



# The right to property

*A guide  
to the implementation  
of Article 1 of Protocol No. 1  
to the European Convention  
on Human Rights*

Monica Carss-Frisk

Human rights handbooks, No. 4



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# I Overview

## Introduction

1. Article 1 of Protocol No. 1 to the European Convention on Human Rights guarantees **the right to property**.<sup>1</sup>
2. It provides:  
*"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."*
3. The Convention is not alone among international human rights instruments in recognising the right to property.<sup>2</sup> The inclusion of the right in the European Convention, however, was controversial. The United Kingdom and Sweden, in particular, were concerned as to whether including the right to property in the Convention might place too much of a fetter on the power of States to implement programmes of nation-

1 *Marckx v. Belgium*, A31 (1979).

2 The Universal Declaration of Human Rights provides, for example, that "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." (Cf. the International Covenant on Civil and Political Rights, where the right has not been included).

3 See Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (1995), p. 516.

alisation of industries for political and social purposes.<sup>3</sup> The formulation that was ultimately adopted provides a qualified right to property.<sup>4</sup>

4. The State accordingly has a wide margin of appreciation<sup>5</sup> in implementing social and economic policies that have the effect of interfering with the right to property.<sup>6</sup> But this does not mean that the Court has no role to play in assessing the legitimacy of such an interference. As the European Court of Human Rights observed in *James v. the United Kingdom*:<sup>7</sup>

...although the Court cannot substitute its own assessment for that of the national authorities, it is bound to review the contested measure under Article 1 of Protocol No. 1 and, in so doing, to make an inquiry into the facts with reference to which the national authorities acted. (para. 46)

5. Particularly in recent years, there have been many cases in which the European Court of Human Rights has found that the State has exceeded its margin of appreciation and has violated the right to property guaranteed by Article 1 of Protocol No. 1.<sup>8</sup>

## Broad overview of the right

### Scope

6. The first thing to bear in mind when considering Article 1 of Protocol No. 1 is that **the concept of property, or “possessions”, is very broadly interpreted**. It covers a range of economic interests. The following have been held to fall within the protection of Article 1: movable or immovable property, tangible or intangible interests, such as shares, patents, an arbitration award, the entitlement to a pension, a landlord’s entitlement to rent, the economic interests connected with the running of a business, the right to exercise a profession, a legitimate expectation that a certain state of affairs will apply, a legal claim, and the clientele of a cinema.
7. But the protection of Article 1 of Protocol No. 1 does not apply unless and until it is possible to lay a claim to the property concerned: it is only existing property and not the right to acquire property in the future which is protected. It follows that an expectation to inherit property in the future, for example, will not be protected under Article 1.
8. It is important to bear in mind that corporate bodies, as well as natural persons, may invoke

- 4 See, in particular, the second paragraph of Article 1 of Protocol No. 1.
- 5 As to the concept of “margin of appreciation”, see paras. 94 ff.
- 6 *James v. the United Kingdom*, A98 (1986), para. 46.
- 7 A98 (1986).
- 8 See, for example, *Sporrong and Lönnroth v. Sweden*, A52 (1982); *Hentrich v. France*, A 296-A (1994); *Holy Monasteries v. Greece*, A 301-A (1994); *Pressos Compania Naviera SA v. Belgium* A332 (1995); *Aka v. Turkey* 1998-VI (1998); *Papachelas v. Greece* (25 March 1999); *Brumarescu v. Romania* (28 October 1999); *Immobiliare Saffi v. Italy* (28 October 1999); *Spacek v. the Czech Republic* (9 November 1999); *Beyeler v. Italy* (5 January 2000); *Chassagnou v. France* (29 April 2000); *Carbonara and Ventura v. Italy* (30 May 2000); *Former King of Greece and Others v. Greece* (23 November 2000).
- 9 For a detailed consideration of the case-law on

Article 1 of the Protocol.<sup>10</sup>

## The three rules

9. Article 1 of Protocol No. 1 has been held to comprise three distinct rules. This analysis was first put forward by the European Court of Human Rights in its judgment in *Sporrong and Lönnroth v. Sweden*.<sup>11</sup> This is one of the most important decisions of the Court under Article 1 of Protocol No. 1.
10. The case concerned some very valuable properties (buildings and land) in central Stockholm in Sweden. The County Administrative Board decided that the properties were needed for development, and so imposed two different kinds of measures: expropriation permits (which meant that the property might in the future be expropriated) and prohibitions on construction (which prevented any construction of any kind). One of the properties was subject to an expropriation permit for a total of 23 years and to a prohibition on construction for 25 years. Another property was subject to an expropriation permit for 8 years and to a prohibition on construction for 12 years. During the time when these measures were in place, it obviously became much more difficult to sell the properties. The measures were eventually lifted due to a change in planning policy. The owners

of the properties complained to the European Court of Human Rights under Article 1 of Protocol No. 1. They had received no compensation for the time when their properties were affected by the relevant measures.

11. The first question for the Court was whether there was any interference with property at all, within the meaning of Article 1. The Swedish Government argued that the expropriation permits and prohibitions on construction were simply an intrinsic part of town planning, and did not impair the right to peaceful enjoyment of possessions at all. But the Court was quick to reject this argument. It noted that although legally the owners' title to their property (i.e. ownership) remained intact, in practice the possibility of exercising the right to property was significantly reduced. The Court observed that, by virtue of the expropriation permits, the applicants' right to property became "precarious and defeasible".

The Court therefore found that there was an interference with applicants' right to property. It then set out its analysis of Article 1 as comprising three rules:

*That Article [Article 1 of Protocol No. 1] comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of pos-*

this aspect, see below, paras. 42 ff.

10 This is clear from the wording of the first line of Article 1: "Every natural or legal person is entitled..." (emphasis added).

11 A52 (1982).

sessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph. (para. 61).

12. The Court then considered whether the second rule applied and held that there was no expropriation, or deprivation of property. The applicants were at all times entitled, as a matter of law, to use, sell, donate and otherwise deal with the properties. Although it had become more difficult to sell the properties because of the measures in question, it was still possible for the applicants to do so. Therefore, the second sentence of the first paragraph (i.e. the second rule) did not apply.
13. So far as the second paragraph of Article 1 was concerned (i.e. the third rule), it was held that this clearly applied to the prohibitions on construction, which involved the control of use of the property. The expropriation permits, on the other hand, had to be considered under the first sentence of the first paragraph (i.e. the first rule), because they were not deprivations of property, nor were they intended to control the use of property.

## Justification: permissible interferences with property

14. Having decided that there is an interference with property within one of the three rules of Article 1 of Protocol No. 1, the next step is to decide whether that interference can be justified by the State. If it can be justified (the burden of proof being on the State), there will be no violation of Article 1 of the Protocol.
15. In order to be justified, any interference with the right to property must serve a legitimate objective in the public, or general, interest.<sup>12</sup>
16. But it is not sufficient that the interference serves a legitimate objective. It must also be proportionate. In *Sporrong and Lönnroth v. Sweden* (above), the Court made the following important statement of principle concerning the justification of an interference:

...the Court must determine whether a **fair balance** was struck between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights... The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 [of Protocol No. 1]. (para. 69) (emphasis added)

Applying this test, the Court found that the fair balance had been upset in that case. In another significant statement of principle, quoted again and again in its later judgments, the

12 *James v. the United Kingdom*, A98 (1986), para. 46.

Court stated:

*Being combined in this way, the two series of measures created a situation which upset the fair balance which should be struck between the protection of the right to property and the requirement of the general interest: the Sporrang Estate and Mrs Lönnroth bore **an individual and excessive burden** which could have been rendered legitimate only if they had had the possibility of seeking a reduction of the time-limits or of claiming compensation. Yet at the relevant time Swedish law excluded the possibilities and it still excludes the second of them. (para. 73) (emphasis added)*

17. So it is necessary to consider whether any interference with property strikes a fair balance between the protection of the right to property and the requirement of the general interest. Such a fair balance will not have been struck where the individual property owner is made to bear "an individual and excessive burden".<sup>13</sup> The application of these criteria is considered in more detail below.<sup>14</sup>
18. An interference with property is also subject to the requirement of **legal certainty**, or legality. This requirement is expressly stated in the second sentence of the first paragraph of Article 1 of Protocol No. 1, where it is provided that a deprivation of property must be "subject to the conditions provided for by law". But the principle of legal certainty is inherent in the Convention as a whole, and must be complied with

whichever of the three rules of Article 1 applies.

19. Legal certainty requires the existence of and compliance with adequately accessible and sufficiently precise domestic legal provisions, which satisfy the essential requirements of the concept of "law". In other words, the phrase "subject to the conditions provided for by law" is not restricted to domestic law alone. The Convention seeks to ensure that the domestic law itself complies with the essential requirements of "law". This involves a fair and proper procedure, namely, that the measure in question should issue from and be executed by an appropriate authority and should not be arbitrary.<sup>15</sup> There must also be procedural safeguards against the misuse of powers of the State. The principle of legal certainty is considered further below.<sup>16</sup>

## The questions to be asked

20. It follows from the above that the relevant questions to be asked when considering whether there has been a violation of the right to property guaranteed by Article 1 of Protocol No. 1 are:
  - (i) Is there a property right, or possession, within the scope of Article 1?
  - (ii) Has there been an interference with that possession?
  - (iii) Under which of the three rules of Article 1 does

13 *Sporrong and Lönnroth v. Sweden*, A52 (1982), para. 73.

14 See below, paras. 20 ff.

15 *Winterwerp v. the Netherlands*, A33 (1979).

16 See below, paras. 149 ff.

the interference fall to be considered?

- (iv) Does the interference serve a legitimate objective in the public or general interest?
  - (v) Is the interference proportionate? That is, does it 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?
  - (vi) Does the interference comply with the principle of legal certainty, or legality?<sup>17</sup>
21. If there has been an interference with a possession, the interference will be incompatible with Article 1 of Protocol No. 1 if the answer to any one of questions (4) to (6) is "no".

## II The scope of the right to property

- 22. As indicated above, the concept of what constitutes property, or "possessions", in Article 1 of Protocol No. 1 is wide. A **range of economic interests** falls within the scope of the right to property, including movable or immovable property, tangible or intangible interests.
- 23. That Article 1 applied to the ownership of **shares in a company**, for example, was recognised by the European Commission of Human Rights in 1982 in Applications Nos. 8588/79 and 8589/79, *Bramelid and Malmström v. Sweden* (1982).<sup>18</sup> The case concerned two private individuals who owned shares in a large well-known department store in Stockholm, Sweden. In 1977 a new Company Act was passed, which had the effect that any company which owned more than 90% of the shares and voting rights in another company was entitled to compel the remaining minority of shareholders to sell their shares to it, at the same price as would have been paid if it had purchased the shares through a public offer, or otherwise at a price fixed by arbitrators. The minority shareholders complained to the Commission about the application of the new law to them. They argued

17 In *Iatridis v. Greece* (25 March 1999), the European Court of Human Rights emphasised the importance of this requirement and stated that this was the first question to be asked, because if the interference was not lawful, it could not be compatible with Article 1 of Protocol No. 1 (para. 58). This requirement has, however, been listed as the last question above, because it is anticipated that in most cases the primary questions will be whether the interference served a legitimate objective and whether it was proportionate.

18 See Appl. No. 12633/87, *Smith Kline and French Laboratories v. the Netherlands* (1990), for recognition of the fact that Article 1 of Protocol No. 1 may apply to the ownership of patents.

- that they had had to surrender their shares to the majority shareholders at less than market value. (The price had been fixed by arbitrators).
24. The Commission first considered whether the shares amounted to "possessions" within the meaning of Article 1 of Protocol No. 1. They considered what a complex thing a share was: a certificate that promises the holder a share in the company, together with corresponding rights (especially voting rights). It also involved an indirect claim on company assets. There was no doubt in this case that the shares had economic value. The Commission therefore considered that the shares were "possessions".
  25. On the question of which of the three rules of Article 1 applied, the Commission considered that the application of the Company Act to the shares of the minority shareholders did not fall within the second, "deprivation", rule as the applicants had argued. The Commission observed that although there was no express reference to "expropriation" in Article 1, its wording showed clearly that the second rule was intended to refer to expropriation, i.e. the action whereby the State lays hands – or authorises a third party to lay hands – on a particular piece of property for a purpose which is to serve the public interest. This interpretation was confirmed by the *travaux préparatoires* to Article 1. The Commission considered that the legislation complained of was something completely different. It concerned relations between private individuals. So the second sentence did not apply.
  26. The Commission then noted that in all the States Parties to the Convention, the legislation governing private law relations between individuals includes rules which determine the effects of these legal relations with respect to property and, in some cases, compel a person to surrender a possession to another. Examples include the division of inherited property, especially agricultural, the division of matrimonial estates and in particular the seizure and sale of property in the course of execution. The Commission considered that this type of rule, which is essential in liberal society, cannot in principle be contrary to Article 1 of Protocol No. 1. But the Commission nevertheless had to make sure that, in determining the effects on property of legal relations between individuals, the law did not create such inequality that one person could be arbitrarily and unjustly deprived of property in favour of another. In the case before it, it found no such inequality.
  27. *Bramelid and Malmström v. Sweden* (above) is significant not only because it recognises that share ownership falls within the protection of Article 1 of Protocol No. 1, but also because it makes clear that this Article is capable of apply-

ing to legislation which affects **legal relations between private individuals**.

28. In the more recent case of *Stran Greek Refineries and Stratis Andreadis v. Greece*,<sup>19</sup> the European Court of Human Rights held that an **arbitration award** was a "possession" for the purposes of Article 1 of Protocol No. 1. By a contract made in 1972, Mr Andreadis contracted with the State (then under the control of a military dictatorship) for the construction of a crude oil refinery near Athens in Greece by a company owned by him ("Stran"). The cost was to be about US\$ 76 million. The State ratified the contract by legislative decree, but subsequently failed to fulfil its part of the bargain. Once democracy had been restored in Greece, the State considered that the contract was contrary to the national economy and terminated it. Stran had incurred large costs before the contract was terminated. A dispute arose, and Stran brought legal proceedings against the State in Athens. The State argued that the Athens court lacked jurisdiction and that the case should go to arbitration. It proceeded to appoint an arbitration tribunal and requested it to find all the legal claims of Stran unfounded. But instead the arbitration court found in favour of Stran, ordering the payment by the State to Stran of over US\$16 million. The State then applied to the court to set aside the award, on the

basis that the arbitration court lacked jurisdiction. The State lost in the court of appeal. While the case was subsequently pending in the court of cassation, the State in 1987 enacted a new law, which had the effect of rendering the arbitration award in Stran's favour void and unenforceable. Stran and Mr Andreadis complained to the Strasbourg organs, *inter alia*, under Article 1 of Protocol No. 1 to the Convention.

29. Much of the case before the European Court of Human Rights was concerned with Article 6 of the Convention. In relation to Article 1 of Protocol No. 1, the State argued that no "possession" had been interfered with. They contended that an arbitration award could not be equated with the right which might be recognised by such an award. The Court observed that it had to decide whether the award had given rise to a debt in Stran's favour which was sufficiently established to be enforceable. It concluded that it had. The award was on its face final and binding. It did not require any further enforcement measure, and there was no ordinary or special appeal against it. Stran therefore had a property right which fell within the scope of Article 1 of Protocol No. 1 at the time when the annulling law was passed in 1987.
30. *Pressos Compania Naviera SA v. Belgium*<sup>20</sup> is a

19 A301-B (1994).

20 A332 (1995).

somewhat similar case, which also demonstrates the breadth of the concept of property, or “possessions” for these purposes. It is another case concerning a legal claim. Here the applicants were ship owners whose ships were involved in collisions in the territorial waters of Belgium. They considered that the collisions were due to the negligence of Belgian pilots (for whom the State was responsible according to Belgian law), and brought proceedings against the State. By an Act of 30 August 1988, the Belgian legislature effectively excluded liability for damage in the cases in question.

31. The ship owners complained under Article 1 of Protocol No. 1, arguing that their right to property had been violated. The State disputed that the applicants had any “possessions”, and argued that they had had no recognised claims which had been determined by a judicial decision having final effect.
32. The European Court of Human Rights stated that although the concept of “possession” is autonomous,<sup>21</sup> it was relevant to consider the position as a matter of domestic (Belgian) law. It noted that under Belgian law claims for compensation for torts came into existence as soon as damage occurred. Such a **claim constituted “an asset”** and therefore amounted to a “possession”, within the meaning of Article 1 of Protocol No. 1. In addition, based on

judicial determinations prior to the passing of the 1988 Act, the applicants could argue that they had a legitimate expectation that their claims could be determined in accordance with the general law of tort.

33. The 1988 Act was held to amount to an interference with the right to property, as it prevented the applicants from enjoying the rights they had had before the Act.
34. Another case which illustrates the width of the scope of Article 1 of Protocol No. 1 is *Pine Valley Developments Ltd v. Ireland*,<sup>22</sup> where the European Court of Human Rights held that Article 1 was capable of protecting **a legitimate expectation** that a certain state of affairs will apply. In that case, the applicant bought a plot of land in 1978, relying on an existing grant of outline planning permission for industrial development. Subsequently, in 1982, the Irish Supreme Court held that the original grant of outline planning permission was *ultra vires* and a nullity *ab initio*, since it was contrary to the relevant legislation. The applicant claimed that the decision of the Supreme Court was contrary to his right to property guaranteed by Article 1 of Protocol No. 1.
35. The Court asked itself first whether the applicant ever enjoyed any right to develop the land which could be the subject of an interference under Article 1, given the ruling of the Supreme

21 I.e. domestic law is not conclusive as to whether something amounts to a property right or “possession”.

22 A 222 (1991).

Court, which meant that as a matter of Irish law he enjoyed no such right. The Court held that he did, because when he bought the land he did so in reliance on a permission duly recorded in a public register, which he was entitled to assume was valid. The Court said that in these circumstances it would be “unduly formalistic” to hold that the decision of the Supreme Court did not constitute an interference with the applicant’s property.<sup>23</sup> Until that decision was given, the applicant had at least a legitimate expectation that he could carry out the proposed development, and this had to be regarded for the purposes of Article 1 of Protocol No. 1 as a component of the property (i.e. the land) in question.

36. In *Van Marle v. the Netherlands*,<sup>24</sup> the European Court of Human Rights had to consider whether a professional clientele could be protected under Article 1 of Protocol No. 1. The applicants had practised as accountants for some years, when in 1972 a new statute was adopted which required them to seek registration by a Board of Admission if they wanted to continue to practise. They applied for registration and this was refused in 1977. An appeal to the Board of Appeal was unsuccessful, after the applicants had been interviewed. The Board took the view that they had provided some unsatisfactory answers and had not shown sufficient

professional competence. The applicants claimed that the decision of the Board was contrary to Article 1 of Protocol No. 1 because as a result of it their income and the value of the goodwill of their accountancy practices had diminished. They argued that the decision amounted to an interference with the peaceful enjoyment of their possessions, and that they had been partially deprived of their possessions without compensation.

37. The State argued that the applicants had no “possessions” for the purposes of Article 1, but the Court disagreed. It held that the right they relied on “may be likened to the right of property” embodied in Article 1. By dint of their own work, the Applicants had built up **a clientele; this in many respects had the nature of a private right and constituted an asset and, hence, a “possession”**.
38. Further, the refusal to register the applicants radically affected the conditions of their professional activities and the scope of those activities was reduced. Their income fell, as did the value of their clientele and, more generally, their business. Consequently, there was an interference with their right to the peaceful enjoyment of their possessions.
39. *Tre Traktörer Aktiebolag v. Sweden*<sup>25</sup> is another example of the application of Article 1 of Protocol No. 1 to the economic interests connected

23 Para. 51.

24 A101 (1986).

25 A159 (1989).

with the running of a business. The applicant was a Swedish limited company. It took over the management of a restaurant called "Le Cardinal" (in 1980). The restaurant had previously been granted a licence to serve alcohol. Concerns arose as to the lady who was behind the applicant company, as to her tax affairs and generally as to her ability to manage the restaurant. In July 1983, the County Administrative Board decided to revoke the licence with immediate effect. The company argued that as a result, the restaurant had to be closed the very next day (although this was disputed on behalf of the State). An appeal to a further administrative authority was rejected, as was a claim addressed to the Government for compensation as a result of the withdrawal of the licence.

40. The applicants complained to the European Court of Human Rights under Article 6 as well as under Article 1 of Protocol No. 1 to the Convention. As to the latter, the State argued that a licence to serve alcohol could not constitute a "possession" for the purposes of Article 1. But the Court, like the Commission, considered that **the "economic interests connected with" the running of the restaurant were "possessions"** for these purposes. The maintenance of the licence was one of the principal conditions for the carrying on of the applicant company's business, and its withdrawal had

adverse effects on the goodwill and value of the restaurant. Such withdrawal constituted an interference with the peaceful enjoyment of possessions.

41. The Court then recited the three rules of Article 1. It said that, severe though it might be, the interference did not fall within the ambit of the second sentence of the first paragraph. The applicant company, although it could no longer operate "Le Cardinal" as a restaurant, kept some economic interests represented by the leasing of the premises and the property assets contained therein, which it finally sold in 1984. There was therefore no deprivation of property within the second rule. The withdrawal of the licence was therefore a measure for the control of use of property, under the second paragraph of Article 1.
42. The same approach of looking at business interests as "possessions" was adopted in the recent case of *Iatridis v. Greece* (25 March 1999). Here, a Mr K.N. had inherited an estate in Greece, on which he decided to build an open air cinema (having obtained the necessary permit from the authorities). There was subsequently a dispute as to ownership of the land on which the cinema was built, and the State claimed it. Notwithstanding this, the State also claimed inheritance tax from K.N.'s heirs in respect of it (in 1976). The dispute as to owner-

ship continued, and in 1978, K.N.'s heirs leased the cinema to the applicant, who restored it. In 1989, the authorities ordered the applicant to be evicted. The eviction order was then forcibly executed, and the cinema given to the local town council.

43. On the question of whether the applicant had any "possession" within the meaning of Article 1 of Protocol No. 1, the Court reiterated that the concept of "possession" in Article 1 has an autonomous meaning which was certainly not limited to the ownership of physical goods; certain other rights and interests constituting assets could also be regarded as "property rights", and thus as "possessions" for the purposes of Article 1.<sup>26</sup>
44. The Court made it clear that it could not determine the dispute under domestic law as to who owned the land, but noted that before the applicant was evicted he had been responsible for the operation of the cinema under a lease which was formally valid, without any interference from the authorities, as a result of which he had built up **a clientele which constituted an asset**.
45. The Court then recited the three rules of Article 1. Since the applicant held a lease of the premises, there was neither an expropriation nor an instance of control of use, but an interference within the first rule of Article 1.

46. In *Mellacher v. Austria*,<sup>27</sup> the Court had to consider an interference with a landlord's contractual entitlement to rent.<sup>28</sup> The applicants jointly owned a large building in Graz in Austria comprising a number of flats leased to tenants. A system of rent control had existed in Austria since World War I. But this did not apply to houses constructed after 1917 or to certain other flats. In 1981 a new Rent Act was introduced after heated debate, to bring about overall reform. It had the effect for the applicants of vastly reducing the rents they were entitled to under existing tenancy agreements. They complained that the legislation interfered with their freedom of contract and entitlement to future rent. The existing rents had been contractually agreed under the old law.
47. It was not disputed that the reduction in rent made pursuant to the 1981 Act constituted an interference with the applicants' enjoyment of their rights as owners of the building. The applicants claimed that this was a *de facto* expropriation of their property (the building), and that they had in any event been deprived of their contractual right to receive rent. The Court held that there had been no *de facto* expropriation of property, as there had been no transfer of the applicants' property, nor had they been deprived of their right to use, let or sell it. Admittedly the effect of the Act was to deprive

26 Para. 54.

27 A169 (1989).

28 See also Appl. No. 10741/84, *S v. the United Kingdom* (1984), where the Commission considered that Article 1 of Protocol No. 1 applied to the benefit of a restrictive covenant and the entitlement to annual rent.

them of part of their income from the property. This amounted in the circumstances to a control of use of property.

48. The **entitlement to a pension** is also capable of falling within the protection of Article 1 of Protocol No. 1. This issue was considered in an early decision by the European Commission of Human Rights, Application No. 5849/72, *Müller v. Austria* (1975). Mr Müller had worked as a locksmith in Austria and Luxembourg for many years, making compulsory and voluntary contributions to a State-run old-age insurance scheme. As a result of a treaty entered into between Austria and Luxembourg, part of his contributions could no longer count towards his main pension, but only towards a supplementary pension. This meant that when Mr Müller came to retire in 1970, he did not get as much by way of pension benefit as he had expected. He argued that the application of the treaty to him involved a violation of his right to property under Article 1 of Protocol No. 1.
49. When considering his argument, the European Commission of Human Rights made it clear that the right to an old-age pension is not included as such among the Convention rights. But it decided that the making of compulsory contributions to a pension fund might create a property right in a portion of such a fund and that such a right might be affected by the way

the fund was distributed.

The Commission was also prepared to assume, without deciding, that voluntary pension contributions could equally give rise to a right safeguarded by Article 1 of Protocol No. 1.

50. Ultimately, the Commission rejected Mr Müller's claim, on the basis that although Article 1 might guarantee a person the right to derive benefit, it cannot be interpreted as entitling that person to a particular amount. But the decision is important in that it shows that pension rights based on contributions to a fund may fall within the protection of Article 1. This does not of course mean that Article 1 of Protocol No. 1 guarantees entitlement to pension or social security benefits where there is no basis for such benefits as a matter of domestic law.

### **“Autonomous” concept of what is a “possession”**

51. It is important to bear in mind that in order for Article 1 of Protocol No. 1 to come into play, it is not necessary for domestic law to recognise the relevant interest as a property right: the **concept of “possessions” is autonomous** for Convention purposes.
52. A good example of this is *Tre Traktörer Aktieföretag v. Sweden*,<sup>29</sup> where (as indicated above) the Court recognised that the established economic in-

29 A159 (1989), para. 53.

terests in connection with the running of a business attracted the protection of Article 1 of Protocol No. 1.

53. But in order to invoke the protection of Article 1, a person must enjoy some right as a matter of domestic law, which may be regarded as a property right from the Convention perspective. This point is illustrated by Application No. 11716/85, *S. v. the United Kingdom* (1986), where the European Commission of Human Rights held that the occupation of property without a legal right was not protected under Article 1 of Protocol No. 1.
54. In this case a woman had lived “as man and wife” for many years with another woman. The other woman was a tenant of the local authority, but the applicant had no legal right in the property or the tenancy. When her partner – the tenant – died, the applicant applied to the English court for the tenancy to vest in her, as surviving partner of the tenant. But the English court held that the law did not allow this: only the surviving spouse of a heterosexual couple that had married could claim a tenancy. Before the European Commission of Human Rights, the applicant relied primarily on Article 8, but also on Article 1 of Protocol No. 1. The Commission rejected this claim out of hand. It noted that the applicant had no contractual right, and the mere fact that she had been living

in the house did not mean that she had any “possession” for the purposes of Article 1 of Protocol No. 1.

## No guarantee of the right to acquire property in the future

55. The protection of Article 1 of Protocol No. 1 only applies when it is possible to lay claim to the relevant property. **Article 1 does not protect the right to acquire property.**
56. This principle is illustrated by the case of *Marckx v. Belgium*.<sup>30</sup> In this case the applicant and her infant daughter complained of the fact that certain aspects of the illegitimacy laws in Belgium, including the fact that maternal affiliation could only be established by a formal act of recognition, and the existence of limitations on the mother’s right to bequeath, as well as limitations on an illegitimate child’s right to inherit, constituted interferences with their right to property under Article 1 of Protocol No. 1 (also read together with Article 14).<sup>31</sup> (Other claims were also made, in particular under Article 8).<sup>32</sup>
57. The European Court of Human Rights held that Article 1 of Protocol No. 1 did not apply at all to the daughter, noting that this article does no more than enshrine the right of everyone to the peaceful enjoyment of “his” possessions,

30 A 31 (1979). Cf. *Inze v. Austria*, A126 (1987). Here the applicant was an illegitimate child who complained that he was not permitted to take over his mother’s farm (as the eldest son) as he would have been if he had been legitimate. He claimed a violation of Article 1 of Protocol No. 1 read together with Article 14 of the Convention. The State relied on the *Marckx* case to argue that Article 1 of Protocol No. 1 did not come into play at all. But the Court rejected this argument. It distinguished *Marckx*, on the basis that whereas that case concerned a potential right to inherit, here the applicant had in fact already inherited a share of the farm, and his complaint was that he was not permitted to inherit as much as he would have been able to inherit if he had been a legitimate child.

31 Article 14 of the Convention prohibits discrimination in relation to the enjoyment of the rights and freedoms guaranteed by the Convention. See below, paras. 163 ff.

that consequently it applies only to a person's existing possessions and does not guarantee the right to acquire possessions whether on intestacy or through voluntary dispositions.

58. The same principle was applied in Application No. 8410/78, *X v. the Federal Republic of Germany* (1979). In this case, the applicant was a notary working in Germany. He complained about German legislation which obliged him to reduce his fees when drawing up deeds for certain clients, such as universities, churches and other non-profit making organisations. The amount of reduction was 80% as compared to what he had previously been entitled to charge under the regulations. He complained, *inter alia*, under Article 1 of Protocol No. 1. The European Commission of Human Rights made short shrift of the application. It stated that a notary's claim for fees could only be considered a possession when such a claim has come into existence in a particular matter, on the ground of services actually rendered and on the basis of the existing regulations for notaries' fees. The mere expectation that the legal regulations on fees would not change could not be considered a property right.

## The property of corporations

59. It is not only natural persons who may enjoy the protection of Article 1 of Protocol No. 1:

corporate bodies fall within the scope of the right. This is clear from the wording of Article 1, which refers to "Every natural or *legal* person" (emphasis added).

60. It follows that companies may claim in respect of interferences with their property. But shareholders generally have no claim based on damage to a company. The "piercing of the corporate veil" will only exceptionally be permitted, as when a company is unable to make a claim through its organs or liquidators.
61. This principle is illustrated by *Agrotexim v. Greece*.<sup>33</sup> In this case, the applicants were companies who held shares in a brewery in Athens. In order to overcome certain financial problems, the brewery wanted to develop two of its sites. But the Athens Council decided to adopt measures with a view to expropriating the land. The brewery then went into liquidation, and liquidators were appointed. The applicant shareholders complained to the European Commission of Human Rights that the expropriation measures were in breach of Article 1 of Protocol No. 1.
62. The State took the preliminary point that the applicants as shareholders were not victims of any violation of the company's right to property. The Commission held that they could be victims, taking into account in particular that the interference with the rights of the brewery

32 Article 8 of the Convention protects the right to respect for private and family life.

33 A330-A (1995).

had caused a fall in the value of its shares, and thus had diminished the value of the applicants' shareholding. But the Court disagreed. It opposed the idea that a shareholder should generally be able to claim for violations of the property rights of a company. It pointed to the fact that disagreements between shareholders and a company's board of directors, or amongst shareholders, are common. Such disagreements could cause difficulties in relation to an infringement of the company's rights. If the Commission's view were followed, there would be a risk – in view of the competing interests – of creating difficulties in determining who would be entitled to claim. Such a view would also cause real problems about exhausting do-

mestic remedies,<sup>34</sup> as shareholders do not generally in Member States have the right to sue in respect of violations of the company's rights.

63. The Court therefore held that the "piercing of the corporate veil" – or disregarding of the company's legal personality – will be justified only in exceptional circumstances, in particular, when it is clearly established that it is impossible for the company to claim through the organs set up under its articles of incorporation, or – in the event of liquidation – through its liquidators. In this case, there was no legal reason why the liquidators should not claim, and no suggestion that they were not doing their job properly. The applicants' claim therefore failed on that preliminary point.<sup>35</sup>

34 Article 35 of the Convention requires all domestic remedies to have been exhausted before an application is made to the European Court of Human Rights.

35 The *Agrotexim v. Greece* case is in contrast to certain earlier decisions by the Commission to the effect that a substantial majority shareholder may be held to be a victim of damage to the company, for the purposes of Article 1 of Protocol No. 1. See Appl. No. 9266/81, *Yarrow v. the United Kingdom* (1983) and Appl. No. 1706/62, *X v. Austria* 21 CD 34 (1966).

36 A52 (1982). See above, paras. 9 ff.

37 For an example of a formal transfer of ownership in breach of the second rule of Article 1 of Protocol No. 1, see the judgment of the European Court of Human Rights in the case of *The Former King of Greece and Others v. Greece*, 23 November 2000.

### III The three rules

64. We have seen that the European Court of Human Rights has analysed Article 1 of Protocol No. 1 as comprising three distinct rules. This analysis was first put forward in the *Sporrong and Lönnroth v. Sweden* case,<sup>36</sup> and has been repeated time and time again in the Court's subsequent judgments. The three rules are:
- (I) the principle of peaceful enjoyment of possessions (the first sentence of the first paragraph);
  - (II) deprivation of possessions (the second sentence of the first paragraph); and
  - (III) control of use (the second paragraph).
65. The second and third rules will be considered first, and then the first rule.

### The second rule

66. In order to decide whether there has been a **deprivation of property** within the meaning of the second rule, it is necessary to investigate not only whether there has been a formal expropriation or transfer of ownership,<sup>37</sup> but also to investigate the realities of the situation to see whether there has been a *de facto* taking of property.

67. This was made clear in *Sporrong and Lönnroth v. Sweden*,<sup>38</sup> the case concerning the imposition of expropriation permits and prohibition notices on properties in Stockholm, Sweden,<sup>39</sup> where the Court observed that:  
*In the absence of formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of ... Since the Convention is intended to guarantee rights that are "practical and effective" ..., it has to be ascertained whether that situation amounted to a de facto expropriation, as was argued by the applicants.* (para. 63)<sup>40</sup>
68. This approach to the question of what amounts to a taking of property coincides with the approach adopted by general international law, that: "...measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner."<sup>41</sup>
69. A good example of measures which amounted to a *de facto* expropriation is provided by the case of *Papamichalopoulos v. Greece*.<sup>42</sup> The applicants were owners of a large area of valuable land in Greece. The land included a beach, and in 1963 the applicants had obtained permission

from the Greek Office of Tourism to construct a hotel complex on the site. But thereafter a military dictatorship assumed control in Greece, and in August 1967 the applicants' land (including the beach) was transferred to the Navy. The applicants sought, not surprisingly, to recover the land, but failed. The Navy proceeded to construct a naval base on the land and a holiday resort for officers.

70. Despite various court actions in Greece, and some suggestions on behalf of the State that the applicants should get some other land by way of exchange, no redress at all had been made available by the early 1990s, when the applicants applied to the Commission in Strasbourg.
71. When the case came before the European Court of Human Rights, the Court began by noting that the interference had to be regarded as a continuing violation since 1967. The Court noted that the interference here was not for the purpose of controlling use of property, and so the third rule of Article 1 did not apply. As regards the second rule, the land was never formally expropriated, in the sense that title was not transferred. But since the Convention was intended to safeguard rights that were "practical and effective", it had to be ascertained whether the situation complained of nevertheless amounted to a *de facto* expropriation.

38 A52 (1982).

39 For a summary of the facts of this case, see above, paras. 9 ff. In this case, the Court rejected the argument that the second rule of Article 1 of Protocol No. 1 applied, as there had been no legal deprivation of ownership, and no *de facto* expropriation, because the applicants were able in practice to sell their properties, albeit that this had been made more difficult by the measures complained of.

40 See also *James v. the United Kingdom*, A98 (1986), para. 38; *Hentrich v. France*, A296-A (1994), paras. 34-35.

41 *Case concerning Starrett Housing Corporation and the Government of the Islamic Republic of Iran*; Interlocutory award of December 1983 by Iran-United States Claims Tribunal.

42 A260-B (1993).

- 43 Interestingly, having found a *de facto* expropriation, the Court did not go on to ask whether the expropriation served a legitimate objective and was proportionate. It simply stated that the *de facto* expropriation was “incompatible with the applicants’ right to the peaceful enjoyment of their possessions”, presumably because there was no compensation or other remedy.
- 44 28 October 1999, para. 76.
- 45 As to whether the interference with the right to property could be justified, the Court observed that no justification as to public interest had been offered by the State. It also noted that the applicant had been deprived of the house for four years without any compensation reflecting the true value of the property. It is interesting that the Court in this case found the judgment of the first instance court in Romania to have been the applicant’s possession, rather than stating that title to the house vested in the applicant and treat-

72. The Court noted that the Navy Fund actually physically took the applicants’ property from them and built on the land. From that date, the applicants were unable to make use of their property or to sell, bequeath, mortgage or make a gift of it. The Court held that the loss of all ability to dispose of the land, taken together with the failure to remedy the situation, entailed sufficiently serious consequences for the applicants’ land *de facto* to have been expropriated.<sup>43</sup>
73. This principle was applied more recently in the case of *Brumarescu v. Romania*,<sup>44</sup> where the European Court of Human Rights reiterated that, in determining whether there has been a deprivation of possessions within the second rule, it is necessary to look behind the appearances and investigate the realities of the situation complained of.
74. In this case, the applicant’s parents had built a house in Bucharest in 1939. In 1950, the house was nationalised pursuant to a legislation decree. In 1974, the house was sold by the State to two brothers, who had previously lived in a flat in the house as tenants. In 1993, the applicant brought an action in the Romanian court to establish that the nationalisation was null and void, because his parents fell within an exemption provided for in the decree, as they were unemployed. The court at first instance

agreed, and ordered the administrative authorities to transfer the house to the applicant. The applicant went to live in the house, and paid land tax in respect of it.

75. But the Procurator-General, acting on behalf of the brothers to whom the property had previously been transferred, then brought an application on their behalf in the Supreme Court. The Supreme Court quashed the judgment of the first instance court, and held that the applicant did not have title to the house, and that the brothers should have it returned to them.
76. When the case came before the European Court of Human Rights, it held, first, that the applicant had a possession in the form of the judgment of the first instance court that the property had never been lawfully nationalised. It then found that the decision of the Supreme Court had been an interference with the right recognised by that judgment.
77. The Court then applied the principle that you had to see whether in reality the applicant had been deprived of his possession, and held that he had, i.e. the second rule applied. The Court noted that the applicant was no longer able to use the house at all.<sup>45</sup>
78. So whether or not, in the absence of formal transfer of ownership, there is a *de facto* expropriation, is a question of fact and degree.

## The third rule

79. The third rule (in the second paragraph of Article 1 of Protocol No. 1) applies when an interference with property is intended, or is part of a legislative scheme whose purpose is **to control the use of property**.
80. Examples of the application of the third rule have been referred to above. They include *Sporrong and Lönnroth v. Sweden*<sup>46</sup> (concerning the prohibition of construction on land); *Pine Valley Developments Ltd v. Ireland*<sup>47</sup> (concerning planning controls), and *Mellacher v. Austria*<sup>48</sup> (concerning the control of rented property).<sup>49</sup> Further detailed examples of the application of this rule will be given below in the section dealing with the issue of justification of an interference with the right to property.
81. Measures which **secure the payment of taxes or other contributions or penalties** also fall to be considered under the second paragraph of Article 1 of Protocol No. 1. A good example of the application of this aspect of the third rule is *Gasus Dosier- und Fordertechnik v. the Netherlands*,<sup>50</sup> where a German company had supplied goods to a Dutch company on terms stating that it retained title to the goods until they had been paid for. Before payment had been received by the seller, the goods were seized by the Dutch tax authorities in respect of unpaid

tax debts owed by the Dutch purchaser. The German seller alleged that the seizure of the goods by the Dutch authorities involved a violation of its right to property under Article 1 of Protocol No. 1. The European Court of Human Rights held that the case fell to be considered under the third rule of Article 1, on the basis that the seizure of the goods was part of the State's machinery for the collection of taxes. (This case is considered in further detail in paragraph 129 below.)

## The first rule

82. The first rule of Article 1 of Protocol No. 1 may be described as a "catch-all" which may apply where none of the other rules does. It applies where a measure has the effect of interfering with the use or enjoyment of property, but falls short of being a taking, and is not intended to control the use of property.
83. The first rule was held to apply in relation to the expropriation permits that had been imposed in respect of the applicants' properties in *Sporrong and Lönnroth v. Sweden*.<sup>51</sup> Another example of the application of the first rule is *Stran Greek Refineries and Stratis Andreadis v. Greece*,<sup>52</sup> where legislation which had the effect of rendering an arbitration award in the applicants' favour void and un-

ing the house itself as a possession. This may have been because it was unwilling to be seen to be going behind the judgment of the Romanian Supreme Court.

- 46 A52 (1982). See above, paras. 9 ff.
- 47 A222 (1991). See above, para. 34.
- 48 A169 (1989). See above, paras. 46 ff.
- 49 Other examples include the cases of *AGOSI v. the United Kingdom*, A108 (1986) (concerning legislation to control the illegal importation of gold coins); *Air Canada v. the United Kingdom*, A316-A (1995) (concerning the illegal importation of drugs); *Inze v. Austria*, A126 (1987); *Fredin v. Sweden*, A192 (1991); *Vendittelli v. Italy*, A293-A (1994); *Spadea and Scalabrino v. Italy*, A315-B (1995); *Scollo v. Italy*, A315-C (1995) (concerning legislation to control housing).
- 50 A306-B (1995), para. 59. Other examples include Appl. No. 11036/84; *Svenska Management Gruppen v. Sweden* (1985); Appl. No. 13013/87; *Wasa Liv Omsesidigt*

enforceable fell to be considered under the first rule of Article 1.<sup>53</sup>

## The significance of the three rules analysis

- v. Sweden (1988) at pp. 185-187; *National Provincial Building Society and Others v. the United Kingdom*, 1997-VII (1997), para. 79.
- 51 A52 (1982). See above, paras. 9 ff.
- 52 A301-B (1994), para. 68. See also *Erkner and Hofauer v. Austria*, A117 (1987), para 74; and Appl. No. 7456/76, *Wiggins v. the United Kingdom* (1978), at pp. 46-47; Appl. No. 7889/77, *Arrondelle v. the United Kingdom*, 19 DR 186 (1980).
- 53 See above, paras. 28 ff., for a more detailed consideration of this case.
- 54 A169 (1989).
- 55 See above, paras. 46 ff., for a more detailed consideration of this case.
- 56 5 January 2000, para. 98.
- 57 On the facts of this case, the Court considered that the applicant had had to bear “an individual and excessive burden”, and found a violation of Article 1 of Protocol No. 1 (para. 122).

84. When considering whether there has been a violation of Article 1 of Protocol No. 1, the first step is to consider whether the complainant has any property right, or possession, falling within the scope of Article 1. The second step is to consider whether there has been an interference with that possession, and then, thirdly, the nature of the interference (i.e. which of the three rules applies).
85. But it should be remembered that the European Court of Human Rights has on many occasions emphasised that the three rules are connected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of possessions and should be construed in the light of that general principle. See, for example, *Mellacher v. Austria*,<sup>54</sup> a case about rent control legislation,<sup>55</sup> at para. 42.
86. See also *Beyeler v. Italy*,<sup>56</sup> where the European Court of Human Rights emphasised that the second sentence of Article 1 was only a particular instance of interference with the right

to peaceful enjoyment of property as guaranteed by the general rule set forth in the first sentence.

87. This case concerned a painting by Van Gogh, and the facts were extremely complex. There was a dispute as to whether the applicant was the owner of the painting. The painting was acquired by the State pursuant to a right of pre-emption, on the basis of its historical and artistic interest. The Court found that the applicant’s dealings with the painting over a period of time were such that he must be regarded as having a possession within the meaning of Article 1 of Protocol No. 1. But the Court did not actually rule that he was the owner of the painting.
88. The Court then considered the nature of the interference with the applicant’s possession and stated that “The complexity of the factual and legal situation prevents its being classified in a precise category” (para. 106). The applicant had argued that the second rule applied, but the Court, noting that the situation envisaged in the second sentence was only a particular instance of interference with the peaceful enjoyment of property as guaranteed by the general rule in the first sentence of Article 1, decided that it should examine the situation complained of in the light of that general rule.<sup>57</sup>

## IV Justifying an interference with the right to property

### The public or general interest

89. As has been mentioned above, any interference with property can only be justified if it is in the **public, or general, interest**. The requirement that a taking (or deprivation) of property should be in the “public” interest is expressly set out in the second sentence of Article 1 of Protocol No. 1. The third rule refers expressly to the “general” interest. But any interference with property, whichever rule it falls under, must satisfy the requirement of serving a legitimate public (or general) interest objective.
90. One of the earliest cases in which this requirement was considered is *James v. the United Kingdom*.<sup>58</sup> The applicants in this case were trustees of the estate of the Duke of Westminster, who owned 2000 houses in a highly desirable part of London. The applicants complained that the estate had lost a very large amount of money as

a result of the implementation of a statute, the Leasehold Reform Act 1967, which gave long leaseholders (tenants) the right to buy the freehold (ownership) at less than market value. The 1967 Act applied only to long leaseholds, i.e. to leases of 21 years or more. They also had to be leaseholds granted at a low rent. As a result of being forced to sell the freehold under the Act to some 80 tenants in London who exercised their right to buy, or to “enfranchise”, the Duke’s estate lost around £2 million, as compared to the market value.

91. When considering the complaint under Article 1 of Protocol No. 1, the European Court of Human Rights first referred to the “three rules” analysis in *Sporrong and Lönnroth v. Sweden*.<sup>59</sup> The Court considered that the applicants had been deprived of their properties within the second rule (although the transfer of ownership was not to the State but to other private individuals).
92. On the question of whether the taking of the properties could be justified by the State, the applicants argued that the relevant legislation could not be in the public interest, because the properties were not taken for the benefit of the community generally. The applicants contended that the transfer of property from one person to another could not, as a matter of principle, be “in the public interest”. But the

58 A98 (1986), para. 46.

59 A52 (1982). See above, paras. 9 ff.

60 The doctrine of the State's "margin of appreciation" applies generally to the Convention provisions. See, for example, *Handyside v. the United Kingdom*, A24 (1976), para. 48, where the Court observed that: "...the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each contracting state, in the first place, the task of securing the rights and freedoms it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic proceedings have been exhausted."

61 A52 (1982), paras. 69 and 73. See above, paras. 9 ff.

62 *Ibid.*

Court disagreed and held that the compulsory transfer of property from one individual to another may constitute a legitimate aim in the public interest.

93. The Court added that the taking of property pursuant to a policy calculated to enhance social justice within the community could properly be described as being in the public interest. In so deciding the Court recognised that it was not following the approach of the domestic law of a number of contracting States in relation to expropriation.
94. It then made an important and oft-quoted statement of principle about the State's "margin of appreciation".<sup>60</sup> This statement forms the basis, together with the dicta in *Sporrong and Lönnroth v. Sweden*,<sup>61</sup> for any consideration of what is a justified interference with property to this day: *Because 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". Under the system of protection established by the Convention, 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... Here as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation.*

Furthermore, the notion of "public interest" is necessarily extensive. In particular, as the Commission noted, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment is **manifestly without reasonable foundation**. In other words, although the Court cannot substitute its own assessment for that of the national authorities it is **bound to review the contested measures under Article 1 of Protocol No. 1 and, in so doing, to make an inquiry into the facts** with reference to which the national authorities acted. (para. 46) (emphasis added)

95. The Court went on to find that the aim of the Leasehold Reform Act 1967 – greater social justice in the sphere of housing – was a legitimate aim in the public interest.
96. The Court then referred to the requirement of proportionality, citing *Sporrong and Lönnroth v. Sweden*<sup>62</sup> and the test of whether a fair balance had been struck between the demands of the general interest of the community and the re-

quirements of the protection of the individual's fundamental rights. The applicants relied on the fact that other States<sup>63</sup> apparently did not have similarly draconian measures. They argued that in order to be proportionate the measure had to be necessary, in the sense that there was no other alternative. But the Court rejected this submission: it was not for the Court to judge whether the Leasehold Reform Act 1967 constituted the best solution to the problem.

97. The Court also considered the question of compensation and agreed with the Commission that Article 1, although it is silent on the point, generally requires compensation for a taking of property.<sup>64</sup> The Court noted that in the legal systems of contracting States, the taking of property without any compensation would be justifiable only in exceptional circumstances: otherwise the right to property would be largely "illusory and ineffective". As to the standard of compensation, the Court said that a taking of property without an amount of compensation reasonably related to its value would normally be disproportionate. But Article 1 does not guarantee a right to full compensation in all circumstances: *Legitimate objectives of 'public interest', such as are pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.*<sup>65</sup>

98. The Court went on to find that the requisite fair

balance had been struck in this case, although the estate of the Duke of Westminster did not receive the full market value on the transfer of ownership to the tenants. The Court noted that the tenant paid approximately the site value, but nothing for the buildings on the site. This clearly favoured the tenants, but because of the money he (or his predecessors) had paid for the lease (a capital sum) and money spent over the years on repairs, maintenance and improvements, the tenant or his predecessor in title had in effect already paid for the property. Accordingly, there had been no violation of Article 1 of Protocol No. 1.

99. The *James v. the United Kingdom* case<sup>66</sup> illustrates the wide margin of appreciation that the Strasbourg organs have been prepared to afford to the national authorities in assessing both whether an interference with the right to property serves a legitimate aim in the public interest, and whether it is proportionate to that aim. This decision also makes it clear, however, that the Court has a role to play in inquiring into the facts and assessing whether that margin has been exceeded by the State. As indicated above, particularly in recent years the European Court of Human Rights has in many cases found the margin to have been exceeded.<sup>67</sup>

100. A more recent example of the Court considering the question of whether an interference

63 I.e. parties to the Convention.

64 As to the requirement of proportionality and, in particular, of compensation, see further paras. 124 ff. below.

65 Para. 54.

66 A98 (1986).

67 See above, para. 4 ff.

with property served a legitimate objective in the public interest is *Scollo v. Italy*.<sup>68</sup> In this case, the applicant bought a residential flat in Rome in June 1982 that was occupied by a tenant. The applicant sought eviction of the tenant in March 1983, on the grounds, *inter alia*, that he (the applicant) was 71 per cent disabled, unemployed, diabetic and needed the flat, and that the tenant had ceased to pay his rent. The applicant was first granted an eviction order by the magistrate in April 1983. However, in accordance with the Italian Government policy of postponing, suspending or staggering the enforcement of eviction orders against residential tenants, the eviction order was suspended on four separate occasions pursuant to a Legislative Decree. Eventually, the tenant left the flat of his own accord in January 1995, eleven years and ten months after the applicant first began proceedings for his eviction.

101. The applicant complained of a violation of his right to property. When the issue came before the European Court of Human Rights, it first considered the application of the three rules of Article 1. It noted that there was neither a transfer of property nor, contrary to the applicant's submissions, a *de facto* expropriation. At all times the applicant retained the possibility of alienating the property, and he received rent – in full until October 1987, and in part be-

tween November 1987 and February 1990. As the implementation of the measures in question meant that the tenant continued to occupy the flat, they undoubtedly amounted to control of the use of possessions. Accordingly, the second paragraph of Article 1 of Protocol No. 1 applied.

102. The Court referred to the fact that the second paragraph of Article 1 reserves to the States the right to enact such laws as they deem necessary to control the use of property in accordance with the general interest. Such laws, it noted, are especially common in the field of housing, which in our modern societies is a central concern of social and economic policies. In order to implement such policies, the legislature must have a wide margin of appreciation both with regard to the existence of a problem of public concern warranting measures of control and as to the choice of the detailed rules for the implementation of such measures. The Court reiterated<sup>69</sup> that it will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation.
103. The applicant argued that the relevant legislative measures had no legitimate aim; in substance, the fact that the State had no effective housing policy had deprived him of his right to dispose of his flat, since the tenant's interests alone had

68 A315-C (1995), para. 32.

69 See *James v. the United Kingdom*, A98 (1986), para. 46; para. 99 above.

been protected. The Government was not entitled, he argued, to justify the emergency legislation by invoking the general interest.

104. The Court observed, however, that the legislative provisions suspending evictions during the period 1984 to 1988 were prompted by the need to deal with the large number of leases that expired in 1982 and 1983 and by the concern to enable the tenants affected to find acceptable new homes or obtain subsidised housing. To have enforced all the evictions simultaneously would undoubtedly, said the Court, have led to considerable social tension and would have jeopardised public order. Therefore, the legislative provisions had a legitimate aim in the general interest, as required by Article 1 of Protocol No. 1.
105. Going on to deal with the requirement of proportionality, the Court observed that any interference with property must strike a fair balance, and that there had to be a reasonable relationship of proportionality between the means employed and the aim pursued.<sup>70</sup>
106. The applicant argued that the interference in question was disproportionate. He emphasised that he was a small property owner who wanted to occupy his own flat in order to live there with his family. He referred to the fact that he had been obliged to incur debts to buy another flat. The State for its part invoked the exceptional

housing shortage in Italy at that time.

107. The Court noted that housing shortages are an almost universal problem of modern society. In order to see whether the measures were proportionate to the aims sought to be achieved – protecting tenants on low incomes and avoiding the risk of any prejudice to public order – the Court had to ascertain whether the applicant's tenant was treated in such a way that the requisite fair balance was maintained. The Court noted that the applicant had made it clear to the authorities that he needed the flat, that he had no job and that he was disabled. The authorities had taken no action at all in response. The applicant had not been able to recover his property until the tenant left of his own accord, although he had satisfied the conditions for enforcement of eviction during the period when this procedure was suspended. The Court also noted that the applicant had had to buy another flat and to bring an action to recover rent. All in all, the restrictions on the applicant's use of his flat amounted to a breach of the requirement of proportionality and to a violation of Article 1 of Protocol No. 1.
108. So *Scollo v. Italy* is an example of it being argued, unsuccessfully, that the measures in question did not serve a legitimate objective in the public interest. But the applicant did succeed on

- 71 For another example of an unsuccessful argument that a legislative measure which had the effect of depriving the applicants of their property did not serve a legitimate objective in the public interest, see *The Former King of Greece and Others v. Greece* (23 November 2000). The applicants did, however, succeed on their argument that the taking of all their property in Greece without any payment of compensation was disproportionate, and the Court accordingly found a violation of Article 1 of Protocol No. 1.
- 72 See para. 105.
- 73 *James v. the United Kingdom*, A98 (1986), para. 50; and *Lithgow v. the United Kingdom*, A102 (1986), para. 120.
- 74 *Sporrong and Lönnroth v. Sweden*, A52 (1982), paras. 69, 73; *Tre Traktörer Aktieföretag v. Sweden*, A159 (1989), para. 59; *Hentrich v. France*, A296-A (1994), paras. 45-49; *Holy Monasteries v. Greece*, A301-A (1994), para. 70; *Air Canada v. the United Kingdom*, A316-A (1995), para. 29.
- 75 A108 (1986), para. 52.

his argument that even if there was a legitimate objective, the means chosen to serve that objective were disproportionate to that aim.<sup>71</sup>

## Proportionality

109. As indicated above,<sup>72</sup> in order for an interference with property to be permissible, it must not only serve a legitimate aim in the public interest, but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.<sup>73</sup> A fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, the search for such a balance being inherent in the whole of the Convention.<sup>74</sup> This is likely to be the crucial question in most cases.
110. A good example of the application of the proportionality test in practice is *AGOSI v. the United Kingdom*.<sup>75</sup> The applicant was a German company, AGOSI, in the business of metal smelting, and also dealing in gold and silver coins. One Saturday afternoon, a Mr X and Mr Y visited the company's factory in Germany and asked to make an immediate purchase of 1 500 krugerrands, which were gold coins minted in

South Africa. The value of the coins was £120 000. The sale was agreed and the coins were loaded into a car with British number plates. Payment was accepted in the form of a cheque drawn on an English bank. AGOSI sought to cash the cheque, but it was dishonoured. The contract of sale for the gold coins contained a term that ownership of the coins remained with AGOSI until payment in full had been received.

111. Meanwhile, the buyers tried to bring the coins into the United Kingdom hidden in a spare tyre in the car. But the coins were discovered and were seized by the United Kingdom customs authorities. A few months earlier, the importation of gold coins had been prohibited by the Secretary of State for Trade and Industry. The buyers of the coins, Messrs X and Y, were charged with fraudulent evasion of the prohibition on importation of gold coins (smuggling).
112. AGOSI shortly thereafter requested the return of the coins to them, on the basis that they remained their rightful owner, as they had not been paid. The customs authorities declined to restore the coins. Mr X and Mr Y were convicted in the criminal court. Even at that stage the customs authorities refused to return the coins to AGOSI. The company unsuccessfully sued in the English court for their return.
113. Before the European Court of Human Rights,

AGOSI complained, *inter alia*, of the refusal by the customs authorities to restore the coins. The company argued that it was the lawful owner of the coins and innocent of any wrongdoing, and that it had not been given a proper opportunity of putting its case before the English courts. The Strasbourg Court noted that the retention (forfeiture) of the coins clearly amounted to an interference with peaceful enjoyment of possessions within the first sentence of Article 1: this had not been disputed. But the Court then had to determine whether the material provision was the second sentence of the first paragraph or the second paragraph. It observed that the prohibition on the importation of gold coins clearly constituted a control of the use of property. The seizure and forfeiture of the coins were measures taken for the enforcement of that prohibition. It also noted that the forfeiture of the coins did of course involve a deprivation of property, but in the circumstances the deprivation formed a constituent element of the procedure for the control of the use in the United Kingdom of gold krugerrands. Accordingly, the third, control of use, rule applied.

114. As to whether the measures could be justified, the Court noted that the prohibition on the importation of krugerrands was undoubtedly compatible with Article 1 of Protocol No. 1. It

served a legitimate objective in the public interest. But it was also necessary to consider whether there was a reasonable relationship of proportionality between the means used to enforce the prohibition and the aim sought to be realised. The court had to determine whether the requisite fair balance had been struck. The Court observed that:

*The State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question. (para. 52)*

115. The Court noted that under the general principles of law recognised in all contracting States, smuggled goods may as a rule be the object of confiscation. But AGOSI argued (and the Commission had agreed) that this did not apply when the owner was "innocent". The Court noted that the striking of a fair balance depends on many factors, and that the behaviour of the owner of property (in relation to smuggling), including the **degree of fault or care** which he displayed, is one element in the entirety of circumstances which should be taken into account. (The Court also noted that there was no common practice in contracting States as to whether fault was required for forfeiture.)

116. Accordingly, although this is not expressly mentioned in Article 1, the Court had to con-

sider whether the applicable procedures were such as to enable reasonable account to be taken of the applicant's degree of fault or care, and also to see **whether the applicable procedures afforded the company a reasonable opportunity of putting its case** to the responsible authorities. The Court examined the English procedure of judicial review and found that it was sufficient to satisfy Article 1 of Protocol No. 1. Accordingly, there had been no violation of AGOSI's right to property.

117. Another example of the application of the principle of proportionality, and of the wide margin of appreciation that has been afforded to the State in some of the Court's decisions, is *Mellacher v. Austria*.<sup>76</sup> As mentioned above,<sup>77</sup> this case concerned landlords of a block of flats who claimed that Austrian rent control legislation was contrary to Article 1 of Protocol No. 1 because it interfered with their contractual rights to receive rent. The Court found that Article 1 applied, and that there was an interference with the applicants' right to property within the second, control of use, rule.
118. As for the issue of justification, the applicants contended that the 1981 Rent Act did not serve a legitimate aim. They said it was not calculated to redress a social injustice, but to bring about a redistribution of property. They accepted that this was something which could

in principle be done, but argued that there was no problem in existence which required State intervention. They referred to an economic boom which Austria had been experiencing. They put forward statistics showing that accommodation was in fact available, and they claimed that the Act did not have the support of two of the three political parties representing the majority of the population. They argued that it was a measure of a socialist government intended to satisfy a section of the electorate. So it was not a measure, they said, which was in the general interest.

119. The European Court of Human Rights looked at the explanatory memorandum submitted to the Austrian Parliament by the government when the legislation was introduced. This referred to the need to reduce disparities between the rents payable for equivalent flats. The Act was aimed at making accommodation more easily available at reasonable prices. The Court found that these explanations could not be characterised as manifestly unreasonable. The Act therefore had a legitimate aim in the general interest.
120. As for the requirement of proportionality, the Court reiterated the fair balance test. The applicants argued that the Act constituted a statutory inducement not to comply with the terms of validly concluded contracts and therefore violated the principle of freedom of contract.

<sup>76</sup> A169 (1989), para. 48.

<sup>77</sup> See above, para. 46 ff.

The Court observed, however, that in remedial social legislation, and in particular in the field of rent control, it must be open to the legislature to take measures affecting the further execution of previously concluded contracts in order to attain the aim of the policy adopted. The Court further stated that the possible existence of alternative solutions did not of itself render the contested legislation unjustified. Provided that the legislature remained within the bounds of its margin of appreciation, it was not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised some other way.

121. The applicants referred to the fact that the effect of the 1981 Act was to reduce their rents by as much as 80% in two cases, and 22% in another. The Commission had found that degree of interference unjustifiable. The State argued that even at a reduced level, the rents compared reasonably with rent that could be charged for other buildings. The Court found that the requisite fair balance had been struck. It took into account, *inter alia*, that owners were still able to pass on various expenses to tenants, such as insurance cost, and could require the tenants to pay a contribution towards maintenance works. The Act also made transitional provision which meant that landlords

were allowed to recover under existing contracts a rent 50% higher than what they would be allowed to obtain under a new lease. There was, therefore, no violation of Article 1 of Protocol No. 1.

122. The case of *Stran Greek Refineries and Stratis Andreadis v. Greece*<sup>78</sup> has also been referred to above.<sup>79</sup> In this case, concerning an arbitration award that had been rendered void and unenforceable by legislation, the Court decided that the interference was neither an expropriation nor a control of use, and had to be dealt with under the first sentence of Article 1.
123. The Court then went on to determine whether the requisite fair balance had been struck. The State argued that the measure in question was part of a body of measures designed to cleanse public life of the disrepute attaching to the military regime and to proclaim the power and will of the Greek people to defend the democratic institutions. The applicants' rights were said to derive from a preferential contract prejudicial to the national economy, which had helped to sustain the dictatorship. The applicants argued that it would be unjust for every legal relationship entered into with a dictatorial regime to be invalidated when the regime came to an end.
124. The Court did not doubt the State's power to terminate a contract which it considered preju-

78 A301-B (1994), para. 74.

79 See above, paras. 28 ff.

dicial to the economic interests of the State. Indeed this was well-established in public international law: a State has sovereign power to terminate a contract concluded with private individuals, provided it pays compensation. This did not, however, extend to certain essential clauses of the contract, such as an arbitration clause. Otherwise it would be possible for a party to evade jurisdiction in a dispute in respect of which arbitration had been agreed. The Court also noted that the State had itself opted for the arbitration procedure whose consequences it then sought to evade. Therefore, by annulling the arbitration award, the legislature had upset the requisite fair balance. Accordingly, there was a violation of Article 1 of Protocol No. 1.

125. *Pressos Compania Naviera SA v. Belgium*<sup>80</sup> is another example of the State having exceeded its margin of appreciation. As set out above,<sup>81</sup> this was a case where a number of ship owners, whose ships had been involved in collisions in the territorial waters of Belgium, sued for damages in respect of the negligence of pilots who were the responsibility of the Belgian State. After the damage had been suffered, the State had passed legislation to remove the right to compensation in the applicable circumstances. The Court found that the applicants' claims were possessions, and that there had been an

interference with their rights under Article 1 of Protocol No. 1.

126. The State pointed to the need to protect its financial interests, the need to re-establish legal certainty in the field of tort, and the need to bring the position in Belgium into line with that in neighbouring countries, notably the Netherlands. The Court noted that under the Convention system it is 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. The notion of public interest was necessarily extensive. The State therefore had a wide margin of appreciation.
127. As for proportionality, the Court referred to the fair balance test, and noted that compensation terms under the relevant legislation were relevant to that question. It also made the point that the taking of property without the payment of an amount reasonably related to its value will normally be justifiable only in exceptional circumstances. In this case the 1988 Act extinguished with retrospective effect and without compensation very high claims for damages that the victims of the accidents could otherwise have pursued against the Belgian State. In some cases proceedings were already pending. The State referred to the huge potential claims that would have resulted if the Act had not

80 A332 (1995), para. 38.

81 See above, paras. 30 ff.

been passed (3 500 million BEF). The Court concluded that this concern, and the concern to bring the law into line with neighbouring countries, would warrant prospective legislation to alter the law of tort, but these considerations could **not justify legislating with retrospective effect** with the aim and consequence of depriving the applicants of their claims for compensation. Such a fundamental interference was inconsistent with the fair balance, and Article 1 of Protocol No. 1 had accordingly been violated.

## Taxing measures

128. The power of the State to secure the payment of taxes or other contributions or penalties (within the third rule of Article 1 of Protocol No. 1) has been held to be particularly wide. But a taxing measure is nevertheless subject to the requirement of proportionality.
129. In *Gasus Dosier- und Fordertechnik v. the Netherlands*,<sup>82</sup> which has been referred to above,<sup>83</sup> the applicant, Gasus, was a German company that made an agreement with a Dutch company, Atlas, for the sale to Atlas of a concrete-mixer. Gasus' standard terms and conditions of sale included a "retention of title clause" which

meant that they retained ownership in the concrete-mixer until it had been paid for in full.

130. Atlas got into financial difficulties, and the concrete-mixer was seized by the Dutch tax bailiff in respect of Atlas' unpaid tax debts. Gasus complained about this, and went through lengthy legal proceedings in the Dutch court to get the mixer back, but to no avail. They then complained to Strasbourg.
131. Interestingly, as a first point the State argued that the company did not actually retain ownership in the mixer, but simply had an interest in the nature of security. They said that on this basis Gasus did not have any possession. But the Court was quick to reject that argument. It recalled that "possession" has an "autonomous" meaning for the purposes of Article 1, and was certainly not limited to ownership of physical goods. It was therefore quite immaterial whether Gasus retained ownership or merely had a security interest in the mixer. Either way, they had a protected possession under Article 1 of Protocol No. 1.
132. As to which of the three rules applied, Gasus argued that they had been deprived of their property under the second rule. But the Court held that the seizure of the mixer was part of the State's machinery for the collection of taxes and so fell to be considered under the second paragraph of Article 1, which enables

82 A306-B (1995), para. 62; *National Provincial Building Society and Others v. the United Kingdom*, 1997-VII (1997), para. 80.

83 See above, para. 81.

States to "secure the payment of taxes or other contributions or penalties".

133. In this context the Court reminded itself that the drafters of the Convention had attached great importance to this aspect of the second paragraph of Article 1: in fact at a stage when this phrase was not yet included, it was already understood by all concerned, said the Court, that States could pass whatever fiscal laws they considered desirable, provided always that they did not amount to "arbitrary confiscation". Here, said the Court, there was no arbitrary confiscation, albeit that the law permitted the tax authorities to seize goods on the tax payer's premises that did not actually belong to it, but to a third party. The Court found support for its view in the fact that this kind of thing was permitted in several legal systems.

134. The Court then went on to record that the State has a wide margin of appreciation regarding taxing measures, and that its judgment would be respected unless "devoid of reasonable foundation". It cited *Sporrong and Lönnroth v. Sweden*<sup>84</sup> and referred to the requirement of fair balance and proportionality. It also asked itself whether Gasus had been made to bear "an individual and excessive burden".

135. Applying these tests, the Court found that the seizure of the mixer was compatible with Article 1 of Protocol No. 1. It took into account, in

particular: (1) that Gasus was engaged in a commercial venture which by its nature involved risk; (2) that the retention of title clause would provide security against creditors other than the tax authorities; (3) that Gasus could have eliminated the risk altogether by declining to extend credit to Atlas; (4) that it could have obtained additional security, e.g. by insurance; and (5) that Gasus permitted the mixer to be on Atlas' premises.

136. This case illustrates that, although the Court applies the same test of fair balance to a taxing measure as to other interferences with property, the State is afforded a particularly wide margin of appreciation in cases of this kind.

## Compensation

137. As has been noted above,<sup>85</sup> Article 1 of Protocol No. 1 does not expressly require the payment of compensation for a taking of, or other interference with, property. But in the case of a taking (or deprivation) of property, compensation is generally implicitly required. See, for example, *James v. the United Kingdom*,<sup>86</sup> where the Court observed that:

...under the legal systems of the Contracting States, the taking of property in the public interest without

84 A52 (1982).

85 See above, paras. 97 ff.

86 A98 (1986), para. 54; *Lithgow v. the United Kingdom*, A102 (1986), para. 120; *Holy Monasteries v. Greece*, A301-A (1994), paras. 70-75; *Hentrich v. France*, A296-A (1994), para. 48; *Pressos Compania Naviera SA v. Belgium*, A332 (1995), para. 38; *Guillemin v. France*, 1997-I (1997), paras. 52-57.

payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes. As far as Article 1 [of Protocol No. 1] is concerned, the protection of the right to property it affords would be largely illusory and ineffective in the absence of any equivalent principle. Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicant... (para. 54)

138. Whether or not compensation is available is also relevant when assessing the proportionality of other (lesser) interferences with property.
139. An example of the Court taking into account the absence of compensation in relation to an interference with property falling short of a deprivation is *Chassagnou v. France*.<sup>87</sup> In this case the applicants were landowners who, under French law, had the exclusive right to hunt on their land. This right was an aspect of the ownership of the land. But the French authorities considered that it could be beneficial to make smaller landowners get together and form an association granting mutual hunting rights to all concerned. They made it compulsory for landowners like the applicants to become members of the association and to give up their exclusive hunting rights to other members of the association to hunt on their land.

140. The applicants (who were animal welfare activists and anti-hunting) claimed that the compulsory transfer of hunting rights was contrary to Article 1 of Protocol No. 1.
141. It was agreed before the Court that the third, control of use, rule applied. As to public interest, the applicants argued that the law was only for benefit of hunters, and so not in the public interest. The Court rejected that argument. It held that the French authorities were entitled to conclude that it was in the general interest to avoid unregulated hunting.
142. As to proportionality, the Court held that it upset the fair balance for the applicants to be compelled to transfer their hunting rights to enable others to hunt on their land when they had ethical and moral objections to hunting. In particular, the Court noted the absence of any compensation. (The Government had intended that the ability for landowners such as the applicants to hunt on land belonging to others would be sufficient compensation, but this did not assist the applicants, who did not want to hunt.) In the circumstances, the applicants' right to property as guaranteed by Article 1 of Protocol No. 1 had been violated.
143. Where the payment of compensation is required in order to satisfy the requirement of proportionality, it does not necessarily have to be full compensation in all circumstances. Le-

87 1999-III, para 82. See also *Sporrong v. Lönnroth v. Sweden*, A52 (1982), para. 73; *Immobiliare Saffi v. Italy*, 1999-V, paras. 56 and 57.

gitimate objectives of “public interest”, such as are pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. But the amount of compensation should at least be reasonably related to the value of the property.<sup>88</sup>

144. In *Lithgow v. the United Kingdom*,<sup>89</sup> the applicants were shipbuilding and aircraft building companies, whose interests were nationalised. They did not contest that the State had a legitimate objective for the taking, but argued that the compensation paid was grossly inadequate. The British Government had decided on a system of compensation whereby the applicants’ shares (which were nationalised) were valued by reference to their value some three years before the date of transfer of the shares. The Government’s case was that this was done in order to avoid a value which was artificially affected by the knowledge that there would be a nationalisation. The applicants argued that the relevant date should be closer to the date of transfer, because the value of the shares had actually gone up. The applicants pointed to the fact that in general international law, in similar cases, it is the date of taking, or transfer, which is taken as the date of assessment.

145. The Court agreed with the Commission that: *the taking of property without an amount reasonably*

*related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1. Article 1 does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of “public interest”, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. (para. 121).*

146. Significantly, the Court also stated that the standard of compensation may vary depending on the nature of the property and the circumstances of the taking. The standard of compensation required in a nationalisation case may be different from that required in regard to other takings of property, e.g. the compulsory acquisition of land for public purposes (para. 121).

147. The Court held (rejecting the applicants’ argument) that the “margin of appreciation” applied not only to the question of whether the nationalisation was in the public interest, but also to the choice of compensation terms. The Court observed that:

*...the Court’s power of review in the present case is limited to ascertaining whether the decision regarding compensation fell outside the United Kingdom’s wide margin of appreciation; it will respect the legislature’s judgment in this connection unless that judgment was manifestly without reasonable foundation. (para. 122)*

148. The applicants had also relied on the require-

88 *James v. the United Kingdom*, A98 (1986), para. 54; *Holy Monasteries v. Greece*, A301-A (1994), para. 71.

89 A98 (1986).

ment in the second sentence of Article 1 that a deprivation of property be subject to the conditions provided for "by the general principles of international law." They had argued that this requirement meant that the compensation payable to them had to be "adequate, prompt and effective" as required by the general principles of international law. But the Court rejected this argument. It noted that under the general principles of international law themselves, this requirement only applies to non-nationals. Looking at the *travaux préparatoires* to Article 1, it was clear that the States intended this phrase to apply only to non-nationals.

## Legal certainty

149. An interference with the right to property must also satisfy the requirement of **legal certainty, or legality**.<sup>90</sup> This is expressly stated in the second sentence of the first paragraph of Article 1, in relation to a deprivation of property: a taking must be "subject to the conditions provided for by law". But the principle of legal certainty is inherent in the Convention as a whole, and this requirement must be satisfied whichever of the three rules applies.

150. As to what the principle of legal certainty

means, see *Winterwerp v. the Netherlands*.<sup>91</sup> This case concerned the right to liberty guaranteed by Article 5 of the Convention, and the right to a fair hearing guaranteed by Article 6. The applicant had been confined to a mental hospital. He had been detained by court orders which were reviewed periodically, but had not been notified that proceedings were in progress or allowed to appear or be represented. On several occasions, his requests for release were not forwarded to the court by the public prosecutor. As a result of his detention, the applicant automatically lost the right to administer his property.

151. The European Court of Human Rights found a violation of Article 5, in that the applicant was unable to get his detention reviewed by a court and there had been a failure to hear him. Further, the denial of his right to administer his property without affording him a hearing was contrary to Article 6 of the Convention.

152. One of the issues for the Court in relation to Article 5 was whether the applicant's detention was "in accordance with a procedure prescribed by law".<sup>92</sup> The Court stated that these words essentially refer back to domestic law; they state the need for compliance with the relevant procedure under that law. But the domestic law must itself be in conformity with the Convention, including the general principles

90 See above, para. 18.

91 A33 (1979), para. 45.

92 See Article 5 of the Convention.

- expressed or implied therein. The notion underlying the term in question was one of fair and proper procedure, namely, that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary.
153. The Court also observed that "In a democratic society subscribing to the rule of law, no determination that is arbitrary can ever be regarded as lawful." (para. 39). The same principle applies in relation to Article 1 of Protocol No. 1.
154. For a recent case where the importance of the principle of legality, or legal certainty, was stressed, see *Iatridis v. Greece*.<sup>93</sup> As mentioned above,<sup>94</sup> that was a case where the applicant operated an open-air cinema, from which he had been evicted and which had been compulsorily transferred to the municipal authorities. The Court held that the clientele of the cinema constituted a protected asset under Article 1. It proceeded to analyse the interference within the first rule of Article 1.
155. The Court then noted that the eviction order to evict the applicant from the cinema had actually been quashed by the Greek court (despite the fact that the lawfulness of the applicant's interest in the land had never been accepted). That had happened two years earlier, and yet the applicant had not had the land returned. In these circumstances, the Court took the op-

93 25 March 1999, para. 58.

94 See above, paras. 42 ff.

portunity to make an emphatic statement about the crucial need for States to comply with the principle of legality, or legal certainty. As the Court noted, if that requirement was not satisfied, there was no need to go further and consider the legitimacy of the State's objective or the question of proportionality. The Court observed that:

*The Court reiterates that the 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 second sentence of the first paragraph authorises a deprivation of possessions only "subject to the conditions provided for by law" and the second paragraph recognises that the States have the right to control the use of property by enforcing "laws". Moreover, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention ... and entails a duty on the part of the State or other public authority to comply with judicial orders or decisions against it...It follows that the issue of whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights ... becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary. (para. 58)*

156. In the *Iatridis* case, the failure to return the land to applicant was "manifestly" in breach of

Greek law, and so in clear violation of Article 1 of Protocol No. 1, without looking at any other issue.<sup>95</sup>

157. In order to satisfy the principle of legal certainty, the State (or public authority) must comply with adequately accessible and sufficiently precise domestic legal provisions, which satisfy the essential requirements of the concept of "law". This means not only that the interference in question must be based on some provision of domestic law, but that there must be a fair and proper procedure, and that the relevant measure must issue from and be executed by an appropriate authority, and should not be arbitrary.<sup>96</sup>

158. These requirements are illustrated by *Hentrich v. France*.<sup>97</sup> Mrs Hentrich bought some land in Strasbourg for 150 000 FRF. She was then told that the Revenue would exercise a right of pre-emption, that is, a right to buy the property, because they considered the price that she had paid was too low. There was no system of adversarial proceedings in which Mrs Hentrich could argue that the price she had paid was not in fact too low.

159. Mrs Hentrich claimed that her property had *de facto* been expropriated, and that was not contested. She argued that the system of pre-emption was not in the public interest if applied, as in her case, where there was no question of bad

faith or intention to evade tax. The European Court of Human Rights rejected this argument, citing the "wide margin of appreciation" afforded to States in assessing the public interest.

160. The Court then made an important ruling on the question of lawfulness. It held that:

*...the pre-emption operated arbitrarily and selectively and was scarcely foreseeable, and it was not attended by the basic procedural safeguards. In particular, Article 668 of the General Tax Code, as interpreted up to that time by the Court of Cassation and as applied to the applicant, did not sufficiently satisfy the requirements of precision and foreseeability implied by the concept of law within the meaning of the Convention.*

*A pre-emption decision cannot be legitimate in the absence of adversarial proceedings that comply with the principle of equality of arms, enabling argument to be presented on the issue of the underestimation of the price and, consequently, on the Revenue's position – all elements which were lacking in the present case. (para. 42)*

161. The Court then went on to look at proportionality, and stated that in order to assess this, it would look at the degree of protection from arbitrariness. The Court found that there had not been sufficient protection of this kind: it noted that Mrs Hentrich had been selected for this procedure, which was rarely used. There was no suggestion that she had acted in bad faith, and there would have been other means open to the State to discourage tax evasion (e.g. to

95 Para. 62.

96 *Lithgow v. the United Kingdom*, A102 (1986), para. 110; *Winterwerp v. the Netherlands*, A33 (1979), paras. 45 and 39; *Spacek v. the Czech Republic* (9 November 1999), where the Court observed that when speaking of "law", Article 1 of Protocol No. 1 alludes to the same concept to be found elsewhere in the Convention, a concept which comprises statutory law as well as case-law. It implies qualitative requirements, notably those of accessibility and foreseeability (para. 54).

97 A296-A (1994), para. 42.

take proceedings to recover unpaid tax). In these circumstances, the Court found that Mrs Hentrich had been made to “bear an individual and excessive burden”.<sup>98</sup>

162. This case is important, particularly because of its emphasis on the need for a fair procedure, and on the requirement that State must not act arbitrarily – both under the principle of legality, and under the heading of proportionality.

98 Para. 49.

## V Other issues

### Reading Article 1 of Protocol No. 1 with Article 14

163. In some cases, there may not be a violation of Article 1 of Protocol No. 1 taken on its own, but there may be a breach of that Article read together with Article 14 of the Convention (which prohibits discrimination in the enjoyment of the rights and freedoms set out in the Convention).<sup>99</sup>
164. *Marckx v. Belgium*<sup>100</sup> provides an illustration of this possibility. As mentioned above, this was a case which concerned legislation which discriminated against illegitimate children, in that, *inter alia*, it placed limitations on the mother's right to bequeath. The European Court of Human Rights held that this involved an interference with her right to property under Article 1 of Protocol No. 1, read together with Article 14 of the Convention (although there was no violation of Article 1 of Protocol No. 1 read on its own).<sup>101</sup>
165. The *Belgian Linguistics Case* (No. 2)<sup>102</sup> sets out the general principles applicable to Article 14 of the Convention. Here a number of French-speaking parents in Belgium complained that various aspects of Belgian laws on the use of languages in education infringed, *inter alia*, the

right to private life (Article 8) and the right to education (Article 2 of Protocol No. 1), read together with Article 14, in that they denied public support and recognition to French-speaking schools in certain areas designated as Flemish. In considering this claim, the Court made it clear that a measure which in itself conformed to the requirements of an article might infringe that article when read together with Article 14, because it was of a discriminatory nature.

166. But Article 14 would not prohibit every difference in treatment in the exercise of the Convention rights and freedoms. The principle of equality of treatment would be violated only **if the particular distinction had no objective and reasonable justification**. A difference in treatment had to pursue a **legitimate aim**, and there had to be a reasonable relationship of **proportionality** between the means employed and the aim sought to be realised.

### Continuing violations

167. The European Court of Human Rights has recognised the concept of a **continuing violation** of the right to property. This approach may be relevant to takings of property which, on the face of it, occurred before the Russian Federation accepted the jurisdiction of the European Court of Human Rights.

99 Article 14 provides: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

100 A31 (1979). See also *Inze v. Austria*, A126 (1987), referred to in more detail in note 21 above.

101 Para. 65.

102 A6 (1968).

168. A good illustration is provided by *Loizidou v. Turkey*.<sup>103</sup> In this case the applicant was a Greek Cypriot who claimed a violation of Article 1 of Protocol No. 1 in relation to a house she owned and had been forced to leave behind in northern Cyprus after the Turkish occupation of that part of the island in 1974. She alleged that she had been continuously prevented from having access to her property by the Turkish forces.
169. The Turkish Government argued, *inter alia*, that she was unable to claim, because the interference with her property occurred before 1990, when Turkey accepted the jurisdiction of the European Court of Human Rights in relation to events thereafter. The Court recalled that it had already indorsed the notion of a continuing violation in *Papamichalopoulos and Others v. Greece*,<sup>104</sup> and the effects of this notion on the temporal limitations of the competence of the Convention organs. The present case concerned a continuing violation, provided that the applicant could still be regarded for the purposes of Article 1 as being the legal owner of the land. The Court found that she could be so regarded, and that a constitutional "law" passed by the "Turkish Republic of Northern Cyprus", which purported to deprive her of title to her property, could not be regarded as valid law.

103 1996-VI (1996).

104 A260-B (1993). See above, paras. 69 ff.

170. The Court went on to find that having been refused access to the land since 1974, the applicant had effectively lost all control as well as all possibilities to use and enjoy her property. This was not a deprivation of property or a control of use, in the exceptional circumstances of the case. The matter had to be considered under the first sentence of Article 1: it was an interference with the peaceful enjoyment of her possessions. The Court observed that a hindrance can amount to a violation just as much as a legal impediment. The Turkish government had not really sought to justify the interference, and there was therefore a violation of Article 1 of Protocol No. 1.

## Application of the right to property as between private parties

171. It is clear that the application of the right to property in Article 1 of Protocol No. 1 is not restricted to interferences with property which involve the transfer of some benefit to the State. This article is capable of applying to measures introduced by the State (or other public authority) which affect an individual's property rights by transferring them to, or otherwise benefiting, another individual or individuals, or which otherwise regulate the property of an individual.

172. See, for example, *James v. the United Kingdom*,<sup>105</sup> involving legislation which enabled tenants to acquire ownership of the properties in which they lived from their landlords. See also Appli-

cations Nos. 8588/1979, 8589/79, *Bramelid and Malmström v. Sweden*,<sup>106</sup> concerning legislation governing the relationship between shareholders in a company.

105 A98 (1986). See above, paras. 90 ff., where this case is analysed in some detail.

106 (1982). See above, paras. 23 ff.







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These human rights handbooks are intended as a very practical guide to how particular articles of the European Convention on Human Rights have been applied and interpreted by the European Court of Human Rights in Strasbourg. They were written with legal practitioners, and particularly judges, in mind, but are accessible also to other interested readers.