



Victims and press after the war

Tensions between
privacy, historical
truth and freedom
of expression

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WORKING PAPER 4

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INTRODUCTION

The Narration of the Conflict and the Transition to Peace

To narrate the war is also to narrate the end of the war. In societies that are transitioning to peace, such as Colombia, the relationship between the third parties covering the events of the war and the victims can expand to post-agreement contexts.¹ There are facts that deserve to be narrated due to their great social and historical significance, like public commemorations, acts that recognize and pay homage to the victims, reparation processes, projects driven by victim communities, among others. Indeed, because they are at the center of transitional justice processes, victims must play the leading role in these events; this imposes new challenges on the third parties (journalists, academics, and civil society) that cover the acts related to the post-agreement.

In the study presented in this document we understand narration as the process of recounting events that, in this case, are intrinsic to the internal armed conflict and the subsequent transition process. The need to narrate armed conflicts originates in the importance these events carry in a society. The narration of the war not only fulfills the duty to inform those who do not experience it directly: it can also serve as a platform to give a voice to the victims. In the long run, narration also prevents forgetting the causes and consequences of war and, therefore, prevents the return of a society to cycles of violence.

1 We have decided to refer to the Colombian context after the signing on November 24, 2016, of the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace between the Colombian Government and the Revolutionary Armed Forces of Colombia–People’s Army (FARC-EP) as the *post-agreement*.

The war can be narrated by the victims, the perpetrators, the State or by external third parties who have an interest in informing. These third parties can be journalists, academics or civil society organizations, although in this document the narration of the press acquires greater relevance, for the events that originated it question mainly the journalistic community. In turn, the act of narrating is influenced by the narrator's viewpoint, and this viewpoint determines how the narrative is framed (Currie 2010, 88-89). Thus, a news item or a story can be told from the perspective of the communities that have been victims, or from that of the perpetrators or the governments; it can be narrated, also, based on an individual story or an impersonal account of the events. It is important to keep in mind that framing depends on a specific point of view, for two reasons. First, because a specific framework can determine the response of the audience to the narrated facts (iv), and, second, because the framing also depends on the interests and motivations of those who narrate the facts.

In particular, third parties can have diverse motives for depicting conflicts and post-conflicts. Journalists, for instance, cover these types of events for different reasons. On the one hand, there are reasons such as the need to inform, investigative curiosity or simply the motivation to tell stories they consider have great importance (McLaughlin 2017, 21). On the other hand, there are more utilitarian reasons, like the possibility of obtaining monetary gain or some personal recognition, or less altruistic ones, such as editorial biases or the concealed or explicit intent of attacking a policy or contaminating the public debate. In these cases, problems can arise in the ethical sphere, because this type of motivation results in the instrumentalization of the victims' suffering or in partial coverage that only shows one side of the war.

The angles adopted by journalists to narrate the war and the instruments they use to construct the narration can be just as diverse as the motives. Reporting that seeks to give voice to the victims' problems and frame the complexity of the conflict is not equivalent to coverage carried out only to set off alarms in the media, although they may coincide. Likewise, in the latter, a more direct language dominates and images are given prevalence, which is the contrary of, for example, a piece of investigative journalism or an ethnography, in which the analysis of the facts and the narration of local stories prevails. Therefore, opting for a certain way of covering and narrating the war also involves choosing which voices are amplified and which ones are silenced.

By the same token, journalists are important actors for the development of a transitional justice process since their coverage can be a source for interpreting the facts of the transition. In this sense, David Tolbert and Refic Hodzik note that the relationship between journalism and transitional justice exists on a spectrum between symbiosis and conflict (Hodzik and Tolbert 2016, 2-6). That is, journalists can promote a view of the facts that guides the realization of the victims' rights; however, they can also adopt a view of the facts that conflicts directly with these rights. In some cases, the interest in covering a certain fact may clash with the interests of the victims. An example of this clash of interests occurs when victims legitimately require that journalists —or third parties in general— prioritize certain narrative angles and avoid others.

From a legal standpoint, this clash of interests gives rise to tension between different fundamental rights, notably: the privacy of the victims, *habeas data*, freedom of the press, the freedom of expression and information of third parties, and historical truth in its collective dimension in post-agreement contexts. On this occasion we have decided to address this tension and we will try to find a balance between these rights.

A case that adequately illustrates this tension has its roots in the differences that originated in May 2017 in the municipality of Bojayá, Chocó between victims and journalists, due to the coverage of the exhumation of the bodies of the victims of the massacre that occurred on May 2, 2002, in the old town center of Bojayá, amid clashes between the United Self-Defense Forces of Colombia (AUC) and the FARC-EP. In this text we decided to study this case, in order to address the tension that exists between the rights of victims and the rights of journalists and society in general.

The Purpose and Methodology of the Investigation

This document has the purpose of asking and answering, from a socio-legal perspective, the following research question: How can the facts related to the armed conflict and the transition to peace be narrated without violating the right to privacy of the victims involved? Or, more concretely, how can a journalist record a dramatic event or recount an injustice that moves his readers while respecting the limits of the private lives of the victims?

It is not an easy task because journalists fulfill their democratic responsibility by informing society of public interest events, such as the

exhumations in Bojayá. However, we are so in debt to the victims that the protection and tranquility of their private grief, together with a journalist's minimal levels of self-regulation would seem very little. Nevertheless, in our legal analysis we have tried to evaluate the conflict between fundamental rights so that the conclusion is valid not only for the Bojayá case but also in future transition years, since both the victims and society in general benefit from a free and responsible press and the respect of our private lives.

To answer the research question, the text is developed in four sections. In the first section, we present a study of the rights that may clash when third parties narrate the armed conflict and the transition to peace. Furthermore, we indicate the criteria that must be met to determine if the limitation to these rights is legitimate or illegitimate. In this section we argue that, although certain interferences in the private sphere may be considered abusive or illegitimate, this cannot serve as a basis to ignore freedom of expression and historical truth, for there are also criteria that allow establishing whether the limitation of these rights is legitimate or not. In the second section, we present the case study of the exhumations of remains in the community of Bojayá.² Specifically, we evaluate the case in light of the criteria presented in the first part of the text. Third, based on the analysis up to that point, we offer a series of useful sub-rules to resolve similar cases where, due to the coverage of third parties, the right to privacy and the rights to historical truth and to freedom of expression may come into conflict. Finally, we present some basic conclusions as a contribution to the search for balance between conflicting rights.

2 To collect information on the case of the Bojayá exhumations that was analyzed in this study, we conducted, in the first place, a review of the press that allowed us to extract an initial list of relevant facts and tensions, we carried out fieldwork to converse directly with the members of the Committee for the Bojayá Victims, upon their invitation, we were able to talk with the Committee and listen to their questions and preferences regarding the coverage of the acts related to the exhumations. Likewise, we had the opportunity to discuss this issue in different working sessions with the National Center for Historical Memory (CNMH), the Foundation for Press Freedom (FLIP), the New Ibero-American Journalism Foundation (FNPI), Verdad Abierta, the Antonio Nariño Project (PAN), and the Journalism Studies Center at the Universidad de los Andes (CEPER). Together with these civil society organizations, we held a closed session on August 16, in which we were able to bring together victims, journalists, and academics to listen to their different views on the subject.

CRITERIA FOR ESTABLISHING LIMITATIONS BETWEEN RIGHTS THAT HAVE COME INTO TENSION

As we announced previously, the coverage and narration of the armed conflict and the transition to peace can generate tensions between different rights. On the one hand, some journalistic coverage or academic research practices that involve victims can violate their rights to privacy and to *habeas data*. On the other hand, third parties that have an interest in informing the rest of the country about certain events or facts concerning the victims, the armed conflict and the transition to peace feel they are legitimized to do so in the name of the rights to freedom of expression and to historical truth in its collective dimension.

Although the context of each situation is important for conducting a proper weighing of the rights that have come into tension, it is possible to establish limitation criteria that have a general scope and can be applied to each specific case. Therefore, in this section we will characterize the aforementioned rights and present a description of the criteria that allow identifying the limitations that are legitimate. First, we will study the content of the rights to privacy and to *habeas data* and the instances in which interference with these rights is legitimate or, conversely, abusive. After that, we will examine the extent to which it is possible to limit the rights to freedom of expression and to historical truth in its collective dimension, when their exercise implies an abusive interference with the right to privacy. For this, we will explain the content of these two rights and the requirements to limit each one.

The Rights to Privacy and Habeas Data: What Are They and to What Extent Can Interfering with Their Exercise Be Considered Legitimate?

In this part of the text we will study: (i) the content of the rights to privacy and *habeas data*; and, (ii) the criteria to determine whether an interference can be considered legitimate or abusive. With regard to this last point, it should be noted that, although national and international jurisprudence has not developed or systematized unified criteria to evaluate the degree of legitimacy of the interference with the right to privacy, based on the essential elements of this right we have formulated several criteria that we consider are very useful for the analysis of the cases in which the right to privacy comes into tension with other rights.

Right to Privacy

Content

The right to privacy is enshrined in article 15 of the Political Constitution of Colombia, which provides:

Article 15. All individuals have the right to their personal and family privacy and to their good reputation, and the State must respect these rights and ensure they are respected....

Correspondence and other forms of private communication are inviolable. They can only be intercepted or searched pursuant to a judicial order, in the cases and with the formalities established by law. For tax or judicial purposes and for the cases of inspection, surveillance and intervention of the State, the submission of accounting records and other private documents may be required within the limits provided by the law.

The right to privacy is also recognized as part of the constitutional block. In this regard, both article 11 of the American Convention on Human Rights (ACHR) and article 17 of the International Covenant on Civil and Political Rights (ICCPR) establish that “no one shall be subjected to arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation” and “everyone has the right to the protection of the law against such interference or attacks.”

In interpreting the scope and content of this right, the Constitutional Court of Colombia has indicated that it “implies positive protection of private life,”³ understood as an individual’s ontological —non-material— sphere, scope or space, that has been removed from the interference or knowledge of third parties, and in which there are phenomena, behaviors, data, and situations that only interest the holder of the right.⁴ In this regard, it is important to remember that, although this is the definition of “private life” that has been constructed by the jurisprudence, “the truth

3 Corte Constitucional de Colombia. Sentencia T-349. Expediente: T-13211. M. P. José Gregorio Hernández Galindo: 27 de agosto de 1993. [Constitutional Court of Colombia. Decision T-349 of 1993. Presiding Judge: José Gregorio Hernández Galindo.]

4 Corte Constitucional de Colombia. Sentencia SU-056. Expedientes: T-40754 y T-44219. M. P. Antonio Barrera Carbonell: 16 de febrero de 1995. [Constitutional Court of Colombia. Decision SU-056 of 1995. Presiding Judge: Antonio Barrera Carbonell.]

is that the concept of private life is very difficult to define with precision, for it has diverse connotations according to the society in question, each person's environment, and the time that is analyzed or the time period to which it is applied" (Gómez-Robledo 1995, 243).

The Court has also held that the right to privacy (i) has the purpose of separating people from the arbitrary interference of third parties, as well as to protect their image;⁵ (ii) is an expression of the free development of the personality and a way to guarantee the dignity of individuals;⁶ and, (iii) projects in two dimensions, namely: "as the secrecy of private life and as freedom. Conceived as *secrecy*, it is violated by the illegitimate disclosure of facts pertaining to a person's private or family life or the illegitimate investigation of the events of that life. Conceived as *individual freedom*, on the other hand, it transcends and is realized in the right of every person to make by themselves decisions that concern their own private life."⁷

Conceptual Precision

It should be noted that in other parts of the world the right to privacy's two dimensions have been clearly differentiated under two different concepts. Thus, for example, the Argentinean author Carlos Santiago Nino considers that the right to intimacy (*derecho a la intimidad*) only refers to the sphere of an individual that is exempt from the generalized knowledge of others. According to this author, intimacy is "the potential exclusion in accordance with his or her will, from the knowledge and the intrusion of others" (Nino 2002, 328), and is usually violated through the search of the residence, the interception of private papers, correspondence and communications, and the recording of personal data. On the other hand, the voluntary actions of individuals that do not affect third parties are part of what he views as the right to privacy (*derecho a la privacidad*). However, in the Colombian legal system —both in the Political Constitution

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- 5 Corte Constitucional de Colombia. Sentencia T-213. Expediente: T-10.113. M. P. Alejandro Martínez Caballero: 8 de junio de 1993. [Constitutional Court of Colombia. Decision T-213 of 1993. Presiding Judge: Alejandro Martínez Caballero.]
 - 6 Corte Constitucional de Colombia. Sentencia T-011. Expediente: T-716. M.P. Alejandro Martínez Caballero: 22 de mayo de 1992. [Constitutional Court of Colombia. Decision T-011 of 1992. Presiding Judge: Alejandro Martínez Caballero.]
 - 7 Corte Constitucional de Colombia. Sentencia T-222. Expediente: T-026. M.P. Ciro Angarita Barón: 17 de junio de 1992. [Constitutional Court of Colombia. Decision T-222 of 1992. Presiding Judge: Ciro Angarita Barón.]

and in the jurisprudence of the Constitutional Court— the *right to privacy* encompasses both the right that one’s private life is exempt from the generalized knowledge of others as well as the possibility of acting freely in the sphere of one’s private life without any limitations other than the rights of third parties. For this reason, in our country there has not been a clear differentiation between the concepts of intimacy and privacy, which are usually addressed by the High Constitutional Tribunal without any distinction.⁸

Conditions for Limiting the Exercise of the Right

The second paragraph of article 11 of the American Convention on Human Rights states: “2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.”

In interpreting this paragraph, Benente rightly points out that “intrusion into private spheres is not absolutely prohibited, but what is prohibited are those that are abusive or arbitrary” (2010, 67). What are, then, the conditions that determine when interfering with privacy can be considered legitimate or abusive? Unlike the case of other fundamental rights, there is no specialized test as such that has already specified these conditions; at least, not one apart from the proportionality test commonly used by the Constitutional Court. However, based on doctrine and national, international and comparative jurisprudence it is possible to identify certain criteria that, taken together, can provide signals about the arbitrariness or legitimacy of a specific interference.

Before indicating these criteria it should be noted that, in contrast to the rights to honor and to a good name, the very interference or abusive or arbitrary disclosure violates the right to privacy and it is not necessary that the other legal rights of the right holder suffer additional damage. In the words of Eguiguren:

the violation of personal and family privacy results from the mere external interference or unauthorized disturbance in the

8 Some of the judicial decisions that use the concepts of intimacy and privacy interchangeably are: Corte Constitucional de Colombia. Sentencia C-881. Expediente D-10273. M. P. Jorge Ignacio Pretelt: 19 de noviembre de 2014 [Constitutional Court of Colombia. Decision C-881 of 2014. Presiding Judge: Jorge Ignacio Pretelt]; Corte Constitucional de Colombia. Sentencia T-050. Expediente T-5145787. M. P. Gabriel Eduardo Mendoza: 10 de febrero de 2016. [Constitutional Court of Colombia. Decision T-050 of 2016. Presiding Judge: Gabriel Eduardo Mendoza.]

private or reserved areas (acts, events, habits, data) that it encompasses, as well as the disclosure of its content without the consent of the holder of the right. These actions constitute the violation of the right, without the need to cause any harm or additional damage to the affected person, simply being sufficient the inconvenience caused by the intrusion in the intimate or private sphere, or by the unwanted or authorized communication to third parties of aspects that are part of this sphere and that the holder wishes to maintain reserved. (2000, 143)

For its part, the Constitutional Court has said that this violation can occur in three ways,⁹ namely:

The first of these is the *intrusion or irrational intrusion* into the orbit that each person has reserved for themselves; the second consists of the *disclosure* of private facts; and the third, finally, is caused by the *distorted or untruthful presentation* of personal circumstances, the last two aspects bordering the rights to honor and good name¹⁰ (emphasis added).

Notwithstanding, in our opinion, this last situation only relates to the rights to honor and a good name, and not to the right to privacy.

With this in mind, we will now describe the criteria for evaluating interference with privacy that were previously announced. However, before describing them, we wish to make clear that each of these criteria on its own is not conclusive or definitive. On the contrary, they must be evaluated together, so that the more criteria that are fulfilled, the more legitimate the interference.

Thus, we consider that the legitimacy of an interference with privacy will depend on the characteristics of:

(i) The *holder* of the right.

(ii) The *event or fact disclosed* or with regards to which the intromission occurred.

⁹ Division which, in turn, seems to be based on the four major categories used by Prosser (1941) in his book *Law of Torts*, and which consist of: (i) intrusion on plaintiff's privacy; (ii) public disclosure of private facts; (iii) putting the plaintiff in a false light in the public eye; and, (iv) appropriation of some elements of the plaintiff's personality for the defendant's advantage.

¹⁰ Corte Constitucional de Colombia. Sentencia T-407. Expediente: T-3.348.314. M.P. Mauricio González Cuervo: 31 de mayo de 2012. [Constitutional Court of Colombia. Decision T-407 of 2012. Presiding Judge: Mauricio González Cuervo.]

(iii) The *place* where the event or fact takes place.

Next, we will indicate the specific characteristics that must be analyzed to determine the content of each one of these criteria.

(i) *Characteristics of the Holder of the Right to Privacy*

In relation to the right holder, it is necessary to examine (i) the public or private nature of that person, and also (ii) his conduct. The *public or private nature* is relevant, for, as the Constitutional Court noted in decision SU-1723 of 2000:

Those who by reason of their positions, activities and their endeavors in society become centers of attention with public notoriety, inevitably have the obligation to accept the risk of being affected by criticism, opinions or adverse revelations, since much of the general interest has turned its gaze to their ethical and moral conduct. In these instances, the right to inform becomes broader and its superiority is, in principle, reasonable.¹¹

Similarly, according to the Inter-American Commission on Human Rights (IACHR), persons of a public nature

have a distinct threshold of protection that exposes them to a greater degree of scrutiny and public criticism. This is justified by the public interest nature of the activities they engage in, because they have exposed themselves voluntarily to heightened scrutiny, and because they have an enormous capacity to call information into question through their power to appeal to the public. In effect, due to their condition —that implies greater influence on society and easier access to the media— they have a greater opportunity to provide explanations or answer questions and criticism. (2009, para. 40)

Therefore, by having a higher level of voluntary exposure to public scrutiny, public persons must exhibit a greater degree of tolerance to intrusion and criticism.

In order to identify the public nature of a specific person, it is useful to mention the scale of notoriety set forth in “Out of Court. Manual for Journalists Accused of Defamation” (*Fuera de Juicio. Manual para*

11 Corte Constitucional de Colombia. Sentencia SU-1723. Expediente: T-235650. M. P. Alejandro Martínez Caballero: 12 de diciembre de 2000. [Constitutional Court of Colombia. Decision SU-1723 of 2000. Presiding Judge: Alejandro Martínez Caballero.]

periodistas denunciados por injuria y calumnia), published by the Foundation for Press Freedom (FLIP). According to this scale, the degrees of notoriety can be distributed on a scale from 0 to 100, with 0 the level of notoriety of individuals (“ordinary” people), whose actions or omissions, in general, do not affect the general interest. At the other end of the scale (100) are publicly elected officials (president, mayor, congressman, etc.), described as “people seeking the confidence of citizens to represent them. They can be candidates, in office or have fulfilled their mandate. They are more exposed to the public’s monitoring” (FLIP 2012, 37). Finally, in the interregnum between these two ends are both individuals who have voluntarily become involved in public life (that is, for example, artists, athletes, trade and labor union leaders, etc.), as well as public servants (ministers, military, superintendents, etc.). In both cases, these are people who perform activities that in one way or another affect the general interest and, therefore, the degree to which their privacy is protected diminishes progressively, although never to the level of the people located in grade 100 of the scale.

Conduct, on the other hand, is the second characteristic that should be evaluated in relation to the holder of the right to privacy. Thus, it is necessary to establish whether the conduct of the individual is directed at maintaining the privacy of his events or facts, or if, on the contrary, it implies consent to its communication (Eguiguren, 2000). In this regard, it is relevant to note the Constitutional Court’s position, establishing that whoever decides to enter the public space adopts a conduct that implies assuming they are an observed (although not identifiable) subject.¹² In contrast, we consider that whoever takes shelter in the changing room of a clothing store to try on a garment adopts a conduct that indicates precisely the opposite; that is, that they do not intend to communicate to others the acts that take place there.

(ii) *Characteristics of the Fact or Act Disclosed or with Regards to Which the Intromission Occurred*

Let us now turn to noting the characteristics of the *fact or event disclosed or in regards to which the interference occurred* that must be taken into

12 Corte Constitucional de Colombia. Sentencia T-1233. Expediente: T-486155. M.P. Jaime Araújo Rentería: 22 de noviembre de 2001. [Constitutional Court of Colombia. Decision T-1233 of 2001. Presiding Judge: Jaime Araújo Rentería.]

account when defining the legitimacy of a specific interference with the right to privacy. Based on an examination of jurisprudence and doctrine, we have been able to identify that in the case of facts or events, it is necessary to evaluate: (i) the level or degree of privacy to which it corresponds; (ii) its influence or its connection with the duty or activity that makes the holder of the right to privacy a public person; (iii) its social repercussions; (iv) the public relevance of the information that derives from it; and finally, (v) its historical, scientific or cultural interest.

First, to determine the *level or degree of privacy* in which the disclosed fact or event corresponds, it must be kept in mind that according to the Constitutional Court, “depending on the level at which the individual relinquishes part of his private life to public knowledge, there are different degrees of privacy. These degrees of privacy are usually classified into four different levels, namely: personal, family, social and professional privacy (Constitución Política, art. 15).”¹³ Although the right to privacy protects all these spheres in the private life of a person, the strength of the protection varies. Thus, for example, the degree to which personal privacy (*intimidad personal*) is protected is almost absolute. In that sense, only exceptionally important situations or interests justify interfering in the sphere shielded by the right to privacy. In respect to family privacy (*intimidad familiar*), there is also a strong constitutional protection for this sphere, but there is a greater likelihood of legitimate outside interferences. Finally, in the case of social and professional privacy (*intimidad social y gremial*) “the constitutional protection of autonomy privacy (sic) is much lower, although it does not disappear, for it is not possible to assert that the authorities can examine and report on everything that a person does outside of her home, without violating her privacy.”¹⁴

Second, the *influence or connection of the event or fact with the function or activity by virtue of which the holder of the right to privacy is a public person*, for its part, is one of the criteria that stands out the most in the jurisprudence and doctrine that was analyzed. For example, this criterion was

13 Corte Constitucional de Colombia. Sentencia T-787. Expediente: T-722765. M. P. Rodrigo Escobar Gil: 18 de agosto de 2004. [Constitutional Court of Colombia. Decision T-787 of 2004. Presiding Judge: Rodrigo Escobar Gil.]

14 Corte Constitucional de Colombia. Sentencia C-505. Expediente: D-2278. M. P. Alejandro Martínez Caballero: 14 de julio de 1999. [Constitutional Court of Colombia. Decision C-505 of 1999. Presiding Judge: Alejandro Martínez Caballero.]

used to solve the Argentine case *Ponzetti de Balbín*, which analyzed the civil liability of a publisher who had published, without the authorization of his relatives, photos of the politician and presidential candidate Carlos Balbín in a moribund state. In the case's *ratio decidendi* —where the name of what is now known as the Ponzetti de Balbín Doctrine originated— it was established that “in the case of famous individuals, whose life has a public or popular nature, their public or private actions may be disclosed concerning the activity that gives them prestige or notoriety, and provided it is justified by the general interest”¹⁵ (emphasis added). Similarly, this position was also adopted by the Spanish Constitutional Court when deciding the *Paquirri* case,¹⁶ which analyzed the responsibility of a media outlet that had made and commercialized —without authorization— images of the bullfight that led to the death of the bullfighter Francisco Rivera Pérez (Paquirri), and of the subsequent medical treatment in the venue's infirmary. As in Argentina, the Spanish court considered that information relating to public figures “is legitimately disclosed only when the news or data, are inevitably related to the activity that is the basis for the public notoriety acquired in society” (emphasis added) (Basterra 2011, 378).

In that sense, the public nature of a particular person is not enough to ensure the legitimacy of an interference with their privacy. On the contrary, it is essential to also evaluate if the fact or event that is intended to be disclosed is related to the specific activity or characteristic that has made it public. Otherwise, there will be an illegitimate interference with the private life of a person (regardless of whether the individual is a public person).

Third, the *social repercussions* of the event or fact to be disseminated must be evaluated. Although this characteristic is not usually mentioned by doctrine or international or comparative jurisprudence, it was insistently used by the Constitutional Court in decision T-407 of 2012, which discussed whether installing security cameras in a classroom, to enable the safety of the students, constituted an illegitimate, disproportionate and unreasonable interference that affects the essential core of the students' right to free development of their personality, the professor's academic freedom, and of the right to privacy of both. According to the Court, the

15 “Ponzetti de Balbín, Indalia c. Editorial Atlántida S. A.”, Fallos 306:1892 (1984).

16 STC 231/1988, del 2 de diciembre de 1988, www.boe.es.

guarantee of respect for privacy “is absolute when *the actions performed by citizens have no social impact* and are of interest only to the right holder, while it is mitigated in the case of less intimate enclosed spaces where activities *with greater social effects* are carried out”¹⁷ (emphasis added). In this sense, to the degree that the acts or facts have greater social repercussions, the level of protection of the right to privacy tends to decrease.

The *public relevance of the information* is the fourth characteristic of the disclosed fact or event that must be evaluated; it means that communicating the fact or event to public opinion is necessary due to the public interest of the issue that is being communicated or its contribution to the public debate (Benente 2010, 74). For example, the Inter-American Court of Human Rights (Inter-American Court) has stated that regarding public officials (which, as we have mentioned, have a notoriety level of 100), their information has public relevance when:

- a) in any way, despite having a component that involves private life, it is information that has to do with the functions that person carries out, b) it refers to the noncompliance of a citizen’s legal obligation, c) it is important information regarding trust in an official; and d) it refers to the competence and capabilities of an official to perform his duties.¹⁸

This public relevance criterion has been commonly referred to as the “objective element,” which together with the “subjective element” or public nature of the person allows recognizing a lower level of protection to the right to privacy. It was used, for example, in the case *María Isabel Preysler Arrastia*,¹⁹ in which the Spanish Constitutional Court discussed the legitimacy of a note disclosed by the magazine *Lecturas*, under the title “The Hidden Face of Isabel Preysler,” (*La cara oculta de Isabel Preysler*) that exposed facts and situations related to Mrs. Preysler Arrastia, her family and friends, as well as her household’s customs. On that occasion, the Spanish court held that “in order to enforce the constitutional protection of the personality rights, it is necessary that the *objective element* concur

17 Corte Constitucional de Colombia. Sentencia T-407. No de expediente: T-3.348.314. M. P. Mauricio González Cuervo: 31 de mayo del 2012. [Constitutional Court of Colombia. Decision T-407 of 2012. Presiding Judge: Mauricio González Cuervo.]

18 Inter-American Court of Human Rights. *Case of Fontevecchia D’Amico v. Argentina*. Judgment of November 29, 2011. Series C No. 238, para. 17.

19 STC 115/2000, del 05 de mayo de 2000, www.boe.es.

with the *subjective element* of the *individual's public character*; that the facts that constitute the information, *because of their public relevance*, do not undermine privacy” (emphasis added) (Basterra 2011, 382).

A similar case was the Argentine decision *Menem C. Editorial Perfil*,²⁰ which was resolved by the national courts based on the aforementioned Ponzetti de Balbín Doctrine. In this case, the legitimacy of the dissemination of a series of journalistic notes and photos by the magazine *Noticias*, that discussed the presumed extramarital paternity of President Carlos Saúl Menem and his ex-spouse's state of mind regarding this situation. At that time, the Argentine Court ruled that such information was not related to his role as president of the republic and that to that extent, the magazine should be condemned. However, in a subsequent decision the Inter-American Court appealed to the criterion of public relevance and held that

the journalists were sentenced to indemnifying the President for publishing information that was already in the public domain and that *was of public interest* as it involved: a) the possible use of State power for private means on behalf of the president of the Nation; b) the possible unjust enrichment of a State representative; c) the possible existence of death threats against the President's child, and d) the noncompliance with the legal obligation of the former president to recognize the child, an act that is not freely chosen by a parent²¹ (emphasis added).

The fifth characteristic that must be analyzed in relation to the event or fact disclosed or in regard to which the interference has occurred is *its possible historical, scientific or cultural interest*. This criterion is based on article 8 of the Spanish Law 1/82 (*Ley 1/82*) on civil protection of the right to honor, to personal and family privacy, and to one's own image, pursuant to which “in general, the intrusion shall not be considered illegitimate in reference to actions authorized or agreed upon by the competent Authority in accordance with the Law, or *when a relevant historical, scientific or cultural interest prevails*” (emphasis added). According to Antonio Niño and Carlos Sanz (2012), this criterion is intended to protect scientific research and, in particular, research for historical purposes, from abusive applications of the protection of personal privacy.

20 “Menem C. Editorial Perfil” Fallos 324:2895 (2001).

21 Inter-American Court of Human Rights. *Case of Fontevecchia D'Amico v. Argentina*. Judgment of November 29, 2011. Series C No. 238, para. 18.

(iii) Characteristics of the Place Where the Disclosed Event or Act or the Intrusion Occurs

Finally, there is still a need to establish the characteristics of the location where the fact or event to be disclosed occurs, which should be taken into account when determining the legitimacy of a specific interference with the right to privacy. In this regard, it is pertinent to note the aforementioned Decision T-407 of 2012 of the Constitutional Court of Colombia. According to the Court, “not all closed places other than the residence enjoy the same constitutional protection, because in each case privacy should be balanced with other rights. In other words, the Court recognizes that there are different spheres of privacy and intimacy, associated with different spaces, to which correspond different degrees of protection.”²² To that extent, it refers to public,²³ semi-public, semi-private and private²⁴ spaces, assigning to each of them a different level of protection.

In accordance with the Court, in the case of semi-private spaces, the interferences in privacy and the other liberties exercised in these contexts are limited. The latter, considering that these are places where people conduct everyday activities and where the behaviors conducted by the subjects have less social impact. On the other hand, in semi-public spaces, restrictions on privacy are tolerable, due to the greater social repercussion of people’s behavior in these spaces. With regard to public space, this Court has been clear in establishing that from the moment a person steps

22 Corte Constitucional de Colombia. Sentencia T-407. Expediente: T-3.348.314. M. P. Mauricio González Cuervo: 31 de mayo del 2012. [Constitutional Court of Colombia. Decision T-407 of 2012. Presiding Judge: Mauricio González Cuervo.]

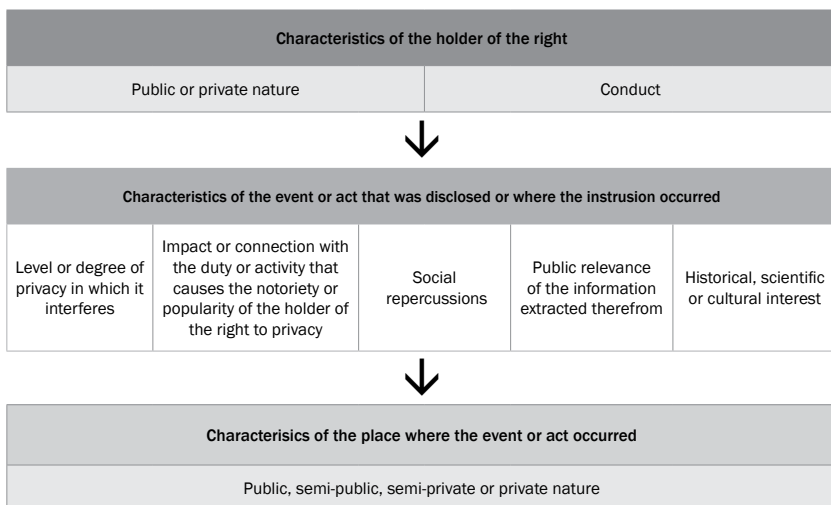
23 According to the Court, “public space is a category that has a clear constitutional connotation, which includes those areas intended for circulation, recreation, the installation of public services, the preservation of public works, and in general all areas in which collective interests and needs prevail over private ones in regards to their use and enjoyment.” Corte Constitucional de Colombia. Sentencia T-407. Expediente: T-3.348.314. M. P. Mauricio González Cuervo: 31 de mayo del 2012. [Constitutional Court of Colombia. Decision T-407 of 2012. Presiding Judge: Mauricio González Cuervo.]

24 The Court held “private space is defined as the place where the person freely develops her privacy and her personality in a ‘reserved and inviolable environment.’ In this sense, residences and the places where people live are the private space par excellence.” Corte Constitucional de Colombia. Sentencia T-407. Expediente: T-3.348.314. M. P. Mauricio González Cuervo: 31 de mayo del 2012. [Constitutional Court of Colombia. Decision T-407 of 2012. Presiding Judge: Mauricio González Cuervo.]

into the public space, she “tacitly assumes and recognizes that she is an observer subject and an observed subject with respect to others.”²⁵

In conclusion, based on doctrine and national and international jurisprudence, we have a set of criteria (figure 1) that can be used when determining whether a specific interference with the right to privacy is legitimate or if, on the contrary, we are faced with an arbitrary limitation that must therefore be avoided.

FIGURE 1.
Criteria to identify the legitimacy of an intrusion in the right to privacy



SOURCE: prepared by the authors.

If, from the application of these criteria, it is found that a specific interference with a person’s right to privacy is arbitrary, there are sufficient arguments to limit this interference. However, to what extent can limitations be established, without completely overlooking the other rights that come into tension? Since in the present text we have selected freedom of expression and historical truth as the other rights that come into play when narrating the armed conflict and the transition to peace, we will

²⁵ Corte Constitucional de Colombia. Sentencia T-1233. Expediente: T-486155. M. P. Jaime Araújo Rentería: 22 de noviembre de 2001. [Constitutional Court of Colombia. Decision T-1233 of 2001. Presiding Judge: Jaime Araújo Rentería.]

now address both their content and the legitimate ways in which these rights can be limited. However, before proceeding with these rights we will briefly describe the right to *habeas data*, since it could also come into tension with other rights in the contexts we are discussing here.

Right to Habeas Data

Content

The right to *habeas data* is also enshrined in article 15 of the Political Constitution, which in the relevant part states:

Article 15. Every individual...has the right to know, update, and rectify information collected about them in data banks and in the records of public and private entities. Freedom and the other guarantees approved in the Constitution shall be respected in the collection, processing, and circulation of data.

Furthermore, its content has been developed in Statutory Law 1266 of 2008 (*Ley Estatutaria 1266 de 2008*) “by which the general provisions of *habeas data* are dictated and the handling of the information contained in personal databases is regulated, especially financial, credit, commercial, services information and information originating in third countries, and other provisions are dictated,” and also in Statutory Law 1581 of 2012 (*Ley Estatutaria 1581 de 2012*) “by which general provisions for the protection of personal data are dictated.”

In interpreting the scope and content of this right, the Constitutional Court of Colombia has indicated that it emerged to protect individuals from the abusive use of their personal data²⁶ through the use of modern information technologies. However, it was first interpreted as a guarantee of the right to privacy and to a good name. Later on, a second line of interpretation developed in the Court considered *habeas data* as an expression

26 According to the Constitutional Court, the characteristics of personal data are: “(i) it refers to aspects that are exclusive and inherent to a natural person, (ii) it allows identifying the person, to a greater or lesser extent, due to the comprehensive vision it provides on its own and with other data; (iii) its ownership resides exclusively with the data subject, a situation that is not modified if it is obtained—lawfully or unlawfully— by a third party, and (iv) its processing is subject to special rules (principles) regarding its collection, administration, and disclosure.” Corte Constitucional de Colombia. Sentencia T-729. Expediente: T-467467. M. P. Eduardo Montealegre Lynett: 5 de septiembre de 2002. [Constitutional Court of Colombia. Decision T-729 of 2002. Presiding Judge: Eduardo Montealegre Lynett.]

of the free development of personality. Finally, the right to *habeas data* was understood as an autonomous right comprised of informational self-determination and freedom.²⁷

Initially, the Court referred to the right to *habeas data* as an *informational freedom*, defining it as “the capacity to dispose of information, to preserve one’s own informational identity, that is, to allow, control or rectify data concerning the personality of its holder and that, as such, identify and individualize him with regard to other people.”²⁸ However, in 2002 the Court adopted the definition that it continues to use today and according to which the right to *habeas data* is:

the right that grants the holder of personal data the power to demand from the personal data administrators access to, and, the inclusion, exclusion, correction, addition, revision, and certification of the data, as well as the limitation of the possibilities for disclosure, publication or transfer of the data, in accordance with the principles that inform the administration processes of personal databases.²⁹

To that extent, this constitutional high court has indicated that the content of the right to *habeas data* manifests in four concrete abilities of the holder, namely: (i) the right to know the information concerning him or her; (ii) the right to update such information, that is, to revise it, adding any new facts; (iii) the right to rectify information that does not correspond to the truth; and, (iv) the right to the expiration of negative data.³⁰

Conditions for Limiting the Exercise of the Right

The legitimacy of the limitations to the right to *habeas data* depends on the fulfillment of five principles —currently set forth in Law 1581 of

27 Corte Constitucional de Colombia. Sentencia T-260. Expediente: T-3.273.762. M. P. Humberto Antonio Sierra Porto: 29 de marzo de 2012. [Constitutional Court of Colombia. Decision T-260 of 2012. Presiding Judge: Humberto Antonio Sierra Porto.]

28 Corte Constitucional de Colombia. Sentencia T-414. Expediente: T-534. M. P. Ciro Angarita Barón: 16 de junio de 1992. [Constitutional Court of Colombia. Decision T-414 of 1992. Presiding Judge: Ciro Angarita Barón.]

29 Corte Constitucional de Colombia. Sentencia T-729. Expediente: T-467467. M. P. Eduardo Montealegre Lynett: 5 de septiembre de 2002. [Constitutional Court of Colombia. Decision T-729 of 2002. Presiding Judge: Eduardo Montealegre Lynett.]

30 Corte Constitucional de Colombia. Sentencia SU-082. Expediente: T-40.966. M. P. Jorge Arango Mejía: 1 de marzo de 1995. [Constitutional Court of Colombia. Decision SU-082 of 1995. Presiding Judge: Jorge Arango Mejía.]

2012—, which, according to the jurisprudence and the law, should guide the processing of personal data.

On the one hand, the *principle of freedom*, according to which, “the processing [of personal data] can only be exercised with the *prior, express and informed consent of the data subject*. Personal data cannot be obtained or disclosed without prior authorization, or in the absence of a legal or judicial mandate that replaces that consent” (emphasis added). On the other hand, the *principle of purpose* establishes that the publication or disclosure of personal data can only be allowed if it is founded on a constitutionally legitimate purpose. Furthermore, the *principle of necessity*, is satisfied if “the personal information to be disclosed has [a] ‘connection with the purpose that is sought with the disclosure.’”³¹ With respect to the *principle of veracity*, it prohibits the publication of personal information that does not conform to reality or is incorrect. Finally, the *principle of integrity* holds that “no bias or fragmentation can be evidenced in the data that is provided, in other words, the information must be complete.”³²

To that extent, if

the holder expresses his consent to the introduction of a legally permitted limitation to his personal freedom in exercise of the principle of free will... this constitutes a *consented interference and, as such, is not arbitrary or abusive* within the scope that international pacts and the doctrine ascribe to these terms”³³ (emphasis added).

This, notwithstanding compliance with the other principles of purpose, necessity, veracity, and integrity mentioned above.

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- 31** Corte Constitucional de Colombia. Sentencia T-634. Expediente: T-3900495. M. P. María Victoria Calle Correa: 13 de septiembre de 2013. [Constitutional Court of Colombia. Decision T-634 of 2013. Presiding Judge: María Victoria Calle Correa.]
 - 32** Corte Constitucional de Colombia. Sentencia T-050. Expediente: T-5.145.787. M. P. Gabriel Eduardo Mendoza Martelo: 10 de febrero de 2016. [Constitutional Court of Colombia. Decision T-050 of 2016. Presiding Judge: Gabriel Eduardo Mendoza Martelo.]
 - 33** Corte Constitucional de Colombia. Sentencia T-022. Expediente: T-4452. M. P. Ciro Angarita Barón: 29 enero de 1993. [Constitutional Court of Colombia. Decision T-022 of 1993. Presiding Judge: Ciro Angarita Barón.]

*Reservations Regarding the Application
of This Right in the Present Case*

However, there are two reasons that lead us to doubt the inclusion of the right to *habeas data* in the tension between rights that is being discussed here.

In the first place, the position of authors, such as Juan Carlos Upegui, limiting the scope of application of the right to *habeas data* to the “structured processing of personal data,” should be considered. According to Upegui,

the distinction between personal information submitted for processing regardless of its relationship with a personal database, and personal information submitted for processing from a personal database can be a useful analytical tool to define the scope, at the very least, of the fundamental right to *habeas data* in Colombia. (2017, 97)

On the basis of that distinction, this author considers that *habeas data* is not a right that allows the protection of personal information in any type of context, but only when a structured personal database is involved. The foregoing, to the extent that “the existence of this specific type of organizing of personal information is a condition for the recognition of the so-called ‘informational power’ and the foundation of *habeas data* as an ‘informational freedom.’” (Upegui 2017, 96).

Thus, although we know of cases like the ones addressed in decisions T-260 of 2012³⁴ and T-277 of 2015,³⁵ where the analysis of the violation of the right to *habeas data* concerned unstructured data processing, we are also aware that in the unifying decision SU-458 of 2012 the Constitutional Court coincided with Upegui’s position, stating:

The right to *habeas data* operates in the closed context of the management of personal information databases. Therefore, exercising this right is legally impossible in relation to personal information that is not part of a database or information that is not of

34 This decision analyzed whether the best interests of the child and the fundamental rights to *habeas data* and to honor of a child were affected by the creation of a Facebook account in her name by her father.

35 The Court examined whether the incomplete information published by *Casa Editorial El Tiempo* on its website about the capture and joinder of Ms. Gloria to a criminal proceeding for the crime of human trafficking violated the plaintiff’s rights, because the publication did not report that the plaintiff did not lose at trial due to the criminal action being barred by the statute of limitations.

a personal nature. These prerequisites have allowed this Court to dismiss the invocation of *habeas data* to, for example, protect personal information that appears in is being held in other mediums, is not organized in a database or in a file, or to protect information of another nature, such as academic, scientific, technical, artistic information that, despite being contained in a database or files, has no connection to natural or legal persons.

Second, it must also be considered that, according to subparagraph d) of article 2 of Law 1581 of 2012, the said Habeas Data Statutory Law does not apply regarding “the databases and files of journalistic information and other editorial content,” because of the type of interests involved that merit special and complementary regulation. Although the paragraph of that same article establishes that the general principles that regulate the processing and protection of data (mentioned above) applies to all databases, including those exempted in that law,³⁶ in our opinion it is not yet clear how to apply these principles to data of a special nature.

For this reason, we consider is it necessary that the statutory legislator, through specific and additional developments in relation to *habeas data* protection, regulate this right in regard to journalistic information. Or ultimately, that the Constitutional Court, as it has already done on other occasions, clarify the scope of the principles of protection of personal data in relation to journalistic information. In this regard, it is worth mentioning what the Court did in decision C-540 of 2012, where it decided to accept a group of principles “on account of the distinctive characteristics of intelligence and counterintelligence matters, and with the purpose of creating harmonic regulation formulas that allow the equitable satisfaction of the rights of the data subjects, information sources, database operators and the users.” In that exercise, the Court left out the principle of freedom, which probably happened “as a result of a weighing exercise in which the

36 Similarly, when interpreting said article 2, the Constitutional Court made it clear that “although in principle it is constitutional to consecrate some exceptions to the application of some provisions of the law, this does not mean that those areas, as well as all the others in which personal data processing is practiced, are excluded from the basic guarantees of the right to *habeas data* or the guarantees of other fundamental rights that in each case may be infringed by the processing of personal data.” Corte Constitucional de Colombia. Sentencia C-748. Expediente: PE-032. M. P. Jorge Ignacio Pretelt Chaljub: 6 de octubre de 2011. [Constitutional Court of Colombia. Decision T-748 of 2011. Presiding Judge: Jorge Ignacio Pretelt Chaljub.]

legal interest protected by *habeas data* has been weighed against the intelligence interests that would be seriously affected if the data subject is put on notice of the intention to process the data” (Ramírez et al. 2017, 49)

Similarly, it would be interesting to know if, due to the special nature of “the databases and archives of journalistic information and other editorial content,” it is not necessary to fulfill the prior, express and informed consent of the data subjects of the information recorded there; or if, on the contrary, this requirement is applicable, at least in sensitive cases such as those that concern us here, where it seems clear the victims are reluctant, as holders of the right to *habeas data*, to have their personal data collected. Although considering the circumstances we lean towards this second option, we prefer to wait until there is an authoritative pronouncement on the matter.

Therefore, as it is not clear if the right to *habeas data* applies in the contexts of unstructured data processing that are analyzed here or, in any event, how it would apply to journalistic information, we consider it is preferable to refrain from including it in the analysis of the case study that we intend to discuss. All of this, with the clarity that, in any event, the right to *habeas data* contributes elements that it is convenient to keep present in this discussion.

The Rights to Freedom of Expression and to Historical Truth in Its Collective Dimension: What Is Their Content and to What Extent Can They Be Limited Legitimately?

In this part we will analyze the content of the rights to freedom of expression and to historical truth in its collective dimension. Similarly, we will present some useful criteria to ascertain under what conditions it is possible to legitimately limit these rights.

The Right to Freedom of Expression

Content

The right to freedom of expression and information is enshrined in article 20 of Colombia’s Political Constitution, which provides:

Article 20. Every individual is guaranteed the freedom to express and diffuse their thoughts and opinions, to transmit and receive information that is true and impartial, and to establish mass media.

The media has freedom and social responsibility. The right to rectification is guaranteed under equitable conditions. There shall be no censorship.

This right has also been guaranteed under international law on human rights, which has been integrated into the constitutional block. In this regard, article 13 of the American Convention of Human Rights establishes:

Article 13. Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. 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.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

For its part, article 19 of the International Covenant on Civil and Political Rights provides the same freedom in similar terms, only including a

broader clause according to which, “everyone shall have the right to hold opinions without interference.”

In interpreting the scope and importance of this right, the Constitutional Court of Colombia has been clear in stating that: (i) it is a communicational or double dimension right: “an individual dimension, consisting of the *right of each person to express* their own thoughts, ideas and information; and a collective or social dimension, consisting of *the right of society to seek and receive* any information, to know the thoughts, ideas and information of others and to be well informed”³⁷ (emphasis added); and, (ii) it encompasses both the communication of *ideas and opinions*, that are personal and closely linked to the right to freedom of thought (freedom of expression in the strict sense), such as “the communication of *pieces of information*, understood as data that describe a situation with an empirical basis, not constituting a mere opinion”³⁸ (emphasis added) (freedom of press and information).

For its part, Inter-American jurisprudence has held that this right includes all expressions of any content, regardless of how shocking, offensive, scandalous or rude the content of what is spoken, written or in any way expressed may be considered.³⁹ According to the IACHR, “this *general presumption of coverage of all expressive speech* is explained by the State’s primary duty of content-neutrality and, as a consequence, by the necessity to guarantee that principle, there are no persons, groups, ideas or means of expression excluded a priori from public debate” (2009, para. 30). Likewise, the right to freedom of expression and information grants a special and reinforced protection for certain types of speech (“specially protected speech”), such as: (i) political speech and *speech involving matters of public interest*;⁴⁰ (ii) speech regarding public officials in the exercise

37 Corte Constitucional de Colombia. Sentencia T-040. Expediente: T-3.623.589. M. P. Jorge Ignacio Pretelt Chaljub: 28 de enero de 2013. [Constitutional Court of Colombia. Decision T-040 of 2013. Presiding Judge: Jorge Ignacio Pretelt Chaljub.]

38 Corte Constitucional de Colombia. Sentencia T-277. Expediente: T-4296509. M. P. María Victoria Calle Correa: 12 de mayo de 2015. [Constitutional Court of Colombia. Decision T-277 of 2015. Presiding Judge: María Victoria Correa.]

39 Inter-American Court of Human Rights. *Case of Herrera Ulloa v. Costa Rica*. July 2, 2004. Series C No. 107, para. 113.

40 See, e.g., Inter-American Court of Human Rights. *Case of Tristán Donoso v. Panamá*. Judgment of January 27, 2009. Series C No. 193, para. 121.

of their duties and candidates for public office;⁴¹ and, (iii) speech that expresses essential elements of personal identity or dignity,⁴² such as expressions in the language belonging to members of ethnic groups, religious expressions or those that express one's sexual orientation or gender identity; this, because of the importance of this kind of expression for democracy and for human rights.

Finally, both domestic and Inter-American jurisprudence have concurred in that the right to freedom of expression and information fulfills a triple function in a democratic system, specifically:

- a) it ensures the individual right of every person to think on their own and to share their thoughts and personal opinions with others, b) it has a *close, indissoluble, essential, fundamental and structural relationship with democracy*, and to that extent, the very purpose of article 13 of the American Convention is to strengthen the functioning of democratic, pluralist and deliberative systems, by protecting and promoting the free flow of ideas and opinions, and c) finally, it is a *key tool for exercising the other fundamental rights*⁴³ (emphasis added).

Conditions for Limiting the Exercise of the Right

Just as with all the other rights, the right to freedom of expression and information is not an absolute right.⁴⁴ This, to the extent that, as the second paragraph of article 32 of the American Convention on Human Rights provides, “the rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.”

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- 41 See, e.g., Inter-American Court of Human Rights. *Case of Kimel v. Argentina*. Judgment of May 2, 2008. Series C No. 177, para. 87 and 88.
 - 42 See, e.g., Inter-American Court of Human Rights. *Case of López Álvarez v. Honduras*. Judgment February 1, 2006. Series C No. 141, para. 169.
 - 43 Corte Constitucional de Colombia. Sentencia T-040. Expediente: T-3.623.589. M. P. Jorge Ignacio Pretelt Chaljub: 28 de enero de 2013. [Constitutional Court of Colombia. Decision T-040 of 2013. Presiding Judge: Jorge Ignacio Pretelt Chaljub.]
 - 44 See, e.g., Inter-American Court of Human Rights. *Case of Eduardo Kimel V. Argentina*. Judgment of May 2, 2008. Series C No. 177, para. 54; Inter-American Court of Human Rights *Case of Palamara-Iribarne v. Chile*. Judgment of November 22, 2005. Series C No.135, para. 79; Inter-American Court. *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 120.

Hence, Inter-American jurisprudence has made it clear that this right may be restricted, provided that the interference is not abusive or arbitrary. In order to determine the legitimate or arbitrary nature of an interference, it is necessary to apply what has been called the “three-part test” or “necessity test,” established in the paragraph 2 of article 13 of the American Convention on Human Rights. In accordance with this paragraph:

2. 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 (emphasis added).

In interpreting this paragraph, Inter-American jurisprudence has made it clear that the conditions that must be fulfilled by limitations of the right to freedom of expression and information in order to be legitimate are:

(i) To have been established by law⁴⁵ (in a formal and material sense), which defines the limitation in a precise and clear way.

(ii) To be directed towards the achievement of one of the compelling objectives included in subparagraphs a) and b) of the aforementioned paragraph.

(iii) To be:

- *Necessary* in a democratic society for attaining the compelling objectives that are sought: that such legitimate objectives cannot be reasonably accomplished by any other means less restrictive to human rights.
- Strictly *proportional* to these objectives: it must be determined whether the sacrifice of the right to freedom of expression is exaggerated or disproportionate compared to the benefit obtained from the limitation. The following three factors must be specifically evaluated to establish the proportionality of a restriction that has the objective of preserving other rights: “(i) the degree to which the competing right is affected (serious, intermediate, moderate); (ii) the importance of satisfying the competing right; and

⁴⁵ Understanding by law, a binding, general and abstract rule, adopted by the constitutionally established legislative body.

(iii) whether the satisfaction of the competing right justifies the restriction to freedom of expression” (IACHR 2009, para. 89)⁴⁶

- *Appropriate* for achieving the same: the measure must be effectively conducive to the objective.

In this regard, it should be noted that the last element of this three-part test proposed by the Inter-American Court (Step iii) contains the same elements (a, b, and c) that are part of the proportionality test used by the Constitutional Court of Colombia to evaluate the validity and legitimacy of any limitation to the fundamental rights enshrined in the Constitution.

When applying the aforementioned conditions, it is necessary to be aware of the following three guidelines that have been established in Inter-American jurisprudence and are of special relevance in the present case: (i) these conditions “apply to laws, as well as administrative decisions, and acts or decisions of any other nature, that is, to all demonstration of state power”;⁴⁷ (ii) “when evaluating an alleged restriction or limitation to freedom of expression, the Court should not restrict itself to examining the act in question, but should also examine this *act in the light of the facts of the case as a whole*, including the *circumstances and context* in which they occurred”⁴⁸ (emphasis added); and, (iii) “certain types of limitations, *due to the type of speech they affect* or the means that they use, must be put to a *more strict and rigorous test* in order to be valid under the Convention” (emphasis added) (IACHR 2009, para. 62).

Regarding the possible limitations or restrictions to be examined, it is also necessary to consider: (i) “the protection of freedom of expression or freedom of information cannot be invoked as an objective that in turn justifies the restriction of freedom of expression or information” (IACHR 2009, para. 78); (ii) the limitations cannot be discriminatory or produce discriminatory effects; (iii) there is an absolute prohibition of prior censorship; and (iv) there is a prohibition of indirect restrictions on freedom of expression, which may even originate in acts between private

46 Inter-American Commission on Human Rights, Office of the Special Rapporteur for Freedom of Expression, *Legal Framework Regarding the Right to Freedom of Expression*, OEA/Ser.L/V/II. CIDH/RELE/INF.2/09 (December 30, 2009), para. 89.

47 Inter-American Court of Human Rights. *Case of López Alvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, para. 165.

48 Inter-American Court of Human Rights. *Case of Ivcher Bronstein v. Perú*. Judgment of February 6, 2001. Series C No. 74, para. 154.

individuals. In this regard, “article 13(3) of the Convention imposes on the State the obligation to ensure the rights and liberties, even within the environment of private relationships, since such article does not only deal with indirect governmental restrictions, but also ‘private... controls’ that produce the same result.”⁴⁹

Right to Historical Truth in Its Collective Dimension

Content

Generally, four fundamental elements have been attributed to transitional justice (Teitel 2003): truth, justice, reparation, and non-repetition. In transition processes, seeking and clarifying the truth has served to accomplish different objectives: (i) it has contributed to establishing an official historical record that (ii) is based on the creation of a dividing line between past and future; furthermore, (iii) it helps victims obtain answers about a violent past and (iv) it promotes reconciliation among the victims, the perpetrators and, in general, the population. By the same token, it also has retributive effects, because (v) it promotes accountability, and preventive effects, as (vi) it promotes reform through the recommendations of truth commissions (Daly 2008).

Based on international experiences in the field of transitional processes, at least two ways in which the truth can be understood have been identified: as a historical phenomenon and as a judicial phenomenon. The latter refers to the truth discovered as a result of investigations in judicial proceedings (Resta and Zeno-Zencovich 2013), while historical truth refers to the reconstruction and narration of the causes, actors, and consequences of the conflict (Resta and Zeno-Zencovich 2013). It is an attempt to ascribe “political responsibilities to collective subjects, as well as to determine the context of the armed conflict in which this type of crimes took place” (Centro Nacional de Memoria Histórica 2012, 160).

At a national level, the right to the truth was enshrined constitutionally in Legislative Act 01 of 2012, which, in turn, added transitory article 66 to the Political Constitution:

Transitory Article 66. The instruments of transitional justice shall be exceptional and their main purpose shall be to facilitate the termination of the internal armed conflict and attaining a

⁴⁹ Inter-American Court of Human Rights. *Case of Perozo et al. v. Venezuela*. Judgment of January 28, 2009. Series C No. 195, para. 367.

stable and lasting peace, with guarantees of non-repetition and security for all Colombians; *and they shall guarantee at the highest possible level, the rights of the victims to truth, justice and reparation.* A statutory law may authorize that, within the framework of a peace agreement, the different illegal armed groups that have been a party to the internal armed conflict and also agents of the State be provided a differentiated treatment in relation to their participation in the conflict... (emphasis added).

However, this constitutional provision is not the first time the right to the truth was legally broached in Colombia. Previously, the Constitutional Court has recognized this right on different occasions and has consolidated a series of decisions that analyze in depth its central elements. Specifically, the Court has defined it as the “possibility of knowing what happened and [the search for] a coincidence between the judicial truth and the real truth.”⁵⁰ Similarly, it has maintained that, in contexts of serious human rights violations and breaches of international humanitarian law, the right to the truth constitutes an *autonomous, inalienable and imprescriptible*⁵¹ right, whose essential content implies “the guarantee of knowing comprehensively and completely the truth of the facts, the specific circumstances and who participated in them, including the conditions under which the violations occurred and the reasons that led to them.”⁵²

Similarly, in adopting what was stated in the *Set of principles for the protection and promotion of human rights through action to combat impunity*, the Court highlighted that the right to the truth is composed of three fundamental elements: (i) the inalienable right to the truth; (ii) the duty to remember, and (iii) the right of victims to know.⁵³

50 Corte Constitucional de Colombia. Sentencia C-282. Expediente D-3672, M. P. Manuel José Cepeda y Eduardo Montealegre Lynett: 3 de abril de 2002. [Constitutional Court of Colombia. Decision C-282 of 2002. Presiding Judge: Manuel José Cepeda and Eduardo Montealegre Lynett.]

51 Corte Constitucional de Colombia. Sentencia T-576. Expediente T-1.247.553. M. P. Humberto Sierra Porto: 5 de junio de 2008. [Constitutional Court of Colombia. Decision T-576 of 2008. Presiding Judge: Humberto Sierra Porto.]

52 Ibid.

53 Corte Constitucional de Colombia. Sentencia C-454. Expediente D-5978. M. P. Jaime Córdoba Triviño: 7 de junio de 2006. [Constitutional Court of Colombia. Decision C-454 of 2006. Presiding Judge: Jaime Córdoba Triviño.]

Thus, in different decisions, the Court has adopted diverse jurisprudential criteria to determine the content and reach of this right: (i) the right to the truth is based on the right to human dignity, the duty of historical memory and the victims' right to good name; (ii) the holders of the right to the truth are the victims, their families, and society as a whole; (iii) in its collective dimension, the right to the truth "means that society must know the reality of what happened, its own history, the possibility of developing a collective narrative through the public disclosure of the results of the investigations, and implies the obligation to have a 'public memory' of the result of these investigations of serious human rights violations"⁵⁴ (emphasis added); (iv) the right to the truth is inalienable and imprescriptible; (v) the right to the truth is directly related to justice and the reparation of the victims; (vi) the existence of alternative and extrajudicial mechanisms for reconstructing the truth, such as truth commissions of an administrative nature, is necessary; (vii) the relatives of disappeared persons have the right to know the whereabouts of the disappeared.

One of the most relevant points for the purposes of this text is the recognition of a double dimension of the right to the truth.⁵⁵ In effect, the Constitutional Court has held that the right to the truth is an individual right of the victims and a collective right of society: "knowledge of the past is fundamental in a transitional justice process, not only as a materialization of the right to the truth of the victims but also as a fundamental component of true reconciliation and the restoration of trust in the rule of law."⁵⁶ That is, the right to the truth has three types of right holders: the *victims*, because "they have the right to know what happened,

54 Corte Constitucional de Colombia. Sentencia C-715. Expediente D-8963. M. P. Luis Ernesto Vargas Silva: 13 de septiembre de 2012. [Constitutional Court of Colombia. Decision C-715 of 2012. Presiding Judge: Luis Ernesto Vargas Silva.]

55 International instruments such as the *Joinet Principles* also recognize the double nature of historical truth: "This is not simply the right of any individual victim or his relatives to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future....in effect, it is part of a people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right."

56 Corte Constitucional de Colombia. Sentencia C-694. Expediente D-9818. M. P. Alberto Rojas Ríos: 11 de noviembre de 2015. [Constitutional Court of Colombia. Decision C-694 of 2015. Presiding Judge: Alberto Rojas Ríos.]

to know who were the agents of the harm that was inflicted, that the facts are investigated seriously and are punished by the State”;⁵⁷ the *relatives of the victims*, as they have the right to know the truth about the victimizing events and in the case of forced disappearances, about the whereabouts of their relatives; and *society*, because it has the right to know the facts related to human rights violations, in order to forge a collective memory that remembers the victims.

The Court explains that the collective side of the right to the truth “means knowing the truth about the events that occurred, the circumstances and the reasons that led to the commission of massive and systematic violations of human rights and international humanitarian law.”⁵⁸ That is, for the Court “this right implies preserving collective memory from oblivion, to avoid the emergence of revisionist and denialist theories, among other things.”⁵⁹ On the other hand, it also notes that certain guarantees should exist so that the right to the truth in its collective dimension can materialize. Thus, the Court holds that one of these guarantees is “the conservation and public consultation of the pertinent official files. In this regard, preventative measures should be adopted to prevent the destruction, adulteration or falsification of the files where the violations that were committed are recorded.”⁶⁰

Therefore, it is possible to see that the right to the truth has a collective aspect that is essential for constructing a collective memory of the conflict and the transition towards peace. That is, the right holders of the right to the truth are not only the victims but also the whole of society, which has had to face the adversities of the conflict.

The Inter-American Court has also addressed the content of the right to the truth in a similar vein as the Constitutional Court. It began its analysis of the right to the truth with the examination of forced disappearance cases in the Americas. For instance, in the *Case of Rodríguez Vera et*

57 Corte Constitucional de Colombia. Sentencia C-370. Expediente D-6032. M. P. Manuel José Cepeda et al.: 18 de mayo de 2006. [Constitutional Court of Colombia. Decision C-370 of 2006. Presiding Judges: Manuel José Cepeda et al.]

58 Corte Constitucional de Colombia. Sentencia C-872. Expediente D-4537. M. P. Clara Inés Vargas Hernández: 30 de septiembre de 2003. [Constitutional Court of Colombia. Decision T-872 of 2003. Presiding Judge: Clara Inés Vargas Hernández.]

59 Ibid.

60 Ibid.

al. (the Disappeared from the Palace of Justice) v. Colombia, this Court stated that “anyone, including the next of kin of the victims of gross human rights violations, has the right to know the truth, according to articles 1(1), 8(1), 25, as well as in certain circumstances article 13, of the Convention.”⁶¹ The Court considers this right “is essentially subsumed in the right of the victims or their family members to obtain from the competent organs of the State the clarification of the acts that violated human rights and the corresponding responsibilities, by the investigation and prosecution”⁶² provided for in articles 8 and 25 of the American Convention on Human Rights, which also constitutes a form of reparation.

Furthermore, the Inter-American Court has also recognized the double facet of the right to the truth. In the *Case of Myrna Mack Chang v. Guatemala*, the Court examined the case of the murder of a Guatemalan anthropologist at the hands of that country’s military. In this decision, the Court states that the right to the truth, on the one hand, implies “the right of the victim or the victim’s next of kin to know the truth of what happened and for those possibly responsible to be punished.”⁶³ On the other hand, the Court holds that “the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with said violations.”⁶⁴

Although the official truth-seeking bodies are truth commissions or analogous figures, we believe that the participation of third parties and civil society is fundamental to enriching the collective aspect of this right. In particular, we consider that the role of journalists in truth-seeking fulfills an important function. Journalistic coverage can inform the work of truth commissions, as it contains information, angles, and versions that do not exist in other sources. However, this is not the only contribution of journalism to truth-seeking. As Refic Hodzik and David Tolbert declare, the “media can support and promote transitional justice mechanisms by reflecting society’s new values and demands of victims” (2016, 1). That is, journalism has the power to favor certain narratives over others and

61 Inter-American Court of Human Rights. *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia*. Judgment of November 14, 2014. Series C No. 287, para. 511.

62 Ibid.

63 Inter-American Court of Human Rights. *Case of Myrna Mack Chang v. Guatemala*. Judgment of November 25, 2003. Series C No. 101, para. 209.

64 Ibid, para. 274.

can prevent certain events from being forgotten. In that sense, journalists give the facts a meaning that is amplified and can help form a collective consciousness about the facts of the conflict and the transition. Finally, from the preceding recount of the recognition of the right to the truth in the national and international legislation and jurisprudence, it is possible to extract at least three fundamental elements of this right. In the first place, it is an *inalienable right*. Likewise, it *imposes different obligations on States in order to satisfy the right for both victims and society*. Similarly, it is understood that the right to the truth implies a *double dimension*. On the one hand, it is an individual and inalienable right held by the victims and, on the other hand, it has a collective dimension directly related to preserving the historical memory of all of society and, therefore, preventing the recurrence of atrocious events.

Necessary Conditions for Limiting the Exercise of the Right

Like the right to privacy and the other fundamental rights, the right to truth in its collective dimension is inalienable.⁶⁵ Therefore, it cannot be completely ignored, and its limitations must be legitimate. Jurisprudence has not yet defined the cases in which it is possible to legitimately limit the right to truth in its collective dimension. In principle, to determine whether the right to the truth in its collective dimension should be limited when it comes into tension with other rights, the generic weighing formula used by the Constitutional Court —called the proportionality test— should be followed.

However, we also consider that, the jurisprudential and doctrinal development of this right allows extracting criteria to evaluate whether a certain limitation placed on the right to the truth in its collective dimension can be considered legitimate. It should be clarified that these criteria relate directly to the purpose of this text; that is, they have been designed to evaluate cases in which there is a tension between the right to truth in its collective dimension and the right to privacy. Therefore, the criteria may vary if the right to the truth is at odds with other rights of a different nature. Having made this clarification, we will mention the criteria we have designed to define whether, in the event of tension between privacy

65 Corte Constitucional de Colombia. Sentencia T-576. Expediente T-1.247.553. M. P. Humberto Sierra Porto: 5 de julio de 2008. [Constitutional Court of Colombia. Decision T-576 of 2008. Presiding Judge: Humberto Sierra Porto.]

and the right to the truth in its collective dimension, the limitation of the latter right is legitimate:

1. When the protection of the right to privacy is not an obstacle to guaranteeing the plural construction of the truth; or
2. When the satisfaction of the right to the truth in its collective aspect comes into direct tension with the satisfaction of the individual rights of the victims.

Below we will explain each of these criteria in greater detail.

1. When the protection of the right to privacy is not an obstacle to guaranteeing the plural construction of the truth

If the main objective of historical truth is contributing to the clarification of the facts of the conflict and the transition to peace, then it is necessary to include the diverse voices that participated in these processes. The truth that is told should receive input from different sources to ensure the plurality of stories and perspectives on a particular event or act. For this reason, the Inter-American human rights system has emphasized the importance of other mechanisms, beyond truth commissions, that serve as sources of historical truth (IACRH 2014, para. 206-235), such as initiatives led by victims or civil society organizations. The plurality of truths becomes necessary, at a minimum, for a vital reason: the complexity of the armed conflict requires the inclusion of diverse perspectives on the facts; in that sense, silencing the stories of certain actors can result in a biased and incomplete truth (Daly 2008).

2. When the satisfaction of the right to the truth in its collective facet comes into direct tension with the satisfaction of the victims' individual rights to truth, justice, reparation, and non-repetition

The victims of the conflict, because of their special condition, have the right to truth, justice, reparation, and non-repetition.⁶⁶ The Constitutional Court has recognized and developed the content of these rights based on “a harmonic interpretation of articles 1, 2, 15, 21, 93, 229, and 250 of the Political Constitution, as well as international humanitarian

66 Corte Constitucional de Colombia. Sentencia C-694. Expediente D-9818. M. P. Alberto Rojas Ríos: 11 de noviembre de 2015 [Constitutional Court of Colombia. Decision C-694 of 2015. Presiding Judge: Alberto Rojas Ríos]; Corte Constitucional de Colombia. Sentencia T-828. Expediente T-4.417.194. M. P. Gloria Stella Ortiz Delgado: 5 de noviembre de 2014. [Constitutional Court of Colombia. Decision T-828 of 2014. Presiding Judge: Gloria Estella Ortiz Delgado.]

law guidelines and international human rights law standards regarding the rights of victims.”⁶⁷ These rights are inherent to the victims, and their recognition derives from their potential to change the state of vulnerability of those who have suffered serious violations of human rights in the context of the armed conflict. For this reason, the rights of the victims of the armed conflict to truth, justice, reparation, and non-repetition must prevail at all times. If these rights are ignored in order to satisfy the right to the truth in its collective dimension, this right must be limited, because in a transitional context the centrality of the victims is a basic premise and the ignorance of their rights may lead to their re-victimization.

CASE STUDY

Events studied

The events of the transition to peace whose narration we intend to study in depth are related to the process of exhumation, delivery of bodies, and ceremonies related to the massacre perpetrated on May 2, 2002, in the municipality of Bojayá, Chocó. In the midst of clashes between the United Self-Defence Forces of Colombia (AUC) and the FARC-EP, a cylinder bomb was launched at the church in the town of Bellavista (Bojayá’s municipal seat), where the inhabitants of this municipality had taken refuge and sheltered from the crossfire between the two armed groups. After the massacre, many of the residents of Bellavista were forced to move to the city of Quibdó and the municipality of Vigía del Fuerte. Given the impossibility of providing a dignified burial to those who died in this event, the bodies were thrown into common graves, which did not allow establishing the number of deaths or the identity of the deceased.

Fifteen years later, in May 2017, the Colombian State exhumed the bodies of those who died in the Bojayá massacre. In this regard, it should be noted that the exhumations were part of a collective reparation process that had been previously discussed and shared with the Committee for the Rights of the Bojayá Victims. At the same time, the exhumations were part of a criminal proceeding conducted by the Prosecutor 37 for Human Rights and IHL in Medellín, whose purpose is to clarify the facts

67 Corte Constitucional de Colombia. Sentencia C-715. Expediente D-8963. M. P. Luis Ernesto Vargas: 13 de septiembre de 2012. [Constitutional Court of Colombia. Decision C-715 of 2012. Presiding Judge: Luis Ernesto Vargas.]

and ascribe responsibility to the authors of the May 2, 2002, massacre.⁶⁸ Lastly, the search, identification, and exhumation of the bodies of the people killed or disappeared in the context of the armed conflict was a topic discussed at the negotiating table of the Peace Agreements between the Government of Colombia and the FARC-EP. Specifically, in Joint Communiqué No. 62 of October 17, 2015 (*Comunicado conjunto No. 62*), the negotiators announced the consolidation of an agreement to “launch the first immediate humanitarian measures for the search, location, identification and dignified delivery of remains of persons considered missing in the context and because of the internal armed conflict” (Delegaciones de Paz del Gobierno Nacional y las FARC-EP, 2015), measures that were developed as part of the process of building trust and reparation for the victims of the armed conflict.

Narration of the Events and Legitimacy of the Interference with the Right to Privacy of the Bojayá Victims

The process of searching and exhuming bodies has characterized several peace transition processes, precisely because of its importance in satisfying the right to the truth of both victims and society (see Annex 1). And the Colombian case is no exception. For this reason, the exhumation, the delivery of bodies, and the mourning ceremonies related to the Bojayá massacre can be of great public interest, not only for that municipality’s community but also for public opinion and society in general. This process is historically important for Colombian society, as it is part of the processes for the reparation of the victims of the armed conflict, and in general, of the peace transition efforts. Similarly, the exhumations and the activities related to them that were carried out in Bojayá can be understood as events that constitute historical truth, because, in addition to repairing the victims of the massacre, the purpose of the exhumations and the other phases of the process is to help clarify a situation directly related to the armed conflict, such as the identification of the victims and the whereabouts of their remains. For these reasons, within the framework

68 This information was provided by the Directorate of the National Specialized Office of the Prosecutor for Transitional Justice of the Office of the Nation’s Attorney General in an official communication dated November 30, 2017, which answered a request for access to information that had been submitted previously.

of the post-agreement, there is a high level of interest that this process be narrated by the media, academics, governmental and non-governmental organizations and other interested persons.

However, does the narration of the processes of exhumation, the delivery of bodies, and mourning ceremonies related to this massacre imply a violation of the right to privacy of the Bojayá victims? As we noted above, not all interferences with the right to privacy are banned. On the contrary, only the ones that, in accordance with the criteria examined above, are arbitrary or illegitimate are prohibited. Consequently, in this case study, it is necessary to examine whether the recording and reports on information related to the process of exhumation, delivery of bodies, and the ceremonies related to the massacre, by the media, academics, governmental and non-governmental organizations, and outsiders in general constituted a legitimate interference with the right to privacy of the victims or, on the contrary, was an arbitrary interference that, therefore, should be limited. Next we will examine how the criteria concerning the legitimacy of an interference with privacy apply in the Bojayá case study.

On the Public or Private Nature of the Behavior of the Bojayá Victims

For purposes of the analysis in this document, it is understood that all members of the Bojayá community should be considered victims. The foregoing, in the sense that it concerns survivors of the massacre perpetrated on May 2, 2002, relatives of the deceased victims, persons displaced as a result of the situation, or affected by breaks and ruptures in the social fabric, the organizational processes, and the sociocultural dynamics that the armed conflict —and particularly the massacre— generated. As indicated in the report of the National Center for Historical Memory, “Bojayá. The Boundless War” (*Bojayá. La guerra sin límites*), “every family was left mourning in some way, all the families had to take part in the search and tally of their victims” (2010, 22).

Due to this condition of victims, these people have lost the anonymity enjoyed by private or ordinary people. As a consequence, for the last fifteen years, they have been immersed in scores of interviews and reports, press conferences, and commemorative events. Likewise, their rights and, in general, their destiny are now of public interest. However, the fact that this exposure was not *voluntarily* sought, means they cannot be considered public persons in the sense that they must admit the reduction of their intimate sphere. Similarly, it is important to consider that —unlike

public officials, celebrities and candidates for elected office— victims do not have social influence or easier access to the media to give explanations or respond to questions or criticisms directed at them. For these reasons, we have decided to refer to them as *notable persons* in this document, because although it cannot be said they are public characters, it is not appropriate to equate them with the ordinary people.

This, however, is not an obstacle to admitting the public character of some of the victims' leaders who, by willingly participating in political and electoral processes, have become relevant political actors, and therefore have become more public. Therefore, although in this case we will not study the implications of privacy for victim leaders, we consider it is important to make this distinction between the diverse degrees of privacy protection that victims may have on account of their situation as such and the victims who progressively and voluntarily have become relevant political actors and, therefore, can be characterized as more public but in combination with an exclusively notable facet.

Regarding their *conduct*, the attitude of the Bojayá victims in the face of the events of the recent months does not appear to account for their will to communicate in reference to their life and their actions. For this purpose, it is pertinent to recall what journalist María Jimena Duzán wrote in her columns “Learning from Bojayá” (*Aprender de Bojayá*) (2015) and “The End of Journalism” (*El fin del periodismo*) (2016), in which she drew attention to the Bojayá victims' reaction of rejection in the face of the media, by prohibiting the entry of journalists to the reconciliation ceremony with the FARC that was held on December 6, 2015. Similarly, the events that occurred between the 7th to the 13th of May and were narrated by the journalist Patricia Nieto in the article titled “Bojayá's silence” (*El silencio de Bojayá*) (2017) do not imply the victims consented the communication of what was happening there. On the contrary, these events are a clear demonstration of their desire to “be left alone.”

Consequently, if we analyze the legitimacy of the potential interference of the media, academics, governmental and non-governmental organizations, and citizens in general in the privacy of the victims, based exclusively on the characteristics of the right holders, it would be concluded that coverage of the processes of exhumation, delivery of bodies, and mourning ceremonies related to the Bojayá massacre would have constituted an abusive or arbitrary interference. The latter, to the extent that they are persons who, might not have a private nature, but are not

subject to the same conditions of limited privacy imposed on public persons. Similarly, instead of assuming that the Bojayá victims consented the communication of the events surrounding their life, their behavior suggests that they wish to grieve privately, to be able to mourn their relatives and give them a dignified burial.

The Events and Acts that Constitute the Exhumation Process

However, considering that the characteristics of the holder of the right to privacy cannot be evaluated in isolation, we must also evaluate the characteristics of the events and acts that are part of the processes for the exhumation, the delivery of bodies, and the mourning ceremonies related to the massacre. Specifically, we are talking about facts such as (i) the rituals performed by the *jaibanás* of the Emberá Dovidá communities to ensure that the souls of the deceased would allow moving their bodies without any mishaps; (ii) the rituals performed by the Afro *sabedores* to facilitate the work of the professionals of the Office of the Attorney General; (iii) the exhumation processes of the remains of the people buried in the municipal cemeteries of Bellavista, Riosucio and Vigía del Fuerte; (iv) the transfer of the bodies by judicial officials to the provisional vaults where they would be kept before being transferred to Medellín to undergo identification tests; (v) *cantora* choirs and honor roads prepared by the community to pay tribute to the newly exhumed; and, (vi) the masses offered to honor the people whose bodies were exhumed. Next, we will analyze each of these events to examine whether the interference was legitimate or not.

However, before continuing the analysis, we would like to emphasize that in general, the moments of suffering and pain experienced by the victims in any of the events that have been recounted are part of the personal privacy of the victims of Bojayá. This level of privacy includes the most intimate sphere of life, corresponding to the most personal feelings and thoughts. As the researcher Sebastián Lalinde points out, this first degree of privacy

speaks to what Warren and Brandeis (1890) referred to as, following Judge Cooley, “the right to be let alone,” that is, the right to be left in peace or, as it has also been translated by the Constitutional Court, the right to be left to oneself. This level of privacy, which finds constitutional support in the inviolability of correspondence and other forms of private communication

(article 15), and the inviolability of the residence (article 28), allows people to build and develop their personality without being seen or heard. (2015, 36-37)

Accordingly, given that personal privacy has the highest degree of protection, only exceptionally important situations or interests justify an interference with the sphere that it shelters.

However, it should also be considered that, generally, feelings do not exist in the abstract, and, on the contrary, occur or materialize in certain events or acts. For that reason, the fact that feelings and emotions are situated in the highest sphere of protection does not imply banning the coverage of events that involve feelings or emotions. However, it does demand taking into account that the direct coverage of the feelings and emotions that manifest during these events can amount to an illegitimate interference with the privacy of the victims. Especially, when pain becomes a “commodity.”

*The Rituals, Masses and Choirs Performed
by the Community of Bojayá*

When clarifying the degree of privacy of feelings, we now proceed to study the level of privacy of the events that were listed above and that are part of the exhumation processes. The rituals, masses, and choirs are part of the customs and religious beliefs of the ethnic communities that live in Bojayá, for they have a strong cultural component and are part of their ethnic conception of the rituals that are needed to make the transition from life to death. For this reason, we consider that these events *are part of what is known as the family privacy of the victims*, that “is informed by the secrecy and privacy of the family nucleus.”⁶⁹ As the Court has indicated, this sphere includes information concerning family relationships, customs, religious beliefs, sexual or health practices that the person only shares with a very close nucleus that consists of the family.

In this regard, it should be noted that in this case, we are referring to a small Afro-descendant community, whose members consider that “the entire community is the family.” Moreover, during our fieldwork, we established that several of the community members are cousins by blood, with the surnames Palacios, Mosquera, Cuesta, Hurtado, Chaverra, Martínez

69 Corte Constitucional de Colombia. Sentencia T-787. Expediente: T-722765. M. P. Rodrigo Escobar Gil: 18 de agosto de 2004. [Constitutional Court of Colombia. Decision T-787 of 2004. Presiding Judge: Rodrigo Escobar Gil.]

and Rivas constantly repeated in the list of deceased persons that rests as a memorial in the church in the old Bellavista. To that extent, any of the events celebrated by this community continues to be a part of their family privacy.

On the other hand, we consider that the tradition of rituals, masses and choirs *has no connection with the condition (of victims) that gives notoriety to the holders of the right to privacy*. Although these acts are performed with the intent of honoring deceased relatives in an event that is related to their status as victims (the massacre of May 2, 2002), the tradition of celebrating these rituals was not born with the events of the year 2002. That is to say, the rituals, the masses, and the choirs are part of their cultural identity, an identity that precedes and transcends their victim status. On the other hand, the nature of the rituals, masses, and choirs has certain meanings and implications that are understood completely only by the members of the community; therefore, it only affects them directly. Thus, given that the performance of these cultural acts *does not have social repercussions for society as a whole, we do not consider them of public relevance either*. As a result, we do not believe that recording and disseminating them would contribute to the public debate surrounding the processes of truth, justice, and reparation that are occurring in Bojayá.

Finally, it should be noted that the communication of these acts *could possibly generate a possible historical and cultural interest* to the extent that it refers to the cultural expressions of one of our country's ethnic communities. However, considering that it is not a prevalent interest in the context of the post-agreement, we consider that the presence of this unique characteristic is not sufficient to define the interference with the rites and the masses offered as legitimate.

The Exhumations and the Transfer of the Exhumed Bodies to Temporary Vaults

The processes for the exhumation and transfer of exhumed bodies can have a triple dimension: (i) as a cultural act of the people of Bojayá; (ii) as an act in the collective reparation process of the people of Bojayá; (iii) as a procedure that is part of the judicial proceedings conducted by the Office of the Attorney General of Colombia. This implies that the characterization of these facts must take into account these three perspectives.

The Inter-American Court indicated in its decision *Case of the Massacres of El Mozote and nearby places v. El Salvador*, that “for the next of

kin, it is very important to receive the bodies of those who died in the massacre, because it allows them to bury them in accordance with their beliefs, as well as to close the process of mourning that they have endured all these years.”⁷⁰ Thus, the exhumations of Bojayá can be seen as private ceremonies by which family members mourn the deceased, pay tribute to them and offer them a dignified farewell. In fact, in our fieldwork, members of the Bojayá community shared with us that, from their perspective, the exhumations were opportunities to reunite with their dead relatives. Later, in the closed discussion that took place on August 16, 2017, one of the representatives of the Bojayá community said that when the massacre was perpetrated no one could give proper burial to the bodies, which meant that the souls were left wandering without being able to rest. For that reason, the exhumation is an essential act to give dignified burials to the bodies and, therefore, to perform the necessary rituals that ensure that the souls of those who died can rest in peace. According to the representative of Bojayá, these acts are also necessary so that their family members can overcome their pain and rejoin the community.

From this perspective, it seems clear that these facts *are part of the family privacy of the Bojayá victims*, because they are linked to both their family relationships and their customs and religious beliefs. As stated above, although this sphere also enjoys an intense constitutional protection, it is likelier that legitimate outside interferences can occur, their acceptability depending—in our opinion—on the fulfillment of the other characteristics in relation to the event or act disclosed or in which the intrusion occurred.

However, the exhumations also take place against the backdrop of a judicial proceeding for the results of this process can reveal answers about the identity of the exhumed bodies and serve as evidence in a potential criminal trial against those responsible for the massacre. For this reason, we consider that the reports or documents about the results of the exhumations should be public, at least from the procedural moment in which “the preventative measure becomes effective or charges are pressed,” as it is information that pursuant to Law 1712 of 2014 (*Ley 1712 de 2014*), is “in the power, custody or possession” of a state entity. This, taking into

70 Inter-American Court of Human Rights. *Case of the Massacres of El Mozote and nearby places v. El Salvador*. Judgment of October 25, 2012, Series C No. 252, para. 331.

account the exceptions to public access to information established in articles 18 and 19 of the same law; that is, the publication of this information cannot, in any moment, violate the rights to privacy, life, health, *habeas data* of a person, or hinder judicial proceedings, among others.

On the other hand, unlike the rituals, masses, and choirs of the Embera Dovidá culture, it appears the exhumations and the transfer of the bodies that were exhumed *do have a relationship with the condition (of victims) that gives notoriety to the holders of the right to privacy*. The massacre of May 2, 2002, was the victimizing event by which members of the community of Bojayá acquired the condition of victims; therefore, the exhumations and the transfer of the bodies of those who died in the massacre have a direct relationship with the condition of victim in this community. In addition, considered as collective reparation acts, these events represent amends to the victims by the State, with the intention of providing them with adequate spaces where they can honor their families and come to terms with their pain.

For that reason, *carrying out these acts has social repercussions*, for they represent the progress of the Colombian State in materializing the commitments acquired with the victims. Similarly, their occurrence is not only relevant for the victims, but also *carries public relevance for Colombian society* in a context where the Colombian State has committed to rectifying its mistakes. Likewise, it is difficult to ignore that *awareness of the occurrence of the exhumations can contribute to the public debate* on the fulfillment of the commitments acquired in the Peace Agreement, and for that reason, *generates a prevailing historical interest*.

However, given that we continue to speak of acts that are part of the family privacy of the victims, this interference must be done with all possible guarantees, in a way that privileges the dissemination of the event over the dissemination of the identity of the people involved (for whom, as we have seen, the protection of their privacy endures). Especially, when the prominence of the people involves capturing expressions of pain and suffering, which, as we have seen, are part of the personal and inviolable privacy of the victims of Bojayá.

The Place Where the Events That Make up the Exhumation Process Occur

For the Constitutional Court of Colombia, public space consists of “those areas intended for circulation, recreation, installation of public services,

preservation of public works, and in general all areas in which collective interests and needs prevail over private ones, in relation to their use and enjoyment.”⁷¹ Conversely, when speaking about semi-public spaces, the Court has referred to those places with relatively open access where different people can meet in certain moments to conduct activities in a shared space.⁷²

Based on these definitions, an unsuspecting observer could assert that most of the acts and events mentioned above take place in spaces that are usually considered public (consider, for example, cemeteries or public thoroughfares) or semi-public (churches or the enclosed places in which the different commemorative events and offers of forgiveness have taken place). Spaces where interference is more admissible than in private (houses) or semi-private spaces (educational institutions).

However, this distinction is not that simple. In this regard, it should be remembered that on December 29, 1997, the Colombian State granted the High Community Council of Medio Atrato (COCOMACIA) the collective title to three municipalities in Chocó, one of which is Bojayá (UNDP 2011).⁷³ As a consequence, in this case we are speaking of collective territories to which black communities hold the title (also called legally lands of the black communities —*tierras de las comunidades negras*).⁷⁴ According to the Ethnic Territories Observatory, “granting a collective title to a black community... is basically the legal recognition of the *right to property* as a development of the fundamental right to territory of the black communities that have ancestrally resided in determined and/or determinable physical spaces” (emphasis added) (2012, 22).

In this regard, it should be taken into account that property is one of the limitations on freedom of movement; the Constitutional Court has stated that in the case of indigenous reservations,

ownership of a reservation is a right-duty, whereby a) for the owner —the indigenous community— it is a subjective right that enjoys the features established in article 669 of the Civil

71 Corte Constitucional de Colombia. Sentencia T-407. Expediente: T-3.348.314. M. P. Mauricio González Cuervo: 31 de mayo de 2012. [Constitutional Court of Colombia. Decision T-407 of 2012. Presiding Judge: Mauricio González Cuervo.]

72 Ibid.

73 PNUD, *Afrocolombianos. Sus territorios y condiciones de vida* (Bogotá: Colección Cuadernos INDH, 2011).

74 See *Ley 70 de 1993*, art. 4.

Code, which states: ownership (which is also called property) is the real right in a corporeal thing, to enjoy and dispose of it arbitrarily, not being against the law or against the rights of others... In particular, it is necessary to have the consent of the owner(s) to circulate in it. In turn, ownership is also a duty because it has a social function. b) For third parties, it is a duty to respect the property of others (article 95.1) and not circulate in it without the consent of the owner.⁷⁵

Consequently, this property right cannot be equated to the right to private property, since it does not allow the exclusive use of the land by one person,⁷⁶ but it could be concluded that it does imply that all the spaces included in it become semi-private. That is, “closed spaces in which a group of people shares an activity and in which public access is restricted,”⁷⁷ and where, consequently, interferences with the right to privacy are less legitimate.

However, it is also important to acknowledge that pursuant to article 6 of Law 70 of 1993 (*Ley 70 de 1993*), collective allocations do not include the ownership of public goods or the urban areas of municipalities. Thus, since the events that are discussed here took place in the urban center of Bojayá, it is not legally possible to assert that they occurred in the titled collective territories of the black communities. On the contrary, the events took place in the cemetery, the church or the public thoroughfare, places that, as was mentioned, should be considered public or semi-public.

75 Corte Constitucional de Colombia. Sentencia T-257. Expediente: T-10.239. M. P. Alejandro Martínez Caballero: 30 de junio de 1993. [Constitutional Court of Colombia. Decision T-257 of 1993. Presiding Judge: Alejandro Martínez Caballero.]

76 According to the Ethnic Territories Observatory, Unlike private property, the right to collective property of black communities includes three elements that integrate it:

- Title in the name of a community and the possibility of disposing of family lands, only between members of the community according to their own guidelines or land management agreements (internal regulations, management plans, *Ley 70 de 1993*).
- The use and enjoyment of the territory, according to their development priorities.
- Control and management by its ethnic authorities. (2012, 23)

77 Corte Constitucional de Colombia. Sentencia T-407. Expediente: T-3.348.314. M. P. Mauricio González Cuervo: 31 de mayo de 2012. [Constitutional Court of Colombia. Decision T-407 of 2012. Presiding Judge: Mauricio González Cuervo.]

What does this mean regarding the acceptance of interferences in the privacy of the people that were present in these places? In principle, in these places, the protection of the right to privacy is limited, because people there expose themselves to being observed. However, it is pertinent to remember that, even in those spaces, the protection of the right to privacy does not disappear. In this regard, it should be remembered that the right to privacy does not protect a physical space, but a personal ontological space that follows the person regardless of where they are. Precisely for that reason,

it must be admitted that certain events must keep their confidentiality and privacy, and not be disclosed, even when they occur in "public places." Thus, for example, the emotional traumatic situation that the victim of an accident or a street assault may experience, or the pain of the mourners in the burial of a family member in the cemetery, must not lose sight of the events protected by privacy, in spite of occurring in the presence of third parties and in places of public access (emphasis added). (Eguigurem 2000, 156)

To that extent, the fact that the events and acts that comprise the process of exhumation, transfer of exhumed bodies, and the ceremonies were conducted in public or semi-public spaces, does not, on its own, exclude the persons that were present from the protection of the right to privacy. However, the scope of this protection will depend on fulfilling the other criteria that were examined above, such as the status of the person (public or private), the degree of privacy, the connection between the event and the activity that caused the person to become public, the social repercussions, its public relevance and the historical, scientific or cultural interest of the events.

Legitimacy of the Limitations of the Narrative

As examined above, the facts that make up the process of exhumation, delivery of bodies, and ceremonies related to the massacre are part of the family privacy of the Bojayá victims. Considering that interferences in this sphere of privacy must be limited and that the moments of suffering and pain experienced by the victims during all these events are part of their personal privacy, the decision to regulate these interference appears appropriate, in principle, to ensure respect for the right to privacy of the Bojayá victims.

However, it cannot be denied that the protection of privacy inevitably implies limiting the rights to freedom of expression and to historical truth in its collective dimension. In light of the latter, it is worth considering if the limitations to these rights that were adopted in the case of Bojayá were legitimate. Against the backdrop of the exhumation process, on May 11, 2017, the Committee for the Rights of the Bojayá Victims (the “Committee”) issued the “Protocol for the Handling of Communications within the Framework of the Peace Process Agreements for Bojayá” (the “Protocol”) (See Annex 2). With this Protocol, the Committee informed the *media*, *academia*, and *outsiders*, that to ensure the respect of their rights, their dignity, their culture and their right to avoid re-victimization: (i) they were asked to “refrain from filming, taking photographs, recording, writing or conducting individual interviews with families, or anyone connected with the *process of exhumation, delivery of bodies, and ceremonies related to the massacre of May 2, 2002, from May 4, 2017 until the end of the exhumations*”; (ii) the information concerning the *process of the agreements signed between the Government and the FARC-EP in relation to Bojayá* should be reviewed, commented and approved for publication by the team of representatives responsible for the Committee’s communications, who would determine what information would be reserved and what information would be public; and that (iii) the Committee, with the support of the Office of the United Nations High Commissioner for Human Rights, would be responsible for recording the videos and taking the photographs of the *process of exhumation, ceremonies, and delivery of bodies* and, afterwards, for deciding which images it considered respected the victims’ dignity, in order to publicly deliver them to the media and interested entities. In addition, it ordered the *governmental and non-governmental organizations* that were involved to arrange any communication related to the processes with the Committee. Finally, the Committee asked the Bellavista Police for their help in enforcing the Protocol in the Bojayá cemetery and the temporary vaults where the victims of the massacre would rest while they were transferred to the forensics unit.

The above allows identifying two measures from the Protocol that could limit the rights to freedom of expression and to historical truth in its collective dimension:

1. The limitation on the production of records of the exhumation process: “refrain from filming, taking photographs, recording, writing or conducting individual interviews with families, or anyone connected with

the process of exhumation, delivery of bodies and ceremonies related to the massacre of May 2, 2002, as of May 4, 2017, to the end of the exhumations” (numeral 1 of section I of the Protocol).

2. The limitation concerning the publication of information related to the “process of the agreements signed between the Government and the FARC-EP in relation to Bojayá”: “the Committee will be the one who determines what information is reserved and what information is public. When information is produced in relation to the process of the agreements signed between the Government and the FARC-EP in relation to Bojayá, it should be reviewed, commented and approved for publication by the team of representatives responsible for the Committee’s communications” (numeral 2 of section I of Protocol).

To determine the legitimacy of the limitations set forth in the Protocol, we will look to the criteria that was outlined in relation to the rights to freedom of expression and information and to historical memory in its collective dimension.

The Requirement that the Limitation of Freedom of Expression Be Established by Law in a Formal and Material Sense

As indicated above, in order to have legitimacy, limitations on the right to freedom of expression and information must have been established by a law in a formal and material sense that defines the limitation in a precise and clear manner; this, to ensure the compatibility of the limitations with the democratic principle. In the case of the Bojayá Protocol, we consider that there are at least two possible interpretations to determine whether or not this requirement is fulfilled.

First, it is possible to approach the fulfillment of this requirement from a *closed interpretation*. In this sense, only the Protocol’s provisions should be analyzed, without considering other norms in the legal system that are relevant in this specific case. In accordance with this interpretation, the restriction would not meet the first requirement of the three-part test for the following reasons. On the one hand, it should be noted that the Committee for the Rights of the Bojayá Victims is—in the words of the Committee—an organizational response that seeks to address

the needs of the Bojayá community in relation to the events that occurred on May 2, 2002, where 79 people lost their lives, so that we can have a group of people in charge of interacting with State entities, international organizations and others in search of

better living conditions and the integral reparation of the community of Bojayá, with an ethnic and territorial focus. (Comité por los Derechos de las víctimas de Bojayá, n.d.)

According to the Committee's web page, it is composed of ten members, which include nine Afro-descendant persons and one indigenous leader.

Considering that the Protocol was issued by a group of citizens that does not have the power to dictate acts of authority or government, it can be said that it does not have the material or formal character of a law. Accordingly, the Protocol can only be considered as a political act, and therefore is not binding in nature.

However, according to the communication sent by the Office of the United Nations for Human Rights to different journalists, academics and civil society organizations to publicize the Protocol, "the Committee [for the Rights of the Bojayá Victims] conceived and drafted the Protocol after discussing it in a *Community Assembly*" (emphasis added). For its part, although the text of the Protocol was written in the name of this committee, it speaks of "decisions made in the *Assembly*" (emphasis added).

If the Assembly they refer to is a general meeting of members of the Bojayá community to decide on common concerns, again, we find ourselves before a political act and not an act of authority or government. This, to the extent that, like the Committee, there is no legal or constitutional source that has vested members of the community with the power to dictate laws in a material or formal sense. On the contrary, if the Protocol expresses the decisions made in one of the general assemblies referenced in article 4 of Decree 1745 of 1995, and that, together with the board, integrates a community council, the discussion would extend to the powers of such council. In this regard, it is important to recall that, by virtue of an ethnic community's right to self-determination, they have the right to self-government.⁷⁸ For this reason, article 3 of Decree 1745 of 1995 established that

a black community can establish itself as a Community Council, which exercises as a legal entity the highest internal administra-

78 Corte Constitucional de Colombia. Sentencia T-693. Expediente: T-2.291.201. M. P. Jorge Ignacio Pretelt Chaljub: 23 de septiembre de 2011. [Constitutional Court of Colombia. Decision T-693 of 2011. Presiding Judge: Jorge Ignacio Pretelt Chaljub.]

tion authority in the Lands of the Black Communities, in accordance with the constitutional and legal mandates that govern it and any other mandate ascribed to it by the internal legal system of each community...The Community Council is composed of the General Assembly and the Board of the Community Council.

To that extent, in regards to this type of assemblies, we would be before what is called an act of government, which in the case of ethnic communities could eventually be equated with a law in the material sense. Notwithstanding, as that is not the case, a closed interpretation requires concluding that the restriction imposed in the Protocol fails the first requirement of the Inter-American human rights system to limit legitimately the right to freedom of expression.

However, in this case, we consider this approach loses sight of the fact that in the legal system there are normative provisions of a legal nature that may be useful to support the legitimacy of the restriction. For that reason, in this document we have decided to adopt an *open interpretation* that is based on the systematic review of the legal and constitutional norms that support the restriction set forth in the Protocol. In effect, we consider that articles 31 and 33 of Law 1801 of 2016 (*Ley 1801 de 2016*), “by which the National Police and Coexistence Code is established” (the “Police Code”), justify the restriction of numeral 1 of section I of the Protocol, pursuant to which third parties must “refrain from filming, taking photographs, recording, writing or conducting individual interviews with families, or anyone connected with the exhumation process, delivery of bodies and ceremonies related to the massacre of May 2, 2002, as of May 4, 2017, to the end of the exhumations.” These rules protect the right to privacy in relationships between individuals and “serve as a general framework for interpreting behaviors related to potential infringements on privacy” (Upegui 2017, 11); therefore, they also justify the cooperation of the National Police in the exhumation process, in order to protect the privacy of the Bojayá victims.

Specifically, article 31 of the Police Code states that “the right to *peace and respectful relationships* is the essence of coexistence. Therefore, it is fundamental to prevent the occurrence of behaviors that affect the tranquility and privacy of people” (emphasis added). Furthermore, article 33 mentions the behaviors that affect the tranquility and respectful relationships of people and, therefore, should not be realized:

The following behaviors affect the tranquility and respectful relationships of people and therefore should not be affected: ... 2. In public spaces, places open to the public, or ones that being private transcend to the public sphere: a) disrespect of the rules typical of public places such as *funeral parlors, cemeteries, clinics, hospitals, libraries, and museums, among others* (emphasis added).

This last rule shows that the State has already regulated the right to privacy in places such as cemeteries and funeral parlors, which are spaces more akin to the area where the exhumations were carried out. Thus, if articles 31 and 33 of the Police Code are read together, it can be surmised that disrespecting the rules that apply in visitation rooms and cemeteries infringes the right to privacy —understood as the protection of tranquility— and, therefore, justifies the intervention of the National Police in exceptional cases. Likewise, we consider that articles 31 and 33 of the Police Code should be read together with paragraph 2 of article 25 of Resolution 5194 of 2010 of the Ministry of Social Protection “regulating the provision of cemetery, burial, exhumation, and corpse cremation services.” Pursuant to this norm, “for the exhumation process, the presence of minors and *people not authorized for the exhumation process*” is prohibited (emphasis added).

The review of these norms allows asserting that the victims and the authorities in charge of carrying out the exhumation process have the power to restrict the access of certain people that may hinder the process and threaten the peace of mind of those present. In the case at hand, the restriction does not refer to the access of people, but to the use of certain devices and the performance of certain acts, such as taking photographs or recording videos. As the members of the Committee stated in our field visit, it is not about limiting journalists’ access or coverage of the exhumations. Their objective is that journalists be present as attendees, accompanying the victims and respecting their grief, and narrate what happened afterwards.

Consequently, we consider that the limitation contained in paragraph 1 of section I of the Protocol is aimed at safeguarding the tranquility of the victims in the exhumation process. This, in turn, means respecting the ancestral beliefs and practices of the community of Bojayá that relate to the journey towards death of their relatives. In this sense, the provision in the Protocol reflects the desire of the victims that third parties respect the procedures that carry strong emotional significance for the

community. This expression of the will of the community is supported by norms of legal and regulatory nature that had determined previously that there should be a greater expectation of privacy and tranquility in spaces such as cemeteries (understood in a broad sense) and in exhumation processes, due to the meaning of these processes have for the attendees.

Based on this argument, we consider that the measure established in paragraph 1 of section I of the Protocol is not an autonomous limitation. On the contrary, it is an application of the rules contained in articles 31 and 33 of the Police Code. Therefore, we consider that the existence of these rules and their applicability to this case are sufficient to conclude that the first requirement of the three-part test is satisfied. However, this does not mean that the National Police has the power to limit freedom of expression in any situation or context. In this case, its intervention is justified by the specific legislative rules of the Police Code that we have mentioned and by the protection of the rights of the victims, who expressed their will to restrict certain types of coverage that may be disrespectful in the context of the exhumations.

Nonetheless, we would like to make a precision: the arguments presented here only apply to the measure contained in paragraph 1 of section I of the Protocol. With respect to the second restrictive measure, established in paragraph 2 of section I of Protocol,⁷⁹ we could not identify a law in a formal and material sense that was being applied when it was set forth in the Protocol or that supported it in any way.

Finally, we do not ignore the existence of other interpretations in relation to the application of the three-part test for evaluating limitations on freedom of expression.⁸⁰ However, we consider that the two described positions are the most relevant approaches for the case of the Bojayá Protocol.

79 The text of this paragraph is as follows: “The Committee will be the one who determines what information is reserved and what information is public. When information is produced in relation to the process of the agreements signed between the Government and the FARC-EP in relation to Bojayá, it will be reviewed, commented and approved for publication by the team of representatives responsible for the Committee’s communications.”

80 For example, an approach proposed by lawyer Juan Carlos Upegui suggests that the limitation of freedom of expression established in the Protocol does not require fulfilling the three-part test of the Inter-American human rights system because, in this instance, the limitation is not directed at enforcing the “subsequent responsibilities” referred to in article 13 of the American Convention on Human Rights. For Upegui, “the purpose of the test is to avoid that the application of subsequent liabilities, which are explicitly permitted

The Compelling Objective That Must Be Sought by the Limitation to Freedom of Expression

The Protocol and the limitations in it were aimed at fulfilling one of the compelling objectives included in section a) of the second paragraph of article 13 of the American Convention, namely: respect for the rights of others. As indicated in the text of the Protocol, it is directed at protecting the dignity, ethnic diversity and the right to avoid re-victimization of the Bojayá victims. Additionally, in our fieldwork, we were able to conclude that the main objective of the Protocol was to allow the relatives of the victims to mourn in *private* and reunite with their dead relatives in accordance with their *culture*, which necessarily implied the absence of any type of recording that could disrupt the location of the corpses. In this regard, it should be noted that according to the leaders of the Committee for the Rights of the Bojayá Victims, culturally, the town's residents attribute the absence of the corpses in the places that were initially explored to the presence of the cameras. For this reason, the communications team of the Committee, which was the only one that received authorization to record the process of the exhumations, ceremonies, and delivery of bodies, had to go through a "process to harmonize" with the souls that were present.

The Appropriateness of the Measure That Limits the Right to Freedom of Expression

Based on the above considerations it seems clear that the prohibition of recording the process of the exhumations, ceremonies and delivery of bodies (through filming, photographs, recordings, interviews or note-taking) and of publishing information on the exhumations, provided for in paragraphs 1 and 2 of section I of the Protocol, were suitable for protecting

by the Convention, does not result in the annulment, in practice, of freedom of expression" and, in that sense, "the general rule 'any limitation to freedom of expression must be found...in a law' is directed at the law that establishes 'in a transparent manner the causes of subsequent liability.'" Although we respect this position, we do not adopt it in this text, since we consider that the restriction contained in the Protocol must be submitted to the three-part test. In effect, the Constitutional Court has applied this test to restrictions that limit freedom of expression but do not necessarily imply subsequent responsibilities. In Decision T-543 of 2017, the Court examines a case in which the Superintendency of Industry and Commerce (SIC) ordered that the broadcast of a television commercial related to the risks of drinking sugary drinks be stopped immediately. In this decision, the Court applies the tripartite test to analyze the restriction imposed by the SIC, even though it did not consider subsequent liabilities.

the rights, dignity, culture and right to avoid re-victimization of the Bojayá victims. This to the extent the prohibitions effectively led to allowing the relatives of the victims to (i) attend the process of exhumations, ceremonies, and delivery of bodies; (ii) mourn in private; (iii) reunite with their relative's souls without any type of interference; and (iv) ensure that their culture and customs were adequately presented to outsiders.

The Necessity of Measure That Limits the Right to Freedom of Expression

To determine whether the Protocol is necessary, we will now analyze each of the specific measures it includes.

Limitation of the Recording of the Exhumations: Measure Established in Paragraph 1 of Section I of the Protocol

We consider that no other measure would have been equally effective and less restrictive of the rights to freedom of expression and information and to historical memory, since the admission of any type of activity to document the events would have implied—in accordance with the cosmovision of the residents of Bojayá—the improper disturbance both of the mourning of the relatives, and of the transit of the victims' souls. Likewise, the adoption of any other measure that was less onerous for the rights to freedom of expression and information and historical memory would have implied the violation of the right to reparation of the victims. In this regard, it is worth noting that the processes of the exhumations, ceremonies, and delivery of bodies took place within the framework of the collective reparation of the community of Bojayá. According to the Directorate of the National Specialized Office of the Prosecutor for Transitional Justice, the exhumation process of the Bojayá massacre victims

involves previously agreed to work, discussed and approved by the Committee for the Defense of the Bojayá Victims (sic), their forensic advisors Equitas, the National Institute of Legal Medicine and Forensic Sciences, the United Nations Office for Human Rights based in Quibdó, the Presidential Council for Human Rights, the Unit for the Comprehensive Reparation to the Victims (UARIV), which currently advances a comprehensive collective reparation plan in that community, which includes the process of exhumation of the victims of Bojayá.⁸¹

81 Directorate of the National Specialized Office of the Prosecutor for Transitional Justice. Official communication dated September 30, 2017.

The implementation of reparation measures must be agreed with the victims because only they know what is the best way of compensating for the damages they have suffered. In addition, since they are victims of serious human rights violations and are part of an ethnic community,⁸² the reparation measures should have a differential approach that considers the importance of their cosmovision and customs. Therefore, if within the framework of the implementation of the reparation measures, the community of Bojayá considered that indiscriminate recording by third parties limited the reparation potential of the exhumations, the adoption of a different measure would have implied ignoring their will.

Further, the participation of victims in the decisions involving reparation mechanisms acquires greater importance in the case of collective reparations that are a consequence of serious human rights violations. Collective reparations are those “obtained through...satisfaction measures of a symbolic nature, or measures that are projected in the community.” It follows that collective reparations are contextual; that is, because of their symbolic nature, they cannot be replicated exactly from one community to another since they relate to the practices and customs of specific each community. In this sense, the process of exhumations, ceremonies, and delivery of remains in Bojayá can be considered as reparation measure in a collective sense, since it seeks to repair the pain of a people who saw their relatives die and did not have the opportunity to give them a burial. In this sense, the participation of the Bojayá community in the decision of the type of reparation and the way in which the reparation measure should be implemented is essential for ensuring that the reparation will fulfill its purpose. Furthermore, excluding the participation of the victims in the process to decide and implement the reparation measures could have resulted in their re-victimizing, since it would have led to the implementation of a measure that was not suitable for guaranteeing their rights.

Similarly, the participation of victims in the determination and implementation of reparation measures becomes more important when dealing with communities composed largely of ethnic minorities. In the first place, the right to prior consultation must be guaranteed to ethnic groups “when it is proven that the legislative, administrative or corresponding

82 In several public statements, the Committee for the Rights of the Bojayá Victims speaks on behalf of the community as a people composed of Afro-Colombian and indigenous persons.

project affects them directly.” In relation to this, it is relevant to mention that Convention 169 of the International Labor Organization (ILO) recognizes the autonomy and participation of indigenous and tribal peoples as fundamental principles for guaranteeing the rights of these population groups. Specifically, paragraph a) of article 5 mentions that “the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals.” And, in the same vein, paragraph a) of article 7 states that “in applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.”

Furthermore, it has been recognized that the reparations process for ethnic minorities should have a special focus, because “due to their particularities, imaginaries, stereotypes, atavistic rejection factors, exclusion, and discrimination, [ethnic minorities] are especially vulnerable and have suffered or maintain processes of marginalization and limited guarantees of their rights, and the armed conflict impacts them in a differentiated and disproportionate manner” (Unidad de Atención y Reparación Integral a las Víctimas 2011). Finally, it must be borne in mind that “only the peoples...know how they have been affected by different events; therefore, the definition of the damages and the reparation measures should originate in the peoples themselves and their organizations” (Dejusticia and ONIC 2011).

Finally, the need for this measure also arises from the fact that exhumations are a procedure that is part of a judicial process. In effect, any process “related to the exhumation, identity verification and delivery of bodies is part of the criminal process currently being conducted by the Prosecutor 37 for Human Rights and IHL in Medellín, in relation to the Bojayá massacre, which is currently in the preliminary investigation stage.”⁸³ As enshrined in the Minnesota Protocol for the Investigation of Potentially Extra-Legal, Arbitrary or Summary Executions⁸⁴ (the “Min-

83 Directorate of the National Specialized Office of the Prosecutor for Transitional Justice. Official communication dated September 30, 2017.

84 This protocol is a soft law instrument created by the Office of the United Nations High Commissioner for Human Rights (OHCHR). It is applicable to all investigations conducted by state authorities that are related to the investigation of possible extrajudicial executions. It is available at <http://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf>

nesota Protocol”), the transparency of judicial proceedings should be the general rule in judicial investigation procedures. However, paragraph 33 of this Protocol states that this general rule has exceptions. Thus, the transparency or publicity of the information related to judicial procedures can be limited if it seeks a legitimate purpose “such as the protection of the privacy and the safety of victims, which ensures the integrity of the investigations.”⁸⁵ In this case, the exhumation process in Bojayá carries a special meaning for the community and its ancestral culture, because it is necessary that the bodies of their relatives are laid to rest and buried with dignity. It is, then, an event that is part of their family privacy, a sphere that accepts interferences but only as an exception. For this reason, we believe that in accordance with article 33 of the Minnesota Protocol, a restriction of the publicity of exhumations —understood in the context of judicial proceedings— is necessary in this case.

Limitation on Publishing Information Related to the “process of the agreements signed between the Government and the FARC-EP in relation to Bojayá”: Measure Established in Paragraph 2 of Section 1 of the Protocol

By contrast, the limitation set out in paragraph 2 of section I of the Protocol, which establishes the committee’s obligation to review, provide feedback and approve the information before its publication,⁸⁶ appears to be a different case. First, we consider that this limitation does not refer exclusively to the recording of information, but in general, to any production of information. Similarly, it does not refer exclusively to the process of exhumations, ceremonies, and delivery of bodies, but in general to the “process of the agreements signed between the Government and the FARC-EP in

85 The complete text of this paragraph is as follows: “33. Any limitations on transparency must be strictly necessary for a legitimate purpose, such as protecting the privacy and safety of affected individuals ensuring the integrity of ongoing investigations, or securing sensitive information about intelligence sources or military or police operations. In no circumstances may a state restrict transparency in a way that would conceal the fate or whereabouts of any victim of an enforced or unlawful killing, or would result in impunity for those responsible.”

86 “2. The Committee will be the one who determines what information is reserved and what information is public. When information is produced in relation to the process of the agreements signed between the Government and the FARC-EP in relation to Bojayá, it will be reviewed, commented and approved for publication by the team of representatives responsible for the Committee’s communications.”

relation to Bojayá.” To that extent, it would eventually include events like public acts commemorating the massacre, meetings between the Bojayá community and state representatives regarding the coordinating and accountability of the reparation processes, or the reconciliation ceremony with the FARC that took place a few months ago. Consequently, and precisely because of the amplitude of its scope, it is a measure that, although suitable for the attainment of the above-mentioned compelling objectives, is not necessary.

In addition, the implementation of a pre-publication filter for any type of information that is produced in relation to the process of the agreements signed between the Government and the FARC-EP on Bojayá is unnecessary to achieve the protection of the rights of the victims. As noted earlier, it was enough to ban the recording of exhumations, ceremonies, and the delivery of bodies. To that extent, it can be said that there was an alternative measure that was equally effective for achieving the compelling objectives sought by the Committee but was less harmful to the rights to freedom of expression and information and to historical memory.

The Proportionality, in a Strict Sense, of the Measure that Limits the Right to Freedom of Expression

Once again, to establish the proportionality of the Protocol we will now analyze each of the specific measures that it includes.

Limitation of the Recording of the Exhumations: Measure Established in Paragraph 1 of Section I of the Protocol

The prohibition to record did not imply per se the prohibition on informing about the process of exhumations, ceremonies, and the delivery of bodies. As the leaders of the Committee pointed out to us, the presence of the media, employed or freelance journalists and communicators, academics, and other persons from outside the community was allowed in every stage of the process, as long as they were “in the context of the activity.” This implied that they incorporate themselves into the activities respectfully, “without filming, taking photographs, recording, writing or conducting individual interviews with families.” According to the members of the Committee, this requirement did not stop journalists and the other outsiders from reporting at a later point in time the events they had witnessed based on the experience they had and not the record they had made of the process.

Thus, the recording ban exists as a strictly proportional measure, which does not disproportionately sacrifice the right to freedom of expression and information or the right to historical memory. Moreover, keeping in mind that pursuant to paragraph 3 of section I of the Protocol, the Committee committed to creating the video and photographic record of the process of exhumations, ceremonies, and delivery of bodies, and subsequently delivering the images considered respectful of the dignity of the victims to the media and other interested parties.

Limitation on Publishing Information Related to the “process of the agreements signed between the Government and the FARC-EP in relation to Bojayá”: Measure Established in Paragraph 2 of Section 1 of the Protocol

We consider that the obligation of the Committee to provide feedback and review the information before it is published imposes an excessive burden on the right to historical truth. In this regard, it should be noted that, from a comparative perspective, one of the most important criticisms of extrajudicial truth-seeking mechanisms is the aim to unify all voices in an “official” truth that silences some perspectives and viewpoints. In this sense, there is not one but many truths and one of the demands made of truth commissions should be the reconstruction and narration of these truths, even when they disagree with each other. Therefore, the right to historical truth is limited if the only versions of the events that are told are the ones that were previously filtered by the Committee, which therefore, will inevitably share the same perspective of what happened.

On the other hand, the measure in question is openly disproportionate to the right to freedom of expression and information because, as we will see below, it constitutes prior censorship. According to the Inter-American Court,

prior censorship implies control and veto power over an expression before it has been disseminated, preventing both the individual, whose expression has been censored, as well as society at large, from exercising their right to information. In other words, prior censorship produces “a radical suspension of freedom of expression by preventing the free flow of information, ideas, opinions or news.”

In our opinion, the filter that the Committee intended to establish prevents the free circulation of the information that is produced, which

would eventually prevent certain information from reaching the public. Consequently, it imposes an excessive, even illegal burden on (i) the right to freedom of expression of the media, employed or freelance journalists and communicators, academics, and other outsiders interested in narrating the process of the agreements signed between the Government and the FARC-EP in relation to Bojayá, and (ii) the right to freedom of information of society as a whole. For these reasons, we believe that this measure is disproportionate in the strict sense.

In conclusion, we believe that the limitations set forth in the Protocol should be analyzed separately in order to assess if they constituted legitimate limitations to the rights to freedom of expression and information and to historical truth. In doing so, we found that the prohibition of recording the process of exhumations, ceremonies, and delivery of bodies constituted a legitimate limitation to those rights. On the contrary, we consider that the obligation that the Committee to review, provide feedback and approve the information related to the process of the agreements signed between the Government and the FARC-EP in relation to Bojayá before it is published is illegitimate, since it was not established by or based on any law in a formal and material sense, and it was unnecessary and disproportionate.

SUB-RULES THAT ARE HELPFUL FOR PROTECTING THE RIGHT TO PRIVACY WITHOUT IGNORING THE RIGHTS TO FREEDOM OF EXPRESSION AND TO HISTORICAL TRUTH

The information and analysis presented up to now correspond to a set of legal considerations that originate in a process of weighing rights that has made it possible to establish that the implementation of instruments such as the “Protocol for the Management of Communications within the Framework of the Peace Process Agreements for Bojayá” may result in limitations imposed on the rights to freedom of expression and information and to historical truth in its collective dimension. Notwithstanding, these limitations can be legitimate in some cases because they are necessary to guarantee the rights of the victims, and illegitimate in others because they are unnecessary or disproportionate. In any event, these rights may be exercised so long as they do not constitute an arbitrary intrusion in the victims’ right to privacy, which in this case are the victims of the Bojayá massacre.

In this section of the text, we concentrate on formulating some sub-rules derived from the normative framework described in the first section and the Bojayá case study. Generally used in the context of judicial decisions, the sub-rules are abstract statements derived from the decision of a specific case and that allow applying a similar solution to analogous situations. In this case, we examine the use of the sub-rules in the judicial arena, in order to present formulations that can serve as weighing guidelines that are directed at victims, journalists, and third parties interested in covering events related to the armed conflict and the transition to peace.

However, we wish to clarify that these sub-rules are not intended for imposing restrictions on the manner in which certain events or acts are covered. On the contrary, these sub-rules are intended to serve as guidelines for communities and public authorities that in the future wish to issue communication protocols or instruments to protect the privacy of the victims in certain acts as well as for journalists, academics, and third parties who decide to self-regulate when covering these events.

Finally, it should be clarified that these sub-rules are intended, mainly, for the coverage of events related to the transition to peace. Although they can be applied to the narration of armed conflicts contexts, we consider that this type of narrative needs other criteria that adapt to the urgency of the events during war. Thus, these sub-rules do not suffice for the narration and coverage of the armed conflict. In part, because it is the pace of the transition to peace that allows us to approach the customs of victims' communities, understand their preferences and apply more reflective self-regulation exercises that respect their culture.

The Victims of the Armed Conflict Are Not Public Figures

As the Constitutional Court has stated, persons that are considered public have a lowered expectation regarding the protection of their privacy; however, this does not mean that they have waived their right because it is inalienable. When we speak of public figures we refer to people who have *voluntarily* chosen positions, tasks or professions that imply greater exposure to the public. Public officials, for example, can be considered public figures, because by carrying out their office they have a more direct relationship with citizens.

In the case of the victims, due to the media value of the events related to the armed conflict, they have lost the anonymity that characterizes an ordinary person; this implies that the facts and acts that involve them have a public interest nature. However, does the interest generated by the lives of the victims of the armed conflict imply that they have the same privacy expectation as public figures? The victims did not voluntarily choose to be the focus of public attention and interest; on the contrary, what put them in the public eye are the victimizing events they had to suffer. For this reason, we have decided to refer to the victims of the armed conflict as *notable persons*; however, it does not follow from this characterization that their expectation of privacy is comparable to that of a public person. Imposing such a burden on them would be disproportionate and re-victimizing, since it would legitimize the message that, in addition to depriving them of their dignity and integrity, the conflict can also deprive them of their privacy.

When the Events or Acts Involve Private Feelings It Must Be Presumed That They Are Part of the Personal Privacy of the People Who Are Present

As we examined above, there are different degrees of privacy: personal, familial, social and professional. Personal privacy refers specifically to the most private aspects of an individual's life and corresponds to the most intimate and personal feelings, thoughts and relationships. In this sense, personal privacy allows the person to freely express their opinions and emotions, "with no other limitations than the rights of others and the legal system."⁸⁷ For this reason, the degree of protection afforded this type of privacy is very broad, so that only exceptionally are intrusions considered legitimate.

It must be presumed that the private feelings of the armed conflict's victims —like the exhumations of Bojayá— are part of their personal privacy. Therefore, they must be protected to a greater degree, since the interference of third parties could violate the victims' right to privacy more severely and cause greater damage.

87 Corte Constitucional de Colombia. Sentencia C-640. Expediente D-7999. M. P. Mauricio González Cuervo: 2010. [Constitutional Court of Colombia. Decision C-640 of 2010. Presiding Judge: Mauricio González Cuervo.]

When the Victims Belong to a Recognized Ethnic Minority the Notion of Privacy of Their Cosmivision Should Be Taken into Account

Respect for multiculturalism and the cultural practices of different groups is enshrined in article 7 of the Political Constitution, pursuant to which “the State recognizes and protects the ethnic and cultural diversity of the Colombian Nation.” From this brief article derives the acknowledgment that ethnic minorities have special rights, such as the right to subsistence, the right to ethnic and cultural identity, the right to territory and the collective ownership of land, and the right to prior consultation.⁸⁸

The grounds for these rights is the awareness that there are minorities that do not share the postulates of the West concerning culture, customs and the how to live as a society.⁸⁹ For this reason, the concept of *privacy* cannot be imposed uniformly in the terms that Western society has understood it, because ethnic minorities can conceive privacy in a different way due to their ancestral practices. Therefore, the criteria presented in Section I of this text to determine whether an interference with privacy is legitimate or not should be applied on a case-by-case basis, taking into consideration the content that each ethnic group decides to give to this concept. Imposing notions that do not conform to their cosmivision can constitute a re-victimizing event with a foreign undertone for it would overlook the basis for the recognition of the rights that ethnic minorities hold today.

When Press Coverage Refers to Acts That Involve the Guarantee of the Victims’ Rights to Truth, Justice, Reparation, and Non-Repetition, It Cannot Limit the Guarantee of These Rights

The coverage of events or acts related to the armed conflict and the transition to peace that involve victims must respect their rights to truth, justice, reparation, and non-repetition of violent acts. The victims of the internal armed conflict are the holders of these rights, for having directly or indirectly suffered the harms caused by the war. A first analysis does not show

88 Corte Constitucional de Colombia. Sentencia T-052. Expediente T-4.445.122. M. P. Gabriel Eduardo Mendoza Martelo: 3 de febrero de 2017. [Constitutional Court of Colombia. Decision T-052 of 2017. Presiding Judge: Gabriel Eduardo Mendoza Martelo.]

89 For a more in depth view of this idea, *see* de Sousa Santos (2010) and United Nations High Commissioner for Refugees (UNHCR) (2007).

clearly how the coverage by third parties of certain acts or events that involve the victims may violate their rights to truth, justice, reparation, and non-repetition. However, the case of Bojayá is a good example for demonstrating why certain third-party coverage, documentation, and narration of the conflict and the transition may threaten the victims' right to privacy.

If additionally, as is the case in Bojayá, coverage involves recognized ethnic minorities, the reparation programs must be discussed and agreed to beforehand with the community. The capacity to do this is part of the essential core of collective reparation programs when applied to ethnic minorities. That is to say, the reparative power of the measure depends entirely on it being carried out in the manner that the community of victims desires. Otherwise, the collective reparation program loses its reparative effect and does not fulfill its purpose. Therefore, the fact that the victims of a community decide that, out of respect for their customs and culture, they want the reparations program to be carried out without the presence of third parties is an important criterion when analyzing the conflict between privacy, freedom of expression and the right to historical truth of society.

The Plurality of Truths About the Conflict and the Transition to Peace Must Be Guaranteed in All Cases

One of the fundamental components of the right to the truth is the plurality of voices it can bring together. The narration of historical truth, in pursuit of constructing a collective memory, cannot be officialized or monopolized in a single voice, since many others would necessarily be silenced. On the contrary, historical truth must be narrated considering the different perspectives of those who lived through the conflict and the transition to peace, even when they disagree with each other: this is the only way of guaranteeing a record that faithfully reflects the complexity of the war and transition processes. Thus, it must be recognized that external actors such as journalists and academics are important for guaranteeing the coverage, analysis, and visibility of the conflict and the transition to peace. In particular, journalists have the task of encouraging public debate on the facts of the conflict and generating a national reflection on them (Hodzic and Tolbert, 2016).

Therefore, the right to historical truth is limited if there is only one version of the facts and the existence of this unique version is not the result of a force majeure situation, but of a previously deliberated restriction. It

should kept in mind that not all the events or acts that directly involve the victims are relevant for forging a collective memory in society. However, in the face of events or acts that do possess that potential, the plurality of positions and perspectives must be guaranteed.

The Regulation of the Coverage of the Events of the Armed Conflict and the Transition to Peace Cannot Imply Prior Censorship

As described, prior censorship —understood as any preventive measure that limits the right to freedom of expression—⁹⁰ is prohibited by the Political Constitution (article 20) and the international instruments that apply in Colombia, such as the American Convention on Human Rights (article 13.2). The rejection of prior censorship, as the Constitutional Court has stated, occurs because this measure “corresponds to [an] activity of various authorities to prevent or seriously obstruct the dissemination of a message or the publication of a certain content. It is a preventive control measure, leaving the publication or issue subject to prior authorization from the authority.”⁹¹ That is, limitations on freedom of expression should occur *a posteriori* and not *a priori*.

The Bojayá case is an illustrative example. The Protocol created by the Committee contained sections that could be interpreted as prior censorship since they conditioned the publication of any third-party journalistic communication to the Committee’s authorization. Therefore, it is important to keep in mind that, in future cases with similar characteristics, the communication protocols or instruments that are created to protect the privacy of victims in certain acts cannot contain provisions that limit or condition in a general, disproportionate and prior manner any demonstration of freedom of expression.

Similarly, these protocols must be both formally and materially provided for by law in order to be enforceable. Therefore, in cases where it is considered imperative to protect legal rights other than the right to freedom of expression, a greater involvement of state entities (including ethnic administrative authorities) is necessary, which ensures that the

90 Corte Constitucional de Colombia. Sentencia C-592. Expediente D-8908. M. P. Jorge Iván Palacio: 25 de julio 2012. [Constitutional Court of Colombia. Decision C-592 of 2012. Presiding Judge: Jorge Iván Palacio.]

91 Ibid.

possible limitations are legal and binding; limitations that, in any case, must comply with the suitability, necessity, and proportionality requirements that were described.

Finally, it must be ensured that in all cases, the aforementioned limitations are promptly disclosed, so that journalists, academics, and third parties interested in covering the events of the transition to peace have enough time to adapt to the requirements that have been established.

RECAPITULATION

The armed conflict and the transition to peace are contexts that must be narrated as part of a process of reconstructing the collective memory that seeks to commemorate the victims and the non-repetition of violent acts. However, the narration of the armed conflict and the transition to peace can lead to abusive interference with the privacy of the victims, which results in their re-victimization in some cases.

For this reason, the research presented in this text was directed at answering the question of how to protect the victims' right to privacy, without ignoring or unjustifiably restricting the rights to freedom of expression and information and to historical truth of society. To this end, we conducted a study of the content of the conflicting rights and formulated criteria to analyze the cases in which interference with privacy and limitations on freedom of expression and historical truth are legitimate. Subsequently, we applied these criteria to a particular case study: the coverage of the exhumations of those who died in the Bojayá massacre. At this point, we concluded that the Communications Protocol created by the Committee for the Rights of the Bojayá Victims contained some limitations on freedom of expression and the right to historical truth that can be considered legitimate, while others are unnecessary and disproportionate.

Throughout this analysis, we mentioned the importance of respecting the concept of privacy held by an ethnic group such as the Bojayá community. In the same vein, we criticized the imposition of a Western notion that ignores multiculturalism and contradicts the recognition of ancestral cultural practices, which must be preserved and protected. Further, we rejected prior censorship in all cases. Finally, we mentioned some sub-rules derived from both the abstract analysis of the conflicting rights and the Bojayá case study. These sub-rules can be useful in future and similar cases, in which the coverage of events or acts related to the armed conflict or the transition to peace threatens to violate the privacy of the victims.

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ANNEXES

Annex 1. Comparative exhumation and burial processes in peace transitions

Argentina: Victims of the Military Dictatorship (1976-1983)	
Exhumation and Burial Methods	Sources
<p>Context: politicization of the exhumations and burials</p> <ul style="list-style-type: none"> ▪ The excavations and the burials gave rise to controversy in the population: since many victims had disappeared, the exhumation was evidence of their death and therefore complicated cooperation between the Government and the relatives of the victims (Crossland 2000). ▪ In addition, some of the victims' relatives viewed the exhumation and the return of the remains as an exoneration of responsibilities: a deliberate strategy of the new democratic Government to put and end to a dark period in history and avoid seeking punishment for the perpetrators. "Each burial and ceremony incrementally brings the nation as a whole closer to closure, while leaving those responsible unchallenged" (Crossland 2000, 155). 	<ul style="list-style-type: none"> ▪ Crossland, Zoë. 2000. "Buried lives: Forensic Archeology and the Disappeared in Argentina." <i>Archaeological Dialogues</i> 7(2): 146-159. ▪ Robben, A.C.G.M. 2015. "Exhumations, Territoriality, and Necropolitics in Chile and Argentina." In <i>Necropolitics: Mass Grave and Exhumations in the Age of Human Rights</i>, 53-75.

Bosnia: Victims of the Srebrenica Massacre (1995)	
Exhumation and Burial Methods	Sources
<p>Context: politicization of the exhumations and burials</p> <ul style="list-style-type: none"> ▪ The exhumations and commemorations took place within the framework of political opportunism: "And the Bosniak political and religious leadership uses the opportunity of the commemoration not only to address their Bosnian Serb and Serbian neighbors, but also to speak directly to the international community present among the diplomatic corps, aid agencies, and media representatives." (Wagner 2008, 193).ⁱⁱ 	<ul style="list-style-type: none"> ▪ Fondebrider, Luis. (2015). Forensic anthropology and the investigation of Political violence. <i>Necropolitics: Mass Graves and Exhumations in the Age of Human Rights</i>, 41. ▪ Pollack, Craig Evan. (2003). Burial at Srebrenica: Linking place and trauma. <i>Social science & medicine</i>, 56.4, 793-801.

Exhumation and Burial Methods	Sources
<ul style="list-style-type: none"> ▪ The presence of the media also enabled this political opportunism. When analyzing a photograph of a local politician crying over the remains of his father, Wagner argues that “with the municipal elections only three months away, his personal grief made for good publicity – regardless of whether he had intended the exposure” (Wagner 2008, 209). <p>Context: media presence</p> <ul style="list-style-type: none"> ▪ The transfer of the bodies and the commemoration were “both private and public.” (Wagner 2008, 206) Journalists had a notable presence in the commemoration. Emotional scenes, including loud crying, were recorded and used by journalists (208). Even when religious/cultural norms came into play, the media seemed to be exempt: “In the VIP section, the women left the immediate area at the request of the Muslim men about to pray. The only exceptions were the female media representatives, who remained within their ranks, operating cameras and microphones to capture the sights and sounds of the religious service” (224). ▪ Some of the events of the commemoration of the bodies were more public than others. For example, the night before the July 11 commemoration, “most of the members of the media had already left, since there was little newsworthy in the quiet scenes of prayer” (Wagner 2008, 211). 	<ul style="list-style-type: none"> ▪ Pollack, Craig Evan. 2003. “Burial at Srebrenica: Linking Place and Trauma.” <i>Social Science and Medicine</i> 56(4): 793-801. ▪ Pollack, Craig Evan. 2003. “Intentions of Burial: Mourning, Politics, and Memorials Following the Massacre at Srebrenica.” <i>Death Studies</i>. ▪ Wagner, Sarah. 2008. <i>To Know Where He Lies: DNA Technology and the Search for Srebrenica’s Missing</i>. University of California Press.

Cambodia: Systematic Homicides by the Khmer Rouge (1975-1979)

Exhumation and Burial Methods	Sources
<p>Context: politicization of the exhumations and burials</p> <ul style="list-style-type: none">▪ Cambodia's killing fields serve as both cemeteries and commemorative sites dedicated to the preservation of memory. However, the motives behind their design are strongly inspired by the current policy: "human remains serve as a powerful tool of legitimization for postgenocide regimes, particularly those that wish to portray themselves as liberating forces" (Lesley 2015, 216).	<ul style="list-style-type: none">▪ Lesley, Elena. 2015. "Death on Display: Bones and Bodies in Cambodia and Rwanda." In <i>Necropolitics: Mass Graves and Exhumations in the Age of Human Rights</i>, 213-239

Chile: Forced Disappearances during the Military Dictatorship (1973-1990)

Exhumation and Burial Methods	Sources
<p>Context: the Government's lack of legitimacy in the search for disappeared persons</p> <ul style="list-style-type: none">▪ In 2006, an identification and exhumation process was started after several governments had forgotten to direct efforts towards the search of the bodies and the judicialization of those who were responsible, which caused incorrect identifications and lack of accountability. Had it not been for the pressure exerted by society, governments never would have really focused on pursuing these procedures (Robben 2015, 70).	<ul style="list-style-type: none">▪ Robben, A.C.G.M. 2015. "Exhumations, Territoriality, and Necropolitics in Chile and Argentina." In <i>Necropolitics: mass grave and exhumations in the age of human rights</i>, 53-75.

Spain: Victims of the Spanish Civil War (1936-1939)

Exhumation and Burial Methods	Sources
<p>Context: lack of legitimacy in the exhumation and burial process</p> <ul style="list-style-type: none"> ▪ Due to “longstanding institutional and legal abandonment” (Ferrándiz 2013), Spain did not have any official exhumations of Republican victims until the year 2000. These exhumations renewed a debate that had been avoided for many years (Ferrándiz 2013). ▪ The historical memory associations have issued criticisms against the processes of exhumation carried out by the State: “at a national level, for instance, important groups such as Asociación Nacional para la Recuperación de la Memoria Histórica (Association for the Recovery of Historical Memory) and Foro por la Memoria (Forum for Memory) have differed in their views around exhumation processes. For the Asociación Nacional para la Recuperación de la Memoria Histórica, the exhumation and reburial of corpses is directly connected to the wishes of relatives and their forms of mourning. For Foro por la Memoria, these acts constitute a way to vindicate, first and foremost, the victims’ political identities and histories. (Aregueta-Toribio 2015, 14) <p>Context: media exposure</p> <ul style="list-style-type: none"> ▪ A discussion very similar to the one in Bojayá arose when some local victims associations argued for limited media coverage: “we do not want to see pathetic scenes and scenes of indignity, we do not want to see utilitarian heroics, but deep and meaningful values, we do not want to succeed on television screens, no, we have to make our demands with dignity and mourn our dead, our prisoners, and our exiles in silence.” (Statement on the Mass Graves). However, the opposition that held this opinion faded gradually in the following years. Still, this fact “shows the frictions that often occur in exhumations stemming from differences among family agendas, local and national politics, disagreements amongst associations, and the media reconstruction of events. “ (Ferrándiz 2013) 	<ul style="list-style-type: none"> ▪ Araguete-Toribio, Zahira. 2015. “Negotiating Identity: Reburial and Commemoration of the Civil War Dead in Southwestern Spain.” <i>Human Remains and Violence: An Interdisciplinary Journal</i> 1(2): 5-20. ▪ Ferrándiz, Francisco. 2013. “Exhuming the Defeated: Civil War Mass Graves in 21st-century Spain.” <i>American Ethnologist</i> 40(1): 38-54. ▪ Ferrándiz, Francisco. 2008. “Cries and Whispers: Exhuming and Narrating Defeat in Spain Today.” <i>Journal of Spanish Cultural Studies</i> 9(2): 177-192. ▪ Renshaw, Layla. “Missing Bodies Near-at-Hand: The Dissonant Memory and Dormant Graves of the Spanish Civil War.” <i>An Anthropology of Absence</i>. New York: Springer. 2010, 45-61. ▪ Statement on the Mass Graves of Oviedo. September 28, 2002. http://www.foacomun.com/comunicado.htm

Greece: Victims of the Civil War (1941-1950)

Exhumation and Burial Methods

Context: politicization

- Despite a recent history of civil war and a peaceful transition to democracy, Greece has remained silent on the issue of exhumations.
- In recent years, no attempts at conducting new victim exhumations and burials have been identified due to the possibility of uncovering inconvenient truths for some political sectors. On the one hand, “the prospect of verifying in a scientific way that violence was a strategy DSE [the communist insurgency] used to recruit fighters has the potential to delegitimize the master narrative of the defeated by portraying them as combatants that instrumentalized their causes, namely that they fought for a noble cause and their members were idealists. Meanwhile, civil society is still reluctant to open the graves, as the identification of Slav-Macedonian remains among the victims could lead to a new chapter of confrontation in the ‘Macedonian conflict’” (Stefatos and Kovras 2015, 166).
- An exception is the island of Lesbos, where political differences are not as problematic as in the rest of Greece. As a result, the exhumations and burials became localized and depoliticized acts of resistance. (Stefatos and Kovras 2015, 176)

Sources

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Guatemala: Victims of the Panzós Massacre (1978)

Exhumation and Burial Methods	Sources
<p>Context: the Government's lack of legitimacy in the search for disappeared persons</p> <ul style="list-style-type: none"> ▪ The funerals of Maya victims are usually open to the public: “after the bodies were identified, either at the grave site or at one of the FAFG’s [Forensic Anthropology Foundation of Guatemala] laboratories in Guatemala City, the remains are placed in individual cases and returned to the families in the village. When it is time for the community-wide funeral, the bodies...are carried through the streets of the village in a public procession, their presence ‘proclaiming a truth hidden for many years.’” (Garrard-Burnett 2015, 187). The ritual includes a priest, a shaman, and the entire community, in the Maya rituals, religious rites, and burials. <p>Context: civil society cooperation</p> <ul style="list-style-type: none"> ▪ Local organizations were more successful than the State in providing psychosocial care to communities in the context of exhumations and burials: by incorporating Maya traditions in their efforts, these organizations were able to work more closely with the members of the community, who were skeptical about the programs created by the Government. (Arriaza and Roht-Arriaza 2008, 168). 	<ul style="list-style-type: none"> ▪ Arriaza, Laura, and Naomi Roht-Arriaza. 2008. “Social reconstruction as a local process.” <i>The International Journal of Transitional Justice</i> 2(2): 152-172. ▪ García, María Luz. 2014. “The Long Count of Historical Memory: Ixhil Maya Ceremonial Speech in Guatemala.” <i>American Ethnologist</i> 41(4): 664-680. ▪ Garrard-Burnett, Virginia. 2015. “Living with Ghosts: Death, Exhumation, and Reburial among the Maya in Guatemala.” <i>Latin American Perspectives</i> 42(3): 180-192. ▪ Stewart, Julie. 2004. “When Local Troubles Become Transnational: The Transformation of a Guatemalan Indigenous Rights Movement.” <i>Mobilization: An International Quarterly</i> 9(3): 259-278.

Peru: Victims of the Assassinations and Forced Disappearances Perpetrated against Members of the Quechua Community (1980-2000)

Exhumation and Burial Methods	Sources
<p>Context: the Government's lack of legitimacy in the exhumation and burial process</p> <ul style="list-style-type: none"> Exhumations and burials were conducted both for rebel and paramilitary victims. Due to the paramilitary ties of politicians who retained power after the conflict, the political opposition to the exhumations was significant due to fear of legal repercussions (Rojas-Perez 2016). <p>Context: politicization</p> <ul style="list-style-type: none"> State actors decided which ceremonies they would attend. Some media, therefore, decided to cover and overexpose certain exhumations to the detriment of others. For example, the exhumations of the victims of massacres perpetrated by insurgent groups received more media coverage. In contrast, the exhumations of massacres perpetrated by the armed forces of the Peruvian State were not covered with the same interest (Robin Azevedo 2016, 42). 	<ul style="list-style-type: none"> Robin Azevedo, Valérie. 2016. "Restoring the Dignity of the War's Disappeared? Exhumations of Mass Graves, Restorative Justice and Compassion Policies in Peru." <i>Human Remains and Violence: An Interdisciplinary Journal</i> 2(2): 39-55. Rojas-Perez, Isaias. 2015. "Death in Transition." In <i>Necropolitics: Mass Graves and Exhumations in the Age of Human Rights</i>, 185. Rojas-Perez, Isaias. 2017. <i>Mourning Remains: State Atrocity, Exhumations, and Governing the Disappeared in Peru's Postwar Andes</i>. Stanford University Press.

Rwanda: Victims of the Genocide (1994)

Exhumation and Burial Methods	Sources
<p>Context: politicization</p> <ul style="list-style-type: none"> Individual remains have been exhumed and buried along with the remains of other victims at memorial sites. Both the bodies and the memorial sites have served as physical evidence and memory of the genocide. Families and communities were not satisfied with the burials in which their opinion was not sought. This type of funerals did not take into account funerary rites and more traditional funerary customs (Major 2015, 167). 	<ul style="list-style-type: none"> Lesley, Elena. 2015. "Death on Display: Bones and Bodies in Cambodia and Rwanda." In <i>Necropolitics: Mass Graves and Exhumations in the Age of Human Rights</i>, 213-239 Major, Laura. 2015. "Unearthing, Untangling and Re-Articulating Genocide Corpses in Rwanda." <i>Critical African Studies</i> 7(2): 164-181.

Annex 2.

Text of the “Protocol for the Management of Communications within the Framework of the Peace Process Agreements related to Bojayá”

Bellavista, Chocó, May 11, 2017

We Value the Work of the Media, the Academic Community, and All of the Institutions or People That Accompany Us and, at the Same Time, We Ask Them to Support Us By Observing This Protocol

The Committee for the Rights of the Bojayá Victims values the importance of raising the visibility to the agreements of the peace process that relate to Bojayá, for this must contribute to advancing their fulfillment and to the construction of peace based on the respect and the guarantee of human rights, both political rights as well as economic and cultural rights. To ensure the respect of our rights, our dignity, our culture and that we are not re-victimized, we call on the institutions, entities, organizations, media, journalists and independent communicators, academics, universities, and outsiders interested in issuing or producing information about this process to adhere to the following decisions made by the assembly:

1. The Committee for the Rights of the Bojayá Victims will coordinate, guide and decide —together with the community— the decisions related to communication processes and information management.

2. External actors must recognize the Committee and its spokespersons as the only valid representatives for establishing agreements in this regard.

3. The Committee for the Rights of the Bojayá Victims appoints Leyner Palacios as spokesperson for communications within the framework of these processes.

4. In addition, written requests will be received at the following email: contacto@comitevictimasbojaya.org

I. Regarding the Media, Academics and Outsiders

1. The victims of Bojayá request that all the media, employed or freelance journalists and communicators, academics and others from outside the community, refrain from filming, taking photographs, recording, writing or conducting individual interviews with families, or any other person connected to the process of exhumation, delivery of bodies, and ceremonies related to the massacre of May 2, 2002, as of May 4, 2017 until the end of the exhumations, out of respect for our dignity, beliefs and culture.

2. The Committee will be the one who determines what information is reserved and what information is public. When information is produced in relation to the process of the agreements signed between the Government and the FARC-EP in relation to Bojayá, it will be reviewed, commented and approved for publication by the team of representatives responsible for the Committee's communications.

3. The Committee for the Rights of the Bojayá Victims, with the support of UN Human Rights, will make the video and photographic record of the process of the exhumations, ceremonies, and delivery of bodies and, subsequently, the Committee will determine what images it considers respectful of the dignity of the victims to deliver them publicly to the media and the interested entities.

4. The Committee for the Rights of the Bojayá Victims has asked the Bellavista Police to help us ensure this protocol is observed in the Bojayá cemetery and the temporary vaults where our family and friends will rest while being transferred to Legal Medicine.

II. Regarding the governmental and non-governmental organizations involved in the process

1. All institutions must reach an agreement with the Committee for the Rights of the Bojayá Victims, regarding any communication related to the processes.

• WORKING PAPER 1

ADDICTED TO PUNISHMENT

The disproportionality of drug laws in Latin America

Rodrigo Uprimny Yepes, Diana Esther Guzmán
& Jorge Parra Norato

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The impulse to conduct this investigation

was born out of the tension that developed in May of 2017 in the context of the journalistic coverage of the exhumations of those who died in the Bojayá massacre. Thus, this document has the purpose of asking and answering, from a socio-legal perspective, the following research question: How can the events related to the armed conflict and to the transition to peace be narrated without violating the right to privacy of the victims? Or, how can a journalist record a dramatic event or recount an injustice that moves his readers while respecting the limits of the private lives of the victims?

To answer the question, this document examines the tensions between rights that can arise out of narrating the transition to peace as part of the journalistic profession, with the hope that the conclusion set forth is valid not only for the Bojayá case but also in future transition years, as both victims and society in general benefit from a free and responsible press and the respect for private lives.

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