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RECENT CASE LAW ON THE PROTECTION OF PROPERTY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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A. Introduction

The guarantee of the protection of property, contained in Article 1 of Additional Protocol No. 1,¹ has become—after Article 6 ECHR—the second most frequently invoked guarantee of the Convention.²

This chapter will first present the jurisprudence describing the Convention notion of protection of property generally (Section B). It will then discuss illustrative case law concerning the concept of 'legitimate expectations', social security claims and the way some well-known recent judgments approach the interpretation of Article 1 of Protocol No. 1 (Section C). In addition, it will select four categories of very recent cases (including some that are less well known) and discuss them (Section D). This discussion will demonstrate that the Strasbourg Court has encountered exaggerated formalism, chicanery, tricks, or plainly arbitrary acts by State authorities (Section E).

¹ Cf. C. Birsan, 'La protection du droit de propriété: développements récents de la jurisprudence de la Cour européenne des droits de l'homme', in L. Caflisch, H.J. Callewaert, R. Lidell, P. Mahoney, and M. Villiger (eds), *Human Rights—Strasbourg Views: Liber Amicorum Luzius Wildhaber* (2007) 5–23; P. Mittelberger, *Der Eigentumschutz nach Art. 1 des Ersten Zusatzprotokolls zur EMRK im Lichte der Rechtsprechung der Strassburger Organe* (Dissertation) (2000); G. Ress, 'Reflections on the Protection of Property under the ECHR', in S. Breitenmoser, B. Ehrenzeller, M. Sassöli, W. Stoffel, and B. Wagner Pfeiffer (eds), *Human Rights, Democracy and the Rule of Law. Liber Amicorum Luzius Wildhaber* (2007) 625–45; M. Pellonpää, 'Reflections on the Notion of "Deprivation of Possessions" in Article 1 of the First Protocol to the ECHR', in P. Mahoney, F. Matscher, H. Petzold, and L. Wildhaber (eds), *Protecting Human Rights: The European Perspective. Studies in memory of Rolv Ryssdal* (2000) 1087–105; C. Schreuer and U. Kriebaum, 'The Concept of Property in Human Rights Law and International Investment Law', in Breitenmoser *et al.*, above, 743–62; L. Wildhaber, 'The Protection of Legitimate Expectations in European Human Rights Law', in M. Monti, N. von und zu Liechtenstein, B. Vesterdorf, J. Westbrook, and L. Wildhaber (eds), *Economic Law and Justice in Times of Globalisation: Festschrift Carl Baudenbacher* (2007) 253–63.

² European Court of Human Rights (ECtHR), *Some Facts and Figures* (January 2008). In 2007, 24 per cent of the Court's judgments dealt with the right to a fair trial (Article 6 ECHR), 18 per cent with the length of proceedings (Article 6), 17 per cent with the right of property (Article 1 Protocol No. 1), 13 per cent with the right to liberty and security (Article 5), 13 per cent with the right to an effective remedy (Article 13), 20 per cent with other guarantees.

B. General Aspects of the Notion of Protection of Property

Interpretation of Article 1 of Protocol No. 1

With an almost striking looseness of terminology, Article 1 of Protocol No. 1 guarantees 'the peaceful enjoyment of [...] possessions', protection against deprivation of 'possessions' and against disproportionate measures of control of 'the use of property' (in French, "droit au respect de ses biens", privation "de sa propriété", et réglementation de "l'usage des biens"³). The European Court of Human Rights noted in the *Marckx v Belgium* case of 1979 that Article 1 was 'in substance guaranteeing the right of property'.⁴ This, the Court stated, had been emphasized by the drafters of Article 1, who continually spoke of a right of (or to) property when they described the subject-matter of the guarantee.

From this finding, the Court proceeded to stress that the notion of property did not refer back to the different domestic legal systems. Instead, the concept of 'possessions' had 'an autonomous meaning which is not limited to the ownership of material goods and is independent from the formal classification in domestic law'.⁵

On the basis of the autonomous understanding of Article 1 of Protocol No. 1, the Court developed its 'three-rules-analysis', first in the *Sporrong and Lönnroth v Sweden* and then in the *James et al v United Kingdom* case:

the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest [...]. The three rules are not, however, '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 principle enunciated in the first rule.⁶

³ See the Dissenting Opinion of Judge Sir Gerald Fitzmaurice in *Marckx v Belgium*, 13 June 1979, A/31, at 48, n. 8.

⁴ *Marckx*, above n. 3, para 63; *Lithgow et al v United Kingdom*, 8 July 1986, A/102, para 106; *Tre Traktörer AB v Sweden*, 7 July 1989, A/159, para 53; *Gasus Dosier- und Fördertechnik GmbH v Netherlands*, 23 February 1995, A/306-B, para 55; *Mazurek v France*, 1 February 2000, ECHR 2000-II, para 41; *Doğan v Turkey*, 29 June 2004, ECHR 2004-VI, para 138.

⁵ *Broniowski v Poland*, 22 June 2004 (GC), ECHR 2004-V, para 129; *Sporrong and Lönnroth v Sweden*, 23 September 1982, A/52, para 57; *James et al v United Kingdom*, 21 February 1986, A/98, para 42; *Gasus Dosier- und Fördertechnik GmbH*, above n. 4, para 53; *Matos e Silva, Lda, et al v Portugal*, 16 September 1996, Reports 1996-IV, para 75; *Iatridis v Greece*, 25 March 1999 (GC), ECHR 1999-II, para 54; *Beyeler v Italy*, 5 January 2000 (GC), ECHR 2000-I, para 100; *Former King of Greece et al v Greece*, 23 November 2000 (GC), ECHR 2000-XII, para 60; *Witteck v Germany*, 12 December 2002, ECHR 2002-X, para 42; *Doğan*, above n. 4, paras 138–9; *Öneryıldız v Turkey*, 30 November 2004 (GC), ECHR 2004-XII, para 124; *Intersplav v Ukraine*, No. 803/02, 9 January 2007, para 30; *Anheuser-Busch Inc v Portugal*, No. 73049/01, 11 January 2007 (GC), para 63.

⁶ *James et al*, above n. 5, para 37. And see *Sporrong and Lönnroth*, above n. 5, para 61; *Lithgow et al*, above n. 4, para 106; *Tre Traktörer AB*, above n. 4, para 54; *Holy Monasteries v Greece*, 9 December 1994, A/301-A, para 56; *Gasus Dosier- und Fördertechnik GmbH*, above n. 4, para 55; *Iatridis*, above n. 5, para 55; *Immobiliare Saffi v Italy*, 28 July 1999 (GC), 1999-V, para 44; *Beyeler*, above n. 5, para 98; *Sovtransavto Holding v Ukraine*, 25 July 2002, ECHR 2002-VII, para 90; *Broniowski*, above n. 5, para 134; *Jahn et al v Germany*, 30 June 2005 (GC), ECHR 2005-VI, para 78; *Maurice v France*, 6 October 2005 (GC), ECHR 2005-IX, para 78; *Hutten-Czapska v Poland*, No. 35014/97, 19 June 2006 (GC), paras 157, 164;

Christoph Schreuer and Ursula Kriebaum remark aptly that,

for a deprivation in the sense of the second sentence of paragraph 1 to occur there must be a deprivation of the whole bundle of rights. If only some of the rights are taken, the Court will examine the case either under the second paragraph (control of the use of property) or under the first sentence of the first paragraph of Art. 1 (peaceful enjoyment of possessions).⁷

Nonetheless, the interconnectedness of the three different parts of Article 1 of Protocol No. 1 is so intense and so dominant that the substantive analysis varies little, whichever part the Court considers applicable to a given set of facts. The margin of appreciation accorded to States is wide. When they restrict or control the use of property, they enjoy considerable latitude, subject to the conditions of legality and proportionality. They must respect a fair balance between the general interest of the community and the interest of individuals. A right to full compensation in all circumstances for a taking of property is not guaranteed, since the public interest 'may call for less than reimbursement of the full market value';⁸ however, a total lack of compensation is justifiable only in exceptional circumstances.

Article 1 of Protocol No. 1 is applicable only to existing possessions,⁹ not to future earnings, nor does it include a right to acquire property.¹⁰ However, since it has an autonomous meaning, it includes '[...] either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right'.¹¹

Enumeration of possessions which were found to be protected

Among the possessions held by the Court to be protected by Article 1 of Protocol No. 1 have been:

- movables and immovables,¹² land and buildings;
- usufruct;¹³

Anheuser-Busch Inc, above n. 5, para 62; *J.A. Pye (Oxford) Ltd et al v United Kingdom*, No. 44302/02, 30 August 2007 (GC), para 52.

⁷ Schreuer and Kriebaum, above n. 1, 759–60.

⁸ *J.A. Pye (Oxford) Ltd et al*, above n. 6, para 54. And see *Lithgow et al*, above n. 4, para 120; *Holy Monasteries*, above n. 6, paras 70–1; *Papachelas v Greece*, 25 March 1999 (GC), ECHR 1999-II, para 48; *Former King of Greece*, above n. 5, paras 89–90, 98–9; *Lallement v France*, No. 46044/99, 11 April 2002, paras 18–24; *Broniowski*, above n. 5, paras 173, 176, 182–7; *Jahn et al*, above n. 6, paras 94, 110–12, 117; *Börekçiogullari v Turkey*, No. 58650/00, 19 October 2006, paras 36–7; *J.A. Pye (Oxford) Ltd*, above n. 6, para 54.

⁹ *Wendenburg et al v Germany*, Decision, 6 February 2003, ECHR 2003-II, 353; *Buzescu v Romania*, No. 61302/00, 24 May 2005, para 81; *Anheuser-Busch Inc*, above n. 5, para 64.

¹⁰ *Van der Musselle v Belgium*, 23 November 1983 (PL), A/70, para 48; *Kopecký v Slovakia*, 28 September 2004 (GC), ECHR 2004-IX, para 35; *Stec et al v United Kingdom*, Nos. 65731/01, 65900/01, Decision, 12 April 2006 (GC), paras 53–5, Merits, 10 May 2007 (GC), para 34.

¹¹ *Beyeler*, above n. 5, para 100; *Lallement*, above n. 8, para 18; *Stretch v United Kingdom*, No. 44277/98, 24 June 2003, para 32; *Tütüncü et al v Turkey*, No. 74405/01, Decision, 13 May 2004; *Kopecký*, above n. 10, para 35; *Caisse Régionale de Crédit Agricole Mutuel Nord de France v France*, No. 58867/00, Decision, 19 October 2004, 11; *Öneryıldız*, above n. 5, para 124; *Sacilor Lormines v France*, No. 65411/01, Decision, 12 May 2005, 41; *Maurice*, above n. 6, para 63; *Poznanski v Germany*, No. 25101/05, Decision, 3 July 2007, 12; *J.A. Pye (Oxford) Ltd*, above n. 6, para 61; *Associazione Nazionale Reduci dalla Prigionia dall'Internamento e dalla Guerra di Liberazione et al v Germany*, No. 45563/04, Decision, 4 September 2007, 13.

¹² In *Wiggins v. United Kingdom*, Decision, 8 February 1978, 13 DR 40, 46, the Commission rejected the argument that the term 'possessions' should be limited to movable property only.

¹³ *Witteck v Germany*, above n. 5, paras 43–4.

- trusts and long leaseholds;¹⁴
- goods to which a title is reserved;¹⁵
- commercial clientele (eg of an open-air cinema¹⁶ or in the case of revocation of a licence to serve alcoholic beverages¹⁷);
- goodwill for professional clientele (eg of certified accountants,¹⁸ tax consultants,¹⁹ advocates²⁰);
- layoff indemnities;²¹
- exclusive rights to use internet domain names;²²
- shares (which were, for instance, forcibly sold, nationalized, or confiscated;²³ however, minority shareholders may only exceptionally 'pierce the corporate veil' and pursue claims independently of the company in which they hold shares²⁴);
- intellectual property (in *Anheuser-Busch Inc v Portugal*, the Court found that Article 1 of Protocol No. 1 was applicable to mere applications for the registration of a trademark, but that there had been no interference, since the decisions of the Portuguese courts were 'not flawed by arbitrariness or otherwise manifestly unreasonable'²⁵ and had not created 'legitimate expectations');
- claims arising from contracts or torts, 'sufficiently established to be enforceable';²⁶
- 'legitimate expectations' (as to this concept see below pp. 661–2).

In continental European legal systems the possessions enumerated thus far would be qualified as 'civil or private law' entitlements. But the Court has also considered as possessions entitlements which are more of an 'administrative law' or mixed character, such as concessions, licences, or welfare benefits:

- licence to serve alcoholic beverages in a restaurant;²⁷
- permit to extract gravel;²⁸
- fishing rights in coastal waters on the basis of leases contracted with the State;²⁹
- hunting rights;³⁰

¹⁴ *James et al*, above n. 5, paras 10–13, 38.

¹⁵ *Gasus Dosier- und Fördertechnik GmbH*, above n. 5, para 53.

¹⁶ *Iatridis*, above n. 5, para 55. ¹⁷ *Tre Traktörer AB*, above n. 4, paras 43, 53.

¹⁸ *Van Marle et al v Netherlands*, 26 June 1986, A/101, paras 39–41.

¹⁹ *Olbertz v Germany*, Decision, 25 May 1999, ECHR 1999-V, 434.

²⁰ *Döring v Germany*, Decision, 9 November 1999, ECHR 1999-VIII, 381; *Wendenburg*, above n. 9, 353; *Buzescu*, above n. 9.

²¹ *Tütüncü*, above n. 11.

²² *Paeffgen GmbH v Germany*, Decision, 18 September 2007, Nos 25379/04, 21688/05, 21722/05, 21770/05.

²³ *Kaplan v United Kingdom*, Report, 17 July 1980, 21 DR 5, 23, para 131; *Bramelid and Malmström v Sweden*, Decision, 12 October 1982, 29 DR 64, 81–3; *Sovtransavto Holding*, above n. 6, paras 91–2. And see Schreuer and Kriebaum, above n. 1, 752–4.

²⁴ *Agrotexim et al v Greece*, 24 October 1995, A/330-A, para 66.

²⁵ *Anheuser-Busch Inc*, above n. 5, paras 66–72, 79–87 (only after final registration by national courts), quoted from para 83.

²⁶ *Stran Greek Refineries and Stratis Andreadis v Greece*, 9 December 1994, A/301-B, para 59; *Burdov v Russia*, 7 May 2002, ECHR 2002-III, para 40. And see Birisan, above n. 1.

²⁷ *Tre Traktörer AB*, above n. 4, paras 43, 53.

²⁸ *Fredin v Sweden*, 18 February 1991, A/192, para 40.

²⁹ *Posti and Rahko v Finland*, 24 September 2002, ECHR 2002-VII, para 76.

³⁰ *Chassagnou et al v France*, 29 April 1999 (GC), ECHR 1999-III, para 74.

- claims to pensions and other social security benefits (as to this category of claims see below pp. 662–4).

C. Case Law Illustrating Protected Elements of the Right to Property

Legitimate expectations

According to the Court's case law, Article 1 of Protocol No. 1 protects '[...] either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right'.³¹

In the leading case of *Kopecký v Slovakia*,³² the Court consolidated and clarified the notion of 'legitimate expectations'. In this case, the applicant complained of the impossibility of retrieving possession of a valuable collection of coins which had belonged to his father and had been confiscated by the Czechoslovakian authorities in 1959. Under the Czechoslovak Judicial Rehabilitation Act 1990, he sought the return of the coins, succeeded at first instance, but was rejected at appellate and cassation stage. He was unable to indicate the current location of the coins, which was an essential statutory condition for restitution.

The Grand Chamber discussed the Court's case law. In some cases (for instance, in the *Pine Valley Developments Ltd et al v Ireland* judgment concerning the annulment of a provisional planning permission),³³ it had interpreted the notion of 'legitimate expectation' as a component of a property right. It was '[...] based on a reasonably justified reliance on a legal act which has a sound legal basis and which bears on property rights'.³⁴ This class of cases is closely connected with the notion of protection of good faith in property issues.

In other cases (eg in the *Pressos Compania Naviera SA et al v Belgium* judgment where legislation extinguished tortious liability claims based on clear case law),³⁵ the 'legitimate expectation' was not in itself constitutive of a proprietary interest. But the holder of a claim qualifying as an 'asset' (relying on the principle of certainty of the law) could expect the national courts to continue to rely on an established jurisprudence.³⁶

In yet another class of cases (eg in the *Gratzinger and Gratzingerová v Czech Republic* decision concerning restitution of property confiscated during the communist regime),³⁷ a 'legitimate expectation' was missing where '[...] it could not be said that [the applicants] had a currently enforceable claim that was sufficiently established'.³⁸

³¹ See the references above at n. 11.

³² *Kopecký*, above n. 10, paras 45 *et seq*; and see *Birsan*, above n. 1, 11–14; *Schreuer and Kriebaum*, above n. 1, 748–50; *L. Wildhaber*, above n. 1, 253–63.

³³ *Pine Valley Developments Ltd et al v Ireland*, 29 November 1991, A/222, para 51. And see *Stretch*, above n. 11, para 35.

³⁴ *Kopecký*, above n. 10, para 47.

³⁵ *Pressos Compania Naviera SA et al v Belgium*, 20 November 1995, A/332, para 31.

³⁶ *Kopecký*, above n. 10, para 48.

³⁷ *Gratzinger and Gratzingerová v Czech Republic*, Decision, 10 July 2002 (GC), ECHR 2002-VII, paras 69, 73.

³⁸ *Kopecký*, above n. 10, para 49.

To this analysis in the *Kopecký* case, some cases might be added where 'legitimate expectations' came into play in the exercise of finding a fair balance between individual rights and the general interest. In the case of the *Former King of Greece v Greece*, for instance, the applicants complained of the expropriation of the royal estates by the military junta in 1973. The Court first remarked that the Greek State had repeatedly treated these estates as private property and had not produced a general set of rules governing their status, which made it impossible to speak of a quasi-public or *sui generis* character of the estates. It then considered that 'the applicants had a legitimate expectation to be compensated by the Greek legislature for the taking of their estates'.³⁹ The *Maurice and Draon v France* judgments arose out of cases concerning the birth of a severely disabled child. Due to negligence in pre-natal diagnosis, the parents were erroneously assured that the foetus showed no signs of abnormality. Parliament overturned the case law of the French courts' awards on actions in negligence. This, the Court found,

deprived the applicants of an existing 'asset' which they previously possessed, namely an established claim to recovery of damages which they could legitimately expect to be determined in accordance with the decided case law of the highest courts of the land.⁴⁰

The Court concluded in the *Kopecký* judgment that its

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 Art. 1 of Prot. No. 1. [...] [T]he Court takes the view that 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, for example where there is settled case-law of the domestic courts confirming it.⁴¹

And so the Court—correctly in our view—went back to earlier formulations that mere hopes or speculations of recognition of a property right by the legislature or the domestic courts could not be considered as a 'possession' within the meaning of Article 1 of Protocol No. 1.⁴²

Social security claims

Up to the leading case of *Stec v United Kingdom*,⁴³ the Court seemed ambiguous about the extent to which entitlements to pensions and other social security benefits were protected by Article 1 of Protocol No. 1. In some cases, it found that pensions or welfare benefits could be considered as 'possessions' only where special contributions had been made,⁴⁴

³⁹ *Former King of Greece*, above n. 5, paras 98, 60.

⁴⁰ *Maurice*, above n. 6, para 90; *Draon v France*, No. 1513/03, 6 October 2005 (GC), para 82. And see *Aubert et al v France*, Nos 31501/03 et al, 9 January 2007, paras 74–6.

⁴¹ *Kopecký*, above n. 10, para 52.

⁴² *Ibid*, para 49; *Gratzinger and Gratzingerová*, above n. 37, para 73.

⁴³ *Stec et al v United Kingdom*, Nos 65731/01, 65900/01, Decision, 6 July 2005 (GC).

⁴⁴ *Kjartan Ásmundsson v Iceland*, 12 October 2004, ECHR 2004-IX, para 39. Contrary to the Court's *Stec* judgment, above n. 43, paras 44–6, we think that the case of *Gaygusuz v Austria*, 16 September 1996, Reports 1996-IV, para 39, belongs to this category. And see the concurring opinion of Judges Wildhaber, Rozakis, and Mularoni in *Azinas v Cyprus*, 28 April 2004 (GC), ECHR 2004-III, 307, and the references given there.

whereas in other cases, even welfare benefits in non-contributory schemes were considered as 'possessions' for the purposes of Article 1 of Protocol No. 1.⁴⁵

With respect to Article 6(1) ECHR, the Court had already held that 'the development in the law [...] and the principle of equality of treatment warrant taking the view that today the general rule is that Article 6 (1) does apply in the field of social insurance, including even welfare assistance', whether the welfare benefits were contributory or non-contributory.⁴⁶ In *Stec*, the importance of coherence in the interpretation of the Convention was one of the decisive considerations. The concept of 'possessions' in Article 1 of Protocol No. 1, the Court said, should be interpreted in a way which was consistent with the concept of pecuniary 'civil rights' under Article 6(1) ECHR.⁴⁷

The *Stec* case concerned non-contributory benefits for industrial injury. The age limits for these benefits were linked to the old-age pension scheme, which in turn was based on a different retirement age for women and men. The Court accepted that within the European States a wide range of social security benefits existed. Some of these were paid for by contributions to a specific fund, some by the beneficiaries themselves, some out of general taxation, and the Court might have added that some schemes were mixed. The Court's conclusion was as follows:

Given the variety of funding methods and the interlocking nature of benefits under most welfare systems, it appears increasingly artificial to hold that only benefits financed by contributions to a specific fund fall within the scope of Art. 1 of Prot. No. 1. Moreover, to exclude benefits paid for out of general taxation would be to disregard the fact that many claimants under this latter type of system also contribute to its financing, through the payment of tax.⁴⁸

In an interesting passage, the Court also refuted the United Kingdom government's argument that the Convention set forth what were essentially civil and political rights. It commented:

The mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.⁴⁹

Practically speaking, the Court confirmed in *Stec* its earlier statement that Article 1 of Protocol No. 1 'does not create a right to acquire property'.⁵⁰

It places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme.⁵¹

If, however, a State sets up legislative schemes providing for welfare benefits—contributory or not—that legislation generates proprietary interests and 'possessions',

⁴⁵ *Koua Poirrez v France*, 30 September 2003, ECHR 2003-X, para 37; Dissenting Opinions of Judges Costa and Garlicki in *Azinas*, above n. 44, 312–13, and the references given there.

⁴⁶ *Schuler-Zgraggen v Switzerland*, 24 June 1993, A/263, para 46. And see *Feldbrugge v Netherlands*, 29 May 1986, A/99, para 40; *Deumeland v Germany*, 29 May 1986, A/100, para 74; *Salesi v Italy*, 26 February 1993, A/257-E, para 19.

⁴⁷ *Stec*, above n. 43, para 49.

⁴⁸ *Ibid*, para 50.

⁴⁹ *Ibid*, para 52.

⁵⁰ See the references above n. 10.

⁵¹ *Ibid*, para 54.

which in turn must be compatible with the prohibition of discrimination of Article 14 ECHR.⁵²

Pension and social security regulations are liable to change. If the amount of a pension or welfare benefit is increased or reduced, this does not as such violate Article 1 of Protocol No. 1.⁵³ But a fair balance must nevertheless be established. A total deprivation or the backdating of a recalculation may well put an excessive burden on individuals.⁵⁴ In the effort to find a fair balance, the contributory nature of a social security scheme may of course also play a role.

Other cases

Under the Court's case law, implicit in the right to enjoy one's possessions is the right to keep or sell or dispose of property. The Court did not take long to find a violation when confronted with the burning of villages or the destruction of houses in the Kurdish region of Turkey.⁵⁵

In the *Marckx v Belgium* case,⁵⁶ the Court was confronted with the total lack of inheritance rights on intestacy, based only on the 'illegitimate' nature of a child's affiliation. It accepted that States could control the use of property. Since, however, the Belgian law limited an unmarried mother's right to make gifts or legacies in favour of her child without subjecting a married woman to any similar restriction, the Court found a violation of the non-discrimination clause of Article 14 in conjunction with the right to property of Article 1 of Protocol No. 1.⁵⁷

The case of *Immobiliare Saffi v Italy*⁵⁸ concerned the impossibility for landlords in Italy to recover possession of their properties, on account of the system of staggering police assistance over the years in enforcing evictions of tenants. The Court found that this was neither a situation of a de facto expropriation nor a transfer of property, but rather a control of the use of property.⁵⁹ However, with respect to the proportionality of the interference, the Court decided that an excessive burden had been imposed on the applicant company.⁶⁰

⁵² Ibid, paras 54–5, and *Stec et al*, above n. 10, paras 52, 66.

⁵³ *Pravednaya v Russia*, No. 69529/01, 18 November 2004, para 37; *Bulgakova v Russia*, No. 69524/01, 18 January 2007, paras 30, 41, 47.

⁵⁴ *Kjartan Ásmundsson*, above n. 44, para 45; *Bulgakova*, above n. 53, para 47.

⁵⁵ *Akdivar v Turkey*, 16 September 1996 (GC), ECHR 1996-IV (burning of houses in the village of Kelekçi in the south-east province of Diyarbakır by security forces; domestic remedies exhausted, violations of Article 8 ECHR, Article 1 Protocol No. 1 and (then) Article 25 ECHR); *Menteş v Turkey*, 28 November 1997 (GC), ECHR 1997-VIII (burning of houses in the village of Sağgöz or Riz in the south-east province of Bingöl by security forces); *Selçuk and Asker v Turkey*, 24 April 1998, ECHR 1998-II (burning of houses in the community of İslamköy in the south-east province of Diyarbakır by security forces). There have been a number of follow-up cases, see *Annual Reports of the European Court of Human Rights* (2001) 60, 76; (2003) 127; (2004) 137. See also, with respect to the refusal to allow villagers to return to their properties on security grounds, *Doğan*, above n. 4, paras 143, 154.

⁵⁶ *Marckx*, above n. 4.

⁵⁷ Ibid, para 65.

⁵⁸ *Immobiliare Saffi*, above n. 6.

⁵⁹ Ibid, para 46.

⁶⁰ Ibid, para 59. And see *Annual Reports of the European Court of Human Rights* (2001) 56; (2002) 76, 116; (2003) 72, 126; (2004) 136; (2005) 74, 144.

A comparable situation occurred in the pilot judgment *Hutten-Czapska v Poland*.⁶¹ The Court found systemic violations of the rights of landlords in the combined effect of defective provisions on the determination of rent, restrictions in respect of termination of leases, the statutory financial burdens imposed on them, and the impossibility for them to offset or mitigate the losses incurred in connection with maintenance of property.⁶² These defective provisions imposed an unfair and excessive burden on the landlords in controlling lopsidedly the use of their property.

In the *Öneryıldız v Turkey* case,⁶³ the applicant lived with his family in a slum quarter surrounding a municipal rubbish tip. His dwelling had been erected illegally on land belonging to the State. Dangerous gases were generated by the decomposing refuse. Despite various reports and warnings, the local authorities took no preventive measures. A gas explosion occurred at the rubbish tip, causing a landslide which engulfed the applicant's house and caused the death of nine close relatives. The Court found violations of Articles 2 and 13 and of Article 1 of Protocol No. 1. As in the *Beyeler v Italy* case, it examined the situation in the light of the general rule of the right to the peaceful enjoyment of 'possessions'. The infringement on the applicant's proprietary interests amounted not to an interference, but to a breach of a positive obligation of the State to protect these proprietary interests.⁶⁴

In the *Beyeler v Italy* case,⁶⁵ the applicant, a Swiss gallery owner, had bought in 1977 through Mr Pietrangeli, acting as his intermediary, a Van Gogh painting, 'Portrait of a Young Peasant'. In 1983, six years later, the applicant's name as the end buyer was notified to the Ministry of Cultural Heritage, and again almost five years later, in 1988, the Ministry declared that the applicant had no valid title to the painting and exercised its statutory right of pre-emption in respect of the 1977 contract of sale. The Court noted that the applicant had been in possession of the painting for several years and appeared to have been considered by the authorities as having a de facto proprietary interest in the painting and even as its real owner. Italian courts even qualified the exercise of the right of pre-emption as 'rather an actual act of expropriation'; this, the Court stated, proved that he had a proprietary interest recognized under Italian law, which constituted a 'possession' for the purposes of Article 1 of Protocol No. 1.⁶⁶ 'The complexity of the factual and legal position prevent(ed) its being classified in a precise category [...]', so that it was examined in the light of the general rule of the first sentence of Article 1 para 1 of Protocol No. 1.⁶⁷ As a result, the Ministry had derived an unjust enrichment, so that the applicant had to bear a disproportionate and excessive burden.⁶⁸

Broniowski v Poland,⁶⁹ the Court's first pilot judgment, concerned a scheme for compensation in kind (in the form of a 'right to credit') for the loss of property-owners east of the River Bug whose properties had to be abandoned after World War II, when Poland's

⁶¹ *Hutten-Czapska*, above n. 6.

⁶² *Ibid.*, paras 160, 223–7, 238–9.

⁶³ *Öneryıldız*, above n. 5.

⁶⁴ *Ibid.*, paras 129, 133–5. In the case of *Hamer v Belgium*, No. 21861/03, 27 November 2007, an illegal weekend residence, built in a zone of forestry where buildings were prohibited, was discovered after 27 years and demolished after 37 years. The Court accepted that it constituted a substantial proprietary interest. The owners had paid taxes, but in a zone of forestry, constructions could not be legalized; they remained illegal. The demolition had therefore not been disproportionate.

⁶⁵ *Beyeler*, above n. 5.

⁶⁶ *Ibid.*, paras 51, 104–5.

⁶⁷ *Ibid.*, para 106.

⁶⁸ *Ibid.*, paras 121–2.

⁶⁹ *Broniowski*, above n. 5.

borderlines were shifted from east to west. The Polish courts qualified the 'right to credit' as an independent property right with pecuniary value, and the European Court agreed and proceeded to examine the situation in the light of the general rule of 'peaceful enjoyment of property'.⁷⁰ It qualified the State's 'obstruction and inaction, both legislative and administrative, and [...] extra-legal practices' as interferences with the applicant's property rights.⁷¹ These interferences or failures to act amounted to a disproportionate and excessive burden which could not be justified in terms of a legitimate general community interest.⁷²

In the case of *J.A. Pye (Oxford) Ltd et al v United Kingdom*,⁷³ the applicant companies lost the beneficial ownership of 23 hectares of agricultural land to neighbouring land-owners with a grazing agreement, as a result of the ordinary law of the land, under which 12 years' adverse possession was sufficient to extinguish the former owner's rights. The Court stated that 'a requirement of compensation for the situation brought about by a party failing to observe a limitation period would sit uneasily alongside the very concept of limitation periods, whose aim is to further legal certainty [...]'.⁷⁴ Such legislation amounted to 'control of use' of land, rather than 'deprivation of possessions'.⁷⁵

D. Four Categories of Recent Case Law

From the case law of the past few years, we would like to draw special attention to four categories of cases in particular:

- de facto expropriations;
- restitution of property confiscated by communist regimes without compensation;
- insufficient or delayed indemnities for expropriations;
- excessively high fines or fees.

De facto expropriations

Complaints concerning constellations of property restrictions which in effect amount to a loss of property and which can therefore be qualified as de facto expropriations have been frequent.

The European Court of Human Rights has not attempted to define what is a de facto expropriation in the Convention system. But ever since the *Sporrong and Lönnroth v Sweden* case,⁷⁶ there have been numerous applications which could be classified under this heading. These are normally cases in which no formal expropriation procedure took place, but where the interference with the rights of an owner is so intense, serious, and usually durable that its effects resemble closely those of an expropriation.⁷⁷ Analogous are

⁷⁰ Ibid, paras 136, 130–1. ⁷¹ Ibid, para 145. ⁷² Ibid, para 187.

⁷³ *J.A. Pye (Oxford) Ltd*, above n. 6.

⁷⁴ Ibid, para 79.

⁷⁵ Ibid, paras 63–6.

⁷⁶ *Sporrong and Lönnroth*, above n. 5.

⁷⁷ *Skibiński v Poland*, No. 52589/99, 14 November 2006 (impossibility of building on land designated for expropriation at some undetermined date, without any compensation); *Weber v Germany*, No. 55878/00, Inadmissibility Decision, 23 October 2006; *Fleri Soler and Camilleri v Malta*, No. 35349/05, 26 September 2006 (requisition of building for government use in 1941 and imposition of quasi-lease agreement that had lasted 65 years); *Ghigo v Malta*, No. 31122/05, 26 September 2006 (requisition of building for use of third-party tenants and imposition of a quasi-lease agreement that had lasted 22

cases in which a State deprives an owner of his or her title after a lengthy phase of property restrictions without just satisfaction.⁷⁸

The notion of a de facto expropriation made its first appearance in the case law of the Court in *Sporrong and Lönnroth v Sweden* in 1982.⁷⁹ The applicants, property owners in the city of Stockholm, were affected by expropriation permits and prohibitions on construction which had been maintained in force for 23 and eight years for the permits, and for 25 and 12 years for the prohibitions. The Court examined the permits and prohibitions together and considered that the applicants' right of property had become 'precarious and defeasible'.⁸⁰ In the absence of a formal expropriation, it had to 'look behind the appearances and investigate the realities of the situation', since Convention rights were intended to be 'practical and effective'.⁸¹ The Court was confronted neither with a deprivation of property⁸² nor (at least in the case of the permits) with the control of the use of property.⁸³ It decided that it was confronted with an interference with the applicants' enjoyment of their possessions.⁸⁴ As a result, it had to determine whether a fair balance had been 'struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.⁸⁵ In the Court's view, this had not been the case. The applicants bore '[...] an individual and excessive burden which could have been rendered legitimate only if they had had the possibility of seeking a reduction of the time-limits or of claiming compensation'.⁸⁶

Another more recent illustration is two Italian cases from the year 2000. In the case of *Carbonara and Ventura v Italy*,⁸⁷ the applicants owned agricultural land adjoining land on which the Noicattaro town council began to build a school in 1963. The prefecture of Bari authorized the town council in May 1970 to take possession, under an expedited procedure, of part of the applicants' land for a maximum period of two years with a view to expropriating it. The building works were not completed until October 1972, by which time the authorized period of possession had expired. In 1980, having waited

years). See also *Bugajny et al v Poland*, No. 22531/05, 6 November 2007 (State's refusal to expropriate privately owned land used as public road and public property); *Longobardi v Italy* and *Perinelli v Italy*, Nos 7670/03, 7718/03, Inadmissibility Decision, 26 June 2007 (absolute prohibition, without compensation, on building in Rome on land designated as building land, in order to protect view of a nearby ancient mausoleum).

⁷⁸ *Ari v Turkey*, No. 65508/01, 3 April 2007 (compensation for loss of title to land on which the army had placed landmines refused, on grounds of 20 years of continued occupation by State and subsequent transfer of title to property to State); *Fener Rum Erkek Lisesi Vakfi v Turkey*, No. 34478/97, 9 January 2007 (Court order annulling, more than 30 years after its lawful acquisition, a title belonging to a foundation set up by a religious minority, on the basis of case law adopted 16 and 22 years after acquisition, unforeseeable at the time of acquisition); *Börekçiogullari*, above n. 8 (de facto occupation of what became a military base and subsequent transfer of property to State due to a 20 years' limitation period).

⁷⁹ *Sporrong and Lönnroth*, above n. 5. ⁸⁰ *Ibid*, para 60. ⁸¹ *Ibid*, para 63.

⁸² In the sense of Article 1 Protocol No. 1, para 1, 2nd sentence.

⁸³ In the sense of Article 1 Protocol No. 1, para 2.

⁸⁴ In the sense of Article 1 Protocol No. 1, para 1, 1st sentence. ⁸⁵ *Ibid*, para 69.

⁸⁶ *Ibid*, para 73.

⁸⁷ *Carbonara and Ventura v Italy*, 30 May 2000, ECHR 2000-VI. See also *Belvedere Alberghiera Srl v Italy*, 30 May 2000, ECHR 2000-VI. In the just satisfaction judgments, the Court awarded Euro 1,385,000 and over Euro 760,000 in respect of pecuniary damages alone, *Carbonara and Ventura v Italy*, No. 24638/94, 11 December 2003, and *Belvedere Alberghiera Srl v Italy*, No. 31524/96, 30 October 2003. In the year 2005, 37 follow-up cases were decided by the Court, *Annual Report of the European Court of Human Rights* (2005) 74, 144.

in vain for their land to be formally expropriated, the applicants sought a court order for damages. The district court would have awarded them damages, in 1989, but both the Court of Appeal and the Court of Cassation, in 1993, dismissed their claims. The Court of Cassation relied on the 'constructive-expropriation or inverted-access rule', which it had established in 1983 in order to clarify an inconsistent prior case law. Under this rule, the town council had become the owner of the land as soon as the works had been completed in 1972, although by that time the two-year period stipulated by the prefecture in the expedited possession order of 1970 had elapsed. The owners of the lands were entitled to compensation within a five-year limitation period, which began to run in 1972 when the public works were completed. The applicants' claim had therefore become time-barred.

The European Court found that the automatic transfer of property to the authorities was not foreseeable, since it became certain to the applicants only in 1993 with the Court of Cassation's judgment. The applicants were denied the possibility of obtaining damages. The Court considered that 'such interference can only be described as arbitrary',⁸⁸ so that there was no fair balance and Article 1 of Protocol No. 1 was violated.

Restitution of property confiscated by communist regimes without compensation

Applications involving issues of how to cope with past history or events continue to occur relatively frequently. These cases often deal with either issues of restitution of property confiscated by communist regimes⁸⁹ or with compensation for war damages or forced labour during the years of World War II.

Expropriations and confiscations are basically instantaneous and self-contained acts.⁹⁰ Their lasting effects cannot be considered as continuing violations of the Convention. If the time of a confiscation was anterior to the ratification of the Convention, the European Court is not competent *ratione temporis*. As the Court noted in the *Kopecký v Slovakia* case:

Art. 1 of Prot. No. 1 cannot be interpreted as imposing any general obligation on the Contracting States to restore property which was transferred to them before they ratified

⁸⁸ Ibid, para 72.

⁸⁹ *Kalinova v Bulgaria*, No. 45116/98, 8 November 2007 (expropriation without compensation owing to a wide interpretation of the legislation on restitution); *Hirschhorn v Romania*, No. 29294/02, 26 July 2007 (no compliance with a final court order to deliver up possession of a building registered as private property of the State and leased to the United States Peace Corps); *Velikovi v Bulgaria*, No. 43278/98 *et al.*, 15 March 2007 (deprivation of property pursuant to legislation aimed at compensating victims of arbitrary expropriations during communist regime); *Debelianovi v Bulgaria*, No. 61951/00, 29 March 2007 (inability to enforce order for the restitution of a listed building, which had been turned into a museum because of its historic and ethnographical importance, because of a moratorium that had been in place for more than 20 years); *Vistiņš and Perepjolkins v Latvia*, No. 71243/01, Decision, 30 November 2006 (expropriation of an island unlawfully expropriated and restituted, in breach of national legislation, compensation manifestly inadequate); *Pikielny v Poland*, No. 3524/05, (impossibility of obtaining compensation for nationalized property due to the State's continued failure to enact an ordinance regulating this issue, as required by law); *Weber*, above n. 77 (impossibility of obtaining delivery of possession of property seized by the German Reich and located in the former GDR); *Gavella v Croatia*, No. 33244/02, Inadmissibility Decision, 11 July 2006 (Judgment of Constitutional Court depriving applicant of a right of pre-emption over nationalized flats, in situation where applicant could not have a legitimate expectation that his claims would be realized); *Melchior v Germany*, No. 66783/01, Inadmissibility Decision, 2 February 2006 (refusal to return an estate on the territory of the former GDR).

⁹⁰ *Kopecký*, above n. 10, para 35(a); *von Maltzan et al v Germany*, Decision, 2 March 2005 (GC), ECHR 2005-V, para 74(a).

the Convention. Nor does Art. 1 of Prot. No. 1 impose any restrictions on the Contracting States' freedom to determine the scope of property restitution and to choose the conditions under which they agree to restore property rights of former owners.⁹¹

In other words, the Court may exercise its European supervision in cases where new restitution laws were enacted or applied subsequent to the ratification of the European Convention on Human Rights, or where recovery proceedings instituted before ratification were still pending after the entry into force of the Convention.

In the case of *Malhous v Czech Republic*,⁹² plots of agricultural land owned by the applicant's father were expropriated in 1949. The former owner never received any compensation. In 1957, some of the plots were transferred to the ownership of natural persons. After the fall of the communist regime in Czechoslovakia, the Land Ownership Act of 1991 provided that property confiscated could be returned to the former owners or their heirs if it was still in the possession of the State or of a legal person. If it had been transferred to natural persons, the former owners could only claim the assignment of other equivalent property or financial compensation.

The European Court of Human Rights decided that the applicant's claim to obtain restitution of his father's property in its entirety was inadmissible. The concept of 'possessions' covered both existing possessions and assets, including claims, in respect of which an applicant could argue that he had at least a 'legitimate expectation' of obtaining the effective enjoyment of a property right. However, '[...] the hope of recognition of the survival of an old property right which it ha[d] long been impossible to exercise effectively [could] not be considered as a "possession" within the meaning of Art. 1 of Prot. No. 1'.⁹³

In the case of *Gratzinger and Gratzingerová v Czech Republic*,⁹⁴ the applicants left Czechoslovakia in 1982, acquired American nationality in 1989, and thereby automatically lost their Czechoslovak nationality. In 1983, a district court convicted them *in absentia* of deserting the Republic and ordered the confiscation of their property. After the collapse of the communist regime, an action to recover their property was dismissed by the Czech courts on the ground that the applicants did not satisfy the requirements of Czech nationality laid down in the Extrajudicial Rehabilitation Act of 1991.

The European Court confirmed that Article 1 of Protocol No. 1 protected existing possessions or assets, including claims, in respect of which there was at least a 'legitimate expectation' that they would be realized. However, 'the hope that a long-extinguished property right [might] be revived [could] not be regarded as a "possession" [...]; nor [could] a conditional claim which ha[d] lapsed as a result of the failure to fulfil the condition'.⁹⁵ The belief that the law then in force would be changed to the applicants' advantage could not be regarded as a form of 'legitimate expectation'. Such expectations had to be 'more concrete than a mere hope and be based on a legal provision or [...] a judicial decision'.⁹⁶

⁹¹ *Kopecký*, above n. 10, para 35(d); *Malhous v Czech Republic*, Decision, 13 December 2000 (GC), ECHR 2000-XII, 552; *von Maltzan*, above n. 90, paras 74(d), 77, 81. See also Schreuer and Kriebaum, above n. 1, 746.

⁹² *Malhous*, above n. 91.

⁹³ *Ibid*, 553.

⁹⁴ *Gratzinger and Gratzingerová*, above n. 37.

⁹⁵ *Ibid*, para 69.

⁹⁶ *Ibid*, para 73.

In the case of *Brumărescu v Romania*,⁹⁷ the applicant's parents were expropriated in 1950 on the basis of a decree governing nationalization, but were nevertheless allowed to occupy as tenants one of the flats in the house. In 1993, the applicant, as beneficiary of his parents' estate, brought a court action seeking a declaration that the nationalization was null and void, since his parents had belonged to a category of persons whose property the decree had exempted from nationalization. The court ruled in his favour, and the decision became final. However, the Procurator-General lodged an application with the Supreme Court of Justice to have the court decision quashed. The Supreme Court of Justice allowed that application, quashed the earlier court decision, and held that the ordinary courts had no jurisdiction to review the manner in which the decree on nationalization had been applied.

The European Court of Human Rights noted that one of the fundamental aspects of the rule of law was the principle of legal certainty.⁹⁸ Where the courts had finally determined an issue, their ruling should not be called into question. The Supreme Court of Justice had infringed the principle of legal certainty, thereby breaching the applicant's right to a fair hearing and violating Article 6 ECHR. In finding that the Romanian courts had no jurisdiction to decide civil disputes such as an action for recovery of possession, the Supreme Court of Justice had moreover violated the right of access to a tribunal.⁹⁹

Once it was established that the applicant was the lawful owner of the house, it was also clear that the Supreme Court of Justice's judgment had deprived him of his rights of property under Article 1 of Protocol No. 1. As a result, a fair balance had been upset, since 'the applicant bore and continue[d] to bear an individual and excessive burden'.¹⁰⁰

In the case of *von Maltzan et al v Germany*,¹⁰¹ the applicants asked for restitution of their land or buildings (or for higher compensation), which had been expropriated either between 1945 and 1949 in the Soviet occupied zone of Germany or after 1949 in the German Democratic Republic (GDR). The European Court of Human Rights held that the case did not concern 'existing possessions'. The Federal Republic of Germany (FRG) did not have any responsibility for acts committed at the instigation of the Soviet occupying forces or for those perpetrated by another State (the GDR) against its own nationals, even though the GDR was subsequently succeeded by the FRG.¹⁰² There was no question of a continuing violation of the Convention that could be imputable to the FRG.¹⁰³ Nor did the applicants have a 'legitimate expectation' of obtaining either the restitution of their property or compensation. The Court insisted that 'where a State elects to redress the consequences of certain acts that are incompatible with the principles of a democratic regime but for which it is not responsible, it has a wide margin of appreciation in the implementation of that policy'.¹⁰⁴ The applications were therefore inadmissible.

⁹⁷ *Brumărescu v Romania*, 28 October 1999 (GC), ECHR 1999-VII.

⁹⁸ *Ibid*, para 61. ⁹⁹ *Ibid*, para 65.

¹⁰⁰ *Ibid*, para 80. In the years 2002–5, the Court has decided some 60 follow-up cases, *Annual Reports of the European Court on Human Rights* (2002) 76, 116; (2002) 72, 126; (2004) 106, 132, 137; (2005) 115, 141.

¹⁰¹ *Von Maltzan et al*, above n. 90. See the critical remarks of Ress, above n. 1, 627, 630–3, to the effect that the Court should have found violations in both the *von Maltzan* and the *Jahn* cases.

¹⁰² *Ibid*, para 81.

¹⁰³ *Ibid*, para 83.

¹⁰⁴ *Ibid*, para 111; see also para 77.

In the case of *Jahn et al v Germany*,¹⁰⁵ the applicants were heirs of the so-called 'new' farmers who had obtained parcels of land of an average of eight hectares, following the land reform implemented in the former Soviet Occupied Zone of Germany after 1945. During the transitional period after the fall of the Berlin Wall in 1989, the 1990 Modrow law of the German Democratic Republic (GDR) lifted all restrictions on disposal of land acquired under the land reform. However, after reunification, under a statute of 1992, the heirs of persons who had acquired land under the land reform had to reassign their land to the tax authorities without receiving any compensation. The reason for this was that they had not been carrying on any activity in an agricultural sector. The applicants alleged that the deprivation of their property had been manifestly disproportionate.

The Court examined whether, in the light of the unique context of German reunification, the special circumstances of the case could be regarded as so exceptional as to justify the lack of any compensation. It first emphasized that States had a wide margin of appreciation when passing laws in the context of a change of political and economic regime.¹⁰⁶ Three factors seemed decisive.¹⁰⁷ First, the Modrow law was passed by a parliament that had not been democratically elected, during a transitional period which was inevitably marked by upheavals and uncertainties. Second, in the context of the huge task of transition to a democratic regime of market economy, the German legislature could be deemed to have intervened within a reasonably short time to correct the effects of the Modrow law. Third, given that the applicants undeniably benefited from a 'windfall' under the Modrow law, the decision of the German legislature to correct the effects of the Modrow law for reasons of social justice was not disproportionate and did not upset a 'fair balance' even if it was done without paying any compensation.

Similar considerations of an intertemporal nature as those which govern the restitution of confiscated property apply to problems of compensation for forced labour during World War II. In the case of *Poznanski v Germany*,¹⁰⁸ Polish nationals who were subjected to forced labour brought actions for non-pecuniary damages and restitution of unjustified enrichment against the successor of I.G. Farben. The plaintiffs, who had received some compensation payments on the basis of earlier legislation, lost their claims when a new statute of 2000 set up a public-law foundation and replaced the earlier claims with an award of compensation.

The Court interpreted this loss as a 'deprivation of possessions'. It accepted that the new law of 2000 was to create legal certainty. Consequently, the replacement of the applicants' claim was in the public interest. Examining the proportionality of the interference, the Court noted that the claims which the applicants lost 'were not assets in the sense of matters which had a physical existence and a quantifiable value'.¹⁰⁹ The substance of the claims was not adjudicated on. The actions were probably time-barred. The applicants had received—relatively speedily—the maximum amount available under the new law. The civil claims of the applicants were for amounts considerably higher, but given the usual risks of civil litigation, it was by no means clear that the applicants would have been awarded the sums they claimed. All in all, the interference with the 'right of property in

¹⁰⁵ *Jahn et al*, above n. 5.

¹⁰⁶ *Ibid*, para 113.

¹⁰⁷ *Ibid*, para 116.

¹⁰⁸ *Poznanski v Germany*, No. 25101/05, Inadmissibility Decision, 3 July 2007. And see *Associazione Nazionale Reduci dalla Prigione e dall' Internamento e dalla Guerra di Liberazione*, above n. 11.

¹⁰⁹ *Ibid*.

the framework of an overall settlement of questions relating to compensation for forced labour under the Nazi regime did not upset the "fair balance" which ha[d] to be struck between the protection of property and the requirements of the general interest'.¹¹⁰

Insufficient or delayed indemnities for expropriations

Complaints about insufficient or delayed indemnities in cases of expropriations or other deprivations of possessions have become commonplace in the past decade.¹¹¹ Of course, the calculation of the market value of expropriated possessions is above all a matter for the domestic (administrative or civil) courts. It is natural that they will be more familiar with the local conditions, needs, and market values than a European Court. The subsidiarity of the Convention system explains the understandable hesitancy of the European Court of Human Rights to act as a fourth instance, performing essentially the same tasks as a domestic court.

However, the lower the compensation awarded by the national authorities is, and the more it is removed from the real market value, the more such compensation for interferences with one's possessions begins to resemble a de facto expropriation, and the more obvious the need for the European Court to step in would appear to be. The more partial and prejudiced in favour of the State or the government the calculations of national courts appear to be, the more it becomes possible to speak of Convention violations, and the more applicants could be denied a fair balance in the calculation of their compensation claims.¹¹²

In the *Akkuş v Turkey* case,¹¹³ the Turkish National Water Board expropriated land belonging to the applicants in order to build the Altinkaya hydroelectric dam. The applicants asked for additional compensation which would take into account the rate of inflation (at that time 70 per cent per year). They were paid 30 per cent per year, four years and four months from the date of expropriation. The European Court found a violation of Article 1 of Protocol No. 1 and insisted that abnormally lengthy delays in the payment of compensation for expropriation were not reasonably proportional to the value of the expropriated property and upset the fair balance.

There was an interesting dissenting opinion in the European Commission of Human Rights by Mr Nørgaard¹¹⁴ in this case, which claimed that there was no rule that full compensation had to be paid in expropriation cases. The States' margin of appreciation allowed them to proceed as in this case.¹¹⁵ In the same vein, Judge Thór Vilhjálmsson¹¹⁶ dissented in the Court, saying that rules on human rights were not an effective instrument in the battle against inflation.¹¹⁷

¹¹⁰ Ibid.

¹¹¹ *Urbárska Obec Trenčianske Biskupice v Slovakia*, No. 74258/01, 27 November 2007; *Kanala v Slovakia*, No. 57239/00, 10 July 2007; *Kozacıoğlu v Turkey*, No. 2334/03, 31 July 2007; *Bistrović v Croatia*, No. 25774/05, 31 May 2007; *Vistiň and Perepjolkins*, above n. 89.

¹¹² Cf J. Christoffersen, *Fair Balance: A Study of Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (forthcoming).

¹¹³ *Akkuş v Turkey*, 9 July 1997, Reports 1997-IV. See also *Aka v Turkey*, 23 September 1998, Reports 1998-VI, paras 44-5.

¹¹⁴ Joined by Mrs Thune, Mr Martínez, Mrs Liddy, Mr Marxer, and Mr Birsan.

¹¹⁵ Reports 1997-IV, 1321.

¹¹⁶ Joined by Judge Mifsud Bonnici.

¹¹⁷ Reports 1997-IV, 1314.

In the meantime, 268 Turkish follow-up cases were decided in the years 2001–5,¹¹⁸ as well as numerous similar cases from other countries.

Excessively high fines or fees

Complaints about excessively high fines or fees, or about tax refunds which are not paid back in due course,¹¹⁹ would seem to concern—in continental European parlance—administrative law issues.

*Mamidakis v Greece*¹²⁰ may be used as an illustrative example for some of the problems that we want to discuss here. The applicant, the chairman of an oil company, was fined for smuggling in the amount of some 3 million Euros and additionally, conjointly with other persons, in the amount of some 5 million Euros. Oil which was destined for export to Bulgaria was sold on the Greek market. The plenary of the Greek Supreme Administrative Court confirmed the fraudulent intent of the applicant and considered the fine as proportionate.

The first Section of the European Court did not, however, follow the Greek court. It first held that the fines had ‘deprived the applicant of an element of property, namely the amount he [was] required to pay’.¹²¹ It described the amount as extremely high.¹²² Objectively, the fines were undoubtedly high. Given that the applicant was chairman of an oil company, it would have been desirable, however, to examine in some detail the subjective elements, that is, the applicant’s possessions and assets, in order to be convinced of the excessiveness and the arbitrariness of the fines. In effect, the Court’s judgment amounts in our view above all to a control of the adequacy of an administrative sanction. The fact that the Court was of the opinion that Article 6 ECHR was not violated in the *Mamidakis* case would seem to confirm our view. Nevertheless the Court held that in the

circumstances, even taking into account the margin of appreciation enjoyed by Contracting States in such matters, [...] the imposition of the fine in question had dealt such a blow to the applicant’s financial situation that it amounted to a disproportionate measure in relation to the legitimate aim pursued.¹²³

In situations where a duty is prescribed by law which involves a certain outlay for the person bound to perform it, the Court has refused to regard the imposition of such a duty as constituting in itself an interference with possessions.¹²⁴ Whereas we would accept that clearly or arbitrarily excessive fines may constitute interferences, we would prefer to take a restrictive approach to this issue.

¹¹⁸ *Annual Reports of the European Court of Human Rights* (2001), 55; (2002) 76, 116; (2003) 72, 127; (2004) 136; (2005) 74, 144.

¹¹⁹ *AON Conseil et Courtage SA and Christian de Clarens SA v France*, No. 70160/01, 25 January 2007; *Mamidakis v Greece*, No. 35533/04, 11 January 2007; *Grifhorst v France*, No. 28336/02, Decision, 7 September 2006; *Weissman et al v Romania*, No. 63945/00, 24 May 2006; *Eko-Elda Avee v Greece*, No. 10162/02, 9 March 2006.

¹²⁰ *Mamidakis*, above n. 119.

¹²¹ *Ibid*, para 44.

¹²² *Ibid*, para 47.

¹²³ *Ibid*, para 48.

¹²⁴ *Van der Musselle*, above n. 10, para 49; *Sacilor Lormines*, above n. 11, 42.

E. On the Way towards a European Supreme Administrative Court in Charge of Fighting Arbitrariness

In a sizeable number of recent applications, the European Court was confronted with exaggerated formalism, chicanery, and tricks by authorities, refusals to implement final court decisions,¹²⁵ or simply by arbitrary acts or omissions.

In the case of *Intersplav v Ukraine*,¹²⁶ the tax administration systematically and groundlessly refused to confirm the applicant company's entitlement to the refund of value-added taxes (VAT). The company instituted more than 140 proceedings in the commercial court, and the court repeatedly found for the applicant, but the refunds continued to be delayed. The European Court noted that the dispute did not concern the particular amount of a VAT refund or of compensation for the delay, but the company's general entitlement, and this amounted to a proprietary interest protected by Article 1 of Protocol No. 1.¹²⁷ The Court considered that the interference with the applicant's possession was disproportionate and 'upset the "fair balance" between the demands of the public interest and the protection of the right to peaceful enjoyment of possessions'.¹²⁸

In the case of *Smirnov v Russia*,¹²⁹ the computer of a lawyer who had represented several persons in a criminal case was retained for more than six years. The computer was seized in the course of a search in the applicant's flat. The central unit of the computer, containing hard disks with data and access to more than 200 clients' files, was kept as physical evidence in a criminal case, although it 'was not an object, instrument or product of any criminal offence',¹³⁰ and the relevant information had been printed out and included in the case file. The European Court found that the search violated Article 8 ECHR, since it had not been 'necessary in a democratic society'. As for the computer, there was not 'any apparent reason for [the] continued retention of the central unit', so that no 'fair balance' had been struck between the demands of the general interest and the requirement of the protection of the applicant's right to peaceful enjoyment of his possessions.¹³¹

In the case of *Khamidov v Russia*,¹³² a family had to leave its Chechen village and to spend the winter of 1999–2000 in a refugee camp under very harsh conditions, because police units of the Ministry of the Interior, who had launched a counter-terrorist

¹²⁵ *Russian Conservative Party of Entrepreneurs v Russia*, No. 55066/00, No. 55638/00, 11 January 2007 (refusal to refund election deposit, final judgment quashed by supervisory-review proceedings); *Unistar Ventures GmbH v Moldova*, No. 19245/03, Decision, 20 February 2007 (non-enforcement of final judgment ordering annulment of a joint venture contract creating an airline company and reimbursement of investments); *Megadat.com SRL v Moldova*, No. 21151/04, communicated on 8 December 2006; *Radovici and Stănescu v Romania*, Nos 68479/01, 71351/01, 71352/01, 2 November 2006 (extension of lease because of failure to comply with mere formalities, so that applicants, who had blocks of flats restituted, were paid no rent for several years); *Jeličić v Bosnia and Herzegovina*, No. 41183/02, 31 October 2006 (impossibility of obtaining enforcement of final judgment, ordering release of money in frozen foreign-currency bank account); *Zlinsat, Spol SRO v Bulgaria*, No. 57785/00, 15 June 2006 (suspension of privatization not appealable to a tribunal, vagueness of law); *Zubko et al v Ukraine*, Nos 3955/04, 5622/04, 8538/04, 11418/04, 26 April 2006 (delays in enforcing judgments awarding salary arrears to judges).

¹²⁶ *Intersplav*, above n. 5.

¹²⁷ *Ibid*, paras 31–2.

¹²⁸ *Ibid*, para 40.

¹²⁹ *Smirnov v Russia*, No. 71362/01, 7 June 2007.

¹³⁰ *Ibid*, para 58.

¹³¹ *Ibid*, paras 58–9.

¹³² *Khamidov v Russia*, No. 72118/01, 15 November 2007.

operation, had moved onto their estate and had damaged their property massively. A compensation claim could not be lodged until January 2001, since prior to that time, the courts on Chechen territory were inoperative. Ultimately, the Russian courts rejected the claim. A court eviction order remained unenforced for some 16 months.

The European Court found violations of Article 8 ECHR and of Article 1 of Protocol No. 1 as a result of the temporary occupation of, and the damage inflicted on, the applicant's estate. It then proceeded to find violations of Article 6 ECHR on account of the denial of access to a court, of the prolonged non-enforcement of the eviction order, of the domestic courts' failure to examine the applicant's compensation claims for occupation of property, and finally, in an unusually strong formulation, 'on account of the arbitrary findings of the domestic courts as regards the applicant's claim in respect of compensation for the damage inflicted on his estate'.¹³³

The Court referred to its usual deference to national tribunals and emphasized that it '[...] will not, in principle, intervene unless the decisions reached by the domestic courts appear arbitrary or manifestly unreasonable and provided that the proceedings as a whole were fair as required by Art. 6 § 1'.¹³⁴ However, in the Court's view, the *Khamidov* proceedings had been plainly unfair, and the conclusions of the domestic courts appeared 'inconsistent, fraught with contradiction and irreconcilable with the actual events'.¹³⁵ The Court repeatedly declared itself surprised and perplexed, found the conclusions of the domestic courts so strikingly unreasonable as to be 'grossly arbitrary', and blamed them for setting 'an extreme and unattainable standard of proof'.¹³⁶

Among other factors, these sort of illustrations of administrative and governmental partiality and arbitrariness have led to a steady increase of right to property cases before the European Court of Human Rights. Obviously such cases may affect individuals significantly. Functioning democracies based on the rule of law should be capable of resolving most such issues by themselves. If this is not the case, problems of arbitrariness will massively increase the Court's workload.¹³⁷ If the Court manages to cope with its workload, then—to be sure—it will contribute not only to the protection of property, but also to the reduction of arbitrariness. There have been interpretations that the European Court of Human Rights, originally intended to be an international tribunal to avert totalitarianism, has become a quasi-Constitutional Court of Europe.¹³⁸ If we look at the complaints about inadequate compensation for expropriations, or at cases such as *Mamidakis*, *Intersplav*, or *Smirnov*, we should probably ask whether the Court is becoming a Supreme Administrative Court of Europe, in charge above all of standing up against arbitrariness and excesses of State authorities. In essence, there seems to be a development to treat the notion of arbitrariness as identical with the violation of a human rights guarantee under the Convention.

¹³³ Ibid, operative part of Judgment No. 6. ¹³⁴ Ibid, para 170.

¹³⁵ Ibid, para 137. ¹³⁶ Ibid, paras 172, 174.

¹³⁷ For details see S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (2006); L. Wildhaber, *The European Court of Human Rights 1998–2006: History, Achievements, Reform* (2006).

¹³⁸ Cf. L. Wildhaber, above n. 137, 113–25.

The trend described seems to confirm the idea advocated by some human rights lawyers that international human rights law is all-inclusive and therefore leaves no 'human rights free zones'.¹³⁹ Indeed, it would constitute an enormous success if the European Court of Human Rights could succeed in taming the arbitrariness of numerous State administrations. And there is little doubt that the applicants in the *Intersplav*, *Smirnov*, and *Khamidov* cases were violated in real and fundamental rights. But there remains the anxious question whether an exaggerated expansion of the right of property is not bound to let the workload of the Court further explode. If it suffices to say—as does the *Mamidakis v Greece* judgment—that a fine constitutes 'an element of property',¹⁴⁰ then any amount of applications complaining about fines, fees, taxes, or the like might reach the Court. It will not be possible to sift them in order to find out which amounts are so disproportionate as to be arbitrary without examining the application files with some care. The Court would therefore be well advised to show prudence and make it clear that fines, fees, or taxes can only exceptionally be attacked before the Court, when their amount is palpably excessive.

Similar, but not analogous considerations apply with respect to inadequate compensation for expropriations, because there the link with actual deprivation of property is more direct, the Court's control powers may be less exceptional, and the existing case law is more firmly established.

E. Conclusion

Most commentators have concluded that the Court has given an extensive or broad interpretation of the notion of protection of property.¹⁴¹ This is hardly surprising given the Court's well-established doctrine of an evolutive interpretation of the Convention guarantees (with respect to protection of property and other rights), its insistence that these guarantees should be 'practical and effective' rather than 'theoretical and illusory' and its practice of giving an autonomous meaning to Convention rights. We would suggest that the Court has evolved a well-balanced jurisprudence in line with general international law standards. It has soon begun to look beyond formal to de facto expropriations. In cases such as *Beyeler*, *Öneryıldız*, *Broniowski*, *Maurice*, and *Hutten-Czapska*, it has given effective protection to 'possessions', whether or not the domestic law treated them as 'property'. In *Stec*, it has endeavoured to give protection to all sorts of social security benefits. In *Kopecký*, it has consolidated the notion of 'legitimate expectations', while taking care that this notion would not be interpreted too broadly. It has given States a wide margin of appreciation in handling restitution and confiscation problems, respecting the fact that general international law standards would have rendered precarious a more activist approach. Similarly, it has accepted the difficulties of rendering concrete the States' 'control' and 'taxation' powers, conceding a certain latitude to legally correct measures

¹³⁹ J. Viljanen, *The European Court of Human Rights as a Developer of the General Doctrines of Human Rights Law: A Study of the Limitation Clauses of the ECHR* (2003) 22.

¹⁴⁰ See above n. 83.

¹⁴¹ Birsan, above n. 1, 14, 23; Pellonpää, above n. 1, 1104–5; Ress, above n. 1, 635, 645; Schreuer and Kriebaum, above n. 1, 744, 761–2.

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in the public interest. Where such measures must be qualified as arbitrary, the Court will tilt the balance in favour of individuals' rights, as it has demonstrated in the *Intersplau*, *Smirnov*, and *Khamidov* cases.

All in all, the role of the European Court of Human Rights as a protector of property and as 'economic court' has perhaps been underestimated. But the role is grounded on a solid case law and on decades-long experience.