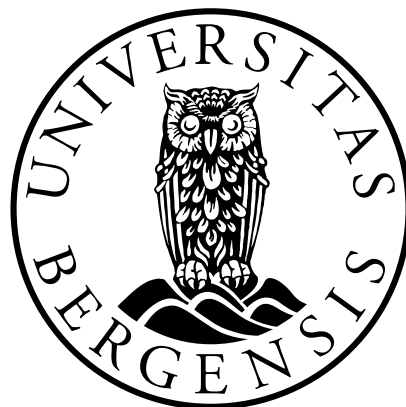


Informal settlements and the human right to property

*The international legal protection of the
human right to property, for inhabitants of
informal settlements*

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1 The human right to property in informal settlements

1.1.1 Thesis topic

This Master’s thesis will address the international legal framework regarding the human right to property, protected by the Universal Declaration of Human Rights Article 17, and how international law affects how states deal with informal settlements. The thesis that will be addressed is the following:

“International legal tools’ potential to ensure better legal protection for inhabitants of informal settlements, to prevent violations of the human right to property”

1.1.2 Topicality

People living in informal settlements is an international challenge in many countries today. An estimated one billion of the worlds 6 billion population are inhabitants in some form of informal settlement¹. This constitutes 25 % of the urban population worldwide.

Despite the efforts from international organizations, states and local governments, there is an estimated 70 million new residents living in informal settlements every year.² The right to property is poorly regulated internationally, which allows violation of the right to happen, with little to none national- or international legal repercussion. This results in millions of people worldwide having virtually no legal rights to their home. This leaves them vulnerable to abuse, with no legal rights or predictability.

¹ UN-Habitat (2005b) Habitat III Issue Paper 22
² UN-Habitat (2005b) Habitat III Issue Paper 22

Informal settlements are thus a global challenge, and the lack of international law to define the right to property results in different degrees of legal protection of the right in different states, with no international legal minimum requirement having to be guaranteed.

In recent years this has resulted in freedom for states to choose how to deal with informal settlements, resulting in numerous eradications of societies, appearance upgrades of urban space, but no cure for the problem. Inhabitants of informal settlements become the victims of the modern world, and are left with no legal protection.

1.1.3 Topic elaboration

This thesis will argue that the international laws regulating this issue are inadequate, and fails to better the living conditions for inhabitants in informal settlements to a satisfactory degree. The existing international law instruments on this subject has remained the same since the Universal Declaration of Human rights was proclaimed in 1948, and there has been adopted no universal and legally binding legislation which secure legal protection of the human right to property since then.

Unequal access to property is one of the fundamental causes of economic inequality in the world today, and causes violations of several human rights. As the international legal system today, is unable to handle the problem, there should be an open debate on how a human rights protection of property rights can be ensured for all people. A traditional western approach of strong rights to private property might not be expedient, especially in some developing countries, where property is very unevenly distributed, so a mere strengthening of the right to property might not be effective.³

1.1.4 Refinements

1.1.4.1 Controversial political issue

The thesis will not address the fact that this is a highly controversial political issue internationally, and one which is hard to get all states to agree on. This aspect will not be addressed, as it is not relevant for the legal potential a new legal framework represents. This thesis merely seeks to illustrate the possibilities a bettering of the international law would

³ Aall (2015) s. 319

represent, not why it might not be in line with the different states' political interests and ideologies.

1.1.4.2 Real-life consequences

International laws are far reaching, and the right to property is a complex right, with a considerable impact on economy, business, socio-economic conditions and has large political impact. The real-life implications a change in the international legal protection of the right to property would entail, for all societies throughout the world, is too comprehensive to account for in this thesis. The objective will be to point out how the legal framework is failing today, and what aspects of the right the legal tools should include, in order to better protect the human right to property.

1.1.4.3 Consequences for other levels of society

The thesis aims to demonstrate the consequences lack of legal protection of the human right to property leads to internationally. This is most prominent in the treatment of the poorest members of society; the inhabitants of informal settlements. Thus, the thesis will not address problems which might occur on other levels of society, and in different ownership conditions. A complete analysis of all possible impacts the right to property entails would be too comprehensive for this format.

1.1.4.4 Movable

As the thesis aim is to analyze the situation of inhabitants of informal settlements, the right to property which will be elaborated on, is the right to land and real estate. Movable will not be treated in this thesis, because these possessions represent less value than real state for this group. This applies for both the inhabitants of the settlement, but also for third party interference. The right to real estate is essential, and is largely under pressure. Protection of movable are considered less relevant for this thesis, as the need for protection of movable within the human rights' scope is limited.

1.1.4.5 Relevant timeframe

The timeframe which will be relevant for this thesis is the period from the drafting of the UDHR to this date. Earlier sources on the right to property will only be used to illustrate different thoughts on the right throughout times, but there will not be made a comprehensive analysis of the right to property predating 1945. This limitation is necessary as it is the legal situation today, and the future which is the objective of this thesis.

1.1.4.6 Nomadic indigenous peoples

The human right to property for indigenous peoples who live on large areas, and live a nomadic lifestyle within that area will not be elaborated on in this thesis. This because their form on informal settlement is in practice different than more established informal settlements, and this requires a separate report and adaptation, which would be too extensive for this thesis. Still one might assume that a bettering of the right to property would benefit also these communities, who are some of the most vulnerable to state- and third-party interference.

1.1.4.7 Expropriation

The right to compensation of expropriated property will not be elaborated on, in conjunction with the human right to property. This right, which is a natural part of property laws in many countries and regional treaties, have too many economic variables, and is mostly important for people who own a property legally, and not for inhabitants of informal settlements. Strong expropriation compensation is seen as a protector of social and financial injustice, as it is a guarantor of “status quo” with regards to informal settlements, as the inhabitants does not have any legal claim to the land, and therefore no right to compensation.⁴

1.1.4.8 Usucaption

The possibility of usucaption, which is the acquisition of land by use, will not be elaborated upon. One might think that this could be a protector of the right to property in informal settlements, but the settlers would generally breach one or more requirements of having established ownership this way. Therefore this is not considered relevant for this thesis.

⁴ Aall (2015) s. 319

1.1.4.9 The acknowledgement of international customary law

The thesis will not address the question of whether international customary law exists. The existence of this legal system is widely accepted⁵, and is a prerequisite of the existence international human rights. For this thesis, it is assumed that international customary law exists.

1.2.1 Legal Method

The thesis topic is carried out through an analysis of the international- and regional legal protection of the human right to property. As interpretations of the right in different nations differs, there will be used some examples of how the international legal protection affects urban development. There will not however be executed an in-depth analysis of any specific countries, as examples are regarded sufficient for the aim of this thesis, in order to demonstrate the inadequacy of the existing legal protection.

The thesis will seek to make suggestions as to how the human right to property can be better protected internationally. The aim being finding the solution which best preserves property as a human right, for all people, regardless of whatever political implications it might entail. This will be done through an analyze of the right as it exists today, *de lege lata*, to a suggestion of how the law right should be protected, *de lege ferenda*.

It is challenging to separate the basic human right to property, from what the right to property means in western societies. Therefore, the thesis will firstly seek to determine if the human right to property exists in international law, and if it indeed does, seek to define what the human right to property entails.

⁵ Aall (2015) p. 25

2 The right to Property's importance internationally

The right to property is a complex legal matter, but is a key discipline in virtually all societies and legal orders. Property is one of the most important assets in the market economy, and represents immense economic and utility value throughout the world. Protection of property is essential in all modern societies, and extensive law and case law on the matter exists in most countries and legal orders.

The right to property is hard to define. On one side, its concept seems simple. It seems well defined and complete. In most western societies, the right to property is a matter of course. On the other side however, its legal terms are hard to apply equally to all different societies worldwide. What the right is expected to entail varies in different countries, in different political ideologies, depending on socio-economic context, religious context and different local social development.

Defining what the right to property is expected, and legally regulated to entail in different countries, does not however, help to determine what the human right to property actually entails. Some states ensure comprehensive legal protection of property rights, whereas other states deny the concept of private property altogether.

The thesis will analyze what the human right to property entails, by using the international human rights systems legal definitions.

2.1 Why property rights in informal settlements matter

A bettering of the right to property in informal settlements matter, because throughout the world countries have different approaches to fixing the “problem” with informal settlements. The approaches vary from funding housing projects, where inhabitants are given new homes in new built areas, to slum upgrading projects, to simply eradicating the informal settlements, without giving its inhabitants any alternative. There are many different variations of these approaches.

Since the debate around informal settlements often is focused around bettering the living conditions of the inhabitants in the informal settlements. The international effort on the matter

then becomes that of fighting symptoms, created by the main problem; inequality. The official international legal efforts today do not in any way address this problem.

The way today's policies are conducted, is not necessarily in the inhabitants' best interest and the work in many countries is too slow to fight the problem. It is obvious that a problem this scale, located mainly in the world's poorer countries, makes an end to informal settlements a utopian project.

3 Why this is a legal problem

The right to property is unclear. A state can interpret the vague international law to justify doing just about anything with informal settlements, and take any measure available. States can eradicate settlements, justifying it by claiming that it did not have “adequate housing”⁶ and therefore it is against the human rights to let people live there. It can be used as a way to move whole neighborhoods, long distances, out of the city, far away from the inhabitants’ place of work. States justify moving with newer houses which are marginally better than what they had, and just within the limit of being “adequate housing”.

To meet UN development goals, it is also suspected that informal settlements have been eradicated, to improve the country’s progress in reports. This might look good on paper, as the chart of how many inhabitants of informal settlement a country has, is a different one than the chart of number of people who are homeless, thus masking the problem.

In the later years there has been a growing interest in finding a more sustainable solution to help the inhabitants of informal settlements. The political interest of people like the Peruvian economist Hernandez de Soto has shown to be an effective approach, advocating formalizing property rights of informal settlements. This approach has been tried out, mainly in Peru, but also in some other parts of South America.⁷ The approach shows great potential, and should be of interest regarding the content of the human right to property.

There are vast economic interests at play in this issue, and this threatens a social, practical, respectful and sustainable development of local communities for millions of people worldwide. To avoid depriving these people of their human right to property, more precise international legal protection is needed.

3.1 Elaboration of informal settlements

The definition of informal settlements is defined by the UN habitat as “residential areas where inhabitants have no security of tenure vis-à-vis the land or dwellings they inhabit, with modalities ranging from squatting to informal rental housing. The neighborhoods usually lack, or are cut off from, basic services and city infrastructure and the housing may not

⁶ “adequate housing” is protected by the UDHR art. 25 and the ICESCR art. 11(1)

⁷ <http://www.lincolnst.edu/publications/articles/influence-sotos-mystery-capital>

comply with current planning and building regulations, and is often situated in geographically and environmentally hazardous areas.”⁸ The term does not include those who are homeless.

There are a wide range of informal settlements, from organized communities with almost all necessities present, to the most deprived living areas on the planet. There are different terminologies used to describe these communities in different countries and areas, such as slum, shanty town, favela, squatter settlement, shacks, barrios bajos, bodinvilles, and more. In this thesis, the term “informal settlement” is used to refer to all these types of non-regulated housing.

There are a lot of settlements which are well established and more or less functioning, and have existed for decades, some even for centuries. These settlements do however, still have no legal protection in international law, and the inhabitants is at a constant risk of losing their homes. The interference in these settlements is especially counter-productive, since they move people from established neighborhoods with some infrastructure, forcing its inhabitants to find new, often improvised shelter in worse areas.

The approach internationally seems to have shifted somewhat from relocating and eradicating informal settlements, to the now favored approach of upgrading existing settlements. This shift however, is not a result of increased rights for the inhabitants. The states are still free to choose which approach they want. Since settlement upgrades are more expensive and slower, and occupies valuable land, this will not be the preferred method in many cases. Oftentimes the upgraded settlement areas do not have room for all its former inhabitants, forcing many to move to a new informal settlements.

A less invasive approach, one which upgrade the settlements in cooperation with its inhabitants have the possibility to leave intact the economic and social networks that residents have created for themselves throughout years, and ensures their legal rights to their homes, weather it being ownership or tenure. This approach will not be the favored one unless they are forced to take the rights of the inhabitants into account. A way to ensuring that the development goes in this direction internationally, is to ensure that the international legislation demands this approach. A clarification of the rights should be done, as there are a

⁸ UN-Habitat (2005b) Habitat III Issue Paper 22

large number of people with no human rights to protect them against violations of their right to property.

3.2 Urbanization – challenging the right to property

The demographics of the world is rapidly changing, and urbanization is an accelerator of the problem of informal settlements. In 2014 an estimated 54 %, or 3.5 billion of the world's population lived in urban areas. In 1950 the number was 30 % or 766 million people. Estimates show that in 2050 66 %, or 6.2 billion of the world's anticipated population will reside in urban areas.⁹ This is an increase of the world's urban population of 5.4 billion people in a hundred years. About half of this increase is yet to happen, which means the problem of informal settlements will escalate in the years to come if the problem is not addressed sufficiently.

Whatever the motivation behind people moving to urban areas, the result remains the same; many people worldwide are seeking housing in urban areas, and a large number of these are poor and vulnerable to exploitation. Many seek urban areas due to lack of jobs and sustainable living conditions in the rural areas. Migration to the cities is often vital for people's ability to support themselves, and this migration trend can therefore not be expected to stop. This increase of people living in urban areas, is challenging urban planning where space is a limited resource and with ever increasing value in urban areas.

3.3 Introduction to the human right to property

The issue of informal settlements is clearly a pressing international problem. A problem which is so vital for so many of the world's inhabitants is of obvious relevance to human rights law. For the problem to have legal protection though, it needs to fall within the scope of the UDHR or be protected by the international customary law the UDHR is derived from.

In the following, the thesis seeks to determine whether property rights for inhabitants of informal settlements indeed fall within the scope of the human rights.

⁹ Worlds Urbanization prospects report, p. 1

3.4 What characterizes human rights - Is property a human right

There is now a significant legal consensus that the human rights in the UDHR stems from international customary law.¹⁰ The existence of international customary law, is today widely accepted, even though some countries still do not acknowledge it as binding. Thus, the rights are to a certain degree binding, even though the UDHR is not directly legally binding. In practice however, this is hard to enforce, especially regarding the right to property, which is hard to define.

There are two different aspects where human right differs from other rights.¹¹ The first one is that human rights are inherent in all human beings, by virtue of being a human being alone. It cannot be lost, bought, need any kind of approval or having to meet any type of condition to apply. The second aspect is that the main duties deriving from human rights, are up to states to ensure, not third parties. Of course, the realization of certain rights might be carried out by third parties, but this responsibility ultimately lies with the state.

Human rights regulate positive and negative obligations the state have to its citizens and others. With regard to the right to property, this relates to the state's responsibility to protect and respect the enjoyment of private property, without interference from the state or third parties.

Further, a right has to be sufficiently concrete, to qualify as a human right.¹² The holder of the right, the object of the right, and the duty bearer of the right, must be identifiable. It has been formulated by the UN General Assembly that human rights should be consistent with the existing international human rights law, and "sufficiently precise to give rise to identifiable and practicable rights and obligations"¹³.

The right to property for inhabitants of informal settlements is somewhat hard to place within this system, as who is holder of the right is not clear. The defining characteristic of informal settlement is that the owner of the land is not whomever who is living there. This makes it hard to determine who has a protected right to property. One relevant question is whether the

¹⁰ Aall (2015) s. 25

¹¹ Van Banning (2002) p. 168

¹² Van Banning (2002) p. 171

¹³ UN General Assembly Resolution 41/120, 04.12.86

human rights can protect property which is legally owned by a wealthy person at the expense of poor people, who have nothing, and therefore have no access to property.

3.5 Should property be a human right?

The question of property rights as human rights is not just a legal question. Or more precisely, it is not just a question about what is the legal situation today, *de lege lata*. It is also a question about how the laws regarding property rights should be, *de lege ferenda*. Therefore, defining how the international laws regarding property rights are *de lege lata*, is not enough to define how the laws should be.

This is not a strictly legal matter, it is also a philosophical, ethical and political question. The ideal way to protect the right to property, will probably differ from country to country, between various political orientations, from business to business, and from person to person. Counties, political parties, businesses and private individuals all have different incentives to what laws they favor.

In the perspective of human rights, however, the answer should be one which safeguards all humans right to property. In this globalized, market run world, this should be a solution which disregards the incentives of the countries, the political parties, businesses and private individuals. Because if it does not, the inhabitants of informal settlements will forever be a marginalized group, left to the mercy of whomever wants to make money of their situation, or by utilizing “their” land, or they are left to the mercy of state- or privately run upgrading- or eradication projects.

3.6 Protection of the right in international human rights organs

The human right to property in international law is inconsistent. Although it is protected by the Universal Declaration of Human Rights (UDHR, 1948) article 17, the right is not included in the International Covenant on Civil and Political Rights (ICCPR, 1966) or in the International Covenant on Economic, Social and Cultural Rights (ICESC, 1966). This non-inclusion means that the right to property does not have any international legally binding protection, as the UDHR does not create legal obligations for countries to follow. It also illustrates that the right to property has been controversial since its inclusion in the UDHR.

The fact that the right to property is only included in the UDHR which is not mentioned in either the ICCPR or the ICESCR was due to lack of global consensus on the matter in the years predating the adoption of the Covenants in 1966.¹⁴ At the time, there were great political and structural economic differences throughout the world. In recent years however, the need for protection of property rights have been more widely acknowledged as more countries have adopted a market-economy political structure.

3.6 Protection in regional treaties

The right to property in international and regional laws and conventions is strongly influenced by the Western ideas about property rights. The definition and thoughts about property in different legal systems do however vary throughout the world. This is expressed through the different regional treaties, which does not establish any unified, international standard on property rights.¹⁵ The regional human rights instruments of Africa, the Americas and Europe all recognize the right to property and protection of property in varying degrees.¹⁶ The Asian continent and Oceania do not have such regional agreements.

This review of regional legislation does not contain an in-depth analysis of their content, including regional jurisprudence on the matter. It is merely a way of showing how the right to property is protected and expressed differently, to investigate if the regional law offers any additional protection for inhabitants of informal settlements.

3.7 Protection of the right to property in European regional legislation

The right to own property is included in the European Convention on Human Rights through article 1 of protocol 1. It is worth noting that the right was not a part of the original version of the ECHR, but was adopted in the first protocol, two years later than the convention was signed.¹⁷

Article 1 of protocol 1 states that “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public

¹⁴ The right to nationality in the UDHR article 15 which regulates the right to nationality is also not mentioned in the Covenants (ICESCR and ICCPR). This right is however thoroughly regulated through the Convention on the Status of Refugees first protocol, which was adopted in 1977.

¹⁵ Alfredsson and Eide p. 359

¹⁶ Alfredsson and Eide p. 364

¹⁷ Aall (2015) s. 318

interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

The article underlines that there is a right to own possessions, which forms the foundation of the respect of private property rights.¹⁸ The wording gives the states wide powers to intervene in the right to property, should it be deemed necessary in the interest of the public, or for one of the other listed reasons. There is not a high threshold for what measure the state can take in order to intervene or expropriate private property. It does however refer to the general principles of international law to complement the article, which includes the right to just compensation.¹⁹ Since there are so many exceptions in the right to property and the wording widely enables interference in the right, it is not certain to what extent the ECHR protects private property.²⁰

This means that in the case of informal settlements, the states can easily find legal grounds to interfere in informal settlements, thus the right to property for inhabitants of informal settlements is not protected in the ECHR.

3.8 Protection of the right to property in the Americas regional legislation

The Bogota Declaration, or the American Declaration of the Rights and Duties of Man, which is signed by many countries in the American continent, and predates the UDHR with less than a year, confirms the right to property.

Article 23 of this declaration states that “Every person has the right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home”.

This wording recognizes to a considerable degree the private right to property, although it is limited to what is essential to meet certain minimum requirements for standard of living. The article does not open directly for exceptions to the rule, but the wording implies that there are possibilities for the state to intervene in certain cases. The wording of the article actually

¹⁸ Baldersheim (2010) s. 66

¹⁹ Baldersheim (2010) s. 66

²⁰ Andenæs & Fliflet (2006) s. 421

implies that the private right to property only includes that which is essential for descent living, and does therefore not establish any general, unlimited right to private property.

This declaration does offer something new within the property rights' sphere, which is the non-protection of property which exceeds what is necessary in order to meet certain essential requirements. This specification is an interesting measure to avoid the problem of protecting large properties at the expense of others, and is an interesting step towards ensuring a more equal distribution of the right to property.

Another convention, the American Convention on Human Rights (1969), which is ratified by a large majority of the countries in South- and Central America, recognizes the right to property, and protection of property, including the right to "just compensation". Article 21 states that "Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms establishes by law".

Similar to several of the other regional treaties, the right to property is recognized, but it offers wide range of exceptions where the states can intervene in the right. This does not offer any protection to property which is not "his", and does therefore not offer protection of the right of the inhabitants of informal settlements.

3.9 Protection of the right to property in African regional legislation

On the African continent, the African Charter on Human and Peoples' Rights states in article 14, that "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

Although the right to property is clearly protected in this article, it seems to suggest that the right to property shall be protected legislatively and in practice. It does not suggest that the right to property is universal for all people. Also, the article opens for the states interference in the right. It seems, however, to be more restricted than in other wording of conventions, by the use of the word "need", and by stating that the interference should only be in "the general interest of the community". This wording suggests that the possibility for interference is

limited, and that the right to property therefore is stronger. However, it opens the possibility of interference as long as it is in accordance with the “provisions of appropriate laws”, which gives the states a wide opportunity of interference.

3.10 Legal scope of the human right to property

Human rights are rights which are inherent to all human beings, whatever nationality, place of residence, sex, national or ethnic origin, color, religion, language or any other status. All people are equally entitled to all human rights, without discrimination. The rights are interrelated, interdependent, indivisible and inalienable.²¹ The human rights make up the rights which are considered necessary to human existence. Fundamental rights which do not change in any circumstances, and which every human being has, solely by virtue of being a human.

The rights are divided into civil and political rights, and economic, social and cultural rights, where the civil rights mainly require the state to refrain from interfering with individual freedom. Social, economic and cultural rights on the other hand requires larger investments from the states to ensure that the right was being secured for all inhabitants.²² This division is however not accurate, as there are rights in each group which do not fit this model.

Most rights are divided in these two groups by which Covenants they are protected. As the right to property is not protected in any of the Covenants, there has been some legal debate on whether the right to property is a civil- or a social right, assuming that the result of which is indicative on how far the right to property should go.

Is the human right to property considered to be a civil law, this suggests that the state’s obligation is to refrain from interfering with the right, and ensure the right against third party interference. The protection of some people’s right to interference-free enjoyment of the right, could however result in some people not having access to any property. An interpretation of the right to property, which leads to the exclusion of some people from the objective of the right seems counterproductive within the human rights system.

²¹ Definition of human rights from the UN human rights office of the high commissioner.
<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>

²² UN office of the high commissioner
<http://www.ohchr.org/EN/Issues/ESCR/Pages/AreESCRfundamentallydifferentfromcivilandpoliticalrights.aspx>

The assumption of the right to property as a civil right was however adopted by the European Court of Human rights, where the court wrote “the applicants’ right of property is, without doubt, a ‘civil right’...”.²³ This use of wording suggests that the definition of the right as a civil right, excludes it from also being a social right.

Is the human right to property, on the other hand, considered to be a social law, this suggests that the states are obligated to enable all individuals to have access to property. This view was assumed by the former communist states, as legal basis for banning private property altogether, since one person’s property rights were, in its very nature, excluding others from enjoying the same right.

The distinction between the two groups of rights however, have less impact on the interpretation of the state’s obligations, as both types of rights in reality requires both financial- and human investment, and freedom from state- or third-party interference to be fulfilled. The content of the right can therefore not be assumed to a satisfactory degree simply by determining to which category it belongs. It is therefore still not clarified what is the actual legal scope of the right.

3.11 The human right to property in informal settlements

It is clear so far that the right to property in international law is unclear and therefore inadequate or certainly limited as a legal tool for protection of the human right to property in general. It does however offer some level of protection for most people; the people who have conventionally obtained their property. For the people who have not obtained the right to property legally, and live informally, the legal protection is absent.

One might argue that the people who are living on land which does not belong to them legally, should not have any protected rights to the land. This is how the traditional western property rights work. The people who have legal ownership have rights, and the people who do not have legal ownership have no protected rights. This interpretation makes sense on paper, and in theory, and is one which is used in most legal systems. After all the right to property has been protected in this way throughout history. One might fear that a change in

²³ Sporrang and Lönnroth vs Sweden, para 61

this arrangement would be unpredictable and destabilizing, both for societies and economies, and therefore not even consider this to be an option.

4 Need of international legal change

Although a change in the traditional way of interpreting the human right to property is not desired by the states or others who enjoys the right to property today, the situation with informal settlements creates a need for change. The way property is distributed today, forces, from a human rights perspective, a change in the traditional way of perceiving the right to property. The human right to property simply cannot be fulfilled for inhabitants of informal settlements, if the people legally owning property exclude them from being able to enjoy the right. This suggest that the human right protection of legally obtained property cannot, from a human rights perspective, trump other peoples' right to property. This need calls for a different interpretation of the right to property than the interpretation which is assumed today.

This raises the question of how international law should be worded and interpreted in order to secure the human right to property, also for those who do not have any legally approved access to property, like inhabitants of informal settlements.

4.1 Informal settlements and what characterizes their legal protection - Scale of the problem

If the mere presence of a problem regarding the protection of the right to property is not reason enough to revise the interpretation of the human right to property, the scale of the problem should be convincing of its necessity. There are an estimated 70 million new inhabitants in informal settlements, every year. The total number of inhabitants of informal settlements worldwide is just below one billion. In other words, 1 in 7 of the world's total population. This is an unfathomable number. It is more than the total number of inhabitants of Europe. It is three times the number of people living in the United States of America, and it is just a little less than the total number of people living in Africa.²⁴

With a problem this size, there is a pressing need for better global regulation which can contribute to steering the development in a more sustainable direction. The wording of the right in the UNDH have not succeeded in ensuring sufficient protection of the human right to property for all people. This is still one of the major challenges for the international

²⁴ UN-Habitat (2005b) Habitat III Issue Paper 22 p. 3

community today, with no change of the wording of the right on the horizon. This should not be acceptable for the international community.

These people cannot be left to fend for their own, in a world that is not theirs, with no legal rights. With no say in what is best for their lives, and no means to make their own life. They are left to the mercy of politics, business contracts and economy, without even the human rights to help fight their battle.

The world needs new legal guidelines, which are suited to tackle the present- and future challenges of urbanization, migration and population growth.

4.2 The way forward - The problem with the current international legal protection

Essentially, the protection of the right today, comes down to business. What are the financial costs of a solution. Who has incentives to initiate measures concerning informal settlements. Contractors, land-owners, politicians, inhabitants or world leaders. The human rights should benefit humans in their lives, and not be a way to “manage” people.

As a disputed right, the protection of the right, is in practice severely reduced. Despite the right to property being widely recognized as a right throughout the world, it is vaguely formulated, and leaves a big room for states to intervene in inhabitant’s execution of their right.

Further, already existing laws and convention regarding the right to property, has not been able to combat the problem of informal settlements efficiently. As unsafe and insecure living conditions are one of the biggest problem the world faces, there is a need for more comprehensive international legal regulation. New wording, or interpretation of international law, is needed to secure the rights of this marginalized group, acknowledging that the existing law is insufficient in tackling the problem.

4.3 Unpopular issue within the human rights scope

The legal debate regarding the right to property has interested the civil law branch of the legal society far greater than the human rights experts. Traditionally the right to property is seen as one which safeguards the rights of the rich and powerful, and not as an instrument to protect

the poor and vulnerable. This has made property as a human right a self-contradictory concept, within the traditional interpretations of the rights.

However, the right to property, and the protection of property, in a capitalist world is essential for growth and security for people. Whatever the price range, property and housing is one of the biggest investments people make in their lives. It is an investment, which in virtually all societies is non-optional, regardless of purchasing power, and socio-economic status.

There is a wave of growing consensus amongst economists, politicians, sociologists and tax-experts that regulating the right to property is a useful tool in bettering living conditions in marginalized societies.²⁵ This possibility justifies international legal contributions and greater involvement from the human rights academic sphere.

4.4 Identifying the problems the right to property needs to address

The problems today, which the existing regulation fail to improve, are many. It might be due to lack of political will, and the fact that none of the people in power have anything to gain from a change of the right in favor of the poor population. This is, however, such an important issue, that it is critical for the development of societies throughout the globe.

Other difficult issues, such as cutting emissions of gasses which are harmful to the environment, is an example that global measures can be made if there is enough international focus on the issue, despite possible negative consequences for the states. The right to housing is also a global phenomenon, which demands that the states have to sacrifice their power. Higher international awareness and focus could therefore make the necessary change possible, and enable an international change in the property rights for poor people worldwide.

There are several concrete issues which results from the lack of formal housing. These issues should be addressed by international law, as they are essential to sustainable development of the informal settlement communities.

²⁵ Van Banning (2002) p. 7

4.5 Problems lack of defined property rights cause for the world's poor population - The need for an official address

Oftentimes informal settlements do not have official street names or address systems. This makes it harder for its inhabitants to register their information. Discrimination based on this do occur, for instance making it harder to get jobs, enrolling children into schools and being admitted into health care systems. This contributes to increased stigma associated with living in informal settlements, and further contributes to increased differences between in societies.

4.6 Securing peoples material goods

Many informal settlements are well established societies with homes and businesses. The people living there have put all their hard-earned money into making a home and livelihood for themselves. In some informal settlements, this has gone on for several generations. Almost without exception the property people have in informal settlement represent an absolute total of their possessions. Many informal settlements have inner real estate markets, both for selling and renting houses, so there is no doubt that the houses have value to the settlements' inhabitants, as they are.

4.7 Moving people against their will

Many projects to eradicate or upgrade informal settlements result in a complete turn-over of the inhabitants in the areas. This ruins the local communities, and many lose their livelihood. The considerable resistance from inhabitants in informal settlements from being moved from their homes and communities, even to technically better housing, shows that people experience the interference, whatever the possible well-meaning intention, as a violation.

4.8 None- or unstable access to electricity, clean water and waste disposal

Informal settlements often lack stable access to electricity, sewage systems and, most importantly, clean water. Because these areas are built by their inhabitants, who have limited resources, this means that oftentimes access to this infrastructure is not ensured. As long as there is little security of how long the settlement will exist, as the states focus is to relocate or eradicate the informal settlement, neither the states or the inhabitants have an incentive to make investments to develop these facilities.

A functioning waste disposal system is also essential for disease control. This includes both sewage and garbage, which are both sources of contagion. This is important for the community in general, but especially for the safety of children.

4.9 Limited access to healthcare and schools in the community

Informal settlements often lack access to basic healthcare facilities in their local communities. Lack of formal address also make it harder in certain countries to register for health care. Enrollment in schools in many countries also require that the child is registered to an official address in the school district.

As the informal settlement is not seen as permanent, this discourage investments in the development of the area. Often settlements exist for decades, leaving the inhabitants deprived of these basic facilities on a practically permanent basis.

4.10 Poorly constructed and unsafe houses

Poorly constructed houses are a big problem in many areas. Normally the buildings will withstand normal conditions, and be mended by its inhabitants if there are minor problems, however often with makeshift solutions. There are often tragic consequences due to this lack of safe construction, following extreme weather strains and natural disasters.

Earthquakes and hurricanes can flatten whole neighborhoods, which could have withstood the stress better, had it been built in accordance with safety regulations. Sadly, this has been shown to be the case in several informal settlements in the later years, for instance in Haiti where devastating earthquakes and hurricanes have left large informal settlements leveled with the ground, and many of its inhabitants' dead or injured.

This is a difficult issue to address, as a bettering of the problem require a general upgrade of the settlements building structures. This would be hard to implement in practice, and would demand large financial- and human resources.

4.11 Bad safety

Informal settlements often have less government control, and is in many cases breeding ground for illegal activity. This affects all inhabitants, also the law-abiding citizens. This makes it less safe for people to live in informal settlements, and contribute to increased

recruitment to illegal activities. This is a problem contributing to a worsening of the social problems amongst poor people, as criminal activities often are associated with substance abuse and other social problems.

4.12 Lack of public transportation infrastructure

Lack of public transportation infrastructure is often a problem in informal settlements. This make it harder for its inhabitants to move around efficiently in the city. This is however not the case in all informal settlements. The general lack of public transportation in many communities makes it practical and necessary for the inhabitants to work close to where they live. This make it more damaging when the communities are moved to different housings, since many people then also lose their livelihood.

Controlling the public transportation is also a powerful way of controlling the preferred and even possible moving patterns of the inhabitants. Exploitation of this power was shown in conjunction with the Rio 2016 Olympics, where bus routes from poor areas to the city center were removed, according to inhabitants' statements to media, as a way of keeping the poor inhabitants away from the central areas of the city during the games. This emphasizes how easy it is to exploit and discriminate against this group.

4.13 The possibility of exploiting the extended right to property

One of the few arguments against better protection of the right to property, is that it could enable people to misuse the right for financial gain, rather than need. This can however be avoided by setting legal refinements to this basic property right, limiting the right to including just the most basic, necessary property, to meet certain requirements.

4.14 Overall

What most of these problems have in common, it that they are essential to secure a safe environment that protect the inhabitant's integrity, health, sustainability and livelihood. What is also common for these factors are that in most cases, where the land itself is not contaminated to an irreparable degree, measures can be taken to better all of these challenges. This eliminates the need of moving the settlements for the inhabitants' sake. There might be other reasons as to why states wish to relocate or upgrade informal settlements, but this is not

motivated by preserving the right to property for inhabitants of the informal settlements, and falls outside the objective of this thesis.

4.15 How to obtain property

If property is considered a human right, the next question is how do one obtain property. If the right to property is protected by the human rights only when it is legally obtained, the way to obtain property cannot be unregulated. This makes it easy for states to exploit the right by making it harder to obtain property legally, thus reducing the opportunity to acquire the right.

Having to meet certain requirements to enjoy the right, fundamentally goes against the definition of a human rights, requiring that there is no minimum demands to be met in order to enjoy protection of the right.

4.16 Arguments against protection of property as a human right

A problem with the right to property is that it is very diverse in its contents. Property can be the very minimum of what is necessary to have a place to exist as a human being, and it can be the source of great wealth. Property, worldwide has immense value, as it is a finite resource. The land occupied by informal settlement are as a rule located in urban areas, making the property valuable.

Although property is an essential resource for all people, there cannot be an unreserved protection of private property. The arguments against a strong protection of property as a human right are considerable.

4.17 Preserving inequality

Property rights are a source of inequality, as someone will own more valuable land than others. This argument alone has inspired larger political movements to limit the right to property as a means of promoting equality. Karl Marx was one of the most influential philosophers to promote this view, and political ideologies such as communism and, to a certain degree, socialism are examples of this thought shaping the property rights in societies where it was- and is implemented.

Friedrich von Hayek, who won the Nobel prize of economics in 1974, for research on the interrelations between economic, social and political processes²⁶, wrote that “the system of private property is the most important guarantee of freedom, not only for those who own property, but scarcely less for those who do not”.²⁷ This represents the opposite view of Marx’, and advocates the right to private property as means of increasing peoples economic freedom.

Others have also seen property rights as a threat to equality, and a threat to other human rights, such as the right to adequate housing, education, health and food.²⁸ The argument being that in market economies, property is one of the main sources of inequality, and the property ownership will always be unequal.

4.18 Legitimacy of current ownership

As property can be obtained in a number of different ways, this raises the question of which claim of ownership is worthy of protection. Current property ownership has often been acquired generations ago, and often in ways which would not be recognized as legal today. Examples of this is vast areas being occupied by colonial powers in the colonization process of many countries. This results in a fundamental unequal distribution of property in these countries.

Undoing previously illegitimately acquired property is however difficult, as a redistribution of property undermines the confidence in the legal property protection. Lack of confidence in the protection of now formal property, results in less investments, which was the case in Zimbabwe in the early 2000s, as redistribution processes resulted in financial isolation of the country, and unwillingness to invest from international investors for many years, leading to economic difficulties for the country.²⁹ Redistribution of property on a large scale, at the expense of property rights is hard to do without damaging and destabilizing the financial situation of the country, and can be a measure working against its purpose of bettering the living of the inhabitants of the lands.

²⁶ http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1974/hayek-facts.html

²⁷ Hayek (1944) p. 76

²⁸ Van Maanen and Van der Walt (1996) p. 423

²⁹ Van Banning (2002) p. 179

4.19 Maintaining current ownership despite unequal distribution

Since the acquisition of property in many cases is questionable and unevenly distributed, a protection of these property rights will mean a maintenance of this distribution. It will be a maintenance of “status quo”. Therefore, a strong protection of private property rights will make it hard to right past wrongs.

4.20 Difficult upper- and lower limit for what property rights are protected by the human right

What defines property, and what kind of property is protected as a human right is hard to define. The protection of large tracts of land can hardly be argued to be a necessity for human existence. It is therefore not a given that all legally owned property would be considered protected by the human right to property. Despite the uncertain protection of these property rights, a society with no predictable ownership, would lead to an unstable legal situation. If one risks losing the right to one’s property to inhabitants of informal settlements, this might provoke anti-social measures to prevent informal settlements to form and exist on one’s property.

The lower limit of what property use should be protected by the human right is also unclear. How long use of land should be required for it to be protected by the human right to property, and how hard should it be to acquire property legally before informal settlements are accepted as the only real option. Consideration of the preservation of stability suggests that only somewhat established use can be protected. If the legal claim and right to a property could change overnight, this would create an impossibly uncertain situation.

Finding a way of regulation this issue, is one of the most challenging of the right to property. Since the values at stake are so great, this might unleash unpredictable consequences and trigger anti-social measures of property protection.

4.21 Litigation costs

Any changes regarding property rights will inevitably have financial consequences. The value of property is so big, that any change in the rights will be persecuted, resulting in large

litigation costs. Still, a period of legal challenges, might be a necessary evil in order to better the legal situation for a large group of people, who are without legal claim today.

Comprehensive laws will in the long run not result in more disputes and larger litigation costs. One could argue that the result would rather be the opposite, as better regulations would result in fewer legal conflicts.

4.22 Arguments in favor of protection of property as a human right - Security and human dignity

Having the right to property is one of the fundamental sources of security for humans. Throughout history humans have always strived for acquiring a place to live. It can be argued that it is one of the most fundamental needs of being a human, is having a place to live. The history of how humans spread throughout the world, from where we as a species first evolved in Africa, spreading to all habitable corners of the planet, was presumably motivated by acquiring the fundamental necessities to survive and live; access to food and having a safe place to live.

In this big perspective, it clearly seems unreasonable that modern day people should be deprived of such a fundamental right, on the basis of some peoples', often legally questionable former acquisition of property. Humans need space to exist, and in a world where there is increasingly less land available, the right to a place to live and exist is not guaranteed.

The necessity of access to property strongly suggests that the right to property for all people, needs to be sufficiently protected in the human rights.

4.23 Individual autonomy

It is fundamental for people to plan their lives and invest in their future to have a safe and predictable place to live. Property secures the possibility to have privacy and to act independently, on their own behalf. Having a commitment to a property, knowing that its value is yours for the foreseeable future, gives people incentive to take care of the property and develop its value. If people are not sure if the property is theirs for the foreseeable future, it discourages them from taking such measures.

On an ideological level, one can argue that private property rights ensure the inhabitants from the arbitrariness from of the state, as it is the antithesis to a totalitarian state.³⁰ In itself this does however not help with the unequal distribution of property between people. Rights and power deriving from property ownership is distributed unequally, and the poor population will not enjoy this power.

4.24 Participation in democratic rights

Earlier democracies only gave the right to vote to land owners and other high ranking male citizens. Although this is no longer the case, this shows how closely the participation in democratic rights are linked to owning property. A study by Jennifer Nedelsky shows that the rate of participation in elections in the Unites States of America, generally the land-owning citizens had a 70 % participation rate, while the non-land-owning citizens had a 35 % participation rate.³¹ Of course there is a question about correlation, but this strongly suggests that there is a link between the desire to participating in politics, and owning land. The lack of participation for inhabitants of informal settlements is understandable. The right to self-determination; being able to choose what one wants to do with one's lives, is marginal as long as one does not have any predictable property rights. Instead one becomes a chip on a table for politicians and others to move around.

4.25 Necessary for the implementation of other human rights

Both civil-, political- and socio-economic rights are enhanced by the right to property. Generally, having a home which is your own, improves liberty, as having a safe place to live is one of the cornerstones of human life. The right to privacy, which is protected by the UDHR article 12 is hard to implement without the right to property. The right to protection against discrimination and against violation of other rights is also hard to enforce without a universal right to access to property.

In situations where new laws are used as a way to end discrimination and promote equality for marginalized groups, their right to property is emphasized. This was true in the aftermath of the French revolution, the American revolution, and the South African constitutional reform

³⁰ Van Banning p. 183

³¹ Van Maanen and Van der Walt, contributed by Nedelsky, Jennifer (1996) p. 215

after following the end of the apartheid regime.³² In developing countries, where the focus is to promote gender equality, through bettering the rights for women, the right to property for women is seen as an essential tool.³³ This suggests that any attempt at bettering the situation for the world's poorest, should start with bettering and emphasizing the right to property.

4.26 What is wrong with the way the problem is addressed today?

Most of the solutions in trying to handle the challenge of informal settlements around the world today, tackle the problem from the top. Governments and other organizations conducts slum eradication- or upgrading projects. This leaves little to be said by the inhabitants of the informal settlements, and they are often moved from their homes against their will.

4.27 The difference between protection as a human right and protection only as a legal right.

The legal situation clearly demonstrates that it is hard for the international community to agree on laws for protection of property. One might wonder what benefits protection as a human right would offer, as opposed to protection through the national legislations in different states or through regional treaties, as it is today. After all, property is an essential area to regulate in all states, and there is hardly any nation in the world without property laws.

One might even argue that the states know better what are the best laws for their country, and how best to safeguard its inhabitants' interests. However, as this thesis have shown, the right to property is a human right, and is one which is imperative to protect legally, in order to avoid violations of the right. The necessary measures are not being taken in many countries, leading to violations of the human right to property. Having protection as a human right would ensure a universal, fundamental right to property, worldwide, thus ensuring the human right to property for people in all countries.

4.28 Why the existing methods are not sustainable

Slum upgrading projects, are in fact often slum rebuilding projects, where the only thing being reused is the actual land. The land is one of the most valuable commodities in urban areas, as urbanization ensures increasing prices. Many informal settlements, especially older

³² Van Banning p. 184

³³ Agarwahl Bina, (1995) via Van Banning (2002) p. 184

settlements are located in very central parts of cities, and have therefore had a huge increase in value. The original land owners, as well as neighboring land owners, have a lot to gain financially by removing the informal settlements, and replacing it with housing and business buildings of a higher standard. The land value increase, by the absence of poor people, and moving new people into the area, who have the financial means to pay more for the property. This results in urban development moving poor people away from urban areas, out of the city, in order to increase- and better utilize the value of the land.

Modern building regulations- and standards also make it so less people fit in the space than before. Space for recreation, “green lungs”, infrastructure and generally larger apartments and houses make it so less people can live in the transformed space. The new buildings are often not affordable for the inhabitants of the informal settlements. even though some states such as in India they have imposed a duty on developers to house the former inhabitants of the settlements. The problem then becomes that the settlers have to prove that they are entitled to these new homes, and to do so they have to be able to prove that they have lived there for a said number of years. It lies in the nature of the informal settlements that there are little or none public records or other means of proving residence over several years. This forces a majority of the settlers to start over in other informal settlements, with no compensation for the house they lost, which in some cases have been in the families for generations.

This makes upgrades, or the remaking of informal settlements to merely a way of pushing the settlements further out of the cities, and reserve the central areas of cities for the richer part of the population.

4.29 Protection of the human right in legally binding covenants

A more comprehensive definition of inclusion of the human right to property, ensuring the right to all people, including inhabitants of informal settlements in the UDHR would send a strong signal that the right is protected by international law.

If the right to property were to be included as a clear right in one of the legally binding covenants such as the ICCPR and/or the ICESCR, the protection of the right would be even stronger. Then, states would not be able violate the right to property. Thus, the states would be forced to respect the right, despite possible negative consequences. Reasons for breaching the right, such as financial gain following different property use, or the wish to preserve or

expand property rights of some inhabitants, businesses, peoples or organizations, at the expense of others, would not be possible.

In recent history, there are many dark examples on how states use legal discrimination of property rights to remove, discriminate and even eliminate the rights of whole groups of people. This happened in South Africa during the Apartheid-regime³⁴, it happened in Yugoslavia during the ethnic cleansing process in the 1990s³⁵ and it happened in Germany in the 1920s with the prohibition of Jewish property.³⁶ The reason why these legal discriminatory measures were able to be adopted, was that there existed no legally higher protection of the human right to property; not in international law, and not in national law on constitutional- or lower levels.

There are however, other examples of consequences the lack of protection still cause in societies today. Women's right to property is severely restricted in many developing and/or Muslim countries, and these states' national legislation is in clear violation the human right to property. This is also the case with the property rights of indigenous people in several countries, where national legislations do not recognize the peoples' rights.

These examples show that protection as a human right in legally binding covenants is an important measure to ensure that national legislation in ratifying countries protect the right to property.

³⁴ <http://www.sahistory.org.za/article/apartheid-legislation-1850s-1970s> 20.05.17

³⁵ <https://www.devex.com/news/taking-ethnicity-out-of-property-rights-81837> 20.05.17

³⁶ <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005681> 20.05.17

5 Requirements new legal wording or interpretation needs to take into account

A renewed, indisputable right to property would have the potential to influence national law-making and steer the development of informal settlements in a more proactive direction. As this thesis shows, there are a lot of elements, which are essential to ensuring the most basic human right to property. A suggestion of wording of a new article to cover the matter follows.

5.1 Suggestion of new article defining the human right to property

1. Every person has the right to own such private property as meets the essential needs of decent living and maintaining the dignity of the individual and their home. Every person is entitled to enjoyment of this property, free from interference.
2. No demands can deprive a person from seeking access to this property on uncultivated land, if no other access to property is achievable.
3. No one shall be removed from their home against their will.
4. Interference in the right without consent, can only be made in situations of significant importance, and only when strictly needed for infrastructure, or to avoid social- or public need.
5. Interference in the right shall have just compensation.

5.2 Elaboration on the suggestion

This suggestion of an elaboration of the human right to property, seek to improve all the limitations the current legal wording of the right entails. It is a composition made mainly from the different international and regional legislations.

Number 1. ensures the right to property, but only what is necessary to live a decent life. This distention is made to avoid too extensive rights to property, which would in practice limit the access to property for all people. The right to enjoy the right without interference is set up as the legal basis.

Number 2. ensures that it cannot be made too difficult to obtain property, without granting people the right to seek property on uncultivated land. The use of the definition “uncultivated” is somewhat problematic, as its opens up for different interpretations. It can

however, be interpreted in each case, thus enabling it to adapt to many different situations. There is a general understanding of how land must be to be defined as uncultivated. This distinction is made, as this ensures that different peoples' human right to property conflict. As uncultivated land is hardly property which "meets the essential needs of decent living and maintaining the dignity", interference in the land do not violate the human right to property.

Number 3. ensures that development happens cooperation with inhabitants. This promotes involvement of inhabitants of an area, if it is to be developed, and ensure that development only happen in the inhabitants' best interest. This wording promotes peoples' autonomy, assuming that people themselves can determine what is in their best interest to do.

Number 4. opens for interference without consent, but only for certain reasons, and for matters of significant importance. This ensure that peoples' right to property is not violated without due cause.

Number 5. ensure the right for just compensation for interference. This is necessary to ensure the peoples' financial situation in the event of interference, which in all societies, to a certain degree, is inevitable.

This example shows that it should be possible to make a version of the right to property in international law, which safeguards the right for all people. The real-life and legal consequences of this suggestion have not in any way been accounted for, but it is a contribution in the debate which should be on this topic.

6 Conclusion

The human right to property is one of the most essential rights all people need to live their lives. The current legal protection of the right is inadequate, as it does not protect all people against violations of their human right to property. This is a relevant issue, as the number of people with limited- or no right to property today is significant, and is expected to increase in the years to come.

The potential legal tools have of bettering the situation is shown to be extensive. Especially for inhabitants of informal settlements, an official bettering of the wording- or interpretation of the human right to property, would mean better possibilities for developing informal communities. This would give the inhabitants greater predictability, and increased opportunities to rule over their own lives and property, and thus contribute to ensure their human rights as a whole.

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