

Human rights files, No. 11 rev.

**The European Convention
on Human Rights
and property rights**

**Council of Europe
Conseil de l'Europe**



The European Convention on Human Rights, together with its first protocol, guarantees the right to peaceful enjoyment of possessions in all states party to the Convention. These states have an obligation to guarantee this right, an alleged violation of which can be examined by the European Court of Human Rights. If the Court finds a violation of the right, just satisfaction, including the payment of compensation, can be awarded.

In the six years since the first edition of this study, the European Commission and Court of Human Rights have been called upon to arbitrate in many cases concerning the deprivation of property rights, and Laurent Sermet has taken full account of the new case-law in producing this completely updated edition.

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The European Convention on Human Rights and property rights

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Introduction

Article 1 of Protocol No. 1 states:

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.

The insertion of a right to the peaceful enjoyment of possessions in the European Convention on Human Rights raised numerous questions between the experts negotiating the text. Should a right to own property be protected, following the example of Article 17 of the Universal Declaration of Human Rights, adopted in 1948?¹ Alternatively and more simply, should property rights be protected? Or should they be excluded, as not being sufficiently fundamental? The incorporation of a right to compensation for deprivation of property also gave rise to fierce discussion.² These problems explain why the right to peaceful enjoyment of possessions was included in Protocol No. 1, signed on 29 March 1952, and not in the Convention itself (4 November 1950).

Since then, Article 1 of Protocol No. 1 has undoubtedly been one of those most frequently cited by applicants in Strasbourg, and the resulting case-law has provided a notable interpretation of its scope and content.

The purpose of Article 1 was first spelt out in the *Marckx* judgment, which declared:

by recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 is in substance guaranteeing the right of property.³

This *obiter dictum* makes it possible to extend the article's scope to guaranteeing the right of property *per se*, and not simply protecting owners against arbitrary confiscation, which was the focus of the *travaux préparatoires* and of the Commission's first decisions.⁴ It also removes any significance from differences in wording between the French and English versions of Article 1.⁵

The conditions for application of Article 1 were later defined in the *Sporrong and Lönnroth* judgment.⁶ As interpreted by the Court, the article's three sentences embody three rules for protection. The first is general, and states the principle of peaceful enjoyment of property. The second covers deprivation of possessions and subjects it to certain conditions. The third recognises that states are entitled to control the use of property in accordance with the general interest. The last two rules must be interpreted in the light of the general principle laid down in the first. Each of these three rules corresponds to a different kind of interference with property ("interference with the substance of property", deprivation of property, control of the use of property). There is, however, a fourth type of interference – interference justified by the need to secure payment of taxes, or other contributions or penalties.⁷ This derives from the last sentence of Article 1, and must be regarded as a form of control of the use of property.

A desire to protect human rights, including property rights, effectively is a constant feature of the decisions given by the Strasbourg bodies. The *Zubani v. Italy* case⁸ illustrates this. The applicants had been deprived of land used to build housing for low-income occupants, and were awarded full compensation for the damage they had suffered. The Court acknowledged that the reparation made was satisfactory, but, in awarding "just satisfaction" itself, allowed for the fact that the dispute compensation had lasted more than eight years. This decision shows again how important it is for the Court that fundamental rights should be *effectively* protected. It highlights the fact that the Court goes beyond what some commentators have called the right to rights, to insist that rights must be effective – and that this itself is a fundamental entitlement.

Finally, it should be noted that Article 1 of Protocol No. 1 often has close connections with other Convention provisions. For, example Article 6, para. 1, of the Convention protects the right to a fair hearing by a tribunal in the determination of civil rights and obligations. Property rights are generally civil rights,⁹ and this means that the guarantee provided by Article 1 may reinforce the fair hearing guarantee provided by Article 6, particularly when the enforcement of court decisions is the issue.¹⁰ Indeed, the guarantee provided by Article 1 would seem to have certain procedural implications.¹¹ In the same way, Article 8 of the Convention, which guarantees respect for the home, can be linked with Article 1 of the Protocol, if the home is seen as a possession. This aspect was brought out in the *Gillow* case¹² and, more recently, in a Turkish case.¹³ Finally, Article 14 of the Convention has no separate existence, since it applies only in conjunction with other Convention provisions. Taken together with Article 1 of Protocol No. 1, it prohibits all discrimination, unless it has an “objective and reasonable” basis.¹⁴

Plan of the study

The various legal aspects of Article 1 of Protocol No. 1 raise five main questions:

- ◆ What is property?

The main question here is what constitutes a “possession” within the meaning of the Convention.

- ◆ Who can claim to be the victim of interference with property?

We shall consider the persons, both natural and legal, who may bring proceedings before the Convention bodies.

- ◆ What are the various types of interference with property?

The various types of interference will have to be determined precisely.

- ◆ When is interference with property compatible with the Convention?

Once interference with property has been established, we shall consider the circumstances in which it is lawful.

- ◆ How can violations of property rights be made good?

The two solutions (compensation and damages) will be described.

Chapter I

The definition of property

To define property, we must first consider protected possessions, and then identify the essential characteristics of property.

I. Protected possessions

Courts have tended to accept the broad definition used in public international law, in which “possessions” are equated with “vested rights”.¹⁵ The European Court of Human Rights subscribes very largely to this view, declaring: “the right of everyone to the peaceful enjoyment of his possessions [...] applies only to a person's existing possessions” (*Marckx* judgment, para. 50).¹⁶ In other words, the property must have been acquired beforehand. This again reflects the High Contracting Parties' desire not to extend protection of property to include protection of the right to property.¹⁷ To some extent, however, Convention case-law has gone further,¹⁸ for two reasons, which are connected with scope and proof of ownership. The concept of property is thus an autonomous one.

A. *The traditional concept of property*

The following are regarded as property in the case-law: movable and immovable property, rights *in rem* and *in personam*, and intellectual property.

1. *Movable and immovable property: rights in rem*

The term “possessions” includes movables and immovables.¹⁹ In its decision on *S. v. the United Kingdom*,²⁰ the Commission recognised that a property right limited to the benefit of a restrictive covenant and receipt of an annual rent was a possession. The exclusively contractual origin of a

right *in rem*, i.e. a right determined only by the parties to the contract, is no obstacle to its being termed a possession. *A fortiori*, the Commission recognises the existence of a possession when the right *in rem* is partly determined by statutory regulation. Thus, in the Case of *James and Others*, the possession was a leasehold.²¹

2. *Rights in personam*

A distinction will be drawn between rights *in personam* arising from a relationship between two private individuals and those arising from a public law relationship.²²

a. *Rights in personam deriving from a relationship between private individuals*

The Commission has stated that a claim may constitute a possession. A conditional claim will be treated as protected property only if all the conditions necessary for its recognition are satisfied,²³ which confirms the vested right approach. In *X v. the United Kingdom*, the Commission recognised that shares constituted possessions.²⁴ It also wondered whether the power or influence which shareholders might acquire over companies could constitute a possession, but did not answer this question.²⁵ Taking an autonomous and broad view of property, it is not impossible that such rights may count as “possessions”.

b. *Rights in personam deriving from a public law relationship*

By analogy with public international law,²⁶ European case-law tends to include all rights *in personam* deriving from public law relationships within the concept of property. Thus a claim against the state is a possession,²⁷ and so is compensation awarded in an enforceable judgment.²⁸ To count as possessions, these rights must confer exclusive use on the holder and have a pecuniary value. Rights generated by social policies deserve attention here.

There have been many disputes relating to pension rights – for example, when public authorities have reduced payment levels. In an early case,²⁹ the Commission ruled that:

the making of compulsory contributions to a pension fund may, in certain circumstances, create a property right in a portion of such fund and [...] such right might be affected by the manner in which the fund is distributed.

Thus, in the Commission's view, the existence of a property right depended on the nature of the social security system applied. In a system based on the solidarity principle, a pension recipient could not claim an identifiable and exclusive share in the fund, and so there was no property right. In the *Müller* case, the Commission clarified its position.³⁰ The applicant had initially paid compulsory social security contributions in Austria, where he had worked until 1963. Employed in Liechtenstein from 1963 on, he paid compulsory contributions there, and began to pay voluntary contributions in Austria. Not receiving his full entitlement on retirement, he argued that his established rights had not been respected.

The Commission noted that, even if property was involved, the corresponding property right could not confer entitlement to a "pension of a particular amount". However, in certain circumstances "a substantial reducing of the amount of the pension could be regarded as affecting the very substance of the right to retain the benefit of the old age insurance system". A pension arising from a funding system might well be regarded as a possession within the meaning of Article 1 of Protocol No. 1.

3. *Intellectual property*

For a long time, patents were not described as possessions, but as civil rights.³¹ In our view, there were several reasons for including patents, and intellectual property in general (copyrights, etc.), among possessions. Firstly, a patent can quite reasonably be regarded as an essential element of an economic activity. Secondly, patents have two characteristics – exclusiveness and transferability – which are also hallmarks of property, and this clearly shows that they are possessions, as the Commission finally decided.³²

B. *Extension of the concept of property*

The fact that legitimate expectations are now protected, on certain conditions, as property, and that the Convention bodies have no hesitation

in defining claims as property, underlines the autonomous nature of the concept and illustrates the way in which it has been broadened.³³

1. *The protection of legitimate expectations*

If the concept of legitimate expectations is not to be misused, and so lose its value in the long term, European case-law must define it restrictively. The Commission's attachment to the old conception of property is reflected in a number of decisions which are backed by little in the way of explanation. It seems unwilling to accept legitimate expectations as property in two cases: when an old property right has not been open to effective exercise for a long time, and when a conditional claim lapses because the condition has not been fulfilled.³⁴

a. *Rights connected with exercise of an occupation*

The case-law here has developed in three stages:

- ♦ refusal to protect income arising from exercise of an occupation,
- ♦ protection of goodwill,³⁵
- ♦ the position regarding authorisations and licences required for the pursuit of an economic activity.

Initially, because of the uncertainties attaching to it, exercise of an occupation was not thought to generate property rights.

In *X v. the Federal Republic of Germany*, for example, the Commission decided that notaries' expectations in respect of fees which had been statutorily reduced³⁶ did not constitute a possession. In that case, the act regulating the drawing-up of deeds for universities, churches and other non-profit-making organisations had reduced notaries' fees by between 50% and 80%. The Commission held that their mere expectation that the regulations on fees would not change could not be considered a possession, although a possession would have existed if the claim had been based on "services rendered by the notary and on [...] the existing regulations". The application concerned potential claims only. In the *Van der Musselle* case,³⁷ where payment of a lawyer under Belgian legal aid legislation was the issue, the Court decided that neither payments due for representation nor expenses incurred were possessions. "No assessment of

fees could be made, because of [the client's] lack of means [...]. It follows [...] that no debt in favour of the applicant ever arose" (*Van der Mussele* judgment, para. 48). Moreover, "these expenses were relatively small and resulted from the obligation to perform work compatible with Article 4 of the Convention" (*Van der Mussele* judgment, para. 49).³⁸

The *Van Marle and Others* case,³⁹ in which the Court was concerned with "goodwill", took the case-law further.

The applicants, four Dutch accountants, had all started to practise between 1947 and 1950. Up to 1962, the profession of accountant was not regulated by law. Two acts were then passed to fill this legal vacuum. The second provided for *ex-officio* registration of people who had practised "to an extent and in a manner evidencing adequate professional competence" for at least ten of the fifteen years before the act came into force. The applicants, to whom this clause did not apply, claimed, under Article 1, that there had been interference with their possessions, since their annual turnover had been reduced by between 50% and 60%. Unlike the notaries in the earlier case, they had thus suffered substantial loss of income.

They also referred to the separate opinion of Judge Wiarda in the *König* judgment.⁴⁰ This opinion, which foreshadowed subsequent case-law developments, argued that a private clinic's patients represented an "element of goodwill which [...] was in the nature of a private right, similar, in some respects, to the right of property". The Court agreed with the Commission that the accountants' clientele constituted a possession: "the applicants had built up a clientele; this had in many respects the nature of a private right and constituted an asset and, hence, a possession within the meaning [of the Convention]". Similarly, in its *H. v. Belgium* judgment, the Court also decided that a lawyer's clientele could constitute an asset and possession.⁴¹

One aspect of goodwill deserves special attention: authorisations or licences required to run a business.

For a long time, such authorisations were not regarded as possessions. Thus, in *M. v. the Federal Republic of Germany*, the Commission ruled that "the holder of an authorisation cannot be considered to have a reasonable

and legitimate expectation to continue his activities, if the conditions attached to the authorisation are no longer fulfilled".⁴² In the *Tre Traktörer AB* case,⁴³ a wholly different line was followed. The applicant, a public limited company managing a restaurant, had been licensed to sell beer, wine and other alcoholic beverages. When its licence was revoked because of book-keeping irregularities – a decision not subject to judicial review in Swedish law – it claimed that its rights under Articles 6, para. 1, of the Convention and 1 of Protocol No. 1 had been violated.

In its opinion, the Commission stated that the economic interests connected with running the restaurant were possessions. The licence to sell alcoholic beverages was an important element in the operation, and revoking it therefore interfered with the company's rights under the protocol. While holding to its position that the licence was not, in itself, a possession, the Commission set out to establish whether it was a sufficiently quantifiable and necessary element of the economic interest concerned, and whether its withdrawal would result in loss of goodwill. In other words, its criterion was the extent to which the licence and the economic interests were linked. The Court accepted the Commission's reasoning, and concluded that retaining the licence was one of the main prerequisites for the applicant's pursuing its economic interests. Clearly, this judgment would not have been possible if goodwill had not previously been defined as a possession (*Van Marle* judgment, para. 41).

b. *Potential claims*

The *Pressos Campania Naviera and Others v. Belgium* case⁴⁴ was concerned with a 1988 act which, with retroactive effect for a period of thirty years and without compensation, extinguished the liability of private and public operators of pilot services for sea-going vessels. This act was used to refuse the applicants compensation. The fact that no claim existed did not stop the Court (contrary to the Commission⁴⁵) from deciding that a possession was at issue. This possession was based on the pecuniary value of the claim – which was specious, since there was no claim – and on the applicants' "'legitimate expectation' that their claims deriving from the accidents in question would be determined in accordance with the general law of tort" (para. 31). The Court's position is not without interest; it means that the protection provided by Article 1 of Protocol No. 1 can

extend to possessions which do not yet exist. In other words, the Court does not hesitate to protect virtual property.⁴⁶ But can this approach be stretched to protecting a possession which has no basis in domestic law? The Court may itself define title to property for the purposes of a given case, basing its decision on the autonomous character of the concept of possessions.

This is confirmed by the case of the *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, in which it seems the Court permitted itself to go a stage further.⁴⁷ Disregarding its own case-law on legitimate expectations,⁴⁸ it stated: "While expressing no concluded view as to whether any of the claims asserted by the applicant societies could properly be considered to constitute possessions, the Court, like the Commission [...] is prepared to proceed on the working assumption that in the light of the Woolwich 2 ruling the applicant societies did have possessions in the form of vested rights to restitution which they sought to exercise in direct and indirect ways in the various legal proceedings" (paragraph 70). In other words, Article 1 may be considered to protect three categories of property: acquired property; property falling under the head of legitimate expectation, because sufficiently established; and property resulting from rights to restitution, as in the present case.

2. *Proof of ownership*

Several recent cases have again underlined the autonomous nature of the concept of possessions, in connection with proof of ownership.

In *Papamichalopoulos v. Greece*,⁴⁹ the applicants' ownership had not been formally established, since the property claimed was regarded in law as military property. On the basis of certain indications, such as offers of compensation made to all the applicants, the Court decided that: "For the purposes of the present dispute, the applicants must therefore be regarded as the owners of the land in issue" (para. 39). This position is surprising. The autonomous nature of the concepts of "property" and "possessions" is one thing, but it is questionable whether the Convention bodies can themselves define title to property on the basis of arguments which fail to convince. Paradoxically, this innovative judgment weakens the protection provided for property rights, since it makes the concept of property too

fluid.⁵⁰ This case seems more open to objections than that of the *Holy Monasteries v. Greece*.⁵¹

II. The characteristics of property

So far, we have explored the concept of property by listing things which constitute property. We must now adopt a more general approach and consider the criteria (use and right of disposal) which distinguish property in all its forms.

A. Use

Article 1 speaks of "the use of property", which we must attempt to define.

Use may be defined as the ability to enjoy an object in accordance with its purpose. In the *Sporrong and Lönnroth* case, the Commission and Court recognised that prohibitions on construction interfered with the use of property. While a full set of principles for the use of property cannot be identified, the issue was broached in a case⁵² where the applicant complained that he himself was required to maintain the shared parts of the premises of which he was the owner/landlord. The Commission considered that an owner could be legally required to do certain things to his property: his rights could not be treated as absolute. Prohibiting the possession of certain items is another way of imposing principles for the exercise of property rights. This approach was adopted in the *Handyside* case, in which the confiscation of pornographic books was allowed under the Convention, on the ground that they were forbidden by law and a danger to the general interest.⁵³

Finally, it should be stressed that use gives the owner an exclusive right to his property. This aspect was brought out in the *Müller* case.⁵⁴ Similarly, in the *Kleine Staarman* case, the Commission considered that for a pension right to constitute a possession, its holder must have an identifiable, claimable, and thus exclusive, claim on the common capital (the pension fund). Absence of exclusiveness ("an identifiable and claimable share") has on occasion led the Commission to refuse to treat disability benefits as possessions.⁵⁵

B. *Right of disposal*

“The right to dispose of one’s property constitutes a traditional and fundamental aspect of the right of property” (*Marckx* judgment, para. 63). This right entitles the owner to enter into a legal relationship with another person, regardless of the form which this relationship takes: sale, rental, usufruct. This transferability may be regarded as an essential condition of economic effectiveness and justice.⁵⁶

The right to dispose of a possession implies that it constitutes an asset. The Commission has sometimes used economic value as its criterion for deciding whether a possession exists. In the *Bramelid and Malmström* case, it considered whether a company share constituted a possession: “a company share is a complex thing: certifying that the holder possesses [...] rights (especially voting rights); it also constitutes an indirect claim on company assets. In the present case there is no doubt that the [...] shares had an economic value [...] therefore [...] the shares [...] were indeed possessions”.⁵⁷

Chapter II

The victim of interference with property

In general, Article 1 of the protocol applies when a natural or legal person complains of interference with his property. Such applicants are considered direct victims in the case-law. However, indirect victims can also invoke Article 1. An indirect victim is “a person who can show that there was a special personal connection between himself and the direct victim and that the violation of the Convention has caused him harm, or that he had a justified personal interest that the violation should cease”.⁵⁸

In the case-law, the question of indirect victims essentially arises in connection with applications from shareholders in commercial companies. In cases of nationalisation, they can certainly claim to be direct victims of interference with their possessions, but does this apply when there is interference with a company's property?

In an early decision, the Commission introduced the “substantial proportion” criterion.⁵⁹ The applicant in that case owned a plot of land, on which he had established a company, of which he was chairman. He owned 91.66% of the shares. Declared bankrupt and required to sell his holding, he claimed that Article 1 of Protocol No. 1 had been violated. In reply, the Government argued that, as a shareholder – even the principal shareholder – he could not be considered the victim, either direct or indirect. The Commission held: “Even if under Austrian law only the company as such would be entitled to take legal action [...] the Commission is of the opinion that the applicant is to be considered a victim [...]; in this respect the Commission has had particular regard to the fact that about 91% of the shares in that company were held by the applicant”. The Commission's criterion may thus be summarised as follows: if a shareholder owns a substantial proportion (in this case 91%) of the shares, he may then complain of interference with a company's property. But what is a

substantial proportion? The Commission did not answer this question for some time.

It eventually clarified its criterion in the *Yarrow and Others* case, in which the applicants, who were shareholders in the parent company, complained of the nationalisation of one of its subsidiaries.⁶⁰ The Commission held that only the first applicant, Yarrow PLC, could claim to be the victim of the nationalisation of Yarrow Shipbuilders. The other applicants could not claim to be either direct or indirect victims: nationalisation had not affected their possessions since “none of the three applicants in question here held a majority or controlling interest in Yarrows”.

Chapter III

The different forms of interference with property

To avail usefully of the protection offered by Article 1 of Protocol No. 1, an applicant must show that his right to use or dispose of his property has been interfered with.

Such interference is usually the direct consequence of action taken by a public body as an executive authority.⁶¹ It may also arise from a court decision or from legislation,⁶² or even from an international legal instrument or constitution, when these affect property rights directly. But Article 1 may still apply, even if the public body was not directly responsible for the interference with property, when a third party – a private individual – provokes the interference. However, the interference may not derive exclusively from a private individual, since a public body must be involved at least mediately, if not directly and immediately. The Commission repeated this rule in the *Bramelid and Malmström* decision: “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” are examples of rules which may compel a person to surrender a possession to another. “The Commission must nevertheless make sure that in determining the effects on property of legal relationships between individuals, the law does not create such inequality that one person could be arbitrarily and unjustifiably deprived of property in favour of another”.⁵⁷

The best-established case-law interpretation assumes that there are three types of interference with property. If two are deduced from the letter of Article 1, the third is a purely judicial construct. However, the Court's criteria for each of the types seem to be becoming less and less clear – and this represents a threat to the effectiveness and security of the European protection system.

I. The two types of interference with property covered by Article 1 of Protocol No. 1

Control and deprivation are two very different types of interference. Deprivation may be defined as dispossession of the subject of property: by taking the possession away from its owner, it removes the attributes of property from it. Deprivation is, in principle, transfer of property. Control involves no transfer: the owner retains his property, but is restricted in his use of it. In a few, exceptional cases, deprivation constitutes control of the use of property.

A. *Deprivation of property*

1. *Deprivation involving transfer of property*

Measures whose purpose is direct dispossession of the owner constitute deprivation. This applies to expropriation⁶³ and nationalisation,⁶⁴ which involve the direct transfer of a property title to a public body or another private individual.

In the *James and Others* case, it was decided that a law which obliged an owner to sell his property (the freehold) by giving the leaseholder right of purchase was a measure involving deprivation of property. In another case, it also found that a redistribution, or reparacling, of property deprived the applicants of their possessions.⁶⁵ In the *Poiss* case, on the other hand, the Commission and Court did not consider that the applicants had been definitively deprived of their possessions, since the transfer carried out was provisional.⁶⁶ Temporary dispossession cannot be regarded as deprivation, but constitutes control of the use of property, as established in the *Handyside* case.⁶⁷

Indirect deprivation is less easy to define. The main criterion here is that transfer of property originates in action by the public authorities, but is actually effected by the owner himself. This applies to forced sales, of the kind at issue in the *Håkansson and Sturesson* case.⁶⁸ The applicant in this case had bought farming land at auction, but had been obliged to resell it, since the authorities refused to grant him the permit he needed to retain it. The Commission decided that this constituted deprivation of property,

since the sale resulted from action by a public body – the refusal to issue a permit confirming acquisition of the property.

2. *De facto expropriation*

“In the absence of a 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” (*Sporrong and Lönnroth* judgment, Series A no. 52, para. 63).

The effects of *de facto* expropriation are equivalent to those of formal expropriation. In other words, it transfers property. But it differs from formal expropriation in not being based on a legal procedure. It also differs from destruction of property, particularly when this results from a retaliation measure, which does not transfer property.⁶⁹ In an important case against Turkey,⁷⁰ the Court took the unlawful character of the Turkish Republic of Northern Cyprus as ground for denouncing Article 159, para. 1.b. of the Constitution of 7 May 1985, which recognised the taking over of property, including the applicant's property, by the new “state” as constitutional. The applicant was accordingly considered still the lawful owner of her land (para. 47). However, because of the division of the island into two parts, she was forbidden access to her property and lost all control over it. The Court saw this as interference with the substance of property and not, curiously, as *de facto* expropriation.

The Court used the term *de facto* expropriation for the first time in the *Papamichalopoulos* case.⁷¹ It declared that: “the applicants were unable either to make use of their property or to sell, bequeath, or make a gift of it; Mr Petros Papamichalopoulos [...] was even refused access to it” (*Papamichalopoulos* judgment, para. 43). The manifest absence of any attempt to regularise the procedure had left the owners without redress for a period of twenty-eight years, and this fact probably strengthened the Court's conviction that the term was justified.

B. Control of the use of property

The last sentence of Article 1 of Protocol No. 1 indicates that there are two types of control of the use of property: that which serves the public interest, and that which is intended to secure the payment of taxes or other contributions or penalties.

1. Control of use of property in the public interest

Article 1 states that control concerns the use of property. In practice, it may also concern the right to dispose of property. Thus, the Commission has decided that restrictions on freedom of contract in respect of tenancies can constitute control of the use of property.⁷² Similarly, interference with exclusiveness is interference with enjoyment of a possession, and thus with the possession itself. A case brought against Sweden illustrates this. The applicant owned lakeside property which gave him exclusive fishing rights, later abolished by law. The Commission recognised that these rights could be considered a possession, and that abolishing them interfered with property. It refused, however, to describe this interference as deprivation of property, considering that it constituted control of use.⁷³

2. Control of use of property to secure payment of taxes or other contributions or penalties

The concepts of taxation, contributions and penalties have been clarified in the case-law.

Taxes usually apply over a period of time, whereas contributions tend to be more specific. The Commission has singled out two further characteristics of taxes, making the point that the purpose for which a tax is raised “does not alter the nature of the tax as such”,⁷⁴ and emphasising that taxation inevitably differentiates between different groups of taxpayers, and varies with the state’s social and economic objectives.⁷⁵ Since power to levy taxes is one of the attributes of national sovereignty, it can reasonably be argued that the Convention bodies do not review the actual decision to raise taxes, but the proportionality between the level of taxes and the means of those required to pay them. The Court does, however, reserve the right to denounce any law that transgresses the ample margin of appreciation which applies to adoption of the fiscal legislation needed to ensure the payment of taxes.⁷⁶

The recent debate on the what exactly is meant by “legislation needed to ensure the payment of taxes” is still open. The Commission has considered that the power to confiscate an inheritance under taxation laws constituted a deprivation of property.⁷⁷ The Court, on the other hand, saw it as a means of controlling the use of property to ensure payment of taxes⁷⁸ – despite the fact that the Dutch tax authorities enjoyed a position of priority over other creditors. In *Hentrich v. France*, the Court adjudged that the seizure of a building was a deprivation of property.⁷⁹ Finally, in the case of the British building societies, the Court stated that the non-restitution of monies paid under invalidated tax provisions extinguished under the effects of retrospective legislation could be considered as control over the use of property with a view to ensuring the payment of taxes.⁸⁰ The Court argued that the legislation involved neither double-taxation nor expropriation.

The above judgments lead us to the belief that the regulation referred to in the third sentence of Article 1 applies as much to tax legislation (definition of the scope and amount of the tax) as to the obligation imposed on an individual to pay taxes.

The Commission has stated that contributions may include legal costs⁸¹ and “contributions” levied by public law foundations.⁸² As for penalties, a comparison of the French and English wording of Article 1 suggests that the term applies only to pecuniary fines, and not punishments involving confiscation of property.⁸³

C. Deprivation of property constituting control of the use of property

There are two groups of cases where, exceptionally, the effective transfer of property is regarded as control, and not deprivation.

1. Measure involving exercise by the state of its executive powers

This applies in cases where the state acts to enforce transactions between individuals. An example here is bankruptcy, which actually means that the bankrupt loses his possessions⁸⁴ and yet constitutes, not deprivation, but control of their use. On the other hand, the civil requirement to pay maintenance, based on the general principles of civil family law, does not, in the Commission’s view, fall within the scope of Article 1 of Protocol No. 1.⁸⁵

2. *Confiscation*

There can be no question that arbitrary confiscation constitutes deprivation of property. When it is not arbitrary, the Court does not use the term “deprivation”, as the *Handyside* and the *Agosi* cases indicate.⁸⁶

The applicant in the *Handyside* case had been found guilty of publishing an obscene book. He was deprived of his property by confiscation in two stages. To start with, the offending books were provisionally seized – a measure dictated by the possibility of his committing an offence and by the public interest. At that stage, and remembering that the measure was provisional, deprivation of property was certainly not the right term. Later, when the applicant had been found guilty, the books were definitively impounded. In describing this interference as deprivation of property, the Court employed an ambiguous formula.⁸⁷

In the second case, gold coins had been smuggled into the United Kingdom without the owner's knowledge. The Court considered that confiscation was justified by the general interest and the applicant's guilt, which had been reasonably established. However, the judgment ran counter to the Commission's opinion, and has been criticised by commentators.⁸⁸ The Commission considered that the absence of a clear link of ownership between the smuggled goods and the smugglers meant that confiscation, which harmed the owners alone, was no longer justified. It expressed no view on the applicant's degree of fault but stated that “English law did not permit [Agosi] to establish his claim to be an innocent owner and thereby to recover the coins as of right” (*Agosi*, Commission Report, para. 90). It is thus questionable whether “control” was the right term here, given the unjust, and indeed arbitrary, nature of the measure. None the less, these judgments have created precedents, as the case of *Raimondo v. Italy* shows.⁸⁹

II. “Interference with the substance” of ownership, a court-defined type of interference

In 1982, in the famous *Sporrong and Lönnroth* case, the Court identified a new type of interference: “interference with the substance of ownership”,⁹⁰ based on the first sentence of Article 1 of the Protocol: “Every natural or

legal person is entitled to the peaceful enjoyment of his possessions". This key principle – the right to peaceful enjoyment of one's possessions – is indeterminate in scope and has caused numerous disputes.

A. "Interference with the substance" restricts the attributes of property without depriving the owner of it

The applicants in the *Sporrong and Lönnroth* case complained about expropriation permits, which had been constantly renewed, and about prohibitions on building.⁹¹ The Court noted that the effects of these measures "stemmed from the reduction of the possibility of disposing of the properties concerned", that "the applicants could continue to utilise their possessions" and that "the possibility of selling subsisted", several dozen sales having been effected. (*Sporrong and Lönnroth* judgment, Series A no. 52, para. 63). It seemed clear to the Court that the interference with the substance of the applicants' property did not completely prevent them from using and disposing of it freely, but did place restrictions on them.

The case shows, in other words, that interference with the substance of ownership does not deprive an owner of his property (*Sporrong and Lönnroth* judgment, *loc. cit.*, para. 63).

The Court also found that there had been interference with the substance of ownership in the *Poiss* case. This concerned the provisional transfer of agricultural land under a very long-term consolidation programme, which meant that the applicants no longer enjoyed the benefits of ownership in practice, although they had not been deprived of their property, either through formal or *de facto* expropriation (*Poiss* judgment, para. 64).⁹² In the Court's view, the provisional transfer of lands in 1963, for however long a period, could not be considered deprivation of property, since the applicants retained the hope that they might one day recover their full property rights.

The Court argued – unconvincingly, as some commentators have complained⁹³ – that the interference to which the applicants had been subjected was covered by Article 1: "[...] the expropriation permits were not intended to limit or control such use – there was thus no control of use. Since they were an initial step in a procedure leading to deprivation of

possessions, they did not fall within the ambit of the second paragraph – there was no deprivation. They must be examined under the first sentence of the first paragraph" (*Sporrong and Lönnroth* judgment, *loc. cit.*, para. 65). The Court found, however, that: "The prohibitions on construction clearly amounted to a control of 'the use of [the applicants'] property', within the meaning of the second paragraph" (*Sporrong and Lönnroth* judgment, *loc. cit.*, para. 64).

B. *The questionable concept of "interference with the substance"*

Originally, the line followed in the *Sporrong and Lönnroth* judgment was thought to apply to cases in which owners were left in a prolonged and unacceptable state of uncertainty concerning the fate of their property. Their ownership rights were jeopardised in consequence, and this justified the term. It did not escape criticism, however. A number of writers,⁹⁴ as well as some of the judges in the case, disagreed with the finding of interference with the substance of ownership. Two lines of criticism are possible here.

Firstly, it can be argued that control and deprivation are the only types of interference with property. Interference which leaves the owner able to exercise some of his property rights, even to a limited extent, is control, while interference which irrevocably nullifies those rights, whether or not the property is transferred, is deprivation – possibly *de facto* expropriation. Secondly, a precise rule for distinguishing between control and interference with the substance of ownership would seem hard to find. The only real criterion is the level of the interference, and the relevant factors here – its duration and more or less definitive character – should make it possible to assign it to one of the other two categories.

The Court is increasingly using this concept. Sharply criticised by the dissenting judges to start with, to my mind it is no more persuasive today. It surely serves as a kind of catch-all category for any kind of interference which is hard to pin down? The following judgments undoubtedly suggest this. In the *Greek refineries* case,⁹⁵ the Court decided, without giving reasons, that legislative annulment of a claim constituted "interference with the substance" (para. 68), although it could well be argued, as the applicants actually did, that it constituted *de facto* deprivation. In the

Venditelli v. Italy case,⁹⁶ the Court did not define the nature of the interference, but decided that the measure had placed a disproportionate burden on the applicant – which strongly implies that it constituted interference with the substance of ownership.

In the *Katte Klitsche de la Grange v. Italy* case, the Court described a prohibition on the applicant's building on part of his land as “interference with the substance” of his property.⁹⁷ In so doing, it was, first of all, going back on its position in the Swedish case, where it had decided that prohibitions on building constituted control of the use of property (*Sporrong and Lönnroth* judgment, para. 64). However, the real surprise in the Italian case was that “interference with the substance” of property rights was not seen as violating Article 1 of Protocol No. 1. This directly contradicts the spirit in which the term was first employed. In fact, it was originally used in connection with special and exorbitant burdens, which necessarily violated Article 1 – and this may actually have helped to make a real distinction between “interference with the substance” and control of the use of property. It is surely strange to bring in this concept, which is heavy with meaning, and then decide that “interference with the substance” of property rights does not violate Article 1? It may be as well that no one type of interference with property should automatically constitute a violation, but the concept itself must be rigorous and predictable. This is not the case, as other Court decisions indicate.

The *Prötsch v. Austria* case⁹⁸ concerned the provisional transfer of agricultural land under a consolidation scheme which the applicants contested, on the ground that they had not been offered land of equal value. They also complained of delay in implementation of the scheme. The Court decided that there had been no deprivation of property, and also that there had been no control of the use of property, giving as its reason the fact that: “This provisional transfer was essentially designed not to restrict or control the ‘use’ of the land” (para. 42). By insisting on the words “essentially” and “use”, was the Court trying to give this portmanteau type of interference with property a measure of consistency? At all events, it decided that there had been no violation, essentially because of the benefits which the applicants had derived from the transfer. Finally, the *Phocas v. France* case⁹⁹ was concerned with restrictions imposed on property rights by an urban development project which had not been

implemented. The Court decided that this interference could not be termed deprivation of property, which is logical, or control of the use of property, which is more questionable. Indeed, this term seems applicable to urban development schemes which, like this one, restrict building. Referring to the threat of expropriation and to the duration of that threat, and also to the Swedish case, the Court described this interference as “interference with the substance of property”. However, it rejected the suggestion that property rights had been violated, on the ground that an offer to purchase the disputed lands had fallen through as a result of the applicant’s conduct. This decision provides a classic reminder that “interference with the substance of property” may exist without violating the Convention.

Chapter IV

Permissible interference with property

Once interference with property has been established, the next question is its lawfulness. If it is not to violate Article 1 of Protocol No. 1, interference must be justified and proportionate, these being the criteria for compliance.¹⁰⁰ A further criterion does seem to emerge, however, from recent case-law. This concerns the procedural requirements which apply to property rights.

I. Justifications for interference with property

Interference with property is justified only when it satisfies two conditions. It must be lawful (i.e. in accordance with domestic law), and it must also be legitimate. In other words, compliance with domestic law and procedures is not enough – interference must also, under Article 1, accord with the public interest (deprivation of property) and the general interest (control of the use of property). These conditions apply to all types of interference.

A. *Lawfulness of interference*

Article 1 of Protocol No. 1 states that deprivation of property must be “subject to the conditions provided for by law” and that control of use must be based on “such laws as it [the state] deems necessary”. This requirement of lawfulness is intended as a safeguard against arbitrary measures. The reference is to domestic law, which may be written (laws, decrees, regulations), precedent-based or customary.

As far as the conditions provided for by law are concerned, it should be noted that the Court has laid down the following requirements: law presupposes the existence of, and compliance with, domestic regulations which are sufficiently accessible and precise (*James* judgment, para. 67).

Moreover, the reference is not merely to domestic law, but also to its quality, i.e. its compatibility with the principle of the rule of law. The European case-law is not restricted to property rights – it draws here on the concept of “law” enshrined in Articles 8, 9, 10 and 11.

B. *Legitimacy of interference*

We shall now consider the legitimacy of interference with property and ways of monitoring it.

1. Meaning of the terms “public interest” and “general interest”

The Court made a number of interesting points concerning the public and the general interest in the *James* case, without making any fundamental distinction between them (*James* judgment, para. 43). It also recognised that the public interest could be the interest of another individual (*James* judgment, para. 39): “a taking of property effected in pursuance of legitimate social, economic or other policies may be ‘in the public interest’, even if the community at large has no direct use or enjoyment of the property taken” (*James* judgment, para. 45). The concept of public interest is a very broad one, and it is hard to say where it begins and ends. Where general interest is concerned, case-law is particularly well-developed in the urban planning field. Thus “[...] in an area as complex and difficult as that of the development of large cities, the Contracting States should enjoy a wide margin of appreciation in order to implement their town-planning policy” (*Sporrong and Lönnroth* judgment, para. 69).

Definitions of public and general interest also vary from country to country and over time, this being one aspect of the margin of appreciation which states are allowed in implementing the Convention.¹⁰¹ In the *Scotts of Greenock* case, the applicants complained of the conditions in which a nationalised company, owned by them prior to nationalisation, was subsequently re-privatised. In the Commission’s view, re-privatisation “was intended to achieve the complete reorganisation of the industry, and was thought likely to provide the most satisfactory basis upon which to establish the industry’s competitiveness [...] However, in view of the political assessment which is required in formulating a policy such as the nationalisation of an industry, it is inevitable in a democratic society that the political perception of such a policy, and hence the policy itself, may

change from time to time". The Commission found that it was "not therefore established that the resale could put the public interest of the original nationalisation in doubt".¹⁰²

2. *Monitoring legitimacy*

"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'" (*James* judgment, para. 46). The Court's supervision of legitimacy thus plays a subsidiary role only.

In the *James* judgment, it defined the scope of its supervision: "The Court [...] will respect the [national] legislature's judgment as to what is 'in the public interest' unless that judgment is manifestly without reasonable foundation" (para. 46). This means that it may be led, in certain cases, to challenge the national legislature's view of the public interest and to penalise an unreasonable decision. Its supervision thus extends to the appropriateness of interference with property. The legislature's judgment must be manifestly without reasonable foundation to be declared incompatible with Article 1. Reasonableness is a vague criterion, especially as any error must be manifest. Such supervision seems cautious and bold at once: cautious, since few laws are likely to be manifestly unreasonable; bold, since the Court, by limiting states' margin of appreciation, is undeniably controlling the "acceptability" of legislation in terms of the Convention. This was so in the cases of *Katikaridis v. Greece* and *Tsomtos and Others v. Greece*, in which the Court decided that the law prescribing a method for valuation of expropriated property was unreasonable.¹⁰³

II. The proportionality of interference with property

A. *The concept of proportionality*

The Court has used its judicial powers to introduce a new form of supervision – supervision of proportionality.¹⁰⁴ The Court referred explicitly to the supervision of proportionality in the *Sporrong and Lönnroth* case, when it said that it had to "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" (*Sporrong and Lönnroth* judgment, para. 69). It considers, in other words, that all types of interference with property must respect proportionality.

The supervision of proportionality involves establishing whether a measure is "both appropriate for achieving its aim and not disproportionate thereto" (*James* judgment, para. 50). This allows the Convention bodies to verify that the aims of legislation and the means it employs are consistent. Once the legitimacy and lawfulness of interference with property have been recognised, supervision thus extends, indirectly, to its needfulness.

The proportionality requirement can take various forms, but this does not seem to be a determining factor in exercising supervision of it.¹⁰⁵

B. Forms of supervision of proportionality

The Commission clarified the content of supervision of proportionality in the *Gillow* case, when it asked itself whether prohibiting the applicant from occupying his property constituted control or deprivation, and noted that: "the measure of proportionality clearly differs in the application of the two rules since [...] a deprivation of property is inherently more serious than the control of its use, where full ownership is retained". It further declared that proportionality must be assessed with reference to the "the severity of the restriction" imposed (*Gillow*, Commission Report, paras. 148 and 157). In other words, the level of concern for private interests depends on the degree of interference with property. This seems to suggest that application of the proportionality principle as a means of supervision may vary from case to case.

Instead of assuming, however, that there are four ways of supervising proportionality, corresponding to the four types of interference with property,¹⁰⁶ it seems more reasonable to identify two: one applying to deprivation, and another to the three other types of interference with property. This is the burden of the Court's judgment in the *Gasus* case,¹⁰⁷ where control of the use of property to secure payment of taxes or other contributions or penalties was the issue.

While holding that the legislator must have ample discretion to adopt the fiscal legislation required to secure payment of taxes (para. 60, last sub-para.),¹⁰⁸ the Court also thought that this legislation must strike a reasonable balance between means and ends (para. 62), and impose no special and exorbitant burdens on owners of property rights (para. 67). In its judgment, it uses the terms which apply to “interference with the substance” and to control of use interchangeably, and this is worth noting, since it seems to suggest that the conditions for supervision of proportionality are the same. In other words, the *Gasus* cases appear to indicate that there are two types of supervision: that which applies in cases of deprivation of property, and that which applies in others.

This is not an illogical distinction. In cases of deprivation of property, proportionality is respected if the dispossessed owner is awarded compensation.¹⁰⁹ In other cases of interference with property, supervision of proportionality varies in content, but is always defined in the same way. This enables the Court to exercise it as it sees fit in specific cases. The *Gasus* judgment casts no doubt on the view expressed by Professor Sudre and by the Commission in the *Gillow* case, that the strictness with which proportionality is supervised depends on the type of interference concerned.¹¹⁰

III. The procedural requirements of Article 1 of Protocol No. 1

The *Air Canada* case gave the Court an opportunity to dilate on the procedural guarantees provided by Article 1 of Protocol No. 1.¹¹¹ The similarity to the *Agosi* case, referred to above, is striking. *Air Canada* complained of arbitrary confiscation when one of its aeroplanes, on to which cannabis resin had been brought without its knowledge, was temporarily seized. The Court found, first of all, that the measures complained of were designed to combat international drug-trafficking and so were justified in the public interest (para. 42). The seizure was carried out by the British customs service five days after the offence had been discovered. No reasons were given by the authorities for this measure. Above all, the applicant company, which had nothing to do with the offence, was penalised for a crime committed by a person unknown to it.

These specific aspects led Judge Martins to conclude, in his dissenting opinion, that the confiscation was acceptable only: “when the owner somehow is to be blamed in respect of the offence committed by dint of his property. [...] Confiscation as a ‘sanction’ not allowing for some defence of innocent ownership, upsets the fair balance between the protection of the right of property and the requirements of general interest.” (*Air Canada*, Series A. No. 316, dissenting opinion, para. 5).

The Court did not agree. Although the judicial review procedure available in British law was not an appeal on the merits of the case (para. 44) and although proportionality was not normally a separate ground of review (para. 21 and 46 *in fine*), which appeared to run counter to Article 6,¹¹² the Court noted that: “the scope of judicial review under English law is sufficient to satisfy the requirements of the second paragraph of Article 1 of Protocol No. 1” (para. 46, first sub-para.). This means that the procedural requirements attaching to property rights are markedly less stringent than those which apply under Article 6: what, after all, is the utility of a judicial remedy which cannot be used to examine the lawfulness of interference with property rights? As case-law develops, it may perhaps become possible to strengthen the procedural requirements of Article 1.

Chapter V

Forms of reparation for interference with property

Disregarding compensation awarded otherwise than by a court or similar body,¹¹³ reparation for interference with property takes two forms: compensation and damages.

Their intrinsic aims are fundamentally different. Compensation is a condition for deprivation of property. This is why property rights are unlike other human rights, since interference with them does not violate Article 1 of Protocol No. 1 if the owner receives compensation. They can, in other words, be commuted into cash. Damages, on the other hand, are a form of compensation awarded to owners when the conditions for interference with property have not been respected. Compensation and damages thus rest on different legal foundations. Compensation is based on Article 1, second sentence, of Protocol No. 1, while Article 50 of the Convention provides a basis for damages in the form of "just satisfaction".¹¹⁴ These differences explain why Article 1 cannot lead to restitution of property,¹¹⁵ whereas Article 50 can. They do not, however, stand in the way of "just satisfaction" for owners deprived of their property in violation of the conditions laid down in Article 1 of Protocol No. 1. This was the case with the *Papamichalopoulos* judgment.

I. The principle of entitlement to compensation in cases of deprivation of possessions

According to current case-law, the principle of compensation can be implemented in three separate ways. Firstly, standard protection involves payment of a sum which is in reasonable proportion to the value of the property, leaving the way open to full compensation. Secondly, the rights of foreigners dispossessed of their property are covered by the general

principles of international law. Finally, exceptional circumstances may justify non-payment of compensation.

A. Standard protection

In the *Lithgow* judgment, the Court laid down rules on damages, and in so doing clarified the *travaux préparatoires*.¹¹⁶ It considered two distinct but complementary aspects of compensation. Firstly, it decided that deprivation of property entailed a right to reasonable compensation, opening the way to – but not requiring – full compensation. Secondly, it stated that it would have to intervene if the method used to value the property was manifestly unreasonable.

1. The right to reasonable compensation

The Court has established that the proportionality principle implies a right to reasonable compensation (*James* judgment, para. 54). In fact, it considers that “the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1” (*Lithgow* judgment, para. 121). The right to compensation is now assured, although it has, in a very limited way, been contested within the Court itself.¹¹⁷

It is, in any case, unlikely that compensation will not be paid, since most democratic constitutions provide for it when property is expropriated or nationalised.

The Court has ruled that compensation must be of “an amount reasonably related to [the value of the property]” (*Lithgow* judgment, para. 121). It has also stated, however, that: “Article 1 does not [...] 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” (*Lithgow* judgment, para. 121 and *James* judgment, para. 54). In the *Scotts of Greenock* case, the Commission found that the compensation awarded satisfied the proportionality rule, since no “manifest disproportion between the value [of the property] taken

and the compensation paid" had been established (*Scotts of Greenock*, Commission Report, para. 90).

In the *Akkus v. Turkey* case the Court was asked to deal with the late payment of an additional compensation, the value of which had been reduced by high inflation. The inflation rate was 70% per year; whereas the interest on the compensation was fixed at the legal limit of 30%. The Court found a violation of Article 1. In a dissenting opinion, Judge Thór Vilhjálmsson said that rules on human rights were not an effective instrument in the battle against inflation. The general impact of inflation meant that it affects economic life as a whole, and the repercussions on individuals, even if frequently serious, were rarely individual and specific.¹¹⁸

The Court thus gives states a wide margin of appreciation concerning the level of compensation. In fact, "provided always that the aforesaid fair balance is preserved, the standard of compensation required in a nationalisation case may be different from that required in regard to other takings of property" (*Lithgow* judgment, para. 121). This distinction was justified because "the valuation of major industrial enterprises for the purpose of nationalising a whole industry is in itself a far more complex operation than, for instance, the valuation of land compulsorily acquired" (*Lithgow* judgment, para. 121).

2. *The valuation method must be manifestly reasonable*

The Court gives national authorities considerable discretion in this area, but has qualified this by stating that it will respect their choice of method unless it is "manifestly without reasonable foundation" (*Lithgow* judgment, para. 122).¹¹⁹ This applied in the cases of *Katikaridis v. Greece* and *Tsomtos and Others v. Greece*.¹²⁰ To prevent the owners of land expropriated for road-building purposes from making unjustified profits, Greek law declared that the project would benefit them, and that compensation would be paid only for expropriated plots above a certain size.

The applicants took their case to the Greek Court of Cassation, which made it an irrebutable presumption that they derived real benefits from improvement of the road and construction of a cloverleaf junction – and accordingly refused them compensation. The Strasbourg Court found the system unduly rigid: "the compensation is in every case reduced by an

amount equal to the value of an area fifteen metres wide, without the owners concerned being allowed to argue that in reality the effect of the works concerned either has been of no benefit – or less benefit – to them or has caused them to sustain varying degrees of loss” (para. 49). It concluded that property rights had indeed been violated, and that the offending law should thus be repealed. Even disregarding the applicants’ case, it found that the Greek law was “manifestly without reasonable foundation” (para. 49). This made it unnecessary even to establish that the applicants had actually suffered the effects of this system, since, “in the case of a large number of owners, it *necessarily* upsets the fair balance between the protection of the right to property and the requirements of the general interest” [our italics] (para. 49). This is an exceptionally noteworthy judgment, since in it the Court denounced a law as being in fact unlawful.

B. *The general principles of international law*

The general principles of international law, referred to in the first paragraph of Article 1, normally require prompt, appropriate and effective compensation for all forms of deprivation.¹²¹ However, the Court does not regard them as applying to a state’s own nationals (*Lithgow* judgment, para. 119 and *James* judgment, para. 66),¹²² and this may give rise to discrimination between aliens and nationals in respect of compensation. This distinction is based on a traditional conception of international law, which does not allow nationals to claim rights under international law in what are properly national situations.

The Court has not admitted explicitly that non-application of the general principles of international law to a state’s own nationals means that they receive less compensation than aliens. Such discrimination is, in any case, optional. None the less, it accepts the principle that nationals may have to bear a heavier burden than non-nationals. “Especially as regards a taking of property effected in the context of a social reform or an economic restructuring, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption.

Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals" (*Lithgow* judgment, para. 116). As the authors of a concurring opinion in the *James* judgment noted: "the thesis accepted by the judgment leads to a difference in the treatment of nationals and aliens under the Convention".¹²³ The Commission has confirmed that this is so.¹²⁴

Many commentators have objected to this interpretation.¹²⁵ Condorelli, for one, considers this discrimination unjustified and has attacked it on various scores.¹²⁶ Firstly, it seems to conflict with the literal meaning Article 1 of the Convention, which refers to "everyone". Secondly, it stands in the way of systematic interpretation, since it has no objective or reasonable basis. Thirdly, it clashes with a teleological interpretation of the Convention, which sees it as basically aiming, in the long term, to eliminate all distinctions between nationals and non-nationals. Finally, it relies on a historical interpretation of the *travaux préparatoires*, which he does not consider authoritative.

C. Non-compensation

In *Lithgow and Others*, the Court referred to exceptional circumstances in which no compensation might be paid.¹²⁷ This seemed merely theoretical, however, and unlikely to apply in practice – until the case of *Pressos Campana Naviera SA and Others v. Belgium* proved otherwise.¹²⁸ This case concerned a 1988 law which, with retroactive effect for a period of thirty years and without compensation, extinguished the liability of private and public operators of pilot services for sea-going vessels. The applicants – the owners and, in one case, the insolvency administrator of ships involved in accidents in Belgian or Dutch territorial waters – were refused compensation under this act.

The respondent government gave three reasons for refusing compensation: the need to protect the state's financial interests, the need to harmonise Belgian and Netherlands law and the need to restore legal certainty in the field of tort. The Court decided that the third reason should be discounted, since there were indications that denial of state liability in connection with

pilot services was not based on any firm legal tradition. However, it partly accepted the first two arguments. While these could not justify the retroactive scope of the act, which in this respect had violated the applicants' rights, they were sufficient to rule out compensation in disputes arising after its coming into force (para. 44). This judgment is by no means insignificant, since it recognises that there may be exceptional circumstances in which persons deprived of their property may validly be refused compensation.

II. "Just satisfaction" for violations of Article 1 of Protocol No. 1

The *Sporrong and Lönnroth* judgment was for a long time the only example,¹²⁹ but there have now been many other cases in which applicants have been awarded just satisfaction. The *Papamichalopoulos* case produced a noteworthy judgment.¹³⁰ Having established, on the main issue, that expropriation had indeed taken place, the Court assessed the material damage caused at 5 551 000 000 drachmas, or 111 020 000 French francs. In determining the rules applying to compensation, it very clearly based itself on the applicable provisions of public international law.

Restoration of the previous situation, or *restitutio in integrum*, is the principle on which decisions on damages given by international courts or arbitration bodies are based: "Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".¹³¹ More recently, the arbitral decision given in the *Texaco-Calasiatic* case confirmed that *restitutio in integrum* was the normal sanction for failure to fulfil contractual obligations.¹³² The principle has thus been clearly stated, but the Permanent Court of International Justice also recognises monetary compensation: "It is a principle of international law that the reparation of a wrong may consist in an indemnity".¹³³ If international law prefers *restitutio in integrum*, this is because it is the most advantageous and rational technique. Accepting this position, the Strasbourg Court gave the Greek Government a choice between restoring the original situation and paying the applicants compensation, while indicating that the first option should be preferred: "failing such restitution, the respondent State is

to pay the applicants, within six months, 5 551 000 000 drachmas in respect of pecuniary damage” (see section 3 of the operative clauses).¹³⁴

Could the original situation have been restored in this case? Given that the Greek navy had built a naval base and a holiday home for officers and their families on the expropriated land, it seems unlikely. The Court took the view that: “the award of the existing buildings would then fully compensate them for the consequences of the alleged loss of enjoyment” (para. 38). This, surely, undermines the effort at rationalisation which the judgment otherwise embodies? Ultimately, the *Papamichalopoulos* judgment remains notable for the size of the sums awarded and for the Court’s real and effective determination to condemn dispossession of this kind.

Conclusion

In conclusion, reference may be made to Andrew Drzemczewski's classification of rights protected by the Convention into three categories:¹³⁵

- ♦ absolute rights: those from which derogation is not possible. Examples are the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 of the Convention);
- ♦ minimal rights: those considered to be a lowest common denominator acceptable to states which have ratified the Convention. These include the right to a fair trial (Article 6 of the Convention);
- ♦ qualified rights: rights or freedoms which are recognised but whose exercise may be subject to certain qualifications. Property rights fit naturally into this category.

Nevertheless, this does not mean that property rights should be turned into secondary rights: qualified rights are still human rights. Just because the Convention bodies are cautious in the protection they offer for property rights, the central importance of those rights in a democratic society should not be forgotten.

Appendices

Appendix I. Summary of principal cases

Eur. Comm. H.R., decision of 20.12.60, *Gundmunsson v. Iceland*, No. 511/59, Collection 4, p. 19.

The general principles of international law include principles relating to the confiscation of goods belonging to foreign nationals. Measures taken by a state with regard to the possessions of its own nationals are not subject to these principles, unless this is explicitly provided for by treaty.

Eur. Comm. H.R., decision of 18.12.63, *De Buck v. Belgium*, Nos. 1420/62 and 1477/62, Collection 13, p. 91.

“Article 1 [of the Protocol] is mainly concerned with the arbitrary confiscation of property [...] It does not, in principle, affect the appropriate ways and means of enforcing judicial rulings on disputes between individuals.”

Eur. Comm. H.R., decision of 29.5.67, *A, B, C and D v. the United Kingdom*, No. 3039/67, Collection 23, p. 66.

The compulsory purchase of stocks held by the applicants constituted deprivation of property. However, the aim of the measure was to put the steel industry on a sound economic footing, and so the “public interest” criterion was satisfied.

Eur. Comm. H.R., decision of 16.12.74, *Müller v. Austria*, No. 5849/72, Decisions and reports (DR) 1, p. 46, and Comm. Report of 1.10.75, DR 3, p. 25.

In certain circumstances, the obligation of contributing to a social security scheme may generate a right of property over part of the accumulated assets, but it does not confer entitlement to income of a specific amount.

* For decisions of the European Commission of Human Rights, references are to the French version of the text. The English version appears in the same volume, but with a different page number.

Eur. Comm. H.R., decision of 19.12.74, *X v. Sweden*, No. 6776/74, DR 2, p. 123.

“The obligation of a state to ensure an individual's right to peaceful enjoyment of his property cannot reasonably imply any right of the applicant to claim financial support by the state in order to make possible the enjoyment of his possessions”.

Eur. Court H.R., *Handyside* judgment of 7.12.76, Series A no. 24.

The confiscation of publications regarded as obscene effectively deprived the applicant of his property, but was justified in the general interest.

Eur. Comm. H.R., decision of 8.2.78, *Wiggins v. the United Kingdom*, No. 7456/76, DR 13, p. 40.

Possessions may be movable or immovable. States alone decide whether interference with the right to use possessions is necessary. Commission supervision is restricted to the lawfulness and purpose of such interference.

Eur. Comm. H.R., decision of 5.10.78, *De Napoles Pacheco v. Belgium*, No. 7775/77, DR 15, p. 143.

A claim may constitute a possession.

Eur. Court H.R., *Marckx* judgment of 13.6.79, Series A no. 31.

Discriminatory legislation relating to inheritance rights on intestacy. The Court held that succession concerned the right to dispose of one's possessions. “The right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property”. It also clarified the purpose of Article 1: “Article 1 is in substance guaranteeing the right of property”.

Eur. Comm. H.R., decision of 3.10.79, *X v. Austria*, No. 8003/77, DR 17, p. 80.

Austrian legislation which controlled certain rents and restricted a landlord's right to terminate a lease constituted control of use, and not deprivation of property.

Eur. Comm. H.R., decision of 13.12.79, *X v. the Federal Republic of Germany*, No. 8410/78, DR 18, p. 216.

The expectation of professional fees to be paid in the future was not a property right.

Eur. Comm. H.R., decision of 12.5.80, *X v. the Federal Republic of Germany*, No. 8363/78, DR 20, p. 163.

Reducing the period of entitlement to burial plots originally assigned in perpetuity represented control of the use of property.

Eur. Comm. H.R., decision of 15.7.80, *Arrondelle v. the United Kingdom*, No. 7889/77, DR 19, p. 186 and Comm. Report of 13.5.81, DR 26, p. 5.

Nuisance caused by operation of an airport and construction of a motorway close to the applicant's home. Friendly settlement.

Eur. Comm. H.R., decision of 10.3.81, *X v. Belgium*, No. 8988/80, DR 24, p. 198.

Bankruptcy does not constitute deprivation of possessions, but control of their use in accordance with the general interest.

Eur. Court H.R., *Sporrong and Lönnroth* judgment of 23.9.82, Series A no. 52 and judgment (Article 50) of 18.12.84, Series A no. 88.

A threat of expropriation, coupled with an excessively lengthy prohibition on construction, interfered with the right to peaceful enjoyment of possessions (first sentence of Article 1 of the Protocol) – and with the substance of ownership.

The Court decided that Sweden should pay damages of 800 000 Swedish crowns to the Sporrong estate and 200 000 to Mrs. Lönnroth.

Eur. Comm. H.R., decision of 12.10.82, *Bramelid and Malmström v. Sweden*, Nos. 8588/79 and 8589/79, DR 29, p. 64.

Legal regulations governing private law relations between individuals do not interfere with the right to enjoyment of property when they compel one person to surrender a company share to another – unless they arbitrarily and unjustly deprive the first of property in favour of the second. With this reservation, the legislator may modify these private law rules, as and when necessary.

Eur. Comm. H.R., decision of 12.7.83, *Moureaux and Others v. Belgium*, No. 9267/81, DR 33, p. 97.

A territorial community's property rights could not be considered those of its elected representatives or inhabitants, and were not among the rights guaranteed.

Eur. Court H.R., *Van der Musselle* judgment of 23.11.83, Series A no. 70.

Failure to pay a lawyer's fees for work he was required to undertake, because of the client's lack of means, as well as his fairly limited expenses, did not constitute deprivation of possessions.

Eur. Court H.R., *James* judgment of 21.2.86, Series A no. 98.

Giving leaseholders a statutory right to purchase their freeholds involves deprivation of property, but is justified in the public interest.

Eur. Court H.R., *Van Marle and Others* judgment of 26.6.86, Series A no. 101.

A new law restricting the activities of accountants who had not been officially registered resulted in loss of income and goodwill. The Court decided that goodwill was a possession, and that the measure complained of constituted control of the use of property.

Eur. Court H.R., *Lithgow and Others* judgment of 8.7.86, Series A no. 102.

Nationalisation of aircraft and shipbuilding industries. There had to be reasonable compensation, and the general principles of international law did not apply to a state's own nationals.

Eur. Court H.R., *Agosi* judgment of 24.10.86, Series A no. 108.

The confiscation of goods which had been the subject of an offence was justified in the public interest, even though the owner was innocent.

Eur. Court H.R., *Gillow* judgment of 24.11.86, Series A no. 109.

The applicant was prohibited from occupying his house in Guernsey. His complaint could not be considered with reference to property rights, since the protocol did not apply in Guernsey.

Eur. Court H.R., *Poiss* judgment of 23.4.87, Series A no. 117.

The lengthy provisional transfer of land as part of a land consolidation process. There was neither control nor deprivation but there was interference with the substance of ownership.

Eur. Court H.R., *Inze* judgment of 28.10.87, Series A no. 126.

The right to a share in an estate is a property right, even before the estate is divided. Legal regulations which, to keep a farm viable, prohibit its division by will constitute control of the use of property and accord with the general interest.

Eur. Comm. H.R., report of 8.10.87, *Jacobsson v. Sweden*, No. 10842/84, and decision of 15.4.86, DR 47, p. 163.

The Commission considered that the extension of prohibitions on construction was justified by future town planning requirements.

Eur. Comm. H.R., report of 17.12.87, *Scotts of Greenock Ltd and Lithgows Ltd v. the United Kingdom*, No. 9482/81, DR 58, p. 5.

The legitimacy is recognised of the privatisation of a company which had previously been nationalised.

Eur. Comm. H.R., report of 13.10.88, *Håkansson and Sturesson v. Sweden*, No. 11855/85, and decision of 15.7.87, DR 53, p. 190.

The enforced sale of agricultural land, following the public authorities' refusal to grant an acquisition permit for the property, constituted deprivation of possessions. The Commission considered that it had been in the public interest and that proportionality had been respected.

Eur. Court H.R., *Tre Traktörer AB* judgment of 7.7.89, Series A no. 159.

Revocation of a restaurant licence affected the applicant's economic interests and constituted control of the use of property.

Eur. Court H.R., *Mellacher v. Austria* judgment of 19.12.89, Series A no. 169.

Rent control legislation reduced rents to 20% and 17.5% of their initial levels. The Commission considered that a reduction to 77.9% of the initial level was not justified. The Court, however, disagreed.

Eur. Comm. H.R., decision of 4.10.1990, *Smith Kline and French Laboratories Ltd v. the Netherlands*, No. 12633/87. DR 66, p. 89.

A patent may be considered a possession.

Eur. Court H.R., *Papamichalopoulos and Others v. Greece* judgment of 24.6.93, Series A no. 260-B, and Eur. Court H.R., *Papamichalopoulos v. Greece* judgment of 31.10.95, just satisfaction, Series A no. 330-B.

For the first time, the Court described interference with property as *de facto* expropriation. It established the applicants' ownership title on the basis of corroborative indications. Finally, it awarded substantial compensation by way of just satisfaction.

Eur. Court H.R., *Air Canada v. the United Kingdom* judgment of 5.5.95, Series A no. 316-A.

The *Air Canada* case gave the Court an opportunity to expand on the procedural guarantees contained in Article 1.

Eur. Court H.R., *Pressos Compania Naviera SA and Others v. Belgium* judgment of 20.11.95, Series A no. 332.

Having described legitimate hope as a possession, the Court recognised that there might be exceptional circumstances in which non-payment of compensation to owners dispossessed of their property was justified.

Eur. Comm. H.R., decision of 4.3.96, *Ladislav and Aurel Brezny v. the Slovak Republic*, No. 23131/93, DR 85-A, p. 65.

The Commission seems unwilling to extend the concept of legitimate hope to two cases: when it has for a long time been impossible to exercise a former property right in practice, and when a conditional claim lapses because the condition has not been fulfilled.

Eur. Comm. H.R., decision of 17.5.96, *Dorin Lapulet v. Romania*, No. 25497/94. DR 85-A, p. 133.

The Convention does not guarantee a right to restitution of property.

Eur. Court H.R., *Zubani v. Italy* judgment of 7.8.96, Collection of judgments and decisions 1996-IV, No. 14.

The applicant owners of expropriated land, on which housing had been built for low-income occupants, were compensated in full for the damage they had suf-

ferred. While recognising that these damages were sufficient, the Court, in deciding to award them just satisfaction, took account of the fact that the dispute concerning compensation had lasted more than eight years.

Eur. Court H.R., *Akdivar and Others v. Turkey* judgment of 16.9.96, Collection of judgments and decisions 1996-IV, No. 15.

Although not formally established, the destruction of property by the Turkish armed forces had violated Article 8 of the Convention and Article 1 of Protocol No. 1. This type of interference did not involve transfer of property or constitute de facto expropriation – but it did constitute deprivation of property.

Eur. Court H.R., *Guillemin v. France* judgment of 21.2.97, Collection of judgments and decisions, 1997-I, No. 29

Even in a case where the owner receives compensation, the compensation procedure must take place within a reasonable time.

Eur. Court H.R., *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom* judgment of 23.10.97, Collection of judgments and decisions, 1997-VII, No. 55.

The Court extends beyond legitimate expectation the protection afforded to rights to restitution, considering that possessions having no foundation in internal law are covered by Article 1.

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Notes

- 1 Article 17 of the Universal Declaration of Human Rights reads as follows:
"Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property."
- 2 The full background to this is set out in the Collected Edition of the *Travaux préparatoires* of the European Convention on Human Rights Vols. I to VIII, Dordrecht, Boston, Lancaster, Martinus Nijhoff publishers, 1985.
- 3 European Court of Human Rights (Eur. Court H.R.), *Marckx* judgment of 13 June 1979, Series A no. 31, para. 63.
- 4 European Commission of Human Rights (Eur. Comm. H.R.), decision of 18 December 1963, *de Buck v. Belgium*, No. 1420/62, Collection 13, p. 91. According to the Commission, "Article 1 is mainly concerned with the arbitrary confiscation of property".
- 5 In the first sub-paragraph, the English version uses the term "possessions" twice, while the French version uses the terms "*biens*" and "*propriété*". Similarly, in the second sub-paragraph, the terms "use of property" and "*usage des biens*" occur. In his dissenting opinion on the *Marckx* judgment, Sir Gerald Fitzmaurice stated that the word "*biens*" was not best translated as "possessions". See *Marckx* judgment, Series A no. 31, p. 48, footnote 8.
- 6 Eur. Court H.R., *Sporrong and Lönnroth* judgment of 23 September 1982, Series A no. 52, para. 61.
- 7 Eur. Court H.R., *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands* judgment of 23 February 1995, Series A no. 306-B, para. 59.
- 8 Eur. Court H.R., *Zubani v. Italy* judgment of 7 August 1996, Collection of judgments and decisions, 1996-IV, No. 14. In the *Guillemin v. France* judgment (21 February 1997, Collection of judgments and decisions 1997-I, No. 29), the Court recalls the need for a compensation procedure to be prompt if it is to be effective. The applicant suffered expropriation in a procedure that failed to conform with French law. He received compensation, but the proceedings were considered to have been too lengthy.

- 9 In the *Sporrong and Lönnroth* judgment, Series A no. 52, para. 79, the Court stated that “the applicants’ right of property is without doubt a ‘civil right’”. Although Convention case-law has always refused to apply Article 6, para. 1 to taxes, contributions and penalties (Eur. Comm. H.R., decision of 15 December 1967, No. 2552/65, Collection 26, p. 1), Article 6 may apply to fiscal penalties which are regarded as criminal charges (Eur. Court H.R., *Öztük* judgment of 21 February 1984, Series A no. 73). It is not impossible that a charge may constitute a possession within the meaning of Article 1 of Protocol No. 1.
- 10 J.-F. Flauss, “Les nouvelles frontières du procès équitable” in *Les nouveaux développements du procès équitable au sens de la Convention européenne des droits de l’homme*, Brussels, Bruylant, 1996, pp. 81-102, particularly p. 87. The question of execution of a court decision affecting a possession within the meaning of Article 1 arose in the *Raimondo v. Italy* case, which concerned preventive action against Mafia-type organisations (Eur. Court H.R., *Raimondo v. Italy* judgment of 22 February 1994, Series A no. 281-A, para. 36).
- 11 Eur. Court H.R., *Air Canada v. the United Kingdom* judgment of 5 May 1995, Series A no. 316-A. See further comments below on the procedural requirements of Article 1.
- 12 Eur. Court H.R., *Gillow* judgment of 24 November 1986, Series A no. 109.
- 13 The applicants in the case of *Akdivar and Others v. Turkey* claimed that the security forces had burned their homes in south-east Turkey, where political tensions were rife. The Court found that Article 8 of the Convention and Article 1 of Protocol No. 1 had both been violated. This link is interesting from a theoretical standpoint. It partially answers the doubts which some people may have as to the fundamental nature of property rights (Eur. Court H.R., *Akdivar and Others v. Turkey* judgment of 16 September 1996, Collection of judgments and decisions, 1996-IV, No. 15). It could also be argued that recognition of property rights in Protocol No. 1 is sufficient to establish their fundamental character.
- 14 Eur. Court H.R., *Inze* judgment of 28 October 1987, Series A no. 126. The applicant in this case, an illegitimate child, contested the Austrian law which did not permit him to inherit, as principal heir, his mother’s farm. The Court considered that the criteria used to select the principal heir had been based on the applicant’s status as an illegitimate child, and concluded that the law concerned did not have an

objective and reasonable basis. See also Eur. Court H.R., *Spadea and Scalabrino* judgment of 28 September 1995, Series A no. 315-B, para. 46.

15 This was the view of the Permanent Court of International Justice:

“The Court, though not failing to recognise the change that had come over Mr Chinn’s financial position [...] is unable to see in his original position – which was characterised by the possession of customers and the possibility of making a profit – anything in the nature of a genuine vested right”. PCIJ, 12 December 1934, Series A/B No. 63, p. 88.

16 This is why the Court refused, in this case, to guarantee Alexandra Marckx’s right to acquire possessions on intestacy, since nothing had, in practice, been passed on. It did, however, consider that property already acquired by inheritants constituted possessions. See Eur. Court H.R., *Inze* judgment of 28 October 1987, Series A no. 126, paras. 37-38.

17 The Commission has frequently confirmed this rule. In one case, the applicant, a hydrobotany student preparing a thesis at the University of Uppsala, complained of the university’s refusal to grant him a scholarship. The Commission stated very clearly that “the obligation of a state to ensure an individual’s right to peaceful enjoyment of his property cannot reasonably imply any right of the applicant to claim financial support by the state in order to make possible the enjoyment of his possessions”. Eur. Comm. H.R., decision of 19 December 1974, *X v. Sweden*, No. 6776/74, DR 2, p. 123.

The Commission confirmed this rule unambiguously a few years later, when it ruled that there was no obligation under Article 1 of the Protocol to index savings systematically. In this second case, it appears to have extended the rule. The savings in the bank had already been acquired, but the applicant claimed that his enjoyment of his possessions was being interfered with. See Eur. Comm. H.R., decision of 6 March 1980, *X v. the Federal Republic of Germany*, No. 8724/79, DR 20, p. 226.

18 This is particularly so in the case of clienteles, which case-law has treated as possessions.

19 Eur. Comm. H.R., decision of 8 February 1978, *Wiggins v. the United Kingdom*, No. 7456/76, Decisions and Reports (DR) 13, pp. 40 ff. In this case, the British

Government claimed that only movable property could be recognised as possessions – an interpretation which the Commission naturally rejected.

- 20 Eur. Comm. H.R., decision of 13 December 1984, *S. v. the United Kingdom*, No. 10741/84, DR 41, pp. 226 ff.
- 21 Eur. Court H.R., *James and Others* judgment of 21 February 1986, Series A no. 98.
- 22 A private individual may successfully require another private individual to fulfil an obligation, if this involves a right *in personam* arising from a relationship between private individuals. In certain cases, however, the right may arise from a public law relationship.

This distinction, once made, must immediately be qualified. Firstly, Convention case-law treats both as “civil rights” (Article 6 of the Convention). Secondly, rights *in personam* generated by public law relationships extend to cases where the relationship links private individuals and public bodies – and the precise form of this relationship depends on the national legal system. In spite of these shortcomings, we shall adopt this distinction.
- 23 Eur. Comm. H.R., decision of 5 October 1978, *De Napoles Pacheco v. Belgium*, No. 7775/77, DR 15, p. 143.
- 24 Eur. Comm. H.R., decision of 26 May 1967, *X v. the United Kingdom*, No. 3039/67, Collection 23, pp. 66-71.
- 25 Eur. Comm. H.R., decision of 11 December 1986, *S. and T. v. Sweden*, No. 11189/84 (unpublished).
- 26 See *Bindschedler Verstaatlichungsmassnahmen und Entschädigungspflicht nach Völkerrecht*, Polygraphischer Verlag, Zurich, 1950, pp. 27 ff.
- 27 Eur. Comm. H.R., decision of 16 July 1976, *A, B, C, D, E, F, G, H and I v. the Federal Republic of Germany*, Nos. 5573/72 and 5670/72, DR 7, p. 8.
- 28 Eur. Comm. H.R., decision of 8 December 1988, *Consorts D. v. Belgium*, No. 11966/86, unpublished.
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- 30 Eur. Comm. H.R., decision of 16 December 1974 (admissibility), *Müller v. Austria*, No. 5849/72, DR 1, p. 46, and Comm. Report of 1 October 1975, DR 3, p. 25.
- 31 Eur. Comm. H.R., decision of 13 July 1978, *X v. Austria*, No. 7830/77, DR 14, p. 200.
- 32 Eur. Comm. H.R., decision of 4 October 1990, *Smith Kline and French Laboratories Ltd v. the Netherlands*, No. 12633/87, DR 66, p. 89.
- 33 Eur. Comm. H.R., decision of 6 April 1995, *Greek Federation of Customs Officers, Nicolas Gialouris, Georgios Christopoulos and 3,333 other customs officers v. Greece*, No. 24581/94, DR 81-A, p. 123. In this case the Commission upheld the traditional case-law view that future income cannot be regarded as a possession. See also Eur. Comm. H.R., decision of 4 March 1996, *G. Mayer and Others*, No. 18890/91, DR 85-A, p. 5, on the restitution of property following German reunification.
- 34 No. 23131/93, *Ladislav and Aurel Brezny v. the Slovak Republic*, decision of 4 March 1996, DR 85-A, p. 65.
- 35 Defining the English word *goodwill* poses many problems in French, because of the broadness of the concept in English law.

The term has been translated variously as *clientèle* (Eur. Court H.R., *Van Marle and Others* judgment of 26 June 1986, Series A no. 101, para. 123) and *fonds de commerce* (Eur. Court H.R., *Tre Traktörer AB* judgment of 7 July 1989, Series A no. 159, para. 43).

No. 86 (August 1986) of the *Petit Termophile*, an internal publication produced by the Council of Europe's translation service, suggested *clientèle, achalandage et valeur de la raison sociale*, adding: "Each of these terms has a more restricted meaning, referring to only part of the English term 'goodwill', which covers all three concepts".

- 36 Eur. Comm. H.R., decision of 13 December 1979, *X v. the Federal Republic of Germany*, No. 8410/78, DR 18, p. 216.
- 37 Eur. Court H.R., *Van der Musselle* judgment of 23 November 1983, Series A no. 70.
- 38 The Court's reasoning may surprise. In not treating remuneration as a possession, the judgment did not differ from the Commission's case-law. The Court confirmed

that the right to the peaceful enjoyment of possessions “applies only to existing possessions”, *Van der Musselle* judgment, para. 48.

Nevertheless, while the client’s lack of means may be a reason for non-payment of the debt, it does not seem to prevent the debt from arising, since the legal relationship has already been established. Moreover, the refusal to regard expenses as possessions, because they were small, is hardly convincing.

39 Eur. Court H.R., *Van Marle and Others* judgment of 26 June 1986, Series A no. 101.

40 Eur. Court H.R., *König* judgment of 28 June 1978, Series A no. 27, separate opinion of Judge Wiarda, p. 43.

41 Eur. Court H.R., *H v. Belgium* judgment of 30 November 1987, Series A no. 127, para. 47.

42 Eur. Comm. H.R. decision of 7 October 1985, *M v. the Federal Republic of Germany*, No. 10748/84, DR 44 p. 203.

43 Eur. Court H.R., *Tre Traktörer AB* judgment of 7 July 1989, Series A no. 159.

44 Eur. Court H.R., *Pressos Compania Naviera SA and Others* judgment of 20 November 1995, Series A no. 332.

45 In support of its position, the Commission referred to its own case-law: it observed that “although in the present case the applicant has probably long entertained the hope of being awarded compensation, he has given no evidence of ever having held a claim to payment on any basis whatsoever against the Belgian State. The action instituted against the State before the civil courts did not create any claim to payment of a debt for the applicant, merely the possibility of securing such payment. Consequently, since a liability action cannot be regarded either as a possession or as a debt, the decisions by the Belgian courts dismissing his action could not have the effect of depriving him of a possession which he owned.” Eur. Comm. H.R., decision of 12 October 1988, *Agnessens v. Belgium*, DR 58, p. 83. See similarly report of 4 July 1994, *Pressos Compania Naviera SA and Others v. Belgium*, Appl. No. 17849/91.

46 For another example: Eur. Court H.R., *Pine Valley Developments Ltd and Others* judgment of 29 November 1991, Series A no. 222, para. 51.

- 47 Eur. Court H.R., *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom* judgment of 23 October 1997, Collection of judgments and decisions, 1997-VII, No. 55.
- 48 *Ibid.*, para. 69: "While noting that the Leeds and the National & Provincial may be considered to have at best a precarious basis on which to assert a right amounting to 'possessions', the Court is of the view that the claims asserted in the judicial review proceedings ... and the second set of restitution proceedings brought by all three applicant societies in May and June 1992 respectively ... could not be said to be sufficiently established or based on any 'legitimate expectation' ... that those claims would be determined on the basis of the law as it stood."
- 49 Eur. Court H.R., *Papamichalopoulos v. Greece* judgment of 24.06.93, Series A no. 260-B.
- 50 The *Stran Greek Refineries and Stratis Andreadis v. Greece* judgment of 9 December 1994 provides another good example of this fluidity (Series A no. 301-B). The applicants based a claim against the Greek Government on an arbitral award and preliminary decision by the Athens Regional Court, which merely gave them reason to hope that their claim would succeed. The Greek Government rightly contested the existence of title to property. In rejecting this argument, the Court relied on various facts, all pointing in the same direction. The "possessions" comprised all the sums awarded by the decision. In its desire to give Article 1 of Protocol No. 1 useful effect, the Court makes the concept of possessions an autonomous one. Does this imply the right to determine title to property? While one can easily accept that a claim constitutes a "property right", however it may be described in domestic law, it is far less certain that the Court has authority to declare that title to property does in fact exist.
- 51 Eur. Court H.R., *Holy Monasteries v. Greece* judgment of 9 December 1994, Series A 301-A. This case concerned legislation which transferred to the state farming and forest lands belonging to the applicant monasteries, unless they could produce proof of ownership or some legal provision or final court decision. For historical reasons, there were very few cases in which the applicant monasteries' ownership could be formally established in practice. To get round the absence of title, the Court explains that it: "attaches particular importance to the acquisition of property by adverse possession". This seems a better argument than that employed in the previous judgment.

- 52 Eur. Comm. H.R., decision of 11 December 1973, *X v. Austria*, No. 5593/72, Collection 45, p. 113.
- 53 “The forfeiture and destruction of the *Schoolbook* [...] permanently deprived the applicant of the ownership of certain possessions. However, these measures were authorised by the second paragraph of Article 1 of Protocol No. 1, interpreted in the light of the principle of law, common to the Contracting States, whereunder items whose use has been lawfully adjudged illicit and dangerous to the general interest are forfeited with a view to destruction.” Eur. Court H.R., *Handyside* judgment of 7 December 1976, Series A no. 24, para. 63.
- 54 Eur. Comm. H.R., decision of 16 December 1974 (admissibility), *Müller v. Austria*, No. 5849/72, DR 1, p. 46, and Comm. Report of 1 October 1975, DR 3, p. 25.
- 55 Eur. Comm. H.R., decision of 16 May 1985, *Kleine Staarman v. the Netherlands*, No. 10503/83, DR 42, p. 162.
- 56 Cf. on this point, C. Mouly, *La propriété in Droits et libertés fondamentaux*, Paris, Dalloz, 1997, 4th. ed., pp. 475-491, particularly p. 488.
- 57 Eur. Comm. H.R., decision of 12 October 1982, *Bramelid and Malmström v. Sweden*, Nos. 8588/79 and 8589/79, DR 29, p. 64.
- 58 See Delvaux, “The notion of victim under Article 25 of the European Convention on Human Rights”, Fifth International Colloquy about the European Convention on Human Rights, published by C.F. Müller Juristischer Verlag, Heidelberg 1982.
- 59 Eur. Comm. H.R., decision of 4 October 1966, *X v. Austria*, No. 1706/62, Collection 21, pp. 26-34.
- 60 Eur. Comm. H.R., decision of 28 January 1983, *Yarrow and Others v. the United Kingdom*, No. 9266/81, DR 30, pp. 155 ff., particularly p. 185.
- 61 Eur. Comm. H.R., decision of 12 May 1980, *X v. the Federal Republic of Germany*, No. 8363/78, DR 20, pp. 163 ff. The Commission is bound by national legislation in determining whether or not there has been interference with property by a public body. In this case, the applicant alleged that reducing his right to use a burial plot from an unlimited period to forty years violated his property rights. The Commission first established that this measure had been taken by the Protestant Church – in German law, a public body with certain responsibilities for the administration of cemeteries. Since a public body was involved, the Commission was

competent to decide whether the action it had taken violated Article 1 of Protocol No. 1.

- 62 Eur. Court H.R., *Marckx* judgment of 13 June 1979, Series A no. 31, para. 27: "Article 25 of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it".
- 63 Eur. Comm. H.R., decision of 13 December 1979, *Andorfer Tonwerke v. Austria*, No. 7987/77, DR 18, p. 31.
- 64 Eur. Comm. H.R., decision of 24 May 1967, *X v. the United Kingdom*, No. 3039/67, Collection 23, p. 66.
- 65 Eur. Comm. H.R., decision of 2 October 1975, *X v. Belgium*, No. 6837/74, DR 3, p. 135.
- 66 Eur. Court H.R., *Poiss* judgment of 23 April 1987, Series A no. 117.
- 67 Eur. Court H.R., *Handyside* judgment of 7 December 1976, Series A no. 24, para. 62.
- 68 Eur. Comm. H.R., report of 13 October 1988, *Håkansson and Sturesson v. Sweden*, No. 11855/85.
- 69 The case of *Akdivar and Others v. Turkey* is certainly an extreme one. The applicants claimed that the security forces had burned their houses in the south-east of the country, where political tensions were rife. It is very rare indeed for such allegations to be made before the European authorities. Although no proof of the security forces' participation had been produced, the Turkish Government's failure to produce evidence to the contrary led the Court to conclude that it had violated the Convention. It accordingly found that both Article 8 of the Convention and Article 1 of Protocol No. 1 had been violated. Eur. Court H.R., *Akdivar and Others v. Turkey* judgment of 16 September 1996, Collection of judgments and decisions 1996-IV, No. 15.
- For similar claims, see Eur. Comm. H.R., report of 10.07.76, *Cyprus v. Turkey*, applications 6780/74 and 6950/75. See in particular paras. 436 to 487.
- 70 Eur. Court H.R., *Loizidou v. Turkey* judgment of 18 December 1996, Collection of judgments and decisions 1996-VI, No. 26.

- 71 Eur. Court H.R., *Papamichalopoulos v. Greece* judgment of 24 June 1993, Series A no. 260-B.
- 72 Eur. Comm. H.R., decision of 3 October 1979, *X v. Austria*, No. 8003/77, DR 17, p. 80.
- 73 Eur. Comm. H.R., decision of 9 March 1989, *Banèr v. Sweden*, No. 11763/85, DR 60, p. 128.
- 74 Eur. Comm. H.R., decision of 13 May 1976, *X v. Austria*, No. 6087/73, DR 5, p. 10.
- 75 Eur. Comm. H.R., decision of 11 November 1986, *Lindsay v. the United Kingdom*, No. 11089/84 (unpublished).
- 76 Eur. Court H.R., *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands* judgment of 23 February 1995, Series A no. 306-B, para. 60, last sub-para.
- 77 Eur. Comm. D.H., report of 21 October 1993, *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*.
- 78 Eur. Court H.R., *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands* judgment of 23 February 1995, Series A no. 306-B, para. 59. For a commentary, see L. Sermet, "Chronique", *Revue universelle des droits de l'homme*, 1996, p. 26.
- 79 Eur. Court H.R., *Hentrich v. France* judgment of 22 September 1994, Series A no. 296-A, para. 35.
- 80 Eur. Court H.R., *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom* judgment of 23 October 1997, Collection of judgments and decisions, 1997-VII, No. 55, para. 79.
- 81 Eur. Comm. H.R., decision of 12 July 1978, *X v. the Federal Republic of Germany*, No. 7544/76, DR 14, p. 60.
- 82 Eur. Comm. H.R., decision of 12 October 1978, *Company X v. the Netherlands*, No. 7669/76, DR 15, p. 133.
- 83 See W. Peukert, "Protection of ownership under Article 1 of the first Protocol to the European Convention on Human Rights", *Human Rights Law Journal* 1981, pp. 37-78.

- 84 Eur. Comm. H.R., decision of 10 March 1961, *X v. Belgium*, No. 8988/80, DR 24, p. 198.
- 85 Eur. Comm. H.R., decision of 4 October 1976, *X v. Belgium*, No. 7264/75 (unpublished).
- 86 Eur. Court H.R., *Handyside* judgment of 7 December 1976, Series A no. 24; and *Agosi* judgment of 24 October 1986, Series A no. 108.
- 87 Para. 63 of the *Handyside* judgment states:
- “The forfeiture and destruction of the Schoolbook, on the other hand, permanently deprived the applicant of the ownership of certain possessions. However, these measures were authorised by the second paragraph of Article 1 of Protocol No. 1, interpreted in the light of the principle of law, common to the Contracting States, whereunder items whose use has been lawfully adjudged illicit and dangerous to the general interest are forfeited with a view to destruction”.
- A similar point is made in the *Agosi* judgment, para. 51:
- “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 coins such as Krueger-rands. It is therefore the second paragraph of Article 1 which is applicable in the present case (see, *mutatis mutandis*, the *Handyside* judgment of 7 December 1976, Series A no. 24, para. 63)”.
- 88 W. Peukert, “Die Rechtssprechung der E.M.R.K. zur Verhältnismässigkeit einer Eigentumentziehung nach zollrechtlichen Vorschriften”, *Europäische Grund-Rechte Zeitschrift*, 1988, pp. 509-513.
- 89 The *Raimondo v. Italy* case concerned preventive measures taken against Mafia-type organisations (Eur. Court H.R., *Raimondo v. Italy* judgment of 22 February 1994, Series A no. 281-A). The property of the applicant, who was suspected of enriching himself unlawfully, was subjected to various withholding measures, including confiscation. The Court upheld the traditional case-law view (para. 29) that confiscation constitutes control of the use of property (*Handyside* judgment of 7 December 1976, Series A no. 24, para. 64, and *Agosi v. the United Kingdom* judgment of 24 October 1986, Series A no. 108, para. 51). The Court used a general argument to justify the measure complained of: “Confiscation, which is

designed to block these movements of suspect capital, is an effective and necessary weapon in the combat against this cancer. It therefore appears proportionate to the aim pursued, all the more so because it in fact entails no additional restriction in relation to seizure. Finally, the preventive purpose of confiscation justifies its immediate application notwithstanding any appeal" (para. 30).

- 90 The Court did not refer explicitly to interference with the substance of ownership. Nevertheless, it considered that expropriation permits "affected the very substance of ownership in that they recognised before the event that any expropriation would be lawful", Eur. Court H.R., *Sporrong and Lönnroth* judgment of 23 September 1982, Series A no. 52, para. 60. The term "interference with the substance" will be used here.

Van Der Broeck, "The protection of property rights under the European Convention on Human Rights", *Legal Issues of European Integration*, 1986, considers that this form of interference constitutes neither deprivation nor control. He refers to interference which is covered neither by the first sentence of Article 1, para. 1, nor by Article 1, para. 2.

- 91 Sporrng's building remained subject to an expropriation permit from 31 July 1956 to 3 May 1979 and was affected by a prohibition on construction from 11 June 1954 to 1 July 1979. In the case of the second applicant, the expropriation permit lasted from 24 September 1971 to 3 May 1979 and the prohibition on construction from 27 February 1968 to 1 July 1980.

Eur. Comm. H.R., report of 8 October 1980, *Sporrong and Lönnroth*, decisions Nos. 7151/75, 7152/75, para. 96.

- 92 Another case which resembled the *Poiss* case should be mentioned: see Eur. Court H.R., *Erkner and Hofauer* judgment of 23 April 1987, Series A no. 117.

The Court's judgment was identical to that in the *Poiss* case, and discussion is therefore confined to the latter.

- 93 The dissenting opinion stated: "The majority also exclude the application of the second paragraph of the article (see para. 65 of the judgment). Their reason for doing so is, in our opinion, hardly convincing". Joint dissenting opinion of Judges Zekia, Cremona, Thór Vilhjálmsson, Lagergren, Sir Vincent Evans, MacDonald, Bernhardt and Gersing. Eur. Court H.R., *Sporrong and Lönnroth* judgment of 23 September 1982, Series A no. 52, p. 35.

- 94 See Higgins, "The taking of property: recent developments in international law", *Recueil des cours de l'Académie de Droit international*, 1983, Vol. 176, The Hague.
- 95 Eur. Court H.R., *Stran Greek Refineries and Stratis Andreadis v. Greece* judgment of 9 December 1994, Series A no. 301-B.
- 96 Eur. Court H.R., *Venditelli v. Italy* judgment of 18 July 1984, Series A no. 293-A, para. 40.
- 97 Eur. Court H.R., *Katte Klitsche de la Grange v. Italy* judgment of 27 October 1994. Series A no. 293-B, para. 40.
- 98 Eur. Court H.R., *Prötsch v. Austria* judgment of 15 November 1996, Collection of judgments and decisions 1996-V, No. 22.
- 99 Eur. Court H.R., *Phocas v. France* judgment of 23 April 1996, Collection of judgments and decisions 1996-II, No. 7.
- 100 As emphasised in the introduction, the two last rules must be interpreted in the light of the first, concerning the principle of respect for property, which is the general rule. The Swedish judgment probably acquires its full significance here, to the extent that the lawfulness of interference with property depends on similar conditions.
- 101 Professor Delmas-Marty explains the national character of states' margin of appreciation in the following terms. Having made the point that the European legal system is based both on subordination (like national law in most cases) and on co-ordination (often seen as the hallmark of international law), she adds: "A margin of appreciation is required in other areas, and this means aiming at co-ordination, based less on hierarchy than harmony. European law's pre-eminent function in this area is limited to pushing states in the right direction, obliging them to bring their national laws more closely into line with one another, without making them identical." *Le Monde édition Liber* No. 1, October 1989, pp. 69-71.
- 102 Eur. Comm. H.R., report of 17 December 1987, *Scotts of Greenock Ltd and Lithgows Ltd v. the United Kingdom*, No. 9482/81, DR 58, p. 22, para. 104.
- 103 Eur. Court H.R., *Katikaridis v. Greece* and *Tsomtos and Others v. Greece* judgments of 15 November 1996, Collection of judgments and decisions, 1996-V, Nos. 20 and 21. See page 40, "The valuation method must be manifestly reasonable".

- 104 For a discussion of proportionality, see Eissen, *Le principe de proportionnalité dans la jurisprudence de la Cour européenne des Droits de l'Homme, Conseil d'État, Études et Documents* No. 40, 1988, pp. 275-284, particularly on property rights, p. 279.
- 105 The *James* judgment refers to "a reasonable relationship of proportionality between the means employed and the aim sought to be realised" (*James* judgment, para. 50). The *Sporrong and Lönnroth* judgment puts the same idea differently when it speaks of the need to strike a "fair balance" between safeguarding the general interests of the community and protecting the individual's fundamental rights.
- 106 See the discussion in the earlier (1992) edition of this book at pp. 37 ff.
- 107 Eur. Court H.R., *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands* judgment of 23 February 1995, Series A no. 306-B.
- 108 A Finnish case illustrates this broad margin of appreciation: Eur. Comm. H.R., decision of 15 April 1996, *Kustannus Oy, Vapaa Ajatteliija Ab, Vapaa-Ajattelijain Liitto Fritänkarnas Förbund ry and Kimmo Sundström v. Finland*, No. 20471/92, DR 85-A, p. 29. The Commission decided that a tax law prohibiting repayment of sums unlawfully collected, below a certain amount, was consistent with Article 1 and served the public interest. See also Eur. Comm. H.R., decision of 16 January 1995, *Travers and 27 Others v. Italy*, No. 15117/89. DR 80-A, p. 5.
- 109 Eur. Court H.R., *Lithgow and Others* judgment of 8 July 1986, Series A no. 102, para. 120: "Clearly, compensation terms are material to the assessment whether a fair balance has been struck between the various interests at stake and, notably, whether or not a disproportionate burden has been imposed on the person who has been deprived of his possessions."
- 110 F. Sudre, *La protection de la propriété privée par la Cour européenne des droits de l'homme*, Recueil Sirey Dalloz, 1988, pp. 71-78.
- 111 Eur. Court H.R., *Air Canada v. the United Kingdom* judgment of 5 May 1995, Series A no. 316-A. In its *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands* judgment of 23 February 1995, Series A no. 306-B, the Court merely emphasised, concerning the procedural requirements of property rights, that Article 1 was not violated, since Netherlands law provided for judicial supervision, in accordance with Article 6 of the Convention (para. 73).

112 On all the guarantees provided by Article 6, reference should also be made to L. Sermet, "*Convention européenne des droits de l'homme et contentieux administratif français*", Paris, *Economica*, 1996.

113 There are two other types of possible compensation for damage suffered by an applicant.

There may be an agreement between the parties. This is informal if the Commission has only played a subsidiary role in its adoption. Alternatively, and this is one of the Commission's principal tasks (Article 28 (b) of the Convention), the parties may reach a friendly settlement. If this occurs when the case is already before the Court, the Committee of Ministers supervises its execution under Article 54 of the Convention.

Moreover, if a case is not referred to the Court after the Commission has given its opinion, the Committee of Ministers may, under the rules adopted at the 409th meeting of the Ministers' Deputies (June 1987), decide whether just satisfaction should be afforded and, if appropriate, tell the state concerned what action it should take.

See P. Leuprecht, "The Protection of Human Rights by Political Bodies - the Example of the Committee of Ministers of the Council of Europe", *Festschrift für Felix Ermacora*, Carl Heymans Verlag, 1988.

114 Article 50 states:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

115 Eur. Comm. H.R., decision of 17 May 1996, *Dorin Lupulet v. Romania*, No. 25497/94, DR 85-A, p. 133.

116 On 18 April 1951, some of the state delegations stated that they were ready to accept the following text:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public

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

The delegations of France, the Saar and the United Kingdom were unable to accept this text. See *Travaux préparatoires*, Vol. VII, pp. 234 and 250.

The words which explicitly provided for compensation were accordingly replaced by "the general principles of international law."

117 Concurring opinion of Judge Thór Vilhjálmsson, Eur. Court H.R., *James* judgment of 21 February 1986, Series A no. 98, p. 49. He denied that there was a right to compensation, basing his opinion on a literal interpretation of Article 1.

118 Eur. Court H.R., *Akkus v. Turkey* judgment of 9 July 1997, Collected judgments and decisions 1997-IV, No. 43

119 One of the dissenting opinions appended to the *Lithgow* judgment criticised the absence from the law of a financial adjustment mechanism to compensate for distortions caused by the selected assessment method: joint partly dissenting opinion of Judges Bindschedler-Robert, Gölcüklü, Pinheiro-Farinha, Pettiti and Spielmann, Eur. Court H.R., *Lithgow and Others* judgment of 8.07.86, Series A no. 102.

120 Eur. Court H.R., *Katikaridis v. Greece* and *Tsomtos and Others v. Greece* judgments of 15 November 1996, Collection of judgments and decisions, 1996-V, Nos. 20 and 21. Because the two cases are similar, only the first will be mentioned.

121 The phrase "the general principles of international law" raised problems of interpretation during the preparatory work (*Travaux préparatoires*).

Thus, the Swedish delegation maintained that "the general principles of international law [...] only applied to relations between a state and non-nationals", while the German delegation wanted those principles to include the obligation of paying compensation to expropriated non-nationals, *Travaux préparatoires*, Vol. VII, pp. 317-319.

Finally, the Committee of Ministers, in its Resolution (52) 1 of 19 March 1952, stated that "the general principles of international law in their present connotation entail the obligation to pay compensation to non-nationals in case of expropriation", *Travaux préparatoires*, Vol. VIII, p. 205.

- 122 Eur. Court H.R., *Lithgow and Others* judgment of 8 July 1986, Series A no. 102. It must therefore be assumed that foreign nationals are entitled to prompt, appropriate and effective compensation.
- See Seidl-Hohenveldern, "Eigentumsschutz nach der EMRK und nach Allgemeinem Völkerrecht im Lichte der EGMR – Entscheidungen in den Fällen *James* und *Lithgow*", Festschrift für Felix Ermacora, Carl Heymans Verlag, Cologne 1988, pp. 181-193.
- 123 Concurring opinion of Judges Bindschedler-Robert, Gökçüklü, Matscher, Pettiti, Russo and Spielmann, Eur. Court H.R., *James* judgment of 21 February 1986, Series A no. 98, p. 50.
- 124 Eur. Comm. H.R., report of 17 December 1987, *Scotts of Greenock (Est'd 1711) Ltd and Lithgows Ltd v. the United Kingdom*, DR 58, p. 5.
- 125 This issue is dealt with in C. Russo: "L'applicabilité des 'principes généraux du droit international' visés à l'article 1 du Protocole n° 1", *Studies in honour of G. Wiarda*, Carl Heymanns Verlag, Cologne, 1988, p. 547.
- 126 Condorelli "La proprietà nella Convenzione europea dei diritti dell'uomo", *Rivista di Diritto internazionale*, 1970, p. 175.
- 127 Eur. Court H.R., *Lithgow and Others v. the United Kingdom* judgment of 8 July 1986, Series A no. 102, para. 120.
- 128 Eur. Court H.R., *Pressos Compania Naviera SA and Others* judgment of 20 November 1995, Series A no. 332.
- 129 Eur. Court H.R., *Sporrong and Lönnroth* judgment of 18 December 1984, Series A no. 88. The awarding of just satisfaction is discussed in the previous edition.
- 130 Eur. Court H.R., *Papamichalopoulos v. Greece* judgment of 31 October 1995, just satisfaction, Series A no. 330-B.
- 131 Permanent Court of International Justice, 13 September 1928, *Factory at Chorzow*, Series A no. 17, p. 47.
- 132 Arbitral decision given by R.-J. Dupuy, 19 January 1977, reproduced in *Journal de droit international*, 1977, p. 350.
- 133 PCIJ, 13 September 1928, *Factory at Chorzow*, Series A no. 17, p. 27.

- 134 For another example of the Court's recommending that a respondent state restore the initial situation: Eur. Court H.R., *Hentrich v. France* judgment of 22 September 1994, Series A no. 296-A, para. 71.
- 135 A. Drzemczewski, *The position of aliens in relation to the European Convention on Human Rights*, Human Rights File No. 8, Strasbourg 1985, p. 13.