

## **Victims' Testimonies in Truth Commissions: Who Owns the Memory?**

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**ABSTRACT**

*After massive abuses of human rights, it is common for a government to create a truth commission. These bodies have different tools for finding the truth sought by wounded societies. One such tool, perhaps the most important, is the victims' testimonies of the events that transpired. The problem this Article tries to solve arises when the truth commission promises the victims that their testimony will be kept confidential if they tell their stories. This Article seeks to resolve whether such confidentiality should be maintained or if the content of the statements should be publicly released because the whole society is entitled to know the truth. What should prevail in these situations: the private property that exists over the testimony itself (owned by the victims) or the right of society to know an episode of its past?*

### INTRODUCTION

*The incorruptible background of each person, their intimacy, is constituted by the experiences of unspeakable pain or ineffable joy that they once experienced. Removed from the intimacy of those who live them—as if by the dignified and intense fury of justice, that substitute of faith—these experiences lose meaning when they are delivered without further ado to a third party: pain transforms into humiliation, joy into frivolity.*

—Carlos Peña<sup>1</sup>

Transitional justice and truth commissions are two concepts that frequently go hand-in-hand. Since the creation of the National Commission on the Disappearance of Persons (CONADEP) in Argentina in 1983, several societies<sup>2</sup> that have experienced similar mass human rights abuses have adopted some sort of truth commission. These truth-seeking bodies have been defined as “investigative bodies aimed at uncovering the truth about a history of violence,”<sup>3</sup> and they embody an entity whose conception and functions are far from peaceful at a doctrinal level. There are several ongoing academic debates involving truth commissions, including: whether commissions should be created by the state itself or by nongovernmental organizations;<sup>4</sup> whether commissions should have powers normally granted to the courts of justice (like the authority to grant amnesty to the perpetrators); and whether commissions should collaborate with the courts of justice.<sup>5</sup>

Nonetheless, it is undeniable that one of the most recurrent mechanisms when dealing with past mass human rights violations are in fact truth commissions, whose most representative task, as the name points out, is to achieve and determine what the truth *is*. To Navi Pillay,

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<sup>1</sup> Carlos Peña, *La Tortura de Lagos*, EL MERCURIO, Sept. 17, 2017, at D12. Unless otherwise noted, all translations from Spanish are the author's.

<sup>2</sup> *E.g.*, Chile, Uruguay, El Salvador, Guatemala, Peru, South Africa, and Sierra Leone. These truth commissions and the treatment they gave to the victims' testimonies will be analyzed in this Article.

<sup>3</sup> Johannes Langer, *Are Truth Commissions Just Hot-Air Balloons? A Reality Check on the Impact of Truth Commission Recommendations*, in 29 DESAFÍOS, no. 1, 2017, at 177, 180.

<sup>4</sup> See ONUR BAKINER, TRUTH COMMISSIONS: MEMORY, POWER, AND LEGITIMACY 25 (2016).

<sup>5</sup> See ALISON BISSET, TRUTH COMMISSIONS AND CRIMINAL COURTS 13 (2012).

former U.N. High Commissioner for Human Rights, this truth can be described as

the full and complete truth about events that transpired . . . their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place as well as the reasons for them. In cases of enforced disappearance and missing persons, the right also implies the right to know the fate and whereabouts of the victim.<sup>6</sup>

In order to achieve the truth, many actors in a particular society must contribute and do so within the scope of their authority. The government must make the political decision to investigate the past and create the commission.<sup>7</sup> State agencies and bodies must provide assistance when requested by the commission and the members of the commission must act in an impartial, efficient, and responsible fashion. The victims and direct witnesses of events that occurred must concur to provide their testimonies regarding those events, and the perpetrators should also give their testimonies and full collaboration. This author finds it logical to assume that the latter actors are the least likely to participate.

This Article focuses on the testimonies of victims during the reconciliation and restoration process, before a truth commission. In particular, this Article discusses whether the content of the victim testimonies should be kept confidential or be disclosed to the public, despite the victims' desire for confidentiality.

The subject under analysis is not at all trivial; the testimonies are usually one of the major sources of information available to truth commissions in order to efficiently perform their work. Access to and absolute knowledge of the truth is seen by Rosalind Shaw as the necessary first step toward a society's reconciliation.<sup>8</sup> That truth is formed by several individual recollections of people that have suffered terrible violations of human rights, reasonably conceived as extremely intimate and personal. Logically, the attestant can be a victim, a direct witness, or a perpetrator. However, this Article addresses the testimonies provided by victims. The term "victim" is very broad in

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<sup>6</sup> Soueid et al., *The Survivor-Centered Approach to Transitional Justice: Why a Trauma-Informed Handling of Witness Testimony Is a Necessary Component*, 50 GEO. WASH. INT'L L. REV. 125, 137 (2017).

<sup>7</sup> See BAKINER, *supra* note 4.

<sup>8</sup> For example, for "who planned and implemented Sierra Leone's TRC," see Rosalind Shaw, *Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone*, 1 INT'L J. TRANSITIONAL JUST., 183, 185 (2007); see also BAKINER, *supra* note 4, at 191.

transitional justice because in the context of mass human rights abuses and state terrorism many people suffer violations. For example, the testimonies before CONADEP, an entity commanded to seek the fate of disappeared persons in Argentina, may have been provided by victims or witnesses. In this author's opinion, a superficial reading of CONADEP's report *Nunca Más* is enough to understand that the attestants, albeit not disappeared, were victims of state terrorism.

As analyzed *infra*, when faced with past events of human rights abuses, different societies have made different decisions regarding the publicity or privacy of the testimonies once they have been provided under the veil of confidentiality. This Article explores the regulatory framework under which these testimonies were provided and addresses the convenience or inconvenience of choosing secrecy or publicity of the testimonies.

## I

### TRUTH COMMISSIONS: MEANS AND END

The existence and functions of truth commissions are determined by a "mandate," which "outlines a commission's terms of reference: what types of human rights violations it is to investigate from what period of time, how it is to conduct the investigation, and what powers it has to do so."<sup>9</sup> Even though mandates differ from one another, in essence they all seek (at least in the short term) the same thing: to create a body that will "seek to piece together the fabric of the past."<sup>10</sup> In order to determine *that* truth, these bodies need to dig deep into the past. Evidently, the people who know the most about the events under investigation are the main actors who experienced them: victims, direct witnesses, and perpetrators. Therefore, a truth commission needs to receive a great number of testimonies in order to get to know—and then declare—the truth.

In a great number of cases, testimonies involve terrible experiences individuals have suffered personally; for example, "Sierra Leoneans experienced displacement, looting, burning, rape, torture, amputation and the killing and abduction of family members; while many former

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<sup>9</sup> Dancy et al., *The Turn to Truth: Trends in Truth Commission Experimentation*, 9 J. HUM. RTS., 45, 49 (2010).

<sup>10</sup> Robert I. Rotberg, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 3, 17 (Robert I. Rotberg & Dennis Thompson eds., 2010).

combatants (large numbers of whom were youth and children) were themselves abducted, displaced, tortured, raped, drugged and made to loot, burn, rape, kill, abduct and amputate.”<sup>11</sup> Testimonies might also include other terrible experiences witnessed by individuals; for instance, the murder of or physical violence toward a relative or a friend, the abduction of one’s child,<sup>12</sup> and threats to loved ones’ safety.

In order to achieve the truth, a truth commission needs to gather information from the actors themselves. In that sense, it is reasonable to state that the truth-finding path has two steps: first, finding the sources of information (which includes the testimonies); and second, learning the truth from those sources. The latter cannot be completely achieved without the information that the main actors have. Truth gathering without testimonials would be extremely difficult and unreliable.

As will be analyzed, in past experiences victims have given their testimonies in different ways, including public hearings, private and confidential conferences with the members of the commission, and also in written statements.<sup>13</sup> Here the issue of whether to take the testimonies in public or private settings is generally not disputed. Rather, the focus is on whether said testimonies, once declared in confidence, become part of the right to collective truth—to which a society is entitled—or if it remains within the sphere of ownership of the attestant, to do with what she deems appropriate. Ultimately, and for practical purposes, this debate is about the testimonies as property and whether they are owned by the individual attestants or by society as a whole.

## II

### IMPORTANCE OF TESTIMONIES IN TRANSITIONAL JUSTICE

Truth commissions can collect a substantial amount of information from the victims. For instance, “Peru’s Truth and Reconciliation Commission (CVR) gathered 17,000 testimonies during its two-year

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<sup>11</sup> Shaw, *supra* note 8, at 185.

<sup>12</sup> *Id.*; *see also* COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS, INFORME “NUNCA MÁS” CH. II.—VÍCTIMAS, ADOLESCENTES, ADVERTENCIA, <http://www.desaparecidos.org/arg/conadep/nuncamas/323.html>. (last visited Sept. 20, 2018) [hereinafter INFORME NUNCA MÁS].

<sup>13</sup> *See* Shaw, *supra* note 8, at 184.

exercise, and the South African CVR collected more than 22,000 testimonies in three years.”<sup>14</sup>

These testimonies have a major importance when the truth is sought because personal stories about events and experiences of those who suffered the most atrocious violations are waiting to be revealed or buried. When interrogated, victims and witnesses will begin to build a narrative by sharing their memories that, when overlaid with thousands of other stories, begin to constitute facts, and the truth will begin to unravel until it is fully revealed.<sup>15</sup>

Testimonies are useful to truth commissions in order to accomplish their task of finding the truth, and thus it is reasonable to assume that they are equally useful for the society that has suffered the abuses. According to Briggittine M. French, “Truth commissions are institutions that use human narrative as one of the primary means to seek truth and justice in the aftermath of state-sponsored violence.”<sup>16</sup>

### III REPRESENTATIVE REGULATORY FRAMEWORKS OF PAST EXPERIENCES

Next, different regulatory frameworks will be analyzed with respect to the mandate of different truth commissions in relation to the confidentiality that was supposed be given to the testimonies of the victims.

#### *A. Argentina: Comisión Nacional sobre la Desaparición de Personas (CONADEP) (1983–1984)*

CONADEP’s mandate,<sup>17</sup> established in Article 2, states that one of the specific functions of the Commission is to receive complaints and evidence about facts related to the disappearance of people in

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<sup>14</sup> CENTRO INTERNACIONAL PARA LA JUSTICIA TRANSICIONAL, EN BUSCA DE LA VERDAD: ELEMENTOS PARA LA CREACIÓN DE UNA COMISIÓN DE LA VERDAD EFICAZ, 15 (Eduardo González & Howard Varney eds., 2013).

<sup>15</sup> “Each story of suffering provided a penetrating window into the past, thereby contributing to a more complete picture of gross violations of human rights in South Africa.” TRUTH AND RECONCILIATION COMMISSION, 1 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 133 (1998) [hereinafter South Africa Comm’n].

<sup>16</sup> Briggittine French, *Technologies of Telling: Discourse, Transparency, and Erasure in Guatemalan Truth Commission Testimony*, 8 J. HUM. RTS., 92, 95 (2009).

<sup>17</sup> Law No. 187/83, Dec. 19, 1983, (Arg.), <http://www.derechos.org/ddhh/arg/ley/conadep.txt>.

Argentina and to immediately refer them to the courts if they are related to the alleged commission of crimes. Therefore, if the victims or witnesses said anything related to a crime, it could be the subject of a criminal investigation. The mandate did not establish any kind of reservation or secrecy regarding the testimonies provided. Conversely, “the public nature of the files allowed that, despite the fact that CONADEP did not publish the list of repressors that it drew from the coincident testimonies received, the records compiled by the Commission allowed a weekly magazine to publish a list of 1,351 offenders.”<sup>18</sup> The final report of CONADEP, *Nunca Más*, described disappearances and enumerated the victims.<sup>19</sup>

***B. Chile: Comisión Nacional de Verdad y Reconciliación (Rettig Commission) (1990–1991) and Comisión Nacional sobre Prisión Política y Tortura (Valech Commission) (2003–2005)***<sup>20</sup>

Once democracy was recovered and power was handed to Patricio Aylwin’s government, the Chilean executive branch created the Rettig Commission.<sup>21</sup> According to Article 7 of the mandate,<sup>22</sup> the Commission’s work had to be carried out in a reserved fashion.<sup>23</sup> Article 8 of the mandate provided that the Commission had to take measures to preserve the identity of those who provided information or collaborated in its tasks.<sup>24</sup> The testimonies were confidential; only the courts of justice could access their full content.<sup>25</sup> In contrast, the Valech Commission was created in 2003 by Ricardo Lagos’s government to identify the persons who had suffered illegal deprivation of liberty and torture for political reasons, perpetrated by state actors or their agents

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<sup>18</sup> Matías Meza-Lopehandía, *El carácter secreto de los antecedentes de la Comisión Valech: derechos humanos y experiencia extranjera*, 1, 8 (2015); Biblioteca del Congreso Nacional, Asesoría Técnica Parlamentaria. <https://www.camara.cl/pdf.aspx?prmTIPO=DOCUMENTOCOMUNICACIONCUENTA&prmID=14005> (last visited Oct. 25, 2017).

<sup>19</sup> INFORME NUNCA MÁS, *supra* note 12.

<sup>20</sup> Meza-Lopehandía, *supra* note 18, at 4.

<sup>21</sup> Law No. 355, Crea Comisión de Verdad y Reconciliación, Apr. 25, 1990, DIARIO OFICIAL [D.O.] (Chile), <https://www.leychile.cl/Navegar?idNorma=30490>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at art. 7.

<sup>24</sup> *Id.* at art. 8.

<sup>25</sup> Meza-Lopehandía, *supra* note 18, at 1.



during the military dictatorship.<sup>26</sup> Article 15 of Law 19.992<sup>27</sup> established that all documents, testimonies, and information provided by the victims before the Commission were secret. This secrecy, according to the same Article, has to be maintained for a period of fifty years after 2004.<sup>28</sup>

The referred law also provided that no person, group of persons, authority, or magistracy could access the documents, reports, declarations, or testimonies, but the owner has a personal right to make them known or provide them to third parties by his or her own will.<sup>29</sup> This means that if the victim or the witness does not want to disclose the content of his or her testimony, no one, including the courts of law, can access them.<sup>30</sup>

***C. El Salvador: Comisión de la Verdad para El Salvador (ELTC)  
(1992–1993)***

In the case of El Salvador, the mandate<sup>31</sup> that created the ELTC established that the Commission was authorized to organize its work and its operation and that its performances had to be carried out in a reserved fashion. To understand what this legal provision means, it is important to know that “[a]ll witnesses were advised that their testimony would be treated as confidential if they so desired, and most requested it.”<sup>32</sup>

***D. Guatemala: La Comisión para el Esclarecimiento Histórico  
(CEH) (1997–1999)***

In Guatemala, the CEH was created to clarify the violations of human rights and acts of violence that caused suffering to the

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<sup>26</sup> *Id.*; see also Supreme Decree 1.040 art.1, Sept. 16, 2003, DIARIO OFICIAL [D.O.] (Chile).

<sup>27</sup> This law was passed in 2004 in order to establish reparation measures for the victims. Additionally, it gave legal standard to the confidentiality that was upheld by the mandate.

<sup>28</sup> Law No. 19.992 at art. 15 (2004) DIARIO OFICIAL [D.O.] (Chile), called “Establece pensión de reparación y otorga otros beneficios a favor de las personas que indica.” [English, “Establishes repair pension and grants other benefits in favor of stated individuals.”].

<sup>29</sup> *Id.*

<sup>30</sup> Meza-Lopehandía, *supra* note 18, at 1.

<sup>31</sup> The “Chapultepec Agreement.” See Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT’L L. 497, 499 (1994).

<sup>32</sup> *Id.* at 510.

Guatemalan population, according to the mandate<sup>33</sup>, which stated that the actions of the Commission were reserved to guarantee the secrecy of sources, as well as the safety of witnesses and informants.<sup>34</sup> During the time the Commission worked,

advertisements were published in newspapers and magazines of national circulation . . . [which] addressed different topics, ranging from the call to appear at the offices of the CEH to provide testimonies or information to the explanation of the importance of historical clarification, *including the guarantee of confidentiality of sources and informants*, and the need to abandon fear and silence. (Emphasis added).<sup>35</sup>

***E. Uruguay: Comisión Investigadora Parlamentaria sobre Situación de Personas Desaparecidas y Hechos que la Motivaron (CIP) (1985) and Comisión para la Paz (COMPAZ) (2000)***<sup>36</sup>

The CIP “gathered information about Uruguayans who had disappeared during the dictatorship, both in Uruguayan territory and outside of it, and received information from public, private, national and international organizations.”<sup>37</sup> The CIP only interviewed about seventy-five witnesses of the acts of detention or relatives of the disappeared persons; their testimonies were reserved to protect those who participated in the investigations.<sup>38</sup> In 2000, another truth commission, the COMPAZ, was created in Uruguay. COMPAZ’s objective was to “[r]eceive, analyze, classify and collect information

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<sup>33</sup> “Acuerdo sobre el Establecimiento de la Comisión para el Esclarecimiento Histórico de las Violaciones a los Derechos Humanos y los Hechos de Violencia que han causado Sufrimientos a la Población Guatemalteca” Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that Have Caused the Guatemalan Population to Suffer, Guat.-Unidad Revolucionaria Nacional Guatemalteca, June 23, 1994, Secretaría de la Paz, Gobierno de Guatemala; *see also* Ana María Varón Gómez, *Reparaciones en Guatemala: Efectos de Una Comisión de la Verdad No Reconocida por el Estado*, 24 ASIAN J. LATIN AM. STUD., 21, 24 (2011).

<sup>34</sup> The Oslo Agreements state: “FUNCIONAMIENTO: . . . IV. Las actuaciones de la Comisión serán reservadas para garantizar la secretividad de las fuentes así como la seguridad de los testigos e informantes;” “[COMMISSION’S] FUNCTIONING: . . . IV. The actions of the Commission will be reserved to guarantee the secrecy of the sources as well as the safety of witnesses and informants.”]. *Id.*

<sup>35</sup> COMISIÓN PARA EL ESCLARECIMIENTO HISTÓRICO, MEMORIA DEL SILENCIO 35 (1999).

<sup>36</sup> *See* Meza-Lopehandía, *supra* note 18, at 9.

<sup>37</sup> *Id.*

<sup>38</sup> Jorge Errandonea, *Justicia Transicional en Uruguay*, 47 INTER-AM. INST. HUM. RTS. MAG., 13, 38 (2008); *see also*, Meza-Lopehandía, *supra* note 18, at 9.

on enforced disappearances that occurred during the de facto regime.”<sup>39</sup> The mandate also provided that the Commission “was granted ‘the broadest powers to receive documents and testimonies,’ imposing also the duty to ‘maintain strict confidentiality regarding its actions,’ as well as to keep ‘absolute confidentiality’ regarding the sources of information obtained.”<sup>40</sup>

***F. Peru: Comisión de la Verdad y Reconciliación (CVR) (2001–2003)***

In Peru, according to Article 6(d) of the CVR’s mandate, the Commission had the authority to perform public hearings and the proceedings that it deemed appropriate in a reserved manner, including the ability to keep secret the identity of those who provided important information or participated in investigations.<sup>41</sup> In brief, the mandate gave the Commission broad powers to decide whether the testimonies of the victims would be taken publicly or confidentially.<sup>42</sup> The CVR held public hearings, which was a very innovative means of collecting testimonies. The CVR was the first truth commission in Latin America to collect testimonies publicly.<sup>43</sup> The CVR was also innovative in other ways. For example, “videotaped statements were shown from imprisoned former members of the Shining Path and MRTA, some of whom offered an apology to their victims.”<sup>44</sup>

***G. South Africa: Truth and Reconciliation Commission (TRC) (1995–2002)***

The TRC’s mandate established that one of the Commission’s tasks was “to provide for the investigation and establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights. . . .” The Commission received more than 20,000

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<sup>39</sup> Resolución de la Presidencia de la República No. 858/200, 2000 (Resolution No. 858/200/2000) (Guat.); see Errondonea, *supra* note 38, at 42; INFORME NUNCA MÁS, *supra* note 12, at 6.

<sup>40</sup> COMISIÓN PARA LA PAZ, INFORME FINAL DE LA COMISIÓN PARA LA PAZ 6 (2003).

<sup>41</sup> Supreme Decree No. 065, 2011 (Decree No. 065/2011) (Peru).

<sup>42</sup> *Id.*

<sup>43</sup> PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 36 (2010).

<sup>44</sup> *Id.*

submissions describing people's stories during the period under investigation.<sup>45</sup>

The TRC Final Report, published in 1998, stated that

[o]ne of the key aspects of the Commission's work has been its commitment to transparency and public scrutiny. Its records, which are in the form of documents, video and audio tapes, pictures and photographs, as well as a computerized database, are a national asset which must be both protected and made accessible.<sup>46</sup>

Nonetheless, sections 37 and 38 of the mandate, both related to issues of confidentiality and security, authorized the TRC to hold private hearings.<sup>47</sup> Also, the TRC was allowed to take measures to prevent the identity of the witnesses from becoming public.<sup>48</sup> It is important to point out that the TRC had "the legal right to subpoena reluctant or even unwilling witnesses—and had done so. . . ."<sup>49</sup>

#### ***H. Sierra Leone: Truth and Reconciliation Commission (SRTRC) (2002–2004)***

The SRTRC was created in 2000. Section 7 of SRTRC's mandate provides the ways in which the Commission was authorized to gather information:

The Commission shall, subject to this Act, solely determine its operating procedures and mode of work with regard to its functions which shall include the following three components—(a) undertaking investigation and research into key events, causes, patterns of abuse or violation and the parties responsible; (b) holding sessions, some of which may be public, to hear from the victims and perpetrators of any abuses or violations of from other interested parties; and (c) taking individual statements and gathering additional information with regard to the matters referred to in paragraphs (a) or (b).<sup>50</sup>

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<sup>45</sup> Michael Lapsley, *Confronting the Past and Creating the Future: The Redemptive Value of Truth Telling*, 4 Soc. Res., 742, 745 (1998). See also *Explanatory Memorandum to the Parliamentary Bill*, TRUTH AND RECONCILIATION COMM'N, <http://www.justice.gov.za/trc/legal/bill.htm> (last visited Nov. 23, 2018).

<sup>46</sup> TRUTH AND RECONCILIATION COMM'N, TRUTH AND RECONCILIATION COMM'N OF SOUTH AFRICA REPORT VOLUME 5 343, <http://sabctrc.saha.org.za/reports/volume5/chapter8/subsection31.htm> (last visited Nov. 20, 2017).

<sup>47</sup> The Truth and Reconciliation Act, at §§ 37–8 (2000) [Sierra Leone], <http://www.sierra-leone.org/Laws/2000-4.pdf>.

<sup>48</sup> BISSET, *supra* note 5, at 118.

<sup>49</sup> Mahmood Mamdani, *Amnesty or Impunity?: A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa*, 32 DIACRITICS 33, 47 (2002).

<sup>50</sup> The Truth and Reconciliation Act, *supra* note 47, at § 7.

In practice, the commission actually collected most of the testimony “by taking individual statements in . . . private, one-on-one meeting[s] between individual victims or witnesses and a statement-taker.”<sup>51</sup> Regarding the nature of this information, it “is of a private nature and is neither in the public domain nor necessarily confidential.”<sup>52</sup> The SRTRC’s final report stated that private meetings “allowed witnesses to testify confidentially, at the discretion of the Commission.”<sup>53</sup>

#### IV THE CONFLICT: WHETHER TESTIMONY SHOULD REMAIN CONFIDENTIAL AT THE REQUEST OF THE ATTESTANT, OR BE MADE PUBLIC

It is hard to imagine a Truth Commission that can function without testimonies from the victims regarding the factual background of the time under investigation. As stated previously, these testimonies are one of the most important and reliable sources (if not the most) that truth commissions have in order to find the complete and absolute truth.

The issue under analysis here is whether testimony given under a seal of confidentiality should remain secret over time at the attestant’s request, or if, instead, the testimony should be made public. First, the position defending the privacy of the testimonies and their confidentiality, even after the final report is issued, rests on the right to privacy and dignity, and in the private property rights that the victims have over their own testimonies. Conversely, the position for full disclosure of the content of private testimonies rests on the collective right to truth. The idea is that a convalescent society is entitled to access the complete and full truth, to which the public knowledge of the testimonies is essential.

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<sup>51</sup> Marieke Wierda, Priscilla Hayner & Paul van Zyl, *The Special Court and the TRC: Exploring the Relationship Between the Special Court and the Truth and Reconciliation Commission of Sierra Leone*, 7 (2002), <https://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Court-TRC-2002-English.pdf> (last visited Nov. 20, 2017).

<sup>52</sup> *Id.*

<sup>53</sup> 1 SIERRA LEONE TRUTH AND RECONCILIATION COMM’N, REPORTS 145 (2004), <http://www.sierraleonetr.com/index.php/view-the-final-report/download-table-of-contents>.

*A. First Position: Confidential Testimonies Are Owned by the Attestants*

Since the end of Pinochet's dictatorship, the most important truth commissions created by the state of Chile are the Rettig Commission in 1990 and the Valech Commission in 2003.<sup>54</sup> Both Commissions' final reports are public; however, the information gathered—namely, testimonies, statements, and other documents—have certain access restrictions. In each case, the decrees that created the aforementioned entities clearly stated the legal reserve of the information collected, as well as the identity of those who provided information.<sup>55</sup> In the Rettig Commission, their information is confidential, but the courts of justice are able to access it.<sup>56</sup> On the other hand, the testimonies of the Valech Commission will be kept confidential for fifty years, regardless of the purpose: not even the courts have access.<sup>57</sup>

In the Valech Commission's final report, the members of the Commission asked themselves the reasons behind the victims' silence and concluded:

After much meditating, we realize that it is a silence based not only on fear, and how much fear! There is also an aspect of elemental dignity. It is one thing to introduce yourself to your family after you have been arrested. Is not hard the plea of innocence and even some pride for having suffered an injustice or suffering for a cause that was considered noble. It is also human to want to be proud and not humiliated. But removing the veil of torture, humiliation, physical and psychological violation is something very difficult to do. Even to spouses. And that same understandable silence was deepening the damage of the unshared sufferings, of the confidences drowned, of

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<sup>54</sup> Meza-Lopehandía, *supra* note 18, at 4.

<sup>55</sup> Law No. 355, at art. 7, Crea Comisión de Verdad y Reconciliación, Apr. 25, 1990, DIARIO OFICIAL [D.O.] (Chile); Supreme Decree 1.040 art. 5, Sept. 16, 2003, DIARIO OFICIAL [D.O.] (Chile) (creating the Valech Commission). Note, both Commissions were created by the Ministry of Interior of Chile.

<sup>56</sup> The information gathered by the "Corporación Nacional de Reparación y Reconciliación" created in Chile by Act No. 19.123 to coordinate, execute and promote the Rettig Report's recommendation in 1992 has identical status. The final report of the Corporación Nacional de Reparación y Reconciliación is called "Informe sobre calificación de víctimas de violaciones de derechos humanos y de la violencia política." Article 5 of the act states: "The actions of the Corporation will be carried out in a reserved manner, and their counselors and officials are required to keep secrecy about the background and documents that they had knowledge in the performance of their duties." See Meza-Lopehandía, *supra* note 18, at 5.

<sup>57</sup> *Id.* at 6.

what we prefer to put on the shelf of nightmares and tear from the archives of history.<sup>58</sup>

The reflection of the Commissioners provides an important element to the present debate: the secrecy can be based on the victims' dignity as human beings. In a scenario in which the whole society should devote itself to addressing the needs of those who suffered the most—the victims—it seems only logical to presume there is a duty toward them. That duty is to listen, not only to their stories and recollections of facts but also to their most intimate wishes.

Former Chilean President Ricardo Lagos wrote a public letter to the *El Siglo* newspaper where he explained the reasons behind the political decision to maintain the confidentiality of the testimonies provided to the Valech Commission:

The reason . . . was that those who were going to give the testimonies had been subjected to torture and out of respect for their human dignity. . . . While the work of the Commission was ending, a woman imperiously asked to speak with me. Finally, an audience was given to her. She entered my office and said, "Mr. President, you can see that I am still young. They tortured me repeatedly when I was fifteen years old. I suffered all kinds of harassments, including rapes of different kinds." Then she added, "I hope to be alive even when I am eighty years old and I do not want that while I am alive my grandchildren get to know about the atrocities their grandmother suffered."<sup>59</sup>

During the discussion of Law 19.992, the Chilean Minister of the Interior, Mr. José Miguel Insulza, said to the legislators:

We are convinced that the success of the [Valech] commission . . . is largely linked to the confidentiality and reservation that, since its creation, informed its performance. Those who testified before it will be able to disprove me. Each person who was presented before that instance was told, before the statement about what had happened started, that everything she or he said would be kept secret.<sup>60</sup>

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<sup>58</sup> COMISIÓN NACIONAL SOBRE PRISIÓN POLÍTICA Y TORTURA, INFORME DE LA COMISIÓN NACIONAL SOBRE PRISIÓN POLÍTICA Y TORTURA 18 (2004) [REPORT OF THE NATIONAL COMMISSION ON POLITICAL PRISON AND TORTURE].

<sup>59</sup> Ricardo Lagos, *El caso que conmovió al ex Presidente Lagos y lo llevó a decidir que el secreto de la Comisión Valech I durara 50 años*, EL SIGLO (Sept. 13, 2017, 9:56 AM), <http://www.emol.com/noticias/Nacional/2017/09/13/875142/El-caso-que-conmovio-al-ex-Presidente-Lagos-y-lo-llevo-a-decidir-que-el-secreto-de-la-Comision-Valech-I-durara-50-anos.html>.

<sup>60</sup> HISTORIA DE LA LEY [HISTORY OF THE LAW] 19.992, LIBRARY OF THE NATIONAL CONGRESS OF CHILE 83 (2004).

In Mr. Insulza's opinion, "That reservation, that confidentiality, allowed the affected people to find in [the Commission] a place of acceptance and consideration regarding their painful testimonies and experiences. Those elements were indispensable in creating this climate of trust."<sup>61</sup>

Later in 2015, the former Secretary of the Rettig Commission, Mr. Jorge Correa Sutil, testified in a case reviewed by the Inter-American Court of Human Rights, as an expert provided by the state of Chile.<sup>62</sup> When asked directly about the importance of confidentiality, Mr. Correa said:

The reason in the case of the Rettig Commission is that otherwise we would not have obtained statements from the people. It was a time of . . . fear, of a lot of feeling that there was a possibility of retaliation, even of democratic involution, and then the essential guarantee for obtaining statements was that they were made under secrecy . . . and without that I insist that their [the Commission's] work was impossible. And once the persons declared under that condition, it has been estimated by the State of Chile that it would be a betrayal to them to make known those records, naturally leaving them the freedom to make them known in the way they deem appropriate, let's say, but it is not the Commission that should make them known. The same thing happens with the Valech Commission.<sup>63</sup>

During this same testimony, Mr. Correa purported that the political decision of maintaining the secrecy of the testimonies is a correct decision because it both (1) protects the information of persons who might be afraid to deliver testimony publicly, as was the case of the Rettig Commission, and (2) protects the individual when there are "personal situations that persons might want or might not want to make publicly known."<sup>64</sup> Those personal situations might be embarrassing to the victims but not necessarily dangerous or threatening to them.

Mr. Correa stated the way victims were tortured is information that not all persons want to disclose publicly in detail.<sup>65</sup> He also said that "not for legal purposes, but for the purposes of recognizing the truth and to repair, it is not essential that the testimonies of the victims are

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<sup>61</sup> *Id.*

<sup>62</sup> Omar Humberto Maldonado Vargas v. Chile, Merits, Reparations, and Costs, Judgment Inter-Am. Ct. H.R. (ser. C) No. 300, p. 32, ¶ 96 (Sept. 2, 2015), [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_300\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_300_esp.pdf).

<sup>63</sup> *Id.*

<sup>64</sup> See Omar Humberto Maldonado Vargas v. Chile, expert testimony of Mr. Jorge Correa Sutil, VIMEO, <https://vimeopro.com/corteidh/caso-omar-humberto-maldonado-vargas-y-otros-vs-chile/video/126422143> (time 1:44:32).

<sup>65</sup> *Id.* at time 1:39:06.



within the reach of public opinion.”<sup>66</sup> It is, however, essential that the truth is reached about past events for the victims’ healing process.

Similarly, the SRTRC’s final report addressed the issue of the policy determination regarding the designation of confidentiality of the truth commission’s collected testimony.<sup>67</sup> The report stated that “some witnesses may wish their information to remain confidential in order to avoid persecution by perpetrators. Some witnesses might require confidentiality because of fear of rejection by their communities.”<sup>68</sup> The final report also stated that when “the statement giver had requested confidentiality, his or her name as well as any details permitting the identification of the statement giver were not to be captured in the database or the Commission’s final report. The Commission would use the information without reference to the identity of the witness.”<sup>69</sup>

Analyzing the relationship between the Special Court for Sierra Leone and the SRTRC, Abdul Tejan-Cole wrote, “[Sierra Leone’s] TRC Act empowers the Commission to take evidence on a confidential basis. It further provides that the Commission will not be compelled to disclose any such information given to it in confidence.”<sup>70</sup> Tejan-Cole also points out that “although the Commission is competent to disclose confidential information, it may not be *compelled* to do so under the Act. For instance, the Commission cannot be subpoenaed to produce its own evidence to the Court.”<sup>71</sup> It is very interesting in this case that although the victims’ confidentiality is held, the Commission—not the attestants—have the authority to decide whether to disclose the content of the testimonials.

In 2011, Holly L. Guthrey interviewed victims who gave public testimony to the truth commissions of Solomon Islands and Timor-Leste for her research.<sup>72</sup> One of the victims stated:

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<sup>66</sup> *Id.* at time 1:43:31.

<sup>67</sup> 1 SIERRA LEONE TRUTH AND RECONCILIATION COMM’N, *supra* note 53, at 145.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Abdul Tejan-Cole, *The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, 6 YALE HUM. RTS. & DEV. L.J., 139, 154 (2003).

<sup>71</sup> *Id.*

<sup>72</sup> Holly L. Guthrey, *Local Norms and Truth Telling: Examining Experienced Incompatibilities Within Truth Commissions of Solomon Islands and Timor-Leste*, 28 THE CONTEMP. PAC. 1, 12 (2016).

I'm sad because the violence that has happened was not appropriate to be described in public. It was very inappropriate . . . the purpose of this program is that victims can tell what happened to them in public, for example, rape. Things like this are not supposed to be told, right? I think this is a disgrace and [should be] left as a story, but the CAVR program is forcing people to tell it because that [violence] was caused by the militia.<sup>73</sup> [Brackets in original document].

The truth commissions analyzed in this Part, despite their differences, have shown transversally a clear understanding of the concept of the victims' privacy and dignity and the need to maintain the confidentiality of the testimonies when requested to do so. The cornerstone of the argument that a victim's dignity is a sufficient reason for maintaining confidentiality is a deep-seated respect for each victim's experience.

Does society deserve to know the totality of the truth, to the extent of the victims' names and innermost intimacies? With respect to the cases analyzed thus far, it *seems* that a victim's right to privacy and dignity outweigh society's collective right to the entire truth.

Another highly relevant case in this matter is the Truth Commission of El Salvador, which "maintained an 'open-door' policy for hearing testimony and a 'closed-door' policy for preserving confidentiality."<sup>74</sup> This means the Commission was open to receiving victims but their testimonies would be behind closed doors. The reason offered by El Salvador's Truth Commission for keeping testimony confidential at a victim or witness's request was provided in the final report:

Another important general consideration that influenced the methodology of the Commission had to do with the Salvadoran reality of today. This is not only reflected in the mandate of the Commission, but also profoundly affected the Commission's investigation process and its *modus operandi*. It obliged the Commission to collect its most valuable information against confidentiality guarantees. The Parties to the Peace Agreements not only authorized the Commission to act in a reserved way and to receive information in private but the Salvadoran reality forced it to do so for two reasons: first, to protect the lives of the witnesses; and, second, to obtain information from witnesses who, due to the climate of fear in which they continue to live, would not have given it if the Commission had not guaranteed them absolute reserve.<sup>75</sup>

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<sup>73</sup> Guthrey, *supra* note 72.

<sup>74</sup> THE COMMISSION ON THE TRUTH FOR EL SALVADOR, FROM MADNESS TO HOPE: THE 12-YEAR WAR IN EL SALVADOR: REPORT OF THE COMMISSION ON THE TRUTH FOR EL SALVADOR 1, 6 (2001), <http://www.latinamericanstudies.org/elsalvador/ElSalvador-Report.pdf> [hereinafter El Salvador Comm'n].

<sup>75</sup> *Id.*

One of the members of the El Salvador Truth Commission, Dr. Thomas Buergenthal, wrote about the confidentiality of the testimonies:

[T]he Commissioners were convinced that we would have to rely on confidential information, despite the repercussions that it will have on due process. Two considerations led us to this conclusion. First, the mandate of the Commission authorized this procedure, and authorized it precisely because the parties to the Peace Accords were well aware that any other path would lead to failure. In other words, the parties took it for granted that there would be very few Salvadorans, if any, who would come forward to testify in public for fear of reprisals from the people they could identify. Second, the Commissioners soon recognized that this fear was justified and that the Commission had no other way to protect those who brought information other than to keep their identities secret.<sup>76</sup>

Although confidentiality of the testimonies was preserved in El Salvador, it was maintained in response to the victims' safety, rather than the victims' right to privacy or dignity, due to the danger that afflicted the country at the time the commission was operative.<sup>77</sup>

Uruguay's Commission stands in stark contrast to El Salvador's. As stated previously, the COMPAZ's mandate established an obligation to keep strict confidentiality about the Commission's actions and absolute confidentiality of the sources from which information was obtained.<sup>78</sup> However, in 2008, Act No. 18,381, regarding the right to access public information, was passed.<sup>79</sup> This Act defined "public information" as "all that emanates or is in the possession of any public body, whether or not state, except for exceptions or secrets established by law, as well as reserved or confidential information."<sup>80</sup> In Article 12, the same Act established that "the entities bounded by this law cannot invoke any of the reservations mentioned in the preceding articles [regarding information that is confidential] when the information requested refers to human rights violations or is relevant to investigate, prevent or avoid violations of them."<sup>81</sup>

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<sup>76</sup> Thomas Buergenthal, *La Comisión de la Verdad para El Salvador*, 24, 25 (1994). Article in Spanish from its original English in Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497, 510–11 (1994).

<sup>77</sup> *Id.*

<sup>78</sup> Meza-Lopehandía, *supra* note 18, at 9.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

The same phenomenon occurred in Guatemala. Even though the CEH's mandate provided that its actions were reserved to guarantee the secrecy of sources and the safety of witnesses and informants, and even though advertisements included the guarantee of confidentiality,<sup>82</sup> Guatemala's government passed the "Access to Public Information Act" in 2008.<sup>83</sup> In Article 24, the law states, "In no case may information related to investigations of violations of fundamental human rights or to crimes against humanity be classified as confidential or reserved."<sup>84</sup>

The governments and truth commissions of Uruguay and Guatemala promised confidentiality of the testimonies but afterwards passed laws to enforce the exact opposite. This contrary behavior can be seen as dishonest to the victims who came to testify, especially those who perhaps came forward only because of the promised reservation.

Another case that highlights the issue at stake is the treatment of the Stasi files after the reunification of Germany. "Access to the Stasi files is governed today by the Stasi Files Act (Stasi-Unterlagen-Gesetz), which was passed by the Bundestag in December 1991 and came into force on 1 January 1992."<sup>85</sup> This Act's first objective was to "allow individuals access to information stored by the Stasi about themselves, so that they can judge the Stasi's influence on their life."<sup>86</sup> The legislation also "ensure[s] and promote[s] historical, political, and legal analysis of the Stasi's activities."<sup>87</sup> In order to harmonize the right to privacy with the promotion of the historical records, "external researchers only are [were] permitted to view files once they have been vetted and all personal information blacked out, [whilst] researchers employed by the archive are allowed to see original files. They must, however, exercise due diligence in maintaining privacy rights in their publications."<sup>88</sup> In 2002, an amendment to this Act was passed "allowing documents relating to holders of public office to be released for the purposes of historical research or for media purposes, provided

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<sup>82</sup> "Acuerdo sobre el Establecimiento de la Comisión para el Esclarecimiento Histórico de las Violaciones a los Derechos Humanos y los Hechos de Violencia que han causado Sufrimientos a la Población Guatemalteca" (Oslo Agreements, 1994).

<sup>83</sup> Law No. 57-2008, 2008 (Guat.)

<sup>84</sup> *Id.*

<sup>85</sup> Gary Bruce, *Access to Secret Police Files, Justice, and Vetting in East Germany Since 1989*, 26 GER. POL. & SOC'Y 82, 87 (2008).

<sup>86</sup> *Id.* at 88.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

that the information in the documents relates to their public life.”<sup>89</sup> In 2006, the “Stasi Files Act” was amended again, this time “[f]iles of those affected by the Stasi can now be viewed without permission or blacking-out if the individual has been deceased for thirty years, or 110 years after the individual’s birth,”<sup>90</sup> and also allows, “under certain (still vague) circumstances—researchers to view documents that have not been blacked out provided that the researcher swears an oath of secrecy.”<sup>91</sup>

Considering the debate at issue in this Article, past experiences have shown that there are two main reasons to preserve the confidentiality of the testimonies delivered to a truth commission: (1) the attestants’ security, and (2) their privacy and dignity. On its face, the former does not seem to be a powerful reason to maintain confidentiality once the danger has passed, although it can be hard to determine *when* it has passed: if terror returns, the state may carry the burden of disclosing the records too soon.<sup>92</sup> The latter reason, to preserve the privacy and dignity of the attestant, appears more powerful.

In her investigation, Holly L. Guthrey stated that “respondents in both countries [Solomon Islands and Timor-Leste] called attention to their sense that speaking about ‘women’s issues,’ or sexual violence, in the public forum provided by the truth commission was inappropriate, and for some this was quite disconcerting, if not distressing.”<sup>93</sup> Like in the case previously described, sometimes victims prefer to remain silent about certain things. To some, silence can be a powerful shield to protect themselves from the memories of what they experienced. If society wants to extract the truth from those who prefer to remain silent, they will have to do so with the promise of confidentiality. And more importantly, that promise must be kept.

Chilean scholar Carlos Peña asked whether justice was demeaned by keeping this veil of confidentiality and concluded:

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<sup>89</sup> *Id.* at 90.

<sup>90</sup> *Id.* at 93.

<sup>91</sup> *Id.*

<sup>92</sup> It is useful to remember the failed coup d’état in Spain in 1981. Could it have been reasonably believed that the danger had passed at that time, six years after Franco’s death? Hypothetically, if Spain had a truth commission during its transition to democracy, and the testimonies of the victims and witnesses had been revealed to the whole society, would not those attestants have been in danger *precisely* because of the decision to make the testimonies public?

<sup>93</sup> Guthrey, *supra* note 72, at 2–3.

Only partially. Because, what justice would be the one that would be willing to pay any price, including the price of people's privacy, to be carried forward? What justice would be that one which satisfies the avenger and damages the victim, again, forcing her to make public a pain that she did not want to confess, not even to those closest to her?<sup>94</sup>

Silence, as a legitimate position for a victim of human rights violations, and the confidentiality of a testimony given in a truth-seeking context seems to make a position in favor of upholding the secrecy of the records containing said testimonies reasonable, if that is the attestant's will. The attestant's right to privacy and her dignity as a human being should be respected and recognized by the society. Such right to privacy remains even if, as a result, the right to collective truth erodes. To some, such right to privacy remains even at the expense of the right to retributive justice.<sup>95</sup>

***B. Second Position: The Content of the Testimonies Should Be Publicly Disclosed Because They Are Essential to Access a Complete Collective Truth***

First, it is important to point out that “[t]he right to truth encompasses both a collective and individual right.”<sup>96</sup> All, a society and its individuals, are entitled to the truth after mass human rights abuses. As stated by Sam Szoke-Burke, this right to truth “has been held to belong not only to victims and their families, but also to victims of similar crimes and to society as a whole.”<sup>97</sup> By the same token, to find the truth, a society must “uncover the truth about each particular incident, including the human rights violations suffered, the *identity of the victim*, the identity and responsibility of the perpetrator and, for disappearances, the victim's whereabouts”<sup>98</sup> (Emphasis added). Regarding who is entitled to this truth, Szoke-Burke wrote that “victims and the general public are also entitled to the ‘full and complete truth’ about the systemic or structural causes and circumstances of the events in question and any patterns of abuse.”<sup>99</sup>

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<sup>94</sup> Peña, *supra*, note 1.

<sup>95</sup> For example, to Chilean academic Carlos Peña; *see id.*

<sup>96</sup> Soueid et al., *supra* note 6, at 137.

<sup>97</sup> Sam Szoke-Burke, *Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies*, in 33 BERKELEY J. INT'L L., 526, 532 (2015).

<sup>98</sup> Szoke-Burke, *supra* note 97, at 532 (emphasis added).

<sup>99</sup> *Id.*

Argentina was the first country in Latin America to “emerge from a period of extreme state terrorism,”<sup>100</sup> and when faced with the issue of how to confront the past, Alfonsín’s government did not have many models or frameworks to look to and replicate. While performing its duty, CONADEP took the testimonies of more than 1,500 people who had survived the detention centers.<sup>101</sup> According to Thomas Wright, “For the victims and their families, testifying before CONADEP and having the names and, in some cases, the stories of their loved ones’ ordeals published in *Nunca Más* was a first step in a long and difficult process of healing.”<sup>102</sup> In Argentina, the testimonies are completely public, and anyone can access their full content.<sup>103</sup> As Wright states:

At the beginning of a new investigation in Argentina, a judge will routinely request any relevant information from the *Archivo Nacional de la Memoria* (National Archive of Memory), where the CONADEP files are kept. The CONADEP conclusions can be admitted by the judge with probatory status—stipulating facts about events, dates, names, etc. However, the testimonies in these files are not given the same force as statements taken directly by the investigating judge. Instead, the statement-giver would have to be found and the testimony repeated, which is of course not always possible.<sup>104</sup>

Argentina did not keep the testimonies confidential.<sup>105</sup> Chapter II of the *Nunca Más* report (about the victims) states that “many disappearances have not been reported . . . because they prefer to keep reservations.”<sup>106</sup> In light of this statement, it may be reasonable to presume that President Alfonsín’s government and the Commission’s members *knew* that there were people who would not testify precisely because they preferred to remain silent, but regardless, they left the publicity of the testimonies content when creating CONADEP. To Argentinians, such publicity was not an issue: “CONADEP decided to

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<sup>100</sup> THOMAS C. WRIGHT, STATE TERRORISM IN LATIN AMERICA 142 (2007).

<sup>101</sup> *Id.* at 144; In Argentina’s dictatorship, there were detention centers. Emilio Fermin Mignone, Cynthia L. Estlund, and Samuel Issacharoff wrote: “According to numerous witnesses, the prisoners were severely tortured during their detention and were kept in a cell measuring less than three cubic meters.” Emilio F. Mignone, Cynthia L. Estlund & Samuel Issacharoff, *Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina*, 10 YALE J. INT’L L. 118, 120 (1984).

<sup>102</sup> WRIGHT, *supra* note 100, at 145.

<sup>103</sup> Meza-Lopehandía, *supra* note 18, at 8.

<sup>104</sup> PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS, n. 315, 314 (1989). According to the notes, the information was provided by CELS and Cath Collins.

<sup>105</sup> Meza-Lopehandía, *supra* note 18, at 8.

<sup>106</sup> INFORME NUNCA MÁS, *supra* note 12.

classify this vast material by clandestine detention center. This had ‘a magnet effect,’ attracting the testimonies of survivors, perpetrators and witnesses.”<sup>107</sup> The testimonies given about the disappearances, “[n]umbering in the thousands, provided by diverse persons from various parts of the country and coinciding both in general aspects and in details . . . represented an exercise in public remembrance, a task of memory that enabled the expansion of the knowledge of what had happened.”<sup>108</sup>

To understand the Argentinian case, a useful example can be addressed. In 2009, a law was passed that “amended the criminal code to allow compulsory DNA testing of anyone suspected of being a stolen child. It was passed after a number of these now adult children refused to submit to testing.”<sup>109</sup> Maria Rae, in her article *Truth at Any Cost?*, cited Penchaszadeh’s work, in which the latter stated that “although initially most victims experienced psychological shock when their true identity was revealed, knowledge of the truth, painful as it was, was emotionally liberating from the perversity, lies, concealment and violence that in many cases had surrounded their rearing.”<sup>110</sup> But Rae concluded, “This case [mandatory DNA samples] is an example of how collective justice demands may result in legal redress that impinges on personal justice in a way that can make victims feel they have ‘disappeared’ twice.”<sup>111</sup> In this way, Argentina chose to prioritize the collective right to truth over personal rights to privacy and dignity: first, regarding the testimonies, and then establishing compulsory DNA samples on *alleged* stolen children.

Moreover, the position of Argentina in this regard became even clearer in 2010, when the Argentinian government passed Decree No. 4/2010. The Decree established that “it is appropriate to reveal the secrecy and confidentiality of information that may favor comprehensive knowledge of the facts linked to human rights

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<sup>107</sup> Emilio Crenzel, *Argentina’s National Commission on the Disappearance of Persons*, 2 INT’L J. TRANSITIONAL JUST., 173, 183 (2008). According to the author, the information was provided in an interview with Graciela Fernández Meijide, in Buenos Aires, on August 26, 2004.

<sup>108</sup> *Id.* at 184.

<sup>109</sup> Maria Rae, *Truth at Any Cost? Law’s Power to Name Argentina’s Disappeared Grandchildren*, 7 OÑATI SOCIO-LEGAL SERIES, 324, 327 (2017), <https://ssrn.com/abstract=2975420> (last visited Nov. 20, 2017).

<sup>110</sup> *Id.* at 333.

<sup>111</sup> *Id.*



violations,”<sup>112</sup> effectively putting an end to any doubts that might have existed regarding the confidential nature of such information.

In El Salvador's case, the Truth Commission took the vast majority of the testimonies confidentially, but the final report stated the following:

The parties to the Peace Accords made it very clear that it was necessary to reach “the full knowledge of the truth” and that is why the Commission was created. However, you cannot tell the whole truth by omitting names. After all, the Commission was not entrusted with writing an academic report on El Salvador. It was requested to investigate and describe acts of violence of singular importance and to recommend measures to avoid the repetition of such events in the future. This task cannot be achieved abstractly, by suppressing information (such as, for example, the names of those responsible for these events) when there is reliable testimony about it, especially when the persons identified occupy high positions and perform official functions that are directly related to the violations or their cover-up. The failure to mention names would reinforce that same blanket of impunity that the parties commissioned the Commission to lift.<sup>113</sup>

Although this argument was articulated in favor of disclosing the identities of perpetrators and accomplices, it can easily be extended to justify the full disclosure of the victims' names and testimonies. In El Salvador, confidentiality was not based on the attestants' right to privacy or dignity but rather confidentiality was a condition to successful information gathering, due to the reality that the victims required safety.

In its report regarding the testimonies, the TRC in South Africa stated that

[e]ach story of suffering provided a penetrating window into the past, thereby contributing to a more complete picture of gross violations of human rights in South Africa. The nation must use these stories to sharpen its moral conscience and to ensure that, never again, will it gradually atrophy to the point where personal responsibility is abdicated.<sup>114</sup>

However, the recommendations from the TRC also suggested that

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<sup>112</sup> Decree 4/2010, May 1, 2010, B.O. 31815 (Arg.), <https://www.argentina.gob.ar/normativa/decreto-4-2010-162573/texto>.

<sup>113</sup> El Salvador Comm'n, *supra* note 74.

<sup>114</sup> South Africa Comm'n, *supra* note 15, at ch. 5, ¶ 109 (1998).

[a]ll Commission records be accessible to the public, unless compelling reasons exist for denying such access, bearing in mind that the individual's rights to privacy, confidentiality and related matters must be respected. In this regard, particular attention needs to be given to the release or withholding of details of human rights violations statements in cases where individuals feel their safety is prejudiced.<sup>115</sup>

It is paradoxical that the TRC promoted an absolute publicity of the records unless there were *compelling* reasons that would support confidentiality, but it does not state what those reasons would be. Nonetheless, the drafting leaves some clues—an individual's rights to privacy must be respected.

In the case of Peru, the government passed the “Transparency and Access to Public Information Act” in 2002.<sup>116</sup> Article 15-A established: “The information related to human rights’ violations or the 1949 Geneva Conventions will not be considered as classified information performed in any circumstance, by any person.”<sup>117</sup>

In the same spirit, the Inter-American Commission on Human Rights has held that “in transitional contexts, the achievement of a truth that is complete, truthful, impartial, and socially constructed, shared, and legitimated is a fundamental element for the reconstruction of public confidence in the state institutions.”<sup>118</sup> The concept of truth drafted here does not leave much ground for confidential information. Further, the same Inter-American body, quoting the Human Rights Council, has pointed out that “truth, justice, reparation and guarantees of non-repetition contribute to the achievement of two intermediate or medium-term objectives (offering recognition to victims and fostering trust) and two final objectives (contributing to reconciliation and strengthening the rule of law).”<sup>119</sup> In the same vein, the Inter-American Court of Human Rights held in *Myrna Mack Chang v. Guatemala* that state authorities cannot rely on state secrecy, confidentiality of the information, or public interest or national security grounds to stop providing the information required by judicial authorities or administrative officers in the investigative or pending process.<sup>120</sup>

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<sup>115</sup> *Id.* at ch. 8, ¶ 103.

<sup>116</sup> Act No. 27,806 [Transparency and Access to Public Information Act] (2002).

<sup>117</sup> *Id.* at art. 15-A.

<sup>118</sup> INTER-AMERICAN COMM’N ON HUMAN RIGHTS, DERECHO A LA VERDAD EN AMÉRICA, 19–20 (2014), <http://www.oas.org/es/cidh/informes/pdfs/derecho-verdad-es.pdf>.

<sup>119</sup> *Id.* at 20.

<sup>120</sup> *Myrna Mack Chang v. Guatemala*, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 101 ¶ 180, 182 (Nov. 25, 2003), [http://corteidh.or.cr/docs/casos/articulos/seriec\\_101\\_esp.pdf](http://corteidh.or.cr/docs/casos/articulos/seriec_101_esp.pdf).

Moreover, Szoke-Burke has addressed this same issue:

Domestic jurisdictions also continue to reaffirm the right to truth of the general public. Argentina, the Bolivarian Republic of Venezuela, Cuba, Peru, and Uruguay all made statements to the Office of the High Commissioner on Human Rights affirming that society is entitled to know the truth regarding serious violations of human rights. Courts in Colombia, Bosnia and Herzegovina, Peru, and Argentina were some of the first national courts to uphold the right of society as a whole to the truth.<sup>121</sup>

A line can be seen with sufficient clarity between the societies that have decided to maintain the confidentiality of the testimonies and those that have chosen not to do so. On the one hand, there is the attestants' right to privacy and dignity; on the other, the right to the truth for the whole society. Both positions are entirely valid; however, each of them finds the other in its path.

## V

### PROPERTY RIGHT OVER THE TESTIMONIES: SOCIETY OR INDIVIDUAL PROVIDER

If the testimonies are capable of being owned, who holds them as property, the provider or the whole society represented by the state? At the end of the day, this issue is a property issue. Deciding who owns the testimonies can decide their fate; the owner of the testimony will determine whether to disclose the testimony.

In a judgment issued regarding a legal action brought by a victim against the Chilean Institute of Human Rights when the institute refused to provide the victim the content of the testimony she had given to the Valech Commission, the Court of Appeals of Santiago, Chile, held that “[t]his refusal affects the property right of [the victim] because it deprives her of the record and information that she owns and, therefore, . . . belong to her.”<sup>122</sup> The court also stated that the law that provides the secrecy of the testimonies “establishes expressly that the holders of the aforementioned records are the ones who have the right and freedom to make them known or provide them to third parties for other purposes, and may do with them as they deem appropriate.”<sup>123</sup>

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<sup>121</sup> Szoke-Burke, *supra* note 97, at 541.

<sup>122</sup> Cote de Apelaciones (C. Apel.) [court of appeals] 2015, “*Valenzuela Valladares c. Instituto Nacional de Derechos Humanos*,” Rol de la Causa case No. 91,155-2015 (Chile), <http://www.pjud.cl/consulta-unificada-de-causas> (last visited Dec.1, 2017).

<sup>123</sup> *Id.*

According to Chilean scholar Dr. Hernán Corral Talciani, this problem can be solved in the Chilean regulatory framework by resorting to a legal concept called “contract-laws.” According to Dr. Corral Talciani, a contract-law “is a hybrid concept that combines, on the one hand, a contractual agreement between an individual and the State Administration and, on the other, a law that establishes a legal regulatory regime that endorses or supports the contractual stipulation.”<sup>124</sup> In Dr. Corral’s opinion, “[T]he persons who testified before the [Valech] Commission acquired a right to the confidentiality of the information provided. . . . That right, as such, is covered by the guarantee of property and, therefore, a law could not suppress it without the requirements of expropriation being met.”<sup>125</sup>

As previously stated, the reasons for confidential testimonies are safety or privacy. In the latter case, many victims and witnesses do not want to publicly disclose horrible experiences. Victims may wish to hide such experiences for several reasons, such as they are personally ashamed about them, they do not want their relatives and friends to know what happened to them, or perhaps they want to forget. All such motivations are reasonable and should be respected

On the other hand, it is undeniable that a wounded society is entitled to the truth, and a complete truth cannot be achieved if information is omitted from public records. In support of collective truth, “the Commission on Human Rights [has] emphasized the right to truth’s links with the entitlement of the public to freedom of information and to the public’s ‘access to the fullest extent practicable information regarding the actions and decision-making process of their Government.’”<sup>126</sup> Furthermore, according to Szoke-Burke, the right to truth, “may be alternatively characterized in domestic legal systems as ‘the right to know, the right to be informed, or freedom of information.’”<sup>127</sup> Additionally, “the General Assembly referred to freedom of information as a ‘fundamental human right.’”<sup>128</sup> Szoke-Burke further addressed the conflict that may arise “between the right to truth and the privacy rights of different stakeholders,” by concluding that privacy “can be facilitated by the use of pseudonyms, private

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<sup>124</sup> Hernán Corral Talciani, *Comisión Valech: confidencialidad y “contrato ley,” Derecho y Academia* (Sept. 17, 2017), <https://corraltalciani.wordpress.com/2017/09/17/comision-valech-confidencialidad-y-contrato-ley/>.

<sup>125</sup> *Id.*

<sup>126</sup> Szoke-Burke, *supra* note 97, at 539 (emphasis added).

<sup>127</sup> *Id.* at 541.

<sup>128</sup> *Id.*

hearings, and other methods of ensuring that individual accounts cannot be traced back to *those who wish, and who have the right, to remain anonymous.*"<sup>129</sup> The last sentence is somewhat ambiguous: does the author mean that those who wish to remain anonymous are the same individuals that, and for that very reason, have a right to anonymity? Or is the author writing about two different stakeholders? Unfortunately, it is not clear. One interpretation is that, by stating that *some* have the right to confidentiality, the author is implying that not every attestant has it. If that were the case, an actual property right over the testimonies would not exist for the common provider (the one who is not legally incapacitated for any reason, like a minor, or the one the State has chosen to protect, like a victim of a sexual assault). From this perspective, society as a whole would be the owner of the testimonies.

Guatemala and Uruguay have both passed regulations upholding the right of access to public information in cases related to human rights abuses. By doing so, the states have decided the destiny of the testimonies. In such cases, the states are in fact the owners of the testimonies and their full content. Applicable here is the idea, as articulated by an Argentinian member of Congress, that "the truth is a collective obligation, not an individual decision."<sup>130</sup>

Gary Bruce stated, when analyzing this issue in the light of the Stasi files disclosure debate, that "the most important dynamic in the Stasi Files Law is the relationship between privacy rights and personal and societal rights to know the past."<sup>131</sup> Bruce concludes that "[t]his delicate relationship has been the subject of major legal cases and subsequent adjustments to the law, and represents the kind of engagement that only a country steeped in legal traditions can undertake."<sup>132</sup>

The position that Chile seems to have adopted, based on the ruling of the Santiago Courts of Appeals and Dr. Corral's interpretation of the law, recognizes a property right over the testimonies, which appears to be more reasonable than one proposing a collective ownership disguised as society's right to the full and complete truth. The fact is, every state shall decide how to face this issue. However, states must choose wisely or risk victims withholding their testimony, which would

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<sup>129</sup> *Id.* at 543.

<sup>130</sup> Rae, *supra* note 109, at 331.

<sup>131</sup> Bruce, *supra* note 85, at 103.

<sup>132</sup> *Id.*

result in a major source of information becoming unavailable due to false promises made in the past.

## VI VALUE OF PROVIDING TESTIMONIES TO THE INDIVIDUAL PROVIDER AND SOCIETY

With their virtues and flaws, truth commissions entered the transitional justice arena and are here to stay. As one of the most important sources of information these bodies have, the testimonies of victims must be treated delicately. If those who have the information do not want to disclose it, the state cannot force them to;<sup>133</sup> therefore, victims must agree to provide their testimonies willingly in a process of transition.

To some, “[w]hen space is created for these stories to be told, and they are listened to respectfully . . . dignity [is] affirmed.”<sup>134</sup> An attestant wrote, when giving testimony before the South African TRC, “[S]omehow I felt that my own story was joined with the millions of stories, the giant story of our nation, permanently, indelibly, forever.”<sup>135</sup>

The fact that society benefits from the testimonies is no surprise. Rosalind Shaw explains that the model on which tools such as truth commissions are based is premised on the belief that a full acknowledgement of the past, through verbal testimony, forms an essential basis for justice and facilitates healing to help rebuild a nation.<sup>136</sup> Similarly, Olivera Simic points out, “Bufacchi (2013) states that without first-person narratives and their recognition and legitimisation as epistemologically and philosophically valuable, ‘our knowledge of violence would be seriously compromised.’”<sup>137</sup>

Similar to the benefits enjoyed by society as a whole, some victims find it useful to tell their stories: “Julie Mertus (2000) argues that, for survivors, it is important to tell their story; as without such

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<sup>133</sup> Even though in South Africa the TRC had the authority to subpoena witnesses that were not willing to testify and did so. See Mamdani, *supra* note 49, at 47.

<sup>134</sup> Elisabeth Porter, *Gendered Narratives: Stories and Silences in Transitional Justice*, 17 HUM. RTS. REV. 35, 36 (2016).

<sup>135</sup> Michael Lapsley, *Confronting the Past and Creating the Future: The Redemptive Value of Truth Telling*, 4 SOC. RES., 742, 755 (1998).

<sup>136</sup> Shaw, *supra* note 8, at 186.

<sup>137</sup> Olivera Simic, *Engendering Transitional Justice: Silence, Absence and Repair*, 1 HUM. RTS. REV. 1, 4 (2016).

acknowledgment, survivors feel forgotten, erased and invisible.”<sup>138</sup> However, an individual’s healing may not result from testimony in the same way as society’s, because what is good for society is not necessarily good for individual persons.<sup>139</sup> In fact,

while providing testimony may carry some benefits for some victims, it is unrealistic to suppose that any one institution or process can meet victims’ disparate needs which may not only include truth and justice, but may also extend to counselling, the restitution of property, relocation, reintegration and social and economic assistance.<sup>140</sup>

Maria Rae transcribed the words of an Argentinian woman who said the following regarding the compulsory DNA samples discussed above:

It’s not my job to mitigate other people’s pain. I’m not saying that the pain isn’t terrible, but I didn’t cause it. Is it my fault? I’m a product of having been born at the wrong time; I am what I am. Everyone is concerned with others’ rights, but I’m a victim of what happened. That’s clear. The state is guilty of stealing me and now the state is out to get me again (Vazquez cited in Lazzara 2013, p. 329).<sup>141</sup>

Priscilla Hayner notes that, although “[t]ruth commissions’ victim-centered approach of collecting thousands of testimonies and publishing the results of their findings in a public and officially sanctioned report represents for many victims the first sign of acknowledgment by any state body that their claims are credible and that the atrocities were wrong,”<sup>142</sup> testifying is actually a step backward for many individual victims. For example,

for many—if not most—of those who testified before South Africa’s human rights violations hearings, the verbalization of unspoken memories was not a healing process. According to the Trauma Centre for Victims of Violence and Torture in Cape Town, between 50 and 60 percent of those who testified experienced difficulties afterwards, and many regretted testifying.<sup>143</sup>

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<sup>138</sup> *Id.* at 4.

<sup>139</sup> Jonathan Doak, *The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions*, 11 INT’L CRIM. L. REV. 263, 264 (2011).

<sup>140</sup> *Id.* at 290.

<sup>141</sup> Rae, *supra* note 109, at 333.

<sup>142</sup> PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS 13 (2011).

<sup>143</sup> Shaw, *supra* note 8, at 193.

Studies carried out in Mozambique, in a population affected by war “show[] that talking about traumatic experiences does not necessarily help patients ‘come to terms’ with their distress.”<sup>144</sup>

Some victims may have additional reservations about testifying, above and beyond the lack of healing; some may even feel revictimized by sharing their story. According to Holly L. Guthrey, “research across various cultures has indicated that it is not uncommon for women to become socially stigmatized and ostracized after disclosing that they were victims of sexual violence.”<sup>145</sup> In essence, not all victims want to tell their stories, and they have reasons for it. To many, no good can come out of it, as sharing their story will not help them heal their wounds. Many attestants share their stories with the commission for the common good. Such attestants trust that the commissioners, perhaps because of the credentials they hold, can help to declare the truth, including the causes, the facts, and the black period in a society’s history, and that such a declaration of truth can provide society with possible courses of action to achieve greater goals, such as social reconciliation.

Society needs the memories of these victims to become testimonies. However, the victims do not need, in many cases, to reveal their memories. It is society that remains in debt to the victims after they are deposed under the cloak of confidentiality. The debt that society contracts with the victims, in the form of a promise, must be maintained over time.

### CONCLUSION

If, after a period of massive violence, there were no survivors, truth commissions would not have been created. Nor would they had only those who committed the crimes survived. So, what is the purpose of these bodies? Some have written that they have “emerged as a manifestation of the survivors’ right to truth.”<sup>146</sup> In the exercise of the right to truth, testimonies have proven to be one of the most important sources of information truth commissions have. The testimonies, when they are known, can be very enlightening to persons in a future generation studying the aftermath of the atrocities. Public knowledge can be enhanced when the victims or witnesses tell their stories in the

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<sup>144</sup> Alcinda Honwana, *Sealing the Past, Facing the Future: Trauma Healing in Rural Mozambique*, ACCORD: AN INT’L REV. PEACE INITIATIVES 75, 77 (1998).

<sup>145</sup> Guthrey, *supra* note 72, at 19.

<sup>146</sup> Soueid et al., *supra* note 6, at 139.



context of a public hearing, or if the hearing is broadcast through mass media, like television or radio. Most likely, this is why “the last decade has seen a steep rise in public, as opposed to closed, hearings, such that victims have essentially become the ‘face’ of these institutions.”<sup>147</sup>

The problems with public hearings are first, the public disclosure of the facts can mean a step backward in the healing process for some victims; and second, attestants have to be willing to share their memories with many others—perhaps thousands or, in some cases, maybe millions. Understandably, some victims do not want to tell their stories to the world, or to their country, or even to their closest loved ones. As a result, there is often a promise of confidentiality to entice an individual to disclose her testimony. Such confidentiality has to be maintained for some time, although it seems unreasonable that the secrecy must last forever, due to society’s right to full and complete truth. Using the German example of the Stasi Files as a model, a reasonable compromise may be found in releasing information to the public after a certain period of time. For example, if the attestant has been dead for thirty years, or 110 years have passed since the individual’s birth, the content may be disclosed.

Transitional justice has the constant challenge of having to update itself while human beings are constantly changing—morally, politically, and mentally. Transitional justice must also grapple with human changes that do not necessarily mean progress. Following the rhythm of history, humankind advances in a pendulum—moving toward the future but also reliving stories from the past. Therefore, transitional justice has the duty of transmitting to future generations the content of the wrongdoings of the past and their causes.

Transitional justice in general, and truth commissions in particular, have a duty to make future generations learn and understand the past, so that a society never again has to experience a trauma or atrocity. However, there is one limitation: the truth cannot be obtained at the expense of the victims. They have already suffered enough.

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<sup>147</sup> Guthrey, *supra* note 72, at 3.

