Submission to the Yoorrook Justice Commission's Inquiry on Land Injustice

1. The authors[1] thank the Yoorrook Justice Commission (**the Commission**) for the opportunity to make a submission to this important inquiry investigating 'ways to address violations of the right to self-determination and human and cultural rights and provide redress for past, present, and ongoing injustice in relation to First Peoples' dispossession of their country now collectively known as the State of Victoria'.[2] The discussion that follows is based on the recognition that First Peoples' sovereignty to this land has never been ceded.

2. The Key Issues this submission seeks to address are: 'ways to provide redress for past, present and ongoing injustice related to taking First Peoples' lands, damaging those lands, and denying First Peoples their rights in relation to their land'. The authors do so as academics, researchers, and practitioners in the field of transitional justice.

3. This submission contends that principles derived from international law and practice can inform approaches to redress for First Peoples in Victoria who have suffered land injustice, adopting the following structure:

    a. Part A focuses on the forms of reparations that may be available in the Victorian context. Reparations are an internationally recognised right, and can provide a pathway for recourse to survivors, reconstituting dignity, and restoring 'a broken relationship'.[3]

    b. Part B discusses comparative contexts and international practice, drawing on the body of transitional justice scholarship—particularly in relation to reparations—and present learnings from four country-specific examples in which land injustice has been addressed.

    c. Part C considers challenges and potential solutions.

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[2] This topic is a Priority Theme cited in the Commission's Issues Paper. This submission adopts the Commission's Issue Paper's use of the terms 'land' and 'country' to include waters, sky, and resources.
[3] Carsten Stahn, Confronting Colonial Amnesia, Towards New Relational Engagement with Colonial Injustice and Cultural Colonial Objects *Journal of International Criminal Justice* 18 (2020), 793–824.

4. The ongoing and real present-day consequences of colonial land injustice make it necessary to approach the colonial past in different terms to those that exist at present. On this basis, the potential solutions identified in Part C include establishing a State-level entity to seek and register Indigenous land rights claims since colonisation in Victoria, with the ability to recognise connections to land that go beyond those known to property law statutory and common law precepts. Such an entity could exist in parallel to existing structures under the Native Title Act and Traditional Owner Settlement (**TOS**) Act frameworks, give meaningful recognition of Traditional Owner rights and responsibilities, and support future treaty processes by creating a register of those rights.

A. Framework of Analysis and Guiding Principles

I. ADDRESSING LAND JUSTICE WITHIN A TRANSITIONAL JUSTICE LENS

5. The framework of analysis for this submission is that of transitional justice. Transitional justice is a set of strategies that help societies deal with human rights abuses at times of transition. There exists a widely held belief that after a period of widespread violations, there must be a measure of accountability for past harms. Transitional justice recognises that the settler/colonial context requires attention to truth-telling, justice, reparations, reconciliation and guarantees of non-repetition.

6. Notably, socio-economic rights violations and/or structural inequalities have not been a prevalent feature of transitional justice, of which First Peoples' land justice is a clear example.[4] Many transitional justice practices take structural inequalities for granted, do not address intergenerational legacies of abuse, or fail to make post-colonial continuities, gaps or biases visible.[5] For instance, the European Union Policy on Transitional Justice does not make any mention of colonial injustice.[6]

7. Nevertheless, it is now recognised that restitution for historical injustices, including forced displacement, property damage and other violations of human rights, constitute one of the key evolving areas in transitional justice.[7] Indeed, truth commissions have played an

[4] Huma Saeed, Transitional Justice and Socio-Economic Harm: Land Grabbing in Afghanistan, Taylor & Francis Group, 2022.
[5] See R Chelin and H van der Merwe, 'Policy Brief: Transitional Justice and Colonialism' (Centre for Study of Violence and Reconciliation, 2018), referencing Mauritius' truth commission to investigate historical legacies of slavery. See also Mauritius Truth and Justice Commission Report, https://www.usip.org/sites/default/files/ROL/TJC_Vol1.pdf.
[6] European Union, 'The EU's Policy Framework on Support to Transitional Justice', 2015, https://www.coe-civ.eu/kh/the-eus-policy-framework-on-support-to-transitional-justice.
[7] Housing, Land and Property Rights in Transitional Justice Jon D Unruh and Musa Adam Abdul-Jalil

important role in investigating socio-economic losses as well as recommending specific initiatives that should be undertaken to address such losses.[8]

II. REPARATION AND LAND JUSTICE

8. Reparations in transitional justice are complex legal constructions, often shaped and entangled with political, social, and moral considerations.[9] At their most basic level, reparations provide benefits to victims and are considered a fundamental right under international law. [10] They embody a society's recognition of and partial measure of atonement for the harms suffered by victims of human rights violations.

9. According to the United Nations (**UN**) Basic Principles and Guidelines on the Right to Reparation for Victims of Violations of Human Rights and International Humanitarian Law (**UN Reparations Guidelines**),[11] reparations encompass several elements: restitution, rehabilitation, satisfaction, and guarantees of non-repetition. Leading scholar and former UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence De Greiff discusses three goals of reparations in transitional justice contexts: recognition, civic trust, and social solidarity.[12]

10. With these elements and goals in mind, land injustice is specifically addressed under UN Reparations Guidelines, which stipulate that restitution and the return of property, constitutes one of several forms of reparations.[13] In simple terms, 'restitution' when used in this sense refers to the restoring to a person of a benefit that has been improperly taken away from them.

International Journal of Transitional Justice, Volume 15, Issue 1, March 2021, 1–6, https://doi.org/10.1093/ijtj/ijab004; see also Report of the Special Rapporteur on the Promotion of Transitional Justice, Reparations and Guarantees of Non-Recurrence, 'Transitional Justice Measures and Addressing the Legacy of Gross Violations of Human Rights and International Humanitarian Law Committed in Colonial Contexts' (2021) A/76/180, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/197/81/PDF/N2119781.pdf?OpenElement.

[8] The 2005 final report of the Commission for Reception, Truth and Reconciliation in Timor-Leste constitutes an important effort to consider violations of economic, social and cultural rights as well as the root causes of the conflict. The Sierra Leone Truth and Reconciliation Commission also addressed violations of economic, social and cultural rights and the root causes of conflict or repression.

[9] Luke Moffett, 'Transitional justice and reparations: remedying the past?' in C. Lawther, L. Moffett, & D. Jacobs (Eds.), Research Handbook on Transitional Justice (Elgar 2017) 377-400.

[10] See, for example, Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, which states: States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.' See also Article 2(3) of the International Covenant on Civil and Political Rights.

[11] A/Res/60/147, adopted by the General Assembly on 15 December 2005.

[12] Pablo de Greiff, Justice and Reparations, in P. de Greiff (ed.), Handbook of Reparations, (OUP 2006)

[13] The Guidelines are available here: https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation.

11. This is supported by the 2005 UN-endorsed Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons (**Pinheiro Principles**),[14] which highlight the necessity of housing, land and property restitution for conflict resolution and long-term peace.[15] Importantly, the Pinheiro Principles state that: "All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal".[16] The Pinheiro Principles specifically emphasise the right to non-discrimination and equality, and urge States to take the necessary administrative, legislative and judicial steps to promote and facilitate housing and property reparation process.

III. SPECIFIC SUPPORT FOR RIGHT TO REPARATION AND INDIGENOUS LAND JUSTICE

12. The First Peoples in Victoria's right to reparations, and more specifically restitution, for land injustice finds further support in the UN Declaration on the Rights of Indigenous Peoples (2007) (**UNDRIP**), the International Labour Organization (**ILO**) Convention 169, and findings of the UN Human Rights Committee and Committee on the Elimination of Racial Discrimination.

13. UNDRIP highlights the vital importance of land for Indigenous peoples.[17] UNDRIP has been endorsed by the Australian Government since 2009.

14. Article 11 of UNDRIP[18] obliges states to provide 'redress' to Indigenous peoples 'with respect to their cultural, intellectual, religious, and spiritual property taken without their free, prior, and informed consent or in violation of their laws, traditions, and customs'. [19]

15. Article 28 provides a right to redress in respect of land, territories, and resources they traditionally owned, occupied or used and of which they have been dispossessed. The remedies may include restitution, and when this is not possible then compensation.[20]

[14] E/CN.4/Sub.2/2004/22.
[15] The Principles are available here: https://www.unhcr.org/au/media/principles-housing-and-property-restitution-refugees-and-displaced-persons-pinheiro.
[16] Pinheiro Principles, 2.1-2.2.
[17] Art. 11(2), UN Declaration on the Rights of Indigenous People.
[18] The preamble makes an express reference to 'colonization and dispossession of' lands, territories and resources.
[19] Art. 11(2), UN Declaration on the Rights of Indigenous People.
[20] See UN Doc.E/CN.4/2004/WG.15/CRP 1; and E/CN.4/2004/81. See also Art 16, ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries.

16. The rights of Indigenous peoples to land are also recognised in the ILO Convention 169.[21] This includes the right to collective lands and the associated inputs necessary to sustain these lands (for instance, access to credit and infrastructure). Since Indigenous people were often moved to different lands (at times more remote and less productive), material claims are often intrinsically linked to systematic abuse against Indigenous people.

17. The UN Human Rights Committee, mandated to monitor implementation of the International Covenant on Civil and Political Rights, has also acknowledged the significance of land and resources to Indigenous peoples' ability to maintain their way of life.[22]

18. Finally, the right of Indigenous peoples to collective reparation—in the event that they are deprived of their right to 'own, develop, control and use their communal lands, territories and resources'—has also been recognized, *inter alia*, by the UN Committee on the Elimination of Racial Discrimination, the Committee mandated to monitor implementation of the International Convention on the Elimination of All Forms of Racial Discrimination. According to the Committee, this form of reparation must comprise:

> *[The] return [of] those lands and territories [traditionally owned or otherwise inhabited or used by them of which they have been deprived without their free and informed consent]. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.*[23]

19. Taken together, it is submitted that the international principles described above, including those coming from the UN Reparations Guidelines, the Pinheiro Principles, treaty obligations including UNDRIP, and the international custom on which these sources are based, indicate that:

    1. Restitution is the preferred (but not exclusive) remedy for arbitrary or unlawful displacement; and
    2. Restitution is a human right in international law.

20. Restitution as a remedy can restore to a person a benefit that has been taken away from

[21] The Convention is available here: http://www.ilo.org/ilolex/english/convdisp.1.htm.
[22] General Comment No 23, at paras 3.2 and 7; Communication No 167/1984 Bernard Ominayak, Chief of the Lubicon Lake Band v Canada, views adopted on 26 March 1990; and Communication No 197/1985 Kitok v Sweden, views adopted on 27 July 1988.
[23] See 'General Recommendation No 23: Indigenous Peoples', 18 August 1997, available at <http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument> , para 5 cited in Federico Lenzerini, *Reparations for Indigenous Peoples in International and Comparative Law: An Introduction* at 17.

them. It is different to and can provide more meaningful redress than compensation, which attempts to financially evaluate and compensate for the loss. Understood this way, in relation to redress for land injustice experienced by Indigenous peoples, international law and international human rights principles recognise the unique relationship between Indigenous peoples and land and preferences restitution of land as the lawful response to dispossession.

B. Comparative Experiences of Land Justice

21. This submission contends that restitution is the preferred form of redress for First Peoples in Victoria dispossessed of their land. However, it is acknowledged that:

    1. Reaching restitution can be a complex process that can also be retraumatising and exclusionary if not done in a participatory and First Peoples-centred way; and
    2. Processes to achieve restitution are only one part of a broader approach to achieve holistic justice for systemic wrongs. For example, symbolic measures such as recognition of land rights, government apologies and memorials are recognised transitional justice practices.

22. To examine this 'broader picture', four international examples have been considered. These include:

    a. Canada, which has focused on resolving Indigenous land claims through treaties,[24] using a legislative scheme that provides access to courts or specialist tribunals. In contexts where historical treaties did not exist between Indigenous inhabitants and settlers, Indigenous representatives can make 'comprehensive' claims, resulting in 'modern treaties' and often compensation;

    b. Colombia, which began returning land in 2011 to internally displaced persons (**IDPs**) and victims of violent conflict, and land reform was provided as part of its 2016 Peace Agreement. However, due to ongoing threats to security and resourcing, the process has faced serious problems in reclaiming lands, despite the existing *de jure* support;

    c. New Zealand, which has a different legal framework to Australia, benefiting from the existing 1840 Treaty of Waitangi. With reference to that Treaty, a Tribunal has been established to address land grievances, cultural losses, and other violations. The Tribunal hears claims and evidence and may make non-binding

[24] See for example, the Land Claims and Self-Government Agreement among the Tłı̨cho and the Government of the Northwest Territories and the Government of Canada.

recommendations made to the Crown for reparations, including in the form of returning land or offering compensation; and

d. Timor-Leste, which has been through various transitional justice processes since 2000, including through a truth and reconciliation commission. However, despite designing a land claims process in line with international principles, implementation has suffered from a lack of persistent political will.

I. CANADA

Context

23. In the first approximately one hundred years of colonisation of Canada, the relationship between the colonising powers and the Indigenous Peoples in Canada[25] was largely transactional and based on legal contracts; France and Great Britain sought military alliances and trade agreements with Indigenous Peoples to shore up their interests against the one another.[26] Within this context, Indigenous land rights were specifically recognised as pre-existing colonisation in the British *Royal Proclamation of 1763,* its wording acknowledging the existence of unceded Indigenous land protected against unauthorised colonial use or possession.[27] It 'creat[ed] a fiduciary relationship'[28] between the Crown and Indigenous communities and formed the foundation for subsequent treaty negotiations.[29]

24. However, following the Napoleonic Wars, the relationship shifted transactional to one of control and assimilation. The British North America Act 1867 confederated the colonies and gave the newly created federal government legislative jurisdiction over 'Indians, and lands reserved for the Indians'. This diminished the space for Indigenous self-government[30] and paved the way for the Indian Act 1876. Amongst other things, the 1876

[25] For conciseness, 'Indigenous Peoples in Canada' will serve as a collective term to refer the First Nations, Inuit, and Métis Peoples, although significant differences exist between and within these groups.
[26] Government of Canada, 'Summaries of Pre-1975 Treaties', https://www.rcaanc-cirnac.gc.ca/eng/1370362690208/1544619449449.
[27] Keith Crowe, Gretchen Albers, and Anne-Marie Pedersen, 'Comprehensive Land Claims: Modern Treaties', *The Canadian Encyclopedia,* https://www.thecanadianencyclopedia.ca/en/article/comprehensive-land-claims-modern-treaties.
[28] John Milloy, 'Indian Act Colonialism: A Century Of Dishonour, 1869-1969', Research Paper for the National Centre for First Nations Governance (May 2008) https://fngovernance.org/wp-content/uploads/2020/09/milloy.pdf.
[29] Aboriginal Affairs and Northern Development Canada, 'Royal Proclamation of 1763: Relationships, Rights and Treaties' https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-PPLCOM/STAGING/texte-text/nahm_250_pt_1379596017260_eng.pdf.
[30] Brian Bird, 'Federal Power and Federal Duty: Reconciling Sections 91(24) And 35(1) Of The Canadian Constitution,' *Appeal* (2011), https://www.canlii.org/en/commentary/doc/2011CanLIIDocs228#!fragment/zoupio-_Tocpdf_bk_1/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zhoBMAzZgI1

Act banned Indigenous Peoples[31] from land ownership and forced Indigenous Peoples from their traditional lands to reservations.[32] As attempts to protect Indigenous land rights through litigation increased into the early 20th century, a 1927 amendment to the Indian Act banned legal representation of Indigenous Peoples without permission from the Crown, effectively quashing the ability of Indigenous Peoples to enforce treaty obligations.[33] This ban remained in place until 1951.[34]

Approach to Land Justice

25. The Canadian federal government has made public apologies related to the forced displacement of Indigenous Peoples and the dispossession of Indigenous lands.[35]

26. However, much of the federal Canadian approach to land justice relates to the awarding of compensation, negotiation of land use, and in some instances withdrawal of Crown interests on Indigenous land. This has occurred primarily through two avenues:

    a. Resolving legal cases left dormant during the ban on legal representation; and
    b. Managing claims out of court through the Comprehensive Land Claim Policy, an alternative to litigation.[36]

Resolution of Legal Cases

27. Since 1951, Indigenous communities have successfully brought legal cases for affirming title, accounting for Crown failures to uphold treaty obligations, and rectifying Crown seizure or misuse of Indigenous land. Whether court-ordered or settled out of court, such cases have resulted in significant compensation awarded to Indigenous plaintiffs. Recent

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TMAjAEoANMmylCEAIqJCuAJ7QA5KrERCYXAnmKV6zdt0gAynlIAhFQCUAogBl7ANQCCAOQDC9saTB80KTsIiJAA.

[31] Though note the complexity of defining to whom the *Indian Act 1876* applies here. See OECD Rural Policy Reviews, *Linking Indigenous Communities with Regional Development in Canada,*(2020) https://www.oecd-ilibrary.org/sites/b4446f31-en/index.html?itemId=/content/component/b4446f31-en.

[32] *Indian Act 1876*, https://nctr.ca/wp-content/uploads/2021/04/1876_Indian_Act_Reduced_Size.pdf.

[33] Amy Swiffen, 'How the Indian Act's 'Blackout Period' Denied Indigenous Peoples Their Legal Rights' *The Conversation* (12 October 2022) https://theconversation.com/how-the-indian-acts-blackout-period-denied-indigenous-peoples-their-legal-rights-191040.

[34] Ibid.

[35] See regarding the 1953 and 1956 forced relocation of Inuit communities CBC News 'Inuit Get Federal Apology for Forced Relocation' (18 August 2010) https://www.cbc.ca/news/canada/north/inuit-get-federal-apology-for-forced-relocation-1.897468; and apologies to the Ahiarmiut Inuit for forced relocation in the 1940s and 1950s and the Qikiqtani Inuit for, amongst other colonial violence, forced relocations from 1950-1975, Patricia Lightfoot, '2019 Was The Year Of The Apology In Nunavut' *Nunatsiaq News* (2 January 2020) https://nunatsiaq.com/stories/article/2019-was-the-year-of-the-apology-in-nunavut/.

[36] Jean-Pierre Morin, 'The Evolution of Financial Compensation to Indigenous Peoples in Canada as a Result of Colonialism,' lecture given to Amerika-Institut 22 June 2022, https://www.youtube.com/watch?v=PikyyBf8TRQ&t=1566s.

examples are cited below.

Comprehensive Land Claim Policy

28. In 1973, the Canadian Supreme Court first recognised Indigenous title existed before colonisation in Calder v British Columbia (AG).[37] Following this, the federal government established the Comprehensive Land Claim Policy, developing a process for settlement of Indigenous claims to land and the enjoyment of land outside of court.[38]

29. Revised several times since 1973 and not without criticism particularly where the process resulted in the extinguishment of Indigenous rights,[39] claims are divided into (1) specific, or claims in which an existing treaty or recognised right has been breached; and (2) comprehensive, or claims which assert continued and ongoing Indigenous rights but no previous treaty or statute to assert such rights yet exists.[40]

30. Of greatest relevance to Victoria, comprehensive claims are addressed by negotiating 'modern treaties.' Costs of communities preparing, submitting, and further researching claims can be subsidised by the Canadian government, although costs are to be repaid from later monetary settlements.[41] Acceptance of these claims are considered by Crown-Indigenous Relations and Northern Affairs Canada and the Department of Justice,[42] with to date 26 signed agreements, 18 of which included provisions for self-government.[43] The process to reach a 'modern treaty' can involve interim measures, including Crown withdrawal from the contested land and Indigenous communities' oversight, or 'pre-screening' for land use agreements.[44]

Learnings

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[37] [1973] S.C.R. 313.
[38] Government of Canada, 'General Briefing Note on Canada's Self-government and Comprehensive Land Claims Policies and the Status of Negotiations' https://www.rcaanc-cirnac.gc.ca/eng/1373385502190/1542727338550#s1-2.
[39] Assembly of First Nations, 'Land Rights and Jurisdiction', https://afn.ca/environment/land-rights-jurisdiction/.
[40] Government of Canada, 'General Briefing Note on Canada's Self-government and Comprehensive Land Claims Policies and the Status of Negotiations' https://www.rcaanc-cirnac.gc.ca/eng/1373385502190/1542727338550#s1-2.
[41] Keith Crowe, updated by Gretchen Albers and Anne-marie Pedersen, 'Comprehensive Land Claims: Modern Treaties' *The Canadian Encyclopaedia* (last edited 10 November 2023) https://www.thecanadianencyclopedia.ca/en/article/comprehensive-land-claims-modern-treaties.
[42] Ibid.
[43] Government of Canada,'General Briefing Note on Canada's Self-government and Comprehensive Land Claims Policies and the Status of Negotiations: Modern Treaties' https://www.rcaanc-cirnac.gc.ca/eng/1677073191939/1677073214344.
[44] 'General Briefing Note on Canada's Self-government and Comprehensive Land Claims Policies and the Status of Negotiations: Unsettled Claims in the Northwest Territory' https://www.rcaanc-cirnac.gc.ca/eng/1373385502190/1542727338550#s2-18.

31. The Canadian approach is heavily focused on resolving issues related to rights and claims to land through treaty mechanisms. Where treaties existed, violation of these treaties can be litigated or settlement for harm from the violation can be negotiated as a 'specific claim'. Most relevant to the Victorian context, where treaties did not exist, accounting for colonisers' land seizure and harmful extraction can be accomplished by submitting comprehensive claims, resulting in 'modern treaties' and often compensation.

32. Canada's negotiation and agreement-based approach is supported by the fact that, like in Australia, the apex Court has recognised that the rights of Indigenous Peoples pre-date colonisation and these rights, even if not codified, are ongoing.

33. However, the development of the Canadian approach differs from that of Victoria in three important ways:

    (1) Canadian land justice efforts are led by the federal government, rather than individual provincial governments, which has encouraged and incentivised provinces to follow suit;[45]
    (2) Although not consistently honoured, the Crown recognised Indigenous Peoples' relationship and claims to land as early as 1763, providing historical precedent which is echoed in justifications for reparation; and relatedly,
    (3) Indigenous Peoples in Canada's rights to land are specifically referenced in s 35(3) of the Constitution Act 1982 and s 25(b) of the Canadian Charter of Rights and Freedoms, further entrenching the legitimacy of such claims.

34. In learning from the Canadian approach, it is noted that:

    a. Efforts to achieve reparation for injustice benefit from codification under settler law. However, the lack of historic treaties should not preclude contemporary negotiations that then form the basis for reparation; and
    b. To engage these negotiations, financial, legal, and cultural support should be offered to individuals or groups making claims; and
    c. Significant political will is required, both to provide the adequate support for seeking a modern treaty and to conclude such a treaty on terms that appropriate rectify the harms done.

[45] Government of Canada, 'General Briefing Note on Canada's Self-government and Comprehensive Land Claims Policies and the Status of Negotiations' https://www.rcaanc-cirnac.gc.ca/eng/1373385502190/1542727338550#s1-2.

II. Colombia

Context

35. Colombia has a complicated history of armed conflict between its government, paramilitary groups and guerrilla groups. While the conflict began in the early 1960s, a 'Final Agreement' for peace was reached between the government and the Revolutionary Armed Forces of Colombia (**FARC**) in 2016. The Colombian Government reported there have been over 9.4 million victims from the conflict, with around 4 million IDPs. Around 8 million hectares of land has been stolen or abandoned.[46]

36. Land was stolen in three common forms.[47] Firstly, farmers were pressured to sell their title and vacate at a far lower value than the worth of their land. Secondly, land was abandoned due to armed conflict. Thirdly, land title was illegally changed, often assisted by government and quasi-government institutions.

Approach to Land Justice Reparations

37. In 2011, the Colombian Government passed a law which, among other restorative measures, allowed for land restitution. Of 9.4 million registered victims, 106,833 claims relate to land restitution.[48] These claims are assisted, without cost, by officials from the Land Restitution Unit, or by a lawyer provided to them. The claim is then considered by specialised judges. Once successful, victims are either granted the land, offered monetary compensation or are assisted in building or buying a home.

38. As of 2023, only 9 percent of these claims have been resolved by judges. Despite granting an additional decade to implement the scheme, it is estimated that it will take a further 50 years to resolve all claims.[49]

Learnings

[46] Laura Maria Rojas Morales, 'Colombia's measures for armed conflict victim reparations and land restitution' (June 2023), https://www.sdg16.plus/policies/colombias-measures-for-armed-conflict-victim-reparations-and-land-restitution/.
[47] Eduardo Medina, 'Property restitution in Colombia' https://www.fmreview.org/sites/default/files/FMRdownloads/en/preventing/medina.pdf.
[48] Frances Thomson, 'Land restitution in Colombia: why so few applications?', *Forced Migration Review* 56(1) 2017) https://www.fmreview.org/sites/default/files/FMRdownloads/en/latinamerica-caribbean/thomson.pdf.
[49] Ibid

39. Unlike in Victoria, the Colombian context[50] does not contend with the *colonial* violence of dispossession but it nevertheless must contend with the complicity of the State, here particularly in relation to the role of government or quasi-governmental in the changing of title. Therefore, like other examples provided, significant political will is required for successfully implementing Colombia's approach.

40. Weaknesses in implementation mean that it is widely accepted that the reparations in Colombia have not actually succeeded. Victim-survivors have not received the compensation that they have been promised and likely never will. This is due to an underestimation of the time needed to complete the scheme, and a lack of funding to support it. Moreover, it was first anticipated that the scheme would receive 360,000 claims, however, only 106,833 eventuated. The absence of applications can be explained by a lack of trust of authorities, a lack of legal literacy, a lack of access in remote areas and actual or threatened violence.[51]

41. As such, in learning from the Colombian approach, it is noted that:

    a. Land justice should be flexible to account for the nature of displacement. This involves having dedicated task forces to assist victim survivors, along with specialised courts to assess claims. It also involves allowing for unconventional evidence to be used to support claims, as the nature of displacement means that traditional evidence one may use to prove ownership has been lost, or simply does not exist;
    b. When assessing claims, a presumption should arise that requires the new 'owners' to prove the legitimacy of their title, rather than requiring the victims to prove their prior ownership; and
    c. As noted in Canada, land justice measures must be accompanied by public education and easy access to support for making claims. The sheer volume of victims must be accounted for, not only in the actual *processing* of claims, but also development of an inclusive, sustainable, and ultimately achievable model to *receive* the claims to process.

III. New Zealand

Context

42. Land reparations in New Zealand, facilitated by the Treaty of Waitangi Tribunal, represent

[50] The Colombian approach also differs from Victoria in that Colombia's unitary government has implemented the measures to provide land restitution—rather than the 32 individual departments, which would be more comparable to an Australian state.
[51] Thomson, op cit 35-36

a significant and ongoing process aimed at addressing historical injustices and honouring the principles of the Treaty of Waitangi. The Treaty was signed in 1840 between the British Crown and various Māori chiefs and was intended to establish a framework for peaceful coexistence and cooperation. However, there have been numerous breaches of the Treaty, particularly regarding land acquisition and settlement.

43. The impetus for the Treaty of Waitangi can be traced back to the increasing European presence in New Zealand during the early 19th century. With growing numbers of settlers, traders, and missionaries arriving, the British Crown sought a formal agreement to establish a legal and political framework for its relationship with the Māori chiefs.[52]

44. The British saw the Treaty as a means to secure British sovereignty over New Zealand while ensuring protection for Māori land and property rights. However, interpretations of the Treaty's text in English and Māori differed significantly, leading to misunderstandings and disputes. The Māori version, in particular, carried nuanced meanings that were not fully reflected in the English text, guaranteeing tribal self-government to Māori in respect of themselves and their properties, both tangible and intangible.[53] As a result, the Māori chiefs believed they were retaining their authority and rights over their lands while also acknowledging the Crown's protection.

45. Following intensifying political pressure in the 1960s and 70s the Treaty of Waitangi Tribunal (**Waitangi Tribunal, the Tribunal**) was established in 1975. Its mandate is to investigate claims by Māori that they have been prejudiced by law, policy, act or omission of the Crown and that such law, policy, act or omission is in breach of the principles of the Treaty of Waitangi.[54]

Approach to Land Justice Reparations

46. The Waitangi Tribunal was established to address these grievances and provide a platform for Māori individuals and groups to present their claims regarding land confiscations, cultural losses, and other violations. The Tribunal conducts inquiries into these claims, aiming to assess the historical facts and determine whether the Crown failed to fulfil its obligations under the Treaty.

47. Hearings are held during which both claimants and the Crown give evidence to a panel.

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[52] Catherine J Iorns Magallanes 'Reparations for Maori Grievances in Aotearoa New Zealand' in Federico Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2008) 523, 524.

[53] See Chief Judge J V Williams, Reparations and the Waitangi Tribunal Paper to "Moving Forward" Conference, Australian Human Rights Commission < https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/reparations-and-waitangi-tribunal>.

[54] See generally s 6 Treaty of Waitangi Act 1975.

The Tribunal then writes a report on whether the claims are well-founded, including making non-binding recommendations made to the Crown for reparations often in the form of returning land or offering compensation. It is then incumbent on the Crown to negotiate Treaty Settlements. Usually, when a Treaty Settlement is negotiated, all of the existing and potential historical claims made by that claimant group are considered finalised. Once Treaty Settlement legislation is passed, the Tribunal has no further power to hear historical claims from that group.

48. Since its inception more than 2000 claims have been lodged with the Tribunal. By 2010 legislation had been passed for settlements with a total value of about $950 million. Three early settlements – Commercial Fisheries ($170 million), Waikato-Tainui raupatu ($170 million) and Ngāi Tahu ($170 million) – and the 2008 Central North Island Forests agreement ($161 million) make up the bulk of this amount.[55]

Learnings

49. Like Canada and Colombia, New Zealand's approach is implemented by, and funded by, New Zealand's unitary government. And, like Canada, negotiations are heavily reliant on a pre-existing treaty.

50. Nevertheless, it is important to note that Tribunal's work in providing land reparations, albeit based on an existing treaty, has been broadly heralded as a success. The Tribunal has recognised that the land reparations process is complex, and it seeks not only to rectify past injustices but also to foster reconciliation and strengthen the partnership between the Māori people and the Crown. Key to this is the Tribunal's ability to provide a platform for Māori individuals and groups to present their claims and have them formally investigated.[56]

51. Some argue that the Tribunal process is lengthy and complex, involving legal, historical, and cultural considerations, leading to delays in addressing grievances. Additionally, the question of whether the reparations offered are sufficient or appropriately address the historical and ongoing impacts on Māori communities remains a point of contention. In recognition of the arduousness of the process, the Government has offered a way of by-passing Tribunal by going directly to the Crown for negotiations. Yet very few Māori

[55] Government of New Zealand, 'Treaty in Brief,' https://nzhistory.govt.nz/politics/treaty/treaty-faqs.
[56] Catherine J Iorns Magallanes 'Reparations for Maori Grievances in Aotearoa New Zealand' in Federico Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2008) 523, 542. Notably, the Tribunal has also been described by commentators as having gone some way to depoliticising and depersonalising race-politics in New Zealand, letting claims be negotiated against the Crown rather than private individuals. Andrew Sharp, The Trajectory of the Waitangi Tribunal' in Janine Hayward and Nicola Wheen (eds), *The Waitangi Tribunal*, (Wellington, Bridget Williams Books, 2004), pp 195–206.

choose that approach, instead preferring to go through the Tribunal even if it takes time and resources. It is suggested this is because Māori prefer the public and transparent nature of the Tribunal's process, opting to be judged by and have their claims validated by a panel made up partly by Māori before they go to the Crown to discuss settlement.[57]

52. This said, in learning from the New Zealand approach, it is noted that:

    a. As done by the Tribunal, hearings for claims should be public and transparent, and conducted as much as is possible in accordance with relevant custom—in New Zealand, this is tikanga Māori (Māori custom);
    b. Public education is paramount; the Tribunal has provided valuable public education with the reports themselves having provided an extremely good public record of the circumstances surrounding the Māori grievances and claims addressed;
    c. It is important to recognise that a simple damages approach to reparations is neither possible nor appropriate, and instead supports packages which restore a lost economic base, bearing in mind the extent and nature of the loss and the current needs of the grieving community.[58]

IV. Timor-Leste

Context

53. Over recent centuries, various periods of foreign occupation have affected land ownership and management in Timor-Leste. Significant grievances related to dispossession and disconnection from land arose from colonialism and the authoritarianism that marked an end to it. There have been periods since 2000 in which transitional justice principles and processes have been called on, including through a truth and reconciliation commission. Despite attempts to provide an equitable land claims process designed around international principles through a partnership with USAID, local political will has been sporadic. In this regard, the example of Timor-Leste provides an illustration of the way that land grievances can persist if reforms are not properly designed, implemented, and followed through on.

54. At the end of the 19th century Portuguese colonial authorities attempted to consolidate power over Timorese territory, passing laws to affirm state ownership of all land that was not privately owned. These laws did not gain significant traction and most of the country

[57] Magallanes, Ibid
[58] See Chief Judge J V Williams, Reparations and the Waitangi Tribunal Paper to "Moving Forward" Conference, Australian Human Rights Commission < https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/reparations-and-waitangi-tribunal>.

remained under possession and management via existing customary systems.

55. Following Portugal's 1974 Revolution, its remaining colonies went through differing independence processes. In the case of Timor-Leste, the independence movement precipitated an invasion by neighbouring Indonesia. While an occupying power, Indonesia passed laws to give it a central role in land administration. However, land rights that were formalised by the occupying government often did not have credibility because of corruption involved in the processes.

Approach to Land Justice Reparations

56. After Timor-Leste voted for independence in a referendum at the turn of the millennium, the United Nations Transitional Administration in East Timor (**UNTAET**) was established to provisionally manage the territory until institutions could be set up with international support. Land-related grievances were a challenging issue for UNTAET, particularly with the return to the capital of many internally displaced people in a context where previous land title records had been destroyed.[59] Although UNTAET identified the need for a land commission or a special court as a priority for transitional justice, conflict prevention and state development, the Mission had a time-limited mandate and efforts were unsuccessful to put any continuing system in place to resolve land injustice issues.[60]

57. After the departure of UNTAET, the Commission for Reception, Truth, and Reconciliation in East Timor (CAVR) expressly considered the issue of land justice as part of its mandate. Its 2005 report commented on land dispossession and recommended that the government conduct an enquiry regarding how to resolve land disputes and provide for restitution.[61] However, these recommendations were never formally acknowledged or implemented.

58. In 2006-07, the Government requested USAID to assist in establishing the Ita Nia Rai (INR), program, which had the main objectives of (1) developing a process for the systematic collection of land claims; and (2) approving a legal framework with criteria to deal with land claims.[62] Over its five-year period, INR carried out the first systematic nationwide data collection of land parcel registration. INR focused on urban areas, which meant that it did not address the complex customary arrangements by which rural areas

[59] Anthony Goldstone, 'UNTAET with Hindsight: The Peculiarities of Politics in an Incomplete State', Global Governance 10(1) (2004): 83–98.
[60] Nigel Thomson, 'Towards Sunrise – East Timor, the United Nations and the Administration of Public and Private Abandoned Land in the Post-Conflict Environment' (Master diss., University of Queensland, 2003).
[61] Available at https://chegareport.org/Chega%20All%20Volumes.pdf.
[62] See Technical Framework for a Transitional Land Law for East Timor, available at https://mj.gov.tl/files/Policy%20Framework%20for%20a%20Transitional%20Land%20Law%20for%20East%20%20%20%20%20%20%20%20%20%20%20%20%20%20TimorFi3.pdf.

were regulated. However, its relatively simple process allowed anyone (including groups or communities) to freely submit a claim to land, regardless of whether they held documentation to support it, which permitted over 50,000 land claims to be lodged within the capital regions.[63]

59. Unfortunately, laws that would have given a legal basis for the INR-recommended claims process were ultimately vetoed by the President. The gains obtained through the INR program were thus stymied by a lack of political impetus.

60. After a new government was formed in 2013, it granted a procurement award to a Timorese-Portuguese joint venture to manage the land claims process that had been developed by the INR. The project created the National Cadastre System (SNC), which also had the aim of registering all land parcels in the country. A new Land Law was passed in 2017, which recognised customary ownership. However, it did not provide an adequate framework for resolving disputes in a context where Timor-Leste's historical context often meant there were multiple overlapping claims over the same land.

Learnings

61. Because the SNC was not supported by adequate legislation or systems, it was not effective.[64] In 2019, the UN Special Rapporteur on the Rights of Indigenous Peoples recommended the suspension of the SNC's work[65] and a coalition of national, local and international civil society organisations working on land issues in Timor-Leste recommended that the land registration and distribution process be discontinued until the issues with the SNC were resolved.[66]

62. The SNC ended in 2020. It has been criticised for failing to implement the learnings of the INR, for neglecting to properly inform citizens of Timor-Leste about the program and how to make claims under it, and for not having independent evaluation. It has also been observed that the SNC has facilitated the resolution of very few claims over land held under customary community possession, despite this category of ownership being the largest in the country.

[63] See Timothy Fella and Karol Boudreaux, An Evaluation of the Strengthening Property Rights in Timor-Leste Project (SPRTL) (USAID, 2011); UNMIT, Timor-Leste Communication and Media Survey (UNMIT, 2011), available at https://pdf.usaid.gov/pdf_docs/PDACT288.pdf.
[64] See e.g. "Land Registration in Timor-Leste: Impact Analysis of the National Cadastral System (SNC)" (Rede ba Rai SNC Report), Rede ba Rai 2019, available at: https://www.laohamutuk.org/Agri/land/2019/RBR2019_RejistrasaunRai_ENG.pdf.
[65] Human Rights Council, Visit to Timor-Leste – Report of the Special Rapporteur on the Rights of Indigenous Peoples (UN General Assembly, 2019).
[66] Rede ba Rai SNC Report.

63. Systems of land possession in Timor-Leste have persisted through communal structures and longstanding connections to place, despite foreign occupations and a series of post-independence governments. Many citizens continue to live under customary land ownership. However, customary regimes have not allowed for past grievances to be methodically addressed, despite a United Nations Mission, a truth and reconciliation commission, foreign investment, and a USAID-supported program. Because there has not been a continuing government with a commitment to resolving land issues, there do not appear to have been long-term inroads made to registering and determining land claims with a view to alleviating past injustices.

64. As such, learning from Timor-Leste, it is noted that:

a. Land restitution and other reparations for land injustice should involve land claims processes designed around international principles, taking local context into account;
b. All reforms should be designed and planned comprehensively and in a manner that will not require multiple rounds of enabling legislation; and
c. Reforms must not only be properly designed but independently evaluated over time, with the possibility to adapt where desired outcomes are not being reached.

C. Conclusions

Challenges

65. Reparations for Indigenous land in the colonial context are complex and constitute an emerging area of transitional justice practice. Indigenous property rights do not mirror Western legal constructs, requiring broader perspectives on reparations, as well as inclusive procedures which accommodate different worldviews. The passage of time and the ongoing nature of violations remain obstacles.

66. Further, in the Victoria case as well as the examples described above, the analysis and proposed solutions have been heavily based in the concepts of Western settler property rights, including ownership and title. While legal negotiations may recognise the inherent rights of First Peoples in relation to the land on which they have lived for millennia, such negotiations take place within the structure of colonial laws, which re-emphasises the power and position of the colonial state.

67. The principles of restitution and compensation established in international law and custom can themselves also be problematic in practice. For example, to whom should land be returned in cases where dispossession and subsequent occupation cuts across generations,

and where more than one group has a valid claim over the same land? Moreover, international practice is less developed on issues such as economic and social inequality, which authors have highlighted as the missing link of transitional justice, and in which land plays a central role.[67]

68. Land justice for Indigenous Victorians is more than just a property or ownership issue, it is about identity, repossession of history and cultural ties, and the transformation of relations towards land. While the landmark Mabo court decision in 1992 paved the way for legislative recognition of native title, its limitations have caused new trauma for those who could not meet the stringent eligibility tests. Although there have been some advancements made under the TOS Act and its related framework, the system has not been widely used and can impose restrictions on those who cannot prove they are a Traditional Owner Group. Further, Traditional Owner Groups may be seen merely as stakeholders, rather than custodians. The legal framework can thus have the effect of not enabling, or even denying, some people and communities their spiritual and ongoing connection to country.[68]

69. Notwithstanding the above challenges, in the authors' view the Commission is in a position to articulate recommendations that would be aligned with internationally accepted principles and address continuing injustice relating to First Peoples' dispossession of land.

Potential solutions

70. The ability to make individual and collective claims for the recognition of connection to land and the rights that come from it are an indispensable prerequisite of land justice. It is particularly important with respect to First Peoples, whose exercise of rights is often collective and engaged with at the communal level.[69]

71. To this end, the Commission might recommend the creation of a State-level entity to seek out and register Indigenous land rights claims since colonisation in Victoria. As the experience of New Zealand demonstrates, a comprehensive and centralised land rights registration process would foster reconciliation and strengthen the partnership between Indigenous people and the Crown.

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[67] Zinaida Miller, 'Effects of Invisibility: In Search of the "Economic",' International Journal of Transitional Justice 2 (2008): 266–291; Wendy Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence,' International Journal of Transitional Justice 3 (2009): 28–48; Lauren Balasco, 'Locating Transformative Justice: Prism or Schism in Transitional Justice?,' International Journal of Transitional Justice 12 (2018): 368–378;

[68] See for example, Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors [2002] HCA 58, [63], Peter Seidel, "Native title: The struggle for justice for the Yorta Yorta Nation" [2004] AltLawJl 16; (2004) 29(2) Alternative Law Journal 70.

[69] See General Comment No 31[80], 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add.13 of 26 May 2004, para 9.

72. The entity should be mandated to recognise rights that go beyond Western property law concepts. Noting that courts have often been unable to recognise the spiritual and other non-'ownership' based connection to country, to coexist within established systems, the entity need not determine land ownership rights, and not be limited to claims where exclusive or continuous possession, or traditional 'ownership' of specific land is alleged.

73. Where Indigenous non-ownership rights are recognised in respect of Crown land, specific types of land access, use, and other benefits may be recommended.[70] Going beyond the Native Title and TOS Act frameworks, the entity may also consider circumstances where connections are claimed in respect of now privately-owned land. In such cases additional challenges will arise; without purporting to grant present rights to Indigenous groups in respect of such land, the entity may register historical connections for the purposes of creating a full narrative account. This is important for any future treaty process.

74. Based on the lessons learned from international practice, any such entity should:

    a. be widely publicised before being set up, to enable inclusive dialogue and full participation;[71]

    b. be designed, led, and implemented with at least equal representation by Indigenous and State Government representatives (whether Indigenous or not);

    c. be given a mandate and sufficient funding to assist Indigenous individuals and communities in educating themselves about their potential historical connections to land, of which they may be unaware as a result of the rupture of their past ties;

    d. provide a platform for Indigenous individuals groups to present their land claims inclusively, and in non-legal and technical terms. Community-based approaches may require a broader consultative process to accommodate individual claims (e.g. ownership issues) and collective interests (e.g. preservation, access).

    e. be empowered to go beyond existing property law concepts of rights relating to land;

[70] It is acknowledged that different approaches may be required to Federal and State Crown land and that any such change would need to be consistent with existing Native Title and TOS Act frameworks.
[71] Article 18 of UNDRIP specifies that Indigenous peoples 'have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures'.

f. be empowered to recommend remedies that may include access to and use of land, or shared forms of heritage, as well as compensation or alternative arrangements such as loans;[72]

g. potentially, be empowered to assist parties with understanding, and administering, the 'modern treaty' process such as has occurred in Canada;

h. be appropriately resourced and with a sufficient legislative basis to permit the entity to continue despite changes in Government.[73]

75. The Commission could also recommend ways to advance First Peoples' needs under the existing laws, including before land reform ministries, titling offices, credit agencies, and social service agencies. These supporting statements could defend collective lands, advocate for territorial autonomy and subsoil rights and secure social services around housing.[74]

76. It may be possible for the Commission to recommend that a fund be set up – whether as part of a package of reparations or otherwise – to enable Traditional Owner Groups to purchase private land with which they have a connection.

77. Additionally, the Commission may consider the myriad of other symbolic and tangible approaches that may be used in parallel to fully provide reparation for colonial harms. For example, measures such as the recognition of pre-existing land rights, government apologies, reburial of ancestral remains and the creation of memorials on significant cultural sites should all be pursued to achieve land justice for Indigenous Victorians.

[72] Carsten Stahn, Confronting Colonial Amnesia, Towards New Relational Engagement with Colonial Injustice and Cultural Colonial Objects *Journal of International Criminal Justice* 18 (2020), 821.
[73] Notably, not all truth commissions' recommendations on reparations have been implemented, such as in Kenya and South Africa. The short-term nature of the Commission means it lacks the mandate to ensure its recommendations are implemented once its term is complete. The Commission should therefore do its best to ensure that there is sufficient political will at the state level to implement its recommendations on reparations.
[74] International Centre for Transitional Justice, Strengthening Indigenous Rights Through Truth Commissions: A Practitioner's Resource (2012) https://www.ictj.org/sites/default/files/ICTJ-Truth-Seeking-Indigenous-Rights-2012-English.pdf.