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The Right to Property in Croatia
In the Aftermath of the Dissolution of former Yugoslavia

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Abbreviations

APN	Agency to Mediate in Transactions of Specified Real Estate
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights”)
JNA	Yugoslav People’s Army
LASSC	Law on Areas of Special State Concern
LLF	Law on Lease of Flats in the Liberated Territories
LTTP	Law on Temporary Take-Over of Specified Property
ODPR	Government Office for Displaced Persons and Refugees
OSCE	Organisation for Security and Co-operation in Europe
SFRY	Socialist Federal Republic of Yugoslavia
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNTAES	United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium

1 Introduction

The subject matter of this report is a direct consequence of the violent break-up of the former Yugoslavia. The conflicts in the region forced tens of thousands of people in Croatia and Bosnia and Herzegovina to leave their homes in fear of persecution from regular or para-military forces of the enemy side. Having escaped from one part of the country to another or from one country to another, these people had to find accommodation in their new places of residence. Typically, the available housing belonged to people of another ethnic group who had similarly been forced to leave their homes due to persecution.

More than five years after the end of the conflicts in Croatia and Bosnia and Herzegovina the property problem remains largely unsolved. While many of the refugees and displaced persons have been successful in returning and repossessing the property they left behind, many have still not been able to do so. The property issue is most probably the main impediment to the return of people to their pre-war places of residence.

Whereas this report considers exclusively the situation in Croatia, the link to Bosnia and Herzegovina is obvious. Any real progress on the property issue must entail a regional approach whereby the problem is adequately addressed in both countries.

Thousands¹ of requests for restitution of property are pending resolution at municipal authorities and courts throughout Croatia. Many of these were submitted years ago. With the time, the owners of these properties find themselves in increasingly desperate situations, whether back in their pre-war village or town, whether residing in someone else's property, with relatives or in collective centres. Similarly, there are very large numbers² of requests to the Croatian Government for assistance to reconstruct property damaged or destroyed in the war. Although the issue of assistance to reconstruction is distinct from the right to property, the overall solution to the property problems depends greatly on achievements on this issue.

The right to property is protected under international human rights law. The Universal Declaration of Human Rights thus provides that everyone has the right to own property and that no person shall be arbitrarily deprived of the same.³ Further, the European Convention on Human Rights (ECHR), to

¹ About 7,000 requests for restitution were pending resolution with administrative bodies as of 3 May 2000. (Source: OSCE Mission to Croatia, *Report of the OSCE Mission to the Republic of Croatia on Croatia's progress in meeting international commitments since September 1999, 3 July 2000, p.9.*)

² No reliable statistics could be found.

³ Article 17.

which Croatia is a State Party,⁴ stipulates that: “every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be arbitrarily deprived of his possessions, except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”⁵

1.1 Purpose

The report aims at providing an introduction to the complex structure of laws and other regulations that constitute the basis for the property rights problem in Croatia. Having described the basis of the situation, the report will examine the property restitution system currently in place. This is done with the view to clearly identify existing deficiencies within this system. Finally, the purpose is to point at some steps that may be taken in order to remedy these deficiencies.

1.2 Delimitations

The property rights situation in Croatia is very complex and this report will not attempt to analyse all aspects of the issue. In particular, the report will only to a very limited extent discuss possible discrepancies between different laws or between different laws and political documents. Such an exercise would require a more thorough knowledge of the Croatian legal system. (Hopefully, though, this report will at least show the existence of such discrepancies.)

The report will not examine the regulation or implementation of the process of privatisation of property currently being carried out in Croatia as part of the transition to a full-blown market economy, although reference to it is made as appropriate for the understanding of other issues.

The distinction between the right to property and the reconstruction issue has already been pointed out. However important for the overall solution to the property issue, reconstruction matters will not be discussed in this report. The difference between the “right to property” and the “right to housing” may here be noted. A basic principle of the “right to property” is that the interest of the owner prevails over the interest of the occupant of the property. The basic principle of the “right to housing” is that the Government’s primary obligation is to ensure adequate accommodation to individuals who cannot provide for their own housing through poverty, disability or other similar causes.⁶

Consequently, the related problem of lack of alternative accommodation to those occupying others’ property or awaiting repossession is neither within

⁴ Croatia became a State Party to the ECHR on 6 November 1996.

⁵ Protocol No. 1, art. 1, para. 1.

⁶ OSCE Mission to Croatia, *Principles and Procedures for Repossession of Private Property*, internal report, August 2000, p. 1.

the scope of this report. However, the strong linkage between this problem and the right to property make necessary some reference, notably to the work of the Agency to Mediate in Transactions of Specified Real Estate (APN). This state Agency purchases houses from those willing to sell that can subsequently be allocated as alternative accommodation.

The report deals only with problems connected to immovable property; movable property will thus not be considered. The occurrence whereby people have been accommodating the homes of others has naturally resulted in many disputes over personal belongings. Issues connected herewith are not included in order not to confuse the subject.

1.3 Disposition

Basic facts about the disintegration of the former Yugoslavia and the war in Croatia as it pertains to the property problem will be briefly discussed in chapter 2. This chapter will also provide background information on the concepts of property rights in the ex-Yugoslavia. In chapters 3 and 4 the Croatian property-related legislation will be examined. The property restitution system established in the Return Programme of 1998 will be elaborated in chapter 5. Concluding observations can be found in chapter 6. In addition, reference is made throughout the report to the relevance of the ECHR for the subject of the report.

2 Background – Socialist Federal Republic of Yugoslavia (SFRY)

2.1 Disintegration of SFRY – War in Croatia

Providing a short background to the break-up of the former Yugoslavia and the war in Croatia is difficult due to the complexity of the situation. Those aspiring to properly understand the events and causes of the conflicts should refer to one of the many books written on the subject.⁷ The following is merely a summary of facts of which knowledge is required for the understanding of the Croatian property rights issue.

The Socialist Federal Republic of Yugoslavia was a federation of six republics. Those were Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia. In addition, there were two autonomous provinces within the Republic of Serbia: Kosovo and Vojvodina. The republics were (and still are) inhabited by a mix of people who identified themselves as belonging to different “nations.” Three of these nations were the Croats, the Serbs and the Muslims (also referred to as Bosniacs). Mainly people of these different groups inhabited particularly Bosnia and Herzegovina, but also Croatia. In Bosnia and Herzegovina the Muslims made up about 43% of the population, the Serbs 32%, and the Croats 17%. In Croatia there were about 78% Croats and 12% Serbs.⁸

From 1943 the Federal Republic was steered by President Josip Broz Tito, who in practical terms ruled the Country as a one-man single-party state. Struggling to keep the nations on an equal footing, Tito suppressed all forms of nationalism. After his death in 1980 no successor was appointed. Instead SFRY was to be governed through the establishment of an eight-member presidency, comprised of one representative from each of the six republics and one from each of the two autonomous provinces. At the end of the 1980s, the Country suffered serious economical and political problems causing tensions among the republics. In particular in Serbia, Croatia and Slovenia nationalistic movements had grown strong.

On 25 June 1991 Croatia (together with Slovenia) declared itself independent. The move was opposed by the Serbian regime in Belgrade, the

⁷ See for example Silber, L and Little, A, *The Death of Yugoslavia*, Penguin, 1996, revised edition.

⁸ Figures are from a population census carried out in SFRY in 1991 prior to the war. (Pending the carrying out of a new census, no reliable population data is available in Croatia and Bosnia and Herzegovina.)

capital of SRFY and the Republic of Serbia. In July 1991 forces of the Serb-dominated Yugoslav People's Army (JNA) attacked Croatia where it fought together with people of the Serb nation within Croatia.

The Serb group (12%) in Croatia lived mainly in the areas of the Republic bordering Bosnia and Herzegovina, where they were in majority. Many Serbs also resided in the Eastern Slavonia region in the northeast at the border with Serbia. During the war these areas came under Serb control. The occupied territories were declared as the "Serbian Autonomous Region of Krajina (Krajina meaning border)." Due to the Serb offensives, the pre-war non-Serb residents (i.e. Croats) of these territories were forced to leave and sought safety either in other parts of Croatia or abroad. Throughout the Croatian conflict the lines of confrontation separating the occupied territories from the rest of Croatia remained stable.

In May and August of 1995, the Croatian Army conducted the military operations known as "Flash" and "Storm" whereby the occupied territories, save for the Eastern Slavonia region, were recuperated into Croatian control. A massive refugee wave of some 200,000 Serbs from the previously occupied territories left Croatia heading for the Federal Republic of Yugoslavia (Serbia and Montenegro), the Serb-dominated parts of Bosnia and Herzegovina, the still Serb-controlled Eastern Slavonia area, or abroad.

Soon after Croatia had re-gained control, pre-war inhabitants began to return. In addition, large numbers of people of the Croat nation in Bosnia and Herzegovina (Bosnian Croats), fleeing persecution from Bosnian Serb forces, found refuge in the previously occupied territories.⁹ Most of these people were accommodated in property belonging to Serb refugees and displaced persons; hence the current property rights disputes in Croatia mainly involve Bosnian Croats occupying Serb-owned property in the previously occupied territories.

The region of Eastern Slavonia thus remained under Serb-control. In November 1995 the Croatian Government and Serb negotiating delegations with the mediation of the United Nations (UN) and the United States signed what is known as the "Erdut Agreement"¹⁰ allowing for the establishment of a UN transitional administration in the region. In January 1996 the United Nations Transitional Administration for Eastern Slavonia (UNTAES) was established. UNTAES remained in place until January 1998 when the region was re-integrated with the rest of the Croatian territory. Following the end of the UN administration, thousands of Serbs left the region, notably to Serbia. A large number of Serbs though remained, many of who currently occupy property owned by Croats. The situation in Eastern Slavonia is thus distinct

⁹ Some 140,000 Bosnian Croats are estimated to be residing in Croatia. (Source: OSCE Mission to Croatia, *Report of the OSCE Mission to the Republic of Croatia on Croatia's progress in meeting international commitments since May 1998*, 8 September 1998, p. 6.)

¹⁰ The Erdut Agreement is the usual name for the *Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium*, signed on 12 November 1995.

insofar as in this area Serbs are occupying Croat-owned property, while in other parts of the Country the situation is the opposite.

2.2 Property Rights in SFRY

2.2.1 Confiscation of Private Property

Before discussing the concepts of ownership in the former Yugoslavia, it should briefly be mentioned that in SFRY, as in other communist states, a process of confiscation of privately owned property was carried out following the end of the 2nd World War. In 1945 the Law on Nationalisation was adopted providing the basis on which much of the private property of the wealthy people was confiscated by the state. This nationalisation process was similar to that which occurred in several other communist states in Eastern Europe. While legislation providing for compensation to the deprived owners was introduced in several other countries, no such law was adopted in SFRY. Only in 1997, in what was then Croatia, the Law on Compensation for Deprived Property during the Yugoslav Communist Rule gave the legal basis for compensation. The implementation of the Law, however, has proceeded slowly with only a few cases of compensation de facto being given to the previous owners.¹¹

2.2.2 Concepts of Ownership – Socially Owned Property

The concept of private ownership is familiar. Also in SFRY this form of ownership was common, with family houses, for example, being privately owned. However, the concept of socially owned property is not known in western economic systems. In SFRY practically all apartments were socially owned, as well as the means of production, factories and office buildings. Housing was built and maintained through contributions made by all workers to a Housing Contribution Fund. These contributions were obligatory and deducted from the salary and could in some cases constitute as much as ten percent of the total income. Most urban property was socially owned while private ownership was the dominating ownership form in rural areas.

People were able to obtain “occupancy rights” to socially owned property. The occupancy right was much stronger than a normal protected lease, but weaker than private ownership. Different from private ownership, a person who holds an occupancy right (hereinafter also referred to as “tenant”) to an apartment does not have the right to sell the same. However, in case of death of the tenant, members of the same household have the right to take over the occupancy right. It would also be possible to exchange the occupancy right

¹¹ Interview with Ms. Tanja Pericic, Legal Assistant, OSCE Mission to Croatia, 10 August 2000.

provided the tenant receives prior approval by the body that allocated the apartment.

Not all people living in socially owned apartments were able to obtain occupancy rights. A criterion that had to be fulfilled was to have ten years of uninterrupted residence in the apartment. Once having obtained occupancy rights the tenants were obliged to pay monthly rents, although greatly subsidised and so often not corresponding even to the cost of maintaining the property.¹² The right to housing was emphasised in the political system of former Yugoslavia. From this followed that the occupancy right was given for life and that the conditions whereby this right could be cancelled¹³ were restrictive and rarely applied.¹⁴

The regulations concerning occupancy rights to socially owned property was stipulated in the SFRY Law on Housing Relations. It was taken over by Croatia and later amended in 1992 and 1993, both times with the view to amend the Law to new circumstances in the field of property rights brought about by the war. The Croatian Law on Housing Relations and the amendments thereto will be examined in chapter 3.2.

¹² *The Short Overview of Property Law in Republic of Croatia*, pp. 1-2.

¹³ These conditions are examined in chapter 3.2.

¹⁴ Serbian Democratic Forum, *Review of the legal provisions that have been applied as a basis for cancellation of tenancy rights in a period from 1991 up to 1997*, report, 17 July 1999, p. 2.

3 Croatian property legislation adopted due to causes of the war

3.1 Law on Temporary Take-Over of Specified Property

3.1.1 Introduction

The Croatian military offensives in May and August of 1995 led to the liberation of the previously occupied territories, save for the Eastern Slavonia region. Massive numbers of Croatian Serbs fled Croatia leaving behind their homes and often most of their private belongings. Concurrently, thousands of Bosnian Croat refugees were on Croatian territory in urgent need of accommodation.

With the view to linking the abandoned property with the accommodation needs of the refugees, the Croatian Government on 31 August 1995 adopted the Decree on the Temporary Take-Over of Specified Property.¹⁵ On 20 September, the Decree was transformed by the Croatian Parliament into the Law on the Temporary Take-Over of Specified Property¹⁶(LTTP). The wording of the Law remained almost identical to that of the Decree. The LTTP authorised the Government to place “abandoned property” under public administration and to give temporary rights to use the same to different groups in society. In reality the affected property was almost exclusively belonging to Serbs, while the beneficiaries under the Law were Croats.¹⁷

Private property was given for temporary use not only on the basis of the LTTP, but also according to the Law on Areas of Special State Concern. This aspect of the property rights issue will be examined in chapter 3.2.

LTTP was abolished on 10 July 1998 by the Law on the Cessation of Validity of the Law on the Temporary Take-Over of Specified Property.¹⁸ Whilst no longer valid, knowledge of LTTP is required in order to understand the current property rights situation in Croatia.

¹⁵ Official Gazette, No. 63/95.

¹⁶ Official Gazette, No. 73/95.

¹⁷ OSCE Mission to Croatia, *Protection of Property Rights in the Republic of Croatia – The Law on Temporary Taking over and Administration of Specified Property*, report, May 1997, pp. 4-5.

¹⁸ Official Gazette, No.101/98.

3.1.2 Content

The aim of the LTTP is to “regulate the temporary take-over, use, administration and supervision of the property of natural persons specified in [the] Law in order to protect this property and to safeguard the claims of creditors arisen in connection with it.”¹⁹ Responsibility for the implementation of the Law was assigned to the municipal level where “Commission[s] for the Temporary Take-Over and Use of the Property” (hereinafter Commissions) were established. The Commissions were to keep records of the administered property, which should be forwarded to the Ministry for Development and Reconstruction where central records would be maintained.²⁰ In addition, the Commissions were obliged to issue minutes recording the hand-over and the physical state of the properties.²¹

Property which could be administered under LTTP was that which was: (1)“situated in the previously occupied, now liberated territory of [Croatia];”(2)“owned by the persons who left [Croatia] after 17 August 1990 or who are staying in the occupied area of [Croatia] or in the territory of Federal Republic of Yugoslavia or in the occupied territory of [Bosnia];” or (3)“placed in the territory of [Croatia] and owned by the citizens of the Federal Republic of Yugoslavia.”²²

In practice this meant that there were no territorial limitations; property located anywhere in Croatia could be taken under administration. Accordingly, not only property located in the previously occupied territories, but also Serb-owned houses along the Dalmatian Coast was taken under municipal control. However, the law was for obvious reasons not applied in the region of Eastern Slavonia, which remained occupied by Serb forces. Notably, the LTTP is clearly discriminating against property owners with citizenship of the Federal Republic of Yugoslavia.

A further criterion for property to be placed under administration was that it was “abandoned by its owners and not personally used by them.”²³ The concept of “abandoned property” is not further defined in the Law or through implementing instructions. One of the questions that therefore arose was for how long a period and under what circumstances the property must have been left behind in order to be considered abandoned. For example, it clearly cannot be sufficient to have left the house to go to the bakery. In the Decree (that came before the Law) a 30-day restitution period for the owner was stipulated. This should mean that periods of less than 30 days could have been sufficient. One may further argue that a degree of intent of the owner not to further dispose of the property should have been required. If so, the owner should have been able to alert the relevant authorities about the

¹⁹ *Law on Temporary Take-Over and Administration of Specified Property*, art. 1.

²⁰ *Ibidem*, art. 4, para. 2.

²¹ *Ibidem*, art. 5, para. 3.

²² *Ibidem*, art. 2, para. 1-3.

²³ *Ibidem*, art. 2, para. 1.

intent to return thereby preventing the taking into administration of the property.²⁴

Beneficiaries under the law were “displaced persons and refugees, returnees whose property has been destroyed or damaged during the liberation war, war invalids, families of Croatian defenders killed or missing in the liberation war, and other citizens performing duties vital for the security, reconstruction and development of the previously occupied areas.”²⁵ Basically anyone could thus be allocated property under the LTTP provided it was in the interest of the Government.

It is clear from the Law that the property given away for use still belongs to the legitimate owner; it is neither state property nor property belonging to the actual possessor. However, the owner’s rights are “empty” insofar as the normal legal consequences derived from ownership do not exist, as he or she cannot, according to the main rule, dispose of the property in any way.²⁶ An exemption to the main rule exists whereby the Ministry of Justice can allow the use of certain property,²⁷ but there is no information indicating that the exemption has ever been applied.²⁸

The temporary user has the obligation to maintain the property with “due care.”²⁹ On the other hand, he or she has the right to “freely use the proceeds of the property.” Since nothing else is stated in the Law, this should include also the proceeds that are the result of work of the owner.

3.1.3 Legal Remedies for Owners

A 30-day restitution period was stipulated in the Decree as mentioned above. In the Law this period was set at 90 days.³⁰ However, since owners only exceptionally returned within that short a period after the military operations, this remedy was of little practical value.

Complaints against the decisions to administer the property could be sent to the Ministry of Justice “within 8 days as of the day of delivery or notice.”³¹ Difficulties with sending mail from, for example, Serbia to Croatia at this time can easily be imagined. In addition, no delivery or notice seem to have been given to the owners.³² Noteworthy, the European Court of Human

²⁴ *Protection of Property Rights in the Republic of Croatia – The Law on Temporary Take-Over and Administration of Specified Property*, p. 7.

²⁵ *Law on Temporary Take-Over and Administration of Specified Property*, art. 5, para 2.

²⁶ *Ibidem*, art. 8, para 1.

²⁷ *Ibidem*, art. 8, para 2.

²⁸ Interview with Mr. Axel Jaenicke, Adviser, OSCE Mission to Croatia, 3 August 2000.

²⁹ *Law on Temporary Take-Over and Administration of Specified Property*, art. 7, para 1.

³⁰ *Ibidem*, art. 11, para. 1.

³¹ *Ibidem*, art. 5, para. 2.

³² *Protection of Property Rights in the Republic of Croatia – The Law on Temporary Take-Over and Administration of Specified Property*, p. 24

Rights, in interpreting the right to access to court under the ECHR,³³ has held that unlawful discrimination may be at issue if a state requires an individual wishing to contest a property claim to pursue any available judicial remedies in person and within a certain time frame, without having the right to file for an extension or an appeal against an adverse decision when circumstances make a personal appearance impossible.³⁴

According to the LTTP, once the decision to administer the property gained legal force, the occupant could not be dispossessed of the property unless previously having been assured alternative accommodation.³⁵ After the deadline of eight days had passed, the only realistic chance whereby owners could repossess their properties was if the occupant would move out because the state had allocated alternative accommodation, or because able to return to his or her place of origin.

On 23 January 1996 LTTP was amended³⁶ with the result that the restitution provision³⁷ was changed so as to providing a reference that the issue would instead be dealt with in a future bilateral agreement between Croatia and the Federal Republic of Yugoslavia. This agreement was passed on 23 August 1996,³⁸ but did not offer much clarity only providing that the contracting parties should provide “just compensation” for those whose property was occupied.

Another agreement was concluded on 23 April 1997, co-signed by Croatia, the Federal Republic of Yugoslavia and the United Nations High Commissioner for Refugees (UNHCR). It was the Agreement of the Joint Working Group on the Operational Procedures for Return. Similar to the document of 23 August 1996, this was a political document only and therefore had no legal force. Notwithstanding this, the agreement contained rather detailed provisions regulating the processing of restitution claims.

The process established in the Agreement provided two alternative paths in the case of a returnee filing a request to return to his or her home, which was occupied: (1) the municipal Commission (established under LTTP) would issue a certificate specifying the date after which the owner would be able to take possession of the property; or (2) the Commission would issue a certificate offering the returnee a “corresponding” accommodation. In the

³³ Article 6 of the ECHR.

³⁴ Gomien, D, *The Right to Property Under the European Convention on Human Rights*, paper presented at conference in Zagreb 27-28 February 1998, p. 9.

³⁵ *Law on Temporary Take-Over and Administration of Specified Property*, art. 11, para. 3.

³⁶ *Law on Amendments to the Law on Temporary Take-Over of Specified Property*, Official Gazette, No. 7/96.

³⁷ *Law on Temporary Take-Over of Specified Property*, art.11, para. 1.

³⁸ *Agreement on Normalisation between the Republic of Croatia and the Federal Republic of Yugoslavia*, signed 23 August 1996.

case that neither of these certificates could be implemented, the Commission had to offer the returnee temporary accommodation.³⁹

On 25 September 1997 the Constitutional Court of Croatia found parts of the LTTP to be in breach of the Constitution. The Constitutional Court decision had several important consequences: (1) the return of property must take place and was no longer pending an agreement with the Federal Republic of Yugoslavia; (2) the owner was no longer prevented from disposing the property and so could sell, exchange or lease it; (3) in case of exchange of the property, the new owner did not have to wait to acquire the property until the user had been provided with alternative accommodation; and (4) in case the specified time of the right of the occupant to use the property had expired, he or she could be forced to move out without being assured alternative accommodation.⁴⁰

Following the Constitutional Court decision, the Croatian Government on 6 November 1997 adopted the Programme for Accommodating the Users of Property under Temporary Administration of the Republic of Croatia which is to be Returned to Original Owners for Occupancy and Use. Neither this document has the force of law. It has the expressed intent of accommodating the users of property allocated by a competent Commission, which would need to be returned to its original owners. The aim was further defined as to reduce the “feeling of insecurity caused by the Constitutional Court decision.”⁴¹ The Programme established procedures for meeting the needs of persons who use and occupy property. Notably, its goal does not contain any reference to the rights of the owners.

According to the Programme, the steps to be taken in the “event of the owner returning” are: (1) the returning owner submits request for repossession with the Government Office for Displaced Persons and Refugees (ODPR) (although in practice the requests were processed by the municipal Commissions⁴²); (2) ODPR provides the owner with organised temporary accommodation; (3) the temporary user is provided with other permanent accommodation; and (4) when permanent accommodation is provided to the temporary user the owner shall return to his or her original place of residence.⁴³

A different procedure is to be implemented in case the owner would attain to his or her right to pursue legal proceedings at a municipal court. In this case

³⁹ *Agreement of the Joint Working Group on the Operational Procedures for Return*, signed 23 April 1997, points 4-6. (*Homes which are being Used Temporarily*.)

⁴⁰ OSCE Mission to Croatia, *Property Law in the Republic of Croatia*, internal report, no date, p. 14.

⁴¹ *The Program for Accommodating the Users of Property Under Temporary Administration of the Republic of Croatia which is to be Returned to Original Owners for Occupancy and Use*, signed 6 November 1997, para. 1.

⁴² Interview with Ms. Tanja Pericic, 25 August 2000.

⁴³ *The Program for Accommodating the Users...*, point 1.1.

the temporary user is not obliged to hand over the property before the owner has “exhausted all regular legal means available under the legislation of the Republic of Croatia.” The Programme enumerates a number of Laws that should be exhausted: the Law on the Constitutional Court, the LTTP, the Law on Administrative Procedure, and the Law on Ownership and Other Material Rights.⁴⁴ Clearly, the need to “exhaust all regular legal means” implies that pursuing a property repossession case through the court system did not constitute an efficient remedy for the owner. In addition, the Programme provides that the user is not obliged to hand over the property if an agreement has been made with the owner on the sale or lease thereof. In case the user cannot be accommodated in any other way, he or she will be provided with accommodation by the state.⁴⁵

The implementation of the restitution procedures established in the Agreement of the Joint Working Group on the Operational Procedures for Return and the above-mentioned Programme resulted in very few cases of property repossessions. This was noted, among others, by the then UN Special Rapporteur on the situation of Human Rights in the former Yugoslavia, Ms. Elisabeth Rehn, who wrote in a report of 14 January 1998: “Croatian Serb refugees continue to face serious difficulties in regaining access to properties given ... under the [LTTP]. Despite guidelines established to encourage such action by local authorities there has been little progress in ... the restitution of ... property taken over in this way.”⁴⁶

3.2 Law on Housing Relations

The SFRY Law on Housing Relations established the legal basis for occupancy rights to socially owned property (see chapter 2.2.2). Following the independence of Croatia, this Law was taken over without significant amendments. An important aspect of the Law on Housing Relations⁴⁷ is the conditions under which occupancy rights could be terminated. The two most relevant conditions were: (1) if the tenant (i.e. the holder of the occupancy right) or someone of the same household did not use the apartment for a period exceeding six months; and (2) if the rent was not paid for more than three months consecutively or three months in the last twelve months. However, an exception was made in case the absence was due to medical reasons, military service or other justified reasons. Termination of occupancy rights was to be established through court procedure.⁴⁸

⁴⁴ The latter Law will be discussed in chapter 4.1.

⁴⁵ The Program for Accommodating the Users..., point 1.2.

⁴⁶ *Final Report of Ms. Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia*, E/CN.4/1998/63, 14 January 1998, part II (D).

⁴⁷ Official Gazette, No. 51/85.

⁴⁸ *The Review of the Legal Provisions that have been Applied as a basis for Cancellation of Tenancy Rights in the Period from 1991 to 1997*, p. 3.

Two amendments were made to the Law that introduced new conditions under which occupancy rights could be cancelled. The amendments made in 1992⁴⁹ had the effect that cancellation could take place for tenants who participated in enemy activities against the Republic of Croatia.⁵⁰ On the basis of this condition, occupancy rights were cancelled in court procedure without evidences being presented about the activities of the holder, as the mere absence from the apartment was considered sufficient. In case other members of the household remained in the apartment, the owner of the apartment building had the right to determine whether or not they would be allowed to stay.⁵¹ In 1993 new amendments⁵² were introduced that prevented the recognition of certain occupancy rights of persons who had exchanged an apartment located in any of the other former Republics of SFRY with an apartment in Croatia. Most tenants of these apartments were Serbs.⁵³

3.3 Law on Lease of Flats in the Liberated Territories

3.3.1 Introduction

Whilst the LTTP regulated the use of private property, the Law on Lease of Flats in the Liberated Territories (LLF)⁵⁴ applied to occupancy rights to socially owned property. Adopted on 27 September 1995, the Law has had enormous consequences for the property rights situation in Croatia. Among the tens of thousands of refugees from the previously occupied territories, who left their homes behind, many held occupancy rights. As with private property, the socially owned property was also used to accommodate the many ethnic Croat displaced persons and refugees on Croatian territory. However, while owners of private property were prevented from temporarily disposing of their homes, the LLF permanently cancelled occupancy rights to socially owned apartments.

A distinction should be made to the Law on Housing Relations. Practically speaking, under this Law occupancy rights were cancelled during the war in those parts of Croatia that were not occupied. In contrast, the LLF applied after 1995 in respect to occupancy rights to apartments located within the previously occupied territories.

⁴⁹ *Law on Changes and Amendments to the Law on Housing Relations*, Official Gazette, No. 22/92.

⁵⁰ *Ibidem*, art. 2.

⁵¹ *The Review of Legal Provisions that have been Applied as a basis for Cancellation of Tenancy Rights in a Period from 1991 up to 1997*, p. 4.

⁵² *Law on Changes and Amendments to the Law on Housing Relations*, Official Gazette, No. 70/93.

⁵³ *The Review of Legal Provisions that have been Applied as a basis for Cancellation of Tenancy Rights in a Period from 1991 up to 1997*, p. 6.

⁵⁴ Official Gazette, No. 73/95.

The LLF was abolished at the same time as the LTTP by the Law on the Cessation of the Validity of the Law on Temporary Take-Over of Specified Property of 10 July 1998.

3.3.2 Content

The Law regulates the “leasing of flats for which ... the tenant’s rights terminates over publicly owned property... located in the previously occupied, now liberated territories of [Croatia].⁵⁵ Also an apartment to which the user has yet to obtain occupancy right is within the scope of LLF.⁵⁶

Cancellation of occupancy rights was implemented “by lawful force if a bearer of a tenant’s right has abandoned the flat and has not used it for a period longer than 90 days since this Law came into force.”⁵⁷ In case family members of tenant’s household remained in the apartment, whether they could continue using the apartment was up to the discretion of the municipal body authorised to allocated the department.⁵⁸ Two important differences from the Law on Housing Relations can be seen. Firstly, the deadline was changed from six to three months. Secondly, occupancy rights were cancelled “ex lege;” not trough court procedure as regulated for in the Law on Housing Relations.

Beneficiaries under the Law, that is the recipients of socially owned property for use, were “persons who will perform activities in the [previously occupied territories] of interest for security, reconstruction and development, the return of displaced persons, refugees and emigrants, as well as other activities of public interest in that territory under the obligation to remain working in that territory for at least three years.”⁵⁹ After three years of use the beneficiary (lessee) had the right to purchase the apartment under the regulations of the Law on Purchase of Flats with Tenancy Rights (see chapter 4.3.).⁶⁰ In case of death of the lessee this right would be taken over by members of the same family.⁶¹

3.3.3 Legal Remedies for Former Occupancy Rights Holders

Once the tenant failed to return to his or her apartment within the stipulated 90 days, the occupancy right was permanently cancelled. No legal remedy is provided for in LLF or elsewhere in Croatian legislation. Those who lost their occupancy rights under the Law on Housing Relations face the same situation.

⁵⁵ *Law on Lease of Flats in the Liberated Territories*, art. 1, para. 1.

⁵⁶ *Ibidem*, art. 1, para. 2.

⁵⁷ *Ibidem*, art. 2, para. 1.

⁵⁸ *Ibidem*, art. 2, para. 2.

⁵⁹ *Ibidem*, art. 4, para. 1.

⁶⁰ *Ibidem*, art. 8, para. 1.

⁶¹ *Ibidem*, art. 9, para. 1.

Whereas no legal remedy is available in the Croatian legal system if the cancellation took place in accordance with one of these laws, affected individuals have initiated lawsuits at municipal courts claiming the cancellation was not carried out as stipulated in the laws. Commonly, persons claim they did in fact return within the stipulated deadlines, but were prevented from accessing the apartment in question.

Temporary users are still occupying many of the apartments allocated for use under the LLF. In other cases the former occupancy rights holders have been able to return to their apartments, but their staying there is based on a normal protected lease contract,⁶² meaning they have lost all the benefits connected with the occupancy right, in particular the right to purchase the apartment as per the regulations for privatisation of property (see chapter 4.3).

The problem of the lack of legal remedy for former occupancy rights holders is further discussed in chapter 4.2.

3.4 Law on Areas of Special State Concern

3.4.1 Introduction

Property taken under public administration was allocated for temporary use also on the basis of the Law on Areas of Special State Concern (LASSC) of 5 June 1996.⁶³ Under the LASSC private as well as socially owned property could be allocated, including apartments for which the occupancy rights had been cancelled under the Law on Housing Relations or the LLF.

The LASSC was amended on 21 July 2000⁶⁴ following long lasting critique from the international community that it contained provisions that discriminated against minority groups.⁶⁵ The amendments remedied most of the concerns expressed. In the below text reference is made both to the previous and the amended versions of the Law.

3.4.2 Content

The Law applies in the previously occupied areas with the purpose of eliminating “the consequences of the war, rapidly returning population that inhabited those areas before the Homeland War, motivating demographic and commercial advancement, and achieving the most equal level of

⁶² Interview with Ms. Tanja Pericic, 15 August 2000.

⁶³ Official Gazette, No. 44/96.

⁶⁴ *Law on Amendments to the Law on Areas of Special State Concern*, Official Gazette, No. 73/00.

⁶⁵ See for example: OSCE Mission to Croatia, *Report of the OSCE Mission to the Republic of Croatia on Croatia's Progress in meeting international commitments since May 1998*, 8 September, p. 7.

development of all areas in the Republic of Croatia.”⁶⁶ It provides procedures for the settlement in these areas of Croatian Citizens “who can contribute to the economic and social development of the areas...”⁶⁷

The LASSC of 1996 defined the concept of “settler” and provided those deemed as such with certain rights. The definition was criticised by the international community for being discriminatory, notably favouring persons of ethnic Croat origin.⁶⁸ In the amended Law of 2000 the definition was modified in accordance with international demands whereby “beneficiary” replaced the term “settler”. However, the effects of the discriminatory provisions have not been abolished insofar as the decisions to afford persons status as settler and to allocate property accordingly have not been cancelled. The content of the 1996 Law therefore remain relevant.

According to the LASSC of 1996, those defined as settlers should be given, “according to their location and activity, an apartment or residential house...”⁶⁹ The housing to be allocated could be “owned by the state or by the state and social legal persons” which included apartments for which occupancy rights were cancelled. Allocation could also take place of property declared abandoned under LTTP, and of certain property to be built from state-funds.⁷⁰

One property rights concern in the previous version of the Law seems to have been resolved by the amendments. In the 1996 Law the users who were given property were guaranteed to receive ownership in case of 10 years of uninterrupted residence in the property.⁷¹ After the international critique, this provision was amended so as to providing only a possibility of receiving ownership and only applying to state-owned property that had not previously been allocated under the Law on Areas of Special State Concern, the LTTP, or the LLF. In other words, the possibility of obtaining ownership only applies to property allocated after the entering into force of the amendments to the Law.

3.4.3 Legal Remedies for Owners and Former Occupancy Rights Holders

While there were no legal remedies stipulated for in the 1996 Law, the amended version of the LASSC is significantly different. It provides that the property allocated for temporary use pursuant to the Law shall be returned into the possession of the owner within six months as of submission of the restitution request by the owner, or in case the request was submitted earlier,

⁶⁶ *Law on Amendments to the Law on Areas of Special State Concern*, art. 1, para. 1.

⁶⁷ *Ibidem*, art. 8, para. 1.

⁶⁸ *Report of the OSCE Mission to the Republic of Croatia on Croatia’s Progress in meeting international commitments since May 1998*, p. 7.

⁶⁹ *Law on Areas of Special State Concern*, art. 8, para. 3.

⁷⁰ *Ibidem*, art. 10, para. 1-2.

⁷¹ *Ibidem*, art.8, para. 5.

within 6 months from the entering into force of the Law.⁷² The user shall be provided with alternative accommodation within the six months period before the repossession is to take place.⁷³ In case that the relevant ministry has failed to provide alternative accommodation and to reinstate the owner within the six months period, it is obliged to sign a lease contract with the owner. The content of the contract shall be determined in special regulations that shall be issued within six months from the entering into force of the Law.⁷⁴

In view of the lack of alternative accommodation in Croatia one may assume that alternative accommodation will be provided within the stipulated period in a relatively small number of cases. The real value of this remedy will therefore depend on the content of the special regulations. The question that comes to mind is why these crucial aspects were not regulated in the Law itself?

No improvements can though be seen in regard to legal remedies for the former occupancy rights holders. As in the LASSC of 1996, no reference is made to this group of people in the new version of the Law.

3.5 Law on Status of Expelled Persons and Refugees

The Law on Status of Expelled Persons and Refugees⁷⁵ defines who should be deemed to have the status of expelled person or refugee and afford those deemed to have this status certain rights that are specified in the Law. The main relevance of the Law for the property rights issue is that it stipulated that temporary users with status could not be forcefully removed from the occupied property unless provided with alternative accommodation.

The provision providing the users with this right was introduced in the Law on Changes and Amendments to the Law on the Status of Expelled Persons and Refugees adopted on 2 June 1995.⁷⁶ According to the amended Article 14(2) all the “procedures regarding coercive removal of displaced persons shall be suspended until the conditions for their return are fulfilled, or until, with their consent, another appropriate lodging is provided in the place of their accommodation, or some other place.” Not only were eviction procedures thus stopped pending identification of alternative accommodation, but it was also required that the temporary user give his or her consent to the identified property. Due to the lack of alternative accommodation, this provision provided the users with a great degree of protection.

⁷² *Law on Amendments to the Law on Areas of Special State Concern*, art. 14, para. 1-2.

⁷³ *Ibidem*, art. 14, para. 4.

⁷⁴ *Ibidem*, art. 14, para. 5.

⁷⁵ Official Gazette, No. 96/93.

⁷⁶ Official Gazette, No. 39/95.

The application of Article 14(2) was restricted to those who had been registered as expelled persons until March 1995.⁷⁷ This excluded the Croatian Serb population expelled in the latter half of 1995 as a result of operations “Flash” and “Storm” and who had resettled (often in Croat-owned property) in the Eastern Slavonia region. Consequently, the expelled persons occupying property in the Eastern Slavonia region were not protected by this provision.

In November 1999 the Law on the Status of Expelled Persons and Refugees was amended again whereby Article 14(2) was abolished.⁷⁸ However, the provision remains relevant in the property rights context because of an “Authentic Interpretation of Article 14 of the Law on Expelled Persons and Refugees”⁷⁹ issued by the Croatian Parliament on 12 Mars 1999 and which remain valid. The question considered in the Authentic Interpretation is whether or not the users (who have the status of expelled person or refugee) are obliged to compensate owners for the use of the property; i.e. whether they should pay protected rent. The opinion of the Parliament is explained in over four pages, but it will here suffice to note the main point: the concept of “bona fide” possessor in the Law on Ownership and other Material Rights. The Parliament determined that the users were “bona fide” possessors since their staying in the properties was legally based in accordance with the LTTP. As legal possessors, the Law on Ownership and other Material Rights provides that they are not obliged to compensate the owners (see also chapter 4.2).⁸⁰ (In respect to the Authentic Interpretation, the OSCE Mission to Croatia expressed concern in a report of September 1999 stating that it: “(1) violates the principle of the independence and impartiality of the judiciary (legislative interference in the judiciary changes the outcome of pending proceedings); and (2) allows for possible arbitrary deprivation of property.”⁸¹)

In May 2000, the already abolished Article 14 (paragraphs 2 and 7) was deemed unconstitutional by the Constitutional Court of Croatia.⁸² The proposal for determining the article’s conformity with the Constitution had been initiated in 1997 prior to the abolition of the contested provisions in 1999.

⁷⁷ *Law on Changes and Amendments to the Law on Status of Expelled Persons and Refugees* (39/95), article 2, para. 3-4.

⁷⁸ *Law on Changes and Amendments to Law on Status of Expelled Persons and Refugees*, Official Gazette, No. 128/99, art. 5.

⁷⁹ *Authentic Interpretation of Article 14 of the Law on Status of Expelled Persons and Refugees*, Official Gazette, No. 29/99.

⁸⁰ *Ibidem*, p. 1.

⁸¹ OSCE Mission to Croatia, *Report of the OSCE Mission to the Republic of Croatia on Croatia’s progress in meeting international commitments since May 1999*, 28 September 1999, p. 4.

⁸² Decision of the Constitutional Court of the Republic of Croatia, No. U-I-236/1996,U-I-840/1997, 3 May 2000.

3.6 Decree on Rights of Returnees

The relevance of this Decree is that it provides that those occupants of other's property who have had their own property in Croatia reconstructed and have returned to the same, are obligated to return the house they were given for use. The Decree on the Rights of Returnees was adopted on 27 March 1997⁸³ and amended on 3 July 1997.⁸⁴

According to the Decree, those having the status of expelled person will lose their status if returning to their property, which has been reconstructed according to the provisions of the Law on Reconstruction. Having lost their status under these conditions, the occupants are obliged to return the house or apartment allocated to them for temporary use.⁸⁵

⁸³ Official Gazette, No. 33/97.

⁸⁴ *Decree on Amendments to the Decree on the Rights of Returnees*, Official Gazette, No. 69/97.

⁸⁵ *Ibidem*, art. 4, para. 3.

4 Other Croatian Property Legislation

4.1 Property Rights in the Croatian Constitution

The Croatian Constitution confirms the inviolability of property as one of the highest values of the constitutional legal system⁸⁶ and guarantees the right of ownership.⁸⁷ Article 50 provides the conditions under which restrictions to the right to property are allowed:

“Ownership may in the interest of the Republic be restricted by law, or property taken over against indemnity equal to its market value.

Entrepreneurial freedom and property rights may exceptionally be restricted by law for the purposes of protecting the interests and security of the Republic, nature, the human environment and health.”⁸⁸

In addition, restrictions to freedoms and rights of the Constitution may be limited only by the law and in order to protect the freedom and rights of other people as well as the legal system, public morality and health.⁸⁹ In times of war, limitations of particular freedoms and rights guaranteed by the constitution may be limited provided that the bodies authorised by the same provision decide on that and that the extent of the limitations is appropriate to the nature of the danger.⁹⁰

4.2 Law on Ownership and other Material Rights

One of the many laws that Croatia took over from SFRY was the Law on Ownership and other Material Rights.⁹¹ In 1996 this Law was significantly amended in view of developments in the field of property rights that had occurred in Croatia. The amended Law⁹² contains provisions regulating “possessors” use of property owned by a third person, and provides owners with protection against the use of property by “mala fide” possessors.⁹³

In order to obtain restitution of property from a possessor, the owner of the property has the right to pursue a claim before a court or “authorised

⁸⁶ *Constitution of the Republic of Croatia*, art. 3.

⁸⁷ *Ibidem*, art 48, para. 1.

⁸⁸ *Ibidem*, art.50, para. 1-2.

⁸⁹ *Ibidem*, art. 16.

⁹⁰ *Ibidem*, art. 17, para. 1.

⁹¹ Official Gazette, No. 53/91.

⁹² *Law on Ownership and other Material Rights*, Official Gazette, No. 91/96.

⁹³ *Ibidem*, art. 161.

body.”⁹⁴(The commissions established under LTTP are considered as “authorised bodies.”) However, in case the possessor has a legally valid right that authorised him or her to use the property (e.g. a decision for temporary use issued on the basis of LTTP), he or she can refuse to return the property to the owner.⁹⁵ In pursuing the claim, the owner is required to provide a valid proof of ownership.⁹⁶ As is usual in most countries, such evidence shall consist of an extract from the court land books, where all ownership and possessions should be registered.⁹⁷

The Law also regulates whether or not the possessor is obliged to compensate the owner for the use of the property, including costs of damage and normal protected lease rent. A distinction is made between the “*mala fide*” possessor, who is obliged to compensate the owner for all costs occurring until the time of the return of the property,⁹⁸ and the “*bonae fide*” possessor, who is under no such obligation.⁹⁹

The above-mentioned provisions thus stipulate that the municipal courts are authorised to decide upon lawsuits for the restitution of property from an illegal user of the same. However, as will be noted in chapter 5.4., the competence of the municipal courts in deciding on property claims is complicated by provisions of the Law on the Cessation of the Law on Temporary Take-Over of Specified Property.

4.3 Law on Purchase of Flats with Occupancy Rights

A household reform was to take place in Croatia following the Country’s independence in 1991. Contributions from workers to the State Housing Funds ceased. As part of the process of privatisation the socially owned apartments were offered for sale. Those holding occupancy rights were given priority to buy the apartment in which they were living, with the price being adjusted according to the size, location, number of family members and the years of residence in the apartment. The prices were normally much below the market value of the properties. If the occupancy rights holder would not purchase the apartment it would be offered to the market. In case the apartment would be bought by other than the occupancy rights holder, the tenant would still have the rights to stay in the apartment but through a normal contract of protected lease, paying rent as determined by the market and the owner of the property.¹⁰⁰

⁹⁴ *Ibidem*, art.162.

⁹⁵ *Ibidem*, art. 163.

⁹⁶ *Ibidem* art.162.

⁹⁷ Interview with Ms. Tanja Pericic, 15 August 2000.

⁹⁸ *Ibidem*, art.165.

⁹⁹ *Ibidem*, art. 164.

¹⁰⁰ *Short Overview of Property Law in Republic of Croatia*, pp.2-3.

In respect to the reform process, the Law on Purchase of Flats with Occupancy Rights¹⁰¹ was introduced in 1992 providing the conditions and modalities for the purchase of the socially owned apartments covered with occupancy rights. The process proceeded accordingly in those areas of Croatia not directly affected by the war. However, persons who had lost their occupancy rights under the Law on Housing Relations or the LLF were unable to benefit from the household reform in this regard.

¹⁰¹ Official Gazette, No. 43/92.

5 1998 Return Programme and the Property Restitution System

5.1 Background – Political Context

LTTP failed in providing the legal owners of the administered property with an efficient legal remedy. The procedures established through political documents did not produce satisfactory results in terms of enabling the restitution of property to the rightful owners. Furthermore, the LTTP was deemed to be in breach of international standards on the right to property. The overall stalemate in the process of return of refugees and displaced persons in general, and with the property restitution in particular, resulted in strong international pressure being placed on the Croatian Government to commit itself to the advancement of the return process. The property problem was identified as a major obstacle to the return of refugees and displaced people to their pre-war homes.¹⁰²

In this political context the Programme for the Return and Accommodation of Displaced Persons, Refugees and Resettled Persons (hereinafter the Return Programme) was adopted by the Croatian Parliament on 26 June 1998.¹⁰³ The process of drafting the Return Programme had included participation of the main international players.¹⁰⁴ Notably, the document provided a framework for a property restitution system, the structure and regulations of which will be discussed here.

Structurally, the Return Programme is divided into three sections: Basic Principles, Introductory Remarks, and Procedures for Return. It entails basic principles guaranteeing the right to return to all Croatian citizens and to all categories of people regarded as refugees in accordance with the 1951 Geneva Convention.¹⁰⁵ In this respect, detailed provisions are given that stipulate the conditions and procedures under which pre-war residents would be able to return to Croatia. These procedures, though, are out of the scope of this report.

¹⁰² See for example: *Periodic Report on the situation of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia*, A/52/490, 17 October 1997, part III, C.

¹⁰³ Official Gazette, No. 92/98.

¹⁰⁴ Art. 5 of the *Basic Principles* of the Programme reads “the Government has elaborated the Programme in co-operation with... [UNHCR] ...and with the support of [OSCE].”

¹⁰⁵ *Convention relating to the Status of Refugees*, adopted on 28 July 1951, in force as of 22 April 1954.

5.2 Property Restitution System

The property restitution system set up in the Programme established “housing commissions” throughout Croatia in “the municipalities and cities of return,”¹⁰⁶ which were authorised to receive and process applications for repossession of property allocated for temporary use. Practically, these housing commissions replaced the “commissions” established under LTTP, whose staff often continued working also in the new system.¹⁰⁷ The Return Programme stipulates that each housing commission shall be composed of five members, two of whom should represent the predominant minority population (typically Croatian Serbs) in the respective municipality. The decisions are to be adopted with a majority vote with the support of at least one of the minority members.¹⁰⁸

The Return Programme does not distinguish between the property allocated under LTTP and that allocated under the Law on Areas of Special State Concern, which leads to the conclusion that the procedures should be equally applied to both situations. In addition, no distinction is made whether or not the property to be reposessed is being used on the basis of the above-mentioned laws or not. In other words, also cases where occupants of other’s property do not (or never did) hold decisions for temporary use are within the scope of the Return Programme. This may be concluded since applications for repossession can be addressed to housing commissions in relation to “property ... used to temporarily accommodate another person.”¹⁰⁹ There is thus no reference to the legal basis (if any) for the usage.

The main tasks of the housing commissions are the following: (1) to register the use of real estate; (2) to issue certificates on the manner in which the property is being used; (3) to record and issue information on damage to housing units; (4) to provide alternative accommodation to returnees whose properties are given for temporary use or has not yet been reconstructed; (4) to find accommodation in state-owned apartments to temporary users; and (5) to co-operate with the Agency to Mediate in Transactions of Specified Real Estate (APN) with the view to making more efficient the purchase or exchange of property of people who do not wish to return.¹¹⁰

¹⁰⁶ *Programme for the Return and Accommodation of Displaced Persons, Refugees and Resettled Persons, Introductory Remarks*, art. 9.

¹⁰⁷ Interview with Mr. Axel Jaenicke, 4 August 2000.

¹⁰⁸ *Program for the Return and Accommodation of Displaced Persons..., Procedures for Return*, art. 14.

¹⁰⁹ *Ibidem*, art. 9.

¹¹⁰ *Ibidem, Introductory Remarks*, art.9.

The overall responsibility for the co-ordination of the work of the housing commissions was assigned to a Government Commission, which would also “devise, implement and monitor the Programme.”¹¹¹

5.2.1 Processing of the Applications for Restitution

In order to provide guidance in the implementation of the property aspects of the Return Programme, the Ministry of Development and Reconstruction on 10 August 1998 issued the “Instructions for the Implementation of the Return Programme.” The fairly complicated procedures thereby established are summarised below.

The applicant for repossession of property completes form PP1: “Claim for the repossession of property”. Within 5 days, the Housing Commission informs the applicant in writing of the status of his or her property using form PP2: “Confirmation on the manner of use and category of damage of a housing facility that the owner has abandoned”. On the basis of submission of sufficient proof of ownership, the Housing Commission issues form PP3: “Decision on the annulment of the decision to the user who will be provided with alternative accommodation”. This decision indicates a deadline for vacating the property and the provision of alternative accommodation for the temporary user, for which the Housing Commission issues forms PP4: “Information on the provision of alternative accommodation for the user of the property, which is to be returned in the possession of the owner” and PP6: “Decision on the annulment of decision to the user for whom alternative accommodation is provided”.

In the absence of available alternative accommodation locally, the Housing Commission submits a Form PP9: “Information on incapacity of providing alternative accommodation for the user of the property, which is to be returned in the possession of the owner” to the Government Commission on Return (GCR) and the ODPR within 5 days of the issuance of the PP3 form. This form requests the Government Commission to provide priority accommodation for the temporary user of the property. The Agency for Transactions in Specified Real Estate (APN) and the ODPR decide upon such cases “according to priority” and directly inform the owner, the temporary user, the Housing Commission and the Government Commission for Return.

In cases where the temporary occupant refuses to vacate the property within 15 days of being issued the PP4/PP6 forms, the Housing Commission files a suit with the municipal court requesting the eviction of the temporary user. This action is to be undertaken within 7 days of the deadline indicated in the PP4 to vacate the property. The Court will rule on the case under a “shortened procedure and its decision shall be immediately enforced”. Any

¹¹¹ *Programme for the Return and Accommodation of Displaced Persons, Refugees and Resettled Persons, Introductory Remarks*, art. 9.

appeal by the temporary user will not suspend the execution of the court order with regard to repossession of the property by the rightful owner.¹¹²

5.2.2 Illegal Occupancy

The concept of “illegal occupancy” is introduced in Article 10 under the Procedures for Return that provides: “Occupancy of more than one property is illegal. Any case of illegal occupancy, be it single or multiple, whereby the occupant is using the object for any purpose other than the primary accommodation of his/her family, shall be terminated immediately.” This provision has proven difficult to implement as it leaves several questions unanswered. For example, in a situation where one family was allocated two properties for use under two decisions, which property should be regarded as that which is used for their primary accommodation? There are many other situations where the definition as it is stipulated does not provide clear answers. As a result, cases of (alleged) illegal occupancy have not been uniformly addressed by housing commissions.¹¹³

5.2.3 Supporting Documents

While in the Programme reference is only made to the need to provide “sufficient evidence,” the Instructions (as amended on 18 February 1999) regulates in detail what documents should be submitted in support of the application.

The first requirement is the evidence of ownership. As noted previously (chapter 4.2), ownership should be proved by providing an extract from the court land books, where all properties should be registered. Despite the war, most land books remained intact and so most owners do not face difficulties in obtaining the required proof. In case though that no registry of the property can be found in the land books, the alleged owner is obliged to complete a regular legacy procedure before the court in order to have the ownership entered into the land books.

In addition to the evidence of ownership the following documents should be attached to the application according to the Instructions: (1) an authorised copy of a personal ID-card (in case applicant is returning from other parts of Croatia), or passport, travel documents, or an UNHCR repatriation form (in case applicant is returning to Croatia from another Country; and (2) an evidence on the place of residence in 1991 for the applicant/bearer of the household. These documents have proven burdensome for many (potential) applicants to obtain, especially since there are fees connected to the issuing of the documents.¹¹⁴

¹¹² OSCE Mission to Croatia, *Report of the OSCE Mission to the Republic of Croatia on Croatia’s progress in meeting international commitments since January 1999*, 18 May 1999, p. 6.

¹¹³ *Report of the OSCE Mission to the Republic of Croatia on Croatia’s progress in meeting international commitments since May 1999*, p 8.

¹¹⁴ Interview with Tanja Pericic, 15 August 2000.

5.2.4 Right to Sell the Occupied Property

As discussed previously, the owners of occupied property re-gained the right to dispose thereof following the decision of the Constitutional Court on 25 September 1997 (chapter 3.1.3). In line with this, the Return Programme provides that persons who owned private property which they will not be able to speedily repossess will “have the right to compensation for their private property according to market conditions, which they can realise through the Agency for Mediation and Transactions of Specified Real Estate of the Government of the Republic of Croatia [APN].”¹¹⁵ This provision refers to the right of any owner to sell the occupied property to this state agency. (The same possibility also exists for an owner who has been able to repossess the property.) The property purchased by APN can be allocated as alternative accommodation. Typically, a house that was occupied and sold to APN will be allocated as alternative accommodation to its temporary user. In other words, the status of the temporary user will change to that of recipient of alternative accommodation.¹¹⁶

5.3 Legal Status of the Return Programme

The property restitution procedures in place before the adoption of the Return Programme (see chapter 3.2) were not based on law, but on political documents. The Return Programme also has the form and structure of a political document rather than that of legislation. However, according to the Croatian Government Office for Legislation, the Programme has indeed the status of law. The Office basis its opinion on the fact that reference to the Programme was made in the Law on the Cessation of the Law on Temporary Take-Over of Specified Property (the further implications of which are discussed below). In contrast, the OSCE Mission to Croatia questions in a report of September 1999 this opinion arguing that the Government Office is acting as an executive rather than judicial body and as such does not have the competence to determine what is or what is not law.¹¹⁷

In case the intent of the legislator was indeed to enact a law, one may ask why the regular procedures for enacting laws were not followed? In any case, it is fact that the legal uncertainty has contributed to the many problems with the implementation of the Return Programme.

5.4 Role of the Courts in the Restitution System

The Government informed in the Return Programme that it had proposed to the Croatian State Parliament to repeal LTTP and the Law on Lease of Apartments in the Liberated Areas. In addition, the Government committed

¹¹⁵ *Programme for the Return and Accommodation of Displaced Persons..., Procedures for Return*, art. 15.

¹¹⁶ Interview with Mr. Axel Jaenicke, 4 August 2000.

¹¹⁷ *Report of the OSCE Mission to the Republic of Croatia on Croatia's progress in meeting international commitments since May 1999*, p. 4.

itself to “frame legal regulations addressing the issues stemming from the abolition of these laws.”¹¹⁸ However, despite this commitment of the Government, the Law on the Cessation of the Validity of the Law on Temporary Take-Over of Specified Property (hereinafter the Law on the Cessation) of 28 July 1998 (see also chapter 3.1.1), which contained only three short articles, has given cause to a great deal of legal uncertainty.

The municipal courts are authorised under the Law on Ownership and other Material Rights to rule in property restitution cases (see chapter 5.1). However, the Law on the Cessation regulates that the Programme “shall be implemented in respect to procedures related to the temporary use, administration and control over property determined by the [LTTP].”¹¹⁹ It further states that in the implementation of these procedures, the housing commissions shall be the first instance, while the municipal courts shall be the second instance.¹²⁰ These provisions have caused inconsistency in the courts’ dealings with lawsuits for property repossession. Many municipal courts have rejected private lawsuits on the basis of the Law on Cessation, while other courts have accepted such on the basis of the Law on Ownership and other Material Rights. With the expressed purpose to avoid that housing commissions and municipal courts take different decisions on the same case, the President of the Croatian Supreme Court issued on 12 August 1999 a memorandum on the Implementation of the Law on the Cessation.¹²¹ He stated this Law is to be applied as “lex specialis” in respect to the provisions of the Law on Ownership and other Material Rights, and that lawsuit submitted directly to the municipal courts therefore should be rejected. However, also after the issuance of this memorandum there are courts that continue to accept private lawsuits.¹²² (The situation in Eastern Slavonia region is distinct in this regard and will be discussed separately below.)

Another issue of legal uncertainty has resulted from the fact that the Return Programme authorises housing commissions to submit cases to the courts where such shall be processed under the “shortened procedure.”¹²³ However, under the Croatian Law on Civil Procedure, which regulates the concept of shortened procedure, there is no basis for municipal courts to process cases brought to it by the housing commissions in this manner. Also this situation has resulted in inconsistency in the judicial implementation with courts being selective in applying either the Law on Civil Procedure or the Return

¹¹⁸ *Programme for the Return and Accommodation of Displaced Persons, Refugees and Resettled Persons, Introductory Remarks*, art. 8.

¹¹⁹ *Law on the Cessation of the Validity of the Law on Temporary Take-Over of Specified Property*, art. 2, para. 1.

¹²⁰ *Ibidem*, art. 2, para. 3

¹²¹ *Supreme Court of the Republic of Croatia, Implementation of the Law on the Cessation of the Law on the Temporary Take-Over of Specified Property*, memo of the Supreme Court of the Republic of Croatia, 12 August 1999.

¹²² Interview with Mr. Anthony London, Head of Field Office Daruvar, OSCE Mission to Croatia, 18 August 2000.

¹²³ *Programme for the Return and Accommodation of Displaced Persons, Refugees and Resettled Persons, Procedures for Return*, art. 10.

Programme. Concern has been expressed in reports of international monitoring organisations that courts are acting in a discriminatory manner, favouring the application of the shortened procedure in cases where the owner is an ethnic Croat but not when the owner is an ethnic Serb¹²⁴

The European Court of Human Rights has found that removing from the courts' jurisdiction the review of property claims, or certain types of property claims may constitute prohibited discrimination.¹²⁵

5.5 Specific Situation in Eastern Slavonia

The situation in the Eastern Slavonia region (hereinafter the Region) is distinct insofar as the LTTP was not applied (see chapter 3.1.2.). The authorities of the former "Autonomous Republic of Krajina" instead issued decisions for temporary use. Notably, the recipients of the allocated property were Serbs and not Croats as in other parts of the Country. Despite the specifics of the situation, the Return Programme does not provide for any difference in application in case the property allocated for use is located within the Region. Housing commissions are indeed functioning similar to those in other parts of the country. However, a major difference is the role that the municipal courts play in the property restitution process in the Region.

In view of the fact that the provisions of the Law on the Cessation of the Law on Temporary Take-Over of Specified Property are not relevant, municipal courts in the Region have not rejected private lawsuits for property restitution on the basis of this Law (see above, chapter 5.4). On the contrary, courts have speedily processed lawsuits and subsequently issued orders for eviction of the occupants. In processing these cases the courts have not regarded the decisions for temporary use issued by the previously existing Serb authorities in Krajina as legal. In addition, no consideration has been taken to the fact that the provisions of the Return Programme provide that the user shall be provided with alternative accommodation.¹²⁶

5.6 Socially Owned Property in the Return Programme

The Return Programme does not provide any solution to the problem of persons who have lost occupancy rights to socially owned property. Only one reference is made to the issue: "in case of persons who do not own an apartment or house, specifically those who lived in socially owned apartments, the [Government] Commission will, where possible, endeavour

¹²⁴ *Report of the OSCE Mission to the Republic of Croatia on Croatia's progress in meeting international commitments since January 1999*, p. 7.

¹²⁵ Gomien, D, *The Right to Property under the European Convention on Human Rights*, p. 10.

¹²⁶ OSCE Mission to Croatia, *Report of the OSCE Mission to Croatia on Croatia's Progress in meeting international commitments since January 1998*, 20 January 1998, p. 7.

to find permanent accommodation when this affects the return process.”¹²⁷
There is, however, no information suggesting that this vague commitment has resulted in the provision of permanent accommodation to any former occupancy rights holders.¹²⁸

¹²⁷ *Programme for the Return and Accommodation of Displaced Persons, Refugees and Resettled Persons, Procedures for Return*, art.5, para. 2.

¹²⁸ Interview with Mr. Axel Jaenicke, 4 August 2000.

6 CONCLUDING OBSERVATIONS

6.1 Right to Property in Croatia in the Context of the European Convention on Human Rights

The need for the Croatian Government to use the property left empty after the liberation of the occupied territories is easy to understand. In view of the emergency situation in the Country it could be argued that it would have been a waste of resources not to use the property to accommodate refugees and displaced persons until the time of return of the owners. However, any limitations to the right to property must be rigorously regulated so as to protect the rights of the owner and in this regard the Croatian Government clearly failed.

The European Convention on Human Rights has been incorporated into Croatian domestic law and as such should be directly implemented by the judicial authorities. The provision of the ECHR regulating the right to property is Article 1 of Protocol Number 1:

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

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

The European Court of Human Rights has yet to consider the legality of the Croatian Government’s restrictions to the owner’s rights through the administration of the abandoned property. However, related case law may be considered in the Croatian context.

The right to “peaceful enjoyment of possessions” encompasses also the right not to use one’s possessions. In the event that a person does not use his or hers possessions or property for a period of time, that individual may not be permanently deprived of the possessions on that ground alone. Nor is it compatible with the principles underlying the property protection in the ECHR that a Government that promulgates laws do so based on legal presumptions about the motivations of individuals who ceased to use their property at a particular time; who do not use their property during a certain

period of time; or who do not act to re-occupy real property within a given time period.¹²⁹

In case a Government continuously denies an individual access to his or her property, effectively preventing that individual from exercising all control, use and enjoyment of it, there is a negation of property rights that contravenes Article 1 of Protocol Number 1.

Even in situations that may be considered emergencies a state may only take actions where the means chosen are appropriate to achieve a legitimate aim to be pursued and where the measures taken are “strictly required by the exigencies of the situation” and which are not “inconsistent with the [state’s] other obligations under international law.”¹³⁰

6.2 Socially Owned Property

All forms of socially owned property, including the occupancy rights of the SFRY are considered to be “possessions” in the above-mentioned sense of the ECHR. Therefore, socially owned property is subject to the same guarantees as any other form of property.¹³¹

The European Court of Human Rights has not ruled on the legality of the Government’s act to terminate by force of law the tenancy rights of people that were absent for more than six months. However, considering other case law regarding permissible restrictions to property rights (see above, chapter 6.1), it seems likely that the Court would rule in favour of the tenancy rights holders finding Croatia in breach of the ECHR.

Concern with the issue of lost tenancy rights has been expressed by the international community to the Croatian Government on several occasions. Repeatedly, the Government has been reminded of its obligation to resolve issues surrounding the loss of occupancy rights.¹³²

In May 2000 the Croatian Constitutional Court revoked a civil court judgement depriving an individual of the occupancy right on the ground that the individual had participated in enemy activities against Croatia, holding that the civil court could only base its judgement on a final valid conviction by a criminal court. The decision is important because many individuals were deprived of their occupancy rights on this basis.¹³³

¹²⁹Gomien, D, *The Right to Property under the European Convention on Human Rights*, p. 3.

¹³⁰*Ibidem*, p. 4.

¹³¹ *Ibidem*, p. 3.

¹³² *Report of the OSCE Mission to the Republic of Croatia on Croatia’s progress in meeting international commitments since May 1999*, p. 15.

¹³³ *Report of the OSCE Mission to the Republic of Croatia on Croatia’s progress in meeting international commitments since September 1999*, p. 5.

6.3 Property Restitution System in the Return Programme

The Croatian property legislation introduced in response to the property situation resulting from the war did not provide adequate protection to the owners and former occupancy rights holders. The laws were in some aspects in breach of international standards. The Return Programme and the property restitution system established therein failed in improving the legal protection of those affected.

The fundamental principle of the Return Programme is that the occupant shall be moved out only in case of there being an alternative accommodation available. The rights of the occupants are thereby given preference before the rights of the owners. It has been noted above (chapter 1.2.) that a basic principle of the right to property is that the interests of the owner are given preference over the rights of the user. This is clearly not the case in the Return Programme.

Despite the fact that its fundamental principles can be criticised, the Return Programme could, if implemented correctly, constitute the basis for the resolution of a great number of property disputes in Croatia, notably those where alternative accommodation is available for the occupant. In this sense, it is practically (albeit not legally) adequate. However, its implementation has been very far from satisfactory. The reports of the OSCE Mission to Croatia contain many examples of housing commissions as well as courts failing in the implementation of the procedures. Housing commissions, for example, generally neglect the prescribed deadlines. In some cases the decision of the housing commission could be many months or even years overdue. Further, there are many examples where the housing commission, in breach of the Programme, does not refer cases to the courts in order for eviction procedures to be carried out. In other situations, the referral might take place but the case remains pending without any action being taken by the pertinent court. When the court has issued the eviction order, there are instances where the involved law enforcement officials are not implementing the decision due to poor performance.

6.4 Recent Developments

A new Croatian Government took office in February 2000. For the first time since the independence of the Country, the Croatian Democratic Union (HDZ) party is no longer in power. Since its inauguration the new Government has confronted some of the crucial issues of concern to the international community, including by introducing amendments to laws that were deemed as discriminatory against minority groups. The amendments made to the Law on Areas of Special State Concern constitute one such example (chapter 3.4). In addition, the new authorities have made

unambiguous statements in favour of the return of refugees and displaced person to their pre-war homes.¹³⁴

Since February 2000 the Government Commission in charge of the implementation of the Return Programme (see chapter 5.2) has been abolished. Instead a “Co-ordination Body for the Areas of Special State Concern” was established. The structure of this body provides for the participation of the international community in its activities. So far it has been much more active than the Government Commission, which hardly ever met. Notably, the Co-ordination Body has expressed awareness of the need to reform the entire property restitution scheme. A Legal Experts Working Group has been established under the auspices of the Co-ordination Body. It is to prepare proposals from a legal standpoint on how to address deficiencies in the current system.

At the time of writing, the Expert Group had recently begun its activities and had not produced any such proposals. No concrete steps had been taken towards the creation of new comprehensive legislation on the property rights issue. This included in particular the problems connected with loss of occupancy rights to socially owned property, in respect to which no initiatives had been taken towards finding a solution to those affected.¹³⁵

6.5 Rule of Law - the Only Way Forward

Reconstruction work in a post war situation must be carried out on the basis of the Rule of Law. Consistence in the judicial and administrative processes is the only means whereby to ensure that discrimination in a still very tense post-conflict situation can be avoided, or at least limited. The example of Croatia shows this very clearly as local municipal bodies have been authorised to deal with issues of extreme importance for individuals without there being a clear legal basis for their decisions. This has opened for a situation where decisions are in-consistent and clearly favouring one side of the recent conflict.

On the other hand, comprehensive and unambiguous legislation would not in itself solve the property rights problem in Croatia. The implementation of the rules will still be a challenge considering the political and emotional context in the aftermath of the war. However, a clear legal foundation for the procedures would not only facilitate the work of the authorities, but would also facilitate the identification of breaches of the rules and the sanction of those responsible thereof.

Again, a property restitution system in Croatia must be based on the principle that the interests of the owner have precedence over those of the possessor. However, it must also take into consideration the background to

¹³⁴ *Ibidem*, p. 1.

¹³⁵ Interview with Mr. Axel Jaenicke, 1 September 2000.

the current situation. Most of the occupants of other's property have been expelled under horrific circumstances from their own homes. Many of these have yet to have their houses reconstructed or repossessed, or are unable to return to their place of origin due to a number of valid reasons. All attempts must therefore be made to ensure the provision of accommodation for all those who cannot provide for themselves. However, the consideration taken to the people occupying others' property must be considered under a social security framework and should not interfere with the resolution of the legal property rights problem.

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