

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



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Centre on Housing Rights and Evictions (COHRE) v. Croatia
Complaint n° 52/2008

**RESPONSE BY COHRE
TO THE GOVERNMENT'S SUBMISSIONS
ON THE MERITS**

registered at the Secretariat on 3 September 2009

EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Centre on Housing Rights and Evictions (COHRE)

v.

Croatia

Complaint no. 52/2008

Response by COHRE to Observations of the Republic of Croatia on the Merits

Geneva, 3 September 2009

TABLE OF CONTENTS

I. INTRODUCTION.....	2
II. REITERATION OF ORIGINAL COMPLAINT.....	2
A. <i>COHRE reiterates its factual assertions and arguments of law in the Complaint registered at the Secretariat of the European Committee of Social Rights on 25 August 2008.</i>	2
III. PRELIMINARY RESPONSES.....	2
A. <i>The scope of the Complaint concerns members of the Serb ethnic minority that enjoyed occupancy rights in what is now the Republic of Croatia regardless of whether or not they are now refugees outside of the Republic of Croatia or displaced internally within the Republic of Croatia.....</i>	2
B. <i>The Republic of Croatia’s assertion that since the loss of occupancy rights was founded on the law, it was free of discrimination, is not substantiated.</i>	3
C. <i>The Programme of Provision of Housing does not address the issue of those who lost occupancy rights on account of ethnic discrimination.....</i>	4
IV. OCCUPANCY RIGHTS UNDER SPECIALLY PROTECTED TENANCIES.....	4
A. <i>Article 16 of the European Social Charter guarantees the right to adequate housing.</i>	4
B. <i>Occupancy rights under Specially Protected Tenancies provided a high degree of security of tenure and are not analogous to leaseholds as suggested by the Republic of Croatia.....</i>	5
V. STATISTICS USED BY THE REPUBLIC OF CROATIA DO NOT ACCURATELY REFLECT THE FACTS OF THE PRESENT COMPLAINT	6
A. <i>The scope of the Complaint is far broader than those ethnic Serbs that may have been members of the army who was at war against the Republic of Croatia.</i>	6
B. <i>The Republic of Croatia fails to disaggregate its data by ethnicity and fails to demonstrate cases finding justified absence based on well founded fear of persecution on account of ethnicity.</i>	7
VI. RACIAL OR ETHNIC DISCRIMINATION IS NOT WITHIN THE SCOPE OF A STATE’S MARGIN OF APPRECIATION	8
A. <i>The scope of the principle of margin of appreciation cannot justifiably include racial or ethnic discrimination.</i>	8
VII. CONCLUSION	8

I. INTRODUCTION

1. The Centre on Housing Rights and Evictions (COHRE) submits this response to the written submissions on the merits by the Republic of Croatia on the Collective Complaint (the Complaint) brought by COHRE against the Republic of Croatia under Article 5 of the Additional Protocol to the European Social Charter (the Charter), now listed as Collective Complaint reference number 52/2008.

II. REITERATION OF ORIGINAL COMPLAINT

A. COHRE reiterates its factual assertions and arguments of law in the Complaint registered at the Secretariat of the European Committee of Social Rights on 25 August 2008.

2. This response to the written submissions on the merits by the Republic of Croatia focuses with particularity on those submissions. However, COHRE reiterates its factual assertions and arguments of law made in the Complaint registered at the Secretariat of the European Committee of Social Rights on 25 August 2008 and disputes generally the submission on the merits of the Republic of Croatia.

III. PRELIMINARY RESPONSES

A. The scope of the Complaint concerns members of the Serb ethnic minority that enjoyed occupancy rights in what is now the Republic of Croatia regardless of whether or not they are now refugees outside of the Republic of Croatia or displaced internally within the Republic of Croatia.

3. The interpretation of the Republic of Croatia in paragraph 2 of its written submission on the merits does not accurately reflect the intent of the Centre on Housing Rights and Evictions (COHRE). In paragraph 2, the Republic of Croatia narrowly defines the scope of the Complaint to “the Serb ethnic minority in Croatia who have lost their occupancy rights”, meaning “ethnic Serbs living in Croatia who have lost their occupancy rights, not ethnic Serbs who reside outside Croatia and have lost their occupancy rights.”
4. COHRE reiterates that the Complaint is brought on behalf of ethnic Serbs and other minorities who have unlawfully or arbitrarily or on the basis of discrimination had their right to adequate housing violated by the acts or omissions of the Republic of Croatia, regardless of whether or not they are presently within the Republic of Croatia.¹
5. COHRE highlights that unlawful ethnic discrimination is that discrimination that is direction, *e.g.* intentional or purposeful discrimination, or indirect, *e.g.*, has a discriminatory effect or impact.
6. Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, cited as persuasive authority and a relevant international instrument by the European Court of Human Rights in the case of *Timishev v. Russia* (Applications nos. 55762/00 and 55974/00, judgment of 13 December 2005), states that:

...the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic

¹ See, *e.g.*, Complaint, para. 11.1.

origin which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.²

7. Additionally and also cited as authority and a relative international instrument in *Timishev v. Russia*, the Council of Europe's European Commission against Racism and Intolerance adopted General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination. It defines "racial discrimination" as follows:

1. For the purposes of this Recommendation, the following definitions shall apply: ...

(b) 'direct racial discrimination' shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification...

(c) 'indirect racial discrimination' shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification....³

8. While COHRE reiterates that the discrimination examined in the present case was and is intentional, the Republic of Croatia seems to argue that no intentional discrimination occurred. COHRE, however, would like to point out that even, assuming *arguendo*, that the Republic of Croatia is correct, the Committee should nonetheless find the above definitions to be persuasive authority and consequently that the policies and actions of the Republic of Croatia did and do, in the least, have an unlawful and arbitrary ethnically discriminatory effect that require just and fair remedy.

B. The Republic of Croatia's assertion that since the loss of occupancy rights was founded on the law, it was free of discrimination, is not substantiated.

9. In paragraph 3 of the written submission of the Republic of Croatia, it is asserted that since "the loss of occupancy rights in Croatia was founded on the law and conducted in each specific case according to a procedure established by law ... therefore the procedure was lawful and free of discrimination on an ethnic basis."

10. This assertion is not only unsubstantiated, but involves illogical reasoning. For instance, a law may be discriminatory on its face or applied in an arbitrary, including discriminatory, manner. Indeed, the Human Rights Committee, in considering Article 17 of the International Covenant on Civil and Political Rights which protects against arbitrary or unlawful interference with his privacy, family, home or correspondence, has stated that "the expression 'arbitrary interference' can also extend to interference provided for under

² International Convention on the Elimination of All Forms of Racial Discrimination, Art. 1, 660 U.N.T.S. 195, entered into force 4 January 1969. (emphasis added) (ratified by the former Yugoslavia on 2 October 1967 and succeeded to by the Republic of Croatia on 12 October 1992).

³ Council of Europe, European Commission against Racism and Intolerance adopted General Policy Recommendation No. 7, adopted 13 December 2002.

the law” and that “the introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.”⁴

C. The Programme of Provision of Housing does not address the issue of those who lost occupancy rights on account of ethnic discrimination.

11. The Programme of Provision of Housing mentioned in Section C of the submission on the merits by the Republic of Croatia does not address the core issue of the discriminatory cancellation of occupancy rights, the resulting inability to purchase one’s home under preferential conditions, nor the right to the remedy of restorative justice, including restitution, necessary to put victims in the situation they otherwise would enjoy but for the violations of the European Social Charter.

IV. OCCUPANCY RIGHTS UNDER SPECIALLY PROTECTED TENANCIES

A. Article 16 of the European Social Charter guarantees the right to adequate housing.

12. The Republic of Croatia argues that Article 16 of the European Charter does not guarantee the right of ownership nor the right of compensation for deprivation or limitation of ownership. The Republic of Croatia, however, seems to be referring to the notion of freehold or title ownership which is not at issue in the present Complaint. Rather the question of security of tenure, and the related right of occupancy, or possession, is at the core of the Complaint.
13. The European Committee of Social Rights (Committee) has held that Article 16 includes the right of families to adequate housing.⁵
14. The term the right to adequate housing is derived from the International Covenant on Economic, Social and Cultural Rights which guarantees in Article 11 that:

The States Parties to the present Covenant recognize 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 realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.⁶

15. General Comment No. 4 of the Committee on Economic, Social and Cultural Rights, mandated to interpret and monitor compliance with the International Covenant on Economic, Social and Cultural Rights, defines the right to adequate housing as including, *inter alia*, security of tenure:

⁴ Human Rights Committee, General Comment 16, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994).

⁵ See, e.g., European Committee of Social Rights, *European Roma Rights Center v. Greece*, Complaint No. 15/2003, Decision on the Merits (8 December 2004).

⁶ International Covenant on Economic, Social and Cultural Rights, Art. 11, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* 3 January 1976. The former Yugoslavia had signed and ratified the Covenant on 8 August 1967 and 2 June 1971, respectively. The Republic of Croatia succeeded to the Covenant on 12 October 1992.

...the concept of adequacy is particularly significant in relation to the right to housing since it serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute 'adequate housing' for the purposes of the Covenant. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include the following:

(a) Legal security of tenure. Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.⁷

B. Occupancy rights under Specially Protected Tenancies provided a high degree of security of tenure and are not analogous to leaseholds as suggested by the Republic of Croatia.

16. What is at the core of the present Complaint is the high degree of security of tenure provided by occupancy rights. The resulting right of occupancy, or right of possession, does amount to a real property interest nearly as strong as that provided by freehold or title ownership. Indeed "occupancy rights" (*stanarsko pravo*) under the former Yugoslavia, also referred to as "Specially Protected Tenancies," "Socially Owned Apartments," or "Right of Tenancy," are understood and treated as "a real property right, and in most aspects amounts to ownership, except that holders of tenancy rights could not sell the right and the state could terminate the right in certain narrow circumstances."⁸
17. Indeed, the Republic of Croatia concedes in paragraph 26 of its written submission on the merits that occupancy rights gave their holder "a preferential lease" with "security of tenure" meant to satisfy housing needs.⁹
18. But, in any event, the right to adequate housing at issue does guarantee security of tenure for most types of tenure including the occupancy rights formerly enjoyed by those in question in the present Complaint.
19. Furthermore, the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles) should be seen as persuasive guidance on the issue of restitution.¹⁰ The Pinheiro Principles state 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.¹¹

⁷ Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), para. 8, U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003).

⁸ Human Rights Watch, *Croatia: A Decade of Disappointment*, Vol. 18, No. 7(D) at p. 4.

⁹ Written submission on the merits by the Republic of Croatia, para. 26.

¹⁰ The Pinheiro Principles are based on a collection of existing legal standards and thus should be deemed binding. See

¹¹ United Nations Principles on housing and property restitution for refugees and displaced persons, Principle 16.1, UN Doc. E/CN.4/Sub.2/2005/17 (28 June 2005).

20. As for the right of restitution, the Pinheiro Principles note that restitution is the preferred remedy and is to be prioritised. The Principles state that:

States shall, in order to comply with the principle of restorative justice, ensure that the remedy of compensation is only used when the remedy of restitution is not factually possible, or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution, or when the terms of a negotiated peace settlement provide for a combination of restitution and compensation.¹²

21. Finally, a key difference between the occupancy rights at issue and leasehold arrangements is that those enjoying occupancy rights were given preferential treatment in the privatization schemes initiated by the Specially Protected Tenancies (Sale to Occupier) Act of 1991. By cancelling one's occupancy rights, the Republic of Croatia denied the possibility of purchasing one's home on such preferential terms.
22. Since the principle of restorative justice, including the right to restitution, is meant to restore persons to the place they would be had the violation not occurred, ethnic Serbs who had their occupancy rights wrongfully cancelled need to be given the opportunity to purchase their original homes at the same preferential conditions they otherwise would have enjoyed.

V. STATISTICS USED BY THE REPUBLIC OF CROATIA DO NOT ACCURATELY REFLECT THE FACTS OF THE PRESENT COMPLAINT

A. The scope of the Complaint is far broader than those ethnic Serbs that may have been members of the army who was at war against the Republic of Croatia.

23. In paragraph 3 of its written submission on the merits, the Republic of Croatia states that some ethnic Serbs were members of the army which was at war against the Republic of Croatia and that the European Court of Human Rights in *Trifunović v. Croatia*, decision no. 34162/06 of 6 November 2008, found that cancelling occupancy rights of such persons amounted to "interference ... necessary in a democratic society as it pursued a legitimate aim and was proportionate to it."
24. However, this sub-group is but a small number of the ethnic Serbs who lost their occupancy rights because they justifiably had to flee ethnic persecution.
25. Furthermore, and in any event, the loss of occupancy rights must be done on a case-by-case basis pursuant to the Housing Act with the burden of proof on the Republic of Croatia to show that an individual did indeed take up arms against the Republic of Croatia. Unless such a determination has been made on a case-by-case basis, individuals should not be deemed to be among the group analogous to the situation considered by the European Court in *Trifunović v. Croatia*.

¹² United Nations Principles on housing and property restitution for refugees and displaced persons, Principle 21.1, UN Doc. E/CN.4/Sub.2/2005/17 (28 June 2005).

B. The Republic of Croatia fails to disaggregate its data by ethnicity and fails to demonstrate cases finding justified absence based on well founded fear of persecution on account of ethnicity.

26. In its submissions on the merits, the Republic of Croatia offers statistics to demonstrate the extent of cancellation of occupancy rights. It fails, however, to disaggregate these data by ethnicity. This failure skews the data to make them meaningless. The Republic of Croatia attempts to imply, however, that the data demonstrate that similarly situated ethnic Serbs and ethnic Croats were treated similarly but fails to substantiate such a claim.
27. Furthermore, such a claim is contradicted by the weight of the evidence that ethnic Serbs were disproportionately impacted by the cancellation of occupancy rights provided with specificity in the Complaint. Furthermore, as examined in paragraphs 54 and 55 of the submission on the merits by the Republic of Croatia, since those of Serbian ethnicity fled some areas of Croatia later in time, the cut off dates for filing for applications to purchase homes had an ethnically disproportionate impact on those of Serbian descent.
28. In those cases cited by the Republic of Croatia which found absence from the home to be justified, the submission on the merits by the Republic of Croatia concedes that justification was found on grounds other than a well founded fear of persecution on account of ethnicity.
29. For instance, in footnote 23 of the submission on the merits by the Republic of Croatia, the courts found reasons to reject cancellation of occupancy rights due to lost personal documents necessary for travel, illness following a traffic accident and resulting loss of mobility, multiple sclerosis, and treatment of cancer.
30. At no point does the Republic of Croatia provide an example of the rejection of cancellation of occupancy rights on account of well founded fear of persecution, although evidence for such persecution is provided in the Complaint and is at the core of the issues before the Committee.
31. Furthermore, the Human Rights Committee recently provided yet another example of such persecution, finding that the Complainant, a Croatian of Serbian descent, in *Dušan Vojnović v. Croatia* was forced into fleeing his home which was “caused by duress and related to discrimination.”¹³ The Human Rights Committee noted that such duress and discrimination suffered by ethnic Serbs was generally widespread in Croatia in the early to mid 1990s.¹⁴
32. Finally, the Human Rights Committee also noted that while the cancellation of occupancy rights was pursuant to the law, citing Article 99 of the Housing Act, it was nonetheless arbitrary and consequently in violation of the International Covenant on Civil and Political Rights.¹⁵

¹³ Human Rights Committee, *Dusan Vojnovic v. Croatia*, Communication No. 1510/2006 (CCPR/C/95/D/1510/2006 (28 April 2009)).

¹⁴ *Id.* at para. 8.3.

¹⁵ *Id.* at para. 8.6.

VI. RACIAL OR ETHNIC DISCRIMINATION IS NOT WITHIN THE SCOPE OF A STATE'S MARGIN OF APPRECIATION

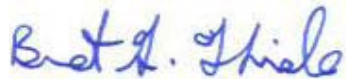
A. The scope of the principle of margin of appreciation cannot justifiably include racial or ethnic discrimination.

33. The Republic of Croatia claims that unlawful ethnically discriminatory application or impact of the law lies within the margin of appreciation afforded states when they ensure compliance with the European Social Charter.
34. However, unlawful ethnic discrimination can not be deemed within the scope of that margin of appreciation. Furthermore, such discrimination contravenes the European Social Charter's goal of social inclusion. Even when balancing the interests of the broader society, those general interests cannot be furthered by discriminating against ethnic minorities.
35. Indeed, the rationale for the doctrine of margin of appreciation is that the principle of separation of powers requires judicial bodies to give some leeway to legislative and executive bodies to implement laws and policies. However, it is well within the powers of judicial bodies to hold legislative and executive bodies accountable when they violate the prohibition on ethnic discrimination, and the prohibition on unlawful racial or ethnic discrimination should be seen as not subject to derogation in the context of the doctrine of margin of appreciation.

VII. CONCLUSION

36. COHRE respectfully reiterates its Conclusions as laid out in the Complaint.

Respectively submitted,



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