

**ORDER OF THE PRESIDENT OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS
OF JUNE 4, 2012
CASE OF MOHAMED v. ARGENTINA**

HAVING SEEN:

1. The brief submitting the case to the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") presented by the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") on April 13, 2011, in which it offered an expert opinion. The Commission did not identify the proposed expert witness.
2. The communication of April 21, 2011, in which the Inter-American Commission indicated the name of the expert witness proposed in the brief submitting the case and presented his curriculum vitae.
3. The brief with pleadings, motions and evidence (hereinafter "pleadings and motions brief") and its attachments presented by the inter-American defenders, representatives of the presumed victim (hereinafter also "the representatives" or "the inter-American defenders")¹ on December 11, 2011, in which they offered the statement of the presumed victim and an expert opinion. In addition, the inter-American defenders requested access to the Victims' Legal Assistance Fund of the Inter-American Court (hereinafter "the Court's Assistance Fund" or "Fund") in order to conduct the "defense in the inter-American proceedings [and] for the expenses required by any activity related to this," and specified some of these expenses.

¹ In an Order of August 31, 2011, the Court decided to inform the AIDF of the request made by the presumed victim, Oscar Alberto Mohamed, to be represented by an inter-American defender (Article 37 of the Rules of Procedure of the Court), owing to the decease of the person who had been representing him in the international proceedings. The Court also indicated that the procedure established in the second article of the Memorandum of Understanding between the Inter-American Court and the AIDF would be followed. On September 16 and 20, 2011, the AIDF General Coordinator advised the names of the two inter-American defenders who had been designated to represent the presumed victim and this information was forwarded to the latter. The inter-American defenders were notified of the submission of the case on October 7, 2011, and the two-month period for presenting the brief with pleadings, motions and evidence was calculated as of this date.

4. The communication sent by the representatives on the day they submitted the pleadings and motions brief presenting an "expansion" of the offer of evidence, consisting in the offer of a second expert opinion. The representatives forwarded the curriculum vitae of this expert witness and his contact information in communications of December 13 and 14, 2011.
5. The communication of December 13, 2011, in which the representatives presented a "clarification" regarding the specific expenses they had requested be covered by the Fund (*supra* having seen paragraph 3).
6. The note of the Secretariat of the Court (hereinafter "the Secretariat") of December 15, 2011, in which, on the instructions of the President and in accordance with the provisions of Article 40(2)(c) of the Court's Rules of Procedure, the representatives were asked to clarify concisely, by December 20, 2011, at the latest, the purpose of one of the expert opinions in relation to the issues or "points" included in the seven questions they had raised when offering this expert opinion in their pleadings and motions brief (*supra* having seen paragraph 3).
7. The notes of the Secretariat of December 15, 2011, in which, among other matters, the parties and the Commission were advised that the said request for assistance from the Fund (*supra* having seen paragraph 3) would "be processed as established in the Rules for the Operation of the Fund, and [would] be regulated by the provisions of the fourth article of the Memorandum of Understanding between the Inter-American Court and the Inter-American Association of Public Defenders" (hereinafter "the Memorandum of Understanding").
8. The brief of December 19, 2011, in which the representatives presented the purpose of the first proposed expert opinion in a more concise form (*supra* having seen paragraph 6) and requested that this formulation of the purpose of the expert opinion should "also apply to the statement of Julio B. J. Maier."
9. The brief of February 24, 2012, in which the Argentine Republic (hereinafter "the State" or "Argentina") filed a preliminary objection and presented its answer to the submission of the case and its observations on the pleadings and motions brief (hereinafter "answering brief"). The State did not offer any testimony as evidence, but contested the expert evidence offered by the Commission and by the representatives.
10. The briefs of March 28 and 29, 2012, in which the representatives and the Inter-American Commission, respectively, presented their observations on the preliminary objection filed by the State; the Commission also included observations on other "preliminary assertions made by the State."
11. The notes of the Secretariat of April 20, 2012, in which, on the instructions of the President of the Court (hereinafter "the President") and in accordance with Article 46(1) of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"),² the representatives and the Inter-American Commission were asked to forward, by May 4, 2012, at the latest, their respective final lists of deponents (hereinafter "final lists") and that, for reasons of procedural economy and in application of the said article, they should indicate those who could provide their statements or expert opinions by affidavit and those who they considered should be summoned to testify at a public hearing.

² Rules of Procedure approved by the Court at its eighty-fifth regular session held from November 16 to 28, 2009.

12. The briefs of May 4, 2011, in which the Inter-American Commission and the representatives forwarded their final lists of deponents and indicated those who could provide their testimony or expert opinions by affidavit and those who could do so during the hearing. The representatives indicated that "Oscar A. Mohamed and his next of kin" and one of the proposed expert witnesses "could testify before notary public." In addition, they indicated that the other proposed expert witness could provide his opinion during the public hearing. The Commission confirmed the expert evidence offered previously and asked that the expert witness testify at the public hearing.

13. The notes of the Secretariat of May 9, 2012, in which, on the instructions of the President and in keeping with Article 46(2) of the Rules of Procedure, the final lists were forwarded to the parties and to the Inter-American Commission and they were advised that they had 10 days in which to present any observations they considered pertinent.

14. The brief of May 15, 2012, in which the Commission advised that "it had no observations to make on the final list of deponents of the representatives" and asked for authorization to question the two expert witnesses proposed by the representatives. The representatives did not present observations on the Commission's final list.

15. The brief of May 18, 2012, in which Argentina requested an extension "to present observations, objections or exceptions to the final list[s] of deponents" of the representatives of the presumed victim and of the Inter-American Commission.

16. The note of the Secretariat of May 18, 2012, in which, on the instructions of the President of the Court, the State was granted the requested extension until May 22, 2012.

17. The brief of May 22, 2012, in which the State presented its observations on the final lists of deponents of the Inter-American Commission and of the representatives. The State reiterated the objections it had made in its answering brief (*supra* having seen paragraph 9), added other objections and challenged Alberto Bovino, who the Commission had proposed as an expert witness.

18. The note of the Secretariat of May 23, 2012, in which, in keeping with Article 48(3) of the Rules of Procedure and on the instructions of the President of the Court, Alberto Bovino, proposed as an expert witness by the Commission, was granted until May 28, 2012, at the very latest, to submit any observations he considered pertinent on the objection to him filed by the State (*supra* having seen paragraph 17).

19. The brief of May 28, 2012, in which Alberto Bovino forwarded his observations on the objection to him filed by the State (*supra* having seen paragraphs 17 and 18).

CONSIDERING THAT:

1. In this Order, the President will rule on the request to access the Assistance Fund presented by the inter-American defenders as representatives of the presumed victim (*infra* considering paragraphs 2 to 13 and 53 to 58), and on the offer of evidence by the Commission and by the said representatives (*infra* considering paragraphs 14 to 52). Furthermore, the President will establish a time frame for the presentation of final oral and written arguments and observations (*infra* considering paragraphs 59 and 60).

1. Application of the Court's Assistance Fund to the expenses incurred by the inter-American defenders

2. Argentina has been a State Party to the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") since September 5, 1984, and accepted the compulsory jurisdiction of the Court on the same day.

3. In the instant case, two inter-American defenders have been appointed to represent the presumed victim (*supra* note 1) in application of the provisions of Article 37 (Inter-American Defender) of the Court's Rules of Procedure.³ As established in the statement of motives of the Court's Rules of Procedure, the mechanism of the inter-American defender was established so that "alleged victims will be guaranteed an attorney to represent their interests before the Court, and financial considerations will no longer impede access to legal representation."

4. In the pleadings and motions brief, the inter-American defenders included requests concerning the use of the Victims' Fund to cover "the expenses required by any activity" related to the exercise of the defense in the inter-American proceedings. In this brief, they specified that they were requesting the assistance of the Victims' Fund for "the attendance at the hearing before the Inter-American Court,⁴ of the victim, the proposed expert witness and the two inter-American defenders (to cover travel costs, transfers, accommodation and per diems during the days required to attend the hearings that are established), as well as the fees of the proposed expert witness." In a brief presented two days later (*supra* having seen paragraphs 3 and 5), they added that they requested this assistance to cover "the expenses required by the [second] expert opinion [offered], and all the travel costs to the sessions of the inter-American Court of [this] expert witness."

5. In 2008, the General Assembly of the Organization of American States (hereinafter la "OAS") created the Legal Assistance Fund of the Inter-American Human Rights System (hereinafter "the Assistance Fund of the Inter-American System") and required the OAS Permanent Council to draft its operating rules.⁵ This Assistance Fund was established in order "to facilitate access to the inter-American human rights system by persons who currently lack the resources needed to bring their cases before the system."⁶ According to the Rules of Procedure adopted by the Permanent Council in November 2009,⁷ the Assistance Fund of the Inter-American System has two separate accounts: one corresponding to the Inter-American Commission and the other to the Inter-American Court. With regard to the financing of the Assistance Fund of the Inter-American System, at the present time this depends on "[v]oluntary capital contributions from the member states of the OAS, the permanent observer States, and other States and donors that may wish to

3 This article stipulates that "[i]n cases where alleged victims are acting without duly accredited legal representation, the Court may, on its own motion, appoint an inter-American defender to represent them during the processing of the case."

4 Subsequently, in their final list of deponents, the representatives asked that the presumed victim testify by affidavit, "because he cannot do so in person owing to his health" (*infra* considering paragraph 47).

5 AG/RES. 2426 (XXXVIII-O/08) Resolution adopted by the fourth plenary session of the thirty-eighth OAS General Assembly, on June 3, 2008, "Establishment of the Legal Assistance Fund of the Inter-American Human Rights System," operative paragraph 2(b).

6 AG/RES. 2426 (XXXVIII-O/08), *supra* note 5, operative paragraph 2(a) and CP/RES. 963 (1728/09), Resolution adopted on November 11, 2009, by the OAS Permanent Council, "Rules of Procedure for the Operation of the Legal Assistance Fund of the Inter-American Human Rights System," Article 1(1)

7 Rules of Procedure of the Legal Assistance Fund of the Inter-American System, *supra* note 6.

collaborate.”⁸ Moreover, according to article 4 of the Rules of Procedure approved by the Permanent Council, the Court was required to regulate the eligibility requirements to request assistance and also the approval procedure.

6. Based on the above, on February 4, 2010, the Court adopted the Rules for the Operation of the Victims’ Legal Assistance Fund (hereinafter the “Rules of the Assistance Fund”), in force as of June 1, 2010, to “regulate the operation of, and access to, the Victims’ Legal Assistance Fund [...] for the litigation of cases before it.”⁹ The Rules establish the requirements for a presumed victim to have to access to this Fund. In cases in which inter-American defenders have been appointed, they should request the assistance of the said Fund, when presenting the pleadings and motions brief, while indicating precisely those aspects of the defense in the proceedings that require the use of the Fund’s resources, as indicated in article 2 of these rules.

7. The Memorandum of Understanding signed by the Inter-American Court and the Inter-American Association of Public Defenders (hereinafter AIDEF)¹⁰ regulates the procedure to be followed for the appointment of inter-American defenders and other relevant aspects of their function of the legal representation of presumed victims before the Court within the framework of the application of Article 37 of the Court’s Rules of Procedure.

8. The fourth article of the said Memorandum regulates the use of the Victims’ Legal Assistance Fund when an inter-American defender intervenes, as follows:

Legal representation before the Inter-American Court by the person designated by the Inter-American Association of Public Defenders is free of charge and this person shall be paid only the expenses arising from the defense.

The Inter-American Court of Human Rights shall cover, insofar as possible and through the Victims’ Legal Assistance Fund, the reasonable and necessary expenses incurred by the designated inter-American defender.

The designated inter-American defender shall submit to the Court all the vouchers required to authenticate the expenses incurred as a result of the processing of the case before the Court.

9. According to the said provisions, in the case of presumed victims who do not have a legal representative in the proceedings before the Inter-American Court and whose representation is assumed free of charge by an inter-American defender in the terms of Article 37 of the Court’s Rules of Procedure, resources will be provided from the Assistance Fund to cover, insofar as possible, the reasonable and necessary expenses resulting from this representation.

8 Rules of Procedure of the Legal Assistance Fund of the Inter-American System, *supra* note 6, Article 2(1).

9 Rules of the Inter-American Court of Human Rights for the Operation of the Victims’ Legal Assistance Fund, approved by the Court on February 4, 2010, article 1.

10 The AIDEF is “a non-profit, apolitical, non-religious civil institution of a social and cultural nature composed of state institutions of public defenders and associations of public defenders of the Americas who are responsible for the representation, counseling and technical defense of persons during a trial in accordance with laws, constitutions, and international treaties; its purposes are, *inter alia*, to defend the exercise and effectiveness of human rights and the guarantees recognized in agreements, international treaties, constitutions and domestic laws in the sphere of competence of public defense; and to promote the necessary assistance and representation of justiciable persons and rights that permit a comprehensive defense and access to justice with the appropriate quality and experience.” Memorandum of Understanding between the Inter-American Court of Human Rights and the Inter-American Association of Public Defenders, signed on September 25, 2009, and in force as of January 1, 2010.

10. In keeping with article 3 of the Fund's Rules, it is the President who decides on the request by the inter-American defenders, and he does so taking into account the preceding observations. First, the President must verify that the request to access the Assistance Fund was made at the appropriate opportunity, in the pleadings and motions brief (*supra* having seen paragraph 3). In addition, the President observes that the inter-American defenders indicated precisely the assistance from the said Fund required by the presumed victim, which is to cover reasonable and necessary expenses related to the production of evidence before the Court; specifically for the presentation of the testimony of the presumed victim and the two expert opinions, either at a hearing or by affidavit (*supra* considering paragraph 4), as well as for the appearance of the inter-American defenders at the public hearing to be convened.

11. The President recalls that the Assistance Fund is composed of voluntary contributions from collaborators (*supra* considering paragraph 5); thus these limited resources are insufficient to cover all the expenses relating to the appearance and eventual presentation of evidence before the Court by the presumed victims. Consequently, in each case, the President evaluates the request for assistance submitted in relation to the funds available, taking into account the need for assistance of other presumed victims that could arise in other cases before the Court, so as to ensure the correct administration and fair distribution of the Fund's limited resources.

12. Based on these considerations, the President admits the request made by the inter-American defenders for assistance from the Fund to cover the reasonable and necessary expenses that are authenticated in order to represent the presumed victim in these proceedings. The specific purpose and intended use of the financial assistance to be provided will be decided in this Order (*infra* considering paragraph 54), when the President has determined the opening of the oral proceedings and decided on the admissibility and relevance of the testimony offered, as well as on how this will be provided, in keeping with Article 50(1) of the Court's Rules of Procedure.

13. The President recalls that the inter-American defenders must justify to the Court the need and reasonableness of the expenses they have incurred or have to incur owing to the processing of the case, and also provide the Court with vouchers for these expenses or an estimate for the expenses when this is requested. The President notes that, to date, the inter-American defenders have not asked for the assistance of the Fund to reimburse any expense incurred, and establishes that a request in this regard should be made with the presentation of the final written arguments, at the latest, as this is the last procedural opportunity to do so, unless the President or the Court grants another procedural opportunity.

II. Offer of evidence by the Inter-American Commission and by the representatives of the presumed victim

14. The offer and admission of evidence, and also the summoning of the presumed victims, witnesses and expert witnesses are regulated in Articles 35(1)(f), 40(2)(c), 41(1)(c), 42(2), 46, 47, 48, 50 and 57 of the Court's Rules of Procedure.

15. The Commission offered an expert opinion as evidence and the representatives offered the testimony of the presumed victim and two expert opinions, all of which were offered at the appropriate procedural opportunity (*supra* having seen paragraphs 1 to 4, 6 and 8). However, extemporaneously, the representatives offered the testimony of "[the] next of kin" of the presumed victim when submitting their final list of deponents (*supra*

having seen paragraph 12). For its part, the State did not offer any deponent (*supra* having seen paragraph 9).

16. The Court ensured the parties and the Commission the right of defense in relation to the evidence offered in their briefs submitting the case and with pleadings and motions, as well as in their final lists (*supra* having seen paragraphs 13, 14 and 17).

17. The Commission and the representatives made no observations on the final lists. For its part, the State presented observations, objections and a challenge. Argentina presented observations on the way in which the statement of the presumed victim, the testimony of his next of kin, and the expert opinion of one of the expert witnesses offered by the representatives were proposed (*supra* having seen paragraphs 9 and 17). In addition, it contested the expert opinions offered by the Inter-American Commission and by the representatives, and challenged the expert witness proposed by the Commission.

18. Regarding the statement of the presumed victim offered by the representatives, the President considers that the State's observations do not refer to the admissibility of the evidence, but rather to the way in which it will be provided. Since it has not been contested, the President considers it desirable to receive the statement of the presumed victim, so that the Court can assess its usefulness at the appropriate procedural moment in the context of the body of evidence and according to the rules of sound judicial discretion. The President will determine the purpose of this statement and the way in which it will be received in this Order (*infra* considering paragraph 47 and operative paragraph 4).

19. The objections made by the State and other aspects to be decided in this Order will be dealt with in the following order: (a) testimony offered by the representatives in their final list of deponents; (b) the State's objections to the admissibility of the expert opinions offered by the Inter-American Commission and by the representatives; (c) the State's challenge of the expert witness offered by the Commission; (d) admissibility of the expert opinion offered by the Commission; (e) the Commission's request to question the expert witnesses offered by the representatives; (f) method of receiving the testimony of the presumed victim and the expert opinions; (g) application of the Assistance Fund, and (h) final written arguments and observations.

A) Testimony offered by the representatives in their final list of deponents

20. In their final list, the representatives offered, for the first time, the testimony of "[the] next of kin" of the presumed victim, without explaining why they had not offered this evidence in the pleadings and motions brief (*supra* having seen paragraph 12).

21. In its observations on the final lists, the State indicated that "the representatives have not specified which next of kin of Mr. Mohamed should give testimony, and have provided no justification whatsoever for the supposed health reasons that would prevent them and the presumed victim from appearing, in person, at the hearing."

22. The President notes that the said testimonial statements of "[the] next of kin" of the presumed victim were not proposed by the representatives in their pleadings and motions brief and that the representatives have not provided any reason why the said testimony was not offered at the appropriate procedural moment. The request to present final lists of deponents does not represent a new procedural opportunity to offer evidence,¹¹ unless the

¹¹ Cf. *Case of Anzualdo Castro v. Peru*. Order of the President of the Court of February 26, 2009, fourteenth considering paragraph; *Case of González Medina and Family Members v. Dominican Republic*. Order of the

exceptions established in Article 57(2) of the Rules of Procedure are alleged, namely: *force majeure*, grave impediment or supervening facts.¹² The main purpose of the final lists is for the Commission, the presumed victims or their representatives, and the State to confirm or withdraw the offer of the testimony opportunely proposed and also, based on the principle of procedural economy, to indicate those of the proposed deponents they consider should provide their testimony at the public hearing and those that can do so by affidavit, in order to program the public hearing as appropriately as possible.

23. Based on the above, the time-barred offer of the said testimonial statements has no regulatory grounds. Moreover, the offer did not identify which of the presumed victim's next of kin were proposed as deponents or explain the purpose of their testimony; thus the President is unable to assess the need or usefulness of the possible testimony of the proposed witnesses. Consequently, the President finds that it is not in order to admit the statements of "the next of kin" of the presumed victim offered by the representatives.

B) The State's objections to the admissibility of the expert opinions offered by the Inter-American Commission and by the representatives

24. The Commission proposed Alberto Bovino, an Argentine lawyer, as an expert witness. The representatives offered the expert opinions of Julio B.J. Maier and Alberto M. Binder, Argentine lawyers. The Commission and the representatives provided the *curricula vitae* substantiating the academic and professional experience of these persons. The purpose of the said expert opinions is indicated below (operative paragraphs 4 and 8).

25. In its answering brief the State indicated that "it opposed the expert opinions offered by the Inter-American Commission and by the representatives [...] and contested the elements of the proposed expertise" because the said opinions related "to matters examined in these proceedings, which fall within the exclusive competence of the judges of the Court." This objection was repeated in its observations on the final lists, on the basis that "the international standards that the expert witnesses proposed by the Inter-American Commission and the representatives of the presumed victim may be asked to describe have arisen from and been developed progressively by the case law of [the] Court called upon to decide the instant case." Argentina underscored that "[t]he importance of the expert opinion is revealed by the fact that, although the judge is an expert on the law, he is generally not an expert in other sciences and does not have specific knowledge of art, mechanics, and numerous other practical activities that require specialized studies and broad experience." According to the State, "it is clearly unnecessary to produce evidence that, within the confines of the elements of the proposed expert opinions set out by the parties, cannot contribute new information or arguments that assist in deciding the case *sub judice*."

26. In this regard, the President finds that, even though the persons proposed as expert witnesses in this case are lawyers, since these are international proceedings, the relevant issue is that, according to the information provided, they possess specialized legal expertise on criminal and criminal procedural matters and on the Argentine legal system in these areas that, applied to the issues in dispute between the parties, may be useful for the analysis that this international human rights court makes of the merits of the case. In numerous cases, the Inter-American Court has admitted and used the expert opinions of

President of the Court of June 3, 2011, eleventh considering paragraph.

¹² Cf. *Case of the La Rochela Massacre v. Colombia*. Order of the President of the Court of September 22, 2006, twentieth to twenty-fourth considering paragraphs; *Case of González Medina and Family Members v. Dominican Republic*, *supra* note 11, eleventh considering paragraph.

jurists who are knowledgeable about specific issues or areas of law that may be relevant to the ruling of this Court when a human rights violation has occurred.¹³

27. Consequently, the President finds that the said objections of the State are not in order. Hence, he admits the expert opinions of Julio B.J. Maier and Alberto M. Binder and recalls that they will be assessed at the appropriate opportunity, in the context of the existing body of evidence and according to the rules of sound judicial discretion. The purpose and method of receiving the said expert opinions will be determined in the operative paragraphs of this Order (*infra* operative paragraphs 4 and 8). Regarding the expert opinion of Mr. Bovino, the President will rule on its admissibility *infra* (considering paragraphs 32 and 38).

C) The State's challenge to the expert witness offered by the Commission

28. The Commission offered the expert testimony of Alberto Bovino to provide an opinion on the international standards concerning the principle of legality and non-retroactivity, the scope of the right to appeal the judgment, and the application of the said standards to the criminal trial and conviction of the victim in the instant case (*supra* having seen paragraphs **Error! Reference source not found.** and 1).

29. In its observations on the final lists of deponents (*supra* having seen paragraph 17), the State filed a challenge to the said expert witness based on Article 48(1)(b) of the Rules of Procedure, on the grounds "that he acts as petitioner in Petition P-828/01 (double pleading), currently being processed before [the Commission], in which issues are being discussed that have an evident similarity to those being analyzed in this case." Argentina asserted that "serious doubts" existed about the impartiality of Mr. Bovino, because "[e]ven though Mr. Bovino did not represent Mr. Mohamed in the different courts that have examined this case, he has an obvious interest in the final result, because the protection of the right to appeal the judgment is, essentially, the issue that is being discussed in the petition in which the expert witness acts as a petitioner."

30. In accordance with Article 48(3) of the Court's Rules of Procedure, the objection raised against him by the State was forwarded to Mr. Bovino. In his observations, Mr. Bovino stated that "the requirement under Article 48(1)(b) of the Court's Rules of Procedure has not been met, because I have not represented Mr. Mohamed at any stage of the proceedings." He indicated that he had "never intervened as a representative of any presumed victim in the domestic or international proceedings, or represents Mr. Mohamed." He also stated that "the fact that a person intervenes as a petitioner in a case, has no effects on his impartiality when he declares under oath in another case and as an expert witness."

31. The President finds that Mr. Bovino does not meet the cause for disqualification alleged by the State, because Article 48(1)(b) of the Rules of Procedure refers to the presumption that the proposed expert witness "is or has been a representative of one of the alleged victims in proceedings regarding the facts of the case before the Court, either at the domestic level or before the inter-American system for the promotion and protection of human rights." The President has indicated that "the Rules of Procedure do not establish

13 Cf., *inter alia*, *Case of Fermín Ramírez v. Guatemala. Merits, reparations and costs*. Judgment of June 20, 2005. Series C No. 126, para. 47; *Case of Atala Riffo and Daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 17, and *Case of Fornerón and Daughter v. Argentina. Merits, reparations and costs*. Judgment of April 27, 2012 Series C No. 242, para. 11.

that the expert witness may have filed a petition in another case before the inter-American system for the protection of human rights as grounds for his disqualification.”¹⁴

32. Based on the above findings, the President rejects the objection filed by Argentina against Mr. Bovino.

D) Admissibility of the expert opinion offered by the Commission

33. Under Article 35(1)(f) of the Rules of Procedure, the “possible appointment of expert witnesses” may be made by the Inter-American Commission “when the inter-American public order of human rights is affected in a significant manner,” and the purpose and grounds must be adequately substantiated. The meaning of this provision is that the appointment of expert witnesses by the Commission is exceptional, subject to the said requirement, which is not met merely because the evidence that it is proposed to provide is related to an alleged human rights violation. “The inter-American public order of human rights [must be] affected in a significant manner,” and the Commission must substantiate this situation.¹⁵

34. The Inter-American Commission offered the expert opinion of Alberto Bovino, who would testify on “the international standards concerning the principle of legality and non-retroactivity, the scope of the right to appeal the judgment, and the application of the said standards to the criminal trial and conviction of the victim in the instant case.”

35. The State and the representatives did not contest the admissibility of the expert opinion offered by the Inter-American Commission as regards its relationship to inter-American public order. The State asked, in general, that the expert evidence offered by the Commission be rejected, but based on other considerations that have been decided *supra* (considering paragraphs 24 to 32).

36. Regarding the relationship of the said expert opinion to inter-American public order, “the Commission considers that [this] case provides an opportunity for [the Court] to develop its case law on the scope of the principle of legality and non-retroactivity under Article 9 [of the American Convention] and [on] the right to appeal the judgment under Article 8(2)(h) [of this instrument].” The Commission referred to the innovative aspects on which the Court could rule in this case and stated that “it would contribute to the definition of relevant criteria on these matters.” It also indicated that, since some of the alleged violations “are the result of a legal framework,” the criteria derived from a possible declaration of the incompatibility of the said legal framework with the Convention, would “necessarily have an impact on changes in the law of the country in question [...], and also on the legislative policy of the States of the region on the issue concerned.”

37. Regarding the admissibility of the expert opinion of Alberto Bovino, the President observes that, as the Inter-American Commission has noted, this case represents the first time that the Court has been called upon to rule on the scope of the right to appeal the judgment, established in Article 8(2)(h) of the Convention, in relation to a criminal conviction handed down by a court of second instance, following an acquittal in first instance, as well as with regard to the scope of the principle of legality and retroactivity,

¹⁴ *Case of Fornerón and Daughter v. Argentina*. Order of the President of the Court of September 13, 2011, fourteenth considering paragraph.

¹⁵ *Cf. Case of Pedro Miguel Vera Vera et al. v. Ecuador*. Order of the President of the Court of December 23, 2010, ninth considering paragraph, and *Case of Vélez Restrepo and Family v. Colombia*. Order of the President of the Court of January 25, 2012, seventh considering paragraph.

established in Article 9 of the Convention, in relation to the crime of culpable homicide. In addition, the purpose of the said expert opinion is not limited to the situation in Argentina or to its laws. The President finds that, in this respect, the proposed evidence can help to strengthen the standards of protection of the inter-American human rights system in these areas. Consequently, the President finds that the purpose of the expert opinion to be provided by Alberto Bovino transcends the specific facts of this case and the particular interest of the parties to this litigation and thus affects inter-American public order.

38. Based on the above considerations, the President finds it appropriate to admit the expert opinion of Alberto Bovino, proposed by the Inter-American Commission. The usefulness of this expert opinion will be assessed at the appropriate opportunity, in the context of the existing body of evidence, and according to the rules of sound judicial discretion. The purpose and the method of receiving this expert opinion will be determined in the operative paragraphs of this Order (*infra* operative paragraph 8).

E) The Commission's request to question the expert witnesses offered by the representatives

39. In its observations on the final lists (*supra* having seen paragraph 14), the Commission asked for "the oral or written opportunity to question, insofar as reasonable and relevant, the two expert witnesses offered by the representatives whose opinions are related both to inter-American public order and to the issues dealt with by the expert opinions offered by the Commission." In this regard, the Commission indicated that "[t]his request is based on the importance of allowing interrelated expert opinions to offer a variety of perspectives [...] on the issues they are intended to clarify." According to the Commission, "part of the purposes proposed for expert witnesses Julio B. J. Maier and Alberto M. Binder, offered by the representatives, is related, respectively," to the right to appeal the judgment and the principle of legality and non-retroactivity, and to "the incompatibility of the legal framework and its application in the domestic sphere," and these are "two issues that will be dealt with by expert witness Alberto Bovino."

40. With regard to the Commission's request, the President recalls the provisions of the Rules of Procedure concerning the reception of testimony proposed by the Commission, as well as on the latter's authority to question the deponents offered by the other parties.¹⁶ In particular, it is pertinent to recall the provisions of Article 50(5) of the Rules of Procedure, which establish that "[t]he alleged victims or their representatives, the respondent State, and, if applicable, the petitioning State may formulate questions in writing for the declarants offered by the opposing party and, if applicable, by the Commission who have been convened by the Court to render their statements by affidavit." This article should be read in conjunction with Article 52(3) of the Rules of Procedure, which establishes the possibility that the Commission question the expert witnesses presented by the parties, "if authorized by the Court upon receiving a well-grounded request therefor, when the inter-American public order of human rights is affected in a significant manner and the statement in question regards a topic included in the statement of an expert witness offered by the Commission." Hence, in each case, the Commission must substantiate the relationship with both inter-American public order and the matter on which the expert opinion is offered, so

¹⁶ Cf. *Case of González Medina and Family Members v. Dominican Republic*, *supra* note 11, forty-eighth considering paragraph; *Case of the Massacres of El Mozote and Neighboring Areas v. El Salvador*. Order of the President of the Court of March 22, 2012, twenty-ninth considering paragraph.

that the Court or its President may duly assess the request and, if appropriate, authorize the Commission to ask its questions.¹⁷

41. The President observes that the Commission alleged “two issues” that relate “part of the proposed purposes” of the expert opinions offered by the representatives with the expert opinion offered by the Commission and with matters of inter-American public order in this case, namely: (i) “the international standards concerning the right to appeal the judgment and the principle of legality and non-retroactivity,” and (ii) “the incompatibility of the legal framework and its application in the domestic sphere.”

42. Regarding the first aspect of the connection alleged and described by the Commission (*supra* (i)), the President recalls that he has previously found that the purpose of the expert opinion of Alberto Bovino concerns inter-American public order because it relates to the scope of the right to appeal the judgment and to the principle of legality and retroactivity (*supra* considering paragraphs 37 and 38). In addition, the President considers that there is an overlap between the purpose of the said expert opinion offered by the Commission and part of the purposes of the expert opinions offered by the representatives with regard to which the Commission asked for the opportunity to ask questions.¹⁸ The President finds that the expert opinions of Julio Maier and Alberto Binder incorporate the said matters relating to inter-American public order as part of their purpose, because comparing them reveals that they deal with the right to appeal a conviction in second instance (formulated by the representatives as “the rights to a broad and effective remedy, to defense during a trial, and to be heard, in relation to guilty verdicts handed down in second instance for the first time”); as well as to the principle of legality (formulated by the representatives as “the compatibility of these guarantees with the surprising assessment made in a guilty verdict.”)

43. Consequently, the President finds it appropriate, under Articles 50(5) and 52(3) of the Rules of Procedure, to grant the Commission the possibility of questioning the expert witnesses Julio B. J. Maier and Alberto M. Binder concerning the said issues related to inter-American public order.

F) Method of receiving the testimony of the presumed victim and the expert opinions

44. It is necessary to ensure the most extensive presentation of the facts and arguments by the parties on everything that is pertinent for deciding the matters in dispute, guaranteeing both the latter’s right to defend their respective positions and also the Court’s ability to give adequate attention to the cases submitted to its consideration, taking into account that the number of these cases has increased significantly and is growing constantly. It must also be ensured that the proceedings are completed within a reasonable time, as required by effective access to justice. Consequently, it is necessary to receive the greatest possible number of statements and expert opinions by affidavit and to hear the presumed victims, witnesses, and expert witnesses whose direct testimony is truly essential at the public hearing, taking into account the circumstances of the case and the purpose of the testimony and expert opinions.

¹⁷ Cf. *Case of Contreras et al. v. El Salvador*. Order of the President of the Court of April 14, 2011, twenty-fifth considering paragraph, and *Case of the Massacres de El Mozote and Neighboring Areas v. El Salvador*, *supra* note 16, twenty-ninth considering paragraph.

¹⁸ Another part of these purposes refers to the Argentine legal system.

F.1. Statement of the presumed victim and expert opinion to be provided by affidavit

45. Before determining the statements that will be received by affidavit, the President finds it pertinent to resolve the State's observation on the method of receiving the statement of Oscar Alberto Mohamed, presumed victim in this case.

46. In its observations on the final lists, the State indicated that the representatives had not justified the supposed health reasons that would prevent the presumed victim from appearing at the hearing. The State also indicated that it considered "it extremely important that the presumed victim appear in person at the hearing that has been convened in order to testify." Furthermore, it affirmed that, if the Court "should decide to exempt Mr. Mohamed [from testifying at the] hearing, [...] it requested authorization to be present when the presumed victim [...] makes his statement before notary public and to cross-examine him orally, as pertinent, on that occasion."

47. The President observes that in the pleadings and motions brief the representatives offered the statement of the presumed victim, in person, at the hearing. In their final list of deponents, the representatives confirmed the offer of the statement of the presumed victim and asked that it be provided by affidavit. The President finds that this change in the method of receiving the said statement is in keeping with the provisions of Article 46(1) of the Rules of Procedure. The President recalls (*supra* considering paragraph 22) that the presentation of the final list constitutes the procedural occasion for the representatives to indicate those of the proposed deponents who can testify by affidavit, based on the principle of procedural economy. Consequently, the President finds inadmissible the State's requests that the presumed victim be summoned to testify at the hearing, and that he be required to justify the health problems that prevent him from appearing at the hearing. Therefore, the President rejects the State's objections and accepts that the presumed victim testify by affidavit.

48. The President also considers inadmissible the State's secondary request for authorization to be present during the statement that the presumed victim makes before notary public and to ask questions orally on that occasion, because Article 50(5) and 50(6) of the Rules of Procedure establish the possibility of the State formulating any questions it considers pertinent in writing, as well as how this should be done (*infra* considering paragraph 50).

49. Bearing in mind the provisions of Article 50(1) of the Rules of Procedure, the observations of the Commission and the representatives with their final lists of deponents, the purpose of the testimony offered, and also the principle of procedural economy, the President finds it desirable to receive, by affidavit, the statement of the presumed victim, Oscar Alberto Mohamed, and the expert opinion of Alberto M. Binder, both proposed by the representatives. The President also finds it pertinent to avail himself of his authority to determine the proposed purpose of the statement of the presumed victim, Oscar Alberto Mohamed, modifying it slightly in order to provide greater clarity to the parties on the limits of the said statement.

50. In application of the provisions of Article 50(5) of the Rules of Procedure, the President proceeds to grant the State the opportunity to submit in writing, if it so wishes, any questions it considers pertinent to pose to the presumed victim and to expert witness Alberto M. Binder. In addition, taking into account the determinations made previously (*supra* considering paragraph 43), the Commission is also given the opportunity to submit any questions it considers pertinent to the said expert witness. When providing their

testimony before notary public, the presumed victim and the expert witness must answer the said questions, unless the President decides otherwise. The corresponding time frames will be defined in the fifth operative paragraph of this Order. The statement of the presumed victim and the above-mentioned expert opinion will be forwarded to the Commission and to the State. In turn, under Article 50(6) of the Rules of Procedure, the State may submit any observations it deems pertinent on the said statement and expert opinion within the time frame indicated in this Order, and the Commission may present any observations it deems pertinent on the said expert opinion (*infra* operative paragraph 7). Opportunely, the Court will determine the probative value of the said statement and the above-mentioned expert opinion taking into account all the points of view, if applicable, expressed by the parties in exercise of their right to defense, and by the Commission, in the context of the body of evidence, and according to the rules of sound judicial discretion.

F.2. Expert opinions to be received at the public hearing

51. The case is ready for the opening of the oral proceedings on the preliminary objection and eventual merits, reparations and costs. Therefore, the President finds it appropriate to convene a public hearing to receive the expert opinions of Alberto Bovino, proposed by the Commission, and Julio B. J. Maier, proposed by the representatives.

52. Regarding the proposed purpose of Mr. Maier's expert opinion, the President observes that, on the final list of deponents, the representatives made minor changes to the purpose that do not affect the essential content which was proposed at the appropriate time (*supra* having seen paragraphs 6 and 8), but rather resume it. The State and the Commission did not present observations on this modification. Therefore, as he has on other occasions,¹⁹ the President avails himself of his authority to determine the purpose of Mr. Maier's expert opinion, based on the purpose offered at the appropriate time and adding to it some relevant aspects or clarifications indicated in the final list, as established in the operative paragraphs of this Order (*infra* operative paragraph 8).

G) Application of the Assistance Fund

53. Having determined that the testimony offered by the inter-American defenders will be received by the Court and the method by which it will be received, the specific purpose and intended use of the resources from the Assistance Fund must now be decided (*supra* considering paragraph 12).

54. In this regard, the President establishes that the financial assistance will be allocated to cover the costs of travel and accommodation: (i) so that the two inter-American defenders (Gustavo L. Vitale and Marcelo Torres Bóveda) can attend the public hearing that has been convened to perform their function of representing the presumed victim, and (ii) so that Julio Maier can appear at the said hearing to provide his expert opinion. Financial assistance will also be provided to cover the expense of notarizing the testimony of the presumed victim and the expert opinion of Alberto Binder provided by affidavit, and forwarding it to the Court, as established in the fourth operative paragraph of this Order. In addition, any reasonable and necessary expenses that the inter-American defenders incur or have incurred will be covered; to this end, they must provide the Court with both the justification for the said expenses, and the corresponding vouchers (*supra* considering paragraph 13).

¹⁹ Cf. *Case of Gudiel Álvarez et al. v. Guatemala*. Order of the President of the Court of March 20, 2012, eleventh considering paragraph, and *Case of the Massacres of El Mozote and Neighboring Areas v. El Salvador*, *supra* note 16, seventh to tenth considering paragraphs.

55. The inter-American defenders must forward the Court an estimate in United States dollars of the cost of notarizing the said sworn statements and their delivery, within the time frame established in the operative paragraphs of this Order. In addition, the President notes that, when asking to access the Fund, the inter-American defenders mentioned that they needed assistance to cover "the cost of the fees of the expert witness [Alberto Binder]" (*supra* having seen paragraph 3 and considering paragraph 4). In this regard, the President considers it necessary that, when submitting the said estimate of the cost of notarizing Mr. Binder's expert opinion, the inter-American defenders clarify whether this includes any cost for "fees."

56. With regard to the appearance at the public hearing of the inter-American defenders and the expert witness, the Court will take the necessary measures to cover the expenses of their travel, accommodation and per diem with resources from the Victims' Assistance Fund.

57. As required by Article 4 of the Rules for the Operation of the Assistance Fund, the Secretariat is ordered to open an expenses file in order to account for and document all the expenditures that are made with resources from the said Fund.

58. Lastly, the President recalls that, in accordance with Article 5 of the Rules of the Fund, the respondent State will be informed of the expenditure made from the Legal Assistance Fund so that it may submit its observations, if it so wishes, within the corresponding time frame.

H) Final oral and written arguments and observations

59. The representative and the State may submit their respective final oral arguments on the preliminary objection and eventual merits, reparations and costs in this case after the statements of the alleged victims and the expert opinions provided at the public hearing. As established in Article 51(8) of the Rules of Procedure, when the arguments have concluded, the Inter-American Commission will present its final oral observations.

60. In accordance with Article 56 of the Rules of Procedure, the presumed victims or their representative, the State and the Commission may present their final written arguments and final written observations, respectively, regarding the preliminary objection and eventual merits, reparations and costs, within the time frame established in the fifteenth operative paragraph of this Order.

THEREFORE:

THE PRESIDENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

in accordance with Articles 24(1) and 25(2) of the Statute of the Court, Articles 4, 15(1), 26(1), 31, 35(1), 40(2), 41(1), 45, 46, 48, 50 to 56 and 60 of the Court's Rules of Procedure, article 3 of the Rules for the Operation of the Legal Assistance Fund of the Court and article 4 of the Memorandum of Understanding between the Inter-American Court and the AIDEF,

DECIDES:

1. To declare admissible the request filed by the inter-American defenders in their capacity as representatives of the presumed victim to access the Victims' Legal Assistance

Fund of the Inter-American Court of Human Rights, as established in considering paragraphs 2 to 13 and 53 to 58 of this Order.

2. To require the representatives to forward to the Court the estimate of the cost of notarizing the sworn statements and sending them to the seat of the Inter-American Court of Human Rights, by June 11, 2012, at the latest, as well as the information and other pertinent expense vouchers, as established in considering paragraphs 13, 54 and 55.

3. To require, in accordance with article 4 of the Court's Rules for the Operation of the Victims' Legal Assistance Fund, that the Secretariat of the Court open an expenses file, in which each expenditure made with resources of the Victims' Legal Assistance Fund will be documented.

4. To require, for the reasons set out in this Order (*supra* considering paragraph 49), based on the principle of procedural economy and in exercise of the authority granted to him by Article 50(1) of the Court's Rules of Procedure of the Court, that the following persons provide their testimony by affidavit:

A. Presumed victim proposed by the representatives

- 1) Oscar Alberto Mohamed, who will testify on the facts described by the Inter-American Commission and the consequences (personal, family, social and financial) of the alleged violations on himself and his family.

B. Expert witness proposed by the representatives

- 1) Alberto Binder, who will provide an expert opinion on: the right to a broad and effective remedy, to defense during a trial, and to the right to be heard (in relation to the guilty verdicts handed down in second instance for the first time); the compatibility of these guarantees with the surprising assessment made in a guilty verdict, and with the enhancement of the arguments for that verdict when rejecting a special appeal; the legitimacy of the application of article 280 of the Code of Civil and Commercial Procedure of the Argentine Nation in cases in which no broad and effective remedy existed, and the compatibility of the sentence handed down against Mr. Mohamed with the principle of *ne bis in idem*.

5. To require the State and the Inter-American Commission, if they consider it pertinent, to forward, for the corresponding purposes and by June 11, 2012, at the very latest, any questions they consider it relevant to submit, through the Inter-American Court, to the expert witness and, in the case of the State, also to the presumed victim indicated in the fourth operative paragraph of this Order. The statement of the presumed victim and the expert opinion required in the fourth operative paragraph must be submitted to the Court by June 19, 2012, at the latest.

6. To require the representatives to coordinate and take the necessary measures so that, when the questions of the State and the Inter-American Commission have been received, the presumed victim and the expert witness include the answers in their respective statement and expert opinion provided by affidavit, in accordance with considering paragraph 50 of this Order.

7. To require that, when the statement of the presumed victim and the expert opinion required in the fourth operative paragraph have been received, the Secretariat of the Inter-

American Court forward them to the State and the Inter-American Commission so that they may submit their observations in keeping with the provisions of considering paragraph 50, with their final written arguments or observations, as appropriate, at the latest.

8. To convene the Argentine Republic, the representatives of the presumed victim and the Inter-American Commission on Human Rights to a public hearing to be held during the Court's ninety-fifth regular session, which will take place at its seat in San José, Costa Rica, on June 20, 2012, starting at 3 p.m., and on June 21, 2012, starting at 9 a.m., to receive their final oral arguments and final oral observations, respectively, on the preliminary objection and eventual merits, reparations and costs, and to receive the testimony of the following:

A. Expert witnesses

Proposed by the Commission

- 1) Alberto Bovino, who will provide an expert opinion on the international standards concerning the principle of legality and non-retroactivity, the scope of the right to appeal the judgment, and also on the application of these standards to the criminal trial and conviction of the victim in the instant case.

Proposed by the representatives

- 2) Julio Maier, who will provide an expert opinion on the principle of criminal legality, the rights to a broad and effective remedy, to defense during a trial, and to be heard (in relation to the guilty verdicts handed down in second instance for the first time); the compatibility of these guarantees with the surprising assessment made in a guilty verdict and with the enhancement of the arguments for that verdict when rejecting a special appeal; the legitimacy of the application of article 280 of the Code of Civil and Commercial Procedure of the Argentine Nation in cases in which no broad and effective remedy existed, and the compatibility of the sentence handed down against Mr. Mohamed with the principle of *ne bis in idem*.

9. To call upon the Argentine Republic to facilitate the exit from and entry into its territory of the deponents, if they reside or are in that country, who have been summoned in this Order to testify at the above-mentioned public hearing, in accordance with the provisions of Article 26(1) of the Court's Rules of Procedure.

10. To require the Inter-American Commission and the representative to notify this Order to the persons they have proposed and who have been summoned to testify, in accordance with the provisions of Article 50(2) and 50(4) of the Rules of Procedure.

11. To inform the Inter-American Commission that it must cover the costs arising from producing or contributing the evidence they propose, in accordance with the provisions of Article 60 of the Rules of Procedure.

12. To require the Commission and the representative to inform the persons summoned by the Court to testify that, under the provisions of Article 54 of the Rules of Procedure, the Court will advise the State, for the purposes established in the relevant domestic laws, of any case in which those summoned to appear or to testify, do not appear or refuse to testify without legitimate cause or when, in the Court's opinion, they have violated their oath or solemn declaration.

13. To inform the representatives, the State, and the Inter-American Commission that, following the statements provided at the public hearing, they may present to the Court their final oral arguments and final oral observations, respectively, on the preliminary objection and eventual merits, reparations and costs in the instant case.

14. To require the Secretariat of the Court, in accordance with the provisions of Article 55(3) of the Rules of Procedure, to notify the Inter-American Commission, the representatives, and the State, as soon as possible, of the link where the recording of the public hearing on the preliminary objection and eventual merits, reparations and costs is available.

15. To inform the representatives, the State, and the Inter-American Commission that they have until July 23, 2012, to present their final written arguments and final written observations, with regard to the preliminary objection and eventual merits, reparations and costs in this case. This time frame is non-extendible and irrespective of the availability to the parties of the recording of the public hearing.

16. To require the Secretariat of the Inter-American Court to notify this Order to the Inter-American Commission on Human Rights, the representatives of the presumed victim, and the Argentine Republic.

Diego García-Sayán
President

Emilia Segares Rodríguez
Deputy Secretary

So ordered,

Diego García-Sayán
President

Emilia Segares Rodríguez
Deputy Secretary