

The Frontiers of Memory: Human Rights as Potential Limits to the Construction of Memory in Colombia's Law on Victims**-*******

Las fronteras de la memoria: los derechos humanos como potenciales límites a la construcción de la memoria en la Ley de Víctimas colombiana

ABSTRACT

Increasing demands for the international recognition of a human right to memory tend to disregard the potential conflict between this right and other

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recognized human rights in transitional justice processes. Relying on the lessons learned from the Colombian Victims and Land Restitution Law, this article provides an overview of the rights (both of the victims themselves and of the perpetrators) that might collide with, and impose restrictions on, an eventual right to memory, while discussing the practical safeguards in the design and implementation of the policies of memory that are necessary to accommodate the rights in conflict.

KEYWORDS

Memory, human rights, Colombia, transitional justice, international law.

RESUMEN

Las crecientes demandas para que se reconozca internacionalmente el derecho a la memoria tienden a no tener en cuenta el potencial conflicto que puede surgir entre este derecho y otros derechos humanos reconocidos en los procesos de justicia transicional. Tomando como punto de partida la Ley colombiana de Víctimas y Restitución de Tierras, este artículo ofrece un panorama de los derechos (tanto de las víctimas como de los victimarios) que pueden entrar en colisión con un eventual derecho a la memoria –e incluso imponerle restricciones–, y aborda las salvaguardias prácticas en el diseño e implementación de políticas de memoria que resultan necesarias para acomodar los derechos en conflicto.

PALABRAS CLAVE

Memoria, derechos humanos, Colombia, justicia transicional, derecho internacional.

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INTRODUCTION

As international human rights law currently stands, the States' duty to preserve the memory of gross human rights violations committed in the past would appear to be crystallizing. This duty is included both in the set of principles on human rights and the fight against impunity prepared by Louis Joinet – adopted by the United Nations (UN) Commission on Human Rights in 1997^[1] – and in the update carried out by Dianne Orentlicher in 2005.² Although these principles have not been adopted by the States as a binding international legal instrument, both documents are key to the institutionalization³ of a trend that began in the 1990s, with the undertaking to remember, honor and commemorate the victims of the Holocaust that emerged from the diplomatic conferences on the subject,⁴ and which continued with the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, where the question of the preservation of the historical memory of slavery, the slave trade, apartheid, colonialism and genocide was addressed.⁵ Likewise, the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (hereinafter *Reparation Principles*) include among their measures of

1 United Nations. *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*. Revised Final Report prepared by Mr. Joinet pursuant to Sub-Commission Decision 1996/119. Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997 [hereinafter *Joinet's Principles*].

2 United Nations. *Report of the independent expert to update the Set of principles to combat impunity*, Diane Orentlicher. Addendum. Updated Set of principles for the protection and promotion of human rights through action to combat impunity. Doc. E/CN.4/2005/102/Add.1, 8 February 2005 [hereinafter *Updated Set of Principles to Combat Impunity*].

3 United Nations. *Report of the Special Rapporteur in the field of cultural rights*, Farida Shaheed. *Memorialization processes*. Doc. A/HRC/25/49, 23 January 2014, para. 25 [hereinafter *Report on Memorialization Processes*].

4 The Stockholm International Forum on the Holocaust. *Declaration*. 30 January 2000, para. 6. Available at: https://www.holocaustremembrance.com/sites/default/files/stockholm_4csilver.pdf (last accessed: 21 February 2022).

5 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. *Durban Declaration*, paras. 57, 58 and 102. In United Nations. *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*. Durban, 31 August-8 September 2001. Doc. A/CONF.189/12. On the “moral” nature of the obligation, see BOTTIGLIERO, I. *Redress for Victims of Crimes under International Law*. Leiden/Boston: Martinus Nijhoff Publishers, 2004, 177-178.

satisfaction, as a means of giving victims redress, some that are related to the preservation and dissemination of memory.⁶

In State practice, a tendency has been observed to take initiatives to preserve evidence of human rights violations, in combination with the adoption of anti-denialist legislation and the promotion of the production of cultural works, the public dissemination of victims' stories and the development of educational programs. Moreover, human rights bodies at the regional level also appear to be paying increasing attention to such questions, either as part of the reparation measures imposed by the States or as a guarantee of non-repetition (the Inter-American Court of Human Rights – hereinafter IACTHR – has been particularly active in this regard⁷), or indirectly through the protection of rights (as is the case with the European Court of Human Rights – hereinafter the ECtHR – which protects the search for historical truth by means of Article 10 of the European Convention on Human Rights – hereinafter ECHR⁸ – in relation to the freedom of expression, as we shall see below⁹). In addition, a number of international organizations have promoted regional initiatives of memorialization, as illustrated by *The African Union Human Rights Memorial* sponsored by the African Union.¹⁰

As the UN Special Rapporteur on Cultural Rights points out, “[m]emorialization is now part of the international agenda.”¹¹ In fact, growing international practice in relation to memorialization initiatives both at the State and inter-State levels suggests the possibility that a customary rule might be

6 United Nations. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. Doc. A/RES/60/147, annex, 16 December 2005, para. 22.g) and h).

7 See, e.g., IACTHR. *Velásquez Rodríguez v. Honduras*. Merits, Judgment, 29 July 1988 (ser. C, n.º 04), para. 181; *Castillo Páez v. Peru*. Merits, Judgment, 3 November 1997 (ser. C, n.º 34), para. 90; *19 Merchants v. Colombia*. Merits, Reparations and Costs, Judgment, 5 July 2004 (ser. C, n.º 109), para. 259; *Rochela Massacre v. Colombia*. Merits, Reparations and Costs, Judgment, 11 May 2007 (ser. C, n.º 163), para. 195. See also TARAPUÉS SANDINO, D. F. & QUINTERO AQUITE, S. *El desarrollo progresivo del derecho a saber la verdad en el derecho internacional de los derechos humanos*. In ZEPEDA, L. et al. (dir.), *Justicia y derechos humanos*. México D.F.: Tirant lo Blanch, 2020, 261-268.

8 Council of Europe. *Convention for the Protection of Human Rights and Fundamental Freedoms*. ETS n.º 5, 4 November 1950 [hereinafter ECHR].

9 See *infra* Section 3.3.

10 African Union. *African Union Human Rights Memorial (AUHRM)*. Concept Note. 13 December 2016. Available at: <https://au.int/en/documents/20161213/auhrm-concept-note> (last accessed: 21 February 2022).

11 *Report on Memorialization Processes*, para. 35.

crystallizing in this field.¹² Such a hypothesis is particularly strong in the Americas, where there is evidence of abundant initiatives both at the State and inter-State level aimed at preserving memory (with the Inter-American system for the protection of human rights serving as a reference), thus suggesting that an international legal norm of a regional nature on this matter may have already crystallized.¹³ However, whether this norm provides for the preservation of memory as a right, as some authors argue,¹⁴ is a different matter. Indeed, the current state of development of international human rights law only appears to point to the existence of State obligations in relation to this matter, without this specifically giving rise to a right to memory, as we shall see below.

Whatever the case, increasing demands for the recognition of a right to memory contrast with the absence of any assessments of the potential conflict between this right and other recognized human rights, both of the victims themselves and of the perpetrators. Such a conflict is, however, probable, and should not be seen in a negative light or as something unusual: the exercise of rights and freedoms often finds itself limited by the rights of others to enjoy their freedoms. In this situation it is necessary to weigh up

12 See *Report on Memorialization Processes*, para. 103-107.

13 See, e.g., IACTHR. *Rochac Hernández et al. v. El Salvador*. Merits, Reparations and Costs, Judgment, 14 October 2014 (ser. C, n.º 285), paras. 234-235; *Cantoral Benavides v. Perú*. Reparations and Costs, Judgment, 3 December 2001 (ser. C, n.º 88), para. 53; *Bámaca Velásquez v. Guatemala*. Reparations and Costs, Judgment, 22 February 2002 (ser. C, n.º 91), para. 56; *Trujillo Oroza v. Bolivia*. Reparations and Costs, Judgment, 27 February 2002 (ser. C, n.º 92), para. 77; *Case of the Caracazo v. Venezuela*. Reparations and Costs, Judgment, 29 August 2002 (ser. C, n.º 95), para. 94; *Juan Humberto Sánchez v. Honduras*. Preliminary Objection, Merits, Reparations and Costs, Judgment, 7 June 2003 (ser. C, n.º 99), para. 168; *Myrna Mack Chang v. Guatemala*. Merits, Reparations and Costs, Judgment, 25 November 2003 (ser. C, n.º 101), para. 278. See also GREELEY, R. A., ORWICZ, M. R., FALCONI, J. L., REYES, A.M., ROSENBERG, F. J. & LAPLANTE, L. J. *Repairing Symbolic Reparations: Assessing the Effectiveness of Memorialization in the Inter-American System of Human Rights*. In *International Journal of Transitional Justice*. Vol. 14, n.º 1, 2020, 167.

14 See, e.g., CABRERA SUÁREZ, L. A. *El derecho a la memoria y su protección jurídica: avance de investigación*. In *Pensamiento Jurídico*. N.º 36, 2013, 173; MILLARD, E. *¿Por qué un derecho a la memoria?* In *Revista Derecho del Estado*. N.º 32, 2014, 145. An alternative approach, with a more solid theoretical ground, would be to consider the right to memory a cultural right (see *infra* section 3.4), rather than an autonomous right, as argued by LUTHER, J. *El derecho a la memoria como derecho cultural del hombre en democracia*. In *Revista Española de Derecho Constitucional*. N.º 89, 2010, 45-76. Huyssen also points out such link between memory and cultural rights (HUYSEN, A. *Natural Rights, Civil Rights and the Politics of Memory*. In *emisférica*. Vol. 6, n.º 2, 2009. Available at: <https://hemisphericinstitute.org/en/emisferica-62/6-2-essays/essay-natural-rights-cultural-rights-and-the-politics-of-memory.html>, last accessed: 21 February 2022).

conflicting interests and determine which rights and freedoms, and to what extent, should prevail.

This article seeks to provide an overview of the rights that might come into collision with the construction of memory in the framework of a process of transitional justice,¹⁵ and intends to contribute to the discussion on how to resolve potential conflicts between them and the eventual right to memory. The starting point for this analysis is the specific case of the Law on Victims adopted in Colombia in 2011.¹⁶ This not only proclaims the right to memory, but it also regulates this right with a degree of concreteness that is unparalleled in international practice, so that *a priori* it constitutes a normative model that could well serve as a reference for assessing the scope of the duty to preserve the memory in international human rights law.

To examine these questions, we begin by analyzing the scope and content of the State's duty to preserve memory, and from which a hypothetical right to memory would be derived. Next, we identify the main human rights that could come into conflict with this right, outlining general jurisprudential criteria followed by the IACTHR and the ECtHR and assessing how potential conflicts of rights are addressed in the Colombian Law on Victims and related rules. We finish by setting out the conclusions drawn from the preceding discussion.

1. SCOPE AND CONTENT OF THE STATE'S DUTY TO PRESERVE MEMORY

According to Reading, a right to memory would involve “the right to a symbolic representation of the past embedded within a set of interventions and social practices.”¹⁷ Sferrazza and Bustos give it a more specific content when they state that it should include at least the individual freedom to remember,

15 Periods of political transition per se do not appear to constitute sufficient cause to consider effective the derogation of human rights, as provided for in international human rights treaties for dealing with crisis situations (see BONET PÉREZ, J. *Introducción general: las situaciones de crisis y el derecho internacional de los derechos humanos*. In BONET PÉREZ, J. & SAURA ESTAPÀ, J. (eds.), *El derecho internacional de los derechos humanos en períodos de crisis. Estudios desde la perspectiva de su aplicabilidad*. Barcelona: Marcial Pons, 2013, 7-27). Indeed, in such contexts, the enjoyment of human rights by all people must, in principle, be full.

16 Ley 1448 de 2011 (Junio 10), *Por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno y se dictan otras disposiciones*. Available at: <http://www.unidadvictimas.gov.co/es/ley-1448-de-2011/13653> (last accessed: 21 February 2022) [hereinafter Law on Victims].

17 READING, A. *Gender and the Right to Memory*. In *Media Development*. Vol. LVII, n.º 2, 2010, 11. In Lee's opinion, the right to memory “affirms and protects those ‘frameworks of collective memory’ [quoting Maurice Halbwachs] that ensure the physical survival and

the right to have the dignity and respectability of one's memories acknowledged, and the right to make the content of memories known.¹⁸ Although the *right to memory* is often referred to, such a right is not enshrined in any international instrument. Those dealing with this issue speak, in fact, of a *State duty to preserve memory*. This same wording is the one opted for by Colombia's Law on Victims. Below we examine the content of this duty in greater depth both as a principle linked to the fight against impunity (1.1) and specifically within Colombia's Law on Victims (1.2).

1.1. The State's duty to preserve memory as a principle linked to the fight against impunity

According to both Joinet and Orentlicher, the State's duty to preserve memory is closely connected with the right to know (the right to the truth), a right that has dual ownership: that is, an individual dimension (the right of the victims) and a collective dimension (the right of the people, that is, the community or society as a whole). Joinet includes what he refers to as the "duty to remember" among the general principles relative to the right to know, "which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people's national heritage and as such must be preserved."¹⁹

In the *Updated Set of Principles to Combat Impunity*, it is stated that the duty to remember translates into a State obligation:

- (i) to preserve archives and other evidence concerning violations of human rights and humanitarian law, and
- (ii) to facilitate knowledge of those violations.²⁰

Moreover, in addition to constituting a State obligation in relation with the victims' right to the truth, memorialization measures are also often considered a form of reparation for the victims, who see how the sufferings they

moral well-being of a people" (LEE, P. *Towards a Right to Memory*. In *Media Development*. Vol. LVII, n.º 2, 2010, 9-10).

18 SFERRAZZA TAIBI, P. & BUSTOS BUSTOS, F. *Violaciones a los derechos humanos y derecho a la memoria en Chile*. In CASTRO, H. (coord.), *Memoria, patrimonio y ciudadanía*. Valparaíso: Universidad de Playa Ancha, 2019, 26.

19 Joinet's Principles, para. 17.

20 *Updated Set of Principles to Combat Impunity*, Principle 3.

experienced are recognized and considered relevant in the construction of the collective memory. In this way, memory initiatives serve as measures of satisfaction – that is, of moral reparation – in line with the *Reparation Principles*, which hold that satisfaction should include, “where relevant and appropriate,” among other measures:

b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; [...]

g) Commemorations and tributes to the victims;

h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.²¹

This dual nature of actions of memorialization raises the difficulty of delimiting the scope of the correlative right to the duty to remember. In reality, this right would not be an eventual *right to memory*, but rather the duty to remember is forged from the coming together of the specific dimensions of two other rights: that is, the right to the truth – in its dual dimensions, individual (the victims’ right to know) and collective (the people’s right to the truth) – and the right to reparation. On the basis of these two rights, the content of the duty to remember can be better defined, that is, in relation to the objective it fulfills in relation to them.

The individual dimension of the right to the truth – which supposes that “victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate”²² – gives meaning to the State’s duty to preserve archives and other evidence concerning violations of human rights and international humanitarian law. This is closely connected with the configuration of the truth as a key element in the realization of the right to justice in relation to gross human rights violations. From this perspective, the right to justice requires that “prompt, thorough, independent and impartial investigations” be undertaken,²³ which relates truth, memory and justice in

21 *Reparation Principles*, para. 22.

22 *Updated Set of Principles to Combat Impunity*, Principle 4.

23 *Ibid.* at Principle 19.

an essential way: without knowing the truth about the circumstances of a concrete case there can be no justice, and for this it is imperative that the State preserve evidence that can be used to demonstrate what happened.

Alongside this individual dimension, the right to the truth presents a collective dimension that translates into “the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes.”²⁴ This dimension is closely connected with the duty to preserve memory to the extent that the right to the truth is guaranteed by the State’s duty to facilitate knowledge of such violations,²⁵ which, moreover, is very close to a guarantee of non-repetition, if we hold as true the well-known saying that those who cannot remember their past are condemned to repeat it.

Measures to preserve memory as a form of symbolic reparation satisfy the victims’ right to reparation.²⁶ The question is to what extent the victims can demand the adoption of memorialist initiatives, and to what extent the right to reparation grants a right to the imposition of a particular type of memory. In principle, it seems clear that the State should provide the most appropriate reparation, but this cannot be understood as the right of victims to obtain reparations of their choice, but rather that adequate resources be

24 *Ibid.* at Principle 2.

25 The fulfillment of this obligation can take many forms: memorials, reports, dissemination through the media, documentaries, or other forms of artistic expression.

26 In this respect, it is particularly interesting the opinion adopted by the French Council of State on 16 February 2009, where it stated that reparation for victims of deportations under the Vichy regime and their families solemnly called for the remembrance – “que doivent à jamais laisser, dans la mémoire de la nation” – of the suffering they endured (Conseil d’État. Decision n° 315499. Lecture du 16 février 2009, ECLI:FR:CEASS:2009:315499.20090216. Available at: <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2009-02-16/315499>, last accessed: 21 February 2022). According to Grosswald Curran, such duty of memory “was one for the State to conduct as a political and historical matter, rather than as a legal one” (GROSSWALD CURRAN, V. *History, Memory and Law*. In *Roger Williams University Law Review*. Vol. 16, n.º 1, 2011, 105). Macaya reaches a similar conclusion when she analyses anti-denialist laws in France and the opinion adopted by the Conseil d’État: the duty of memory would be “un impératif qui guiderait l’action politique et qui s’imposerait à l’État. Il s’agirait d’une sorte de dette morale envers des événements passés auxquels l’État a participé ou dont il se réclame porteur d’une repentance universelle” (MACAYA, A. *Un passé qui ne passe pas: les enjeux juridiques de la “mémoire historique” en France et en Espagne*. In *Jurisdctoria*. N.º 3, 2009, 80). However, she considers that some legal consequences can be drawn: “face à l’impératif du devoir de mémoire, l’État français choisit de solder sa dette par la mise en place d’un dispositif juridique qui certes ne prescrit pas des comportements précis mais qui permet la construction d’une certaine mémoire historique” (*ibid.*).

made available by means of which their condition as victims and their condition as the holders of rights are recognized.²⁷

Thus, the State's duty to preserve the memory does not seem to have as its corollary a *right to the memory* of the victims individually or of society as a whole; rather its counterpart would be the satisfaction of certain dimensions of the rights to truth and to reparation – without excluding that there are dimensions of a potential right to memory linked to the protection of other human rights.²⁸ For this reason, in what follows we prefer to speak of *the preservation of memory* or *the construction of memory*, rather than of a right to memory as such. On this basis, the analysis will start from the premise that the State has a duty to adopt measures aimed at facilitating the construction of memory, which must be centered on the demands derived from the rights mentioned above, and taking into account the limits imposed by the enjoyment of other internationally recognized human rights, as we shall see below.²⁹

27 See United Nations. *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, Pablo de Greiff. Doc. A/69/518, 14 October 2014, para. 9. This seems to be the conclusion reached by Humphrey in his analysis of the Spanish so-called Historical Memory Law (Ley 52/2007, de 26 de diciembre, *por la que se reconocen y amplían derechos y se establecen medidas a favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura*): rather than setting a victims' right to memory, memory laws would “leverage global human rights to create new national rights for victims” (HUMPHREY, M. *Law, Memory and Amnesty in Spain*. In *Macquarie Law Journal*. Vol. 13, 2014, 40) by authorizing “the collective identity and rights claims that victims had made to international human rights agencies” (*ibid.*, 37), what would allow to fulfil “a central aim of transitional justice culture”, such as the re-education of citizens “about past violence through victim testimony” (*ibid.*).

28 Lee (*cit. supra* fn. 17, 8-9) provides a useful list: right to a nationality; freedom of thought, conscience, and religion; freedom of opinion and expression; right to education; right to freely participate in the cultural life of the community; right to self-determination; minority rights; rights of indigenous peoples, and right to mental integrity. Regarding the latter, it is particularly interesting a judgment delivered on the 26 December 2019 by the Appeals Court of Santiago de Chile, concerning a claim against the Army's refusal to remove commemorative plaques and images of army's general Manuel Contreras, convicted for crimes against humanity. While the court linked memory with the right to reparation, it also considered the army's refusal an attack to the claimants' right to mental integrity. The judgment is reproduced and commented in SFERRAZZA TAIBI, P. & BUSTOS BUSTOS, F. *La protección judicial del derecho a la memoria: la remoción de las imágenes de un genocida*. In *Revista de Derecho (Valdivia)*. Vol. 34, n.º 1, 2021, 341-352. As these authors state, several dimensions of memory can be protected through the protection of other human rights (*ibid.*, 348).

29 See *infra* Section 3.

1.2. The duty to preserve memory in Colombia's Law on Victims

Articles 141 to 148 of the Law on Victims provide one of the most comprehensive and concrete State regulations on the question of memory to be found in international practice. This does not mean, however, that the legal consequences relating to the preservation of memory are clearly established, since the law attributes to it a dual legal nature. In fact, according to the law, the preservation of memory is both a specific State obligation – the duty of memory (Article 143) – and a form of symbolic reparation (Article 141). However, this duality is relative, since all the provisions relating to memory are included in Chapter IX, on measures of satisfaction. As such, therefore, they are essentially conceived as measures of reparation.

Under Article 143 of the law, the duty of memory of the State translates as providing the necessary guarantees and conditions so that society, through its different manifestations, be it as victims, academia, think tanks, civil society organizations, organizations of victims and human rights, as well as State agencies that have the competence, autonomy and resources to take steps towards the reconstruction of memory, contributes to the realization of the right to the truth of which the victims and society as a whole are entitled.³⁰

In other words, as regards the (individual and collective) right to the truth, the law attributes to the State an active role as facilitator of the process of construction of historical memory (to use the terminology of the law), leaving considerable room for the victims, along with other social agents, to contribute with their own experiences.

Moreover, under Article 141, the law states that a symbolic reparation can be understood to mean “toda prestación realizada a favor de las víctimas o de la comunidad en general que tienda a *asegurar la preservación de la memoria histórica*, la no repetición de los hechos victimizantes, la aceptación pública de los hechos, la solicitud de perdón público y el restablecimiento de la dignidad de las víctimas” (emphasis added).³¹

30 “El deber de Memoria del Estado se traduce en propiciar las garantías y condiciones necesarias para que la sociedad, a través de sus diferentes expresiones tales como víctimas, academia, centros de pensamiento, organizaciones sociales, organizaciones de víctimas y de derechos humanos, así como los organismos del Estado que cuenten con competencia, autonomía y recursos, puedan avanzar en ejercicios de reconstrucción de memoria como aporte a la realización del derecho a la verdad del que son titulares las víctimas y la sociedad en su conjunto.”

31 “Symbolic reparation can be understood to mean any provision made in favor of the victims or of the community in general that tends to *ensure the preservation of historical*

The law includes numerous measures of memorialization, although it does so in a largely unsystematic fashion. A first set appears among the measures of satisfaction contained in the heading to Article 139, but is not limited to these.³² In addition, Article 142 provides that April 9th of each year be established as the Day of Memory and Solidarity with the Victims, during which the Colombian State undertakes to carry out events of memory and recognition of the facts that have victimized Colombian men and women. Along with these, Article 144 refers to the archives on human rights violations and breaches of international humanitarian law that occurred during the internal armed conflict. The collection, preservation and custody of documents that refer to, or that document, all aspects related to human rights violations, as well as the State's response to such violations, constitute the main functions of the Human Rights and Memory Program. Likewise, Article 145 specifies different measures of archiving, documentation, dissemination, and education that are to be considered actions for promoting the historical memory and which might be developed by either private or public initiative (through the National Center of Historical Memory created by the Act). Finally, in light of the powers conferred on the Center of Historical Memory by Articles 146 to 148, we can add to this list the retrieval of documentary material, oral testimonies, and by any other means that document violations of rights; making this information available; the undertaking of activities in museums and schools; and the design, creation and administration of a Museum of Memory.

In short, of the measures listed it can be deduced that the State's duty of memory consists, primarily, in recognizing human rights violations, making these violations known, fostering the reconstruction of public and private memory (by ensuring that the private memory is aware of the public memory), carrying out actions of commemoration, and undertaking awareness raising activities in schools and museums.

memory, the non-repetition of victimizing acts, the public acceptance of the facts, a request for public pardon and the restoration of the victims' dignity."

32 Namely, proceed with the publications related to the public recognition of the character of the victim (point b); undertake commemorative acts (point c); promote acts of public recognition and public honors (points d and e); construct public monuments by way of reparation and reconciliation (point f); full public dissemination of the victims' narrative of the facts of victimization to which they were exposed, as long as this does not cause more unnecessary harm or threaten their safety (point h).

2. HUMAN RIGHTS THAT MIGHT COME INTO CONFLICT WITH THE CONSTRUCTION OF MEMORY

As we have suggested, the process of the construction of memory – essential for victims and for society as a whole – can, however, affect the enjoyment of internationally recognized human rights, especially those of the perpetrators, but also of the victims. Specifically, this seems to be especially true in relation to the collective dimension of the duty to preserve memory and, therefore, of the obligation to inform the whole of society of the events that occurred. However, state policies concerning the archives of past events may also affect certain rights.

The rights most susceptible to violation would be judicial guarantees of due process (2.1), rights to privacy and honor (2.2), freedom of expression (2.3), and the right to participate in cultural life (2.4). Indirectly, the negative impact on other rights, such as the right to life and the right to personal integrity, cannot be excluded.³³

2.1. Construction of memory and rights to due process

To the extent that the construction of memory requires the reconstruction of past events (or, in other words, the determination of what happened at a particular time and place and the identification of the parties involved) and their dissemination so that they can enter the public domain, the management of data about the perpetrators identified may impact their judicial guarantees³⁴ if, at the same time or subsequently, they are required to go before the courts.³⁵

33 Thus, Article 6 of Decreto 2244 de 2011 (28 Junio), *Por el cual se adicionan unas funciones al Centro de Memoria Histórica y se dictan otras disposiciones* (hereinafter Decree 2244 of 2011), provides that the Center of Historical Memory shall take the necessary measures to ensure that the procedures that are carried out in compliance with this decree do not endanger the life and personal integrity of the interviewees [“El Centro de Memoria Histórica tomará las medidas necesarias para velar por que los procedimientos que adelante en cumplimiento del presente decreto no pongan en riesgo la vida y la integridad personal de los entrevistados”].

34 It should be borne in mind that judicial guarantees are closely linked to the right of access to justice and that its application is not restricted to cases that are exclusively judicial, but it may also cover any type of act emanating from the State that may affect a person’s rights. See NOGUEIRA ALCALÁ, H. *Consideraciones sobre el derecho fundamental a la presunción de inocencia*. In *Ius et Praxis*. Vol. 11, 2005, 221, 240.

35 As Osiel warns, “efforts to employ criminal prosecution to influence a nation’s collective memory of state-sponsored mass murder [...] can easily sacrifice the rights of

In particular, the association of a person to gross human rights violations in a document of memory (i.e., any document related to the construction of memory) that is made public may affect his or her rights to the presumption of innocence. In the cases of *Suárez Rosero v. Ecuador* and *López Mendoza v. Venezuela*, the IACtHR held that the presumption of innocence “is founded upon the existence of judicial guarantees,” and thus imposes the duty of recognizing the innocence of a person until proven guilty.³⁶ Only in this way is it possible to guarantee the effectiveness of the right to defense, since the indisputable demonstration of guilt is an indispensable requirement for criminal punishment. Similarly, the ECtHR held in *Barberà, Messegue and Jabardo v. Spain* that the presumption of innocence “requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged, [...] and any doubt should benefit the accused.”³⁷ Thus, “[t]he presumption of innocence will be violated if, without the accused’s having previously been proved guilty according to law, a judicial decision concerning him reflects an opinion that he is guilty.”³⁸ Elaborating on this idea, in *Lori Berenson-Mejía v. Peru* (citing the ECtHR in *Allenet de Ribemont v. France*³⁹) the IACtHR held that “the presumption of innocence may be infringed not only by a judge or court but also by other public authorities,” so while the authorities might not be impeded from “informing the public about criminal investigations in progress, [...] it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected.”⁴⁰

It is quite evident, therefore, that measures taken by the public authorities in fulfillment of their duty to facilitate knowledge of grave human rights violations that have occurred in the past may come into collision with the right to the presumption of innocence of the alleged perpetrators. This could occur in the case of a person who, not having yet been brought to trial, is

defendants on the altar of social solidarity” (OSIEL, M. J. *Ever Again: Legal Remembrance of Administrative Massacre*. In *University of Pennsylvania Law Review*. Vol. 144, n.º 2, 1995, 466-467). The same can apply if memory is prioritized over defendants’ rights.

36 IACtHR. *Suárez Rosero v. Ecuador*. Merits, Judgment, 12 November 1997 (ser. C, n.º 35), para. 77; *López Mendoza v. Venezuela*. Merits, Reparations, and Costs, Judgment, 1 September 2011 (ser. C, n.º 233), para. 128.

37 ECtHR. *Barberà, Messegue and Jabardo v. Spain*, 6 December 1988, § 77, Series A n.º 146.

38 *Ibid.*, § 91.

39 ECtHR. *Allenet de Ribemont v. France*, 10 February 1995, § 36, Series A n.º 308.

40 IACHR. *Lori Berenson Mejía v. Peru*. Merits, Reparations and Costs, Judgment, 25 November 2004 (ser. C, n.º 119), para. 159.

mentioned in a report on memory, accusing him or her of being responsible for human rights violations. In principle, any assertion of this nature, regardless of whether it is an extrajudicial mechanism, could lead to an obvious violation of the judicial guarantee of the presumption of innocence to which every person is entitled, including alleged perpetrators of the most serious violations of human rights. To this scenario we need to add that in which the judicial process is ongoing, since then, although the person has not yet been condemned within the adversarial process, the fact that documents of memory connect his/her name to the commission of atrocities could significantly influence the construction of a public perception contrary to the presumption of innocence. In both scenarios, the principle of the presumption of innocence could be transgressed for the sake of memory.

International experiences of transitions show that thanks to the work of truth and inquiry commissions, it has been possible to identify persons responsible for criminal acts without their having first been convicted in court. In Argentina, for example, on 10 February 2010, the National Memory Archive, within the Secretariat for Human Rights, handed over to the courts a list containing the names of 4,300 agents that, during the dictatorship, were assigned to the Army's 601 Intelligence Battalion, and who were the subject of judicial investigations.⁴¹ In Kenya, the Truth Commission found during its investigations that the Commission's own President was accused of being "involved in three incidents that not only were linked to human rights violations under investigation [by the Commission] but also implicated him in possible crimes,"⁴² which led to a campaign against the election of President Kiplagat.

In practice, it is argued that memory is not a judicial truth and has no probative value.⁴³ However, in the case of the presumption of innocence, it is

41 Dirección Archivo de Bogotá. *Los archivos y el deber de memoria del Estado. Marco jurídico*. 2010, 28. Available at: https://issuu.com/archivobogota/docs/documento_juridico (last accessed: 21 February 2022). The core of the National Memory Archive is the Archive of the CONADEP (Comisión Nacional sobre la Desaparición de Personas, also known as "Sábato Commission"), which contains the records on cases under investigation and the proceedings of the commission, and which is under permanent expansion and review.

42 ICTJ. *Challenging the Conventional. Can Truth Commissions Strengthen Peace Processes?* June 2014, 69. Available at: <https://www.ictj.org/sites/default/files/subsites/challenging-conventional-truth-commissions-peace/docs/ICTJ-Report-KAF-TruthComm-Peace-2014.pdf> (last accessed: 21 February 2022).

43 Thus, Article 4 of Decreto 588 de 2017 (Abril 5), *Por el cual se organiza la Comisión para el Esclarecimiento de la Verdad, la Convivencia y la no Repetición*, which creates and regulates the work of the Colombian Truth Commission, as well as the scope of extrajudicial truth, states that its contributions to memory cannot be used by judges nor

obvious that, while it might not be a judicial truth, the existence of evidence derived from the investigative work of a State body dedicated to constructing memory is very likely to raise doubts about the innocence of the person in the dock. In Colombia, several provisions intend to ease the tensions that arise between the aforementioned judicial guarantees and the construction of memory. For example, Article 2 of Decree 2244 of 2011 sets out a clear separation between the work of the Centro Nacional de Memoria Histórica (*National Center for Historical Memory*, hereinafter CNMH) and the work of the judiciary, stating that the former may not assume jurisdictional functions, nor interfere in ongoing proceedings before prosecutors, judges, or disciplinary authorities. Consequently, the Center for Historical Memory may not attribute, determine, publish, or mention individual criminal responsibilities.⁴⁴ Additionally, public officials and employees working in the construction of memory are exempt from the duty to report criminal offenses they become aware of in the performance of their duties.⁴⁵ Furthermore, Article 156.2 of the Law on Victims provides that, in the event that the victim mentions the name or names of the potential perpetrator of the harm he or she has allegedly

have probative value: “La CEV será un mecanismo extrajudicial. Por tanto sus actividades no tendrán carácter judicial, ni servirán para la imputación penal ante ninguna autoridad jurisdiccional. La información que reciba o produzca la CEV no podrá ser trasladada por ésta a autoridades judiciales para ser utilizada con el fin de atribuir responsabilidades en procesos judiciales o para tener valor probatorio, ni las autoridades judiciales podrán requerírsela.” See CARRILLO BALLESTEROS, J. G. *Impunidad y reconstrucción de la memoria histórica en Colombia*. In UMAÑA, C. (dir.), *La justicia al encuentro de la paz en contextos de transición*. Bogotá: Universidad Externado de Colombia, 2018, 286-308; LAMADRID LUENGAS, M. *Las comisiones de la verdad en Latinoamérica. Lecciones para Colombia*. In VELÁSQUEZ, F. et al. (dir.), *Jurisdicción Especial para la Paz. Desafíos y oportunidades*. Bogotá: Tirant lo Blanch, 2020, 184.

44 “El Centro de Memoria Histórica no podrá asumir funciones jurisdiccionales, ni interferir en procesos en curso ante fiscales, jueces o autoridades disciplinarias. En consecuencia, el Centro de Memoria Histórica no podrá atribuir, determinar, publicar, ni mencionar responsabilidades penales individuales.”

45 Article 5 of Decree 2244 of 2011: “Para garantizar el adecuado funcionamiento del Centro de Memoria Histórica, los funcionarios y contratistas que tengan conocimiento de la comisión de hechos delictivos, estarán exentos del deber de denuncia, siempre y cuando el conocimiento de tales hechos haya sido en desarrollo de las funciones relacionadas con la Ley 1424 de 2010 [Law on Victims].” [“In order to ensure the proper functioning of the Center of Historical Memory, officials and contractors who are aware of the commission of criminal acts shall be exempt from the duty of reporting them, provided that the knowledge of such facts occurred in the carrying out of their functions in relation to Law 1424 of 2010”]. Even though public officials are exempt from reporting a crime, the judiciary still has the freedom to decide whether to initiate criminal proceedings against a person who has been linked to the commission of gross human rights violations.

suffered in order to access the care, assistance and reparation measures provided for under the present Law, under no circumstances shall this name or names be included in the administrative act by means of which registration is granted or denied.

Along with the potential violation of the right to the presumption of innocence, the construction of memory can affect another judicial guarantee, namely the principle of *ne bis in idem*. This might occur when an alleged perpetrator having been acquitted by ordinary criminal justice is subsequently associated with violations of human rights in a report of memory and investigations are reopened regarding these same acts. In this respect, it should be recalled that the instruments of human rights seem to maintain contradictory positions; thus, while Article 4.2 of Protocol No. 7 to the ECHR⁴⁶ allows the reopening of the case “if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case,” the same is not true under the American Convention on Human Rights, whose Article 8.4 seems to formulate the principle absolutely.⁴⁷ However, in *Almonacid-Arellano et al. v. Chile*, the IACtHR held that the principle of *ne bis in idem* is not absolute, particularly when the circumstances point to a will to keep the person from justice, thus leading to “an ‘apparent’ or ‘fraudulent’ res judicata case.”⁴⁸ Furthermore, the Court ruled that: “if there appear new facts or evidence that make it possible to ascertain the identity of those responsible for human rights violations or for crimes against humanity, investigations can be reopened, even if the case ended in an acquittal with the authority of a final judgment, since the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes the protection of the *ne bis in idem* principle.”⁴⁹

The analysis of the consequences of this statement regarding guarantees of fair trial, however, far exceeds the aims of this discussion. In any case, when there has been no fraudulent attempt to keep a person from criminal conviction, but only a lack of evidence at the time of the trial, the implications (for legal certainty and, what concerns us here, for obtaining all the information that might prove useful in constructing the truth) may be disproportionate.

46 Council of Europe. *Protocol N.º 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*. ETS N.º 117, 22 November 1984.

47 Organization of American States. *American Convention on Human Rights*. OASTS N.º 36, 22 November 1969 [hereinafter ACHR].

48 IACtHR. *Almonacid Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations and Costs, Judgment, 26 September 2006 (ser. C, n.º 154), para. 154.

49 *Ibid.*

2.2. Right to privacy and right to honor

Privacy and honor are two other rights that can come into conflict with the construction of memory. The inclusion of the name (of a victim or a perpetrator) in a report, or its public disclosure by other means, may represent a violation of his or her privacy (especially in the case of victims that do not wish the acts of violence to which they were subject to be known) or their honor (in particular if accusations are made regarding a person who may not have been involved in the events attributed to him or her).

This dilemma is one that truth commissions have been faced with, especially in relation to whether or not they should name the perpetrators of crimes or if, on the contrary, this does not form part of their functions and, therefore, they should refrain from publishing the list of those responsible for gross violations. However, the right to the truth includes in a certain fashion the right to know the identity of the perpetrators of these grave crimes. In practice, few truth commissions have published the names of the authors of crimes⁵⁰ while the majority have not made them public.⁵¹ Among scholars, Hayner is in favor of truth commissions disclosing as much truth as possible: in a country in transition where it is unlikely that trials will be held, then the names of those responsible should be published at least to publicly shame those who organized the atrocities.⁵² However, other scholars advocate for a more nuanced or “moderating” truth based on mutual acknowledgment which includes all the parties involved in the past conflict to avoid the perception of a biased new narrative in divided societies.⁵³ On the side of the victims, the IACtHR has ordered on many occasions the establishment of a street, a

50 The case, for example, of the truth commission of El Salvador (see United Nations. *Report of the Commission on the Truth for El Salvador, transmitted by Letter Dated 29 March 1993 from the Secretary-General Addressed to the President of the Security Council*. Doc. S/25500, 1 April 1993).

51 The case, for example, of the truth commissions of Guatemala (Comisión para el Esclarecimiento Histórico, *Guatemala, Memoria del silencio. Informe de la Comisión para el Esclarecimiento Histórico*. Guatemala: Oficina de Servicios para Proyectos de las Naciones Unidas, 1999), Chile (Comisión Nacional de Verdad y Reconciliación. *Informe final de la Comisión Nacional de Verdad y Reconciliación de Chile*. Vol. I. Santiago: Andros, 1990; reed. 1996), and Morocco (Commission Nationale pour la Vérité, l'Équité et la Réconciliation. *Rapport Final*. Rabat: Conseil Consultatif des Droits de l'Homme, 2009, Vol. I).

52 HAYNER, P. B. *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. 2nd ed., New York–London: Routledge, 2011, 144.

53 AIKEN, N. T. *Rethinking Reconciliation in Divided Societies: A Social Learning Theory of Transitional Justice*. In BUCKLEY-ZISTEL, S., KOLOMA BECK, T., BRAUN, C. & MIETH, F. (eds.), *Transitional Justice Theories*, Abingdon, Oxon: Routledge, 2013, 54.

square, a school and even a garden “museum” with the names of the victims of serious human rights violations, such as enforced disappearance and extrajudicial killings.⁵⁴ This form of reparation aims to preserve the living memory of victims and to raise public awareness to prevent future human rights violations.

In the Colombian legal system, Article 15 of the 1991 Political Constitution recognizes that all persons have “the right to personal and family privacy and to their good name, and the State shall respect those rights and guarantee that they are respected,” in accordance with international human rights law.⁵⁵ As for the protection of the privacy of victims in the context of transitional justice, the right to privacy is the subject of special protection in some normative texts. Thus, Article 37 of the Law on Justice and Peace provides for the protection of the privacy of victims in proceedings before the administration of justice.⁵⁶ More specifically in relation to the preservation of memory, Article 58 of the same law provides, in relation to access to archives, the adoption of measures to protect the right to privacy of victims of sexual violence and minors who have been victims of armed groups outside the law.

The Law on Victims, on the other hand, makes no specific provisions regarding the right to privacy or honor in relation to the construction of memory. There are only two generic allusions to the right to privacy, which are transversal to the entire reparation process. The first, in Article 156 (on the registration process), provides that all information supplied by the victim and related to his or her administrative process of reparation will be considered of restricted access (“de carácter reservado”) to protect their privacy (para. 1).⁵⁷ The second allusion appears in Article 178.4, where the

54 IACtHR, *Case of the “Street Children” (Villagran-Morales et al.) v. Guatemala*. Merits, Judgment, 19 November 1999 (ser. C, n.º 63), para. 103; *Myrna Mack Chang v. Guatemala*, cit. supra fn. 13, para. 286; *19 Merchants v. Colombia*, cit. supra fn. 7, para. 273; *Rochac Hernández et al. v. El Salvador*, cit. supra fn. 13, paras. 235-236.

55 See United Nations General Assembly. *Universal Declaration of Human Rights*. Resolution 217 A (III), 10 December 1948, art. 12; United Nations General Assembly. *International Covenant on Civil and Political Rights*. Resolution 2200A (XXI), 16 December 1966, art. 17; ACHR, art. 11; ECHR, art. 8.

56 Ley 975 de 2005 (Julio 25), *Por la cual se dictan disposiciones para la reincorporación de miembros de grupos armados organizados al margen de la ley, que contribuyan de manera efectiva a la consecución de la paz nacional y se dictan otras disposiciones para acuerdos humanitarios*, art. 38.

57 This does not exclude the disclosure of information insofar appropriate measures are taken to protect the right to privacy, particularly when victims’ reparation is at stake,

adoption of measures to protect the privacy of victims and their families is presented as a duty of public officials.

In practice, bodies entrusted with functions to construct memory (in particular, the Centro Nacional de Memoria Histórica – *National Center for Historical Memory*, hereinafter CNMH) guarantee the victims' right to privacy by having them fill in consent forms for their names to be made public.⁵⁸ As for the perpetrators, stories are triangulated with other sources (judicial decisions, government records, the press, etc.) and discretion is used when deciding to make the name known or not, depending on the relevance of this information.⁵⁹ Often it is more interesting to identify a pattern of behavior or the structural roots of the conflict, since, as Pollin-Galay points out, "[t]he most important thing to remember about a perpetrator, it seems, is not his name or even his ethnicity, but his strategy: one can analyze this and learn to overcome it."⁶⁰

These legislative and practical provisions concerning the right to privacy are not sufficient, however, to ensure that the right to honor is unaffected. In fact, the law implicitly presumes that the process of memory construction can harm that right since Article 147 states that researchers and officials of the CNMH cannot be sued in the civil courts or criminally investigated for the statements made in their reports. Although this provision ensures that the CNMH can undertake its functions free from any external pressures, it must be viewed with reservations, since, if no alternative channels are facilitated – for example, appeals to the Presidency of the Republic, on whom it depends – it could mean that any judicial remedies available to private individuals seeking to protect their right to honor would be blocked.

However, we cannot ignore the fact that both the right to privacy and the right to honor are embodied in international instruments as non-absolute rights, which can be limited by the law, in a manner similar to that of freedom of opinion and expression. This possibility is analyzed next as we examine freedom of expression.

according to the Constitutional Court of Colombia (see Corte Constitucional, Sala Sexta de Revisión. Sentencia T-828 de 2014. M.P.: Gloria Stella Ortiz Delgado. Exp. T-4.417.194).

58 Information provided by CNMH staff members. See also CNMH. *Política de tratamiento de la información y datos personales*. Available at: <https://centrodememoriahistorica.gov.co/wp-content/uploads/2020/06/SIP-PC-015-V2-Politica-de-tratamiento-de-datos-CNMH.pdf> (last accessed: 21 February 2022).

59 Information provided by CNMH staff members.

60 POLLIN-GALAY, H. *Naming the Criminal: Lithuanian Jews Remember Perpetrators*. In *Holocaust and Genocide Studies*. Vol. 30, n.º 3, 2016, 506, 508.

2.3. Freedom of expression

The construction of memory may also enter into conflict with the freedom of expression. In such processes, there will be many concurrent memories (as many as there are people), which means stories may differ and they may contradict each other. As Dulitzky points out, “in memory, unlike other areas, the state has no control over the process. Multiple memory activities are promoted by relatives or private initiatives.”⁶¹ Likewise, the UN Special Rapporteur on Cultural Rights recalls that memorials “encompass all kinds of engagements specifically designed to remember the wrongs of the past,” which “allows for diversity in approaches, as constructed monuments do not always correspond to the wishes or culture of the communities concerned.”⁶² On these grounds, she warns of the tensions that can arise when the different actors that drive processes of memorialization have different priorities⁶³ and of the need to find the right balance between forgetting and remembering,⁶⁴ for which it is “crucial that memorialization processes do not function as empty rhetoric commemorating the dead, while losing sight of the reasons and the context for past tragedies and obscuring contemporary challenges.”⁶⁵ It is not surprising, therefore, that the expression of certain opinions regarding what happened in the past may be annoying or even offensive, particularly if the perpetrators want to record their version of the facts.⁶⁶

The subject has not been extraneous to the jurisprudence of the international human rights courts, in particular the ECtHR, which has used Article 10 of the European Convention on Human Rights to protect the search for historical truth and deal with negationism.⁶⁷ In this regard, it has stated that

61 DULITZKY, A. *Memory, An Essential Element of Transitional Justice*. In *Peace in Progress*. N.º 20, 2014. Available at: http://www.icip-perlapau.cat/numero20/tribuna/tribuna_2/ (last accessed: 21 February 2022).

62 *Report on Memorialization Processes*, para. 7.

63 *Ibid.*, para. 14.

64 *Ibid.*, para. 17.

65 *Ibid.*

66 In Chile, for example, when Augusto Pinochet died, some senators insisted that a monument be erected in his honor. See ALIJA FERNÁNDEZ, R. A. *Le chemin inextricable entre le lit de mort et la lutte contre l'impunité: les cas de Franco et de Pinochet*. In GARIBIAN, S. (dir.), *La mort du bourreau. Réflexions interdisciplinaires sur le cadavre des criminels de masse*. Paris: Petra, 2016, 127.

67 The IACtHR has also connected freedom of expression (art. 13 ACHR) and the right to truth not only of victims and relatives, but also of the society as a whole (see, e.g., IACtHR, *Myrna Mack Chang vs. Guatemala*, cit. supra fn. 13, para. 274), but it has not dealt so far with cases involving denialism.

“it is an integral part of freedom of expression to seek historical truth and it is not the Court’s role to arbitrate the underlying historical issues, which are part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation.”⁶⁸ However, it distinguishes between those events that are not “clearly established historical facts” from those that are, such as the Holocaust, “whose negation or revision is removed from the protection of Article 10 by Article 17 of the Convention [abuse of rights].”⁶⁹

This criterion, however, seems neither obvious nor sufficient to give priority to one story over another to the detriment of freedom of expression. This is apparent in *Perinçek v. Switzerland* where, in relation to the public statement that “the allegations of the ‘Armenian genocide’ are an international lie,” the ECtHR protected Perinçek’s freedom of expression (who had been subjected to criminal proceedings in Switzerland for making such a claim) on the grounds of a lack of general agreement on the legal characterization of the events.⁷⁰ In fact, in passing judgment, the Grand Chamber of the ECtHR pointed to other weighty elements when assessing whether Perinçek’s freedom of expression had been violated by convicting him in criminal proceedings, such as assessing the necessity of the measure adopted (a criminal penalty) in a democratic society.⁷¹ In any case, the ECtHR has considered that the passage of time plays in favor of freedom of expression, since claims made decades after the events cannot be treated with the same severity.⁷² Indeed, the court believes that every country must make efforts to debate its own history in an open and dispassionate way.⁷³

It should be kept in mind that freedom of expression –in common with the rights to privacy and honor– is not an absolute right, but can be subject to restrictions under certain circumstances.⁷⁴ Thus, international human

68 ECtHR. *Chauvy and Others v. France*, n.º 64915/01, § 69, ECHR 2004-VI.

69 *Ibid.*

70 See GARIBIAN, S. *On the Breaking of Consensus: the Perinçek Case, the Armenian Genocide and International Criminal Law*. In WILLEMS, J., NELEN, H. & MOERLAND, R. (eds.), *Denialism and Human Rights*. Cambridge: Intersentia, 2016, 235-250.

71 ECtHR. *Perinçek v. Switzerland* [GC], n.º 27510/08, § 280, ECHR 2015 (extracts).

72 ECtHR. *Monnat v. Switzerland*, n.º 73604/01, § 64, ECHR 2006-X.

73 *Ibid.*

74 See, e.g., art. 13.2 ACHR: “The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals.” Also art. 10.2 ECHR: “The exercise of these freedoms, since

rights courts admit interferences in this right as long as provisions to that effect are included in the law, they pursue one of the aims foreseen in the corresponding convention (legitimate aim), they are necessary in a democratic society, and the measure is proportional to the interest on which it is based and narrowly adjusted to the achievement of the legitimate aim, with minimum interference with the enjoyment of the right.⁷⁵ From this point of view, the particular circumstances of transitional processes could justify the restriction on these rights, provided that such restrictions are calibrated to satisfy the objectives that are central to such processes, namely, protecting victims and securing their right to reparation, preventing impunity for gross violations of human rights, and consolidating peace and democracy. In any event, the legitimacy of restrictions to freedom of expression in this context should be assessed on a case-by-case basis.

Article 143 of Colombia's Law on Victims exemplifies concerns to safeguard freedom of expression, as well as freedom of thought, in the process of the construction of memory. Thus, it provides that:

Under no circumstances shall the State's institutions sponsor or promote exercises aimed at the construction of an official history or truth that denies, violates, or restricts the constitutional principles of plurality, participation and solidarity and the rights of freedom of expression and thought. The prohibition of censorship enshrined in the Political Charter shall also be respected.⁷⁶

This provision is notable because, given the right to these freedoms, it theoretically opens the door to narratives that might be deemed denialist or revisionist, although preventing the dissemination of such versions is ultimately the main

it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

75 GARCÍA RAMÍREZ, S. & GONZA, A. *La libertad de expresión en la jurisprudencia de la Corte Interamericana de Derechos Humanos*. San José-México, D. F.: Corte Interamericana de Derechos Humanos-Comisión de Derechos Humanos del Distrito Federal, 2007, 31-32. In the ECtHR case law, see *e.g.*, ECtHR. *Handyside v. the United Kingdom*, 7 December 1976, §§ 48-49, Series A n.º 24.

76 "En ningún caso las instituciones del Estado podrán impulsar o promover ejercicios orientados a la construcción de una historia o verdad oficial que niegue, vulnere o restrinja los principios constitucionales de pluralidad, participación y solidaridad y los derechos de libertad de expresión y pensamiento. Se respetará también la prohibición de censura consagrada en la Carta Política."

goal of the duty to remember. To avoid this, it could be useful to adhere to the distinction laid down by the ECtHR between historical facts that can and cannot be clearly established, and, above all, to deliberate the necessity of such measures in a democratic society. Ideally, then, the State should counter such narratives by promoting debates and by presenting the public with the victims' perspectives of events. It should also facilitate private initiatives for the reconstruction of memory, an aspect that is examined in greater depth when addressing cultural rights in the next section. However, in this regard, the question needs to be raised as to whether this is really a possibility in the Colombian case, insofar as Article 139 of the Law makes victims and social organizations largely responsible for the construction of memory.

It is also noteworthy that the law limits the dissemination of the victims' narratives to the extent that they may cause "further unnecessary harm" (a concept whose scope it does not define) or generate "threats to safety" (Article 139.h). This safeguard, behind which the censor might hide, is nevertheless in line with the *Reparation Principles*, specifically Principle 22 (b) which provides that:

Satisfaction must include, where relevant and appropriate, [...] [v]erification of the facts and full and public disclosure of the truth, *to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations* (emphasis added).

It can be understood, therefore, that this provision is not to be used to prejudice freedom of expression, but merely to limit public disclosure to protect victims from "unnecessary harm," while reference to "threats to safety" should be interpreted to mean the prevention of further human rights violations.

If the arguments presented up to this point affect primarily public disclosure of the facts, we need to consider the importance of the archives holding documentary records and the jurisprudential line opened up by the ECtHR in *Kenedi v. Hungary*, where it was held that "access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression."⁷⁷ In this case, a historian had been denied access to documents concerning the operations of the Hungarian State Security Service during the communist era. Here, it should be noted that Colombia's Law on Victims includes among its measures of memorialization the making available of documents and testimonies,

77 ECtHR. *Kenedi v. Hungary*, n.º 31475/05, § 43, 26 May 2009.

provided that these do not contain confidential information or information subject to retention (“no contengan información confidencial o sujeta a reserva” – Article 145.3). In the light of the ruling in *Kenedi*, however, this provision could violate the right to freedom of expression if it is used to restrict access to original documents.

2.4. Cultural rights (participation in cultural life)

Leaving civil and political rights to one side, the policy that a State designs to preserve memory can also adversely affect the enjoyment of cultural rights and, in particular, the right to participate in cultural life.⁷⁸ As the UN Committee on Economic, Social and Cultural Rights has indicated, the right to take part in cultural life comprises three components:

- a) participation in cultural life, which covers “the right of everyone – alone, or in association with others or as a community– to act freely, to choose his or her own identity, to identify or not with one or several communities or to change that choice, to take part in the political life of society, to engage in one’s own cultural practices and to express oneself in the language of one’s choice;”⁷⁹
- b) access to cultural life, which covers “the right of everyone – alone, in association with others or as a community – to know and understand his or her own culture and that of others through education and information, and to receive quality education and training with due regard for cultural identity,”⁸⁰ and

78 See United Nations General Assembly. *International Covenant on Economic, Social and Cultural Rights*. Resolution 2200A (XXI), 16 December 1966, art. 15(1)(a); Organization of American States. *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*. OASTS N.º 69, 17 November 1988, art. 14(1)(a); African Union. *African Charter on Human and Peoples’ Rights*. OAU Doc. CAB/LEG/67/3 rev. 5, 27 June 1981, art. 17(2); League of Arab States. *Arab Charter on Human Rights*. UN Doc. CHR/NONE/2004/40/Rev.1, 2004, art. 42(1); Association of Southeast Asian Nations (ASEAN). *ASEAN Human Rights Declaration*. 19 November 2012. Available at: <https://asean.org/asean-human-rights-declaration/> (last accessed: 21 February 2022), para. 32.

79 This component also includes “the right to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity” (United Nations. *General Comment 21: Right of everyone to take part in cultural life* (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights). Doc. E/C.12/GC/21, 21 December 2009, para. 15.a).

80 *Ibid.*, para. 15.b).

- c) contribution to cultural life, which refers to the “right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community”, as well as the “right to take part in the development of the community to which a person belongs, and in the definition, elaboration and implementation of policies and decisions that have an impact on the exercise of a person’s cultural rights.”⁸¹

The relationship between the preservation of the memory of past atrocities and cultural rights has already attracted the attention of the UN Special Rapporteur on cultural rights, whose report of 2014 on the subject noted that:

All persons have the right to access, participate in, enjoy and contribute to culture, and in particular cultural heritage, which encompasses both history and memory [...]. Artists should be able to articulate their voices; the right to freedom of artistic expression and creativity must be fully respected and protected [...]. More widely, cultural rights call for the implementation of policies promoting cultural interaction and understanding between people and communities, the sharing of perspectives about the past and the design of a cultural landscape that is reflective of cultural diversity.⁸²

In order to protect and guarantee cultural rights, therefore, the State should make spaces available for people to participate in memorial policies and, of course, should respect private and informal memorial initiatives (“initiatives driven from below by artists, political groups or communities determined to publicly recall the memory of victims overlooked or denied by State policies”⁸³) which, in short, are ways of participating in the cultural life of a community.⁸⁴

81 *Ibid.*, para. 15.c).

82 *Report on Memorialization Processes*, para. 48.

83 *Ibid.*, para. 26. On “illegal” memorials, see paras. 59-60.

84 So far, neither the IACtHR nor the ECHR have dealt with cases concerning State respect and protection of private and informal memorial initiatives. However, the former examined in length and found a violation of the right to participate in cultural life in IACtHR. *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*. Merits, Reparations and Costs. Judgment, 6 February 2020 (ser. C, n.º 400), para. 231-242 and 289. The latter, instead, can only provide an indirect protection of this right, as it is not enshrined by the ECHR. Thus, it might hypothetically consider obstacles to private and informal memorial initiatives either a violation of freedom of expression or of the right to private and family life provided for in art. 8 ECHR (*cf.*, e.g., ECHR. *Sargsyan v. Azerbaijan* [GC], no. 40167/06, § 257, ECHR 2015).

From this perspective, Colombia's Law on Victims leaves room for the enjoyment and exercise of cultural rights insofar as it guarantees that the State will not hinder private initiatives for the reconstruction of memory. Indeed, as already mentioned,⁸⁵ Article 143 provides that the State's duty of memory means providing the necessary guarantees and conditions so that "society, through its different manifestations, be it as victims, academia, think tanks, civil society organizations, organizations of victims and human rights, [...] contributes to the realization of the right to the truth of which the victims and society as a whole are entitled."

Examining this idea further, and as far as its documentary archives are concerned, it is worth remembering that paragraph 1 of Article 144 expressly protects initiatives to reconstruct the historical memory undertaken by public and private entities or organizations from state interference.⁸⁶ Although it is arguable that a provision in relation to archives might not be the most appropriate place to make this point, it does provide a safeguard for private initiatives of memory and, therefore, of the right to participate in cultural life.

CONCLUSIONS

The preservation of memory is gradually being consolidated as an international legal obligation of the State, following a period of gross violations of human rights and international humanitarian law, in close connection with the right to the truth (of the victims and of society) and the right to reparation (of the victims). However, policies of memorialization should not only be concerned with the human rights of victims, they also need to respect those of the perpetrators of the violations. Indeed, the construction of memory can limit the enjoyment of certain rights of both groups. Specifically, this can be the case of certain procedural safeguards insofar as they affect perpetrators, the right to privacy (of both victims and perpetrators), the right to honor (of perpetrators), and freedom of expression and cultural rights (in both cases, of anyone in society).

Respect for these rights in the elaboration of memory policies persists in the particular circumstances of a transitional process, since this scenario *per se* does not reach the level of exceptionality necessary to justify a derogation of human rights. However, international human rights law offers certain

85 See *supra* section 2.2.

86 "En ningún caso se obstaculizarán o interferirán experiencias, proyectos, programas o cualquier otra iniciativa que sobre reconstrucción de memoria histórica avancen entidades u organismos públicos o privados."

mechanisms of accommodation that allow some of the aforementioned rights to be restricted. This is especially true in the case of freedom of expression and the rights of privacy and honor, that can be subject to restrictions under certain conditions, what may enable States to meet the specific needs arising during the transition to a democratic system. According to the IACtHR, even the principle of *ne bis in idem* would not be upheld in the case of gross violations of human rights, although this position does not seem defensible if it cannot be argued that the judicial process to be reopened was fraudulent.

The Law on Victims adopted in Colombia in 2011, which to date serves as the best example in state practice of the incorporation of the State's duty to preserve memory (with the consequent formulation of a public policy of memory that satisfies that end), does not seem to be indifferent to these potential conflicts. While it does not resolve them fully, it at least includes some safeguards that allow the mitigation of the violation of some of these rights. This is particularly the case with respect to the victims, which the law sees as the central actors and beneficiaries of the process of memory construction. However, to achieve this reconciliation, the centrality of the victims should not lead to the violation of third-party rights, as this could open up new social divisions.

Clearly, a law is incapable of foreseeing all the potential conflicts that might arise, which means that the State authorities need to take certain precautions when implementing its provisions and designing actions for the construction of memory, so that they do not have an adverse effect on the enjoyment of human rights. In the case of Colombia, institutions with a central role in the construction of memory (such as the CNMH) employ a methodology that seeks to be respectful of the right to privacy. The right to honor, however, remains *a priori* more unprotected, since the actions of the Center are not subject to criminal or civil action. To guarantee the enforceability of this right, by those who consider it violated, requires that an administrative appeal be heard before a higher body. In addition, although not expressly stated, the law does respect, guarantee, and promote the enjoyment of cultural rights in the process of memory construction, favoring above all private initiatives in this field.

Just how procedural guarantees can be safeguarded without allowing impunity to prosper remains unresolved. It seems clear that consolidated guarantees of democratic systems, such as the presumption of innocence and *ne bis in idem*, tend to suffer in a process of transitional justice, with priority being given to the right to the truth (and, hence, to memory). The question arises as to whether this is absolutely necessary or whether in practice formulas of accommodation might be found. For example, a case-selection

strategy might be adopted, distinguishing between those that can be allowed to follow the established judicial path (and, thus, in these cases increase the level of care need to ensure the presumption of innocence) and those that can be examined by bodies for the determination of the truth. As regards *ne bis in idem*, its operation should be subject to the examination of the fraudulent nature or otherwise of the sentences handed down.

Nonetheless, and in full awareness of the dilemmas that must be faced, it is essential that the protection of *all* human rights be included as a central part of any transitional process, so as to ensure social peace in the future and, moreover, to guarantee that the whole of society benefits from the right to memory. In this way, recognizing all the rights at stake and finding ways to accommodate them are critical processes if reconciliation is to be achieved.

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