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A LEGAL STANDARD FOR POST-COLONIAL LAND REFORM

Amelia Peterson, University of Colorado at Boulder

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Amelia Chizwala Peterson

TABLE OF CONTENTS

Introduction ........................................................................................................................................... 3

I. Modern Post-Colonial Land Reform ................................................................................................. 8
   A. Background ................................................................................................................................... 8
   B. The Idea of Property .................................................................................................................... 10
   C. Zimbabwe: A Modern Example .................................................................................................. 19

II. Land Reform & Rights under International Law .......................................................................... 26
   A. The (None-existent) Human Right to Land ................................................................................. 26
   B. Procedure under Civil & Political Rights & Norms .................................................................. 29
   C. Explicitly Recognized Land Rights ............................................................................................ 34
   D. The Idea of Property in Human Rights Jurisprudence ............................................................... 36

III. Core Elements of the Land Reform Formula ............................................................................. 43
   A. Existence and Articulation of Public Emergency Creating Legitimacy ...................................... 43
   B. The “In Accordance with the Law” Test .................................................................................... 44
   C. Proportionality & Minimal Restrictiveness of Policy ................................................................. 45
   D. Eradication of Discriminatory Property Right Allocation from Reform Policy ....................... 47
   E. Compensation Where Elements are Breached ........................................................................... 48

Conclusion ........................................................................................................................................... 49

* Amelia Chizwala Peterson, J.D. Valparaiso University School of Law, L.L.M. (Natural Resources Law) University of Colorado Law School, Senior Research Fellow (Governors’ Climate and Forests Task Force (GCF) Secretariat, Boulder, Colorado).
Abstract

This article proposes a legal standard for the design of post-colonial land redistribution policies. It confronts the complex interface between the need for land reform to alleviate land pressure in many developing countries, and the importance of upholding the idea of property. Regardless of which side of the post-colonial milieu we most quickly sympathize with, human rights law removes the tendency to seek out the victim by framing its language in terms of the homo sapien, not one particular race, gender, or economic status. It is in the interest of the various stakeholders enmeshed in post-colonial land imbalance debates and stalemates to aggregate towards a legal standard for land reform; one that acknowledges the deep injustices of the past and their equally insidious hangovers that have bled into the present-day economic reality of many former colonies. Such a standard must also promote social and economic development by affirming the idea of property under international law. Classical and customary formulations of property rights do not contemplate the complex facts of post-colonial land redistribution, and property rights under these circumstances are not comprehensively defined anywhere. The article extracts from the international human rights norms on property and due process to show that to be legal under international law, a post-colonial land redistribution policy must be motivated by a legitimate public purpose, implemented in accordance with both domestic and international law, proportional to the need, guarantee non-discriminatory property rights under the new system, and compensate incumbent landholders when these elements are breached.
“[T]he increase of lands, and the right employing of them, is the great art of government: and that prince, who shall be so wise and godlike, as by established laws of liberty to secure protection and encouragement to the honest industry of mankind, against oppression of power and narrowness or party, will quickly be too hard for his neighbor...”

John Locke

We live in a world of globalizing processes that impose particular limitations on any one State’s capacity to do as it pleases under the cloak of sovereign independence, particularly in economic and human rights matters.”

Ben Chigara

INTRODUCTION

The violent land redistribution program of a small sub-Saharan country made international headlines twelve years ago before quickly bowing off the world stage. Thousands of violently displaced Zimbabwean farmers soon settled into their new lives as farmers in neighboring African countries, as refugees abroad, or as the hopeful remnant holding on to hopes that they would one day be able to resume their livelihood as farmers in their country. The agrarian economy they once supported crashed and their hundreds of thousands of workers were also displaced. Today, a serious unaddressed question lingers in the air—perhaps a sense that there is a better way to accomplish the genuine goals of post-colonial land redistribution. Our ordered society, at least our innate desire to strive for such order, remains unsettled by one central question—what happens to property rights in the context of post-colonial land redistribution?

Property law, and the realm of land reform and redistribution, is at the heart of issues traditionally left to domestic governance under the principles of sovereignty. This article recognizes, as it must, that post-colonial land reform is a necessity. Yet, even in the absence of

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1 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 26 (C.B. Macpherson, ed. 1980) (originally published 1889).
3 See infra notes 6 and 89 (and accompanying text).
4 This article borrows the definition of “land reform” that broadly includes reforms that increase the ability of the rural poor and other socially excluded groups to gain access and secure rights to land. See Roy L. Prosterman and Tim Hanstad, Land Reform in the Twenty-First Century: New Challenges, New Responses, 24 SEATTLE J. FOR SOC.
A LEGAL STANDARD FOR POST-COLONIAL LAND REFORM

definitive international land reform law, to accept land reform of the Zimbabwean fast-track style
is to declare core international norms concerning property dead. As post-colonial governments in
Latin America, Sub-Saharan Africa, and even Australia grapple with the concept of land
redistribution, it is important to acknowledge the critical need for land reform in many agrarian
economies. But the heart of the legality of land distribution is really a question of the manner in
which land redistribution is done, by examining the legal and moral bounds of power of a
sovereign state to correct obvious, entrenched imbalances in land ownership through law, formal
institutions and proper process.

Land reform is essentially about the bounds of government authority to reshape the idea of
property. Thus, international law—the law governing sovereigns, must prescribe the principles
by which land reform should be done, lest the universally-held respect for property rights be
unraveled by the accretion of botched land redistribution attempts. Over the last two decades,
scholars have launched scathing condemnations of Zimbabwe’s fast track land reform, citing
violations of human rights and property law. Yet, none provides a comprehensive standard to
inform post-colonial governments regarding rules prescribed by the community of nations that
constrain land reform policy. The salient question is how international law actually strikes the
legal and moral balance between two seemingly irreconcilable goals: ending the ugly, dignity-

JUST. 763 (Spring/Summer, 2006). See, e.g. Olivier De Schutter, Access to Land and the Right to Food, Report of
the Special Rapporteur on the Right to Food presented at the 65th General Assembly of the United Nations
[A/65/281], 21 October 2010 (drawing on lessons learned from decades of agrarian reform and emphasizing the
importance of land redistribution for the realization of the human right to food, but cautioning against development
models that lead to evictions, disruptive shifts in land rights and increased land concentration).

5 See, e.g. Caitlin Shay, Comment, Fast Track to Collapse: How Zimbabwe’s Fast Track Land Reform Violates
(2012) (arguing that Amendments 16A and 16B to the Zimbabwean constitution fall short of the basic human rights
standards articulated in the UDHR and Banjul Charter and that Zimbabwe is in violation of its obligations to a
Southern African Development Community Tribunal’s decision by refusing to register the Tribunal’s judgment that
Amendments 16A and 16B are arbitrary, do not provide due process, and do not provide compensation to owners).
stripping past of land oligopoly through land redistribution and establishing a platform of secure property rights which supports national economic and social development long into the future.\(^6\)

Acknowledging the critical role of land as a primary natural resource for post-colonial developing countries and the need to develop fragile post-colonial economies, this article shows how both the classical and customary theories of property present a foundational gap for modern post-colonial land reform. Classical and customary theories of property, collectively forming the corpus of the idea of property, are ill-equipped to guide and inform land reform policy. Further, the few international articulations of property rights to land, being restricted to marginalized groups, also fail to provide a blueprint for global post-colonial land reform.

This article proposes that the conceptual gap in the notion of property rights is closed by five core elements extracted from human rights law and overarching, universally accepted international norms concerning property. The land reform formula proposed here is grounded in so-called *first generation* human rights, making it a practical and achievable platform for any country to adopt, regardless of its level of economic and institutional development. To be legal under international norms, a land reform policy must: (1) stem from a legitimate public purpose; (2) be in accordance with law; (3) be proportional to the public purpose; (4) guarantee a non-discriminatory right to own land under the new system; and (5) compensate landowners where elements of the formula are violated.

Property rights in the context of post-colonial land redistribution have never been articulated.\(^7\) We intuitively believe that both those who have enjoyed access to property rights in

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\(^6\) See generally, Lillian Aponte Miranda, *The Role of International Law in Intrastate Natural Resources Allocation: Sovereignty, Human Rights, and People-Based Development*, 45 VAND. J. TRANSNAT’L L. 785 (2012) (describing the evolution of international law and its infiltration into what has been deemed a sacred prerogative of states—sovereignty of their natural resources—and thereby, ultimate decision-making authority regarding the course of development).
land and those who have been marginalized and prevented by law from enjoying the same should have some protected property rights under the new regime. However, the nature of the rights—particularly in the case of the group that benefitted from exclusionary property laws—seems difficult, if not uncomfortable to articulate.

The bulk of human rights law establishes no other criteria in order for a claimant to qualify as an intended beneficiary of the law. In general, the state, on whose shoulders rests primary obligations under international law, is required by the global community to protect the claimant’s right simply be virtue of the claimant being human. Human rights law, articulating emerging principles of international law, provides the framework for a legal standard for land reform. Land rights are not protected as human rights, although they are occasionally mentioned by human rights instruments; some examples include the right to food or the autonomy of indigenous peoples. Nevertheless, this article argues that explicit rules of international law, in conjunction with regional and international interpretations of state obligations under universal human rights law, define the appropriate legal and moral balance. If struck, this balance stands a much greater chance of addressing the problem of land ownership imbalances that plague post-colonial States

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8 The Convention for the Elimination of Discrimination against Women, CEDAW is one notable exception in which gender defines the protected class. See Convention for the Elimination of Discrimination against Women, art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]. The bulk of human rights law establishes no other criteria in order for a claimant to qualify as an intended beneficiary of the law. In general, the state, on whose shoulders rests primary obligations under international law, is required by the global community to protect the claimant’s right simply be virtue of the claimant being human.

9 See De Schutter, supra note 4, at 2 (concluding that access to land and security of tenure are essential for the enjoyment of the right to food, and exploring how States and the international community could better respect, protect and fulfill the right to food by giving increased recognition to land as a human right).
and beyond, which may finally put the issue to rest. These sources of law point to a core property right to land—a bare minimum below which the right to hold land should not plunge if post-colonial land issues are to be adequately and fairly dealt with in the interest of firming property rights in a way that supports development and a permanent solution to land conflict.

If the elements of the post-colonial land reform formula are breached, such as the government failing to protect property rights, the dispossessed will have the right to be compensated at a market value that has been independently determined. Therefore, the formula proposed here forces governments to adhere to universally accepted norms or be required to pay compensation for the land. Given the justified resistance to making any payments for annexed land in post-colonial land reform, the land rights formula seeks to uphold human rights principles by clarifying the conditions under which annexation without compensation may be accomplished consistent with international norms.

Part I introduces modern post-colonial land reform and makes plain the need to articulate the legal principles that must guide these policies if they are to achieve the legitimate goal of ending retrenched barriers to land access. Part I will review the idea of property as it relates to this land reform by tracing both classical theories of property and the notion of rights under customary law. The Zimbabwe land reform platform, commenced in the late 1990s, will be used as a case study to demonstrate the role of domestic law, the need for land reform, and the critical need for the legal standard for land reform proposed in this article. The Zimbabwean method morphed from market driven sales of land to the government and indigenous farmers in the 1980s, into a rapid, violent phase marked by the “gazetting” and reacquiring of land held by white commercial farmers; acquired land was redistributed to indigenous people.
of land redistribution. Despite this perceived silence, land reform is captured by the body of human rights law which addresses procedural rights, i.e. “first-generation,” or civil and political (“CP”) rights. Part III analyzes principles from civil and political rights that have direct import to property rights under land reform. These principles are bolstered by articulation of the rights to property and natural resources under the African and the Inter-American human rights treaties and the decisions of the respective human rights courts. The confluence of CP rights principles, specific articles of human rights law on property, and judicial interpretations of the idea of property establish the outer bounds of the land reform formula proposed here.

Articulating the legal bounds of land redistribution is more critical today than it ever was. The legal standard proposed here is aimed at: (1) protecting the universal idea of property; (2) advancing the right and capacity of post-colonial governments to develop land as a natural resource; and: (3) providing a clear skeletal framework for legally and morally justifiable land reform for those regions of the world contemplating wide-scale land transfer programs.

I. MODERN POST-COLONIAL LAND REFORM

A. Background

Agrarian nations with a history of colonization are on the verge of imploding under the weight of unaddressed or poorly addressed needs for land reform. In its broadest sense, land reform entails a wide spectrum of options including land claims, acquisition and distribution of

11 See, e.g. Butjwana Seokoma, Land Redistribution: A Case for Land Reform in South Africa (NGO Pulse, Feb. 10, 2010) available at http://www.ngopulse.org/article/land-redistribution-case-land-reform-south-africa (last visited July 17, 2012) (arguing: “South Africa should speed up the redistribution of land to the black majority. There is a need for the government to review the current laws that govern how land should be redistributed. Government, land owners, CSOs and citizens should work together to make land reform a success. The willing buyer willing seller’ principle and the exorbitant prices charged by farmers when selling land for redistribution frustrates government’s ability to speed up land reform. Lack of land prevents poor communities from participating in the mainstream economy.”)

12 See, e.g. De Schutter, supra note 4, at 5 (describing long-term trends of rural population growth and the loss or severe degradation of arable land in Asia, Eastern and Southern Africa).
land, access to land for certain purposes, land use planning, infrastructure development, farming and commercial support, resettlement programs, security of tenure and training.\textsuperscript{13} The type of land reform that has received the least attention from international scholars, and yet arguably poses the most direct threat to development for post-colonial States, is the acquisition and distribution of land, or land redistribution.

In 2004, Ben Chigara framed the Southern Africa Development Cooperation (“SADC”) land issue as threatening social, political and economic disintegration of some SADC member States and destabilization of the region in general.\textsuperscript{14} He argued that the strategies adopted to resolve the apparent problem of inequitable land distribution in the predominantly agrarian economies of SADC States, the outcomes that they obtain, and the reaction of stakeholders will impact the political stability, as well as the human resource and skill base of the SADC.\textsuperscript{15} The resolution of land issues will promote or hamper the development objectives of one of the world’s poorest regions, underscoring the critical importance of modern post-colonial land reform. The need for the resolution of post-colonial land issues is not unique to sub-Saharan Africa. Latin America and Asia are also grappling with land reform issues, particularly the need to reduce landlessness and poverty among those groups who have never progressed economically since gaining their independence.

The justifications for land reform are primarily social, economic and political and include, \textit{inter alia}: the need to right historical wrongs as in the case of Zimbabwe, Uganda, Eritrea and

\textsuperscript{13} Bertus DeVilliers, \textit{Land Reform: Issues and Challenges A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia}, KONRAD ADENAUER FOUNDATION (2003).

\textsuperscript{14} The SADC is a regional agreement among 14 sub-Saharan States, each one a former colonies of Portugal, Belgium, the United Kingdom, and/or Germany. \textit{See} CHIGARA, \textit{supra} note 2, at xvi (proposing several lenses through which to best conceptualize and approach land reform, including human rights law).

\textsuperscript{15} \textit{Id.}
South Africa; the need to rationalize distortions in land relations, particularly in regards to tenure and distribution as the case with Kenya, Uganda, Malawi and Mozambique; the need to resolve internal conflicts arising from inefficiencies within the existing tenure relations—Tanzania, Swaziland, Lesotho and Uganda; and the desire to “modernize” indigenous tenure as a means of stimulating agrarian development such as in Swaziland, Kenya and South Africa.16

B. The Idea of Property

There is no more direct conflict than that between the idea of property and the re-appropriation of land. Land redistribution confronts the individual right to hold property and turns it over to parties who are perceived to represent a public need. The beneficiaries of valid land reform embody the public need, which may even be extreme enough to rise to the level of a public emergency. Regardless of the enormity of landholding imbalances, land redistribution stands in opposition to most ideas of property. Both classical theories of property and customary law, to varying degrees, conceptualize property as an individual or common right to own, hold or use land to the exclusion of all others.17 The problem is that neither classical theories nor customary rights approaches to property stand up to the modern challenge of the critical need for

16 Id. at 122 (recognizing that his proposed humwe principle [grounded in social justice principles] alone is not adequate to resolve the land issues in sub-Saharan Africa and that market efficiency supporting (1) the development of a sustainable supply of agricultural products and creation of domestic and international markets for the same, and (2) the restoration/preservation of the capacity to feed their populations and to supply external markets with food and food products.) See Margaret Rugadya, Land Reform: The Ugandan Experience, Oxfam 12 (1999) (explaining how and why land reform has taken center stage on the agendas of East, Central and Southern African countries in the last few decades), available at http://www.oxfam.org.uk/landrights/Ugaexp.rtf (last visited July 20, 2012); see also Prosterman and Hanstad, supra note 3, at 763 (stating that in countries where the landless are a large part of the agricultural population, their families form a deep concentration of poverty and human suffering, as well as an impediment to the process of economic development and, in many settings, a potential threat to political stability).

17 See, e.g., Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (declaring that the right to exclude is “universally held to be a fundamental element of the property right”) and Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (emphasizing the importance of the right to exclude to the property owner, calling it “one of the most treasured strands in the owner’s bundle of property rights.”). It should be noted that customary law clashes with codified law most dramatically in regions of the world that are engaged in modern agricultural land reform.
land redistribution that proceeds by dispossessing a land-wealthy few and transferring land to previously marginalized groups.

A variety of philosophical traditions guide scholars and judges in choosing a normative approach to what the rules of property law are and should be. Justice, liberty or rights-based approaches focus the decider’s attention on the obligation to pursue justice and liberty when selecting the applicable law in a given case. The justice approach arises out of the notion that law should protect individual rights. This approach to property focuses on considerations such as individual autonomy, human dignity, human flourishing, distributive fairness, social justice, human needs and other related norms.

In addition to giving little guidance on how to carry out post-colonial land redistribution, rights-based approaches to property can be easily used to support the idea of a land redistribution program that simply orders total restitution, such as full dispossession of land-holders whose estates can be traced to colonial conquest. Furthermore, the rights-based approach falls apart in the context of post-colonial land redistribution. Once something is perceived as a “right” the accompanying tensions arise. For example, if one interest is viewed as being more important than competing ones, it has a tendency to trump the “lesser” interests or even override general considerations of public policy by which competing interests are balanced against each other.

Therefore, a land-wealthy commercial farmer in agrarian Uganda may end up with the same

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19 Id.
20 See id. (explaining that rights language justifies property regimes or rules because they are right, i.e. they describe ways in which people ought to behave towards each other).
21 Id.
22 Id.
“right” as the dispossessed, marginalized landless Ugandan, depending on a vague determination of interests. The application of rights-based approaches provides no guidance on how the piece of land should be divided, when it should be divided or who should pay the expense of administering redistribution (if one can in fact be supported by two diametrically opposed, equal claims to a “right” in the land). Further, the language of rights necessarily connotes that someone has the corresponding obligation to protect or preserve the right. In land reapportionment, who has the obligation to protect the right? Should the government pay for the land on behalf of the dispossessed, as was the case with the first major phase of land redistribution in Zimbabwe? Or does that obligation fall on another, maybe the public at large?

A second category or approach to property is the utilitarian or consequentialist approach, which creates rules of property based not on their inherent goodness or fairness, but on the consequences they produce.\(^{23}\) The goal of this strand of property theory is to promote the general welfare, wealth maximization, or increase social utility and efficiency.\(^ {24}\) If the economic snapshot of Zimbabwe between the colonial 1970s and the 2000s after the Fast-Track land reform program are compared, the utilitarian theories have the perverse effect of suggesting that land should not have been redistributed at all.\(^ {25}\) This theory would vest the white commercial farmer’s right to the land on the basis that the land was inherited or purchased from farmers who obtained the right to the land by being in the best position to put the land to beneficial use. Despite the fact that land was concentrated in the hands of a few, the country was generally prosperous and it can be argued that in this sense, the country’s land distribution prior to the

\(^{23}\) *Id.* at 14.

\(^{24}\) *Id.*

\(^{25}\) In the 1980s, Zimbabwe thrived on a strong agricultural sector. Exports of crops such as tobacco ranked high on the world market. Today, Zimbabwe is primarily and importer of commodities, including many food products.
Fast-Track program maximized social utility. However, establishing a property right to land on the beneficiaries of colonization simply because they had the wealth, capital and financial resources to engage in large-scale commercial farming in the first place is to place the notion of property on shifting soil. How does one account for the fact that colonial law, such as the Land Tenure Act in Zimbabwe, excluded the indigenous from owning land, even if one had the wealth and knowledge to contribute to the agricultural output on a large-scale. The utilitarian theory of property therefore fails to support the idea of the core without raising some insurmountable equity questions.

A few traditional theories of property law take a more direct approach to the idea of property by creating justificatory norms in which to ground particular definitions and allocations of property rights. Most relevant are: (1) first possession as a source of property rights—including conquest; (2) labor (desert); (3) personality and human flourishing; (4) efficiency; (5) justified expectations; and (6) distributive justice. The possession theory of the source of property rights protects possessors from claims by anyone but the title holder, and in some cases even the title holder will not be able to dispossess a possessor. Commonly held norms that provide justification for the possession theory include rights and efficiency.

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26 See Carol Rose, Possession as the Origin of Property, 52 U. Chi. L. Rev. 73, 88 (1985) (stating: “[t]he common law gives preference to those who convince the world that they have caught the fish and hold it fast. This may be a reward to useful labor, but it is more precisely the articulation of a specific vocabulary within a structure of symbols approved and understood by a commercial people. It is this commonly understood and shared set of symbols that gives significance and form to what might seem the quintessentially individualistic act: the claim that one has, by ‘possession,’ separated for oneself property from the great commons of unowned things.”).

27 See JOSEPH WILLIAM SINGER, PROPERTY 17 (2010) (describing the historical “finders keepers” concept as a simple and workable rule to allocate ownership of unpossessed or abandoned objects).

28 Id.
Although rights and efficiency are attractive norms, possession as a justificatory norm in the context of post-colonial land distribution is highly problematic. Land allocation during colonial rule did not allow black Africans to make similar land claims. The Land Apportionment Act of 1931 strengthened the white settlers’ outright expropriation of land owned by indigenous people. Under a system that designated land in terms of who lived on and farmed it, the legislation allocated approximately 51% of land to about 3,000 white farmers, confining 1.2 million indigenous Africans to Native Reserves that constituted 30% of the country’s poorest agricultural land. Indigenous Africans could not own land classified as white in the apartheid system established by this and subsequent laws, and those who already owned or lived on designated lands were lifted enmasse and relocated to Native Reserves. The distributive implications of the possession theory make it an insufficient theory on which to base the right of non-indigenous African land owners to a core interest in land under a redistribution program.

Since possession alone creates the right to property under the first possession theory, a second flaw in the theory as applied to land ownership under circumstances of colonization is that the European settlers in African colonies grabbed land that was already in the possession of indigenous Africans, much in the same way that colonial settlers in the Americas did not arrive on the continent to occupy uninhabited land. Land in Zimbabwe was therefore obtained by a

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29 See, e.g., Jeremy Waldron, The Right to Private Property (1998) (explaining that the fact that one grabs something is not a strong enough reason for others to recognize his rights to control it unless those others have similar opportunity to obtain property); see also, Singer, supra note 30.


31 Id.

32 See Chigara, supra note 2, at 107, citing to statement by President Robert Mugabe, Address to the ZANU(PF) Central Committee, 17 September 1993 in referring to the resistance of White farmers to the gazetting of commercial lands:

"It is land they have, and on that reckoning, held illegally all along and not under any title from our ancestors. If it is argued that the fact of conquest and defeat can transfer title, and actually did
combination of coerced agreements, force or conquest. Once again, the idea of upholding a right to retain a core portion of land through land reform seems unjustified by mere possession as the methods of possession under colonial rule no longer pass muster under modern notions of justice and fairness.

First, possession is rooted in the notion of better title. Chigara explained the futility of this theory in the context of land redistribution:

Restoration of land to the one with the best title…is about competition and battle among holders of different titles to the same land. They must do combat in the forum elected by the policymakers in a bid to prove that theirs is the unassailable claim. The outcome is either victory or loss, with the winner taking all. Those beaten to the prize face social humiliation and economic ruin depending on their personal circumstances.

The property theory that comes close to providing a foundation for the idea of a core right to land ownership in the face of land redistribution is John Locke’s labor theory of property. In his Second Treatise of Government, Locke posited: “As much land as man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labor does, as it were, inclose [sic] it from the common.” He argued further: “God gave the world to men in common; but since he gave it them for their benefit, and the greatest conveniences of life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational, (and labor was to be his title to

33 The series of clashes through which the indigenous Africans were driven from their lands includes the First Chimurenga, or First War of Independence in which the Shona and Ndebele uprising in opposition to displacement was violently quelled in 1897 by the Pioneer Column, a group of settlers sent to the region by the British South African Company in search of gold and diamonds. See BINSWANGER-MKHIZE, BOURGUIGNON, & VAN DEN BRINK supra note 30, at 138.

34 CHIGARA, supra note 2, at 222.

35 LOCKE, supra note 1, at 21.
it…) not to the fancy or covetousness of the quarrelsome and contentious.”

Locke thus declared that “[w]hatsoever then [a person] removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property.”

Based on Locke’s labor theory of property, agricultural land under colonialism, as well as the continued commercial use of land past independence, created in white commercial farmers title to the land, notwithstanding the circumstances under which it was acquired. The efficient use of land by its conversion to large-scale agricultural production, which created a bustling agricultural base supporting food sufficiency and surplus for export, is in line with the theory’s underpinnings in natural law (God). It is this “mixing” of one’s labor alone which creates the idea of property.

However, despite its surface simplicity, Locke’s labor theory explicitly constrains the idea of a property right by requiring that the person claiming the property by virtue of his labor “mixed” in with the land not take so much of the land that others, who would otherwise work the land in order to establish a right in the land, lack access and opportunity to land of equal quality as that claimed by the first person. Originally published in the 1800s, Locke’s theory makes sense in an era where the productive use of land was encouraged, capitalism was spreading and there was ample land available for anyone who had the resources to turn uninhabited or unused land into an economic resource in an efficient manner. The conditions in post-colonial Africa, with its historical legal barriers to land access, mean that indigenous Africans did not have access to land of same quality as settlers. Therefore, the natural rights theory provides a theoretical starting

36 Id.
37 Id. at 19.
38 See infra notes 46-49 (and accompanying text, discussing the colonial legislation which created land classification and barred blacks from ownership of land in “velds” where the soil and weather conditions best promoted agriculture on a large-scale).
point for post-colonial land reform in that it rejects the absoluteness of the other classical
theories and refuses to base property rights on unlimited amassing of land-wealth. To Locke, the
post-colonial commercial farmers’ agrarian efforts, while establishing property rights in the land,
are valid only to the extent that their exercise does not deny other individuals the opportunity to
create for themselves the same type of property rights.

While they are useful in framing the conceptual gap in property rights theory as applied to
post-colonial land redistribution, classical theories of property are further confounded by the
historical dominance of customary ideas of property in Africa, Asia and Latin America. Under
the customs and traditions of many countries that have undergone, or are currently engaged in,
land redistribution, the idea of property especially where applied to land, was largely
communitarian.39 Land was owned in common by the entire community, with the existence of
temporary claims only. For example, one planted seed in the ground to trigger a communally
recognized right to access the land until harvest time. Local leaders divided the land among
members of the community according to each man’s ability and willingness to put the land to
productive use. Grazing was carried out in common, often intermingling livestock and rotating
them across the entire expanse of land in a collective effort to ensure adequate access to pasture
for all. This system of communitarian holding patterns established the “law” prior to
colonization. Customary patterns of land tenure stand in stark contrast to the settlers’ idea of
specifically identified, titled and exclusive land rights. While no one held title to land under

39 See Rugadya, supra note 16, at 3 (explaining in the context of Ugandan land reform that prior to the
colonization era none of the communities in Uganda recognized individual ownership of land. Individual rights of
possession and use of land existed but were subject to sanction by the holder’s family, clan, or community).
customary law, the colonial system and its titling model introduced a system of individual land ownership in line with the Jeremy Bentham’s theory of property as a *justified expectation*.\textsuperscript{40}

Customary land tenure still influences holding patterns today. For example, to many indigenous populations of Latin America, the territory is considered to be a communal possession of a distinct people or ethno-linguistic group.\textsuperscript{41} Customary norms stipulate that the territory is to be shared for the benefit of the collective and prohibit alienation of the whole or any portion of it (no matter how small) by any individual, family, community or other association.\textsuperscript{42} Unlike the civil codes of many Latin American countries, which dictate that land ownership rights derive exclusively from the social function of rural property when put to agricultural use, indigenous customary laws see exclusive rights of possession flowing from use, occupancy, practical and spiritual knowledge, and religious and spiritual ties to the land.\textsuperscript{43} In many indigenous societies, traditional territorial possession and rights to share in and benefit from a homeland are derived from intimate collective and individual knowledge of the totality of a particular territory or a specific part of that territory.\textsuperscript{44}

The preceding sweep through both classical and customary theories of property establishes that existing conceptualizations fail to answer how the idea of property ought to co-exist with

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\textsuperscript{40} \textbf{JEREMY BENTHAM, THE THEORY OF LEGISLATION} 111-113 (C.K. Ogden ed. 1931) stating:

“Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it. Now this expectation, this persuasion, can only be the work of law. I cannot count upon the enjoyment of that, which I regard as mine, except through the promise of law which guarantees it to me.”
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\textsuperscript{42} \textit{Id.} (citing P. Garcia, Territorios Indigenas: Tocando a las Puertas del Derecho. Revista de Indas, LXI (223)).
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\begin{flushright}
\textsuperscript{43} \textit{Id.}
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\textsuperscript{44} \textit{Id.}
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post-colonial land redistribution efforts in a world of increasing land pressure. Yet certain universal norms strongly point to a legal standard for post-colonial land redistribution. These norms define the common ground between securing the idea of property, preserving the notion of human dignity and upholding the universal standards of the relationship between government and the individual. Part III explores international law to find a robust body of legal and moral norms that suggest the outright stripping of land rights from one group in a land redistribution program, even where that group has benefitted historically from a system weighted in its favor, conflicts with universal principles found in human rights law and in general principles of international law.⁴⁵

C. Zimbabwe: A Modern Example

What has come to be known today as the Zimbabwe Fast-Track land policy is the accelerated version of land redistribution embarked on by the national government in 2000. The history of Zimbabwe is marked by racially skewed systems determining the ownership of agricultural land.⁴⁶ Under the authority of the Land Apportionment Act of 1965, the colonial government moved indigenous populations to marginal lands in the predominantly dry agricultural zones.⁴⁷ After Zimbabwe gained its independence from Great Britain in 1980, about 4,500 large-scale commercial farmers, consisting of less than one per cent of the population, occupied 45 per cent

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⁴⁵ See infra Part III (further discusses international law in relation to land reform norms).

of the agricultural land. More than half of the large-scale commercial farms were in regions of the country which experience the highest rainfall and where the potential for agricultural production was highest. In the independence war that ensued, and culminated in a declaration of independence in 1980, rural indigenous Zimbabweans provided the main force against white rule because of their strong historical attachment to the land.

To address the clear imbalance in land ownership between black and white Zimbabweans, the government implemented three consecutive land reform programs and one joint government/large-scale commercial white-farmer program. Phase 1, the Land-Reform and Resettlement Program (“LRRP”), spanned the period from 1980 to 1997. By agreement with the United Kingdom, land reform during this early period of land reform focused on settling people selected by the Zimbabwean government on land sold willingly by large-scale farmers, purchased willingly by the Zimbabwean government (“WSWB”). Phase II of land reform was

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48 Id. This grossly disproportionate land-ownership profile can be traced back to the Land Apportionment Act of 1931, a law passed by the colonial government which created a land apartheid scheme, with land being designated black/white, as well as by the type of activity the land would be used for. Under this legislation alone, 51 percent of land was allocated to about 3,000 white farmers, and 1.2 million indigenous Zimbabweans were confined to Native Reserves (later renamed “communal lands”) consisting of 30 percent of Zimbabwean land. See BINSWANGER-MKHIZE, BOURGUIGNON & VAN DEN BRINK, supra note 30, at 138-139.

49 Id. Zimbabwe’s agricultural land (about 32.2 million hectares) is divided into five natural ecological zones (natural regions). Natural regions I, II and III (covering about 12.6 million hectares) are characterized by high rainfall, lush vegetation and rich soil, properties that are most suitable for agricultural production. On the other hand, natural regions IV and V (covering about 19.6 million hectares) have low rainfall, scant vegetation and soil properties of low inherent fertility. Id.


51 The land reform programs addressed here are the largest scale efforts at land redistribution. The UNDP 2002 Mission Report referred to a number of smaller initiatives entailing collaboration between landowners and the Government of Zimbabwe. For example, a few large business corporations have submitted small amounts of land for phases I and II of the Land-Reform and Resettlement Programme. See id., at 4 (mentioning the Karoi Initiative, which aimed to resettle 1,300 to 1,500 low-income rural households on 20,000 hectares in the Karoi and Marondera areas using community-based resettlement approaches based on market-assisted, negotiated transfers of commercial farm land to low-income rural households, assisted by a trust organization).

52 See UNDP 2002 Mission Report, supra note 46, at 5 (stating that the United Kingdom contributed £30 million sterling during the 1980s to fund the “willing-seller, willing-buyer” or WSWB program).
initiated between 1997 and 1998 and was overtaken by the Fast Track, or “People First” land policy, which commenced in June 2000 and is the illustrative focus of this article.\textsuperscript{53}

Accelerated land reform—a frustrated response to the slow progress of land redistribution under phases I (WSWB) and II, was facilitated by domestic law and the decoupling of targeted lands from the market.\textsuperscript{54} A combination of constitutional amendments legitimized the policy.\textsuperscript{55} Section 16A of the Zimbabwean Constitution, by an act of Parliament, was amended to provide, \textit{inter alia}:

\begin{itemize}
\item \textit{(1)(c)} – the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land; and accordingly-
\item \textit{i} – the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and
\item \textit{ii} – if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.\textsuperscript{56}
\end{itemize}

\textsuperscript{53} See People First – Zimbabwe’s Land Reform Programme 2, Ministry of Lands, Agriculture and Rural Settlement in conjunction with the Department of Information and Publicity, Office of the President and Cabinet, June 2001.

\textsuperscript{54} See, e.g. UNDP 2002 Mission Report, supra note 46, at 5 (explaining that Phase I of the land-reform program was expected to redistribute 8.3 million hectares through four farm-settlement models of varying sizes and land use, but by 1997, only 3.5 million hectares had been either purchased or acquired and 71,000 (out of the target 162,000) families from communal areas had been resettled). In addition to the inertia of land redistribution under these earlier models, the process was rife with problems. See id. (stating that the willing seller-willing buyer approach meant that, inevitably, settlements were scattered, making it difficult to generate economies of scale in the development of both settlement areas and infrastructure). As a result, access roads to farmers’ fields were often inadequate; only about 10 per cent of planned roads within the scheme were constructed. Also, while 86 per cent of schools were built, they were often not within walking distance for young children. Only 34 per cent of the planned blair toilets were constructed. Finally, the land purchase and acquisition processes were cumbersome and expensive.


\textsuperscript{56} Constitution of Zimbabwe as Amended by the Constitution of Zimbabwe Amendment (No. 16) Act, 2000 (entry into force 19 April 2000), amend. 16A(1). The constitutional amendment shifts the responsibility of financing land acquisitions to “the former colonial power.” Id. Under the authority of Section 16A, a national total of 2,706 farms covering more than six million hectares, were gazetted (listed in the official government journal)
The amendment significantly extended the grounds upon which land could be compulsorily acquired.57

Constitutional amendments in 2005, carried out by acts of Parliament, provided the mechanism for annexation with little to no compensation: (1) Amendment 16B(2)—automatic vesting of title to the government for all gazetted land with no compensation for the land itself, but compensation for improvements to the land; (2) Amendment 16B(3)(a)—“a person having any right or interest in the land may not petition a court to challenge the acquisition of the land and courts are barred from entertaining any such challenge;” and (3) Amendment 16B(6)—criminalizing the act of possessing or occupying acquired land.58 Not only is the vesting of title


58 See Constitution of Zimbabwe as Amended by Constitution of Zimbabwe Amendment (No. 17) Act, 2005 (entry into force 16 September 2005), amend. 16B(2). See also, amend. 16B(4) providing:

As soon as practicable after the appointed day, or after the date when the land is identified in the manner specified in subsection (2)(a)(iii), as the case may be, the person responsible under any law providing for the registration of title over land shall, without further notice, effect the necessary endorsements upon any title deed and entries in any register kept in terms of that law for the purpose of formally cancelling the title deed and registering in the State title over the land.

Under the Land Acquisition Amendment Act (“LAAA”) of 2000, (Part V.A) a Compensation Committee provides the land owner with written notification of the estimated value after a preliminary valuation has been carried out by a designated valuation office. See UNDP 2002 Mission Report, supra note 46, at 16 (reporting that notification as to the value of improvements is often received after eviction from the land, creating valuation disputes arising from degradation of the property after the owner’s departure and attributing irregularities in the valuation process to a serious shortage of qualified personnel to undertake the preliminary valuations); see also, id. at 17 (recommending that private professional valuers be hired to accompany and/or supervise the preliminary valuations). The Zimbabwean government has justified its refusal to pay for gazetted land on grounds that beginning in 1923 when the colonial government became a self-governing territory, the colonial government enacted legislation such as the Land Apportionment Act of 1931, which lifted whole communities of black Zimbabweans from their traditional lands and resettled them, without giving any form of compensation. See BINSWANGER-MKHIZE, BOURGUIGNON, & VAN DEN BRINK supra note 30, at 138-139.Constitution of Zimbabwe as Amended by Constitution of Zimbabwe Amendment (No. 16) Act 2000, at amend. 16B (3)(a). The narrow exception applies to persons challenging the level of compensation, not the legality of the acquisition. See id. (“a person having any right or interest in the land ...may, in accordance with the provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, challenge the amount of compensation payable for any improvements effected on the land before it was acquired”).Id. at amend. 16B(6) (providing that “an Act of Parliament may make it a criminal offence for any person, without lawful authority, to possess or occupy land referred to in [section 16] or other State land”)

in the state immediate upon identification in the national registry—it is also permanent.59 In addition to the sweeping constitutional amendments, the Land Acquisition Act was amended in May and November 2000 by Presidential decree.60

Unlike earlier efforts at land reform that had rested on the WSWB or market model, land reform under the accelerated policy changed settler selection and the provision of settlement support to a completely government-driven approach to ensure rapid resettlement.61 The most notable change of policy, however, was the introduction of forced removals of white commercial farmers from gazetted lands. Under the land reform program, ruling party militias, often led by veterans of Zimbabwe's liberation war, carried out serious acts of violence against farm owners and farm workers.62 Between 2000 and 2004, they used occupied farms as bases for attacks

59 See Internal Displacement Monitoring Center, The Many Faces of Displacement: IDPs in Zimbabwe 37, August 2008, available at http://www.unhcr.org/refworld/pdfid/48ad3b70c.pdf [hereinafter “Internal Displacement Monitoring Center 2008 Report”] (stating that the beneficiaries of the land reform program under the A1 and A2 models do not obtain land title; instead, ownership of all land acquired under the land reform program for resettlement purposes is retained by the state. Beneficiaries’ presence on the land is regulated by land use permits under the A1 model, and 99-year lease agreements for the A2 model). This restrictive access to land ownership has had perverse consequences. See, id. at 38 (observing that beneficiaries’ lack of security of tenure has a number of adverse consequences, primarily that A2 farmers are reluctant to invest in the farms when they have no guarantees that their investment will be secure, and banks are reluctant to lend money to farmers in the absence of such guarantees).

60 Under the Presidential Powers (Temporary Measures) Act of 1986, the Zimbabwean President has the power to enact six month temporary legislation.

61 UNDP 2002 Mission Report, supra note 46, at 8; see also, People First—Zimbabwe’s Land Reform Program, supra note 53. According to the UNDP Report, the stated objectives of the change in policy were to:

1) acquire no less than 8.3 million hectares from the large-scale commercial farming sector;
2) reduce the population pressure in communal areas;
3) reduce the extent and intensity of rural poverty among rural families and farm workers by providing them with adequate land for agricultural use;
4) increase the contribution of the agricultural sector to GDP and to export earnings;
5) promote environmentally sustainable use of land through agriculture and eco-tourism;
6) develop and integrate small-scale farmers into the mainstream of commercial agriculture; and
7) create conditions for sustainable economic, political and social stability.


against residents of surrounding areas. The police did little to halt the violence, and in some cases were directly implicated in the abuses.

More than twelve years since the first wave of rapid land acquisition, the results of the accelerated style of land reform in the sub-Saharan country are being carefully watched by various researchers and non-governmental agencies. These include economic impacts such as stagnated economic growth and socio-economic impacts, including widespread displacement of farm-workers, an intensifying of racial tensions in Zimbabwe, and the curtailment of the progress made in race relations during the period of reconciliatory policies. However, reports are emerging that suggest a more nuanced, region-specific analysis showing positive results from the

63 Id.
64 Id.
65 Non-governmental agencies called for more global attention on the impact of the fast-track land reform program on farm workers. Human Rights Watch, Fast Track Land Reform in Zimbabwe, supra note 47 (stating that while international attention has focused on the plight of white farm owners and on the consequences of illegal expropriations of land for property rights and the macro-economy, it is poor, rural, black, people who have suffered most from the violence that has accompanied the fast track process).

66 For a detailed economic history of Zimbabwe, see AFRICAN DEVELOPMENT BANK, Zimbabwe Report: From Stagnation to Recovery, available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/3.%20Zimbabwe%20Report_Chapter%201.pdf (showing a dramatic dip in GDP growth between 1998 and 2001, the period during which annexations under the fast-track program took place). The report shows that Zimbabwe experienced a 6% decline in GDP growth between 2006 and 2007, despite positive GDP trends as high as 18% in neighboring sub-Saharan countries included in the report. Id. at 2. See INTERNAL DISPLACEMENT MONITORING CENTER 2008 Report 32-33 (stating that the vast majority of farm workers have not benefited from the land reform program); see also, id. citing THE ECONOMIST, Coming to a Crunch, 19 Mar. 2008, available at http://www.economist.com/daily/news/displaystory.cfm?story_id=10880693 (referring to studies suggesting that only about 2% of all farm workers have been resettled on land acquired by the state, and that no more than 10-12 per cent of all former farm workers have benefited from the fast-track land reform program). In 2007, the African Institute for Agrarian Studies estimated that 15 per cent of farm workers were still employed on large-scale commercial farms. See Walter Chambati, Impact of FTLRP on Farm Workers and Labour Processes in Zimbabwe, AFRICAN INSTITUTE FOR AGRARIAN STUDIES, Jun. 2007. The Internal Displacement Monitoring Center reported that the remaining farm workers, who have not been resettled and are also no longer employed, have either been forced to leave their homes on the farms, or are still living on farms but are at risk of being displaced. Together with farm workers’ families, this group comprises hundreds of thousands of people. Internal Displacement Monitoring Center 2008 Report, at 33.
rapid land redistribution.67 The fate of dispossessed and displaced commercial farmers caught world attention for a brief moment, before receding away from mainstream media and imbedding itself in distant memory with the vaguely unsettling recollection of the excesses of government and the wrath of former colonies in dealing with the modern vestiges of colonialism.

Although the model is extreme, Zimbabwe’s fast-track land reform program provides a canvass so recent in our memories to inform the articulation of a legal standard. Basic principles of fairness would suggest that those who possessed and maintained their commercial farming estates through a land-grab executed by their ancestors have no right in the property in the same way that a thief has no property interest in the chattel of another by simply taking it and converting it to his own use. Natural notions of corrective justice and restitution support the full return of land into the hands of the historically disenfranchised group, regardless of the moral or economic judgments we may make about economic viability of such an undertaking. Under the traditional ideas of property, we are left in a world of land reform triage—insufficient principles on which to base the otherwise indispensable need for land redistribution and little guidance on how to implement this invaluable undertaking while upholding the idea of property. This theoretical gap is unsustainable given the urgencies faced by post-colonial governments to resolve critical issues of land distribution. It demands that our post-modern legal order begin to creatively structure an adaptive legal standard for land reform.

67 See, e.g. Ian Scoones et al., Zimbabwe’s Land Reform: Myths and Realities (2010) (reporting, based on research in one of the country’s six provinces, “impressive strides have been made in clearing the land, in purchasing livestock, equipment and transport and in building new settlements” and estimating that each household had invested over US$2000 in a variety of items in the period from settlement to 2008-09). See also, Klaus Deininger, Hans Hoogeveen and Bill Kinsey, Benefits and Costs of Land Reform in Zimbabwe with Implications for Southern Africa, OXFORD CENTER FOR THE STUDY OF AFRICAN ECONOMIES, available at http://www.csae.ox.ac.uk/conferences/2002-UPaGiSSA/papers/Hoogeveen-csa2002.pdf (finding that modest per-capita benefits have come from land reform). However, the Scoones et al. study of one small province of Zimbabwe concedes that the province is not representative of the high-veld regions of the country where commercial farming had its stronghold. There, commercial farming and export markets have collapsed. The Deininger, Hoogeveen & Kinsey report, published in 2002, could not possibly have had adequate data to provide an economic CBA of fast-track land reform in the country.
II. LAND REFORM & RIGHTS UNDER INTERNATIONAL LAW

Article 17 of the Universal Declaration of Human Rights (“UDHR”) explicitly protects the right to property. It states:

(1) Everyone has the right to own property alone as well as in association with others.
(2) No one shall be arbitrarily deprived of his property.68

It has been posited that the UDHR’s human right to own property is not a right to specific pieces of property but a general right to hold adequate property.69 Land is fundamental to the attainment or protection of a variety of other basic human rights such as the right to life.70 Therefore, although no international right to land is explicitly guaranteed in the international legal framework, there is a growing international norm recognizing that a post-colonial government’s sovereign right to redistribute land violates an international moral code on property rights when it fails to recognize the five elements articulated here.71

A. The (None-existent) Human Right to Land

The political documents that first articulated fundamental human rights, the U.S. Declaration of Independence and the French Declaration of the Rights of Man and Citizens were shaped by religious overtones.72 The U.S. Declaration of Independence claimed that “all Men...are


69 See Poul Wisborg, Are Land Rights Human Rights? Online debate on Human Rights Day -10th December 2011, available at http://landportal.info/content/are-land-rights-human-rights-online-debate-human-rights-day-10th-december-2011 (last visited July 19, 2012 (identifying the protection of land rights as governing the idea and the institutions of property); see also, Universal Declaration of Human Rights, supra note 68.


71 See supra Part II (provides details regarding the legal framework).

endowed by their Creator with certain inalienable rights.”  

The French Declaration made claim to certain “natural, inalienable, and sacred rights of man” that are enjoyed “under the auspices of the Supreme Being.”  

Indeed, religious justifications for human rights provide the basis for a universal morality, at least for societies of religious faith. Perhaps this is why it is nearly impossible to have a conversation on human rights without the word “dignity” marking and shaping the discussion.

The cornerstone of U.S. human rights law, which is set out in the American Declaration of the Rights and Duties of Man, acknowledges the dignity of the individual, and recognizes that, “the essential rights of man are not derived from the fact that he is a national of a certain State, but are based upon attributes of his human personality.” Without this focus on individual rights, the entire concept unravels at the hands of under-protective domestic norms and unbridled exercises of state sovereignty. Human rights principles operate to take unfettered power out of the hands of States in the universal recognition that certain basic entitlements are tied to human dignity, the access to which should not lie within the discretion of the political authority governing the individual. Today, human rights concepts have crystallized into law, creating binding obligations on governments despite the backdrop of Westphalia and sovereignty.

73 Id.
74 Id.
75 Id.
76 American Declaration of the Rights and Duties of Man, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (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.; see also, CHIGARA, supra note 2, at 206 (stating: “there is nothing more universal than human dignity” and describing the related “humanity” as the common denominator among people of all races and faiths.)
77 Sovereignty is an overarching and constantly lurking principle of international law. The Treaty of Westphalia in 1648 created a world of independent, individual States each governing a fixed territory, having jurisdiction over the people and things within its boundary, and providing the basic infrastructure for the benefit of its citizens. Since the 1400s, geopolitics have shifted the effects of sovereignty, but its core idea of self-determination remains undisturbed and is the basis of the rules governing international relations.
Yet, human rights law represents ideals over which conflicting groups will continue to struggle.78 On one hand, human rights activists and scholars push for a definition of human rights based on a broad and inclusive conception of what it means to be “human” and stress a wide range of moral claims to which humans are entitled.79 On the other hand, states, groups, and individuals who are resistant to a progressive human rights agenda commonly define humanity in more narrow and limited ways.80 Legal distinctions are made between fundamental human rights and other rights, with fundamental rights being perceived as elementary or supra-positive in that their validity is not dependent on their acceptance by the subjects of law, but which are the foundation of the international community.81

78 DELAET, supra note 72, at 14.

79 Id. Human rights systems are rife with decisions that have largely been ineffective on the ground. See, e.g., Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria). Case No. ACHPR/COMM/A044/1, available at http://www.umn.edu/humanrts/africa/comcases/allcases.html [hereinafter “SERAC v. Nigeria”] (holding that the Nigerian government had violated several provisions of the African Charter, a human rights treaty to which most African states are party). Despite being viewed as a sweeping victory for the right to a healthy environment, Africa continues to be an attractive option for the export of environmental toxins. The 2006 incident involving Dutch oil company Trafigura where dozens were killed and tens of thousands injured by toxic waste dumped off the coast of C’ote d’Ivoire is just one example of the weak impact of the SERAC decision on the behavior of African governments. Some of the reasons cited that hamper the effective operation of the human rights system in Africa include: (1) the apathy of State Parties towards fulfilling their obligations under the African Charter in terms of implementation of the Charter at a national level and the submission of periodic reports; (2) the non-observance of decisions rendered against Member States in Communications as well as general recommendations that have been made by the Commission; and (3) the absence of an enforcement mechanism to ensure compliance with the provisions of the Charter, as well as decisions taken by the Commission. Claire Martin, The African Charter on Human and Peoples’ Rights and the African Commission on Human and Peoples’ Rights, available at http://www.humanrightsinitiative.org/artres/african_commission_paper.pdf (last visited August 15, 2012).

80 DELAET, supra note 72, at 14.

81 THEO VAN BOVEN, DISTINGUISHING CRITERIA OF HUMAN RIGHTS, in The International Dimensions of Human Rights, Vol. 1, Karel Vasak and Alston, eds. 43 (1982) (contending the existence of very fundamental human rights, described, for example in international humanitarian law as that part of human rights law which does not permit any derogation even in time of armed conflict). The universal validity of VAN BOVEN’s “fundamental prescriptions” is emphasized by the language of Common Article 3 of the four 1949 Geneva Conventions, prohibiting violence to life and person, taking of hostages, outrages upon personal dignity, and extrajudicial sentences at any time and in any place whatsoever. Id.
Consequently, although the right to own a piece of land is not classified as a fundamental human right the international norms protecting human dignity underscore the existence of a legal standard for preservation of property rights under post-colonial land reform. The heart of these norms is procedural due process.

B. Procedure under Civil & Political Rights & Norms

The International Convention on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) embody the so-called first generation and second generation human rights respectively. A third generation of rights is a more recent development. A brief overview of the three evolutionary classes of human rights reveals that first generation, or civil and political (“CP”) rights, require governments to adopt a policy of post-colonial land redistribution to extend broad procedural protections to the group whose land is indentified for annexation.

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82 See International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter “ICCPR”]. Out of 196 countries in the world, 167 are party to the ICCPR, including Zimbabwe (ratification 1991). See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3 [hereinafter “ICESCR”]. According to Anton and Shelton, the United States and other Western states opposed the inclusion of economic, social, and cultural rights alongside civil and political rights in one treaty. Donald Anton and Dinah Shelton, Environmental Protection & Human Rights 231 (2011). These states argued “that economic, social, and cultural rights were, in essence, not rights at all but future goals dependent on the availability of resources. Id. (explaining the early bifurcation of the UDHR as a compromise which ensued that the U.S. central objection—that against the inclusion of an individual right of petition—was contained in a separate instrument and would apply only to civil and political rights); see also, Matthew Craven, The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development 8 (1998) (describing how Soviet States, on one hand, championed the cause of economic, social, and cultural rights, which they associated with the aims of the socialist society, while Western States, on the other hand, asserted the priority of civil and political rights as being the foundation of liberty and democracy in the “free world”).

83 See generally Prudence Taylor, From Environmental to Ecological Human Rights: A New Dynamic in International Law? 10 GEO. INT’L ENVTL. L. REV. 317 (1998) (describing a third option in the human right to environment approaches, which treats environmental quality as a collective or solidarity right, giving communities (“peoples”) rather than individuals a right to determine how their environment and natural resources should be protected and managed). This third generation of rights has been added to the discourse on the “splitting of human rights at birth,” and perceives, for example, the human right to the environment as being neither CP nor ESC, but rather a part of the corpus of “new human rights,” stand-alone rights that derive from a comprehensive norm directly related to environmental goods.
The ICCPR governs the protection of the human interest in bodily integrity, self-determination and human dignity. The enumerated rights under the ICCPR each stem from the idea of due process of law. Due process is therefore perceived as playing a significant role in fulfilling the universal need for human dignity. Access to the enumerated protection and procedure can be afforded all human beings with less intrusion on the sovereignty of states than a substantive obligation would impose. Therefore, like the Universal Declaration of Human Rights, the ICCPR presumes the universal applicability of the norms it articulates. The body of CP rights envisages a system in which individuals are accorded specific minimal procedural protections in the determination of their legal entitlements. It does not provide access to substantive entitlements, but where those entitlements are re-ordered by government, the CP norm triggers the state’s duty to align the procedural mechanism employed to universal principles articulated in the spirit and letter of the ICCPR.

Several of these CP rights are framed in absolute terms in the Covenant, which arises out of the fundamental nature of the protected rights. For example, Article 25 creates an obligation for

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84 These first generation rights are negative “freedoms from” rather than more positive “rights to.” See id., at 317-318. The preamble of the International Covenant for Civil and Political Rights declares:

- The States Parties to the present Covenant,
- Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
- Recognizing that these rights derive from the inherent dignity of the human person,…

ICCPR, supra note 82, Preamble. See also, Taylor, supra note 83, at 317-318 (explains that these civil and political rights derived from seventeenth and eighteenth century reformism and the political philosophy of liberal individualism and economic laissez-faire); ROBERT H. KAPP, SOME PRELIMINARY VIEWS ON THE RELATIONSHIP BETWEEN CIVIL AND POLITICAL RIGHTS AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE CONTEXT OF DEVELOPMENT AND ON THE RIGHT TO DEVELOPMENT 3 (1978) (Mimeo, The International Commission of Jurists, Geneva) (stating: “Civil and political rights are rooted in traditional Western sources. They have been associated with the eighteenth century and the French and American Revolutions. They can be traced back to the Magna Carta of 1215 and the thoughts of traditional Western philosophers.”).

85 HENRY J. STEINER, PHILIP ASTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 152 (2007).

86 See, e.g., supra note 82, art. 8(1) (“[n]o one shall be held in slavery”).
states to provide every citizen the right and the opportunity, “without any of the distinctions mentioned in article 2 and without unreasonable restrictions to take part in the conduct of public affairs, *inter alia*.”

The International Covenant on Economic, Social and Cultural Rights (“ICESCR”) embodies *second generation* rights. Scholars have characterized economic, social, and cultural rights as “programmatic and promotional.” According to Anton and Shelton, despite the fact that within the U.N. there is an almost universal acceptance of the theoretical “indivisible and interdependent” nature of the two sets of human rights, the reality in practice is that economic, social, and cultural (“ESC”) rights remain largely ignored. Craven attributed this perceptual inferiority of ESC rights on two assertions: (1) that human rights come from a natural law pedigree rooted in the concern for individual autonomy and freedom, interests already protected by CP rights and not promoted by ESC rights, and (2) that ESC rights “lack the essential characteristics of universality and absoluteness which are the hallmarks of human rights” such that this category of rights only debilitates, muddies and obscures the true essence of human rights.

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87 Article 2 identifies, not to the exclusion of other possibilities, the following distinctions: race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. *See id.*, art. 2, part 1. *Id.* art. 25.

88 *See Ian Brownlie, Principles of Public International Law* 539 (2003) (suggesting that the attainment of the standards set by the Economic, Social, and Cultural Covenant involves effort over time); *see also*, General Comment No. 3 of the Committee on Economic, Social, & Cultural Rights, U.N. Doc. HRI/GEN/1/Rev.6 (May 12, 2003) (stating that while the ICESCR provides for progressive realization and acknowledges the constraints due to the limits of available resources, it imposes various obligations that which are of immediate effect). The Committee specifically points to the following State obligations under the covenant: the “undertaking to guarantee” that relevant rights “will be exercised without discrimination” and the article 2(1) undertaking “to take steps,” which itself is not qualified or limited by other considerations. *Id.*

89 *Craven, supra* note 82, at 8.

90 *See id.*
The ESC body of international human rights differs in substance from CP rights and meets greater opposition from individual states because of its deeper interface with issues that, even in a world governed by the Universal Declaration of Human Rights, are traditionally seen as domestic prerogatives. For a flavor of the types of rights guaranteed under the ICESC, see articles 6, 91, 92, 93, 94, 95, 96, 97, 98, and 14.

Specific rights to land as property have been left out of all major treaties. This is not surprising, given that land is such a central aspect of sovereignty that it is even part of the definition of the nation-state. Land law is generally an issue over which States exercise full

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91 The right to work.

92 The right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

93 The right to form trade unions and to strike.

94 The right of everyone to social security.

95 Family-type rights (right to marry, assistance to families, paid maternity leave)

96 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.”

97 The “fundamental right of everyone to be free from hunger.”

98 The right to the “enjoyment of the highest attainable standard of physical and mental health.”

99 The right to education.

100 See Malcolm Nathan Shaw, International Law 178 (2003) (stating that Article 1 of the Montevideo Convention on Rights and Duties of States, 1933 lays down the most widely accepted formulation of the criteria of statehood in international law). It notes that the state as an international person should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states. See also, Nandasiri Jasentuliyana, ed., Perspectives on International Law 20 (1995) (stating that the traditional definitions provided for in the Montevideo Convention remain generally accepted as applied to states).
territorial sovereignty. Nevertheless, the ICCPR and the ICESC impose procedural and substantive minima States may not ignore in recognition of their obligations under international law. Specifically the ICCPR guarantees everyone, including holders of land seized under a land redistribution policy, the right to an effective remedy, even against State actors, the right to a judicial remedy, and the right of the individual to retain enough property for an adequate standard of living. Derogation from ICCPR obligations is permitted under very narrow circumstances characterized by public emergency.

Despite the fact that primary human rights instruments avoid directly addressing property rights concerning land, other sources of international law take the subject head-on, but only for the protection of a very narrow group of people. These international instruments are instructive for the identification of the elements of a legal standard for land reform because they are an example of instances where international law has breached the barrier erected by sovereignty over domestic affairs as traditional as land issues. Explicit rights to land have been developed in two areas of international human rights law, the rights of indigenous peoples and the rights of women. These instruments suggest a growing willingness of sovereign states to cede absolute

101 See JOHN W. BRUCE ET AL., LAND LAW REFORM: ACHIEVING DEVELOPMENT POLICY OBJECTIVES, THE WORLD BANK 15 (2006) (stating that property rights in land are, under international law, largely the business of national state). A state has the right to establish its own property system so long as it is not repugnant to international law. Id.

102 ICCPR, supra note 82, art. 2.3(a) and (b) and ICESCR, supra note 82, art. 11 (protecting the right 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”).

103 See ICCPR, supra note 82, at art. 4:

“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

VAN BOVEN, supra note 81 (and accompanying text); and infra note 177 (and accompanying text).

104 Land rights have been more fully developed in the sphere of indigenous rights. Women’s rights are recognized by several international documents, primarily the Universal Declaration of Human Rights (Articles 17 and 25);
control of at least some issues of property law and policy, and also point to the universal importance of both *access* and *tenure*.

**C. Explicitly Recognized Land Rights**

The International Labor Organization Convention 169 on Indigenous and Tribal Peoples (“Convention 169”) is the only legally binding international instrument related to the rights of indigenous peoples.\(^{105}\) Convention 169 establishes the right of indigenous peoples in independent countries to “exercise control, to the extent possible, over their own economic, social and cultural development” in a number of areas.\(^{106}\) It includes a section on land and requires States Parties to identify lands traditionally occupied by indigenous peoples and guarantee ownership and protection rights.\(^{107}\) In essence, the “measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.”\(^{108}\)

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(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

\(^{106}\) *Id.* art. 1. This definition, on its face, would bar a claim by a White Zimbabwean farmer, particularly by the language in subsection 2 which casts the colonizer in the role of aggressor and fails to envisage the modern day “tables-turned” unleashing of rights violations against populations who historically held the power.

\(^{107}\) *See id.*, art. 14.

\(^{108}\) *Id.*
Convention 169 also requires the provision of legal procedures to resolve land claims, establishes rights over natural resources, and protects against forced removal.\textsuperscript{109} To date, Convention 169 has only been ratified by 20 States, most of them in Latin America.\textsuperscript{110}

A second explicit articulation of land rights was generated under the UN framework and garners much wider support than Convention 169, but it is not a legally binding instrument.\textsuperscript{111} The UN Declaration on the Rights of Indigenous Peoples (“UNDRIP”) states that “indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”\textsuperscript{112} Indigenous people have a right to own and develop resources on their land, a “right to redress . . . for the lands, territories and resources which they have traditionally owned or otherwise occupied or used and which have been confiscated, taken, occupied, used or damaged.”\textsuperscript{113} The Declaration confirms similar principles to those contained in Convention 169. Both the Convention and the Declaration emphasize consultation, participation and free, prior, and informed consent where government policy affects lands occupied by indigenous peoples.\textsuperscript{114}

\textsuperscript{109} Id.

\textsuperscript{110} Convention 169, supra note 105 (and accompanying text).

\textsuperscript{111} Despite their lack of legal force, the species of agreements termed Declarations under the UN framework create an important source of international law that scholars have classified as “soft law.” Soft law, as the term suggests, is not legally enforceable but is important for its potential to develop into international norms and generate consensus around binding agreements.


\textsuperscript{113} Id. art. 26(2). See id., art. 28.

\textsuperscript{114} See id., art. 10, 28, 29, 32 and Convention 169, supra note 105, art. 6 (requiring governments to consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly).
Implicit in both laws governing the land rights of indigenous peoples is the underlying notion that human rights law comes to the aid of those who are defenseless to reform or redefine land property rights in the face of State power. The narrow application of Convention 169 and UNDRIP merely mirrors the fact that this power imbalance between government and individuals (or groups) has historically applied to poor, displaced people with deep historical connections to the geographic location from which they are expelled. Modern cases of government altering the idea of property through land reform call for the same body of law, human rights law, to protect the excesses of land reform. While it can be agreed upon that land rights are not in themselves human rights, lacking the inalienability of self-determination or the fundamental nature of bodily integrity, it is within human rights norms that the core elements defining what property rights remain under a legally sound post-colonial land reform policy are found.

D. The Idea of Property in Human Rights Jurisprudence

On May 27, 2002 the African Commission on Human Rights and Peoples’ Rights (“African Commission”) became the first human rights adjudicatory organ to find the existence of a sweeping “human right to a healthy environment.” By broadly interpreting Article 24 of the African Charter on Human and Peoples’ Rights (“African Charter”) in SERAC v. Nigeria, the Commission seemed to herald a new era in the liberalization of human rights. It has been described as a sweeping decision on the duties of African states to ensure respect for economic, social and cultural rights. At the time that SERAC v. Nigeria was passed, there was high optimism that the decision offered a “blueprint for merging environmental protection, economic


development, and guarantee of human rights.” 117 But most importantly, the African Commission’s SERAC decision suggested a liberal interpretation of the rights protected under the African Charter, opening the door to the possibility of clothing other rights under the charter with broad protection under regional and international law. Article 14 of the same Charter directly protects a human right to property, except under very specific circumstances. 118

The African Commission on Human Rights has spoken in a specific way in two cases invoking land interests in the context of human rights, but none concerning human rights in the context of land redistribution. 119 Endorois v. Kenya is of paramount importance in understanding how strong the conflict is between human rights and public policies that alter property rights in land. In that case, the African Commission ruled on a complaint filed by the Center for Minority Rights Development (“CEMIRIDE”) and others, on behalf of the Endorois community. 120 The complaint alleged that the Government of Kenya violated the African Charter, the constitution of Kenya and international law by forcibly removing the Endorois from their ancestral lands around Lake Bogoria and other areas without prior consultation and without adequate or effective

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117 Id. at 942.

118 Article 14 of the Banjul (African) Charter states:
“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”
Banjul Charter, supra note 115, art. 24.


120 The African Commission on Human and Peoples’ Rights was the judicial enforcement mechanism under the African Charter up until 2010. It accepted “Communications” from plaintiffs alleging violations of the human rights Charter, conveyed the Communication to the defendant Government, giving the Government an opportunity to address the alleged violation, and ultimately admitting the communication where it found that the defendant Government had ample opportunity to address the charge and had failed to do so. In this case, the Commission ruled the complaint admissible under the African Charter, citing the Kenyan government’s lack of cooperation with the procedural mechanisms set up by the African Charter. See Endorois v. Kenya, supra note 119, at para. 60. The Endorois are a community of approximately 60,000 people, indigenous to Kenya, who for centuries have lived in the Lake Bogoria area.
compensation. The plaintiffs alleged that the displacement disrupted their community’s pastoral enterprise, disrupting their primary economic livelihood and prevented them from practicing their religion and culture. They sought a declaration by the African Commission that the Republic of Kenya was in violation of Articles 8, 14, 17, 21, and 22 of the African Charter. The plaintiffs demanded (1) restitution of their land, with legal title and clear demarcation, and (2) compensation to the community for all the losses suffered through the loss of property, development and natural resources, as well as the loss of freedom to practice their religion and culture.

The Kenyan government argued that the land on which the Endorois lived was designated as Trust Land. Further, under the Kenyan Constitution, Trust Lands could be alienated or set apart as government land for government or private purposes, extinguishing any interests previously vested in any tribe, group, family or individual under African customary law.

Human rights courts have consistently considered land to be “property” for the purposes of the underlying textual guarantees. International law observes the principle that even where

121 Endorois, supra note 119, para. 1-2.

122 Id., para. 2.

123 Article 8 of the African Charter guarantees the right to practice religion. Banjul Charter, supra note 115, art. 8. Article 14 of the Charter guarantees the right to property. Id. at art. 14. Article 17(2) guarantees the right to “freely take part in the cultural life” of one’s community. Id. art. 17(2). Article 21 protects the right to free disposition of natural resources, stating: “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.” Id. art. 21.

124 Endorois, supra note 119, para. 175.

125 Id. para. 175-176.

126 See Malawi African Association and Others v. Mauritania, African Commission on Human Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98 (2000), para. 128 (2001) (holding: “The confiscation and looting of the property of black Mauritians and the expropriation or destruction of their land and houses before forcing them to go abroad constitute a violation of the right to property as guaranteed in article 14”); see also, Dogan and Others v. Turkey, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004),
plaintiffs (Applicants or Communicants under the African system) cannot demonstrate registered title to the lands from which they are forcibly evicted: “the notion of possessions has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interest constituting assets can also be regarded as ‘property rights’, and thus as ‘possessions’.” The African Commission relied on its own jurisprudence and on international case law to decide the conflict.

The threshold question that needs to be addressed before determining the violations, if any, is whether the Endorois had a property right in the land around Lake Bogoria. The Endorois argued that they have always been the bona fide owners of the land around Lake Bogoria, contending that as a pastoralist community, their concept of “ownership” has not been one of paper, but one where the Endorois land belongs to the entire community as a whole. The Kenyan government argued against giving the Endorois title to their ancestral lands, preferring

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127 See Dogan and Others, supra note 126 (defining the word “possessions” in Article 1 of the Protocol to the European Convention to include the homes of the displaced villagers). Article 1 of the Protocol to the European Convention states:

“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 the law and by the general principles of international law.”


128 Endorois, supra note 119, para. 186.

129 Id. at para. 72. This argument by the Endorois is not novel. Land tenure under African customary law was rarely written down as a codification of rights or title, but was nevertheless understood through mutual recognition and respect between landowners. In fact, land transactions only took place by way of conquest. Id. para. 87; see also, supra notes 42-45 and accompanying text (discussing customary traditions defining the idea of property for African and Latin American societies.).
instead to give them “access” to ceremonial sites for their religious practices.\textsuperscript{130} Despite the existence of a State’s right to autonomously determine its development trajectory under the same African Charter, a right which the Kenyan government argued was supported by the removal of the Endorois to promote revenue-generating tourism in the area.\textsuperscript{131} The African Commission condemned the conduct of the government, finding that giving the Endorois restricted access to their territory fell below internationally recognized norms.

The African Commission pointed to Articles 26 and 27 of the UN Declaration on Indigenous Peoples to stress that indigenous peoples have a recognized claim of ownership, not just access, to ancestral lands under international law, even in the absence of official title deeds.\textsuperscript{132} The Commissions held that the traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title and entitles them to demand official registration of property title.\textsuperscript{133} Further, those Endorois who had been forced to leave against their will did

\textsuperscript{130} Endorois, supra note 119, para. 206.

\textsuperscript{131} See Banjul Charter, supra note 115, at art. 22.

\textsuperscript{132} Endorois, supra note 119, para. 207, citing The Mayagna (Sumo) Awas Tingni v. Nicaragua, IACtHR (2001), paras. 140(b) and 151 (stating that possession of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property). The UN Working Group on Indigenous Populations offers a definition of indigenous peoples:

[1]Indigenous peoples are… those which, having a historical continuity, with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.


\textsuperscript{133} Endorois, supra note 119, para. 209.
not lose title to those lands by virtue of having left, unless those lands had since been transferred to innocent third parties.134

But the Commission did not base its decision solely on international laws pertaining to indigenous rights. Of specific import to the broader notion of property rights in the context of land reform is the Commission’s reliance on Articles 14 and 21 of the Charter. Article 14 provides:

The individual right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.135

Article 21 provides:

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.136

The Commission clarified that it is not the encroachment itself that creates a violation of Article 14 of the African Charter.137 The right to property under Article 14 consists of an obligation on states to respect the “right to property” as well as protect that right.138 The Commission applied a two prong test extracted from the language of the provision. Under Article 14, an encroachment can only be conducted: (1) in the interest of public need or in the general interest of the

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134 According to the holding, possession is not a requisite condition for the existence of indigenous land restitution rights. See id., para. 209.

135 See infra note 136 and accompanying text (explaining the distinction between individual and “peoples’ rights under the Banjul Charter). Banjul Charter, supra note 115, art. 14.

136 Even though the traditional international trajectory of human rights law has focused on the individual, the African Charter is divided into two broad categories of rights: individual human rights, and rights that can be claimed collectively, or “peoples’ rights.” Articles 20, 21, 22, 23, and 14 provide for peoples to retain rights collectively. See SERAC v. Nigeria, supra note 79, para. 40 (“the importance of community and collective identity in African culture is recognized throughout the African Charter”). Banjul Charter, supra note 115, art. 21.

137 Endorois, supra note 119, para. 211.

138 Id., para. 191.
community, and (2) in accordance with appropriate laws. The test laid out in Article 14 is conjunctive.

The Commission declared that domestic law alone did not suffice to prescribe the right to property. Accordingly, the Commission scrutinized the actions of the Kenyan government in light of standards and principles of international law. Relying on the Saramaka case, a recent landmark ruling by the Inter-American Court for Human Rights regarding the right of tribal and indigenous people in the Americas to control the exploitation of natural resources in their territories, the African Commission explained that the “in accordance with the provisions of appropriate law” requirement under the African right to property required inquiry into: (1) effective participation; (2) compensation; and (3) prior environmental and social impact assessment.

Finding that the Kenyan government had failed to sufficiently accord any of the three elements to the Endorois expropriation, the Commission held that the Kenyan government was in violation of the Endorois’ right to property.

The Commission also elaborated on the notion of “public interest,” stating that this part of the test is met with a much higher threshold in the case of encroachment of indigenous land, as opposed to individual private property. The Commission found support for its position in General Comment No. 4 of the Committee on Economic, Social and Cultural Rights states that “instances of forced eviction are prima facie incompatible with the requirements of the ICESC

139 Id.
140 See Case of the Saramaka People v. Suriname, IACtHR, Judgment of August 12, 2008 (upholding the right of the Saramaka people to refuse access to logging operations on their native lands).
141 Id. para. 212 (“the [public interest] test is more stringent when applied to ancestral land rights of indigenous peoples”); see also, Nazila Ghanea and Alexandra Xanthaki, eds. Indigenous Peoples’ Right to Land and Natural Resources in Erica-Irene Daes, MINORITIES, PEOPLES AND SELF-DETERMINATION (2005) (“Limitations, if any, on the right to indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state”).
Covenant and can only be justified in the most exceptional circumstances, and in accordance with relevant principles of international law.” The clarity of the encroachment rule now positions us to extract from the corpus of international and regional human rights law those elements of the notion of property that must infuse any post-colonial land redistribution program.

III. **Core Elements of the Land Reform Formula**

Five legal principles can be extracted from the preceding section, which together form the minimum standards under international law for post-colonial land redistribution. These elements are universal principles linking the right to land (as property) to broader principles of international law. Under this legal standard, post-colonial land reform: (1) is based on the existence and articulation of a legitimate public emergency; (2) is authorized and carried out in accordance with both domestic and international law; (3) exercises proportionality in its implementation; (4) makes available a non-discriminatory right to own land under the new system; and (5) pays compensation at independently determined market value where the other elements are breached. The following section explores these elements in depth.

**A. Existence and Articulation of Public Emergency Creating Legitimacy**

An indispensable component of the land reform formula is that government proceeds on the basis of a legitimate public need for land reform. Because land reform through expropriation is an extreme measure confronting many civil and political rights, a land reform program can only be legal under international law if conditions in the post-colonial states qualify as a public emergency which “threatens the life of the nation.”

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The land imbalance in Zimbabwe was stark enough to set aside debates on the necessity of land reform. Landlessness, especially where it is an insurmountable economic barrier in the absence of reform policy, can be considered a public emergency. Therefore, when executed to avert urgent economic and social crises, land reform is designed to empower previously land-less people by giving them access to land, a primary natural resource and the hallmark of agrarian economies. Under the land reform formula for post-colonial states, governments have an obligation to articulate a legitimate public interest before any program of redistribution is implemented. That public need must rise to the level of a threat to the economic or social well-being of the State.

B. The “In Accordance with the Law” Test

A land reform program which adheres to principles of international law is designed and implemented in accordance with law, that is, with respect for the rule of law. In Endorois v. Kenya, the African Commission emphasized the conjunctive nature of the inquiry into whether the human right to property had been violated. The African Commission explained that under this analysis, the dispossession of land must satisfy both domestic and international law.

That the African right to property in Endorois was supported by the ruling of the Inter-American Court of Human Rights in Saramaka bolsters the universal reach of the notion that land expropriation must be designed and implemented in accordance international norms on

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143 See supra notes 14-18 and accompanying text (describing the salient purposes of land reform in modern-day post-colonial nations to reduce poverty and decrease economic disparities).

144 See CHIGARA, supra note 2, at 213 (2004) (arguing that land reform policies that ignore the requirement of the principle of the rule of law cannot be regarded as legitimate and efficient strategies for the resolution of the issue of inequitable land distribution in the SADC).

145 Endorois, supra note 119, para. 219 (stating that the Kenyan government bore the burden of demonstrating that the removal satisfied both international and Kenyan law).

146 Id.
effective participation, compensation and prior environmental and social impact assessment.\textsuperscript{147} In the absence of these formal mechanisms, the substance of rule of law is lost. In essence, land reform may be governed entirely by domestic laws as long as that law embodies the three core elements that human rights precedent agrees enshrines lawful expropriation.\textsuperscript{148}

\textit{C. Proportionality \& Minimal Restrictiveness of Policy}

Both African and European jurisprudence restricts the range of permissible State conduct which interferes with the right to property. In addition to the requirements that government have a legitimate public purpose and that the expropriation be carried out in accordance with appropriate domestic and international law, \textit{Endorois} held that limitations placed by government on the human right to property must be reviewed under the principle of proportionality. Under this requirement, limitations on rights to property must be proportionate to a legitimate need, and should be the least restrictive measures possible.\textsuperscript{149} Principles of proportionality require that a land reform platform allow incumbent landowners to retain that portion of land that supports a family and allows them to be self-sufficient.

Not limiting the discussion to indigenous peoples, the Commission cited its own decision in \textit{Constitutional Rights Project Case 1999}: “the justification of limitations must be strictly

\textsuperscript{147} See \textit{Endorois, supra} note 119; \textit{Saramaka, supra} note 140. The compensation requirement is the only one of the three that is probably directly applicable only in the case of expropriation of land from indigenous peoples. In the case of land redistribution to transfer land concentrated in a relatively few hands to previously disenfranchised groups, the right to compensation under this land reform standard is only triggered where the expropriation is not carried out consistently with (1) a legitimate public purpose; (2) in accordance with domestic and applicable international norms; (3) proportionality; and (4) non-discriminatory design. \textit{See infra} Part IV. E.

\textsuperscript{148} See \textit{id.} (explaining the more nuanced right to compensation under the land reform standard proposed here, unlike the right to compensation derived from the human right to property by both the Inter-American Court and the African Commission in \textit{Saramaka} and \textit{Endorois} respectively).

\textsuperscript{149} \textit{Endorois, supra} note 119, para. 214 (finding that in pursuit of creating a Game Reserve, the Republic of Kenya had unlawfully evicted the Endorois, an act disproportionate to any public need served by the Game Reserve.)
proportionate with, and absolutely necessary for, the advantages which follow."\textsuperscript{150} The outer bounds of the rule of proportionality are that "a limitation may not erode a right such that the right itself becomes illusory" and eviction violates the very essence of the right.\textsuperscript{151}

The international norm of proportionality in the human rights context has been defined by the European Court of Human Rights as requiring that any condition or restriction imposed upon a right [under the European Convention on Human Rights] be "proportionate to the legitimate aim pursued."\textsuperscript{152} Although proportionality is most readily identified in the realm of international law on the use of force, proportionality is also a central theme of international law in the context of civil and political rights.\textsuperscript{153} The derogation clause illustrates this principle, restricting State actions that depart from protecting CP rights only to the "extent strictly required by the exigencies of the situation."\textsuperscript{154} Therefore, the international legal instruments and human rights cases only support land reform that is designed and implemented to achieve its legitimate public purpose of ending entrenched barriers to land ownership while minimizing the adverse economic, social and environment impacts of the policy.

The outright dispossession of land simply replaces the old color bar system with a new layer of disenfranchisement. Further, under no set of hypothetical scenarios can physical violence and


\textsuperscript{151} Id. para. 215. Although eviction was held to violate the essence of the right to property in Constitutional Rights Project v. Nigeria, eviction is not per se a violation of human rights. In the context of land reform, eviction may be a necessary tool where current land-holders resist land reform, but the eviction process itself is subject to the proportionality principle and must be accompanied by due process mechanisms to protect the rights of the parties being evicted.

\textsuperscript{152} Handyside v. United Kingdom, European Court of Human Rights, No. 5493/72, Series A.24 (7 Dec. 1976), para. 49.


\textsuperscript{154} See supra note 103 and accompanying text.
force be deemed a legally permissible platform for land expropriation, and where the appropriate laws and procedures are being followed, resistance to expropriation should be treated through the justice system, the appropriate civil and political rights being protected.

D. Eradication of Discriminatory Property Right Allocation from Reform Policy

Citizens of the post-colonial country, barring other non-discriminatory impediments, should be given the same opportunity to own land under the new system. Conceptual loopholes in existing human rights law expose the individuals and entities subject to land annexation to discriminatory treatment. Yet a land reform program that excludes certain groups from obtaining title to land or enjoying the same types of property rights available to the direct beneficiaries of the reform simply perpetuates systems of disenfranchisement and violates the anti-discrimination principles of the ICCPR, the ICECSR, and other treaties which collectively form a clear universal norm against discrimination.\(^\text{155}\)

The victory of the Endorois under the African regional human rights system is a reinforcement of the focus of land rights on the poor to the exclusion of the rich. Yet, human rights are not for the poor, nor for the rich, but for everyone. The fact that the land rights of ‘the poor,’ or the disenfranchised in parts of the world like Lake Bogoria in Kenya, draw our sentiments more easily that others deserve special protection as human rights, while our knee-jerk reaction is to find the idea of preserving property rights in people who benefitted from colonization impalpable misconstrues the idea of human rights.\(^\text{156}\)


E. Compensation Where Elements are Breached

The notion of compensation for injury is well established under international law, but ideas about its role in land redistribution are less converging.\textsuperscript{157} Having determined that the Endorois owned the land and thus had a protected right to own the land under international and African human rights law and under general principles of international law, the Commission proceeded to determine the remedy. Article 14 provides that in the case of dispossession the victims have the right to the lawful recovery of its property as well as to an adequate compensation.\textsuperscript{158} The Republic of Kenya also argued that the displaced Endorois had been compensated.\textsuperscript{159} The Commission held that Endorois who had been forced off the land were entitled to either restitution or to obtain other lands of equal extension and quality.\textsuperscript{160}

From a practical standpoint, land redistribution is unlikely to be attainable on the scale required to reverse urgent needs for land reform if it demands compensation at market value for all land acquired for redistribution. But there is also a legal dimension: the ICCPR derogation clause suggests that such compensation is not mandated under international law.\textsuperscript{161} Where a public need for land reform rises to the level of threatening the life of a nation, the notion of compensation at market value cannot stand in the way of a State’s power, indeed the obligation,

\footnotesize\textsuperscript{157} See American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143 (also known as the Pact of San Jose), art. 63(1). “[If] the Court finds that there has been a violation of a right or freedom protected by the Convention, the Court shall rules that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.” \textit{Id.}

\footnotesize\textsuperscript{158} Banjul Charter, \textit{supra} note 115, art. 21.

\footnotesize\textsuperscript{159} Payments to the tune of £30 had been disbursed to a relatively small portion of the dispossessed families.

\footnotesize\textsuperscript{160} This is equivalent to the notion of specific performance, as it would require the Kenyan government to bring the Endorois back onto their land, with full legal title to it. \textit{Endorois, supra} note 119, para. 209.

\footnotesize\textsuperscript{161} See \textit{supra} note 103 (and accompanying text).
to address land pressure. Instead, compensation should be viewed as a penalty government must pay to incumbent landowners if its land reform policy breaches any of the preceding four procedural and substantive elements.

**CONCLUSION**

Land reform has become too critical an issue in post-colonial countries and the use of power by governments to alter property rights consistent with international law must be addressed. This article proposes a legal standard, rooted in human rights law, for post-colonial land reform. The elements of right to property in the post-colonial context are drawn from universally accepted principles, particularly the human right to government process under the ICCPR and the jurisprudence of human rights courts defining the right to property.

The legal standard for land reform proposed here demonstrates that human rights *can* co-exist with the recognition of the need for land redistribution to correct the land ownership imbalances that for many post-colonial countries remains an unresolved, simmering issue of contention. The land right is not synonymous with the basic human right, because the need for land lacks the characteristic universality of fundamental human rights. Rather, the land right that *is* protected under international law within the complicated framework of post-colonial land redistribution is the right of the incumbent to retain enough land for his subsistence and that of his family. This is the substantive portion of the notion of property in the land reform context. Further, for annexation and redistribution to be lawful under international law, the policy must: (1) be based on the existence and articulation of a legitimate public emergency; (2) be authorized and carried out in accordance with both domestic and international law; (3) exercise proportionality in its implementation; (4) make available a non-discriminatory right to own land.
under the new system; and (5) pay compensation at independently determined market value where the other elements are breached.

Classical theories and customary practices defining the concept of property are ill-suited to the modern-day need to justify and implement land redistribution. The clash between the dominant theories upon which property law is founded and the transfer of land by government from the land-wealthy to the landless requires a new comprehensive way of looking at property—one that is founded on universal principles that apply to individuals and groups regardless of their race or status. In a world where many post-colonial governments are grappling with serious issues of land pressure, the absence of definitive international law on land reform is untenable. This proposed legal standard for land reform takes from established international norms to provide a substantive and procedural minimum that perhaps post-colonial governments, in their assertions of sovereignty, will consider seriously in formulating much-needed land redistribution.