

# Indigenous peoples' participation in transitional justice

From colonisation to autonomy and self-governance

POLICY BRIEF  
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*Addressing rights violations that have their roots in colonial times – as in the case of indigenous peoples – means additional challenges to transitional justice processes due to their extensive time-window. The display and analysis of the history of these historic injustices – often initiated in the colonial period and continued after the independence of the nation state – is essential for understanding today's challenges and transgenerational damage, including contemporary social and economic marginalisation, racism and land claims, among other factors. However, when it comes to justice and reparations, the*

*extensive historical legacy of colonialism poses a number of challenges on transitional justice processes. In most cases restitution is impossible to achieve at full scale as the amount and gravity of rights violations have provoked irrevocable developments. Therefore, restoring the situation to the status before colonisation is virtually impossible. Having said this, by taking into account not only historical injustice, but focusing on their impact on the living conditions of peoples today, justice and reparations can make a huge difference for the survival, prosperity and wellbeing of peoples and individuals.*

## Transitional justice and colonisation

While modern transitional justice is considered to have its main roots in the processes evolving as a result of the break-down of military dictatorships in South America, transitional justice has been used in other processes, after other events. One is the transition from internal armed conflict to peace in Central America. Other examples include the processes after the genocide in Rwanda, the electoral violence in Kenya, as well as truth commissions related to the illegal adoption of children in Chile and the Netherlands. Some of these examples are not as clear as to the type of transition they would represent but they use implements from the transitional justice toolbox.

In many of these historical events, indigenous peoples were affected and to different degrees participated in the processes. In the case of the military dictatorships of Chile and Argentina, the crimes committed against indigenous peoples have been invisible in truth seeking and the public debate, despite the fact that indigenous leaders were subject to the horrors of state terrorism, and the indigenous peoples suffered limitations as to their collective rights, including connected to the dictatorships' favouring of extractive industries. In Guatemala and Peru, indigenous peoples were the most affected by the internal armed conflicts and were to a greater degree part of the transitional justice processes.

In addition to these examples where indigenous peoples have participated as a part of an important event of transition – mostly as victims – there are also processes which are entirely dedicated to injustices committed against indigenous peoples. One such process was the truth commission on boarding schools for indigenous peoples in Canada; others include the truth commissions on the Sami people in Norway, Sweden and Finland. While some commissions are limited in time and scope, others are broader and have the possibility to deal with events hundreds of years back in time –as in the case of the Sami truth commissions and the Royal Commission on Aboriginal Peoples in Canada. In 2022, the government of Greenland (Naalakkersuisut) and the government of Denmark decided to prepare a new government commissioned report of the relationship between Greenland and Denmark in the

period after World War II and up to the present day. The joint declaration states that the planned government commissioned report will “create conditions for reconciliation with the past”. These commissions have the possibility to address a third type of transition – the one from colonisation to autonomy and self-governance.

The legacy of colonialism also includes the oppression of people of African descent and colonial structures that have remained after the withdrawal of the colonial powers, such as the marginalisation of ethnic groups. A number of truth commissions have been established to this end.

In 2020, Belgium set up a parliamentary commission to look into its colonial crimes in the Democratic Republic of Congo, Rwanda and Burundi between 1885 and 1962. This commission was a potential pioneer in Europe, but after two and a half years, there was no political consensus to apologise to the victims, which also stalled its other recommendations, at least for the time being. As for criminal responsibility, a complaint filed against Belgian officers for the assassination in 1961 of the first prime minister of the Democratic Republic of Congo, Patrice Lumumba, has remained at pre-trial stage for ten years.

In Mauritius, the Truth and Justice Commission investigated the impact of slavery from 1638 onwards, in Tunisia, the mandate of the Truth and Reconciliation Commission included the pre-independence period, and this was also the case for the Truth and Reconciliation Commission in Burundi.

In recent years Manuel Macron launched several initiatives regarding the colonial role of France. The Vincent Duclert commission on France's role in the Rwandan genocide delivered its report in 2021 and the Benjamin Stora report on France's colonisation and war in Algeria was concluded in 2021. In 2022, Macron also announced the creation of a commission to shed light on France's colonial past in Cameroon. The commission is mainly made up of historians from both countries and was officially launched in March 2023. These initiatives have been controversial and it remains to be seen what they bring to the table. The Stora report on Algeria is supposed to be followed by a “Memory and Truth Commission”. When it comes to criminal procedures in France regarding crimes committed in Algeria, these have been blocked by the 1968 amnesty act.

The German colonial crimes against the Herero and Nama peoples of Namibia is by many seen as the first genocide of the 20th century. Starting in 2015, the German and Namibian governments negotiated possible reparations for the crimes, especially the genocide. However, the process has been criticised for the strict secrecy of the negotiations, excluding lawful representatives of the minority and indigenous victims and civil society in both countries. The German government has relied on formal gestures while refusing all legal responsibility for the colonial crimes, possibly in fear of creating a far-reaching precedent. The 2021 agreement, which has been contested in court by the Herero and Nama, includes the acknowledgement of the genocide, public apologies and development assistance to Namibia as a form of compensation. The lawsuit claims that the agreement contravenes various articles in the Namibian constitution, and the Herero and Nama demand direct participation in negotiations, as well as reparations.

In conclusion and broadly speaking, we would have three main kinds of transitions where transitional justice is used: from authoritarian rule to democracy, from internal armed conflict to peace, and from colonisation to autonomy and self-governance. This while in practice we would also find a mix of the three as well as scenarios where there is no clear transition at hand but where transitional

***“Reparations should not and cannot be dressed up as humanitarian aid, assistance or development cooperation, evading the assumption of due responsibilities.”***

Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (A/76/180), p21



justice tools can be used. This policy brief deals with the participation of indigenous peoples in different transitional justice processes and also the issue of transition from colonisation to autonomy and self-governance regarding indigenous peoples. The transitional justice process in Colombia and the Truth Commissions on the Sami people in Norway, Sweden and Finland, are used as the main examples.

***“[...] for transitional justice processes to be holistic and appropriately comprehensive, it is imperative to include the study of the colonial legacy, where appropriate.”***

Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (A/76/180), p5

## **Indigenous peoples’ participation in transitional justice – opportunity for change?**

The question whether indigenous peoples’ participation in transitional justice represents an opportunity for change is not easily answered, and the answer will necessarily vary from one case to the other, also taking in the different nature, scope and mandate of processes. We would probably find different opportunities in a process relating to a transition from internal armed conflict to peace, compared to one of authoritarian rule to democracy, or from colonisation to self-determination and self-governance. Regarding the Colombian peace and transitional justice process, the transitional justice framework to a large degree complies with conditions which facilitate the meaningful participation of indigenous peoples and the advancement of indigenous peoples’ rights. The negative exception was the peace negotiations’ process where indigenous peoples were invited at the very last moment. Considering this and other experiences of peace negotiations, it would be important that *the Peace Treaty Initiative* – a major global undertaking to help develop an international law of peace negotiation – incorporates the special role of indigenous peoples and minorities.

In spite of a less than ideal participation in the peace negotiations, the ethnic peoples of Colombia achieved guarantees for their effective participation in the implementation of the peace accords and also recognition of historical injustice:

*“That the National Government and the FARC-EP recognize that the ethnic peoples have contributed to the construction of a sustainable and lasting peace, to progress, to the economic and social development of the country, and that they have suffered historical conditions of injustice, product of colonialism, enslavement, exclusion and having been dispossessed of their lands, territories and resources; that they have also been seriously affected by the internal armed conflict and the maximum guarantees must be promoted for the full exercise of their human and collective rights within the framework of their own aspirations, interests and worldviews.”*

Peace agreement between the Colombian state and FARC, “Ethnic chapter”, 2016, p205

## I Mandate and time-frame

A central aspect in order to help realise the rights of indigenous peoples is to *go beyond recent violations*. Looking at one of the most recent truth commissions being set-up – the Norwegian truth commission, investigating the “Norwegianisation” and injustices against the Sami people and the Kven Norwegian Finnish minority – the time frame for the commission was from the nineteenth century until today and could be extended even further back in time if considered relevant. Such a time-frame naturally provides a fertile ground for investigating historic injustices and their impact on the situation of indigenous peoples and minorities today. What is more – it was set up with these groups at the centre.

Some other truth commissions have studied the impact of the colonial past. The Mauritius Truth and Justice Commission examined the impact of slavery from 1638. The Tunisian Truth and Dignity Commission included the pre-independence period in its mandate. The Truth and Reconciliation Commission of the Republic of Korea examined the period 1905–2005. The Truth and Reconciliation Commission in Burundi included colonial crimes committed since 1885. In contrast, the commissions in East Timor and South Africa did not include the colonial periods of those countries, despite their importance for structural injustice.

The Colombian Commission and the transitional justice system, embarks a quite limited time frame – from 1958 to 2016. Due to the length of the internal armed conflict though, the window is unusually wide – amounting 59 years – this while the Commission had the possibility go even further back if considered relevant for its mandate. In practice, the Commission also extended the timeframe beyond 2016 – following and acting on later developments – for example related to the grave situation of human rights defenders and social leaders seen after the inception of the Commission. In its final report delivered in 2022, the Commission dedicated a full volume to the indigenous peoples and other ethnic minorities, albeit with a focus on the effects of the internal armed conflict, even though an annex is dedicated to the history of the ethnic minorities. The Commission also recommends the state to establish a Historic Truth Commission of the ethnic minorities, with the objective to make their history and cultures known and acknowledged, to recognise historic injustice and to prevent future harm.

In the case of the National Truth Commission of Brazil, delivering its final report in 2014, its mandate included the period from 1946 to 1988 with a focus on the military dictatorship between 1964 and 1985. The report includes a relatively short chapter on the violations of the human rights of indigenous peoples which recommends the Brazilian state to recognise that the persecution of indigenous peoples for the colonisation of their lands was a politically motivated crime. Most importantly, the report also recommends the institution of a National Truth Commission for Indigenous Peoples.

*“Of the more than 40 truth commissions established in transitional contexts over the past four decades, very few have addressed the colonial period or examined the economic and social injustices rooted in that period.”*

Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (A/76/180), p10

## The most strategic time-frame

A commission counting a more generous time window arguably would have a better chance of delivering a more comprehensive truth, provided that it can count on resources to dig deep enough in each relevant time period and topic, i.e. it would deliver “more truth”.

Then, when it comes to justice and reparations, the extensive historical legacy of colonialism poses a number of challenges on transitional justice processes. In most cases restitution is impossible to achieve at full scale as the amount and gravity of rights violations have provoked irrevocable developments. Therefore, restoring the situation to the status before colonisation is virtually impossible. Having said this, by taking into account not only historical injustice but focusing on their impact on the living conditions of peoples today, justice and reparations can make a huge difference for the survival, prosperity and wellbeing of peoples and individuals. One example of this is the recuperation of land rights.

Thus, returning to the central issue of this policy brief – if transitional justice can deliver change for indigenous peoples – brings us to question what a truth commission and the whole transitional justice system can bring about to push change? One position is what would be fair and desirable from the indigenous peoples’ perspective and another what is reasonable and achievable taking account of all actors and interests in a specific context. Going back, say five hundred years, will certainly provide more information on historic injustices

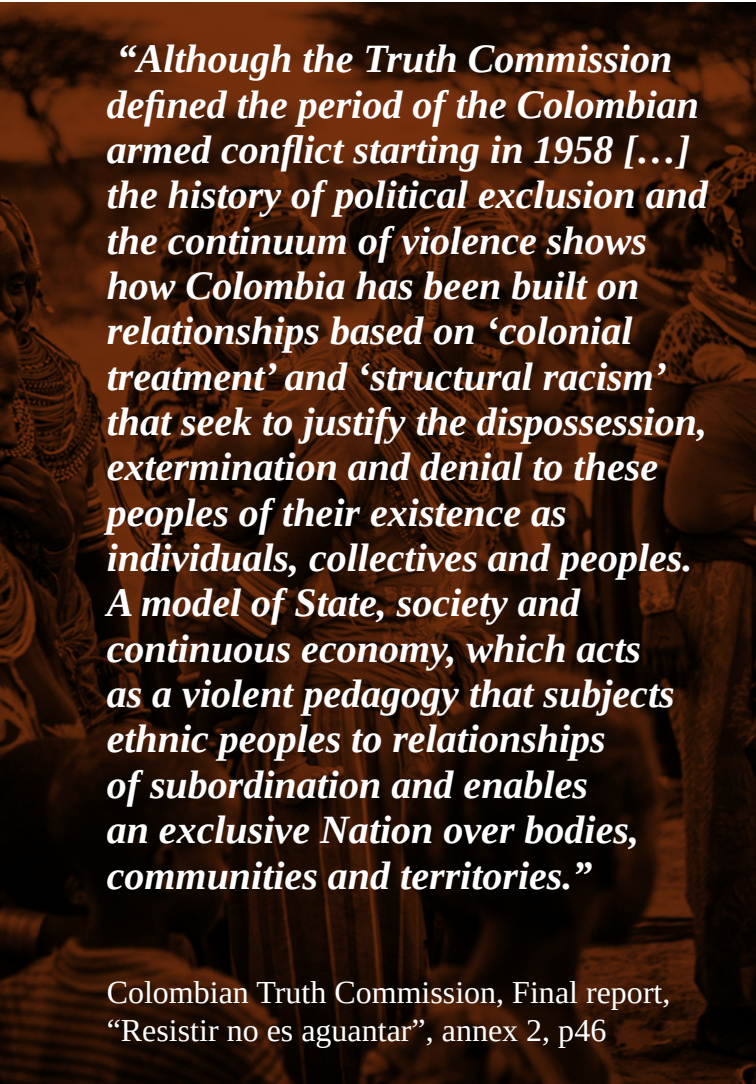
and as well as evidence on the origin of a people and its historic occupation of ancestral lands, for example. This evidence can be used in different processes, including in courts. One example is a case where a Sami community sued the Swedish state in a national court (Girjas vs. Sweden), aiming at self-determination regarding hunting and fishing rights within their territory – a right that had been taken away by means of a government decision – leaving decision-making to the regional administration. The Sami community used official written sources as well as archaeological findings to prove their long-term links to their ancestral lands. A transitional justice system that can deliver such evidence would potentially be a resource for peoples defending or aiming at re-conquering their rights to ancestral lands.

The mandate of the Colombian Truth Commission did not go as far back as colonial times, and not even independence from Spain, it did however cover a relatively wide time-frame with potential for finding and exposing the patterns of gross human rights violations and serious infractions of international humanitarian law committed against indigenous peoples, albeit only in the context of the internal armed conflict. The report also delivered an annex analysing the major injustices committed from colonial times until today, seen from the perspective of the indigenous peoples. These findings could be used as an advocacy resource for indigenous peoples at a more general level. When it comes to the Special Jurisdiction for Peace, cases will probably be of more recent nature, but on the other hand provide more detailed evidence on specific events and situations compared to the Truth Commission.

For a possible future truth commission on the indigenous peoples of Colombia, as was recommended by the Colombian Truth Commission, it would be important to disclose and make widely known all injustices committed by the Spanish crown during colonial times as well as all the injustices committed by the Colombian state from independence. However, for peoples seeking justice it might be wiser, more reasonable, and more effective, to focus on more recent times, say from the independence from Spain. This would probably make for better chances in terms of justice, as it would be possible to claim the continuity of the Colombian state from that point in time.

In essence, for transitional justice processes, what is important is to be able to link the historic injustices, oppression and dispossession to the analysis of present challenges of peoples that were colonised. These include contemporary social and economic marginalisation, racism and land claims, among other factors, as the result of transgenerational damage.

Reflecting on the genuinely disturbing conditions for the incredibly rich variety of indigenous peoples living within and across Colombian national borders, it might actually be an advantage to concentrate efforts on disclosing the recent history of injustice, including on-going injustice. This since resolving a situation where the majority of peoples face serious threats of being extinguished as peoples, cultures and individuals, needs urgent attention, resources and effective action from the Colombian Government and its branches. Having said this, linking historical injustice with present challenges is essential for understanding the reasons behind, and in advocating for change.



***“Although the Truth Commission defined the period of the Colombian armed conflict starting in 1958 [...] the history of political exclusion and the continuum of violence shows how Colombia has been built on relationships based on ‘colonial treatment’ and ‘structural racism’ that seek to justify the dispossession, extermination and denial to these peoples of their existence as individuals, collectives and peoples. A model of State, society and continuous economy, which acts as a violent pedagogy that subjects ethnic peoples to relationships of subordination and enables an exclusive Nation over bodies, communities and territories.”***

Colombian Truth Commission, Final report, “Resistir no es aguantar”, annex 2, p46

## I Holistic approach

To better understand transitions and to strive at transformative transitions, we need to look outside the mainstream transitional justice measures, incorporating potentially transformative measures that can be included in a peace treaty or similar agreements on transitions. In Colombia, looking outside of the formal Colombian transitional justice framework, there are various mechanisms with potential to advance indigenous peoples’ rights on the ground. The Land Restitution Programme is such a component, having the potential for securing much needed land rights for the indigenous peoples, albeit the capacity shortage for its implementation, which needs to be addressed for effective change on the ground. Other components include the Development Plans with Territorial Focus, the National Comprehensive Programme for the Substitution of Crops Used for Illicit Purposes and the Comprehensive Rural Reform. However these are also facing difficulties of adequate implementation, especially in relation to indigenous peoples.

## I Beyond written sources

A central aspect in order to help realise the rights of indigenous peoples is to *go beyond archival and written sources*. Interviews, public hearings and other events are at the very heart of truth commissions, including the one in Colombia. However, the oral source is often translated into writing in the form of reports and recommendations, using the dominant language. This while oral tradition generally is a centrepiece of indigenous peoples’ culture. And still, generalising about oral tradition, the different cultures also present different characteristics in terms of their understanding of their own and the surrounding environment, time frameworks and historic events. Adapting to this reality means considering it at all stages of the process – including methodology, effective interaction with peoples, the resulting products and their presentation. As with other groups, the outcome will also necessarily depend on who you incorporate in the process, i.e. which sub-groups and individuals you listen to. Handling all these aspects in a country counting more than a hundred indigenous peoples, obviously is a huge task. Success is intimately connected to the meaningful participation of indigenous peoples throughout the process. In Colombia, the Truth Commission and the Special Jurisdiction for Peace invited the peoples at an

early stage and facilitated the creation of mechanisms for continuous accompaniment of the process.

Turning to the Special Jurisdiction for Peace, much of the advances and challenges are common to the ones faced by the Truth Commission. Being a judicial institution though, some additional challenges are at hand. One is the assessment and understanding of oral evidence. Another the communication of findings and conclusions. A further one, although not specifically tied to the use of sources, is the recognition and reparations that the sentences involving indigenous peoples as victims and (individual) victimisers will determine – aiming at reparations adapted to the cultural reality at hand. Lastly, looking at the Search Unit for Disappeared Persons, this institution has been part of the joint process of consultations with indigenous peoples, conducted in cooperation with the Truth Commission and the Special Jurisdiction for Peace, why the elements for a successful culturally adapted process of clarifying and searching for forcefully disappeared and the return of victims' remains, are present.

While going beyond written sources is essential in relation to indigenous peoples, when looking at the different truth initiatives run by indigenous peoples and their organisations in Colombia, many are expressed in Spanish and use internet as their platform. This might have something to say about the participation of indigenous peoples in transitional justice and the opportunity for change. In order to reach change, indigenous peoples need to advocate their truth and their rights in front of “mainstream” society including the state and its institutions and the way to reach them is through mainstream language and platforms. Thus, indigenous peoples' truth initiatives that use the language of the colonising state might well be rational from an advocacy-for-change perspective. In reality, this is nothing new – already from the middle of the sixteenth century, representatives of the indigenous peoples of today's Colombia went to Spain, Lima and Quito to make advocacy in front of Felipe II and representatives of the Crown, using the language, concepts and legal system of the invaders.

## I Procedures and representation

The protocols and procedures of a transitional justice system at all stages of the process, need to involve and adapt to indigenous peoples. A first element to consider is *to ensure consultation to*

*obtain free, prior and informed consent*. A crucial success factor for truth commissions is to consult with the ones they are to serve – the victims. These consultations need to take place throughout the process – from design to implementation. In this respect it is important to bear in mind the often stated fact that for truth commissions, the process is as important as the outcome. In the case of indigenous peoples, states have a duty to consult in good faith to obtain free, prior and informed consent of any administrative or legislative measure affecting indigenous peoples.

When it comes to Colombia, the negotiation of the peace accords with the FARC did not fully entail a satisfactory procedure of free, prior and informed consent – the involvement of indigenous peoples took place at the very final stages of peace negotiations, resulting in the Ethnic chapter. Also, in preparing for the implementation of the peace accords, the Fast-Track process applied, meant little involvement of indigenous peoples and the process most probably did not live up to the standards of free, prior and informed consent. The majority of norms consulted with indigenous peoples remained paper products or were substantially altered after consultations. However, when it comes to the different parts of the transitional justice system, participation and consultations in good faith to obtain free, prior and informed consent were established as the standard from the outset.

A second element is for the transitional justice system *to respect indigenous peoples' representative institutions*. In relation to free, prior and informed consent, a centrepiece is to determine who represents the indigenous peoples. In a matter that concerns only one people, representation might be less complicated, but in the framework of a transitional justice system, determining rightful participation might be challenging. Broad representation is a natural way to ensure inclusion and avoid exclusion, but also means challenges in terms of coordination. Furthermore, indigenous communities, as all societies, consist of different sectors that are not necessarily represented in their leadership, such as women, children and youth. For a truth commission a challenge is to ensure that anyone that should be heard is given the opportunity and that the interests of different sub-groups are taken into account. Central is also the principle of do-no-harm in order to avoid worsening divisions within communities and between communities

and to avoid re-victimisation. From a transformative justice perspective, i.e. for transitional justice to contribute to a transformative process, when it comes to indigenous peoples' rights, the strengthening of indigenous peoples' organisations and the movement as a whole, can be an important result of the transitional justice process, as seen in Guatemala.

In the Colombian case, the respect for indigenous peoples' representative institutions has been profound. However, women have not necessarily felt represented in the national indigenous organisations and have resorted to other arenas, such as the participation of women's organisations in the peace process, as a vehicle for advocacy. While this is a natural path to take, some women also have hesitated to engage and speak out as it might fire back at them, in fear of harming and dividing the indigenous movement. Looking at the Permanent Forum for Concertation with the Indigenous Peoples (MPC), which is the mechanism used for free, prior and informed consent in relation to the transitional justice system, all eight delegates representing indigenous organisations were men. This while one of two "permanently invited" was a woman and two out of five delegates representing the National Commission for Human Rights of the Indigenous Peoples (CDDHPI) were women. Now, even if numbers and representation do not tell the whole picture when it comes to the processes behind, or real influence in the process, they indicate that there was a potential problem of representation and a real problem of equality.

Another complexity in the Colombian case is the large number of indigenous peoples. The process is of course made more manageable through the interaction with organisations that represent several or even a large number of peoples, such as in the case of the Organisation of Indigenous Peoples of Colombia (ONIC). However, it seems reasonable to be concerned whether the peoples that are smaller in numbers and at the verge of being extinct, have a say and real influence. ONIC claims to represent these peoples and in effect draws attention to the special situation faced by them, but in general, in processes like this, it must be of great importance seeing to that not only the stronger peoples are heard and benefit from the process, but also the ones lacking resources and their own political platform. Otherwise processes risk worsening inequalities and conflicts between peoples.

While it is important to respect indigenous peoples' representative institutions it might be valuable *to keep in mind the basic principles of a human rights-based approach*, including participation, non-discrimination, empowerment and transparency.

The third element is for transitional justice systems to provide attention *to the specific needs of indigenous witnesses*. The different entities of the transitional justice system should adopt culturally adapted methodologies for the interaction with the different indigenous peoples, including psychosocial support. It is also important to count with indigenous staff and interpreters to be able to fulfil their role. Among the many elements at hand, central concepts of the framework within transitional justice might not have a translation into indigenous languages, and similarly, the way of describing an event by an indigenous witness might not be correctly understood by an outsider to the culture. And, again, to be able to do-no-harm in order to avoid negative effects for the individual and the community and avoid re-victimisation, cultural adaptation is essential.

The fourth element to take into account *is the power structures created by the colonising power* which may have led to division within peoples. One such example is the Sami in Sweden where government policies deciding to conserve the way of life of the Sami in the mountainous areas while stripping the woodlands- and coastal Sami of their rights and way of life, forcefully integrating them into Swedish society. The Swedish state also forcefully moved rein-herding Sami families from one region to another, taking away their original lands and creating conflicts with the original Sami population of the new area. These conflicts and injustices still persist today and heavily influence inter-Sami relations.

This is also the case of the Naga people in today's India and Myanmar. The long running peace process has been marked by the breach of agreements by the Indian state, failure to address core issues behind the conflict and absence of transparency, resulting in the fragmentation and internal disputes among the Nagas.

In Colombia, the transitional justice system has set the protocols for the interaction with indigenous peoples, placing participation in every moment as a cornerstone of the process, but this is a huge task, considering the rich variety of indigenous peoples



and other ethnic groups. A chain is only as strong as its weakest link and this certainly goes for the special procedures within a transitional justice process. Perhaps most important in this respect is the last link – the ones at the very end of the chain – interacting with individual and collective victims. It is still too early to say how this interaction with indigenous peoples will turn out in reality – i.e. how indigenous peoples will grade their experience of participating in the transitional justice system.

## | Collective approach

Transitional justice processes need to *go beyond an individualistic form of analysis* in order to adapt to the realities of indigenous peoples. Many truth commissions have focused on crimes committed against individuals such as forced disappearances, extrajudicial killings and torture. While investigating crimes against individuals is utterly important and also contributing to the patterns of violence in a specific context, telling the truth regarding indigenous peoples necessarily entails analysis of the effects on the peoples and communities, including economic, social, cultural and environmental rights. In the Colombian case, already the peace agreement between the government and the FARC, takes account not only of individual damage but to a large degree focuses on the impact on different groups, including indigenous peoples. In particular, the Ethnic chapter strengthens this approach.

Also when it comes to the Truth Commission and the Special Jurisdiction for Peace, there is a pronounced emphasis on the damage the internal armed conflict has caused ethnic groups and the cases opened within the Special Jurisdiction for Peace, are focused on ethnic groups as collectives.

## | Transnational justice

A number of indigenous peoples move and live across nation state borders. This makes them dependant on the policies of more than one government and the relationships between neighbouring nation state governments. When it comes to transitional justice, this transnational nationhood creates another layer of complexity that should not be ignored. In the case of the Sami, their traditional land *Sápmi* extends over four nation state territories: Norway, Sweden, Finland and Russia. The creation of the nation states and the relationship between states have had tremendous impact on Sami life and history. Not least the restrictions imposed regarding the free movement of reindeers across state borders has meant huge challenges for rein-herding Sami. However, Norway, Sweden and Finland set up separate truth commissions as a measure to deal with the past. Doing this is a natural avenue as the respondent is the nation state, however, important cross-national issues risk being left apart. Cooperation between the commissions would therefore be important and also the inclusion in each commission of transnational matters. This, as well as the tri-national analysis of the outcomes of the truth commissions and the implications for regional policy. The regional intergovernmental organisation – the Nordic Council – might be relevant for such an effort – especially if the Sami Parliamentary Council is welcomed as a full member.

## | Transformative justice

Looking at the scope of justice that can be expected in Colombia in terms of collective justice for indigenous peoples, truth was delivered at a more general level by the Truth Commission while the Special Jurisdiction for Peace will bring clarity on collective and individual cases, including sanctions and reparations. Thus we can expect truth, justice and reparations in a system that is centred on restorative justice, meaning that hoping for the system in itself to be transformative in terms of indigenous peoples' rights, might be hoping for much. However, it definitely can lay a fertile ground and provide tools that can be used for carving out those rights in a transformative manner in the near future. Then, of course, as pointed out above, several of the components laying outside of the transitional justice system, but being part of the package resulting from the peace accords, are important building blocks for the realisation of indigenous peoples' rights on the ground.



When it comes to the commissions in Norway, Sweden and Finland on the Sami people, one advantage is that these commissions were instituted as separate processes, only focusing on the crimes committed against the Sami. This means that their recommendations do not risk being overshadowed by other recommendations, as in the case of Colombia, where the focus is the termination of the conflict with the FARC guerrilla. However, recommendations will still have to compete for public space and for the interest and resources of the political sphere. Recommendations are not mandatory and can easily be ignored or swept under the carpet. This is also why, both in the Colombian and in the Sami case, the wide socialisation of the findings and recommendations of the commissions is so important – including in the longer perspective – the inclusion of the findings in school curricula.

***“A commitment by States to redress the historical and ongoing dispossession perpetrated against indigenous peoples is an essential element of a new relationship with them. These mechanisms should look at past, present and persistent violations with a human rights-based approach and thorough comprehension of historical processes”***

Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/51/50, p14

## **| From rhetoric to action**

Perhaps the most important aspect for bringing about transformative justice for indigenous peoples is converting words into action. Unfortunately, the Colombian state and its branches present a mediocre record when it comes to make effective the promotion, protection and implementation of indigenous peoples’ rights. In fact, the right to life and survival is a central and basic part of all human rights covenants, which has not been guaranteed by the Colombian state in relation to indigenous peoples, as has been shown and continuously criticised by the Colombian Constitutional Court.

- Indigenous peoples’ participation in transitional justice

Moreover, indigenous organisations witness the generally poor implementation record of agreements sealed with the state and the excessive responding time by different government agencies, due to lack of resources and specialised knowledge on indigenous peoples, which makes implementation slow and inadequate.

In this respect it is notable how the peace agreement has been praised for its focus on the territories, gender approach and focus on ethnic groups, and how at the same time, these parts of the accords have been lagging behind in terms of implementation. On the positive side is the ambition of the Colombian president Gustavo Petro, elected in 2022, to fully follow the sixty-seven recommendations of the Truth Commission, during his term.

Non-compliance of agreements with indigenous peoples or of legal orders is however not unique for Colombia. The Sami in Norway have protested against the Fosen wind-turbine park, which was deemed as non-compatible with the Sami right to their culture under article 27 of the International Covenant on Civil and Political Rights by the Norwegian Supreme Court in October 2021. However, the state had yet as of December 2023 not acted on the judgement. Wind turbines were still running.

In Sweden, the Supreme Court in January 2020 ruled in favour of the Girjas Sami village regarding their exclusive right to grant hunting permits in the Sami village area. This has however not lead to other Sami villages gaining the same right – seemingly each village would have to go to court to achieve this. Governments of different political colours have been dragging their feet behind creating a system where the courtroom is the only avenue to advance rights.

***“A mandate for a special rapporteur on the implementation of indigenous peoples’ treaties, agreements and constructive arrangements should be created.”***

Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/51/50, recommendation no. 24

## Non-recurrence – a vision broken?

Essential for a transformative process to take place – and even a restorative process to thrive – is the effective non-recurrence of past events and avoid re-lapsing into conflict. Unfortunately, apart from the fact that the internal armed conflict between the FARC and the government is only one of the multidimensional conflicts that indigenous peoples of Colombia face, if not re-lapsing into conflict, at least the conflict has been transforming, involving other patterns and actors. The security situation for human rights defenders and indigenous peoples' leaders was aggravated after the signing of the peace accords as the vacuum left by the FARC was claimed by other armed groups. Murders of human rights defenders and social leaders continued at alarming rates and there were new cases of forced displacements and confinements.

In some cases the vacuum created meant access to geographic areas rich in natural resources, which also attract other actors – both legal and illegal – leaving the indigenous peoples with many fronts to cover. From this perspective – interpreting the provision of non-recurrence in a wider manner – recurrence, even if not being a carbon copy of the past, is already happening in certain contexts. This is also true for the Sami and other peoples who historically were displaced by colonisation and the extraction of natural resources during industrialisation. The new threat and recurrence of past colonisation is spelled climate-change transformation and comes in the form of wind-mills and transition mineral extraction.

This while in Bangladesh, following long and grave violations of indigenous peoples' rights and the formation of a guerrilla movement, in 1997, the Chittagong Hill Tracts Peace Accord was signed. However, the hope that the peace accord would bring lasting peace and development for the indigenous peoples has not been realised as indigenous peoples' rights continue being violated and different actors invade the hill tracts for use and extraction of its natural resources.

***“Despite the recognition of rights that occurred with the promulgation of the Political Constitution of 1991, the legacy of colonial treatment continues to generate, for example, that on ethnic territories, projects for the extraction of natural resources are imposed contrary to the will of the ethnic peoples and that these are the most impoverished sectors of the country.”***

Colombian Truth Commission, Final report, “Resistir no es aguantar”, annex 2, p6

## Reconciliation: multi-national, multi-cultural and multi-ethnic

Looking at reconciliation as a part of non-recurrence, a common way of interpreting the reconciliation part of a truth commission is the re-establishing of trust between citizens and between citizens and the state, as well as the repairing of national unity and identity. However, while reconciliation is an important goal, it should not mean the strengthening of a particular national identity at the expense of others. This would, apart from ignoring the right for indigenous peoples to define their own nationhood as provided by the UN Declaration on Indigenous Peoples, also ignore the fact that many conflicts stem from and develop patterns of ethnic dominance and failure to embrace a multi-ethnic environment. Transitional justice processes therefore need to go beyond the state-centric view. Instead of a mono-national reconciliation, there is a need for a *multi-national, multi-cultural and multi-ethnic reconciliation approach*, which requires dialogue across these dimensions.

***“[...] based on the established hierarchies, a monocultural and monolingual State project is established, with a single religion, and to that extent it defines a single citizenship in accordance with that project. Those who come close to their ideals or assimilate are included, those who do not are considered part of the ‘other’, the different, which threatens the civilizing project, for which reason they must be controlled and governed.”***

Colombian Truth Commission, Final report, “Resistir no es aguantar”, annex 2, p6

## **Transitional justice – transformative in itself or a vehicle for change?**

There is no doubt as to the need for transitional justice to reach beyond its restorative basis and nature. But, how much can we expect from transitional justice itself? Looking at the Colombian process and its different components, what can be expected is mostly restorative measures, although some of these might have effects that to a certain extent change the life of individuals and collectives. The Truth Commission delivered a facts-based narrative, the Special Jurisdiction for Peace delivers more facts as well as judgements, sanctions and reparations, and the Unit for Search of Missing Persons delivers the right for relatives to get to know the fate of their loved ones and the right to care for their remains. Moreover, victims have the right to be at the centre of these processes and non-recurrence is the overarching goal. However, to what degree can we expect this process to amount to a transformative level? Most probably it is not from the proper transitional justice process that we can expect transformative justice, but rather the long-term use of its products and the processes that are connected to and inspired by it, as well as the implementation of the peace accords, that as a sum can add up to transformative justice. As elabo-

rated upon above, several components of the peace accords and on-going processes originating from the demobilisation of the paramilitary, also add to restitution and hopefully also to a transformative process of Colombian society.

Moreover, for transitional justice to contribute to a transformative process when it comes to indigenous peoples’ rights, the strengthening of indigenous peoples’ organisations and the movement as a whole, can be an important result of the transitional justice process. Hopefully this can also be the result of the Sami truth commissions – especially in the sense of uniting the different fractions of the peoples – thorn by conflicts originating from politics of the colonising states.

In contexts of transitions from authoritarian regimes and from internal armed conflicts, the injustices committed against indigenous peoples have often been invisibilised and this lack of visibility and recognition comes with several effects. The absent or insufficient building of memory means that mainstream society is unaware of the history, cultures and living conditions of indigenous peoples. The lack of truth-telling means that discrimination against the communities continues, ignoring their participation, their struggles, achievements and resistance. And the absence of justice means a historic debt for crimes committed, which is repeated on a daily basis as to present-day lack of participation and access to justice.

Considering these challenges, can transitional justice in itself be transformative? It all boils down to a question of where and when transitional justice starts and ends. The transition from armed conflict to peace, or from authoritarian rule to democracy in itself must be said to be of transformative nature and certainly needs to be transformative also in its different parts in order to be sustainable. It entails processes that pertains to traditional transitional justice, but can also include other processes, for example provided by a peace treaty. This while the seeds sown in a transitional justice processes also have been known to grow and prosper long after the official process ended, nurturing from the fertilisers produced by the process and the rain that suddenly make them grow and give fruit. Turning to indigenous peoples, to say that transitional justice processes so far to any significant degree have been transformative, would be to say too much. Transformative processes include

so much more than a judgement on gross human rights violations against indigenous peoples and non-repetition of the past, it means changing structures and creating opportunities, ensuring that new generations of indigenous peoples can lead a life in peace, counting on the full enjoyment of rights and freedoms as peoples and individuals. It means the recognition of ways of life, not only on paper, but in practice. And it means turning the development of peoples slowly dying out to creating the preconditions for cultures to flourish. If managed in an inclusive and differentiated manner, potential is there for transitional justice processes to at least serve a vehicle that can be used for advocating change in this direction, including the cases where truth commissions are not exclusively dedicated to transition from colonisation to self-determination and self-governance.

**“Count on us for peace, never for war.”**

National Indigenous Organisation of Colombia (ONIC)

## | Recommendations

Elements to be considered in transitional justice processes involving indigenous peoples:

- To adopt free, prior and informed consent, as *modus operandi*, before, during and after the process – including in peace processes.
- To respect indigenous peoples’ representative organisations.
- To ensure the participation of marginalised groups and peoples.
- To adopt a rights-based approach.
- To adopt a culturally sensitive do-no-harm approach.
- To go beyond written and archival sources.
- To go beyond a state-centric view.
- To include a collective form of analysis, including economic, social, cultural and environmental rights.
- To adopt a multi-national, multi-cultural and multi-ethnic approach and dialogue.
- To allow a generous time-frame which permits investigating the effects of colonisation.

- To link historic injustices to contemporary violations of rights and freedoms.
- To include a transnational perspective.
- To acknowledge and make visible the contributions, struggles and resilience of indigenous peoples.
- To strive at transformative justice.
- To have in mind that each process and each people is unique.

## Further reading

INDIGENOUS PEOPLES’ PARTICIPATION IN TRANSITIONAL JUSTICE – OPPORTUNITY FOR CHANGE?



*Lessons from Colombia, Swedish Foundation for Human Rights, 2020.*

PDF-version available [here](#)

## Transitional justice processes with an indigenous peoples’ rights component

- Argentina, Napalpí Massacre – Trial for Truth (judgement in Spanish)
- Australia, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families
- Australia, (Victoria State)
- Bangladesh, Chittagong Hill Tracts Accord
- Brazil, National Truth Commission
- Canada, Royal Commission on Aboriginal Peoples
- Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls
- Canada, Truth and Reconciliation Commission of Canada
- Canada, British Columbia Treaty Commission
- Canada, Treaty Relations Commission of Manitoba
- Chile, Report of the Historic Truth Commission and New Deal with the Indigenous Peoples
- Colombia, Commission for the Clarification of Truth, Coexistence, and Non-Repetition
- Colombia, Special Jurisdiction for Peace
- East Timor, Commission for Reception, Truth and Reconciliation in East Timor
- Finland, Truth and Reconciliation Commission

### Concerning the Sami People

- Greenland, Greenland Reconciliation Commission (Danish)
- Guatemala, Commission for Historical Clarification
- Guatemala, Nunca Más
- Guatemala, Peace Accords
- India, Indo-Naga Peace Agreements and Accords
- India, Memorandum of Settlement (Bodo people)
- Mexico, San Andrés Accords
- Nepal, Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal
- New Zealand/Aotearoa, Waitangi tribunal
- Norway, The Commission to Investigate the Norwegianisation Policy and Injustice against the Sami and Kvens/Norwegian Finns
- Paraguay, Truth and Justice Commission
- Peru, Truth and reconciliation Commission
- Sweden, Truth Commission for the Sami People
- Sweden, White Paper Project on the Church of Sweden and the Sami
- USA (Maine), Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission

### **Additional materials on transitional justice processes regarding colonialism**

- Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/51/50
- French report on colonial past in Algeria by Benjamin Stora, Les questions Mémoires portant sur la colonisation et la guerre d'Algérie
- French Commission on the Genocide in Rwanda, La France, le Rwanda et le génocide des Tutsi (1990-1994)
- Littlechild & Stamatopoulou (Eds.), Indigenous Peoples' Access to Justice, Including Truth and Reconciliation Processes, Institute for the Study of Human Rights, Columbia University, 2014
- Mauritius Truth and Justice Commission, Final report
- Paige Arthur (Ed.), Identities in transition, Cambridge University Press, 2011
- Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/76/180
- Truth and Reconciliation Commission of the Republic of Korea
- Tunisian Truth and Dignity Commission, Final report (summary in English)

