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## COMMENT

### The State's Right to Property Under International Law

#### INTRODUCTION

On December 3, 2013, agents of the Australian Secret Intelligence Service seized privileged documents belonging to Timor-Leste on the premises of one of Timor-Leste's legal advisers in Australia.<sup>1</sup> The documents concerned an ongoing arbitration between the two states over Australian espionage.<sup>2</sup> Two weeks later, Timor-Leste sued Australia before the International Court of Justice (ICJ) for violating its property rights under international law.<sup>3</sup> The claim seemed flawless: there was no dispute that Australia had taken the documents.<sup>4</sup> Nevertheless, Australia had a response: the taking was lawful because states do not have a general right to property under international law.<sup>5</sup>

As absurd as it may sound, Australia is correct. But two points of clarification are in order. First, there is no question that *individuals* have a

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1. Memorial of the Democratic Republic of Timor-Leste, Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.), ¶¶ 4.10-.11, 4.14-.15 (Apr. 28, 2014), <http://www.icj-cij.org/docket/files/156/18698.pdf> [<http://perma.cc/Q9TY-3N9T>] [hereinafter Memorial of Timor-Leste].
  2. *Id.* ¶ 4.12. On April 23, 2013, Timor-Leste instituted arbitral proceedings against Australia, claiming that the Treaty on Certain Maritime Arrangements in the Timor Sea was invalid because Australian intelligence services had bugged Timor-Leste's negotiating room during the treaty negotiations. *Id.* ¶¶ 3.3-.4.
  3. Application Instituting Proceedings, Timor-Leste v. Austl., ¶¶ 1, 3, 10 (Dec. 17, 2013) [hereinafter Application Instituting Proceedings], <http://www.icj-cij.org/docket/files/156/17962.pdf> [<http://perma.cc/Q4DG-GVLR>].
  4. Counter-Memorial of Australia, Timor-Leste v. Austl., ¶ 1.2 (July 28, 2014), <http://www.icj-cij.org/docket/files/156/18702.pdf> [<http://perma.cc/A6EV-VCGD>].
  5. *Id.* ¶ 5.64; Timor-Leste v. Austl., Verbatim Record, 11-12, 24 (Jan. 21, 2014, 10:00 AM), <http://www.icj-cij.org/docket/files/156/17920.pdf> [<http://perma.cc/XS5Y-66J6>] [hereinafter Timor-Leste v. Austl., Jan. 21. Verbatim Record].

general right to property under *domestic law*.<sup>6</sup> Australia was merely asserting that *states* do not have such a right under *international law*.<sup>7</sup> Second, Australia was not arguing that taking another state's property is *always* lawful under international law; rather, it merely asserted that a taking *can be* lawful. In particular, Australia claimed that the state has rights to *certain types* of property, but not *all types* of property. Yet even with these qualifications, the thesis still sounds absurd. How can states not have a general right to property under international law?

This Comment explains this unintuitive fact. Surprisingly, very little scholarly work discusses the state's right to property under international law,<sup>8</sup> which formed the basis of Timor-Leste's original claim<sup>9</sup> and received significant attention during oral arguments.<sup>10</sup> Most of the secondary literature on *Timor-Leste v. Australia* has focused on the underlying arbitration rather than the ICJ litigation,<sup>11</sup> and commentary on the ICJ case has for the most part

6. This is true under the domestic law of the large majority of states, but there are some exceptions. See *infra* note 78 and accompanying text.
7. Australia's assertion can be distinguished from John G. Sprankling's thesis on the international right to property. See generally JOHN G. SPRANKLING, THE INTERNATIONAL LAW OF PROPERTY (2014) (arguing that an international or global right to property has emerged); John G. Sprankling, *The Emergence of International Property Law*, 90 N.C. L. REV. 461 (2012) (same); John G. Sprankling, *The Global Right to Property*, 52 COLUM. J. TRANSNAT'L L. 464 (2014) [hereinafter Sprankling, *The Global Right to Property*] (same). Sprankling's notion of the international right to property is limited to the rights of *individuals*; it does not extend to the rights of *states*, which are the subject of Australia's assertion. See Sprankling, *The Global Right to Property, supra*, at 498 ("[T]he right principally concerns the relationship between a natural or legal person, on the one hand, and a government entity, on the other hand.").
8. John Sprankling's writings on the international right to property focus on the individual's right to property rather than that of the state. See *supra* note 7.
9. Application Instituting Proceedings, *supra* note 3, ¶ 11.
10. See *Timor-Leste v. Austl.*, Verbatim Record, 23-25 (Jan. 22, 2014, 5:00 PM), <http://www.icj-cij.org/docket/files/156/17926.pdf> [<http://perma.cc/6EEU-R2GB>]; *Timor-Leste v. Austl.*, Verbatim Record, 9-10, 19 (Jan. 22, 2014, 10:00 AM), <http://www.icj-cij.org/docket/files/156/17922.pdf> [<http://perma.cc/3YJ7-U4F3>] [hereinafter *Timor-Leste v. Austl.*, Jan. 22, 10:00 AM. Verbatim Record]; *Timor-Leste v. Austl.*, Jan. 21. Verbatim Record, *supra* note 5, at 11-12, 22-27; *Timor-Leste v. Austl.*, Verbatim Record, 27-28, 36-37 (Jan. 20, 2014, 10:00 AM), <http://www.icj-cij.org/docket/files/156/17918.pdf> [<http://perma.cc/F3X2-A859>].
11. E.g., Donald K. Anton, *The Timor Sea Treaty Arbitration: Timor-Leste Challenges Australian Espionage and Seizure of Documents*, 18 AM. SOC'Y INT'L L. INSIGHTS (Feb. 26, 2014), <http://www.asil.org/insights/volume/18/issue/6/timor-sea-treaty-arbitration-timor-leste-challenges-australian-espionage> [<http://perma.cc/N6SU-9CV4>]; Anthony Bergin, *The Growing Timor Gap*, STRATEGIST (May 14, 2013), <http://www.aspistrategist.org.au/the-growing-timor-gap> [<http://perma.cc/UM8Y-H3V6>]; *Bugs in the Pipeline*, ECONOMIST (June 8, 2013), <http://www.economist.com/news/asia/21579074-timorese-leaders-push-better-deal-their-offshore-gas-fields-bugs-pipeline> [<http://perma.cc/TTE8-RD6F>]; Kate Mitchell & Dapo Akande, *Espionage & Good Faith in Treaty Negotiations: East*

focused on the privileged nature of the documents rather than the state's right to property.<sup>12</sup> And unfortunately, the ICJ will not have the opportunity to address the issue in this particular case, as Timor-Leste withdrew its claim in June 2015.<sup>13</sup>

This Comment makes both a descriptive and a normative argument. Part I argues that as a descriptive matter, states have a general right to territory but an incomplete right to property under international law. Part II makes the normative argument that the international community, which has primarily focused on establishing rights to certain types of property, should now focus on developing the state's general right to all types of property. Part III offers a short discussion on how that right could emerge.

## I. THE STATE'S RIGHTS TO TERRITORY AND PROPERTY

The state has rights to territory and property. The state's territory is the physical space over which the state exercises sovereignty.<sup>14</sup> The state's property

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*Timor v Australia*, EJIL: TALK! (Jan. 20, 2014), <http://www.ejiltalk.org/espionage-fraud-good-faith-in-treaty-negotiations-east-timor-v-australia-in-the-permanent-court-of-arbitration> [<http://perma.cc/2XS5-X2HD>].

12. E.g., Leon Chung & Alexandra Payne, *ICJ Orders Provisional Measures in Proceedings Between East Timor and Australia*, HERBERT SMITH FREEHILLS (Mar. 17, 2014), <http://www.herbertsmithfreehills.com/insights/legal-briefings/icj-orders-provisional-measures-in-proceedings-between-east-timor-and-australia> [<http://perma.cc/J4PD-KYRH>]; Sebastian Perry, *ICJ Orders Australia To Cease Spying on East Timor*, GLOBAL ARB. REV. (Mar. 4, 2014), <http://globalarbitrationreview.com/news/article/32470> [<http://perma.cc/2472-7QDC>]; Stephen Tully, *Legal Professional Privilege and National Security*, NEW S. WALES BAR ASS'N 24 (Feb. 20, 2014), [http://www.nswbar.asn.au/docs/webdocs/BN\\_022014\\_RD.pdf](http://www.nswbar.asn.au/docs/webdocs/BN_022014_RD.pdf) [<http://perma.cc/N434-4D3M>]. The ICJ in indicating provisional measures ultimately relied on the privileged nature of the documents. Questions Relating to the Seizure and Detention of Certain Documents and Data (*Timor-Leste v. Austl.*), Provisional Measures, 2014 I.C.J. 147, ¶ 28 (Mar. 3) [hereinafter *Timor-Leste v. Austl.*, Provisional Measures].
13. *Timor-Leste v. Austl.*, Order, 3 (June 11, 2015), <http://www.icj-cij.org/docket/files/156/15694.pdf> [<http://perma.cc/56AD-ED5S>]. A seemingly large part of the reason why Timor-Leste decided to withdraw the case is that Australia agreed to return the seized documents to Timor-Leste. See Daniel Hurst, *Timor-Leste Presses Ahead with Challenge to Timor Sea Oil and Gas Treaty*, GUARDIAN (June 5, 2015), <http://www.theguardian.com/world/2015/jun/05/timor-leste-to-resume-treaty-challenge-after-australia-returned-documents> [<http://perma.cc/L4PK-7KBW>]. Nevertheless, it is not clear why Timor-Leste chose to withdraw the entire case, as it had also requested declaratory relief concerning Australia's allegedly unlawful actions. Memorial of Timor-Leste, *supra* note 1, at 62.
14. *Island of Palmas (Neth. v. U.S.)*, 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928); JAMES R. CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 245 (8th ed. 2012); SIR ROBERT JENNINGS & SIR ARTHUR WATTS, *OPPENHEIM'S INTERNATIONAL LAW* 563 (9th ed. 1992).

is the set of tangible and intangible objects over which the state exercises ownership,<sup>15</sup> such as embassies, buildings, vehicles, and documents.

For the purposes of this Comment, a right is “general” if *any* interference with it gives rise to a cause of action, whereas a right is “incomplete” if only *certain* interferences with it give rise to a cause of action. As explained below, the current state of international law is such that the state has a general right to territory,<sup>16</sup> but an incomplete right to property.<sup>17</sup>

#### A. *The State’s General Right to Territory*

The state has a general right to territory because any interference with a state’s territory gives rise to a cause of action under international law, either under the principle of state sovereignty or under the prohibition on territorial conquest.

Although taken for granted today, the principle of state sovereignty was not always a norm of international law. As late as the seventeenth century, sovereigns coexisted without well-defined boundaries.<sup>18</sup> As a result, they engaged in frequent warfare, culminating in the Peace of Westphalia of 1648,<sup>19</sup> which established, inter alia, the principle of state sovereignty: states were prohibited from interfering with another state’s territory.<sup>20</sup>

Although this prohibition was a significant accomplishment, there was one important exception: states could still lawfully acquire territory from other states through military conquest.<sup>21</sup> Consequently, for centuries following the Peace of Westphalia, states continued to engage in warfare to expand their territory.<sup>22</sup> It was only after the Kellogg-Briand Pact of 1928<sup>23</sup> and the U.N.

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15. See MARGARET MOORE, A POLITICAL THEORY OF TERRITORY 15-16 (2015).

16. See *infra* Section I.A.

17. See *infra* Section I.B.

18. See Antonio Cassese, *States: Rise and Decline of the Primary Subjects of the International Community*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 49, 49-51 (Bardo Fassbender & Anne Peters eds., 2012).

19. See *id.* at 50.

20. See *id.* at 50-51.

21. See Marcelo G. Kohen, *Conquest*, MAX PLANCK ENCYCLOPEDIA PUB. INT’L L. ¶ 9 (Feb. 2015), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e275> [<http://perma.cc/GP43-DWQJ>]; Hans-Ulrich Scupin, *History of International Law, 1815 to World War I*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L L. ¶ 36 (May 2011), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e708> [<http://perma.cc/8Q3F-UC2D>].

22. For example, in the late nineteenth century to the early twentieth century, the major European powers colonized and annexed many African territories in what has come to be

Charter of 1945<sup>24</sup> that the prohibition on territorial conquest became a respected norm of international law.<sup>25</sup> From then on, any interference with a state's territory constituted a *prima facie* breach of international law, establishing the state's general right to territory in the international legal order.<sup>26</sup>

*B. The State's Incomplete Right to Property*

Unlike the state's right to territory, the state's right to property is incomplete. Although the Immunities Convention of 2004<sup>27</sup> – which has not yet entered into force<sup>28</sup> – appears to codify a general right to property, the Convention would apply only to “the immunity of a State and its property *from the jurisdiction of the courts of another State*.”<sup>29</sup> Indeed, its purpose from the very beginning was only to codify the rules of foreign sovereign immunity applicable in national courts; it was never intended to prohibit interference with state property in the international legal order.<sup>30</sup>

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known as the “Scramble for Africa.” See Matthew Craven, *Colonialism and Domination*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW, *supra* note 18, at 862, 879-82.

23. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.
24. U.N. Charter art. 2, ¶ 4.
25. Kohen, *supra* note 21, ¶ 12.
26. Indeed, future developments in the state's rights to territory all derived from the principle of state sovereignty or the prohibition on territorial conquest. For example, although the tribunal in the seminal *Trail Smelter* arbitration pioneered the prohibition on transboundary environmental damage, it established the principle as a direct consequence of the principle of state sovereignty. See *Trail Smelter (U.S. v. Can.)*, 3 R.I.A.A. 1905, 1963 (Perm. Ct. Arb. 1941).
27. United Nations Convention on Jurisdictional Immunities of States and Their Property, Dec. 2, 2004, U.N. Doc. A/59/508 [hereinafter Immunities Convention].
28. *United Nations Convention on Jurisdictional Immunities of States and Their Property*, UNITED NATIONS TREATY COLLECTION (Jan. 4, 2016, 5:03 PM), [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-13&chapter=3&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&lang=en) [<http://perma.cc/HU26-TK8L>] [hereinafter Immunities Convention Status]. The Convention will enter into force after thirty states have become parties to the Convention. Immunities Convention, *supra* note 27, art. 30. Currently, only twenty-one states are parties. Immunities Convention Status, *supra*.
29. Immunities Convention, *supra* note 27, art. 1 (emphasis added).
30. Int'l Law Comm'n, Rep. on the Work of Its Forty-Third Session, U.N. Doc. A/46/10, at 13 (1991), *reprinted in* [1991] 2 Y.B. Int'l L. Comm'n 13, 13, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2).

The absence of a general right to property is understandable as a historical matter. Traditionally, states kept all their property within their own territory, such that the general prohibition on interfering with another state's territory provided sufficient protection for states' property. But over time, states have needed to locate more and more of their property extraterritorially. In response, international law has evolved to provide protection—often in the form of immunities—for this property. This protection, however, has developed in a piecemeal fashion, creating rights to specific types of property instead of establishing a general right to property.

The first type of protected extraterritorial property is diplomatic property. Originating from the practice of Italian sovereign city-states, diplomatic premises began enjoying immunity in the sixteenth century.<sup>31</sup> Today, their immunity has been enshrined in the Vienna Convention on Diplomatic Relations of 1961 (VCDR), which extends immunities to other diplomatic property as well, such as the diplomatic mission's means of transport, archives, documents, correspondence, and diplomatic bag.<sup>32</sup> The Vienna Convention on Consular Relations of 1963 (VCCR) extends similar protections to consular premises and property,<sup>33</sup> as does the Convention on Special Missions of 1969 for the premises and property of special missions.<sup>34</sup> In the landmark *Tehran Hostages* case of 1980, the ICJ held the relevant provisions of the VCDR and VCCR to be general international law.<sup>35</sup>

The second type of protected extraterritorial property is extraterritorial vehicles, including ships, aircraft, and spacecraft. State ships employed for noncommercial purposes have historically enjoyed immunity based on the legal fiction that they form part of their flag state's territory;<sup>36</sup> their immunity is

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31. Arthur Eyffinger, *Diplomacy*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW, *supra* note 18, at 813, 820-22.

32. Vienna Convention on Diplomatic Relations arts. 22-28, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

33. Vienna Convention on Consular Relations arts. 31-36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

34. Convention on Special Missions arts. 24-28, Dec. 8, 1969, 1400 U.N.T.S. 231.

35. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 31 (May 24). On the other hand, it is not clear if the Convention on Special Missions reflects general international law. Nadia Kalb, *Immunities, Special Missions*, MAX PLANCK ENCYCLOPEDIA PUB. INT'L L. ¶ 4 (May 2011), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1054> [<http://perma.cc/L5HQ-5CJY>].

36. Gil Carlos Rodriguez Iglesias, *State Ships*, MAX PLANCK ENCYCLOPEDIA PUB. INT'L L. ¶ 5 (Mar. 2011), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1224> [<http://perma.cc/LM69-XRZV>].

now enshrined in the Unification Convention of 1926,<sup>37</sup> the High Seas Convention of 1958,<sup>38</sup> and the U.N. Convention on the Law of the Sea of 1982 (UNCLOS).<sup>39</sup> Under UNCLOS, state aircraft likewise enjoy the freedom of overflight in the high seas and the exclusive economic zone,<sup>40</sup> and under the Paris Convention of 1919, military aircraft enjoy certain immunities in the territory of other states.<sup>41</sup> State spacecraft are also accorded a certain degree of immunity under the Outer Space Treaty of 1967.<sup>42</sup>

Therefore, as a matter of *lex lata*,<sup>43</sup> any interference with a state's diplomatic property or extraterritorial vehicles gives rise to a cause of action under international law. But where a state interferes with any other type of property belonging to another state, often no such cause of action arises. Indeed, the very existence of treaties specifically protecting diplomatic property and extraterritorial vehicles supports the contention that a general right to property does not exist. After all, if there had been a general right to property, then states would not have had to provide for specific protections in the aforementioned treaties in the first place.

## II. THE NEED FOR A GENERAL RIGHT TO PROPERTY

If the only types of state property at risk of interference were diplomatic property and extraterritorial vehicles, then there would be no need for a general right to property. However, each year more and more types of state property – both within and outside of state territory – find themselves at risk.

Consider three examples. The first is computer networks: states are increasingly launching cyberattacks on other states' computer networks, as

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37. International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels art. 3(1), Apr. 10, 1926, 179 L.N.T.S. 199.

38. Convention on the High Seas art. 9, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11.

39. United Nations Convention on the Law of the Sea arts. 95-96, Dec. 10, 1982, 1833 U.N.T.S. 397.

40. *Id.* arts. 58(1), 87(1)(b).

41. Convention Relating to the Regulation of Aerial Navigation (Paris Convention) art. 32, Oct. 13, 1919, 11 L.N.T.S. 173.

42. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. VIII, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

43. *Lex lata* refers to "what the law is," as opposed to *lex ferenda*, which refers to "what the law should be."

seen in Estonia,<sup>44</sup> Georgia,<sup>45</sup> Iran,<sup>46</sup> Israel,<sup>47</sup> and the United States.<sup>48</sup> Second, communication systems: states are increasingly conducting espionage by bugging other states' communication systems, as evidenced by Brazil,<sup>49</sup> Germany,<sup>50</sup> *Timor-Leste v. Australia*,<sup>51</sup> and most recently *Croatia v. Slovenia*.<sup>52</sup> Third, privileged documents: documents concerning pending litigations and arbitrations have increasingly been targeted, as was the case in Kazakhstan,<sup>53</sup> *Philippines v. China*,<sup>54</sup> and *Timor-Leste v. Australia*.<sup>55</sup> The list of types of state property at risk goes on.

There are two ways to solve this problem. First, there is the piecemeal approach, whereby the state's right to property develops incrementally by type

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44. Steven Lee Myers, *Cyberattack on Estonia Stirs Fear of "Virtual War,"* N.Y. TIMES (May 18, 2007), <http://www.nytimes.com/2007/05/18/world/europe/18iht-estonia.4.5774234.html> [<http://perma.cc/W7LZ-2FA6>].
  45. John Markoff, *Before the Gunfire, Cyberattacks*, N.Y. TIMES (Aug. 12, 2008), <http://www.nytimes.com/2008/08/13/technology/13cyber.html> [<http://perma.cc/6XYD-5A6D>].
  46. Thomas Erdbrink & Ellen Nakashima, *Iran Struggling To Contain "Foreign-Made" "Stuxnet" Computer Virus*, WASH. POST (Sept. 27, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/27/AR2010092706229.html> [<http://perma.cc/9TLC-QSG2>].
  47. Isabel Kershner, *Israel Says It Repelled Most Attacks on Its Web Sites by Pro-Palestinian Hackers*, N.Y. TIMES (Apr. 7, 2013), <http://www.nytimes.com/2013/04/08/world/middleeast/pro-palestinian-hackers-attack-israeli-sites.html> [<http://perma.cc/JZT7-EHAJ>].
  48. Julie Hirschfeld Davis, *Hacking of Government Computers Exposed 21.5 Million People*, N.Y. TIMES (July 9, 2015), <http://www.nytimes.com/2015/07/10/us/office-of-personnel-management-hackers-got-data-of-millions.html> [<http://perma.cc/26BV-N3NQ>].
  49. Julian Borger, *Brazilian President: US Surveillance a "Breach of International Law,"* GUARDIAN (Sept. 24, 2013), <http://www.theguardian.com/world/2013/sep/24/brazil-president-un-speech-nsa-surveillance> [<http://perma.cc/PVR5-J24K>].
  50. Alison Smale, *Anger Growing Among Allies on U.S. Spying*, N.Y. TIMES (Oct. 23, 2013), <http://www.nytimes.com/2013/10/24/world/europe/united-states-disputes-reports-of-wiretapping-in-Europe.html> [<http://perma.cc/6LB7-H59P>].
  51. Memorial of Timor-Leste, *supra* note 1, ¶ 3.4.
  52. Alison Ross, *ICJ President Backs out of Croatia-Slovenia Dispute*, GLOBAL ARB. REV. (Aug. 5, 2015), <http://globalarbitrationreview.com/news/article/34038/icj-president-backs-croatia-slovenia-dispute> [<http://perma.cc/M3K7-TFVE>]; Arman Sarvarian & Rudy Baker, *Arbitration Between Croatia and Slovenia: Leaks, Wiretaps, Scandal*, EJIL: TALK! (July 28, 2015), <http://www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal> [<http://perma.cc/9SLY-JMQV>].
  53. Douglas Thomson, *Curtis-Kazakhstan E-mails Hacked by Unknowns*, GLOBAL ARB. REV. (Mar. 18, 2015), <http://globalarbitrationreview.com/news/article/33650/curtis-kazakhstan-e-mails-hacked-unknowns> [<http://perma.cc/LTW9-XBA9>].
  54. Alison Ross, *Cybersecurity and Confidentiality Shocks for the PCA*, GLOB. ARB. REV. (July 23, 2015), <http://globalarbitrationreview.com/news/article/34000/cybersecurity-confidentiality-shocks-pca> [<http://perma.cc/889U-TMAV>].
  55. *Timor-Leste v. Austl.*, Provisional Measures, *supra* note 12, ¶ 33.



of property. This has been the prevailing approach for decades, and as a result, today the state has an incomplete right to property (i.e., rights to only certain types of its property).<sup>56</sup> The second approach is the holistic approach, whereby the state's right to property develops as a general matter, such that the default is that all of a state's property is protected under international law. Under this approach, states would have a general right to property (i.e., rights to all types of its property).

Today, the piecemeal approach continues to prevail. To protect state computer networks, commentators have proposed<sup>57</sup> and states have concluded<sup>58</sup> cybersecurity treaties. To protect state communication systems, some commentators have similarly pushed for an anti-espionage treaty.<sup>59</sup> And to protect privileged state documents, the ICJ declared in its provisional-measures order in *Timor-Leste v. Australia* that states plausibly have the right to exclude other states from accessing their privileged documents.<sup>60</sup>

The piecemeal approach undeniably has its benefits: in particular, it allows states to develop regimes of protection customized to each type of property. Nevertheless, there are three reasons why the holistic approach is necessary to supplement the piecemeal approach.

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56. See *supra* Section I.B.

57. E.g., Oona A. Hathaway et al., *The Law of Cyber-Attack*, 100 CALIF. L. REV. 817, 880-84 (2012); David Weissbrodt, *Cyber-Conflict, Cyber-Crime, and Cyber-Espionage*, 22 MINN. J. INT'L L. 347, 385-87 (2013); Stephen Moore, Note, *Cyber Attacks and the Beginnings of an International Cyber Treaty*, 39 N.C. J. INT'L L. & COM. REG. 223 (2013).

58. China and the United States concluded a "cyber agreement" in September 2015. JOHN W. ROLLINS, CONG. RESEARCH SERV., IN10376, U.S.-CHINA CYBER AGREEMENT 1 (2015). In addition, forty-seven states have ratified or acceded to the Council of Europe Convention on Cybercrime. *Chart of Signatures and Ratifications of Treaty 185, Convention on Cybercrime*, COUNCIL OF EUR. (Dec. 3, 2015), [http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures?p\\_auth=igXbHmd5](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures?p_auth=igXbHmd5) [<http://perma.cc/L579-K3MH>].

59. E.g., John O'Donnell & Luke Baker, *Germany, France Demand "No-Spy" Agreement with U.S.*, REUTERS (Oct. 24, 2013), <http://www.reuters.com/article/2013/10/25/us-eu-summit-idUSBRE99NoBJ20131025> [<http://perma.cc/7U35-PQ59>]; Boris Pankin, Opinion, *An Espionage Treaty*, MOSCOW TIMES (Apr. 12, 2001), <http://www.themoscowtimes.com/opinion/article/an-espionage-treaty/254065.html> [<http://perma.cc/RW8W-8L8A>]; Michael Reisman, Opinion, *Accord on Embassy Espionage Would Ease U.S.-Soviet Tensions*, NEW HAVEN REGISTER, Sept. 11, 1988, at B3; William Safire, Opinion, *Stop the Espionage Race*, N.Y. TIMES (Apr. 20, 1987), <http://www.nytimes.com/1987/04/20/opinion/essay-stop-the-espionage-race.html> [<http://perma.cc/V3BY-T6GD>].

60. *Timor-Leste v. Austl.*, Provisional Measures, *supra* note 12, ¶¶ 27-28. The ICJ only held that the right is "plausible," because "plausibility" is the standard for a provisional-measures order. See *id.* ¶¶ 26, 28.

First, the piecemeal approach is reactive, whereas the holistic approach is proactive. Under the piecemeal approach, the state's right to a certain type of property almost always develops only after interferences with that type of property begin to occur, often due to an innovation in technology. The subsequent process of development takes time: for example, a comprehensive cybersecurity treaty and an anti-espionage treaty have been in the works for decades, allowing states to interfere with state computer networks and communication systems with impunity in the interim.<sup>61</sup> Under the holistic approach, on the other hand, states would have a default right to all of their property, even against unprecedented interferences with a specific type of property.

Second, the piecemeal approach places the burden of proof on the victim state, whereas the holistic approach places the burden on the perpetrator state. Under the piecemeal approach, even when one state unquestionably interferes with another state's property, the victim state must prove that it had a right to that property under international law. For example, in *Timor-Leste v. Australia*, Timor-Leste carried the burden of proving that it had a right to the confidentiality of its privileged documents, causing years of litigation over what should have been a simple issue.<sup>62</sup> Under the holistic approach, the presumption would be reversed, such that the victim state could always invoke its general right to property and the perpetrator state would have the burden of raising an affirmative defense.

Third, the piecemeal approach makes it difficult to articulate a right to previously unrecognized types of property in the court of public opinion, whereas the holistic approach would facilitate such articulation. Under the piecemeal approach, this "articulation difficulty" could lead to impunity for the perpetrator. For example, after the National Security Agency (NSA) tapped Chancellor Angela Merkel's and President Rousseff's phone conversations, the German and Brazilian governments had trouble pointing to a specific rule of international law that the United States had violated.<sup>63</sup> Ultimately, many commentators conceded that the NSA's activities did not violate international

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61. See *supra* notes 44-52 and accompanying text.

62. The court did not expressly state that Timor-Leste had the burden of proof, but the court effectively required an affirmative finding that Timor-Leste's claimed rights plausibly existed. See *Timor-Leste v. Austl.*, Provisional Measures, *supra* note 12, ¶ 26.

63. President Rousseff nonetheless accused the United States of violating international law, arguing in front of the U.N. General Assembly that "[t]ampering in such a manner in the affairs of other countries is a breach of international law and is an affront of the principles that must guide the relations among them." Borger, *supra* note 49.

law at all.<sup>64</sup> More dangerously, this “articulation difficulty” may also lead to the distortion of other rules of international law. For example, in light of recent Chinese cyberattacks against American entities,<sup>65</sup> U.S. lawyers and academics have been scrambling to find the legal grounds for declaring such action unlawful under international law. Compelled by a sense that significant cyberattacks must somehow violate international law, commentators have developed theories about when a cyberattack amounts to a breach of the prohibition on the use of force under Article 2(4) of the U.N. Charter,<sup>66</sup> arguably leading to overly expansive interpretations of Article 2(4).<sup>67</sup> The holistic approach, however, would make clear that the fundamental reason why these acts are wrongful is that they are interferences with another state’s property; there should be no need to invoke the laws on the use of force to declare a cyberattack unlawful. Unfortunately, however, the absence of the general right to property under current international law deprives states and

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64. See, e.g., Richard Norton-Taylor, *Merkel Phone Tapping Fair Game Under International Law, Says Ex-MI6 Deputy*, GUARDIAN (Feb. 18, 2014), <http://www.theguardian.com/world/2014/feb/18/merkel-phone-tapping-law-mi6-nigel-inkster> [<http://perma.cc/M7ET-H2EX>] (quoting a former deputy chief of MI6 as saying that the surveillance “would appear to be fair game”); Stefan Talmon, *Tapping the German Chancellor’s Cell Phone and Public International Law*, CAMBRIDGE J. INT’L & COMP. L. (Nov. 6, 2013), <http://cjlcl.org.uk/2013/11/06/tapping-german-chancellors-cell-phone-public-international-law> [<http://perma.cc/VVL2-DPTS>] (“The tapping of the Chancellor constitutes espionage in times of peace and, as such, does not generally violate public international law.”).
65. See, e.g., Ellen Nakashima, *Confidential Report Lists U.S. Weapons System Designs Compromised by Chinese Cyberspies*, WASH. POST (May 27, 2013), [http://www.washingtonpost.com/world/national-security/confidential-report-lists-us-weapons-system-designs-compromised-by-chinese-cyberspies/2013/05/27/a42c3e1c-c2dd-11e2-8c3b-0b5e9247e8ca\\_story.html](http://www.washingtonpost.com/world/national-security/confidential-report-lists-us-weapons-system-designs-compromised-by-chinese-cyberspies/2013/05/27/a42c3e1c-c2dd-11e2-8c3b-0b5e9247e8ca_story.html) [<http://perma.cc/DS5W-TVTF>]; *Annual Report to Congress: Military and Security Developments Involving the People’s Republic of China 2015*, OFF. SECRETARY DEF. 38-39 (Apr. 7, 2015), [http://www.defense.gov/Portals/1/Documents/pubs/2015\\_China\\_Military\\_Power\\_Report.pdf](http://www.defense.gov/Portals/1/Documents/pubs/2015_China_Military_Power_Report.pdf) [<http://perma.cc/6KAG-FANU>].
66. E.g., INT’L GRP. OF EXPERTS, NATO COOP. CYBER DEF. CTR. OF EXCELLENCE, TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 48-51 (Michael N. Schmitt ed., 2013) [hereinafter TALLINN MANUAL]; Michael Gervais, *Cyber Attacks and the Laws of War*, 30 BERKELEY J. INT’L L. 525, 535-41 (2012); Michael N. Schmitt, *Cyber Operations and the Jus Ad Bellum Revisited*, 56 VILL. L. REV. 569, 573-78 (2011); Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 YALE J. INT’L L. 421, 431-40 (2011).
67. For example, the authoritative *Tallinn Manual* lists a set of factors that go well beyond the traditional notions of what constitutes a violation of Article 2(4). Compare TALLINN MANUAL, *supra* note 66, at 48-51, with Oliver Dörr & Albrecht Randelzhofer, *Article 2(4)*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 200, 208-13 (3d ed. 2012). Similarly, Michael Schmitt argues that, because of cyberattacks, violations of Article 2(4) may be nonmilitary; this argument directly contradicts the traditional understanding of Article 2(4). Compare Schmitt, *supra* note 66, at 573, with Dörr & Randelzhofer, *supra*, at 210.

commentators of the necessary language to articulate this rationale. For this reason, along with the two previously mentioned, this Comment proposes that the international community take a holistic approach to the problem by working toward a general right to property.<sup>68</sup>

Skeptics may be concerned that a general right to property goes too far. As Australia argued during the hearings on provisional measures, a general right to property “would allow a State adventitiously to expand its sovereignty into the territory of other States.”<sup>69</sup> Nevertheless, history reveals that states are willing to sacrifice aspects of their sovereignty for the equal protection of property rights. After all, states came together to protect diplomatic property and extraterritorial vehicles,<sup>70</sup> and states have also come together to protect computer networks.<sup>71</sup> The one exception may be espionage: state support for an anti-espionage treaty is relatively weak, and commentators have argued that bugging the communication systems of other states is not necessarily a violation of international law.<sup>72</sup> Nevertheless, the general right to property would merely be a default: if espionage is lawful under international law, it would remain lawful. The major difference under a general-right regime would be that the state conducting the espionage would bear the burden of showing its legality.

### III. TOWARD A GENERAL RIGHT TO PROPERTY

The piecemeal and holistic approaches are not mutually exclusive; they should work in tandem. As discussed earlier, commentators and states have already dedicated considerable thought, time, and energy to developing piecemeal solutions to today’s most pressing problems.<sup>73</sup> Indeed, efforts to conclude cybersecurity and anti-espionage treaties are commendable. Nevertheless, the predominant concerns of today will be different from those

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68. Although there has been little movement for a general right to property for *states* in the international legal order, there has been a movement for a general right to property for *individuals* in *domestic* legal orders. See *supra* note 7 and accompanying text.

69. *Timor-Leste v. Austl.*, Jan. 21. Verbatim Record, *supra* note 5, at 12.

70. See *supra* Section I.B.

71. See *supra* note 58 and accompanying text.

72. Geoffrey B. Demarest, *Espionage in International Law*, 24 DENV. J. INT’L L. & POL’Y 321, 347 (1996); see *supra* note 64 and accompanying text. But see Manuel R. García-Mora, *Treason, Sedition and Espionage as Political Offenses Under the Law of Extradition*, 26 U. PITT. L. REV. 65, 79-80 (1964); Quincy Wright, *Espionage and the Doctrine of Non-Intervention in Internal Affairs*, in *ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW* 3, 12 (Roland J. Stanger ed., 1962).

73. See *supra* Section I.B, Part II.

of tomorrow. In the long term, we need a more sustainable solution: a general right to property.

This general right could emerge in one of three ways: by treaty, by custom, or by general principle of law.<sup>74</sup> A Convention on the State's Right to Property sounds appealing, but the political obstacles would likely be insurmountable. States are already having trouble concluding treaties to effectively protect computer networks and communication systems; concluding a treaty to protect all types of property, a fortiori, would be even more difficult. Similarly, the development of a customary general right to property is appealing,<sup>75</sup> but it would be difficult to prove the existence of the requisite state practice and *opinio juris*.<sup>76</sup>

The most feasible option, then, is the development of a general principle. Unlike treaties and custom, which derive from the acts of states in the international legal order, general principles develop from analogies with the law of domestic legal orders.<sup>77</sup> A very strong case may be made that the general

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74. Treaties, custom, and general principles are the three main sources of international law. Alain Pellet, *Article 38*, in 3 THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 731, 797-98 (Andreas Zimmermann et al. eds., 2d ed. 2012). They are authoritatively set forth in the ICJ Statute. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

75. Timor-Leste attempted to argue for a customary general right to property during the oral proceedings. *Timor-Leste v. Austl.*, Jan. 22, 10:00 AM. Verbatim Record, *supra* note 10, at 19 (“[W]e read this practice, and these authoritative writings, as recognizing a general customary rule of inviolability and immunity of State property.”).

76. State practice and *opinio juris* are the two elements of customary international law. *North Sea Continental Shelf Cases* (Ger. v. Den., Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 77 (Feb. 20); Pellet, *supra* note 74, at 814. As defined by the ICJ, *opinio juris* is the “belief that [the State practice] is rendered obligatory by the existence of a rule of law requiring it.” *North Sea Continental Shelf Cases*, 1969 I.C.J. Rep. 3, ¶ 77. Note that Sprankling, when arguing for a general right to property for *individuals*, asserts that the two elements are present. Sprankling, *The Global Right to Property*, *supra* note 7, at 493-97. However, it is much more difficult to establish the two elements with respect to the property of *states*, as there are far fewer cases where states directly interfere with the property of other states.

77. See ICJ Statute, *supra* note 74, art. 38(1)(c) (stating “general principles of law recognized by civilized nations” (emphasis added)); Pellet, *supra* note 74, at 834; Advisory Comm. Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920 with Annexes*, PERMANENT CT. INT’L JUST. 335 (1920), [http://www.icj-cij.org/pcij/serie\\_D/D\\_proceedings\\_of\\_committee\\_annexes\\_16june\\_24july\\_1920.pdf](http://www.icj-cij.org/pcij/serie_D/D_proceedings_of_committee_annexes_16june_24july_1920.pdf) [http://perma.cc/P9WD-5HBD] [hereinafter *Procès-Verbaux*] (“[T]he general principles referred to in point 3 were these which were accepted by all nations *in foro domestico*, such as certain principles of procedure, the principle of good faith, and the principle of *res judicata*, etc.”); Giorgio Gaja, *General Principles of Law*, MAX PLANCK ENCYCLOPEDIA PUB. INT’L L. ¶¶ 8-10 (May 2013), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1410?rkey=9f5vgy&result=3&prd=OPIL> [http://perma.cc/J38N-N7SV]. For example, Judge Simma in his separate opinion in *Oil Platforms*, after having examined Canadian,

right to property similarly constitutes a general principle of law: ninety-five percent of the 193 Member States of the United Nations guarantee a general right to property in their domestic law.<sup>78</sup> Although this right only applies to individuals in domestic legal orders, the right may be transposed to the international legal order as a general principle of law to apply to states as well. Applying this right to states is, moreover, supported by the principle of the sovereign equality of states enshrined in Article 2(1) of the U.N. Charter.<sup>79</sup>

Furthermore, it should be remembered that the Advisory Committee of Jurists<sup>80</sup> included general principles of law as a source of international law for the very purpose of avoiding situations of *non liquet*, where there is no law to apply because the issue at hand is sufficiently novel or unprecedented.<sup>81</sup> It therefore seems particularly appropriate to invoke general principles to establish rights over previously unrecognized types of property.

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French, German, and Swiss law, concluded that “the principle of joint-and-several responsibility . . . can properly be regarded as a ‘general principle of law.’” *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, 358 ¶ 74 (Nov. 6) (separate opinion by Simma, J.).

78. Sprankling, *The Global Right to Property*, *supra* note 7, at 484.
79. U.N. Charter art. 2, ¶ 1; *cf.* *Jurisdictional Immunities of the State (Ger. v. It.)*, Judgment, 2012 I.C.J. 140, ¶ 57 (Feb. 3) (holding that state immunity derives from the principle of sovereign equality under Article 2(1) of the U.N. Charter).
80. The League of Nations, the predecessor to the United Nations, appointed the Advisory Committee of Jurists in 1920 to “prepar[e] plans for the establishment of the Permanent Court of International Justice.” *Procès-Verbaux*, *supra* note 77, at iii. The Advisory Committee drafted Article 38 of the Statute of the Permanent Court of International Justice, Pellet, *supra* note 74, at 742-43, which eventually became Article 38(1) of the ICJ Statute, *id.* at 743-45, the authoritative list of the sources of international law, *see supra* note 74.
81. HUGH THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW* 93-94 (2014); Pellet, *supra* note 74, at 832.

**CONCLUSION**

For the aforementioned reasons, this Comment argues that international courts and tribunals should take the initiative of recognizing the state's general right to property as a general principle of law. The ICJ had the opportunity to do so in *Timor-Leste v. Australia*, but it instead ordered provisional measures on the far narrower ground of legal privilege.<sup>82</sup> But because questions surrounding the state's right to property are bound to arise in many more cases to come, the next international court or tribunal should not miss the opportunity to assert the state's general right to property as a general principle of law.

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<sup>82</sup>. *Timor-Leste v. Austl.*, Provisional Measures, *supra* note 12, ¶ 28.

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