EMBASSY OF MEXICO

San José, Costa Rica, December 18, 2008

To the Secretary,

I am writing in connection with the request for advisory opinion submitted by the Government of Argentina regarding the interpretation of Article 55 of the American Convention on Human Rights (hereinafter, "the ACHR") in relation to the provisions on *ad hoc* judges and equality of resources between the parties for proceedings before this Court in the course of cases originated in an individual petition, the nationality of magistrates and the right to an independent and impartial judge.

In that respect, we submit to this Honorable Court the note signed by Justice Alejandro Negrín Muñoz, and the answer of the Government of Mexico to such request.

Kindest regards,

[Signature:]

María Carmen Oñate M.

Ambassador

[Seal:]

IACHR

December 19, 2008

RECEIVED

[Seal:]

United Mexican States, Embassy of Mexico

San José, Costa Rica

To the Honorable Dr. Pablo Saavedra-Alessandri, Secretary of the Inter-American Court of Human Rights
City

1 ANNEX

Mexico, D.F., December 17, 2008

To the Honorable Secretary,

The Government of Mexico hereby addresses the Honorable Inter-American Court of Human Rights in connection with the request for advisory opinion submitted by the Government of the Argentine Republic regarding the interpretation of Article 55 of the American Convention on Human Rights in relation to the provisions on *ad hoc* judges and equality of resources between the parties in the course of proceedings before this Court in relation to cases originated in individual petitions, the nationality of magistrates and the right to an independent and impartial judge.

For the purposes of replying to the issues raised by the Argentine Republic, the State filed its observations through the document annexed, which is divided into the following sections:

I. In the first section, the Government of Mexico submits its comments on the right of the judges of the Inter-American Court, who are nationals of the State Party involved in the dispute submitted to its jurisdiction, to hear the case. Special emphasis is made on the principles of independence and impartiality that should govern every international tribunal and legal practice in the context of such international instances.

II. The second section describes the arguments of the State regarding the participation of an *ad hoc* judge in the context of cases originated in an individual petition. The State supports its observations on the legal status and the benefits of such concept within international tribunals; furthermore, it requests the IACHR to recognize a regional practice generally accepted in the countries that participate in the Inter-American System upon resorting to *ad hoc* judges.

III. The third and last section contains additional observations by the State whereby it expresses its opinion that the participation of a judge from the IACHR -permanent or *ad hoc*- and a national of a respondent State upon hearing a case originated in the context of an individual petition does not purport any risk to the principle of equality between the parties in the context of jurisdictional proceedings.

The State of Mexico highlights the relevance of this request for advisory opinion, not only for the purposes of protecting the human rights of the alleged victims, but also for the development of standards much more consistent with the practice of international legal proceedings.

Respectfully submitted.

Kindest regards,

Justice Alejandro Negrín Muñoz, State Official

Dr. Pablo Saavedra

Secretary of the Inter-American Court of Human Rights

San José, Costa Rica

Costa Rica

Response of the Government of Mexico regarding the request for advisory opinion

submitted by the Argentine Republic to the Inter-American Court of Human Rights.

OC-21

The Government of Mexico makes reference to note CDH-OC-21/032 of the Honorable Inter-American Court of Human Rights (hereinafter, "the IACHR") whereby it submitted the request for advisory opinion filed by the Government of the Argentine Republic regarding the interpretation of Article 55 of the American Convention on Human Rights (hereinafter, "the ACHR") in relation to the provisions on *ad hoc* judges and equality of resources between the parties in the course of proceedings before this Court in relation to cases originated in individual petitions, the nationality of magistrates and the right to an independent and impartial judge.

The issues raised by the Argentine Government before the IACHR through its request for advisory opinion are as follows:

1. "Should a magistrate who is a national of the respondent State decline participation to hear and decide a case originated in an individual petition in order to guarantee a decision free from any possible influence or bias?"

2. "Pursuant 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 where the application filed with the Court originated in an inter-state petition?"

In that regard, based on Articles 38(1) and 64 of the Rules of Procedure of the Inter-American Court of Human Rights, the State of Mexico filed its observations and comments on the issues raised in the request for advisory opinion.

1. Observations of the Government of Mexico

regarding the right to hear a case of judges who are nationals of a State

that is a party to the dispute submitted to the jurisdiction of the Court.

Articles 10(1) of the Statute of the Inter-American Court of Human Rights and Article 55(1) of the ACHR set forth that "if a judge is a national of any of any of the States Parties to a case submitted to the Court, he shall retain the right to hear the case".

The general rule for interpreting the regulatory provisions contained in international treaties, set forth in Article 31(1) of the Vienna Convention on the Law of Treaties, provides that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in such context and pursuant to its purpose and goal.[1]

Regarding the scope of the aforementioned Article, the United Nations International Law Commission has indicated that:

> *The article as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation ab initio into the intentions of the parties.*[2]

Furthermore, the International Court of Justice emphasized the fact that the duty to interpret does not consist in reviewing the treaty itself or grasping meaning not expressly contained, or impliedly included therein.[3]

The State of Mexico considers that -based on the principle of interpretation in good faith pursuant to the usual construction of the provisions of the American Convention on Human Rights in accordance therewith and considering its purpose and goal- Article 55(1) of the ACHR grants judges who are nationals of a State that is a party to a case submitted to the jurisdiction of the Court the right to hear the case at stake and, ultimately, it will be a prerogative of such judge to refrain from hearing such case.

The considerations above apply notwithstanding the criteria on restrictions, excuses and disqualification set forth in Article 19 of the Statute of the IACHR, which may be invoked by the judge or the President of the Court in order to comply at all times with the fundamental principles of independence and impartiality that safeguard the jurisdictional activity of the international bodies in charge of administering justice and, hence, the judges that integrate such bodies.

In that regard, the IACHR has stated that the personal involvement of all judges of the Court is

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[1] Vienna Convention on the Law of Treaties. U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, entered into force January 27, 1980. Vienna, May 23, 1969.

[2] International Law Commission (ILC). Draft Articles on the Law of Treaties with commentaries. Yearbook of the International Law Commission, 1966, vol. II, page 220.

[3] International Court of Justice. United States Nationals in Morocco case. Reports 1952, paras. 196 and 199.

supported by, and must be consistent with, the need to protect independence and impartiality within an international tribunal;[4] such situation was crucial for building the reliability of all States of the region that recognize and participate in the jurisdictional activities of the Court.

1.1. Principles of independence and impartiality.

Independence

It is necessary to refer to the case law developed by international tribunals regarding human rights, for instance the European Court of Human Rights (hereinafter, "the ECHR") and this IACHR, upon specifying the elements that must be present for a judge in an international court to be independent, particularly as to the need to apply an adequate appointment procedure, a fixed term for the position and guarantees against external pressure.[5]

As regards the Inter-American System of Human Rights, the aforementioned requirements have been fully satisfied under the regulatory framework applicable to the operation of such system, which contemplates a very specific selection procedure before the Organization of American States to appoint the judges of the Court, a fixed term to hold such position, and restriction and control mechanisms for the performance of their duties.

Impartiality

This principle means that judges must perform their jurisdictional duties without any bias or prejudice, both at the time of rendering a decision and throughout proceedings.[6] As regards the principle of impartiality, the ECHR has recognized the existence of an objective and subjective element; the first one is based on the personal understanding of a judge as to its impartiality in a given case, which must be presumed until proven otherwise,[7] and the second element means that the judge should offer sufficient guarantees to exclude any reasonable doubt as to its performance during proceedings,[8] which is determined through the conduct of the judge and the facts that justify the judge's performance through an adequate objective justification.[9]

In addition to the aforementioned considerations, the IACHR has explained that lack of independence and impartiality may also be evidenced through overt failures in proceedings and an impairment of the

[4] Case of Paniagua-Morales *et al*., Order of the Inter-American Court of Human Rights of September 11, 1995. Whereas clause No.].

[5] IACHR. Case of the Constitutional Tribunal v. Peru. Jurisdiction. Judgment of September 24, 1999. Series C No. 55: Para. 75; ECHR, Case of Langborger v Sweden, petition No. l1179/84, Judgment of June 22, 1989; Para. 32; ECHR, Case of Alfatli v. Turkey, Petition No. 32984/96, Judgment of October 30, 2003; Para. 45; ECHR, Case of Campbell and another v. United Kingdom, petition No. 7819/77, 7878/77, Judgment of June 28, 1984; Para. 78; ECHR, Case of Lauko v. Slovakia, Petition No. 26138/95, Judgment of September 2, 1998.

[6] Bangalore Principles of Judicial Conduct. Adopted by the Judicial Group for Strengthening Judicial Integrity and reviewed by the Round Table Meeting of Chief Justices at the Peace Palace, the Hague, on November 25 and 26, 2002, Application 2.1 to Principle 2: Impartiality.

[7] ECHR, Case of Steck-Risch and others v. Liechtenstein, Petition No. 63151/00, Judgment of May 19, 2005; Para. 40.

[8] ECHR, Case of Sigurdsson v. Iceland, Request No. 39731/98, Judgment of April 10, 2003; Para. 37.

[9] Ibid. Para. 37.

rights of one of the parties.[10]

As regards the impartiality and independence of the Court, and for the purposes and goals herein, the former President of this Court, Judge Cançado Trindade, stated as follows:

> "Upon international legal proceedings within the context of international human rights protection, the balance of the Court (...) does not mean – should not mean- a permanent evaluation by the Court of the interests and perceptions of the parties (...) since, otherwise, the Court's impartiality and independence would be impaired. The Court must always be guided by higher considerations focused on the guarantee of effective protection of human rights."[11]

Selection and performance of the judges that compose the IACHR.

The statutes and rules of most international tribunals establish specific criteria and procedures for the selection of their members, based on the principles of independence and impartiality.[12]

The procedure for selecting the judges of the IACHR is carried out "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", considering that "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".[13]

Moreover, the Statute of the IACHR is conclusive upon establishing that the "Court shall consist of seven judges, nationals of the member states of the OAS, 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 under the law of the State of which they are nationals or of the State that proposes them as candidates".[14]

Similarly, Articles 18 and 19 of the Statute set forth a standard of activities inconsistent with the judicial functions performed by this Court[15] and those cases where judges cannot exercise such function.[16]

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[10] Case of the Constitutional Tribunal v. Peru. op. cit., paras. 82-84.

[11] Case of Paniagua-Morales *et al*. Separate Opinion of judge Cançado Trindade on the Order of the Inter-American Court of Human Rights of September 11, 1995. 1995.

[12] Article 11 of the Statute of the IACHR.

[13] Article 53 of the ACHR.

[14] Art. 4(1) Statute of the IACHR.

[15] Article 18. Incompatibilities.

1. The position of judge of the Inter-American Court of Human Rights is incompatible with the following positions and activities:
   a. Members or high-ranking officials of the executive branch of government, except for those who hold positions that do not place them under the direct control of the executive branch and those of diplomatic agents who are not Chiefs of Missions to the OAS or to any of its member states;
   b. Officials of international organizations;
   c. Any others that might prevent the judges from discharging their duties, or that might affect their independence or impartiality, or the dignity and prestige of the office.
2. In case of doubt as to incompatibility, the Court shall decide. If the incompatibility is not resolved, the provisions of Article 73 of the Convention and Article 20(2) of the present Statute shall apply.
3. Incompatibilities may lead only to dismissal of the judge and the imposition of applicable liabilities, but shall not invalidate the

1.3. General observations about legal practice by judges upon declining to hear a given matter before an international tribunal.

In the practice of the Inter-American System of Human Rights, the possibility of a judge to decline to hear a case where the respondent State is the country of which the judge is a national has been exercised in various occasions; that not withstanding, in a large number of cases where judges did not decline jurisdiction, they voted against the claims of their own States.[17]

General practice has been consistent and clear upon showing that the main reason that supports a decline of jurisdiction by a judge or, as the case may be, disqualification of a judge by any of the parties involved, is concerned with the close relation existing between a judge and a given case. Therefore, the possibility for a judge to decline jurisdiction is inherent not only to the judge national of the respondent State in an international conflict, but also applies to judges of other nationalities who, in some way or another, had some prior involvement in those matters.[18]

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acts and decisions in which the judge in question participated,
4.

[16] Article 19. Impediments, excuses and disqualification
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.
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.
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.
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.

[17] For those cases where regular judges voted against the claims of the State, see: IACHR. Case of Velasquez-Rodriguez v. Honduras, Preliminary Objections. Judgment of June 26, 1987. Series C No. 1; IACHR. Case of Fairen Garbi and Solis Corrales v. Honduras, Preliminary Objections. Judgment of June 26, 1987. Series C No. 2; IACHR. Case of Godinez Cruz v. Honduras, Preliminary Objections. Judgment of June 26, 1987. Series C No. 3; IACHR. Case of Velasquez-Rodriguez v. Honduras, Merits. Judgment of July 29, 1988. Series C No. 4; IACHR. Case of Godinez Cruz v. Honduras, Merits. Judgment of January 20, 1989. Series C No. 5; IACHR. Case of Caballero-Delgado and Santana v. Colombia, Preliminary Objections. Judgment of January 21, 1994. Series C No. 17; IACHR. Case of Genie Lacayo v. Nicaragua, Preliminary Objections. Judgment of January 27, 1995. Series C No. 21; IACHR. Case of Genie Lacayo v. Nicaragua, Merits, reparations and costs. Judgment of January 29, 1997. Series C No. 30; IACHR. Case Suarez Rosero v. Ecuador, Merits. Judgment of November 12, 1997. Series C No. 35; IACHR. Case of "The Last Temptation of Christ" (Olmedo Bustos et al. v. Chile, Merits, reparations and costs, Judgment of February 5, 2001. Series C No. 73; IACHR. Case of the Gómez-Paquiyauri Brothers v. Peru, Merits, reparations and costs. Judgment of July 8, 2004. Series C No. 110; IACHR. Case of Ximenes Lopes v. Brazil, Preliminary Objections. Judgment of November 30, 2005. Series C No. 139; IACHR. Case of Ximenes Lopes v. Brazil, Merits, reparations and costs. Judgment of July 4, 2006; IACHR. Case of Montero-Aranguren et al. (Catia Detention Center) v. Venezuela, Preliminary Objections, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150; IACHR. Case of Claude Reyes et al. v. Chile, Merits, reparations and costs. Judgment of September 19, 2006. Series C No. 151; IACHR. Case of Almonacid Arellano et al. v. Chile, Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154; IACHR. Case of the Dismissed Congressional Employees [Aguado Alfaro et al.) v. Peru, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158. Instead, for those cases where regular judges voted against the claims of the State, see: IACHR. Case of Fairen Garbi and Solis Corrales v. Honduras. Merits. Judgment of March 15, 1989. Series C No. 6; IACHR. Case of Caballero-Delgado and Santana v. Colombia, Merits. Judgment of December 8, 1995. Series C No. 22, IACHR; IACHR. Case of Genie Lacayo v. Nicaragua, Request for review of Judgment on the Merits, Reparations and Costs. Order of the Court of September 13, 1997. Series C No. 45; IACHR. Case of Alfonso Martin del Campo Dodd v. Mexico, Preliminary Objections. Judgment of September 3, 2004. Series C No. 113; IACHR. Case of Huilca Tecse v. Peru, Merits, reparations and costs. Judgment of March 3, 2005. Series C No. 121; IACHR. Case of Nogueira de Carvalho et al. v. Brazil, Preliminary Objection and Merits. Judgment of November 28, 2006.

[18] In the case of "Certain Phosphate Lands in Nauru (Nauru v, Australia)", a judge decline jurisdiction after having participated in the Committee investigating the case. Furthermore, a judge declined jurisdiction in the "Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)" given his prior involvement in the matter. Sir Benegal Rau did not hear the case between Great Britain and Iran "the Anglo-Iranian Oil Company" since he was a member of the Security Council while the dispute was at the very first stages. Sir Muharnmed Zafruliah did not hear the merits of the case "South West Africa", apparently because he was proposed as *ad hoc* judge for the case, even though he never performed such duty. In the same case, the ICJ rejected the request of the Government of South Africa to disqualify judge Luis Padilla Nervo due to his statements before the UN during the "South West Africa" debates. Sir Hersch Lauferpacht did not hear the case "Notfebohm" and judge Philip Jessup in the case of

2. Observations of the Government of Mexico regarding the right of States to designate an *ad hoc* judge in the course of cases originated in an individual petition.

The first reference to the rules on *ad hoc* judges is found in the State of the Permanent Court of International Justice (hereinafter, "the PCIJ").[19] The Commission of Jurists in charge of drafting such instrument chose to take into account the right of each State to appoint an *ad hoc* judge whenever the proceedings before the PCIJ did not include a judge who was a national of the States in conflict, since the presence of that judge in Court would be essential to contribute his knowledge of domestic law, and of political and social procedures in the State appointing him.[20]

In the opinion of Lord Phillimore, member of such Commission of Jurists, an ad *hoc* judge facilitates the understanding of the Court in matters that require specialized knowledge and is related to the differences between the various legal systems,[21] an issue that has also been addressed by legal scholars within public international law.[22]

Today, the institute of the *ad hoc* judge is still admitted in tribunals that are clearly inter-state in nature, such as the International Court of Justice[23] and the International Tribunal for the Law of the Sea,[24] as well as tribunals that receive individual petitions for the protection of human rights, such as the IACHR[25] and the ECHR.[26]

As regards the Inter-American System of Human Rights, Article 55 of the ACHR, Article 10 of the Statute of the IACHR and Article 18 of the Rules of the IACHR grant the States parties to a conflict submitted to the jurisdiction of the IACHR the right to appoint a judge who is a national of that State.

Note that, based on the ACHR, all cases pending within the Inter-American System of Human Rights originate in interstate conflicts (Article 45)[27] -none of which are pending before this IACHR- or in the

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"Temple of Preah Vihear". In the "Morocco" case, judges Green Hackworfh and Jules Basdevant did not refrain from hearing the case even though they took part with their respective governments during the first stages of the dispute. Judge Hefge Klaestad participated in the consideration of the case "The Norwegian Fisheries", even though he had prior knowledge of the case given that he was a member of the Supreme Court of Norway.

[19] Article 31 of the Statute of the Permanent Court of International Justice.

[20] Advisory Committee of Jurists - Proces-verbaux of the Proceedings of the Committee, June 16th - July 24th, 1920. (Proces-verbaux)

[21] Id., p. 529.

[22] Thomas M. Franck. Fairness in international law and institutions, Oxford University Press, (1995); page 324;Terry D. Gill. Litigation Strategy at the International Court: a case study of the Nicaragua v. United States, Martinus Nijhoff Publishers (1989); pdg. 101.

[23] Op. Cit. note 19.

[24] Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261 {10 Die. 1982), article 17.2.

[25] Article 55 of the Convention.

[26] European Agreement for the Protection of Human Rights and Fundamental Freedoms reviewed under Protocol No. 11; Article 27(2).

[27] Article 44. Any person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

processing of individual petitions (Article 44),[28] which constitute the basis for the operation of the Inter-American System of Protection of Human Rights and, hence, the type of cases that call for the appointment of *ad hoc* judges.

2.1. Nature of the institute of the *ad hoc* judge.

Evidently, the judicial decisions rendered by international courts undoubtedly impact on the domestic legal systems of the States involved in a given legal conflict. Therefore, most respondent States before international courts agreed on the need to enjoy the presence of a judge who is a national of that State to know and participate in the evaluation of the cases in which they are involved.

To satisfy this need, many international tribunals have included in their statutes and rules of procedure the right of a State that is a party to an international conflict to appoint an *ad hoc* judge in order to guarantee equality of resources between the parties.

For a person to be able to participate in the capacity as *ad hoc* judge before the IACHR, such judge must meet the requirements set forth in Article 52(1) of the ACHR and Article 4(1) of the Statute of the IACHR. Additionally, after taking office, such judge must give oath or render a sworn statement[29] and will be subject to the same conditions set forth for regular judges (Article 10(5) of the Statute of the IACHR).

In the opinion of the State of Mexico, the fact that the Court, after the related assessment procedure, accepted the participation of an *ad hoc* judge reflects that the fundamental impartiality and independence principles to exercise such a prestigious function are fully satisfied.

The above has been previously admitted by the IACHR in the Whereas clauses to the Order of September 11, 1995, in the case of Paniagua-Morales *et al*., where it stated:

> *"1. The nature of an* ad hoc *judge is similar to that other judges of the Inter-American Court in the sense that they do not represent a given Government nor are they agents of that government and they are members of the Court in their own personal capacity, as set forth in Article 52 of the Convention, in accordance with Article 55(4). The same requirements apply to* ad hoc *judges. The appointment in their own personal capacity of all judges, either permanent or* ad *hoc, is justified by and must be consistent with the need to protect the independence and impartiality of an international tribunal;*
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> *3.The Statute of the Court establishes the same rights, duties and responsibilities for all*

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[28] Article 45A. Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.

[29] Article 11 of the Statute of the IACHR.

judges, either permanent or ad *hoc (Article 10(5), in accordance with the provisions of Chapter IV of the Statute of the Court);"*[30]

In that order issued by the IACHR, the separate opinion of the current member of the ICJ, Judge Cançado Trindade also contains references to the independence and impartiality of an *ad hoc* judge:

"(…) As set forth in the American Convention on Human Rights (Article 55(4), in accordance with Article 52) and the Statute of the Inter-American Court of Human Rights (Articles 10(5) and 15) to 20), the ad hoc *judge is not a government agent, but a judge in a specific case. Hence, the precedents of the Inter-American Court reflect cases where* ad hoc *judges voted in the same line as regular or permanent judges, against the respondent State.*

2. *Thus, an* ad hoc *judge, once sworn and admitted to the Court, may not be unilaterally removed therefrom by one of the parties, the respondent State. Any argument to the contrary would be difficult to reasonably explain to support the presence of the* ad hoc *judge in any international legal proceeding, particularly regarding the international protection of human rights, which is widely known to have its own peculiarities.*

3. *The concept of the* ad hoc *judge reflects the impact of meta-legal considerations on the operation of the international legal system; i.e. in practice, a revival of traditional arbitral activity transferred to judicial practice, also showing a conceptual difference between national and judicial bodies. Hence, the institution of the* ad hoc *judge has infiltrated into the Statute of the Permanent Court of International Justice, and of the International Court of Justice, and has survived until today in the systems of the American Convention on Human Rights and the European Convention of Human Rights."*[31]

Moreover, the International Court of Justice (ICJ) expressed its opinion on this matter through the dissenting opinion of *ad hoc* judge Lauterpacht, regarding the judgment in the case "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Serbia and Montenegro), where it held:

"What is true for the Court as a whole is every bit as compelling for an ad hoc judge. The fact that he is appointed by a party to the case in no way reduces the operative force of his solemn declaration under Article 20 of the Statute, made in the same form as that of the

[30] Op. Cit. note 4.
[31] Op. Cit. note 11.

titular judges, that he will exercise his powers impartially and conscientiously."[32]

2.2. Role of an *ad hoc* judge.

For the State of Mexico, the participation of an *ad hoc* judge in the course of a case originated in an individual petition in no manner represents inequality of resources between the parties; on the contrary, based on the autonomy recognized by the tribunal, any assessment made on the arguments submitted by the parties must be much more objective since it is the only member of the Court that is closely connected with the national legal system in conflict.

It is necessary to refer to the observations submitted on this concept both by the honorable IACHR and the ICJ.

As regards the ICJ, *ad hoc* judge Lauterpacht, in its dissenting opinion mentioned above, explained the importance of the role of an *ad hoc* judge:

> *"(...) it cannot be forgotten that the institution of the ad hoc judge was created for the purpose of giving a party, not otherwise having upon the Court a judge of its nationality, an opportunity to join in the work of this tribunal. The evidence in this regard of the attitude of those who participated in the drafting of the original Statute of the Permanent Court of International Justice can hardly be contradicted. This has led many to assume that an ad hoc judge must be regarded as a representative of the State that appoints him and, therefore, as necessarily pre-committed to the position that that State may adopt.*
>
> *That assumption is, in my opinion, contrary to principle and cannot be accepted. Nonetheless, consistently with the duty of impartiality by which the ad hoc judge is bound, there is still something specific that distinguishes his role. He has, I believe, the special obligation to endeavor to ensure that, so far as is reasonable, every relevant argument in favor 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 (…)."*[33]

Furthermore, the judge of the ICJ, Sir Geoffrey Palmer, based on its experience as *ad hoc* judge, expressed its opinion on the true purpose of that institute in its dissenting opinion in the case "Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests* (New Zealand *v.* France)", where he held:

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[32] International Court of Justice, separate opinion of judge Lauterpacht "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)". http://www.ici-cii.Org/docket/files/91/7323.pdf

[33] Ibid.

"The position of an ad hoc judge on this Court is an unusual one and the nature of the obligations imposed on such a judge have been a source of consideration for me. The Statute provides, in Article 31 (6), that such judges "shall take part in the decision on terms of complete equality with their colleagues". In this case I feel the institution served a useful purpose of bringing to the Court a perspective of one who lives in the region of the world with which the application deals. But I have not felt that my position on the Court is a representative one. Its utility was in providing another perspective and some more detailed familiarity with the background. (...)."[34]

Similarly, in the ICJ, in its dissenting opinion, Judge Frank in the case "Sovereignty over Pulau Ligitan and Puiau Sipadan (Indonesia/Malaysia)" made observations on the benefits and independence of the *ad hoc* judge in this sense:

"As Judge ad hoc Nicolas Valticos has pointed out, the ad hoc judge is not simply a representative of the appointing State. (...)

The nub of the matter is this: the ad hoc judge must always ensure that the appointing State's arguments are fully addressed by the Court, whether or not they convince the majority of the judges. Between March 1948 (Corfu Channel (United Kingdom v. Albania)) and July 2002 (Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)) there have been ad hoc judges in 45 cases and 53 phases of cases before this Court. Of these, 29 have written dissenting opinions, corresponding quite closely to the number of ad hoc judges appointed by losing parties. That, however, does not argue against the integrity of the institution of ad hoc judges. Rather, it demonstrates that, when a State is the losing party, the ad hoc judge it appointed has an even greater obligation to ensure that the Court's judgment accurately and fully reflects the careful consideration given by the Court to the losing State's representations. The drafting of the dissent attests to the richness of the Court's collegial deliberative process.

The function of the dissent, therefore, is multiple. It assures the losing party that its arguments, far from being overlooked, were considered extensively by the entire Court. It facilitates the reasoned and balanced exchange of deliberative process. And, perhaps, it presents to the law's universal market place of ideas certain principles of law and nuances of analysis which, even if not adopted in the instant case, may be of use in another, as yet unforeseen, context.

The ad hoc judge, like any other judge authoring a separate opinion, is accorded a sacred freedom. To be preserved, it must be used. As Judge ad hoc Bula-Bula has written, the ad hocs "traditional practice would seem to be characterized by its freedom" (Arrest Warrant of I April' 2000 (Democratic Republic of the Congo v.

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[34] International Court of Justice. Separate Opinion of judge Sir Geoffrey Palmer. Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974, in the Nuclear Tests (New Zealand v. France) Case.

Belgium), Judgment, I. C J. Reports 2002, p. 100, para 2, separate opinion of Judge ad hoc Bula-Bula). (...).”[35]

As regards the Inter-American System of Human Rights, the dissenting vote of judge Montiei Arguello, in the order of September 11, 1995, in the case of Paniagua-Morales *et al*., the judge made reference to the observations of the inter-allied Committee in charge of drafting the project of the Statute for the Permanent Court of International Justice regarding the concept of the *ad hoc* judge:

"In theory, this system seems open to objections departing from the idea of permanence and the non-national status of the Court, but in practice we consider it is essential to maintain its current condition. Indeed, countries will not fully trust the decisions of the court in a case in which they are involved unless the composition of the court includes a judge who is a national of the State of the other party. Moreover, even though national judges are not -and must not- be representatives in Court of their own country, they play a vital role upon contributing their local knowledge and national perspective."[36]

Furthermore, in February 2002, the ICJ issued a guideline that establishes very specific limitations to the exercise of international jurisdictional duties in this tribunal, which includes *ad hoc* judges:

"Practice Direction VII

The Court considers that it is not in the interest of the sound administration of justice that a person sits as judge ad hoc in one case who is also acting or has recently acted as agent, counsel or advocate in another case before the Court. Accordingly, parties, when choosing a judge ad hoc pursuant to Article 31 of the Statute and Article 35 of the Rules of Court, should refrain from nominating persons who are acting as agent, counsel or advocate in another case before the Court or have acted in that capacity in the three years preceding the date of the nomination. Furthermore, parties should likewise refrain from designating as agent, counsel or advocate in a case before the Court a person who sits as judge ad hoc in another case before the Court."[37]

It is highly important to take into account the statements made by M. Adatci, member of the Commission of Jurists in charge of drafting the Statute of the PCIJ, who expressed the following considerations regarding the relevance of the participation of an *ad hoc* judge in the preparation of a judgment by an international court:

[35] International Court of Justice. Dissenting opinion of judge Frank in the case "Sovereignty over Puiau Ligitan and Pulau Sipadan (Indonesia/Malaysia)", http://www.icj~ cij.org/docket/tiles/102/7718.pdf

[36] Case of Paniagua-Morales *et al*. Dissenting opinion of judge Arguello on the order of the Inter-American Court of Human Rights of September 11, 1995.

[37] International Court of Justice. Practice Direction VII www.icj: Cij,org/documents/index.php?p1=4&p2=4&p3=0

"A Judge representing a party should be admitted to take part in the deliberations and the vote. He would be of great assistance, especially in the drafting of the sentence, a sufficiently delicate question in cases of national law and even more so in international cases, where sentence have to be drawn up, which must be complied by States, sometimes by powerful States. It is essential that the explanatory statement accompanying the sentence should be so drawn up as to remove the possibility of obstacles which national susceptibilities would ne inclined to put in the way of the execution of the sentence."[38]

The Government of Mexico finds that the aforementioned decisions must be valued and taken into account by this IACHR given their relevance as source of international law,[39] since they evidence that the participation of *ad hoc* judges in various international tribunals has favored the increase in the number of resolutions highly consistent with the domestic legal systems involved in international conflicts, adhering at all times to the principles of independence, impartiality and the exercise of duties in a personal capacity by the judges who compose those instances; a situation that gives rise to certainty as to the terms and scope of the judgments that are eventually rendered by the Tribunal.

The considerations timely made by an *ad hoc* judge may or may not be accepted by the other members of the Tribunal, but the most important aspect of their participation is the fact that their reasoning must be absolutely understood by all members, hence their participation is of the essence for the evaluation of all cases.[40]

3.1. The participation of *ad hoc* judges before the Inter-American Court is a practice generally accepted by the countries of the region that take part in the system.

Lastly, the State of Mexico makes reference to customary practice as a source of public international law applicable to international tribunals.[41]

Customary practice arises when what is considered is not a mere temporary phenomenon attributable to special circumstances but, on the contrary, a constant firmly-established practice, known as such by a plurality of States.[42]

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[38] Proces-verbaux op. cit; page 529.

[39] Article 38. 1.d of the Statute of the ICJ. "Judicial decision and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law..."

[40] Nagendra Singh. The role and record of the International Court of Justice: 1946-48 – in celebration of the 40th anniversary. Martinus Nijhoff Publishers, 989; pag. 324.:, 4[f]he particular approach adopted by a party to a case may note be shared by all, or indeed any. Members of the Court, but what is essential is that it should be fully understood before it is accepted or rejected. It is in this respect that the national judge, whether elected or appointed ad hoc, plays an essential role."

[41] Statute of the International Court of Justice. Article 38(1) The ICJ, whose duty is to decide –pursuant to international law- any controversy submitted to its jurisdiction, must apply:

[42] Sorensen Max. *Manual de derecho Internacional Publico*. Ed. FCE, Mexico 2008. pdg. 162.

The mandatory nature of a practice results from general acceptance by the States. Such acceptance becomes evident when the practice in question is used in general and continuously.[43]

In this sense, the recognition of a generally accepted practice may be considered a general customary practice (applicable to the entire international community) and local or regional customary practice (applicable only to a given group of States).

Reference could be made to the recognition of a general customary rule in the context of interstate conflicts submitted to the jurisdiction of international tribunals; however, the State of Mexico considers that as regards the Inter-American System of Human Rights, it is necessary to admit that there is a generalized regional practice related to the concept of the *ad hoc* judge in the processing of cases initiated under individual petitions, which constitute the basis for the operation of the system.[44]

In this regard, the International Court of Justice has emphatically listed the conditions that must be satisfied for a “practice generally accepted as a right” to be considered a regional international customary practice. The order issued on November 20, 1950, in the case of "Asylum (Colombia v. Peru)" is clear upon stating that:

a. international conventions, either general or specific in nature, provide for rules expressly recognized by the States to the lawsuit;

b. international customary practice is a proof of a practice generally accepted as law;

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

d. the judicial decisions and authoritative opinions of the most renowned advisors of the different nations, are an auxiliary means to establish the rules of law, notwithstanding the provisions of Article 59.

> *"The Colombian Government has finally invoked "American international law in general". In addition to the rules arising from agreements which have already been considered, it has relied on an alleged regional or local custom peculiar to Latin-American States.*
>
> *The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law."*[45]

[43] Ibid.

[44] There is only one interstate petition processed before the IACHR that was declared inadmissible.

[45] International Court of Justice. Asylum case. Order of November 20, 1950. http://www.ici-cii.Org/docket/fjles/7/1849.pdf

Furthermore, the order issued on February 20, 1969, in the case "North Sea Continental Shelf (Federal Republic of Germany/Netherlands)" set forth:

> *"Although 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, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;- and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."*[46]

The references mentioned above indicate that the recognition of a regional customary rule is based on the assessment of two elements; the practice in the States involved (State practice) and the firm understanding of those States that such practice is consistent with an international legal obligation (*opinio juris sive necessitatis*).

The State of Mexico does not intend to have this honorable IACHR to issue a decision on the recognition of an international customary rule; however, it is necessary to take into consideration that both elements have been fully satisfied in the instant case.

Only 4 out of the 25 countries that to date have ratified the ACHR do not recognize the contentious jurisdiction of the IACHR (Dominica, Grenada, Jamaica and Trinidad and Tobago).[47] Furthermore, 19 out of the 21 remaining countries -irrespective of the number of cases processed- have exercised their right to appoint an *ad hoc* judge to consider the matters where their State is a party.[48]

Note that 32 *ad hoc* judges participated in the processing of 46 cases before the IACHR, whose voting was as follows: 29 against the State, 12 in favor of the State, 2 partially against the State and 3 in favor of the State.

Based on the observations made above, the State of Mexico considers that the right of the States that have recognized the contentious jurisdiction of the IACHR to appoint an *ad hoc* judge to participate in the consideration of conflicts brought before it is a practice generally accepted by the countries of the region, whose exercise is supported by the regulatory instruments of the system itself and is based on the principles of independence and impartiality applicable to every and each of the members who have ever been part of such an important instance.

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[46] International Court of Justice. North Sea Continental Shelf (Federal Republic of Germany/Netherlands). Order of February 20, 1969. Page. 84.

[47] American Convention on Human Rights. Status of signatures and ratifications. http://vwAV.cidh.ora/Basicos/Basicos3.htm

[48] Venezuela, Panama, Dominican Republic and Barbados have exercised their right to appoint an *ad hoc* judge but their proposals did not comply with the requirements set forth by the Court for the exercise of such right and refrained from submitting new proposals. Chile and Haiti are the only countries that have never exercised that right. http://www.corteidh.or.cr/porpais.cfm

4. Final considerations.

The issues raised in the request for advisory opinion submitted by the Argentine Republic before the IACHR can be summarized as follows:

> Does the possibility of a judge -member of the Court or *ad hoc*- who is a national of a respondent State involved in the analysis of a case originated in an individual petition, purport a risk to the principle of equality of resources between the parties upon jurisdictional proceedings?

The answer is fully explained in this document; however, the State of Mexico considers that it is necessary to add that the IACHR should be conscious about the diversity of cultures and criteria present in the international community, which must be taken into account upon organizing international tribunals that will timely hear and settle a given situation.

Such is the case of the International Court of Justice, whose Statute adequately indicates that the composition of the court should provide for the representation of the great civilizations and the main legal systems of the world.[49]

In that regard, Judge Levi Caneiro, during his participation in the International Court of Justice, stated that:

> "It is inevitable that everyone of us in this Court should retain some trace of his legal education and his former legal activities in his country of origin. This is inevitable, and even justified, because in its composition the Court is to be representative of the main forms of civilization and of the principal legal systems of the world".[50]

Even though most of the States that participate in the Inter-American System of Human Rights share the Roman-Germanic origin of their domestic legal systems, due to countless circumstances, such systems are different from each other as to their methods and operation.

The fact that the Honorable IACHR is composed of 7 judges and that there cannot be more than 2 judges of the same nationality[51] cannot purport a legal disadvantage to a State that is a party to an international conflict, where there is no judge who is a national of such State to take part in the analysis of the case. On the contrary, since the order that the Court will eventually issue will certainly impact on the domestic legal system (Article 2 of the ACHR)[52] of the condemned State, the right to appoint an independent and impartial national to cooperate with the Court is a fundamental right in the context of international public law.

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[49] Article 9. At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

[50] Anglo Iranian Oil Co. (United Kingdom//Iran), Preliminary Objections (Dis. Op. Levi Caneiro), ICJ Reports (1952), pp. 151,161, Para. 14.

[51] Article 4 of the Statute of the IACHR.

[52] Article 2. Domestic Legal Effects. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

In its advisory opinion on the *Effects of Awards,* the ICJ finds that it is possible for the international community to establish “an independent and truly judicial body [capable] of rendering final judgments".[53] Moreover, as held by the 1st Chamber of First Instance of the International Criminal Tribunal for the former Yugoslavia, "[t]he question whether a court is independent and impartial depends not upon the body that creates it but upon its constitution, its judges and the way in which they function".[54]

The participation of a judge who is a national of the respondent State in the course of a case originated in an individual petition is a necessary and suitable resource of this tribunal to gather sufficient elements that will timely allow to perform an assessment that is much more objective and consistent with the specific circumstances of domestic legislation and the political, economic and social context in which the State in conflict is enmeshed.

Thus, the participation of a national judge of a respondent State in the analysis of the case is advantageous for the alleged victims who are parties to the international conflicts brought before this Tribunal, since such evaluation of violations will adjust to the circumstances prevailing in the respondent State and the order that the Tribunal will eventually issue will be much more coherent for compliance thereof.

In that regard, the European Court of Human Rights has systematically sustained the following as regards the principle of equality of resources:

> *"One of the elements of the broader concept of a fair trial is the principle of equality of arms, which requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent".*[55]

Moreover, the United Nations Human Rights Committee held that the principle of equality of resources or procedural fairness is guaranteed through equal access to rights and procedural means,[56] "unless distinctions can be justified on objective and reasonable grounds, without purporting any actual disadvantage or other unfairness to the respondent.[57]

Consequently, the principle of equality of resources between the parties entails the need for the parties to a proceeding to be able to present their case in a manner that avoids substantial disadvantages among them.

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[53] Effects of awards of compensation made by the U.N. Administrative Tribunal (Advisory opinion), ICJ. Reports, 1954, page 53.

[54] *Prosecutor v, Dusko Tadic (Decision on* the *Defense Motion on jurisdiction),* IT-94-1-T, T. Ch. II (August 10, 1995) (Tadic (Decision on jurisdiction), para. 32.

[55] European Court of Human Rights (ECHR), Case of Kukkonen v Finland, petition No. 57793/00, judgment of June 7, 2007, para. 20;. ECHR, Case of Niderost-Huber v Switzerland, petition No. 18990/91, Judgment of February 18, 1997; Para. 28; ECHR, Case of Ankerl v. Switzerland, Petition No. 17748/91, Judgment of October 23, 1996; Para. 38.

[56] Human Rights Committee, General Comment No. 32 to the International Covenant on Civil and Political Rights, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007); Para. 8. (hereinafter, "General Observation No. 32").

[57] Id., Para. 13; Human Rights Committee, Communication No. 1347/2005, Dudko v. Australia, Para. 7.4.

The considerations above mean that, even though upon proceedings before international tribunals the parties enjoy equal procedural rights, there might be objective and rational justifications that give rise to distinctions among the rights granted upon them.

For the State of Mexico, the fact that a national judge from a respondent State participates in the considerations of a given case allows to "preserve a fair balance between the protection of human rights, which is the ultimate purpose of the system, and the legal certainty and procedural equity that will ensure the stability and reliability of the international protection mechanism",[58] and participation represents a rational and objective justification based on its functions, which is not only beneficial to the parties but also essential to the operation of the Court itself.

The State of Mexico has no other option but to recognize the independence and impartiality that has always characterized this tribunal, which have resulted in a high and increasing level of reliability among the countries of the region; in this regard, it is adequate to quote Judge Cançado Trindade, who appropriately stated as follows:

> *"It is precisely to cover the gaps of applicable legal texts that the Inter-American Court exercised the important duty to interpret the wording and spirit of the American Convention on Human Rights. The main concern of the Court, rather than the understanding of the parties as to the scope of their own duties, may not consist –in my opinion- in anything other that the full preservation of impartiality and independence to effectively contribute to the performance of the ultimate purpose and goal of the American Convention on Human Rights. (...)*[59]

[58] Cf. Inter-American Court of Human Rights (IACHR), Case of Cayara v, Peru., Preliminary Objections. Judgment of February 3, 1993. Series C No. 14, para. 63.

[59] Op. Cit. note 11.