

TRUTH AND MEMORY

# Strengthening Indigenous Rights through Truth Commissions:

## *A Practitioner's Resource*



Cover Image: **Rankin Inlet, Nunavut, Canada**, March 2011.  
The Inukshuk, the stone statue in the image, is a traditional symbol of Inuit, Inupiat, Kalaallit, Yupik, and other peoples of the Arctic, and was used as a landmark and navigation aid. The statue represents a human form with outstretched arms, and is known as a symbol of hospitality and friendship.  
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## About ICTJ

ICTJ assists societies confronting massive human rights abuses to promote accountability, pursue truth, provide reparations, and build trustworthy institutions. Committed to the vindication of victims' rights and the promotion of gender justice, we provide expert technical advice, policy analysis, and comparative research on transitional justice measures, including criminal prosecutions, reparations initiatives, truth seeking, memorialization efforts, and institutional reform. For more information, visit [www.ictj.org](http://www.ictj.org).

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## ACRONYMS

AFN	Assembly of First Nations (Canada)
CEH	Commission for Historical Clarification (Guatemala)
CERD	Committee on the Elimination of Racial Discrimination
CEJ	Collective Ethnic Justice
CSV	Centre for the Study of Violence and Reconciliation (South Africa)
ICTJ	International Center for Transitional Justice
ILO	International Labour Organization
TRC	Truth and Reconciliation Commission
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNPFII	United Nations Permanent Forum on Indigenous Issues

# 1. Presentation

Indigenous peoples are among those most affected by contemporary conflict. The resource-rich territories they occupy are coveted by powerful, often violent groups. Their identity is perceived with mistrust, sometimes with hate. Indigenous communities live at a precarious intersection between unresolved historic injustices and the contemporary incursion of industry and political violence.

Susceptibility to violent conflict and poverty are both a cause and an effect of another phenomenon affecting indigenous peoples: their weak voice in the political arena and in judicial institutions. As a result, when societies decide to confront the legacy of war, tyranny, or entrenched injustice, the suffering of indigenous communities is often marginalized or inadequately addressed.

Some truth commissions have addressed cases of violence against indigenous peoples, such as those in Guatemala, Peru, and Paraguay. New commissions are now working or emerging on the horizon that will investigate contexts where indigenous peoples were targeted by gross human rights violations, including in Canada, Cote d'Ivoire, and Nepal.

This trend has coincided with the international community's historic recognition of the rights of indigenous peoples as human rights and the extraordinary achievement of the 2007 UN Declaration on the Rights of Indigenous Peoples.

This resource book focuses on truth commissions mandated to look at a period of human rights violations that particularly affected indigenous communities, such as those listed above. It is an initial effort to systematically organize lessons learned and make further progress by designing truth processes that are fully compliant with the rights of indigenous peoples.

The ideas presented in this resource are intended to encourage hard thinking by transitional justice practitioners, in particular those working in the field of truth-seeking and memory. Transitional justice measures have potential to help realize the rights of indigenous peoples, but to do so, some assumptions must be rethought. We hope this resource will serve as a platform to transform truth commissions, and transitional justice, to better respond to the unique reality of indigenous peoples and serve the advancement of their rights.

## About this Resource

This resource grew with the input of transitional justice practitioners, truth commission staff, indigenous-rights activists, and academics. Their experience and expertise includes cases in Guatemala, Canada, Peru, South Africa, Nepal, New Zealand, Indonesia, Colombia, the United States, Bangladesh, Mexico, and Kenya. The resource is a document produced from the findings of an international conference on truth commissions and indigenous rights hosted by the International Center for Transitional Justice in New York, July 19–22, 2011.

Our goal was to identify guiding principles to ensure that truth commissions strengthen indigenous rights, as these are gaining growing international recognition in national and international arenas. In particular, the transitional justice community should look for guidance in the UN Declaration on the Rights of Indigenous Peoples.

The conference approached the topic both with practice-oriented questions and a normative concern. As a practical question, we aimed to determine proper procedures for commissions to work productively with indigenous peoples. As a normative question, we wanted to develop guiding principles for truth commissions to comply with the rights of indigenous peoples.

This resource offers an overall discussion of the substantive and procedural aspects of a truth commission that should be rethought to reflect indigenous perspectives in the introduction. Then, three essays presented at the conference discuss how truth commissions contribute to the realization of the rights of indigenous peoples. Deborah Yashar's essay offers a normative framework to understand the form in which truth commissions may have a productive role in the strengthening of indigenous rights; César Rodríguez-Garavito and Yukyan Lam present the concept of "collective ethnic justice" as a normative construction appropriate to address violations of indigenous collective rights and explore the impact such an understanding can have on the work of a truth commission; and Paige Arthur presents a proposal of appropriate roles that truth commissions can have, both at the substantive and the procedural level, in order to make a realistic contribution to the right of self-determination. Finally, proposals are offered to ensure that the design, operation, and dissemination of a truth commission's work is responsive to indigenous rights.

This work is primarily targeted at transitional justice practitioners, but it may also be useful for indigenous rights activists considering how the instruments of transitional justice could enhance recognition of their demands. Having said this, we do not presume to have identified guidance for indigenous communities: this is only a contribution to a process of reflection that is already taking place among indigenous activists. The challenges facing indigenous rights are diverse, and the contexts where truth commissions are established vary. We do not present our findings as generalizable prescription, but as an initial contribution. Insights, critique, and further elaboration from readers, particularly from indigenous communities, are welcome.



## 2. Rethinking Truth Commissions to Make Them More Responsive to Indigenous Rights

Truth commissions have typically been established as instruments to reaffirm goals of unity and reconciliation within a nation-state. The nation to be reconciled by a truth commission is usually understood as the one represented by the central government. This model may be inadequate to set the goals of a truth commission dealing with first nations<sup>1</sup> that may, or may not, recognize themselves fully as part of the state.

Commissions have usually focused on instances of recent violence; cases that can be remembered by individual witnesses and survivors, and that can be recorded in writing for the benefit of policymaking. Indigenous peoples who remember long-term, historical violence affecting a communal way of life, often transmitted through an oral tradition, may find the standard model of truth commission to be alien or insufficient.

Our goal, then, should be to rethink the work of truth commissions to better address indigenous experiences and better serve their rights. On a substantive level we identified the following broad areas for consideration in a truth-seeking approach when engaging indigenous rights:

- going beyond a state-centric view of transitional justice;
- going beyond an individualistic form of analysis;
- going beyond recent violations; and
- going beyond archival and written sources.

Based on this substantive discussion, truth commissions should involve indigenous peoples at all stages. Some areas that could be examined include:

- ensuring consultation to obtain free, prior, and informed consent;
- respecting indigenous peoples' representative institutions;
- providing attention to the specific needs of indigenous witnesses.

### I. Questioning Some Basic Assumptions

#### *Beyond a State-centric Approach*

Truth commissions are often described as national reconciliation projects: a process of setting the record straight and re-establishing trust among communities, reaffirming a damaged national identity. From an indigenous perspective, while reconciliation within a divided country is a worthwhile goal, it should not mean the strengthening of one dominant national identity at the exclusion or absorbing of others. Many conflicts began with patterns of dominance or denial of multi-ethnic realities.

According to the UN Declaration on the Rights of Indigenous Peoples, indigenous peoples have a right to affirm their own nationhood, in accordance with their traditions or customs, while retaining the right of citizenship of the state in which they live. This distinction is important when discussing the potential reconciliatory function of a truth commission, so that instead of a mono-national approach, a “nation-to-nation” focus is put in place.

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<sup>1</sup> The term “first nations” is widely understood in the context of the indigenous peoples of Canada. However, other self-identification terms by indigenous peoples around the world also allude often to specific national identities that are different from the state they live in.

A truth commission recognizing the rights of indigenous peoples can set new standards of practice. To do so, a truth commission could recognize the rights of indigenous peoples; ensure their free, prior, and informed consent at each step of the process; and recognize the value of customary indigenous legal practices alongside mainstream law.

### ***Beyond an Individualistic Form of Analysis***

One of the strengths of truth commissions is that they provide victims with a rare opportunity to have a public voice. First-person accounts by survivors can give societies a better understanding of abuse. Also, the capacity of truth commissions to obtain thousands of individual statements allows them to identify patterns of violations.

Truth commissions have often focused mostly on rights protecting individual physical and mental integrity and on investigating violations such as torture, killings, and enforced disappearances. This approach may not be useful for establishing how individual violations impact a group or community or for confirming whether individual violations targeted a group through systemic persecution, forced displacement, or genocide.

Similarly, an exclusive focus on the rights of individuals may relegate attention to violations of economic, social, and cultural rights. This could be a fundamental problem to examining indigenous rights, which cannot be examined without addressing other issues, such as access to land and territories and the right to practice language, rituals, and religious beliefs. Occupying ancestral territories, forcibly assimilating children into other cultures, and forbidding the use of traditional language, ceremonies, and technologies, can harm an indigenous identity as effectively as physical persecution.

### ***Beyond Recent Violations***

The standard truth commission focus on recent violations is easy to understand, as commissions work mainly with individual living witnesses. For indigenous people, such an approach may be inadequate to address long-term experiences of marginalization and persecution. Historical abuses suffered by ancestors may remain in the memory and oral traditions of the living and should be addressed for a community to adequately recognize the experience.

For truth commissions, this means their mandates and inquiries should recognize injustices, even if abuses took place in the distant past, and question official national historical narratives. This is a significant challenge for truth commissions and an opportunity to provide indigenous peoples' histories the same consideration given to the national narratives of settler societies and non-indigenous populations.

### ***Beyond the Archival and Written Sources***

Truth commissions rely on oral sources, especially during their inquiries and outreach. However, these sources are translated into written statements and reports, a format more appropriate for state consumption and policymaking. There is significant discussion in the transitional justice community about the effectiveness of media that are better suited to communicating with a marginalized population that has little access to either print or the dominant language of a settler society.

Oral tradition plays an important role as a source of law, a basis for claims, and a guarantee of action in indigenous societies. The performance of ceremonies to witness or commemorate is an important element in validating and dignifying storytelling. Truth commissions should understand and incorporate these characteristics. Such an approach demands bold discussion: How can we assess the validity of oral tradition as evidence? How do different cultures treat time and causality in narratives of the past? Who speaks for a community, and how may that differ from community members' individual accounts? On the basis of these reflections, truth commissions focused on indigenous rights could devise innovative techniques for taking statements, processing data, and developing standards of evidence. Similarly, learning from indigenous peoples on the most appropriate forms to transmit information should inform a truth commission's approach on outreach and dissemination of its findings.

## **II. Devising New Procedures for Truth Commissions**

### *Consulting in Good Faith to Obtain Free, Prior, and Informed Consent*

Broad and ongoing consultation with constituent groups is crucial to the success of a truth commission. This principle already enjoys consensus among transitional justice practitioners, but it is especially critical to indigenous people. Governments have a duty to consult in good faith and to obtain free, prior, and informed consent for any legislative or administrative measure affecting indigenous people. Good-faith consultation is premised on transparent objective and an openness to change initial goals and continue the process meaningfully—until consent is obtained or not. This can be a difficult process, requiring time and commitment from governments, particularly in societies where the consent of indigenous peoples has never been genuinely sought.

Regardless of the challenge associated with a thorough and extensive consultation, it should be seen as an essential component of the work of a truth commission—the process is as important as the outcome. These processes start well before testimonies are delivered, in the discussions in city halls, religious houses, and indigenous communities. Moreover, if truth commissions are to recognize and offer remedies to victims, they should do so from their inception.

### *Respecting Indigenous Peoples' Representative Institutions*

It is important to acknowledge that the principle of free, prior, and informed consent is complicated by community representation. Indigenous communities, like any political community, have multiple leaderships, representing different components within a society. Coordinating with multiple leaderships is a challenge for truth commissions, and even in the most successful cases it is difficult to ensure everyone who ought to be heard will have an opportunity. There are no firm guidelines for negotiating who will represent others during consultation, in testimony, or on the staff of a commission. The principle should be to ensure that the work of a truth commission does no harm: that it does not augment existing divisions or victimize those who have already suffered abuse.

It is also important to acknowledge that representatives of indigenous institutions may not represent the views of women or children. The UN Declaration of Rights of Indigenous Peoples explicitly recognizes the rights of indigenous women and the need for specific attention to the requirements of indigenous children. These challenges are significant, but cooperating with local leaders during a commission's process strengthens and legitimizes the process. One of the most significant achievements of the Guatemalan truth commission was the mobilization of leadership to form new coalitions between indigenous organizations, well beyond the achievements of the commission itself.

### ***Providing Attention to the Specific Needs of Indigenous Witnesses***

A truth commission is a large-scale research project with thousands of people providing information, most of whom will talk about events that had a profoundly negative impact on their lives. Commissions should adopt culturally appropriate methods to document the experiences of indigenous witnesses.

Participants are being asked to share something they are likely to have spent much of their lives trying to forget. Returning to these memories risks re-traumatization, which is rarely emphasized in transitional justice literature. Culturally appropriate mental health support is an important staffing consideration when planning operations, and efforts should be made to partner with government and civil society support networks. Where access and sustainability of care is constrained, participants should be aware of the options and limitations they face.

It is also important for truth commissions to employ indigenous staff and provide special consideration to any limitations of language and translation. Concepts critical in the legal framework of the inquiry may not translate accurately into indigenous languages, and, similarly, some expressions for violent events in indigenous languages may not be clearly understood by non-indigenous researchers.

### 3. Indigenous Rights and Truth Commissions: Reflections for Discussion

*Deborah J. Yashar*

Indigenous peoples have endured many abuses throughout the colonial and contemporary periods. Indeed, violations against indigenous people have taken many forms. We have seen human rights abuses against indigenous people in the form of genocide, torture, and the removal of children from family homes. We have seen political exclusion of indigenous people through *de facto* and *de jure* political disenfranchisement, physical displacement, and isolation, as well as the breaking of legal accords when they are no longer favorable to non-indigenous actors or states. We have seen discrimination against indigenous peoples in many domains—in bureaucracies, schools, and places of employment, to name just a few. We have seen material harm—as indigenous peoples have been deprived and dispossessed of their lands, affected by environmental hazards such as oil exploration and logging, and denied economic opportunity through debt bondage and deception. We have also seen formal and informal attempts to weaken indigenous culture by foreclosing and ridiculing the right to speak indigenous languages, to wear indigenous clothes, to practice indigenous customs, and to sustain indigenous authority systems (including customary law). The perpetrators of these abuses are multiple—from complicit states, to churches, economic elites, international corporations, and everyday citizens.

This abuse has long been formally overlooked, at best, and portrayed as a necessary part of “modernization,” at worst. These attitudes, however, are neither sustainable nor justifiable. Indeed, indigenous movements, parties, NGOs, and conferences have become increasingly vocal advocates of indigenous rights—seeking to bring attention to past abuses and ensure a better future for indigenous peoples—as individuals and as collectivities. Drawing support from international agencies such as the United Nations, the International Labor Organization, and various NGOs, indigenous peoples have found various venues for demanding recognition, reparations, and reform.

In the context of these historical political wrongs and this contemporary political momentum, the question is, how can one right these past wrongs? One could imagine many possible instruments of change: democratization; constitutional and institutional reforms; elections; legislation on a range of issues including territorial autonomy, political sovereignty, education, and social services; and international pressure; etc. For ICTJ, the question is, what role can and should truth commissions play in the pursuit of indigenous rights. Can they help redress (some of) these past wrongs? If so, how? This essay serves as an overview to address these basic questions. It is organized in three parts. Part I does some conceptual groundwork by addressing core indigenous agendas. Part II probes the degree to which truth commissions can address these issues, discussing both benefits and recommendations. Part III highlights the challenges and obstacles for truth commissions as instruments in pursuit of indigenous rights.

The underlying argument developed throughout this essay is that truth commissions can serve to bring attention to past abuses and even to provide momentum to advance indigenous agendas with greater force and legitimacy. However, to address and defend core indigenous rights, more fundamental political changes must also be advanced—including political suffrage, representation, and autonomy rights—so as to provide an ongoing mechanism for indigenous people to insert claims into the political arena. Truth commissions are powerful and yet temporary institutions that can highlight issues and set agendas; however, they cannot hold people to account indefinitely or force them to follow their recommendations. In this context, indigenous people and their allies also need to work with other more enduring political institutions (such as constitutions, legislation, elections, and autonomy rights) that can provide ongoing mechanisms to secure and defend rights, both those articulated now and those likely to emerge in the future.

## I. Indigenous Rights

What are the core indigenous issues a truth commission might address? To address this deceptively simple question, we must first unpack what is meant by “indigenous.” Indigeneity is a subset of ethnic identity and, as such, refers to shared understandings and affinities (such as a combination of a common language, history, practices, religion, and so on).<sup>2</sup> In addition, indigenous groups also share some of the following traits that distinguish them from other ethnic groups.

***Prior physical presence:*** Indigenous groups resided in the physical spaces in question prior to the arrival of colonists. In the contemporary period, this means that indigenous groups resided in national territories prior to the formation of nation-states. This prior physical existence provides the basis for all subsequent claims. In practice, this means that indigenous groups have been dominated by outsiders, who have often imposed a history of colonization, domination, dispossession, repression, exclusion, and assimilation.

***A strong contemporary connection to the land:*** Indigenous groups generally have a strong connection to the land. This includes a general respect for land (often based on spiritual principles), but it is also a particular assertion that the identity and future of indigenous peoples are tied to a territorial space where they can reside, work, and sustain their culture and customary law. Within indigenous communities, lands are not historically regarded as individual titles, but to the contrary are often regarded as collectively owned and often inalienable and indivisible (even if in practice lands are farmed individually). Latin American indigenous groups, for example, regularly highlight that indigenous identity, subsistence, and governance has been strongly tied to collectively held lands or territories. While indigenous individuals have clearly been part of urban migration, their collective identity (historical and contemporary) and familial lineage are frequently portrayed as connected to the land or territory.

***Governance:*** Indigenous communities are frequently governed by indigenous authority systems and customary law. Indigenous communities often practice autonomous ways of selecting local authorities, who, in turn, follow indigenous customary law and sometimes mediate with the state. This means that indigenous people can be simultaneously subject both to the laws of the state (country) within which they live and the indigenous community within which they reside. As such, indigenous people have rights that flow from both national and traditional law.

***Culture:*** Indigenous groups possess distinct cultural identities that are often expressed through language, dress, religion, and customs. Although these cultural practices vary across indigenous communities and have changed over time, they form the basis of strong contemporary affinities. For example, cultural affinities can occur at the community level; over time, they can scale up (or down) based on historical events—including mobilization, migration, education. Similarly, contemporary indigenous cultural practices are inherited from the past, but they are as much the outcome of contemporary processes (including colonial practices) that have reshaped these identities over time. As such, indigeneity has fluid boundaries not only in terms of who is indigenous but also in terms of regional or local groupings, who represents the group, and which historical traditions are salient.

The above characteristics are not uniformly shared among indigenous groups but apply in varying measures to each. Viewed together, this brief discussion highlights the broader point that indigenous peoples are defined by multiple core affinities that include historical, political, material, and cultural elements. There is no singular experience, and we would be mistaken to reduce indigeneity to culture alone.

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<sup>2</sup> There is an enormous academic literature and debate on race and ethnicity that I do not cite or discuss here. I will merely note that while ethnic (and indigenous) identities are commonly portrayed in everyday usage as fixed and immutable (primordial), academics generally highlight that these identities are experienced or portrayed as primordial but are in fact constructed—a product of historical and contemporary processes and struggles.

What does it mean to talk about indigenous rights? What kinds of rights-based claims have indigenous movements advanced in recent years? The international community has advanced many ideas, including the International Labor Organization's (ILO's) Convention 169 and the UN Declaration on the Right of Indigenous Peoples. While these documents outline multiple rights, this paper emphasizes just a few of the many significant ways in which the indigenous rights agenda has reconceptualized and expanded our understanding of the prevailing model of liberal citizenship. The classic liberal understanding of citizenship focuses on the individual as rights-bearing (individuals have rights to representation, participation, property, and the like). Indigenous movements seek to expand this liberal understanding of citizenship (and its associated state) by supplementing a defense of individual rights with a simultaneous call to recognize and defend collective rights (to representation, participation, property, and the like).<sup>3</sup>

**Equal rights as individuals:** Indigenous people have demanded that their constitutionally recognized individual rights be respected. While this point might seem obvious, it bears emphasizing that indigenous people have long been the victims of discrimination not only by other citizens, but also by states. Against this backdrop, indigenous movements have asserted their universal right to be free from harm and violence, including equal protection before the law, equal representation (including suffrage and the right to serve in elected office), the defense of their property rights, and equal access to services. These demands have occurred not only in authoritarian contexts, but also in democracies that respect indigenous rights in law but not in practice and in limited democracies that have restricted citizenship rights and where indigenous people have been relegated to secondary status (i.e., denied suffrage). In all cases, indigenous movements have mobilized to demand that the law be respected and expanded in a way that recognizes that indigenous people are equal to other citizens and that applies the law equally and accountably—that is, free from discrimination (a point made in several articles of ILO Convention 169, especially Article 2).

**Collective rights:** In addition to demands for individual political equality, indigenous people have also demanded a recognition and defense of collective rights that are unique to indigenous people and not shared by all citizens. Here the claim is that by virtue of being indigenous, such groups possess unique rights that should be recognized, institutionalized, and defended. This essay highlights three ways to discuss these collective rights.

First is the demand for ***formal recognition of indigenous peoples as collective members of a multicultural polity***. Many countries have historically tried to assimilate, eradicate, or deny the formal relevance of indigenous peoples. The range of abuses (including official denial, active assimilation, displacement, and genocide) varies over time and geography. Despite this diversity, we can observe a general pattern where nation-states historically attempt to impose one national identity on their citizenries (with one presumed core national identity and one sovereign state as the law for all individual citizens residing in state territory). This involved destructive intentions and consequences for indigenous peoples, who have responded by demanding not only respect for their differences, but also a formal and constitutional recognition that their countries are multicultural and multi-ethnic in composition. Constitutional recognition provides a symbolic and legal basis for all collective rights; these reforms have found particular momentum in Latin America—although implementation has been more varied in practice.<sup>4</sup> Indigenous groups might demand much more than constitutional recognition, but, at a minimum, a first right is to be constitutionally recognized.

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<sup>3</sup> Elsewhere I have referred to this reframing of citizenship as a post-liberal agenda (Yashar, *Contesting Citizenship in Latin America*), precisely because it combines classic liberal concerns about protecting individual rights with indigenous claims about securing collective rights. Indigenous people have challenged the restrictive and homogenizing terms of this liberal understanding not only because they have been denied the equal rights promised to them but also because their understanding of citizenship simultaneously demands a recognition that they are a collectivity with a separate ethno-national identity (that is not secondary to, but coterminous with, the national identities that colonial powers and subsequent independent states imposed upon them); associated collective rights of representation; and foundational rights to autonomy and self-government.

<sup>4</sup> Van Cott, *Friendly Liquidation of the Past*.



Second, indigenous peoples have demanded recognition that there are *diverse political units and forms of representation* within the formal political arena. They argue states should not presume that only individuals have rights to representation in local, regional, and national politics; states should also grant rights and representation to collective groups. In the past, this was referred to as a form of “corporatism,” a pattern that has been used to describe both indigenous people and class-based representation. In the contemporary indigenous rights agenda, however, collective rights are tied particularly to indigenous communities, peoples, and organizations. This could take many forms, and might include granting land rights to communities, designating seats for indigenous people in national legislatures, creating government departments for indigenous affairs, and implementing affirmative action in education.

Third is for states to recognize *multiple spheres of authority*—including indigenous territories, autonomy, and corresponding authorities. As I have written elsewhere:

This is more than just a call for land, although that is certainly a core and necessary component of the demand. Rather, it is a demand that the state recognize indigenous political jurisdiction over that land, including the right of indigenous legal systems and authorities to process and adjudicate claims. In this regard, diversified state structures would coincide with some form of legal pluralism.<sup>5</sup>

Legal pluralism would entail the coexistence of both national law and indigenous (or customary) law. This presumes that indigenous people have the right to political self-determination and autonomy within existing states and that indigenous authority, law, and jurisdiction includes the right to govern defined territories—including both the land and the natural resources that exist below and above the topsoil.

**The citizenship challenge:** Viewed together, the combination of these individual and collective claims contests the contemporary terms of citizenship. In this combination, the demand for collective rights makes the agenda distinct—and a potential challenge for truth commissions rooted historically in evaluating abuses of individual human rights. The agenda is also distinct because the rights in question are based on not only contemporary but also historical injustices. It is worth remembering that this agenda has been articulated by indigenous movements but has found broad appeal in and support from international bodies—including the ILO (which passed Convention 169 on this topic) and the UN (which has also brought ongoing attention to this issue). As stated in Article 1 of the United Nations Declaration on the Rights of Indigenous Peoples: “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized by the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.” There have been some notable, if uneven, advances in pursuing this agenda—particularly in the Americas.

To summarize, indigenous peoples are not simply demanding classic liberal individual rights; they are also demanding collective rights that challenge the way nation-states have classically thought about who we are, who is represented, and which laws apply. This brief conceptual discussion provides the foundation for the following discussion about truth commissions and indigenous rights.

## II. Truth Commissions and Indigenous Rights

Truth commissions have historically been tasked with evaluating past human rights abuses—especially those committed during authoritarian periods or civil wars. They have traditionally presumed that individuals are bearers of human rights and thus have evaluated where those individual human rights have been violated. While groups or classes of people were often disproportionately victims (black people in South Africa, indigenous people in Guatemala and Peru, presumed communists throughout Latin America, and

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<sup>5</sup> Yashar, *Contesting Citizenship in Latin America*, 297.



others), the violation of their rights has often been evaluated as the violation of their individual rights. Truth commissions have emerged as an important contemporary mechanism to reveal and highlight where violations have targeted these individuals because they belong to a group. This is particularly the case since truth commissions are often better than courts at identifying patterns of abuse, especially where there are limited official mechanisms to prosecute human rights abuses. Whether reconciliation is possible (or can be mandated, as in the South African case) is an open debate. But at a minimum, there has been a belief that exposing the truth is vital to transitioning toward a new and more just society.

Against this backdrop, are truth commissions useful vehicles for addressing indigenous rights, broadly defined? To what degree can this instrument of transitional justice address the violation of human rights when the victims are also pursuing a collective understanding of citizenship and citizens' rights—one that includes not just a defense of individual rights but also the pursuit of collective demands, including recognition of a multinational citizenry, multiple units of representation, and the creation of legal pluralism that respects indigenous authorities and territorial autonomy?

Truth commissions present both notable advantages and significant challenges in pursuing this agenda. These challenges are not necessarily insurmountable; however, with the track record of truth commissions and indigenous rights unproven in this area, it is important to address these issues.

**Benefits:** There are notable benefits in setting up truth commissions to address the plight and rights of indigenous peoples. Of course the benefits depend on how seriously and vigorously a given country supports the process. However, in a best-case scenario, a truth commission can provide the following important benefits.

First, truth commissions can play a critical role in giving a publicly sanctioned space for people to speak and be heard. In a context where indigenous people have been portrayed in national discourse as relics of the past (perhaps even an obstacle to modernization), a truth commission can provide a forum for giving testimony in a formal setting that has national and international recognition and support.<sup>6</sup> Since many indigenous peoples have strong oral traditions, truth-seeking testimonials can be a particularly powerful venue for reaching out to victims who can share their experiences of abuse. In this context, truth commissions can help gather testimony, other information, and evidence of patterns of abuse. Clearly, indigenous movements and parties have already played a critical role in addressing some of these concerns. But a truth commission offers a distinct and complementary opportunity because the state sanctions the process—international bodies also tend to lend a certain weight to the process (although not always legitimacy)—and everyday citizens can speak and recount their personal narratives. The culmination of these individual acts can have a profound impact by providing an approximate record of the scope and content of past abuses, formally recognizing abuse that had previously existed with relative impunity, providing credible evidence for identifying both perpetrators and victims, and providing the potential basis for making official apologies.<sup>7</sup>

Second, truth commissions can provide an arena to analyze the structural causes of past violence. In Guatemala, for example, the truth commission not only gathered testimony but also analysis of why the violence occurred in the first place. While difficult to write, this kind of work can help identify patterns that are revealed in the testimonies. It can also help us to understand why and how the abuse has occurred.

Third, truth commissions can inspire action, depending on the agreed-upon guidelines and the political commitment. This could entail prosecutions, reparations, constitutional reform, legislation, services, or educational reform, among others. Of course, a truth commission cannot make these things happen of its

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<sup>6</sup> National support does not mean there is a consensus on this point. Rather, the intent is to highlight that there is formal commitment on the part of the state to do so.

<sup>7</sup> Nobles, *The Politics of Official Apologies*.

own accord. But it might contribute to the kinds of broader debate and political momentum to pursue change, not only to redress the past but perhaps also to advance the citizenship agenda outlined above. In this regard, the truth commission has the opportunity to try to promote societal tolerance and inclusion via outreach and education. Accordingly, a truth commission can aim to strengthen a tolerant public opinion.

**Recommendations:** This essay makes some recommendations for truth commissions designed to address abuses against indigenous peoples (whether that focus is the exclusive mandate or only a part of it). These recommendations are general and are presented as a set of guiding questions.

**First, starting with the most obvious, truth commissions must use a methodology that includes indigenous people as leaders, consultants, and participants in all aspects of the process**—particularly in the design, implementation, analysis, and outreach stages. As such, Indigenous peoples should be part of the truth commissions not only as victims (rights bearing and claims making actors) but also as agents of change.<sup>8</sup> This inclusive methodology is vital if truth commissions are to generate a more meaningful, respectful, and legitimate process for all involved—victims, commissioners, and society. We can project that truth commissions will be received more readily by indigenous communities if they perceive that indigenous people were active participants in the design, implementation, analysis, and outreach stages. How should truth commissions go about including indigenous people? I have no universal template, but the following points seem critical.

- **Consultation and participation:** There should be active consultation with, and formal participation by, indigenous leaders. Wherever possible, truth commissions should operate by consent. Where that is not possible, indigenous peoples should have the right of veto (provided that indigenous leaders are unanimous in this position) or to write dissenting opinions where there is significant and unresolved debate—or both. Indigenous leaders must have leadership roles in this process (not just consultative and periodic ones), while recognizing indigenous communities rarely have one leader or movement that can speak for the communities as a whole. When commissions visit communities for testimonials, they should engage with local leaders as they might not share the same concerns as national leaders.
- **Interviews:** Commissions should consult with indigenous leaders about the most appropriate type of interviews. Some people may be more comfortable speaking in individual interviews; others in focus groups. Some people may feel more at liberty to speak in private; others might feel that they can only speak in public to avoid accusations that things were said in private that should not have been shared. Surveys may be a useful instrument, depending on how they are conducted. Presumably, one will get different information-sharing based on the instrument used. If focus groups provide a certain kind of security in numbers, they might also minimize the diversity of opinions. Given this trade-off, it is critical to consult with indigenous leaders about what might work best—and if it would be useful to hold multiple kinds of interviews to triangulate across information and to provide a sensitive, trusting, and meaningful process for those who agree to participate.
- **Language:** Commissions should also pay close attention to the choice of language to avoid reflecting and reinforcing patterns of domination—hence privileging one history over another. This requires a self-reflective and critical evaluation of core concepts and terms, always doing so with the participation and consent of indigenous leaders. For example, alternate phrases (such as colonizers versus settlers; claims versus rights) evoke very different historical understandings and can have legal implications.
- **Gender:** Indigenous women have been active leaders in many places. But in some cases, women might not readily speak publicly in front of men (indigenous or otherwise). Truth commissions should consult

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<sup>8</sup> See Jelín, *Silences, Visibility, and Agency*, 195–96, for discussion of how transitional justice might focus on people as victims rather than as equals.

with women leaders about what kinds of interview settings would achieve increased participation, open dialogue, and an open space for ascertaining consent—with consideration for both individual and collective interviews, women-only interviews, and other similar formats. There should also be a concerted effort to pair female interviewees with female interviewers.

- **Interviewers:** Those conducting interviews should preferably be indigenous—not only to improve trust, but also to ensure that interviewers can communicate in indigenous languages where necessary. Sensitivity to women interviewees is especially important. Gender and ethnic mirroring is not essential in all cases, but it can facilitate the process of speaking openly and clearly.
- **Time and location:** Indigenous people often lack the resources to travel distances for meetings during working hours. Some indigenous communities are nomadic. Others have members who migrate seasonally. Indigenous leaders can provide insight into which places and times would work best.
- **Interethnic dialogue:** The pursuit of indigenous rights requires interethnic dialogue to understand patterns of violence, generate interethnic communication, and create lasting changes.
- **Dissemination and outreach:** Reports need to be distributed, but how do to so in a way that both is meaningful to victims and consequential to society? How to disseminate this information without creating spectacles of those who have suffered most? There is no easy solution here, and it is once again important to consult with both indigenous leaders and victims about what will be most useful for them. Truth commission documents should be produced in indigenous languages, not just official languages. Perhaps the most enduring ways to distribute information to indigenous groups are publishing documents and videos and enacting curricular reform. For example, the Sierra Leone Truth and Reconciliation Commission produced a 1,500-page report (and over 3,500 pages of testimony), but also shorter versions for both secondary schools and younger children and accompanying video. The Timor-Leste Commission for Reception, Truth and Reconciliation produced a 2,800-page report, but also developed photo books, audio resources, and an exhibition to reach those with low levels of literacy.

**Second, commissions need to be clear about what time period should be covered.** Most commissions have typically focused on approximately 10-year periods, but this limit could alienate victims who regard the beginning or continuation of a conflict differently. Patterns of abuse against indigenous people have occurred in some places for centuries. A commission should clarify whether its focus is on the recent past (living people can testify) or on longer-term abuses. If so, how far back will it go? Theoretically, one could go back to the colonial period (in Latin America, this could bring one back to the fifteenth century). To address these points, the parties negotiating the mandate should include representatives and the consent of indigenous communities.

Communities in question should decide this matter as part of a feasibility discussion on what a commission can cover during the life of its tenure. However, we should be clear that there is a trade-off. A limited time period can allow for a more focused and intensive report, and yet it may frame only a slice of the experience. A more expansive time period may identify structural patterns and causes and yet may result in an overly drawn-out report. Clarity about what will not be covered is critical to managing expectations and improving the likelihood of a successful report. Should a short time period be decided, mandate interpretation should be flexible to ensure that indigenous leaders have the space to shape how the assigned period should be understood.

**Third, it is important to determine the range of matters the commission will address.** Where abuses are many and long-standing, and the commission is a temporary institutional arrangement, setting the parameters of focus is no small task. For example, some of the abuse against indigenous people took place during authoritarian periods and civil wars, and fits within a human rights abuse framework. Some of it transcends

the classic human rights frameworks and includes displacement, dispossession, discrimination, disempowerment, and violation of treaties—some of which took place during both authoritarian and putatively democratic times. It is critical to be sensitive to the range of abuse that indigenous people have experienced, clarifying the particularities of each case rather than presuming that they share common features. Commissions will have quite a challenge determining what (not) to include. If feasible, the commission should evaluate the range of abuses (not just violations of civil and political human rights), since they are endemic, often structural, and interrelated.

Similarly, it is important to ask why indigenous people or communities were targeted. In many cases, racism will be the primary and only explanation for patterns of abuse across a wide range of issue areas. In other cases, racism may have combined with other motivating factors, including Cold War politics, class conflict, disputes over land and natural resources, and civil war dynamics. To identify and redress the abuses that have taken place, a commission should investigate complementary (even competing) causes of abuse—focusing on, but not limited to, racism. This open inquiry is important not only for interrogating the past but also for making effective recommendations about particular issues, such as dispossession of land, state violence, and discrimination in the workplace.

***Fourth, commissions should be tasked with determining complicity and, accordingly, ascertaining which institutions require reform (or creation).*** Again, indigenous people may have been abused by many different actors—the state (including the military and bureaucracy), religious institutions, agri-businesses, or common citizens, among others. Determining the degree of state complicity and responsibility is vital. The military may have committed inexcusable abuses in the context of civil wars. However, other state agencies may have overseen other abuses—removing children from their families, confiscating land, or failing to deliver basic services.

***Fifth, commissions should be clear about to what degree they focus on clarifying the past or advancing “indigenous rights” through future policy.*** Commission reports are not binding documents and do not necessarily bind constitutions, legislatures, or everyday citizens to accept or respect their outcomes. While commissions can advocate for change, they are but one (and not necessarily the most important) tool for doing so. As temporary institutions, they do not necessarily have the power to hold future actors to account.

***Sixth, advancing indigenous rights also requires sustained and coordinated advocacy on other fronts—particularly on the political front.***<sup>9</sup> This is the long term work of reforming constitutions; legislating change; and mobilizing within political parties, movements, and public discourse to persuade, ally, and strategize for change. This essay offers a strategic hierarchy for pursuing indigenous rights (broadly defined).

A political strategy is the first priority for pursuing and defending indigenous rights and for shaping and forming the agenda in each state. Harnessing the political momentum associated with the commission, advocates should focus on securing formal political rights—in both constitutions and legislation. It is important to note that formalizing rights does not necessarily mean that they will be respected (a point that indigenous people know all too well). But without these rights, it is difficult to even participate in governing and in decision-making institutions. It is through formal political power that indigenous people can form alliances to advance and defend their rightful citizenship claims—including their individual and collective rights, as discussed in Part I (and outlined in the United Nations Declaration on the Rights of Indigenous Peoples). This political strategy, at a minimum, would entail political enfranchisement of indigenous peoples at the national level and political decentralization to allow for a greater voice at the local level. Where sought, it might also include the legal recognition and defense of national quotas, political autonomy, and legal pluralism, among other objectives. To effectively pursue these formal constitutional and legal goals requires ongoing political organizing—organized movements, civic associations, and political parties. While political organizing might decline after political gains, it is imperative to sustain an organizational strategy—not only so that

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<sup>9</sup> Pablo de Grieff has made a similar point in his work (also cited by Arthur, *Introduction*, 11).

indigenous people can take part in national-level decisions affecting the country as a whole, but also so that they can advocate, defend, and uphold existing indigenous rights and policies against possible backlash, indecision, or inaction.

A second strategy is to defend the material rights of indigenous people. Drawing on ILO Convention 169, this would include the right to collective lands and the associated inputs necessary to sustain these lands (for instance, access to credit and infrastructure). Since indigenous people were often moved to different lands (at times more remote and less productive), material claims are often intrinsically linked to systematic abuse against indigenous people. International documents, such as the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention 169, highlight the vital importance of land for indigenous people. While commissions may not be able to deliver this entire agenda, they can articulate a clear position on the moral obligation of the state to defend indigenous people's right to land, livelihood, and material well-being and the value of creating and funding a state agency dedicated to working with indigenous peoples in the defense of their material rights (as they currently exist). Such an agency could provide information and staff support to advance and defend indigenous needs before land reform ministries, titling offices, credit agencies, and social service agencies. These supporting statements could defend collective lands, advocate for territorial autonomy and subsoil rights, aid the harmonization of land titles (where multiple laws and registries include conflicting information about who has title to the land), and secure social services that at a minimum are equal to those offered to other citizens.

It is clear that material resources are vital. In the absence of political power, however, these material resources can be (and have been) given and taken away. It is critical, therefore, that the pursuit of rights occurs in tandem with the pursuit of political rights. The latter can provide a political instrument to defend and advocate indigenous rights (including material rights) in the future.

Finally, cultural rights form an important part of the indigenous rights agenda. Commissions should uphold the rights outlined in the United Nations Declaration on the Rights of Indigenous Peoples, including the right to practice and revitalize indigenous languages, cultures, and traditions, free from discrimination or forced assimilation by the state; the protection of cultural and spiritual sites; and the right to decide and control relevant educational systems, among other issues outlined in this historic document. Commissions should defend the right to experience one's culture free from exclusion, discrimination, and abuse by the state or other perpetrators. But, in making these claims, it is important to note that formal recognition of culture can serve political ends that are not always necessarily in the best interests of indigenous people at large (since it can be used to control, dilute, and even divide communities). Pursuing a broader cultural rights agenda in a formal arena can be a double-edged sword. This is because culture is both consequential (it provides heuristics that shape how people act) and fluid (it is never fixed). Once one seeks to instantiate it formally (to say that certain cultural practices must be respected and defended), culture can be selected by elites who reduce it to a shell. Not all cultural rights are worth defending (this is true of all cultures).<sup>10</sup> Hence, commissions should defend the principle of cultural rights, while recognizing that they may not be best positioned to pursue a detailed agenda of cultural rights as part of their mandate, especially since defining cultural rights is an open-ended issue.

### III. Challenges and Open Questions

The previous section highlighted the need to be attentive to various challenges, leaving several critical questions open. At the risk of being repetitive, this paper highlights a few that are particularly relevant for those focusing on the possible intersection of truth commissions and indigenous rights.

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<sup>10</sup> Arguing cultural rights based on historical precedent cannot be enough. All societies have had cultural practices that disempower certain sectors (indigenous people, black people, women, Jews, etc.) or have used violent practices such as capital punishment. The defense of cultural rights therefore has to accommodate the principled right of individuals, and groups of individuals, to demand equitable treatment.

**Which standards and bodies will have jurisdictions?** There are always political implications in choices and decisions. As Will Kymlicka notes in general: “There are no neutral spaces, language, or jurisdictions that float free of ethno-national contestation in multi-national states.”<sup>11</sup> Hence there is a challenge in deciding which standards and bodies have the jurisdiction to make the following decisions.

- **Who decides who participates?** Consultation and participation is important, but who decides which groups participate when there are many groups and individuals under consideration. Are national leaders prioritized over local leaders? Elected or appointed? Elders or youth?
- **Domestic vs. international law:** Which laws apply and who decides? At a minimum, international agreements such as ILO 169 and the United Nations Declaration on the Rights of Indigenous Peoples should be used to define and defend indigenous rights. But how to shape domestic law is a question that commissions will have to address.
- **Individual vs. collective rights:** This essay has focused on the claim for individual and collective rights, but what happens when these rights are in conflict? States have to decide how to “harmonize” plural legal systems, a legal tension that will have to be addressed.<sup>12</sup>
- **Boundaries:** What happens if or when indigenous groups cross state boundaries? Which laws apply then?

**What are the limits of what commissions can do?** Are commissions best when focused on addressing the past? Or are they also a useful mechanism for identifying and supporting indigenous claims to advance a better future? Might there be other institutions that are equally, or better, poised to do this? Or might there be other mechanisms or strategies that could be simultaneously or subsequently pursued for commissions to have greater weight? This paper asserts that commissions will be more effective where they can reveal past abuses and focus on agenda setting, but agenda setting will be effective only when supported by existing political movements. These coordinated efforts can legitimize one another. But ultimately, domestic reformers will require long-term reforms in the constitution, legislation, and bureaucracies.

**In the future, how should one prioritize political, material, and cultural rights?** This is a question for stakeholders to decide. Without political power, however, indigenous people might not be able to defend their material needs and cultural practices; material rights are important, but they could be curtailed if political power does not exist to defend them. Political rights of autonomy and self-governance, in turn, cannot exist in a vacuum; they also require respect for material rights to territorial autonomy.

**Can truth commissions effectively document and hold to account abuses that have taken place during democratic regimes?** Since most truth commissions have focused on authoritarian regimes, it was arguably easier for transitional regimes to hold perpetrators to account. But when abuses have taken place during both authoritarian *and* democratic regimes, commissions will need to decide whether there is enough political will and capital to hold contemporary violators to account.

**Where will impacted countries find the capital resources to address these critical issues, particularly reparations and land reform?** Indigenous people often live in highly unequal and impoverished countries. Discussion of reparations and redistribution can be viewed as particularly contested. Bureaucracies might get caught in administrative entanglements (such as multiple land-title registries that do not have compatible information). In countries with significant minority or majority indigenous populations, this is a major consideration.

**How can one increase support and minimize opposition—or apathy?** Reforms do not always have widespread political support and can sometimes elicit a backlash. This includes the redistributive reforms, noted above,

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<sup>11</sup> Kymlicka, *Transitional Justice*, 330.

<sup>12</sup> Where these laws are in conflict, this raises important questions about where authority lies—although Chapman, *Transitional Justice*, 262 highlights that the UN Minorities Declaration highlights that customary law and cultural rights should be respected except when they violate national or international standards.



but also claims for political sovereignty. President Evo Morales' political gains in Bolivia were met with widespread resistance by non-indigenous elites—some of it violent. Guatemala's civil war accords, which included agreements on indigenous rights, were not accepted when brought to a vote in 1999 (for many reasons—including substandard referendums, confusing language, and poor turnout). How then to increase support by stakeholders in reforms that advance a profound expansion of rights and responsibilities?

#### **IV. Conclusion**

In short, truth commissions are a powerful and important tool. They can improve awareness of abuse against indigenous peoples and provide powerful tools to promote and shape significant debate advancing indigenous rights. Against a backdrop of not only abuse, but also silence, commissions can offer a significant venue to address these patterns. They are but the first step, however. Ongoing political work is required by activists, politicians, and reformers committed to reforming constitutions, legislation, education, and bureaucratic norms.

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## 4. Addressing Violations of Indigenous Peoples' Territory, Land, and Natural Resource Rights During Conflicts and Transitions

*César Rodríguez-Garavito and Yukyan Lam*<sup>13</sup>

In addressing violations of indigenous peoples' rights to territory, land, and natural resources, the logic of transitional justice can be problematic for at least two different reasons. The emphasis on restitution, characteristic of the restorative logic of transitional justice, may clash with ethical, political, and legal principles that are just as important, and may neglect considerations of distributive justice.<sup>14</sup>

Second, indigenous peoples' conception of the conflict that resulted in the deprivation of their rights may differ significantly from that of the mainstream and dominant sectors of society. For example, indigenous people may view the conflict as extending back to the era of colonization and may not agree with the narrower temporal focus of transitional justice policies, which tend to target a specific period of armed conflict or totalitarian rule. Or they may disagree even with the idea that a transition is taking place at all. According to González and Rice:

Transitional justice has been utilized in situations of extreme or massive violence such as armed conflict or under dictatorship, while indigenous peoples have often suffered forms of structural violence that are normalized and continue to apply in times of peace, even under otherwise democratic regimes.<sup>15</sup>

In addition, transitional justice policies may emphasize the responsibility of certain actors (such as illegal armed groups) while minimizing the responsibility of others (such as the state itself or private corporations that have provoked, facilitated, or aggravated violations of indigenous groups' territory, land, and natural resource rights). As Rodolfo Stavenhagen, the first UN special rapporteur on the rights of indigenous people, has stated: "When land ownership is part of the problem, then strong private economic interests make it very difficult for Indigenous communities to obtain justice, particularly when there has been little or no progress in the passing of adequate legislation."<sup>16</sup>

In this context, the present article seeks to broaden the conceptual and empirical outlook on transitional justice through the inclusion of a new criterion of justice, collective ethnic justice (CEJ),<sup>17</sup> which is analytically different from transitional justice and social justice, though their challenges may overlap. We contend that collective ethnic justice is especially significant for addressing violations of indigenous peoples' rights to territory, land, and resources during conflicts and in contexts of transition, given that the rights at stake are collective in nature and the victims are communities whose cultural survival depends on effective enjoyment of these rights.

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<sup>13</sup> Sections of this article are based on earlier versions published in Rodríguez-Garavito, "Ethno-Reparations" and Rodríguez-Garavito and Lam, *Etnorreparaciones*.

<sup>14</sup> For a more detailed discussion of the contrast between the commutative logic of transitional justice and the distributive logic of social justice, see Saffon and Uprimny, *Distributive Justice* and Kalmanovitz, *Corrective Justice*.

<sup>15</sup> González and Rice, *Indigenous Voices*.

<sup>16</sup> Stavenhagen, *Big Picture*.

<sup>17</sup> While this article focuses on indigenous peoples in particular, the term "collective ethnic justice" is so named because in its original conception we applied it to other ethnic groups in Colombia as well, including Afro-descendant communities. See Rodríguez-Garavito, "Ethno-Reparations" and Rodríguez-Garavito and Lam, *Etnorreparaciones*. In Colombia, these groups have been recognized as beneficiaries of the same fundamental rights and constitutional protections offered to indigenous peoples.

Although CEJ is based on various principles and standards that have been established in both international law and national norms, its conceptual clarification and practical application remain pending tasks. Thus, to help fill this void, we concentrate on collective ethnic justice as a criterion for reparation and assignation of territory, land, and natural resource rights in particular. Our aim is threefold: First, from an analytical viewpoint, we seek to give conceptual clarity to the principle, explaining its relationship to other parameters of justice that are relevant to agrarian reform and reparation policies. Second, from a legal and policy viewpoint, we elaborate the implications for transitional justice programs by establishing the standards that should guide reparations for indigenous groups that have been victims of forced displacement and land dispossession. Finally, we seek to provide an idea of how CEJ might look in practice in times of transition or conflict by briefly exploring the ways in which truth commissions and CEJ can be mutually reinforcing.

## I. Typology of Violations of Territory, Land, and Natural Resource Rights

To understand the approaches to conflicts about territory, lands, and natural resources that are debated in transitional situations, we first must explain the range of conflicts at stake. A useful initial step entails constructing the typology illustrated in Table 1.

*Table 1: Typology of land, territory, and resource right violations*

		NATURE OF TERRITORY, LAND, OR RESOURCE RIGHT	
ORIGIN OF DISPOSSESSION OR VIOLATION		Individual	Collective
	Illegal	Example: forced sales of peasant-farmer plots provoked by threats or acts of violence.	Example: illegal armed groups threaten indigenous groups to abandon strategically located ancestral territories
	Legal	Example: peasant farmers displaced by large-scale development projects and their resulting environmental damage	Example: outside corporations seek title to sub-surface natural resources within indigenous or tribal groups' territories

On one hand, the horizontal axis distinguishes between violations of collectively and individually held rights to territory, land, and natural resources. On the other hand, the variable on the vertical axis is the origin of the violation or dispossession, which distinguishes between those provoked by illegal activities and those caused by activities that are in principle legal. The former causes include, for example, activities of illegal armed groups that form part of their strategy of territorial control and their involvement in drug trafficking. The latter include economic projects, which, although having the legal backing of the state, may cause forced displacement and destroy natural resources. Of course, the evidence shows that legal and illegal causes are frequently combined, but despite the existence of these hybrid examples, for analytical purposes, the legal/illegal categories are useful as ideal types.

The primary contribution of a broad typology like the one proposed here is that it includes the different forms of dispossession in the discussions of and policies on displacement and reparations. In many country contexts, indigenous groups' rights to territory, land, and resources have been affected not only by illegal groups, but also by a set of complex hybrid factors, which include activities that are legally endorsed by the state. (On occasion, the state may undertake these activities itself, as occurs with the construction of macro-infrastructure projects in indigenous territories and the fumigation of illicit crops that has secondary effects harmful to legal peasant-farmer economies.)

This typology allows for the inclusion of both cases of individual dispossession (which are usually the focus of the studies and policies of transitional justice and agrarian reform) and cases of displacement and appropriation in which the victims are indigenous communities who occupy a collective territory.

## II. Four Criteria for Justice in Relation to Territory, Land, and Natural Resource Rights

The above typology of conflicts over territory, land, and natural resources is, at the same time, a map of the emphases of different approaches to the question of reparations, agrarian policy, and reform. These emphases are shown in Table 2, which reproduces the typology of the previous table and highlights which conflicts are favored by the four different criteria of justice: transitional justice, social justice, justice as efficiency, and collective ethnic justice.

*Table 2: Criteria of justice regarding territories, land, and natural resources*

		NATURE OF TERRITORY, LAND, OR RESOURCE RIGHT	
		Individual	Collective
<b>ORIGIN OF DISPOSSESSION OR VIOLATIONS</b>		<b>Transitional Justice</b>	
	Illegal	Example: forced sales of peasant-farmer plots provoked by threats or acts of violence.	Example: illegal armed groups threaten indigenous groups to abandon strategically located ancestral territories
	Legal	Example: peasant farmers displaced by large-scale development projects and their resulting environmental damage	Example: outside corporations seek title to sub-surface natural resources within indigenous or tribal groups' territories
		<b>Social Justice / Justice as efficiency</b>	<b>Collective Ethnic Justice (CEJ)</b>

The upper row of the table highlights transitional justice's emphasis on the victims of illegal actions and violence in contexts of armed conflict. As shown by Saffon and Uprimny,<sup>18</sup> transitional justice centers on the reparation of grave violations of human rights and international humanitarian law, such as appropriation of land and forced displacement. Thus, the subjects of this approach are the victims of such violations. In addition, transitional justice mostly examines the past and is guided by commutative justice, which emphasizes restoring the situation that existed prior to the harm.

In the left-hand column are two focuses, social justice and justice as efficiency, which share an emphasis on individually owned rights to territory, land, and natural resources but which offer contrasting views on the criteria for assigning them. Whereas social justice emphasizes the redistribution of such rights to small farmers as a mechanism to achieve inclusion and social equity, justice as efficiency favors market criteria to promote rural productivity through large-scale private investment. In this sense, while the central subject of the former is the poor peasant farmer, that of the latter is the investor. In contrast with transitional justice, both approaches look to future transformation of patterns of land ownership and exploitation.

<sup>18</sup> Saffon and Uprimny, *Distributive Justice*.

The right-hand column of the table highlights CEJ's fundamental characteristic: its applicability to communal territories that serve as a space for expressing and affirming a culture of collectivity. Thus, when compared to the other approaches, CEJ exhibits important differences, which justify its separate analytical treatment and explain its practical effects. In contrast to social justice and justice as efficiency, collective ethnic justice, in addition to its reference to collective territories, emphasizes cultural identity as a criterion for the distribution of land.

In comparison to social justice—and using the terms of Fraser's well-known distinction between criteria of justice—we see that while social justice is centered on redistribution as a mechanism to counteract material inequities, ethnic justice revolves around cultural recognition as a way of correcting inequities of status.<sup>19</sup> Also, because of this emphasis, CEJ is clearly far from justice as efficiency, whose criterion for distributing land, territory, and natural resource rights is the maximization of social utility, measured not as a relationship among collectivities, but among individual agents in the market.

For the purposes of the specific subject of this article—ethno-reparations in contexts of armed conflict and transition—it is especially important to examine the relationship between CEJ and transitional justice. The comparison yields two central differences and one important similarity.

With regard to the differences, CEJ, in contrast to transitional justice, seeks to compensate for harms caused by massive and historic violations of rights that generated inequalities among ethnic groups. In Latin America, for example, this historical and inter-generational injustice underlies the claims for the restitution of ancestral territories usurped from indigenous peoples during the age of colonization.<sup>20</sup>

A further difference between CEJ and transitional justice is that the former not only looks toward the past, but to the future as well. CEJ seeks to transform, instead of restore, the historical relationships between ethno-racial groups. Hence, typical mechanisms that embody the CEJ approach include the granting of collective titles to territory and land, demarcation of autonomous regions, and special measures that allow indigenous and tribal groups to use subsurface natural resources that have formed an essential part of their traditional economies.<sup>21</sup>

Notwithstanding these differences, CEJ and transitional justice overlap in one fundamental point in relation to indigenous groups' territory, land, and resource rights: an interest in repairing the harms caused by forced displacement and dispossession of collective territories that has taken place in the recent past. This intersection between the two criteria (seen in the upper right-hand box of Table 2) is precisely the center of the discussion on ethno-reparations, including the idea of a "differential focus" set forth in international norms. As we will see in Part IV below, the conceptual overlap here occurs in practice when observing, for example, the ways in which transitional justice's well-known mechanism of truth commissions can complement the work of CEJ and vice versa.

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<sup>19</sup> See Fraser, *Redistribution of Recognition?*

<sup>20</sup> Torres, *Indigenous Peoples*.

<sup>21</sup> A paradigmatic demonstration of this approach is Colombia's Law 70 of 1993 on the land rights of Afro-descendant communities. Article 1 defines its objective as follows:

"The object of the present law is to recognize the right to collective property of the black communities who have been occupying uncultivated lands in the rural areas along the riverbanks of the Pacific Basin, in accordance with their traditional practices of production, in conformity with the rules set forth in this law. It also aims to establish mechanisms for the protection of the cultural identity and rights of the black communities of Colombia as an ethnic group and to encourage their economic and social development, in order to guarantee that these communities obtain real conditions for equal opportunities in relation to the rest of Colombian society . . . This law will also apply to the uncultivated rural and riverside zones, which have been occupied by black communities who have traditional practices of production in other regions of the country and comply with the requisites established in this law."

Thus, the main set of regulations on the traditional territorial rights of Afro-Colombians subordinates legal protection to the existence of cultural patterns such as "traditional practices of production," with the aim of protecting the identity of black communities as an "ethnic group." This recognition of cultural difference, therefore, is the precondition for promoting the redistribution of material opportunities through "the encouragement [of] economic and social development [of the communities]."

With the characterization of CEJ and other criteria of justice offered as background, in the following sections we move to an analysis of the practical consequences of this approach as embodied in international law.

### III. Collective Ethnic Justice and Territory, Land, and Natural Resource Rights in Practice

The overarching objective of CEJ is to use the past to understand and assess the present situation, in order to formulate measures to guarantee rights in the future.<sup>22</sup> As discussed in the previous sections, this wider conceptual framework is one of the aspects that differentiate CEJ from traditional transitional justice. It is worth noting, however, that current transitional justice trends, especially those that deal with indigenous peoples, demonstrate a shift toward the CEJ framework. As Jung explains:

Whereas the government may try to use transitional justice to signal a break with the past, indigenous activists may try to use the past as a way to critique the present. The “transition” is to a relationship in which connections between past and present are firmly acknowledged, and in which the past guides present conceptions of obligation.<sup>23</sup>

Against the conceptual backdrop offered above, we turn our attention now to the fundamental question of how CEJ can be achieved in practice. Although from a conceptual standpoint it has not been addressed systematically, the practical guidelines associated with it, which we describe below, are based on established international norms.

#### *Point of Departure: When is Collective Ethnic Justice Necessary?*

To answer this question, one of the most basic principles in the international law on reparations must be considered: analysis of the conduct or circumstances requiring reparations and the measures for seeking truth and justice must incorporate the perspective of the affected victims. This principle is particularly applicable in the case of collective ethnic justice, as indigenous peoples may suffer the effects of the conduct or circumstances in a disproportionate or particular way. Thus, as observed by Lenzerini, indigenous groups' perspective in fact should be given greater consideration:

In considering the “pathological” moment that leads to the production of the situation from which the right to reparation arises, as well as the effects produced to the prejudice of the victim(s), the nature and content of the terms “wrong,” “tort,” “prejudice,” “loss,” “damage” or other similar expressions are to be evaluated primarily through the subjective lens of the perception of the persons and/or groups concerned, and not under stereotyped criteria. In other words, the terms in point are not to be interpreted as necessarily requiring the production of an economic loss, physical damage or any other kind of predetermined effect, especially with respect to indigenous peoples, whose holistic philosophy of existence is drastically different from the materialistic vision of life of the Western world.<sup>24</sup>

As such, when it comes to addressing territory, land, and resource rights, it is necessary to bear in mind their significance for indigenous and tribal peoples. It is important to consider that the notion of territory is not purely physical and includes not only the land itself and the resources contained therein, but also sacred sites and other elements of spiritual significance. Changes provoked by large-scale development projects or the presence and actions of public security forces within indigenous groups' territories, for example, can hinder and effectively constitute violations of their rights to enjoy their territory, land, and

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<sup>22</sup> Rodríguez-Garavito and Lam, *Etnorreparaciones*.

<sup>23</sup> Jung, *Transitional Justice*.

<sup>24</sup> Lenzerini, *Reparations for Indigenous Peoples*, 15.

resources freely. Thus, the importance of using the indigenous groups' perspective to analyze whether violations have occurred—and therefore whether truth, justice, and reparations are necessary—cannot be overstated. In this regard, as the United Nations special rapporteur on indigenous people (“UN special rapporteur”) has explained, whenever major development projects “occur in areas occupied by indigenous peoples it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them.”<sup>25</sup> At the same time, debates over whether the consequences of development projects are an appropriate subject for transitional justice are precisely why the CEJ framework may be more adequate, especially in countries such as Colombia, where the lines between the actions of public and private economic actors and state security forces and illegal armed groups are blurry and complex.

### ***Practical Guidance: How Should Collective Ethnic Justice Be Achieved?***

Given the close relationship between the cultural identities of indigenous groups and their territories (particularly ancestral territories), as well as the serious repercussions that violations of territory rights have for the enjoyment and fulfillment of other rights, justice and reparations measures must ensure that collective territory rights are respected both on paper and in practice. The process for achieving this should follow certain basic principles that have been established by international norms.

In general terms, recognition of indigenous groups as collectivities with specific identities, characteristics, and requirements is essential. Without this recognition, it is likely that the measures adopted to provide truth, justice, and reparations do not effectively fulfill their aim and, worse, may actually cause harm to the group (for example, by causing ruptures within the collectivity or imposing alterations to its traditions and customs). In this regard, the measures' adequacy and effectiveness are evaluated “not on the basis of solely material and/or objective criteria (consisting in ascertaining whether such measures are proportionate to the gravity of the breach and the consequent harm), but also and especially through evaluating the extent to which they are considered as adequate and effective by the individuals and/or peoples concerned (subjective criterion).”<sup>26</sup> Thus, the CEJ process—the question of what procedures are appropriate for addressing violations of territory, land, and resource rights—must be guided by the cultural identity and needs of the beneficiary group, as articulated by the group itself.

In practical terms, the foregoing requires adherence to at least the following three criteria, which are themselves fundamentally interrelated: (i) In determining the appropriate measures to be adopted, the collectivity affected should be consulted and given the opportunity to exercise its right to free, prior, and informed consent. Additionally, the group should retain some level of control over the implementation of the measures. (ii) The measures should respect the group's particular cultural identity, which includes its nature as a collectivity, as well as its values, traditions, and institutions. (iii) In cases of dispossession and forced displacement, restitution of ancestral territories should be the general rule. If restitution is not possible (for legitimate reasons) or not desired by the group affected, then fair compensation can be offered as an alternative.

We turn our attention now to each of these criteria and how they have been established in international norms and practice.

*(i) Determination of the appropriate measures should involve consultation of the affected indigenous group, which should retain some level of control thereafter over the measures' implementation.*

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<sup>25</sup> Report of the Special Rapporteur (2003), 2.

<sup>26</sup> Lenzerini, *Reparations for Indigenous Peoples*, 15.

This standard is an important application of the more general principle that the adoption of any measure that affects indigenous and tribal groups requires full consultations with them, with the objective of obtaining those groups' free, prior, and informed consent. In this connection, the UN Declaration on the Rights of Indigenous People (hereinafter "UN Declaration"), adopted by the General Assembly on September 13, 2007, and endorsed widely by countries around the world,<sup>27</sup> has various provisions that affirm this principle. Article 19 asserts that "states shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect them." Similarly, Convention 169 of the International Labor Organization, a binding instrument for the 22 countries that have ratified it, instructs states to "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly."<sup>28</sup>

In relation to territory, land, and natural resources, provisions one and two of Article 32 of the UN Declaration state:

(1) Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. (2) States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Similarly, Article 15 of ILO Convention 169 provides:

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
2. In cases in which the state retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

These same principles have been applied in the Inter-American System of Human Rights by the Inter-American Court and the Inter-American Commission. Addressing the necessity of consultation in the context of reparations in particular, for example, the Inter-American Commission on Human Rights, in a case regarding land claims brought by Mayan communities against the state of Belize, urged the country to adopt the measures necessary to secure the Mayan people's land rights through fully informed consultations with them.<sup>29</sup> In the case of *Moiwana Community v. Suriname*, the Inter-American Court ordered Suriname

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<sup>27</sup> The UN Declaration on the Rights of Indigenous Peoples was adopted on September 13, 2007, by a majority of 144 states in favor, with four votes against and 11 abstentions. The four countries that voted against it—Australia, Canada, New Zealand, and the United States—have since reversed their positions. Two of the 11 countries that abstained—Colombia and Samoa—have also changed their positions and now endorse the declaration. See United Nations Permanent Forum on Indigenous Issues, *United Nations Declaration on the Rights of Indigenous Peoples*.

<sup>28</sup> ILO Convention 169, Article 6(1)(a).

<sup>29</sup> *Maya Indigenous Communities of the Toledo District v. Belize*. Inter-American Commission on Human Rights, para. 197(1).



to adopt measures to ensure the property rights of the Moiwana community, requiring the state to guarantee the participation and informed consent of the victims and the indigenous communities, in fact including neighboring indigenous communities.<sup>30</sup>

It is no surprise that essentially all of the cases in which “mere” consultation is not enough, and in which actual consent of the affected groups is required, pertain to circumstances that affect indigenous peoples’ rights to territory, land, and natural resources. As summarized in a recent report produced by the Inter-American Commission on Human Rights:

Regardless of the fact that every consultation process must pursue the objective of consent, in some specifically defined cases, the Inter-American Court’s jurisprudence and international standards legally require states to obtain indigenous peoples’ free and informed consent prior to the execution of plans or projects which can affect their property rights over lands, territories and natural resources . . . The development of international standards on indigenous peoples’ rights, including those set by the Inter-American system, makes it possible to identify a series of circumstances where obtaining indigenous peoples’ consent is mandatory.

1. The first of these situations, identified by the UN special rapporteur, is that of development or investment plans or projects that imply a displacement of indigenous peoples or communities from their traditional lands, their permanent relocation. The requirement of consent in these cases is established in Article 10 of the UN Declaration: “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior, and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”

2. Indigenous peoples’ consent is also required, according to the Inter-American Court in the Saramaka judgment, in cases where the execution of development or investment plans or of concessions for the exploitation of natural resources would deprive indigenous peoples of the capacity to use and enjoy their lands and other natural resources necessary for their subsistence.<sup>31</sup>

Consequently, international norms and practice indicate that in determining how to address violations of indigenous peoples’ rights to territory, land, and natural resources, the groups or communities affected should be fully consulted and given the opportunity to exercise their right to free, prior and informed consent. In addition, they should be able to retain some level of control over the subsequent implementation of the measures decided. Various decisions in which the Inter-American Court has ordered the establishment of community development funds as reparations and the administration of these funds by a representative of the affected community demonstrate support for this idea.<sup>32</sup> In short, both consultation with and control by the beneficiary indigenous group are important elements that help ensure that the reparation measures meet the needs of the group and that the group ultimately takes ownership of them.

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<sup>30</sup> *Moiwana Community v. Suriname*. Inter-American Court of Human Rights. Judgment of June 15, 2005, Series C No. 124.

<sup>31</sup> *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, IACHR 2009, para 329 & 334.

<sup>32</sup> See, e.g., *Moiwana Community v. Suriname*, Inter-American Court of Human Rights, paras. 214–15; Inter-American Court of Human Rights, *Sawhoyamaya Indigenous Community v. Paraguay*, paras. 224–25. See also *UN Declaration on the Rights of Indigenous Peoples*, Article 23 (“Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development”) and Article 26 (“[1] Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. [2] Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.”).



*(ii) The measures should respect the group's particular cultural identity, which includes its nature as a collectivity, as well as its values, traditions, and institutions.*

In the first place, the measures adopted to address violations of indigenous rights should take into consideration the collective dimension of the harm caused. As the rights affected in this case—territory, land, and resource rights—are collective in nature, the measures adopted to address the violations should also be principally collective. In particular, it is important that reparations include measures that benefit the group as such, and not just individual victims who are members of the group. In this regard, the Inter-American Court of Human Rights has held in cases involving indigenous communities that “reparations take on a special collective significance,”<sup>33</sup> and that, in light of the fact that the individual victims belonged to a certain collectivity, an important component of the individual reparations would be reparations granted to the community as a whole.<sup>34</sup>

While this principle may seem obvious, there have been cases in the past in which violations of a collective territory-related right—for example, the right to prior consultation before implementation of development projects in indigenous territories—led to court decisions that ordered individually based measures of reparation, such as monetary compensation to be paid out to individuals or individual families. These decisions, though they may be well-intentioned, reflect a disregard for the collective nature of the affected groups and ultimately did little to ensure their cultural survival.<sup>35</sup>

Furthermore, existing international standards indicate that an indigenous group's identity should provide some guidelines for determining how to address violations of indigenous rights and the manner in which reparatory measures should be implemented.<sup>36</sup> For example, Article 5 of ILO Convention 169 provides that in the implementation of the convention's provisions to benefit indigenous and tribal peoples, “the social, cultural, religious, and spiritual values and practices of these peoples shall be recognized and protected,”<sup>37</sup> and “the integrity of the values, practices, and institutions of these peoples shall be respected.”<sup>38</sup> On how to address infringements of indigenous peoples' rights, Article 40 of the UN Declaration states that the decisions made “[should] give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned.” And in relation to land, territory, and resource rights in particular, the Committee on the Elimination of Racial Discrimination (CERD) has urged states “in consultation with the indigenous communities concerned . . . to establish adequate procedures, and to define clear and just criteria to resolve land claims by indigenous communities within the domestic judicial system *while taking due account of relevant indigenous customary laws.*”<sup>39</sup>

Direct application of these principles to the context of reparations can be seen in the jurisprudence of the Inter-American Court of Human Rights, which has ordered in determining the measures' beneficiaries that the community's customs and local law, not state law, should guide interpretation of terms such as “child,” “spouse,” and “ascendants,”<sup>40</sup> and that the lack of official records to prove the identity of a potential beneficiary should not be an obstacle to reparations.<sup>41</sup>

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<sup>33</sup> *Yakye Axa Indigenous Community v. Paraguay*, para. 188. Inter-American Court of Human Rights.

<sup>34</sup> *Plan de Sánchez Massacre v. Guatemala*, para. 86; Inter-American Court of Human Rights, *Moiwana Community v. Suriname*, para. 194. Inter-American Court of Human Rights.

<sup>35</sup> See, e.g., Rodríguez-Garavito and Orduz, *Territorio, pueblos indígenas y desarrollo*.

<sup>36</sup> Citroni and Quintana, *Reparations for Indigenous Peoples*, 320.

<sup>37</sup> ILO Convention 169, Article 5(a).

<sup>38</sup> *Ibid.*, Article 5(b).

<sup>39</sup> Concluding observations of CERD, para. 16. Emphasis added.

<sup>40</sup> *Aloeboetoe et al. v. Suriname*. Inter-American Court of Human Rights, para. 62.

<sup>41</sup> *Ibid.*, para. 64; *Moiwana Community v. Suriname*. Inter-American Court of Human Rights, para. 178.

Thus, in addressing violations of indigenous peoples' rights to territory, land, and resources, the affected group's identity must be respected. For example, special consideration should be given to the communities' own institutions and norms for ownership and administration of lands and resources, customary practices that the groups might have (such as ancestral artisanal mining or other traditional territory-related forms of subsistence), and restoration of sacred sites that may have been harmed.

*(iii) In cases of dispossession and forced displacement, restitution of ancestral territories should be the general rule. If restitution is not possible (for legitimate reasons) or not desired by the group affected, then fair compensation can be offered as an alternative.*

One of the clearest manifestations of CEJ in international law is the special protection given to indigenous peoples' territories, lands, and natural resources. Indeed, international legal standards are based on the acknowledgment of the close relationship between cultural identity and the territories, lands, and resources traditionally used or occupied by these groups. Measures to address dispossession and forced displacement of indigenous peoples must include guarantees ensuring collective territory, land, and resource rights, both in law and in fact.

Because of the significance of land, territory, and resources to indigenous communities, restitution (accompanied by repairing any environmental harm caused) is the ideal means of reparation in cases of dispossession and forced displacement. Only if this is not possible for legitimate reasons, may the state use the alternative of providing fair compensation. Such compensation should consist of other lands, territories, or resources of equal quality, size, and legal status, or, if this is not possible, monetary or other appropriate compensation. As scholar Aoife Duffy points out, "forcing monetary compensation on indigenous peoples as reparation for lands lost is discriminatory, and disregards the special relationship many indigenous peoples have with their homelands."<sup>42</sup>

Numerous international instruments and jurisprudence reaffirm these principles. For example, Article 28 of the UN Declaration on the Rights of Indigenous Peoples specifies:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair, and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used, or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories, and resources equal in quality, size, and legal status or of monetary compensation or other appropriate redress.<sup>43</sup>

Invoking the requirement of consent, Article 10 of the UN Declaration states that "indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior, and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."<sup>44</sup>

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<sup>42</sup> Duffy, *Indigenous Peoples' Land Rights*, 527.

<sup>43</sup> See also ILO Convention 169. First, Article 13 recognizes that states must respect "the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship." Therefore, relocation of these groups from their lands is allowed only when "considered necessary as an exceptional measure" (Article 16[2]). Additionally, "whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist" (Article 16[3]). Article 16(4) of the convention further establishes that the next best alternative is to provide them with "lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development." This same provision notes that monetary compensation as mode of reparation is permitted only when the ethnic group has expressed a preference for it and there are "appropriate guarantees."

<sup>44</sup> The CERD General Recommendations on Indigenous Peoples similarly urge states to return "territories traditionally owned or otherwise inhabited or used" that have been taken from indigenous peoples "without their free and informed consent." CERD, General Recommendation XXIII.

Importantly, the requirement that compensation be fair has both procedural and substantive components. In fulfilling the former, obtaining the agreement of the affected group through transparent processes is of vital importance in light of the first criterion described above. With regard to the substantive aspect, alternative lands must be equal in quality, size, and legal status. If monetary compensation is given, the amount must also be considered equitable and fair. For example, the UN special rapporteur criticized the New Zealand government's redress to the Maori people as follows: "The overall land returned by way of redress through settlements is a small percentage of the land claims, and cash paid out is usually less than 1% of the current value of the land. Total Crown expenditure on the settlement of Treaty breach claims over the last decade . . . is about 1.6% of the government budget for a single year."<sup>45</sup>

The Inter-American Court of Human Rights has extensive jurisprudence on the importance of land and territory to indigenous peoples and the appropriate measures of reparation when their rights have been violated. Regarding the principle that restitution is the ideal means of reparation, the court's decision in the case of *Sawhoyamaxa* is illustrative: "The court considers that the restitution of traditional lands to the members of the *Sawhoyamaxa* community is the reparation measure that best complies with the *restitutio in integrum* principle, therefore the court orders that the state shall adopt all legislative, administrative, or other type of measures necessary to guarantee the members of the community ownership rights over their traditional lands, and consequently the right to use and enjoy those lands."<sup>46</sup>

The fact that a group may have lost possession of its traditional lands does not preclude its claim of ownership,<sup>47</sup> and in cases "where the relationship with the land is expressed . . . in traditional . . . activities, if the members of the indigenous people carry out few or none of such traditional activities within the lands they have lost, because they have been prevented from doing so for reasons beyond their control, . . . such as acts of violence or threats against them, restitution rights shall be deemed to survive until said hindrances disappear."<sup>48</sup>

In circumstances in which traditional lands are currently in private hands, the court has specified that "the state must assess the legality, necessity and proportionality of expropriation or non-expropriation of said lands to attain a legitimate objective in a democratic society."<sup>49</sup> Importantly, the court adds that the state must take into account the "specificities . . . values, practices, customs and customary law" of the community affected in making this determination,<sup>50</sup> which relates directly to the second criterion outlined above. States are permitted to consider other forms of reparation only when they have "concrete and justified reasons."<sup>51</sup> In those cases, "the compensation granted must be guided primarily by the meaning of the land" for the groups affected.<sup>52</sup>

The specific parameters for the determination of alternative lands were established by the court in the case of the *Yakye Axa* community, and reaffirm both of the previous two criteria discussed above: "If for objective and well-founded reasons the claim to ancestral territory of the members of the *Yakye Axa* Community is not possible, the state must grant them alternative land, (i) chosen by means of a consensus with the community, (ii) in accordance with its own manner of consultation and decision-making, practices and customs. In either case, (iii) the area of land must be sufficient to ensure preservation and development of the community's own manner of live [sic]."<sup>53</sup>

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<sup>45</sup> Report of the Special Rapporteur (2006), para. 27.

<sup>46</sup> *Sawhoyamaxa Indigenous Community v. Paraguay*. Inter-American Court of Human Rights, para. 210.

<sup>47</sup> See *ibid.*, para. 128.

<sup>48</sup> *Ibid.*, para. 132.

<sup>49</sup> *Yakye Axa Indigenous Community v. Paraguay*. Inter-American Court of Human Rights, para. 217.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, para. 149.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*, para. 217. Enumeration added.

Finally, precisely because addressing violations of indigenous peoples' rights to territory, land, and natural resources is a complex matter that may take a significant amount of time to resolve (especially during times of conflict or transition), states should adopt interim measures to guarantee the affected groups' physical and cultural survival. For example, in the cases involving the Yakye Axa and Sawhoyamaya indigenous communities, the Inter-American Court ordered that while the communities remained landless, "given [their] special state of vulnerability and the impossibility of resorting to [their] traditional subsistence mechanisms," the state must supply immediate and regular access to drinking water, medical care, infrastructure for the management of biological waste, and appropriate bilingual educational materials.<sup>54</sup>

#### **IV. Relating Reparations of Indigenous Groups to Transitional Justice: Truth Commissions and Collective Ethnic Justice as Mutually Reinforcing**

The truth commission is the mechanism most widely associated with transitional justice—and with truth-telling in general. Although a precise figure may be difficult to determine (since there may be debate as to whether a given initiative constitutes a truth commission or not), some scholars have suggested that the number of countries implementing truth commissions increased from some 17 countries in the mid-1990s to twice that number by the end of 2008.<sup>55</sup> As truth commissions become more widely used, especially in complicated and "fractured settings" that have experienced divisions along racial, ethnic, and religious lines, expectations of the commissions may likewise increase.<sup>56</sup> In these contexts, commissions may be expected not only to address issues of perpetrators and victims, but also to contribute to transforming unequal or discriminatory relationships based on ethnic and racial identities.

With the stakes raised, we cautiously but optimistically observe that truth commissions and CEJ have significant potential to be mutually reinforcing. In accordance with the first CEJ criterion discussed—consultation and consent of indigenous peoples throughout the CEJ process—truth commissions have an opportunity to be a truly participatory mechanism for justice by involving indigenous leaders and community members from the outset, in the design and establishment of the commission as well as during its subsequent proceedings. Commissions can lead to more "open dialogue about more holistic notions of justice including . . . ecological rights . . . land rights, and use of traditional territories."<sup>57</sup> Moreover, indigenous peoples could also use truth commissions to broaden notions of culpability to include traditionally overlooked violations of human rights, such as those occurring in the distant past, as well as those provoked by public and private economic actors and unintentional state behavior.<sup>58</sup> As González and Rice point out, "truth commissions have the potential to open debate on much more than individual culpability. While commissions maintain a legal and ethical condemnation of abuse, they illustrate the systematic nature of certain abuses, patterns, and historical conducts."<sup>59</sup> As a starting point, then, truth commissions may be helpful for ensuring that the identification of the need for reparations CEJ is as complete and comprehensive as possible.

Unfortunately, this potential has not always been realized. The Peruvian Truth and Reconciliation Commission is an example: the commission's process did not, for the most part, include organizations advocating for the rights of indigenous peoples, and the commissioners themselves were intellectuals or members of the clergy. Only two of the 30 institutional cooperation agreements signed by the commission throughout the country were with organizations that worked on indigenous peoples' rights. Further, the commission

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<sup>54</sup> *Sawhoyamaya Indigenous Community v. Paraguay*. Inter-American Court of Human Rights, para. 230; *Yakye Axa Indigenous Community v. Paraguay*. Inter-American Court of Human Rights, para. 221.

<sup>55</sup> Fullard and Rousseau, *Truth Telling*, 54.

<sup>56</sup> *Ibid.*

<sup>57</sup> González and Rice, *Indigenous Voices and Truth Commissions*.

<sup>58</sup> For example, commentators have suggested that the report of the Guatemalan Commission for Historical Clarification helped to "open social space for the previously taboo discussion of Guatemala's violent past—racial discrimination, and the integration of indigenous population into the representation of the Guatemalan nation." Fullard and Rousseau, *Truth Telling*, 66.

<sup>59</sup> González and Rice, *Indigenous Voices and Truth Commissions*.

ultimately devoted limited attention—despite its broad mandate—to collective violations other than those falling under the title of forced displacement and violations of the rights to life, freedom, and physical integrity. Some effort was made, however, to incorporate a culturally sensitive perspective. Reminiscent of the second CEJ criterion invoking the importance of respecting cultural identity, the Peruvian commission, for the purposes of identifying victims and beneficiaries, did take into account the fact that some Andean and forest communities had a different notion of family than the Western-style nuclear family.<sup>60</sup>

Another way truth commissions can contribute to CEJ is by facilitating the documentation of aspects that might otherwise be neglected. They can reveal disproportionate impact or specific targeting of indigenous peoples. As one example of this, although the Peruvian Truth and Reconciliation Commission reached the general conclusion that the armed conflict in Peru was not an ethnic conflict *per se*, the commission received so much testimony on the violations committed by the rebel group Shining Path against the Amazonian Asháninka people that it determined that the extermination perpetrated might have reached the level of genocide.<sup>61</sup> For its part, the Guatemalan Commission for Historical Clarification found that acts of genocide had been committed against the Mayan people in certain regions, as 83 percent of the cases it recorded involved Mayan victims.<sup>62</sup> As another example, since truth commissions are based largely on testimony, they may also be a useful forum for recording cultural harm, such as the impact on traditional practices, including the inability to conduct certain contemporary or ancestral customs. In relation to violations of territory, land, and natural resource rights in particular, documentation through testimony is useful because it helps strengthen the case for restitution of ancestral territories (see CEJ criterion [iii] above).

Ultimately, each country's particular situation, necessities, and actors will likely define the scope and functioning of its truth commission. As Madeleine Fullard and Nicky Rousseau have aptly pointed out, “truth-telling initiatives, naturally, do not operate in a vacuum but work within, across, or even against the grain of other transformation projects, . . . the particular nation-building project of the state, the broader implementation of redress, and forms of memorialization.”<sup>63</sup> Nevertheless, we hope that the preceding discussion is sufficient to illustrate that truth commissions have significant potential for contributing to collective ethnic justice in multifarious ways, and that, at the same time, by considering the CEJ framework and following its criteria, truth commissions—and transitional justice efforts in general—can become more attentive to the demands and aspirations of indigenous peoples.

## V. Conclusion

In this article, we have sought to contribute to expanding our understanding of the range of theoretical, political, and legal approaches to distributive issues during conflicts and in transitional contexts. We have offered a typology of criteria for addressing violations of land, territory, and resource rights that includes—alongside the well-known approaches of distributive justice, corrective justice, and economic efficiency—a fourth criterion that is conceptually distinct and has specific support in international law: collective ethnic justice.

We first provided conceptual clarity to CEJ, explaining its relationship to other parameters of justice that are relevant to agrarian and reparation policies. Subsequently, we proceeded to explain its practical implications by laying out three principal standards that, according to established international norms, must guide policies for addressing violations of indigenous peoples' rights to territory, land, and natural resources. These interrelated standards are: First, in determining the appropriate measures to be adopted, the group affected should be consulted and given the opportunity to exercise their right to free, prior, and

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<sup>60</sup> Rubio-Marín et al., *Indigenous Peoples and Claims for Reparations*, 27-30.

<sup>61</sup> *Ibid.*, 25.

<sup>62</sup> Fullard and Rousseau, *Truth Telling*, 64.

<sup>63</sup> *Ibid.*, 85.

informed consent. Additionally, the group should retain some level of control over the implementation of the measures. Second, the measures should respect the group's particular cultural identity, which includes its nature as a collectivity, as well as its values, traditions, and institutions. Finally, in cases of dispossession and forced displacement, restitution of ancestral territories should be the general rule. If restitution is not possible (for legitimate reasons) or not desired by the group affected, then fair compensation can be offered as an alternative.

Importantly, as Chris Chapman, head of conflict prevention at Minority Rights Group International, has observed, "countries emerging from political transitions are keen to establish their legitimacy internationally, and in this respect, [minority and indigenous peoples] rights are an important benchmark."<sup>64</sup> Thus, rather than viewing CEJ as contrary to transitional justice or as displacing transitional justice principles, countries should pursue CEJ as a complementary means for ensuring that the transition process is as inclusive as possible and does not neglect the rights of their indigenous populations. In accordance with this idea, we ended our analysis with a final section on several ways in which truth commissions and CEJ can be mutually reinforcing.

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<sup>64</sup> Chapman, *Transitional Justice*.

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## Annex One: Colombia Case Study

### Collective Ethnic Justice? Colombia's Indigenous Peoples and the Victims' Law<sup>65</sup>

In Colombia, victims movements, academics, politicians, and activists have been debating how to provide reparations for the hundreds of thousands of victims of human rights abuses committed (and still ongoing) during the country's protracted civil war. At the same time, Colombia's indigenous peoples, amounting to just over 3 percent of the national population, or close to 1.5 million people, have also made demands for reparation for violations of their individual and collective rights, including their rights to life, physical integrity, cultural diversity, autonomy, political participation, lands, territories, and natural resources, among other rights.

During the end of 2010 and the beginning of 2011, debate on the issue intensified, as the administration of newly-elected President Juan Manuel Santos promoted legislation that would provide reparations for victims of human rights violations committed from 1985 onward, known as the Victims' Law ("Ley de Víctimas"). As the Victims' Law gained popularity (even among victims' organizations and human rights organizations, which approved the proposed initiative in general because it was more inclusive and progressive than proposals advanced by the prior administration of President Álvaro Uribe), a dilemma arose.

Both Colombian and international norms require the state to consult, and in some circumstances obtain consent from, indigenous peoples while formulating and before implementing measures that affect them. Failure to do so would most likely lead, as it had on previous occasions on different subjects, to the Constitutional Court of Colombia's invalidation of the measures as unconstitutional. Thus, on one hand, indigenous groups and their advocates had a sound legal argument for forestalling the legislative process; on the other hand, such a move could be politically unwise and unpopular, given that most other victims' groups and human rights organizations were giving unprecedented support to the government's initiative.

The solution that was decided as the most expedient was to introduce an article into the law stating that it would not apply to Afro-Colombian communities and indigenous peoples, and that the president would have special power to issue a decree with the force of law ("decreto ley") within six months to address the issue of reparations for these segments of the population after first consulting with them.

In this framework, Colombia's indigenous peoples have assumed a leading role in not only proposing draft articles for the decree but also designing the methodology for the consultations to be held with indigenous peoples around the country. Working together and with the support of independent experts from different disciplines, the four principal indigenous organizations that participate in the national-level Permanent Roundtable for Coordination with Indigenous Peoples and their Authorities and Organizations ("Mesa Permanente de Concertación con los Pueblos, sus Autoridades y Organizaciones Indígenas") have proposed a series of consultations that begin at the local level, then proceed to the departmental level, and culminate at the regional and national levels. The teams in charge of the consultations will receive training and specific instructions on the methodology to use, taking into account the organizations' recommendations in this regard. In addition, each of the teams will include not only government officials but also one member from one of the four principal indigenous organizations.

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<sup>65</sup> Interview with Natalia Órdúz, researcher at the Center for Law, Justice, and Society, and advisor to the National Indigenous Organization of Colombia, Bogotá, May 2011.

With regard to the substance of the decree, the indigenous organizations have also formulated guiding principles and, as of the writing of this article, are working on concrete recommendations for the decree's provisions. The point of departure consists of a reflection and critique of the limitations of the transitional justice framework, including the following points: First, there is no transition. Second, the conflict began before 1985. Third, the framework emphasizes culpability of armed actors (particularly illegal armed actors), thereby minimizing the responsibility of the state and other third parties.

The guiding principles underscore the importance of indigenous ancestral norms; in fact, these norms are considered foremost and are explicitly accorded the highest status in the hierarchy of applicable norms. Additionally, while indigenous organizations have recognized the need to include both individual and collective rights, the emphasis is clearly on the latter.

The framework endorsed by indigenous groups closely resembles that of collective ethnic justice, tailored to the Colombian context through incorporation of key country-specific recommendations, decisions, experiences, and norms, such as Constitutional Court Order 004 of 2009, a comprehensive and multifaceted decision that sought to address the crisis of forcibly displaced indigenous persons and communities.

In formulating their own proposal for the decree's articles, currently indigenous organizations continue to debate various important questions internally, including the following:

- How should individual victims be determined? What titles for relationships should be used for determining individual, indirect victims? How should collectivities be determined for purposes of collective reparations?
- Should there be time restrictions on reparations claims? Should restrictions vary based on the type of violation alleged and the nature of the reparation sought (that is, territory-related, monetary compensation, or symbolic or non-repetition measures for historic injustices)?
- For each type of violation, should the decree specify guidelines for the appropriate reparation measures, or should this be left open so that reparations can be determined freely on a case-by-case basis?
- To what extent should this legislation on reparations also include measures designed to enhance the provision of social services and humanitarian aid?
- Regarding territorial rights, should violations that affect enjoyment of territory in an intangible way be included? Regarding claims of dispossession, under what circumstances should a presumption in favor of the victims alleging these claims apply?
- What roles should the different state institutions play in overseeing the decree's application?
- What roles should indigenous groups' own jurisdictions and authorities play?
- Would some form of a truth commission be useful?

## 5. Indigenous Self-Determination and Political Rights: Practical Recommendations for Truth Commissions

*Paige Arthur*

Truth commissions and commissions of inquiry are not new for indigenous peoples. In Guatemala, Peru, Australia, Chile, and Canada, indigenous peoples have been consulted, given statements, read reports, and more. Yet the larger question for indigenous peoples must be: how can a truth commission advance their longer-term vision of self-determination and full exercise of their political rights? Can a truth commission even make a difference on these issues?

In the past, truth commissions have not made much of a difference on these particular issues, it is true. Perhaps Guatemala's Commission of Historical Clarification (CEH) is the only one that has made a demonstrable contribution to the participation of indigenous people in public life. The commission's finding that the state had committed acts of genocide against indigenous peoples helped to reframe political debate in Guatemala, and the struggle for truth and reparations galvanized a range of indigenous groups to become more active politically.<sup>66</sup> The story continues, more than 10 years after the government initially rejected the CEH's report. In June 2011, a former general in the Guatemalan army was arrested—the first person to be arrested in Guatemala on charges of genocide.

A truth commission cannot lead to self-determination by itself. But it may be part of a longer-term process leading in that direction. In order to contribute, however, they may need to operate a bit differently than in the past. The goal of this paper is to identify some practical recommendations for a truth commission to consider, to contribute to the realization of self-determination and other political rights for indigenous peoples.

In international law, self-determination is defined as the right of all peoples to “freely determine their political status and freely pursue their economic, social, and cultural development.” While recognizing that there is a diversity of opinion within indigenous communities about what form self-determination should take, this paper will focus on claims that do not involve secession from a state. This choice is made due to two simple facts. First, claims for secession are not the dominant ones among indigenous peoples today (although they do exist). And, second, achieving secession, whether for indigenous groups or national minorities, has proved extremely difficult, the recent case of Kosovo notwithstanding. Therefore, the paper will look at a group's right to freely determine its own development in terms of pursuing that development as part of an existing state.

Political rights refer to the rights of all individuals to participate in decisions that affect their lives, and effective participation will be the focus of this paper. This includes, among other things, voting, membership of a political party, and standing for election. Effective participation is important for other political and civil rights, as well as economic, social, and cultural rights.

Finally, since other authors in this resource deal with cultural rights and land claims, this paper will avoid those topics. However, it must be noted that these issues are intertwined. Claims to self-determination are often deeply linked to land among indigenous peoples, as a special connection with a territory shapes the distinctive identity—as well as the livelihoods—of indigenous groups. Effective participation is often linked to protecting important cultural rights, as well as a community's capacity to reproduce its culture across generations.

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<sup>66</sup> See Isaacs, *At War with the Past*.

## I. Appropriate Goals for a Truth Commission

Truth commissions attempt to provide a definitive account of human rights abuse, explain why the abuse took place, identify the institutions responsible for the abuse, recognize victims, and make recommendations on ways to provide remedy and to prevent the violations from happening again.

From Peru to South Africa, truth commissions have proved adept at contributing to a number of social changes. They can catalyze a growth in local civil society organizations, as groups coalesce in order to engage with the commission, as happened during the Peruvian Truth and Reconciliation Commission (TRC) process. They can help both to legitimize and to delegitimize political and state actors, by revealing the truth about how actors behaved during the period under investigation. Certainly the South African police were severely discredited by the South African TRC process, and have undergone extensive reforms since. Truth commissions can also help to reframe political issues and legitimize the claims of marginalized groups. A finding that a state has committed acts of genocide against a people, as happened in Guatemala, can be used to assert claims for a stronger political voice for reparation or for special protections from the state.

There is no clear example of a truth commission having an intended, direct impact on claims for self-determination or political rights of indigenous peoples. This paper aims to offer some practical suggestions based on the above analysis of what truth commissions have shown they can do: they can enhance civil society; they can legitimate or delegitimize political actors; and they can reframe important political issues for a broader public.

Based on this analysis, then, what are some realistic goals for truth commissions with respect to self-determination and other political rights? Identifying realistic goals will not only ensure that all parties have clarity about what a truth commission might achieve; it will also help to define strategies for a truth commission to deploy, and allow people to assess whether the desired changes have either taken place or are underway at the end of a truth commission process. It should be noted that these modest goals should be achievable to some degree even if the truth commission is not focused solely on abuses suffered by indigenous peoples, but also looking at other abuses. This is an important point, because although recent commissions in Canada and Australia have focused specifically on indigenous peoples, most commissions throughout the world do not. Instead, commissions typically look at a range of abuses that have affected the population as a whole and provide special mention of the often unique impact that abuse has on indigenous peoples.

Appropriate goals for a truth commission with respect to self-determination and other political rights might include, depending on the context:

- An improved understanding among indigenous peoples, the state, and the general public (if possible) of how the lack of self-determination and effective political rights contributed to the conditions for human rights violations.
- An increased number of civil society groups representing indigenous peoples within the truth-seeking process.
- Increased legitimacy of formal and informal indigenous decision-making bodies participating in the truth-seeking process.
- Increased capacity (where appropriate) of formal and informal indigenous decision-making bodies participating in the truth-seeking process.
- Increased capacity (where appropriate) of indigenous civil society groups to engage effectively with critical parts of democratic life: the media, education, the justice sector, and others.
- Increased practice of consultation: more indigenous organizations are consulted about all actions of the truth-seeking process that may affect their rights or interests.
- Increased participation of indigenous peoples, communally and individually, in the truth-seeking process, including indigenous women and young people.

Truth commissions have sometimes been burdened with outsized expectations for change. There are broader social changes that a truth commission may aspire to contribute to, but may ultimately have only an indirect effect on. For example:

- The constitution is changed in order to recognize rights of indigenous peoples.
- Public attitudes among non-indigenous people change from rejecting the notion of self-determination for indigenous peoples to accepting it.
- Indigenous peoples form viable political parties or other forms of political participation, as appropriate.
- Indigenous peoples effectively exercise self-determination in matters of justice, land, and other critical concerns.
- Women, children, youth, and lower “castes” internal to indigenous communities have increased understanding of and access to their political rights.

While these goals are important, they are also outside of the bounds of what a truth commission can accomplish on its own. While the main focus of the paper will be on the first set of goals, it is important to keep these larger goals in mind as a kind of “ideal” that we might be striving for.

What follows are some practical recommendations for a truth commission to achieve the more modest goals listed above.

## II. Truth Commission Processes

The suggestions below are all oriented around the idea of effective participation. Some ensure that indigenous peoples participate effectively in both a truth commission's planning and in its work. Others are intended to ensure that a truth commission's own actions can help to accord deeper legitimacy and respect to indigenous political actors, or empower citizens' organizations in areas beyond the narrow work of a truth commission.

1. *For every aspect that is likely to have effects on the rights or interests of indigenous peoples, the state must respect fully the duty to gain the free, prior, and informed consent of indigenous peoples, following the principles stated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Such consent may require a horizontal, free, respectful “peoples-to-peoples” framework, which is applied to different aspects of the mandate of the truth commission, such as its objectives, scope of research, powers, composition, and form of establishment. All major aspects of the commission's framework, both procedural and substantive, should be negotiated and agreed by representatives of relevant parties.*

The central importance of free, prior, and informed consent is that it ensures both that an indigenous perspective fully informs the mandate of a truth commission and that indigenous peoples are offered political recognition and respect.

The value of this approach can be understood by looking at the current TRC in Canada. The TRC was established by the Canadian courts, stemming from the settlement of a class-action lawsuit brought by survivors of Canada's residential schools system. The mandate of the commission is narrowly defined around the residential schools and does not include examination of other harms important to aboriginal peoples in Canada, such as past and ongoing expropriation of land. Further, the mandate does not include the thousands of aboriginal children who attended residential schools as day students rather than boarders. In general, if there had been a good-faith negotiation process, rather than a court settlement, there would have been a better chance that the Canadian TRC would address a broader range of issues important to aboriginal communities.<sup>67</sup>

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<sup>67</sup> Author interview with Jeff Cornthassel, June 22, 2011.

Yet another example is the creation of the CEH in Guatemala. The peace accord that created it was negotiated between the government and the guerillas; indigenous peoples (among other interested parties) were largely excluded from the process, resulting in a vague mandate. That a whitewash did not in fact take place ultimately was due to intensive mobilization after the creation of the mandate—effort that might have been saved had indigenous actors been included from the start.<sup>68</sup>

It should be noted, however, that how the principle of free, prior, and informed consent is implemented may depend on many different factors. One of these is whether the truth commission is designed specifically to deal with indigenous issues, or whether indigenous issues are among a larger set of issues that the commission will examine. In the case of the CEH in Guatemala, violations against indigenous peoples were examined along with other human rights violations against human rights activists, labor activists, and others. It would seem unfair to these other groups if negotiations with indigenous groups were to stall the process entirely. Care should thus be taken in thinking through how best to put the principle of consent into practice in different contexts.

- 2. The commission establishes regular consultations with both formal and informal indigenous political authorities—whether the state recognizes these authorities or not. This should include bringing diverse local authorities together, especially when they are spread out over a large area and have little contact. It may take the form of an advisory committee with a distinct mandate.*

Truth commissions usually operate as top-down structures that—for the sake of efficiency or other reasons—bypass local government. However, since most indigenous government is local government, it makes sense for a truth commission to engage with local political authorities. That is, a truth commission is unlikely to have meaningful relationships with indigenous political authorities if it operates only at the level of the state. One counterexample to this pattern is Canada's Assembly of First Nations (AFN), which is a national organization that has engaged effectively with the state and Canada's TRC. Even in this case, however, there is debate within aboriginal groups in Canada about whether the AFN adequately represents them. This underscores the importance of considering engaging with local authorities.

One example of how this has worked is in Australia, where a Council for Aboriginal Reconciliation was established in 1991 to promote reconciliation between Aboriginal and Torres Strait Islanders, and the wider Australian community—in particular, to educate non-aboriginal Australians about why a treaty with aboriginals might be desirable. It operated for 10 years, with an average annual budget of \$4 million. As part of its work, the council created a network of “Australians for Reconciliation” in which communities came together in various ways. For example, a number of municipalities in the suburbs of Melbourne joined with local aboriginal communities to develop official statements supporting justice and equity for indigenous Australians, which included acknowledging the aboriginals' prior occupation of the area.<sup>69</sup> The council also held a number of national “reconciliation conventions,” in which aboriginal and non-aboriginal leaders gathered to discuss agendas and progress.<sup>70</sup>

It should be noted, though, that the work of the Council for Aboriginal Reconciliation was not very successful. For one, the community movement avoided important aboriginal issues, such as self-determination and rights to land, for fear of alienating non-aboriginals. Further, the conventions did not have enough funds to pay for the attendance of aboriginal leaders lacking resources. The example is still an instructive one, however. The breadth of the effort in attempting to engage local communities was a good idea. The problem was that the initiative never went far enough in terms of the actual issues discussed, and it was ultimately a disappointment to many aboriginal peoples.<sup>71</sup>

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<sup>68</sup> See Issacs, *At War with the Past*.

<sup>69</sup> For a successful instance of this kind of recognition, see Council for Aboriginal Reconciliation, *Walking Together the First Steps*, chap. 19.

<sup>70</sup> Short, *Reconciliation and Colonial Power*, chap. 6.

<sup>71</sup> *Ibid.*

What is the lesson for truth commissions? While one cannot generalize from a single case, it is safe to say that truth commissions should attempt to engage local authorities and also bring them together on the national level. These are good ideas, and they are at the heart of the ideas of participation and legitimacy. But such efforts should not ignore the issues close to the hearts of indigenous peoples, or they are likely doomed to failure. They may even have the negative consequence of further alienating indigenous peoples.

Another way of including local authorities is through an advisory committee—such as the one that supports the work of the Canadian TRC. We cannot yet say what the impact of such a committee might be, however.

3. *The commission establishes regular communications with the UN Permanent Forum on Indigenous Issues (UNPFII), the special rapporteur on the rights of indigenous peoples, and the Expert Mechanism on the Rights of Indigenous Peoples, as appropriate.*

The UNPFII, the special rapporteur, and the Expert Mechanism together make up a structure at the international level that holds states accountable for their obligations under UNDRIP and other instruments of international law. It would make sense for these entities—at a minimum—to know that a truth commission related to indigenous peoples has been established. Beyond that minimum, these entities could pressure states that are not willing to grant indigenous peoples adequate participation in the truth commission process.

Further, these entities should receive the final reports, along with the commission's recommendations. They could then help to monitor implementation of the recommendations—especially those that are most closely related to the provisions of UNDRIP.

While this has never been done in relation to truth commissions, it has been done in relation to monitoring peace agreements in which indigenous peoples are key actors. The special rapporteur on the rights of indigenous peoples, Rodolfo Stavenhagen, helped to monitor the implementation of the Guatemalan peace agreements. He visited the country in 2002 and 2007, and his reports after both visits emphasized that more progress was needed from the government's side, especially institutional support and budgetary allocations.<sup>72</sup>

4. *Authority over aspects of the commission's work—such as setting up public hearings, responsibility for gathering statements, or creating commemorative events—are devolved to formal and informal indigenous political authorities or at a minimum are done in partnership with such authorities.*

There is little precedent among other commissions—which tend to be administratively centralized in their work—to devolve authority to local bodies. For example, in spite of the South African Truth and Reconciliation Commission's relative decentralization and extensive national reach, these aspects were achieved through the creation of separate committees of investigation, rather than through devolving power or authority, whether to a local or an indigenous authority.<sup>73</sup>

One exception to this general approach is the Commission for Reception, Truth, and Reconciliation in Timor-Leste. This commission developed a community-based reconciliation process for those who admitted to committing a crime during the conflict (assuming that the crime was not so grave as to be forwarded to the special court set up to try serious crimes). Power was devolved to regional panels, which organized public hearings in which both the perpetrator and members of the community were allowed to speak. At the conclusion of the hearing, the panel would decide on appropriate amends for the perpetrator to make in order to be accepted back into the community, such as public apology, community service, or reparations.<sup>74</sup>

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<sup>72</sup> See Gilbert, *Indigenous Peoples and Peace-Agreements*.

<sup>73</sup> Correspondence between the author and Graeme Simpson, June 30, 2011.

<sup>74</sup> *Chegal*, part 2, 12–14.



The impact of this decentralization is hard to evaluate. It was not designed to recognize or legitimize local authorities, so it has not been evaluated according to those criteria. Evaluation of its impact on local-level reconciliation reveals mixed results, although it does not appear that any of the supposed negative results were related to the decentralized nature of the proceedings.<sup>75</sup>

5. *The commission establishes a preference for working with indigenous civil society organizations in all aspects of its functioning. This includes not only the obvious areas of outreach to communities and help with statement taking or hearings, but also the less obvious areas, such as working with media, outreach to educators, or establishing an archive or museum.*

The intent of this suggestion is to extend the practical benefits of a truth commission beyond the period of its actual operation. While there seems to be little precedent of this with respect to a truth commission, another relevant example comes from Guatemala. In the late 1990s, the UN Verification Mission in Guatemala developed radio infrastructure to communicate its work with groups—mainly indigenous peoples—cut off from mainstream forms of media. Indigenous activists have since inherited that infrastructure, expanding to a network of 175 community radio stations that broadcast in a range of indigenous languages.<sup>76</sup>

6. *The commission provides adequate funding to indigenous civil society organizations and formal and informal political authorities with which it works in partnership.*

If a truth commission needs help from indigenous organizations in order to do its work, then it should set aside adequate funds for those organizations, rather than expecting them to raise funds on their own.

While not related to a truth commission, an important example comes from Bosnia-Herzegovina. In the mid-2000s, Bosnia-Herzegovina established a War Crimes Chamber to take over cases from the International Criminal Tribunal for the Former Yugoslavia as well as to try new cases. In developing its outreach strategy to the broader community, the court initially partnered with local organizations who were trusted in their communities and who could act as mediators of information about the court. After one year, however, the court cut off funding to the organizations at a crucial moment in the project's development, and asked them to raise funds on their own. At that point, the outreach strategy collapsed.<sup>77</sup>

It is important for truth commissions to have trusted mediators between themselves and local communities—whether it is to explain the work of the commission, to help with statement taking, or to offer support in the wake of giving testimony.<sup>78</sup> This is especially true in the case of indigenous peoples, who may severely distrust the state and its representatives. If a commission wants local organizations to work to support its aims, then it should ensure that it budgets for that work.

7. *The commission provides training and other capacity-building measures to indigenous authorities and civil society groups when needed, and also provides for adequate follow-up to training to ensure that people have the support that they need. This may include obvious areas such as training on statement taking, but it may also include less obvious areas such as dealing with the media, educators, and archives.*

Truth commissions typically provide training in areas where it is needed—such as statement taking—but to whom? If the suggestion above is taken to prioritize working with indigenous civil society groups, then members of those groups would be the ones to benefit.

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<sup>75</sup> For a review of literature evaluating the impact of the Timor-Leste commission, see Senier, *Traditional Justice as Transitional Justice*, 78–80.

<sup>76</sup> See Cultural Survival, *Guatemala Radio Project*.

<sup>77</sup> Author interview with Refik Hodzic, September 10, 2008.

<sup>78</sup> On this point, see Arthur, *Fear of the Future*, 291.



One broader area where indigenous civil society groups might stand to benefit from engaging with a truth commission is in learning how to deal with the media, and ultimately to ensure their perspectives are represented in mainstream media more frequently than they currently do. Access to media—both as a consumer and as a producer—is critical to political participation. A truth commission's outreach strategy could include media training and networking as part of its work; if done well it could have tangible benefits for indigenous communities.

8. *Symbols of indigenous peoples' political authority are accorded equal status with the symbols of the state in all official documentation, correspondence, public hearings, and media outreach.*

A recent example of how symbols have been managed is the Maine Wabanaki Child Welfare Truth and Reconciliation Commission. The commission, launched in May 2011, will investigate the effects of state child-welfare policies on native children. It was established through agreement of the five Wabanaki nations of Maine and the state government of Maine. In all of its official brochures, symbols of all six groups—the five tribes and the state—are represented.

In the case of Maine, the number of parties is relatively small, making their representation easy. In cases where indigenous peoples are more numerous—such as at the national level in Canada and the United States, which each boast more than 500 different communities—it may be much more challenging, if not impossible.

For example, in Australia, aboriginal peoples recognize a common flag, which is recognized as an official flag and displayed at many public buildings in Australia alongside the national flag. It is worth noting that that recognition of the flag moved first from the municipal level then to the provincial level and finally to the national level—thus the local level was formative in this case.<sup>79</sup> This symbolic representation has not been without controversy—for example, when Cathy Freeman held the aboriginal flag after her gold medal wins at the 1994 Commonwealth Games.<sup>80</sup> This controversy perhaps underscores how important the symbolic level can be in bringing formal recognition to groups. It should be noted, however, that it is likely that many aboriginal peoples in Australia would wish to be represented by their own particular symbols, rather than by the aboriginal flag.<sup>81</sup>

As challenging as it may be in some contexts, the equal representation of indigenous symbols should at least be considered. Using them suggests that the process is not one imposed by the state, but agreed to equally by all parties. This representation signals that the commission's legal and administrative spaces can be trusted by indigenous groups—an important point for indigenous peoples, who may have a history of mistrust of state authorities.

Additionally, a truth commission could support smaller symbolic acts, such as recognizing indigenous peoples' preferred names for places and people.

### III. Truth Commission Substance

The central idea of the suggestions below is “context.” If a truth commission wants to contribute to indigenous peoples' self determination and political rights, then it must put individual human rights violations in their historical and social contexts. Additionally, it must make clear links between the absence of self-determination and political rights, on the one hand, and massive human rights violations on the other.

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<sup>79</sup> See Council for Aboriginal Reconciliation, *Walking Together the First Steps*, chap. 19.

<sup>80</sup> Williams, “Cathy Freeman”, *Time Magazine*.

<sup>81</sup> Author interview with Damien Short, July 1, 2011

1. *The truth commission adopts the terminology of indigenous “peoples”—or otherwise the preferred designation of indigenous peoples—and refers to the UN Declaration on the Rights of Indigenous Peoples, in addition to other standard human rights instruments, in its mandate.*

While a number of official commissions (not necessarily “truth” commissions) have been respectful of indigenous peoples’ preferred terminology—the commissions in Australia and Canada are examples—none of them have so far referenced obligations under international law in their mandates. For truth commissions, which deal especially with human rights violations, these obligations should offer guidance to commissions not just about how they should behave (for example, obtaining the free, prior, informed consent of indigenous peoples), but also the kind of society that they should contribute to realizing (for example, one in which indigenous peoples freely determine their political status).

Including mention of these international documents signals their value to the broader public. It also may help commissioners interpret their mandate in cases where the mandate is not well defined. For example, the mandate of the Guatemalan Historical Clarification Commission was both brief and vague. The progressively minded commissioners interpreted it in such a way as to include investigation of specific harms to indigenous peoples, including acts of genocide—a decision that resulted not just from the commissioners’ willingness, but also intense pressure from indigenous civil society groups. Making reference to UNDRIP would only strengthen the position of commissioners who wish to interpret a commission’s mandate in this direction.

2. *A section of the report is devoted to explaining how self-determination and other political rights of indigenous peoples were eroded or destroyed over time.*

Commissions generally have a good record on this issue. Commissions of inquiry such as the Royal Commission on Aboriginal Deaths in Custody (Australia) and the Royal Commission on Aboriginal Peoples (Canada) have made special efforts to explain how the concept of “terra nullius” was used by colonizers to appropriate land from indigenous peoples and, in some cases, either to forcibly relocate or to exterminate them. The report of the Guatemalan CEH has strong words for the exclusionary, racist, and anti-democratic nature of the colonial state.<sup>82</sup> In each case, however, the analysis could be taken even further in describing how indigenous peoples’ ability to govern themselves, specifically, was eroded over time through colonial imposition of control.<sup>83</sup> In many cases, current reports focus more on the actions of the colonizing state than they do on the impact of these actions on indigenous peoples. It would be welcome for reports to include both perspectives, as evidence permits.

Attention should also be paid to the ways in which contact may have affected gender roles within indigenous communities. In some cases, contact with Christian missionaries, who assumed a subservient role for women, may have led to a diminution of women’s roles and responsibilities within the life of the community.<sup>84</sup> Indeed, in Canada, the 1876 Indian Act shut out First Nation women from political leadership and influence, when hitherto they held sway as hereditary chiefs, clan mothers, or through women’s councils.<sup>85</sup>

3. *A section of the report analyzes how lack of self-determination and other political rights created conditions for state-led human rights abuse.*

Here again, existing reports are good models, yet they still could go further to clarify the links. For example, *Bringing Them Home: the report on the Stolen Generation in Australia*, describes how self-governance—which was critical to protecting aboriginal children from abduction—was lost over the course of the nineteenth

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<sup>82</sup> Commission for Historical Clarification, *Conclusions*.

<sup>83</sup> See *Report of the Royal Commission*, chap. 10.3.

<sup>84</sup> See, e.g., Wesley-Esquimaux, *Trauma to Resilience*.

<sup>85</sup> Anderson, *Leading by Action*, 100.

century by forcing aboriginal peoples off their land, pushing them to the edge of starvation, and establishing “protectorates,” among others.<sup>86</sup> Yet it does not explicitly use the term “self-governance” or state that the loss of self-governance was either an intention or a direct result of these events, and indeed the subject was not part of its mandate. Thus, while the needed information is there, the over-arching theme of self-governance remains buried. If reports in the future can unearth the issue and make it explicit, it would be a welcome improvement.

Attention to gender is important in this respect as well, and has been dealt with by some commissions. In Australia, the Royal Commission on Aboriginal Deaths in Custody offers a more complete gender analysis, describing the impact of colonialism and, later, the modern welfare state on gender roles—both of which had a variety of effects on men and women, some empowering and some disempowering. Since one of the goals of the report is to understand the relatively high incarceration rates of young aboriginal men, this more expansive analysis makes sense.<sup>87</sup> It can also serve as a model for analyzing other situations.

4. *Outreach strategies to non-indigenous people explain why exercise of self-determination and other political rights are critical to reconciliation.*

Many non-indigenous people are simply unaware of indigenous people’s aspirations and rights. It is understandable that a broader public may not understand what all the “fuss” is about when confronted with a truth commission for indigenous peoples—and they may thus be dismissive or even hostile toward it. It is important that the broader public start to understand the broader issues facing indigenous peoples for the work of the commission itself to be successful.

The case of the Australian Council for Aboriginal Reconciliation demonstrates this point very clearly. The council was the government’s response to a social movement among aborigines to finally establish a treaty between aboriginal communities and the Australian government. (No treaty had ever been signed with aborigines in Australia.) The government believed that more “public education” on the issue was needed before it could discuss a treaty. It thus created the council to undertake this education over a period of 10 years. As mentioned, however, the education process did not broach the issues of self-determination and land—which, obviously, are important elements in any treaty settlement in Australia. It therefore left out the very things about which the public most needed to be educated.

Truth commissions can reframe issues for the public—and they should not necessarily avoid reframing the issues of self-determination and political rights for indigenous peoples. A reasoned discussion of what self-determination and political rights might look like could play an important role in establishing a truth commission’s recommendations. And it could also discredit the myth that self-determination is synonymous with secession.

5. *The commission makes recommendations that will improve the self-determination and other political rights of indigenous peoples. This includes concrete recommendations related to the work of the truth commission. It should also include broader proposals related to constitutional reform, the protection of land rights, and other similar issues.*

Canada’s Royal Commission on Aboriginal Peoples placed emphasis on the fact that indigenous peoples never gave up their right to “self-governance,” and that they still hope to exercise it. It also insists that there are three orders of government in Canada: “federal, provincial/territorial, and Aboriginal,” and that these three share sovereignty.<sup>88</sup>

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<sup>86</sup> See Human Rights and Equal Opportunity Commission, *Bringing Them Home*, esp. part 2, chap. 2.

<sup>87</sup> *Report of the Royal Commission*, chaps. 10 and 11.

<sup>88</sup> Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation*.

The challenge for a truth commission is to make this broad sentiment more practical in its recommendations. With respect to its own work, a truth commission could recommend that indigenous peoples should have control of one of the copies of the truth commission archive, that they would be delivered the final report directly, that they would be asked to host hearings, or that their decision-making bodies should develop proposals for reparations.

A truth commission can also make recommendations related to the broader, more aspirational goals listed above—that is, that the state consider amending its constitution or that it establish a good-faith plan to rewrite official representations of history and educate the non-indigenous community about the value of indigenous self-determination and political rights.

6. *The commission proposes oversight mechanisms for the implementation of its recommendations that include the Permanent Forum on Indigenous Issues, the special rapporteur on the rights of indigenous peoples, and the Expert Mechanism on the Rights of Indigenous Peoples.*

This suggestion is an extension of the earlier one to establish regular communications with these international entities. Since it is often the case that a truth commission's recommendations are taken selectively, external pressure on a state to adhere to its international obligations may be helpful.

#### **IV. Risk of Addressing Self-Determination and Other Political Rights in a Truth Commission**

Taking some of the steps outlined above is not without its risks, and as such, the risks should be duly weighed before proceeding.

First, there is no question that the issue of self-determination, in particular, has the potential to create a public and political backlash in some countries. Some may interpret claims to self-determination as a slippery slope toward secession and division of the state. Additionally, in some countries, even the effective exercise of political rights by indigenous peoples can appear threatening to non-indigenous groups who are used to being in power and who may even deploy racist ideologies to maintain their position.

As a result, depending on the context, it may be politically risky to raise these issues—especially for state authorities, even if they are personally sympathetic to such claims. That said, the critical issue is perhaps not so much that the issue cannot be raised, but rather that it must be adequately explained, so that the non-indigenous community understands what is being asked for, which usually is not secession. The Council for Aboriginal Reconciliation in Australia found out—only at the very end of its work—that non-aboriginals were in fact quite receptive to aboriginal notions of self-determination, if they were discussed and explained in small groups.<sup>89</sup>

Second, using a peoples-to-peoples framework could expose a truth commission to negotiations that may take a long time, which is not in the interests of victims. Especially when there are a large number of parties involved, or where there are strong disagreements, this approach may be questionable. In these cases, a concept of “adequate consultation” may be more appropriate.

Third, there is a risk that formal and informal political authorities—just like political authorities everywhere—may not be representative of their group or may be representing the interests of only some of their group members. Truth commissions should pay close attention to the gender dynamics of such groups, to ensure that male authority is not exclusive. In general, it will not reflect well on a truth commission if its local

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<sup>89</sup> The council commissioned a study based on “deliberative polling,” in which people are polled before and after they have a chance to be informed, question competing experts, and discuss with their peers. See Short, *Reconciliation and Colonial Power*, 125–27.

partners are themselves repressive or illiberal. In cases where local partners are not adequately representative of their peoples, a truth commission could try to encourage more democratic representation through a number of means. It may, for instance, withhold the right to participate in the process until an authority becomes more inclusive or invite people from the group in addition to the local authority.

It is thus critical to assess the current state of gender roles and women's participation specifically in public decision-making before embarking on a truth commission process. Where women are excluded, issues that are important to them tend to be marginalized. This appears to have been the case in Canadian politics, where, according to one observer, First Nations women's concerns about stopping family violence have taken a back seat to men's concerns about land and resources.<sup>90</sup> The Canadian TRC, however, has done its work in such a way so far that it has avoided such criticism. When women are formally or informally excluded from participating, some countries have taken steps to remedy the situation. For example, in the 1980s, Nicaragua created two autonomous zones on the Atlantic coast—an area mainly populated by indigenous peoples who had divided their loyalties between the Sandinistas and the Somoza regime during the conflict. The government made provisions to ensure the participation of women, such as requiring regional councils to consult with women's organizations before executing new health, education, and cultural plans (it is unclear how well these provisions have worked).<sup>91</sup>

Fourth, reliance on formal and informal political authorities may be difficult if those authorities have little experience with the tasks they are responsible for. A truth commission usually involves a fair amount of bureaucracy and standardized procedures—which is not surprising, since it is usually a manifestation of the state. This helps to confer legitimacy on the commission's findings. But many indigenous peoples have little contact with the state, which usually operates in a different language and is often located far away. They also may have a history of suspicion and mistrust of the state. Thus, for some indigenous authorities, there may be both reluctance and a lack of capacity to play a responsible role in a truth commission.

## V. Conclusion

Narrowing the goals of truth commissions with respect to self-determination and political rights may feel disappointing. Indigenous peoples have waited for justice for so long that there may be reason to hope that a truth commission could deliver it instantly. But this is asking too much of a truth commission, and it raises expectations among victims and their families that are likely to be dashed. The last thing that victims need is more false hope, so it is important that a truth commission be honest and forthright about its particular role in a larger social change process.

What a truth commission can reasonably do is to enhance the political legitimacy and the capacity of indigenous peoples—in particular their authorities and their civil society groups. It can also create an unassailable record of how the erosion of self-determination and other political rights has been detrimental to the basic human rights of indigenous peoples. In this way, a truth commission can hope to be one catalyst among many for positive change in a society that is finally ready to recognize indigenous peoples as equal partners with distinctive rights.

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<sup>90</sup> Anderson, *Leading by Action*, 101.

<sup>91</sup> Brunnegger, *From Conflict to Autonomy in Nicaragua*, 5.

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## 6. Guidelines for the Observance of Indigenous Rights in Truth Commissions

### I. On these Guidelines

These guidelines are proposed for country scenarios where gross violations of human rights have been inflicted on indigenous populations, and where the state has agreed to implement truth-seeking mechanisms to provide remedies to victims. They are intended to serve the needs of policymakers at the state level, indigenous leaders, and international institutions, such as intergovernmental bodies and cooperation agencies. They are also intended to assist the policymaking capacity of civil society and human rights activists.

As victims of the most serious international crimes, indigenous peoples, both as individuals and as communities, have the right to receive effective remedies, including the right to establish the truth, circumstances, facts, and responsibilities for the violations.

These guidelines are based on lessons learned in the practice of transitional justice around the world, and apply the framework of the rights of indigenous peoples. However, the guidelines are not intended to substitute for the analysis of each specific situation or the free decision-making of indigenous peoples themselves. Any truth-seeking activity focused on the rights of indigenous peoples must genuinely consult with them, to seek their free, prior, and informed consent.

### II. Considering Whether to Establish a Truth Commission

*Truth commissions are usually created in the wake of violent conflict or authoritarian rule to address the legacy of atrocity. They intend to establish an authoritative narrative of facts, recognize the victims, and provide authorities with information and policy recommendations to uphold the rights of victims and prevent repetition. In considering their establishment, governments and citizens have taken into consideration several factors, such as the existence of enough political will for the enterprise; the existence of adequate guarantees of security for participants in the inquiry; the likelihood of setting complementary roles among the commission and jurisdictional bodies; and the availability of adequate human and material resources, among others.*

In cases where indigenous populations have been the object of atrocities, or it is suspected that they may have been specifically targeted, the following guidelines are proposed:

1. In situations of conflict and other serious disturbances that may affect indigenous peoples, the state should ensure that it has the capacity to receive first-hand information on alleged abuses, that indigenous peoples are free to document and report violations without risk of reprisal, and that there is adequate protection for information received on such crimes.
2. In situations of conflict and other serious disturbances that have affected the general population, but where specific reporting on violence has not been received from indigenous peoples, the state should make all efforts to contact indigenous peoples and assess how general patterns of violence may have affected them.
3. Where the object of study of truth commissions, commissions of inquiry, and other similar institutions will in all likelihood include abuses that affected the rights of indigenous peoples, the authorities must ensure a genuine consultation to obtain the free, prior, and informed consent of indigenous peoples to the inquiry.



4. Appropriate mechanisms for consultation may include assemblies, groups of elders, women's groups, youth associations, and other authorities. When engaging in consultation, it is important to ensure that indigenous groups and persons participate freely, receive all necessary information to ensure meaningful discussion, have sufficient time to engage in dialogue, and are free to express their ideas and proposals in the manner that is most culturally appropriate for them.
5. Policymakers should identify what sources of information indigenous peoples consider most significant during this phase: direct testimony, oral tradition, and archives, among others; and they should ensure that these sources are valued and protected.

### III. Deciding the Mandate of a Truth Commission

*Truth commissions are created according to a legal mandate specifying their objectives, powers, focus of inquiry, composition, and period of activity. Such mandates have usually been established by the executive branch through decrees or by laws passed by the appropriate legislative bodies.*

When, with the consent of indigenous peoples, it has been decided that a truth commission will include in its mandate a specific focus on the rights of indigenous peoples, the following guidelines are proposed:

1. The objectives of the commission should clearly state that it will seek the highest possible attainment of the rights of indigenous peoples, specifically identifying the rights that appear to have been violated during the period under examination.
2. The mandate of the commission should state that established and developing international human rights law will guide its activities, including specific instruments regarding the rights of indigenous peoples, such as the, ILO Covenant 169 and the UN Declaration of the Rights of Indigenous Peoples.
3. The establishment of the commission should seek to include the presence of indigenous persons at all levels, including as commissioners, monitors, or staff, and ensure that the nomination and appointment of such public servants is conducted transparently and in consultation with the indigenous peoples.
4. The commission should be guaranteed the support of the appropriate government authorities at the national and local levels to facilitate genuine consultation with indigenous peoples. In particular, the commission should be enabled to enter into agreements with indigenous communities in order to carry out its investigative activities in a participatory manner.
5. The commission should be enabled to request and obtain effective cooperation from law enforcement authorities to ensure the protection of indigenous communities offering information to the inquiry; mechanisms of protection must be effective and should be culturally appropriate for victims and witnesses.
6. The mandate should specify which abuses committed against indigenous communities fall under its competence. Those abuses may include genocide, persecution, slavery, forced displacement, and other inhumane acts. The mandate should ensure that the commission will pay specific attention to violations of the rights of self-determination, access to land and ancestral territories, and the practice of specific culture and language.
7. Notwithstanding the limited temporal scope of the commission's inquiry, the mandate should specify that the commission should pay attention to the structural and historical causes of violations, including colonization or other forms of marginalization of indigenous peoples.



8. Notwithstanding the limited territorial scope of the commission's inquiry, when the indigenous peoples included in the inquiry are separated by international borders, the mandate should specify that the commission will be enabled to seek international cooperation to ensure that such peoples are free to maintain contact and cooperate in the inquiry, if they so decide.
9. The mandate should recognize the value of indigenous legal and cultural practices of story telling and witnessing, as valid sources to establish fact, and contribute toward the identification of responsibilities, and nonjudicial or judicial conciliation.
10. The mandate should specify that indigenous persons engaged by the commission as witnesses or as persons of interest, will have their rights to due process respected, and that they will be correctly and fully informed of the characteristics and consequences at all stages of the investigative process.
11. The national authorities entrusted with the passage of legal instruments should give enough time to meaningful consultation with indigenous communities prior to the adoption of the mandate of a commission. If external considerations make full consultation with indigenous populations impossible, governments should consider suspending the application of the mandate on indigenous populations until consultation is effectively carried out.
12. The act of adoption of the mandate should involve the indigenous peoples and recognize their forms to witness, solemnize, and legitimize the mandate.

#### **IV. During the Establishment**

*Truth commissions are usually established when, after adopting a mandate, the highest national authorities appoint commissioners. The initial activities of a commission include the interpretation of their mandate, determining a methodology for the inquiry, planning and allocating resources, establishing offices, and hiring staff.*

When a truth commission is entrusted to investigate abuses against indigenous peoples, and mandated to contribute to the realization of indigenous rights, the following guidelines are proposed:

1. Adequate consultation should take place to nominate, vet, and appoint commissioners to lead the inquiry. Indigenous peoples should have a meaningful and genuine opportunity to propose names of commissioners and other forms of participation in the commission; as well as to participate in the vetting of those interested in serving as commissioners.
2. Commissions that include a mandate to focus on abuses suffered by indigenous peoples should include indigenous commissioners. Non-indigenous commissioners should be persons who are committed to the rights of indigenous peoples.
3. The commission's staff should be appointed to ensure that indigenous persons are represented, particularly in units that will have responsibility to gather information from indigenous deponents and conduct outreach to indigenous communities. All staff of the commission should receive appropriate training to ensure knowledge of and respect for indigenous cultures and languages.
4. The location of a commission's offices should seek to maximize access by indigenous participants. Mobile teams should be created to ensure that deponents in remote areas have an opportunity to participate in the process. The commission's work in indigenous territories should be subject to the free, prior, and informed consent of the indigenous communities.
5. Determining the investigative methodology should allow forms of transmitting knowledge and offering testimony common to indigenous cultures, ensuring that participants can communicate with the commission in their language and in forms culturally appropriate to them.

## V. Operations

*Once established, truth commissions carry out their investigative tasks through intensive field work; typically, they try to ensure that the maximum possible number of deponents and areas affected by abuse are reached. In addition to statement-gathering, commissions conduct outreach and educational activities for the larger public.*

Commissions established to investigate abuses against indigenous peoples and mandated to contribute to the realization of indigenous rights should consider the following guidelines:

1. Publish and disseminate a declaration of principles that will guide their work. Include specific guarantees in the declaration to ensure respect to indigenous peoples and maximize their participation in the process.
2. Secure the advice of indigenous organizations, through bodies such as committees of survivors, elders, and others. Contact international bodies that promote and protect indigenous rights, such as the UN Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples, the UN special rapporteur on the rights of indigenous peoples, and relevant regional bodies.
3. Conduct outreach to indigenous communities, ensuring that information about the commission is accurate and responds to any specific doubts and questions from indigenous populations. Build alliances with indigenous organizations to assist with outreach to communities and statement-taking.
4. Outreach to non-indigenous population should have a strong educational component to explain the importance of recognizing the violations committed against indigenous peoples and encourage and facilitate cooperation of different communities, indigenous and non-indigenous, to overcome the legacies of conflict.
5. The commission must take effective measures to ensure that statement-taking and evidence-gathering are culturally appropriate to indigenous communities and persons and in their mother tongue. The commission must determine jointly with the indigenous communities how to balance diverse methods of testimony, both individual and collective. In the case of collective statement-taking, the commission should strive to ensure that the voices of indigenous women and children are heard.
6. In cases concerning the search for the missing and disappeared, the commission should observe the rituals that the community considers most appropriate in the different phases of exhumation, identification, and devolution to the families.
7. Open hearings of the commission, involving witness testimony, should be conducted observing the indigenous customs for receiving, listening, and comforting a witness. Participation in public hearings must be subject to free, prior, informed consent of the indigenous individuals and communities.
8. Standards of evidence by commissioners should value and respect indigenous forms of testimony that may be different from archive or written record, including indigenous oral tradition and performance.

## VI. Reporting

*Commissions conclude their work with the compilation of a report that is solemnly presented to the highest authorities and the general public. Reports, typically in written form, but increasingly in several formats (such as video and exhibitions) and versions, include findings relevant to the mandate as well as policy recommendations.*

A commission should consider the following proposed guidelines in the reporting phase:

1. The structure of the report should be meaningful to indigenous communities, and respect their narrative techniques. The contribution of indigenous communities and persons to the findings and recommendations of the commission should be recognized as appropriate and be consistent with guarantees of safety.
2. The report's findings should recognize the dignity of indigenous peoples and clearly state the abuses committed against them are ethically and legally unacceptable. The commission should clearly detail fact, context, political responsibility, and, when appropriate, presumptive individual responsibilities for violations.
3. In addition to recommendations aimed at restoring rights affected by recent violations, the report should include specific attention to transformative action, promoting the full enjoyment of indigenous rights, particularly self-determination, access to land and territory, and cultural rights.
4. The report format should ensure maximum dissemination among indigenous populations, including audio and audiovisual versions; indigenous language versions; educational summaries; and versions highlighting the experiences of specific segments of the indigenous populations.
5. The presentation of the final report to the highest authorities in the state should include solemn ceremonies respecting indigenous customs and symbolism regarding witnessing and justice. The commission should ensure accurate consultation on the precise form in which indigenous communities may want to participate in the presentation: either as participants in national events or with specific events in indigenous territories, or both. The commission should ensure that individual communities receive the final report and are specifically recognized for their participation.

## **VII. Following a Truth Commission**

*After presentation of their report, commissions usually dissolve, entrusting the implementation of any recommendations to successor organizations or existing institutions. Depending on the mandate, governments could be obligated to respond to the commission's findings and recommendations.*

A truth commission focused on the realization of indigenous rights should consider the following proposed guidelines:

1. The legal mandate of the commission should specifically establish a successor institution, subject to the same process of establishment by consultation and consent, used by the truth commission. Such successor institutions should engage in direct dialogue with the government to discuss the implementation of commission's recommendations.
2. Preservation of the commission's records should ensure guarantees of access and use by indigenous communities and persons, respecting the guarantees of privacy and due process afforded to those documents in the existing legal framework. Governments should not use national security considerations to prevent victimized communities access to information necessary to ensure legal remedy.
3. Criminal justice, reparations, or institutional reform recommendations that may affect the rights of indigenous peoples should be carried out on the basis of good faith consultation with them, in order to obtain their free, prior, and informed consent.

<b>STRENGTHENING INDIGENOUS RIGHTS THROUGH TRUTH COMMISSIONS</b> <b>JULY 19-21, 2011</b> <b>5 HANOVER SQUARE, FLOOR 23 NEW YORK</b>		
<p>Tuesday, July 19 <b>Identifying Lessons Learned and Challenges Ahead</b></p>	<p>Wednesday, July 20 <b>Considering the Key Concerns for Truth Seeking in Indigenous Rights</b></p>	<p>Thursday, July 21 <b>Setting New Standards: Truth Commissions and Support for Indigenous Rights</b></p>
<p>9:30 – 10:00 Arrival and informal introductions</p>	<p>9:00 – 9:30 Introduction</p>	<p>9:00 – 9:30 Introduction</p>
<p>10:00 – 11:00 Truth Commissions and Indigenous Rights: What is at Stake?</p> <p>Opening Remarks: Understanding the challenges and opportunities at the intersection of indigenous rights and transitional justice.</p> <p>Eduardo González, <i>ICTJ Truth and Memory</i></p>	<p>9:30 – 10:30 Reflections for Discussion on Indigenous Rights for Truth-Seeking</p> <p>How do indigenous rights for social, political and material empowerment cross into the work of a truth commission? What range of rights violations will a truth commission report on to support indigenous rights? What is the potential of this mechanism to help right these wrongs?</p> <p>Deborah Yashar, <i>Princeton University</i> Pablo de Greiff, <i>ICTJ Research</i></p> <p>10:30 – 11:00 Defining rights and types of violations for truth commissions to address.</p>	<p>9:30 – 11:00 Designing a Truth Commission to Support Indigenous Rights Workshop</p> <p>How can we rethink truth commission operations to best support indigenous rights? A workshop on recommendations for design, establishment, implementation and follow up.</p>
<p>11:30 – 1:00 Indigenous Rights &amp; Truth-Seeking in First Colonization Regions</p> <p>What can we learn from truth commissions in Latin America? What are the successes and where are the failures of the first intersections of Indigenous Rights and truth-seeking?</p> <p>Alvaro Esteban Pop (moderator), <i>UN Permanent Forum on Indigenous Issues</i> Leslie Villapolo, <i>Amazonian Center for Anthropology and Practical Application</i> Marcie Mersky, <i>ICTJ Program Office</i> ICTJ Comments: Milosz Kusz, <i>ICTJ Colombia</i></p>	<p>11:30 – 12:30 Truth Commissions and Indigenous Rights to Land and Resources</p> <p>What is the potential and what are the challenges of land and resource rights as a topic of investigation for truth commissions?</p> <p>César Rodríguez-Garavito and Yukyan Lam <i>University of the Andes and DeJusticia</i> Bartolomé Clavero, <i>University of Seville</i></p>	<p>11:30 – 12:30 Next Steps: Where do we go from here? What networks, structures and strategies will take this work forward?</p> <p>Claire Charters, <i>UN Expert Mechanism on Indigenous Issues</i> Chandra Roy-Henriksen and Arturo Requesens, <i>UN Permanent Forum on Indigenous Issues</i> Suzanne Benally and Andrew Erueti, <i>Cultural Survival and Amnesty International</i></p>

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<p>2:00 – 3:30 Truth Commissions as a New Approach to Seeking Justice in Settler Societies</p> <p>Understanding the ongoing impacts of the truth commissions in Canada and the US; truth-seeking in Australia and New Zealand.</p> <p>Marie Wilson (moderator), <i>Truth and Reconciliation Commission of Canada</i> Andrew Erueti, <i>Amnesty International, New Zealand</i> Esther Attean, <i>Maine Wabanaki Child Welfare Truth and Reconciliation Commission</i> ICTJ Comments: Lisa Magarrell, <i>ICTJ Program Office</i></p>	<p>2:30 – 3:30 Truth Commissions and the Right to Self-Determination</p> <p>How can truth commissions support self-determination and other political rights of indigenous peoples?</p> <p>Paige Arthur, <i>Consultant</i> Chief Wilton Littlechild, <i>Truth and Reconciliation Commission of Canada, UN Expert Mechanism on the Rights of Indigenous Peoples</i></p> <p>3:30 – 4:00 Right to Self Determination.</p>	<p>2:30 – 3:30 Summary Session: Defining Principles, Setting New Standards</p> <p>What procedural standards and normative concerns should guide a truth commission to ensure it better supports indigenous rights?</p>
<p>4:00 – 5:30 Indigenous Rights and Truth Seeking in the Face of Post-Colonial Nation-Building</p> <p>The challenges and potential impacts of emerging truth commissions and truth-seeking in Indonesia, Nepal, Burma, and Kenya.</p> <p>George Mukundi (moderator), <i>Centre for the Study of Violence and Reconciliation</i> Patrick Pierce, <i>ICTJ Burma</i> Sangeeta Lama, <i>National Indigenous Women's Federation, Working Women Journalist</i> ICTJ Comments: Njonjo Mue, <i>ICTJ Africa</i></p>	<p>4:30 – 7:00 Outreach and Indigenous Rights</p> <p><b>"Granito"</b> Special screening at the Museum of the American Indian followed by a discussion on the challenges and potential of outreach through film to strengthen Indigenous Rights.</p> <p>Refik Hodzic, <i>ICTJ Communications and XY Films</i> Naomi Roht Arriaza, <i>University of California and Project Advisor</i> Marcie Mersky, <i>ICTJ Program Office and Consulting Producer</i></p>	

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