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Property as a Natural Institution: The Separation of Property from Sovereignty in International Law

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PROPERTY AS A NATURAL INSTITUTION: THE SEPARATION OF PROPERTY FROM SOVEREIGNTY IN INTERNATIONAL LAW

L. BENJAMIN EDERINGTON*

An independent individual, whether he been driven from his country, or has legally quitted it of his own accord, may settle in a country which he finds without an owner, and there possess an independent domain. Whoever would afterwards make himself master of the entire country, could not do it with justice without respecting the rights and independence of this person.

—EMMERICH VATTTEL, *THE LAW OF NATIONS* bk. 2, ch. 7, § 96, at 170 (1797).

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I. INTRODUCTION

Private property has always enjoyed a unique sanctity under modern international law. Unlike other "human rights," which have received tentative and hesitant protection, both customary and conventional international practice have repeatedly asserted the sanctity of private property.

This particularly has been the case since the end of the Cold War and the dissolution of the Soviet Union. For example, in November 1990, the Conference on Security and Co-operation in Europe (CSCE) adopted the Charter of Paris, which designates the right "to own property . . . and to exercise individual enterprise" as one of the most fundamental of human rights.¹ This concern with private property rights, however, is hardly unique to the 1990s.

In fact, the protection of private property from state interference has been one of the most pronounced themes throughout the history of modern international law since its inception in the seventeenth century. One could even argue, in light of the emphasis that early international publicists such as Hugo Grotius and Samuel Pufendorf placed on safeguarding private property from the ravages of war, that modern international law developed for the express purpose of pro-

1. Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 190, 194 (1991). Such an unconditional pronouncement was unimaginable during most of this century when international law, influenced by modern Statist ideologies, qualified that an individual's right to private property "shall not, however, in any way impair the right of a State to . . . control the use of property in accordance with the general interest." Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 1, 213 U.N.T.S. 262.

Elaborate legal structures created to resolve property disputes in the aftermath of both the Bosnian and Gulf Wars provide recent evidence of this concern with private property rights. *See, e.g.*, General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, 35 I.L.M. 75; Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687, May 2, 1991, 30 I.L.M. 1706 (establishing the United Nations Compensation Committee).

protecting private property rights from state interference.

This article will consider three analogous bodies of law which reflect this general respect afforded private property under international law: the recognition of private property in *terra nullius*, the preservation of property rights after changes in sovereignty, and the protection of property rights during military occupation.²

All three fields embody a common theme—that property rights are fundamentally independent of state sovereignty and, hence, changes in (or even the complete absence of) sovereignty or government do not affect them. The recognition of property rights in *terra nullius* (i.e., land that belongs to no state) is the paradigmatic example of this idea. A few contemporary commentators—imbued with the modern image of property as the creation of municipal law—question the ability of private parties to establish property rights in *terra nullius*.³ Despite the absence of a state sovereign to give legal sanction to these rights, customary practice nonetheless has repeatedly recog-

2. See Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687, *supra* note 1. See generally Case Concerning the Factory at Chorzów, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13); 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 317-18 & n.1 (Hersch Lauterpacht ed., 6th ed. 1947) (providing extensive citation to principal cases and treatises on the subject); 8 MARJORIE WHITEMAN, DIGEST OF INTERNATIONAL LAW § 25, at 1020-185 (1967). Another example—probably more familiar to most readers—of the general respect afforded private property under international law is the set of rules restricting a state's ability to expropriate property held by foreign nationals, in particular, the obligation to provide compensation. Of course, as international law has expanded beyond its Western juridical foundations, non-Western developing countries, in particular, have heavily criticized this rule. See, e.g., Brice M. Clagett & Daniel B. Poneman, *The Treatment of Economic Injury to Aliens in the Revised Restatement of Foreign Relations Law*, 22 INT'L LAW. 35 (1988) (recounting the internal debates within the American Law Institute on this issue).

Yet another (more obscure) illustration of the privileged status of private property involves the doctrine of prescriptive title. At least one scholar has argued that concern for the protection of vested private property rights motivated the formation of this doctrine. See MARK F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 179 (1926) ("Ce principe trouve une application toute particulière lorsqu'il s'agit d'intérêts privés, qui, une fois mis en souffrance, ne sauraient être sauvegardés d'une manière efficace même par des sacrifices quelconques de l'État auquel appartiennent les intéressés.") (quoting Norway-Sweden Maritime Boundary Arbitration, 102 S.P. 947 (1909)).

3. See, e.g., 1 OPPENHEIM, *supra* note 2, at 507; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 164-65 (1966).

nized private property rights in *terra nullius*.

The laws governing both state succession and military occupation evince the same conviction that private property is fundamentally distinct from state sovereignty. Thus, among the rather murky body of rules governing state succession, the only doctrine that states have consistently recognized as legally obligatory is the doctrine of acquired rights. This doctrine states that although "[t]he people change their allegiance [and] their relation to their ancient sovereign is dissolved[,] their relations to each other, and their rights of property, remain undisturbed."⁴ Similarly, the rules governing military occupation mandate that, although an occupant may exercise some of the sovereign powers of the conquered state, "[i]mmovable private enemy property may under no circumstances or conditions be appropriated."⁵

The common theme of these three bodies of law—divorcing the right to property from state sovereignty—reflects the influence of a powerful theory of property in Western jurisprudence: the "natural right" image of property as a pre-political, natural institution.

A. PROPERTY AS A NATURAL INSTITUTION

As the epigraph from Emmerich Vattel's classic treatise, *The Law of Nations*,⁶ illustrates, international law historically has been inclined to this notion of private property as a fundamental, primeval institution that exists independent of state sovereignty. According to this theory, the state does not create property rights. Rather, the state, itself, is a creation, formed to preserve pre-existing property rights. This natural right theory of property has been one of the most influential views of property in Western legal jurisprudence.⁷

John Locke is one of the most influential exponents of this theory.

4. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 87 (1833).

5. 2 LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 403 (Hersch Lauterpacht ed., 7th ed. 1948).

6. Emmerich Vattel, *The Law of Nations* (1797).

7. See generally RICHARD SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* (1951) (providing an interesting history of various theories of private property in Western political philosophy); LAWRENCE C. BECKER, *PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS* (1977); ALAN CARTER, *THE PHILOSOPHICAL FOUNDATIONS OF PROPERTY RIGHTS* (1989); C.B. MACPHERSON, *PROPERTY, MAINSTREAM AND CRITICAL POSITIONS* (1978).

His conceptualization presents property as a natural, pre-political institution that the individual creates through the investment of labour:

[E]very Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.⁸

"Thus Labour," and not the state or the law, "in the Beginning, gave a Right of Property."⁹

The state, by contrast, is not grounded in nature. It is formed by the agreements of man. Because property in the state of nature is insecure, people unite to form a government whose principal purpose is to protect their property rights.¹⁰ The result, according to Locke, is that property is immune to governmental interference. "The *Supream Power cannot take* from any Man any part of his *Property* without his own consent. For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should *have Property*."¹¹

The essence of Locke's theory, therefore, is to divorce the right to property from the state. By asserting that "property is natural, that the right to property is a natural right, and that private ownership is an institution, not of man, but of nature," Locke insulates property rights from changes in the state.¹² "Political institutions, founded on the artificial agreements and conventions of men, may be remade

8. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* bk. 2, ch. 5, § 27, at 305-06 (Peter Laslett ed., Cambridge Univ. Press, 2d ed. 1960) (1690).

9. *Id.* bk. 2, ch. 5, § 45, at 317; see also *id.* bk. 2, ch. 5, § 30, at 307 ("[A]mongst those who are counted the Civiliz'd part of Mankind, who have made and multiplied positive Laws to determine property, this original Law of Nature for the *beginning of Property* . . . still takes place.").

10. See *id.* bk. 2, ch. 7, § 88, at 342-43.

11. *Id.* bk. 2, ch. 11, § 138, at 378.

12. SCHLATTER, *supra* note 7, at 152; see also David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 AM. J. LEGAL HIST. 464, 472 (1993) ("Property is a natural and pre-political institution given to man by God, and a property interest gives the owner a singular and absolute control over something which no one, including the state, could violate.") (citing Gerald E. Aylmer, *The Meaning and Definition of "Property" in Seventeenth Century England*, 86 PAST & PRESENT 93-95 (1980)).

whenever the contracting parties so will; property institutions, founded on nature, are as unalterable as the structure of the universe."¹³

Although Locke's notion of property has exerted tremendous influence in the Anglo-American legal tradition,¹⁴ this fundamental notion of property is hardly unique to Locke or that legal tradition. Nineteenth-century British publicist John Westlake observed that the theory of a state of nature—with its related notion that property pre-exists the formation of governments, and is therefore more fundamental than the state—influenced both the continent and the British Isles during the seventeenth and eighteenth centuries, the gestational period of modern international law.¹⁵

Hugo Grotius, the purported father of modern international law, suggested in his magnus opus, *De Jure Belli ac Pacis*, that the "introduction of property ownership" preceded that of government and law, occurring during a state of nature, a state that "preceded all civil law."¹⁶ Similarly, German publicist Samuel Pufendorf, in *De Jure*

13. SCHLATTER, *supra* note 7, at 152.

14. See, e.g., Edward S. Corwin, *The Debt of American Constitutional Law to Natural Concepts*, 25 NOTRE DAME LAW. 258 (1950); Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985); Schultz, *supra* note 12, at 471 & n.50, 472-75; Jeffrey Riedinger, *Property Rights and Democracy: Philosophical and Economic Considerations*, 22 CAP. U. L. REV. 893, 897-98 (1993). William Blackstone's famous COMMENTARIES ON THE LAWS OF ENGLAND, which often invokes Locke's theories and, in general, expresses similar views of property, evocatively demonstrates Locke's influence on Anglo-American jurisprudence. See 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND ch. 1, 26 (William Draper Lewis ed., Rees Welsh & Co., 1977) (1900).

15. See JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 11 (1894) ("[I]t was in the age when international law was being formed that a theory, by no means confined to that age, attained its fullest development and currency. I mean the theory of a state of nature . . ."); see also *id.* at 164-65 ("It squared with fashionable theory, comparing the acquisition of uncivilised regions to the acts of men living without government in a supposed state of nature . . ."); HENRY STEINER & DETLEV VAGTS, TRANSNATIONAL LEGAL PROBLEMS 480 (3d ed. 1986).

16. HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES bk. 2, ch. 8, § 1, at 295 (Francis W. Kelsey trans., Clarendon Press 1925; see also *id.*, ch. 1, § 7, at 40 ("[T]he right to use force in obtaining one's own existed before laws were promulgated.")).

John Westlake described the essence of Grotius' legal thought as a conviction that

Certain institutions exist among all men . . . and are consonant with reason They

Naturae et Gentium Libri Octo,¹⁷ articulated a perspective of property that Locke later echoed—that “proprietaryship and dominion belong to *natural law*,”¹⁸ and that the intrinsic “obligation to observe the [natural] law of abstaining from what is another’s is coeval with mankind,”¹⁹ existing even in the absence of a legal regime to protect such rights. “For surely it is as plain as day, despite what is said to the contrary by Hobbes, that those who live outside of states can have something which is their own.”²⁰

The natural rights doctrine equally influenced eighteenth century jurists. Like Emmerich Vattel, both his contemporary Jean Jacques Burlamaqui and German publicist Christian Wolff ascribed to the theory that “the property of individuals is prior to the formation of states.”²¹ In a passage quite similar to Vattel’s, Wolff posits that when “families dwelling in the same territory unite into a state The ownership of the estates always remains distinct from the sovereignty, nor does the sovereignty affect the ownership in any way.”²² Thus, Locke’s notion of property as a natural institution was merely a refinement of a theory that enjoyed broad currency throughout

are examples of distributive justice, even if neither history nor any fair presumption to be made about prehistoric times enables us to refer their beginning to a conscious exercise of such justice. Among these are property, with binding contract as its necessary adjunct”

WESTLAKE, *supra* note 15, at 43.

17. 2 SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO*, bk. 4, ch. 4, § 14 (Oldfather trans. 1934).

18. *Id.* at 555 (Oldfather trans., 1934) (emphasis added).

19. *Id.* at 556.

20. *Id.* bk. 7, ch. 5, § 2, at 1276 (citation omitted). Of course, like Locke, Pufendorf realized that such primitive property rights were insecure, and therefore, the State was formed to give more protection to these rights. *See id.* at 1277 (quoting CICERO, *ON DUTIES*, bk. 2, ch. 21) (“Commonwealths were established principally for this cause, that men should hold what was their own. For although mankind was congregated together by the guidance of nature, yet it was with the hope of preserving their own property that they sought the protection of cities.”).

21. 2 J.J. BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* pt. 3, ch. 5, at 144 (Thomas Nugent trans., 5th ed., 1807); *see* CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* ch. 1, §§ 86-87, at 50-51 (Drake trans. 1934).

The natural law tradition—with its consonant notion that property pre-existed the state—particularly influenced German legal scholars. *See generally* OTTO GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY: 1500 TO 1800* (Ernest Barker trans., 1st ed. 2d prtg. 1960) (discussing political theories of the modern age).

22. WOLFF, *supra* note 21, ch. 1, § 86, at 50-51.

Europe during the seventeenth and eighteenth centuries.

Because of its prevalence during these centuries (not to mention its continued popularity in the legal systems of most developed countries), this Lockean, or natural rights, theory of property exerted a tremendous influence on international law. As late as 1884, prominent jurists, such as Sir Travers Twiss, explicitly referenced the *natural* foundation of property in their discussions of international law:

There thus arises an obligation of Natural Law to refrain from disturbing a party who is in possession of a thing The first rule is, that a person may take possession of a thing which has no owner, so as to acquire Rightful Possession of it; and Property is in such a case acquired simultaneously with Possession Such being the Law of Nature in regard to primitive acquisition on the part of individuals, the Law of Nations is in perfect accord with it.²³

Such occasional references to natural law or rights, nevertheless, fail to reflect the real influence of the natural rights theory of property. The numerous doctrines that incorporate its general thesis reveal its subtle but lasting legacy. International law's adoption of the principle declared by Christian Wolff in 1740 that "the ownership of the estates always remain distinct from the sovereignty, nor does the sovereignty affect the ownership in any way,"²⁴ manifests this legacy.

B. PROPERTY AS A CREATION OF THE STATE

Other theories helped shape Western legal jurisprudence along with the Lockean notion of property. A second, anti-podal tradition runs throughout modern international law. In contrast to the evoca-

23. SIR TRAVERS TWISS, *THE LAW OF NATIONS* §§ 115-16, at 194-95 (1884); see also J.B. MARTENS FERRÃO, *L'AFRIQUE: LA QUESTION SOULEVÉE DERNIÈREMENT ENTRE L'ANGLETERRE ET LE PORTUGAL* 6 (1890).

Explicit reference to the natural rights theory of property was not limited to treatises. Diplomatic practice during the nineteenth century also often recognized this theory. For example, in negotiations between the United States and Great Britain in 1826 over boundary disputes, the American plenipotentiary declared that "[i]t may be admitted, as an abstract principle, that, in the origin of Society, first occupancy and cultivation were the foundation of the rights of private property and of National Sovereignty." Message of President Adams to Congress (Dec. 28, 1827), *quoted in* TWISS, *supra*, § 122, at 202.

24. WOLFF, *supra* note 21, ch. 1, § 86, at 51.

tive imagery of a state of nature, exponents of this conflicting tradition often ground their perspective of property on an equally powerful postulate. Proponents of this tradition posit that, as Aristotle claimed, "man is by nature a political animal"²⁵ and, therefore, resides within the context of political society. Others, recognizing a pre-political state of nature, agree with Thomas Hobbes's assertion that because life in such a state would be "nasty, brutish and short,"²⁶ any notion of property must exist within the protecting confines of the State. As a result, this tradition views property as the creation of society and convention. To its proponents, the notion that property can exist outside of law is ludicrous. Jeremy Bentham's statement represents a paradigmatic expression of this tradition: "[T]here is no such thing as natural property . . . it is entirely the work of law Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."²⁷

Bentham's powerful critique of the natural rights theory of property in many ways merely revived an older view in Western philoso-

25. 1 ARISTOTLE, *POLITICA* ch. 2, reprinted in *THE BASIC WORKS OF ARISTOTLE* 1129 (Richard McKeon ed. & Benjamin Jonett trans., 1941).

26. THOMAS HOBBS, *THE LEVIATHAN* ch. 13, at 84 (J.C.A. Gaskin ed., Oxford Univ. Press, 1996).

27. JEREMY BENTHAM, *THEORY OF LEGISLATION* 111-13 (C.K. Ogden & Richard Hildreth trans., Harcourt Press 1931); see also 3 *THE WORKS OF JEREMY BENTHAM* 221 (John Bowring pub., 1862) ("Rights are . . . the fruits of the law, and of the law alone. There are no rights without law—no rights contrary to law—no rights anterior to the law.").

Interestingly, the Conservatives, usually antagonistic toward Utilitarian philosophies, shared the Utilitarian criticisms of the Lockean natural right to property. See generally RUSSELL KIRK, *THE CONSERVATIVE MIND: FROM BURKE TO SANTANAYA* (7th ed. 1995) (providing a general introduction to Conservatism and its proponents). See, e.g., EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 219-21 (1790); SIR HENRY SUMNER MAINE, *VILLAGE COMMUNITIES OF THE EAST AND WEST* 230 (3d ed. 1913) ("Nobody is at liberty to attack several property and to say at the same time that he values civilization. The history of the two cannot be disentangled.").

The German Idealists, Bentham's contemporaries, expressed similar notions on the Continent. Hegel, in particular, with his emphasis on the organic state, argued "that individual rights of property do not hold good against the commands of the state [being] always subject to the 'higher spheres of right,' to a corporate body, e.g., or to the state." SCHLATTER, *supra* note 7, at 257 (quoting FRIEDRICH HEGEL, *PHILOSOPHY OF RIGHT* 214 (T.M. Knox trans., Clarendon Press 1942); see also IMMANUEL KANT, *PHILOSOPHY OF LAW* 79 (William Hastie trans., 1887).

phy of property as the creation of the state. The Roman jurists, Cicero and Seneca, for example, both suggested that property could exist only within the context of the state.²⁸ Similarly, both medieval Christian theology and its companion feudal notion of territory as the personal property of the prince considered "the division and appropriation of property [to] proceed[d] from human law."²⁹

Other famous exponents of this tradition include Hobbes, who asserted that "[a]ll private estates of land proceed originally from the arbitrary distribution of the sovereign,"³⁰ In addition, Rousseau argued that private property and civil society are synonymous. Both simultaneously come into existence the moment that the "first man, who after enclosing a piece of ground, took it into his head to say, *this is mine*, and found people simple enough to believe him."³¹

Scottish philosopher David Hume also viewed property as a man-made concept. To Hume,

property is nothing but those goods, whose constant possession is *establish'd by the laws of society*; that is, by the laws of justice Tis very preposterous, therefore, to imagine, that we can have any idea of property, without fully comprehending the nature of justice, and shewing its

28. See, e.g., CICERO, *FOR CAECINA*, quoted in PUFENDORF, *supra* note 18, bk. 8, ch. 5, § 2, at 1276-77.

29. 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* ch. 57, § 2 (Timothy McDermott ed., 1989); see also WESTLAKE, *supra* note 15, at 131-32.

30. HOBBS, *supra* note 26, ch. 24, at 164; see also *id.*, ch. 18, at 119 (stating "annexed to the sovereignty, the whole power of prescribing the Rules, whereby every man may know, what goods he may enjoy . . . without being molested by any of his fellow subjects: and this is it men call propriety.").

James Harrington, a contemporary of Hobbes and Locke, also challenged the idea that property was a natural institution. He, like Hobbes, viewed property as a convention of the state, which could be altered by the sovereign to promote the common good. See *THE POLITICAL WORKS OF JAMES HARRINGTON* 405 (J.G.A. Pocock ed., 1977).

31. JEAN-JACQUES ROUSSEAU, *Discourse on the Origin and Foundation of Inequality Among Men*, reprinted in JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSE ON THE ORIGIN OF INEQUALITY* 211 (Lester G. Crocker ed., 1967) [hereinafter *SOCIAL CONTRACT*]. Unlike Grotius, Locke, and Hobbes, Rousseau viewed the creation of the state (through that first act of recognizing private property) as an evil act that destroyed an idyllic state of nature in which all men were equal. Rousseau therefore believed that the creation of private property is the source of all inequality between men and the inspiration for his famous statement: "Man was born free, and everywhere he is in chains." Jean-Jacques Rousseau, *The Social Contract*, reprinted in *SOCIAL CONTRACT*, *supra*, at 7.

*origin in the artifice and contrivance of man.*³²

This conventional or positivistic conception of property as a social institution, an artifact of human invention, has become the dominant theory of property in contemporary society. Domestic law reflects this theory in the notion of eminent domain and the conviction that the state possesses the ultimate power to rearrange property rights for the public good. International law reveals this influence in the widespread acceptance of the congruous idea that:

A State enjoys an exclusive right to regulate matters pertaining to the ownership of property of every kind which may be said to belong within its territory. Thus it may determine not only the processes by which title may be acquired, retained or transferred, but also what individuals are to be permitted to enjoy privileges of ownership.³³

This positivist, state-oriented view of property found its most powerful exposition in the 1970s. During this period, most developing states challenged the customary international rules that protect foreign-owned property through such vehicles as the 1974 Charter of Economic Rights and Duties of States.³⁴ In particular, states questioned the rule that a state must provide compensation for expropriating property owned by foreign nationals.³⁵

Despite the general triumph of this positivistic notion of property in both municipal and international law, international practice, nevertheless, continues to afford extensive protections to private property from government intrusion, illustrating the continued influence

32. 3 DAVID HUME, *A TREATISE OF HUMAN NATURE* pt. 2, § 2, at 491 (L.A. Selby-Bigge ed., 1958) (emphasis added); see also DAVID HUME, *ESSAYS: MORAL, POLITICAL AND LITERARY* 190 (T.H. Green & T.H. Grose eds., 1875) ("All questions of property are subordinate to authority of civil laws . . ."); JOSEPH PRIESTLEY, *ESSAY ON THE FIRST PRINCIPLES OF GOVERNMENT* 41 (2d. ed. 1771) ("[N]othing is properly *a man's own*, but what general rules, which have for their object the good of the whole, give to him.").

33. 1 Charles Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 650 (2d rev. ed. 1947).

34. United Nations Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR Supp. No. 31, U.N. Doc. A/9631 (1974).

35. See *id.*; see generally John King Gamble, Jr. & Maria Frankowska, *International Law's Response to the New International Economic Order: An Overview*, 9 B.C. INT'L & COMP. L. REV. 257 (1986) (examining the international legal aspects of the new international economic order).

of the natural rights image of property. Vestiges of this venerable theory emerge in doctrines addressing the status of private property in territories of questionable sovereignty: the recognition of property rights in *terra nullius*, the preservation of vested rights during state succession, and the protection of property during military occupation. At the same time, these three bodies of law also often reflect the influence of the more modern, positivistic image of property as a creation of the state. Consequently, consideration of the three doctrines will illuminate the continued tension in international law between two competing images of property: property as a natural institution and property as a state-constructed artifact.³⁶

II. TERRA NULLIUS

One of the most interesting questions in international law concerns an individual's claim to property in a territory that no country has previously claimed (i.e., *terra nullius*) but that a state has suddenly annexed.³⁷ To conceptualize this issue, imagine a small reef in the

36. Before turning to the corpus of this paper, a brief comment on sources is in order. Although this paper has sought multinational evidence for its discussions, even a brief survey of the footnotes will show a considerable majority of the sources are English-based. This was not intentional. Instead, it was a result of the simple fact that, for whatever reason—perhaps because of the particular sanctity of private property in the Anglo-American juridical and social consciousness—those countries which have inherited the English common law, the United States in particular, have been, as several commentators have observed, the most emphatic defenders of private property rights under international law. *See e.g.* Francis Sayre, *Change of Sovereignty and Private Ownership of Land*, 12 AM. J. INT'L L. 475, 479 & n.6 (1918) (stating that the United States has been selected for this examination, in part because its decisions carry influence, but primarily because United States law contains more precedents and decisions upon the subject than the law of any other country); D. P. O'CONNELL, *THE LAW OF STATE SUCCESSION* 79-80 (1956) [hereinafter O'CONNELL, *STATE SUCCESSION*] (stating that the doctrine of respect for land tenure has been upheld in a long series of American cases); ARTHUR B. KEITH, *THE THEORY OF STATE SUCCESSION* 78 (1907) ("The United States is peculiarly rich in judicial and other dicta on this head."); WESTLAKE, *supra* note 15, at 246 ("[T]he leaning of writers in England and the United States is towards greater mildness than seems to prevail on the continent . . .").

37. Albeit a fascinating topic, this article does not address attempts by private individuals and corporations to create independent states, like the ill-fated SeaLand or the legacy of Sir James Brooke as the Rajah of Sarawak. *See* Samuel P. Meneff, "Republics of the Reefs: Nation-Building on the Continental Shelf and in the World's Oceans," 25 CAL. W. INT'L L.J. 81 (1994); 1 DANIEL P. O'CONNELL, *INTERNATIONAL LAW* 480-81 (2d ed. 1965) [hereinafter O'CONNELL,

South Pacific. Assume no country has claimed the reef as part of its territory and that it lies outside the 12-mile maritime boundary of any state.³⁸ In other words, the reef is *terra nullius*—land that literally belongs to no country. Now, assume a private individual or company discovers the reef and decides it would make a great location for a small hotel or the foundation for a mining rig. Finally, imagine the individual or company succeeds in its endeavor, and a country (of which the private party is not a national) learns of this success and asserts sovereignty over the reef.

What are the rights of the private party? Does the new sovereign have to respect the party's claim to the reef? Can the new sovereign eject the party from the reef and transfer ownership to one of its own nationals without compensating the party?

Most contemporary treatises on international law fail to address these questions. Two of the principal English-language treatises contain only brief allusions to this subject, and both discussions are confusing. This confusion results, in part, from the strain in modern international law between the two conceptualizations of property outlined above: the Lockean natural notion of property as antecedent to the state and the conventional positivistic notion of property as a creation of the state.

A. TREATISES AND DICTA

The classic treatise on international law, Oppenheim's *Interna-*

INTERNATIONAL LAW]; 1 OPPENHEIM, *supra* note 2, at 496-97; LINDLEY, *supra* note 2, at 84-90, 91-113 (1926). In a similar vein, this discussion does not discuss the significant role of private parties as the indicia of occupation that states have relied upon to support their claims to *terra nullius*. See generally ARTHUR KELLER ET AL., CREATION OF RIGHTS OF SOVEREIGNTY THROUGH SYMBOLIC ACTS: 1400-1800 (1938); O'CONNELL, INTERNATIONAL LAW, *supra*, at 480-83; LINDLEY, *supra* note 2, at 284-91; BROWNLIE, *supra* note 3, at 134-35; 1 LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 678 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); LINDLEY, *supra* note 2, at 91-109 (providing a fascinating discussion of the role of the great trading corporations, such as the British and Dutch East India Companies).

38. For those concerned with the qualification of the reef as an "island" under the Law of the Sea Convention of 1982, assume that the reef has grown above the water line so that a portion is exposed even at high tide. See Third United Nations Convention of the Law of the Sea, U.N. Doc. A/Conf. 62/122, 21 I.L.M. 1245 (1982).

tional Law,³⁹ illustrates the tensions between these two conceptions. Several passages in the treatise indicate a modern, positivistic disbelief that property rights can be created outside of a state's sovereignty. For example, Oppenheim states that "occupation can only take place by and for a State; it must be a State act, that is, it must be performed in the service of a State, or it must be acknowledged by a State after its performance."⁴⁰ Despite such categorical statements, however, a more Lockean view occasionally appears in Oppenheim's comments. In a footnote to that very statement, Oppenheim cites the *Jacobsen* case discussed below as a decision "affirming the proprietary right of a private individual in a part of Jan Mayen island occupied by him at a time when it was *terra nullius*."⁴¹ Similarly, an earlier passage in the book acknowledges that private individuals and corporations can acquire land that is "not under the territorial supremacy of a member of the Family of Nations" (i.e., *terra nullius*), but in order to receive protection for the acquisition under international law, the individual or corporation "must either declare a new state to be in existence . . . or must ask a member of the Family of Nations to acknowledge the acquisition as having been made on its behalf."⁴² Oppenheim's comments arguably reflect a positivistic perspective, recognizing that private parties *can* physically occupy *terra nullius*, but asserting that this practical occupation implicates no legal title to the land under international law. Considering the allusion to *Jacobsen v. Norwegian Government*,⁴³ however, Oppenheim may be making a more Lockean argument: that private parties *may* legally claim title to *terra nullius*, but, because of the state-focus of international law, they must enlist a state to assert their legal rights on their behalf.

Ian Brownlie's *Principles of Public International Law*⁴⁴ evinces similar incertitude. Although questioning "whether private interests established prior to the reduction into sovereignty of a *terra nullius*

39. 1 LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 678 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

40. 1 OPPENHEIM, *supra* note 2, at 507.

41. *Id.* at 507 & n.2 (citing *United States v. Fullard-Leo*, 133 F.2d 743 (9th Cir. 1943)).

42. 1 OPPENHEIM, *supra* note 2, at 496-97.

43. 7 I.L.R. 109 (1933-1934 Ann. Dig.) (Nor. Sup. Ct. 1940).

44. BROWNLIE, *supra* note 3.

must be respected by the new sovereign," Brownlie acknowledges in the footnote to this skeptical remark that French publicist Paul Guggenheim "says that they must."⁴⁵

In contrast to Brownlie's and Oppenheim's vacillation, Guggenheim emphatically asserts that property rights in *terra nullius* are protected by international law:

Les droits que les individus peuvent acquérir dans un tel territoire sans maître relèvent de l'ordre juridique de leur Etat d'origine, à l'exception des droits patrimoniaux. Conformément au droit international coutumier, ces derniers sont régis directement par les règles du droit international. La pratique arbitrale et conventionnelle, en effet, est unanime à admettre que les droits patrimoniaux créés par des ressortissants étrangers dans les territoires sans maître doivent être respectés par l'Etat occupant.⁴⁶

As a result, his discussion of this subject presents a powerful example of the continued influence of the Lockean notion of property in modern international law. For Guggenheim, property rights in the absence of a sovereign are not contradictory. Property rights are sanctioned by a fundamental law—international law—that not only substitutes for municipal law in its absence but supersedes it, mandating that "les droits patrimoniaux . . . doivent être respectés par l'Etat occupant," irrespective of the state's own laws. These brief passages from Oppenheim, Brownlie, and Guggenheim are the exception, however, not the rule. Most contemporary treatises are silent on this issue.

Despite neglect by most contemporary publicists, older sources contain many intimations that private parties can establish legally-cognizable property rights in *terra nullius*. For example, in *De Jure Belli ac Pacis*, Grotius criticizes legal scholars who make a broad distinction between property which belongs to citizens by the law of nations and that which belongs to the same persons by municipal

45. *Id.* at 164-65 & n.1 (citing 1 PAUL GUGGENHEIM, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC* 456-57 (1954)).

46. GUGGENHEIM, *supra* note 45, at 456-57 (emphasis added) ("The rights that individuals are able to acquire in *terra nullius* is governed by the laws of their state of origin, *except* property rights. Consistent with customary international law, these last are governed directly by the rules of international law. Arbitral and conventional practice is unanimous in acknowledging that these hereditary/property rights created by previous occupants in *terra nullius* must be respected by the occupying state.").

law. In consequence they grant to the king a more unrestricted right over property owned under the law of nations, even to the extent of taking it away without cause and without compensation, while they admit no such right in the case of property held by [municipal law].⁴⁷

Emmerich Vattel is even more suggestive in his assertion that an "independent individual . . . may settle in a country which he finds without an owner, and there possess an independent domain [Whoever] would afterwards make himself master of the entire country, could not do it with justice without respecting the rights and independence of this person."⁴⁸

An equally intriguing assertion appears in Chief Justice Marshall's famous opinion in *Johnson v. McIntosh*.⁴⁹ As dicta, Marshall casually presented

a principle of universal law that, if an uninhabited country be discovered by a number of individuals, who acknowledge no connexion with, and owe no allegiance to, any government whatever, the country becomes the property of the discoverers, so far at least as they can use it. They acquire a title in common.⁵⁰

Like the passage from Oppenheim, it is difficult to discern exactly what Marshall means. In particular, it is unclear whether Marshall believed that private individuals, acting as private individuals (not as the founders of a new state), could establish legally-enforceable property rights that other states would be obligated to respect. Nonetheless, the Lockean influence in this passage is readily apparent.

The United States Court of Appeals for the Ninth Circuit issued an opinion more than one hundred years after *Johnson v. McIntosh* which illustrates the continued appeal of this natural rights vision, despite the predominance of the conventional theory of property during the intervening century. Citing Marshall's opinion, the court asserts that "it is possible, under principles of international law for

47. GROTIUS, *supra* note 16, bk. 3, ch. 10, § 9, at 808.

48. VATTEL, *supra* note 6, bk. 2, ch. 7, § 96, at 170; *see also id.* § 97, at 170-71 (theorizing that groups of families possessing a free domain have a legal right to the domain even though they have not formed a political society).

49. 21 U.S. (8 Wheat.) 543 (1823).

50. *Id.* at 595.

two individuals to obtain title to such territory as they discover,”⁵¹ The court also observes, however, that “such an occurrence is rare.”⁵² According to the court, the reason for this rarity is that although private individuals may obtain a title in *terra nullius*, they are powerless to protect it.⁵³ Thus, much like Oppenheim, the Ninth Circuit seems torn by competing visions. The court reaffirms the Lockean ideal that private parties can make internationally-recognized claims to property in *terra nullius*. Simultaneously, however, the opinion evinces a more positivistic belief that such claims are meaningless in the absence of a state to give them legal definition and sanction. Ultimately, however, the court reaffirms the principle of *Johnson v. McIntosh* that private individuals can establish proprietary rights in *terra nullius*.

Based on such hints and intimations, a few commentators in the early part of the century suggested that private property rights in *terra nullius* deserved recognition under international law. Mark Lindley’s *The Acquisition and Government of Backward Territory*,⁵⁴ for example, contains numerous suggestions to this effect. In explaining that *terra nullius* is land inhabited by “isolated individuals,” Lindley contrasts the individuals’ claims to sovereignty (which, as individuals, they could not assert) with their claims to property (to which, apparently, they were entitled): “[I]n such a case it would appear that the only rights possessed by them are rights of property and that, as regards the sovereignty, the country would be *territorium nullius*.”⁵⁵ Similarly, in a later passage, Lindley argues that if an individual asserts a proprietary interest in land over which his state chooses not to exert sovereignty (i.e., retaining the status of *terra nullius*), “the individual would be entitled to the protection of his

51. *United States v. Fullard-Leo*, 133 F.2d 743, 746 (9th Cir. 1943); 1 OPPENHEIM, *supra* note 2, at 507 & n.2 (citing *Fullard-Leo* for this proposition).

52. *Fullard-Leo*, 133 F.2d at 746.

53. *See id.* at 746-47 (hypothesizing that the threat of conquest would deter most explorers from claiming important lands and that taking possession on behalf of a sovereign affords a better chance for reward).

54. LINDLEY, *supra* note 2.

55. *Id.* at 23; *see also* 1 JOHN WESTLAKE, INTERNATIONAL LAW 109 (1913) (“[W]here whites may have acquired [property] in uninhabited places by enterprise and industry of the fruits of which it would be an outrage for any government established later to deprive them.”).

State against arbitrary action on the part of foreign Powers.”⁵⁶

An even clearer expression of the idea that private property claims in *terra nullius* are entitled to legal recognition under international law appears in Charles Hyde's venerable compendium, *International Law Chiefly as Interpreted and Applied by the United States*.⁵⁷ In two brief passages, Professor Hyde asserts that a state may “protect the activities of its nationals within a distant island that is *res nullius* without simultaneously striving to create a right of sovereignty therein.”⁵⁸ Hyde also argues that a state may demand “that the private property of its nationals in countries not possessed of European civilization, and not belonging to states recognized as such, should nevertheless be respected, upon the establishment of rights of sovereignty therein by an acknowledged member of the family of nations.”⁵⁹

B. JAN MAYEN ISLAND

Although numerous commentators have suggested the possibility of legally-cognizable private property rights in *terra nullius*, the only case in which a court has explicitly recognized such a property right is the Norwegian Supreme Court's opinion in *Jacobsen v. Norwegian Government*.⁶⁰ In *Jacobsen*, the Court held that the Norwegian government was legally obligated to respect the proprietary claims of Mr. Jacobsen to a part of Jan Mayen Island, even though his property right was established prior to Norway's assertion of sovereignty over the island.⁶¹

56. LINDLEY, *supra* note 2, at 85.

57. HYDE, *supra* note 33.

58. *Id.* at 346.

59. *Id.* at 236-37.

60. 7 I.L.R. 109 (1933-1934 Ann. Dig.) (Nor. Sup. Ct. 1940).

61. Jan Mayen Island is better known in contemporary international law from a recent International Court of Justice adjudication of the dispute between Denmark and Norway concerning the maritime boundary between Greenland and Jan Mayen Island. See *Maritime Delimitation in the Area Between Greenland and Jan Mayen Island* (Den. v. Nor.), 1993 I.C.J. 38 (June 14). Prior to that, Jan Mayen was also the subject of an agreement between Iceland and Norway for the joint management of the resources of the Jan Mayen continental shelf—a significant amount of relevance for a relatively small island. See Elliot L. Richardson, *Jan Mayen in Perspective*, 82 AM. J. INT'L L. 443 (1988) (reviewing the dispute resolution process and the resulting agreement between Iceland and Norway).

Jan Mayen Island is located in the North Atlantic, approximately 550 nautical miles west of Norway and 292 nautical miles north of Iceland.⁶² With no indigenous population or economy, Jan Mayen's principle feature is a meteorological station established in 1922.⁶³ Although Norway did not claim sovereignty over Jan Mayen until 1929, private occupation of the island began at least a decade earlier.⁶⁴ Nonetheless, as late as 1923 the Norwegian Foreign Office officially informed the United States that it considered Jan Mayen to be *terra nullius*.⁶⁵

In 1902, Mr. Jacobsen bought title to a home and some land from an individual who had been residing on Jan Mayen. In 1921, Mr. Jacobsen organized an expedition to the island, claimed an even larger part of the island as his property, and marked the boundaries of the claimed area. After Norway asserted sovereignty in 1929, however, its government ignored Mr. Jacobsen's claim to this property and assigned portions of the land for the use of the meteorological station. Mr. Jacobsen sued.

The Norwegian Supreme Court held that the Norwegian government's action was illegal. According to the court, the government was obligated to respect Mr. Jacobsen's property claim as legally valid, even though established while Jan Mayen was still *terra nullius*, and that, consequently, the "Norwegian Government was not entitled to proprietary rights in the part of the island which had been occupied by the plaintiff."⁶⁶ The Court concluded that because "[a]t the time of [his] arrival . . . the whole island was no man's land[,] [h]e was accordingly entitled to undertake a private occupation with the object of obtaining property in the occupied land"⁶⁷ The Court's reasoning is a paradigmatic illustration of the Lockean vision of property.

62. See Richardson, *supra* note 61, at 443.

63. See *Maritime Delimitation*, 1993 I.C.J. at 46.

64. For example, in 1917, a Norwegian national claimed part of the island as part of a plan to prospect for ore and establish a station for manufacturing seal-oil. See *Island of Jan Mayen*, 1 HACKWORTH DIGEST § 71, at 474. In 1921, the Norwegian Meteorological Institute established the still-existing meteorological station. See *Jacobsen*, 7 I.L.R. at 110; 1 HACKWORTH, *supra*, at 474-75.

65. See 1 HACKWORTH, *supra* note 64, at 475.

66. *Jacobsen*, 7 I.L.R. 109, 110.

67. *Id.*

In fact, the *Jacobsen* case is literally a modern recreation of Locke's man in the state of nature. By his labors (erecting several huts), Jacobsen succeeded in "removing" the land "from the State of Nature" and converting it into private property, property that his own government was obligated to respect. The absence of a government to authorize, or even give legal sanction to, his occupation was irrelevant. For the Norwegian Supreme Court, the absence of Norwegian sovereignty in Jan Mayen did not invalidate Jacobsen's property right.

Other incidents resulting from Norway's assertion of sovereignty over Jan Mayen also suggest the powerful respect for private property rights under international law. The Polarfront Company, owned by an American citizen Hagard Ekerold, occupied land in Jan Mayen and established two fox farms before Norway asserted its sovereignty.⁶⁸ After Norway's assertion of sovereignty, the United States Department of State sent a note to the Norwegian government stating its expectation that Norway would respect the property rights of Mr. Ekerold and his company.⁶⁹ Norway responded that "the occupation of Jan Mayen island by Norway was in no way intended to cause changes in the rights which, according to civil law, 'exist in the island.'" ⁷⁰ Thus, not only did Norway find itself legally obliged in the *Jacobsen* case to respect the property rights established in *terra nullius* by its own citizen, it also considered itself obligated to respect the property rights of a foreign national.

The exact nature of those property rights, however, was not clear.⁷¹

68. See 1 HACKWORTH, *supra* note 64, at 475-76.

69. See *id.*

70. *Id.* at 476 (quoting Message by the Norwegian Chargé d'Affairs to Mr. Stimson, Aug. 7, 1929).

71. Professor Goldie has argued, based upon the Spitsbergen example discussed at *infra* notes 80-84, that the type of property title a private party can obtain in *terra nullius* is essentially a usufruct. See L.F.E. Goldie, *Title and Use (and Usufruct)—An Ancient Distinction Too Oft Forgotten*, 79 AM. J. INT'L L. 689 (1985). Although Professor Goldie's use of the traditional property title of usufruct is interesting and compelling, he has unnecessarily restricted the nature of property title that a private party can establish in *terra nullius*. This restriction is principally a result of his example. In Spitsbergen, the land at issue was being used for mining, a perfect example of a usufructuary title—i.e., a right in the fruits of the land. With the examples of Messrs. Jacobsen and Ekerold in Jan Mayen, however, we have examples that would appear to support more than a mere usufructuary title. In both instances, the private parties had developed the land—Mr. Ekerold's fox farms and

In 1927, while Jan Mayen was still *terra nullius*, the Polarfront Company asked the Department of State about the status of its property claims.⁷² Its response evinced a positivistic doubt that property rights could be created in the absence of state sovereignty over the islands.⁷³ The State Department observed:

Ownership, in its essential features, constitutes the use and enjoyment of the property owned, to the exclusion of all others in its use and enjoyment, and is secured to the owner under the authority of the Government exercising the right of sovereignty with relation both to the island and its inhabitants.⁷⁴

At the same time, however, the State Department was unwilling to state that Mr. Ekerold lacked a legal right to the land his company occupied in Jan Mayen. As subsequent cables to the Norwegian government indicate, the State Department believed that Mr. Ekerold possessed proprietary rights, which it expected Norway to respect.⁷⁵ In other words, the United States government was torn by conflicting images of property. On the one hand, it argued that the absence of a government to sanction and protect such rights “rendered it impossible [for Polarfront] to acquire title to property there, as ordinarily understood.”⁷⁶ At the same time, however, it was unwilling to condemn the company as a mere trespasser, arguing that the company’s labors in developing the island had created a property right—if not a title “as ordinarily understood”—which Norway was required to respect.⁷⁷

Whatever the exact nature of Messrs. Ekerold’s and Jacobsen’s property rights in Jan Mayen during its status as *terra nullius*, the important point is that after Norway’s assertion of sovereignty, Norway considered itself legally bound to respect their pre-existing claims.⁷⁸ As such, these two instances are strong evidence of the in-

Mr. Jacobsen’s huts—and were using the land for more than merely harvesting its fruits.

72. See 1 HACKWORTH, *supra* note 64, at 476.

73. See *id.*

74. Letter from the Department of State to Mr. Ekerold, Feb. 16, 1927, *quoted in* 1 HACKWORTH, *supra* note 64, at 476 [hereinafter Ekerold letter].

75. 1 HACKWORTH, *supra* note 64, at 476.

76. *Id.*

77. See *id.*

78. See *id.*

ternational custom that recognizes the legality of private property claims established in *terra nullius*.

C. SPITSBERGEN ARCHIPELAGO

Another example of the recognition of private property rights in *terra nullius* involves the Spitsbergen archipelago, a desolate cluster of barren islands located in the Arctic Ocean about 400 miles from Norway.⁷⁹ Until the turn of the century, the islands were principally uninhabited, visited only by whalers and hunters during the four months when ice does not block the islands.⁸⁰ No state considered it worthwhile to assert sovereignty over the islands, because of their inaccessibility and forbidding climate the states generally recognized the status of the islands as *terra nullius*.⁸¹

In the early 1900s, however, large deposits of coal were discovered. In 1906, an American company, the Arctic Coal Company, began profitable mining operations that encouraged mining companies from other countries (including Norway, Russia, Germany, and the United Kingdom) to make competing claims.

The interested nations did not know how to resolve these conflicting private mining claims in a territory that they had previously recognized as *terra nullius*. This "Spitsbergen Question," as it came to be known, became a major issue for international lawyers, as evidenced by Robert Lansing's article in the *American Journal of International Law* (published just after his appointment as Secretary of State), entitled *A Unique International Problem*.⁸² The solution was a 1920 treaty in which nine of the countries with an interest in Spits-

79. The Norwegian name for the archipelago, "Svalbard," means "land with cold coasts" in Old Norse.

80. See generally ELEN SINGH, *THE SPITSBERGEN (SVALBARD) QUESTION: UNITED STATES FOREIGN POLICY, 1907-1935* (1980) (providing a very interesting and thorough history of the "Spitsbergen Question").

81. See Robert Lansing, *A Unique International Problem*, 11 AM. J. INT'L L. 763, 764 (1917); see also Goldie, *supra* note 71, at 705; Fred K. Neilsen, *The Solution of the Spitsbergen Question*, 14 AM. J. INT'L L. 232 (1920); LINDLEY, *supra* note 2, at 5; Message by President Taft to Congress (Dec. 3, 1912), 1912 FOR. REL. at xx, reprinted in 1 HACKWORTH, *supra* note 64, at 465 ("[T]he subarctic island of Spitzbergen . . . has always been regarded politically as 'no man's land . . .'").

82. Lansing, *supra* note 81.

bergen recognized Norway's sovereignty over the archipelago.⁸³ The treaty is intriguing, not in its recognition of Norway's sovereignty over the islands but in its *limitation* of that sovereignty.

In return for acquiring sovereignty over the islands, the treaty mandated that Norway respect the rights of existing "Occupiers of land" and provide equal freedom of access, commerce, mining and fishing to citizens of the signatory countries.⁸⁴ Article 6 specifically provides that "acquired rights of nationals of the High Contracting Parties shall be recognized [by Norway]."⁸⁵ Article 7 stipulates that "[e]xpropriation [of this property] may be resorted to only on grounds of public utility and on payment of proper compensation."⁸⁶ In order to implement these requirements, the parties established a tribunal to adjudicate conflicting property claims.⁸⁷ As a result of the tribunal's findings, Norway ultimately recognized the property claims of nationals from several different countries.⁸⁸

This restriction on Norway's sovereignty resulted from the other signatories' insistence on the legal recognition of their nationals' pre-existing claims to the islands. President Taft's Message to Congress on December 7, 1909 is illustrative. In announcing the United States' intention to attend the first Oslo Conference, President Taft strongly defended the rights of the Arctic Coal Company, announcing that

83. See Treaty on the Spitsbergen Archipelago, Feb. 9, 1920, 43 Stat. 1892, 2 L.N.T.S. 7 [hereinafter Spitsbergen Treaty]; see also Neilsen, *supra* note 81. The nine signatory nations were Denmark, France, Great Britain, Italy, Japan, Norway, the Netherlands, Sweden and the United States. Russia acceded to the treaty in 1924.

Great Britain and the United States applied a potentially analogous solution to their dispute over the Oregon territory. The 1846 Treaty of Washington that resolved this conflict contained a provision that "the possessory rights of the Hudson's Bay Company, and of all British subjects who may be already in the occupation of land or other property lawfully acquired in the said territory, shall be respected." Treaty for the Cession of Oregon, June 15, 1846, U.S.-Gr. Brit., art. III, 9 Stat. 869 [hereinafter Treaty with Great Britain]; see also SIR TRAVERS TWISS, *THE OREGON QUESTION EXAMINED IN RESPECT TO FACTS AND THE LAW OF NATIONS* 151 (1846). Unlike the Spitsbergen islands, however, it is unclear whether the Oregon territory was *terra nullius* at the time of the Treaty.

84. See Spitsbergen Treaty, *supra* note 83, arts. 2, 6 & 7.

85. *Id.* art. 6.

86. *Id.*

87. See LINDLEY, *supra* note 2, at 320.

88. See Report of the Svalbard Commissioner Concerning Claims to Land in Svalbard (1927); LINDLEY, *supra* note 2, at 320.

"all interests in those islands already vested should be protected" and that there should be "equality of opportunity for the future."⁸⁹

Such assertions obviously reflect a natural rights vision of property. The fact that these interests existed outside of any legal regime was irrelevant.⁹⁰ In fact, the international community's first attempt to resolve this problem did not even view the creation of a sovereign for the archipelago as necessary for the recognition and protection of these rights. In 1914, a conference of the interested countries convened in Oslo (then known as Christiania), Norway.⁹¹ Although this body was eventually responsible for the Treaty of 1920, its initial goal was more ambitious: to establish an international regime that would perpetuate the islands' status as *terra nullius*, while protecting the property interests of the various private parties.⁹² As such, this "unique scheme" was a powerful illustration of a natural rights notion divorcing property from sovereignty.

This idealistic, Lockean solution soon fell victim, however, to a more modern, positivistic vision of property as fundamentally intertwined with sovereignty. Perhaps the reason Lansing had considered the "Spitsbergen Question" so unique and intractable was that

89. Message of the President to Congress, Dec. 7, 1909, *reprinted in* 1909 FOR. REL. at ix, xiii (1914); *see also* Neilsen, *supra* note 81, at 233 (claiming that the United States' interest is limited to mining); Goldie, *supra* note 71, at 707-08 (citing United States diplomatic correspondence to the effect that "the United States Government quite practically viewed the rights that the Arctic Coal Co. had acquired in Spitzbergen as having been sufficiently established to be the subject of an international arbitration as to the boundaries of the American enterprise's 'tract' . . .") (footnote omitted); 1 HACKWORTH, *supra* note 64, at 466 ("[The United States] simply desired . . . that the rights of its nationals in the islands be recognized and property secured . . .").

90. In fact, one commentator, in describing the status of these property rights while the islands were *terra nullius*, explicitly used Lockean language:

The practical men who established, and bought and sold, and made money out of their mining tracts on Spitsbergen took a different view of their rights from that of the positivists . . . Accordingly, before 1920 they established a regime whose basic agreement ("social contract") may be summarized as follows: "This is my tract because I am working it."

L.F.E. Goldie, Comment, *Customary International Law and Deep Seabed Mining*, 6 SYRACUSE J. INT'L L. & COM. 173, 179 (1979).

91. The countries represented at the Conference included Denmark, France, Germany, Great Britain, Norway, the Netherlands, Russia, Sweden and the United States. *See Spitsbergen Treaty*, *supra* note 71.

92. *See* 1 HACKWORTH, *supra* note 64, at 466; LINDLEY, *supra* note 2, at 5; Neilsen, *supra* note 81, at 233; Lansing, *supra* note 81, at 765.

he, and other international lawyers, were torn by conflicting images of property. On the one hand, they felt that the law should respect the property claims of their nationals. These parties had exerted their labor in developing the islands, and their interests should not be ignored simply because they existed outside of any recognized state or legal regime. On the other hand, as progeny of a positivistic age, it was difficult to conceptualize property rights outside of the legal context of sovereignty:

In these circumstances a real right, in the common acceptance of the term, cannot exist in Spitzbergen The essential feature of ownership is the exclusion of all others from the use and enjoyment of the things owned. . . . Ownership in the case of land in Spitzbergen could not, therefore, exist.⁹³

Thus, the conference participants discarded the natural rights notion underlying the original conference proposal as “many finely spun theories . . . some of them doubtless a bit too fine.”⁹⁴ Instead, they applied a “more practicable”—i.e., positivistic—solution. They recognized one nation as sovereign for all of the islands and, therefore, capable of bringing legal vitality to these property claims: “Because a sovereign was needed on Spitzbergen in order to create the legal basis for exclusive property rights that would be good against all the world, the treaty recognized Norway as sovereign.”⁹⁵

Despite this Hobbesian solution, the generally Lockean lesson of Spitsbergen—that although the islands were *terra nullius*, property claims established by private parties “were held to be, and were protected as, ‘exclusive’ and ‘vested’ rights”⁹⁶—should not be ignored. As such, the “Spitsbergen Question” remains one of the most dramatic applications of Vattel’s assertion that “[a]n independent in-

93. Lansing, *supra* note 81, at 769; *see also* Neilsen, *supra* note 81, at 234 (“The provisions of the annex properly accord international recognition to rights, which have heretofore been legally undefined, since, of course, claimants to land in a *terra nullius* could have no title under municipal laws where such laws did not exist . . .”).

94. Neilsen, *supra* note 81, at 233.

95. Steven J. Burton, *Freedom of the Seas: International Law Applicable to Deep Seabed Mining Claims*, 29 STAN. L. REV. 1135, 1157 (1977); *See also* Lansing, *supra* note 81, at 770-71.

96. Goldie, *supra* note 71, at 705; *see also id.* at 706 (distinguishing between vested rights and interests already vested); GUGGENHEIM, *supra* note 45, at 457.

dividual . . . may settle in a country which he finds without an owner, and there possess an independent domain [and] [w]hoever would afterwards make himself master of the entire country, could not do it with justice without respecting the rights and independence of this person."⁹⁷

D. GUANO ISLANDS

Another example of the recognition of private property rights in *terra nullius* appears in United States diplomatic practice involving the Guano Islands. In 1854, two American nationals discovered guano deposits in the Los Monges Islands—a collection of barren rocks located nineteen to twenty miles off the Venezuelan coast.⁹⁸ The two Americans, Messrs. Gowen and Copeland, established facilities on the islands and began to work the deposit. In 1855, the Venezuelan government, claiming sovereignty over the islands, expelled the Americans and seized their facilities.⁹⁹ Several years later, an arbitral commission, established by treaty between the United States and Venezuela, awarded the Americans \$20,000 in damages.

The commission's opinion contains a powerful assertion of the Lockean notion that property exists independent of the state. The commission found that even though the islands appeared to be *terra nullius* when the Americans discovered them, the Americans "possessed 'an equity to be reimbursed for their outlay in taking possession of what was apparently derelict and abandoned property.'"¹⁰⁰

97. VATTEL, *supra* note 48, bk. 2, ch. 7, § 96, at 170.

98. This account of the *Los Monges* dispute is based on 4 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3354-3359 (1898) [hereinafter INTERNATIONAL ARBITRATIONS] and 1 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 576-577 (1906).

99. See 1 MOORE, *supra* note 98, at 576. Interestingly, Venezuela's actions were apparently instigated by another American company, which, upon hearing of the large deposits in the Los Monges, had approached Venezuela to obtain a lease to the islands. See INTERNATIONAL ARBITRATIONS, *supra* note 98, at 3355.

100. 1 MOORE, *supra* note 98, at 577 (quoting INTERNATIONAL ARBITRATIONS, *supra* note 98, at 3354-59) (emphasis added). It is important to note that when the commission described the islands as "derelict and abandoned," it was employing terms of art. See INTERNATIONAL ARBITRATIONS, *supra*, at 3359. As Lindley explains, "Territory that has been occupied may again become *territorium nullius* . . . because the sovereignty over it has been abandoned—in which case it is that species of *territorium nullius* which is known as *territorium derelictum*." LINDLEY,

For the commission, the fact that no country had asserted sovereignty over the islands did not prohibit Messrs. Gowen and Copeland from establishing a property right in the islands. Clearly, the commission did not consider state sovereignty a necessary element in the creation of a property right. The only thing necessary to create a property right, according to the commission, was labor by the Americans, labor for which they received compensation.

If the commission ultimately decided that the Americans did not "own" the islands, it did not base its finding on a philosophical opposition to the notion that property can exist outside of the state. Instead, the commission based its finding on the actions of the American businessmen, which the commission interpreted as an indication that "[they] did not consider that they had established title to the islands."¹⁰¹ In fact, the commission concluded that the Americans could have established such title if "only they had stubbornly stood on their rights and demanded indemnity for the wrong done them."¹⁰²

The same outcome occurred in a similar dispute that involved the discovery of guano deposits on the Aves Islands by United States nationals in 1854. The Americans began to exploit the deposits but Venezuela subsequently claimed sovereignty over the islands. The United States government considered the islands *terra nullius*, however—"not embraced within the sovereignty of any power, but were derelict"—and therefore demanded compensation from Venezuela "for molesting [its citizens] and breaking up their business."¹⁰³ For the United States, the fact that its citizens claimed property rights to territory outside the sovereignty of any state obviously did not raise doubts about the validity of their complaints. In a subsequent convention between the United States and Venezuela, Venezuela paid \$130,000 in reparations to the victims.¹⁰⁴

Whether a specific impetus or not, these types of incidents helped encourage the passage of legislation in Congress in 1856 ("Guano

supra note 2, at 48; see also BROWNLIE, *supra* note 36, at 135-36; O'CONNELL, INTERNATIONAL LAW, *supra* note 37, at 511-13.

101. INTERNATIONAL ARBITRATIONS, *supra* note 98, at 3357.

102. *Id.*

103. Memorandum from United States Secretary of State Marcey to Venezuelan Minister Eames (Jan. 24, 1855), *quoted in* 1 MOORE, *supra* note 98, at 571.

104. See *id.* (stating that the United States would not make further claims to the islands).

Islands Act") intended to promote the discovery and exploitation of guano deposits on *unclaimed* islands in the Pacific Ocean and Caribbean Sea.¹⁰⁵ Under the Guano Islands Act, American citizens who located guano deposits on an "island, rock, or key" that was "*not within the lawful jurisdiction, or occupied by the citizens of any other government*"—i.e., *terra nullius*—could apply for protection of their claim with the United States government.¹⁰⁶

Unlike the Los Monges and Aves island incidents, however, the international status of the islands claimed under the Guano Islands Act was unclear. The Act itself stated that such islands would be considered as "appertaining" to the United States. Unfortunately, the Act did not articulate a clear definition of "appertaining." For example, in an opinion issued in 1907, the State Department asserted that "the United States possess[es] no sovereign or territorial rights over Guano islands."¹⁰⁷ In the same year, however, an opinion by the Solicitor of the War Department took a slightly different approach, observing that "while not territory of the United States . . . [the islands] would seem to be, internationally speaking, within the jurisdiction of the United States."¹⁰⁸ In an 1890 opinion, the United States Supreme Court went even further, stating that an island covered by the Act was a "possession of the United States."¹⁰⁹

105. See Act to Authorize Protection of Citizens who Discover Deposits of Guano, 11 Stat. 119 (1856) [hereinafter Guano Act].

106. Memorandum from the Legal Advisor of the Department of State to Messrs. Eccleston and Knife (Sept. 2, 1936) (emphasis added), *quoted in* 1 HACKWORTH, *supra* note 64, at 503.

107. Cable from Assistant Secretary of State Bacon to Messrs. Dudley and Michener (Jan. 3, 1907) [hereinafter Dudley Cable], *quoted in* 1 HACKWORTH, *supra* note 64, at 502.

108. Opinion of the Solicitor for the Department of State (Sept. 25, 1907), *quoted in* 1 HACKWORTH, *supra* note 64, at 503. This nebulous status is arguably equatable with the notion of "inchoate title," which recognizes that a "[s]tate that is in [the] process of perfecting its title has more claim to the *terra nullius* than any other, though its title is not unimpeachable." O'CONNELL, INTERNATIONAL LAW, *supra* note 37, at 478; *see also Palmas Island Case*, 2 U.N. Rep. 829 (1928); 1 OPPENHEIM, *supra* note 2, at 510-11. Such an inchoate title would not vest the United States with legal sovereignty over the islands; instead it would serve notice to other states of the United States' intention to occupy the islands, which other states would respect out of a sense of comity. *See* WESTLAKE, *supra* note 15, at 158.

109. *Jones v. United States*, 137 U.S. 202, 203-04 (1890); *see also* Memorandum from Attorney General Sargent to Secretary Hughes (June 24, 1925) (stating that the extension of United States protection is within the President's discretion,

Irrespective of the questionable status of these islands, the disputes arising under this Act evinced a very different conception of property than that which emerged in the Los Monges and Aves island disputes. In those cases, the courts recognized property rights in a complete legal vacuum.¹¹⁰ By contrast, in the disputes arising under the Guano Act (although the nature of the relationship of the affected islands with the United States was not always clear), the Act itself created the property rights at issue.¹¹¹ The Act specified the limited nature of these rights, which extended "only to appropriation and disposal of the guano" on the islands.¹¹² Thus, in a case concerning Navassa Island—whose occupation by American guano excavators in 1857 led to a brief military showdown with Haiti—the Supreme Court made clear that whatever rights the discoverers possessed in the islands "derived from the United States."¹¹³

Grounding these property rights in a federal statute did not necessarily mean that the United States rejected the underlying philosophical principle of the Los Monges and Aves Island cases. In fact, as the subsequent practice in Jan Mayen and Spitsbergen illustrate, the United States continued to assert the natural rights notion that property rights can be created in *terra nullius*. However, passage of the Act reflected a conventional belief that American claims in guano

and, once a tenant is under United States protection, no act by that tenant can end United States control), *quoted in* 1 HACKWORTH, *supra* note 64, at 505, 518. *But see Jones*, 137 U.S. at 221 (citing 1859 opinion by the Attorney General "to the effect that the president has no right under the law to annex a guano island to the United States.").

110. *See supra* notes 98–105 and accompanying text.

111. *See* Guano Act, *supra* note 105, § 1.

112. Dudley Cable, *quoted in* 1 HACKWORTH, *supra* note 64, at 502 (interpreting the statute's provision); *see also* Guano Act, *supra* note 105, § 2 (discussing "the exclusive right of occupying said island . . . for the purpose of obtaining said guano").

The Act acknowledged the claim of "the discoverer, or his assigns," however, it suggested that the original discoverer's property right included the ability to assign property. *Id.* § 2. Moreover, an 1872 revision extended the Act to include "the widow, heirs, executors and administrators of such discoverer." Act to Amend Guano Act, § 1, 17 Stat. 48 (1872). The United States Supreme Court, however, decided the right was not such an estate in land that it should be subject to dower. *Duncan v. Navassa Phosphate Co.*, 137 U.S. 647, 652 (1891).

113. *See Duncan*, 137 U.S. at 651–52 (characterizing the limited proprietary right as a "license" to occupy the island and remove the guano which "cannot last after the guano is removed [and] may be terminated at any time 'at the pleasure of congress'"); *see also Jones*, 137 U.S. at 218; 1 MOORE, *supra* note 98, at 577.

islands would be stronger if grounded in municipal law.

E. "BACKWARD" TERRITORY & "UNCIVILIZED" PEOPLES

Western treatment of "backward territory" provides yet another example of the recognition of property rights in *terra nullius* and the natural rights image of property that motivated this recognition. During the nineteenth century, most Western international lawyers considered territories occupied by indigenous, "uncivilized" peoples to be *terra nullius*.¹¹⁴ As Professor Jennings observed, the nineteenth-century requirement that a territory not be subject to the sovereignty of a state in order to qualify as *terra nullius* was "not to say, of course, that the territory need be uninhabited. Natives living under a tribal organization were not regarded as a state for this purpose . . ."¹¹⁵

114. See Robert A. Williams, Jr., *Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 673-76; see also Burton, *supra* note 95, at 1165; H. Elizabeth Dallam, *The Growing Voice of Indigenous Peoples*, 8 ARIZ. J. INT'L & COMP. L. 117, 125 (1991); Robert K. Hitchcock, *International Human Rights, the Environment, and Indigenous Peoples*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 1, 7 (1994). But see Matthew M. Ricciardi, *Title to the Aouzou Strip: A Legal and Historical Analysis*, 17 YALE J. INT'L L. 301, 396 (1992) ("[Scholars] could not agree, however, whether the land possessed by 'savage' or 'barbaric' tribes with a rudimentary organization qualified as *terra nullius* or whether, on the contrary, such tribes were deemed to be sovereign and their rights entitled to respect.").

The best discussion of this issue appears in LINDLEY, *supra* note 2, at 10-47. Lindley concludes that "over some three and a half centuries, there had been a persistent preponderance of juristic opinion in favour of the proposition that lands in the possession of any backward peoples who are politically organized" are not *terra nullius*, "[b]ut that, especially in comparatively modern times, a different doctrine has been contended for . . . a doctrine which denies that International Law recognizes any rights in primitive peoples to the territory they inhabit." *Id.* at 20; cf. O'CONNELL, *INTERNATIONAL LAW*, *supra* note 37, at 469-70 (arguing that the equation of uncivilized territory with *terra nullius* was an ex post facto "invention by late nineteenth century authors" that did not accurately describe actual practice in previous centuries).

115. ROBERT JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 20 (1963); see also Brownlie, *supra* note 3, at 119. Quotations to support such assertions are not hard to come by. The juxtaposition of "territory which is either unsettled or settled only by savages" reappears throughout official statements for the period. Memorandum from United States Secretary of State Upshur to Mr. Everett (Oct. 9, 1843), *quoted in* 1 MOORE, *supra* note 98, at 259; see also Opinion of Mr. Sidney Webster, *quoted in* 1 MOORE, *supra* note 98, at 261 ("The principle and rule to be deduced respecting title to unoccupied regions, or those in

Of course, under modern international law, such an anachronistic definition of *terra nullius* is no longer acceptable, legally or morally.¹¹⁶ A modern, alternative interpretation of this practice, adopted by Professor O'Connell in his classic treatise, *The Law of State Succession*, treats the transition from "uncivilized" to "civilized" as a unique instance of state succession. Under this interpretation, the colonizing power succeeds the tribal authorities as sovereign over the territory in question.¹¹⁷ This re-interpretation accords with some state practice from the early twentieth century, as the holding of the British-American Claims Tribunal in its famous *George Rodney Burt* opinion suggests: "The Crown authorities by refusing to recognize his title, failed to carry out the obligation which Great Britain, as the *succeeding Power* in the islands, must be held to have assumed."¹¹⁸ However, irrespective of this successful attempt to harmonize nineteenth-century practice with contemporary law, the fact remains that in the nineteenth century such territory was considered *terra nullius*.¹¹⁹

the possession of the aboriginal inhabitants . . ."). In the third edition of *INTERNATIONAL LAW*, the renowned Lassa Oppenheim observed that *terra nullius* included both territory that was "entirely uninhabited, as e.g. an island, or inhabited by natives whose community is not to be considered as a state." LASSA OPPENHEIM, *INTERNATIONAL LAW* 383-84 (Ronald Roxburgh ed., 3d ed.1920). Interestingly, this passage can still be found as late as the 6th edition, published in 1947. See 1 OPPENHEIM, *supra* note 2, at 507. Similarly, John Westlake, another influential publicist, stated that as a general assumption of international law, "[o]ccupation by uncivilised tribes of a tract . . . was not felt to interpose a serious obstacle to the right of the first civilised occupant."

116. See, e.g., *Case Concerning the Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6, 54-55 (Feb. 3); *id.*, 1994 I.C.J. at 93 (Sette-Camara, J., dissenting) (arguing that the territory was never *terra nullius*); *Western Sahara Case*, 1975 I.C.J. 12, 39 (Oct. 16); *Mabo v. Queensland (No. 2)*, 175 C.L.R. 1 (Austl. 1992) (abandoning the legal doctrine that Australia was *terra nullius* when occupied by Great Britain in 1788); JOSEPH G. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 185 (8th ed. 1977) (stating that "territory inhabited by tribes or peoples having a social and political organisation cannot be of the nature of *terra nullius*") (quoting *Western Sahara*, 1975 I.C.J. 12).

117. See O'CONNELL, *STATE SUCCESSION*, *supra* note 36, at 92-94. But see 1 OPPENHEIM, *supra* note 2, at 510 & n.1.

118. *George Rodney Burt (U.S.) v. Great Britain*, in FRED K. NEILSEN, *REPORT ON AMERICAN AND BRITISH CLAIMS ARBITRATION* 588, 598 (1926) [hereinafter NEILSEN REPORT] (emphasis added).

119. An interesting reflection of the continued vitality of the natural rights perspective of property, this reinterpretation of state practice regarding "backward" territories preserves the underlying philosophical notion that property is distinct

Although Western legal practice and theory considered such territory *terra nullius* (enabling Western countries to ignore indigenous peoples' territorial claims and acquire territory by occupation), this same legal tradition required Western countries to respect the private property claims of Western nationals in "uncivilized" territory, even if these property claims originated in grants by the indigenous society.¹²⁰ Thus, as Lindley observed, as "the general rule, rights of private property, including land and concessions, which foreigners have acquired in backward territory, remain unimpaired when the territory passes under the sovereignty of an advanced state."¹²¹

The most famous expression of this legal principle is the *George Rodney Burt* opinion from the British-American Claims Tribunal.¹²² The case, resulting from Britain's annexation of the Fiji islands (which had been considered *terra nullius* prior to Britain's assertion of sovereignty) in 1874, turned on whether the British government had to respect the property title of George Burt, an American citizen, even though Burt's title was acquired from a native chief prior to the annexation.

Burt had resided on the islands since 1856. In 1868, he bought 3,750 acres of land from a native chief. The tribunal held that Burt had received a legally-cognizable title that Britain had to respect: "The Crown authorities by refusing to recognize his title, failed to carry out the obligation which Great Britain, as the succeeding Power in the islands, must be held to have assumed."¹²³ As a result, the tribunal awarded Burt £10,000 as compensation.¹²⁴

from sovereignty. Thus, the change in sovereignty from the "backward," indigenous sovereign to the "civilized," colonizing power did not affect private property rights).

120. See, e.g., WESTLAKE, *supra* note 15, at 145 ("In that case the state which afterwards becomes sovereign will be bound to respect such right and give effect to it by its legislation, morally bound if only its own subjects are concerned, but if the previous right of property existed in a subject of another state, there can be no doubt but that respect to it would constitute an international claim as legally valid as any claim between states can be.").

121. LINDLEY, *supra* note 2, at 316.

122. *Burt*, in NEILSEN REPORT, *supra* note 118, at 588-98. The German government also pursued several claims on behalf of its citizens residing in Fiji, arguing that "the property of the respective subjects of German Empire should be recognized and confirmed" by the British government. LINDLEY, *supra* note 2, at 318-19.

123. See *Burt*, in NEILSEN REPORT, *supra* note 118, at 598.

124. *Id.* In a similar case, the Tribunal recognized the validity of a private

Similar outcomes occurred with Great Britain's and Germany's subsequent assertions of sovereignty over the Gilbert, Solomon, and Marshall islands groups. In a series of cables, the American Secretaries of State, Messrs. Bayard and Foster, expressed "the deep concern" the United States felt over these countries' claims.¹²⁵ Although the United States acknowledged the presence of the indigenous population in these islands "where the traders of various nationalities have obtained lodgment through good relations with the natives," the United States government left no doubt that it considered the islands *terra nullius*: "They are understood to belong to the large category of hitherto unclaimed islands which have been under no asserted administration, and . . . which have hitherto been free to the trade of all flags" ¹²⁶ Despite their status as *terra nullius*, the United States nonetheless demanded that Germany and Great Britain respect the property rights of American citizens in the islands: "*What we think we have a right to expect*, and what we are confident will be cheerfully extended *as a recognized right*, is that the interests found to have been created in favor of peaceful American settlers in those distant regions shall not be disturbed by the assertion of exclusive claims of territorial jurisdiction on the part of any power" ¹²⁷

party's title to several reefs and rocks acquired prior to Britain's acquisition of these islands. See Isaac M. Brower, in NEILSEN REPORT, *supra* note 118, at 612.

Commentators often contrast the Burt opinion with *Successors of William Webster*, in NEILSEN REPORT, *supra* note 118, at 537, in which the Tribunal held that Webster's claims to the land prior to Britain's acquisition of territorial sovereignty were not as clear as those of Burt, and consequently, Great Britain was not obligated to respect the claims. See 1 HACKWORTH, *supra* note 64, at 555; O'CONNELL, STATE SUCCESSION, *supra* note 36, at 93 & n.2.

125. Cable from United States Secretary of State Bayard to Mr. Pendleton (Feb. 27, 1886) [hereinafter Pendleton Cable], *quoted in* 1 MOORE, *supra* note 98, at 422; *see also* Cable from United States Secretary of State Bayard to Mr. Morrow (Feb. 26, 1886) [hereinafter Morrow Cable], *quoted in* 1 MOORE, *supra* note 98, at 423; Cable from United States Secretary of State Bayard to German Foreign Minister von Alvensleben (Mar. 4, 1886) [hereinafter von Alvensleben Cable], *quoted in* 1 MOORE, *supra* note 98, at 424-25; Cable from United States Secretary of State Foster to Mr. White (Nov. 5, 1892) [hereinafter Foster Cable], *quoted in* 1 MOORE, *supra* note 98, at 425-26.

126. Pendleton Cable, *supra* note 125, at 422-23; *see also* Morrow Cable, *supra* note 125, at 423 ("[T]he outlying unattached groups of islands [in the Pacific], dependent upon no recognized sovereignty . . .").

127. Pendleton Cable, *supra* note 125, at 423 (emphasis added); *see also* Foster Cable, *supra* note 125, at 426 ("You will say to him that this Government believes that it has a right to expect that the rights and interests of the American citizens

The United States also repeatedly questioned why either Britain or Germany could assert claims to the islands superior to that of other countries:

It is not easy to see how either Great Britain or Germany can assert the right to control and divide between them insular possessions which have hitherto been free to the trade of all flags, and which owe the civilizing rudiments of social organization they possess to the settlement of pioneers of other nationalities than British or German. If colonial acquisition were an announced policy of the United States, it is clear that this country would have an equal right with Great Britain or Germany to assert a claim of possession¹²⁸

Of course, these American complaints did not dissuade either Germany or Great Britain from asserting sovereignty over the islands. Both countries, however, guaranteed the protection of the existing property rights of "civilized" settlers. Thus, when German Foreign Minister von Alvensleben officially announced the creation of the German protectorate over the Marshall Islands, he stated that "well-established rights of third parties are to be duly respected."¹²⁹ Similarly, when Great Britain established a protectorate over the Gilbert Islands in 1892, the United States issued a statement expressing its expectation that "the rights and interests of American citizens established in the Gilbert Islands will be as fully respected and confirmed under Her Majesty's Protectorate as they could have been had the United States accepted the offer of protection not long since solicited by the rulers of those islands."¹³⁰ Great Britain re-

established in the Gilbert Islands will be as fully respected and confirmed under Her Majesty's Protectorate"); Cable from United States Secretary of State Bayard to Portugese Minister das Nogueiras (Mar. 3, 1886) (regarding the Portuguese protectorate over São Thomé). Mr. Bayard's cable to Mr. das Nogueiras states:

If citizens of the United States . . . establish themselves in uncivilized regions and acquire vested interests there in the same way as foreigners of other nationalities through good relationship with the natives, it is not to be supposed that, in the event of any one power . . . assuming control of the country, our citizens will be discriminated against, in residence or trade, as compared with the subjects of the protecting power.

Id. at 424.

128. Pendleton Cable, *supra* note 125, at 423.

129. von Alvensleben Cable, *supra* note 125, at 425; *see also* O'CONNELL, STATE SUCCESSION, *supra* note 36, at 94 & n.1.

130. 1892 FOR. REL. 241, 246 (1895), *quoted in* O'CONNELL, STATE SUCCESSION, *supra* note 36, at 93-94.

sponded by promising that such rights “will be fully recognized and respected.”¹³¹

This customary practice received partial codification in the Berlin Conference of 1884-1885.¹³² Intended as ground rules for “new occupations on the African coasts” by the principal Western powers, the Final Act of the Conference included “the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African Continent sufficient to protect existing rights (*droits acquis*).”¹³³

This requirement to respect the pre-existing property claims of individuals was one of the major issues at the Conference. The initial proposal of the German government was even more specific, describing the rights as those “acquired by private individuals” irrespective of “whatever period they may have been acquired, before as well as after the occupation.”¹³⁴ Similarly, the President of the Conference explained that acquired rights “comprised all the acquired rights in existence at the time of a new occupation, whether these rights belonged to private individuals or to governments.”¹³⁵ Though the Conference accepted this interpretation, as Lindley observes, “it was not considered necessary to include the proposed explanation”¹³⁶ because Article 35 was universally understood by the participants in the Conference as “merely express[ing] in a formal manner a rule which had previously obtained very considerable acceptance.”¹³⁷

Although the hypocrisy inherent in this Western legal practice is striking, the importance of the Berlin Conference—and the judicial

131. *Id.*; see also 1 MOORE, *supra* note 98, at 425-26.

132. See Final Act of the Conference of Berlin, Feb. 26, 1885, 165 Consol. T.S. 485 [hereinafter Final Act]. The Final Act was signed by Austria-Hungary, Belgium, Denmark, France, Great Britain, Germany, Italy, the Netherlands, Norway, Portugal, Russia, Spain, Sweden, Turkey, and the United States. The United States, however, never ratified the Act. See LINDLEY, *supra* note 2, at 144.

133. Final Act, *supra* note 132, art. 35; see also Convention Revising the General Act of Berlin (Convention of St. Germain-en-Laye), Sept. 10, 1919, art. 10, 8 L.N.T.S. 25, 35 (containing a similar provision “to maintain in the regions subject to their jurisdiction an authority and police forces sufficient to ensure protection of persons and of property”).

134. See LINDLEY, *supra* note 2, at 145-47.

135. *Id.* at 147.

136. *Id.*

137. *Id.* at 146 (citing British and French statements).

and diplomatic practice that it chronicled—to this article is not the irony of a legal regime that disregarded the indigenous people's territorial claims while simultaneously respecting the private property claims of its nationals in such territory (even those based on grants from the otherwise ignored indigenous peoples). Its importance lies, instead, in providing yet more evidence that international law (at least as interpreted in the nineteenth century by Western countries) recognized property rights established in *terra nullius* as legally-cognizable and protected under customary international law. As such, this practice also evocatively demonstrates the considerable influence of the natural rights image of property (with its vision of property existing in the absence of state sovereignty) on international law.

III. DOCTRINE OF ACQUIRED RIGHTS

In addition to the recognition of private property rights in *terra nullius*, the doctrine of acquired rights is another field of international law that reflects the powerful influence of the Lockean notion of property on modern international law. Although, as several commentators have observed, the laws governing state succession in general (such as whether a successor inherits its predecessor's debts) are contentious and unsettled,¹³⁸ there is a remarkable consensus that a change of sovereignty over a territory does not affect the vested or acquired property rights of the inhabitants.¹³⁹ This principle is known

138. See Sayre, *supra* note 36, at 475 ("Perhaps no part of international law gives rise to more uncertainty and disagreement than the law which determines the resulting rights and duties of states and individuals upon a change of sovereignty—the so-called law of succession."); STARKE, *supra* note 116, at 353.

139. See, e.g., Georges Kaeckenbeeck, *The Protection of Vested Rights in International Law*, 17 BRIT. Y.B. INT'L L. 1, 8-9 (1936) (arguing that the rule that "[a] cession of territory therefore does not imply any change in the private rights of the inhabitants nor does it legitimate the confiscation of any of those rights [is] an actual and universally accepted rule of positive law"); Sayre, *supra* note 36, at 477 ("[T]he general principle that change of sovereignty shall work no interference with private property rights . . . has been well established by innumerable court decisions."); JAMES L. BRIERLY, *THE LAW OF NATIONS* 157 (Sir Humphrey Waldock ed., 6th ed. 1963) ("[T]he recent practice of states . . . tends to establish as a rule of international law the duty of a successor state . . . to respect the acquired rights of private persons.") (quoting 1 LASSA OPPENHEIM & ARNOLD MCNAIR, *INTERNATIONAL LAW* 168 & n. (4th ed. 1928)); ARRIGO CAVAGLIERI, *LA NOTION DES DROITS ACQUIS ET SON APPLICATION EN DROIT INTERNATIONAL PUBLIC* (1931); KEITH, *supra* note 36, at 78; LINDLEY, *supra* note 2, at 387; O'CONNELL,

as the doctrine of acquired rights and, as one commentator has observed: "The principle that *droits acquis*—acquired rights—survive incidents of state succession and must be respected by the successor state is one of the most well-established norms in the field."¹⁴⁰ As such, the doctrine remains one of the most powerful vestiges of the natural rights notion of property in modern international law.

This natural rights perspective of property as insulated from a sovereign's positivistic legal regime appears throughout the literature: "Sovereignty and property being distinct and different entities, there is no necessary reason why circumstances that affect the one should have any influence upon the other."¹⁴¹ This perspective views the right to property as arising "within a prescribed legal order, an order which derives its validity not from the ultimate legislative authority but from the very community itself The order, therefore, does not collapse or evaporate when the sovereign is removed, but survives" ¹⁴²

The repeated allusions to "equity" in both practice and treatises demonstrate this rejection of the positivistic notion of property: "The word 'equity' is the key, it is believed, to the entire problem of State succession."¹⁴³ As Professor Starke concluded, the principle feature

INTERNATIONAL LAW, *supra* note 37, at 436; O'CONNELL, STATE SUCCESSION, *supra* note 36, at 78, 99 (discussing the obligation of a successor state to respect property rights acquired under the predecessor state); 1 OPPENHEIM, *supra* note 2, at 155 & n.5, 522; KURT VON SCHUSCHNIGG, INTERNATIONAL LAW: AN INTRODUCTION TO THE LAW OF PEACE 153, 157-58 (1959); GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 87 (1967); WESTLAKE, *supra* note 15, at 130. *See generally*, 1 MOORE, *supra* note 98, at 95, 99, 332-34, 414-429.

140. Michael J. Volkovitsch, Note, *Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts*, 92 COLUM. L. REV. 2162, 2203 (1992) (citing O'CONNELL, STATE SUCCESSION, *supra* note 36, at 239).

141. LINDLEY, *supra* note 2, at 337.

142. O'CONNELL, STATE SUCCESSION, *supra* note 36, at 267; *see also* Kaeckenbeeck, *supra* note 139, at 2 (arguing that the emphasis on "*droits acquis*" or "vested rights" was "to distinguish between such rights as, deriving only from a statutory provision, could also be taken away by statutory provision, and such rights as, resting on special title of acquisition, could not be thus taken away").

143. O'CONNELL, STATE SUCCESSION, *supra* note 36, at 268; *see also id.* at 105; *United States v. Auguisola*, 68 U.S. (1 Wall.) 352, 358-59 (1863); *United States v. Kingsley*, 37 U.S. (12 Pet.) 476, 484-85 (1838) ("[T]he United States must maintain the rights of property under it . . . by applying, in the first instance, in such cases, as was said in *Arredondo's case*, the principles of justice . . .").

of the doctrine of acquired rights is "a tendency to pay regard to the question whether it is *just, reasonable, equitable*, or in the interests of the international community that rights should pass upon external changes of sovereignty over territory."¹⁴⁴

This emphasis on equity and justice—divorcing the doctrine from *legal* sources—evinces, as Professor O'Connell argues, a concern with insulating "private rights from the impact of changes of sovereignty."¹⁴⁵ In explaining this concern, commentators often evoke Lockean language, arguing that "[a] man who invests capital and labour in the construction of works of profit and value to a State acquires an equity in that investment that is not destroyed by change of sovereignty"¹⁴⁶ and that "human nature manifests a certain constancy, and respect for property is by no means unrelated to, or a far derivative of, the requirements of human nature."¹⁴⁷

In order to properly protect such a fundamental notion of property, it was inevitable that the courts and commentators of the developed Western countries (the Anglo-American tradition, in particular) would have to insulate such property rights from the positivistic idea that property rights are nothing more than what a particular country's legal regime will recognize:

The right to land is one on any sound theory of jurisprudence valid against all the world, including the Government. . . . The idea that a Government normally owns the land of a country is a confusion A state is sovereign in public law over the territory, but it does not own the terri-

The doctrine's criticisms of the medieval notion that a sovereign monarch personally "owned" the territory subject to his control also reflect a rejection of a positivistic notion of property—thus, equating sovereignty with property. *See, e.g.,* LINDLEY, *supra* note 2, at 337.

144. STARKE, *supra* note 116, at 353 (emphasis added).

145. O'CONNELL, INTERNATIONAL LAW, *supra* note 37, at 426 (citing Grotius, Pufendorf, and Vattel); *see also* Kaackenbeeck, *supra* note 139, at 1, 16; O'CONNELL, STATE SUCCESSION, *supra* note 36, at 103-04, 273 (arguing that "the principle of unjustified enrichment is the norm behind the doctrine of respect for acquired rights in the law of State succession, and is the concept which renders the data of practice intelligible").

146. O'CONNELL, STATE SUCCESSION, *supra* note 36, at 268; *see also* Sayre, *supra* note 36, at 483 ("To eject or disregard the titles of all those who by their toil and daring had given to the land its value would have been a mockery of justice . . .").

147. O'CONNELL, STATE SUCCESSION, *supra* note 36, at 274.

tory.¹⁴⁸

The vehicle for this insulation was the doctrine of “equity” and the notion that, with respect to property, obligations superseding sovereignty governed the actions of sovereign powers.

A. PERCHEMAN AND ITS PROGENY

The doctrine of acquired rights—with its Lockean perspective of property as distinct from sovereignty—has been most clearly (and emphatically) formulated in a series of decisions by the United States Supreme Court, beginning with Chief Justice Marshall’s famous opinion in *United States v. Percheman*.¹⁴⁹ In *Percheman*, Marshall articulated the doctrine’s basic premise: that when there is a change in sovereignty over a particular territory “[t]he people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed.”¹⁵⁰

The case arose out of the cession of Florida by Spain to the United States in 1819. The plaintiff, Juan Percheman, had acquired approximately 2,000 acres of land in Florida by grant from the Spanish Governor of East Florida prior to the cession.¹⁵¹ After the cession, a commission—established by the United States government to ascertain and clarify the status of property claims in East Florida—refused to recognize his claim, charging that his title was insufficiently documented.¹⁵² The Supreme Court, through Marshall, reversed the commission’s decision, holding that “[t]he modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled.”¹⁵³

148. KEITH, *supra* note 36, at 81; *see also* WESTLAKE, *supra* note 15, at 131-32.

149. *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

150. *Percheman*, 32 U.S. at 87. The importance of the *Percheman* opinion in the development of the doctrine of acquired rights cannot be exaggerated. By Francis Sayre’s description, it is the “classic case which has been quoted and followed universally until it has become a famous landmark in this part of the law.” Sayre, *supra* note 36, at 479; *see also* Kaeckenbeeck, *supra* note 139, at 9.

151. *See Percheman*, 32 U.S. at 82-83.

152. *See id.* at 83-84.

153. *Id.* at 86-87.

The treaty of cession between the United States and Florida had contained a stipulation that the United States would respect the legitimate property claims established prior to the change in sovereignty.¹⁵⁴ Marshall could have based his decision solely in this provision. Instead, Marshall chose to ground his decision on his interpretation of customary international law, concluding that even if Florida had "changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change; it would have remained the same as under the ancient sovereign."¹⁵⁵

Although Marshall did not cite any sources to support this holding, the attorney for Percheman in his oral argument did cite Emmerich Vattel's classic treatise, *The Law of Nations*, for the proposition that "according to the mitigated rights of war, as now well understood and settled by international law, the lands of individuals are safe, even after conquest."¹⁵⁶ Marshall's reasoning demonstrates his reliance on this citation:

[I]t is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory?¹⁵⁷

Prior to the *Percheman* decision, American courts had issued numerous opinions, some by Justice Marshall, recognizing the same general principle. Neither the *Percheman* opinion nor the oral arguments cited these cases, however. For example, three years before *Percheman*, Marshall commented that in

the treaty by which Louisiana was acquired, the United States stipulated

154. Treaty of Amity, Settlement and Limits, Feb. 22, 1819, U.S.-Spain, art. VIII, 8 Stat. 252 [hereinafter Treaty with Spain] ("All the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities, in the said territories ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty.").

155. *Percheman*, 32 U.S. at 87.

156. *Id.* at 65 (citing 3 VATTTEL, *supra* note 48, ch. 13, § 200).

157. *Id.* at 86-87.

that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. The United States, as a just nation, regard this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract.¹⁵⁸

A myriad of Supreme Court decisions followed *Percheman* in which the Court reinforced the holding in *Percheman*.¹⁵⁹ In *Leitens-*

158. *United States v. Souland*, 29 U.S. (4 Pet.) 511, 511-12 (1830) (Marshall, C.J.); see also *Mutual Assurance Soc. v. Watts*, 14 U.S. (1 Wheat.) 279, 282 (1816) ("The idea is now exploded that a mere change of sovereignty produced any change in the state of rights existing in the soil."); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 589 (1823) (Marshall, C.J.) ("[H]umanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired . . ."); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828) (Marshall, C.J.) ("On such a transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change."); *United States v. de la Arredondo*, 31 U.S. (6 Pet.) 691, 712 (1832); *Wilcox v. Henry*, 1 U.S. (1 Dall.) 69, 71 (1782) ("If, also, a conquered country is ceded, the old possessors are entitled to their estates; and when any country is conquered, the possessors are not deprived of their estates, but only change their masters."). These cases principally involve property claims arising from the Mexican-American War and the subsequent cessions of Arizona, California, New Mexico, and annexation of the Republic of Texas.

159. See *Shapleigh v. Mier*, 299 U.S. 468, 470 (1937); *John II Estate v. Brown*, 235 U.S. 342, 349 (1914) (Holmes, J.); *Ainsa v. New Mexico & Ariz. R.R. Co.*, 175 U.S. 76, 79 (1896) ("Private rights of property in land lying within a territory ceded by one independent nation to another . . . are not affected by the change of sovereignty and jurisdiction, and are entitled to protection, whether they are complete and absolute titles, or merely equitable interests . . ."); *Ely's Adm'r v. United States*, 171 U.S. 220, 223 (1898) ("[I]n harmony with the rules of international law, as well as with the terms of the treaties of cession, the change of sovereignty should work no change in respect to rights and titles; that which was good before should be good after; that which the law would enforce before should be enforceable after the cession."); *Cessna v. United States*, 169 U.S. 165, 186 (1898) ("It is the duty of a nation receiving a cession of territory to respect all rights of property as those rights were recognized by the nation making the cession . . ."); *United States v. Chaves*, 159 U.S. 452, 457 (1895); *Knight v. United Land Ass'n*, 142 U.S. 161, 184 (1891); *Interstate Land Co. v. Maxwell Land Grant Co.*, 139 U.S. 569, 588 (1891) ("It needs no citation of authorities to support the general proposition of international law that private rights of property in a ceded territory are nowise affected by a treaty of cession."); *More v. Steinbach*, 127 U.S. 70, 78 (1888); *Coffee v. Groover*, 123 U.S. 1, 9 (1887) ("It is no doubt the received doctrine that, in cases of ceded or conquered territory, the rights of private property in lands are respected."); *Chicago, Rock Island & Pac. Ry. Co. v. McGlinn*, 114 U.S. 542, 546 (1885) ("By the cession public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment."); *Airhart v. Mas-*

*dorfer v. Webb*¹⁶⁰—a case arising out of the cession of New Mexico—the Court stated:

By this substitution of a new supremacy, although the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the Government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged This is the principle of the law of nations as expounded by the highest authorities.”¹⁶¹

Similarly, in *Strother v. Lucas*,¹⁶² the Supreme Court expostulated that “[b]y the law of nations . . . the rights of property are protected, even in the case of a conquered country, and held sacred and inviolable when it is ceded by treaty, with or without any stipulation to such effect.”¹⁶³ Several state courts—in particular, the Texas Supreme Court and its subordinate courts—for understandable geographic reasons also have developed a rather extensive body of precedent, reasserting the general principle of *Percheman*: “It is elementary that a change of sovereignty does not affect the property rights of the inhabitants of the territory involved.”¹⁶⁴

sieu, 98 U.S. (8 Otto) 491, 496 (1878) (following *Jones v. McMasters*, 61 U.S. (20 How.) 8, 21-22 (1857)) (“The general principle is undisputed, that the division of an empire works no forfeiture of a right of property previously acquired The title remains after the revolution, and erection of the new government, the same as before.”); *Dent v. Emmeger*, 81 U.S. (14 Wall.) 308, 312 (1871) (“[A] change of government is never permitted to affect pre-existing rights of private property.”); *United States v. Repentigny*, 72 U.S. (5 Wall.) 211, 259-60 (1866); *United States v. Auguisola*, 68 U.S. (1 Wall.) 352, 358 (1863); *United States v. Moreno*, 68 U.S. (1 Wall.) 400, 404 (1863) (“That cession did not impair the rights of private property. They were consecrated by the law of nations”); *United States v. Power’s Heirs*, 52 U.S. (11 How.) 570, 577 (1850); *Doe v. Eslava*, 50 U.S. (9 How.) 421, 445 (1850); *Smith v. United States*, 35 U.S. (10 Pet.) 326, 330 (1836); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 734 (1835); *Delassus v. United States*, 34 U.S. (9 Pet.) 117, 133 (1835) (Marshall, C.J.) (“The sovereign who acquires an inhabited territory, acquires full dominion over it; but this dominion is never supposed to divest the vested rights of individuals to property The people change their sovereign. Their right to property remains unaffected by this change.”).

160. *Leitensdorfer v. Webb*, 61 U.S. (20 How.) 176 (1857).

161. *Leitensdorfer*, 61 U.S. at 177-78.

162. *Strother v. Lucas*, 37 U.S. (12 Pet.) 410 (1838).

163. *Strother*, 37 U.S. at 436, 438.

164. *Miller v. Letzerich*, 49 S.W.2d 404, 407-08 (Tex. 1932) (“[I]t is plain, we think, that whatever title, rights, and privileges the inhabitants of Texas received by virtue of land grants from the Spanish and Mexican governments . . . remained intact, notwithstanding the change in sovereignty”); *Clements v. Texas Co.*,

In addition to this extensive judicial precedent, American treaties have followed the natural rights principle of *Percheman* that changes in sovereignty do not affect private property. The 1819 Treaty with Spain discussed in *Percheman* was not unique in including a provision protecting private property in the ceded territory. In fact, every major treaty of cession to which the United States has been a party has included similar provisions.¹⁶⁵ For example, the treaty ending the American Revolution contained two articles for the protection of private property.¹⁶⁶ Similarly, the Treaty of Paris that concluded the Spanish-American War included a provision that provided that the cession of Spanish colonies to the United States did not "in any respect impair the property or rights which by law belong to . . . private individuals, of whatsoever nationality such individuals may be."¹⁶⁷

As the American judiciary repeatedly observed, however, "[t]his is the usual stipulation in treaties and is in effect a declaration of the rights of the inhabitants under international law."¹⁶⁸ As such, these

273 S.W. 993, 999 (Tex. Civ. App. 1925); *Texas v. Gallardo*, 135 S.W. 664, 669 (Tex. Civ. App. 1911), *aff'd*, 166 S.W. 369 (Tex. 1914) ("[I]t should be borne in mind that a mere change of sovereignty, even in the absence of treaty stipulations for the protection of private rights, does not divest the vested property rights of individuals.").

165. See, e.g., Treaty for the Cession of Louisiana, Apr. 30, 1803, U.S.-Fr., art. III, 8 Stat. 200 ("The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their . . . property . . ."); Treaty with Spain, *supra* note 154, art. VIII; Treaty with Great Britain, *supra* note 83, art. III ("[T]he possessory rights of the Hudson's Bay Co., and of all British subjects who may be already in the occupation of land or other property lawfully acquired in the said territory, shall be respected."); Treaty of Peace, Friendship, Limits and Settlement, Feb. 2, 1848, U.S.-Mex., art. VIII, 9 Stat. 922 ("In the said territories, property of every kind, now belonging to Mexicans . . . shall be inviolably respected."); Treaty with Mexico, Dec. 30, 1853, U.S.-Mex., art. V, 10 Stat. 1035; Treaty for the Cession of Alaska, Mar. 30, 1867, U.S.-Russ., art. III, 15 Stat. 539; Treaty for the Cession of the Danish West Indies, Aug. 4, 1916, U.S.-Den., art. II, 39 Stat. 1706 ("[I]t is understood that this cession does not in any respect impair private rights which by law belong to the peaceful possession of property of all kinds by private individuals of whatsoever nationality . . .").

166. See Definitive Treaty of Peace, Sept. 3, 1783, U.S.-Gr. Brit., arts. V & VI, 8 Stat. 80.

167. Treaty of Peace, Dec. 10, 1898, U.S.-Spain, art. VIII, 30 Stat. 1754.

168. *Eastern Extension, Australasia and China Telegraph Co. v. United States*,

courts considered the principle expressed by these treaties to be customary international law, legally obligatory even if not stipulated by treaty: "The United States, as a just nation, regard this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract."¹⁶⁹

In addition to rather extensive judicial and contractual precedent, Professor O'Connell has observed, "[t]he absolute duty of a successor State to respect the rights of landowners was enunciated in no less vigorous terms in United States diplomatic practice."¹⁷⁰ The American opposition to the proliferation of British and German protectorates in the South Pacific during the later part of the nineteenth century is an example of such practice.¹⁷¹ During the same period, United States Secretary of State Bayard expressed strong protests to the Chilean government after the 1879-1883 war between Peru and Chile. Pursuant to the peace terms, Chile acquired sovereignty over the nitrate-rich Tarapacá province that contained property held by several American commercial interests. The Chilean government subsequently began to review all land titles in the province, ostensi-

46 Ct. Cl. 646, 649 (1911) (citing *United States v. de la Arredondo*, 31 U.S. (6 Pet.) 691, 712 (1832)); *see also* *Municipality of Ponce v. Roman Catholic Apostolic Church*, 210 U.S. 296, 324 (1908) ("[T]he treaty has merely followed the recognized rule of international law which would have protected the property of the church in Porto Rico subsequent to the cession."); 1 MOORE, *supra* note 98, at 414 ("Stipulations for the protection of rights of property may also be found in other treaties by which the United States has acquired title to territory. They are held by the courts to be merely declaratory of the law of nations.").

169. *United States v. Soulard*, 29 U.S. (4 Pet.) 511, 512 (1830); *see also* *Knight v. United Land Ass'n*, 142 U.S. 161, 184 (1891) ("Irrespective of any such provision in the treaty, the obligations resting upon the United States, in this respect, under the principles of international law, would have been the same."); *Coffee v. Groover*, 123 U.S. 1, 9 (1887) ("It is true that the property rights of the people, in those cases, were protected by stipulations in the treaties of cession, as is usual in such treaties; but the court took broader ground, and held, as a general principle of international law, that a mere cession of territory only operates upon the sovereignty and jurisdiction . . . and not upon the private property of individuals . . ."); *Coffee v. Groover*, 123 U.S. 1, 9 (1887); *Dent v. Emmeger*, 81 U.S. (14 Wall.) 308, 312 (1871) ("The treaty so provided, and such would have been the effect of the principles of the law of nations if the treaty had contained no provision upon the subject."); *United States v. Moreno*, 68 U.S. (1 Wall.) 400, 404 (1863) ("The treaty stipulation was but a formal recognition of the pre-existing sanction in the law of nations."); *Strother v. Lucas*, 37 U.S. (12 Pet.) 410, 435 (1838); *Delassus v. United States*, 34 U.S. (9 Pet.) 117, 133 (1835) (Marshall, C.J.).

170. O'CONNELL, *STATE SUCCESSION*, *supra* note 36, at 80.

171. *See* discussion in text at *supra* notes 125-131.

bly to harmonize these titles with its own property laws.

In a cable to the American ambassador in Santiago, Secretary of State Bayard presented a rather detailed legal justification for the opinion of the "Government of the United States . . . that titles derived from a duly constituted prior foreign government to which it has succeeded are 'consecrated by the law of nations' even as against titles claimed under its own subsequent laws."¹⁷² This statement is arguably the strongest possible assertion of the Lockean notion of property in that not only does Secretary Bayard assert that private property rights survive a succession unharmed, but that a successor state is prohibited from making *any* subsequent adjustments to pre-existing property rights, even to harmonize them with its own property laws.

B. INTERNATIONAL PRECEDENT & THE GERMAN SETTLERS CASE

Considering this wealth of precedent—judicial, conventional, and diplomatic—it is not surprising that several commentators have observed that "[t]he principle that cession works no impairment of private property rights has nowhere been more clearly enunciated than in the United States."¹⁷³ Foreign courts soon incorporated the doctrine into the jurisprudence of several other (principally European)

172. Cable from United States Secretary of State Bayard to Mr. Roberts, March 20, 1886, *quoted in* 1 MOORE, *supra* note 98, at 422 [hereinafter Roberts Cable]. The dispute between Panama and Costa Rica over the "Sixaola territory" at the beginning of the century provides yet another example. *See* 1 HACKWORTH, *supra* note 64, at 526-27. Costa Rica claimed sovereignty over the territory pending the ratification of a treaty that would have transferred the territory to Panama. Costa Rica began to seize property owned by the American Banana Company. While acknowledging the continued legality of Costa Rica's claim to the territory (until the eventual transfer), the United States argued that "Costa Rica exercises at present a temporary de facto sovereignty over the territory . . . continuing until such time as the pending boundary treaty is ratified." Memorandum from U.S. Secretary of State Root to Costa Rican Minister Magoon, April 16, 1906, *quoted in* 1 HACKWORTH, *supra* note 64, at 527. As a result, the United States argued that "[h]er functions of government are limited by her tenure, which is of a temporary and precarious character. Her duty is to preserve the property, not to destroy it, and hand it over to her successor without the commission of any acts tending to impair the ultimate rights of the de jure owner." *Id.*

173. Sayre, *supra* note 36, at 479; *see also* O'CONNELL, STATE SUCCESSION, *supra* note 36, at 79-80; KEITH, *supra* note 36, at 78 ("The United States is peculiarly rich in judicial and other dicta on this head."); O'CONNELL, INTERNATIONAL LAW, *supra* note 36, at 436.

countries, often by explicit citation to Marshall's famous opinion.¹⁷⁴ The statements of Argentinean publicist Charles Calvo are paradigmatic:

La conquête, nous l'avons déjà démontré, change les droits politiques des habitants du territoire et transfère au nouveau souverain la propriété du domaine public de son cédant. Il n'en est pas de même de la propriété privée, qui demeure incommutable entre les mains de ses légitimes possesseurs. 'Ce serait violer un usage qui a acquis force de lois entre les nations modernes,' dit le juge Marshall à propos de la translation d'un pays d'une souveraineté à une autre, 'ce serait outrager ce sentiment de justice et de droit reconnu par tous les peuples civilisés . . . ' ¹⁷⁵

Numerous treaties of cession during the period which "frequently provide[d] for the quiet enjoyment of the private property of individuals" demonstrate the general acceptance of this doctrine during the nineteenth century.¹⁷⁶ Like the American courts, European com-

174. As John Bassett Moore once observed, because of the apotheosis of Marshall as interpreter of the Constitution, scholars often overlook his important role in the development of modern international law:

So marked was his supremacy . . . so profoundly did his opinions affect the course of national development, that we are accustomed to think of him in the United States only as the expounder of the Constitution. This is not, however, his sole title to fame. He is known in other lands as the author of important opinions on questions which deeply concern the welfare and intercourse of all nations . . . [I]t was his lot in more than one case to blaze the way in the establishment of rules of international conduct . . .

John Moore, *John Marshall: An Address*, 16 POL. SCI. Q. 393, 404-05 (1901).

175. 4 CHARLES CALVO, *LE DROIT INTERNATIONAL* 399 (5th ed. 1896) ("Conquest, as we have already demonstrated, changes the political rights of the inhabitants of the territory and transfers to the new sovereign the public property located in the transferred territory. It does not affect private property which remains unchanged in the hands of its legitimate possessors. 'This would violate the usage which has become the law between modern nations,' said Justice Marshall regarding the transfer of a country from one sovereign to another, 'it would outrage the sentiment of justice and law recognized by all civilized people . . . '") (emphasis added); see also Sayre, *supra* note 36, at 497 ("It seems fair to assume, therefore, that the general principles underlying the decisions of the United States land cases are not of purely local extent, but are principles of international recognition and validity . . .") (citing French, German, and Italian publicists); O'CONNELL, *STATE SUCCESSION*, *supra* note 36, at 90-99 (discussing the diplomatic and judicial practice in the matter of acquired rights).

176. KEITH, *supra* note 36, at 78, 80 (citing several German and English treaties of cession); see also O'CONNELL, *STATE SUCCESSION*, *supra* note 36, at 90 & n.5 ("Most of the treaties of cession of the nineteenth century, whether relating to European, American or undeveloped countries, contained provisions for the protection of acquired rights.") (citing more than twenty treaties as evidence of the

mentators felt that such contractual "stipulations [were] unnecessary" since "treaties in this respect [were] declaratory of the common International Law."¹⁷⁷

This "common International Law" was reflected in a judicial precedent which, though not as rich as that of the United States, afforded considerable protection to private property rights in territories subject to state succession. Considering the prevalence of the Lockean view of property in the English common law, it is not surprising that English law and practice often articulated this rule. For example, in an opinion for the British Privy Council, Lord Haldane stated that "a mere change of sovereignty is not presumed to disturb rights of private owners; and the terms of a cession are *prime facie* to be construed accordingly."¹⁷⁸ His opinion echoed an earlier holding by the same court that "[a]ccording to the well-understood rules of International Law a change of sovereignty by cession ought not to affect private property."¹⁷⁹

English courts, however, were not alone in promulgating such a Lockean notion of private property rights. The Romanian-Hungarian Mixed Arbitral Tribunal—established to handle claims between these countries following the dissolution of the Austro-Hungarian Empire and transfer of Hungarian Transylvania to Romania—re-affirmed that "[a] measure as a result of which the property of an ex-enemy is taken away in its entirety from the owner constitutes, *prima facie*, a violation of the general principle of respect of acquired rights and oversteps the limits of *common international law*."¹⁸⁰

proposition).

177. KEITH, *supra* note 36, at 78.

178. *Amodu Tijani v. Secretary, Southern Nigeria*, 2 A.C. 399, 407 (1921) (requiring monetary compensation for expropriation of property); *see also* *Salaman v. Secretary of State of India*, 1 K.B. 613, 638 (1906); *The Fama*, 5 Robinson's Rep. 106, *quoted in* *Leitensdorfer v. Webb*, 61 U.S. (20 How.) 176, 177 (1857) ("[T]he settled principle of the law of nations, that the inhabitants of a conquered territory change their allegiance . . . but their relations to each other, and their rights of property . . . remain undisturbed."); *West Rand Gold Mining Co. v. The King*, 2 K.B. 391, 411 (1905) (distinguishing the sanctity of private property with contractual obligations: "[T]he obligations of conquering States with regard to private property of private individuals, particularly land as to which the title had already been perfected before the conquest or annexation, are altogether different from the obligations which arise in respect of personal rights by contract."); KEITH, *supra* note 36, at 79-80.

179. *Cook v. Sprigg*, A.C. 572 (1899).

180. *Kulin v. Roumanian State*, *abstracted in* 4 I.L.R. (1927-1928 Ann. Dig.),

Similarly, after the creation of the Palestinian Mandated Territories, a Palestinian court, considering the status of property titles previously derived under Ottoman law, announced that "the mere change of State, however, is not an act of confiscation." The court observed that "[t]his theory supports the generally accepted view that the substitution of a new State for an old can make no difference to existing private rights in and over property."¹⁸¹ In a genuflection to the positivist theory of property, however, the court did acknowledge that such property rights could be violated if "specifically extinguished by the treaty itself," but dismissed such a theoretical possibility by stating that "in practice . . . the power is seldom, if ever, acted upon."¹⁸²

The advisory opinion of the Permanent Court of International Justice in its *German Settlers Case*¹⁸³ confirmed the status of the doctrine of acquired rights. The Permanent Court concluded that the doctrine enunciated in *Percheman* was customary international law.¹⁸⁴ The *German Settlers Case* concerned the eviction of German settlers by Poland from territory that Germany ceded to Poland after the First World War. The case addressed the validity of contracts with the former Prussian authorities on which the German settlers based their tenancies. The Permanent Court held that Poland was obligated to respect these contracts and, therefore, the settlers' tenancies:

88, 90 (emphasis added); see also *Thalheimer v. Yugoslav State*, abstracted in 4 I.L.R. (1927-1928 Ann. Digest) 88, 90 ("[R]eaffirmed in favour of Hungarian nationals . . . the rule of international law according to which a State acquiring foreign territory by way of cession or conquest is bound to respect existing private rights . . ."); *Les Anciens Urbalistes de la Commune de Beremond v. Yugoslav State*, cited in 4 I.L.R. (1927-1928 Ann. Digest) 88, 90 & n.2.

181. *Heirs of Prince Mohamed Selim v. Palestine*, abstracted in 8 I.L.R. 123, 125 (1935-1937 Ann. Dig., Palestine; Land Court of Jaffa 1937); see also *Greece v. Bulgaria*, abstracted in 7 I.L.R. 91 (1933-1934 Ann. Dig., Östen Undén, Arbitrator 1933).

182. *Selim*, *supra* note 181, 8 I.L.R. at 125.

183. *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland*, 1923 P.C.I.J. (ser. B) No. 6 (Sept. 10) [hereinafter *German Settlers*].

184. See *German Settlers* at 36 (Sept. 10); see also *Case Concerning Certain German Interests in Polish Upper Silesia*, 1926 P.C.I.J. (ser. A) No. 7, at 42 (May 25) (reaffirming the holding in the *German Settlers Case* that the doctrine of acquired rights is "a principle which, as the Court has already had occasion to observe, forms part of generally accepted international law.").

Private rights acquired under existing law do not cease on a change of sovereignty It can hardly be maintained that, although the law survives, private rights acquired under it have perished . . . even those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights . . . are invalid as against a successor in sovereignty.¹⁸⁵

The Court dismissed Poland's contention that it did not have to respect the German settlers' property rights as "based on no principle and *would be contrary to an almost universal opinion and practice*."¹⁸⁶

C. POSITIVISTIC RESTRICTIONS ON THE DOCTRINE OF "DROITS ACQUIS"

Even the doctrine of acquired rights evinces the tension in international law between the natural rights and conventional perspectives of property. Although emphasizing a Lockean notion of property in its basic assertion that "mere" changes in sovereignty do not affect property rights, the law of state succession does not completely insulate private property from the successor sovereign. Instead, the law of state succession recognizes that a new sovereign can adjust property rights through general, non-discriminatory legislation. As Professor Lauterpacht succinctly put it, "[t]he transfer of sovereignty by cession or by subjugation does not *ipso facto* affect rights of private property, though the subsequent legislation of the new sovereign may affect them."¹⁸⁷

During the late nineteenth century, several developed countries challenged this acknowledgment of the state's control of property, arguing that property held by non-nationals was immune from *any* adverse legislative changes.¹⁸⁸ For example, in its dispute with Chile, the United States declared that Chile had violated the doctrine of acquired rights by adjusting property rights in a recently conquered ter-

185. German Settlers, 1926 P.C.I.J. at 36.

186. *Id.* (emphasis added).

187. 1 OPPENHEIM, *supra* note 2, at 501 & n.9; *see also* VON SCHUSCHNIGG, *supra* note 139, at 157-58.

188. *See* O'CONNELL, STATE SUCCESSION, *supra* note 36, at 100-01 (asserting that nationalization of certain industries has led to the abandonment of the principle that a successor state may not interfere with private property rights in the territory it absorbs).

ritory:

Title to land and landed improvements is, by the law of nations, a continuous right, not subject to be divested by any retroactive legislation of new governments [What] is here denied is the right of any government to declare titles lawfully granted by its predecessor to be vacated because they could not have been lawfully granted if its own law had, at the time in question, prevailed.¹⁸⁹

Such claims were the exception, however, not the rule. Most of the practice and commentary in this field evinces a more modern, positivistic belief in the fundamental ability of a successor state to alter property rights in newly acquired territory.¹⁹⁰ As one commentator observed: "Being now their sovereign, it may indeed impose any burdens it pleases on its new subjects—it may even confiscate their private property, since a sovereign State can do what it likes with its subjects."¹⁹¹ Professor O'Connell's explanation intimates a similarly positivistic notion of property as the creation of the state. Professor O'Connell notes that since the previous sovereign power could always adjust property rights through its power of eminent domain,

"[t]here is no reason . . . why acquired rights should be invested after a change of sovereignty with a 'sanctity and permanence' greater than they had before."¹⁹² Comparable expressions appear in judicial statements: "[B]y the law of nations, the inhabitants, citizens or subjects of a conquered or ceded country, territory or province, retain all the rights of property which have not been taken from them by . . . the laws of the sovereign who acquires it by cession."¹⁹³

Thus, under the doctrine of acquired rights, a sovereign can change the private property rights in an affected region, but only if it does so in accordance with its other international obligations. As Pro-

189. Roberts Cable, *supra* note 172, at 422; *see also* Kaeckenbeeck, *supra* note 139, at 13.

190. *See* KEITH, *supra* note 36, at 78; Kaeckenbeeck, *supra* note 139, at 14; O'CONNELL, STATE SUCCESSION, *supra* note 36, at 99-102 ("The principle of respect for acquired rights in international law is no more than a principle that change of sovereignty should not touch the interests of individuals more than is necessary. This does not mean that these interests may not be interfered with at all.").

191. 1 OPPENHEIM, *supra* note 2, at 522.

192. O'CONNELL, STATE SUCCESSION, *supra* note 36, at 101.

193. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 734 (1835).

fessor Starke observes, because "there is no rule of international law obliging [a new sovereign] to respect the former municipal legal system . . . [a] successor state can always displace existing rights and titles by altering the former municipal law, unless in doing so, it breaks some other independent duty under international law, for instance, by expropriating the property of aliens arbitrarily, and not for a public purpose."¹⁹⁴ In other words, the new sovereign's ability to adjust vested rights is subject only to the general restriction that "a state cannot elude international obligations, or render internationally illegal acts internationally legal by enacting a statute to that effect."¹⁹⁵

Thus, if a private party were a national of the state asserting sovereignty over a territory, that state could adjust the property rights in the territory with virtual impunity (as long as the state made such adjustments through general legislation that did not discriminate against its new subjects).¹⁹⁶ If the private party were not a national of the new sovereign, however, then the state would have, as Professor Starke suggested, the additional responsibilities incumbent upon a state under international law to respect the property of foreign nationals—i.e., to not expropriate the property arbitrarily and to provide just and adequate compensation.¹⁹⁷ Nonetheless, in general, the doctrine of acquired rights recognizes a sovereign as having a fairly unfettered authority to adjust property rights *after* a change in sover-

194. STARKE, *supra* note 116, at 362; *see also* O'CONNELL, INTERNATIONAL LAW, *supra* note 37, at 441 (stating that a change in sovereignty does not prevent a successor state from modifying or even expropriating an individual's pre-existing property rights as international law permits).

195. Kaeckenbeeck, *supra* note 139, at 13.

196. *See* 1 OPPENHEIM, *supra* note 2, at 155 & n.5 ("The successor State cannot avoid its obligations by enacting legislation either of a discriminatory character or nominally affecting all the residents of the territory.").

197. *See* STARKE, *supra* note 116, at 362; *see also* O'CONNELL, STATE SUCCESSION, *supra* note 36, at 102 (stating that if a successor state alters or cancels property rights, it must provide adequate compensation or grant an equivalent title to the holder of rights, as required by international law); Kaeckenbeeck, *supra* note 139, at 16 (postulating that the obligation of a successor state is to make compensation "as a minimum of justice and fairness in the treatment of foreigners, which a state may not transgress without exposing itself to rightful intervention and international liability"). For a general discussion of the obligations of a state under the doctrine of state responsibility for the expropriation of private property of aliens, *see supra* note 2; STARKE, *supra* note 116, at 326; BRIERLY, *supra* note 139, at 284-85; SCHWARZENBERGER, *supra* note 139, at 105-06.

eignty.

Another positivistic restriction on the doctrine of acquired rights is the limited ability of private individuals to assert their rights under this doctrine. For example, many countries, the United Kingdom in particular, have developed municipal law doctrines that prohibit private individuals from securing their rights under international law through municipal courts when the defendant is their own government.¹⁹⁸ These "Act of State" doctrines represent the conventional perspective of property rights that exist in the legal systems of most Western nations: the state, as creator of property, can adjust property rights under municipal law with impunity, even if its acts apparently violate some international (Lockean) norm.

International law presents a similar bar in the principle that only states are legal actors under international law and, hence, capable of enforcing the international rights of their nationals. This bar on the individual pursuit of rights under international law is based on the same positivistic principles underlying the notion that property is a creation of the state: that the state is the fundamental expression of man, and that, in the absence of such state structure, all is anarchy.¹⁹⁹

Considering the affinity of many publicists for the doctrine of acquired rights (and its underlying philosophical vision of property as more fundamental than the state), it is not surprising that these publicists also advocate the ability of individuals to assert their rights before international tribunals. Kaeckenbeeck, for example, proposes that private parties should have standing to appear before such tribunals²⁰⁰ because the inability of individuals to prosecute their rights

198. See O'CONNELL, STATE SUCCESSION, *supra* note 36, at 85-90; KEITH, *supra* note 36, at 83-84; 1 OPPENHEIM, *supra* note 2, at 154-55 & n.5; O'CONNELL, INTERNATIONAL LAW, *supra* note 37, at 437-39; Kaeckenbeeck, *supra* note 139, at 11.

199. Compare Kaeckenbeeck, *supra* note 139, at 18 ("The supporters of the sovereign state, and with it, of international law in its present structure, deny the capacity of humanity to integrate itself politically, and see in the individualism of man an anarchic force.") with HOBBS, *supra* note 26, at 183-88 (discussing that regardless of the judge's power in interpreting the law, the people will not allow an interpretation that contradicts human nature).

200. See Kaeckenbeeck, *supra* note 139, at 17. Kaeckenbeeck's suggestions evolved from his experience as presiding judge of one of the International Mixed Arbitration Tribunals (established by the Treaty of Versailles) which granted private parties standing. See generally GEORGES KAECKENBEECK, THE

before international tribunals often leads to inequity.²⁰¹ Similarly, Professor O'Connell, author of the classic treatment of the law of state succession, argues that

theory and practice establish that the individual has legally protected interests, can perform legally prescribed acts, can enjoy rights and be the subject of duties under municipal law deriving from international law, and if personality is no more than a sum of capacities, then he is a person in international law, though his capacities may be different from and less in number and substance than the capacities of States.²⁰²

INTERNATIONAL EXPERIMENT OF UPPER SILESIA (1942). Other tribunals that have granted standing to private individuals claiming personal rights include the Central American Court of Justice established between Costa Rica, Guatemala, Honduras, Nicaragua, and El Salvador by the 1907 Treaty of Washington; the Central Commission for the Navigation of the Rhine and the European Commission of the Danube; and the stillborn International Prize Court provided for in Articles 4 and 5 of the Hague Convention of 1907. *See* MAREK ST. KOROWICZ, *INTRODUCTION TO INTERNATIONAL LAW* 348-50, 353-60 (1959); Edwin M. Borchard, *Access of Individuals to International Courts*, 24 AM. J. INT'L L. 359, 360 (1930); Quincy Wright, *The End of a Period of Transition*, 31 AM. J. INT'L L. 604, 610-12 (1937); O'CONNELL, *INTERNATIONAL LAW*, *supra* note 37, at 121 & n.84-86. *See generally* DENIS SCHULÉ, *LE DROIT D'ACCÈS DES PARTICULIERS AUX JURISDICTIONS INTERNATIONALES* (1935).

201. *See* Kaeckenbeeck, *supra* note 123, at 16; *see also* BRIERLY, *supra* note 139, at 277 (discussing the lack of remedy available to a private individual when his state refuses to take up his case, and the delays often involved in requiring a defendant state to go to arbitration).

202. O'CONNELL, *INTERNATIONAL LAW*, *supra* note 37, at 118; *see also* O'CONNELL, *STATE SUCCESSION*, *supra* note 36, at 85-86 (referring to "the now largely discredited theory that the individual cannot be a subject of international law [T]he prevailing tendency to give persons other than sovereign States the right of appearance before international tribunals is breaking down the old assumptions that States only are the subjects of international law.").

Of course, these comments are only part of a general trend beginning early in this century of recognizing private parties as legal personalities under international law. *See, e.g.*, Harold Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2358-59 & n.66-67 (1991); Marek St. Korowicz, *The Problem of the International Personality of Individuals*, 50 AM. J. INT'L L. 533, 534-540 (1956); Quincy Wright, *War Crimes*, 39 AM. J. INT'L L. 257, 265 (1945) ("The concept of the individual as a subject of international law has been developed by numerous publicists, and has been recognized in official declarations and treaties which permit individuals . . . to petition international institutions, [and] which propose international tribunals before which individuals could be parties"); ST. KOROWICZ, *supra* note 200, at 327-28 ("The idea that international law rules not only the intercourse of independent States but also that its provisions are directly binding on individuals without the intermediary of their State, is as old as the science of international law itself."); O'CONNELL, *INTERNATIONAL LAW*, *supra* note

Nonetheless, state practice has consistently viewed the protection of vested rights from a more conventional perspective. This perspective intimately links property to the state, considers the state the principal actor under international law and, therefore, views the state as the only vehicle to assert such rights.²⁰³

Finally, the restriction that the doctrine of acquired rights protects only vested rights—i.e., rights that were recognized under the previous state's legal regime—illustrates the influence of the conventional perspective: "[T]he succeeding Government is not obligated to recognise rights which were not legal under the law of his predecessor."²⁰⁴ Inchoate rights—rights that had not been fully legally vested prior to the succession—are "of imperfect obligation and affected only the conscience of the new sovereign."²⁰⁵

Even in the context of inchoate rights, however, the Lockean vision emerges. Several American commentators have maintained that a legally sanctioned title is unnecessary and that a successor state is "bound to recognise and protect all private rights in land, whether they are held under absolute grants or inchoate titles, for *property* in land includes every class of claim to real estate, from a mere inceptive grant to a complete, absolute, and perfect title."²⁰⁶ To do other-

37, at 116-21; VON SCHUSCHNIGG, *supra* note 139, at 69-72; BRIERLY, *supra* note 139, at 277 ("It has been suggested that a solution might be found by allowing individuals access in their own right to some form of international tribunal . . . a possible reform which deserves to be considered."); *see also* 35 (II) *Annuaire de l'Institut de Droit International* 267, 271 (1930) (adopting a resolution that "[t]here are cases in which it may be desirable to recognize the right of individuals to directly appeal to an international judicial body in their differences with states"). *But see* SCHWARZENBERGER, *supra* note 139, at 38-39 (noting that: (i) municipal courts are in a lower category than international courts and the standing of the courts differs considerably; (ii) the act of state doctrine imposes restrictions on the judicial freedom of municipal courts; and (iii) "only on the lowest level are judgments of municipal courts merely evidence of national attitudes to international law").

203. *See, e.g.*, Kaeckenbeeck, *supra* note 139, at 17-18; O'CONNELL, STATE SUCCESSION, *supra* note 36, at 85-86.

204. KEITH, *supra* note 36, at 82 (citing *United States v. Hanson*, 41 U.S. (16 Pet.) 196 (1842)); *see also* Sayre, *supra* note 36, at 484-87, 492-94; O'CONNELL, STATE SUCCESSION, *supra* note 36, at 83 ("To receive the protection of international law an interest must have been properly vested, *bona fide* acquired and duly evidenced.").

205. *Dent v. Emmeger*, 81 U.S. 308, 312; *see also* O'CONNELL, INTERNATIONAL LAW, *supra* note 37, at 437 & n.45 (citing several other opinions to this point).

206. 2 HENRY W. HALLECK, HALLECK'S INTERNATIONAL LAW 505 (Baker ed.

wise, "[t]o eject or disregard the titles of those who by their toil and daring had given to the land its value would have been a mockery of justice."²⁰⁷ This was particularly the case in "the new Louisiana territory [where] . . . pioneer settlers . . . often had to place more reliance upon their muskets than upon legal rules and titles, nothing was more common than to hold land without recorded legal title."²⁰⁸

Thus, despite such positivistic restrictions, the general principle of the doctrine of acquired rights remains unchallenged: a change of sovereignty does not affect a change in private property rights because these rights are distinct from the state and are grounded in notions of equity and justice. As such, this general principle is a dramatic example of the continued influence of the Lockean notion of private property in modern international law.

IV. MILITARY OCCUPATION

In addition to the recognition of property rights in *terra nullius* and the protection of property under the doctrine of acquired rights, the ambiguous and contradictory law governing military occupation also illustrates the influence of the natural rights image of property. International law distinguishes military occupation as a unique phase of military operations, governed by a slightly more restrictive set of rules than actual combat. Unfortunately, there is no consensus on what constitutes an occupation or at what point an occupation begins or ends.²⁰⁹ Article XLII of the annex to the Hague Conventions of

1878); see also *Strother v. Lucas*, 37 U.S. (12 Pet.) 410, 436 (1838) ("This court has defined property to be any right, legal or equitable, inceptive, inchoate, or perfect . . . as to affect the conscience of the former sovereign."); *Ainsa v. New Mexico & Ariz. R.R. Co.*, 175 U.S. 75, 79 (1899) (stating that changes of sovereignty and jurisdiction do not affect the validity of private property rights, both perfected and unperfected) (relying on *Rio Arriba Land & Cattle Co. v. United States*, 167 U.S. 298, 309 (1897)); *Stoneroad v. Stoneroad*, 158 U.S. 240, 248 (1895); *Astiazaran v. Santa Rita Land & Mining Co.*, 148 U.S. 80, 80-82 (1893).

207. Sayre, *supra* note 36, at 483.

208. *Id.* But see *id.* at 484-87 (discussing the requirement that, although a title that was inchoate prior to cession could be binding on the successor state, the title had to have been recognizable under the predecessor's laws if the individual had chosen to petition for legal title).

209. See, e.g., Adam Roberts, *What is a Military Occupation?*, 55 BRIT. Y.B. INT'L L. 249 (1984); NISUKE ANDO, SURRENDER OCCUPATION, AND PRIVATE PROPERTY IN INTERNATIONAL LAW: AN EVALUATION OF U.S. PRACTICE IN JAPAN 93-95 (1991) (arguing that the post-war American occupation of Japan was not a

1907 provides the vague guidance that an occupation exists when a territory "is actually placed under the authority of the hostile army."²¹⁰ As Oppenheim has observed, this definition is "not at all precise, but it is as precise as a legal definition of . . . occupation can be."²¹¹

Regardless of the circumstances that actually trigger the body of customary and conventional practice concerning military occupation, the rules themselves evince the powerful influence of the Lockean notion of property. Running throughout these rules is a tremendous respect for the sanctity of private property—a conviction that such rights are immune to any changes in government as an occupation.²¹² At the same time, however, there is a cross-current running through the rules. The "military necessity" exceptions to most of these rules reflect a more modern, positivistic notion that property rights—as a creation of the state—can be subordinated to the state's interests.

A. RESPECT FOR PRIVATE PROPERTY: CUSTOMARY PRACTICE

The fundamental sanctity of private property under the rules of military occupation derives from the understanding that, although belligerent occupation affects a temporary transfer of partial sovereignty over the occupied territory from the *de jure* sovereign to the occupying power, occupation alone does not transfer permanent sovereignty to the occupant. Only a treaty of cession or "possession so long and permanent, as should afford conclusive proof, that the territory was altogether abandoned by its sovereign" can produce a change in sovereignty.²¹³ Implicit in the notion of occupation, there-

traditional "belligerent occupation" because hostilities had ceased prior to the occupation).

210. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, annex art. XLII, 36 Stat. 2306, T.I.A.S. No. 539, 99 U.N.T.S. 149 [hereinafter Hague Convention].

211. 2 OPPENHEIM, *supra* note 5, at 167.

212. As was the case with the doctrine of acquired rights and the recognition of property rights in *terra nullius*, Anglo-American practice and commentary provides the most consistent and emphatic defense of private property rights under military occupation. See WESTLAKE, *supra* note 15, at 246 ("[T]he leaning of writers in England and the United States is towards greater mildness than seems to prevail on the continent.").

213. *United States v. Hayward*, 26 F.Cas. 240, 246 (1815); see also *id.* at 246 ("The right which existed was the mere right of superior force, the allegiance was temporary, and the possession not that firm possession, which gives to the con-

fore, is the understanding that the occupant's control is only provisional.²¹⁴

As a result, an occupation only transfers to the occupying power a *temporary* authority to exercise some of the powers of a sovereign, principally those necessary to maintain public order and to support the war efforts of the occupying power.²¹⁵ As the United States Supreme Court observed:

The right to thus occupy an enemy's country and temporarily provide for

queror *plenum dominium et utile*, the complete and perfect ownership of property.") (emphasis added); *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 195 (1815) ("[A]cquisitions made during war are not considered as permanent until confirmed by treaty."); *United States v. Rice*, 17 U.S. (4 Wheat.) 246, 254 (1819); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828) ("The usage of the world is . . . to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace."); *Ho Tung & Co. v. United States*, 42 Ct. Cl. 213, 227-28 (1907); 1 PAUL FAUCHILLE, *TRAITE DE DROIT INTERNATIONAL PUBLIC* 763-66 (1925); JENNINGS, *supra* note 115, at 52; TWISS, *supra* note 23, at 227 ("[I]t is not the superior power of the conqueror which gives right to his conquest, but it is the consent of the conquered."); 1 OPPENHEIM, *supra* note 2, at 518-19 ("Conquest alone does not *ipso facto* make the conquering State the sovereign of the conquered territory Conquered enemy territory, although actually in possession and under the sway of the conqueror, remains legally under the sovereignty of the enemy until through annexation it comes under the sovereignty of the conqueror."); GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* 31-33 (1957) (noting that it is established that the rights and the sovereignty of the legitimate government are suspended only when they conflict with the stronger power of the occupant during the period of actual occupation). *But see id.* at 38 & n.35 (noting that the occupant is the *de jure* sovereign of an occupied territory).

214. *But see* Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44 (1990) (arguing that several instances of prolonged occupations, particularly the Israeli occupation of the West Bank and Gaza, challenge the assumption that occupations are of short duration).

215. *See, e.g.*, WAR DEP'T, *RULES OF LAND WARFARE* 73-74 (1940) *quoted in* 6 HACKWORTH, *supra* note 64, at 385 ("[M]ilitary occupation confers upon the invading force the right to exercise control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty."); *see also* 6 HACKWORTH, *supra* note 64, at 385-88 (providing additional examples where no transfer of sovereignty occurred); 7 MOORE, *supra* note 98, at 257-65; 1 MOORE, *supra* note 98, at 46-48 (discussing the rights of the military occupant); Hague Convention, *supra* note 210, annex art. XLIII (noting that once power comes withing the occupant's hands, the occupant "shall take all measures in his power to restore, and ensure, so far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country").

its government has been recognized by previous action of the executive authority, and sanctioned by frequent decisions of this court. The local government being destroyed, the conqueror may set up its own authority and make rules and regulations for the conduct of *temporary government*²¹⁶

Because of the transitory nature (in a legal, if not always temporal sense) of the occupying power's authority over the territory, scholars often describe the status of the occupying country as that of a usufructuary.²¹⁷ In other words, the occupying power may administer the territory—including, levying taxes and requisitioning supplies²¹⁸—so as to maintain order and provide for the needs of the inhabitants and the occupying forces, but it must respect and safeguard the underlying legal status quo. In particular, the temporary sovereign must respect the existing property rights of the population.²¹⁹

As suggested by Chief Justice Marshall's opinion in *Percheman*, this protection of private property during a belligerent occupation

216. *MacLeod v. United States*, 229 U.S. 416, 425 (1913) (citing *Dooley v. United States*, 182 U.S. 222 (1901); *City of New Orleans v. Steamship Co.*, 87 U.S. (20 Wall.) 387 (1874); *Cross v. Harrison*, 57 U.S. (16 How.) 164 (1853); *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850)) (emphasis added).

217. See Sayre, *supra* note 36, at 494 & n.26; Hague Convention, *supra* note 210, annex art. LV ("The occupying State shall be regarded only as administrator and usufructuary."); WILLIAM BUCKLAND, A TEXTBOOK OF ROMAN LAW 269 (Peter Stein ed., 3d ed. 1966) (noting that the concept of "usufruct" evolved from the Roman Civil Law doctrine of "usufructus" which "was the right to enjoy the property of another and to take the fruits, but not to destroy it, or fundamentally alter its character").

218. See Hague Convention, *supra* note 210, arts. 49, 52; see also 7 MOORE, *supra* note 98, at 280-87; 1 MOORE, *supra* note 98, at 47 (citing *Cross v. Harrison*, 57 U.S. (16 How.) 164, 190 (1853); *Dooley v. United States*, 182 U.S. 222, 230 (1901)).

219. See Hague Convention, *supra* note 210, arts. 46-47; *Mrs. Alexander's Cotton*, 69 U.S. (2 Wall.) 404, 419 (1864) ("This rule, as to property on land . . . may now be regarded as substantially restricted 'to special cases dictated by the necessary operation of war,' and as excluding, in general, 'the seizure of the private property of pacific persons.'") (citation omitted); see also 1 MOORE, *supra* note 98, at 47-48 (discussing General Butler's proclamation at New Orleans that "a conqueror has a right to displace the pre-existing authority and to assume . . . all the powers and functions of government"); 7 MOORE, *supra* note 98, at 273-75 (discussing the treatment of the inhabitants); 1 OPPENHEIM, *supra* note 2, at 521-22; VON GLAHN, *supra* note 213, at 194-95; Jacob Elon Conner, *The Development of the Law of Belligerent Occupation*, 4 U. IOWA STUD. IN SOC., ECON., POL. & HIST. 3, 33 (1912).

enjoys a long tradition in international law.²²⁰ Hugo Grotius captured this notion at the very foundation of modern international law. Concerned by the violence and chaos that he witnessed in Europe during the Thirty Year's War, he wrote his *De Jure Belli ac Pacis* in order to moderate belligerent practice.²²¹ Grotius admonished belligerents to respect the property of private individuals and not to capture the property of enemy subjects in order to punish their monarchs.²²²

Vattel's *Law of Nations* refined this precept, admonishing that the "conqueror seizes on the possessions of the state, the public property, while private individuals are permitted to retain theirs."²²³ Vattel rejected the notion "that the conqueror is absolute master of his conquest, that he may dispose of it as his property—that he may treat it as he pleases" as a "monstrous principle" that "reduce[s] men to the state of transferable goods, or beasts of burden."²²⁴

A more recent statement of these Lockean notions of property appears in Oppenheim's *International Law*: "Immovable private enemy property may under no circumstances or conditions be appropriated by an invading belligerent. Should he confiscate and sell private land or buildings, the buyer would acquire no right whatever to the property."²²⁵ Oppenheim's opinion echoes that of Pasquale Fiore who "goes so far as to say categorically that modern international law uniformly recognizes the inviolability of private property. He argues that since private property is inviolable by the law of nature, it

220. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 86-87 ("[I]t is very unusual, even in cases of conquest for the conqueror to do more than to displace the sovereign and assume dominion over the country If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory.").

221. See GROTIUS, *supra* note 16, at 20 ("I have had many and weighty reasons for undertaking to write on this subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of."); see also 1 THOMAS A. WALKER, A HISTORY OF THE LAW OF NATIONS § 142, at 284-85 (1899).

222. See GROTIUS, *supra* note 16, at 758.

223. VATTEL, *supra* note 6, at 388.

224. *Id.*

225. 2 OPPENHEIM, *supra* note 5, at 403; see also VON GLAHN, *supra* note 213, at 186 ("[I]n no case may the occupant dispose of such immovable property, even if the proceeds of a sale are to be handed over to the owners at the conclusion of the war.").

cannot lose its inviolability by the fact of war.”²²⁶

European and American courts long recognized such statements as declaratory of a customary international rule obliging belligerents to respect private property. In affording such protection to private property, the courts often gave expression to the Lockean notion of property as somehow more fundamental and sanctified than sovereignty. For example, in a case arising out of the United States occupation of New Mexico during the Mexican-American War of 1846-1848, the United States Supreme Court observed that “although the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the Government of their former allegiance . . . remained in full force and unchanged.”²²⁷

Similarly, in a case arising from the Philippine Insurgency which followed the conquest of those islands by the United States during the Spanish-American War, the United States Court of Claims, held that “[t]he military occupancy, though absolute and supreme, operated only upon the political conditions of the people without affecting private rights of person and property.”²²⁸ As a result, the plaintiffs were entitled to compensation for the United States Army’s

226. DORIS A. GRABER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION (1863-1914): A HISTORICAL SURVEY* 196 (1949) (citing 2 PASQUALE FIORE, *NOUVEAU DROIT INTERNATIONAL PUBLIC* 302-04 (1869)).

227. *Leitensdorfer v. Houghton*, 61 U.S. (20 How.) 176, 177-78; *see also Cross v. Harrison*, 57 U.S. (16 How.) 164, 190 (1853). In *Ochoa v. Hernandez y Morales*, 230 U.S. 139 (1913), a case arising out of the United States’ occupation of Puerto Rico during the Spanish American War, the United States Supreme Court ruled that an order by the American Military Governor violated international law. The Court observed that “our Government, by its military forces, in the occupation and control of Porto Rico as a colony of Spain [was] bound by the principles of international law to do whatever was necessary to secure . . . the guaranties of private property.” *Id.* at 159. The Court relied extensively on President McKinley’s instructions for the occupation which contained similar declarations of an international obligation to respect the private property of the local population:

[T]he municipal laws of the conquered territory, such as affect private rights of person and property . . . are considered as continuing in force . . . and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion.

Id. at 155 & n.1. “Under this changed condition of things the inhabitants . . . are entitled to security in their private rights and relations.” *Id.*

228. *Philippine Sugar Estates Dev. Co. v. United States*, 39 Ct. Cl. 225, 246-47 (1904) (citing *Percheman* and its progeny).

seizure of their property. The court grounded its decision on the customary notion that “[a]ny other rule would . . . lead to results harmful to the inhabitants. . . . something that has not been tolerated in modern times.”²²⁹

As several commentators have observed, the emergence of these extensive protections for private property coincided with the dominance of the “politico-economic doctrines of laissez-faire, and of the separation of the spheres of politics and economics during the expanding industrialization of the West.”²³⁰ It is no coincidence that several of the principal authors on the laws of war during the seventeenth and eighteenth centuries, such as Vattel and Grotius, were also exponents of the natural rights theory of property. In contrast to the positivistic view of property as an artifact of the state, the general idea underlying the rules of military occupation is that private property (as a natural institution) is distinct from sovereignty and continues to exist even when sovereignty has been destroyed.

B. CODIFICATION: THE HAGUE AND GENEVA CONVENTIONS

The customary understanding that private property must be respected during a military occupation was codified in the nineteenth and early twentieth centuries in a series of famous conventions. The most famous of these codifications is Article 46 of the annex to the Hague Conventions of 1899 and 1907, which explicitly states that “private property cannot be confiscated.”²³¹ The article also mandates that “[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be

229. *Id.* at 247; *see also* *Philippine Sugar Estates Dev. Co. v. United States*, 40 Ct. Cl. 33 (1904).

230. JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 727 (Stevens ed., 1959).

231. Hague Convention, *supra* note 210, annex art. 46. The Hague Convention of 1899—of which the 1907 Hague Convention was basically a restatement—contained a similar prohibition. *See* Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, art. 46, 32 Stat. 1822, 98 U.N.T.S. 93. As von Glahn notes, the Conference participants generally accepted these provisions as codifications of pre-existing customary practice: “Little question existed by the time of the First Hague Conference (1899) that private property could not be confiscated by an invader under ordinary conditions, and the two relevant articles of the Hague Regulations (46 & 47) did not encounter opposition at either Hague meeting.” VON GLAHN, *supra* note 213, at 185.

respected," while Article 47 prohibits pillage.²³² During the Nuremberg trials, the International Military Tribunal declared that the "rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war."²³³ At least since then, scholars have viewed the Hague Conventions as embodying customary international law.²³⁴

After World War II, the Geneva Diplomatic Conference of 1949 produced four conventions on the conduct of war. Like the Hague Conventions, legal scholars generally recognize these conventions as declarations of customary international law, in large part because of their nearly unanimous adoption.²³⁵ The fourth convention, the Convention for the Protection of Civilian Persons in Time of War, devoted particular attention to occupied territory. Because the participants considered the Hague Convention's protections of property more than adequate, however, the Geneva Conventions do not include as many explicit protections of private property. Instead, the Geneva Conventions implicitly incorporate the protections of private property enumerated in the Hague Conventions,²³⁶ adding only a few supplemental provisions, such as Article 147, which forbids "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."²³⁷ In addi-

232. Hague Convention, *supra* note 210, annex arts. 46-47.

233. Trial of German Major War Criminals, 1946, CMD. 6964, Misc. No. 12, at 65, *quoted in* Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 359 (1987).

234. *See* Roberts, *supra* note 214, at 53 (citing 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 497 (1948)). *See generally* Meron, *supra* note 233, at 358.

235. *See generally* Meron, *supra* note 233. As Meron points out, the Geneva Conventions "are binding on even more states than the Charter of the United Nations." *Id.* at 348.

236. *See* COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 271 (Uhler & Coursier eds. 1958) ("Consequently the question of the treatment of enemy private property in the territory of the belligerent is still, in general, governed by usage and by the Hague Regulations of 1907."); *see also* Meron, *supra* note 233, at 364 & n.51; Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT'L L. 295, 303 & n.46 (1995).

237. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 147, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Geneva Convention]; *see also id.* arts. 27, 46, 50.

tion, Article 49 of the Convention added a prohibition against establishing civilian settlements in occupied territories: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."²³⁸ This protection was particularly important in the controversy surrounding the Israeli occupation of the West Bank and Gaza.²³⁹

Prior to the Hague and Geneva Conventions, the most famous codification of the customary practice protecting private property was the Lieber Code, which the Union army adopted during the American Civil War at the behest of President Lincoln.²⁴⁰ Although legally binding only on the Union army, the instructions are consid-

238. Geneva Convention, *supra* note 237, art. 49.

239. The occupation in recent decades has been the prolonged Israeli occupation of the Gaza strip, Golan Heights, Sinai Peninsula, and West Bank. The application of the norms of military occupation to these occupied territories has often engendered vitriolic debate. *See, e.g.,* Craig Jackson, *Israeli West Bank Settlements, The Reagan Administration's Policy Toward the Middle East and International Law*, 79 AM. SOC'Y INT'L L. PROC. 217 (1985) (reporting a rather acrimonious panel discussion hosted by the American Society of International Law) [hereinafter West Bank]; Michael Curtis, *International Law and the Territories*, 32 HARV. INT'L L.J. 457 (1991) (*responding to* Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT'L L.J. 129 (1991)).

Of course, the Israeli occupation of several of these regions is over, notwithstanding the continued controversy surrounding the 1994 transfer of control over the Gaza strip and several villages in the West Bank to the Palestinian Authority. *See* Agreement on the Gaza Strip and Jericho Area, May 4, 1994, Isr.-P.L.O., 33 I.L.M. 662. In 1974, pursuant to the Israeli-Syrian disengagement agreement, Israel withdrew from all of the Golan regions it had occupied during the 1973 war and some areas it had occupied since the 1967 war. *See* Agreement on Disengagement, May 31 and June 5, 1974, Isr.-Syria, 13 I.L.M. 880. The return of the Sinai to Egypt was, of course, a result of the famous Camp David Accords. *See* Treaty of Peace, Mar. 26, 1979, Isr.-Egypt, U.N. Doc. S/11302/Add. 1-3, 18 I.L.M. 362. The two countries resolved the status of the small disputed area around Taba in 1989. *See* Agreements Regarding the Permanent Boundary, Feb. 26, 1989, Isr.-Egypt, 28 I.L.M. 611.

240. *See* Instructions for the Government of the United States in the Field, April 24, 1863 [hereinafter Lieber Code], *reprinted in* THE LAWS OF ARMED CONFLICTS 3-23 (Deitrich Schindler & Jiri Toman eds, 1981) [hereinafter ARMED CONFLICTS]. Other oft-cited attempts to delineate the rules of belligerent occupation prior to the Hague Conventions include the Oxford Manual of 1880, *reprinted in supra* at 35, and the 1874 Declaration of Brussels, *reprinted in supra* at 25; *see also* Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 AM. J. INT'L L. 1 & n.89 (1992) (discussing Henry V's Ordinances of War, promulgated in 1419 during the Hundred Years War with France).

ered to have embodied the contemporaneous customs and laws regarding land warfare.²⁴¹ Unlike public property, which the "victorious army appropriates . . . and sequesters for its own benefit or that of its government,"²⁴² the Code mandated that "[p]rivate property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity."²⁴³ Following the example of the United States, several European countries adopted similar manuals regulating the conduct of military occupations and providing general protection for private property—a process of codification which eventually climaxed with the Hague and Geneva Conventions of this century.²⁴⁴

Though not always obeyed with punctilious respect, the Conventions' provisions for the protection of private property continue to exert tremendous influence on international practice. The Statute of the International Tribunal for the former Yugoslavia, for example, grants the Tribunal jurisdiction to prosecute persons committing grave breaches of the Geneva Conventions including "extensive destruction and appropriation of property."²⁴⁵

The Conventions' protection of private property has even at times constrained the Israeli occupation of the West Bank and Gaza, which is generally in violation of the Geneva and Hague Conventions. For example, in several cases, the Israeli Supreme Court has heard challenges under Article 44 of the Hague Conventions to Israeli policies in the occupied territories.²⁴⁶ On at least one occasion, the Court has even held that a proposed settlement in the territories was illegal under these Conventions.²⁴⁷

241. See ARMED CONFLICTS, *supra* note 240, at 3.

242. Lieber Code, *supra* note 240, art. 31.

243. *Id.* art. 38.

244. Conner, *supra* note 219, at 61.

245. Statute of the International Tribunal, arts. 1, 2(d) (published as the Annex to the Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, May 3, 1993), U.N. Doc. S/25704 (1993), 32 I.L.M. 1159, 1192.

246. See, e.g., *Jamayat Iscaan v. Commander of I.D.F. Forces in the Judea and Samaria Region*, 37(4) H.C. 393 (1982); *Abu Aita Case*, 37(2) P.D. 197 (1983); see also *Benevenisti & Zamir*, *supra* note 236, at 307-08 (arguing that the "Israeli military government handles [abandoned property in the occupied territories] in accordance with the rules of occupation.").

247. See *Dweikat v. Government of Israel*, 34(1) P.D. 1 (1980); see also *Rob-*

C. POSITIVISTIC LIMITS ON THE SANCTITY OF PROPERTY

As with the doctrine of acquired rights, however, the law of belligerent occupation has not completely immunized private property from seizure by an occupying power. Reflecting a more conventional notion of property, several "writers like Halleck and Dana . . . believe that the protection of private property is an act of grace by the occupant who has the right to take private property, either in the form of requisitions, contributions, taxes, and fines, or in other forms he may choose."²⁴⁸ Even writers who view property as entitled to greater sanctity, generally acknowledge the power of a state, in certain circumstances, to requisition private property when necessary for their war effort.

As a result, the law governing military occupation, is "a true compromise between the exigencies of the standard of civilization and the necessities of war," evincing a Janus-like nature—simultaneously declaring the sanctity of property and yet sanctioning violations of these very rights.²⁴⁹ For example, the Geneva Convention's general prohibition against "extensive destruction and appropriation of property." includes the exception: unless "justified by military

erts, *supra* note 214, at 90 ("It was on the basis of Article 52 of the Hague Regulations . . . that the Supreme Court, in its famous judgment of October 22, 1979, in the Elon Moreh case, declared an Israeli civilian settlement near Nablus in the West Bank to be illegal").

Although Israel is not a signatory to the Hague Conventions, the Israeli Supreme Court has recognized these conventions as declaratory of customary international law and, hence, binding on the Israeli occupation. See *Ayub v. Minister of Defense*, 33(2) P.D. 113 (1978); Comments of Professor W. Thomas Mallison, *reprinted in* West Bank, *supra* note 239, at 227; Roberts, *supra* note 214, at 63.

248. GRABER, *supra* note 226, at 196. As the role of government has grown during the twentieth century (with the simultaneous emergence of an increasingly positivistic perspective of property), the traditional protections afforded private property have come under increased stress. See, e.g., Davis P. Goodman, Note, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573, 1590-93 (1985); Elyce D. Santerre, *From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield*, 124 MIL. L. REV. 111, 115 (1989) (noting that it is increasingly difficult to distinguish between private and public property).

249. SCHWARZENBERGER, *supra* note 139, at 204; see also VON GLAHN, *supra* note 213, at 227 ("Article 23(g) of the Hague Regulations of 1907 supplies an excellent example of the compromise solution which has been produced by the recurring conflict between the humanitarian tendencies of international law and the stern realities of warfare.").

necessity.”²⁵⁰ Similarly, Article 23 of the Hague Conventions declares that “[i]t is especially forbidden . . . to destroy or seize the enemy’s property, *unless* such destruction or seizure be imperatively demanded by the necessities of war.”²⁵¹

Treatises on this subject are replete with such contradictory sentences: “As regards their property, [the local inhabitants] are entitled to immunity from pillage, but they must submit to its appropriation by an invading force, both in the form of goods, under the name of requisitions, and in that of money, under the name of contributions.”²⁵²

Cases involving the seizure of property in occupied territory often exhibit similar inconstancy, making paeans to the sanctity of private property at one instant and appeals to the exigencies of military operations the next. The United States Supreme Court opinion in *United States v. Russell*,²⁵³ for example, begins with a panegyric to the principle that “[p]rivate property . . . shall not be taken for public use without just compensation.”²⁵⁴ As a bulwark against tyranny and oppression, “it is clear that there are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value.”²⁵⁵ The Supreme Court acknowledges, however, that “the power of the government . . . to supply for the moment the public wants” may at times supersede any individual’s property interest and that “[e]xtraordinary and unforeseen occasions arise . . . in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the

250. Geneva Convention, *supra* note 237, art. 147; *see also* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 18, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (permitting the confiscation of “arms” and “horses” (interpreted to include any form of transportation), even if privately owned, without compensation). The Hague Convention permits the seizure of a similarly broad category of war materials, although, unlike the Geneva Convention, it requires the state to compensate the owners. *See* Hague Convention, *supra* note 210, annex art. 53; Elihu Lauterpacht, *The Hague Regulations and the Seizure of Munitions de Guerre*, 32 BRIT. Y.B. INT’L L. 218 (1955).

251. Hague Convention, *supra* note 210, annex art. 23(g) (emphasis added).

252. WESTLAKE, *supra* note 15, at 245.

253. 80 U.S. (13 Wall.) 623 (1871).

254. *Id.* at 627.

255. *Id.*

owner.”²⁵⁶

The tension between these competing views of property is particularly evident in the grant to occupants, both under customary law and the Hague Conventions, of authority to levy taxes and requisitions.²⁵⁷ This grant of authority reflects a positivistic notion that the state has fundamental control over all property rights and, hence, can requisition property for the public good. At the same time, however, the law of military occupation attempts to cabin this control in an attempt to minimize the state's control over property. Thus, although the norms of military occupation provide an occupying power with considerable authority to procure supplies and finances, they also restrict its exercise to “such limitations that it may not savor of confiscation.”²⁵⁸ Under the legal regime that the Hague Conventions established, these more specific requirements reinforce this admonition. For example, requisitions “shall only be for the needs of the [occupying] army or of the administration of the territory in question,”²⁵⁹ and, in the case of requisitions of materials or services, the occupying power must pay compensation.²⁶⁰

This duty to pay compensation is the greatest restriction on a state's unfettered ability to requisition property. The Hague Conventions' requirements to this effect merely re-articulated existing customary practice. American courts, for example, have created an implied contractual obligation on the part of an occupant to compensate

256. *Id.* at 627-28.

257. See *supra* note 218 and accompanying text (discussing the ability of an occupying power to administer a territory under the Hague Convention). The Lieber code provided similarly broad authority to levy contributions and taxes. See GRABER, *supra* note 226, at 193.

258. *MacLeod v. United States*, 229 U.S. 416, 426 (1913) (quoting an executive order by President McKinley). The Court prefaced this quote by stating that President McKinley's statements “show that the President was sensible of and disposed to conform the activities of our Government to the principles of international law and practice.” *Id.*

259. Hague Convention, *supra* note 210, annex art. 49; see also *id.*, annex art. 52 (“Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation.”); *MacLeod*, 229 U.S. at 426 (“The moneys so collected are to be used for the purpose of paying the expenses of government under the military occupation, such as the salaries of the judges and the police, and for the payment of the expenses of the army.”).

260. Hague Convention, *supra* note 210, annex art. 52 (“Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.”).

individuals for the seizure of their property.²⁶¹ Similarly, a post-World War I arbitration tribunal held that, although "[m]ilitary requisitions are a form of expropriation for the public benefit [and a]s such they are not prohibited by international law . . . they are permitted only subject to the duty of compensation."²⁶² As the American publicist, John Bassett Moore, summarized:

Private property may be taken by a military commander for public use, in cases of necessity, or to prevent it from falling into the hands of the enemy, but the necessity must be urgent, such as will admit of no delay . . . [and] the government is bound to make full compensation to the owner.²⁶³

Thus, a Lockean attempt to insulate property from the state is apparent even in the doctrine of military occupation, which, of the three doctrines discussed in this paper, is the most influenced by the positivistic notion that the state can manipulate property rights for the public good.

V. CONCLUSION

These restrictions on an occupant's power to seize private property, like the recognition of property rights in *terra nullius* and the protection of vested rights from changes of sovereignty, illustrate the general sanctity enjoyed by private property under international law. Underlying each doctrine is a common philosophical conviction that property, as a natural institution, is fundamentally distinct from the state.

As this article attempts to demonstrate, this conviction illustrates the influence of the natural rights theory of property prevalent during the seventeenth and eighteenth centuries when modern international

261. See *United States v. Russell*, 80 U.S. (13 Wall.) 623, 629-30 (1871) (holding that where the state impresses private property into public use during an emergency, such as in war, the government makes an implied promise to compensate the owner); *Philippine Sugar Estates Dev. Co. v. United States*, 39 Ct. Cl. 225 (1904); *Philippine Sugar Estates Dev. Co. v. United States*, 40 Ct. Cl. 33 (1904).

262. *Goldenberg & Sons (Roumania) v. Germany*, abstracted in 4 I.L.R. (1927-1928 Ann. Dig.) 542, 544; see also *Démètre Karmatzucas c. Etat allemand*, VII Recueil des décisions des Tribunaux Mixtes 17, 22, quoted in 6 HACKWORTH, *supra* note 64, at 409.

263. 7 MOORE, *supra* note 98, at 287 (citing *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134 (1851)).

law was first articulated. Expostulated in the writings of such classic publicists as Hugo Grotius, Samuel Pufendorf, Emmerich Vattel, and Christian Woolf, this theory has had a dramatic impact on international law's treatment of property. Viewing property as a natural, pre-political institution, these publicists and the state practices that they inspired had little difficulty treating property as more permanent than governments or states and, thus, as immune from changes in sovereignty (such as a state's acquisition of territory that was previously *terra nullius* or the military occupation of a conquered region).

A nineteenth and twentieth-century resurgence of a positivistic image of property as an artificial construct of the state has led to an increased recognition of the ability of the state to adjust property rights. Nevertheless, as the three doctrines discussed in this paper attest, international law continues to accept the general thesis of the Lockean vision of property that "[s]overeignty and property being distinct . . . there is no necessary reason why circumstances that affect the one should have any influence upon the other."²⁶⁴

264. LINDLEY, *supra* note 2, at 337.