Article 1. Protection of property/Protection de la propriété

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 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.

Toute personne physique ou morale a droit au respect de ses biens. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et dans les conditions prévues par la loi et les principes généraux du droit international.

Les dispositions précédentes ne portent pas atteinte au droit que possèdent les États de mettre en vigueur les lois qu'ils jugent nécessaires pour réglementer l'usage des biens conformément à l'intérêt général ou pour assurer le paiement des impôts ou d'autres contributions ou des amendes.

Introductory comments

Property figures in the earliest declarations of human rights. The French *Déclaration des droits de l'homme et du citoyen* of 1789 recognized the right to property as being one of the 'droits naturels et imprescriptibles'. Article 17 of the *Déclaration* stated: 'La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemment, et sous la condition d'une juste et préalable indemnité.'[1] But this profoundly *bourgeois* right was also contested, famously by the anarchist Pierre-Joseph Proudhon: 'la propriété, c'est le vol'.[2] In the Communist Manifesto, Marx and Engels said that 'the theory of the Communists may be summed up in the single sentence: Abolition of private property.'[3]

To some extent, the philosophical differences about the sanctity of private property that characterized the formulation of the right in the Universal Declaration and that persist to the present day find their reflection in the case law of the European Court of Human Rights under article 1 of Protocol No. 1, notably in cases involving control or deprivation of property in pursuit of social policy in such matters as rent control. The Universal Declaration of Human Rights, in article 17, recognizes a right to property:

(1) Everyone has the right to own property alone as well as in association with others.
(2) No one shall be arbitrarily deprived of his property.

This text results from a compromise, an attempt to reconcile different social systems and their corresponding approaches to private property.[4] The Universal Declaration of

[1] See also article 16 of the 23 June 1793 version of the *Déclaration*, cited by Judge Borrrego Borrego: *Stec and Others v. the United Kingdom* [GC], nos 65731/01 and 65900/01, Concurring Opinion of Judge Borrego Borrego, ECHR 2006-VI.

[2] Pierre-Joseph Proudhon, *Qu'est-ce que la propriété?*, Paris: Bibliothèque internationale, 1867, at p. 13.

[3] Karl Marx and Friedrich Engels, *The Communist Manifesto*, Oxford: Oxford University Press, 2008, p. 24.

[4] See Johannes Morsink, *The Universal Declaration of Human Rights, Origins, Drafting, and Intent*, Philadelphia: University of Pennsylvania Press, 1999, at pp. 146–56.

Human Rights also enshrines respect for intellectual property, described in article 27(2) as 'the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.

There is no right to property in the two United Nations Covenants. Agreement both on where it belonged and the proper formulation could not be reached, and the matter was dropped by the Commission on Human Rights, never to return in the course of the negotiations.[5] However, the importance of the right to property has resurfaced in debates about indigenous peoples, extreme poverty, and women's equality. The United Nations Special Rapporteur on adequate housing has referred to the 'social function of property' in the Guiding Principles on Security of Tenure for the Urban Poor:

> Policies that promote the social function of property aim to ensure that land is allocated, used and regulated in a manner that serves both individual and collective needs. Limitations are placed on private property rights for the purpose of promoting social interests and the general welfare. States inherently recognize the social function of land through, inter alia, the collection of property taxes, the exercise of expropriation powers for the public good, adverse possession laws, and urban planning that designates spaces for public use and environmental protection. States should take further measures to ensure both private and public land is used optimally to give effect to its social function, including adequate housing of the urban poor.[6]

The African Commission on Human and Peoples' Rights has addressed the importance of the right to property in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights. Accordingly,

> The right to property is a broad right that includes the protection of the real rights of individuals and peoples in any material thing which can be possessed as well as any right which may be part of a person's patrimony. The concept also includes the protection of a legitimate expectation of the acquisition of property. It encompasses the rights of the individual, group or people to peaceful enjoyment of the property. The right may be limited by the State in a non-arbitrary manner, according to the law and the principle of proportionality.[7]

The Convention concerning Indigenous and Tribal Peoples in Independent Countries of the International Labour Organisation provides that 'the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised'.[8] The United Nations Declaration on the Rights of Indigenous Peoples protects 'cultural, intellectual, religious and spiritual property' and the right of indigenous peoples to 'maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions'.[9]

[5] William Schabas, 'The Omission of the Right to Property in the International Covenants', (1991) 4 *Hague Yearbook of International Law* 135.

[6] Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Raquel Rolnik, UN Doc. A/HRC/25/54, para. 42.

[7] Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter of Human and Peoples' Rights, November 2010, para. 53.

[8] International Labour Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, (1991) 1650 UNTS 383, art. 14(1).

[9] United Nations Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295, annex, arts. 11(2), 31(1).

The Charter of Fundamental Rights of the European Union recognizes a right to property in the following terms:

Art. 17. Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

It is meant to have the same meaning and scope as it does in article 1 of Protocol No. 1 to the European Convention.[10]

Drafting of the provision

The initial draft European Convention on Human Rights was prepared by the International Juridical Section of the European Movement, chaired by Pierre-Henri Teitgen, with David Maxwell Fyfe and Fernand Dehousse as rapporteurs. Both Maxwell Fyfe and Dehousse had been involved in the drafting of the Universal Declaration of Human Rights the previous year. The text enshrined '[f]reedom from arbitrary deprivation of property'.[11] Teitgen, at the first session of Consultative Assembly, called for adoption of a convention that was to include 'freedom from arbitrary deprivation of property'.[12]

There was no general agreement in the Commission on Legal and Administrative Questions of the Consultative Assembly on the inclusion of a right to property. Some members contended 'that there was no reason to differentiate between the right to own property and the other social and economic rights, and that it would be preferable, therefore, to exclude it from the guarantee, since in principle the [Convention] did not cover rights of this nature'.[13] However, the majority considered that it should be included 'having regard to the importance of the part played by the right to own property in the independence of the individual and of the family'.[14] The Commission proposed the following text: 'In this Convention, the Member States shall undertake to ensure to all persons residing within their territories: . . . The right to own property, in accordance with article 17 of the United Nations Declaration.'[15] In the plenary Assembly, the debate continued, with Lord Layton of the United Kingdom arguing against including a right to

[10] Explanation relating to the Charter of Fundamental Rights, Official Journal of the European Union, C 303/34, 14 December 2007.

[11] Convention for the Collective Protection of Individual Rights and Democratic Liberties by the States, Members of the Council of Europe, and for the establishment of a European Court of Human Rights to ensure observance of the Convention, Doc. INF/5/E/R, I *TP* 296–303, at p. 296, art. 1(k).

[12] Eighth sitting [of the Consultative Assembly] held 19 August 1949, I *TP* 36–154, at p. 46.

[13] Report presented by Mr. P.H. Teitgen, 5 September 1949, Doc. A 290, I *TP* 192–213, at pp. 198–200; Report [of the Committee on Legal and Administrative Questions], 5 September 1949, Doc. AS (1) 77, I *TP* 216–39, at pp. 228–9.

[14] Report presented by Mr. P.H. Teitgen, 5 September 1949, Doc. A 290, I *TP* 192–213, at pp. 198–200; Report [of the Committee on Legal and Administrative Questions], 5 September 1949, Doc. AS (1) 77, I *TP* 216–39, at pp. 228–9.

[15] Report presented by Mr. P.H. Teitgen, 5 September 1949, Doc. A 290, I *TP* 192–213, at pp. 198–200.

property in the Convention: 'I urge that the list of rights should be limited to the absolute minimum necessary to constitute the cardinal principles for the functioning of political democracy.'[16] It appears that this was an issue upon which the deputies were divided on political lines, with the socialists contending that to recognize the right to property but not any other economic and social rights, such as the right to work, would send the wrong message about the substance of human rights.[17] Faced with a lack of any agreement on including the right to property, the Consultative Assembly voted to refer its draft to the Committee of Ministers and not include it in its proposed text of the Convention.[18]

In the Committee of Experts, which met in February 1950, Ireland and Turkey proposed that the provision be restored.[19] A Sub-Committee assigned to examine the matter proposed the Committee of Ministers be informed that the Committee of Experts, 'or certain of its members', believed that the Convention should include the right to property.[20] In fact, the Report adopted by the Committee said the view was held by '[m]ost of the Members of the Committee'. The Report drew the Ministers' attention to the importance of the right to property, noting 'that the totalitarian regimes had a tendency to interfere with the right to own property as a means of exercising illegitimate pressure on its nationals'.[21]

The Conference of Senior Officials did not consider the issue when it met in June 1950, to the dismay of the Legal Committee of the Consultative Assembly.[22] Ireland formally proposed the addition of a right to property provision when the Committee of Ministers met in August 1950,[23] but no action appears to have been taken. The debate returned to the Consultative Assembly at its August 1950 session. Basing itself on a proposal from Henri Rolin,[24] the Committee on Legal and Administrative Questions agreed on the following:

> All individuals and corporate bodies are entitled to respect for their property. Such property shall not be liable to arbitrary confiscation. This shall not, however, in any way prejudice the right of the different States to enact such laws as may be necessary to ensure the use of this property for the public good.[25]

[16] Official Report of the Sitting [of the Consultative Assembly, 8 September 1949], II *TP* 14–274, at p. 52.

[17] For the extensive debate, see Official Report of the Sitting [of the Consultative Assembly, 8 September 1949], II *TP* 14–274, notably pp. 54–6, 60–2, 70–4, 76–86, 92–4, 98–100, 104–8.

[18] Ibid., p. 134.

[19] Amendment to Article 2 of the Recommendation of the Consultative Assembly proposed by the Experts of Ireland and Turkey, Doc. A 776, III *TP* 184–5; Amendment to Articles 2 and 3 of the Recommendation of the Consultative Assembly, proposed by the Irish Expert, Doc. A 778, III *TP* 184–5.

[20] First part of the Report of the Sub-Committee Instructed to Make a Preliminary Study of the Amendments Proposed by the Members of the Committee, Doc. A 796, III *TP* 200–5, at p. 204.

[21] Report to the Committee of Ministers submitted by the Committee of Experts Instructed to Draw Up a Draft Convention of Collective Guarantee of Human Rights and Fundamental Freedoms, Doc. CM/WP 1 (5) 15, A 924, IV *TP* 2–55, at p. 18.

[22] Letter of 24 June 1950 from Sir David Maxwell Fyfe, Chairman of the Committee on Legal and Administrative Questions, to the Chairman of the Committee of Ministers, Doc. CM (50) 29, V *TP* 32–41, at p. 36.

[23] Amendments proposed by the Irish Government, Doc. CM 1 (50) 2, A 1863, V *TP* 58–61.

[24] Text proposed by M. Rolin, Doc. AS/JA/WP 1 (2) 1, A 1942, V *TP* 204–5.

[25] Progress Report, Doc. AS/JA (2) 1, A 2041, V *TP* 206–7; Supplementary Report of 8 August 1950 on the Draft Convention for the Protection of Human Rights and Fundamental Freedoms Presented on Behalf of the Committee by M. P.H. Teitgen, Doc. AS/JA (2) 30, V *TP* 208–9.

After a resumed debate in the plenary Consultative Assembly,[26] the Committee on Legal and Administrative Questions continued its work on the matter. Teitgen had a revised text:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. Such possessions cannot be subjected to arbitrary confiscation. The present measures shall not however be considered as infringing, in any way, the right of a State to pass necessary legislation to ensure that the said possessions are utilised in accordance with the general interest.[27]

The text met with agreement in the Committee.[28] Its Report to the plenary Consultative Assembly described the text as 'a fair definition of an essential right, arrived at after much discussion'. The Report noted that 'certain members of the Committee felt that it was wrong to include this social right and exclude others such as the right to work and the right to rest and leisure, and had doubts as to the form in which the right was stated'. It noted that the text had been adopted by fifteen votes to four.[29] After further debate in the plenary Consultative Assembly,[30] the provision adopted by the Legal Committee was endorsed, by ninety-seven votes, with eleven abstentions[31] and the recommendation duly transmitted to the Committee of Ministers.[32] A memorandum on the Consultative Assembly discussions prepared by the Secretariat General described the text as 'a compromise' produced by a Sub-Committee 'the members of which held varying political views'.[33]

Meeting in Rome immediately prior to adoption of the Convention, on 3 November 1950, the Committee of Ministers was unable to agree on inclusion of the right to property in the Convention. The United Kingdom representative moved that proposals from the Consultative Assembly, including the right to property provision, be referred to a Committee of Experts 'with a view to the preparation of a Protocol to the Convention'. This was adopted by ten votes to one. An attempt by the Irish representative, Seán

[26] Report of the sitting [of the Consultative Assembly, 14 August 1950], V *TP* 216–71, at pp. 244–6; Report of the sitting [of the Consultative Assembly, 16 August 1950], V *TP* 272–351, at p. 312–14, 324; Motion relative to the right to own property proposed by Mr. MacEntee and several of his colleagues, Doc. AS/JA (2) 59, V *TP* 272–73.

[27] Draft Motion submitted by M. Teitgen, Original Draft, Doc. AS/JA (2) 6, A 2207, VI *TP* 6–11; Draft Motion submitted by M. Teitgen, Revised Draft, Doc. AS/JA (2) 6 rev., A 2238, VI *TP* 10–15.

[28] Draft Recommendation submitted to the Consultative Assembly, Doc. AS/JA (2) 20, A 2491, VI *TP* 42–7.

[29] Text of the Report [of the Committee on Legal and Administrative Questions], Doc. AS (2) 93, VI *TP* 58–72, at pp. 60–2, 68; First Report [of the Committee on Legal and Administrative Questions], Doc. AS/JA (2) 15, A 2298, VI *TP* 46–52, at p. 48; Second Report Doc. AS/JA (2) rev., A 2493, VI *TP* 52–9, at p. 54. See also Note of 14 December 1950 prepared by the Secretariat-General on the reasons for the Amendments to the Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the Consultative Assembly on 15 August 1950, Doc. CM (50) 96, A 3503, VII *TP* 130–41, at pp. 132–6.

[30] Report of the sitting [of the Consultative Assembly, of 25 August 1950, morning], VI *TP* 74–141, at pp. 86–8, 94–8, 104–10, 116–20, 134–40; Report of the Sitting [of the Consultative Assembly, 25 August 1950, afternoon], VI *TP* 144–91, at pp. 148–64.

[31] Report of the Sitting [of the Consultative Assembly, 25 August 1950, afternoon], VI *TP* 144–91, at p. 164. See also Note of 14 December 1950 prepared by the Secretariat-General on the reasons for the Amendments to the Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the Consultative Assembly on 15 August 1950, Doc. CM (50) 96, A 3503, VII *TP* 130–41, at pp. 136–41.

[32] Text published in the Collected Documents of the Consultative Assembly, Doc. AS (2) 104, VI *TP* 198–229, at p. 208.

[33] Explanatory Note by the Secretariat General, 9 September 1950, Doc. CM (50) 57, A 2781, VI *TP* 230–9, at p. 232.

MacBride, to enlarge the Committee so as to include representatives of the Consultative Assembly was not accepted.[34]

There was much discontent in the Consultative Assembly about the turn of events. On 5 November 1950, the Standing Committee expressed 'regret' that the amendments, including the right to property provision, were not included in the Convention.[35] Later in November, when the plenary Assembly convened, anger was expressed with the United Kingdom, to whom responsibility for omission of the right to property was attributed. The Assembly grudgingly accepted the fact that work would continue on a protocol where its concerns could be addressed.[36]

The Secretariat-General prepared a memorandum noting that the Assembly had drafted a text 'as a statement of general principles rather than as an exact definition' and that this approach had generally been rejected by the Committee of Ministers. 'It therefore appears necessary to define as accurately as possible what is meant by "arbitrary confiscation" and what exceptions are to be permitted in the general interest to the individual rights of enjoyment of one's possessions.' The Secretariat-General said definitions would need to take into account national legislation on such matters as nationalization, requisition in time of war, expropriation for public use, agrarian reform, confiscation in criminal law, death duties, and reversion to the State on intestacy.[37] The Secretary General wrote to Member States inviting them to prepare proposals for discussion by a Committee of Experts in February 1951 in view of adoption of a protocol to the Convention by the Committee of Ministers the following month.[38] He wrote again to Member States in early February, conveying a draft right to property provision proposed by the United Kingdom:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. This provision, however, shall not be considered as infringing in any way the right of a state to enforce such laws as it deems necessary either to serve the ends of justice or to secure the payment of monies due whether by way of taxes or otherwise, or to ensure the acquisition or use of property in accordance with the general interest.[39]

The United Kingdom subsequently proposed a change to its text 'in order to protect the principle of compensation' that changed the last phrase by inserting between 'or to ensure' and 'the acquisition' the words '. . . subject to compensation, . . .'. Alternatively, it

[34] Report of the Meeting [of the Committee of Ministers, 3 November 1950], VII *TP* 24–34, at p. 34.

[35] Minutes of the meeting held by the Standing Committee of the Consultative Assembly in Rome on 5 November 1950 (morning), Doc. AS/CP (2) PV 5, p. 2, A 3057, VII *TP* 82–4; Minutes of the fourth meeting held in the afternoon of 5 November 1950 [by the Standing Committee of the Consultative Assembly], Doc. AS/CP (2) PV 6, p. 2, A 3058, VII *TP* 84–5; Second Report on the work of the Standing Committee presented in accordance with the Resolution adopted by the Assembly on 6 September 1949, Doc. AS (2) 137, pp. 1126–7, VII *TP* 86–9.

[36] Report of the Consultative Assembly, 2nd session, 18 November 1950, VII *TP* 90–121.

[37] Note on the amendments to the Convention on Human Rights proposed by the Consultative Assembly about which the Committee of Ministers was not able to reach unanimous agreement, Doc. CM (50) 90, A 3034, VII *TP* 126–30, at pp. 126–8.

[38] Letter from the Secretary General of the Council of Europe to the Foreign Ministers of Member States, 18 November 1950, Doc. D 280/9/50, VII *TP* 180–1.

[39] Memorandum by the Secretariat setting forth the different texts proposed, Doc. CM/WP 4 (50) 3, CM/WP 1 (51) 29, A 4005, VII *TP* 192–7, at pp. 192–3. Also Letter from the Secretary General of the Council of Europe to the Foreign Ministers of Member States, 7 February 1951, Doc. D 1357, VII *TP* 184–7.

suggested adding at the end, following 'general interest', the words 'subject to such compensation as shall be determined by law'.[40]

In addition to the Consultative Assembly draft and the British text, Belgium submitted its own version:

> Every natural or legal person is entitled to the peaceful enjoyment of his possession. No-one shall be deprived of his possessions except in the public interest, in such cases and by such procedure as may be established by law and subject to fair compensation which shall be fixed in advance. The penalty of total confiscation of property shall not be permitted.
>
> The present measures shall not however infringe in any way the right possessed by states to pass legislation to control the use of property in accordance with the general interest or to impose texts or other contributions.[41]

Belgium also proposed a modification that placed a full stop in the second sentence after the words 'subject to fair compensation' and deleted the remainder of the first paragraph.[42]

The Committee of Experts met from 21 to 24 February 1951. The Report of the Committee of Experts to the Committee of Ministers indicates that it reached unanimity on the following sentence: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions.' However, the Committee did not find consensus on whether the Protocol should protect a right to compensation in the case of acquisition of private property in the public interest. France considered the phrase 'such possessions cannot be subjected to arbitrary confiscation' in the Consultative Assembly draft to be the most satisfactory. The majority of delegations supported the Belgian proposal. The United Kingdom was opposed to stating a general principle because it:

> did not think it possible to express this principle in terms which would be appropriate to all the various types of case which might arise, nor could it admit that decisions taken on this matter by the competent national authorities should be subject to revision by international organs. On the other hand, the words 'arbitrary confiscation' in the text proposed by the Assembly were imprecise, and if 'arbitrary' meant 'not in accordance with law' the idea was completely covered by the United Kingdom draft.[43]

France said it could accept the British proposal on the condition that the second sentence of the Assembly draft ('Such possessions cannot be subjected to arbitrary confiscation') be added after the first sentence of the British draft. The other delegations were also prepared to accept the British draft, but on the condition that the last two lines were replaced with the following: 'or to ensure the acquisition or use of property in accordance with the general interest, subject, in the case of acquisition, to such compensation as shall be determined in accordance with the conditions provided for by law'.[44]

[40] Proposed addition to the text of the United Kingdom Delegation, Doc. CM/WP 1 (51) 30, CM/WP VI (51) 4, VII *TP* 196–9.

[41] Proposal of the Belgian Government, Doc. CM/WP 1 (51) 25, CM/WP VI (51) 5, VII *TP* 192–3.

[42] Ibid.

[43] Report of the Committee of Experts to the Committee of Ministers, Doc. CM/WP 1 (51) 40, CM/WP VI (51) 7, A 4024, VII *TP* 204–13, at p. 208.

[44] Report of the Committee of Experts to the Committee of Ministers, Doc. CM/WP 1 (51) 40, CM/WP VI (51) 7, A 4024, VII *TP* 204–13, at pp. 206–9.

The Committee of Experts met again in April 1951. At the outset, Belgium, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, and Norway said they could accept a draft based on the Belgian proposal:

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 interest, in such cases and by such procedure as are established by law and subject to such compensation as shall be determined in accordance with the conditions provided for by law.

The present measures shall not however infringe, in any way, the right of a State to pass legislation to control the use of property in accordance with the general interest or to impose taxes or other contributions.

France, the United Kingdom, and the Saar could not agree, while Sweden and Turkey reserved their positions.[45] No progress was made at the meeting in resolving the differences.[46]

The Committee of Experts met yet again in June. By this point, the only outstanding issue in negotiations to adopt the Protocol concerned the right to property. The Committee was able to submit a proposal based upon the text cited above that had obtained broad support. However, the final phrase in the second sentence, following the words 'except in the public interest,' were replaced with: 'and subject to the conditions provided for by law and by the general principles of international law'. Also, the words 'The present measures' in the final sentence were replaced with 'The preceding provisions'.[47]

Advisers to the Ministers of Foreign Affairs met in Strasbourg on 17 July 1951 to see if a final agreement could be reached. The United Kingdom returned with yet another amendment. It proposed replacing the second paragraph with the following: 'The preceding provisions shall not, however, in any way infringe 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 of penalties imposed by the Courts.'[48] Acting on a letter from Germany seeking the record indicate 'the general principles of international law entail the obligation to pay compensation in cases of expropriation',[49] the Advisers stated that at the request of Germany and Belgium, it was agreed that 'the general principles of international law, in their present connotation, entailed the obligation to pay compensation to non-nationals in cases of expropriation'.[50] The Report also indicated that Sweden had requested that the conclusions mention 'that the general principles of international law referred to under Article 1 of the Protocol only applied to relations between a State and non-nationals'.[51] The Ministers' Advisers recommended the following text for consideration by the Committee of Ministers:

[45] Note relating to the right of property, Doc. CM/WP VI (51) 11, A 4388, VII *TP* 232–5.

[46] Report of the Committee of Experts to the Committee of Ministers (19 April 1951), Doc. CM (51) 33 final, A 4421, VII *TP* 250–5, at pp. 250–1.

[47] Report of the Committee of Experts to the Committee of Ministers (6 June 1951), Doc. CM/WP VI (51) 20 final, Appendix, VII *TP* 300–9, at pp. 304–5.

[48] Amendments proposed by the Government of the United Kingdom, Doc. CM/Adj. (51) 34, VII *TP* 314–15.

[49] Letter from M Blankenhorn [on behalf of the Minister for Foreign Affairs of the Federal Republic of Germany to the Secretary General of the Council of Europe (10 July 1951)], Doc. A 4652, VII *TP* 312–13.

[50] Conclusions of the Meeting of the Ministers' Advisers, Doc. CM, Point II, pp. 300–3, VII *TP* 324–7.

[51] Ibid.

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 interest, and subject to the conditions provided for by law and by the general principles of international law.

The present measures shall not, however, in any way infringe the right of a State to enforce such property in accordance with the general interest or to impose taxes, other contributions or penalties.[52]

The Committee of Ministers agreed on this text.

In preparation for examination of the text by the Consultative Assembly, the Secretariat-General prepared a commentary on the draft Protocol. Comments were made on three aspects of the draft text. The Commentary noted that the sentence '[s]uch possessions cannot be subjected to arbitrary confiscation' in the Consultative Assembly draft had been replaced, 'principally because the phrase "arbitrary confiscation" was thought to be too unprecise [sic] in a legal text, as it is subject to very varying interpretations'. The Commentary referred to the debate about whether to make deprivation of property 'subject to compensation'. It noted that at one time a majority of governments favoured such a reference but that others had made objections. However, even in the absence of an explicit reference, the Commentary said 'the phrase "subject to the conditions provided for by law" would normally require the payment of compensation, since it is normally provided for in legislation on the nationalisation or expropriation of property'. The reference to international law would guarantee compensation to foreigners even if it were not paid to nationals. Finally, the Commentary noted that the final sentence of the Assembly's text had been extended 'to make it clear that this article does not prevent the State from collecting taxes, or other penalties such as fines, even though they might constitute the whole of the property of the individual in question'.[53]

The Legal Committee of the Consultative Assembly adopted the right to property proposed by the Committee of Ministers.[54] But the debate was not quite over. At the December 1951 meeting of the Consultative Assembly, a radically altered version of article 1 was proposed as an amendment by one of the French deputies, Claude Hettier de Boislambert.[55] It was aimed at protecting rights of inheritance. Pierre-Henri Teitgen took the floor to confirm that although the text adopted by the Committee of Ministers differed in several details from the Assembly text, 'we have no objections as regards this Article guaranteeing the right to property'.[56] At his urging, Hettier de Boislambert agreed to withdraw the amendment.[57]

The Committee of Ministers finally adopted Protocol No. 1 in March 1952, a year after it was promised. Pursuant to Germany's request, it reiterated that 'as regards

[52] Recommendations of the Ministers' Advisers relating to the Agenda for the Session (1 August 1951), Doc. CM (51) 64 revised, A 5578 VII *TP* 326–33, at pp. 328–9.

[53] Commentary by the Secretariat General on the Draft Protocol (18 September 1951), Doc. AS/JA (3) 13, pp. 2–4, VIII *TP* 4–17, at pp. 8–11.

[54] Minutes of the Meeting of 1 October 1951 [of the Committee on Legal and Administrative Questions of the Consultative Assembly], Doc. AS/JA (3) PV 3, p. 2, VIII *TP* 16–19, at pp. 18–19; Report on the Draft Protocol to the Convention presented by the Committee on Legal and Administrative Questions, Doc. AS (3) 81, VIII *TP* 28–37, at pp. 34–5.

[55] Doc. AS (3) 93, Amendment No. 1, VIII *TP* 76–7.

[56] Consultative Assembly Sitting of 7 December 1951 (afternoon), VIII *TP* 76–115, at pp. 82–3.

[57] Consultative Assembly Sitting of 8 December 1951 (afternoon), VIII *TP* 114–71, at pp. 160–7.

Article 1, the general principles of international law in their present connotation entail the obligation to pay compensation to non-nationals in cases of expropriation'.[58]

The heading 'Protection of property' was added pursuant to Protocol No. 11.[59]

Analysis and interpretation

'[T]he first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful', the Court has said.[60] Three distinct rules are set out in article 1 of Protocol No. 1. The first sentence of the first paragraph presents the principle of peaceful enjoyment of possessions. This is a right recognized to every natural and legal person. The second sentence of the first paragraph prohibits the deprivation of possessions, but only 'in the public interest and subject to the conditions provided for by law and by the general principles of international law'. The second paragraph of article 1 recognizes that States Parties may control the use of property in accordance with the public interest. The Court has explained that the three rules 'are not, however, distinct in the sense of being unconnected'. The second and third rules deal with particular forms of interference with the right to peaceful enjoyment of property 'and should therefore be construed in the light of the general principle enunciated in the first rule'.[61] It has been said that all three rules 'are not to be seen as watertight or unconnected' and that they import 'a requirement of proportionality and the necessity of striking a fair balance between the demands of the community as a whole and the protection of the rights and interests of the individual'.[62]

The distinction between an interference with the peaceful enjoyment of possessions, under the first sentence, and the deprivation of possessions, under the second, is not always crystal clear. For example, in a case involving litigation directed against the State, it had been possible for the lawyer to recover fees due from the client directly from the State under a provision in the Code of Civil Procedure. This mode of payment had been agreed between the lawyer and her client. Subsequently, in the midst of the proceedings and after the client had been successful at first instance, the State enacted legislation to extinguish the claim, thereby preventing the lawyer from recovering the amount due for professional services. The Court considered this to be an interference with enjoyment of possessions and not a deprivation of them. The claim by the lawyer for her fees had not been brought to an end by the legislation, merely the possibility under the Code of Civil Procedure of recovering them by offsetting them against the amount payable by the State to the lawyer's client.[63]

[58] Resolution CM (52) 1, VIII *TP* 202–5.

[59] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, ETS 155, art. 4(a).

[60] *Khodorkovskiy and Lebedev v. Russia*, nos 11082/06 and 13772/05, § 869, 25 July 2013.

[61] *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 48, 19 February 2009; *James and Others v. the United Kingdom,* 21 February 1986, § 37, Series A no. 98; *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 61, Series A no. 52; see also *The Holy Monasteries v. Greece*, 9 December 1994, § 56, Series A no. 301-A; *Iatridis v. Greece* [GC], no. 31107/96, § 55, ECHR 1999-II; *Beyeler v. Italy* [GC], no. 33202/96, § 106, ECHR 2000-I.

[62] *Brosset-Triboulet and Others v. France* [GC], no. 34078/02, Joint Dissenting Opinion of Judges Bratza, Vajić, David Thòr Bjöorgvinsson, and Kalaydjieva, § 2, 29 March 2010.

[63] *Ambruosi v. Italy*, no. 31227/96, § 27, 19 October 2000.

Like other rights enshrined in the Convention and its Protocols the protection of property also has positive dimensions. This is underscored by the phrase 'shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention'. According to the Grand Chamber, 'this general duty may entail positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention. In the context of Article 1 of Protocol No. 1, those positive obligations may require the State to take the measures necessary to protect the right of property.'[64] In a very broad and general formulation, the Court said:

> When an interference with the right to peaceful enjoyment of possessions is perpetrated by a private individual, a positive obligation arises for the State to ensure in its domestic legal system that property rights are sufficiently protected by law and that adequate remedies are provided whereby the victim of an interference can seek to vindicate his rights, including, where appropriate, by claiming damages in respect of any loss sustained.[65]

Such measures may be either preventive or remedial.

The State is not, of course, directly liable in the case of private disputes. Its obligations 'are limited to providing the necessary assistance to the creditor in the enforcement of the respective court awards, for example, through a bailiff service or bankruptcy procedures'.[66] States are required to provide judicial procedures accompanied by the appropriate procedural guarantees so as to enable effective and fair adjudication of disputes between private parties including the possibility of claims to recover damages.[67] Even when it is the horizontal relations between private parties that are concerned, 'there may be public-interest considerations involved which may impose some obligations on the State'.[68] Moreover, although the Court does not in principle deal with disputes of a purely private nature, 'it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention'.[69] The boundaries between positive and negative obligations of the State with respect to article 1 do not lend themselves to precise definition. A case may be analysed in terms of a positive duty of the State or an interference by a public authority; in either case, the applicable criteria are substantively the same. 'In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole', according to the Grand Chamber.[70]

[64] *Amišić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia, and 'the former Yugoslav Republic of Macedonia'* [GC], no. 60642/08, § 100, 16 July 2014; *Broniowski v. Poland* [GC], no. 31443/96, § 143, ECHR 2004-V; *Likvidējamā p/s Selga and Vasiļevska v. Latvia* (dec.), nos 17126/02 and 24991/02, §§ 94–113, 1 October 2013.

[65] *Blumberga v. Latvia*, no. 70930/01, § 67, 14 October 2008.

[66] *Shestakov v. Russia* (dec.), no. 48757/99, 18 June 2002; *Krivonogova v. Russia* (dec.), no. 74694/01, 1 April 2004; *Kesyan v. Russia*, no. 36496/02, 19 October 2006.

[67] *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 96, ECHR 2002-VII.

[68] *Zolotas v. Greece (no. 2)*, no. 66610/09, § 39, ECHR 2013 (extracts); *Broniowski v. Poland* [GC], no. 31443/96, § 143, ECHR 2004-V.

[69] *Fabris v. France* [GC], no. 16574/08, § 60, ECHR 2013 (extracts); *Pla and Puncernau v. Andorra*, no. 69498/01, § 59, ECHR 2004-VIII.

[70] *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia, and 'the former Yugoslav Republic of Macedonia'* [GC], no. 60642/08, § 101, 16 July 2014; *Broniowski v. Poland* [GC], no. 31443/96, § 144, ECHR 2004-V.

Natural or legal person

The right to peaceful enjoyment of possessions is ensured to '[e]very natural or legal person'. It is the only right in the Convention and the Protocols where the protection is formally extended to corporate bodies. Article 34 of the Convention authorizes the Court to receive applications from 'any person, non-governmental organisation or group of individuals', a notion that must be larger than 'natural or legal persons' because a non-governmental organization may be an informal body without legal status and a group of individuals may not necessarily have a legal existence separate from that of its component members.[71] There does not appear to be any case law on the concept of 'legal person' within the scope of article 1 of Protocol No. 1.

Possessions

Even if it is 'possessions', and not 'property', that are protected by the first paragraph of article 1 of Protocol No. 1, the provision is 'in substance guaranteeing the right of property'.[72] The second paragraph, in which the exception to the general rule is stated, speaks of the 'use of property'. In the French version of the text, 'possessions' and 'property' are rendered as *biens* and *propriété*, suggesting that the two English terms are synonymous. The word 'Property' is also used in the title, added by Protocol No. 11.

'Possessions' may be 'existing possessions' in the sense of assets. If a property interest contemplated by article 1 of Protocol No. 1 is in dispute, it falls to the European Court to determine the applicant's legal position.[73] Article 1 does not enshrine any right to acquire property,[74] although in one case the Grand Chamber seemed to recognize the possibility of this taking place through 'adverse possession', despite the impossibility of such a thing happening under domestic law.[75] Article 1 may apply where a person has 'at least a "legitimate expectation" of obtaining effective enjoyment of a property right'.[76] By 'legitimate expectation' is meant something grounded in 'a legislative provision or a legal act bearing on the property interest in question'.[77] The Court does not apply the concepts of 'genuine dispute' and 'arguable claim' in determining whether a 'legitimate expectation' exists.[78]

[71] *Hyde Park and Others v. Moldova (no. 4)*, no. 18491/07, § 33, 7 April 2009; *Hyde Park and Others v. Moldova (nos 5 and 6)*, nos 6991/08 and 15084/08, § 31, 14 September 2010; *Christians against Racism and Fascism v. the United Kingdom*, no. 8440/78, Commission decision of 16 July 1980, (1981) 24 YB 178, DR 21, p. 138.

[72] *Marckx v. Belgium*, 13 June 1979, § 63, Series A no. 31.

[73] *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, § 61, ECHR 2007-III.

[74] *Kopecký v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX; *Slivenko and Others v. Latvia* (dec.) [GC], § 121, 23 January 2002.

[75] *Brosset-Triboulet and Others v. France* [GC], no. 34078/02, § 71, 29 March 2010: 'in the present case the time that elapsed had the effect of vesting in the applicants a proprietary interest in peaceful enjoyment of the house'. See also *Brosset-Triboulet and Others v. France* [GC], no. 34078/02, Concurring Opinion of Judge Casadevall, § 5, 29 March 2010.

[76] *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, § 61, ECHR 2007-III; *Von Maltzan and Others v. Germany* (dec.) [GC], nos 71916/01, 71917/01, and 10260/02, § 74, ECHR 2005-V; *Prince Hans-Adam II of Liechtenstein v. Germany [*GC], no. 42527/98, § 83, ECHR 2001-VIII.

[77] *Saghinadze and Others v. Georgia*, no. 18768/05, § 103, 27 May 2010.

[78] *Kopecký v. Slovakia* [GC], no. 44912/98, § 52, ECHR 2004-IX; *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 94, ECHR 2007-II.

From a temporal jurisdiction standpoint, there is no obligation under article 1 for the State to compensate the former owners or to return property transferred to it prior to ratification of the Convention and of Protocol No. 1. 'Deprivation of ownership or of another right *in rem* is in principle an instantaneous act and does not produce a continuing situation of "deprivation of a right"', the Grand Chamber has explained.[79] Thus, a property confiscated prior to entry into force of the Protocol is not a 'possession' that falls within the scope of article 1. Nor does article 1 apply where there is only a hope that 'an old property right which it has long been impossible to exercise effectively' may have survived.[80] However, it may extend to a particular benefit of which the persons concerned have been deprived on the basis of a discriminatory condition of entitlement.[81]

Although most States in Central and Eastern Europe have enacted some form of restitution legislation concerning property confiscated by former regimes, some have opted to do nothing in this respect, while others have made provision within certain limits.[82] If they chose to do so, States Parties are free to establish the scope of property restitution and the conditions under which it will be conducted.[83] For example, they may exclude categories of property owners from eligibility for restitution.[84] If, however, they enact a scheme by which formerly confiscated property is to be restored, this generates a new property right protected by article 1 for beneficiaries of the legislation.[85] Even if the relevant arrangements for restitution or compensation pre-date the ratification of Protocol No. 1, if the legislation has subsequently remained in force, then Protocol No. 1 may be applicable.[86]

The application of article 1 to various categories of assets has been discussed in the case law. The notion has an autonomous meaning that is not limited to ownership of physical goods, and 'certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions"'.[87] The scope of 'possessions' is independent of formal classifications found in domestic law.[88] According to the Court, 'the issue that needs to be examined is whether the circumstances of the case, considered as a whole, may

[79] *Von Maltzan and Others v. Germany* (dec.) [GC], nos 71916/01, 71917/01, and 10260/02, §§ 74, 81–82, ECHR 2005-V; *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII; *Gisela Mayer, Hans-Christoph Weidlich, and Bernd-Joachim Fullbrecht, Ortwin A. Hasenkamp, Hartwig Golf, Werner Klaussner v. Germany*, nos 18890/91, 19048/91, 19342/92, and 19549/92, Commission decision of 4 March 1996, (1996) 39 YB 86, DR 85, p. 5; *Ladislav and Aurel Brežny v. Slovakia*, no. 23131/93, Commission decision of 4 March 1996, (1996) 39 YB 96, DR 85, p. 65.

[80] *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII; *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 85, ECHR 2001-VIII; *Nerva and Others v. the United Kingdom*, no. 42295/98, § 43, ECHR 2002-VIII; *Stretch v. the United Kingdom*, no. 44277/98, § 32, 24 June 2003.

[81] *Andrejeva v. Latvia* [GC], no. 55707/00, § 79, ECHR 2009; *Fabris v. France* [GC], no. 16574/08, § 50, ECHR 2013 (extracts).

[82] *Maria Atanasiu and Others v. Romania*, nos 30767/05 and 33800/06, §§ 85–106, 12 October 2010.

[83] *Von Maltzan and Others v. Germany* (dec.) [GC], nos 71916/01, 71917/01, and 10260/02, §§ 74, 81–82, ECHR 2005-V; *Jantner v. Slovakia*, no. 39050/97, § 34, 4 March 2003.

[84] *Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], no. 39794/98, § 69, ECHR 2002-VII.

[85] *Maria Atanasiu and Others v. Romania*, nos 30767/05 and 33800/06, § 136, 12 October 2010; *Kopecký v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX; *Manushaqe Puto and Others v. Albania*, nos 604/07, 43628/07, 46684/07, and 34770/09, § 92, 31 July 2012.

[86] *Broniowski v. Poland* [GC], no. 31443/96, § 125, ECHR 2004-V.

[87] *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, § 53, Series A no. 306-B.

[88] See, e.g., *Brosset-Triboulet and Others v. France* [GC], no. 34078/02, § 71, 29 March 2010.

be regarded as having conferred on the applicant title to a substantive interest protected by that provision'.[89]

As a general principle, a proprietary interest that constitutes a claim or a debt must be rooted in national law, for example where the case law of the courts confirms its validity.[90] If there is no debt, article 1 does not apply.[91] In the case of an attempt to recover a sum that was unduly paid, the debtor cannot invoke article 1 because the sum owed cannot be considered a 'possession'.[92] An enforceable judgment debt is a 'possession' within the terms of article 1.[93] Future income constitutes a 'possession' pursuant to article 1 of Protocol No. 1 only if it has been earned or where an enforceable claim to it exists.[94] But there is no right to become the owner of property.[95]

With respect generally to non-physical assets, the Court will consider 'whether the legal position in question gave rise to financial rights and interests and thus had an economic value'.[96] Accordingly, article 1 has been applied to professional practices and their clientele,[97] to intellectual property,[98] to business permits and licences,[99] trade marks and copyright,[100] the right to use an internet domain name, [101] and to shares in limited liability companies.[102]

The European Convention does not generally deal with economic and social rights, and there is no obligation on States Parties to provide social security payments, or to any particular amount of such benefit.[103] In practice, all States Parties have such schemes for

[89] *Saghinadze and Others v. Georgia*, no. 18768/05, § 103, 27 May 2010; *Depalle v. France* [GC], no. 34044/02, § 62, ECHR 2010; *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 63, ECHR 2007-I; *Öneryıldız v. Turkey* [GC], no. 48939/99, § 123, ECHR 2004-XII.

[90] *Plechanow v. Poland*, no. 22279/04, § 83, 7 July 2009; *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 94, ECHR 2007-II; *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 65, ECHR 2007-I; *Kopecký v. Slovakia* [GC], no. 44912/98, § 52, ECHR 2004-IX; *Draon v. France* [GC], no. 1513/03, § 68, 6 October 2005.

[91] *Van der Mussele v. Belgium*, 23 November 1983, § 48, Series A no. 70.

[92] *Cheminade v. France* (dec.), no. 31599/96, 19 January 1999.

[93] *Kotov v. Russia* [GC], no. 54522/00, § 90, 3 April 2012; *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 59, Series A no. 301-B; *Burdov v. Russia*, no. 59498/00, § 40, ECHR 2002-III.

[94] *Ambruosi v. Italy*, no. 31227/96, § 20, 19 October 2000; *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 64, ECHR 2007-I.

[95] *Slivenko v. Latvia* (dec.) [GC], no. 48321/99, § 121, ECHR 2002-II; *Kopecký v. Slovakia* [GC], no. 44912/98, § 35 (b), ECHR 2004-IX; *Andrejeva v. Latvia* [GC], no. 55707/00, § 77, ECHR 2009; *Stec and Others v. the United Kingdom* [GC], nos 65731/01 and 65900/01, § 53, ECHR 2006-VI.

[96] Paeffgen *GmbH v. Germany* (dec.), nos 25379/04, 21688/05, 21722/05, and 21770/05, 18 September 2007.

[97] *Lederer v. Germany* (dec.), no. 6213/03, 22 May 2006; *Buzescu v. Romania*, no. 61302/00, § 81, 24 May 2005; *Wendenburg and Others v. Germany* (dec.), no. 71630/01, 6 February 2003; *Olbertz v. Germany* (dec.) no. 37592/97, 25 May 1999; *Döring v. Germany* (dec.), no. 37595/97, 9 November 1999; *Van Marle and Others v. the Netherlands*, 26 June 1986, § 41, Series A no. 101.

[98] *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, §§ 72, 78, ECHR 2007-I.

[99] *Megadat.com SRL v. Moldova*, no. 21151/04, §§ 62–63, ECHR 2008; *Bimer S.A. v. Moldova,* § 49; *Rosenzweig and Bonded Warehouses Ltd v. Poland*, no. 51728/99, § 49, 28 July 2005; *Capital Bank AD v. Bulgaria*, no. 49429/99, § 130, ECHR 2005-XII (extracts); *Tre Traktörer AB v. Sweden*, 7 July 1989, § 53, Series A no. 159.

[100] *Melnychuk v. Ukraine* (dec.), no. 28743/03, ECHR 2005-IX.

[101] *Paeffgen GmbH v. Germany* (dec.), nos 25379/04, 21688/05, 21722/05, and 21770/05, 18 September 2007.

[102] *Olczak v. Poland* (dec.), no. 30417/96, § 60, 7 November 2002; *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 91, ECHR 2002-VII.

[103] *Andrejeva v. Latvia* [GC], no. 55707/00, § 77, ECHR 2009; *Kjartan Ásmundsson v. Iceland*, no. 60669/00, § 39, ECHR 2004-IX; *Domalewski v. Poland* (dec.), no. 34610/97, ECHR 1999-V; *Janković v. Croatia* (dec.), no. 43440/98, ECHR 2000-X.

the payment of social benefits. This generates a property interest that falls under the scope of article 1.[104] It has also been applied to pensions and other forms of social security benefit[105] to the extent that some tangible and definable proprietary interest can be demonstrated. Previously, the Court and the Commission distinguished between contributory and non-contributory pension benefits for the purposes of applying article 1, but that has now been abandoned.[106] It now takes the view that 'when a State chooses to set up a pension scheme, the individual rights and interests deriving from it fall within the ambit of that provision, irrespective of the payment of contributions and the means by which the pension scheme is funded'.[107]

Peaceful enjoyment of property

The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property: *usus, fructus, abusus*,[108] to invoke the categories of Roman law that are reflected in all legal systems in one form or another. Provided there is a proprietary interest, the right to be protected against interference, even if it does not involve deprivation, is ensured by article 1. The protection of peaceful enjoyment of property must be read together with the second paragraph of article 1, where measures necessary to control the use of property are authorized. When the Court concludes that there has been an interference with the peaceful enjoyment of property, it will first examine whether the measures have a 'reasonable basis' and then assess whether or not 'the applicants have had to bear an individual and excessive burden which has upset the fair balance which should be struck between the requirements of the general interest and the protection of the right to the peaceful enjoyment of one's possessions'.[109] Any interference with the right to the peaceful enjoyment of possessions 'must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[110] The Court has explained that '[t]he concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, including, therefore, the second sentence, which is to be read in the light of the general principle enunciated in the first sentence'. In particular, 'there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measures applied by the State, including measures depriving a person of his of her possessions'.[111]

[104] *Stec and Others v. the United Kingdom* (dec.) [GC], nos 65731/01 and 65900/01, §§ 53–55, ECHR 2005-X; *Andrejeva v. Latvia* [GC], no. 55707/00, § 77, ECHR 2009; *Moskal v. Poland*, no. 10373/05, § 38, 15 September 2009.

[105] *Stec and Others v. the United Kingdom* (dec.) [GC], nos 65731/01 and 65900/01, §§ 53–55, ECHR 2005-X; *Andrejeva v. Latvia* [GC], no. 55707/00, § 77, ECHR 2009; *Moskal v. Poland*, no. 10373/05, § 38, 15 September 2009.

[106] *Stec and Others v. the United Kingdom* (dec.) [GC], nos 65731/01 and 65900/01, §§ 47–53, ECHR 2005-X

[107] *Andrejeva v. Latvia* [GC], no. 55707/00, § 76, ECHR 2009.

[108] *Mosteanu and Others v. Romania*, no. 33176/96, § 61, 26 November 2002; *Hirschhorn v. Romania*, no. 29294/02, § 57, 26 July 2007; *Chassagnou and Others v. France* [GC], nos 25088/94, 28331/95, and 28443/95, Dissenting Opinion of Judge Costa, § 9, ECHR 1999-III.

[109] *Matos e Silva, Lda., and Others v. Portugal*, 16 September 1996, § 72, *Reports of Judgments and Decisions* 1996-IV.

[110] *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 63, 19 February 2009; *Sporrong and Lönnroth v. Sweden,* 23 September 1982, § 69, Series A no. 52.

[111] *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 63, 19 February 2009; *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, § 38, Series A no. 332; *The former King of Greece and Others v. Greece*

The Court concluded that there was a violation of article 1 when the owner of property in occupied Cyprus had been unable to use, control, and enjoy her property as a result of the Turkish invasion. As the judgment explains, this could not be regarded as either deprivation of property or a control of use of property, falling instead within the meaning of the first sentence of article 1 as an interference with the peaceful enjoyment of possessions.[112] But in a case involving a citizen of Yugoslavia residing in Germany who did not take Croatian citizenship following the breakup of the country but who retained property within Croatia, the Court distinguished this with the situation in Cyprus. It said 'the rights entailed in the provisions of Article 1 of Protocol No. 1 do not encompass the right for a foreign citizen who owns property in another country to permanently reside in that county in order to use his property'.[113]

Withdrawal of a licence to conduct business activities constitutes interference with the right to peaceful enjoyment of possessions.[114] Even if it is not fully withdrawn, limitation of the licence may amount to depriving the right of its substance.[115]

The issue of peaceful enjoyment has also arisen in a series of cases involving hunting rights. Several States have legislation authorizing the vesting of hunting rights in private associations despite the objections of the actual landowners, who may be morally and ethically opposed to the practice as such. For example, in France the *Loi Verdeille* of 1964 compelled small landowners to transfer hunting rights to hunters' associations without compensation. It did not deprive them of property rights, but rather it interfered with the peaceful enjoyment by the owners. The European Court said this 'upset the fair balance to be struck between protection of the right of property and the requirements of the general interest'.[116] In a similar case from Luxembourg, there was some financial compensation for the landowners but the Court did not feel this to be decisive—it amounted to €3.25 per annum—and again concluded that the right to peaceful enjoyment had been breached.[117] It reached the same result in other cases.[118]

The right to dispose of one's property, the *abusus*, 'constitutes a traditional and fundamental aspect of the right of property'.[119] When Poland revised its rent control policy in order to deal with housing problems, it lowered the rent payable to such an extent that owners could not cover their operating expenses out of the income from tenants. This resulted in the reduction of the value of the tenement houses and 'entailed

[GC], no. 25701/94, §§ 89–90, ECHR 2000-XII; *Sporrong and Lönnroth v. Sweden,* 23 September 1982, § 73, Series A no. 52; *Beyeler v. Italy* [GC], no. 33202/96, § 107, ECHR 2000-I.

[112] *Loizidou v. Turkey* (merits), 18 December 1996, § 63, *Reports of Judgments and Decisions* 1996-VI; *Cyprus v. Turkey* [GC], no. 25781/94, §§ 186–189, ECHR 2001-IV.

[113] *Ilić v. Croatia* (dec.), no. 42389/98, 19 September 2000.

[114] *Tre Traktörer AB v. Sweden*, 7 July 1989, § 53, Series A no. 159; *Capital Bank AD v. Bulgaria*, no. 49429/99, § 130, ECHR 2005-XII (extracts); *Rosenzweig and Bonded Warehouses Ltd v. Poland*, no. 51728/99, § 49, 28 July 2005; *Bimer S.A. v. Moldova*, no. 15084/03, § 49, 10 July 2007.

[115] *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 177, ECHR 2012.

[116] *Chassagnou and Others v. France* [GC], nos 25088/94, 28331/95, and 28443/95, §§ 79, 82–85, ECHR 1999-III. Measures subsequently taken by France allowing for a form of 'conscientious objection' were approved by the Committee of Ministers: ResDH(2005)26 and *Chabauty v. France* [GC], no. 57412/08, § 25, 4 October 2012.

[117] *Schneider v. Luxembourg*, no. 2113/04, § 49, 10 July 2007.

[118] *Herrmann v. Germany* [GC], no. 9300/07, § 93, 26 June 2012; *Baudinière and Vauzelle v. France*, nos 25708/03 and 25719/03, 6 December 2007; *Piippo v. Sweden*, no. 70518/01, 21 March 2006; *Nilsson v. Sweden*, no. 11811/05, 26 February 2008.

[119] *Marckx v. Belgium*, 13 June 1979, § 63, Series A no. 31.

consequences similar to expropriation'. Although the owners were not deprived of their possessions, their right to enjoyment was infringed.[120] In other cases, the Court has rejected the '*de facto* expropriation' thesis to describe restrictions imposed on the right of property that have the consequence of reducing the value and thereby encroaching upon the possibility of disposing of the asset. Such measures do not amount to deprivation and are to be examined from the standpoint of the second sentence of the first sentence of paragraph 1 of article 1.[121] In some cases involving forfeiture and seizure for tax liability, the Court has taken the perspective of interference with control over possessions under paragraph 2, rather than deprivation of property under paragraph 1.[122]

Limitations periods are a common feature of national legislation. They are designed 'to ensure legal certainty and finality and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past'.[123] In a case concerning provisions of the Greek Civil Code, whereby a twenty-year limitation period applied to bank deposits, the Court noted that 'the twenty-year limitation period for agreements on the deposit of fungible goods was justified by an aim in the public interest, namely that of terminating, in the interests of the community, legal relationships that had been created so long before that their existence had become uncertain'.[124] This interference with the enjoyment of possessions was 'a drastic measure', especially because it applied to ordinary people who were not versed in the law. As a result, the Court said the State had a positive obligation 'to require that banks, in view of the potentially adverse consequences of limitation periods, should inform the holders of dormant accounts when the limitation period is due to expire and thus afford them the possibility to stop the limitation period running, for instance by performing a transaction on the account'.[125] Law applicable in the United Kingdom providing that the registered owner lost control of property where there had been 'adverse possession' for twelve years was deemed proportionate, although there were many dissenters in the Grand Chamber.[126]

Deprivation of possessions

At the heart of article 1 is the protection against deprivation of possessions. This is the second rule of the provision, set out in the second sentence of the first paragraph. Deprivation of possessions is subjected to certain conditions. It must be 'in the public interest', and 'subject to the conditions provided for by law and by the general principles

[120] *Hutten-Czapska v. Poland*, no. 35014/97, § 176, 22 February 2005; *Hutten-Czapska v. Poland* [GC], no. 35014/97, §§ 202–203, ECHR 2006-VII.

[121] *Anthony Aquilina v. Malta*, no. 3851/12, § 54, 11 December 2014; *Elia S.r.l. v. Italy*, no. 37710/97, §§ 57–58, ECHR 2001-IX; *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 65, Series A no. 52; *Erkner and Hofauer v. Austria*, 23 April 1987, § 74, Series A no. 117; *Poiss v. Austria*, 23 April 1987, § 6, Series A no. 117.

[122] *AGOSI v. the United Kingdom*, 24 October 1986, § 51, Series A no. 108; *Air Canada v. The United Kingdom*, 5 May 1995, § 34, Series A no. 316-A; *C.M. v. France* (dec.), no. 28078/95, ECHR 2001-VII; *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, § 59, Series A no. 306-B.

[123] *Zolotas v. Greece (no. 2)*, no. 66610/09, § 43, ECHR 2013 (extracts); *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, § 68, ECHR 2007-III; *Stubbings and Others v. the United Kingdom*, 22 October 1996, § 51, *Reports of Judgments and Decisions* 1996-IV.

[124] *Zolotas v. Greece (no. 2)*, no. 66610/09, § 48, ECHR 2013.

[125] Ibid., § 53.

[126] *J.A. Pye (Oxford) Ltd et J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, §§ 75–85, ECHR 2007-III; ibid., Joint Dissenting Opinion of Judges Rozakis, Bratza, Tsatsa-Nikolovska, Gylumyan, and Šikuta; ibid., Dissenting Opinion of Judge Loucaides Joined by Judge Kovler.

of international law'. The Court will also consider whether deprivation of property was 'proportionate'. In determining whether there is a deprivation of possessions governed by the second rule, the Court will look behind the appearances and investigate the realities of the situation complained of. Because 'the Convention is intended to guarantee rights that are "practical and effective", it has to be ascertained whether the situation amounted to a *de facto* expropriation'.[127]

In the public interest

The concept of 'public interest', which permits States to deprive persons of their property, has been distinguished with the necessity tests that are so familiar to the jurisprudence of the European Convention on Human Rights. The discretion accorded pursuant to the 'public interest' is wider in scope. As the European Commission of Human Rights explained in *Handyside v. The United Kingdom*, '[c]learly, the public or general interest encompasses measures which would be preferable or advisable, and not only essential, in a democratic society'. It considered that its duty under the Convention was 'to review the actions of member States purporting to be in the public or general interest, in order to establish that they have acted reasonably and in good faith'.[128] The Commission's view was endorsed by the Court. It added that in contrast with article 10(2) of the Convention, article 1 of Protocol No. 1 'sets the Contracting States up as sole judges of the "necessity" for an interference. Consequently, the Court must restrict itself to supervising the lawfulness and the purpose of the restriction in question.'[129]

In a subsequent decision, the Court referred to *Handyside*, noting that under the Convention system 'it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken'. It said that '[b]ecause of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest"'. The Court explained that the notion of 'public interest' was necessarily extensive, given that decisions to enact legislation expropriating property commonly involved controversial political, economic, and social issues. It said the Court would 'respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation'.[130] That there may exist alternative solutions does not impugn the contested legislation. As long as the legislature remains within the bounds of its margin of appreciation, 'it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislature's discretion should have been exercised in another way'.[131]

[127] *Brosset-Triboulet and Others v. France* [GC], no. 34078/02, § 81, 29 March 2010; *Brumărescu v. Romania* [GC], no. 28342/95, § 76, ECHR 1999-VII; *Sporrong and Lönnroth v. Sweden*, 23 September 1982, §§ 63, 69–74, Series A no. 52.

[128] *Handyside v. the United Kingdom*, no. 5493/72, Commission report of 30 September 1979, § 167. Also *Håkansson and Sturesson v. Sweden*, no. 11855/85, Commission decision of 15 July 1987, DR 53, p. 190.

[129] *Handyside v. the United Kingdom*, 7 December 1976, § 62, Series A no. 24.

[130] *James and Others v. the United Kingdom*, 21 February 1986, § 46, Series A no. 98. Also *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 53, 19 February 2009; *Beyeler v. Italy* [GC], no. 33202/96, § 112, ECHR 2000-I.

[131] *Zolotas v. Greece (no. 2)*, no. 66610/09, § 44, ECHR 2013 (extracts); *J.A. Pye (Oxford) Ltd. v. the United Kingdom*, no 44302/02, §§ 43–45, 15 November 2005.

Conditions provided by law

The second sentence of article 1 provides that in addition to a deprivation of property being in the 'public interest' it must also be 'provided by law'. The relevant provisions must satisfy the requirements of accessibility, precision, and foreseeability.[132] But the Court 'has limited power, however, to review compliance with domestic law'.[133] Its review is generally confined to considering whether national courts applied the applicable law in a manifestly erroneous manner or in such a way as to reach arbitrary conclusions.[134] It will also look at the aim pursued to ensure that it is legitimate. For example, it has taken the view that 'the proper conduct of criminal proceedings and, more generally, of fighting and preventing crime . . . undoubtedly falls within the general interest as envisaged in Article 1 of Protocol No. 1'.[135] Also, 'the protection of a country's cultural heritage is a legitimate aim capable of justifying the expropriation by the State of a building listed as "cultural property"'.[136] The disbarment of a lawyer had the effect of depriving him of his clientele and therefore was an interference with the enjoyment of possessions. The Court said that this pursued an aim that was in the general interest 'since it appeared to be legitimate for the FRG to review retrospectively the behaviour of persons, who after reunification, were authorised to practise the professions of lawyer, notary or lay judge throughout Germany, and who, by the nature of their work, were required to meet particularly high standards of integrity and morality, given that they were considered to be officers of the court and guarantors of the rule of law'. Such checks were designed to protect the public by verifying the integrity and morality of legal practitioners.[137]

Finally, the Court considers the proportionality of the measure, something described in the case law as striking a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The issue of 'fair balance' only becomes relevant 'once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary'.[138] This is where the issue of compensation arises. According to the Court, 'the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference'.[139] But article 1 of Protocol No. 1 does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of 'public interest' may call for less than reimbursement of the full market value of the

[132] *Beyeler v. Italy* [GC], no. 33202/96, §§ 108–109, ECHR 2000-I; *Hentrich v. France*, 22 September 1994, § 42, Series A no. 296-A; *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 110, Series A no. 102.

[133] *Håkansson and Sturesson v. Sweden*, 21 February 1990, § 47, Series A no. 171-A.

[134] *Tre Traktörer AB v. Sweden*, 7 July 1989, § 58, Series A no. 159.

[135] *Lavrechov v. the Czech Republic*, no. 57404/08, § 46, ECHR 2013; *Denisova and Moiseyeva v. Russia*, no. 16903/03, § 58, 1 April 2010.

[136] *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 54, 19 February 2009; *SCEA Ferme de Fresnoy v. France* (dec.), no. 61093/00, ECHR 2005-XIII; *Debelianovi v. Bulgaria*, no. 61951/00, § 54, 29 March 2007.

[137] *Döring v. Germany* (dec.), no. 37595/97, 9 November 1999.

[138] *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II.

[139] *Pyrantienė v. Lithuania*, no. 45092/07, § 40, 12 November 2013; *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 64, 19 February 2009; *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 121, Series A no. 102; *Broniowski v. Poland* [GC], no. 31443/96, § 182, ECHR 2004-V; *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 95, ECHR 2006-V.

expropriated property.[140] Indeed, there may be exceptional circumstances where no compensation is provided.[141] For example, interference with property will be in the public interest when the impugned measures are designed to correct mistakes of the authorities and restore the rights of ownership of former owners.[142]

The Court has said that 'where an issue in the general interest is at stake, in particular when the matter affects fundamental human rights such as those involving property, the public authorities must act in good time and in an appropriate and above all consistent manner'.[143] Described as the 'good governance principle',[144] it does not 'as a general rule, prevent the authorities from correcting occasional mistakes, even those resulting from their own negligence'.[145] In cases involving revocation of ownership of property that has been transferred erroneously, the Court has invoked the 'good governance principle'. It has said that 'where an issue in the general interest is at stake, in particular when the matter affects fundamental human rights such as those involving property, the public authorities must act in good time and in an appropriate and above all consistent manner'.[146] The authorities may be required not only to act promptly in correcting the mistake but also some form of compensation or reparation to the former *bona fide* holder of the property may be dictated.[147]

Under Turkish law, it was not possible to take into account that part of the value related to the architectural and historical features of a building for the purposes of compensation in the case of expropriation. The Court described such a valuation system as unfair because it enabled depreciation resulting from a property's listed status to be taken into account during expropriation, although any eventual appreciation was deemed irrelevant in determining the compensation for expropriation. 'Thus, not only is such a system likely to penalise those owners of listed buildings who assume burdensome maintenance costs, it deprives them of any value that might arise from the specific features of their property', it said.[148]

General principles of international law

Aside from article 1 of Protocol No. 1, there are only three other references to international law in the European Convention. In article 1, the clear intent of the drafters was to engage the international law concerning the expropriation of property. Customary international law 'permits States to expropriate foreign property if it is in the public

[140] *Pyrantienė v. Lithuania*, no. 45092/07, § 64, 12 November 2013; *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 121, Series A no. 102; *Broniowski v. Poland* [GC], no. 31443/96, § 182, ECHR 2004-V; *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 95, ECHR 2006-V.

[141] *Sociedad Anónima del Ucieza v. Spain*, no. 38963/08, § 76, 4 November 2014; *The Holy Monasteries v. Greece*, 9 December 1994, § 71, Series A no. 301-A; *Broniowski v. Poland* [GC], no. 31443/96, § 186, ECHR 2004-V.

[142] *Romankevic v. Lithuania*, no. 25747/07, § 35, 2 December 2014; *Pyrantienė v. Lithuania*, no. 45092/07, §§ 44–48, 12 November 2013.

[143] *Bogdel v. Lithuania*, no. 41248/06, § 65, 26 November 2013; *Moskal v. Poland*, no. 10373/05, § 51, 15 September 2009 .

[144] For the origins of the principle, before it was given the name 'good governance': *Beyeler v. Italy* [GC], no. 33202/96, § 120, ECHR 2000-I; *Megadat.com SRL v. Moldova*, no. 21151/04, § 72, ECHR 2008.

[145] *Bogdel v. Lithuania*, no. 41248/06, § 66, 26 November 2013.

[146] Ibid., § 65.

[147] *Romankevic v. Lithuania*, no. 25747/07, § 35, 2 December 2014; *Maksymenko and Gerasymenko v. Ukraine*, no. 49317/07, § 64, 16 May 2013.

[148] *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 70, 19 February 2009.

interest or for a public purpose, accomplished in a non-discriminatory fashion, and in conformity with due process'.[149] There has been controversy in international law with respect to the issue of compensation, although the debate has been mainly about the level or amount rather than about the existence of an obligation itself. A 1962 General Assembly resolution speaks of 'appropriate compensation',[150] whereas another resolution with the same title, adopted a decade later, says that 'each State is entitled to determine the amount of possible compensation and the mode of payment . . .'[151]

In early cases, the European Commission took the view that the principles of international law referred to in article 1 were inapplicable to nationals of the respondent State.[152] The Commission later adjusted its view that article 1 'requires member States to respect the property of "every natural or legal person" within their jurisdiction, which of necessity includes nationals. To decide otherwise would be to render the Article meaningless.'[153] Subsequently, the Court explained that the reference to international law serves at least two purposes:

> Firstly, it enables non-nationals to resort directly to the machinery of the Convention to enforce their rights on the basis of the relevant principles of international law, whereas otherwise they would have to seek recourse to diplomatic channels or to other available means of dispute settlement to do so. Secondly, the reference ensures that the position of non-nationals is safeguarded, in that it excludes any possible argument that the entry into force of Protocol No. 1 (P1) has led to a diminution of their rights. In this connection, it is also noteworthy that Article 1 (P1-1) expressly provides that deprivation of property must be effected 'in the public interest': since such a requirement has always been included amongst the general principles of international law, this express provision would itself have been superfluous if Article 1 (P1-1) had had the effect of rendering those principles applicable to nationals as well as to non-nationals.[154]

The Court concluded that the negotiating history as a whole shows 'that the reference to the general principles of international law was not intended to extend to nationals'.[155]

According to Luigi Condorelli, when there is a reference to 'principles of international law' in a treaty, it can only be in order to resolve a profound difficulty among the drafters in reaching a consensus, who were unable to reconcile positions about the extent to which an obligation of compensation should be a condition for lawful taking of property.[156] Professor Condorelli notes that this debate has since been resolved to the extent that the Court has established a strong presumption in favour of compensation regardless of the nationality of the owner of the possessions in question. Indeed, in recent decades there does not appear to have been any litigation of any significance at the European Court

[149] Ursula Kriebaum and August Reinisch, 'Property, Right to, International Protection', in Rüdiger Wolfrum, ed., *The Max Planck Encyclopedia of Public International Law*, Vol. III, Oxford: Oxford University Press, 2012, pp. 522–33, at p. 525.

[150] Permanent Sovereignty over Natural Resources, UN Doc. A/RES/1803 (1962), para. 4.

[151] Permanent Sovereignty over Natural Resources, UN Doc. A/RES/3171 (1973), para. 3.

[152] *Gudmundsson v. Iceland*, no. 511/59, Commission decision of 20 December 1960, (1960) 3 YB 394, at p. 426; *X v. Federal Republic of Germany*, no. 1870/63, Commission decision of 16 December 1965, (1965) 8 YB 218.

[153] *Handyside v. the United Kingdom*, no. 5493/72, Commission report of 30 September 1979, § 163.

[154] *James and Others v. the United Kingdom*, 21 February 1986, § 62, Series A no. 98; *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 115, Series A no. 102.

[155] *James and Others v. the United Kingdom*, 21 February 1986, §§ 64, 66, Series A no. 98; *Lithgow and Others v. The United Kingdom*, 8 July 1986, § 115, Series A no. 102.

[156] Luigi Condorelli, 'Premier Protocole Additionnel, Article 1', in Pettiti et al., *La Convention européenne*, pp. 971–97, at p. 986.

concerning the issue of 'principles of international law' as it relates to the property rights of non-nationals.

Control of the use of property

The second paragraph of article 1 enables the State Party 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 distinction with deprivation of the right to enjoy one's possessions, governed by the first paragraph of article 1, is not always evident, and the parties may admit that article 1 applies but disagree about whether it is a question of deprivation or merely of control.[157] In practice, the methodology used in examining cases where this provision applies is not significantly different from that of the other two rules set out in article 1.[158] The interference must be prescribed by law and it must pursue one or more legitimate aims. There must be a relationship of proportionality between the means that are employed and the aim or aims of the legislation. This involves assessing whether a 'fair balance' has been struck between the requirements of the 'general interest' and those of the individual concerned.[159] The second paragraph of paragraph 1 invokes the criterion of 'general interest', whereas the first paragraph refers to 'public interest'. The case law has not attempted to make any meaningful distinction between the two.[160]

The State has a broad margin of appreciation in this area. Its power to review whether domestic law has been complied with is limited.[161] The Court has said that '[i]t is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, even in those fields where the Convention "incorporates" the rules of that law, since the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection'.[162] The deference for national courts is especially robust when difficult questions of interpretation of domestic law are involved.[163] Where the general interest of the community is pre-eminent, for example in cases involving regional planning and environmental conservation policies, the margin of appreciation is greater than where civil rights alone are at stake.[164]

A classic example of control of the use of property 'in accordance with the general interest' concerns legislation governing residential tenancies.[165] This is the area where the Court may come the closest to ruling on economic and social rights. The Court has held 'that in spheres such as housing, States necessarily enjoy a wide margin of appreciation not

[157] E.g., *Lindheim and Others v. Norway*, nos 13221/08 and 2139/10, §§ 75–78, 12 June 2012.

[158] *N.K.M. v. Hungary*, no. 66529/11, § 44, 14 May 2013; *R.Sz. v. Hungary*, no. 41838/11, § 32, 2 July 2013.

[159] *AGOSI v. the United Kingdom*, 24 October 1986, § 51, Series A no. 108; *Sporrong and Lönnroth v. Sweden*, 23 September 1982, §§ 69–73, Series A no. 52; *Handyside v. the United Kingdom*, 7 December 1976, §§ 62–63, Series A no. 24.

[160] *Hutten-Czapska v. Poland* [GC], no. 35014/97, § 165, ECHR 2006-VIII.

[161] *Allan Jacobsson v. Sweden (no. 2)*, 19 February 1998, § 57, *Reports of Judgments and Decisions* 1998-I.

[162] *Pavlinović and Tonić v. Croatia* (dec.), no. 17124/05 and 17126/05, 3 September 2009.

[163] *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 83, ECHR 2007-I.

[164] *Gorraiz Lizarraga and Others v. Spain*, no.62543/00, §70, ECHR 2004-III; *Alatulkkila and Others v. Finland*, no. 33538/96, § 67, 28 July 2005; *Valico S.r.l. v. Italy* (dec.), no. 70074/01, ECHR 2006-III; *Lars and Astrid Fägerskiöld v. Sweden* (dec.), no. 37664/04, 26 February 2008.

[165] *Hutten-Czapska v. Poland* [GC], no. 35014/97, §§ 160–168, ECHR 2006-VIII; *Edwards v. Malta*, no. 17647/04, §§ 52–78, 24 October 2006; *Srpska pravoslavna Opština na Rijeci v. Croatia* (dec.), no. 38312/02, 18 May 2006.

only in regard to the existence of a problem of public concern warranting measures for control of individual property but also to the choice of the measures and their implementation'.[166] It has also noted that 'State control over levels of rent is one such measure and its application may often cause significant reductions in the amount of rent chargeable.' Moreover, the principles that govern the matter 'apply equally, if not *a fortiori*, to measures adopted in the course of the fundamental reform of a country's political, legal and economic system in the transition from a totalitarian regime to a democratic State'.[167] According to the Court, 'where the operation of the rent-control legislation involves wide-reaching consequences for numerous individuals and has economic and social consequences for the country as a whole, the authorities must have considerable discretion not only in choosing the form and deciding on the extent of control over the use of property, but also in deciding on the appropriate timing for the enforcement of the relevant laws'.[168] The Court has indicated its sensitivity to the 'reconciliation of the conflicting interests of landlords and tenants', observing that the State authorities are required 'on the one hand, to secure the protection of the property rights of the former and, on the other, to respect the social rights of the latter, often vulnerable individuals'.[169]

The Court has often ruled in favour of the landlord, probably too often. With regard to Croatian legislation governing rent control, it referred to factors such as the small amount of protected rent to which the applicant was entitled, the statutory burdens placed upon him, the low level of profit, the fact that he had not been able to recover possession of the flat for fifty-five years, and 'the absence of adequate procedural safeguards for achieving a balance between the competing interests of landlords and protected'. The Court said there were no discernable demands of general interest that could justify such restrictions and that there was 'not a fair distribution of the social and financial burden resulting from the reform of the housing sector. Rather, a disproportionate and excessive individual burden was placed on the applicant as a landlord'.[170] A similar conclusion was reached with respect to legislation in Slovakia,[171] and in a case dealing with ground rent in Norway.[172] In a Maltese case, the Court considered that rent control legislation no longer corresponded to the economic reality of the country, and as a result could no longer be justified.[173]

Taxation, contemplated by the second paragraph of article 1, 'is in principle an interference with the right guaranteed by the first paragraph of Article 1 of Protocol No. 1, since it deprives the person concerned of a possession, namely the amount of money which must be paid'.[174] Noting that 'the interference is generally justified under the second paragraph of this Article, which expressly provides for an exception as regards the payment of taxes or other contributions', the Grand Chamber has insisted that 'the

[166] *Statileo v. Croatia*, no. 12027/10, § 140, 10 July 2014.
[167] *Bittó and Others v. Slovakia*, no. 30255/09, § 96, 28 January 2014.
[168] *Anthony Aquilina v. Malta*, no. 3851/12, § 61, 11 December 2014.
[169] Ibid., § 114.
[170] *Statileo v. Croatia*, no. 12027/10, § 143, 10 July 2014. See also *Ghigo v. Malta*, no. 31122/05, § 69, 26 September 2006; *Edwards v. Malta*, no. 17647/04, § 78, 24 October 2006.
[171] *Bittó and Others v. Slovakia*, no. 30255/09, §§ 115–117, 28 January 2014.
[172] *Lindheim and Others v. Norway*, nos 13221/08 and 2139/10, § 134, 12 June 2012.
[173] *Anthony Aquilina v. Malta*, no. 3851/12, § 65, 11 December 2014.
[174] *Buffalo S.r.l. en liquidation v. Italy*, no. 38746/97, § 32, 3 July 2003.

issue is nonetheless within the Court's control, since the correct application of Article 1 of Protocol No. 1 is subject to its supervision'.[175]

The approach to the second exception in the second paragraph of article 1, 'to secure the payment of taxes or other contributions or penalties', is much the same as it is with the 'general interest'. The measures must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. A reasonable relationship of proportionality between the means employed and the aims pursued is required.[176] Thus, 'the financial liability arising out of the raising of tax or contributions may adversely affect the guarantee secured under this provision if it places an excessive burden on the person or the entity concerned or fundamentally interferes with his or its financial position'.[177] For example, where Swedish authorities sold a valuable asset at auction that had been seized in order to enforce tax liability, obtaining a sum that was dramatically lower than the actual value of the property in question, the Court held that article 1 had been breached because an individual and excessive burden had been imposed upon the applicant.[178] In this area, there is considerable deference to the national legislature. The Court has explained that '[d]ecisions in this area normally involve, in addition, an assessment of political, economic and social problems which the Convention leaves to the competence of the member States, as the domestic authorities are clearly better placed than the Convention organs to assess such problems'.[179]

The term 'contributions' has been interpreted as covering court costs.[180]

It is not uncommon for laws imposing taxes to be given a retrospective effect. The Court has confirmed that this is not inconsistent with the lawfulness requirement imposed by article 1 of Protocol No. 1.[181]

Discrimination

The Grand Chamber has noted that article 14 does not expressly prohibit distinctions based 'on the ground of property'. It is not deemed a criterion of distinction that is unacceptable as a matter of principle, as is the case with racial or ethnic origin, or unacceptable in the absence of very weighty reasons, as is the case with gender and sexual orientation.[182] This does not mean, however, that there can never be a violation of the Convention related to article 1 of Protocol No. 1 in conjunction with article 14.

The area of social benefits—which are recognized as 'possessions' and therefore within the ambit of article 1—is fraught with distinctions and therefore with allegations of

[175] *Burden v. the United Kingdom* [GC], no. 13378/05, § 59, ECHR 2008.

[176] *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23 October 1997, § 80, *Reports of Judgments and Decisions* 1997-VII.

[177] *Ferretti v. Italy*, no. 25083/94, Commission decision of 26 February 1997; *Buffalo S.r.l. in liquidation v. Italy*, no. 38746/97, § 32, 3 July 2003.

[178] *Rousk v. Sweden*, no. 27183/04, § 126, 25 July 2013.

[179] *Azienda Agricola Silverfunghi S.a.s. and Others v. Italy*, nos 48357/07, 52677/07, 52687/07, and 52701/07, § 103, 24 June 2014; *Musa v. Austria*, no. 40477/98, Commission decision of 10 September 1998; *Baláž v. Slovakia* (dec.), no. 60243/00, 16 September 2003.

[180] *Perdigão v. Portugal* [GC], no. 24768/06, § 61, 16 November 2010; *Aires v. Portugal*, no. 21775/93, Commission decision of 25 May 1995, DR 81, p. 48.

[181] *Maggio and Others v. Italy*, nos 46286/09, 52851/08, 53727/08, 54486/08, and 56001/08, § 60, 31 May 2011; *Arras and Others v. Italy*, no. 17972/07, § 81, 14 February 2012.

[182] *Chabauty v. France* [GC], no. 57412/08, § 50, 4 October 2012.

prohibited discrimination. The Court insists that although there is no restriction on the freedom of States Parties to decide whether to have in place any form of social security scheme, nor any obligation to do so, if a State creates a benefits or pension scheme this must comply with article 14 of the Convention.[183] The leading case, *Stec and Others v. The United Kingdom*, concerns differences in pensionable age between men and women. The Grand Chamber noted that the rationale for such a distinction was to mitigate the 'financial inequality and hardship arising out of women's traditional unpaid role of caring for the family in the home rather than earning money in the workplace' and that as a measure to correct 'factual inequalities' between men and women it was objectively justified under Article 14.[184] Over time, this changed but, as the Grand Chamber explained, 'the development of parity in the working lives of men and women has been a gradual process, and one which the national authorities are better placed to assess'.[185]

Ukraine imposed a rule whereby retirement pensions were not payable to persons living abroad. The Court considered that this constituted a distinction based on personal status in accordance with article 14 of the Convention. It said that Ukraine had provided no justification for the measure, adding that 'the Government has not relied on considerations of international cooperation to justify treating pensioners living in Ukraine differently from those living abroad'. Referring to the 1952 International Labour Organisation's Social Security (Minimum Standards) Convention that authorizes suspension of pension benefits to non-residents, the European Court said it was 'not prevented from defining higher standards on the basis of the Convention than those contained in other international legal instruments'. It went on to say that '[t]he rise of population mobility, the higher levels of international cooperation and integration, as well as developments in the area of banking services and information technologies no longer justify largely technically motivated restrictions in respect of beneficiaries of social security payments living abroad, which may have been considered reasonable in the early 1950s'. Consequently, there was a breach of article 14 in conjunction with article 1 of Protocol No. 1.[186]

The Court rejected the claim of two elderly sisters who had lived together all their lives. They argued that property taxes imposed on the surviving sister following the death of one of them would pose a discriminatory burden because married cohabiting couples as well as same-sex couples were not exposed to the same liability. 'States, in principle, remaining free to devise different rules in the field of taxation policy', the Grand Chamber said.[187] Cohabiting sisters could not be equated with married or same-sex couples.

In a case concerning hunting rights, a small landowner invoked the Court's judgment finding a violation because French legislation had assigned the rights to associations without regard to the views of some owners who were opposed to the practice on ethical reasons. The applicant argued, unsuccessfully, that this was discrimination because it did not take into account the encroachment on the rights of landowners who had principles opposed to hunting.

[183] *Stec and Others v. the United Kingdom* (dec.) [GC], nos 65731/01 and 65900/01, §§ 54–55, ECHR 2005-X; *Stec and Others v. the United Kingdom* [GC], nos 65731/01 and 65900/01, § 53, ECHR 2006-VI.

[184] *Stec and Others v. the United Kingdom* [GC], nos 65731/01 and 65900/01, § 61, ECHR 2006-VI.

[185] Ibid., § 63.

[186] *Pichkur v. Ukraine,* no. 10441/06, §§ 52–54, 7 November 2013.

[187] *Burden v. the United Kingdom* [GC], no. 13378/05, § 65, ECHR 2008.

Reservations and declarations

Upon ratification, Luxembourg made the following reservation: 'Désirant éviter toute incertitude en ce qui concerne l'application de l'article 1er du Protocole additionnel par rapport à la loi luxembourgeoise du 26 avril 1951 qui concerne la liquidation de certains biens, droits et interêts ci-devant ennemis, soumis à des mesures de séquestre, *Déclare* réserver les dispositions de la loi du 26 avril 1951 désignée ci-dessus.'[188]

Austria made a reservation to Protocol No. 1 that was associated with the obligations it assumed under the State Treaty: 'being desirous of avoiding any uncertainty concerning the application of Article 1 of the Protocol in connection with the State Treaty of 15th May 1955 for the Restoration of and Independent and Democratic Austria, declares the Protocol ratified with the reservations that there shall be no interference with the provisions of Part IV "Claims arising out of the War" and Part V "Property, Rights and Interests" of the abovementioned State Treaty'.[189] However, the law itself was not referred to in the reservation. The Commission held that in making the reservation, 'Austria must necessarily have had the intention of excluding from the scope of the First Protocol everything forming the subject matter of Parts IV and V of said Treaty'. Accordingly, Austria's reservation must be interpreted as intended to cover all legislative and administrative measures directly related to the subject matter of Parts IV and V of the State Treaty'.[190] Later, the Commission expressed its intent to reconsider its position.[191]

Portugal formulated the following reservation: 'Article 1 of the Protocol will be applied subject to Article 82 of the Constitution of the Portuguese Republic, which provides that expropriations of large landowners, big property owners and entrepreneurs or shareholders may be subject to no compensation under the conditions to be laid down by the law.'[192] The United Kingdom reacted to the reservation with a letter to the Secretary General of the Council of Europe 're-affirm[ing] the view of the Government of the United Kingdom that the general principles of international law require the payment of prompt, adequate and effective compensation in respect of the expropriation of foreign property'.[193] Similar statements were made by Germany and France. The Secretary General replied to each country, noting that the letters did not constitute a formal objection to the Portuguese reservation but that they would nevertheless be circulated to Member States.[194] The Portuguese reservation to article 1 of Protocol No. 1 was withdrawn in 1987.[195]

San Marino formulated a reservation declaring that 'having regard to the provisions of law in force which govern the use of goods in conformity with the general interest', the principle set forth in article 1 'has no bearing on the regulations in force concerning the real estate of foreigners'.[196]

[188] (1955–56–57) 1 YB 42.
[189] (1958–59) 2 YB 88–91.
[190] *F. H. jr. v. Austria*, no. 1452/62, Commission decision of 18 December 1963, (1963) 6 YB 268, at p. 276. Also *Association X v. Austria*, no. 473/59, Commission decision of 29 August 1959, (1958–59) 2 YB 400.
[191] *X v. Austria*, no. 8180/78, Commission decision of 10 May 1979, DR 20, p. 26.
[192] (1978) 21 YB 16–19.
[193] (1979) 22 YB 16–17.
[194] Ibid., pp. 16–23.
[195] (1987) 30 YB 4–5.
[196] (1989) 32 YB 5.

Invoking article 33 of its Constitution, Spain made three reservations to article 1: '1. The right to private property and to inheritance is recognised. 2. The social function of these rights shall determine their scope, as provided for by law. 3. No person shall be deprived of their property or their rights except for a cause recognised as being in the public interest or in the interest of society and in exchange for fitting compensation as provided for by law.'[197]

Bulgaria made a reservation stating that article 1 of Protocol No. 1 'shall not affect the scope or content of Article 22, paragraph 1 of the Constitution of the Republic of Bulgaria, which states that: "No foreign physical person or foreign legal entity shall acquire ownership over land, except through legal inheritance. Ownership thus acquired shall be duly transferred."'[198]

Upon ratification on 16 April 1996, Estonia formulated the following reservation:

> In accordance with Article 64 [now article 57] of the Convention, the Republic of Estonia declares that the provisions of Article 1 of the First Protocol shall not apply to the laws on property reform which regulate the restoration or compensation of property nationalised, confiscated, requisitioned, collectivised or otherwise unlawfully expropriated during the period of Soviet annexation; the restructuring of collectivised agriculture and privatisation of state owned property.

The reservation was completed with a lengthy list of relevant legislation.[199] The Court has upheld the validity of the Estonian reservation.[200] But it has also observed: 'The reservation only covers laws in force at the material time and does not extend to later amendments to the restitution laws which might subsequently be subjected to Convention scrutiny. Moreover it only concerns substantive as opposed to procedural questions in the field of the property issues encompassed by its terms.'[201] It has suggested that the reservation cannot apply to subsequent amendments to the Property Reform (Principles) Act.[202] Upon ratification in 1997, Latvia made a similar reservation to Protocol No. 1.[203] It has also been upheld by the Court.[204]

Georgia has made several reservations to article 1 of Protocol No. 1. Georgia stated that article 1 'shall not apply to persons who have or will obtain status of "internally displaced persons" until the elimination of circumstances motivating the granting of this status (until the restoration of the territorial integrity of Georgia)'. There are several other detailed reservations relating to Georgian legislation.[205]

[197] (1990) 33 YB 9.
[198] (1992) 35 YB 5.
[199] (1996) 39 YB 23–25.
[200] *Shestjorkin v. Estonia* (dec.), no. 49450/99, 15 June 2000; *Põder and Others v. Estonia* (dec.), no. 67723/01, 26 April 2005. Also *Vesterby v. Estonia*, no. 34476/97, 1 July 1998; *Stalas v. Estonia*, no. 40108/98, Commission decision of 21 October 1998; *Elias v. Estonia*, no. 41456/98, Commission decision of 21 October 1998.
[201] Ibid.; *Põder and Others v. Estonia* (dec.), no. 67723/01, 26 April 2005.
[202] *Põder and Others v. Estonia* (dec.), no. 67723/01, 26 April 2005.
[203] (1997) 40 YB 49–52.
[204] *Koslova and Smirnova v. Latvia* (dec.), no. 57381/00, 23 October 2001; *Liepājnieks v. Latvia* (dec.), no. 37586/06, § 45, 2 November 2010.
[205] (2002) 45 YB 19.

Further reading

Corneliu Bîrsan, 'La protection du droit de propriété: développements récents de la jurisprudence de la Cour européenne des droits de l'homme', in Lucius Caflisch, Johan Callewaert, Roderick Liddell, Paul Mahoney, and Mark Villiger, eds, *Liber Amicorum Luzius Wildhaber*, Kehl, Germany: N.P. Engel, 2007, pp. 5–24.

Ali Riza Çoban, *Protection of Property Rights within the European Convention on Human Rights*, Farnham, UK: Ashgate, 2004.

Luigi Condorelli, 'Premier Protocole Additionnel, Article 1', in Pettiti et al., *La Convention européenne*, pp. 971–97.

Hélène Ruiz Fabri, 'The Approach taken by the European Court of Human Rights to the Assessment of Compensation for Regulatory Expropriations of the Property of Foreign Investors', (2002–2003) 1 *New York University Environmental Law Journal* 148.

Frowein/Peukert, *MenschenRechtsKonvention* Vladimiro Zagrebeslsky, pp. 639–70.

Grabenwarter, *European Convention*, pp. 365–80.

Harris et al., *Law of the European Convention*, pp. 655–96.

Timo Koivurova, 'Jurisprudence of the European Court of Human Rights regarding Indigenous Peoples: Retrospect and Prospects', (2011) 18 *International Journal on Minority and Group Rights* 1.

Richard Lang, 'Unlocking the First Protocol: Protection of Property and the European Court of Human Rights', (2008) 29 *HRLJ* 1.

Helen Mountfield, 'Regulatory Expropriations in Europe: The Approach of the European Court of Human Rights', (2002–2003) 11 *New York University Environmental Law Journal* 136.

Petra Herzfeld Olsson, 'Every Natural or Legal Person is Entitled to the Peaceful Enjoyment of His or Her Possessions: Article 1, Protocol 1 to the Euroepan Convention on Human Rights', in Filip Dorssemont, Klaus Lörcher, and Isabelle Schömann, eds, *The European Convention on Human Rights and the Employment Relation*, Oxford/Portland, OR: Hart, 2013, pp. 381–416.

Kudret Özersay and Ayla Gürel, 'Property and Human Rights in Cyprus: The European Court of Human Rights as a Platform of Political Struggle', (2008) 44 *Middle Eastern Studies* 291.

Ovey/White, *Jacobs and White, European Convention*, pp. 300–19.

Arjen van Rijn, 'Right to the Peaceful Enjoyment of One's Possessions (Article 1 of Protocol No. 1)', in Van Dijk et al., *Theory and Practice*, pp. 863–93.

Egon Schwelb, 'The Protection of the Right of Property of Nationals under the First Protocol to the European Convention on Human Rights', (1964) 13 *American Journal of Comparative Law* 518.

Maya Sigron, *Legitimate Expectations Under Article 1 of Protocol No. 1 to the European Convention on Human Rights*, Antwerp: Intersentia, 2014.