Violations of the Right to Property in Libya and the Promise of Transitional Justice

Fowler, Alexandra and Radan, Mohamed

This is the peer reviewed version of the following article: Fowler, Alexandra and Radan, Mohamed 2022. Violations of the Right to Property in Libya and the Promise of Transitional Justice. International Human Rights Law Review. Advanced online publication, DOI:10.1163/22131035-11010001, which has been published in final form at

https://doi.org/10.1163/22131035-11010001.

VIOLATIONS OF THE RIGHT TO PROPERTY IN LIBYA AND THE PROMISE OF TRANSITIONAL JUSTICE

Authors: Alexandra Fowler (Westminster Law School, University of Westminster, London, UK) and Mohamed Radan (School of Law, University of Tripoli, Tripoli, Libya)

Address for correspondence:
Dr Alexandra Fowler
Westminster Law School
University of Westminster
4-12 Little Titchfield St
London W1W 2BY
Email: a.fowler@westminster.ac.uk

Word count: 14492 (including title, abstract, footnotes and author details)

VIOLATIONS OF THE RIGHT TO PROPERTY IN LIBYA AND THE PROMISE OF TRANSITIONAL JUSTICE

Alexandra Fowler and Mohamed Radan*

ABSTRACT

Libya's Law No. 4 of 1978, which authorized the confiscation of real estate from private owners and its redistribution to other needy citizens, reflected elements of a long debate at the international level about the human right to property. This article examines Law No. 4 against Libya's obligations under international instruments and finds that it led to violations of the right to property for which redress still remains outstanding today. Noting also the extensive violations of property rights and displacement in Libya due to civil conflict since 2011, as well as previous ineffective efforts at transitional justice, the article argues for a new concerted attempt at a comprehensive property claims mechanism applying the *Pinheiro Principles* and complementary international instruments within a broad-ranging transitional justice process. More broadly, Libya's experience lends weight to calls for encapsulating the right to real property in multilateral treaty form.

1- Introduction

The right to property is considered a fundamental human endowment, but its history has not been without controversy. It was enshrined in Article 17 of the 1948 Universal Declaration of Human Rights (UDHR), which gave protection to the right to own property alone as well as in association with others and declared that no-one is to be arbitrarily deprived of their property. However the drafters disagreed sharply over whether 'property' should refer only to personal property or a more expansive meaning of the term which would include shares in corporations.[1] The phrase 'alone or in association with others' reflected both sides of the developing Cold War ideological divide, thus being a compromise allowing both capitalist forms of joint ownership and

* Dr Alexandra Fowler is a Lecturer in International Law at the Law School, University of Westminster, London (UK). Dr Mohamed Radan is a Lecturer in International Law in the School of Law, University of Tripoli, Tripoli (Libya). Email address for correspondence: a.fowler@westminster.ac.uk.

[1] J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, Philadelphia, 1999), 146-152.

Soviet forms of collective ownership.[2] Despite that earlier compromise, the right to property was not recognised in the International Covenant on Civil and Political Rights (ICCPR)[3] or in the International Covenant on Economic, Social and Cultural Rights[4] (ICESCR); by the 1960s ideological differences and rivalries between the socialist and capitalist camps played too prominent a role in treaty negotiations. The ideological split between those who advocated for a right to own any form of property and those who proposed a right only to own personal property (similar to the discussion that preceded the formulation of the UDHR) led ultimately to a failure to codify the concept in either document.[5] Nevertheless, an agreed feature of that discussion was the payment of compensation in the event that a state was to deprive a citizen of property in a nonarbitrary manner, as permitted under the UDHR.[6]

More recently however, the three regional human rights treaties have guaranteed the right to property, subject to restrictions imposed by law and in the public interest. The American Convention on Human Rights (ACHR)[7] recognises the right to protection of property in Article 21, while European states enshrined the right to protection of property in Article 1 of Protocol 1 to the European Convention on Human Rights (ECHR).[8] Ouguergouz[9] notes out that the inclusion of private property as a human right was controversial in the drafting of the African Charter on Human and Peoples' Rights (ACHPR)[10], but the final text guaranteeing the right in fact strengthened the language found in the Dakar Draft of the Charter. Its Article 14 thus states clearly that '[t]he right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance

[2] *Ibid*.
[3] International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI) of 16 December 1966.
[4] International Covenant on Economic, Social and Cultural Rights, General Assembly Resolution 2200A (XXI) of 16 December 1966.
[5] W. Schabas, 'The Omission of the Right to Property in the International Covenants' (1991) 4 *Hague Yearbook of International Law*, 135–170.
[6] *Ibid*. Also R. Howard-Hassmann, 'Reconsidering the Right to Own Property' (2013) 12 *Journal of Human Rights* 180-197 at 181; M. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (2nd ed., University of California Press, Berkeley, 2008), 224.
[7] *American Convention on Human Rights*, 1144 UNTS 123
[8] Protocol 1 to the *European Convention on Human Rights*, Paris, 20.III.1952.
[9] F. Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff, 2003), 152, as mentioned in R. Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press, 2019), 364.
[10] *African Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 ILM 58 (1982).

with the provisions of appropriate laws'. As such, in all three regional conventions, the right to property protects the right of property owners against arbitrary removal of their property by the state.

Libyan domestic law has reflected these ideas, but the right to property was significantly remodelled in the country's ideological transition from capitalism to socialism in the 1970s under the hand of the Ghaddafi regime.[11] The most prominent example was the passage of Law No. 4 of 1978 which, motivated by notions of social justice, authorized the confiscation of real estate from those who owned more than one property in order to re-distribute it to those with none.[12] A large number of properties were confiscated under such provisions. At the same time, it should be noted that Libya ratified the ACHPR in 1986 which binds it to minimum international obligations in relation to property rights.

This paper thus considers the nature of the right to property in Libya and the difficulties that have arisen as a result of these Ghaddafi-era laws. It examines the compatibility of Libyan legislation with international standards on the right to property, including past efforts by the Libyan legislature to address Ghaddafi-era violations of property rights. It then surveys the right to restitution (compensation *in lieu*) in recent international instruments and case law in the light of the wide-ranging violations of property rights and displacements that have occurred during Libya's recent civil wars. Noting the significant shortcomings of a series of Libyan transitional justice laws since 2011, it argues for renewed and serious effort to tailor a comprehensive property claims mechanism to address both historic and conflict-related claims. This would ideally occur within the framework of an effective broad-ranging transitional justice process addressing all human rights abuses. There are significant challenges ahead, but only this way can Libya finally draw a line under the turmoil of recent decades and work toward building a society governed by the rule of law and founded on lasting economic and social stability.

More broadly, the paper notes that Libya's experience adds weight to calls for recent developments on the right to real property which are currently found in non-binding documents and case law to be formalised in multilateral treaty-level instruments such

[11] D. Vandewalle, *A History of Modern Libya* (2nd ed., Cambridge University Press, 2012), 164.
[12] M. Fitzgerald and T. Megerisi, *Libya: Whose Land Is It? Property Rights and Transition in Libya* (Legatum Institute, 2015), 7.

as the International Convention on Civil and Political Rights (ICCPR) and/or the International Convention on Economic, Social and Cultural Rights (ICESCR). This would remedy a notable gap in the enumeration and protection of the right at the international level.

2 The Nature of the Right to Property in International Human Rights Law

Suspicions about the right to property as a fundamental human right survive to this day, to the detriment of the coherence of human rights as a guiding political concept and to fundamental freedoms and prosperity. Controversy over the right to property and its interpretation has centred upon whose rights are protected (e.g. natural persons or also corporations), the type of property protected (property used for the purpose of consumption or production) and the reasons for which property can be restricted (for instance, for regulations, taxation or nationalisation in the public interest).[13] Additionally, the right has been controversial because while it is regarded by some as central to human rights, others see it as a possible instrument for abuse - a right that protects the 'haves' against the 'have nots'. This complexity is illustrated by the fact that few other human rights are subject to more qualifications and limitations and, consequently, have resulted in more complex case-law.

Before examining some of the controversies over the scope and implications of property rights under international human rights law, it must be recognised that there are a number of key points that are widely agreed. These include the right to be able to own property and the right to the peaceful enjoyment of possessions.[14] Allowing the possibility of restricting this right in the public interest in accordance with the provisions of the law and providing fair compensation in cases of confiscation,[15] the concept in this form has been affirmed in all three regional human rights conventions. According to the European Court of Human Rights, the right to property (as mentioned in Article 1 of Protocol 1 to the ECHR) consists of three main rules: The first rule is of a general

[13] Icelandic Human Rights Center, "What is the Right to Property?", <http://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-right-to-property/what-is-the-right-to-property> accessed 12 December 2021.
[14] M. Carss-Frisk, *A guide to the Implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights* (2nd edn, Directorate General of Human Rights, Council of Europe Human Rights Handbooks, No. 4, 2003), 8.
[15] *Ibid*.

nature and enounces the principle of peaceful enjoyment of property. The second rule covers deprivation of possessions and subjects it to certain conditions. The third rule recognises that States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose.[16] According to the African Court, the right enshrined in the ACHPR's Article 14 has three elements: 'the right to use the thing that is subject to the right (usus), the right to enjoy the fruit thereof (fructus) and the right to dispose of the thing, that is, the right to transfer it (abusus)'.[17] The right requires that any expropriation based on "public need or in the general interest of the community" must serve legitimate public interest objectives at all times, such as economic reform or social justice.[18] The right of ownership has been held to be central to Article 14.[19]

However, if ownership of property is a human right, is it 'negative' or 'positive'? Generally speaking, 'negative' human rights are assumed to be those that require state forbearance, while 'positive' human rights require active fulfilment by the state. For example, the right not to be tortured is a 'negative' right, in the sense that the state must refrain from torture, while the right to education is positive, as the state must provide basic education for children who cannot provide it for themselves.[20] This is a simplistic distinction, as the right not to be tortured also requires the state to invest resources in order to fulfil the right, for example in training its police forces to prevent torture, and to ensure prompt investigation and punishment where cases arise. Even so, the right to property similarly raises the issue of forbearance versus fulfilment. In one sense, the right to property is a 'negative' right as the state must refrain from unfair confiscatory activity. However, if the right extends to owning property, then it is the duty of the state to assure that every individual has some, that is, it has a duty of 'positive' fulfilment of individuals' right to own property. Further questions then arise, such as the minimum amount of property that an individual should have.[21] The

---

[16] *Sporrong and Lönnroth v Sweden*, Series A No 52 (1982) 5 EHRR 35, par 61. See also Carss-Frisk, *supra* n14.
[17] *African Commission on Human and Peoples' Rights v Republic of Kenya*, App. No. 006/2012, Judgement of 16 May 2017, para 124, as quoted in Murray, *supra* n9, 365.
[18] Murray, *supra* n9, 365.
[19] Communication 276/03, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya ('Endorois Case')*, 25 November 2009, para 204.
[20] Howard-Hassmann, *supra* n6, 191.
[21] *Ibid*.

‘positive’ principles required to assure that every individual owns property differ from the regular ‘negative’ principles of protection against unfair or arbitrary expropriation.

Western human rights thinking has generally reflected the ‘negative’ concept of the right to property. In a market economy, individuals acquire income via their own work (or assistance from other sources), and they then determine which property they wish to acquire. While the State must provide a minimum amount of income to those who otherwise have none in order to fulfil their economic human rights (such as the right to food), it has no business determining how individuals translate their income into property. As such, it is not the role of the State to dictate whether individuals should use their incomes to buy, for example, more farm tools and less real property, no matter how much of the latter they acquire. In parallel with the end of the Cold War and the wider collapse of socialism, much of mainstream human rights thinking has come to reflect this classical Western view. Indeed, the European Court has stressed that there is no guarantee of the right to acquire property in the future, as the protection of Article 1 of ECHR Protocol No. 1 only applies when it is possible to lay claim to a relevant property. That is, Article 1 does *not* protect the right to acquire property, only the right not to be divested of it arbitrarily, which was illustrated clearly by the Court’s ruling in *Marckx v Belgium* (1979).[22] Based on this, the state must protect ownership of property, but it is not required to provide it.[23]

The ‘positive’ obligation to fulfil the right to property was underlined by Golay and Cismus in their 2010 *Legal Opinion on the Right to Property from a Human Rights Perspective*.[24] Also in 2010, the then UN Special Rapporteur on the Right to Food Olivier De Schutter asserted that the unequal distribution of land threatens the right to food[25], and as a remedy he proposed that states should encourage ‘communal ownership systems’ rather than focus on ‘strengthening the rights of landowners’[26] through a ‘Western concept of property rights’.[27] Additionally, according to the Special

[22] *Marckx v Belgium*, Eur. Ct. H.R. (ser. A), 63, Application no. 6833/74, Judgement of 13 June 1979. See also Carss-Frisk, *supra* n14, 18-19.
[23] Howard-Hassmann, *supra* n6, 192.
[24] C. Golay, and I. Cismas, *Legal Opinion: The Right to Property from a Human Rights Perspective* (International Centre for Human Rights and Democratic Development, 2010), <https://ssrn.com/abstract=1635359> accessed 12 December 2021.
[25] UNGA, “The right to food”, UN. Doc. A/65/281, 21.
[26] *Ibid*.
[27] UNGA, “The right to food”, *supra* n25, 10.

Rapporteur, realizing the right to food may also entail an obligation on the state to secure access to land ‘through redistributive programmes that may in turn result in restrictions on others’ right to property’.[28] Howard-Hassmann has also linked the right to property to ensuring the right to adequate food and freedom from hunger, thus arguing it is a ‘strategic’ human right (a right that protects other rights).[29] Mchangama’s view is similar:

> “In order for the right to property to be fulfilled and for everyone to really enjoy the right to property, every individual should enjoy a certain minimum of property needed for living a life in dignity, including social security and social assistance.”[30]

In the African context, scholars such as Murray have noted the close links between the right to property and the right to work, the right to education, and particularly the right to housing.[31] Indeed, as the right to housing or shelter is not provided expressly in the ACHPR, the African Commission in the *SERAC Case* noted that the right to shelter or housing in the African Charter depends upon the combined effect of the right to property, the right to health and the right to protection of family life.[32] The Commission’s Resolution 231 (2012) referred to the *SERAC Case* and underlined that the ‘right of access to adequate housing’ had to ‘meet the basic need of a decent livelihood’.[33] Resolution 262 (2013) urged compliance with the Maputo Protocol on the rights of women in Africa[34] and called on states to ‘ensure, protect and promote women’s right to land and property’, which appears to go beyond a ‘negative’ concept of the right.[35] Additionally, the Commission has underlined that an ‘independent and

---

[28] UNGA, “The right to food”, *supra* n25, 4.
[29] Howard-Hassmann, *supra* n6, 193.
[30] J. Mchangama, *The Right to Property in Global Human Rights Law* (2011) Cato Policy Report, 33, <https://www.cato.org/policy-report/may/june-2011/right-property-global-human-rights-law> accessed 12 December 2021.
[31] Murray, *supra* n9, 368.
[32] Communication 155/96, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, 27 October 2001, para 60.
[33] Resolution on the Right to Adequate Housing and Protection from Forced Evictions, ACHPR/Res.231 (LII), 22 October 2012; available at: https://www.achpr.org/sessions/resolutions?id=258 (accessed 12 December 2021).
[34] Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (‘Maputo Protocol’), adopted by the African Union on 11 July 2003, entry into force on 25 November 2005, available at: https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf (accessed 12 December 2021).
[35] Resolution on Women’s Right to Land and Productive Resources, ACPHR/Res.262 (LIV), 5 November 2013, <https://www.achpr.org/sessions/resolutions?id=282> accessed 12 December 2021. See Murray, *supra* n9, 367.

broad conception' should be taken of the right to property[36] under the African Charter, which includes both the right to have 'access to property of one's own and the right not for one's property to be removed'.[37]

These indications suggest that the concept of the right to property may well be broader under the African Charter than under the equivalent European instrument, thus encompassing an obligation akin to a 'positive' conception of the right as well as a 'negative' one. This has clear implications for attempts at property redistribution in the Libyan context.

Even if it could be argued that the legal obligation under the African Charter is no wider than the European one, there is nothing preventing a state from enacting legislation to fulfil the right to acquire property if it wishes to do so. Such a move would represent a commitment by the state beyond that required by international treaty law, which is permissible in accordance with the *Lotus* principle.[38] Indeed, a socialist concept of the right to property is that all individuals have the right to own property, which carries the logical implication that the state must somehow ensure that everyone enjoys a minimum amount of it. This raises the questions of how the minimum each individual is entitled to is to be determined and how the state should distribute it; these are clearly issues of policy and politics. Libya's attempt at this goal is to where this paper now turns.

3 Compatibility of Libyan Legislation Regulating Real Property with Human Rights Standards under the African Charter

3.1 *Libyan Law Allowing Confiscation and Redistribution of Property*

[36] Communication 286/20 04, *Dino Noca v Democratic Republic of the Congo*, 22 October 2012; Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights ('*Principles and Guidelines in the African Charter'*), para 53, <https://archives.au.int/handle/123456789/2063> accessed 12 December 2021.
[37] Communication 105/93-128/94-130/94-152/96, *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria*, 31 October 1998.
[38] *'S.S. Lotus'*, France v Turkey, Judgment No 9, PCIJ Series A No 10, ICGJ 248 (PCIJ 1927) (7 September 1927) [PCIJ].

The Libyan Constitution has guaranteed the right to property ever since Libya achieved independence in 1951, and considerably before the establishment of the African Charter. Article 31 of the Constitution reads as follows:

> ‘Property is inviolable. No owner shall be prevented from disposing of his property except within the limits of the law. No property of any person shall be expropriated except to serve the public interest and in cases and means prescribed by law, provided that such person is awarded fair compensation’.[39]

After the regime of the former President Muammar Ghaddafi took control of the government in 1969, Article 8 of the Constitutional Declaration of 1969 affirmed the right to property but with a socialist impression:

> ‘Public ownership by the people is the basis of the society’s development and growth and for self-sufficiency in production. Non-exploitative private ownership is protected and may only be taken away by law’.[40]

Ghaddafi's ideas about property were summarized in *The Green Book*, in which he melded together the protection of property from arbitrary confiscation (the so-called ‘negative’ aspect) with a right to acquire property (the ‘positive’ aspect). He believed that the freedom of a human being is lacking if his or her needs are controlled by others.[41] Accordingly, he argued that any property that exceeds the needs of the individual should be regarded as part of the wealth of society.[42] As housing is an essential need for both the individual and the family, it should not be owned by others; living in another’s house, whether paying rent or not, compromises freedom. Because in a socialist society no one, has the right to control people’s needs, therefore no one has the right to acquire a house additional to his or her own dwelling for the purpose of renting it. Ghaddafi's socialist view of property was not limited to housing only, but

---

[39] Libyan National Assembly, Libya's Constitution of 1951, issued in Benghazi, Libya, October 7, 1951, <https://security-legislation.ly/sites/default/files/lois/13-%20Constitution%20of%201951_EN.pdf> accessed 12 December 2021.

[40] The Libyan Arab Republic, Constitutional Declaration, The Revolutionary Command Council, issued on 11 December 1969, <https://security-legislation.ly/sites/default/files/lois/6-%20Constitutional%20Declaration%20of%201969_EN.pdf> accessed 12 December 2021.

[41] Muammar al-Qaddafi, *The Green Book: Part II - The Solution of the Economic Problem: Socialism* (3 vols, The Green Book Center, Tripoli, 1980), 49.

[42] *Id*, 58.

also included agricultural land and rented commercial premises, on the pretext of that the properties which are in excess of one's needs are another person's share of the wealth of society.[43]

Ghaddafi's socialist approach influenced most Libyan legislation regulating the right to property during his rule.[44] For example, Article 1/1 of Law No. 123/1970 on the Disposal of State-Owned Agricultural and Reclaimed Land stipulated that the provisions of this law would apply to agricultural lands owned by the state *or whose ownership is transferred to the state in the future*. In addition, Article 7 of Law No. 123 stipulated that the distribution of land in accordance with the provisions of this law shall be made to Libyan citizens who do not have enough for a decent living provided that they are engaged in agriculture or are able to carry out agricultural operations; priority was given to large families with less money.[45] This law did not include any specific text stipulating the confiscation of land, but the reference in Article 1/1 to agricultural lands whose ownership will be transferred to the state in the future would become the primary vehicle under which the State redistributed tribal and other similar land (see below).

Later, in Law No. 4/1978, the State expanded the scope of properties subject to confiscation. In Law No. 4, the right to property was restricted to one property for each family or individual who had reached the age of 18 years. More than one property for the same purpose would be expropriated by the State, but the owner would be compensated. The State would in turn distribute the confiscated properties to needy citizens who did not own real estate, with priority being given to existing tenants of those properties.[46] The law required the new owner to not already own a dwelling or a plot of land for building a dwelling, and if the property was a commercial or industrial premises, the new owner should practice a suitable craft or industry and not already own a suitable property.[47] The distribution of confiscated properties to the needy

---

[43] *Ibid*.
[44] Vandewalle, *supra* n11, 164. See also Fitzgerald and Megerisi, *supra* n12, 7.
[45] The Revolutionary Command Council, Law No. 123 of 1970 on the Disposal of State-Owned Agricultural and Reclaimed Land, issued on September 7, 1970 [hereinafter Law No. 123 of 1970].
[46] Article 7 of Law No. 4; Articles 5 and 7 of Executive Regulations of Law No. 4 of 1978.
[47] S. Ibrahim and J. M. Otto, *Resolving Real Property Disputes in Post-Ghaddafi Libya in the Context of Transitional Justice* (Final Report of a Libyan-Dutch Collaborative Research Project, Van Vollenhoven Institute, 2017), 8, <https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-

occurred by them either renting, or buying the property at a price below its market value, from the State. There are no official figures on the amount of real estate that was confiscated under Law No. 4 in Libya, but Ibrahim and Otto estimate that 55,000 properties were confiscated in Tripoli alone, including housing, commercial stores, and arable farms.[48]

3.2 *Evaluation of Law No. 4 of 1978*

Article 1 of Law No. 4 stipulates that the ownership of a dwelling is considered sacred and should not be taken except for the public benefit. Additionally, Article 3 protects the properties that owners use for the purposes of their professions, trades or industry. However, the same law imposes limits on the right to property - in mandating that each individual only has one property for personal use, Article 2 prescribes that anyone in possession of more than one house, plot of land or workshop must choose which they wish to retain, while additional properties will be transferred to the ownership of the State. However, Article 8 of the Law provides that the former owners of confiscated property be compensated.[49]

The question of whether there can be a limit on the amount of property an individual owns is controversial; this is one of the questions that stalled discussion on the right to own property in the UDHR and in the two 1966 Covenants and it remains unsettled today.[50] A socialist concept of the right to property would require that the State somehow ensures that everyone enjoys a minimum amount of property, which implies that the State may need to introduce policy restrictions on multiple ownership. As mentioned previously, it is open to a State to go further with respect to the right to property (such as redistributing property in order to achieve social justice), as long as actions to implement such a policy comply also with other settled restrictions on deprivation contained in Article 17(2) of the UDHR and regional human rights

metajuridica/resolving-real-property-disputes-in-post-ghadaffi-libya.pdf> accessed 12 December 2021.

[48] *Id*, 9.

[49] See also Executive Regulations of Law No. 4 of 1978, Article 16; S. Ibrahim, 'Property Claims in Post-Ghaddafi Libya: Political Debates and Justice Seeking in the Aftermath of Law 4/1978' (2017) 9 *Hague Journal on the Rule of Law* 135, 141.

[50] Morsink, *supra* n1, 167.

treaties[51], particularly the African Charter. The treaties outline that adequate compensation must be provided, expropriation must follow the forms established by law, and access to redress is allowed. Article 14 of the African Charter underlines that "public interest" objectives be legitimate, that there be effective public participation in any acquisition process, and that compensation fairly balances the rights of the individual and the wider interests of society.[52] There was no public participation in the acquisition process. Law No. 4 appears *prima facie* to meet the other criteria, but it is necessary to examine its operation and impact in more detail.

"Taking"

The jurisprudence of the European Court recognises that deprivation or confiscation of property may occur in a number of ways, including those which fall short of formal expropriation. Thus, it is necessary to investigate not only whether there has been a formal expropriation or transfer of ownership, but also to investigate the realities of the situation to see whether there has been a *de facto* taking of property. This was made clear in *Sporrong and Lönnroth v Sweden*, a case concerning the imposition of expropriation permits and prohibition notices on properties in Stockholm, where the Court observed that:

> "In the absence of formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of … Since the Convention is intended to guarantee rights that are "practical and effective"…, it has to be ascertained whether that situation amounted to a de facto expropriation, as was argued by the applicants."[53]

This approach to the question of what amounts to a taking of property is similar to the approach adopted in international law; for example, in 1983 the U.S.-Iran Claims Tribunal noted that:

> "[M]easures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been

[51] J. Alvarez, 'The Human Right of Property' (2018) 72 *University of Miami Law Review* 580, 620; Carss-Frisk, *supra* n14, para 89. See generally M. Baderin and M. Ssenyonjo, 'Development of International Human Rights Law Before and After the UDHR' in M. Baderin and M. Ssenyonjo, *International Human Rights Law: Six Decades after the UDHR and Beyond* (1st edn, Ashgate Publishing Limited, 2010).
[52] *Principles and Guidelines in the African Charter*, *supra* n36, para 55, as mentioned in Murray, *supra* n9, 365.
[53] *Sporrong and Lönnroth v Sweden*, *supra* n16, para 63.

> expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.[54]

Cases of implicit expropriation may include cases where a decision of confiscation is issued without implementation, with the result that the property cannot be sold or mortgaged or utilised further: the European Court would consider such an eventuality akin to an actual confiscation attracting the regular requirements of due process and compensation. To this day there are no accurate figures on how many Libyan owners were not able to use or sell their properties as a result of them being considered liable for expropriation, but a strict reading of the law entitles their owners to compensation in the same way as if the expropriation had in fact been carried out.

Murray notes that considerable attention has been paid by the African Commission to forced evictions, which it has condemned as leading to internal displacement and the violation of other rights.[55] There is no information on whether this occurred in the Law No. 4 context given that its aim was to confiscate additional properties.

In the "Public Interest"

Further, for the state to lawfully take property (for instance, a home) it must meet a compelling State interest and must be necessary to accomplish that interest.[56] So it is necessary to consider whether Law No. 4's confiscation of properties by the State and redistributing them to the needy can be considered an intervention, in the terms of Article 14 of the African Charter, in the "public need or in the general interest of the community".

One of the earliest cases in which the issue of public interest was considered is *James v the United Kingdom* (1986).[57] In that case, the European Court found that the purpose of the Act in question (to achieve greater social justice in the sphere of housing), which involved the compulsory transfer of property from one individual to

---

[54] *Starrett Housing v Iran*, ITL 32-24-1, 4 Iran-U.S. C.T.R. 122 (19 December 1983).
[55] Murray, *supra* n9, 372. See also the Resolution on the Right to Adequate Housing and Protection from Forced Evictions, *supra* n33; Communication 249/02, *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean Refugees in Guinea) v Guinea*, 7 December 2004.
[56] C. Saporita, 'Reconciling Human Rights and Sovereignty: A Framework for Global Property Law' (2003) 10 *Indiana Journal of Global Legal Studies* 255, 278.
[57] *James v United Kingdom*, 98 Eu. Ct. H.R. 68 (Series A, 1986). See also Carss-Frisk, *supra* n14, 26.

another, was a legitimate aim in the public interest.[58] Thus a policy which mandates property transfers with the aim of enhancing social justice within the community could be described as being in the public interest.[59] However, the state's authority to assess the public interest is conditional on the further requirement of *proportionality* between the public interest and the protection of individual rights. Traditionally, international courts have allowed States a large margin of appreciation for measuring the public interest because national political authorities are generally better placed than judges (particularly foreign judges) to appreciate the needs, concerns and remedial actions appropriate to their societies.[60] The European Court in *James* highlighted this fact, noting that a decision to enact laws expropriating property will commonly involve consideration of political, economic, and social issues on which opinions within society may differ widely.[61] Accordingly, while assessment of the "public interest" must strike a fair balance between property owners' interests and the general interests of society as a whole, the margin of appreciation available to the legislature is broad. This is consistent with the approach of the African Commission when determining the "public interest" in *Dino Noca v Democratic Republic of the Congo*.[62]

It is clear that it does not need to be shown that no other alternative to confiscation exists[63], although confiscation does need to be *necessary*, in the sense that there is no reasonable alternative.[64] The African Commission has emphasised that any encroachment on property rights must be 'absolutely necessary for the advantages which follow', and be 'the least restrictive measures possible'.[65] This is consistent with the obligation to 'respect and protect' from arbitrary deprivation.[66] Occasionally it can be difficult to assess whether proportionality has been achieved, but the Court in *James* made clear that it was not its role to decide whether confiscation constituted

[58] *James v United Kingdom*, *supra* n57, para 46.
[59] Carss-Frisk, *supra* n14, 27. See also Alvarez, *supra* n51, 676; R. Barnes, *Property Rights and Natural Resources* (1st ed., Hart Publishing Ltd, Oxford, 2009), 132.
[60] Carss-Frisk, *supra* n14, 27. There may also have been separation of powers concerns.
[61] *Ibid*.
[62] *Dino Noca v Democratic Republic of the Congo, supra* n36, para 160.
[63] Barnes, *supra* n59, 148.
[64] Carss-Frisk, *supra* n14, 28. T. Xu and J. Allain, *Property and Human Rights in a Global Context* (1st edn, Hart Publishing Ltd, Oxford, 2015), 84.
[65] *Endorois Case*, *supra* n19, paras 213-214.
[66] Communication 373/06, *INTERIGHTS, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme v Mauritania ('INTERIGHTS Mauritania Case')*, 3 March 2010, para 43.

the best solution to the problem.[67] While Law No. 4 claimed promotion of the public interest (social equity in housing)[68], it is doubtful whether confiscation was necessary to achieve this aim. The State could have achieved the same goal through other means, such as building low-cost housing for those in need, introducing subsidies or incentives, imposing high taxes on property in excess of personal use or imposing limits on the value of rent (indeed, the African Commission has encouraged such moves as part of meeting state obligations under the closely-allied right to housing[69]). The fact that less restrictive measures could have been adopted made the displacement of the Endorois community from their land disproportionate to the state's legitimate aim.[70]

The Commission has also noted that the concept of proportionality requires asking whether a 'fair balance' has been struck, which raises questions such as whether there were fair decision-making processes, and whether there were safeguards against abuse.[71] It is clear that the negative effects of Law No. 4 were substantial. Tens of thousands of properties were confiscated, which resulted in significant economic disruption. There was also social unrest – as early as four months after the promulgation of Law No. 4, the Minister of Justice warned the heads of the Offices of Public Prosecution about a number of instances of citizens entering vacant dwellings (presumably those to be surrendered as a result of Law No. 4) without authorization and by force.[72] In addition, the Ghaddafi government admitted to many misapplications of Law No. 4 in a report published by the Public Administrative Control Authority in 1986, including assigning ownership of a property to more than one person, assigning more than one property to a person, assigning property to a person who occupied it by force or without satisfying the required conditions, or assigning

---

[67] Carss-Frisk, *supra* n14, 28.
[68] See Law No. 4, Article 7. Also Executive Regulations of Law No. 4 of 1978, Articles 5,7.
[69] State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights ('Tunis Reporting Guidelines'), 24 October 2011, para F, <https://archives.au.int/handle/123456789/2068> accessed 12 December 2021.
[70] *Endorois Case*, *supra* n19, para 215.
[71] Communication 284/03, *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe*, 3 April 2009, paras 176-177.
[72] Ibrahim and Otto, *supra* n47, 9. See also General People's Committee for Justice (Ministry of Justice), Circular No. 5/1978 dated 14/10/1978.

property on the basis on favouritism and personal connections.[73] This suggests that many confiscations were not carried out in accordance with the law and not in the public interest, thus making them arbitrary.[74]

The Requirement for Compensation

Compensation is not specifically mentioned in Article 14 of the African Charter, although there is a reference to recovery of property and adequate compensation in Article 21 (right to dispose of wealth and natural resources). However, Principle 60 of the *Basic Principles and Guidelines on Development-Based Evictions and Displacement* (2007) states that "[w]hen eviction is unavoidable, and necessary for the promotion of the general welfare, the State must provide or ensure fair and just compensation for any losses of personal, real or other property or goods, including rights or interests in property".[75] It notes also that "[c]ash compensation should under no circumstances replace real compensation in the form of land and common property resources", and that "[w]here land has been taken, the evicted should be compensated with land commensurate in quality, size and value, or better".[76] Although there was no evidence of any evictions in Libya and the socialist rationale behind Law No. 4 clearly mitigated against compensating with alternate properties, the sentiment in favour of compensation is clear.

Case law is explicit on the issue of redress. In a number of cases involving land deprivation the African Commission has recommended restitution, i.e. the government 'restore the plaintiff his rights'.[77] In others, the Commission has stated that a State must provide adequate compensation in the event of deprivation of property (such as confiscating a complainant's building, as in the *Dino Noca Case*).[78] In the *Endorois Case*, the Commission ordered 'adequate compensation … for all the loss suffered'[79],

---

[73] Ibrahim, *supra* n49, 144-145. Inspector General's Circular No. 2/1986 addressed to the Secretaries of the General People's Committees and the Secretaries of the People's Committees for Municipalities.
[74] *INTERIGHTS Mauritania Case*, *supra* n66, para 45.
[75] *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, A/HRC/4/18 (2007), 13, <https://www.ohchr.org/documents/issues/housing/guidelines_en.pdf> accessed 12 December 2021.
[76] *Ibid*.
[77] Communication 197/97, *Bah Ould Rabah v Mauritania*, 4 June 2004; Communication 262/02, *Movement ivoirien de droits de l'Homme (MIDH) v Cote d'Ivoire ('MIDH Case')*, 22 May 2008.
[78] *Dino Noca v Democratic Republic of the Congo, supra* n36, para 147.
[79] *Endorois Case*, *supra* n19; Murray, *supra* n9, 383.

and in other cases 'fair and equitable compensation'[80] or 'expeditious, just and fair compensation'.[81]

Tribunals outside of Africa have been just as explicit. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (the 'Wall case'*), the International Court of Justice referred to the fundamental principles requiring restitution in kind, or, if this is not possible, payment of a sum equivalent to value for an act contrary to international law, and held that these principles applied to "the requisition and destruction of homes, businesses and agricultural holdings… that was a consequence of the construction in violation of… international law of the wall in the Occupied Palestinian Territory".[82] Human rights tribunals in the European and Inter-American systems have also consistently ordered compensation for victims of human rights violations involving property (real and personal)[83], and held that compensation can be more effective than restitution for confiscated properties - particularly if they have been occupied by others for a long period of time, such as in *Demopoulos v Turkey* (2010).[84]

As to the amount of compensation, all three regional human rights fora have recognised that a taking of property without an amount of compensation reasonably related to its value would be disproportionate, although the legitimate objective of "public interest" (such as measures designed to achieve greater social justice) may call for less reimbursement than full market value.[85] A "fair balance between the

---

[80] *MIDH Case*, *supra* n77.
[81] *Dino Noca v Democratic Republic of the Congo, supra* n36. See also Communication 272/03, *Association of Victims of Post-Electoral Violence & INTERIGHTS v Cameroon*, 25 November 2009, paras 134-138; Communication 253/02, *Antonie Bissangou v Congo*, 29 November 2006, para 84.
[82] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004 (ICJ), paras 152-153, quoting *Factory at Chorzów*, Merits, Judgment *No. 13, 1928, P.C.I.J., Series A, No. 17*, p.47. See also Walter Kalin, *Guiding Principles on Internal Displacement – Annotations* (2008) American Society of International Law (Brookings Institute) Studies in Transnational Legal Policy No. 38, Principle 29.2, 132-140, <https://www.brookings.edu/wp-content/uploads/2016/06/spring_guiding_principles.pdf> accessed 12 December 2021.
[83] Kalin, *supra* n82, 136.
[84] *Demopoulos v Turkey*, ECtHR App. Nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04 (2010, Grand Chamber), paras 114-118. See also Rhodri C. Williams and Ayla Gürel, 'The European Court of Human Rights and the Cyprus Property Issue - Charting a Way Forward' (2011) Peace Research Institute Oslo (PRIO), 21.
[85] *James v United Kingdom*, *supra* n57, para 54. See also Carss-Frisk, *supra* n14, 28.

general interest and individual interest" is required.[86] This suggests that the amount of compensation paid under Law No. 4 may be valid if it is less than full market value, but too much of a disparity - as occurred for many of the expropriations conducted in Tripoli[87] - would result in a violation of the former owner's right to property. On the issue of timing, *Salvador Chiriboga* noted that compensation needs to be "prompt, adequate, and effective", and without these elements an expropriation becomes "illegal and arbitrary".[88] In that case, the claimant had waited 11 years since the expropriation for compensation, and over 15 years for a final determination of the amount in judicial proceedings. It is clear that serious delays and ineffective remedies, even if not the result of specific legislation or procedural rules, may violate the right to property.[89]

Law No. 4 recognized the right of the owners of expropriated property to compensation and the Executive Regulations provided the mechanics of the process via a specialised Committee[90]; even if such a mechanism satisfies the African Commission's requirement of compensation being determined by an 'impartial court of competent jurisdiction'[91], in practice there appeared to be clear reluctance from this Committee to pay compensation in many cases. This delay continued for years, with little done by the State to address the situation.[92] This hinted strongly at an undeclared policy of the Libyan government under the Ghaddafi regime to delay (and perhaps frustrate) the payment of compensation.[93] Whether this was the result of an informal belief within the administration that excess private ownership should not be rewarded, a serious lack of bureaucratic attention, or corruption and mismanagement - perhaps a combination of all three - such significant delays are unlawful. In many cases, compensation remains outstanding to this day.

---

[86] *Salvador Chiriboga v Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-American Court of Human Rights (Ser. C) No. 179 (6 May 2008), para 95. See also Tunis Reporting Guidelines, *supra* n69.
[87] Ibrahim and Otto, *supra* n47, 9.
[88] *Salvador Chiriboga v Ecuador*, *supra* n86, para 113.
[89] *Id.*, paras 123-124.
[90] Ibrahim and Otto, *supra* n47, 22. See also Articles 16 and 21 of the Executive Regulations to Law No. 4.
[91] *Dino Noca v Democratic Republic of the Congo, supra* n36, para 147.
[92] *Ibid*.
[93] Fitzgerald and Megerisi, *supra* n12, 7-8.

In summary, it can be concluded that there was no flaw in the Libyan (socialist) policy that the right to property implies the right to have some property to own, as in the attempt made through Law No. 4 to redistribute excess properties to the needy. As discussed earlier, attempts to fulfil the right to acquire property (at least a minimum of it) may even be mandated by the African Charter (although this document post-dated the Libyan law). The problem lay in the misapplication of the mechanism the Libyan government used to achieve this aim. Despite Article 8 of Law No. 4 and provisions in its Executive Regulations being *prima facie* in accordance with international standards on compensation, Law No. 4 violated the right to property in several respects, most notably due to a lack of public participation in the process, a lack of proportionality (lack of necessity) and/or redress for abuses, and a lack of adequate compensation or a failure to pay such compensation at all or within a reasonable timeframe.

3.3 *Pre-War Attempts by the Libyan State to Guarantee an Effective Remedy to Victims of Law No. 4*

Law No. 4 aimed at social justice and set out clear provisions on both the expropriation and redistribution of property, including compensation and appeal procedures.[94] Yet the practice of the law was not clear, and the government's own Public Administrative Control Authority admitted in 1986 (see above) that 'misapplications' were common, indicating that Law No. 4 often did not achieve its intended aim at all. Further, aggrieved persons were not afforded a fair chance to challenge even manifest 'misapplications'.[95]

There were further problems with the quantum of compensation. Legislation regulating the implementation of Law No. 4 states that the estimation of the value of each property had to be based on the price of the land and any building or installation(s) constructed on it at the time that the property was expropriated. The basis of this evaluation was stipulated in regulations issued by the High Committee for Law No. 4.[96] Those regulations also distinguished between two groups of recipients. The first group comprised ex-owners who had a limited income and those who had depended

[94] Law No. 4 of 1978, Art 8. Executive Regulations of Law No. 4 of 1978, Art 16.
[95] Ibrahim and Otto, *supra* n47, 8.
[96] Executive Regulations of Law No. 4 of 1978, Resolution of the General People's Committee, May 31, 1978, Art 15, 21.

for their living on the rent from their property; for them, compensation had to be paid in full. The second group comprised all those not falling into the first group. For those ex-owners, persons whose property had a value of less than LYD10,000 were entitled to immediate full payment of compensation, but persons whose property had a value exceeding LYD10,000 would have compensation paid in annual instalments of LYD10,000 in the form of Treasury bonds issued in their name.[97] Despite the apparent clarity of the provisions, in many cases (and for both groups of ex-owners) the State did not pay, or did not pay in full.[98] As mentioned previously, these deficiencies most probably amounted to breaches of the former owners' rights to property.

Ten years after promulgation of Law No. 4, the regime tried to address these deficiencies by issuing Law No. 5/1988, which established the People's Court.[99] That Law gave the Court jurisdiction over a number of types of legal claim, including those concerning "annulment, restitution and compensation for any misapplication of revolutionary statements". A number of 'misapplications' of Law No. 4 had been detailed in a report by the Public Administrative Control Authority in 1986[100], and the official admission of transgressions in that report opened the door to claims in the People's Court for the restitution of confiscated property or compensation for its loss.[101]

During its first years the People's Court was successful in addressing some of the cases of real estate confiscated under Law No. 4. Its success was however short-lived as the legislature enacted a series of provisions which significantly restricted claimants' ability to challenge 'misapplications' of Law No. 4. First, Law No. 11/1992[102] prevented the restitution of any houses expropriated in accordance with Law No. 4, and suspended all legal claims demanding that such action be taken. Furthermore, any judgments ordering restitution that had already been handed down but had not yet been executed were deemed non-enforceable. The only enforceable ruling under

[97] Ibrahim, *supra* n49, 144.
[98] Ibrahim and Otto, *supra* n47, 9.
[99] The People's Court, Law No. 5 of 1988, Official Gazette Special Issue dated 1/6/1988.
[100] Ibrahim, *supra* n49, 146. See also Inspector General's Circular No. (2) 1986 addressed to the secretaries of the General People's Committees and the secretaries of the People's Committees for Municipalities.
[101] Ibrahim, *supra* n49, 146.
[102] General People's Congress, Law No. 11 of 1992 Concerning Special Provisions of Real Property Ownership, Official Gazette Issue No. 27 dated 5/9/1992.

this change was compensation that the law described as 'fair'.[103] The small window of opportunity that this may have allowed to settle, at least partially, some property claims was closed when the legislature followed up with Law No. 7/1997 limiting any lawsuits concerning compensation for 'misapplication of revolutionary statements' to those related to personal (rather than real) property.[104] This was reinforced by Law No. 10/1997 which forbade legal claims for the restitution of ownership of real property, even if the property was vacant.[105] The result of this new legislation was that compensation for any real property became, once again, unobtainable.[106]

The tightening of legislation in the 1990s concerning expropriated property coincided with a period of economic depression in Libya as a result of international sanctions imposed following the Lockerbie incident. However from 2000 until 2011, spearheaded by Saif Al-Islam al-Ghaddafi (Ghaddafi's son and then presumptive heir), the regime attempted to present less of a socialist-driven image and to resolve a number of issues that had been problematic both at the domestic and international levels.[107] Among the issues benefiting from this policy shift was that of compensation for seized properties, which saw a key development in the passage of Resolution 108/2006 'On the Procedures, Bases and Criteria Concerning the Completion of the Compensation for Properties Subject to Law No. 4/1978'.[108] This resolution permitted restitution to pre-1978 owners and their adult sons of houses and plots of land ready for the construction of houses if the property had been used or invested in by the State (public law persons and public companies) but had never been conclusively registered in the Socialist Real Property Registry in the name of another citizen. If restitution was unattainable (because it was now officially owned by another Libyan), the Resolution allowed for compensation of the original owners. There were similar provisions for the restitution of workshops.[109] The Restitution Committee was authorised to allocate money or a similar property at the former owners' request, but it could also adopt settlements

---

[103] Ibrahim, *supra* n49, 146.
[104] General People's Congress, Law No. 7/1997 'Concerning Amending Some Provisions Related to Law No. 5 of 1988 Establishing the People's Court', Official Gazette Issue No. 10 dated 29/5/1997.
[105] General People's Congress, Law No. 10/1997 'Concerning Special Provisions of Ownership, Eviction, and Expulsion Lawsuits on Real Property Allocated to Society', Official Gazette Issue No. 2 dated 21/2/1998.
[106] Ibrahim, *supra* n49, 146.
[107] Ibrahim and Otto, *supra* n47, 10. See also Vandewalle, *supra* n11, 187.
[108] General People's Committee Resolution No. 108/2006 'Regarding Procedures for Completing Compensation for Real Estate Subject to the Provisions of Law No. 4', dated 27 April 2006.
[109] Ibrahim, *supra* n49, 147.

reached between former owners and current occupiers and liaise as necessary with the competent authorities.[110]

It is unclear whether the new development represented an attempt to comply with international standards on the right to property (outward-focused), or an attempt merely to streamline the implementation of already-existent provisions of domestic law (inward-focused). Whichever was the case (it may have been both), during the period between its establishment in 2006 until the outbreak of civil war in February 2011 the Committee resolved 8,000 out of the 25,000 compensation claims it received.[111]

There were a number of issues that made the Committee's work very challenging. While envisaging initially that claims for restitution would be prominent among its workload, in fact the Committee's attention was occupied in large part by claims from occupiers rather than former owners. This was because tenants who had been allocated property formerly owned by others had by then been residing there for two or three decades and had gained legal rights (and formal documentation) to that property. [112] Others had legally-acquired usage rights either through purchasing the property on the market or through traditional methods of transferring ownership (such as exchange for other property or by gift/bequest). As a result, Ibrahim and Otto note that most Libyans working on the issue acknowledged early on that mass restitution was unrealistic, and although some awards returning property were made the majority of the Committee's work was limited to compensation. Lastly, the process was affected by continuous confrontation with other State authorities and with influential figures in the Libyan elite which prevented independent and effective performance of its mandate.[113] As a result, many claims remained outstanding upon the collapse of the Ghaddafi regime and the outbreak of civil war.[114]

4 Addressing Property Claims as Part of a Post-War Transitional Justice Process

4.1 *Attempts to Resolve Property Grievances Following Removal of the Ghaddafi Regime*

[110] Ibrahim and Otto, *supra* n47, 15.
[111] Statistics issued by the Committee of 2006, December 2012 - see Ibrahim, *supra* n49, 148.
[112] Ibrahim and Otto, *supra* n47, 16.
[113] *Ibid*.
[114] Fitzgerald and Megerisi, *supra* n12, 8.

The belated attempts by the Ghaddafi regime to correct the obvious abuses of Law No. 4 and the work of the Restitution Committee before the removal of the regime had provided redress for part of the caseload. However, the outbreak of civil war in early 2011 and continued instability in its wake have stymied further progress on outstanding claims. In the face of continued weakness and corruption in the army and the police frustrated former owners have often taken the law into their own hands and sought to regain their property(ies) by force, which has led to further conflict and confusion over the property's lawful ownership.[115]

While post-regime governments have not abolished Law No. 4 so as not to directly harm the many occupiers and others who have benefited from it[116], they have made numerous legislative efforts to address the problems of confiscated property, ostensibly in the context of a transitional justice process. The Interim Constitutional Declaration of 2011 had no provisions on real property grievances but did contain a reference in its Preamble to 'restoration of all rights taken during the Ghaddafi regime'. It also emphasized the State's duty to protect private and individual ownership.[117] A significant number of other pieces of remedial legislation were also passed, including Law No. 17/2012 (by the Transitional National Congress) on the Establishment of the Rules of National Reconciliation and Transitional Justice, and then Law No. 29/2013 (by the General National Congress - GNC) on Transitional Justice[118] – both general in terms.[119]

Alongside this legislative activity, a Constitutional Drafting Assembly was established in Tripoli in 2014. The Drafting Assembly issued its final product in 2017, despite the country having been divided by then between a new parliament in the east of the country (the House of Representatives) which at first enjoyed international recognition, an Islamist-inspired 'new GNC' which was based in Tripoli (later replaced by the

---

[115] Ibrahim, *supra* n49, 148.
[116] Fitzgerald and Megerisi, *supra* n12, 18. See also Ibrahim and Otto, *supra* n47, 22.
[117] The National Transitional Council of Libya, Constitutional Declaration of 2011, Official Gazette Issue No. 1, 9/2/2012 (Articles 8, 16 and 21), <https://security-legislation.ly/sites/default/files/lois/2-Constitutional%20Declaration%20of%202011_EN_Consolidated.pdf> accessed 12 December 2021.
[118] The General National Congress - Libya, Law No. 29 of 2013 on Transitional Justice, issued in Tripoli 02/12/2013, <https://security-legislation.ly/sites/default/files/lois/631-Law%20No.%20%2829%29%20of%202013_EN.pdf> accessed 12 December 2021.
[119] The government had also planned another law on real property grievances entitled 'Law on the Restitution of Real Property', which would have included provisions on the retrospective abolition of all Ghaddafi-era laws effecting confiscation and the establishment of a comprehensive commission to address the effects thereof. However, the GNC again held back from passing the law as it was concerned about disrupting civil peace - Ibrahim and Otto, *supra* n47, 22.

Government of National Accord (GNA) and endorsed by the United Nations Security Council), and segments of territory in the south and south-east under the control of jihadists and local warlords. The new draft Constitution contained an explicit reference to real property grievances; Article 197 emphasized former owners' rights to restitution or compensation without prioritizing one over the other (only the occupants' financial position was relevant). It also referred to previous administrative and judicial measures, suggesting that any solution should build upon them.[120]

The problem therefore has not been a lack of attention to restorative justice or a lack of law to address the injustices of the Ghaddafi era or since. Hamad suggests that Libya in fact suffers from 'legislative congestion', which has been characterised by the 'absence of legislative planning and strategy, the lack of effective dialogue between the parties involved in the legislative process, and the low quality of drafting'.[121] The failure of efforts to date has been the result of a number of factors – for example, all laws prior to Law No. 29 of 2013 were incomplete, covering some aspects of transitional justice while neglecting many others. Meanwhile, Law No. 29 – the latest pronouncement, suffers from numerous problems both in its design and implementation. First, it was issued in a hurry and without sufficient public consultation in a society deeply affected by tribalism and a profound lack of confidence in government. For instance, use of the term 'national reconciliation' (*muṣālaḥa waṭaniyya*) rather than 'transitional justice' fuelled widespread distrust amongst the public that its real aim was to pardon human rights abusers and was issued at the behest of militia groups, rather than being about real reconciliation. Second, there were serious deficiencies in the resourcing and manpower of the Truth and Reconciliation Commission that was set up under the Law. Third, there has been ineffective and only partial implementation on the ground, with poor bureaucratic management and the workings of the Commission being consistently undermined by subsequent legislative activity. Further, there has been no attempt to include any civil society organisations or victims of violations before and during the Revolution in

[120] The Constitutional Drafting Assembly of Libya, Constitutional Consolidation Committee, Proposal of a Consolidated Draft Constitution, Al Bayda, Libya, 16 April 2017, <https://security-legislation.ly/sites/default/files/lois/229-2017%20Draft%20Constitution_ENG.pdf> accessed 12 December 2021.

[121] M. Hamad, 'A Law of Diminishing Returns: Transitional Justice in Post-Revolutionary Libya' (2020) 3(1) *Al Muntaqa* 23-37.

discussion of what the law should look like.[122] These deficiencies have meant the latest attempt at a general transitional justice process has fallen, again, far short of what is needed, meaning very little progress on redress for either historical or civil war-related property violations.

4.2 ***The Need for Consistency with International Law***

Differences exist in international law between non-conflict related violations of the right to property (such as occurred in the Ghaddafi era) and those which occur during conflict. An effective property claims mechanism would need to be able to manage both.

4.2.1 Law No. 4 Cases

In 2018 the United Nations Support Mission in Libya (UNSMIL) and UNDP met with a number of Libyan parties concerned with the problem of arbitrarily confiscated (Law No. 4) properties. The meeting concluded with several proposals, perhaps the most prominent of which was the abolition of the property laws that allowed for the confiscation of property. It was also suggested that this problem should be more effectively included in transitional justice laws.[123] The meeting was notable for its observation that there has been an overall lack of focus in post-2011 Libyan legislative activity on redress for Ghaddafi-era property confiscations.

Compensation for Law No. 4 violations, as opposed to restitution, is appropriate for several reasons. First, as has been argued above in this paper, violation of property rights in Libya has occurred not through act(s) of confiscation *per se*, but because the non-payment of (adequate) compensation made those confiscations unlawful. Second, taking a compensatory approach to such cases would avoid significant numbers of families becoming homeless while State financial support for such persons is not available. Compensation would cause less social unrest, which is a particularly important factor in Libya considering the serious political and military turmoil the country has faced over the last 10 years in particular. Lastly, a compensation process would take account of caselaw from the regional courts, such as the ECtHR decision

[122] *Id*, 32.
[123] UNSMIL, 'State Representatives and Experts Discuss Best Remedies to Address Grievances Resulting From Past Property Ownership Laws and Practices in Libya', 27 July 2018, <https://unsmil.unmissions.org/state-representatives-and-experts-discuss-best-remedies-address-grievances-resulting-past-property> accessed 12 December 2021.

in *Demopoulos v Turkey* (2010) (above) to award compensation (not restitution) to the former owners on the basis that the passage of more than 30 years had weakened the link between them and their property to less than that enjoyed by the current occupants.[124] Turkey's establishment of its Immovable Property Commission (which settled most claims by compensation)[125] in response to a similar earlier ruling in *Xenides-Arestis v Turkey* (2005)[126] is also instructive. The comparable period of time in Libya suggests that a similar approach could be warranted for Law No. 4 cases. Taking a compensation rather than restitution approach for the majority of Law No. 4 disputes would be in line with the approach adopted at the time of the Restitution Commission when it was recognised that restitution was impractical. It also sits well with decisions by the African Commission[127], as well as the general spirit of Libyan legislation to date.

4.2.2 Civil War Displacement Cases

For property owners who have been displaced by conflict or by ethnic/religious-based discrimination, international law prioritises *restitution* over compensation. The *Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles)* (2005) which define the rights of refugees and displaced persons to return to their homes, lands and property[128], consider restitution is the best remedy, and resort may be made to compensation only if the restitution of the property is impossible according to the opinion of an independent observer, or if the affected party accepts compensation as an alternative.[129] The *Pinheiro Principles* state that priority must be given to restitution as an essential element in remedial justice, and restitution should only be considered impossible in exceptional cases (such as when the property has been destroyed) - even in these cases, the original owner must have the option to request repair or reconstruction of the property whenever possible.[130] The *Guiding Principles on Internal Displacement* require that property be protected against illegal

---

[124] *Demopoulos v Turkey*, *supra* n84, paras 114-118. See also Williams and Gürel, *supra* n84, 21.
[125] M. Erdem and S. Greer, 'Human Rights, the Cyprus Problem, and the Immovable Property Commission' (2018) 67(3) *International and Comparative Law Quarterly*, 721-732.
[126] *Xenides-Arestis v Turkey,* ECtHR No. 46347/99, 22 December 2005, Information Note no. 81.
[127] Murray, *supra* n9, 381-384.
[128] Principles on Housing and Property Restitution for Refugees and Displaced Persons, UN Doc E/CN.4/Sub.2/2005/17 (by Paulo Sérgio Pinheiro) [hereinafter *Pinheiro Principles*], Article 2, <https://www.unhcr.org/uk/protection/idps/50f94d849/principles-housing-property-restitution-refugees-displaced-persons-pinheiro.html> accessed 12 December 2021.
[129] *Ibid*.
[130] Article 21 of the *Pinheiro Principles*, *supra* n128.

appropriation, occupation or use, noting that there is a 'strong trend' in present international law toward there being a duty on authorities to refrain from such violations and to provide protection against violations by others.[131]

The right of return post-conflict, which is intimately linked with the exercise of property rights, has been recognised in Security Council resolutions and in the mandate of peacekeeping operations, and in other UN and regional bodies.[132] The 2007 UN Secretary General's report on protection of civilians in armed conflict recommended measures to assist restitution or compensation (where necessary).[133] The ICRC argues that the right of return to one's original residence has crystallised as a rule of customary international humanitarian law no matter the nature of the armed conflict causing the displacement[134], and there are also provisions in human rights law tending in that direction.[135] The notion of redress for violations of the right to property from displacement as a result of conflict is consistent also with the ICJ's advisory decision in the *Wall case*, and with the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005).*[136]

The African Commission has noted that the *Pinheiro Principles* are guidelines without force of law, but together with the decisions of regional bodies it has found 'great persuasive value' in them as a guide to interpreting Article 14 of the African Charter[137], and has employed them in a range of relevant decisions.[138]

---

[131] Commission on Human Rights, *Guiding Principles on Internal Displacement* (E/CN.4/1998/53/Add.2, 11 February 1998), Principle 21. See also Kalin, *supra* n82, 99-100.
[132] Kalin, *supra* n82, 127-130.
[133] S/2007/643, para 59.
[134] ICRC, Database on Customary International Humanitarian Law, Rule 132, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule132> accessed 12 December 2021.
[135] Kalin, *supra* n82, 126-127.
[136] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, E/CN.4/RES/2005/35 (16 December 2005), endorsed by the UNGA in A/RES/60/147 (21 March 2006), <https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx> accessed 12 December 2021 (hereafter the '*Basic Principles on the Right to a Remedy*').
[137] Communication 279/03-296/05, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan*, 27 May 2009, para 204.
[138] See Murray, *supra* n9, Chapter 15.

There are also notable examples of the application of these principles outside of Africa.[139] In Bosnia and Herzegovina, Article 1 of Annex 7 to the Dayton Peace Agreement declared that all refugees and displaced persons "have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them".[140] Garlick has noted that Dayton was the first instance in which the right to return to one's *house* of origin has been recognised at the international level.[141] Annex 7 also created a Commission for Real Property Claims of Displaced Persons and Refugees (hereinafter 'CRPC') which had broad powers to make decisions on property title for hundreds of thousands of refugees and displaced persons through a fast-track administrative process.[142]

In Kosovo, UN Security Council Resolution 1244 (1999) emphasised the right of all refugees and displaced persons to return to their homes. UNMIK subsequently established the ad-hoc Housing and Property Directorate and the Housing and Property Claims Commission (HPD/HPCC)[143] for residential property claims. These were replaced in 2006 by the Kosovo Property Agency and Kosovo Property Claims Commission (KPA/KPCC) which allowed also for commercial and agricultural property claims.[144] The UN thus placed the resolution of housing, land and property rights disputes at the forefront of the peace-building process (UNMIK was the first UN operation to do so[145]) and Kosovo's post-war government has followed suit through

---

[139] S. Leckie, 'New Housing, Land and Property Restitution Rights' (2006) 25 *Forced Migration Review* 52-53.
[140] The General Framework Agreement for Peace in Bosnia and Herzegovina ('the Dayton Peace Agreement') was initialled in Dayton on 21 November 1995 and signed in Paris on 14 Dec 1995. For the text, see 35 ILM (1996) 75. The right to return was also incorporated in Art II para 5 of the new Constitution of Bosnia and Herzegovina (Annex IV, Dayton Peace Agreement).
[141] M. Garlick 'Protection for property rights: A partial solution? The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) in Bosnia and Herzegovina' (2000) 19 *Refugee Survey Quarterly* 68; M. Stavropoulou, 'Bosnia and Herzegovina and the right to return in international law' in M. O'Flaherty and G. Gisvold (eds), *Protection of Human Rights in Bosnia and Herzegovina* (Martinus Nijhoff, The Hague, 1998), 127.
[142] H. Das, 'Restoring Property Rights in the Aftermath of War' (2004) 53(2) *International and Comparative Law Quarterly* 429, 432-433.
[143] UNMIK Regulation 2000/60, adopted 31 October 2000, s2, <https://docs.pca-cpa.org/2016/01/UNMIK-Regulation-2000-60-Clarification.pdf> accessed 12 December 2021. See also Das, *supra* n142, 435.
[144] UNMIK Regulation 2006/10, adopted 4 March 2006, <https://docs.pca-cpa.org/2016/01/UNMIK-Regulation-2006-10.pdf> accessed 12 December 2021. Also G. van Heugten, 'Post-conflict property restitution in Kosovo: A continuing challenge', *Terra Nullius* (23 November 2012).
[145] van Heugten, *supra* n144.

the development in 2016 of a National Strategy on Property Rights (NSPR) envisaging a slew of legislative reform measures and new judicial procedures.[146]

In Iraq, after the removal of the Saddam Hussein regime the US-installed Government of Iraq acknowledged that resolving the land and property disputes of the former regime was paramount to national reconciliation and conflict resolution. In 2006 the Commission for the Resolution of Real Property Disputes (CRRPD)[147] was set up to make restitution or provide the basis for compensation for hundreds of thousands of ethnic Kurds and Turkomans forced from their homes during Saddam's 'Arabization' programme.[148] There have also been laws to deal with property losses during conflict, including the 2014-2017 Kurdish Peshmerga/US-led conflict with 'Islamic State'. The mandate of the CRRPD was supplemented by Iraqi Law No. 20 of 2009 and also Law No. 57 of 2015 which provide for the compensation of all citizens affected by damage caused by war operations, military accidental mistakes and terrorist actions in Iraq.[149] This was consistent with the *Basic Principles on the Right to a Remedy* as well as the *Pinheiro Principles*.

Lastly, wary of repeating Zimbabwe's Mugabe-era mass confiscations from white farmers which was a significant contributor to that country's subsequent economic collapse, South Africa opted for a judicial mechanism - the Land Claims Court – to address the widespread dispossession that millions of Black property owners had suffered under *apartheid*. The majority of land claims quickly became bogged down with weak administrative systems and lax enforcement, so finally in early 2021 the government announced a new Land Court with more sweeping powers in an effort to deal with the backlog of unsettled claims. Other measures to redistribute millions of hectares of land are also planned, including a long-awaited Expropriation Bill which

---

[146] Kosovo National Strategy on Property Rights, December 2016, <https://kryeministri.rks-gov.net/repository/docs/National_Strategy_and_Annexes_ENG.pdf> accessed 12 December 2021.
[147] Iraq Order No.2/06: Statute of the Commission for the Resolution of Real Property Disputes (2006), 1 January 2006, <https://www.refworld.org/docid/5b3e23484.html> accessed 12 December 2021.
[148] P. van den Auweraert, 'Property Restitution in Iraq', Presentation at the Symposium on Post-Conflict Property Restitution (6-7 September 2007), <https://2001-2009.state.gov/documents/organization/98032.pdf> accessed 12 December 2021.
[149] Reliefweb, "Restoration of Property Rights and Compensation for Iraqi IDPs", bignewsnetwork.com, 23 December 2018, <https://www.bignewsnetwork.com/news/258671243/restitution-of-property-rights-and-compensation-for-iraqi-idps> accessed 12 December 2021.

allows State seizure of land which is unused, abandoned or poses a safety risk.[150] For its part, in 2020 Zimbabwe backtracked on its mass confiscations of land from white farmers 20 years earlier by announcing a plan to allow those former landowners to regain their property(ies) or be allocated a replacement(s).[151]

4.2.3 A Unique Process is Required

The above examples show that various types of property claims mechanisms have been set up by the international community to reverse the effects of ethnic cleansing and displacement during conflict. All processes put in place to settle post-conflict property disputes have been consistent on the need for restitution, and for compensation only if restitution is not possible, as outlined in the *Pinheiro Principles* and complementary instruments such as the *Guiding Principles on Internal Displacement*, and the *Basic Principles on the Right to a Remedy.* Thus for persons who were displaced from their homes when they fled conflict zones during Libya's civil war, international standards require that the focus be on restitution. Claims for property damage (whether to residential, commercial or industrial land) during armed conflict do not generally involve disputes over ownership, meaning compensation may be more appropriate in such cases. In both types of cases, as for Law No. 4-related disputes, a comprehensive and authoritative claims process dealing with all of these violations is advisable in order to settle claims consistently and fairly.

The above survey also makes clear that while adherence to core international standards is required, there is no template or model that is immediately applicable to Libya. The shape of efforts to resolve property disputes in other jurisdictions lends instructive guidance, but ultimately the design of a property claims process for Libya needs to be unique to Libya's own background and context. In the establishment of such a process, the following factors will however require close consideration: the institutional design of the body mandated to decide property restitution claims, the administration of evidence, the enforcement of decisions and the issue of monetary

[150] Reuters, 'South Africa Plans Special Court to Help Unblock Land Redistribution', *US News*, 1 March 2021.

[151] This move has led to criticism about the lack of compensation for the original Black dispossession that occurred under British rule, and in the Southern Rhodesia era. Some have also been sceptical of the motivations for the reform, given the desire of wealthy elites to have international sanctions against them and their businesses lifted; See T. Mhaka, 'Who is to Blame for Zimbabwe's Land Reform Disaster?', *Al Jazeera*, 20 September 2020; Reality Check Team, 'Zimbabwe Sanctions: Who is being Targeted?', *BBC News*, 25 October 2019.

compensation *in lieu* of restitution.[152] It is suggested that mixed international-local models (such as the CRPC) offer significant advantages in giving a perception of independence and thus confidence from the local population, as well as allowing the resolution of disputes according to international standards and with sensitivity to local laws and requirements. Adversarial models (such as those in South Africa) have faced major difficulties with delays, although any alternative model requires difficult decisions to be made about evidential requirements and sampling processes in the face of mass claims (as occurred for the UN Claims Commission (UNCC) process set up under Security Council Resolution 687 following the 1991 Iraq-Kuwait conflict).[153]

Another notable issue is gender-specific. Traditional or cultural values have often prevented women from accessing and enforcing property rights, so redress programmes need to be designed to also take account of these potential claimants. The Tunis Reporting Guidelines require 'equitable and non-discriminatory access, acquisition, ownership, inheritance and control of land and housing, especially by women and members of low income groups'[154], and the African Commission's *Resolution on Women's Right to Land and Productive Resources* requires 'effective remedies' for violations of property rights as well as free legal assistance for women in order to obtain restitution or compensation.[155] Libya is also a member of the Maputo Protocol, which requires states parties to guarantee women's rights to property and productive resources (Articles 6j, 7d and in particular, 19c), as well the right to housing (Article 16).[156] Much work will need to be done on this issue in Libya, noting that previous iterations of government policy to correct 'misapplications' of Law No. 4, not to mention more recent transitional justice laws, have spoken only of the rights of adult males (for example, sons of deceased former owners).

Importantly also, international experience shows that the establishment of a property restitution commission in a weak or partially-functioning state requires extra support

---

[152] Das, *supra* n142, 435.
[153] S/RES/687 (1991) (adopted on 8 April 1991). See L. Reed, 'International Claims Tribunals: What International Criminal Prosecutors Might Need to Know' (2009) 40 *Studies on Transnational Legal Policy* 207; H. Niebergall, 'Overcoming Evidentiary Weaknesses in Reparation Claims Programmes' in C. Ferstman *et al* (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (Brill, 2009); J. Tackaberry QC, 'The UNCC Mass Claims and Dispute Resolution Generally', Paper for the Seminar on Compensation Claims of The Chartered Institute of Arbitrators, London (17 November 2016).
[154] Tunis Reporting Guidelines, *supra* n69.
[155] See *supra* n35.
[156] See *supra* n34.

to ensure there is sufficient adjudicatory and administrative expertise, resources, impartiality (particularly important if there is a history of ethnic or religious conflict), and the ability and capacity to ensure enforcement of rulings: "if the rule is a politicized administration that works primarily in the service of local or national political elites, it will be extremely difficult to mount a large-scale property restitution process with national resources alone".[157] Libya's recent bureaucratic attempts at implementing a transitional justice process are a case in point.[158]

Funding of course is a crucial part of the equation. Libya has experienced an economic crisis since the fall of the Ghaddafi regime, which has obvious implications for the State's ability to pay compensation. A number of lawmakers have in recent years been concerned that a blanket compensation scheme would make a major dent in the country's finances; for instance, in the immediate aftermath of the removal of the regime some estimates assessed property and land prices, particularly in urban areas, to have more than doubled in just two years.[159] The financial resources required to compensate all victims of the Qaddafi regime, as well as more recent ones, has the potential to be vastly expensive.[160] Yet Libya has a relatively small population – around 6.6 million[161] - so the financial burden should be more manageable than for some other post-conflict societies (above). Furthermore, the African Commission has pointed out that compensation at market value is not necessary, and compensation needs to reflect a 'fair balance' with the public interest.[162]

Even so, Libya's oil industry has been decimated as a result of armed conflict and of continued disputes affecting its post-war rebuild.[163] A key problem now is that a

---

[157] van den Auweraert, *supra* n148, 10.
[158] See Hamad, *supra* n121.
[159] R. F. Worth, 'Thousands of Libyans Struggle With Recovery of Property Confiscated by Qaddafi', *New York Times*, 13 May 2012, <http://www.nytimes.com/2012/05/14/world/africa/libyans-consider-recovery-of-property-confiscated-by-qaddafi.html?pagewanted=all> accessed 12 December 2021.
[160] I. Sharqieh, 'Reconstructing Libya; Stability Through National Reconciliation', Brookings Doha Center Analysis Paper No. 9, December 2013, 25.
[161] World Population Review – Libya, <https://worldpopulationreview.com/countries/libya-population> accessed 12 December 2021.
[162] See *supra* n85, n86.
[163] S. al-Wardany, 'Civil War's End Won't Be Enough to Revive Libyan Oil Production', *World Oil Magazine*, 25 June 2020, <https://www.worldoil.com/news/2020/6/25/civil-war-s-end-won-t-be-enough-to-revive-libyan-oil-production> accessed 12 December 2021; S. El Wardany, 'Libya Oil Recovery Under Threat as Funding Row Hits Output', *Bloomberg.com*, 19/20 April 2021, <https://www.bloomberg.com/news/articles/2021-04-19/libyan-daily-oil-output-falls-below-million-barrels-on-port-halt> accessed 12 December 2021; A. Ghaddar,'Libya Oil Leaks Hitting Output, NOC Chief Says', *reuters.com*, 9 June 2021, <https://www.reuters.com/business/energy/libya-lost-oil-production-recent-days-due-pipeline-leaks-noc-chairman-2021-06-09/> accessed 12 December 2021.

significant amount of Libya's oil wealth is being syphoned into the pockets of warlords, and this will be very difficult to solve.[164] Funding for a comprehensive transitional justice architecture aimed at all human rights abuses, and for a property claims mechanism within it, would need to draw from state revenues in the longer term, but in the short-to-medium term any serious work on a transitional justice process will require international assistance at least to some degree. This may be difficult to secure given Libya's inherent oil wealth. It is to be hoped that the external consequences of Libya's continuing instability will mean that assistance – financial, technical and managerial - will be forthcoming in the interim.

Finally, the UN's most recent report on the scale and complexities of the displacement problem requires a mention. The 2018 report on Libya by the UN Special Rapporteur on the Human Rights of Internally Displaced Persons noted that waves of armed conflict in Benghazi, Tripoli, Misrata and other cities since 2011 had caused not only civilian deaths, but massive displacement and widespread destruction of property. In 2014 alone, 6-7 percent of the population – 400,000 people – became internally displaced.[165] Since then displacement had become a permanent feature of life for many. Moreover, displacements are still ongoing with multifaceted causes, such as tensions leading to armed clashes in cities, lack of access to basic services, political persecution, human rights abuses, attacks based on alleged terrorist or party affiliations, and tribal and ethnic conflicts, as well as conflicts related to housing, land and property. Further, as a result of not being able to receive protection or achieve durable solutions within the country, many had been looking to emigrate, which has clear impacts beyond Libya itself. The report noted the need for a much stronger response from the Libyan Government to address the needs of displaced persons and pointed out that mere physical return (for those who wish to return) will not lead to durable solutions unless these other underlying issues are also addressed.[166] In this

---

[164] R. F. Worth, 'Qaddafi's Son is Alive. And He Wants to Take Libya Back', *New York Times*, 30 July 2021, <https://www.nytimes.com/2021/07/30/magazine/qaddafi-libya.html> accessed 12 December 2021.

[165] Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons on her Visit to Libya, A/HRC/38/39/Add.2 (10 May 2018), 5, <https://reliefweb.int/report/libya/report-special-rapporteur-human-rights-internally-displaced-persons-her-visit-libya> accessed 12 December 2021.

[166] *Id*., 6, as well as the Note by the Secretariat therein.

vein, Sharqieh has noted atrocities committed during the civil war is a significant bar to return for some internally-displaced persons.[167]

Therefore, it is abundantly clear that redress for the various forms of violations of the right to property discussed in this article needs to take place within a much broader architecture that addresses violations of human rights as part of a whole-of-society reconciliation process. As Das has noted, “[t]he protection or restoration of property rights is closely linked to … the protection of human rights and the restoration of the rule of law”, making it fundamental in order for a society to recover from conflict.[168] Hamad has pointed out the need for four basic requirements to make Libyan transitional justice work: a stable constitutional regime valorising transitional justice; a single unified set of state institutions; a set of important reconciliations (tribal and otherwise) on the ground; and a national consensus on the shape and content of the transitional justice program.[169] These pose enormous challenges, and none have yet come to pass.

5 Conclusions

The right to property is one of the most controversial human rights, both in terms of its existence and interpretation. No other human right is subject to more qualifications and limitations and, consequently, no other right has resulted in more complex case law. The law on confiscations in Libya’s Ghaddafi era highlighted some of the key ideological disagreements over conceptions of the right. Nowadays however, whatever the social justice motivations once were for the law, the regime’s downfall and ensuing civil wars have left a backlog of thousands of unsettled claims by frustrated former owners. Many of these involve a difficult choice between prioritising former ownership rights or the rights of current occupants who would otherwise have no alternative housing. This again reflects an ongoing and fundamental debate at the international level over the scope and content of the right to property which is not unique to Libya.

Needless to say, Libya’s troubled political and security environment has made it extremely difficult to solve Ghaddafi-era property disputes in an organised legal way.

[167] Sharqieh, *supra* n160, 19-22.
[168] Das, *supra* n142, 439.
[169] Hamad, *supra* n121, 33.

An orderly post-election environment would allow the opportunity to finally treat violations of property rights as human rights issues to be resolved within a broader transitional justice framework. This could foreshadow the creation of an independent, adequately-resourced and effective claims body or mechanism which would enjoy both local and international support. A claims settlement process will require time, resources and substantial international assistance. Even more crucially, it will require Libya's internal political stability, unity and commitment. It is to be hoped that the 2021 elections will help create the conditions to allow real work to begin.

More generally, the international community needs to develop more solid common ground on the right to property. While the ECHR, ACHPR and IACHR each affirm the right (at least in its 'negative' sense), they have limited reach. The ideological tension of the Cold War which prevented a broader consensus on the scope of the right is now in the past. Much law has been affirmed since then, such as the *Guiding Principles on Internal Displacement*, the *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, and the *Pinheiro Principles*. These dovetail with the right to redress for gross human rights violations highlighted in the *Basic Principles on the Right to a Remedy,* key decisions of the International Court of Justice and other tribunals, and developments in international criminal law. Yet many of the principles relating to real property rights lack a firm foundation as they have been developed progressively in a range of instruments lacking treaty status, and reactive to displacement and conflict.

In 2014 there were at least thirty-five international instruments ranging across a range of forums and contexts containing references to property protections.[170] Scholars such as Koskenniemi and Leino, and more recently Sprankling, and have argued for the harmonisation of these instruments, or at least for the international community to recognise a 'global' human right to property as a matter of general customary international law or general principles of law.[171] It is beyond the scope of this paper to consider whether there is sufficient evidence for such a customary right in international law at present. Indeed, the concept has notable opposition in scholars such as

[170] Alvarez, *supra* n51, 585.
[171] M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden J. Int'l L.* 553; J. Sprankling, 'The Global Right to Property' (2014) 52 *Colum. J. Transnat'l L*. 464-502; J. Sprankling, *The International Law of Property* (Oxford University Press, 2014), 347-360.

Alvarez, who argues that it is sufficient that current international law clearly embraces property rights although it has not cohered around a unified law of property: 'the human right of property will remain a viable proposition… only to the extent that it remains subject to distinct contextualized interpretations in international regimes and diverse international adjudicative forums'.[172] Given the vast array of different types of property, past use of the concept to justify rapacious colonial exploitation, ideological differences and local/sovereign sentiment, any global harmonisation project of this nature would be wildly difficult and beset with deep controversy.

That said, the road appears much clearer in relation to *real property*, particularly in the contexts in which the issue has arisen in Libya and in other societies which have experienced significant population displacement and/or are recovering from conflict. It should be possible to encapsulate the key principles and rules in the instruments discussed in this article in a new multilateral treaty, or at least in amendments to the ICCPR and/or the ICESCR. Not only would this remedy a notable gap at the international level, but it would also give greater certainty as to the fundamental nature of the right, its scope, the circumstances in which real property can be expropriated, and the type of redress available. This would be of particular value in societies undergoing transitional justice and reconciliation. It would also have broader implications for social and economic prosperity during peacetime as it would support the creation of conditions for the realisation of other core economic and social human rights, including the rights to food, work and education, and particularly housing.

[172] Alvarez, *supra* n51, 588.