

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX**



8 September 2008

Case document No. 1

Centre on Housing Rights and Evictions (COHRE) v. Croatia
Complaint n° 52/2007

COMPLAINT

registered at the Secretariat on 25 August 2008

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I. ADMISSIBILITY

I.A. State Party

I.A.1. Croatia: High Contracting Party to the European Social Charter (ESC) since 26 February 2003; and accepted supervision under the collective complaints procedure provided for in Part IV, Article D, paragraph 2 of the Charter in accordance with the Additional Protocol to the ESC providing for a system of collective complaints from 26 February 2003.

I.B. Articles Concerned

I.B.1. Article 16: "With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal, and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means."

I.B.2. Read independently or in conjunction with the non-discrimination clause in the Preamble of the 1961 ESC: "[T]he enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin."

I.C. Standing of the Centre on Housing Rights and Evictions

I.C.1. The Centre on Housing Rights and Evictions (COHRE) is an international non-governmental organisation, which has consultative status with the Council of Europe and is among organisations entitled to lodge collective complaints under the ESC/RESC mechanism. Under Part IV, Article D, referring to the provisions of the second additional protocol, Parties recognise the rights of international non-governmental organisations which have consultative status with the Council of Europe and are listed as having standing before the ESC/RESC mechanism to submit collective complaints to the European Committee of Social Rights, irrespective of whether the organisations concerned come under the jurisdiction of any of the State Parties to the ESC/RESC. COHRE has standing with the ESC/RESC collective complaint mechanism since 1 January 2005.

I.C.2. In addition, under Article 3 of the Second Additional Protocol to ESC, the international non-governmental organisations referred to in Article 1(b) may submit complaints with respect to those matters regarding which they have been recognised as having particular competence. COHRE is the leading international human rights organisation campaigning for the protection of housing rights and the prevention of forced evictions. COHRE's work includes a training and education program and extensive research and publications activity. COHRE is registered in the Netherlands since 1994, and coordinates its global activities from its headquarters in Geneva, Switzerland. Additional information about the organisation, is available on the internet at <http://www.cohre.org>.

II. Summary: Subject Matter of the Complaint

11.1. At issue in this Collective Complaint is the ongoing failure to resolve and remedy, in a manner consistent with the rule of law and Croatia's international human rights obligations, the arbitrary frustration of the right to adequate housing and related rights for ethnic Serbs and other minorities. These are a result of systematic cancellations by the Croatian government of socially owned property rights - so-called "occupancy rights" (*stanarsko pravo*) or "specially protected tenancies"¹ - and the failure to make available modes which would ensure equity with ethnic Croats in the provision of replacement housing. This has resulted in systemic denial of Charter rights prevailing to the present day.

11.2. The conflict in the former Yugoslavia created a massive displacement of the ethnic Serb population in Croatia. The exceptional circumstances created by the war were characterized by forced evictions, intense racial discrimination against ethnic Serbs and other minority populations, and impossibility for occupancy right holders to return due to security issues.² The Croatian courts permitted massive cancellation of occupancy rights to take place, mainly in absentia without notifying the occupancy right holders³, and shortly thereafter, another round of cancellation took place *ex lege* with the entry into force of legislation cancelling the existence and concept of occupancy right.⁴ These flats were then preferentially allocated to members of the majority or appropriated by the public authority on a permanent basis.⁵ After the war, Croatia refused to consider restitution or compensation for former holders of occupancy rights on the allegation that such a manner of property right no longer existed.⁶

11.3. Although the Croatian government has recently begun implementing programs to make housing available to some of the persons excluded from their housing during the conflict, these programs (i) lack a human rights basis; (ii) do not constitute adequate remedy for Charter violations; and (iii) are otherwise inadequate for a number of reasons. In addition, property restitution proceedings in Croatia have been ineffective for this purpose as they have discriminated between two classes of property owners: those whose private property was arbitrarily seized on the one hand, and those holding the property status of "occupancy rights" on the other. The latter have been denied adequate remedy on an equal footing with persons who, prior to the conflict, owned private property. Restitution for those internally displaced persons and refugees who lost their occupancy rights has not been completed.

11.4. The present Collective Complaint holds that these matters give rise to violations by the Croatian state of the right of the family to social, legal and economic protection as stipulated by Article 16 of the Charter - read together with and/or independently of the Charter's perambulatory non-discrimination provisions - as well as of related international standards. In

"Occupancy Rights" under the former Yugoslavia, are also referred to as "Specially Protected Tenancies," "Socially Owned Apartments," or "Right of Tenancy." Occupancy Rights, was understood and treated as "a real property right, and in most aspects amounted to ownership, except that holders of tenancy rights could not sell the right and the state could terminate the right in certain narrow circumstances." Human Rights Watch, Vol. 18 No.7(D). p. 4.

² Barbara McCallin, NRC 2007, see also Human Rights Watch, *Croatia: A Decade of Disappointment*, p.4-5

³ Barbara McCallin, NRC 2007, see also IDMC *Croatia* 2006, p. 161.

⁴ Barbara McCallin, NRC 2007, see also Human Rights Watch *Croatia: A Decade of Disappointment* 2006, p.5 referring to: Law on the Lease of Apartments in Liberated Areas, *Narodne novine* (official gazette of the Republic of Croatia), no. 73/1995, September 27, 1995 (HRW2006, ftn19).

⁵ Barbara McCallin, NRC 2007, see also International Displacement Monitoring Centre, Norwegian Refugee Council, *Croatia: Reforms come too late for most remaining ethnic Serb IDPs*, 18 April 2006, p.94-97; Human Rights Watch, *Broken Promises, Impediments to Refugee Return*, Vol. 15 No.6 (D), September 2003, p.35.

⁶ Barbara McCallin, NRC 2007, U.S. Dept. of State, Report on Human Rights Practices in Croatia 2006, §d. Freedom of Movement Within the Country, Foreign Travel, Emigration and Repatriation. <http://www.state.gov/g/drl/rls/hrrpt/2006/78806.htm>

order to ensure the necessary conditions for the full development of the family, which is a fundamental unit of society, Croatia has undertaken, through ratifying Article 16 of the European Social Charter on 26 February 2003,⁷ "to promote the economic, legal and social protection of family life by means such as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and by other appropriate means."⁸

11.5. The authors of this complaint are aware that on several occasions, including in the Grand Chamber ruling in the matter of *Blečić v. Croatia*,⁹ as well as in the recent admissibility ruling in *Milka Gaceša v. Croatia*,¹⁰ the European Court of Human Rights - at least in the cases on which it has to date had the opportunity to rule - has held that certain of these cases have not fallen within the ambit of the Court's law, as a result of *ratione temporis* and *ratione materiae* reasons respectively. The authors of this complaint contend that the meaning of effective remedy within the ambit of the Charter is harmonious with, and extends beyond that of the Convention, as interpreted by the Court in related cases to date. Insofar as Charter law incorporates social inclusion and social cohesion purposes, the failure to provide due remedy to persons arbitrarily expelled from their housing gives rise to the legal problem of exclusion from polity and society, which has pernicious, socially degrading effects. Among other impacts, persons denied due remedy solely or primarily as a result of their identification with an ethnic group, gives rise to Charter violations. It is this remedial and partially future-oriented character which, among other reasons, gives Social Charter law its distinctive character with respect to European Convention on Human Rights law.

11.6. The present Collective Complaint alleges that, in particular where the ethnic Serbs are concerned, as comprising the majority of affected internally displaced persons or returning refugees, the Charter's Article 16 requirements are not upheld at present in Croatia. Croatia's Charter Article 16 and related commitments are not respected as a result of the Croatian government's continuing violation of former occupancy rights holder's housing rights through the adoption and/or toleration of a number of policies and practices that strike at the fundamental basis of family existence; specifically these are the need for security, privacy, and shelter, and freedom from racial and other discrimination constituting the foundation for the successful realization of fundamental human rights, including but not limited to the right of adequate housing. At the core of this complaint is the disproportionate discriminatory impact that continuing housing rights violations have on Croatia's ethnic Serb population, in particular, those persons who previously resided in socially-owned flats. The ongoing denial of adequate restitution or compensation is a violation of their housing and human rights.

⁷ http://www.coe.int/t/e/human_rights/esc/5_survey_by_country/Croatia_en.pdf, accessed 5 May 2008.

⁸ European Social Charter (original), European Committee of Social Rights, (1961)

⁹ *Case of Blečić v. Croatia*, (Application no. 59532/00) Grand Chamber Judgment, Strasbourg, 8 March 2006.

¹⁰ *Case of Milka Gaceša v. Croatia*, Application no. 43389/02, First Chamber Admissibility Ruling, 1 April 2008.

III. THE FACTS

III.A. Background

III.A. 1. The conflict in the former Yugoslavia resulted in the expulsion and displacement of hundreds of thousands of ethnic Serbs from Croatia. Today, the ethnic Serb population faces several challenges to their right to adequate housing and to the realization of their rights under Article 16 of the Convention. These challenges include: lack of restitution of flats or compensation for lost occupancy rights; limited access to housing due to on-going discrimination; and lack of adequate electricity and water in those areas to which they have returned. The following is an overview of the facts that have led to the current situation in Croatia.

III.A.2. According to the government's own assessment, the ethnic Serb population of Croatia dropped from circa 580,000 in 1991, to circa 200,000 in 2001. These persons left Croatia because of violence, threats of violence, or because of an intense atmosphere of ethnicity-based intimidation during the 1990s that, in some areas, continuing to the present day. In the course of these massive upheavals, the property and homes of literally hundreds of thousands of persons were seized by their neighbours or appropriated via proceedings cloaked in only the thinnest veneer of legality that aimed to reshape the fundamental demography of Croatia in the "nation-building" context of the new Croatian state. Ethnic Serbs who fled have the right to live in Croatia and indeed may be Croatian nationals.

III.A.3. Prior to the conflict, a large group of ethnic Serbs had acquired extensive occupancy rights in socially-owned properties. This category of tenure included, *inter alia*, extensive protections against eviction, as well as rights of inheritance to descendants. Beginning in 1991, specially protected tenancies were terminated extensively in areas that remained under Government control; 23,700 individual proceedings in 85 municipalities were initiated under the 1985 Housing Act.¹¹ Most of these termination proceedings were based upon Article 99 of the Housing Act on the grounds that the tenant's absence of more than six months during the conflict was unjustified.¹² These acts took place notwithstanding the inclusion of "undergoing medical treatment, performance of military service or other justified reasons" amongst justifiable absences.¹³ Courts cancelled occupancy rights *en masse*, without considering the exceptional circumstances created by war. Forced evictions,¹⁴ systematic and widespread harassment on an ethnic basis (including raw physical attacks),¹⁵ and the impossibility for occupancy rights

See Human Rights Watch: *Croatia a Decade of Disappointment*, p4; See also *Zakon o stambenim odnosima*, Official Gazette nos. 51/1985, 42/1986, 22/1992, 70/1993.

² Human Rights Watch: *Croatia a Decade of Disappointment*, p.4; see also IDMC *Croatia* 2006, p.162. Section 99 of the Housing Act read as follows:

"1. A specially protected tenancy may be terminated if the tenant [...] ceases to occupy the flat for an uninterrupted period exceeding six months.

2. A specially protected tenancy shall not be terminated under the provisions of paragraph 1 of this section in respect of a person who does not use the flat on account of undergoing medical treatment, performance of military service or other justified reasons."

^B Barbara McCallin, NRC 2007; see also, Human Rights Watch, *Broken Promises*, p.34. ("The court decisions terminating tenancy rights were in most cases both substantively and procedurally flawed. Although most of the displaced fled in the face of a real threat to their safety, the courts did not find that this justified their absence in excess of six months. In other cases Serbs were forcibly expelled from their apartments.")

^H Human Rights Watch: *Croatia a Decade of Disappointment*, p.5 (".. the fact of having been forcibly expelled did not help them to preserve the right over the apartment.")

Human Rights Watch, *Croatia: A Decade of Disappointment* 2006, p.4 ("evidence about killings and torture of numerous Serb civilians in urban centers like Osijek, Sisak, and Split, has underscored the very real threat faced by

holders to return due to security situations were widespread characteristics of the war.¹⁶ These dangers were routinely deemed insufficient justification by local courts for a tenant's absence.¹⁷ The overwhelming impact of these termination proceedings involved Serbs or members of other minority groups who departed in large numbers from Government controlled territories; many were victims of forcible evictions by military personnel and others.¹⁸ The massive cancellation of occupancy rights by Courts took place mainly in absentia without notification to the occupancy rights holders.¹⁹

III.A.4. In August 1995, "Operation Storm"²⁰ liberated most of the occupied territory and by September, the Croatian Parliament adopted the Law on Lease of Flats in the Liberated Territories.²¹ This legislation nullified the concept of occupancy rights in Croatia and created

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another round of cancellations. Flats previously occupied by ethnic Serbs who were now refugees and displaced persons, were allocated to members of the majority population, ethnic Croats, who were then entitled to privatise and purchase those flats.²³ This law, *inter alia*, automatically terminated specially protected tenancies of those persons who were absent from

many who fled their homes and hence the unfairness of the court decisions affirming the termination of their right to return.")

¹⁶ Barbara McCallin, NRC 2007; see also Human Rights Watch, *Croatia: A Decade of Disappointment 2006*, p.4; Human Rights Watch, *Broken Promises 2003*, p.34.

¹⁷ Human Rights Watch, *Croatia: A Decade of Disappointment*, p.4-5 ("Although most of the displaced fled in the face of a real threat to their safety, Croatian courts rejected arguments that this justified any absence of more than six months")

¹⁸ For further discussion see *Situation of Human Rights in the Territory of the Former Yugoslavia*, Fifth Periodic Report on the situation of human rights in the territory of the former Yugoslavia, 17 November 1999, at paragraphs 99, 124-130. See also, Human Rights Watch, *Croatia: A Decade of Disappointment*, p.4-5. See also, Human Rights Watch, *Broken Promises: Impediments to Refugee Return to Croatia*, Vol. 15, No. 6(D), September 2003, p. 16.

¹⁹ Barbara McCallin, NRC 2007; see also IDMC *Croatia 2006*, p.161, citing OSCE 2003 *Occupancy/Tenancy Rights Still Unresolved*, ("During and after the course of the war, the Croatian Government passed a number of decrees and laws affecting occupancy rights. Holders of occupancy/tenancy rights who fled their homes were deprived of these rights - in most cases this occurred without notice, hearing or right of appeal. Those affected by the termination of such rights were almost exclusively Croatian Serbs. They have had no effective recourse either to reclaim the apartments, to be given substitute accommodation of comparable location, size and value, or to receive compensation.")

²⁰ "Operation Storm" is the name given to the August 1995 offensive launched by the Croatian army against the Serb-held territory in Northern and Southern Sectors which recaptured the remaining areas outside Eastern Slavonia. In May 1995, the Croatian army offensive launched in Serb-held territory in Western Slavonia had also recaptured the territory and was dubbed "Operation Flash." The two operations led to the flight of more than 200,000 Serbs in Eastern Slavonia, Bosnia and Croatia, the single largest population displacement during the conflict in the former Yugoslavia. In the case of Operation Storm, the exodus was accompanied by the killings of Serb civilians and widespread arson and dynamiting of Serb housing. See International Displacement Monitoring Centre, Norwegian Refugee Council, *Croatia: Reforms come too late for most remaining ethnic Serb IDPs*, 18 April 2006, p.16. (hereinafter *IDMC Croatia 2006*)

²¹ Human Rights Watch, *Croatia: A Decade of Disappointment*, p.5; See also, *Zakon o najmu stanova na oslobodjenim područjima*, Official Gazette nos. 73/1995, repealed 101/1998 (The law was repealed in 1998 at the insistence of the international community. The repeal, however, had no practical effect as the termination of specially protected tenancies had already been accomplished.)

²² Barbara McCallin, NRC 2007

²³ Barbara McCallin, NRC 2007, see also IDMC *Croatia 2006*, p.94-97. ("Following the displacement of the population as a consequence of the conflicts, a great number of accommodation belonging to members of Serb community were occupied, with or without legal authorisation, by Croat displaced persons or refugees mostly from Bosnia and Herzegovina. In accordance with the Law on Temporary Take-Over and Administration over Specified Properties adopted in 1995, municipal Housing Commissions could declare the house unoccupied."); Human Rights Watch, *Broken Promises*, 2003, p.35 ("During and after the war, the state and the state enterprises allocated the apartments left by displaced Serbs to Croat displaced persons and refugees, or to other individuals. In the areas controlled by the government during the war, the new occupants acquired tenancy rights in place of their predecessors; in the areas previously held by Serb rebels, the new occupants became protected lease holders under the Law on Lease of Apartments in Liberated Areas, enacted in September 1995.")

their flats for more than 90 days and provided for the leasing of such flats to others.²⁴ The legislation reduced the absence period by half, from 6 months to 3 months, and eliminated the judicial requirement of individual proceedings, thereby significantly increased the speed with which such terminations could be accomplished.²⁵ Some thousands of families, primarily of the Serb minority, had their specially protected tenancies terminated in this manner within the three-month period following "Operation Storm."²⁶

III.A.5. The massive cancellations initiated in Croatia both prior to and as a consequence of the 1995 law, created a massive exclusion of ethnic Serbs from the privatization schemes

²⁷ implemented through the Specially Protected Tenancies (Sale to Occupier) Act in 1991. In 1991, the law required privatization applicants to have the status of specially protected tenant making them occupancy rights holders; by 1995 the Croatian government changed the law to allow "privatisation by persons who had Government permission to temporarily occupy the flats if the previous specially protected tenancy had been terminated".²⁸ This had a particular, discriminatory impact on ethnic Serbs, as their flats were predominantly those whose occupancy rights had been cancelled. Even more detrimental to the internally displaced persons and refugees were additional amendments in 1995, which imposed stricter requirements of privatization by holders of a specially protected tenancy in state-owned flats. These requirements included physical presence at the time of the application and disqualified tenants who, *inter alia*, participated in enemy activity, evaded military service, left Croatia or went to

²⁴ Blečić 3rd party intervention by the OSCE Mission to Croatia, p.4, Law on Lease of Flats in the Liberated Territories (*Zakon o najmu stanova na oslobodjenim područjima*, Official Gazette nos. 73/1995, repealed 101/1998, (The law was repealed in 1998 at the insistence of the international community. The repeal however had no practical effect as the termination of occupancy rights holders had already been accomplished.) See also, Human Rights Watch, *Croatia: A Decade of Disappointment*, p.5;

²⁵ Blečić 3rd party intervention by the OSCE Mission to Croatia, p.4; see also, Human Rights Watch, *Croatia: A Decade of Disappointment*, p.5; IDMC *Croatia 2006*, p.162; Human Rights Watch, *Broken Promises*, p. 36.

²⁶ Human Rights Watch, *Croatia: A Decade of Disappointment* p. 5 ("Only a month earlier, hundreds of thousands of Serbs previously resident in these areas had fled from Croatia after Croatian forces regained control. ... At the time of the law's adoption it was obvious that genuine fear would prevent Serb refugees from returning within ninety days to repossess their apartments.")

²⁷ Blečić 3rd party intervention by the OSCE Mission to Croatia, citing: *Zakon prodaji stanova no kojima postoji stanarsko pravo*, Official Gazette nos. 27/1991, 33/92, 43/1992—consolidated text, 69/92, 25/93, 48/93, 2/94, 44/94, 47/94, 58/95, 11/96, 11/97, 68/98, 96/99, 120/2000. The European Court on Human Rights had previously discussed the Specially Protected Tenancies (Sale to Occupier) Act in its inadmissibility decision issued in *Soric v. Croatia*, application no. 43447/98 (16 March 2000); see also *Strunjak v. Croatia*, application no 46934/99 (5 October 2000). This ECHR distinguished the position of users of privately-owned and publicly-owned flats stating: "The Court observes that the applicant has always been in a position significantly different from the one of persons whose right to purchase the flats on which they previously held specially protected tenancy is recognized by the Specially Protected Tenancy (Sale to Occupiers) Act. While such persons were holders of a specially protected tenancy in regard of publicly-owned flats the applicant had become *ab initio* a lessee of a privately owned flat, where his position was dependent on the will of the owner." The Court went on to note that permitting occupants of privately-owned flats would expose the private owners to "a compulsory obligation to sell their flats," there was no such threat to private ownership involved in the privatization of publicly-owned flats." See also, Human Rights Watch, *Broken Promises*, p.39. (The June 2003, government adopted "Conclusion on the Housing Care for the Returnees Who Are Not Owners of a House or an Apartment, And Who Lived in Socially Owned Apartments" were able to rent or purchase government built apartments for the amount of 15 to 50 percent below the market price," however, "Other former tenancy right holders, whom the government had not divested of the right, had been able to privatize apartments for a far lower price, at about one third of the market value.")

²⁸ Blečić 3rd party intervention by the OSCE Mission to Croatia, p.5 (Article 1a extended this entitlement to disabled to disabled veterans of the Homeland War and immediate and extended family of the killed, imprisoned or missing Homeland War defenders). See also Human Rights Watch, *Broken Promises*, p.35 ("In the areas controlled by the government during the war, the new occupants acquired tenancy rights in place of their predecessors; in the areas previously held by Serb rebels, the new occupants became protected lease holders under the Law on Lease of Apartments in Liberated Areas, enacted in September 1995.")

the occupied territories and had not used the flat for more than six months. While it might arguably be a legitimate measure for persons *convicted* before an independent tribunal of having participated in enemy activity, the Croatian authorities applied such measures arbitrarily, additionally applying them to whole families, rather than solely to the persons concerned. This law and its related measures again directly and disproportionately impacted internally displaced persons and refugees, who left due to forced evictions and threats to their safety. The impact of these measures has had continuing impact, following Croatia's ratification of the Charter, and enduring until the present day.

III.A.6. In addition to the already disproportionate negative impact on ethnic Serbs created by the housing cancellation programs and changes in legislation, the judges in the cancellation proceedings used their arbitrary discretion to determine whose rights were to be terminated. The 6-month standard discussed above was strictly applied by courts when terminating the tenancies of ethnic Serbs and members of other national minority groups. During this same time period, other provisions of the law were liberally construed by the courts so as to maintain an absent, non-ethnic Serb's specially protected tenancy.³⁰ For example, in one case, the Croatian Supreme Court determined that a six-year absence by a non-Serb occupancy right holder was considered temporary and within the Act's exception for work abroad even though the tenant was working and residing in Canada together with his family and in the process of acquiring Canadian citizenship.³¹ The Supreme Court determined that the tenant had the "constant subjective intent" to maintain his place of permanent residence in Croatia.³²

III.A.7. Under international pressure to facilitate the return of displaced persons, including ethnic Serbs expelled from socially-owned housing, the Croatian government created the series of programs known collectively as "housing care". These programmes - and their inadequacy as human rights remedy — are examined in detail in section III.C below.

III.A.8. In 2004, the Croatian government provided the following report to the Council of Europe's Advisory Committee to the Framework Convention for the Protection of National Minorities. This report was based on Croatia's most recent census in 2001 :

The largest decrease of minority population was experienced by the Serbian national minority: the number of 581,663 citizens in 1991 was reduced to 201,681 citizens in 2001. This means that the number of Serbs was reduced by two-thirds in comparison to their number in 1991. However, other national minorities also experienced a reduction of number of their members. The number of Bosniacs and Muslims was decreased by 3000, Hungarians dropped from 22,355 to 16,595, Montenegrins from 9,724 to 4,926 and so on. The conclusion can be drawn that the reduction of members of national minorities was primarily caused by emigration during the war. This is undoubtedly true in the case of Serbs, although there are no precise data on how many members of the Serbian national minority emigrated during 1990s. The rough estimates mention between 300,000 and 350,000 people.³³

²⁹ Blečić 3rd party intervention by the OSCE Mission to Croatia, p.5, referencing, Article 50a. In 1997, the Constitutional Court invalidated several of the additional requirements for privatization of state-owned flats as contrary to the Constitution. U-I-697/95, dated 29 January 1997 (Official Gazette 11/1997).

³⁰ Blečić 3rd party intervention by the OSCE Mission to Croatia, p.3

³¹ Blečić 3rd party intervention by the OSCE Mission to Croatia, p.3, referring to Supreme Court Rev-87/1996-2 dated February 14 1996.

³² Blečić 3rd party intervention by the OSCE Mission to Croatia, p.3, referring to Supreme Court Rev-87/1996-2 dated February 14 1996.

³³ Council of Europe, ACFC/SR/II(2004)002, "Second Report Submitted By Croatia Pursuant To Article 25, Paragraph 1 Of The Framework Convention For The Protection Of National Minorities", (Received on 13 April 2004).

III.A.9. In its 2007 report on Croatia's progress toward accession to the European Union, the European Commission noted the following, with respect to the matters at issue in the complaint:

The right to property is guaranteed. However, there are certain difficulties in exercising this right. The process of restitution of property that was confiscated after World War II continues to proceed slowly. Provisions discriminating on grounds of nationality have not been removed from the law on the restitution of nationalised property. Weaknesses have also been highlighted both by the Ombudsman and the ECtHR in the compensation scheme for owners of property temporarily taken under legislation in force during the 1991-1995 war. ...

There has been limited progress on the various outstanding issues regarding refugees. Around 3,500 refugees returned to Croatia over the past year. The total number of Croatian Serbs registered as returnees to Croatia increased to 130,000, although the estimated level of actual return could be less than 60% of this figure. Reconstruction of housing has continued. The programme to reconnect public infrastructure in certain return villages is ongoing without major difficulties. Mine clearance operations have continued.

However, a number of obstacles to sustainable return of Serb refugees remain, principal among them being housing, particularly for former tenancy rights holders. Implementation of the Croatian government's housing care programmes within and outside the areas of special state concern (ASSC) for the former tenancy rights holders who wish to return to Croatia continues to be extremely slow. Outside the ASSC, only around 2% of the 4,500 applications for accommodation have been definitively resolved, four years after the programme was launched. Processing of applications is subject to significant delay. Of 8,320 applications inside ASSC, some 3,736 (44%) families have been allocated an apartment, up just 6% from last year. Croatia has indicated that the current target date of 2011 for full implementation outside the areas of special state concern will be brought forward to 2009. However, political will and a concerted effort from responsible authorities is clearly needed if this deadline is not to be missed.³⁴

10.A.10. It was subsequently reported that 2007 and 2008 targets would indeed be missed.³⁵

III.B. Obstacles Faced By Returnees

III.B.1. Accurate data on the number of returnees has been difficult to obtain. The Government Office for Refugees, Returnees and IDPs is the Croatian governmental office that collects data and publicizes its reports quarterly. The UNHCR also collects statistics on returnees in Croatia. Both offices face problems in counting the actual number of returnees; people who come back to visit or obtain Croatian papers are often counted as returnees even though they are not returning on a permanent basis.³⁶ The UNHCR published a report entitled *Sustainability of minority return in Croatia* which detailed the difficulties in obtaining accurate data:

³⁴ Commission Of The European Communities, Brussels, 6.11.2007, Sec(2007) 1431, Commission Staff Working Document, Croatia 2007 Progress Report, Accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy And Main Challenges 2007-2008, {Com(2007) 663 Final}, pp. 13-15.

³⁵ OSCE Office in Zagreb, Fortnightly Report No. 12/2008: 28 May-10 June 2008, 12 June 2008, pp.4-5.

³⁶ ECRE, Current Challenges for Returns in the Western Balkans: An NGO Perspective, at 23.

Interestingly, results are showing that just 34,8% of returnees reside at their registered address, while 54% of returnees live somewhere else. The remainder of 11,2% of registered returnees have deceased. Out of those who are not living at their registered address, 65% are living outside Croatia, mainly in Serbia (82,3%), BiH (5,9%), Montenegro (2%) and other countries (9,8%). An important finding of the research is that places of return are mostly rural areas in Croatia. Only 3% of returnees are to be found in settlements with more of 100,000 inhabitants.³⁷

III.B.2. Government figures suggest that a large number of IDPs and refugees have returned to Croatia since 1995. In April 2006, the Croatian government figures claimed that approximately 120,000 ethnic Serb refugees had returned to Croatia. In reality, however, the actual number of returnees is believed to be much lower; "many of those who are registered as returnees make only occasional visits to Croatia while continuing to live in Serbia or in Bosnia and Herzegovina, and only 60-65 percent of the registered returnees are believed to remain permanently in Croatia."³⁹ Many ethnic Serbs who have returned to Croatia have found it difficult to return because of the lack of adequate housing and this situation can be exacerbated by discrimination when they seek employment.

III.B.3. Human rights organizations have documented that, in addition to and including the structural obstacles at issue in the complaint, continuing violations against ethnic Serbs in Croatia are at the centre of problems with reintegration of this population.⁴⁰ New refugee returns have slowed significantly in recent years. An April 2006 Human Rights Watch Report specifically noted that obstacles to the full respect of human rights of Serbs who have returned to Croatia include: "the lack of progress in resolving tenancy rights stripped from Croatian Serbs during the war; [and an] increase in the number of ethnically motivated violence and harassment against Croatian Serbs."⁴¹

III.B.4. The failure of the Croatian government to resolve the continuing violations and lack of an effective remedy regarding the lost tenancy rights of displaced Croatian Serbs, has not only had a significant impact on refugee return to the urban areas where they formerly lived, it also forced many to return to rural areas or simply remain in other countries of refuge.⁴²

III.B.5. For many of the families who have not received restitution, their current housing situations are inadequate at best. Many internally displaced persons and refugees did not have other housing options when they were forcibly evicted from their homes, and have lived in buildings such as university dormitories, schools and hospitals for over 15 years; these places are referred to as collective centres.⁴³ The collective centres are inadequate as housing options; whole families live in single rooms, sharing kitchens and bathrooms often in states of disrepair with irregular supplies of gas, electricity and water.⁴⁴ Other persons not located in collective centres may be housed in temporary situations, under tenure arrangements lacking one or more elements of the international law *acquis*, or in other conditions of housing estrangement.

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³⁸ *Ibid.* at 1.

³⁹ *Ibid.* at 1.

⁴⁰ Human Rights Watch, *Croatia, A Decade of Disappointment*, p. 1-2.

⁴¹ Human Rights Watch, *Croatia, A Decade of Disappointment*, p.2

⁴² Human Rights Watch, *Croatia, A Decade of Disappointment*, p.2

⁴³ Internal Displacement Monitoring Center (Norwegian Refugee Center) [Internal Displacement: Global Overview of Trends and Developments in 2007](#), April 2008.

⁴⁴ *Id.* at 85-86.

III.C. Obstacles to Restitution for Occupancy Rights

III.C.1. The Council of Europe's Parliamentary Assembly began systematic monitoring of Croatia after its accession to the Council of Europe in 1996. The Parliamentary Assembly concluded in 2000 that Croatian authorities should adopt as a priority matter "a thorough reform of the legislation governing property issues throughout the country.. including the issue of occupancy/tenancy rights."⁴⁵ It continued by noting that "[a]pproximately 90,000 of the Croatian Serbs who left the country had been registered as of 2004 as having returned since 1995, however, they continued to face difficulties on property related issues."⁴⁶ The Committee specifically stated that "the resolution of the tenancy rights issue is seen by the international community as a determining factor for the return of refugees and displaced persons, since many of them do not have any other property in Croatia."⁴⁷ The Parliamentary Assembly made repeated recommendations that the Government "seek and follow the advice of Council of Europe legal experts in resolving the problem of the right to occupy formerly socially-owned property claimed by refugees, displaced persons and returnees."⁴⁸

III.C.2. Following his 2004 visit to Croatia, then-Council of Europe Human Rights Commissioner Alvaro Gil-Robles characterised the situation in Croatia concerning occupancy rights as follows:

Before the conflict, several thousand of Serbs lived in socially-owned or public company-owned apartments. The right to use these apartments was quasi similar to full property right but excluded the possibility of selling this right and with the possibility for the State to end the lease in limited cases. This category of housing represented more than 70% of housing units in former Yugoslavian cities.

During and just after the conflict, the authorities in charge at the time cancelled several thousand of leases granted to Serbs through judicial decisions brought in the absence of the tenant in the majority of cases. In order to terminate these contracts, the State or the State-own companies submitted requests to courts calling for the application of Article 99 of the Law on Housing, which provides for an ending of the renting contract in cases of an unjustified absence of the occupant for more than six months.

Afterwards, apartments were re-allocated to Croat refugees and displaced persons. Obviously, such procedures aimed to limit, as much as possible, the return of Serbs who

Resolution 1223 (2000), Honouring of obligations and commitments by Croatia, 26 September 2000, Parliamentary Assembly, Section 3.i.e.

⁴⁵ Blečić 3rd party intervention by the OSCE Mission to Croatia, p.9-10, Honouring of obligations and commitment by Croatia, Recommendation 1473 (2000), Doc. 9204, 18 September 2001, Reply from the Committee of Ministers adopted at the 763rd meeting of the Ministers' Deputies (12 September 2001) at paragraph 16.

⁴⁷ Blečić 3rd party intervention by the OSCE Mission to Croatia, p.9, Referencing, Honouring of Obligations and Commitments by Croatia, Doc. 8353, 23 March 1999, Report, Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe, Rapporteurs: Mr. J. Jaskiernia and Mrs. M. Stoyanova, Section III, Chapter 2.I.D.iv. ("In the urban areas of former Yugoslavia, the right to occupy a socially owned apartment (occupancy or tenancy right) was the main form of real property. This right could be acquired by an individual who fulfilled certain conditions prescribed by law and had virtually all characteristics of a private property right except for the right to sell. The European Court of Human Rights has held that the right of a tenant to occupy socially owned property is protected by the ECHR (article 8). ... The resolution of the tenancy rights issue is seen by the international community as a determining factor for the return of refugees and displaced persons, since many of them do not have any other property in Croatia.")

⁴⁸ Recommendation 1406 (1999), Return of Refugees and Displaced Persons to Their Homes in Croatia, Parliamentary Assembly, 29 April 1999 (14th sitting), Section 10.i.g.; Resolution 1223 (2000), Honouring of obligations and commitments by Croatia, 26 September 2000, Parliamentary Assembly, Section 3.i.e.

had fled during the conflict. Moreover, a great number of Croats could regain possession of their apartments upon their return even in cases where it had been occupied by another person while members of the Serb minority were not able to do the same. Despite courts action submitted by previous occupants who claimed abusive interpretation of the law or possibility of defending their interests - which they could not do during the first procedure due to their absence - courts have refused to rule on these requests. Finally, Serbs who fled Croatia following the operations "Storm" and "Flash" lost their rights in accordance with one legislative provision, seeing themselves deprived of any possibility of court action to challenge their contract's termination.

The system of socially-owned property was terminated on 5 November 1996, giving way to a new system of renting, with tenants enjoying the possibility of purchasing their accommodation off the state at prices lower than the market value. Once again, people of Croat origin have found themselves *de facto* privileged in comparison with those of Serb origin who left the country and lost their tenancy rights. ... Former occupants of housing in collective property are in fact the most important category of refugees whose housing problems have not yet been resolved.⁴⁹

III.C.3. In June 2008, a former US Ambassador to Croatia, Peter Galbraith, testified to the widespread discrimination against ethnic Serbs during and after the conflict in the former Yugoslavia at the trial of three Croatian generals. Ante Gotovina, Ivan Cermak and Mladen Markac were indicted in July 2006 by the UN war crimes tribunal in The Hague for their actions during and after "Operation Storm." The indictment alleges that these three men and others, including the first Croatian President Franjo Tudman, "participated in a joint criminal enterprise, the common purpose of which was the permanent removal of the Serb population from the Krajina region by force, fear or threat of force, persecution, forced displacement, transfer and deportation, appropriation and destruction of property or other means."⁵⁰ According to the Croatian news agency HINA:

A former US ambassador to Croatia, Peter Galbraith, told the UN war crimes tribunal in The Hague.. that it was part of the Croatian government's policy in prevent Serb refugees from returning to their prewar homes in Croatia, and that this was done through laws and regulations that made it difficult for refugees to acquire Croatian citizenship and repossess their property and by ordering or allowing the large-scale burning and looting of Serb property in areas recaptured by Croatian forces in the 1995 Operation Storm. ...

The systematic destruction of Krajina was something that was planned or allowed, which (the late Croatian president Franjo) Tudjman and others wanted to happen. That was a matter of government policy...

Galbraith said that his conviction that it was a preconceived policy was based on his personal information that Tudjman wanted an ethnically homogenous state and regarded the Krajina Serbs as a strategic threat to Croatia.

⁴⁹ Council of Europe, "Report By Mr Alvaro Gil-Robles, Commissioner For Human Rights, On His Visit To The Republic Of Croatia, 14 - 16 June 2004 for the attention of the Committee of Ministers and the Parliamentary Assembly", Strasbourg, 4 May 2005, paras. 52-56, available at: <https://wcd.coe.int/ViewDoc.jsp?id=854521&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FF65B&BackColorLogged=FFC679>, accessed 5 May 2008.

⁵⁰ Case Information Sheet, "Operation Storm" (IT-06-90) Gotovina *et al.*, at 5. <http://www.un.org/icty/cases-e/cis/gotovina/cis-gotovinaetal.pdf> (date last visited 26/07/08).

He added that the purpose of deeply unjust laws relating to the return of Serb refugees was to make their return impossible by denying them citizenship and their property.

Galbraith said he had heard various comments from Croatian officials on this matter, citing the statement by the then presidential chief of staff, Hrvoje Sarinic, that the Serbs were a cancer on Croatia's stomach, and the statement by the late defence minister, Gojko Susak, that the military operation in Grahovo had created an ethnically cleansed area.⁵¹

Galbraith also reportedly stated that it President Tudjman believed in ethnically homogenous countries. He "supported the notion of humane resettlement and change of borders in the former Yugoslavia... Tudjman considered Serbs a strategic threat to Croatia."⁵²

III.C.4. At least in part as a response to international criticism such as that of the Commissioner for Human Rights quoted above, the Croatian legislature adopted in 2002 a scheme referred to commonly under the shorthand "housing care".⁵³ The "housing care" programme however lacks a human rights basis and therefore does not provide a solution to the housing problem faced by ethnic Serbs. Among other deficiencies, (i) the applicant must evince a desire to return to Croatia;⁵⁴ (ii) the housing provided in the housing care framework is not necessarily in the place of origin of the person concerned, or indeed in any place in the social or economic mainstream of life in Croatia; (iii) persons may not choose the place of housing allocation; (iv) the housing allocated is not assured to include adequate security of tenure in conformity with international law, or even comparable to that assured persons similarly situated; (v) the status of protected lessee granted under the housing programme is much less favourable as the one given to former occupancy rights holders who were not displaced; (vi) the conditions under which the given flat can be purchased are not as favourable as the ones existing at the time of privatisation of socially owned properties. Under the existing conditions, very few refugees and IDPs can afford to purchase a flat.

III.C.5. In practice, targets for the provision of "housing care" alternative accommodation to former occupancy right holders have been repeatedly missed.⁵⁵ There are concerns that this is due to discriminatory reactions to returnees as the "housing care" provision imposes many conditions that make it difficult for former occupancy rights holders to return to their homes.⁵ The housing care program is directed at providing permanent alternative accommodation to

HINA, Croatian News Agency, Former US Ambassador Begins Testimony in Trail of Three Croatian Generals at Hague Tribunal, The Hague, June 23, 2008.

² HINA, Croatian News Agency, Galbraith: Tudjman Believed in Idea of Ethnically Homogenous Countries, The Hague, June 23, 2008

⁵³ "Housing care" is the shorthand used to refer to the Alternate/Temporary Accommodation scheme effectuated by the Croatian government.

⁵⁴ The Croatian government has repeatedly emphasized that persons not willing to return are not eligible for "housing care". Thus, in March 2008, Croatian Ambassador Vladimir Matek, Permanent Representative of Croatia at the OSCE told the 704th meeting of the Permanent Council of the OSCE: "For the rest, may I also recall our Interpretative Statement concerning the Decision on the opening of the OSCE Office in Zagreb and to repeat that the Sarajevo Declaration contains obligations for all the signatories and not only for Croatia. In the Point 1 of the SD this is formulated as: "*facilitating returns or local integration of refugees and internally displaced persons in our countries, depending on their individual decisions*" and in Point 3 as "*refugees who have chosen not to return will be assisted by their new host countries to locally integrate...*". Therefore, the requests not directly linked with the return (the convalidation issue, as well as the compensations for those who don't wish to return are belonging to this category) cannot be accepted as a Croatian obligation under SD Process." (Statement of H.E. Ambassador Vladimir MATEK, Permanent Representative of Croatia, at the 704th meeting of the Permanent Council (Agenda item 1), PC.DEL/197/08 6 March 2008).

⁵⁵ See for example Human Rights Watch, *Croatia: A Decade of Disappointment*, p.6.

European Council on Refugees and Exiles (ECRE), Current Challenges for Returns in the Western Balkans: An NGO Perspective, October 2007, p. 6.

"former tenancy right holders in the areas that were under the control of Serb rebel forces during the war.. providing they did not have other inhabitable property in Croatia or elsewhere in the territory of the former Yugoslavia."⁵⁷ Although some former tenancy rights holders have been allocated housing, approximately 3,000 families were still awaiting housing in November 2007.⁵⁸ The government has prioritized among applicants for housing, explicitly stating that former tenancy rights are the lowest priority for receiving alternative housing after other groups that are almost exclusively ethnic Croat.⁵⁹

III.C.6. In a December 2007 report to the UN Committee on the Elimination of Racial Discrimination, the Croatian government provided the following vague information on proceedings with regard to these issues:

With reference to the problem of housing for former holders of tenancy rights, at the end of 2005 implementation of an intense programme to settle the housing problems of former holders of tenancy rights outside of areas under special State care commenced, and this also encompassed the remaining groups of refugees who still need to find housing upon their return to Croatia. A large number of requests are currently being processed, and the determination of who is entitled to housing is under way: so far 2,200 applicants have been summoned to regional offices to resolve their requests and determine their right to housing outside of areas of special State care. So far approximately 700 applicants (32%) responded to the summons, and housing rights have been ascertained for 189 of them and consent to grant them housing has been issued.⁶⁰

The figures provided reveal a scandalously low allocation of housing, given the many thousands of persons potentially at issue.

III.C.7. According to an OSCE Office in Croatia Document of March 2008:

In spring 2007 the Government affirmed its commitment to accelerate the pace of implementation of the two housing care programmes for former OTR holders willing to return to Croatia by setting a specific benchmark for provision of housing units both inside and outside Areas of Special State Concern (ASSC). In agreement with the Zagreb-based international community, the Government pledged to physically deliver (the "keys-in-hands" principle) 1,400 housing units by the end of 2007, of which 1,000 would be in war affected areas and 400 in urban centres, respectively. The Government had noticeably intensified purchase of housing units and their allocation in the second half of 2007.

Government data updated as of January 2008 suggest that while the Ministry completed in 2007 the administrative processing of nearly all of the targeted 1,400 housing care applications, only sixty three percent (881 cases) of these applicants were physically provided housing by the end of 2007. This data includes cases where building material was delivered to a beneficiary under one of the housing care models. Provision of housing for the remaining cases, and construction of housing units from the building material delivered, is expected in 2008. ...

⁵⁷ Human Rights Watch, *Croatia, A Decade of Disappointment*, p. 24.

⁵⁸ US State Department 2007 State Report, Croatia.

⁵⁹ Human Rights Watch, *Croatia, A Decade of Disappointment*, p. 8.

⁶⁰ COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 9 OF THE CONVENTION, *Sixth, seventh and eighth periodic reports of States parties due in 2006, Addendum*, CROATIA, CERD/C/HRV/8, 6 December 2007, para. 156.

In total, around 13,100 applications from the former OTR holders intending to return to Croatia have been filed for the two housing care programmes. Until the end of 2007, around 4,500 cases have been resolved through the physical allocation of housing, while almost 2,000 cases have been rejected or issued with negative consents. The Office estimates that almost 3,900 cases with positive decisions await physical resolution and around 2,800 cases are still pending decision on eligibility. The Government plans to complete the entire exercise of providing housing care to former OTR holders by the end of 2009. As of the end of 2007, there was no indication of the necessary appeals procedure which is to be established to ensure a fair administrative process when deciding on the applications.⁶¹

III.C.8. Subsequent reporting in June 2008 indicates that the targets noted above have again been missed.⁶²

III.C.9. The OSCE has further noted recently that institutional restructuring within the Croatian government has recently created new ambiguities as to the current status of addressing these matters:

With the cabinet reshuffle of the new Government at the year's beginning, the Ministry for Maritime Affairs, Tourism, Transport and Development, the so far counterpart of the Mission on return related issues, was dissolved and divided into several new ministries. The former Department for Reconstruction of Family Houses and the Department for Refugees, Returnees and Displaced Persons (ODPR) now operate within the new Ministry for Regional Development, Forestry and Water Management under the responsibility of former Assistant Ministers, who have been elevated to the positions of State Secretaries. The exact division of responsibilities among the State Secretaries and the internal organisation of the Ministry, including its regional offices, was not formalised at the time of issuing this report.⁶³

III.C.10. To date, in proceedings for the restitution of such properties, Croatian authorities have been held to a different standard of account than elsewhere in the former Yugoslavia. For example, in Bosnia and Serbia, "under pressure and tight control of the international community, the legislation provided for restitution of occupancy rights to their holders with the possibility for them to purchase the flat under the same favourable conditions as those who were not displaced. In Croatia, despite the fact that the occupancy rights had exactly the same characteristics as in the above-mentioned countries, IDPs and refugees were never allowed to repossess their occupancy rights nor to purchase them."⁶⁴

Organization for Security and Co-operation in Europe Office in Zagreb, "Report of the Head of the OSCE Office in Zagreb Ambassador Jorge Fuentes to the OSCE Permanent Council Covering both the last five-month period under the former mandate of the OSCE Mission to Croatia and the first two-month period under the current mandate of the OSCE Office in Zagreb", 6 March 2008.

⁶² OSCE Office in Zagreb, Fortnightly Report No. 12/2008: 28 May-10 June 2008, 12 June 2008, pp.4-5.

⁶³ Ibid.

⁶⁴ McCallin, Barbara, "Property Restitution and the Right to Adequate Housing for Refugees and Displaced Persons in the Balkans", unpublished paper presented at Council of Europe Housing Rights Seminar, Budapest, September 24-25, 2007, p.2.

III.D. Examples

III.D.1. While some have contended that these matters are now for the most part resolved, a cursory glance at the facts of a number of cases indicates that quite the opposite is true. For the most part, the persons at issue have undertaken extensive efforts to secure justice with regard to their expulsion from their homes but have met with limited success, if any.⁶⁵ For those families who lost their homes during the conflict, a lack of adequate housing as they await restitution is an on-going problem. The following are examples of the violations of Article 16 faced by ethnic Serbs in Croatia today:

III.D.2. Mr. and Mrs. J.A. and L.A. are both pensioners over the age of 60, of Serb ethnicity. With the exception of one year, September 1991 to November 1992, they have lived in Zadar, Croatia for 25 years and in their current home for a total of more than 20 years. They have lived continuously in their home for the past eleven years, since regaining possession in September 1995 in the immediate aftermath of Croatia's armed conflict. On 1 July 1981, Mr. J.A. acquired a specially protected tenancy of their flat in Zadar. Ten years later, in September 1991, Mr. J.A. and Mrs. L.A. traveled to Belgrade where Mr. J.A. was being treated at a military hospital. In mid-October 1991, an ethnic Croatian family, family Z.K., related to Mr. J.A. and Mrs. L.A. by marriage and displaced from the countryside surrounding Zadar due to escalation in the armed conflict, moved into the flat with the permission of Mr. J.A. and Mrs. L.A. When Mr. and Mrs. J.A. returned to Zadar, the family refused to leave their flat; between November 1992 and September 1995, Mr. J.A. and Mrs. L.A. made several unsuccessful attempts to regain possession of their flat and to have the Z.K. family vacate through informal negotiations, including personal contacts and written requests, and later through formal legal remedies. In September 1995, after the completion of Operation Storm, the Z.K. family voluntarily left the flat. However the A. family's problems did not end here. The A. family's right to continue living in their home has been the subject of over twelve years of litigation before the domestic courts, including three rounds of appeals in the civil courts and concluding with a constitutional complaint to the Croatian Constitutional Court. The Zadar Courts have terminated their specially protected tenancy three times. Twice the rulings were overturned on appeal. The last termination was not overturned, and the A. family is currently subject to eviction although no eviction has been scheduled to date. Despite the fact that they have been living in the flat now again for more than a decade, they face new displacement.

III.D.3. Mr. J.M. was an occupancy rights holder of an apartment in Zadar. On New Year's Eve 1991, displaced Family P. from Novigrad broke in into his apartment. Family P. did not want to leave the apartment claiming that they had nowhere to go as they were refugees and expelled from Novigrad. Mr. J.M. agreed that to let them stay in his apartment. Mr. J.M. retired in 1992 and resided in a family home in Poljice; he occasionally returned to Zadar, as he did some temporary jobs for his old firm and during these visits he stayed in his flat along with Family P. In 1995, Family P. left Mr. J.M.'s apartment and returned to Novigrad, their pre-war residence. In the same year, the Ministry of Defense initiated a lawsuit for termination of occupancy rights of Mr. J.M. at Zadar Municipal Court on the basis of Article 99 Law on Housing Relations (unjustified absence for more than 6 months). On 16 April 1997 Municipal Court Zadar passed a verdict No P-1987/95 rejecting the request for termination of occupancy rights of Mr. J.M. The Ministry of Defense lodged an appeal in the County Court Zadar. On 3 May 2000 the County Court in Zadar accepted the appeal of the Ministry of Defense and changed the verdict of the Municipal Court in Zadar, terminating the occupancy rights of Mr. J.M. citing unjustified

⁶⁵ Case summaries provided by the OSCE Mission to Croatia, communication with COHRE, 25 October 2008. Names have been changed to initials to protect the privacy of the persons concerned. The authors of this complaint are prepared to release the names of the persons concerned, if the interests of justice so require.

absence as its reasoning. The Court stated that the only way for Mr. J.M. to have prevented the termination of his occupancy rights would have been to file a complaint for eviction of the displaced Family P. In the summer of 2000, Mr. J.M. lodged a request for revision to the Supreme Court. The Ministry of Defense requested and received an order for eviction that was scheduled for 12 December 2002, but the eviction was postponed. A new eviction order was issued and executed on 30 September 2003.

III.D.4. In the case of Ms. S.M. and family, the family had obtained occupancy rights on an apartment in Zadar in November 1968. Ms. S.M.'s husband retired from JNA in 1981 due to illness. On 23 December 1991 he left Zadar continue his medical treatment at the Military Hospital in Belgrade. Ms. S.M. remained in the apartment in Zadar and continued to work as a nurse in Zadar Hospital; as she was disabled, she worked only 4 hours a day. In 1992 her health deteriorated and after some medical treatment she retired on 30 June 1992 with a disability pension. She accommodated in her apartment an expelled Croat family from Zadar hinterland. 1 October 1992 she temporarily moved out of her apartment on 1 October 1992 to tend to her ill husband in Belgrade; her husband died in 1994. After Operation Storm in 1995, the expelled Croat family left her home in Belgrade and returned to their pre-war residence; on 4 September 1995 Mrs. S.M. moved back into her apartment. In autumn 1995 Ms. S.M. submitted to the Ministry of Defense, a request to purchase this apartment. In 1996, the Ministry of Defense initiated court proceedings for termination of her occupancy rights. On 31 October 1996 Zadar Municipal Court terminated her occupancy rights on the basis of six months unjustified absence from the apartment based on Article 99 Law on Housing Relations. Ms. S.M. filed an appeal to County Court Zadar but the Court rejected her appeal one year later and confirmed the first instance decision on the termination of occupancy rights. On 7 April 1998 Ms. S.M. filed a request for revision to the Supreme Court through Municipal Court in Zadar, but this request was rejected as untimely. On 2 June 1998 Ms. S.M. lodged an appeal to the County Court against the Municipal Court decision denying her request for revision. The County Court revoked the first instance decision denying revision. On 5 May 1999 Ms. S.M. submitted a proposal to the Municipal Court in Zadar for the postponement of the execution of the eviction order but this proposal was rejected on 10 April 2000. Ms. S.M. filed an appeal to the County Court in Zadar however, on 14 February 2001, the County Court in Zadar confirmed the decision of the Municipal Court denying the postponement.

III.D.5. Mr. D.S. and his wife Ms. M.S. were occupancy rights holders in Split since 1967. In 1991, their large apartment was exchanged for two smaller ones, and the family moved to another apartment in Split. On 4 June 1991 their son, Mr. M.S., moved into one of the latter two flats, where he is still residing. In August 1991, Mr. D.S. and Ms. M.S. left Split and went to the village of Kolarin, near Benkovac. They were unable to return to Split due to war until June 1997 when they joined their son M.S. in the apartment in Split. In 1999 Ministry of Defense filed a lawsuit with the Municipal Court Split, asking for the termination of their occupancy tenancy right, based on Article 99.1 of the Law on Housing Relations stating that they had not used their apartment for over 6 months for unjustified reasons. The Municipal Court in Split issued verdict no. P-750/99 on 30 January 2001 terminating their occupancy tenancy rights. The S. Family appealed this verdict and on 24 October 2003 County Court Split denied the appeal in verdict no. Gz-2380/01. On 15 December 2003, the S. Family lodged a request for protection of lawfulness with the State Attorney Office in Split, and on 19 December 2003 they lodged a constitutional complaint with the Constitutional Court. On 31 December, Mr. M.S. received a letter from the Ministry of Defense, Administration for Human Resources, Service for the Housing Affairs, head Ms. Nevenka Mažar, calling upon him and his parents to vacate the apartment within 15 days, based on the municipal and county court decisions.

III.D.6. The preceding cases are just a few examples of the systemic and widespread housing rights violations faced by ethnic Serbs and members of other minority populations in Croatia today. Faced with discriminatory practices on the part of the government and municipalities, ethnic Serbs and other minority populations are left in vulnerable situations. Access to adequate housing is imperative for sustainable living; without this, the rights of these populations as set out in Article 16 are in a state of systemic violation.

IV. THE LAW

IV.A. Article 16 and the Right to Adequate Housing

IV.A.1. Standards on the right to adequate housing have in recent years been elaborated by a number of international bodies including the European Committee of Social Rights. The content of the right to adequate housing is now defined, and is recognised as inherent in a number of the Charter's provisions, including Article 16.

IV.A.2. The European Committee of Social Rights has stated that "adequate housing" means a dwelling which is not only structurally secure, but also safe from a sanitary and health point of view and not overcrowded, containing security of tenure.⁶⁶ The Committee has recognized that housing is an area of such key significance for the successful implementation of the Charter as a whole that it implicates rights above and beyond those included in Article 31, the Revised Charter provision explicitly setting out a right to housing. Other Charter rights concerned include but are not necessarily limited to Article 30 and Article 16, the latter being the explicit subject of the present Collective Complaint.

IV.A.3. The Committee noted in *European Roma Rights Centre v. Greece*, that "in order to satisfy Article 16 states must promote the provision of an adequate supply of housing for families, take the needs of families into account in housing policies and ensure that existing housing be of an adequate standard and include essential services (such as heating and electricity)... Furthermore the obligation to promote and provide housing extends to security from unlawful eviction."⁶⁷

IV.A.4. Housing is fundamental for the development of family life and is encompassed in Article 16 of the Charter. The European Committee of Social Rights has held that Article 16 is "overlap[ing] with respect to several aspects of the right to housing," as stated in Article 31.⁶⁸ It has additionally stated that, "the notions of adequate housing and forced eviction are identical

European Social Charter (Revised), Conclusions 2003, Volume 1, European Committee of Social Rights, p. 363.⁶⁷ European Committee of Social Rights, Report to the Council of Europe Committee of Ministers on the Collective Complaint *European Roma Rights Centre v. Greece*, See Collective Complaint No. 15/2003, paragraph 24. Strasbourg, February 7, 2005.

⁶⁸ *European Roma Rights Centre v. Bulgaria*. European Committee of Social Rights. Complaint No. 31/2005. Decision on the Merits. Strasbourg, 18 October 2006. (117); ESC Article 31 -The Right to Housing; states: "With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: to promote access to housing of an adequate standard; to prevent and reduce homelessness with a view to its gradual elimination; to make the price of housing accessible to those without adequate resources."

under Articles 16 and 31.⁶⁹ The European Committee of Social Rights, as responsible for the oversight of the European Social Charter, has acknowledged its central role ensuring that the right to adequate housing is fully secured for all in assessing a states' compliance with Article 16. The Committee has also observed that "the principle of equality and non-discrimination form an integral part of Article 16 as the result of the Preamble."⁷⁰ Further, recalling previous case law, the Committee has noted that "implementation of the Charter requires the State Parties to take not merely legal action but also practical action to give full effect to the rights recognised in the Charter. When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter.. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for other persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings."⁷¹ Finally, the Committee has emphasized that ".. ultimate responsibility for implementation of official policy lies with the.. state."⁷²

IV.A.5. Additionally, Article 16 of ESC should be read in light of Part 1, which requires Contracting Parties to pursue by *all appropriate means* the attainment of the provisions of the ESC. The phrase "all appropriate means" encompasses at a minimum an understanding that the Party must refrain from practices that are in violation of the ESC, that the Party review legislation and policy to ensure that no laws or other regulations or practices contravene its commitments under the ESC or provide a framework for violations of such commitments, and that the Party must ensure that the law is enforced against its agents or against third parties engaging in practices that infringe upon the ESC. This term includes the adoption of legislative measures in order to promote the right of the family to appropriate social, legal and economic protection to ensure its full development, including measures to secure the right to adequate housing.

IV.A.6. The approach of the ESC Committee is reaffirmed by that of the United Nations Committee on Economic, Social and Cultural Rights in interpreting the International Covenant on the Economic, Social and Cultural Rights (ICESCR) by which Croatia is also bound. The ICESCR states, at Article 11 (1), "[t]he States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent."⁷³ The United Nations Committee on Economic, Social and Cultural Rights has derived the right to adequate housing from the "right to an adequate standard of living, including adequate food, clothing and housing."⁷⁴

⁶⁹ *European Roma Rights Centre v. Bulgaria*. European Committee of Social Rights. Complaint No. 31/2005. Decision on the Merits. Strasbourg, 18 October 2006. (117)

⁷⁰ European Committee of Social Rights, Report to the Council of Europe Committee of Ministers on the Collective Complaint *European Roma Rights Centre v. Greece*. See Collective Complaint No. 15/2003, paragraph 26. Strasbourg, February 7, 2005.

⁷¹ See European Committee of Social Rights. Complaint No. 13/2002, *Autism—Europe v. France*. Decision on the Merits, paragraph 53, available at: <http://hudoc.esc.coe.int/esc/search/default.asp>.

⁷² European Committee of Social Rights, Report to the Council of Europe Committee of Ministers on the Collective Complaint *European Roma Rights Centre v. Greece*. See Collective Complaint No. 15/2003, paragraph 29. Strasbourg, February 7, 2005.

⁷³ Croatia succeeded on October 8, 1991 via the former Yugoslavia's ratification of the Covenant on Economic, Social and Cultural Rights on June 2, 1971.

⁷⁴ See Committee on Economic, Social and Cultural Rights (CESCR). General Comment 4: The right to adequate housing (Art. 11.1 of the Covenant). December 13, 1991, paragraph 1. Further, the African Commission on Human and Peoples' Rights concluded that the right to adequate housing was implicitly recognised in rights to

IV.A.7. In its General Comment 4 on the right to adequate housing, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) elaborated an approach whereby adequate housing was to be understood in terms of seven key elements. These are:

- "(a) Legal security of tenure... ;"
- "(b) Availability of services, materials, facilities and infrastructure...;"
- "(c)Affordability...;"
- "(d)Habitability...;"
- "(e) Accessibility...;"
- "(f) Location...;"
- "(g) Cultural adequacy... ."75

IV.A.8. Evaluating further in its General Comment 7 the relationship between the right to adequate housing (including, as noted above, the element of legal security of tenure) and the issue of forced evictions, the Committee held that "forced evictions are prima facie incompatible with the requirements of the Covenant... Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available." 76

IV.A.9. In addition, the CESCR has emphasized that special attention should be accorded to vulnerable individuals or groups, *inter alia*, ethnic and other minorities, since often these individuals and groups suffer disproportionately from the practice of forced evictions.⁷⁷ The CESCR has also noted that forced evictions "also take place in connection with forced population transfers, internal displacement, forced relocations in the context of armed conflict, mass exoduses and refugee movements... [and that].. in all of these contexts, the right to adequate housing and not to be subjected to forced eviction may be violated through a wide range of acts or omissions attributable to States parties."⁷⁸ As the General Comments further elaborated, "[m]any instances of forced eviction are associated with violence, such as evictions resulting from international armed conflicts, internal strife and communal or ethnic violence."⁷⁹

IV. A. 10. The CESCR's General Comment 4, regarding the interpretation of the right to adequate housing, further illuminates the general understanding which is encompassed within this right.⁸⁰ The Committee has indicated that "the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing."⁸¹ It also noted that "a general decline in living and housing conditions, directly attributable to policy and legislative decisions

protection of family life and property: see *SERAC & CESR v.Nigeria*, African Commission on Human Rights, Case No. 155/96, 30th Session at paragraph 59 and 65.

⁷⁵ United Nations Convention on Economic, Social and Cultural Rights, General Comment 4, paras. 6-7. Sixth Session, 1991.

⁷⁶ "General Comment No. 7 (1997), The Right to Adequate Housing (Art 11(1) of the Covenant): Forced Evictions," adopted by the UN Committee on Economic, Social and Cultural Rights on 20 May 1997, contained in U.N. document E/1998/22, annex IV.

⁷⁷ CESCR, General Comment 7, paragraph 11.

⁷⁸ CESCR, The Right to Adequate Housing (Art. 11.1): forced evictions:. 20/05/1997. CESCR General Comment 7. Sixteenth Session, 1997. (20/05/97), para. 5.

⁷⁹ CESCR General Comment 7; para.6.

⁸⁰ CESCR, The Right to Adequate Housing (Art.11.1); 13/12/91. CESCR General Comment 4. Sixth Session, 1991 (13/12/91).

⁸¹ CESCR, General Comment 4, para.9.

by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant."

IV.B. The Ban on Discrimination 1: The Particularly Invidious Harm of Discrimination Based on Ethnicity or Perceived Race in Access to Housing

IV.B.1. Croatia has ratified, through succession, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and so has undertaken "to prohibit and eliminate racial discrimination in all of its forms and to guarantee the right of everyone.. to equality before the law, notably in the enjoyment of the .. right to housing."⁸³

IV.B.2. The Preamble of the original European Social Charter, as ratified by Croatia, states: "[c]onsidering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin."⁸⁴ The European Committee of Social Rights has stated that, "the principle of equality and non-discrimination form an integral part of Article 16 as a result of the Preamble."

IV.B.3. The Committee has elaborated on the scope of the principles of equality underlying the Preamble and the more recently formed Article E in *Autism-Europe v. France*.⁸⁶ The Committee held that "[t]he Parties fail to respect the Charter, where without an objective and reasonable justification, they fail to treat differently persons whose situations are different."⁸⁷ The Committee noted that "human treatment should be responded with discernment in order to ensure real and effective equality."⁸⁸ Article E prohibits not only direct discrimination, but all forms of indirect discrimination as well. Consequently, "such discrimination may arise by failing to take due and positive account of relevant difference or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all."⁸⁹

IV.B.4. In addition to the Preamble of the European Social Charter, a number of other Council of Europe standards ban racial discrimination; this area of law has recently been in a state of dramatic expansion. In 1994, the Council of Europe adopted the Framework Convention for the Protection of National Minorities. This document provides an extensive series of anti-discrimination guarantees, including:

⁸² CESCR, General Comment 4, para.1 1.

⁸³ See Article 5(e)(iii). Croatia succeeded on October 12, 1992 via the former Yugoslavia's ratification of the Convention on the Elimination of All Forms of Racial Discrimination on October 2, 1967.

⁸⁴ Council of Europe, European Social Charter, European Treaty Series —No.35, Turin, 18.X.1961, p.2

⁸⁵ European Committee of Social Rights, Report to the Council of Europe Committee of Ministers on the Collective Complaint *European Roma Rights Centre v. Greece*. See Collective Complaint No. 15/2003, paragraph 26. Strasbourg, February 7, 2005. Other international human rights instruments place similar requirements on Croatia in regards to discrimination and housing. In particular, the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") at Article 5(e)(iii) prohibits racial discrimination in the enjoyment of the right to housing. Croatia succeeded to the ICERD on 12 October 1992, as the former Yugoslavia had signed and ratified ICERD on 15 April 1966, and 2 October 1967 respectively.

⁸⁶ *Autism-Europe v. France*, Complaint No. 13/2000, decision on the merits of 4 November 2003.

⁸⁷ *Autism-Europe*, para. 52.

⁸⁸ *Autism-Europe*, para. 52.

⁸⁹ Council of Europe, European Committee of Social Rights Secretariat, Digest of the Case Law, December 2006, (citing *Autism - Europe* para. 52 and *ERRC v. Italy*, Complaint No. 27/2004, decision on the merits of 7 December 2005. §36.)

At Article 3(1): "Every person belonging to a national minority shall have the right to freely choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice."

At Article 4(1): "The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited."

At Article 4(2): "The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to a majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities."

At Article 6(2): "The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity."⁹⁰

IV.B.5. The Council of Europe has also seen expansion in the application of non-discrimination provisions in the findings of the European Court of Human Rights. In the *Case of Timishev v. Russia*, the Court discusses the level of proof necessary to demonstrate direct discrimination.⁹¹ The judgment states that "[a]ccording to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un-rebutted presumptions of fact."⁹² In addition, "the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake."⁹³

IV.B.6. Of particular significance for the current situation is the Court's determination in *Timishev* that "[e]thnicity and race are related and overlapping concepts".⁹⁴ The discrimination directed at ethnic Serbs in Croatia has been on account of their ethnicity which, in this context, can be understood as synonymous to race. The Court stated that:

A differential treatment of persons in relevant, similar situations, without an objective and reasonable justification, constitutes discrimination. Discrimination on account of ones' actual or perceived ethnicity is a form of racial discrimination.. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous
⁹⁵
reaction.

IV.B.7. The Court further elaborated that the burden of proving the absence of discrimination shifts to the respondent Government once the applicant has shown a difference in treatment.⁹⁶ In response to the lack of justification given by the Russian government, the Court found that "no difference in treatment which is based exclusively or to a decisive extent on a person' s

⁹⁰ Croatia ratified the Framework Convention for the Protection of National Minorities 11/10/1997; entered into force on 01/02/1998.

⁹¹ *Case of Timishev v. Russia*, ECHR (Application Nos. 55762/00 and 55974/00) Judgment, Strasbourg, 13 December 2005. para. 39.

⁹² *Timishev v. Russia*, para.39.

⁹³ *Timishev v. Russia*, para. 39. (Citing, see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, 147, ECHR 2005)

⁹⁴ *Timishev v. Russia*, para. 55.

⁹⁵ *Timishev v. Russia*, para. 56. (Citing *Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV).

⁹⁶ *Timishev v. Russia*, para. 57.

ethnic origin is capable of being objectively justified in contemporary democratic society built on the principles of pluralism and respect for different cultures."⁹⁷

IV.B.8. Similar to the matters addressed in *Timishev* and those of the present Collective Complaint is the principle expressed in the Court's 2000 ruling in the matter of *Thlimmenos v. Greece*. In *Thlimmenos*, the Court held:

The Court has ... considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification [...]. However, the Court considers that this is not only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.

IV.B.9. Most recently, the European Court of Human Rights found a violation of the Convention provision banning discrimination in the realization of the right to education in *D.H. and Others v. Czech Republic*.⁹⁸ The case concerns the systematic placement of Romani children in schools for the mildly mentally disabled, and the complaint was brought to the ECtHR after the Czech Constitutional Court dismissed the complaint.¹⁰⁰ In its decision the court recognized statistics as a method of proving racial discrimination, particularly in the context of an allegation of indirect discrimination:

As to whether statistics can constitute evidence, the Court has in the past stated that statistics could not in themselves disclose a practice which could be classified as discriminatory... However, in more recent cases on the question of discrimination, in which the applicants alleged a difference in the effect of a general measure or *de facto* situation..., the Court relied extensively on statistics produced by the parties to establish a difference in treatment between two groups (men and women) in similar situations. Thus,... '[w]here an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule—although formulated in a neutral manner—in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination.'¹⁰¹

IV.B.10. While the Court has acknowledged the importance of recognizing what statistics are capable of showing, it has also indicated:

.. the Court considers that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be

⁹⁷ *Timishev v. Russia*, para. 58. (In conclusion, the court found that "since the applicant's right to liberty of movement was restricted solely on the ground of his ethnic origin, that difference in treatment constituted racial discrimination within the meaning of Article 14 of the Convention.)

⁹⁸ European Court of Human Rights, Judgment, *Thlimmenos v. Greece*, (Application no. 34369/97), 6 April 2000.

⁹⁹ *D.H. and others v. the Czech Republic*, (Application no. 57325/00) Grand Chamber Judgment, Strasbourg, 13 November 2007.

¹⁰⁰ *D.H. and Others*, para.28.

¹⁰¹ *D.H. and Others*, para. 181.

reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.¹⁰²

IV.B.11. The jurisprudence developed by the European Court of Human Rights and the Conclusions issued by the European Committee of Social Rights indicate that a government is not only in violation of its obligations when allowing and/or promoting direct discrimination, but equally so when failing to remedy recognizable indirect discrimination. Additionally, the findings of statistics and reliable sources are sufficient to shift the burden to the government to demonstrate the presence of objective factors to explain the discrepancy. The overwhelming documentation demonstrating the significant impact primarily on ethnic Serbs through Croatia's policies and application of laws regarding occupancy rights holders, is prima facie evidence of, at a minimum, indirect discrimination with clear signs of direct discrimination in some cases.

IV.C. The Ban on Discrimination 2: Charter Issues Arising as a Result of Treating Inherently Similar Categories of Persons Differently, without Objective and Reasonable Justification, in Matters Related to Housing Restitution

IV.C.1. In addition to the racial discrimination law issues detailed above, the equality requirements inherent in Article 16 would render highly problematic the arbitrary distinction in treatment in restitution between persons who previously inhabited private property on the one hand, and occupancy rights holders on the other.

IV.C.2. In *Dartmouth*, the Nova Scotia Court of Appeal struck down a tenure law that discriminated between public and private tenants. The legislation provided security of tenure to tenants in private housing after five years of tenancy, but did not extend the same protection to public housing tenants. The applicant, a black woman relying on welfare benefits, successfully claimed that the law resulted in indirect discrimination on the basis of sex, race and income. The law was more likely to adversely affect those groups since they had less chance of accessing rental housing in the private market.

IV.C.3. Similarly, in *Larkos v. Cyprus*, the European Court of Human Rights was confronted with a distinction between private tenants and civil servants who rented from the government: the latter were provided less security of tenure after the expiry of leases despite the private nature of the contract. The Court found that no legitimate aim for the distinction could be identified, and no reasonable and objective criteria for the distinction had been established.

IV.D. Ban on Discrimination 3: Positive Obligation to Gather and Make Available Disaggregated Data on the Situation of Weak Groups in Sectoral Fields of Relevance to the Charter

IV.D.1. The Committee has repeatedly held that states have an obligation to provide statistical data when a particular group is or could be discriminated against:

¹⁰² *D.H. and Others*, para.188.

¹⁰³ *Dartmouth/Halifax County Regional Housing Authority v. Sparks (1993)*, 101 D.L.R. (4th) 224 (N.S.C.A.).

¹⁰⁴ *Case of Larkos v. Cyprus*, Application No. 29515/95, Judgment, Strasbourg, 18 February 1999.

The Committee recalls that when it is generally acknowledged that a particular group is or could be discriminated against, the state authorities have a responsibility for collecting data on the extent of the problem (ERRC v. Greece, Complaint No. 15/2003, decision on the merits of 8 December 2004, §27). The gathering and analysis of such data (with due safeguards for privacy and against other abuses) is indispensable to the formulation of rational policy. Similarly, if homelessness is to be progressively reduced as required by Article 31 §2 of the Revised Charter, states will need the necessary factual information to deal with the problem. The regular collection of detailed information and statistics is a first step towards achieving this objective (Conclusions 2005, France, Article 31 §2, p.268).¹⁰⁵

IV.D.2. The fact that a civil war on ethnic lines has been fought on Croatian territory in the very recent past would seem to place particularly strong burdens on the state in this area.

IV.E. Right to an Effective Remedy

IV.E.1. The right to an effective remedy is arguably an inherent component of Article 16, as the right of the family to social, legal and economic protection would be rendered meaningless without an accompanying right to an effective remedy. The intrinsic necessity of an effective remedy was touched upon by the Committee in its Conclusions on Article 16 concerning Turkey, when it asked, "does the owner or occupier have administrative or judicial remedies before or after such an action is taken."¹⁰⁶

IV.E.2. The right to an effective remedy is further interpreted as inherent in the ICSECR, to which Croatia succeeded in 1991.¹⁰⁷ General Comment 7 on the Right to Adequate Housing, relating to Article 11(1) of the Covenant, makes it clear that the right to an effective remedy is required.¹⁰⁸ The General Comment indicates that the guarantees of "legal protection against forced eviction, harassment and other threats" create obligations on the state and "legal remedies or procedures should be provided to those who are affected."¹⁰⁹ The Comment continues by referring to the "pertinent" article 2.3 of the Covenant on Civil and Political Rights, which requires States parties to ensure "an effective remedy" for persons whose rights have been violated and the obligation upon the "competent authorities [to] enforce such remedies when granted."¹¹⁰

IV.E.3. In addition, section 13 of the "Principles on housing and property restitution for refugees and displaced persons"¹¹¹ by the United Nations Economic and Social Council,

¹⁰⁵ European Committee of Social Rights, Decision on the Merits, Collective Complaint 27/2004, European Roma Rights Centre v. Italy, 7 December 2005, para. 23.

¹⁰⁶ European Committee of Social Rights. Conclusions XIII-1, Turkey, pp.258-259, December 2006. (p.259 of Charter Index).

¹⁰⁷ <http://www2.ohchr.org/english/bodies/ratification/3.htm>. The former Yugoslavia had signed and ratified the Covenant on 8 August 1967 and 2 June 1971, respectively.

¹⁰⁸ General Comment 7, CESCR, The Right to Adequate Housing (art. 11.1 of the Covenant): forced evictions. Sixteenth session, 1997. f 13

¹⁰⁹ CESCR, General Comment 7. 1[13. Croatia succeeded to the International Covenant on Civil and Political Rights in 1991, the Former Yugoslavia signed and ratified, on 8 August 1967 and 2 June 1971 respectively. (<http://www.unhcr.ch/pdf/report.pdf>)

United Nations Economic and Social Council, Economic, Social and Cultural Rights, Housing and property restitution in the context of the return of refugees and internally displaced persons; Final report of the Special Rapporteur, Paulo Sérgio Pinheiro, Principles on housing and property restitution for refugees and displaced persons; (hereinafter "Pinheiro Principles"). E/CN.4/Sub.2/2005/17. 28 June 2005. Commission on Human Rights, 56th Session.

CESCR, General Comment 4, The right to adequate housing (Art 11(1)). 13/12/91, Sixth Session 1991

highlights the importance of having access to an effective remedy. It states under the "accessibility of restitution claims procedures" that "[e]veryone who has been arbitrarily or unlawfully deprived of housing, land and/or property should be able to submit a claim for restitution and/or compensation to an independent and impartial body, to have a determination made on their claim and to receive notice of such determination."¹¹²

IV.E.4. Similarly, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (Limburg Principles) set out the necessity of effective remedy in order for the "full realization of the rights recognized in the Covenant."¹¹³ The Limburg Principles note that "States parties shall provide for effective remedies including, where appropriate, judicial remedies."¹¹⁴ The Principles further state that "[a]dequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitation on economic, social and cultural rights."¹¹⁵

IV.E.5. Another source demonstrating that access to an effective remedy is integral to fulfilling state obligations, is the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, created on January 22-26, 1997.¹¹⁶ Under remedies and other responses to violations, the Guidelines indicate the centrality of access to remedies; "[a]ny person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and international levels."¹¹⁷

IV.E.6. Finally, the United Nations Committee on Economic, Social and Cultural Rights has repeatedly held that an effective remedy is a requirement of a state's obligations under international law establishing economic, social and cultural rights. For example, in its General Comment 9 on Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, the Committee stated, *inter alia*, that, to fulfil the requirements of the Covenant, remedies should be "accessible, affordable, timely and effective".¹¹⁸

IV.F. Housing, Property and Land Restitution

IV.F.1. Instances of emergency of the kind prevailing in Croatia in the period 1992-1995 give rise to particularly acute needs for the state to undertake measures to protect vulnerable groups, particularly ones which may be threatened in the context of ethnic or related violence; these are measures which the Croatian government patently failed to undertake. In recent years there have been significant efforts to clarify the scope and content of international law requirements for remedy in the context of wholesale expulsion from housing, property and/or land. The Pinheiro

¹¹² Economic and Social Council. Economic, Social and Cultural Rights: Housing and property restitution in the context of the return of refugees and internally displaced persons. E/CN.4/Sub.2/2005/17. 28 June 2005. 113.1.

¹¹³ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. [UN doc. E/CN.4/1987/17, Annex; and *Human Rights Quarterly*, Vol. 9 (1987), pp. 122-135. 18. Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 9 *Human Rights Quarterly*, 1987, p. 121 [hereinafter 'Limburg Principles' or 'Principles']. See also Basic Texts, 37 *The Review (International Commission of Jurists)*, 1986. The 103 Principles were formulated at a symposium [hereinafter "Symposium"] held in Maastricht, the Netherlands in June 1986.

¹¹⁴ Limburg Principles 119.

¹¹⁵ Limburg Principles 151.

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997.

¹¹⁷ Maastricht Guidelines, 122. ⁸ CESCR, General Comment 9, Substantive Issues Arising in the Implementation of the International Covenant on

§V.122. http://www1.umn.edu/humanrts/instate/Maastrichtguidelines_.html ¹¹⁷ Maastricht Guidelines, 122.

⁸ CESCR, General Comment 9, Substantive Issues Arising in the Implementation of Economic, Social and Cultural Rights. E/C12/1998/24, 3 December 1998, para. 9.

Principles¹¹⁹ have emphasized the continuing importance of the recognition of forced evictions in the context of refugees and internally displaced persons and has made recommendations for governments. The preamble begins by "*Recognizing* that millions of refugees and displaced persons worldwide continue to live in precarious and uncertain situations, and that all refugees and displaced persons have a right to voluntary return, in safety and dignity, to their original and former habitual homes and lands."¹²⁰ (emphasis added) The Pinheiro Principles indicate that "States shall demonstrably prioritize the right to restitution as the preferred remedy for displacement, .. [and that] the right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return or refugees and displaced persons entitled to housing, land and property restitution."¹²¹ (emphasis added)

IV.F.2. Of particular relevance to the matters addressed in this Collective Complaint is the indication in the Pinheiro Principles that:

States should ensure that the rights of tenants, social-occupancy rights holders and other legitimate occupants or users of housing, land and property are recognized within restitution programmes. To the maximum extent possible, States should ensure that such persons are able to return to and repossess and use their housing, land and property in a similar manner to those possessing formal ownership rights.¹²² (emphasis added)

IV.F.3. The international principles regarding Right to Adequate Housing, Forced Evictions and the role of States with respect to refugees and displaced persons, make it clear that while occupancy rights holders are different from owners, the parallels and similarities have led to judicial decisions deeming them nearly equivalent, and at least sufficiently recognizable possession interests. Aside from Croatia, other successor states to the former Yugoslavia have recognized the right to restitution or compensation in cases where occupancy rights were lost or wrongfully terminated.

IV.F.4. If Croatia had fulfilled the requirements regarding restitution it would not now be in a situation of failing to fulfil its obligation with respect to the provision of adequate housing under the Charter.

V. CONCLUSIONS

V.1. As noted above, the Committee has requested that States' provide information on effective remedies in an Article 16 context. The Committee has not however to date set out in detail the requirements of remedy arising from Article 16. The present complaint provides an important opportunity to do so. At minimum, it is the contention of the authors of this complaint that effective remedy in a Charter context must: (i) be harmonious with the remedy requirements imposed on the Charter Party by other elements of international and regional human rights law; (ii) in keeping with its role in reviewing collective rather than individual petitions, that it assess in detail facts related to indirect discrimination and/or disparate impact on certain groups, as protected by the Charter's pre-ambulatory provisions, to ensure that no persons or groups of persons in effect are excluded from access to an effective remedy in areas of relevance to Charter law; and (iii) that Charter remedy incorporate also a test to assess the socially exclusionary effects of decisions taken by the public authority, to determine what effects they

⁹ UN Economic and Social Council, General Principles on housing and property restitution for refugees and displaced persons E/CN.4/Sub.2/2005/17, 28 June 2005, (hereinafter "Pinheiro Principles").¹²⁰ Pinheiro Principles, Preamble.

¹¹ Pinheiro Principles, para.2.2

¹² Pinheiro Principles, para. 16.1.

may be having on social cohesion in the given Charter Party. A tripartite approach of this kind would recognize the distinct character of Social Charter law.

V.2. There is ample basis in Charter law for the Committee to take such an approach. For example, in its Final Decision on the Merits of Collective Complaint 27/2004, *European Roma Rights Centre v. Italy*, describing the requirements of Article 31 of the Charter, the Committee stated:

The Committee recalls that Article 31 is directed to the prevention of homelessness with its adverse consequences on individuals' personal security and well being (Conclusions 2005, Norway, Article 31, p.587). The right to housing secures social inclusion and integration of individuals into society and contributes to the abolishment of socio-economic inequalities.¹²³ (emphasis added)

V.3. In its report on Collective Complaint 31/2005, *European Roma Rights Centre v. Bulgaria*, the Committee held that, "as many other provisions of the Charter, Articles 16 and 31, though different in personal and material scope, partially overlap with respect to several aspects of the right to housing. In this respect, the notions of adequate housing and forced eviction are identical under Articles 16 and 31."¹²⁴

V.4. Also in the Final Decision on the Merits of Collective Complaint 27/2004, the Committee stated, as to the scope of the Revised Charter Article E discrimination ban:

The Committee recalls that in its decision on the right to housing of Roma in Greece it emphasised that "one of the underlying purposes of the social rights protected by the Charter is to express solidarity and promote social inclusion. It follows that States must respect difference and ensure that social arrangements are not such as would effectively lead to or reinforce social exclusion" (*ERRC v. Greece*, Complaint No. 15/2003,¹²⁵ decision on the merits of 8 December 2004, § 19).

V.5. Thus, in a racial discrimination context, the Committee has repeatedly emphasized that a core purpose of the Charter is securing or promoting social inclusion and/or integration, combating social exclusion, and expressing solidarity.

V.6. It is the contention of COHRE that the corpus of facts raised above, comprising a range of acts of commissions and omissions by the Croatian government, gives rise to breaches of Article 16 of the European Social Charter, read in conjunction with or independently of the pre-ambulatory non-discrimination provisions of the Charter.

V.7. The "housing care" policies established in Croatia in recent years in response to criticism on Croatia's record on these issues, are not and cannot be considered restitution and/or compensation to which ethnic Serbs are entitled by right.

V.8. Discrimination matters concerning Croatia are not new to the Committee. In its December 2006 conclusions, the Committee held that Croatia was not in conformity with Charter Article

¹²³ European Committee of Social Rights, Decision on the Merits, Collective Complaint 27/2004, *European Roma Rights Centre v. Italy*, 7 December 2005, para. 18(ii).

¹²⁴ European Committee of Social Rights, Decision on the Merits, Collective Complaint 31/2004, *European Roma Rights Centre v. Bulgaria*, 30 November 2006, para. 17.

²⁵ European Committee of Social Rights, Decision on the Merits, Collective Complaint 27/2004, *European Roma*

²⁵ European Committee of Social Rights, Decision on the Merits, Collective Complaint 27/2004, *European Roma Rights Centre v. Italy*, 7 December 2005, para. 19.

16 obligations through the "excessive residence requirement" for non-state nationals to receive payment of family benefits.¹²⁶

V.9. Nevertheless, to date, despite extensive monitoring by international institutions, as well as processes surrounding Croatia's candidacy for membership in the European Union, no forces have been sufficient to bring an end to these systematic infringements of Croatia's international and regional human rights law obligations. Indeed, it is doubtful as to whether Croatia has yet complied with the minimum requirement, set out above, to gather and produce accurate data on the situation of vulnerable groups in matters related to housing and property restitution, particularly where former occupancy rights holders are concerned.

V.10. We urge the Committee to find Croatia in breach of Article 16 of the Charter, read in conjunction with or independently of the pre-ambulatory non-discrimination provisions of the Charter, and to undertake any and all measures necessary to ensure that the matters in this complaint are remedied without delay.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Claude Cahn', with a long, thin vertical stroke extending downwards from the end of the signature.

Claude Cahn
Head of Advocacy Unit

²⁶ Council of Europe Publishing, European Social Charter, European Committee of Social Rights, Conclusions XVIII-1, Volume 1, Strasbourg, December 2006.
