Expropriation Law: From National Laws to Global Guidelines?

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Abstract: Expropriation usually refers to the taking of property from its owner by the state or an authority for public use or interest. Yet, in the context of globalisation, expropriation is no longer an issue that may only be considered at the domestic level, as more non-state actors not only increasingly become the victims of expropriation, but also are exercising the power to expropriate property. The rise of 'global expropriation' involves different interests, tensions and conflicts whether at the local, regional or global levels. The lack of a level playing field between competing claimants calls for strengthening the role of the international community and involving non-state actors in setting out global standards and rules to redress those imbalances, taking into account marginalised groups such as minorities and indigenous peoples. However, how could expropriation law be transformed from national laws to global standards, transcending national and regional differences? Employing the human rights approach has been such an endeavour. However, compared to the recognition of individual property rights in international human rights instruments, treating communal property rights as a fundamental human right is highly contentious. This paper examines the nature of global expropriation and the possibility, desirability, and limits of using soft law standards to protect the right to communal property, probing into the theoretical foundations of human rights and the multi-layered global governance system. The emerging soft law protection of communal property rights gives rise to debates over the content and scope of property rights, state power regarding expropriation, the legitimacy of expropriation, the sources of state obligation towards property owners, compensation standards, and so on. Those debates revive and recast old issues such as those surrounding sovereignty and legality and challenge the distinction between 'binding' and 'non-binding' norms in the international legal system.

> 'An estimated 500 million acres, an area eight times the size of Britain, was reported bought or leased across the developing world between 2000 and 2011, often at the expense of local food security and land rights… But the thing most consistently missed about this global land rush is that it is precisely that – global.' [1]

Introduction

Expropriation usually refers to the taking of property from its owner by the state or an authority for public use or interest.[2] It is also closely associated with regulation such as zoning or land-use control. Yet, in the context of globalisation, expropriation is no longer an issue that may only be considered at the domestic level, as more non-state actors are either exercising the power of expropriating property, as is the case with some multi-national companies, or being adversely affected by expropriation, as is the case with some local groups and communities. The rise of 'global expropriation' involves different interests, tensions and conflicts at local, regional and global levels. The lack of a level playing field between competing claimants calls for strengthening the role of the international community in setting out global standards and rules to reconcile those conflicts and redress those imbalances, taking into account marginalised groups such as minorities and indigenous peoples and their property rights.

Yet how could the legal framework affording protection for communal property rights in expropriation that is mainly the result of national laws be transformed into global standards, transcending national and regional differences? 'Soft law' protection of communal property

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[1] A Mittal 'The "global" Land Rush', 4 August 2014, http://farmlandgrab.org/post/view/23792-the-global-land-rush (last accessed on 10 August 2014).

[2] Oxford Online Dictionary, http://www.oxforddictionaries.com/definition/english/expropriate?q=Expropriation#expropriate__15 (last accessed 15 August 2014).

rights may provide such mechanisms. Soft law, as opposed to 'hard law', is 'a body of standards, commitments, joint statements, or declarations of policy or intention…, resolutions adopted by the UN GA or other multilateral bodies, etc.'[3] It mainly applies in the contexts of human rights, international economic relations and environmental protection.[4] This paper focuses on soft law instruments related to the right to communal property which have been developed within a United Nations framework, and by transnational organisations and other groups, aiming to secure and safeguard communal property rights and related human rights. [5] It also covers some key soft law instruments regarding international economic relations, as they are relevant to the protection of the right to property.

Soft law protection of communal property rights depends heavily on the development of international human rights instruments, as Richard Falk argues: 'to advocate human rights is to inform people about their violation, to fortify the morale of certain resistance efforts, to create "space" for human rights concerns within and without the governmental apparatus, and to set in motion a positive transnational momentum on behalf of peace and justice in the world'.[6] However, as it is difficult for states to reach consensus on global norms and standards, international organisations,[7] other groups, and even individuals step in so as to fulfil the task of formulating agreed guidelines and statements.[8] It is often argued that the crucial difference between 'hard law' and 'soft law' is that the latter lacks enforceability and mechanisms of legal sanctions.[9] But we should note that some hard laws, including UN human rights treaties, also lack effective enforcement provisions.

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[3] A Cassese *International Law* (Oxford: Oxford University Press, 2001) p 160. For studies of soft law, see also CM Chinkin 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 (4) *ICLQ* 850; CM Chinkin, 'Normative Development in the International Legal System' in D Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2003), pp21–42; U Mörth (ed) *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (Cheltenham, UK: E. Elgar, 2004); D Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2003).

[4] Cassese, above n3, p 160.

[5] For soft law and the protection of property rights, see eg, C Golay and I Cismas, 'Legal Opinion: The Right to Property from a Human Rights Perspective' SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2010), http://papers.ssrn.com/abstract=1635359; M Barelli, 'The Role of Soft Law in the International Legal System: The Case of the UN Declaration on the Rights of Indigenous Peoples' (2009) 58 *ICLQ* 957.

[6] RA Falk *Human Rights and State Sovereignty* (New York: Holmes & Meier Publishers Inc, 1981) p 3.

[7] This is not to argue that international organisations represent global values and interests, as the representativeness of international organisations and their propensity tend to be Western centric. International organisations are also strongly influenced by strong states such as the US, see e.g., C Harlow, 'Accountability as a Value in Global Governance and for Global Administrative Law' in G Anthony et al (eds) *Values in Global Administrative Law* (Oxford ; Hart Publishing, 2011), pp173–92at 187,

[8] Cassese, above n3, p161.

[9] See eg., U Mörth, 'Introduction' in U Mörth (ed.), *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (Cheltenham, UK ; Northampton, MA: E. Elgar, 2004), 1-9, p1.

Soft law protection of communal property rights is a laudable attempt to provide a level playing field for competing claimants in disputes arising from global expropriation, giving voices to marginalised social groups such as minorities and indigenous peoples. However, it also faces many challenges. First, expropriation of property rights is an area where states are reluctant to subordinate national sovereignty to rules of international human rights law. Even if those states agree to endorse global standards of protecting property rights in an informal manner under some political and social pressure, the protection is still dominated by strong claims based on national sovereignty. Second, while the human rights approach apparently has many merits, as Richard Falk points out:'[it takes] into account cultural pluralism, group rights, duties to the community, the unheard voices of indigenous peoples, and giving due weight to the hitherto insufficiently influential non-Western civilisations',[10] it also has limits. The dominant human rights approach is essentially individualistic, leaving limited scope to afford protection for communal or collective rights, which are often regarded as a contrast to individual rights. The theoretical foundation of human rights is also underpinned by statist claims, further restricting the initiatives of communities and groups for protecting the right to property. Indeed treating communal property rights as a fundamental human right is highly contentious.

The analytical framework of this paper challenges the state-centred analysis of expropriation and adopts a multi-level inquiry above and below the level of the state, [11] which involves diverse 'actors' with respect to the realisation of human rights. To probe into the effectiveness of human rights protection we need to look at the roles played by various actors in global governance. Employing a multi-level study involving diverse actors in formulating soft law protection of communal property rights, the analysis of this paper is organised around these key questions: Why is there a need for soft law protection of communal property rights? Is soft law protection for communal property rights effective? If not, why not? The paper concludes with identifying the prospects of soft law protection of communal property rights.

[10] RA Falk *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (London: Routledge, 2000) p2.

[11] Earlier works include Falk, above n6, in particular Chapter III 'Theoretical Foundations of Human Rights' pp33-62. This multi-level framework has been applied to recent studies of global constitutionalism, global administrative law and global governance. See e.g., N Krisch, *Beyond Constitutionalism : The Pluralist Structure of Postnational Law* (Oxford : Oxford University Press, 2010); S Cassese 'Administrative Law without the State? The Challenge of Global Regulation?' (2005) 37 *International Law and Politics* 663; C Joerges, I-J Sand, and G Teubner (eds), *Transnational Governance and Constitutionalism* (Oxford; Hart, 2004).

1. Global Expropriation and the Evolution of Peoples' Rights

Globalisation challenges the state-centred analysis of expropriation. First, expropriation of property is now carried out by private bodies with the permission of the government especially in development-based expropriation. Leading examples include acquiring land for building infrastructure projects such as large dams, railway networks or venues for major international business and sporting events; constructing large-scale industrial or energy projects; upgrading slums and renovating urban housing etc. Second, studies of the emerging fields of 'global administrative law' and 'transnational private regulation' have shown that,[12] in response to emerging global issues such as environmental protection and financial crisis, regulatory power has been devolved and hybrid public-private and even purely private bodies have been delegated with regulatory powers.[13] Third, the rise of corporate power -- especially that of transnational corporations – and its expropriation of local resources (in particular communal resources) in under-developed countries has witnessed an exponential growth in large-scale land acquisitions or 'land grabbing'[14] and raised many controversies.[15] The legal basis upon which the companies engage in such expropriation is weak. Their activities lack a sovereign basis of the kind exercised by states when they take property, but are licensed within the framework of the relevant (sovereign) laws of states where the resources are located through large land deals and contracts. Finally, expropriation often occurs in the form of forced eviction and displacement in the context of armed conflicts or displacement resulting from environmental degradation.

Global expropriation has transformed the scope of the right to property: a subject 'once deemed private [has now] passed into the public sector and from there into issues of transnational concern.'[16] Does the emerging global expropriation signal the diminishing

[12] See eg, G Anthony, J-B Auby, J Morison and T Zwart (eds) *Values in Global Administrative Law* (Oxford, Hart Publishing, 2011) pp1-16; B Kingsbury, N Krisch and RB Stewart 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15. For transnational private regulation, see eg, C Scott, F Cafaggi and L Senden 'The Conceptual and Constitutional Challenge of Transnational Private Regulation' (2011) 38 *Journal of Law and Society* 1; L Casini, ' "Down the Rabbit-Hole": The Projection of the Public/private Distinction beyond the State' (2014) 12 (2) *International Journal of Constitutional Law* 402. For using private-public linkages in regulation, see eg, O Perez 'Using Private-Public Linkages to Regulate Environmental Conflicts: The Case of International Construction Contracts' (2011) 29 *Journal of Law and Society* 77.

[13] Kingsbury, Krisch, and Stewart, above n12, at 16-17.

[14] See eg, L Cotula *The Great African Land Grab?: Agricultural Investments and the Global Food System* (London; New York : Zed Books, 2013).

[15] These have also raised many human rights issues. See eg, D Kinley *Civilising Globalisation: Human Rights and the Global Economy* (Cambridge, Cambridge University Press, 2009), in particular Chapter 4 'Commerce and Human Rights'.

[16] D Shelton 'Introduction', in Shelton (ed.), above n3, p6.

significance accorded to ideas of sovereignty and 'law' in the context of globalisation? To seek an answer to this question necessitates an analysis involving different interests and actors below, at, above, and within the state level; distinguishing strong states from weak states. If the answer is yes, then there is a need to seek alternative mechanisms, in particular soft law instruments, to protect property rights, taking into account the rise of new participants in the global legal order and their role in formulating those instruments and their willingness to be bound by them. Furthermore, as states are reluctant to be bound by unwanted commitments in the form of 'hard law', the choice of soft law allows for 'the incorporation of conflicting standards and goals and provide States with the room to manoeuvre in the making of claims and counterclaims'.[17] However, soft law alone cannot redress the structural imbalances in the international legal system, and this requires a scrutiny of the ordering logic of the global governance system, which will be dealt with in Section Two.

Soft law instruments indicate new concerns and trends emerging in the global community.[18] They are closely linked to group/communal rights in particular peoples' rights, which have been adversely affected in global expropriation. The evolution of peoples' rights is associated with the 'third generation of rights' proposed by Karel Vasak, the first Secretary-General of the International Institute of Human Rights in Strasburg and former UNESCO legal adviser. Those rights have emerged as 'a response to the phenomenon of global interdependence', which calls for international cooperation to fulfil states' human rights obligations in order to benefit both individuals and peoples. [19] Communal or group rights are an important category of the third generation rights. The provisions in both the International Covenant on Civil and Political Rights (ICCRP)[20] and the International Covenant on Economic, Social Rights and Cultural Rights (ICESR)[21] that assert peoples' rights – most notably, self-determination – are the precursor of shifts in the meaning of rights in the 1970s and 1980s, and, indeed, the mark of 'a new generation of rights'.[22]

[17] Chinkin, above n3, at 866.
[18] Cassese, above n3, p161.
[19] K Vasak 'A Thirty Year Struggle -- the Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights', UNESCO Courier, November 1977, summarised by R Rich 'The Right to Development: A Right of Peoples', in J Crawford (ed) *The Rights of Peoples* (Oxford: University of Oxford Press, 1988), 39-54, p 41.
[20] Adopted on 16 December 1966; entry into force on 23 March 1976.
[21] Adopted on 16 December 1966; entry into force on 3 January 1976. The US has not ratified the ICESR.
[22] B Felice 'Rights in Theory and Practice: An Historical Perspective' (1989) 16 (1) *Social Justice* 34, at 51.

The Universal Declaration of the Rights of Peoples (also known as the Algiers Declaration) [23] marks an important step to further elaborate and legitimise the concept of peoples' rights. It was drafted on 4 July 1976 not by states but by a group of distinguished international lawyers from diverse legal cultures, following the initiative of the Italian lawyer and politician, Lelio Basso (1903-1978).[24] Based on the principles established in the Algiers Declaration, the Permanent People's Tribunal (PPT) was set up in June 1979 which is 'an opinion tribunal whose activities include identifying and publicising cases of systematic violation of fundamental rights, especially cases in which national and international legislation fails to defend the right of the people'.[25] Richard Falk argues that the adoption of the Algiers Declaration made 'a symbolic demonstration that "law" belongs not only to modern state bureaucracies, but also to citizens and transnational democratic forces'.[26] The text of the document articulates the rights of a people to existence and political self-determination, to control over its resources, economic system, culture, and environment. Property rights is included in the category of economic rights (Section III), and individuals are entitled to just compensation when their property is expropriated.[27] 'Right to Environment and Common Resources' is also acknowledged in Section V.[28] Since the drafting of this declaration, the adoption of other important international documents has formed a legal basis for peoples' rights in a dialectical relationship to human rights including the 1981 African Charter on Human and Peoples' Rights and the 1986 United Nations Declaration on the Right to Development.[29] UNESCO has also explicitly recognised 'the right to be different'.[30] Recognising peoples' rights is significant for establishing a new legal basis for expropriation law, as 'to affirm the rights of peoples is an expression of legal, moral, and political support *on a transnational basis* for popular struggles against various contemporary forms of oppression'.[31]

[23] Adopted in Algiers, 4 July 1976
[24] RA Falk 'United States Foreign Policy as an Obstacle to Realising the Rights of Peoples' (1989) 16 (1) *Social Justice* 57–70, at 60.
[25] Lelio and Lisli Basso Foundation, available at: http://www.internazionaleleliobasso.it/?page_id=207&lang=en (accessed 20 July 2014).
[26] Ibid.
[27] Article 8: 'Every people has an exclusive right over its natural wealth and resources. It has the right to recover them if they have been despoiled, as well as any unjustly paid indemnities'.
[28] Article 17: 'Every people has the right to make use of the common heritage of mankind, such as the high seas, the sea-bed, and outer space'.
[29] A/RES/41/128, 4 December 1986
[30] Article 1, Paragraph 2, the Declaration on Race and Racial Prejudice, UNESCO, 27 November 1987.
[31] Falk, above n24, p.58. Emphasis added.

Soft law instruments regarding international economic relations also afford protection of communal property rights. For example, the right to property finds close proximity to economic rights in the 1974 Declaration for the Establishment of a New International Economic Order (NIEO)[32] and a Charter of Economic Rights and Duties of States adopted along with the Declaration. [33] The Declaration and the Chapter – in particular four of the Charter's basics principles ((g), (i), (k), and (m))[34] – relate to fundamental human rights and have important implications for the protection of communal property rights. The Declaration provides every State 'full permanent sovereignty over its natural resources' (Article e) and power of regulating and supervising the activities of transnational corporations (Article g), although no references to specific mechanisms is made. Co-operation among states in the exploitation of shared natural resources is emphasised.[35] Article 16 of the Charter reads:

> It is the right and duty of all States, individually and collectively, to eliminate colonialism, *apartheid*, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination, and the economic and social consequences thereof, as a prerequisite for development. States which practise such coercive policies are economically responsible to the countries, territories and peoples affected for the restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples.[36]

Had this Charter been fully adopted and implemented, it would have provided good guidance for dealing with restitution and compensation issues arising from global expropriation, in particular exploitation of local resources by transnational companies. However, as a soft-law

[32] Adopted by the United Nations General Assembly on 1 May 1974. It consists of a set of proposals developed by some developing countries through the United Nations Conference on Trade and Development.
[33] 12 December 1974, A/RES/29/3281. Chapter II, Article 2 (c): 'To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means'.
[34] Chapter 1 'Fundamentals of International Economic Relations': 'g. Equal rights and self-determination of peoples; i. Remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development; k. Respect for human rights and international obligations; m. Promotion of international social justice'.
[35] Chapter II, Article 3.
[36] Italics original.

instrument, the Charter does not have legal effect, and many major economic powers, in particular the US, voted against it.[37]

2. Theoretical Foundations of Human Rights and Challenges to Soft Law Protection of Communal Property Rights

Different ordering logics of the world system including statist, supranationalist, transnationalist and populist are proposed by Richard Falk as the theoretical foundations to evaluate the realisation of human rights.[38] Those logics are operated by various actors in the world system, which may play different roles in soft law making. Here I borrow the term 'logic' in his analysis, but update his framework, drawing upon the wealth of literature on global constitutionalism, global governance and postnational governance discussed above. Statist logic is marked by the Westphalian system and 'the "will" of the territorial sovereign state' in formulating relations of states.[39] According to this logic, governmental consent is the key to the formulation of international law obligations, which are also subject to each state's own interpretation.[40] International law obligations posed by international human rights instruments are unlikely to be endorsed by states unless consent has been obtained from them. Therefore statist logic poses challenges to soft law protection of communal property rights and engenders tensions between international norms and internal prerogatives.

Yet, as discussed above, domestic laws are not effective in terms of achieving the substantial realisation of human rights in global expropriation. International logic has therefore come into play and has been materialised in institutional forms, imposing international standards and norms. The United Nations is the most notable example. However, as the membership of the UN is comprised of sovereign states, international logic underpinned by the function of the UN is constrained by this statist logic and to some extent it even reinforces statist logic. Examples of international logic operating at the regional level include the European Convention on Human Rights (ECHR)[41] and the European Court of Human Rights, the American Convention of Human Rights[42] (ACHR) and the Inter-American Court of Human Rights, the African Charter on Human and Peoples' Rights (AfCHPR) [43] and the African

[37] SA Tiewul 'United Nations Charter of Economic Rights and Duties of States' (1975) 10 *Journal of International Law and Economics* 645, at 684, 686.
[38] Falk, above n6, pp33-62.
[39] Falk, above n6, p35.
[40] Falk, above n6, p35.
[41] Adopted on 4 November 1950; Entry into force on 3 September 1953.
[42] Adopted on 22 November 1969; came into force on 18 July 1978.
[43] Adopted by the Organisation of American Unity in June 1981; Entered into force in October 1986.

Court on Human and Peoples' Rights.[44] It should be noted that 'regional logic is operative to a limited and uneven extent in different parts of the world'. [45] The discussion in Section Four will show that the European framework reinforces statist logic, whereas the American and African frameworks make a departure from it and interact with populist logic. In general, the legitimacy of international logic comes from the compromise and consensus made by different states; international logic does not contradict statist logic but complements it.

Transnational actors (e.g., NGOs, transnational corporations) are fluid entities. They are often located within sovereign states but have an impact elsewhere, either overwhelming 'the statist capacities of weak states' or forming partnership with these states.[46] The expropriation of resources in African countries by transnational corporations, one of the most powerful transnational actors, with the permission of the local governments, is illustrative of the interaction between transnational and statist logics. By way of exerting moral, social, political and economic influences on states, transnational actors can constrain state actions and may have an impact on the promotion of human rights. Their potential impact, however, may be limited, as transnational actors could be constrained or co-opted by strong states. Furthermore, actors such as transnational corporations and investors, including hedge funds and private equity funds, do not necessarily uphold human rights.[47] Instead, they could violate human rights while capitalising on global land grab.

Populist logic is associated with the emergence of individual initiatives and 'loosely organised groups', which are a marginalised source of power in global governance, and their initiatives to promote the substantial realisation of human rights and correct the government failure in achieving the same goal are often overlooked.[48] Populist logic endorses peoples' rights. The populist initiatives including the adoption of the 1976 Universal Declaration of the Rights of Peoples and the establishment of the Lelio Basso Foundation are the most notable examples.

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[44] Falk termed these examples as supranational, but these are all in the form of international law. The most notable organisation that typically attracts the label of supranational is the EU, see eg, *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] EUECJ R-26/62 (5 February 1963); *Costa v ENEL* [1964] EUECJ C-6/64 (15 July 1964). Thanks to Professor Gordon Anthony for raising this point. See also Krisch, *Beyond Constitutionalism*, p4.

[45] Falk, above n6, p45.

[46] Falk, above n6, p49. See also Casini, above n15, at 405; A-M Slaughter, *A New World Order* (Princeton, N.J.: Princeton University Press, 2004); S Wheeler, 'Corporate Respect for Human Rights: As Good As It Gets?' in A Perry-Kessaris (ed.) *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Abingdon, Oxon: Routledge, 2012), at 209–21.

[47] Mittal, above n1.

[48] Falk, above n6, p51.

Populist logic interacts with other logics. Some of the populist initiatives may have transnational impact. The proclamation of the 1976 Universal Declaration of the Rights of Peoples and the operation of the Lelio Basso Foundation illustrate such an amalgam of populist and transnationalist logics. However, populist logic differs from transnationalist logic: the former rejects statist legitimacy, whereas the latter accepts it.[49]

Statist logic is a barrier to the recognition of peoples' rights, in particular self-determination in international human rights instruments. Richard Falk argues that the right to self-determination has two dimensions. The first dimension, embodied in Article 1 of both the ICCPR and the ICESCR, regards self-determination as 'the underpinning for all individual claims for the legal protection of human rights'.[50] Compared to the first generally accepted conception of self-determination, the second dimension is controversial, as it involves claims of sovereignty or 'at least the right to exert effective control over one's *collective destiny'*.[51] The fear is that recognising the second dimension of self-determination will lead to fragmentation, jeopardising the unity of sovereign states. [52] As a result, there has been a persistent struggle for self-determination below the level of the state, that is, self-determination by indigenous peoples, ethnic or religious minorities etc. Those instances of the second dimension of self-determination are 'either [to be] accommodated within existing state structures or be handled extralegally as political facts'. [53] The international consensus on the scope of self-determination has been narrowed down to 'its human rights role of ensuring equitable treatment within existing state structures of authority', encompassing those rights including the right to national resources, the right to economic, social and cultural development, self-government etc..[54] This position has now been reaffirmed in Articles 3 and 4 of the 2007 United Nations Declaration on the Rights of Indigenous Peoples. The fact that the right to self-determination has been endorsed in the UN framework in a non-binding form corroborates the predominance of statist logic; as analysed above, the UN membership is limited to sovereign states.

3. The UN Framework: Retrospect

Article 17 of the 1948 Universal Declaration of Human Rights (UDHR) reads: 'Everyone has the right to own property as well as in association with others' (1) and 'No one shall be

[49] Falk, above n6, p52.
[50] Falk, above n10, p98.
[51] Ibid. My emphasis.
[52] Ibid, pp102-13.
[53] Ibid, p102.
[54] Ibid, p103.

arbitrarily deprived of his property' (2). The reference 'in association with others' in Part 1 of the article was proposed by the Soviet Union and inserted in order to cover collective forms of property.[55] Article 17 (2) does not pose a strong limitation on state actions, as it only prohibits the 'arbitrary' deprivation of property. Therefore, it allows for 'a considerable margin of discretion for states in adopting national laws relating to property of various kinds'.[56] Nevertheless, it entails a general rule that the taking of property shall not be justified without any compensation.[57]

The status of property rights in the UDHR is vague. Different versions of the article were under various national influences including the US, the UK, France, the Soviet Union, and Chile.[58] The UK and Australia were in fact opposed to the incorporation of such an article into the UDHR, as they were resistant to the subjection of the national controls of property rights to an international norm.[59] The scope of property rights and possible limitations that might be imposed on states differ significantly in various national legal systems, therefore it is difficult to adopt unified standards for protecting property rights at the international level.[60] In the final version of the article, the right to property is not absolute, as Article 17 (2) implies, because deprivation of property is possible if such action is not arbitrary, although no explicit mention of limitations to the right to property is made.[61] Furthermore, 'property' is included in the list of impermissible grounds of distinction in Article 2 of the UDHR. Despite the significant influence of the liberal and individualist approach to both property rights and human rights on the draft of the legally non-binding UDHR, States reserve considerable power to expropriate property and regulate the use of property. This echoes Richard Falk's argument that 'to make the governments of these strong states the target of international law arguments has generally seemed futile'.[62] This observation has been corroborated in the failure of the endeavour to include a free-standing property clause in adopting the legally

[55] A Rosas 'Property Rights', in A Rosas, JE Helgesen, and D Goodman (eds) *The Strength of Diversity: Human Rights and Pluralist Democracy* (Dordrecht ; Boston: Martinus Nijhoff, 1992), 133–58, p137.
[56] Ibid, pp137-138.
[57] Ibid.
[58] C Krause, and GS Alfreðsson 'Article 17', in GS Alfreðsson and A Eide *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Martinus Nijhoff Publishers, 1999), 359-378, pp 361-362; Rosas, above n55, p136.
[59] Krause and Alfredsson, above n58, p364; Rosas, above n55, p137.
[60] Krause and Alfredsson, above n58, p360.
[61] Ibid, p364.
[62] Falk, above n24, p58.

binding ICCRP in 1966, although 'right to housing' is provided in Article 17 of the ICCPR[63] and the prohibition of discrimination/distinction on the basis of property is also included.[64]

The right to property was also discussed in connection with the legally binding ICESCR, but no free-standing provision is included, although Article 11, Paragraph 1 for this part makes reference to the right to 'housing'.[65] The ultimate reason for not including a property clause in the covenants was that the Soviet Union and some of its allies could not accept the wording on the limitation on state power regarding expropriation, although they did not oppose the inclusion of a property clause *per se*.[66] Objections persisted to both limitations to the right and to restrictions on state action in expropriation. The UN Secretary-General's *Annotations on the text of the draft International Covenants on Human Rights* (1995) summarise best the mind-set of the drafters:

> While no one questioned the right of the individual to own property, some doubted the advisability of including an article on the right of property in the covenants. It was stated that there were considerable differences of opinion with regard to the concept of property and the restrictions to which the right of property should be subject… (para. 197). It was generally admitted that the right to own property was not absolute. At the same time it was recognised that the limitations on the right varied from time to time and from country to country. Consequently, it was difficult to reach agreement not only on the extent of the limitations to be included in the article, but also on the manner in which such limitations were to be defined (para. 202). While there was wide agreement that the right to own property was subject to some degree of control by the State, it was felt that certain safeguards against abuse must be provided.

[63] 'Article 17 of the ICCPR: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks'.
[64] ICCPR, Art. 2(1) provides that 'State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Art 2(2) of the ICESCR provides a similar prohibition.
[65] 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions….' See also TRG van Banning *The Human Right to Property* (Antwerp: Intersentia, 2002) p44; Rosas, above n55, p138.
[66] Rosas, above n55, p138.

> However, there was considerable difficulty in reaching agreement on such safeguards (para. 206).[67]

Despite the difficulties in achieving consensus in formulating global guidelines regarding the right to property and the fact that the right to property only appears in both covenants as part of the non-discrimination clause, Art. 1 of the ICCPR[68] and Art. 1 of the ICESR recognise the rights of all peoples to self-determination. In 1984, this provision on self-determination was reiterated in a consensus adopted by the Human Rights Committee, the supervisory body established under the ICCPR:

> The right of self-determination is of particular importance because its realisation is *an essential condition for the effective guarantee and observance of individual human rights* and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.[69]
>
> Article 1 enshrines an *inalienable* right of all peoples as described in its paragraphs 1 and 2. By virtue of that right they freely "determine their political status and freely pursue their economic, social and cultural development". The article imposes on all States parties corresponding *obligations*. This right and the corresponding obligations concerning its implementation are interrelated with other *provisions of the Covenant and rules of international law*.[70]
>
> Paragraph 2 affirms a particular aspect of the economic content of the right of self-determination, namely *the right of peoples*, for their own ends, freely to "dispose of their natural wealth and resources without prejudice to any obligations arising out of *international economic cooperation*, based upon the principle of *mutual benefit*, and

[67] Annotations on the text of the draft International Covenants on Human Rights, 1 July 1995, UN Doc. A/2929, paras. 197, 202, 206.
[68] Para. 1: 'All peoples have the right of self-determination, including the right to determine their political status and freely pursue their economic, social and cultural development'. Paragraph 2: 'All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.'
[69] Human Rights Committee, General Comment 12, Article 1 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994), available at: http://www1.umn.edu/humanrts/gencomm/hrcom12.htm. Emphasis added.
[70] Art. 2, ibid, emphasis added.

> *international law*. In no case may a people be deprived of its own means of subsistence". This right entails corresponding duties for all States and the international community…[71]

The provision on self-determination in both covenants and the highlighted parts of the above quotation reaffirm the human rights obligations imposed on states and the importance of global interdependence and international cooperation in order to fulfil those obligations. However, the adoption of that article and the emphasis on peoples' rights in both covenants go against the Western perception of rights, which is inherently individualistic, giving rise to the 'fear that peoples' rights are detrimental to the realisation and enjoyment of individual rights'.[72] The definition of a 'people' also poses challenges to the concepts of the 'nation' or the 'state' and to the dominance of Western powers.

4. The Regional Frameworks

Given the absence of a general property clause and detailed provisions on property rights protection in the two international covenants, the keystone of international human rights law, the protection of the right to property largely depends on regional human rights instruments. This section focuses on the protection of the right to property in three regions, the European, the Inter-American, and African. Compared to the formulation of international human rights instruments, it is relatively easy for states within one region to reach consensus on commitments and obligations. Therefore, the protection of property right is mostly in hard law forms at the regional level. Nevertheless, the protection of property rights in the Inter-American system begins with soft law, which has an important influence on the development of hard law commitments in that region. Furthermore, the limits of the hard law protection underpinned by statistic logic demonstrate the need to develop soft law to fill the gaps left by hard law protection.

(a)The European Framework

The European framework has a solid institutional foundation, marked by the ECHR and the European Court of Human Rights.[73] Although the protection of the right to property in the European context is mainly by hard law, it is worth briefly sketching the legal framework and considering its international underpinning in a regional setting, which is constrained by statist

[71] Art. 5, ibid, emphasis added.
[72] T von Boven 'Can Human Rights Have a Separate Existence from Peoples' Rights?' (1989) 16 (1) *Social Justice* 12, at 12-13.
[73] Falk, above n6, p45.

logic. The drafting and adoption of the ECHR and its Protocol 1 took place after the period of authoritarian rule in parts of Europe and mark a shift in the constraint of state power regarding expropriation.[74] States began to acknowledge 'the social function of property', which entails that 'the right to property is also a social right thereby implying a substantial and active role of the State' in securing the public interest, but at the same time, were reluctant to submit to judicial review political decisions on issues such as expropriation and nationalisation, which are often carried out in agrarian reform and other economic and social reforms.[75] As a result, the ECHR affords some protection against expropriation, but it allows states a very wide 'margin of appreciation'. With the UK as the leading opponent to the inclusion of the right to property in the Convention itself, [76] the right was included in Article 1, Protocol 1 (A1P1), adopted in 1952:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The Article could be broken down into 'three distinct rules': a general right to property (the first sentence of the first paragraph); a set of principles concerning the deprivation of possessions (the second sentence of the first paragraph), and a right of states to control the use of property (the second paragraph).[77] The second paragraph of A1P1 reserves to states the right to enact such laws as they deem necessary to control the use of property according to general interest. To put this another way, states enjoy a wide margin of appreciation with regard to choosing the means of enforcement of the law and ascertaining whether such enforcement will be justified in the general interest.[78] The initial assessment of whether there

[74] Golay and Cismas, above n5, p5.
[75] Banning, above n65, p79
[76] For debates on whether to include the right to property in the ECHR, see C Krause 'The Right to Property', in A Eide, C Krause, and A Rosas (eds.), *Economic, Social, and Cultural Rights: A Textbook*, 2nd rev. ed (Dordrecht; Boston: M. Nijhoff Publishers, 2001), p195.
[77] *James v. United Kingdom*, App No 8793/79, Judgement of 21 February 1986, §37; *J. A Pye (Oxford) Ltd and J. A Pye (Oxford) Land Ltd v. The United Kingdom*, App No 44302/02, (GC) Judgement of 30 August 2007, § 52.
[78] *Pye v. The United Kingdom*, §55.

exists a public interest in justifying the taking of property is often left to the national authorities. Furthermore, the right to compensation is not specified in A1P1.[79]

(b)The Inter-American Framework

The protection of the right to property afforded in the American system begins with the soft law form when the Organisation of American States (OAS) adopted the American Declaration of the Rights and Duties of Man in 1948.[80] The Inter-American human rights system 'has made considerable use' of the 1948 Declaration.[81] The right to property is provided in Art. XXIII: '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'. In 1969 an analogous hard law instrument, the American Convention on Human Rights,[82] was adopted. Art. 21 provides: 'Everyone has the right to the use and enjoyment of his property' (Art. 21(1)). Immediately after this provision, it acknowledges the social function of property by providing that 'the law may subordinate such use and enjoyment to the interest of society'.[83] Yet, restrictions on state actions are imposed: 'No one shall be deprived of his property except upon payment of *just compensation*, for reasons of public utility or social interest…' (Art. 21 (2)). The article also cautions against the abuse of exercising private property rights by prohibiting 'usury and any other form of exploitation of man by man' (Art. 21 (3)). This acknowledges property as the relationship between persons, that is, everyone's right to property is limited by other people's right to property.

The jurisprudence of the Inter-American Court of Human Rights[84] recognises the evolution of peoples' rights and the associated communal property rights. In *Sawhoyamaxa Indigenous Community v. Paraguay*,[85] it held that:

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[79] In the EU Charter of Fundamental Rights, protection of the right to property (Art. 17) is along the lines of A1P1 of the ECHR, with an addition that deprivation of possessions is subject to 'fair compensation being paid in good time'. Proclaimed in 2000, the Charter has become legally binding on member states of the EU (when implementing EU law) with the entry into force of the Treaty of Lisbon, in December 2009.
[80] O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).
[81] D Shelton, 'Human Rights', in Shelton (ed.), above n3, p345.
[82] Adopted on 22 November 1969; came into force on 18 July 1978.
[83] Banning, above n65, p. 62.
[84] The Judgments of the Inter-American Court of Human Rights are legally binding, whereas the Inter-American Commission on Human Rights concludes cases by making recommendations, which are generally regarded as non-binding, See Shelton, above n81, p393.
[85] Judgement of 29 March 2006, para 128. See also *the Mayagna (Sumo) Awas Tingni v. Nicaragua*, Judgement of 31 August 2001; *the Moiwana Community v. Suriname*, Judgement of 15 June 2005; *the Yakye Axa*

> …the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights.

Case law allows for the recognition of communal or collective property rights of indigenous peoples. In *The Mayagna (Sumo) Awas Tingni v Nicaragua*, the Court said that property rights are protected 'in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property' (para. 148):

> Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community…For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations (para. 149).

Furthermore, the decision in *The Moiwana Community v. Suriname* extends the scope of communal property rights beyond indigenous peoples, recognising other groups of individuals as right holders (para.111). This position was reaffirmed in *Saramaka People v. Suriname,* a case in which the Saramaka people were deprived of their property rights by Chinese and multinational logging and mining companies under the permission of the government.[86] The Court recognised that although 'the Saramaka people are not indigenous to the region they inhabit', the members of the Saramaka people should be treated as 'a distinct social, cultural and economic group with a special relationship with its ancestral territory'.[87] Therefore 'the State shall delimit, demarcate, and grant collective title over the territory of the members of the Saramaka people, in accordance with their customary laws, and through previous, effective and fully informed consultations with the Saramaka people' (para. 194).

Indigenous Community v. Paraguay, Judgement of 17 June 17 2005; *Pueblo Saramaka v. Suriname,* Judgement of 28 November 2007.

[86] Judgement of 28 November 2007.

[87] *Saramaka People v. Suriname*, Para. 79.

(c) *The African Framework*

The legally binding African Charter on Human and Peoples' Rights[88] (also known as the Banjul Charter) reflects African approaches to human rights and the interface between human rights and peoples' rights.[89] It specifies different categories of peoples' rights at the international level, including self-determination (Art. 20), the free disposal of their wealth and natural sources (Art. 21), the right of all peoples to economic, social, and cultural development (Art. 22), the right of all peoples to national and international peace and security (Art. 23), and the right to a generally satisfactory environment (Art. 24).[90]

Those categories of peoples' rights in relation to property rights that were often violated in the colonial history of Africa and are still being infringed by the recent increasing land acquisition in Africa are delineated in Article 21:

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. State Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity and solidarity.
5. State Parties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

[88] Adopted by the Organisation of American Unity in June 1981; Entered into force in October 1986.
[89] von Boven, above n72, at 15.
[90] Ibid, at 15.

This provision gives an almost identical interpretation of the property rights of indigenous peoples as is contained in the ACHR. In the Endorois case,[91] a landmark ruling on indigenous land rights, the African Commission ruled on 4 February 2010 that the Endorois' eviction from their traditional land for tourism development violated their human rights. The judgement also reaffirms the position adopted in the case law developed by the Inter-American Court of Human Rights[92] that 'possession is not a requisite conditioning the existence of indigenous land restitution rights' (para. 209)'. Yet the AfCHPR does not rule out the subordination of property rights to expropriation 'in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws' (Art. 14). The safeguards on state action remain very weak, as the interpretation of public interest is largely dependent on the State. Moreover, although Art. 21(2) of the Charter provides that a dispossessed people is entitled to 'the lawful recovery of its property and adequate compensation', it does not specify the compensation standards and there may be different interpretations of 'adequate compensation' under domestic law. In addition, the decisions of the Court are also uncertain, due to the political influence.[93] Against this background regional cooperation and integration initiatives have emerged in soft law forms including the African Union Framework and Guidelines on Land Policy in Africa.[94]

6. Towards Global Norms? Recent Developments and Prospects of Soft Law Protection of Communal Property Rights

Since the 1980s the indigenous peoples' communal relationship and perception of property have been recognised by the major development of international law and international human rights instruments regarding indigenous peoples,[95] cumulating in the adoption of the ILO (International Labour Organisation) Convention Concerning Indigenous and Tribal People in Independent Countries in 1989 (hereinafter ILO Convention 169)[96] and the UN General Assembly of the United Nations Declaration on the Rights of Indigenous Peoples 2007

[91] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Case No. 276/2003, 25 November 2009.
[92] See eg, *Sawhoyamaxa Indigenous Community v. Paraguay*, para. 128.
[93] C Heyns, 'African Regional Human Rights System: The African Charter' (2003-04) 108 *Penn State Law Review* 679, at 685.
[94] AUC-ECA-AfDB Consortium, 2010, Addis Ababa, Ethiopia, available at: http://rea.au.int/en/sites/default/files/Framework%20and%20Guidelines%20on%20Land%20Policy%20in%20Africa.pdf.
[95] See T Koivurova, 'Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects' (2011) 18 *International Journal on Minority and Group Rights* 1, 1.
[96] Adopted on 27 June 1989, entered into force on 5 September 1991.

(hereinafter the UN Declaration 2007).[97] However, it should be noted that the ILO Convention 169 had only 22 ratifications by July 2014, which again demonstrates the difficulties in using hard law to protect property rights at the international level.

The past few years have witnessed the proliferation of international principles, guidelines and standards in providing safeguards for property rights mainly in the UN framework. This soft law framework is particularly relevant to the protection of indigenous peoples' communal property rights, as they are often the victims of arbitrary or unlawful deprivation of lands and properties in forced eviction and displacement due to conflict or the construction of large scale development projects. These soft-law instruments recognise communal property rights, limit state power to expropriate property and emphasise the responsibility of the international community. Due to limited space of this paper, this section outlines the key provisions regarding the rights to property in those soft-law instruments, leaving the question on their implementation, in particular, how soft law has actually benefit indigenous peoples, as the subject of a further paper.

The 2005 United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (the Pinheiro Principles)[98] emphasise the right to housing, land and property restitution 'in situations where displacement has led to persons being arbitrarily or unlawfully deprived of their former homes, lands, properties or places of habitual residence' (Article 1.1),[99] drawing direct links to global issues such as peace-building, reconciliation, post-conflict reconstruction and economic development which call for protection of property rights afforded by international human rights law. The Pinheiro Principles also emphasise the responsibility of the international community including international financial, trade, development and other related institutions and agencies (Article 22). National legislation regarding housing, land and property restitution should be compatible with international human rights law, refugee and humanitarian law and related standards (Article 18.3). Art. 7 on 'the right to peaceful enjoyment of possessions' is similar to the provision in A1P1 of the ECHR, with an addition that 'where possible, the "interest of society" should be read

[97] Art. 26 of the UN Declaration 2007 provides: 'indigenous peoples have the right to the lands, territories and resources which they traditionally owned, occupied or otherwise used or acquired' (Art. 26(1)), and states are obliged to protect the same with 'due respect to their customs, traditions and land tenure systems (Art 26 (3).'

[98] The final text was presented to the UN Sub-Committee on the Promotion and Protection of Human Rights and published on 28 June 2005, UN Doc. E/CN.4/Sub.2/2005/17.

[99] See also Article 2.1: 'All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived…'

restrictively, so as to mean only a temporary or limited interference with the right to peaceful enjoyment of possessions'.

The 2005 Basic Principles and Guidelines on the Rights to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[100] include provisions on whether collectives should be included in the notion of victims ('the status of victims', Chap. V), the responsibility of non-state actors including business enterprises exercising economic power, various forms of repatriation (monetary and non-monetary) including restitution,[101] and compensation for economically assessable damage. The 2005 Basic Principles and Guidelines have notable impact as a reference for domestic, regional and international courts: For example, a few Latin American countries have referred to the draft Principles and Guidelines when passing legislation on reparation for victims, and the Inter-American Court of Human Rights has 'referred several times to the (draft) Principles and Guidelines in its jurisprudence relating to various forms of collective and individual reparation it awarded'.[102]

The 2007 Basic Principles and Guidelines on Development-Based Evictions and Displacement[103] apply to acts and/or omissions involving the coerced or involuntary displacement of not only individuals but also *groups* and *communities* from home and/or lands and *common property resources* that were *occupied or dependent upon* (e.g., Arts. 16, 23, 28, 32, 36, 52, 56, 64, 68). This gives recognition to indigenous peoples' 'dependency on and attachment to informally held land'. [104] Protection for most socially and economically

[100] Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx
Although international humanitarian law is beyond the scope of the current study, it is worth noting that provisions of international humanitarian law offer protection for property rights in times of armed conflict. Eg, Art. 46, the Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907; Article 53, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1949; the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, plus its two protocols.
[101] Restitution refers to measures which 'restore the victim to the original situation before the gross violations of international human rights law and serious violations of international humanitarian law occurred' (Principle 19). Examples of restitution includes restoration of enjoyment and return of property.
[102] T van Boven, 'The United Nations Basic Principles and Guidelines on the Rights to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', United Nations Audiovisual Library of International Law, available at: http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf (access on 22 July 2014).
[103] Available at: http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf
[104] The Guiding Principles on Internal Displacement (1998) contains similar provisions. Principle 21 reads: 'No one shall be arbitrarily deprived of property and possessions'. Principle 9 provides: 'States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.' E/CN.4/1998/53/Add.2, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G98/104/93/PDF/G9810493.pdf?OpenElement

vulnerable and marginalised sectors of society including women, children, minorities and indigenous peoples is emphasised. Obligations are accorded to states that they 'should carry out comprehensive reviews of relevant national legislation and policy with a view to ensuring their conformity with international human rights provisions' (Art. 24). Like the Pinheiro Principles, the 2007 Basic Principles emphasise the role of the international community including international organisations (international financial, trade, development, and other related institutions and agencies, member or donor States that have voting rights within such bodies); transnational corporations and other business enterprises must also respect the human right to adequate housing (Chap. VIII).

'The Voluntary Guidelines on the Responsible Governance of Tenure' was issued by the Food and Agriculture Organisation of the United Nations in 2012 (hereinafter the Voluntary Guidelines 2012). [105] The Voluntary Guidelines were issued as 'an international response to the global land rush'.[106] Many non-state actors have been involved in the process of negotiation including NGOs, farmer associations, development agencies, and the private sector.[107] The negotiation also encouraged local consultation and independent impact assessment before land acquisition project approval.[108] The Voluntary Guidelines restrict not only state power regarding expropriation but also actions of transnational corporations and foreign investors in land grab.[109] This may redress the structural imbalances in hard law, whereby 'while international law has gone a long way towards strengthening the protection of foreign investment, it offers little protection to rural people who may be adversely affected by investment flows.'[110]'This guidance provides an international reference that local groups and the organisations supporting them can wield in their legal and political struggles for

[105] 'The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security' adopted in Rome, 2012. The Guidelines promote secure tenure rights and equitable access to land, fisheries and forests as a means of eradicating hunger and poverty, available at: www.fao.org/nr/tenure/voluntary-guidelines/en/ (last accessed 4 May 2014). Thanks to Professors Leon Verstappen and Hanri Mostert for drawing my attention to this document.
[106] Cotula, above n14, p 101.
[107] A Arial *et al* 'Governance of Tenure: Making it Happen', 2012 (1) *Land Tenure Journal* 63, 66, available at: http://www.fao.org/nr/tenure/land-tenure-journal/index.php/LTJ/article/viewFile/51/91 (last accessed 31/08/2014).
[108] Ibid.
[109] Relevant instruments include the Guiding Principles on Business and Human Rights endorsed by the United Nations Human Rights Council in 2011. For a critique of the Principles and related Corporate Social Responsibility (CSR) initiatives, see Wheeler, above n46.
[110] Cotula, above n14, p12. Investment and trade treaties, in particular the Bilateral Investment Treaties (BITs), might provide other sources for determining state's obligation to property owners.

justice'.[111] Although its effect is limited by its non-binding nature, it can be used to exert political pressure for change in both 'hard law' and policy.

Conclusion

This paper has considered the nature of global expropriation and the possibility, desirability, and limits of using soft law to protect the right to communal property. The emergence of soft law protection of communal property rights demonstrates the interplay of normative standards and social forces, in particular the evolution of peoples' rights and the associated indigenous peoples' property rights. Soft law instruments have imposed more state obligations, limiting state power regarding expropriation. They also recognise communal property rights, ensure community members' participation in decision-making and governance of communal resources, and emphasise the economic, social, cultural, environmental and spiritual impact of expropriation on local and traditional communities. However, soft law protection of communal property rights has limited legal effect due to their 'non-binding' nature and the lack of formal enforcement mechanisms. Nevertheless, soft law may fill in gaps where hard law protection is ineffective or relevant policy is still being worked through. Furthermore, soft law has become the starting point for negotiating international binding commitments. The process of negotiation on the global scale gives voices to marginalised groups of people and strengthens the role of non-state actors in shaping the global legal framework safeguarding communal property rights, with formulating the 1976 Universal Declaration of the Rights of Peoples and the Voluntary Guidelines 2012 as the leading examples.

The study of soft law protection of communal property rights revives and recasts old issues such as those surrounding sovereignty and legality. This study has also led us to rethink questions about state power to expropriate, the legitimacy of the expropriation of property, the content and scope of property rights, the sources of state obligations towards property owners, compensation standards, and so on. The challenge ahead is to leverage global guidance through soft law to increase pressure, legal, political, social and economic, that may shift imbalances in power in the international legal framework. It will also require a change in the ordering logic of the global governance system to limit statist logic and strengthen populist logic.

[111] Ibid, p110.