University of Miami Law Review

Volume 72
Number 3 *Spring 2018*

Article 3

4-24-2018

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ARTICLES

The Human Right of Property

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*Despite the absence of a comprehensive global pact on the subject, the human right to property protection—a right **of** property but only rarely **to** specific property—exists and is recognized in 21 human rights instruments, including some of the most widely ratified multilateral treaties ever adopted. The Cold War's omission of property rights in the two principal treaties on human rights, namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, has been overtaken by events. But that reality continues to be resisted by legal scholars, including human rights advocates, as well as by many across the political spectrum from many on the left (who associate property rights with misguided "Western" models for economic development) to some on the right (who see it as yet another intrusion on sovereign discretion sought by global elites). It is also resisted by U.S. courts which continue to assert that international law regulates the treatment of foreign property but not of "domestic takings" involving actions directed at a state's own citizens.*

This Article surveys the reality of internationalized property rights protections outside the usual context in which it

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is addressed, namely to protect the property of foreign investors in the host states in which they operate. It canvasses the policy and jurisprudential objections to the idea of a treaty-based human right of property, addresses how the U.S. has contributed to the internationalization of this human right, and contrasts the property caselaw of the Inter-American Court of Human Rights with the ways U.S. courts have largely resisted the idea that the international human right of property exists. It addresses how human rights treaties respond to objections to property rights writ large and uses, inter alia, the property rulings of the Inter-American Court of Human Rights to advance a non-instrumentalist defense of the human right to property protection based on "moral intuitions" of what human dignity requires. Finally, the Article defends the fragmented nature of the distinct international regimes that protect property from those who would seek to harmonize its contours either through a global agreement or by recognizing its status as customary law.

INTRODUCTION

Although states today do not routinely expropriate private property without compensation, they continue to abuse their power over property. Consider two, not atypical, cases.

In 2011, Nelson Mezerhane, a successful Venezuelan entrepreneur who owned a leading bank, the newspaper Diario El Globo, and the television channel Globovisión, filed a seventeen-count complaint against Venezuela in a federal district court in the United States.[1] He alleged that, beginning in 2004, during Hugo Chavez's term as President, the Venezuelan government targeted his enterprises because of their editorial independence.[2] Eventually, through what he asserted were "illegitimate judicial proceedings," the Chavez regime expropriated all of Mr. Mezerhane's and his family's assets, stripped him of his Venezuelan citizenship, and revoked his rights to travel or earn a livelihood, and to acquire, sell, or convey any property.[3] Mr. Mezerhane asserted that, as a result of these actions, he was rendered stateless.[4] At the time of filing his claims, he was seeking asylum in the United States.[5] Comparable expropriating actions to silence political dissent continue to occur in places like Vladimir Putin's Russia and Xi Jinping's China.[6]

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[1] Mezerhane v. República Bolivariana de Venezuela, 785 F.3d 545, 546–47 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 800 (2016), discussed *infra* Part IV.

[2] *Id.* at 547.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *See, e.g.*, Jordan Gans-Morse, *Threats to Property Rights in Russia: From Private Coercion to State Aggression*, 28 POST-SOVIET AFF. 263, 264 (2012); Emily Korstanje, *China's Oppression of Tibetans has Dramatically Increased*,

Contemporary deprivations of property rights do not always involve instances in which a government rescinds prior title to land out of political pique. Claims to property, now as always, continue to be made by groups of indigenous peoples who have lived and farmed lands for generations without any formal legal title but who face displacement by a state's decision to sell tracks of that land to private owners—frequently to huge agribusinesses.[7] When this occurred to the Sawhoyamaxa Community in Paraguay, they brought a claim in 2006 against that state before the Inter-American Court of Human Rights (IACHR).[8] Both representatives of the tribe and expert witnesses on its behalf claimed that Paraguay's denial of ancestral lands forced tribe members to live in "precarious" circumstances with limited access to food, drinkable water, or medical care, which led to many preventable deaths in violation of the tribe's right to life[9]—and not only its right to property.[10] Similar "land grabs" by multinational interests (in collusion with governments), along with other forms of governmental evictions—in violation of interdependent rights to food, shelter, and health as well as rights to property and life—have led to comparable complaints before the African Commission of Human Rights.[11]

NEW INTERNATIONALIST (Feb. 4, 2016), https://newint.org/features/web-exclusive/2016/02/04/chinas-oppression-of-tibetans-has-dramatically-increased.

[7] *See, e.g.*, Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, at 16 (Mar. 29, 2006).

[8] *Id.* at 1–2.

[9] *Id.* at 26–28, 47–49.

[10] *Id.* at 68.

[11] *See, e.g.*, Soc. and Econ. Rights Action Ctr. v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 1–9 (Oct. 27, 2001), http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf; Malawi Afr. Ass'n v. Mauritania, Communication 54/91-61/91-96/93-98/93-164/97_196/97-210/98, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 17 (May 11, 2000), http://www.achpr.org/files/sessions/27th/comunications/54.91-61.91-96.93-98.93-164.97_196.97-210.98/achpr27_54.91_61.91_96.93_98.93_164.97_196.97_210.98_eng.pdf. *See also* Olivier De Schutter, *How Not to Think of Land-Grabbing: Three Critiques of Large-Scale Investments in Farmland*, 38 J. PEASANT STUD. 249, 249 (2011).

Despite such abuses, international lawyers, including human rights advocates, are ambivalent and sometimes hostile about recognizing a "human right" to property protection. That skepticism extends to U.S. judges. As discussed below, if Venezuela steals the property of Mr. Mezerhane or if Paraguay deprives its own indigenous peoples of their livelihood, U.S. courts appear to be of the view that this is not an issue governed by international law.[12] This Article explores the bases for such hostility and defends the reality (and the idea) of the human right of property.

In doing so, this Article revisits questions that have been raised for centuries concerning the right of property and, at least since WWII, the role of international law with respect to that right. The latter was a particular source of tension when the U.N. first began to elaborate the "international bill of rights."[13] Whether to include a reference to property became a highly contentious issue when the U.N. General Assembly elaborated, in 1948, the Universal Declaration of Human Rights, and much later, when that body considered the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[14] On both occasions, there was considerable dispute about whether the international community ought to include as a "fundamental human right" a right to the protection of property.[15] After a fraught battle (mostly on East-West lines), the U.N. opted to include what ultimately became Article 17 in the Universal Declaration.[16] That contested decision to include a purposely vague recognition of the "right to own property," in an instrument regarded as purely hortatory, came only after a series of votes on alternative formulations (including one widely supported option to omit such a right altogether).[17] Later in 1966, when the Assembly sought to

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[12] Mezerhane v. República Bolivariana de Venezuela, 785 F.3d 545, 549–52 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 800 (2016).

[13] *See* John G. Sprankling, *The Global Right to Property*, 52 COLUM. J. TRANSNAT'L L. 464, 469–71 (2014).

[14] *Id.*

[15] *Id.* at 471–72.

[16] *Id.* at 472–73.

[17] G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 17 (Dec. 10, 1948) ("1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property."). *See* Gudmundur Alfredsson, *Article* 17, *in* THE UNIVERSAL DECLARATION OF HUMAN

transform the Universal Declaration of Human Rights into a binding treaty, property rights were left on the cutting room floor.[18] Such a right never made it into either the ICCPR or the ICESCR, the bases for the "international bill of rights."[19] While the West, led by the United States, was eager to protect the institution of private property, the U.S.S.R., its allies, and many newly independent states were equally eager to defend the paramount right of sovereigns to exercise self-determination, particularly with respect to a matter so closely connected to a nation's decision to be either a socialist or a market state.[20] When the two covenants affirmed, as their respective first articles, the right of self-determination, the West's preference for including the right to property was the first casualty.[21]

Much has changed in international law since 1966 but some attitudes have not. Today, as is suggested by the list of thirty-five international instruments accompanying this Article in the Appendix, property protections feature prominently in a number of widely ratified treaties, including all of today's most prominent regional human rights regimes. In the wake of the Cold War—and the inclusion

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RIGHTS: A COMMENTARY 255, 255–56 (Asbjørn Eide et al. eds., 1992). Opposition to including property rights among the "rights of man" was not limited to the U.N.'s East bloc members. *See, e.g.*, H. LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 163 (1945). Lauterpacht argued that the decision by the Institute of International Law in 1929 to include, as the first article in its Declaration on the Rights of Man, the duty of states "to grant to every person the equal right to life, liberty, and property" is "unobjectionable," so long as the intention is to require "respect on a footing of equality such rights" under national law. *Id.* But he argued that "social and economic changes have intervened" to preclude acceptance of what Locke, Blackstone, the Virginia Bill of Rights of 1776, and the French Declaration of the Rights of Man of 1789 had all considered an "inviolable and sacred right." *Id.* Lauterpacht omitted property rights from his bill of rights not only because of the rise of states reliant on collective ownership as the principal means of production, but because even states dependent on private property interfered with such property "through taxation, death duties, and regulation in pursuance of general welfare." *Id.*

[18] *See* Sprankling, *supra* note 13, at 470.

[19] *Id.*

[20] *Id.* at 471–72.

[21] *See* International Covenant on Civil and Political Rights art. 1(1), *adopted* Dec. 19, 1966, 999 U.N.T.S. 171, 173 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights art. 1(1), *adopted* Dec. 16, 1966, 993 U.N.T.S. 3, 5 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

of property rights in nearly all of the world's constitutions—there is no longer a clear East-West divide on the question of whether legal protections for property rights exist as a matter of national or international law.[22] As demonstrated by a case study of the property rights jurisprudence of the IACHR in Part III, such rights are now the subject of international adjudication, not only by regional human rights tribunals but by several human rights treaty bodies.[23] International property rights scholarship exists with respect to a number of the treaty regimes identified in the Appendix, particularly jurisprudence under the European Court of Human Rights (ECtHR), in the World Trade Organization (WTO) relating to intellectual property, and in investor-state tribunals under International Investment Agreements (IIAs).[24] Property rights also feature prominently in the work and reports issued by development experts and economists.[25] International financial institutions, such as the World Bank and the International Monetary Fund (IMF), give high salience to property rights as part of good governance.[26] Indeed, these institutions, and others that purport to measure "rule of law" compliance, presume that states have a duty to protect the property of both their own na-

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[22] According to a 2012 study of the Universal Declaration of Human Rights' potential impact on subsequent national constitutions, 85% of the world's constitutions contained a right to own property. Zachary Elkins et al., Imagining a World Without the Universal Declaration of Human Rights 19, tbl.1 (Mar. 7, 2014) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2469194. *See also* Sprankling, *supra* note 13, at 493 (noting that at a symposium in 1995, Louis Henkin, the chief Reporter for the 1986 U.S. Restatement—which did not include the right to property in its list of established customary human rights in section 702—is reported to have said that, given changes in the world since 1986, "if he were drafting Section 702 today he would include as customary international law [the] right[] to property") (quoting Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 7 n.43 (1995)).

[23] *See also infra* Part V.

[24] *See infra* Appendix. *See also* José E. Alvarez, *The U.S. Contribution to International Investment Law*, *in* AMERICAN CLASSICS IN INTERNATIONAL LAW: INTERNATIONAL INVESTMENT LAW 1, 30 (José E. Alvarez ed., 2017) [hereinafter Alvarez, *International Investment Law*].

[25] *See, e.g.*, Harvey M. Jacobs, *Private Property and Human Rights: A Mismatch in the 21st Century?*, 22 INT'L J. SOC. WELFARE S85, S94 (2013).

[26] *See id.* at S94–S95.

tionals and of foreign investors and traders located in their territory.[27] But apart from these discrete regimes, attention to property rights as part of international human rights law lags.[28] Indeed, even human rights defenders remain either ambivalent or overtly hostile to the idea that international law protects property as a fundamental human right. As a leading U.S. scholar on the subject, John Sprankling has noted, despite black letter treaty law to the contrary, the traditional answer to the question—does a right to property exist under international law?—is "no."[29]

The few contemporary scholars who have taken international property protections seriously, such as Sprankling, have tended to assume that the piecemeal nature of international property protections, illustrated by the absence in the accompanying Appendix of a single overarching multilateral property protection treaty, is a problem that needs correcting.[30] On this issue, as on many others, some suggest that international law's approach to property protection needs harmonization.[31] There is a presumption that it would be desirable to encourage the development of an "international law of property" that would embrace a "global" human right to property recognized as a matter of general customary international law or general principles of law.[32] Such a global right, applicable to all nations irrespective of their adherence to any treaty and perhaps achieved through gradual case law development, would ideally result in clarity about the protected forms of both tangible and intangible property, along with global agreement on the legitimate modalities for its creation and acquisition, including uniform rights to use, destroy, exclude, and transfer property.[33] Of course, a global

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[27] *See, e.g.*, Era Dabla-Norris & Scott Freeman, *The Enforcement of Property Rights and Underdevelopment* 3 (IMF, Working Paper No. WP/99/127, 1999), https://www.imf.org/external/pubs/ft/wp/1999/wp99127.pdf.

[28] *But see* Christophe Golay & Ioana Cismas, Legal Opinion: The Right to Property from a Human Rights Perspective 2 (July 7, 2010) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1635359.

[29] Sprankling, *supra* note 13, at 465.

[30] *Id.* at 500–02.

[31] *See id.*; *see generally* Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 553 (2002).

[32] JOHN G. SPRANKLING, THE INTERNATIONAL LAW OF PROPERTY 347–60 (2014).

[33] *See id.*

human right to property would also contain consistent rules identifying when states can legitimately regulate or interfere with the right.

This Article explores why there is a continuing resistance to acceptance of such a human right in many circles even though international law embraces property rights while not cohering around a unified law of property. It also attempts to show, through select examples, what the human right of property has meant so far in practice. Part I surveys reasons for the continuing resistance to global property rights. Part II answers the canard that the international protection of property rights is fundamentally "un-American." Part III provides a case study of how one regional human rights system has dealt with the right of property. Part IV addresses, by contrast, U.S. courts' responses to claims based on such a human right. Part V explores, more broadly, what contemporary international law says about the right, while Part VI advances some normative justifications for the black letter law. A final section concludes that, contrary to advocates of defragmentation or harmonization, the human right of property, admittedly a product of the West, will remain a viable proposition in the West and beyond only to the extent that it remains subject to distinct contextualized interpretations in international regimes and diverse international adjudicative forums.

I. THE RIGHT TO PROPERTY PROTECTION AND ITS DISCONTENTS

Hostility to the idea that international law should protect a *human* right to property applicable to a state's own nationals, and not only to foreigners within it, cuts across the left-right political spectrum. While left-leaning international lawyers are sympathetic to the claims of groups such as the Sawhoyamaxa community in Paraguay, they are likely to see demands by indigenous peoples as special cases involving the self-determination or the "cultural" rights of a group—and not an instance that invokes a general human right to property under international law.[34] At the same time, critics of socialist or undemocratic regimes may recoil at the property abuses committed by such regimes when directed at a state's own nationals

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[34] *See, e.g.*, Ariel E. Dulitzky, *When Afro-Descendants Became "Tribal Peoples": The Inter-American Human Rights System and Rural Black Communities*, 15 UCLA J. INT'L L. & FOREIGN AFF. 29, 58–59 (2010).

(such as the treatment accorded to Mr. Mezerhane) but still remain reluctant to open the door of their own courts to claims by foreigners or to permit supranational scrutiny of how states treat the property rights of their own citizens.[35]

Human rights advocates' ambivalence about this alleged fundamental right is deeply rooted in history.[36] The right to property underlies, after all, some of the darkest episodes in history and they are skeptical about elevating the status of a right that has impeded the realization of what they consider "more important" human rights.[37] They are aware that some theologians have used the right of property (recast as sovereign "dominium") to justify "just war" and its consequences, including the plunder of property owned by "infidels"[38]; that the "father" of international law, Hugo Grotius, used property rights to justify the Dutch East India Company's unilateral rights to protect Dutch trading routes;[39] and that nineteenth century lawyers argued that the need to protect the rights of foreign investors from the North required resort to gun-boat diplomacy and even military interventions in the Global South.[40] The ostensible right to property has privileged powerful and wealthy elites within states,[41]

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[35] *See, e.g.*, FOGADE v. ENB Revocable Tr., 263 F.3d 1274, 1294–95 (11th Cir. 2001).

[36] *See* Jacobs, *supra* note 25, at S86.

[37] *Id.* at S95–96.

[38] WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW 105 (Michael Byers trans., 2000); JAMES THUO GATHII, WAR, COMMERCE, AND INTERNATIONAL LAW 43–46 (2010).

[39] Martti Koskenniemi, *International Law and the Emergence of Mercantile Capitalism: Grotius to Smith*, *in* THE ROOTS OF INTERNATIONAL LAW 3, 6–9 (Pierre-Marie Dupuy & Vincent Chetail eds., 2014).

[40] *See, e.g.*, O. Thomas Johnson, Jr. & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law*, *in* Y.B. INT'L INV. L. & POL'Y 2010–2011, 649, 651 (Karl P. Sauvant ed., 2012).

[41] *See* Jacobs, *supra* note 25, at S95–96.

been used to limit the right to vote,[42] perpetuated patriarchy,[43] promoted inequality,[44] and hampered efforts to redistribute.[45] Indeed, given the concentration of wealth in the world, the right to property would appear to be a problem to be solved rather than a right that needs defending.[46]

The right to property has been charged, in short, with many sins. It has been used as an imperialist cudgel to colonize,[47] to privilege only one kind of market state,[48] and to support wrong-headed "privatization" demands by the IMF.[49] Today, the most prominent international property rights regime—pursued under treaties like the North American Free Trade Agreement (NAFTA),[50] which protects the property rights of foreign investors in its three states—is seen as chilling environmental regulations even in rich countries like Canada and the U.S.[51] The fact that property rights feature so prominently in institutions like the IMF is one reason they are seen with great suspicion by those who have long questioned the consequences of that institution's ideologically loaded development

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[42] *See* RALPH FEVRE, INDIVIDUALISM AND INEQUALITY: THE FUTURE OF WORK AND POLITICS 74 (2016).

[43] *See* Kerry Rittich, *The Properties of Gender Equality*, *in* HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 87, 87 (Philip Alston & Mary Robinson eds., 2005) [hereinafter HUMAN RIGHTS AND DEVELOPMENT].

[44] *See* Jacobs, *supra* note 25, at S95–96.

[45] *See* Gregory S. Alexander, *Property as a Fundamental Constitutional Right? The German Example*, 88 CORNELL L. REV. 733, 770–71 (2003).

[46] *See* FEVRE, *supra* note 42, at 1–2. It has not escaped the notice of international lawyers that the two human rights covenants' sole mention of property targets the well-known uses of property entitlements to engage in harmful discrimination. *See, e.g.*, ICCPR, *supra* note 21, art. 2(1) (barring distinctions among persons "of any kind, such as . . . property, birth or other status"); ICESCR, *supra* note 21, art. 2(2) (same).

[47] *See* Jacobs, *supra* note 25, at S87.

[48] *Id.*

[49] *See, e.g.*, *Ukraine Receives IMF Support But Must Accelerate Reforms*, IMF Country Focus (Apr. 4, 2017), https://www.imf.org/en/News/Articles/2017/04/03/na040417-ukraine-receives-imf-support-but-must-accelerate-reforms.

[50] North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

[51] *See* Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. Rev. 30, 32 (2003).
See generally Jacobs, *supra* note 25, at S85–99.

agenda, including experts on human rights or transitional justice. If one's view of what international property rights mean is dominated by its role in investor-state arbitrations or in the conditionality agendas of the IMF—regimes that are now subject to considerable backlash—there is no mystery surrounding resistance to such rights.[52] To the extent internationalized property protections are seen as the product of discredited formulas to promote economic development in less developed states, these are likely to suffer the same criticisms as the Washington Consensus (or post-Washington Consensus) frames for justifying them.[53]

Resistance to an individual "right" to property protection is not limited to modern day skeptics of economic globalization.[54] It has deeper roots in conceptual and moral contradictions that have been obvious to legal philosophers for centuries.[55] How can persons simultaneously be protected *from* government for a right that exists only because it is created *by* government? Why protect private property, a creature of society, from society, when society needs at times to take property without full compensation, as with land reform?[56] For

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[52] *See, e.g.*, Letter from Alliance for Justice, to Members of Congress (Mar. 11, 2015), http://www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf (letter signed by 100 U.S. law professors urging Congress to reject investor-state dispute settlement provisions in order "to protect the rule of law" as trade agreements are negotiated).

[53] *See, e.g.*, José E. Alvarez, *Why are We "Re-Calibrating" Our Investment Treaties?*, 4 WORLD ARBITRATION & MEDIATION REV. 143, 144 (2010) [hereinafter Alvarez, *Our Investment Treaties*].

[54] *See, e.g.*, PIERRE-JOSEPH PROUDHON, WHAT IS PROPERTY? 13 (Donald R. Kelley & Bonnie G. Smith, eds., trans., Cambridge Univ. Press 1994) (1840).

[55] *See id.*; *see also* Rhonda E. Howard-Hassmann, *Reconsidering the Right to Own Property*, 12 J. HUM. RTS. 180, 182 (2013).

[56] *See, e.g.*, LAUTERPACHT, *supra* note 17, at 163. These tensions emerge even in documents that affirm official long-standing U.S. policy affirming the illegality of government takings of foreign owned property. Thus, the influential Third Restatement on Foreign Relations Law, whose chief reporter was Louis Henkin, affirms that states are responsible for injury to nationals of other states, including for acts or omissions that violate their right to property. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 711 (AM. LAW INST. 1986). It also acknowledges that while there is lack of agreement on the scope of the right, "the right of an individual to own some property and not to be deprived of it arbitrarily is recognized as a human right." *Id.*, cmt. d. Nonetheless, it acknowledges that states other than the U.S. have frequently asserted an

many it is hard to take seriously a right whose limitation may be necessary—even vital—to give effect to the rights of others or whose essence (the right to sell, trade or destroy one's property) seems at odds with the inalienability that for some distinguishes "genuine" civil and political rights.[57] While we would be aghast by the idea that someone should be able to bargain away his right not to be tortured, it would be a feeble property right that does not include the rights to sell, trade or destroy it.

As this suggests, skepticism about a right to property is not limited to international lawyers. For some legal philosophers, the alleged right to property does not derive from the human condition but rather from the mere material (and arbitrary) fact that someone has managed to secure first possession.[58] Other critics argue that the purported right is largely a claim made against the state and has little to say about the most important consequence of recognizing such a right: namely, that it diminishes the rights of other persons by excluding them from possession.[59] The right to property largely consists, after all, in the right to exclude others from enjoying one's property. Recognition of such a "right" limits the freedom of others since it imposes a duty on them to abstain from interfering with it.[60] If one defines "genuine" human rights[61] as those that serve to *connect* individuals by reminding them of their common humanity,

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exception from compensation in cases involving a national program of agricultural land reform which would not be possible if full compensation were to be paid. *Id.* § 712 reporter's note 3.

[57] *See, e.g.*, Francis Cheneval, *Property Rights as Human Rights*, *in* 1 REALIZING PROPERTY RIGHTS 11 (Hernando de Soto & Francis Cheneval eds., 2006); LOUIS HENKIN, THE AGE OF RIGHTS 3 (1990).

[58] *See* Manuel Monteagudo, *The Right to Property in Human Rights and Investment Law: A Latin American Perspective of an Unavoidable Connection* 6, n.26 (SECO / WTI Academic Cooperation Project Working Paper Series No. 2013/06, 2013) (citing Héctor Faúndez Ledesma). For a thoughtful critique of efforts to justify private property on theories of historic entitlement, see JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 253–83 (1988).

[59] For an effort to square this circle, see HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS 37–40 (2011).

[60] *See, e.g.*, Joseph Raz, *Human Rights in the Emerging World Order*, *in* PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 217, 220 (Rowan Cruft et al. eds., 2015) [hereinafter PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS] (noting that this is characteristic of all rights).

[61] Monteagudo, *supra* note 58, at 6 (discussing whether the right to property is a "genuine" human right).

property rights appear to do the opposite. Encouraging people, like children, to claim—"that's mine"—does not seem, at first glance, a particularly promising way to encourage individuals to relate to one another. Why protect a right, in short, that, as the *Ten Commandments* suggest, is largely defined by the right *to exclude others from what is one's own*?[62]

As this suggests, religious leaders have not generally (or always) been strong proponents of property rights, particularly if these are seen as individual rights to private property.[63] Christian theologians have long struggled with the moral justifications for allocating private property.[64] Many of them have pointed out that, since man—not God—created the institution of private property and God's earth was created for the use and enjoyment of all, there needs to be a particular justification offered for privileging a right that allocates particular objects or pieces of land to individuals to use as they please to the exclusion of others who may have a greater need.[65] Other theologians have struggled with the moral justifications of a right they associated with several of the deadly sins—from avarice to gluttony.[66] And those with a sense of history have questioned the need to elevate to the status of a "right" a concept that has justified slavery and is still used around the world to subjugate the rights of women.[67] Why privilege a bundle of rights, including inheritance,

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[62] "You shall not covet your neighbor's house; you shall not covet your neighbor's wife or his male servant or his female servant or his ox or his donkey or anything that belongs to your neighbor." *Exodus* 20:17. For general critiques of the right to property along these lines, see Laura Dehaibi, *The Case for an Inclusive Human Right to Property: Social Importance and Individual Self-Realization*, 6 W. J. LEGAL STUD. 1, 1 (2015).

[63] *See, e.g.*, Louis W. Hensler III, *What's* Sic Utere *for the Goose: The Public Nature of the Right to Use and Enjoy Property Suggests a Utilitarian Approach to Nuisance Cases*, 37 N. KY. L. REV. 31, 36 (2010).

[64] *See id.*

[65] *Id.*

[66] *Id.* at 37.

[67] See, e.g., *Exodus*, *supra* note 62, or, for that matter, JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT & DISCOURSES 221 (G.D. H. Cole ed., J.M. Dent & Sons 1913) (1755) ("[They] bound new fetters on the poor, and gave new powers to the rich . . . irretrievably [they] destroyed natural liberty, eternally fixed the law of property and inequality, converted clever usurpation into unalterable right, and, for the advantage of a few ambitious individuals, subjected all mankind to perpetual labour, slavery, and wretchedness.").

which perpetuates the accumulation of wealth—and which only makes it harder, as Jesus suggested, for rich men (property holders have historically been predominately male) to get into Heaven?[68] Indeed, even defenders of private property, such as John Locke, argued that persons should not possess more property than they could use or suggested, as did Rousseau, that the right to one's personal property does not include the right to make a profit from it.[69] Many prominent scholars have treated property as a form of theft, have called for its abolition, have seen it as a manifestation of pernicious possessive individualism, or have associated it with violence pursued for the sake of dispossession.[70]

And even defenders of national property rights have been skeptical of the need for supra-national scrutiny in furtherance of such rights. For example, U.S. property scholars have been critical of the need for international rules to protect the rights of those whose rights are already subject to the considerable protections accorded under relevant U.S. law, including the Takings Clause of the U.S. Constitution.[71] For many such critics, international property rights, such as those that accompany the investment chapter of NAFTA, have become more like swords wielded by powerful foreign investors to challenge legitimate regulation and less like shields against the abuse of state power.[72] Critics allege that IIAs, originally touted as

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[68] *Matthew* 19:24 ("[I]t is easier for a camel to go through the eye of a needle, than for a rich man to enter the kingdom of God." (quoting Jesus). Thus, even John Locke, a foremost defender of rights to private property, took contradictory positions regarding the "natural rights" of heirs to their inheritance. *See* WALDRON, *supra* note 58, at 241–51.

[69] *See, e.g.*, Howard-Hassmann, *supra* note 55, at 182 ("As much land as a man tills, plants, improves, cultivates, and can use the product of, so much [only] is his property.") (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 308 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690)); ROUSSEAU, *supra* note 67, at 50–51.

[70] *See, e.g.*, Howard-Hassmann, *supra* note 55, at 182 (citing PIERRE JOSEPH PROUDHON, WHAT IS PROPERTY? AN ENQUIRY INTO THE PRINCIPLE OF RIGHT AND OF GOVERNMENT (1840); KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO (Samuel H. Beer et al eds., 1955) (1888); C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962)); Stefan Andreasson, *Stand and Deliver: Private Property and the Politics of Global Dispossession*, 54 POL. STUD. 3 (2006)).

[71] *See, e.g.*, Been & Beauvais, *supra* note 51, at 59.

[72] *See id.* at 40.

tools to promote the rule of law, have become mechanisms to undermine it.[73]

Others, particularly on the right, laud defenders of private property—from Robert Nozick to Friedrich Hayek—but insist that decisions on how a government chooses to treat the property of its own citizens should not be subject to the dictates of international adjudicators. Some of the populist resistance to the European Union undoubtedly stems from resentments generated by property-restricting mandates issued from Brussels and enforced by the European Court of Justice.[74] In the United States, for self-described members of the "Alt-Right," the fact that many human rights treaties identified in the Appendix purport to intrude on "sovereign" rights to allocate property rights is yet one more reason for opposing such treaties as inconsistent with "American values."

Outside of Western countries like the United States, hostility to the internationalization of property rights has a long history that extends as far back as attempts to establish a "New International Economic Order" in the 1970s.[75] It is not lost on critical scholars of international law that the idea of protecting property on the basis of international norms first arose in connection with protecting the rights of (Western) foreign investors.[76] For some scholars associated with Third World Approaches to International Law (TWAIL), those

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[73] *See* Letter from Alliance for Justice, *supra* note 52. For some U.S. critics, the property protections in the international investment regime are reminiscent of discredited property protections imposed under the Lochner era as described in, HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE & DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 10, 19–22 (1993).

[74] Indeed, the very first property rights case brought to the European Court of Justice was a challenge brought by a German farmer who was precluded from planting new wine vines by an E.U. edict that precluded use of her land for this purpose to maintain a "quantitative balance" of the market in wine. The farmer lost the case on the basis that the restriction was not an "undue limitation upon the exercise of the right to property." Case 44/79, Hauer v. Land Rheinland-Pfalz, 1979 E.C.R. 3727, 3748–49.

[75] James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 MICH. L. REV. 1996, 2032 n.116 (2000).

[76] For example, see, Ursula Kriebaum & August Reinisch, *Property, Right to, International Protection*, *in* MAX PLANCK ENCYC. OF PUB. INT'L L. (Rüdiger Wolfrum ed., 2009) (noting that international investment law has served as a backbone for international rules on the protection of private property).

historical origins continue to dominate, and therefore, the contemporary property rights instruments identified in the Appendix constitute struts supporting the "structural violence" of racialized privilege and embedded asymmetries that international law continues to impose on the formerly colonized.[77] To such critics, the human right to property perpetuates "Westernised legal modernities of individualised property rights and land designation titles."[78] As this suggests, arguments first heard at the U.N. in 1948 and 1966—that each nation should be able to determine for itself when to create alternatives to private property, including common property (e.g. national parks) or communal property (such as communal lands governed by a tribe)—continue to be made today.[79] Then, as now, many see the idea of an international human right to property protection as fundamentally incompatible with the U.N. Charter's prohibition on interference with states' domestic jurisdiction or its recognition that every state enjoys the right to self-determination.[80]

Finally, even those who might be willing to concede that property rights should ideally be recognized at the national and international levels differ considerably as to the nature of the "right" in question. Both defenders and detractors of the human right to property in the United States tend to see it as an individualized right to secure compensation under the Takings Clause of the U.S. Constitution.[81] To the extent they consider them at all, they see internationalized property rights as demanding freedom *from* state interference.[82] But even European states equally disposed to protecting private property as a constitutional right have not seen such rights in

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[77] *See, e.g.*, B.S. Chimni, *Capitalism, Imperialism, and International Law in the Twenty-First Century*, 14 OR. REV. INT'L L. 17, 27–28 (2012).

[78] Phanuel Kaapama, *The Enduring Colonial Legacies of Land Dispossessions and the Evolving Property Rights Legal Discourse: Whither Transitional Justice?*, 11 HUM. RTS. & INT'L LEGAL DISCOURSE 108, 112 (2017). *See generally* Gathii, *supra* note 75, at 2027.

[79] *See, e.g.*, Howard-Hassmann, *supra* note 55, at 181–82.

[80] Indeed, the Calvo Doctrine – which opposed the idea that an international minimum standard of treatment protects the property rights of foreigners – was grounded in Latin American apprehension of external pressures that affront self-determination. *See, e.g.*, Monteagudo, *supra* note 58, at 6–7 nn.29–30.

[81] *See, e.g.*, RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 347 (2014).

[82] *See id.*

quite the same way.[83] Property rights in places like Germany are associated with both positive duties on states as well as negative obligations not to impose harm.[84] Others, including the IACtHR (as discussed in Part III), have seen the protection of property as a species of economic, social, and cultural rights that imposes duties on governments to respect, protect, and fulfill certain basic needs beyond merely providing a social safety net.[85] For these and other reasons, many on the left and the right, in the East and the West, think that the idea of a global right to property is so deeply contested that it cannot be the subject of international rule. On this view, property protection surely cannot be a "fundamental," genuinely universal state obligation—and therefore cannot be a "human" right.

II. INTERNATIONAL PROPERTY PROTECTION AS AN "AMERICAN" IDEA

It hardly needs be said that respect for property rights is deeply ingrained in the American DNA—and its law. As scholars on the U.S. founding have noted, it is likely that only rhetorical elegance prevented Thomas Jefferson from proclaiming, in the Declaration of Independence, that the "pursuit of happiness" includes, most prominently, the pursuit and protection of property.[86] The contemporary Virginia Declaration of Rights had proclaimed, after all, that all have "inherent rights, of which, when they enter into a state of society, they cannot . . . deprive or divest their posterity . . . " including "the means of acquiring and possessing property . . . ."[87] Neither of these declarations confine their "inalienable rights" by nationality. Like the 1789 French Declaration of the Rights of Man and of the Citizen, they consider rights to property as extending to all persons as human beings irrespective of nationality or other status.[88]

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[83] *See, e.g.*, Alexander, *supra* note 45, at 775.

[84] *Id.* at 733, 742 (noting that the concept of the Sozialstaat embraces duties on the state to redistribute wealth and not only individual rights against state abuse).

[85] *See, e.g.*, Golay & Cismas, *supra* note 28, at 2, 28–29.

[86] *See* Carli N. Conklin, *The Origins of the Pursuit of Happiness*, 7 WASH. U. JURIS. REV. 195, 197–99 (2015).

[87] VA. DECLARATION OF RIGHTS § 1 (1776).

[88] *See* DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN DE 1789 [DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN], art. 2 ("Le but

Despite the clear universal implications of such documents, a common view in the United States is that such property protections are our own, designed to protect our nationals, perhaps even when they reside or invest abroad, and are thus not conferred by international law. This is historically inaccurate.[89] While the U.S. Framers were careful to embed individual property rights directly into the U.S. Constitution and its Bill of Rights—in its takings, contract, due process, and equal protection clauses—and U.S. judges eventually required individual states of the Union to respect such rights for all those residing in the country, from the start the Framers saw property rights as having international repercussions and dimensions.[90]

As scholars of the founding period have pointed out, those who established the Republic revered the merchants' chapter of the Magna Carta which had proclaimed that

> [a]ll merchants shall have safe and secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and selling by the ancient and right customs, quit from all evil tolls, except (in time of war) such merchants as are of the land at war with us.[91]

While it would be anachronistic to describe the English noblemen of 1215 behind the merchants' chapter as the equivalent of to-

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de toute association politique est la conservation des droits naturels et imprescriptibles de l'Homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l'oppression." ["The aim of all political association is the preservation of the natural and imprescriptible rights of Man. These rights are liberty, property, security, and resistance to oppression."]), https://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789.

[89] *See* David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 370 (2003).

[90] *See* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 934–35 (2010).

[91] MAGNA CARTA ch. 41 (1215).

day's "free traders" in their attitudes, the Founders were deeply influenced by them.[92] They saw the rights to private property as embedded in the English common law imported to the colonies and saw the mother country's failure to respect it as a betrayal justifying revolution and eventually independence. As is also well known, the Founders, including James Madison, followed John Locke in proclaiming that "[g]overnment is instituted no less for the protection of the property than of the persons of individuals."[93] Given these views, it is no surprise that they sought to convince foreign governments that the fledging U.S. Republic would respect the laws of nations, including, as the Golden Rule demands, customary norms to protect the property rights of all.[94] As legal historians have documented, the founding documents of the United States—from its Constitution to its first treaties with Great Britain—were intended to speak to a foreign as well as a domestic audience.[95] These instruments emphasized that the United States, like other nations worthy of international legitimacy, would respect both national and foreign owned property.

From the start, America's infatuation with property rights did not stop at its border. The Founders, particularly Alexander Hamilton, argued that international law, and not only U.S. law, required extending the property rights protections enjoyed by U.S. citizens under the Constitution even to British "traitors" whose contract and property rights were violated by state courts in the United States in the wake of the revolutionary war.[96] Accordingly, thanks largely to

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[92] *See* José E. Alvarez, *Alexander Hamilton's Defense of Foreign Capital* 4 (N.Y.U. Law IILJ MegaReg Forum Paper 2017/1), http://www.iilj.org/wp-content/uploads/2017/01/Alvarez_IILJ-MegaRegForumPaper_2017-1.pdf [hereinafter Alvarez, *Defense of Foreign Capital*].

[93] THE FEDERALIST NO. 54, at 313 (James Madison) (ABA ed., 2009) (1788) (echoing LOCKE, *supra* note 69, at 368–69 ("The great and *chief end* . . . of men's uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*.").

[94] *See* Alvarez, *Defense of Foreign Capital*, *supra* note 92, at 4.

[95] *See* Golove & Hulsebosch, *A Civilized Nation*, *supra* note 90, at 934–35.

[96] *See, e.g.*, Alvarez, *International Investment Law*, *supra* note 24, at 8–9. *See also* Alvarez, *Defense of Foreign Capital*, *supra* note 92, at 8. In *The Defence*, Hamilton did not distinguish the contract rights of foreigners from their rights against government takings of property even though, at the time, the U.S. Constitution barred states from impeding contract rights but the federal takings clause had not yet been extended to the states.

Hamilton's efforts—whose instructions deeply influenced the United States' negotiator, John Jay—George Washington's first treaty, the 1794 Treaty of Amity, Commerce and Navigation between Great Britain and the United States (otherwise known as the "Jay Treaty") included recognition of the substantive rights owed to British investors and creditors.[97] The Jay Treaty also established a mixed claims arbitral commission to settle claims of property rights deprivations.[98]

At a time when the Jay Treaty was being passionately denounced and Jay was being burned in effigy in several U.S. cities for negotiating a treaty that was as unpopular then as trade agreements appear to be today, Hamilton, became its "undisputed champion."[99] Hamilton and an ally wrote twenty-eight erudite essays, nearly 100,000 words, defending sequentially the Treaty's twenty-eight articles,[100] entitled *The Defence*.[101] The principal arguments arrayed against the Jay Treaty by its critics were that Jay had concluded a wildly unequal and possibly unconstitutional agreement that undercut U.S. sovereignty and fundamental U.S. national interests—all while undemocratically allocating important adjudicative decisions to arbitrators instead of Article III judges.[102] Hamilton responded that the terms of the Jay Treaty were not only in the national interests of the new republic, but also the best alternative to renewed conflict or war.[103] Hamilton's defense was equal parts law and policy. He argued that everything in the treaty was supported by the Constitution, fulfilled pledges made in the Treaty of Peace that had ended the revolutionary war, and had the backing of the law of nations.[104] Turning to international arbitration was necessary, Hamilton argued, because

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[97] *See, e.g.*, RON CHERNOW, ALEXANDER HAMILTON 487–500 (2004); Alvarez, *International Investment Law*, *supra* note 24, at 4–6.

[98] Alvarez, *International Investment Law*, *supra* note 24, at 10.

[99] CHERNOW, *supra* note 97, at 496.

[100] Alvarez, *Defense of Foreign Capital*, *supra* note 92, at 2.

[101] For a text of *The Defence*, see generally ALEXANDER HAMILTON, 5 THE WORKS OF ALEXANDER HAMILTON (Henry Cabot Lodge ed., 1904) (Hamilton, writing as "Camillus," a wise Roman general who, according to Plutarch's Lives, was sorely misunderstood by his people, wrote nos. I–XXII, XXXI–XXXIII, and XXXVI–XXXVIII; Rufus King, a federalist ally of Hamilton, wrote under Hamilton's supervision, nos. XXIII-XXX and XXXIV–XXXV).

[102] Alvarez, *Defense of Foreign Capital*, *supra* note 92, at 3.

[103] HAMILTON, *supra* note 101, at 213.

[104] *Id.* at 158–60.

the courts of neither Britain nor the U.S. could be trusted to address those claims impartially.[105]

Hamilton appealed to morality as well as pragmatism to defend the need to protect private property even when owned by foreigners.[106] "No powers of language at my command[,]" he stated, "can express the abhorrence I feel at the idea of violating the property of individuals . . . ."[107] Although the law of nations accepted that a nation was free to determine for itself whether to permit foreigners to bring property into or acquire property in its territory, once it did so, it had a "duty . . . to protect that property, and to secure to the owner the full enjoyment of it" as "it tacitly promises protection and security."[108] Anything else is "inconsistent with the notion of property[,]" as it would violate the "contract between the society and the individual" ensuring that the latter retains his property and its use.[109] "The property of a foreigner placed in another country, by permission of its laws, may justly be regarded as a deposit, of which the society is the trustee."[110] A violation of that trust would be an act of "perfidious rapacity," offensive to "moral feeling" and its perpetrator would deserve "all the opprobrium and infamy of violated faith."[111] The sixth article of Jay's Treaty permitting compensation to British creditors for their losses and damages notwithstanding state laws that made it impossible for them to collect on these debts wiped away what Hamilton called a stain on the "honor and character of the country" and was required by morality, natural justice, and the "spirit and principles of good government . . . ."[112] Respecting this public pledge and renouncing recourse to such sequestrations in the future were a "valuable pledge for the more strict future observance of our public engagements . . . ."[113] Doing anything else would sanction "the power of committing fraud, of violating the

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105 *Id.* at 345–46.
106 *Id.* at 413–14.
107 *Id.* at 405–06.
108 *Id.* at 414.
109 *Id.* at 414–15.
110 *Id.* at 415.
111 *Id.* at 415–16.
112 *Id.* at 347–48.
113 *Id.* at 348.

public faith, of sacrificing the principles of commerce, [and] of prostrating credit."[114] "To Hamilton, protecting a nation's reputation for respecting private rights of property under the rule of law was vital to ensuring incoming flows of capital."[115] Even temporary suspensions of the exercise of foreigners' property rights could not be justified for "extraordinary and great emergencies[,]" because any such exception, "if conceived to exist, would be, at least, a slow poison, conducing to a sickly habit of commerce . . . ."[116]

Hamilton's *The Defence* is the first in a long line of significant policy speeches, adjudicative innovations, and treaties, initiated by virtually every U.S. President in the modern era and designed to protect foreign capital both here and abroad through various tools of national and international law.[117] There is a remarkable continuity with respect to these matters across Democratic and Republican administrations.[118] The Jay Treaty planted the seed for what would eventually become U.S. post-WWII treaties of Friendship, Commerce and Navigation (FCNs)[119] with significant property protections for their respective parties—treaties which eventually led to contemporary bilateral investment treaties and investment chapters in today's free trade agreements (such as Chapter Eleven of NAFTA).[120]

Given the fact the United States has been, for much of its history, the world's greatest importer and exporter of capital, it should surprise no one that it has long used the tools of international law to protect such capital flows. This policy has been pursued through, for example, sixty-five international claims commissions established over the two centuries since the Jay Treaty, as well as through U.S.

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114 *Id.* at 410.

115 Alvarez, *Defense of Foreign Capital*, *supra* note 92, at 5.

116 HAMILTON, *supra* note 101, at 445.

117 *See* Alvarez, *International Investment Law*, *supra* note 24, at 20, 63. *See also* KENNETH J. VANDEVELDE, THE FIRST BILATERAL INVESTMENT TREATIES: U.S. POSTWAR FRIENDSHIP, COMMERCE, AND NAVIGATION TREATIES 48 (2017).

118 *See* Alvarez, *International Investment Law*, *supra* note 24, at 63.

119 *See* José E. Alvarez, *Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA. J. INT'L L. 1, 19 (1989) [hereinafter Alvarez, *Political Protectionism*].

120 *See* José E. Alvarez, *Is the Trans-Pacific Partnership's Investment Chapter the New 'Gold Standard'?*, 47 VICTORIA U. WELLINGTON L. REV. 503, 503 (2016).

diplomatic efforts to undermine the Calvo Doctrine (which tried to affirm that only national law determines the treatment of foreign capital) in the nineteenth century.[121] By the mid-twentieth century, U.S. friendship, commerce and navigation treaties after WWII, which served to export Franklin Delano Roosevelt's New Deal, and repeated affirmations by U.S. secretaries of state (starting with Cordell Hull) expressed the view that expropriations directed against U.S. citizens abroad require "prompt, adequate and effective" compensation.[122] Eventually, by the 1970s, U.S. government opposition at the U.N. to establish a New International Economic Order (NIEO) went so far as to include U.S. legislation precluding aid to nations that resort to expropriations without compensation (as anticipated by the NIEO).[123] Further, from the mid-1980s through at least the Obama Administration,[124] America resorted to investor state arbitration to protect foreign investor rights in BITs[125] and investment chapters within FTAs (including Chapter Eleven of NAFTA).[126] Consistent with Hamilton's admonitions in *The Defence*, the U.S. has always sought to protect private property, even in cases of war and national emergency.[127] U.S. leaders presumed that the same Lockean social contract struck between a government and the governed to protect the property of citizens has been struck among at least some nations through treaties that extend to such protections to foreign-owned property once it is permitted to enter the country.[128] U.S. officials have always argued, as did Hamilton, that protecting national and foreign capital helps to ensure more of both.[129] Their efforts to use FCNs (and eventually BITs and FTAs) to protect such

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121 *See* Alvarez, *International Investment Law*, *supra* note 24, at 1–10, 70–71.

122 *Id.*

123 *Id.*

124 *See* Alvarez, *Defense of Foreign Capital*, *supra* note 92, at 8.

125 *See* Johnson & Gimblett, *supra* note 40, at 685–90.

126 *See* Alvarez, *Political Protectionism*, *supra* note 119, at 139. For an overview of Jay Treaty's contribution to arbitration, see Charles H. Brower II, *Arbitration*, MAX PLANCK ENCYC. OF PUB. INT'L L., http://opil.ouplaw.com/home/EPIL (last updated Feb. 2007) (type "arbitration" in search bar and follow "Arbitration" hyperlink).

127 *See, e.g.*, Alvarez, *Political Protectionism*, *supra* note 119, at 136; Alvarez, *International Investment Law*, *supra* note 24, at 67.

128 Alvarez, *International Investment Law*, *supra* note 24, at 62–63.

129 *See id.* at 65; Alvarez, *Defense of Foreign Capital*, *supra* note 92, at 5–6, 8.

rights was seen by U.S. negotiators as an effort to export the protections accorded by U.S. law to the world; that is, an effort to elevate the standards of property protections extended to one's nationals to foreign investors located in one's territory.[130]

Of course, the idea that everyone's right to property requires respect because it is essential for a nation's people to live peacefully in common, because it enables sovereigns to engage with one another, and because it provides a suitable base for a common law among nations—*jus gentium*—were not justifications newly minted by the U.S. Founders. The framers of the U.S. Constitution and the Jay Treaty drew on the intellectual heritage forged by Western forebears of property rights writ large, including Aristotle, Aquinas, Francisco de Vitoria, Domingo de Soto, Hugo Grotius, Adam Smith, and John Locke.[131] Hamilton's thoughts on the value of property derived in no small part from those of the Scholastics, for example. The Dominican friars of Salamanca, Francisco de Victoria and Domingo de Soto, borrowed ideas from Aristotle and Aquinas to provide a Christian justification for private property and its protection.[132] Long before Hamilton, they argued that even though God originally created shared or communal property, after the Fall when humans came to associate in society, natural law compelled the establishment of private property because this made everyone more diligent, enabled human affairs to be conducted in a more reliable way, and the rise of commerce made peace more likely.[133] There is a direct line between that Salamanca school and the "father of international law," Hugo Grotius, which continues through the more secular arguments of enlightenment thinkers like Locke, Adam Smith, and avid absorbers of this heritage like Hamilton.[134]

Those who suggest that Judeo-Christian civilization is undermined by globalization and property respecting pacts that facilitate

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[130] *See, e.g.*, Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501, 502 (1998).

[131] *See generally* WALDRON, *supra* note 58, at 6–7, 242.

[132] *See* Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 U. TORONTO L.J. 1, 5–6 (2011).

[133] *Id.* at 16.

[134] *Id.* at 7, 26, 30; *see also* Martti Koskenniemi, *Sovereignty, Property and Empire: Early Modern English Contexts*, 18 THEORETICAL INQUIRIES L. 355, 383 (2017).

it should remember that the forebears of Judeo-Christian ethics provided the intellectual firepower that enabled and justified private property institutions to emerge, along with the institutions that internationalized it, such as *lex mercatoria*, international banking, organizations to enable global trade and capital flows, and, as the Jay Treaty and its successors illustrate, international adjudicative mechanisms to settle property disputes with a transnational dimension.[135] Those who criticize the internationalization of property rights as creatures of (predominately Western) notions of mercantile capitalism are therefore not wrong. There is little question that international law, long before Jeremy Bentham coined the term,[136] has served to grease the wheels of global capitalism, not least by elevating the status of private property from an individual right to a sovereign right over territory[137]—and that many of the contemporary instruments listed in the Appendix reflect increasing reliance on Western legal frameworks that Lauterpacht, back in 1945, argued were undermined by modernity.[138]

For centuries, Western scholars and policymakers have justified the right to property on the basis that it advances efficiency, promotes stability, and is conducive to peace within and between nations. After 1989, those assumptions, flawed or seriously incomplete as they may be, have underpinned liberal aspirations to "reform the world"[139]—as well as many of the property regimes in the Appendix. But, as the next part illustrates, human rights regimes, including the regional systems that incorporate a right of property, have been subject to their own evolution over time. As Part III shows, the property jurisprudence of the IACtHR does not replicate U.S. takings law; the American Convention of Human Rights' inclusion of the

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135 Alvarez, *Defense of Foreign Capital*, *supra* note 92, at 8–9.

136 *See* M. W. Janis, *Jeremy Bentham and the Fashioning of "International Law"*, 78 AM. J. INT'L L. 405, 408 (1984).

137 *See* Sprankling, *supra* note 13, at 467 ("A fundamental precept of international law is that each nation has sovereignty over its own territory.") (footnote omitted).

138 *See* LAUTERPACHT, *supra* note 17, at 163.

139 GUY FITI SINCLAIR, TO REFORM THE WORLD: INTERNATIONAL ORGANIZATIONS AND THE MAKING OF MODERN STATES 13–20 (2017) (historical survey of de facto constitutional transformations through changes in the operation of U.N. peacekeeping, the turn to ILO technical assistance, and World Bank "good governance" efforts).

right to property[140] has not simply exported U.S. takings jurisprudence to the Western hemisphere and the same appears to be the case with respect to the other human rights instruments that incorporate property rights in the Appendix. The complex international regimes extending property protections to citizens of the world today may have been inspired by Western ideas but, as is suggested by the case study in Part III, have taken distinct forms and continue to evolve.

III. CASE STUDY OF THE PROPERTY JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-American Court of Human Rights (IACtHR) provides one gateway to understanding how contemporary international law handles the human right of property—and the many critiques that have accompanied that right. To be sure, the European Court of Human Rights has handled more property claims than has the IACtHR.[141] But European property rights jurisprudence, including that produced by the European Court of Justice, the product of considerable scholarship, requires no summary here.[142] The international property jurisprudence of our own hemisphere is ironically, less well known—and in some respects, more enlightening to those seeking

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[140] Organization of American States, American Convention on Human Rights art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter ACHR].

[141] The ECtHR was established in 1959 under Article 19 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953). Twenty years later, in 1979, the IACtHR was created by the ACHR, *supra* note 140.

[142] *See, e.g.*, Georg Ress, *Reflections on the Protection of Property under the European Convention on Human Rights*, *in* HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW 625, 625 (Stephan Breitenmoser et al. eds., 2007); Mar Aguilera Vaqués, *Right of Property and Limits on its Regulation (Additional Protocol No. 1, Article 1)*, *in* EUROPE OF RIGHTS: A COMPENDIUM ON THE EUROPEAN CONVENTION OF HUMAN RIGHTS 537, 537 (Javier García Roca & Pablo Santolaya eds., 2012); Florian Becker, *Market Regulation and the 'Right to Property' in the European Economic Constitution*, 26 Y.B. EUROPEAN L. 265, 265–68 (P. Eeckhout & T. Tridimas eds., 2008). Indeed, the fact that, according to the latest figures produced by the ECtHR, one in six rulings of that Court deal with property rights accounts in part for the considerable scholarship on point. *See* EUR. CT. H.R., OVERVIEW 1959–2016 9 (2017), http://www.echr.coe.int/Documents/Overview_19592016_ENG.pdf [hereinafter ECTHR OVERVIEW].

to understand the complexities of today's internationalized right of property.

The first part below addresses how the IACtHR handled the Saxhoyamaxa Community's claim, mentioned at the outset of this Article, as well as six other rulings of that Court issued through April of 2017, raising rights to communal property. The second part canvasses the eighteen claims in which the IACtHR has addressed the merits of alleged violations of private property.[143]

A. *Recognizing the Communal Rights of Indigenous Peoples*

The IACtHR has considered seven cases in which a violation of Article 21 was found in relation to communal, and not individual property.[144] In the course of these decisions, that Court has expanded the protections accorded under that provision by (1) interpreting that Article to include not only individual, but also communal property; (2) developing requirements for communities to enjoy these entitlements; (3) elaborating the obligations of states regarding such communal rights; and (4) indicating ways to balance the rights of states vis-à-vis the communities asserting such rights. These innovations are considered in turn.

1. SECURING COMMUNAL PROPERTY

In the seminal 2001 *Mayagna (Sumo) Awas Tingni Community* case, the Court acknowledged that "[a]mong indigenous peoples there is a communitarian tradition regarding a communal form of

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[143] These numbers were distilled from the decisions available in the database elaborated by the Court and the Supreme Court of Mexico, available at BDJH: Sistema Interamericano (BDJH: Interamerican System) http://www.bjdh.org.mx/interamericano (enter search terms "derecho a la propiedad privada" and "Articulo 21") (only in Spanish). The total number of property claims is small relative to the 187 rulings issued by the IACtHR during this period. The eighteen rulings involving non-communal property rights were identified through a search in that database for decisions containing the words "right to property" and "Article 21." Decisions in which property claims were dismissed prior to consideration of the merits, e.g. based on procedural grounds, are not included in these figures.

[144] ACHR, *supra* note 140, art. 21 ("1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment in the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law.").

collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community."[145] It later clarified that this "notion of ownership and possession of land does not necessarily conform to the classic concept of property, but [it still] deserves equal protection under Article 21 of the American Convention."[146] In the *Sawhoyamaxa* case, the Court elaborated on why communal rights needed to be extended protection:

> Disregard for specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons.[147]

The Court has justified this interpretation first on the basis of negotiating history and plain meaning, noting that the preparatory works of the American Convention suggest that every sort of property right was purported to be included within the purview of Article 21.[148] Second, the Court has justified its interpretation on the basis that "human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions."[149] Third, the Court has referred to Article 29(b) of the Convention, which states that no provision may be interpreted as "restricting the enjoyment or exercise of any right or freedom rec-

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[145] Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001).

[146] Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 120 (Mar. 29, 2006).

[147] *Id.*

[148] *Mayagna*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 145 (noting, among other things, that the drafters decided to refer to the "use and enjoyment of his *property*" instead of "private property").

[149] *Id.* ¶ 146 (footnote omitted). In the 2005 *Yakye Axa* case, the Court linked this resource explicitly to the case law of the European Court of Human Rights. Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 125 (June 17, 2005).

ognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party."[150] Finally, the Court has relied on the need for systemic interpretation of treaties under the Vienna Convention on the Law of Treaties.[151] Accordingly, the IACtHR has interpreted Article 21 in light of ILO Convention No. 169,[152] the ICCPR, and the ICESCR, as well as interpretations issued by relevant interpretive bodies of all of these instruments.[153]

2. Determining Whether a Group Enjoys Such Rights

The Court has identified two principles that should be taken into account when interpreting the requirements for a community to have a claim under Article 21. The first principle is the community's relation to the land. As the Court put it in the 2001 *Mayagna (Sumo) Awas Tingni Community* case:

> Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material

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150 *Mayagna*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 147.

151 *See, e.g.*, *Yakye Axa*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 126 (noting that the "interpretation of a treaty should take into account not only the agreements and documents directly related to it (paragraph two of Article 31 of the Vienna Convention), but also the system of which it is a part (paragraph three of Article 31 of said Convention)").

152 *Id.* ¶¶ 127–30.

153 Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 93–95 (Nov. 28, 2007) (noting that while Suriname had not ratified ILO Convention No. 169 or recognized a right to communal land under its domestic law, the ICESCR committee had interpreted the right of self-determination included in that convention as being applicable to indigenous peoples, while the ICCPR committee had interpreted Article 27 of that convention as requiring minorities not to be denied the right, in community with other members of the same group, to enjoy their culture which may consist of a way of life closely associated with territory and use of resources).

> and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[154]

The second principle is the need to protect a people's natural resources. In *Sarayaku*, the Court said the following:

> Given this intrinsic connection that indigenous and tribal peoples have with their territory, the protection of property rights and the use and enjoyment thereof is necessary to ensure their survival. In other words, the right to use and enjoy the territory would be meaningless for indigenous and tribal communities if that right were not connected to the protection of natural resources in the territory. Therefore, the protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their way of living. This connection between the territory and the natural resources that indigenous and tribal peoples have traditionally used and that are necessary for their physical and cultural survival and the development and continuation of their worldview must be protected under Article 21 of the Convention to ensure that they can continue their traditional way of living, and that their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by the States.[155]

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[154] *Mayagna*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149. *See also, e.g.*, Moiwana Cmty. v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 133 (June 15, 2005); *Yakye Axa*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 137.

[155] Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 146 (June 27, 2012) (citing *Yakye Axa*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 124, 135, 137; Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 118, 121 (Mar. 29, 2006)).

In giving effect to these two principles, the Court has concluded that a community need not have been indigenous to the land in the sense of being its first occupiers,[156] and that the group seeking to demonstrate the necessary customary connection to the land need not have a formal title over the property to deserve protection. Possession, as determined by customary practices, suffices.[157] As the Court indicated in the *Saxhoyamaxa* case:

> 1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title; 2) traditional possession entitles indigenous people to demand official recognition and registration of property title; 3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and 4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality.[158]

Moreover the IACtHR has concluded that the right to communal lands can be claimed indefinitely into the future, for as long as the relationship with the land lasts, and notwithstanding hindrances that prevent its exercise. [159] The Court has also clarified that states are not excused from fulfilling such communal rights by claiming that

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[156] *Moiwana*, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 132–33.

[157] *Id.* ¶¶ 130–31; *see also Mayagna*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 151.

[158] *Sawhoyamaxa*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 128. *See also* Xákmok Kásek Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 109 (Aug. 24, 2010).

[159] *Sawhoyamaxa*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 131–32. *See also Xákmok Kásek*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 113 (noting that this connection can be expressed through traditional presence or use, by means of spiritual or ceremonial ties, sporadic settlements or crops, hunting, fishing or seasonal or nomadic gathering, use of natural resources related to indigenous customs, or any other element characteristic of their culture).

the land tenure system that is in effect for the indigenous group is unclear; lack of clarity is not itself an "insurmountable obstacle" but requires a state to consult with the members of the group.[160] Finally, the Court has explained that the community's right extends over their own territory, not that of their ancestors.[161]

3. STATE OBLIGATIONS WHERE COMMUNAL RIGHTS ARE ESTABLISHED

Once a communal right to property exists, states have "a positive obligation to adopt special measures that guarantee members of indigenous and tribal peoples the full and equal exercise of their right to the territories they have traditionally used and occupied."[162] This obligation includes taking steps to ensure that such right is guaranteed; merely offering the possibility of judicial remedies should breaches occur is not sufficient to comply with Article 21.[163] Required steps include first, an obligation to delimit the land owned by the community, after engaging in consultation with community members.[164] Second, the state must

> abstain from carrying out, until that delimitation, demarcation, and titling have been done, actions that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographical area where the members of the Community live and carry out their activities.[165]

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[160] Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 101 (Nov. 28, 2007).

[161] *Xákmok Kásek*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 95.

[162] *Saramaka*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 91.

[163] *See id.* ¶ 115.

[164] *See* Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 153 (Aug. 31, 2001); *Saramaka*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 115.

[165] *Mayagna*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 153.

Third, the state must provide the community with a title and not merely extend a "privilege" to use the land.[166]

Finally, the communal right to property must be appropriately balanced against any individual right to property that might be in play. In balancing the rights to property of an indigenous community with the rights to private property held by individuals or corporations, the IACtHR has emphasized that the former rights need not always prevail, but that it is important to keep in mind that the ancestral rights of members of indigenous communities "could affect other basic rights, such as the right to cultural identity and to the very survival" of that community.[167] The Court has noted that restricting

> the right of private individuals to private property might be necessary to attain the collective objective of preserving cultural identities in a democratic and pluralist society, in the sense given to this by the American Convention; and it could be proportional, if fair compensation is paid to those affected pursuant to Article 21(2) of the Convention.[168]

The Court has also noted that striking the appropriate balance needs to involve, consistent with ILO Convention No. 169, consulting the indigenous communities involved "in accordance with their own mechanism of consultation, values, customs and customary law."[169]

In the case involving the Sawhoyamaxa Community, the core of the complaint relied on the American Convention's Article 21. The IACtHR ruled that the Saxhoyamaxa's traditional possession of tribal lands could be treated as the functional equivalent to that of "a state-granted full property title" that entitled the tribe to restitution and that Paraguay's actions fell short of its obligations.[170] In doing

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[166] *Saramaka*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 115 (noting that "title must be recognized and respected, not only in practice, but also in law, in order to ensure its legal certainty").

[167] Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 147–49 (June 31, 2005).

[168] *Id.* ¶ 148.

[169] *Id.* ¶ 151.

[170] Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 128 (Mar. 29, 2006).

so, the Court rejected Paraguay's three claimed defenses, namely that the claimed lands had been conveyed to private owners "for a long time," that the lands were "adequately exploited," and that the private owners' rights in the lands were now protected by a bilateral investment agreement between Paraguay and Germany.[171] With respect to the defense that the claimed lands were now in private hands, the Court demurred from deciding "that Sawhoyamaxa Community's property rights to traditional lands prevail over the right to property of private owners or *vice versa*, since the Court is not a domestic judicial authority with jurisdiction to decide disputes among private parties. This power is vested exclusively in the Paraguayan State."[172]

The Court did not hesitate, however, to find the presence of innocent third party purchasers insufficient as a ground for dismissing *prima facie* the claims by indigenous peoples since otherwise those rights would "become meaningless."[173] It also rejected defenses that the land was currently productive since this argument addressed only the economic productivity of the land and not the "distinctive characteristics" of the indigenous peoples. [174] With respect to Paraguay's third argument, the Court noted that it had not been provided with the text of the bilateral investment agreement but understood that this treaty permitted nationalizations for a "public purpose or interest" and did not in itself preclude restitution of the land.[175] It also added that the enforcement of such bilateral treaties "should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States."[176] Ultimately the IACtHR found that Paraguay had not ensured the right protected under Article 21 since,

> when a State is unable, on objective and reasoned grounds, to adopt measures aimed at returning traditional lands and communal resources to indigenous

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171 *Id.* ¶¶ 137–41.
172 *Id.* ¶ 136.
173 *Id.* ¶ 138.
174 *Id.* ¶ 139.
175 *Id.* ¶ 140.
176 *Id.* (footnote omitted).

> populations, it must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures.[177]

B. *Claims Involving Private Property*

1. DEFINING PROTECTED PROPERTY

The IACtHR has explored three sets of issues relating to the definition of property: the general definition of the term; whether it extends to rights held by shareholders; and the extent to which it covers certain "acquired rights." Early on, the IACtHR defined "property" in Article 21 broadly, as including "material objects that may be appropriated, and also any right that may form part of a person's patrimony; this concept includes all movable and immovable property, corporal and incorporeal elements, and any other intangible object of any value."[178] In its 2005 ruling in *Palamara-Iribarne*, the Court elaborated on this last element and included intellectual property.[179] It explained this on the basis of a presumptive link between labor and property:

> The protection of the use and enjoyment of a person's works, grants the author rights which have both tangible and intangible aspects. The tangible dimension of such property rights includes, among other aspects, the publication, exploitation, assignment, or transfer of the works, while the intangible dimension

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[177] *Id.* ¶ 135 (citing Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 149 (June 31, 2005)).

[178] Ivcher-Bronstein v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 74, ¶ 122 (Feb. 6, 2001). It also included "within the broad concept of 'assets' whose use and enjoyment are protected by the Convention . . . works resulting from the intellectual creation of a person, who, as the author of such works, acquires thereupon the property rights related to the use and enjoyment thereof." Palamara-Iribarne v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 135, ¶ 102 (Nov. 22, 2005).

[179] *Palamara-Iribarne*, Inter-Am. Ct. H.R. (ser. C) No. 135, ¶ 102.

> of such rights is related to the safeguard of the authorship of the works and the protection of the integrity thereof. The intangible dimension is the link between the creator and the works, which extends over time. The exercise of both the tangible dimension and the intangible dimension of property rights is susceptible of having value and becomes part of a person's assets.[180]

On the issue of shareholders' rights, the IACtHR has elaborated and distinguished the concept in four rulings. In the 2001 *Ivcher-Bronstein* case, the Court relied on the ICJ's *Barcelona Traction* decision to distinguish the legal rights of companies (not covered by the Convention) and the specific direct rights of shareholders (which are protected).[181] In *Ivcher-Bronstein*, the Court found that the challenged government measures had indeed obstructed shareholders' specific rights and that therefore these rights had been violated.[182] It reached a similar conclusion in 2007 in *Chaparro Álvarez & Lapo Íñiguez*, where the Court examined whether the underlying government measures affected the shareholders' rights to receive dividends, to attend and vote at general meetings, and to receive part of the company's assets at liquidation.[183]

In its 2009 ruling in *Perozo v. Venezuela*, however, the Court clarified that demonstrating harm to company assets does not in and of itself prove harm to the specific rights enjoyed by that company's shareholders.[184] In that case the Court found that the property of Globovisión TV was damaged as a result of government action, but that damage to its premises was not proven to cause an "an abridgment of the rights of Mr. Ravell and Zuloaga, in their capacity as shareholders of the company."[185] It maintained these views in the notorious case of *Radio Caracas Televisión v. Venezuela*, which

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[180] *Id.* ¶ 103.

[181] *Ivcher-Bronstein*, Inter-Am. Ct. H.R. (ser. C) No. 74, ¶ 127.

[182] *Id.*

[183] Chaparro Álvarez and Lapo Íñiguez v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 170, ¶¶ 181–82, 189, 195 (Nov. 21, 2007).

[184] Perozo v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 195, ¶¶ 402–03 (Jan. 28, 2009).

[185] *Id.* ¶ 402.

arose from the decision of the Venezuelan government of Hugo Chávez to not renew the broadcasting license of that network, which had been very critical of the government.[186] In response to a contention that the radio station (RCTV) was a vehicle for freedom of expression, the Court reiterated its position distinguishing the property rights of the company from the property rights of its shareholders:

> On the argument that the general rule of separation of the assets of the company and that of the shareholders should not be applied, the Court has established that the legal person of RCTV was a vehicle for the freedom of expression of its workers and directives, however, it does not find that this constitutes sufficient legal ground to hold that as a result of that instrumental function the separation between the assets of the legal person and that of the shareholders has disappeared. The Court reiterates that the rights of the shareholders of a company are different to the rights of a legal person. Thus, to dismiss the legal personality of the company and to attribute the partners the legitimacy to claim for the damages generated by acts aimed at the company, there must be sufficient evidence to support said relationship.[187]

A third category of definitional issues arose in a series of applications regarding the rights that emerge, under Article 21, from the assignment of pensions and, in more recent cases, other obligations owed to individuals. In the seminal 2003 *"Five Pensioners"* case, the applicants had retired and their employer, the Superintendency of Banks and Insurance of Peru (SBS) had assigned them a pension equal to the salary earned by the person in their former position at that time.[188] Subsequently, the SBS decided to decrease or discontinue the payments without notice[189] and the pensioners argued that

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[186] Granier y Otros (Radio Caracas Televisión) v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 293, ¶¶ 1, 338–39 (June 22, 2015).

[187] *Id.* ¶ 350 (unofficial translation from Spanish by author).

[188] "Five Pensioners" v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 98, ¶ 8 (Feb. 28, 2003).

[189] *Id.* ¶ 83(a).

they had an acquired right to these payments.[190] After considering the domestic legislation in point, the Court upheld the pensioners' claims, concluding that pursuant to the Peruvian Constitution they had an acquired right to their former pensions.[191] The Court further explained the meaning of an acquired right by stating, "in other words, a right that has been incorporated into the patrimony of the persons."[192] The Court built on its *"Five Pensioners"* decision in its 2009 ruling in *Acevedo Buendía.*[193] There, it found that the claimants enjoyed a right to an adjustable pension that had been affirmed by Peruvian courts.[194] The IACtHR concluded that the governments' lack of observance of constitutional judgments which had affirmed these "patrimonial" rights was itself a violation of Article 21 of the Convention.[195]

In the 2011 *Abrill Alosilla* case, the Court extended this reasoning to include not only pensions, but also other similar sources of income that produced "wealth effects."[196] According to the Court, "just as pensions that have complied with all legal requirements are part of the wealth of a worker, the salary, benefits and raises earned by that worker are also protected by the right to property enshrined in the Convention."[197] In that case, a series of decrees issued during the Peruvian process of state reform of the early 1990s, under the presidency of Alberto Fujimori, imposed retroactive cuts in the salaries of public workers that were operative approximately one year before the decrees were issued.[198] As a result, the workers began receiving their salaries with reductions, because, according to the new scheme envisaged in the decrees, they had erroneously been

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190 *Id.* ¶ 104(b).

191 *Id.* ¶ 102.

192 *Id.*

193 Acevedo Buendía v. Perú, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 198, ¶¶ 85–86 (July 1, 2009).

194 *Id.* ¶ 88 (finding that "the right to an adjustable pension that the alleged victims acquired, according to the applicable Peruvian legislation, produced an effect on the patrimony of such people, who received the corresponding amounts every month").

195 *Id.* ¶ 90.

196 Abrill Alosilla v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 223, ¶ 83 (Mar. 4, 2011).

197 *Id.*

198 *Id.* ¶¶ 58–60.

paid in excess during the past year.[199] The Court found a violation based on the impact on a "vested right."[200]

It applied similar reasoning a year later in *Furlan and Family v. Argentina*.[201] In that case, Sebastián Furlan had an accident while playing as a child in an abandoned military base near Buenos Aires, Argentina.[202] As a result, he had several medical conditions and disabilities which led to a suit and an eventual settlement with the government for compensation.[203] However, a later law, passed in the early 1990s, changed the payment options available to Furlan.[204] After he opted for payment through consolidated bonds issued for sixteen-year terms and attempted to sell these, Furlan ended up receiving less than 30% of the money from his initial settlement.[205] For the Court, the question was whether Furlan had an acquired right over the settlement, and whether the payment method constituted a violation of Article 21 of the Convention.[206] Although the Court found that Argentina had the right to change the payment terms in response to an economic crisis, it found the impact on Furlan's settlement to be disproportionate and found in his favor.[207] But arguments based on such acquired rights have not been successful in at least two other cases.[208]

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199 *Id.* ¶ 63.

200 *Id.* ¶ 84.

201 Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 246, ¶¶ 104–05 (Aug. 31, 2012).

202 *Id.* ¶¶ 71–72.

203 *Id.* ¶¶ 73–76, 102.

204 *Id.* ¶ 103.

205 *Id.* ¶¶ 104–05.

206 *Id.* ¶¶ 42–43.

207 *Id.* ¶¶ 222–23.

208 *See* Barbani Duarte v. Uruguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 234, ¶ 238 (Oct. 13, 2011) (rejecting the claims of holders of bank accounts who had been unsuccessful in securing their savings pursuant to an administrative procedure established by the government in the wake of a financial crisis); Granier y otros (Radio Caracas Televisión) v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 293, ¶¶ 180, 343 (June 22, 2015) (rejecting the contention that the non-renewal of a radio broadcasting license interfered with an acquired right).

2. Defining Deprivations of Property

The IACtHR has faced three kinds of cases in which it addressed what constitutes a deprivation of property: classic cases of expropriation, instances involving civil forfeiture, and cases involving damage to property in the course of law enforcement. It has also referred to a special category of "grave" cases.

a. Expropriations

The Court has repeatedly emphasized that the right to property is not an absolute right,[209] and that deprivations of property may be lawful if three requisites are fulfilled, namely when government measures are based on "reasons of public utility or social interest, subject to the payment of just compensation," proceed according to the forms established by law, and are carried out in accordance with the Convention.[210] The Court has also underlined the social role of the right to property, namely that it

> must be understood within the context of a democratic society where in order for the public welfare and the collective rights to prevail there must be proportional measures that guarantee individual rights. The social role of the property is a fundamental element for its functioning and for this reason, the State, in order to guarantee other fundamental rights of vital relevance in a specific society, can limit or restrict the right to property, always respecting the cases

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[209] *See e.g.*, Chaparro Álvarez and Lapo Íñiguez v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 170, ¶ 174 (Nov. 21, 2007); Palamara-Iribarne v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 135, ¶ 108 (Nov. 22, 2005); Salvador Chiriboga v. Ecuador, Preliminary Objection and Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 179, ¶ 61 (May 6, 2008); Perozo v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 195, ¶ 399 (Jan. 28, 2009); Acevedo Buendía v. Perú, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 198, ¶ 84 (July 1, 2009); *Abrill Alosilla*, Inter-Am. Ct. H.R. (ser. C) No. 223, ¶ 82; *Furlan and Family*, Inter-Am. Ct. H.R. (ser. C) No. 246, ¶ 220.

[210] Ivcher-Bronstein v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 74, ¶ 128 (Feb. 6, 2001). *See also Chaparro Álvarez*, Inter-Am. Ct. H.R. (ser. C) No. 170, ¶ 174; *Salvador Chiriboga*, Inter-Am. Ct. H.R. (ser. C) No. 179, ¶ 61.

> contained in Article 21 of the Convention and the general principles of international law.[211]

Finally, the IACtHR has also suggested that its evaluation would be attentive to context, that is, that it "should not restrict itself to evaluating whether a formal dispossession or expropriation took place, but should look beyond mere appearances and establish the real situation behind the situation that was denounced."[212]

The IACtHR has defined reasons of public interest broadly, noting that these

> comprise all those legally protected interests that, for the use assigned to them, allow a better development of the democratic society. To such end, the States must consider all the means possible to affect as little as possible other rights and therefore, undertake the underlying obligations in accordance with the Convention.[213]

It found such justifications absent in the 2001 case of *Ivcher-Bronstein.* There, the Court ruled that the precautionary measure, which effectively removed Mr. Ivcher from his role as director and chairman of a media company, could not be justified on the basis that his Peruvian nationality had been annulled by the government.[214] Specifically, it found

> no evidence or argument to confirm that the precautionary measure ordered by Judge Percy Escobar was based on reasons of public utility or social interest; to the contrary, the proven facts in this case coincide to show the State's determination to deprive Mr. Ivcher of the control of Channel 2, by suspending his rights as a shareholder of the Company that owned it.[215]

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211 *Salvador Chiriboga*, Inter-Am. Ct. H.R. (ser. C) No. 179, ¶ 60.

212 *Ivcher-Bronstein*, Inter-Am. Ct. H.R. (ser. C) No. 74, ¶ 124 (footnote omitted).

213 *Salvador Chiriboga*, Inter-Am. Ct. H.R. (ser. C) No. 179, ¶ 73.

214 *Ivcher-Bronstein*, Inter-Am. Ct. H.R. (ser. C) No. 74 ¶¶ 125, 129.

215 *Id.* ¶ 129.

But it found the government's justifications fully justified in the 2008 *Salvador Chiriboga* case, where it concluded that an expropriation carried out to build a public park was acceptable.[216]

The IACtHR's view of what constitutes "just compensation" has been influenced by, among other things, determinations made by the ECtHR.[217] The IACtHR has suggested that such compensation needs to be "prompt, adequate, and effective."[218] It has noted that at least in the context of expropriation, the just compensation that must be paid needs to take into account "the trade value of the property prior to the declaration of public utility . . . and also, the fair balance between the general interest and the individual interest . . . ."[219] The Court has also focused attention on whether the domestic legislation fulfills this principle of just compensation, and whether the state authorities exercise "due diligence" in applying the law.[220]

In the 2008 *Salvador Chiriboga* case, the Court elaborated on the need to follow procedures established by law:

> [T]his Tribunal notes that the domestic legislation of Ecuador provided for in the then Article 62 of the Political Constitution, at the moment, article 33 of the Constitution, the requirements to exercise the condemnatory function of the State. Among such requirements, the law emphasizes the need to follow a procedure within the term established in the procedural rules, by means of a prior appraisal, payment and compensation[]. In this sense, the European Court of Human Rights . . . in the expropriation cases, has pointed out that the *nullum crimen nulla poena sine lege praevia principle* [principle of lawfulness] is a decisive condition in order to verify the combination of a violation of the right to property and has insisted on the fact that this principle implies that the legislation that regulates the deprivation of

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216 *Salvador Chiriboga*, Inter-Am. Ct. H.R. (ser. C) No. 179, ¶ 76.

217 *Id.* ¶¶ 96–97.

218 *Id.* ¶ 96 (in accordance with a "general principle of the international law").

219 *Id.* ¶ 98.

220 *Id.* ¶¶ 107, 109. The Court has also found that payment of a provisional sum does not exempt the state from complying with fair process. *Id.* ¶ 110.

> the right to property must be clear, specific and foreseeable.[221]

The Court also suggested the type of national legislation needed to satisfy the rule of law. It noted that,

> it is not necessary that every cause for deprivation or restriction to the right to property be embodied in the law; but that it is essential that such law and its application respect the essential content of the right to property. This right entails that every limitation to such right must be exceptional. As a consequence, all restrictive measure must be necessary for the attainment of a legal goal in a democratic society in accordance with the purpose and end of the American Convention.[222]

b. Civil Forfeiture

The first civil forfeiture case faced by the IACtHR was relatively easy.[223] In 1995, Daniel Tibi was arrested in Ecuador under false charges of drug-dealing.[224] At that moment, eighty-five items that were in his possession (including some valuable art and gems) were seized by the police and entered into the record.[225] When Tibi was finally released, in 1998 (after being tortured and subject to a number of atrocities),[226] and requested the return of his possessions, "the judge asked Mr. Tibi to demonstrate "pre-existence and property" of the goods seized"—an order that was reversed by an appeals court.[227] Not surprisingly, the IACtHR seized the opportunity to clarify that in such a context those subject to civil forfeiture do not have the burden of proof.[228] Since Mr. Tibi had the goods on him

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221 *Id.* ¶ 64 (footnotes omitted).

222 *Id.* ¶ 65 (footnote omitted).

223 *See* Tibi v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶¶ 209–21 (Sept. 7, 2004) (discussing the violation of Article 21 in less than three pages).

224 *Id.* ¶ 3.

225 *Id.*

226 *Id.* ¶¶ 148–49.

227 *Id.* ¶¶ 213–14.

228 *Id.* ¶ 220.

when he was seized, he "was not under the obligation to demonstrate pre-existence or property of the goods seized for them to be returned to him."[229]

The second case of civil forfeiture proved more difficult. Humberto Antonio Palamara-Iribarne was a naval mechanic engineer who served for twenty-one years in the Chilean navy.[230] In 1992, he wrote a book entitled "*Ética y Servicios de Inteligencia*" ("*Ethics and Intelligence Services*") and asked for authorization to publish it, as required by the rules of the Navy.[231] When Palamara-Iribarne was denied the authorization on the basis that the book allegedly posed a threat to national security and defense, he decided to publish it nevertheless.[232] The Navy then instituted criminal proceedings against him.[233] During the process, a naval prosecutor seized all copies of the book and deleted the electronic copies available both at the publishing offices and at Palamara-Iribirane's house.[234] Later in the process, the naval prosecutor conducted investigations to find the "missing copies" of the book, "and the Naval Judge prevented the case from being sent to full trial until all copies of the book were collected."[235] After lengthy proceedings, Palamara-Iribarne was finally found guilty and sentenced to more than two years of prison.[236] The Naval Judge also ordered the

> forfeiture of 900 copies of the book . . . a floppy disk containing the complete text of the publication, 6,213 loose sheets of paper making up the book . . . 90 thin cardboard covers of said book, 4 of which were half printed, 31 brochures advertising the book and 15 thin cardboard sheets with the cover design of the book . . . .[237]

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229 *Id.*

230 Palamara-Iribarne v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 135, ¶ 63(1) (Nov. 22, 2005).

231 *Id.* ¶¶ 63(4), 63(7), 63(11).

232 *Id.* ¶¶ 63(12), 63(16).

233 *Id.* ¶ 63(16).

234 *Id.* ¶¶ 63(19–20).

235 *Id.* ¶ 63(58) (footnote omitted).

236 *Id.* ¶ 63(66).

237 *Id.*

Although the Navy ultimately decided to acquit Plamara-Iribirane, a further legal battle ensued after he criticized the actions of the Navy at a press conference. Palamara-Iribirane ultimately sought relief in the IACtHR arguing, *inter alia*, that the seizure of the books and of the electronic data constituted a violation of his right to property.[238] The IACtHR confirmed that the actions of the state deprived Palamara-Iribarne of both his tangible and intangible property without compensation.[239] It also affirmed, along the way, that the taking of the books and the erasure of data "constituted acts of censorship" under Article 13 of the Convention.[240] It concluded that the government had not demonstrated that the deprivation of property in this case was justified by an "institutional interest."[241]

A third case, though similar to the *Tibi* case, had its own complexities. *Chaparro Álvarez and Lapo Íñiquez v. Ecuador* also involved false charges of drug-trafficking, but the property seized was not just personal belongings, but an entire factory.[242] In 1997, Ecuadorian anti-narcotics police found illegal drugs inside ice chests contained in a fish cargo shipment destined for Miami.[243] Because Juan Carlos Chaparro Álvarez's factory produced ice chests similar to those found with illegal drugs, the police arrested him and confiscated the factory; although he was later acquitted, the factory was not returned to him for almost five years since it had been confiscated.[244] The Court first considered whether the adoption of precautionary measures regarding property was a violation of Article 21.[245] The Court cautiously responded that such measures do not "constitute *per se* a violation of the right to property, if it is considered that they do not signify a transfer of the ownership of the right to legal title."[246] But the Court suggested that these measures in context would be justified only if the government demonstrated

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238 *Id.* ¶ 2.
239 *Id.* ¶¶ 106–08.
240 *Id.* ¶ 100.
241 *Id.* ¶ 109.
242 Chaparro Álvarez and Lapo Íñiguez v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 170, ¶ 2 (Nov. 21, 2007).
243 *Id.*
244 *Id.* ¶ 3.
245 *Id.* ¶ 183.
246 *Id.* ¶ 187.

> the inexistence of another type of measure that is less restrictive of the right to property. In this regard, it is only admissible to seize and deposit property when there is clear evidence of its connection to the offense, and provided that it is necessary to guarantee the investigation and the payment of the applicable pecuniary responsibilities, or to avoid the loss or deterioration of the evidence. Also, these measures must be adopted and supervised by judicial officials, taking into account that, if the reasons that justified the precautionary measure cease to exist, the judge must assess the pertinence of maintaining the restriction, even before the proceedings are concluded. This point is extremely important, given that if the property ceases to fulfill a relevant role in continuing or promoting the investigation, the material precautionary measure must be lifted, because they run the risk of becoming an anticipated punishment. The latter would constitute a manifestly disproportionate restriction of the right to property.[247]

Further, the Court clarified that when issuing precautionary measures, "the national authorities are obliged to provide reasons that justify the appropriateness of the measure. This requires them to clarify the '*fumus boni iuris*,' in other words, that there are sufficient probabilities and evidence that the property was really involved in the offense."[248] The Court also disapproved of the state's attempt to impose charges on the accused for the maintenance of the seized property:

> In this regard, the Court emphasizes that material precautionary measures are adopted with regard to the property of a person who is presumed innocent; hence, these measures should not prejudice the accused disproportionately. The charges that a person whose case has been dismissed is required to pay,

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247 *Id.* ¶ 188.
248 *Id.* ¶ 197.

> with regard to the property of which he was provisionally dispossessed, constitute a burden that is tantamount to a sanction. This requirement is disproportionate for those persons whose guilt has not been proved.[249]

The Court found that delays in the return of the property as well as the failure to return part of the property constituted a violation of Article 21.[250] It also affirmed that the "unsatisfactory administration" of Mr. Chaparro's property by the State amounted to a violation of Article 21, because he "was deprived arbitrarily of the possibility of continuing to receive the profits that he obtained when the company was operating."[251]

The 2013 *Mémoli v. Argentina* decision presented a new challenge for the Court's approach to civil forfeiture and judicial interference with property. This case concerned a suit for libel damages which lasted over seventeen years, during which the defendants, Carlos and Pablo Mémoli, were subject to a general injunction on their assets.[252] The Court found that this constituted a violation of their rights, including the right to property:

> The Court finds that this lack of diligence of the authorities is especially relevant when considering that the presumed victims have been subject to a precautionary measure of a general injunction on property for more than 17 years, based on possible civil damages. According to the applicable domestic laws, this type of measure entails a "general prohibition to sell or encumber property" and is not limited to a specific amount. The Court recalls that the adoption of precautionary measures involving private property does not constitute *per se* a violation of the right to property, even when it does represent a limitation of this

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249 *Id.* ¶ 193.

250 *Id.* ¶¶ 204, 209.

251 *Id.* ¶ 214.

252 Mémoli v. Argentina, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 265, ¶ 178 (Aug. 22, 2013).

> right, to the extent that it affects an individual's ability to dispose freely of his property.[253]

Although the Court found that measures imposed on the claimants had been properly "established by law,"[254] it found their application in this instance unfairly punitive because:

> the domestic judicial authorities did not establish the possibility of moderating the impact of the duration of the civil proceeding on the ability of the presumed victims to dispose of their property, nor did they take into account that, according to Argentine law, "[t]he judge, to avoid unnecessary liens and prejudice to the owner of the property, may establish a precautionary measure other than the one requested, or limit it, taking into account the significance of the right that it is sought to protect." Despite this provision, the precautionary measure has been in force for more than 17 years and, according to the information in the case file provided to this Court, was re-ordered in December 2011, which presumes that it will be in effect until December 2016 . . . . In brief, the prolonged duration of the proceeding, in principle of a summary nature, combined with the general injunction on property for more than 17 years, has constituted a disproportionate impairment of the right to property of Messrs. Mémoli and has resulted in the precautionary measures becoming punitive measures.[255]

c. Damage to Property in the Course of Law Enforcement

Between 1998 and 2011, five members of the Barrios family were killed, and the whole family was subjected to different instances of harassment by the police of the Venezuelan state of Aragua.[256] In this context, the Court found that the right to property of the surviving members

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253 *Id.* (footnotes omitted).

254 *Id.* ¶ 179.

255 *Id.* ¶ 180 (footnotes omitted).

256 Barrios Family v. Venezuela, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶ 36 (Nov. 24, 2011).

> was affected by the fact that, during the search of their homes, police agents removed without authorization and failed to return household appliances, money, medicines, clothes and articles of personal hygiene, destroyed documents, clothes and household appliances, and set fire to part of the residence of Luis Alberto Barrios and Orismar Carolina Alzul García. The victims were deprived of the said possessions without any justification, and the State has not specifically contested these facts or provided explanations about what happened.[257]

A similar case was decided by the Court a year later. In 2001, police agents in the state of Falcón, in Venezuela, raided Néstor José Uzcátegui's home, beat members of his family, and assassinated him.[258] His brother Luis, the main witness of the crime, had denounced the killing publicly and had been subject to harassment and arbitrary detentions by the police.[259] In this context, the Court considered that damage to the Uzcátegui's property by law enforcement, when raiding their home could be considered a violation of Article 21.[260] The decision of the Court was highly contextual:

> The Court also finds that, given the circumstances in which the action took place and, in particular, the socioeconomic status and vulnerability of the Uzcátegui family, the damage to their property during the raid had a far greater impact than it would have had for other family groups with other means. In this regard, the Court considers that States must take into account that groups of people living in adverse circumstances and with fewer resources, such as those living in poverty, experience an increase in the extent

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[257] *Id.* ¶ 149.

[258] Uzcátegui v. Venezuela, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 249, ¶¶ 40, 89 n.117, 91, 96 n. 130, 97 n.132 (Sept. 3, 2012).

[259] *Id.* ¶¶ 40 n.45, 89–96, 123–24, 184.

[260] *Id.* ¶ 203 (noting that "police officers who entered the home of the Uzcátegui family damaged the roof of the house, broke locks on the doors of the house, broke down a door and smashed the windows and . . . in addition to damaging the structure of the house, caused damage to objects inside the house").

> to which their rights are affected, precisely because of their more vulnerable situation.[261]

The Court noted that "it is public knowledge that such people were frequently subjected to intimidation through the destruction of their goods, homes or personal belongings."[262] It found that

> the damage caused to the structure and furniture of the Uzcátegui's home, had a significant impact on the family's property and therefore concludes that the State violated the right to property established in Article 21(1) of the American Convention, in relation to Article 1(1) thereof . . . .[263]

d. Cases of "Special Gravity"

In the 2006 case of *Ituango Massacres v. Colombia*, the Court stated that certain violations of the right to property were of "particular gravity"[264] or "particularly serious."[265] In that case, a paramilitary group in Colombia, while raiding a town, set fire to 80% of the houses and stole cattle.[266] Members of the Colombian Army knew of the theft and even collaborated with the paramilitary by imposing a curfew that restricted the inhabitants from protecting their possessions.[267]

The Court first underlined how the theft of the livestock was a grave violation of Article 21 of the Convention:

> The Court finds it opportune to underscore the particular gravity of the theft of the livestock of the inhabitants of El Aro and the surrounding areas. As the Commission and the representatives have emphasized, from the characteristics of the district and the daily activities of the inhabitants, it is clear that there

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261 *Id.* ¶ 204.
262 *Id.* ¶ 205.
263 *Id.* ¶ 206.
264 Ituango Massacres v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 178 (July 1, 2006).
265 *Id.* ¶ 192.
266 *Id.* ¶¶ 176, 218.
267 *Id.* ¶¶ 176–77.

> was a close relationship between the latter and their livestock, because their main means of subsistence was cultivating the land and raising livestock. Indeed, the damage suffered by those who lost their livestock, from which they earned their living, is especially severe. Over and above the loss of their main source of income and food, the way in which the livestock was stolen, with the explicit and implicit collaboration of members of the Army, increased the villagers' feelings of impotence and vulnerability.[268]

Moreover, the Court found that the violation of property rights in this case was "particularly serious[,]" noting its close relationship "to the maintenance of basic living conditions . . . ."[269] It applied similar reasoning with respect to the house burnings:

> This Court also considers that setting fire to the houses in El Aro constituted a grave violation of an object that was essential to the population. The purpose of setting fire to and destroying the homes of the people of El Aro was to spread terror and cause their displacement, so as to gain territory in the fight against the guerrilla in Colombia . . . . Therefore, the effect of the destruction of the homes was the loss, not only of material possessions, but also of the social frame of reference of the inhabitants, some of whom had lived in the village all their lives. In addition to constituting an important financial loss, the destruction of their homes caused the inhabitants to lose their most basic living conditions; this means that the violation of the right to property in this case is particularly grave.[270]

The Court has reiterated its stance on the right to property in relation to massacres in later cases. In the 2012 *Massacres of El Mozote* case against El Salvador, where the armed forces had carried

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268 *Id.* ¶ 178.
269 *Id.* ¶ 181.
270 *Id.* ¶ 182 (citation omitted).

out "a consecutive series of massive, collective and indiscriminate executions of defenseless individuals[,]"[271] the Court found that

> soldiers stripped the victims of their possessions, set fire to their homes, destroyed and burned their crops and killed their animals, so that the operation of the Armed Forces consisted in a sequence of events that simultaneously affected a series of rights, including the right to property. Consequently, the Court concludes that the State violated Article 21(1) and 21(2) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of the victims executed in the massacres or of their next of kin.[272]

While addressing the surviving victims, the tribunal underlined, as in previous cases, the gravity of these violations:

> The right to property is a human right and, in this case, its violation is especially serious and significant, not only because of the loss of tangible assets, but also because of the loss of the most basic living conditions and of every social reference point of the people who lived in these villages. As expert witness María Sol Yáñez de la Cruz underscored, "[n]ot only was the civilian population exterminated, but also the whole symbolic and social tissue. They destroyed homes and significant objects. They stripped the people of their clothes, the children's toys, and their family photographs; they removed and destroyed everything that was important to them. They killed or took the animals; they all recount that they took the cows, the hens; they took my cows, they killed two bulls: a loss of both material and affective significance in the peasant universe. Scorched earth is a type of violation and stigmatization by soldiers, created by the perpetrators. The scale of the horror perpetrated there

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[271] Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 151 (Oct. 25, 2012).

[272] *Id.* ¶ 168.

> was aimed at annihilating the area, with all its inhabitants, to vacate the territory, to expel them from the area." Furthermore, "[i]t was a rationale of extermination, of total destruction of the social mechanisms. [. . .] The massacre disintegrated the collective identity, by leaving a social vacuum where the community had once carried out its rituals, its affective exchanges, the context and the framework in which they knew they were part of a community."[273]

That same year, the Court rendered its judgment concerning the *Santo Domingo Massacre*. In that case, the Colombian armed forces bombed a small village, forced its inhabitants to abandon the area, and looted their houses.[274] As in previous cases, the Court referred to the jurisprudence of international criminal tribunals to emphasize that looting constitutes "a serious violation of the laws and customs of war."[275] It then took a step further, suggesting that the gravity of the situation was heightened by the situation of poverty in which the victims lived:

> In addition, the Court has considered that, owing to the circumstances in which the events took place, and especially owing to the socio-economic conditions and vulnerability of the presumed victims, the damage caused to their property may have a greater effect and significance than that caused to other persons or groups under other conditions. In this regard, the Court finds that the States must take into account that groups of people who live in poverty face an increased degree of harm to their rights, precisely due to their situation of greater vulnerability.[276]

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[273] *Id.* ¶ 180 (footnotes omitted).

[274] Santo Domingo Massacre v. Colombia, Preliminary Objections, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 259, ¶¶ 68–69, 75, 79 (Nov. 30, 2012).

[275] *Id.* ¶ 272 (quoting Prosecutor v. Simić, Case No. IT-95-9-T, Judgment, ¶ 101 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003)).

[276] *Id.* ¶ 273 (citing Uzcátegui v. Venezuela, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 249, ¶ 204 (Sept. 3, 2012)).

IV. U.S. COURTS' DIFFICULTIES WITH THE HUMAN RIGHT OF PROPERTY

As scholars of U.S. Indian law have pointed out, U.S. jurisprudence on point—not international law—has largely defined the extent of inherent tribal "sovereignty" or "self-determination" in terms of the scope of the federal government's powers over Indian tribes under the U.S. Constitution.[277] While the international law of "discovery," played a role in the original U.S. cases dealing with Indian rights—largely in terms of justifying the United States' exclusive right to buy or approve the sale of Indian lands based on Europeans' claims over the New World that transferred to the United States—the role of international law, and especially of international human rights, has played a peripheral role at best in modern U.S. case law on point.[278] While there is some uncertainty in U.S. Indian law jurisprudence as to whether its "particular doctrines arise out of [U.S.] constitutional law, international law, or domestic common law,"[279] that case law does not rely on an alleged human right to communal property as defined by the IACtHR in its interpretation of Article 21 of the American Convention.[280]

U.S. courts' focus on assessing the extent of relevant federal power—whether defined as "plenary" or as expressing a unique obligation of "trusteeship" towards Indian tribes[281]—is dramatically different from the concerns expressed by the IACtHR in comparable cases. Whereas the IACtHR seems acutely aware of the historic injustices done to indigenous peoples and the need to rectify these, preferably through restitution of lost lands and close consultation

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[277] *See, e.g.*, Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751, 1752–53 (2003).

[278] *Id.* at 1752–54, 1762–64.

[279] *Id.* at 1755.

[280] *See id.* at 1762–63. This is hardly surprising since, as is demonstrated by the Appendix, the U.S. is not a party to the American Convention of Human Rights – or to many of the human rights conventions listed there.

[281] *See, e.g.*, United States v. Lara, 541 U.S. 193, 200 (2004) (reaffirming congressional plenary power in modern Indian affairs); Cherokee Nation v. Hitchcock, 187 U.S. 294, 302 (1902) ("As we have said, the title to these lands is held by the tribe in trust for the people . . . . While we have recognized these tribes as dependent nations, the government has likewise recognized its guardianship over the Indians and it obligations to protect them in their property and personal rights.") (internal quotation marks omitted).

with the affected communities, such "therapeutic" concerns and remedies do not register in relevant U.S. jurisprudence.[282] The IACtHR's emphasis on the need to take into account the ways indigenous peoples have traditionally associated with the land—for cultural identity and economic survival—and to adopt consensus-based remedies that allow these communities to enjoy land rights in perpetuity, despite intervening interruptions, are not characteristic of relevant U.S. Supreme Court jurisprudence.[283] Indeed, even when U.S. courts have ruled in favor of tribal rights, this is most likely to occur as a result of a need to defer to the express will of Congress.[284]

The lack of attention in U.S. Indian law to the possibility that international law might require restoring communal land rights is reflected even in the work of those who would like to reform such law. A recent Harvard Note proposing that international law should play a greater role in federal Indian law identifies the "emerging" law governing indigenous peoples (including ILO Convention No. 169), the international law with respect to self-determination, and international human rights requiring non-discrimination with respect to cultural integrity—but does not mention the rights of property contained in all the human rights instruments contained in the Appendix.[285]

But if the international law of property plays a non-role with respect to U.S. Indian law, its fate with respect to efforts to attempt to enforce an international human right relating to the protection of private property in U.S. courts is even more dire. While such claims have arisen in U.S. courts in a number of different contexts, the status of the human right of property has arisen most often in connection with suits against foreign states involving rights in property "taken in violation of international law"—an anomalous exception

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[282] *See, e.g.*, S. James Anaya, *The United States Supreme Court and Indigenous Peoples: Still a Long Way to Go Toward a Therapeutic Role*, 24 SEATTLE U. L. REV. 229, 229 (2000).

[283] *See id.* at 231 (discussing the Supreme Court's failure to embrace "due process" values attentive to accommodating the views of both majority institutions and minorities such as indigenous peoples).

[284] *Id.* at 232–33.

[285] Note, *supra* note 277, at 1756–62. This is so even though the Note includes discussion of the IACtHR's *Awas Tingni* case. *Id.* at 1761.

from foreign sovereign immunity contained in the U.S. Foreign Sovereign Immunities Act of 1976 (FSIA).[286] As one U.S. circuit court has noted, this exception "was intended to subject to United States jurisdiction any foreign agency or instrumentality that has nationalized or expropriated property without compensation, or that is using expropriated property taken by another branch of the state."[287] The four requisites that must be satisfied to apply this exception from sovereign immunity—proving that "property rights" are at issue, that the property was indeed "taken," that the taking was in violation of international law, and that the claim involves a nexus to the United States (such as a commercial nexus)—have each generated significant interpretative case law.[288] The focus here is on how U.S. courts have interpreted the third crucial requirement, namely demonstrating that the taking was "in violation of international law."

United States courts, including the Eleventh Circuit which foreclosed Mr. Mezerhane's claims against Venezuela[289] mentioned at the outset, have uniformly resisted claims that government takings of its own national's property violates international law. Courts have dismissed property claims against foreign sovereigns when such claims involve what the courts call "domestic takings"—that is takings of property owned by a state's own nationals.[290] This judicially

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[286] Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

[287] De Sanchez v. Banco Central de Nicar., 770 F.2d 1385, 1395 (5th Cir. 1985) (quoting Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 204 (5th Cir. 1984)).

[288] *See* Zappia Middle E. Constr. Co. Ltd. v. Emirate of Abu Dhabi, 215 F.3d 247, 251 (2d Cir. 2000). *See also* Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 671 (7th Cir. 2012), *aff'd sub nom.* Fisher v. Magyar Allamvasutak Zrt., 777 F.3d 847 (7th Cir. 2015). The D.C. Circuit has taken a slightly different approach. It has indicated that such a claim "must meet three requirements to fit within the FSIA's expropriation exception: (i) the claim must be one in which 'rights in property' are 'in issue'; (ii) the property in question must have been 'taken in violation of international law'; and (iii) one of two commercial-activity nexuses with the United States must be satisfied." Simon v. Republic of Hungary, 812 F.3d 127, 140 (D.C. Cir. 2016) (citations omitted); *see also* Agudas Chasidei Chabad v. Russian Fed'n, 528 F.3d 934, 939–42 (D.C. Cir. 2008).

[289] Mezerhane v. República Bolivariana de Venezuela, 785 F.3d 545, 549, 551 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 800 (2016).

[290] *Id.* at 549 (noting the Fifth Circuit's "long-standing rule that closes the doors of American courts to international-law claims based on a foreign country's domestic taking of property").

created "domestic takings" rule apparently stems from language deployed by the U.S. Supreme Court in its 1937 decision in *United States v. Belmont*.[291] There, the Supreme Court explained that "[w]hat another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration . . . . Such nationals must look to their own government for any redress to which they may be entitled."[292] Following this precedent, U.S. courts have concluded that, "[a]s a rule, when a foreign nation confiscates the property of its own nationals, it does not implicate principles of international law."[293]

The leading application of this "domestic takings" rule remains the Fifth Circuit's decision in *De Sanchez v. Banco Central de Nicaragua*.[294] The oft-cited passages from that 1985 ruling state that,

> [w]ith a few limited exceptions, international law delineates minimum standards for the protection only of aliens; it does not purport to interfere with the relations between a nation and its own citizens. Thus, even if Banco Central's actions might have violated international law had they been taken with respect to

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[291] 301 U.S. 324 (1937).

[292] *Id.* at 332.

[293] FOGADE v. ENB Revocable Tr., 263 F.3d 1274, 1294 (11th Cir. 2001) (citations omitted). *See also, e.g.*, Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1105 (9th Cir. 1990) ("Expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law.") (citations omitted), *abrogated by* Samantar v. Yousuf, 560 U.S. 305 (2010); Siderman de Blake v. Republic of Arg., 965 F.2d 699, 711 (9th Cir. 1992) (explaining "the exception does not apply where the plaintiff is a citizen of the defendant country at the time of the expropriation"); Altmann v. Republic of Austria, 317 F.3d 954, 968 (9th Cir. 2002), *amended on denial of reh'g*, 327 F.3d 1246 (9th Cir. 2003), *aff'd on other grounds*, 541 U.S. 677 (2004) (explaining that "[t]o fall into this exception, the plaintiff cannot be a citizen of the defendant country at the time of the expropriation"); Beg v. Islamic Republic of Pakistan, 353 F.3d 1323, 1328 n.3 (11th Cir. 2003) ("International law prohibits expropriation of alien property without compensation, but does not prohibit governments from expropriating property from their own nationals without compensation.") (citation omitted); Santivanez v. Estado Plurinacional De Bolivia, 512 F. App'x 887, 889 (11th Cir. 2013) ("[B]ecause the Bolivian government expropriated land owned by Francisco Loza—a Bolivian national—no violation of international law occurred.").

[294] 770 F.2d 1385, 1390 (5th Cir. 1985).

> an alien's property, the fact that they were taken with respect to the intangible property rights of a Nicaraguan national means that they were outside the ambit of international law.[295]
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> . . . .
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> International law, as its name suggests, deals with relations between sovereign states, not between states and individuals . . . . Nations not individuals have been its traditional subjects . . . . Injuries to individuals have been cognizable only where they implicate two or more different nations: if one state injures the national of another state, then this can give rise to a violation of international law since the individual's injury is viewed as an injury to his state. As long as a nation injures only its own nationals, however, then no other state's interest is involved; the injury is a purely domestic affair, to be resolved within the confines of the nation itself . . . .[296]
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> Recently, this traditional dichotomy between injuries to states and to individuals—and between injuries to home-grown and to alien individuals—has begun to erode. The international human rights movement is premised on the belief that international law sets a minimum standard not only for the treatment of aliens but also for the treatment of human beings generally. Nevertheless, the standards of human rights that have been generally accepted—and hence incorporated into the law of nations—are still limited. They encompass only such basic rights as the right not to be murdered, tortured, or otherwise subjected to cruel, inhuman or degrading punishment; the right not to be a slave; and the right not to be arbitrarily detained . . . . At present, the taking by a state of its national's property does not contravene the international law of minimum human rights. This has been

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295 *Id.* at 1395.

296 *Id.* at 1396 (citations and footnote omitted).

> held to be true in much more egregious situations than the present, including cases where the plaintiff had had his property taken pursuant to Nazi racial decrees.[297]

The judges in *De Sanchez* also indicated, along the way, what may be a more fundamental reason for their resistance to the invocation of the FSIA's expropriation exception:

> The doctrine that international law does not generally govern disputes between a state and its own nationals rests on fundamental principles. At base, it is what makes individuals subjects of one state rather than of the international community generally. If we could inquire into the legitimacy under *international* law of Nicaragua's actions here, then virtually no internal measure would be immune from our scrutiny. Concomitantly, actions of the United States affecting the property of American citizens would become subject to international norms and hence reviewable by the courts of other nations. In the field of international law, where no single sovereign reigns supreme, the Golden Rule takes on added poignancy. Just as we would resent foreign courts from telling us how we can and cannot rule ourselves, we should be reluctant to tell other nations how to govern themselves. Only where a state has engaged in conduct against its citizens that outrages basic standards of human rights or that calls into question the territorial sovereignty of the United States is it appropriate for us to interfere.[298]

The reasoning used in *De Sánchez* has been widely cited by and relied upon by other U.S. courts. Thus, when Mr. Mezerhane presented his claims against Venezuela outlined at the beginning of this Article, the results were in a sense pre-ordained. The Eleventh Circuit felt no need to consider whether, as expert witness Joseph

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297 *Id.* at 1396–97 (citations and footnote omitted).

298 *Id.* at 1397–98.

Weiler had argued below to the district court,[299] a right to property exists as a matter of customary law or general principles.[300] Instead, the appellate court simply adhered to established precedent to find, once again, that "[a]s a rule, when a foreign nation confiscates the property of its own nationals, it does not implicate principles of international law . . . . such claims simply are not international."[301] The court rejected Mezerhane's argument that, in the thirty years since *De Sanchez* was decided, international human rights law had developed such that FSIA's "expropriation exception" now encompassed so-called "domestic takings."[302] As in *De Sanchez*, the *Mezerhane* Court added that its conclusion also stemmed from a reluctance to "open the courts of this country to suits involving takings abroad by foreign governments that have little or no nexus to the United States."[303]

Although the "domestic takings" rule remains operative within U.S. courts, it may be subject to one exception. Despite the reference to Nazi takings in *De Sanchez*, some U.S. courts have since come to accept claims under the FSIA's "expropriation exception" to the extent these involve "genocidal takings."[304] In a series of decisions concerning the taking of property during the Holocaust, U.S. circuit courts have upheld jurisdiction to consider these claims against foreign states on the proposition that such claims, unlike the typical "domestic taking," really do involve human rights law.[305] Genocidal takings have successfully punctured sovereign immunity because, as the Fifth Circuit put it, these deprivations of property violate

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[299] Rep. and Op. of Prof. Joseph H.H. Weiler at 4, 9–11, Mezerhane v. República Bolivariana de Venezuela, No. 1:11–CV–23983–MGC (S.D. Fla. Nov. 30, 2012), ECF No. 59-1 [hereinafter Weiler Report].

[300] Mezerhane v. República Bolivarian De Venezuela, 785 F.3d 545, 549–52 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 800 (2016).

[301] *Id.* at 549–50 (quoting FOGADE v. ENB Revocable Tr., 263 F.3d 1274, 1294 (11th Cir. 2001)).

[302] *Id.*

[303] *Id.* at 549.

[304] Simon v. Republic of Hungary, 812 F.3d 127, 145–46 (D.C. Cir. 2016).

[305] *Id.*

"such basic rights as the right not to be murdered, tortured, or otherwise subjected to cruel, inhuman or degrading punishment; the right not to be a slave; and the right not to be arbitrarily detained."[306]

The Seventh Circuit's 2012 ruling in *Abelesz*, for example, acknowledged the continuing application of the domestic takings rule,[307] but found that

> the plaintiffs' allegations about the relationship between genocide and expropriation in the Hungarian Holocaust take these cases outside the domestic takings rule and its foundations. Genocide, the complaints here clearly imply, can be an expensive proposition. Expropriating property from the targets of genocide has the ghoulishly efficient result of both paying for the costs associated with a systematic attempt to murder an entire people and leaving destitute any who manage to survive. The expropriations alleged by plaintiffs in these cases—the freezing of bank accounts, the straw-man control of corporations, the looting of safe deposit boxes and suitcases brought by Jews to the train stations, and even charging third-class train fares to victims being sent to death camps—should be viewed, at least on the pleadings, as an integral part of the genocidal plan to depopulate Hungary of its Jews. The expropriations thus effectuated genocide in two ways. They funded the transport and murder of Hungarian Jews, and they impoverished those who survived, depriving them of the financial means to reconstitute their lives and former communities.[308]

That court concluded that given the uniform condemnation of genocide, it did not "believe the domestic takings rule can be used to require courts to turn a blind eye to the means used to carry out

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306 De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1397 (5th Cir. 1985).

307 Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 674–75 (7th Cir. 2012).

308 *Id.* at 675.

those ends—in this case, widespread expropriation of victims' property to fund and accomplish the genocide itself."[309] The D.C. Circuit took the same stance in its 2016 *Simon v. Republic of Hungary* decision.[310]

In summary, the position of those U.S. courts that have most directly addressed the status of an alleged human right to property protection is not different from that suggested by Lauterpacht back in 1945. Even now, some twenty years after the collapse of the Berlin Wall, the Eleventh Circuit and other U.S. federal courts continue to conclude, at least by way of dicta, that international human rights law does not exist or that, even if does, that law does not extend to protecting property rights of all human beings, except perhaps in the unusual case where deprivations of property are used as tools to commit genocide.[311] The *Mezerhane* Court found not only that Venezuela's purported violation of the American Convention of Human Rights (which contains a right to property) does not constitute a "violation of international law" as demanded by the FSIA, but, that the human rights revolution prompted by the adoption of the international bill of rights and the number of human rights instruments listed in the Appendix never happened.[312] That court drew upon prior domestic takings rulings by U.S. courts to say that international

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[309] *Id.* at 676.

[310] *See Simon*, 812 F.3d at 144–46. Most recently, the U.S. Supreme Court, faced with a D.C. circuit decision that decided to proceed with an FSIA claim against Venezuela for an alleged discriminatory taking of property on the basis that such a claim was "not frivolous," remanded the case on the basis that courts need to determine at the threshold, for purposes of upholding jurisdiction, whether an expropriation in violation of international law has been committed and not only that this *might* have occurred. The Court did not decide whether a discriminatory taking of a state's own nationals' property violated international law but indicated that "there are fair arguments to be made that a sovereign's taking of its own nationals' property sometimes amounts to an expropriation that violates international law . . . ." Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1321 (2017).

[311] *See, e.g.*, Mezerhane v. República Bolivarian De Venezuela, 785 F.3d 545, 551 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 800 (2016); Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1105–06 (9th Cir. 1990), *abrogated by* Samantar v. Yousuf, 560 U.S. 305 (2010).

[312] *Mezerhane*, 785 F.3d at 546, 549–51.

law only regulates the actions of states vis-à-vis one another and does not address what a state does internally, to its own citizens.[313]

The courts of the nation that have, since the time of Alexander Hamilton, been among the most forceful proponents of internationalizing property protections remain hostile to the idea, except when "domestic takings" accompany genocide or when the deprivation of property is directed at a U.S. national and the stolen property is located in the United States. These rulings share few commonalities with those by the IACtHR, canvassed in Part III, in which international law is used as a license to scrutinize and often trump domestic property rules that intrude on the property rights of a state's own citizens. While there is a greater similarity in terms of result between U.S. court rulings involving "genocidal takings" and some of the IACtHR's decisions involving cases of "special gravity," the suggestion made by U.S. courts that only property deprivations involving genocide (presumably because only these implicate violations of genuine human rights like the right to life) violate international law is not supported by the IACtHR, and of course, such statements ignore the property protecting human rights instruments in the Appendix. None of those treaties suggest that the property rights of nationals, indigenous peoples, aliens, or others are *lesser* rights that only become international law breaches when the state committing the property violation is also violating other presumably *more serious* human rights.

It is, of course, understandable that U.S. judges do not want to take jurisdiction over complaints against foreign governments that have no connection to the United States. As judges indicate in many of these cases, they do not want to turn U.S. courts into all-purpose forums for foreign takings and certainly do not want to license foreign courts to do the same and second guess U.S. government decisions with no direct connection to their territory or their nationals. But, as the FSIA case law makes clear, there are many routes to dismissing such claims from U.S. courts. Jurisdiction over such claims can be denied by, for example, interpreting the FSIA to encompass only violations of international law with a "commercial" or other nexus to the United States, through the use of other doctrines (e.g., the Act of State doctrine or failure to exhaust local remedies), or the

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313 *Id.* at 550.

deployment of other U.S. statutes (e.g., the Hickenlooper Amendment).[314] One could even imagine a narrow reading of the FSIA's reference to "international law" to refer only to "customary international law." If so, U.S. courts that dismiss "domestic takings" lawsuits would only be finding that they have not been convinced that customary international law has evolved to the point of protecting the property of a state's own nationals and not just foreign investors.[315] But the statements in cases like *Mezerhane* are far broader and suggest, in defiance of clear evidence to the contrary, that international law (treaty or customary) does not impose duties on a state with respect to its own citizens or that only genocidal deprivations of property do so.

V. WHAT THE HUMAN RIGHT OF PROPERTY IS (AND ISN'T)

Part III suggests a number of generalizations about the property jurisprudence of the IACtHR. Article 21 of the American Convention of Human Rights, as interpreted by the IACtHR, the body charged with its interpretation, protects both communal and private property and extends its protections to certain groups (indigenous peoples) as well as individuals. These rights include the right for individuals to be fairly compensated for government deprivations of property and, at least on some occasions, to have not only equal eligibility to own property, but to actually enjoy its possession and use. The protections accorded to property under the American Convention, as interpreted by the Court, have evolved over time in ac-

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[314] For discussion of these possibilities, see, e.g., Todd Grabarsky, Note, *Comity of Errors: The Overemphasis of Plaintiff Citizenship in Foreign Sovereign Immunities Act "Takings Exception" Jurisprudence*, 33 CARDOZO L. REV. 237, 240 (2011).

[315] Even within Europe, there has not always been a consensus that the "general principles of international law," referred to in Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262 [hereinafter Protocol to the Convention], apply where a state has taken property from its own nationals. *See, e.g.*, Hélène Ruiz Fabri, *The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for "Regulatory Expropriations" of the Property of Foreign Investors*, 11 N.Y.U. ENVTL. L. J. 148, 161 (2002) (discussing the position taken by the ECHR's Commission in *Gudmundsson v. Iceland* and by the ECtHR in later cases). *See also infra* Conclusion.

cordance with the Court's view of the Convention as a "living instrument" responsive to changing technology, changing national laws establishing certain entitlements, and other "current living conditions" within the region's democracies.[316] Through 2017, this means that undefined "property" given protection under Article 21 has been seen as extending to "sacred" lands farmed (but not formally owned) by identified indigenous peoples, some forms of intellectual property, certain rights enjoyed by corporate shareholders, tangibles seized from individuals in the course of law enforcement and civil forfeiture, and forms of "acquired rights" established under national laws (such as pensions). In designating these protected forms of property, that Court has treated as relevant the economic, social, and "affective" associations formed between the property and persons,[317] the expectations for continued enjoyment of property established under national law on behalf of either groups or individuals,[318] the satisfaction of due process requirements established under the rule of law within established democracies,[319] and presumed connections between the freedom to work and the right to secure the benefits of one's labor.[320] Whether a claimant enjoys "first possession" of the property in question or even has formal title to it has not always proven determinative.[321] As this suggests, while the Court has often been concerned with ensuring that individuals receive equal treatment with respect to property under national law, its determinations that property rights have been breached have not been limited to cases of discrimination. Although the hurdles to

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316 Mayangna (Sumo) Awas Tingni Cmty v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 146 (Aug. 31, 2001).

317 *See, e.g.*, *id.* ¶ 149; Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 180 (Oct. 25, 2012); Ituango Massacres v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 178 (July 1, 2006).

318 *See supra* notes 188–208 and accompanying text.

319 *See, e.g.*, Salvador Chiriboga v. Ecuador, Preliminary Objection and Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 179, ¶ 56 (May 2, 2008).

320 *See, e.g.*, Palamara-Iribarne v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 135, ¶¶ 102–03 (Nov. 22, 2005).

321 *See, e.g.*, Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 128 (Mar. 29, 2006).

reaching the IACtHR are formidable and subject to interminable delays, the few property rights claims that reach the Court often result in considerable scrutiny over national laws and practices under which the Court has found a number of state actions to be defective.

The application of Article 21 has led to a second, supra-national look at even politically sensitive actions taken by governments in response to crime or economic or other crises.[322] In such cases the Court has noted that property rights are "not absolute" and need to be judged relative to any competing rights of distinct groups of persons—as well as the right of governments to regulate in the public interest.[323] The IACtHR accepts that, as Louis Henkin acknowledged, "[f]ew, if any, human rights are absolute[,]" and that even human rights may bow to compelling public interests.[324] In undertaking this balancing, the Court appears to proceed on a "case by case" basis in which a number of factors (e.g., burdens of proof in criminal cases, the relative poverty of the claimant, or the seriousness of the property deprivation) are considered both for purposes of determining whether a treaty breach has occurred as well as to decide the appropriate remedy.

The IACtHR's approach to states' corresponding duties encompasses a wealth of "positive" and not just "negative" duties on government. Some might suggest that it has more in common with the German constitutional tradition which sees property rights, as Alexander described it, "not [as] a Lockean right, but a right that fuses the traditions of Kantian liberalism and civic republicanism."[325] Whether or not this is the case, the IACtHR's jurisprudence is starkly different from U.S. Indian law jurisprudence or even U.S. Supreme Court jurisprudence involving direct or indirect takings.[326]

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[322] *See, e.g.*, Furlan & Family v. Argentina, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 246, ¶ 222 (Aug. 31, 2012).

[323] *See supra* note 209 and accompanying text.

[324] Louis Henkin, *The Universality of the Concept of Human Rights*, 506 ANNALS AM. ACAD. POL. & SOC. SCI. 10, 11 (1989). For examples, see *supra* Part II, particularly the expropriation cases at Section III.B.2.a.

[325] Alexander, *supra* note 45, at 739.

[326] Scholarly analysis of both is voluminous. On U.S. Indian law, see FRANCIS PAUL PRUCHA, 2 THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS (1984). For introductions to U.S. takings jurisprudence

Under the IACtHR's case law, governments are not expected merely to refrain from doing harm to property (as by refraining from expropriations), rather they may be expected to be more proactively protective of property to the extent vulnerable groups (such as those living in poverty) are affected. Further, governments subject to that Court's scrutiny may not satisfy their property rights obligations merely by making available certain judicial remedies. Depending on the property right at stake, governments may be expected to satisfy legitimate expectations generated by prior laws that establish, for example, entitlements to pensions at a certain level. States' duties to protect some forms of property (such as the historic rights of indigenous peoples) are perceived to overlap with their affirmative obligations to satisfy basic human needs, as for shelter and access to natural resources. Further, consistent with the demands of Article 31(3)(c) of the Vienna Convention on the Law of Treaties,[327] the IACtHR has argued that states' property obligations may also be affected by their other obligations (e.g., as under the ILC Convention No. 169, the ICCPR, and the ICESCR), but that such treaties (such as the Germany-Paraguay Bilateral Investment Treaty) cannot be used to undermine the human rights commitments made under the American Convention.[328] While on rare occasion (as with respect to communal lands) the Court has required restitution of specific lands, in most instances it has been satisfied with other remedies, including, but not limited to, compensation.[329]

The Inter-American regime is only one of twenty-one instruments listed in the Appendix that most would identify as "human

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from different perspectives, see EPSTEIN, *supra* note 81, at 347–66; Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 329 (1996).

[327] Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.A. 339 (authorizing treaty interpreters to consider "relevant rules of international law").

[328] *See, e.g.*, Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 140 (Mar. 29, 2006). It is not clear that national courts in general or that other international courts would adhere to this particular prioritization among the property rights instruments identified in the Appendix.

[329] *Id.* ¶ 226.

rights" instruments.[330] It is beyond the scope of this Article to consider how many of the above generalizations of the IACtHR's property rights jurisprudence apply to the other twenty instruments in the Appendix that include property rights within their human rights protections. What can be said with more certainty is that, despite the IACtHR's frequent references to the case law of the ECtHR,[331] for a number of reasons its own property jurisprudence is not likely to be identical to that of the ECtHR (or, as is evident, that of the U.S. Supreme Court). Divergent interpretations are likely due to the IACtHR's occasional reliance on the particular negotiating history (and texts) of the American Convention; frequent resort to the national laws, national traditions, and legal practices common to American states to complement its interpretation of the requirements of the vague property rights in the Convention; and efforts to emulate, in its own jurisprudence, the hemisphere's historic reverence for giving effect to the affirmative obligations of states to satisfy "essential needs."[332]

The IACtHR also has had to confront property claims that involve "special gravity,"[333] involving violent deprivations and loss of life at a considerable remove from the more quotidian property violations that the ECtHR has most often considered. The IACtHR has

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[330] The "human rights" instruments for purposes of this Article are numbers 5–6, 8–11, 13–15, 19–20, 23–26, 30–31, and 33–35 in the Appendix. They range, in chronological order by date of conclusion, from the oldest, the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man (both from 1948), to the ASEAN Human Rights Declaration (from 2012). Of course, some might consider other instruments in the Appendix as protective of "human rights" depending on one's definition of the term. *See infra* Appendix.

[331] The IACtHR has relied on ECtHR rulings for the proposition, for example, that human rights instruments like the American Convention are "liv[ing] instruments" that evolve over time. Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 125 (June 31, 2005).

[332] Organization of American States, American Declaration of the Rights and Duties of Man art. 23, May 2, 1948, OAS Doc. OEA/Ser.L./V.II.23, doc. 21, rev. 6, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1, at 17 (1992). For this reason, it is possible that the IACtHR might find more commonalities with the ways the German Constitutional Court has evolved the property right in the German Constitution. *See, e.g.*, Alexander, *supra* note 45, at 742 (emphasizing the German court's efforts to balance property rights with the state's needs to fulfill basic needs).

[333] *See, e.g.*, *Yakye Axa*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 169.

needed to evolve its own jurisprudence to address such grave cases—and the prospect of greater resistance to its rulings in such cases. It has also needed to evolve its own creative property rights jurisprudence in response to claims made by distinctive indigenous peoples within the Americas. At the same time, the luxury of not having to address particularly grave deprivations of property rights has enabled the ECtHR to focus, with more care, on the procedural elements of due process that property rights holders enjoy.[334] Moreover, even some of the interpretative rules that might be seen as encouraging harmonized interpretations of human rights law, such as Article 31(3)(c) of the Vienna Convention on the Law of Treatises ("VCT"), may not have that effect since some other treaties used to interpret the American Convention, like the Indigenous and Tribal Peoples Convention No. 169, play no comparable role in the ECtHR.[335]

For all these reasons, neither the ECtHR nor the IACtHR—the two regional human rights courts most attentive to the human right of property—should be seen as producing harmonious property rights jurisprudence, and those courts' respective case law cannot be presumed to indicate the parameters of "the international law of property" applicable to the world. As is suggested by the diverse objects and purposes evident among the instruments in the Appendix—and the absence of a single comprehensive property treaty on

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[334] This helps to explain one of the appeals of the ECtHR's case law to other international adjudicators looking for applicable procedural standards. *See, e.g.*, José E. Alvarez, *The Use (and Misuse) of European Human Rights Law in Investor-State Dispute Settlement*, *in* THE IMPACT OF EU LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 519, 571–86 (Franco Ferrari ed., 2017). Of course, there are other differences between the two courts with respect to property rights. For example, while the ECtHR's Protocol I, Article 1 explicitly extends its property protections to both "natural and legal persons," the IACtHR has, as a matter of interpretation, recognized only certain property rights protections on behalf of corporate shareholders. *See, e.g.*, Granier y Otros (Radio Caracas Televisión) v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 293, ¶ 64 (June 22, 2015).

[335] Vienna Convention on the Law of Treaties, *supra* note 327, art. 31. But the possibility that interpreters may resort to Art. 31(3)(c) (and other arguments) to draw from other treaties that deal with property rights for purposes of interpreting the human rights instruments in the Appendix means that the other property respecting instruments in that Appendix that are not considered human rights treaties may sometimes be used to assist the interpretation of treaties like the ACHR.

point—there is no such thing as a single global regime for property protection. The sheer diversity of these instruments and the forums charged with interpreting them impose formidable obstacles towards reaching such a goal, even if such a prospect were desirable. Indeed, even the twenty-one instruments whose titles suggest that they deal with "human rights" contained in the Appendix differ to some extent among themselves. The non-regional human rights treaties included, such as CEDAW and CERD, for example, encompass only non-discrimination guarantees with respect to property and only provide access for individual claimants to committees of experts that are not formally delegated the power to issue legally binding judgments.[336] Further, the Appendix of "select" texts understates the sheer diversity of relevant international instruments; it only includes documents which explicitly identify "property" as their subject.[337] It does not include treaties, like the ICESCR, that include rights to other things that might plausibly be seen as species of "property," such as the right to shelter, food, or medical care.[338] Nor does the Appendix include compacts that guard "security" interests in things, such as vessels or minerals extracted from the deep seabed as regulated under the U.N. Convention on the Law of the Sea

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[336] *See, e.g.*, Comm. on the Elimination of Discrimination Against Women, *General Recommendation on Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (Economic Consequences of Marriage, Family Relations and Their Dissolution*), ¶¶ 37–38, 55 U.N. Doc. CEDAW/C/GC/29 (Oct. 30, 2013) [hereinafter *General Recommendation on Article 16*].

[337] Note that the European Convention of Human Rights is included because even though the first paragraph of Art. 1, Protocol 1 extends to the enjoyment of one's "possessions," "property" is mentioned in the second paragraph of that provision and the ECtHR has made clear that Art. 1 protects the right to property as broadly understood. *See, e.g.*, Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A), ¶ 63 (1979) (drawing from the rest of the text of the Article as well as its *travaux préparatoires* the conclusion that this provision "is in substance guaranteeing the right of property").

[338] Indeed, many would find it more intuitively appealing to include, under the "human right of property," such treaties even though they do not identify these as "property." *See generally* Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 27–28 (Nov. 28, 2007).

(UNCLOS) and the "Mining Code" issue by the International Seabed Authority, even though these are undoubtedly a species of property rights.[339]

The Appendix also does not include the over 3,000 bilateral investment treaties ("BITs") and free trade agreements (collectively "IIAs") that include protections for foreign investments and investors. These treaties do not adhere to a single text and despite some generally common provisions, differ among themselves in terms of the precise rights conferred.[340] Inclusion of this number of treaties would vastly eclipse the others in the Appendix. As a placeholder for the widespread international investment regime—which includes some 180 states that are parties to at least one BIT—the Appendix includes only one such treaty, Chapter Eleven of NAFTA. That treaty, like many other IIAs, protects not only investments (including corporations) but individual investors, including shareholders whose holdings may be entirely wiped out if a state expropriates a company.[341] There is no question that IIAs like NAFTA protect property rights, albeit only those held by certain foreign investors. Indeed, international law rules (including rules of customary international law such as the "international minimum standard" and the duty to pay "prompt, adequate, and effective compensation" in case of expropriation) designed to protect the property rights of foreign investors emerged before many of the other treaties in the Appendix—including the human rights instruments listed.[342]

Another obstacle to elaborating a unified human right of property is the fact that international lawyers do not agree even on what

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339 *See* United Nations Convention on the Law of the Sea arts. 133–37, 153, Dec. 10, 1982, 1833 U.N.T.S. 397; *The Mining Code*, INT'L SEABED AUTHORITY, https://www.isa.org.jm/mining-code/Regulations (last visited Feb. 26, 2018). While Article 136 of UNCLOS determines that the deep seabed and its resources are the "common heritage of mankind," states such as the United States resist the conclusion that this means that these are "common" or "communal" property. Martin A. Harry, *The Deep Seabed: The Common Heritage of Mankind or Arena for Unilateral Exploitation?*, 40 NAVAL L. REV. 207, 214–16 (1992) (discussing U.S. interpretation of "common heritage of mankind").

340 *See, e.g.*, José E. Alvarez, *Is Investor-State Arbitration 'Public'?*, 7 J. INT'L DISP. SETTLEMENT 534, 557–58 (2016).

341 NAFTA, *supra* note 50, art. 1110.

342 *See, e.g.*, José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17, 18–19, 33 (2009) [hereinafter Alvarez, *A BIT on Custom*].

a "human right treaty" is, for purposes of distinguishing among international instruments. The suggestion made here that twenty-one of the texts in the Appendix are "traditionally" seen as human rights instruments (based on their titles) sidesteps the absence of such a definition. Not everyone agrees, for example, that treaties that protect foreign investors (either as individuals or as corporate legal persons) should be seen as protective of "human" rights.[343] Whether some instruments in the Appendix should be considered human rights instruments even when the texts (or titles) of such treaties make no such reference may turn on whether, for example, such a treaty intends to recognize as a third party beneficiary a human being, and endows such persons rights to bring their own claims for breach before some kind of adjudicator. If that is what a "human rights treaty" is, agreements as varied as the Vienna Convention on Consular Relations, and many IIAs (apart from NAFTA) could be so classified.[344] But if the universe of "human rights" treaties is confined only to those that enable individual claims to be brought before international courts capable of issuing legally binding determinations without the need for the individual's home state to intercede, and without the possibility that this home state can "waive" or otherwise undermine such claims once brought, only a handful of the instruments in the Appendix can be so classified.[345] Indeed, this narrow definition—intended to demarcate rights that are truly inalienable and genuinely enforceable would exclude all the U.N. human rights instruments in the Appendix, including CEDAW and CERD, since these enable individual complaints to be heard only before committees with no authority to issue legally binding rulings. That

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[343] *See, e.g.*, José E. Alvarez, *Are Corporations "Subjects" of International Law?*, 9 SANTA CLARA J. INT'L L. 1, 27 (2011); *See generally* Alvarez, *supra* note 334, at 571.

[344] This proved to be a contentious question before the International Court of Justice. *See, e.g.*, Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. Rep. 12, ¶ 15 (Mar. 31).

[345] *See generally* Raz, *supra* note 60, at 223 (articulating a position that comes close to adopting this strict view of enforceability as necessary for a genuine human rights international obligation to exist); *see also* David Miller, *Joseph Raz on Human Rights: A Critical Appraisal*, *in* PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS, *supra* note 60, at 232–34 (criticizing Raz's definition as being inconsistent with the diverse remedies available within international regimes and with the uses to which international law is put).

definition would also exclude NAFTA's investment chapter, which permits its state parties to issue binding interpretations that can undermine even investor claims that have been submitted to investor-state arbitration.[346]

All of these suggest the many things that the human right of property *is not*. The human right of property is not one idea but many. The property jurisprudence of the IACtHR presented in Part III is only one example of what the internationalization of property rights has meant. Anyone seeking to understand more fully what the human right of property means would need to explore the commonalities (and differences) among the regional human rights regimes that have generated property rights jurisprudence, as well as those multilateral regimes in the Appendix that might plausibly be seen as addressing human rights. The 130 states that are parties to the principal four regional human rights treaties, the additional three states that are parties to the Commonwealth of Independent States' Convention on Human Rights and Fundamental Freedoms, and the 189 countries (including the United States) that are state parties to at least one treaty that prohibits discrimination with respect to property (such as CEDAW or CERD) have accepted the idea that a human right to property protection exists as a matter of black letter treaty obligation—even as its instantiation has been left to regime-by-regime elaboration.[347]

The diversity of the instruments in the Appendix indicate that states have long been aware that the concept of property—and of an individual's right to it—is deeply contested both within societies and naturally among them.[348] Numerous failed attempts to craft

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346 NAFTA, *supra* note 50, art. 1131.

347 As indicated in the Appendix, 45 states are parties to Protocol I of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 24 are parties to the American Convention of Human Rights, 39 states are parties to the African Charter on Human and Peoples' Rights, and 22 are parties to the Arab Charter on Human Rights (for a total of 130). The Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States (not included in the Appendix) has been ratified by Belarus, Kyrgyzstan, the Russian Federation, and Tajikistan. See, e.g., Andrei Richter, Commonwealth of Independent States Convention on Human Rights, available at http://www.unhcr.org/protection/migration/4de4eef19/cis-convention-human-rights-fundamental-freedoms.html.

348 *See, e.g.*, WALDRON, *supra* note 58, at 30 ("The objects of property—the things which in lay usage are capable of being owned—differ so radically in legal

comprehensive multilateral rules regarding even a subpart of this subject—namely the treatment that states owe the property of foreign investors under international law—have provided states with abject lessons about the difficulties of overcoming these differences among all states.[349] The distinct instruments in the Appendix, ratified by separate numbers and groups of states, are the product of the sheer difficulty of such an undertaking on a global scale. What the IACtHR has begun to do with respect to most states of the Americas is to delineate with some greater precision *in the context of a single treaty* what constitutes protected forms of common, communal, and private property, specify what it means for groups and individuals to enjoy these rights, and delineate state responsibilities applicable to each form of protected property.

To the extent claims of international property rights are grounded in the instruments in the Appendix, and not on universally applicable customary rules or general principles of law,[350] the treaty basis of the international right of property protection provides one answer to sovereigntists who object to the very idea of internationalized property rights. Sovereignty is not a fatal objection to the extent states remain free to ratify (and even to withdraw from) property-protective treaties. The à la carte and treaty-based nature of international property rights means that this capacious right remains responsive to sovereign consent—and, at least to this extent, to the discrete needs, cultures, and historic traditions of nations. Even those instruments in the Appendix designated as protecting "human rights" differ on the types of "property" they protect, the kind of limitations they impose on states, and the forums (and enforceable remedies) anticipated to handle breaches of their terms. These dis-

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theory, that it seems unlikely that the same concept of ownership could be applied to them all, even within a single legal system."). Nonetheless, in his book, Waldron proceeds to provide a right-based argument for a right to private property. *See id.* at 62–105.

[349] For one such ambitious attempt, see Louis B. Sohn & R. R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 547 (1961) (an attempt to develop a "draft convention" on the subject).

[350] For efforts to address whether the right to property exists as a rule of custom or as a general principle of law, see Sprankling, *supra* note 13, at 485–88, and Weiler Report, *supra* note 299, at 8. *See also infra* Conclusion.

tinctions—which, to be sure, enable and even encourage the "fragmentation" of the law and undermine stable expectations and the predictability of the underlying rules—understandably generate suggestions for remedying this threat to international law's unity (as through a global pact). But the fragmented nature of internationalized property rights—and even the contained uncertainty of whether some treaties define them as "human rights"—can be seen as a strength and not a flaw. The capacity of states to pick and choose among property rights and for each treaty regime to define them over time is international law's (predictable) way of responding to the complexity of property rules as well as to concerns about the prospects for undermining "sovereignty," including self-determination.

The design features of these treaties help explain the substantive property rights that they contain. Instruments that were originally intended to be merely hortatory, such as the U.N. General Assembly's Universal Declaration of Human Rights or the American Declaration of the Rights and Duties of Man (both from 1948), could afford to proclaim the right to property in the broadest (and vaguest) of terms—after all, these rights were not intended for direct application in a court of law.[351] But even the property rights texts of these contemporaneous declarations show some sensitivity to distinct concerns for sovereignty. As would be expected of the more diverse membership of the U.N.'s General Assembly, which in 1948 included both communist and capitalist governments, the Universal Declaration's Article 17 is strikingly non–specific with respect to the right to "own" property, extending that right without distinction to personal, as well as other forms of property.[352] Article 17's constraint on government takings is also minimal: its only restriction is

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[351] "Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property." G.A. Res. 217 (III) A, *supra* note 17, art. 17. "Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home." American Declaration of the Rights and Duties of Man, *supra* note 332, art. 23.

[352] As Rhoda E. Howard-Hassmann points out, the division between socialist and capitalist states during the Cold War, which explains both the absence of a property right in the 1966 Covenants as well as the vagueness in Article 17 of the Universal Declaration, was over whether international law should recognize all forms of property (including communal and common) or merely the right to per-

that such deprivations cannot be "arbitrary."[353] As the negotiating history of the Universal Declaration indicates, a more detailed draft proposed by the Human Rights Commission that would have specifically recognized the right to own personal property and that spelled out more particular limits on its deprivation (including the need to do so for the "public welfare" and with "just compensation") was rejected.[354] As a leading commentary on Article 17 indicates, it is possible to infer (but it is not altogether certain) that the drafters of the Universal Declaration sought to make the taking of property by a state without compensation, by definition, "arbitrary" and therefore illegal; it is a bit clearer, based on the Declaration's simultaneous prohibitions on discrimination based on "other status," that distinctions based on owning property (such as to vote) would violate the Declaration's Articles 2 and 7.[355] As noted, the American Declaration's comparable right, though similarly vague, reflects strong sentiments prevailing in the hemisphere in favor of using law to defend "essential needs."[356]

The property rights provision in the ECHR and the subsequent caselaw of the ECtHR suggests the greater depth of protection that is sometimes possible within a region with greater shared historical,

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sonal property (along with the right of compensation for deprivations of it). Communist states did not oppose mention of property rights as such. *See* Howard–Hassmann, *supra* note 55, at 181–83.

353 G.A. Res. 217 (III) A, *supra* note 17, art. 17 ("No one shall be arbitrarily deprived of his property.").

354 The rejected text stated: "Everyone has the right to own personal property. No one shall be deprived of his property except for public welfare and with just compensation. The State may determine those things, rights and enterprises, that are susceptible of private appropriation and regulate the acquisition and use of such property." Alfredsson, *supra* note 17, at 256. Also rejected was a proposed text by a U.N. Working Group that bore some resemblance to the text ultimately adopted in the OAS insofar as it too restricted the right to own property "as meets the essential needs of decent living, that helps to maintain the dignity of the individual and of the home . . . ." *Id*.

355 *Id*. at 256–57 (suggesting that distinctions made on the basis of property ownership or lack thereof would violate Article 2 as well as the right to equal protection under the laws in Article 7).

356 *See* Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 117–21 (Mar. 29, 2006).

cultural, and legal traditions.[357] The ECHR accepts the right to enjoy undefined possessions for both individuals and legal persons like corporations; along with the right not to be deprived of these except for generalized and legitimate public reasons subject to the rule of law—and enables individuals, including a state's own citizens, to file claims before an international court to protect these rights and ensure compensation under binding rulings that can second guess domestic laws and courts. The ECtHR has developed the largest body of property case law of any international court. Of the 19,570 rulings that it issued between 1959 and 2016, 3,098—roughly one in six—involved claims under the right to property.[358] The European countries that have traditionally had the greatest number of property claims brought against them have been Turkey, Russia, Romania, and Italy.[359] The number of ECtHR rulings addressing the right to property increased dramatically after states engaged in democratic transitions in Eastern Europe—whose histories were different than those of Western Europe—joined the Court. Yet, even in Europe, the right to property is among the most violated provisions of the ECtHR—ranked third from 1959 through 2016, behind alleged denials of right to liberty and security, claims of inhumane/degrading treatment, and denials of rights to fair trial.[360]

The human rights instruments in the Appendix do not insist, as would the strongest defenders of private property rights like Hernando de Soto, that the only route to economic development lies in allocating private title to holders of land.[361] Instruments like the American Convention purport to protect the human right of property, not simply "private" property.[362] This has enabled the IACtHR,

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[357] "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." Protocol to the Convention, *supra* note 315, art. 1.

[358] ECTHR OVERVIEW, *supra* note 142, at 9.

[359] *Id.* at 8–9.

[360] *Id.* at 7.

[361] HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 49–51 (2000).

[362] ACHR, *supra* note 140, art. 21.

as noted, to embrace certain *communal* rights.[363] And while a number of these treaties are fully compatible with and may even presume the existence of a liberal and democratic market state, these instruments do not generally require recognition of "entrepreneurial freedom,"[364] "freedom of commerce,"[365] or a right to democracy.[366] In theory and in fact (given the diversity of states that have ratified many of these treaties), these instruments extend to all forms of government and presumptively accommodate diverse approaches to allocating the powers of the state versus the market. Some international property rights regimes may be *components* of the "Washington Consensus" or of misguided efforts to promote privatization or to encourage forms of "good governance" compatible with the desires of certain hegemonic states, but the diverse property instruments in the Appendix should not be conflated with these efforts. Despite the historical connections between some of these treaties and certain hegemonic powers, such as the rise of IIAs and influence of the United States addressed in Part II, contemporary international property protections do not merely reproduce a particular kind of free market ideology.

Consider the ways that international law has increasingly come to recognize the many ways national property laws and practices subject women to unequal treatment. CEDAW reframes property rights by targeting the specific ways that women's property rights have been violated—e.g., during marriage and divorce and inheritance.[367] Today's ever-evolving understanding of the diverse ways

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[363] *See, e.g.*, Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 146 (June 27, 2012); Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 118, 121 (Mar. 29, 2006); Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001).

[364] *See, e.g.*, LOUIS HENKIN ET AL., HUMAN RIGHTS 1536–40 (2d ed. 2009) (including, as a contested potential human right, "freedom of enterprise").

[365] *But see* LAUTERPACHT, *supra* note 17, at 164 (rejecting the idea of including the freedom "to buy and to sell" within his bill of rights).

[366] *See, e.g.*, Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992).

[367] Under Articles 15 and 16 of CEDAW, states "shall give women equal rights to conclude contracts and to administer property" and "shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations," in particular to extend "[t]he same rights for

that national laws, cultural and religious practices make women less than human, deny them the full potential for self-realization, and treat them as objects in defiance of Kant's categorical imperative is at least in part the result of the elaboration of equality instruments like CEDAW. We have become ever more aware of the absence of genuine equality for women thanks to interactions between CEDAW-initiated practices and those of other human rights instruments.[368] Interpretations by the CEDAW committee recognizing the interaction between Articles 23.4 of the ICCPR (requiring states to ensure equality of rights and responsibilities of spouses) and Article 16.1 of CEDAW (containing a similar demand but also directing states specifically to respect property rights in connection with marriage and family relations), for example, have enabled a greater understanding of how women are unfairly treated in terms of the distribution of property rights between husband and wife, and between widows and their husbands' relatives and surviving children (including the rights of daughters).[369]

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both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property . . . ." Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 20378 (entered into force Sept. 3, 1981) [hereinafter CEDAW]. *See also* Rep. of the Comm. on the Elimination of Discrimination Against Women on Its Thirteenth Session, U.N. Doc. A/49/38, at vii–xv, (Apr. 12, 1994) (adopting commentary to elaborate on Articles 9, 15, and 16 of CEDAW to enable "equality in marriage and family relations").

[368] For one example of how the CEDAW Committee's scrutiny of national laws has furthered the interpretation of the rights in that Convention that relate to property rights, see Savitri W.E. Goonesekere, *Article 15*, *in* THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 388–407 (Marsha A. Freeman, Christine Chinkin & Beate Rudolf eds., 2012). *See also* Marsha A. Freeman, *Article 16*, *in* THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 432–36.

[369] *See, e.g.*, *General Recommendation on Article 16*, *supra* note 336, ¶¶ 10–11 (criticizing the fact that the constitutions and laws of a number of states still provide that personal status laws, such as those governing the distribution of marital property, are exempt from scrutiny for non-discrimination); *id.* ¶¶ 25–26 (noting that marriage registration protects the rights of spouses with regard to property); *id.* ¶¶ 34–35 (noting the need for protecting women with respect to prenuptial and postnuptial agreements dealing with property); *id.* ¶¶ 36–38 (calling for attention to discriminatory systems of property management during marriage); *id.* ¶¶ 43–48 (calling for equality with respect to legal arrangements for distribution of property after divorce or separation); *id*. ¶¶ 49–53 (calling for non-discriminatory treatment of widows with respect to property rights after death of their

The specificity of the CEDAW Committee's General Recommendation No. 21 on these topics—its "attention to ways in which family relations, distribution of work and responsibilities in the household, and gender stereotypes can cause bias in the distribution of property rights between spouses"[370]—has encouraged human rights advocates to challenge the "double vulnerability" that women face with respect to remaining secure in their homes, insofar as their right to access to land and housing are challenged not only by national laws that fail to treat them equally, but also by embedded practices that emphasize male lineage with respect to tenure, inheritance, and even their right to their names.[371] The specialized attention to gender equality prompted by the adoption of CEDAW, along with the gender mainstreaming in U.N. institutions that it has encouraged, has enabled international law to begin to address the many ways that international and national laws have fallen short of ensuring equal treatment for men and women. These flaws include the traditional "public/private" distinctions embedded in international rules, their focus on formal but not substantive equality, the presumption of male-headed households, and the emphasis on only some forms of

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spouses, including changes to customary rules permitting widows and her children to be dispossessed of their property, survivorship rights with respect to pensions and disability, and rules regarding the making of wills to override discriminatory laws). *See generally* Ingunn Ikdahl, *Property and Security: Articulating Women's Rights to Their Homes*, *in* WOMEN'S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL AND NATIONAL LAW 268, 268 (Anne Hellum & Henriette Sinding Aasen eds., 2013). As Ikdahl points out, CEDAW's efforts on behalf of equal inheritance rights for daughters have been supported by the Committee on the Rights of the Child. *Id*. at 275–77 (citing Comm. on the Rights of the Child, *General Comment No. 3: HIV/AIDS and the Rights of the Child*, ¶ 33, U.N. Doc. CRC/GC/2003/3 (Mar. 17, 2003)); *see also* Human Rights Comm., *General Comment No. 28: Equality of Rights Between Men and Women*, ¶ 25, U.N. Doc. CCPR/C/21/Rev. 1/Add. 10 (Mar. 29, 2000) (noting that to fulfill their obligations with respect to ensuring the equality of spouses under Art. 23(4), states need to accord equal rights with respect to the "ownership or administration of property, whether common property or property in the sole ownership of either spouse"); *id.* ¶ 30 (noting that "[d]iscrimination against women is often intertwined with discrimination on other grounds such as . . . property").

370 Ikdahl, *supra* note 369, at 272–73.

371 *Id*. at 271–77. For examples of national laws that now come under scrutiny by U.N. human rights committees and U.N. special rapporteurs, see, e.g., Janet Walsh, *Women's Property Rights Violations in Kenya*, *in* HUMAN RIGHTS AND DEVELOPMENT, *supra* note 43, at 133.

financial contributions to marital property. These shortcomings, often shared with national laws, have harmed not only the rights of women, but have undermined efforts to promote sustainable development.[372]

Thanks to treaties like CEDAW as well as developments in other rights regimes, it is increasingly accepted (including within international financial institutions) that "[t]he pursuit of gender empowerment without attention to the distribution of land is an enterprise that is fatally hobbled from the outset as, for a large percentage of the world's population, real assets come primarily in the form of entitlements to land."[373] Attention to the intersection between gender and property—and the intersectional insights produced by considering that interaction—is challenging assumptions, including within institutions like the World Bank, that only property regimes requiring privatization and de-regulation as well as individualized and property titles are desirable.[374] Kerry Rittich points out that the growing attention to gender equality is contesting traditional approaches to how (or whether) property rights need to be secured.[375] CEDAW's insistence on contextualizing how property rights relate to the unequal status of women and girls—its committee's insistence on "accommodating differences" not only between men and women but between different women (and girls) in different places and time—even casts doubt on the wisdom of *uniform* property rules.[376] The specific attention to how property and gender intersects enabled by CEDAW has allowed policymakers who are willing to listen to become more aware of the different ways that one can achieve

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[372] *See generally* Ikdahl, *supra* note 369, at 289; Karen O. Mason & Helene M. Carlsson, *The Development Impact of Gender Equality in Land Rights*, *in* HUMAN RIGHTS AND DEVELOPMENT, *supra* note 43, at 114.

[373] Rittich, *supra* note 43, at 88. The literature on the deep connections between equality of land rights and development is substantial. *See, e.g.*, Mason & Carlsson, *supra* note 371, at 114. Indeed, it has been mainstreamed into the work of international financial institutions. *See, e.g.*, WORLD BANK, ENGENDERING DEVELOPMENT: THROUGH GENDER EQUALITY IN RIGHTS, RESOURCES, AND VOICE xi (2001), http://siteresources.worldbank.org/PGLP/Resources/Engendering_Development.pdf.

[374] *See, e.g.*, Rittich, *supra* note 43, at 88.

[375] *Id.* at 89.

[376] This has encouraged, for example, more attention to the special needs of rural women and girls. *See* G.A. Res. 70/132, ¶ 2 (Dec. 17, 2015).

greater security, certainty, and predictability without requiring formalization or individualization of title or the commodification of all forms of property; notably, such efforts may require more, not less, by way of careful government regulation.[377]

This critical take on property rights, which departs considerably from the individualistic property jurisprudence of countries like the United States, emerges from instruments like CEDAW and other "equality" instruments in the Appendix. Instruments like CEDAW require evaluating rights to property alongside the other equality rights spelled out in the convention. They put property rights in the context of the need to respect the equality rights of a particular vulnerable group *and* require that right to be treated as one among others.[378] Such treaties, embedded in institutional settings that include expert committees, special rapporteurs, periodic consideration of state reports, annual re-visitations by the U.N. General Assembly, and, where states have accepted optional protocols permitting individual complaints, expert committees, encourage continuous conversations on how property rights impact vulnerable groups.[379] They are, as the IACtHR would put it, "living instruments" for *revisable* property rights.[380]

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[377] *See* Rittich, *supra* note 43, at 101–03. *See generally* Dehaibi, *supra* note 62, at 2 (arguing for a more "inclusive" human right to property that serves as a tool for positive social action to satisfy basic needs).

[378] CEDAW, *supra* note 366, arts. 15, 16. The CEDAW committee's contextual property right might be seen, as is the case with the IACtHR's, as more accommodating of the view, suggested by the positive obligations imposed by CEDAW itself, that states need to take positive action to satisfy essential human needs and that property rights need to be among those positive actions. *Compare, e.g.*, Alexander, *supra* note 45, at 736 (discussing German law), *with* Rory O'Connell, *The Role of Dignity in Equality Law: Lessons from Canada and South Africa*, 6 INT'L J. CONSTITUTIONAL L. 267, 267 (2008) (discussing evolutions of the needs demanded by substantive equality in those systems).

[379] *See e.g.*, CEDAW, *supra* note 367, art. 11.

[380] Ituango Massacres v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 155 (July. 1, 2006). This means that matters that might have been originally omitted from treaty texts in order to secure agreement—such as mention of inheritance rights in CEDAW's Article 16—may re-emerge in the course of later treaty interpretations. *See, e.g.*, Freeman, *supra* note 368, at 414.

The progressive attention paid to accommodating disparities among persons differentially situated—from women to the disabled—encouraged by the distinct human rights treaty regimes included in the Appendix has also inspired more critical takes on the ways *different* national laws (e.g., dealing with family law and inheritance, contracts, land regulation, rules for titling and registration, or rules on immigration) affect such persons, as well as the "devastating effects of property rights violations—including poverty, disease, violence, and homelessness[.]"[381] Interactions among these international regimes as well as within them have spurred human rights advocates to propose reforms to national laws and regulations that, left unchanged, would make the property rights of women or minorities more vulnerable or even non-existent.[382]

To be sure, these property rights instruments, devised by states, do not intrude on their sovereignty in equal respects.[383] Critics of IIAs are not wrong when they suggest such treaties, which usually enable foreign investors to secure direct access to international arbitral remedies that are, by international standards, unusually effective, provide more credible remedies than most human rights treaties. It may indeed be true, as this author has suggested elsewhere, that a foreign investor's right to property is the most enforceable "human right" in the canon.[384] It is also true that even IIAs, much less human rights instruments, like the American Convention of Human Rights, may fail to change national laws and practices in place and do little to remedy systemic flaws in property rights protections beyond the occasional high-profile case. They may fail to secure the desired structural reforms sought by judges on international courts, investor-state arbitrators, or members of U.N. expert bodies. But these critical flaws—shared with other international legal regimes—are also, from a different standpoint, their saving grace. These regimes' notorious enforcement gaps, and express and implied exceptions, make the human right of property a malleable instrument that does not always "trump" the state—or threaten its sovereignty. Textual weaknesses in CEDAW with respect to the actual requirements

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381 Walsh, *supra* note 371, at 133.

382 *See, e.g.*, Ikdahl, *supra* note 369, at 282–83 (noting how the interaction of certain laws and practices render many women essentially homeless).

383 *See infra*, Appendix.

384 Alvarez, *International Investment Law*, *supra* note 24, at 61–62.

imposed on states (e.g., the prevalence of hedge words like "all appropriate" throughout its text),[385] abundant and broad reservations, as well as the potential for outright defiance of the CEDAW committee's non-binding views and recommendations, threatens to make that treaty, as well as many others in the Appendix, toothless tigers. But this weakness means that the threat that these human rights treaties pose to legitimate sovereignty concerns should not be exaggerated. Whatever it might be in IIAs (and its relatively effective arbitration system), the human right of property as applied in places like the CEDAW committee is not a sword of Damocles hanging over conscientious regulators bent on fulfilling the public good.

Comparable sensitivity to sovereign concerns is suggested by the remedies available to those seeking to enforce the human right of property. That right, at least in the traditional human rights instruments contained in the Appendix, is literally a right *of* and not necessarily *to* property, even though the latter is how it is routinely (if inaccurately) described in some of these instruments.[386] While in some cases, such as IACtHR rulings that grant indigenous peoples access to particular ancestral lands or a U.S. court's recognition that a particular painting by Klimt, seized by the Nazis, belongs to the Altmann family,[387] international law requires granting certain persons title to particular lands or goods, in the vast majority of cases where international legal regimes extend relief for property deprivations or other harms, that relief consists of some form of "just" or "proportional" compensation or other forms of redress (including perhaps merely an apology).[388] International law instruments that address property do not typically proclaim a right to acquire or to have restored title to specific property and, in accord with their reluctance to award specific performance, it is extremely rare for an international court to demand restitution of even unjustly expropriated property. As is clear from the IACtHR case law, except in very

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385 CEDAW, *supra* note 367, art. 2.

386 For example, Article 21 is entitled "Right to Property" in the American Convention. ACHR, *supra* note 140.

387 *See* Xákmok Kásek Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 281 (Aug. 24, 2010); Altmann v. Republic of Austria, 317 F.3d 954, 974 (9th Cir. 2002), *aff'd on other grounds*, 541 U.S. 677 (2004).

388 *See* Alvarez, *Defense of Foreign Capital*, *supra* note 92, at 7.

rare circumstances, international law does not establish or secure a right to specific property. This is true even when international law establishes, alongside the substantive right to property protection, an adjudicative mechanism capable of providing a legal remedy, such as regional human rights courts. These courts have historically been most attentive to securing the removal of states' laws or practices that violate human rights, in accord with the view that their principal function is to prevent future abuses of rights. Although the increased attention to the right to an "effective remedy" (particularly in the ECHR) may be changing things, historically, such courts have been only secondarily attentive to the need to fully redress victims for their injuries through just compensation, even with respect to property rights.[389]

Adjudicative mechanisms charged with protecting property rights do not adhere to a uniform view requiring damages that amount to the full market value of the property. Regional human rights courts—such as the European and Inter-American Courts—do not necessarily take the same approach with respect to the extent of compensation even when they find that some level of compensation is due. The judges of these courts exercise considerable discretion. Neither of these courts is obligated to award those who suffer property deprivations the "prompt, adequate and effective" compensation that is often explicitly required under IIAs when property is lost due to an expropriation.[390] Moreover, nothing in international law seems to require paying victims of property deprivations the full value of the property *as the victim has experienced it*. While investor-state arbitrators may be more willing to grant considerable monetary relief to injured claimants than is the case for human rights tribunals (and have at times been heavily criticized for it), even they do not purport to compensate victims for the full *subjective* value of

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[389] For a fulsome description of the diverse (and competing) goals of regional human rights courts, see DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS Law (1999).

[390] It is also worth noting that there is some flexibility with respect to compensation even with respect to IIAs, particularly since those treaties generally do not specify the level of compensation owed to those who suffer from property deprivations that do not involve the full taking of their property, such as a violation of fair and equitable treatment.

what was lost.[391] The diverse (and sometimes unpredictable) remedies accorded to victims of property violations may correspond, in part, to the different texts of the underlying treaties. Human rights treaties, for example, usually affirm certain procedural rights with respect to how individuals are treated alongside their property rights. Treaties that protect individuals from "arbitrary" or discriminatory treatment, with respect to some uses of property or in some contexts, may result in remedial orders that only seek to ensure that a person is accorded just treatment. To that extent as well it is more accurate to say that international human rights instruments typically extend protections *of* property rather than specifically *to* it.

VI. NORMATIVE JUSTIFICATIONS FOR THE HUMAN RIGHT OF PROPERTY

What is the international lawyer's response to the many profound critiques of property rights canvassed in Part I?[392]

The existence of an internationalized right to property protection grounded in so many instruments might be seen as a piecemeal, pragmatic effort to correct, by fits and starts and subject to some reservations and the inevitable hypocrisy that characterizes all interstate human rights ventures, many of the objections to such a right canvassed in Part I. Those involved in crafting these instruments have said, in effect, "yes, the right to property has been used to exclude from its reach slaves, women, prisoners, and refugees as well as to extend certain privileges only to those with property—but these unconscionable mistakes can be corrected without abolishing the only viable system that we have for organizing society and individual rights within it, namely schemes for allocating property rights." The predictable absence of universal consensus around a single text recognizing a right to property protection has not precluded states from elaborating and joining, in increasing numbers, compacts that haltingly accept the proposition that all human beings—from those who create intellectual property, to members of racial minorities,

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391 *See* Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 119 (2002).

392 This section puts to one side the oft-addressed debate about whether discussion of fundamental imprescriptible rights, natural or otherwise, is, as Jeremy Bentham suggested, "nonsense upon stilts." WALDRON, *supra* note 58, at 16.

women, prisoners, indigenous peoples and others who work the land, migrants, refugees and stateless persons, and the disabled—can only be fully human if their rights to property are respected without discrimination.[393] International law, at least in the form of the human rights instruments in the Appendix, recognizes that while it is true that unequal distribution of property rights tends to follow the lines of sex and race and that the right to property has, through much of recorded history, privileged the urban rich over the rural poor, the answer to these inequities is not to abolish the right to private property (even if that were possible). Nor is the answer to cede the subject entirely to the "domestic" realm ungoverned by international law. The human rights instruments that include property protections seek to expand the enjoyment of some property rights under the rule of law where possible on a non-discriminatory and non-arbitrary basis.

The instruments in the Appendix also begin to suggest how international law handles the balances that must be struck between individuals, and between individual and societal rights, whenever any human right is recognized. While it is true that property rights are notoriously grounded in excluding someone else from enjoying what is one's property—that, for example, the IACtHR's finding that the minority Sawhoyomaxa Community was entitled to certain lands meant that others were thereby excluded from them—it is important to recognize that the recognition of any right (even one as basic as free speech) imposes limits on the freedom of others, at least to the extent that it imposes a duty on others not to violate those rights.[394] An absolutist free speech country like the United States imposes a duty on all to at least tolerate (and not respond violently to) even the most virulent repulsive hate speech, for example.[395] International law's acceptance of property rights reflects deep seated needs—at the national and international levels—to establish a system of rights (and attendant) duties on others, including the right to exclude.

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393 *See infra*, Appendix.

394 *See, e.g.*, Raz, *supra* note 60, at 220 ("Each right establishes a set of duties, and identifies a set of people who are subject to the various duties.").

395 *See, e.g.*, LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

Internationalized human rights of property—and the diversity of treaties that they encompass—are also consistent with the idea that all societies have various forms of common and communal property and have the right to decide which types of property or possessions fall into each. While the instruments in the Appendix presume that all societies accept the basic institution of private property, they also suggest, as a group, that the objects or lands that are subject to it remain a contested concept (and are likely ever to be so). Contestations over what "property" is (e.g., whether it includes certain rights/things, tangibles/intangibles, land/other immovables, waters/oceans, air space/outer space) and whether the property so designated for protection includes all or only some of the bundle of rights associated with private property (e.g., the right to acquire, to use, to destroy, to exclude, or to transfer) have not precluded discrete agreements among states recognizing some forms of property rights as such. [396] Treaties like CEDAW—accepted by virtually every state—require at least non-discrimination with respect to property rights. Of course, this variable geometry with respect to many human rights (apart from those that might be regarded as *jus cogens*) is not unusual. Comparable disagreements have not precluded discrete international law agreements, including at the regional level, with respect to other human rights, such as freedom of expression, association, or economic rights to health or social security despite severe differences of opinion among states about their contours and meanings.[397] It is up to each state to decide whether the "compromised" sovereignty entailed by adherence to any of these treaties is worth the reputational or other benefits the treaty confers.[398]

As for the right of property itself, the utilitarian arguments for its protection are familiar.[399] Multilateral human rights instruments,

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[396] *Cf.* SPRANKLING, *supra* note 32, at 352–53 (dealing sequentially with all of these distinctions).

[397] *See, e.g.*, ACHR, *supra* note 140, at arts. 13, 15; ICESCR, *supra* note 21, at arts. 11, 12.

[398] It is not clear that as a group, the property rights instruments in the Appendix uniformly endorse (or presume) either the "bundle of sticks" or the competing "right to things" approaches that is common to the U.S. literature on property. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law & Economics?*, 111 YALE L.J. 357, 357 (2001).

[399] For an effort to distinguish utilitarian defenses of private property from moral or "right-based" contentions, see WALDRON, *supra* note 58, at 284–322.

like CEDAW and CERD, seem premised on the idea that since equality is essential to the rule of law, equal property rights are essential to it as well.[400] Others, like the instruments on indigenous peoples, on protecting wages or pensions, or the rights of performers, seek to achieve certain social justice goals. Those concerning the treatment of refugees and stateless persons aspire to fulfill certain foundational notions of fairness. Several, particularly CEDAW, rely, at least in part, on the need to promote economic development. More generally, the drafters of the property rights provisions in the human rights instruments in the Appendix in all probability assumed, like the Scholastics, that a right to personal property is essential to persons living in common because it generates and protects settled expectations, promotes diligence and efficiency, and deflects or avoids conflict. Utilitarian concerns certainly underlie many of Alexander Hamilton's arguments in Part II as well as many of the rulings of the IACtHR canvassed in Part III.

The harms that these treaties seek to prevent or to remedy often elicit more specific instrumental justifications. The right of property is needed to protect all of Franklin Delano Roosevelt's "Four Freedoms."[401] In appropriate contexts, the right to individual or communal property serves to protect persons from want, may ensure their right to work and to benefit from it, enables freedom of expression, and provides some protection from fearful attacks (particularly from governmental forces). Some takings of property, like that of Mr. Mezerhanes' newspaper and TV station, require protection because the underlying property was a vehicle for the freedom of expression and providing recompense for taking such property might deter further media interventions.[402] Some deprivations—as of communal lands of those who live off of it or the cases of "special gravity" considered by the IACtHR—require a remedy because of their intrinsic connections to basic human needs for food, shelter, and even to life.[403] Some takings, as of a family painting in *Altmann v. Austria*

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400 CEDAW, *supra* note 367, art. 15.

401 *See FDR and the Four Freedoms Speech*, FDR PRESIDENTIAL LIBR. & MUSEUM, https://fdrlibrary.org/four-freedoms (last visited Feb. 4, 2018).

402 *But see* Mezerhane v. República Bolivarian De Venezuela, 785 F.3d 545, 551 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 800 (2016).

403 *See, e.g.*, Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 169 (June 31, 2005).

seized by the Nazis, need to be restored to their rightful owners out of respect for the bonds of family, integral to personal identity.[404]

The utilitarian case for property protections has been made, in short, by everyone from Aristotle to Garrett Hardin (whose "tragedy of the commons" is often seen as a justification for private property rights).[405] Some of these strategic arguments extend to the international protection of the right and some are more convincing than others. For authors like Hernando de Soto, granting discrete land titles to individuals, including those who formerly held land in common, is absolutely essential for economic development.[406] Others, like the U.N. Special Rapporteur on the Right to Food, Olivier De Shutter, or, as noted, certain feminist defenders of CEDAW, strongly dispute the wisdom of such efforts and argue that there are better ways to ensure security of tenure to poor farmers, including recognition of communal land ownership.[407]

Today, as the hostility to "free trade pacts" in the United States demonstrates, there is considerable skepticism about the instrumentalist arguments that are sometimes made to defend global rights to property, particularly as applied to foreign traders and investors. Contentions that such rights are part and parcel of "economic freedom" (including free trade and capital flows and the spread of IIAs) and that market freedoms are the only, or best, way to promote prosperity and development no longer satisfy. Many resist the continuation of the NAFTA or the ratification of the Trans-Pacific Partner-

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[404] The famous Klimt saga, the subject of a Hollywood film ("Woman in Gold"), had a happy ending. But the Nazi looting of art was, of course, far more widespread and its full scope and consequences for the rightful owners of these works may never be fully known or addressed. *See, e.g.*, LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1995); HECTOR FELICIANO, THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART 3 (1998); Will Gompertz, *Nazi Trove in Munich Contains Unknown Works by Masters*, BBC NEWS (Nov. 5, 2013), http://www.bbc.com/news/world-europe-24818541; *Nazi Loot Probe: More Art Found at Gurlitt Austria Home*, BBC NEWS (Feb. 11, 2014), http://www.bbc.com/news/world-europe-26133532.

[405] Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244–45 (1968). *See also* WALDRON, *supra* note 58, at 5.

[406] DE SOTO, *supra* note 361, at 49–51.

[407] *See, e.g.*, De Schutter, *supra* note 11, at 271; *see also General Recommendation on Article 16*, *supra* note 336, ¶¶ 36–38.

ship, not because these pacts defend the right to property, but because they lack confidence in the real benefits produced by adherence to David Ricardo's theory of comparative advantage, they do not believe these treaties promote the desired trade or capital flows, or they believe that global trade and capital do not lift all boats but principally enrich those with yachts.[408] Reasonable people disagree about the overall economic benefits of these treaties. Those who defend the right to property only through instrumental arguments premised on the merits of free trade and capital flows are not likely to convince those who are skeptical, rightly or wrongly, about the wisdom of those flows.[409]

Somewhat more plausible are utilitarian arguments that states that fail to respect the property rights that they have previously granted tend to be weak rule of law states, generally with less than independent judiciaries that cannot be counted on to enforce other human rights.[410] On this view, the human right of property is a needed strut to support the rule of law more generally. Those who make this argument point out that authoritarian rulers—from Chavez to Putin to Xi—have used property deprivations to penalize political opponents like Mr. Mezerhane.[411]

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[408] *Compare* JAMES GWARTNEY, ROBERT LAWSON & JOSHUA HALL, ECONOMIC FREEDOM OF THE WORLD: 2015 ANNUAL REPORT v–vii (2015), https://www.fraserinstitute.org/sites/default/files/economic-freedom-of-the-world-2015.pdf, *with* THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS (2d ed. 2008) (arguing, *inter alia*, that global inequality has become worse despite the turn to the free market solutions). *See also* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 572–73 (Arthur Goldhammer trans., Harv. Univ. Press 2014).

[409] *See, generally*, POGGE , *supra* note 408.

[410] *See, e.g.*, Daniel Behn, Tarald Laudal Berge & Malcolm Langford, Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration 15–17 (June 2, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2978546 (demonstrating a significant correlation between respondent states that lose investor-state disputes and those states' capacity to protect property rights); David Gomtsyan & Suren Gomtysan, *What Do the Decisions of the European Court of Human Rights Tell about Property Rights across Europe?* 2 (TILEC Discussion Paper No. 2016-009, 2016), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2762522 (suggesting that the ECtHR is more likely to find property violations in countries, such as those in the new democracies of Central, Eastern, and Southeastern Europe, due to weaker rule of property law protections in those countries).

[411] *See, e.g.*, Gans-Morse, *supra* note 6, at 264.

The connections between respect for property rights at the national and international levels and the general health of a country's devotion to the rule of law are particularly salient when the national rule of law completely breaks down. When the rule of law clearly collapses, it is more likely that a country will face the kinds of property deprivations with "special gravity" that the IACtHR has faced. As U.S. court cases addressing "genocidal takings" remind us, property rights abuses, including outright thefts of property, have long accompanied the systematic mass atrocities too often seen throughout the twentieth and twenty-first centuries. Property rights violations have served as a tool to pursue ethnic cleansing or to commit other crimes against humanity, or genocide, as in Mugabe's Zimbabwe from 2000 to 2012; they can be used, as in perhaps Venezuela today, to enable "malnutrition by expropriation."[412] The Khmer Rouge in Cambodia targeted intellectuals-cum-property owners; Mao denied landed peasants access to their plots during his "Great Leap Forward."[413] It is also true that resort to property deprivations—the routine destruction of titles, for example, during such mass atrocities—have complicated efforts to restore the rule of law or engage in transitional justice.[414] Nor have governments bent on forms of ethnic cleansing stopped using property deprivations as a tool today. Legislation enacted in 1991 in Kosovo had the object and effect of restricting the sale of properties from Kosovo Serbs to Kosovo Albanians as a means of ensuring that the Serb population did

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412 Howard-Hassman, *supra* note 55, at 183–86, 193–94.

413 *See* Phnom Penh, *Cambodia Land Rights in Focus*, IRIN (Mar. 15, 2013), http://www.irinnews.org/report/97654/analysis-cambodian-land-rights-focus; Llewellyn H. Rockwell Jr., *The Horrors of Communist China Under Mao Zedong That Most Westerners Don't Know About*, BUSINESS INSIDER (May 1, 2017), http://www.businessinsider.com/horrors-of-communist-china-under-mao-2017-5.

414 Thus, recent press reports narrate problems associated with the Khmer Rouge's decision to destroy all property rights records in the 1970s. *See* Pauline Chiou, *Khmer Rouge Legacy: Land Disputes*, CNN (Nov. 27, 2011, 11:54 PM), http://www.cnn.com/2011/11/25/world/asia/cambodia-property-development-controversy/index.html; *see also* Penh, *supra* note 412 (noting that "[l]and rights remains a highly controversial issue in Cambodia, where the communist Khmer Rouge banned private property in the late 1970s in their effort to establish an agrarian society, destroying scores of land documents in the process").

not decline.[415] The pending ICC arrest warrant against al Bashir of Sudan includes a charge that forces under his control "systematically committed acts of pillaging" towns and villages.[416]

But, not everyone is convinced that situations of rule of law collapse tell us much about the everyday connection between respect for the rule of law and property rights—or that even if such a connection exists, property rights need international protection via treaty. Even in the situations noted above, the causal arrows are not clear. It is doubtful that if property rights had been more secure or protected via treaty, any or some of these mass atrocities would not have occurred. Not everyone believes that a government willing to sacrifice the rights of foreign investors for the public good will next violate the rights of its own citizens, or that IIAs and human rights treaties with property protections are required to (or can) prevent either or both outcomes.

Instrumental justifications aside, what can be said about whether an international human right of property advances the most common justification offered for human rights: protecting human dignity?[417]

Human dignity played a large role in Louis Henkin's path-breaking defense of human rights. Henkin was a revolutionary advocate that our age was the "age of rights," in which every individual "has legitimate claims upon his or her own society," justified not because these rights are necessary to achieve some common good or because they are granted to us by the grace of democratic governments, but

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[415] *See, e.g.*, Margaret Cordial & Knut Rosandhaug, *The Response of the United Nations Interim Administration Mission in Kosovo to Address Property Rights Challenges*, *in* HOUSING, LAND, AND PROPERTY RIGHTS IN POST-CONFLICT UNITED NATIONS AND OTHER PEACE OPERATIONS: A COMPARATIVE SURVEY AND PROPOSAL FOR REFORM 61, 65–67 (Scott Leckie ed., 2008).

[416] Prosecutor v. Omar Hassan Ahmad Al Bashir, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09, at 4–5 (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01514.pdf.

[417] Dignity is the most commonly relied upon justification for human rights, among both scholars and courts. *See generally*, Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 655 (2008); Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, *in* ZUR AUTONOMIE DES INDIVIDUUMS: LIBER AMICORUM SPIROS SIMITIS 249, 249–51 (Dieter Simon & Manfred Weiss eds., 2000); Oscar Schachter, Comment, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 853 (1983); Jürgen Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, 41 METAPHILOSOPHY 464, 464 (2010).

because they are moral entitlements owed to all human beings.[418] He argued that dignity plays a foundational role in the very idea of calling some rules "human rights" and according them exceptional importance.[419] He suggested that dignitarian entitlements are called "rights" to indicate that they are claims "as of right," that is, not provided "by appeal to grace, or charity, or brotherhood, or love," and not because they are "earned or deserved," but because they are claims "upon society," "derive[d] from moral principles governing relations between persons" that society has the burden to satisfy.[420]

The dignitarian intuitions that underlie the human rights instruments in the Appendix are not hard to discern. A number of these texts—such as the Refugee Convention, the treaty on indigenous peoples, and for stateless persons—explicitly recognize that the right of property is not dependent on sovereigns to give or withhold. Each of these recognizes that, as both Thomas Jefferson and Henkin said, certain property rights, "inherent" to personhood, are not dependent on a person's nationality or lack of one.[421] Under these treaties, states should not discriminate between refugees who are not part of their national social contract because they are people; they need to do the same with respect to stateless persons even if these human beings lack a state protector; they need to recognize the right to land of indigenous peoples even when a state has not formally given such persons or groups formal title. Such treaties usefully remind us that foreigners are people too and that governments do not always get to decide unilaterally who a *person with rights is*. Equality instruments, such as CEDAW and CERD, might be seen as associating, at a fundamental level, equal treatment with dignity.[422]

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[418] Henkin, *supra* note 324, at 11. *See also* HENKIN, *supra* note 57, at 2. Henkin's conception of dignity appears to owe much to Kant's well-known concept of human dignity as embracing the categorical imperative. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 24–25 (Cambridge Univ. Press 1998) (1785); *see generally* Michael J. Meyer, *Kant's Concept of Dignity and Modern Political Thought*, 8 HIST. OF EUR. IDEAS 319, 319 (1987).

[419] Henkin, *supra* note 324, at 11.

[420] HENKIN, *supra* note 57, at 3.

[421] *See id.*; *see also* Henkin, *supra* note 324, at 15; Va. DECLARATION OF RIGHTS, *supra* note 87.

[422] For examples of this connection made by national courts, see, e.g., O'Connell, *supra* note 378, at 271.

But, as often been noted, dignity itself is a contested concept with a plurality of meanings that is left undefined by all the human rights instruments that nonetheless rely on it, particularly in their preambles.[423] Further, neither Henkin nor others of the founding human rights generation clarified what they meant when they said that dignity was "the foundational value" for human rights.[424] Since the time that Henkin's *Age of Rights* was published, however, there has been renewed attention to the philosophical study of the idea of human dignity.[425] More recently, Jeremy Waldron has usefully provided four possible ways to understand the idea that dignity is a foundational concept for human rights. According to Waldron this might mean: (1) "that, as a matter of history and genealogy," human rights was generated from conceptions of human dignity; (2) "that [human dignity] is the source of [human rights], in the way that the application of one legal proposition may be the source of the validity of another;" (3) that [human rights] can be derived logically from [human dignity], either deductively or with the help of empirical premises;" or (4) that [human dignity] throws some indispensable light on [human rights] or helps in the interpretation of [them]."[426]

Waldron skeptically examines each of these conceptions and suggests that perhaps it is best to see dignity as a "status" concept "that *comprises* a given set of rights."[427] He suggests that we do not have human rights because we have human dignity, but that human dignity is what we enjoy when one's human rights are respected.[428] Waldron also argues that contemporary international human rights instruments constitute an effort to elevate the rank or status of all

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[423] *See* Jeremy J. Waldron, *Is Dignity the Foundation of Human Rights*?, 6–9 (N.Y.U. Pub. L. & Legal Theory Working Papers No. 374, 2013). Waldron also suggests that the absence of a definition for dignity makes it a questionable candidate on which to build a foundation for human rights. He notes George Kateb's point that to the extent human rights are "nonsense on stilts," the idea of human dignity only adds more nonsense. *Id*. at 9. *See also* McCrudden, *supra* note 417, at 702.

[424] *See, e.g.*, Jeremy Waldron, *Dignity and Rank: In Memory of Gregory Vlastos (1907–1991)*, 48 EUR. J. SOC. 201, 205–07 (2007) [hereinafter Waldron, *Dignity and Rank*].

[425] *See, e.g.*, *id.* at 201; McCrudden, *supra* note 417, at 657–58; MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 4–5 (2012).

[426] Waldron, *supra* note 423, at 12.

[427] *Id*. at 25.

[428] *Id*.

persons to the level once given only to the rank of nobility; that is, that the human species is now owed rights once granted only to members of the nobility.[429] Waldron acknowledges that the notion of dignity as a foundational idea may make sense to the extent that it provides a common rationale to explain how the various rights and duties in the international human rights canon hang together.[430] He argues that dignitarian ideas may supply an underlying coherence to these rights as a whole.[431]

The human right to the protection of property, including the protection of at least some forms of private as well as communal property, can be plausibly examined using any of Waldron's useful delineations of what dignity means or what it means to use it as a "foundational" concept. Following Waldron, the right to property is demonstrably a "status" concept whose precise contents are defined, as many human rights instruments in the Appendix suggest, based on the characteristics of the persons to whom the right is accorded. Despite these treaties' emphasis on equality, states have distinguished among the property protection rights to be accorded based on distinct categories of persons depending on their status.[432] Children, prisoners, stateless persons, and refugees, for example, do not receive the same treatment with respect to their property protections as do a state's adult citizens and, to some extent, some international regimes (e.g., the NAFTA's Investment Chapter, IIAs generally, and possibly the ECHR) continue to evince the solicitude for the property rights of foreigners that characterized the law of state responsibility long before the rise of human rights.[433] One needs to be cautious though about concluding that the instruments in the Appendix, taken as a whole, are an effort to elevate, in bits and pieces, the

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429 Waldron, *Dignity and Rank*, *supra* note 424, at 201.

430 Waldron, *supra* note 423, at 10–11.

431 *Id.* at 26, 28–29.

432 *See e.g.*, Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 147–49 (June 17, 2005).

433 *See, e.g.*, Rosalyn Higgins, *The Taking of Property and Human Rights*, *in* THE TAKING OF PROPERTY BY THE STATE: RECENT DEVELOPMENTS IN INTERNATIONAL LAW 355, 355–75 (1982); *see also* James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A) ¶ 68 (1986) (dicta suggesting that greater solicitude for the property rights of aliens is based on the fact that these persons do not have equal access to political processes for making laws in their host states).

status of all persons to enjoy the level of property protections once reserved for foreigners' property. The idea that today even a country's nationals are entitled to the extensive property protections now provided in IIAs ignores the differences among the property instruments in the Appendix and presumes that a single level of property protection is required for all. Caution about such a simple conclusion is also warranted because, as noted, IIAs—and the protections they extend to foreigners as well as the limitations imposed on states' right to regulate—are a moving target.

The dignitarian foundations for the human right to property protection can also be plausibly explained using Waldron's four possible delineations of what this might mean noted above. These are considered in turn.

Waldron is skeptical of his first, genealogical, frame. He argues that it is historically inaccurate to contend that human rights grew out of pre-existing discourses relating to human dignity and that it is probably more accurate to say the reverse, namely that the idea of dignity reflects socio-historical conceptions of basic rights and freedoms that preceded it.[434] But while this may be true for human rights as whole, a historical/genealogical view of the relationship between specific international rights of property and the foundational value of dignity is not implausible. As the chronology of human rights instruments indicates, while the right to property protection was included in the Universal Declaration of Human Rights as a vague and possibly rhetorical value, that right was not given concrete form until years later, in the course of repeated invocations by regional human rights courts (particularly the ECtHR and IACtHR)[435] and as property protections came to be included in a number of legally binding instruments for different groups of persons.

The various human rights treaties recognizing the right of property and to non-discriminatory treatment with respect to it are modern post-U.N. products—as is the evolving institutional jurispru-

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[434] Waldron, *supra* note 423, at 13–14.

[435] *See, e.g.*, Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparation and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 142–45 (Aug. 31, 2001); Abrill Alosilla v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 223, ¶ 82 (Mar. 4, 2011); Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A), ¶ 63 (1979); *see also* Fabri, *supra* note 315, at 149–51.

dence giving these rights ever more nuanced content. As is suggested by the IACtHR case law noted above, as well as the ongoing dynamic re-interpretations of what the right *of* or *to* property means in the course of general comments and views issued by U.N. human committees and U.N. special rapporteurs, what that right means today to women, indigenous peoples, children, prisoners, the disabled, or immigrants is not the same as it was in 1948.[436]

Today, as Henkin would predict, the contours of property protections are often derived from certain dignitarian "moral intuitions."[437] The contemporary human right of property owes much to contested and evolving (but often strongly held) ideas of what human dignity means in the modern world. For example, the proposition that married women and widows are owed secure property rights (including to the marital home) and that national laws that fail to respect these rights are illegal is, to a considerable extent, derived from progressive notions of what it means to see women as fully human.[438] Notably, these legal propositions may be read into instruments (such as the ICCPR) whose texts do not contain such guarantees.[439] While human dignity as a general universal value may have been originally inspired by instruments like the U.N. Charter itself and the 1948 Universal Declaration of Human Rights, those instruments did not close off dignity's juris-generative ripples. It is not implausible to argue that institutional actors such as judges on the IACtHR now charged with defining the scope of the right of property derive new ideas of what the static text on property before them means based on intuitive ideas about what "human dignity" requires in contemporary society. Determining the genealogical roots of the contemporary human right of property is a complex project and presents a moving target. The target is moving not least because to the extent the goal is to elevate the status of all persons to the level of property protections owed to aliens, the goalposts of that treatment—set by IIAs—is changing rapidly, as states re-calibrate the

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[436] *See, e.g.*, Ikdahl, *supra* note 369, at 289; Goonesekere, *supra* note 368, at 396–97.

[437] Henkin, *supra* note 324, at 10, 15.

[438] *See* CATHARINE A. MACKINNON, ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES 41–43 (2006).

[439] ICCPR, *supra* note 21, arts. 1, 2.

balance between their rights to regulate versus the property protections they are willing to guarantee foreign investors.[440]

Nor is Waldron's second conception of the function of dignity—dignity as the source of validity or legitimacy for human rights—inapposite. While states are bound by the treaties identified in the Appendix because they are treaties—as a matter of positive law—the extent to which states continue to violate these pacts and attempt on occasion to withdraw from them remains a source of great concern. Human rights advocates, including those fighting property rights violations, continue to turn to human dignity as *grundnorm* to push for enforcement or implementation and to deter states from (as some have) withdrawing from regional human rights systems or otherwise undermining rights protections.[441] Appeals to dignity as a source of legitimacy and a deeper source of validity[442] than mere *pacta sunt servanda* are particularly important for rights in the international rights canon—such as property protections—which are otherwise fragile under positive law because of the ambivalence in which they are held or the fact that few claim they enjoy the status of *jus cogens*.[443] The age of Brexit, Trump, Xi, and Putin may not be a promising time to rely simply on positive law and *pacta sunt servanda* as a basis for encouraging respect for human rights, including the right to property protection. It may be, on the contrary, just the right moment for dignitarian appeals precisely to stress the "universality, inalienability, and non-forfeitability" of these rights—and the need to be consistent about ensuring the dignity of all persons.[444] Indeed, appeals to such higher values may be all the

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[440] Thus, many of the changes being made to contemporary BITs and FTAs—from the reformulation of FET guarantees to "clarifications" of the distinction between legitimate regulation and improper expropriations—are designed to protect the rights of states to regulate while still protecting the property of foreign investors. *See generally* Alvarez, *Our Investment Treaties*, *supra* note 53, at 143–44.

[441] *See* Waldron, *supra* note 423, at 14.

[442] *Id.* at 14–16.

[443] Higgins, *supra* note 433, at 355.

[444] Waldron, *supra* note 423, at 15; *see also* WALDRON, *supra* note 58, at 414–18 (arguing that defenses of property rights based on their contributions to the "freedom, autonomy, and the development of independence and responsibility" of individuals encourage consistent advocacy of such values on behalf of all, even the most property-less).

more necessary to mobilize civil disobedience to induce state compliance with these treaties or to preclude withdrawal from needed institutions like the IACtHR or the ECtHR.

Waldron's third frame is supported by the rulings of international courts such as that of the IACtHR surveyed in Part III. That court's decisions, along with the views presented by others charged with the day to day application of the human right of property, whether legally binding or not, provide numerous examples of how adjudicative or other interpretative findings with respect to these treaty rights are derived logically from ideas of human dignity, either deductively or with the help of empirical premises.[445] A wealth of G.A. resolutions and World Bank reports that emphasize the extent to which respect for women's property rights advances not only the economic health of nations but the capacity of women for self-realization provide examples of the latter.[446] The CEDAW committee's ongoing interpretations of what it means for women to enjoy "equal" rights to marital property, often derived from ideas that women need to be able to have normative agency—to be able to maintain a home, to secure equal pay in their jobs, to inherit marital property, or to establish a business—provide evidence of the former.[447] While, as Waldron indicates, the idea that normative agency is important to human dignity and that it is really at stake in particular factual contexts are contested notions, these are the "moral intuitions" that, as Henkin would predict, appear to make a difference to those engaged in human rights advocacy and interpretation.[448]

Moreover, adjudicators or U.N. human rights bureaucrats who rely on dignitarian ideas to justify conclusions about whether the right of property can be invoked in particular contexts are in good company. They may be presuming, along with Amartya Sen, that the right to property allows people to lead the kind of lives people

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[445] *See, e.g.*, Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001); Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 147–49 (June 17, 2005).

[446] *See generally* WORLD BANK, *supra* note 373.

[447] *See General Recommendation on Article 16*, *supra* note 336, art. 16 ¶¶ 30–39.

[448] Waldron, *supra* note 423, at 17–18; Henkin, *supra* note 324, at 10, 15.

value.[449] They may be following Hegel in the belief that personal property enables the exercise of dignity in the form of individual autonomy; they may be assuming that property enables persons to express their personality, achieve their independence, and master a degree of self-government.[450] They may be suggesting, as did Aristotle, that without nondiscriminatory access to basic core rights to property, including security to their homes, people are slaves.[451]

More controversially, some applications of the human right of property seem premised on intuitive connections between the dignity of labor and the dignity of self. This connection is suggested by some IACtHR rulings in Part III,[452] national laws (as in Germany)[453] which draw a close connection between the right to labor and the right to property, and some of the other international instruments in the Appendix (including non-human rights instruments that protect industrial property, investors, the wages of workers, or the right to farm or use personal or communal lands).[454] A number of the property rights instruments in the Appendix appear to presume a connection between the right to work and the right to benefit from that work.

The presumptive labor/property tie, most closely associated with Locke,[455] has been the subject of considerable scorn, particularly by legal philosophers. Prominent legal philosophers argue that, as a

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449 *See* Monteagudo, *supra* note 58, at 8 (connecting the right to property to Amartya Sen's views).

450 *See id.* (connecting the right to property to Hegel); WALDRON, *supra* note 58, at 343–89 (discussing Hegel's justifications for private property).

451 *See generally* Koskenniemi, *supra* note 132, at 18.

452 *See* Abrill Alosilla v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 223, ¶ 83 (Mar. 4, 2011).

453 HENKIN ET AL., *supra* note 364, at 1538.

454 *See infra* Appendix.

455 As famously recognized in Locke's words from his First Treatise on Government:

[E]very Man has a *Property* in his own *Person* . . . . The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned [sic] to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other Men.

LOCKE, *supra* note 69, at 305–06.

matter of strict logic, Locke's idea that one can "mix" one's labor with an object and therefore acquire a right to the object makes no sense.[456] Locke's defense of personal property has also been discredited to the extent that he used it to justify European rights to take property from the American Indians as far as the latter had not, in his view, "improved" the land;[457] and Locke's views have been resisted by many others, including, of course, by Karl Marx.[458] Nonetheless, the texts of a number of property rights international instruments as well as national laws suggest that the labor/property connection may be another one of those "moral intuitions" which the drafters of these laws could not resist—and which those interpreting them ignore at their peril. International law, including treaties ratified by nearly all states in the Appendix, presumes that the right to one's labor presupposes the right to own the product of that labor. As a chief critic of Locke, Jeremy Waldron, points out, drawing a connection between acts of appropriation and the right to property need not be grounded in Locke's proposition that property entitlements emerge when objects are "mixed with one's labor"; such property entitlements might be, more plausibly, argued on the premise that persons should be entitled to property that they have "improved" as an additional way to evince respect for Hegelian ideas of individual autonomy and responsibility.[459] It would therefore be wrong to presume that some, or all of property rights instruments in the Appendix, subscribe to Locke's vision of property, as opposed to, for example, Rousseau's or Hegel's.[460] And, these instruments

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[456] *See, e.g.*, Liam B. Murphy, Professor of Law, N.Y.U., *Private Law and Public Illusion*, CLUSTER OF EXCELLENCE: "THE FORMATION OF NORMATIVE ORDERS" (May 2–3, 2016), http://www.normativeorders.net/en/events/frankfurt-lectures/48-veranstaltungen/frankfurt-lectures/4662-private-law-and-public-illusion-eng; WALDRON, *supra* note 58, at 184–91.

[457] *See e.g.*, Blake A. Watson, *John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of "Universal Recognition" of the Doctrine of Discovery*, 36 SETON HALL L. REV. 481, 531–32 (2006).

[458] *See* Richard Teichgraeber III, *Rousseau's Argument for Property*, 2 HIST. EUR. IDEAS 115, 127–28 (1981).

[459] WALDRON, *supra* note 58, at 310–13 (connecting this approach to Hegel's account of the ethical importance of property).

[460] Locke's most prominent antagonist with respect to property, Rousseau, argued for Republican controls over the excesses wrought by acquisition of property and the desire for profit, not for the elimination of private property. Teichgraeber, *supra* note 458, at 121–124. Indeed, as Teichgraeber points out, Rousseau teaches

certainly do not follow Locke insofar as he refused to extend the benefits of either labor or property rights to indigenous peoples.[461]

For much the same reasons, ideas of dignity seem to be used in the fourth sense defined by Waldron: to throw "indispensable light" on what a human right means or to help in the interpretation of it.[462] They appear to underlie decisions issued by the IACtHR (such as those directed at the forfeiting of property to the state in criminal cases noted at Section III(B)(2)(b)), and are inescapable in the jurisprudence of the ECtHR.[463] They may also help to explain the IACtHR's greater solicitude to some victims of property deprivations who happen to be poor.[464]

CONCLUSION

This Article is modeled in many respects on those included in Henkin's *Age of Rights*. It canvasses weighty arguments directed against the idea of the human right to property that emulate Henkin's "bill of particulars" against the idea of human rights generally.[465] It

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the child Emile to cultivate beans in order to show the child, by example, that what one cultivates, that is, "given his time, his labour, and his trouble, [and] his very self to" provides a claim "against all the world[.]" *Id*. at 126 (quoting JEAN JACQUES ROUSSEAU, ÉMILE 62 (Barbara Foxley trans., J.M. Dent & Sons Ltd. 1911) (1762)); *see also* David S. Siroky & Hans-Jörg Sigwart, *Principle and Prudence: Rousseau on Private Property and Inequality*, 46 POLITY 381, 381 (2014).

461 *See e.g.*, Lindsey L. Wiersma, *Indigenous Lands as Cultural Property: A New Approach to Indigenous Land Claims*, 54 DUKE L.J. 1061, 1065 (2005) ("John Locke articulated the quintessential European position on the rights of indigenous peoples: that they had no rights to lands they did not cultivate.") (footnote omitted).

462 Waldron, *supra* note 423, at 12.

463 *See, e.g.*, McCrudden, *supra* note 417, at 683; *see also* Paolo G. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, 19 EUR. J. INT'L L. 931, 934–39 (2008) (agreeing with McCrudden insofar as concluding that the ECtHR relies on three core dignitarian ideas: (1) an ontological claim about the intrinsic worth of the human person; (2) a relational claim about how others should treat human persons in view of their inherent value; and (3) a claim regarding the proper role of the state vis-á-vis the individual (i.e., that the state exists for the good of persons and not vice-versa)).

464 *See, e.g.*, Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 164 (Oct. 25, 2012).

465 Indeed, Henkin's general "bill of particulars" strikingly echoes contemporary objections to the specific right to property protection:

then attempts to do for the human right of property what Henkin did for human rights as whole: canvass how the right is compatible with U.S. values, identify what it means in particular cases (as in the IACtHR), and advance normative justifications for its existence.

This Article does not address one question with which contemporary scholars of international property rights like Sprankling are much concerned. It does not consider whether, apart from the instruments enumerated in the Appendix, a universally applicable human right to property protection exists as a matter of customary international law or general principles of law. This question, which lurks even in the context of some of the U.S. expropriation rulings discussed above,[466] has been the subject of considerable attention. Scholars dealing with the rules applicable to the protection of alien investors have repeatedly revisited this question, at least since Elihu Root affirmed, before the American Society of International Law in 1910, that an "international minimum standard of treatment" exists to protect the property of U.S. investors abroad or later, in the wake of Cordell Hull's statements to Mexican officials in 1938 that customary international law requires "prompt, adequate and effective

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[T]he rights idea is selfish and promotes egoism. It is atomistic, disharmonious, confrontational, often litigious . . . . It is antisocial, permitting and encouraging the individual to set up selfish interests as he or she sees them against the common interest commonly determined. The idea of rights challenges democracy, negating popular sovereignty and frustrating the will of the majority. In principle as well as in detail, it may exalt individual autonomy over communality, egoism over *gemeinschaft*, freedom over order, adversariness over harmony . . . . It imposes an artificial and narrow view of the public good . . . and takes critical decisions from those chosen to govern and the only ones capable of governing. In many societies and circumstances, the idea of rights helps immunize egotistic property interests and extravagant claims to autonomy and liberty, thereby entrenching reaction and preventing revolutionary social change.

HENKIN, *supra* note 57, at 182.

[466] Thus, in its 2012 *Abelesz* decision, the Seventh Circuit stated that there is no need to search for a self-executing treaty so long as the underlying rules were part of customary international law. It therefore turned to customary international law to find the "genocidal taking" exception to the domestic takings rule. "Conventions that not all nations ratify can still be evidence of customary international law. As we explained above, the expropriations alleged by plaintiffs were an integral part of the planned genocide of the Hungarian Holocaust. And genocide has been recognized as a violation of customary international law." Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 685–86 (7th Cir. 2012) (citation omitted), *aff'd sub nom*. Fischer v. Magyar Allamvasutak Zrt., 777 F.3d 847 (7th Cir. 2015).

compensation" when expropriating the assets of foreigners.[467] Those who initiated the U.S. Bilateral Investment Treaty (BIT) Program have since indicated that reaffirming these rules was a key reason for pursuing BITs.[468] The extent to which customary law protects the rights of foreign investors, ably scrutinized by scholars, international and national judges, investor-state arbitrators, and many others, requires no revisiting here.[469]

In *Mezerhane*, discussed at the beginning of this essay, the U.S. district court had on hand (but ignored) expert witness Joseph Weiler's opinion that the uncompensated expropriation of property violates two distinct branches of customary international law, namely the rules governing state responsibility for the protection of aliens and its rules against violating fundamental human rights.[470] Weiler argued that universally applicable property protections also exist under general principles of law recognized by the national laws of nations.[471] Others, including John Sprankling, have advanced comparable claims, albeit with more nuance.[472]

The case for a universal right to property protection as a matter of customary international law is largely based on the fact that, as noted, more than two-thirds of nations are now parties to a regional human rights treaty—namely the American Convention, the ECHR, the African Charter, or the Arab Charter—that include the right to property and a court with the power to issue legally binding judgments to enforce it. It would also draw support from the fact that only two states in the world, Palau and South Sudan, are not parties

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[467] *See* Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AM. J. INT'L L. 517, 521–23 (1910); *The Hull Formula (Exchanges between Cordell Hull and the Mexican Government (1938)*, *in* AMERICAN CLASSICS IN INTERNATIONAL LAW: INTERNATIONAL INVESTMENT LAW, *supra* note 24, at 235.

[468] *See e.g.*, Alvarez, *supra* note 342, at 20.

[469] For a survey of views and precedents, see generally Alvarez, *International Investment Law*, *supra* note 24, at 1–81.

[470] Weiler Report, *supra* note 299.

[471] *Id.* at 8. *But cf.* Mezerhane v. República Bolivariana de Venezuela, 785 F.3d 545, 552 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 800 (2016). The *Mezerhane* Court, which ultimately dismissed Mezerhane's claim on the basis of sovereign immunity, focused on whether the American Convention of Human Rights was self-executing and did not address the broader questions of customary international law or general principles. *Id.* at 548–49.

[472] Sprankling, *supra* note 13, at 464–66.

to at least one treaty in the Appendix, such as those barring discriminatory treatment with respect to property rights against vulnerable groups, such as CEDAW (189 parties), CERD (179), the Migrant Workers convention (51), and the Disabilities convention (175).[473] But, while it is not unusual today to use widespread treaty ratifications as proof that a rule of universal custom exists, as Sprankling acknowledges those who would insist on separate indications of *opinio juris* to make a definite finding that custom exists would not find evidence that states have entered into treaties necessarily sufficient.[474] The contention that a human right to property protection exists as a general principle of law would draw some support from the fact that today, when some ninety-five percent of the world's nearly two hundred states guarantee the right to property under their national laws (most commonly in their national constitutions), there is no longer an East-West divide with respect to national laws that troubled Henkin when he was the chief rapporteur for the 1986 U.S. Restatement of Foreign Relations.[475]

But neither conclusion, even if correct, would support anything other than a primitive or rudimentary conception of what the ostensible universal right of property would entail. A universal right grounded in either custom or general principles presumably would not go further than the wording in the original Universal Declaration

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[473] *See infra*, Appendix. Sprankling also canvasses other evidence for this conclusion, including G.A. Resolutions and a 1993 U.N. report authored by Venezuelan scholar Luis Valencia Rodriguez that cast doubt on the conclusion that the right to property was truly universal. Sprankling, *supra* note 13 at 472–73.

[474] *Id.* at 495–97. But short-circuiting the need to search for sufficient state practice and *opinio juris* by relying on widespread treaty ratification for findings of custom is, at least in the practice of national and international courts, quite common. *See* Stephen J. Choi & Mitu Gulati, *Customary International Law: How Do Courts Do It?*, *in* CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 117, 132–34 (Curtis A. Bradley ed., 2016) (citing an empirical survey of how national and international courts find contemporary rules of custom for the conclusion that resort to widespread treaty ratifications is the leading source of evidence for adjudicative findings of custom).

[475] *See* Sprankling, *supra* note 13, at 485, 492–93. But arguments premised on alleged general principles of law often paint with a broad brush and may ignore very real differences in how national laws and constitutions define and protect property rights. *See generally* Neha Jain, *Judicial Lawmaking and General Principles of Law in International Criminal Law*, 57 HARV. INT'L L.J. 111, 111–13 (2016) (critiquing how international criminal courts have deployed alleged general principles of law).

of Human Rights, which leaves the parameters of such a property right, along with the definition of property owed protection, undefined and presumptively subject to considerable state discretion.[476] Even if a universally applicable human right to property exists, that right would need to be capacious enough to embrace a wide range of state laws and economic systems with widely different emphases on reliance on the market—and more importantly, differing conceptions of how property rights relate to equality and human dignity. It would also need to be malleable enough to survive the fact that despite widespread treaty reservations, some states remain outside many of the property protecting instruments in the Appendix, while a few have taken reservations expressly with respect to their property provisions.[477]

What can be said with more certainty is this: human rights of property exist even if they are grounded in treaties and not universal custom or general principles. International law has therefore recognized such a right, including, but not limited to, the right to compensation for government takings, and appears to base the right of property on universal values like human dignity, even if the international community of states has not yet extended it to all humans as a matter of universal customary law. The vast majority of states that are parties to treaties like the regional human rights treaties or U.N. "human rights" conventions in the Appendix have elevated property rights

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[476] "Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property." G.A. Res. 217 (III) A, *supra* note 17, art. 17. For one attempt to give content to such a minimalist conception, see Henry G. Schermers, *The International Protection of the Right of Property*, *in* PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 565, 565 (Franz Matscher & Herbert Petzold eds., 1990).

[477] Thus, the United States does not consider itself to be a party to any regional human rights system for human rights, notwithstanding its ratification of the OAS Charter, which has been interpreted as incorporating the American Declaration of the Rights and Duties of Man. On the evolution of the American Declaration within the OAS, see THOMAS BUERGENTHAL, DINAH SHELTON & DAVID P. STEWART, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL, 226–33 (3rd ed. 2002). Switzerland decided not to ratify Protocol 1 of the European Convention of Human Rights, in part because it includes Article 1's property right. *See* Bundesgericht [BGer] [Federal Supreme Court] May 1, 2013, INTERPELLATION ZUR RATIFIZIERUNG DES 1. ZUSATZPROTOKOLLS DER EMRK (Switz.).

to a fundamental right, even while not defining what protected property is.[478] These states have answered Lauterpacht's original suspicions about the wisdom of recognizing such a right at the international level in the way states like the United States have done so under national law for two centuries: by recognizing that property rights can be "fundamental" even if they can still be trumped by other social values, including the right of others and the right/duties of states to regulate for the public good.[479] In regional human rights regimes and under IIAs, states have delegated to adjudicators the power to define the property rights requiring protections as well as the corresponding duties and rights of states with respect to them. On occasion, these adjudicators have not been satisfied with ensuring that governments accord the mere *opportunity* to enjoy property but have insisted that people actually have them.[480] In human rights treaties they have extended property protections to an individual or a group—and treated them as "human rights"—even though to greater extent than other rights, rights to property (particularly but not only rights to private property) curtail the freedoms of others (as through the right to exclude).

When and how international law recognizes the human right of property (including determinations about what it applies to or its relative status as compared to other human rights), on how states can regulate the right, and the nature of the "bundle of rights" conveyed, are complex matters that, at present, are left to bilateral, regional, and some multilateral treaty regimes to determine, with no assurance that the determinations made or interpretations advanced under one treaty regime will be the same as in another. Efforts to provide a uniform set of responses to these matters through a global international law of property are likely to fail and are probably counterproductive. Only the fragmented, evolving, and possibly contradictory

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[478] *See* Sprankling, *supra* note 13, at 481.

[479] *See* LAUTERPACHT, *supra* note 17, at 3–4. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 489 (2005) (confirming the power under eminent domain for a local government to take property from one private owner and transfer it to another for purposes of economic development).

[480] *See generally* WALDRON, *supra* note 58, at 390 (arguing that the normative reasons for property rights are not satisfied with a state's providing the mere opportunity to satisfy them).

treaties that we have hold the prospect of answering the grave concerns the international right of property elicits, including perceptions that they threaten sovereignty.

The least controversial normative justification for the international right of property (including the right to private property) may well be that it is essential to the advancement of human dignity, that is, the full development of "freedom, autonomy and the development of independence and responsibility" of individuals.[481] And the best response to the problem that the international right of property promotes (or may even be responsible for) global poverty and inequality may be the answer that Waldron provides in justification of general rights-based arguments in favor of national protections of private property: when persons defend property rights on the basis that they advance everyone's dignitary needs, they are also recognizing that no one should be denied "the amount of property and economic security" they need to satisfy at least their basic needs if not more.[482] Paradoxically, the national and international property rights that some see as gravely complicit in massive inequalities both within societies and among states may be vital to future efforts to rectify these inequalities.

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481 *Id.* at 416.

482 *Id.* at 414.

APPENDIX

Significant Instruments Recognizing the Right to Property in International Law

References:
*: The United States is a party to this treaty.
**: The United States voted in favor of this declaration.
***: This declaration is now incorporated into the OAS Charter and according to the OAS, the United States is therefore a party to it (and subject to the jurisdiction of the Inter-American Commission (but not Court) of Human Rights).
****: The United States signed this treaty but has not ratified it.

Note: These instruments and others not listed may also include protections for interests that many see as equivalent to "property" such as rights to food or housing in the ICESCR (Art. 11(1)) or the "moral and material interests" arising from "scientific, literary or artistic production" protected under the ICESCR (Art. 15(1)(c)) or the Universal Declaration of Human Rights (Art. 27(2)).

#	Instrument			Defined Right	Beneficiaries
	Year	Name	State Parties		
1	1883[483]	Paris Convention for the Protection of Industrial Property (revised in 1900, 1911, 1925, 1934, 1958, 1967, & 1979), article 1[484]	177*[485] (1967 Stockholm Act)	• Right to *industrial property*.[486]	• Nationals of member states and nationals of others domiciled or established in the member states (art. 3).[487]

[483] Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *revised* July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 305.
[484] *Id.* art. 1.
[485] *WIPO-Administered Treaties: Paris Convention (Total Contracting Parties: 177)*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2 (last visited Feb. 28, 2018).
[486] Paris Convention, *supra* note 483, art. 1.
[487] *Id.* art. 3.

2	1886[488]	Berne Convention for the Protection of Literary and Artistic Works* (revised in 1896, 1908, 1914, 1928, 1948, 1967, 1971, 1979)[489]	175[490] (1971 Paris Act)	• *Protection* of literary and artistic works, e.g., exclusive right to translate, make reproductions, to broadcast, to perform in public dramatic and musical works, to make motion pictures, adaptations and arrangements of the work.[491]	• Authors of literary and artistic works.[492]
3	1891[493]	Madrid Arrangement Concerning the International Registration of Marks (revised in 1900, 1911, 1925, 1934, 1957, 1967, & 1979), article 1(2)[494]	55[495] (1967 Stockholm Act)	• Right to *protection* for marks.[496]	• Nationals of member states and nationals of others domiciled or established in the member states.[497]

[488] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221 (as revised at Paris on July 24, 1971 and amended in 1979).

[489] *Id.*

[490] *WIPO-Administered Treaties: Berne Convention (Total Contracting Parties: 175)*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (last visited on Feb. 28, 2018).

[491] Berne Convention, *supra* note 488, arts. 8–12.

[492] *Id.* art. 2.

[493] Madrid Arrangement Concerning the International Registration of Marks, Apr. 14, 1891, 828 U.N.T.S. 389.

[494] *Id.* art. 1(2).

[495] *WIPO-Administered Treaties: Madrid Agreement (Marks) (Total Contracting Parties: 55)*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=21 (last visited on Feb. 28, 2018).

[496] Madrid Agreement, *supra* note 493, art. 1.

[497] *Id.*

4	1907[498]	Hague Convention (IV) Respecting the Laws and Customs of War on Land[499]	38[500]	• Right of prisoners of war to *property over personal belongings*.[501] • Prohibition *to destroy or seize enemy property*.[502] • Prohibition *of confiscation of enemy property during capitulations*.[503] • Right *to private property of municipalities, and institutions dedicated to religion, charity and education, the arts and sciences.*[504]	• Prisoners of war.[505] • Parties in hostilities.[506] • Capitulating parties to hostilities.[507] • Municipalities, and institutions dedicated to religion, charity and education, the arts and sciences.[508]
5	1948[509]	Universal Declaration of Human Rights, article 17.[510]	**[511]	• Right to *own property*.[512] • Right *not to be deprived of property arbitrarily*.[513]	• Individuals.[514] • Groups ("in association with others").[515]

[498] Fourth Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

[499] *Id.*

[500] *Treaties, States Parties and Commentaries: Convention (IV) Respecting the Laws and Customs of War on Land*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=195 (last visited Feb. 28, 2018).

[501] Hague Convention, *supra* note 498, annex, art. 4.

[502] *Id.* arts. 22–23,

[503] *Id.*

[504] *Id.* art. 56.

[505] *Id.* art. 4.

[506] *Id.* art. 23.

[507] *Id.* art. 35.

[508] *Id.* art. 56.

[509] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

[510] *Id.* art. 17.

[511] Adopted by the United Nations General Assembly. *See generally id*.

[512] G.A. Res. 217 (III) A, *supra* note 509, art. 17.

[513] *Id.*

[514] *Id.*

[515] *Id.*

6	1948[516]	American Declaration of the Rights and Duties of Man, article XXIII.[517]	35***[518] (Parties to the OAS Charter)	• Right to *own property*.[519]	• Every person.[520]
7	1949[521]	Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)[522]	196*[523]	• Right *not to have property destroyed*.[524] Internees: • Right *to possession of articles of personal use and of those who have a personal or sentimental value*.[525] • Right *to remuneration*.[526] • Right *to retain a certain amount of money, to be able to make purchases.*[527]	• Individuals and groups during armed conflict or military occupations.[528] • Internees.[529]

[516] Organization of American States, American Declaration of the Rights and Duties of Man, May 2, 1948, OAS Doc. OAS Doc. OEA/Ser.L./V.II.23, doc. 21, rev. 6, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L./V.II.23, doc. 6, rev. 1, at 17 (1992).

[517] *Id.*

[518] *Member States*, OAS, http://www.oas.org/en/member_states/default.asp (last visited Feb. 28, 2018).

[519] American Declaration, *supra* note 516, art. XXIII.

[520] *Id.*

[521] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[522] *Id.*

[523] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/showdetails.aspx?objid=0800000280158b1a (last visited on Oct. 27, 2017).

[524] *See* Geneva Convention, *supra* note 521, art. 53.

[525] *Id.* art. 97.

[526] *Id.* art. 98.

[527] *Id.* art. 98.

[528] *Id.* art. 53.

[529] *Id.* art. 98.

8	1949[530]	ILO Convention (No. 95) Concerning the Protection of Wages (No. 95)[531]	98[532]	• Right *to receive wages* directly, regularly, in legal tender, and without deductions.[533] • Right to *dispose freely of wages*.[534]	• "[A]ll persons to whom wages are paid or payable."[535]
9	1951[536]	Convention Relating to the Status of Refugees[537]	145[538]	• Right *to treatment which is* (i) as favorable as possible, and (ii) not less favorable as other aliens *in the acquisition of property and other rights pertaining thereto*.[539] • Right *to movable and immovable property* (industrial property also protected by art. 14).[540]	• Refugees.[541]
10	1952[542]	Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 1[543]	45[544]	• Right to the *peaceful enjoyment of possessions*.[545] • Right *not to be deprived of possessions* (with exceptions).[546]	• Every natural or legal person.[547]

[530] Convention (No. 95) Concerning the Protection of Wages, July 1, 1949, 138 U.N.T.S. 226 (entered into force Sept. 24, 1952).

[531] *Id.*

[532] *Ratifications of C095 – Protection of Wages Convention, 1949 (No. 95)*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312240 (last visited Feb. 28, 2018).

[533] *See* Convention Concerning the Protection of Wages, *supra* note 530, arts. 3.1, 5, 9.

[534] *Id.* art. 6.

[535] *Id.* art. 2.1.

[536] Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150.

[537] *Id.*

[538] *The 1951 Refugee Convention*, UN REFUGEE AGENCY, http://www.unhcr.org/en-us/1951-refugee-convention.html (last visited Feb. 28, 2018).

[539] Convention Relating to the Status of Refugees, *supra* note 536, art. 13.

[540] *Id.* arts. 13, 14.

[541] *Id.* art. 3.

[542] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262.

[543] *Id.* art. 1.

[544] *Chart of Signatures and Ratifications of Treaty 187*, COUNCIL OF EUROPE, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p_auth=cPfiRlgV (last visited Feb. 28, 2018).

[545] Protocol to the Convention, *supra* note 542, art 1.

[546] *Id.*

[547] *Id.*

11	1954[548]	Convention Relating to the Status of Stateless Persons, article 13.[549]	89[550]	• Right *to treatment which is* (i) as favorable as possible, and (ii) not less favorable as other aliens in the acquisition of property and other rights pertaining thereto.[551] • Right to movable and immovable property (industrial property also protected by art. 14).[552]	• Stateless persons.[553]
12	1954[554]	Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention.[555]	127*[556]	• Obligation to *protect cultural property*.[557]	• States.[558]

[548] Convention Relating to the Status of Stateless Persons, *opened for signature* Sept. 28, 1954, 360 U.N.T.S. 117 (entered into force June 6, 1960).

[549] *Id.* art. 13.

[550] *Convention Relating to the Status of Stateless Persons*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en (last visited Feb. 28, 2018).

[551] Convention Relating to the Status of Stateless Persons, *supra* note 548, art. 13.

[552] *Id.* arts. 13, 14.

[553] *Id.* art. 13.

[554] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215.

[555] *Id.*

[556] *State Parties to the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, http://www.unesco.org/eri/la/convention.asp?KO=13637&language=E&order=alpha (last visited Feb. 28, 2018).

[557] Convention for the Protection of Cultural Property, *supra* note 554, art. 2.

[558] *Id.* art. 3.

13	1955 (adopted in 1957 and 1977 by ECOSOC, revised by U.N. GA in 2015)[559]	Standard Minimum Rules for the Treatment of Prisoners.[560]	-	• Right to a *safe custody* of money, valuables, clothing and other effects.[561]	• Prisoners.[562]
14	1957[563]	ILO Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.[564]	27[565]	• Right of *ownership of lands traditionally occupied*.[566] • Respect to *traditional mechanisms of transmission of rights*.[567]	• Indigenous peoples: both individuals and collectives.[568]
15	1961 (revised in 1996)[569]	European Social Charter.[570]	47[571]	• Right to *fair remuneration for work*.[572]	• Workers.[573]

[559] G.A. Res. 70/175, United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) (Dec. 17, 2015).

[560] *Id.*

[561] *Id.* r. 67.

[562] *Id.*

[563] Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, 328 U.N.T.S. 247.

[564] *Id.*

[565] *Ratification of C107 – Indigenous and Tribal Populations Convention, 1957 (No. 107)*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252 (last visited Mar. 1, 2018).

[566] ILO Convention No. 107, *supra* note 563, art. 11.

[567] *Id.* art. 13.

[568] *Id.* art. 11.

[569] European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89.

[570] *Id.*

[571] *European Social Charter Signatures & Ratifications*, COUNCIL OF EUROPE, https://www.coe.int/en/web/turin-european-social-charter/signatures-ratifications (last updated Mar. 21, 2016).

[572] European Social Charter, *supra* note 569, pt. I, princ. 4.

[573] *Id.* pt. I.

16	1961[574]	Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, article 7(1).[575]	93[576]	• Right *to the protection of performances*.[577]	• Performers, producers of phonograms and broadcasting organizations.[578]
17	1961[579]	Vienna Convention on Diplomatic Relations.[580]	191*[581]	• Right to *inviolability of property, residence, papers and correspondence*.[582] • Right *to be exempt from taxation*.[583]	• Diplomatic agents.[584]
18	1962[585]	ILO Convention (No. 117) Concerning Basic Aims and Standards of Social Policy, article 4.[586]	33[587]	• Right to *ownership and use of land*, which must serve certain social purposes.[588]	• Agricultural producers.[589]

[574] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43.

[575] *Id.*

[576] *WIPO-Administered Treatises: Rome Convention (Total Contracting Parties: 93)*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17 (last visited Mar. 1, 2018).

[577] Convention for the Protections of Performers, *supra* note 574, art. 7.

[578] *Id.* art. 2.

[579] Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

[580] *Id.*

[581] *Vienna Convention on Diplomatic Relations*, UN TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en (last visited Mar. 1, 2018).

[582] Vienna Convention on Diplomatic Relations, *supra* note 579, art. 30.

[583] *Id.* art. 34.

[584] *See generally id.*

[585] Convention (No. 117) Concerning Basic Aims and Standards of Social Policy, June 22, 1962, 494 U.N.T.S. 249.

[586] *Id.*

[587] *Ratification of C117 – Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117)*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312262 (last visited Mar. 1, 2018).

[588] Convention (No. 117) Concerning Basic Aims and Standards of Social Policy, *supra* note 585, art. 4.

[589] *Id.*

19	1965[590]	International Convention on the Elimination of All Forms of Racial Discrimination, article 5.[591]	179*[592]	• Right to *own property* without racial discrimination.[593] • Right to *inherit* without racial discrimination.[594]	• Individuals.[595] • Groups ("in association with others").[596]
20	1969[597]	American Convention on Human Rights, article 21.[598]	24****[599]	• Right *to the use and enjoyment of property*.[600] • Right *not to be deprived of property* unless under certain conditions.[601]	• Everyone.[602]

[590] International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

[591] *Id.* art. 5.

[592] *International Convention on the Elimination of All Forms of Racial Discrimination*, UN TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en#1 (last visited Mar. 1, 2018).

[593] International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 590, art. 5(d)(v).

[594] *Id.* art. 5(d)(vi).

[595] *Id.* art. 5(d)(v).

[596] *Id.*

[597] Organization of American States, American Convention on Human Rights art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

[598] *Id.* art. 21.

[599] *American Convention on Human Rights*, UN TREATY COLLECTION, https://treaties.un.org/pages/showdetails.aspx?objid=08000002800f10e1 (last visited Mar. 1, 2018).

[600] American Convention on Human Rights, *supra* note 597, art. 21.

[601] *Id.*

[602] *Id.*

21	1970[603]	Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[604]	131****[605]	• Right to *the protection of cultural property*.[606]	• Everyone.[607]
22	1971[608]	Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, article 2.[609]	79*[610]	• Protection against the duplication and distribution of phonograms.[611]	• Producers of phonograms.[612]

[603] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 96 Stat. 2350, 823 U.N.T.S. 231.

[604] *Id.*

[605] *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO, http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E&order=alpha (last visited Mar. 1, 2018).

[606] Convention on Preventing Transfer of Ownership of Cultural Property, *supra* note 603.

[607] *Id.*

[608] Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, 25 U.S.T. 309, 866 U.N.T.S. 67.

[609] *Id.* art. 2.

[610] CONVENTION FOR THE PROTECTION OF PRODUCERS OF PHONOGRAMS AGAINST UNAUTHORIZED DUPLICATION OF THEIR PHONOGRAMS, UN TREATY COLLECTION, https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XIV/XIV-4.en.pdf (last visited Mar. 1, 2018).

[611] Convention for the Protection of Producers of Phonograms, *supra* note 608.

[612] *Id.*

23	1979[613]	Convention on the Elimination of All Forms of Discrimination against Women, articles 15 & 16.[614]	189****[615]	• Equal right to *administer property*.[616] • Same rights as men in respect of the *ownership, acquisition, management, administration, enjoyment and disposition of property*.[617]	• Women.[618]
24	1981[619]	African Charter on Human and Peoples' Rights, article 14.[620]	39[621]	• Right *to property*.[622]	• Human beings.[623]

[613] Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 20378 (entered into force Sept. 3, 1981).

[614] *Id.* arts. 15, 16.

[615] *Convention on the Elimination of All Forms of Discrimination against Women*, UN TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&lang=en (last visited Mar. 1, 2018).

[616] Convention on the Elimination of Discrimination against Women, *supra* note 613, art. 15.2.

[617] *See id.* at art. 16.1(h).

[618] *Id.* arts. 15, 16.

[619] African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 245.

[620] *Id.* art. 14.

[621] *See African Charter on Human and Peoples' Rights*, UN TREATY COLLECTION, https://treaties.un.org/pages/showDetails.aspx?objid=08000002800cb09f (last visited Mar. 1, 2018).

[622] *See* African Charter on Human and Peoples' Rights, *supra* note 619, art. 14.

[623] *See id.* pmbl.

25	1989[624]	ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries.[625]	22[626]	• Right of *ownership and possession* over the lands traditionally occupied.[627] • Right to *safeguard* the lands not occupied, but accessed for subsistence and traditional activities.[628] • Right to *participate in the use, management and conservation of natural resources* pertaining to their lands.[629]	• Indigenous peoples.[630]
26	1990[631]	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 15.[632]	51[633]	• Right *not to be deprived of property arbitrarily*.[634]	• Migrant workers and members of their families.[635]

[624] Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 7, 1989, 1650 U.N.T.S. 383, 28 I.L.M. 1382.

[625] *Id.*

[626] *Ratification of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 (last visited Mar. 1, 2018).

[627] Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *supra* note 624, art. 14.

[628] *Id.*

[629] *Id.* art. 15.

[630] *Id.* art. 1.

[631] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3.

[632] *Id.* art. 15.

[633] *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, UN TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&lang=en (last visited Mar. 1, 2018).

[634] Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *supra* note 631.

[635] *Id.*

27	1994[636]	North American Free Trade Agreement (NAFTA), chapter 11.[637]	3*[638]	• Right to compensation for governmental expropriations and other protections for "investments" and "investors."[639]	• Foreign investors from NAFTA.[640]
28	1994[641]	Agreement on Trade-Related Aspects of Intellectual Property Rights.[642]	164*[643]	• Right to *the protection of intellectual property*.[644]	• Everyone entitled to intellectual property.[645]
29	1995[646]	UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.[647]	42[648]	• Right to *compensation for returning a stolen or illegally exported cultural object*.[649]	• Possessors of stolen or illegally exported cultural objects.[650]

[636] North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993).

[637] *Id.* ch. 11.

[638] *North American Free Trade Agreement*, AM. SOC'Y OF INT'L L., https://www.asil.org/eisil/north-american-free-trade-agreement (last visited Mar. 1, 2018).

[639] *Id.* art. 1102.

[640] *Id.* art. 1101.

[641] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197.

[642] *Id.*

[643] *IP-Related Multilateral Treaties: Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)*, WORLD INTELL. PROP. ORG., http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22 (last visited Mar. 1, 2018).

[644] Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 641.

[645] *Id.* art. 3(1).

[646] International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 2421 U.N.T.S. 457, 34 I.L.M. 1322.

[647] *Id.*

[648] *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995) – Status*, INT'L INST. FOR THE UNIFICATION OF PRIVATE L. (UNIDROIT), http://www.unidroit.org/status-cp (last visited Mar. 1, 2018).

[649] UNIDROIT Convention, *supra* note 646, art. 4(1).

[650] *Id.* art. 3(1).

30	1994/2004 [651]	Arab Charter on Human Rights, article 25 (*1994 version, which never entered into force*),[652] article 31 (*2004 version, entered into force in 2008*).[653]	22[654]	• Right to *own private property*.[655]	• "Every citizen."[656]
31	2000 (legally binding as of 2009)[657]	Charter of Fundamental Rights of the European Union.[658]	28[659]	• Right to *own, use, dispose of and bequeath lawfully acquired possessions*.[660] • Right to *intellectual property*.[661]	• "Everyone."[662]
32	2000[663]	United Nations Convention Against Transnational Organized Crime.[664]	189*[665]	• Implies the existence of a right to *acquisition, possession or use of property*.[666]	• Everyone.[667]

[651] League of Arab States, Arab Charter on Human Rights, Sept. 15, 1994, *reprinted in* 12 INT'L HUM. RTS. REP. 893 (1997) (never entered into force).

[652] *Id.* art. 25.

[653] League of Arab States, Arab Charter on Human Rights art. 31, May 24, 2004, *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005) (entered into force Mar. 15, 2008).

[654] *Arab Charter on Human Rights*, UNHCR: REFWORLD, http://www.refworld.org/docid/3ae6b38540.html (last visited Mar. 1, 2018).

[655] Arab Charter on Human Rights, *supra* note 653, art. 31.

[656] *Id.*

[657] Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1.

[658] *Id.*

[659] *Countries*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/countries_en (last visited Dec. 31, 2017).

[660] Charter of Fundamental Rights of the European Union, *supra* note 657, art. 17(1).

[661] *Id.* art. 17(2).

[662] *Id.* art. 17(1).

[663] G.A. Res. 55/25, United Nations Convention Against Transnational Organized Crime (Nov. 15, 2000).

[664] *Id.*

[665] *United Nations Convention against Transnational Organized Crime*, UN TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en (last visited Mar. 1, 2018).

[666] G.A. Res. 55/25, *supra* note 663, art. 6(1)(b)(i).

[667] *Id.* art. 6.

33	2003[668]	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.[669]	36[670]	• Right *to acquire and administer property during marriage*.[671] • Right to *an equitable sharing of property deriving from marriage*.[672] • Right to *property over land*.[673] • Right *to inherit*.[674]	• Women.[675]
34	2006[676]	Convention on the Rights of Persons with Disabilities, article 12.5.[677]	175****[678]	• Equal right to *own or inherit property*.[679] • Equal right to *control their own financial affairs* and have access to credit.[680] • Equal right *not to be arbitrarily deprived of property*.[681]	• Persons with disabilities.[682]

668 Org. of African Unity (OAU), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003, OAU Doc. CAB/LEG/66.6 (entered into force Nov. 25, 2005).

669 *Id.*

670 *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, AFRICAN COMM'N ON HUM. & PEOPLES' RTS., http://www.achpr.org/instruments/women-protocol/ (last visited Mar. 1, 2018).

671 *Id.* art. 6(j).

672 *Id.* art. 7(d).

673 *Id.* art. 19(c).

674 *Id.* art. 21(1).

675 *Id.*

676 Convention on the Rights of Persons with Disabilities, *opened for signature* Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008).

677 *Id.* art. 12(5).

678 *Convention on the Rights of Persons with Disabilities (CRPD)*, UN: DIV. FOR SOC. POL'Y & DEV. DISABILITY, https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html (last visited Mar. 1, 2018).

679 *Id.* art. 12(5).

680 *Id.*

681 *Id.*

682 *Id.*

35	2012[683]	ASEAN Human Rights Declaration, right 17.[684]	(ASEAN has 10 member states)[685]	• Right to *own, use, dispose of and give lawfully acquired possessions*.[686] • Right *not to be arbitrarily deprived of property*.[687]	• "Every person."[688]

[683] Association of South East Asian States (ASEAN) Human Rights Declaration art. 17, Nov. 18, 2012, *available at* http://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf.

[684] *Id.*

[685] *Id.*

[686] *Id.*

[687] *Id.*

[688] *Id.*