

## INDIGENOUS SELF-DETERMINATION AND POLITICAL RIGHTS: PRACTICAL RECOMMENDATIONS FOR TRUTH COMMISSIONS<sup>1</sup>

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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>2</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

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2 See Anita Isaacs, "At War with the Past: The Politics of Truth Seeking in Guatemala," *International Journal of Transitional Justice* 4, no. 2 (2010): 251–74.

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.

## **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.
- Woman, 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 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>3</sup>

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>4</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

3 Author interview with Jeff Corntassel, June 22, 2011.

4 See Issacs, "At War with the Past."

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 aborigines' prior occupation of the area.<sup>5</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>6</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>7</sup>

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*

5 For a successful instance of this kind of recognition, see Council for Aboriginal Reconciliation, *Walking together the First Steps* (Canberra: Australian Government Printing Service, 1994), Ch. 19; available at [www.austlii.edu.au/au/other/IndigLRes/car/1994/1/168.html](http://www.austlii.edu.au/au/other/IndigLRes/car/1994/1/168.html).

6 Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Aldershot, UK: Ashgate Publishing, 2008), Ch. 6.

7 Ibid.



*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>8</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

<sup>8</sup> See Jérémie Gilbert, "Indigenous Peoples and Peace-Agreements: Transforming Relationships or Empty Rhetoric?" in Gaby Ore Aguilar and Felipe Gomez Isa, Rethinking Transitions: Equality and Social Justice in Societies Emerging from Conflict (Antwerp/Cambridge: Intersentia, forthcoming 2011).

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>9</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>10</sup>

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>11</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.*

9 Correspondence between the author and Graeme Simpson, June 30, 2011.

10 *Chega! Final Report of the Commission for Reception, Truth, and Reconciliation in Timor-Leste* (Dili, 2006), Part 2, pp. 12–14; available at [www.cavr-timorleste.org/en/chegaReport.htm](http://www.cavr-timorleste.org/en/chegaReport.htm).

11 For a review of literature evaluating the impact of the CAVR, see Amy Seiner, "Traditional Justice as Transitional Justice: A Comparative Study of Rwanda and East Timor," *Praxis: The Fletcher Journal of Human Security* 23 (2008): 78–80; available at [fletcher.tufts.edu/praxis/archives/xxiii/PRAXIS-TraditionalJustice.pdf](http://fletcher.tufts.edu/praxis/archives/xxiii/PRAXIS-TraditionalJustice.pdf).

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>12</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>13</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>14</sup> This is especially true in the

12 Cultural Survival, “Guatemala Radio Project”; available at [www.culturalsurvival.org/current-projects/guatemala-radio-project](http://www.culturalsurvival.org/current-projects/guatemala-radio-project).

13 Author interview with Refik Hodzic, September 10, 2008.

14 On this point, see Paige Arthur, “‘Fear of the Future, Lived through the Past’:

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, than 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.

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

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Pursuing Transitional Justice in the Wake of Ethnic Conflict,” in Paige Arthur, ed., Identities in Transition: Challenges for Transitional Justice in Divided Societies (New York: Cambridge University Press, 2010), 291.

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 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>15</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>16</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>17</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.

15 See Council for Aboriginal Reconciliation, *Walking together the First Steps*, Ch. 19.

16 Daniel Williams, "Cathy Freeman," *Time Magazine*, Dec. 25, 2000; available online at [www.time.com/time/world/article/0,8599,2047953,00.html](http://www.time.com/time/world/article/0,8599,2047953,00.html).

17 Author interview with Damien Short, July 1, 2011.

### 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.

*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>18</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>19</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>20</sup> Indeed, in Canada, the 1876 Indian Act shut out First Nation women from political

18 Commission for Historical Clarification, "Conclusions" in *Guatemala: Memory of Silence*, English trans. (Washington, DC: AAAS, 1999).

19 See Report of the Royal Commission on Aboriginal Deaths in Custody, Vol. 2, Ch. 10.3.

20 See, e.g., Cynthia C. Wesley-Esquimaux, "Trauma to Resilience: Notes on Decolonization," in Gail Guthrie Valaskakis, Madeleine Dion Stout, and Eric Guimond, eds., Restoring the Balance: First Nations Women, Community, and Culture (Winnipeg: University of Manitoba Press, 2009).

leadership and influence, when hitherto they held sway as hereditary chiefs, clan mothers, or through women's councils.<sup>21</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 century by forcing aboriginal peoples off their land, pushing them to the edge of starvation, and establishing “protectorates,” among others.<sup>22</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>23</sup> It can also serve as a model for analyzing other situations.

21 Kim Anderson, “Leading by Action: Female Chiefs and the Political Landscape,” in *ibid.*, 100.

22 See Human Rights and Equal Opportunity Commission, *Bringing them Home* (Sydney, 1997), esp. Part 2, Ch. 2.

23 Royal Commission into Aboriginal Deaths in Custody, *National Report*, Chs. 10 and 11.



*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>24</sup>

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.

<sup>24</sup> Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples* (Ottawa, 1996); available at [www.ainc-inac.gc.ca/ap/pubs/rpt/rpt-eng.asp#chp4](http://www.ainc-inac.gc.ca/ap/pubs/rpt/rpt-eng.asp#chp4).

#### **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>25</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

<sup>25</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 Damien Short, Reconciliation and Colonial Power, 125–27.

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 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>26</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>27</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

26 Kim Anderson, "Leading by Action: Female Chiefs and the Political Landscape," 101.

27 Sandra Brunnegger, "From Conflict to Autonomy in Nicaragua: Lessons Learnt" (London: Minority Rights Group, April 2007), 5.

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.