



The right to property under the European Convention on Human Rights

***A guide to the implementation
of the European Convention
on Human Rights
and its protocols***

**Aida Grgić, Zvonimir Mataga,
Matija Longar and Ana Vilfan**



Human rights handbooks, No. 10

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Directorate General
of Human Rights
and Legal Affairs
Council of Europe
F-67075 Strasbourg Cedex

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Cover illustration © sue2you – Fotolia

1st edition, June 2007
Printed in Belgium

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Article 1 of Protocol No. 1 to the European Convention on Human Rights

Article 1 of Protocol No. 1, which guarantees the right to property, provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Introduction

Article 1 of Protocol No. 1 guarantees the right to property (see p. 4). Other international human rights instruments, such as the Universal Declaration of Human Rights, also recognise the right to property. However, neither the International Covenant on Civil and Political Rights nor the International Covenant on Economic, Social and Cultural Rights which turned the Universal Declaration into legally binding commitments made any reference to protecting property.

Similarly, when the European Convention on Human Rights (“the Convention”) was being drafted, the states were unable to reach an agreement. The formulation eventually adopted by the first Protocol provides a rather qualified right to property, allowing the State a wide power to interfere with that right.

In *Marckx v. Belgium*¹ the European Court of Human Rights (“the Court”) considered for the first time Article 1 of Protocol No. 1 in the context of illegitimacy legislation in Belgium and explained:

By recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 is in substance guaranteeing the right of property. This is the clear impression left by the words “possessions” and “use of property” (in French: “biens”, “propriété”, “usage des biens”); the “travaux préparatoires”, for their part, confirm this unequivocally: the drafters continually spoke of “right of property” or “right to property” to describe the

subject-matter of the successive drafts which were the forerunners of the present Article 1. Indeed, the right to dispose of one’s property constitutes a traditional and fundamental aspect of the right of property.

In that judgment the Court defined the scope of Article 1 of Protocol No. 1, which applies only to existing possessions and “does not guarantee the right to acquire possessions”.

Article 1 of Protocol No. 1 protects individuals or legal persons from arbitrary interference by the State with their possessions. It nevertheless recognises the right of the State to control the use of or even deprive of property belonging to individuals or legal persons under the conditions set out in that provision.

The Convention institutions have sought to ensure that any interference with property rights pursues the general or public interest. In particular, public authorities can control the use of property to secure the payment of taxes or other contributions or penalties.

In order to comply with the test of proportionality between the collective interest and the interests of an individual, interference should be conducted in such a manner which is not arbitrary and which is in accordance with the law. As regards its necessity, however, the Court and the former European Commission for Human Rights (“the Commission”) have generally accorded States a wide margin of appreciation. Although Article 1 of Protocol No. 1 contains no explicit reference for a right to compensation for a taking

1. Full references to the cases cited appear on pp. 45 ff.

of property or other interference, it is in practice implicitly required (*Holy Monasteries v. Greece*). Only exceptional circumstances like the unique context of German reunification may justify absence of any compensation paid (*Jahn and others v. Germany*).

Article 1 of Protocol No. 1 is the only article of the Convention which expressly mentions “legal persons”. Every applicant, whether a natural or legal person, must be able to demonstrate the existence of a right to property at issue in order to qualify as a “victim” under the Convention. It follows that companies fall within the scope of this right. However, company shareholders have generally no claim based on damage sustained by the company, unless they can show that it was impossible for the company or its liquidator to institute domestic proceedings – the so-called piercing of the corporate veil (*Agrotexim v. Greece*). Very exceptional reasons will be required for a shareholder to be given standing as a “victim”.

Article 1 of Protocol No. 1 is not concerned with relationships of a purely contractual nature between private individuals. Thus, a court ruling that requires an individual to surrender property to another individual, for example pursuant to generally applicable laws such as the law of contract (seizure and sale of property in the course of execution), tort law or family law (division of inherited property, matrimonial estate), generally fall outside the scope of Article 1 of Protocol No 1.

Nevertheless, in determining the effects of legal relations between individuals on property, the Convention organs check that the law did not create such inequality that one person could be arbitrarily and unjustly deprived of property in favour of another. In certain circumstances, however, the State may be under an obligation to intervene in order to regulate the actions of private individuals. To conclude, Article 1 of Protocol No. 1 applies in general where the State itself interferes with property rights, or permits a third party to do so.

Although some apprehension existed before the opening of the Convention and its protocols to central and eastern European countries, the pre-existing Convention standards concerning property issues have been largely confirmed in rather opulent case-law. In the recent years, the Commission and the Court had to address a number of legal issues which reflect particular political, historic and social circumstances in those countries after the end of the Communist reign. A series of applications involving rather complicated factual and legal issues resulting from the political will of the States to reverse injustices from the previous regime and seek a new balance between different social groups have thus been examined by the Convention institutions.

The scope of the right

An applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the alleged interference relates to his or her “possessions” within the meaning of that provision.

The concept of “possessions” has an autonomous meaning which is independent from the formal classification in domestic law.

It is often argued that the concept of “possessions” is very broadly interpreted in the Court’s case-law because it does not include only the right of ownership but also a whole range of pecuniary rights such as rights arising from shares, patents, arbitration award, established entitlement to a pension, entitlement to a rent, and even rights arising from running of a business.

This broad interpretation is mandated by the use of the word “*biens*” in the French version of the text of Article 1 of Protocol No. 1. In French legal terminology the term “*biens*” relates to all patrimonial (i.e. pecuniary) rights.

Having said that, it should not come as a surprise that, apart from ownership of immovable or movable property, for example, shares, intellectual property rights, final arbitral award and entitlement to a rent arising from a contract also qualify as “possessions” within the meaning of Article 1 of Protocol No. 1.

However, the protection of that article does not apply unless and until it is possible to lay a claim to a certain property. As already stated, Article 1 of Protocol No. 1 does not guarantee the right to acquire property. It was for this reason that the Court held in the *Marckx v. Belgium* case that Article 1 of Protocol No. 1 was not applicable to the illegitimate child’s potential right to inherit in case of death of her mother. In contrast, that article was held to be applicable in the case when the applicant – also an illegitimate child – had already inherited a share of the farm but had not been

permitted to inherit as much as he would have been able as a legitimate child.

By the same token, in the case of *X v. Germany*, the Commission held that the mere expectation of notaries that the existing rates for their fees would not be reduced by law did not constitute a property right within the meaning of Article 1 of Protocol No. 1.

Nevertheless, this does not mean that the notion of “possessions” is limited to “existing possessions”. Other assets, including claims in respect of which an applicant can argue that he or she has at least a “legitimate expectation” (which must be of a nature more concrete than a mere hope) that they will be realised, qualify as “possessions”.

A **claim** may be regarded as an asset only when it is sufficiently established to be enforceable (“*suffisamment établie pour être exigible*”). No “legitimate expectation” can come into play in the absence of a sufficiently established claim. In contrast, a conditional claim cannot be considered an asset. Therefore, for example, a notary’s claim for fees can only be considered a “possession” when such a claim has in particular matter come into existence on the ground of services rendered by the notary and on the basis of the existing regulations for notaries’ fees.

A further illustration as to how a claim may constitute an asset and, therefore, a “possession” is the case of *Pressos Compania Naviera SA and others v. Belgium*. In that case the applicants were ship owners whose ships were involved in collisions in Belgian territorial waters. Considering that the collisions were due to the

negligence of Belgian pilots, for whom under the Belgian law the State was liable, they brought proceedings against the State. However, in August 1988 the Belgian legislature enacted a law exempting, with retrospective effect, the State from liability. The applicants complained under Article 1 of Protocol No. 1 that their right to property had been violated. The State argued that the applicants had no “possessions” within the meaning of that article. The Court noted that under Belgian tort law claims for compensation came into existence when damage occurred. Therefore, such a claim constituted an asset and therefore amounted to a “possession”. Moreover, on the basis of the case-law of the Court of Cassation prior to the passing of the new legislation, the applicants could argue that the domestic courts would rule in their favour, i.e. accept their claims deriving from accidents in question.

Enterprise, being understood as a mass of rights, interests, and relations destined to a determined purpose and organised as an economic unit by an entrepreneur, is also protected under Article 1 of Protocol No. 1. Enterprise is comprised of interests and relations, such as clientele, good will, and business secrets, as well as potential sources of income, such as organisation and advertising. In fact, the applicability of Article 1 of Protocol No. 1 to business practices (i.e. enterprises) extends only to their clientele and goodwill, as these are entities of a certain value that have in many respects the nature of a private right and thus constitute “assets” and therefore “possessions” within the meaning of the first sentence of that article.

For example, in the *Iatridis v. Greece* case the applicant operated an open-air cinema, which had been built on the land which was in dispute between the heirs of a certain K.N. and the Greek State. The applicant leased the cinema from the heirs in 1978 but in 1988 the authorities ordered his eviction on the grounds that he was wrongfully retaining State property, and assigned the cinema to the local authorities. In 1989 the Athens Court of First Instance had quashed the eviction order but the Minister of Finance refused to comply with the court’s judgment. Before the Court the applicant complained that the failure of the authorities to return the cinema to him constituted an infringement of his right to the peaceful enjoyment of his possessions.

The Court noted that, before he was evicted, the applicant had operated the cinema for eleven years under a formally valid lease without any interference by the authorities, as a result of which he had built up a clientele, which constituted an asset.

The Court then noted that the applicant, who had had a specific licence to operate the cinema he had rented, had been evicted from it by the local authorities and had not set up his business elsewhere. It also noted that, despite a judicial decision quashing the eviction order, the applicant could not regain possession of the cinema because the Minister of Finance refused to revoke the assignment of it to the local authorities. In those circumstances, the Court found that there had been interference with the applicant’s property rights and eventually held that there had been a breach of Article 1 of Protocol No. 1.

The entitlement to a **pension** or other **welfare (social security) benefits** is also capable of falling with the protection of Article 1 of Protocol No. 1. The Court has stressed in the *Stec and others v. the United Kingdom* case that in the modern, democratic State, many individuals were, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognised that such individuals required a degree of certainty and security, and provided for benefits to be paid – subject to the fulfilment of the conditions of eligibility – as of right. Therefore, where an individual had an assertible right under domestic law to a welfare benefit, the importance of that right should also be reflected by holding

Article 1 of Protocol No. 1 to be applicable. However, this provision cannot be interpreted as giving an individual a right to a pension of a particular amount, although a substantial reduction could be regarded as affecting the very substance of the right.

It does not mean either that Article 1 of Protocol No. 1 guarantees entitlement to pension or other social security benefits where there is no basis for such benefits under the domestic law. This is so because the right to a pension or other social security benefits is not as such guaranteed under the Convention and because, as already noted above, Article 1 of Protocol No. 1 does not create a right to acquire property.

Negative and positive obligations of the State

The obligation to respect the right to property under Article 1 of Protocol No. 1 incorporates both negative and positive obligations. The essential object of this provision is to protect a person against unjustified interference by the State with the peaceful enjoyment of his or her possessions (negative obligations). Negative obligations have been held to include, for example, expropriation or destruction of property as well as planning restrictions, rent controls and temporary seizure of property.

In *Pressos Compania Naviera SA and others v. Belgium* the State was held liable for extinguishing the applicant's pending claims by enacting retroactive legislation.

On the other hand, by virtue of Article 1 of the Convention, the effective exercise of the right protected by Article 1 of Protocol No. 1 does not depend merely on the State's duty not to interfere, but may require positive measures of protection, particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and the effective enjoyment of his possessions. There used to be very little case-law on the State's positive obligations under Article 1 of Protocol No. 1. However, from the Court's more recent practice, it is clear that positive obligations may arise in a number of circumstances.

In *Öneryıldız v. Turkey* the State was found to be under the obligation to undertake practical steps to avoid destruction of property as a result of unsafe conditions in a refuse tip.

In *Sovtransavto v. Ukraine* the applicant company's property rights were found to have been violated as a consequence of unfair proceedings resulting in the reduction of its shareholding in a company and in the loss of control of the company's activity and assets.

The content of the right

Article 1 of Protocol No. 1 has been held to comprise three distinct rules. This analysis was first put forward in the case of *Sporrong and Lönnroth v. Sweden*, which is one of the most important Court judgments in relation to this Article of the Convention. The rules were defined in the following manner:

... The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.

When considering whether there has been a violation of Article 1 of Protocol No. 1, the Court shall firstly examine whether there exists any property right (a possession) falling within the ambit of

that provision. The second step is to consider whether there has been interference with that possession and, ultimately, the nature of that interference (i.e. which of the three rules applies).

It should, however, be borne in mind that the three rules are not distinct in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principles enunciated in the first rule.

Deprivation of property (second rule)

The essence of deprivation of property is the extinction of legal rights of the owners. However, more generally, the Court will not only take into account whether there had been a formal expropriation or transfer of ownership, but will also investigate the realities of a situation to see whether there has been a *de facto* expropriation.

In *Papamichalopoulos v. Greece* the applicants' valuable land had been taken by the State in 1967 during the dictatorship period and given to the Navy, which then established a naval base on the site. Since after that time the applicants were unable to make effective use of their property or to sell it, the State was held liable for a *de facto* expropriation.

In *Brumărescu v. Romania* the applicant had, on the basis of a first-instance judgment in his favour, regained possession of a house nationalised from his parents in 1950. Subsequently, the Supreme Court quashed the first-instance judgment as a consequence of which the applicant was no longer entitled to use the house at issue. The Court considered the first-instance judgment as the applicant's possession within the meaning of Article 1 of Protocol No. 1 and examined the case under the second rule of that provision.

Control of the use of property (third rule)

A measure falls within this rule if its main aim is for the State to control the use of property, be it in the general interest or "to secure the payment of taxes or other contributions or penalties".

In *Handyside v. the United Kingdom* the authorities seized the applicant's book because it contained obscene images. Since the book had been seized only temporarily, the measure did not involve a deprivation of property, but instead fell to be examined under the third rule of Article 1 of Protocol No. 1.

Control of the use of property (third rule)

In *Mellacher and others v. Austria* the applicants owned numerous flats rented to tenants. They complained before the Court about the reduction of rent granted to tenants pursuant to the newly enacted Rent Act. The measure at issue was considered to be one of control of use of property.

In *Svenska Managamentgruppen AB v. Sweden* the applicant company complained that the levying of a newly introduced profit-sharing tax upon it as well as the obligation to pay a supplementary pension charge interfered with its property rights. The case fell to be examined under the third rule of Article 1 of Protocol No. 1.

Peaceful enjoyment of possessions (first rule)

The first rule is often said to be of a general nature and includes all situations which interfere with the individual's property rights, but do not constitute deprivation of property or a measure of control of its use. When deciding which rule a certain situation falls to be examined under, the Court shall normally first determine whether the second or the third rule are applicable, since they involve particular categories of interference with the peaceful enjoyment of possessions. Given the wide interpretation of the other two rules, in particular the control of use of property, the application of this rule has not been as wide as might have been expected.

In *Sporrong and Lönnroth v. Sweden* the existence of expropriation permits resulted in the reduction of the selling price of the property at issue. However, the applicants had never ceased to be the owners of the property and they could at all times sell it if they

wished to do so. This part of the case was thus examined under the first (general) rule guaranteeing peaceful enjoyment of possessions.

In *Stran Greek Refineries and Stratis Andreadis v. Greece* the legislation rendering an arbitration award in the applicant's favour void and unenforceable fell to be considered under the first rule.

Permissible restrictions

Interference

As already stated, the right to protection of property is, however, not absolute. It is subject to restrictions clearly prescribed in Article 1 of Protocol No. 1. Interference with the right to peaceful enjoyment of possessions shall be allowed only if:

- it is prescribed by law,
- it is in the public interest, and
- it is necessary in a democratic society.

All three conditions must be fulfilled cumulatively. Should only one of them not be met, there will have been a violation of the Convention.

Furthermore, by virtue of Article 15 of the Convention, at time of war or other public emergency the State may take measures derogating from its obligation to respect the right to peaceful enjoyment of property to the extent strictly required by the exigencies

In *Solodyuk v. Russia* the applicant's pension instalments were paid late in circumstances of high inflation of the currency, as a result of which the value of the amounts actually received was significantly decreased. The case consequently also fell to be examined under the general rule.

of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Lawfulness

Interference with the right to property must firstly satisfy the requirement of legality. Even though it is expressly stated only in the second sentence of the first paragraph of Article 1 of Protocol No. 1 ("subject to conditions provided for by law"), the principle of legal certainty as one of the fundamental principles of a democratic society is inherent in the Convention as a whole and must therefore be satisfied whichever of the three rules applies.

The notion of law under the Convention also has an autonomous meaning. A "law" is not only a law in a formal sense. It can also include another statute (e.g. subordinate legislation), Constitution, international treaty to which the State concerned is a party, as well as EC law.

It is not sufficient for the act, on the basis of which a State limited the enjoyment of possessions, to be a formal legal source within the meaning of the domestic law, but it must furthermore contain certain qualitative characteristics and afford appropriate procedural safeguards so as to ensure protection against arbitrary action.

For example, in the case of *James v. the United Kingdom*, the Court reiterated that

... it has consistently held that the terms “law” or “lawful” in the Convention [do] not merely refer back to the domestic law but also [relate] to the quality of the law, requiring it to be compatible with the rule of law.

Accordingly, the law must be accessible (published) and its provisions formulated with sufficient precision to enable the persons concerned to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct. This does not require complete precision, which would exclude the necessary interpretation in the application of laws. However, it requires a certain level of foreseeability, which depends on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.

Should the Court establish that interference with a property right was not in accordance with the law, it does not need to consider the legitimacy of the State’s objective or the issue of proportionality. In this case, there will automatically be a violation of Article 1

of Protocol No. 1 and it will be unnecessary for the Court even to consider whether such unlawful interference pursued a legitimate aim or whether it had been proportionate.

In the case of *Iatridis v. Greece* the applicant was evicted from an open-air cinema, despite the fact that the eviction order in his case had been quashed several months after the eviction. The Court established that the authorities’ refusal of the applicant’s request to repossess the land in question – which constituted interference with his property rights – had been unlawful and that there had accordingly been a violation of Article 1 of Protocol No. 1.

In the case of *Belvedere Alberghiera v. Italy* the applicant company’s land was expropriated with a view to building a road. The competent court subsequently quashed the decision on expropriation, declaring it unlawful. However, once the applicant company sought return of the land, its request was dismissed, the courts having concluded that the transfer of property to the authorities had become irreversible. The Court concluded that the denial of the restitution of land in the circumstances of the present case had been in breach of Article 1 of Protocol No. 1.

General interest

Furthermore, any lawful interference with the individual’s property rights may be justified only if it pursues a legitimate aim in the general (public) interest. This obligation is expressly stated in relation to deprivation of property (“public interest”) and in relation to control of use of property (“general interest”). However, any interference with property rights, irrespective of the rule it

falls under, must satisfy the requirement of serving a legitimate public (or general) interest.

The notion of “public interest” is necessarily an extensive one. Since the domestic authorities have a better knowledge of their society and its needs, they are usually better placed than the Court to establish what is in the public interest. The Court will therefore respect the domestic authorities’ judgment as to what is in the “public interest” unless that judgment is manifestly without reasonable foundation.

For example, in the case of *Former King of Greece and others v. Greece*, the applicants, members of the royal family, claimed that a legislative measure deprived them of their ownership of some land in Greece. The Government argued that the State’s legitimate interest lay in the need to protect the forests and archaeological sites within the contested estates and, moreover, that the contested legislation was linked to the major public interest in preserving the constitutional status of the country as a republic. The Court noted that there had been no evidence to support the Government’s argument on the need to protect the forests or archaeological sites. On the other hand, although with some hesitation given that the disputed law was enacted almost 20 years after Greece had become a republic, the Court accepted that it was necessary for the State to resolve an issue which it considered to be prejudicial for its status.

Proportionality

A measure interfering with the peaceful enjoyment of possessions must be necessary in a democratic society directed at achieving a legitimate aim. It must strike a fair balance between the demands of the general interest of the community and the requirements of the individual’s fundamental rights. Such a fair balance will not have been struck where the individual property owner is made to bear “an individual and excessive burden”.

However, the Court leaves the Contracting States certain discretion commonly referred to as “margin of appreciation”, considering the state authorities to be better placed to assess the existence of both the need and the necessity of the restriction, given their direct contact with the social process forming their country. For this reason, there will in principle be no violation of the Convention should there exist another measure less restrictive to a Convention right than the one chosen in achieving a certain aim, as long as both measures fall within the State’s margin of appreciation. On the other hand, the Court shall certainly take into consideration the existence of alternative solutions when ruling whether interference had been proportionate to the aim sought to be achieved.

This margin of appreciation also derives from the subsidiary role of the Court in the achievement of Convention rights. However, it is not unlimited, but goes hand in hand with scrutiny by the Court foreseen by the Convention. This is why the Court shall not refrain from criticising every measure the State undertakes and

justifies by its margin of appreciation. Its scope depends on the circumstances of the case, the nature of the guaranteed Convention right, the nature of the legitimate aim pursued by the interference as well as the intensity of the interference.

In the case of *Hentrich v. France* the applicant purchased some land, on which a State authority subsequently wanted to exercise its pre-emption right. The State submitted that the public interest in the present case lay in the prevention of tax evasion. The Court firstly concluded that the pre-emption by the State operated arbitrarily and selectively as well as that it was scarcely foreseeable. On the basis of such procedure, the Court concluded that the applicant as a selected victim bore an individual and excessive burden which could have been rendered legitimate only if she had had the possibility – which was refused to her – of effectively challenging the measure taken against her. The fair balance which should be struck between the protection of the right of property and the requirements of the general interest was therefore upset.

In the case of *Scollo v. Italy* the applicant purchased a flat in Rome, which was occupied by a tenant. Even though the applicant himself was a disabled person, unemployed and needed the flat for his own use, he was not able to have the tenant evicted for a period

of almost twelve years. Like in many other cases concerning tenancy rights, the Court examined the case under the third rule of Article 1 of Protocol No. 1, the control of use of property. Having found that the domestic authorities did not undertake any action to evict the tenant even though the applicant made it clear to them the situation he was in, the Court concluded that the restrictions on the applicant's use of his flat amounted to a breach of proportionality and to a violation of Article 1 of Protocol No. 1.

In the case of *Pressos Compania Naviera SA v. Belgium*, a number of ship owners, whose ships had been involved in collisions in the territorial waters of Belgium, brought actions in damages in respect of the negligence of the pilots who were the liability of the State. The State subsequently adopted legislation removing the right to compensation of such damage and thereby retroactively extinguishing the ship owners' claims. The Court reiterated that the taking of property (in this case claims) without any compensation may only be justified under specific circumstances. In the present case the legislation with retrospective effect with the aim and consequence of depriving the applicants of their claims was considered inconsistent with the fair balance principle and consequently in breach of Article 1 of Protocol No. 1.

The relationship of Article 1 of Protocol No. 1 to other articles of the Convention

When peaceful enjoyment of possessions is at stake, also other rights enshrined in the Convention and its protocols may come into play.

For example, in cases where an individual has the right to live in a particular residence, interference with this right will be scrutinised under Article 1 of Protocol No. 1. If the residence is at the same time the home of that person, also his or her right to peaceful enjoyment of home, protected by Article 8, may come into play. Likewise, complaints concerning the destruction of a building may be considered as an infringement of the applicant's right to home and/or privacy as well as the right to peaceful enjoyment of possessions. While the right to respect for person's home or place of work is protected by Article 8 of the Convention, the premises concerned usually constitute a possession for the purposes of Article 1 of Protocol No. 1.

A significant part of legislation concerning spatial planning, taxes and environmental protection interferes with property rights. These provisions normally make a distinction between different social and economic groups which in itself means discrimination. Article 14 of the Convention proscribes less favourable treatment on certain grounds such as race, national origin, and also property status and provides safeguards for protection of property in addition to those protected by Article 1 of Protocol No. 1.

Besides, while the substance of property is protected by Article 1 of Protocol No. 1, procedural guarantees for enjoyment of property rights, as long as they are considered civil rights, are provided for by Article 6 § 1. Thus, when property rights are at stake, an applicant may seek access to court, rely on various procedural safeguards, and, ultimately, request an enforcement of judicial decisions resulting from these proceedings.

Other articles of the Convention, such as Articles 3 and 10, have been relied on in applications concerning protection of property, but since their significance appears to be only slight and the pertinent Court's case-law sparse, their relations with Article 1 of Protocol No. 1 will not be delved into.

Article 1 of Protocol No. 1 and Article 3 of the Convention

It can occasionally occur that when the applicants raise complaints concerning social or pension insurance entitlements, which, in principle, may be considered property, they also rely on Article 3 of the Convention under its inhuman or degrading treatment heading. The Convention organs, however, have been reluctant to entertain such complaints. In the *Predojević and others v. Slovenia* case the Court declared inadmissible as manifestly ill-founded the applicants' complaints that their being deprived of

military pension constituted inhuman or degrading treatment and deprivation of property. As for the complaints made under Article 1 of Protocol No. 1, the Court considered that the applicants did not meet the requirements, imposed by the domestic law, to be awarded a pension.

Article 1 of Protocol No. 1 and Article 6 of the Convention

Article 6 §1 of the Convention protects the right to have one's civil rights and obligations determined in the course of a fair and timely hearing by an impartial tribunal. One of such civil rights is also the right to property. While Article 1 of Protocol No. 1 protects the substance of the right to property, Article 6 §1 provides procedural guarantees for resolution of disputes concerning property. In other words, the first provision sets the requirements for admissible interferences with property rights; the second provision guarantees access to court and a fair trial in establishing whether the interference was permissible and the property rights determined fairly. If the applicants have no existing possession or at least a legitimate expectation in this respect, they cannot rely on Article 1 of Protocol No. 1. However, no such requirement is needed to attract the guarantees of Article 6 §1, where it is essential that the outcome of the proceedings is decisive for the recognition or existence of the property right relied on.

The alleged violation of the right to a trial within reasonable time may raise particular questions under both provisions, since unduly long proceedings maintain their outcome unclear over a

period of time, which may have detrimental effects on the property rights concerned. The delay aspect of these complaints falls under Article 6, while the outcome of proceedings under Article 1 of Protocol No. 1. Length of proceeding may have particularly unfavourable effect in times of inflation. In *Aka v. Turkey*, for example, the applicant succeeded in seeking an increase in compensation for his expropriated land. The amounts of the compensation awarded by the national authorities bore a 30% simple interest, whilst the inflation rate at that time exceeded 70% per annum. The Court found that the difference between the amounts of compensation due to the applicant when his land was expropriated and the amounts due when the compensation was actually paid was, in part, a result of the length of proceedings. This separate loss, coupled with the loss of his land, upset the fair balance that should have been maintained between the protection of the right to applicant's property and the demands of the general interest. The Court thus found infringement of Article 1 Protocol No. 1, because domestic legislation allowed the State to profit from an exceptional situation, because it was favourable to the State, if it did not meet its obligations, i.e. perform speedy trials, as diligently as it should.

The Court came to a different conclusion in a case where the applicant's claims in domestic proceedings were lodged against private individuals and not the State. In *O.N. v. Bulgaria* the applicant complained that the domestic courts refused to take into account the inflation and, at the end of the day, awarded him sums many times lesser than the real value of what he had given under

the impugned contract. The Court declared the complaints under Article 6 and Article 1 of Protocol No. 1 inadmissible. It concluded that imposing on the State the positive obligation to remedy situations of depreciation of currency and increased inflation through legislation or judicial decision would be no less than imposing on the State an obligation to guarantee the value of possessions despite inflation or other economic phenomena.

Execution of a judgment forms an integral part of a fair trial as guaranteed by Article 6 §1. Procedural guarantees enshrined therein are stripped of all essence, if the decision to which they led is not honoured. When such cases arise, the Court considers the applicant deprived of the right to access to court and if the domestic proceedings concerned property rights, failing to adhere to the final decision may also result in a breach of property rights. In *Burdov v. Russia*, the State was ordered to pay the applicant damages for his poor health resulting from extensive exposure to radioactive emissions. The Court rejected the Government's argument that the State failure to execute the judgment resulted from the lack funds and found a breach of Article 6 §1 and Article 1 of Protocol No. 1. Alleged lack of funds led to the same result in the case of *Prodan v. Moldova*. In that case, the domestic courts upheld the applicant's claim to declare void the contracts of sale of apartments, which the applicant had sought in the restitution proceedings. The municipality was first ordered to provide the occupants of the apartments with alternative accommodation, but the order was later changed to oblige the municipality to pay compensation instead; however, lack of funds obstructed the enforcement

for several years. The Court found a breach of the rights to a fair trial and to property.

The above cases concerned disputes between individuals and a State. It should be noted, however, that Article 6 §1 has limited application to the cases involving litigation between private parties. Even so, national authorities have been held responsible under this provision and also under Article 1 of Protocol No. 1 for belated or absent enforcement of domestic courts' judgments issued against private persons. In *Fuklev v. Ukraine* the Court held that positive obligations generated by Article 1 of Protocol No. 1 may entail certain measures necessary to protect the right to property even in cases involving litigation between private individuals or companies. States are thus under an obligation to ensure that the procedures enshrined in the domestic legislation for the enforcement of final judgments are observed.

An integral part of Article 6 §1 is the principle of legal certainty, which requires that the final ruling resolving the case should not be challenged. In *Brumărescu v. Romania* the final judgment concerning restitution of a house nationalised to the applicant's parents was executed. Thereupon, the Public Prosecutor, who was not a party to the restitution proceedings, brought the case to the Supreme Court which set aside that judgment, which constituted a violation of Article 6 §1 and Article 1 of Protocol No. 1.

The examination of the complaints under either Article 6 §1 or Article 1 of Protocol No. 1 may occasionally result in the other provision being obsolete. However, no clear-cut rules can be

inferred from the Court's case-law in order to determine in what circumstances this occurs. It appears, however, that when the result of the domestic proceedings is decisive, the complaints made under Article 1 of Protocol No. 1 will be examined whereas when the emphasis is on the proceedings the focus will be on Article 6 §1. For instance, in *Draon v. France* the Court found a breach of the applicants' right to property, because the State had enacted a law limiting the compensation for special burdens suffered as a consequences of disability, while the compensation proceedings had been pending. The applicants also claimed that immediate application of this law violated their right to a fair trial, but the Court did not find it necessary to examine them. On the other hand, in *Canea Catholic Church v. Greece* the Court ruled that denying the applicant's legal personality because it was formally acquired, although exercised in practice for decades, fell foul of Article 6 §1. The applicant church maintained that such refusal deprived it of the possibility to take part in legal proceedings to protect its property, but the Court refused to examine this complaint.

Article 1 of Protocol No. 1 and Article 8 of the Convention

Article 8 guarantees respect for private and family life which comprises also the right to home and correspondence. The applicants alleging a breach of their right to home and invoking Article 8 occasionally rely also on Article 1 of Protocol No. 1. The differ-

ence in the protection offered by these two provisions appears to be very subtle and varies in the Court's case-law.

What constitutes "home" within the meaning of Article 8 was decided in *Gillow v. the United Kingdom*. In that case, the applicants had not occupied the house they had built on Guernsey for nearly nineteen years, but they maintained a link with the house by renting it out. The Court found that the applicants, who had eventually moved into the house, established no other domicile elsewhere and apparently intended to remain living in the house. This was sufficient to consider that house their home for the purposes of Article 8. But since the Protocol No. 1 was not applicable to the island of Guernsey at the time, the Court declared inadmissible the complaints raised under that provisions. The Court has ever since applied a wide interpretation of "home" in its case-law.

The intersection between Article 8 of the Convention and Article 1 of Protocol No. 1 was often displayed in cases concerning tenancies and rent control. The *Larkos v. Cyprus* case scrutinised the legislation concerning eviction upon expiry of a lease. The relevant provisions provided for a differential treatment between the tenants living in state-owned residences and those living in dwellings owned by private individuals. The Court examined the case under Article 14 in conjunction with Article 8, rather than Article 1 of Protocol No. 1, which suggests that the tenants' rights to reside in a particular abode constitutes the right to a home and not the right to property.

Similarly, in the case of *Sorić v. Croatia*, the Court found that neither Article 8 nor Article 1 of Protocol No. 1 included the right of tenant to buy certain property, namely a home. The prior provision only protected a person's right to respect for his or her already existing home and the latter only guaranteed peaceful possession of equally already existing property. The applicant in this case had never been the owner of the flat in question, but had been in the possession of that residence for over sixty years. That possession, however, had not been threatened by the mere enactment of new legislation which did not favour the applicant with the right to buy the apartment he occupied under specially protected tenancy.

It appears that the above approach may not be relied on in the cases where the landlord's rights are at stake. In the case of *Velosa Barreto v. Portugal* the applicant landlord was denied the right to terminate the lease of a house he inherited, although he needed the house for his own occupation. The Court found no violation of Article 8, because the applicant's need for the residence was not dire, as his living conditions improved at the time of the proceedings. The Court went on to examine the case also under Article 1 of Protocol No. 1 and found that the restriction on the applicant's right to terminate his tenant's lease constituted control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1. This control, however, pursued a legitimate social policy aim and the Court held that the State did strike a fair balance between the competing interests involved. Since the applicant provided no arguments in support of his claim, the

Court referred to its findings under Article 8 and found no breach of applicant's rights.

In *Cvijetić v. Croatia* the applicant complained about the length of eviction of her former husband from her illegally occupied flat. The Court found a breach of Article 8 due to the fact that the judgment ordering the eviction was not executed for a prolonged period of time and this prevented the applicant from living in her home. The applicant's complaints raised under Article 1 of Protocol No. 1 were not examined, because they were essentially the same as those made under Article 8.

On the contrary, in *Zaklanac v. Croatia*, where the applicant alleged that the failure to enforce an eviction order violated his right to respect for his home, private and family life and his right to property, the Court examined the issue separately under Article 8 and under Article 1 of Protocol No. 1. Since the proceedings were still pending, the complaints were declared inadmissible as premature.

Other types of interferences with property rights have been scrutinised under Article 8 and Article 1 of Protocol No. 1, such as police entry into a residence or place of work. In *Niemietz v. Germany* the Court found the unlimited order for search of the applicant lawyer's office and seizure of documents disproportionate, particularly in the context of the confidentiality inherent in the lawyer's profession. The applicant further claimed that the search constituted a violation of Article 1 of Protocol No. 1 by impairing his reputation as a lawyer. Having already taken into

consideration, in the context of Article 8, the potential effects of the search on the applicant's professional reputation, the Court found no separate issue under Article 1 of Protocol No. 1.

Similarly, in *McLeod v. the United Kingdom* the applicant's former husband, accompanied by the police, entered into their former matrimonial house, where the applicant was living at the time, in order to collect his belongings. The Court considered that the aims of preserving the peace or prevent a crime could generally justify the police entering into a home. Nevertheless, in the present case, the police officers learned that the applicant was not at home and should therefore have not entered the house, as it should have been clear to them that there was little or no risk of disorder or crime occurring. Although the applicant had relied on Article 1 of Protocol No. 1 in the proceedings before the Commission, which had found no breach of the applicant's rights, she did not maintain this complaint before the Court.

The ultimate form of interference with the right to a home and terminal form of deprivation of property is destruction of a dwelling. In such cases complaints under Article 8 and Article 1 of Protocol No. 1 are often raised. In the case of *Selçuk and Asker v. Turkey* the Court simultaneously examined the complaints under these two articles. It found that the Turkish security forces deliberately burned down the applicants' homes and household property obliging them to leave the village of their origin. In such circumstances the Court saw no doubt that these acts constituted particularly grave and unjustified interferences with the applicants' rights to respect for their private and family lives and homes as

well as breach of their right to peaceful enjoyment of their possessions.

The cases concerning displaced persons raise similar issues. Nonetheless, in order to allege any claim under Article 8, the applicants will be required to prove that the residence from which they were removed was indeed their home. Such a requirement is partially the result of the finding that Article 8 does not necessarily allow individuals preferences as to their place of residence to prevail over the general interest. For instance, in the *Chapman v. the United Kingdom* case the applicant bought a plot of land with a view to settling there. However, her request for planning permission to station caravans on her land was refused due to detrimental effect it may have on the rural character of the site. The Court established that there were alternatives available to the applicant besides remaining in occupation on that site without planning permission and found no violation of Article 8. For the same reasons, the Court ruled that the applicant's right, protected by Article 1 of Protocol No. 1, to live peacefully on the plot of land she had bought, was not breached.

Measures or regulations on spatial planning and use of land make part of a group of applications concerning pollution and nuisances, which is another area falling within the ambit of Article 8 and Article 1 of Protocol No. 1. Even though the number of cases on this subject has been noticeably growing in the past few years, the Court has not yet found a violation of both of these provisions in a single case. In general, there is no provision in the Convention or its protocols designed to protect environmental interests of

individuals, however, some positive obligations are implied. The extensive interpretation of Article 8 has allowed the Court the examination of various “environmental” complaints where environmental factors directly and seriously affected private and family life or home, including in cases where the State had failed to provide effective protection of applicant's rights. On the other hand, preservation of environment, including planning policies, is occasionally the aim which justifies certain types of interferences with Article 8 rights. When this aim is pursued in the general interest, it permits also the control of the use of property in accordance with Article 1 of Protocol No. 1. This provision, however, does not guarantee peaceful enjoyment of property in a pleasant environment. Moreover, it allows restrictions on the use of property for environmental reasons, if a fair balance between competing interests is struck. Besides, from Article 1 of Protocol No. 1 certain positive obligations arise, in particular when carrying out dangerous activities is involved.

It appears that Article 1 of Protocol No. 1 secures ownership rights, i.e. applicant's proprietary or economic interest in a particular possession, while Article 8 guarantees the perpetuity of peaceful enjoyment of possessions; nevertheless, neither of the provisions offers unlimited protection. This idea is supported in particular by the above cited case-law concerning tenancies from which it is clear that the tenants seldom succeed with their (proprietary) claims under Article 1 of Protocol No. 1. Another conclusion deduced from the presented jurisprudence is that the Court first establishes whether a specific residence is a home and

considers if the safeguards offered by Article 8 were respected (access to, occupation of and the right to remain in the premises in issue). Only thereafter the guarantees inherent in Article 1 of Protocol No. 1 come into play. Hence, if the violation alleged concerns mainly the privacy aspect of the applicant's rights and had no or little economic effect on the property at issue, the Court will primarily scrutinise the case only under Article 8 and hold that no separate issue arises under Article 1 of Protocol No. 1. The adverse approach is seldom to be found in the case-law of the Court. Evidently, where no “home” has been established, the Court will find no violation of Article 8, regardless of the conclusions made as to the alleged breach of Article 1 of Protocol No. 1.

The conclusions made as to the intersection between property rights and the protection of home and privacy are at large applicable also to protection of correspondence, although the relevant Court's case law on this subject is much more scarce.

Article 1 of Protocol No. 1 and Article 10 of the Convention

In *Handyside v. the United Kingdom* the authorities seized and later destroyed the matrix and hundreds of copies of a schoolbook published by the applicant due to its lewd content. The Court, acknowledging that Contracting States had a margin of appreciation under Article 10, found no breach of this provision. Examining the complaints under Article 1 of Protocol No. 1, the Court found that the complaint concerning the seizure could not be entertained under the second sentence of Article 1 of Protocol

No. 1 (the destruction of property), since the measure was merely a temporary one. On the other hand, the seizure did concern the control of use of the applicant's property and thus fell within the ambit of the second paragraph of that article. However, the State was found to be the ultimate adjudicator in the matter of necessity for interference in such cases, and the Court considered that the notion of "general interest" encompassed in Article 1 of Protocol No. 1 left the states much room for interpretation. For this reason, the Court found no violation of Article 1 of Protocol No. 1. Since the final destruction of the books was the result of them being lawfully adjudged illicit and dangerous to the general interest, this measure was also in accordance with the second paragraph of Article 1 of Protocol No. 1.

More recently, in *Öztiürk v. Turkey*, the Court took a different approach. It held that the confiscation and destruction of copies of a book published by the applicant was an incidental effect of his conviction. Since the Court found a breach of Article 10, it held that it was not necessary to consider the applicant's complaints under Article 1 of Protocol No. 1.

Article 1 of Protocol No. 1 and Article 13 of the Convention

According to the Court's case-law, Article 13 guarantees to everyone who claims, on arguable grounds, that one or more of his or her Convention rights were violated, an effective remedy before a national authority.

Article 1 of Protocol No. 1 and Article 13 of the Convention

Since the right to property protected by Article 1 of Protocol No. 1 is a right set forth in the Convention, it is incumbent on the States to ensure that every person under their jurisdiction has an effective remedy for the protection of that right.

In this connection it is important to note that, where the Convention right asserted by the individual is a "civil right" recognised under domestic law – such as the right to property – the protection afforded by Article 6 §1 will also be available. In such circumstances the safeguards of Article 6 §1, implying the full panoply of a judicial procedure, are stricter than, and absorb, those of Article 13. Thus in cases in which the Court has found a violation of Article 6 §1 it will not consider it necessary also to rule on an accompanying complaint made under Article 13. This is so because Article 6 §1 constitutes a *lex specialis* in relation to Article 13. In such cases there is no legal interest in re-examining the same complaint under the less stringent requirements of Article 13.

Nevertheless, Article 13 may come into play in cases involving the right to property, where for one reason or another, Article 6 is not applicable.

For instance, employment disputes between the authorities and public servants, who are acting as depositories of public authority, are not "civil" and are, therefore, excluded from the scope of Article 6 §1 of the Convention (*Pellegrin v. France*). In such cases Article 13 may come into play if the employment dispute complained of concerns payment of a public servant's already earned

salary (which qualifies as “possession” within the meaning of Article 1 of Protocol No. 1).

Furthermore, Article 6 does not apply to proceedings concerning interim measures or provisional remedies. However, for a remedy to be effective it must provide relief rapidly enough to avoid any irreparable harm. The regular remedies (for example, a civil action) may not always be able to do so because they are sometimes too slow or allow for dilatory manoeuvres. Therefore, Article 13 may require the availability of provisional remedies in cases where their absence could result in irreparable harm for the applicant’s property rights. In such situations the provisional remedies could be the only effective remedies.

Article 1 of Protocol No. 1 and Article 14 of the Convention

The prohibition of discrimination, which is encompassed in Article 14, is one of the fundamental rights. However, this provision has no independent existence, but can only be relied on in conjunction with other rights enshrined in the Convention. For example, the applicant claiming that he was discriminated against with regard to his property rights will rely on Article 14 in conjunction with Article 1 of Protocol No. 1. He will have to have a possession within the meaning of this provision, but will not be required to establish, that his property rights were violated in order to claim that he was discriminated against. It will suffice to prove that he was subject to treatment which interfered with his

possession and that this treatment was unjustifiably different to the one offered to those in comparable situations.

In the already mentioned *Marckx v. Belgium* case, the Court ruled that the mother was discriminated against in disposing freely with her property in respect of illegitimate children, but found no violation of Article 1 of Protocol No. 1 taken on its own. Similarly, in *Inze v. Austria*, the Court found that the applicant was discriminated against in that the domestic legislation gave preference to the legitimate children over illegitimate in succession of an entire farm. The test for the applicability of Article 14 linked with Article 1 of Protocol No. 1 in these two cases was not whether the applicants’ property rights were violated, but whether their claims fell within the scope of property.

Interestingly enough, the application of Article 14 in property cases may go beyond the property rights which the Contracting States are obliged to guarantee under the Convention. It includes also property rights that the states choose to protect voluntarily. In *Gaygusuz v. Austria* the applicant complained that he was denied emergency assistance for the unemployed on the ground that he did not have Austrian nationality. Even though the State was not obliged to offer social security benefits to its residents, the Court found that where such scheme was established, a refusal of assistance to the applicant, who met all the statutory requirements, solely on the basis of his nationality was contrary to of Article 14 taken in conjunction with Article 1 of Protocol No. 1.

The Court has often stressed that differential treatment does not run against Article 14 as long as it can be reasonably and objectively justified for the general interest. However, in determining to what extent different treatment is necessary, the margin of appreciation left to the states under Article 14 is narrower than the one under Article 1 of Protocol No. 1. In particular to certain grounds of differentiation, such as gender and race, the Court is not susceptible to accept but very well-founded arguments in order to uphold less favourable treatment. In addition to these discrimination criteria and illegitimacy and nationality referred to in the above-mentioned cases, Article 14 offers a non-exhaustive list of grounds on which discrimination is not allowed. In the ambit of property rights, discrimination on the ground of property is particularly eye-catching.

Legislation on spatial planning, taxes and environmental protection interfere with property rights. These provisions normally make a distinction between different social and economic groups, occasionally on the ground of property. In *Pine Valley Developments Ltd and others v. Ireland* the applicants bought some land in reliance on an outline planning permission for industrial warehouses and office development. Since detailed planning approval was not granted, the property bought sustained a loss in value. Subsequently, legislation was adopted to remedy misapplication of planning law with a view of validating planning permissions. However, the applicants were not granted planning permission. Their complaint that they were discriminated against in comparison with other landowners was upheld by the Court.

Another discrimination case on the ground of property was *Chassagnou and others v. France*. In that case a law imposed on the owners of estates smaller than 20 hectares the transfer of hunting rights to hunting associations. The applicants, who were such owners, claimed they were victims of discrimination on the ground of the seizure of property. The Court established that the result of the impugned legislation was that only large landowners were entitled to use their land as they wished, which put the applicants and other small owners into a discriminatory position in breach of Article 14 taken in conjunction with Article 1 of Protocol No. 1.

Another aspect of the relationship between Article 14 and Article 1 of Protocol No. 1 is the question of when does the Court consider the complaints only under the substantive or discrimination angle, and when both of them. In *Chassagnou and others v. France* the Court reiterated: “Where a substantive article of the Convention has been invoked both on its own and together with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court to consider the case under Article 14 also, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case”. In many a prominent judgment the Court examined the complaints under Article 1 of Protocol No. 1, but went on to hold that it was either not necessary to examine the complaints under this provision taken in conjunction with Article 14 or that no separate issue arose in this respect. The Court did so regardless of the outcome of the review of the

substantive complaint. On the other hand, when the Court finds no breach of the substantive provision, it often examines the complaints under Article 14.

Article 14 thus protects the right to enjoy the property rights free from discrimination. When relying on this provision, the applicant must prove to have had a possession under Article 1 of Protocol No. 1 and that he or she, in exercising the rights originating from this possession, was treated less favourably than others in

comparable situation. The burden then falls on the State to establish that the different treatment was in accordance with the law, pursued a legitimate aim and that the means employed were proportionate to that aim. It should be noted that when the ground for differentiation is property, the margin of appreciation offered to the State is wider than when the gender, nationality, social status and the like are used as criterion for differentiation.

The admissibility criteria

Exhaustion of domestic remedies

According to the generally recognised rules of international law (cited in Article 35 of the Convention), the Court may only deal with the matter after all domestic remedies have been exhausted. Complaints under Article 1 of Protocol No. 1 are no exception to this rule (see *Docevski v. "the former Yugoslav Republic of Macedonia"* and *Krisper v. Slovenia*).

Under Article 35 § 1, the applicants are under an obligation to use the remedies provided under the national law which are sufficient to afford redress in respect of the breaches alleged. The complaint must have been brought before the competent judicial or administrative authority and taken to the highest instance available – for instance before the Constitutional Court in Croatia and in Slove-

nia. If the applicants were unable to properly use the domestic remedies because of their own failure to comply with the formal requirements or time-limits, their complaint shall be declared inadmissible for non-exhaustion (see *Sirc v. Slovenia*).

Ratione temporis

Article 28 of the Vienna Convention on the Law of Treaties of 23 May 1969 (“the Vienna Convention”) provides that, unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

In their case-law the Commission and the Court have firmly endorsed this general rule of international law (see, notably, *Blečić v. Croatia*).

Accordingly, the Court is not competent to examine applications against a State in so far as the alleged violations are based on facts having occurred before the date of the entry into force of the Convention in respect of that State. However, the question of whether an alleged violation is based on a fact occurring prior or subsequent to a particular date gives rise to difficulties when the facts relied on fall partly within and partly outside the period of the Court's competence.

In the case of *Blečić v. Croatia* the Court has consolidated its case-law on the matter and elaborated the principles governing its temporal jurisdiction in the following way:

1. *[T]he Court's temporal jurisdiction is to be determined in relation to the facts constitutive of the alleged interference. The subsequent failure of remedies aimed at redressing that interference cannot bring it within the Court's temporal jurisdiction.*
2. *An applicant who considers that a State has violated his rights guaranteed under the Convention is usually expected to resort first to the means of redress available to him under domestic law. If domestic remedies prove unsuccessful and the applicant subsequently applies to the Court, a possible violation of his rights under the Convention will not be caused by the refusal to remedy the interference, but by the interference itself,*

3. *Therefore, in cases where the interference pre-dates ratification while the refusal to remedy it post-dates ratification, to retain the date of the latter act in determining the Court's temporal jurisdiction would result in the Convention being binding for that State in relation to a fact that had taken place before the Convention entered into force in respect of that State. However, this would be contrary to the general rule of non-retroactivity of treaties [embodied in Article 28 of the Vienna Convention].*
4. *Moreover, affording a remedy usually presupposes a finding that the interference was unlawful under the law in force when the interference occurred (tempus regit actum). Therefore, any attempt to remedy, on the basis of the Convention, an interference that had ended before the Convention came into force, would necessarily lead to its retroactive application.*
5. *In conclusion, while it is true that from the ratification date onwards all of the State's acts and omissions must conform to the Convention (see Yağcı and Sargın v. Turkey, judgment of 8 June 1995, Series A no. 319-A, p. 16, §40), the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to that date (see Kopecký v. Slovakia [GC], no. 44912/98, §38, ECHR 2004-IX). Any other approach would undermine both the principle of non-retroactivity in the law of treaties and the fundamental distinction between violation and reparation that underlies the law of State responsibility.*

6. *In order to establish the Court's temporal jurisdiction it is therefore essential to identify, in each specific case, the exact time of the alleged interference. In doing so the Court must take into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated.*

The *Blečić* case concerned the termination of the applicant's specially protected tenancy of her flat in Zadar on account of her prolonged absence during the war. In July 1991 the applicant left her flat and went to visit her daughter in Rome for the summer. Since during her absence the war had escalated and Zadar had been exposed to constant shelling, she decided to stay in Rome. In November 1991 a certain M.F. and his family occupied her flat. In February 1992, the local authorities brought a civil action against the applicant for termination of her tenancy, on the ground that she had been absent from the flat for more than six months without justified reason.

While the first-instance court ruled against the applicant accepting the local authorities' claim for the termination of the applicant's tenancy, the second-instance court reversed that judgment and dismissed their claim. Eventually, on 15 February 1996, the Supreme Court reversed the second-instance judgment and upheld that of the first-instance, which thereby acquired the force of *res judicata*. On 8 November 1999, that is, after the entry into force of the Convention in respect of Croatia on 5 November 1997, the Constitutional Court dismissed the applicant's constitutional complaint against the Supreme Court's judgment.

The applicant alleged violations of her rights to respect for her home and to peaceful enjoyment of her possessions, as guaranteed by Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention.

The Court noted that under Croatian law in force at the material time a specially protected tenancy was considered to be terminated at the moment a court judgment upholding the claim of the provider of the flat to terminate such a tenancy became *res judicata*. The Court found that the termination of the applicant's tenancy occurred when the Supreme Court gave its judgment on 15 February 1996. That was before the date of entry into force of the Convention in respect of Croatia. It was that judgment that constituted the alleged interference with the applicant's rights under the Convention and not the subsequent Constitutional Court decision which merely allowed that already existing interference to stand.

Moreover, the Court held that in those circumstances the Constitutional Court could not have applied the Convention when reviewing the Supreme Court's judgment without having faced the difficulty posed by Article 28 of the Vienna Convention.

In sum, since the relevant fact giving rise to the application was the Supreme Court's judgment of 15 February 1996, and not the Constitutional Court's decision of 8 November 1999, the Court held that an examination of the merits of the case could not have been undertaken without extending its temporal jurisdiction to a fact which, by reason of its date, was not subject thereto. To do so

would have been contrary to the general rules of international law. Therefore, the application was found to be incompatible *ratione temporis* with the provisions of the Convention.

The Court has followed the same approach in the subsequent case of *Mrkić v. Croatia*. The case also concerned the termination of the applicant's specially protected tenancy. However, in that case the applicants' tenancy was terminated already in the moment when the second-instance court dismissed the applicants' appeal and upheld the first-instance judgment against them, which thereby became *res judicata*. As this had occurred in March 1997, i.e. before the entry into force of the Convention in respect of Croatia, it did not matter that, unlike in the *Blečić* case, both the decision of the Supreme Court and the decision of the Constitutional Court that followed were rendered after the ratification. It is true that the applicants' complained under Article 8 of the Convention but given the *Blečić* case there is a little doubt that the conclusion would have been the same had they also complained under Article 1 of Protocol No. 1.

The above considerations apply only to cases in which the interference complained of takes the form of an instantaneous act. However, when the alleged violation relates to a continuing situation, which lasts after the entry into force of the Convention in respect of the State concerned, the Court has jurisdiction to examine the period following the ratification.

The Court has recognised the concept of a continuing violation in the context of the right to property in the case of *Loizidou v.*

Turkey. In that case the applicant – a Greek Cypriot – was the owner of a house in northern Cyprus, which she had been forced to leave after the Turkish occupation of that part of the island in 1974. Before the Court she complained under Article 1 of Protocol No. 1 that she had been continuously prevented from having access to her property by the Turkish forces.

The Turkish Government claimed *inter alia* that the applicant's property had been irreversibly expropriated by virtue of Article 159 of the Constitution of the Turkish Republic of Northern Cyprus ("the TRNC") of 7 May 1985, prior to Turkey's declaration of January 1990 accepting the Court's jurisdiction.

As it was evident from international practice and resolutions of various international bodies that the international community did not regard the TRNC as a State under international law and that Republic of Cyprus remained sole legitimate Government of Cyprus, the Court was unable to attribute legal validity for the purposes of the Convention to provisions such as Article 159 of the TRNC Constitution. Accordingly, the applicant could not be deemed to have lost title to property and the alleged violation was thus of continuing nature.

Since the applicant remained legal owner, the Court went on to find that having been refused to access to her property since 1974, she had effectively lost all control as well as all possibilities to use and enjoy it. Thus continuous denial of access amounted to interference with rights under Article 1 of Protocol No. 1. In as much as the Turkish Government had not sought to justify interference,

the Court did not find such complete negation of property rights justified.

A specific and unique feature of the complaints under Article 1 of Protocol No. 1 in the context of the Court's temporal jurisdiction is that interference complained of, even if it falls outside that jurisdiction, may under the domestic law generate a claim for compensation. If such a claim existed at the moment the Convention entered into force in respect of the State concerned and was sufficiently established to be enforceable thereby giving rise to legitimate expectation that it may be realised, the subsequent interference with that claim would fall within the Court's temporal jurisdiction.

For example, in the case of *Almeida Garret v. Portugal* two plots of land owned by the applicants had been nationalised in 1975, whereas the third plot was expropriated in 1976. Under the relevant legislation the applicants were entitled to payment of compensation for the loss of their property, but the legislation did not stipulate how the compensation would be calculated or paid. The court proceedings and administrative procedures which the applicants instituted in order to obtain the compensation were still pending when the Court examined the case. The Government argued that the Court had no jurisdiction *ratione temporis* to examine the applicants' complaints as the expropriations in question had occurred in 1975 and 1976 i.e. before Portugal ratified the Convention in November 1978. The Court observed that the applicants did not complain about the deprivation of their property – which was indisputably, an instantaneous act beyond its

temporal jurisdiction – but about the failure to pay them compensation: a right afforded to them by the domestic legislation.

The Court reached the same conclusion in the case of *Hingitaaq and others v. Denmark* in which the members of the Inughuit tribe in Greenland complained under Article 8 of the Convention and Article 1 of Protocol No. 1 thereto about the substantial restriction of their hunting and fishing rights resulting from the establishment of the Thule Air Base in 1951, as well as, about relocation of the population from their settlement in May 1953.

The applicants had maintained that they had, on a continuing basis, been deprived of their homeland and hunting territories and denied the opportunity to use, peacefully enjoy, develop and control their land.

The Court held that the events complained of had been instantaneous acts that had taken place before Denmark had ratified the Convention (September 1953) and Protocol No. 1 (May 1954). It accordingly dismissed these complaints as being incompatible *ratione temporis* with the provisions of the Convention.

However, the applicants also complained under the above-mentioned articles about the outcome of the proceedings instituted in 1996 before the Danish courts with a view to obtaining compensation for the above described interferences with their property rights. These courts held that the events complained of had to be considered acts of expropriation and awarded them compensation. The amount of compensation was however substantially lower than the one sought by the applicants.

That being so, the impugned events, even though outside the Court's temporal jurisdiction, had generated a claim for compensation under the domestic law that continued to exist after the Denmark's ratification of the Convention and Protocol No. 1 thereto. That claim constituted a property interest protected by Article 1 of Protocol No. 1 and distinct from the property expropriated from the applicants in 1951 and 1953. The Court therefore held that these complaints did fall within its competence, but eventually found that they were manifestly ill-founded.

However, when the domestic law does not give rise to a claim for compensation for the events that took place before the ratification, any complaint alleging violation of the Convention on that account will be considered incompatible *ratione temporis (et materiae)* therewith. This is so because the right to obtain compensation for an injury which does not itself constitute a violation of the Convention (for example, if such injury falls outside the Court's competence *ratione temporis*) is not a right guaranteed by the Convention. Moreover, the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to the ratification.

Ratione materiae

The Court can deal only with complaints concerning rights which are covered by the Convention and its protocols.

As already stated, an applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the alleged interference relates to

his or her possessions within the meaning of that provision. Therefore, the first question to be asked when dealing with such applications is whether Article 1 of Protocol no. 1 is applicable to the case at issue. If the conclusion after what could be a rather lengthy examination of this issue is the Article 1 of Protocol No. 1 is not applicable, such complaint is normally rejected under Article 35 §3 as incompatible *ratione materiae* with the provisions of the Convention.

Ratione loci

Where complaints are based on events in a territory outside the Contracting State and there is no link between those events and any authority within the jurisdiction of the Contracting State, the complaints will be dismissed as incompatible *ratione loci* with the provisions of the Convention. The Convention authorities have rarely dealt with the admissibility issues concerning the Court's jurisdiction *ratione loci*.

In the above-mentioned case *Loizidou v. Turkey*, the Turkish Government also argued that the applicant's complaints concerned matters which were not within its jurisdiction *ratione loci*. The Court recalled that the concept of jurisdiction was not restricted to the national territory of the Contracting States. Since it was not disputed that the applicant's loss of control of the property stemmed from the occupation of the northern part of Cyprus by Turkish troops and the establishment of the "TRNC", the Court rejected the Government's objection.

Specific issues pertaining to central and eastern Europe

Restitution claims

One of the characteristics of the communist rule in central and eastern Europe was widespread taking of private property into public ownership or control. Following the fall of communism, expectations rose for this property to be returned *in natura* or for compensation to be awarded, either to those who had been dispossessed or to their descendants. Both the Commission and the Court considered a number of claims against central and eastern European states in connection with expropriated or confiscated property and with different legal situations created following the return of property to previous owners.

As far as claims concerning taking of property after the Second World War are concerned, the Convention institutions consistently rejected them holding that the applicants had no existing property right at the time when the Convention and Protocol No. 1 came into force in those countries. Expropriations and confiscations which occurred before that time were held to be outside the Commission's and the Court's jurisdiction *ratione temporis*.

In *Malhous v. the Czech Republic* restitution was not available where property had been transferred to other individuals who could establish that they had acquired a legal title to the property. The Court held that the applicant possessed merely "the hope of recognition of a property right which has been impossible to exercise effectively". The initial taking of property was considered in

principle an instantaneous act and did not produce a continuing situation of "deprivation of a right" of (see also *Kopecký v. Slovakia* for the recapitulation of principles) save if the ownership was not validly lost before the Convention entered into force like in the *Vasilescu v. Romania* case. There the Court held that the retention of the property at issue by the Romanian authorities had been unlawful and that the applicant remained the owner of the property. The applicant's complaint therefore related to a continuing situation which still maintained. The Court found a violation of Article 1 of Protocol No. 1.

In the beginning of the 1990s, restitution measures were adopted in many countries in central and eastern Europe. However, since Article 1 of Protocol No. 1 does not guarantee the right to acquire property, the Convention organs held that Article 1 of Protocol No. 1 cannot be interpreted as imposing any general obligation on the Contracting States to return property which was transferred to them before they ratified the Convention. Nor does Article 1 of Protocol No. 1 impose any restrictions on the Contracting States' freedom to determine the scope of property restitution or to choose the conditions under which they agree to restore property rights of former owners. The *Jantner v. Slovakia* case concerned the issue whether the applicant had, in fact, established a genuine permanent residence in Slovakia which was a condition for restitution.

In particular, the Contracting States enjoy a wide margin of appreciation with regard to the exclusion of certain categories of former owners from such entitlement. Where categories of owners are excluded in this way, their claims for restitution cannot provide the basis for a legitimate expectation attracting the protection of Article 1 of Protocol No. 1.

For instance, in the *Gratzinger and Gratzingerova v. the Czech Republic* case, the legislation excluded the possibility of restitution of property to those claimants who were not Czech nationals. The Court held that the applicants had no legitimate expectation that their claim would be determined in their favour. Moreover, the belief that a law previously in force would be changed to an applicants' advantage cannot be regarded as a form of legitimate expectation for the purposes of Article 1 of Protocol No. 1. There is a difference between a mere hope of restitution, however understandable that hope may be, and a legitimate expectation, which must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision (see also *Maltzan and others v. Germany*).

The claimants should therefore fulfil all conditions set by domestic legislation – typically the nationality or permanent residence requirements or any other condition. A person who complains of a violation of his or her right to property must therefore first show that such a right existed in the framework of domestic proceedings (*Des Fours Walderode v. the Czech Republic*).

Restitution claims

In *Bugarski and von Vuchetich v. Slovenia*, the applicants contested the finding of the domestic courts that they, as individuals, were not entitled to restitution since the property at issue had been expropriated to a legal person, and in the *Nadbiskupija Zagrebačka v. Slovenia* case the Zagreb Archdiocese (*Nadbiskupija Zagrebačka*) claimed to be a religious community operating on Slovenian territory, which was one of the conditions set by the legislation, and therefore to be entitled to restitution of expropriated property. The Court found that the findings of the domestic courts that the applicants did not fulfil the conditions set by the 1991 Denationalisation Act were not arbitrary. The applicants therefore had no possession or legitimate expectation of realising their claims under Article 1 of Protocol No.1.

Similarly, the *Gavella v. Croatia* case concerned the loss of pre-emption rights of the applicant whose family had owned three residential buildings in the centre of Zagreb as a result of quashing of certain provisions of the 1997 Denationalisation Act. The Court took the view that the applicant's pre-emption rights were claims rather than existing possessions. Since they were conditional from the outset and one of the conditions was not fulfilled, Article 1 of Protocol No. 1 did not apply.

On the other hand, once a Contracting State, having ratified the Convention including Protocol No. 1, enacts legislation providing for the full or partial restoration of property confiscated under a previous regime, such legislation may be regarded as generating a new property right protected by Article 1 of Protocol No. 1 for persons satisfying the requirements for entitlement. The same

may apply in respect of arrangements for restitution or compensation established under pre-ratification legislation, if such legislation remained in force after the Contracting State's ratification of Protocol No. 1. The issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1 (*Broniowski v. Poland*).

The *Broniowski* judgment concerned the alleged failure of the Polish authorities to satisfy the applicant's entitlement to compensation for property in Lwów (now Lviv, in Ukraine) which belonged to his grandmother when the area was still part of Poland, before the Second World War – the so-called “Bug River claims”.

The applicant's grandmother along with many others who had been living in the eastern provinces of pre-war Poland was repatriated after Poland's eastern border had been redrawn along the Bug River, in the aftermath of the Second World War. Since 1946, Polish law has entitled the repatriated to compensation in kind.

However, following the change of legislation in 1990 and various transfers of state owned land to local authorities, the State Treasury has been unable to fulfil its obligation to meet the compensation claims because it had insufficient land to meet the demand. The Court found that the applicant's entitlement to obtain compensatory property constituted possessions for the purposes of Article 1 of Protocol No. 1.

While the Court accepted that the radical reform of the country's political and economic system, as well as the state of the country's finances, might justify stringent limitations on compensation for the Bug River claimants, the Polish State had not been able to adduce satisfactory grounds justifying, in terms of Article 1 of Protocol No. 1, the extent to which it had continuously failed over many years to implement an entitlement conferred on the applicant, as on thousands of other Bug River claimants, by Polish legislation. The applicant has received only approximately 2% of the value of the compensation due to him. Since the relationship between the value of the property taken and the compensation paid was manifestly disproportionate, the Court found a violation of Article 1 of Protocol No. 1.

With nearly 80 000 people concerned, the Court adopted a “pilot” judgment identifying a systemic failure in which it has indicated appropriate individual and general measures required to remedy such problems with a view to reducing the number of repetitive applications. The applicant and the Polish Government subsequently reached a friendly settlement concerning not only the individual applicant's claims, but also the claims of others in the same situation.

The *Kopecký v. Slovakia* case concerned the applicant's attempt to recover golden and silver coins which were confiscated in 1959. The 1991 statute under which he claimed restitution contained a condition that the person seeking restitution must show where the coins were deposited. The applicant was successful at first instance, but this judgment was subsequently overturned. Consid-

ering that the applicant was unable, for reasons which were imputable to public authorities, to trace the property at issue, the Chamber found a violation of Article 1 of Protocol No. 1.

However, after reviewing the Court's case law on claims as property rights, the Grand Chamber concluded that the case-law does not contemplate the existence of a "genuine dispute" or an "arguable claim" as a criterion for determining whether there is a "legitimate expectation" protected by Article 1 of Protocol No. 1. On the contrary, where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law. It may also be of relevance whether a "legitimate expectation" of obtaining compensation arose in the context of the impugned proceedings. This was however not the case since the first-instance judgment granting the applicant's request was subsequently overturned in the context of the same proceedings and without having acquired legal force. The same principle was applied in the *Sirc v. Slovenia*, where the applicant's claims for compensation were partially granted by the first-instance court but the judgment was subsequently overturned.

On the contrary, in the already mentioned *Brumărescu v. Romania* judgment, the Court found a violation of Article 1 of Protocol No. 1 since the Supreme Court quashed the Higher Court's judgment granting the applicant's request which had become final and was enforced.

The Convention organs also had to address several situations created when previous owners claimed the return of property. In

such situations, it is necessary to strike a fair balance between the interests of persons currently in possession of the property and those of the owners, and to assure that the requirements of the right to a fair hearing and the prohibition on discrimination are respected.

In the Polish cases, the Court found that restrictions on property use related to the provisions of housing, such as rent control legislation affecting the landlords (*Hutten-Czapska v. Poland*), and measures to control the eviction of tenants (*Schirmer v. Poland*), amounted to a control of use of property in breach of Article 1 of Protocol No. 1.

However, the Court found a violation of Article 1 of Protocol No. 1 in the *Pincova and Pinc v. the Czech Republic* case. In 1991 the son of the former owners sought recovery of the property, arguing that the applicants had acquired it at a price lower than its true value. In 1994 the restitution of property was granted. The applicants complained about a violation of their right to property, claiming that they had acquired their possessions in 1967 in good faith, unaware that they had been confiscated and without being able to influence the sale conditions or the purchase price.

The Court also found a violation in the *Străin and others v. Romania* case where the applicants had been owners of a house which was nationalised in 1950. They started restitution proceedings in 1993. Although the national authorities were aware of those proceedings, the State-owned company which managed the

property sold one of the apartments at issue. The applicants sought in vain to have the sale declared void.

The Court observed that Romanian law did not foresee with sufficient clarity and certainty the consequences for individuals' property rights of the sale of their property by the State to a third party acting in good faith. Given the manner in which the taking of their property had interfered with the fundamental principles of non-discrimination and the rule of law, the total lack of compensation meant that the applicants had had to bear a disproportionate and excessive burden incompatible with the right to respect for the peaceful enjoyment of possessions. The Court held that Romania had to return the building in question to the applicants.

Finally, in the *Jahn and others v. Germany* case, the Court found that in the unique context of German reunification the taking of property without any compensation was considered justifiable under Article 1 of Protocol No. 1.

Specially protected tenancy

The first question to be asked when dealing with the applications involving specially protected tenancy is whether Article 1 of Protocol No. 1 is applicable to the case at issue, i.e. whether such a tenancy constitutes a “possession” within the meaning of that article.

In its first judgment in the *Blečić v. Croatia* case the Court did not find it necessary to decide whether or not specially protected tenancy constituted a “possession” within the meaning of Article 1

of Protocol No. 1. It proceeded on the assumption that it did and found no violation of that provision. As the case was later on referred to the Grand Chamber which eventually found the case to be inadmissible *ratione temporis*, the question whether a specially protected tenancy can be considered a “possession” or not, remains, for the time being, unresolved.

It is, however, important to note that in several somewhat similar cases, the Court and the former Commission have found that Article 1 of Protocol No. 1 was not applicable, that the complaints under that article were manifestly ill-founded, that there was no violation of that provision, or that no separate examination of the complaint under Article 1 of Protocol No. 1 was necessary.

In the case of *S v. the United Kingdom* the applicant had lived for many years in a lesbian relationship with another woman. The other woman was a tenant in a house owned by the local authority. The applicant herself had no tenancy or any other legal right over that house. When her partner – the tenant – died, the local authority brought proceedings against the applicant and obtained a court order for her eviction. In her appeal the applicant requested that the eviction order be set aside and the tenancy vest in her as surviving partner of the tenant. The Court of Appeal dismissed the applicant's appeal holding that under the relevant law only a surviving spouse of a heterosexual couple that had married could claim a tenancy. Before the Commission the applicant complained, *inter alia*, under Article 1 of Protocol No. 1. The Commission found that there had been no contractual *nexus* between the applicant and the local authority. It held that the fact that the

applicant had been living in the house for some time without legal title could not constitute a possession within the meaning of Article 1 of Protocol No. 1. Accordingly, the applicant's complaint was incompatible *ratione materiae* with the provisions of the Convention.

In the case of *Durini v. Italy* the Commission took a more general view that the right to live in a particular home which one does not own was not a possession within the meaning of Article 1 of Protocol No. 1 and that, therefore, that provision was not applicable to the case.

The case of *Pentidis and others v. Greece* concerned the applicants, Jehovah's Witnesses, who rented a room under a private agreement in June 1990. The agreement specified that the room would be used "for all kinds of meetings, weddings, etc., of Jehovah's Witnesses". The applicants were subsequently convicted by the Greek courts for having established a place of worship without requesting an authorisation from the Minister of Education and Religious Affairs. In November 1990 the police authorities put seals on the entrance door of the room rented by the applicants. The seals were removed in July 1991. Before the Commission the applicant's complained, *inter alia*, under Article 1 of Protocol No. 1 that their right to the peaceful enjoyment of their possessions had been infringed by the placing of seals on the front door of the room which they had rented.

The Commission noted that the applicants were tenants and not the proprietors of the room in question and that they had been

renting it for only five months before the door had been sealed. They could not therefore be considered to be the owners of a "possession" within the meaning of paragraph 1 of Article 1 of Protocol No. 1, and thus could not claim to be victims of a violation of that provision. Accordingly, the Commission held that there had been no violation of Article 1 of Protocol No. 1. The Commission later on referred the case to the Court, which eventually decided to strike it out of its list because in 1997 the Greek authorities had granted the applicants' request for authorisation to open a place of worship.

The first case before the Court involving similar issues was the case of *Larkos v. Cyprus*. In 1967 the applicant, a civil servant, rented from the State a house in which he and his family have lived since. The tenancy agreement had many features of a typical lease of property. In 1986 the Ministry of Finance informed the applicant that he had to surrender the property. As the applicant failed to do so, the Attorney-General notified him that legal action would be taken against him. The applicant, claiming that he was a "statutory tenant" entitled to protection under the Rent Control Law 1983, refused to leave. In February 1990 the government instituted eviction proceedings and in February 1992 the District Court gave judgment against the applicant considering that a person renting premises from the State could not be regarded as a statutory tenant, since the Rent Control Law applied only to private landlords. The applicant's appeal to the Supreme Court was dismissed in May 1995.

The Commission and the Court found a violation of Article 14 of the Convention in conjunction with Article 8 thereof on account that there had been no reasonable and objective justification for excluding the applicant from the protection afforded to other tenants. The applicant also argued that his rights as a tenant were “property rights” within the meaning of Article 1 of Protocol No. 1 and that denying him the protection from eviction afforded to other tenants constituted a breach of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1. However, in view of their conclusions under Article 14 in conjunction with Article 8, both the Commission and the Court found that it was not necessary to examine separately the complaint under Article 14 in conjunction with Article 1 of Protocol No. 1.

In the case of *J.L.S. v. Spain* the Court followed the view of the Commission expressed in the *Durini* case. The applicant, a regular soldier, had obtained the use of lodgings in Madrid by signing an “administrative special-quarters-allocation form” supplied by the military body responsible for dealing with the housing needs of military personnel, who were liable to be transferred at regular intervals. Subsequently, a royal decree had been issued requiring certain servicemen in the provisional reserve force, in which the applicant was serving, to surrender possession of their quarters to the State. The applicant was obliged to vacate the premises. Spanish Higher Court of Justice dismissed his application for judicial review of the decision requiring him to leave and upheld the eviction order. The Constitutional Court dismissed his *amparo* appeal.

The Court found that the applicant’s mere expectation that the regulations governing the use of military quarters would not be modified could not be considered a right of property. The applicant had been given the use of the housing “in his capacity as a serviceman” at a rent that was much lower than it would have been under a private lease. He had not signed a lease agreement, but an “administrative special-quarters-allocation form” supplied by the army authorities and had not suggested that use of the quarters could be equated to an agreement under private law. Policy regarding the provision of military quarters had been established in response to the need for servicemen to be given appropriate accommodation as they had been subject to frequent transfers while in service. The Court, endorsing the Commission’s view in the *Durini* case, held that the right to live in a particular property not owned by the applicant did not constitute a “possession” within the meaning of Article 1 of Protocol No. 1. Furthermore, to allow a “user” such as the applicant (who had not been even a tenant) to remain indefinitely in premises belonging to the State would prevent the authorities from performing their obligation to administer State property in accordance with their statutory and constitutional duties. Accordingly, the Court held that the application was incompatible *ratione materiae* with the provisions of the Convention.

The Court has followed this approach in cases of *Kovalenok v. Latvia* and *H.F. v. Slovakia*. In the *Kovalenok* case the applicants complained under Article 1 of Protocol No. 1 that their expulsion from Latvia had deprived them of the right to live in their flat. The

Court noted that in 1976 the applicants had acquired the right to live in the flat at issue, which had been publicly owned. In the period between 1976 and 1992 the applicants' rights over the flat had been those of the tenants, whereas the public authorities had retained ownership. Reiterating its position in the *J.L.S.* case, that the right to live in a particular home which one does not own did not constitute a "possession", the Court held the complaint to be incompatible *ratione materiae* with the provisions of the Convention.

In contrast to the cases cited above, in the later case of *Teteriny v. Russia* the Court held that the non-enforcement of a judgment entitling the applicant to a "social tenancy agreement", which should have been signed between her and the competent public authority, constituted a breach of Article 1 of Protocol No. 1. In holding so the Court did not explain how a (mere) claim to have a tenancy agreement concluded amounted to a "possession", whereas the already existing tenancy (i.e. the right to live in a home which one does not own) did not.

It is worth noting that a specially protected tenancy usually gave rise to a (separate) right to purchase (privatise) the flat under favourable conditions. As it is the basis for the right to purchase it, the termination of tenancy would regularly lead to interference with that right. If the claim to purchase the flat is sufficiently established to be enforceable i.e. gives rise to a legitimate expectation that it may be realised, than it would constitute a "possession" within the meaning of Article 1 of Protocol No. 1 and would enjoy its protection.

Pension rights and other social benefits

Therefore, it may not be necessary to decide whether a specially protected tenancy as such amounts to a "possession" but whether the ensuing right to purchase the flat under favourable conditions falls within the ambit of Article 1 of Protocol No. 1.

At the time of writing, there is only one case pending before the Court, which involves a specially protected tenancy. In the case of *Gačša v. Croatia* the applicant complains under Article 1 of Protocol No. 1 that, even though she was not the owner of the flat, she had a "possession" and a legitimate expectation to buy it. It remains to be seen what will be the Court's decision in that case.²

Pension rights and other social benefits

In principle, social insurance entitlements may be considered as property rights under certain conditions. There is however no right *per se* to receive a social security payment of any kind.

The *Müller v. Austria* case established that there was no general right to an old-age state pension under the Convention. Nevertheless, a property right to receive a benefit from a contributory social security scheme either compulsory or voluntary may exist, provided that the claimant has met any necessary conditions that may legitimately be imposed by the state pursuant to the second paragraph of Article 1 of Protocol No. 1. However, that right cannot be interpreted as entitling the beneficiary to receive a particular amount of pension (see *Dumanovski v. "the former Yugoslav Republic of Macedonia"*).

2. The case was still pending at the time of going to press (June 2007).

Accordingly, states are entitled to alter the amount payable in line with reasonable economic policy. In *Domalewski v. Poland* the Court found that the withdrawal of veteran status from the applicant, a retired officer of the former Ministry of Public Security, with consequent loss of financial benefits, was not a breach of his property rights, since he was receiving the same basic pension rights from a contributory pension scheme as he had before the withdrawal of his status, even though he had lost other non-contributory discounts and allowances (see also *Storkiewicz v. Poland*).

In the *Janković v. Croatia* case the applicant retired in 1987 from the Yugoslav People's Army and was in receipt of a military pension. In 1992, the Croatian authorities assessed his pension at 63.22% of his previous pension. Under Article 1 of Protocol No. 1 and Article 14 of the Convention, the applicant complained about the reduction of his pension. The Court found that, since the reduction of the pensions of officers of the Socialist Federal Republic of Yugoslavia (SFRY) was a means of integrating those pensions into the Croatian general pension system, the measures taken by the authorities were within the State's margin of appreciation and were not discriminatory (see also *Schwengel v. Germany*).

In two cases against Slovenia, *Tričković and Predojević and others*, the applicants, who were retired members of the Yugoslav People's Army living in Slovenia after the break-up of the SFRY, claimed that the Slovenian social authorities should award them advance on military pensions and that the conditions set out by the Slove-

nian legislation were discriminatory. Even assuming that the applicants' rights to an advance existed since they had paid contributions in the SFRY to the military fund in Belgrade and not the Slovenian fund, the Court found that the applicants did not comply with the requirements which did not lack an objective and reasonable justification.

A link between contributions and emergency benefit was established by the Court in the *Gaygusuz v. Austria* case. There the Court held that emergency unemployment assistance in Austria, which could be claimed once an entitlement to employment benefit had been exhausted, was a pecuniary right within the meaning of Article 1 of Protocol No. 1. The applicant, an Iranian, was refused assistance on the basis that he did not fulfil the nationality requirement. He claimed that he had suffered discrimination in respect of his property rights. Noting that unemployment benefit could only be claimed by those who had contributed to the unemployment insurance fund, the Court found a violation of Article 1 of Protocol No. 1 and of Article 14 of the Convention.

Before the above-mentioned *Stec and others v. the United Kingdom* case, a distinction had been drawn in the case-law between benefits which were paid on the basis of contributions, and those which were paid without reference to contributions. Under the new approach, if the legislation in force provides for the payment of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements.

Banks

One of the major problems concerning property issues in successor States of the Socialist Federal Republic of Yugoslavia (SFRY) relates to the so-called “old” foreign-currency savings which originated in freezing of foreign currency savings accounts in the SFRY. Since these savings were guaranteed by the SFRY, different legal solutions were applied in different successor states following the break-up of the SFRY.

In *Trajkovski v. “the former Yugoslav Republic of Macedonia”* the applicant complained under Article 1 of Protocol No. 1 about the payment in State bonds of his “old” foreign-currency savings. The claims of the holders of the “old” savings accounts were regulated by the 1993 Act and subsequent legislation. The State bonds could be used to purchase an apartment, business premises, or for other purposes set out by law. The applicant was also able to withdraw certain amounts in euros.

The Court found that the contested legislative measures which indeed substantially limited the applicant’s right to dispose of his funds amounted to a control of the use of property. Having regard to the need to strike a fair balance between the general interest and the right of property of the applicant, and of all those in the same situation with him, the Court considered that the means chosen were suited to achieving the legitimate aim pursued and declared the application inadmissible.

In *Kovačić and others v. Slovenia*, the applicants, all Croatian citizens, had deposited strong foreign currencies savings in accounts

at the Ljubljana Bank, Zagreb Main Branch, in Zagreb (Croatia) before the break-up of the SFRY in 1991. Under legislation applicable at the time, such savings were guaranteed by the SFRY. Since 1989 the applicants had been generally unable to access their money. They argued that there had been a violation of Article 1 of Protocol No. 1, and one of the applicants further complained that there had been a violation of Article 14.

When Slovenia became independent in 1991 it assumed guarantee for all foreign-currency savings deposited with banks on Slovenian territory. In 1991, after its independence, Croatia took over the guarantee for the foreign-currency savings deposited with banks whose head office was situated in Croatia or were transferred by Croatian nationals into Croatian banks from other banks.

Croatia, which intervened in the proceedings before the Court as a third party, has taken the view that it is either the Ljubljana Bank or the Slovenian State which should meet the liabilities owed to customers of the Croatian branch. However, Slovenia considered that those liabilities should be divided under the succession arrangements among the five states formed from the dissolved SFRY. The total amount of savings in strong foreign currencies deposited with the Croatian branch of the Slovenian bank has been estimated at approximately 150 000 000 euros with accrued interest, and 140 000 investors appear to be involved. On 29 June 2001 in Vienna the successor states signed the Agreement on Succession Issues; it entered into force on 2 June 2004.

The Court declared the applications admissible and joined the question of compliance with the six-month rule to the merits. Subsequently, the Court decided to strike out the cases under Article 37 §1.b and c on the grounds that two of the applicants, Mr Kovačić and Mr Mrkonjić, had in the meantime received payment in full of their foreign currency deposits in the framework of execution proceedings brought in Croatia. As to the third applicant, Ms Golubović, the Court considered that in cases in which liability for a former State's debt was disputed by the successor States, a claimant could reasonably be expected to seek redress where other claimants had been successful. It was still open to her to bring proceedings in Croatia.

In *Jeličić v. Bosnia and Herzegovina*, the first case against Bosnia and Herzegovina to be declared admissible, the applicant complained under Article 1 of Protocol No. 1 and Article 6 about the non-enforcement of a judgment ordering the release of her foreign currency savings.

The applicant placed a sum of money in German marks in two foreign-currency savings accounts at the former *Privredna banka Sarajevo Filijala Banja Luka* before the break-up of the SFRY. She attempted unsuccessfully to withdraw her savings from the bank on several occasions. On 26 November 1998 she obtained a judgment ordering her bank to release all sums on her accounts plus default interest and legal costs. On 18 January 2002, according to the domestic legislation and following the completion of the privatisation of the bank, the money in the applicant's foreign-currency accounts became a public debt attributable to the Republika

Srpska. On 15 April 2006 Bosnia and Herzegovina (that is, the State) took over that debt, under section 1 of the Old Foreign-Currency Savings Act 2006.

The Court found a violation of Article 6 §1, since the essence of the applicant's right of access to court protected by Article 6 of the Convention was impaired due to non-enforcement of the judgment ordering the release of her funds. While the Court appreciated that a major part of "old" foreign-currency savings might have ceased to exist before or during the dissolution of the former SFRY and the disintegration of its banking and monetary systems, such circumstances fell to be invoked and examined prior to a final domestic determination of a case and where the courts have finally determined an issue, their ruling should not be called into question. The Court also found a violation of Article 1 of Protocol No. 1.

In *Suljagić v. Bosnia and Herzegovina* the applicant deposited foreign currency in a commercial bank during the 1970s and 1980s. Although in 1992 Bosnia and Herzegovina took over the guarantee for "old" foreign-currency savings from the former SFRY, the applicant has never been able to dispose freely of his savings, due to various statutory provisions. The applicant could have converted his savings to privatisation coupons which he could have used to purchase State-owned companies. Under recent legislation, he can expect to receive approximately 500 euros in cash and the remaining amount of his savings in State bonds. On 20 June 2006 the Court declared the application admissible.

The Court has also examined applications concerning the reduction of the value of savings in other central and east European states.

In *Rudzińska v. Poland* the applicant complained under Article 1 of Protocol No. 1 that the State failed in its obligations as regards financial assistance relating to the housing savings account opened under the 1983 legislation. In particular, following the 1993 and 1996 change of legislation, her savings were no longer subject to reassessment such as to offset in full the effects of inflation. The Court was of the view that a general obligation on states to maintain the purchasing power of sums deposited with banking or financial institutions by way of a systematic indexation of savings cannot be derived from Article 1 of Protocol No. 1. Insofar as the applicant's complaint could be understood that as a result of the reduction of the scope of guarantees offered by the State to persons possessing housing savings accounts, the applicant could not become an owner of a house for which she had been saving, the Court recalled that Article 1 of Protocol No. 1 did not recognise any right to become the owner of property and declared the application inadmissible.

In *Gayduk and others v. Ukraine* the applicants were Ukrainian nationals who opened savings accounts with the Ukraine Savings Bank, which until 1992 was an integral part of the USSR Savings Bank. At the material time, the payment of savings was guaranteed by the State. In 1996 the Ukrainian authorities implemented a monetary reform affecting the applicants' deposits which already considerably depreciated as a result of inflation. In addition, the

1996 Ukrainian Citizens' Deposits (State Guarantee of Reimbursement) Act established a system for the indexed savings to be repaid progressively, taking into consideration the account-holder's age, the amount on deposit and other criteria. The applicants who brought proceedings in Ukraine complained under Article 1 of Protocol No. 1.

As to the amounts representing the indexed value of the deposits under the 1996 legislation, the Court noted that their availability depended on the amounts which the State allocated to the Treasury subject to certain conditions. The proceedings in the domestic courts did not, therefore, concern existing possessions that belonged to the applicants. In that connection, the Court reiterated that the right to the indexation of savings as such was not guaranteed by Article 1 of Protocol No. 1, and declared the application inadmissible.

In *Appolonov v. Russia* the applicant complained under Article 1 of Protocol No. 1 that the value of his personal savings, which he had deposited with the Savings Bank, had significantly dropped following the economic reforms, and that the State had not properly discharged its obligation to revalue the deposits in order to offset the effects of inflation, even though it had assumed that obligation under 1995 Savings Act. The Court further noted that the State has nevertheless undertaken such an obligation by enacting the Savings Act with the purpose of creating a State-supported scheme aimed at revaluing monies deposited with the bank before 20 June 1991. That Act provided for the savings to be converted into special bonds that guaranteed the same purchasing power as

that offered by the national currency in 1990. The Court declared the application inadmissible (see also *Grishchenko v. Russia*).

Taxes

Article 1 expressly recognises the power of States to determine taxes, impose penalties and fines. Measures taken to secure their payment are considered under the second paragraph of Article 1 of Protocol No. 1 as a control of use. States enjoy a wide margin of appreciation in this area. However, if raising of taxes places an excessive burden on the person concerned or fundamentally interferes with his financial position, the Convention organs may examine the application.

The Court has also held in the *Buffalo S.r.l. in liquidation v. Italy* case that when national authorities have established that the tax has been overpaid, the delay in its reimbursement amounts to violation. Similarly, in *S.A. Dangeville v. France*, the Court noted that

the applicant was a creditor of the State on account of the VAT wrongly paid and that in it had at least a legitimate expectation of being able to obtain a refund. The impossibility of obtaining reimbursement of overpaid tax therefore amounted to violation.

In *Špaček, s.r.o. v. the Czech Republic*, where the complaints related to the accessibility and foreseeability of income tax legislation and the applicant was a company rather than an individual, the Court has suggested that there may be an obligation to take specialist advice, and that this would be a factor in assessing whether or not the measure was sufficiently foreseeable.

The Court's approach in examining tax issues under Article 1 of Protocol No. 1 may be compared with its approach in examining allegations concerning tax proceedings which in principle do not fall under Article 6 unless the nature of the offence or the severity of the punishment could be deemed to have a criminal character (see *Bendenoun v. France*).

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