

## EXPROPRIATION IN HUMAN RIGHTS LAW\*

Property is not only at the centre of the protection of aliens, and international investment law: it is also a human right under international law. Although property was included in the 1948 Universal Declaration of Human Rights, it was not considered within those listed in the 1966 International Covenants of the UN on Civil and Political Rights, and on Economic, Social and Cultural Rights. At the regional level, property has been a part of the European, American and African systems since 1952, 1969 and 1981, respectively. Article 21 of the American Convention on Human Rights, and Article 14 of the African Charter on Human and Peoples' Rights, protect property against eventual deprivations, or encroachments on it. Neither of these provisions, however, have been interpreted and applied extensively. The most complex and influential case-law on the issue is the one derived from Article 1 of the First Optional Protocol of the European Convention on Human Rights, which has been developed by European Commission and Court of Human Rights, far from the ideological debate at the UN between capital-importing and capital-exporting states, and the emergence of international investment law.

According to Article 1 of the European Convention, as construed by these institutions, the state is not prevented from interfering with the use of property. A measure that produces this result is justified when the correspondent authorities

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observe a fair balance between individual and community interests. For this purpose, the state is given a wide margin of appreciation. The European Commission and Court have recognised three related rules in this provision: interferences to the peaceful enjoyment of possessions, the deprivation of property, and the control on its use. Each rule is found, in the first sentence of Article 1, in the second sentence of the same paragraph, and in its second paragraph. Distinguishing among these rules is not easy in practice. The European Court has given a restrictive interpretation to the concept of expropriation, and a broad one to the notion of control on the use of property. In this context, the tribunal will consider other interferences only when it is not able to establish a deprivation or control on the use. From the three forms of interference that comprise Article 1, only deprivations require compensation to be considered lawful. In this respect, the state will enjoy a wide margin of appreciation at the moment of establishing the sum due, especially in cases of nationalisation. As a general rule, the European Court requires an amount reasonably related with the property taken. Full compensation, however, is not guaranteed for every taking.

This chapter is about property and its deprivation in international human rights law. It centres on the protection of this right in the Americas, Africa and Europe. The relevance of the decisions of the European Commission and Court explains the focus given to the practice of these institutions regarding not only the deprivation of property, but also the control on its use and other interferences. The case-law on Article 1 of the First Protocol is addressed in detail. The chapter ends with the study of the meaning given by these institutions to certain concepts included in the second rule on deprivation: public interest, conditions provided by municipal law, and those stipulated by general principles of international law.

### 3.1. A Debated Right and its Taking

Article 17 of 1948 Universal Declaration of Human Rights states that “(1) Everyone has the right to own property alone as well as in association with others”, and “(2) No one shall be arbitrarily deprived of his property”.<sup>1</sup> Adopted as a UN General Assembly resolution<sup>2</sup>, the Universal Declaration was the result of a collective effort of an international society that included, for the first time in the history of international law, states with important differences in their political, social, economic and cultural backgrounds. As Antonio Cassese explains, its object was to find the lowest common denominator in the conception of basic human rights, and the relationship between state and individual.<sup>3</sup> This legally non-binding instrument focused on civil and political rights, rather than on economic, social, and cultural rights.<sup>4</sup> Even though it reflected a developed states’ view of human rights, the Universal Declaration is today an essential instrument to this area of law.<sup>5</sup> It forbade arbitrary deprivations of property and, therefore, acknowledged the right to expropriate by implication.<sup>6</sup> The two legally binding 1966 multilateral treaties,

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<sup>1</sup> Available at <<http://www.un.org/rights/50/decla.htm>> (last visited 30 June 2013).

<sup>2</sup> 1948 UNGA Res. 217 (III).

<sup>3</sup> A Cassese, *International Law in a Divided World* (1994), 299.

<sup>4</sup> Cassese (1994), 299.

<sup>5</sup> The Universal Declaration has been considered by some to evidence customary international law. See Tschofen (1992), 388.

See also *Filartiga v. Peña-Irala*, US Circuit Court of Appeals, 2<sup>nd</sup> Circuit, 30 June, 1980, Opinion by Circuit Judge Kaufman. Available at

<<http://www.icrc.org/ihl-nat.nsf/0/27721c1b47e7ca90c1256d18002a2565?OpenDocument>> (last visited 30 June 2013).

See generally H Charlesworth, ‘Universal Declaration of Human Rights (1948)’, in R Wolfrum (ed.), *EPIL* online edition, available at

<[http://www.mpepil.com/sample\\_article?id=/epil/entries/law-9780199231690-e887&recno=24&](http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e887&recno=24&)> (last visited 30 June 2013).

<sup>6</sup> Tschofen (1992), 407-8.

known as the UN Covenants, were based on the Universal Declaration.<sup>7</sup> However, neither the covenant on civil and political rights, nor the one on economic, social and cultural rights, included the right of property.<sup>8</sup> This omission reveals a second and third world approach to human rights, aimed at undermining international customary norms which in the past had protected the property of aliens from expropriation through the Hull formula.<sup>9</sup> The right to own property was only reasserted by the UN in 1986, in a General Assembly resolution.<sup>10</sup> Meanwhile, two regional human-rights treaties had followed in the footsteps of the Universal Declaration and acknowledged the state's right of expropriation by implication in Europe and the Americas, during the 1950s and 1960s. A couple of decades later, another regional human-rights treaty recognised this right in Africa.

### 3.1.1. *Protecting Property in the Americas*

Article XXIII of the 1948 American Declaration of the Rights and Duties of Man expressly established that “[e]very person has a right to own such private

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<sup>7</sup> Tschofen (1992), 388.

The International Covenant on Civil and Political Rights and its first Optional Protocol, and the International Covenant on Economic, Social and Cultural Rights, were opened for signature, ratification and accession by UN General Assembly Res. 2200 A (XXI), adopted on 16 December, 1966.

Both treaties entered into force in 1976

<sup>8</sup> Cassese (1994), 303.

See A Robertson and J Merrills, *Human Rights in the World* (1996), 37 & 276.

This exclusion was apparently due to differences on the content of the concept.

J Waincymer, ‘Balancing Property Rights and Human Rights in Expropriation’, in P Dupuy, F Francioni and E Petersmann, (eds.), *Human Rights in International Investment Law and Arbitration* (2009), 279.

See C Tomuschat, ‘The European Court of Human Rights and Investment Protection’, in C Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009), 638.

<sup>9</sup> Cassese (1994), 303.

<sup>10</sup> 1986 UNGA Res. 41/132.

See I Seidl-Hohenveldern, *International Economic Law* (1992), 132.

property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home”.<sup>11</sup> Originally, the American Declaration was a legally non-binding instrument adopted within the context of the Organization of American States (OAS). It came to be considered by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights as incorporated into the OAS Charter, only after the amendment of the latter in 1967 and 1970.<sup>12</sup> The Inter-American Commission even considered the American Declaration in the 1990s to establish “universal and regional rules which have become rules of customary international law and, as such [...] obligatory in [...] international law”.<sup>13</sup> By then, the Inter-American human rights system had established a more detailed regulation of the right of property in another legally binding instrument. Article 21 of the 1969 American Convention on Human Rights, also known as the Pact of San José de Costa Rica<sup>14</sup>, contains a protection against expropriation.<sup>15</sup> Consequently, it recognises the correspondent right of the state to

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<sup>11</sup> The American Declaration was approved by the Ninth International Conference of American States held in Bogotá, Colombia, in 1948. Available at <<http://www.cidh.oas.org/Basicos/basic2.htm>> (last visited 30 June 2013).

<sup>12</sup> See Res. No. 23/81, Case 2141 (USA), 6 March 1981, Annual Report of the I/A Commission HR 1980-1981; and Res. No. 3/87, Case 9647 (USA), 22 September 1987, Annual Report of the I/A Commission HR 1986-1987.

The annual reports of I/A Commission HR are available at <<http://www.cidh.oas.org/annual.eng.htm>> (last visited 30 June 2013).

See also S Davidson, *The Inter-American Human Rights System* (1997), 23-30.

<sup>13</sup> ‘Report on Nicaragua’, Annual Report of the I/A Commission HR 1993.

See S Davidson, ‘The Civil and Political Rights Protected in the Inter-American Human Rights System’, in D Harris and S Livingstone (eds.), *The Inter-American System of Human Rights* (1998), 276.

Finally, see Advisory Opinion OC-10/89 of the I/A Court HR, 14 July, 1989, on the Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights.

The advisory opinions of the I/A Court HR are available in Spanish at <<http://www.corteidh.or.cr/opiniones.cfm>> (last visited 30 June 2013).

<sup>14</sup> In force since 1978.

<sup>15</sup> On the two instruments that form the current Inter-American system of human rights, see P Nikken, ‘Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights’ in P Dupuy, F Francioni and E Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (2009), 246.

expropriate by implication, following certain requirements which constitute a minimum standard of treatment applicable not only to foreigners, but also to nationals of the state adopting the respective measure. Article 21 provides:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.<sup>16</sup>

Property was one of the most debated rights during the preparatory stage of the American Convention. Some delegations even tried to remove any reference to it from the treaty, but in the end the right to property and its social function were included in the approved text of the Convention.<sup>17</sup> Because the implementation of the Inter-American system has been mostly a Latin American affair, focused in a long and difficult struggle against military regimes, the human-rights community has considered the protection of property in the Americas as something sophisticated, even frivolous.<sup>18</sup> Even though the Inter-American Commission has considered Article 21 as a rule of customary international law<sup>19</sup>, the endemic mistrust towards foreign investment in Latin America has made both the Commission and Court somehow reluctant at the moment of interpreting and applying this right.<sup>20</sup>

As construed by the Inter-American Court, Article 21 refers to property in the traditional wide sense attached to the word, comprising tangible and intangible

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<sup>16</sup> Available at <<http://www.oas.org/juridico/english/Treaties/b-32.htm>> (last visited 30 June 2013).

<sup>17</sup> See *Comunidad Mayagna (Sumo) Awas Tingni c. Nicaragua*, I/A Court HR, Series C No. 79, Judgment, 31 August 2001, para. 145.

All judgments of the I/A Court HR are available in Spanish at <<http://www.corteidh.or.cr/casos.cfm>> (last visited 30 June 2013).

<sup>18</sup> Nikken (2009), 247.

See Tomuschat (2009), 639-40.

<sup>19</sup> 'Report on Nicaragua', Annual Report of the I/A Commission HR 1993.

See Davidson (1998), 276.

<sup>20</sup> Nikken (2009), 247.

assets.<sup>21</sup> This is a rather broad interpretation, which includes the private and communal property of indigenous peoples.<sup>22</sup> *Ivcher* was the first claim of indirect expropriation settled by the Court.<sup>23</sup> It involved a naturalised Peruvian citizen who owned a television network, where he had been denouncing serious violations of human rights and acts of corruption. In conformity to a domestic statute, owners of telecommunications media companies in Perú must be of this nationality. Based on this norm, the Peruvian state annulled Mr. Ivcher's nationality in order to remove him from the editorial control of his television network. As a consequence, a judicial resolution suspended the exercise of the applicant's rights in the company and revoked his appointment as a director and chairman. Mr. Ivcher was prevented from transferring his shares and receiving dividends, and from taking part in board meetings, where the minority shareholders took important decisions, like increasing the company's capital. This judicial measure even prevented Mr. Ivcher's wife, co-

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<sup>21</sup> See *Baruch Ivcher Bronstein c. Perú*, I/A Court HR, Series C No. 74, Judgment, 6 February 2001, paras. 122; *Comunidad Mayagna*, Judgment, 31 August 2001, para. 144; *Cinco Pensionistas c. Perú*, I/A Court HR, Series C No. 98, Judgment, 28 February 2003, para. 103; *Comunidad Indígena Yakye Axa c. Paraguay*, I/A Court HR, Series C No. 125, Judgment, 17 June 2005, para. 137; *Humberto Palamara Iribarne c. Chile*, I/A Court HR, Series C No. 135, Judgment, 22 November 2005, para. 102; *Comunidad Indígena Sawhoyamaxa c. Paraguay*, I/A Court HR, Series C No. 146, Judgment, 29 March 2006, para. 121; *Familia Barrios c. Venezuela*, I/A Court HR, Series C No. 237, Judgment, 24 November 2011, para. 148; and *Alicia Barbani Duarte y otros c. Uruguay*, I/A Court HR, Series C No. 234, Judgment, 13 October 2011, para. 237.

<sup>22</sup> See *Comunidad Mayagna*, Judgment, 31 August 2001, paras. 148-9 & 151; *Comunidad Moiwana c. Suriname*, I/A Court HR, Series C No. 124, Judgment, 15 June 2005, paras. 129-34; *Comunidad Yakye Axa*, Judgment, 17 June 2005, paras. 135-7; *Comunidad Sawhoyamaxa*, Judgment, 29 March 2006, paras. 118-21; *Comunidad Indígena Xákmok Kásek c. Paraguay*, I/A Court HR, Series C No. 214, Judgment, 24 August 2010, paras. 85-7 & 109-13; and *Pueblo Indígena Kichwa de Sarayaku c. Ecuador*, I/A Court HR, Series C No. 245, Judgment, 27 June 2012, paras. 145-8 & 171.

On the relation between private property and the communal property of indigenous peoples, see *Comunidad Yakye Axa*, Judgment, 17 June 2005, paras. 143-51; *Comunidad Sawhoyamaxa*, Judgment, 29 March 2006, paras. 126-41; and *Comunidad Xákmok Kásek*, Judgment, 24 August 2010, paras. 110-3.

See also Nikken (2009), 261-5.

See generally J Anaya and R Williams, 'The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System', (2001) 14 *Harv. HRJ* 33; M del Toro, 'El derecho de propiedad colectiva de los miembros de comunidades y pueblos indígenas en la jurisprudencia de la Corte Interamericana de Derechos Humanos', (2010) 10 *AMDI* 49; and F Forero, 'Conectividad: alcances del derecho a la propiedad aborígen y tribal en la jurisprudencia de la Corte Interamericana de Derechos Humanos', (2010) 16 *IL-RCDI* 177.

<sup>23</sup> See *Ivcher Bronstein*, I/A Court HR, Judgment, 6 February 2001.

owner of the shares, from enforcing her rights.<sup>24</sup> The case was submitted to the Inter-American Court by the Commission, following the two-tier procedure established in the Convention. Implicitly endorsing the concept of indirect expropriation, and quoting the case-law of the European Court of Human Rights, the Inter-American Court said:

To determine whether Mr. Ivcher was deprived of his property, the Court should not restrict itself to evaluating whether a formal dispossession or expropriation took place, but should look beyond mere appearances and establish the real situation behind the situation that was denounced.<sup>25</sup>

The tribunal found no evidence of public utility or social interest in the domestic judicial decision that prevented Mr. Ivcher from exercising his property rights. Moreover, the tribunal found no indication that the applicant received compensation for the deprivation of the enjoyment and use of his property, or that the measure that affected him was adopted satisfying the minimum requirements of due process of law.<sup>26</sup> Mr. Ivcher's deprivation of property was thus considered inappropriate, arbitrary and in breach of Article 21 of the American Convention.<sup>27</sup> In the words of Francisco Orrego:

It was [...] held that although the claimant was not deprived of his property of company shares, he was in fact deprived by judicial decision of the fundamental rights associated with such property, namely the right to vote in the company and to receive dividends.<sup>28</sup>

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<sup>24</sup> *Ivcher Bronstein*, I/A Court HR, Judgment, 6 February 2001, paras, 125-7.

<sup>25</sup> *Ivcher Bronstein*, I/A Court HR, Judgment, 6 February 2001, para, 124.

The Inter-American Court made reference to *Belvedere Albergheria S.R.L. v. Italy*, Eur. Court HR, Reports of Judgments and Decisions 2000-VI, Judgment, 30 May 2000, para. 53.

<sup>26</sup> *Ivcher Bronstein*, I/A Court HR, Judgment, 6 February 2001, para, 130.

<sup>27</sup> *Ivcher Bronstein*, I/A Court HR, Judgment, 6 February 2001, paras, 130-1.

<sup>28</sup> F Orrego Vicuña, 'Carlos Calvo, Honorary NAFTA Citizen', (2002) 11/I *NYU ELJ* 19, at 22.

### 3.1.2. *Deprivations and encroachments*

The Inter-American Court dealt again with a dispute involving a taking in *Salvador*.<sup>29</sup> Although this case referred mostly to the payment of just compensation, it is important for the link expressly made by the Court between the notions of expropriation and fair balance or proportionality. *Salvador* was submitted by the Commission against Ecuador, and referred to the situation of two of its nationals: a sister acting on behalf of her dead brother. Both had inherited land from their father in Quito. The municipal authorities of the city declared its expropriation for public utility, and occupied the property. The Salvador brothers presented several claims before state authorities against this measure, asking for a just compensation in conformity with Ecuadorian law and the American Convention of Human Rights, to no avail.<sup>30</sup> In its judgment, the Inter-American Court started by recognising the broad notion of property in Article 21, comprising tangibles and intangibles.<sup>31</sup> It then related the protection of this right with the concept of proportionality, as developed in the case-law of the European Court of Human Rights. According to the Inter-American Court:

The right to property must be understood within the context of a democratic society, where there must be proportional measures that guarantee individual rights, if the public welfare and collective rights are to prevail. The social function of property is a fundamental element for its functioning. For this reason, the State can limit or restrict the right to property to guarantee other fundamental rights of vital relevance in a specific society, always respecting Article 21 of the Convention, and the general principles of international law.<sup>32</sup>

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<sup>29</sup> See *María y Julio Guillermo Salvador Chiriboga c. Ecuador*, I/A Court HR, Series C No. 179, Judgment, 6 May 2008.

<sup>30</sup> *Salvador Chiriboga*, I/A Court HR, Judgment, 6 May 2008, paras. 1-4, 6 & 50.

<sup>31</sup> *Salvador Chiriboga*, I/A Court HR, Judgment, 6 May 2008, para. 55.

<sup>32</sup> *Salvador Chiriboga*, I/A Court HR, Judgment, 6 May 2008, para. 60.

See *Comunidad Yakye Axa*, Judgment, 17 June 2005, paras. 144-5; and *Comunidad Sawhoyamaya*, Judgment, 29 March 2006, para. 212.

The Court was clear in this point. There must be a fair balance between the interests of the society and those of the individual. For that purpose, the state has to employ proportional means.<sup>33</sup> Quoting the European Court of Human Rights, the tribunal insisted in the notion of lawfulness, by which the legislation that regulates a deprivation of the right to property must be clear, specific and foreseeable.<sup>34</sup> For the Inter-American Court, a law depriving or restricting property must respect the essential content of this right.<sup>35</sup>

In *Salvador*, there was no conflict between the parties regarding the “public utility or social interest” that had motivated the municipal authorities of Quito to expropriate the claimants’ land. The state wanted to create a metropolitan park, aimed at the recreation and ecological protection of the city.<sup>36</sup> Regarding this point, the Court emphasised that:

[...] in relation to the deprivation of the right to property [...] a legitimate or general interest based on the protection of the environment as the one seen in this case, represents a cause of legitimate public use.<sup>37</sup>

In this respect, the Inter-American Court equated the concepts of “public utility or social interest” used in Article 21 of the Convention to that of common good, understood as:

a concept that must be interpreted as an integral element of the public order of a democratic state, the main purpose of which is [in conformity with the American Declaration of the Rights and Duties of Man] ‘the protection of the essential rights

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<sup>33</sup> *Salvador Chiriboga*, I/A Court HR, Judgment, 6 May 2008, paras, 63 & 75.

<sup>34</sup> *Salvador Chiriboga*, I/A Court HR, Judgment, 6 May 2008, para, 64.

The Inter-American Court cited the following cases: *Beyeler v. Italy*, Eur. Court HR, Reports of Judgments and Decisions 2000-I, Judgment, 5 January 2000, paras. 108-9; *Carbonara and Ventura v. Italy*, Eur. Court HR, Reports of Judgments and Decisions 2000-VI, Judgment, 30 May 2000, para. 65; *Belvedere*, Eur. Court HR, Judgment, 30 May 2000, para. 58; and *Velikovi and others v. Bulgaria*, Eur. Court HR, Judgment, 15 March 2007, para. 166.

<sup>35</sup> *Salvador Chiriboga*, I/A Court HR, Judgment, 6 May 2008, para. 65.

<sup>36</sup> *Salvador Chiriboga*, I/A Court HR, Judgment, 6 May 2008, paras. 67 & 76.

<sup>37</sup> *Salvador Chiriboga*, I/A Court HR, Judgment, 6 May 2008, para. 76.

of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness'.<sup>38</sup>

The conflict in *Salvador* had to do with the payment of a just compensation. The Court considered this requirement to be a derivation of the need to balance the social and the individual interests. It described the compensation requirement as “prompt, adequate and effective”, quoting the case-law of the Iran-US CT (*INA*).<sup>39</sup> In the end, the Inter-American Court concluded that, even though the aim of the expropriation was legitimate, Ecuador did not respect the requirements established in the American Convention, thus not complying with the principle of lawfulness. As a consequence, the expropriatory process was considered arbitrary.<sup>40</sup> The Court concluded that Article 21 had been violated by Ecuador.<sup>41</sup>

In his concurring vote, Judge Manuel Ventura further developed the notion of fair balance between the interests of the society and the individual. He considered this notion to be useful for “the determination of a violation of the right to property, resulting from the lack of proportionality of the means used by the state to restrict such rights”, on one hand, and for “the appraisal of a fair compensation in the specific case”, on the other.<sup>42</sup> In his opinion, the state should use the less costly means to the right to property, every time it decides to limit it.<sup>43</sup> Quoting the European Court of Human Rights, he added that:

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<sup>38</sup> *Salvador Chiriboga*, I/A Court HR, Judgment, 6 May 2008, para. 74.

<sup>39</sup> *Salvador Chiriboga*, I/A Court HR, Judgment, 6 May 2008, para. 96.

See *INA Corporation, v. The Government of the Islamic Republic of Iran*, Iran-US CT, Award No. 184-161-1, 13 August 1985, (1987) 8 *Iran-US CTR* 373.

See Chapter 4 *infra*.

<sup>40</sup> *Salvador Chiriboga*, I/A Court HR, Judgment, 6 May 2008, paras. 113 & 116-7.

<sup>41</sup> *Salvador Chiriboga*, I/A Court HR, Judgment, 6 May 2008, paras. 114 & 118.

<sup>42</sup> *Salvador Chiriboga*, I/A Court HR, Judgment, 6 May 2008, Concurring Vote of Judge Ventura, para. 3.

<sup>43</sup> *Salvador Chiriboga*, I/A Court HR, Judgment, 6 May 2008, Concurring Vote of Judge Ventura, para. 6.

[a]ll limitation, necessarily must entail a reasonable relation of proportionality between the means employed and the aim sought to be realized by any measures applied by the State, including measures designed to control the use of the individual's property.<sup>44</sup>

Outside the Americas, Article 14 of the 1981 African Charter on Human and Peoples' Rights also establishes the right of expropriation by implication.<sup>45</sup> The terms of this provision are broad. In conformity with it, not only “[t]he right to property shall be guaranteed”, but also “[i]t may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws”.<sup>46</sup> Like Article 1 of the First Optional Protocol to the European Convention, and contrary to Article 21 of the American Convention, Article 14 does not refer explicitly to the payment of compensation in any form. The few pronouncements of the African Commission on Human and Peoples’ Rights regarding this provision relate with the state’s sealing up of premises of publications.<sup>47</sup> In *Media Rights Agenda*, the African Commission found a violation to the right protected by Article 14 in these terms:

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<sup>44</sup> *Salvador Chiriboga*, I/A Court HR, Judgment, 6 May 2008, Concurring Vote of Judge Ventura, para. 8.

Judge Ventura made reference to *Hutten-Czapska v Poland*, Eur. Court HR, Judgment, 22 February 2005, para. 93.

In his concurring vote, Judge Ventura also cited the following cases of the European Court: *Sporrong and Lönnroth v. Sweden*, Eur. Court HR, Series A No. 52, Judgment, 23 September 1982; *James and Others v. United Kingdom*, Eur. Court HR, Series A No. 98, Judgment, 21 February 1986; *Papamichalopoulos and Others v. Greece*, Eur. Court HR, Series A No. 260-B, Judgment, 24 June 1993; *Matos e Silva Lda. and others v. Portugal*, Eur. Court HR, Reports of Judgments and Decisions 1996-IV, Judgment, 16 September 1996; *Belvedere*, Eur. Court HR, Judgment, 30 May 2000; and *Jahn and others v. Germany*, Eur. Court HR, Judgment, 30 June 2005.

<sup>45</sup> This treaty is in force since 1986.

<sup>46</sup> Art. 14 of the African Charter on Human and Peoples' Rights is available at <<http://www1.umn.edu/humanrts/instree/z1afchar.htm>> (last visited 30 June 2013).

<sup>47</sup> See C Heyns, ‘Civil and Political Rights in the African Charter’, in M Evans and R Murray (eds.), *The African Charter on Human Rights and Peoples’: the System in Practice, 1986-2000* (2002), 174-5.

See also K Olaniyan, ‘Civil and Political Rights in the African Charter: Articles 8-14’, in M Evans and R Murray (eds.), *The African Charter on Human Rights and Peoples’ Rights: the System in Practice, 1986-2006* (2010), 238-41.

On the problems of the African system of human rights, see Tomuschat (2009), 640.

The right of property necessarily includes a right to have access to property of one's own and the right that one's property not be removed. The decrees which enabled these premises to be sealed up and for publications to be seized cannot be said to be 'appropriate' or in the interest of the public or the community in general. [...] In addition, the seizure of the magazines for reasons that have not been shown to be in the public need or interest also violates the right to property.<sup>48</sup>

This view was reaffirmed in *Constitutional Rights Project*, where the African Commission declared:

The government did not offer any explanation for the sealing up of the premises of many publications, but maintained the seizure in violation of direct court orders. [...] The right to property necessarily includes a right to have access to one's property and the right not to have one's property invaded or encroached upon. The Decrees which permitted the newspapers' premises to be sealed up and publications to be seized cannot be said to be 'appropriate' or in the interest of the public or the community in general. The Commission finds a violation of Article 14.<sup>49</sup>

### 3.2. The European Convention and Property

The right of property has been dubbed the problem child of the European family of rights and freedoms.<sup>50</sup> The earliest list of basic civil and political rights considered by the first drafting committee of the European Convention on Human Rights included it, but was later deleted on the suggestion that the right of property was not a fundamental requirement of a democratic society.<sup>51</sup> According to Robertson and Merrills, it was then clear that the inclusion of property would only be acceptable to Western socialist governments if the relevant provision would not

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<sup>48</sup> Communications 105/93, 128/94, 130/94 and 152/96, *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, African Commission HPR, 12<sup>th</sup> Activity Report 1998-99, Annex V, para. 77, in R Murray and M Evans (ed), *Documents of the African Commission on Human and Peoples' Rights* (2001), at 727.

<sup>49</sup> Communications 140/94, 141/94 and 145/95, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, African Commission HPR, 13<sup>th</sup> Activity Report 1999-2000, Annex V, para. 54, as quoted in M Evans and R Murray (2002), 175.

<sup>50</sup> D Anderson, 'Compensation for Interference with Property', (1999) 4/*VI Eur. HRLR* 543, at 545.

<sup>51</sup> See A Robertson and J Merrills, *Human Rights in Europe. A Study of the European Convention on Human Rights* (2001), 7-9; D Harris, M O'Boyle, C Warbrick and E. Bates, *Law of the European Convention on Human Rights* (2009), 655; and Tomuschat (2009), 638.

prevent states from nationalising private property.<sup>52</sup> The Council of Europe decided not to defer the signature of the Convention until an agreement on an acceptable wording for this right, and those of education and to free elections, would be reached.<sup>53</sup> The right of property was, therefore, not included in the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>54</sup> The aim of this treaty was to encourage a cohesive democratic bloc of states that would serve as a buttress against communism and the resurgence of national-socialism.<sup>55</sup> The Convention had to be endorsed as a minimum standard of treatment, and for that it had to reflect the views of the members of the Council of Europe, which ranged from capitalist to socialist states. For this purpose, its drafters tried to include those core values that create and maintain a democratic society, while at the same time respecting the political, social and economic differences of the parties, present at the moment of its signature.<sup>56</sup>

Two years later, however, an agreement on the wording of the protection of property was reached. Incorporated in Article 1 of the First Optional Protocol to the European Convention, it said:

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

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<sup>52</sup> Robertson and Merrills (2001), 12.

See T Allen, *Property and The Human Rights Act 1998* (2005), 17-28; and T Allen, 'Compensation for Property under the European Convention of Human Rights', (2007) 28/II *Mich. JIL* 287, at 291.

<sup>53</sup> See *ibid.*, 12-3.

<sup>54</sup> This treaty entered into force in 1953.

<sup>55</sup> H Mountfield, 'Regulatory Expropriations in Europe: The Approach of the European Court of Human Rights', (2003) 11/I *NYU ELJ* 136, at 138.

<sup>56</sup> See Mountfield (2003), 138-9.

accordance with the general interest or to secure the payment of taxes or other contributions or penalties.<sup>57</sup>

This provision contains a minimum standard of treatment and a general commitment to the rule of law.<sup>58</sup> The difficulties that surrounded the introduction of the right of property, among those protected by the European Convention, explain the fact that Article 1 neither mentions expropriation as such, nor expressly includes the right to be compensated. This right is only implied in the reference to general principles of international law regarding deprivations of property, a formula adopted as a compromise between those states in favour of mentioning compensation and those against it.<sup>59</sup> Despite all these difficulties, the problem child did come of age: Article 1 is, at present, the second most frequently invoked guarantee of the European Convention on Human Rights.<sup>60</sup>

### 3.2.1. *Interferences with a Right*

After its adoption, Article 1 was soon criticised in doctrine as an inadequate and excessively weak provision, establishing an economic and social entitlement rather than a proper right.<sup>61</sup> The European Court of Human Rights, however, has not

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<sup>57</sup> Signed in 1952, the First Protocol came into force in 1954. The European Convention and all its protocols are available at

<<http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>> (last visited 30 June 2013).

<sup>58</sup> See Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002), 3 & 152-3; and Allen (2007), 292-4.

<sup>59</sup> H Ruiz Fabri, 'The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for "Regulatory Expropriations" of the Property of Foreign Investors', (2003) 11/I *NYU ELJ* 148, at 151.

<sup>60</sup> After Art. 6, concerning the right to a fair hearing.

L Wildhaber and I Wildhaber, 'Recent Case Law on the Protection of Property in the European Convention on Human Rights', in Binder, C, et al (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009), 657.

<sup>61</sup> Mountfield (2003), 139-40.

shared this vision. According to it, by recognising the right to the peaceful enjoyment of possessions, Article 1 is in substance guaranteeing the right of property of both tangible and intangible assets. The wording of the other official version of the European Convention confirms the conclusion of the Court. In the French text, the first paragraph of Article 1 talks about “*biens*” and “*propriété*”, instead of “possessions”.<sup>62</sup> In this context, the European Commission and Court have interpreted this last word to include, for instance, contractual rights<sup>63</sup>, company shares<sup>64</sup>, goodwill in a business<sup>65</sup>, fishing rights<sup>66</sup>, patents<sup>67</sup>, and planning permissions.<sup>68</sup> As Luigi Condorelli explains, neither the Commission nor the Court have identified with precision the contours of the right of property, thus allowing the progressive enlargement of this legal concept according to the needs of an evolving society.<sup>69</sup> But such an approach is not limitless. The European Court, for example, has not considered the enjoyment of aesthetic or environmental qualities of

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See Anderson (1999), 545; and R Clayton and H Tomlinson, *The Law of Human Rights* (2000), 1302.

<sup>62</sup> See E Schwelb, ‘The Protection of the Right of Property of Nationals under the First Protocol to the European Convention on Human Rights’, (1964) 13/IV *AJCL* 518, at 519-20; B Wortley, ‘Some Early But Basic Theories of Expropriation’, (1977) 20 *GYIL* 236, at 238; and G Gretton, ‘The Protection of Property Rights’, in A Boyle et al (eds.), *Human Rights and Scots Law* (2002), 276-7.

<sup>63</sup> See *A, B and Company AS v. Federal Republic of Germany*, Eur. Commission HR, No. 7742/76, (1978) 14 Decisions and Reports 146.

<sup>64</sup> See *Bramelid & Malmstrom v. Sweden*, Eur. Commission HR, Nos. 8588/79 and 8589/79, (1982) 29 Decisions and Reports 64.

<sup>65</sup> See *Van Marle and others v. Netherlands*, Eur. Court HR, Series A No. 101, Judgment, 26 June 1986.

<sup>66</sup> See *Baner v. Sweden*, Eur. Commission HR, No. 11763/85, (1989) 60 Decisions and Reports 128.

<sup>67</sup> See *Smith Kline and French Laboratories Ltd v. Netherlands*, Eur. Commission HR, No. 12633/87, (1990) 66 Decisions and Reports 70.

<sup>68</sup> See *Pine Valley Developments Ltd and others v. Ireland*, Eur. Court HR, Series A No. 222, Judgment, 29 November 1991.

See also Clayton and Tomlinson (2000), 1305-7; M Ruffert, ‘The Protection of Foreign Direct Investment by the European Convention on Human Rights’, (2000) 43 *GYIL* 116, at 222-3; Harris, O’Boyle, Warbrick and Bates (2009), 656-62; Tomuschat (2009), 646-7; Wildhaber and Wildhaber (2009), 659-64; and R White and C Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (2010), 481-8.

<sup>69</sup> L Condorelli, ‘Premier Protocole Additionnel. Article 1’, in L-E Pettiti, E Decaux and P-H Imbert (eds.), *La Convention Européenne des Droits de l’Homme* (1999), 975.

See U Kriebaum, ‘Is the European Court of Human Rights an Alternative to Investor-State Arbitration?’, in P Dupuy, F Francioni and E Petersmann, (eds.), *Human Rights in International Investment Law and Arbitration* (2009), 232-3.

possessions as guaranteed under Article 1.<sup>70</sup> The right to acquire property is also not protected by the Convention.<sup>71</sup>

The meaning given by the European Court to the term possessions is an autonomous one.<sup>72</sup> As a consequence, the determination of its existence in a specific situation is not affected by the non-recognition of an interest as a right or its legal qualification, when recognised, under the relevant municipal law.<sup>73</sup> Nevertheless, the correspondent applicant must demonstrate that his or her interest has an economic value. That is to say, what Richard Clayton and Hugh Tomlinson call a legal right to some benefit, even if is contingent upon satisfaction of certain conditions.<sup>74</sup> Expectations are generally not regarded as possessions because they lack the necessary degree of certainty or concreteness.<sup>75</sup> In some cases, the European Court has considered them within this concept, if they have a sufficient basis in national law.<sup>76</sup> Legitimate expectations must be of a nature more concrete than a mere hope.<sup>77</sup>

As stated in *Lelas*:

The Court considers that an individual acting in good faith is, in principle, entitled to rely on statements made by state or public officials who appear to have the requisite authority to do so, and that internal rules and procedures were complied

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<sup>70</sup> Clayton and Tomlinson (2000), 1307.

See P van Dijk, F van Hoof, A van Rijn and L Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (2006), 865-6.

<sup>71</sup> See *Marckx v. Belgium*, Eur. Court HR, Series A No. 31, Judgment, 13 June 1979, para. 63.

See also *Moskal v. Poland*, Eur. Court HR, Judgment, 15 September 2009, para. 38; and *Valkov and Others v. Bulgaria*, Eur. Court HR, Judgment, 25 October 2011, para. 84.

All judgments of the European Court are available at <<http://www.echr.coe.int/ECHR/EN/hudoc/>> (last visited 30 June 2013).

<sup>72</sup> *Gasus Dosier- und Fordertechnik GmbH v. Netherlands*, Eur. Court HR, Series A No. 306-B, Judgment, 23 February 1995, para. 53.

See *Broniowski v. Poland*, Eur. Court HR, Reports of Judgments and Decisions 2004-V, Judgment, 22 June 2004, para. 129.

<sup>73</sup> See Clayton and Tomlinson (2000), 1304; Ruiz Fabri (2003), 153; van Dijk et al (2006), 865-6; Harris, O'Boyle, Warbrick and Bates (2009), 658; Kriebaum (2009), 233; and Wildhaber and Wildhaber (2009), 658.

<sup>74</sup> Clayton and Tomlinson (2000), 1305.

See Kriebaum (2009), 233.

<sup>75</sup> Harris, O'Boyle, Warbrick and Bates (2009), 657-8.

<sup>76</sup> *Depalle v. France*, Eur. Court HR, Judgment, 29 March 2010, para. 63.

<sup>77</sup> *Sierpinski v. Poland*, Eur. Court HR, Judgment, 3 November 2009, para. 65.

with, unless it clearly follows from publicly accessible documents (including primary or subordinate legislation), or an individual was otherwise aware, or should have been aware, that a certain official lacked the authority to legally bind the State. It should not be incumbent on an individual to ensure that the state authorities are adhering to their own internal rules and procedures inaccessible to the public and which are primarily designed to ensure accountability and efficiency within a state authority. A State whose authorities failed to observe their own internal rules and procedures should not be allowed to profit from their wrongdoing and escape their obligations. In other words, the risk of any mistake made by state authorities must be borne by the State and the errors must not be remedied at the expense of the individual concerned, especially where no other conflicting private interest is at stake.<sup>78</sup>

Licences to serve alcoholic beverages<sup>79</sup> or to extract gravel<sup>80</sup>, among others, are considered to be included in Article 1 only if their lasting nature can reasonably be expected by the licence-holder.<sup>81</sup> From this perspective, claims can also be considered possessions.<sup>82</sup> This is, for instance, how the European Court construed in *Pressos Compania Naviera* the legitimate expectation that an unresolved claim will be decided in accordance with the general law.<sup>83</sup> Not surprisingly, pensions are considered within the notion of possessions, every time an individual satisfies the correspondent requirements for such a benefit.<sup>84</sup> In sum, as the European Court observed in *Kopecky*:

‘Possessions’ can be either ‘existing possessions’ or assets, including claims, in respect of which the applicant can argue that he or she has at least a ‘legitimate

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<sup>78</sup> *Lelas v. Croatia*, Eur. Court HR, Judgment, 20 May 2010, para. 74.

<sup>79</sup> *See Tre Traktörer Aktiebolag v. Sweden*, Eur. Court HR, Series A No. 159, Judgment, 7 July 1989.

<sup>80</sup> *See Fredin v. Sweden*, Eur. Court HR, Series A No. 192, Judgment, 18 February 1991.

<sup>81</sup> Clayton and Tomlinson (2000), 1305.

<sup>82</sup> *See e.g. Stran Greek Refineries and Stratis Andreadis v. Greece*, Eur. Court HR, Series A No. 301-B, Judgment, 9 December 1994, para. 62; *Gratzinger and Gratzingerova v. Czech Republic*, Eur. Court HR, Admissibility decision, 10 July, 2002, para. 69; and *Stretch v. United Kingdom*, Eur. Court HR, Judgment, 24 June 2003, para. 32.

In any case, the respective claim must be sufficiently established to be enforceable, and must have a basis in national law.

*See e.g. OAO Plodovaya Kompaniya v. Russia*, Eur. Court HR, Judgment, 7 June 2007, para. 27; *Lelas*, Judgment, 20 May 2010, para. 56; and *Maggio and Others v. Italy*, Eur. Court HR, Judgment, 3 May 2011, para. 54.

<sup>83</sup> *See Pressos Compania Naviera S.A. and others v. Belgium*, Eur. Court HR, Series A No. 332, Judgment, 20 November 1995.

*See also* Anderson (1999), 546.

<sup>84</sup> *Iwaszkiewicz v. Poland*, Eur. Court HR, Judgment, 26 June 2011, para. 41.

*See Grudić v. Serbia*, Eur. Court HR, Judgment, 14 April 2012, para. 72.

expectation' of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a 'possession' within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition.<sup>85</sup>

It took some time before the first case on Article 1 was decided by the European Court.<sup>86</sup> The increasingly complex regulations, derived from the market-oriented policies favoured in the continent during the last decades, and the establishment of the individual right of petition before the Court by Protocol 11 of the European Convention<sup>87</sup>, prompted a large and authoritative case-law on Article 1.<sup>88</sup> In conformity with this provision, state measures can interfere with the peaceful enjoyment of possessions in three different degrees. Deprivations, controls on the use of property, and other interferences have been identified by the European Court of Human Rights as distinct, but somehow connected rules.<sup>89</sup> The fact that these rules are related explains the general approach of the European Court when considering cases under Article 1. Because the second and third rules (deprivations and controls

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<sup>85</sup> *Kopecky v. Slovakia*, Eur. Court HR, Reports of Judgments and Decisions 2004-IX, Judgment, 28 September 2004, para. 35.

See *Viaşu c. Roumanie*, Eur. Court HR, Judgment, 9 December 2008, para. 58; and *Bulves AD v. Bulgaria*, Eur. Court HR, Judgment, 22 January 2009, para. 53 & 57.

On legitimate expectations and the European Court, see U Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State', (2007) 8/V *JWIT* 717, note 65 at 734; P De Sena, 'Economic and Non-Economic Values in the Case Law of the European Court of Human Rights', in P Dupuy, F Francioni and E Petersmann, (eds.), *Human Rights in International Investment Law and Arbitration* (2009), 210; and Wildhaber and Wildhaber (2009), 661-2.

<sup>86</sup> See *Handyside v. United Kingdom*, Eur. Court HR, Series A No. 24, Judgment, 7 December 1976.

The first case decided by the European Court concerning an interference with the property of a foreigner was *AGOSI*.

See *AGOSI v. United Kingdom*, Eur. Court HR, Series A No. 108, Judgment, 24 October 1986.

See also Kriebaum (2009), 217.

<sup>87</sup> In force since 1998.

<sup>88</sup> See Gretton (2002), 291.

<sup>89</sup> This test was first applied by the European Court in 1982.

See *Sporrong and Lönnroth*, Eur. Court HR, Judgment, 23 September 1982, para. 61.

See also *Holy Monasteries v. Greece*, Eur. Court HR, Series A No. 301-A, Judgment, 9 December 1994, para. 56; *Carbonara and Ventura*, Eur. Court HR, Judgment, 30 May 2000, para. 58; and *Jahn and others v. Germany*, Eur. Court HR, Judgment, 30 June 2005, para. 78.

See Clayton and Tomlinson (2000), 1302; Ruffert (2000), 120-1; Merrills and Robertson (2001), 235; Ruiz Fabri (2003), 152; van Dijk et al (2006), 864; Harris, O'Boyle, Warbrick and Bates (2009), 666; Wildhaber and Wildhaber (2009), 658; and White and Ovey (2010), 478.

on the use) are particular instances of the first rule (other interferences)<sup>90</sup>, the tribunal will start by establishing whether a deprivation or a control on the use of property has taken place.<sup>91</sup> Only if neither has occurred, will it study whether the state has interfered with this right in any other way.<sup>92</sup>

The European Court has recently stated that “the genuine, 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 give rise to positive obligations”.<sup>93</sup> In this sense, governments must act “in an appropriate manner and with utmost consistency” so that their measures are implemented “with reasonable clarity and coherence, in order to avoid, in so far as possible, legal uncertainty and ambiguity for the persons concerned by [them]”.<sup>94</sup> As the Court has expressly recognised, these positive duties of the state comprise a larger obligation: good governance.<sup>95</sup>

### 3.2.2. *Proportionality and Deprivations*

Under Article 1, the state can justify interferences with the right of property “in the public interest”, in relation with the second rule, and “in the general interest”, in

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<sup>90</sup> See e.g. *AGOSI*, Judgment, 24 October 1986, para. 48.

See also *James*, Eur. Court HR, Judgment, 21 February 1986, para. 37.

More recently, see *Adzhigovich v. Russia*, Eur. Court HR, Judgment, 8 October 2009, para. 25.

Deprivations and controls on use -the second and third rules- cover the three main legislative powers: the taking of private property for public use, the regulation of its use, and taxation.

Clayton and Tomlinson (2000), 1303.

<sup>91</sup> In both cases there has to be a reasonable and foreseeable national legal basis for the measure. Mountfield (2003), 141.

<sup>92</sup> See Allen (2005), 110-2; and White and Ovey (2010), 347.

<sup>93</sup> *Sierpinski*, Eur. Court HR, Judgment, 3 November 2009, para. 68.

See *Malysh and Others v. Russia*, Eur. Court HR, Judgment, 11 February 2010, para. 74.

<sup>94</sup> *Sierpinski*, Judgment, 3 November 2009, paras. 65-6.

<sup>95</sup> See *Moskal*, Eur. Court HR, Judgment, 15 September 2009, paras. 51 & 72; *Rysovskyy v. Ukraine*, Eur. Court HR, Judgment, 10 October 2011, paras. 70-1; and *Kapel v. Poland*, Eur. Court HR, Judgment, 2 October 2012, para. 75; and *Zofia Sikora v. Poland*, Eur. Court HR, Judgment, 4 December 2012, para. 62.

relation with the third rule. It is unlikely that any particular distinction was intended between public and general interest. The European Court has not attempted to distinguish them either.<sup>96</sup> Moreover, the tribunal has applied a single test for the three rules at the moment of establishing whether an interference is justified or not. Each will require the achievement of a fair balance between the interests of the community and those of the affected person.<sup>97</sup> For this purpose, the objectives of the correspondent measure must be proportional to the means actually used for their fulfilment. The idea is to avoid an excessive burden on the protected persons.<sup>98</sup> According to the tribunal, “[t]he issue of whether a fair balance has been struck becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary”.<sup>99</sup> In this regard, the Court explained in *Forminster* that:

[...] the character of interference, the aim pursued, the nature of property rights interfered with, and the behaviour of the applicant and the interfering State authorities are among the principle factors material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants.<sup>100</sup>

In the application of this test, the state has consistently been given a wide margin of appreciation or discretion –not only to identify the public or general interest involved, but also to assess the means chosen and their consequences or

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<sup>96</sup> Gretton (2002), 281.

<sup>97</sup> See Allen (2007), 294-8 & 305.

See e.g. *Sporrong and Lönnroth*, Eur. Court HR, Judgment, 23 September 1982, para. 69; *Holy Monasteries*, Eur. Court HR, Judgment, 9 December 1994, para. 70; and *Velosa Barreto v. Portugal*, Eur. Court HR, Series A No. 334, Judgment, 21 November 1995, para. 36.

<sup>98</sup> S Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (2009), 220.

This author, however, only considers the fair balance test to be applicable to the first and third rules: *i.e.*, to other interferences and controls on the use.

See *ibid.* 200 & 220.

<sup>99</sup> *Seryavin and Others v. Russia*, Eur. Court HR, Judgment, 10 January 2011, para. 107.

See *Beyeler*, Judgment, 5 January 2000, para. 107.

<sup>100</sup> *Forminster Enterprises Limited v. Czech Republic*, Eur. Court HR, Judgment, 9 October 2008.

effects.<sup>101</sup> The Court has declared that “regional planning and environmental conservation policies, where the community's general interest is pre-eminent, confer on the State a margin of appreciation that is greater than when exclusively civil rights are at stake”.<sup>102</sup> However wide the margin, the European Court has expressly said that it is not limitless –otherwise, the protection embodied in Article 1 would become illusory.<sup>103</sup> The margin, therefore, has to be construed -in the wording of this tribunal- “so as to guarantee to individuals that the essence of their rights is protected”.<sup>104</sup> The payment of compensation will generally play an important role in the determination of the proportionality of an interference with property.<sup>105</sup> The European Court openly declared so in *James*:

Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants.<sup>106</sup>

Given the common analytical approach adopted by this tribunal to all interventions with property, the practical relevance of the distinction among deprivations, controls on use, and other interferences lies in the payment of compensation.<sup>107</sup> According to the case-law of the European Commission and Court, controls on the use of property and other interferences do not create a right to

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<sup>101</sup> Clayton and Tomlinson (2000), 1314; and Arai-Takahashi (2002), 156-7.

On the margin of appreciation, *see generally* H Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (1995); Arai-Takahashi (2002); J García Roca, *El margen de apreciación nacional en la interpretación del Convenio Europeo de Derechos Humanos: soberanía e integración* (2010); and A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (2012).

<sup>102</sup> *Depalle*, Eur. Court HR, Judgment, 29 March 2010, para. 84.

<sup>103</sup> *Družstevni Záložna Pria and Others v. Czech Republic*, Eur. Court HR, Judgment, 31 July 2008, para. 93.

<sup>104</sup> *Ibid.*

<sup>105</sup> Anderson (1999), 548; and Ruffert (2000), 129.

*See* Allen (2007), 298-300; and Tomuschat (2009), 652-3.

<sup>106</sup> *James*, Eur. Court HR, Judgment, 21 February 1986, para. 54.

*See Perdigão v. Portugal*, Eur. Court HR, Judgment, 16 November 2010, para. 68.

*See also Curmi v. Malta*, Eur. Court HR, Judgment, 22 November 2011, paras. 42 & 48-9.

<sup>107</sup> Anderson (1999), 554.

compensation. If these are considered unlawful, however, the Court has repeatedly stated that they should be repaired, “putting the applicant [...] in the position in which it would have been had the violation not occurred”.<sup>108</sup> Only exceptionally will the European Court conclude that a total lack of compensation is justifiable.<sup>109</sup> In case of deprivation, the Commission and the Court have considered that the protection of Article 1 would be ineffective in the absence of a compensatory principle equivalent to that of European comparative law.<sup>110</sup> Full compensation is, nevertheless, not guaranteed in all circumstances.<sup>111</sup>

Expropriations are not mentioned as such in Article 1. In conformity with the second sentence of this provision, deprivations of property are permitted if the respective state measure is adopted in the public interest, subject to the conditions provided by national law, and by the general principles of international law. The European Court has considered the notion of deprivation to cover not only direct

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<sup>108</sup> *Zlinsat, Spol SRO v. Bulgaria*, Eur. Court HR, Judgment, 10 January 2008, para. 39. See Kriebaum (2009), 243.

According to the European Court, the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by an applicant. See e.g. *Hentrich v. France*, Eur. Court HR, Series A No. 296-A, Judgment, 22 September 1994; and *Bulves*, Eur. Court HR, Judgment, 22 January 2009.

<sup>109</sup> Wildhaber and Wildhaber (2009), 659. Cf. Tomuschat (2009), 654.

<sup>110</sup> See e.g. *Lithgow and others v. United Kingdom*, Eur. Court HR, Series A No. 102, Judgment 8 July 1986, para 120; *Baner*, Eur. Commission HR (1989); and *Pinnacle Meat Processors v. United Kingdom*, Eur. Commission HR, No. 33298/96, Admissibility decision, 21 October, 1998, (1998) 27 *Eur. HR Rep. CD* 217.

See also R Higgins, ‘The Taking of Property by the State: Recent Developments in International Law’, (1982) 176/III *RCADI* 259, at 360; Clayton and Tomlinson (2000), 1311-13; Ruffert (2000), 129 & 134-6; Mountfield (2003) 141-2; and M Perkams, ‘The Concept of Indirect Expropriation in Comparative Public Law – Searching for Light in the Dark’, in S Schill (ed.), *International Investment Law and Comparative Public Law* (2010), 112-3.

See generally Allen (2007).

<sup>111</sup> See e.g. *Holy Monasteries*, Eur. Court HR, Judgment, 9 December, 1994, para. 71; *J.A. Pye (Oxford) Ltd. and J.A. Pye (Oxford) Land Ltd. v. United Kingdom*, Eur. Court HR, Judgment, 30 August 2007, para. 54; and *Curmi*, Judgment, 22 November 2011, para. 41. See also Ruffert (2000), 129-30 & 136-8; and Wildhaber and Wildhaber (2009), 659.

takings of property, but also measures that amount to them.<sup>112</sup> The tribunal explained in *Sporrong and Lönnroth* that:

In the absence of a formal expropriation, that is to say a transfer of ownership, the Court [...] must look behind the appearances and investigate the realities of the situation complained of [...]. Since the Convention is intended to guarantee rights that are 'practical and effective' [...], it has to be ascertained whether that situation amounted to a de facto expropriation [...].<sup>113</sup>

According to Clare Ovey and Robin White, the extinction of the rights of the owner will be the main criterion at the moment of determining whether a deprivation has taken place.<sup>114</sup> Ursula Kriebaum points to a more accurate factor: there must not be any possible use or economic value of the property remaining.<sup>115</sup> However, not all acts producing this result will necessarily constitute an expropriation, for they may be treated as a control on the use of property.<sup>116</sup> Within this context, the destruction of property will be tantamount to a deprivation.<sup>117</sup> Temporary seizures of property will merely amount to a control on the use.<sup>118</sup> In any case, a deprivation requires the taking of the whole bundle of rights. If only some of these are taken, the Court's analysis will fall under the third and first rules: *i.e.*, as controls on the use, or other interferences.<sup>119</sup> The European Court has been cautious in finding that a measure amounts to a deprivation, when there is no formal extinction of legal rights, because the second rule requires a substantial interference with the enjoyment of possessions.<sup>120</sup> For this reason, a restriction of rights will not constitute an

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<sup>112</sup> *Fredin*, Eur. Court HR, Judgment, 18 February 1991, para. 42.

<sup>113</sup> *Sporrong and Lönnroth*, Eur. Court HR, Judgment, 23 September 1982, para. 63. This is the first description of an indirect taking given by the European Court. Wildhaber and Wildhaber (2009), 667.

<sup>114</sup> White and Ovey (2010), 488.

<sup>115</sup> Kriebaum (2009), 238-9.

<sup>116</sup> Clayton and Tomlinson (2000), 1308.

<sup>117</sup> See *e.g. Akdivar and others v. Turkey*, Eur. Court HR, Reports of Judgments and Decisions 1996-IV, Judgment, 16 September 1996, para. 88.

<sup>118</sup> See *e.g. Handyside*, Eur. Court HR, Judgment, 7 December 1976, para. 63.

<sup>119</sup> Wildhaber and Wildhaber (2009), 659.

<sup>120</sup> Clayton and Tomlinson (2000), 1308.

expropriation, though it might be considered another interference, under the residual category of Article 1.<sup>121</sup> In *Moskal*, the Court expressly related the concept of deprivation with that of good governance. The tribunal defined the latter as a principle that “requires that where an issue in the general interest is at stake it is incumbent on the public authorities to act in good time, in an appropriate manner and with utmost consistency”.<sup>122</sup> The European Court went on to state that:

[i]t is desirable that public authorities act with the utmost scrupulousness, in particular when dealing with matters of vital importance to individuals, such as welfare benefits and other property rights. In the instant case, the Court considers that having discovered their mistake the authorities failed in their duty to act in good time and in an appropriate and consistent manner.<sup>123</sup>

### 3.3. Not Only Expropriations

Directly related with the fair balance test is the notion of public interest. In conformity with the second sentence of Article 1, the measure resulting in a deprivation must be aimed at this objective. Although there is no conventional

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The approach of the European Court of Justice to the problem of indirect takings has been similar to that of the European Court of Human Rights.

See Allen (2005), 15-6; UNCTAD, *Investment Provisions in Economic Integration Agreements* (2006), 109-10; B De Witte, ‘Balancing of Economic Law and Human Rights by the European Court of Human Rights’, in P Dupuy, F Francioni and E Petersmann, (eds.), *Human Rights in International Investment Law and Arbitration* (2009), 199-201; and Perkams (2010), 138-47.

See also e.g. *J Nold, Kohlen-und Baustoffgroßhandlung v Commission of the European Communities*, ECJ, Case 4-73, Judgment, 14 May, 1974; *Liselotte Hauer v Land RheinlandPfalz*, ECJ, Case 44/79, Judgment 13 December, 1979; *SA Biovilac NV v European Economic Community*, ECJ, Case 59/83, Judgment, 6 December 1984; and *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, ECJ, Case 5/88, Judgment, 13 July 1989.

These judgments are available at <<http://eur-lex.europa.eu/en/index.htm>> (last visited 30 June 2013).

<sup>121</sup> See e.g. *Matos e Silva Lda. and others v. Portugal*, Eur. Court HR, Reports of Judgments and Decisions 1996-IV, Judgment, 16 September 1996, paras. 79 & 85.

*Papamichalopoulos, Hentrich, Pressos Compania Naviera, and Guiso-Gallisay* are good examples of cases in which the European Court of Human Rights found a deprivation of property, in the form of an indirect expropriation.

See *Papamichalopoulos and Others v. Greece*, Eur. Court HR, Series A No. 260-B, Judgment, 24 June 1993; *Hentrich*, Eur. Court HR, Judgment, 22 September 1994; *Pressos*, Eur. Court HR, Judgment, 20 November 1995; and *Guiso-Gallisay v. Italy*, Eur. Court HR, Judgment, 8 December 2005.

<sup>122</sup> *Moskal*, Eur. Court HR, Judgment, 15 September 2009, para. 51.

<sup>123</sup> *Ibid.*, para.72.

definition of such a term, the European Court of Human Rights has considered it to be similar to that of general interest, known in international law as public purpose.<sup>124</sup> This condition will require a balancing of the individual and collective concerns.<sup>125</sup> As Rosalyn Higgins notes, the object of the test is to differentiate takings for purely private gain on the part of the ruler, from those adopted for reasons related to the economic and social preferences of the country concerned.<sup>126</sup> The second sentence of Article 1 adds that an expropriatory measure must be subject to the conditions established in municipal law. This means that any taking in breach of domestic norms amounts to a violation of Article 1<sup>127</sup>: the act of deprivation adopted by the state must have a basis in municipal rules. The European Court has considered this condition not merely to refer back to domestic norms, but also to the quality of these rules, “requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention”.<sup>128</sup>

Besides expropriations, Article 1 comprises two more rules. The second paragraph of this provision refers to state measures that fall short of deprivation, but interfere with the right of property to a higher degree than those established in the first sentence of this provision. The power of the state to enforce those laws that are necessary to control the use, enjoyment or disposition of property in conformity with the general interest<sup>129</sup>, or to secure the payment of taxes, is wide. So is its margin of appreciation to judge the necessity of the measure adopted, from the standpoint of

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<sup>124</sup> Ruiz Fabri (2003), 158.

*See* Higgins (1982), 371; Anderson (1999), 547; and De Sena (2009), 212.

<sup>125</sup> White and Ovey (2010), 491.

<sup>126</sup> Higgins (1982), 371.

<sup>127</sup> White and Ovey (2010), 491.

<sup>128</sup> *Malone v. United Kingdom*, Eur. Court HR, Series A No. 82, Judgment, 2 August 1984, para. 67.

<sup>129</sup> *See* Allen (2005), 119.

the principle of fair balance.<sup>130</sup> The European Court will focus on the establishment of a reasonable relationship of proportionality between the means employed and the aim sought to be realised by the respective state, applying a lax standard to controls on the use, thus allowing national authorities a wider margin of appreciation than for deprivations of property.<sup>131</sup> The distinction between deprivations and controls on the use is not always easy. According to Pieter van Dijk, Fried van Hoof and Arjen van Rijn, when property is clearly affected by a state measure and it is not possible to identify a deprivation or a control on its use, the European Court will decide the respective case in conformity with the rule laid down in the first sentence of Article 1.<sup>132</sup> Other interferences are, therefore, a residual category in this provision.<sup>133</sup>

### 3.3.1. *Public Interest and Lawfulness*

The European Court has given the state great autonomy when adopting measures that interfere with the right of property. For the tribunal there is almost a presumption that a national measure is in the public interest.<sup>134</sup> This explains its reluctance to review the identification of the collective interest involved made by the

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<sup>130</sup> Clayton and Tomlinson (2000), 1317.

<sup>131</sup> Arai-Takahashi (2002), 151-2.

See Clayton and Tomlinson (2000), 1303 & 1314.

See e.g. *AGOSI*, Eur. Court HR, Judgment, 24 October 1986, para. 52; *Allan Jacobsson v. Sweden*, Eur. Court HR, Series A No. 163, Judgment, 25 October 1989, para. 55; *Mellacher and others v. Austria*, Eur. Court HR, Series A No. 169, Judgment, 19 December 1989, para. 48; and *Spadea and Scalabrino v. Italy*, Eur. Court HR, Series A No. 315-B, Judgment, 28 September 1995, para. 33.

<sup>132</sup> Van Dijk et al (2006), 873; and A Mowbray, *Cases and Materials on the European Convention on Human Rights* (2007), 924.

<sup>133</sup> Anderson (1999), 546; and Gretton (2002), 278.

<sup>134</sup> White and Ovey (2010), 492.

state adopting the respective measure.<sup>135</sup> In early cases related with takings of property, the European Commission and Court held that states had an unlimited right to determine the necessity of such deprivation.<sup>136</sup> This almost absolute right has been replaced by the wide margin of appreciation illustrated in *James*.<sup>137</sup> The applicants were trustees, acting under a will, of an area in central London where a large estate was developed. A leasehold law conferred rights of acquisition to the occupants of the estate. A number of them exercised this right and deprived the trustees of their ownership in a number of properties. The applicants claimed that this compulsory transfer gave rise to a violation of Article 1. In essence, the applicants were complaining against the terms and conditions of the contested legislation, not against the manner of execution of the law by a state authority.<sup>138</sup> From this perspective, the European Court started its analysis of the situation by declaring that:

a deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be 'in the public interest'. Nonetheless, the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest.<sup>139</sup>

The Court declared in *James* that a taking of property, in pursuance of a policy calculated to enhance social justice within the community, can be properly described as being in the public interest. It even stated that an expropriation adopted in pursuance of a legitimate policy may be in such an interest, even if the community at large has no direct use or enjoyment of the property taken.<sup>140</sup> The Court's general view on the margin of appreciation was clearly expressed in this case. It provides a

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<sup>135</sup> See Clayton and Tomlinson (2000), 1315; Arai-Takahashi (2002), 157-8; Mountifield (2003), 140; van Dijk et al (2006), 879-81; Harris, O'Boyle, Warbrick and Bates (2009), 667; and White and Ovey (2010), 492.

<sup>136</sup> Ruiz Fabri (2003), 158, at note 48.

<sup>137</sup> *James*, Eur. Court HR, Judgment, 21 February 1986.

<sup>138</sup> *James*, Eur. Court HR, Judgment, 21 February 1986, para. 36.

<sup>139</sup> *Ibid.*, para. 40.

<sup>140</sup> *Ibid.*, paras. 41 & 45.

guideline on how to approach other cases involving deprivations of property for public purpose:

Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken [...].

Furthermore, the notion of 'public interest' is necessarily extensive. In particular, as the Commission noted, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation.<sup>141</sup>

In other words, national authorities know the needs of their societies better.<sup>142</sup>

This extensive conception of public purpose makes it difficult for a tribunal to deny the general interest claimed by the state adopting a measure that deprives someone of his/her/its property.<sup>143</sup> On this basis, for instance, the European Court found that the leasehold law involved in *James* was compatible with Article 1. This margin, although considerable, is not without restrictions. As the European Court declared in *Broniowski*, "the exercise of the State's discretion, even in the context of the most complex reform of the State, cannot entail consequences at variance with Convention standards".<sup>144</sup> Hélène Ruiz Fabri concludes that:

[t]he Court's review is limited in practice to verifying whether, in the abstract, the deprivation of property has pursued a legitimate aim in the public interest. This means that any probing judicial review will focus on other criteria.<sup>145</sup>

Article 1 not only requires deprivation be in the public interest, but also subject to the conditions provided for by law and by the general principles of international

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<sup>141</sup> *Ibid.*, para. 46.

<sup>142</sup> Ruiz Fabri (2003), 158.

<sup>143</sup> *Ibid.*, 159.

<sup>144</sup> *Broniowski*, Eur. Court HR, Judgment, 22 June 2004, para 183.

<sup>145</sup> Ruiz Fabri (2003), 159.

law. As a consequence, national law should be adequately accessible and sufficiently precise.<sup>146</sup> In addition, it must have foreseeable consequences, and the taking itself should be surrounded by basic procedural safeguards.<sup>147</sup> Whether the deprivation is subject to the conditions provided by municipal law requires a case-by-case analysis, where the European Court will only look for manifest violations of domestic norms.<sup>148</sup> However, it will not examine the correct application of national law. In this respect, the European Court will refer to the judgment of the relevant domestic court in order not to function as a “fourth instance”.<sup>149</sup> In *Guiso-Gallisay*, the European Court reiterated its views on lawfulness. It declared that this principle “presupposes that the provisions of domestic law are sufficiently accessible, precise and foreseeable in their application”.<sup>150</sup> The tribunal considered legal certainty as an element of the rule of law.<sup>151</sup>

As to the general principles of international law mentioned in the second sentence of Article 1, these entitle non-nationals to protection against arbitrary expropriations by the host-state in the form of compensation for the loss of their property.<sup>152</sup> Ruiz Fabri explains that a special reference to those principles was the result of a compromise between states which refused any mention of compensation,

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<sup>146</sup> *Lithgow*, Eur. Court HR, Judgment, 8 July 1986, para. 110.

<sup>147</sup> *Hentrich*, Eur. Court HR, Judgment 22 September 1994, para. 42.

*E.g.*, the availability of procedural remedies to prevent the arbitrary adoption and exercise of state measures.

*See De Sena* (2009), 215-6.

<sup>148</sup> Ruiz Fabri (2003), 159, at note 57.

*See Allen* (2005), 95.

<sup>149</sup> van Dijk et al (2006), 885.

<sup>150</sup> *Guiso-Gallisay v. Italy*, Eur. Court HR, Judgment, 8 December 2005, para 82.

<sup>151</sup> *See ibid.*, paras. 82 & 93.

*See also Minsayan and Semerjyan v. Armenia*, Eur. Court HR, Judgment, 23 June 2009, paras. 66-7; and *Malysk*, Judgment, 11 February 2010, para. 82; *Seryavin*, Judgment, 10 January 2011, para. 40.

<sup>152</sup> *See White and Ovey* (2010), 492.

*See also Anheuser-Busch, Inc. v. Portugal*, Eur. Court HR, Judgment, 11 January 2007, Dissenting Opinion of Judges Caflisch and Cabral Barreto, para. 9.

and states which desired such a mention.<sup>153</sup> The case-law of the Court generally describes a form of protection that is very close to the requirements of the principles of international law.<sup>154</sup> Nevertheless, the standard of compensation is only incorporated for cases of deprivation, not for those related with controls on the use or other interferences with property.<sup>155</sup> As a consequence, Article 1 would strongly imply that there is no such duty for normal state regulation.<sup>156</sup> Unjustified expropriations, however, should be compensated.<sup>157</sup>

The European Court has concluded that a reference to the general principles of international law does not entitle nationals of the expropriating state to this protection.<sup>158</sup> While such an approach conforms to the minimum standard enjoyed by foreigners under international law, it contradicts the equal application of human rights law in the host-state.<sup>159</sup> It also runs counter the European Convention itself, for Article 14 expressly prohibits discrimination in the enjoyment of its substantive rights on grounds of national origin. The reason for this position was explained in *James*, in the following terms:

Especially as regards a taking of property effected in the context of a social reform, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.<sup>160</sup>

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<sup>153</sup> Ruiz Fabri (2003), 151.

<sup>154</sup> *Ibid.*, 173.

<sup>155</sup> See Higgins (1982), 360; Clayton and Tomlinson (2000), 1313; and Mountfield (2003), 141-2.

<sup>156</sup> K Yannaca-Small, 'Indirect Expropriation and the Right to Regulate: How to Draw the Line?', in Yannaca-Small, K (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (2010), 452.

<sup>157</sup> Kriebaum (2009), 240.

<sup>158</sup> See Anderson (1999), 549.

<sup>159</sup> See e.g. Schwelb (1964), 520-32 & 541.

<sup>160</sup> *James*, Eur. Court HR, Judgment, 21 February 1986, para. 63.

See *Lithgow*, Eur. Court HR, Judgment 8 July 1986, paras. 111-9.

The tribunal confirmed their exclusion from Article 1 by referring to the *travaux préparatoires* of the Protocol.<sup>161</sup> Consequently, there would be no compensation for the deprivations of the property of nationals of the host-state: at least, in theory. But due to the application of the fair balance test, their position is rarely (if ever) less favourable than that of non-nationals.<sup>162</sup> The sum paid as compensation is part of the proportionality assessment of the state measure.<sup>163</sup> As the European Court declared in *Holy Monasteries*:

the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 only under exceptional circumstances.<sup>164</sup>

Regarding the standard of compensation in case of deprivation, the Court has not followed international law. While according to the latter, the alien is entitled to a prompt, adequate and effective compensation of the value of his/her/its property taken, Article 1 requires neither this standard nor the same level of compensation for every category of deprivation.<sup>165</sup> In principle, the corresponding amount must be reasonably related to the value of the property taken.<sup>166</sup> Nevertheless, the European Court will give the state a wide margin of appreciation when it comes to this. That is to say, it will respect the judgment of the domestic authorities on the terms and conditions of the compensation, unless it is manifestly without reasonable

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Interestingly enough, the European Court had not found an expropriation of a foreigner by 2009. See Kriebaum (2009), 241-2.

<sup>161</sup> *James*, Eur. Court HR, Judgment, 21 February 1986, para. 64.

Cf. Schwelb (1964), 532-41.

<sup>162</sup> Anderson (1999), 549; De Sena (2009), 214 & 217; and Tomuschat (2009), 652-3.

<sup>163</sup> Kriebaum (2009), 240-1.

See Wildhaber and Wildhaber (2009), 672-3.

<sup>164</sup> *Holy Monasteries*, Eur. Court HR, Judgment, 9 December 1994, para. 71.

<sup>165</sup> Harris, O'Boyle, Warbrick and Bates (2009), 681.

<sup>166</sup> Kriebaum (2009), 240.

foundation.<sup>167</sup> For this purpose, the European Court will distinguish between nationalisations and other forms of takings, as the state's margin of appreciation appears to be wider in the former. The tribunal explained its view on the subject in *Lithgow*:

Article 1 (P1-1) does not [...] guarantee a right to full compensation in all circumstances, since legitimate objectives of 'public interest', such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.<sup>168</sup>

The proportionality test is not used in European human rights law to decide whether an expropriation has occurred, but to establish a fair balance between the interests of the state and the affected person. As a result, the application of this test can lead to the payment of an amount which is less than the fair market value of the respective property.<sup>169</sup> In any case, compensation must be adequate. This is, it should take into account the damage arising from the length of the deprivation, and be paid within a reasonable time.<sup>170</sup> Excessive delays in receiving final compensation by those deprived of their property will amount to a breach of the fair balance requirement.<sup>171</sup>

### 3.3.2. Controls on the Use, Other Interferences

The second paragraph of Article 1 refers to controls on the use, which are not always compensable. The availability of this compensation, however, will be one of

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<sup>167</sup> Ruiz Fabri (2003), 166.

<sup>168</sup> *Lithgow*, Eur. Court HR, Judgment 8 July 1986, para. 121.

See Ruiz Fabri (2003), 166 & 170; and Harris, O'Boyle, Warbrick and Bates (2009), 682.

<sup>169</sup> See Kriebaum (2009), 241.

<sup>170</sup> See *Guillemin v. France*, Eur. Court HR, Reports of Judgments and Decisions 1997-I, Judgment, 21 February 1997, para. 54.

<sup>171</sup> *Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, Eur. Court HR, Reports of Judgments and Decisions 2000-I, Judgment, 11 January 2000, para. 54.

the factors taken into account in the assessment of the balance test, and its payment should normally support a finding of non-violation of Article 1.<sup>172</sup> This criterion of fair balance is flexible: a measure will be disproportionate when the public interest could have been satisfied without imposing an excessive burden on someone. In practice, the European Court will not easily conclude that a fair balance between the individual and community interest was lacking.<sup>173</sup> *Chassagnou*, *Immobiliare Saffi*, *Hutten-Czapska*, *Saliba* and *Lindheim* are rare examples of cases in which the Court found state authorities to fail the proportionality test when controlling the use of property.<sup>174</sup> Even though Article 1 does not expressly require controls on the use to be in conformity with law, the European Court has considered itself competent to review the lawfulness of these measures.<sup>175</sup> According to the Court:

[...] a norm cannot be regarded as a 'law' within the meaning of the Convention unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; an individual must be able -if need be with appropriate advice- to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. [...] A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the[se] consequences [...].<sup>176</sup>

This requirement of lawfulness presupposes, among other things, the existence of procedural guarantees affording the individual or legal entity a reasonable

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<sup>172</sup> Nevertheless, in several cases the European Commission and Court have concluded that the challenged measure was proportionate, notwithstanding the failure to compensate the affected applicant for the reduction in the value of his property. Anderson (1999), 550-1.

<sup>173</sup> Allen (2005), 119; and van Dijk et al (2006), 888-9.

<sup>174</sup> See *Chassagnou and Others v. France*, Eur. Court HR, Reports of Judgments and Decisions 1999-III, Judgment, 29 April 1999; *Immobiliare Saffi v. Italy*, Eur. Court HR, Reports of Judgments and Decisions 1999-V, Judgment 28 July 1999; *Hutten-Czapska*, Eur. Court HR, Judgment, 22 February 2005; *Saliba and Others v. Malta*, Eur. Court HR, Judgment, 22 November 2011; and *Lindheim and Others v. Norway*, Eur. Court HR, Judgment, 12 June 2012. See also *Schneider c. Luxembourg*, Eur. Court HR, Judgment, 10 July 2007; and *Hermann v. Germany*, Eur. Court HR, Judgment, 26 June 2012.

<sup>175</sup> van Dijk et al (2006), 890-1.

<sup>176</sup> *Forminster*, Eur. Court HR, Judgment, 9 October 2008, para. 65. See *Sun v. Russia*, Eur. Court HR, Judgment, 5 February 2009, para. 27.

opportunity to challenge the respective measure before an independent body.<sup>177</sup> The tribunal will respect the legislature's judgment on the general interest involved in cases of control on the use, unless that appraisal is manifestly not in accordance with domestic law<sup>178</sup> or without reasonable foundation.<sup>179</sup> In this context, purposes considered to be in the general interest are, for instance, social and economic policies related with town planning<sup>180</sup>; alcohol consumption<sup>181</sup>; housing<sup>182</sup>; the protection of nature<sup>183</sup> and the environment<sup>184</sup>; and the combat of international drugs trafficking.<sup>185</sup> Regarding taxes, contributions, and penalties, the European Commission has declared that taxation measures will adversely affect the guarantee established in the second paragraph of Article 1 only if they place an excessive burden on the person concerned or fundamentally interfere with his or her financial position.<sup>186</sup> In relation with measures taken by the state to enforce tax obligations, the European Court has held that it will respect the authorities' assessment unless it is devoid of reasonable foundation.<sup>187</sup> As a result, the second paragraph of Article 1 allows national authorities an almost unlimited power to impose restrictions on the use of property in accordance with the general interest.<sup>188</sup>

In contrast with the narrow reading given by the European Court to the notion of deprivation, the concept of control on the use of property has received a wider

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<sup>177</sup> *Družstevni*, Eur. Court HR, Judgment 31 July, 2008.

<sup>178</sup> *Tre Traktörer*, Eur. Court HR, Judgment, 7 July 1989, para. 58.

<sup>179</sup> *Mellacher*, Eur. Court HR, Judgment, 19 December 1989, para. 45.

<sup>180</sup> *See Allan Jacobsson*, Eur. Court HR, Judgment, 25 October 1989, para. 55.

<sup>181</sup> *See Tre Traktörer*, Eur. Court HR, Judgment, 7 July 1989, para. 58.

<sup>182</sup> *See Mellacher*, Eur. Court HR, Judgment, 19 December 1989, para. 45.

<sup>183</sup> *See Fredin*, Eur. Court HR, Judgment, 18 February 1991.

<sup>184</sup> *See Pine Valley*, European Court, Judgment, 29 November 1991.

<sup>185</sup> *See Air Canada v. United Kingdom*, Eur. Court HR, Series A No. 316-A, Judgment, 5 May 1995.

<sup>186</sup> *See Svenska Managementgruppen v. Sweden*, Eur. Commission HR No 11036/84, (1985) 45 Decisions and Reports 211, *Wasa Liv Omsesidigt v. Sweden*, Eur. Commission HR, No. 13013/87, (1988) 58 Decisions and Reports 163; and *Travers and 27 others v. Italy*, Eur. Commission HR, No. 15117/89, (1995) 80 Decisions and Reports 5.

<sup>187</sup> *Gasus Dossier*, Eur. Court HR, Judgment, 23 February 1995, para. 60.

<sup>188</sup> van Dijk et al (2006), 887.

one. Clayton and Tomlinson point out that the elimination of one of the bundle of rights comprising ownership, for instance, will usually not be enough to deprive someone of his or her ownership, but this infringement may amount to a control on the use of property.<sup>189</sup> However, not all interferences short of deprivation will necessarily be considered such an act by the European Court.<sup>190</sup> A state may control the use of property by requiring certain actions or imposing certain restrictions on the activities of individuals and legal entities.<sup>191</sup> The European Court has a longstanding tendency to classify as controls on use, measures that by most ordinary standards would be considered deprivations.<sup>192</sup> The seizure of obscene publications<sup>193</sup>; refusal to register as certified accountants<sup>194</sup>; withdrawal of licences<sup>195</sup>; rent controls<sup>196</sup>; planning restrictions<sup>197</sup>; temporary seizure of property in criminal proceedings<sup>198</sup>; temporary seizure of an aircraft for drugs enforcement<sup>199</sup>; retrospective tax legislation<sup>200</sup>; and a sequestration measure<sup>201</sup>, are all examples of control on the use of property. Under the second paragraph of Article 1, states are even entitled to adopt measures which affect the execution of contracts in force.<sup>202</sup>

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<sup>189</sup> Clayton and Tomlinson (2000), 1309.

<sup>190</sup> Harris, O'Boyle Warbrick and Bates (2009), 686.

<sup>191</sup> See Clayton and Tomlinson (2000), 1309; and Harris, O'Boyle, Warbrick and Bates (2009), 687.

<sup>192</sup> Anderson (1999), 553.

<sup>193</sup> See *Handyside*, Eur. Court HR, Judgment, 7 December 1976.

<sup>194</sup> See *Van Marle*, Eur. Court HR, Judgment, 26 June 1986.

<sup>195</sup> See *Tre Traktörer*, Eur. Court HR, Judgment, 7 July 1989.

See also *Fredin*, Eur. Court HR, Judgment, 18 February 1991.

<sup>196</sup> See *Mellacher*, Eur. Court HR, Judgment, 19 December 1989.

<sup>197</sup> See *Pine Valley*, Eur. Court HR, Judgment, 29 November 1991.

<sup>198</sup> See *Raimondo v. Italy*, Eur. Court HR, Series A No. 281-A, Judgment, 22 February 1994.

<sup>199</sup> See *Air Canada*, Eur. Court HR, Judgment, 5 May 1995.

<sup>200</sup> See *The National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. United Kingdom*, Eur. Court HR, Reports of Judgments and Decisions 1997-VII, Judgment, 23 October 1997.

<sup>201</sup> See *Ismayilov v. Russia*, Eur. Court HR, Judgment, 6 November 2008, para. 30, 33 & 35; and *Sun*, Eur. Court HR, Judgment, 5 February 2009, para. 24-5.

<sup>202</sup> *Mellacher*, Eur. Court HR, Judgment, 19 December 1989, para. 51.

Besides controls on the use, the European Court of Human Rights has identified a third possibility within Article 1: other interferences with the right of property. The Court first distinguished them, as different from deprivations or controls on its use, in the most widely cited judgment under Article 1 of the Protocol.<sup>203</sup> In *Sporrong and Lönnroth*, the Swedish government had granted long-term expropriation permits to the city of Stockholm.<sup>204</sup> Although not depriving the applicants' rights by themselves, these permits gave the authorities the power to do so in the future. The city of Stockholm then adopted prohibitions on construction on the applicants' properties. After being in force for twenty three and eight years, respectively, Mr. Sporrong and Mr. Lönnroth complained that these permits made it impossible to sell or build anything in these properties, and difficult to invest or obtain mortgages for them. The applicants argued that this situation amounted to an interference with their right to a peaceful enjoyment of their possessions. The European Commission of Human Rights found no violation of Article 1, and concluded that the measures were enforced in the general interest and were thus justifiable.<sup>205</sup> The approach of the European Court in this case was both different and novel. Before *Sporrong*, it was generally assumed that claims related with Article 1 should take the form of either a deprivation or a control on the use of property. In this case, the European Court declared that the state can interfere with the peaceful enjoyment of possessions by measures that do not amount to deprivations or controls on its use. Applying the fair balance test between the individual and community interests, the Court concluded that a violation of the rule established in the first

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<sup>203</sup> Yannaca-Small (2010), 463.

*See Sporrong and Lönnroth*, Eur. Court HR, Judgment, 23 September 1982.

<sup>204</sup> Under the 1972 Expropriation Act.

<sup>205</sup> *See Higgins* (1982), 344.

sentence of Article 1 had taken place.<sup>206</sup> *Loizidou*, *Stretch* and *Broniowski* are other examples of findings on this rule.<sup>207</sup>

Although the condition of public or general interest is not expressly mentioned in the first sentence of Article 1, the European Court has considered it applicable to any interference by the host-state within this provision. In *Beyeler*, the tribunal declared that:

The principle of a 'fair balance' inherent in Article 1 of Protocol No. 1 itself presupposes the existence of a general interest of the community. [...] it should be reiterated that the various rules incorporated in Article 1 are not distinct in the sense of being unconnected and that the second and third rules are concerned only with particular instances [...]. One of the effects of this is that the existence of a 'public interest' required under the second sentence, or the 'general interest' referred to in the second paragraph, are in fact corollaries of the principle set forth in the first sentence, so that an interference with the exercise of the right to the peaceful enjoyment of possessions within the meaning of the first sentence of Article 1 must also pursue an aim in the public interest.<sup>208</sup>

The Court has adopted a broad approach to the notion of the control on the use of property, leaving comparatively few cases to be considered under the residual category of Article 1. The European Commission and Court had found violations to this rule, for instance, in the refusal of a housing licence to an applicant to live in his own house<sup>209</sup>; the provisional transfer of the applicants' land to other landowners as part of a consolidation plan<sup>210</sup>; the annulment by law of an arbitration award in favour of the applicants<sup>211</sup>; an urban development scheme which impeded the development of the applicant's property for many years<sup>212</sup>; and public interest

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<sup>206</sup> See *Sporrong and Lönnroth*, Eur. Court HR, Judgment, 23 September 1982, paras. 56-75.

<sup>207</sup> See *Loizidou v. Turkey*, Eur. Court HR, Reports of Judgments and Decisions 1996-VI, Judgment, 18 December 1996; *Stretch*, Eur. Court HR, Judgment, 24 June 2003; and *Broniowski*, Eur. Court HR, Judgment, 22 June 2004.

<sup>208</sup> *Beyeler*, Eur. Court HR, Judgment, 5 January 2000, para. 111.

See e.g. *Viaşu*, Eur. Court HR, Judgment, 9 December 2008, para. 73.

<sup>209</sup> See *Wiggins v. United Kingdom*, Eur. Commission HR, No. 7456/76, (1979) 13 Decisions and Reports 40.

<sup>210</sup> See *Ekner and Hofauer v. Austria*, Eur. Court HR, Judgment, 23 April 1987.

<sup>211</sup> See *Stran Greek Refineries*, Eur. Court HR, Judgment, 9 December 1994.

<sup>212</sup> In fact, more than 16 years.

declarations, issued as a preliminary expropriation, and prohibitions to build or change the use of certain parcels of land.<sup>213</sup> More recently, cases dealing with governmental and administrative partiality and arbitrariness have been solved in conformity with the first rule.<sup>214</sup> In all, David Anderson observes that other interferences:

[have] been applied to both restrictions which are consistent with Article 1 and might just as well have been characterised as controls of use, and to particularly blatant interferences which could easily have been described as deprivations.<sup>215</sup>

### 3.4. Conclusion

The right of property of tangible and intangible assets is protected, primarily, by regional instruments of human rights. Among these norms, the European Convention stands out as the main source for the study of expropriation in this area of international law. Article 1 of the First Optional Protocol to this treaty protects property against interferences with it, particularly against those that do not respect a fair balance between community and individual interests. To this end, the objectives of the respective measure must be proportional to the means employed in their completion. In that way, the burden suffered by the affected person will not be excessive. According to the European Court of Human Rights, Article 1 includes three different rules: deprivations of property, controls on its use, and other interferences. In all of them, the state enjoys a wide margin of appreciation with

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*See Phocas v. France*, Eur. Court HR, Reports of Judgments and Decisions 1996-II, Judgment, 23 April 1996.

<sup>213</sup> *See Matos*, Eur. Court HR, Judgment, 16 September 1996.

<sup>214</sup> Wildhaber and Wildhaber (2009), 674-6.

*See Intersplav v. Ukraine*, Eur. Court HR, Judgment, 9 January 2007; and *Smirnov v. Russia*, Eur. Court HR, Judgment, 7 June 2007.

<sup>215</sup> Anderson (1999), 551-2.

regards to the fair balance test and the application of the requirement of public or general interest. A measure that interferes with the right of property to a higher degree than the residual category, but falls short of a deprivation, is a control on the use. The state may exercise this control by requiring certain actions or imposing certain restrictions in the activities of persons. In this respect, the power of the state is almost unlimited. As with other interferences, the control on the use of property does not create a right to compensation for those affected by the respective measure, as long as the interference is not considered unlawful.

Regarding expropriations, Article 1 recognises an international minimum standard: non-nationals affected by the measure adopted by the respective state are entitled to compensation. In practice, both nationals and foreigners are compensated for deprivations. As a general rule, the amount required by this provision should be reasonably related with the value of the taken property. Deprivations include indirect takings, which require a substantial interference with the right of property. The effects doctrine is not found in Article 1 or in its interpretation by the European Court. Facts that would normally be classified as deprivations might be given the category of controls on use by this tribunal, even of other interferences. This situation and the lack of an absolute standard of compensation for the deprivation of property allows the European Court to take into account not only the interests of the aliens, but also those of the host-state, without having to resort to the effects doctrine's counterpart in cases of interference with the rights of property: the police-powers theory.

At present, this fair balance approach is not only restricted to the European system. The Inter-American Court has referred to notions such as proportionality and

lawfulness in its meagre case-law on indirect takings. It has also described the concept of good governance, without mentioning it expressly. That the host-state's regulation must be clear, specific and foreseeable is a requirement not unknown in the European Court's case-law. This tribunal has referred explicitly to the notion of good governance in relation to Article 1. According to the European Court, this obligation of the state involves certain positive duties, such as acting timely, with reasonable clarity and utmost consistency. Its aim is to avoid, as far as possible, legal uncertainty and ambiguity. To this effect, domestic laws must be sufficiently accessible, precise and foreseeable in their application, and state measures must be implemented with coherence. In the European Court's view, good governance is an essential element of the rule of law.