

# CHALLENGES OF TRUTH COMMISSIONS TO DEAL WITH INJUSTICE AGAINST INDIGENOUS PEOPLES

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## I. Introduction: From a general framework for truth commissions to reflecting on how best to address specific contexts

Truth commissions are still being created around the world in order to redress human rights violations, in accordance to the right of victims to an effective remedy and the right to know the truth<sup>2</sup> to the fullest extent possible.<sup>3</sup> As non-judicial official bodies, which investigate violent historical periods often silenced or denied, truth commissions recognize the dignity of the victims, and propose policies to prevent<sup>4</sup> more violations from happening in the future. Further to that purpose, the recommendations of truth commissions generally seek to identify the causes of the violations, determining patterns of abuse and preventing recurrence.<sup>5</sup>

Based on the experiences of many past truth commissions, the best practices and legal standards have been systematized to provide

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2 The right to know the truth includes the establishment of the identity of perpetrator, causes, circumstances and facts surrounding the violations and the whereabouts of the victims in case of forced disappearances.

3 Varney & Gonzalez (Eds.), Thematic Studies on Truth Commissions. Brasília: Brazilian Amnesty Commission, Ministry of Justice; New York: International Center for Transitional Justice, 2011m, p.1. The right to truth has been increasingly recognized by various UN resolutions, expert reports, and national courts, regional and international decisions. See, United Nations Commission on Human Rights. Resolution on the Right to Truth. A/HRC/RES/9/11, United Nations Commission on Human Rights. Promotion and Protection of Human Rights. Study on the Right to the Truth. Report of the office of the United Nations High Commissioner for Human Rights. E/CN.4/2006/91.

4 Varney & Gonzalez (Eds.), Thematic Studies on Truth Commissions, p. 9.

5 See UN Office of the High Commissioner For Human Rights, “Rule of law tools for post-conflict states. Truth Commissions”, 2006, p. 1.

a general framework for establishing a truth commission, as well as for helping to identify inauthentic commissions created to cover up lack of political will to conduct prosecutions. However, relying too heavily on this framework poses risks of limiting creativity or imposing general formulas that might not be adequate for some specific situations,<sup>6</sup> since truth commissions modeled on this framework may be inadequate to redress serious human rights violations in some contexts. Therefore, it is important to point out that while the many tools and practice guidelines<sup>7</sup> for truth commissions that have been adopted over time are very important as a general framework on how truth commissions should be established, the fulfillment of these guidelines are not *per se* sufficient, and a thoughtful reflection on how to address specific contexts that might pose concrete challenges is imperative.

In that sense, we have seen that truth commissions are going further than the traditional focus on individual human rights violations often affecting physical and mental integrity (*i.e.* torture, forced disappearances, murders, or sexual violence) to tackle collective human rights violations to economic, social, cultural and environmental rights.<sup>8</sup> For instance, some truth commissions have been starting to look at structural racial inequality<sup>9</sup>, environmental damage,<sup>10</sup> as well as serious human rights violations experienced by Indigenous Peoples around the world.<sup>11</sup>

This paper examines some of the challenges that truth commissions face when addressing Indigenous Peoples' issues, reflecting what measures have to be taken into account in order to establish truth

6 González-Cueva, Eduardo, *Where are truth commissions headed?* in Transitional Justice: Handbook for Latin America/Editor Felix Reategui – Brasilia: Brazilian Amnesty Commission, Ministry of Justice; New York: International Center for Transitional Justice, 2011, p. 315.

7 E.g. UN Office of the High Commissioner For Human Rights, “Rule of law tools for post-conflict states. Truth Commissions”, 2006

8 *Id.*, p. 11

9 Such is the case of the Metropolitan Detroit Truth & Reconciliation Commission on Racial Inequality, in the State of Michigan, United States. See <http://www.metrodetroittruth.com/>

10 The Center for Earth, Energy and Democracy aims to create a truth commission to acknowledge and reconcile the losses associated with environmental harms. See <http://www.ceed.org/>

11 Truth commission looking into violations experienced by Indigenous Peoples has been established in Chile, Canada and the State of Maine, United States.

commissions that respect the rights, perspectives and needs of Indigenous Peoples.

## **II. The needs, perspectives and rights of Indigenous Peoples as reality and a normative framework to take into account when establishing truth commissions**

Indigenous Peoples are among the groups most affected by contemporary conflicts as well as unresolved historic injustice involving their territories, resources and cultures, and often this situation is aggravated by their weak voice in the political arena. Therefore, even when societies decide to confront the legacy of mass atrocity, the violation of Indigenous Peoples' rights is often inadequately addressed.<sup>12</sup>

Some truth commissions have already focused on addressing cases of violence against Indigenous People such as Guatemala<sup>13</sup>, Peru<sup>14</sup> and Paraguay.<sup>15</sup> Recently, new truth commissions have emerged investigating contexts in which Indigenous Peoples were targeted by serious human rights violations such as Chile<sup>16</sup>, Canada<sup>17</sup>, and the State of Maine in the

12 ICTJ, *Strengthening Indigenous Rights through Truth Commissions: A Practitioner's Resource*, ICTJ (2012), 3. Available at <http://ictj.org/publication/strengthening-indigenous-rights-through-truth-commissions-practitioners-resource>, p.1

13 The Commission for Historical Clarification took place from 1997 until 1999. Even though Indigenous Peoples were not mentioned in the mandate, the truth commission investigated crimes committed against Indigenous Peoples and addressed them separately in the final report.

14 The Truth and Reconciliation Commission operated from 2001 until 2003 with a mandate that explicitly included investigating violations to collective rights of Indigenous Peoples.

15 The Truth and Justice Commission worked from 2004 until 2008. The commission found that Indigenous Peoples were among the most victimized during the dictatorship, suffering from massacres, trafficking of Indigenous children, and seizure of their lands.

16 The historical Truth and New Deal Commission took place in Chile from 2000 until 2004 preparing as a result a report on the historical relationship between Indigenous Peoples and the Chilean State and making recommendations for more inclusive governmental policies.

17 The Truth and Reconciliation Commission of Canada, in operation since 2009, was established to look into abuses suffered by Indigenous Peoples through forced assimilation during the life of residential schools system set up by the Federal Government in 1874.

United States.<sup>18</sup> In Colombia, for example, while there has not yet been a national, comprehensive truth commission, some public and private institutions have initiated truth-telling initiatives in a context in which Indigenous Peoples' rights have been severely violated.<sup>19</sup>

This tendency to focus on abuses suffered by Indigenous Peoples has coincided with the international community's recognition of Indigenous Peoples' human rights. For instance, the International Labor Organization (ILO) adopted Convention 169<sup>20</sup> which recognizes, *inter alia*, the State's responsibility for the participation of Indigenous Peoples,<sup>21</sup> the duty of consultation,<sup>22</sup> that the application of national legislation shall take into account their customs and customary law<sup>23</sup> and the establishment of measures to ensure mutual understanding in legal proceedings.<sup>24</sup> In addition, The United Nations Declaration on the Rights of Indigenous Peoples<sup>25</sup> recognizes that Indigenous Peoples have the right to maintain and strengthen their legal, political, social, economic and cultural institutions and to participate in the State in which they live<sup>26</sup> and the State's obligation to provide mechanisms to prevent and repair any action that deprives them of their integrity as

18 The Child Welfare Truth and Reconciliation Commission is working from 2012 to look into the legacy of abuse under the Indian Adoption Project which caused hundreds of Indigenous children to be taken from their families and tribes to be placed in foster homes managed by the State in the 1950s and 1960s.

19 For instance in Colombia, the civil society has organized many memorialization and truth-telling initiatives from diverse communities and NGOs. As a result, databases on human right violations and fact-collection exercises have provided information that could advance truth-telling processes. An official truth commission should build on the expertise and experience of these civil society-led initiatives, taking into account the general framework for truth commissions, and furthermore being informed by a holistic analysis of relevant social and political dynamics, including a thoughtful analysis of how to redress the human rights violations of Indigenous Peoples who have suffered torture, extrajudicial killings, displacement, etc. See, ICTJ, Roberto Vida-Lopez, *Truth-Telling and Internal Displacement in Colombia*, available at <http://ictj.org/sites/default/files/ICTJ-Brookings-Displacement-Truth-Telling-Colombia-CaseStudy-2012-English.pdf>, p. 9.

20 See the Convention 169, International Labor Organization, art. 1.1.

21 *Id.* Art. 2.

22 *Id.* Art. 6.

23 *Id.* Art. 8.1.

24 *Id.* Art. 12.

25 *Id.*

26 *Id.* Art. 7 y 8.

distinct peoples with distinct cultural and ethnical identities, and their possession of lands, territories and resources.<sup>27</sup>

This normative framework, in addition to the specific perspectives and needs that Indigenous Peoples have in different contexts compel us to a thoughtful reflection on what are the challenges that truth commissions as a transitional justice tool pose when dealing with Indigenous Peoples' issues, and how truth-telling initiatives can be adapted to adequately serve in redressing human rights violations suffered by Indigenous Peoples.

### **III. Rethinking truth commissions in the light of the Indigenous Peoples' rights**

Truth commissions have significant potential to help remedy abuses suffered by Indigenous Peoples and strengthen their rights. Implemented properly, with strong guarantees of independence, integrity and adequate leadership, as well as considering the rights, perspectives and needs of Indigenous Peoples, truth commissions can help strengthen the rights of Indigenous Peoples by fulfilling the right to know the truth, recognizing the dignity of Indigenous Peoples and proposing policies to prevent further violations. In this sense, truth commissions can strengthen the recognition of sovereignty, the identity and Indigenous perspectives and respect for their civil, political, economic, social and cultural rights as well as their rights to ancestral lands and natural resources.

Truth commissions often have found serious human rights violations against Indigenous Peoples, have recognized the historical value and cultural identities of Indigenous Peoples, and have also proposed reparation measures and the establishment of mechanisms for the full realization of their rights. Furthermore, these truth-seeking mechanisms can help inform non-Indigenous society, which has largely turned its back on the needs and rights of Indigenous Peoples.<sup>28</sup>

<sup>27</sup> *Id.* Art. 8.

<sup>28</sup> For instance, in Peru, after the work of the Truth and Reconciliation Commission, a historical documentation centre was opened that exhibited iconic photographs from the conflict. This exhibition called "*Yuyanapag*" (To remember) had a profound impact on the Peruvian society.

However, the traditional model of truth commission requires consideration of several features in order to adapt this tool to the context, rights and perspectives of Indigenous Peoples.<sup>29</sup> Truth commissions have generally been established as a tool to reaffirm the goals of reconciliation and unity within a nation-state.<sup>30</sup> A model, focused only on the reconciliation and unity within a nation-state that does not properly acknowledge, consult and warrant participation of the Indigenous Peoples, may not be best for commissions working with people who claim an identity as “First Nations” and should be recognized as such.<sup>31</sup>

Truth commissions have generally focused on recent abuse cases, which can be recalled by witnesses who directly lived those experiences. Indigenous Peoples have suffered historical violence, whose history is usually transmitted by oral tradition, so existing methods of truth commissions may be insufficient. In addition, Indigenous Peoples have suffered violations that affected not only individual rights of its members, but their collective rights affecting their communal way of life and identity.

Consequently, truth-seeking mechanisms involving Indigenous issues must go beyond one-way analysis focused on individual violations to tackle the violation of collective rights and should go beyond the State, as well as consider other sources beyond the written and archival such as the oral tradition and performance of rituals and ceremonies.<sup>32</sup> In order to properly implement this, truth commissions should involve Indigenous Peoples during all phases of their operations, ensuring consultation to seek to obtain free, prior and informed consent, respecting their representative institutions and providing attention to the needs of Indigenous People, women and children.

29 *Id.* ICTJ, Strengthening Indigenous Rights through Truth Commissions.

30 It is important to distinguish those truth commissions that have been created with the specific goal of analyzing Indigenous issues, such as Chile, Canada or Maine, from those that have analyzed Indigenous issues in a much broader context.

31 The term “First Nations” it is often used in the context of Indigenous Peoples in Canada. Other Indigenous Peoples around the world use this term referring to national identities that differ from the State in which they live.

32 *Id.* ICTJ, Strengthening Indigenous Rights through Truth Commissions. p. 3.

## **1. Questioning some traditional assumptions of truth commissions**

### **1.1. Focus on the national identity of a State**

Truth commissions are often designed to achieve national reconciliation projects: “a process of setting the record straight and re-establishing trust among communities, reaffirming a damaged national identity”.<sup>33</sup> While reconciliation within a country is a worthwhile goal, from an Indigenous perspective it should not mean to strengthen one dominant national identity at the exclusion of others, as many conflicts began with patterns of dominance or denial of multi-ethnic societies.

The UN Declaration on the Rights of Indigenous Peoples recognizes the right of Indigenous Peoples to affirm their own nationhood, in accordance with their traditions and customs, while retaining the right of citizenship in the state in which they live. This distinction is relevant when discussing the potential function of reconciliation of certain truth commissions conceived with a “nation-to-nation” focus instead of a “mono-national” approach. In this sense, truth commissions should set new standards of practice that go beyond the general framework of traditional truth commissions, and ensure the Indigenous Peoples’ right to free, prior, and informed consent for each step of the process; recognizing the value of customary Indigenous legal practices alongside the mainstream law.<sup>34</sup>

For instance, the Historical Truth and New Deal Commission in Chile found that Indigenous Peoples living in Chile were descendants of the original occupants in Chilean territory and determined that the Chilean nation was established in an attempt to assimilate native peoples by using violence, denying their identity, with serious consequences for Indigenous Peoples. In that sense, the Commission recommended seizing this historic opportunity for understanding between the State, society and the different Indigenous Peoples’ groups, recognizing the cultural diversity and multi-ethnic reality of Chilean society. While

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*, p. 4.

there is still much to be done in this respect, this is a small first step on the right direction.

A truth commission that deals with injustice against Indigenous Peoples has to take into account the different nations existing within the State's territory, without intending to strengthen the dominant national identity.

## **1.2. Focus in an individualistic form of analysis**

Truth commissions have often focused on violations such as torture, killings, and forced disappearances. This approach may not be sufficient for establishing how individual violations impact a community or to confirm whether individual violations targeted Indigenous Peoples through systemic persecution, forced displacement, or genocide. An exclusive focus on individual rights may relegate attention to violations of economic, social, cultural or environmental rights. This could generate problems when examining Indigenous rights which cannot be examined without addressing other connected issues, such as access to their lands, territories and resources and their right to practice their languages, rituals, and religious or spiritual beliefs. Abuses such as occupying ancestral territories, forcibly assimilating children into other cultures or forbidding the use of traditional languages, ceremonies, and technologies, not only harm individual rights but also Indigenous identities as effectively as physical persecution<sup>35</sup>.

For instance, the Commission for Historical Clarification in Guatemala has identified many abuses against Indigenous Peoples including aggressions against elements of deep symbolic significance for native peoples, such as the extrajudicial killing of elders, custodians of traditional knowledge, or the destruction of cornfields.<sup>36</sup> These violations exceed the concept of individual rights to constitute violations to collective rights having serious negative impact on the identity of Indigenous Peoples, and perturbing the transmission of their culture from generation to generation.

35 *Id.*

36 See Final Report para. 122. Available at <http://shr.aaas.org/guatemala/ceh/report/english/toc.html>.



In consequence, truth commissions looking into abuses suffered by Indigenous Peoples should go beyond violations of individual rights to comprehensively address violations of economic, social, cultural or environmental rights.

### **1.3. Focus on recent violations**

Traditionally, truth commissions focus on recent violations as they work mainly with individual living witnesses. For Indigenous Peoples, such an approach might be inadequate to address long-term human rights violations as well as experiences of marginalization and persecution. Historical abuses suffered by ancestors might still remain in the memory and oral traditions of the living and should be addressed for the community to adequately recognize and redress those experiences. The mandate and inquiries of truth commissions should focus on injustices, even if abuses took place in a distant past, questioning official national historical narrative.

For instance, the Truth and Reconciliation Commission in Canada is looking into abuse suffered by Indigenous Peoples through forced assimilation resulting from residential schools since 1874. The experiences of residential schools include prohibition of the use of the Indigenous languages and cultural practices and often sexual, physical and psychological abuse generating long-lasting negative impacts transmitted generation after generation. Other examples of abuses toward Indigenous Peoples—such as those suffered during colonization—are able to pose even more significant challenges given that they have happened long time ago, on a continued basis. Nevertheless, this also becomes an opportunity for Indigenous Peoples to tell their stories and give their history the same consideration given to the national narratives.

### **1.4. Focus on archival and written sources**

Truth commissions traditionally rely on oral sources, especially during their inquiries and outreach. However, these sources are translated into written statements and reports, a more appropriate format for State use and policy making. In Indigenous communities,

oral tradition plays an important role as a source of law, a basis for claims and a guarantee of action. The performance of ceremonies and rituals to witness or commemorate is an important element in validating and dignifying storytelling. Truth commissions should understand and incorporate such manifestations. For instance, the Truth and Reconciliation Commission of Canada has been carrying out a vast public education campaign, holding more than two hundred conferences and commemorative events in which victims tell their stories, as well as theatre and sports events.

This approach would demand discussing: “How can we assess the validity of oral tradition as evidence? How do different cultures treat time and causality in the narratives of the past? Who speaks for a community, and how might that differ from community members’ individual accounts?” On the basis of these reflections, truth commissions should devise innovative techniques for taking statements, processing data, and developing standards of evidence. Similarly, learning from Indigenous Peoples on a contextual basis, on the most appropriate form to transmit information should inform a particular truth commission’s approach on outreach and dissemination of findings and conclusions.<sup>37</sup>

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

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

A broad and ongoing consultation with constituent groups is crucial to the success of truth commissions. This principle already enjoys consensus among transitional justice practitioners, but it is especially critical when Indigenous Peoples are involved. Governments have a duty to consult in good faith and to seek to obtain free, prior, and informed consent for any legislative or administrative measure affecting Indigenous Peoples. 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.

<sup>37</sup> *Id.* p.4.

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.

## **2.2. 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 on the Rights of Indigenous Peoples explicitly recognizes the rights of Indigenous women and the need for specific attention to 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.

### **2.3. 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 who 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.<sup>38</sup>

## **IV. Conclusion**

We are at the beginning of a long road toward dealing with injustice against Indigenous Peoples. Truth commissions are useful tools to further this important and challenging endeavor. While truth commissions have already been used to investigate human rights violations experienced by Indigenous Peoples these initiatives often were not the result of a conscious effort. There is still much work to be done on defining how truth commissions that focus on the rights

38 For further recommendations, see *Guidelines for the Observance of Indigenous Rights in Truth Commissions* in ICTJ, *Strengthening Indigenous Rights through Truth Commissions: A Practitioner's Resource*. ICTJ (2012). Available at <http://ictj.org/publication/strengthening-indigenous-rights-through-truth-commissions-practitioners-resource> p. 49.

of Indigenous Peoples have to look like in order to give concrete expression to the right to know the truth, recognize the rights and dignity of Indigenous Peoples and propose policies that prevent further abuses.

While a general framework and recommendations on how to establish truth commissions help to guarantee independence, and integrity and adequate leadership, it is also important to take into account the needs, perspectives and rights of Indigenous Peoples. We are pleased to see an increasing attention of academics, practitioners as well as NGOs and the United Nations<sup>39</sup> on these topics, by analyzing experiences and lessons learned in order to come up with guidelines and recommendations to facilitate properly addressing these issues. These resources should be taken into account when establishing truth commissions involving Indigenous Peoples. However, it is worth highlighting that these general frameworks should not intend to substitute a proper analysis of the context in which this institution will operate, nor the free decision-making process by Indigenous Peoples whom have to be consulted in good faith to obtain free, prior and informed consent in all the different phases of a given truth-seeking process.

39 See the Study on the rights of Indigenous Peoples and truth commissions and other truth-seeking mechanisms on the American continent, E/C.19/2013/13 in which my colleague Eduardo Gonzalez Cuevas and I had the privilege to contribute on behalf of the International Center for Transitional Justice (ICTJ).