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Of Looting, Land and Loss: The New International Law of Takings

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Of Looting, Land, and Loss: The New International Law of Takings

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International law has traditionally protected aliens against unlawful expropriations by host states. After World War II, citizens gained protection against property being taken by their own governments. In Federal Republic of Germany v. Philipp *(2021), the U.S. Supreme Court held that the Takings Exception to the Foreign Sovereign Immunities Act (28 U.S.C. § 1605(a)(3)) incorporated international law's protections against alien property deprivation but not protections for citizens. The Court did so, in part, because international law's traditional inapplicability to citizen takings, in its view, "survived the advent of modern human rights law."*

The U.S. Supreme Court was simply wrong. Even at the time the U.S. Congress enacted the Takings Exception in 1976, many human rights instruments addressed citizen takings. Later, similar norms would enter a variety of other areas of international law, forming a mutually reinforcing network of property protections. But Philipp *not only missed an opportunity to describe property norms accurately—its more significant omission was failing to distinguish the types of property covered by the alien and citizen regimes. Using a typology developed by Margaret Jane Radin, we identify alien property as "fungible," meaning a dispossessed owner can be made whole by acquiring equivalent property in the market or its monetary equivalent. We identify citizen property as "property constitutive of personhood" or "personal property," meaning the owner can only be made whole through restitution.*

This Article explores how these very different conceptions of property have become manifest in two paradigmatic types of takings. For alien property, we examine the practice of expropriated foreign direct investment. For citizen property, we examine property taken during forced evictions in civil wars and persecution, including ethnic cleansing. In each case, the way in which the right to property conceives of the protected interest and the remedy available to owners reflect the different nature of the property involved. While the remedy of compensation is available for both alien and citizen property under the law of state responsibility, investors have chosen compensation in almost every reported case. By contrast, citizens with a deep connection to homes, family businesses, art, and land demand restitution. Focusing on that choice is consistent with Radin's definition of personal property as a largely subjective concept, built on how individual owners understand specific pieces of property to constitute an essential aspect of their character.

Three consequences flow from conceiving alien and citizen property as fungible and personal, respectively. First, the distinction introduces a human-centered conception of property that has been missing from international law debates focused on identifying legally cognizable "takings" and appropriate measures of compensation. Second, the idea of personal property clarifies the ways in which international law views certain takings, such as the seizure of homes attendant to massive human rights abuses and the taking of cultural property. Third, the land of indigenous peoples, often described as occupying its own

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legal category, is presented here as an extreme example of personal property. In turn, that conception may help clarify and bolster claims for restitution of other types of personal property.

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Introduction

In June 1998, Belay Redda, seventy-one years old, and his wife Hiwot Nemariam, sixty-seven years old, were arrested in Addis Ababa, Ethiopia, detained, and deported to neighboring Eritrea. At the time of their expulsion, Belay and Hiwot owned a dry-cleaning business, a house, and two certificates of deposit at the Commercial Bank of Ethiopia worth approximately 1,429,876 birr (in 1998, roughly $204,000).[1] They had lived in Addis for more than twenty-five years.

1. Complaint ¶¶ 51–53, Nemariam v. Federal Democratic Republic of Ethiopia, No. 00-1392 (D.D.C. June 12, 2000) [hereinafter Nemariam Complaint]. Disclosure: The authors of this Article served as part

Belay and Hiwot's lives reflected the turbulence of the twentieth century in the Horn of Africa. They were each born in Asmara, Eritrea, when Eritrea was an Italian colony. They married in 1946, when the territory was under British Military Administration. Six years later, Eritrea was joined with Ethiopia pursuant to a U.N. General Assembly Resolution but was granted broad autonomy.[2] In 1962, Ethiopian Emperor Haile Selassie dissolved Eritrea's autonomous status and formally annexed the territory, setting off a thirty-year war of independence.[3] Belay and Hiwot moved to Addis Ababa in 1972. The couple had four children, all of whom eventually emigrated to the United States, and Belay and Hiwot developed their business within an economically successful community of Eritrean-Ethiopians.[4] Belay and Hiwot were indisputably Ethiopian nationals who lived, voted, and paid taxes in Ethiopia, their only state of citizenship. When the couple left the country, they traveled abroad on their Ethiopian passports.

In Addis Ababa, Belay worked as an official in the Finance Office of the Ethiopian Government. A well-known member of the Eritrean-Ethiopian community, Belay served as an election officer during the U.N.-brokered 1993 referendum on Eritrean independence, and he headed a peace committee to assist in the transition of power from the military dictatorship that ruled Ethiopia from 1974 to 1991 (the *Dirg*) to the newly elected Ethiopian Prime Minister. Belay continued in his role as an election official during the 1995 Ethiopian federal election.[5]

In May 1998, a border dispute centered on the town of Badme erupted into a full-blown war between Eritrea and Ethiopia.[6] The following month, Ethiopia began the systemic expulsion of persons of Eritrean origin, descent, or nationality living in its territory. The Ethiopian government used the voter rolls from the 1993 referendum (among other indicators) to identify Ethiopians of Eritrean origin, descent, or nationality.[7] On June 12, 1998, the Ethiopian Government issued an order freezing the bank accounts of Eritrean-Ethiopians.[8]

Belay was arrested on June 13, 1998, and taken to Shogole prison where he was held overnight with approximately 850 other prominent members of

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of the plaintiffs' litigation team in *Nemariam v. Federal Democratic Republic of Ethiopia*, 491 F.3d 470 (D.C. Cir. 2007), and *Nemariam v. Federal Democratic Republic of Ethiopia*, 315 F.3d 390 (D.C. Cir. 2003).

2. G.A. Res. 617 (Dec. 17, 1952); *see* Gregory H. Fox, *Eritrea*, *in* Self-Determination and Secession in International Law 273 (Christian Walter et al. eds., 2014) (providing a historical overview of Eritrea's pre-independence).

3. *Id.* at 278–79.

4. Noah B. Novogrodsky, *Identity Politics*, Boston Rev. (June 1, 1999), https://www.bostonreview.net/articles/noah-benjamin-novogrodsky-identity-politics/ [https://perma.cc/T7HH-P8GA].

5. Declaration of Plaintiff at 20, Nemariam v. Federal Democratic Republic of Ethiopia, No. 00-1392 (D.D.C. June 12, 2000) [hereinafter Redda Declaration].

6. Sean D. Murphy, *The Eritrean-Ethiopian War*—1998–2000, *in* The Use of Force in International Law: A Case-Based Approach 552 (Tom Ruys et al. eds., 2018).

7. Redda Declaration, *supra* note 5, ¶ 11.

8. *Id.* ¶ 4.

the Eritrean-Ethiopian community. Early the next morning, Belay and other detainees were loaded onto buses that transported them to the Eritrean border. The detainees endured a nine-day journey, during which they were threatened with execution by Ethiopian soldiers who stopped the convoy along its route. Once near the border, Belay and others were ordered off the buses and told to walk to "their own country," the Eritrean town of Om Hajer.[9] Belay's near-thirty years of living and working in Addis had come to an end.

Hiwot remained in Ethiopia for approximately two weeks after her husband was deported. In June 1998, Hiwot attempted to withdraw funds from her personal account at the Commercial Bank of Ethiopia but was informed that her funds were inaccessible and the bank officials refused any withdrawals.[10] Hiwot was arrested on July 3, 1998, and over the course of the next three days she was interrogated about her connection to the Eritrean government, photographed, and told that she was being deported because she was "Eritrean." On July 6, Hiwot was loaded onto a bus for the same nine-day journey to Eritrea.[11]

Once they had been expelled from Ethiopia, Hiwot and Belay were unable to return. At the time, Ethiopian banking law did not permit personal checking accounts and the rules required holders of savings accounts and certificates of deposit to appear in person to withdraw funds.[12] The Commercial Bank of Ethiopia, acting on government orders, sold Hiwot and Belay's dry cleaning business at auction.[13] Deprived of the use of his home, business, and bank accounts, Belay retained Ethiopian counsel to try to reclaim his property, but was unsuccessful.[14] Hiwot and Belay were among the approximately 70,000 Eritrean-Ethiopians who were stripped of their citizenship and whose businesses, homes, licenses, pensions, and bank accounts were subject to expropriation.[15] Interviewed in Asmara in 1999, Hiwot explained that she missed her kitchen in Addis Ababa, a place where she made fusion Italian and Ethiopian cuisine in familiar surroundings.[16]

Hiwot and Belay's story is not unique. Many cases of mass human rights violations involve governments taking the property of their own citizens. Genocide, ethnic cleansing, mass expulsions, and apartheid-like discrimination, have all involved the de facto or de jure taking of land, homes, businesses, bank accounts, and other property of fellow nationals. Deprivations of property in these cases are inseparable from the suffering visited on the individuals

9. *Id.* at ¶¶ 17–18.
10. *Id.* ¶ 24.
11. Declaration of Plaintiff at 29, Nemariam v. Federal Democratic Republic of Ethiopia, No. 00-1392 (D.D.C. June 12, 2000), ECF No. 61-8 [hereinafter Hiwot Declaration].
12. Redda Declaration, *supra* note 5, ¶ 32.
13. *Id.* ¶ 30.
14. *Id.* ¶¶ 31–34.
15. Nemariam Complaint, *supra* note 1, ¶ 7.
16. Interview with Hiwot Nemariam in Asmara, Eritrea (July 10, 1999).

themselves. When governments or rebel groups commit mass atrocities, the targeted groups are seen as an unacceptable presence on the territory and in the body politic. In order to remove such groups, the persecutors sometimes kill members of the group, but just as often forcibly displace them and confiscate or destroy their homes and goods. Property deprivation in the form of looting, expropriation, and authorized theft is a widely deployed means of displacing or marginalizing disfavored groups. A meaningful remedy that can make such victims whole must seek to reunite the affected population with their property.

Hiwot and Belay estimated their losses at over eight million birr, approximately $1,144,000.[17] Expelled from their home country and unable to challenge the takings in an Ethiopian court, they joined other Eritrean-Ethiopians in filing suit under the "Takings Exception" to the Foreign Sovereign Immunities Act ("FSIA"),[18] which permits claims against foreign states and their agencies or instrumentalities for "property taken in violation of international law."[19] One of their claims alleged that the Ethiopian government's taking of their property was an integral part of a targeted and discriminatory campaign against Eritrean-Ethiopians and so constituted a taking "in violation of international law."[20] The U.S. courts never reached that issue, as the suit was ultimately dismissed on other grounds.[21] Nearly twenty years later, however, in *Federal Republic of Germany v. Philipp*,[22] the U.S. Supreme Court resolved that very question, holding that human rights violations against a state's own citizens do not involve "property taken in violation of international law" for FSIA purposes.[23] Approving the so-called domestic takings rule, the Court held that only governmental takings of *foreigners'* property could satisfy the exception and thereby

17. Nemariam Complaint, *supra* note 1, ¶ 56 (approximately $2 million today when adjusted for inflation using the U.S. Bureau of Labor and Statistics' CPI Inflation Calculator).

18. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611 (1976).

19. *Id.* § 1605(a)(3). The Takings Exception creates an exception to the immunity normally granted sovereign states in cases in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

20. Nemariam Complaint, *supra* note 1, ¶¶ 1–7.

21. *See Nemariam*, 491 F.3d at 481. The suit focused primarily on the plaintiffs' accounts in the Commercial Bank of Ethiopia. Because the Bank was owned by the state of Ethiopia, the Foreign Sovereign Immunities Act (FSIA) granted it immunity from suit unless an FSIA exception applied. The plaintiffs relied on the second clause in § 1605(a)(3), that the accounts were "owned or operated by an agency or instrumentality of the foreign state" and that agency or instrumentality was "engaged in a commercial activity in the United States." *Id.* at 474. The D.C. Circuit ultimately held that the relation between a bank and its depositor is contractual. By preventing the plaintiffs from accessing their accounts, the Commercial Bank "did not assume the appellants' contractual right to performance—instead it declined to perform its own contractual obligations." *Id.* at 481. The Circuit Court found that a violation of a contractual obligation involving property is not the same as assuming ownership or operation of that property and does not meet the terms of § 1605(a)(3)'s second clause. *Id.*

22. Federal Republic of Germany v. Philipp, 141 S. Ct. 703 (2021).

23. *Id.* at 711.

abrogate the foreign state's sovereign immunity in U.S. courts.[24] As for human rights law, which the Court acknowledged "constrain[]s how states interact not just with other states but also with individuals, including their own citizens," the opinion was dismissive. Human rights instruments, the Court declared, were "silent . . . on the subject of property rights"[25] and the domestic takings rule "survived the advent of modern human rights law."[26]

Philipp's domestic takings rule would have doomed Hiwot and Belay's claims had it been law at the time (and had the Court reached the issue), for they alleged that the Ethiopian government took their property when they were citizens of Ethiopia.[27] This Article does not challenge the *Philipp* Court's conclusions about how the U.S. Congress in 1976 understood international law with respect to the FSIA's Takings Exception. The Court was almost certainly correct that in 1976, the U.S. Congress had a limited and static view of the international law it incorporated into the Takings Exception, one focused on recovering U.S. investments expropriated by foreign governments.[28] But the Court offered an erroneous history of international law itself, a question distinct from which elements of international law the U.S. Congress intended to incorporate into the Takings Exception. In contrast to the domestic takings rule, human rights treaties protected citizens against wrongful taking by their governments as early as 1976. In the following decades, international law produced a vast web of jurisprudence, treaties, "soft law" instruments, state practice, and initiatives of international organizations supporting an individual's right to property against her own government. International law has done so with particular attention to forced evictions in the course of mass human rights violations, such as Hiwot and Belay's loss of their home and property in Addis Ababa. *Philipp*'s eagerness to avoid human rights-based claims under the Takings Exception led the Court to misstate international law with respect to citizen takings. International law has long understood such losses as remediable because they are rooted in the importance of home, culture, and land, and distinct from the law of alien takings. *Philipp* missed that point, and its focus on the citizenship of the property owner to the exclusion of a rich history represents a lost opportunity.

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24. *Id.*

25. *Id.* at 710.

26. *Id.* at 712. One could read both of these statements as describing human rights law circa 1976 and not contemporary law, though the Court does not qualify the passages in that way. Even if that is what the Court intended, its description of human rights law in the mid-1970s was incomplete and inaccurate. *See infra* Part IV.A.

27. On the subject of citizenship, see Nemariam Complaint, *supra* note 1, ¶¶ 12–13. *See also* Eritrea-Ethiopia Claims Commission - Partial Award: Civilian Claims - Eritrea's Claims 15, 16, 23 and 27–32 (Dec. 17, 2004), ¶ 51, XXVI Rpts Int'l Arb. Awards 195, 218 (2009) [hereinafter, Eritrea-Ethiopia Claims Commission]. The Eritrea-Ethiopia Claims Commission, which adjudicated claims arising out of the 1998 conflict, found that Ethiopian citizens like Hiwot and Belay who voted in the 1993 Eritrean independence referendum thereby acquired Eritrean nationality.

28. *See* Françoise N. Djoukeng, *Genocidal Takings and the FSIA: Jurisdictional Limitations*, 106 Geo. L. Rev. 1883, 1890–93 (2018).

This Article takes up the question *Philipp* declined to examine in a determinative way: How does international law respond to governments' takings of their own citizens' property? We contend that international law understands property deprivations in two distinct ways simultaneously. International law treats foreign investments subject to expropriation as generic and compensable while recognizing the domestic taking of homes, family businesses, and property that form part of the individuals' and communities' dignity and culture (especially during the commission of mass human rights violations) as a wrong deserving of restitution. The law on foreign investment has a long history and *Philipp* drew on that history in describing the domestic takings rule. The law on domestic takings is new and still developing, though it has roots in the post-1945 human rights revolution.

Part I of this Article addresses the dichotomous treatment of takings by applying a distinction between *fungible property* and *property constitutive of personhood*, which we will also refer to as "personal property." Fungible property is that which can be replaced, exchanged, or sold for commensurate value by its owner. When such property is taken, the owner can be made whole through monetary compensation at full market value. Personal property, by contrast, contributes to the owner's unique sense of self, such that it becomes a defining aspect of her personhood. Because personal property cannot be replaced with a non-existent equivalent available in the market, a taking of personal property is best remedied by its restitution.

Part II considers these two categories in the context of the international law of property rights. We argue first that property covered by the traditional law on alien expropriations should be understood as fungible. Most of that property is or was owned by foreign extractive industries that have sought to profit from their investments and nothing more. Foreign investors can be made whole through compensation at full market value. The non-personal nature of the property is underlined by the fact that the taking of foreign investment property has historically generated claims for compensation from the alien's state of nationality, not claims of the alien herself. The irony of *Philipp*'s refusal to recognize and explore the new law protecting citizen expropriations is that this body of law is growing in importance. Today, citizen takings are much more common than traditional alien expropriations and the former is the focus of legal innovation and development, not the latter.

Part III describes the post-World War II expansion of international law with respect to domestic property takings as an affront to individual, cultural, and communal integrity. This Part demonstrates the ways in which regional human rights systems, global issue-specific regimes, and U.N. organs have all created remedies for a state's deprivation of its own nationals' *personal* property. Since the 1990s, and possibly earlier, international law has accorded an elevated

status to certain forms of property by interpreting treaties and conventions to respect the concepts of home and culture. This Part focuses on three overlapping categories of property takings: deprivations that result from mass human rights violations; cultural property takings; and the commodification and dispossession of indigenous lands.

Part IV shifts from the personal/fungible distinction to the law of remedies. We find that in keeping with fungible property's impersonal nature, the taking of alien investment property has in almost all cases resulted in monetary compensation. For the taking of citizens' homes, businesses, and other property in their communities, we focus on claims by refugees and internally displaced persons, two groups whose property has been protected by international efforts to end and remediate civil wars. In such cases, restitution is the preferred remedy unless it cannot feasibly be provided or an owner chooses compensation. The normative commitment to restitution for citizens has informed the international practice of negotiating peace agreements to end civil wars and sending peacekeeping missions to post-conflict states. In both cases, the international community has sought restitution of property of the forcibly displaced, effectively operationalizing the personal conception of their property.

Finally, Part V describes several innovations resulting from the new law of citizen takings. First, the personal/fungible distinction identifies a distinctly human-centered conception of property. Second, the distinction provides a partial response to the critique that recognizing individual property rights operates as an international law veto over economic centralization efforts by developing countries. Third, the personal conception reveals the centrality of citizen property rights to international efforts to address civil wars. Fourth, property as personhood finds expression in the communal land, natural resources use, and place-based connection of indigenous peoples. We argue that viewing indigenous land and cultural property as personal property illuminates common traits with other forms of internationally protected property.[29]

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29. This Article will not address other aspects of *Philipp*'s sovereign immunity analysis, except one. In the course of justifying the domestic takings rule, the Court misrepresented the relation between the FSIA and the international law of sovereign immunity. The *Philipp* Court warned that allowing claims under human rights law would "arguably force courts themselves to violate international law" by "derogating [from] international law's preservation of sovereign immunity for violations of human rights law." *Philipp*, 141 S. Ct. at 706. This, in the Court's view, would be a departure from existing practice. The FSIA largely adheres to the internationally accepted "restrictive" view of sovereign immunity because "[m]ost of the FSIA's exceptions, such as the exception for 'commercial activity carried on in the United States,' comport with the overarching framework of the restrictive theory." *Id.* at 713. The respondents' view, warned the Court, "would overturn that rule whenever a violation of international human rights law is accompanied by a taking of property." *Id.* Extending the takings exception to human rights violations, in other words, would subject foreign sovereigns to liability in U.S. courts in circumstances that would violate the international law on sovereign immunity.

But three *existing exceptions* to the FSIA's general rule of immunity already contradict the international law of sovereign immunity. The first is the Takings Exception itself. As the leading treatise on international sovereign immunity law states, "[t]here is no parallel to this exception in the practice of other States."

I. Personal and Fungible Property

Philipp concerned a collection of traditional German art known as the *Welfenschatz* or the Guelph Treasure.[30] Toward the end of the Weimar Republic, a consortium of three art firms, each owned by Jewish citizens of Germany, purchased the *Welfenschatz* from the Duke of Brunswick.[31] Seven decades later, in U.S. federal court litigation, heirs of the consortium owners alleged that after Hitler ascended to power in 1933, his deputy, Hermann Goering, became interested in the *Welfenschatz* and "employed a combination of political persecution and physical threats to coerce the consortium into selling the remaining pieces to Prussia in 1935 for approximately one-third of their value."[32]

After World War II ended, the United States, as the occupying power, returned the *Welfenschatz* to the Federal Republic of Germany. In 2014, heirs to the consortium's owners first approached Germany claiming that the sale of the *Welfenschatz* had been unlawful. A commission established by the German government to investigate claims of Nazi-confiscated art determined that "the sale had occurred at a fair price without duress."[33]

Having failed to win redress before the German commission, the heirs then brought suit in the U.S. District Court for the District of Columbia against Germany and a German governmental entity that maintained the *Welfenschatz*, asserting common law property claims. The defendants moved to dismiss, arguing that the only possible exception to their sovereign immunity was the

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Hazel Fox QC & Philippa Webb, The Law of State Immunity 430 (3d ed. 2015); *see also* Restatement (Fourth) of the Foreign Relations Law of the United States § 455, Rptr. Note 15 (Am. L. Inst. 1995) ("[N]o provision comparable to § 1605(a)(3) has yet been adopted in the domestic immunity statutes of other countries."). The second is the Terrorism Exception, 28 U.S.C. § 1605(a)(7) (Supp. 11 1996), which lifts immunity against monetary damages for certain state sponsors of certain acts of terrorism. *See id.* § 460, Rptr. Note 11 (with the exception of Canada "[i]t does not appear [] that other states have adopted similar approaches to remove immunity for acts of state-sponsored terrorism"). The third is the 2016 Justice Against Sponsors of Terrorism Act (JASTA), 18 U.S.C.A. § 2333 & 28 U.S.C.A. § 1605B. *See* Daniel Franchini, *State Immunity as a Tool of Foreign Policy: The Unanswered Question of Certain Iranian Assets*, 60 Va. J. Int'l L. 433, 444 (2020) ("[T]he crystallization of an exception to immunity for terrorist-related activities has simply not occurred.").

Given this history, *Philipp*'s concern that permitting human rights claims under the Takings Exception would "arguably force courts themselves to violate international law" appears to elevate a possible future inconsistency over three extant ones. *Philipp*, 141 S. Ct. at 706. The *Philipp* Court was not uniquely preventing litigation against sovereign defendants who, under international law, are entitled to immunity because Congress has long violated international law by enacting the three exceptions. By omitting discussion of the other internationally unlawful FSIA exceptions, the Court gave this argument an authority it does not possess.

30. On a tour of the United States from 1930 to 1931, the eighty-two pieces of eighth to fifteenth century liturgical objects that comprised the *Welfenschatz* were described as "the greatest single group of medieval objects that had ever been offered for sale in America." Christina Nielson, *"The Greatest Group of Medieval Objects Offered for Sale": The Guelph Treasure and America* 1930–1931, 27 J. Hist. Collections 441, 441 (2015).

31. *Philipp*, 141 S. Ct. at 708.

32. *Id.*

33. *Id.*

Takings Exception, and it did not apply. A state's taking of its own citizens' property, Germany argued, is not done "in violation of international law" as required by 28 U.S.C. § 1605(a)(3). The U.S. District Court and the U.S. Court of Appeals rejected this argument. The Court of Appeals agreed with the heirs that the phrase "international law" was broad enough to include the international law of human rights, and specifically the prohibition on genocide.[34] It found that the forced sale of the art was a constituent act of the genocide then being perpetrated by Nazi Germany against its Jewish citizens.[35] The U.S. Supreme Court reversed, holding that Congress intended the Takings Exception to apply only to the expropriation of alien property.[36] If Germany had taken the *Welfenschatz* from German citizens, that act fell outside the exception so construed.[37] In so holding, *Philipp* joined the growing trend in which the U.S. Supreme Court has narrowed the type and number of human rights suits that can be brought in U.S. federal courts without a strong territorial nexus.[38]

Philipp addressed two bodies of property law: that concerning property taken from aliens, and that concerning property taken from citizens. In seeking to understand the differences between the two, the Court adopted a largely chronological approach, focusing on how international law over time has enlarged the class of property owners endowed with rights against expropriation.[39] International law traditionally addressed only interstate relations. Since individuals were viewed as appendages of their home states, a state expropriating alien property on its territory necessarily implicated the interests of the alien's home

34. Federal Republic of Germany v. Philipp, 894 F.3d 406, 410–11 (D.C. Cir. 2018).

35. *Id.* at 412.

36. *Philipp*, 141 S. Ct. at 715.

37. Prior to *Philipp*, the FSIA case law provided support for both positions. De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1395 (5th Cir. 1985), held that "international law delineates minimum standards for the protection only of aliens; it does not purport to interfere with the relations between a nation and its own citizens." A series of other decisions fashioned an exception for "genocidal takings." *See generally* Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661 (7th Cir. 2012) (genocide of Hungarian Jews during the Holocaust); Davoyan v. Republic of Turkey, 116 F. Supp. 3d 1084 (C.D. Cal. 2013) (Armenian genocide); Simon v. Republic of Hung., 812 F.3d 127 (D.C. Cir. 2016) (claims by Hungarian Holocaust survivors).

38. *See* Kiobel v. Royal Dutch Shell, 569 U.S. 108, 124 (2013) (limiting the ability of plaintiffs to bring suit under the Alien Tort Statute, 28 U.S.C. § 1350, for extraterritorial harms); Jesner v. Arab Bank, 138 S. Ct. 1386, 1407 (2018) (same); Nestlé v. Doe, 141 S. Ct. 1931, 1937 (2021) (same). The *Philipp* court's deference to the German Advisory Commission decision also suggests that the notion of due process in international law means a single hearing in the country most closely connected to the taking. In *Brok v. Czech Republic*, Committee member Martin Scheinin previewed this view by arguing that whether Mr. Brok was "entitled to the restitution of his parent's property is an issue of domestic law" and that "the proper remedy . . . is that the State . . . secures to [Mr. Brok's] widow a fresh possibility to have the restitution claim considered, without discrimination or arbitrariness." Brok v. Czech Republic, U.N. Doc. CCPR/C/73/D/774/1997 (1997) (individual opinion by Committee member Martin Scheinin (partly concurring, partly dissenting)). To the extent the *Philipp* plaintiffs failed in a fulsome procedure in Germany, the FSIA case represented a second, duplicative action.

39. *See infra* Part IV.A. In that Section, we argue that *Philipp*'s chronology is both factually incorrect and highly misleading in suggesting that the limited international protection of citizens' property rights in 1976 continues to this day.

state.[40] But taking property of a state's own citizens affects no other state and so remains within the state's protected sphere of domestic jurisdiction, akin to taxation or the exercise of eminent domain. After World War II, human rights law extended property rights to citizens contesting actions by their own governments.[41] One could well understand the human right to property as an extension of the same set of protections enjoyed by foreign investors to a new class of domestic right-holders. The *Philipp* Court adopted such an approach in asking what the U.S. Congress meant by the phrase "property taken in violation of international law" when it passed the FSIA in 1976. Had human rights law progressed sufficiently to displace the "domestic takings rule" of the traditional alien investor regime? The Court found it had not: The domestic takings rule endured even as "international law increasingly came to be seen as constraining how states interacted not just with other states but also with individuals, including their own citizens."[42]

The chronological approach, however, misses a more significant difference between the two regimes: the nature of the property itself. When property is taken from its lawful owner, what is lost? The answer depends on the meaning the owner ascribes to her property and the relationship of that property to other closely held values. Property held only as an investment and for profit will likely produce a loss equivalent to its market value and expected future profits. By contrast, losing property with a long-standing personal connection to the owner or community—a family heirloom for instance—will produce a different kind of harm, one that cannot be measured solely by market value. In some cases, the owner's relationship to such property might be so personal that she can only be made fully whole by its return. Similar questions arise in the case of land held collectively by indigenous peoples. Its loss, or even its treatment as alienable real property, may affect the continued viability of the community as a whole. In such cases, what is lost implicates dignitary interests as well as the pure ownership rights of the individual or group.[43] The nature of the loss

40. *See* Kate Miles, The Origins of International Investment Law: Empire, environment and the Safeguarding of Capital 47–49 (2014). Miles cites Lassa Oppenheim's seminal treatise on the foundations of this statist conception:

> Although foreigners fall at once under the territorial supremacy of the State they enter, they remain nevertheless under the protection of their home State . . . every State can exercise this right when one of its subjects is wronged abroad in his person or property, either by the State itself on whose territory such person or property is for the time, or by such State's officials or citizens without such State's interfering for the purpose of making good the wrong done.

Lassa Oppenheim, International Law § 319 (1905).

41. *See generally* Christophe Golay & Ioana Cismas, *Legal Opinion: The Right to Property from a Human Rights Perspective* (July 7, 2010), https://ssrn.com/abstract=1635359 [https://perma.cc/7URG-4X48]; John G. Sprankling, *The Global Right to Property*, 52 Colum. J. Transnat'l L. 464 (2014); U.N. Comm'n on Human Rights, U.N. Doc. E/CN.4/1994/19 (Nov. 25, 1993).

42. *Philipp*, 141 S. Ct. at 710.

43. Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41 Law & Soc. Inq. 796, 800 (2016)

in a taking thus requires understanding the *purpose or purposes* ownership serves. In this Section we explore the essential difference between the taking of aliens' property and citizens' property in these relational terms.

In her seminal 1982 article, Margaret Jane Radin articulated a view of property as an expression of "personhood."[44] Departing from both social contract and utilitarian justifications for protecting property rights, Radin argued that people's conception of themselves is necessarily bound up in the acquisition of objects "they feel are almost part of themselves."[45] Property law, Radin claimed, ought to recognize this connection in order to protect and maximize human flourishing, which should, in such cases, supersede the common utilitarian focus on wealth maximization.[46] Radin built on Hegel's view that a person's individuality only becomes manifest in relation to external things: "To achieve proper self-development—to be a person—an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights."[47] That the loss of property imbued with personhood causes distress and pain well beyond its monetary value suggests to Radin a connection to the owner's sense of self. Without certain property we would conceive of ourselves differently, both in present and future terms. "If an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your personhood depends on the realization of these expectations."[48] Jeremy Waldron echoed Radin's claims with regard to an owner of land:

> He will know it intimately, he may inhabit it with his family, cultivate it, earn his living from it, care about it, and regard it as part of the wealth that he relies on for his own security and that of his descendants. He will be able to point to features of the land where his work and his initiative have made a difference, so that the land will not only seem like his, but actually seem to be part of himself.[49]

For Radin, the home is the clearest example of property that is constitutive of personhood. The home is "the scene of one's history and future, one's

(exploring the related concept of "dignity takings," which occur "when a state directly or indirectly destroys or confiscates property rights from owners or occupiers whom it deems to be sub persons without paying just compensation and without a legitimate public purpose." The owners' dignity is degraded because the act of confiscation is "accompanied by dehumanization or infantilization.").

44. *See generally* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

45. *Id.* at 959.

46. *See* Margret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1851 (1987).

47. Radin, *supra* note 44, at 957 (emphasis omitted); *see* G.W.F. HEGEL, PHILOSOPHY OF RIGHT ¶ 41 (S.W. Dyde trans., 2001) (1821) (articulating the idea of property as an extension of self: "A person must give to his freedom an external sphere, in order he may reach the completeness implied in the idea.").

48. *Id.* at 968.

49. JEREMY WALDRON, THE RULE OF LAW AND THE MEASURE OF PROPERTY 57 (2012).

life and growth" and the place where "one embodies or constitutes oneself" as Hiwot's kitchen did for her.[50] It is "affirmatively part of oneself—property for personhood—and not just the agreed-on locale for protection from outside interference."[51] Shelly Kreiczer-Levy cites empirical support for the idea that the home "creates a sense of belonging, permanence, and continuity."[52] In later scholarship, Radin explored whether property constitutive of personhood might exist in a range of other settings—the sale of human organs, adoption, reproductive freedoms, criminal justice, and the regulation of cyberspace.[53]

Of course, not all property contributes to a sense of identity. Radin contrasts personal property with "fungible" property.[54] Property is fungible when it is "perfectly replaceable with other goods of equal market value"[55] or indistinguishable from any other form of wealth held by an owner.[56] The personal/fungible distinction is not always easy to discern, since Radin's subjective view of property ownership does not track formal legal categories. It might seem that personal possessions and commercial property respectively map well onto the two categories but many household objects such as pots and pans are fungible.[57] Likewise, a commercial enterprise in a family for generations likely holds intrinsic value beyond what it might fetch on the market, especially businesses that carry the family name or have an established reputation in the community reflective of their owners. The distinction for Radin turns instead on the "character or strength of the connection . . . [t]he more closely connected with personhood, the stronger the entitlement."[58] Indeed, the same object may change categories depending on the perspective of its owner: "[I]f a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo—perhaps no amount of money can do so."[59] Similarly,

50. Radin, *supra* note 44, at 992; *see also* Leila Scannell & Robert Gifford, *The Experienced Psychological Benefits of Place Attachment*, 51 J. Env't. Psych. 265, 256–57 (2017) (examining the psychological benefits provided by "place attachment"—i.e., "the cognitive-emotional bond to a meaningful setting"—and the detrimental effects that can result from a deprivation of place attachment); *see also* Carole Després, *The Meaning of Home: Literature Review and Directions for Future Research and Theoretical Development*, 8 J. Architectural Planning & Res. 96, 97–102 (1991) (examining various categories of meaning that homeowners ascribe to their dwellings); Rachel S. Herz & Jonathan W. Schooler, *A Naturalistic Study of Autobiographical Memories Evoked by Olfactory and Visual Cues: Testing the Proustian Hypothesis*, 115 Am. J. Psych. 21, 21–30 (2002) (testing the Proustian phenomenon—i.e., where smells, tastes, and visual cues trigger the recollection of autobiographical memories).

51. Radin, *supra* note 44, at 992.

52. Shelly Kreiczer-Levy, *Property Without Personhood*, 47 Seton Hall L. Rev. 771, 777 (2017) (citations omitted).

53. Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 Yale L.J. 1022, 1047 (2009) (reviewing Radin's scholarship).

54. Radin, *supra* note 44, at 986.

55. *Id.* at 960.

56. *Id.* at 990–91.

57. *Id.* at 960 n.6.

58. *Id.* at 986.

59. *Id.* at 959.

as Kreiczer-Levy notes, "[o]ccupational rights of tenants are to be characterized as personhood property, and the ownership rights of landlords are fungible property."[60] The same rationale is present in the South African Constitutional Court's decision in *Grootboom*, which holds that the destruction of an informal settlement violated the dignitarian rights of the squatters under both domestic and international human rights law, even though the occupants had no formal ownership interest in the tent city they had constructed.[61]

Radin therefore avoids rigid categories or line drawing and instead conceives of personal property as case-specific, deriving from the "subjective nature of the relationships between person and thing."[62] For Radin, the two forms of property exist on "a continuum that ranges from a thing indispensable to someone's being to a thing wholly interchangeable with money."[63]

Radin uses the personal/fungible distinction primarily to evaluate compensation due for property taken by the state. In her view, market value is appropriate for fungible property because it holds no greater value for its present owner than for any future owner. Compensation for personal property is not so easily measured. A greater amount of money may in some cases be adequate compensation, but in others "it may be difficult to decide whether compensatory justice requires higher compensation or whether no compensation should be paid because the problem is outside the scope of compensatory justice."[64]

While the personhood perspective is not free from contradictions or criticism,[65] we find it a particularly helpful device in framing the evolution of international law as it has moved from protecting alien property to regulating domestic takings. As we argue in the next Part, the traditional law of alien takings has usually been applied to property easily described as fungible, while the

60. Kreiczer-Levy, *supra* note 52, at 777 (citing Radin, *supra* note 44, at 960, 963).

61. The Government of the Republic of South Africa v. Grootboom and Others, 2000 (1) SA (CC), para. 10 (S. Afr.). Justice Yakoob's Dickensian decision recalls that day "at the beginning of the cold, windy and rainy Cape winter" when "the respondents were forcibly evicted at the municipality's expense." *Id.* Yakoob notes, "this was done prematurely and inhumanely: reminiscent of apartheid-style evictions. The respondents' homes were bulldozed and burnt and their possessions destroyed. Many of the residents who were there could not even salvage their personal belongings." *Id.* Yakoob continues, noting that "[t]he state had an obligation to ensure, at the very least, that the eviction was humanely executed." *Id.* ¶ 88. And further, "the provisions of section 26(1) of the Constitution burdens the state with at least a negative obligation in relation to housing. The manner in which the eviction was carried out resulted in a breach of this obligation." *Id.* South Africa's international human rights obligations are discussed in ¶¶ 26–27.

62. Radin, *supra* note 44, at 987.

63. *Id.*; *see also id.* at 969 (conceding that a wholly subjective evaluation of the personal value of property could devolve into valuing "object fetishism"—the sense based on "an objective moral consensus that to be bound up with that category of 'thing' is inconsistent with personhood or healthy self-constitution"). In Radin's view, a state could legitimately take such objects and not implicate a legitimate sense of self.

64. Margaret Jane Radin, Reinterpreting Property 154 (1993).

65. For critical reactions to Radin, see Gregory S. Alexander & Eduardo Peñalver, An Introduction to Property Theory 69 (2012) (collecting critiques); Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of the Home*, 107 Mich. L. Rev. 1093, 1110–15 (2009); Jeffrey Douglas Jones, *Property and Personhood Revisited*, 1 Wake Forest J. L. & Pol'y 93, 135 (2011); Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 Stan. L. Rev. 347, 352–67 (1993).

new law of domestic takings largely (though not exclusively) applies to property exhibiting characteristics of the personal.

II. The Traditional Law of Takings

A. Law Among States

Obligations in the traditional international law of expropriation ran between the two states involved: the expropriating state and the alien's state of nationality.[66] The alien herself suffered no cognizable injury.[67] In the state-centric Westphalian world of pre-twentieth century international law, states were the only actors with legal personality and uniquely capable of sustaining injuries and asserting claims.[68] The harm suffered by individual property owners—whether financial or personal—was no more than "a convenient scale for the calculation of reparations due to the State."[69] How then could states protect their citizens abroad from expropriations or other harm at the hands of host states? The answer was to characterize injuries to a state's citizens as injuries to the state itself. The state would "espouse" the citizen's claim as its own through a process eventually denominated as "diplomatic protection."[70] Such claims might be asserted in a court or tribunal if one was available, but since few such venues existed prior to the twentieth century, states more frequently resolved expropriation claims through negotiated settlements.[71] If these cooperative responses failed or were never tried, states could engage in reprisals, "exercise intervention, and [] even go to war when necessary."[72]

66. Katja Creutz, State Responsibility in the International Legal Order: A Critical Appraisal 61 (2020). Traditional rules on alien expropriation were positioned in the midst of a much broader evolution in the law of state responsibility. The obligation to provide compensation for foreign-expropriated property began as an example of norms addressing minimum standards of treatment for aliens. Miles, *supra* note 40, at 47–48. In the 1950s and 60s, such "denial of justice" norms in turn became the baseline for an expanding set of secondary "state responsibility" rules that encompassed all state obligations under international law. Creutz, *supra* note 66, at 82–84. For our purposes, the critical point is that whether one moves back or forward on this timeline, the obligations were owed by states to other states.

67. Factory at Chorzow (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 28 (Sept. 13) [hereinafter Factory at Chorzow] ("The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage.").

68. Barcelona Traction (Belg. v. Spain), Judgment, 1970 I.C.J. 44, ¶ 78 (Feb. 5) ("Should the natural or legal persons on whose behalf it [the state] is acting consider their rights are not adequately protected, they have no remedy in international law.").

69. Factory at Chorzow, 1928 P.C.I.J., at 28.

70. John Robert Dugard (Special Rapporteur), *First Report on Diplomatic Protection*, U.N. Doc. A/CN.4/506 and Add. 1 (April 20, 2000). *See generally* Edwin M. Borchard, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 Am. J. Int'l L. 133 (1929) (discussing early twentieth century international law on state obligations toward aliens and the mechanism of espousal).

71. *See* Rodrigo Polanco, The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection? 26 (2019).

72. Oppenheim, *supra* note 40, at 375.

Purely interstate obligations, coupled with the lack of standing accorded to individuals, led to the "domestic takings rule" identified in *Philipp*. The injury to the foreign state and its right of espousal came via its national. When states expropriated their own citizens' property no such link existed. Before the post-World War II human rights revolution, a state's action toward its own citizens' property, as Alexander Fachiri wrote in 1929, was "a question outside the purview of international law."[73] The state-centrism of law concerning alien expropriation was also a natural consequence of its grounding in territorial notions of legal authority. States had virtually absolute authority over individuals within their territory and almost none over those outside.

The twentieth century brought a series of expropriations that differed both in scale and purpose from prior takings.[74] First in the Soviet Union, then in Mexico, and then in Eastern Europe after World War II, states nationalized entire sectors of their economies in pursuit of collective ownership models and control over natural resources.[75] As Frank Dawson and Burns Weston observed in 1962, "the planned, large-scale taking of alien property has become today the most publicized form of foreign-wealth deprivation."[76] Predictable debate emerged during this period between capital importing and exporting states over the standard of compensation owed for the nationalizations.[77] Newly independent developing states challenged the traditional "prompt, adequate and effective" test for compensation (often referred to as the "Hull Formulation" after U.S. Secretary of State Cordell Hull), arguing for "appropriate" compensation or other metrics that would give the expropriating state virtually unlimited discretion in determining amounts owed.[78] Former colonial powers

73. Alexander P. Fachiri, *International Law and the Property of Aliens*, 10 BRIT. Y.B. INT'L L. 32, 32 (1929); *see also* Salimoff v. Standard Oil Co. of N.J., 262 N.Y. 220, 227 (1933) (Russia, "[a]ccording to the law of nations, [] did no legal wrong when it confiscated the oil of its own nationals and sold it in Russia to the defendants."); John Fischer Williams, *International Law and the Property of Aliens*, 9 BRIT. Y.B. INT'L L. 1, 18 (1928) ("Constitutional or legal obligations of private law are subject to no international authority in so far as they relate to the property of the nationals of the legislating state within its own jurisdiction.").

74. Frank G. Dawson & Burns H. Weston, *"Prompt, Adequate and Effective": A Universal Standard of Compensation?*, 30 FORDHAM L. REV. 727, 729 (1962) (In the nineteenth century, "[p]rivate foreign-wealth deprivations were never matters of major national policy, but were confined to limited deprivations involving isolated takings of amounts of property insignificant to the aggregate of foreign-owned wealth in the depriving State.").

75. For detailed discussions, see GILLIAN WHITE, NATIONALISATION OF FOREIGN PROPERTY 19–24 (1961); B.A. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 61–71 (1959).

76. Dawson & Weston, *supra* note 74, at 731.

77. *Compare* Fachiri, *supra* note 73, at 32–34, *with* Williams, *supra* note 73, at 1–2 (reaching opposite conclusions on this issue).

78. *See* Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT'L L. 474, 488 (1991). The Hull Forumulation required, in the absence of exceptional circumstances, compensation "in an amount equivalent to the value of the property taken [adequate] . . . paid at the time of the taking [prompt] . . . and in a form economically usable by the foreign national [effective]." *Id.* at 476 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 712 (AM. L. INST. 1987)). The newly independent states objected to the Hull Formulation both because it denied them control over the natural resources subject to the expropriated foreign investments and because they had not participated in its control. *Id.* at 478.

and other capital exporting states defended the Hull Formulation, arguing well into the 1980s that it had survived the wave of expropriations intact.[79]

B. *Expropriated Alien Property as Fungible Property*

The expropriated alien property that set off these debates fits comfortably into Radin's conception of fungible property. First, the property in the vast majority of cases was rarely the kind contributing to a sense of personhood—a primary home, a community building, a family business, or culturally-specific objects. Instead, the typical case involved a tangible or intangible ownership interest in investments valued for their profit potential.[80] The large-scale expropriations that drove legal debates in the twentieth century involved property of foreign corporations, often in extractive industries.[81] The new Soviet Union nationalized all private property, both domestic and foreign, but the negotiations with Western states that implicated international legal standards focused mostly on corporate foreign investors, as did the treaty-based resolutions of the compensation claims.[82] Likewise, the early twentieth century Mexican expropriations were multifaceted: the 1925 agrarian reforms affected mostly (though not exclusively) large foreign landowners, and the 1938 oil expropriations affected foreign oil companies.[83] Only corporate property owners were subject to expropriations in Czechoslovakia (1945 and 1948),[84] Poland (1946),[85] Yugoslavia (1946),[86] Hungary (1948),[87] and Romania (1948).[88] The most comprehensive and widely-cited dataset on expropriation in this period focuses exclusively on foreign direct investment (FDI).[89] Not surprisingly, most

79. *See* Davis R. Robinson, *Expropriation in the Restatement (Revised)*, 78 Am. J. Int'l L. 176 (1984).

80. *See* G. Hornsey, *Foreign Investment and International Law*, 3 Int'l L. Q. 552, 560 (1950).

81. *See generally* Nicholas R. Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 Colum. L. Rev. 1125 (1948). Bulgaria, apparently unique among post-World War II Eastern European countries, nationalized foreign property owned both by individuals and legal persons. *Id.* at 1156.

82. *See* Charles Lipson, Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries 66–70 (1985); Samy Friedman, Expropriation in International Law 17–23 (1953).

83. *See Mexico-United States: Correspondence Concerning Expropriation by Mexico of Agrarian Properties Owned by Aliens, Extradition, and Naturalization*, 32 Am. J. Int'l L. 181, 184 (1938); Josef L. Kunz, *The Mexican Expropriations*, 17 N.Y.U. L.Q. Rev. 327, 364 (1940).

84. *See* Alan R. Rado, *Czechoslovak Nationalization Decrees: Some International Aspects*, 41 Am. J. Int'l L. 795 (1947) (Czech nationalizations covered mines, certain industrial enterprises, banks, and insurance companies); Doman, *supra* note 81, at 1145–46 (1948 decrees expanded list of nationalized "enterprises").

85. Doman, *supra* note 81, at 1146 (Poland nationalizes "industry, mines, transportation, banking, insurance, and commercial undertakings.").

86. *Id.* at 1150 (Yugoslvia nationalizes forty-eight different branches of industry).

87. *Id.* at 1152 (Hungary nationalizes "all electrical works, industrial, transportation and mining companies which employed more than 100 persons at any time on or since August 1, 1946 . . . . In addition, 47 specifically listed businesses were nationalized even though they employed less than 100 persons.").

88. *Id.* at 1155 (discussing 1948 nationalization law entitled "Bill of Nationalization of Industrial, Banking, Insurance, Mining and Transport Enterprises").

89. Stephen J. Kobrin, *Expropriation as an Attempt to Control Foreign Firms in LDCs: Trends from* 1960 *to* 1979, 28 Int'l Stud. Q., 329, 331 (1984) [hereinafter Kobrin, *Attempt to Control Foreign Firms*]; Stephen J. Kobrin, *Foreign Enterprise and Forced Divestment in LDCs*, 31 Int'l Org. 65, 67 (1980); *see also* Roberto

investor-state arbitrations through the mid-twentieth century were based on concession agreements, instruments by which a broad range of favorable rights were granted to foreign corporate investors, "usually involving the exploitation of natural resources or the construction of large-scale infrastructure projects."[90] Such property owned by foreign corporations, acquired principally to generate profit, has no specific meaning for natural persons and thus makes no contribution to their sense of personhood. As Radin writes, "[a]ll property is fungible for business entities; they have nothing to lose but their wealth."[91]

Second, even if individual aliens owned property to which they had formed an attachment, and that property was expropriated, they could not assert their own claims. The claim became that of their state, which, as the Permanent Court of International Justice observed, "[asserts] its own rights, its right to ensure, in the person of its subjects, respect for the rules of international law."[92] "[W]hether the present dispute originates in an injury to a private interest," the court continued, "which in point of fact is the case in many international disputes, is irrelevant from this standpoint."[93]

Third, the justifications given for the alien compensation rule were presented not in personal but in aggregate terms. Some commentators argued the rule furthered international trade by enhancing the security of foreign investments.[94] Others described states as viewing their citizens' property as part of the national patrimony and its expropriation as an attack on the state itself.[95] In 1928, Frederick Sherwood Dunn bluntly declared that the protection of aliens and their property "is nothing more nor less than the ideas which are conceived to be essential to a continuation of the existing social and economic order of European capitalistic civilization."[96] None of these asserted justifications for the compensation rule—benefits to foreign investors, their home states, and "European capitalistic civilization"—involved the unique interests of individual property owners. Each is phrased in collective or aggregate terms, meaning

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Chang, Constantino Hevia & Norman Loayza, *Privitation and Nationalization Cycles*, at 2 (Apr. 20, 2016), https://ssrn.com/abstract=1471127 [https://perma.cc/2GGR-HSXW] (analyzing "[o]ne of the most important institutional reforms in the post-communist era [which is] the privatization of commercial enterprises all around the world").

90. Andrea Leiter, *Protecting Concessionary Rights: General Principles and the Making of International Investment Law*, 35 LEIDEN J. INT'L L. 55, 57 (2021).

91. RADIN, *supra* note 64, at 155.

92. Mavrommatis Palestine Concessions (Greece v. U.K.), Judgment, 1924 P.C.I.J. (ser. B) No. 3, ¶ 21 (Aug. 30).

93. *Id.* ¶ 22.

94. Chandler P. Anderson, *Basis of the Law against Confiscating Foreign-Owned Property*, 21 AM. J. INT'L L. 525, 526 (1927).

95. FRIEDMAN, *supra* note 82, at 4.

96. Frederick Sherwood Dunn, *International Law and Private Property Rights*, 28 COLUM. L. REV. 166, 175 (1928). Dunn went even further, suggesting none too subtly that the alternative to major powers receiving compensation for their citizens' property would be retaliation by force: "A removal of the practice of diplomatic protection would almost certainly result in an increase of political domination by the great powers over the weaker nations." *Id.* at 180.

all members of the referenced group would benefit equally. For the individual members of these groups, in other words, the property's value is wholly fungible. In sum, by excluding personal aspects of property ownership and claims for expropriation, the law on alien takings falls squarely under Radin's fungible category.

C. *The Declining Relevance of Customary Law on Alien Expropriation*

While debates over alien expropriations were front-burner issues for international law in the mid and late-twentieth century—covering compensation levels, regulatory takings, the exhaustion of local remedies, and other questions—these controversies have waned in recent years. *Philipp*'s exclusive focus on alien expropriation law thus came at a time when the citizen expropriations it left unexplored assumed far greater relevance than the law it deemed incorporated into the FSIA's Takings Exception.

The most obvious explanation for this shift in focus is that takings of foreign property, the act giving rise to disputes, have decreased dramatically. Expropriation of FDI peaked in the 1970s, with 43,423 acts of expropriation during the decade.[97] From 1990 to 2006 there were only sixty-six acts of expropriation.[98] Apart from Venezuela and Bolivia, which were responsible for twenty-eight percent and eleven percent, respectively, of the expropriations during this period (almost forty percent of the total), few states engaged in more than two expropriations and more than half (twenty-four of twenty-seven) engaged in only one.[99] At no point since 1990 has there been an expropriation on the scale, for example, of Sri Lanka's 1975 nationalization of its agricultural industry, affecting 233 foreign firms.[100]

This decline largely resulted from most developing states changing their economic strategies in ways that deemphasize public ownership. The spike in expropriations during the 1960s and 1970s was driven by the wave of African and East Asian states gaining their independence and embracing centralized models of economic development. "Countries achieving independence since 1960 account for almost half of all acts [of expropriation] between 1960 and 1980."[101] The newly independent states faced "[p]ressures to politically assert independence, combined with a general perception that lack of indigenous ownership and managerial control was to blame for economic development

97. Christopher Hajzler, *Expropriation of Foreign Direct Investments: Sectoral Patterns from* 1993 *to* 2006, 148 Rev. World Econ. 119, 128 (2012).

98. *Id.*

99. Christopher Hajzler & Jonathan Rosborough, Government Corruption and Foreign Direct Investment under the Threat of Expropriation, https://www.bankofcanada.ca/2016/03/staff-working-paper-2016-13/ [https://perma.cc/6BAM-EDX3] (unpublished data) (on file with authors).

100. *Id.*

101. Hajzler, *supra* note 97, at 131.

achievements falling short of post-independence expectations."[102] Leslie Rood has termed this dynamic "indigenization," understood as "the process by which a government limits participation in a particular industry to citizens of the country."[103]

Several decades after independence, developing states are more likely to enhance their economic autonomy by entering into profit sharing arrangements facilitated by international financial institutions than by resorting to direct nationalizations.[104] Critically, many states in the Global South now compete aggressively for foreign investment in multiple sectors, turning any risk of expropriation into a comparative disadvantage. States showing little or no risk of expropriation are generally seen as more attractive investment destinations.[105]

The institutionalized resolution of investor-state disputes has also changed the conversation from whither expropriation and the appropriate level of compensation to technical discussions of how an investment dispute will be resolved. As of 2016, more than 3,000 investment treaties worldwide provided for arbitration mechanisms.[106] A majority of contemporary investment agreements incorporate the traditional Hull Formulation of "prompt, adequate and effective" compensation,[107] thereby largely marginalizing the customary law debate on levels of compensation.[108]

Modern investment treaties are supported and promoted by a series of transnational institutions established after the era of FDI expropriation: the Multilateral Investment Guarantee Agreement ("MIGA"), the Overseas Private Investment Corporation ("OPIC"), and the International Center for Settlement of Investment Disputes ("ICSID").[109] Instead of treating expropriation as a symbolic righting of historic wrongs connected to national identity and culturally significant symbols of power and ownership, the multilateral dispute resolution mechanisms offered by these instruments regard expropriation as periodic wealth distribution episodes that trigger ordinary legalized proceedings.

Philipp's exclusive incorporation of the law on alien takings tied section 1605(a)(3) to controversies that are increasingly rare and which, when they do occur, are unlikely to be litigated in U.S. courts. They are rare because alien expropriations themselves have almost disappeared as a response to disputes with capital investors. And they are unlikely to appear in U.S. courts because

102. *Id.*

103. Leslie L. Rood, *Nationalisation and Indigenisation in Africa*, 14 J. MOD. AFR. STUD. 427, 430 (1976).

104. Hajzler, *supra* note 97, at 131.

105. Kobrin, *supra* note 89, at 344.

106. Rachel L. Welhausen, *Recent Trends in Investor-State Dispute Settlement*, 7 J. INT'L DISPUTE SETTLEMENT 117, 117 (2016).

107. David Khachvani, *Compensation for Unlawful Expropriation: Targeting the Illegality*, 32 ICSID REV. 385, 387 (2017).

108. Norton, *supra* note 78, at 488.

109. Michael S. Minor, *The Demise of Expropriation as an Instrument of LDC Policy*, 25 J. INT'L BUS. STUD. 177, 183 (1994).

of the many alternative mechanisms now available for resolving foreign investment disputes.

III. The Right to Personal Property in International Law

While international law does continue to promote pathways for alien compensation, much of the post-World War II development in the field tracks Radin's conception of personal property and has created openings for the redress of domestic takings. The rise in protection from domestic takings is primarily associated with international human rights law, which increasingly recognizes an individual right to certain forms of property. The trend is evident in the text of governing instruments, the jurisprudence of courts and tribunals, and the practice of states that were once reluctant to rectify domestic takings.

Of course, foreign states today face no barrier to espousing the claims of their individual citizens whose personal property was unlawfully taken by a foreign government. And the human right to property discussed below may be (and has been) invoked by corporate owners against their own governments. The alien/espousal regime and citizen regime, in other words, do not map directly on to fungible and personal conceptions of property. But our argument is not based on the irregular cases but rather on the different ways an owner can relate to her property—a multiplicity of interests that in our view track fungible and personal conceptions of possession.

A. The Landscape of the Individual Right to Property

The individual right to property was first recognized by international law in Article 17 of the 1948 Universal Declaration of Human Rights ("UDHR"): "Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property."[110] The appearance of property in the UDHR reflected the concretization of market economy values, even if the milquetoast final wording suggests a compromise with socialist states that deemphasized property rights.[111] Curiously, the *Philipp* Court ended its review of international sources at the UDHR, finding that the admittedly "growing body of human rights law" was "silent . . . on the subject

110. G.A. Res. 217 (III) A, art. 17 (Dec. 10, 1948) (Article 25 of the UDHR further recognizes housing as part of the right to an adequate standard of living).

111. *See* William A. Schabas, *The Omission of the Right to Property in the International Covenants*, 4 Hague Y.B. Int'l L. 135, 137–48 (1991) (describing how debates in the U.N. Human Rights Commission over the right to property split along predictable East-West lines in the new Cold War environment and the demise of earlier drafts that would have provided a right of compensation or restitution in the event of takings and made clear that the scope of property rights would not be defined by national law (the favored position of the Soviet bloc)).

of property rights."[112] Perhaps the Court came to this conclusion because the two major global human rights treaties, the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), both completed in 1966, did not directly address property rights.[113] Whatever the reason, *Philipp* ignores developments in human rights law of the era and beyond. The American Declaration of the Rights and Duties of Man, adopted seven months prior to the UDHR, provides in Article 23 that "[e]very person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home."[114] Protocol 1 to the European Convention on Human Rights, completed in 1952, provides in Article 1 that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."[115] The 1963 International Convention on the Elimination of All Forms of Racial Discrimination requires in Article 5(d)(v) that state parties eliminate racial discrimination in the enjoyment of "[t]he right to own property alone as well as in association with others."[116] The 1969 American Convention on Human Rights provides in Article 21 that "[e]veryone has the right to the use and enjoyment of his property" and that "[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."[117]

The protection of property in international law accelerated after 1976, the year the FSIA was enacted. Article 14 of the 1981 African Charter on Human

112. Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 710 (2021). Later in the opinion, the Court reiterated that property rights had been omitted from the international codification of human rights and that the domestic takings rule "survived the advent of modern human rights law, including the Genocide Convention." *Id.* at 712. The Genocide Convention and the Universal Declaration were approved at virtually the same time by the U.N. General Assembly, the former on December 9, 1948, and the latter on December 10, 1948.

113. Schabas, *supra* note 111, at 169 (giving various explanations for the omission of property rights from the two Covenents but cautioning that "it is impossible to reduce the issue to an ideological conflict of West and East").

114. Organization of American States, American Declaration of the Rights and Duties of Man, O.A.S. G.A. Res. 1591, art. 23, O.A.S. Doc. OEA/Ser.L.V/I.82 doc. 6 rev. 1 (1948).

115. Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, ETS 9, 213 U.N.T.S. 262.

116. International Convention on the Elimination of All Forms of Racial Discrimination art. 5(d)(v), Mar. 7, 1966, 660 U.N.T.S 195.

117. American Convention on Human Rights "Pact of San Jose, Costa Rica" art. 21, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

and Peoples' Rights,[118] Article 31 of the 2004 Arab Charter on Human Rights,[119] Article 26(1) of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States,[120] and Article 17 of the non-binding 2012 ASEAN Human Rights Declaration[121] all contain an explicit right to property. Several international instruments addressing particular groups also protect property rights of those groups. The 1979 Convention on the Elimination of All Forms of Discrimination Against Women requires that women receive equal rights in the "ownership, acquisition, management, administration, enjoyment and disposition of property."[122] More recently, the 2007 U.N. Declaration on the Rights of Indigenous Peoples, ("UNDRIP") requires that states provide effective means of redress when indigenous peoples' "cultural, intellectual, religious and spiritual property [is] taken without their free, prior and informed consent or in violation of their laws, traditions and customs."[123] In total, as of 2014, "two thirds of all nations are parties to regional human rights treaties that contain the right to property."[124] The European Court of Human Rights ("ECtHR"), the Inter-American Commission and Inter-American Court of Human Rights, and the African Commission on Human and Peoples' Rights have all developed a rich jurisprudence on property rights and found that the regional conventions they enforce provide for individual and communal property or possessory rights.[125] *Philipp* simply ignores the development of treaty-based property protection over this almost-sixty year period.

It also ignores the practice of the U.N. Human Rights Council, which has built on the edifice of hard-law instruments by making respect for property rights a defining feature of its Charter-based oversight. The Council has

118. African Charter on Human and Peoples' Rights art. 14, June 27, 198, 21 I.L.M. 58 [hereinafter African Charter] ("The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.").

119. Arab Charter on Human Rights art. 31, May 22, 2004, *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (2005) ("Everyone has a guaranteed right to own private property, and shall not under any circumstances be arbitrarily or unlawfully divested of all or any part of his property.").

120. Convention on Human Rights and Fundamental Freedom art. 26, May 26, 1995, 3 I.H.R.R. 1 ("Every natural and legal person shall have the right to own property. No person shall be deprived of his property except in the public interest, under a judicial procedure and in accordance with . . . principles of international law.").

121. ASEAN Human Rights Declaration art. 17, Nov. 19, 2012 ("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.").

122. G.A. Res. 34/180 (Dec. 18, 1979) ("[State Parties] shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure . . . [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.").

123. G.A. Res. 61/295 art. 11, ¶ 2 (Sept. 13, 2007).

124. Sprankling, *supra* note 41, at 466.

125. Golay & Cismas, *supra* note 41, at 13–14.

condemned, among other states, Myanmar,[126] Syria,[127] and Sudan[128] for property right violations. In 2018, for example, it admonished Eritrea to "fully respect land rights in relation to traditional ownership and property rights, including those of foreign communities, and . . . bring to an end all arbitrary deprivation of property in violation of international law."[129] The U.N. High Commissioner for Human Rights has taken similar positions.[130]

B. Property as Personhood in International Law

International law, as we have observed, conceives of property broadly and secures individual interests that are both personal and fungible. Our focus is on the former—property as a signifier of personhood. In that regard, international courts and tribunals addressing property claims have repeatedly elaborated on a personal conception in at least three overlapping settings: (i) takings attendant to massive human rights violations, including genocide, ethnic cleansing and the expulsion of groups on a discriminatory basis; (ii) theft of cultural property; and (iii) the commodification and seizure of indigenous land.

1. Property Taken in Connection with Mass Human Rights Violations

The recognition of property as integral to a victimized community's wealth, identity, and economic flourishing under international law began with legal efforts to reckon with the Holocaust.[131] "For many survivors and their families," Evan Hochsberg writes, "their property [was] the only remaining physical connection to a life that was devastated during the Holocaust and its aftermath."[132] The Nazis' seizure of Jewish-owned assets produced both individual and collective cultural losses. Philippe Sands describes the plunder of Polish art at the hands of Hans Frank, the Third Reich's Occupation Governor-General:

> [Frank] adopted a selfless policy of taking into custody important Polish art treasures, signing decrees that allowed famous works of art to be confiscated for "protective" reasons. They became part of Germany's artistic heritage . . . . Some pieces went to Germany,

126. Human Rights Council Res. 25/26, U.N. Doc. A/HRC/RES/25/26, ¶¶ 5, 10 (Mar. 28, 2014).

127. Human Rights Council Res. 42/22, U.N. Doc. A/HRC/42/L.22, ¶¶ 37–40 (Sept. 24, 2019).

128. Report of the Independent Expert on the Situation of Human Rights in the Sudan, U.N. Doc. A/HRC/45/53 ¶ 87(g) (2020).

129. Human Rights Council Res. 38/15 U.N. Doc. A/HRC/38/L.15/Rev.1, ¶ 7 (July 6, 2018).

130. *See* U.N. Office of the High Commissioner for Human Rights, *Land and Human Rights: Standards and Applications*, 53–56, U.N. Doc. HR/PUB/15/5/Add.1 (2015).

131. *See generally* Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946 (Nuremberg, 1947). *See also* Peter Calvocoressi, Nuremberg: The Facts, the Law and The Consequences 48 (1947) (crimes charged at Nuremburg included "wanton devastation of towns and villages; the plunder of works of art.").

132. Evan Hochberg, *Toward a Fair and Just Comprehensive Property Restitution Law in Poland*, 41 Loy. L.A. Int'l & Comp. L. Rev. 727, 728 (2019).

> like the thirty-one sketches by Albrecht Durer, lifted from the Lubomirski collection in Lemberg and personally handed to Goring. Other pieces were held at the Wawel Castle, some in Frank's private rooms.[133]

Hans Frank was hanged at Nuremberg for committing crimes against humanity, not property offenses.[134] In the post-Nuremberg era, international legal institutions have begun to incorporate an understanding of the public harm associated with confiscation of private property during the Holocaust, the paradigmatic mass violation of human rights.[135] In the period after the Cold War, a number of domestic property-return initiatives paired redress for Holocaust-era takings with compensation or restitution for communist-era expropriations, particularly in Eastern European states.[136] The European reckoning with property-related crimes has spawned a growing body of international law to guide remedies for victims of takings associated with modern pogroms anywhere they are committed. Where marginalized groups have suffered state-sponsored violence and dehumanizing discrimination—particularly when the goal of such persecution is to erase the bonds that connect a community to a place—property has been recognized as a critical marker of dignity, identity, and belonging.

In *Brok v. Czech Republic,*[137] for example, the Human Rights Committee of the ICCPR addressed the question of whether a Jewish family's apartment building in Prague that had been seized under Nazi rule and converted to "national property" by post-war communists created an obligation of restitution for the Czech Republic. As Patrick Macklem has noted, "the Committee was asked . . . whether a restitution initiative can ignore the justice of the distribution of property in place before the establishment of communist rule."[138] The Committee found that the Czech restitution legislation denied Robert Brok's widow equal protection of the law as guaranteed by Article 26 of the ICCPR and that the Czech Republic "is under an obligation to provide the [applicant] with an effective remedy. Such remedy should include restitution of the property or

133. Philippe Sands, East West Street 247 (2016).

134. *Hans Frank*, Shoah Res. Ctr., https://www.yadvashem.org/odot_pdf/Microsoft%20Word%20-%205859.pdf [https://perma.cc/7BWQ-EVZH] (last visited Nov. 13, 2023).

135. The best known example of states marhalling their public resources to address art taken during the Hoocaust was the Washington Conference Principles on Nazi-Confiscated Art. *See* Washington Conference Principles on Nazi-Confiscated Art, *infra* note 195.

136. Tom Allen, *Transitional Justice and the Right to Property Under the European Convention on Human Rights*, 16 Stellenbosch L. Rev. 413, 413–21 (2005).

137. Brok v. The Czech Republic, Comm. 774/1997, U.N. Doc. A/57/40, Vol. II, at 110 (HRC 2001) [hereinafter Brok].

138. Patrick Macklem, *Rybna 9, Praha 1: Restitution and Memory in International Human Rights Law*, 16 Eur. J. Int'l L. 1, 3 (2005).

compensation . . . ."[139] In restating the Brok family's complaint, the Committee also observed that

> [t]he Czech Republic has, according to the author's widow, systematically refused to return Jewish properties. She claims that since the Nazi expropriation targeted the Jewish community as a whole, the Czech Republic's policy of non-restitution also affects the whole group. As a result, and for the reason of lacking economical basis, the Jewish community has not had the same opportunity to maintain its cultural life as others, and the Czech Republic has thereby violated their right under article 27 of the Covenant.[140]

By finding that the loss of the building exacerbated the Brok family's suffering during the Holocaust and reduced the inheritance and economic opportunities available to descendants after the war, the Committee recognized the intergenerational consequences of past state deprivations of private property. And by tying the economic deprivation associated with Nazi-era expropriations to the Jewish community's inability to maintain cultural life, the Committee acknowledged the ways in which the taking of property represents a loss of collective personhood. Although the ICCPR does not contain a right to property *per se*, and the Human Rights Committee typically disregards claims relating to events occurring before the ICCPR's entry into force, the Czech Republic's failure to remedy historic property-based injustices violated the Covenant's prohibition on cultural discrimination.[141]

In a similar fashion, the European Convention on Human Rights guarantees the right to peaceful enjoyment of possessions in all states party to the Convention, a right that has been extended to security of the home.[142] The ECtHR has interpreted possessions to include not only tangible property

139. Brok, *supra* note 137, ¶¶ 8–9.

140. *Id.* ¶ 7.4. Article 27 of the ICCPR provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 27 [hereinafter ICCPR].

141. Brok, *supra* note 137, ¶ 7.4.

142. The notion of "home" is an autonomous concept which does not depend on the classification under domestic law. Accordingly, the answer to the question whether a habitation constitutes a "home" under the protection of Article 8 § 1 depends on the factual circumstances, namely the existence of sufficient and continuous links with a specific place. *See, e.g.*, Chirago v. Armenia, App. No. 13216/05, ¶ 204 (June 16, 2015), https://hudoc.echr.coe.int/fre?i=001-155353 [https://perma.cc/G77B-XMBW]; Winterstein v. France, App. No. 27013/07 (Apr. 28, 2016), https://hudoc.echr.coe.int/eng?i=001-162215 [https://perma.cc/3LVP-E67L]; Sargsyan v. Azerbaijan, App. No. 40167/06 (June 16, 2015), https://hudoc.echr.coe.int/fre?i=001-155662l [https://perma.cc/D5Y3-JLC8]; Prokopovich v. Russia, 2004-XI Eur. Ct. H.R. 1, ¶ 37; Mckay-Kopecka v. Poland, App. No. 45320/99 (Sept. 19, 2006), https://hudoc.echr.coe.int/eng?i=001-77276 [https://perma.cc/2ES2-3JU7].

but also movable and immovable property,[143] economic interests, contractual agreements, compensation claims against the state, and goodwill.[144] In sum, possessions are all valuable assets that may be lost in the context of takings and confiscation.[145]

Article 8 of the European Convention identifies the "home" as a sanctuary deserving of specific protection by providing that:

> Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Protocol No. 1, Article 1 to the Convention broadens the property safeguards in the Article 8 definition of "home" to state that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.[146]

The ECtHR, unlike the Human Rights Committee, has been reluctant to order remedies for takings in the Nazi or Communist eras,[147] but the court has found that modern day takings attendant to human rights abuses committed against ethnic minorities constitute a violation of the European Convention. In *Tănase and others v. Romania*, for example, the applicants complained that Romanian authorities had breached Article 8 by failing to remedy an anti-Roma pogrom in the town of Bolintin Deal that led to the destruction of dozens of homes and denial of access to a cemetery where three generations of Roma from

143. *See* Tom Allen, *Compensation for Property Under the European Convention on Human Rights*, 28 MICH. J. INT'L L. 287, 295 (2007).

144. S. v. United Kingdom, App. No. 10741/84, 41 Eur. Comm'n H.R. Dec. & Rep. 226, 229 (1984); Wiggins v. United Kingdom, 13 Eur. Comm'n H.R. Dec. & Rep. 40, 42 (1978).

145. *But see* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) ¶¶ 62–63, 67 (1976) (holding that pornographic material that is outlawed may be properly confiscated without compensation).

146. Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 1, 8, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention]. Protocol No. 1, Article 1 is modified by language noting that "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

147. *See* Gratzinger v. Czech Republic, App. No. 39794/98, 35 Eur. Ct. H.R. 202 (2002) (refusing to entertain equality claims under the European Convention relating to the scope of restitution initiatives in post-Communist Europe).

the town were interned.[148] In ruling the case admissible, the ECtHR noted "the involvement of the local authorities (the mayor) in the events and the fact that [the applicants] could no longer return to their village, and were deprived of their homes, of medical and social services, employment opportunities and schooling for their children."[149] *Tănase* is mirrored by *Moldovan v. Romania* and *Others v. Romania*, and *Lăcătuş and Others v. Romania*, in which the applicants alleged that the town police encouraged a non-Roma crowd to destroy Roma properties.[150]

Each of the Roma cases echoes the ECtHR's seminal ruling in *Akdivar and Others v. Turkey*, in which the court ordered monetary compensation for the burning of nine houses following a ethnically-motivated clash between Turkish security and the Kurdistan Worker's Party ("PKK") forces in a predominately Kurdish town. "The Court is of the opinion that there can be no doubt that the deliberate burning of the applicants' homes and their contents constitutes at the same time a serious interference with the right to respect for their family lives and homes and with the peaceful enjoyment of their possessions."[151] The ECtHR found that Article 8 of the Convention and Article 1 of Protocol No. 1 had *both* been violated.[152] Similarly, in *Dogan and Others v. Turkey*, villagers forced from their homes and unable to return during a state of emergency were found to have established a violation of Article 1, Protocol 1 even though they were unable to produce deeds to property.[153]

The Inter-American system has also secured property rights following massacres and forced evictions that have severed community-level connections to place. In 2012, the Inter-American Court of Human Rights reiterated the

148. Tănase v. Romania, App. No. 62954/00, at 7 (May 19, 2009), https://hudoc.echr.coe.int/eng?i=001-69280 [https://perma.cc/PA7X-JYRR].

149. *Id.*

150. Moldovan v. Romania, App. No. 41138/98 and 64320/01, ¶¶ 90, 109 (July 12, 2005), https://hudoc.echr.coe.int/eng?i=001-69670 [https://perma.cc/7TPM-76WT]; Lăcătuş v. Romania, App. No. 12694/04, ¶¶ 8–18 (Nov. 13, 2012), https://hudoc.echr.coe.int/eng?i=001-114513 [https://perma.cc/L2G5-HXDD]; *see also* Gergely v. Romania, App. No. 57885/00, Eur. Ct. H.R. 1, ¶¶ 8–15 (Apr. 26, 2007) *and* Kalanyos and Others v. Romania, App. No. 57884/00, Eur. Ct. H.R. 1, ¶¶ 8–18 (Apr. 26, 2007) (concerning the burning of houses belonging to Roma villagers by the local, non-Roma population, the poor living conditions of the victims and the authorities' failure to prevent the attack to carry out an adequate criminal investigation, thus depriving the applicants of their right to bring a civil action to establish liability and recover damages for property losses).

151. Akdivar v. Turkey, 1996-IV Eur. Ct. H.R. 1192; *see also* Gillow v. United Kingdom, 109 Eur. Ct. H.R. (ser. A) (1986).

152. Akdivar v. Turkey, 1996-IV Eur. Ct. H.R., ¶ 88.

153. Dogan v. Turkey, 2004-VI Eur. Ct. H.R. 81, ¶ 139; *see also* Human Rights Monitoring: A Field Mission Manuel 352 (Anette Faye Jacobsen ed. 2008) ("[T]he Court notes that it is undisputed that the applicants all lived in Boydas village until 1994. Although they did not have registered property, they either had their own houses constructed on the lands of their ascendants or lived in the houses owned by their fathers and cultivated the land belonging to the latter. The Court further notes that the applicants had unchallenged rights over the common lands in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling. Accordingly, in the Court's opinion, all these economic resources and the revenue that the applicants derived from them may qualify as 'possessions' . . ." for the purposes of Article 1.).

central role of property destruction in violent assaults on entire communities. In the same way that Hiwot longed for her Addis Ababa home following her expulsion from Ethiopia, the tribunal in the *Massacres of El Mozote* case emphasized the connective tissue that joins victims, property, personhood, and community:

> The right to property is a human right and, in this case, its violation is especially serious and significant, not only because of the loss of tangible assets, but also because of the loss of the most basic living conditions and of every social reference point of the people who lived in these villages. As expert witness María Sol Yáñez de la Cruz underscored, "[n]ot only was the civilian population exterminated, but also the whole symbolic and social tissue. They destroyed homes and significant objects. They stripped the people of their clothes, the children's toys, and their family photographs; they removed and destroyed everything that was important to them. They killed or took the animals; they all recount that they took the cows, the hens; they took my cows, they killed two bulls: a loss of both material and affective significance in the peasant universe. Scorched earth is a type of violation and stigmatization by soldiers, created by the perpetrators. The scale of the horror perpetrated there was aimed at annihilating the area, with all its inhabitants, to vacate the territory, to expel them from the area." Furthermore, "[i]t was a rationale of extermination, of total destruction of the social mechanisms. . . . The massacre disintegrated the collective identity, by leaving a social vacuum where the community had once carried out its rituals, its affective exchanges, the context and the framework in which they knew they were part of a community."[154]

Likewise, in *Moiwana Community v. Suriname*, the court determined that during a 1986 massacre, "[s]tate agents and collaborators killed at least 39 defenseless community members, including infants, women and the elderly, and wounded many others. Furthermore, the operation burned and destroyed village property and forced survivors to flee."[155] The separation of community members from their property, the court found, constituted an ongoing offense because the villagers "ability to practice their customary means of subsistence and livelihood" was "drastically limited."[156] In response to

154. Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 180 (Oct. 25, 2012); *see also* Santo Domingo Massacre v. Colombia, Preliminary Objections, Merits, and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 259, ¶¶ 68–69, 75, 79 (Nov. 30, 2012).

155. Moiwana Community v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124 ¶ 86 (June 15, 2005).

156. *Id.* ¶ 186.

the petitioners' request that Suriname "rebuild the houses in the village and construct, furnish and staff fully-equipped and functional educational and health facilities, all with the prior informed consent of the victims and with their full cooperation,"[157] the court ordered the establishment of a $1.2 million fund to be directed "to health, housing and educational programs for the Moiwana community members."[158]

The same reasoning is present in the jurisprudence of the African Commission on Human and Peoples' Rights ("ACHPR") under Article 14 of the African Convention.[159] In *Sudan Human Rights Organisation v. Sudan*,[160] the ACHPR examined massacres of the Fur, Marsalit, and Zaghawa people in Darfur and held that Sudan was obligated to protect people's lives and property during unrest, which included the obligation to resettle people who were in harm's way.[161] The *Sudan Human Rights Organisation* decision is notable for grounding the property's relation to its owners not in formal terms but in its value to their everyday lives. The ACPHR held that the lack of legal title to the land did not impede their claims. Rather, "the fact that the victims cannot derive their livelihood from what they possessed for generations means they have been deprived of the use of their property under conditions which are not permitted by Article 14."[162] Like the Human Rights Committee decision in *Brok*, the ACPHR opinion reasoned that the destruction of property in Darfur threatened the safety and dignity of the community as a whole.[163] The dispersal of communities via the loss of property was also central to a case arising from human rights abuses in the Mauritania-Senegal Border War. The ACPHR ruled that "[t]he confiscation and looting of the property of Black Mauritanians and the expropriation or destruction of their land and houses before forcing them to go abroad constitute a violation of the right to property as guaranteed in Article 14."[164]

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157. *Id.* ¶ 199(h).

158. *Id.* ¶ 214.

159. African Charter on Human and Peoples' Rights art. 14, June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986). Article 14 provides: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws." *Id.*

160. Sudan Human Rights Organisation v. Sudan, Communication 279/03, 296/05, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (May 27, 2009).

161. *Id.* ¶¶ 192, 201 ("The right to property is a traditional fundamental right in democratic and liberal societies. It is guaranteed in international human rights instruments as well as national constitutions, and has been established by the jurisprudence of the African Commission. The role of the State is to respect and protect this right against any form of encroachment, and to regulate the exercise of this right in order for it to be accessible to everyone, taking public interest into due consideration.").

162. *Id.* ¶ 205.

163. *Id.* ¶ 201.

164. Malawi African Association v. Mauritania, Communication 54/91, 61/91, 98/93, 164/97, 196/97, 210/98, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 128 (May 11, 2000); *see also* Institute for Human Rights and Development in Africa v. Guinea, Communication 249/02, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 44 (Dec. 7, 2004) (holding a mass expulsion targeting specific national, racial, ethnic, or religious groups to violate Article 12.5 of the African Charter).

2. Theft of Cultural Property and Personhood

The human right to property is often phrased in individual terms, despite the reality that victims are frequently targeted because of their ethnic, religious, or other group identity. By contrast, the protection of cultural property explicitly ties the nature and value of protected property to a notion of collective identity, marked by community-level traditions, objects, and ways of life. The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("UNESCO Convention"), for example, describes the harm of illicit transport of cultural property as being "the impoverishment of the cultural heritage of the countries of origin of such property."[165] Likewise, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (the "Hague Convention") exists to safeguard "each people's" ability to make "its contribution to the culture of the world."[166] And Article 15(1)(a) of the ICESCR upholds "the right of everyone to take part in cultural life."[167]

The connection between cultural property and the collectivity of its origin complicates the application of Radin's distinction between fungible and personal property. International law regards cultural property as constitutive of personhood precisely because it is valued not by a single individual but by all members of a socio-cultural community. The identity of the group defines the identity of its members and vice-versa. In that context, the theft, destruction, or misappropriation of property, particularly that which reflects or identifies the group, is a loss visited upon the unique dignity and markers—personhood—of the collective. As a 1925 Appeals Court in India put it, a contested Hindu family idol "could not be seen as a mere chattel [] which was owned."[168] Rather, the idol was "regarded as a legal entity in its own right [entitling it] to have its own interests represented in court."[169]

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

166. Convention for the Protection of Cultural Property in the Event of Armed Conflict pmbl., May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention]; *see also* John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 Am. J. Int'l L. 831, 841 (1986) (arguing that the 1954 Convention embodies a "cosmopolitan notion of a general interest in cultural property" on the part of "all mankind," whereas the later UNESCO Convention seeks to protect the integrity of national cultural heritage).

167. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 15(1)(a) (Dec. 16, 1966); *see also* Farida Shaheed, *Report of the Independent Expert in the Field of Cultural Rights*, U.N. Doc. A/HRC/17/38, ¶ 78 (Mar. 21, 2011) (recognizing that "[t]he right of access to and enjoyment of cultural heritage forms part of international human rights law, finding its legal basis, in particular, in the right to take part in cultural life, the right of members of minorities to enjoy their own culture, and the right of indigenous peoples to self-determination and to maintain, control, protect and develop cultural heritage").

168. Mullick v. Mullick, (1925) 52 L.R. Ind. App. 245, *cited in* Lyndel V. Prott & Patrick J. O'Keefe, *'Cultural Heritage' or 'Cultural Property'?* 1(2) Int'l J. Cult. Prop. 307, 310 (1992).

169. Alessandro Chechi, The Settlement of International Cultural Heritage Disputes 88 (2014).

An additional difference is that Radin finds a personal connection with property arising after the property is acquired. Individual members of a state or sub-state cultural group, by contrast, are commonly part of a group venerating the property from birth.[170] Their connection to group property is inseparable from the importance associated with the role of objects and possessions in their upbringing and world view.

Cultural property entered the legal lexicon via the 1954 Hague Convention.[171] Drafted in response to the Nazis' theft and misappropriation of art and artifacts,[172] it identifies cultural property as a bundle of distinct goods, practices, and attributes containing value and worthy of international preservation. Without using the word "personhood," Article 1(a) enumerates the component parts of "culture" by citing the objects and customs that mark distinctive groups, including "movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest . . ." and the museums and buildings that house such material.[173] The Hague Convention also obligates State Parties to prevent pillage and acts of vandalism directed against cultural property in interstate armed conflicts[174] and, to a more limited extent, non-international armed conflicts.[175] The 1970 UNESCO Convention goes further by covering property designated by a state party "as being of importance for archaeology, prehistory, history, literature, art or science" [176] and can include everything from flora to rare manuscripts, to antiquities and furniture over 100 years old.[177] In contrast to the Hague Convention, the UNESCO Convention is not limited to times of armed conflicts. The UNESCO Convention "creates multilateral control of the movement of cultural property

170. *See* JOHN HENRY MERRYMAN, THINKING ABOUT THE ELGIN MARBLES 25–26 (2000) (quoting Greek Minister, Melina Mercouri, on the British Museum's continued refusal to return the sculptures taken from the Greek Parthenon in the early nineteenth century: "[T]hey are the symbol and the blood and the soul of the Greek people . . . . [W]e have fought and died for the Parthenon and the Acropolis . . . . [W]hen we are born, they talk to us about all this great history that makes Greekness . . . .").

171. 1954 Hague Convention, *supra* note 166.

172. Merryman, *supra* note 166, at 835.

173. 1954 Hague Convention, *supra* note 166, art. 1.

174. *Id.* art. 4 ¶ 3.

175. *Id.* art. 19, ¶ 1. Article 19 of the Hague Convention requires all parties to non-international armed conflicts to "apply, as, a minimum, the provisions of the present Convention which relate to respect for cultural property." *Id.* This wording has been criticized as being less than clear in the obligations it imposes on NIAC parties. *See* Louise Arimatsu & Mohbuba Choudhury, *Protecting Cultural Property in Non-International Armed Conflicts: Syria and Iraq*, 91 INT'L L. STUD. 641, 644 n. 9 (2015). The 1999 Second Protocol to the Hague Convention applies in its entirety to NIACs and was designed to fill this gap. *See* Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 3511 [hereinafter Second Protocol].

176. 1970 UNESCO Convention, *supra* note 165, art. 1.

177. *Id.* art. 1 (a)–(k).

while seeking to promote the legitimate exchange of cultural property and international cooperation in preparing national inventories."[178] UNESCO later adopted the more detailed Convention for the Safeguarding of the Intangible Cultural Heritage.[179] The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects ("UNIDROIT Convention") was designed to implement the 1970 UNESCO Convention and to harmonize private law regimes with the "national treasure" exception found in both the General Agreement on Tariffs and Trade ("GATT") and Treaty on the Functioning of the European Union ("TFEU") free trade systems. The UNIDROIT Convention, like the earlier trade regimes, designates certain cultural objects as protected goods that cannot be freely traded, including objects reflecting national heritage patrimony or contained in certain museum collections.[180] The UNIDROIT Convention also promotes interstate cooperation after unauthorized export and is designed to resolve disputes over legal title to stolen or illegally exported cultural objects.[181] Its central directive is that the "possessor of a cultural object which has been stolen shall return it."[182] Finally, the recently-enacted 2022 Council of Europe Convention on Offences relating to Cultural Property ("Nicosia Convention") seeks to promote international cooperation in criminal prosecutions of cultural property theft.[183]

Each of these instruments advances the protection and promotion of cultural heritage, although their free use of "culture" assumes a definitional equivalence between its legal meaning and how it is conventionally understood.[184] One critical example is Article 13(d) of the UNESCO Convention, which affirms the "indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported."[185] Implicit in this definition is the notion that certain markers of

178. James A. R. Nafziger, *International Penal Aspects of Protecting Cultural Property*, 19 THE INTERNATIONAL LAWYER 835, 837 (1985).

179. Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 3.

180. Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1330 (1995) [hereinafter UNIDROIT Convention].

181. Francesco Francioni, *Cultural Heritage*, *in* MAX PLANCK ENCYCLOPEDIAS INTERNATIONAL LAW ¶¶ 11–12 (2020), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1392?print=pdf [https://perma.cc/4AR4-5KYA].

182. UNIDROIT Convention, *supra* note 180, art. 3, ¶ 1.

183. Council of Europe Convention on Offences relating to Cultural Property, May 19, 2017, C.E.T.S. No. 221 (entered into force Apr. 1, 2022), https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/221 [https://perma.cc/QD7Q-GAB2].

184. Although there are many interpretations of culture, at a minimum the word refers to the distinctive attributes of dignity and identity that define a group or people. *See* Jane Anderson & Haidy Geismar, *Introduction*, *in* THE ROUTLEDGE COMPANION TO CULTURAL PROPERTY 2 (Jane Anderson & Haidy Geismar, eds. 2017) ("Despite its history, nation-states and national institutions are not the only arbiters of the definition and value of cultural property. As such we must also be attentive to the ways in which cultural property has been able to offer itself as a vehicle to articulate complex identity politics and painful histories of exploitation and appropriation both within and between states.").

185. 1970 UNESCO Convention, *supra* note 165, art. 13(d).

group identity—objects or items reflecting personhood in Radin's language—may be shared but not sold. An expansive understanding of "cultural property" would grant designating states extraordinary authority to take objects out of the commercial market.

Modern international law also criminalizes certain acts, including the intentional destruction of "cultural heritage sites," without defining the nature of the "culture" involved.[186] Building on the precedent of the Nuremberg prosecution of notorious cultural relics looter Alfred Rosenberg,[187] the International Criminal Tribunal for the former Yugoslavia ("ICTY") prosecuted and convicted Miodrag Jokić and Pavle Strugar for the bombardment and damage to the clearly identified World Heritage city of Dubrovnik.[188] More recently, Mali requested that the International Criminal Court investigate and indict the perpetrators of attacks on religious and cultural property in Timbuktu, resulting in the prosecution and conviction of Ahmad al Faqi al Mahdi.[189]

International law thus functions to define the protected cultural property in question—often material objects held dear by particular communities—and to inform national-level proceedings.[190] In practice, states acting both through national mechanisms and those contained in multilateral treaties have engaged in two primary forms of legal action related to cultural property. The first involves demands for the return of tangible things to individuals asserting their property was wrongfully taken, often in connection with Nazi-era confiscations

186. UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage (Oct. 17, 2003), available at http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html; Francesco Francioni, *Customs, General Principles, and the Intentional Destruction of Cultural Property*, *in* Cultural Heritage and Mass Atrocities (James Cuno & Thomas G. Weiss eds., 2022).

187. Ana Filipa Vrdoljak, *The Criminalisation of the Intentional Destruction of Cultural Heritage*, *in* Forging a Socio-Legal Approach to Environmental Harms: Global Perspectives 237–66 (Tiffany Bergin & Emanuela Orlando eds., 2017). As Vrdoljak notes, the U.S. prosecutor sealed Rosenberg's fate by arguing persuasively that "the forcing of this treasure-house by a horde of vandals bent on systematically removing to the Reich these treasures which are, in a sense, the heritage of all of us . . . ." *Id.* (citing 4 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946, 81 n.17 (1947)).

188. Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶ 232 (Int'l Crim. Trib. for the Former Yugoslavia June, 2004); Prosecutor v. Jokić, Case No. IT-01-42/1-S, Sentencing Judgment, ¶¶ 45, 53 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 18, 2009). The Trial Chamber in *Jokić* noted that "since it is a serious violation of international humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on an especially protected site, such as the Old Town [of Dubrovnik]." And, after citing *Jokić*, the Trial Chamber in *Strugar* found "that the offences under Articles 3(b) and 3(d) of the Statute are serious violations of international humanitarian law.".

189. Prosecutor v. Mahdi, Case No. ICC-01/12-01/15-171, ¶¶ 62–63, Judgment and Sentence (Sept. 27, 2016), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_07244.PDF [https://perma.cc/8QUR-LRA9]. Al Mahdi was prosecuted under Article 8.2(e)(iv) of the Rome Statute which defines war crimes to include "intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives." *See generally* Milena Sterio, *Individual Criminal Responsibility for the Destruction of Religious and Historic Buildings: The Al Mahdi Case*, 49 Case W. Res. J. Int'l L. 63 (2017).

190. Anderson & Geismar, *supra* note 184, at 16 ("Conventions such as UNESCO 1970 attempt to create international consensus by developing requirements to adopt certain standards within national law.").

of art from private owners.[191] While the need to show provenance and a good faith or diligent search can limit recovery,[192] litigation has resulted in numerous works of stolen art and other property being returned to their former owners or their successors, often following dispossession of culturally-specific work.[193] The proliferation of claims in this space, including numerous suits filed in the United States under the FSIA, led to the 1998 Washington Conference Principles on Nazi-Confiscated Art.[194] The Washington Conference endeavored to "achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case[,]" and it also encouraged national-level arbitration as a means of resolving claims.[195] In the words of a claimant at the Dutch Restitutions Committee convened after the Washington Conference, "Our objective is not to recover every stolen work of art. For us it's about recognition. The most important issue for us is that the name of our great-grandfather is restored into the work's provenance."[196]

One of the most prominent of the individual cases, *Republic of Austria v. Altmann*, stands in stark contrast to the *Welfenschatz* collection in *Philipp. Altmann* concerned five works by Gustav Klimt—including the *Portrait of Adele Bloch-Bauer*—that were protected under an Austrian law as national patrimony.[197] Maria Altmann, a U.S. citizen and the niece of and heir to the estate of her uncle Ferdinand Bloch, a Jewish collector, sought recovery of the paintings depicting her relatives and housed in an Austrian government museum.[198] Altmann tried and failed to sue the museum in Austria before

191. *See* Robert Kirkwood Paterson, *Resolving Material Culture Disputes: Human Rights, Property Rights and Crimes Against Humanity*, *in* Cultural Heritage Issues: The Legacy of Conquest, Colonization and Commerce 371–87 (James A. R. Nafziger & Ann M. Nicgorski eds., 2009).

192. Evelien Campfens, *Whose Cultural Objects? Introducing Heritage Title for Cross-Border Cultural Property Claims*, 67 Neth. Int'l L. Rev. 257–59 (2020) (detailing unsuccessful litigation in the Netherlands and France for the repatriation of a Chinese Buddha sculpture discovered in a Hungarian museum and on behalf of Hopi Native Americans seeking "to stop the auction of their sacred Katsina—masks representing incarnated spirits of ancestors that are referred to as 'friends' and according to Hopi law cannot be privately owned or traded.").

193. *See generally* Wojciech Kowlaski, Art Treasures and War: A Study on the Restitution of Looted Cultural Property Pursuant to Public International Law (1998).

194. *See* Nicholas O'Donnell, A Tragic Fate: Law and Ethics in the Battle Over Nazi-Looted Art 477–78 (2017).

195. U.S. Dep't of State, Office of the Special Envoy for Holocaust Issues, Washington Conference Principles on Nazi-Confiscated Art, princ. 8–9, 11, Dec. 3, 1998, https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/ [https://perma.cc/66BT-7LZW]; *see also* Lindsey Blair, *Holocaust-Era Cultural Property Looting: The United States and The Washington Principles*, 24 Art Antiquity & L. 49 (2019) (providing an in-depth history of the Holocaust-era cultural property looting, the Washington Principles, and the HEAR Act).

196. Evelien Campfens, *Bridging the Gap Between Ethics and Law: The Dutch Framework for Nazi-Looted Art*, 25 Art Antiquity & L. 1, 1 (2020) (quoting Ella Andriesse and Robert Strum, the heirs in a restitution claim before the Dutch Restitution Committee).

197. Republic of Austria v. Altmann, 541 U.S. 677, 683 (2004).

198. The Klimt paintings at issue in *Altmann* were personal in every sense of the word. As the Ninth Circuit recognized, "Klimt made hundreds of sketches of Adele, culminating in 1907 with the shimmery golden portrait, *Adele Bloch–Bauer I*," a painting at the heart of the subsequent dispute over the ownership and exchange of artworks in Ferdinand Bloch's estate. Altmann v. Republic of Austria, 317 F.3d 954, 959

bringing the action in the United States under 28 U.S.C. § 1605(a)(3); the U.S. Supreme Court determined that the FSIA applied to claims originating prior to 1976 and allowed the case to proceed.[199] After the ruling, Altmann and Austria entered arbitration that resulted in the restitution of the paintings to Altmann.[200]

The second set of claims involves demands by states and cultural agencies—as opposed to individuals—for the return of objects held in foreign museums and collections to the state of origin.[201] Here too, international law has encouraged the diplomatic and museum/national institution-level negotiations for the repatriation of heritage objects.[202] Once a trickle, the return of cultural objects to former colonies and indigenous groups has gathered momentum in recent years. In 2017, French President Emmanuel Macron announced the return of African artifacts and confirmed the right of Africans to access their own culture.[203] Similarly, "a 2019 German government policy instrument, facilitating the return of colonial takings by German museums, provides as a rationale that 'all people should have the possibility to access their rich material culture . . . to connect with it and to pass it on to future generations.'"[204] Across Europe and North America, museums and institutions in former colonial powers are responding to claims for the return of cultural property by transferring or relinquishing objects to museums in the developing world and to indigenous communities.[205]

(9th Cir. 2002) ("Ferdinand, who was Jewish and had supported anti-Nazi efforts before the annexation of Austria, fled the country to avoid persecution, leaving behind all his holdings, including his paintings, a valuable porcelain collection, and his beautiful home, castle, and sugar factory. He settled in Zurich, Switzerland . . . . In the meantime, Nazi officials, accompanied by representatives of what later became the Austrian Gallery, convened a meeting to divide up Ferdinand's property. His sugar company was 'Aryanized' and his Vienna home was reduced to a German railway headquarters. Reinhardt Heydrich, the author of the infamous Final Solution, moved into Ferdinand's castle.").

199. *Id.* at 681–88, 701.

200. Benjamin E. Pollock, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims*, 43 Hous. L. Rev. 193, 211 (2006).

201. *See* Nicole M. Crawford & Darrell D. Jackson, *Stealing Culture: Digital Repatriation (A Case Study)*, 12 Univ. Museums and Collections J. 77, 77–83 (2020).

202. Article 7(b) of the UNESCO Convention obliges the return of objects that are documented in an inventory of a public institution while Article 13(d) requires Member States "to facilitate recovery of such property." 1970 UNESCO Convention, *supra* note 165, arts. 7(b), 13(d).

203. Emmanuel Macron, President of the French Republic, Speech at the University of Ouagadougou (Nov. 28, 2017); *see* Felwine Sarr & Bénédicte Savoy, The Restitution of African Cultural Heritage. Toward a New Relational Ethics 1 (Drew S. Burk trans., 2018).

204. Campfens, *supra* note 192, at 279 (citation omitted).

205. In March 2022, the Smithsonian Institution announced that it is returning its collection of 39 Benin Bronzes, a name that is used to cover a variety of artifacts ranging from brass plaques, carved elephant tusks, ivory leopard statues and wooden heads. Many were stolen from what is now Nigeria during the British Army's 1897 raid on the ancient Kingdom of Benin. Matt Stevens, *Smithsonian to Return Most of Its Benin Bronze Collection to Nigeria*, N.Y. Times (Mar. 8, 2022), https://www.nytimes.com/2022/03/08/arts/design/smithsonian-benin-bronze-nigeria.html [https://perma.cc/ND72-Q5L3].

3. The Seizure of Indigenous Lands and Personhood

The right of indigenous peoples to their traditional lands is perhaps the clearest example of international law recognizing a personal conception of property. In the seminal case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Inter-American Court of Human Rights observed:

> the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations. [206]

Many indigenous cultures are structured around lands and follow traditions emanating from specific places. The coherence of the group is often explained by its origin in the territory.[207] The Human Rights Committee has observed that a minority group's culture often manifests itself in "a particular way of life associated with the use of land resources, especially in the case of indigenous peoples."[208] The centrality of land to indigenous culture is echoed by the International Indian Treaty Council, which states that "without their traditional lands" indigenous peoples "are denied their very identity as peoples."[209] In Clare Charters' words, "In many cases, indigenous peoples' territories are considered to be the 'mother' from whom Indigenous peoples spring, at least in Indigenous mythologies."[210] Indigenous scholar Michael Dodson explains, "[r]emoved from our lands, we are literally removed from ourselves."[211]

Much like the relationship between cultural property and its owners, the nexus between land and indigenous culture moves well beyond Radin's description of property as personhood. Radin argues that certain property may merge

206. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001).

207. Sanna Valkonen, Jarno Valkonen & Veli-Pekka Lehtola, *An Ontological Politics of and for the Sámi Cultural Heritage: Reflections on Belonging to the Sámi Community and the Land*, *in* Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges 164–65 (Alexandra Xanthaki, Sanna Valkonen, Leena Heinämäki & Piia Kristiina Nuorgam eds., 2017).

208. Human Rights Committee, CCPR General Comment No. 23: Article 27 (Rights of Minorities), CCPR/C/21/Rev.1Add.5, ¶ 7 (Apr. 8, 1994).

209. Claire Charters, *Indigenous Peoples' Rights to Lands, Territories and Resources in the UNDRIP: Articles 10, 25, 26, and 27*, *in* The UN Declaration on the Rights of Indigenous Peoples: A Commentary 395, 397 (Jessie Hohmann & Marc Weller eds., 2018) [hereinafter UNDRIP] (quoting U.N. Commission on Human Rights, ¶ 23, U.N. Doc. E/CN.4/1995/WG.15/4 (Oct. 10, 1995)); *see also* Carpenter, Katyal & Riley, *supra* note 53, at 1052 ("When this place is destroyed, the Cherokee people cease to exist as a people.").

210. Charters, *supra* note 209, at 397.

211. Michael Dodson, *Land Rights and Social Justice*, *in* Our Land is Our Life: Land Rights—Past, Present and Future 39, 39, 41 (Galarrwuy Yunupingu ed., 1997).

into a person's identity after it is acquired and assimilated in daily life. Land for many indigenous peoples is and has *always been* integral to their identity, since members of the group do not live substantial portions of their lives culturally or physically separated from the land.[212] Each member is born into, and immediately joins, a culture grounded in land and all its attendant significance. Thus, the critiques of Radin that focus on the merger of property possession and self-conception—that is, can a home that is rented but not owned become part of personhood?; How long does a person need to live in a home before it merges into their identity?; Can the same wedding ring constitute the personhood of a married person but not that of a pawnbroker who acquires it after a divorce?—generally do not arise for indigenous land. It is personal by its nature.

Indigenous land rights are most prominently secured in international law by a series of articles in the 2007 UNDRIP.[213] UNDRIP confirms the right of indigenous people to own and use traditional lands, secures a right against forced removal, and compels states to establish open and impartial processes to adjudicate disputes relating to indigenous lands.[214] Indigenous land rights are also addressed in the International Labor Organization's Indigenous and Tribal Peoples Convention ("ILO Convention 169")[215] and in the jurisprudence of global human rights treaty bodies, which have applied protections against racial discrimination and economic, social, and cultural rights to indigenous lands and access to natural resources thereon.[216]

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212. Aoife Duffy, *Indigenous Peoples' Land Rights: Developing a Sui Generis Approach to Ownership and Restitution*, 15 Int'l J. Minority & Group Rts. 505, 508 (2008).

213. G.A. Res. 61/295, *supra* note 123.

214. *Id.* arts. 10, 25–27. Article 10 provides: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."

Article 25 provides: "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."

Article 26 provides:

> (1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired;
> (2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired;
> (3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

215. Indigenous and Tribal Peoples Convention art. 17, June 27, 1989, 28 I.L.M. 138 [hereinafter ILO Convention 169].

216. *See* Mattias Åhrén, Indigenous Peoples' Status in the International Legal System 202–05 (2016) (discussing the decisions by the U.N. Committee on the Elimination of Radical Discrimination and the U.N. Committee on Economic, Social and Cultural Rights).

As the phraseology of these articles suggests, indigenous land is distinguished from other types of property subject to domestic takings by the identity of the owner. Indigenous lands—integral to group identity—are held by the community, not by its individual members, sometimes under the label of "aboriginal title."[217] In a series of decisions, the Inter-American Commission and the Inter-American Court of Human Rights have interpreted Article 21 of the Inter-American Convention on Human Rights to recognize the collective character of land ownership and the related concept of aboriginal title.[218] In the *Awas Tingni* case, the court acknowledged that "[a]mong indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community."[219] *Awas Tingni* was just the first case to enshrine the right of communal ownership of ancestral lands.[220] Subsequent cases have built on *Awas Tingni*, including *Maya Indigenous Community of the Toledo District v. Belize*, decided by the Inter-American Commission,[221] and *Saramaka People v. Suriname*, which reaffirmed the communal property rights of indigenous communities:

> [T]he members of the Saramaka people make up a tribal community protected by international human rights law that secures the right to the communal territory they have traditionally used and occupied, derived from their longstanding use and occupation of the land and resources necessary for their physical and cultural survival, and that the State has an obligation to adopt special measures to recognize, respect, protect and guarantee the communal property right of the members of the Saramaka community to said territory.[222]

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217. Mabo v. Queensland [No. 2] (1992) 175 CLR 1, 5 (Austl.) (recognizing indigenous inhabitants are entitled to property rights in accordance with their cultural understanding of property); Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010 (Can.).

218. American Convention, *supra* note 117, art. 21. Article 21 of the American Convention on Human Rights provides that: (1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society; (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law; and, (3) Usury and any other form of exploitation of man by man shall be prohibited by law. *Id.*

219. Awas Tingni, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149.

220. *See* S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1, 2 (2002).

221. Maya Indigenous Communities v. Belize, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L/C/II.122, doc. 5 rev. ¶ 197 (2004); Noah B. Novogrodsky, *All Necessary Means: The Struggle to Protect Communal Property,* 12 U. WYO. L. REV. 197, 204–05 (2012).

222. Saramaka People v. Suriname, Preliminary Objections, Meris, Reparations, Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No 172, ¶ 96 (Nov. 28, 2007). The court wrote, "When indigenous communal property and individual private property are in real or apparent contradiction, the American Convention itself and the jurisprudence of the Court provide guidelines to establish admissible restrictions to the enjoyment and exercise of those rights . . . ." *Id.* ¶ 127. Those guidelines include: (a) the restrictions must be established by law; (b) they must be necessary; (c) they must be proportional; and (d) their purpose must be to attain a legitimate goal in a democratic society. *Id.*

The Inter-American system's legal treatment of indigenous lands is mirrored by the ACPHR's decision in *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*.[223] There, the ACHPR found that Kenya's forcible displacement of the Endorois community from their ancestral lands to create a national park violated the tribe's right to property protected by Article 14 of the African Charter on Human and Peoples' Rights.[224] The Commission cited *Awas Tingi* and *Dogan* to determine that the tribe's human rights were violated by the interruption to their traditional lifestyle and the lack of government-provided compensation.[225]

The rationale for the distinctive treatment of aboriginal lands appears in *Sawhoyamaxa Indigenous Community v. Paraguay*, in which the Inter-American Court of Human Rights elaborated on the need for communal property protection:

> Disregard for specific versions of use and enjoyment of property, springing from culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons.[226]

The same court in a later case added that the balance between private ownership interests and the collective objective of preserving cultural identities needs to evolve, consistent with ILO Convention 169, which involves engaging with indigenous communities "in accordance with their own mechanism of consultation, values, customs and customary law."[227] Responding to these developments, Kristin Carpenter, Sonia Katyal, and Angela Riley have articulated a theory of property and personhood addressing group-oriented claims to traditional land and cultural property. Their focus is on the nature of the bond with land, not the circumstances of its creation. The authors propose a notion of cultural stewardship designed to preserve group identity and discourage a wholly alienable market in indigenous lands and cultural goods. "[C]ertain indigenous cultural property," they note, "is inextricably bound up with peoplehood, and as such is necessary to a people's identity formation and is nonfungible."[228]

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223. Centre for Minority Rights Development and Minority Rights Group v. Kenya, Communication 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 266 (Nov. 25, 2009) (finding that "[t]he Saramaka case is analogous to the instant case . . .").

224. *Id.* ¶ 238; African Charter, *supra* note 118, art. 14 ("The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.").

225. *Id.* ¶ 144.

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

227. Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 151 (June 30, 2005).

228. Carpenter, Katyal & Riley, *supra* note 53, at 1090.

Like cultural property and goods seized during the commission of other international crimes, indigenous lands enjoy protection from domestic takings under international law. The logic of such protection is rooted in Radin's connection between property and personhood but applied here to community-level interests. Just as the line between personal and fungible property turns on the question of how an owner would fare after it is taken, many commentators observe that indigenous peoples' collective identity may be shattered by the loss of land.[229] The time, nature, and process by which both types of property are merged into the owner's self-conception are at that point immaterial. It is the loss that demonstrates the merger.

IV. Remedies for Takings of Property as Personhood

The personal/fungible distinction clarifies how international law allocates rights in property to aliens and citizens. This Section examines how that distinction operates when international law prescribes remedies for domestic takings. Remedies may take the form of either restitution or compensation, which, broadly defined, involve the return of property or the award of money damages, respectively.[230] We argue that compensation is usually provided for the taking of fungible property, while restitution occurs when the property is personal. When international actors regularly pursue restitution for domestic takings, they provide important evidence of the property's personal nature.

We begin by examining the international response to takings during civil wars. We do so not only because the response to civil war takings has largely been led by the United Nations and other international organizations, thus providing insight into collective responses rather than those of individual states. Civil wars also create strong incentives for international actors to choose compensation rather than restitution. Arranging the return of thousands of homes, businesses, and other property in the aftermath of a civil conflict is an immensely complex undertaking. Compensation, on the other hand, avoids the logistical hurdles associated with undoing transfers of title, evicting secondary occupants, and persuading citizens to return to places where they are distinctly unwelcome. Despite these obvious impracticalities, the international community has consistently supported restitution as the preferred remedy for civil war

229. Gilbert, *supra* note 207, at 126–28.

230. The International Law Commission's Articles on State Responsibility define "restitution" as "reestablishing the status quo ante, i.e., the situation that existed prior to the occurrence of the wrongful act." Int'l L. Comm'n Rep. on the Work of Its Fifty-Third Session, *State Responsibility*, Y.B. Int'l L. Comm'n, at 96, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter ILC Articles]. Compensation involves "any financially assessable damage including loss of profits insofar as it is established." Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, annex, U.N. Doc. A/RES/56/83 (Dec. 12, 2001), art. 36(2).

takings. There is substantial legal value in such actions, taken despite clear incentives to make the opposite choice.

This Section then examines evidence for the preference for restitution in principles concerning internally displaced persons and refugees. We do so in the law of state responsibility, and in two aspects of conflict resolution—peace agreements ending civil wars and U.N. peacekeeping operations.

A. Takings During Civil Wars

Civil war is the most common form of contemporary conflict.[231] Bloody internal conflicts in Myanmar,[232] Syria,[233] South Sudan,[234] Niger,[235] Afghanistan,[236] Georgia,[237] and elsewhere have all been characterized by forced evictions and the widespread taking and destruction of property, largely by government forces. In the U.N. Secretary-General's view, "land-related human rights abuses, such as forced evictions, are often key to the conflict and connected to large-scale population displacements."[238] Accordingly, takings function as both a cause and consequence of internal armed conflicts.[239] The types of property affected are varied. When people are forced from their homes in the midst of intrastate conflicts, they also abandon businesses, communal structures, personal property, safety deposit boxes, and bank accounts, usually without any capacity to stop new occupants from taking possession in their absence. Perversely, property takings and expropriation can create constituencies for other types of human rights abuses by allying the beneficiaries of confiscation with the regime responsible for dispossession. Carol Rose explains the hazard associated

231. In 2020, only five percent of active armed conflicts were between two or more states. Therése Pettersson et al., *Organized Violence* 1989–2020*, with a Special Emphasis on Syria*, 58 J. PEACE RSCH. 809, 811–12 (2021).

232. Human Rights Council, Rep. of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/39/64, ¶ 18 (Sept. 12, 2018).

233. Emily Stubblefield & Sandra Joireman, *Law, Violence, and Property Expropriation in Syria: Impediments to Restitution and Return*, 8 LAND 1, 5–7 (2019).

234. Stephen Oola & Luke Moffett, *Reparations in South Sudan: Prospects and Challenges*, REPARATIONS, RESPONSIBILITY & VICTIMHOOD IN TRANSITIONAL SOCIETIES 11–13 (2019), https://reparations.qub.ac.uk/assets/uploads/South-Sudan-Report-Update-SP.pdf [https://perma.cc/39YD-863E].

235. Cecilia Jimenez-Damary (Special Rapporteur on the Human Rights of Internally Displaced Persons), *Rep. of the Special Rapporteur on Her Mission to Niger*, U.N. Doc. A/HRC/38/39/Add.3, ¶¶ 59–63 (May 9, 2018).

236. Chaloka Beyani (Special Rapporteur on the Human Rights of Internally Displaced Persons), *Rep. on His Mission to Afghanistan*, U.N. Doc. A/HRC/35/27/Add.3, ¶¶ 6–10 (Apr. 12, 2017).

237. Chaloka Beyani (Special Rapporteur on the Human Rights of Internally Displaced Persons), *Rep. of the Special Rapporteur on the Human Rights of Internally Displaced Persons: Follow-up Mission to Georgia*, A/HRC/26/33/Add.1 ¶ 38 (June 4, 2014).

238. U.N. Secretary-General, Guidance Note of the Secretary-General: The United Nations and Land and Conflict, at 5, (Mar. 2019) [hereinafter SG Guidance Note on Land and Conflict], https://unhabitat.org/sites/default/files/documents/2019-05/sg-guidance-note-on-land-and-conflict-march-2019-1.pdf [https://perma.cc/H3BQ-WAUA].

239. *Id.* at 4 ("[L]and can be a root cause or trigger for conflict, a critical factor causing its relapse, or a bottleneck to recovery.").

with new occupants who resist returning ill-gotten property to the former owners. "Their new endowments turn [the new owners] . . . into constituents for expulsion and supporters of the expelling regime, whatever the consequences to the former residents."[240]

Efforts to end civil wars inevitably raise questions about the return of abandoned or expropriated property, how to measure compensation where return is impossible, and what, if any, rights should be accorded to new occupants.[241] The international community has created a series of remedial regimes to address the property rights of forced migrants fleeing civil wars. That these regimes apply to evicted property owners whether they qualify as refugees or internally displaced persons ("IDPs")—two groups with otherwise very different legal characteristics—underlines the centrality of property issues to internal armed conflicts generally.[242]

B. The Preference for Restitution

Because fungible property is interchangeable with alternative property of equivalent pecuniary value, a remedy of monetary compensation will render its former owner whole. Because personal property is unique, only restitution of that property can undo the harm of a taking. This distinction between unique and non-unique property is basic to the law of equitable remedies in Anglo-American law.[243] Radin herself did not address the restitution/compensation distinction in private law, focusing instead on a much more radical idea in the public realm that property deemed constitutive of personhood ought not be

240. Carol Rose, *Property's Relation to Human Rights*, *in* Economic Liberties and Human Rights 69, 85 (Jahel Queralt & Bas van der Vossen eds., 2019).

241. *See* Jon Unruh et al., *A Digital Advance for Housing, Land and Property Restitution in War-Affected States: Leveraging Smart Migration*, Stability: Int'l J. Sec. & Dev. (2017); Housing, Land, and Property Rights in Post-Conflict United Nations and Other Peace Operations: A Comparative Survey and Proposal for Reform 5–7 (Scott Leckie ed., 2008).

242. *See* Convention Relating to the Status of Refugees art. I(A)(2), July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 137 (defining refugees as those who cross borders and seek asylum in a host country based on a "well-founded fear of persecution"). *See generally* The Oxford Handbook of Refugee and Forced Migration Studies (Elena Fiddian-Qasmiyeh et al. eds., 2014); Arthur C. Helton & Eliana Jacobs, *What is Forced Migration?*, 13 Geo. Immigr. L.J. 521, 521–27 (1999); U.N. High Comm'r for Refugees, Guiding Principles on Internal Displacement, U.N. Doc. E/CN.4.1998/53/Add.2, ¶ 2 (1998) [hereinafter Guiding Principles on Internal Displacement]. Internally displaced persons are those who have moved within the borders of their home state. There is no legally binding definition of IDPs. The influential U.N. Guiding Principles on Internal Displacement, discussed below, define IDPs as "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized border." *Id.* ¶ 2.

243. *See* Dan B. Dobbs & Caprice L. Roberts, Law of Remedies: Damages—Equity—Restitution 93 (3d ed. 2018) (A plaintiff may be entitled to equitable relief of an injunction or specific performance where "[p]laintiff needs the thing and cannot get it in the market.").

subject to official expropriation at all.[244] For our purposes, whether the personhood idea operates in the public or private law realms, the consequence is the same: the property must attach to its owner (that is, be returned or never taken in the first place). The rules developed for the expropriation of citizens' property in international law similarly acknowledge its unique nature and overwhelmingly prefer restitution where feasible.[245]

1. The Pinheiro Principles

The Pinheiro Principles, completed by the United Nations Economic and Social Council's Sub-Commission on Human Rights in 2005, serve as a crucial expression of personhood principles wrapped in an international law instrument addressing property restitution.[246] Formally entitled the *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, and named for the Sub-Commission's Special Rapporteur, Paulo Sérgio Pinheiro, the Pinheiro

244. Radin, *supra* note 44, at 1005 ("[A] few objects may be so close to the personal end of the continuum that no compensation could be 'just.' That is, hypothetically, if some object were so bound up with me that I would cease to be 'myself' if it were taken, then a government that must respect persons ought not to take it.").

245. Two regional treaties advance the property rights of IDPs in certain African states. The first is the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons. Known as the Kampala Convention, it was drafted in response both to the large numbers of IDPs in Africa and the perceived inadequacy of the non-binding Guiding Principles. *See* Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Oct. 23, 2009, 49 I.L.M. 86 [hereinafter Kampala Convention]. The Kampala Convention was also a response to the frequency of civil wars on the continent, a major cause of internal displacement and the loss of personal property. Adama Dieng, *Protecting Internally Displaced Persons: The Value of the Kampala Convention as a Regional Example*, 99 Int'l Rev. Red Cross 263, 270–73 (2017). While the Kampala Convention does impose binding obligations and prohibits arbitrary displacements, it does not clearly insist that IDPs' property be returned. Rather, the Convention requires parties to "establish appropriate mechanisms providing for simplified procedures where necessary, for resolving disputes relating to the property of internally displaced persons." Kampala Convention, *supra*, art. XI, ¶ 4. State parties must also establish, "according to international standards," an "effective legal framework to provide just and fair compensation and other forms of reparations" for "damage incurred as a result of displacement." *Id.* art. XII, ¶ 2. The second instrument, the 2006 Protocol on the Property Rights of Returning Persons, was part of the Pact on Security, Stability and Development in the Great Lakes Region among the member states of the International Conference on the Great Lakes Region. *See* Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons, Nov. 30, 2006, https://www.refworld.org/docid/52384fe44.html [https://perma.cc/G7UY-NZNF]. The Protocol—a vehicle for importing the U.N. Guiding Principles into domestic law—is substantially clearer than the Kampala Convention in requiring restitution where possible and prioritizing restitution overcompensation. *Id.* art. 4. The Protocol requires that member states create mechanisms in their own legal systems to ensure IDPs can recover their property. *Id.* art. 4, ¶ 3, art. 29, ¶ 2.

246. U.N. Econ. & Soc. Council, Comm'n Hum. Rts., Sub-Comm'n on Promotion & Prot. of Hum. Rts., Principles on Housing and Property Restitution for Refugees and Displaced Persons, U.N. Doc. E/CN.4/Sub.2/2005/17 (June 28, 2005) [hereinafter Pinheiro Principles]; *see* Organization for Security and Co-operation in Europe, Property Rights Mass-Claim Mechanism: Kosovo Experience 11 (2020) [hereinafter Mass-Claim Mechanism], https://www.osce.org/files/f/documents/2/7/454179.pdf [https://perma.cc/7Q67-JHLM] ("[The Pinheiro Principles] represent one of the most crucial international standards outlining the rights of refugees and displaced persons to return to their original homes and lands."); Anneke Smit, The Property Rights of Refugees and Internally Displaced Persons: Beyond Restitution 3 (2012) ("[The Principles represent the] culmination of years of consultation, discussion and operational experience.").

Principles capped more than a decade of international efforts to redress property deprivation in post-conflict states.[247] The Pinheiro Principles address the rights of both internally displaced persons and refugees, thereby, as noted above, collapsing the distinction between the two groups for the purpose of property issues.[248] The inclusion of IDPs constitutes a significant innovation, since their entitlement to protection as a group had not previously been clear.[249]

The Pinheiro Principles describe a right to restitution of land and property in broad and absolute terms:

> *All* refugees and displaced persons have the right to have restored to them *any* housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for *any* housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal.[250]

"Restitution" in the Sub-Commission's view means restoration of one's home and property.[251] The Pinheiro Principles pay special attention to the home. "[F]

247. That practice appeared most prominently in the 1995 Dayton Accords ending the Bosnian civil war. *See* discussion *infra* Part V.D.2. But it also appears in international efforts in other post-conflict states and in an increasingly rich human rights jurisprudence. *See* U.N. Econ. & Soc. Council, Comm'n Hum. Rts., Sub-Comm'n on Promotion & Prot. of Hum. Rts., The Return of Refugees' or Displaced Persons' Property, Working Paper Submitted by Mr. Paulo Sergio Pinheiro Pursuant to Sub-Commission Decision, U.N. Doc. E/CN.4/Sub.2/2002/17 (June 12, 2002) [hereinafter Working Paper].

248. Pinheiro Principles, *supra* note 246, principle 1.2 ("The Principles on housing and property restitution for refugees and displaced persons apply equally to all refugees, internally displaced persons and to other similarly situated displaced persons who fled across national borders but who may not meet the legal definition of refugee.").

249. IDPs were previously "not allocated a legal status and until recently, [and] had no treaty specifically for their protection." Bríd Ní Ghráinne, *Internally Displaced Persons*, *in* Max Planck Encyclopedia of International Law ¶ 10 (2021), https://mural.maynoothuniversity.ie/13413/1/EPIL_Internally_Displaced_Persons_IDPs.pdf [https://perma.cc/U6J4-7XAC]. IDPs' protection as *individuals* under human rights law was, of course, clear and formed one of the legal foundations for the Principles. The 2007 Handbook on implementing the Pinheiro Principles, created by the UNHCR and other U.N. agencies, goes to great lengths to demonstrate the Principles' grounding in existing human rights law for individuals:

> These standards are found within treaty provisions under international law, international and regional human rights law, international humanitarian law and international criminal law, innumerable UN Security Council and UN General Assembly resolutions, UNHCR Executive Committee Conclusions, UN Commission on Human Rights and Sub-Commission on the Protection and Promotion of Human Rights resolutions and related standards, general comments issues by the UN human rights treaty bodies, various peace agreements ending conflicts, a range of voluntary repatriation agreements concluded between UNHCR and States of origin, and within the jurisprudence of many human rights bodies including the European Court on Human Rights and others.

Off. of the High Comm'r for Hum. Rights et al., Handbook on Housing and Property Restitution for Refugees and Displaced Persons 24 (2007), https://www.ohchr.org/en/publications/policy-and-methodological-publications/handbook-housing-and-property-restitution [https://perma.cc/H4U2-LN5F].

250. Pinheiro Principles, *supra* note 246, principle 2.1 (emphasis added).

251. The Special Rapporteur defined "restitution" as referring "to an equitable remedy, or a form of restorative justice, by which persons who suffer loss or injury are returned as far as possible to their original pre-loss or pre-injury position (i.e., status quo ante)." Restitution includes: "restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property." Paulo Sérgio Pinheiro (Special Rapporteur), *Rep. on Housing and Property*

or many refugees and other displaced persons," the Sub-Commission observed, "dispossession of their homes lies at the root of their displacement."[252] Without the return of their homes, refugees and IDPs are unlikely (or, at least, less likely) to return to their communities, which in turn frustrates peacemakers' desire to reverse the consequences of ethnic cleansing and other forms of forced migration. The Pinheiro Principles' title denotes a disjunction between "Housing" *and* "Property," indicating the Sub-Commission's view of homes as distinct from other forms of property and deserving of particular protections. This focus on the home echoes its centrality to Radin's conception of personhood—in which the place one builds a life and family and spends the majority of one's time becomes integral to one's identity.[253]

Compensation under the Pinheiro Principles is appropriate as an alternative to restitution only "when the remedy of restitution is not factually possible, or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution or when the terms of a negotiated peace settlement provide for a combination of restitution and compensation."[254] In stating a clear preference for restitution, the Pinheiro Principles exceeded prior soft-law standards for IDPs, which had presented restitution and compensation as equal alternatives.[255] Restitution under the Pinheiro Principles may be available even if an IDP does not return home, a point they make clear by separating the right to restitution from the right to return. The right to restitution "exists *as a distinct right*, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution."[256] By decoupling restitution from return, the Pinheiro Principles effectively characterize the property involved as personal not fungible, for, as Giulia Paglione argues, even a migrant's inability to be physically proximate to the property

Restitution in the Context of the Return of Refugees and Internally Displaced Persons, ¶ 8, U.N. Doc. E/CN.4/Sub.2/2003/11 (June 16, 2003) [hereinafter Pinheiro Preliminary Report].

252. Working Paper, *supra* note 247, at 4.

253. Some scholars have described the home as a haven or refuge. *See generally* Shelley Mallet, *Understanding Home: A Critical Review of the Literature*, 52 SOCIO. REV. 1 (2004).

254. Pinheiro Principles, *supra* note 246, principle 21.1. The Sub-Commission defined compensation as "legal remedy by which a person receives monetary payment for harm suffered, for example resulting from the impossibility of restoring the person's property or house." Working Paper, *supra* note 248, ¶ 12. In an odd echo of the Hull Formulation, the Principles also provide that compensation must be "full and effective." Pinheiro Principles, *supra* note 246, principle 21.1.

255. *See, e.g.*, London Declaration of International Law Principles on Internally Displaced Persons art. 9, July 29, 2000, *reprinted in* 12 INT'L J. REFUGEE L. 672, 677 (2000) (IDPs "shall be entitled to restitution or adequate compensation for property losses or damages and for physical and mental suffering resulting from their forced displacement."). The Sub-Committee described its choice as codifying a nascent trend in international law. *See* Pinheiro Principles, *supra* note 246, Introduction ¶¶ 3–6 (Pro-restitution approach draws on "lessons learned by experts in the field, and the 'best practices' which have emerged in previous post-conflict situations wherein restitution has been seen as a key component of restorative justice.").

256. Pinheiro Principles, *supra* note 246, principle 2.2 (emphasis added).

does not render compensation an adequate substitute remedy.[257] Of course one's bond with a home is not fully (or perhaps even partially) restored when one cannot live in that home. But the Pinheiro Principles choose not to make that judgment for a displaced person, leaving room for the possibility that merely retaining ownership would restore some aspect of personhood represented by the property. The Pinheiro Principles empower the migrant herself, rather than a governmental actor, to evaluate her relationship to the property and decide whether restitution will truly contribute to being made whole.[258]

The Pinheiro Principles' self-described role in the larger project of post-conflict reconstruction is an additional manifestation of Radin's personhood logic. Property restitution, the Sub-Committee argued, "is essential to the resolution of conflict and to post-conflict peace-building, safe and sustainable return and the establishment of the rule of law."[259] Compensation would allow those depriving civilians of their property to argue they had met peace-building goals through payment. In so doing, the expelling forces might effectively price seizures of property into a calculus of their war aims. The Sub-Committee argued instead that "[e]nsuring housing and property restitution and, thereby, the right to return in safety and in dignity, is essential *in order not to allow the results of such conditions to remain in place*, as well as to protect the human rights of the victims of such situations."[260] If the status quo ante was one in which property was part of individuals' self-conception, restoring that status quo can only be accomplished by reuniting people with that property.

2. The U.N. Guiding Principles on Internal Displacement

The U.N. Guiding Principles on Internal Displacement ("Guiding Principles"), completed in 1998, reflect the United Nations' attempt to achieve for its own operations the same clarity on property restitution the Pinheiro Principles seek to generate for all international actors. Unlike Pinheiro, the Guiding Principles are limited to IDPs, a community that regularly suffers property takings. The U.N. Special Rapporteur on IDPs described the Guiding Principles in

257. Giulia Paglione, *Individual Property Restitution: from Deng to Pinheiro—and the Challenges Ahead*, 20 Int'l J. Refugee L. 391, 405–06.

258. *See* Rhodri C. Williams, *Property*, *in* Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges 378 (Walter Kälin et al. eds., 2010) ("In contemporary post-displacement practice, restitution continues to be preferred over alternate remedies because it uniquely facilitates choice between all three possible durable solutions (return, local integration where displaced, or resettlement elsewhere in the country or abroad).").

259. Pinheiro Principles, *supra* note 246, Preamble; *see also* Pinheiro Preliminary Report, *supra* note 252, ¶ 66 ("When properly implemented, housing and property restitution programmes are indispensable to post-conflict resolution and to creating a durable peace, as they are essential components of the right to reparations for past human rights violations as well as the right to return.").

260. Working Paper, *supra* note 247, at 5 (emphasis added).

2018 as "the key international standard on internal displacement worldwide."[261] Principle 21 sets out standards on property deprivation:

> 1. No one shall be arbitrarily deprived of property and possessions.
> 2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts:
>   a. Pillage;
>   b. Direct or indiscriminate attacks or other acts of violence;
>   c. Being used to shield military operations or objectives;
>   d. Being made the object of reprisal; and
>   e. Being destroyed or appropriated as a form of collective punishment.
> 3. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.[262]

The Guiding Principles draw on both human rights and humanitarian law,[263] but arguably push the boundaries of those norms by not limiting the prohibition on arbitrary deprivation to governmental actors.[264]

Like the Pinheiro Principles, the Guiding Principles state a clear preference for restitution over compensation:

> Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.[265]

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261. U.N. Hum. Rts., International Standards: Special Rapporteur on the Human Rights of Internally Displaced Persons, https://www.ohchr.org/en/special-procedures/sr-internally-displaced-persons/international-standards [https://perma.cc/YUP9-74YJ]; *see also* G.A. Res. 60/1, 2005 World Summit Outcome (Sept. 16, 2005) (recognizing the Guiding Principles as "an important international framework for the protection of internally displaced persons").

262. Guiding Principles on Internal Displacement, *supra* note 242, principle 21.

263. The annotations to the Guiding Principles ascribe the provenance of Article 21, and in particular the categorical statement in Principle 21(1) that "no one shall be arbitrarily deprived of property and possessions," to human rights and humanitarian law norms prohibiting arbitrary deprivation of property, pillage, the direct targeting of civilians in armed conflict, and collective punishments. WALTER KALIN, GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: ANNOTATIONS 96 (2008).

264. *Id.* at 99 ("[Principle 21(3)] reflects a strong trend in present international law towards deducing from human rights guarantees the duty of authorities not only to refrain from violations but to provide protection against violations by others.").

265. Guiding Principles on Internal Displacement, *supra* note 242, principle 29 ¶ 2.

C. Restitution and Compensation in State Responsibility Law

The different remedial options specific to displaced people and foreign corporate investors—restitution for the former and compensation for the latter—present an incomplete picture of the relief available under international law. There is also an overarching body of law applicable to both groups: the law of state responsibility, which governs all internationally wrongful acts by states. State responsibility law, which applies to the two groups because both are victimized by state actors, strongly prefers restitution for *all* victims of international wrongs. If state responsibility law would thus allow both citizens and alien investors to seek restitution, does the personal/fungible distinction still hold in the law of remedies?

Principles of state responsibility frame the remedies available for violations of any state obligations under international law.[266] In general terms, states acting unlawfully are obliged, to the extent possible, to restore the injured party to the status quo ante.[267] In the classic *Factory at Chorzow* case, the Permanent Court of International Justice declared that "[r]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[268] As Antoine Buyse observes, the goal of this formulation is "to turn back . . . time as if no harm was done; the reparation functions as a kind of magical wand."[269]

The International Law Commission's ("ILC") Articles on Responsibility of States for Internationally Wrongful Acts follow the Chorzow Factory principle. Article 34 provides that "[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation, and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."[270] Article 35 addresses restitution specifically:

> A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation

266. G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) *construed in* ILC Articles, at 35. A state might be responsible for forced migration even if people are expelled and their property taken by private parties. In commentary to Article 2, the International Law Commission notes that "cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two." A state's failure to restrain private parties from engaging in the appropriation of property could incur responsibility by omission. *See generally* Danwood Mzikenge Chirwa, *The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights*, 5 MELB. J. INT'L L. 1 (2004).

267. This is a default rule. States are free to adopt specific remedies they deem more appropriate for particular internationally wrongful acts. As previously discussed, many states have done so in bilateral investment treaties.

268. Factory at Chorzow (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47.

269. Antoine Buyse, *Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law*, 68 ZAÖRV 129, 131 (2008).

270. ILC Articles, *supra* note 230, art. 34.

> which existed before the wrongful act was committed, provided and to the extent that restitution:
>
> (a) is not materially impossible;
> (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.[271]

It appears then, that state responsibility law, in seeking to restore the status quo ante for all victims of unlawful acts, does not prescribe compensation for some victims and restitution for others. If this is correct, the personal/fungible distinction we have sought to identify in the remedies available to alien investors and citizen property owners may turn out to be illusory. Three aspects of the ILC Articles support this idea of a uniform set of remedies. First, the Articles describe international practice as prioritizing restitution as the preferred mode of reparation.[272] The ILC observed that restitution is the remedy most consistent with the *Chorzow Factory* principle "because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation."[273] Reviewing prior practice, the Commission noted that states often insist on restitution over compensation and that international tribunals "have considered compensation only after concluding that, for one reason or another, restitution could not be effected."[274]

Subsequent international decisions have largely validated the Commission's view of past practice. In the *Israeli Wall* case, for example, the International Court of Justice ordered return of expropriated Palestinian land and property, permitting compensation only if return was "materially impossible."[275] Most, though not all, international human rights bodies have also expressed a preference for restitution.[276] The European Court of Human Rights,[277] the Inter-

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271. *Id.* art. 35.

272. James Crawford, State Responsibility: The General Part 509 (2013). Crawford, ILC Special Rapporteur for the Articles, recounts that while a hierarchy of remedies was debated in the Commission, "the ILC decided that the primacy of restitution should be retained." *Id.*

273. ILC Articles, *supra* note 230, art. 35 cmt. 3.

274. *Id.*

275. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, at 198 (July 9) ("Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered.").

276. Dinah Shelton, Remedies in International Human Rights Law 306–14 (3d ed. 2015); Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. Rev. 693, 706 (2008).

277. Hentrich v. France, 269-A Eur. Ct. H.R. (ser. A) at 21 (1994) ("[T]he best form of redress would in principle be for the State to return the land.").

American Court of Human Rights,[278] and the African Commission[279] have all affirmed the *Chorzow Factory* approach and preferred restitution in cases where it is feasible, including in cases of property deprivation.[280]

Second, the obligation in state responsibility law to make restitution is not absolute, a concession to reality that mirrors a similar exception in the Pinheiro Principles.[281] Article 35 recognizes exceptions where restitution is "impossible" and where there is a "burden out of all proportion to the benefit deriving from restitution instead of compensation."[282] Impossibility occurs when "the property in question has been destroyed or fundamentally changed in character or the situation cannot be restored to the status quo ante for some reason."[283] Restitution might also be impossible where there is simply no chance the expropriating state would ever return the property.[284]

Article 35 appears to acknowledge the possibility that some takings may be met by a combination of remedies. Richard Buxbaum's scholarship on postwar claims against Germany unpacks the way multiple forms of redress were deployed to blur the traditional boundaries between public international law and domestic constitutional law. In the European reparations context, "state claims for reparations encompass[ed] compensation for particularized harms suffered by a subject of the claimant state" and extended to such compensation.[285] Of course, the form of reparations varied from state to state and involved compensation paid to industrial owners and restitution of specific

278. Velásquez-Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶¶ 25–26 (July 21, 1989) ("Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.").

279. Malawi, *supra* note 164, at 25 (recommending for Malawian citizens "the restitution of the belongings looted from them at the time of the said expulsion").

280. The Human Rights Committee of the International Covenant on Civil and Political Rights is an exception, viewing restitution and other forms of reparation as equally available. *See* Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 13 (2004) ("The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.").

281. Pinheiro Principles, *supra* note 246, principles 2.1, 2.2.

282. ILC Articles, *supra* note 230, art. 35.

283. *Id.* cmt. 4. In the Bosnia/Serbia genocide case, in which the ICJ found that Serbia had violated its obligation to prevent and punish genocide, Bosnia itself recognized that it would be "inappropriate to ask the Court to find that the Respondent is under an obligation of *restitutio in integrum*." Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 460 (Feb. 26), https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf [https://perma.cc/7BT4-NANR].

284. Steven R. Ratner, *Compensation for Expropriations in a World of Investment Treaties: Beyond the Lawful/Unlawful Distinction*, 111 Am. J. Int'l L. 7, 29 (2017) ("The general refusal to order restitution reflects arbitrators' realization that states will almost certainly not reverse course on something as important as an expropriation of foreign property.").

285. Richard M. Buxbaum, *A Legal History of International Reparations*, 23 Berkeley J. Int'l L. 314, 316 (2005).

properties and artwork. Within the category of restitution, Buxbaum writes, the victorious Allied occupiers of postwar Germany addressed "tracing, and thus . . . restitution as a complement or possible alternative to reparations." The restitution of property,

> the ownership of which was traceable to original owners or their appropriate successors is not, however, a simple matter. Restitution of property is not conceptually limited to state-owned property, and already during the war the Western Allies discussed whether to distinguish between the restitution of property taken by the Third Reich from its own subjects and property taken from the subjects of occupied or other enemy countries.[286]

Third, while a state that commits an internationally wrongful act is under an obligation to make restitution if so ordered, the injured state need not seek restitution if it would prefer compensation. The ambiguous language concerning the voluntariness of restitution in Article 35 is clarified by Article 43(2)(b), which provides that an injured state may specify "what form reparation should take."[287] This has been described as a "right of election."[288] The Pinheiro Principles recognize a similar right of choice for individuals.[289]

It would appear that restitution and compensation are available under state responsibility law and the Pinheiro Principles under the same set of circumstances. This parity, however, does not invalidate our claim of a distinction in the law of remedies between fungible foreign investments and personal property subject to domestic takings. Because property as personhood is a largely subjective idea for Radin, the category is concerned with "the person with whom [the property] ends up—on an internal quality in the holder or a subjective relationship between the holder and the thing, and not on the objective arrangements surrounding production of the thing."[290] In Radin's view, the property owner is best positioned to decide whether property is personal or fungible. The critical question, then, is which remedies have expropriated foreign investors chosen? In the overwhelming number of foreign investment arbitrations, investors have chosen compensation, even where restitution was available, and that choice has been honored.[291] None of the historically significant FDI arbitrations

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286. *Id.* at 324.

287. ILC Articles, *supra* note 230, art. 43, ¶ 2(b).

288. Crawford, *supra* note 272, at 508; *see also* ILC Articles, *supra* note 230, art. 43, cmt. 6 (pointing out that Germany sought compensation rather than return of the factory in the Chorzow Factory case).

289. Pinheiro Principles, *supra* note 246, principle 21 (compensation may be given when "the injured party knowingly and voluntarily accepts compensation in lieu of restitution").

290. Radin, *supra* note 44, at 987.

291. Attila Tanzi, *Restitution*, *in* Max Planck Encyclopedia of International Law ¶ 6 (2021), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1094 [https://perma.cc/JZ6R-Q4HS]; Buyse, *supra* note 269, at 132 ("Restitution is a rather rare remedy in international arbitration and compensation is sought much more often.").

involved a claim for restitution.[292] The practice of capital exporting states also shows a clear preference for compensation. When debates over the appropriate level of compensation created uncertainty in the customary international law on remedies for foreign investment, capital exporting states began to codify remedies for expropriation in bilateral investment treaties ("BITs"). Despite the exporting states' substantial leverage in negotiating those treaties, none of the agreements specifies restitution as a preferred remedy, evincing a uniformly fungible view of FDI.[293] In all these circumstances, foreign investors and the states espousing their claims have chosen not to seek restitution despite its availability. That choice of compensation is the most salient indicator of how the investors conceive of the property's personal value, which is none at all.

By contrast, states espousing property claims of their individual citizens cannot erase those individuals' preference for restitution by seeking only compensation. The ILC notes that in situations "involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination," a claimant state "may not, as it were, pocket compensation and walk away from an unresolved situation."[294] Such cases involve "continuing obligations, the performance of which are not simply matters for the two States concerned[,]" and "those States may not be able to resolve the situation by a settlement."[295] Indeed, all the illustrations the Commission gives of inappropriate settlements involve states rejecting opportunities for restitution.[296] Put differently, when a state stands in for its wronged citizen, its right of election is not absolute.[297] The underlying rights are those of citizens, not the state, and the fiction of

292. *See* BP Exploration Co. (Libya) Ltd. v. Libya, 53 I.L.R. 297, ¶ 196 (Lagergren, Arb. 1973) ("[W]hile *restitutio in integrum* in the sense of restitution in kind of industrial property, i.e., physical restoration of such assets, has sometimes been claimed . . . no international tribunal has ever prescribed this remedy with regard to such property, nor considered it in a context such as that presented in these proceedings."); Ratner, *supra* note 284, at 12 (describing 1977 award of restitution in *Texas Overseas Petroleum Co. v. Libya*, 53 I.L.R 389 (Int'l Arb. Trib. 1978) as "rather audacious" and noting it "has not been followed in an expropriation case since"). In *Libyan American Oil Co. v. Libya*, 20 I.L.M. 1, 124 (Int'l Arb. Trib 1981), the arbitrator went so far as to declare that restitution is "against the respect due for the sovereignty of the nationalizing State."

293. This is true of the model BITs of the United States, Mexico, Italy, Germany, Denmark, Sweden, the Netherlands, Canada, Russia, India, France, Iran, and China, the world's leading capital exporting states. *See International Investment Agreements Navigator*, UNCTAD INVESTMENT POLICY HUB, https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements [https://perma.cc/BTT4-KYAR].

294. ILC Articles, *supra* note 230, art. 43 cmt. 6.

295. *Id.*

296. *Id.*

297. *Id.* art. 43 cmt. 7 ("In the light of these limitations on the capacity of the injured State to elect the preferred form of reparation, article 43 does not set forth the right of election in an absolute form."). In some extreme cases of claimant states diverging from the interests of the individual citizens they purportedly represent, the states do not even transfer damage awards to their citizens. As noted earlier, this occurred in the case of the Eritrea-Ethiopia Claims Commission. *See* Eritrea-Ethiopia Claims Commision, *supra* note 27.

diplomatic protection cannot work to deprive the citizen right-holders of their preference for restitution.[298]

D. Operationalizing Restitution in Post-Conflict States

Two other areas of international practice support the primacy of restitution in international law related to property: peace agreements and peacekeeping missions to post-conflict states.

1. Peace Agreements

Some older peace treaties ending *interstate* conflicts required property captured from the other warring party to be returned to its original owners.[299] In the post-Cold War era, peace agreements ending non-international armed conflicts ("NIACs") have regularly included property restitution clauses. The Peace Agreements-X dataset codes 121 NIAC peace agreements from 1990 to 2022 as containing provisions on property return and restitution.[300] As housing, land and property issues have been increasingly identified as core accelerants of conflict, "the clear trend over time leans toward the inclusion" of such provisions in peace agreements.[301]

Some peace agreements state plainly that all returning displaced persons are entitled to reclaim their property. The 2020 Juba Agreement for Sudan provides that "[i]ndividuals and communities have the right to restitution of

298. The limitation on governing elites' ability to trade their citizens' rights in interstate bargains is consistent with international law limiting other "consensual" actions violative of individual rights, such as mass population transfers. *See* GREGORY H. FOX, HUMANITARIAN OCCUPATION 136–40 (2008) (Contemporary international law "has long moved past these agreements' view of individuals as passively subject to whatever arrangements parties to a peace agreement may find politically advantageous.").

299. Early examples include "the 1794 Treaty of Amity, Commerce and Navigation between Great Britain and the United States . . . the 1648 Treaty of Westphalia, the 1678 Treaty of Nimeguen between Spain and France, the 1839 Treaty of London concerning the independence of Belgium and the 1920 Peace Treaty with Turkey." Malcom Langford & Khulekani Moyo, *Right, Remedy or Rhetoric? Land Restitution in International Law*, 28 NORDIC J. HUM. RTS 143, 162–63 (2010). The Peace Agreement X dataset, which begins in 1990, does not list any interstate peace agreements containing property restitution provisions. The two documents it codes for such a provision are U.N. Security Council Resolution 687 (April 8, 1991), passed in the wake of the Iraq-Kuwait war, and the 2008 United States-Iraq agreement on the withdrawal of U.S. forces. Neither is a peace agreement between conflict parties. See the search results at *Peace Agreements Database*, THE UNIVERSITY OF EDINBURGH, https://www.peaceagreements.org/search?SearchForm%5Bregion%5D=&SearchForm%5Bcountry_entity%5D=&SearchForm%5Bagreement_type%5D%5B%5D=Interstate%2Finterstate+conflict&SearchForm%5Bname%5D=&SearchForm%5Bcategory_addressed%5D%5B%5D=34&SearchForm%5Bsubcategory_addressed%5D%5B%5D=166&SearchForm%5Bcategory_mode%5D=any&SearchForm%5Bagreement_text%5D=&s=Search+Database [https://perma.cc/ZY4B-GG37].

300. *Peace Agreements Database*, THE UNIVERSITY OF EDINBURGH, https://www.peaceagreements.org/search [https://perma.cc/7U8H-5KAU]. The PA-X site allows searches for agreements addressing the issue of "property return and restitution." The cited figure is the result of such a search.

301. DISPLACEMENT SOLUTIONS & NOR. REFUGEE COUNCIL, HOUSING, LAND AND PROPERTY RIGHTS AND PEACE AGREEMENTS: GUIDANCE FOR THE MYANMAR PEACE PROCESS 14 (2018) (emphasis omitted), https://reliefweb.int/sites/reliefweb.int/files/resources/HLP-Rights-and-Peace-Agreements-Guidance-for-Peace-Negotiators-in-Myanmar.pdf [https://perma.cc/C2VQ-9W4G].

lands lost resulting from the conflict in Darfur."[302] The parties to the 2016 Colombia Peace Agreement declared their intention to "achieve restitution for the victims of dispossession and forced displacement and the restoration of land rights to communities."[303] To this end, the Agreement established criteria for a land restitution policy, including amending an earlier law to take into account international standards.[304] The 2011 Mabanga Peace Accord for Kenya states that "all persons who are the victims of displacement . . . who hold legitimate title deeds or any other supporting evidence confirming ownership of land from which they were evicted should be assisted . . . to repossess their land."[305] The 1993 Afghan Peace Accord determines that "[a]ll public and private buildings, residential areas and properties occupied by different armed groups during the hostilities shall be returned to their original owners."[306] The 1992 General Peace Agreement for Mozambique provides that "Mozambican refugees and displaced persons shall be guaranteed restitution of property owned by them which is still in existence and the right to take legal action to secure the return of such property from individuals in possession of it."[307]

Other peace agreements create adjudicatory bodies to review claims for property restitution or grant such competence to existing bodies. The 2011 Doha Document for Peace in Darfur (Sudan) developed a Property Claims and Restitution Committee to "ensure that IDPs and refugees have their houses, land and property restored to them."[308] The most significant of the Nepali peace instruments created a "central-level monitoring committee" tasked with overseeing return of property confiscated by the Maoist rebels during the conflict.[309] The 1997 Chittagong Hill Tract Accord for Bangladesh provided for the creation of a Land Commission to settle "disputes of lands of the rehabilitated tribal refugees."[310] The Commission was to have "full power for cancellation of

302. Juba Agreement for Peace in Sudan Between the Transitional Government of Sudan and the Parties to Peace Process, tit. 2, ch. 4, § 11.6, Oct. 3, 2020 [hereinafter Juba Agreement]. The full texts of all agreements discussed in this section are available on the PA-X website.

303. Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, § 1.1.7, Nov. 24, 2016.

304. *Id.* § 5.1.3.6 (Land Restitution Measures); *id.* § 6.1.10(h) (prescribing amendment to 2011 law on Victims and Land Restitution "taking into account the principle of universality and in accordance with international standards, to extend the recognition of all the victims of breaches of international humanitarian law or of serious and flagrant violations of international human rights standards, occurring during the internal armed conflict").

305. Resolutions of Mabanga Peace Conference, § A(1), Oct. 21, 2011.

306. Afghan Peace Accord annex I, ¶ 6, Mar. 7, 1993, U.N. Doc. S/25435.

307. General Peace Agreement for Mozambique, 6 protocol III, § IV(e), Oct. 4, 1992, U.N. Doc. S/24635.

308. Doha Document for Peace in Darfurr, ¶ 262, July 14, 2011, U.N. Doc. A/65/914, S/2011/449.

309. *Agreement Between the Political Parties to Amend the Constitution and to Further the Peace Process*, *in* From Conflict to Peace in Nepal: Peace Agreements 2005–10, 124, 127 (Izumi Wakugawa et al. eds., 2011).

310. Chittagong Hill Tracts Accord art. (D)(4), Dec. 2 1997, https://peacemaker.un.org/node/1449 [https://perma.cc/VJ7J-RR5A]; *Amendment of CHT Land Commission Act: A Bold Effort of the Government to the Implementation Process of CHT Accord*, Kapaeeng Foundation, https://www.kapaeeng.org/

ownership of those lands and hills which have been so far illegally settled and occupied."[311]

The U.N. Security Council has helped facilitate numerous peace agreements providing for property restitution, including agreements for Bosnia (1995),[312] Cambodia (1991),[313] Colombia (2016),[314] Croatia (1995),[315] the DR Congo (2003),[316] Nepal (2006),[317] Rwanda (1993),[318] and South Africa (1993).[319] In 2010, the Secretary-General instructed U.N. officials participating in peace negotiations or post-conflict reforms to include property restitution or compensation in their transitional justice initiatives, including peace processes.[320]

Peace agreements are opportunities for conflict parties and international mediators (like the United Nations) to operationalize property restitution principles for IDPs and refugees. Data reveal that many NIAC agreements have included property restitution provisions.[321]

2. Peacekeeping Missions

Several Security Council-approved peacekeeping missions have been specifically tasked with overseeing initiatives to return property.[322] Building on this experience, the United Nations codified its approach to land restitution in 2019 in order to guide future post-conflict missions. The Secretary-General's Guidance Note on the United Nations and Land and Conflict states:

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amendment-of-cht-land-commission-act-a-bold-effort-of-the-government-to-the-implementation-process-of-cht-accord/ [https://perma.cc/352V-GRJZ]; *CHT land commission yet to get rules of business*, THE BUSINESS STANDARD, https://www.tbsnews.net/bangladesh/cht-land-commission-yet-get-rules-business [https://perma.cc/C5G9-JZP7] (Sept. 12, 2019, 6:10 PM).

311. *Id.*

312. S.C. Res. 1031 (Dec. 15, 1995).

313. S.C. Res. 745 (Feb. 28, 1992).

314. S.C. Res. 2366 (July 10, 2017).

315. S.C. Res. 1037 (Jan. 15, 1996).

316. S.C. Res. 1468 (March 20, 2003).

317. S.C. Res. 1740 (Jan. 23, 2007).

318. S.C. Res. 872 (Oct. 5, 1993).

319. S.C. Res. 894 (Jan. 14, 1994). The Council also urges parties to follow through on restitution and compensation provisions once agreements are concluded. In March 2022, in renewing the mandate for the peacekeeping mission overseeing the 2018 South Sudan agreement, the Council urged the government to "resolve housing, land and property issues for the realization of durable solutions for IDPs and refugees." S.C. Res. 2625 ¶ 13 (March 15, 2022).

320. U.N. Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, at 8–9 (Mar. 2010) [hereinafter SG Guidance Note on Transitional Justice].

321. *See supra* text accompanying note 301.

322. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, at 18, U.N. Doc. S/2004/616 (Aug. 23, 2004) ("[I]n peace operations across the globe, United Nations personnel are helping States to develop reparations programmes for common post-conflict challenges, such as the loss of property by displaced persons and refugees."). In Darfur, for example, two U.N. agencies recommended that the government of Sudan "[e]nsure that all IDPs recover their property, in line with the provisions stipulated in DDPD [the Doha Document for Peace in Darfur,] and in the United Nations Principles on Housing and Property." OHCHR & UNAMID, *The Human Rights Situation of Internally Displaced Persons in Darfur* 2014–2016, at 27, (Nov. 21, 2017), https://www.ohchr.org/Documents/Countries/SD/UNAMID_OHCHR_situation_Darfur2017.docx [https://perma.cc/FX6T-CBMP].

> land-related human rights violations are inherent in every displacement situation, such as the destruction and illegal occupation and/or sale of forcibly abandoned land and buildings. Remedying and restoring land rights is important to achieve justice, build peace and facilitate self-reliance (including in the place of refuge) and achieve durable solutions. Monitoring, advocacy, preventive and preparatory measures are required to facilitate early successful voluntary returns.[323]

The Guidance Note seeks to create a throughline from a rights-based view of property return to remedial actions in post-conflict reconstruction. The Guidance Note grounds U.N. involvement in "international norms and standards, including international humanitarian law ("IHL") and human rights laws that apply to both peace and security and development."[324] Making the now-familiar link between restitution and stability in post-conflict societies, the Secretary-General's Guidance Note extends property rights to the remedial stage: "Remedying and restoring land rights is important to achieve justice, build peace and facilitate self-reliance (including in the place of refuge) and achieve durable solutions."[325] The Guidance Note identifies three imperatives for U.N. action flowing from these principles: (1) land issues should be integrated into its infrastructure for post-conflict states, which include peace agreements, peacekeeping missions, and Security Council resolutions setting out mandates for those missions;[326] (2) the United Nations should seek to include land issues in law reform efforts, including "the creation of land-mandated bodies with judicial, mediation or compensation/restitution capacity;"[327] and (3) the United Nations should pursue the resolution of "land disputes particularly around illegal occupation of abandoned land" for refugees and IDPs, which should involve "strengthening national laws, policies and regulations to facilitate reclamation/restitution of land-related rights."[328]

The U.N. missions to Bosnia and Kosovo made the most extensive efforts to return homes and land to their lawful owners. During the Bosnian civil war, Bosnian Serbs displaced Bosnian Croats and Muslims and assimilated the captured territory and property into a "Greater Serbia."[329] At the war's close, 2.3

323. U.N. Secretary-General, *Guidance Note of the Secretary-General: The United Nations and Land and Conflict*, at 4, 6 (Mar. 2019). The Note addresses only the taking of land, not other forms of property. It argues that the taking of land is both a significant driver of conflict and an important "issue in the achievement of sustainable and durable peace." *Id.*

324. *Id.* at 5. These are set out in a three-page annex of hard and soft-law instruments. *Id.* at 15–17.

325. *Id.* at 5.

326. *Id.* at 10.

327. *Id.* at 11.

328. *Id.*

329. Rhodri C. Williams, Post-Conflict Property Restitution in Bosnia: Balancing Reparations and Durable Solutions in the Aftermath of Displacement 5 (2006), https://

million people—all Bosnian citizens fleeing from armed groups of other Bosnian citizens—had been uprooted from their homes.[330] The 1995 Dayton Peace Accords ending the Bosnian conflict contained multiple provisions addressing property restitution. Most significant was a new constitution for Bosnia and Herzegovina, which provided in Article II (5):

> All refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void.[331]

Annex 7 to the Accords provides that refugees and IDPs "shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them."[332] In order to process claims for the return of property, the Accords established an independent Commission for Displaced Persons and Refugees ("CRPC").[333] The CRPC operated from 1996 to 2003 and issued over 300,000 decisions on property rights with more than one million beneficiaries.[334]

In Kosovo, the Belgrade government enacted a series of laws in the early 1990s regulating real estate transactions in Kosovo that, in practice, virtually

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www.brookings.edu/wp-content/uploads/2016/06/200612_rcw_TESEVpresentation.pdf [https://perma.cc/R9PV-JBPV].

330. Lorena del Pilar Castilla Medina, *Housing, Land and Property Rights: The Impact of the UN Peacekeeping Operation on Economic Recovery in Bosnia and Herzegovina*, *in* THE UNIV. OF ESSEX RSCH. REPOSITORY (2019).

331. General Framework Agreement for Peace in Bosnia and Herzegovina annex 4, art. II ¶ 14, Dec. 14, 1995, 35 I.L.M. 75 [hereinafter Dayton Peace Accords].

332. *Id.* annex 7, art. I, ¶ 1.

333. *Id.* annex 7, art. VII. The CRPC's mandate was to:

> receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return.

Id. annex 7, art. XI.

334. INT'L ORG. FOR MIGRATION, PROPERTY RESTITUTION AND COMPENSATION: PRACTICES AND EXPERIENCES OF CLAIMS PROGRAMMES, 15 (2008). At the end of its tenure, the CRPC transferred jurisdiction over unresolved and pending claims to Bosnian domestic authorities. While the CPRC fulfilled its mandate and adjudicated rights to property for all who applied, the number of successful applicants was much lower. *See* Langford & Moyo, *supra* note 299, at 165 (citing UNHCR statistics from 2006 to make the claim that nearly a million IDPs and refugees were returned); WILLIAMS, *supra* note 329, at 9. In October 1999, in coordination with other international organizations operating in Bosnia, the Bosnian High Commissioner imposed a Property Legislation Implementation Plan on both entities, which was designed to ensure "the right to reclaim property superseded any right the current occupant might have been granted during the war." Lynn Hastings, *Implementation of the Property Legislation in Bosnia Herzegovina*, 37 STAN. J. INT'L L. 221, 243 (2001).

halted the transfer of property from Serbs to Kosovar Albanians.[335] The 1999 campaign of ethnic cleansing against the Kosovars resulted in the destruction of approximately fifty percent of the housing stock in the territory.[336] When the fighting stopped, more than 1.5 million Kosovars had been expelled from their homes, a figure representing approximately ninty percent of the pre-war Kosovar population.[337]

After the close of hostilities, the Security Council created the United Nations Interim Administration Mission in Kosovo ("UNMIK") to—among other tasks—establish "a secure environment in which refugees and displaced persons can return home in safety" and to assure "the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo."[338] Unlike the U.N. mission in Bosnia, UNMIK exercised full governmental authority and "possess[ed] full legislative and executive powers."[339]

The Special Representative of the Secretary General in Kosovo used this authority to establish the Housing and Property Directorate ("HPD") and the Housing and Property Claims Commission ("HPCC"), both of which operated from 1999 to 2006.[340] The HPD exercised overall administrative control while the HPCC was a quasi-judicial body charged with resolving individual disputes over residential properties.[341] When it completed its work in 2006, the HPCC had resolved 28,716 property claims, which account for more than ninty-eight percent of the total claims submitted.[342]

Peacekeeping missions facilitating property return are particularly useful examples of international practice because of their clear normative grounding. The Secretary-General in his Guidance Note connected restitution schemes such as those found in Bosnia and Kosovo to a rights-based conception of property return, while also emphasizing the importance of restitution to creating lasting peace.[343] That most of the property returned under the scrutiny of

335. Dimo Tordorovski et al., *Conflict and Post-Conflict Land Administration – The Case Study of Kosovo*, 48 Survey Rev. 316, 319 (2016); Leopold von Carlowitz, *Crossing the Boundary from the International to the Domestic Legal Realm: UNMIK Lawmaking and Property Rights in Kosovo*, 10 Global Governance 307, 309 (2004).

336. Eric Rosand, *The Kosovo Crisis: Implications of the Right to Return*, 18 Berkeley J. Int'l L. 229, 231 (2000); von Carlowitz, *supra* note 335, at 308.

337. Rosand, *supra* note 336, at 231. Throughout the crisis, the Security Council passed a series of resolutions affirming the right of displaced Kosovars to return to their homes. *See* S.C. Res. 1239 (May 14, 1999) (citing numerous prior resolutions and reaffirming "the right of all refugees and displaced persons to return to their homes in safety and dignity").

338. S.C. Res. 1244, ¶¶ 9(c), 11(k) (June 10, 1999); *see also* S.C. Res. 1244, annex 2 ¶ 4 (June 10, 1999) ("The international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees.").

339. von Carlowitz, *supra* note 335, at 307.

340. Int'l Org. for Migration, *supra* note 334, at 18.

341. Mass-Claim Mechanism, *supra* note 246, at 6.

342. *Id.* at 6.

343. SG Guidance Note on Transitional Justice, *supra* note 323.

peacekeepers has been individual homes also connects the missions to Radin's personhood perspective.

V. Innovations of the New Law of Takings

The international law of property rights cannot be understood as a single unified regime, despite heroic scholarly efforts to the contrary.[344] As we have shown, the move from the traditional law on alien takings to the new law of citizen takings created two regimes that differ in almost every significant respect. Most importantly, the right-holders in the critical cases generating normative change are not the same. For alien takings, it is foreign corporations; for citizen takings, it is forced migrants. In addition, the circumstances of the takings driving normative change are not the same. For alien takings, it is the expropriation of some or all of a major industry, usually as part of a host country's effort to foster economic nationalism. For citizen takings, it is frequently mass human rights violations directed against particular ethnic, religious, national, or other groups. Finally, and most importantly in our view, the nature of the property is not the same. For alien takings, the property is acquired as part of an expected profit that is interchangeable with other income-generating assets. As a result, the traditional remedy for alien takings is compensation. For citizen takings, the property is bound up in the owner's sense of personhood or identity and is not interchangeable even with comparable property. Contemporary international law makes clear such citizen owners can only be made whole through restitution.

Beyond dispelling the idea of a unified property regime, the personal/fungible distinction suggests at least four additional implications for international law. First, it introduces a human-centered conception of property rights. Second, it provides a new perspective on the critique that an international right to property impedes developing states' ability to adopt centralized economic models. Third, it reveals the importance of respect for property rights to responses to secession and ethnic cleansing during civil wars. Finally, the personhood view brings a new perspective to property claims by indigenous peoples.

The first innovation is a human-centered conception of property rights. Radin's critical insight is the specificity of individuals' relationship to their property: how particular forms of property can reflect a particular aspect of a particular person's identity.[345] This view is the antithesis of the categorical groupings of property owners and their collective interests. The debates over FDI expropriation, and in particular whether an individual right to property

344. Sprankling, *supra* note 41, at 464; John G. Sprankling, *The Emergence of International Property Law*, 90 N.C. L. Rev. 461 (2012).

345. *See* Radin, *supra* note 44, at 1015.

functions as an instrument of market state hegemony, describe benefits accruing to "property owners,"[346] "nationals,"[347] and "the mutual benefits which nations receive through the investment of foreign capital for the development of national resources."[348] Countervailing rights grounded in economic nationalism are described as accruing to "peoples."[349] The personal conception of property rejects such notions of aggregate interests and asks how individuals or distinct groups relate to their property within single cultural systems. But centering certain property rights on individual people does not tell us what specific types of property fit in the "personal" category, beyond the quintessential example of the home. Do family heirlooms, businesses long held in a family or which have moved their owners from poverty to relative comfort, collectively owned lands without formal indicia of ownership, places of worship, or religious totems qualify? Because property rights are regulated by diverse international legal regimes, including general purpose human rights treaties (both global and regional), regimes for specific groups (such as CEDAW and UNDRIP), a regime for cultural property, and the soft-law regimes for forced migrants, the answer may depend as much on the status of the owner as the nature of the property.

A second consequence of the personal/fungible distinction is to provide a new perspective on the critique that individual property rights operate as an international law veto on economic centralization efforts by developing countries. David Kennedy argues that property rights use "the authority of the human rights movement to narrow the range of socio-economic choices available in developing societies."[350] This is so, he contends, because developing states cannot both nationalize key industries and provide full compensation to all affected property owners.[351] The argument sees the states' choice as

346. Anderson, *supra* note 94, at 526.

347. G. Hornsey, *Foreign Investment in International Law*, 3 INT'L L. Q. 552, 554 (1950).

348. Dunn, *supra* note 96, at 169.

349. The 1986 Third Restatement of Foreign Relations of the United States, for example, stated that for "the new majority of states" in the post-World War II period "a people's right to dispose of its national resources became 'economic self-determination' and was designated a 'human right.'" RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 712, rptr. n.1 (AM. L. INST. 1987). For "the United States and other capital exporting states," by contrast, compensation at full market value was "solidly based on both the moral rights of property owners and on the needs of an effective international system of private investment." *Id.*; *see also* José E. Alvarez, *The Human Right of Property*, 72 U. MIA. L. REV. 581, 595 (2018) ("It is not lost on critical scholars of international law that the idea of protecting property on the basis of international norms first arose in connection with protecting the rights of (Western) foreign investors . . . [For those scholars] the contemporary property rights instruments . . . constitute struts supporting the 'structural violence' of racialized privilege and embedded asymmetries that international law continues to impose on the formerly colonized.").

350. David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 116 (2002).

351. *See* Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 553, 576 (1981) (For some developing countries "iron application of the Hull rule would result at times in disastrous consequences to the common good.").

zero-sum: any concession to property rights means a diminution of economic self-determination and any deference to a state's right to acquire ownership of critical economic sectors infringes on individual property rights. If international law chooses property rights, argue Kennedy and others, the result may be to preclude legitimate efforts to attain true economic autonomy and to lock in place exploitative patterns of foreign ownership.[352]

The personhood regime, however, does not stand in a zero-sum relation to principles of economic sovereignty. With only isolated exceptions, developing states do not use claims of economic nationalism to justify the expropriation of their citizens' homes, small businesses, or other property that might involve personal connections. They instead focus on foreign-owned investment property in industries that were key to the expropriating state's development ambitions and patrimony. The problem in such cases is—or was—*external*. In the parlance of an earlier time, ending foreign ownership of resource extraction industries was an effort by developing countries to "consolidate their national independence and reinforce their fighting front by challenging imperialist and neo-colonial exploitation structures."[353] The personhood regime, by contrast, arises from efforts to protect citizens' property caught up in the persecution of national minority groups. That problem is *internal*.

Third, the personal/fungible distinction reveals the importance of property restitution to international efforts to address secession and ethnic cleansing during civil wars. The outbreak of civil war represents the breakdown of social and political cohesion within a state—a radical disagreement between governments and rebels over the legitimate source of national authority. When fighting commences, both sides have effectively rejected a pluralistic political system in which they must cooperate and compromise. Indeed, in many conflicts, the parties seek to erase pluralism altogether. Rebels do so by attempting to secede and to create their own states. Governments do so by forcibly expelling members of the opposition group. The question of property restitution enters this dynamic because international law almost always opposes anti-pluralist tactics, discouraging secession[354] and condemning mass

352. *Cf.* M. Sornarajah, *Compensation for Expropriation: The Emergence of New Standards,* 13 J. WORLD TRADE L. 108, 113 (1979).

353. Fourth Summit Conference of Heads of State or Government of the Non-Aligned Movement at 66, U.N. Doc. A/9330 (Sept. 9, 1973).

354. Security Council resolutions uniformly express a commitment to the territorial integrity of states in civil war. *See, e.g.*, S.C. Res. 2625 (Mar. 15, 2022) (Sudan); S.C. Res. 2640 (June 29, 2022) (Mali); S.C. Res. 2657 (Oct. 31, 2022) (Somalia); S.C. Res. 2626 (Mar. 17, 2022) (Afghanistan); S.C. Res. 2624 (Feb. 28, 2022) (Yemen); S.C. Res. 2647 (July 28, 2022) (Libya); S.C. Res. 2641 (June 30, 2022) (DR Congo). For a comprehensive review of state practice, see James Crawford, *State Practice and International Law in Relation to Secession*, 69 BRIT. Y.B. INT'L L. 85, 92, 108 (1999) ("Since 1945, no State which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the government of the predecessor State."). A series of entities has attempted to or proclaimed independence in the years since Crawford's study, but in each case "the international community opposed their recognition and in the end the secession failed." Juan Francisco Escudero Espinosa, *The Absence of Any Right to 'Remedial Secession' in*

expulsions.[355] Instead, the international community has consistently sought to maintain or restore existing borders and demographic profiles in post-conflict states.[356] That is, international actors have an interest in making demographically pluralist states work as viable political communities.

The restoration of seized property is integral to these efforts. Forced migration and property deprivation are two components of the same dynamic. As the ICTY noted in the Krnojelac case, "the prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference."[357] Reversing forced displacement and allowing communities to regenerate requires restoring property that ties people to a particular place. Not surprisingly then, "restitution has become a common component of peace negotiations to end conflict characterized by mass-displacement or ethnic cleansing."[358] The Pinheiro Principles prioritize restitution over compensation on the grounds that without a home to which they can return, forced migrants are likely to remain displaced or exiled.[359] The same view animates the U.N. Guiding Principles.[360] Returning property that most closely ties forced migrants to their communities is thus an essential step to restoring the population to its pre-war state. The link between the normative commitment to demographic pluralism and the

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International Law, 22 Spanish Y.B. Int'l L. 393, 399 (2018). *See also* Ryan D. Griffiths & Louis M. Wasser, *Does Violent Secession Work?*, 63 J. Conflict Res. 1310, 1312 (2018) ("[W]e find no evidence that violent methods help secessionists to gain independence. In fact, our results suggest that the use of violence can be counterproductive if it comes at the expense of the use of institutional methods.").

355. Forced eviction from a state violates a host of human rights norms and is defined as a crime against humanity in the Rome Statute of the International Criminal Court. ICC Statute, art. 7(d) ("Deportation or forcible transfer of population"). *See also* U.N., Hum. Rts. Committee, No 27: art. 12 (Freedom of Movement), ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999) ("The right to reside in a place of one's choice within the territory includes protection against all forms of forced internal displacement"); *id.* ¶ 19 ("The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries."); Alfred de Zayas, *Forced Population Transfers*, *in* Max Planck Encyclopedia of International Law ¶ 12 (2010), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e802#law-9780199231690-e802-div1-1 [https://perma.cc/9GP2-MZJ3] (Forced population transfer "entails gross violations of human rights.").

356. The reordering of political authority within existing borders has been a common feature of peace accords. Examples include federal arrangements, regional autonomy schemes, minority rights regimes, and power-sharing arrangements. *See* Anthony Wanis-St. John & Roger Mac Ginty, *Conclusion: Peace Processes, Past, Present, and Future*, *in* Contemporary Peacemaking: Peace Processes, Peacebuilding and Conflict 585, 593–94 (Roger Mac Ginty & Anthony Wanis-St. John eds., 3d ed. 2022).

357. Prosecutor v. Krnojelac, Case No. IT-97-25-A, Appeals Chamber Judgment, ¶ 218 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003); *see also* Prosecutor v. Milosevic, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 69 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004) (observing that the values protected by the crimes of deportation and forcible transfer are the "right of the victim to stay in his or her home and community and the right not to be deprived of his or her property by being forcibly displaced to another location").

358. Williams, *supra* note 258, at 367.

359. Pinheiro Preliminary Report, *supra* note 251, ¶ 9 (restitution of refugee and IDP property is "essential to the realization of the right to return").

360. Williams, *supra* note 258, at 367.

successful return of forced migrants runs directly through these property restitution mechanisms.

The final contribution of property as personhood is the new perspective it brings to property claims by indigenous peoples. The claims of many indigenous people are focused primarily on traditional lands. International actors, scholars, and indigenous communities themselves describe aboriginal peoples' relation to their land as unique.[361] There is a "special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories"[362] or a "distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands."[363] As the Inter-American Court declared in the *Awas Tingni* case, "For indigenous communities, relations to the land are not merely a matter of possession and production but [possess] a material and spiritual element which they must fully enjoy."[364]

Two consequences flow from the fact that indigenous lands are *constitutive* of personhood and paradigmatically non-fungible. One is that indigenous lands are so fundamental to individual and communal self-conception that addressing the contestation over native land advances our understanding that some things are not for sale.[365] Focusing on the personal, identity-forming quality of indigenous lands may offer conceptual clarity in the face of competing claims or the litany of problems and inconsistencies in indigenous land claims identified by Benedict Kinsbury.[366] Instrumentally, the fact that indigenous land has traits in common with other forms of personal property may make it helpful in claims for the lands' return or for claims to continued use and occupancy.[367] The second is that indigenous lands—in practice, in international law, and in the legal imagination—are jurisgenerative and complicate Western assumptions of individual ownership and alienability. The possession and title of what was once stolen, emptied, and occupied land is now frequently challenged through rhetorical, institutional, and procedural devices, all legal tools to codify that most lands under the control of aboriginal groups cannot be owned and alienated by individuals.[368] The result is that the lands in question are increasingly characterized by hybrid legal arrangements: usufructuary rights, shared resources,

361. *See supra* Part IV.B.3.

362. ILO Convention 169, *supra* note 215, art. 13.

363. UNDRIP, *supra* note 209, art. 25.

364. Awas Tingni, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149.

365. *See* Darlene Johnston, *Native Rights as Collective Rights: A Question of Group Self-Preservation*, 2 Canadian J.L. & Juris. 19, 32–34 (1989).

366. Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U. J. Int'l L. & Pol. 189, 244–46 (2001).

367. Darlene Johnston, Respecting and Protecting the Sacred 2–5 (2006), https://commons.allard.ubc.ca/fac_pubs/191/ [https://perma.cc/N3YB-V6UU] (describing the Anishnaabeg origin story as means by which by which geographically-bounded cultural communities ground their identity in particular narratives and particular landscapes).

368. Jérémie Gilbert, Indigenous Peoples' Land Rights Under International Law: From Victims To Actors 169–70 (2nd ed. 2016).

conservation easements, carve outs for reservations, and land trusts—anything but traditional individual ownership.[369] Holding the land collectively does not diminish the personal investment of each member of indigenous communities in the land's cultural value, and may indeed enhance it.

Conclusions

The distinction between the fungible property of foreign investors and the personal property of individual citizens has been hiding in plain sight in international law. Lawyers from common law states will recognize it as akin to the division between equitable remedies and remedies at law in property disputes, with the former being available only when the nature of property means an owner cannot be made whole through compensation. Our examination of the new law on personal takings has been less an excavation of an opaque trend than an effort to identify a series of factors that obscure the extent to which restoring unique individual property departs from the foreign investor regime.

We have argued there is simply no unified "international law of property" within whose four corners the distinction might operate. The norms we have described not only divide between the law on foreign investment and the law of human rights (the distinction central to the Court in *Philipp*), but divide further into a host of more specialized regimes and subject areas. These include international law governing refugees, IDPs, indigenous peoples, cultural property, peace agreements, and the practice of peace-keeping in post-conflict states. An examination of the treatment of property in these domains reveals a common view of the home, particularly when taken as part of a campaign of violence and discrimination. The personal nature of such property is underscored by an emphasis on restitution, not compensation, as evidenced by the voluminous efforts accompanying peace agreements, the mandate of peace-keeping missions, and the resettlement of refugees and IDPs.

The distinction between fungible and personal property in international law is magnified by norms concerning state responsibility, which expresses a clear preference for restitution (subject to certain limitations). The preference applies equally to foreign and citizen property seizures. The universal availability of restitution might suggest that the international law of remedies does not distinguish the nature of damages involved in taking the two types of property. In practice, however, the mere availability of both remedies elides the reality that states espousing the claims of foreign investors almost never ask for restitution and investor-state arbitrators have almost never ordered that restitution be made.

369. *See supra* Part IV.B.3.

Even when the unique nature of fungible personal property is evident to dispossessed owners, and those owners bring claims to courts or tribunals capable of making the necessary connections between multiple legal sources, additional hurdles exist that prevent these bodies from clearly articulating contemporary law. *Philipp* is a prime example. The U.S. Supreme Court defined its task not as identifying the developing international law concerning the human right to property but as examining how Congress in 1976 incorporated that law into the FSIA's Takings Exception.[370]

The property at issue in *Philipp* also made the case a less than ideal opportunity to understand the nature of personal ownership. The plaintiff heirs to the consortium of German Jewish citizens who owned the *Welfenschatz* did not contend that it reflected their culture, that it depicted Jewish subjects, that it had been confiscated rather than sold, or that it had been subject to a demand for restitution.[371] *Welfenschatz* appears to be more akin to investment property than cultural heritage, which would have complicated the genocide claim.[372]

Belay Redda and Hiwot Nemariam's long crusade to reclaim their Ethiopian bank accounts, businesses, and home provides a further lesson. After their FSIA claims against the Commercial Bank of Ethiopia were dismissed by the D.C. Circuit, their broader property claims were eventually heard before the Eritrea-Ethiopia Claims Commission ("EECC"), convened as part of a ceasefire agreement that concluded the war between the two states.[373] The EECC was created to "decide through binding arbitration all claims for loss, damage or injury by one Government against the other" related to the armed conflict and resulting from "violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law."[374] Ethiopia and Eritrea were permitted to submit claims on their own behalf and on behalf of their nationals—both natural and legal persons—or, in appropriate circumstances, persons of Ethiopian or Eritrean origin who were not nationals.[375] Hiwot and Belay submitted claims through Eritrea alleging that:

370. *See supra* Part II.

371. Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 708 (2021).

372. Neither the District Court nor the D.C. Circuit in *Philipp* ever reached this question, since Germany took an interlocutory appeal from the District Court's denial of its motion to dismiss arguing that the domestic takings rule barred all claims under the Takings Exception. *See* Philipp v. Federal Republic of Germany, 894 F.3d 406, 410 (D.C. Cir. 2018).

373. *Eritrea-Ethiopia Claims Commission*, Permanent Court of Arbitration, https://pca-cpa.org/en/cases/71/ [https://perma.cc/L8EX-9W9N] (last visited Nov. 12, 2023).

374. Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia, *in* Letter dated Dec. 12, 2000 from the Permanent Rep. of Algeria to the U.N. addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/55/686-S/2000/1183, annex, art. 5, ¶ 1 (Dec. 13, 2000).

375. *Id.* art. 5, ¶¶ 8–9.

> Ethiopia implemented a widespread program aimed at unlawfully seizing Eritrean private assets, including assets of expellees and of other persons outside of Ethiopia, and of transferring those assets to Ethiopian governmental or private interests. Ethiopia denied that it took any such actions. It contended that any losses resulted from the lawful enforcement of private parties' contract rights, or the nondiscriminatory application of legitimate Ethiopian tax or other laws and regulations.[376]

The Commission ultimately rendered a mixed verdict on the expellees' property claims, rejecting demands relating to accounts at the Commercial Bank of Ethiopia and Horn International Bank, but finding that Ethiopia violated the claimants' rights with respect to immovable property.[377] In the final analysis, the EECC report dismissed the fungible property claims but recognized the international law violations associated with the taking of personal property, including Hiwot and Belay's home and businesses, that defined their lives and livelihood.[378]

Philipp and the Eritrean FSIA case were thus imperfect vehicles for the elaboration of the personal/fungible distinction. Even if future cases avoid their procedural problems, they may still not generate fulsome decisions. After all, claims by dispossessed foreign investors are generally heard by specialized investor-state arbitration bodies designed for those cases, while human rights claims usually go to human rights treaty bodies. Very occasionally, tribunals are established to hear claims of mass dispossession (such as in Bosnia and Kosovo), but they decide mostly factual questions of ownership and secondary occupation under national law. Cases that call on courts to address both the alien and citizen regimes and compare their attributes are unlikely to arise in any of these circumstances.

That is why *Philipp* was such a missed opportunity. Both regimes were present, and determining what § 1605(a)(3) means by "international law" required the U.S. Supreme Court to choose between the two. The case was also decided

376. Eritrea-Ethiopia Claims Commission: Partial Award, Civilian Claims: Eritrea's Claims 15, 16, 23, 27–32, 44 I.L.M. 601 (Perm. Ct. Arb. 2005), ¶ 123.

377. Acting for the expellees, Eritrea "contended that Ethiopia unlawfully appropriated a significant portion of the value of expellees' property by imposing a '100% location value' tax on forced real estate sales. . . . The Commission conclude[d] that the 100% 'location tax' was not a tax generally imposed, but was instead imposed only on certain forced sales of expellees' property. Such a discriminatory and confiscatory taxation measure was contrary to international law." *Id.* ¶¶ 137–140.

378. At the conclusion of the Eritrea-Ethiopia Claims Commission, Belay and Hiwot's losses were compensated in the amount of more than $319,000. By then, Belay had died and the award was assigned to Eritrea and combined with other claims from both sides such that it was offset by one state against another. As Lea Brilmeyer recounts, "Alas, neither Eritrea nor Ethiopia ever paid the amount awarded to the other party, and thus neither received any compensation for the loss and injury suffered by it and by its people." Lea Brilmayer, Chiara Giorgetti & Lorraine Charlton, International Claims Commissions: Righting Wrongs After Conflict 120 (2017).

at a time when the steep decline in foreign expropriations and the rise in mass dispossessions during civil wars and ethnic cleansing made clarifying the distinct attributes of the new personal regime particularly important.

Like Hiwot's kitchen, childhood homes, indigenous land, small businesses carrying family names, and cultural heritage objects constitute *les choses de la vie*, an inextricable part of the owner's personal identity, whether uniquely individual or part of a cultural collectivity. Norms addressing their loss are the new international law of takings.