**ORDER OF THE**

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

**OF JUNE 18, 2012**

**CASE OF THE SANTO DOMINGO MASSACRE *v.* COLOMBIA**

**HAVING SEEN:**

1. The brief raisings preliminary objections, answer to the application, and observations to the brief containing pleadings and motions, and its appendixes (hereinafter "the answer brief"), received on March 9, 2012, whereby the Republic of Colombia (hereinafter "the State") offered one testimony and five expert witness reports without identifying the individuals it was proposing. The State expressed *inter alia* that it would provide the Court with the names and curriculum vitaes of the expert witnesses "as soon as possible;" it requested a deadline for doing so, should it be deemed relevant. It also requested that should its expert witness evidence not be accepted, the Court "be the one to propose the names of international expert witnesses." Additionally, it stated that "in any [case], the State […] would cover the cost of the expert witnesses chosen *ex officio* by the Court."

2. The notes of the Secretariat of the Court (hereinafter "the Secretariat") dated April 25, 2012, whereby the parties were informed that the Inter-American Court of Human Rights (hereinafter "the Court" or "the Tribunal") would hold a public hearing in this case during its XCV Regular Period of Sessions and requested their final lists of declarants, pursuant to the terms of Article 46(1) of the Rules of Procedure.[1] Likewise, based on the principle of judicial economy and in application of the aforementioned Article of the Rules of Procedure, the parties were asked to indicate which declarants would be able to give their statements before a notary public (affidavit) and which ones should be called to testify in the public hearing.

3. The brief and its appendixes dated May 9, 2012, whereby the State submitted its final list of declarants and offered two expert witness reports and one testimony for the hearing, as well as two expert witness reports via affidavit. In this brief, the State provided the names of the expert witnesses it was proposing, submitted their curriculum vitaes, and reiterated its "subsidiary" request (supra Having Seen clause 1).

4. The notes of the Secretariat dated May 10, 2012, providing final lists of the declarants and announcing that pursuant to the terms of Article 46 of the Rules of Procedure and following the instructions of the President of the Court (hereinafter "the President"), a deadline of May 16, 2012, was established for submitting any observations deemed pertinent.

5. The briefs dated May 15 and 16, 2012 whereby the representatives, the Inter-American Commission on Human Rights (hereinafter "the Commission") and the State submitted their observations on the final lists of declarants.

6. The note from the Secretariat dated May 18, 2012, whereby, following the instructions of the President, and without detriment to what it would have to decide with regard to the

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[1] Rules of Procedure passed in the LXXXV Regular Period of Sessions held from November 16 to 28, 2009.

allegation that the expert witness evidence offered by the State was time-barred, the State was ordered in application of Article 48(3) of the Rules of Procedure of the Tribunal to forward the objections submitted by the representatives to the four individuals proposed as expert witnesses in its final list of declarants in order that they might submit their observations by no later than May 23, 2012.

7. The briefs of May 24 and 25, 2012, whereby Héctor Alfredo Amaya Cristancho, Efraín Acosta Jaramillo, Máximo Duque and Juan Pablo Franco Jiménez, put forward as witnesses by the State, submitted their comments to the objections to their participation in this case.

8. The brief dated May 24, 2012, whereby the representatives addressed the request for a deadline extension submitted by the State and reiterated other arguments on the admissibility of the evidence offered by the State.

9. The brief dated May 29, 2012, whereby the State submitted pleadings with regard to the observations of the representatives on its evidentiary proposals.

10. The note of the Secretariat dated May 31, 2012, whereby the State and the representatives were informed that as they had not been requested nor provided for in the Rules of Procedure, the two prior briefs (supra Having Seen clause 8 and 9) would be brought to the attention of the President in order to weigh their admissibility or pertinent aspects.

11. The Order handed down by the President on June 5, 2012, calling a public hearing and ruling which statements would be given before a notary public (affidavit) and which during the public hearing.

12. The brief dated June 7, 2012, whereby the State "partially appealed" the aforementioned Order.

13. The note from the Secretariat dated June 8, 2012, whereby, following instructions of the President, the representatives and the Commission were given until June 12, 2012, to submit their observations to the State's final brief.

14. The brief dated June 12, 2012, whereby the Commission and the representatives submitted their comments to the State's brief of June 7, 2012.

15. The note of the Secretariat of June 14m 2012, wherein the parties were informed that the appeal filed by the State was reported to the plenary of the Court and that, following instructions by it, the Tribunal had decided to dismiss it. Moreover, the parties were informed of the decision of the Plenary in order for them to be aware of it with sufficient time, in account that the date of the public hearing was nearing, thereby noting that legal notice of the respective Order would be provided to the parties during the Regular Period of Sessions, prior to the celebration of the mentioned hearing.

**CONSIDERING THAT:**

1. The decisions of the President that are not simply procedural in nature can be appealed before the Court, pursuant to Article 31(2) of the Rules of Procedure of the Tribunal[2] (hereinafter "the Rules of Procedure").

2. The offering and admission of evidence, as well as the calling of alleged victims, witnesses and expert witnesses, is regulated by Articles 35(1)(f), 40(2)(c), 41(1)(c), 46, 47, 48, 49, 50, 52(3), 57, and 58 of the Rules of Procedure of the Court.

3. The State partially appealed the Order of 5 June 2012, issued by the President. The State argues, *inter alia*, that the Court has the practice of "generating procedural spaces so the parties may correct errors, a situation that did not occur in this case, where on the contrary,

[2] Rules of Procedure passed in the LXXXV Regular Period of Sessions held from November 16 to 28, 2009.

without any warning whatsoever, the Court asked the State for the final list of declarants and only referred to the matter of the failure to act within the time period granted due to the observations presented in that sense by the Commission and the representatives of the alleged victims." The State argued that said alleged practice "to overcome errors or weaknesses in the evidentiary offering" is to the benefit of "the purpose of the proceedings." As such, it argued that in this case the Court stepped away from said practice and that, upon having requested the final list of declarants from the State, the Presidency "led it to understand that it was making such a request because the requirements and suppositions described in Article 46(1) of the Rules of Procedure had been complied with," a list that, the State argues it forwarded "in good faith and responding to the Court's request." The State also argued that the Court ruled on the alleged failure to act within the time period granted without giving it the opportunity to refer to this matter, thus it did it "on its own initiative". Finally, it argues that, "without trying to free itself of its burden to propose and forward the evidence in a timely manner, the State considers that the mentioned decision violates due process, especially its right to a defense and equality of arms," and therefore it requests that all expert opinions proposed be admitted and that, in a subsidiary manner and in application of Article 58(a) of the Rules of Procedure the Court hear the expert opinions *ex officio*.

4. The Commission stated that, pursuant to the practice of the Court and its Rules of Procedure, the request for the final list of declarants does not imply acceptance of the expert opinions or testimonies offered by the parties, since it only seeks for the parties to confirm or desist from the offering, opening an adversarial space for both parties in which they may present observations or objections. Also, it noted that the requirements for the offering of evidence is clearly established in the Rules of Procedure, which protects due process and adversary nature between the parties, which is known by the State in its permanent litigation [...] before the Court and was not complied with by the State, as verified in the President's Order. It stated that given that the State indicated in its answer that it would appoint experts "as soon as possible," it can be validly inferred that the State was fully aware of its regulatory obligation to appoint the experts within a short period of time and not months later, thus it is understandable that the Court did not consider it necessary to reiterate said requirement from the Rules of Procedure. Additionally, regarding the manner in which the State offered said evidence, subjecting the appointment of the experts to a preliminary determination by the Court on its appropriateness and to the granting of a "reasonable period of time" for it, the Commission considered that the State's mechanism for the appointing of its experts is not established in the Rules of Procedure, since it would assume a determination regarding the merits of the appropriateness of the evidence prior to complying with the minimum requirements for its admissibility. Since it is an offer in violation of the Rules of Procedure, it did not correspond to the Court to carry out requests that may suggest a modification to a procedural strategy of a particular party. The Commission concluded that the plenary of the Court should not revise the Order issued by the President.

5. The representatives also argued that the State's notorious negligence in this case should not be endured by the representatives and even less so by the Tribunal, which has offered all guarantees of the due process. The State wants to assert a position contrary to the Court's practice regarding the inadmissibility of time-barred evidence, which is contrary to reality, since it has had multiple regulatory opportunities to exercise its defense and present the arguments it considered necessary. They recalled that the possibility to file an appeal should not fall upon ineffective and negligent actions attributable to their own actions, thus the President's Order is in accordance with the State's procedural behavior. The State's argument is "disrespectful" since the request for the final lists of deponents does not suggest or imply the admissibility of the evidence offered in a time-barred manner. Even though the Tribunal has generated procedural opportunities to correct some of the parties' errors in other cases, it has done so in totally different circumstances and in cases in which the negligence of the party requesting the expert opinions was not so notorious. They concluded that the State's argument suggesting that the Court must apply practices regarding new non-regulatory procedural

opportunities is ungrounded and in this case would affect the right to the equality of arms of the victims' representatives. Therefore, both the main and subsidiary claims made by the State must be rejected.

6. With regard to the admissibility of the expert witness evidence offered by the State and the "subsidiary" request that the Court order, *ex officio*, the gathering of expert witness opinions, the pertinent part of the aforementioned Order of the President ruled as follows:

> 5. In its answer brief, the State requested:
> "[a]s a primary claim, and pursuant to the Rules of the Court […] that expert evidence be decreed with international experts that be announced to follow. As such, the names and resumes of the expert witnesses will be provided to the Court as soon as possible. Were the Court to agree, the State requests that a period be established to present these names. […]
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> 1. Expert report of an expert in explosives.
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> The expert report given by an expert in explosives, is aimed at accurately determining the characteristics of the explosive device that caused the injuries, deaths, and destruction in Santo Domingo, Arauca. This will establish a high degree of certainty, that the events sub judice resulted from the action of a homemade bomb installed by the FARC, in a truck parked on the only route to the hamlet, and not due to the impact of a device AN-MIA21 launched by the Colombian Air Force.[…]
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> 2. Expert report of an expert in medical forensics.
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> The expert opinion given by an expert in forensic medicine, is aimed at showing that the evidence that makes up the body of evidence do not prove that the injuries and deaths in Santo Domingo on December 13, 1998, were caused by air – land weaponry, implemented by the Colombian Air Force.[…]
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> 3. Expert in chain of custody.
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> The expert opinion given by an expert on chain of custody, is aimed at showing that the evidence used in the first and second criminal proceedings to convict members of the Colombian security forces for allegedly launching a AN-MIA2 device on the hamlet of Santo Domingo, were obtained without complying with protocols on chain of custody. [...]
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> 4. High level expert on cassation.
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> The statement of an expert of the highest level, is aimed at explaining to […] the Court the manner in which Colombia handles extraordinary appeals of cassation, its purpose, procedures, and aims. [...]
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> 5. Expert report by an expert in forced displacement.
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> The expert report given by an expert in forced displacement, is aimed at establishing and clarifying the issues related to the alleged violation of Article 22(1) of the Convention against the alleged victims by the Colombian State. Similarly, it should be noted that the intervention of a expert will facilitate obtaining accurate conclusions. Therefore, the expert evidence offered is relevant and useful. [...]
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> 7. Subsidiary claim
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> Under the circumstance that the principal claim is not admitted, the Colombian government very respectfully requests that if the Court itself so considers, it may provide the names of international experts, whether in regard to expert evidence on the matters set forth above or any others deemed relevant and necessary to achieve clarity and truth. In any event, the Colombian State will assume the costs of the expert witnesses that the Court orders *ex oficio*."

6. In its final list of declarants, the State offered four expert witnesses and one witness, in order to render statements at the hearing and via affidavit. At that time, the State identified the persons it proposed as experts, provided their curriculum vitaes, and maintained the purpose of the reports that had been initially proposed. Moreover, the State reiterated its "subsidiary request." (*supra* Considering clause. 5).

7. On its behalf, in the brief on observations to the final list, the representatives expressed that the offer of expert witnesses is contrary to the provisions of Article 41 of the Rules of Procedure and thus time-barred. They further expressed that the State sought to remedy this problem by seeking a subsidiary or alternative claim, which suggests, given the State's negligence, that the Court officially decreed the expert nominated by the State as part of its regulatory power. Thus, the view *ex oficio* provide for the experts proposed by the State within the Court's regulatory powers. Therefore, the representatives considered that the State renounced its request for expert witnesses, by not complying with the regulatory requirements of an offer. Secondly, they presented challenges and objections to those expert witnesses who were offered on the ground that there are impediments that affect their impartiality, and they do not have technical ability to render the expert reports.

8. Furthermore, the Commission stated that the mechanism used by the State for its appointment of experts is not established in the Rules of Procedure, and thus the evidence offered is time-barred, to which the State did not present any arguments, at any of the procedural opportunities it had, regarding the circumstances established in Article 57(2) regarding admissibility under exceptions. The Commission also argued that the alternative or subsidiary claim of the State does not comply with the Court's exercise of the power regarding the seeking of evidence *ex officio*, as the only evidence offered would support its position in this case, and because an offer on its behalf to fund international experts "*ex officio*" could be problematic in light of the principle of procedural equality, since it is reasonable to infer that the representatives do not necessarily have the same opportunity to make such offer.

9. Pursuant to that established in Article 41(c) of the Rules of Procedure of the Court, the opportune procedural moment for the presentation of expert evidence by the State is in its answer brief. In this case, the State did not identify in its answer those persons proposed as expert witnesses, but rather limited itself to arguing the necessity of the expert evidence, defining the purpose of the expert reports it proposed. During this opportunity, the State did not provide the curriculum vitaes; it expressed that it would provide them "as soon as possible," which it did not do within the period of 21 days established in Article 28 of the Rules of Procedure regarding the provision of annexes to the answer brief. Subsequently, in its final list of declarants, the State offered two expert witnesses and one witness for the hearing and two expert witnesses to render statements via affidavit; it indicated the names of the expert witnesses and provided their curriculum vitaes. Upon reiterating the purposes of the statements that had been initially proposed, the State once again raised its "subsidiary request" (*supra* Considering clause. 5). Until that moment, the State had not argued any of the exceptions established in Article 57(2) of the Rules of Procedure to justify its offer of evidence. As such, and notwithstanding the possible decision on the admissibility of this evidence, a period was granted to those offered as expert witnesses in order for them to present their observations (*supra* Having seen clause 11). It was not until the request for an extension (*supra* Having seen clause 13) that the State expressed that the provision of the final list and curriculum vitaes of the expert witnesses "had been carried out in good faith and heeding to the requirements of the Court" and it argued, as well, that Mr. Eduardo Montealegre Lynett had been appointed as Attorney General of the Nation and that, at the time of his appointment, he was the State's Agent in this case, a situation which "became a situation of *force majeur* for the State, which affected the attention given to the case and its follow-up, having to take urgent measures to assure due representation." Thus, it requested that the Court "assess the situation as insurmountable and declare that the expert evidence offered by the State was timely."

10. The State provided, in a tardy fashion, the identification and curriculum vitaes of the proposed expert witnesses, without offering a clear explanation. Neither did it argue one of the exceptions under Article 57(2) of the Rules of Procedure, until a much later time. As noted by the State itself in its observations to the final lists (*infra* Considering clause 20), in light of Article 46 of the Rules of Procedure, the final list of declarants is just an opportunity to confirm or retract the offered evidence. Thus, the State's failure to offer expert evidence at the appropriate time and in the appropriate manner, leads the Court to declare that it is inadmissible.[3]

7. First, the Court reiterates that pursuant to Article 41(c) of the Rules of Procedure, the proper procedural moment for the State to identify its proposed declarants is in its brief answering the application.[4] The Tribunal recalls that in this case, the State itself had indicated

[3] Case of the Massacre of *Santo Domingo*, Order of the President of the Inter-American Court of Human Rights of June 5, 2012, Considering clauses 9 and 10.

[4] Article 41(c) of the Rules of Procedure of the Court: "The respondent shall, in writing, state its position regarding the presentation of the case and, if applicable, answer the brief containing pleadings, motions, and evidence within a non-renewable term of two months from the receipt of the latter brief and its annexes, without prejudice to the term that the Presidency may establish in the circumstances mentioned in Article 24(2) of these Rules of

in its answer to the application that it would provide the curriculum vitae of the proposed expert witnesses "as soon as possible," which would seem to indicate that the State was aware of its procedural obligation to submit that information in order for its proposed expert witness evidence to be considered. Finally, the State did not submit the names of the individuals that it proposed as expert witnesses, nor did it provide their curriculum vitaes within the 21 days provided for in Article 28 of the Rules of Procedure, nor did it do so even after that deadline until it submitted its final list of declarants. In this sense, the time period of 21 days established in Article 28 of the Rules of Procedure is established for the parties to submit their original briefs and appendixes, and in no way is it intended to allow them to correct material errors in proposals of evidence. The Rules of Procedure of the Tribunal are clear with regard to the opportunities, means, and methods by which the parties can submit documentary, testimonial, and expert witness evidence. Thus, the fact that precedents exist according to which the Tribunal could have ruled that there had been flaws in the evidentiary proposals cannot and should not be understood as generating a procedural right for the parties, and much less serve as an obligation of the Court which, should it not be complied with, would result in an alleged procedural imbalance or infraction of the right to defense.

8. With regard to the opportunity established in Article 46 of the Rules of Procedure to the parties to submit definitive lists of the declarants offered in their initial briefs, the Tribunal recalls that the instruction that the parties submit those lists consists of a procedural opportunity, established in the Rules of Procedure, in order for the parties to confirm or retract their evidentiary proposals made in a timely fashion and in the correct form.[5] After this, the parties have the opportunity under the adversarial principle to exercise their right to defense with regard to the evidentiary proposals of the other parties. Thus, the fact that the Court indicates pursuant to the provisions of Article 46 of the Rules of Procedure the moment at which the parties may present those lists cannot, as the State would like, be understood as an acceptance or guarantee of the testimonial or expert witness evidence proposed or - even less so in this case - of the expert witness evidence offered by the State after the deadline.

9. Finally, the Tribunal finds that certain statements made by the State in its request are not accurate, in particular where it states that it did not have a chance to exercise its right to defense. On this point, the Court highlights first that both the Commission and the representatives argued correctly in the procedural moment established for doing so in the Rules of Procedure - namely, in the period for comments on the final lists - that the proposal of expert witness evidence by the State was time-barred. Second, the State submitted its observations on this. Those observations were also taken into account, despite the fact that they had not been requested nor are they provided for in the Rules of Procedure.

10. Pursuant to all this, the Tribunal finds that the failure to indicate the names of the proposed expert witnesses at the proper procedural moment was the result of the State's own actions. As previously indicated, a mistake by a party with regard to the proposal of evidence within the proper time period and in the proper form is not sufficient reason for a request for the reconsideration of the President's ruling to be considered admissible.[6] Based on this, the Court finds no reason to rule contrary to what the President had decided in his Order. Therefore, it reiterates the content of considering paragraphs 9 and 10 of the Order of the

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Procedure. In its answer, the State shall indicate: [...] c. the identity of the declarants offered and the object of their statements. Expert witnesses must also submit their curricula vitae and contact information."

[5] Article 46 of the Rules of Procedure of the Court: "Definitive list of declarants: 1. The Court will request the Commission, the alleged victims or their representatives, the respondent State, and, if applicable, the petitioning State to submit definitive lists of declarants, in which they shall confirm or retract offers of evidence submitted within time in accordance with Articles 35(1)(f), 36(1)(f), 40(2)(c), and 41(1)(c) of these Rules of Procedure. Additionally, they must indicate to the Court their position as to which of the declarants offered should be summoned to the hearing, where applicable, and which declarants can render their statements through notary public (affidavits) [..].

[6] *Cf.* Case of the Barrios Family, Order of the Court of June 17, 2011, Considering clause 17, Case of Forneron and daughter, Order of the Court of October 9, 2011, Considering clause 7.

President of June 5, 2012 (*supra* Considering clause 6) in all its terms and finds that the failure on the part of the State to propose expert witness evidence at the proper time and in the proper form makes its proposal inadmissible. That evidence shall therefore not be requested, pursuant to the terms of Article 58 of the Rules of Procedure.

**THEREFORE:**

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

pursuant to Article 25(2) of the American Convention on Human Rights and with articles 31(3), 41, 46 and 50 of the Rules of Procedure of the Tribunal,

**DECIDES TO:**

1. Dismiss the appeal filed by the State, and subsequently, ratify the Order of the President of the Inter-American Court of Human Rights of June 5, 2012, in all its terms.

2. Order the Secretariat of the Court to provide legal notice of this Order to the representatives of the alleged victims, the State, and the Inter-American Commission.

Diego García-Sayán
President

Manuel Ventura Robles

Leonardo A. Franco

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