

TAMÁS SZABADOS*

Right to Property and Cultural Heritage Protection in the Light of the Practice of the European Court of Human Rights

- **ABSTRACT:** *This article presents the relationship between the protection of property and cultural heritage protection under the ECHR system. Most often, state measures aimed at the protection of cultural heritage appear to interfere with private parties' right to the peaceful enjoyment of possessions. Those dissatisfied with the outcome of domestic court proceedings regarding such interferences often want to reverse unfavorable domestic court decisions by bringing their case before the ECtHR. This article outlines the relevant case law of the ECtHR, distinguishing deprivation of property cases from controls on the use of property, in accordance with the structure of Article 1 of Protocol No. 1. At the same time, it demonstrates the limits of property protection and, thereby, the success of claims by applicants before the ECtHR in cases involving cultural heritage. First, the limited temporal scope of the application of the ECHR and Protocol No. 1 excludes many cultural heritage disputes from the jurisdiction of the ECtHR. Second, the applicant has to prove that (s)he has possessions as interpreted by the ECtHR; the lack of possessions bars in particular restitution claims regarding property expropriated before the ratification of the Convention. Third, cultural heritage protection is considered a legitimate aim by the ECtHR, which can justify a deprivation or restriction of the use of property. States have a wide margin of appreciation in determining whether and how they will ensure the protection of cultural heritage in public interest. In particular, the ECtHR seems to endorse policies underlying both cultural nationalism and internationalism without giving a priori preference to any of them. Finally, the application of the flexible proportionality test by the ECtHR often makes the outcome of the procedure difficult to predict.*
- **KEYWORDS:** cultural heritage; possessions; right to property; expropriation; proportionality; ECHR; ECtHR

* Associate Professor, LL.M. (UCL), PhD, Department of Private International Law and European Economic Law, Faculty of Law, Eötvös Loránd University, Hungary, szabados@ajk.elte.hu; ORCID number: 0000-0002-5195-685X.



1. Introduction

Legal scholarship has several times underlined the need to create a specialized permanent international court for cultural heritage disputes with mandatory jurisdiction,¹ but such a judicial forum has not yet been created. Parties to such disputes who are dissatisfied with the outcome of domestic court proceedings sometimes bring their claims to an international judicial forum, such as the European Court of Human Rights (ECtHR or the Court). In several recent cases involving claims related to cultural property, after having gone through the various national judicial instances without success, the losing party in the domestic proceedings sought remedy directly before the ECtHR. In proceedings before the courts of European states, the assertion that the party will turn to the ECtHR if it loses the case domestically is an argument of last resort. This happened recently in the Esterházy case, pending before Hungarian courts. Alternatively, the parties rely on the rules of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, also called the European Convention for Human Rights) and its protocols before domestic courts (even outside Europe), as illustrated by the Cassirer case.²

In the case of the Esterházy collection, the Austrian Esterhazy Private Foundation (*Esterhazy Privatstiftung*) is claiming its right of ownership over treasures located in Hungary that were once kept in the Fraknó (*Forchtenstein*) castle of the Esterházy family (which has been in Austrian territory since 1921), but were later moved to Budapest, where they were nationalized after the Second World War. After the court of first and second instance in Hungary rejected the claim of the Esterhazy Private Foundation,³ the latter stated that it would bring the claim to the Kúria, the Supreme Court of Hungary, the Hungarian Constitutional Court, or, if necessary, even to the ECtHR. Currently, the case is pending before the Hungarian courts,⁴ so it remains to be seen whether the Esterhazy Private Foundation will later turn to the ECtHR.

In the Cassirer case, the heir of a German Jewish owner of a Pissarro painting, '*Rue Saint-Honoré, après-midi, effet de pluie*,' sought before US courts to reclaim the painting from the Thyssen-Bornemisza Museum in Madrid, asserting that

1 See, for example, Parkhomenko, 2011, pp. 145–160; Granovsky, 2007, pp. 25–40.

2 Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5), Rome, 4 November 1950.

3 Decision of the court of first instance: Fővárosi Törvényszék (Budapest-Capital Regional Court) 4.P.22.219/2020/5, 23 September 2020; decision of the court of second instance: Fővárosi Ítéltábla (Budapest-Capital Regional Court of Appeal) 7.Pf.20.731/2020/25, 14 April 2021.

4 The decision of the Hungarian Supreme court, the Kúria, Pfv.II.20.909/2021/9, 19 January 2022 rescinded the decision of the court of second instance and instructed it to conduct a new procedure and to render a new decision.

the painting was sold by its owner in 1939 under pressure from the Nazi authorities. The plaintiff argued, *inter alia*, that the Spanish museum could not acquire ownership of the painting due to adverse possession because the Spanish adverse possession rules are contrary to Article 1 of Protocol No. 1 of the ECHR.⁵ Briefly analyzing the case law of the ECtHR, the US Court of Appeals for the Ninth Circuit did not hesitate to establish that the Spanish adverse possession rules did not violate Article 1 of Protocol No. 1.⁶

The extent to which the provisions of the ECHR and its protocols and a procedure before the ECtHR can serve to alter the outcome of domestic proceedings in favor of the applicant is questionable. This article outlines the approach of ECtHR to cases concerning cultural heritage and the limits of recourse to the ECtHR.

This article is limited to the analysis of ECHR provisions and case law concerning cultural heritage from the perspective of the right to property. This aspect is, however, particularly important, since state measures aimed at the protection of cultural heritage often appear as interference with private parties' right to peaceful enjoyment of their possessions. Even though certain individual decisions of the ECtHR relevant for cultural heritage protection have received some attention, the legal literature has not addressed the relevance and peculiarities of the provisions of the ECHR and its protocols, as well as the case law of the ECtHR for cultural heritage in a more comprehensive way. This contribution intends partly to fill this gap by focusing on the protection of property under Article 1 of Protocol No. 1 of the ECHR.

2. Property protection under the ECHR System

■ 2.1. *Brief glance at property protection in the context of the international framework of cultural heritage protection*

In cultural heritage protection law, the need for the protection of property rights is often linked to the circulation of works of art, and discussed primarily regarding stolen cultural objects in the relationship between the original owner and the actual possessor of the cultural object. The 1995 UNIDROIT Convention on stolen or illegally exported cultural objects provides for the restitution of the stolen cultural object, giving priority to the right of property of the original owner, even against a good faith purchaser.⁷ A good faith possessor, who exercised due

5 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 009), Paris, 20 March 1952.

6 *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 862 F.3d 951 (9th Cir. 2017); see also *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 153 F.Supp.3d 1148 (2015). The case is mentioned in the context of the relationship between private international law and human rights by Hirschboeck, 2019, pp. 181–182.

7 UNIDROIT Convention on stolen or illegally exported cultural objects, Rome, 24 June 1995.

diligence when acquiring the object, must be content with fair and reasonable compensation. Thus, the UNIDROIT Convention intends to strike a balance between two competing titles: that of the original owner, and that of the actual possessor. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property prohibits any transfer of ownership of cultural property effected in breach of the Convention.⁸

However, very often, the question is whether a person's ownership right can be limited to protect cultural heritage. Certain international conventions aiming at the protection of various forms of cultural heritage explicitly recognize that the protection of individual property rights must sometimes yield to the general interest in protecting cultural heritage, and as such, property rights can be subject to certain limits. For example, under the Council of Europe Convention for the Protection of the Architectural Heritage of Europe, state legislation has to permit public authorities to require the owner of a protected property to carry out the necessary conservation works or to carry out such works if an owner fails to do so. The state legislation also has to allow the compulsory purchasing of a protected property.⁹ In fact, such an approach reflects to a certain extent the solution of Article 1 of Protocol No. 1 of the ECHR that, in addition to guaranteeing the right to property, recognizes the possibility of restricting the same right in the general interest.

■ 2.2. *The added value of the property protection under the ECHR system*

There is no special international court for legal disputes that hears claims brought by private parties regarding cultural property. For this reason, Francioni writes of an 'enforcement deficit in international cultural heritage law.'¹⁰ Although the International Court of Justice has addressed a few cases related to cultural heritage, only states may be parties in cases submitted before it.¹¹ In Europe, however, even private parties can rely on human rights and fundamental freedoms, including the protection of their right to property before the ECtHR, in disputes related to cultural heritage. However, the ECtHR is not a forum specifically created for cultural heritage disputes. The wording of the ECHR and its protocols does not refer to 'cultural property,' 'cultural heritage,' 'cultural objects,' or 'cultural goods.'¹² The protection of cultural heritage is not the objective of the ECHR.¹³ It addresses cultural heritage exclusively through the lens of human rights.

8 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, 14 November 1970, UNTS 11806, Art. 3.

9 Convention for the Protection of the Architectural Heritage of Europe (ETS No. 121), Granada, 3 October 1985, Art. 4.

10 See Francioni, 2012, pp. 726–729.

11 Statute of the International Court of Justice, Art. 34(1).

12 See Ress, 2005, p. 499.

13 See Michl, 2018, p. 110.

The ECtHR used various provisions of the ECHR to recognize what can be called cultural rights.¹⁴ In this way, the ECtHR provided protection, for example, for the right to artistic expression, access to culture and cultural identity, and the use of one's own language.¹⁵ Nonetheless, in the case brought by an Athenian cultural association for the return of the Elgin marbles, in the context of Article 8 (the right to respect for private and family life) it held that the ECHR does not recognize 'a general right to protection of cultural heritage.'¹⁶ Despite this reticence, state measures aiming to protect cultural heritage are often considered an interference with private parties' right to peaceful enjoyment of their possessions. At the same time, cultural heritage protection is deemed a legitimate aim that can justify restrictions on the right to property. This generates tension between individuals' interest in the protection of their property and the general aim of protecting cultural heritage. This underscores the significance of property protection under the ECHR system if we want to understand the challenges applicants face in disputes concerning cultural heritage brought before it.

The protection of property is enshrined in Article 1 of the First Protocol to the ECHR, which provides the following:¹⁷

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

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

Even though the wording of Article 1 refers more broadly to 'possessions,' in most cases related to cultural heritage, the deprivation of or the restriction on ownership constituted the object of the proceedings. In the established practice of the

14 See in particular ECHR Art. 8 (right to respect for private and family life), Art. 9 (freedom of thought, conscience and religion), Art. 10 (freedom of expression), Art. 1 of Protocol No. 1 (protection of property) and Art. 2 of Protocol No. 1 (right to education).

15 For a detailed summary of these cultural rights, see European Court of Human Rights, Research Division, Cultural Rights in the Case Law of the European Court of Human Rights. Council of Europe/European Court of Human Rights 2011.

16 Case *Syllogos ton Athinaion v. United Kingdom*, no. 48259/15, 23 June 2016.

17 For a summary of the case law related to Article 1 of Protocol No. 1, see European Court of Human Rights, Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights—Protection of Property (31 August 2022). Council of Europe/European Court of Human Rights 2022. See also Schabas, 2015, p. 958; von Raumer, 2017, 'Artikel 1 Schutz des Eigentums,' paras. 1–65.

ECtHR, there are three distinguished rules in the wording of Article 1 of Protocol No. 1. The first sentence of the first paragraph declares the right to peaceful enjoyment of possessions. A second rule, laid down in the second sentence of the first paragraph, addresses deprivation of property and allows expropriation under certain conditions. The third rule contained in the second paragraph of Article 1, recognizes the right of the contracting states to restrict the use of property in accordance with the general interest. The second and third rules demonstrate that the right to property is not an absolute right; it can be subject to restrictions. Even if deprivation of property and restrictions on the use of property are regulated separately, their conditions specified in the practice of the ECtHR largely overlap.¹⁸ In both cases, the ECtHR examines whether the state measure is provided for by law, whether it pursues a legitimate objective in the public interest, and the proportionality of the measure. In the cases decided by the ECtHR, it was not difficult to establish that the state's interference was based on legislation, and it consistently acknowledged that the protection of cultural heritage is a legitimate aim that can justify expropriation or any other restriction on the right of property. In expropriation cases, the ECtHR additionally examines the existence and appropriateness of compensation provided by the state. In the next chapter, the judicial practice of the ECtHR will be discussed by distinguishing the two types of cases: deprivation of property and restrictions on the use of property.

3. Resolving conflicts between the right to property and the protection of cultural heritage: the case law of the ECtHR

Private parties may have recourse to property protection when the state restricts the peaceful enjoyment of their possessions for protecting cultural heritage. In accordance with the rules contained in Article 1 of Protocol No. 1 of the ECHR, the cases decided so far by the ECtHR can be classified either as deprivation of property—that is, as expropriation—or as controls on the use of property. Following the structure of Article 1 of Protocol No. 1, the judgments of the ECtHR related to the protection of cultural property will be briefly outlined in accordance with this distinction.

■ 3.1. Expropriation and restitution

In several cases, the ECtHR had to address the deprivation of possessions, meaning expropriation. As former expropriations are sometimes followed by restitution, the ECtHR's approach to restitution in the context of cultural heritage is also elucidated below.

In *Bogdel v. Lithuania*, a state-owned plot of land at the entrance to the picturesque Trakai castle was first leased and then sold to the applicants, who

¹⁸ See Michl, 2015, p. 372.

operated a kiosk and later a café there.¹⁹ Subsequently, the national authorities concluded that the underlying agreements breached the cultural heritage legislation, and so they were declared null and void. The applicants alleged that this constituted property deprivation. The ECtHR noted that interference by the state was based on law, and the conservation of cultural heritage served the public interest. Remarkably, the ECtHR used other sources to support this statement. It pointed out that the site was on the tentative list of the Lithuanian state for UNESCO World Heritage status (it is now a World Heritage Site), and it also referred to the Council of Europe Convention for the Protection of the Architectural Heritage of Europe, which requires state parties to take measures to protect architectural heritage.²⁰ The ECtHR recalled the principle of good governance, according to which public authorities must act in good time and in an appropriate and consistent manner. However, this principle does not exclude correcting any earlier mistakes by the authorities. Nevertheless, the need for the correction of any former mistake must not disproportionately restrict the right acquired by private persons who were relying in good faith on the legitimacy of the erroneous action of the national authority. Revoking the ownership of a property transferred erroneously by the authorities is possible if this takes place promptly and by providing appropriate compensation to the private persons concerned. In *Bogdel*, the Court found that such adequate compensation was granted, and thus interference with the right to property was not disproportionate.

In practice, not only can the legitimacy of expropriations be challenged, but also the amount of compensation provided by the state. In *Kozacıoğlu*, the determination of the value of the compensation for an expropriated building was in question after Turkish authorities classified it as a cultural asset.²¹ The ECtHR did not doubt that the case constituted a deprivation of property within the meaning of the second sentence of paragraph 1 of Article 1 of Protocol No. 1. The ECtHR stated that deprivation of property without compensation clearly constitutes a disproportionate interference. However, Article 1 of Protocol No. 1 does not always require a complete compensation. Legitimate public-interest objectives can justify compensation below the market value of the expropriated property. Even so, the ECtHR found the Turkish system of compensation unfair because it excluded taking the rarity and architectural and historical value of the building into account when determining the amount of compensation. Undue advantage was given to the state, as the depreciation of the building could be considered in the course of the expropriation, but any benefit resulting from the above features of the property or the maintenance costs incurred by the original owner could not. Consequently, it violated Article 1 of Protocol No. 1.

19 Case *Bogdel v. Lithuania*, no. 41248/06, 26 November 2013.

20 Convention for the Protection of the Architectural Heritage of Europe (ETS No. 121), Granada, 3 October 1985.

21 Case *Kozacıoğlu v. Turkey*, no. 2334/03, 19 February 2009.

There are cases in which the question arose as to whether the restitution claims of past owners of expropriated assets are substantiated under the ECHR. In the *Prince Hans-Adam II of Liechtenstein v. Germany* case, the prince, as an applicant, wanted to challenge the confiscation of a painting formerly owned by his father.²² The painting 'Szene an einem römischen Kalkofen' by Pieter van Laer was stored in a family castle in the territory of the current Czech Republic and was confiscated due to the Beneš decrees after the Second World War because the Czechoslovakian authorities classified the applicant's father as a German citizen. The applicant's father's appeal before the Czechoslovakian courts was rejected. In 1991, the painting was on a temporary loan in Cologne, and the applicant, as an heir, took this occasion to reclaim the painting. He requested the delivery of the painting to him before the German courts, but this was rejected. Even though the painting was given to a bailiff while the domestic proceedings were pending, it was finally returned to the Czech Republic. In the proceedings before the ECtHR, the applicant argued that the procedure of German courts, by finding his restitution claim inadmissible and returning the painting to the Czech Republic, violated, among others, Article 1 of Protocol No. 1. The ECtHR found no violation of his right to property. The hope of recognizing an old property right that could not be exercised due to expropriation did not give rise to a legitimate expectation on the applicant's part and could not be considered as possessions within the meaning of the first sentence of the first paragraph of Article 1.

Sometimes, states or national authorities decide to remedy past expropriations and order restitution to the original owners. In such cases, restitution must comply with the requirements of Article 1 of Protocol No. 1. In the *Archidiocèse catholique d'Alba Iulia c. Roumanie* case, the Romanian state decided to give back the collection of the Batthyaneum library, the institute of astronomy, and the building containing them, which were nationalized in 1961, to the applicant archdiocese.²³ Despite this decision, restitution was not implemented, even 14 years after the adoption of the regulation ordering it. The ECtHR saw that Romanian law established the state obligation to return those assets that gave rise to a legitimate expectation to settle the proprietary status of those assets swiftly, considering their importance, not only for the applicant but also for the general interest. Therefore, Article 1 of the First Protocol could be applied to the restitution claim. The relevant regulation did not specify the deadline or procedure for restitution and did not provide for any judicial recourse as to the application of the legislative provisions. The Romanian state did not justify this prolonged inaction either. The ECtHR found this delay incomprehensible in light of the cultural and historical significance of the assets in question, which should have called for rapid action in

22 Case *Prince Hans-Adam II of Liechtenstein v. Germany*, no. 42527/98, 12 July 2001.

23 Case *Archidiocèse catholique d'Alba Iulia c. Roumanie*, no. 33003/03, 25 September 2012.

view of their preservation and appropriate use in general interest. Considering the above, the ECtHR found a violation of Article 1 of Protocol No. 1.

In *Debelianovi*, a house was expropriated by the Bulgarian authorities as one of the most significant historical and ethnographical monuments in the municipality of Koprivshtitsa, and it was transformed into a museum.²⁴ Applicants requested an annulment of the expropriation. Even though the Bulgarian Supreme Court ordered restitution, this was not implemented because the Bulgarian National Assembly set a moratorium for the restitution of assets classified as national monuments of cultural character until the adoption of a new law on cultural monuments. The ECtHR considered the moratorium as an interference with the right to property, but it could have been justified by the aim of preserving the elements of national cultural heritage. Nevertheless, the ECtHR established a violation of Article 1 of Protocol No. 1, since the decision to introduce the moratorium gave rise to uncertainty. After more than a decade, restitution was not effected and the decision did not determine when the moratorium would end. No new legislation was put forward to regulate monuments, and the Bulgarian government did not explain its delay. Furthermore, no compensation was provided to the applicants for the impossibility of using their assets.

■ 3.2. *Restrictions on the use of property*

Based on Protocol No. 1 and the related case law of the ECtHR, restrictions on the use of property are permissible for both movable and immovable objects in accordance with the conditions specified in the second paragraph of Article 1. Regarding movable objects, this provision was interpreted by the ECtHR in its seminal *Beyeler* judgment regarding the pre-emption rights reserved for the state.²⁵ In 1977, Ernst Beyeler, a Swiss national, acquired the painting 'Portrait of a Young Peasant' by Vincent Van Gogh through an intermediary, an antique dealer from Rome. Italian authorities deemed the painting to be a work of historical and artistic interest. In 1983, when Beyeler wanted to sell the painting to the Peggy Guggenheim Collection in Venice, the Italian state was invited to announce its intention to buy the painting. The authorities did not allow the painting to be transported to Venice; they ordered that it be taken into custody by the Modern and Contemporary Art Gallery in Rome. In 1988, the competent ministry decided to avail itself of the right to pre-emption, taking the 1977 agreement and the price determined there into account, which was significantly less than the market value of the painting by the time the exercise of the pre-emption right was declared. The Italian authorities explained that the delay in exercising the pre-emption right was caused by Beyeler not duly declaring himself as a buyer to the Italian authorities

²⁴ Case *Debelianovi v. Bulgaria*, no. 61951/00, 29 March 2007.

²⁵ Case of *Beyeler v. Italy*, Application no. 33202/96, 5 January 2000. See Renold, 2000, pp. 73–76; Rudolf, 2000, pp. 736–739; Seidl-Hohenveldern, 2001, pp. 70–78.

at the time of purchasing the painting, which impeded them from exercising their right to pre-emption. It was also disputed whether Beyeler qualified as the owner of the painting under Italian law. The ECtHR, without addressing the issue of title under Italian law, stated that the concept of possessions within the meaning of Article 1 has an autonomous independent meaning and does not correspond to the formal classifications made by national laws. Autonomous meaning is not limited to ownership. Taking into account that Beyeler was treated as the owner of the painting on a number of occasions by the Italian authorities, the ECtHR concluded that the applicant had a proprietary interest in the painting that constituted a 'possession' within the meaning of Article 1 of Protocol No. 1, and the latter provision could be accordingly applied to the case.

The exercise of the right of pre-emption constituted interference with the applicant's right to the peaceful enjoyment of his possessions. As the Court recognized that this interference was based on legislation and aimed at the protection of cultural and artistic heritage, the question was rather whether the restriction was proportionate. The Italian authorities announced the exercise of their right to pre-emption with a significant delay even though it is required that national authorities 'act in good time, in an appropriate manner and with utmost consistency,' where a case concerns general interest. Moreover, the delay enabled them to buy the painting well below the market price and gain unjust enrichment that excluded the existence of a fair balance between the general interest and the applicant's rights protected under Article 1.

In *Albert Fürst von Thurn und Taxis v. Germany*, the ECtHR found the applicant's claim, by which he intended to challenge the restrictions related to the family library and archives in his ownership, to be inadmissible.²⁶ The library, dating back to the 15th century, belonged to a family trust fund (*Fideikommiss*). When the institution of *Fideikommiss* was terminated in Germany in 1939 and its assets transferred to private ownership, certain restrictions, including a requirement to obtain authorization for changing, displacing or disposing of the collection and an obligation to maintain it in good condition, were imposed on the owners because the collection included objects of artistic, scientific, historical, and patrimonial value. In 2002, the applicant asked the German courts to lift these restrictions. The measures concerned the use of property with a view to protecting cultural heritage as a legitimate objective. The ECtHR held that the restrictions did not give rise to a disproportionate and excessive burden on the applicant. The applicant was aware of the restrictions imposed when he inherited the collection. Supervision by a state authority can be justified by the aim of the protection of cultural heritage. The requirement of state authorization did not prevent the applicant from using his property; moreover, no such authorization was requested by the applicant.

26 Case *Albert Fürst von Thurn und Taxis v. Germany*, no. 26367/10, 14 May 2013. The judgment is analysed in detail by Michl, 2015, pp. 370–374.

Even if its considerable costs were acknowledged, the obligation of maintaining the collection in a proper state was justified by the fact that the owner should make such expenditure anyway to preserve the value of his property. Based on these considerations, no violation of Article 1 of Protocol No. 1 was established. It can be remarked that, in the legal literature, the view was expressed that the case should have qualified as a *de facto* deprivation of property instead of a measure of controlling the use of property because of the financial burden of the continuous maintenance costs on the owner, which were not covered by the state.²⁷ The above mentioned judgments concerning movable cultural property indicate that states can interfere with the art market and the interests of the owners in order to protect cultural heritage as long as the restrictive measures are proportionate.

In other cases, the ECtHR had to address restrictions related to immovable properties. In *SCEA Ferme de Fresnoy v. France*, the vestiges of a chapel and a capitular hall of the Knights Templars from the 12th and 13th centuries were classified as historical monuments by the French authorities.²⁸ The farming site, which included monuments surrounded by various agricultural buildings, was intended to be developed by the applicant for undertaking farming. The applicant company argued, *inter alia*, that the restrictions imposed to protect ancient buildings, including the need for authorization before constructing or demolishing buildings, violated its right to property. The ECtHR acknowledged that this constituted interference with the right to respect the possessions of the applicant as a rule on the use of assets. However, the Court found that the protection of cultural heritage was a legitimate aim, and that the restrictions were not disproportionate. It referred to the Council of Europe Framework Convention on the Value of Cultural Heritage for Society, also known as the Faro Convention, which establishes in its Article 1(c) that ‘the conservation of cultural heritage and its sustainable use have human development and quality of life as their goal.’²⁹ It was noted that the company applied for various building and demolition permits, and only two were refused.

In the *Hellborg v. Sweden* case, the applicant argued that Article 1 of Protocol No. 1 was violated by the Swedish state, as he could not build a second house on his property despite the fact that authorities had previously issued a tentative approval that would have enabled him to receive a building permit for the construction project within two years.³⁰ The building permit was rejected due to a new development plan and in view of the protection of the cultural heritage of the neighborhood in Lund, where the property was located. The Court rejected the applicant’s argument that the refusal to issue a building permit amounted

27 Michl, 2015, pp. 372–373.

28 Case *SCEA Ferme de Fresnoy v. France*, no. 61093/00, 1 December 2005.

29 Council of Europe Framework Convention on the Value of Cultural Heritage for Society (CETS No. 199), Faro, 27 October 2005.

30 Case *Hellborg v. Sweden*, no. 47473/99, 28 February 2006.

to *de facto* expropriation. Instead, the measure was considered a control of the use of property. Based on the tentative approval, the applicant had a legitimate expectation of receiving the building permit. However, the ECtHR added that the interest in preserving the particular character of the neighborhood could prevail over the individual interest in obtaining a building permit for the construction of a second house in that area.

In the *Matas v. Croatia* case, an industrial building located in Split and used as a car repair workshop was subject to a measure of preventive protection relating to cultural heritage.³¹ The restrictions included a requirement for authorization for any change in the nature of the building, right of pre-emption for the state in the event of the sale of the property, and the possibility of expropriation. Croatian cultural heritage legislation provided that such measures could be adopted for a period of three years. However, after the expiration of the three-year duration of the measure, preventive protection was ordered for the workshop building a second time. The workshop owner challenged the extended measures before the Croatian authorities and courts without success. The ECtHR considered the measure to be a restriction on the use of the property. Even if the measure was provided for by law and pursued the legitimate aim of conserving cultural heritage, the actions of the Croatian authorities failed to be proportionate. Extending the preventive measures was not preceded by examining the value of the applicant's property with regard to cultural heritage to ascertain whether repeated preventive measures were indeed necessary. The Court also referred to the principle of good governance, which requires state authorities to act in good time, in an appropriate and consistent manner. It was found that the Croatian authorities failed to meet these requirements, particularly because they did not act in due time to address the status of the building.

The Court not only requires states to refrain from disproportionate restrictions on the use of property, but it also underlines that Article 1 of Protocol No. 1 imposes a positive obligation on them to protect individuals' rights to property. This was also highlighted in the *Potomska and Potomski* case, where the applicants bought a plot of land from the state with the intention of building a house and a workshop.³² The property, which was a Jewish cemetery from the 19th century, was classified as a historic monument. As a result, the applicants were not allowed to develop the property without the permission of the competent authority. The Polish authorities did not offer an appropriate alternate plot to the applicants, and the plot of land could not be expropriated in the absence of financial resources. The listing of the property did not deprive the applicants of their possession but constituted a restriction on its use. The restrictions ranged from the prohibition of fully or partly developing the property to an obligation imposed on the applicants to protect

31 Case *Petar Matas v. Croatia*, no. 40581/12, 4 October 2016.

32 Case *Potomska and Potomski v. Poland*, no. 33949/05, 29 March 2011.

and preserve it. The ECtHR found that the most suitable measure would have been expropriation with the payment of compensation or offering an appropriate alternative plot. The Court established that Article 1 of Protocol No. 1 not only imposes a negative obligation on the states, not to interfere with the right to the peaceful enjoyment of possessions, but also confers a positive obligation on states to take measures to protect the right to property. This could have been satisfied by providing an effective procedure for expropriation and resolving potential disputes related to the suitability of an alternative plot. The lack of financial resources did not justify the failure to remedy the applicants' situation. The uncertainty of the legal situation and the impossibility for the applicants to develop their property or have it expropriated resulted in a violation of Article 1.

4. Limits

Property protection before the ECtHR is subject to certain limits. Some limitations, such as the requirement of the exhaustion of all domestic remedies, have a role in all proceedings reaching the ECtHR. Nevertheless, there are limitations that acquire particular significance in legal disputes related to the right to property and cultural heritage. Among these, we can refer to (1) the limited temporal scope of application of the ECHR and Protocol No. 1; (2) the need to establish that the applicant had a possession (that had been violated); (3) the wide margin of appreciation enjoyed by states to determine whether and how to protect cultural heritage; and (4) the uncertainty of the proportionality test. These factors can have a decisive impact on the outcome of legal disputes involving cultural heritage where the applicants invoke their property rights.

■ 4.1. *Temporal scope of application of the ECHR and Protocol No. 1*

The first limitation follows from the temporal scope of application of the ECHR. A peculiarity of cultural heritage disputes is that court proceedings often start well after the emergence of the facts underlying legal disputes. Such a delay is usually the result of, for example, the identity of the defendant and/or the location of the cultural object are unknown, and the plaintiff is not in a position to make the claim.

The ECHR and its protocols do not apply to events preceding the date of its ratification. A clear illustration of the limits ensuing from the temporal scope of the ECHR was the rejection of the claim of a Greek association dealing with the protection of Athenian historical monuments, for the return of the Elgin marbles, which were removed from the Parthenon of Athens and transported to England in the 19th century.³³ To bring the case under the jurisdiction of the ECtHR, the

33 *Sylogos ton Athinaion v. United Kingdom*.

association argued that the UK continues to refuse the return of the marbles on display in the British Museum and the UK was unwilling to take part in a mediation procedure on the fate of the Parthenon marbles. The ECtHR, however, disambiguated that the removal took place some 150 years before the adoption of the ECHR and thus it cannot be applied to the restitution claim. The UK's continued retention did not bring this matter to the jurisdiction of the ECtHR.

In *Potomska and Potomski*, where the Polish authorities' omissions to offer an alternative plot or to proceed with the expropriation of the plot in issue commenced in 1987, the ECtHR confirmed that its jurisdiction *ratione temporis* extends only to acts and omissions committed following the date of ratification of the ECHR and its protocols by the respondent state.³⁴ However, state measures can also fall under the jurisdiction of the ECtHR to the extent that they are extensions of a situation already existing before that date. It added that such facts can be taken into consideration, which came into existence prior to the date of ratification, to the extent they contribute to a situation also of relevance after the date of ratification, or if those facts are necessary to understand the facts emerging after that date. Even if the reference to the extension of situations may suggest that, contrary to what was held in the case of the Elgin marbles, measures taken before the ratification of the ECHR and its protocols could fall under the jurisdiction of the ECtHR, in fact, in *Potomska and Potomski*, the Court did not follow a different approach. It exclusively examined the events that occurred, and the measures taken after the ratification of Protocol No. 1 by Poland.³⁵

For this reason, in several cases applicants tried to devise tactics to bring their dispute under the jurisdiction *ratione temporis* of the ECtHR. They challenged decisions that fell under the jurisdiction of the Court, even if the source of the dispute went back for a period before the ratification of the ECHR and Protocol No. 1. In the *Prince Hans-Adam II of Liechtenstein v. Germany* case, the ECtHR made it clear that it does not have competence *ratione temporis* for the examination of the Czechoslovakian expropriation measure and its continuing effects. This was not imputed to Germany, the respondent state.³⁶ However, the applicant did not directly contest the expropriation measure of 1946, but the (in)actions of the German courts in refusing to deliver the painting to the princely family several decades later. This is how the case could fall under the temporal scope of application of the ECHR, even if a violation of the ECHR or its Protocol No. 1 was not finally established by the Court. Following a similar strategy, in *Thurn und Taxis*, the applicant did not challenge the imposition of the restrictions on the library and the archives that dated back to 1943, but the subsequent decisions of the German

34 *Potomska and Potomski v. Poland*, paras. 40–41.

35 *Ibid.*, para. 41.

36 *Prince Hans-Adam II of Liechtenstein v. Germany*, para. 85.

courts rendered in the 2000s that refused to lift the restrictions. Therefore, the case could fall within the jurisdiction of the ECtHR.³⁷

Expropriation cases, such as the *Prince Hans-Adam II of Liechtenstein v. Germany* judgment, in addition to the limited temporal scope of application of the ECHR and its protocols, exhibit another problem: the difficulties in establishing the existence of a possession.

■ 4.2. *The existence of a 'possession' of the applicant*

In matters brought before the ECtHR, the applicants must prove that the contested national measures affect their 'possessions'.³⁸ The term 'possessions' is construed autonomously by the ECtHR and is not limited to the ownership of physical goods. 'Possessions' can be either existing possessions, typically a right of ownership, or at least a legitimate expectation based on domestic law to obtain a property right.³⁹

In most cases, this does not cause any problem because the claimant is without doubt the owner of the movable or immovable object subject to litigation. As Beyeler demonstrates, the broad interpretation followed by the ECtHR, extending 'possessions' to any proprietary interest without having regard to domestic concepts even facilitates bringing claims to the Court. It is to be examined whether all circumstances of the case let the applicant hold a title to a substantive interest protected by Article 1 of Protocol No. 1.⁴⁰

However, in cases related to the expropriation of cultural objects, the lack of the right to possessions sometimes raised an obstacle to bringing a successful claim under the ECHR and its Protocol No. 1, as well as to restitution. The ECtHR held that, following expropriations that took place before the ratification of the ECHR by the respondent state, the state could decide whether it wanted to return the property and, the conditions for doing so.⁴¹ No obligation to return follows from the ECHR and its Protocol for such property. This is strongly connected to the lack of retroactive force of the ECHR and Protocol No. 1, as set out in chapter 4.1. In the *Prince Hans-Adam II of Liechtenstein v. Germany* case described above, the applicant failed to demonstrate that he had a property right or legitimate expectation related to the painting he wanted to claim back. The applicant could not effectively exercise the rights of the owner regarding the painting located in the Czech Republic, and the hope of an old property right being recognized by itself could not be considered as 'possessions' within the meaning of Article

37 *Fürst von Thurn und Taxis v. Germany*, para. 19.

38 *Rikon*, 2017, p. 335.

39 *Case Maria Atanasiu and others v. Romania*, nos. 30767/05 and 33800/06, 12 October 2010, para. 134; *Case Archidiocèse catholique d'Alba Iulia c. Roumanie*, para. 82.

40 *Beyeler*, para. 23.

41 *Case Jantner v. Slovakia*, no. 39050/97, 4 March 2003, para. 34; *Atanasiu v. Romania*, para. 135.

1 of Protocol No. 1. As the ECtHR put in other cases, a legitimate expectation of restitution must be of a more concrete nature than a mere ‘hope’ and be based on a legislative act or court decision.⁴² A mere hope of restitution does not constitute ‘possessions’.

■ 4.3. *Wide margin of appreciation of the states in cultural heritage protection*

4.3.1. *Cultural heritage protection as a legitimate aim*

It is evident from the ECHR text that certain restrictions on the right to property are acceptable. In practice, restrictions have two justifications in the context of cultural heritage protection. First, when the movable or immovable property itself is part of the cultural heritage. Second, when the property does not have a pre-eminent cultural value, but the environment in which the property is located does, and this justifies restrictions regarding the property.

In the judgments outlined above, the ECtHR consistently acknowledged that the protection and conservation of cultural heritage is a legitimate objective that can justify a restriction on the right to peaceful enjoyment of possessions. In *Beyeler*, the ECtHR stated that restricting the art market to protect cultural and artistic heritage is a legitimate aim in the public interest. This margin of appreciation extends to determine what is in the general interests of the community.⁴³ In *Kozacıoğlu*, the ECtHR not only established that the protection of the cultural heritage of a country is a legitimate aim that can in principle justify expropriation, but it also stated that the contracting states enjoy a wide margin of appreciation in implementing social and economic policies. The protection of historical or cultural heritage does not differ from these.⁴⁴ Accordingly, the ECtHR respects the determination of ‘public interest’ by the contracting states, except it lacks a reasonable foundation.

The ECtHR’s acceptance of the protection of cultural heritage as a legitimate aim is in accordance with the objectives of the Council of Europe’s conventions adopted in the field of the protection of cultural heritage. Under the European Cultural Convention, contracting states must take appropriate measures to safeguard objects of European cultural value.⁴⁵ The European Convention on the Protection of the Archaeological Heritage requires contracting states to protect

42 Case *Gratzinger and Gratzingerova v. Czech Republic*, no. 39794/98, 10 July 2002, para. 73; Case *Von Maltzan and others v. Germany*, nos. 71916/01, 71917/01 and 10260/02, 2 March 2005, para. 112.

43 *Beyeler*, para. 112; In *SCEA Ferme de Fresnoy*, the ECtHR, referring to *Beyeler*, also confirmed that national authorities have a wide discretion to determine what is in the general interest of the community.

44 *Kozacıoğlu*, para. 53.

45 Council of Europe, European Cultural Convention (ETS No. 18), Paris, 19 December 1954, Art. 5.

archaeological sites,⁴⁶ while the Convention for the Protection of the Architectural Heritage of Europe imposes an obligation on contracting states to take statutory measures and implement specific supervisory and authorization procedures to protect architectural heritage.⁴⁷ It is interesting to note that in *SCEA Ferme de Fresnoy c. France*, the ECtHR referred to the Council of Europe Framework Convention on the Value of Cultural Heritage for Society to support that the protection of cultural heritage is a legitimate objective, even though France, the respondent state, is not a party to the Faro Convention.

The ECtHR rarely questions assertions by states that a measure aims to protect cultural heritage. As will be presented in Chapter 4.3.2, the Court found it unproblematic in *Beyeler* that Italy tried to justify the existence and application of its pre-emption right on the grounds of protecting Italian cultural heritage concerning a painting by a Dutch painter living in France. An exception is, however, the case of the *Former King of Greece v. Greece*, where Greece intended to justify the confiscation of the former king's and other members of the royal family's lands without compensation for the goal of protecting archaeological sites.⁴⁸ The ECtHR pointed out that there was no evidence of the need to protect archaeological sites in the case.⁴⁹

It is worth stopping for a moment to see how the two policy approaches pervading the theory of cultural heritage protection—cultural internationalism and cultural nationalism—fit into the wide discretion accorded by the ECtHR to states.

4.3.2. *Cultural internationalism and cultural nationalism*

Cultural heritage literature, tracing back to John Henry Merryman, distinguishes between cultural nationalism and internationalism.⁵⁰ Cultural internationalism treats cultural objects as the expression of universal human culture, and accordingly intends to ensure the broadest possible access to cultural objects by facilitating free trade in works of art as well. It assumes that in the free flow of cultural objects, wealthy purchasers will also make the expenditure necessary to protect their property and investment. On the contrary, cultural nationalism takes as a point of departure that cultural objects are an inherent component of national culture, and thus they belong to their country of origin. This justifies restrictions on art trade and export controls in particular.

46 European Convention on the Protection of the Archaeological Heritage (ETS No. 66), London, 6 May 1969, see in particular Art. 2; European Convention on the Protection of the Archaeological Heritage (Revised) (ETS No. 143), Valetta, 16 January 1992, see in particular Art. 4.

47 Convention for the Protection of the Architectural Heritage of Europe (ETS No. 121), Granada, 3 October 1985, Arts. 3–4.

48 Case *Former King of Greece and others v. Greece*, no. 25701/94, 23 November 2000.

49 *Ibid.*, para. 88.

50 Merryman, 1986, pp. 831–853; Merryman, 2005, pp. 11–39.

In *Beyeler*, when the ECtHR analyzed the aim of interference, it pointed out that the 1970 UNESCO Convention gives preference in principle to the ties between cultural goods and their country of origin.⁵¹ However, it immediately added that the *Beyeler* case did not concern the return of a cultural object to its country of origin. At the same time, it also stated that a state can take measures concerning ‘works of art that are lawfully on its territory and belong to the cultural heritage of all nations’ to ensure a wide public access to those cultural objects ‘in the general interest of universal culture.’⁵²

Without mentioning them explicitly, the reference to the 1970 UNESCO Convention and the country of origin, on the one hand, and to universal cultural values and the broadest access to them on the other hand, exposes cultural nationalism and internationalism as matters of fact. Merryman deemed the 1970 UNESCO Convention to be a clear illustration of cultural nationalism because it enables countries of origin to impede the exportation of cultural objects using wide export restrictions that can lead to the retention of cultural property.⁵³ On the contrary, facilitating the flow of works of art, granting access to them for the broadest public, and the universalism of culture are the cornerstones of cultural internationalism. In this way, the ECtHR endorses policies underlying both cultural nationalism and internationalism from the perspective of the human rights protection regime.

In *Beyeler*, the question emerged of whether the portrait painted by Van Gogh, a Dutch painter in France, could reasonably be classified as a national cultural heritage by Italy, which was not the country of origin of the painting. Italy justified the protection and accompanying restrictions by the scarcity of Van Gogh works in Italy. The ECtHR had to answer whether the extended cultural nationalism represented by Italy could justify restrictions on the free salability of the painting. The lack of a strong cultural connection between the painting and the country imposing the restrictions could have called into question the legitimacy of the measure.⁵⁴ The ECtHR was content with a distant and somewhat economic (rather than cultural) connection in this case. It simply acknowledged the wide margin of appreciation of states in determining public interest regarding cultural heritage protection without substantively objecting to the qualification of the painting under Italian law.⁵⁵

It cannot be ignored that the contraposition of cultural nationalism and internationalism has been subject to various criticisms, and several alternatives

51 *Beyeler*, para. 113. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, Paris, 14 November 1970, UNTS 11806.

52 *Beyeler*, para. 113.

53 Merryman, 1986, pp. 842–852; Merryman, 2005, p. 22.

54 Michl, 2018, p. 121.

55 *Ibid.*, p. 122.

have been proposed in the literature to overcome the differences between the two theories. Hence, an opinion has been formulated that finds market regulation necessary while satisfying commercial demands to a certain extent.⁵⁶ Others have highlighted that the binarity of cultural nationalism and internationalism disregards those communities that live together with a cultural heritage and should receive a role in regulating cultural heritage that transcends state- and institution-centered approaches.⁵⁷ Finally, a view can be also found according to which cultural property disputes are characterized by indeterminacy and uncertainty, and they cannot simply be channeled into the extremes of cultural nationalism and internationalism.⁵⁸ Instead, the settlement of disputes related to cultural property should be based on multiple methods.

As these two doctrines represent two extremes, it has always been difficult to apply them in practice. It is not a coincidence that international, regional, and national cultural heritage legislation has never followed either of these theories in a pure form. Merryman acknowledged that certain restrictions can be admitted in international art trade.⁵⁹ In other words, only unnecessary restrictions are not acceptable. However, this raises the question of which restrictions can be considered necessary and which cannot.

The ECtHR has a practical answer to resolve conflicts between the proprietor's interest in ensuring the free movement and use of his property and the general interest in protecting cultural heritage. To determine whether an obstacle raised by a state in view of the protection of cultural heritage is necessary in its relation to the right to property, the ECtHR applies the proportionality test that is known and used in relation to other rights and freedoms in the ECHR system. Thus, the conflict between cultural internationalism and cultural nationalism is also addressed through the prism of the proportionality test. Interestingly, however, the ECtHR did not refer to the two policy approaches either explicitly or by implication in its subsequent judgments related to cultural heritage. The proportionality review remained the key tool to decide cases of interference with the right to property. Nevertheless, as the next section demonstrates, the application of the proportionality test is not without uncertainty.

■ 4.4. Proportionality test

As the formal criteria, that the restrictive state measure must be provided for by law and must serve a legitimate objective, were hardly contestable in the cases discussed above, almost all of which turned on the application of the proportionality test. The proportionality test enables the ECtHR to provide a structured answer based on legal reasoning in the cases before it. In applying the proportionality

⁵⁶ Bauer, 2007, pp. 690–724.

⁵⁷ Lixinski, 2019, pp. 563–612.

⁵⁸ Soirila, 2022, pp. 1–16.

⁵⁹ Merryman, 2005, p. 12.

test, the ECtHR evidently enjoys considerable room to maneuver. Therefore, it is often difficult to predict its outcome.⁶⁰

When applying the proportionality test, it is to be examined whether a fair balance has been struck between the demands of the general interest of the community and the protection of the right to property under Article 1 of Protocol No. 1, and whether the means employed by the state and the aim pursued by the legislation are in a reasonable relationship of proportionality. In this respect, as noted in *SCEA Fresnoy*, the Court accords a wide margin of appreciation to the states. For instance, in the framework of the proportionality review, the ECtHR established that not all listings of private property as cultural heritage should be considered a violation of Article 1 of Protocol No. 1, and that the owners of a property subject to listing or another restriction on the use of property are not always entitled to some form of compensation.⁶¹ A violation of Article 1 can be established when, due to the action or inaction of the state, the applicant must bear a disproportionate and excessive burden.

In *Potomska and Potomski*, the ECtHR enumerated certain factors that should be considered in the course of the proportionality review. The applicant's knowledge at the time of the acquisition of actual or possible future restrictions on the property, the existence of legitimate expectations regarding the use of property, the scope of the restrictions, and the availability of remedies concerning the restrictive measures can influence the outcome of the proportionality review.⁶²

Even if some guidelines were given in *Potomska and Potomski* regarding the factors to be considered, the proportionality test in practice can give rise to uncertainty. In *Potomska and Potomski*, the Court did not mention the existence of concrete negative effects of the restrictions among the factors to be considered. Michl highlights the uncertainty around the extent to which concrete negative effects must be examined by comparing the *Fürst von Thurn und Taxis* with the *Matas* judgments.⁶³ In *Fürst von Thurn und Taxis*, the ECtHR examined the concrete effects of the restrictions imposed on the treatment of the library and archives to protect cultural heritage and found no concrete negative bearing on the applicant. Even the requirement that the owner maintain the collection in an orderly state, which presupposed considerable expenditure, was not considered a negative effect. As in *Fürst von Thurn und Taxis*, in *Matas* the applicant had not sought authorization for any particular transaction related to his property and did not even have to incur additional costs because of the cultural value of the property. However, the argument that potential buyers may be discouraged from investing in the property was enough for the Court to accept the existence of negative implications for the owner. Such potential of investments being held back

60 See Trykhlil, 2020, p. 138.

61 *Potomska and Potomski*, para. 67; *Fürst von Thurn und Taxis v. Germany*, para. 23.

62 *Potomska and Potomski*, para. 67.

63 Michl, 2018, pp. 123–124.

was equally present concerning the Thurn und Taxis library due to the various restrictions.⁶⁴

In summary, taking the wide margin of appreciation of the ECtHR and the uncertainty of the factors used in the course of the proportionality test into account, it seems that it can be difficult from the perspective of a potential applicant to anticipate the outcome of the proportionality review and, thus, that of a procedure before the Court.

5. Conclusions

Private parties often challenge state interference in their right to property before the ECtHR, when they fail to obtain a remedy in domestic court proceedings against states seeking to protect cultural heritage. The chances of applicants in such disputes concerning cultural heritage are limited by certain factors. First, cultural property law disputes often date back to a time prior to the adoption and ratification of the ECHR and Protocol No. 1 by the respondent state (e.g., in the case of expropriations following the Second World War) and as such do not fall under the jurisdiction of the ECtHR. Even so, applicants often try to devise tactics to bring claims under the jurisdiction *ratione temporis* of the ECtHR, for example, by challenging decisions rendered at a time when the ECHR and Protocol No. 1 were already applicable. Second, the applicant has to demonstrate that (s)he has possessions violated by state measures that, in addition to the limited temporal scope of application of the ECHR and Protocol No. 1, can in particular bar restitution claims regarding cultural objects expropriated before their ratification. Third, the ECtHR recognizes the restriction of the right to property in favor of protecting cultural heritage as a legitimate aim. It does not take its turn *a priori* in favor of cultural heritage nationalism or cultural heritage internationalism. States enjoy a wide margin of appreciation regarding whether and how to protect cultural heritage in their domestic law. Finally, another factor that can raise an obstacle to claims based on the right to property is proportionality review. The proportionality test is quite flexible, and the outcome of its use may sometimes seem uncertain. In particular, the extent to which the Court requires that state measures have concrete negative effects on the applicant is questionable. Even though the case law of the ECtHR can be considered largely coherent, the wide margin of appreciation accorded to states in determining when and how to interfere to protect cultural heritage, as well as the flexibility of the proportionality review, leaves states with considerable room to maneuver in restricting the right to property. These factors bring an element of uncertainty in the procedure that often renders successful challenges to state measures difficult before the ECtHR.

64 Michl, 2015, p. 372.

Bibliography

- Bauer, A. A. (2007) 'New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates', *Fordham International Law Journal*, 31(3), pp. 690–724.
- Francioni, F. (2012) 'Public and Private in the International Protection of Global Cultural Goods', *European Journal of International Law*, 23(3), pp. 719–730; <https://doi.org/10.1093/ejil/chs039>.
- Granovsky, M. (2007) 'A Permanent Resolution Mechanism of Cultural Property Disputes', *Pepperdine Dispute Resolution Law Journal*, 8(1), pp. 25–40; <https://doi.org/10.2139/ssrn.1001786>.
- Hirschboeck, M. (2019) 'Conceptualizing the Relationship between International Human Rights Law and Private International Law', *Harvard International Law Journal*, 60(1), pp. 181–199.
- Lixinski, L. (2019) 'A Third Way of Thinking about Cultural Property', *Brooklyn Journal of International Law*, 44(2), pp. 563–612.
- Merryman, J. H. (1986) 'Two Ways of Thinking About Cultural Property', *American Journal of International Law*, 80(4), pp. 831–853; <https://doi.org/10.2307/2202065>.
- Merryman, J. H. (2005) 'Cultural Property Internationalism', *International Journal of Cultural Property*, 12(1), pp. 11–39; <https://doi.org/10.1017/S0940739105050046>.
- Michl, F. (2015) 'Noblesse oblige? – Die Thurn-und-Taxis-Entscheidung des Europäischen Gerichtshofs für Menschenrechte', *Bayerische Verwaltungsblätter*, 146(11), pp. 370–374.
- Michl, F. (2018) 'The Protection of Cultural Goods and the Right to Property Under the ECHR' in Lagrange, E., Oeter, S., Uerpmann-Witzack, R. (eds.) *Cultural Heritage and International Law*. Cham: Springer, pp. 109–127; https://doi.org/10.1007/978-3-319-78789-3_6.
- Parkhomenko, K. (2011) 'Taking Transnational Cultural Heritage Seriously: Towards a Global System for Resolving Disputes over Stolen and Illegally-Exported Art', *Art Antiquity and Law*, 16(2), pp. 145–160.
- Raumer von, S. (2017) 'Artikel 1 Schutz des Eigentums' in Meyer-Ladewig, J., Nettesheim, M., von Raumer, S. (eds.) *Europäische Menschenrechtskonvention*. Baden-Baden: Nomos.
- Renold, M-A. (2000) 'A Landmark Decision in Art Law by the European Court of Human Rights: Beyeler v. Italy', *Art Antiquity and Law* 5(1), pp. 73–76.
- Ress, G. (2005) 'Kulturgüterschutz und EMRK' in Grupp, K., Hufeld, U. (eds.) *Recht – Kultur – Finanzen – Festschrift für Reinhard Mußgnug zum 70. Geburtstag am 26. Oktober 2005*. Heidelberg: C.F. Müller, pp. 499–516.
- Rikon, M. (2017) 'Property Rights as Defined and Protected by International Courts', *Brigham-Kanner Property Rights Conference Journal*, 6, pp. 329–340.
- Rudolf, B. (2000) 'European Court of Human Rights – Regulation of Cultural Property – Preemptive Right of State to Acquire Works of Art – Compensation for Deprivation of Possessions – UNESCO Convention on Cultural Property: Beyeler

- v. Italy', *American Journal of International Law*, 94(4), pp. 736–739; <https://doi.org/10.2307/2589800>.
- Schabas, W. A. (2015) *The European Convention on Human Rights: A Commentary*. Oxford: Oxford University Press; <https://doi.org/10.1093/law/9780199594061.001.0001>.
 - Seidl-Hohenveldern, I. (2001) 'State Preemption of Foreign-Owned Painting and International Law', *International Journal of Cultural Property*, 10(1), pp. 70–78; <https://doi.org/10.1017/S0940739101771214>.
 - Soirila, P. (2022) 'Indeterminacy in the Cultural Property Restitution Debate', *International Journal of Cultural Policy*, 28(1), pp. 1–16; <https://doi.org/10.1080/10286632.2021.1908275>.
 - Trykhljib, K. (2020) 'The Principle of Proportionality in the Jurisprudence of the European Court of Human Rights' in Duić, D., Petrašević, T. (eds.) *EU and Comparative Law Issues and Challenges Series (ECLIC), Issue 4—EU 2020—Lessons from the Past and Solutions for the Future*. Osijek: University Josip Juraj Strossmayer of Osijek – Faculty of Law Osijek, pp. 128–154; <https://doi.org/10.25234/eclic/11899>.