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# The Emergence of International Property Law

John G. Sprankling

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# THE EMERGENCE OF INTERNATIONAL PROPERTY LAW\*

JOHN G. SPRANKLING\*\*

*This Article explores a new field: international property law. International law increasingly creates, regulates, or otherwise affects the property rights of individuals, business entities, and other non-state actors. Globalization, democratic reforms, technology, and human rights principles have all contributed to this development.*

*The Article begins by examining the unsuccessful effort to create a broad, internationally-enforceable human right to property during the second half of the twentieth century. Despite this failure, international property law doctrines have evolved in specialized contexts over recent decades. The Article demonstrates that these doctrines stem from four sources: (a) regulation of the global commons; (b) coordination of transboundary property rights; (c) adoption of global policies to prevent specific harms; and (d) protection of the human rights of vulnerable groups.*

*Finally, the Article argues that the time has come to recognize international property law as a discrete subject, and thereby promote its coherent evolution in future decades. The Article discusses the value of recognizing international property law, explores an international definition of “property,” and analyzes how international property law can be enforced.*

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\*\* Distinguished Professor and Scholar, University of the Pacific, McGeorge School of Law.

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## INTRODUCTION

Title to deep seabed minerals, ownership of cultural objects, transferable allowances to emit greenhouse gases, security interests in spacecraft, and rights of indigenous peoples in ancestral lands are all components of a new field: international property law.

Scholars have traditionally viewed property law solely as a national concern. In fact, the conventional wisdom is that international property law does not exist as a discrete subject.<sup>1</sup> But identifiable principles of property law have appeared at the international level, particularly in recent years. The time has now come to recognize it as a distinct field.<sup>2</sup> This recognition will bring greater consistency and coherence to the subject, and thereby enhance its development.

Forty years ago, international environmental law emerged as a new subject.<sup>3</sup> A similar transition is now occurring in property law. Once we ask how international law affects private property rights, we find more substance than might be supposed.<sup>4</sup> If we view international law through the lens of property, a significant body of international property law has already developed.<sup>5</sup> Some components are well established, while others are still evolving.

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1. No articles or books examine the subject of international property law. A January 1, 2012 search of the U.S. Law Review and Journals database in LexisNexis for the phrase "international property law" produced only forty-three references. Some of these are shorthand references to international intellectual property law, while others are misquotations of original sources referring to "international intellectual property law" which omit the word "intellectual." The rest are offhand references to "international property law" in specialized contexts, such as cultural property. Nor do any treatises address the subject. The book that comes closest is a law school casebook that I coauthored, JOHN G. SPRANKLING ET AL., *GLOBAL ISSUES IN PROPERTY LAW* (2006). This casebook mainly deals with comparative property law issues and does not address the thesis of this Article.

2. As discussed below in Section III.B, there is no precise, internationally-accepted definition of "property." However, there is general agreement in both the common law and civil law systems that property can be defined as the right of a person in relationship to a thing. This definition is used in this Article, subject to the limitations outlined in that Section.

3. The term "international environmental law" was first used in law review articles in 1971. See L.H.J. Legault, *The Freedom of the Seas: A License to Pollute?*, 21 U. TORONTO L.J. 211, 220 (1971); Donat Pharand, *Oil Pollution Control in the Canadian Arctic*, 7 TEX. INT'L L.J. 45, 61 (1971).

4. The focus of this Article is at the international level, not the regional level. Accordingly, although the European Union nations are moving toward an integrated body of supranational property law, this will be given only limited consideration.

5. For example, international intellectual property law is commonly recognized as a distinct subject. But it is merely a subset of the larger universe of international property law.

Section I of this Article examines the antecedents of international property law. Section II explores the thesis that four modern sources have created a robust body of international property law doctrines: (a) regulation of the global commons; (b) coordination of transboundary property rights; (c) adoption of global policies to prevent specific harms; and (d) protection of human rights. Finally, Section III explores the challenges that arise from the emergence of international property law.

## I. THE EVOLUTION OF INTERNATIONAL PROPERTY LAW

### A. *Legal Positivism and the International System*

Property rights have historically been created and defined by national law. As a matter of international law, each nation is viewed as having sovereignty over its territory, which includes the right to adopt its own laws regarding property within that territory.<sup>6</sup> As Chief Justice Marshall observed almost two centuries ago in *Johnson v. M'Intosh*,<sup>7</sup> "the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie."<sup>8</sup> The same approach has customarily been applied to tangible personal property and to intangible property, with minor exceptions.<sup>9</sup> Thus, if a copyright, horse, painting, or promissory note existed in Nation A, then the rights of its Citizen B in that thing were governed exclusively by Nation A's law.

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6. As one treatise explains:

A State enjoys an exclusive right to regulate matters pertaining to the ownership of property of every kind which may be said to belong within its territory. Thus it may determine not only the processes by which title may be acquired, retained or transferred, but also what individuals are to be permitted to enjoy privileges of ownership.

1 CHARLES CHENEY HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 650 (2d rev. ed. 1947); see also 1 OPPENHEIM'S *INTERNATIONAL LAW* 384 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("According to the maxim, *quidquid est in territorio est etiam de territorio*, all individuals and all property within the territory of a state are under its dominion and sway . . .").

7. 21 U.S. (8 Wheat.) 543 (1823).

8. *Id.* at 572.

9. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 427 (7th ed. 2008) ("Ownership in international law is normally seen either in terms of private rights under national law . . . or in terms of territorial sovereignty."); THEO R.G. VAN BANNING, *THE HUMAN RIGHT TO PROPERTY* 34 (2002) (observing that under the traditional view "[t]he treatment of the property rights of their own citizens by a State was . . . seen as an internal matter" unless expropriation occurred).

This traditional analysis reflects legal positivism: property rights exist only to the extent that they are recognized by the national government. As Jeremy Bentham famously explained: "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."<sup>10</sup> In this sense, property law stems from a vertical relationship between the state, on the one hand, and its citizens, on the other.

In contrast, classic international law was public law. It governed only the interactions among nations, not the rights of individual citizens within such nations.<sup>11</sup> Thus, it reflected what might be seen as a horizontal relationship among different nations. Certainly, fragments of this body of international law did affect property rights. For example, the law protected the private property of diplomats<sup>12</sup> and restricted the wartime seizure of civilian property.<sup>13</sup> But there was no effort to envision these legal shards as parts of a broader field of international property law. Rather, they were viewed as components of other bodies of law.<sup>14</sup>

### B. *A Global Right to Property?*

In the aftermath of World War II, the development of international human rights standards led to consideration of a global right to property. In 1948, the U.N. General Assembly adopted the Universal Declaration of Human Rights ("Universal Declaration"), a nonbinding instrument.<sup>15</sup> Its Article 17 recognized the right to

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10. JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 69 (Oceana Publ'ns 1975) (1802).

11. See Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555, 1556 (1999).

12. This customary norm of international law is codified in the Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. The Convention provides that a diplomat's "papers, correspondence and . . . property, shall . . . enjoy inviolability." *Id.* at art. 30(2).

13. For example, the Convention Respecting the Laws and Customs of War on Land provided that "[p]rivate property cannot be confiscated," with minor exceptions. Convention Respecting the Laws and Customs of War on Land, at Annex art. 46(2), Oct. 18, 1907, 36 Stat. 2277; see also INGRID DETTER, *THE LAW OF WAR* 276–97, 349–62 (2d ed. 2000) (discussing how the law of war protects private property).

14. See, e.g., 3 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 663–89 (Francis W. Kelsey trans., Clarendon Press 1925) (1646) (discussing the right to acquire property in war as part of the law of war).

15. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration]. The Universal Declaration was "deemed to enunciate only moral rules with no binding effect." Independent Expert Report, *The Right of Everyone to Own Property Alone as Well as in Association with Others* 9, U.N. Comm'n on Human Rights, U.N. Doc. E/CN.4/1994/19

property as a human right with two components: "(1) Everyone has the right to own property alone as well as in association with others"<sup>16</sup> and "(2) No one shall be arbitrarily deprived of his property."<sup>17</sup>

The framers of the Universal Declaration intended that it would culminate in a treaty which imposed binding obligations on member nations.<sup>18</sup> Eventually, the subject matter of the Universal Declaration was divided between two proposed treaties, the International Covenant on Economic, Social and Cultural Rights<sup>19</sup> and the International Covenant on Civil and Political Rights.<sup>20</sup> The U.N. Commission on Human Rights, which was charged with drafting the treaties, struggled for years to develop an acceptable formulation of the right to property. As one scholar explains, "[w]hile no one questioned the right of the individual to own property, there were considerable differences of opinion with regard to the concept of property, its role and functions, and the restrictions to which the right to own property should be subjected."<sup>21</sup>

The negotiations reached a climax in 1954, when there appeared to be broad support in the drafting subcommittee for including the following language in the Covenant on Economic, Social and Cultural Rights:

1. The states parties to this Covenant undertake to respect the right of everyone to own property alone as well as in association with others. This right shall be subject to such limitations and restrictions as are imposed by law in the public interest and in the interest of social progress in the country concerned.

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(Nov. 25, 1993) (by Luis Valencia Rodriguez) [hereinafter *The Right of Everyone to Own Property*].

16. The draft of the first section originally provided: "Everyone has the right to own property." Reflecting the ideological battles to come, however, the USSR proposed adding the phrase "alone, as well as in association with others," in order to protect its collective farms. VAN BANNING, *supra* note 9, at 38. In addition, the USSR tried to amend this section by replacing "arbitrarily" with "illegally," which would have allowed the law of each state to define the scope of the right, thus eviscerating a uniform international standard; this effort failed. *Id.*

17. Universal Declaration, *supra* note 15, at art. 17.

18. VAN BANNING, *supra* note 9, at 42.

19. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

20. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

21. *The Right of Everyone to Own Property*, *supra* note 15, at 10.

2. No one shall be deprived of his property without due process of law. Expropriation may take place only for considerations of public necessity or utility as defined by law and subject to such compensation as may be prescribed.<sup>22</sup>

However, the USSR and certain other nations were concerned that this text would subject expropriations to international scrutiny; and the United States announced in advance that it would not sign the final Covenant, weakening its influence in the negotiations.<sup>23</sup> Eventually, the subcommittee held five separate votes on portions of this text, and all were passed by majority vote.<sup>24</sup> But when the Commission considered the complete text, it was rejected by a narrow margin.<sup>25</sup> Accordingly, the Commission “decided to adjourn indefinitely consideration of the question of the inclusion of an article on the right to property in the draft covenant.”<sup>26</sup>

The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights were finally adopted in 1966. However, the right to property was omitted from both covenants. Significantly, “it is virtually the only substantive article of the Universal Declaration of Human Rights . . . which has not been repeated as a broadly formulated right in the Covenants or in global conventions.”<sup>27</sup>

Later efforts to create a global right to property were frustrated by both decolonization conflicts and Cold War tensions. Newly-independent nations in Africa and Asia were reluctant to permit international review of their efforts to nationalize foreign-owned property.<sup>28</sup> In addition, for ideological reasons, the USSR and its allies blocked efforts at the international level to support and expand property rights.<sup>29</sup>

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22. VAN BANNING, *supra* note 9, at 44.

23. *Id.* at 44–45.

24. *Id.* at 45.

25. *Id.*

26. *The Right of Everyone to Own Property*, *supra* note 15, at 10.

27. VAN BANNING, *supra* note 9, at 5.

28. It is generally accepted that a state has the inherent power to expropriate private property owned by a foreign national. The more difficult issue is whether the state is required to compensate the property owner. See BROWNIE, *supra* note 9, at 531–36.

29. The ideological hostility to recognizing international “property” law may have shaped the manner in which other branches of international law evolved. For instance, some components of what is now called international environmental law—such as the duty to avoid transboundary harms—fit more neatly under the label of international property law; however, classifying them as something other than “property” seems to have facilitated international agreement.



Renewed interest in an international right to property surfaced in 1989, with the fall of the Berlin Wall. The U.N. General Assembly requested the Commission on Human Rights to “consider the means whereby and the degree to which respect for the right to own property . . . contributes to the development of individual liberty and initiative, which serve to foster, strengthen and enhance the exercise of . . . human rights and fundamental freedoms.”<sup>30</sup> In turn, the Commission appointed Luis Valencia Rodriguez, a noted scholar, to prepare a comprehensive report on the topic.

The final report, which Rodriguez submitted in 1993, effectively ended further consideration of a global right to property. He agreed that “[t]he basic right of the individual to own property . . . may be regarded as an essential human right.”<sup>31</sup> However, he found that “it is extremely difficult to establish a universal human right to individual private property in terms that one can substantiate as requiring incorporation in the national law of all States and capable of being given the same weight to in domestic courts.”<sup>32</sup> Accordingly, rather than making any specific recommendation for action, he concluded by suggesting that it would be appropriate to retain the issue “as an agenda item of the General Assembly and the Commission on Human Rights and to consider in more detail basic aspects of this issue, preferably on a biennial basis.”<sup>33</sup> However, this periodic review has not occurred.

In summary, the effort to create a broad, internationally enforceable right to property has been unsuccessful to date. It remains an aspiration, not a reality.<sup>34</sup>

### C. *Recognizing International Property Law*

Although the effort to create a broad human right to property ultimately failed, specific, identifiable components of an international

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30. G.A. Res. 45/98, ¶ 5, U.N. Doc. A/RES/45/98 (Dec. 14, 1990).

31. *The Right of Everyone to Own Property*, *supra* note 15, at 90.

32. *Id.*

33. *Id.* at 93.

34. In contrast, the human right to property in Europe, as recognized in Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262, has led to a sizeable body of supranational property law, enforced by the European Court of Human Rights. *See generally* ALI RIZA ÇOBAN, PROTECTION OF PROPERTY RIGHTS WITHIN THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2004) (discussing the human right to property under the Convention).

property law system have evolved in recent years, a development that has been largely overlooked by scholars.<sup>35</sup>

The ideological opposition to private property has faded, creating a more favorable climate for international property law. With the collapse of the USSR, the development of new market-based economies in Eastern Europe, and the end of the Mao Zedong regime in China, many nations have now embraced private property systems at the domestic level. China exemplifies this transformation. The 2004 amendments to its constitution provide that “private property is inviolable” and thus require the government to pay compensation when it takes such property for public purposes.<sup>36</sup> In addition, the Property Rights Law, which took effect in China in October 2007, adopts property principles traditionally found in the civil and common law systems.<sup>37</sup> Similar, though less effective, changes can be found in the legal systems of former communist nations such as Russia<sup>38</sup> and Vietnam.<sup>39</sup>

Moreover, the international legal system has evolved to the point where it regulates actors other than nations, including nongovernmental organizations, businesses, and individuals.<sup>40</sup> As Paul Stephan explains, “it has become an important body of regulatory and commercial law directly affecting private lives and transactions.”<sup>41</sup> In this environment, states often serve “more as

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35. For example, scholars have extensively explored the field of international intellectual property law. *See generally* GRAEME B. DINWOODIE ET AL., *INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY* (2d ed. 2008) (surveying international intellectual property law); JAMES J. FAWCETT & PAUL TORREMANS, *INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW* (1998) (same). The recognition of this field as one subdivision of international property law logically leads one to ask (a) what other subdivisions of international property law exist? and (b) how are they interrelated? To date, scholars have not attempted to explore international property law as a discrete subject.

36. XIANFA art. 13, § 1 (2004) (China), *translated at* <http://www.usconstitution.net/china.html> (last visited Dec. 31, 2011) (unofficial translation).

37. Property Rights Law of the People's Republic of China (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) (China), *translated at* [www.lehmanlaw.com/fileadmin/lehmanlaw\\_com/laws\\_regulations/Propoerty\\_Rights\\_La\\_w\\_of\\_the\\_PRC\\_LLX\\_03162007.pdf](http://www.lehmanlaw.com/fileadmin/lehmanlaw_com/laws_regulations/Propoerty_Rights_La_w_of_the_PRC_LLX_03162007.pdf) (unofficial translation).

38. KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 35, 36 (Russ.), *translated at* The Constitution of the Russian Federation, <http://www.constitution.ru/en/10003000-01.htm> (last visited Dec. 31, 2011) (unofficial translation).

39. CODE CIVIL [C. CIV.] arts. 173, 189, 198, 201, 222 (Viet.), *translated at* Vietnamese Laws, [mirrors.creativecommons.org/international/vn/civil-code-2005-\(English\).pdf](http://mirrors.creativecommons.org/international/vn/civil-code-2005-(English).pdf) (last visited Dec. 31, 2011) (unofficial translation).

40. *See* BROWNIE, *supra* note 9, at 519–85; 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 6, at 16–22.

41. Stephan, *supra* note 11, at 1555.

agents of the international bodies than as their principals”<sup>42</sup> by imposing internationally-created standards on their citizens. The development of international property law mirrors this trend: international law increasingly affects the property rights of non-state actors such as businesses and individuals. In other words, just as traditional property law stemmed from the vertical relationship between a nation and its citizens, the growing body of international property law has created a vertical relationship between the international legal system, on the one hand, and citizens of individual nations, on the other.

What makes a doctrine part of international property law? This occurs in three broad and somewhat overlapping situations: (1) international law creates property rights, either expressly or impliedly; (2) international law provides a mechanism to coordinate property rights created at the national level; or (3) international law restricts the scope of property rights that may be created at the national level.

These categories reflect a functional approach to delineating the scope of international property law. In other words, the issue is how international law creates, restricts, or otherwise affects property rights, either directly or indirectly. For example, international law authorizes the trading of greenhouse gas emissions allowances in order to comply with the Kyoto Protocol, as discussed in Section II.A.3 below. But it does not require a signatory nation to allow its citizens to engage in such trading. In this sense, international law creates property rights indirectly, by empowering a member nation to permit its citizens to acquire and trade such allowances.

The familiar distinction between “hard” and “soft” international law is important in this new field.<sup>43</sup> Much international property law consists of soft law, such as aspirational norms in binding treaties, obligations in nonbinding instruments (such as resolutions of the U.N. General Assembly), and principles, guidelines, and recommendations made by international bodies or officials.<sup>44</sup> For example, the U.N. Special Rapporteur on the right to adequate housing has issued the

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42. *Id.* at 1557.

43. See generally COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000) (discussing compliance within the context of international soft law); Alan Boyle, *Soft Law in International Law-Making*, in INTERNATIONAL LAW 141 (Malcolm D. Evans ed., 2d ed. 2006) (examining the role of soft law in international law-making).

44. See Ian Johnstone, *Law-Making Through the Operational Activities of International Organizations*, 40 GEO. WASH. INT’L L. REV. 87, 88–91 (2008).

Basic Principles and Guidelines on Development-Based Evictions and Displacement,<sup>45</sup> which restrict the ability of states and certain non-state actors to conduct large-scale evictions of citizens in order to facilitate development projects, as discussed in Section II.D.3 below. While these Principles are technically nonbinding, they create legal norms that states have an incentive to follow. As in other areas of international law, over time such soft law may evolve into hard law.<sup>46</sup> Thus, in the international context we can view the process for creating property rights as a continuum: nonbinding precepts—which might be called “protoproperty”—slowly crystallize into binding rules.

In recent decades, four related developments have fostered the growth of international property law. Each has produced an identifiable set of international property law principles, and thus each may be seen as a crucible through which such principles arise. Collectively, they form the foundation from which international property law has emerged as a discrete subject.

First, technology increasingly permits humans to exploit resources in the global commons—areas which are outside of the territory of any nation, such as the earth’s atmosphere, outer space, and the high seas.<sup>47</sup> Because these resources transcend national borders, international regulation is both desirable and inevitable.<sup>48</sup> A series of treaties has delimited the scope of national rights in such areas<sup>49</sup> and, accordingly, the extent to which citizens of different nations may enjoy property rights there.

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45. Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, *Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex I of the Report on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, U.N. Human Rights Council, U.N. Doc. A/HRC/4/18 (Feb. 5, 2007) (by Miloon Kothari) [hereinafter *Basic Principles*].

46. For a discussion of this process in an analogous context, see Daniel Barstow Magraw, *International Pollution, Economic Development, and Human Rights*, in *INTERNATIONAL LAW AND POLLUTION* 30, 49–50 (Daniel Barstow Magraw ed., 1991).

47. PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 14 (2d ed. 2003).

48. See, e.g., Eric A. Posner & Alan O. Sykes, *Economic Foundations of the Law of the Sea*, 104 AM. J. INT’L L. 569, 595 (2010) (discussing the need for international regulation of ocean resources “to protect against overexploitation, excessive investment in search, and related externality problems”).

49. See generally United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS] (oceans); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty] (outer space); Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71 (Antarctica).

Second, one result of globalization is that property rights and their owners increasingly span national borders, creating the need for international law to coordinate these rights. For example, airplanes routinely travel between nations. Suppose that a creditor in Nation C holds a security interest in an airplane, which is valid under the laws of Nation C; if the airplane enters Nation D where it is seized by other creditors, will the security interest of the Nation C creditor be honored? In situations like this, all nations have a mutual and reciprocal interest in coordinating security interests and other transboundary property rights. In this context, international coordination enhances the effectiveness of property rights arising under national law.

Third, in certain situations the common good of all nations requires the adoption of international constraints on property rights that expressly preempt national law to some extent. This is typically done to further specific global policy goals, such as saving endangered species or preventing criminal conduct. By definition, these standards restrict the scope of property rights which may be created under national law.

Finally, even though a broad human right to property is still an aspiration, a narrow version of this right is recognized in some contexts, such as rights to aboriginal lands and the property rights of refugees. In these instances, international property law may be inconsistent with national law because it applies to conduct that occurs entirely within a particular nation's territory, raising fundamental questions about enforcement.

## II. FOUR SOURCES OF INTERNATIONAL PROPERTY LAW

This Section develops the thesis that international property law stems from four principal sources: (a) regulation of the global commons; (b) coordination of transboundary property rights; (c) adoption of global policies to protect against specific harms; and (d) protection of human rights. While these categories may overlap to some extent, they provide a helpful framework for exploring the subject.

The discussion below examines specific doctrines to illustrate how each such mechanism functions. This is not intended as a comprehensive catalogue of international property law principles, which would be a task beyond the scope of this Article. But the examples below demonstrate that a significant body of international property law already exists.

### A. *Regulation of the Global Commons*

International law is the only method to regulate property rights in the global commons because, by definition, these regions are outside the scope of national jurisdiction. There is a clear trend toward creating internationally-recognized property rights in the global commons in specific situations, including rights in deep seabed minerals, tradable emissions allowances, and rights in geostationary satellite orbits.

#### 1. General Prohibition of Property Rights

The global commons consists of areas that are outside of the territory of any state, and thus not subject to any claim of national sovereignty. These areas include outer space, the high seas (and the seabed and subsoil), and Antarctica.<sup>50</sup> As a general rule, international law does not recognize property rights in the global commons.

For example, the United Nations Convention on the Law of the Sea (“UNCLOS”) contains provisions that govern the “high seas”—the portions of the oceans that are beyond the exclusive economic zone of any nation, normally ocean waters which are more than 200 nautical miles offshore.<sup>51</sup> It proclaims that “[t]he high seas are open to all States.”<sup>52</sup> Accordingly, “[n]o State may validly purport to subject any part of the high seas to its sovereignty.”<sup>53</sup> This ban logically means that no nation may allow its citizens to assert any ownership claim over the high seas, unless allowed by international law. The same principle applies to the “sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction” (“the Area”),<sup>54</sup> though here the text of UNCLOS is clearer. It provides that no “juridical person” may appropriate any part of the Area or its resources.<sup>55</sup> Rather, all rights in the Area are “vested in mankind as a whole.”<sup>56</sup>

A similar pattern appears in the treaties governing outer space. The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (“Outer Space Treaty”) provides that outer space, including the moon and other bodies, “shall be the province of all

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50. SANDS, *supra* note 47, at 14.

51. UNCLOS, *supra* note 49, at arts. 57, 86.

52. *Id.* at art. 87(1).

53. *Id.* at art. 89.

54. *Id.* at art. 1(1)(1).

55. *Id.* at art. 137(1).

56. *Id.* at art. 137(2).

mankind.”<sup>57</sup> Thus, outer space “is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.”<sup>58</sup> The logical implication is that no nation may recognize property rights in outer space. The subsequent Agreement Governing the Activities of States on the Moon and Other Celestial Bodies<sup>59</sup> includes provisions that avoid any possible ambiguity on the issue. After decreeing that the moon and other celestial bodies are “the common heritage of mankind,”<sup>60</sup> it goes on to provide that neither the surface nor subsurface of the moon or of any other celestial object<sup>61</sup> “shall become property of any State, international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person.”<sup>62</sup>

## 2. Rights in Deep Seabed Minerals

One exception to the general rule that property rights cannot exist in the global commons concerns rights in deep seabed minerals. UNCLOS, as amended by the 1994 Agreement Relating to the Implementation of Part XI,<sup>63</sup> establishes an international entity (“the Authority”) to create and regulate property rights in manganese, copper, nickel, cobalt, and other valuable minerals<sup>64</sup> which exist on the seabed beyond the limits of national jurisdiction.<sup>65</sup>

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57. Outer Space Treaty, *supra* note 49, at art. I.

58. *Id.* at art. II.

59. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 5, 1979, 1363 U.N.T.S. 3 [hereinafter Moon Treaty].

60. *Id.* at art. 11(1).

61. *Id.* at art. 11(3). The Moon Treaty states that provisions “relating to the moon shall also apply to other celestial bodies within the solar system, other than the earth, except in so far as specific legal norms enter into force with respect to any of these celestial bodies.” *Id.* at art. 1(1).

62. *Id.* at art. 11(3).

63. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 33 I.L.M. 1309.

64. See R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 223, 236–48 (3d ed. 1999).

65. Part XI of UNCLOS establishes an international regime to regulate the exploitation of resources in the “Area,” which is defined as “the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.” UNCLOS, *supra* note 49, at art. 1(1)(1). Each coastal state exercises jurisdiction over the seabed (a) within its exclusive economic zone, the region which is within 200 nautical miles of the coastal baseline, and/or (b) which is part of its continental shelf. *Id.* at arts. 56, 57, 77(1). For a discussion of the legal regime governing the Area, see CHURCHILL & LOWE, *supra* note 64, at 224–53.

Any person or entity<sup>66</sup> from a nation which has ratified UNCLOS may apply to the Authority for the “exclusive right to explore for and exploit”<sup>67</sup> the mineral resources in a particular region of the deep seabed up to 150,000 square kilometers in size.<sup>68</sup> The applicant must meet specified financial and technological criteria, and be sponsored by its nation.<sup>69</sup> Assuming that the applicant is qualified, the Authority may refuse the request for only three reasons: (a) another applicant has been granted the right to that region or has applied for that right; (b) the proposed mining would pose “the risk of serious harm to the marine environment;”<sup>70</sup> or (c) the applicant’s nation has already sponsored an inordinate amount of such mining (e.g., more than two percent of the total seabed area available for mining).<sup>71</sup> The approved applicant will enter into a contract with the Authority, receiving the exclusive right to exploit the minerals in its region in exchange for the payment of royalties. Notably, such a contract must provide for “security of tenure,” so that it can be revised or terminated only for good cause.<sup>72</sup>

Once the applicant acquires physical possession of the minerals, it also acquires internationally-recognized property rights in them. In the words of Annex III to UNCLOS, “[t]itle to minerals shall pass upon recovery in accordance with this Convention.”<sup>73</sup>

### 3. Tradable Emissions Allowances

Another example of a property right arising under international law is the tradable emissions allowance. The Kyoto Protocol to the U.N. Framework Convention on Climate Change mandates specific reductions in the emission of greenhouse gases, but allows member nations to meet their commitments through “emissions trading.”<sup>74</sup> As implemented by the subsequent Marrakesh Accords, this system contemplates that business entities and other private actors will be

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66. UNCLOS, *supra* note 49, at art. 153(2)(b).

67. *Id.* at Annex III art. 3(4)(c).

68. Int’l Seabed Auth., *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area*, at 16, ISBA/6/A/18 (July 13, 2000), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/672/84/pdf/N0067284.pdf?OpenElement>.

69. UNCLOS, *supra* note 49, at Annex III art. 4.

70. *Id.* at art. 162(2)(x).

71. *Id.* at Annex III art. 6(3).

72. *Id.* at art. 153(6).

73. *Id.* at Annex III art. 1.

74. Kyoto Protocol to the United Nations Framework Convention on Climate Change arts. 6, 17, Dec. 10, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].



active participants in such trading.<sup>75</sup> The basic structure of an emissions trading system is simple. The national government sells or issues rights to private parties that allow the emission of greenhouse gases into the atmosphere—in effect, a right to pollute<sup>76</sup>—but at a level that reduces the total volume of the nation's emissions.<sup>77</sup> In turn, these rights may be resold or traded to other parties on the open market. This creates an economic incentive for polluters to minimize emissions in order to be able to sell the emissions rights to others.<sup>78</sup>

The most successful example to date is the European Union Emissions Trading Scheme, which includes all twenty-seven members of the European Union (“EU”) and three nonmembers.<sup>79</sup> It facilitates the purchase and sale of emissions allowances, each of which gives the holder the right to emit one metric ton of carbon dioxide.<sup>80</sup> The EU

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75. United Nations Framework Convention on Climate Change [UNFCCC], Marrakesh, Morocco, Oct. 29–Nov. 10, 2001, *Report of the Conference of the Parties on its Seventh Session*, 32–33, U.N. Doc. FCCC/CP/2001/13/Add.1, Dec. 5/CP.7 (Jan. 21, 2002).

76. The basic trading unit is the “assigned amount unit,” which provides the right to emit one ton of carbon dioxide equivalent into the atmosphere. UNFCCC, Montreal, Can., Nov. 28–Dec. 10, 2005, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol*, 3, U.N. Doc. FCCC/KP/CMP/2005/8/Add.2, 9/CMP.1 Annex (Mar. 30, 2006), available at <http://unfccc.int/resource/docs/2005/cmp1/eng/08a02.pdf>. However, three other types of units—certified emissions reductions, emission reduction units, and removal units—may also be traded. *Id.* at arts. (A)(1)(a), (b), (d). See generally THOMAS H. TIETENBERG, EMISSIONS TRADING: PRINCIPLES AND PRACTICE (2d ed. 2006) (discussing types of units which may be traded).

77. There is no clear boundary line between (a) the upward limit of a nation's territorial sovereignty over air space and (b) outer space, which is part of the global commons. BROWNLIE, *supra* note 9, at 256. It has been suggested that the portion of earth's atmosphere that is affected by greenhouse gas emissions is “somewhere in between” sovereign air space and outer space, and thus a “common concern” of all humans, which should be subject to international regulation. CHRIS WOLD ET AL., CLIMATE CHANGE AND THE LAW 153, 155–56 (2009).

78. More indirectly, the Kyoto Protocol has the potential to affect property rights in land located in member nations. For example, for the purpose of meeting the emissions reductions required by the Protocol, a party receives credit for the “net changes in greenhouse gas . . . removals by sinks resulting from direct human-induced land-use change and forestry activities, limited to afforestation, reforestation and deforestation since 1990.” Kyoto Protocol, *supra* note 74, at art. 3(3). At a minimum, this creates an incentive for nations to restrict deforestation activities by private landowners within their jurisdiction.

79. For a description of this system, see A. DENNY ELLERMAN ET AL., PRICING CARBON: THE EUROPEAN UNION EMISSIONS TRADING SCHEME 1–8 (2010). Another example is the Western Climate Initiative, a consortium of six U.S. states and four Canadian provinces, which seeks to establish an emissions trading program by 2012. For more information about this initiative, see generally WESTERN CLIMATE INITIATIVE, <http://www.westernclimateinitiative.org> (last visited Dec. 31, 2011).

80. See Council Directive 2003/87, art. 3(a), 2003 O.J. (L 275) 32, 34 (EC) (“‘[A]llowance’ means an allowance to emit one tonne of carbon dioxide equivalent during a specific period . . .”). Two other forms of emission credits may also be traded

Directive establishing the system requires member nations to “ensure that allowances can be transferred” between persons within the EU or between persons in the EU and those in certain other nations.<sup>81</sup> It further provides that such allowances “shall be valid” during the period for which they are issued, preventing a member nation from cancelling an allowance.<sup>82</sup> Currently, each allowance lasts for five years, but this will be increased to eight years in 2013.<sup>83</sup> These emissions allowances fit comfortably within the traditional conception of property: a valuable right, which may be used by its holder or transferred to another, and cannot be arbitrarily cancelled by a national government.<sup>84</sup>

#### 4. Rights in Geostationary Satellite Orbits

The system for allocating geostationary satellite orbits can be viewed as creating a form of international property rights in the global commons akin to long-term leases. A geostationary satellite is one that rotates at the same speed as the earth, about 36,000 kilometers above the equator.<sup>85</sup> Accordingly, it appears to be in a stationary location from the perspective of a viewer on the earth’s surface. The right to occupy a geostationary orbit is valuable for communications, weather, and navigation satellites, because transmissions from a satellite in this location can reach about one-third of the earth.<sup>86</sup> Due to physical and technological constraints, only about 2,000 geostationary satellites can be accommodated.<sup>87</sup>

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within this system: emission reduction units and certified emissions reductions. Council Directive 2004/101, arts. 1(1)(m), (n), 2004 O.J. (L 338) 18, 20 (EC). Emissions reduction units stem from investments in certain projects that reduce greenhouse gas emissions in “Annex I” countries, essentially consisting of developed countries, as authorized by the “joint implementation” provisions of the Kyoto Protocol. Kyoto Protocol, *supra* note 74, at art. 6. Certified emissions reductions are credits for similar investments in developing countries that reduce such emissions, as authorized by the “clean development mechanism.” *Id.* at art. 12.

81. Council Directive 2003/87, art. 12(1), 2003 O.J. (L 275) 32, 36 (EC).

82. *Id.* at art. 13(1).

83. Council Directive 2009/29, art. 1(16), 2009 O.J. (L 140) 63, 78 (EC).

84. Indeed, the European Union uses standard market terminology in describing the system, treating it much like a traditional stock market. For example, one directive expresses concern “whether the market for emissions allowances is sufficiently protected from insider dealing or market manipulation.” *Id.* at art. 1(15).

85. FRANCIS LYALL & PAUL B. LARSON, *SPACE LAW: A TREATISE* 246 (2009).

86. See Milton T. Smith III, *The Orbit/Spectrum Resource and the Technology of Satellite Telecommunications: An Overview*, 12 RUTGERS COMPUTER & TECH. L.J. 285, 287 (1987).

87. Paris Arnopoulos, *The International Politics of the Orbit-Spectrum Issue*, 7 ANNALS AIR & SPACE L. 215, 216 (1982).

Geostationary satellite orbits and their accompanying radio frequencies are allocated by the International Telecommunications Union ("ITU"), a specialized United Nations agency, primarily using a first-in-time system.<sup>88</sup> Suppose E, a corporation, wishes to place a satellite in a particular geostationary orbit. It first obtains the assistance of a nation that is an ITU member; that nation then notifies the ITU's Radiocommunications Service of this intent; and if no conflicts or other difficulties are discovered, the Service registers the orbit and frequency allocation in the ITU's Master Register. Once registration is completed, it remains in effect until either (a) the life expectancy of the satellite ends or (b) E gives notice that it is no longer using the orbit and frequency. Because the ITU will not accept a subsequent registration for the same orbit and frequency from a different applicant, only the original registrant may utilize these entitlements. However, a registrant such as E may transfer its rights to another private party.<sup>89</sup>

As a practical matter, this system creates property rights and allocates them to registrants.<sup>90</sup> A registrant like E has a valuable entitlement from an international agency which gives it the right to use an orbit and frequency for up to fifty years,<sup>91</sup> to exclude others from such use, and to transfer that right.<sup>92</sup> An argument can be made that this conclusion is inconsistent with the Outer Space Treaty, which provides that outer space "is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."<sup>93</sup> However, recognizing an internationally-created private property right of limited scope and duration is quite

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88. For detailed descriptions of the allocation process, see Lawrence D. Roberts, *A Lost Connection: Geostationary Satellite Networks and the International Telecommunication Union*, 15 BERKELEY TECH. L.J. 1095, 1111–14 (2000); Jannat C. Thompson, Comment, *Space for Rent: The International Telecommunications Union, Space Law, and Orbit/Spectrum Leasing*, 62 J. AIR L. & COM. 279, 297–98 (1996).

89. Roberts, *supra* note 88, at 1113–14.

90. Many geostationary satellites are owned by private companies. For example, Eutelsat Communications, a French company, owns a fleet of twenty-nine satellites, making it the leading satellite operator in Europe. *Eutelsat's Satellites*, EUTELSAT COMMC'NS., <http://www.eutelsat.com/satellites/satellites.html> (last visited Dec. 31, 2011).

91. Roberts, *supra* note 88, at 1114 n.127.

92. See Susan Cahill, Comment, *Give Me My Space: Implications for Permitting National Appropriation of the Geostationary Orbit*, 19 WIS. INT'L L.J. 231, 243 (2001) ("This system protects users on a 'first-come, first-served' basis, much akin to the 'prior-right in law' principle of real property.").

93. Outer Space Treaty, *supra* note 49, at art. II. By contrast, the Moon Treaty is more explicit on the issue; it provides that the moon surface or subsurface shall not "become property." Moon Treaty, *supra* note 59, at art. 11(3).

different from acknowledging that a particular nation has sovereignty over part of outer space.<sup>94</sup>

### *B. Coordination of Transboundary Property Rights*

Some property rights are uniquely suited for international coordination because they involve objects or owners that routinely cross national boundaries. In this context, there is a risk that the property laws of different nations may conflict—so that the rights of a citizen of Nation F are not adequately respected inside Nation G. A coherent and predictable legal infrastructure is essential to protect nationally-created property rights in this transboundary context. In this setting, all states share a common interest in harmonizing their property law.<sup>95</sup> Examples of this coordination function are found in the international principles governing rights in equipment that crosses national borders, rights to compensation for expropriation, rights in intellectual property, and rights of owners who cross national borders.

#### 1. Rights in Equipment that Crosses National Borders

Airplanes and trains regularly travel across national borders. It was traditionally difficult for creditors to protect their security interests in these items, because they could easily be moved.<sup>96</sup> Moreover, the national laws governing security interests in personal property varied widely. The 2001 Convention on International Interests in Mobile Equipment<sup>97</sup> addressed these problems by

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94. The Outer Space Treaty seeks to preclude any nation from obtaining such sovereignty because this would be inconsistent with the precept that the use of outer space should be “carried out for the benefit and in the interests of all countries.” Outer Space Treaty, *supra* note 49, at art. I. The ITU’s allocation of geostationary satellite orbits, in contrast, reflects an international consensus that granting property rights of limited scope and duration is for the benefit of all countries.

95. The best known example of this category is the international law governing expropriation. A multitude of treaties, arbitral decisions, and other sources suggest that a new norm of customary international law is developing: a country that seizes the property of a foreign national must pay appropriate compensation. See SPRANKLING ET AL., *supra* note 1, at 144–45. See generally ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW (2d ed. 2008) (discussing the international law governing expropriation).

96. In contrast, an internationally-recognized system of security interests in merchant vessels has existed since 1931, when the International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, Apr. 10, 1926, 120 L.N.T.S. 187, came into force. It has now been superseded by the International Convention on Maritime Liens and Mortgages, May 6, 1993, 2267 U.N.T.S. 39, which took effect in 2004. However, both conventions were ratified by only a handful of states and, accordingly, have proven to be relatively ineffective.

97. Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285.

establishing a uniform international system for the coordination of security interests in aircraft and railroad equipment.<sup>98</sup> Negotiations are underway to extend this approach to spacecraft.<sup>99</sup>

The Convention establishes an “international interest”—a security interest held by a creditor in certain types of mobile equipment in conjunction with a sale, financing, or lease transaction—that all member nations agree to honor. In the event of default, the creditor may repossess, sell, or lease the equipment in a commercially reasonable manner.<sup>100</sup> The priority of such international interests is defined by which creditor is the first to file in an electronic International Registry authorized by the Convention. Once registered, an interest has priority over all unregistered interests and all subsequently registered interests, without any exception for the subsequent bona fide encumbrancer.<sup>101</sup>

## 2. Right to Compensation for Expropriation

The international principles governing the expropriation of foreign investments provide a second example of the coordination function. Suppose H, a citizen of Nation I, purchases a factory in Nation J; Nation J then seizes the factory and sells it to another party. As a general rule, the expropriation of alien property does not violate international law if certain conditions are satisfied.<sup>102</sup> The main requirement is that the owner must be compensated for the seizure of his property.<sup>103</sup> But how much compensation is required?

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98. The Convention contemplated that more specific protocols would be adopted to supplement its provisions as to specific types of equipment. Two such protocols exist: (a) the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, Nov. 16, 2001, 2367 U.N.T.S. 615, and (b) the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, Feb. 23, 2007, 46 I.L.M. 662. For an analysis of the Convention, see Mark J. Sundahl, *The “Cape Town Approach”: A New Method of Making International Law*, 44 COLUM. J. TRANSNAT’L L. 339, 348–54, 358–60 (2006).

99. The most recent negotiations produced a Revised Preliminary Draft Protocol to the Cape Town Convention on Matters Specific to Space Assets. For the text of the revised protocol, see generally International Institute for the Unification of Private Law [UNIDROIT], *Revised Preliminary Draft Protocol to the Cape Town Convention on Matters Specific to Space Assets*, C.G.E./Space Pr./5/W.P.3 (Nov. 2010), available at <http://www.unidroit.org/english/documents/2010/study72j/cge-session5/cge-5-wp03-e.pdf>.

100. Convention on International Interests in Mobile Equipment, *supra* note 97, at arts. 8(1), (3).

101. *Id.* at art. 29.

102. 1 OPPENHEIM’S INTERNATIONAL LAW, *supra* note 6, at 918–19.

103. *Id.* at 920–21 (“The final generally accepted requirement is that compensation should be paid for the expropriated property . . .”); see also Compañía del Desarrollo de

Before World War I, it was generally accepted as customary international law that a nation that expropriated property was obligated to pay adequate compensation to the owner, defined as the fair market value of the property.<sup>104</sup> This international consensus was eroded during the twentieth century, particularly as newly-independent nations nationalized foreign property after World War II with little or no compensation.<sup>105</sup> The high-water mark of this trend occurred in 1974, when the U.N. General Assembly adopted the Charter of Economic Rights and Duties of States.<sup>106</sup> It provided that the amount of compensation for expropriation would be based on each nation's "relevant laws and regulations and all circumstances that the State considers pertinent"—rather than on the historic international standard.<sup>107</sup>

In recent decades, the pressures of globalization have shifted international law back toward the traditional requirement of adequate compensation, particularly as developing countries seek foreign investment.<sup>108</sup> Two key developments evidence this transition. First, over 2,500 bilateral investment treaties have been adopted between developing and developed countries;<sup>109</sup> today 177 nations are parties to such treaties.<sup>110</sup> Because these treaties routinely utilize the

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Santa Elena, S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Final Award, ¶ 68 (Feb. 17, 2000), 5 ICSID Rep. 157 (2002), available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC539\\_En&caseId=C152](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC539_En&caseId=C152) ("[T]here rests upon the expropriating state a duty, in . . . international law, to pay compensation in respect of even a lawful expropriation.").

104. See LOWENFELD, *supra* note 95, at 469–70. The classic judicial formulation of the standard appears in *The Factory at Chorzów* (Ger. v. Pol.), Claim for Indemnity, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13), where the Permanent Court of International Justice held that Poland had illegally seized a factory owned by a German citizen. The court ruled that the amount of compensation "must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear [is required] . . ." *Id.* at 47.

105. LOWENFELD, *supra* note 95, at 483–85.

106. G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/RES/3281 (Jan. 15, 1975).

107. *Id.* at ch. 2, art. 2(2)(c).

108. An example of this trend may be seen in the 1992 World Bank Guidelines on the Treatment of Direct Foreign Investment, which require "adequate" compensation for expropriation, defined as "the fair market value of the taken asset . . ." World Bank, Legal Framework for the Treatment of Foreign Investment: Guidelines on the Treatment of Direct Foreign Investment, §§ IV(1), (3), 31 I.L.M. 1379, 1382 (1992), available at [italaw.com/documents/WorldBank.pdf](http://italaw.com/documents/WorldBank.pdf).

109. LOWENFELD, *supra* note 95, at 554.

110. *ICSID Database of Bilateral Investment Treaties*, INT'L CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <http://icsid.worldbank.org/ICSID/FrontServlet>

adequate compensation standard, many commentators view them as evidence that this standard is customary international law.<sup>111</sup> Second, international arbitration tribunals have heard hundreds of expropriation disputes during this period. In cases where the compensation standard was not set by a specific treaty, these tribunals have typically adopted the adequate compensation standard as customary law.<sup>112</sup>

### 3. Intellectual Property

Intellectual property law offers another example of how the international system coordinates property rights. Copyrights, patents, trademarks, and other forms of intellectual property are particularly vulnerable to piracy. Consider a copyrighted novel. It is expensive to create, but inexpensive to reproduce. In our digital era, reproductions can be transmitted to thousands of people around the world in an instant; and once a copyrighted book is released to the public, it is difficult to prevent others from using the work. Further, enforcement of intellectual property rights in foreign countries is particularly onerous when national laws differ. A series of treaties—most notably the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”)<sup>113</sup>—have established a property rights regime to address these challenges.

TRIPS requires global minimum standards for intellectual property protection. Some standards apply to all categories of

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(last visited Dec. 31, 2011). Remarkably, even Cuba—which is still under U.S. sanctions for its expropriations following the 1958 revolution—is a party to forty-two bilateral investment treaties. *Id.*

111. See, e.g., LOWENFELD, *supra* note 95, at 584 (“[A] fair inference might be drawn that, taken together, the Bilateral Investment Treaties are now evidence of customary international law . . .”). But see Patrick Dumberry, *Are BITs Representing the “New” Customary International Law in International Investment Law?*, 28 PENN ST. INT’L L. REV. 675, 680–93 (2010) (rejecting the argument that bilateral investment treaties reflect customary law).

112. See, e.g., Patrick M. Morton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT’L L. 474, 488 (1991) (“[Except in one instance], every recent arbitral tribunal that has considered the issue has affirmed that customary international law requires a state expropriating the property of a foreign national to pay the full value of that property, measured, where possible, by the market price.”); see also *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Final Award, ¶¶ 483–93 (Oct. 2, 2006), available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC648\\_En&caselId=C231](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC648_En&caselId=C231) (applying the *Chorzów Factory* standard as “the default standard contained in customary international law” and citing other decisions where standard was used).

113. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS].

intellectual property, such as the requirement of national treatment: each nation “shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals.”<sup>114</sup> Similarly, it establishes uniform standards for both domestic<sup>115</sup> and international enforcement<sup>116</sup> of intellectual property rights. In addition, specific substantive standards are provided for each category of intellectual property. For example, the Agreement incorporates most of the preexisting Berne Convention for the Protection of Literary and Artistic Works<sup>117</sup> to define the scope of copyright protection. In turn, that convention establishes minimum copyright standards such as which works may be copyrighted,<sup>118</sup> the duration of a copyright,<sup>119</sup> and the scope of the exclusive rights created by a copyright.<sup>120</sup>

#### 4. Right of Owners Who Cross National Boundaries

A final example of the coordination function is found in treaties governing the rights of property owners who cross national boundaries. Global standards have been created for wills,<sup>121</sup> intestate succession,<sup>122</sup> estate administration,<sup>123</sup> trusts,<sup>124</sup> and marital property.<sup>125</sup>

One illustration is the international will. Today people are more likely to live in two or more countries during their lifetimes than in

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114. *Id.* at art. 3(1).

115. Part III of TRIPS sets forth detailed standards for domestic enforcement of the substantive rights created by the Agreement. All member nations “shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement.” *Id.* at art. 41(1).

116. The dispute resolution mechanisms in Articles XXII and XXIII of the 1994 General Agreement on Tariffs and Trade, Apr. 15, 1994, 33 I.L.M. 1154, also apply to disputes arising under TRIPS. TRIPS, *supra* note 113, at art. 64.

117. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221.

118. *Id.* at art. 2.

119. *Id.* at art. 7(1).

120. *Id.* at arts. 8, 9, 11, 11bis, 11ter, 12, 14.

121. Convention Providing a Uniform Law on the Form of an International Will, Oct. 26, 1973, 12 I.L.M. 1298 [hereinafter International Will Convention].

122. Convention on the Law Applicable to Succession to the Estates of Deceased Persons, Oct. 20, 1988, 28 I.L.M. 150.

123. Convention Concerning the International Administration of the Estates of Deceased Persons, Oct. 21, 1972, 11 I.L.M. 1277.

124. Convention on the Law Applicable to Trusts and on their Recognition, July 1, 1985, 23 I.L.M. 1389.

125. Convention on the Law Applicable to Matrimonial Property Regimes, Mar. 14, 1978, 16 I.L.M. 14.



any other historical period. Immigration, temporary work abroad, and retirements to foreign countries all contribute to this trend. Thus, it is increasingly common for a person to execute her will in one nation and later die in another.

The 1973 Convention Providing a Uniform Law on the Form of an International Will addresses this problem by authorizing the creation of an international will that is valid in all member nations.<sup>126</sup> Article I of the Convention requires the parties to adopt into their national law the "Uniform Law on the Form of an International Will," which is attached as an Annex.<sup>127</sup> In turn, Articles 2, 3, 4 and 5 of the Uniform Law set forth the minimum requirements for an international will to be valid. The core requirements are: a will in writing, signed by the testator in the presence of two witnesses or acknowledged before them, together with the testator's declaration before two witnesses and "a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof."<sup>128</sup> An international will is valid as to both personal property and real property. For example, if K, a French citizen, executes an international will in France and later dies in the United States owning real property in France, the will effects a valid transfer of that property.

### C. *Adoption of Global Policies to Prevent Specific Harms*

International law sometimes restricts the scope of property rights which may be created at the national level in order to implement public policies endorsed by the global community. These restrictions reflect an international consensus to curtail the exercise of property rights in order to prevent specific harms. Examples of this category include restrictions on exports and imports of hazardous wastes,

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126. International Will Convention, *supra* note 121, at Annex art. 1(1). See generally Kurt H. Nadelmann, Comment, *The Formal Validity of Wills and the Washington Convention 1973 Providing the Form of an International Will*, 22 AM. J. COMP. L. 365 (1974) (discussing the international will).

127. This presents a challenge in a federal system such as the United States, where state law governs the validity of wills. The Convention provides that such a nation may limit its application to certain "territorial units" within its borders. International Will Convention, *supra* note 121, at art. XIV(1). In the United States, the Convention has been adopted as part of the Uniform Probate Code and, accordingly, is in force in many states. For a discussion of this process, see Jeffrey A. Schoenblum, *Multijurisdictional Estates and Article II of the Uniform Probate Code*, 55 ALB. L. REV. 1291, 1301-14 (1992).

128. International Will Convention, *supra* note 121, at Annex art. 4(1); see *id.* at Annex arts. 2, 3, 5.

restrictions on rights in cultural objects and contraband, and restrictions on transboundary impacts.

### 1. Restrictions on Exports and Imports

One situation where international law limits property rights to prevent specific harms is found in treaty-based restrictions on exports and imports. These restrictions share a common theme: in order to combat an internationally-recognized problem, it is necessary to curtail an owner's rights to use and transfer particular items.

This theme is evident in the 1992 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,<sup>129</sup> which restricts the scope of an owner's property right to use and transfer hazardous wastes. An owner may transport covered wastes across a national border only under narrow circumstances, such as where the exporting state does not have the technical capacity to dispose of the wastes properly.<sup>130</sup> Further, such wastes cannot be exported if the importing state will not manage the wastes in an "environmentally sound manner."<sup>131</sup>

A second example is found in the restrictions on the export and import of endangered species, which similarly limit an owner's rights to use and transfer her property. These restrictions seek to reduce the economic incentive to kill endangered animals and plants, and thereby help to preserve such species. Under the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"),<sup>132</sup> a person who owns a "specimen" of an endangered animal or plant may not export or import that specimen unless he can qualify to obtain special permits. For example, in order to transfer an elephant tusk across a national border, the owner needs permits from both the exporting nation and the importing nation.<sup>133</sup> One of the restrictions on export permits is that the specimen may not be used

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129. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57.

130. *Id.* at art. 4(9).

131. *Id.* at art. 4(2)(e) ("Each Party shall take appropriate measures to: . . . (e) Not allow the export of hazardous wastes . . . if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner . . .").

132. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1090, 993 U.N.T.S. 243 [hereinafter CITES].

133. *Id.* at arts. III(2), (3). The African elephant is generally classified as an Appendix I species under CITES. Accordingly, most exports and imports of elephants or "any readily recognizable part or derivative thereof"—such as a tusk—are governed by CITES Article III. *Id.* at art. I(b)(ii).

“for primarily commercial purposes”<sup>134</sup>—a standard that is difficult to satisfy in most situations.

## 2. Rights in Cultural Objects

Another illustration of harm-preventing policies is found in the international law dealing with cultural objects.<sup>135</sup> For centuries, paintings, sculpture, and similar items of cultural significance have been exported from their states of origin and transferred to private or public owners in other states. The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects<sup>136</sup> creates an international regime that requires owners of certain cultural objects to return them to their states of origin,<sup>137</sup> thus preempting property rights in those objects which would otherwise be recognized under national law.

The Convention utilizes a broad definition of “cultural objects.”<sup>138</sup> It includes items “of importance for archaeology, prehistory, history, literature, art or science” that fall within certain categories listed in an Annex, such as paintings, statues, postage stamps, “old musical instruments,” rare specimens of minerals, and “property relating to history.”<sup>139</sup>

Under the Convention, the owner of a “stolen” cultural object must return it to the country of origin, even if she acquired title in good faith.<sup>140</sup> An illegally-excavated object is considered to have been stolen under this provision.<sup>141</sup> However, if the owner “neither knew nor ought reasonably to have known that the object was stolen” and can prove that she acted with due diligence in acquiring the object, she is entitled to be paid “fair and reasonable compensation” when

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134. *Id.* at art. III(3)(c).

135. See generally CRAIG FOREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE (2010) (discussing the laws governing cultural property).

136. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 2421 U.N.T.S. 457.

137. In addition, a system for restricting exports and imports of certain cultural objects was created by the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231. For example, it requires each member state to prohibit the export of “cultural property” from its territory unless the owner obtains an appropriate export certificate. *Id.* at art. 6.

138. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 136, at Annex art. 2.

139. *Id.*

140. *Id.* at art. 3(1).

141. *Id.* at art. 3(2).

the object is returned.<sup>142</sup> Similar provisions apply to cultural objects that have been illegally exported. For example, if the state of origin can demonstrate that such an object has “significant cultural importance,” then the state where the object is located must compel its return.<sup>143</sup> Again, the owner of the object is entitled to “fair and reasonable compensation” if she “neither knew nor ought reasonably to have known” that it was illegally exported.<sup>144</sup> In summary, the Convention supersedes national laws governing property rights in cultural objects. This may divest even the good faith owner of all property rights.

### 3. Rights in Contraband

In a similar manner, international law requires that all nations adopt domestic laws providing that the possession, transfer, or use of drugs and certain other items are criminal offenses. Thus, by definition, property rights may not exist in such contraband.

One example is the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>145</sup> It provides that the parties “shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally” acts such as: (a) the “possession, purchase, or cultivation of narcotic drugs or psychotropic substances for personal consumption”;<sup>146</sup> (b) the “possession or purchase” of any such drug or substance for the purpose of sale or distribution;<sup>147</sup> and (c) “[t]he acquisition, possession or use of property” knowing that it was derived from criminal activity.<sup>148</sup> States are also required to adopt measures that allow the confiscation of drugs, substances, and equipment used in connection with illicit trafficking, and the proceeds of such trafficking, without prejudicing “the rights of bona fide third parties.”<sup>149</sup>

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142. *Id.* at art. 4(1).

143. *Id.* at art. 5(3).

144. *Id.* at art. 6(1).

145. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, 1582 U.N.T.S. 165.

146. *Id.* at art. 3(2). There is uncertainty about the scope of this provision, because it is immediately followed by language that arguably limits it to possession “contrary to the provisions” of certain other conventions. For a discussion of the issue, see NEIL BOISTER, *PENAL ASPECTS OF THE U.N. DRUG CONVENTIONS* 127–28 (2001).

147. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 145, at art. 3(1)(a)(iii).

148. *Id.* at art. 3(1)(c)(i).

149. *Id.* at arts. 5(1), (8).

The 2004 Convention Against Transnational Organized Crime<sup>150</sup> applies the same approach to the proceeds received from the commission of a transnational crime by a group. It requires states to “adopt . . . such legislative and other measures” as necessary to establish as a crime “[t]he acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime.”<sup>151</sup> Again, states are also required to adopt measures that allow the confiscation of such proceeds of crime, together with any property used to commit the crime, unless this prejudices the rights of innocent third parties.<sup>152</sup>

#### 4. Transboundary Impacts

It is a well-settled principle of international law that no state has the right to permit its territory to be used in a manner that harms persons or property located in another state.<sup>153</sup> This norm requires each state to ensure that its nationals will not use their property in a manner that will cause transboundary harms—an indirect limitation on the right to use private property. In effect, this is an international version of domestic nuisance law.<sup>154</sup>

The 1941 *Trail Smelter Arbitration*<sup>155</sup> decision is the most famous illustration of the doctrine.<sup>156</sup> The Consolidated Mining and Smelting Company of Canada (“COMINCO”) operated a lead and zinc smelter in the town of Trail, British Columbia. The normal operation of the smelter produced sulfur dioxide gas—the toxic ingredient in most acid rain—and the prevailing winds transported this gas seven miles south, where it entered the United States. The fumes damaged privately-owned farms and timber in the State of Washington,

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150. Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209.

151. *Id.* at art. 6(1)(b). This provision is qualified by an introductory phrase noting that the obligation is “[s]ubject to the basic concepts of its legal system.” *Id.*

152. *Id.* at arts. 12(1), (8).

153. *See, e.g., Corfu Channel Case (U.K. v. Alb.)*, 1949 I.C.J. 4, 22 (Apr. 9) (acknowledging “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”).

154. *See SPRANKLING ET AL., supra* note 1, at 134 (discussing “transboundary nuisance problems”).

155. *Trail Smelter Arbitration (U.S. v. Can.)*, 3 R.I.A.A. 1911 (1941).

156. The *Trail Smelter Arbitration* is typically categorized as an example of international environmental law. *See, e.g., DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 515 (4th ed. 2011) (referring to it as “the most famous international environmental law dispute”). While this characterization makes sense to a point, it is important to remember that the arbitral panel awarded damages for injury to private property, not for injury to the natural environment. *Id.* at 510.

prompting the United States to demand compensation from Canada. In the ensuing arbitration, the panel found that “under the principles of international law . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein” where the case was “of serious consequence” and the damage was proven by clear and convincing evidence.<sup>157</sup> In other words, Canada did not have the right to allow COMINCO to damage private property in the United States. This is the functional equivalent of saying that under international law an owner may not use her property in a manner that damages property in another nation.

In the decades since the *Trail Smelter Arbitration*, international law has moved toward imposing more direct obligations on states to adopt national legislation to deal with transboundary injuries.<sup>158</sup> The most recent example is the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities,<sup>159</sup> which was adopted by the U.N. International Law Commission in 2006. The Draft Principles call on each state to adopt national laws that impose liability on persons within its territory whose “hazardous activities” cause significant “transboundary damage” to persons, property, or the environment.<sup>160</sup> In this context, a “hazardous activity” is defined as an activity “which involves a risk of causing significant harm”—a standard similar to the test traditionally used to define private intentional nuisance.<sup>161</sup> Under this approach, an owner in Nation L may not use her land in a manner that presents a risk of significant harm to private property located in Nation M.

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157. *Trail Smelter Arbitration*, 3 R.I.A.A. at 1965.

158. For example, the Convention on Long-Range Transboundary Air Pollution requires states to take action to minimize “[a]ir pollution,” which is defined to include the introduction of “substances . . . into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property.” Convention on Long-Range Transboundary Air Pollution art. 1(a), Nov. 13, 1979, 1302 U.N.T.S. 217.

159. Rep. of the Int’l Law Comm’n, 58th sess, May 1–June 9, July 3–Aug. 11, 2006, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006).

160. *Id.* at prins. 2(e), 4(1).

161. *Id.* at prin. 2(c). A private intentional nuisance is a “nontrespassory invasion of another’s interest in the use and enjoyment of land.” RESTATEMENT (SECOND) OF TORTS § 821D (1979). One of the elements required to prove liability is that the defendant’s conduct was “unreasonable,” defined to mean that the “gravity of the harm outweighs the utility of the actor’s conduct.” *Id.* § 826(a).

#### D. *Protection of Human Rights*

Despite the failure to create a binding human right to property, specific areas of international property law have developed under the umbrella of human rights protection. For example, international law prohibits the recognition of property rights in human beings. In addition, a number of doctrines protect the property rights of disadvantaged or vulnerable groups, including the rights of indigenous peoples, refugees and other displaced persons, and poor tenants.

##### 1. Prohibition of Property Rights in Human Beings

Most importantly, international law prohibits any nation from recognizing property rights in human beings. The first major treaty to address the issue was the 1926 Convention to Suppress the Slave Trade and Slavery,<sup>162</sup> negotiated under the auspices of the League of Nations. Defining slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised,”<sup>163</sup> it required all parties to “bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.”<sup>164</sup> Almost four decades later, the Universal Declaration imposed an absolute ban: “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”<sup>165</sup>

The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery<sup>166</sup> extended the prohibition to certain slavery-like practices, which is consistent with the definition that slavery includes even one of the powers attaching to the right of ownership. For example, it abolished debt bondage—the practice allowing a debtor to pledge his personal services as security for a debt, which effectively created a lien on a human being.<sup>167</sup> Similarly, it banned serfdom: “the condition

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162. Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 60 L.N.T.S. 253.

163. *Id.* at art. 1(1).

164. *Id.* at art. 2(b).

165. Universal Declaration, *supra* note 15, at art. 4; *see also* International Covenant on Civil and Political Rights, *supra* note 20, at art. 8(1) (“No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.”); *Koraou v. Niger*, (2008) AHRLR 182, 193–94 (ECOWAS 2008) (holding that plaintiff was sold into slavery in violation of international law).

166. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3.

167. *Id.* at art. 1(a).

... of a tenant who is by law, custom or agreement bound to live and labor on land belonging to another person ... and is not free to change his status.”<sup>168</sup> Finally, it prohibited traditional practices whereby a woman was effectively treated as a chattel, to be sold in marriage “on payment of a consideration” or “inherited” by another upon the death of her husband.<sup>169</sup>

## 2. Rights in Aboriginal Lands

A growing body of international law recognizes that indigenous peoples have a human right to ownership of the lands that their ancestors traditionally occupied. In this context, international law supersedes conflicting national laws.<sup>170</sup>

One example is *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,<sup>171</sup> a decision by the Inter-American Court of Human Rights. The Community, a group of 650 indigenous people living in Nicaragua, claimed ownership of 300 square miles of undeveloped forest land that had been traditionally occupied by its ancestors; but it did not hold formal title to the land.<sup>172</sup> In 1996, the government of Nicaragua granted a thirty-year logging concession over portions of the land to a Korean corporation.<sup>173</sup> The Community attacked this decision through litigation in Nicaraguan courts, without success.<sup>174</sup> It then filed a petition with the Inter-American Commission on Human Rights, alleging that Nicaragua had violated Article 21 of the American Convention on Human Rights, which protects the right to property.<sup>175</sup> When the Commission brought an action against

168. *Id.* at art. 1(b).

169. *Id.* at art. 1(c).

170. See generally DAVID LEA, PROPERTY RIGHTS, INDIGENOUS PEOPLE AND THE DEVELOPING WORLD: ISSUES FROM ABORIGINAL ENTITLEMENT TO INTELLECTUAL OWNERSHIP RIGHTS 1–30 (2008) (discussing rights of indigenous peoples in their ancestral lands); Andrew Erueti, *The Demarcation of Indigenous Peoples' Traditional Lands: Comparing the Domestic Principles of Demarcation with Emerging Principles of International Law*, 23 ARIZ. J. INT'L & COMP. L. 543 (2006) (same).

171. Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

172. *Id.* ¶¶ 103(d), (g).

173. *Id.* ¶ 103(n).

174. *Id.* ¶ 83(1).

175. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123. It provides:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to 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.



Nicaragua, the Inter-American Court of Human Rights reasoned that Article 21 “protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property.”<sup>176</sup> It accordingly held that Nicaragua “has violated the right of the members of the Mayagna Awas Tingni Community to the use and enjoyment of their property.”<sup>177</sup>

Building on *Awas Tingni Community* and similar decisions, the U.N. General Assembly adopted the Declaration on the Rights of Indigenous Peoples in 2007.<sup>178</sup> It provides special protections for lands traditionally owned or occupied by these peoples. For example, Article 26(1) declares that indigenous peoples “have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”<sup>179</sup> Accordingly, nations are required to “give legal recognition and protection to these lands, territories and resources.”<sup>180</sup> Nations must also provide “effective mechanisms for [the] prevention of . . . [a]ny action which has the aim or effect of dispossessing them of their lands, territories or resources.”<sup>181</sup>

*Id.* at art. 21.

176. *Awas Tingni Community*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 148.

177. *Id.* ¶ 153. The *Awas Tingni Community* approach was extended further in *Dann v. United States*, Case 11.140, Inter-Am. Comm’n H.R., Report No. 75/02, OEA/Ser.L.V/II.717, doc. 1 rev. 1 (2002). There the Inter-American Commission on Human Rights considered a claim by the Shoshone tribe that the United States had wrongfully deprived the tribe of its ancestral lands in six states, in violation of the right to property set forth in Article XXIII of the American Declaration of the Rights and Duties of Man (1948), reprinted in INTER-AMERICAN COURT OF HUMAN RIGHTS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM OEA/Ser.L.V/II.71, doc. 6 rev. 1, at 17, 22 (1987). The Commission reasoned that “general international legal principles” applicable to the dispute included “the right of indigenous peoples to legal recognition of . . . their control, ownership, use and enjoyment of territories and property.” *Dann*, Case 11.140, Inter-Am. Comm’n H.R., ¶ 130. It concluded that the procedure followed by the United States to extinguish the tribe’s property rights violated Article XXIII and other provisions of the Declaration. *Id.* ¶ 172; see also *Endorois Welfare Council v. Kenya*, ¶ 238, 49 I.L.M. 861, 892 (Afr. Comm’n H.P.R. 2010) (recognizing right of Endorois people to their ancestral lands under African Charter on Human and Peoples’ Rights and international law).

178. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007). For more information, see also the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382, which provides that “[t]he rights of ownership and possession of the [indigenous and tribal] peoples concerned over the lands which they traditionally occupy shall be recognized.” *Id.* at art. 14(1).

179. Declaration on the Rights of Indigenous Peoples, *supra* note 178, at art. 26(1).

180. *Id.* at art. 26(3).

181. *Id.* at art. 8(2)(b).

### 3. Right to Avoid Forced Evictions

Similarly, there is an evolving international consensus that residents have a human right to avoid being evicted from their homes without good cause.<sup>182</sup> The International Covenant on Economic, Social and Cultural Rights—which binds over 140 nations—acknowledges “the right of everyone to an adequate standard of living for himself and his family, including adequate . . . housing.”<sup>183</sup> This provision is widely seen as recognizing a human right to adequate housing. General Comment No. 7 to the Covenant, adopted in 1997, specifies that “forced evictions are *prima facie* incompatible with the requirements of the Covenant.”<sup>184</sup> The Comment goes on to provide that each “[s]tate itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions”<sup>185</sup> unless there is “reasonable cause” for such eviction.<sup>186</sup>

More recently, the U.N. Special Rapporteur on the Right to Adequate Housing issued the Basic Principles and Guidelines on Development-Based Evictions and Displacement, which apply to large-scale evictions conducted to facilitate development projects, such as dams, mines, urban renewal, and industrial projects.<sup>187</sup> These

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182. This right is particularly important in developing countries where many pastoralists, farmers, and other users do not hold formal title to the lands they occupy. For example, in Sub-Saharan Africa

[m]uch of the land is formally owned by the government, and the landusers have no property titles on the land they cultivate; in many cases too, a complex combination of property rights and users' rights results in a situation in which those who cultivate the land do not own it, although they may or may not be paying rent in cash or kind or may or may not have a formal agreement with the nominal owner.

Special Rapporteur on the Right to Food, *Large-scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge*, Human Rights Council, ¶ 23, U.N. Doc. A/HRC/13/33/Add.2 (Dec. 28, 2009) (by Olivier De Schutter), available at <http://www.oecd.org/dataoecd/16/19/45285639.pdf>. One World Bank study found that arrangements transferring at least 110 million acres—a region larger than California—from traditional farmers to foreign investors were announced during 2009; more than seventy percent of the affected land was in Africa. Neil MacFarquhar, *African Farmers Displaced as Investors Move In*, N.Y. TIMES, Dec. 22, 2010, at A1.

183. International Covenant on Economic, Social and Cultural Rights, *supra* note 19, at art. 11(1).

184. U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 7: The Right to Adequate Hous. (art. 11.1 of the Covenant): Forced Evictions, ¶ 1, U.N. Doc. E/C.12/1997/4 (May 20, 1997).

185. *Id.* ¶ 8.

186. *Id.* ¶ 11.

187. *Basic Principles*, *supra* note 45, ¶ 8.

principles provide that forced evictions can occur only in “exceptional circumstances.”<sup>188</sup> Among other limitations, any such eviction must be “undertaken solely for the purpose of promoting the general welfare,” “reasonable and proportional,” and “regulated so as to ensure full and fair compensation.”<sup>189</sup> While states are primarily responsible for implementing the principles, non-state actors such as “project managers and personnel, international financial and other institutions or organizations, transnational and other corporations, and individual parties” are also obligated to follow them.<sup>190</sup>

#### 4. Rights of Refugees and Other Displaced Persons

International law increasingly recognizes the human right of refugees and other displaced persons to return to the land or other property they left behind.<sup>191</sup> The most comprehensive formulation of this concept is found in the Pinheiro Principles, which were adopted by the U.N. Sub-Commission on the Protection and Promotion of Human Rights in 1995.<sup>192</sup> For example, Principle 2.1 provides that “[a]ll refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived” or “to be compensated” if such

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188. *Id.* ¶ 6.

189. *Id.* ¶ 21.

190. *Id.* ¶ 11.

191. For example, the U.N. General Assembly Resolution on Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006), recognizes that states are obligated to provide “effective remedies,” including the “return of property,” to victims. *Id.* ¶¶ 3(d), 19; see also *Akdivar v. Turkey*, 1996-IV Eur. Ct. H.R. 1192, 1192 (holding that the deliberate destruction of the applicants’ homes and their contents by government security forces was a violation of the right to property under Article 1 of the First Protocol to the European Convention on Human Rights).

192. Special Rapporteur on Housing and Property Restitution, *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, prin. 5, U.N. Sub-Comm’n on the Promotion and Prot. of Human Rights, U.N. Doc. E/CN.4/Sub.2/2005/17 (June 28, 2005) (by Paulo Sérgio Pinheiro) [hereinafter *Pinheiro Principles*], endorsed by Rep. of the Sub-Comm’n on the Promotion and Prot. of Human Rights, July 25–Aug. 12, 2005, ¶ 4, U.N. Doc. E/CN.4/2006/2 (Oct. 17, 2005). Although the Pinheiro Principles do not have the same legal effect as a treaty, they “do have *persuasive authority* and are *explicitly* based on existing international, regional and national law.” HANDBOOK ON HOUSING AND PROPERTY RESTITUTION FOR REFUGEES AND DISPLACED PERSONS: IMPLEMENTING THE ‘PINHEIRO PRINCIPLES’ 19 (2007) [hereinafter HANDBOOK], available at <http://www.fao.org/docrep/010/ai131e/ai131e00.htm>. But see Megan J. Ballard, *Post-Conflict Property Restitution: Flawed Legal and Theoretical Foundations*, 28 BERKELEY J. INT’L L. 462, 483 (2010) (“[T]he right to property restitution following displacement caused by armed conflict should be viewed as a new right based on the evolution of international law, rather than one firmly grounded in international law.”).

restoration is impossible.<sup>193</sup> These principles apply to all situations of involuntary displacement, including armed conflict, forced evictions, and natural disasters.<sup>194</sup>

The property restitution process after the conflicts in Bosnia and Herzegovina was guided by this concept. The General Framework Agreement for Peace in Bosnia and Herzegovina provided that “[a]ll refugees and displaced persons . . . have the right to have restored to them their property of which they were deprived in the course of hostilities since 1991.”<sup>195</sup> The implementation of this process was successful: over 200,000 property claims were resolved over a period of six years of post-war administration.<sup>196</sup>

### III. CHALLENGES POSED BY INTERNATIONAL PROPERTY LAW

The examples discussed above demonstrate that a substantial body of international property law already exists—even if it is not conventionally viewed as such. Three key issues arise at this point. First, is there value to recognizing international property law as a discrete subject? Second, does international agreement exist about the meaning of “property”? Finally, how can international property law be enforced?

#### A. *The Value of Recognizing International Property Law*

Lawyers, judges, and scholars understand law as a series of categories such as contracts, torts, and property, each with its own distinct characteristics.<sup>197</sup> Jay Feinman identifies two reasons to develop categories of legal doctrines: “to get things done (an

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193. *Pinheiro Principles*, *supra* note 192, at prin. 2.1.

194. See HANDBOOK, *supra* note 192, at 16; see also Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, G.A. Res. 40/144, arts. 5(2), 9, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/40/53, at 253 (Dec. 13, 1985) (recognizing that the rights of aliens include “[t]he right to own property alone as well as in association with others, subject to domestic law” and the right not to be “arbitrarily deprived of his or her lawfully acquired assets”); Charles W. Gould, *The Right to Housing Recovery After Natural Disasters*, 22 HARV. HUM. RTS. J. 169, 174–81 (2009) (discussing the right to housing).

195. General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, at Annex 7 art.1(1), Dec. 14, 1995, 35 I.L.M. 75 (1996).

196. See Rhodri C. Williams, *Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice*, 37 N.Y.U. J. INT’L L. & POL. 441, 442–44 (2005).

197. See Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661, 664–72 (1989); Roscoe Pound, *Classification of Law*, 37 HARV. L. REV. 933, 934–38 (1924).

instrumental reason) and to get things right (an analytic reason)."<sup>198</sup> Both reasons support the proposition that international property law should be viewed as a separate field.

### 1. Instrumental Value

Instrumental classification embodies the view that similar legal categories deserve to be treated in a similar manner.<sup>199</sup> This allows doctrines to be "(1) [s]tated effectively with a minimum of repetition, overlapping, and potential conflict, (2) administered effectively, (3) taught effectively, and (4) developed effectively for new situations."<sup>200</sup>

The recognition of international property law as a discrete subject will serve these goals. Section II above analyzes sixteen areas of international property law that have traditionally been seen as components of different legal subjects. For instance, the regulation of transboundary impacts is classified as international environmental law, while the right to avoid forced evictions is classified as international human rights law. But viewing these doctrines and others as components of a comprehensive system of international property law will allow the development of key organizing principles that will help to avoid overlaps and conflicts. These organizing principles will permit the subject to be administered more effectively by both international entities and national governments. Finally, because international property law has not been recognized as a discrete subject, it has not been taught in law schools.<sup>201</sup> Just as international environmental law has become a standard course in U.S. law schools since its birth approximately forty years ago, the recognition of international property law will allow it to be taught as a separate course.

Similarly, this recognition will provide a foundation for applying the law to new situations generated by globalization and technological change. For instance, it seems inevitable that valuable resources will be discovered in the global commons in future years. Because national law does not apply to these regions, we will need an international regime to delineate property rights. An established body of international property law governing such resources will both

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198. Feinman, *supra* note 197, at 672.

199. *Id.* at 672-75.

200. Pound, *supra* note 197, at 944.

201. The casebook which I coauthored, *GLOBAL ISSUES IN PROPERTY LAW*, *supra* note 1, is the closest law school textbook, but it primarily deals with comparative law issues and is intended to supplement traditional casebooks in the domestic property course.

facilitate their development and minimize the risk of conflict. The UNCLOS principles governing property rights in deep sea minerals, for example, might be applied to genetic resources<sup>202</sup> discovered on the high seas or to minerals found on bodies in outer space.

## 2. Analytic Value

Analytic classification reflects the concept that the “law’s claim to authority still rests in part on logic, order, and consistency.”<sup>203</sup> The recognition of international property law will help to improve legal doctrine by identifying and developing its core principles, which will bring more consistency and coherence to the subject. For example, the international system governing security interests in airplanes and trains could logically be extended to other types of equipment that cross national borders, such as vessels.<sup>204</sup> In this setting, an international regime is essential to facilitate the movement of equipment that would otherwise be hampered by conflicting national laws, leading to contradictory decisions.<sup>205</sup> Harmonization promotes efficiency, and thus fosters economic growth.

The acceptance of international environmental law as a field distinct from general international law provides a helpful precedent. Even as late as the 1960s, this field did not exist. Yet a significant body of law dealing with the environment had already developed at the international level. For instance, a number of treaties protected migratory animals,<sup>206</sup> while others dealt with allocation of fresh water.<sup>207</sup> Even the famous 1941 *Trail Smelter Arbitration* decision was initially seen as an isolated event, not part of a new legal field. Over

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202. “Genetic resources” refers to “any material of plant, animal, microbial or other origin” that contains “functional units of heredity” and has “actual or potential value.” Convention on Biological Diversity art. 2, June 5, 1992, 1760 U.N.T.S. 79.

203. Feinman, *supra* note 197, at 676.

204. The U.N. Commission on International Trade Law worked from 1968 through 1980 to develop a convention that would apply to security interests in many types of collateral, but ultimately abandoned the effort. See Stephen J. McGairl, *The Proposed UNIDROIT Convention: International Law for Asset Finance (Aircraft)*, 4 UNIFORM L. REV. 439, 447–88 (1999).

205. See, e.g., Florian Rödl, *Private Law Beyond the Democratic Order? On the Legitimacy Problem of Private Law “Beyond the State”*, 56 AM. J. COMP. L. 743, 746 (2008) (“[I]nternational pluralism raises transaction costs and legal uncertainty because it can lead to contradictory decisions in different states . . .”).

206. See, e.g., International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72; Convention for the Preservation and Protection of Fur Seals, July 7, 1911, 37 Stat. 1542 (binding Japan, Russia, the United Kingdom, and the United States).

207. See, e.g., Convention Relating to the Development of Hydraulic Power Affecting More Than One State, Dec. 9, 1923, 36 L.N.T.S. 76.

time, however, globalization and technological change created environmental problems that spanned national boundaries, such as acid rain. In turn, this created the need for a more systematic international approach. These pressures culminated in the 1972 U.N. Conference on the Human Environment, which produced the Stockholm Declaration<sup>208</sup>—widely recognized as the birth of international environmental law. Since that time, unifying principles of international environmental law have been developed, bringing greater logic, order, and consistency to the field.

*B. Toward an International Definition of “Property”*

What is “property”? John Cribbet, one of the foremost property law scholars in the United States, famously remarked that this simple question was “unanswerable.”<sup>209</sup> Yet the American property system functions well because there is sufficient agreement about the basic meaning of the term, even if a precise definition is elusive.<sup>210</sup>

Similarly, there is no precise internationally accepted definition of the term.<sup>211</sup> For example, while the Universal Declaration provides that each person has the “right to own property,”<sup>212</sup> it does not delineate the content and scope of that right; nor does it identify the types of things in which property rights may exist.<sup>213</sup> Because the existing international property law doctrines have principally evolved

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208. Declaration of the United Nations Conference on the Human Environment, June 16, 1972, 11 I.L.M. 1416, 1416 (“The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world . . .”).

209. John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1, 1.

210. Definitional complexity arises in the United States, in part, because the legal meaning of “property” is different from its common meaning. The layman views property as a thing, while the attorney views it as rights in relation to a thing. JOHN G. SPRANKLING, *UNDERSTANDING PROPERTY LAW* 1 (2d ed. 2007); see also BRUCE ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 26–29, 97–100 (1977) (discussing the distinction between a layman’s understanding and an attorney’s understanding of property). The same issue arises in the international context to some extent.

211. See SPRANKLING ET AL., *supra* note 1, at 1–10.

212. Universal Declaration, *supra* note 15, at art. 17(1).

213. The same phenomenon is seen in most other treaties that deal with “property”: they use the term, but do not define it. One of the few exceptions is the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 14 [hereinafter CEDAW], which requires nations to adopt legislation to ensure “[t]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property.” *Id.* at art. 16(1)(h). This language implies that the right to property includes use (“enjoyment”), exclusion (“management, administration”), and disposition. *Id.*

in specialized contexts, the lack of a general definition has not been a problem. But as the field evolves, the issue will become more important. As discussed below, there is enough agreement on the core meaning of the term to allow for the future development of the international property law system.

### 1. Content of the Right to Property

In nations following the civil law and common law traditions—which together encompass most of the world population—there is broad agreement on the content of the right to property.<sup>214</sup> Roman law, which undergirds the civil law approach, recognized three key components of that right: to use or abuse, to exclude others, and to dispose.<sup>215</sup> In general, modern civil law nations follow much the same approach.<sup>216</sup> For example, the French Civil Code of 1804—the foundation of the modern civil law system—provided that “[o]wnership is the right to enjoy and dispose of things in the most absolute manner.”<sup>217</sup> In the United States, the most important sticks in the metaphorical bundle of rights are: the right to possess and use;

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214. Charles Donahue, Jr., *The Future of The Concept of Property Predicted from Its Past*, in NOMOS XXII: PROPERTY 28, 30–34 (J. Roland Pennock & John W. Chapman eds., 1980); see also ÇOBAN, *supra* note 34, at 9–34 (discussing the definition of property in the international context); A.J. VAN DER WALT, PROPERTY IN THE MARGINS 28 (2009) (arguing that the “traditional and doctrinal differences between the two systems [as to the nature of property] are . . . overshadowed by the similarities”). See generally GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE (2006) (comparing the constitutional property law approaches of Germany, South Africa, and the United States); UGO MATTEI, BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION (2000) (comparing property law principles of England, France, Italy, Germany, and the United States).

215. VAN BANNING, *supra* note 9, at 18–21.

216. ÇOBAN, *supra* note 34, at 14 (“Traditionally property is defined both in the common law and in civil law as a right of a person with respect to a thing.” (citing Donahue, *supra* note 214, at 30)).

217. CODE CIVIL [C. CIV.] art. 544 (Fr.) (1804); see also KONSTITUTSIIA ROSSIJSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 35(1) (Russ.) (guaranteeing “the right to have property, possess, use and dispose of it both personally and jointly with other people”); Property Rights Law of the People’s Republic of China (promulgated by the Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007) art. 2 (China), *translated at* [www.lehmanlaw.com/fileadmin/lehmanlaw\\_com/laws\\_regulations/Propoerty\\_Rights\\_La\\_w\\_of\\_the\\_PRC\\_LLX\\_03162007.pdf](http://www.lehmanlaw.com/fileadmin/lehmanlaw_com/laws_regulations/Propoerty_Rights_La_w_of_the_PRC_LLX_03162007.pdf) (defining “property rights” as “the exclusive right enjoyed by the obligee to directly control specific properties including ownership, usufructary and security right in property rights”) (unofficial translation); CHARLES AUBRY & CHARLES RAU, II DROIT CIVIL FRANÇAIS § 191, at 173–76 (Paul Esmein ed., Jaro Mayda trans., West Publ’g Co. 7th ed. 1966) (1961) (explaining the meaning of property under French law).



the right to exclude; and the right to transfer.<sup>218</sup> The right to destroy, the counterpart to the civil law power to abuse, may also be part of the bundle.<sup>219</sup> Significantly, the property jurisprudence of the European Court of Human Rights, which spans common law and civil law nations, also recognizes the same core aspects of the right to property: to use, to exclude, and to dispose.<sup>220</sup>

Admittedly, beyond this basic shared understanding, the “bundle of rights” approach to ownership in common law jurisdictions differs markedly from the “absolute ownership” theory used in civil law nations.<sup>221</sup> But the common core provides a sufficient foundation for recognizing a similar international definition of property.

This approach is consistent with the definition of “property” used by Rodriguez in his 1993 report to the U.N. Commission on Human Rights as part of its consideration of a broad human right to property. The final report explained that “[t]he contents of the right to own property may be regarded as a number of exclusive powers of ownership, including ‘acquisition, management, administration, enjoyment and disposition of property.’ ”<sup>222</sup> This language includes the three central powers identified above: to use, to exclude, and to dispose.<sup>223</sup>

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218. SPRANKLING, *supra* note 210, at 4–5.

219. See Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 787–96 (2005).

220. VAN BANNING, *supra* note 9, at 87–88 (citing cases in which the European Court discusses fundamental aspects of the right to property).

221. See *id.* at 14–21 (comparing the civil and common law approaches to property); John Henry Merryman, *Ownership and Estate (Variations on a Theme by Lawson)*, 48 TUL. L. REV. 916, 924–28 (1974) (same).

222. *The Right of Everyone to Own Property*, *supra* note 15, at art. 90.

223. The concept of an international right to property has been criticized as “reflecting certain, largely, western, liberal social values that did not (and still do not) find resonance in many parts of the world.” HANDBOOK, *supra* note 192, at 44. Millions of people do not have the type of property rights that are recognized by the civil law and common law traditions. For example, more than ninety percent of residents in Sub-Saharan Africa do not hold formal title to the lands they utilize for cultivation or grazing; rather, they gain access to land through customary tenure systems (e.g., allocation of land by a village chief or based on ancestry) with little or no government involvement. U.N. HUMAN SETTLEMENTS PROGRAMME, SECURE LAND RIGHTS FOR ALL 14 (2008), available at [www.landcoalition.org/pdf/08\\_GLTN\\_Secure\\_Land\\_Rights\\_BK.pdf](http://www.landcoalition.org/pdf/08_GLTN_Secure_Land_Rights_BK.pdf). Similarly, over seventy-five percent of urban dwellings in developing nations are “informal” housing, often built illegally on land to which the residents do not hold formal title. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 37 (2000). However, international property law doctrines respect these traditional forms of ownership, as reflected in the protections accorded to aboriginal lands and the ban on forced evictions.

## 2. Scope of the Right to Property

The traditional scope of property rights is determined by the extent to which a nation may impair or destroy those rights. The Universal Declaration provides that “[n]o one shall be arbitrarily deprived of his property,”<sup>224</sup> which seems to require some form of legal process before a nation may impair private property. As noted above, the international law regulating the physical expropriation of property is now well-developed. But, for example, at what point does government action that harms private property cross the “line from noncompensable regulation to indirect expropriation that requires paying investors according to international standards”?<sup>225</sup> The answer to this question is far from clear.

At this stage in the development of international property law, however, it is unrealistic to insist on a uniform global standard for the scope of property rights.<sup>226</sup> More to the point, it is not necessary. The doctrines in the field have evolved incrementally in limited areas where the permissible level of state interference was usually not at issue, other than in the human rights context. Over time, this incremental process will contribute to the development of international standards on the question of scope, much in the same way that the jurisprudence of the European Court of Human Rights has slowly clarified the scope of the right to property under the European Convention.<sup>227</sup>

## 3. Things Property Rights May Concern

Nations broadly agree on the core “things” which property rights may concern. Generally, rights may exist in land, structures on land, and tangible movable property.<sup>228</sup> But the extent of these rights can

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224. Universal Declaration, *supra* note 15, at art. 17(2).

225. Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT’L L. 475, 478 (2008).

226. However, a more uniform definition of global property rights would eventually be helpful. One approach is to establish a minimum package of property rights which all nations would guarantee under domestic law, which might include (a) the right to free alienation of property and (b) the right to receive the fair market value of the property if expropriation occurs. See SPRANKLING ET AL., *supra* note 1, at 119 (suggesting this approach in the context of international land sales).

227. See VAN BANNING, *supra* note 9, at 80–89 (discussing the property jurisprudence of the European Court of Human Rights).

228. See ÇOBAN, *supra* note 34, at 12–13; A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES: A COMPARATIVE ANALYSIS 22 (1999); see also TOM ALLEN, THE RIGHT TO PROPERTY IN COMMONWEALTH CONSTITUTIONS 122–25 (2000) (discussing definition of property in commonwealth constitutions).

vary widely. For example, in China most land is formally owned by the state.<sup>229</sup> But businesses and individuals may own “allocated land use right[s],” which give the holder the exclusive right to use and occupy a parcel of land for a designated period—a form of property rights in land.<sup>230</sup> Similarly, in Saudi Arabia all mineral rights are the property of the state, even though the land in which minerals exist may be privately owned.<sup>231</sup>

In addition, most nations recognize that property rights can exist in intangibles, such as bank deposits, copyrights, debts, patents, and shares of stock.<sup>232</sup> But there are disagreements at the margins. For instance, the dominant view in the United States is that property rights cannot exist in the “market share” of a particular business,<sup>233</sup> even though such a share is recognized as a form of property under the North American Free Trade Agreement.<sup>234</sup> Another issue is whether property rights can exist in welfare benefits, pensions, or occupational licenses.<sup>235</sup>

These differing views about the things that property rights may concern pose a challenge to developing an international definition. But the challenge is not insurmountable, as the experience of the European Court of Human Rights demonstrates. It has created an extensive body of supranational property law, even though the nations subject to its jurisdiction hold partially inconsistent views about the things in which property rights can exist.<sup>236</sup>

### C. *The Enforcement Problem*

Under the traditional view, international law regulated only nations, not private entities or individuals. Thus, some scholars argue

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229. Property Rights Law of the People's Republic of China (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) arts. 47, 48 (China), *translated at* [www.lehmanlaw.com/fileadmin/lehmanlaw\\_com/laws\\_regulations/Propoerty\\_Rights\\_Law\\_of\\_the\\_PRC\\_LLX\\_03162007.pdf](http://www.lehmanlaw.com/fileadmin/lehmanlaw_com/laws_regulations/Propoerty_Rights_Law_of_the_PRC_LLX_03162007.pdf) (unofficial translation).

230. See PATRICK A. RANDOLPH, JR. & LOU JIANBO, CHINESE REAL ESTATE LAW 86 (2000) (discussing land use rights in China).

231. Basic Law of Government, ch. 4, art. 14 (Saudi Arabia), *translated at* [www.mideastinfo.com/documents/Saudi\\_Arabia\\_Basic\\_Law.htm](http://www.mideastinfo.com/documents/Saudi_Arabia_Basic_Law.htm) (unofficial translation).

232. ÇOBAN, *supra* note 34, at 12; VAN DER WALT, *supra* note 228, at 22–23.

233. SPRANKLING ET AL., *supra* note 1, at 10.

234. See *Methanex Corp. v. United States*, International Arbitration Tribunal, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345, 1372, 1457 (NAFTA ch. 11 Arb. Trib. 2005), *available at* <http://www.state.gov/documents/organization/51052.pdf>.

235. ÇOBAN, *supra* note 34, at 157–61.

236. *Id.* at 1–6. But see Amnon Lehavi & Amir N. Licht, *BITs and Pieces of Property*, 36 YALE J. INT'L L. 115, 139–48 (2011) (analyzing how cultural orientations affect the nature and strength of property rights).

that international law is not “law” at all, because no supranational entity has the power to enforce it against a nation. However, as Louis Henken points out: “It is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.*”<sup>237</sup> The principal reason for this is reciprocity: Nation A fulfills its obligations to Nation B so that Nation B will fulfill its obligations to Nation A.

However, international property law concerns the rights of non-state actors such as private entities and individuals, not simply the rights of nations. Accordingly, reciprocity may be a less effective incentive for a nation to comply with its obligations. In addition, enforcement of some international property law doctrines may be inconsistent with a nation’s self-interest. Accordingly, it is important to explore how such law can be enforced. The answer to this inquiry is unsurprising: in most instances, each nation is responsible for enforcing this law as to its own nationals. The discussion below addresses the enforcement challenge in four contexts: (1) rights in the global commons; (2) transboundary property rights; (3) special restrictions on national property rights; and (4) the human right to property.

### 1. Global Commons

Enforcement of international property law in the global commons is difficult. By definition, this region is outside the territorial sovereignty of any nation, and there is no international executive body with broad enforcement powers.

As a general matter, each nation is responsible for ensuring that its nationals comply with the rules governing the global commons. For example, the Outer Space Treaty provides that each member state “shall bear international responsibility for national activities in outer space . . . whether such activities are carried on by governmental agencies or by non-governmental entities.”<sup>238</sup> Similarly, under UNCLOS a ship on the high seas is subject to the “exclusive jurisdiction” of the flag state, except as provided in other treaties.<sup>239</sup> Thus, if a citizen of Nation P attempted to remove minerals from the moon or from the deep seabed in violation of international law, Nation P would be obligated to prevent the violation. In a similar manner, if a citizen of Nation Q launched a communications satellite

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237. LOUIS HENKEN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979).

238. Outer Space Treaty, *supra* note 49, at art. VI.

239. UNCLOS, *supra* note 49, at art. 92(1).

into a geostationary orbit without permission from the ITU—thereby interfering with property rights granted to other satellite operators—Nation Q would be required to take enforcement action.

The most comprehensive enforcement standards have been developed for the high seas, because this is the sector of the global commons where most human activity occurs. Under narrow circumstances, a state is empowered to enforce certain international property standards against foreign nationals. The obvious example is piracy—a direct interference with private property rights. Under UNCLOS, piracy is defined to include “any illegal acts of . . . detention, or any act of depredation, committed for private ends by the crew . . . of a private ship” and directed “on the high seas, against another ship . . . or against . . . property on board such ship.”<sup>240</sup> In this situation, authorities from any nation may board a pirate ship or any ship captured by pirates, arrest the pirates, and seize the property found on board.<sup>241</sup>

Another example is found in the post-UNCLOS convention that protects “straddling fish stocks” and “migratory fish stocks”<sup>242</sup> on the high seas. A “straddling fish stock” is a species that exists both within the exclusive economic zone and in the portion of the high seas immediately adjacent to it,<sup>243</sup> while a “highly migratory fish stock” is one which migrates long distances during the life cycle, such as tuna or swordfish,<sup>244</sup> and thus travels through both the exclusive economic zone and the high seas. The convention calls for regional fisheries management organizations to (a) determine the maximum sustainable yield for particular stocks and (b) allocate fishing quotas in these stocks to individual nations.<sup>245</sup> Each nation, in turn, may allocate portions of its quotas—for example, the right to catch ten tons of tuna on the high seas—to private entities or individuals. In effect, each such recipient holds internationally-created fishing rights. The convention creates an international enforcement mechanism: each nation which is a member of such an organization may direct its

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240. *Id.* at art. 101(a).

241. *Id.* at art. 105.

242. *See generally* Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, 2167 U.N.T.S. 3 [hereinafter *Straddling Stocks Agreement*] (assigning fishing quotas to individual nations).

243. UNCLOS, *supra* note 49, at art. 63.

244. *Id.* at art. 64; *see also* CHURCHILL & LOWE, *supra* note 64, at 311 (discussing regional organizations concerned with fishing for tuna).

245. *Straddling Stocks Agreement*, *supra* note 242, at arts. 5(b), 10(b).

“duly authorized inspectors” to “board and inspect” fishing vessels flying the flag of other member nations in order to ensure compliance with these quotas and other standards.<sup>246</sup>

Enforcement problems in the global commons will probably increase in the future. As technological innovations allow easier access to resources in the deep seas, outer space, and other remote regions, the exploitation of these resources will accelerate. Accordingly, more effective enforcement systems—like the fisheries example—will be necessary.

## 2. Transboundary Property Rights

Similarly, each nation is required to enforce the international standards for coordination of transboundary property rights. These obligations usually stem from treaty provisions mandating that each member state adopt enforcement mechanisms, typically domestic statutes that can be enforced in national courts.<sup>247</sup> To date, enforcement of such transboundary property rights has been generally effective, in part because the treaty parties share a mutual interest in facilitating commerce and thus rely on reciprocity.<sup>248</sup>

In addition, specialized dispute resolution tribunals are sometimes available to enforce transboundary property rights. For example, TRIPS provides for international enforcement of each nation’s obligations to protect intellectual property rights through dispute resolution bodies established under the World Trade Organization.<sup>249</sup> Similarly, bilateral investment treaties typically require that expropriation disputes be submitted to binding arbitration, most commonly by the International Centre for the Settlement of Investment Disputes.<sup>250</sup>

## 3. Special Restrictions on National Property Rights

National enforcement of special international restrictions on property rights has proven less successful. The theoretical basis for enforcement is again the mutual self-interest of the affected states,

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246. *Id.* at art. 21(1).

247. For example, TRIPS requires member nations to “ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement.” TRIPS, *supra* note 113, at art. 41(1).

248. Admittedly, the enforcement of rights to compensation for expropriation is more troublesome. See LOWENFELD, *supra* note 95, at 495–534.

249. TRIPS, *supra* note 113, at art. 64.

250. See LOWENFELD, *supra* note 95, at 570.

usually parties to a treaty dealing with a specific problem, such as contraband. But states often have little incentive to comply with such treaty obligations; particularly where implementation is expensive, enforcement is often weak.

For example, although CITES has been ratified by 176 nations, almost half failed to adopt the domestic statutes which were necessary to implement it.<sup>251</sup> Moreover, the CITES trade restrictions are primarily enforced at border crossings; but implementation has been uneven, due to insufficient funding, personnel, and perhaps interest.<sup>252</sup> A recent undercover investigation revealed that tiger parts were widely available for sale in shops in Singapore, a CITES member, even though all commercial tiger trade has been prohibited under CITES since 1987.<sup>253</sup> Because tigers do not exist in Singapore, these parts were apparently imported into Singapore and exported from their nations of origin in violation of CITES.<sup>254</sup>

#### 4. Human Right to Property

The enforcement of international property law principles found in human rights instruments presents a challenge because it may involve a conflict between the interests of a nation and those of its citizens.<sup>255</sup> One common scenario is where a property owner seeks to assert such an international standard as a shield against action by her own national government. Suppose that Nation R has engaged in forced evictions of its citizens in order to begin an industrial development project. S, a citizen of Nation R, might claim that this action violates the human right to avoid forced evictions under international law. But how can this right be enforced? Unlike the three enforcement situations discussed earlier in this Section, here the government of Nation R has a strong interest to avoid enforcement.

The 1993 Rodriguez report assumed that the right to property should be enforced at the national level. As he explained, the right

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251. In 2001, for example, the CITES Secretariat listed seventy-six member nations that had not adopted such legislation and called on them to do so. See Elisabeth M. McOmber, Note, *Problems in Enforcement of the Convention on International Trade in Endangered Species*, 27 BROOK. J. INT'L L. 673, 697 (2002).

252. See *id.* at 696–701.

253. Press Release, Animal Concerns Research & Educ. Soc'y, Undercover Investigations into the Illegal Trade in Tiger Parts in Singapore (Mar. 19, 2010), available at <http://www.acres.org.sg/media/pressreleases.html>.

254. *Id.*

255. See generally Harold Hongju Koh, Addison C. Harris Lecture, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999) (discussing national enforcement of international human rights law).

would be incorporated “in the national law of all States and capable of being given the same weight to in domestic courts.”<sup>256</sup> To date, only a handful of nations have expressly incorporated human rights provisions dealing with the right to property into their national laws. The Constitution of Argentina, for example, lists ten human rights treaties which are given constitutional status under its domestic law,<sup>257</sup> including five treaties which expressly protect the right to property.<sup>258</sup> Even without such express incorporation, some domestic courts have enforced the human right to property contained in treaties that their nations have ratified. An example is *Ephraim v. Pastory*,<sup>259</sup> where the High Court of Tanzania invalidated a doctrine of customary law that female members of the Haya tribe had no power to sell clan land, but male members did.<sup>260</sup> The ruling was based in part on human rights treaties ratified by Tanzania, which recognize the right to acquire property without discrimination.<sup>261</sup>

In addition, the property rights provisions in human rights instruments could be enforced by international tribunals, particularly those established under regional agreements.<sup>262</sup> Yet the efficacy of such tribunals is limited by a variety of factors, including the frequent lack of compulsory jurisdiction and the reliance on national institutions to enforce tribunal decisions. Moreover, disputes involving rights to land pose particular enforcement challenges

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256. *The Right of Everyone to Own Property*, *supra* note 15, at 91; see also BROWNIE, *supra* note 9, at 584 (noting that enforcement of human rights law “depends for its efficacy upon the domestic legal systems of States,” but that “[i]n practice, such a system fails when it has to face the worst case scenarios”).

257. Art. 75(22), CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.), translated at [www.argentina.gov.ar/argentina/portal/documentos/constitucion\\_ingles.pdf](http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_ingles.pdf).

258. They are: (1) American Declaration of the Rights and Duties of Man, *supra* note 177; (2) Universal Declaration, *supra* note 15; (3) the Declaration on the Rights of Indigenous Peoples, *supra* note 178; (4) the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195; and (5) CEDAW, *supra* note 213.

259. (2001) AHRLR 236 (TzHC 1990).

260. *Id.* at 246–47; see also *Bhe v. Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) at 608–09 (S. Afr.) (invalidating customary law of intestate succession that discriminated against women, based in part on international human rights treaties).

261. The court cited four international human rights instruments, including the Universal Declaration and CEDAW. *Ephraim*, (2001) AHRLR ¶ 10. The Universal Declaration provides that “[e]veryone has the right to own property.” Universal Declaration, *supra* note 15, at art. 17(1). CEDAW states that member nations must “give women equal rights . . . to administer property.” CEDAW, *supra* note 213, at art. 15(2).

262. Notably, the right to property in the European Convention on Human Rights has been vigorously enforced by the European Court of Human Rights, resulting in a large body of supranational property law. See generally ÇOBAN, *supra* note 34 (discussing the right to property under the European Convention).



because land is so closely linked to both territorial sovereignty and national economic development. For instance, in its 2001 decision in *Awas Tigni Community*, the Inter-American Court of Human Rights established an important precedent that nations were required to honor the communal property rights of indigenous peoples.<sup>263</sup> Although the court directed Nicaragua to award formal title to the community, little progress toward this goal was made for many years.<sup>264</sup> Delays in such cases are caused, in part, by “the continued threats to their lands and natural resources coveted by governments, and national and transnational corporations.”<sup>265</sup>

Ultimately, moral suasion is the most effective method to enforce human rights. Compared with such fundamental concepts as the right to be free from torture or the right to a fair trial, the right to property has less moral significance. Further, in some situations it may pose a substantial threat to a nation’s self-interest. However, the evolving property jurisprudence of the European Court of Human Rights provides an example that other regional tribunals may emulate over time.<sup>266</sup>

### CONCLUSION

When a coral reef gradually emerges from the ocean depths to form a new island, it rests on a foundation that has grown upward for decades. In a similar manner, international property law is now emerging as a new field, as formerly scattered doctrines coalesce into a discrete body of law. Some doctrines are well-established, while others are still in formation—a kind of protoproperty.

We can no longer ignore the reality that international law affects the private property rights of individuals, business entities, and other non-state actors. In some contexts, property rights are directly created by international law, such as rights in deep seabed minerals or the rights of aboriginal peoples in their ancestral lands. International law also harmonizes transboundary property rights, such as rights in equipment that travels between nations or rights in intellectual property. Finally, international law often restricts nationally-created property rights, such as rights in cultural objects or rights to use land in a manner that causes transboundary harms.

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263. See *supra* Part II.D.2.

264. See Leonardo J. Alvarado, *Prospects and Challenges in the Implementation of Indigenous Peoples’ Human Rights in International Law: Lessons from the Case of Awas Tigni v. Nicaragua*, 24 ARIZ. J. INT’L & COMP. L. 609, 618–32 (2007).

265. *Id.* at 638.

266. See *supra* note 34 and accompanying text.

The trajectory of international property law is clear: the field will continue to expand. Recognizing it as a separate subject will help to improve legal doctrine by identifying key organizing principles, and thus bring more consistency and predictability to the area. But two potential challenges loom on the horizon. First, the lack of a precise, internationally recognized definition of “property” may hamper efforts to broaden the field outside of the specialized contexts where it has evolved to date. Second, the enforcement of international property law may be problematic, especially where enforcement conflicts with the self-interest of the affected nation.

In the space of forty years, international environmental law has progressed from an idea to a well-developed body of law, which is examined in hundreds of articles and books, and routinely taught in law schools around the world. Today we stand on the threshold of a similar era in international property law. Overlooked by scholars, a substantial body of international property law already exists. Its development has been fueled by the forces of globalization, democratic reform, technology, and pressure for human rights. The time has come to recognize international property law as a discrete subject, and thereby promote its coherent evolution in the decades to come.