The Right to Property Taking Economic, Social and Cultural Rights Seriously

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Abstract

The right to property is part of International Human Rights Law (IHRL). However, the right is conspicuously missing from some fundamental treaties, and there are important inconsistencies in its interpretation by regional and global human rights bodies. In light of the indeterminacy and polysemy of IHRL in relation to property, this paper articulates a proposal to rethink this right taking Economic, Social and Cultural Rights (ESCR) seriously: property is a human right; it includes private property as one of its forms, but this is not the only one; property has a social function; and potential clashes between property and other rights, including ESCR, should be dealt with in accordance with the principles of proportionality and public interest.

Keywords

Economic, Social and Cultural Rights; International Human Rights Law; Property; Social Function.

I. INTRODUCTION

Except for "thin air,"[1] virtually any good, physical or not, is subject to ownership. Property is everywhere, and everywhere it is unevenly distributed. According to the World Inequality Report 2022, the poorest half of the world barely owns 2 per cent of all the wealth, while the richest 10 per cent own 76 per cent.[2] Concentration of wealth is a global phenomenon that has only become more pronounced since the 1980s.[3] The gap between the 'haves' and the 'have-nots' is today similar to the level of the early 1900s.[4]

Inequality is a feature of our times, and inequality of income and wealth cannot be detached from property, from the way we understand and regulate property.

The right to property is part of the Universal Declaration of Human Rights (UDHR),[5] and it is contained in one way or another in international treaties and authoritative documents of the human rights system. However, there is no univocal definition of property in International Human Rights Law (IHRL), the right is conspicuously missing from some fundamental human rights treaties, and differences in case-law between the three main regional human rights systems are striking (see Section II below).

What does the right to property actually mean? Authoritative bodies dealing with Economic, Social and Cultural Rights (ESCR) have largely dodged the question, even when they had an excellent opportunity to address it head on. As will be shown in Section III, the UN Committee on Economic, Social and Cultural Rights (CESCR) has not been coy when it came to discounting and restricting private property in the name of ESCR. However, neither the CESCR nor other human rights bodies dealing with ESCR have thus far provided a substantive analysis of the outlines of the right to property.

This is regrettable because property, particularly private property, is of huge significance when dealing with housing (think of evictions in the private lease sector),[6] education (attempts to limit the privatization of public education),[7] access to essential services delivered by private companies (disconnection from water or electricity),[8] or health (for example, pharma companies' refusal to issue open and non-exclusive licenses of their Covid-19 vaccines).[9]

Acknowledging that there is a right to property, and daring the delineate its contour, would make progressive interpretations of ESCR, not bullet-proof, but more credible and rigorous.

This paper does not advocate for an expansive interpretation of the right to property. At the same time, however, ignoring the significance of property as an ubiquitous social phenomenon cannot be helpful for the cause of human rights.

This paper conceptualizes property in its different forms as a human right that needs to be made compatible with other human rights, particularly ESCR. Section II examines the noticeable silences and prominent contradictions in the way the right to property is recognized in international treaties and in the authoritative interpretation by human rights bodies. Section III shows how property has been sidelined by ESCR bodies at the United Nations. With a holistic view that intends to make sense of the plurality of meanings in IHRL, Section IV then articulates a proposal to rethink property taking ESCR seriously: Property is a human right; it includes private property as one of its forms, albeit not the only one; property has a social function; and potential clashes between property and other rights, including ESCR, need to be dealt with in accordance with the principles of proportionality and public interest.

II. THE INDETERMINACY AND POLYSEMY OF PROPERTY IN INTERNATIONAL HUMAN RIGHTS LAW

The UDHR of December 1948 recognizes the right to property in Article 17: "Everyone has the right to own property alone as well as in association with others," (first paragraph) and "no one shall be arbitrarily deprived of *his* property" (second paragraph; italics added).[10]

The language of the UDHR is different from that of the American Declaration of Rights and Duties of Man, adopted in Bogota, Colombia, seven months before the Universal Declaration. Article 23 of the American Declaration establishes that "every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home."[11] In other words, not all forms of ownership would deserve the consideration of human rights. For the drafters in the Americas private property seemed to be a human right only to the extent that it is necessary to maintain dignity and to cover *essential needs of decent living*. We will return to this nuance later.

Morsink's archival research shows that, due to the lack of consensus about property among national constitutions, the drafters of the UDHR considered borrowing the wording of the Bogota Declaration.[12] At the early stages of the process, the Soviet delegation sought to secure "some abstract formula which made allowance for different social systems," so the right to property would only be so "in conformity with the laws of the state in which such property is located."[13] Such a formulation did not find its way onto the final text, as delegates rightly pointed out that making the international recognition of rights entirely dependent on national laws would make the recognition meaningless in practice. However, the Soviet Union persuaded other delegations to drop the word "private" and to add "in association with others,"

because of the difference between the capitalist private property, the collective or communal property, and property over personal items and incomes from work, a distinction that was essential in the Soviet legal system.[14] As is well known, nevertheless, the Soviet Union and its allies ended up abstaining on the UDHR on December 10, 1948.[15] The United States and others successfully advocated for the removal of the words "essential needs" and "decent living," alleging they were too vague.[16]

In the midst of the Cold War, neither the International Covenant on Economic, Social and Cultural Rights (ICESCR)[17] nor the International Covenant on Civil and Political Rights (ICCPR),[18] both adopted on December 16, 1966, mentioned property as a right as such. This was due to fundamental differences of opinion about the very concept of property and about the extent to which the right could be subjected to restrictions.[19] Given the economic nature of the right to property, one could have expected to find it in ICESCR. However, according to Sprankling, property was deliberately excluded due to two main reasons: The ideological objection of the Soviet Union and the strategic rejection of newly decolonized nations, which resorted to the expropriation of property owned by former colonizers.[20] Property is only mentioned as one of the explicit grounds of prohibited discrimination in Article 2(2) ICESCR and in Articles 2(1), 24 and 26 ICCPR. Several times has the UN Human Rights Committee declared claims partly or totally inadmissible ratione materiae because they alleged the violation of the right to property.[21]

The right to property has also been proclaimed in other key human rights instruments, particularly in the form of equal right of men and women to administer, enjoy and dispose of property (Articles 15(2) and 16(1)(h) of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women),[22] equal right of persons with disabilities to own and inherit

property, and to control their finances (Article 12(5) of the 2007 Convention on the Rights of Persons with Disabilities),[23] non-discrimination against children based on property among other grounds (Article 2(1) of the 1989 Convention on Rights of the Child),[24] prohibition of racial discrimination in relation to property (Article 5(d)(v) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination),[25] and prohibition of discrimination against migrant workers based on property, as well as protection from arbitrary deprivation of property of migrant workers (Articles 1(2), 7 and 15 of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families).[26] The 1989 ILO Convention No. 169 on Indigenous and Tribal Peoples proclaimed their right to "ownership and possession," as two distinct legal categories, over their traditional lands.[27] Similarly, the 2007 Declaration on the Rights of Indigenous Peoples established that they have the right to "own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership."[28]

The right to property is not synonymous with the right to *private* property in international human rights treaties and in the authoritative interpretation of these standards by UN bodies. A search in the Universal Human Rights Index of the Office of the High Commissioner for Human Rights shows that,[29] as of July 2022, the "right to private property" is only mentioned twice, in one recommendation from Mexico to Burkina Faso in the Universal Periodic Review in relation to equality between men and women,[30] and in the report of the Special Rapporteur on Adequate Housing on Argentina, calling for the redefinition "of the right to private property as regulated in the Civil Code so as to include the concept of the social function of property."[31] "Private property," with no mention of a right, appears in thirteen more recommendations or observations from nine other human rights mechanisms, for example, in relation to access to land of indigenous peoples in Congo and Paraguay,[32] compensation for losses of businesses in

the aftermath of protests in Zimbabwe,[33] demolition of houses and private property in Israel and the Occupied Palestinian Territories,[34] state acquisition of private property in Venezuela,[35] or protection of victims of slavery in Kazakhstan.[36] "Right to property" is cited in fifty-eight recommendations or observations of nine human rights mechanisms, most of them from the Committee on the Elimination of Discrimination Against Women, and under the Universal Periodic Review, primarily in relation to access to land of indigenous peoples,[37] and equality between men and women.[38] Finally, the word "property", not necessarily in its private form or as a right, appears in 1,109 recommendations or observations in 682 documents issued by forty-two mechanisms. While in some of these occasions the word "property" might be used with a different meaning, i.e., to refer to an attribution or characteristic of something,[39] the difference in the numbers is striking, showing that sometimes UN human rights bodies choose to specify they refer to *private* property, but sometimes they choose not to do so.

Private, public, traditional, communal or personal, the right to property can be considered an economic right, insofar as property consists of ownership and possession over things that have or can have an economic value. It has also been considered a civil right, notably because of the central role of private property, together with liberty and formal equality, in the construction of liberalism in Western political theory.[40] For example, Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination includes "the right to own property alone as well as in association with others" and "the right to inherit" in its list of civil rights, alongside freedom of movement, right to nationality, marriage, and freedom of opinion, thought or association.[41]

Similarly, the protection of property is proclaimed in Article 1 of the first Protocol to the European Convention on Human Rights (ECHR), a treaty devoted to civil and political rights.

It was indeed argued during the preparatory works that the Convention should not address property given the socioeconomic nature of this right.[42] Be that as it may, Article 1 Protocol 1 firstly protects the right of "every natural or legal person" to the "peaceful enjoyment" of "possessions" ("*biens*" in the French version), adding, as a second rule, that no one shall be "deprived" of their possessions except in the public interest and in accordance with the law, with the caveat, the third rule, that the state can "control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."[43]

According to Simpson, despite the debate about the accommodation of an economic right in a treaty on civil and political rights, during the drafting process there was wide support for the idea that "private property was a prerequisite of human freedom," while at the same "it was legitimate, within reason, for the state to regulate and impose limits upon the right to property in the general welfare."[44]

The right to property is one of the most commonly alleged violations in front of the European Court of Human Rights. Between 1959 and 2021, the European Court found a violation of Article 1 Protocol 1 on 3,706 occasions, only behind Article 6 ECHR (fair trial within reasonable time, with 11,532 judgments) and Article 5 (right to liberty and security, with 4,496 judgments).[45]

Whilst Article 1 Protocol 1 is entitled "protection of property," the first paragraph speaks of "possessions," blurring the legal distinction between the legal entitlement and the effective occupation or physical control. *Property* and *possessions* mean the same thing for the purposes of ECHR. Both terms have an autonomous meaning, independent from whether and how property is recognized and regulated at the national level. In practice, anyway, all potential

interests categorized as property nationally are likely to be treated as possessions by the European Court of Human Rights.[46] According to the interpretation of the Court, "'possessions' can be either 'existing possessions' or assets, including claims, in respect of which the applicant can argue that he or she has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right,"[47] based for example "on a reasonably justified reliance on a legal act which has a sound legal basis and which bears on property rights."[48] Both contributory and non-contributory social security or housing benefits would in principle be covered by Article 1 Protocol 1, but the provision does not include the right to a certain type or amount of benefit.[49] That is because the right to property is no proxy for the right to social security,[50] or indeed for the right to adequate housing.[51]

Article 1 Protocol 1 does not make compensation mandatory in case of expropriation. A significant interference with the right to property, a deprivation of a possession, must be lawful and serve the general interest, but compensation is not explicitly required in the treaty. However, since the 1980s, it has been the standing case-law of the European Court of Human Rights that, in all but "exceptional circumstances" – like "measures of economic reform or measures designed to achieve greater social justice" – full compensation of "an amount reasonably related" to the market value would be required; the absence of such a requirement would make the right to property "largely illusory and ineffective".[52] The Court reached this conclusion despite the fact that, as shown by Allen, drafters very consciously decided not to include compensation in the Protocol given the lack of agreement in the 1940s and 50s about whether full or even partial compensation should be part of the essential content of the right to property.[53]

The phrasing and the conceptualization of the right to property is noticeably different in the regional human rights systems in the Americas and Africa.

Article 21 of the 1969 American Convention on Human Rights (ACHR) proclaims that "everyone has the right to the use and enjoyment of *his* property," adding immediately that such use and enjoyment can be subordinated by law to the "interest of society;" the law would also establish the exceptional circumstances under which one could be "deprived of *his* property… upon payment of just compensation, for reasons of public utility or social interest;" finally, "usury and any other form of exploitation of *man by man* shall be prohibited by law" (italics added).[54] The Inter-American Court of Human Rights has developed a broad interpretation of property, "including material goods that can be possessed or… intangible things, as well as any right that may form part of a person's assets… (and) rights that have been incorporated into a person's patrimony."[55] Property "includes all movable and immovable property, corporal and incorporeal elements, and any other intangible object of any value."[56] For example, a retirement pension is an acquired right, therefore incorporated into personal patrimony, and hence covered by Article 21.[57] In this regard, Article 21 ACHR is similar to Article 1 Protocol 1 ECHR.

However, regional case-law in the Americas has shown how property can go beyond private property. In Awas Tingni v Nicaragua (2001), the Inter-American Court recalled that in the ACHR drafting process it was purposefully decided to leave the word "private" out of Article 21,[58] a point the Court used to extend the application of this provision to other forms of communal and collective property rights of indigenous and tribal groups.[59] The Inter-American Court connected the right to property with the economic survival, spiritual life and cultural identity of indigenous peoples.[60] Nonetheless, this interpretation has not gone without critique.

For example, Townsend and Townsend lament that the Inter-American system did not "disassociate the concept [of property] from its colonial history, nor (did the system) transform it into a concept apt for articulating Indigenous relations to land."[61]

In Xákmok Kásek v Paraguay (2010), the Inter-American Court summarized the implications of expanding the right to property to the communal property of indigenous people: 1) Traditional possession has "the same effects" of a legal title granted by the state, 2) indigenous peoples have the right to have their ownership recognized and registered by the state, 3) "the state must delimit, demarcate and grant collective title to the lands," 4) indigenous people who have lost possession of their land for reasons out of their control "retain ownership rights, even without legal title, except when the land has been legitimately transferred to third parties in good faith," and 5) if the lands have been legitimately sold and transferred, indigenous people "have the right to recover them or to obtain other lands of the same size and quality."[62] The latter two principles implicitly acknowledge the possible conflict between property claims and interests of indigenous people, on the one hand, and good faith buyers of private property, on the other hand.

In Lhaka Honhat v Argentina (2020), the Inter-American Court for the first time drew an explicit connection between the right to communal and traditional property of indigenous peoples through Article 21 ACHR, and the rights to food, water, cultural identity and diversity, and the right to a healthy environment through Article 26.[63] Echoing the language of Article 2(1) ICESCR, Article 26 ACHR urges states to "adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization" of ESCR.[64] The Inter-American Court concluded that the state failed to intervene to protect the

indigenous community from environmentally harmful activities that negatively affected their way of life, the access to and enjoyment of communal property, as well as their right to food and water as part of the right to an adequate standard of living.[65]

As regards the African system, the right to property can be found in Article 14 of the 1981 Banjul Charter on Human and Peoples' Rights, containing two principles: "The right to property shall be guaranteed," and "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."[66] The guarantee of the right to property means, according to the African Commission on Human and Peoples' Rights, the right to have access to one's property and protection in case of unlawful removal of the property.[67] The African Commission has also established that the right to adequate housing, despite not being cited in the Banjul Charter, is implicit and can be derived from a combined reading of the right to health, protection of family and the right to property.[68]

The right to property is the first of the articles listed in the 2010 Principles and Guidelines on the Implementation of ESCR in the African Charter on Human and Peoples' Rights,[69] another confirmation of the socioeconomic nature of this right. Those Principles and Guidelines make clear that the right "includes the protection of a legitimate expectation of the acquisition of property,"[70] as is the case in the European and Inter-American case-law, as covered earlier.

The African Commission has established that Article 14 of the Banjul Charter protects the "rights, interests and benefits" of indigenous peoples "in their traditional lands."[71] The Commission has urged African states to "adopt policies and laws that secure the rights of indigenous populations/communities to own, control and manage their ancestral lands in the

forests and protected areas."[72] Echoing Inter-American jurisprudence, as well as the UN Declaration on the Rights of Indigenous Peoples, for to the African Commission, the right to property gives indigenous peoples the "claim to ownership to ancestral land under international law, even in the absence of official title deeds."[73]

Article 14 remains silent about compensation, but Article 21(2) of the African Charter, on the collective right to accessing natural resources, says that "dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation."[74] Despite the silence of Article 14, the African Commission's Principles and Guidelines on the Implementation of ESCR include the obligation of states to ensure "compensation for public acquisition of property," which should in general "be reasonably related to the market value of the acquired property."[75] The Commission opens the door to exceptions, without much detail, but noting that consideration should be given to the individual rights and wider social interests at stake.[76]

In sum, the right to property was proclaimed in the Universal Declaration of Human Rights in 1948, but neither of the two fundamental treaties of 1966, ICCPR and ICESCR, acknowledge this right. They only mention property as one of the prohibited grounds of discrimination, as do the other key universal treaties in relation to equality between men and women, children's rights, racial discrimination, rights of persons with disabilities, and migrant workers. There is no univocal definition of the right to property, but particularly outside Europe it has been recognized that the concept comprises other forms besides private property. There are remarkable differences between regional human rights systems. In Europe, the right is one of the most frequently claimed in front of the European Court of Human Rights. Besides its exclusive focus on private property, one other European particularity is that it provides

coverage to both natural persons and legal persons, in practice, corporations. The human rights system in the Americas began in the 1948 Bogota Declaration by looking at the preservation of property necessary to the satisfaction of the essential needs of decent living. The 1969 Convention, however, did not retain the same wording, while the Inter-American Court of Human Rights has applied a flexible and broad interpretation of property to protect groups and collective interests. A similar practice has been followed by the African Commission on Human and Peoples' Rights. Despite the lack of an explicit mention in the relevant treaties, both Banjul and Strasbourg have called for market-referenced compensation in the case of expropriation. One significant difference between the regional systems is that while, in the case of Europe, the right to (private) property is shoehorned into a civil rights treaty, that is not the case in the Americas and Africa. Their respective human rights bodies see property as an economic right, and recent jurisprudence from San José de Costa Rica has explicitly addressed the interdependence between property and other social, economic, cultural and environmental rights.

III. PROPERTY ACCORDING TO UNITED NATIONS BODIES DEALING WITH ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The right to property is not enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[77] One could argue that the CESCR does not have a mandate to elaborate on the definition of rights not contained in the baseline covenant. However, the right to property is proclaimed in other international human rights treaties and declarations (as shown in Section II), and Article 5(2) ICESCR declares that no right recognized in national laws, international treaties or customs shall be restricted or derogated on the pretext that such a right is not recognized in ICESCR.[78] Moreover, the Committee has provided authoritative interpretations of rights not explicitly mentioned in ICESCR, like the right to water, and

opinions about relevant issues not envisioned when the ICESCR drafting process ended in 1966, such as sustainable development, business and human rights or access to land, as will we discussed shortly.

And yet, over the years, the CESCR has developed its expansive interpretation of the rights contained in the International Covenant while implicitly restricting the scope of the right to property, or simply ignoring it entirely, a right that is not in ICESCR, but it is proclaimed in national constitutions and international law as a human right.

For example, CESCR's General Comment No. 17 is devoted to the distinction between, on the one hand, the moral and material interests resulting from one's artistic, literary or scientific productions, and, on the other hand, the right to (intellectual private) property.[79] In General Comment No. 17, the CESCR drew a clear distinction between property and human rights in the very first paragraph in a way that would shape the whole document: "Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States" promote creativity, encourage the dissemination of innovation, and preserve scientific, literary and artistic productions, among other goals.[80] In other words, intellectual property would play an important role, but at the end of the day it would remain a discretionary creation of the state, a mere legal claim that "can be revoked, licensed or assigned to someone else",[81] unlike human rights, which would be "timeless expressions of fundamental entitlements of the human person."[82]

General Comment No. 24, on state obligations under ICESCR in the context of business activities,[83] appears to take corporations as a reality of life but lacks an acknowledgment and an assessment of how businesses can also be the expression of economically productive private

property. The CESCR begins by observing that "businesses play an important role in the realization of economic, social and cultural rights, inter alia by contributing to the creation of employment opportunities and —through private investment— to development."[84] However, property is only mentioned when calling for national regulation of intellectual property so as to prevent the "denial or restriction" of the right to health and food.[85] The right to property is not acknowledged anywhere else in the document. Once again, the Committee appears to think of property in opposition to ESCR, as a limit to the expansion of these rights, but not as a right in itself that would need to be made compatible with the whole human rights corpus based on the principles of interdependence and interrelatedness.

The exclusion and implicit rejection of property is also practiced by Special Procedures. In 2017, the UN Special Rapporteur on Adequate Housing, Leilani Farha, presented her report on the financialization of housing and its negative impact on human rights.[86] The UN expert pertinently described and critiqued how the expanding dominance of financial markets in the housing sector relied on "legal systems governing property rights,"[87] but nowhere in the report did she address the extent to which these practices may exceed the remit of the right to property considering the need to fulfil the right to adequate housing.

In 2018, the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, observed that "privatization advocates promiscuously invoke the language of freedom, property rights, autonomy and dignity, albeit often in ways that are entirely alien to agreed international human rights standards," and issued a call to reclaim human rights against privatizations.[88] However, the report does not provide any indication of how the right to property might be reinterpreted to make it compatible with, and even to fulfil, other human rights.

The 2020 report on privatization of water and sanitation services by the UN Special Rapporteur on Safe Drinking Water and Sanitation, Léo Heller,[89] does not mention the right to property and its limits either.

The urgency to redefine the content and shape of the right to property taking ESCR seriously became even more profound during the Covid-19 pandemic. Responding to a crisis of such a magnitude required the mobilization of privately owned resources and facilities, including private hospitals and labs, as well as hotels and other accommodation establishments to host people in homelessness.[90] In the early weeks of the pandemic, in April 2020, the UN Independent Expert on Foreign Debt and Human Rights, Juan Pablo Bohoslavsky, issued an "urgent appeal for a human rights response to the economic recession" emerging from Covid-19.[91] Bohoslavsky reminded governments that "property rights are not absolute and, if duly justified, States should be able to take the necessary economic and legal measures to more effectively face the current health crisis."[92] Later that year, the UN Special Rapporteur on Adequate Housing, Balakrishnan Rajagopal, called for a global ban on evictions and foreclosures, asking governments to provide shelter for homeless people in hotels and second properties, inviting them to purchase or expropriate empty or vacant properties as necessary, and to provide financial assistance to low-income tenants and small-scale landlords, but not to corporate landlords.[93] The two reports would have been strengthened if they had included an audacious attempt to set limits to the right to property in order to make ESCR real.

Also relevant in the context of Covid-19, in General Comment No. 25, on science and ESCR, the CESCR pointed out that "a balance must be reached between intellectual property and the open access and sharing of scientific knowledge and its applications."[94] The Committee invited

states to use “compulsory licences” and to “refrain from granting disproportionately lengthy terms of patent protection for new medicines” in order to facilitate the production and distribution of affordable medicines.[95] In its Statement on intellectual property in relation to Covid-19 vaccination, the CESCR cut to the chase: “Intellectual property rights are not a human right, but a social product.”[96]

These and other statements by UN human rights Treaty Bodies and Special Procedures in the context of the pandemic evince the need to find the place of property, including private property, within ESCR in a global health crisis. There is a theoretical gap in the global understanding of human rights, and this gap has very practical implications, as we will see later.

An exception to the general avoidance of the question of property is the ongoing discussion on a CESCR general comment on access to land.[97] The current draft provides insightful standards regarding the diverse facets of the relationship between property and land, for example: the cultural property of indigenous people, equality between men and women, fair compensation in case of deprivation of land, the importance of agrarian reform for a more equitable distribution of land, the need to ensure that the formalization or titling of informal settlements does not lead to greater commodification, the call to limit large-scale land investments and transactions in order to preserve the right to an adequate standard of living of small tenure holders, and the need to ensure access to communal lands.[98]

This new general comment could be an important contribution to the very necessary conversation about the outline of the right to property in relation to other ESCR. However, the draft focuses on the reality of peasants, rural communities and indigenous people in rural areas.

The reality in urban settings is out of its scope. Considering that more than 56 per cent of the world's population lives in urban areas, and that the proportion has risen sharply since 1960, when it was 33 per cent,[99] an authoritative interpretation of the right to property and ESCR in cities is necessary. Furthermore, the draft general comment deals with land rights only, and not with other issues relevant to property, such as the private provision of public services, intellectual property, foreclosures and rental evictions, or the privatization and exclusion of public spaces. Other standards, such as the mentioned General Comments No. 17 and 24,[100] as well as General Comments No. 4 and 7 in relation to housing,[101] do not provide a satisfying answer either.

When resolving individual complaints in application of the Optional Protocol to ICESCR, the CESCR has advocated for housing rights not only against the state but also vis-à-vis private actors. The CESCR has called for better protection of the procedural rights of homeowners in mortgage foreclosures.[102] The CESCR has also established that there must be an independent assessment of the proportionality of evictions in the private lease sector on a case-by-case basis.[103] The right to adequate housing may also require postponing "an eviction while the competent authorities negotiate with the persons concerned regarding the available alternatives."[104] In López Albán v Spain (2019), despite saying that states can adopt measures to protect private property from illegal occupation,[105] the CESCR extended the principle of proportionality to an illegal occupation of property: the proportionality test "entails examining not only the consequences of the measures for the evicted persons but also the owner's need to recover possession of the property. This inevitably involves making a distinction between properties belonging to individuals who need them as a home or to provide vital income and properties belonging to financial institutions."[106] In Walters v Belgium (2021), the CESCR acknowledged that the fact that property is not in ICESCR is no reason to restrict this right or

to derogate from it, but immediately after doing that, the Committee attempted to swiftly solve the conundrum this way: "States parties would violate their duty to protect Covenant rights by failing to prevent or to counter conduct by businesses that leads to such rights being abused, or that has the foreseeable effect of leading to such rights being abused."[107] It is the same wording used in General Comment No. 24, on states' obligations in relation to business activities.[108]

Like the Special Rapporteur on Adequate Housing in the aforementioned Covid-19 report,[109] in its still incipient case-law the CESCR draws a clear line between the property rights of small-scale landlords and the interests of corporate and large-scale landlords. Irrespective of the sympathies one might feel towards it, the distinction requires scrutiny and justification in light of all the rights at play.

IV. THE RIGHT TO PROPERTY IN LIGHT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PROPOSAL

The following proposal builds on the practice and interpretation of universal and regional human rights bodies to conceptualize and operationalize property as a human right that must coexist with other rights, including ESCR, in the international human rights system. The proposal is based on the recognition of property as an economic right or a civil right in international law, but also as a legal reality and a social construct that is pervasive worldwide and has been so through history.

A. The necessary acceptance of property as a human right

Property is and has been consubstantial to human interaction from time immemorial. The right to property is nowadays recognized in international law as an economic or a civil right. Social groups have historically been excluded in law or practice from holding property. IHRL is clear that one requirement of the right to property is the prohibition of discrimination based on sex, disability, race, color, national origin and other grounds.[110] States have the obligation to respect the right to property, refraining from directly interfering with the enjoyment of property, and they are also obliged to protect from the potential curtailing of the right by third parties. The obligation to fulfil, in the sense of taking measures to facilitate the enjoyment of the right, would include the obligation to register, delimit, demarcate and grant collective title to indigenous lands.[111] The positive obligation to fulfil also means that the state should do everything reasonable within their power to protect individuals' private interests in light of a risk that public authorities know or ought to have known.[112] States should also provide judicial mechanisms to settle property disputes and enforce compliance, and the duty would be even more important when the dispute is between an individual and the state.[113]

Expansive interpretations of the right to housing, access to land, the right to benefit from scientific and artistic productions and other ESCR can conflict with the right to property. However, as shown in Section III, thus far, authoritative human rights bodies have largely pretended this conflict does not exist. Conceptualizing and operationalizing the right to property requires, first and foremost, accepting that it is part of the human rights corpus juris. It also requires redefining property to reconcile it and to make it compatible with the corpus juris as a whole, including ESCR. As a result, it may become necessary in certain circumstances to interpret the right bearing the social function of property in mind, as will be discussed later.

In December 1990, when liberal democracy and free market appeared to have emerged victorious from the Cold War, the UN General Assembly adopted without vote Resolution 45/98, on the "respect for the right of everyone to own property alone as well as in association with others and its contribution to the economic and social development of Member States."[114] The resolution recognized that there are many forms of property, private property, but also "communal, social and state forms," and considered that further national measures were necessary to protect and preserve "economically productive property, including property associated with agriculture, commerce and industry," urging states to enhance the status of the right to property in their laws and constitutions.[115] A very similar resolution had been adopted in 1988, under the same title, and also with no need for a vote, but such a resolution only dared to "suggest" that states and UN specialized agencies and bodies "may wish" to "address" economically productive property, together with personal property.[116]

According to Howard-Hassmann, Resolution 45/98 "did not generate much further interest, leaving the right to own property in abeyance."[117] In fact, the General Assembly never again adopted a resolution on the right to own property.[118] However, one consequence of Resolution 45/98 was that it led to the appointment of an independent expert by the then Commission on Human Rights, Luis Valencia Rodríguez, who presented his report in November 1993.[119] Valencia Rodríguez concluded that the right to own property "may be regarded as an essential human right and a fundamental freedom,"[120] but he also questioned the universal nature of the right "given the enormous variety of forms of property and their social importance."[121] It should be noted that Valencia Rodríguez's report did not rely on a universal comparative analysis, but on information provided by some states, international organizations and NGOs, and the amount and substance of information received was varied. Furthermore, Valencia Rodríguez wrote his report at a time of profound political transformation around the world in

capitalism's favor. No ESCR-related UN Special Procedure existed at the time. The right to a healthy environment had not been constructed yet.[122] The CESCR had only issued three general comments, and negotiations towards an individual complaint mechanism – the Optional Protocol – would only begin a decade later.[123] The global human rights community had largely ignored ESCR, and international and national advocacy on these rights was in its infancy.[124]

Three decades later, an increasing number of ESCR are recognized in one way or another in most national constitutions.[125] Domestic and international courts have applied ESCR in different cases and scenarios.[126] There are multiple thematic reports emerging from the Human Rights Council, in addition to Treaty Body general comments, and individual decisions from Geneva and from the regional human rights systems. This abundant material has contributed to sketch out the meaning and significance of ESCR. Human rights advocates are also more confident dealing with issues relating to taxation, inequality and socioeconomic justice than in the 1990s. At the current state of normative development, there is no reason to doubt that ESCR can coexist with the right to property. Clashes of rights will occur, but they can be dealt with through compromise and assessment of the conflicting interests at play.

In this new political and epistemic context, thirty years after Valencia Rodríguez's report, a new systematic review of international standards and national laws would be welcome. It could provide an up-to-date and holistic perspective, and identify general trends and particular nuances in the recognition and practice of property around the world. It could also confirm the extent to which there is or there is not opinio juris among nations about the recognition of property as a human right.

B. The right to property is more than private property, but it is also private property

As discussed in Section II, the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights conceive the right to property as the right to *private* property, where the right holder can be a natural or a legal person. However, in the American and the African systems, both at the stage of the drafting process and in the subsequent application of the relevant treaties, it was made clear that property need not be private and need not be an individual right. Property can be communal, and groups such as indigenous people should be able to claim the protection of property as a collective right.[127]

A synergetic interpretation of the right to property, based on the practice of human rights bodies, should include communal, social and state-owned or public property, as well as personal and economically productive forms of property, echoing the categorization of the mentioned General Assembly Resolution 45/98 (1990).[128]

There is still a widespread tendency to conflate the idea of property with exclusive and private ownership. This tendency is, in Olsen's view, "the residual effect of a theoretical project in early modern European thought that sought to establish presumptively exclusive private ownership of material things by individuals as the essential nature of property."[129]

Property, as private property, has indeed been theorized as a natural right in much of Western political theory particularly since the 17th century. For Pufendorf, property was "introduced by the will of God, with consent among men."[130] For Grotius, whatever the state of nature was, the first occupant legitimately claimed exclusive ownership rights.[131] For Adam Smith, property is built on the recognition by others of the legitimacy of one's entitlement over one's possessions.[132] Locke's position relied on the application of labor over a natural resource:

"God, by commanding to subdue, gave authority so far to appropriate: and the condition of human life, which requires labour and materials to work on, necessarily introduces private possessions."[133] For Paine, the creation of value through labor provides the foundation to ownership over the actual improvement of the good, albeit not necessarily over the original good whose value has been increased by labor.[134] For Burke, inheritance must be the foundation of law, and inheritance rights are the only claims deserving of high consideration.[135] For Hegel, property is essential to the development of individual freedom.[136]

In general, from the early days of capitalist development, enhancing the productivity of the land was thought of as the main argument to prioritize private property above subsistence rights and communal customary rights.[137] Historical research shows that enclosures of formerly communal land in England were correlated with higher productivity but also with higher inequality in land distribution.[138]

Private property has not been exempted from critique. More's Utopia deplored that the enclosure of property leads to "hideous property… side by side with wanton luxury."[139] Rousseau ironized: "The first man who, having enclosed a piece of ground, bethought himself of saying *This is mine*, and found people simple enough to believe him, was the real founder of civil society" (italics in the original).[140] For Proudhon, private property is "theft", and for Marx, property is an expression of capitalist selfishness and the means by which the capitalist steals the surplus value created by workers.[141] E. P. Thompson concluded that land enclosure was "a plain enough case of class robbery, played according to fair rules of property and law laid down by a parliament of property-owners and lawyers."[142]

More recently, Koskenniemi wrote about the essential role of private property in the expansion of Western imperialism and domination: "*Sovereignty and property are the yin and yang of European power*" (italics in the original).[143] The appropriation of land by white Europeans, as property as well as colony, cannot be disjointed from the ideology of racial superiority inherent to colonialism.[144] For Tzouvala, the expansion of the concept of private property was an imperative of capitalist modernity, and the colonial standard of civilization was used to globalize the protection of property rights and to preserve metropolitan interests in the colonies.[145] Progressive approaches to Private Law try to balance out private ownership and collective interests of social justice,[146] and Critical and Third World approaches to International Law have documented the resistance to private property by social movements and communities "from below".[147]

The use of the law to provide ideological coverage to the concentration of wealth has also been covered by Pistor[148] and Piketty.[149] From a very different ideological perspective, Hayek agreed on this point: "In no system that could be rationally defended would the state just do nothing. An effective competitive system needs an intelligently designed and continuously adjusted legal framework."[150] Friedman would add that the state must do something that the market cannot do: "to determine, arbitrate, and enforce the rules of the game."[151] After all, "property and law are born and must die together," asserted Bentham.[152]

There used to be a difference between belongings and property, or in other words, between personal property and productive property. The difference is observable in the Marxist principle of the collective ownership of the means of production, which need not extend to personal items. For both Marx and Weber, private ownership over the means of production is one of the defining features of capitalism.[153] However, as observed by Milanovic, the

extraordinary level of commodification in the current stage of global capitalist development has resulted in the blurring of the space between personal property and productive property.[154] The private sphere of the home when one is on vacation, and daily activities, like cooking, cleaning or dog-walking, are now commodities, assets with an economic value, with ever smaller personal space out of potential trade.[155] Commodification has been correlated with the financialization of the economy and the corresponding increase in private debt, which is what "has sustained aggregate demand and economic growth over the past decades, often at the expense of indebted households," as observed by Bohoslavsky, former UN Independent Expert on Foreign Debt and Human Rights.[156]

In line with international interpretation (Section II), property should include material goods, but also immaterial goods and acquired rights over which the individual may have a legitimate expectation in the future, such as a public pension, social benefits and equivalent entitlements.

All forms of private property can in principle be covered by the right to property. However, not all forms will necessarily deserve the same level of protection in case of conflict with other rights. One would need to bear the social function of property in mind (Subsection IV.C), as well as principles of public interest, proportionality and fair balance (Subsection IV.D).

C. The social function of property

In Private Property Law, there is "a tension between two philosophical starting points," which Gray characterizes as "the perspectives of the property absolutist and the property relativist."[157] The absolutist position is famously represented by Blackstone, for whom the private property was the "sole and despotic dominion which one man claims and exercises over the external

things of the world, in total exclusion of the right of any other individual in the universe."[158] An alternative relativist approach could be that of Hume's, writing also in the 18th century, who favored an instrumental, consequentialist and conventional approach to private property that took general interests into account.[159]

Hume was not alone in acknowledging society when delimiting property rights. In the late 18th century, Paine said that "all accumulation… of personal property, beyond what a man's own hands produce, is derived to him by living in society; and he owes on every principle of justice, of gratitude, and of civilization, a part of that accumulation back again to society from whence whole came."[160] In the mid-19th century, Compte would add: "Thanks to the 'moral equivalence between private property and public service', it should be possible for free enterprise and the unequal distribution of wealth to function together for 'the common good' and 'collective utility'."[161]

If one accepts Gray's dichotomy between absolutist and relativist approaches to property,[162] a notion of the right to property that takes ESCR seriously should follow a relativist approach, an approach that is sensitive to the social function of property.

Coined by Léon Duguit in the early 20th century,[163] the idea of the social function of property is based on the recognition that individuals are not isolated, human interdependence is "the central element of social reality," and "solidarity is not a political principle but a social fact."[164]

The idea of the social function of property has been incorporated into a number of national constitutions primarily in Latin America and in Europe.[165] It has not yet found its way onto the international human rights systems in either region. There is only one reference in the online

digest of the Inter-American Court of Human Rights:[166] in Chiriboga v Ecuador (2008), the Inter-American Court of Human Rights observed that, due to its social function, the state, can limit or restrict the right to property in the name of public welfare and collective rights, or in order to preserve individual rights of others.[167] Neither the search engine on the European Court's website,[168] nor the authoritative guide on Article 1 Protocol 1,[169] suggest that the social function has ever been explicitly part of the Court's interpretation of that provision.

The social function of property has been theorized as "a notion that aims to secure the goal of human flourishing for all citizens within any state."[170] Understood as such, there is room for exploring this idea within the international human rights system, searching for new links between private law and human rights.[171]

A non-absolutist approach to property would be in line with human rights exegesis from international bodies. Already in 1969, the UN General Assembly agreed that development required "the establishment, in conformity with… the social function of property, of forms of ownership of land and of the means of production which preclude any kind of exploitation of man, ensure equal rights to property for all and create conditions leading to genuine equality among people."[172] Much more recently, in General Comment No. 17, the UN CESCR established that intellectual property has a social function, as a result of which states should prevent unreasonably high costs for access to medicines, educational material and means of food production.[173] Similarly, the UN Special Rapporteur on Adequate Housing called on states to ensure that public and private investment in housing "recognizes its social function and States' human rights obligations."[174]

The idea of the social function of property can be important for all human rights, but particularly for ESCR. This is so for at least three reasons. Firstly, the social function of property can provide the baseline for a more holistic approach to human rights, like Lhaka v Argentina (2020), where, as we saw earlier, the Inter-American Court of Human Rights highlighted the interdependence between communal property, the right to a healthy environment, the right to an adequate standard of living and the right to take part in cultural life.[175] Secondly, from the social function of property, it follows that privately owned goods and services ought to be part of the maximum of available resources that public authorities could make use of in order to realize ESCR.[176] Contributing to fulfil ESCR is one of the social functions of property, including private property. In this sense, taxation is not simply a legitimate form of control of the use of property.[177] Taxation is also a necessary public tool to materialize ESCR. As observed by the UN CESCR, "progressive taxation schemes" are one of the mechanisms through which the state mobilizes resources to discharge its obligation to fulfil human rights.[178] And thirdly, the social function of property can contribute to account for the intersectional forms of structural inequality in relation to ESCR.[179] This would result in a richer understanding and acknowledgment of the cumulative and varied effects of discrimination and disadvantage due to the combination of identity – sex, ethnicity, disability, etc. – and material conditions – income and wealth. International human rights bodies are increasingly showing awareness of intersectional inequalities, for example, in relation to residential segregation[180] and evictions from informal settlements of Roma people in Europe,[181] communal property rights of indigenous people in Kenya,[182] and unsafe working conditions affecting predominantly low-income women in Brazil.[183]

It would be particularly advisable to investigate the significance of the social function of property in relation to homeownership. The social function could provide the foundation to

achieve a better balance between the right to private property, the right to private and family life, and the right to adequate housing. The principle would endorse the view that, unless the state provides a convincing argument as per the necessity of an eviction from public land, the private right to home may prevail over public property,[184] since "the loss of one's home is a most extreme form of interference with the right to respect for the home."[185] The standard of the legitimate aim would be more easily met when the state intends to use the land for a social purpose, such as protecting rights and freedoms, preventing disorder or promoting the general wellbeing of the population, particularly of people in a situation of vulnerability.[186] Rent controls in the private sector are not necessarily contrary to the right to property,[187] and in case courts deemed the rent too low, updating it would be sufficient with no need for an eviction.[188] The right to home may trump somebody else's private property when the purchaser should have been aware of potential risks when they bought the property at a low price in a public auction.[189] These standards are in line with standing case-law from Strasbourg. Beyond that threshold, the social function of property would also require a proportionality test of evictions in the private lease sector, as argued elsewhere.[190]

Reinterpreting property taking ESCR seriously invites to regulate residential real estate ownership in accordance with a social function that should include the satisfaction of adequate housing. For example, in the context of a rising number of evictions, in the 2010s several regions in Spain reformed their housing laws to include fiscal incentives and/or punitive measures targeted at dwellings kept deliberately empty by the owners for a long period of time. Legislation in these regions established that homeownership must serve the social function of satisfying a housing need, and therefore houses kept out of the market did not meet the legally recognized essential content of homeownership. Bearing in mind the constitutional guiding principle of the right to adequate housing, and by reference to Strasbourg's case-law on Article

1 Protocol 1, Spain's Constitutional Court concluded that such a social function was consistent with the right to private property.[191]

One of the arguments developed by Duguit was that private property must mobilize the wealth contained therein to serve society. In the context of the early 20th century, that meant that "property cannot remain unproductive."[192] In the context of housing financialization of the 21st century,[193] the same principle could mean that homeownership is property over a good that exists to serve a public function that is at least as important as its private function: apart from satisfying an investor's legitimate private interest, a house exists to give people a place to live in.[194]

D. Private Property, Proportionality and Public Interest

Property will inevitably clash with other ESCR. It is therefore imperative to reflect on how rights can coexist and overcome together the unavoidable conflicts that will unfold between them. This means that sometimes some rights will prevail at the expense of other rights, which will need to be limited. "The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality," established the South African Constitutional Court in S v Makwanyane (1995).[195]

A proportionality assessment need not be a mere cost-benefit analysis; it can be a qualitative balance exercise based on the equality of rights and the equal moral worth of rights-holders.[196] Such a qualitative assessment would consider, among other things, whether a core or a

peripheral aspect of a certain right is at risk, providing more protection in the former case than in the latter.[197]

In Bank Mellat v HM Treasury (2013), the UK Supreme Court helpfully broke down the proportionality test of the limitation of rights in four steps: firstly, whether the objective of the measure is "sufficiently important" to justify a limitation of rights; secondly, whether the limitation is "rationally connected to the objective", in other words, whether there is a logical link between means and ends; thirdly, whether the objective is achievable through "less intrusive" means, and therefore whether the limitation is avoidable; and fourthly, a balance exercise between the measure and the objective, namely, whether the goal is so important that it outweighs the "severity" of the limitation of rights.[198]

States' duty to fulfil ESCR proclaimed in international and national law ought to be one of the most *sufficiently important* objectives that may justify limiting the right to property as a matter of public interest. This proposition builds on existing practice of international human rights bodies. The Inter-American Court of Human Rights,[199] the African Commission[200] and the African Court[201] on Human and Peoples' Rights have all established that the right to property can be restricted if it is proportionate and necessary for the public interest. In James and Others v UK (1986), the European Court of Human Rights acknowledged that "eliminating what are judged to be social injustices" is one of the legitimate aims of regulation affecting and potentially limiting individual property rights.[202] In a recent advisory opinion requested by the French Conseil d'État (2022), the European Court established that the right to property does not protect the right to hunt on one's own land, and that limits can be set in the name of the general interest of environmental protection.[203] In Yordanova and Others v Bulgaria (2012), the Court ruled that the proportionality of an eviction in public land "is inextricably linked to

the use for which the authorities seek to recover the land."[204] Part of the equation, therefore, must be whether the property, in this case public property, would be used for the general interest, to promote the general wellbeing of the population, especially people at greater risk of harm, disadvantage or discrimination.[205]

Taking ESCR seriously would also require paying attention to the situation and needs of particularly vulnerable people, who should be prioritized in public policies intended to protect and fulfil these rights. For example, the African Commission on Human and Peoples' Rights established that "the 'public interest' test is met with a much higher threshold in the case of encroachment of indigenous land rather than individual private property."[206] This is closely connected with the mentioned requirement of the proportionality test that *less intrusive* means must be considered and discarded for a restriction of the right to property, or other rights, to be justifiable.

The European Court of Human Rights justified the need for compensation in the case of public dispossession of property, despite it not being explicitly recognized in the ECHR (as shown earlier in Section II), by stating that no measure should "impose a disproportionate burden" on individuals.[207] The balance exercise between means and ends – the proportionality test in stricto sensu – should contain a procedural requirement within itself: it should entail giving the people involved and potentially affected a reasonable opportunity to be heard, make their case and potentially challenge the assessment of the situation by public authorities and eventually the courts via an appeal. The European Court of Human Rights recognized this principle as far as the right to property is concerned.[208] Insofar as the right to property may conflict with (other) ESCR, the same principle should apply to these rights as well, hence sustaining the argument

for their justiciability and for the right of people concerned to be meaningfully involved in the decision-making process.[209]

In this regard, the African Commission on Human and Peoples' Rights adds two more elements to the proportionality test: Whether the decision-making process was procedurally fair, and whether the "very essence" of the right is at risk.[210]

The second element echoes a classic ruling of the European Court of Justice from 1979, where the Court of the then European Communities ruled that a certain national policy was contrary to European Law because it resulted in a "disproportionate and intolerable interference" that impinged upon "the very substance of the right to property".[211]

This jurisprudential principle is in line with the idea defended in this paper of property taking ESCR seriously. It suggests that a basic level of private property ought to be preserved under all circumstances, while private property above and beyond such a level could be subjected to greater scrutiny if necessary and proportionate for the public interest of fulfilling other human rights. The exact level at which such a scrutiny would begin would be a matter of debate and analysis, but a helpful normative reference could be Article 23 of the American Declaration of Human Rights: the level of private property that "meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home."[212] In this sense, private property can be considered a human right that deserves a high level of protection only in its core content, "to the extent that it is crucial to our self-determination and insofar as it is made equally available to us all."[213] Further research could help identify potential instances of conflict between the core content of the right to property and the core content of other ESCR, situations that would need to be dealt with on a case-by-case basis.[214]

This proposal is not at odds with some national case-law. The South African Constitutional Court ruled in City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another (2011) that a private landowner could be expected to have to wait longer to repossess a property when they purchased it for commercial purposes, as opposed to residential purposes, and when they knew that the property was occupied, even if unlawfully.[215] Spain's Constitutional Court observed that the use of housing as an investment by legal entities can conflict with the right to housing of individual tenants, and this clash can reasonably justify imposing different burdens on private and corporate landlords and providing different degrees of protection to their property rights.[216] Both rulings have in common that the purpose of the investment – commercial or residential – and/or the identity of the investor – corporate or natural person – were considered valid justifications to treat property differently.

As said earlier (Section III), the UN CESCR stated in López Albán v Spain (2019) that the proportionality test in the case of evictions in the private lease sector "entails examining not only the consequences of the measures for the evicted persons but also the owner's need to recover possession of the property."[217] Section III critiqued this particular point in that decision because it lacked justification, due to the fact that the UN Committee has thus far resisted recognizing that property is a human right proclaimed in other treaties, not in ICESCR. However, the proportionality test defended in this paper, a test that takes both the right to property and other ESCR seriously, does indeed provide a moral and legal justification to the CESCR's position. While the income from private leasing may be essential or close to essential for many private individuals, it would not be so for most corporate landlords. Human rights should not provide the same level of protection to the property of the former and the latter.

V. CONCLUSION

> "The Christian tradition has never recognized the right to private property as absolute or inviolable, and has stressed the social purpose of all forms of private property. The principle of the common use of created goods is the first principle of the whole ethical and social order; it is a natural and inherent right that takes priority over others." (Fratelli Tutti Encyclical, Pope Francis)[218]

Property exists in international law and human rights discourse, but it is not limitless. The right to property includes private property but it can adopt other forms as well, such as collective and communal property.

Property must coexist with other human rights, even if this means clashing with them, particularly with ESCR. It is necessary to problematize this relationship and to tackle it fearlessly. Those conflicts will inevitably occur, do indeed occur on a daily basis, but they need to be resolved taking both the right to property and ESCR seriously, weighing the interests at play, including the general public interest, on the basis of proportionality.

Property has a social function to play. The social function can provide the baseline for a holistic approach to rights that highlights the interdependence between them. The social function supports the notion that some privately owned resources will be part of the maximum of available resources public authorities ought to mobilize in order to advance progressively towards the full realization of ESCR.[219] The social function of property can also contribute to account for the intersectional impact of structural forms of inequality in relation to housing, access to land, working conditions and other ESCR.

The ESCR recognized in international law can contribute to strike a fairer balance between individual property rights and the public interest of ensuring the conditions for the fulfilment of ESCR. That seemed to be the path taken by Scotland with the inclusion of ICESCR in the 2016 land reform.[220] One should nonetheless refrain from overstating the impact of this approach in relation to land distribution. In South Africa, for example, despite the advocacy for the democratization of access to land and the jurisprudential push for socio-economic rights,[221] wealth inequality has not decreased since the end of apartheid in the 1990s.[222]

The recognition of the private type of property in IHRL was a progressive achievement for many, considering how certain groups – women, ethnic minorities, persons with disabilities, etc. – have been historically discriminated against and excluded from property. The importance of private property lies in its ability to give individuals the opportunity to be more autonomous and have greater control over their lives.[223] However, there is no right to non-interference with property. The private property necessary to meet the essential needs of a decent life ought to be respected, protected and fulfilled as part of the core content of the right to property. Possessions, investments, savings and wealth above such a threshold are not inalienable, and they can be subjected to control and potentially limitation as a matter of public interest.

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[1] Kevin Gray, Property in Thin Air, 50 Cambridge Law Journal 252 (1991).
[2] Lucas Chancel, Thomas Piketty, Emmanuel Saez & Gabriel Zucman (coords), World Inequality Report 2022, World Inequality Lab wir2022.wid.world 10-11.
[3] *Id.*
[4] *Id.*
[5] Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess, Article 17, U.N. Doc. A/RES/3/217A (1948).
[6] Koldo Casla, Unpredictable and damaging? A human rights case for the proportionality assessment of evictions in the private rental sector, 2022 EHRLR 253 (2022).
[7] FRANK ADAMSON, SYLVAIN AUBRY, MIREILLE DE KONING & DELPHINE DORSI (EDS), REALIZING THE ABIDJAN PRINCIPLES ON THE RIGHT TO EDUCATION (EDWARD ELGAR 2021).
[8] Complaint No. 206/2022 in front of the European Committee of Social Rights: DCI, FEANTSA, MEDEL, CCOO and ATD Fourth World v Spain (March 2022).
[9] Amnesty International, A double dose of inequality: Pharma companies and the Covid-19 vaccine crisis (2021).
[10] UDHR *supra* note 5, Article 17.
[11] American Declaration of the Rights and Duties of Man (Adopted by the Ninth International Conference of American States, Bogota, Colombia, 1948), Article 23.
[12] JOHANNES MORSINK, ARTICLE BY ARTICLE: THE UNIVERSAL DECLARATION OF HUMAN RIGHTS FOR A NEW GENERATION 110 (UNIVERSITY OF PENNSYLVANIA PRESS 2021).
[13] *Id.*
[14] Constitution of the Union of Soviet Socialist Republics 1936, Articles 6, 7, 8, 9 and 10. Marxists Internet Archive. https://www.marxists.org/reference/archive/stalin/works/1936/12/05.htm
[15] MORSINK, *supra* note 12, at 112.
[16] *Id.* at 113-4.
[17] International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), U.G. GAOR, 21st Sess. U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force 3 Jan. 1976).
[18] International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 Mar. 1976).
[19] Luis Valencia Rodríguez, Independent Expert, The right of everyone to own property alone as well as in association with others. Completed final report, 15 Nov. 1993, U.N. Doc. E/CN.4/1994/19 at para 34.
[20] John G. Sprankling, The Global Right to Property, 52 COLUM. J. Transnat'l L. 464, 470-2 (2014).
[21] For example, Famara Koné v Senegal, Communication No. 386/1989, Views of 21 Oct. 1994, U.N. Doc. CCPR/C/52/D/386/1989 para 5.1; Alina Simunek et al. v the Czech Republic, Communication No. 516/1992, Views of 19 Jul. 1995, U.N. Doc. CCPR/C/54/D/516/1992 para 4.3; Kéténguéré Ackla v Togo, Communication No. 505/1992, Views of 25 Mar. 1996, U.N. Doc. CCPR/C/51/D/505/1992 para 6.3; PEEP v Estonia, Communication 2682/2015, Views of 13 Mar. 2020, U.N. Doc. CCPR/C/128/D/2682/2015 para 7.6.
[22] Convention on the Elimination of All Forms of Discrimination Against Women, 18 Dec. 1979, United Nations, Treaty Series, vol. 1249, p. 13, General Assembly Resolution 34/180, Articles 15(2) and 16(1)(h).
[23] Convention on the Rights of Persons with Disabilities: Resolution / adopted by the General Assembly, 24 Jan. 2007, U.N. Doc. A/RES/61/106, adopted without vote, 76th plenary meeting; Issued in GAOR, 61st sess., Suppl. no. 49. "Annex: Convention on the Rights of Persons with Disabilities": p. 2-29, Article 12(5).
[24] Convention on the Rights of the Child, 20 Nov. 1989, United Nations, Treaty Series, vol. 1577, p. 3, General Assembly Resolution 44/25, Article 2(1)
[25] International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, United Nations, Treaty Series, vol. 660, p. 195, General Assembly Resolution 2106 (XX), Article 5(d)(v)
[26] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 Dec. 1990, U.N. Doc. A/RES/45/158, General Assembly Resolution 45/158, Articles 1(2), 7 and 15.
[27] International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 Jun. 1989, C169, Article 14.
[28] UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 Oct. 2007, U.N. Doc. A/RES/61/295, Article 26(2).
[29] Universal Human Rights Index https://uhri.ohchr.org/en/

[30] UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Burkina Faso, 8 Jul. 2013, U.N. Doc. A/HRC/24/4 para 135.59.
[31] Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Mission to Argentina, 21 Dec. 2011, U.N. Doc. A/HRC/19/53/Add.1 para 59.
[32] Special Rapporteur on the rights of indigenous people, Visit to the Congo, 10 Jul. 2020, U.N. Doc. A/HRC/45/34/Add.1 para 79; Visit to Paraguay, 13 Aug. 2015, U.N. Doc. A/HRC/30/41/Add.1 para 88.
[33] Special Rapporteur on the rights to freedom of peaceful assembly and of association, Visit to Zimbabwe, 22 May 2020, U.N. Doc. A/HRC/44/50/Add.2 para 61.
[34] CESCR, Concluding Observations: Israel, 12 Nov. 2019, U.N. Doc. E/C.12/ISR/CO/4 para 53; UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Israel, 20 Apr. 2018, U.N. Doc. A/HRC/38/15 para 118.232; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mission to Israel and Occupied Palestinian Territory, 16 No. 2007, U.N. Doc. A/HRC/6/17/Add.4 para 61.
[35] Independent Expert on the promotion of a democratic and equitable international order, Mission to Venezuela and Ecuador, 3 Aug. 2018, U.N. Doc. A/HRC/39/47/Add.1 para 25.
[36] Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Mission to Kazakhstan, 27 Jun. 2013, U.N. Doc. A/HRC/24/43/Add.1 para 130.
[37] UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Argentina, 22 Dec. 2017, U.N. Doc. A/HRC/37/5 para 107.171; UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Colombia, 4 Jul. 2013, U.N. Doc. A/HRC/24/6 para 116.119; UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Argentina, 12 Dec. 2012, U.N. Doc. A/HRC/22/4 para 99.111; CESCR, Concluding Observations: Brazil, 12 Jun. 2009, U.N. Doc. E/C.12/BRA/CO/2 para 9; Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Follow-up to country recommendations: Brazil, Cambodia, Kenya, 26 Feb. 2010, U.N. Doc. A/HRC/13/20/Add.2 para 15; Special Rapporteur on the rights of indigenous people, Mission to Suriname, 18 Aug. 2011, U.N. Doc. A/HRC/18/35/Add.7 para 19; Committee on the Rights of the Child, Concluding Observations: Brazil, 30 Oct. 2015, U.N. Doc. CRC/C/BRA/CO/2-4 para 79.d.
[38] Human Rights Committee, Concluding Observations: Togo, 24 Aug. 2021, U.N. Doc. CCPR/C/TGO/CO/5 para 19; UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Lebanon, 7 Apr. 2021, U.N. Doc. A/HRC/47/5 para 150.237; UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Gambia, 19 Dec. 2019, U.N. Doc. A/HRC/43/6 para 127.79; UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Tonga, 16 Apr. 2018, U.N. Doc. A/HRC/38/5 para 94.56; UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Liberia, 13 Jul. 2015, U.N. Doc. A/HRC/30/4 para 100.46; UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Cambodia, 27 Mar. 2014, U.N. Doc. A/HRC/26/16 para 118.53; UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Congo, 6 Jan. 2014, U.N. Doc. A/HRC/25/16 para 111.32; UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: India, 23 May 2008, U.N. Doc. A/HRC/8/26 para 86.17; CEDAW Committee, Concluding Observations: Bosnia and Herzegovina, 12 Nov. 2019, U.N. Doc. CEDAW/C/BIH/CO/6 para 40; CEDAW Committee, Concluding Observations: Saudi Arabia, 2018, CEDAW/C/SAU/CO/3-4 para 64; CEDAW Committee, Concluding Observations: Oman, 2017, U.N. Doc. CEDAW/C/OMN/CO/2-3 para 54; CEDAW Committee, Concluding Observations: Namibia, 28 Jul. 2015, U.N. Doc. CEDAW/C/NAM/CO/4-5 para 39; Independent Expert on minority issues, Mission to Ethiopia, 28 Feb. 2007, U.N. Doc. A/HRC/4/9/Add.3 para 99.
[39] I thank Antonio Coco for making this point.
[40] Robert Lamb, Liberty, Equality, and the Boundaries of Ownership: Thomas Paine's Theory of Property Rights, 72 Review of Politics 483 (2010); Robert Lamb, Locke on Ownership, Imperfect Duties and 'the Art of Governing', 12 BJPIR 126 (2010); ELLEN MEIKSINS WOOD, LIBERTY AND PROPERTY: A SOCIAL HISTORY OF WESTERN POLITICAL THOUGHT FROM RENAISSANCE TO ENLIGHTENMENT (VERSO 2012); Julia McClure, The legal construction of poverty: examining historic tensions between property rights and subsistence rights, in Poverty and Human Rights 54 (Suzanne Egan & Anna Chadwick eds 2021); Erik J Olsen, The early modern 'creation' of property and its enduring influence, 21 EJPT 111 (2022).
[41] ICERD *supra* note 25, Article 5(d)(v) and (vi).

[42] BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION 762 (OXFORD UNIVERSITY PRESS 2004); Tom Allen, Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights, 59 ICLQ 1055, 1057 (2010).
[43] Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, article 1, ETS 9; Sporrong and Lonnroth v Sweden, 7151/75 [1982] ECHR 5 (23 Sept. 1982) para 61.
[44] SIMPSON *supra* note 42, at 757.
[45] European Court of Human Rights, Table Violations by Article and by State https://www.echr.coe.int/Documents/Stats_violation_1959_2021_ENG.pdf The table is generated automatically using metadata from the HUDOC database.
[46] ALISON CLARKE, PRINCIPLES OF PROPERTY LAW 145 (CAMBRIDGE UNIVERSITY PRESS 2020).
[47] Kopecky v Slovakia, 44912/98 [2004] ECHR 446 (28 Sept. 2004) para 35.1.c.
[48] *Id.* para 47.
[49] Stec and Others v UK, 65731/01 and 65900/01 [2006] ECHR (GC) (12 Apr. 2006) para 53.
[50] Ingrid Leijten, The right to minimum subsistence and property protection under the ECHR: Never the twain shall meet? 21 EJSS 307 (2019).
[51] Tchokontio Happi v France, 65829/12 [2015] ECHR (9 Apr. 2015) para 59-60.
[52] James and Others v UK, 8793/79 [1986] ECHR 2 (21 Feb. 1986) para 54.
[53] Allen *supra* note 42, at 1055.
[54] American Convention on Human Rights (Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969), Article 21.
[55] Furland and Family v Argentina, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Aug. 31, 2012) para 220.
[56] Ivcher-Bronstein v Peru, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Feb. 6, 2001) para 122.
[57] Five Pensioners v Peru, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Feb. 28, 2003) para 102-3.
[58] Mayagna (Sumo) Awas Tingni Community v Nicaragua, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Aug. 31, 2001) para 145.
[59] *Id.* para 148.
[60] *Id.* para 149. See also Yakye Axa Indigenous Community v Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Jun. 17, 2005) para 123-31; Sawhoyamaxa Indigenous Community v Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Mar. 29, 2006) para 116-21.
[61] Dina Lupin Townsend & Leo Townsend, Epistemic Injustice and Indigenous Peoples in the Inter-American Human Rights System, 35 Soc. Epistemology 147, 152 (2021).
[62] Xákmok Kásek Indigenous Community v Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Aug. 24, 2010) para 109.
[63] Indigenous Communities of Lhaka Honhat (Our Land) Association v Argentina, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Feb. 6, 2020) para 92-98 and 202-54.
[64] ACHR *supra* note 54, Article 26.
[65] Lhaka Honhat v Argentina *supra* note 63, at para 278-89.
[66] African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 Jun. 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 14; Interights v Mauritania, Comm. 373/2009, 28th ACHPR AAR Annex (Nov 2009 - May 2010) para 46.
[67] Media Rights Agenda and Others v Nigeria, African Commission on Human and Peoples' Rights, Comm. Nos. 105/93, 128/94, 130/94 and 152/96 (1998) para 77
[68] Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria, Com. No. 155/96 (2002) para 60.
[69] African Commission on Human and Peoples' Rights, Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Draft Principles and Guidelines), adopted at the 48th session (November 2010) para 51.
[70] *Id.* at para 53.
[71] Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm. 276/2003 (2010) para 187.
[72] Resolution on Indigenous Populations/Communities in Africa - ACHPR/Res.334(EXT.OS/XIX)2016.
[73] Endorois Welfare Council v Kenya *supra* note 71, at para 207.
[74] African Charter on Human and Peoples' Rights *supra* note 66, Article 21(2); RACHEL MURRAY, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMMENTARY 374 (OXFORD UNIVERSITY PRESS 2019).
[75] African Commission on Human and Peoples' Rights *supra* note 69, at para 55.
[76] *Id.*
[77] ICESCR *supra* note 17.
[78] *Id.* Article 5(2).

[79] CESCR, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant), 12 Jan. 2006, U.N. Doc. E/C.12/GC/17.
[80] *Id.* at para 1.
[81] *Id.* at para 2.
[82] *Id.*
[83] CESCR, General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 Aug. 2006, U.N. Doc. E/C.12/GC/24.
[84] *Id.* at para 1.
[85] *Id.* at para 24.
[86] Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Report, 18 Jan. 2017, U.N. Doc. A/HRC/34/51.
[87] *Id* at para 1 and 51.
[88] Special Rapporteur on extreme poverty and human rights, Report, 26 Sept. 2018, U.N. Doc. A/73/396 at para 73.
[89] Special Rapporteur on the human rights to safe drinking water and sanitation, Human rights and the privatization of water and sanitation services, 21 Jul. 2020, U.N. Doc. A/75/208.
[90] Koldo Casla, Rights and Responsibilities: Protecting and Fulfilling Economic and Social Rights in Times of Public Health Emergency, in Covid-19, Law and Human Rights: Essex Dialogues 11, at 15 (Carla Ferstman & Andrew Fagan eds, University of Essex, 2020).
[91] Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, COVID-19: Urgent appeal for a human rights response to the economic recession (2020).
[92] *Id.* at 10.
[93] Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, COVID-19 and the right to adequate housing: impacts and the way forward, 27 Jul. 2020, U.N. Doc. A/75/148 at para 68(b), (c) and (g).
[94] CESCR, General comment No. 25 on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights), 30 Apr. 2020, U.N. Doc. E/C.12/GC/25 at para 62.
[95] *Id.* at para 69.
[96] CESCR, Statement on universal affordable vaccination against coronavirus disease (COVID-19), international cooperation and intellectual property, 12 Mar. 2021, U.N. Doc. E/C.12/2021/1 at para 7.
[97] CESCR, General comment No. 26 on land and economic, social and cultural rights. Draft, 3 May 2021, U.N. Doc. E/C.12/69/R.2.
[98] *Id.* at para 23, 16-7, 34, 35, 33, 31 and 15.
[99] United Nations Population Division, World Urbanization Prospects: 2018 Revision. https://data.worldbank.org/indicator/SP.URB.TOTL.IN.ZS
[100] CESCR *supra* note 79 and 83.
[101] CESCR, General Comment No. 4: The right to adequate housing (Art. 11.1), 13 Dec. 1991, U.N. Doc. E/1998/22; CESCR, General Comment No. 7: The right to adequate housing (Art. 11.1): forced evictions, 20 May 1997, U.N. Doc. E/1998/22.
[102] https://www.housingrightswatch.org/jurisprudence/idg-v-spain-communication-no-22014-17062015 IDG v Spain, 2015.
[103] Ben Djazia and Bellili v Spain, Communication No 5/2015 (CESCR), Views of 20 Jun. 2017, U.N. Doc. E/C.12/61/D/5/2015 at para 15.1.
[104] Gómez-Limón Pardo v Spain, Communication 52/2018 (CESCR), Views of 5 Mar. 2020, U.N. Doc. E/C.12/67/D/52/2018 at para 9.6.
[105] López Albán v Spain, Communication 37/2018, Views of 11 Oct. 2019 (CESCR), U.N. Doc. E/C.12/66/D/37/2018 at para 10.1.
[106] *Id.* at para 11.5.
[107] Walters (L.J.W.) v Belgium, Communication 61/2018, Views of 23 Nov. 2021 (CESCR), U.N. Doc. E/C.12/70/D/61/2018 at para. 11.5.
[108] CESCR *supra* note 83 at para 18.
[109] Special Rapporteur Adequate Housing *supra* note 93.
[110] CEDAW *supra* note 22, Articles 15(2) and 16(1)(h); CRPD *supra* note 23, Article 12(5); CRC *supra* note 24, Article 2(1); ICERD *supra* note 25, Article 5(d)(v); ICPRMW *supra* note 26, Articles 1(2), 7 and 15.
[111] Xákmok Kásek v Paraguay *supra* note 62, at para 109.
[112] Öneryildiz v Turkey, 48939/99 [2004] ECHR (30 Nov. 2004) para 134-6.
[113] Sierpiński v Poland, 38016/07 [2009] ECHR (3 Nov. 2009) para 69.

[114] UN General Assembly, Respect for the right of everyone to own property alone as well as in association with others and its contribution to the economic and social development of Member States, 14 Dec. 1990, U.N. Doc. A/RES/45/98.
[115] *Id.* at para 1, 3 and 4.
[116] UN General Assembly, Respect for the right of everyone to own property alone as well as in association with others and its contribution to the economic and social development of Member States, 8 Dec. 1998, U.N. Doc. A/RES/43/123, para 6.
[117] Rhoda E. Howard-Hassmann, Reconsidering the Right to Own Property, 12 J. Hum. Rts. 180 (2013).
[118] Search function of the UN Library https://research.un.org/en/docs/ga/quick/regular/76
[119] Luis Valencia Rodríguez *supra* note 19.
[120] *Id.* at para 474.
[121] *Id.* at para 475.
[122] John H Knox, Constructing the Human Right to a Healthy Environment, 16 ARLSS 79 (2020).
[123] Catarina de Albuquerque, Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights—The Missing Piece of the International Bill of Human Rights, 32 Hum. Rts. Q. 144 (2010).
[124] Mary Robinson, Advancing Economic, Social, and Cultural Rights: The Way Forward, 26 Hum. Rts. Q. 866 (2004).
[125] Evan Rosevear, Ran Hirschl & Courtney Jung, Justiciable and Aspirational Economic and Social Rights in National Courts, in The Future of Economic and Social Rights 37 (Katharine G Young ed, Cambridge University Press, 2019).
[126] Malcolm Langford, Judicial Politics and Social Rights, in The Future of Economic and Social Rights 66 (Katharine G Young ed, Cambridge University Press 2019).
[127] Ting Xu & Wei Gong, Communal Property Rights in International Human Rights Instruments: Implications for De Facto Expropriation, in Property and Human Rights in a Global Context 225 (Ting Xu & Jean Allain, Hart Bloomsbury 2018).
[128] UNGA *supra* note 114 at para 1.
[129] Olsen *supra* note 40, at 112.
[130] Lamb *supra* note 40, at 497.
[131] *Id.* at 499.
[132] John Salter, Adam Smith and the Grotian Theory of Property, 12 BJPIR 3, 12 (2010).
[133] JOHN LOCKE, SECOND TREATISE, CHAPTER V (1690) PARA 35.
[134] Lamb *supra* note 40, at 495 and 511.
[135] JUSTINE LACROIX & JEAN-YVES PRANCHÈRE, HUMAN RIGHTS ON TRIAL: A GENEALOGY OF THE CRITIQUE OF HUMAN RIGHTS 77-8 (CAMBRIDGE UNIVERSITY PRESS 2018).
[136] JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY, CHAPTER 10 (OXFORD UNIVERSITY PRESS 1990); Alan Patten, Hegel's Justification of Private Property, 16 History of Political Thought 576 (1995).
[137] WOOD *supra* note 40, at 114-5; McClure *supra* note 40, at 54-9.
[138] Leander Heldring, James a Robinson & Sebastian Vollmer, The Economic Effects of the English Parliamentary Enclosures, NBER Working Paper No. 29772 (2022).
[139] THOMAS MORE, UTOPIA 13 (W.W. NORTON 1992).
[140] JEAN JACQUES ROUSSEAU, ON THE ORIGIN OF INEQUALITY 61 (COSIMO 2005).
[141] WALDRON *supra* note 136, at chapters 8 and 9; Karl Marx, On the Jewish Question, in The Marx-Engels Reader (2nd ed) 42 (W.W. Norton 1978).
[142] EDWARD PALMER THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS 218 (PANTHEON 1963).
[143] MARTTI KOSKENNIEMI, TO THE UTTERMOST PARTS OF THE EARTH: LEGAL IMAGINATION AND INTERNATIONAL POWER 959 (CAMBRIDGE UNIVERSITY PRESS 2021).
[144] Meredith Terretta, Claiming Land, Claiming Rights in Africa's Internationally Supervised Territories, in Social Rights and the Politics of Obligation in History 264 (Steven L. B. Jensen & Charles Walton eds, Cambridge University Press 2022).
[145] NTINA TZOUVALA, CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW 59 (CAMBRIDGE UNIVERSITY PRESS 2020).
[146] RACHAEL WALSH, PROPERTY RIGHTS AND SOCIAL JUSTICE: PROGRESSIVE PROPERTY IN ACTION (CAMBRIDGE UNIVERSITY PRESS 2021).
[147] For a review: OLIVIER DE SCHUTTER & BALAKRISHNAN RAJAGOPAL (EDS), PROPERTY RIGHTS FROM BELOW: COMMODIFICATION OF LAND AND THE COUNTER-MOVEMENT (ROUTLEDGE 2019).
[148] KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (PRINCETON UNIVERSITY PRESS 2019).
[149] THOMAS PIKETTY, CAPITAL AND IDEOLOGY 154 (HARVARD UNIVERSITY PRESS 2020).
[150] FRIEDRICH HAYEK, THE ROAD TO SERFDOM 40 (ROUTLEDGE 1944).

[151] MILTON FRIEDMAN, CAPITALISM AND FREEDOM 27 (UNIVERSITY OF CHICAGO PRESS 1962).
[152] Jeremy Bentham, Principles of the Civil Code, Part 1, Objects of the Civil Law, Chapter 8, On Property. https://www.laits.utexas.edu/poltheory/bentham/pcc/pcc.pa01.c08.html
[153] BRANKO MILANOVIC, CAPITALISM, ALONE 12 (HARVARD UNIVERSITY PRESS 2019).
[154] *Id.* at 190-6.
[155] *Id.*
[156] Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights, Private Debt and Human Rights, Private Debt and Human Rights, 3 Jan. 2020, U.N. Doc. A/HRC/43/45, para 82; Juan Pablo Bohoslavsky, The Explosion of Household Debt: Curse or Blessing for Human Rights?, 43 Hum. Rts. Q. 1, 26 (2021).
[157] Kevin Gray, Land Law and Human Rights, in Land Law: Issues, Debates, Policy 221 (Louise Tee ed, Willan, 2002).
[158] William Blackstone, Commentaries on the Laws of England, in Four Books. Notes selected from the editions of Archibold, Christian, Coleridge, Chitty, Stewart, Kerr, and others, Barron Field's Analysis, and Additional Notes, and a Life of the Author, Vol. 1, Books I and II, Chapter I (George Sharswood ed 1893).
[159] LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 43-4 (OXFORD UNIVERSITY PRESS 2002).
[160] Thomas Paine, Agrarian Justice (1797), in The Origins of Universal Grants: An Anthology of Historical Writings on Basic Capital and Basic Income 13 (John Cunliffe & Guido Erreygers eds, Springer 2004).
[161] LACROIX & PRANCHÈRE *supra* note 135, at 122.
[162] Gray *supra* note 157.
[163] LÉON DUGUIT, LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLÉON 21 (LIBRAIRIE FÉLIX ALCAN 1912).
[164] Sheila Foster & Daniel Bonilla, The Social Function of Property: A Comparative Perspective, 80 Fordham Law Review 1005 (2011).
[165] *Id.* at 1008.
[166] Digesto Themis Inter-Am. Ct. H.R.: https://www.corteidh.or.cr/cf/themis/digesto/digesto.cfm#_ftn_8_4270
[167] Salvador Chiriboga v Ecuador, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (May 6, 2001) para 60.
[168] HUDOC ECHR: https://www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC&c=
[169] Council of Europe and European Court of Human Rights, Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of property (Updated 31 Dec. 2021): https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf
[170] Colin Crawford, The Social Function of Property and the Human Capacity to Flourish, 80 Fordham Law Review 1089 (2011); similarly, Gregory S Alexander, The social-obligation norm in American property law, 94 Cornell Law Review 745 (2009).
[171] Irina Domurath & Chantal Mak, Private Law and Housing Justice in Europe, 83 Modern Law Review 1188 (2020).
[172] United Nations General Assembly, Declaration on Social Progress and Development Resolution 2542 (XXIV), 11 Dec. 1969, U.N. Doc. A/RES/24/2542, Article 6.
[173] CESCR *supra* note 79, at para 35; see also CESCR *supra* note 93, at para 62.
[174] Special Rapporteur on adequate housing *supra* note 86, at para 77.
[175] Lhaka Honhat v Argentina *supra* note 63, at para 92-98 and 201-254.
[176] ICESCR *supra* note 17, Article 2(1).
[177] Protocol 1 ECHR *supra* note 43, Article 1.
[178] CESCR *supra* note 83, at para 23; CESCR, Concluding Observations: UK, 14 Jul. 2016, U.N. Doc. E/C.12/GBR/CO/6, at para 17.b.
[179] Colm O'Cinneide, The Potential and Pitfalls of Intersectionality in the Context of Social Rights Adjudication, in Intersectionality and Human Rights Law 59 (Shreya Atrey and Peter Dunne eds 2020).
[180] ERRC v Greece, Complaint No. 15/2003, ECSR, Decision on the Merits, 8 Dec. 2004, para 19.
[181] Yordanova and Others v Bulgaria, 25446/06 [2012] ECHR (24 Apr. 2012) para 133.
[182] Endorois Welfare Council v Kenya *supra* note 71, at para 196.
[183] Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v Brazil, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Jul. 15, 2020) para 199-200.
[184] Yordanova and Others v Bulgaria *supra* note 181, para 118.v.
[185] McCann v UK, 19009/04 [2008] ECHR (GC) (13 May 2008) para 50.
[186] Ghailan and Others v Spain, 36366/14 [2021] ECHR (23 Mar. 2021) para 60 and 78.
[187] Mellacher and Others v Austria, 10522/83, 11011/84, 11070/84 [1989] ECHR (Plenary) (19 Dec. 1989) para 47-8.

[188] Portanier v Malta, 55747/16 [2019] ECHR (27 Aug. 2019) para 48; Bartolo Parnis and Others v Malta, 49378/18 and three others [2021] ECHR (7 Oct. 2021) para 63.
[189] Rousk v Sweden, 27183/04 [2013] ECHR (25 Jul. 2013) para 141.
[190] Casla *supra* note 6.
[191] Constitutional Court of Spain, Judgment 16/2018, 22 Feb. 2018, Legal Foundation No. 17.
[192] Foster & Bonilla *supra* note 164, at 1007.
[193] Special Rapporteur on adequate housing *supra* note 86.
[194] Benjamin Davy, 'Dehumanized housing' and the ideology of property as a social function, 19 Planning Theory 38, 46-7 (2020).
[195] S v Makwanyane, 1995 3 SA 391 (CC), para 104.
[196] Samantha Besson, Human Rights in Relation: A Critical Reading of the ECtHR's Approach to Conflicts of Rights, in When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony? 34 (Stijn Smet and Eva Brems eds, Oxford University Press, 2017).
[197] Stijn Smet, Conflicts between Human Rights and the ECtHR: Towards a Structured Balancing Test, in When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony? 47 (Stijn Smet and Eva Brems eds, Oxford University Press, 2017).
[198] Bank Mellat v Her Majesty's Treasury (No. 2) [2013] UKSC 39 (19 Jun. 2013) para 20.
[199] Yakye Axa v Paraguay *supra* note 60, at para 145.
[200] Endorois Welfare Council v Kenya *supra* note 71, at para 211-14.
[201] African Commission on Human and Peoples' Rights v Kenya (006/2012) [2017] AFCHPR 28, (26 May 2017) para 129.
[202] James and Others v UK *supra* note 52, at para 47.
[203] Advisory Opinion on the difference in treatment between landowners' associations "having a recognised existence on the date of the creation of an approved municipal hunters' association" and landowners' associations set up after that date (Request no. P16-2021-002) [2022] ECHR (GC) (13 Jul. 2022) para 80.
[204] Yordanova and Others v Bulgaria *supra* note 181, at para 127.
[205] Ghailan and Others v Spain *supra* note 186, at para 60 and 78.
[206] Endorois Welfare Council v Kenya *supra* note 71, at para 212.
[207] James and Others v UK *supra* note 52, at para 54.
[208] Zehentner v Austria, 20082/02 [2009] ECHR (16 Jul. 2009) para 73.
[209] Roberto Gargarella, Why Do We Care about Dialogue? 'Notwithstanding Clause', 'Meaningful Engagement' and Public Hearings: A Sympathetic but Critical Analysis, in The Future of Economic and Social Rights 212 (Katharine G Young ed, Cambridge University Press, 2019).
[210] Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe, Comm. 284/03 (2009) para 176.
[211] Judgment of 13 Dec. 1979, Hauer, C-44/79, EU:C:1979:290. para 23.
[212] ADHR *supra* note 11.
[213] Hanoch Dagan & Avihay Dorfman, The Human Right to Private Property, 18 Theoretical Inquiries in Law 391, 397 (2017).
[214] I thank Juan Carlos Benito Sánchez for raising this issue.
[215] City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CC) [2011] ZACC 33, para 40.
[216] Constitutional Court of Spain *supra* note 191, at Legal Foundation No. 10.
[217] López Albán v Spain *supra* note 105, at para 11.5.
[218] Pope Francis, Encyclical Letter Fratelli Tutti (Oct. 3, 2020) para 120.
[219] ICESCR *supra* note 17, Article 2(1).
[220] Douglas S K Maxwell, Broadening the human rights discourse, realising socio-economic rights, and balancing rights to property: moving beyond the rhetoric of socio-economic rights and Scottish land reform, 2019 PL 121 (2019).
[221] Mandisa Shandu & Michael Clark, Rethinking Property: Towards a Values-Based Approach to Property Relations in South Africa, 11 Constitutional Court Review 39 (2021).
[222] Aroop Chatterjee, Léo Czajka & Amory Gethin, Wealth Inequality in South Africa, 1993–2017, 36 The WB Economic Review 19 (2022).
[223] John Kekes, The Right to Private Property: A Justification, 27 Social Philosophy and Policy, 1, 5 (2010).