

The role of freedom of expression in the construction of historical memory

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Abstract

The construction of historical memory is closely linked to the guarantees provided by the right to freedom of expression. This right ensures that victims and society in general are able to speak about the past, narrate their own stories, and call for and influence social discussion and institutional reform. Mechanisms such as access to State archives, participation in the media, journalistic coverage of armed conflicts and the free flow of stories, artistic endeavours, criticisms and condemnations empower victims and the rest of society in the construction of alternative narratives and independent memories. This article examines case law of the Inter-American System of Human Rights that elaborates on freedom of expression, and considers its importance for the construction of historical memory. It also touches upon some decisions taken by the Colombian high courts, relevant to a context in which mechanisms of transitional justice have recently been implemented.

Keywords: historical memory, freedom of expression, State archives, journalistic coverage, media, armed conflict.



* The views expressed in this article are those of the author and do not necessarily reflect the position of the International Committee of the Red Cross.

Introduction

To designate a hell is not, of course, to tell us anything about how to extract people from that hell, how to moderate hell's flames.

Susan Sontag¹

We live in a time when the horrors of war are widely broadcast in a constant stream of images. The media and social networks daily provide a graphic insight into the destructive effects of armed conflict on civilians, the main victims of war. Every day we are bombarded with live broadcasts of military operations, multitudes of people on the move in search of refuge and asylum, the dead and injured, and the destruction of cities, hospitals and cultural property. In the midst of this barrage of images of war, which turns pain and suffering into a media spectacle, a form of entertainment, the voices and experiences of the victims are seldom heard.² This demonstrates the truth of the words of Susan Sontag, who cautions that just because “news about war is now disseminated worldwide does not mean that the capacity to think about the suffering of people far away is significantly larger.”³

Representation of victims in this sea of information is poor. Additionally, their participation in legal proceedings and other mechanisms for establishing criminal responsibility and discovering the fate and whereabouts of family members might be afforded by the legislation, but it is not fully implemented in practice.⁴ In Latin American countries struck by protracted armed conflicts and generalized violence, attempts have been made to prosecute and punish the perpetrators of human rights and international humanitarian law (IHL) violations, although challenges for guaranteeing effective participation of the victims still persist.⁵ In the international scene, the creation of the International Criminal Court provided a major role for victims, affording them both participation and reparation rights. The Court has a limited capacity to handle huge numbers of victims, however, and has to balance the opposing interests of the accused, the prosecution, the public and the victims; at times this may not

1 Susan Sontag, *Regarding the Pain of Others*, Picador and Farrar, Straus and Giroux, New York, 2003, p. 114, available at: https://monoskop.org/images/a/a6/Sontag_Susan_2003_Regarding_the_Pain_of_Others.pdf (all internet references were accessed in August 2019).

2 Mario Morales, “Los medios, en deuda”, *El Espectador*, 21 November 2015, available at: www.elespectador.com/noticias/politica/los-medios-deuda-articulo-600588. According to this research, media coverage of the peace negotiations between the government of Colombia and the guerrilla Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo (FARC-EP) by national media channels mainly focused on official statements emphasizing war, whereas victims, civil society and academia were seldom considered as relevant sources. Victims appeared as a source in 2% and as a subject in 4% of the coverage; in contrast, the government was a source in 23% of coverage and a subject in 19.7%.

3 S. Sontag, above note 1, p. 115.

4 María Galvis, “Informe Comparativo”, in Fundación para el Debido Proceso Legal, *Las víctimas y la justicia transicional, ¿Están cumpliendo los Estados latinoamericanos con los estándares internacionales?*, Washington, DC, 2010, pp. 21–22, available at: www.dplf.org/sites/default/files/1285258696.pdf.

5 Diana Guzmán, Nelson Sánchez and Rodrigo Uprimny, “Colombia”, in Fundación para el Debido Proceso Legal, above note 4, p. 113. These authors affirm that barriers for victims' participation in judicial investigations and prosecution against paramilitary groups in Colombia under Law 975 of 2005 included lack of economic resources to attend the hearings, lack of information, lack of psychological support and lack of legal representation before the courts.

allow victims to participate in the proceedings to the greatest extent possible.⁶ At the domestic level, lack of capacity or resources in some States to effectively investigate and prosecute massive human rights and IHL violations leads to a sense of frustration, and victims, witnesses and members of the judiciary are put at risk, facing threats to their lives and safety.⁷

Although endeavours to construct and legitimize historical memory in the judicial arena are important, initiatives led by victims and civil society organizations outside this framework could play a significant role in the construction of historical memory. The spectrum of creative and participatory possibilities finds fertile ground in the interaction between historical memory and freedom of expression. Artistic creations including audiovisual and written works, statements, critiques, opinions and research conducted by victims, activists or journalists might complement, challenge or contradict the official narrative, which in turn may reopen debates and trigger social conflicts.⁸ The protection of this kind of speech is particularly important, bearing in mind the dynamic, political nature of historical memory and the fact that certain memories could have been silenced, hidden or excluded in the construction of national narratives.⁹

- 6 Elisabeth Baumgartner, “Aspects of Victim Participation in the Proceedings of the International Criminal Court”, *International Review of the Red Cross*, Vol. 90, No. 870, 2008, p. 439, available at: www.corteidh.or.cr/tablas/R21692.pdf. Even though victims have gained attention internationally, for some authors this has also led to negatively affecting the rights of the accused. See Charles P. Trumbull IV, “The Victims of Victim Participation in International Criminal Proceedings”, *Michigan Journal of International Law*, Vol. 29, No. 4, 2008, pp. 777–778, available at: <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1156&context=mjil>. Also, see the criticism of the IACtHR in Ezequiel Malarino, “Activismo judicial, punitivización y nacionalización. Tendencias antidemocráticas y antiliberales de la Corte Interamericana de Derechos Humanos”, in *Sistema interamericano de protección de los derechos humanos y derecho penal internacional*, Konrad-Adenauer-Stiftung, Berlin, 2010, pp. 25, 45–49, available at: <https://archivos.juridicas.unam.mx/www/bjv/libros/8/3515/6.pdf>.
- 7 D. Guzmán, N. Sánchez and R. Uprimny, above note 5, p. 110.
- 8 Elizabeth Jelin, “Las luchas políticas por la memoria”, in *Los trabajos de la memoria*, Siglo Veintiuno Editores, Madrid, 2001, p. 45, available at: <https://tinyurl.com/y2grffmc>. Both the European human rights system and the Inter-American System of Human Rights have upheld that freedom of thought and expression is essential for the historical reconstruction of the past, and have underlined that the “sole historical truth” does not exist in relation to historical debate. See European Court of Human Rights, *Monnat v. Switzerland*, Appl. No. 73604/01, Judgment, 21 December 2006, para. 68, available at: <http://hudoc.echr.coe.int/eng?i=001-76947>. Also see IACtHR, *Kimel v. Argentina*, Series C, No. 177, Merits, Reparations and Costs, Judgment, 2 May 2008, paras 41–43, 91–94, available at: www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf. This case refers to a journalist and research historian who was criminally charged and punished for defamation after publishing a book on crimes committed during the Argentinean dictatorship. Later on, this landmark decision led to the decriminalization of defamation, libel and slander when speech refers to public figures and their activities as such. See Penal Code of Argentina, Ley 11.179 (T.O. 1984 update), InfoLEG, Ministerio de Justicia y Derechos Humanos, Arts 109, 110, available at: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16546/texact.htm>.
- 9 E. Jelin, above note 8, p. 50. Jelin highlights that activists and what she calls memory promoters, militants or entrepreneurs might attempt to change or influence the sense and content of official history and its hegemony in order to eliminate distortions or to make public and legitimize versions that had been in the “catacombs”, concealed, censored or silenced (author’s translation). Also, on how perceptions of heroism might ignore, silence or avoid shameful episodes of past history, leading to their validation and repetition, see Centro de Memoria Histórica, *Recordar y narrar el conflicto: Herramientas para reconstruir memoria histórica*, Colombia, 2009, p. 36, available at: www.centrodememoriahistorica.gov.co/descargas/informes2009/cajadeherramientas/presentacionbaja.pdf.

In such contexts, access to State records, the creation of and participation in alternative media outlets, and media reporting on conflicts are some of the measures that can contribute to amplifying the voices of victims, leading to social discussion and public participation.

Approaching historical memory in the light of freedom of expression is complementary to its characterization in terms of the right to the truth embedded in the State's obligation to respect human rights.¹⁰ Certainly, freedom of expression allows people to create and develop ideas and thoughts and share them widely.¹¹ However, it should be noted that in the construction of memories, the expressions and interests of victims may not concur with those of other victims, perpetrators, and other individuals or groups. Also, it is possible that such different expressions will not be equally promoted, guaranteed or protected.

When it comes to communication, not all individuals and groups may have the same opportunities to express their opinions or participate in the debates that forge public opinion. For example, the needs of victims and other marginalized groups might not be taken into account in the allocation of radio and television broadcasting licences,¹² and criminal law can be used to censor victims, journalists or human rights defenders when they criticize or make allegations against public officials.¹³ The Inter-American Commission on Human Rights (IACHR) has noted in relation to the Americas that:

the so-called “contempt laws” and criminal offenses of libel, slander, and defamation continue to be used to criminalize and punish critical statements

- 10 IACtHR, *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Series C, No. 287, Preliminary Objections, Merits, Reparations and Costs, Judgment, 14 November 2014, p. 511, available at: www.corteidh.or.cr/docs/casos/articulos/seriec_287_ing.pdf. In this case, the Court held that the right to know the truth derives from the State's obligation to respect rights, the right to a fair trial, the right to judicial protection, and the freedom of thought and expression. The Court affirms that the right to know the truth is subsumed basically 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 their corresponding responsibilities, via the investigation and prosecution procedures established by Articles 8 and 25 of the American Convention on Human Rights.
- 11 American Convention on Human Rights (ACHR), San José, Costa Rica, 22 November 1969. The ACHR enshrines in its Article 13.1 on freedom of thought and expression that “[e]veryone 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.”
- 12 Inter-American Commission on Human Rights (IACHR), *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*, Vol. 2, 15 March 2017, p. 575, available at: www.oas.org/en/iachr/expression/docs/reports/annual/AnnualReport2016RELE.pdf. In this context, the Special Rapporteur has recommended that the States of the region should “[l]egislate in the area of community radio broadcasting, in a manner that will produce an equitable division of the spectrum and the digital dividend to community radio stations and channels. The allocation of these frequencies must take into account democratic criteria that guarantee equal opportunities to all individuals in the access and operation of these media in conditions of equality, without disproportionate or unreasonable restrictions, and in conformity with Principle 12 of the Declaration of Principles and the ‘Joint Declaration on Diversity in Broadcasting’.”
- 13 IACHR, *Criminalization of Human Rights Defenders*, 2015, para. 97, available at: www.oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf.

concerning public officials and on issues of public interest, which has disproportionately affected the work of human rights defenders.¹⁴

In contexts previously affected by armed conflict and other situations of violence, the duty of the State to respect and guarantee freedom of expression takes on special significance. This article aims to show how freedom of expression enhances, protects and guarantees the creation and dissemination of historical memories by victims and other social groups in the Inter-American System of Human Rights. This author will not address aspects such as safeguards and participation of victims in the judicial sphere, truth-seeking mechanisms in transitional contexts or different forms of reparations.¹⁵ Likewise, the present analysis will not touch upon other aspects closely linked to freedom of expression such as the right to privacy of victims related to media coverage of the circumstances around their victimization.¹⁶

This article takes specific note of the Inter-American Court of Human Rights' (IACtHR) interpretation of the right to freedom of speech. Additionally, it focuses on the Colombian case because although armed conflicts still persist in that country,¹⁷ there are efforts, legal frameworks and transitional justice institutions for producing and preserving memory in the midst of hostilities, such as the National Center for Historical Memory.¹⁸ The Americas, and Colombia in particular, have accumulated good and best practices as well as lessons for promoting and guaranteeing freedom of expression on behalf of victims of armed conflicts and other situations of violence.

As further discussed below, freedom of expression has a strong potential to promote and support victims in the construction of collective memories. This article will first address the interaction between freedom of expression and historical memories, as well as the different conflicts that may arise between various groups and individuals as they create and disseminate their own versions of the past. The article will then focus on the guarantees of freedom of expression provided by the State. In particular, it will concentrate on access by victims to media outlets, State archives and protection measures for those facing threats to their lives and integrity. These conditions are key to supporting victims' own initiatives to bring public attention not only to their suffering, but also to their interpretation of the past, their interests, their needs and their proposals for institutional and social change.

14 *Ibid.*

15 M. Galvis, above note 4.

16 In relation to the tensions between the right to privacy and media coverage, see the analysis in Vivian Newman, María P. Ángel and María X. Dávila, *Victims and Press after the War: Tensions between Privacy, Historical Truth and Freedom of Expression*, Working Paper No. 4, Center for the Study of Law, Justice and Society, Dejusticia, Bogotá, 2018, available at: www.dejusticia.org/wp-content/uploads/2018/01/Victims-and-press-after-the-war-Versio%CC%81n-final-PDF-para-WEB-1.pdf.

17 International Committee of the Red Cross, "Colombia: Five Armed Conflicts – What's Happening?", 30 January 2019, available at: www.icrc.org/en/document/colombia-five-armed-conflicts-whats-happening.

18 Centro Nacional de Memoria Histórica (CNMH), "Misión y visión", 18 July 2019, available at: www.centrodehistoriahistorica.gov.co/somos-cnmh/que-es-el-centro-nacional-de-memoria-historica/mision-y-vision.

Historical memory and freedom of expression

There is a wide variety of activities that allow victims of armed conflicts and other situations of violence to express and disseminate their feelings and ideas, with a bearing on the construction of historical memory. For instance, in Colombia different groups of people affected by the armed conflict and other situations of violence find healing through art, oftentimes conveying messages against impunity and demanding institutional reforms. The women of Manpuján create tapestries onto which they inscribe their stories as victims of displacement and sexual violence perpetrated by armed groups.¹⁹ Mothers of victims of executions and disappearances also weave tapestries to share their experiences, and further spread their stories by visiting children and young people at schools.²⁰ Young people who have experienced urban violence gather in the community to grow plants, perform symbolic burials, talk about their memories, and compose and interpret hip-hop and rap music with their messages.²¹ Community leaders and social communicators train the inhabitants of areas once struck by paramilitary violence to create community radio stations, and help them to improve or acquire skills for creating and broadcasting audiovisual materials.²²

These expressions of victims not only narrate the past but may reunite the community and rebuild social networks. In that manner, the expressions transcend the individual or group orbit to a wider audience, to the rest of society. These two conditions are two sides of the same coin, the right to freedom of expression, that has an individual and collective dimension. Article 13.1 of the American Convention on Human Rights (ACHR) provides that:

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.²³

This provision highlights that freedom of expression includes both an individual dimension, allowing people to express their ideas and opinions, and a collective one, guaranteeing their dissemination and giving society in general the right to receive them.²⁴ These two dimensions have also been recognized as an integral

19 Gloria Castrillón, “Las tejedoras de Manpuján: Fuerza femenina del perdón”, *Cromos*, 19 November 2015, available at: <https://cromos.elespectador.com/hoy-historias-chronicas/las-tejedoras-de-mampujan-la-fuerza-femenina-del-perdon-16675>.

20 Alcaldía Mayor de Bogotá, “Costurero de la memoria, el lugar donde las víctimas de la violencia tejen su esperanza”, 25 January 2016, available at: www.bogota.gov.co/content/temasdecuidad/victimascosturero-de-la-memoria.

21 Carito Rendón, “Los raperos agricultores de la Comuna 13 de Medellín”, *Vice*, 4 October 2016, available at: www.vice.com/es_co/article/yv8zx7/medellin-comuna-13-raperos-hip-hop-aka-agroarte.

22 Corporación Colectivo de Comunicaciones Montes de María Línea, available at: <http://colectivolinea21.galeon.com/>.

23 ACHR, Art. 13.

24 IACtHR, *Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85, Series A, No. 5, 13 November 1985, para. 30, available at: www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf.

part of the right to the truth²⁵ and play a significant role in the construction of historical memory.²⁶ In other words, victims have the right not only to seek and receive information about their loved ones, but also to publicly express and broadcast their feelings, stories and opinions. In this way, society as a whole is involved: memories no longer belong exclusively to the victims but enter the realm of public discussion and encourage the adoption of commitments to ensure that the atrocities of the past are not repeated.

The right to the truth and the duty to preserve memory have not been expressly recognized in human rights treaties in the inter-American context.²⁷ However, Issues related to the reconstruction of memory and the realization of victims' rights have been significantly developed by human rights bodies' reports and resolutions²⁸ as well as the jurisprudence. The IACtHR, for example, has recognized the right to the truth in a number of cases of enforced disappearance,²⁹ based on an analysis of the victims' right to access to justice. For the Court, this right is a guarantee against impunity and materializes when victims are informed of the fate and whereabouts of their relatives. In other words, access to justice means that the victims are entitled to have those facts investigated and that those responsible are prosecuted and punished.³⁰ The IACtHR has also stated that the right to the truth is related to the right to personal integrity, given the anxiety and uncertainty caused by not knowing the fate and whereabouts of missing relatives as well as the impossibility of burying the bodily remains.³¹ The right to the truth has also been linked to the issue of

- 25 United Nations (UN) Economic and Social Council (ECOSOC), *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principles 1–2, 4, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>.
- 26 See IACtHR, *Myrna Mack Chang v. Guatemala*, Series C, No. 101, Preliminary Objections, Merits, Reparations and Costs, Judgment, 25 November 2003, para. 274, available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_101_ing.pdf.
- 27 Inter-American Commission on Human Rights, *The Right to Truth in the Americas*, Washington DC, 2014 (Chapter II – Legal framework: the conceptualization of the right to the truth in the Inter-American Human Rights System), para. 53, available at: <http://www.oas.org/en/iachr/reports/pdfs/right-to-truth-en.pdf>
- 28 UN Human Rights Council, “Right to the Truth”, Decision 2/105, 27 November 2006; UN Office of the High Commissioner for Human Rights, *Study on the Right to the Truth*, UN Doc. E/CN.4/2006/91, 9 January 2006; UN Commission on Human Rights, Res. 2005/66, “Right to the Truth”, 20 April 2005; ECOSOC, above note 25.
- 29 IACtHR, *Zambrano Vélez et al. v. Ecuador*, Series C, No. 166, Merits, Reparations and Costs, Judgment, 4 July 2007, para. 128, available at: www.corteidh.or.cr/docs/casos/articulos/seriec_166_ing.pdf; IACtHR, *Anzualdo Castro v. Peru*, Series C, No. 202, Preliminary Objection, Merits, Reparations and Costs, Judgment, 22 September 2009, para. 119, available at: www.corteidh.or.cr/docs/casos/articulos/seriec_202_ing.pdf; IACtHR, *Radilla Pacheco v. Mexico*, Series C, No. 209, Preliminary Objections, Merits, Reparations and Costs, Judgment, 23 November 2009, para. 74, available at: www.corteidh.or.cr/docs/casos/articulos/seriec_209_ing.pdf.
- 30 IACtHR, *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, Series C, No. 219, Preliminary Objections, Merits, Reparations, and Costs, Judgment, 24 November 2010, para. 201, available at: www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf; IACtHR, *Kawas-Fernández v. Honduras*, Series C, No. 196, Merits, Reparations and Costs, 3 April 2009, available at: www.corteidh.or.cr/docs/casos/articulos/seriec_196_ing.pdf; IACtHR, *Castro*, above note 29, para. 118.
- 31 IACtHR, *Gomes Lund*, above note 30, paras 239, 242.

access to information because of victims' requests for information related to human rights violations.³²

The IACtHR has recognized the notion of historical memory in the case of *Gomes Lund et al. v. Brazil*, which examined incidents involving torture, enforced disappearances and extrajudicial executions taking place during military operations carried out between 1972 and 1975 with the aim of wiping out the Araguaia guerrilla movement.³³ In this case, the Court recognized the relationship between the right to the truth and freedom of expression and concluded that the State violated these rights in denying the families and the courts access to military records.³⁴

Importantly, the IACtHR has underlined that historical memory is a means of determining the truth, which is something that cannot be done solely and exclusively through the judiciary or extrajudicial mechanisms in transitional processes.³⁵ In the *Gomes Lund* case, the Court underlined that the construction of historical memory in less formal settings does not release the State from its duty to establish the facts and circumstances of human rights violations and hold those responsible to account.³⁶ It also stressed that historical memory is determined by the context in which it is constructed, which means that it is relative, dynamic and changing.³⁷

Independently of the discussion on whether the right to the truth is an autonomous right or one deriving from other rights,³⁸ linking the processes of truth-seeking and construction of historical memory to freedom of expression opens up a whole range of possibilities and opportunities for victims, groups and communities to create their own narratives about their past and future and communicate their ideas to society. It also allows for the promotion of collective memories which do not necessarily converge on one historical and official version of the past, but refer more to multiple and diverse interpretations of the past by taking into account victims' present experiences.³⁹

The wide dissemination of the expressions of victims and other social groups traditionally excluded from social and political participation dignifies them as agents of their own reparation, recognizing their capacities and talents.

32 *Ibid.*, paras 201, 210.

33 *Ibid.*, paras 2, 88, 121–125. Guerrilha do Araguaia was the name of the resistance movement formed by members of the Brazilian Communist Party that opposed the military regime.

34 *Ibid.*, paras 6, 226–231.

35 *Ibid.*, para. 297.

36 *Ibid.*

37 *Ibid.*

38 See Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, in IACtHR, *Rodríguez Vera*, above note 10.

39 On the distinction between historical memory and collective memory, see Maurice Halbwachs, *Memoria colectiva y memoria histórica*, 1995, pp. 209–219, available at: http://ih-vm-cisreis.c.mad.interhost.com/REIS/PDF/REIS_069_12.pdf. This author indicates that if by historical memory one understands a list of events preserved by national history, those frameworks do not represent what collective memory is all about. Also see the mission of the Colombian Center for Historical Memory, which promotes “plural memories” of armed conflict by including views of different individuals and groups: see CNMH, above note 18.

However, it is possible that as victims and their messages gain visibility, their engagement in social debate creates disagreement due to the existence of opposed versions of the past, justifications for acts of victimization, and the different interests of the actors involved. The next section will demonstrate that an adequate balance between the rights of the victims and the rights of other social groups must be struck.

Competing narratives in the construction of historical memories and efforts to ensure the protection of victims' dignity

The memories of victims may be contradicted or challenged by the versions of other victims, perpetrators or different social groups. In countries where transition processes have taken place (for example, transition to democracy, peace negotiations, demobilization of armed actors, granting of amnesties and pardons, reintegration into public and political life, and reparations for victims), tensions and conflicts may arise between erstwhile victims and perpetrators.⁴⁰

In democratic societies, debates and discussions about issues of interest to victims may feature differing views and visions. As victims engage or are encouraged to participate in scenarios of debate, they may be exposed to confrontation on their ideas and opinions, which is unavoidable once they participate in public and political life. Also, it can be challenging for victims when their construction of memory is opposed to versions held by alleged, investigated or convicted perpetrators of human rights and IHL violations, or by other victims, State authorities, or individuals. When those actors justify crimes or stigmatize victims, it can be painful, reopen wounds or even prevent healing.⁴¹

For victims, it is crucial to eradicate the stereotypes and stigma often attached to them as a result of armed conflicts or other situations of violence. It

40 On the transition in Spain after the civil war, Elizabeth Jelin observes that “times of political change, periods of transition, create a scenario of confrontation among actors with different, generally opposing, political experiences and expectations. And each of these positions involves a vision of the past and an agenda (in many cases implicit) for coming to terms with that past in the new era that is regarded as a break with all that has gone before” (author’s translation). See E. Jelin, above note 8, p. 45. Guzmán, Sánchez and Uprimny, above note 5, pp. 115–117, explain that victims could not challenge or debate the confessions and declarations of demobilized members of paramilitary groups before the courts in Colombia under Law 975 of 2005. Besides the lack of access on the part of the media, the versions of the perpetrators justifying their acts were given more attention, leaving the victims with restricted opportunities to contradict them, cross-examine them and restore the honour and reputation of their relatives. Also, see the judicial ban imposed on a march within the Carnaval of São Paulo, Brazil, that intended to honour military figures during the period of the dictatorship (1964–85). Different NGOs mobilized against the tributes, while the promoters of the march claimed that their right to freedom of expression was violated by the ban. See “Justiça de SP proíbe bloco carnavalesco que homenageia a ditadura militar”, *CBN Globo Radio*, 9 February 2018, available at: <https://cbn.globoradio.globo.com/media/audio/159161/justica-de-sp-proibe-bloco-carnavalesco-que-homena.htm>.

41 Verónica Coral Rojas, “The Construction of Perpetrators in Enrique Buenaventura: A Reflection around the Construction of the Perpetrator in the Colombian Historical Memory”, *Revista Cultura Investigativa*, No. 6, June 2013, p. 51, available at: https://revistaci.weebly.com/uploads/1/5/6/0/15607460/05_enrique_buenaventura.pdf. Here the author explains that perpetrators are linked to the society that produce or enables them, and in that sense perpetrators should be understood as societal products; this does not justify their deeds, but can help to explain them.

is possible that victims of violence will be portrayed as responsible for their own deaths, as terrorists, criminals, members or supporters of armed groups, etc. It is also possible that those labels will be used to justify the perpetration of human rights violations.⁴² The expression of victims is then key to affirming the reputation of their loved ones and having a say in how they should be remembered.

The Colombian Constitutional Court regards memory as part of a family's heritage and links it to certain rights such as the right to protect one's good name and honour.⁴³ In this regard, the Court has established that families have the right, even when their loved one is no longer alive, to some form of reparation from those who committed abuses against them or tarnished their reputation.⁴⁴ Both the Constitutional Court and the Council of State of Colombia have emphasized that public acts to honour the memory of victims are measures of reparation and contribute to increasing recognition and awareness about victim's lives, projects and legacies.⁴⁵

In Europe there are several domestic legislations against Holocaust denial, and the European Court of Human Rights has ruled against such speech, affirming its defence of democratic values and tolerance.⁴⁶ Similarly, the Inter-American System of Human Rights has established a framework that outlaws speech which promotes war and hatred linked to the incitement of violence. In this regard, Article 13.5 of the ACHR provides that:

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.⁴⁷

Clearly, the ACHR prohibits utterances that promote hate, hostility, discrimination and resort to violence.⁴⁸ If there is no incitement to resort to violence, such

42 Colombia Check and Rutas del Conflicto, "¿En Colombia existen pueblos paramilitares y guerrilleros?", available at: http://rutasdelconflicto.com/especiales/estigma_grupo_armado/.

43 Constitutional Court of Colombia, Judgment T-478, Referencia: Expediente T-4.734.501, 3 August 2015, para. 27, available at: www.corteconstitucional.gov.co/relatoria/2015/t-478-15.htm.

44 *Ibid.*, para. 93.

45 *Ibid.*; Council of State of Colombia, Chamber 3, Judgment No. 05001-23-26-000-1990-05197-01 (19939), 27 September 2013, p. 73.

46 Paolo Lobba, "Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime", *European Journal of International Law*, Vol. 26, No. 1, 2015, available at: www.ejil.org/pdfs/26/1/2569.pdf. This article analyzes the differences between the Western European and North American systems as well as the debates, controversies and dilemmas of Holocaust-denial litigation. See also Robert A. Kahn, *Holocaust Denial and the Law: A Comparative Study*, Palgrave Macmillan, New York, 2004, pp. 153 ff., available at: www.e-reading.club/bookreader.php/135786/Kahn_-_Holocaust_Denial_and_the_Law_-_A_comparative_study.pdf.

47 ACHR, Art. 13.5.

48 UN General Assembly, World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Review of Reports, Studies and Other Documentation for the Preparatory Committee and the World Conference*, UN Doc. A/CONF.189/PC.2/24, 22 March 2001, p. 4, available at: <https://tinyurl.com/yxe52hyu>. According to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, no one should be penalized for the

statements might still constitute an affront to the honour, dignity and reputation of victims and their families.

In cases involving the death of civilians as a result of the armed conflict,⁴⁹ the Colombian Council of State has determined that condoning acts which constitute human rights violations creates stigma and stereotypes, resulting in double victimization and a violation of the right to memory.⁵⁰

It is important to keep in mind that certain types of speech may influence not only the construction of historical memory, but also the future dynamics in a specific context. For example, in the prosecution of crimes committed by members of paramilitary groups in Colombia, a district high court ruled that the dissemination of offensive, violent or dehumanizing messages by people in public office or politics can influence developments in a conflict and perpetuate confrontations between historically opposed groups.⁵¹

Since such expressions may not necessarily be prohibited by the ACHR if in principle they do not incite violence,⁵² States should provide additional measures to protect the memories and the honour of victims. A mechanism that could contribute to that is the right to reply or correction. This remedy is available to those who wish to make a stand against discourse perceived as offensive. Article 14 of the ACHR provides that anyone injured by

inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.⁵³

The State and the media must therefore ensure that victims are able to request that corrections be made and to participate in debates where they can exercise their right to reply. This guarantee only refers to statements that are both inaccurate and offensive, and not to opinions, because they cannot be subjected to rectification or correction.

Colombia's legislation establishes, for instance, that it is the duty of the State to support the construction of official narratives or truths by ensuring that the principles of pluralism, participation, solidarity and freedom of expression and thought are upheld.⁵⁴ Similarly, in relation to violations of international human rights law, the updated UN Economic and Social Council Set of Principles for the Protection and Promotion of Human Rights through Action to Combat

dissemination of hate speech unless it has been shown that the perpetrator had the intention to incite discrimination, hostility or violence.

49 Council of State of Colombia, Chamber 3, Judgment No. 05001233100020090023301 (51623), 1 June 2017, pp. 21–22, and Judgment No. 63001233100020080009701 (41511), 18 May 2017, pp. 20, 27.

50 *Ibid.*

51 Bogotá District High Court, Justice and Peace Chamber, Judgment No. 11001600253200680008 N.I. 1821, 31 October 2014, paras 296, 298.

52 ACHR, Art. 13.5.

53 *Ibid.*, Art. 14.

54 Congress of the Republic of Colombia, Ley de Víctimas, Act 1448 of 2011, Art. 143, available at: www.unidadvictimas.gov.co/es/ley-1448-de-2011/13653.

Impunity establishes the duty to preserve memory.⁵⁵ The Principles recommend that States adopt measures to prevent the extinction of collective memory and the development of revisionist and negationist arguments.⁵⁶

Access by victims to spaces for communication may increase the diversity of voices and prevent versions that deny or offend the rights of victims from gaining wider currency and crystallizing into the “only and absolute truth”. Equitable participation of victims in judicial and extrajudicial mechanisms, as well as spaces for debate and discussion, can counter the effects of negationist or justifying speech as it enables victims to put forward their ideas and opinions and make known their objections and responses.⁵⁷

In sum, when promoting and ensuring processes of constructing memory, States should play an active role in relation to expressions that justify atrocities or bring stigma to victims, by at the very least prohibiting statements that incite to violence and ensuring the right to reply. As shown above, the existing standards might not be sufficient, and other guarantees should be implemented to enable victims to raise their voices, to react to narratives that affect their honour and reputation, and most importantly to share their memories with society.

Guarantees derived from freedom of expression linked to the construction of historical memory

According to Article 1.1 of the ACHR, States must respect and guarantee human rights, including freedom of expression.⁵⁸ The duty to respect human rights requires agents of the State to refrain from doing anything that could directly or indirectly deny or curtail freedom of expression.⁵⁹ The IACtHR observes that freedom of expression can be restricted by means of prosecution, administrative action, *de facto* requirements and acts and omissions of public officials or private individuals, increasing the vulnerability of those exercising, or attempting to exercise, freedom of expression.⁶⁰

The duty to guarantee human rights includes creating conditions and social practices that provide an enabling environment for the exercise of the right to freedom of expression⁶¹ and preventing violations and abuses by public officials and private individuals.⁶² In this context, there are freedom of expression guarantees that have a bearing on the construction of historical memory, such as the opportunity to access radio and media outlets and consult

55 ECOSOC, above note 25.

56 *Ibid.*, Principle 3.

57 D. Guzmán, N. Sánchez and R. Uprimny, above note 5, pp. 115–117.

58 ACHR, Art. 1.1.

59 IACtHR, *Ríos et al. v. Venezuela*, Series C, No. 194, Preliminary Objections, Merits, Reparations, and Costs, Judgment, 28 January 2009, paras 105–106, available at: http://corteidh.or.cr/docs/casos/articulos/seriec_194_ing.pdf.

60 *Ibid.*, para. 107.

61 *Ibid.*

62 *Ibid.*, para. 109.

State archives,⁶³ the protection of journalistic coverage of armed conflicts,⁶⁴ and the protection of criticism against public officials and others.⁶⁵

Drawing on the reports of the IACHR and IACtHR case law, certain guarantees of freedom of expression are analyzed below. Some of the judgments cited concern the conduct of members of the armed forces, providing insights into historical memory guarantees in the context of armed conflicts and other situations of violence.

The voice of victims and its social echo: Creating opportunities to share memories

Media outlets such as radio stations and television channels may allow people to share facts, ideas and opinions and capture the attention of a wide audience. For that reason, the State must adopt measures to ensure victims' access to public debate and the media, by eliminating arbitrary restrictions over newsprint and broadcasting channels and equipment that prevent communication and circulation of expression.⁶⁶

According to the IACHR, democracies must ensure that multiple and diverse voices are given weight in wider society.⁶⁷ Groups such as indigenous peoples, communities of African descent, rural and neighbourhood communities, women and persons with disabilities are often excluded and ignored.⁶⁸ As noted by the Commission, their participation in the media enables them to decisively influence the debates that can help reverse processes of exclusion and discrimination.⁶⁹

For the IACHR, a plurality and diversity of voices is an essential feature of a democratic society.⁷⁰ In keeping with these principles, the Commission points out that the way in which the radio frequency spectrum is assigned has an impact on freedom of expression,⁷¹ highlighting the importance of legislating to prevent the creation of media monopolies and oligopolies.⁷² It further notes that the State

63 ECOSOC, above note 25, Principle 15. IACtHR, *Gomes Lund*, above note 30, para. 199. Also see Elisabeth Baumgartner and Lisa Ott, "Determining the Fate of Missing Persons: The Importance of Archives for 'Dealing with the Past' Mechanisms", *International Review of the Red Cross*, Vol. 99, No. 905, 2018, available at: www.icrc.org/en/international-review/article/determining-fate-missing-persons-importance-dealing-past-mechanisms.

64 IACtHR, *Vélez Restrepo and Family v. Colombia*, Series C, No. 248, Preliminary Objections, Merits, Reparations and Costs, Judgment, 3 September 2012, para. 165, available at: www.corteidh.or.cr/docs/casos/articulos/seriec_248_ing%20.pdf.

65 IACtHR, *Kimel*, above note 8.

66 ACHR, Arts 13.2, 13.3; IACHR, Office of the Special Rapporteur for Freedom of Expression, *Freedom of Expression Standards for Free and Inclusive Broadcasting*, Washington, DC, 30 December 2009, paras 23–24, available at: <https://tinyurl.com/y4hp2t57>.

67 *Ibid.*

68 *Ibid.*, para. 105.

69 *Ibid.*

70 *Ibid.*, para. 24.

71 IACHR, Declaration of Principles on Freedom of Expression, 2000, Principle 12, available at: www.oas.org/en/iachr/expression/showarticle.asp?artID=26

72 *Ibid.*

must take into account democratic criteria in assigning radio frequencies, with a view to ensuring that everyone has equal opportunities for access.⁷³

In its Freedom of Expression Standards for Free and Inclusive Broadcasting published in 2010, the IACHR recommended that States ensure that broadcasting regulations include special rules to guarantee access to groups traditionally marginalized from mass communication.⁷⁴ To this end, it urged States to reserve part of the frequency spectrum for community media and establish fair licensing conditions that take into account the distinct nature of private non-commercial media.⁷⁵ The standards also highlight the importance of establishing special licensing procedures for these social groups,⁷⁶ providing support for adapting to the digital era,⁷⁷ and providing sources of funding to ensure the sustainability of their communication projects.⁷⁸

In addition to guaranteeing access to the media, the State must also ensure that victims are able to create and share their messages and the stories of their own and their families' lives by any means of written, oral or visual communication. In the case of *Manuel Cepeda Vargas v. Colombia* concerning the killing of a congressman, who was also a journalist, by members of the armed forces and paramilitary groups, the IACtHR ruled that an audiovisual documentary should be made portraying the victim's life and career as a politician and journalist as a form of reparation.⁷⁹ The Court established a similar measure of reparation in the case of *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia* concerning extrajudicial executions and enforced disappearances committed by members of the armed forces and police.⁸⁰ On this occasion, the Court ruled that the documentary should focus on the facts of the case, the victims and the search for justice undertaken by their families.⁸¹

These two documentaries were seen as a way of recovering and restoring historical memory for the victims and their families.⁸² The IACtHR ordered the State to bear the cost of producing, distributing and showing the documentary, to involve the victims in the creative process and to take their opinions into account.⁸³ It also ordered the State to broadcast the documentary on national

73 *Ibid.*

74 IACHR, above note 66, para. 29.

75 *Ibid.*, paras 68–97, 109–113.

76 *Ibid.*, para. 37.

77 *Ibid.*, para. 81.

78 *Ibid.*, para. 132.

79 IACtHR, *Manuel Cepeda Vargas v. Colombia*, Series C, No. 213, Preliminary Objections, Merits, Reparations and Costs, Judgment, 26 May 2010, paras 228, 229, available at: www.corteidh.or.cr/docs/casos/articulos/seriec_213_ing.pdf.

80 IACtHR, *Rodríguez Vera*, above note 10.

81 *Ibid.*

82 *Ibid.*

83 *Ibid.* Similarly, in a case concerning the killing of a human rights activist, the Colombian Council of State ordered a documentary to be produced on his life. The victims were to be involved in its production, the editing of the script and other aspects of the production process. See Council of State of Colombia, Chamber 3, Judgment No. 50001-23-31-000-1998-01262-01 (26029), 26 June 2014, para. 61.

television and distribute videotapes of it to the victims, their representatives, civil society organizations and the country's main universities.⁸⁴

Access to State archives

In the Inter-American System of Human Rights, access to public information and the principle of maximum disclosure have been interpreted in relation to the right to freedom of expression, because “anyone who gains access to State-held information has, in turn, the right to disseminate the information so that it circulates in society, so that society can become familiar with it, have access to it, and evaluate it”.⁸⁵ As explained in this section, the right to access information is closely linked with freedom of expression, for example when victims use public information for their research and creative expressions in the construction of memory.⁸⁶

For victims of armed conflicts and other situations of violence, access to information is crucial. Information is needed to know the fate and whereabouts of the missing and to establish the truth about the circumstances surrounding violations of rights and any acts and/or omissions committed. It may be that the information sought is in the possession of the State's armed forces⁸⁷ or non-State armed groups.⁸⁸ As these sources may contain information that is vital for establishing the facts or determining accountability, it is essential to put in place institutional policies and practices to prevent concealment, removal, destruction or falsification of such information.⁸⁹

84 IACtHR, *Manuel Cepeda Vargas*, above note 79.

85 IACHR, Office of the Special Rapporteur for Freedom of Expression, *The Right to Access to Information in the Americas: Inter-American Standards and Comparison of Legal Frameworks*, 30 December 2011, p. 31, paras 99, 102, available at: <https://tinyurl.com/y528zsvt>. Here the Commission states that “the right of access to information shares the individual and social dimensions of the right to freedom of expression, both of which must be guaranteed simultaneously by the State”.

86 IACHR, Office of the Special Rapporteur for Freedom of Expression, *The Inter-American Legal Framework regarding the Right to Access to Information*, 30 December 2009, Prologue, available at: <https://tinyurl.com/y2bgan7k>.

87 The IACHR Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, above note 25, defines the word “archives” as “collections of documents pertaining to violations of human rights and humanitarian law from sources including (a) national governmental agencies, particularly those that played significant roles in relation to human rights violations; (b) local agencies, such as police stations, that were involved in human rights violations; (c) State agencies, including the office of the prosecutor and the judiciary, that are involved in the protection of human rights; and (d) materials collected by truth commissions and other investigative bodies”.

88 See Ana M. Ramírez, María P. Ángel, Mauricio Albarracín, Rodrigo Uprimny and Vivian Newman, *Acceso a los archivos de inteligencia y contrainteligencia en el marco del posacuerdo*, Documentos 31, Dejusticia, Bogotá, 2017, pp. 43, 46. This publication notes that the agreement between the Colombian government and the guerrilla FARC-EP for the creation of a truth commission did not provide for access to archives in possession of the guerrillas. However, the FARC-EP committed to sharing information related to the missing persons with the International Committee of the Red Cross. See Comunicado Conjunto No. 62, “Agreement on Missing Persons”, Havana, 18 October 2015, available at: www.accioncontraminas.gov.co/prensa/2015/Paginas/151018-Acuerdo-sobre-personas-desaparecidas.aspx.

89 IACHR, above note 25, Principle 14.

When victims and their representatives are guaranteed access to State archives, these “reservoirs of memory”⁹⁰ can play an active role in their projects, their search for the truth, and the construction and reconstruction of their memories. The use of archives can also contribute to the work of the courts and non-judicial mechanisms, such as truth commissions and other formal and informal spaces for victim participation.⁹¹

The legal basis for access to information is the definition of the right to freedom of expression contained in Article 13.1 of the ACHR, which provides that people have the right to seek and receive information of all kinds.⁹² The IACtHR maintains that in principle all the information in the possession of the State is presumed to be accessible, subject to a restricted system of exceptions.⁹³ The State therefore has the duty to ensure maximum disclosure and facilitate access and consultation of information by all people.⁹⁴ In the opinion of the Court, such guarantees are crucial to the functioning of a democratic society based on transparency and good governance.

Other bodies, such as Colombia’s Constitutional Court in the case of a massacre of members of the community of San José de Apartadó, and the Council of State on a case related to the incineration of archives by a military authority, have indicated that access to archives containing public documents contributes to the reconstruction of historical memory and is related to the right to request information held by public authorities, due process in administrative law and access to justice.⁹⁵ Both bodies have also stated that the reconstruction of historical memory is affected when the State disregards the importance of archives of this kind and allows them to disappear.⁹⁶

In spite of the existence of this legal framework, in countries like Chile and Colombia victims or their representatives are still denied access to military archives because the information they contain is classified as secret or confidential.⁹⁷ In this

90 Elizabeth Jelin, “¿De qué hablamos cuando hablamos de memorias?”, in *Los trabajos de la memoria*, Siglo Veintiuno Editores, Madrid, 2001, p. 22.

91 IACHR, above note 25, Principles 14–16.

92 ACHR, Art. 13.1

93 IACtHR, *Gomes Lund*, above note 30, para. 199.

94 *Ibid.*

95 Constitutional Court of Colombia, Judgment T-1025, Referencia: Expediente T-1401460, 3 December 2007, paras 5–18, available at: <http://www.corteconstitucional.gov.co/relatoria/2007/T-1025-07.htm>; Council of State of Colombia, Chamber 3, Judgment No. 50001-23-31-000-1996-05888-01(22666), 31 May 2013, paras 32.1, 32.6.

96 See above note 95.

97 See IACHR, above note 12, paras 1213–1231, on restrictions in Chilean legislation to accessing archives in custody by the National Commission on Political Imprisonment and Torture (Valech Commission I) created in 2003 in order to determine who was imprisoned and tortured for political reasons during the military dictatorship. See A. M. Ramírez *et al.*, above note 88, p. 58, which shows that in Colombia under the mechanisms created under the peace accords between the government of Colombia and the FARC-EP, the classification of documents for national security reasons is not binding to the tribunal created to judge crimes committed during the armed conflict. In relation to the Truth Commission and the Unit for the Search of Missing Persons, the classification is binding except in cases of human rights violations. However, society in general cannot have access to intelligence and contra-intelligence archives before the classification term of thirty years. Also see the public commitment by Ministry of Defence of Colombia to share military archives with the Truth Commission, in “Fuerzas armadas le

respect, it should be noted that under the case law of the Inter-American System of Human Rights, States' freedom to classify military information or impede access to documents or files of such nature is restricted. The IACtHR emphasizes that limitations on access to information must be regulated and established as exceptional measures,⁹⁸ and highlights that

in cases of violations of human rights, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or pending procedures.⁹⁹

According to Article 13.2 of the ACHR, there are three cumulative requirements for restrictions on access to information to be compatible with human rights: (1) the restriction must be stipulated by law; (2) the purpose of the restriction must be to protect the rights and reputation of others, national security or public order, health or morals; and (3) the restriction must be necessary and proportional – that is, it must interfere as little as possible with access to information.¹⁰⁰ The application of these criteria prevents the arbitrary or discretionary treatment of requests for information.

The Colombian Constitutional Court has established additional conditions for exceptional restrictions on access to information.¹⁰¹ For example, it considers that information should only be classified temporarily and that there should be measures in place to ensure the proper custody and preservation of information so that it can be made public at a later date.¹⁰² The Court also makes it clear that access to classified information by bodies responsible for overseeing, supervising and investigating public institutions cannot be restricted.¹⁰³

In the *Gomes Lund* case, the IACtHR established that when judicial or administrative authorities require information to be provided, governments may not refuse access to State archives on the grounds that the information is classified or for reasons of public interest or national security.¹⁰⁴ In its judgment, the Court established the obligation to supply information held by military institutions in the following manner:

[W]hen it comes to the investigation of punishable facts, the decision to qualify the information as secretive or to refuse to hand it over cannot stem solely from

abrirán sus archivos a la Comisión de la Verdad”, *Semana*, 17 December 2017, available at: www.semana.com/nacion/articulo/fuerzas-armadas-le-abriran-sus-archivos-a-la-comision-de-laverdad/551044. And see the statement of the president of the Truth Commission in “‘Las Fuerzas Armadas contarán todo lo que pasó en el conflicto’: Comisión de la Verdad”, *Caracol Radio*, 12 December 2017, available at: http://caracol.com.co/radio/2017/12/17/nacional/1513539877_870091.html.

98 IACtHR, *Gomes Lund*, above note 30, paras 230, 231.

99 *Ibid.*, para. 202.

100 ACHR, Art. 13.2.

101 Constitutional Court of Colombia, Judgment T-1025, above note 95, para. 6.

102 *Ibid.*

103 *Ibid.*

104 IACtHR, *Gomes Lund*, above note 30, para. 202.

a State organ whose members are charged with committing the wrongful acts.¹⁰⁵

Similarly, the Colombian Constitutional Court has determined that the State may not deny access to information of a military nature on the grounds that it is classified, unless so provided by law, or for the purpose of protecting agents of the State from being investigated and prosecuted.¹⁰⁶ For example, in the case of the massacre of members of the community of San José de Apartadó, the Court held that names, codes and ranks of military personnel and police officers present in an area where violations were committed were not classified.¹⁰⁷ Also, the Court ruled that due process or the presumption of innocence of those under investigation cannot be evoked as a basis not to share this kind of information.¹⁰⁸ On this subject, the Court stresses that

regardless of whether the military personnel or police officers whose names have been requested are innocent or not, the victims have the right to seek to ascertain the circumstances surrounding the violations and the alleged perpetrators, and this means that they should be supplied with the names of the people they believe could be involved.¹⁰⁹

In the view of the Colombian Constitutional Court, the information requested by the community did not concern personal matters or aspects of the private lives of military or police personnel, which indeed have greater restrictions for access.¹¹⁰ The Court also established in this case that access to information cannot be denied on the grounds that its disclosure could pose risks or life and integrity threats against State agents or their families. In this sense, the Court indicated that it is expected that public officials have special protective measures against such threats.¹¹¹

The IACtHR has stressed that in order to ensure access to information, States must establish procedures for receiving and processing requests for information, set time limits for replying and delivering the information requested, and have officials adequately trained to carry out these tasks.¹¹² The Court also emphasized that decisions to refuse to provide the information requested must be based on reasoned and substantiated arguments¹¹³ and that there must be a simple, prompt and effective legal procedure in place to challenge such decisions.¹¹⁴

105 *Ibid.*, para. 202.

106 Constitutional Court of Colombia, Judgment T-1025, above note 95, paras 10–12.

107 *Ibid.*, para. 18.

108 *Ibid.*, para. 12.

109 *Ibid.*

110 *Ibid.*, para. 17.

111 *Ibid.*

112 IACtHR, *Gomes Lund*, above note 30, para. 231. See also IACHR, *The Inter-American Legal Framework regarding the Right to Access to Information*, 2nd ed., 7 March 2011, paras 27–31, available at: <https://tinyurl.com/y26vvdoe>.

113 *Ibid.*

114 *Ibid.*

It is also worth noting in this regard that international law establishes the duty to ensure that the information contained in archives is accessible and adapted to the needs of those who may wish to consult it, taking into account accessible formats for persons with disabilities.¹¹⁵

In relation to their cultural value, the Council of State of Colombia has ruled that archives related to the armed conflict can be considered cultural property under the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.¹¹⁶ According to the Court, military archives are also fundamental elements for the building of the nation, constructing a national narrative, and discovering the past or historical memory considered as a political and cultural heritage of peoples.¹¹⁷ As a consequence, the Council of State emphasizes that the State has the duty to diligently store and preserve archives, to impose disciplinary and criminal sanctions on those who destroy them, and to make efforts to reconstruct damaged or destroyed archives and their evidentiary content.¹¹⁸

Protection of journalists and victims in the dissemination of historical memory

The protection of journalists and victims is predominantly the duty of States, while the media also plays an important role in creating and implementing security protocols to protect its employees, such as those who are deployed to cover armed conflicts and hostilities.¹¹⁹ In the eyes of the IACtHR and IACHR, killing and attacking journalists is a form of censorship¹²⁰ which breeds fear and potentially deters other journalists from undertaking or continuing similar work.¹²¹ According to

115 UN Convention on the Rights of Persons with Disabilities, 13 December 2006, Art. 21, available at: www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html. The Convention establishes, under the right to freedom of expression and opinion and access to information, that States must provide information intended for the general public in accessible formats and technologies appropriate to different kinds of disabilities.

116 Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, The Hague, 14 May 1954, Art. 1. (a), available at: http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html.

117 Council of State of Colombia, above note 95, para. 32.7.

118 *Ibid.*, para. 7.

119 CNMH, *El caso de la Asamblea del Valle: Tragedia y reconciliación*, Bogotá, 2018, p. 88–117 available at: www.centrodehistoriahistorica.gov.co/micrositios/diputados-del-valle/assets/pdf/el-caso-de-la-asamblea-del-valle_tragedia-y-reconciliacion.pdf. This report reconstructs the memories of two journalists who were killed while covering confrontations between the armed forces and a non-State armed group. The armed forces were ordered to economically redress the families of the journalists; also, the court ruling on this case underlined that journalists and their teams had not been responsible for those deaths because armed conflicts imply taking risks and personal commitment to provide coverage in areas with hostilities. According to the report, this case impacted some media channels to the point of creating careful protocols and procedures for their teams.

120 IACtHR, *Vélez Restrepo*, above note 64, paras 146, 148; IACHR, Office of the Special Rapporteur for Freedom of Expression, *Violence against Journalists and Media Workers: Inter-American Standards and National Practices on Prevention, Protection and Prosecution of Perpetrators*, Washington, DC, 31 December 2013, para. 1, available at: www.oas.org/en/iachr/expression/docs/reports/2014_04_22_violence_web.pdf.

121 *Ibid.*

the IACtHR, this type of violence, along with kidnappings of journalists and the confiscation or destruction of their equipment, materials and recordings, is an infringement of the right to freedom of expression.¹²²

Victims and journalists engage in the investigation, narration and dissemination of events that occur during armed conflicts, and this can expose them to certain risks and threats. Threatening or killing victims and journalists for what they say is a form of censorship and leads to gaps in historical memory.¹²³ The Inter-American System of Human Rights draws attention to the fact that it is the duty of the State to protect journalists.¹²⁴ Certainly, this obligation also extends to victims who might face risks when reconstructing and spreading memories of their experiences in such contexts.

In *Vélez Restrepo and Family v. Colombia*, the IACtHR examined the case of a journalist who was physically assaulted by members of the armed forces while he was filming a demonstration, and whose camera was destroyed to prevent him from recording the events.¹²⁵ The Court maintained that such an action cannot be considered as a legitimate security measure in controlling a protest or demonstration.¹²⁶ It also concluded that this type of conduct violates freedom of expression, as media coverage of the events enables people “to observe and verify whether, during the demonstration, the members of the armed forces were performing their duties correctly, with an appropriate use of force”.¹²⁷

The risks faced by journalists can persist even after they have finished covering an armed conflict or some other situation of tension or violence. When criticisms or allegations are made about the conduct of agents of the State, journalists and their families may be subjected to threats and harassment. This can cause them great distress and psychological problems and may even force them to move to another part of the country or abroad. On this subject, the IACtHR stated that “journalism can only be exercised freely when those who carry out this work are not victims of threats or physical, mental or moral attacks or other acts of harassment”.¹²⁸

The IACtHR has established that there are a number of factors that exacerbate the risks faced by journalists, such as the type of events they cover, the public interest value of the information they report, the areas where they carry out their assignments and the subject of their reporting. Accordingly, both

122 IACtHR, *Vélez Restrepo*, above note 64, para. 142.

123 IACHR, Office of the Special Rapporteur for Freedom of Expression, *Silenced Zones: Highly Dangerous Areas for the Exercise of Freedom of Expression*, 5 March 2016, p.11, available at: www.oas.org/en/iachr/expression/docs/publications/ZONAS_SILENCIADAS_ENG.pdf.

124 *Ibid.*, pp. 17–18, 72 ff; IACtHR, *Vélez Restrepo*, above note 64, paras 211–215. See CNMH, *La palabra y el silencio: La violencia contra periodistas en Colombia (1977–2015)*, 2 December 2015, available at: www.centrodehistoria.gov.co/informes/publicaciones-por-ano/2015/la-palabra-y-el-silencio. This report indicates that from 1977 to August 2015, 152 journalists have been killed for doing their work. Most of them were workers for community radio stations and regional newspapers, committed to investigating and reporting on corruption and the armed conflict (*ibid.*, p. 60).

125 IACtHR, *Vélez Restrepo*, above note 64.

126 *Ibid.*, para. 144.

127 *Ibid.*, para. 145.

128 *Ibid.*, para. 209.

journalists and victims may risk life and personal integrity when they speak about the past, condemn human rights violations or call for investigations and sanctions.¹²⁹ States therefore have the duty to promptly assess risks related to the requests of victims and journalists¹³⁰ and to adopt protective measures required to prevent any threat to their lives and safety.¹³¹ Special attention should be given to the risks faced by journalists and victims living in rural areas and in zones highly affected by armed conflict and other situations of violence, to enable them to continue their work.¹³²

Protection of speech criticizing acts of public authorities

As a result of their work to investigate, denounce and condemn violations, journalists as well as others may face prosecution on charges of slander, libel or defamation. On this subject, in the case of *Kimel v. Argentina*, the IACtHR held that public officials have the right to protect their honour and good name and that freedom of expression is not an absolute right.¹³³ However, the Court also stated that public officials are subject to greater public scrutiny and that the fact that they perform their duties in the public interest requires them to be more tolerant of criticism.¹³⁴

In the same case, the IACtHR indicated that all democratic societies should be based on the principles of pluralism, tolerance and a spirit of openness.¹³⁵ The Court therefore maintained that freedom of expression is valid not only for “information or ideas that are favourably received or considered inoffensive or indifferent, but also for those that shock, concern or offend the State or any sector of the population”.¹³⁶

On this issue, the IACHR Declaration of Principles on Freedom of Expression states that the “protection of a person’s reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest”.¹³⁷ Although such sanctions may affect journalistic reporting, they are less harmful than criminal prosecution. The Commission furthermore specifies that even in such civil liability cases it must be proven that the news was disseminated with specific malicious intent to inflict harm, with full awareness that it was false or with complete disregard for the truth.¹³⁸

129 *Ibid.*, para. 194.

130 *Ibid.*, paras 201–205.

131 *Ibid.*

132 IACHR, above note 120, pp. 19–21.

133 IACtHR, *Kimel*, above note 8, paras 54–57, 71.

134 *Ibid.*, paras 87–88.

135 *Ibid.*

136 *Ibid.*

137 IACHR, above note 71, Principle 10.

138 *Ibid.*

In this regard, the IACtHR has indicated that criminal prosecution is the harshest way of protecting the honour of public officials and that it can discourage journalistic work.¹³⁹ The threat of facing criminal prosecution can deter journalists and victims from looking into matters with important social implications, one of them being human rights violations.¹⁴⁰ For the IACtHR, the use of criminal law to protect the honour of public officials is excessive, taking into account the consequences a conviction can have, including imprisonment, stigma, a criminal record and the negative impact on the person's family and professional life.¹⁴¹

In short, the State must guarantee the right of victims to voice their opinions or speak out against public institutions or officials. Such narratives may be delivered not only in judicial and non-judicial settings but also in informal and independent spaces where victims re-create their memories both individually and as a community. Furthermore, victims must be allowed to criticize the way the public authorities act, with a view to bringing about changes in practices and behaviour to ensure that there is no repetition of the violation of their rights.

Conclusion

Case law of the IACtHR and its robust interpretation of freedom of expression provide a valuable contribution to the construction and dissemination of victims' memories. The Colombian experience is also an example of efforts and challenges for supporting the construction of victims' memories during ongoing armed conflicts and other situations of violence. From the discussion above it can be ascertained that it is not sufficient to allow victims to express their feelings, ideas, opinions and narratives. It is also important to guarantee access to information and implement affirmative action to guarantee access to public and political debate.

Freedom of expression grants victims and marginalized social groups the right to articulate their ideas and opinions and to disseminate information and creative endeavours using any means they choose. Freedom of expression is a fundamental safeguard as it acknowledges the multiplicity of victims and the diversity of their experiences and memories. In this way, it prevails over discourses that homogenize victims and mute their interests and priorities.¹⁴² It also gives victims the chance to decide for themselves when and to what extent

139 IACtHR, *Kimel*, above note 8, paras 76, 85. In Mexico, slander was decriminalized in 1985 and defamation in 2007, with sixteen of Mexico's thirty-one States amending their criminal legislation to this effect. See Investigation and Analysis Department, Chamber of Deputies, *Calumnias, difamación e injurias: Estudio teórico conceptual, de antecedentes, de las reformas al Código Penal Federal, iniciativas presentadas y de derecho comparado*, Mexico, 2012. On Argentina's decriminalization of libel and slander, see above note 8.

140 IACtHR, *Ricardo Canese v. Paraguay*, Series C, No. 111, Merits, Reparations and Costs, Judgment, 31 August 2004, paras 106–109, available at: www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf.

141 IACtHR, *Kimel*, above note 8, para. 85.

142 Gonzalo Sánchez, "Tiempos de memoria, tiempos de víctimas", *Análisis Político*, Vol. 21, No. 63, 2008, p. 4, available at: <https://revistas.unal.edu.co/index.php/anpol/article/view/46014/47567>.

they give voice to and disseminate their stories, and at the same time ensures respect for their silence and their desire to forget when this is their wish.¹⁴³

Historical memories can take diverse forms, including literary or artistic creations, and can provide opportunities to question stereotypes associated with processes of victimization, violence and social exclusion. Furthermore, diverse expressions of memory by victims can contribute to rebuilding trust and community ties and alleviating grief and trauma. Such expressions also encourage ownership and reassertion of public spaces and the restoration and celebration of customs and rituals.

Expressions of memory by victims can also put an end to periods of silence and fear imposed by armed conflicts and other situations of violence.¹⁴⁴ In such circumstances, access to the media and support for sustainable community communication projects serve as a means to amplify and disseminate the voice of victims by helping them to “recover their life projects, stand and claim for their rights, and identify themselves not as worthy of mercy but as entitled humans, beyond the society that victimized them”.¹⁴⁵ Initiatives of this kind give voice to the stories of victims and other social groups and can influence public debate and discussion.

In accordance with the collective or social dimension of freedom of expression, historical memories concern not only victims but also the rest of society, who might be interested in knowing the circumstances around victimization and the experiences of its witnesses. As Elizabeth Jelin puts it, ensuring that victims’ expressions of memory are widely shared prevents them from becoming isolated and trapped in the repetition of rituals of grief.¹⁴⁶ This aspect is associated with “mechanisms that extend social engagement through memory”, whereby the meaning of the experiences articulated can be reinterpreted by others.¹⁴⁷

The autonomous and independent management of community broadcast projects or radio stations and the production of audiovisual works can generate visibility and foster empathy and solidarity towards victims. Initiatives of this kind can provide alternatives that counteract arguments seeking to justify or excuse human rights and IHL violations. While memory-building is beset with a multiplicity of interests, conflicts and confrontations, freedom of expression establishes a limit, requiring authorities to publicly condemn incitement to hatred and violence as well as to prevent the latter.

143 *Ibid.*, p. 18.

144 By way of illustration, see IACtHR, *Gomes Lund*, above note 30, para. 90. In this case, the IACtHR recorded that, in connection with the disappearance of members of the Araguaia guerrilla movement, the government imposed “absolute silence regarding the events which occurred in Araguaia” and “prohibited the press from releasing news on the matter”.

145 G. Sanchez, above note 142, p. 21. In this text, the author uses the expression “democratizing memory”, emphasizing the importance of supporting victims who may not be able to write about their memories. For example, the author refers to ethnic communities and persons who are illiterate, who can be excluded from official narratives.

146 E. Jelin, above note 8, p. 62.

147 *Ibid.*

The preservation of archives and access to them are essential to the protection of historical memory and are key for identifying practices and conducts of both State agents and other social actors. Drawing on historical memory lessons for transforming harmful social practices requires the incorporation of memory into the public sphere in order to “build lessons from the past into principles for action in the present”.¹⁴⁸ For example, lessons of the past can form the basis of training and instruction for the armed forces, police and other concerned authorities.¹⁴⁹

As part of freedom of expression safeguards, victims and journalists must be protected when they investigate, criticize and make allegations against public officials. Bringing the criticism made by victims into the public spotlight and generating lively discussion could counterbalance the speech of those who deny or justify human rights and IHL violations, and at the same time safeguard freedom of expression and the construction of historical memory. Another fundamental guarantee is the timely and effective adoption of measures to protect victims subjected to threats and risks as a result of their involvement in legal and non-judicial action and journalists who cover armed conflicts and other situations of violence.

In conclusion, an understanding of the construction of historical memory in the light of freedom of expression offers avenues of action for victims which are complementary to their participation in judicial and extrajudicial mechanisms. This approach allows victims to use multiple forms of expression and to avoid associations with trauma, grief and blame. It also engages the State and society as a whole as prominent actors in giving meaning to victims’ experiences, bringing about changes in practices and behaviour and mobilizing against indifference and erasure.

¹⁴⁸ *Ibid.*, p. 58.

¹⁴⁹ IACtHR, *Vélez Restrepo*, above note 64, para. 277. In this case, the Colombian government affirmed that its training to the armed forces has a specific component on freedom of expression and protection of journalists.