INTERGROUP CONFLICTS OVER SOVEREIGNTY AND PROPERTY: EXTENDING THE NORMATIVE UNIVERSE THROUGH HUMAN RIGHTS ADJUDICATION

By Rob Howse\textsuperscript{1} and Ruti Teitel\textsuperscript{2}

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\textsuperscript{1} NYU Law School.
\textsuperscript{2} New York Law School and LSE (Visiting Fellow).
Introduction

Intergroup conflicts over sovereignty and property seem to require resolution of competing claims through politically bargained comprises between the antagonists or their representatives; the (all too frequent) alternative is resort to violence-rapports de force. What can legal norms, and their interpretation by judges, do to resolve competing accounts of historical justice and competing demands for self-determination that often underwrite such claims? As we discussed in recent work, courts have become increasingly entangled in these conflicts; some, such as the International Court of Justice in the advisory case on Kosovo, have cowered before the challenge of wading in these waters, and declined to articulate the proper role of legal principles. Others have sought to articulate law’s contribution; the Canadian Supreme Court in the Secession Reference for instance sought to elaborate a framework of legal norms, drawn from the principles underlying Canada’s own constitution as well as international law, to guide the political actors in the case of secession negotiations, all the while stressing that ultimately the decisions were those of the political actors to make. In the Sedjic and Finci case, the European Court of Human Rights arguably went further, finding that aspects of a political bargain that divided democratic

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sovereignty between Serbs, Croats and Muslims in Bosnia violated non-discrimination norms, since those not affiliated with these groups were excluded from certain important forms of political participation (running for public office). The Court had no hesitation in putting at risk a compromise aimed at managing a brutally violent intergroup conflict; though in fairness, it noted that the particular features in question could be altered while still preserving a structure of divided sovereignty. But this seemed to abstract from how politically fraught it can be to open these kinds of deals and rework them, given the level of tension among, or mistrust between, the groups in question, among other things. At the same the Court’s approach reflects what we have suggested is a generally positive or hopeful tendency for human rights to become explicitly part of the picture in those legal structures available to deal with issues of self-determination, and the kinds of sovereignty and property claims that may ensue.

In this paper address we seek to widen and deepen the inquiry into the judicial role in expanding the normative universe for addressing intergroup conflict over self-determination, and its resolution, in particular by looking at a range of cases where disputes about property seem to play an important part in the conflict, at least in the foreground, as it were but where contested sovereignty or claims to self-determination are the broader context. Property and sovereignty can be understood as legal concepts, of course, but they are also powerful slogans of
political rhetoric, and battle cries in political struggles of various kinds, often used a purported normative trump cards, with the potential to escalate intergroup conflicts into clashes of absolutes. By taking a holistic view of the relevant normative universe, courts can blunt the hard edges or deep fault lines that often result in the invocation of the notions of property or sovereignty. While human rights discourse is often faulted for moral absolutism, in fact as we shall elaborate, courts that look at property and sovereignty, not in terms of any absolute right or claim to one or the other, but in light a range of different human rights that are interlocking and complex in their implications for remedies. This holistic view can generate nuanced normative constructs, which may in turn be helpful to break impasses in political negotiations, if understood properly.

It is with these normative constructs that we are mostly concerned, not doctrinal contributions to any particular legal system of any particular tribunal. Much as we sketched in our essay “Cross-Judging” we imagine a world of relatively unstructured but continuous judicial dialogue or conversation, where one

court’s thinking about the normative constructs appropriate for addressing some deep human problem may well be taken up by others, without too much hand-ringing about the differences between systems of positive law. With two exceptions, a domestic court in Israel and the International Court of Justice, this version of the paper focuses on the jurisprudence of two regional human rights tribunals the European Court of Human Rights and the Inter-American Court. In later versions, will intend to add a range of domestic court decisions, especially from Latin America, concerning indigenous peoples. Putting aside questions of comparativist methodology, we have attempted to get insight where we can find it.

I. Thinking About the Judicial Role

Courts could play any one of a number of roles in addressing intergroup conflicts about property and/or sovereignty. At the maximalist end of the spectrum, courts could try and articulate the claims as vested legal rights, imposing as positive law what amounts to a single solution. Sometimes petitioners will want exactly that, i.e. the court to vindicate as a legal right their actual substantive positive in the conflict, even if pragmatically the court might have little authority to impose it on the political actors on the other side. Courts are unlikely to play this maximalist role; underpinning the presentation of claims as legal rights will often be controversial, contested historical narratives, and placing intergroup relations on a new footing may be very difficult without
an exercise of bargaining and then institution-building that entails political reconciliation. Here there are limits to judicial intervention to enforce legal rights in abstraction from the broader political context. For example, South Africa’s constitutional court in the AZAPO case allowed civil amnesty in the truth commission legislation to prevail over victims’ individual legal rights to compensation from perpetrators. In that case the constitutional norms that prevailed were those protecting the political bargain for transition to democracy, not those protecting redress for violation of individuals’ legal rights. On the other hand, in the absence of a politically negotiated interim constitutional settlement, as it were of the claims involved, constitutional in the sense that the court doesn’t just enforce a legal right in a vacuum of political bargaining, but it fashions a settlement that has due regard to the rights and interests of others, the court’s own view of what a legally principled compromise of the group conflict would look like. This still might leave room for the political actors to bargain over the exact parameters. As we shall discuss at length below, this is what the Inter-American Court did when it ordered the Surinam government, in the absence of any territorial settlement of the indigenous people’s self-determination over their historical homeland, to establish collective property rights for those people in their traditional territory within Suriname. Third, a court might not address the
ultimate disposition of claims that relate either to property rights or sovereignty over territory but still find that there has been harm to human rights of distinct groups or individuals that must be prevented now regardless of the final resolution of the underlying conflict. At the same time, whatever the court requires in terms of immediate redress could be shaped or modulated in light of the realization that the ultimate settlement will be politically determined. (Indeed, one of the most interesting things to look at is the courts’ self-perceptions of how their solutions might impact on the margins or parameters of any future political bargain. Further, the courts might see themselves as guardians of the integrity or inclusiveness of political negotiations, and especially as protectors of those who might be marginalized or disempowered in a settlement that reflects power dynamics, not simply normative principle: this is illustrated by the Sedji and Finci case already mentioned (and discussed in our earlier work). Also, the Canadian Supreme Court would appear to have taken on this role, in its ground rules for political negotiation of secession, which indicated the need to consider the rights of minorities not simply the interests of the main conflicting groups. These last roles seem highly consistent with what can be called a human rights or humanity-based view of the problems in question. Finally, courts might intervene to prevent one of the parties from changing the facts on the ground so as to preclude a solution that allow certain
forms of redress of the grievances of the other party or parties. In other words, making a fait accompli that forecloses options in future political negotiations. This role might be seen as roughly analogous to preliminary measures or injunctive relief to prevent “irreparable harm” to the interests of one of the parties. This is perhaps the most judicially minimalist role of the various ones just discussed. Yet it does entail admission or recognition by the court that there is a conflict with more than one side, and that justice must be done to both: thus, nothing must be done to foreclose the options for a fair settlement, even if what is fair is left undetermined. Often there will be an explicitly proceduralist aspect emphasized when the court is playing this role, for example the proposed change to the status quo ante is blocked until consultations can with affected parties, including the other side in the conflict, or interests that are proxies for or connected to their interests are examined or taken into account. But in appearing to say nothing about the conflict, even with these forms of relief, the court is in fact saying something about what might need to be taken into account for a solution to be legitimate. In the Inter-American Court’s case law, for instance, the emphasis has often been on rights of consultation\(^5\) prior to the approval of projects affecting the interests of indigenous people, in part due to

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\(^5\) So much so that some analysts refer to this jurisprudence as essentially about “consultation rights”. See ELLA Policy Brief, “Defending Latin America’s Indigenous and Tribal Peoples’ Rights Through Laws and the Courts” (undated)
being closer to what positive law often uncontroversially requires, while in fact the Inter-American Court, as we shall see, has in effect granted significant substantive rights of self-determination to indigenous peoples.

*Lifta*

The Arab village of Lifta, at the entrance to Jerusalem, was taken by Zionist militants during the war of independence around 1948. The village, which is within the “Green Line”, i.e. not on territory that could be viewed as subject under international law to illegal occupation by the state of Israel, has been left largely intact; indeed it is viewed as one of the few artifacts of the culture and civilization of Palestine pre-the creation of Israel that has not been destroyed or rendered unrecognizable by the conflict or the occupation. The fate of Lifta has come to take on the function of a symbol of one of the key demands of the mainstream of the Palestinian movement in negotiations with Israel on the fulfillment of Palestinian self-determination: the right of return to property and territory from which Palestinians were displaced therefrom during the war of independence. This right of return is without prejudice, it should be pointed out as to the borders that would define an independent state of Palestine, i.e. to the
resolution of the sovereignty question. The narratives of Palestinians and the currently politically dominant part of the Jewish Israeli population diverge on whether the original displacement was an injustice and even if it was how it could justly be remedied. Many people in Israel stick to a narrative that Palestinians voluntarily abandoned their property and villages, instigated by Arab leaders in the wake of their rejection of the UN plan for the partition of Palestine post-Mandate. On the other hand, a body of evidence is increasingly pointed to that indicates many cases where brutal violence was used by Zionist militants to ethnically cleanse the villages and ensure that the Arab inhabitants never thought about trying to go back. Even those Jewish Israelis who acknowledge such injustices occur point out the difficulty of remedying them by an absolute or unqualified right of return, not least that the lives of people now occupying those properties, and not directly complicit in ethnic cleansing would be severely disrupted. In the case of Lifta in particular, there is apparently very explicit evidence of ethnic cleansing: “On 28 December 1947 a coffeehouse in Lifta was attacked by a group of the Stern Gang who used machine guns and grenades killing six of the patrons and wounding seven. From December 1947 through January 1948, the residents of Lifta fled their village in the wake of actions by the Jewish forces, which included threats,
house demolitions and raids intended to cause the evacuation of the Lifta residents.”

Between 2006 and 2011, the Israeli government took steps to convert Lifta into a site for the building of luxury residences, a hotel and commercial activities. A coalition of activists, both Jewish and Israel Palestinian began to advocate opposition to the plan, which culminated in a tender of lots for sale to private entities for building. Based upon the petition of these activists an Israeli administrative court blocked the tender, enjoining the sale of the land. This was a remarkable decision, given that (unlike for example litigation involving the security fence) sovereignty of Israel over the village of Lifta was unquestionable both under domestic and international law; nor were there any current Arab residents of Lifta whose property would be displaced or lives or businesses affected by the government’s land sale.

The petitioners’ arguments included the claim that sale of the village to private buyers bid, had been forced or intimidated to return to the village. But the petitioners also emphasized that, quite apart from remedying injustices to individual Palestinians who might be able to claim that they never lost their entitlement to their property in Lifta, Lifta could be seen as a kind of collective

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cultural property of Palestinians; memory of the past and indeed of past injustices was itself a form of cultural heritage or property that would be destroyed with the eradication of Lifta.

Had the Israeli court blocked the government’s planned sale of the village on grounds of preserving the possibility of an ultimate right of return of the former Arab residents and their descendants as part of a negotiated solution of the conflict, it would have provoked a dramatic political reaction, for never before would an official Israeli institution have come to recognize the putative legitimacy of the notion of a right of return or historical narrative of ethnic cleansing—the Nakba-on which it is based.

The cultural heritage or cultural property argument was rather different; the government had already responded to the concern of cultural heritage by offering to demarcate a cemetery and preserve a mosque as a public building.\(^7\) This seemed like an admission of sorts that cultural heritage issues would need to be taken into account in the way in which Lifta’s future was planned. It was thus not a great leap for the court to block the sale of land until a thorough documentation and conservation survey was conducted.

\(^7\) Ibid, p. 72.
At a very basic level, the court’s ruling was a vindication of the notion that the village’s future could not be disposed of without any regard for its past, and the stake of the Palestinian people in that past. The relationship of the original inhabitants to the village could not be simply written off or denied any normative or juridical significance. From this perspective, the petitioners were successful, and the court’s decision, while evoking the most minimalist of the roles described above, nevertheless drew a line in the sand, as it were, against the reduction to meaninglessness and attempted obliteration of the Palestinian memory of the past. Lifta’s significance as a cultural artifact, though at times the petitioners did invoke distinctive architecture one of the more traditional indicators of “cultural property” was as the preservation of the memory of a way of life said to have been destroyed by the Israeli war of independence and its various consequences. The court thus albeit indirectly or silently seemed to be giving some legitimacy to the normative basis or at least the historical basis of the right of return. On the other hand, one might ask if the emphasis on cultural heritage or cultural property did not undermine somewhat the notion of the right of return as a demand in peace negotiations that is not subject to compromise or modification (and this is why some in the Palestinian movement objected to the petition to the Israeli court on these terms). Recall the approach to transitional justice reflected in South Africa’s Truth Commission: the notion
of amnesty for disclosure suggested that acknowledgement of past could be itself a kind of remedy. The court’s decision on Lifta, and indeed the way the activists framed their petition to the court, may thus have a subtle normative message in any future peace negotiations: that there cannot be justice without addressing the past and preserving its memory, on the one hand, and that the full right of return is not the only avenue for reckoning with the past and its injustices. The court made an almost silent but nuanced statement about the current impasse in political negotiations, implying a normative inadequacy to the intransigence of both sides’ representatives. At the same time, by saying nothing about individual rights of displaced persons and their descendants the court did not suggest that these were non-existent or required no remediation beyond some protection of collective cultural property or cultural heritage.

**Cyprus and the European Court of Human Rights**

Since the case of *Loizodou v. Turkey* in 1996 the ECtHR has become notorious for its insistence that the rights of individual Greek Cypriot landholders be vindicated. Greek Cypriots experienced significant interference with their property following the Turkish invasion of Cyprus in 1974 and the
reorganization of territorial control that made it impossible for many Greek Cypriots to have access to their property and in some cases their homes. As Williams and Gurel note, by ruling that individual property holders’ rights be vindicated the court has been seen by some as making a grand political compromise between the Turkish and the Greek sides more difficult, contributing the impasse in negotiations. In fact, the court’s interventions in the Cyprus conflict have been executed with considerably more subtlety than it is usually given credit for, and have more ambiguous, and arguably some positive consequences for a possible negotiated solution. First of all, the court has as a matter of positive law motivated its overall approach in the right to use of property in the European convention, avoiding invitations to find discrimination in the behavior of the Turkish authorities, for instance. By insisting on a remedy for interference with the right to the use of property, the court has left open how a political settlement might possibly alter the pre-existing property rights. Second, the relationship between these claims of individual property holders and the Court’s approach to the state-to-state claims brought by Greece against Turkey has been underappreciated, even though the Court itself has drawn attention to this relationship. In this litigation, the Court,

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beginning with the original 2001 decision of *Cyprus v. Turkey* found numerous human rights violation “arising out of the Turkish military operations in northern Cyprus in July and August 1974, the continuing division of the territory of Cyprus and the activities of the “Turkish Republic of Northern Cyprus””). In the state-to-state cases, the Court clearly revealed its view of the effects on the use of property as part of a broader picture of human rights violations, reinforcing a view of its role as the guardian not of property rights or claims as such but of the human rights of the individuals affected by the conflict. At the same time, the Court has insisted, finding in 2014 that Turkey had failed to do so, that “just satisfaction” for these human rights violations cannot properly await or be put on hold until political negotiations for a definitive settlement of the Cyprus conflict are concluded. At one level, this could be said to be an orthodox application of state responsibility in international law, where there is an obligation to remedy past breaches as well as to cease, and failing to cease, to remedy continuing ones (such as continuing interference in the use of property). But it is also a powerful insistence, in the face of Turkey’s arguments to the contrary (from old fashioned notions of diplomatic protection) that just satisfaction in a state-to-state dispute must

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9 *Cyprus v. Turkey* (2014), para. 4.
provide accessible justice to individuals, if their situation as victims of rights violations is the legal basis for the state-to-state claim.

It is in this context of this litigation that we should view the Court’s disposition of claims of individually related specifically to interference with the use of property. In *Xenides-Arestis v. Turkey*, the property in question was the home of a Greek Cypriot, and the court found a violation both of the right to respect of the home, as well as the general right to the use of one’s property. At the same time, the Court decided not to proceed to award compensation to the petitioner instead the remedy devised by the Court was one that actually required some measure of dialogue or interaction at least between the Turkish authorities and Greek Cypriots and in its character pointed to the need for a systemic solution to these aspects of the overall conflict. Thus, the court held: “The Court considers that the respondent State must introduce a remedy which secures genuinely effective redress for the Convention violations identified in the instant judgment in relation to the present application as well as in respect of all similar applications pending before it…Such a remedy should be made available within three months from the date on which the present judgment is delivered and redress should be afforded three months thereafter.” (para 40). Notably the court placed no limits on, much less defining in detail, what “effective redress” might mean. It therefore left that determination in the first
instance to the Turkish authorities in dialogue with the Greek Cypriot community.

The Turkish authorities did in fact respond to the Court in creating an Immovable Property Commission (IPC), which disposed of a large number of claims through settlement with the victims, either through compensation or outright restitution. In later litigation, when petitioners dissatisfied with the IPC brought a claim to the court, the court was more explicit in articulating the nature of the deference accorded to the Turkish authorities, always however within the overall premise that individual rights must be protected pending the settlement of the overarching territorial conflict between Turkey and Greece. The court said, particularly, that it would be “arbitrary and injudicious” to impose an obligation to effect restitution in all cases, especially given that to do so would involve forcible eviction of many individuals who had inhabited these properties since the Turkish invasion, including children. The court thus suggested that it was appropriate that a balance be struck between the rights of the victims and those of people who would be drastically affected by the remedy of restitution. The IPC could exercise its discretion on a case by case basis to determine what kind of remedy suited the particular situation, whether restitution, compensation, or finding ways to guarantee meaningful access to the property itself. The Court concluded that the law establishing the IPC
provided “an accessible and effective framework of redress”. While the Court has repeatedly emphasized that the ultimate resolution of property rights in the Cyprus conflict will be through negotiation, the Court has at one and the same time held both that human rights, including those connected to property, must be always respected and at the same time that from a human rights perspective, redress may take any numbers of forms depending on the circumstances and that as long as redress is “effective” and access to it real the actors on the ground have the flexibility to work out solutions. The court has thus resisted viewing claims related to property as absolute property rights that would not be tractable to political compromise or solutions that take into account the interests and rights of others.

The Inter-American Court of Human Rights and the Saramaka People in Suriname

There is now a fairly extensive jurisprudence of the Inter-American Court where petitioners representing various peoples have challenged large-scale development projects (mines, etc.), partly on grounds that, given the likely impact (environmental, social) on territory that those peoples inhabit, there is a duty of prior consultation that has not been fulfilled. The Inter-American Court has not only halted projects until consultations can take place, it has also imposed substantive constraints on the impact that is permissible, given the
state’s human rights obligations under the Inter-American Convention and related instruments. The Court has also stipulated that peoples must be given a share of the benefit from the projects that take place on or affect their territory. Of this jurisprudence, one of the more recent cases, *Saramaka People v. Suriname* stands out, first of all because the Saramaka did not qualify as an indigenous people, and therefore the Court had to make explicit the foundations of its analysis in the general human rights of peoples (as opposed to the particular rights of indigenous groups), and secondly because of the transformative nature of the remedy, which required that Suriname establish a system of collective property rights for the Saramaka, a scheme the Court envisaged as giving them a kind of limited self-government or sovereignty over the territory that constituted their traditional homeland within Suriname. While this is not the only case where the Court used the construct of collective property rights, it is notable that in Suriname, tribal peoples lacked juridical personality to exercise collective rights. Thus, the remedy ordered by the Court demanded some basic changes to the legal system of Suriname, in effect constitutional change recognizing the Saramaka has having the capacity of collective governance of their territory. The petition of the Saramaka was in large part a response to Chinese logging activities on their traditional territory. While there was 19th century treaty with the Saramaka that recognized it as
having some kind of autonomous collective existence on the territory of Suriname, the modern constitution of Suriname did not reflect or incorporate this treaty; rather sovereignty was undivided and the constitution explicit gave the state control over all property in the country. In responding to the petition the Suriname state argued that Suriname law protected individual property rights and gave a remedy for interference or destruction of these rights that was available to members of Saramaka as individual property holders. The Court held, however, that this was insufficient, because it did not protect the Saramaka’s right to peoplehood, to collective survival. Thus, the Court ordered that the state “delimit, demarcate, and grant collective title over the territory of members of the Saramaka people, in accordance with their customary laws, and through previous, effective and fully informed consultations with the Saramaka people, without prejudice to other tribal and indigenous communities…. [and] grant the members of the Saramaka people legal recognition of their collective juridical capacity, pertaining to the community to which they belong, with the purpose of ensuring the full exercise and enjoyment of their right to communal property as well as collective access to justice.” (para. 194) In effect, the Court ordered the government of Suriname to engage in a constitutional negotiation with the Saramaka concerning self-government, with the baseline being the Saramaka’s own traditions and customs. At the same time, the Court set limits
on the extent of the autonomy over their traditional territory that human rights law granted peoples like the Saramaka. The state could, consistent with human rights law, restrict the collective rights of the Saramaka where the restrictions were previously established by law, necessary, proportional and with the aim of achieving a legitimate objective in a democratic society, provided the restrictions do not deny “their survival as a tribal people”. (Paragraphs 127-128)

Thus, the Court seems to envisage the kind of collective property rights to be accorded to the Saramaka as falling between mere subsidiarity on the one hand and full self-government, or local sovereignty, on the other. The exact equilibrium would result from the required consultations and negotiations with the Saramaka people themselves within the shadow, as it were, of these parameters in the Court’s decision.

**Ukraine/Crimea: Provisional Measures in the International Court of Justice**

In the recent decision of *Ukraine v. Russia*\(^\text{10}\) the ICJ ordered provisional measures against Russia. It stipulated: “the Russian Federation must refrain, pending the final decision in the case, from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative

institutions, including the Mejlis. In addition, the Russian Federation must ensure the availability of education in the Ukrainian language.” (Paragraph 102)

This order was based on the Ukraine’s claim that actions of Russia interfered with or suppressed the cultural and linguistic self-determination of non-Russian groups in the Crimea, causing irreparable harm to their exercise of rights under the Convention on Elimination of All Forms of Racial Discrimination (CERD).

The Ukraine alleged that Russia:

violated its obligations under the CERD by: (a) systematically discriminating against and mistreating the Crimean Tatar and ethnic Ukrainian communities in Crimea, in furtherance of a state policy of cultural erasure of disfavored groups perceived to be opponents of the occupation regime; (b) holding an illegal referendum in an atmosphere of violence and intimidation against non-Russian ethnic groups, without any effort to seek a consensual and inclusive solution protecting those groups, and as an initial step toward depriving these communities of the protection of Ukrainian law and subjecting them to a regime of Russian dominance; (c) suppressing the political and cultural expression of Crimean Tatar identity, including through the persecution of Crimean Tatar leaders and the ban on the Mejlis of the Crimean Tatar People; (d) preventing Crimean Tatars from gathering to celebrate and commemorate important cultural events; (e) perpetrating and tolerating a campaign of disappearances and murders of Crimean Tatars; (f) harassing the Crimean Tatar community with an arbitrary regime of searches and detention; (g) silencing Crimean Tatar media; (h) suppressing Crimean Tatar language education and the community’s educational institutions; (i) suppressing Ukrainian language education relied on by ethnic Ukrainians; (j) preventing ethnic Ukrainians from gathering to celebrate and commemorate important cultural events; and (k) silencing ethnic Ukrainian media.

According to the Ukraine, taken together these alleged acts constituted a policy of “cultural erasure.” If they were not halted now they would cause irreparable harm; if “cultural erasure” succeeded, the right to cultural self-determination, as reflected the right to linguistic and educational institutions, for instance, would be forever defeated because the culturally distinct group that held the right
would have been, effectively, eliminated. Hence, the case for provisional measures.

The Court prefaced its ruling on the request for provisional measures with a statement indicating that it was well-aware of the “context”, the violent territorial conflict between Ukraine and Russia over the Eastern Ukraine/Crimea, and took pains (along the lines of one of the normative constructs we identified earlier in this paper) to emphasize that its order was not a judgment on the territorial conflict itself in any way:

The context in which the present case comes before the Court is well known. In large parts of eastern Ukraine, that context is characterized by periods of extensive fighting which, as the record before the Court demonstrates, has claimed a large number of lives. The destruction, on 17 July 2014, of Malaysia Airlines Flight MH17 while it was flying over Ukrainian territory en route between Amsterdam and Kuala Lumpur, caused the deaths of 298 people. The Court is well aware of the extent of this human tragedy. Nevertheless, the case before the Court is limited in scope. In respect of the events in the eastern part of its territory, Ukraine has brought proceedings only under the ICSFT. With regard to the events in Crimea, Ukraine’s claim is based solely upon CERD and the Court is not called upon, as Ukraine expressly recognized, to rule upon any issue other than allegations of racial discrimination.

Referring to provisions of the CERD (Article 5) which include cultural and social rights (among them the right to equal participation in cultural activities), the ICJ held that Ukraine’s case that Russia was violating the CERD met the “plausibility” standard for provisional measures. But, most importantly, the ICJ accepted Ukraine’s logic that if the rights in the CERD are to be preserved, there is an immediate imperative to halt policies of “cultural erasure.” The ICJ
noted that the rights in the CERD are *individual* rights; at the same time, it considered that protecting the future capacity to exercise those rights might entail measures to preserve the distinctive cultural existence of *groups*. The implications of this decision for other conflicts, such as Israel/Palestine, are evidently significant. Recalling the example of Lifta, some Israeli government policies with respect to resettlement and re-development in the West Bank might be argued to constitute deliberate policies of “cultural erasure”. The ruling on the merits in *Ukraine v. Russia* may give further guidance on this concept.

**Conclusion**

When courts intervene in intergroup conflicts over sovereignty and property, they generally do so in recognition that any definitive settlement, to the extent it is imaginable, must occur through political negotiation and compromise. Courts can and do create normative conditions and parameters for negotiated solutions and provide interim protection for vulnerable persons and peoples, while managing not to over-determine what any final resolution of property or sovereignty claims might look like (or as with the ICJ in *Ukraine v. Russia* explicitly refraining from addressing it all). Whether their rulings are followed by the political actors and whether actually result in facilitating political
solutions is another matter. The more explicitly transformative the judicial intervention, the harder it may be, however, to elicit a positive response from political actors. This is illustrated by the fate of the Inter-American Court’s rulings in the case of the Saramaka, as their own representatives summarize it nearly 7 years later: “the State has failed to comply with all of the fundamental orders…there is no extant process, participatory or otherwise, aimed at their implementation…” (despite various promises or gestures by the state to the Court in the face of further litigation to enforce the original orders). By contrast, the apparently minimalist intervention of the Israeli court with respect to Lifta has held in abeyance now for several years the government’s plan to eradicate the village; the very uncertainty arising from the court’s decision concerning how cultural property or culture heritage will affect future administrative and judicial dispositions over Lifta’s fate might be inclining potential private buyers to look to less contested sites for building their hotels and shopping malls. Finally, along the lines of the “beyond compliance”
perspective we have advocated for looking at the real-world effects of international law, the value of the normative entrepreneurship of the courts is not limited to advancing solution of the particular conflicts in which they intervene. These normative constructs may well help inspire political or other judicial actors in different situations. In different ways, for example, the European and Inter-American Court decisions discussed above might contribute to normative discourse surrounding intergroup conflict in Israel/Palestine. The European Court’s affirmation of the original owners’ right to use their property in the Cyprus case was combined with acceptance of discretion over remedies that would allow the flexibility to choose between restitution, compensation, and access to the area where the property is located depending on individual circumstances, and the legitimate interests of others. Might one imagine an agreement in the Israel/Palestine conflict that recognizes in principle a Right of Return but then allows a commission under Israel’s jurisdiction remedial flexibility on a case by case basis? In the Suriname case, the Inter-American Court’s extension of a right to peoplehood beyond the case of indigenous peoples and the Court’s notion of collective property rights, may have implications for the discourse surrounding the conflict between the Bedouin. Israel’s refusal to recognize the Bedouin’s status as “indigenous”, should not, on the European Court’s reasoning, preclude their protection as a people in a
similar way; also, doubts that have been raised about the existence of
recognizable individual property rights of Bedouin\textsuperscript{11} would not preclude a claim
for the recognition of collective property rights, following the logic of the
European Court. These are just two examples that show why those concerned
with the resolution of intergroup conflict concerning sovereignty and property
out to be attentive to the courts, even if their interventions often appear
marginal relative to the intensity of these disputes, their apparent intractability,
and the distance that remains between the antagonists. Considering
jurisprudence from elsewhere is a way of avoiding the normative universe being
narrowed by the history and experience of the sides in one particular conflict, a
kind of path dependency that may unnecessarily narrow the options for
constructing a just peace.

\textsuperscript{11} This is not to say that we agree with either the position that the Bedouin are not indigenous or with the doubts
about whether land holdings of individuals are based on recognizable legal property rights; only that the
InterAmerican Court ruling illustrates why lack of common ground on these points would not necessarily be fatal to
a settlement that protects the Bedouin’s right to peoplehood. See work in progress by Oren Yiftachel and Batya