

The secrecy of the archives of Chile's National Commission on Political Prisoners and Torture and its problematic relationship with the right to justice

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eine Demonstration der Bewegung gegen die Folter, Santiago de Chile 1988. Foto: Rainer Huhle

After the end of the civil-military dictatorship in Chile (1973-1990), the country began a process of transition to a democratic state that included various measures to address the terrible consequences that the systematic and widespread human rights violations committed by the dictatorship had on society. As part of this process, in 2003, the Comisión Nacional sobre Prisión Política y Tortura (National Commission on Political Prisoners and Torture) was formed, better known as the Valech Commission, because it was chaired by Monsignor Sergio Valech. This

Commission was created to clarify the identity of persons who suffered deprivation of liberty and torture for political reasons by agents of the State or persons in its service during the dictatorship. In 2004, Ley No. 19.992 established absolute confidentiality for 50 years of all information received by the Comisión Nacional sobre Prisión Política y Tortura, explicitly prohibiting access to the archives by any person, authority, or magistrate, except for the right of the holders of the statements and documents to make them public.

As Pablo de Greiff (de Greiff, 2012) points out, approaching justice in contexts where massive and serious human rights violations have occurred is a complex task that involves many obstacles to the prosecution and trial of those responsible, including the number of perpetrators, the scarcity of resources, the capacity and will of authorities and courts, and how unstable and fragile a transitional government can be in the face of the power of the former authoritarian regime. In addition to these numerous complexities, it must be considered that isolated initiatives for prosecution and the pursuit of justice are not sufficient in the framework of transitional justice if they do not go hand in hand with the other elements that comprise it: truth, reparation, and guarantees of no recurrence. In the same way, as Pablo de Greiff (de Greiff, 2012) indicates, truth-seeking exercises, even exhaustive ones, when applied on their own, are not considered equivalent to justice since adequate reparation for victims is not exhausted with the revelation of what happened.

The establishment, duration, and implications of the extensive secrecy of the archives of the Valech Commission have generated a great debate in Chile that continues to this day and in which victims, human rights defenders, authorities, politicians, academics, and public opinion, among others, have participated. Victims' groups and human rights defenders have promoted

bills to lift the secrecy or make the reserve less demanding, but so far, none has prospered. Even in the process that seeks to provide Chile with a new constitution, an unsuccessful attempt was made to enshrine constitutionally that the 50-year confidentiality established in Ley No. 19.992 was contrary to the principles and rights recognized in the draft of the new Constitution.

This article, taking into account the experience of other truth commissions and the international principles and standards developed on the treatment of and access to archives on human rights violations, will analyze how this secrecy affects the right of access to justice in the framework of transitional justice, highlighting the existence of less extreme alternative means to achieve the ends that were claimed to be pursued with the establishment of such a restriction.

I. National Commission on Political Prisoners and Torture and the secrecy of its archives

In 2003, thirteen years after the end of the dictatorship, and following requests submitted to the State by groups of former political prisoners and torture survivors, President Ricardo Lagos ordered the creation of the Comisión Nacional sobre Prisión Política y Tortura through Decreto Supremo No. 1.040. According to this decree, its mandate was to:

Determine, according to the information submitted, who are the persons who suffered deprivation of liberty and torture for political reasons, by acts of agents of the State or persons in its service, in the period between September 11, 1973 and March 10, 1990 (Decreto Supremo No. 1.040, 2003: art. 1º, inc. 1º).

Decreto Supremo No. 1.040 also established that the Valech Commission was to propose to the President of the Republic measures of reparation for persons recognized as political prisoners or tortured and that it could not assume jurisdictional functions, therefore, it could not pronounce on the responsibility that under the law could be attributed to individuals.

This commission was composed of eight people nominated by President Lagos and was chaired by Catholic bishop Sergio Valech Aldunate, who played an important role in the defense of human rights during the dictatorship as vicar of the Vicaría de la Solidaridad (Vicariate of Solidarity), an institution that provided legal and social assistance to victims of human rights violations during the military regime. According to the Informe de la Comisión Nacional sobre Prisión Política y Tortura (Report of the National Commission on Political Prisoners and Torture) (2004), the commission received the testimony of 35,868 people, who voluntarily came to testify over a period of six months and qualified a total of 27,255 people as victims. This number of persons qualified as victims rose to 28,459, after Decreto No. 1.086 ordered the continuation of the Comisión Nacional sobre Prisión Política y Tortura between November 2004 and May 2005, opening a period of reconsideration. The Valech Commission also issued a series of recommendations that served as a precedent for the creation of Ley No. 19.992, which established reparation measures for recognized victims.

The process of receiving background information was the basis of the commission's work and the concept of confidentiality was central to it. Decreto Supremo No. 1.040 established that: "All the proceedings carried out by the Commission, as well as all the information it receives, shall be confidential for all legal purposes" (Decreto Supremo No. 1.040, 2003: art. 5º, inc. 5º). In addition, this decree gave the Valech Commission the power to adopt measures, ex officio or at the request of a party, to guarantee the confidentiality of the identity of those who provide information or collaborate in its work. Thus, based on the above, and as indicated in

the Informe de la Comisión Nacional sobre Prisión Política y Tortura (2004), the general rule was that any type of information related to cases and situations of detention or torture for political reasons was confidential, with a strict prohibition on its partial or total disclosure to persons, groups of persons or institutions outside the Valech Commission. For this reason, the Valech Commission report did not present the information in a way that could link a specific victim to the method of torture to which he or she was exposed. The different types of torture used were described and the victims' names were kept confidential.

Later, through Ley No. 19.992 of 2004, which established a reparation pension and other benefits in favor of the victims identified by the Valech Commission, an even stricter confidentiality was decreed, indicating that the documents, testimonies and background information provided by the victims to the commission in the course of its work are secret, specifying that the secrecy does not extend to the report prepared by the commission. But, in addition, Ley No. 19.992 states that:

The secrecy provided for in the preceding paragraph shall be maintained for a period of 50 years, during which time the information on which it is based shall remain in the custody of the Ministry of the Interior. As long as the secrecy provided for in this article is in force, no person, group of persons, authority or magistracy shall have access to the records (Ley No. 19.992, 2004: art. 15).

This law indicates, referring to Article 247 of the Criminal Code, the penalty for the communication, disclosure or revelation of the information and data covered by the established secrecy, and establishes, for the participants of the Valech Commission, the power to refrain from testifying in criminal proceedings for reasons of professional secrecy with respect to the information covered by the decreed secrecy. It also specifies the personal right of the holders of the documents, reports, statements and testimonies included therein, to disclose them or provide them to third parties at their own free will. Thus, Ley No. 19.992 established a 50-year secrecy on all the information provided to the Valech Commission, which even affected the courts of justice and those in charge of investigating crimes and human rights violations committed during the dictatorship.

1.1. Main arguments raised in the debate on the pertinence of secrecy of the archives and victims' statements

To find the main reasons that have been given to justify this extensive and strict secrecy, we must refer to the Historia de la Ley No. 19.992 (history of Law No. 19.992), constructed by the Biblioteca del Congreso Nacional de Chile (Library of the National Congress of Chile) (2004) from the information available in its archives. This document contains the message from President Ricardo Lagos initiating the processing of the bill, which states that the success of the tasks entrusted to the Valech Commission is, to a large extent, linked to the confidentiality and reserve with which, since its creation, its actions and the information it gathered were treated, and this would have allowed the victims to find in this instance a space of welcome and respectful consideration for them so that the trust they were able to place in the commission should be honored and safeguarded, not allowing their testimonies and memories to be used for any other purpose than the one for which they were provided; that is, the preparation of the report that the Valech Commission was entrusted with. The same message also states that the confidentiality of the background information was, in addition, a formal commitment of the government to the victims who came to the commission to testify. It is indicated in the Historia de la Ley No. 19.992 that the nature of the Valech Commission is not jurisdictional, investigative, broadcasting or journalistic, and therefore the information and

statements provided therein do not constitute statements of inquiry or incrimination, nor evidence of any kind, nor judicial investigation or complaints, and it is also stated that:

the secrecy established over such information prevents, on the one hand, the denaturalization of the function performed by the Commission and of the information provided to it and, on the other hand, it preserves the right of the victims, who are the sole holders of such information, to dispose of it as they deem appropriate (Biblioteca del Congreso Nacional de Chile, 2004: p. 20).

In order to oppose the establishment of such a secret, the arguments given by the parliamentarians, among them Congresswoman Laura Soto, focused on pointing out that such secrecy would limit attributes of the jurisdiction and the jurisdictional function of the courts of justice to judge facts that have the character of crimes and would be violating obligations imposed on the State by international human rights treaties such as the American Convention on Human Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, regarding the obligation to prosecute torturers. In line with the above, several members of Congress, among them Laura Soto and Isabel Allende, presented an indication to article 15 of draft law No. 19.992, which can be found in the Historia de la Ley No. 19.992, to reconcile the criminal prosecution of those responsible for human rights violations and the protection of the privacy of the victims who would have testified before the Valech Commission within the framework of confidentiality:

However, the Courts of Justice, in the exercise of their powers, may require specific background information that is or may be contained in the records of the testimonies of the deponents before the Commission. The entity in charge of the custody of this information must request the express consent of the victim who appeared to provide it for his or her personal data to be made known to the requesting judicial authority. In any case, the full story may always be communicated to the justice system without identifying the physical person of the victim. This information will be, in both cases, incorporated into the respective processes through a special secret notebook. Likewise, the court may always request the documents and background information provided by the victim, without any limitation whatsoever (Biblioteca del Congreso Nacional de Chile, 2004: p.91).

Nevertheless, this indication was rejected after only 34 deputies approved it, 53 rejected it and 5 abstained, so the Government's initial proposal of Article 15 was the one that ended up prevailing.

Later, in 2009, Ley No. 20.405 created the Instituto Nacional de Derechos Humano (National Human Rights Institute) (INDH), whose purpose is to promote and protect the human rights of persons living in the territory of Chile. Among other functions, Ley No. 20.405 states that the INDH is responsible for the custody and safekeeping of the documents and records gathered by the Comisión de Prisión Política y Tortura (Valech I) and by the Comisión Asesora para la calificación de Detenidos Desaparecidos, Ejecutados Políticos y Víctimas de Prisión Política y Tortura (Advisory Commission for the Classification of Disappeared Detainees, Political Executed and Victims of Political Prisoners and Torture) (Valech II). In 2015, in an opinion column, the then Director of the INDH noted, with respect to the State's obligation to ensure a prompt investigation, bring justice and punish those responsible for torture, that: "The prohibition or secrecy of the Valech records constitutes an obstacle to the investigation to the extent that information that could be valuable for the advancement of legal cases cannot be known by our courts" (Fries, 2015). In the same column, she pointed out, with respect to the role that the victims would have had in the handling of the commission's background information, that "According to victims accredited by the Valech Commission who have come

to the INDH, they were not asked if they wanted to disclose their background to the justice system" (Fries, 2015).

In line with the above, in July 2017, in the framework of the processing of a bill to amend Ley No. 19.992 to allow the courts of justice to access the records of the Valech Commission, David Quintana, President of the Coordinadora Nacional de Ex Presos y Ex presas Políticas Salvador Allende (National Coordinator of Former Political Prisoners Salvador Allende), stated before the Senate Committee on Human Rights, Nationality and Citizenship, that:

we wish to clarify that when we made our statement before the aforementioned Commission, nowhere in the respective form, nor in the attached document, were we asked to express our agreement or not regarding the confidentiality of the information provided and what would be done with that information [...] Those of us who attended to testify before the Commission were never consulted about the secret nature of our background information. We found out in the Law of Reparation that our background information would be secret (Quintana, 2017: p.2).

Currently, this bill is in the second constitutional procedure in the Senate, without urgency, so there is no expectation that it will advance soon and allow the modification of the restriction of access to the archives.

II. Experiences of other truth commissions concerning limitations of access to their archives

Other cases of truth commissions where limitations have been placed on access to archives and information gathered have been the Comisión de la Verdad para El Salvador (Truth Commission for El Salvador) and the Comisión Nacional de Verdad y Reconciliación of Chile (National Truth and Reconciliation Commission of Chile). In these two cases, how the restrictions were established, and their scope differs from those of the Valech Commission; in one case, the restriction is even more extreme, and in the other case, the limitation was less restrictive, but their experiences allow us to identify an essential relationship between access to archives and information gathered and the possibility of approaching justice.

2.1. The Truth Commission for El Salvador

The Comisión de la Verdad para El Salvador emerged after a terrible period of internal war in the country in which serious acts of violence and massive human rights violations were committed. Another important difference with respect to the Valech Commission is that in this case, the parties to the conflict requested assistance from the United Nations to form and finance the Commission, and allowed it to appoint its members, which subsequently influenced the way in which its archives are guarded, and access to them has been restricted.

This Commission was created based on the provisions of the Peace Agreements signed between the Government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional (FMLN) to advance toward reestablishing peace in El Salvador after years of internal conflict. Among these agreements are the Acuerdos de México (Mexico Agreements), which indicate, with respect to the Truth Commission, that it will be composed of three persons appointed by the Secretary General of the United Nations, after hearing the opinion of the parties, and that its mission will be: "to investigate the serious acts of violence that have occurred since 1980, whose imprint on society demands with greater urgency the public knowledge of the truth" (Acuerdos de México, 1991: para. VI). Among the functions of the

Commission, it is also worth mentioning the one established in the Acuerdos de Chapultepec (Chapultepec Agreements) about overcoming impunity:

It is recognized the need to clarify and overcome all allegations of impunity of officers of the Armed Forces, especially in cases where respect for human rights is compromised. To this end, the Parties refer the consideration and resolution of this point to the Truth Commission (Acuerdos de Chapultepec, 1992: p.7).

Former Colombian President Belisario Betancur, Venezuelan Reinaldo Figueredo, and Thomas Buergenthal from the US chaired the Commission. The Secretary General of the United Nations appointed them to this function without objection from the parties. In 1993, the report of the Commission was released, called "De la locura a la esperanza: la guerra de los doce años en El Salvador" (From Madness to Hope: The Twelve Years' War in El Salvador). According to Thomas Buergenthal (Buergenthal, 1994), the report describes some notorious individual cases that moved public opinion, and cases that exemplified patterns of violence that characterized the conduct of the parties and had a poignant effect on society. According to the report, of the 22,000 complaints of serious acts of violence that the Commission recorded:

More than 60% of the total corresponded to extrajudicial executions; more than 25% to forced disappearances; and more than 20% included allegations of torture. The testimonies attributed almost 85% of the cases to State agents, paramilitary groups allied with them, and death squads (Comisión de la Verdad para El Salvador, 1993: p.41).

Buergenthal (Buergenthal, 1994) notes that all witnesses who testified before the Commission were informed that their testimony would be kept confidential if they so wished and that most requested that it be kept confidential. Buergenthal (Buergenthal, 1994) also indicates that the Commission's mandate authorized the procedure of relying on confidential information because the parties to the peace accords assumed that very few Salvadorans would come forward to testify in public for fear of reprisals from those they might identify. The report of the Comisión de la Verdad para El Salvador (1993) notes that the Salvadoran population continued to believe that active and retired military and police officers, government officials, judges and members of the FMLN were in a position to cause serious physical and material harm to anyone willing to testify about the violence committed between 1980 and 1991, and that the Commission was not in a position to offer meaningful protection to witnesses, apart from the guarantee of confidentiality, as it lacked the authority to issue precautionary measures and did not have police powers, highlighting also the public's perception that the Salvadoran judicial system was not in a position to provide the necessary guarantees. Buergenthal (Buergenthal, 1994) recalls that the same institutions and individuals responsible for many brutal acts of violence remained in power, which explains the fear many of the witnesses who appeared before the Commission had. Even under these conditions, the Commission's attempts to seek the truth allowed for the collection of dense testimonial, documentary, photographic and audio material.

As Trudy H. Peterson (Peterson, 2005) notes, after the publication of the report, the Commission's archives were entrusted for an indefinite duration to the United Nations. According to the Instituto de Derechos Humanos de la Universidad Centroamericana de El Salvador (Human Rights Institute of the Central American University of El Salvador) (2019), there has been no individualized analysis of which elements of the archives should be confidential or the reason for confidentiality, and the date on which their consultation would cease to be restricted has not been determined. According to the report written by Allison O'Brien (O'Brien, 2018) about the Panel Event: "The Uses of Truth: Truth Commission Archives, Justice and the Search for the Disappeared in El Salvador", Trudy H. Peterson (cited in O'Brien, 2018) indicated in that panel that the Commissioners did not consider the archives to be the property of the United Nations, but neither did they treat them as if they were the property of

the government of El Salvador and that after being sent to the United Nations archives department for storage, at no point has it been clearly defined who has the power to determine in the long term what will happen to those documents. Leonor Arteaga (cited in O'Brien, 2018) points out, in the same panel, that, in the context in which the regime responsible for the human rights violations was still in power and the institutionality was weak, perhaps it made sense for the United Nations to be the custodian of the archives, but that 25 years later, when there is no longer an Amnesty Law in El Salvador and progress is being made in court cases, it is the right time to have access to the archives that could be used as evidence to achieve justice, if done responsibly protecting the security and integrity of the people who provided information. In the same sense, Benjamín Cuellar (cited in O'Brien, 2018) points out in the panel mentioned above that, after the invalidation of the Amnesty Law, the excuse for not advancing justice in El Salvador has been that there is no information when it does exist in the Commission's archives, and mentions that Reinaldo Figueredo, one of the former commissioners of the Commission, has pointed out to him that, although the "Jesuit Case" (massacre of six Jesuit priests and two women at the Universidad Centroamericana José Simeón Cañas in 1989) is described in only ten pages of the Commission's final report, there are more than 300 pages on the case in the Commission's archives, which would allow progress to be made in the judicial case.

2.2. Chile's National Truth and Reconciliation Commission

On April 25, 1990, after the end of the dictatorship, President Patricio Aylwin created, through Decreto Supremo No. 355, the Comisión Nacional de Verdad y Reconciliación (National Truth and Reconciliation Commission), better known as the Rettig Commission, because it was chaired by the lawyer and politician Raúl Rettig, former ambassador of President Salvador Allende in Brazil. The purpose of the Rettig Commission, according to that decree, was to:

Contribute to the global clarification of the truth about the most serious human rights violations committed in recent years [...] in order to collaborate in the reconciliation of all Chileans and without prejudice to the judicial proceedings to which such events may give rise. For these purposes, serious violations shall be understood as the situations of missing detainees, executed and tortured resulting in death (Decreto Supremo No. 355, 1990: article one (own translation)).

Decreto Supremo No. 355 (1990) established the confidential nature of the proceedings of the Rettig Commission and granted the Commission the power to protect the identity of those who provided information or collaborated with the Commission's work. This reservation is less specific and more limited than the one established in Decreto Supremo No. 1.040 with respect to the Valech Commission, since no direct reference is made to the information received by the Rettig Commission and, therefore, it is not included in the reservation. But another distinction is that Decreto Supremo No. 355, in its art. 2, states that "If, in the exercise of its functions, the Commission receives information on facts that are criminal in nature, it shall immediately submit them to the appropriate court". This implies a significant difference with the Valech Commission, where this type of obligation was not imposed and, therefore, did not generate a direct link of information delivery to the courts of justice that would trigger the exercise of their jurisdictional power.

In 1992, Ley No. 19.123 created the Corporación Nacional de Reparación y Reconciliación (National Corporation for Reparation and Reconciliation), whose purpose was to coordinate, execute and promote the actions necessary to comply with the recommendations contained in the Informe de la Comisión Nacional de Verdad y Reconciliación (Report of the National Truth and Reconciliation Commission). Ley No. 19.123 entrusted the Corporación Nacional de

Reparación y Reconciliación, among other tasks, with the custody of the records gathered by the Comisión Nacional de Verdad y Reconciliación and the Corporation itself, indicating that "Access to information shall ensure absolute confidentiality, without prejudice to the possibility that the Courts of Justice may have access to such information in the proceedings before them" (Ley No. 19.123, 1992: art. 2.3). Ley No. 19.123 gives legal status to the confidentiality established in Decreto Supremo No. 355, stating that:

The actions of the Corporation shall be carried out in a confidential manner, and its directors and officers shall be obliged to maintain secrecy regarding the background information and documents that come to their knowledge in the performance of their duties (Ley No. 19.123, 1992: art. 5).

In this way, the confidentiality of the records continued to be ensured, but access to them by the Courts of Justice was guaranteed, thus avoiding facilitating impunity for those responsible for human rights violations.

According to the Informe de la Comisión Nacional de Verdad y Reconciliación (1991), the Commission, in compliance with the provisions of Decreto Supremo No. 355, forwarded to the courts any evidence that appeared new, useful or relevant to the judicial investigations. In doing so, it took care to protect the identity of persons who wished to testify confidentially, without this preventing it from forwarding to the courts all available evidence on the places where the remains of a person who disappeared after detention might be found. But during this time, most of the cases presented by the commission to the courts did not advance because Decreto Ley de Amnistía No. 2.191, which the Pinochet dictatorship enacted to maintain impunity for those responsible for crimes and human rights violations committed between 1973 and 1978, the period in which the greatest number of crimes were committed while the country was under a state of siege, continued to be applied by the courts.

The Corporación Nacional de Reparación y Reconciliación concluded its work and ceased to have legal existence on December 31, 1996, and in 1997, through Decreto No. 1.005 of the Ministry of the Interior, the Programa de Continuación Ley No. 19.123 (Program for the Continuation of Law No. 19.123), also known as the "Programa de Derechos Humanos", was created for the purpose of continuing the Corporation's work. According to the Centro de Derechos Humanos de la Universidad Diego Portales (2010), in the following years, this program will be the body that will exercise public criminal prosecution in the cases of disappeared detainees and those executed between 1973-1990. According to Anita Ferrara (Ferrara, 2021: p. 265), it was in this context that many judges rediscovered the documentation and records contained in the Rettig Commission archives, which acquired a new role and became the basis for the main prosecution efforts in Chile. During this time, investigations into human rights violations also began to advance due to the new evolution of the jurisprudence of the Supreme Court which, as indicated by Humberto Nogueira (Nogueira Alcalá, 2005), began to consider that in cases of disappeared detainees, whether the act was classified as kidnapping or illegal detention, Decreto Ley de Amnistía No. 2.191 did not apply because they were permanent crimes that continued to be committed after the period covered by the amnesty, which lasted until April 19, 1978.

As noted in recent interviews by Judges Carroza and Cifuentes (2019, cited in Ferrara, 2021: p. 265), who have investigated cases of human rights violations, truth commission archives are still actively used as evidence to build their cases and they attach great importance to them in the investigative phases of the proceedings. For Judge Carroza (2019, cited in Ferrara, 2021: p. 265), the records of the Rettig Commission contain witness statements and statements of family members, which constitute elements of evidence that allow for the reconstruction of the crimes, while Judge Cifuentes (2019, cited in Ferrara, 2021: p. 265)

regularly uses truth commission records to locate witnesses and/or family members or to access the statements of those who can no longer testify. Both consider truth commission archives to be even more valuable than before, as more time passes, more evidence is eroding, and both victims and perpetrators are dying.

III. International principles and standards on access to human rights archives and their relationship to the prosecution of perpetrators

As outlined in the Basic Principles on the Role of Archivists and records managers in Support of Human Rights, developed by the International Council of Archives (2016), in the handling of archives and the management of documents related to human rights, one must deal with legal aspects, social policy issues, and ethical issues. Important dilemmas regarding the handling of information may arise, as in the case of the Valech Commission, where the apparent contradiction between the right to access justice and prosecute those responsible for human rights violations and the protection of the privacy and confidentiality of the victims must be addressed. It is helpful to consider the principles and standards that have been developed internationally on the subject to address these dilemmas. These establish that the general rule should be the possibility of access to archives, justifying the limitation of access mainly for two reasons: protection of the privacy of the victims and protection of legitimate national security interests.

3.1. International principles applicable to the matter

Principle 16 of The updated set of Principles for the protection and promotion of Human Rights through action to combat impunity, developed by the United Nations Commission on Human Rights in 2005, states that:

Courts and non-judicial commissions of inquiry, as well as investigators reporting to them, must have access to relevant archives. This principle must be implemented in a manner that respects applicable privacy concerns, including in particular assurances of confidentiality provided to victims and other witnesses as a precondition of their testimony (United Nations Commission on Human Rights, 2005: p.11).

The Basic Principles on the Role of Archivists and records managers in Support of Human Rights, developed by the International Council of Archives (2016), also state that the authorities must guarantee that archives relating to severe violations of human rights and humanitarian law are accessible, safeguarding the privacy of individuals, reconciling it with the right to truth, further noting that:

Institutions, archivists and records managers should ensure that safeguards are in place to protect personal information from unauthorized access, in order to ensure respect for rights, fundamental freedoms and the dignity of persons to whom the information relates (International Council of Archives, 2016: p. 8).

Pablo de Greiff (de Greiff, 2015), who served as the first United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, contributes to the development of standards in this area by recommending that truth commissions establish guidelines for access to their records, ensuring that victims, families, investigating and prosecuting authorities, and legal defense teams have unrestricted access to information about their specific cases, also noting that: "there should be a presumption of public access to

all State information with only limited exceptions; a procedure to make effective the right of access should be established" (de Greiff, 2015: p.29). Concerning the limited exceptions that might justify restricting court access to relevant records of human rights violations, the Basic Principles on the Role of Archivists and records managers in Support of Human Rights indicate that this should only occur in extraordinary circumstances when: "the restriction has been prescribed by law; the Government has demonstrated that the restriction is necessary in a democratic society to protect a legitimate national security interest; and the denial is subject to independent judicial review" (International Council of Archives, 2016: p.11). Here we must consider that, as Diane Orentlicher (2005) points out in her report as an independent expert to update the Set of Principles to combat impunity, the concept of "legitimate national security interest" must be understood as it is reflected in The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, where it is stated that a restriction that is intended to be justified on national security grounds is not legitimate unless:

Its genuine purpose and demonstrable effect are to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to the violent overthrow of the government (The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, 1995: Principle 2).

3.2. Pronouncements of the Inter-American Court of Human Rights and international human rights bodies

In 2003, the Inter-American Court of Human Rights (IACtHR), in the case of Myrna Mack Chang v. Guatemala, expressed, regarding access to State-held information contained in archives, that in cases of human rights violations, State authorities may not rely on mechanisms such as State secrecy or confidentiality of information, or on reasons of public interest or national security, to fail to provide the information required by judicial or administrative authorities. However, curiously, in the case of Humberto Maldonado Vargas et al. v. Chile, the same IACtHR notes, concerning what was expressed in the case of Myrna Mack Chang v. Guatemala, that: "these precedents do not refer specifically to archives of truth commissions responsible for seeking the extrajudicial truth about egregious human rights violations" (IACtHR, 2015: para. 89). The IACtHR leaves out truth commissions among the State institutions that, in the case of human rights violations, should not rely on mechanisms such as confidentiality of information or on reasons of public interest or national security for not providing the information required by judicial or administrative authorities, and this is strange because although these bodies are not traditional and permanent institutions of a State; they are created and operate under its approval and wing, and the custody and control of their archives will typically be handed over to the State, except in cases such as El Salvador. Therefore, on this point, the Court departs from the standards developed by Pablo de Greiff and the principles mentioned above.

To justify its departure from former jurisprudence and the Principles to combat impunity, the IACtHR in the case of Humberto Maldonado Vargas et al. v. Chile, in relation to the denial of information to a national court of justice that requested information about the archives of the Valech Commission on several persons who had been included in the list of victims, proceeds to analyze the confidentiality imposed on the archives, based on the standards that the court itself has developed in previous cases, indicating that:

The Court must determine whether the restriction of access to the information contained in the Valech Commission's archives was contrary to the Convention, and to this end, it will

analyze whether that restriction: (i) was legal; (ii) complied with a legitimate purpose; (iii) was necessary, and (iv) was strictly proportionate (IACtHR, 2015: para. 91).

The IACtHR (IACtHR, 2015) concludes that, in the specific circumstances of the case under analysis, the denial of information to the court does not constitute an illegitimate restriction on access to information since i) the restriction was set by Ley No. 19. 992; ii) to guarantee the success of the tasks entrusted to the Valech Commission and to protect the private and intimate life of the persons who gave testimony; iii) the restriction is necessary to comply with those legitimate purposes, and iv) it is proportional since the sacrifice inherent to the restriction is not exaggerated or disproportionate compared to the advantages obtained considering that the same law establishes an exception to the reserve allowing the holders of the statements and testimonies to provide that information to third parties of their own free will. This conclusion reached by the IACtHR seems inconsistent with the international principles and standards mentioned above concerning access to archives in cases of human rights violations and also with the standards which the Court itself has developed in previous cases concerning restrictions on the right of access to information, specifically regarding the necessity and proportionality of the measure, since it must be considered whether the only way to safeguard the privacy of the victims and ensure the success of the objectives of the Valech Commission was to establish such an extensive and extreme confidentiality of the archives as that which was established and whether this was the least restrictive and strictly proportional means to achieve the legitimate aims mentioned.

The experience of the Rettig Commission makes it possible to identify a less severe restriction on access to archives that interferes to a lesser extent with the effective exercise of the right of access to information under the control of the State. In that instance, the confidential nature of the Commission's actions was established, and the Commission was granted the power to protect the identity of those who provided information or collaborated with the Commission's tasks, but it was also mandated to make available to the courts the background information on criminal facts, thus ensuring, on the one hand, the fulfillment of the objectives of the Commission, which fulfilled its purpose of advancing in reaching the truth about the disappeared, executed and tortured to death during the dictatorship, protecting the privacy of the victims and the confidentiality of the records, and, on the other hand, guaranteeing access to them by the courts of justice, preventing impunity for those responsible for human rights violations.

But it should be mentioned that the conclusion reached by the IACtHR in the case of Humberto Maldonado Vargas et al. v. Chile regarding the confidentiality of the Valech Commission records is also problematic because it is not just any information on human rights violations to which access is being restricted, but rather information on cases of torture, and these constitute severe human rights violations, which are absolutely prohibited under international human rights law and which have even reached the status of *ius cogens*, as the IACtHR itself has pointed out: "There is an international legal system that absolutely forbids all forms of torture, both physical and psychological, and this system is now part of *ius cogens*. Prohibition of torture is complete and non-derogable, even under the most difficult circumstances" (IACtHR, 2004: para. 143).

The obligation of States concerning the prohibition of torture is not only to respect this prohibition and prevent acts of torture from occurring but also to investigate and punish those responsible for committing torture, as is established in article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984): "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction" and its article 4: "Each State Party shall make

these offences punishable by appropriate penalties which take into account their grave nature". It is along these lines that the Committee against Torture, in its Concluding Observations with respect to Chile, expressed its concern regarding the persistence of impunity for those responsible for crimes of torture committed during the dictatorship since adequate measures have not been taken to ensure that they are prosecuted and convicted, and recommended that:

The Committee urges the State party to provide the courts with all relevant information at its disposal in order to help them administer justice. The Committee also urges the State party to repeal the provision contained in Act No. 19.992 under which information on the practice of torture during the dictatorship is to remain classified for 50 years (Committee against Torture, 2009: para. 19).

The Committee against Torture, having identified no progress in this regard, reiterated the same recommendation in 2018 in its Concluding observations on the sixth periodic report of Chile. The Human Rights Committee, for its part, in its Concluding observations on the sixth periodic report of Chile, about investigations of past human rights violations, recommended to the Chilean State:

Continue its concerted efforts to investigate all human rights violations proactively and to ensure that the perpetrators are identified, prosecuted and given appropriate penalties that are in proportion to the gravity of their offences. It should also make the documents of the Truth and Reconciliation Commission and the National Commission on Political Prisoners and Torture public (Human Rights Committee, 2014: para. 8).

Furthermore, under international criminal law, it is necessary to underline that the thousands of cases of torture classified by the Valech Commission must be considered crimes against humanity. The Rome Statute of the International Criminal Court defines crimes against humanity in Article 7.1 as crimes "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" (Rome Statute, 1998). Torture is, along with other crimes, one of those specified in this article.

Paragraph 2 of Article 7 defines the concept of "Attack directed against any civilian population" as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack" (Rome Statute, 1998). Gerhard Werle y Florian Jessberger (Werle & Jessberger, 2020: para.1001-1002) point out that the "widespread" criterion describes a quantitative element, which may be derived from the number of victims and may be inferred from the extent of the attack over a wide geographical area, although this is not necessary to satisfy the requirement, while the criterion of a "systematic" attack is qualitative in nature and refers to the nature of the acts of violence committed, which require a certain degree of organization and planning so that the violation of individual rights must follow a pattern.

As Francisco Jara (Jara Bustos, 2018) notes, the Valech Commission Report evidences the systematic and widespread practice of torture in Chile during the dictatorship by the State. There was coordination at the highest level for the persecution of opponents by the Armed Forces and Order, and the practice of torture was used against tens of thousands of people throughout the country so that these attacks against the civilian population must be considered crimes against humanity. In this regard, it is worth noting what the IACtHR stated in the case of *Almonacid-Arellano et al v. Chile* in which it indicated:

Crimes against humanity give rise to the violation of a series of undeniable rights that are recognized by the American Convention, whose violation cannot remain unpunished. The Court has stated on several occasions that the State has the duty to prevent and combat impunity, which the Court has defined as "the lack of investigation, prosecution, arrest, trial, and conviction of those responsible for the violation of the rights protected by the American Convention." Likewise, the Court has determined that the investigation must be conducted resorting to all legal means available and must be focused on the determination of the truth and the investigation, prosecution, arrest, trial, and conviction of those persons that are responsible for the facts, both as perpetrators and instigators, especially when State agents are or may be involved in such events (IACtHR, 2006: para. 111).

Conclusions

Although truth commissions do not have a jurisdictional nature, nor is it within their functions to prosecute and punish those responsible for human rights violations, their task of getting closer to the truth about what happened is directly related to justice. Truth commissions can provide vital information to the goals of combating impunity, restoring the rule of law, and access to justice by revealing the truth about the causes of human rights violations, the circumstances in which they occurred, the fate and whereabouts of the victims, and the identity of the perpetrators responsible. In this sense, the Comisión de la Verdad para El Salvador, formed in a historical and political context very different from the context in which the Valech Commission was formed, had among its functions, in accordance with the Acuerdos de Chapultepec, that of clarifying the allegations of impunity with respect to officers of the Armed Forces in cases in which respect for human rights was compromised. In the Comisión de la Verdad para El Salvador, in a context in which the regime responsible for the human rights violations was still in power and the institutional framework was weak, to protect the victims, their testimonies were kept confidential, and to protect the information gathered, the Commission's archives were entrusted to the United Nations for an indefinite period. Although the circumstances in which the restrictions on access to the archives were decreed were different from those of the Valech Commission, the reasons given for requesting the lifting of these restrictions are similar to those provided for requesting the lifting of the secrecy of the Valech Commission about access to justice. It has been pointed out that, considering how the political context in El Salvador has changed over the last 25 years, access to the Commission's archives, carried out responsibly while protecting the security and integrity of the people who provided information, would make it possible to obtain evidence to advance and make progress in judicial cases such as the "Jesuit Case", and thus make progress in securing justice concerning severe human rights violations committed during the internal conflict.

The severe restriction of access to the Valech Commission's archives and the secrecy imposed for 50 years has been defended mainly by pointing out that it was necessary to guarantee the success of the Commission, linked to the confidentiality and secrecy of its actions and the information collected, which would have allowed the victims to find a space of welcome and trust to give their testimonies. But as has been identified, it was not necessary to impose such a strict limitation on access to information to achieve this legitimate purpose. An adequate alternative option is the one unsuccessfully proposed as an indication to article 15 of draft law No. 19.992 to allow the Courts of Justice, in the exercise of their powers, to access certain information collected by the Commission, requesting the consent of the victims to disclose their personal data and identification but not requiring such consent for the courts to access the stories without identification of the victims, incorporating the information to the proceedings through a special secret notebook.

Another argument President Ricardo Lagos gave to decree the secrecy of the files was that the confidentiality of the information was a formal commitment assumed by the government with the victims who came to the Commission to testify. However, this has been denied by victims who had requested the lifting of the secrecy of the files and who had pointed out that when they came to testify to the Commission, they were not asked to express their agreement concerning the confidentiality of the information provided or were consulted about the secret nature of it. This does not imply that there were no other victims who could have requested the government to keep their information confidential. Still, it would have been appropriate to decree the confidentiality of the information provided by the victims who asked for it, not all of them without distinction, ignoring the opinion of many victims who might disagree with this measure, dismissing them as the rights-holders who they are. As victims, they should be allowed to participate in making a decision like this since they are central actors in the framework of the actions developed in transitional justice; they are the actors who contribute most to the success of the truth commissions and, therefore, their dignity should be respected, and their opinions should be considered, protecting their privacy and personal data, but without obstructing the search for justice.

In this sense, the mechanism used in the Rettig Commission is more respectful of the victims and seems to correctly reconcile the protection of their privacy and the confidentiality of the files with access to them by the courts to advance access to justice. The Rettig Commission established the confidential nature of the Commission's actions, granting it the power to protect the identity of those who provided information or collaborated with its work, but it was also entrusted with making the background information on criminal acts available to the courts, thus ensuring, on the one hand, the fulfillment of the Commission's objectives, which fulfilled its purpose of advancing the truth about those who disappeared, were executed and tortured to death during the dictatorship, protecting the privacy of the victims and the confidentiality of the records, and, on the other hand, guaranteeing access to them by the courts of justice, avoiding impunity for those responsible for human rights violations. This mechanism is in line with the international principles and standards reviewed on access to archives and information in cases of human rights violations, which indicate that the courts and investigating and prosecuting authorities should have access to the relevant archives, safeguarding the privacy and confidentiality of the victims.

On the other hand, it should be noted that the archives of the Valech Commission contain essential information on those responsible for crimes of torture and the manner and circumstances in which they were committed. The prohibition of torture is an absolute prohibition in international human rights law, which does not admit to exceptions or justifications, which has reached the status of *ius cogens*, and which implies for states the responsibility to investigate, punish and make reparations. Considering the above, the recommendations of the Human Rights Committee and the Committee against Torture are made to the Chilean state to make public the commission's background and provide the courts with all relevant information available to help them administer justice.

It is necessary to emphasize that the cases of torture classified by the Valech Commission must be considered crimes against humanity because of the widespread and generalized way in which the civilian population was attacked, considering the number of victims and its practice throughout the country, and also because of the systematic way in which this attack was carried out, in the sense that it responded to an organization and coordination at the highest level by the Armed Forces and Law Enforcement, both for the persecution and torture of opponents. Concerning crimes against humanity, the IACtHR has indicated that these crimes cannot go unpunished and that the investigation of these acts must be carried out using all available legal means, focusing on the determination of the truth, prosecution, detention, trial, and conviction of those responsible for the acts, both as perpetrators and instigators, especially

when State agents are or may be involved in such actions, as was the case during the Chilean dictatorship.

The extreme restriction on access to the Valech Commission's records is imposed in a country where, as in many countries undergoing transition processes, it has been difficult to advance in terms of justice, prosecution, and punishment of those responsible for the rights violations committed. After the dictatorship ended, Pinochet continued for eight years as commander in chief of the Army and then became designated a senator for life. The Amnesty Law that the dictatorship enacted to protect those responsible was applied for a long time, the military and collaborators of the dictatorship permanently refused to collaborate in the judicial cases, hiding and destroying information, and many of the courts of justice were slow to allow the cases of human rights violations to move forward. In this context, establishing 50 years of secrecy concerning relevant information on human rights violations is yet another critical obstacle to advancing justice.

The Valech Commission archives could contribute to ongoing investigations into cases of torture, in the same way that the Rettig archives contributed to investigations in the cases of political detainees-disappeared and executed. As noted by Judges Carroza and Cifuentes (cited in Ferrara, 2021), who could access information from the Rettig Commission, its files continue to be actively used as evidence to build cases and are given great importance in the investigative phases of the proceedings. For its part, the Valech Commission may contain statements from witnesses and family members that may constitute evidence for reconstructing crimes, may make it possible to locate witnesses and family members, or access statements from people who can no longer testify. The archives are valuable in court cases as they allow the reconstruction of what happened; even though time passes, evidence erodes, and victims, witnesses, and perpetrators die.

The secrecy of the files of the Comisión Nacional sobre Prisión Política y Tortura continues to affect the right to justice and prevents the fight against impunity with the necessary force in a country where the road to justice has been long and challenging. The Chilean State has time to follow the request of victims and the recommendations of the international human rights bodies to lift the extreme restriction of access to the archives, allowing, at least, the access of the courts of justice to these records that can be useful for the judicial cases of human rights violations, with the appropriate mechanisms that have been identified to do so while protecting the privacy and confidentiality of the victims.

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