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COULD THE INTERAMERICAN HUMAN RIGHTS SYSTEM HAVE PREVENTED THE EXISTENCE OF FALSE VICTIMS IN THE MAPIRIPÁN CASE?*

¿PUDO LA CORTE INTERAMERICANA DE DERECHOS HUMANOS HABER PREVENIDO LA EXISTENCIA DE VÍCTIMAS FALSAS EN EL CASO DE LA MASACRE DE MAPIRIPÁN?

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ABSTRACT

Although the Inter-American system on Human Rights, enjoy a fair deal of legitimacy among its members and the international community, the Inter-American Commission and Court on Human Rights have experienced certain criticism. Mostly, member States have hinted on the fact that the Court has a strong reticence in deploying fact-finding missions even when dealing with sensitive cases that require a high level of fact analysis. On the other hand, the Commission has been placed under the inquisitor eye and has lost credibility amongst States. The above critiques have recently become stronger with the scandal of the false victims in Mapiripán. Accordingly, it has been argued that the existence of false victims responds partly to a lack of conscious assessment by the Commission and the Court. Several declarations of the Colombian government have hinted on this aspect and consequently Colombia has requested the Court to revise its judgment. Despite the fact that the Court has never agreed to revise its judgments, the impact that this case has on the credibility of the system has compelled the Court to do so. Thus, the main objective of this article is to analyze if the existence of false victims could have been prevented if both organs would have engaged more actively in fact-finding activities.

Keywords authors: Inter-American System of Human Rights, fact finding, Mapiripán massacre, procedure before the Inter-American System of Human Rights.

Keywords plus: false victims, review of judgment, credibility, Colombia, IACHR, international law, repair costs.

RESUMEN

Aunque el Sistema Interamericano de Derechos Humanos ostenta un alto grado de legitimidad entre sus Estados miembros, la Comisión y la Corte Interamericana de Derechos Humanos recientemente han experimentado algunas críticas. Sobre todo, los Estados miembros han dado a entender que el Sistema ha mostrado una fuerte reticencia en el despliegue de visitas in loco *e investigativas para determinar la veracidad de los hechos denunciados, incluso cuando se trata de casos delicados que requieren un alto grado de análisis. Lo anterior aumentó recientemente con el escándalo de las falsas víctimas en Mapiripán. Así, se ha sostenido que la existencia de víctimas falsas responde, en parte, a la falta de una evaluación consciente por parte de la Comisión y de la Corte. Varias declaraciones del Gobierno colombiano han hecho alusión a este aspecto y, en consecuencia, Colombia ha solicitado a la Corte que revise la sentencia. A pesar de que la Corte nunca ha aceptado revisar sus sentencias, el impacto que este caso tiene sobre la credibilidad del sistema ha obligado a la Corte a hacerlo. Así, el objetivo principal de este artículo es analizar si la existencia de víctimas falsas podría haberse evitado si el Sistema hubiera desplegado actividades de investigación de los hechos de manera más activa.*

Palabras clave autoras: *Sistema Interamericano de Derechos Humanos, esclarecimiento de hechos, masacre de Mapiripán, procedimiento ante el Sistema Interamericano de Derechos Humanos.*

Palabras clave descriptor: *falsas víctimas, revisión de sentencia, credibilidad, Colombia, CIDH, derecho internacional, costos y reparación.*

SUMMARY

INTRODUCTION

Under the auspices of the Organization of American States, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are the bodies responsible for ensuring the promotion and protection of human rights in the Americas. The political and social unrest that most of the Latin American countries have experienced throughout history, leads to the conclusion that the American Convention on Human Rights, as well as other treaties that are part of the Inter-American Human Rights System, is the body most exposed to gross violations of human rights. Its homologous body, the European Court of Human Rights, handles a much greater number of cases but has never been exposed to such a great number of massive violations of Human Rights. Thus, the Inter-American system bears a great responsibility, not only to the region, its members States, but also to the victims themselves.

Although the system enjoys a fair deal of legitimacy among its members and the international community, the Court and the Commission have experienced certain criticism. Mostly, member States have hinted on the fact that the Court has a strong reticence in deploying fact-finding missions even when dealing with sensitive cases that require a high level of fact analysis. On the other hand, the Commission has been placed under the inquisitor eye and has lost credibility amongst States due to allegations that it does not make a fair and conscious assessment on the facts presented to it, and generally opts to accept the information provided by the representatives of the victims as truthful, without any inquiry regarding the veracity of the information presented and disregarding any other additional information presented by the State[1].

The above critiques have recently become stronger with the scandal of the false victims in Mapiripán. In 2005, the

1 R. Teitelbaum, *Recent Fact-Finding Developments at the International Court of Justice,* 119 (Martinus Nijhoff Publishers, The Hague, 2007).

Inter-American Court held Colombia responsible for having violated several of its obligations under the American Convention on Human Rights; more specifically for having acquiesced and aided the paramilitaries in the commission of the massacre[2]. This specific judgment has become a milestone in the Inter-American system in terms of monetary reparations as it condemned Colombia to pay one of the highest sums up to date.

However, several years later, and after the Colombian government had granted reparations to the victims, one of them confessed that she was not a victim of the massacre and that her relatives who had allegedly been disappeared by the paramilitaries were not living in Mapiripán at the time of the massacre. As the scandal unleashed, further investigations by the Prosecutor´s Office have shown that this is not an isolated case, and that several of the so-called victims in the massacre may have given a false testimonies in order to benefit from the possible reparations that could be provided by the State. Investigations until now have not reached any specific conclusion, but the Prosecutor´s Office has determined that the evidence recollected proves that 10 persons were killed in the massacre.

Accordingly, it has been argued that the existence of false victims responds partly to a lack of conscious assessment by the Commission and the Court. Several declarations of the Colombian government have hinted on this aspect and consequently Colombia has requested the Court to revise its judgment. Despite the fact that the Court has never agreed to revise its judgments, the impact that this case has on the credibility of the system has compelled the Court to do so.

Thus, the main objective of this article is to analyze if the existence of false victims could have been prevented if both organs would have engaged more actively in fact-finding activities. Though it is important to assess the role of the various participants in the dispute, *i.e.* the State as well as the victim's

2 Mapiripán Massacre vs. Colombia. Inter-American Court on Human Rights. Series C-134, Judgement of September 15, 2005.

representatives, this paper will focus on the role of the Court and the Commission.

Section 1 will briefly describe the importance fact-finding has in cases that deal with human rights violations. Section 2 will briefly describe the procedure before the Inter-American System of Human Rights. Section 3 will describe the factual aspects of the Mapiripán massacre as well as some details regarding the investigation that is being held after the confessions. Section 4 will address the work of the Commission and the assessment it made of the information presented before directing the case to the Court. Finally Section 5 will address the analysis made by the Court, which led to the conviction of Colombia.

The sources and information, upon which the analysis is based on, will primarily rely on the file of the case that the Inter-American Court has provided for in its web site. The great majority of documents presented by all of the parties are within the file. However, public hearings are not available and therefore the testimonies presented by the victims and other witnesses before the Court are limited to what the parties may have cited in their corresponding documents.

Before describing the importance that fact-finding has in international Courts or International Tribunals, one special remark has to be made. Even if this paper aims to study the strengths and flaws that the Inter-American System presents in fact-finding matters, this does not imply that both Colombia and the representatives of the victims, Corporación Colectivo de Abogados José Alvear Restrepo (CCAJAR) did not fail in similar aspects. On the contrary, we acknowledge that both the State and the NGO representing the victims did not provide sufficient or reliant information both to the Commission and the Court, and therefore the totality of the negative outputs of the Mapiripán case cannot be imputed solely on the Inter-American system. In the case at hand, it is clear that both the Colombian government as well as the representatives, failed in several respects.

For its part, the State failed in its ability to present at least a general outline of the events in the Mapiripán massacre. When

the case was filed, criminal investigations had only been conducted for a small period of time and, therefore, there was no certainty as to the number of civilians killed by the paramilitaries. Though in numerous occasions the State manifested that there was an uncertainty in the number of persons killed, it also lacked the capacity to present an exhaustive list of victims. Without prejudice of this aspect, the relevant question for the present case study is if the Commission, taking into account that both parties in the case did not present sufficient information for the determination of victims, should have sought to obtain additional information in order to support its claims for reparations of each and every victim.

On the other hand, CCAJAR has alleged that the victims misled them into believing that their relatives were amongst the persons that the paramilitaries had tortured and disappeared. Without making any judgments regarding this statement, one cannot stop and ask if CCAJAR failed in corroborating the information that was presented to them, and especially if they should bear any type of responsibility in the matter.

Though the above aspects will not be furthered analyzed, aspects such as the inability of the State to present a specific number of victims will be an element taken into account in assessing whether the Inter-American system could have and should have done more in order to prevent the existence of false victims.

I. The Importance of Fact-finding in Human Rights Cases

International Courts, whatever their nature, are usually faced with fact intensive cases. The Court must not only decide on the legal matters at stake, but must carefully assess the factual matters in order to provide a comprehensive solution[3]. The implementation of a strong fact-finding mechanism has proven to

3 S. Halink, *All Things Considered: how the International Court of Justice Delegated its Fact-Assessment to the United Nations in the Armed Activities Case*, 40 NYU J., 1, Int'l L. & Pol. 13 (2008).

be beneficial for the process, as it will allow the Court to have a higher degree of certainty of the evidence that will ultimately support its decision. Specifically, fact-finding allows for further investigation of the facts that are in dispute and serves as a means to corroborate information that is insufficient or even to fill gaps that remain unanswered but still are decisive in the process.

The above becomes even more significant when there is an alleged violation of a human rights obligation. Accusing a State of having violated human rights has different and varied consequences. On the first hand, the State may be held internationally responsible and is obliged under international law to provide redress to victims and grant them sufficient reparations[4]. On the other hand, taking into account the political overtones that come within any human rights context, the mere allegations of a State violating, its international obligations by either committing the violation itself or acquiesced on it, may lead to negative political consequences or economic sanctions. Therefore, when a Court decides to hold a State responsible for massive violations of human rights it must do so in a rigorous manner and cannot be done so based in information that has not been strictly assessed.

In that sense, even though there is no specific or agreed definition of fact-finding, this mechanism can be applicable to different fields of international law. Irrespective of the nature and the objectives pursued through fact-finding missions, fact-finders typically, "*examine data, hear testimony, and consider contextual circumstances. In many contemporary instances, they also deduce whether normative standards have been violated and may thus reach conclusions*"[5] regarding the compliance of such international standards.

International Courts, such as the European Court of Human Rights, the International Criminal Court and the Inter-American Court inclusive, are empowered by their constituent instruments to engage in fact-finding missions and even receive information

4 American Convention on Human Rights, Article 63.1

5 T. Franck & S. Fairley, *Procedural Due Process in Human Rights Fact-Finding by International Agencies*, 74 Am.J.Int'l, 308 (1980).

of experts in order to have a more comprehensive notion of certain aspects of the case at hand. When international law has empowered such institutions to provide effective protection "*to individuals in their daily lives and must therefore be able, in case of doubt or controversy, to ascertain the facts* (…) *fact-finding is thus frequently called for as part of the action taken by the international community to secure respect for human rights*"[6].

Though International Courts or Tribunals are not compelled to engage in fact-finding missions; as the Courtsare vested with the autonomy to determine when to deploy them, there are strong arguments to support the idea that when dealing with massive violations of human rights, such additional instrument is in the majority of cases required. The following scenarios may show how engaging in fact-finding may prove to be helpful in determining whether a State or an individual is responsible for a violation of human rights.

The first scenario shows that in certain occasions the evidence presented by the parties in the dispute is not sufficient in order to comply with the bar or standard that each Court has set to determine the existence of international responsibility. Given the fact that Courts themselves do not have the power to compel States to *prima facie* provide the information and evidence that they sometimes require or consider necessary to solve the dispute, Courts can generally conduct on site inspections in order to gather the information needed[7]. While States will have to agree beforehand to the Court performing such investigations, States who have accepted the competence of the Court will not risk refusing such petition. In this case, additional fact-finding may serve as a mechanism in order to fill the gaps that remain even after the parties have presented their corresponding evidence.

The second scenario is quite a recurrent in a human rights dispute. Both the State and the representative of the victims (and, in the case of the Inter-American System, the Inter-Ameri-

6 B. Ramcharan, *International Law and Fact-Finding in the Field of Human Rights. Foreword*, VII (Martinus Nijhoff Publishers, The Hague 1982) .

7 *Supra* note 2, p. 1.

can Commission on Human Rights) will present a great amount of information that contradicts itself. Generally the counselors for the victims will try to convey that the State has beyond any reasonable doubt violated its obligations under international law. The State in turn, will try to proof that either the facts that are alleged did not happen, that, if they did happen, they are not attributable to the State, or that the representatives of the victims have exaggerated the information and that, therefore, the violations that are presented are blown out of proportion. When Courts are confronted with such disparate information, engaging in fact-finding proves to be beneficial. Through fact-finding Courts may perform in loco visits, complete interviews to alleged victims and have a much more comprehensive knowledge of the facts of the case.

As such, the power of Courts, "*to make factual determinations is not merely derivative from its powers, it's a basic part of the original purpose of an international court*"[8]. Fact-finding may well be seen as a means to achieve and end, which in the context of a human rights violation alludes to the concept of providing justice for victims of such violations. Thus, if fact-finding carried out by NGO's or the United Nations is seen as a means to secure human rights and prevent future violations of the rule of law, the same reasoning should be applicable to international Courts, which assume a much higher responsibility in the international community.

Despite the above, most constitutive instruments do not directly address the importance of fact finding as a means to facilitate the accomplishment of the Court's endeavor. Though the great majority of constitutive instruments do allow the Courts to authorize or establish fact-finding missions, Courts have been reluctant in taking full advantage of such capacity. It has been argued that engaging in fact-finding strategies will not only be time consuming but will increase the cost of the process. Taking

8 K. Highet, *Evidence, the Court, and the Nicaragua Case*, in *Recent Fact-Finding Developments at the International Court of Justice*, 119 (R. Teitelbaum, Martinus Nijhoff Publishers, The Hague, 2007).

into account that parties in the conflict would want to see the dispute resolved in the least amount of time possible and that neither the parties nor members States are willing to increase a Court´s budget, engaging in fact finding may result problematic for the expediency of the Courts judgments. As such, the excessive backlog of cases or the high costs may increase the pressure on Court's judges not to sanction fact-finding processes[9].

II. The procedure before the Inter-American System on Human Rights

The Inter American Commission on Human Rights is an organ of the Organization of American States[10]; and, as well as the Inter American Court of Human Rights, is an organ of the American Convention on Human Rights, and has its attributions stated on article 41 of that same instrument. As one of the bodies of the Convention, the Commission is linked with the Court, given that both of them have the function of examining individual petitions according to articles 44, 45, 61, 62 and following of the American Convention[11].

Nonetheless, and as the Inter American Court has previously stated, the Inter American System of Protection of Human Rights relies on the full autonomy and independence of its

9 K. Highet, Óp. cit.

10 Article 106. Charter of the Organization of American States. As amended by the Protocol of Amendment to the Charter of the Organization of American States; Protocol of Buenos Aires, signed on February 27, 1967, at the Third Special Inter-American Conference, by the Protocol of Amendment to the Charter of the Organization of American States; Protocol of Cartagena de Indias, approved on December 5, 1985, at the Fourteenth Special Session of the General Assembly, by the Protocol of Amendment to the Charter of the Organization of American States; Protocol of Washington, approved on December 14, 1992, at the Sixteenth Special Session of the General Assembly, and by the Protocol of Amendment to the Charter of the Organization of American States; Protocol of Managua, adopted on June 10, 1993, at the Nineteenth Special Session of the General Assembly.

11 Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights (Articles 41 and 44 to 55 of the American Convention on Human Rights). Advisory Opinion OC-19/05, November 28, 2005. Serie A-19, par. 25. Requested by the Bolivarian Republic of Venezuela.

organs, in order to carry out the powers and faculties entrusted to them[12].

In the following paragraphs we will make a brief explanation of the procedure before the Inter American System of Human Rights, making particular emphasis on the flexibility of this procedure. This flexibility, as we will see, is based primarily on the nature, main objective and purpose of the Inter American System, which is to promote the observance and defense of Human Rights[13]. Therefore, this allows certain flexibility in regards to the process, which is beneficiary for the victims but could play in detriment of the right that states have in order to defend themselves.

Once an individual petition is presented before the Inter American Commission, it has the duty to verify the compliance of the requirements established in article 46 of the American Convention and articles 27 and 28 of the Rules of Procedure of the Inter American Commission, which include the exhaustion of local remedies, the identification of victims when possible, the indication if the complaint has been submitted to another international settlement proceeding, among others.

The Commission must forward the state in question in question the relevant parts of the petition, requesting information regarding the case. Subsequently, the state may present its observations, in the sense of presenting preliminary objections and other information that it finds relevant for the case. This first part of the procedures focuses only on evaluating the requirements needed in order to admit a petition, and generally does not evaluate the merits of the petition, this is, whether or not the state is responsible of the violation of the rights established in the American Convention. Having fulfilled this first assessment the Commission has to conclude whether the petition is admissible or not.

12 Óp.cit. par. 26.
13 Article 106, Charter of the Organization of American States. Advisory Opinion, OC 19/05, par. 23.

If the petition is admitted, according to articles 36 and 37 of the Rules of Procedure of the Commission, it shall be considered as a case and the proceedings on the merits shall be initiated. Both the petitioners and the state have the possibility to submit additional information and observations regarding the merits of the case. During this time, the Commission has the possibility to conduct on site investigation, if deemed necessary and advisable. As we will see, this could have been an option in the present case, taking into consideration the notorious differences between the information presented by the petitioners and the information given by the state regarding the victims.

According to article 43 of the Rules of Procedure, the Commission "*shall deliberate on the merits of the case, to which end it shall prepare a report in which it will examine the arguments, the evidence presented by the parties, and the information obtained during hearings and on-site observations. In addition, the Commission may take into account other information that is a matter of public knowledge*". Once the Commission makes an assessment regarding the merits, it draws up a report with the conclusion, which is transmitted to the state. This report is not public. The Commission includes recommendation for the State to adopt.

After three months, the Commission, according to article 51 of the American Convention, can submit the matter to the Inter-American Court of Human Rights or can make public the report mentioned before. Once the case is submitted, the process before the Commission finishes and it becomes one of the parties in the process before the Inter-American Court.

The Inter-American Court of Human Rights receives the report presented by the Commission and, after verifying the fulfillment of the requirements established in Article 34 of the Rules of Procedure of the Court, it shall transmit the application to the representatives of the victims, in order for them to present, in a period of two months, the brief containing pleadings, motions and evidence. Once the Court has this brief, it shall transmit to the concerning state both the application

submitted by the Commission and the brief presented by the representatives of the victims.

The state shall present, in a term of two months, its answer, which contains its own account of the facts, the preliminary objections (which do not suspend the proceedings on the merits), the evidence it seeks to present before the Court, and the observations regarding the brief presented by the representatives of the victim.

Once the written proceedings are complete, according to Chapter 3 of the Rules of the Procedure of the Court, the President of the Court shall announce the opening of the oral proceedings, and call as many hearings as necessary. At the beginning there was a different hearing for the preliminary objections, the merits and the reparations. Nowadays, the Court analyzes in the same hearing the preliminary objections, the merits and the reparations.

The Court, regarding the recollection of evidence, and according to articles 46 and following the Rules of Procedures, can accept all the evidence presented by the Commission, without repeating it, unless it deems it necessary. "*This practice avoids repetition, speeds up the proceedings, and saves on the costs of evidence production*"[14].

After the hearings, the Commission, the representatives of the victims and the state may submit final allegations regarding the matter at hand, which shall be considered by the Court when deciding on the preliminary objections, merits and reparations. Once it has all the information at hand, the Court produces its judgment, and with the procedure concludes.

As was mentioned before, the procedure before the Court it's very flexible, particular in the aspects that relate to the procurement of the evidence and its analysis. As the Court has stated:

> "*With regard to receiving and assessing evidence,* [...] *the proceedings before it are not subject to the same formalities as court proceedings under domes-*

14 J. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 152 (2nd Ed., Cambridge University Press, New York, 2013).

tic law, and that inclusion of certain items in the body of evidence must be done paying special attention to the circumstances of the specific case and bearing in mind the limits established to ensure respect for legal certainty and procedural balance among the parties. The Court has also taken into account that international jurisprudence, deeming that international courts have the authority to assess and appraise evidence in accordance with the rules of competent analysis, has always avoided a rigid determination of the quantum of evidence necessary as grounds for a decision. This criterion is especially valid with regard to international human rights courts, which –to establish the international responsibility of a State for violations of the person's rights- enjoy broad flexibility in the assessment of the evidence tendered before them regarding the pertinent facts, in accordance with the rules of logic and based on experience"[15].

This shows that the Court has an enormous flexibility when assessing evidence. Such power, even tough it may be considered necessary when analyzing human rights violations, is not always used, as it should be. The Court, in this particular case, did not collect as much evidence as it should have, taking into consideration the difference between the elements presented by the representatives of the victims and the state, and the complexity of the case in itself.

III. The Mapiripán Massacre

Pursuant to the facts that the Inter-American Court considered to be proven in the case, on July 12, 1997, approximately one hundred members of the Autodefensas Unidas de Colombia (AUC) landed on irregular flights and were picked up by members of the Colombian Army without the latter applying any sort of control measures[16]. The Colombian Army provided transportation for the paramilitary to Mapiripán[17]. On July 15, 1997, more than 100-armed paramilitaries surrounded Mapiripán and initiated to spread terror amongst the community[18]. "*When they arrived*

15 Mapiripán Massacre vs. Colombia. Inter-American Court on Human Rights. Series C-134. Judgement of September 15, 2005. Merits, Reparations and Costs, para. 73.
16 Óp. *cit*., para. 96.32.
17 *Ibidem*, para. 96.31.
18 Ídem para. 96.34.

in Mapiripán, the paramilitary took control of the town, of communications, and of the public offices, and intimidated its inhabitants, kidnapping and killing other inhabitants"[19]. Testimonies of some of the survivors explain that several individuals, who had been identified on a list as collaborators to the guerrilla, were tortured and dismembered by members of the AUC (paramilitary group)[20]. Furthermore, once the operation was completed, the AUC destroyed a major part of the physical evidence with the aim of obstructing the future gathering of evidence[21].

In 2005, the Court held that Colombia was responsible for the deaths of several civilians in the Mapiripán massacre. Though the deaths were directly attributed to the Autodefensas Unidas de Colombia, the State not only failed to provide protection to the civilians,but also aided and acquiesced the paramilitaries to committing the massacre. As a consequence, several of the families and relatives of the victims received a large sum of economic compensation.

In 2011, a group of investigators belonging to the Peace and Justice Unit[22] in Colombia came to Mapiripán to further on the investigations that had been started regarding the massacre. After the investigation the Unit presented its report, it was established that of the dead and missing persons that were supposedly killed, people living in Mapiripán could only provide information about ten of them. The Prosecutor´s Unit decided to trace the families and came to one of the victims whose husband and son had allegedly been killed in the Massacre and had received, in total approximately 1.5 million dollars[23]. The victim, Mrs. Contreras, confessed that her husband had died from natural causes and that the guerrilla had recruited her sons long before the massacre occurred. As revealed by a prosecutor, 16 of the

19 Mapiripán Massacre vs. Colombia. Inter-American Court on Human Rights. Series C-134. Judgement of September 15, 2005. Merits, Reparations and Costs, para. 96.35.
20 *Óp. cit*., para. 96.39
21 *Ibídem.*
22 Unit in charge of investigating crimes of demobilized combatants in Colombia.
23 *A interrogatorio seis de las supuestas falsas víctimas de Mapiripán*. El Tiempo (November 11, 2011). http://www.eltiempo.com/justicia/ARTICULO-WEB-NEW_NOTA_INTERIOR-10784466.html

26 victims that were recognized by the Inter-American Court could be alive or could not have been killed in the massacre[24]. The existence of false victims could have given rise to a fraud of 3 million dollars (approximately)[25].

IV. The Inter-American Commission on Human Rights and its Assessment of the Evidence Presented in the Mapiripán Case

The determination of the number of victims was one of the most contested issues in the whole process. Both CCAJAR and the Colombian State disagreed upon them. When the Commission took the stand and it was its turn to decide upon the number of victims, it opted to follow CCAJAR's approach and dismissed Colombia's arguments. The Commission's report on this matter has been considered decisive, as the Colombian government has argued that the lack of conscious assessment made by the Commission in the determination of the victims lead primarily to the existence of false victims.

A small recollection of the process will be mentioned in order to have a wider grasp of the process by which the Commission determined the victims that were to receive reparations in case the Court found the State internationally responsible.

In 2003, the Commission received an individual complaint from CCAJAR, a Colombian organization who requested for the Colombian State to be declared responsible for multiple violations of human rights, according to the American Convention on Human Rights. Even though the complete complaint is not available, the Commission established that the petitioners alleged that massive violations of human rights had occurred in Mapiripán, as several individuals had been tortured and disap-

24 *Descubren falsas víctimas en la Masacre de Mapiripán*. El País. (October 26, 2011). http://www.elpais.com.co/elpais/judicial/noticias/descubren-falsas-victimas-en-masacre-mapiripan

25 *Supra* note 15.

peared by the paramilitary groups[26]. The petitioners alleged the existence of 49 victims or more. They based their findings on the following evidence: (i) a public declaration made by, Mr. Carlos Castaño, the paramilitary leader at the moment, who estimated that the deaths that resulted from the Mapiripán struggle were *approximately* 49, and (ii) a testimony provided by one of the town villagers who stated before the Office of the Prosecutor that *several* persons were killed in the massacre[27].

CCAJAR did not provide any additional information that would allow the Commission to exactly determine the number of victims. It did however, provide a list of persons who in their consideration were victims of the massacre and therefore requested the Commission to present the case before the Court. A list with several names was presented.

Following the procedure set by the Rules and Procedures of the Commission[28], the Commission requested the Colombian government to provide amongst other aspects, information regarding the criminal and disciplinary investigations that were initiated as a consequence of the massacre. Though the initial response provided by the State is not available for the public, and therefore it is not possible to determine the specific response given by the State in this and other matters, further declarations by the Colombian government have hinted on the fact that it did, in fact, disagree with the facts presented by CCAJAR and consequently the number of casualties that resulted from the massacre.

When the Colombian government presented its preliminary objections to the case, it explicitly stated that a thorough review of the criminal proceedings initiated by the Prosecutor's Office, determined that there were several aspects of the narration of both the Commission's and CCAJAR's versions that were isolated and taken out of context, including the determination of the

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26 File for suit presented by the Inter-American Commission on Human Rights. Case 12250. Mapiripán Massacre (September. 5, 2003).

27 *Óp.cit.*

28 See articles 29 and 30. *Rules of Procedure of the Inter-American Commission on Human Rights*. Approved by the Commission at tis 109th special session held from December 4 to 8, 2000 and amended at its 116th regular period of sessions.

victims. The State further emphasized that it had already requested the Commission to analyze the information presented as a response to the request of information made, but that the Commission had dismissed its arguments[29].

The State added that according to confessions made by several paramilitary leaders there was no certainty regarding the victims in the massacre.

> "*After the Mapiripán massacre was carried out* [it was] *Carlos Castaño Gil himself who, before the media and as a '*victory report*' stated that 49 individuals were eliminated in the paramilitary incursion in Mapiripán* (…) *Doctor Leonardo Ivan Cortés Novoa asserted that approximately 26 individuals were killed and missing* (…) *In addition it has been asserted by paramilitary José Pastor Gaitán Ávila who says that they counted 23 persons murdered*".[30]

This aspect coupled with the fact that paramilitaries had thrown some of the bodies into the Guaviare River, made the process of identification of the victims much more difficult. Finally, the State argued that not all of the victims that were present in CCAJAR's list had presented before the competent authorities any type of complaint or were "*civil parts*" in any criminal proceeding.

Subsequently, when the Commission submitted the case to the Court[31] and requested it to specifically declare that the State had violated articles 4, 5, 7 and 8(1) of the American Convention on Human Rights, it determined that the victims for the case were "*at least 49 people*"[32]. The Commission did not present any additional information than that originally provided by CCAJAR in order to support such determination. It also provided the Court with the same list of names submitted by CCAJAR. The Commission did not explain the reasons for the determination of such victims or why it had not considered any other possible victims. The Commission merely justifies its findings by mentioning: "*It*

29 Preliminary Exceptions presented by Colombia, p. 19 (April 1, 2004) (Author's translation).
30 Final arguments presented by Colombia, p. 102 (no date provided).
31 *Supra* note 18.
32 *Ibídem*, paras. 1 and 2.

comes from the elements that have been proved in the file that in fact approximately 49 people were tortured and dismembered and their remains thrown to the Guaviare River"[33].

The Commission, despite affirming that it was a proven fact that there were 49 victims, it also recognizes that given the mode in which the crime was committed and the way in which paramilitaries got rid of the bodies, it was not possible to determine the number of casualties or identify them. It acknowledges that the State, despite having done some initial investigations, has not been able to determine with accuracy the persons that were killed in the massacre and therefore requests the State to implement the measures necessary to determine who they are. "*Given the nature of this case* (…) *the victims may not be fully identified until the State completes a serious and in depth investigation to clarify the extent of the damage caused by the Massacre including full identification of the victims*"[34].

The above assertion maybe some what contradictory. The Commission on the one hand has vehemently stated that the documentary as well as testimonial evidence in the file proves the existence of 49 victims and on the other hand acknowledges that it has been impossible for the State to determine exactly who the victims were as most of them were dismembered and their remains were thrown to the river.

Once Mrs. Contreras confessed that the testimonies given by her daughter[35] were false and that she had not suffered any harm due to the Mapiripán massacre, further investigations done by the Prosecutor´s Peace and Justice Unit determined that according to the evidence that up to now has been gathered, 10 people and not 49 died in the massacre[36].

There are two aspects to be highlighted, which show how is it that the Commission should do a careful and conscious

33 *Supra* note 18. para. 27.
34 *Ibidem*, para. 96.
35 Mapiripán Massacre vs. Colombia. Inter-American Court on Human Rights. Series C-134. Judgement of September 15, 2005, see in particular Chapter VII (C).
36 *Supra* note 22, p. 61.

evaluation of the information provided, and how, if necessary, it should not hesitate to participate into fact-finding missions.

The first of them is the importance that the information the Commission provides to the Inter-American Court represents for the procedure. Being the Commission the sole organ of the OAS[37] under the system capable to refer cases directly to the Court, it is essential that the data and information presented by the Commission is reliable, meaning that it should be as accurate and complete as possible regarding each particular case. Despite the fact that the Court will receive additional information and evidence from the parties in the dispute, the first impression the Court will have of the facts of the case will be the one that the Commission has presented to it. We are not implying that the Court may be bias in the assessment of the facts, but it is undeniable that being the Commission and the Court complementary organs under one same system the Court will rely in the information provided by the Commission as a basis for its future determinations.

Taking into account this scenario, the Commission has an implicit responsibility to corroborate as much as possible every type of information presented to it. The information that the Commission forwards to the Court may ultimately have a great impact in the Court determination of the facts, as well as in the case and matters such as the determination of victims and the reparations to be granted.

In the case at hand, and after reviewing the responses of the State, there is certain skepticism on whether or not the Commission made a conscious assessment of the information presented by CCAJAR and the State or if it simply dismissed without any analysis or justification the information provided by the State.

In that same vein, the second aspect that grants attention is the fact that the Commission did not present further evidence that controverted or even supported the affirmations made by

37 Article 19(b) Statute of the Inter-American Commission on Human Rights, OAS Res.447 (IX-0/79), OAS Off. Rec. OAS/Ser.P/IX.0.2/80, Vol. 1 at 88, Annual Report of the Inter-American Commission on Human Rights, OAS /Ser.L/V/11.50 doc.12 rev.1 at 10 (1980).

the representatives of the victims. The Commission provided the same list of victims as the one presented by CCAJAR without any qualms about whether the people who were in such list were in fact affected by the massacre or were close relatives of the victims. These type of postures send a very strong message to the State who will have to provide a much more stringent set of evidence in order for the Commission to shift its posture.

Given the outcome of the case, and the fact that the Colombian State has mostly attributed the existence of false victims to the Commission, we will describe the possible options the Commission could have adopted in order to attempt to clarify the facts of the case as well as the feasibility of those options.

As such, and pursuant to the Commission's own Statute as well as its Rules and Procedures, the Commission has been vested with the power to review complaints from individuals or initiate its own proceedings concerning violations of the American Convention by any of the member States of the OAS[38].

When reporting the human rights situation of Member States, the Commission has constant contact with member States and usually engages *in loco* visits[39], aimed at collecting information from primary and secondary sources. These visits are the primary source of information for the Commission to determine whether or not there has been and improvement in the general human rights situation of each particular Member State. "*Similarly, on-site visits allow to obtain corroborating evidence and the facts alleged in individual complaints*"[40]. In that sense, it is not far fetched to conclude that the Commission has made a quite decent mapping of the human rights situation in the region.

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38 Article 18. Statute of the Inter-American Commission on Human Rights.

39 Art. 18(g) and 48(g), *Óp.cit.* See also A. Cançado Trindade, *The Inter-American System of Protection of Human Rights (1948- 1999): Evolution, Present State and Perspectives* (International Institute of Human Rights, XXX Study Session, Strasbourg, France, 1999); A. Cançado Trindade, *Co-existence and Co-ordination of Mechanism of International Protection of Human Rights (At Global and Regional Levels)*, 202 *Recueil des Cours de l'Académie de Droit International de La Haye,* 21-435 (1987).

40 B. Santoscoy, *Las visitas* in loco *de la Comisión Interamericana de Derechos Humanos*, 609. Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM. http://biblio.juridicas.unam.mx/libros/5/2454/40.pdf

This mechanism, as well as the annual reports, also product of the *in loco* visits, has proven to be quite successful in the past few years[41].

Thus, one of the options the Commission could have pursued once it received the complaint from CCAJAR was to make an on site visit to Colombia. It is not uncommon for the Commission to make such visits to this country, as it annually reports on its human rights situation. This visit could have aided the Commission in obtaining primary basic information that could serve for better knowing the history, context and implications of the Massacre. This option would have been highly feasible. Unlike the majority of States, Colombia has shown that it is "*open*" to receiving in loco visits form members of the United Nations or the Inter-American System. Most likely if the Commission would have requested and *in loco* visit, the Colombian government would have allowed it.

On the other hand, in the existence of any doubt and if the Commission deems it necessary and advisable, it may also carry out an on-site investigation. In serious and urgent cases, and with the prior consent of the State in whose territory a violation has allegedly been committed, the sole presentation of a petition or communication that fulfills all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an on-site investigation[42]. This procedure has been frequently used by the Commission in order to corroborate certain facts or report the situation of human rights amongst the member States[43].

Once the Commission has obtained the consent of the State for on-site observation, the Commission is "*governed by broad rules of inquiry*"[44]. It can specifically interview witnesses, mem-

41 D. Shelton, *Improving Human Rights Protections: Recommendations for Enhancing the Effectiveness of the Inter-American Commission and Inter-American Court of Human Rights*, 3 Am. U.J.Int'l &Pol' 323, 5 (1998).

42 *Supra* note, Article 39. FALTA EL NRO. DE NOTA AL QUE SE REFIERE ESTO.

43 *Ibidem*, Article 19.

44 Inter-American Commission on Human Rights, Regulations Regarding On-Site Observations, OAS Doc.OEA/Ser.L/V/II.35.

bers of international organizations and even government officials in order to have a more specific conception of the allegations. If allowed to, it may equally perform visits to certain territories in order to gather more specific information[45]. It can therefore designate one or some of its members as country rapporteurs and will provide them with a definite mandate that should be linked to the fulfillment of its functions of promotion and protection of human rights[46]. Indeed, the American Convention provides the Inter-American Commission with formal powers to carry out *in loco* investigations to verify the facts of an individual complaint. On site, a Special Commission appointed for that purpose carry out investigations[47].

As can be seen, in fact, the Commission has the ability to perform fact-finding activities when receiving information about a possible violation of American Convention. However, these kind of activities must be done before the Commission decides to refer the case to the Inter-American Court, as once the Commission presents its documentary or testimonial evidence to the Court, the Court will not receive additional evidence, except if the *force majeure* is alleged.

Going back to the case at hand, and taking into account the degree of divergence that existed between the State and CCAJAR in the determination of victims, as well as the complexity of the case because of the particular facts, it would have been convenient if the Commission deployed a research group to aid in the gathering of evidence to support the existence of at least 49 victims or at least evidence that allowed the Commission to justify its presentation of number of victims.

The necessity of engaging in a fact-finding mission is furthered enhanced by the fact that when the Commission receives and individual petition, it presumes that the facts alleged in such petition are true, if the State does not provide or has not pro-

45 D. Weissbrodt & J. McCarthy, *Fact-Finding by International Nongovernmental Human Rights Organizations*. 22 Va. J. Int'l L. 1, 33(1981-1982).

46 *Supra* note 20, Article 15.

47 See in particular Articles 41(f), 44-47 and 48(1) (d) & (e). Article 51 of the Rules of Procedure of the Inter-American Commission on Human Rights.

vided responsive information during the period given to it, as long as other evidence does not lead to a different conclusion[48]. This rule exemplifies precisely the case at hand. The facts that were presented by CCAJAR were *ab initio* presumed to be true despite it lacking strong evidence to prove such determination. However, the State alleged that the number of victims presented by CCAJAR did not correspond with the information that it had, however it also failed to provide sufficient information to provide a specific number of victims. In this case neither of the evidence presented lead to a clear response on the identification and number of victims. The Commission could have therefore deployed a fact-finding mission in order to partially corroborate the information that the parties were providing. It however, opted to adopt the arguments of the representatives of the victims.

Precisely, the Commission has been criticized repeatedly for adopting in a somewhat flexible manner the positions or arguments the representatives of the victims pose, without actually making a sensible analysis of the information provided. This was precisely the case of Mapiripán in which the Commission despite the lack of sufficient evidence provided by both the State and CCAJAR, the Commission felt satisfied with the information submitted by the petitioners without actually confronting the evidence presented with that of the State or any additional primary or secondary sources. "*These factors may affect the willingness of states to cooperate in the petition procedures. Moreover, far less serious consequences result from the decision in an individual case than from a country study because the OAS General Assembly has never acted on Commission findings in an individual case*[49].

Considering that the Commission should have in fact attempted to gather more information about the victims, it must be

48 Rules of Procedure of the Inter-American Commission on Human Rights, Article 38.

49 See D. Shelton, *Abortion and the Right to Life in the Inter-American System: the Case of Baby Boy,* 2 HUM. RTs. L.J. 309, 309-10 (1981) (noting that the Commission reached conclusions in the Baby Boy case with questionable reasoning, faulty analysis, and with little attention to canons of construction of international documents). D. Shelton, *Improving Human Rights Protections: Recommendations for enhancing the effectiveness of the Inter-American Commission and Inter-American Court of Human Rights*, AM. U.J.Int'L L. & POL'Y, 328 (Vol. 3:323) (1981).

concluded that even if it had done this, the result of the case in this particular aspect, that is to say the existence of false victims, most probably would not have changed.

When the Commission decides to engage in human rights fact-finding, even if acknowledging that it has a vast experience in doing so, it will never have the same institutional or working capital comparable to a State. Therefore one should not expect that the Commission would be able to gather sufficient information in a short period of time that allows to identify the victims. Prove of this is that despite the fact that the Colombian government had initiated investigations in order to determine the number of victims, it was only until one year ago that it started to discover that the number of victims in the massacre did not come even near to 49.

Furthermore, when such inquiry commissions are deployed the objective is not to replace the role of the State. On the contrary, without prejudice of a fact-finding mission or not, the State has the obligation under international law to investigate any allegations of human rights violations.

However, even if we acknowledge that the result would have been the same, if the Commission would have performed any activity related to fact-finding its legitimacy would not have been so questioned today, and the State would not have found an easy excuse to blame the existence of false victims to the Commission.

V. Inter-American Court and the Mapiripán Case

For its part the Inter-American Court has been vested with the jurisdiction over contentious cases involving states parties to the Convention[50]. In regards to its fact-finding powers, article 45 of its Rules of Procedures gives the Court "*ample powers to gather any additional evidence that it considers necessary. These powers include 'hearing witnesses (including experts), requesting from the parties the production of certain evidence, requesting*

50 American Convention, *supra* note 1, Art. 61.

a report or opinion from a third party or commissioning its own Judges to hold a hearing at the seat of the Court or elsewhere'. However, the Inter-American Court has in practice rarely utilised its fact- finding powers"[51]. The Court as explained before, generally relies on the information that the Commission has provided or acts cautiously in deploying fact-finding missions given the high costs they imply[52].

Colombia, when delivering its final arguments, repeatedly asked the Court to revise the number of victims that were recognized in the case; as domestic investigations had once again shown that the number of victims did not rise as high as 49 individuals. However, once more the State was not able to either disprove or provide stronger evidence as to refute the existence of the victims.

In March of 2005, the Colombian State recognized its responsibility for the Massacre and recognized that it violated certain convention obligations[53]. However when it did so, the State was also cautious in not recognizing the existence of 49 victims. In its final arguments it emphasized: "*For the effects of the recognition of responsibility that the Colombian State has made* (…) *the State requests the Honorable Court to recognized as victims* (...) *those who the Colombian authorities have already recognized such condition and that served as a foundation to the recognition of responsibility that was made*"[54].

It further manifested:

> "*Is that if you do not act with caution in recognizing the status of victims* (…) *these could lead to an absurd situation in which you may order compensation to those who have not suffered harm, or deny compensation to someone that has* (...) *the evidence offered by the Honorable Commission and the petitioners are merely indications and do not allow to have a judgment free of uncertainty*"[55].

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51 P. Leach, L. Paraskeva, G. Costas & G. Uzelac, *International Human Rights & Fact Finding. An Analysis of the Fact-Finding Missions Conducted by the European Commission and Court of Human Rights*. Report by the Human Rights and Social Justice Research Institute at London Metropolitan University, 31 (2009).

52 See: http://www.wcl.american.edu/hrbrief/v4i2/groo42.htm

53 Recognition of international responsibility by Colombia, March 7, 2005.

54 *Supra* note 22, p. 67.

55 *Ibidem*, p. 68.

The Court[56] in its final judgment determined that it was a proven fact that "*the paramilitary remained in Mapiripán from July 15 to 21, 1997, during which time they impeded free movement of the inhabitants, and they tortured, dismembered, eviscerated and decapitated approximately 49 individuals*"[57]. The Court did not address specifically the petition of the State to carefully take into account the number of victims. On the contrary, the Court tacitly rejected Colombia's requests for the Court to abstain itself in declaring that 49 were the number of victims, it in turn stated that even in adjudicatory proceedings before the Court the interest party must identify the beneficiary or beneficiaries[58]:

> "*The Court states its deep concern regarding the situation of the unidentified victims, for whose death the State also acknowledged its responsibility, as well as regarding that of their next of kin. While the approximately 49 victims acknowledged by the State as well as their next of kin, will be beneficiaries of other forms of reparation and/or the compensation set for non- pecuniary damages, for lack of information the Court abstains from ordering compensation for pecuniary damages in favor of those victims and their next of kin who have not been individually identified in this proceeding*"[59].

It further on concluded that despite the fact that they were not determined in the process the 49 individuals were to be considered "*injured parties*" and therefore all of them will be entitled to reparations set by the Court[60].

The Mapiripán case is the perfect example of how the Court is reluctant to engage in fact-finding mechanisms even when it its confronted with fact-sensitive cases and when the parties in the case present different versions of the facts. Though in this case the Court attempted to take into account the observations of the Colombian government regarding the risk that would entail providing reparations to undetermined victims, it finally opted

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56 *Supra* note 8.
57 *Ibidem,* Chapter VII. Proven Facts.
58 See: Interamerican Court of Human Rights. Case of the Moiwana Community. Series C-124, para. 177. Judgment of July 15, 2005.
59 *Supra* note 49. Chapter XIV Reparations, para. 247.
60 *Ibidem*, para. 257.

for a much more "*cautious*" approach and provided compensatory measures for those 49 victims. It did no question, however the veracity of the evidence provided by CCAJAR.

In determining whether the deployment of a fact-finding investigation would have changed the result, one may conclude that even if the Court had accepted to do so, the result would not have been different. As established with the Commission, the specific facts of the case did not allow any type of fact-finding mechanism to gather any information different from that presented by the Colombian Government, and as we saw, such information was not sufficient to establish the number of victims.

In our opinion, the element that triggered the existence of false victims in the Mapiripán massacre case was the different testimonies presented by each of the victims (some of them false victims). The Court in its final decision presents several excerpts of how Ms. Contreras and her relatives explained with great amount of detail and coherence the facts of the case. These testimonies under any type of standard of proof, would have been quite a determinative in order for a Court to find that a State was responsible for a violation of its international obligations. This will be more probable if the Court, such as the Inter-American Court does not apply a "*beyond reasonable doubt*" standard but a much more flexible one[61]. Therefore, these type of testimonies will shift the scale and lead the Court to have strong arguments to decide on the responsibility of the State, specially when the States has not managed to provide alternative strong evidence.

Finally one can conclude that fact-finding is desirable in human rights cases, such extra assessment will allow certain gaps to be filled and one can gather primary sources of information. Equally fact-finding in this case would have allowed the Commission to have a greater legitimacy in the assessment it makes of the cases that are presented before it. The Court, for its part has not experienced such a detrimental effect, but its decision

61 See: IACHR, Series C-4 para. 165. Judgment of 29 July, 1988. See also Inter-American Court of Human Rights, Velasquez vs. Honduras, Series C-4 (1988), Section 174; Barrios Altos case. Judgment of 14 March, 2001. Series C-75 Section 41-44 and 53.

regarding the revision of the judgment will in fact test the Court's capacity to accept its flaws and present not only to Colombia but to the rest of the states members a plausible solution.

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