision. […]

[… T]here is no doubt that the natural relationship between a State and a private individual is unequal; however, this same inequality is the rationale of the international systems of justice, among them, the Court, since its intervention matches this relationship of power and solves the dispute based on objective parameters, without regard to the relationship of power that exists between the parties and, above all, for the sake of obtaining justice; in the specific case of the Court, for the sake of obtaining an effective protection of the human rights. […] The independence and impartiality of a judge is not determined based on his nationality […].
[.. T]he fact that the judge is a national of the respondent State does not mean that his opinion shall be subjectively or objectively biased or subjected to the subject-matter of the request […]. Therefore, […] the obligation of a judge who is a national of the respondent State, to disqualify himself from hearing a case arising from an individual petition [...] has no legal grounds. The independence and impartiality of the judges is guaranteed since the moment they comply with the qualifications required to be judges and are appointed by the member States. […]

"Bernard and Audre Rapoport" Center for Human Rights and Justice of the Law School of The University of Texas In Austin, of the United States of America

In its amici curiae [FN8] brief, it indicated that:

[FN8] Brief on observations submitted by The Bernard and Audre Rapoport Center for Human Rights and Justice, The University of Texas at Austin, School of Law) on January 26, 2009, in relation to the request for an advisory opinion presented by the State of Argentina (Secretariat's translation).

Regarding the first question of the request (supra para. 3)

[.. T]he practice of granting respondent States a "right" to appoint a Judge ad hoc has no textual basis. [… Article 55 of the] American Convention expressly grants States this power only in state-versus-state cases.
To properly interpret the text of Article 55 of the Convention, international norms of treaty interpretation set forth in the Vienna Convention on the Law of Treaties, 1969 are essential [Articles 31 and 32…]. [I]n the case of human rights treaties related to the protection of human rights, moreover, objective criteria of interpretation that […] are more appropriate […].
[… The text o]f Article 55 of the American Convention appears to be drawn from Article 31 of the Statute of the International Court of Justice. […] However, [… t]he structure of the International Court of Justice's Statute illustrates its single mandate -to resolve disputes between States- [... which] is fundamentally different from the Inter-American Court's mandate […].
[…] It is worth noting that when the drafters used the language of the ICJ's Article 31 to write Article 55 of the American Convention, they did not use any language particular to individual complainants. Rather, Article 55 clearly refers to 'States Parties.'
Continual restructuring of operations is necessary in the early stages of an international institution. […T]hese procedural changes before the [Inter-American] Court, particularly the authorization for autonomous representation of the alleged victim, are additional motives to reconsider the intervention of ad hoc [judges] in [the] context of [individual petitions]. […] If

there was any justification to maintain the ad hoc practice in a contentious case brought before the Commission, it no longer exists.
[On the other hand, the] judges ad hoc may be independent and impartial, but the perception that […] they are, by the individuals and member States, is extremely important […]. The petitioner's perception of impartiality and independence is especially important in cases in which the petitioner has denounced the State's violation of human rights. From that point of view, the exclusive authority of the States in individual cases to appointed judges ad hoc is an unacceptable procedural advantage.
[… Likewise,] the practice of appointing Judges ad hoc affects the principle of equality of arms. First, it gives one of the parties to the case, the State, the power to affect the composition of the Court itself. [Consequently, the State] becomes aware […] of the issues under consideration before the date for beginning the trial is set [… which] represents a fundamental procedural advantage […]. In effect, the State is in the position 'to appoint a person of its confidence not only to have a vote on the outcome of the case but also […], basically, to be a lobbyist in a very effective position.' [… The petitioner] is not only in a factual weaker position to the State in terms of human and financial resource but, [additionally…] the individual is legally in a weaker position because he cannot appoint a Judge ad hoc on his behalf […].
[…] Second, the equality of arms is fundamental to values of equality and justice that are cornerstones of human rights […]. A completely just outcome requires the parties to face each other as equals and to thereby acknowledge the other's dignity.
Based on our prior considerations, it is necessary to reform the practice of ad hoc appointments in individual cases so as to abide by the principle of equality of arms.

Regarding the second question of the request (supra para. 3):

[.. T]he sole provision applicable to individual complaint cases governing recusal is Article 19 of the Statute of the Court[… . Hence,…] the grounds for disqualification are based on specific and tangible conflicts of interest, rather than shared nationality between judge and state parties.
Note that […], in the matter of disqualification of members of the bench in cases involving individual petitioners, […] if the judge does not voluntarily disqualify himself or disagrees that there is grounds for his disqualification, the Court reserves the final power to decide. Such a provision further intimates an institutional, objective decision, rather than a personal, subjective choice of the jurist. […]
The aforementioned tends to demonstrate that the Court has adequate procedural safeguards in place to guarantee a competent, impartial and independent trial and its rules are consistent with international norms and the practices of similar courts regarding disqualification or ineligibility of judge. However, to further strengthen the Court's judicial safeguards, it may wish to consider amending its Rules to follow the example of the Commission and automatically disqualify a Judge who is national of the State party to the case. Alternatively, the Court may provide an avenue to petition for recusal, or a motion for disqualification available to victims and their attorneys.

Group of researchers of the Faculty of Law of the Pontificia Universidad Católica Argentina

In its amici curiae brief, it indicated that:

Regarding the first question of the request (supra para. 3)

[… T]he principle of equality of arms is another aspect […] within a broader concept of due process of law, which must be interpreted in light of the pro homine principle. […] The principle of equality of arms consists in 'providing the same opportunities, under equal conditions, to all the parties to a case' [...].
Under international human rights law and more precisely, in the matters processed before the [Inter-American] Court, whenever a case is initiated in an individual petition, the respondent -that is, the State-, is the one who enjoys a superior situation, since the difference of human and material resources in comparison to the plaintiff is more evident. […]
[…] The origin of the Judge ad hoc seems to be more linked to [an international Court that settles] disputes between States, [… in which,] the selection of Judges ad hoc was permitted in order to balance the position in relation to the other State […]. The [same] logic […] cannot be applied to cases arising from disputes between an individual and a State [due to] the natural inequality that exists between them […]. [Moreover] by having no influence on its appointment, the Inter-American Commission, the victim and their representatives are placed in an inferior condition in relation to the respondent State […].
As to [… the] impartiality and independence […] they must be understood as safeguards that are essentially extended to the parties as a right to access to justice and to the different guarantees governing the due process. […A]part from understanding impartiality from a subjective point of view, it must also be seen from an objective one, which entails giving the 'appearance of impartiality' [… . T]he independence […] must imply that the exercise of the judges cannot be affected by any type of influence trying to tip the balance in favor of one party or the other.
[… T]he possibility for the judge to intervene in the deliberations, present his opinion and considerations of the case for which he was appointed, could suggest, prima facie, a risk of partiality. [… T]he Judge ad hoc inculcates, in the different activities of the Court, the knowledge of the legislation of the respondent State, its particular situation and other circumstances that are important to have a broad and complete picture of the situation at the moment of the deliberation and decision-taking process, though this is more like a role that should be played by the expert witness, who could be proposed by the parties as a means of evidence. […] In this way, […] the appointment of Judges ad hoc by one of the parties to the case (in this case, the State) could create certain feeling of mistrust in the international public opinion.
[…] The feeling of independence and impartiality that the [Inter-American] Court should offer to the American society could also be considered to be neglected, inasmuch as the citizens note the way the victims of human rights violations committed by the State are precisely tried by a jurist elected by that same State […].
[… T]he questions put forward by the Republic of Argentina should be analyzed in light of the pro homine or pro persona principle, by which international treaties on human rights should be interpreted in a broader way when dealing with the recognition of a person's rights and in a restrictive way, when trying to limit those rights.

Regarding the second question of the request (supra para. 3)

[… T]he more typical quality and duty inherent to the judicial profession is impartiality. Every jurist must be conscious of the dignity he possesses and of his duties as a public figure, insofar as

the judge is not a private individual, but the representative of authority that needs to solve the case with strict justice and on behalf of the community […].
[… The judge] must not have interests related to the parties or to the object of the matter and cannot, naturally, have a preconceived opinion on the case. […] Impartiality cannot be only seen from a subjective point of view (reserved to the intimate sphere of the jurists) but also from an objective perspective (which implies giving the 'appearance of impartiality') […]. In this regard, even appearances may be important [… given that] not only justice must be done: it must also give the appearance that it is being done.
[… T]he impartiality of a Court or a judge entails, in turn, their independence from any power, political or media pressure[... . T]he role of a judge cannot be affected by any type of influence that tries to tip the balance in favor of one party or the other.
[…]Hence, it is necessary that, […] the judge who must intervene in matters in which a petition has been filed against his country of origin, in order to 'provide confidence' [... to] the victims of human rights violations regarding the international Courts, must abstain from doing so.

Group of students and academics affiliated with Notre Dame University, of the United States of America

In its amici curiae brief, it indicated that:

Regarding the first question of the request (supra para. 3)

[… According to Article 31 of] the 1969 Vienna Convention, […] an adequate interpretation of Article 55(3) of the [American] Convention must lead to the analysis of the full text of said Article […]
[… A]rticle 55(2) clearly provides a factual situation of […] a judge who is a national of one the States Parties to the case and, under such condition, the text of the Convention acknowledges the possibility for any other State Party in the case to appoint a Judge ad hoc. According to this reading, it is only possible, in good faith and in the context, to accept that the current meaning of the term 'case' in Article 55(2) must refer to an inter-State communication, [...] being that the only situation in which the two States shall be, simultaneously, parties to an case before the Court.
[… T]he logical reading of the following numeral 3 leads to determine that the word 'case' therein refers, once again, to the inter-State communications; […] the mention of 'the States Parties', followed by the phrase 'any other' leads to the conclusion that the plural form does not only imply an abstract reference to all the potential States against whom an individual petition may exist before the Court, but to the specific case of two or more States that act as opposing parties to a case before the Court itself. […]
[… T]he institution of the Judge ad hoc was always conceived as an institution applicable to judicial proceedings in line with the classical international law, that is, proceedings in which both parties are States. This dimension of international disputes was incorporated in the Inter-American system for the Protection of Human Rights by means of the institution of inter-State communications or cases; furthermore, the typical characteristics of classical disputes, that is, the Judge ad hoc, must be limited to that dimension. […] At the present moment of international law, in which the individual is acknowledged as a legal person and whose right to autonomously participate in the individual cases before the Inter-American Court is also recognized, the

institution of the Judge ad hoc is, completely, incompatible with the current state of the international procedural law before the human rights bodies.
[… On the other hand, t]he right to equality before the Courts and courts of justice [also implies] equality of the procedural resources. This means that all the parties to a case will enjoy the same rights in the procedure[, … Likewise,] The principle of equality of arms does not only implies aspects related to the judicial debate, but it also relates to the way the institutions are formed[…]. Futhermore, […] importance must be given to the appearance in equality of arms within the procedure. [...] In accordance with the context of application of the Convention and the object and purpose thereof, the rules related to the procedure must be applied according to a criteria of suitability, since, otherwise, there would be no balance between the parties and justice would be compromised [… I]n the international jurisdiction, the essential is to preserve the necessary conditions so that the procedural rights of the parties are not affected or unbalanced, in order to achieve the objectives for which the different procedures have been designed.
By application of the previously mentioned criteria, it is possible to sustain that granting of the right to only one of the parties to the case before the Inter-American Court to appoint, unilaterally, a person to serve on the Court completely creates an unbalance between the parties.
[… Regarding the] principles of judicial independence and impartiality […] in spite of being traditionally interpreted and applied in relation to national Courts, they are, and must be, equally enforced and absolute within the framework of any international proceeding, including the individual cases before the Inter-American Court.
[… In the Inter-American Court, j]udges ad hoc are, in most cases, elected and nominated by the Executive Power of the respondent States [...]; there is no specific process within the Inter-American system that acts as a mechanism of control of said appointment, and through which it is possible to verify whether the people designated for these duties effectively have the experience and professional background as required for permanent judges.
[… T]he Judges ad hoc are appointed by the State to a case in particular, […] once the respondent State was notified of the proceeding conducted against it and received the documentation, including the application brief submitted by the Inter-American Commission. [...] This fact [...] radically differentiates the process of selection between Judges ad hoc and permanent judges of the Court, who are elected 'in abstract terms' based on their qualifications as jurists and knowledge of human rights, among other aspects.
[…] Due to the typical nature of the institution, there exists a risk and appearance of partiality in favor of the State that appointed the Judge ad hoc [,] which is completely inconsistent with the principle of judicial independence and impartiality [...].
[… Based on the foregoing,] the institution of Judges ad hoc must be exclusively limited to inter-State communications, [… insofar as this institution] within the framework of individual petitions[,] is contrar[y]: (i) to the entire wording of Article 55(3) in its context; (ii) to the history and progressive development of the institution itself at the international level; (iii) to the object and purpose, as well as the nature of the system of individual petitions; (iv) to the specific principles governing said petitions, and (v) to other general principles that guarantee the integrity of any judicial proceeding.

Regarding the second question of the request (supra para. 3)

[…] Even though it is clear, […] that since the first cases against Honduras, Judge Jorge R. Hernández, of Honduran nationality, disqualified himself from participating in the composition

of the Court based on Article 19 of the Court's Statute, it does not spring from the text of the judgments that said disqualification has exclusively based on his nationality. […] It is not possible either to sustain that, according to the subsequent cases, the Court has, over time, developed a generalized practice, in that regard, with the judges of the […] Court. On the contrary, […] the reference to the nationality seems to be additional information, and not the reason for his disqualification, [… nevertheless, it is] a relevant data insofar as said disqualification has given rise to the States' possibility to appoint a Judge ad hoc.

[… T]he analysis of the issue must begin with the text of Article 55(1) of the [American Convention ...] The simple initial reading of this rule, without considering the context of Article 55 as a whole, would seem to indicate that the Convention explicitly authorizes the permanent judges to hear individual petitions that have been submitted against the State of which they are nationals […]. Nevertheless, […] to limit the analysis of this reading would be contrary to the basic principles of interpretation of the international treaties, which require that the meaning of the terms of all the provision be determined based on a good faith interpretation and pursuant to the context of such treaties.

[… In] the context in which the terms of numeral 1 of [...] Article 55] are framed and, based on a complete logical reading of such Article, necessarily [...] the term 'case' [...] refers [...] exclusively to inter-state communications. […] By giving this meaning to the term of 'case' in all the numerals of Article 55, the logical relationship existing between them is reasserted [...].

According to this interpretation […] of Article 55(1) of the Convention, […], it is clear that said Article would not be applicable to individual petitions and, in the absence of other express rule within the Convention in that respect, […] there is no express conventional affirmation or denial for this situation; in other words, the Convention is silent about whether a permanent judge should disqualify himself from hearing an individual petition based, only, on his nationality.

[Moreover, according to the] criteria established […] by international case-law [...], in order to guarantee integrity in the proceedings, the judges must: (i) be free from undue pressure from or any connection with the state authorities; (ii) not have prior relationships with the parties to the case or particular interests in the result of such case; (iii) be elected by a clear process of nomination and selection and clear rules regarding their stability in the office must exist and (iv) abstain from participating in activities that could jeopardize their independence and impartiality.

[…] There are clear and precise proceedings for the nomination and selection of judges, […] [and for] their stability in the offices. […] Additionally, […] the parties to a case have the right to request the disqualification of a judge in case they consider that his o her independence or impartiality has been affected.

[… Regarding impartiality] it is necessary to differentiate between a subjective test [of impartiality], which intends to determine the personal convictions [...] as to a specific case, and the objective test, which aims at establishing whether it [...] offers sufficient guarantees to leave no legitimate doubt in that regard.

[…] As to the subjective test, […] there is a strong presumption in favor of the subjective impartiality of the judges[... .] Moreover, as to the objective test of impartiality, [...] it is adequate to determine [... whether] there are ascertainable facts giving rise to doubts regarding their impartiality. […] In this regard, even appearances may be important. […] The question is whether there are doubts or fear of impartiality and not the existence, in fact, of bias or predispositions.

[Currently], there are practices that, within the framework of rules and institutions of different international human rights bodies, seem to aim at an increasing tendency towards the limitations

of the participation of permanent judges to decisions against the States of which they are nationals. […]
[… We conclude then, that b]efore the silence of the American Convention,[…] regarding the participation of judges, who are nationals of the respondent State, in individual petitions, there is no legal obligation according to which the permanent judges of the Inter-American Court should disqualify themselves, immediately and without a case-by-case consideration of the available evidence, from hearing an individual petition against the States of which they are nationals. However, as an additional precaution, following the fine international tendency in the field, if the Court considers it is appropriate in order to strengthen the appearance of independence and impartiality in individual petitions, it could adopt such measure as an institutional policy.

Human Rights and International Disputes Group, affiliated with the Caldas University Legal and Social Sciences School of Colombia

In its amici curiae brief, it indicated that:

Regarding the first question of the request (supra para. 3)

[…] The institution of the Judge ad hoc contemplated in Article 55 of the Convention is only conceived, in accordance with regulations, within the inter-State jurisdictional matters [since the rule makes only reference to the States Parties], which evidences the existence of an international legal gap [regarding the Judges ad hoc] in judicial cases arising from individual petitions.
[… T]he procedural practice followed by the [Inter-American Court ...] constitutes a custom of International Law given that reporting the [...] characteristics [of repetition, uniformity and consistency, generality, duration and obligatory]. [… S]uch custom creates law; therefore, in the specific case […] there is no violation of the guarantees of the petitioners […] and no procedural unbalance [… . Therefore, i]t is necessary to use the institution in the future and for […] the State to keep having that option.
[… I]n the case of individual petitions […] the individual […] cannot convene a Judge ad hoc [… . N]evertheless, the petitioner possesses other protective mechanisms like the representative and the delegate, which are two figures that clearly structure the equality of arms int eh process, […] protecting the petitioner […].
[…] In order to evaluate the efficacy [of the] institution of the Judge ad hoc, we must base our argument on the use that this institution represents when the judge fulfils the role as interpreter, a factor of comprehension and knowledge of the national legislation and realities that may determine the aspects related to the development of the proceeding and the elaboration of a decision compatible with the rights in question and the relationship of national and international legislation. […]

Regarding the second question of the request (supra para. 3)

According to the very essence of the jurisdiction, the judge cannot be, at the same time, party to a case that is submitted to his consideration. [… T]here have to be two opposing parties who resort to an impartial third party, which is the judge [… T]he judge must be committed to the faithful performance of this duties and to the application of the enacted law to the specific case, without being influenced by any other circumstance when making a decision.

[… T]he election [of the judges] in their individual capacities, is pivotal, inasmuch as that reveals that the nationality of the chosen one is not important, and when receiving the authority of the other [S]tates Signatories to the [C]onvention, their personal qualifications shall prevail.

Group of Global Justice and Human Rights of the Law School of Universidad de los Andes, Colombia

In its amici curiae brief, it indicated that:

Regarding the first question of the request (supra para. 3)

[… T]he institution of the Judge ad hoc […] has been resumed by the Inter-American Court as from the experience of the International Court of Justice, [... the latter, …] has exclusive jurisdiction over […] disputes between States […]. The foregoing is contrary to the practice in the field of human rights and, especially, in a Court like the [Inter-American] Court, where even though it has jurisdiction over inter-states cases, [...] the general rule is comprised of individual complaints where there is no equality among the parties to the case […, meaning,] the individual and the State[. In this regard,] judges ad hoc result in an institution foreign to the system of individual petitions, given that…] individuals are placed at a disadvantage towards the State's power given that they do not have the power to appoint a judge of their own.
[… T]he independence of any judge implies the existence of a proper process of selection, a determined term of office, guarantees of permanent tenure and guarantee against external pressures. […] Said independence […] refers to the institutional as well as the individual qualification of the judge. […] In this way, when a State appoints an [ad hoc] judge in those cases arising from individual petitions], it does not only jeopardizes the independence of the individual, but of the Court itself, due to the influence and power of decision he has.

Regarding the second question of the request (supra para. 3)

[…] Most of the criticisms against judges who are nationals of the State party to the case are focused on general principles of […] justice, above all […] practical considerations. […A]llowing the judges decide over their own States affects the international nature of the litis and goes against the principle according to which no one should be judged in his own cause.

Members of the Seminar on the Inter-American Human Rights and International Humanitarian Law of the Law School of Veracruz University, of the Mexican United States

In its amici curiae brief, they expressed that:

Regarding the first question of the request (supra para. 3)

[…T]he appointment of Judges ad hoc by the respondent States before the Court and their acceptance by the Court have been based on the provisions of Article 55(3) of the American Convention, as well as Article 10(3) of the Court's Statute; however, from the reading of both concepts, it clearly spring that such provisions are applicable to inter-State communications.

In fact, the institution of Judges ad hoc has been drawn from the Statute of the International Court of Justice; without questioning its international jurisdiction, inasmuch as such Court is called to resolve disputes between States who enjoy equal sovereign rights. […]
[…E]very judicial proceeding must provide sufficient safeguards so that both parties are able to put forward the grounds of their cases and the grounds for objections and defenses, that is, there is a need to ensure that the parties have the same opportunities to defend themselves, as well as to prove and allege what may correspond, in order not to place one of the parties at a disadvantage. […T]he institution of the Judge ad hoc was designed to maintain the procedural balance among the parties, and not to give one of the parties an unacceptable advantage. […I]f one of the parties to the case is not allowed to appoint a Judge ad hoc, it seems improper to give such advantage to the other party.
In this sense, the presence of a Judge ad hoc, appointed by the respondent State who is party to the case, even when the person appointed as such has the qualifications required by the Convention, would seem to jeopardize, prima facie, his impartiality regarding the nominating party.
[…Based on the foregoing, t]he appointment of Judges ad hoc, within the framework of the system of individual petitions, is the result of a practice of the Court that is not based on the American Convention or the Statute of such body.

Regarding the second question of the request (supra para. 3)

[…F]rom a strict interpretation of Articles 55(1) of the Convention and 10(1) of the Court's Rules of Procedure, both applicable to the case of inter-state disputes, it is clear that the judge who is a national of one of the State parties to the case, shall retain his right to hear the case and, for the sake of preserving the balance among the parties the other party is entitled to appoint a Judge ad hoc. […] Nevertheless, within the framework of individual petitions, […] the fact that a judge, who is a national of the respondent State, forms part of the Court could eventually question the impartiality of the Court.
[…I]mpartiality […] means that the judge, who intervenes in a particular matter, must come up with the facts of the case without any type of bias, subjectively speaking, and furthermore, offering sufficient guarantees, of an objective nature, that would allow to cast any doubt that the respondent or the community may harbor about impartiality. [P]ersonal or subjective impartiality is presumed, unless evidence to the contrary. […T]he judge must appear to be acting without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, but only and exclusively pursuant to- and driven by- the Law.
[... I]n practice, judges who are nationals of the respondent State are not always disqualified from hearing the deliberation of the case. In this sense, it is important to emphasize that the nationality of a judge does not necessarily imply his partiality at the moment of making a decision; however, the idea is not to question the moral qualifications or honesty of the judge in that hypothesis, but, as the Court has correctly sustained, to provide confidence to those people who resort to the court, in that the judge is absolutely impartial.
[… Consequently,] the practice of the Court, in the sense of letting the judge, who is a national of the respondent State, decide whether to disqualify himself or not, in cases arising from individual petitions, is not legally based on the American Convention.

Alberto Bovino and Juan Pablo Chirinos In their amici curiae brief, they indicated that:

Regarding the first question of the request (supra para. 3)

Even when it is sustained that Judges ad hoc must comply with the same qualifications that the judges who were permanently appointed, the regime of selection is substantially different. […] In the case of Judges ad hoc, instead, the judge […] does not go through the control system designed to those people who will serve on such an exceptional Court. […] In this way, the system seems to operate in the opposite direction to proper one. The more reasons there are for the Commission and the representatives of the alleged victim to reveal a well-grounded fear of impartiality of the national judge specially appointed by the respondent State, […] in order [only] to intervene in the specific case, less procedures are followed to guarantee the qualifications that every judge of the Court must fulfill.
[…] The text of Article 55 […] leaves no doubt. […] Although numeral 1 of said Article is somewhat ambiguous, it is clear that all other regulate situation in which the litigation […] necessarily involves, at least, two States parties with interests in the conflict, meaning, they intervene as counterparties to the specific case[. … Consequently,] the Convention, based on the principle of equality of arms, allows, in number 2 [of Article 55], that the State party to this concrete case who does not have a national among the permanent judges of the Court 'may appoint a person of its choice to serve on the Court as a Judge ad hoc.'
[… Regarding t]he principles of impartiality and independence [… these] are universal, and are based on natural law as well as substantive law. [… T]hey propose individual attributes as well as institutional conditions. […] Their existence leads to the denial of justice and damages the credibility of the proceeding. [… T]he impartiality and independence of the judiciary is not so much related to the privileges of the judiciary as it is related to the human rights of the addresses of justice.
[…] Impartiality […], in a general sense, implies […] that 'the judges shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.' […] There are subjective factors that affect the impartiality of the judge in a case whenever there are personal circumstances that require the judge to be separated from a specific case […]. The objective factors, instead, relate to circumstances or activities of the judge, in principle, alien to the case, but that could affect the decision of the judge in a particular case. […T]he subjective impartiality of a judge in a particular case is presumed, unless evidence to the contrary. In contrast, pursuant to objective impartiality, a Court or a judge must offer the following safeguards in order to eliminate any doubt regarding the impartiality observed in the process. […] In order to guarantee the impartial performance of the judges, the principle of a natural judge [is contemplated…].
[… Based on the foregoing and considering] that the guarantees of independence and impartiality of the judge [..] are not included in any of the situations in which the current appointment of Judges ad hoc is allowed for those adversarial proceedings submitted before the Court arising from an individual petition[,…] it is necessary to modify the interpretation that has been given so far to Article 55 of the Convention […].

Augusto Guevara Palacios

In his amicus curiae brief, he indicated that:

Regarding the first question of the request (supra para. 3)

For the interpretation of the rules of the American Convention, the classical methods of interpretation must be followed, which are codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties […], therefore […] must 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 the object and purpose of the American Convention and the Inter-American system of human rights in general and, if applicable, in light of the preparatory works […].
Regarding the context, the standard must be interpreted taking into consideration the full text that it is a part of […]. On the other hand[,] all of the rules of interpretation provided by [American] Convention itself […] in Article 29 must be taken into consideration, as well as the provisions of the system of the Convention contained in Articles 1.1 and 2 […]. Finally, it is appropriate to apply the principles [...] pro homine [and] of progressiveness […] by virtue of which the Inter-American Court of Human Rights has made "a progressive interpretation" of the American Convention, emphasizing the usual evaluation of the [Inter-American] system and assuming a progressive point of view for the sake of a greater protection of the individuals.
[…] From the terms used by [Article 55 of the American Convention], we conclude that its correct application is only for those cases where two or more States are involved and opponents. The interpretation [… is] sustained by the analysis of the regulatory background of Article 55 of the American Convention.
[…] The alleged right of the State Party to appoint a Judge ad hoc in a case of 'an individual nature' […] given that […] it arbitrarily limits the procedural right to equality of arms and due process of law in the international sphere of the victim and the alleged victim, […] infringes what was established in Article 29 (a) of the […] [Convention]. The object and purpose of the American Convention is the protection of the fundamental rights of the human beings and, therefore, the ultimate objective of every rule or interpretation must be in the sense to afford greater protection to it. The application of a rule or an interpretation that changes the regulatory meaning of the conventional text and creates an unbalance unfavorable to the rights of the alleged victim violates the object and purpose [...…].
[…] It should be noted that the pro homine principle has the characteristic that it is necessary to choose which application of the interpretation (or the rule) is more beneficial to the human being. That is why an 'extensive interpretation' of Article 55 of the American Convention, […] which could infringe the human rights, enshrined by the Convention itself (procedural equality of arms or the guarantees of due process of law- Article 8 of the American Convention), is contrary to this principle and, therefore, let aside by the Court.

Regarding the second question of the request (supra para. 3)

[…] Considering the object and purpose of the American Convention, the pro homine principle and the disqualifying practice followed in [contentious cases originated by petitions that are not inter-state] […] by the judges of the Court, we conclude that [in these matters] […], it is contrary to the right of the alleged victim (or next-of-kin) to be tried by impartial and independent judges, the participation in the deliberation and decision of the Court […] of the judge who is a national of the respondent State.

Carlos Eduardo García Granados

In his amicus curiae brief, he indicated that:

Regarding the first question of the request (supra para. 3)

The appointment of the Judge ad hoc by the State, in respect of which a petition has been filed for alleged human rights violations against its citizens, in […] principle, could be considered as a situation of unbalance between the parties, due to the fact that the victims of the abuse committed by the State and who have suffered the State's denial to restore their violated rights, have to face, at a regional level, a special judge, appointed by the State to defend its initial position. [… This] has an advantage: since a judge, who is familiar with the legal system of the State involved in the matter, participates in the resolution of the case; though, certainly, there is a risk that such judge may influence in favor of its State in the judicial decisions to be adopted.
Nevertheless, in the Inter-American Court, judges act in their individual capacity and responsibility[,…] that is, they do not represent States or have commitments different from the ones of the administration of justice and the Court. [...] So much so that the history of the Inter-American Court has registered cases involving Judges ad hoc who voted in the same sense that the permanent judges, against the respondent State.

Regarding the second question of the request (supra para. 3)

[…] Based on the fact that the nature of the Court is temporary and therefore, the work of the judge is not permanent, the Court allows the judges to exercise their profession, apart from holding office at the [Court].
[…] Article 18 of the [Court's] Statute mentions the cases of incompatibility of the judge of the Court [… and] subparagraph c) is sufficient broad to guarantee the independence [of the Court, given that is that entity …] that must decide in cases of doubt. But, evidently, in order to avoid contact and confrontations, the States, by proposing the candidates, are the ones who must bear in mind these incompatibilities. [… In last resort,] the Court itself […] is empowered to request the OAS Assembly the application of the disciplinary authority.

Carlos Rafael Urquilla

In his amicus curiae brief, he indicated that:

Regarding the first question of the request (supra para. 3)

[…] The interpretation proposed by Article 31 of the Vienna Convention on the Law of Treaties is based, according to paragraph 1, on the coincidence of three factors […] good faith, […] the ordinary meaning in which the terms of a treaty should be understood and, finally, that the ordinary meaning must be given to the terms of the treaty in the context of the treaty and in light of its object and purpose.
[… Within] Article 55(3) of the American Convention on Human Rights, [… t]he phrase that […] could be confusing is the one that reads 'a national of the States Parties' […]. It should not

pass unnoticed that it is a phrase written in the plural form [...and,] that the expression 'States Parties' is used in its procedural-judicial meaning, that is, as 'States Partie to a case'.
[…I]t seems that the use of the plural calls for an insight. Given the fact that there is one case (the case) before the Inter-American Court of Human Rights, the expression the 'States Parties' makes sense in the hypothetical situation of an inter-state proceeding.
[…] Finally, paragraph c) of Article 31(3) of the Vienna Convention […] provides that the interpretation of a rule shall be made by taking into account any relevant rules of international law applicable in the relations between the parties, under this frame of mind it is not possible to question that the general legal principles are a valuable source of international law. Under these principles, we can mention the principle of equality of arms, in terms of which the procedural scenario must allow the parties to a case to make use of the same legal resources, [...] what is permitted to one of them, must be permitted to the other. […] Taking into account that […] the American Convention […] does not authorize the Inter-American Court […] to propose and Judge ad hoc, it could be construed that it neither authorizes the State when the lawsuit is brought by them. The contrary would be a flagrant and manifest violation of the legal rule deriving from said principle […].
[…] Nevertheless, […] precisely because an interpretation made in good faith would also admit, as valid, a meaning of interpretation in which, for the sake of preserving such principle, it is possible to understand that the authority of States to appoint Judges ad hoc applies to the Inter-American Commission of Human Rights. [… In that regard,] the application of Article 31 of the Vienna Convention […] to interpret Article 55(3) of the American Convention […] does not provide a conclusive result, […] [we must now analyze said rule according to] Article 32 of the Vienna Convention […] [which] authorizes the use of supplementary means of interpretation […]. Specifically, it is useful to resort to the preparatory works of the American Convention […].
[…] The standard related to the Judge ad hoc that appeared in the Project of the Inter-American Convention […] provided that a judge, national of the respondent State to a case, would disqualify himself from hearing the case. However and only in the case where such disqualification would amount to a lack of quorum in the deliberations, the remaining judges of the Inter-American Court […] would select a Judge ad hoc. […] […However, afterwards,] the drafting of current Article 55(3) of the American Convention […] was preferred, where instead of referring to any case, a limited writing was adopted, applicable only to inter-state cases, inspired directly by the Statute of the International Court of Justice, which only contemplates that type of cases. […, In this regard, r]eference was made to the experience of Judges ad hoc in the International Court of Justice […], whose jurisdiction only hears inter-state contentious cases.
[…] Based on the foregoing, the interpretation of Article 55(3) of the Convention […], allows to understand that [the] institution of [the Judge ad hoc] must be only applicable to inter-states cases.

Regarding the second question of the request (supra para. 3)

[… A]rticle 55(1) of the American Convention on Human Rights […is] written in the plural form […and] there is no doubt that it refers to States as parties to the case. And only 'States Parties to a case' exist when dealing with inter-states disputes. Therefore, the singular form

would be used instead, as in the case of 'State Party to a case'. […] It is not admissible, under the good faith principle, an interpretation leading to the absurd, unreasonable, unethical or illegal.
[…T]he nationality [is not] a harmless value within the sphere of the Inter-American system. […A]rticle 52(2) of the American Convention […] recognizes certain importance in relation to nationality, by providing that […] no two judges may be nationals of the same state in the Inter-American Court […].
[… Even though] it is not possible to automatically consider that the nationality would imply an obstacle for the independent and impartial performance of a judge, [what it is possible to] sustain is that regarding the nationality, it is important to proceed with caution. […] From here that […] Article 55(1) of the American Convention […] must not imply an automatic prohibition of every Judge who is a national of the State Party to the case.
Hence, […] the preparatory works [that help interpreting all the paragraphs of Article 55 of the American Convention] clearly sustain that the intent […] was exclusively [… to] regulate the institution of Judges ad hoc. […] In this sense, […] Article 55(1) […can only be] referring to a judge who is a member of the Court and who is hearing an inter-state case [and not, one initiated by the Commission].
[…] Therefore, Article 55(1) [… only] governs the situation [… in] which there is an inter-state case submitted to the consideration of the Inter-American Court [...] and among the judges called upon to decide, one of them is a national of one of the States Parties; and such regulation preserves the right of the judge to keep hearing the case.
[…] Nevertheless, this does not mean that, under the Inter-American system, there are no rules governing such aspect. It only means that […] the protection of the independence and impartiality of a judge of the Inter-American Court […] is subjected to the control of the Court itself and its President- Articles 19(1) and 19(3) of the Court's Statute […]-, of the concerned judge himself – Article 19(2) of the Statute […]- and of course, of what may be allege and prove by the parties to the case – Article 19(2) of the Rules of Procedure [... . In conclusion f]or those cases that do no involve inter-state disputes, the judge of the Inter-American Court [...] that is a national of the respondent State is not obliged per se and automatically, to disqualify himself from participating in the processing and decision of the case [...].

Elisa de Anda Madrazo and Guillermo José García Sánchez

In their amici curiae [FN9] brief and oral arguments, they indicated that:

[FN9] Brief on observations submitted by Elisa de Anda Madrazo and Guillermo José García Sánchez on January 26, 2009, in relation to the request for an advisory opinion presented by the State of Argentina (Secretariat's translation)

Regarding the first question of the request (supra para. 3)

[… T]he interpretation of [Article 55] of the [American] Convention in its literal meaning and according to its object and purpose […] acts in favor of the exclusion of the Judge ad hoc when the proceeding is initiated by private individuals. [… Said] Article […] textually refers to that […] 'States Parties' may appoint a Judge ad hoc, that is, it refers to, in a plural form, to the States

and not to the parties or individuals. Its literal terms clearly speak of an exclusive inter-State proceeding. This has been sustained when analyzing the deliberations of the Convention that reveal […] that it exclusively deals with an inter-State proceeding. Even, the Article that it was used as a model for Article 55 of the Convention, this is, Article 31 […] of the Statute of the International Court of Justice, did not include the express reference to the States, but it referred to the parties; therefore, we could easily sustain that the States, when including the word 'States' in the plural form, clearly wanted to refer to the inter-State proceeding and not to that proceeding involving private individuals by means of the Commission, insofar as, if that was the real intention, they would limited to preserve the word 'parties'. […]

Whereas the regulations of the IHR System do not expressly contemplate that the Judge ad hoc should be used by the Court […] when the Inter-American Commission on Human Rights […] submits the case (as opposed to interstate cases), it is the Inter-American Court's interpretation that the Judge ad hoc may be used in the former case. Such interpretation goes against the purpose of the ACHR by altering the procedural balance between the parties [… given that] it gives an advantage to the State by allowing it to name a person who[…] usually ensures that every relevant argument in favor of the party that has appointed him has been fully appreciated. The Commission (and thus, the victim) does not have this privilege.

[Regarding the] argument […] that the Judge ad hoc helps ensure that all the aspects presented by the State be duly and deeply analyzed […], we would have to ask ourselves who guarantees the private individual that same right […].

[…] If what the Court needs is an expert on the State's Law, why doesn't the Court appoint the expert? If the appointment is made by the Court, the expert's independence and truthfulness would be less likely questioned, and if the parties want to object to the expert's view, they would have the information and the opportunity to do so in compliance with the presence of both parties to an action principle that characterizes the proceedings before the Inter-American Court.

The Court [...…] must ensure procedural balance and change its criteria determining that the Judge ad hoc should not be used in cases where the claimant is the Commission and use instead - if needed - expert reports offered by the Court itself. This criteria change does not require a modification of the legal framework or the support of the States. Thus, it would be a decision taken by the Inter-American Court autonomously that would certainly strengthen and give greater legitimacy to [this Court] by confirming its independence from the States.

[...] Now, [...regarding] the aspect of the existence of custom, in the sense of Article 38 of the Statute of the International Court of Justice, [...] we consider that the practice that exists in the Inter-American system cannot be considered to be customary law. The practice of a Court does not create custom. If a Court sustains the same arguments, what it is upholding is an interpretative precedent, but not international custom. Custom, […] as defined by the doctrine, by the Statute of the International Court of Justice and the International Court itself, is the custom created by the States, and not the Courts [...].

Marcos David Kotlik

In his amicus curiae brief, he indicated that:

Regarding the first question of the request (supra para. 3)

[…] The Judge ad hoc fulfils an important role of advisor with respect to internal legislation. Considering that he or she is a jurist of the highest moral authority, of recognized experience in the field of human rights and that he or she compiles with the qualifications required for the exercise of the most important judicial functions […], who is more qualified to intervene in the deliberations of the Court? His or her presence shall make it possible […] to have a point of view that contemplates, in addition, an indepth knowledge of the internal rules of the respondent State and to, at the same time, maintain the impartiality.
[…] Even though the appointment of Judges ad hoc in cases arising from individual petitions is not contemplated in the provisions of the Convention, the Statute or Rules of Procedure, the truth is that the Inter-American Court has been very clear from the very beginning: The respondent State may, in any case (as long as there is no national of the State among the members of the Court), appoint a Judge ad hoc, under the conventional, statutory and regulatory conditions already established. The current context does not justify, in any way, the reexamination of the interpretation that the Court has traditionally made. The practice has shown that the institution of Judges ad hoc is compatible with non- interstate cases.

Regarding the second question of the request (supra para. 3)

[… T]he nationality of the judges of the Court […] does not represent a risk: there is no evidence of any type of direct or indirect influence that has affected the independent and impartial role within the Court. Furthermore, […] an adequate interpretation of a modern treaty on human rights proposes to include those tools that are more advantageous to the protection of human rights. [… In fact,] if a permanent judge of the Court is a national of the respondent State, his knowledge in the case, […] presents […] advantages [… . Therefore, for] those cases arising from individual petitions, such judge, national of the respondent State, should not disqualify himself from participating in the processing and decision of the case, if he considers it is not appropriate [… thus retaining,] his right to hear the case.

Ligia Galvis Ortiz And Ricardo Abello Galvis

In their amici curiae brief, they expressed that:

Regarding the first question of the request (supra para. 3)

[… In view of the provisions of] Article 55(2) and (3) of the [American Convention on Human Rights…] we consider the following elements of analysis: […] a. The provisions clearly establish the active individual, which are the States Parties to the case submitted the Court's jurisdiction, […] b. There are […] central ideas […]: The judge, who is a national of one of the States Parties to the case submitted to the Court's jurisdiction, retains his right to hear the case; if one of the States Parties to the case does not have a judge of its nationality, such State can appoint a Judge ad hoc; and 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 a Judge ad hoc, and […] c. The three ideas form part of the interpretation that tend to the need to preserve the equality of the individuals that intervene in the case, that is, the States. […] What does not seem to be very clear is in which cases the Judge ad hoc is appointed […].

[… T]he Court, in its interpretation [of the American Convention] has applied the power of the States to appoint Judges ad hoc to complaints between States as well as to cases presented by the Commission [… . W]e can accept that the idea is to guarantee the principle of equality of arms of the States […], but this establishes a principle of doubt about the independence and impartiality of the judges that make up the Court. […]
[… In this regard, t]he interpretation of the Court [that] analyze the principle [of equality of arms between States …] does not seem to take into account the principle of the universality in the enjoyment of rights and the principle that all people are equal before the law, which is also an universal legal principle. The international instances are not exempt from the application of these principles.
[…I]f the States can appoint Judges ad hoc, for the sake of the principle of equality of arms before the Court, the Commission should also have the same power when there are no judges of the same nationality that the victims in the cases submitted before the Court's jurisdiction. But this channel would lead to a procedural complexity that would necessarily affect the independence and impartiality that characterizes our supreme international Court of our region, and the dispatch of the proceedings.

Regarding the second question of the request (supra para. 3)

[… I]ndependence is a universal legal principle applicable to both domestic legal systems and international public law. [… In this regard,] the judges elected by the OAS are independent judges despite the fact that they are nominated by the Member States of the Convention. [Moreover,] all judges that comprise the Inter-American Court […] can intervene in all cases, and only the incompatibilities established in Article 71 of the Convention, the incompatibilities and impediments established in Articles 18 and 19 of the Statute, and Article 19 of the Rules of Procedure […] apply to them.
[… Likewise and only for inter-State complaints,] the impediments could be extended and it could be considered that the existence of a judge, who is a national of the States parties to the case, may end the balance that is necessary to ensure an impartial decision and, as a result, a conflict of interest arises. Then, it would be appropriate for the Judge to disqualify himself from participating in the case and for the Court itself to decide whether it appoints a Judge ad hoc to maintain the necessary quorum. […]
[… Nevertheless, and in consideration of the current rules, except] for the incompatibilities and the impediments mentioned, the judges of the Court are allowed to hear all type of cases submitted to the Court's jurisdiction, including […inter-States disputes, as well as cases presented by] the Inter-American Commission on Human Rights […].

Luis Peraza Parga

In his amicus curiae brief and oral arguments, he indicated that:

Regarding the first question of the request (supra para. 3)

[…] The Court has proven to be a creative Court, with little resources, imaginative and cutting-edge […] In this sense […] I urge the Court to focus on the issue of equality of arms. […] We are putting forward a reform in which the Judge ad hoc would disappear, [… and for that] it is

not necessary to pay. Simply, we have to put the person back at the center of the international judicial activities. [… We should not forget] the precedence of clause more favorable to the person […].
[… In relation to the issue of the contribution to the knowledge of the local legislation] the appointment of a judge to an international office does not necessarily have to disregard […] aspects of national law […]It is not exact […, and] in a certain way, it is a contempt of the role of the international judge to say [that] he absolutely disregards the issues of internal law. Here […] the judges of the Court […] have shown that they have knowledge of the international law and also, the national law; then, a proposal would be, [...] in keeping with the modern tendencies of the international Courts, to allow the participation of the civil society [to improve the process of selection of permanent judges].
[Finally, we consider that it is] possible to put the Inter-American system in the vanguard of human rights, eliminating this institution. In this sense, [...] I urge the [...] Court to be the first international court to veto the possibility of a Judge ad hoc in individual petitions […].

Regarding the second question of the request (supra para. 3)

[… In particular,] Article[s] 76 and 77 of the American Convention […] establish the correct, legal and legitimate way for the noble Argentina expectations developed in its two questions, that is, by means of reforms and additional protocols […; therefore, the] Advisory Opinion is not the correct avenue for the duly modification of the American Convention in terms of procedure.
[… D]espite the fact there is a national judge among the membership of the Court, he […] should not disqualify himself […] insofar as the supranational consciousness depends on the person who has an enormous work ahead, not so adequately paid for or without being paid at all […].

III. COMPETENCE

12. This request for an advisory opinion was submitted to the Court by the State of Argentina, in exercise of the faculty granted to it by Article 64(1) of the American Convention. Argentina is an OAS State Member and, therefore, has the right to request the Inter-American Court for advisory opinions regarding the interpretation of said treaty.

13. The request formally complies with the requirements established in Article 64 of the Court's Rules of Procedure, according to which a request for an advisory opinion shall state with precision the specific questions on which the Court's opinion is being sought; identify the norms to be interpreted; present the considerations giving rise to the request and specify the name and address of the Agent.

14. On several occasions, this Court has established that compliance with the regulatory requirements for formulating a request does not imply that the Court is obliged to respond to it. In this respect, in order to determine the legal basis for the request, the Court must bear in mind considerations that go beyond the merely formal aspects related to the generic limits that the Court has recognized to the exercise of its advisory function. [FN10]

[FN10] Cf. "Other treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982, Series A No.1, para. 13; Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, para. 50, and Control of Legality in the Practice of Authorities of the Inter-American Commission of Human Rights (Arts. 41 & 44 to 51 of the American Convention on Human Rights. Advisory opinion OC-19/05 of November 28, 2005. Series A No. 19, para. 17.

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15. In this regard, the Court recalls that its advisory jurisdiction is not, in principle, mere academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion. [FN11] In this sense, the Court notes that the request made by Argentina is related to a precise situation, the organization and composition of the Court, essential aspect of the operation of the Court, whose strengthening responds to a general interest of the region. [FN12]

[FN11] Cf. Judicial Guarantees in States of Emergency (arts. 27.2, 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 16; Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 35, and Juridical Condition and Rights of the Undocumented Migrants, supra note 10, para. 65.

[FN12] Cf. General Assembly of the OAS, AG/RES. 2500 (XXXIX-O/09), Order on "Observations nad recommendations of the annual report of the Inter-American Court of Human Rights," Approved at the fourth plenary session held on June 4, 2009, operative paragraph two.

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16. In that respect, in the request for advisory opinion, Argentina stated that:

The Inter-American System for the Protection of Human Rights is currently the subject of far-reaching discussions concerning the necessity and advisability of adopting various measures in relation to its operation. Essentially, these discussions are focused on the introduction of procedural reforms, and, more specifically, on the Rules of Procedure of both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

[…]Nevertheless, the Government of Argentina observes that the substance of the proposed reforms only partially encompasses the global need for reform. The essence of this reform should not lose sight of the fact that the object and purpose of the Convention's international protection system is the effective protection of the rights that it embodies […].

[…] In this regard, the Government of Argentina believes that the process of discussion on the future of the Inter-American human rights system is an appropriate framework for invoking the advisory jurisdiction of the […] Inter-American Court of Human Rights. It thus submits to the Court this request for a legal opinion on two matters that, within the framework of the system's current practice, are contrary to the object and purpose of the American Convention on Human Rights.

17. From that perspective, the Court understands, as on previous occasions, that its opinion could be useful within a reality in which the aspects of the operation of the Inter-American system for the protection of human rights have been questioned. This utility has been shown by the participation, in this proceeding, of nine OAS States Members, of the Inter-American Commission and of 30 institutions and private individuals who are members of the civil and academic society of the region, in their capacity as amici curiae (supra para. 11). The participants, in most cases, have emphasized the importance of the instant request within the framework of the current process of reflection and strengthening of the bodies of the Inter-American system "not only in the benefit of the protection of the human rights of the alleged victims, but also in the progressive development of standards much more according to the reality of the international legal process." [FN13]

[FN13] Brief of observations to the request for an advisory opinion presented by Mexico on December 19, 2009.

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18. As it has been discussed, the instant request for opinion refers essentially to the legal interpretation of certain concepts of the American Convention regarding the organization and composition of the Court. In this respect, the Court recalls, when laying down competence over this matter, the broad scope of its advisory jurisdiction, unique within the modern international law. [FN14] Said role allows the Court to interpret any rule of the American Convention, without excluding any party or aspect of the said treaty, in principle, from the scope of interpretation. In this regard, it is evident that this Court is competent to make, with full authority, interpretations regarding all the provisions of the Court, including those of a procedural nature and that it is the most appropriate Court to do it, since it is the "ultimate interpreter of the American Convention." [FN15]

[FN14] Cf. "Other treaties" subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights). supra note 10, para. 14; Juridical Condition and Rights of the Undocumented Migrants, supra note 10 para. 64; and Control of Legality in the Practice of Authorities of the Inter-American Commission of Human Rights (Arts. 41 and 44 to 51 of the American Convention on Human Rights) supra note 10, para. 18.

[FN15] Cf. Case of Almonacid Arellano et al. V. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 124, and Case of La Cantuta v. Peru. Merits, Reparations, and Costs. Judgment of November 29, 2006. Series C No. 162, para. 173.

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19. Based on the foregoing, the Court does not find in the instant request any reason to abstain from considering it and, therefore, admits it and responds as follows.

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20. The inquiry formulated by Argentina poses two clearly-defined questions (supra para. 3.) The Court will answer them in the order proposed.

IV. ARTICLE 55(3) OF THE AMERICAN CONVENTION THE FIGURE OF THE JUDGE AD HOC IN THE PROCESSING OF CONTENTIOUS CASES ORIGINATED IN "INDIVIDUAL PETITIONS"

21. The first question posed by Argentina seeks to determine if, in conformity with the meaning and scope of Article 55(3) of the American Convention, the possibility of a respondent State before the Inter-American Court to appoint a Judge ad hoc to the Court is restricted to cases in which the Court's contentious function is activated upon request of a State Party against another, meaning, in inter-state communications. The requesting State argues that such appointment is not admissible in controversies originated in individual petitions, submitted to the Court by request of the Inter-American Commission, "under the penalty of gravely affecting the principle of equality of arms, as well as the right of the alleged victim and their next of kin to have the controversy resolved by independent and impartial judges."

22. Article 55(3) of the Convention, whose interpretation has been requested, establishes that "[i]f 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 a Judge ad hoc."

23. For the interpretation of this provision the Court will use, as it has on numerous occasions, [FN16] the methods of interpretation of international law provided in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Article 31 integrates different elements that form a general rule of interpretation, which in turn may be supported by the complementary rule enshrined in Article 32 of said instrument.

[FN16] Cf. "Other treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights). supra note 10, para. 33; Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 49; and Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights). Advisory Opinion OC-7/86 of August 29, 1986. Series A No. 7, para. 21.

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1. General rule for the interpretation of treaties

24. The Court's task regarding this point will focus on determining the scope and meaning of the standard under consideration to verify whether it guarantees the States Parties in a contentious case the possibility of appointing a Judge ad hoc in controversies originated from individual petitions.

25. The Vienna Convention on the Law of Treaties establishes in Article 31(1) that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

26. In light of the aforementioned standard, the Court has asserted that the "ordinary meaning of the terms" cannot be a rule in itself, but must be considered within the context, and particularly within the object and purpose of the treaty. [FN17] The Court has also expressed that the "ordinary meaning of the terms" must be considered as part of a whole whose meaning and scope must be established based on the legal system to which it belongs. [FN18] All of this is to guarantee a harmonious and current interpretation of the provision under consideration.

[FN17] Cf. Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 23, and Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights. Advisory Opinion OC-12/91 of December 6, 1991. Series A No. 12, para. 21.

[FN18] Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 113; Case of the Ituango Massacres v. Colombia. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 1, 2006 Series C No. 148, para. 156, and Case of Bueno Alves v. Argentina. Merits, Reparations, and Costs. Judgment of May 11, 2007. Series C No. 164, para. 78. Likewise, the International Court of Justice has indicated that "the Court cannot base itself on a purely grammatical interpretation. [The Court] must seek the interpretation which is in harmony with a natural and reasonable way of reading the text" (Secretariat's translation). Cf. Anglo-Iranian Oil Company Case. (United Kingdom v. Iran), I.C.J. Reports 1952, Preliminary Objection, judgment of July 22, 1952, p. 104.

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27. Based on the foregoing, the Court believes that the analysis of Article 55(3) of the American Convention requires the interpretation of Article 55 as a whole, especially subsections 1, 2 and 3, and the analysis of their connection with the remaining provisions of the treaty. The opposite would lead to a fragmented interpretation of the standard that ignores the logic of the interpretative function, according to that general rule contained in Article 31 of the Vienna Convention.

28. The full text of Article 55 of the American Convention stipulates that:

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 a Judge ad hoc.
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 a Judge ad hoc.
4. A Judge ad hoc shall possess the qualifications indicated in Article 52.
5. If several States Parties to the Convention should have the same interest in a case, they shall be considered as a single party for purposes of the above provisions. In case of doubt, the Court shall decide.

29. From the natural and reasonable reading of this provision, the Court observes that in subsections 1, 2 and 3 there are three hypotheses or regulatory assumptions regarding the composition of the Court in a concrete case. As a first hypothesis, the standard says that should there be a national of "any of the States parties to the case" in the Court's permanent composition, he shall retain his right to hear that case. As second hypothesis, it establishes that if one of the judges in the Court is a national of "one of the States Parties in the case" and has decided to retain his right to hear that case, the "other State Party in the case" may appoint a Judge ad hoc. Lastly, the Convention establishes that if among the Court judges none is a national of any of the States Parties to the case, "each of the latter" may appoint a Judge ad hoc.

30. From the ordinary meaning of the expressions contained in this Article – "any of the States Parties in the case," "one of the States Parties," "other State Party to the case" and "each of the latter" – it seems evident that the hypotheses established therein for the composition of the Court in a concrete case presume the participation of more than one State Party in the case.

31. Nevertheless, in answering the instant inquiry the Court must pay special attention to the manner in which the abovementioned expressions (supra para. 29 and 30) relate to the remainder of the treaty.

32. The Court deems it necessary to distinguish the types of participation of a State in a contentious case, as stipulated by other provisions in the American Convention. In this regard, the Court notes that this participation in a contentious case could result from two different proceedings of complaints or communications before the Inter-American Commission. In the first, set forth in Article 44 of the Convention, States are the respondent party in contentious cases originated in individual petitions. In the other, set forth in Article 45 of said treaty, the States are presented as opposing procedural parties, meaning as respondent and petitioner in contentious cases originated in inter-state petitions. Consequently, not just "any person or group of persons" but also "all State Party" to the Convention may submit communications before the Inter-American Commission, claiming that the other State Party has violated the human rights established in the treaty. Once the proceeding is completed, these may result in a petition before the Court, as long as they fulfill the rest of the requirements for that entity to exercise its contentious jurisdiction. In this regard, Article 61(1) of the Convention is clear in that it establishes that "[o]nly States Parties and the Commission have the right to submit a case for consideration by the Court."

33. An interpretation in conformity with the ordinary meaning of the terms of Article 55 of the Convention, in harmony with the other provisions of this treaty, leads to the assertion that the plural expression "States Parties," which serves as a presumption to the hypotheses contained in Article 55 (supra para. 29), is applicable only to contentious cases originated in inter-state communications.

34. The above interpretation of Article 55 of the Convention is confirmed by analyzing the object and purpose of the provision under consideration. In this regard, the Court deems it convenient to refer to the background of the figure of the Judge ad hoc. This institution was conceived in international law for the resolution of classic disputes between States. Article 31 of the Statute of the International Court of Justice [FN19] expressly recognized this figure. [FN20]

In conformity with this provision, which is almost textually reproduced in Article 55 of the American Convention (supra para. 28), the States, which are the only procedural parties in the lawsuits substantiated by that court, are entitled to appoint a Judge ad hoc if there is no judge of their nationality in the composition of that Court.

[FN19] Statute of the International Court of Justice, annex to the Charter of the United Nations (1945), available at : http://www.icj-cij.org/homepage/sp/icjstatute.php

Article 31

1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.

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

3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.

4. The provisions of this Article shall apply to the case of Articles 26 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such, or if they are unable to be present, to the judges specially chosen by the parties.

5. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court.

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

[FN20] This figure was first recognized before the Permanent Court of International Justice. Cf. PCIJ, Statute and and Rules of Court, Series D, Acts and Documents concerning the organization of the Court, No. 1, fourth edition, p. 20 (April 1940), available at http://www.icj-cij.org/pcij/serie_D/ D_01_4e_edition.pdf. Said Article established that:

Article 31

Judges of the nationality of each of the contesting parties shall retain their right to sit in the case before the Court.

If the Court includes upon the Bench a judge of the nationality of one of the parties, the other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these parties may proceed to select a judge as provided in the preceding paragraph.

The present provisions shall apply to the case of Articles 26, 27 and 29. In such cased, the President shall request one or, if necessary, two of the members of the Court forming the Chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such or if they are unable to be present, to the judges specially appointed by the parties.

Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point is settled by the decision of the Court.

Judges selected as laid down in paragraphs 2, 3, and 4 of this Article shall fulfill the conditions required by Articles 2.17 (paragraph 2), 20, and 24 of this Statute. They shall take part in the decision on terms of complete equality with their colleagues. (Secretariat's translation).

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35. Therefore, in conformity with the preparatory work of the Statute of the International Court of Justice, the origin of the incorporation of the figure of the Judge ad hoc had political and diplomatic motives. At that time and according to the prevailing circumstances it was believed that "if the States cannot ensure their representation in the Court, it would be impossible to obtain their consent." [FN21]

[FN21] Cfr. PCIJ, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee: June 16th-July 24th 1920, p. 538 (1920), available at: http://www.icj-cij.org/pcij/serie_D/D_proceedings_of_committee_annexes_16june_24july_1920.pdf. (Secretariat's translation). Also in Adam M. Smith, "Judicial Nationalism in International Law: National Identity and Judicial Autonomy at the ICJ." Texas International Law Journal vol. 40, University of Texas, 2005, p. 206.

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36. In regard to the foregoing, the Court considers that the different provisions contained in Article 55 (supra para. 28), similar to those of Article 31 of the Statute of the International Court of Justice (supra note 19), are intended to preserve the procedural equity between the parties, constituted by two or more sovereign States equal under the law and whose relations are governed by the principle of reciprocity. This is to the extent that the right for a State to appoint a Judge ad hoc originates only when the judge national of the counterparty decides to use his right to remain in the hearing of the case, or, when neither of the States Parties have a national judge in the composition of the Court (supra para. 29). This reasoning only makes sense within the context of contentious cases originated in inter-state communications, which is significantly different from cases originated in individual petitions, even in other matters considered by the Inter-American Court (request for provisional measures and advisory opinions).

37. The Court highlights that, according to the American Convention, it is empowered to solve not only cases originated in inter-state communications but also in individual petitions. Nevertheless, the Court is aware that the figure of the Judge ad hoc, created to maintain the procedural equity between States Parties equal under the law, could come into conflict with the special nature of modern human rights treaties and the idea of collective guarantee. [FN22] The conflict under consideration is more evident when individuals and States are the opposing procedural parties. Therefore, although it is expressly provided in the American Convention, the Court must give the figure of the Judge ad hoc a restricted application in conformity with the object and purpose of Article 55 of the Convention.

[FN22] Regarding this point, the Court has asserted the special nature of human rights treaties in general, and particularly, the American Convention, emphasizing the manner in which they are different from multilateral treaties in other matters concluded to accomplish reciprocal

exchanges of rights for the mutual benefit of the contracting States. Cf. The Effect of Reservations on the Entry into Force of the American Convention on Human Rights. Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 29; Case of Constantine et al. v. Trinidad and Tobago. Preliminary Objections. Judgment of September 1, 2001. Series C No. 82, para. 86, and Case of Baena Ricardo et al. v. Panama. Competence. Judgment of November 28, 2003. Series C No. 104. In this regard, the Court has indicated that:

The American Convention, as well as all other human rights treaties, are inspired in common superior values (focused on the protection of human beings), are endowed with specific supervision mechanisms, are applied in conformity with the notion of collective guarantee, enshrine obligations of an essentially objective character, and have a special nature, which differentiates them from other treaties. Cf. Case of Ivcher Bronstein v. Peru. Competence. Judgment of September 24, 1999. Series C No. 54, para. 42; Case of Baena Ricardo et al. v. Panama, supra note 22, para. 96, and Case of the Mapiripán Massacre v. Colombia. Merits, Reparations, and Costs. Judgment of September 15, 2005. Series C No. 134, para. 104.

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38. In view of the foregoing, the Court believes that Article 55 of the Convention is an exception to the general rules on the composition of the Court, [FN23] since it is only applicable in the context of a contentious case originated in inter-state communications. Article 55 is also exceptional in relation to the rules on the election of the Court's titular judges. [FN24]

[FN23] Article 52(1) of the American Convention establishes that:

"The Court shall consist of seven judges, nationals of the member states of the Organization, elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates.

[FN24] Article 53(1) of the American Convention establishes that:

"53.1 The judges of the Court shall be elected by secret ballot by an absolute majority vote of the States Parties to the Convention, in the General Assembly of the Organization, from a panel of candidates proposed by those States."

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39. As an exception, the intervention of the Judge ad hoc must not be extended to proceedings for which it is not expressly provided. [FN25] In this manner, while the Court ensures the protection of the rights recognized by the American Convention, it also guarantees, both to the States Parties that have recognized the Court's competence and to the alleged victims, strict respect of their procedural standards, in conformity with their meaning and scope. [FN26]

[FN25] Cf. Legal Consequences for Status of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion: I.C.J., Order of 29 January 1971, p. 13. Similarly, Permanent Court of International Justice, Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, (Order of 31 October 1935), (Series A/B) No. 65, p. 70.

[FN26] Cf. Case of Ivcher Bronstein v. Peru. Competence. Supra note 22, para. 35; Case of the Girls Yean and Bosico. Judgment of September 8, 2005. Series C No. 130, para. 107; Case of Nogueira de Carvalho et al. v. Brazil. Preliminary Objections and Merits. Judgment of November 28, 2006, Series C No. 161, para. 41.

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40. Consequently, the expression "States Parties," followed by "each of the latter" in Article 55(3) of the American Convention, must be understood as referring to the assumption that it is a proceeding originated in an inter-state communication. The American Convention does not mention whether the contracting parties' intention was to provide a special meaning to these terms, from which the respondent States' right to appoint a Judge ad hoc to the Court in cases originating from individual petitions could be derived.

2. Supplementary means of interpretation

41. The preparatory work of the American Convention confirms the meaning that results from the previous interpretation. In this regard, Article 32 of the Vienna Convention on the Law of Treaties provides that "[r]ecourse may be had to supplementary means of interpretation, including preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31."

42. The Court observes that in the Draft American Convention prepared by the Inter-American Commission on Human Rights, and presented before the OAS Specialized Conference, [FN27] a provision on the figure of the Judge ad hoc [FN28] was proposed. The participation of Judges ad hoc was proposed in order to maintain the necessary quorum for the Court's deliberations. As such, their participation seemed to be open to any type of case, and their election was not performed by the States. In Article 46 the Draft provided, that:

1. The minimum quorum for the Court's deliberations is five judges.
2. The judge that is a national of a State Party, in the case, will be substituted by a Judge ad hoc, with the qualifications of Article 42, selected by an absolute majority of votes from the other judges of the Court as long as it is necessary to comprise the quorum indicated in paragraph 1 of this Article. [FN29]

[FN27] Cf. Inter-American Specialized Conference on Human Rights, held in San José, Costa Rica, from November 7 to 22, 1969, Minutes and Documents, OEA/Ser.K/XVI/1.2, Washington, D.C., 1978, available at http://www.corteidh.or.cr/tablas/15388.pdf.

[FN28] On the contrary, during the preparatory work other Drafts of the American Convention were presented which did not contain a provision regarding the figure of the judge ad hoc. These included the draft presented by the Inter-American Council of Jurists, final minutes, Santiago de Chile, September 1959, Article 65; the draft presented by the Republic of Uruguay Second Extraordinary Inter-American Conference, Rio de Janeiro, 1965, Article 70; and the draft presented by the State of Chile, Second Extraordinary Inter-American Conference, Rio de Janeiro, 1965, Article 46(65) Cf. Inter-American Yearbook on Human Rights 1968, General

Secretariat of the Organization of American States, Washington, D.C., 1973, page 264, 291 and 313.
[FN29] DRAFT INTER-AMERICAN CONVENTION ON THE PROTECTION OF HUMAN RIGHTS. Prepared by the Inter-American Commission on Human Rights, and approved as a "working paper" through the Order of the Council of the Organization of American States in the session held on October 2, 1968. OEA/Ser. K/XVI/1.2. Text in Spanish, reproduced in the Inter-American Specialized Conference on Human Rights, supra note 27, pp. 12-35. Also see TEXT OF THE AMENDMENTS SUGGESTED BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS TO THE DRAFT CONVENTION ON HUMAN RIGHTS PREPARED BY THE INTER-AMERICAN COUNCIL OF JURISTS, OAS/Serv.L/V/II.16, doc. 8, reproduced in the Inter-American Yearbook on Human Rights 1968, supra footnote 28, page 374.
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43. As can be observed, Article 46 originally proposed differs from Article 55 finally adopted in the Convention. In the report by the Second Committee responsible for writing the section on "Protection Organs and General Provisions" of the Draft Convention, it was indicated that the intention behind the modification was to "include as members of the Court judges of the same nationalities of the States Parties in a concrete case [and that] this practice [was] in conformity with the provisions of Article 31 of the Statute of the International Court of Justice." [FN30]

[FN30] Cf. REPORT BY THE SECOND COMMITTEE. "PROTECTION ORGANS AND GENERAL PROVISIONS." Rapporteur: Robert J. Redington (United States of America) reproduced in the Inter-American Specialized Conference on Human Rights, supra note 27, p. 375.
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44. In this regard, the Court considers that the writers of the American Convention wished to enshrine and reproduce "the system established in Article 31 of the Statute of the International Court of Justice which was, in the opinion of individuals of recognized authority and competence in the matter, the most technical and juridical system for the appointment of Judges ad hoc." [FN31] Therefore, the reading of the preparatory work of the Convention confirms the interpretation of the ordinary meaning of the terms of Article 55(3) of the Convention, within the context of the treaty and considering its object and purpose.

[FN31] Cf. PLENARY SESSION, FINAL MINUTES AND TEXT OF THE CONVENTION, minutes of the third plenary session of November 21, 1969, reproduced in the Inter-American Specialized Conference on Human Rights, supra note 27, p. 456.

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45. In view of the foregoing, it may be concluded that Article 55(3) of the Convention, within the framework of the text of Article 55 in its entirety, the context, object and purpose of the treaty and the preparatory work, are unequivocally geared toward the same meaning. Thus, it

is possible to assert that this provision applies, with an exceptional character, only in contentious cases resulting from inter-state communications, and therefore its application cannot be extended to controversies initiated through an individual petition.

46. Without detriment to the above, the Court deems it convenient to examine other observations made by the participants in the framework of this advisory opinion, for the Court to also address their inquiries in relation to the interpretation of Article 55(3) of the American Convention.

A) The Court's repeated invitation on the possibility to appoint Judges ad hoc

47. Some States have considered that the Court's repeated invitation on the possibility to appoint Judges ad hoc is "customary international law." In this regard, they indicated that the appointment of Judges ad hoc in contentious cases originated in individual petitions is an autonomous procedural right of the States that arises from that international custom.

48. In this regard, the Court observes that Article 38(1)(b) of the Statute of the International Court of Justice refers to international custom as "evidence of a general practice accepted as law." In this regard, the case law of the International Court of Justice, as well as the international doctrine, have indicated that this source of law consists of two formative elements. The first, objective in character, is the existence of a general practice created by the States, and performed constantly and uniformly (usus or diuturnitas). The second element, of a subjective character, refers to the States' conviction that said practice constitutes a legal norm (opinio juris sive necessitatis). [FN32]

[FN32] Cfr. Asylum Case (Colombia/Peru), I.C.J. Reports (1950), judgment of 20 November 1950, pages. 276 and 277; North Sea Continental Shelf Case (Federal Republic of Germany/Denmark), I.C.J. Reports (1969), judgment of 20 February 1969, para. 77, and Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v. United States of America), I.C.J. Reports (1986), judgment of 27 June 1986, para. 207. Also, Sorensen, Max, edit., Manual de Derecho Internacional Público, 8th reprint., Mexico, Fondo de Cultura Económica, 2002, pp. 160-169; Brownlie, Ian, Principles of Public International Law, 6th ed., USA, Oxford University Press, 2003, pp. 6-10; Cassese, Antonio, International Law, 2nd. ed., USA, Oxford University Press, 2005, pp. 156-160; Jiménez de Aréchaga, Eduardo, "La costumbre como fuente del derecho internacional", en Estudios de Derecho Internacional. Homenaje al Profesor Miaja de la Muela, Vol. I, Madrid, Tecnos, 1979, p. 391; Gutiérrez Espada, Cesáreo, Derecho Internacional Público. Introducción y fuentes, 4th ed., Barcelona, Promociones y Publicaciones Universitarias-DM, 1993, pp. 86- 87; Shaw, Malcolm N., International Law, 5th ed., Cambridge, Cambridge University Press, 2003, pp. 72-84.

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49. The Court observes that since its first contentious cases it has repeatedly informed the respondent State, through notifications by the Secretariat and following the Presidency's instructions, of the possibility to appoint a Judge ad hoc when amongst the judges summoned to hear a case initiated through an individual petition none are nationals of the respondent State.

The Court has thus accepted the intervention of Judges ad hoc when, on one hand, the composition of the Court does not include a judge national of the State Party in the case, [FN33] and, on the other hand, when titular judges that are nationals of the respondent State are allowed to excuse themselves from participating in the matter based on Article 19(2) of the Statute. [FN34] This participation is appreciated by the Court. [FN35]

[FN33] Cf. inter alia, Case of Aloeboetoe et al. v. Surinam. Merits. Judgment of December 4, 1991. C Series No. 11, para. 6; Case of Gangaram Panday v. Surinam. Preliminary Objections. Judgment of December 4, 1991. C Series No. 12, para. 6, and Case of Neira Alegría et al. v. Peru. Preliminary Objections. Judgment of December 11, 1991. C Series No. 13, para. 6.

[FN34] Cf. inter alia, Case of Velásquez Rodríguez v. Honduras. Preliminary Objections. Judgment of June 26, 1987. C Series No. 1, para. 4; Case of Fairén Garbi and Solís Corrales v. Honduras. Preliminary Objections. Judgment of June 26, 1987. C Series No. 2, para. 4, and Case of Godínez Cruz v. Honduras. Preliminary Objections. Judgment of June 26, 1987. C Series No. 3, para. 4.

[FN35] The 38 Judges ad hoc who participated in the judgments adopted by this Court are: Alejandro Montiel Argüello, Judge ad hoc; Alejandro Sánchez Garrido, Judge ad hoc; Alfonso Novales Aguirre, Judge ad hoc; Álvaro Castellanos Howell, Judge ad hoc; Antônio A. Cançado Trindade, Judge ad hoc; Arturo Alfredo Herrador Sandoval, Judge ad hoc; Arturo Martínez Gálvez, Judge ad hoc; Charles N. Brower, Judge ad hoc; Claus Werner von Wobeser Hoepfner, Judge ad hoc; Diego Eduardo López Medina, Judge ad hoc; Diego Rodríguez Pinzón, Judge ad hoc; Edgar Enrique Larraondo Salguero, Judge ad hoc; Emilio Camacho Paredes, Judge ad hoc; Ernesto Rey Cantor, Judge ad hoc; Fernando Vidal Ramírez, Judge ad hoc; Einer Elías Biel Morales, Judge ad hoc; Francisco José Eguiguren Praeli, Judge ad hoc; Gustavo Zafra Roldán, Judge ad hoc; Hernán Salgado Pesantes, Judge ad hoc; Javier de Belaunde López de Romaña, Judge ad hoc; Jorge E. Orihuela Iberico, Judge ad hoc; Jorge Santistevan de Noriega, Judge ad hoc; Julio A. Barberis, Judge ad hoc; Juan Carlos Esguerra Portocarrero, Judge ad hoc; Juan Federico D. Monroy Gálvez, Judge ad hoc; Leo Valladares Lanza, Judge ad hoc; Manuel Aguirre Roca, Judge ad hoc; Marco Antonio Mata Coto, Judge ad hoc; Oscar Luján Fappiano, Judge ad hoc; Pier Paolo Pasceri Scaramuzza, Judge ad hoc; Rafael Nieto Navia, Judge ad hoc; Ramón Fogel Pedroso, Judge ad hoc; Ricardo Gil Lavedra, Judge ad hoc; Rigoberto Espinal Irías, Judge ad hoc; Roberto de Figueiredo Caldas, Judge ad hoc; Víctor Manuel Núñez Rodríguez, Judge ad hoc; Víctor Oscar Shiyín García Toma, Judge ad hoc, and John A. Connell, Judge ad hoc.

Additionally, a total of 10 Judges ad hoc were appointed, who for different reasons did not complete all activities of that office, namely: Alwin Rene Baarh; César Rodrigo Landa Arroyo; David Pezúa Vivanco; Freddy Kruisland; Jaime Enrique Granados Peña; Juan Antonio Tejada Espino; Juan Vicente Ardilla Peñuela; Rhadys Abreu de Polanco; Ramón Fogel Pedroso, and Rolando Adolfo Reyna Rodríguez.

Currently there are Judges ad hoc exercising that function, appointed by the respondent States Parties to serve on the Court for controversies under consideration.

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50. The Court is aware that since the alleged victims and their representatives have the procedural capacity of intervening autonomously before the Inter-American Court, [FN36] in several contentious cases originated in individual petitions the figure of the Judge ad hoc has

been subject to opposition by them and by the Inter-American Commission. [FN37] In fact, the victim's representatives have indicated that the functioning of the organs of the Inter-American system for the protection of human rights has been subjected to important reforms through the introduction of substantial changes focused on the recognition of a full, active, and direct participation by the alleged victim, their next of kin or representatives, in all procedural stages before the Court; however, according to the Convention, they do not have the possibility of appointing Judges ad hoc.

[FN36] During the last decade the functioning of the organs of the Inter-American System for the protection of human rights have undergone important reforms aimed at recognizing the locus standi in judicio of the alleged victims before the Inter-American Court. Largely, these changes have been the result of the Court's experience in the exercise of its functions, but they also respond to recommendations by the OAS General Assembly. In this regard, said organ recommended the Court to consider the possibility of "[a]llowing direct participation of the victim, as a party, in the procedures […] taking into account the need to preserve the procedural balance, as well as to redefine the role of the [Commission] in said proceedings (locus standi)." Cf. OAS General Assembly, AG/RES. 1701 (XXX-O/00), Resolution on the "Evaluation of the Workings of the Inter-American System for the Protection and Promotion of Human Rights with a view to its improvement and strengthening," approved in the First Plenary Session, held on June 5, 2000, operative paragraph seven, subsection a.

The regulatory modifications in the year 2000 followed this direction, whereby the alleged victims, their families or representatives were allowed to submit their motions, pleadings, and evidence autonomously, once the petition has been admitted, and guaranteed their participation in the oral proceeding. Cf. Rules of Procedure of the Inter-American Court of Human Rights, approved in its XLIX Ordinary Period of Sessions, held from November 16 to 25, 2000, Articles 2(23) and 23(1).

Similarly, the 2003 amendment to the Court's Rules of Procedure reaffirmed the function of the Commission as a "guarantor of the public interest under the American Convention" while recognizing the full procedural capacity of the alleged victims and their representatives before the Court. Cf. Rules of Procedure of the Inter-American Court of Human Rights, partially amended in the LXI Ordinary Period of Sessions, held from November 20 to December 4, 2003, Article 33(3). This last provision has not been modified and corresponds to Article 34(3) of the Court's effective Rules of Procedure. Cf. Rules of Procedure of the Inter-American Court of Human Rights, partially amended in the LXXXII Ordinary Period of Sessions, held from January 19 to 31, 2009.

[FN37] Cf. Case of the Gómez Paquiyauri Brothers v. Peru. Merits, Reparations and Costs. Judgment of July 8, 2004. C Series No. 110, para. 22; Case of Apitz Barbera et al. ("First Court of Administrative Contentious Disputes") v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 5, 2008. C Series No. 182, footnote 3; Case of Castañeda Gutman v. Mexico. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008. C Series No. 184, footnote 2; Case of Tristán Donoso v. Panama. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 27, 2009 C Series No. 193, footnote 1, and Case of González et al. ("Campo Algodonero"), Order of October 30, 2008, Having Seen clause 10 and Considering clause 4.

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51. Regarding this point, until now the Court had not found reasons, "examining the question as an incidental issue in the framework of a specific contentious case," [FN38] for modifying the interpretation observed until now (supra para. 48). The present request for an advisory opinion has required that the Court reexamine this matter.

[FN38] Cf. Case of the Gómez Paquiyauri Brothers v. Peru, Order of the Inter-American Court of Human Rights of November 18, 2002, Considering clause 6.

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52. As previously stated, it is a natural function of every court [FN39] to interpret the substantive and procedural norms that it is empowered to apply (supra para. 21), and in this regard, the Court must always attempt to interpret the provisions contained in the American Convention in a manner that is effectively compatible both with the language and spirit of the treaty. Consequently, the Court considers that when there is reason to do so, the review of a previously created interpretation is not only possible but necessary. [FN40]

[FN39] In this regard, the Court has stated in its constant jurisprudence that when interpreting a treaty no only the agreements and instruments formally related to it are taken into consideration (subsection two of Article 31 of the Vienna Convention), but also the system that it is a part of (subsection three of Article 31 of the Vienna Convention). This orientation is particularly important for international law on human rights, which has advanced substantially through the evolutionary interpretation of the international protection systems. This is consistent with the general rules of interpretation enshrined in Article 29 of the American Convention. Cf. The Right to Information on Consular Assistance in the Framework of the Guarentees of the Due Process of Law, supra note 18, para. 113 and 114; Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits. Judgment of November 19, 1999. Series C No. 63, para. 192 and 193; Caso de la Comunidad Mayagna (Sumo) Awas Tingni Vs. Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C, No. 79, para. 146 to 148; Case of Juan Humberto Sánchez v. Honduras. Interpretation of the Judgment on Preliminary Objections, Merits and Reparations. Judgment of November 26, 2003. Series C No. 102, para. 56; Case of the Gómez Paquiyauri Brothers v. Peru, supra note 36, para. 164 and 165; Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 7, 2004. Series C No. 114, para. 144; Case of the Serrano Cruz Sisters v. El Salvador. Preliminary Objections. Judgment of November 23, 2004. C Series No. 118, para. 119; Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations, and Costs. Judgment of June 17, 2005. C Series No. 125, para. 125 and 126; Case of the Massacre of Mapiripán v. Colombia, supra note 22, para. 106; Case of the Ituango Massacres v. Colombia, supra note 18, para. 155 and 156; Case of Bueno Alves v. Argentina, supra note 18, para. 78, and Case of Apitz Barbera et al. ("First Administrative Contentious Court") v. Venezuela, supra note 36, para. 218.

[FN40] In effect, during its first contentious cases the Court abstained from ruling on the costs and expenses incurred by the victims, their next of kin, or representatives to obtain access to the Inter-American System for the protection of human rights. Cf. Case of Velásquez Rodríguez v. Honduras; Case of Godínez Cruz v. Honduras, and Case of Aloeboetoe et al. v. Surinam.

Subsequently, the Court considered that costs constitute an issue to be considered within the concept of reparations, referred to in Article 63(1) of the American Convention, given that they naturally derive from the activities performed to obtain access to the justice provided by the Convention, which implies or may imply payments and commitments of an economic nature that must be compensated when a condemnatory judgment is ruled. Cf. Case of Garrido and Baigorria v. Argentina. Reparations and Costs. Judgment of August 27, 1998. C Series No. 39, para. 79-81; Case of Anzualdo Castro v. Peru. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 22, 2009. C Series No. 202, para. 223; and Case of Dacosta Cadogan v. Barbados. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 24, 2009. C Series No. 203, para. 115.

On the other hand, regarding the issue of forced disappearances, in its first cases the Court refrained from indicating as reparation the obligation to make all efforts possible to locate and identify the remains of the victims and deliver them to the families. Cf. Case of Velásquez Rodríguez v. Honduras, and Case of Godínez Cruz v. Honduras. Further on, the Court has considered, as a reparation the right of the next of kin to know the truth, immediately proceeding to search and locate the mortal remains, either within the criminal investigation, or through another adequate and effective procedure. Cf. Case of Castillo Páez v. Peru. Merits. Judgment of November 3, 1997. C Series No. 34, para. 90; Case of Ticona Estrada et al. v. Bolivia. Merits, Reparations, and Costs. Judgment of November 27, 2008. C Series No. 191, para. 155, and Case of Anzualdo Castro v. Peru. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 22, 2009. C Series No. 202, para. 185.

Finally, the Court has declared on several occasions the violation of the right to humane treatment of the family of the victims of certain human rights violations or other individuals with close bonds to those persons. Cf. Case of Blake v. Guatemala. Merits. Judgment of January 24, 1998. C Series No. 36, para. 114, and Case of Heliodoro Portugal v. Panamá. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 12, 2008. C Series No. 186. In this regard, in the case of Valle Jaramillo et al. v. Colombia this Court considered that it is possible to declare a violation to the mental and moral integrity of the direct relatives of victims to certain human rights violations, applying a presumption iuris tantum regarding mothers and fathers, sons and daughters, husbands and wives, permanent companions (hereinafter "direct relatives"), as long as this responds to the particular circumstances of the case. In the case of these direct relatives, the State must disavow this presumption. In all other presumptions, the Court must analyze whether the evidence included in the file proves the violation of the alleged victim's humane treatment (personal integrity), regardless of whether it is family or not of another victim to the case. Cf. Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations and Costs. Judgment of November 27, 2008. C Series No. 192, para. 119, and Case of Kawas Fernández v. Honduras. Merits, Reparations and Costs. Judgment of April 3, 2009, C Series No. 196, para. 128 and 129.

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53. Therefore, the act of repeatedly informing the respondent States Parties of the possibility to appoint Judges ad hoc, responds to an interpretation of Article 55(3) of the Convention performed by the Inter-American Court itself, taking into account its procedural norms. As such, no interpretation of the Convention performed by the Court, even in a repeated manner, may be understood as a practice of the States in the sense of Article 38(1)(b) of the Statute of the International Court of Justice, in a manner that prevents the Court from modifying its criteria.

Based on the foregoing, it is noted that in this matter there is no internal customary law according to which the States have acquired any rights to appoint Judges ad hoc in contentious cases originated in individual petitions.

54. In any case, the Court considers that it would not be possible to have an interpretation of the Convention that threatens the fundamental principle of equality and non-discrimination (supra para. 50), which underlies all human rights, and whose prohibition has reached the character of jus cogens. The Court notes, as it has on repeated occasions, [FN41] that the juridical framework of national and international public order rests on this fundamental principle, therefore it permeates the whole juridical system. Consequently, the repeated interpretation of Article 55(3) of the Convention, even if it were an international customary law, could not have compulsory effects over a peremptory norm.

[FN41] Juridical Condition and Rights of the Undocumented Migrants. supra note 10, para. 101; Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. C Series No. 127, para. 184; and Case of Servellón-García et al. v. Honduras. Merits, Reparations and Costs. Judgment of September 21, 2006. C Series No. 152, para. 94.

B) The guiding function of the Judge ad hoc

55. In some of the approaches formulated by the participants to the procedure on this request for Opinion, it has been expressed that in the context of a case originated by an individual petition the Judge ad hoc is "a suitable and necessary resource" available to the Court "to garner sufficient elements which in due time will allow it to perform a much more objective valuation and in conformity with the particular circumstances of the domestic legislation and political, economic, and social context of the State in conflict."

56. The Court observes that the presence of Judges ad hoc in other contentious processes between states under international law had the purpose of "helping the Court understand several aspects which require a high degree of specialized knowledge related to the different legal systems." [FN42]

[FN42] Cfr. PCIJ, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, supra nota 21, intervention de Lord Phillimore, pp. 528-529. Similarly, Judge Lauterpacht's opinion is classic, who acting as a Judge ad hoc before the International Court of Justice expressed that:
"[C]onsistently with the duty of impartiality by which the Judge ad hoc is bound, there is still something different that distinguishes his role. He has, I believe, the special obligation to endeavour to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected – though not necessarily accepted – in any separate or dissenting opinion that he may write." (Secretariat's translation). Cf. ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v. Serbia

and Montenegro), I.C.J., Order of 13 September 1993, Separate opinion of Judge ad hoc Lauterpacht, para. 6. (Secretariat's translation).

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57. In this regard, the Court deems it pertinent to refer, as on other occasions, [FN43] that in the Inter-American System's scope, when a case has been submitted to its jurisdiction to determine whether the State is responsible for violations to the human rights embodied in the American Convention or other applicable instruments, its adjudicatory function is focused on analyzing the facts in light of the applicable provisions; determining whether the people who have requested the intervention of the Inter-American System are victims of the alleged violations; establishing international responsibility, if applicable; determining whether the State must adopt reparation measures; and, monitoring compliance with its decisions. [FN44]

[FN43] Cf. Case of Ríos et al. v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. C Series No. 194, para. 54, and Case of Perozo et al. v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. C Series No. 195, para. 65.

[FN44] Cf. Case of Baena Ricardo et al. v. Panama. supra note 22, para. 59 and 60; Case of Molina Theissen v. Guatemala. Monitoring Compliance with Judgment. Order of the President of the Court of August 17, 2009, considering clause one, and Case of the Caracazo v. Venezuela. Monitoring Compliance with Judgment. Order of the Court of September 23, 2009, considering clause one.

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58. The Court thus recognizes, on one hand, that in the elucidation of whether the State has violated or not its international obligations based on the actions of its judicial organs may lead to the Court's examination of the corresponding domestic proceedings in order to establish their compatibility with the American Convention. [FN45] On the other hand, as indicated in its reiterated jurisprudence, [FN46] the Court may analyze, by virtue of its contentious jurisdiction, the compatibility of the domestic legislation with the American Convention.

[FN45] Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. supra note 39, para. 222; Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. C Series No. 170, para. 22; and Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 6, 2009. C Series No. 199, para. 44.

[FN46] Cf. International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. A Series No. 14, para. 40 to 44; Case of Heliodoro Portugal v. Panama. supra note 40, para. 60, and Case of Escher et al. v. Brazil. supra note 45, para. 218.

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59. The Court considers that during an international proceeding it is necessary to ensure the appreciation of the truth and the most ample presentation of arguments by the parties, thus guaranteeing their right to defend their respective positions, [FN47] while complying with the principle of presence of both parties. In this regard, the Court has ample rights to receive all documentary, testimonial, and expert evidence [FN48] and information it deems pertinent, [FN49] to have sufficient elements that will allow it to analyze the facts in light of the applicable provisions, which is conducive to orders that demonstrate an understanding of the national judicial systems and legal provisions, as well as the concepts, institutions, and practices involved in the case, so as to benefit its analysis and the application of the American Convention.

[FN47] Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations, and Costs. Judgment of March 29, 2006. C Series No. 146, para. 51.
[FN48] Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay. supra note 47, para. 51, and
Case of Ríos et al. v. Venezuela, supra note 43, para. 96.
[FN49] Cf. Case of Ximenes Lopes v. Brasil. Merits, Reparations, and Costs. Judgment of July 4, 2006. Series C No. 149, para. 44; Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 10, 2007. C Series No. 167, para. 45, and Case of Ríos et al. v. Venezuela. supra note 43, para. 96.

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60. The Court gives a special mention to the presentation of amicus curiae, recognizing their great contribution to the Inter-American System through the presentation of reasoning related to concrete cases, legal considerations on matters of the proceeding, and other specific matters. Thus, as indicated by the Court on repeated occasions, [FN50] they contribute arguments or opinions that may serve as elements of judgment regarding aspects of the law submitted before it.

[FN50] Cf. Case of Kimel v. Argentina. Merits, Reparations, and Costs. Judgment of May 2, 2008 C Series No. 177, para. 16, and Case of Castañeda Gutman v. Mexico. supra note 36, para. 14. Likewise, cf. Article 2(3) of the Court's Rules of Procedure in force.

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61. In view of the foregoing, the Court deems that the considerations with regards to the useful or guiding function performed by the Judges ad hoc by providing "local knowledge and a national point of view" to the Court, are not sufficient within the framework of the functioning of the contentious proceedings performed by this Court.

62. Finally, the Court highlights that the procedural capacity must be guaranteed for all parties, in conformity with the imperatives and needs of the due process. Consequently, the Court believes that in the context of contentious cases originated in individual petitions, in which the parties are the respondent State and the alleged victims and, only procedurally, the Commission (supra footnote 35), the reopening of procedural questions and arguments on the merits of the matter without the presence of the parties affects the realization of the principles of

the presence of both parties, procedural equity, and legal certainty. Therefore, it is inappropriate for the Court to receive information regarding facts or the law without the presence of all parties to the proceeding.

C) The representativeness of the Judge ad hoc

63. During the processing of this advisory opinion several States indicated that the participation of a Judge ad hoc in cases originated in individual petitions allows for a greater level of representation in the trial, and even the representativeness of the different legal systems in the region.

64. In this regard, the Court considers appropriate to refer to the American Convention [FN51] and to its Statute, [FN52] both approved by the OAS General Assembly, which set forth in their pertinent provisions the procedure to be followed for proposal of candidates and election of the titular judges that comprise it.

[FN51] The American Convention sets forth:
Article 53
1. The judges of the Court shall be elected by secret ballot by an absolute majority vote of the States Parties to the Convention, in the General Assembly of the Organization, from a panel of candidates proposed by those states.
2. Each of the States Parties may propose up to three candidates, nationals of the state that proposes them or of any other member state of the Organization of American States. When a slate of three is proposed, at least one of the candidates shall be a national of a state other than the one proposing the slate.
[FN52] The Statute of the Inter-American Court of Human Rights stipulates:
Article 7
Candidates
1. Judges shall be elected by the States Parties to the Convention, at the OAS General Assembly, from a list of candidates nominated by those States.
2. Each State Party may nominate up to three candidates, nationals of the state that proposes them or of any other member state of the OAS.
3. When a slate of three is proposed, at least one of the candidates must be a national of a state other than the nominating state.

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65. In conformity with those provisions, it is clear that the issue of guaranteeing the representativeness of judges falls beyond the Court's functions, as it corresponds to other OAS organs. However, it is worth noting that the Court's judges, though nominated by States, serve in an individual capacity (infra para.79).

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66. Based on the foregoing, after interpreting Article 55(3) of the American Convention, considering the ordinary meaning of its terms, analyzing it in the context of Article 55 as a

whole, as well as other provisions of said treaty, in conformity with its object and purpose, and based on the preparatory work of the Convention, this Court believes that such provision is restricted to contentious cases initiated by inter-state communications (as set forth in Article 45 of that instrument). Hence, the possibility of the States Parties to appoint a Judge ad hoc to integrate the Court when there is no judge of its nationality, established in Article 55(3) of the Convention, is limited to that type of cases. Therefore, it is not possible to derive from that norm a similar right in favor of States Parties to contentious cases originated in individual petitions (under the terms of Article 44 of said treaty).

67. Based on the foregoing, in the present advisory opinion the Court deems it necessary to move away from the interpretations previously formulated on this matter.

VI. ARTICLE 55(1) OF THE AMERICAN CONVENTION A NATIONAL JUDGE IN THE PROCESSING OF CONTENTIOUS CASES ORIGINATED IN "INDIVIDUAL PETITIONS"

68. The second question submitted by the requesting State refers to the participation of the "judge national of the accused State" in cases originated in individual petitions. The requesting State asks whether in light of Article 55(1) of the American Convention, that judge "should excuse himself from participating in the proceeding and decision of the case so as to guarantee a decision free of all potential bias or influence."

69. In its request, the State of Argentina suggests that, "it is an opportunity to reflect on the eventual need to adopt measures that guarantee, to the greatest extent possible, a decision exempt from all direct or indirect influence, which could eventually arise in a specific case due to the nationality of a Court judge." Additionally, it argued that Article 55(1) of the Convention, "interpreted harmoniously along with the other provisions of the treaty, and examined in light of the criteria contemplated in Article 29 of the Convention, seems to leave no doubt that the right of the national judge of the respondent State to continue hearing the case would be limited to inter-state claims, not to cases originated by an individual petition."

70. Similarly, in some of the observations submitted before the Court during the processing of this request it was indicated that the participation of a national judge may "put at risk the procedural balance between that parties," and affect the principles of procedural equity and legal certainty. Largely, it was expressed that the participation of a judge national of the respondent State in cases originated in individual petitions could affect the perception of impartiality and independence of that judge, among other, due to the consideration that in those cases nationality is an important connection with the State. Likewise, it was indicated that since Court judges are not permanent, there are no organic guarantees to ensure full independence and impartiality.

71. On the other hand, it was also expressed that a judge national of the respondent State does not lose his impartiality and independence due to its nationality, given that the adjudicatory function enjoys the presumption of those qualities, therefore any observation to the contrary must be performed in a concrete case, not in general. Similarly, it was indicated that judges exercise their position on an individual capacity and not as representatives of the interests of the State of which they are nationals, and, in any case, if there is any indication that the judge lacks

independence and impartiality the regime established in the Statute of the Inter-American Court must be applied.

72. Article 55(1) of the American Convention under consideration establishes that "[i]f 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." To answer the question submitted by Argentina on the participation of a judge who is a national of the respondent State in contentious cases originated in an individual petition, the Court has examined two possible interpretations of that provision.

73. Based on the first interpretation, it is possible to conclude that said Article refers solely to the presumptions of the Court's composition in contentious cases originated in inter-state communications (supra para. 45). This provision expressly grants the right of a titular judge national of the respondent State to hear contentious cases originated in individual petitions. All of this derived from that analyzed in the previous chapter on the meaning and scope of Article 55 of the American Convention (in light of Articles 31 and 32 of the Vienna Convention on the Law of Treaties), and in conformity with a harmonious interpretation of all of the provisions contained in that rule.

74. For that purpose, as previously stated, the ordinary meaning of the expression "any of the States Parties to the case" mentioned in Article 55(1) of the Convention, it derives that this provision applies to the hypothesis of participation of more than one State Party to a controversy, meaning in contentious cases originated in inter-state communications.

75. This is confirmed based on the object and purpose of the treaty and of the provision under consideration. Taking into account the characteristics of the contentious process established in the Inter-American Convention, for this Court the participation of a national judge, just like the intervention of a Judge ad hoc, responds to the need to maintain procedural balance between the parties, constituted by one or more sovereign States equal under the law (supra para. 36). This is evidently not the object and purpose of the possibility for a national judge to remain in cases originated in individual petitions, given that, on the contrary, in this type of cases States are not the only parties to the procedure.

76. In some of the observations submitted before the Court in the process of this request for opinion it was expressed that the purpose of this standard was to guarantee the Court a better understanding of the legal system of the respondent State. The Court does not find this argument persuasive (supra para. 55-62). In this regard, it considers that, if that were the case, the intervention of a titular judge who is a national of the respondent State in contentious cases originated in individual petitions would generate a procedural imbalance between the States, given that according to the rules of the composition of the Court the majority of the States Parties to the American Convention do not have a national judge in the composition of the Court (supra notes 51 and 52). Therefore, accepting based on these reasons, that from the interpretation of Article 55(1) of the American Convention derives a right of the national judge to hear a case originated in an individual petition, would imply that the majority of States who have recognized the contentious jurisdiction of the Court could not assist the Court to understand relevant national aspects of the case. In any case, the Court reiterates that procedural capacity must be guaranteed for all parties, in conformity with the imperatives and needs of due process, therefore, it is

inappropriate for the Court to receive information of fact or law without the presence of all parties to the proceeding, which obtains special significance in the context of cases originated through individual petitions. (supra para. 62)

77. The above interpretation ensures the parties in the process that the enforcement of one of the fundamental principles of justice, which is due process, is guaranteed, and which has the assumption that the judge who intervenes in a particular dispute approaches the facts of the case in an impartial manner, meaning, lacking, subjectively, all personal prejudice, and offering sufficient objective guarantees that allow for the elimination of all doubt that the persons demanding justice or the community may hold with regards to the lack of impartiality. [FN53]

[FN53] Cf. Case of Apitz Barbera et al. ("First Court of Administrative Contentious Disputes") v. Venezuela, supra note 37, para. 56.

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78. Based on this first analysis of Article 55(1) of the Convention, only in the processing of controversies originated in inter-state communications, the judge or judges of the nationality of the States Parties to the case submitted before the Court retain their right to participate in its substantiation. Following this interpretation, Article 55 of the Convention would enshrine an exceptional regime not only in relation to the appointment of Judges ad hoc (supra para. 45), but also with regards to the participation of judges who are nationals of the respondent States. As previously stated, this interpretation is confirmed by studying the preparatory works of the American Convention from which it is inferred that the writers wanted to limit the scope of application of Article 55 as a whole to cases originated in inter-state communications, similarly to Article 31 of the Statute of the International Court of Justice (supra para. 44).

79. Following the second interpretation, it may be concluded that Article 55(1) of the Convention does not make any mention of the participation of the judge national of the respondent State in cases originated in individual petitions, given that it refers exclusively to cases originated in inter-state communications, as established in the previous chapter. Based on this perspective, taking into consideration the importance and transcendence of the issue, it is not possible to infer in interpretative terms an implicit prohibition of that standard.

80. In that regard, the determination of the meaning of the treaty's silence on this matter is a complex task that requires that the Court perform an analysis that takes into account the rest of the provisions of the American Convention as well as the nature of the matter not covered by said treaty. Consequently, the Court advises that the American Convention has provided a regime for the independent, impartial, and competent integration of the Court, with the clear purpose of ensuring the legitimacy and efficiency of the judicial process that it performs. Therefore, in conformity with Article 52 of the Convention, the Court will be comprised of seven judges, nationals of the States members of the OAS, who are elected in an individual capacity from among jurists of the highest moral authority, with recognized competence in the field of human rights, who meet the conditions required to exercise the highest judicial functions in conformity with the law of the country of which they are nationals or of the State that proposes them as candidates. Additionally, the Court's judges are elected for a six-year term, [FN54] in a

secret ballot and by absolute majority of votes of the States Parties to the Convention, in the OAS General Assembly, from a list of candidates proposed by those same States. [FN55] Titular judges are different in this regard from Judges ad hoc, given that the latter are appointed by the States to exercise their position in a concrete case, after the case has been introduced before the Court.

[FN54] In this regard, Article 54(1) of the Convention establishes that "[t]he judges of the Court shall be elected for a term of six years, and may be reelected only once."

[FN55] On this matter, Article 53(1) of the Convention indicates that "[t]he judges of the Court shall be elected by secret ballot by an absolute majority vote of the States Parties to the Convention, in the General Assembly of the Organization, from a panel of candidates proposed by those states."

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81. Consequently, based on the second interpretation criteria, the sole nationality of a judge who must hear a case originated in an individual petition against the State of which he is a national is not a quality which, by itself and a priori, should raise suspicions on the lack of impartiality or on the lack of independence.

82. Nevertheless, the Court observes that since in the large majority of the cases submitted before the Court, some of the titular judges were nationals of the respondent State and since its first contentious cases (supra para. 48) the titular judges of the Court have understood as a right the participation or non-participation in any type of case. However, in a large number of contentious cases submitted by the Inter-American Commission the titular judges have disqualified themselves from participating when they were of the nationality of the respondent State. This trend has strengthened during the past years, [FN56] which reveals a growing consensus in that national judges should not participate in the hearing of those cases.

[FN56] To that end, in one way or the other, the statutory and regulatory provisions of the impediments, excuses and disqualification regime have been invoked. Particularly, Article 19(2) of the Statute of the Court has been used as a basis, which states that: "[i]f a judge is disqualified from hearing a case or for some other appropriate reason considers that he should not take part in a specific matter, he shall advise the President of his disqualification. Should the latter disagree, the Court shall decide."

Likewise, Article 19 of the Court's Rules of Procedure in effect at that time has been expressly referred to, which stipulated the following:

Article 19. Impediments, excuses, and disqualification

1. Impediments, excuses, and disqualification of Judges shall be governed by the provisions of Article 19 of the Statute.

2. Motions for impediments and excuses must be filed prior to the first hearing of the case. However, if the grounds therefore were not known at the time, such motions may be submitted to the Court at the first possible opportunity, so that it can rule on the matter immediately.

3. When, for any reason whatsoever, a judge is not present at one of the hearings or at other stages of the proceedings, the Court may decide to disqualify him from continuing to hear the case, taking all the circumstances it deems relevant into account."
This provision is currently contained in Article 20 of the Inter-American Court's current Rules of Procedure.
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83. In this regard, the Court highlights that in other human rights courts or international bodies, the tendency in matters or contentious cases originated in individual petitions is to limit the participation of judges or members of the nationality of the respondent State or State being monitored. This is the case in the sphere of quasi-jurisdictional protection organs such as the Human Rights Committee, [FN57] the Committee for the Elimination of Racial Discrimination, [FN58] the Committee against Torture [FN59] and the Inter-American Commission of Human Rights, [FN60] and more recently the African Court on Human and People's Rights, which is a strictly judicial organ. [FN61]

[FN57] Article 42(2) of the International Covenant on Civil and Political Rights establishes that: "[T]he members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under Article 41."
[FN58] Article 12(2) of the International Convention on the Elimination of All Forms of Racial Discrimination establishes that: "[t]he members of the Commission shall serve in their personal capacity. They shall not be nationals of the States parties to the dispute or of a State not Party to this Convention."
[FN59] Article 103(1)(c) of the Rules of Procedure of the Convention against Torture and Other Cruel, Inhumane, or Degrading Treatment indicates that: "[A] member shall not take part in the examination of a complaint by the Committee or its subsidiary body: […] (c) If he/she is a national of the State party concerned […]."
[FN60] Article 17(2)(a) of the Rules of Procedure of the Inter-American Commission of Human Rights in force sets forth that: "[m]embers of the Commission may not participate in the discussion, investigation, deliberation or decision of a matter submitted to the Commission in the following cases: a. if they are nationals of the State which is the subject of the Commission's general or specific consideration, or if they were accredited or carrying out a special mission as diplomatic agents before that State; […]."
[FN61] Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights establishes that: "[I]f the judge is a national of any State which is a party to a case submitted to the Court, that judge shall not hear the case."
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84. Therefore, the Court observes that the question of a judge's nationality is a factor that must be taken into account by the Court to strengthen the perception of the judge's impartiality. In this regard both interpretations given to Article 55(1) of the Convention coincide, from which it is possible to conclude, with the same validity, that the titular judge national of the respondent State must not participate in contentious cases originated in individual petitions.

85. In conclusion, the Court considers that the question of the nationality of the judges is also related to the perception of the justice applied by the Court in the framework of controversies, which do not correspond to classic international law, in which human beings are the true recipients of the protection offered by the system. In this advisory opinion the Court has already indicated that when interpreting the Convention it must act so as to preserve the integrity of the monitoring mechanism established therein, for which it must take into consideration the special nature of human rights treaties (supra note 22). Additionally, this includes bearing in mind that in conformity with the mechanism established in the American Convention, States are no longer the only actors in international proceedings (supra note 35). The Court is called upon to resolve not only controversies originated in inter-state communications but also in individual petitions, as has occurred while performing its adjudicatory function.

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86. In view of the arguments presented in both interpretations, in conformity with both interpretations, the Court is of the opinion that a judge who is a national of the State accused in a contentious case initiated in an individual petition (in conformity with Article 44 of the Convention), must not hear the controversy.

VII. OPINION

87. For the foregoing reasons, in the interpretation of Articles 55(3) and 55(1) of the American Convention on Human Rights,

THE COURT,

DECIDES

unanimously,

That it is competent to issue the instant Advisory Opinion.

AND IS OF THE OPINION,

unanimously,

1. That in conformity with Article 55(3) of the American Convention, the possibility for States Parties in a case submitted before the Inter-American Court to appoint a Judge ad hoc to be part of the Court when there is no judge of its nationality in its composition, is restricted to contentious cases originated in inter-state communications (Article 45 of said instrument), and that it is not possible to derive a similar right in favor of States Parties in cases originated in individual petitions (Article 44 of said treaty).
2. That the national judge of the respondent State must not participate in the hearing of individual cases.

Cecilia Medina-Quiroga
President

Diego García-Sayán
Sergio García-Ramírez
Manuel Ventura Robles
Leonardo A. Franco
Margarette May Macaulay
Rhadys Abreu-Blondet

Pablo Saavedra-Alessandri
Secretary

So ordered,

Cecilia Medina-Quiroga
President

Pablo Saavedra-Alessandri
Secretary

CONCURRING OPINION OF JUDGE SERGIO GARCÍA-RAMÍREZ TO ADVISORY OPINION OC-20/2009 OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS, OF SEPTEMBER 29, 2009, ON "ARTICLE 55 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS"

I. Prior considerations

1. In 1998 I started my career as a judge of the Inter-American Court of Human Rights having been elected in 1997. This duty concludes at the end of 2009. For twelve years I have had the honorable opportunity to participate in a task –better yet: a mission— for which I have the utmost respect and deepest appreciation. It has become an essential chapter of my life. I acknowledge and value the teachings and experiences it has offered me. I treasure the good moments, which were many.

2. As a member of the Court I have participated in adopting the majority of the judgments that the Court has issued, as well as in several advisory opinions. Since its first judgments, some judges, not a mere few, stated their own points of view about different topics, albeit in agreement with their colleagues in most cases. This is the category of individual separate opinions, which are of two types: concurring opinions and dissenting opinions.

3. The Court's sound practice has lent itself to hear individual opinions nurturing the collegiate examination of issues. Such good practice leads to respecting the opinions expressed by each judge, regardless of the fact that they may be concurring or dissenting with the majority. This is a good habit among peers that acknowledge one another as such, with no room for

demands or intolerance. There is no “single line of thought”, although there may be an agreement on the fundamental values and criteria.

4. Issuing individual opinions responds to different reasons. It is obvious that the appropriateness or the need to express them increases when the author dissents with his colleagues and shall justify a minority vote, stating his grounds. Thus, it is convenient to explain, analyze, state his grounds and try to convince.

5. Issuing concurring opinions does not respond to the same reasons. It is a personal way of understanding the judicial task, a way of being, a way of sharing views, because a ruling is not comprehensive enough –it is impossible that any judgment or opinion can fully encompass the opinion of each judge-, or because someone wants to propose new directions or express personal considerations that the readers may share, expand, or reject. Sometimes, issuing an opinion goes hand in hand with the judge’s tasks in other areas or simply with his work habits: for example, the academic work and the written expression of ideas.

6. In synthesis, expressing separate opinions does not praise or diminish whoever makes them. Neither are they cumbersome for those issuing them. It only reflects a way of being and doing things, and it may contribute to placing the court’s opinions and grounds under the analysis of the reader and whoever applies the judgments. It is valid. Of course, I refer to juridical opinions on matters of the same nature as those in the judgment, not to texts of another nature: rhetorical essays or literary excursions.

7. All along my career as a judge I have presented seventy-five individual opinions. Most of them are concurring and individual opinions. Sometimes my agreement was perceived as discrepancy. I can understand it. It so happens that walking on a knife-edge raises doubts, makes choices difficult, accounts for the grams placed on each side of the pan until the balance is tipped in favor of the vote finally issued. Preparing individual opinions has given me the chance to express my point of view in my own words, from a more personal perspective (not engaging the Court, even when the Court has resorted to them in some of its subsequent decisions, turning them into jurisprudence).

8. I confess that I tend to look for consensus that may strengthen a collective decision –but I acknowledge it may eventually weaken it--, based on essential agreements; this does not mean agreeing with everything even going against good sense. Of course, the search for and the scope of a consensus may involve withdrawing individual considerations that are less important in the name of more important collective solutions.

9. I shall not refer to the subjects I have examined in opinions of such nature. They range from the guarantees of the due process of law to prison problems; from a competent court to a self-composed solution; from the protection of liberty and the protection of health to the recognition of the rights of members of indigenous communities; from the State’s responsibility for acts of third parties to the duty of justice; from general rights and special measures for the comprehensive protection of children and adolescents to the freedom of expression in a democratic society; from economic and social rights –a matter whose deeper analysis is still pending—to the collective guarantee in the event of serious violations of human rights; from the

protection of members of groups at risk to the rights of undocumented immigrants; from traditional compensations to the ample catalogue of juridical consequences –under the title of "reparations"--, which is one of the most original and fruitful contributions of the Inter-American Court to International Human Rights Law; from the confession and acquiescence to the control of conventionalism, etcetera, etcetera.

10. In my individual opinions, which reflect my attitude as a judge in their text –and, more broadly, as a person—with regard to the Court, my colleagues, and other bodies and actors in the system, I have always tried to avoid judging or causing damage to those who had points of view that were different from and even opposite mine. I also refrained from questioning the Court itself, its performance, its merits, its efforts, its timing and careful processes, making my opinions a reference to gauge the correctness of the jurisdiction as a whole. My understanding and practice have shown me that we must pay attention to the "judicial language", which is a testimony of the court and its judges. Of course, I have also spared the dignity and competences of other bodies of the Inter-American system.

11. I do not judge the Court. I am not a "judge of judges". I have tried to be a judge who concurs with his colleagues in the responsibility for serving justice, seeking the success of the work in common, respecting the ideas of his peers, listening to their reasons, acknowledging the merit of their efforts and seeking the prestige of the body to which I belong and the development of the mission it responds to. Needless to say, I do not think at all that my opinion is the best, and even less so, the only acceptable one.

12. Please, excuse me for continuing with the writing of this opinion but it is based on two circumstances. First of all, there is an essential element linked to the opinion: the Court has had to rule on judges and judicial functions, that is, it has taken "itself" into consideration, directly and indirectly. This involves entering an area that goes beyond what has been explored on other occasions.

13. Here we are –and I am- faced with a second circumstance: this is the last time I have the possibility to issue a personal opinion as a member of the Inter-American Court. I do not mean to say that this is the last time I shall examine matters of the Inter-American jurisdiction. Neither memory nor reflections are closed down when you no longer hold a certain position. But it is the last time I shall be able to state my points of view as a judge regarding matters that call my attention and that I could not include word by word in an opinion or judgment without exceeding its mission and going beyond its dimension.

II. Advisory Opinion OC-20/2009

14. The requesting State has referred to two matters regarding the integration of the Inter-American Court under certain assumptions. Consequently, the idea is to revise its structure, related to the notion of "competent court". For the purposes of the litigations resolved by the Court, but also the organic and procedural matters under its competence, the concept of competent tribunal and its specific connections are established in Articles 8 and 55 of the American Convention and other precepts applicable to the hypothesis under analysis. That is

why I have stated that in this case the Court must study "itself": its ideal composition, in order to be consistent with the Convention and the principles that best serve its object and purpose.

A) Judges ad hoc

15. First, the appointment of an Judge ad hoc in matters originated in an individual complaint or accusation is questioned when there is not a member of the nationality of the respondent State in the regular composition of the Court, whether this absence is due to the ordinary integration of the Court or to the fact that the judge of the nationality of the respondent State has excused himself. The requesting State mentions the Court's interpretation of precepts 52(5) through 55(5) of the American Convention, and establishes its opinion on the corresponding interpretation.

16. In order to resolve this matter it is necessary to examine –as the Court does in OC-20-, both the precedents on the matter seen in many litigations, and the imperatives that can be derived from the principle of equality –rather than the term non-discrimination--, a balance between the parties, equity, development of the procedural legal standing of those who appear as parties in the proceedings, etcetera. All this is analyzed within the framework of the Inter-American prosecution regarding human rights, especially regarding the procedural condition of the parties.

17. It also responds to the reflections of the participants in the consultation regarding the position of an Judge ad hoc, normally a national of the State that appoints him –a rule that has had some exceptions-, as an expert of the legal system and the circumstances that prevail in the respondent State. This is particularly important in the case of the second question made by the requesting State, to which I shall refer below.

18. This examination on the figure of Judges ad hoc does not entail any "judgment on Judges ad hoc" who have exercised the Court's jurisdiction for many years. I have observed the meticulous and erudite performance of Judges ad hoc with whom I have had the privilege of sharing jurisdictional tasks. They have expressed their points of view freely and on solid grounds, and they have voted as they deemed appropriate, agreeing or disagreeing with the opinion of the majority. I am not issuing any judgment –and even less so do I mean any criticism— on the merits or performance of such judges. What is sub judice is the "figure of Judges ad hoc", not Judges ad hoc considered individually.

19. The criterion supported by the Court in OC-20/2009 differs from the one it has traditionally used when construing the corresponding paragraphs of Article 55 of the American Convention. This approach is not the result of traditionally inviting a State to appoint an Judge ad hoc for a contentious matter. It is the case when the Court focuses its analysis on the precept and revises its interpretation when responding to a State's consultation that refers precisely to that matter.

20. Some participants have affirmed that a change of criterion in this matter would imply the modification of a practice or a habit within the framework of the Inter-American system. Instead, in the Court's opinion this approach only implies a new interpretation of a precept in the Convention. Its powers, which are a characteristic of a jurisdictional body such as the Inter-

American Court, involve the possibility to reread a regulation, pursuant to the evolution of the subject matter and the change of circumstances, but always in the light of the object and purpose of the instrument where it appears, replacing the previous interpretation by another one that better responds to such ideas. A human rights treaty –the Court has affirmed—is a "living body"; judicial interpretation responds to this vitality.

21. Constitutional courts and international courts of a similar nature and characteristics of the Inter-American Court shall, each of them within the scope of their own jurisdiction, determine the course by construing regulations of a very ample scope and updating the meaning of the precepts. This should be the case in order to avoid subverting the essential orientation of the regulations, under the guise of interpreting them, making a detailed analysis and progress. Such is the case under the new interpretation, insofar as it responds more accurately and effectively to the principles that govern international litigations in matters of human rights, taking into account their characteristics, the background of the provisions under analysis, the development of the system, and other matters.

22. I agree with my colleagues that we are not facing any change of an international custom, strictu sensu –which would be a source of International Law--, because the Court does not establish any binding customs. Thus, there is no international custom or deviation therefrom. Instead, there has been a judicial use, a forensic use –in an ample sense--, which is now under review.

23. No use has the productive effectiveness of binding regulations resulting from true customs formed by the States through deeply rooted practices and the common and coinciding opinion regarding its juridical force. In other words, it is correct to establish a difference between an international custom that creates regulations of a general scope and the use of the tribunal for the resolution of its matters. It is clear that the tribunal can modify its uses, as it has done on several occasions to advance in its judicial performance in a manner that is consistent with the purposes it serves.

24. The Court has taken into consideration the strict meaning of the words used by the Convention and carefully considered its background and the origin of the institution of Judges ad hoc in the international scenario. From both points of view –literally and by origin— the conclusion that may be drawn is that Judges ad hoc are associated to interstate disputes, where efforts are made to solve them in conditions of procedural equality among the States in the dispute. They are "judges of the parties" –or more lightly, "appointed by the parties" in the litigation —well-known at different stages of the prosecution; their presence contributes to pari-passu conditions among the parties.

25. The conditions of interstate conflicts are not present in a litigation when an individual claim is filed. In this case, the conflict is not between two States. The respondent State is a party in a dispute with an allegedly affected individual – parties in a material sense-, and both the State and the Inter-American Commission, a party in a formal sense, participate in the proceedings. I shall not go into any further analysis of this matter, subject to different points of view albeit not hindering the situation under discussion.

26. It is evident that the respondent State's ability to appoint an Judge ad hoc to be a member of the judicial body that shall hear its own case places the State in a different procedural position –if not in an advantageous position— in relation to the situations of the alleged victim and the Inter-American Commission. In fact, there is no equality among the parties participating in the proceedings and as such what is permitted to one of the parties –the State- is not permitted to the others.

27. It would be different if the victim could appoint an Judge ad hoc to "reinforce" his position in the proceedings. However, this method to create a "balance" would not be desirable either; neither is it desirable to upset the equality of the parties by acknowledging that the defendant has the ability or power to appoint a judge.

28. There are other considerations to be taken into account. There is an additional piece of information regarding the Court's integration to hear a case: the person appointed does not go through the same election process as the permanent members of the court: he is a judge for a single case, appointed by the State to which the case refers.

29. Likewise, I am not persuaded by the argument, which I shall discuss further below when dealing with the second question made to the Court that an ad-hoc member provides his colleagues with elements of judgment to better understand the problem under debate and judgment. This suggests that the ad-hoc member would act as an expert, beyond any conflicting control. On the other hand, it ignores the idea that such judge is a third party regarding the parties, not an auxiliary body of the latter or of the court to analyze the evidence and arguments in dispute.

30. It would be useful to understand why the interpretation of Article 55 that is today being replaced by the Court's interpretation has been valid for so long. There are various points of view about this matter. On the one hand, it would be applicable to suppose that the best way to interpret these characteristics is an advisory opinion, where the general application of a rule included in a human rights treaty is discussed at length accurately and directly, instead of dealing with an incident within a specific proceeding on the violation of rights. I acknowledge that this argument is debatable.

31. On the other hand, it can also be assumed that in a previous stage of the development of the Inter-American jurisdiction it was convenient that the uses and reasonable interpretations –albeit not indisputable or unchangeable— of the Court could contribute to the evolution, firmness, and rooting of the system, considering the prevailing times and circumstances. Many doubts and much reluctance among the States had to be overcome –as well as among the actors of the civil society—and evidence had to be shown regarding the independence, impartiality, and good performance of the tribunal, which only serves the cause of justice through the preservation of human rights.

32. Did the presence of ad hoc judges actually contribute to the trust of the States, without causing any distrust of other players of the system? The former could see the performance of the Court "from the inside", adequately assessing how the court adopts them. An explanation of the institution of the ad hoc judge has been mentioned by a participant in the collective discussion

which is the basis of OC-20. Furthermore, the way the Inter-American jurisdiction was used during its establishment and initial development does not lead to the final acknowledgement of any "acquired rights" of the States during the consolidation stage.

33. In the end, the participation of an Judge ad hoc would be limited to the realm where it has originated: disputes among States. The legal system of the Inter-American Court of Justice –that hears this kind of litigations— has referred to this matter since it includes the possibility that the litigating States be understood –I shall not say represented— by the reassuring presence, perhaps, of a judge of its nationality, which would mean a "balancing" factor vis-à-vis the presence of a judge of the nationality of another disputing State. OC-20 states that the appointments of these judges "is restricted to contentious cases originating on interstate communications (Article 45 of the Convention), and that it is not possible to derive a similar right in favor of the States Parties in cases originated on individual petitions (Article 44 of the Convention)."

34. The Court has never received complaints from a State against another State. This assumption –established in the American Convention— has been purely hypothetical so far. The Inter-American Commission has presented the complaints actually filed and processed.

35. I consider that even in the so-called interstate cases it is worthwhile discussing about Judges ad hoc, even if lege ferenda. Some of the arguments that question their participation in so-called individual cases would result in their exclusion from the other category. In the end, the most reasonable solution would be that the court be formed by judges that are not of the same nationality as any of the parties. Thus, the court would be a third party outside and beyond the parties more clearly.

36. To conclude this part of my reasoning I would like to mention my own points of view – which I presented above as questions—publicly exposed from the beginning of my career as a judge of this Court. They have weighed more heavily in my spirit and they are still valid. In an article written over ten years ago, titled "The Inter-American Jurisdiction on Human Rights. Current Affairs and perspectives," published in the Mexican Magazine of Foreign Policy (Mexico, No. 54, June 1998, pp. 116-149) and reproduced in my book Juridical Studies (Mexico, Universidad Nacional Autónoma de México, Institute of Legal Research, 2000, pages 279 et seq.), I stated what I transcribe below, without modifying the terms in which the publication was made and keeping the corresponding footnotes.

37. "In the structure of the Court [I am hereby referring to the Inter-American Court of Human Rights] –as well as in the composition of other similar bodies—there are Judges ad hoc, called upon to participate next to the permanent judges when none of them is a national of the State that appears before the Court. There is material for future discussion here [FN62]. It is clear that in all cases judges shall be absolutely 'neutral' vis-à-vis matters to be heard by them. In other words, no judge shall rule on the basis of his national feelings, but on the regulations applicable to the case."

[FN62] This matter is related to the subject of a study by Alcalá-Zamora and Castillo Niceto "El antagonismo juzgador-partes: situaciones inmediatas y dudosas", Estudios de teoría general e historia del proceso (1945-1972), México, UNAM, Institute of Legal Research, 1974, V II, pages 239 and following. This distinguished jurist referred to the situation of the defending judge, characteristic of labor jurisdictions (pages 252 and 253), whose profile can be applied to similar figures in other jurisdictional systems.

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38. "However, the institution of Judges ad hoc seems to be based on a hypothesis that is not very consistent with that idea, namely, that it is essential –or at least convenient— that the court includes a judge of the nationality of the litigating State, maybe to increase -I shall not say guarantee since it would be excessive— the court's objectivity or, in a softer tone, to reinforce the court's knowledge of the circumstances of the State in question."

39. "There are well known arguments in favor and against figures in the proceedings placed between the parties and the judges, even though they participate as the latter. Conflicting expectations fall upon them: on one hand, the party's hope that its position shall be well considered by the judge; on the other, the demands of impartiality and objectivity inherent to the jurisdictional duty. [FN63]"

[FN63] See the interesting consideration made by a former ad hoc judge, Rigoberto Espinal Irías, regarding certain expectations of the IA Court HR, its permanent judges and the ad-hoc judge, in "Jurisdiction and functions of the Inter-American Court", in Navia Nieto (ed.), La Corte y el Sistema Interamericano de Derechos Humanos, San Jose, Costa Rica, Organization of American States, European Union, 1994, pages 117 and 118.

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40. "Of course –I said in the last paragraph of the text I am quoting-, the ethical and professional quality of Judges ad hoc allows for their correct handling of this uncomfortable antinomy and for performing their task accurately. This keeps alive the institution of this occasional judge. However, there is still a question: is it necessary? [FN64] If the question is asked by jurisdictional bodies, of a classist composition, for example, there are even more solid grounds in the case of judges who shall return to their own countries after having issued a judgment against it, and that based on that may generate mixed feelings among the judge's fellow countrymen."

[FN64] Faúndez Ledesma rejects the institution of the ad-hoc judge and considers it an "undesirable trace of arbitration". El sistema interamericano de protección de los derechos humanos. Aspectos Institucionales y procesales, San Jose, Costa Rica, Inter-American Institute of Human Rights, 1996, page 136.

B) National judges

41. The second matter presented by the Government of Argentina was stated in the following terms: “For those cases originated on an individual petition, should the judge of the nationality of the respondent State excuse himself from participating in the proceeding and decision of the case in order to guarantee a decision free from any possible bias or influence?” This no longer refers to Judges ad hoc (even though it does affect whoever is appointed in that capacity, if they are nationals of the respondent State), but to judges who normally form part of the court, empowered to hear any controversy and unconnected to the case in which their possible exclusion is being presented.

42. The Court has examined this matter in detail and unanimously concluded as follows: “the judge of the nationality of the respondent State shall not participate in hearing contentious cases originated on individual petitions.” The court has presented two possible interpretations or roads for the solution of this subject, which are included in the advisory opinion. Both options lead to the same conclusion, even when the method and reasoning to reach it are different.

43. One of them (paras. 73 and following) suggests that the matter shall be analyzed within the context of Article 55 of the American Convention, considered as a whole, which discusses both Judges ad hoc and national judges in general, according to which they would be excluded from participating in disputes promoted by individual communications, but not in interstate cases. The other possible interpretation or road of solution (paras. 79 et seq.) is based on the idea that Article 55(1) does not regulate the subject of national judges in cases originated on individual petitions. Consequently, the Court’s conclusion should be based on other grounds, taking into account that the national judge keeps his right to participate in the case of the State of his nationality. The good image of the court from the point of view of the “objective impartiality of the judge” along with the “assessment of justice served by the Court” becomes more important in the other reasoning.

44. As I did in the case of the Judges ad hoc, I leave aside the impartiality and integrity of the judges who have, as in my case, acted in matters regarding countries of which we are not national. In the communications received for reflection on OC-20, the majority opinion was neutral, and many times there was approval, regarding the participation of national judges, who are not appointed to hear a specific case, but for all litigations, and whose position does not come directly by the litigating State, but by the States parties to the American Convention, whose assessment of the candidates could not foresee any future individual controversy. Thus, we are not in a situation full of suspicions that can damage the performance and prestige of the Court.

45. It is also important to point out that any fears regarding any “biased” national judge, which is usually directed to the possible favoring of the State, could also refer –if there is subjective data: emotions and liking over reasons and objectivity— to the possible favoring of the other party. It would be disturbing to hear that a State refers to the national judge as “my judge or our judge”, but along the same line it would not be reassuring for the counterpart to refer to the judge in those terms. It is obvious that when a contentious claim is filed, the attention of the national observers, full of expectations, is addressed mainly to the judge of their nationality. We often hear the question: is there a judge of that nationality on this case?

46. Besides highlighting the differences between the election of permanent judges and the appointment of ad hoc judges, those who defend their participation have frequently stated that national judges know the conditions in which the violations of the rights occurred as well as the domestic juridical order better than their colleagues. I have already affirmed, and I reiterate it here, that the assignment of the judge differs radically from that of an expert. If the Court wishes to be further informed about matters that it does not know, it shall require the presence of experts, not turn a member of the tribunal into an expert, whose explanations –offered during the private deliberation of the judges— would not be heard and analyzed under the principle of the presence of both parties.

47. Additionally, if the direct knowledge of a certain national reality or a specific domestic legal code by the Court as a whole or at least by one of its members was essential, the court would not act in a large number of matters, since it only has seven members, of that many nationalities, and that contentious cases may correspond to any of the twenty-one States that have accepted the contentious jurisdiction of the Court.

48. As a Mexican, I have had to rule on my own participation in cases regarding Mexico. They have not been that frequent. They are starting to be so. At first there were statements about provisional measures, whose examination I also made. Then complaints were filed. It is natural that they were filed in the past few years, taking into account the date of admission –a wise admission by the way— of the contentious jurisdiction of the Inter-American Court by Mexico, which occurred a long time after the other States of Latin America had made that acknowledgment. I was only part of the Court in the first litigation regarding Mexico in 2004, which did not reach a judgment on merits. I based my decision on the unquestioned opinion the Court itself had issued in this regard.

49. As of that case I have checked the subject, not only regarding litigations in which there could be, albeit remotely, any personal knowledge of the matter or the parties, or any former statement of individual points of view. In such cases there is no room for doubt. One must disqualify oneself from hearing the case. My private question –but the analysis of the subject could and should be shared— was based on the nationality, without any other relation between the judge and the case.

50. Shall a national judge participate in hearing a matter that refers to the respondent State of his nationality or to victims that are also –more frequently than not— nationals of that State? Unlike the members of the Inter-American Commission, do they have the right to do so? And if they do, is it convenient that they exercise it when it is not what the doctrine has called a “right of obligatory exercise”? Does it benefit justice, is it useful for the court, does it contribute to the good image –absolutely necessary: this is a Court!— of the body that serves justice? Does it entail progress or does it jeopardize it? Can there be –but most importantly can it be believed that there is— that complete “neutrality” of an individual with regard to his country, as with regard to another?

51. In my previous discussion I did not refer to supplementary considerations nor do I do so now; they are not useful grounds to make a decision about this matter. I have mentioned mere interest –all too natural— in participating in national cases, based on their importance, their

characteristics, or the mere nationality of the judge. However, these personal reasons would not be enough to justify a decision with any judicial significance. I also obviously avoided referring to the purpose of judging the matters of a country at an international court to express what should be said and defended at the national court.

52. Since May 7, 2007, that is, almost a year and a half ago, I have called on my nationality – without detriment to other factors of disqualification, when they seemed to be present— not to hear matters regarding Mexico. Based on that disqualification, I have refused to hear cases of the same origin on several occasions; to that end I submitted the corresponding briefs: May 4, 2008, June 16, 2009, August 28, 2009, and September 1, 2009. The court ruled favorably on my requests.

53. I do not want to reproduce here the texts included in my reasoning regarding this matter, which is one of the subjects covered in the request of opinion filed by the Government of Argentina. I shall focus on the most representative and explicit paragraphs on my conviction as a judge and my consistent personal position –which is not only mine; other judges have proceeded in the same way— regarding the subject under analysis and on which the Court is issuing OC-20/2009.

54. In my communication of May 7, 2007 to the Vice-President of the Inter-American Court, [FN65] I stated the following, inter alia: "As you are aware, Article 55(1) of the American Convention on Human Rights establishes that '[i]f 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.' Therefore, the ability to hear a case is a right, not an obligation, of the judge who is a national of the respondent State."

[FN65] Communication where I inform of my disqualification in the case of Castañeda Gutman v. Mexico.

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55. In the same brief I argued the following: "I am Mexican. This fact alone does not exclude me from being part of the Court in a case that refers to the State of which I am a national. However, I deem it appropriate to weigh up this circumstance from the standpoint of the Court's best performance. I think it is better for the Court that judges abstain from participating when they are nationals of a State party to the litigation. The disqualification of a national judge (in all cases, but even more so when it is the President of the Court) does not involve any problem whatsoever for the Inter-American jurisdiction. On the contrary, it could be convenient that judges of other nationalities form part of the Court. I shall recall that we are not dealing with an interstate case, but with a litigation started upon request of an individual and taken before the Court by the Inter-American Commission, not by another State in the position of plaintiff."

56. I discussed this matter in further detail in my brief of disqualification of May 4, 2008, [FN66] where I expressly requested the point of view of the Inter-American Court and its President. I pointed out some of the expressions of Article 55(1) of the Convention: "the national judge 'shall retain his right' (to be part of the Court), it does not state it shall take part therein.

The second paragraph indicates (that the State): 'may appoint', it does not state that it must appoint (in fact, respondent States have abstained from appointing an Judge ad hoc in several cases). Thus, it is a power that the Convention grants both to the national judge of the litigating State as well as to the latter, in its respective hypotheses."

[FN66] Brief of disqualification in the case of Radilla Pacheco v. Mexico.

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57. I immediately recalled that there is an opinion that these provisions refer to the so-called interstate cases. I added that even when the Court had not resorted to that restrictive interpretation, it "does not mean it cannot revise that issue –as it has done in other subjects, and I hope it shall continue to do so whenever necessary. The Court may adopt the orientations and decisions it considers most adequate for the evolution of its jurisprudence, in favor of justice and without affecting security."

58. I noted that at that time I was not referring to the institution of the Judge ad hoc, although I acknowledged the impact of my considerations on a national judge. I affirmed: "If the national judge can, under the protection of Article 55(1), analyze the appropriateness of participating or abstaining from doing so –that is, demand or not his right, not his obligation--, it is all too natural to question the advantages and disadvantages of such participation for the Inter-American jurisdiction and for the purposes it serves; of course, such question is not related to any of the judge's strictly personal preferences. It refers to matters that concern an institution and the function it fulfills, not an individual and his increased or decreased willingness to participate in hearing a specific case."

59. Then I referred to the conditions of independence and impartiality of the judge, which are co-substantial to the competent tribunal and the condition of the due process of law. I acknowledged the possibility that "a judge should be absolutely impartial in his analysis and decision of a litigation against the State of his nationality, where there is usually also another national of the same State, i.e. he should have no prior opinion or link of any type whatsoever – of any nature, whichever it could be— that could influence his decision."

60. However, I observed: "Even though it is possible that the judge may be impartial and neutral, and keep absolute distance from the subject and the parties involved in the conflict, it is not always possible for those observing the dispute and awaiting the decision to consider that there is –in the judge's true conscience— a complete neutrality, which is a condition of impartiality. In this sense, it is important to recall, however, that good performance of jurisdictional duties is not only based on the integrity and capacity of the judge –which are necessary, of course-, but also on the assessment made of them. To be and also to seem."

61. I concluded by stating as in other parts of this opinion: "the judge examining this matter in detail and calmly shall answer the question I made at the beginning of this communication. Taking into account that the Convention allows the judge to exercise or not his right to participate, what advantages and disadvantages can be offered by the participation of a judge in cases referring to the State of which he is a national and to the individual –probably a

compatriot— claiming for and awaiting justice? What elements are present in one sense and in the other? Which should be the option in favor of justice, not of the personal or professional preference of the judge facing the question and the corresponding dilemma? I think the reasons to abstain from participating are stronger and more persuasive than those to participate."

62. Upon deciding this matter, the Court expressed its position in a subject that involves a deep analysis of the Court itself and the best way to fulfill its high mission. I have already mentioned the conclusion, which I share: "the judge who is a national of the respondent State shall not participate in hearing individual cases." As indicated, the court offered two roads to reach this conclusion: on the one hand, it points out the grounds strictly related to Article 55, construed from a comprehensive perspective; on the other hand, the motives or, even better, the reasons to exclude the national judge from hearing a litigation are made evident.

63. Would it be excessive to say that this final vision involves a classic principle of the due process of law: "nobody should be a judge of his own case." The national judge is not a judge in "his own" dispute, but he is a judge in a controversy that in some way concerns him as a member of a specific country. In this sense –and only in this sense— it is not alien to him. This position is arguable. I do not insist on this appreciation –not necessarily mine, but of some observers-, which may be shared or rejected. Whichever the position taken by each judge of the Court as a basis for his interpretation, the most important aspect is that they all reached the same conclusion, whose closeness I noticed some time ago, as indicated above.

III. Farewell to the Court: Final consideration

64. I have referred to a key issue of jurisdiction, and even more so, of justice in further detail than usual for an individual opinion: the judge, towards who the main actors, the defendants, address their claims and expectations. The Inter-American Court, which is a great project of humanism and justice, of a distinct protectionist nature, shall continue developing its service –directly and, especially indirectly: due to the importance of its decisions, with their manifold impact— to this universe of American compatriots.

65. This Court is part, with relevance and dignity, of the Inter-American protection system, which is always undergoing a constructive process and in an on-duty attitude. This is due to the development of the system, which started a long time ago and shall continue for the years to come. It is also due to the fact that any recess, any rest or neglect shall engage the place gained, which is never definitely safe. The rule of law –and the courts guaranteeing it— is under a constant, notorious, or stealthy siege by the authoritarian power.

66. I firmly believe that the Inter-American Court, already three decades old, has successfully served the cause for which it was conceived. It has done so with good will and hard work, opening roads and suggesting horizons. It has been able to resist and build, both in favorable conditions and under adverse circumstances. Among the latter it has evidently suffered severe budgetary restrictions for its work –unique within the realm of international courts— although it has carried out its jurisdictional task come hell or high water.

67. The Court can offer good results encompassing all its stages, from the establishment and initial development to consolidation. No doubt it is an independent jurisdictional body. There have been no exceptions whatsoever in fulfilling this duty, which is a matter of principle for the administration of justice. On the other hand, it is a permanent tribunal, because exercising its jurisdiction is constant, even though the college of judges does not formally meet on a daily basis. It has known how to renew itself without losing its way, how to make plausible interpretations without incurring in adventures, how to combine the demands of reason with the creative impulse of the imagination, how to justify its condition as a court of law without ignoring the circumstances in which it acts and the need to open a space for human rights and consolidate the rule of democracy. Throughout these years –a formidable chapter in the history of the Inter-American Human Rights Law— we can observe a growing acceptance of the Court's jurisprudence in domestic legal systems. Of course, we have to expect, seek, and demand more, much more.

68. When the Court was created it was said that it should reduce the distance –sometimes a very big distance— between liberty and justice and actual conditions, which resists and often hinders the efforts of progress. The Court must be very active in that sense, as it has in fact been working closely to other restructuring agents.

69. In recent years, intensely carrying out its jurisdiction, the Court resolved almost sixty-five per cent of all the litigations that came before it in thirty years, it reduced to less than half the time to deal with contentious matters, it introduced the pattern of holding extraordinary sessions outside its headquarters –it went to twelve American countries, besides Costa Rica-, it modified the structure and extension of its judgments. It did all this in accordance with new regulations and judicial practices, increasing access to justice and keeping the quality of jurisprudence. In those same years there were other plausible novelties that strengthened this institution and made the Court move forward in the international protection of human rights. The dominant sign has been progress.

70. Of course, the work of recent times has a clear and firm foundation: the work carried out by previous generations of judges, since the very first generation that started the task in 1979. I admire –I have said it in numerous forums many times and I reiterate it here— the work done and the respectability guaranteed by those in charge of them. There are landmarks that we acknowledge gratefully. Suffice to mention the brilliant example of Velásquez Rodríguez, among the best known and most frequently invoked cases.

71. The future of the Court, regarding which many can make predictions, depends on the future of a series of data of our everyday life, with deep historical roots. Changes of concepts, policies, and practices about democracy, human rights, and communications between national and international legal systems, safety, domestic jurisdictions, the currents and trends of globalization are centered on such future. There are different scenarios for these changes that shall influence the performance and strength of the Inter-American jurisdiction: the world, America, the States of this hemisphere.

72. The so-called "agenda" of the Inter-American jurisdiction includes many on-going subjects, none completed: universalization of rights and their jurisdictions –one long walk

towards an elusive fate: “rights and courts for all”; the role of public opinion –even more so: the culture of human rights; the condition of the Court as a tribunal of paradigmatic cases, creator of criteria of a great scope and progressive definitions that encourage the reconstruction of national regulations in the light of international regulations; and ample domestic acceptance of such criteria and definitions; the structural strengthening setting out the necessary consistency between the established purposes and the means available; specific compliance with the orders of a tribunal created by the sovereign decision of the States, offering collective guarantees for the effective exercise of rights.

73. The system is constantly in transition: in transit towards its high objectives, a dynamic building and rebuilding, perfecting itself along the way. The success of any transition involves diagnosis, self-criticism, definition, serenity, perseverance, and hard work. There are pending tasks on the horizon and renewed profiles for the actors of the Inter-American system, which are not only –and I have always insisted on this— the Commission and the Court. The system is founded on deep ideological coincidences about human beings, society, and the State; it flows on an adequate and sufficient corpus juris, and operates following the behavior of committed and diligent actors, all on the same road –with their own variations—and towards the same goal.

74. It is convenient to redefine the work of the States at these times of tension; to redefine in order to advance, not to go back. It would be correct to reflect on the strategy within the proceeding, if it is agreed that the lofty purpose of any democratic state is the protection of human rights. Likewise, it is appropriate to reflect on the role of the Organization of American States, which has proclaimed the priority of democracy and human rights and that could promote the rooting of that priority even further and improve the means with which they are served by the Inter-American institutions, modestly equipped. Of course, the Organization uses the resources provided by its members; this is the main dimension of its strength, which sets the direction and the framework of its projects. Without such resources –which should arrive substantially and decisively from the Continent and not from other sources- the political will and the effective progress seem somehow fragile.

75. It would not hurt to examine the renewed position of civil society and its agents, the non-governmental organizations, former and wonderful militants of this battle, and the new fighters that land there whose commitment is so necessary –this has been a live experience of the Court, in recent years— to expand access to justice and multiply the benefits of its jurisdiction: the ombudsman, public defense, social communicators, the academia. “Critical awareness” is essential and much healthier to the extent that it favors access to justice, carefully and objectively examining the “state of the matter”, operating to strengthen the system, distinguishing between what is circumstantial and essential, not giving up the niches gained for human rights, and striving for new grounds in the progress of this cause.

76. Insofar as the jurisdictional service is seen by a growing number of individuals –both through the media and by holding sessions in different capitals of the Americas-, the effectiveness of “publicity”, a principle of the proceedings and stimulus for the respect of the rights of human beings, increases. Democratic control –of domestic powers and international justice-, is also exercised through this means; it serves the pedagogic function of the human rights jurisdiction and progress is encouraged by public opinion.

77. The revision we are talking about engages the Inter-American Court above all. A good judge starts at home. This Court has promoted the evolution of the system, inasmuch as it corresponds to it. It has also collaborated with other forces and instances, both formal and informal ones, with great openness and evident solidarity. Evidence of this is the renewal of the rules of procedure –in an unusual process of open consultations that we offered before the Committee on Juridical and Political Affairs of the OAS some years ago. Along the same line is the renewal of judicial practices –at one point resisted and better understood every day-, which allows the Court to make changes once it has discussed them, presented them and complied with them, despite the meager resources available and the stones in the road.

78. The spirit of renewal of the Court does not mean that the Court has strayed from its past or has been reluctant to progress. That would be naive. It acknowledges the past and builds on it. And it understands the need for change. It accepts it and encourages it along its entire horizon: regulations, practices, and jurisprudence. It seems to me that we should avoid that the pedagogic mission of the jurisdiction, which is not only healthy but also necessary, could move toward "justice as a spectacle". Judges are not actors on the scene, but a factor of justice. Exercising their duties requires consideration, rigor, austerity, efforts, intellectual humbleness, which are all judicial characteristics and virtues, adverse to authoritarianism, vanity, satisfaction, prominence, intolerance.

79. Judicial performance should not be taken for an academic exercise, which has made and is currently making excellent contributions to develop the system. The jurisdictional task faces considerable problems that shall be resolved firmly and intelligently, seeking the effective protection of the individual and the authentic progress of the protection system at all times. Firm compliance with the jurisdictional task, without showing off, contributes to the achievement of the ideals that justify the existence and direct the tasks of a jurisdictional body.

80. The Inter-American court rigorously supervises the exercise of its own jurisdiction. It is not self-attributing jurisdictional powers that have not been granted to it –such attribution would jeopardize the legal certainty and, in the end, the prestige and effectiveness of the system— nor is it a forum for political confrontation among the forces looking for a country's power, which may and shall settle their differences through internal democratic processes.

81. The court's judgments do not entail any qualification of the political process. Likewise, they do not ignore the facts that violate human rights. They do no refer to the political process by making political proclamations that do not concern it, but instead it issues judgments about such facts based on the international legal system from which the Court receives its jurisdiction. This is a system that the States accept in a sovereign manner when making their commitments and accepting the sources of responsibility -and their juridical consequences- that appear in the Inter-American human rights corpus juris.

82. The Inter-American community shall, objectively and constantly, supervise the court's performance. Critical awareness, an informed and weighed judgment, a lucid analysis in good faith are all necessary factors for an adequate performance of this jurisdictional body, as well as

for the good exercise of any domestic judicial instance that serves the purposes of a democratic society.

83. The international court –as well as domestic constitutional judges— is called to fulfill a first-order duty in the emerging society and the State it generates. This duty, both growing and complex, converges to integrate new niches to exercise the power of democracy.

84. As creators of a jurisprudence of values, international human rights judges shall understand and appreciate the enormous importance of their decisions, called upon to guide domestic legal systems through the growing national acceptance of International Human Rights Law; to exercise reason and avoid any "judicial adventure" that would jeopardize safety and justice; to warn that the ruling issued in each case contributes to the strength and dignity of the system as a whole, but it c can undermine it if it is inopportune; in synthesis, subordinating their actions to the austere compliance with their task. All this allows international judges to justify their mission and, therefore, consolidate their presence.

85. I acknowledge that this opinion which agrees with OC-20/2009 –the last decision of the Inter-American Court to which I shall add an opinion of this nature— is extensive with regard to its natural limitations: form and content. However, as previously stated and reiterated here, I could argue in my favor the circumstances in which I am issuing it: after twelve years of jurisdictional activity. And especially the fact that these reflections revolve, in the end, around what we, my colleagues and I, have been and are: judges of an international court, and to what the international court has been, is, and shall be as a guarantor of justice, sometimes the last and sometimes on its own, operating precisely where our main interests lie: the effective validity of human rights.

86. I do not forget the question that some litigating attorneys make to the alleged victims appearing before it in a hearing: "What do you expect from this court?" Similarly, I do not forget the frequent answer. And especially what they both mean for a judge and the college of superior judges that hears and resolves the vehement claim for justice.

Sergio García-Ramírez
Judge

Pablo Saavedra-Alessandri
Secretary