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# The Global Right to Property

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# THE GLOBAL RIGHT TO PROPERTY

*John G. Sprankling\**

## TABLE OF CONTENTS

### INTRODUCTION

#### I. PROPERTY AND SOVEREIGNTY

- A. *Natural Law Dents in the Westphalian Model*
- B. *The Universal Declaration of Human Rights*
- C. *The International Covenant on Economic, Social and Cultural Rights*
- D. *The Valencia Rodriguez Report*

#### II. RECOGNIZING THE GLOBAL RIGHT TO PROPERTY

- A. *Property in the Post-Cold War Era*
- B. *Treaties*
  - 1. Human Rights Treaties
  - 2. Anti-Discrimination Treaties
  - 3. Conclusion
- C. *General Principles of Law*
  - 1. General Principles as a Source of International Law
  - 2. The Right to Property in Domestic Law
  - 3. Conclusion
- D. *Customary Law*
  - 1. Custom as a Source of International Law
  - 2. State Practice
  - 3. *Opinio Juris*
  - 4. Conclusion

#### III. IMPLICATIONS OF THE GLOBAL RIGHT TO PROPERTY

- A. *Content of the Right*
- B. *Practical Applications*
- C. *Potential Conflicts of Law*

### CONCLUSION

## INTRODUCTION

Does a right to property exist under international law? The traditional answer to this question is “no”—a right to property can only arise under the domestic law of a particular nation. Yet the view that property rights are exclusively governed by national law is increasingly obsolete. This Article develops the thesis that the evolution of international law has reached the

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point where a global right to property should be recognized, not merely as a moral principle but rather as an entitlement which all nations must honor.<sup>1</sup>

Transformative economic and political changes over the last three decades have laid the foundation for establishing a universal right to property. With the end of the Cold War era, China, Russia, and most other socialist states have transitioned to market economies, ending their long-held ideological opposition to property rights. Developing nations have increasingly realized that respecting property rights may both encourage needed foreign investment and help their citizens escape from poverty. The protection of property rights has become an essential component of the globalization of trade, as reflected in a series of international and bilateral treaties. Finally, today two-thirds of all nations are parties to regional human rights treaties that contain the right to property.

This Article explores three independent lines of analysis for recognizing a global right to property that binds all nations, each based on a different source of international law.<sup>2</sup> First, the near-universal ratification of anti-discrimination treaties which arguably recognize the right to property may provide a basis for justifying the right under conventional law. Second, because the domestic law of virtually every nation embraces the right to property, it should be recognized as a general principle of law which has universal application. Finally, because almost all nations recognize the right to property under domestic law and have expressed their belief that the right also exists under international law, it should be viewed as customary law which all nations must follow.

Section I of this Article explores the unsuccessful efforts to negotiate a treaty that would have created a global right to property during the Cold War era and its aftermath. Section II analyzes three bases for recognizing the global right today: (a) conventional law; (b) general principles of law; and (c) customary law. Finally, Section III addresses the future implications of recognizing the global right.

## I. PROPERTY AND SOVEREIGNTY

### A. *Natural Law Dents in the Westphalian Model*

For centuries, scholars have debated whether the right to property is created by the state or arises independently from it as a matter of natural law.<sup>3</sup> The 1648 Peace of Westphalia, which

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<sup>1</sup> A number of scholars have analyzed the scope of the right to property that is contained in four regional human rights treaties. *See, e.g.*, ALI RIZA COBAN, PROTECTION OF PROPERTY RIGHTS WITHIN THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2003); THEO R.G. VAN BANNING, THE HUMAN RIGHT TO PROPERTY (2002). Because those treaties do not bind all nations, they do not create a global right to property. *See infra* text accompanying notes 59-62. This Article is the first scholarship to demonstrate that a general right to property exists under international law.

<sup>2</sup> It has been suggested that a specialized treaty should be adopted in order to create a global right to property. *See, e.g.*, VAN BANNING, *supra* note 1, at 369; Edwin D. Williamson, *U.S.-E.U. Understanding on Helms-Burton: A Missed Opportunity to Fix International Law on Property Rights*, 48 CATH. U. L. REV. 293, 304-12 (1999); *cf.* Christopher K. Odinet, *Towards a Convention for the International Sale of Real Property: Challenges, Commonalities, and Possibilities*, 29 QUINNIPIAC L. REV. 841 (2011) (arguing for a treaty covering real property sales). While a treaty would be helpful in delineating the scope of the global right to property, this Article argues that the right already exists, contrary to the position of these commentators.

<sup>3</sup> *See generally* RICHARD SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA (1951).

ushered in the modern nation state system, signaled the victory of the positivistic approach. Under this view, property rights exist only to the extent that they are recognized by the law of a particular nation.<sup>4</sup>

A fundamental precept of international law is that each nation has sovereignty over its own territory.<sup>5</sup> The logical corollary of this view is that each nation has the right to adopt its own laws regarding the occupancy and use of that territory by private actors, including laws regulating property rights. As one authority summarized, “[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.”<sup>6</sup> Under this approach, sovereignty and property are inextricably intertwined; property rights are created and defined by only national law.<sup>7</sup> Thus, international law traditionally has no impact on property rights except in a few specialized situations.<sup>8</sup>

Despite the predominance of positivism, the theory that a right to property arises from natural law persisted.<sup>9</sup> Thus, John Locke proclaimed that “[t]he Law of Nature stands as an Eternal Rule to all Men, *Legislators* as well as others.”<sup>10</sup> Under this view, states were formed in order to protect pre-existing natural rights, including the right to property. In a sense, this natural law formulation may be viewed as an international right in that it superseded national law and was viewed as a universal standard.

Inspired by Locke and other natural rights theorists, the 1776 Virginia Declaration of Rights proclaimed that all men possessed certain “inherent rights” which, when they “enter into a state of society, they cannot . . . deprive or divest their posterity,” including “the means of acquiring and possessing property.”<sup>11</sup> Declarations adopted by several other American colonies

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<sup>4</sup> As Jeremy Bentham famously stated: “Before laws were made there was no property; take away laws, and property ceases.” JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 69 (Oceana Publications, Inc. 1975) (1802).

<sup>5</sup> 1 OPPENHEIM’S *INTERNATIONAL LAW* 458 (Robert Jennings & Arthur Watts eds., 9<sup>th</sup> ed. 1992) [hereinafter “OPPENHEIM”].

<sup>6</sup> 1 CHARLES HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 650 (2d rev. ed. 1947). See also *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 402(1)(b) (1986) [hereinafter “RESTATEMENT”] (providing that a state has jurisdiction to “prescribe law with respect to . . . the status of . . . interests in things[] present within its territory”); E.A. Harriman, *The Right of Property in International Law*, 6 B.U. L. REV. 103, 104 (1926) (“It is a mere truism . . . to say that the legal right of property is a matter of local law.”).

<sup>7</sup> The concepts of sovereignty and property “are essentially analogous on account of the exclusiveness of enjoyment and disposition which is in law the main formal characteristic of both private property and territorial sovereignty.” HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES IN INTERNATIONAL LAW* 95 (1927).

<sup>8</sup> The principal situations where international law affected property rights involved (a) the expropriation of property from foreign nationals and (b) the destruction of civilian property during wartime. Harriman, *supra* note 6, at 105. See also L. Benjamin Ederington, *Property as a Natural Institution: The Separation of Property from Sovereignty in International Law*, 13 AM. U. INT’L L. REV. 263 (1997) (arguing that international law traditionally protected property rights in three situations).

<sup>9</sup> As Hugo Grotius explained: “Soon after the creation of the world, and a second time after the Flood, God conferred upon the human race a general right over things of a lower nature . . . In consequence, each man could at once take whatever he wished for his own needs, and could consume whatever was capable of being consumed. The enjoyment of this universal right then served the purpose of private ownership . . .” 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 186 (Francis W. Kelsey trans., Clarendon Press 1925) (1625). This “introduction of property ownership . . . preceded all civil law . . .” *Id.* at 295.

<sup>10</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 358 (Peter Haslett ed., student ed. 1988) (3d ed. 1698).

<sup>11</sup> VIRGINIA DECLARATION OF RIGHTS art. I (1776).

followed the Virginia model, expressly endorsing the right to property as natural law.<sup>12</sup> Although the later Declaration of Independence referred to the “pursuit of happiness” as an “unalienable right,” without specifically mentioning property,<sup>13</sup> it seems likely that Thomas Jefferson intended this broader formulation to encompass the right to property.<sup>14</sup>

In turn, these American declarations influenced the development of the 1789 Declaration of the Rights of Man and of the Citizen in France.<sup>15</sup> Article 2 of the Declaration identified “property” as one of four “natural and imprescriptable rights of man.”<sup>16</sup> The content of the right was set forth in Article 17: “Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified.”<sup>17</sup>

### B. *The Universal Declaration of Human Rights*

The concept that a right to property should exist regardless of national law was reborn in the wake of World War II as part of the modern human rights movement.<sup>18</sup> The culmination of this effort was the Universal Declaration of Human Rights (“Universal Declaration”),<sup>19</sup> which was adopted by the U.N. General Assembly in 1948. The use of the term “rights” in this context has the potential to cause confusion, because the Universal Declaration was created as a nonbinding instrument<sup>20</sup> that merely set forth aspirational goals, not legally-enforceable obligations. The distinction that Stephen Holmes and Cass Sunstein draw between “legal rights” and “moral rights” is helpful here.<sup>21</sup> Under their approach, the provisions of the Universal Declaration would be seen as non-enforceable “moral rights.” Because its provisions are “not backed by legal force . . . [they are] . . . toothless by definition[,]” imposing “moral duties on all mankind, not legal obligations . . . .”<sup>22</sup>

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<sup>12</sup> See PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 165-66 (1998).

<sup>13</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1976).

<sup>14</sup> MAIER, *supra* note 12, at 134 (suggesting that Jefferson “meant to say more economically and movingly” what George Mason, the principal drafter of the Virginia Declaration of Rights, “stated with some awkwardness and at considerably greater length”).

<sup>15</sup> DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN (Fr. 1789) [hereinafter “1789 Declaration”].

<sup>16</sup> *Id.* art. 2. See also DECLARATION OF THE RIGHTS OF MAN AND CITIZEN arts. 2, 16, 18, and 19 (Fr. 1793) (discussing the scope of the right to property in detail).

<sup>17</sup> 1789 Declaration, *supra* note 15, at art. 17.

<sup>18</sup> I briefly addressed the subject matter of Sections IB, IC, and ID in John G. Sprankling, *The Emergence of International Property Law*, 90 N.C. L. Rev. 461, 465-68 (2012). The present Article analyzes this material in greater depth to provide the necessary foundation for Sections II and III.

<sup>19</sup> 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 based on an initial draft that “contained the first-generation political and civil rights found in British, French, and American revolutionary declarations of the seventeenth and eighteenth centuries: protections of life, liberty, and property . . . .” OLIVIER DE SCHUTTER, *INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIALS, COMMENTARY* 31 (2010).

<sup>20</sup> INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND 4 (Mashood A. Baderin & Manisuli Ssenyonjo eds. 2010) [hereinafter “SIX DECADES”].

<sup>21</sup> STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXATION* 16-17 (1999).

<sup>22</sup> *Id.* at 17.

Article 17 of the Declaration acknowledged the right to property as a moral right.<sup>23</sup> It provided: “(1) Everyone has the right to own property alone as well as in association with others[]” and “(2) No one shall be arbitrarily deprived of his property.” The first clause recognized the right to property in general terms.<sup>24</sup> The second clause partially defined the content of that right by limiting the ability of any nation to interfere with private property. While a nation could deprive a person of his property, it could not do so in an arbitrary manner. This restriction echoes the Due Process Clause of the U.S. Constitution.

When the Universal Declaration was adopted, it was widely viewed as a preliminary step toward a binding treaty that would transform its moral rights into legal rights.<sup>25</sup> The U.N. Human Rights Commission (“Commission”) later undertook two efforts to convert the right to property in the Universal Declaration into a binding obligation: (1) during negotiations leading up to the 1966 International Covenant on Economic, Social and Cultural Rights (“ICESCR”);<sup>26</sup> and (2) during a study of the issue between 1986 and 1993. Both were unsuccessful.

### C. *The International Covenant on Economic, Social and Cultural Rights*

During the 1950s and 1960s, drafting committees working under the aegis of the Commission negotiated two treaties to implement the Universal Declaration: the ICESCR<sup>27</sup> and the International Covenant on Civil and Political Rights.<sup>28</sup> But when these twin treaties were eventually adopted in 1966, neither contained a right to property.<sup>29</sup> The principal roadblocks that led to this outcome stemmed from two sources: Cold War tensions and decolonization.

First, the Soviet Union and its allies objected to the creation of a global right to property as a matter of ideology.<sup>30</sup> The most intense negotiations occurred between 1951 and 1954, well after the post-war détente between the Soviet bloc and the West had faded. In this atmosphere, Soviet negotiators tended to view Western efforts to include the right to property in the draft ICESCR as a threat to the integrity of the communist system. For example, fearing foreign interference with its economic system, the Soviet Union suggested an amendment that would

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<sup>23</sup> The fact that the property provision of the Universal Declaration was located in its Article 17, just as the property provision of the 1789 Declaration was located in its Section 17, is presumably homage, not a coincidence.

<sup>24</sup> *But see* Martin A. Geer, *Foreigners in Their Own Land: Cultural Land and Transnational Corporations: Emergent International Rights and Wrongs*, 38 VA. J. INT’L L. 331, 372 (1998) (arguing that Article 17 does not recognize a “right to property”).

<sup>25</sup> JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTERPRETATION* 15-20 (1999); *SIX DECADES*, *supra* note 20, at 11.

<sup>26</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 998 U.N.T.S. 3 [hereinafter “ICESCR”].

<sup>27</sup> *Id.*

<sup>28</sup> International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

<sup>29</sup> However, one scholar notes that this omission “can hardly be construed as rejecting the existence in principle of a human right to own property and not be arbitrarily deprived of it.” Louis Henkin, *Introduction, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 21 (Louis Henkin ed., 1981). It is noteworthy that the ICESCR does contain provisions which relate to the right to property. Its Article 11(1) recognizes the right of everyone to “an adequate standard of living for himself and his family, including adequate . . . housing . . . .” ICESCR, *supra* note 26, at art.11(1). In addition, Article 15(1)(c) recognizes the “right of everyone . . . [t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” *Id.* at art. 15(1)(c).

<sup>30</sup> VAN BANNING, *supra* note 1, at 44-45.

define the scope of the “global” right to property by the law of the nation in which the property existed—a position which would have eviscerated the international character of the right.<sup>31</sup> Ultimately, after the drafting committee was unable to reach agreement on the phrasing of the right to property in 1954, the committee suspended its efforts on this point and moved on to consider other topics.<sup>32</sup>

Second, the decades following World War II brought widespread decolonization, as former colonies became independent nations. This process was often accompanied by anti-colonial rhetoric that called for the expropriation of property owned by citizens of the former colonial powers. Under these conditions, new nations were often unwilling to agree to a global right to property because it would constrain their ability to expropriate.<sup>33</sup> U.N. General Assembly Resolution 1803<sup>34</sup> illustrates this mindset. Adopted in 1963 over the objections of most developed nations, it appeared to reject the pre-World War II consensus that a state which expropriated property owned by a foreign national was obligated to pay compensation equal to the fair market value of the property. Instead, the resolution provided that a state had the right to expropriate such property in its national interest and was obligated to pay only “appropriate consideration” as defined by both “the rules in force in the State taking such measures in the exercise of its sovereignty” and by international law.<sup>35</sup> Motivated by this concern, many of these new countries were reluctant to endorse an enforceable global right to property, either during the 1951-54 negotiations or thereafter.

#### D. *The Valencia Rodriguez Report*

Twenty years after the ICESCR was adopted, the question of a global right to property arose again. In 1986, the U.N. General Assembly adopted a resolution asking the Commission to “consider the means whereby and the degree to which the right to own property . . . contributes to the development of individual liberty and initiative . . . .”<sup>36</sup> The preamble to the resolution expressed the conviction that “the right of everyone to own property alone, as well as in association with others, as set forth in article 17 of the Universal Declaration of Human Rights, . . . is of particular significance in fostering widespread enjoyment of other basic human rights . . . .”<sup>37</sup> Four years later, the General Assembly adopted Resolution 45/98, which urged states “to provide, where they have not done so, adequate constitutional and legal provisions to protect the right of everyone to own property alone as well as in association with others and the right not to be arbitrarily deprived of one’s property.”<sup>38</sup>

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<sup>31</sup> U.N. Econ. & Soc. Council, Comm’n on Human Rights, Draft Int’l Covenant on Human Rights & Measures for Implementation: USSR—Amendment to the draft resolution of the United States, U.N. Doc. E/CN.4/614 (May 4, 1951).

<sup>32</sup> U.N. Econ. & Soc. Council, Comm’n on Human Rights, Report of the 10<sup>th</sup> Session, Supp. 7, at 7-9, U.N. Doc. E/CN.4/705 (Apr. 1954).

<sup>33</sup> See LOUIS HENKIN ET AL., HUMAN RIGHTS 217 (2d ed. 2009) (noting that one reason the right to property was omitted from the ICESCR was a lack of consensus on issues relating to expropriation); VAN BANNING, *supra* note 1, at 47 (explaining that “newly independent states felt the need to establish and assert unequivocally their sovereignty over natural resources” through expropriation of foreign property).

<sup>34</sup> G. A. Res. 1803 (XVII), U.N. Doc. A/RES/1803 (XVII) (Dec. 14, 1962).

<sup>35</sup> *Id.* at art. 4.

<sup>36</sup> G.A. Res. 41/132, U.N. Doc. A/RES/41/132 (Dec. 4, 1986).

<sup>37</sup> *Id.*

<sup>38</sup> G.A. Res. 45/98, U.N. Doc. A/RES/45/98 (Dec. 14, 1990).

The Commission selected Luis Valencia Rodriguez, a Venezuelan scholar, to conduct an investigation into the right to property. In his 1993 report, Valencia Rodriguez acknowledged that “[t]he basic human right of the individual to own property and develop it to its full potential may be regarded as a human right and a fundamental freedom.”<sup>39</sup> Yet he did not conclude that a binding right to property existed even in this limited form. Rather, he observed that the right to property had “acquired its mandatory legal character” only to the extent that it was included in certain regional human rights conventions and other specialized treaties examined in the report.<sup>40</sup> Yet, because not all nations were parties to such agreements, he reasoned that it was not yet a “universal right.”<sup>41</sup>

In rejecting the concept of a universal right, Valencia Rodriguez noted that it would be “extremely difficult” to establish a global right to property that would be (1) incorporated into “the national law of all states” and (2) “capable of being given the same weight in domestic courts.”<sup>42</sup> He also expressed concern that further consideration of the right to property by the Commission might interfere with “the effective functioning of other areas of the human rights system,”<sup>43</sup> especially due to the “considerable financial constraints” which affected the Commission at that time.<sup>44</sup> Ultimately, he did not recommend that the Commission take concrete steps to ensure that the right to property was honored at the international level, such as by encouraging the adoption of a multilateral treaty on the subject. However, he did indicate support for developing additional regional human rights conventions that would recognize the right to property “similar to that established under the European Convention on Human Rights and the First Protocol thereto.”<sup>45</sup> Under this approach, the costs of monitoring and enforcing the right to property would presumably be borne by regional human rights entities, not by the Commission or other U.N. bodies.

Underlying the Valencia Rodriguez study was the assumption that a binding right to property did not exist under international law. Indeed, the point of his study was to ascertain whether it would be feasible and desirable to recognize such a right in the future, presumably through a multilateral treaty.

## II. RECOGNIZING THE GLOBAL RIGHT TO PROPERTY

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<sup>39</sup> Independent Expert Report, *The Right of Everyone to Own Property Alone as Well as in Association with Others* 90, U.N. Comm’n on Human Rights, U.N. Doc. E/CN.4/1994/19 (Nov. 25, 1993) (by Luis Valencia Rodriguez) [hereinafter “Valencia Rodriguez report”].

<sup>40</sup> *Id.* at 38.

<sup>41</sup> *Id.* at 22.

<sup>42</sup> *Id.* at 90. However, it is not clear why Valencia Rodriguez believed that an international right to property should be required to satisfy these stringent criteria. Most of the provisions of the ICESCR are not incorporated into national laws, but are still considered to be international law. Similarly, while it might ultimately be desirable if the global right to property were enforced in domestic courts, this level of enforcement is not essential to the existence of the right. Recognition of the global right will ensure that it is respected in proceedings before international judicial and arbitral tribunals and also employed in less formal methods of international dispute resolution, whether or not it is also enforced in domestic courts. See *infra* text accompanying notes 191-93.

<sup>43</sup> *Id.* at 93.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

### A. Property in the Post-Cold War Era

The thesis of this Article is that a global right to property does exist, not simply as a matter of abstract morality but rather as a binding obligation. The contrary conclusion in the Valencia Rodriguez report may well have been accurate when it was reached in 1993, given international conditions at that time and the limited scope of the study. But, even assuming this *arguendo*, four factors compel re-examination of the question today.

First, with the collapse of the Soviet bloc, the development of new democracies, and the accelerating globalization of trade, international attitudes toward property rights have shifted dramatically. The revised constitutions of former Soviet bloc members generally guarantee that their citizens have a right to property.<sup>46</sup> Indeed, their modern economic systems are largely premised on the existence of private property. When the Valencia Rodriguez report was prepared, this transformation was underway but not yet completed.<sup>47</sup>

Second, as developing countries seek to both attract foreign investment and enhance their domestic economies, they increasingly understand the value of protecting property rights. In recent decades, over 2,400 bilateral investment treaties have been implemented between investor nations and developing nations;<sup>48</sup> these treaties routinely include provisions which protect against the expropriation of private property.<sup>49</sup> The rapid expansion of the World Trade Organization—and particularly the enhanced protection of intellectual property rights embodied in the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>50</sup>—reflect heightened international support for the protection of property rights.

Third, the development of international law has accelerated since the Valencia Rodriguez study was completed. For example, the report noted that the “degree of ratification and accession to universal conventions containing [the right to property] does not allow us to state that we are dealing with a universally recognized right.”<sup>51</sup> But, at the same time, it stressed that “the level of recognition is steadily increasing, approaching universality.”<sup>52</sup> In the last two decades, this trend has continued to the point where an argument can be made that the global right to property exists as a matter of treaty law.

Finally, because the Valencia Rodriguez study was conducted under the auspices of the U.N. Commission on Human Rights, it examined the right to property as a human rights issue. Thus, while it discussed the extent to which such a right could be found in human rights treaties,

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<sup>46</sup> John G. Sprankling, *The Right to Property in National Constitutions* (Feb. 27, 2013) (unpublished manuscript) (on file with author) [hereinafter “National Constitutions”].

<sup>47</sup> The Valencia Rodriguez report acknowledged that this transformation was occurring. *See, e.g.*, Valencia Rodriguez report, *supra* note 39, at 21-22, 40-41.

<sup>48</sup> ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 554 (2d ed. 2008).

<sup>49</sup> *Id.* at 584.

<sup>50</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299.

<sup>51</sup> Valencia Rodriguez report, *supra* note 39, at 22.

<sup>52</sup> *Id.*

it did not explore whether the right could be viewed as a general principle of law or as customary international law.<sup>53</sup>

It is generally-accepted that Article 38(b) of the Statute of the International Court of Justice<sup>54</sup> sets forth the authoritative sources of international law.<sup>55</sup> They include: (1) “international conventions” or treaties; (2) the “general principles of law recognized by civilized nations”; and (3) “international custom, as evidence of a general practice accepted as law.”<sup>56</sup> Each of these sources potentially provides a separate basis for recognizing the global right to property.

## B. *Treaties*

Today the majority of the world’s nations are parties to regional human rights treaties which contain a right to property. While this level of recognition is not yet universal, it must be stressed that a principle of international law may exist without unanimous agreement. Indeed, only a handful of international law doctrines enjoy universal acceptance. This section first evaluates the extent to which the human rights treaties endorse the right to property. Because many nations are not parties to such a treaty, it then considers whether the right to property is implicit in anti-discrimination treaties that have been ratified by virtually all nations.

### 1. Human Rights Treaties

It is remarkable that 132 nations—more than two-thirds of the 193 member states of the United Nations—are now parties to human rights treaties which expressly recognize a right to property.<sup>57</sup> These treaties are the Convention for the Protection of Human Rights and

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<sup>53</sup> The only reference to general principles of law in the Valencia Rodriguez report is found in the section on expropriation; it concludes that the obligation to pay compensation when a state takes property owned by a foreign national is required by “general principles of international law.” *Id.* at 75. Although the report states vaguely that the Universal Declaration set forth “universal standards which became rules of customary international law,” it does not identify which standards became customary law or state that the right to property was included in this group. *Id.* at 38. Indeed, two paragraphs later the report states that the right to property “acquired its mandatory legal character” only to the extent that it was “included in treaties analyzed above.” *Id.* Thus, the report does not appear to claim that the right to property is customary international law.

<sup>54</sup> Statute of the International Court of Justice art. 38(b).

<sup>55</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-5 (7<sup>th</sup> ed. 2008); OPPENHEIM, *supra* note 5, at 24-25.

<sup>56</sup> Statute of the International Court of Justice art. 38(b).

<sup>57</sup> This tabulation is based on the following. Fifty-three nations have ratified the African Charter. African Commission on Human and Peoples’ Rights, Ratification Table, *available at* <http://www.achpr.org/instruments/achpr/ratification/> (last visited Feb. 27, 2013). Twenty-three nations have ratified the American Convention on Human Rights. Organization of American States, American Convention on Human Rights, Signatories and Ratifications, *available at* [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm) (last visited Feb. 27, 2013). Eleven nations have ratified the Arab Charter. Jean-Bernard Marie, *International Instruments Relating to Human Rights: Classification and Status of Ratifications*, 32 HUM. RTS. L.J. 197, 200 (2012). Forty-five nations have ratified the First Protocol to the European Convention. Council of Europe, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Status, *available at* <http://www.conventions.coe/int/Treaty/Commun/ChercheSig.asp?NT=009&CM=8&DF=28/02/2013&CL=ENG> (last visited Feb. 27, 2013).

Fundamental Freedoms (“European Convention”),<sup>58</sup> the American Convention on Human Rights (“American Convention”),<sup>59</sup> the African Charter on Human and Peoples’ Rights (“African Charter”),<sup>60</sup> and the Arab Charter on Human Rights (“Arab Charter”).<sup>61</sup> Thus, a right to property is a reality in most of the world based on conventional law.<sup>62</sup>

Despite contentious negotiations, the right to property was initially omitted from the European Convention when it was adopted in 1950.<sup>63</sup> In part, this omission reflected economic concerns; some Western European states anticipated that the nationalization of key industries such as banks, railways, and utilities might be desirable.<sup>64</sup> Another factor was the political tension resulting from Soviet influence over Eastern European states.<sup>65</sup> The right to property was later added to the European Convention as Article 1 of Protocol 1.<sup>66</sup> It provides, in part, that “[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions.”<sup>67</sup> Although the term “possessions” might be viewed as a narrower category than “property,” the European Court of Human Rights has subsequently interpreted this article as protecting all types of property.<sup>68</sup>

Over the last three decades, the movement toward recognizing property as a human right has gained momentum. In succession, the right was enshrined in the American Convention which entered into force in 1978 and in the African Charter which took effect in 1986. The American Convention expressed the basic right in clear language: “Everyone has the right to the use and enjoyment of his property.”<sup>69</sup> The formulation adopted in the African Charter was equally straightforward: “The right to property shall be guaranteed.”<sup>70</sup> Finally, the Arab

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<sup>58</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, protocol 1, art. 1, Mar. 20, 1952, 213 U.N.T.S. 262 [hereinafter “Protocol 1”].

<sup>59</sup> American Convention on Human Rights art. 21, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter “American Convention”].

<sup>60</sup> African Charter on Human and Peoples’ Rights art. 14, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter “African Charter”].

<sup>61</sup> Arab Charter on Human Rights art. 25, Sept. 15, 1994, *reprinted in* 12 INT’L HUM. RTS. REP. 893 (2005) [hereinafter “Arab Charter”].

<sup>62</sup> In addition, ten members of the Association of Southeast Asian Nations have (a) adopted a non-binding declaration which recognizes the right to property and (b) announced their intention to enter into a binding treaty which will include this right. *See infra* text accompanying notes 72-73. It should be noted that ten other nations, while not parties to any of the regional human rights conventions, are signatories to the non-binding Charter of Paris for a New Europe, which affirms that “every individual has the right . . . to own property alone or in association . . .” Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 193, 194. They are: Belarus, Canada, Kazakhstan, Kyrgyzstan, Macedonia, Switzerland, Tajikistan, Turkmenistan, the United States, and Uzbekistan. *Id.* Thus, in addition to the 132 nations that are currently members to a binding treaty recognizing the right to property, an additional twenty nations are parties to non-binding regional instruments that recognize the right.

<sup>63</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter “European Convention”].

<sup>64</sup> VAN BANNING, *supra* note 1, at 64.

<sup>65</sup> *Id.*

<sup>66</sup> Protocol 1, *supra* note 58.

<sup>67</sup> *Id.*

<sup>68</sup> *See, e.g.,* Marckx v. Belgium [1979] Eur. Ct. H.R. 6833/74 at ¶ 63 (observing that “Article 1 is in substance guaranteeing the right to property”).

<sup>69</sup> American Convention, *supra* note 59, at art. 21(1).

<sup>70</sup> African Charter, *supra* note 60, at art. 14.

Charter, which entered into force in 2008, provides in part: “Everyone has a guaranteed right to own private property . . . .”<sup>71</sup>

Most recently, the ten member states of the Association of Southeast Asian Nations adopted the ASEAN Human Rights Declaration,<sup>72</sup> a nonbinding instrument that recognizes the right to property. Its Article 17 echoes the right to property set forth in the Universal Declaration: “Every person has the right to own, use, dispose of and give that person’s lawfully acquired possessions alone or in association with others. No person shall be arbitrarily deprived of such property.”<sup>73</sup> The ASEAN nations intend to develop a binding treaty that will guarantee the rights in this declaration, including the right to property.

In short, there is a clear trend toward including a global right to property in regional human rights treaties. It is reasonable to assume that this momentum will continue in coming decades, as more nations become members of such treaties.

It is logical at this point to consider whether characterizing the right to property as a “human right” rather than simply as a “right” significantly affects its nature or content. At one level, framing the right as a human right suggests that it is fundamental in nature. As the Restatement (Third) of the Foreign Relations Law of the United States explains, the term “human rights refers to freedoms, immunities, and benefits which, according to widely accepted contemporary values, every human being should enjoy in the society in which he or she lives.”<sup>74</sup> The implication of this view is that human rights “occupy a hierarchical superior position among the norms of international law,”<sup>75</sup> and thereby prevail over other norms. This approach applies neatly to human rights which are recognized as *jus cogens*, such as the absolute right to be free from genocide or torture. But it must be questioned whether this characterization applies as readily to socio-economic norms, such as the right to property, which are by definition relative in nature.<sup>76</sup>

A related issue is whether the protection afforded by a human right to property applies only to natural persons or whether it extends as well to legal persons such as corporations and other entities. One component of the basic definition of a “human right” is that it is a right held by a human being, not by an entity. For example, Article 1 of the Universal Declaration suggests that the instrument applies only to “human beings.”<sup>77</sup> The scope of the nonbinding right to property established in Article 17, then, would seem only to protect natural persons. However, most of the regional human rights treaties cover legal persons as well as natural persons.<sup>78</sup> In

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<sup>71</sup> Arab Charter, *supra* note 61, at art. 31.

<sup>72</sup> ASEAN Human Rights Declaration, Nov. 18, 2012, *reprinted in* 32 HUM. RTS. L.J. 219 (2012).

<sup>73</sup> *Id.* at art. 17.

<sup>74</sup> RESTATEMENT, *supra* note 6, at § 701 cmt. a.

<sup>75</sup> DE SCHUTTER, *supra* note 19, at 60.

<sup>76</sup> *See infra* text accompanying notes 181-84. *But see* The Sawhoyamaya Indigenous Community v. Paraguay, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 140, 141 (Mar. 29, 2006) (suggesting that the right to property held by indigenous people supersedes a bilateral investment treaty).

<sup>77</sup> Universal Declaration, *supra* note 19, at art. 1.

<sup>78</sup> *See* European Convention, *supra* note 63, at art. 25; American Convention, *supra* note 59, at art. 44; African Charter, *supra* note 60, at art. 55. However, the Arab Charter is not clear on this question. Its Article 25 guarantees the right to property of “every citizen,” which seemingly would include both individuals and entities. Arab Charter, *supra* note 61, at art. 25. On the other hand, its Article 2 undertakes to ensure that each “individual” is able to

addition, the right recognized by these treaties appears to extend to all forms of property, including family or household property and income-generating property such as businesses, farms and industrial facilities—not simply to the type of property which an individual would use in daily life.<sup>79</sup> Accordingly, the right to property as recognized by the human rights treaties has a broad scope.

## 2. Anti-Discrimination Treaties

Because many nations are not parties to the regional human rights treaties, these treaties are insufficient to establish a global right to property as conventional law. Thus, it is important to determine whether the right to property is included in other treaties which they have ratified. One argument is that the global right to property is implicit in certain treaties which prohibit discrimination against vulnerable groups—treaties that have been ratified by almost all nations of the world. Under this view, each of these treaties inherently assumes that the right to property exists under international law, but that discrimination at the national level prevents the particular group from enjoying this right on an equal basis with other citizens. Thus, it is necessary to redress this imbalance by prohibiting discrimination so that the underlying global right to property can be realized.

For example, 187 nations<sup>80</sup>—ninety-seven percent of the world’s countries—are parties to the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”).<sup>81</sup> Its Article 16 requires member states to “ensure, on a basis of equality of men and women: . . . (h) [t]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.”<sup>82</sup>

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“enjoy the rights and freedoms” specified in the Charter without discrimination; this may imply that only natural persons are entitled to protection. *Id.* at art. 2.

<sup>79</sup> The American Convention and the African Charter both protect the right to “property” as a general matter, without imposing any limitations on the nature of the property protected. American Convention, *supra* note 59, at art. 21(1); African Charter, *supra* note 60, at art. 14. *See also* Mouvement Ivoirien de Droits de l’Homme/Cote d’Ivoire, Af. Comm’n H.P. Rts. 262/02 (May 2008) (holding that the seizure of rural land owned by 40 companies violated the right to property in African Charter). The Arab Charter guarantees the right to “private ownership,” again without any limitations on the type of property protected. Arab Charter, *supra* note 61, at art. 25. Finally, the reference to protection of “possessions” in the European Convention extends to all forms of property. Protocol 1, *supra* note 58; COBAN, *supra* note 1, at 144-162 (analyzing decisions by the European Court of Human Rights interpreting the right to property). In contrast, the first regional human rights instrument, the 1948 American Declaration of the Rights and Duties of Man, covered only such property as was needed “for decent living and help[ed] to maintain the dignity of the individual and the home.” American Declaration of the Rights and Duties of Man art. XXIII, O.A.S. Res. XXX (May 2, 1948).

<sup>80</sup> U.N. TREATY DATABASE, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-8&chapter=4&lang=en) (last visited Feb. 20, 2013).

<sup>81</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 14 [hereinafter “CEDAW”].

<sup>82</sup> *Id.* at art. 16(1)(h).

Similarly, the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”),<sup>83</sup> ratified by 175 nations,<sup>84</sup> obligates member states “to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the exercise of the following rights: . . . (v) [t]he right to own property alone as well as in association with others.”<sup>85</sup>

The right to property is also recognized in the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (“CPRMW”),<sup>86</sup> which has been ratified by forty-six nations.<sup>87</sup> It provides that “[n]o migrant worker or member of his or her family shall be arbitrarily deprived of property, whether owned individually or in association with others.”<sup>88</sup>

Most recently, the 2006 Convention on the Rights of Persons with Disabilities (“CRPD”),<sup>89</sup> ratified by 127 nations,<sup>90</sup> requires member states to “take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property . . . .”<sup>91</sup>

The implied recognition argument posits that CEDAW, CERD, CPRMW, and CRPD presuppose the existence of an underlying international right to property which is enjoyed generally by most people, but that discrimination sometimes prevents women, racial minorities, migrant workers, and disabled persons from fully exercising this right. As the argument goes, these treaties do not create a global right to property, but rather implicitly acknowledge that such a right exists as a matter of background law. By prohibiting discrimination against vulnerable groups, the treaties allow everyone to fully enjoy this fundamental right on equal terms.

Support for the position that these treaties impliedly recognize the global right to property is found in resolutions adopted by the U.N. General Assembly. One example is Resolution 41/132, adopted in 1986, which invited the U.N. Commission on Human Rights to “resume consideration of the right of everyone to own property alone as well as in association with others.”<sup>92</sup> The preamble to the resolution states that “the right of everyone to own property alone

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<sup>83</sup> International Convention on the Elimination of All Forms of Racial Discrimination, May 7, 1966, 660 U.N.T.S. 195 [hereinafter “CERD”].

<sup>84</sup> U.N. TREATY DATABASE, CERD, *available at* [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en) (last visited Feb. 20, 2013).

<sup>85</sup> *Id.* at art. 5(v).

<sup>86</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter “CPRMW”].

<sup>87</sup> U.N. TREATY DATABASE, CPRMW, *available at* [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-13&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en) (last visited Feb. 20, 2013).

<sup>88</sup> *Id.* at art. 15.

<sup>89</sup> Convention on the Rights of Persons with Disabilities, May 30, 2007, 2515 U.N.T.S. 3 [hereinafter “CRPD”].

<sup>90</sup> U.N. Treaty Database, CRPD, *available at* [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en) (last visited Feb. 20, 2013).

<sup>91</sup> CRPD, *supra* note 89, at art. 12(5).

<sup>92</sup> G.A. Res. 41/132 ¶ 10, U.N. Doc. A/RES/41/132 (Dec. 4, 1986).

as well as in association with others,” as set forth in Article 17 of the Universal Declaration, was “reaffirmed” by Article 16 of CEDAW. This language seemingly acknowledges that the nonbinding right to property in the Universal Declaration was incorporated into CEDAW, a binding treaty, and thus imposes an obligation on all 187 member nations to respect that right. It is a well-settled principle that a subsequent agreement between the parties regarding the interpretation of a treaty may be taken into account in determining its meaning.<sup>93</sup> Because Resolution 41/132 was approved by a vote of 109 nations to none, it might be viewed a subsequent agreement which interprets the meaning of CEDAW.<sup>94</sup> Four years later, Resolution 45/98 struck the same theme, repeating that the right to property contained in Article 17 was “reaffirmed” by CEDAW.<sup>95</sup>

In his 1993 report, Valencia Rodriquez implied that the global right to property was “incorporated in universal instruments” such as CEDAW, CERD, and CPRMW.<sup>96</sup> Yet the report concluded that the degree of ratification of such treaties at that time did not justify treating the right to property as a “universal right.”<sup>97</sup> Today, twenty years later, the degree of ratification is substantially higher. As noted above, 187 members of the United Nations have ratified CEDAW—every member except Iran, Palau, Somalia, Sudan, South Sudan, Tonga, and the United States. However, Iran, Somalia, Sudan, Tonga, and the United States have ratified CERD,<sup>98</sup> which also protects the right to property. Only two U.N. member states—Palau and the newly independent nation of South Sudan—are not parties to a treaty which arguably incorporates the global right to property. Thus, if the implied recognition approach is justifiable, it is fair to say that today the right to property is almost universally recognized in conventional law.

But there are several bases for questioning this approach. First, no provision in these treaties expressly recognizes a general right to property. Consistent with the principle that a treaty is to be interpreted “in the light of its object and purpose,”<sup>99</sup> the dominant theme in CERD, CEDAW, and CRPD may simply be to protect vulnerable groups against discrimination in the exercise of rights that already exist under domestic law, not to impose new rights which a nation does not recognize. Under this interpretation, for example, if Nation A prohibited private property altogether, this law would not discriminate against the vulnerable groups protected by these treaties because the nation would be according the same treatment to all of its nationals. Thus, an argument can be made that the property-related clauses in the treaties simply mean that (a) if a state chooses to allow property rights as a matter of domestic law, then (b) it may not discriminate against members of these protected groups in their enjoyment of those rights. In contrast, the phrasing of the property provision in the CPRMW seems to guarantee that migrant

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<sup>93</sup> Vienna Convention on the Law of Treaties art. 31(3)(a), May 23, 1965, 1155 U.N.T.S. 331 [hereinafter “Vienna Convention”].

<sup>94</sup> U.N. BIBLIO. INFO. SYST., A/RES/41/132, *available at* <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=HB6251K582145.481285&menu=search> (last visited Mar. 1, 2013).

<sup>95</sup> G.A. Res. 45/98, U.N. Doc. A/RES/45/98 (Dec. 14, 1990).

<sup>96</sup> Valencia Rodriquez report, *supra* note 39, at 13, 14, 22.

<sup>97</sup> *Id.*

<sup>98</sup> See U.N. TREATY DATABASE, CERD, *supra* note 84.

<sup>99</sup> Vienna Convention, *supra* note 93, at art. 31(1).

workers and their families have a right to property under international law, regardless of domestic law. Yet CPRMW has not been widely ratified.

Second, the circumstances surrounding the adoption of these treaties also undercut the implied recognition approach. When the meaning of a treaty is “ambiguous or obscure,” supplementary means such as the “circumstances of its conclusion” may be considered to help determine its meaning.<sup>100</sup> CERD and CEDAW were adopted in 1966 and 1979, respectively, years before the collapse of the Soviet bloc. During this era the Soviet Union and its allies generally continued to oppose private property rights for ideological reasons. It is difficult to believe that these nations would have ratified these treaties if any reasonable argument could have been made that they were thereby acknowledging the existence of a global right to property. Even as late as 1986, forty-one nations abstained from voting on General Assembly Resolution 41/132, which endorsed the view that CEDAW “reaffirmed” the right to property in the Universal Declaration.<sup>101</sup> Yet the adoption of CRPD in 2006—long after the disintegration of the Soviet bloc—appears to counterbalance this point, and thus support the implied recognition theory. It is significant that CRPD has been ratified by China (2008), Cuba (2007), Russia (2012), and twenty nations which were formerly part of the Soviet bloc (2007-12).<sup>102</sup>

A final challenge is that the relevant General Assembly resolutions may be viewed as internally inconsistent as to whether the global right to property exists. As noted above, the text of Resolutions 41/132 and 45/98 stated that CEDAW “reaffirms” the right to property in Article 17 of the Universal Declaration, which supports the implied recognition theory. However, Resolution 45/98 simultaneously urges all nations to “provide, where they have not done so, adequate constitutional and legal provisions to protect the right of everyone to own property alone as well as in association with others and the right not to be arbitrarily deprived of one’s property.”<sup>103</sup> Similarly, Resolution 43/124 calls on states to ensure that “their national legislation with regard to all forms of property shall preclude any impairment of the enjoyment of human rights and fundamental freedoms . . . .”<sup>104</sup> These provisions might be read either as suggesting that (a) domestic legislation is required to create a right to property because the right is not recognized by international law or (b) domestic legislation is an appropriate method to implement the right to property which is recognized by international law.

### 3. Conclusion

Conventional law provides limited support for the existence of a global right to property. Although the right to property is expressly recognized in the regional human rights treaties, about one-third of the world’s nations have not ratified them. An argument can be made that the global right to property is implied in anti-discrimination conventions which have been ratified by

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<sup>100</sup> *Id.* at art. 32(a).

<sup>101</sup> U.N. BIBLIO. INFO. SYST., *supra* note 94. It is notable that the list of abstaining nations included China, Cuba, the USSR, Vietnam, and nine Eastern European nations in the Soviet bloc.

<sup>102</sup> U.N. Treaty Database, CRPD, *supra* note 90. The former Soviet bloc nations which have ratified CRPD are Albania, Azerbaijan, Bosnia & Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Macedonia, Montenegro, Poland, Romania, Serbia, Slovakia, Slovenia, Turkmenistan, and the Ukraine. *Id.*

<sup>103</sup> G.A. Res. 45/98 art. 4, U.N. Doc. A/RES/45/98 (Dec. 14, 1990).

<sup>104</sup> G.A. Res. 43/124 art. 4, U.N. Doc. A/RES/43/124 (Dec. 8, 1988).

virtually every nation. But, at a minimum, the strength of the implied recognition argument is unclear. Accordingly, it is appropriate to consider whether the global right to property can be established through either general principles of law or customary law, both sources of international law which bind all nations.

### C. General Principles of Law

The right to property as a general matter is almost universally protected by national law. Ninety-five percent of the 193 states which are members of the United Nations guarantee the right to property,<sup>105</sup> most commonly by language embedded in the national constitution.<sup>106</sup> The right is typically contained in the section of the constitution which sets forth the “basic rights,” “fundamental rights,” or “human rights” which are recognized by that nation. The near-unanimous recognition of the right to property qualifies it as a general principle of law at the international level which will bind all nations—including the few that do not recognize a domestic right to property.<sup>107</sup> This approach would extend the global right to nations which are not parties to regional human right treaties, avoiding the need to rely on the implied recognition theory. However, perhaps because international tribunals have been cautious about utilizing general principles, to date there has been no scholarly analysis about using this approach to establish a global right to property.<sup>108</sup>

#### 1. General Principles as a Source of International Law

It is uniformly accepted that the “general principles of law recognized by civilized nations” are a source of international law.<sup>109</sup> As one scholar notes, “[t]he legal principles which

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<sup>105</sup> The precise scope of the right to property will presumably vary from nation to nation, both in terms of the content of the right and the items which are subject to the right. The point is that these nations do recognize the right to property as a general matter.

<sup>106</sup> National Constitutions, *supra* note 46. Cuba, North Korea, Venezuela, and Zimbabwe are the principal exceptions. The constitutions of Cuba and North Korea contain only narrow rights to property. The Cuban constitution protects personal savings from work, dwellings, other “goods and objects which serve to satisfy the material and cultural needs of the person,” and ownership of land by small farmers. CONST. OF CUBA art. 19, 21. Similarly, the North Korean constitution covers property used “for the personal and consumption purposes of citizens,” which includes income from “garden plot farming . . . [and] other legal economic activities.” CONST. OF NORTH KOREA art. 24. In contrast, the constitutions of Venezuela and Zimbabwe both contain a broad right to property, but substantially undercut that right by allowing the expropriation of property with little or no compensation under certain circumstances. CONST. OF VENEZUELA art. 115, 116; CONST. OF ZIMBABWE art. 71, 72. *See also* A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES: A COMPARATIVE ANALYSIS (1999) (analyzing property clauses from eighty-five national constitutions).

<sup>107</sup> *Cf.* RESTATEMENT, *supra* note 6, at § 701 n. 1 (noting “a willingness to conclude that prohibitions [on interference with human rights] common to the constitutions or laws of many states are general principles that have been absorbed into international law”).

<sup>108</sup> *But see* Brice M. Claggett, *The Controversy Over Title III of the Helms-Burton Act: Who Is Breaking International Law—The United States or the States that Have Made Themselves Co-conspirators with Cuba in its Unlawful Confiscations?*, 30 GEO. WASH. J. INT’L L. & ECON. 271, 289 (1997) (suggesting that it “may be possible to conclude that the duty of a state not to confiscate its citizens’ property without just compensation” is a general principle); Natalie Hevener & Steven Mosher, *General Principles of Law and the U.N. Covenant on Civil and Political Rights*, 27 INT’L & COMP. L.Q. 596, 609, 612 (1978) (arguing that Article 17(1) of the International Covenant on Civil and Political Rights codifies the general principle of the right to inviolability of the home).

<sup>109</sup> The modern view is that a “civilized nation” in this context simply refers to a state with a well-developed legal system. All nations that are members of the United Nations are presumed to be “civilized” nations. M. Cherif

find a place in all or most of the various national systems of law naturally commend themselves to states for application in the international legal system, as being almost necessarily inherent in any system within the experience of states.”<sup>110</sup> These principles may be established through comparative law research. The goal is to identify a core principle which is shared by the “major legal systems of the world,” even if it is not necessarily utilized by every nation.<sup>111</sup> Once established, a general principle of law is binding on all nations.

Despite the predictions of some scholars that general principles of law would substantially expand the corpus of international law,<sup>112</sup> tribunals have generally been reluctant to use them.<sup>113</sup> Thus, it is appropriate to consider whether the reasons for this reluctance apply to the right to property.

One explanation for the limited use of general principles is that international law traditionally regulated only interactions among state actors, where principles of domestic law had little relevance.<sup>114</sup> Yet the scope of international disputes has expanded in recent decades to new subject areas where little or no international law exists, often involving the relationship between a state actor and a private actor.<sup>115</sup> It has become necessary to utilize new sources of law in order to accommodate this expansion.<sup>116</sup> Accordingly, for example, arbitral tribunals have increasingly utilized general principles derived from domestic contract law in resolving investment disputes.<sup>117</sup>

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Bassiouni, *A Functional Approach to “General Principles of International Law,”* 11 MICH. J. INT’L L. 768, 768 (1990).

<sup>110</sup> OPPENHEIM, *supra* note 5, at 36.

<sup>111</sup> Wolfgang Friedman, *The Uses of “General Principles” in the Development of Modern International Law*, 57 AM. J. INT’L L. 279, 284 (1963); *see also* H.C. GUTTERIDGE, *COMPARATIVE LAW* 65 (2d ed. 1946) (noting that the principle must be “recognized in substance by all the main systems of law”); Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 535 (1993) (noting that the principle must be shared by “the principal domestic legal systems”).

<sup>112</sup> *See, e.g.*, Friedmann, *supra* note 111, at 279 (noting that “[i]t is to the general principles of law . . . that we must increasingly turn for the building and evolution of new branches of international law, such as international administrative law, international criminal law, or international contract law”).

<sup>113</sup> 1 RUDOLPH SCHLESINGER, *FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS* 8 (1968) (finding “virtual unanimity” among scholars that general principles have not “been a truly significant factor in the jurisprudence of international courts”); BROWNLIE, *supra* note 55, at 17 (noting that the International Court of Justice has used general principles “sparingly”).

<sup>114</sup> *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).

<sup>115</sup> *See, e.g.*, Lord McNair, *The General Principles of Law Recognized by Civilized Nations*, 3 BRIT. Y.B. INT’L L. 1, 1-4 (1957) (discussing the need for new principles to govern investment disputes between states and private investors).

<sup>116</sup> Thus, “reliance on general principles of law has played an important part in the provision of legal rules in those areas which . . . do not fall within the traditional scope of international law, such as . . . transactions of states (particularly in their dealings with private corporations) on essentially private law matters.” OPPENHEIM, *supra* note 5, at 39. *See also* OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 49 (1991) (noting that general principles of law “have been significant in allowing international law to expand into new areas of interstate transactions and especially into activities affecting the relations of States with non-State entities (such as business corporations) and with individuals”).

<sup>117</sup> *See, e.g.*, John R. Crook, *Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience*, 83 AM. J. INT’L L. 278 (1989) (discussing the use of general principles of contract law in resolving claims before the tribunal); *see also* RESTATEMENT, *supra* note 6, at part III intro. note (observing that the “international law of international agreements, indeed, is derived from general principles common to the contract

A second objection is that the use of general principles is inconsistent with the axiom that the international system is premised on state consent.<sup>118</sup> Yet general principles, by definition, reflect core legal concepts which are shared by the major legal systems of the world; individual nations have effectively consented to these principles by adopting them into their domestic laws. Thus, the use of such principles cannot cause surprise or inequity, particularly in a dispute which falls outside of the traditional areas of international law, such as a property dispute between a nation and a foreign corporation.

A third concern is that allowing judges to rely on general principles would permit them to exercise subjective judgment unconstrained by the relatively clear limits of conventional and customary international law, thus becoming “a mere mask for capricious law-making by judicial fiat.”<sup>119</sup> At bottom, this concern is about methodology. Admittedly, tribunals which use general principles sometimes appear to assume that a particular concept is found in the domestic law of most or all nations, with little or no analysis of comparative law.<sup>120</sup> But this potential problem has no application to the right to property which is almost universally recognized in domestic law, as discussed above.<sup>121</sup>

Finally, there is widespread scholarly disagreement about how specific a general principle of law may be. Most authorities agree that general principles connote fundamental concepts, rather than technical rules. Thus, Hersch Lauterpacht viewed them as “obvious maxims of jurisprudence of a general and fundamental character,”<sup>122</sup> while Bin Cheng characterized them as “cardinal principles of the legal system.”<sup>123</sup> Yet other scholars suggest that even a narrow rule could be viewed as a general principle of law.<sup>124</sup> Because this Article advocates the recognition of the right to property in broad terms, there is no danger that it would create a general principle which is unduly specific.

## 2. The Right to Property in Domestic Law

While the precise formulation of the right varies somewhat, almost every nation guarantees the right of natural and legal persons to own property as a general matter, without any

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laws of state legal systems . . . .”); LAUTERPACHT, *supra* note 7, at viii (noting that general principles of law used in international arbitration “are for the most part identical with generally recognized principles of private law”).

<sup>118</sup> Bassiouni, *supra* note 109, at 785-86.

<sup>119</sup> SCHLESINGER, *supra* note 113, at 11; *see also* Bassiouni, *supra* note 109, at 779.

<sup>120</sup> *See, e.g.*, Crook, *supra* note 117.

<sup>121</sup> *See* National Constitutions, *supra* note 46.

<sup>122</sup> 1 INTERNATIONAL LAW BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 69, 74 (E. Lauterpacht ed., 1970).

<sup>123</sup> *The Meaning and Scope of Article 38(1)(c) of the Statute of the International Court of Justice*, 38 GROTIUS SOCIETY TRANSACTIONS FOR THE YEAR 1952 125, 132 (1953) (discussion of Bin Cheng).

<sup>124</sup> SCHLESINGER, *supra* note 113, at 8 (suggesting that a general principle of law could be “broad or narrow”); F.A. Mann, *Reflections on a Commercial Law of Nations*, 33 BRIT. Y.B. INT’L L. 20, 36 (1957) (observing that a general principle of law could be a “rule . . . of a technical character”).

limitation on the nature of that property.<sup>125</sup> Many of these provisions echo Article 17(1) of the Universal Declaration, even if phrased differently.<sup>126</sup> Sample clauses include:

*Angola:* Everyone shall be guaranteed the right to private property and its transmission under the terms of the Constitution and the law. The state shall respect the property and any other rights in rem of private individuals, corporate bodies and local communities . . . .<sup>127</sup>

*Argentina:* All inhabitants of the Nation are entitled to the following rights: . . . to make, use and dispose of their property . . . . Property may not be violated and no inhabitant of the Nation can be deprived of it except by virtue of a sentence based on law . . . .<sup>128</sup>

*Azerbaijan:* Everyone has the right to own property. No type of property shall be granted superiority. Ownership rights, including the rights for private owners, are protected by law.<sup>129</sup>

Most of these provisions go well beyond merely recognizing the right as an abstract matter and specifically address one or more of the following topics: (1) the content of the right; (2) limitations on the state's ability to regulate property; and (3) limitations on the state's ability to deprive citizens of property.<sup>130</sup>

It is instructive to compare the overwhelming acceptance of the right to property today with the situation which Valencia Rodriguez described in his report two decades ago. Rather than conducting independent research, he relied on states to voluntarily submit information on the extent to which they recognized a right to property. Many states did not respond to the request for information, and diplomatic concerns presumably limited the scope of further inquiry. As a result, the report identified only thirty-five nations where "the basic laws and other legislation...recognize[] the right to own property as both a legal institution and a basic right."<sup>131</sup> From this information and other sources he was able to conclude that "the majority of states have declared their commitment to the principle of full recognition and protection of all forms of property, including private property."<sup>132</sup>

Yet today national recognition of the right to property has moved from a majority view to an almost universal norm. The key to understanding this shift concerns the forty-one nations which abstained from voting for General Assembly Resolution 41/132 in 1986<sup>133</sup>—primarily

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<sup>125</sup> See National Constitutions, *supra* note 46.

<sup>126</sup> See, e.g., CONST. OF MALAWI art. 28 ("(1) Every person shall be able to acquire property alone or in association with others. (2) No person shall be arbitrarily deprived of property.").

<sup>127</sup> CONST. OF ANGOLA art. 37.

<sup>128</sup> CONSTITUTION NACIONAL [Const. Nac.] art. 14 (Arg.).

<sup>129</sup> CONST. OF THE REPUBLIC OF AZERBAIJAN art. 29.

<sup>130</sup> See National Constitutions, *supra* note 46; see also VAN DER WALT, *supra* note 106 (analyzing property clauses from various national constitutions).

<sup>131</sup> Valencia Rodriguez report, *supra* note 39, at 17.

<sup>132</sup> *Id* at 90.

<sup>133</sup> U.N. BIBLIO. INFO. SYST., *supra* note 94.

members of the Soviet block and their allies that opposed private property rights for ideological reasons. Today, almost three decades later, most of these nations have amended their constitutions and other laws to recognize the general right to property as part of their transition to market economies.<sup>134</sup> China and Russia exemplify this transition, as can be seen by comparing their current constitutions with those which were in place in 1986.

In 1986, the Constitution of China provided that the nation's economic system was based on "socialist public ownership of the means of production . . . ."<sup>135</sup> The constitution covered only the property that was necessary for a citizen's personal use: "The State protects the right of citizens to own lawful earned income, savings, houses and other lawful property."<sup>136</sup> In contrast, the 2004 Constitution accepts the role of private property in the national economy, stressing that the state will protect "the lawful rights and interests of the individual, private and other non-public sectors of the economy."<sup>137</sup> Accordingly, it provides that "[t]he lawful private property of citizens is inviolable"<sup>138</sup>—without any limitation on the nature of that property. Moreover, it imposes three new and distinct limitations on the power of the state to take private property. Such a taking must be (1) "in the public interest," (2) "in accordance with the law," and (3) compensation must be paid.<sup>139</sup>

The Russian experience is similar. In 1986, the Constitution of the Soviet Union provided that the "foundation of the economic system . . . is socialist ownership of the means of production . . . ."<sup>140</sup> The constitution protected only "[p]ersonal ownership of citizens," which encompassed "[a]rticles of everyday use, of personal consumption and comfort, and of the subsidiary household, a dwelling, and savings from labor."<sup>141</sup> In contrast, the 2008 Constitution of the Russian Federation endorses the "free flow of goods, services and financial resources, support of competition, and the freedom of economic activity."<sup>142</sup> Accordingly, "private, State, municipal and other forms of property shall be recognized and protected on an equal basis."<sup>143</sup> It broadly provides that "[t]he right of private property shall be protected by law,"<sup>144</sup> without limiting the type of property which is covered. The same provision restricts the right of the state to take private property by imposing limits similar to those in the modern Constitution of China: (1) such a taking must be for "State requirements"; (2) it must be done "under a court order"; and (3) "prior and just compensation" must be paid.<sup>145</sup>

### 3. Conclusion

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<sup>134</sup> See National Constitutions, *supra* note 46.

<sup>135</sup> XIANFA art. 6 (1982) (China).

<sup>136</sup> *Id.* at art. 13.

<sup>137</sup> XIANFA art. 11 (2004) (China).

<sup>138</sup> *Id.* at art. 13.

<sup>139</sup> *Id.*

<sup>140</sup> KONSTITUTSIJA RSFSR (1978) [KONST. RSFSR] [RSFSR CONSTITUTION] art. 10.

<sup>141</sup> *Id.* at art. 13.

<sup>142</sup> KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 8 (Russ.).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at art. 35.

<sup>145</sup> *Id.*

It is appropriate to recognize the right to property as a general principle of law at the international level. Today the right is accepted as a core concept in the domestic legal system of almost every nation. Moreover, because the international legal system has expanded over time to regulate the relationship between state actors and non-state actors, it is necessary to enlarge the corpus of international law by adopting principles which are appropriate to deal with these new relationships. Over fifty years ago, Lord McNair suggested that general principles of law should be utilized to regulate economic development agreements between nations and foreign investors, noting that such arrangements “often involve the creation of rights which are not purely contractual, but are more akin to rights of property . . . .”<sup>146</sup> Recognition of the global right to property as a general principle will help to implement this vision.

#### D. Customary Law

It is generally agreed that customary international law imposes limitations on the right of a state to expropriate the property of foreign nationals.<sup>147</sup> Indeed, disputes concerning the extent of these limitations have generated a substantial body of international jurisprudence and extensive scholarly analysis.<sup>148</sup>

This section of the Article considers a broader question which has received little attention to date: Does a general right to property exist as a matter of customary international law? This question differs from the expropriation issue in two respects. First, it asks whether such a right exists in both citizens and foreign nationals. Second, it addresses the right as a general matter, not simply in the context of expropriation. Because customary international law applies to all nations, this approach provides an alternative method of extending the global right to nations which have not ratified one of the regional human rights treaties.

The conventional wisdom is that a global right to property is not customary international law, as the 1987 Restatement (Third) of the Foreign Relations Law of the United States (“Restatement”) illustrates. The Reporter’s Note to Section 702 of the Restatement observes that the Universal Declaration includes “the right to own and not to be arbitrarily deprived of property.”<sup>149</sup> However, it then explains that disagreement as to the scope and content of that right “weighs against the conclusion that a human right to property generally has become a principle of customary law.”<sup>150</sup> But the next sentence seemingly contradicts this tentative conclusion; it provides that “[a]ll states have accepted a *limited* core of rights to private property, and violation of such rights, as state policy, *may* already be a violation of customary law” (emphasis added).<sup>151</sup> Presumably, the reference to a “limited core of rights” reflects the ideological tensions of the Cold War era. Even Soviet bloc nations acknowledged that an individual had a right to the property necessary for personal use, such as clothes, tools, furniture,

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<sup>146</sup> McNair, *supra* note 115, at 3.

<sup>147</sup> See, e.g., RESTATEMENT, *supra* note 6, at § 712(1) (noting that a state is responsible “for injury resulting from . . . a taking by the state of the property of a national of another state that (a) is not for a public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation”).

<sup>148</sup> See generally LOWENFELD, *supra* note 48, at 494-591 (discussing decisions, treaties, and scholarship that bear on expropriation).

<sup>149</sup> RESTATEMENT, *supra* note 6, at § 702 note k.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

and the like.<sup>152</sup> In context, the note suggests that such a limited right might be customary law. But it rejects the concept that a broad right to property is customary international law.

The enigmatic language of the Reporter's Note masks a division among the drafters of the Restatement. During a preliminary meeting in 1982, a member of the drafting committee suggested that a general right to property should be included in the Restatement as customary international law.<sup>153</sup> In the ensuing discussion, Professor Louis Henkin, the Chief Reporter, commented that customary international law only recognized a right to property in the context of the expropriation of property of foreign nationals, not a general right to property.<sup>154</sup> Reflecting the international tensions of the era, he emphasized that only "those areas on which socialism and capitalism agree" could be designated as customary law.<sup>155</sup> This would have extended protection only to such individual property as was necessary for personal use, the only category which was recognized by both the Soviet bloc and the West. Ultimately, a motion to add a broad right to property in Section 702 as customary international law was defeated by a voice vote.<sup>156</sup>

The irony in this saga is that Henkin apparently changed his mind on the issue thirteen years later. During a 1995 symposium, he reportedly stated that "if he were drafting Section 702 today he would include as customary international law [the] right[] to property . . . ."<sup>157</sup> However, he did not explain his rationale for this change in position. This section of the Article will explain why Henkin's 1995 conclusion was correct—a topic which scholars have not previously addressed.

### 1. Custom as a Source of International Law

A principle of customary law arises when two elements are met: (a) states generally adhere to a particular practice; and (b) they do so under the belief that this is required by international law.<sup>158</sup> This second requirement is known as *opinio juris sive necessitatis*, usually abbreviated as *opinio juris*.

The first element is satisfied if a clear majority of states customarily follow the practice, even if it is not universally accepted. This custom may be evidenced by sources such as domestic legislation, judicial decisions, and official government statements.<sup>159</sup> Although there is scholarly disagreement about how widespread the practice must be, it is desirable to demonstrate that it "is at least representative of the 'main forms of civilization and of the principle legal systems of the world.'"<sup>160</sup> This standard reflects both methodological and prudential constraints.

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<sup>152</sup> See, e.g., KONSTITUTSIJA ROSSIJSKOI FEDERATSII, *supra* note 142.

<sup>153</sup> Continuation of Discussion of Restatement of the Law, Foreign Relations Law of the United States (Revised), Tentative Draft No. 3, 59 A.L.I. PROC. 189, 211 (1982).

<sup>154</sup> *Id.* at 216-17.

<sup>155</sup> *Id.* at 212.

<sup>156</sup> *Id.* at 221.

<sup>157</sup> Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 7 n. 43 (1995).

<sup>158</sup> OPPENHEIM, *supra* note 5, at 26; BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL IMPLICATIONS 6 (2010).

<sup>159</sup> OPPENHEIM, *supra* note 5, at 26.

<sup>160</sup> JOHN H. CURRIE, PUBLIC INTERNATIONAL LAW 190 (2d ed. 2008).

It may be difficult to determine what the practices of 193 nations actually are. Moreover, if customary international law could be established only when a practice was universally accepted, only few such rules could be recognized because unanimous endorsement of any principle is rare.<sup>161</sup> Once a principle is acknowledged to be customary international law, it is binding on all states, whether or not they follow the custom.

The standards that govern the *opinio juris* element are more complex. As the International Court of Justice noted in the *North Sea Continental Shelf Cases*, this element is met when states “feel that they are conforming to what amounts to a legal obligation.”<sup>162</sup> In some situations, the Court has seemingly assumed the existence of *opinio juris* where a widespread state practice has been proven.<sup>163</sup> Yet other decisions of the Court appear to require affirmative evidence that states have a subjective belief that the practice is obligatory.<sup>164</sup> This belief may be deduced from multilateral treaties, United Nations resolutions, and other conduct by state officials.<sup>165</sup>

## 2. State Practice

The right to property easily satisfies the state practice requirement. As discussed above, today almost every nation in the world recognizes the right of natural and legal persons to own property, either through its national constitution or domestic legislation.<sup>166</sup>

This modern uniform practice is the product of a remarkable global transformation which began in the late 1980s. When Henkin and his colleagues debated whether the right to property could be viewed as customary law in the mid-1980s, the Soviet Union and its allies were still largely hostile to private property for ideological reasons. Thus, at this time “socialism and capitalism” could not agree that a global right to property should exist. Yet by 1995, when Henkin changed his opinion on the question, this Cold War schism had largely ended: the Soviet Union had dissolved; the newly reorganized Eastern European states had embraced market economies; and even China was moving swiftly toward privatization.<sup>167</sup>

## 3. *Opinio Juris*

The more difficult question is whether the *opinio juris* element is satisfied. Because the state practice is almost universal, a tribunal might well utilize the less rigorous approach to the element and assume that the practice reflects *opinio juris* without the need for proof of subjective belief.

Under the more rigorous approach to *opinio juris*, a threshold question arises. Most nations originally established the right to property as domestic law because it was seen as

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<sup>161</sup> *Id.*

<sup>162</sup> (Fed. Rep. Ger. v. Den./Fed. Rep. Ger. v. Neth.), 1969 I.C.J. 3, 44 (20 Feb.).

<sup>163</sup> BROWNIE, *supra* note 55, at 8.

<sup>164</sup> *See, e.g.*, Military & Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 108-09 (June 27); BROWNIE, *supra* note 55, at 9-10.

<sup>165</sup> OPPENHEIM, *supra* note 5, at 28.

<sup>166</sup> National Constitutions, *supra* note 46.

<sup>167</sup> *See supra* text accompanying notes 47-50, 133-45.

advantageous, not due to a subjective belief that it was mandated by international law. This process occurred long before the post-World War II era, when the international community first began to consider a global right to property. In addition, the former Soviet bloc nations which adopted private property systems at the end of the Cold War seemingly did so because of the economic and social benefits which these systems provide, rather than because they believed that international law compelled this result. If a state initially adopts a particular practice such as the right to property for domestic reasons, but later expresses its belief that the practice is required by international law, does the practice become customary law? The answer to this question is probably “yes.”<sup>168</sup> Regardless of why a state originally adopted the right to property, the subjective element should be deemed satisfied once the state expresses its belief that the global right is required by international law. In this situation, the state follows the practice for dual reasons. It is both (a) advantageous to the state and (b) compelled by international law.

One source of *opinio juris* for the right to property is found in treaty law. In the *North Sea Continental Shelf Cases*, the International Court of Justice acknowledged that “a very widespread and representative” ratification of a multilateral treaty could provide evidence of *opinio juris*.<sup>169</sup> As discussed above, about two-thirds of the world’s nations are parties to regional human rights treaties which expressly recognize a binding right to property under international law. This fact alone should be viewed as sufficient evidence of *opinio juris*. The almost universal ratification of anti-discrimination conventions such as CEDAW, CERD, and CRPD, which arguably recognize the right to property by implication, provides an independent basis for satisfying the *opinio juris* element.

As the International Court of Justice observed in *Military and Paramilitary Activities in and Against Nicaragua*,<sup>170</sup> *opinio juris* may also be “deduced from . . . the attitudes of . . . States towards certain General Assembly resolutions.”<sup>171</sup> Some scholars have suggested that the entirety of the Universal Declaration of Human Rights—presumably including the right to property in Article 17—has evolved over time to become customary international law through its periodic reaffirmation by the General Assembly and other international bodies, though this remains a minority view.<sup>172</sup> At a minimum, however, the consistent endorsement of the Universal Declaration by virtually all nations is evidence of *opinio juris* as to the right to property and its other provisions.<sup>173</sup> As Brian Leppard summarizes, “the Universal Declaration and other evidence point to a belief by states that they have a strong persuasive legal obligation to protect all the rights it proclaims . . . .”<sup>174</sup>

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<sup>168</sup> See RESTATEMENT, *supra* note 6, at § 102 cmt. c (noting that “[a] practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it”).

<sup>169</sup> *North Sea Continental Shelf Cases*, *supra* note 162, at 43.

<sup>170</sup> *Military & Paramilitary Activities in and Against Nicaragua*, *supra* note 164.

<sup>171</sup> *Id.* at 99-100.

<sup>172</sup> See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 321, 323-25 (1996) (citing scholars on this point).

<sup>173</sup> See LEPPARD, *supra* note 158, at 318-27 (analyzing extent to which the Universal Declaration reflects *opinio juris*).

<sup>174</sup> *Id.* at 327.

A third source of *opinio juris* is found in General Assembly resolutions which specifically endorse the right to property. In 1986, Resolution 41/132 expressed the view of 109 nations that “the right of everyone to own property alone as well as in association with others, as set forth in article 17 of the Universal Declaration of Human Rights . . . . is of particular significance in fostering widespread enjoyment of other basic human rights.”<sup>175</sup> It is noteworthy that no nations voted against this resolution, although many abstained. Four years later, Resolution 45/98 both (a) repeated the theme that the right to own property contained in the Universal Declaration and elsewhere was important in ensuring enjoyment of human rights and (b) urged all states “to provide . . . adequate constitutional and legal provisions to protect the right of everyone to own property . . . .”<sup>176</sup> This resolution was adopted by the General Assembly without any opposition.<sup>177</sup>

#### 4. Conclusion

The analysis above supports the view that the right to property should be recognized as customary international law. Because this right is almost universally found in domestic law, the state practice element is easily satisfied. It is less clear that the *opinio juris* element is met. But both treaties and U.N. resolutions provide compelling evidence that today the vast majority of states accept the right as international law, even if many initially adopted the right for other reasons. Accordingly, it is time to update the position taken by the Restatement, as Henkin belatedly advocated, by acknowledging that the right to property is customary international law.

### III. IMPLICATIONS OF THE GLOBAL RIGHT TO PROPERTY

#### A. Content of the Right

Assuming that the global right to property does exist, the next question is how to define the scope of that right. In other words, if X holds a right to property which is recognized as a matter of international law, what is the content of that right?

Any attempt to answer that question in a meaningful fashion would go well beyond the limited scope of this Article. The thesis of this Article is that the global right to property does exist as a general matter. Thus, it is intended as the first step in a long and incremental process of delineation. Extensive work by scholars, tribunals, international organizations, and others will be necessary to develop and catalogue the components of the right, an endeavor which will

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<sup>175</sup> G.A. Res. 41/132, U.N. Doc. A/RES/41/132 (Dec. 4, 1986).

<sup>176</sup> G.A. Res. 45/98, U.N. Doc. A/RES/45/98 (Dec. 14, 1990).

<sup>177</sup> U.N. BIBLIO. INFO. SYST., A/RES/45/98, available at

<http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares4598> (last visited Feb. 25, 2013). In addition, General Assembly Resolution 43/124 offers a tepid endorsement of the right to property, noting that the Universal Declaration and other documents “assign property a role in the exercise of human rights and fundamental freedoms.” G.A. Res. 43/124, U.N. Doc. A/RES/43/124 (Dec. 8, 1988). Yet it goes on to provide that “social progress and development require the establishment . . . of forms of ownership of land and of the means of production which preclude any kind of exploitation of man [and] ensure equal rights to property for all . . . .” *Id.* In context, this appears to be more of an endorsement of state ownership than private ownership, which suggests a lack of *opinio juris* for a broad right to property.

necessarily take time. But this effort cannot begin until the existence of the right is first acknowledged.

With these caveats in mind, it is possible to sketch out four core aspects of the global right to property. First, the right principally concerns the relationship between a natural or legal person, on the one hand, and a government entity, on the other hand.<sup>178</sup> There is a well-developed body of human rights law governing the extent to which nations are required to implement economic, social and cultural rights, which would logically apply to the right to property either directly or by analogy.<sup>179</sup> Under this approach, the basic obligation is the duty of the state to respect the right to property.<sup>180</sup> In most instances, the relevant government will be a national government or one of its subdivisions, such as a provincial or city government. However, the same principle might logically apply to the relationship between a person and an intergovernmental organization, such as the United Nations.

Second, the right to property is a relative right, not an absolute one. By definition, the scope of the right may be affected by cultural, social, and economic factors which may evolve over time.<sup>181</sup> Interpreting the right to property in absolute terms could have harmful consequences, such as blocking important land redistribution projects<sup>182</sup> or impairing the

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<sup>178</sup> This theme is evident in the formulations of the right to property in the Universal Declaration, the European Convention, and the American Convention, all of which provide that an owner may not be “deprived” of her property unless certain conditions are met. Universal Declaration, *supra* note 19; Protocol 1, *supra* note 58; American Convention, *supra* note 59. The implication in all three clauses is that the deprivation would stem from government action. In parallel fashion, the African Charter states that property may be “encroached upon”—presumably by government—only in certain situations. African Charter, *supra* note 60.

<sup>179</sup> See MANISULI SSENAYONI, ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW 23-26 (2009); DE SCHUTTER, *supra* note 19, at 242-51.

<sup>180</sup> International human rights law recognizes two additional duties in specific situations: the duty to protect the right against interference by third parties and the duty to fulfill the right. SSENAYONI, *supra* note 179. While the state may well have the positive duty to protect the right to property against interference by third parties, it is quite unlikely that it also has an obligation under human rights law to ensure that each citizen does become an owner of property. VAN BANNING, *supra* note 1, at 115 (“[T]he state cannot be obliged to fulfill property rights for individuals.”).

<sup>181</sup> The formulations of the right to property in the regional human rights conventions include limitations. For example, the European Convention provides that an owner may be deprived of property “in the public interest and subject to the conditions provide for by law and by the general principles of international law.” Protocol 1, *supra* note 58. The American Convention similarly allows the deprivation of property “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 . . . .” American Convention, *supra* note 59, at art. 21(2). See also VAN BANNING, *supra* note 1, at 3 (noting that the human right to property is “subject to more qualifications and limitations” than any other human right); VAN DER WALT, *supra* note 106, at 24-26 (discussing limitations on the right to property found in selected national constitutions).

<sup>182</sup> In this context, the effort of South Africa to strike a balance between the right to property and the societal interest in land reform merits study. Its current Constitution provides that the amount of compensation paid for the expropriation of private property must be “equitable, reflecting an equitable balance between the public interest and the rights of those affected, having regard to the circumstances, including—(a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.” S. AFR. CONST. art. 25(3), 1996. In contrast, the constitutions of a few nations appear to allow the expropriation property owned by their citizens, at least in some situations, with no compensation. See, e.g., CONSTIT. OF VENEZUELA art. 116; CONST. OF ZIMBABWE art. 72.

collection of taxes.<sup>183</sup> Ultimately, at a minimum, the right means that no one may be arbitrarily deprived of her property, as Article 17 of the Universal Declaration reflects. As it develops, the right will undoubtedly be broader than this core concept. But it will remain a relative right, which may be counterbalanced by other societal needs. The logical starting point for this analysis is Article 29 of the Universal Declaration, which provides that all human rights are subject to “such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”<sup>184</sup>

Third, the property which is covered by the right is not limited to that which is vital for individual or family life, such as a home, clothing, furniture, tools, or personal bank accounts—as members of the former Soviet bloc had advocated—but rather encompasses all forms of property. Early efforts to restrict the scope of Article 17 of the Universal Declaration to family property were unsuccessful.<sup>185</sup> Accordingly, the right to property recognized in the regional human rights conventions extends to property in general.<sup>186</sup> Similarly, the U.N. General Assembly has indicated its belief that the right to property should extend to both “[p]ersonal property, including the residence of one’s self and family”<sup>187</sup> and “[e]conomically productive property, including property associated with agriculture, commerce and industry.”<sup>188</sup>

Finally, the right should encompass both individual ownership and forms of communal or joint ownership. This approach is consistent with Article 17 of the Universal Declaration which specifies that it includes the right to own property “in association with others.” Although this clause originally stemmed from Cold War tensions, today it provides a basis for respecting traditional forms of customary or communal ownership which are often found in developing countries, where rights are held by a tribe, clan, or other group.<sup>189</sup> The traditional Western focus on individual property rights need not define the global right to property. Indeed, any such attempt would be counterproductive to the goal of developing an international standard.

### B. Practical Applications

The recognition of the global right to property would provide five types of benefits. The magnitude of these benefits will increase exponentially as the contours of the right are delineated with more precision.

First, recognition will ensure that the right is consistently respected and enforced in international tribunals. The specialized tribunals which adjudicate disputes arising under the regional human rights treaties, such as the European Court of Human Rights and the Inter-

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<sup>183</sup> See VAN BANNING, *supra* note 1, at 7 (noting that “property rights have . . . often been perceived as an instrument to protect the rich and the powerful”).

<sup>184</sup> Universal Declaration art. 29, *supra* note 19. Although the preamble to U.N. General Assembly Resolution 41/132 endorses a global right to property, it appears to restrict the scope of that right by citing Article 29 of the Universal Declaration. G.A. Res. 41/132 pmb1., U.N. Doc. A/RES/41/132 (Dec. 4, 1986).

<sup>185</sup> See Valencia Rodriguez report, *supra* note 39, at 10.

<sup>186</sup> See *supra* text accompanying note 79.

<sup>187</sup> G.A. Res. 45/98 art. 3, U.N. Doc. A/RES/45/98 (Dec. 14, 1990).

<sup>188</sup> *Id.*

<sup>189</sup> See VAN BANNING, *supra* note 1, at 301-07 (discussing modern forms of common property).

American Court of Human Rights, routinely enforce this right.<sup>190</sup> Yet because the conventional wisdom is that the global right to property does not exist as binding law, it has not been uniformly respected in other international tribunals.

Second, a number of international instruments, ranging from treaties to contracts, provide that “general principles” of international law or a similar standard should be used to resolve any dispute which arises between the parties.<sup>191</sup> Recognition of the right to property as international law will aid in interpreting the meaning of these provisions when disputes arise, whether or not formal litigation occurs. In particular, consultation, conciliation, mediation, negotiation, and other informal methods of dispute resolution are frequently used in the international arena.<sup>192</sup>

Third, recognition of the right will contribute to building the framework for regulating property in the global commons—areas which by definition are outside of the sovereign jurisdiction of any nation such as the high seas, outer space, and Antarctica.<sup>193</sup> As a general matter, it is both desirable and inevitable that a comprehensive legal regime be established to govern the rights and duties of nations, intergovernmental organization, and private actors in these regions. It is anomalous that the right to property would be routinely honored within the territory of sovereign nations, as domestic laws almost universally provide, but not recognized in the global commons.<sup>194</sup> The global right to property would help to fill that gap.

Fourth, the laws governing intergovernmental organizations will be clarified by recognition of the right.<sup>195</sup> In this context, an intergovernmental organization is one (a) whose members consist of nation states and (b) which performs quasi-governmental functions.<sup>196</sup> Examples of such organizations range from the United Nations to the Inter-American Tropical Tuna Association to the International Criminal Court. By definition, intergovernmental organizations are not subject to the jurisdiction of any nation. Accordingly, the legal standards which govern their rights and duties are sometimes unclear. Most commonly, these are established by specialized treaties.<sup>197</sup> But recognizing the right to property as a matter of international law would help to fill some of the inevitable gaps and ambiguities found in such treaties.

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<sup>190</sup> See generally COBAN, *supra* note 1 (discussing case law); VAN BANNING, *supra* note 1 (same).

<sup>191</sup> SCHLESSINGER, *supra* note 113, at 12.

<sup>192</sup> See EDITH BROWN WEISS ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 160-171 (2d ed. 2007) (discussing these dispute resolution techniques in the analogous context of international environmental law).

<sup>193</sup> PHILIPPE SANDS, PRINCIPLE OF INTERNATIONAL ENVIRONMENTAL LAW 14 (2d ed. 2003).

<sup>194</sup> Under international law, a nation has the jurisdiction to prescribe law “with respect to . . . the activities, interests, status, or relations of its nationals outside its territory . . . .” RESTATEMENT, *supra* note 6, at § 402(2). Accordingly, a nation has the power to regulate the property rights which its nationals may enjoy in the global commons. But it is not clear that this power has been exercised by most nations, outside of specialized contexts. For example, it is well-settled that a vessel on the high seas, including “things aboard,” is governed by the law of the flag state. OPPENHEIM, *supra* note 5, at 731. The law governing property rights in outer space and Antarctica, for example is less clear. Moreover, rather than having property rights in the global commons governed by a patchwork of national property regimes—which well may conflict at points—it makes sense to develop uniform international standards. For example, the simple extension of domestic property laws to the global commons does not provide a satisfactory solution when a particular item of property located there is jointly owned by citizens of different nations and the national laws differ.

<sup>195</sup> Cf. SCHLESINGER, *supra* note 113, at 12-13.

<sup>196</sup> BROWN, *supra* note 193, at 1093-94.

<sup>197</sup> *Id.* at 1093.

Finally, the evolution of the global right to property may eventually help to harmonize national property laws. While variation among the property laws of different nations is inevitable, it may be possible to develop a global minimum standard for the right to property which could encourage greater uniformity in national laws over time. Instruments such as the Berne Convention for the Protection of Literary and Artistic Works<sup>198</sup> could provide a useful model. Although the Convention establishes minimum standards for the scope of copyright protection that all member nations must recognize in their domestic law, any member is free to provide a greater level of protection.<sup>199</sup> The certainty provided by a global minimum standard for property rights would encourage and facilitate international transactions.

### *C. Potential Conflicts of Law*

A final issue is whether the global right to property would conflict with domestic legal standards, whether found in formal laws or in customary tenure arrangements. While it is foreseeable that such tensions could occur, this should not prevent the recognition of the global right.

As demonstrated above, the domestic law of virtually every nation already recognizes the right to property as a general matter, even if the specific content of the right may vary.<sup>200</sup> Thus, in the short term, recognition of the global right in broad terms would be consistent with these domestic laws. A bigger challenge could arise in the future as the content of the right is further developed. The risk of conflict will presumably increase as the scope of the global right becomes more specific.

One potential response is to develop the right as a global minimum standard which consists of general principles. As discussed above, the value of this approach is that it establishes a minimum floor of protection for the right, which allows a certain degree of international uniformity but also permits national laws to vary in some respects. The history of the European Court of Human Rights is instructive on this point. Although the domestic property laws of its member nations differ somewhat, spanning civil law, common law, and former socialist law systems, the court's property law jurisprudence has established what might be termed a regional minimum standard while also tolerating some national autonomy.<sup>201</sup>

Customary or informal tenure arrangements may also cause concern. In parts of some nations, particularly in Africa, Asia, and Latin America, the formal legal system—including the laws establishing a right to property—has limited relevance to the lives of many ordinary people. Subsistence farmers in these regions often obtain an informal right to use communal land through customary tenure systems, while formal title to the land is vested in the government or in

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<sup>198</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 1161 U.N.T.S. 30 (as amended at Paris, July 24, 1971).

<sup>199</sup> *Id.* art. 19.

<sup>200</sup> National Constitutions, *supra* note 46.

<sup>201</sup> *See generally* VAN BANNING, *supra* note 1.

absentee owners.<sup>202</sup> Similarly, in developing countries most dwellings on the outskirts of large cities are built by squatters without permission from the landowner.

Yet the risk that a global right to property would unduly interfere with these informal arrangements is probably more theoretical than real. The scope of the global right should be broad enough to protect these land users—and perhaps more beneficial than formal domestic property law. International law increasingly recognizes that indigenous and tribal peoples have a right to ownership of the lands that their ancestors have historically used, regardless of how formal title is held.<sup>203</sup> Moreover, a growing body of international law provides that residents have a right to avoid being evicted from their homes and farms without good cause, even if they do not hold formal title.<sup>204</sup> Finally, as noted above, the global right would protect both individual and communal forms of ownership.

### CONCLUSION

The time has come to recognize that a right to property exists under international law. In recent decades, this body of law has expanded well beyond its historic function of governing relations among state actors to the point where it increasingly addresses the relationships between states and their citizens, as evidenced by the growth of international human rights law. Moreover, the ideological opposition to property rights has faded away as formerly socialist states and developing nations have embraced free-market economies. Just as the right to property is a basic principle in the domestic law of virtually every nation, it should be viewed as a fundamental right under international law.

The evolution of the right to property under the European Convention provides a helpful template for development of the global right. When the right was incorporated into the Convention in 1954, it consisted of only three sentences. The basic right was recognized in the first sentence: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions.” The two ensuing sentences provided limited guidance as to the scope of the right. Since that time, the European Court of Human Rights has decided hundreds of cases which have defined the scope of that right.<sup>205</sup> In addition, the writings of many scholars have assisted in this process. The right to property under the European Convention is now so thoroughly developed that entire books have been devoted to the topic.<sup>206</sup>

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<sup>202</sup> U.N. HUMAN SETTLEMENTS PROGRAMME, SECURE LAND RIGHTS FOR ALL 14 (2008).

<sup>203</sup> See generally DAVID LEA, PROPERTY RIGHTS, INDIGENOUS PEOPLE AND THE DEVELOPING WORLD: ISSUES FROM ABORIGINAL ENTITLEMENT TO INTELLECTUAL PROPERTY RIGHTS 1-30 (2008) (discussing international law governing rights of indigenous peoples); 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).

<sup>204</sup> See 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); Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex I, Report on Adequate Housing as a Component of the Right to an Adequate Standard of Living ¶ 6, U.N. Doc. A/HRC/4/18 (Feb. 5, 2007).

<sup>205</sup> See generally COBAN, *supra* note 1 (analyzing decisions interpreting the scope of the right to property under the European Convention).

<sup>206</sup> See, e.g., *id.*; VAN BANNING, *supra* note 1 (same).

The content of the global right to property will undoubtedly be the subject of extensive debate in future decades. It is inevitable that future study will identify and delineate the core concepts which are encompassed within the right, dealing with topics such as the acquisition and transfer of property among private actors<sup>207</sup> and the ability of the state to regulate or seize property. Conventional law may be helpful to some extent in developing these core concepts. Indeed, it might be possible to craft a universally-accepted treaty which provides a blueprint for the scope of the right.<sup>208</sup> But the more promising tools for this purpose are general principles of law and customary international law, supplemented by decisions of judicial and arbitral tribunals and the writings of scholars. Ultimately, the result will be a cohesive and coherent body of international law which ensures that citizens of all nations will be able to fully enjoy this fundamental right.

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<sup>207</sup> For example, international tribunals have sometimes adopted the doctrine of prescription from domestic legal systems to aid in resolving boundary disputes between nations. *See* LAUTERPACHT, *supra* note 7, at 116-17 (discussing cases). It may well be that prescription should be viewed as a general principle of law. Similarly, the concept that “no one may transfer more than he has” may have achieved the status of a general principle of law. *See* BROWNLIE, *supra* note 55, at 121; SCHACHTER, *supra* note 116, at 51.

<sup>208</sup> *See* Williamson, *supra* note 2 (suggesting components of a treaty to implement the right to property, with a focus on protection against expropriation); *cf.* Odinet, *supra* note 2 (advocating for a treaty to regulate the international sale of real property).