Ministry of Foreign Affairs
Republic of Colombia
Human Rights and International Humanitarian Law Office

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Bogotá, D.C., January 26, 2009

To the Secretary of the
Inter-American Court of Human Rights
PABLO SAAVEDRA ALESSANDRI
San José de Costa Rica

Dear Mr. Secretary,

We have the honor of addressing you on behalf of the Government of Colombia in response to the invitation of the Honorable Inter-American Court of Human Rights (hereinafter "the Court" or "the IA Court HR") to submit comments regarding the request for an advisory opinion filed by the Argentine Republic on the "interpretation of Article 55 of the American Convention on Human Rights", especially on "the *ad hoc* judge and the equality of arms in the proceedings before the Inter-American Court in the context of a case arising from an individual petition" as well as concerning "the nationality of the judges [of the Court] and the right to an independent and impartial judge".

In this connection, please find attached the comments by the Government of Colombia regarding the issues raised for consultation in order to nurture the opinion of the Court in that regard.

A. The *ad hoc* judge and equality of arms in the proceedings before the Court in the context of a case arising from an individual petition.

The Argentine Republic requested the Court to issue an opinion regarding the interpretation of Article 55(3) of the American Convention on Human Rights (hereinafter "the Convention" or "the ACHR") insofar as it considers that the established practice of the Court in that regard should be revisited in order to "limit the right of the States to appoint an *ad hoc* judge to those cases in which the application filed before the Court arises from an inter-State petition".

Thus, specifically, the question posed to the Honorable Court is as follows: *"According to the provisions of Article 55(3) of the American Convention on Human Rights, should the possibility of appointing an 'ad hoc' judge be limited to those cases in which the application filed before the Court arises from an inter-State petition?"*

Even though the interpretation of Article 55 has been requested and the Court has grounded the right of the States to appoint an *ad hoc* Judge in cases arising from individual petitions on said provision, the Government of Colombia considers that this practice has gained empirical and legal autonomy, crystallizing as a regional custom of international law, for the reasons stated below.

- The right to an *ad hoc* Judge: an Inter-American customary rule.

As a result of the codification process that international law has undergone since the 20th century, international treaties and conventions are usually regarded as the preferred source of international law. However, this trend disregards the content of Article 38 of the Statute of the International Court of Justice (hereinafter "the ICJ Statute"), which specifies the sources of international law and establishes the nature of each one of them. Said provision reads as follows:

"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

This provision has been recognized by the most eminent jusinternationalists[1] as an authoritative statement of the sources of international law.[2] Furthermore, it has been noted that, in a strict sense, the sources of international law are those contained in paragraphs (a), (b) and (c) of the Article transcribed above. As regards judicial decisions, even though Article 38 refers to them as "subsidiary means," there is debate among legal experts about their status as formal sources of international law,[3] as opposed to the general view on the teachings of publicists, the subsidiary status of which is widely accepted.[4]

Thus, the regulatory framework of the Inter-American System for the Protection of Human Rights is mainly composed of human rights treaties, conventions and protocols as well as the of Inter-American custom developed by inter-State practice and the practice of the Inter-American System itself, and by the general principles of law and, subsidiarily, by the case law and opinions of the Inter-American Court and the Commission.

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[1] Pastor Ridruejo, José A. *Curso de Derecho Internacional Público y Organizaciones Internacionales* (Course in Public International Law and International Organizations). Madrid: Tecnos, 2003, p. 65; Brownlie, Ian. *Principles of Public International Law*. New York: Oxford University Press, Sixth Edition, 2003, pp. 4 and 5; Shaw, M. *International Law*, Cambridge: Cambridge University Press, 2003, pp. 66 and 67.

[2] However, Article 38 is not an exhaustive list of the sources of international law.

[3] For example, to Brownlie "[j]udicial decisions are not strictly speaking a formal source" (Brownlie Ian. Principles of Public International Law. New York: Oxford University Press, Sixth Edition, 2003, p. 19). Similarly, Shaw maintains that judicial decisions are of a subsidiary character. (Shaw M. *International Law*, Cambridge: Cambridge University Press, 2003, p. 103). However, Scelle, Giraud and Pastor consider case law to be a formal source of international law (Scelle, G. *Tours de Droit International Public*. Paris, 1948, p. 596, and Giraud E. *Le Droit International Public et la Politique*. In R. es C., III, vol. 110, 1963, quoted by Pastor Ridruejo, José A. *Curso de Derecho Internacional Público y Organizaciones Internacionales*. Madrid: Tecnos, 2003, p. 82).

[4] Diez de Velasco, Manuel. *Instituciones de Derecho Internacional Público* (Institutions of Public International Law). Madrid: Tecnos, 2005, p. 126.

Within this framework, the Inter-American Court has grounded the appointment of an *ad hoc* Judge in cases arising from an application filed by the ICHR on Article 55(2) and 55(3) of the Convention[5] as well as on its Statute (Article 10)[6] and Rules of Procedure (Article 18(1)),[7] in the event none of the judges called upon to hear a case is a national of the defendant State.

However, the Government of Colombia considers that the appointment of an *ad hoc* judge at the request of the Inter-American Court in cases arising from individual petitions -in addition to being grounded on the provisions contained in the ACHR itself, according to the interpretation of the Court- constitutes, at present, an autonomous procedural right of the States Parties to the Convention, which has emerged as a customary international rule of regional character.[8]

This customary rule meets the requirements derived from Article 38(1)(b) of the ICJ Statute, namely the *usus o diuturnitas* (the objective or material element) and the *opinio juris sive necessitatis* (the subjective or mental element).

The *usus* can be found in the IA Court HR's established practice of requesting the State to appoint an *ad hoc* Judge, as well as in the appointment of such judge or the lack of express state opposition in the different cases. This way, at least in the following cases, the Court requested the States to notify the name of the *ad hoc*

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[5] American Convention on Human Rights. "Article 55 II 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. II 2. If one of the judges called upon to hear a case should be a national of one of the States Parties to the case, any other State Party in the case may appoint a person of its choice to serve on the Court as an *ad hoc* judge. II 3. If among the judges called upon to hear a case none is a national of any of the States Parties to the case, each of the latter may appoint an *ad hoc* judge. II 4. An *ad hoc* judge shall possess the qualifications indicated in Article 52. II 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." (Emphasis added).

[6] Rules of Procedure [sic] of the IA Court. "Article 10. *Ad Hoc* Judges. II 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. II 2. If one of the judges called upon to hear a case is a national of one of the States Parties to the case, any other State Party to the case may appoint a person to serve on the Court as an *ad hoc* judge. II 3. If among the judges called upon to hear a case, none is a national of the States Parties to the case, each of the latter may appoint an *ad hoc* judge. Should several States have the same interest in the case, they shall be regarded as a single party for purposes of the above provisions. II [...]" (Emphasis added)

[7] "Section 18. Judges *Ad Hoc*. II 1. In a case arising under Article 55(2) and 55(3) of the Convention and Article 10(2) and 10(3) of the Statute, the President, acting through the Secretariat, shall inform the States referred to in those provisions of their right to appoint a Judge *ad hoc* within 30 days of notification of the application. II" (Emphasis added).

[8] It should be noted that the International Court of Justice has recognized that the existence of a regional custom is possible. Specifically, in the Case Regarding the Right to Asylum, it recognized the possibility of the existence of an Inter-American international custom (ICJ. *Asylum Case* (Colombia/ Perú) Judgment of November 20th, 1950).

Judge, which appointment is understood to be a procedural right of the States Parties to the Convention:

1. Case of Valle-Jaramillo. Judgment of November 27, 2008. Series C No. 192.
2. Case of Ticona-Estada. Judgment of November 27, 2008. Series C No. 191.
3. Case of Tiu-Tojín. Judgment of November 26, 2008. Series C No. 190.
4. Case of Bayarri. Judgment of October 30, 2008. Series C No. 187.
5. Case of Heliodoro-Portugal. Judgment of August 12, 2008. Series C No. 186.
6. Case of Apitz-Barbera et al. Judgment of August 5, 2008. Series C No. 182.
7. Case of Salvador-Chiriboga. Judgment of May 6, 2008 Series C No. 182 [sic].
8. Case of the Saramaka People. Judgment of November 28, 2007 Series C No. 172.
9. Case of Albán Cornejo. Judgment of November 22, 2007. Series C No. 171.
10. Case of Chaparro-Álvarez. Judgment of November 21, 2007. Series C No. 170.
11. Case of Boyce et al. Judgment of November 20, 2007. Series C No. 169.
12. Case of García-Prieto. Judgment of November 20, 2007. Series C No. 168.
13. Case of Zambrano-Vélez. Judgment of July 4, 2007. Series C No. 166.
14. Case of Escué-Zapata. Judgment of July 4, 2007. Series C No. 165.
15. Case of the Rochela Massacre. Judgment of May 11, 2007. Series C No. 163.
16. Case of La Cantuta. Judgment of November 29, 2006. Series C No. 162.
17. Case of Vargas-Areco. Judgment of September 26, 2006. Series C No. 155.
18. Case of Goiburú et al. Judgment of September 22, 2006. Series C No. 153.
19. Case of Servellón-García. Judgment of September 21, 2006. Series C No. 152.
20. Case of the Ituango Massacres. Judgment of July 1, 2006 Series C No. 148.
21. Case of the Sawhoyamaxa Indigenous Community. Judgment of March 29, 2006. Series C No. 146.
22. Case of Acevedo-Jaramillo et al. Judgment of February 7, 2006. Series C No. 144.
23. Case of López-Álvarez. Judgment of February 1, 2006. Series C No. 141.
24. Case of the Pueblo Bello Massacre. Judgment of January 31, 2006. Series C No. 140.
25. Case of García-Asto and Ramírez-Rojas. Judgment of November 25, 2005. Series C No. 137.
26. Case of Palamara-Iribarne. Judgment of November 22, 2005. Series C No. 135.
27. Case of the Mapiripán Massacre. Judgment of September 15, 2005. Series C No. 134.
28. Case of Raxcacó-Reyes. Judgment of September 15, 2005. Series C No. 133.
29. Case of Gutiérrez-Soler. Judgment of September 12, 2005 Series C No. 132.
30. Case of the Girls Yean and Bosico. Judgment of September 8, 2005. Series C No. 130.
31. Case of Acosta-Calderón. Judgment of June 24, 2005. Series C No. 129.
32. Case of Yatama. Judgment of June 23, 2005. Series C No. 127.
33. Case of Fermín Ramírez. Judgment of June 20, 2005. Series C No. 126.
34. Case of the Yakye Axa Indigenous Community. Judgment of June 17, 2005. Series C No. 125.
35. Case of the Moiwana Community. Judgment of June 15, 2005. Series C No. 124.
36. Case of Caesar. Judgment of March 11, 2005. Series C No. 123.
37. Case of Serrano-Cruz Sisters. Judgment of March 1, 2005. Series C No. 120.

38. Case of Lori Berenson-Mejía. Judgment of November 25, 2004. Series C No. 119.
39. Case of Carpio-Nicolle et al. Judgment of November 22, 2004. Series C No. 117.
40. Case of De la Cruz-Flores. Judgment of November 18, 2004. Series C No. 115.
41. Case of Tibi. Judgment of September 7, 2004. Series C No. 114.
42. Case of the "Juvenile Reeducation Institute". Judgment of September 2, 2004. Series C No. 112.
43. Case of Ricardo Canese. Judgment of August 31, 2004. Series C No. 111.
44. Case of the Gómez-Paquiyauri Brothers. Judgment of July 8, 2004. Series C No. 110.
45. Case of the 19 Tradesmen. Judgment of July 5, 2004. Series C No. 109.
46. Case of Herrera-Ulloa. Judgment of July 2, 2004. Series C No. 107.
47. Case of Molina-Theissen. Judgment of May 4, 2004. Series C No. 106.
48. Case of the Plan de Sánchez Massacre. Judgment of April 29, 2004. Series C No. 105.
49. Case of Maritza Urrutia. Judgment of November 27, 2003. Series C No. 103.
50. Case of Myrna Mack-Chang. Judgment of November 25, 2003. Series C No. 101.
51. Case of Bulacio. Judgment of September 18, 2003. Series C No. 100.
52. Case of Juan Humberto Sánchez. Judgment of June 7, 2003. Series C No. 99.
53. Case of the “Five Pensioners”. Judgment of February 28, 2003. Series C No. 98.
54. Case of Cantos. Judgment of November 28, 2002. Series C No. 97.
55. Case of the 19 Tradesmen. Preliminary Objection. Judgment of June 12, 2002. Series C No. 93. Case of Las Palmeras. Judgment of December 6, 2001. Series C No. 90. Para.
56. Case of Cantos. Preliminary Objections. Judgment of September 7, 2001. Series C No. 85.
57. Case of Constantine et al. Preliminary Objections. Judgment of September 1, 2001. Series C No. 82.
58. Case of Benjamin et al. Preliminary Objections. Judgment of September 1, 2001. Series C No. 81.
59. Case of Hilaire. Preliminary Objections. Judgment of September 1, 2001. Series C No. 80.
60. Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of August 31, 2001. Series C No. 79.
61. Case of Barrios Altos. Judgment March 14, 2001. Series C No. 75.
62. Case of Baena-Ricardo et al. Judgment of February 2, 2001. Series C No. 72.
63. Case of Cantoral-Benavides. Judgment of August 18, 2000. Series C No. 69.
64. Case of Durand and Ugarte. Judgment of August 16, 2000. Series C No. 68.
65. Case of Las Palmeras. Preliminary Objections. Judgment of February 4, 2000. Series C No. 67.
66. Case of the Mayagna (Sumo) Awas Tingni Community. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66.
67. Case of Trujillo-Oroza. Judgment of January 26, 2000. Series C No. 64.
68. Case of the Constitutional Court. Competence. Judgment of September 24, 1999. Series C No. 55.
69. Case of Ivcher-Bronstein. Competence. Judgment of September 24, 1999. Series C No. 54.
70. Case of Castillo-Petruzzi et al. Judgment of May 30, 1999. Series C No. 52.

71. Case of Durand and Ugarte. Preliminary Objections. Judgment of May 28, 1999. Series C No. 50.
72. Case of Cesti-Hurtado. Preliminary Objections. Judgment of January 26, 1999. Series C No. 49.
73. Case of Blake. Reparations (Art. 63(1) of the American Convention on Human Rights). Judgment of January 22, 1999. Series C No. 48.
74. Case of Castillo-Petruzzi et al. Preliminary Objections. Judgment of September 4, 1998. Series C No. 41.
75. Case of Cantoral-Benavides. Preliminary Objections. Judgment of September 3, 1998. Series C No. 40.
76. Case of the "White Van" (Paniagua-Morales et al.). Judgment of March 8, 1998. Series C No. 37.
77. Case of Blake. Judgment of January 24, 1998. Series C No. 36.
78. Case of Suárez-Rosero. Judgment of November 12, 1997. Series C No. 35.
79. Case of the "Street Children" (Villagrán-Morales et al.). Preliminary Objections. Judgment of September 11, 1997. Series C No. 32.
80. Case of Genie-Lacayo. Judgment of January 29, 1997. Series C No. 30.
81. Case of Neira-Alegría et al. Reparations (Art. 63(1) of the American Convention on Human Rights). Judgment of September 19, 1996. Series C No. 29.
82. Case of Blake. Preliminary Objections. Judgment of July 2, 1996. Series C No. 27.
83. Case of Garrido and Baigorria. Judgment of February 2, 1996. Series C No. 26.
84. Case of Loayza-Tamayo. Preliminary Objections. Judgment of January 31, 1996. Series C No. 25.
85. Case of Castillo-Páez. Preliminary Objections. Judgment of January 30, 1996. Series C No. 24.
86. Case of the "White Van" (Paniagua-Morales et al.). Preliminary Objections. Judgment of January 25, 1996. Series C No. 23.
87. Case of Maqueda. Order of January 17, 1995. Series C No. 18.
88. Case of Gangaram-Panday. Judgment of January 21, 1994. Series C No. 16.
89. Case of Cayara. Preliminary Objections. Judgment of February 3, 1993. Series C No. 14.
90. Case of Neira-Alegría et al. Preliminary Objections. Judgment of December 11, 1991. Series C No. 13.
91. Case of Gangaram-Panday. Preliminary Objections. Judgment of December 4, 1991. Series C No. 12.
92. Case of Aloeboetoe et al. Judgment of December 4, 1991. Series C No. 11.
93. Case of Godínez-Cruz. Preliminary Objections. Judgment of June 26, 1987. Series C No. 3.
94. Case of Fairén-Garbi and Solís-Corrales. Preliminary Objections. Judgment of June 26, 1987. Series C No. 2.
95. Case of Caso Velásquez-Rodríguez. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1.

Thus, if we examine the practice of the Court in contentious cases, it is apparent that the Court has repeatedly and consistently followed this practice –year in, year out since 1991- in cases arising from individual petitions; that is, it has requested respondent States to appoint an *ad hoc* Judge. Furthermore, States have never

refused to make the appointment,[9] and in most cases the investiture of the *ad hoc* judge took place. The foregoing shows the widespread character of this practice insofar as most States, against which the IACHR has filed an application in cases arising from individual petitions, have exercised this right.[10]

With respect to the time element necessary before a rule can be considered to have become an international custom, it should be noted that for it to be crystallized it is not required that the practice of the subjects of international law be repeated over a "long" period of time. As stated by the ICJ in *The North Sea Continental Shelf Cases*:

> "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule."[11]

In addition, the practice under consideration has developed over the entire course of the judicial activity of the Inter-American System. In other words, it would be impossible to require the passage of a greater period of time for it to be considered an international custom.

Thus, the Inter-American practice has been constant, consistent, and uniform, which is essential to consider the material element of an international custom to be satisfied[12].

On the other hand, it could be maintained that this international custom has not been accepted by all States Parties to the ACHR, to the extent that some of them have either implicitly or expressly waived their right to appoint an *ad hoc* Judge. However, it should be noted that it is not necessary to obtain the express consent of all subjects of international law involved in the law-making process of the customary rule (in this case, the Inter-American Court and the States Parties to the ACHR). Brownlie illustrates this point as follows:

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[9] Even though in some cases they have allowed the term for the appointment of the *ad hoc* judge to expire, it may not be interpreted as a rejection of the practice.
[10] ICJ. *The North Sea Continental Shelf cases*. (Germany / Denmark / Netherlands) Judgment of February 20th, 1969, paras. 54-74.
[11] ICJ. *The North Sea Continental Shelf cases*. (Germany / Denmark / Netherlands) Judgment of February 20th, 1969.
[12] Shaw, M. *International Law*, Cambridge: Cambridge University Press, 2003, p. 72.

> "At present, when they gradually crystallize in the World community [in our case, Inter-American community], customary rules do not need to be supported or consented to by all States. For a rule to take root in international dealings it is sufficient for a majority of States to engage in a consistent practice corresponding with the rule and to be aware of its imperative needs. States shall be bound by the rule even if some of them have been indifferent or relatively indifferent, to it, [...] or at any rate have refrained from expressing either assent or opposition."[13]

Moreover, the procedural right of the States Parties to the Convention to appoint an *ad hoc* Judge in cases brought before the IA Court HR arising from an individual petition if none of the judges hearing the case is a national of the respondent State is supported by the *opinio juris sive necessitatis*.

With respect to the subjective element, in the Case of Nicaragua against the United States the ICJ held that:

> "In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the *North Sea Continental Shelf* cases, for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action, or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*".[14]

This practice is, without a doubt, supported by the mental element. This is determined by looking at the practice itself. Firstly, in cases where none of the judges of the IA Court HR is a national of the defendant State, the Court has recognized the procedural right of the State to appoint a Judge to the Court. In addition, if the appointment does not comply with the applicable legal requirements (e.g. the 30-day time limit following notification of the application granted to the State to appoint the *ad hoc* Judge,[15] or the impediments, and grounds for excuse or disqualification provided for in Article 19 of the Court's Statute and Rules of

[13] Brownlie, Ian. *Principles of Public International Law*. New York: Oxford University Press, Sixth Edition, 2003, p. 162.
[14] ICJ. *Nicaragua*. (Nicaragua / United States of America) Judgment of June 27th, 1986.
[15] As was the case, for example, in *Albán Cornejo*. Judgment of November 22, 2007. Series C No. 171; *Chaparro-Álvarez*. Judgment of November 21, 2007. Series C No. 170; and *Apitz-Barbera et al*. Judgment of August 5, 2008. Series C No. 182.

Procedure),[16] such appointment is rendered invalid and, therefore, such Judge is removed from the case. In other words, the States consent to the mandatory obligation to comply with the procedural rules regarding the appointment of an *ad hoc* Judge in cases arising from individual petitions. The foregoing is evidenced by the fact that States did not challenge the Court's decision in any of the cases in which the appointment was found to be invalid as untimely. Therefore, States have never been speculative; rather, they have acted in the belief that there is a legal rule, and not for any other reason.

Similarly, the Presidency of the Honorable Court, as well as its Secretariat, considers this practice to be mandatory, to the extent that mere compliance with the legal requirements is sufficient to accept the participation of the *ad hoc* Judge in this type of cases. In addition to being a consistent and uniform practice of the Court, at least until 2004, "absolutely no judge [has] objected to the appointment of ad hoc judges to cases arising from an application filed by the Commission".[17] Furthermore, a study of the case law of the Court reveals that the IACHR has only objected to such appointment on a recent occasion.[18] That is to say that the *opinio juris* is also evidenced by the judicial practice of the organs of the Inter-American System.

In conclusion, the right of the States Parties to the Convention against which a case is brought before the IA Court HR to appoint an *ad hoc* judge in cases arising from individual petitions –in the event none of the judges of the Court is a national of the defendant State-, in addition to being a constant, consistent and uniform practice in the Inter-American context, is considered by those following it –that is, the States, the Court and the Commission- to be a legal rule and not a mere formality.

- The Rules of Procedure and the Opinions of the IA Court HR must adhere to customary law.

[16] As was the case in *Baena-Ricardo et al.* Judgment of February 2, 2001. Series C No. 72; *De la Cruz-Flores*. Judgment of November 18, 2004. Series C No. 115; *La Rochela Massacre*. Judgment of May 11, 2007. Series C No. 163; and in *Heliodoro-Portugal*. Judgment of August 12, 2008. Series C No. 186.
[17] Faundez Ledesma, H. *El Sistema Interamericano de Protección de los Derechos Humanos, Aspectos Institucionales y procesales* (the Inter-American System for the Protection of Human Rights, Institutional and Procedural Aspects). San José: IIDH. 2004, p. 184.
[18] IA Court HR. Case of *Apitz-Barbera et al*. Judgment of August 5, 2008. Series C No. 182.

Given that the right of the States to appoint an *ad hoc* Judge in cases filed by the IACHR with the IA Court HR is an Inter-American customary rule, it is necessary to overhaul the Rules of Procedure of the Court or its opinions, i.e., an advisory opinion may oppose said legal precept.

In the opinion of the Colombian Government, the Rules of Procedure of the organs of the Inter-American System, as well as their opinions, should conform to the sources of Inter-American law, both customary and treaty sources, for several reasons.

First, the regulatory power of the organs of the Inter-American System for the Protection of Human Rights emanates from the ACHR[19] and, therefore, their rules must conform to the provisions set forth in the Convention. This way, the Rules of Procedure develop the treaty content and may not, under any circumstances, impose additional obligations on the States Parties or broaden the scope of those provided for in the international treaty.

Similarly, if other sources of Inter-American human rights law emerge, whether through conventions or protocols or through international custom, the regulatory power must be subject to those formal sources of law. Consequently, the Rules of Procedure of the IA Court HR could not deny the procedural right of the State to appoint an *ad hoc* Judge in cases filed by the IACHR.

As stated above, pursuant to Article 38 of the ICJ Statute, the teachings of publicists are subsidiary in relation to the formal sources of international law and are hierarchically subordinate to custom or treaties.[20] The Advisory Opinions of the IA Court HR fall within the concept of teachings of publicists. The Court itself has stated so when distinguishing the nature of these rulings from those delivered in the exercise of its jurisdiction to hear cases brought before it. This way, in its first Advisory Opinion, the Court clarified the scope of these documents as follows:

[19] Article 39 of the Convention provides that the IACHR shall establish its own Regulations. In addition, Article 60 contains the same provisions in relation to the IA Court HR.
[20] Shaw, M. *International Law*, Cambridge: Cambridge University Press, 2003, p. 115.

> "51. [...] the advisory opinions of the Court and those of other international tribunals, because of their advisory character, lack the same binding force that attaches to decisions in contentious cases. (Convention, Art. 68). This being so, less weight need be given to arguments based on the anticipated effects that the Court's opinions might have in relation to States lacking standing to participate in the advisory proceedings here in question. Viewed in this light, it is obvious that the possibility that the opinions of the Court might conflict with those of other tribunals or organs is of no great practical significance; there are no theoretical obstacles, moreover, that would bar accepting the possibility that such conflicts might arise."[21] (Emphasis added)

This position was later reaffirmed when the IA Court HR held that:

> "32. In contentious proceedings, the Court must not only interpret the applicable norms, determine the truth of the acts denounced and decide whether they are a violation of the Convention imputable to a State Party; it may also rule "that the injured party be ensured the enjoyment of his right or freedom that was violated." [Convention, Art. 63(1).] The States Parties to such proceedings are, moreover, legally bound to comply with the decisions of the Court in contentious cases. [Convention, Art. 68(1).] On the other hand, in advisory opinion proceedings the Court does not exercise any fact-finding functions; instead, it is called upon to render opinions interpreting legal norms. Here the Court fulfills a consultative function through opinions that "lack the same binding force that attaches to decisions in contentious cases."[22] (Emphasis added)

However, this does not mean that the Advisory Opinions have no legal significance. The IA Court HR itself has held that these are of legal value, to the extent that they may be used as a tool to analyze cases.[23] That is to say, they are of a subsidiary character and as such they must be regarded as international teachings.

In accordance with the foregoing, an international customary rule, such as the one under consideration, may not be repealed by means of an advisory opinion because of its subsidiary character. Therefore, excluding the procedural right of the States Parties to appoint an *ad hoc* Judge in cases arising from individual petitions in the event none of the judges of the Court is a national of the defendant State from the Inter-American legal system by means of an Advisory Opinion, as proposed by the

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[21] *Cf.* IA Court HR. **"***Other treaties" subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights)*. Advisory Opinion OC-1 of September 24, 1982. Para. 51.
[22] *Cf.* IA Court HR. *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*. Advisory Opinion OC-3 of September 8, 1983. Para. 32.

[23] *Cf.* IA Court HR. *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17 of August 28, 2002. Para. 33; *Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights)*. Advisory Opinion OC-15 of November 14, 1997. Para. 26; and *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)*. Advisory Opinion OC-9 of October 6, 1987. Series A No. 9. Para. 16.

Argentine Republic, would be contrary to the general principles of law of the system of sources of international law.

- Nonexistence of the alleged procedural imbalance caused by the *ad hoc* judge or national judge.

Upon careful review of the cases decided by the IA Court HR since 1987, none of them reveal that the opinion of the permanent Judges was biased towards the defendant State by the participation of the *ad hoc* Judge. A review of the cases resolved entirely in favor of the State, i.e. cases dismissed either because the preliminary objections were sustained by the Court[24] or because no violation of the ACHR was found,[25] reveals that neither the *ad hoc* Judge nor the Judge who was a national of the defendant State influenced the decision of the Court. In fact, in those cases the decision of the Court was unanimous. The same holds true for the cases resolved partially in favor of the State.

Contrary to Argentina's contention, in those cases where the *ad hoc* Judge filed a concurring or separate opinion, they have not necessarily supported the appointing State. For instance, in the *Case of Blake*, the Guatemalan Government appointed Mr. Alfonso Novales-Aguirre as *ad hoc* judge, who filed a separate opinion in the judgment on preliminary measures, a concurring opinion in the judgment on the merits and in the judgment on reparations, and, in none of them, he favored the interests of the State of Guatemala.

Similarly, in the *Case of Cantos*, the Argentine Republic appointed Professor Julio A. Barberis as *ad hoc* Judge, of Argentine nationality. Professor Barberis expressed his views regarding the case by means of a separate opinion in the judgment on the merits, which favored the victims.

In addition, in the *Case of the Mapiripán Massacre*, our Government appointed Professor Gustavo Zafra Roldan, of Colombian nationality, to serve as *ad hoc* Judge

[24] *Cf.* IA Court HR. *Case of Cayara*. Preliminary Objections. Judgment of February 3, 1993. Series C No. 14, and *Case of Alfonso Martín del Campo-Dodd*. Preliminary Objections. Judgment of September 3, 2004. Series C No. 113.
[25] *Cf.* IA Court HR. *Case of Nogueira de Carvalho et al.* Judgment of November 28, 2006. Series C No. 161.

in the case. Judge Zafra appended a separate opinion to the judgment on the merits and reparations of the IA Court HR, which does not reveal any regard for the litigation interests of the defendant State.

Likewise, in the *Case of Tibi*, the Republic of Ecuador appointed jurist Hernán Salgado Pesantes, Ecuadorian, as *ad hoc* Judge, who filed a separate opinion concurring with the majority in relation to the international responsibility of the State in the case.

In any case, even in cases in which some sectors maintain that the *ad hoc* Judge has supported the interests of the appointing State,[26] it is difficult to assert that the opinion of such Judge favored the interests of the defendant to the point of shifting the balance of the Court's deliberations and decisions in its favor.

In sum, the judicial practice of the *ad hoc* Judge -and national Judge on some occasions- in cases arising from individual petitions may not be considered to exert procedural influence to the detriment of the Commission or the victims and, therefore, the alleged procedural imbalance caused by *ad hoc* judges has no factual basis.

- Positive aspects of the *ad hoc* Judge in the Inter-American System and in International court proceedings

Finally, the Government of Colombia would like to highlight some positive effects of the *ad hoc* Judge on international proceedings, especially when such judge is a national of the defendant State.

Firstly, the *ad hoc* national judge plays an important role in assisting the Court with the understanding of the defendant State's legal system. Thus, the permanent judges have the possibility of asking questions to the *ad hoc* Judge concerning the

[26] As, for example, the comments made by legal author Faundez Ledesma regarding the views of Judge Charles Broker in the separate opinion appended to the judgment on reparations in the *Case of Trujillo-Oroza*. However, in that same judgment, the IA Court HR (including Judge Broker) unanimously ordered reparations in favor of the victims.

specific circumstances of the State and its institutions.[27] This possibility is of paramount importance in the analysis conducted by the Court, specially with respect to the design of the measures of reparations ordered by means of the judgment, given that the knowledge that the *ad hoc* Judge may provide makes it possible for the Court to adjust the reparations or the method of compliance therewith to the domestic institutional reality, thereby avoiding raising unrealistic expectations on the part of the victims and their families.

Secondly, this institution favors the dissemination of the System within the States insofar as the participation of a national in the examination, deliberation and disposition of a case arouses considerable interest at the domestic level. Furthermore, given the great reputation of the Court's judicial investiture, the Judges are invited to participate in academic forums and debates, which encourages the promotion of human rights in the Hemisphere.

B. The nationality of the judges and the right to an independent and impartial judge.

In addition, in its request, the Argentine Republic pointed out that "this is a good opportunity to reflect on the possible need to adopt measures tending to guarantee, as far as possible, a decision free of any direct or indirect influence that could arise regarding a specific case as a result of the nationality of a judge of the Court".

Therefore, Argentina requested the opinion of the Court regarding Article 55(1) of the Convention as follows: *"In cases arising from an individual petition, should a judge who is a national of the defendant State recuse himself from taking part in the consideration and decision of the case in order to guarantee a decision free of any possible bias or influence?"*

Colombia considers that impartiality and independence in the IA Court HR's decisions is a value of utmost importance no only for the protection of human

[27] Schwebel, Stephen. "National Judges and Judges Ad Hoc of the International Court of Justice," pp. 894 in *The International and Comparative Law Quarterly*, Vol. 48, No. 4 (Oct. 1999), pp. 889-900.

rights in the hemisphere but also to ensure the legitimacy of the Court itself. However, the Government of Colombia does not share Argentina's contention, as inferred from its question, that a judge who is a national of the defendant State loses his or her impartiality and independence simply because of that fact.

In addition, it should be noted that in the request for an Advisory Opinion, at first, Argentina argues –in order to provide support for the request in relation to the *ad hoc* judge- that Article 55 of the Convention is only applicable to inter-state petitions, and later in its request -in support of the question relating to the national Judge- the scope of Article 55 is broadened so as to include cases between the IACHR and a State Party to the Convention. In the opinion of the Government of Colombia, the concern expressed by the requesting State is pertinent in relation to the independence and impartiality of the judges of the IA Court HR, which are guaranteed under the provisions set out in Articles 52, 71, and 73 of the ACHR and related provisions, and not by the provision mentioned by the Argentine Republic.

It is important to point out that Article 61(1) of the Court's Rules of Procedure[28] sets forth the formal requirements for filing a request for an Advisory Opinion with the Court, namely:

i. Identification of the international treaty or convention as well as the specific parties in relation to which the interpretation is being sought;
ii. The specific question(s) on which the opinion of the Court is being sought, and
iii. The considerations giving rise to the request.

Therefore, in the opinion of the Government of Colombia, the request for advisory opinion, in its second question, does not strictly comply with these formal requirements insofar as its question does not refer to Article 55(1) of the Convention.

[28] Rules of Procedure of the IA Court HR. "Article 61. Interpretation of Other Treaties. II. 1. If the interpretation requested refers to other treaties concerning the protection of human rights in the American States, as provided for in Article 64(1) of the Convention, the request shall indicate the name of, and parties to, the treaty, the specific questions on which the opinion of the Court is being sought, and the considerations giving rise to the request. II [...]."

Despite this formal error, Colombia considers that the IA Court HR has jurisdiction to consider the second question posed by the Argentine Republic. Firstly, because in analyzing the advisory jurisdiction of the Court "it is necessary to avoid excessive formalism, which would prevent the Court from considering questions that are of legal interest in the protection and promotion of human rights".[29] Secondly, because of the broad powers conferred by the Convention upon the Court to exercise its advisory function. In this regard, it is pertinent to mention the Court's view as stated in Advisory Opinion No. 19:

> "20. The Court has jurisdiction to render an opinion in relation to this request, insofar as it involves an organ of the Inter-American system for the protection of human rights, i.e. the Inter-American Commission, and insofar as it will help elucidate the scope of the functions conferred upon it by the American Convention in relation to the promotion and defense of human rights. The powers of the Court include the interpretation and application of the American Convention and other instruments of the Inter-American system concerning the protection of human rights. The Court shall respond to this request within the framework of the aforesaid jurisdiction."[30]

Thus, the question of Argentine Republic refers to (i) the moral and professional qualifications of the judges of the IA Court HR, which are verified by means of the election process (Article 52 of the Convention) as well as (ii) the rules regarding incompatibility and impediments, and grounds for excuse and disqualification, contained in Article 71 of the ACHR and Article 19 of the Court's Statute, respectively, and related provisions.

The Government of Colombia, like Argentina, considers that the independence and impartiality of the decisions of the IA Court HR is a value of paramount importance for the protection of human rights in the Hemisphere as well as for ensuring the legitimacy of the Court itself. However, Colombia disagrees with Argentina's

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[29] *Cf.* IA Court HR. *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; *Reports of the Inter-American Commission on Human Rights* (Art. 51 American Convention on Human Rights) Advisory Opinion OC-15/97 of November 14, 1997. Series A No. 15, para. 39; and *Certain Attributes of the Inter-American Commission on Human Rights* (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights). Advisory Opinion OC-13/93 of July 16, 1993. Series A No. 13, para. 41, and *"Other treaties" subject to the advisory jurisdiction of the Court* (Art. 64 American Convention on Human Rights), *supra* note 3, para. 24.

[30] *Cf.* IA Court HR. *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. 20.

contention, as inferred from its question, that a judge who is a national of the defendant State loses his or her impartiality and independence simply because of that fact.

Firstly, in cases where the national judge has supported decisions favorable to the State, it may not be contended that the judge's view was biased by reason of his nationality. In this connection, the words of the former President of the International Court of Justice, Stephen M. Schwebel, in his study of the participation of the national judge in the proceedings of said Court illustrate this point. Schwebel maintains that, even though in most cases the national judge supported the case of their State, this should be analyzed in detail insofar as (i) in a large number of cases the national judge's view and vote concurred with those of the other judges. That is to say that the legal finding is not a matter of personal preference but the authoritative legal opinion of the Court; (ii) in a significant minority of cases the national judge voted against the interests of his country; (iii) criticizing the opinion of the national judge that votes in a manner consistent with the interests of his country *per se*, means assuming that the opinion of the Court is always right, and this is not always the case, and (iv) the judicial work of the national judge is more related to his personal and professional qualities than to his nationality.[31]

This way, the guarantee of independence and impartiality of the judges of the IA Court HR may not be questioned *in genere* by reason of their nationality. The impartiality, independence, and professionalism is guaranteed by way of two mechanisms: the selection and election process for the judges and the system of incompatibility and impediments. Therefore, in the following pages we will discuss the nature and scope of these two legal mechanisms to ensure the independence and impartiality of the judicial office, in relation to the question under consideration.

- Eligibility criteria or the moral and professional qualities of the judges of the IA Court HR.

[31] Schwebel, Stephen. "National Judges and Judges Ad Hoc of the International Court of Justice," pp. 893 and 894 in *The International and Comparative Law Quarterly*, Vol. 48, No. 4 (Oct. 1999), pp. 889-990.

Before examining the eligibility requirements, the Government of Colombia would like to reiterate the important and valuable judicial work performed by each and every judge that has served in the Inter-American Court in furtherance of the protection and enforcement of human rights in the Continent.

In addition, it should be noted that there is a presumption of independence and impartiality that attaches to the judicial function of the Judges, which rests on the principle of good faith and, consequently, general national alignments or bias should not be presumed. In this regard, the European Court of Human Rights has held that it is a principle of law that the independence and impartiality of judges is to be presumed and that any allegation to the contrary must be proven, not as a general assertion, but within and in relation to the case in which it is alleged.[32]

The American Convention provides for several mechanisms to ensure the independence and impartiality of the judges of the Court. The first one is the definition of eligibility criteria that candidates for judges of the Court must meet. In this regard, Article 52(1) of the ACHR[33] provides that those seeking the office of court judge must posses at least the following qualities:

i. national of one of the Member States of the OAS;
ii. jurist of the highest moral authority;
iii. jurist of recognized competence in the field of human rights, and
iv. 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.

Furthermore, this provision clearly shows that the judges do not act, under any circumstances, on behalf of the State of which they are nationals; rather, they exercise their functions in a personal capacity. That is to say that their office may not be regarded as representative of the interests of their State, but rather as a strictly judicial duty, governed exclusively by a commitment to guarantee the

[32] *Eur. Court H. R., Campbell and Fell judgment of June 28, 1984, Series A No. 80,* para. 84 and *Eur. Court H.R., Le Compte, Van Leuven and De Meyere judgment of June 23, 1981, Series A no. 43,* para. 58.

[33] American Convention on Human Rights. Article 52. "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."

human rights of the persons that come before the Court, through the IACHR, seeking international protection of their rights, based on the American Convention.

These eligibility requirements are verified in the process for the selection of the members of the Court. This process is regulated by Article 53 of the Convention, which sets forth 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". This way, in the event any eligibility requirement is not met in the election process any Member State of the OAS may challenge the qualifications of the candidate.

In addition, it should be noted that this election process is completed once the judges take office, at which time, in accordance with Article 11 of the Court's Statute,[34] they must take a solemn oath that they will act independently and impartially –among other things- in the exercise of their judicial functions.

Pursuant to that, judges are subject to two rigorous overlapping processes: one, at the domestic level, in which the country nominating the Judge examines their moral qualities and legal expertise in the field of human rights; and another one, at the international level, in which, besides determining once more whether the candidates meet the eligibility requirements, Member States of the General Assembly of the OAS select the seven judges among a maximum of 75 candidates.[35]

The foregoing shows the scrupulous and rigorous selection process which precedes the assumption of the office of Judge of the Inter-American Court. The immediate purpose of this process is thus to ensure a democracy in which all States participate in the selection of the judges on an equal footing, and its supreme goal is to guarantee the independence and moral qualities of the members of the Court and, consequently, of their decisions.

[34] Statute of the IA Court HR. "Article 11. II. Oath II 1. Upon assuming office, each judge shall take the following oath or make the following solemn declaration: "I swear" - or "I solemnly declare" - "that I shall exercise my functions as a judge honorably, independently and impartially and that I shall keep secret all deliberations. II [...]." (Emphasis added)
[35] In the event each of the 25 States Parties to the ACHR nominates three candidates.

In any case, despite the technical and political evaluation conducted by the OAS by means of the process for the election of candidates for judge of the IA Court HR, there are also mechanisms in place for disqualification from hearing a case in the event a judge's impartiality and independence is questioned in relation to a specific case. We will discuss these mechanisms in the following section.

- Mechanisms to ensure the impartiality and independence of the judges of the Inter-American Court in specific cases: impediments, excuses and disqualification.

The Colombian Government considers that the proposal submitted by the Argentine Republic would not allow for the examination of a possible conflict of interest in each specific case. Rather, it would create a presumption of fact, according to which the nationality of a judge is, by itself, a sufficient element to regard the judge's view as biased and lacking in objectivity. This reasoning not only disregards the moral and professional qualities of the judges, the selection process, and the principle of good faith, but also fails to recognize the system of impediments, excuses and disqualification as the appropriate mechanism to challenge the independence and impartiality of a judge.

Indeed, Article 71 of the ACHR provides that the office of judge of the Inter-American Court of Human Rights is incompatible with any other activity that might affect their independence or impartiality. Based on this provision Article 18 of the Statute of the IA Court HR sets forth that the position of judge is incompatible with the following offices or positions:

> a) Member or high-ranking official of the executive branch of government (with some exceptions)
>
> b) Official of the executive branch of government, and
>
> c) Any other office or activity that might prevent the judges from discharging their duties, or that might affect their independence or impartiality, or the dignity and prestige of the office.

In addition, in relation to disqualification, Article 19 of the Court's Statute[36] provides that judges may not participate in matters in which, in the opinion of the Court, they or members of their family have a direct interest or in which they have previously taken part as agents, counsels or advocates, or as members of a national or international court or an investigatory committee, or in any other capacity.

Therefore, the grounds for disqualification apply to specific cases where there may be a conflict of interest, while the grounds for incompatibility set out in Article 18 of the Statute apply to the office of judge.

This system of impediments, excuse and disqualification finds its effectiveness in Article 19(2) of the Court, which sets forth that:

> *"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."*

Based on the foregoing, pointing out the need for the recusal of the national judge overlooks the existence of provisions governing impediments and grounds for excuse and disqualification. If, at the time of drafting the Convention, as well as the Statute and the Rules of Procedure of the Court, the judges of the defendant State had been regarded as lacking in impartiality by reason of their nationality there would not be a system of impediments, excuses and disqualification in place; rather said documents would expressly provide that the national judge of a defendant State should recuse himself from participating in the consideration and decision of the case. Adoption of the reasoning offered by Argentina, in its request for advisory opinion, would render the system of impediments, excuses and disqualification ineffective.

[36] Statute of the IA Court HR. "Article 19. II. Impediments, Excuses and Disqualification. II 1. Judges may not take part in matters in which, in the opinion of the Court, they or members of their family have a direct interest or in which they have previously taken part as agents, counsel or advocates, or as members of a national or international court or an investigatory committee, or in any other capacity. II 2. If a judge is disqualified from hearing a case or for some other appropriate reason considers that he should not take part in a specific matter, he shall advise the President of his disqualification. Should the latter disagree, the Court shall decide. II 3. If the President considers that a judge has cause for disqualification or for some other pertinent reason should not take part in a given matter, he shall advise him to that effect. Should the judge in question disagree, the Court shall decide. II 4. When one or more judges are disqualified pursuant to this article, the President may request the States Parties to the Convention, in a meeting of the OAS Permanent Council, to appoint interim judges to replace them.

The existence of such impediments and grounds for excuse and disqualification is the bedrock upon which the presumption of the judges' impartiality and independence is built, and provides the possibility of resorting to such system whenever any judge is considered to lack independence and impartiality to resolve a case.

The regulatory framework of the Inter-American System recognized that the principle of ethics is the one that should guide the conduct of the participants of the System, and not general presumptions of fact which disregard the specific and singular procedural characteristics of each case. In this connection, the Inter-American regulations provide the possibility of analyzing each case and situation in an independent and specific manner, upholding the principle of good faith and guaranteeing all those involved in the process the independence of the judges through the system of disqualification and incompatibility. Therefore, the Colombian Government considers that requiring judges to recuse themselves from hearing and deciding cases in which their State is the defendant disregards the regulatory rationale offered by the Convention and related regulations, violates the principle of good faith, and ignores the specific circumstances surrounding each matter brought before the Court, thus attaching more importance to general speculations.

These grounds for disqualification and incompatibility are provided with a specific implementation mechanism: the disciplinary regime. Article 73 of the American Convention provides that, at the request of the Court, the General Assembly must resolve the cases in which the grounds set out for in the Statute of the Court[37] are applicable to a Judge. This provision is further developed in Article 20 of the Court's Statute, which provides that:

> "1. In the performance of their duties and at all other times, the judges and staff of the Court shall conduct themselves in a manner that is in keeping with the

[37] American Convention on Human Rights. "Article 73. II The General Assembly may, only at the request of the Commission or the Court, as the case may be, determine sanctions to be applied against members of the Commission or judges of the Court when there are justifiable grounds for such action as set forth in the respective statutes. A vote of a two-thirds majority of the member states of the Organization shall be required for a decision in the case of members of the Commission and, in the case of judges of the Court, a two-thirds majority vote of the States Parties to the Convention shall also be required." (Emphasis added)

> office of those who perform an international judicial function. They shall be answerable to the Court for their conduct, as well as for any violation, act of negligence or omission committed in the exercise of their functions.
>
> 2. The OAS General Assembly shall have disciplinary authority over the judges, but may exercise that authority only at the request of the Court itself, composed for this purpose of the remaining judges. The Court shall inform the General Assembly of the reasons for its request.
>
> 3. Disciplinary authority over the Secretary shall lie with the Court, and over the rest of the staff, with the Secretary, who shall exercise that authority with the approval of the President.
>
> 4. The Court shall issue disciplinary rules, subject to the administrative regulations of the OAS General Secretariat insofar as they may be applicable in accordance with Article 59 of the Convention."

This way, if a judge does not recuse himself from hearing a case in respect of which there is ground for disqualification pursuant to Articles 18 and 19 of the Statute, he shall be subject to disciplinary proceedings. The effectiveness of this double system (the disciplinary regime and the system of impediments, excuses and disqualification) as a means to ensure the independence and impartiality of the Judges of the Court is evidenced by the cases in which the respective Judge excuses himself from the case, which recusal is accepted by the Court. For instance, in the *Case of La Cantuta*:

> "Judge Diego García-Sayán, a Peruvian national, excused himself from hearing this case, pursuant to Article 19(2) of the Statute of the Court and Article 19 of its Rules of Procedure, since in his capacity as practicing Minister of Justice of Perú in 2001 he was a party to the instant case as Agent of the Peruvian State during its proceeding before the Inter-American Commission on Human Rights. Therefore, on March 31, 2006 the Secretariat informed the State that, pursuant to the provisions of Article 10 of the Statute of the Court and Article 18 of its Rules of Procedure, it was entitled to appoint a judge *ad hoc* who would take part in the consideration of the case, to which purpose the State appointed Fernando Vidal-Ramírez." (Emphasis added)

Likewise, there are cases in which Article 19(2) was applied in order to avoid any allegation of bias in favor of the victims,[38] which shows that the system of

[38] "On January 28, 2008, Judge Diego García Sayán, a Peruvian national, disqualified himself from hearing this case "in the best interest of the Court." He stated that he is a "member of the *Comisión Andina de Juristas* (Andean Commission of Jurists) and that he holds an "executive office with said organization." He considered that "[w]hile the specific functions of his office are not directly connected with institutional communication or consideration of substantive issues, […] it would be adequate to disqualify himself from hearing the case in order to prevent the perception of the Court as an impartial and independent body from being affected." The President of the Court concluded that Judge García

impediments, excuses and disqualification guarantees in itself and every one involved the independence and impartiality of the judges of the Court.

These rules are also applicable to *ad hoc* judges and are equally effective, e.g. in the *Case of the Rochela Massacre*:

> "When the application was served upon the State, the State was informed of its right to designate an *ad hoc* judge to participate in the hearing of the case. On May 9, 2006, the State designated Juan Carlos Esguerra Portocarrero as *ad hoc* judge. On November 28, 2006, *ad hoc* Judge Juan Carlos Esguerra Portocarrero submitted a communication to the Court in which he "recused himself before [the President of the Tribunal] as *ad hoc* Judge in the case of the "Massacre of La Rochela" and gave his reasons for his recusal. In a letter of December 1, 2006, Mr. Esguerra Portocarrero and the parties were informed that the abovementioned communication had been submitted to the President of the Court who, in consultation with the other Judges of the Tribunal, decided to accept the recusal of the *ad hoc* Judge, taking into account Articles 19 of the Rules of Procedure and Statute of the Court, and in light of the reasons expressed by Mr. Esguerra Portocarrero for his recusal." (Emphasis added)

Therefore, the argument that the mere nationality of a judge casts doubts on his independence and impartiality in those cases in which the defendant is the State of which he is a national implies that the work of each and every national judge –both permanent and *ad hoc*- who have participated in cases decided by the Court to date is vitiated and that relevant disciplinary proceedings must be instituted in accordance with the Convention and related regulations.

In addition, just like in relation to the first question posed by the Argentine Republic, the Colombian Government considers that the conclusion drawn by Argentina that the national judge should recuse himself from hearing cases in which his State is a party to the proceedings is contrary to the Inter-American System. The personal character of the judicial functions performed by the Judges of the IA Court HR is clearly based on treaty provisions, namely Articles 52(1)[39]

Sayán had not participated in any way in the instant case and that he had refrained from expressing, either publicly, privately, or to the parties hereto his views on this controversy, its foundations, or details and possible solutions. However, the President, after consulting the other members and pursuant to Article 19(2) of the Rules of Procedure of the Court, found it reasonable to address and in turn grant the disqualification petition of Judge García Sayán as a means to "prevent the perception of the Court as an impartial and independent body from being affected." (Emphasis added). (Case of Apitz-Barbera et al. Judgment of August 5, 2008. Series C No. 182. Footnote, page 1).

[39] American Convention on Human Rights. Article 52 "1. 1. 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

and 55(1),[40] which may not be altered by an Advisory Opinion. In order to accept the contention raised by the requesting State, it would be necessary to amend the ACHR.

C. Conclusion

In light of the foregoing, the Government of Colombia considers that:

(i) The right of a State to appoint an *ad hoc* Judge in cases filed with the Court by the IACHR if none of the judges of the Court is a national of the defendant State is a rule of customary Inter-American human rights law. Therefore, it should be observed by all participants in the System; and

(ii) The character of national judge does not *per se* taint the impartiality and independence of the judicial function. In addition, the American Convention, the Statute and the Rules of Procedure of the Court provide for sufficient mechanisms to ensure the competence of the members of the IA Court HR as well as the independence and impartiality of their work in specific cases. Therefore, the national judge should not be disqualified from hearing and deciding cases in which his State is the defendant, as has been the practice to date.

Yours faithfully,

[Signed]
ANGELA MARGARITA REY ANAYA
Director of the Human Rights and International Humanitarian Law Office
Ministry of Foreign Affairs

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the state of which they are nationals or of the state that proposes them as candidates. II [...]" (Emphasis added)

[40] ACHR. Article 55. "1. If a judge is a national of any of the States Parties to a case submitted to the Court, he shall retain his right to hear that case. II [...]"

[Signed]
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Vice Presidency of the Republic