

Behind the legal curtain: Social, cultural and religious practices and their impact on missing persons and the dead in Colombia

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Abstract

This paper examines social, cultural and religious factors that affect the implementation of international humanitarian law concerning dead and missing persons in non-international armed conflicts. To this end, the behaviour of both armed groups and civil society is studied. The argument made in the paper is that in some cases endogenous and exogenous systems of value (social, religious and cultural understandings), operating within the logic of armed non-State actors and within local communities, should be considered by policies concerning the search for missing persons. The Colombian armed conflict is used as case study; the social,

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cultural and religious practices of the National Liberation Army and the Revolutionary Armed Forces of Colombia–People’s Army are analyzed as examples. Likewise, social and cultural values within affected populations can impact on post-conflict mechanisms agreed upon by the parties concerning the search for missing persons, and vice versa. Consequently, customs and traditions such as the “adoption” of unidentified buried people by local communities (social resignification of the dead) and the practices of indigenous communities are reviewed in order to establish a holistic framework.

Keywords: armed groups, Colombia, social practices, culture, missing persons, the dead.

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Introduction

This article will explore social and cultural aspects regarding the treatment of the dead in the non-international armed conflict in Colombia. Since its creation in 2016, the Missing Persons Search Unit has received 9,482 search requests.¹ Practices concerning the management of bodies provide numerous explanations that transcend the legal and political sphere and are extremely relevant to (1) understanding the observance of humanitarian norms by the different parties to the conflict from a social and cultural perspective, and (2) refining mechanisms to search for missing persons in *jus post bellum* contexts. In this sense, corporeality as one of the territories of armed conflict is a relevant factor concerning the establishment of mechanisms designed to search for missing persons in the aftermath of conflict.

The temporal scope of the study covers the period from 1964 onwards, considering that this is the year in which the guerrilla groups analyzed in this work were first formed. The first part of the study describes the normative context governing the treatment of bodies in armed conflict and the normative system applicable to Colombia, while the second part briefly explains the Colombian armed conflict. The third part explores the practices carried out by two of the armed groups under study in relation to the deceased in light of their system of values. The fourth section describes the dynamics between the Integral System of Truth, Justice, Reparation and Non-Repetition and armed groups concerning the search for the missing, while the fifth part describes how the cultural and social practices of civilians also impact on the search for missing persons.

1 Unidad de Búsqueda de Personas Dadas por Desaparecidas (UBPD), *Informe de gestión y rendición de cuentas 2020*, 2020, p. 17, available at: www.ubpdbusquedadesaparecidos.co/wp-content/uploads/2021/01/Informe-de-gestion-y-rendicion-de-cuentas-UBPD-2020.pdf.

On IHL obligations

IHL rules concerning the treatment of dead bodies and the search for missing persons

There are limited references in international humanitarian law (IHL) to the treatment of those killed in non-international armed conflicts and the search for missing persons. Article 8 of Additional Protocol II (AP II) states that it is the obligation of the parties to the conflict—especially after the cessation of hostilities—to take all measures within their means to recover the bodies of deceased persons and to give them a decent burial.² Article 8 does not have the scope and detail observed in the Geneva Conventions and in Additional Protocol I (AP I).³ The International Committee of the Red Cross (ICRC) Commentary on AP II notes this difference, pointing out that it would be unrealistic to require the same type of obligation from non-State armed groups as from States. However, it stresses the importance of establishing measures in post-hostilities contexts to trace the whereabouts of those persons who are missing and the location of burial sites where appropriate.⁴

Furthermore, the ICRC has established that regardless of the nature of the armed conflict, there is a customary obligation to keep records of the whereabouts of persons killed or missing during the conflict, as well as to implement tracing systems and share information obtained about their fate with their relatives.⁵ It is worth noting that the ICRC understands that obtaining information on the fate of missing persons constitutes an obligation of means, while providing such records to relatives of missing persons is an obligation of result.⁶ Likewise, despite the absence of specific norms concerning the identification of the dead in non-international armed conflicts, there is a consistent practice—in military manuals, judgments, and ICRC resolutions, among others—that consolidates this obligation of armed non-State actors.⁷

In the case of the International Criminal Court, Article 8(2)(c)(ii) of the Rome Statute recognizes that it is a serious violation of Article 3 common to the

2 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 12 July 1978) (AP II), Art. 8.

3 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Arts 120, 121; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Arts 26, 129, 130, 131, 133; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 12 July 1978), Arts 33, 34.

4 ICRC, *Comentario del Protocolo adicional II a los Convenios de Ginebra de 1949*, 11 January 1998, p. 4657, available at: www.icrc.org/es/doc/resources/documents/misc/comentario-protocolo-ii.htm.

5 Jean-Marie Henckaerts and Louise Doswald-Beck, *El derecho internacional humanitario consuetudinario*, Vol. 1: *Normas*, ICRC, Buenos Aires, 2007, pp. 477–478.

6 *Ibid.*, pp. 482–483.

7 Ximena Londoño Romanowsky and Marisela Silva Chau, “The Protection of the Missing and the Dead under International Law”, in Roberto C. Parra, Sara C. Zapico and Douglas H. Ubelaker (eds), *Forensic Science and Humanitarian Action*, John Wiley & Sons, Hoboken, NJ, 2020, p. 30.

four Geneva Conventions to commit outrages upon personal dignity.⁸ The *Elements of Crimes* recognizes in a footnote that this includes dead persons, clarifying that “this element takes into account relevant aspects of the cultural background of the victim”.⁹

It is also important to highlight soft-law instruments on this issue, such as United Nations General Assembly Resolution 3320 on “Assistance and Cooperation in Accounting for Persons who are Missing or Dead in Armed Conflicts”. It requests belligerent parties in armed conflicts, “regardless of the nature of the conflict”, to take all measures within their power to locate and identify graves, facilitate the return of remains to their families, and provide information to families on the fate of missing persons.¹⁰

Implementing IHL in Colombia

In the Colombian case, the armed conflicts between the State and the National Liberation Army (Ejército de Liberación Nacional, ELN) and between the State and the Revolutionary Armed Forces of Colombia – People’s Army (Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, FARC-EP) has been classified as a non-international armed conflict. Due to the intensity of the hostilities and the particular characteristics of the armed groups, the applicable rules of IHL are common Article 3 and AP II.¹¹

For the application of AP II, certain requirements set out in the Protocol must be met, including that one of the parties to the conflict be a State and that the non-State armed group be strongly organized in a hierarchical structure, capable of carrying out sustained military operations over time and able to control part of the territory.¹² In Colombia, the ELN and FARC-EP’s level of organization, their capacity to manage large portions of territory (especially in the regions of Antioquia and Santander), the collection of taxes from local communities and the administration of justice in these areas, as well as the hierarchy of their structure, fulfil the requirements set by AP II.

In *Case C-225* of 1995, the Constitutional Court of Colombia ruled specifically on the scope of AP II. As part of the national legislative process for the ratification of the Protocol, the National Congress requested the Court to analyze the instrument in light of Colombian constitutional provisions.¹³ The Court stated that international humanitarian norms are guaranteed by the Constitution (Article 214(2)) and that not only the Armed Forces are bound by

8 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), Art. 8(2)(c)(ii).

9 International Criminal Court, *Elements of Crimes*, 2011, Art. 8(2)(c)(ii), fn. 57, available at: www.icc-cpi.int/Publications/Elements-of-Crimes.pdf; Kai Ambos, “Deceased Persons as Protected Persons within the Meaning of International Humanitarian Law: German Federal Supreme Court Judgment of 27 July 2017”, *Journal of International Criminal Justice*, Vol. 16, No. 5, 2019, p. 1115.

10 UNGA Res. 3220 (XXIX), 6 November 1974, para. 2.

11 Colombia ratified AP II on 14 August 1995.

12 AP II, Art. 1.

13 Congress of Colombia, Law 171, 1994, Final Dispositions.

IHL, but also members of irregular armed groups.¹⁴ It also made it clear that non-State armed groups “do not become, by the sole application of humanitarian law, subjects of public international law”.¹⁵

In the same vein, the Court determined that under the Constitution, the rules of IHL must be applied in all cases, with no need to assess the level of intensity of the conflict after it has been classified as such, as required by Article 1 of AP II.¹⁶ This provision establishes that these norms “shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature”.¹⁷

On the armed conflict in Colombia

During the civil war known as La Violencia (1948–57), the opposing parties belonged to two elite economic groups. In 1957, these two groups signed a peace agreement through which they would share power alternately for sixteen years.¹⁸

The alternation of power between concentrated economic groups gave rise to peasant resistance movements, who saw an opportunity to put an end to oligarchic domination in Colombia. Although these rural groups originated during La Violencia, it was not until a few years later that confrontations between the peasant groups and government forces gave rise to the creation of several guerrilla groups and the beginning of a new armed conflict in 1964.

One of the main causes of the current conflict is the great inequality in land distribution and the concentration of agricultural activity in a minority and conservative sector. This, together with the lack of legitimacy in the land titles that had been granted since 1944 and the unclear methods and criteria for the appropriation of abandoned lands, led to the conflict.¹⁹

Notably, there is no presence of State institutions in 60% of the Colombian territory.²⁰ At the same time, in 75% of these municipalities there are guerrilla bases, where it is believed that the guerrillas control the administration of justice.²¹

The FARC-EP

In 1958, rural communities founded the independent and self-governed republic of Marquetalia in the territory of southern Tolima. In response, the government

14 Constitutional Court of Colombia, *Case C-225/95*, Case No. C-225–95, 18 May 1995, para. 10.

15 *Ibid.*, para. 14.

16 *Ibid.*, para. 25.

17 AP II, Art. 1.

18 Jemima Garcia-Godos, “Colombia: Accountability and DDR in the Pursuit of Peace?”, in Chandra Lekha Sriram *et al.* (eds), *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants*, Routledge, Abingdon and New York, 2013, p. 220.

19 Comisión Histórica del Conflicto y sus Víctimas, *Contribución al entendimiento del conflicto armado en Colombia*, Ediciones Desde Abajo, Bogotá, 2015, p. 13.

20 Juan Sebastián Urdaneta, “El campo jurídico de las FARC: Aproximación a las prácticas de justicia guerrillera”, *Revista Via Iuris*, No. 21, 2016, p. 116.

21 *Ibid.*

carried out Operation Sovereignty on 18 May 1964. During the confrontation between the two sides, the Guerrilla Agrarian Programme was created, which laid the foundations for the FARC-EP, founded during the same year. From that moment on, the peasant self-defence groups began a process of transition to guerrilla warfare.²² The number of FARC-EP members oscillated between 3,600 in 1986, 17,000 in 2000 and 7,000 (under the demobilization process) in 2018.²³

The FARC-EP operated in rural territories where the State had little or no presence. In line with its historical beliefs, the group advocated for the rights of farmers, who had been systematically deprived of their fundamental rights. The main objective of the FARC-EP was the transformation of the management of farmland in Colombia. Hence, the group established a close relationship with peasant communities. By the mid-1990s, the FARC-EP had come to control approximately 40–50% of Colombia's 1,071 municipalities.²⁴

At an internal level, the guerrilla group maintained a strong top-down structure with a clear line of command. Members were not supposed to commit looting against the civilian population, and internal codes of conduct were strict regarding infractions committed for individual gain.²⁵ If abuses against civilians were committed, these actions were generally approved by the squad or platoon authority.²⁶

According to the FARC-EP, disrespect for local communities was a serious crime.²⁷ Nevertheless, considering the ambiguous wording of this principle and the numerous IHL violations committed by this guerrilla group, it is questionable under what conditions this maxim was applied.

The ELN

The ELN dates back to the 1960s in the Arauca region of Colombia. It is a decentralized guerrilla group, characterized by the autonomy that many of its subgroups maintain in relation to the Central Command.²⁸

The ELN was born as a student movement that, in light of the inequality experienced in Colombia and the regional context, especially the Cuban Revolution, decided to form a revolutionary guerrilla group with the aim of founding a socialist State.²⁹ According to the ELN Official Programme, it is a military and political organization whose main objective is to seize power for the

22 Daniel González and Isabel Martínez Bravo, "El discurso fundacional de las FARC-EP", *Comunicación y Ciudadanía*, No. 8, 2016, p. 13.

23 Rene Provost, "FARC Justice: Rebel Rule of Law", *UC Irvine Law Review*, Vol. 8, No. 2, 2018, p. 235.

24 *Ibid.*, p. 247.

25 FARC-EP, *Disciplinary Rules and Regulations of the FARC-EP*, 25 January 1978, Arts 3(a), 3(h), 3(l).

26 Francisco Gutiérrez Sanín, "Telling the Difference: Guerrillas and Paramilitaries in the Colombian War", *Politics & Society*, Vol. 36, No. 1, 2008, p. 13.

27 FARC-EP Statute, 25 January 1978, Art. 1(2)(c), available at: <https://tinyurl.com/3azuy6zp>.

28 Camilo Echandía Castilla, *El ABC del Ejército de Liberación Nacional (ELN): Evolución del Frente de Guerra Oriental (territorialidad, iniciativa armada y relación con la población y las economías ilegales)*, Fundación Ideas para la Paz, Bogotá, 2015, p. 4.

29 Andrea Lissett Pérez Fonseca, "La construcción social de una guerrilla", *Análisis Político*, Vol. 29, No. 87, 2016, p. 79.

people and to create a democratic and transparent system composed of workers, peasants, intellectuals and students.³⁰

Between 1973 and the early 1980s, the ELN was reorganized and expanded to Cesar, north of Santander and Arauca, on the border with Venezuela.³¹ From 1983 onwards, the group decided to expand its military operations in the Arauca region in order to increase its influence, especially on mining areas. Oil exploitation allowed the organization to dominate numerous regions over other armed groups, including the FARC-EP.³² The expansion of the ELN can be attributed to a number of factors, particularly the group's historical relationship with local communities, social movements and groups that sought recognition for the agricultural sector, and the influx of economic resources provided by oil exploitation.³³

From 1998 onwards, with the rise of the FARC-EP, the ELN's dominance in the Cordillera region started to decline.³⁴ In addition, the increase in activities by paramilitary groups in the Arauca region in 2000 led to a more complex scenario for the ELN's territorial control.³⁵ This situation did not de-escalate after the demobilization of paramilitary groups in 2005, but rather triggered a confrontation between the FARC-EP and the ELN over territorial control of Arauca.³⁶ In order to support its military operations financially, the ELN had to resort to cooperation with drug cartels, though this option had initially been rejected as contrary to the organization's principles.³⁷

From its very beginning, the ELN imposed internal rules of conduct and guerrilla codes that governed the daily life of the organization and also provided for sanctions in case of infractions.³⁸

The hostilities went on for decades, and the strong interference of drug trafficking organizations marked the complexity of a context that worsened with the formation of paramilitary (counter-insurgency) groups, supported by the Armed Forces and the government. The origin of paramilitarism dates back to 1968, when Congress legislatively validated the creation of private self-defence groups. This regime was in force until 1989, when its legal status was eliminated during peace negotiations. However, the growing presence of the guerrillas from 1990 onwards introduced new legislation, called *Convivir*, under which paramilitary groups came under the Private Security and Surveillance Statute.³⁹

The Unit for Comprehensive Attention and Reparation of Victims (*Unidad para la Atención y Reparación Integral a las Víctimas, UARIV*) has established that

30 Carlos Medina Gallego, *Ejército de Liberación Nacional: Notas para una historia de las ideas políticas*, Universidad Nacional de Colombia, Bogotá, 2019, p. 78.

31 C. Echandía Castilla, above note 28, p. 11.

32 *Ibid.*, p. 4.

33 *Ibid.*, p. 7.

34 *Ibid.*

35 *Ibid.*, p. 8.

36 *Ibid.*, p. 9.

37 *Ibid.*, p. 10.

38 C. Medina Gallego, above note 30, pp. 62–63.

39 J. García-Godos, above note 18, p. 221.

between 1985 and July 2021, 151,521 persons were missing as a result of the conflict in Colombia.⁴⁰

On 24 November 2016, the *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace* (2016 Peace Agreement) was signed in Havana between the government and the FARC-EP, bringing an end to more than five decades of armed conflict.⁴¹ The ELN did not sign the Agreement and still carries out military activities.

The 2016 Peace Agreement established mechanisms for the reintegration of former guerrilla members into society, comprehensive reparations for victims of the conflict, the prosecution of those responsible for serious violations of IHL and human rights, and the transition of the FARC-EP to a political party. The ELN has recognized its responsibility in many of the international crimes committed during the armed conflict, but unlike the FARC-EP, it has not signed the peace accords. Nonetheless, it has participated in rounds of negotiations with the Colombian government in Havana to reach an agreement. The group has stated:

In the ELN, we assume our part of the responsibility over 50 years of confrontation with the State. In this sense, our organisation adheres to the universal doctrine of treating victims of conflict with truth, justice and reparation and a commitment to non-repetition.⁴²

In 2007, the ELN highlighted the issue of enforced disappearances and the search for the missing in the context of exploratory meetings for a peace agreement. Despite the progress made, the country's political situation and the disagreements between the government and ELN proposals led to the suspension of the negotiations, and proposals for a joint search did not succeed. The first phase of the dialogue between the government of Juan Manuel Santos and the ELN took place between 2014 and 2016. That same year, six working priorities were announced: these were participation of society, democracy for peace, transformations for peace, victims, end of the conflict, and implementation of the agreement. With the arrival of Iván Duque to the Colombian presidency in 2018, the dialogue came to a dead end.⁴³

40 UARIV, “Registro Único de Víctimas (RUV)”, available at: www.unidadvictimas.gov.co/es/registro-unico-de-victimas-ruv/37394.

41 Government of Colombia and FARC-EP, *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace*, 24 November 2016 (2016 Peace Agreement), available at: www.peaceagreements.org/viewmasterdocument/1845.

42 Luis I. Sandoval Moreno and Felipe Pineda Ruiz, “El ELN y la salida política del conflicto armado”, in Víctor de Currea-Lugo (ed.), *¿Por qué negociar con el ELN?*, Editorial Pontificia Universidad Javeriana, Bogotá, 2014, p. 208.

43 Erika M. Rodríguez Pinzón, “Colombia: El desafío de implementar una paz imperfecta”, *Documentos de Trabajo Fundación Carolina*, No. 4, 2019, p. 21; Jerónimo Ríos, “El Ejército de Liberación Nacional, el gobierno de Iván Duque y la encrucijada de la paz en Colombia”, *Canadian Journal of Latin American and Caribbean Studies*, Vol. 46, No. 2, 2021, pp. 230–231.

The buried and the missing

It is necessary to point out that the search for missing persons seeks three objectives: to determine if the person is alive, and his or her location if so; if not, to determine his or her fate (whether he or she was killed, tortured, died of an illness while in captivity, died during combat, etc.); and to determine the fate of the person after death (treatment of the victim's body or remains).⁴⁴ These determinations are relevant to the social, historical and political narrative of the armed conflict and, in particular, to the parties involved. The behaviour of each party regarding the treatment of the dead speaks not only to their compliance with humanitarian norms, but also to their social and cultural practices (which can fluctuate over time). Conversely, their socio-cultural values and ethics, as well as their religious beliefs, could be useful for predicting the behaviour of the groups regarding the dead and for establishing differentiated search mechanisms.

It is worth noting that the fate of those who have died has not always been a result of the socio-cultural practices or tactical logics of the different actors involved in the conflict. In many cases, the dynamics of armed conflict prevent the parties from making decisions about the victims' bodies. For instance, the immediate need to evacuate settlements in one part of the territory because of an enemy attack may make it impossible to bury and identify those killed in the fighting. However, when decisions about the bodies do come from socio-cultural practices or military decisions, it is possible to observe different attitudes depending on the different parties to the conflict.

The undignified treatment of the dead by the different parties to the conflict may be motivated by different objectives: to punish, to humiliate, to set an example to the enemy, to intimidate people not to collaborate with the guerrillas, and so forth. In this sense, Foucault's notion of biopower becomes relevant, as the treatment of the bodies reveals a physical approach to armed conflict: war is embodied in the decisions made regarding the fate of the remains of those who have died. And these choices are not a minor aspect of the conflict—the dead are eminently political objects because of their capacity to test the legitimacy of all kinds of power.⁴⁵ In this sense, as Olarte-Sierra and Castro Bermúdez argue, forensic knowledge provides an understanding of the body as a “territory of war”.⁴⁶

In the case of the ELN, despite the scarce resources and hunger faced by the group, one of its guiding principles was to maintain a comradely relationship with the peasant communities. Consequently, ELN members worked the farmers' land on a daily basis, not only to persuade them to join the revolutionary cause, but

44 Élisabeth Anstett, “Comparación no es razón: A propósito de la exportación de las nociones de ‘desaparición forzada’ y ‘detenidos desaparecidos’”, in Gabriel Gatti (ed.), *Desapariciones: Usos locales, circulaciones globales*, Siglo del Hombre Editores, 2017, p. 38.

45 *Ibid.*, p. 37.

46 María Fernanda Olarte-Sierra and Jaime Enrique Castro Bermúdez, “Notas forenses: Conocimiento que materializa a los cuerpos del enemigo en fosas paramilitares y falsos positivos”, *Revista de Antropología y Arqueología*, No. 34, 2019, p. 136.

also to earn food.⁴⁷ Solidarity was the main pillar in the group's relationship with local communities.⁴⁸ There was empathy between these communities and the ELN, a product of a common past, shared cultural traditions and practices and, in many cases, common experiences of misery and inequality.

The emergence of the so-called "Church of the Poor", a social movement within the Catholic Church marked by the Second Vatican Council (1962–65) and the Second Latin American Episcopal Conference in 1968 that sought to make the needs of the poor and marginalized visible, significantly influenced the guerrilla groups.⁴⁹ It highlighted a "humanistic" vision in the conduct of the guerrillas, where the use of practices such as the desecration of the dead was strictly forbidden. In the case of the ELN, the commitment to the social transformation of the poor through sacrifice and Christian faith was established as a maxim by the former priest and guerrilla Camilo Torres Restrepo.⁵⁰

In this sense, the ELN called for a "humanization of war" and compliance with IHL as an "expression of its revolutionary ethics and humanism", denouncing at the same time a State practice of enforced disappearances and proposing the intervention of the ICRC.⁵¹ At the same time, the ELN's social and cultural narrative was pervaded with religious connotations, especially with notions of sacrifice and the quest for a virtuous life: "[W]e developed this spirit of solidarity through sacrifice, because the conditions were extremely difficult, incredibly precarious. At that time, it was just that: a heroic campaign of limitations and sacrifice."⁵²

Guided by Restrepo's path, many priests and nuns joined the guerrillas, seeing a parallel between the organization's objectives and their own altruistic calling. They shared a culture of sacrifice in order to reach the liberation of the people and the salvation of their souls.⁵³ Interestingly, some authors have described the ELN as being symbolically composed of an army of the living and an army of the dead, as the commitment to those who have died in the name of a common and just cause is one of the most important reasons for which one can sacrifice oneself.⁵⁴

The ELN's treatment of the bodies of its own members included burial and ceremony. Burial was carried out with military honours in cases where the person had led an exemplary militant life. The ELN describes as an affront a situation in which the body of one of its main commanders, Luis José Solano Sepúlveda, who had been buried, was disinterred by an army patrol and exhibited to local

47 C. Medina Gallego, above note 30, p. 66.

48 A. L. Pérez Fonseca, above note 29, p. 85.

49 William N. Holden and R. Daniel Jacobson, "Ecclesial Opposition to Nonferrous Mining in Guatemala: Neoliberalism Meets the Church of the Poor in a Shattered Society", *The Canadian Geographer*, Vol. 53, No. 2, 2009, pp. 146–148.

50 *Ibid.*, p. 89.

51 C. Medina Gallego, above note 30, p. 493.

52 *Ibid.*, p. 64 (author's translation).

53 *Ibid.*, p. 108.

54 Geraldine Bustos Zamora, "Unión entre marxismo y cristianismo en el Ejército de Liberación Nacional", *Izquierdas*, No. 49, 2020, p. 1381.

communities with a sign declaring him “killed in combat”.⁵⁵ It is no coincidence that the ELN’s references to its most important deceased leaders describe a “physical disappearance”, but not a spiritual one.⁵⁶

In most of the statements on military actions published by the ELN, however, there is no indication of how the bodies of enemies killed in combat are treated. When a person is captured and subjected to revolutionary prosecution, he or she is described only as “having been executed”, without any further reference to the fate of the body or the location of the grave.⁵⁷ In the cases of those killed in combat, there are also ambiguous descriptions such as “March 20: we attacked the narco-paramilitaries in La Veta, Montecristo municipality, South Bolivar, where one narco-paramilitary was killed and another wounded”.⁵⁸

In this sense, the differentiated symbolic value of death depending on whether or not it is associated with the armed group is a determining factor in understanding the subsequent treatment of the bodies. In the case of the ELN, and especially through the historical and epic narrative of the hero and the martyr, the death of a member in combat symbolizes the triumphant end of the fighter and perpetuates the revolutionary myth. Such a death is thus a reaffirmation of the purity and integrity of the deceased and his or her commitment to the cause. It is, according to an epic narrative, a “beautiful death”.⁵⁹ Consequently, it is a priority to recover the body in order to provide the fighter with an honourable burial. In this sense, the body of an ELN fighter is at the service of a collective cause and becomes relevant as a means for the social construction and projection of that cause.⁶⁰

In a narrative describing the daily life of ELN members, Rodríguez Bautista and García describe the death of a comrade and the procedure that was followed. As they were not at the camp, the body had to be left at the side of the road, but not before checking the deceased’s belongings for valuables that could be of use to the unit.

“– Go – Carlos orders me –, take everything you have out of his pockets, check if he’s dead, if he’s only wounded let me know immediately.” I run to Parmenio and lie down next to his body, check his pulse, I don’t feel anything. I put my head on his chest looking for his heartbeat, I hear nothing. I do the pupil test, there is no doubt, Parmenio is dead. Two colleagues tell me to hurry up, so I

55 ELN, *Revista Insurrección*, Vol. 775, 25 January 2021, p. 39, available at: <https://eln-voces.net/insurreccion-775/>.

56 ELN, *Revista Insurrección*, Vol. 772, 4 January 2021, pp. 24–25, available at: <https://eln-voces.net/insurreccion-772/>.

57 ELN, “Acciones elenas en la cordillera central”, 5 April 2021, available at: <https://eln-voces.net/acciones-elenas-en-la-cordillera-central/>, ELN, “Accionar eleno en el oriente durante enero”, 8 February 2021, available at: <https://eln-voces.net/accionar-eleno-en-el-oriente-durante-enero/>, ELN, “Combates en el Pacífico suroccidental”, 11 January 2021, available at: <https://eln-voces.net/combates-en-el-pacifico-suroccidental/>.

58 ELN, “Acciones elenas en la cordillera central”, above note 57.

59 Vera Carnovale, “¿Por un mundo mejor? En diálogo con Sobre la violencia revolucionaria. Memorias y olvidos de Hugo Vezzetti”, *Nueva Sociedad*, No. 238, 2012, p. 96.

60 J. Ríos, above note 43, p. 194.

take out the things he has in his pockets and although I don't want to separate from him, I have to leave him.⁶¹

The importance of burying comrades is described in different publications of the organization, many of them written by the commanders themselves. Regarding the death of Camilo Torres Restrepo, one of them writes:

The situation was very difficult during the shooting and they had to leave the body there. The location of the body is a mystery, it's a national secret. But they [the Armed Forces] have it, like a trophy. ... They stole his body, because they know they are hurting us by doing that.⁶²

In contrast, the death of the enemy lacks this social symbolism of dedication and sacrifice. The courage and ideals of the Other are not comparable, and their death becomes something less impressive, even an "administrative" act, as Carnovale describes it.⁶³ This leads to a different treatment of the bodies. Consequently, despite the strong influence of its religious and moral roots, the ELN has on numerous occasions failed to comply with IHL provisions relating to the treatment of the bodies of deceased persons.

In the case of the FARC-EP, its conduct was characterized by a partial compliance with IHL norms. In most cases, compliance was the result of a convergence point between the organization's ideology and the content of some specific norms. For instance, the Disciplinary Rules and Regulations of the FARC-EP stipulate that disciplinary measures are understood as a necessity that the member accepts as a voluntary and serious commitment.⁶⁴ He or she is guided by the need to fight against an oligarchic regime and the pursuit of "a proletarian national liberation government".⁶⁵

In many cases, armed groups move from non-compliance to compliance with international norms based purely on a cost-benefit analysis.⁶⁶ However, in the case of the FARC-EP, the organization's ethos and values cannot be disregarded as key factors contributing to compliance. In this sense, there was a social and political interest in representing the peasant sector that is consistent with part of the IHL normative repertoire.

The so-called "Farian morality" (social and cultural values within the FARC-EP, *moralidad fariana*) and its adherence by the members of the organization was the basis of daily life, where the conceptions that sustained the organization were reinforced, thus reaffirming the bonds of identity and belonging among the individuals. These practices also functioned as a justification for the non-observance

61 Nicolás Rodríguez Bautista and Antonio García, "Papá, ¿son los muchachos!", La Fogata, Bogotá, 2017, pp. 60–61 (author's translation).

62 Milton Hernández, *Rojo y negro: Una aproximación a la historia del ELN*, ELN, 1998, p. 132 (author's translation).

63 V. Carnovale, above note 59, p. 99.

64 FARC-EP, above note 25, Introduction.

65 *Ibid.*

66 Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics*, Cambridge University Press, Cambridge, 2015, p. 19.

of certain IHL norms, with members considering them to be foreign and therefore inapplicable to their way of life.⁶⁷

The FARC-EP was the most prolific producer of regulations in the guerrilla movement in Colombia. Its rules of conduct were drawn up before 1952, in many cases by people who were not aware of the existence of IHL. In essence, they were influenced by Marxist values, the emerging “Farian morality” and the armed group’s superior interest.⁶⁸ The Statute, Regulations and Norms and Principles on clandestine operations were adopted by the armed group between 1999 and 2001 and served to rebuild aspects concerning solidarity.⁶⁹ Surprisingly, none of the group’s instruments—such as operation manuals, internal regulations, the Statute or the ten National Conferences—makes any reference to the methodology to be followed concerning the remains of the dead in its custody.⁷⁰ Its Statute only stipulates the obligation “to respect prisoners of war as to their physical integrity and convictions”.⁷¹

The major source of information on the *modus operandi* of the FARC-EP’s companies, columns and units are the testimonies written by the group’s leaders. In this regard, one of its most prominent leaders observed:

A high percentage of the deaths in the guerrilla remained unknown. If the troops did not take their bodies to bury them in mass graves, they were buried in lost graves in the middle of the jungle. One day I suggested that we should try to calculate the number of fighters who had died, extending the definition of fighter to Colombians who had at one time or another been members of the FARC. How many people were part of the guerrilla, how many died? Such figures are impossible to estimate.⁷²

Within the framework of the FARC-EP’s activities, there were different scenarios of disappearance. In the case of soldiers and policemen killed in military operations, the bodies were thrown over cliffs or buried in mass graves without any topographical record of the locations used for this purpose or lists indicating the identity of the persons buried.

A second scenario for disappearances is disciplinary measures within the armed group. In 2010, a media report stated that the FARC-EP had killed more of its own members through internal trials than members of the Armed Forces or

67 ICRC, *El origen de las restricciones en la guerra*, Geneva, 2018, p. 45, available at: www.icrc.org/es/publication/el-origen-de-las-restricciones-en-la-guerra.

68 Mario Aguilera Peña, “Las guerrillas marxistas y la pena de muerte a combatientes: Un examen de los delitos capitales y del ‘juicio revolucionario’”, *Anuario Colombiano de Historia Social y de la Cultura*, Vol. 41, No. 1, 2014, p. 209.

69 Cristian Acosta Olaya, “Férrea pero consciente: Disciplina y lazo identitario en las organizaciones clandestinas de las Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo (FARC-EP)”, *Izquierdas*, No. 49, 2020, p. 543.

70 The FARC-EP’s Open Order Charter, the Closed Order Regulations, the FARC-EP Statute and the ten National Conferences were analyzed without finding any reference on this issue.

71 FARC-EP Statute, above note 27, Art. 7(k).

72 Ángel Gabriel, “De la larga guerra al nuevo partido”, *Fuerza Alternativa Revolucionaria del Común*, 19 August 2017 (author’s translation), available at: <https://partidofarc.com.co/farc/2017/08/19/de-la-larga-guerra-al-nuevo-partido/>.

paramilitaries.⁷³ In practice, most of the executions committed by the armed group were justified as disciplinary measures for those who had behaved in a manner incompatible with its principles. After the trials, called “revolutionary war councils”, those found guilty were forced to dig their own graves, where they were buried without any identification and without notifying their families.⁷⁴ The bodies were not handed over to the authorities for legal identification, and no record was kept of their whereabouts. They were either thrown into the river or buried in unmarked graves.⁷⁵ It has been argued that the constant concern of having infiltrators from the government among the group’s members was the main cause for such a severe and rigorous justice system.⁷⁶

Another modality of disappearance under the FARC-EP regime is related to the practice of extortive kidnapping of civilians. According to the Observatory on Memory and Conflict of the National Centre of Historical Memory (Centro Nacional de Memoria Histórica, CHMH), 35,888 kidnappings were identified as having taken place since 1964.⁷⁷ Guerrilla groups were responsible for 85.4% of these cases.⁷⁸ In the cases registered between 1970 and 2010 where the perpetrators of these crimes could be determined (9,082), 37% were attributed to the FARC-EP, whereas in cases of presumed responsibility (29,085), 33% of them were attributed to this group.⁷⁹ The FARC-EP, for its part, justified this *modus operandi* by the need to finance its operations under the legal figure of military necessity.⁸⁰ Deaths while in captivity account for 7% of cases. Causes of death include illness, escape attempts and rescue operations attempted by law enforcement agencies.⁸¹ In many of the cases attributed to the FARC-EP, the location of the bodies was never revealed to their families and their graves were never found.⁸²

In addition to the disappearance of civilians in cases of kidnapping, a fourth scenario involves the disappearance of civilians as a result of conflict between local communities and the armed group. One of the main reasons for confrontation was the resistance of many communities to territorial, judicial and administrative control by the armed group. This situation was particularly evident in the case of

73 R. Provost, above note 23, pp. 245–246.

74 Gloria María Gallego García, “El Acuerdo Gobierno: FARC sobre búsqueda, identificación y entrega digna de restos de personas desaparecidas. Análisis político y jurídico”, *Estudios de Derecho*, Vol. 72, No. 160, 2015, pp. 129–130.

75 Sala de Justicia y Paz, Relatoría del Tribunal Superior de Medellín, “Reclutamiento ilícito y ejecuciones en las Farc: hechos de connotación”, *Resiliencia*, No. 5, 2014, p. 4.

76 C. Acosta Olaya, above note 69, p. 547.

77 Observatory on Memory and Conflict, “The Conflict in Numbers: Kidnapping”, CHMH, available at: <http://micrositios.centrodehistoriamemoria.gov.co/observatorio/portal-de-datos/el-conflicto-en-cifras/secuestro/>.

78 *Ibid.*

79 CHMH, *Una verdad secuestrada: Cuarenta años de estadísticas de secuestro 1970–2010*, Imprenta Nacional, Bogotá, 2013, p. 12.

80 By understanding the armed conflict in terms of class conflict, activities such as the kidnapping of civilians to finance military operations were justified by the FARC-EP in order to end the conflict and because these victims represented a segment of the population that did not share their ideals. See ICRC, above note 67, pp. 43–44.

81 Observatory on Memory and Conflict, above note 77, p. 23.

82 G. M. Gallego García, above note 74, p. 132.

the indigenous populations of the Cauca region during the 1980s, giving rise to self-defence groups in small villages.⁸³

The last of the scenarios of disappearances at the hands of the FARC-EP involves cases of police and soldiers captured during military operations and confrontations, as well as the intentional kidnapping of members of the Armed Forces who were on leave or on holiday, for the purposes of prisoner exchanges. In these cases, Gallego García indicates that there are at least 135 persons who were never released and whose whereabouts are unknown.⁸⁴

Cataño has postulated that the revolutionary justice of the FARC-EP was not guided by a formal rational system whereby conduct may or may not be in line with fixed normative precepts.⁸⁵ On the contrary, acts of justice were guided by the system of values and ethical principles on which the armed group bases its *raison d'être*. Thus, it operated through a kind of “irrational justice”.

Within the value system of the FARC-EP, the death of a person marked an end to that person's entity. The armed group, characterized as Marxist-Leninist, did not subscribe to religious concepts. In fact, no records were kept of the deaths of the organization's own members. In the context of the revolutionary cause, there was no valuing of life after death, which is why there was a tacit irrelevance of the corporeality of any person – a member of the armed group, a civilian or a prisoner of war – after his or her death. This certainly does not imply that no attempt was made to create graves for the deceased, but rather that it was not a matter of priority in light of the organization's objectives. This premise is also supported by Cataño, who notes:

The pride of their Marxism-Leninism (an irreligious, “scientific” and “objective” philosophy) has enabled some combatants to differentiate themselves from their colleagues in the ELN, who are very prone to following the orientations of former members of the Church and the teachings of the Theology of Liberation.⁸⁶

From the above, it is important to note how the foundations of the armed groups determine their line of conduct. The FARC-EP justified violence against civilians when military advantage was at stake, and internal rules did not entail any disposition regarding proper burials for guerrillas. While both the FARC-EP and the ELN shared goals concerning the recognition of the demands of the marginalized and the poor, especially within the peasant communities, the ELN also had a spiritual and religious approach that differentiated it from the systematic FARC-EP practices related to the treatment of the dead.

83 Mario Aguilera Peña, “Claves y distorsiones del régimen disciplinario guerrillero”, *Análisis Político*, No. 78, 2013, p. 267.

84 G. M. Gallego García, above note 74, pp. 133–136.

85 Gonzalo Cataño, “Justicia con intimidación: El caso de las FARC”, *Revista de Economía Institucional*, Vol. 19, No. 36, 2017, p. 102.

86 *Ibid.*, p. 130 (author's translation).

Mechanisms of search: Cooperation between civil society, armed non-State actors and public institutions

The UBPD

Joint Communication No. 62 between the Colombian government and the FARC-EP in October 2015 established a specific agreement on immediate measures prior to the signing of the 2016 Peace Agreement for the purpose of finding the remains of missing persons who had died as a result of the conflict and returning them to their families.⁸⁷ It established the creation of the Missing Persons Search Unit (Unidad de Búsqueda de Personas Dadas por Desaparecidas, UBPD) to articulate mechanisms designed to register the whereabouts of missing persons under the control of the different parties to the conflict, up to 2016.⁸⁸ The FARC-EP agreed to share available information on the fate of persons who had died under its custody and whose whereabouts were unknown.⁸⁹

This communication also established the creation of a tripartite working group between the FARC-EP, the national government and the ICRC, which would facilitate search operations on the field. With the information provided by the FARC-EP and the government, the ICRC, together with the National Institute of Legal Medicine and Forensic Sciences, would design and implement humanitarian programmes.⁹⁰

The UBPD coordinates and directs activities aimed at searching for and locating persons who have disappeared in the context and as a result of the armed conflict, taking all possible measures to locate and identify their remains and to hand them over to their families in a dignified manner.⁹¹ Significantly, the 2016 Peace Agreement stresses the need to respect different ethnic and cultural traditions during the process of returning the remains of deceased persons.⁹²

In terms of complementarity, it is specified that “the activities of the UBPD can neither replace nor impede the judicial investigations that may be carried out in compliance with the State’s obligations”.⁹³ In this sense, the activities of the UBPD do not affect the investigations and proceedings of the Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, JEP) regarding individual responsibility for the crimes related to cases of disappearances that the Unit is investigating.⁹⁴

On 20 August 2019, the FARC-EP submitted information on the whereabouts of 276 missing persons. Of these, 64% are former members of non-State armed groups, 28% are civilians and 1% are members of the Armed

87 Government of Colombia and FARC-EP, Joint Communication No. 62, 17 October 2015, available at: www.centrodememoriahistorica.gov.co/descargas/dialogos-paz-2015/comunicado-62-negociaciones-paz-2015.pdf.

88 *Ibid.*, section II.

89 *Ibid.*, section I.

90 *Ibid.*

91 2016 Peace Agreement, above note 41, section 5.1.1.2.

92 *Ibid.*

93 *Ibid.*

94 *Ibid.*

Forces.⁹⁵ Between 2018 and 2020, the UBPD received 132 offers of information from former members of this guerrilla group.⁹⁶ The FARC-EP, according to the provisions of the 2016 Peace Agreement, created the FARC Search Commission for Missing Persons, a body that has received requests for information since the publication of Joint Communication No. 62.⁹⁷

Part of the UBPD's agenda is to disseminate its role to former members of armed groups in order to facilitate the exchange of information for the location and identification of victims. Throughout 2019, the UBPD trained many of these former members on the gathering of cartographic information so that they could provide details on the whereabouts of missing persons.⁹⁸ Furthermore, in 2019 a working group was established between the UBPD, the ICRC and the FARC political party (Comunes) to accelerate the exchange of information in order to elaborate search strategies.⁹⁹

The role of the JEP

The UBPD works in coordination with the JEP. For instance, in *Case 01: Hostage-Taking and Other Serious Deprivations of Liberty*, the UBPD submits regular reports on missing persons included in the case. The JEP provides an opportunity for former members of the FARC-EP to share information that would facilitate the location of missing persons who had been illegally retained by the group. In this regard, the order dated 10 January 2020 of the Chamber for the Recognition of Truth, Responsibility and the Determination of Facts and Conducts established that thirty-one former high-ranking members of the FARC-EP and sixteen ex-fighters would be notified so that they could provide information.¹⁰⁰

The Absence of Acknowledgment of Truth and Responsibility for Facts and Conduct Section is a relevant agency of the JEP, which works in collaboration with the UBPD. This Section dictates provisional measures to safeguard territories where it is believed that there are remains of persons who are being searched for. For instance, on 30 July 2020 a provisional measure was ordered to protect the Universal Garden Cemetery in Medellín, where it is believed there are remains of persons who were victims of enforced disappearance, in order to conduct exhumations. This was decided on the basis of information provided by the UBPD, which compiled and compared information submitted by victims' relatives, FARC-EP members and witnesses.¹⁰¹

95 UBPD, *Informe de gestión y rendición de cuentas 2019*, 2019, p. 21, available at: <https://tinyurl.com/wja8af5s>.

96 UBPD, above note 1, p. 19.

97 UBPD, above note 95, p. 21.

98 *Ibid.*

99 *Ibid.*

100 JEP, Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, *Caso 01: Toma de rehenes y otras privaciones graves de la libertad*, Case No. 20203250005183, 10 January 2020.

101 JEP, "JEP decretó medidas cautelares en el Cementerio Universal de Medellín donde habría 140 cuerpos de personas no identificadas", 31 July 2020, available at: <https://tinyurl.com/nmny63yu>.

In the case of the ELN, a recent statement of the JEP has determined that military operations and hostilities are obstructing efforts to find missing persons. The current clashes between the ELN and other armed groups in the region of Antioquia are preventing progress in the exhumation of mass graves, especially in the Urabá region.¹⁰²

The resignification of bodies as an obstacle to the search for missing persons

The case of Puerto Berrío

The Magdalena River in Colombia is considered the largest cemetery in the country.¹⁰³ Many of the bodies of people who were killed during the armed conflict were disposed of there to make them disappear.

Due to its strategic location, the shore of this river has always been a disputed territory between guerrilla and paramilitary groups. The town of Puerto Berrío, with approximately 40,000 inhabitants, was, along with other neighbouring villages, controlled by the FARC-EP and ELN during the 1960s and 1970s, and later by paramilitary groups.¹⁰⁴ Between twenty and twenty-five bodies per week were recovered from the river by this community. These figures were additional to the town's own figures: 1,172 selective killings and 589 enforced disappearances have occurred there to date.¹⁰⁵ Due to the large number of bodies, the Prosecutor's Office and the local morgue were overloaded and the bodies were piled up waiting for space in the vaults of the local cemetery. In response to this situation, graves with the inscription "N. N." (*nomen nescio*, name unknown) began to be dug by gravediggers, as most of the bodies in the morgue were found without any kind of identification.¹⁰⁶

The inhabitants of Puerto Berrío felt the need to give a sense of identity to the bodies that were recovered from the river. They began to forge a religious practice that consisted of replacing the letters "N. N." with names chosen by the residents themselves, giving them a new identity, praying for them and even bringing them gifts as a way of requesting favours from the dead.¹⁰⁷ In other words, the community started a practice of "adopting" unidentified dead persons

102 JEP, "JEP alerta sobre acciones del ELN que atentan contra el derecho a la verdad y a la no repetición de las víctimas", 14 February 2021, available at: <https://tinyurl.com/2mxy6bjt>.

103 María Victoria Uribe Alarcón, "Mata que Dios perdona: Gestos de humanización en medio de la inhumanidad que circunda a Colombia", in Francisco A. Ortega and Veena Das (eds), *Veena Das: Sujetos del dolor, agentes de dignidad*, Pontificia Universidad Javeriana, Universidad Nacional de Colombia, Centro de Estudios Sociales, Medellín, 2008, p. 177.

104 Comisión Histórica del Conflicto y sus Víctimas, above note 19, pp. 606–609.

105 UARIV, above note 40.

106 UBPD, "Los cuerpos del cementerio de Puerto Berrío que quieren volver con sus familias", 18 March 2021, available at: <https://ubpdbusquedadesaparecidos.co/actualidad/los-cuerpos-del-cementerio-de-puerto-berrio-que-quieren-volver-con-sus-familias/>.

107 Claudia Lorena Gómez-Sepúlveda and Helwar Hernando Figueroa-Salamanca, "'No olvidemos a los muertos': Anímero y violencia en Puerto Berrío, Antioquia", *Revista CS*, No. 28, 2019, p. 129.

so as to give them an identity and a spiritual existence. In Alarcón Uribe's view, to make the bodies disappear is to dehumanize the victims.¹⁰⁸ To give them a new identity is to restore a part of their dignity.

One of the testimonies collected by the organization Routes of Conflict (Rutas del Conflicto) describes the case of a woman whose son is still missing from the conflict. She "adopted" one of the bodies that came via the river and baptized it with her son's name.¹⁰⁹ Through this process, a bond is created between local people and the remains of the missing persons: the disappeared person returns through another body.

Another testimony states:

It became difficult; in the past many "bodies from the river" arrived, so it was easy to choose, but now you talk to the gravedigger and tell him to let you know when there is a new "nameless person" As soon as you choose one, you mark the vault so that people know it has already been taken. When the favour is granted, you do what you have promised to the dead, whether it is to provide a tombstone or the maintenance of their grave; only then can someone else choose them again.¹¹⁰

The emergence of these traditional practices is not unusual considering that religious practices function as systems of memorialization and reinforcement of collective identity, especially in contexts of conflict.¹¹¹ Religion, in these cases, works as "atonement for violence".¹¹²

It is worth mentioning that this practice was not always allowed. During the 1990s, when the community was under paramilitary control, rescuing bodies from the river was strictly forbidden.¹¹³ This is explained by the symbolic meaning of the bodies thrown in the river: intimidation and horror were key to obtaining obedience from civilians.

In this sense, memory, as a vehicle to forgiveness for collective trauma, is used to resignify religious practices and give the "N. N."s an identity.¹¹⁴ The adoption of bodies is intended to restore a cultural order that has been violated by conflict. There is indeed a close relationship between violence and religiosity in Colombia, which, if approached from a cultural and social perspective, can provide important insights into the search for the missing. Therefore, understanding the traditions of very religious communities that have had a history of forced coexistence with violence for decades provides key insights in determining the possible location of the unidentified bodies that arrive to these populations through the river.

108 M. V. Uribe Alarcón, above note 103, p. 177.

109 Rutas del Conflicto, "Ningún nombre", available at: <http://rutasdelconflicto.com/rios-vida-muerte/especial/rio-magdalena/ningun-nombre.html>.

110 C. L. Gómez-Sepúlveda and H. H. Figueroa-Salamanca, above note 107, pp. 134–135 (author's translation).

111 *Ibid.*, p. 129.

112 *Ibid.*, p. 130.

113 *Ibid.*, p. 5.

114 *Ibid.*, p. 2.

It is clear that, in line with the notion explained above regarding the “army of the living and the dead” in the collective narrative of the ELN, the inhabitants of Puerto Berrío have also found a way to build a bridge between a sacred and a profane space, between themselves and the dead.

Practices such as the one in Puerto Berrío constitute one of the main obstacles to the joint work of the UBDP. Many of the bodies are moved from one place to another, which results in the loss of the identification codes provided by the morgue with the date that they were recovered from the river. Faced with this obstacle, the local Prosecutor’s Office has placed a sign on the wall of the cemetery in Puerto Berrío that stipulates: “Please do not erase, paint or change the information of the N. N.s.” Some of the gravestones read: “N. N. Do not touch. Do not pick. Do not paint.”¹¹⁵

Consequently, the UBDP’s latest approaches focus on conducting trainings in rural villages to ask inhabitants not to move the bodies or baptize them with other names, as this practice interferes with the victims’ correct legal identification.¹¹⁶ This situation illustrates two problematic aspects of the armed conflict: the missing persons, and the unidentified victims buried in cemeteries and clandestine graves.

Recently, the UBDP published a report describing its efforts in Puerto Berrío concerning the identification of bodies “adopted” by local inhabitants.¹¹⁷ During its initial visit to La Dolorosa Cemetery in Puerto Berrío, the Unit had found and recovered 416 bodies. On the second visit, the UBDP and the Forensic Technical Support Group of the Investigation and Prosecution Unit of the JEP recovered forty-three more bodies and transferred them to the Legal Medicine Department in order to identify them and hand them over to their families.¹¹⁸ This was possible thanks to the villagers who approached the Unit and confirmed that they had “taken” the abandoned bodies in order to care for them and give them an identity. In this case, the FARC-EP’s collaboration in the search for disappeared persons, partly based on the organization’s own ideology, encounters a barrier posed by the social beliefs of the rural inhabitants.

Indigenous communities and the “bad death”

Violent deaths and the impossibility of burying the dead according to their ancestral traditions have a profound impact on indigenous communities. Life is not assumed

115 “El pueblo que adopta cadáveres: ‘Bajaban por el río entre 20 y 25 cuerpos cada semana’”, *El Confidencial*, 5 August 2020, available at: www.elconfidencial.com/mundo/2018-06-28/colombia-asesinatos-narco-paramilitares-berrio_1585136/. The term “pick” in this context refers to the practice of selecting an abandoned body and assigning it a new identity.

116 Rutas del Conflicto, “Más de mil cuerpos recuperados en 190 ríos”, available at: <http://rutasdelconflicto.com/rios-vida-muerte/especial/mil-cuerpos.html>.

117 UBDP, “‘Siempre supe que no era de mi propiedad. Él tiene una familia que lo está buscando’: Habitante de Puerto Berrío que adoptó un cuerpo”, 24 May 2021, available at: www.ubpdbusquedadesaparecidos.co/actualidad/siempre-supe-que-no-era-de-mi-propiedad-el-tiene-una-familia-que-lo-esta-buscando-habitante-de-puerto-berrio-que-adopto-un-cuerpo/

118 UBDP, above note 106.

to be finished after a person passes away; rather, his or her relationship with the world merely changes as a new stage in the cycle of life, and people are transformed into spirits that can communicate with those who are alive.¹¹⁹ For many communities, their feeling of belonging is deeply connected to the places where their ancestors and close family are buried.¹²⁰

In the Wayuu community, death is understood as part of life, and the rituals performed when a person dies ensure the transformation of that organic life into a spiritual stage of life.¹²¹ Therefore, when someone in the community dies in a violent context, there is an urge to bury him or her immediately according to the community's traditions.¹²² Otherwise, violence contaminates the community. Violent deaths and the disappearance of people gave rise to the concept of the "bad death" (*mala muerte*), in which the dialogue between the different stages of life (including life after death) is interrupted.¹²³

In a similar vein, members of the Iku community have expressed that unidentified people buried on their sacred territories are affecting the natural balance of their cosmovision of the world and, as a consequence, illnesses have been spread within the community.¹²⁴ Therefore, the existence of mass graves negatively affects the socio-cultural practices on which their community life and bonds of solidarity are based.

One unexplored issue concerning missing persons is the shortage of indigenous leaders as a result of the conflict. The disappearances of leaders by armed groups have led to the disarticulation of the community itself. In the indigenous community of Saundó, it can take up to fifteen years to train a person as a leader.¹²⁵ Many of these leaders have been victims of enforced disappearance, and consequently, the community has been deprived of the ability to honour its leaders through traditional funeral rituals. Moreover, there are no long-term successors for this role because of the fear instilled in the community.¹²⁶

In this sense, one of the UBPD's priorities is the exhumation of these bodies not only for their identification, burial and return to their families, but also to repair the damage caused to the indigenous communities. On the one hand, returning the bodies of people from these communities restores the life after death that each person has pending, and on the other, it heals the land they inhabit, erasing the passage of the "bad death" in the cases of outsiders buried in their territories.

These aspects have been addressed by the UBPD, which in 2019 elaborated the *Protocol of Relationship and Coordination between the Missing Persons Search Unit and the Indigenous Peoples of Colombia*. This document was designed in

119 Centro Nacional de Memoria Histórica and Organización Nacional Indígena de Colombia, *Tiempos de vida y muerte: memorias y luchas de los pueblos indígenas en Colombia*, Bogotá, 2019, p. 184.

120 *Ibid.*

121 *Ibid.*, pp. 187–188.

122 *Ibid.*

123 *Ibid.*, p. 187.

124 *Ibid.*, p. 189.

125 Hacemos Memoria, "Las dificultades para buscar indígenas desaparecidos en Urabá", 5 March 2021, available at: <http://hacemosmemoria.org/2021/03/05/las-dificultades-para-buscar-indigenas-desaparecidos-en-uraba/>.

126 *Ibid.*

cooperation with indigenous leaders to articulate the search for missing persons in their ancestral territories through an indigenous ethnic approach and attending to the particular needs of each community.¹²⁷ The Protocol highlights the multiple dimensions of the damage caused by enforced disappearances against indigenous communities, especially the transgression of their relationship with Mother Earth, “affecting their spiritual equilibrium, social organization and self-government, autonomy, and the strengthening and continuity of their administrative processes”.¹²⁸

Furthermore, before starting intrusive procedures such as excavation, the Protocol recommends exhausting extrusive prospection measures, such as probes and satellite photographs.¹²⁹ Alongside these methodologies, search systems developed by indigenous communities based on their own knowledge and experience will be employed.¹³⁰

Conversely, there are previous cases where exhumations of mass burials carried out by the Public Prosecutor’s Office have not been conducted in a manner considering the needs of victims and the cultural aspects of local communities. For instance, the Prosecutor’s Office exhumed bodies in Bojayá, which civilians themselves had buried in mass graves due to the urgency of the conflict. When the authorities reburied them, they only identified them with a number and placed them in the lowest part of the cemetery, which is prone to flooding, putting at risk both the permanence of the graves and the health of the community itself. After several claims to regional and national authorities, in 2019 the Legal Medicine Unit in Medellín exhumed 100 bodies.¹³¹ By the end of 2019, each family had received the technical-scientific details of the causes of death of their loved ones. In the evenings, collective prayers were held, led by traditional leaders.¹³² There are still many missing persons from Bojayá, and the villagers stress that the impossibility of providing a dignified burial according to local traditions has caused great harm and suffering to the victims’ families and the community as a whole.¹³³

The success of search mechanisms does not only depend on the number of bodies recovered and their identification. In the case of Bojayá, only the regional origin of the victims had initially been established, and not their individual identities. As a result, the possible delegitimization of these mechanisms could lead to a lack of cooperation between public institutions and local communities. Respect for local traditions as well as the way in which searches are conducted impact on the efforts and results obtained by search mechanisms, and therefore, on the fulfilment of their mandate.

127 UBPD, *Protocolo de relacionamiento y coordinación entre la UBPD y los pueblos indígenas de Colombia*, 19 January 2019, Introduction, available at: www.ubpdbusquedadesaparecidos.co/wp-content/uploads/2020/07/PROTOCOLO-INDIGENAS-16-10-19.pdf.

128 *Ibid.*, p. 8 (author’s translation).

129 *Ibid.*, Art. 19.

130 *Ibid.*, Art. 14.

131 José de la Cruz Valencia Córdoba, “Bojayá busca soluciones a la mala muerte y el cierre al duelo prolongado”, *Revista Colombiana de Antropología*, Vol. 56, No. 2, 2020, p. 226.

132 *Ibid.*, p. 227.

133 *Ibid.*, p. 223.

Forensic anthropology and legal processes should also include an ethnicity-based approach.¹³⁴ It becomes necessary to combine technical knowledge with the traditional knowledge of the communities so that prayers and rituals can be performed, gravediggers can conduct the appropriate treatment of the corpses, and so on.¹³⁵

Conclusions

The ICRC has stated that the legal approach is not as effective in influencing behaviour as is the combination of the law and the values that support it.¹³⁶ Linking legislative norms to local values and traditions reinforces the likelihood of compliance with those norms and facilitates the efforts of search mechanisms.

On the one hand, the analysis presented in this paper suggests that the structure of values and traditions governing an armed group has a significant impact on the group's behaviour towards IHL norms regarding the treatment of bodies. Although the moral constructs of each group do not guarantee full compliance with IHL, they do allow us to identify a pattern of behaviour with respect to these norms. On the other hand, it can be observed that certain social and cultural practices have arisen as a result of the armed conflict within affected communities. These rites of spirituality and memorialization seek, through resignification, to confront dehumanizing acts. As a feedback process, the observance of differentiated approaches according to ethnic and cultural aspects of the victims and affected communities has a great impact on the level of cooperation with the search mechanisms. Until today, many communities have not been able to bring information to the UBPD because they have not been aware of this mechanism as they do not speak Spanish. In its last report, the UBPD noted that it had produced documentation in twelve different languages to expand its outreach to indigenous communities.¹³⁷

The search for missing persons is a dynamic, multidirectional process, where cultural, religious and social dimensions from different groups (including ex-guerrillas, indigenous populations, farming communities, search mechanisms and civil society) interact with each other. In the cases examined here, understanding the social, cultural and religious dynamics of the treatment of the dead operating both within armed groups and in local communities brings humanitarian law and search operations in post-conflict contexts closer to more comprehensive responses in the aftermath of violence. This approach could facilitate an understanding of the armed groups' relationship to humanitarian norms and the promotion of compliance, as well as the design of effective search mechanisms that emphasize local needs.

134 *Ibid.*, p. 225.

135 *Ibid.*

136 ICRC, above note 67, p. 71.

137 UBPD, above note 1, p. 28.