

**ORDER OF THE
INTER-AMERICAN COURT OF HUMAN RIGHTS***

OF JUNE 18, 2012

CASE OF MOHAMED v. ARGENTINA

HAVING SEEN:

1. The Order of the President of the Inter-American Court of Human Rights (hereinafter "the Inter-American Court," "the Court," or "the Tribunal") of June 4, 2012, whereby, *inter alia*, he requested via affidavit, the alleged victim's statement and the opinion of an expert witness, both proposed by the representatives of the alleged victim,¹ and convened the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission"), the representatives of the alleged victim (hereinafter "the representatives"), and the Republic of Argentina (hereinafter "the State") to a public hearing in order to receive their closing oral arguments on merits and eventual reparations and costs in the present case, as well as the opinions of two expert witnesses, one proposed by the Inter-American Commission and the other by the representatives.

2. The brief of June 8, 2012, whereby the State "lodged a formal appeal with [the] Honorable Court against the Order of [the] President dated June 4th of this year, particularly with regard to the decisions outlined in [...] Paragraphs 24 to 27, [...and] Paragraphs 28 to 32 therein."²

3. The notes of the Secretariat of the Inter-American Court (hereinafter "the Secretariat") of June 11, 2012, whereby, following a directive of the President of the Tribunal, it communicated to the representatives and the Inter-American Commission that they had a strict deadline of June 13, 2012, by which to present observations on the appeal lodged by the State.

4. The brief of June 12, 2012, whereby the Inter-American Commission submitted its observations on the appeal lodged by Argentina. The representatives did not present any observations.

CONSIDERING THAT:

* Judge Leonardo A. Franco, of Argentine nationality, excused himself from hearing the *Mohamed case*, in accordance with Article 19(2) of the Statute and 19(1) of the Rules of the Court (approved by the Court in its LXXXV Ordinary Period of Sessions, held November 16 to 28, 2009).

¹ The representatives of the alleged victim are two Inter-American defenders designated in accordance with that which is set out in Article 37 of the Rules of Procedure of the Court.

² Considering clauses 24 to 27 of the Order of the President refer to the State's objections to the admissibility of the expert testimony proposed by the Inter-American Commission and the representatives. Considering clauses 28 to 32 of the Order of the President decides upon the objection lodged by the State against the expert witness proposed by the Commission.

1. Decisions of the President, provided that they are not purely procedural in nature, may be appealed before the Court, pursuant to Article 31(2) of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure").

2. The Tribunal has extensive powers regarding the admission and receipt of evidence, in accordance with Articles 50, 57, and 58 of the Rules of Procedure.

3. The appeal lodged by Argentina against the Order of the President of the Court of June 4, 2012 (*supra* Having Seen 1) refers to three points, which will be addressed by the Court in the following order: a) the decision of the President to dismiss the objection filed against the expert witness Alberto Bovino; b) the decision of the President to declare the State's objections to the proposed expert witnesses inadmissible; and c) the decision of the President to convene expert witnesses Alberto Bovino and Julio Maier to render their expert opinions at the hearing and not by affidavit.

A) Decision of the President to dismiss the objection lodged against expert witness Alberto Bovino

4. The Commission proposed the expert testimony of Mr. Alberto Bovino, with the aim that he should render an expert opinion on international standards regarding the principle of legality and nonretroactivity, the scope of the right to appeal a judgment, and the application of these standards in the criminal prosecution and conviction of the victim in this case.

5. In its comments on the final list of deponents, the State lodged an objection against Alberto Bovino, expert witness proposed by the Commission. The State filed this challenge on the basis of Article 48(1)(b) of the Rules of Procedure, as "[Mr. Bovino] is the applicant in Petition P-828/01 (Second Instance), currently pending before [the Commission], in which issues that are clearly similar to those being analyzed in the present case are discussed." Argentina sustained that there are "serious doubts" concerning Mr. Bovino's impartiality, given that "[he] did not represent Mr. Mohamed in the different instances that arose in the case, [Mr. Bovino] holds a clear stake in the final outcome, since the protection of the right to appeal a judgment is essentially the subject under discussion in the complaint in which he himself is the applicant."

6. Pursuant to Article 48(3) of the Rules of Procedure of the Court, the objections made by the State against Mr. Bovino were communicated to him. In his observations, Mr. Bovino stated that "the requirements of Article 48(1)(b) of the Rules of Procedure of the Court have not been met, as I have not represented Mr. Mohamed at any stage of the proceedings." He indicated that "[he] ha[s] never acted as a representative of any alleged victim in domestic or international proceedings, nor do[es he] represent Mr. Mohamed." He also sustained that "the fact that a person happens to be the petitioner in one case does not by any means affect that person's impartiality when testifying in another case as an expert witness under oath."

7. In his Order of June 4, 2012, the President dismissed the aforementioned objection lodged by Argentina upon finding that:³

the grounds for objection claimed by the State do not apply to Mr. Bovino, since Article 48(1)(b) of the Rules of Procedure considers situations in which the proposed expert witness "is or has been a representative of one of the alleged victims in proceedings regarding the facts of the case

³ Order of the President of the Court of June 4, 2012, Considering clauses 31 and 32.

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 as grounds for objection the fact that an expert witness has filed a petition in another case before the Inter-American System for the protection of human rights."⁴

8. The President later analyzed, in Considering clauses 33 to 38 of his Order, whether the subject of Alberto Bovino's expert opinion affects the public order of the Inter-American System, and found it admissible to allow his testimony. Furthermore, the President indicated that the expert opinion will be assessed at the appropriate opportunity, within the context of the existing body of evidence and under the rules of sound judgment.

9. Upon lodging an appeal against the decision of the President to dismiss the aforementioned objection, the State presented the following arguments:

a) "[W]hile it is true that it has not been established in the current proceedings that Mr. Bovino is or has been a representative of an alleged victim of the facts of the case before this Court - as stipulated in Article 48(1)(b) of its Rules of Procedure - the fact remains that the ultimate aim of this norm lies precisely in safeguarding the due impartiality that ought to govern the comportment of expert witnesses; preventing the involvement, in that capacity, of those who might hold a particular interest in the outcome of the case.";

b) "[D]espite failing to strictly meet the situation contained in the regulatory standard, its aim is nevertheless distorted when Mr. Bovino participates in two international proceedings that - though diverse in the facts being analyzed, the persons involved, and their contexts - amount to a situation in which the discussion of identical issues of 'pure law' relating to the problem of the second instance in criminal matters is permitted.";

c) The Court "should dispense with a strictly literal interpretation, demanding that fact patterns be identical, when, though the facts may be different, they allow for the analysis of identical points of law." The State refers to the interpretation of treaties, citing the Vienna Convention on the Law of Treaties. It affirms that in the present case, in accordance with teleological criteria, the interpretation which most conforms to the object and aim of the treaty "would be the one concerned with preserving the due impartiality that ought to guide the actions of expert witnesses.";

d) There are "serious reasons to doubt whether Mr. Bovino would act with impartiality as an expert witness." In this regard, the State indicated that "both in the petition in which he acts as the applicant before the Inter-American Commission on Human Rights (petition P-828/01), and in the present case, practically identical issues are discussed with regard to 'the right to appeal.' This reasonably [...] leads us to conclude that Mr. Bovino might be seeking to influence, with his expert opinion, the criteria adopted in the present case, in order to promote his position in the proceedings of the petition in which he is the applicant.";

e) "[T]he involvement of Mr. Bovino as an expert witness in the present case [...] would disregard criteria laid down on the 'impartiality of judges' that would apply *mutatis mutandis* in this case, [...] with respect to the norms of impartiality that should govern their actions."

f) "Mr. Bovino's dual role, as an applicant and eventual expert, in proceedings in which practically identical questions of pure law are debated, constitutes an objectively justifiable reason to sustain, in consideration of the norm of subjective impartiality, that there is clearly a personal stake invested in the outcome of the

⁴ *Case of Fornerón and daughter v. Argentina*. Order of the President of the Court of September 13, 2011, Considering clause fourteen.

present case, given the assured impact it will have on the petition in which Mr. Bovino is the applicant.”; and

g) “[T]he acceptance of Mr. Alberto Bovino as an expert witness will introduce a clear interest into the manner in which this Honorable Court resolves this case. The procedural equality of the parties will plainly be affected in the event of the addition, under the guise of an expert opinion, of an allegation with an interest in the final outcome of the controversy.”

10. In its observations on the State’s petition, the Commission indicated that “it considers that the reason invoked by the State does not apply in the context of Mr. Bovino as a petitioner before the Inter-American Commission.” Moreover, it noted that “beyond his capacity as a petitioner – not provided for in the Rules of Procedure as grounds for objection – the Commission finds that Mr. Bovino’s experience and knowledge in subjects relevant to the present case afford him the status of independent expert; status that is not affected by his participation as a petitioner in a case before the organs of the Inter-American System, regardless of the subject to which that other participation relates.

11. Article 48 of the Rules of Procedure of the Court regulates “Objections to Expert Witnesses.” In its first paragraph, it stipulates the grounds for disqualifying experts in the following terms:

1. An expert witness may be disqualified based on the following grounds:
 - a. he or she is a relative by blood, affinity, or adoption, up to the fourth degree, of one of the alleged victims;
 - b. he or she 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;
 - c. he or she currently has, or has had, close ties with the proposing party, or is, or has been, a subordinate of the proposing party, and the Court considers that his or her impartiality may be affected;
 - d. he or she is, or has been, an officer of the Inter-American Commission on Human Rights with knowledge of the contentious case in which his or her expert opinion is required;
 - e. he or she is or has been an Agent of the respondent State in the contentious case in which his or her expert opinion is required;
 - f. he or she has previously intervened, in any capacity and before any organ, whether national or international, in relation to the same case.

12. The Court finds that, as Mr. Alberto Bovino is not and has not been a representative of Mr. Oscar Mohamed, alleged victim in this case, either at the domestic level or before the Inter-American System, the situation alleged by the State is not provided for under the grounds for disqualification of expert witnesses stipulated in subsection b) of the aforementioned Article 48(1) of the Rules of Procedure.

13. In addition, the Tribunal considers it pertinent to reiterate that which was indicated in the Order of the President when Mr. Bovino’s expert opinion was first admitted, regarding the fact that Mr. Bovino’s testimony will be assessed at the appropriate opportunity by the Court, within the context of the existing body of evidence, and according to the rules of sound judgment. Moreover, during its assessment of the expert opinion, the Court will take into account the allegations and observations of the State, which will have the opportunity to question Mr. Bovino at the public hearing, and to present its observations on his testimony in its final oral and written briefs.

14. Based on the foregoing, the Court finds that there is no basis for modifying the decision of the President in this regard.

B) Decision of the President to dismiss the objections of the State against the proposed expert witnesses

15. In its response, the State manifested that “it is opposed to the expert testimonies proposed by the Inter-American Commission and by the representatives [...], and contests the proposed areas of expertise” because these opinions treat “on the questions debated in the proceedings, and which are the exclusive jurisdiction of the judges of the Honorable Court.” This opposition was reiterated in its observations on the final list of deponents, with basis in that “the description of the international standards which would eventually be asked of the expert witnesses proposed by the Inter-American Commission and the representatives of the alleged victim have originated and been developed in a progressive manner by the very jurisprudence of [the] Honorable Court called to resolve the present case.” Argentina emphasized that “[t]he importance of expert opinion is made manifest in the circumstance that the judge, despite being an expert in law, is generally not an expert in other sciences, and may not be knowledgeable about matters of art, mechanics, and numerous practical activities that require specialized study or ample experience.” According to the State, “it is clearly unnecessary to produce evidence which, under the limits set by the parties concerning the proposed points of expertise, could not provide new information or arguments to help resolve the case under review.”

16. In his Order, the President declared the abovementioned objections against the three proposed expert witnesses inadmissible.⁵ On the matter, the president found that,

even though the proposed experts in this case are lawyers, as this is an international process what is important is whether, in accordance with the information provided, these experts possess specialized legal knowledge in criminal law and criminal procedure, and of the Argentine legal system in those areas; which, when applied to the points in dispute between the parties, can be useful in the analysis this international human rights tribunal will carry out on the merits of this case. In a great many cases, the Court has admitted and utilized the expert opinions of lawyers versed in specific areas or topics of law that could be of use in the Court's efforts to determine whether or not a violation of human rights had occurred.⁶

17. In its appeal of the Order of the President, the State affirms that it considers that “the expert testimony is not only unnecessary, but also inappropriate” generally; however, in its specific allegations it objected only to the admission of the expert testimony of Mr. Alberto Bovino, by virtue of the following arguments:

- a) In accordance with that which was decided upon by the President in allowing the expert opinion of Alberto Bovino, Mr. Bovino should limit his testimony to the international standards that are the jurisdiction of the [H]onorable Court, and dispense with his special knowledge of criminal law, criminal procedures, and Argentine law, and
- b) “Despite the argument employed by the President of the Court to dismiss the objection to the expert testimony filed by the State, the expert witness has not been requested to comment with respect to criminal law, or criminal procedure, or the Argentine criminal process— specialties that may be outside of the judges’

⁵ Considering clauses 26 and 27.

⁶ 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 Children 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.

knowledge-base. On the contrary, he has been asked to form an opinion with regard to issues that are the exclusive jurisdiction of the Tribunal, and of which, in fact, the Tribunal represent the greatest source of expertise in the Inter-American System.”

18. In its observations on the objections filed by Argentina, the Inter-American Commission indicated that Mr. Bovino’s expertise “lies precisely in the international standards on two of the main issues arising from this case – the right to appeal a judgment, and the principle of legality and nonretroactivity – and that his experience and knowledge permit him to apply these standards to Argentine criminal law and procedure, and more precisely, to the particulars of the criminal proceedings against Mr. Mohamed.”

19. First, the Court notes that when the President decided to declare the aforementioned objections of the State inadmissible, he did not affirm that this was because the expert testimonies were to be exclusively on Argentine criminal law and procedure. What the President highlighted as relevant is that the three proposed experts possess specialized legal knowledge on criminal law, criminal procedure, and the Argentine criminal code (*supra* Considering clause 16).

20. After declaring these objections inadmissible, the President determined that Mr. Bovino’s expert testimony relates to the Inter-American public order, was admissible, and established its subject as being “the international standards on the principle of legality and nonretroactivity, the scope of the right to appeal a judgment, and the application of these standards on the criminal prosecution and conviction on the victim in this case.”

21. The Court finds that the reason given by the President for the dismissal of these objections and the terms in which he declared Mr. Bovino’s expert testimony admissible are not contradictory. Although Mr. Bovino’s expert opinion is directed to refer principally to the aforementioned international standards, his specialized knowledge in criminal law, criminal procedure, and Argentine legal processes will be relevant both in evaluating these standards, as well as their application in the criminal prosecution and conviction of the alleged victim in the present case. Accordingly, the Court considers the State’s appeal inappropriate in this regard, and maintains the President’s decisions to dismiss the State’s objections with respect to expert witnesses, and to admit the expert testimony of Mr. Alberto Bovino, as set out in the Order of the President.

C) Decision of the President to convene expert witnesses Alberto Bovino and Julio Maier to render their opinion in court and not by affidavit

22. In its observations on the final list of deponents, the State indicated that,

Notwithstanding the foregoing arguments [by which it objected to the admissibility of all the expert witnesses], while the proposed expert testimonies are clearly expendable, in the event that the Honorable Court should decide to receive them [...], the State opposes that these should be given in a public hearing, as the transfer to the Court itself is a patently unnecessary expense, especially when taking into account the fact that Mr. Mohamed has requested application to the Victims’ Assistance Fund. As a result, the State requests that, in any event, the expert opinions be received through affidavit.

23. In his Order, the President put forth the criteria whereby he determined which evidence would be received at the hearing and which would be received through affidavit in the following terms:

44. It is necessary to ensure the most comprehensive presentation of facts and arguments by the parties in all that is relevant to the resolution of controversial issues, ensuring the parties the right to defend their respective positions, as well as the right to adequately address the cases

under consideration by the Court, taking into account that the number of cases has grown considerably, and increases steadily. It is also necessary to ensure a reasonable timeframe for the duration of the process, as required by the effective access to justice. In light of this, the Court must receive the greatest possible number of testimonies and expert opinions via affidavit, and to hear directly at public hearings the truly indispensable testimonies of alleged victims, witnesses, and experts— taking into consideration the circumstances of the case and the object of the statements and opinions.

[...]

51. The present case is ready for the initiation of oral proceedings on the preliminary objection and possible merits, reparations, and costs. For that reason, the President deems it pertinent to summon a public hearing for the receipt of the expert opinions of Alberto Bovino, proposed by the Commission, and Julio B.J. Maier, proposed by the representatives.

24. In appealing the Order of the President, the State alleged that it “has failed to consider the Argentine state’s opposition to the receipt of the expert testimony at the public hearing, in favor of receiving it via affidavit. This was made as an alternative request, in the event that the Honorable Court resolved to dismiss the State’s objection to the expert opinions outlined in the previous section, and taking into consideration budgetary reasons for avoiding unnecessary costs.” It also indicated that “the Tribunal’s failure to address the State’s subsidiary request violates the right of defense of the Argentine state, in light of which [...] it requests that this issue be resolved expressly.”

25. The Commission did not present any observations on this point.

26. First, the Tribunal stresses that, in accordance with the stipulations of Article 50(1) of the Rules of Procedure, it is a discretionary faculty of the Court or its Presidency to determine which declarations should be rendered before a notary public (by affidavit) and which it deems necessary to be rendered in a public hearing. Likewise, the Court emphasizes that the President indicated relevant considerations when he decided upon the matter. The President signaled that this decision was made bearing in mind the number of cases being considered before the Court, the circumstances of this particular case, and the purpose of the statements and opinions.

27. Moreover, the Court notes that only two expert witnesses were convened to the public hearing to give their testimony before the Tribunal: Mr. Alberto Bovino and Mr. Julio Maier. The first of these experts was proposed by the Inter-American Commission, and as such, the Commission will cover the costs that this evidence generates; under no circumstances shall the costs be reimbursed by Argentina. The second expert witness to give an opinion was proposed by the representatives of the alleged victim, and the expenses necessary for his appearance before the Tribunal shall be covered by the Inter-American Court’s Legal Assistance Fund for Victims (hereinafter the “Assistance Fund of the Court”), in accordance with that which was set forth by the President in the aforementioned Order.⁷

28. The Tribunal is in agreement with the President regarding the grounds on which he determined that expert witnesses Bovino and Maier should give their testimonies in a public

⁷ In the Order of June 4, 2012, the President also approved the request made by the Inter-American defenders, in their capacity as representatives of the alleged victim, to receive aid from the Court’s Legal Assistance Fund for Victims. *Cf.* Considering clauses **¡Error! No se encuentra el origen de la referencia.** to **¡Error! No se encuentra el origen de la referencia.** and **¡Error! No se encuentra el origen de la referencia.** to **¡Error! No se encuentra el origen de la referencia.**, and operative paragraphs one to three.

hearing, and underscores the relevance of these expert opinions, considering the legal issues being disputed in the present case. Beyond this, the Court notes that the State did not offer any expert opinion on the legal issues under dispute; yet in its arguments, it cited excerpts of an opinion signed by Mr. Maier as supporting evidence. With this, it becomes even more relevant for this Court to hear the expert opinion of Julio Maier during the public hearing. Concerning the expenditures that this testimony entails, in accordance with that which is set out in the Rules of Procedure of the Legal Assistance Fund for Victims, the State will be notified promptly of the costs accrued in the application of said Fund, so that it might present its observations, if it so chooses, within the timeframe to be established for this purpose.

29. Moreover, with respect to the alleged infringement of the State's right of defense by "the lack of treatment [...] of the State's subsidiary request," it should be remembered that this Court has held that the duty to state reasons does not require a detailed answer to every argument of the parties, but may vary depending on the nature of the decision, and that it should be analyzed in each case whether this duty has been fulfilled.⁸ In the Order under appeal, the President discussed each and every one of the objections and challenges filed by Argentina: those focused on not admitting the expert testimony proposed by either the Commission or the representatives, the objection lodged against Mr. Alberto Bovino, the objections to the declaration by affidavit of the alleged victim, and the objections to the admissibility of the statements of the alleged victim's family members.

30. Based on the foregoing, the Tribunal finds no reason to deviate from the decision of the President in this regard, and thereby maintains the decision of the President to convene expert witnesses Alberto Bovino and Julio Maier to render their testimonies in the public hearing and not by affidavit.

THEREFORE:

THE INTER-AMERICAN COURT OF HUMAN RIGHTS,

in accordance with Article 25(2) of the Statute of the Court and Articles 31(2), 45, 50, and 51 of its Rules of Procedure,

DECIDES:

1. To dismiss the appeal lodged by the State and, as a result, to ratify the Order of June 4, 2012, of the President of the Inter-American Court of Human Rights in its entirety.
2. To request that the Court's Secretariat serve notice of the present Order upon the Argentine Republic, the representatives of the alleged victim, and the Inter-American Commission on Human Rights.

⁸ *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of August 5, 2008. Series C No. 182, para. 90. *Case of Tristán Donoso v. Panama. Preliminary Objections, Merits, Reparations, and Costs.* Judgment of January 27, 2009. Series C No. 193, para. 154, and *Case of López Mendoza v. Venezuela. Merits, Reparations, and Costs.* Judgment of September 1, 2011. Series C No. 233, para. 146.

Diego García-Sayán
President

Manuel Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Alberto Pérez Pérez

Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri

Secretary