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Standards and Policies for Conflict Resolution, Truth, Transitional Justice and Reconciliation

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Towards Standards and Policies on the Use of Transitional Justice to Advance the Rights of Indigenous Peoples

Summary

The field of transitional justice has grown exponentially, reflecting the states' acceptance of their normative obligations, and also, pragmatically, as a policy that has proven productive in the areas of peacebuilding and strengthening of the rule of law. In its expansion, the field has included progressively the experiences and rights of populations in conditions of vulnerability, including Indigenous peoples. In a parallel process, Indigenous Peoples have made normative and practical strides toward the international recognition and implementation of their rights; including several strategies for their protection, such as mobilization and litigation.

Eventually, these two developments have converged, as Indigenous Peoples adopted elements from transitional justice as tools to advance their rights, and transitional justice has initiated what can be a challenging process to decolonize its assumptions and practice, fully integrating the perspectives and wisdom of indigenous peoples.

1. The evolution of transitional justice, from harms related to conflict to systemic harms

The field of transitional justice has several, often conflictive, genealogies[1], but its exponential growth starting in the 1980s was linked to a wave of democratization in Southern Europe and Latin America: the question of how to deal with the abuses committed during authoritarian regimes was originally posed in binary terms, between amnesties, like that adopted in Spain, and comprehensive prosecution of former leaders, like the trials in Argentina.

The combination of amnesty laws, prosecutions, reparation processes, truth commissions and reforms, principally in the security forces, would come to be understood as "justice in times of transition"[2]. It proved to be an attractive proposal, both as a policy that allowed civilian elites to manage the demands of a complex political transition, and as a normative commitment from the State regarding human rights obligations.

The perceived success of transitional justice seeped into the field of transitions after violent conflict. Certainly, this was nothing new: factually, after World War II, there were judicial processes that we may understand as precursors for transitional justice. But the novelty in 1992,

[1] Paige Arthur: How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice. Human Rights Quarterly Vol 31, Num 2, May 2009
[2] Ruti Teitel: Transitional Justice. Oxford University Press, 2000

when the UN sponsored the creation of the Truth Commission in El Salvador[3], was that a holistic process was identified including justice, truth, reparation and institutional reforms, interconnected with each other. Also, the lessons learned in the political transitions and even the seductive name of "commission on the truth" was transposed to new scenarios.

Over time, transitional justice was adopted as an indispensable approach in the field of peacemaking and peacebuilding. The UN Secretary General adopted in explicit linkage to the treatment of armed conflict and its legacies[4]. In fact, a growing practice sedimented in key principles that have become standards that the international community demands to ensure the legitimacy and necessary support to peace agreements around the world.

The focus of transitional justice in authoritarian regimes or in armed conflict assumed implicitly that TJ would answer to exceptional situations in the life of a nation: interruptions of the rule of law and the peace, moments of incomparable breakup of the social rules that posed the challenge of going back to a previous situation of peace and legality. That is perhaps why the concept of "reconciliation" became so significant: attractive for political leaders concerned about the necessary pacts of a transition, perhaps less so for victims focused on their rights.

The field proved to be quite ambitious, expanding toward what was at some point called "transitional justice without transitions", that is, implementing the institutions of TJ such as truth commissions, reparations, trials, institutional reforms, or a part of them while a conflict was still active[5]. 12 years before the peace accord between the Government of Colombia and the FARC guerrilla, that country implemented special criminal procedures, truth and reparation processes, as paramilitary groups conducted a controversial demobilization that did not guarantee peace.

Soon enough, a different non-transitional situation became the focus of debates in the field. Situations of ongoing injustice and an unresolved conflictive past in societies that were otherwise peaceful and democratic. If the international community developed such an investment of resources and support to transitional justice in countries of the Global South ravaged by conflict, shouldn't it explore the responsibilities of the advanced economies and the former colonial powers?[6] This has proven quite a difficult proposition and, with the exception of certain declaratory apologies from leaders of the North[7], we still need to see action regarding the recognition of colonial harm in any way consistent with the mechanisms of transitional justice.

[3] El Salvador – Mexico Peace Agreements. Provisions Creating the Commission on the Truth. April 27 1991
[4] UN Secretary General. Guidance Note: United Nations Approach to Transitional Justice. March 2010
[5] Catalina Botero, María Paula Saffon, Rodrigo Uprimny. ¿Justicia transicional sin transición? Verdad, justicia y reparación para Colombia. Bogotá 2006
[6] International Center for Transitional Justice. Decision in Mau Mau Case Strengthens the Right to Reparations of all Victims of Torture. 10 May 2012
[7] Kabena Hambira, Miriam Gleckman-Krut. Germany Apologized for Genocide. It's Nowhere near Enough. The New York Times. July 8, 2021

However, a few countries were able to implement mechanisms of transitional justice to look into their own long-term, historical injustices regarding the treatment of Indigenous Peoples. Australia[8], Chile[9], the USA[10] and Canada[11] established truth-seeking institutions to review the relationship between Indigenous Peoples and the settler state. New Zealand established a permanent commission[12] to review complaints about the transgression of treaties between the Crown and the Aboriginal peoples.

The case of our hosts, here in Chile, is illustrative of how transitional justice was soon perceived as a tool in the repertoire of mechanisms to ensure a better relationship between the State and Indigenous Peoples. Chile had established two successive truth commissions to look into human rights violations committed during the period of the Pinochet military dictatorship (1973-1990), as well as reparations processes and prosecutions. It was only an extension of those initiatives that a "Commission on Historical Truth and a New Deal" would be established, with a membership representative of the different Indigenous peoples of Chile.

The Canadian Truth and Reconciliation Commission did not review the entirety of the relationship of First Nations and the Canadian State; it only focused on one conduct: the forced assimilation of indigenous children through so-called Indian Residential Schools, typically run by religious institutions. A judicial settlement[13] between Canada, the Christian churches of the country and the First Nations resulted in the implementation of a 4 billion dollar reparation program and the creation of the TRC. The legacy of the commission has been significant, both in Canada, where it was at the basis of additional inquiries, and internationally, where its visibility has resulted in new acts of recognition, such as the recent Papal apology[14] to the First Nations.

2. **The thematic evolution of transitional justice**

Transitional justice as originally conceived, around the treatment of authoritarian abuse and armed conflict, focused on the most serious human rights violations, understood as those crimes that affected non-derogable rights, and that have been universally condemned in international human

[8] Bringing Them Home. Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families. April 1997
[9] Informe de la Comisión de la Verdad Histórica y Nuevo Trato. 28 de octubre 2003
[10] Beyond the Mandate. Continuing the Conversation. Report of the Maine-Wabanaki State Truth and Reconciliation Commission. 2015
[11] Honoring the Truth, Reconciling for the Future. Summary of the Final Report of the Truth and Reconciliation Commission of Canada. 2015
[12] New Zealand Government. Treaty of Waitangi Act. 1975
[13] Indian Residential Schools Settlement Agreement. May 8, 2006
[14] National Post. Read the Full text of Pope Francis' Apology to Residential School Survivors. July 25,2022

rights treaties. The thematic scope of truth commissions, reparations programs and trials so far has always included a combination of conducts such as arbitrary executions, forced disappearance of persons, arbitrary imprisonment, torture, sexual violence, forced recruitment and other[15].

Since these crimes were committed against political opponents or combatants, the initial transitional justice processes adopted a generic understanding of the victim: the human person, victim of arbitrary power that affected fundamental rights. This focus left out violations of human rights that did not address the main personal protections of freedoms and integrity. The celebrated South African Truth and Reconciliation Commission, for example, examined a number of atrocities committed under Apartheid but not the act of Apartheid itself[16]: the infamous zone laws, the arbitrary expropriation of Black property, the anti-miscegenation prohibitions, the mass of legislation denying economic, social and cultural rights to the majority of the population.

Transitional justice was traversed by those debates early on. Violations of Economic, Social and Cultural Rights were significant not just in themselves, but because they were often at the root of the conflicts that resulted in serious human rights violations: dictatorships were established to deny economic rights, rebellions were fought in the name of cultural rights. The massive phenomenon of corruption was also important in this connection, as authoritarianism and war were generally the breeding ground for massive grand-scale corrupt practices.

Corruption had figured notoriously in the transitional justice process in The Philippines after the Marcos dictatorship[17]: the judicial processes against the Marcos family and their accomplices included their acts of embezzlement, and the country was diligent in pursuing the recovery of money absconded in accounts abroad. The Truth Justice and Reconciliation Commission of Kenya was the first to include corruption and violations of ESCR explicitly in its mandate[18]. Certainly, it resulted in a massive scope to investigate and no little difficulties, but it created an important precedent.

Another area of thematic expansion of transitional justice was the attention to the specific experiences, rights and needs of groups of victims. The focus on dictatorships and war had resulted in a generic vision that did not properly reflect the realities of the world of victims. The experience of political prisoners and combatants, typically male, for example resulted in justice processes that

[15] Eduardo Gonzalez, Elena Naughton, Felix Reátegui. Challenging the conventional. Can Truth Commissions Strengthen Peace Processes? ICTJ, Kofi Annan Foundation, 2014. See also Adam Kochanski. Mandating Truth: patterns and Trends in Truth Commission Design. Human Rights Review Vol 21, 2020.
[16] Mahmood Mamdani. Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa. Diacritics. Vol 32, Num 3/ 4, 2002
[17] Government of The Philipines. Executive Order Num. 1, s. 1986. Creating the Presidential Commission on Good Government. 28, February 1986
[18] Government of Kenya. The Truth, Justice and Reconciliation Commission Bill. 2008

ignored the experiences of women[19], and the pervasive nature of sexual and gender-based violence which typically affected them. The focus on opponents and combatants took out of focus the situation of populations that were not originally involved in conflict and became the most harmed by it, such as indigenous peoples, national minorities, and children.

Sexual violence was included in the work of the international tribunals of Yugoslavia and Rwanda, resulting in landmark cases and inspiring a similar focus on truth commissions: the Peruvian Truth and Reconciliation Commission[20] did not explicitly include sexual violence in its written mandate, but the members of the TRC interpreted their terms of reference to include all forms of sexual violence linked to conflict. The Peruvian commission was also the first to clarify a case of terrorism committed against LGBT persons[21], opening a line of research that was later further developed by the commissions of Brazil[22] and Colombia[23].

During the work of the Sierra Leonean TRC, UNICEF developed specific protocols to work with former child combatants and helped produce a child-friendly version of the commission's report[24]. Soon enough, UNICEF, together with think tanks like the International Center for Transitional Justice (ICTJ) developed detailed standards to include child-friendly procedures in transitional justice mechanisms[25].

It was only evident that this thematic evolution would result in a specific attention to indigenous peoples. The experiences in Australia, Canada, Chile and New Zealand were of critical importance during our reflection at the ICTJ[26] and later at the UN Permanent Forum on Indigenous Issues (UNPFII). Under the presidency of Alvaro Pop, of Guatemala, the Forum commissioned its first report[27] on the experience of truth commissions for the advance of indigenous rights. The report was the first to examine the growing focus of truth commissions in the American continent, which allowed it to reflect on the different historical processes and treatment of indigenous rights in Latin America and North America. Later, the Expert Mechanism on the Rights of Indigenous Peoples at

[19] Vasuki Nesiah. Truth Commissions and Gender. Principles, Policies and Procedures. ICTJ, 2006
[20] Gobierno del Perú. Decreto Supremo 065-2001 Crean Comisión de la Verdad. 2 Junio 2001
[21] José Montalvo Cifuentes "Crímenes de odio durante el conflicto armado interno en el Perú (1980-2000)". *+MEMORIA(S)*. Lima, número 1, 2017.
[22] Comissao Nacional da Verdade. Relatorio Final. Vol 2, Texto 7: Ditadura e homosexualidades. 2014
[23] Informe Final de la Comisión de Esclarecimiento de la Verdad, la Convivencia y la No Repetición. Mi cuerpo es la verdad. Experiencias de mujeres y personas LGBTIQ en el conflicto armado. 2022
[24] UNICEF Sierra Leone. Truth and Reconciliation Commission Report for the Children of Sierra Leone. Child Friendly version 2004.
[25] UNICEF, ICTJ. Children and Truth Commissions. 2010
[26] Eduardo Gonzalez, Joanna Rice. Strengthening Indigenous Rights Through Truth Commissions. A Practitioner's Resource. ICTJ, 2012
[27] UN Permanent Forum on Indigenous Issues. Study on the rights of indigenous peoples and truth commissions and other truth seeking mechanisms in the American Continent. 2013

the Human Rights Council would produce a report on TJ and reconciliation processes[28] with a global scope.

3. Experiences in indigenous participation in transitional justice

3.1. Truth commissions and indigenous peoples

The first truth commission that treated the massive violations suffered by Indigenous Peoples was Guatemala's Historical Clarification Commission (CEH), established by the Oslo Agreements of 1994 between the Government of Guatemala and the URNG guerrilla. Significantly, the formal mandate of the CEH did not make explicit mention of the indigenous experience[29], their cultural specificity or crimes that harmed them. In spite of this generic approach, the CEH established clearly that the crimes committed during the armed conflict had disproportionate impact among the Maya peoples and, moreover, that acts component of the crime of genocide[30] had been committed by the armed forces. The findings of the commission were at the basis of the historic trials that the judiciary of Guatemala would pursue later on against former military leaders, and became a point of symbolic contention in the country, between the Maya communities and the non-indigenous political and social elites.

After the Guatemalan commission, new truth commissions included formally the attention on human rights violations committed against indigenous peoples. In Peru, the mandate explicitly spoke of the collective rights of indigenous communities. In Paraguay[31] and Brazil[32], commissions established to clarify the history of military dictatorships widened the knowledge about the crimes they had committed: while it was so far widely accepted that they had persecuted political opponents, the commissions reconstructed the history of regimes that saw indigenous peoples as obstacles to development and committed calculated crimes to displace, enslave and exterminate them.

The recent truth commission of Colombia (CEV) received not only the mandate to investigate crimes committed against indigenous peoples, but also those committed against all Ethnic peoples,

[28] UN Human Rights Council. Expert Mechanism on the Rights of Indigenous Peoples. Efforts to Implement the United Nations declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation.
[29] Government of Guatemala. Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer. 1994
[30] Guatemala: Memoria del silencio. Reporte de la Comisión de Esclarecimiento Histórico. 1999
[31] Comisión de la verdad y justicia del Paraguay . Informe Final. Tomo III: Violaciones de los derechos de algunos grupos en situación de vulnerabilidad y riesgo. 2008
[32] Comissao Nacional da Verdade. Relatorio Final. Vol 2, Texto 5: Violacoes dos direitos humanos dos povos indigenas. 2014

including Afro-descendants and Rom[33], and ensuring that the procedures of the commission would always include indigenous representatives as commissioners, commission staff and the consent of indigenous communities.

The tendency, though, appears to be not just one of growing inclusion of indigenous peoples, but one of transformation of the commissions themselves. Instead of commissions to examine violations suffered by the general population including indigenous peoples, new commissions are established focused only on the situation of Indigenous Peoples. The Chilean Historical Truth and New Deal commission was a precursor of this trend. Commissions in Canada, the US, Australia, Norway, Sweden, and Finland[34] are developing it.

This potentially signals a change of paradigm, from inclusion of the indigenous focus in transitional justice institutions to the indigenous appropriation of those institutions to make visible their experiences, and to be conducted in accordance to specific truth-seeking and healing practices. What does it mean to seek the truth among indigenous populations? What exactly would it mean to "reconcile" with the dominant population, especially if there is no original state of conciliation to look back to?

In fact, in the Peruvian TRC[35], when we developed our public hearings and research with the Asháninka Nation, in the Central Amazon, we had to develop an intercultural approach for which we had extremely limited previous knowledge. How would we translate key concepts and how would we do justice to the Asháninka cosmovision? We had to find culturally appropriate concepts for "truth" and "reconciliation", and we had to conduct dialogue, from a Western, liberal notion of human rights, with the warrior traditions of the Asháninka, with specific understandings of combat, value of life, and treatment of the dead.

In Australia, the Yoorrook Commission, established in the state of Victoria[36], has departed entirely of the concept of "truth" using the Aboriginal concept of Yoorrook, with the intention, as the commission documents explain to go beyond the mere "gathering" of information to a culturally appropriate practice of "deep listening" grounded on respect, ancestral connection and a specific comprehension of time and place.

3.2. Reparation processes and indigenous peoples

[33] Presidencia de la República de Colombia. Decreto 588 de 2017. Por el cual se organiza la Comisión para el Esclarecimiento de la verdad, la convivencia y la no repetición.
[34] Astri Dankertsen, Malin Ardvidsson. Truth commissions in the Nordic countries. Who is to be recomciled with whom? JusticeInfo.com December 2, 2021
[35] Eduardo Gonzalez. Transitional Justice and Indigenous Peoples in Latin America. Lessons Learned from case studies of Guatemala, Peru and Colombia. Due Process of Law Foundation. 2021
[36] Letters Patent. Establishing the Royal Commission to be known as the Yoo Rook Justice Commission. May 2021

Judicial reparation requires the alignment of extremely unusual factors, including the demonstration of harms after an exhaustive examination of evidence, the application of criteria of monetary compensation that may create unfair results, and the actual possibility to locate assets from the guilty. For Indigenous peoples, who are often marginalized from access to court protection, obtaining reparation through judicial means is even more difficult.

Transitional justice has eased the way into reparations through two different strategies: by establishing nonjudicial administrative systems to demonstrate harm in an expedited manner, and by expanding the form of reparation beyond individual monetary compensation. This is critically important for Indigenous persons and communities, as it creates the possibility of obtaining state transfers and services in a relatively easier form.

In Peru, the Comprehensive Program on Reparations[37] disbursed until 2019 collective reparations to over 1800 communities, mostly in the Andes. The program has obtained the support of community leaders and small city mayors all over the country. Collective reparation in Peru pays a standard amount (33,000 USD for communities harmed by armed violence) but the actual investments with the amount must be decided by the community.

In Canada, the survivors of the Indian Residential Schools received a Common Experience Payment after simply demonstrating having attended the schools, which were assumed to be harmful. Those who wanted to provide additional testimony to demonstrate specific damages could do so, and would receive additional compensation. Canada disbursed over 4 billion CAD in the program.

In New Zealand, the Waitangi Tribunal is a permanent commission of inquiry with the mandate to review complaints of Aboriginal populations and make recommendations that often include reparation. The Tribunal looks into historical offenses as it is created to ensure that a 1840 treaty between the Crown and the Aboriginal peoples is respected.

Reparation is also important for Indigenous peoples, because it has allowed them to advocate for recognition of cultural conceptions when deciding on reparation, including the notion of what is a rights-holder entity[38]. In Colombia, the Supreme Court has recognized that the River Atrato, a body of water in the region of Chocó, inhabited by Indigenous and Afrodescendant communities, has the right to be protected in its ecological integrity, and has been harmed by the convergent action of illegal extractive industries and paramilitary activity.

[37] Julie Guillerot. Reparations in Peru. 15 years of delivering redress. Queen's University Belfast. 2019
[38] Corte Constitucional de Colombia. Sentencia T-622 del 10 de noviembre de 2016

It is difficult to emphasize how important Reparation is to set up a different kind of relationship between Indigenous peoples and the states they live in. The actual form of reparation—monetary amounts or services, individual or collective transfers—is less important than the message it conveys: the recognition of harm caused and the responsibility of the State in providing redress.

3.3. Prosecution and indigenous peoples

Prosecution for gross human rights violations is an area where much needs to happen in order to bridge the chasm between the formal judicial process and indigenous conceptions of justice. Retributive justice, which requires a complex set of procedures to determine individual criminal responsibility and results in a standardized form of carceral punishment, often clashes with conceptions of what injustice is and its consequences.

In Guatemala, the genocide is considered "nimla rahilal"[39], a great suffering causing an irreparable imbalance in the world. No retributive action will mend what has been torn, specifically regarding members of the community that were instrumental for the mass crimes. The futility of punishing with jail those who committed genocide results in a process that uses dialogical processes to lead the offenders back to the community through the understanding of their actions. Similarly, for the Asháninka in Peru, punishment for those who committed brutal crimes would entail an unimaginable suffering that no human process of justice could deliver. In fact, those who committed crimes pay constantly for their actions through suffering that the cosmos delivers in the form of ilness and guilt. As a result, it is better to engage in community-sanctioned rituals of healing that may purify those who participated in killing others.

Still, indigenous activism in transitional justice has not renounced the use of formal justice mechanisms. In the Americas, the role of the InterAmerican Court of Human Rights has been critical to affirm the right of indigenous peoples to judicial redress. Guatemalan cases like *Plan de Sánchez* and *Bámaca Velásquez* have specifically affirmed the obligation of the state to investigate and punish the crimes, and to recognize the importance of cultural rituals that were denied in the process of the atrocity, in particular the treatment of the dead. Also, as a result of indigenous activism, the principle of universal jurisdiction has been used to prosecute individuals responsible for the Guatemalan genocide. In Guatemala itself, the former military leader of the country, Efrain Rios Montt was indicted and tried for genocide.

However, probably the most interesting transitional justice development concerning indigenous rights and prosecutions is the current experiment in Colombia: the establishment of a Special

[39] Lieselotte Viaene. Nimla rahilal. Pueblos indígenas y Justicia transicional: reflexiones antropológicas. Cuadernos Deusto de derechos humanos.Universidad de Deusto, 2019.

Jurisdiction for Peace[40] as a result of the peace accord between the government and the FARC guerrilla. The Special Jurisdiction consists on a system of chambers and a prosecutorial service that provides benefits for perpetrators –both guerrillas and military—who provide complete information about their crimes. When the perpetrators are indigenous persons, the Special Jurisdiction coordinates with indigenous authorities in case they want to exercise their own indigenous jurisdiction, which will prevail. Also, the Special Jurisdiction has indigenous judges, investigators and staff and integrates a methodology of consultation with indigenous organizations. The large quantity of individual cases has resulted in the Jurisdiction grouping conducts by type or region, in what is known as a "macro-case", one of which concerns the Cauca Valley and was organized using testimony and investigations provided by the indigenous organizations of the region.

4. Emerging principles: an agenda for indigenous TJ practice

Transitional justice and indigenous rights have been for some time on a route of convergence. Significant progress has taken place to include crimes committed against indigenous peoples in the scope of TJ institutions, indigenous perspectives are challenging in a constructive manner the assumptions and methodologies of those institutions, and indigenous participation as survivors, partners and leadership in TJ scenarios has grown exponentially. Both communities, transitional justice and indigenous rights have taken steps to explore their interface, and to identify good practices.

Still, there are key areas where further exploration is warranted. The following are recommendations that the UNPFII, the UN Special Rapporteur on the Rights of Indigenous Peoples, the UN Special Rapporteur on the Promotion of the Rights to Truth, Justice, Reparation and Guarantees of Non-Recurrence, the EMRIP and other international organizations such as the Inter American System on Human Rights, could examine. The UNPFII decision to establish an expert group on transitional justice, adopted during its 2022 session, is a step in the right direction to identify lessons learned and good practices.

4.1. Recognizing the specificity of the indigenous experience

The original assumptions and methodologies grounding transitional justice practice do not fully reflect the experience or the wisdom of indigenous peoples. Transitional justice processes have—

[40] Gobierno de Colombia. Ley 1922 de 18 de julio de 2018. Por la cual se adoptan unas reglas de procedimiento para la jurisdicción especial para la paz.

in balance—made a positive contribution to make visible the violations suffered by indigenous peoples, but they have shown their own limitations to address systemic, historic injustice.

In fact, transitional justice processes have typically focused on violations committed during relatively recent historical periods, for which sources of evidence must be strenuously tested according to previously accepted procedure that can be applied to archival material or the testimony of living persons. Such assumptions are insufficient to capture the specificity of long-term historical injustice such as colonization, whose effects remain in the intergenerational memory transmitted through oral traditions and rituals, that are considered valid knowledge for indigenous peoples but would be probably ignored in the regular justice system.

Additionally, transitional justice processes focused on recent history often assumes that, after the resolution of a political conflict in the state, violence will recede for indigenous peoples. In fact, there is no guarantee that that will happen and, in some cases, the contrary is true. Periods of peace or democratization facilitate new processes of colonization and exploitation of natural resources and indigenous territories, exploitation of indigenous persons and generalized violence. Transitional justice institutions that are temporary in nature, such as truth commissions or prosecutions, should, at the end of their tenure, ensure that follow-up mechanisms such as observatories and ombudsperson institutions are established to ensure that the cycle of colonization and violence is effectively interrupted.

An emerging principle of transitional justice and indigenous rights should be to ensure appropriate recognition of the indigenous experience in at least the following ways:

- Formal recognition of the existence of indigenous peoples, organized in specific forms of cultural practice and community governance.
- Formal recognition of the historical harms inflicted to indigenous peoples through colonial and settler processes.
- Explicit recognition of the validity of indigenous justice, including culturally appropriate forms of witnessing, providing evidence, and testing its validity.
- Recognition of indigenous concepts, including the quality of nature as a rights holder, and indigenous peoples as guardians of such rights.

When the methodologies of a transitional justice mechanism and indigenous wisdom appear to be incompatible, intercultural dialogue should take place to find culturally appropriate procedures. Such a dialogue should occurs in a framework of strict respect for the right of indigenous peoples to provide or withdraw consent, and therefore to set up the conditions of their participation.

4.2. Applicability of the UN Declaration of the Rights of Indigenous Peoples to TJ

Transitional justice processes that have a potential to touch upon indigenous rights and interests should be subject to the same rules of consultation and consent that are enshrined for other state policies. This means that a good faith process of consultation needs to take place between the states interested in initiating a process of transitional justice and the legitimate organizations of the indigenous peoples, and that such a consultation should receive the necessary time, resources and political will to be productive, and respected in its results. Such consultation should result in formal protocols agreed on by the parties stipulating concrete methodologies, form of communication, and resolution of controversies.

Transitional justice processes should include violations of indigenous rights in their investigative scope: the destruction or appropriation of territories; the destruction of identity, language, spirituality and wisdom or the prohibition to practice them; attacks against self-government institutions and other violations that are experienced not only at an individual level but that have destructive effects in the existence of the indigenous communities.

After the 2019 EMRIP report on the applicability of the Declaration to processes of reconciliation, further work would take place to identify good practices strengthening specific TJ mechanisms including truth commissions, reparations processes, judicial processes, the search for the missing, and the creation of appropriate memorialization processes.

4.3. Formal inclusion of indigenous restorative and healing practices in all transitional justice mechanisms

Transitional justice operates in social environments characterized by mistrust, and within lives deeply affected by trauma, both direct and intergenerational. Psychosocial support has already been widely identified as a need in those processes, but they are marked by the assumptions of the science and practice of the dominant population, and may not provide culturally appropriate support for indigenous participants.

TJ mechanisms should include indigenous restorative and healing practices in all instances when indigenous persons participate in them. Indigenous healers should be always available to ensure the best conditions for participation of survivors and, when appropriate, to facilitate the interaction between indigenous and non-indigenous participants. All processes of witnessing, providing depositions, interaction with components of the justice system, examination of evidence or locations, should incorporate the time and seriousness to use rituals to solemnize or sacralize them.

It is essential to ensure that a trauma-informed perspective is part of any process of reparations. Reparation should not be a one-off interaction with the state authorities, as in the mere transference

of funds, but the creation of a fundamentally new experience of respectful dialogue, an authentic "culture of reparation"[41] linked to healing and transformation.

4.4. Address the specific needs of indigenous women and youth

Given that traditional patriarchal forms of governance may in some cases weaken the position of women and youth, transitional justice institutions need to ensure that, without bypassing the legitimate indigenous authorities, all efforts are made to ensure the dialogue with indigenous women and youth, both individually and in their organizations. In fact, in many communities the disruption caused by violence from external actors has already resulted in propelling women and youth to leadership roles.

Special effort is needed to ensure that the interaction of TJ institutions with indigenous women and youth does not worsen already existing conflict and trauma. In many cases, violent conflict changed the roles of the different sectors of the community creating resentment and distrust, and the TJ process should not compound such harm.

How to strike the right balance requires additional study and interaction between our two fields: TJ institutions should operate always under the consent of indigenous communities, and in the conditions accepted by them. At the same time, they should always indicate to the community the importance TJ gives to making visible the experiences of women and youth, as well as the respect for specific forms of interaction with those participants.

4.5. Maintain a normative decolonial orientation to ensure real reconciliation

TJ has made significant strides to investigate and make visible harms against indigenous peoples. Also, it has had successful experiences of the participation of indigenous persons communities. Nonetheless, those efforts may not be enough if the orientation of the TJ process is to merely correct some aspects of the unfair relationship between indigenous peoples and the states resulting from colonization.

The structure of the transitional justice field including access to power, material resources and specialized knowledge must be challenged[42]: as the evolution of truth commissions show, indigenous leadership creating commissions in direct negotiation with the state, to focus on

[41] The term "culture of reparations" has been coined by Black US activists in the context of addressing historical harms caused by slavery. It proposes that reparation is an indispensable process that transforms society, based on truth and toward effective reconciliation. See Dr. David Ragland's personal page https://theraglandpagecom.wordpress.com/ last consulted November 21 2022.

[42] Eduardo Gonzalez. Broadening the Past. Decolonizing Our Field. FriEnt. Working Group on Peace and Development. 5 July 2022

indigenous harm and to use indigenous methodology, is a productive and successful way forward. Inclusion is positive, but transformation is better.

This also entails that transitional justice in any of its forms cannot be a “one-off” moment limited to the functioning of an institution, such as a truth commission, but an ongoing process committed to transformation and decolonization. It is important to identify cases where Indigenous peoples lead monitoring, education and reparation experiences after the work of truth commissions or tribunals.

A decolonial orientation ensures that the concept reconciliation is enriched and turns more substantive. Reconciliation should never be forced or expected as some sort of duty from indigenous communities subject to ongoing abuse. On the contrary, it should be seen as a long process of transformation of the relationship between indigenous communities and the non-indigenous, on the basis of respect to human rights and the correction of historical wrongs.