Honorable Court:

Pursuant to Article 63.3 of the Rules of Procedure of the Inter-American Court of Human Rights, ELISA DE ANDA MADRAZO and GUILLERMO JOSÉ GARCÍA SÁNCHEZ – both Mexicans by birth and residents of Mexico City –, respectfully file their written opinion on the first question covered by the Argentine Republic's request for an advisory opinion – OC-21.

I. Identification of the people who submit the writ

Attached please find a copy of their Passports.

II. Contact information for notifications and communications

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III. Written opinion

The existence of the ad hoc judge in the Inter-American Court of Human Rights (Court H.R.) creates a procedural imbalance between the parties. Its inclusion in the Inter-American Human Rights System (IHR System) was accidental and is not justified.

In the early 1920s, the League of Nations discussed if the inclusion of the ad hoc judge – an institution used in old arbitral procedures – would be advisable in the

Statute of the Permanent Court of International Justice (PCIJ)[1]. The result of the debate ended with its inclusion in Article 31 by giving the parties the opportunity [2] to select a judge of their nationality when the Court does not include one on the Bench. The legal and political reasoning behind the decision was that the presence of an ad hoc judge had proven its utility in arbitral procedures by (i) providing confidence to the countries that there was no inequity caused by the participation of a judge of the nationality of only one party; and (ii) allowing the Tribunal to have a person more familiar with the views and the law of one of the parties participating in its deliberations.

The International Court of Justice (ICJ) was established in 1945 as the successor of the PCIJ, adopting almost all of the former's Statute including Article 31[3].

Since then, the ICJ has become the model for international tribunals and consequently its organic and procedural rules were reproduced[4] in the adoption of new international judicial institutions. It was in this way that the ad hoc judge infiltrated The European Convention on Human Rights[5] and The American Convention on Human Rights (ACHR).

Whereas the regulations of the IHR System do not expressly contemplate that the ad hoc judge should be used by the Court H.R. when the Inter-American Human Rights Commission (Commission) submits the case[6] (as opposed to a State v. State case), it is the Court`s interpretation that the ad hoc judge may be used in the former case[7].

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[1] See *Acts and Documents concerning the Organisation (sic) of the Court.* Minutes of Meetings held during the Preliminary Session of the Court – January 30th to March 24th 1922. Publications of the Permanent Court of International Justice. Pp. 117-119.

[2] If several parties share the same interest, they are considered one party only.

[3] The only 2 differences between Article 31 of the Statutes are: (i) that the PCIJ`s Statute established that the ad hoc judge had to be selected among the deputy-judges while the ICJ`s Statute just says that the party "may choose a person"; and (ii) that the ICJ`s Statute establishes a new paragraph that states that the provisions of Article 31 shall apply to the case of Articles 26 and 29 (which are about the Court working in chambers).

[4] As a result of the vast devastation that WW II left and the changing configuration of the international community, a significant effort has been made in this period to maintain peace and to protect human rights by using international courts and tribunals to solve conflicts and violations of international law.

[5] While The European Convention on Human Rights also included the ad hoc judge concept – Article 29 of the 11 Protocol, Article 38 of the original Convention –, its use is not that common because the European Court of Human Rights is composed of one judge from each of the countries that are party to the Convention. Thus, there is hardly any need to have ad hoc judges.

[6] Article 55 of the American Convention on Human Rights, Article 10 of the Statute of the Court and Article 18 of the "Regulations", establish the legal framework of the ad hoc judge appointment only when a state is the claimant.

[7] In such case, only the State has the right to appoint an ad hoc judge. The Commission does not have this privilege.

Such interpretation goes against the purpose of the ACHR by altering the procedural balance between the parties. This assertion can be proven by analyzing the reasons supporting the original inclusion of the ad hoc judge in the international courts and the nature of the IHR System:

(i) The ad hoc judge for the Court H.R. does not provide confidence to both parties. Instead it gives an advantage to the State by allowing it to name a person who, while being an expert in the State's law and presumably impartial, usually ensures that every relevant argument in favor of the party that has appointed him has been fully appreciated[8]. The Commission (and thus, the victim) does not have this privilege, which clearly creates a procedural imbalance in the deliberations.

(ii) Some authors sustain the positive nature of the ad hoc judge by saying that it adds to the Tribunal a person more familiar with the law and the views of the State. However, since the Tribunal has access to this expert on the State's law, who's opinion usually play an important role in the deliberation, a legitimate question must be raised: shouldn't this expert opinion be available to the parties so they can know its content and support it or object to it?

Actual regulation does not allow the parties to know what the "expert" (ad hoc judge) is sustaining or suggesting, and it is logical that the Commission and the victim are going to be concerned that he or she is probably going to present all the State's arguments and explain to the other judges the State's law.

If what the Tribunal needs is an expert on the State's Law, why doesn't the Tribunal appoint the expert[9]. If the appointment is made by the Tribunal, the expert's independence and truthfulness would be less likely questioned, and if the parties want to object to the expert's view, they would have the information and the opportunity to do so in compliance with the contradiction principle that characterizes the proceedings before the Court H.R.

The Court H.R. should pursue procedural balance and change its criteria determining that the ad hoc judge should not be used in cases where the claimant is the Commission and use instead – if needed – expert reports offered by the Tribunal itself. This criteria change does not require a modification of the legal

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[8] Separate opinion of Judge Lauterpacht. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993, p. 409).

[9] Article 45 of the Court H.R.'s Rules of Procedure states that: "The Court may, at any stage of the proceedings: 1. Obtain, on is own motion, any evidence it considers helpful. In particular, it may hear as a witness, expert witness, or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant".

framework neither the support of the States. Thus, it would be a decision taken by the Court H.R. autonomously that would certainly strengthen and give greater legitimacy to the Court H.R. by confirming its independence from the States.[10]

Sincerely,

Elisa de Anda Madrazo

Guillermo José García Sánchez

[10] Actually, this new interpretation is being taken up by other systems, such as the African Court on Human and Peoples' Rights, the Protocol of which does not contemplate the appointment of ad hoc judges.