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Report on issues related to property restitution and compensation in former Communist countries, prepared by the Kantor Center for the Study of Contemporary European Jewry at Tel Aviv University,

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INTRODUCTION

During the Holocaust and World-War II properties belonging to Jewish persons and communities were seized by the European governments occupied by the Nazi regime. Following the war, some of the properties remained in the states' ownership and then nationalized or expropriated during Communism. In the 1990s, during the democratization of former communist countries, some properties were sold to new owners in the privatization process. The democratization process presented particular challenges, including the need to address and redress former property seizure grievances while still protecting the rights of current tenants or new owners. The approaches greatly varied among the countries, consisting of a combination of restitution *in rem* and compensation, limited with ceilings and maximum reimbursement amounts. The process was driven and halted in accordance with the political will prevalent at the time. As a result of political lobbying efforts or petitions to the national constitutional courts, some countries subsequently widened the scope of eligible claimants. The significant passage of time between the property seizures and restitution process posed technical difficulties, such as lack of documentation necessary for proving historical ownerhsip, destroyed land registries, deceased owners and heirs. Moreover, valid rule of law questions arose, such as protecting the legal interests of new owners who acquired the property in good faith versus the moral imperative to redress persons who had been unjustly and at times unlawfully stripped of their right to property. Finally, from an International law perspective since the property seizures occurred before the general acceptance of international human rights law, it remained unclear whether such property seizures could be retroactively redressed by a new "right to property restitution", and whether such right existed at all according to European law standards. Proponents for restitution and compensation pointed that countries based on democratic values could not be founded on the historical basis of morally and legally reprehensible property seizures, and that such former government actions must be overturned. From an economic perspective, establishing legal certainty and clear status of property ownership was deemed a prerequisite for social and economic stability, the

development of a market economy, the attraction of foreign investments and the free movement of capital within Europe.

Purpose and scope

This report presents a comparative legal analysis of noteworthy and outstanding issues pertaining to the return of immovable property taken during the Holocaust and during the Communist regime, and may be supplemented by the report prepared by the WJRO in preparation for the 2012 International Property Restitution Conference. As the findings are mainly based on reports of the European Parliament and European Court case-law, the matter restitution and compensation for property seized from Jewish individuals and communities is incorporated within the scheme of the respective country's *general* property restitution laws and procedures, unless indicated otherwise.

The purpose of the report is to identify and highlight main issues hindering the immovable property restitution and compensation process, and to offer solutions for overcoming such obstacles. A comparative analysis will facilitate an understanding of country-specific issues as well as recurring problems among the countries. The report will also shed light on whether the problems are particular to the restitution process or rather subsets of wider issues, such as inadequate rule-of-law mechanisms. Applications pertaining to property restitution often raise problems of a more general nature, usually from the perspective of the rule of law. While such problems are not unique to property restitution, they greatly affect the country's ability to effectively and efficiently carry out its property restitution and compensation process. Moreover, such violations found by the European Court are relevant for assessing the country's compliance with the *Guidelines and Best Practices*[1].

Methodology

This report focuses predominantly on European Court of Human rights judgments, European Parliament studies and European Commission reports. In many cases, property

[1] Guidelines and Best Practices for the Restitution and Compensation of Immovable (Real) Property Confiscated or Otherwise Wrongfully Seized by the Nazis, Fascists and Their Collaborators, during the Holocaust (Shoah) Era between 1933-1945, Including the Period of World War II

seized during the Holocaust was later nationalised by the Communist regime. Therefore, when approaching the matter of property restitution to Jewish persons in the context of European Court jurisprudence, in most case it may only be examined within the framework of the country's general restitution of property. Especially since the Court's data do not differentiate between properties of Jewish persons to those of other ethnicities, the case law may highlight systemic problems and challenges facing the country as a whole in this area.

Firstly, the European legal framework will be presented, with a particular emphasis on the work of the European Court of Human Rights. Thereafter, noteworthy issues relating to nine former communist countries (Croatia, Czech Republic, Hungary, Latvia, Lithuania, Poland, Romania, Serbia and Slovakia) will be presented.

EXECUTIVE SUMMARY

At the outset, it is important to note that European law does not formally obligate the Member States to enact laws pertaining to the return of property taken during former totalitarian regimes. Nevertheless, as property issues raise many basic rule-of-law and free market concerns, this matter is highly relevant to the European Community at large. The establishment of clear property rights is viewed as the basis for a functioning European land market and maintaining a culture of respect for human rights, including an individual's right to property. The matter of the restitution and compensation of property also raises a wide range of technical, political, legal and substantive challenges. The following issues are common among many East and Central European countries and have hindered, and at times even halted, the process[2]:

1. *Changing political will resulting in unpredictable policy towards property restitution*, in turn causes multilayered, frequently amended, highly complex laws, difficult to understand and interpret by the authorities (not to mention the individual applicant).

[2] European Parliament Study on Private Properties issues Following the Change of Political Regime in Former Socialist or Communist Countries: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia, 2010, pages 32-33

This subsequently leads to *differing implementation of the law*, unequal rulings for similar cases, many appeals and complaints to higher instances and prolonged court proceedings.

2. *Weak Institutional policy*. In many cases the authorities responsible for processing the property claims are not sufficiently supervised or audited. While laws are enacted, providing for the general right to file claims for return of ownership title or receipt of compensation, they are nevertheless not followed up by the requisite regulations, which would facilitate the ongoing work of the responsible authorities, specifying exact procedures, eligibility conditions, necessary documentation for filing claims, etc.

3. *Conflicting rights on the same property*. In some cases, the restitution claims came after the privatisation process in the country. This, among other issues, leads to more than one individual or legal person claiming ownership right to the same property.

4. *Ineffective or inadequate compensation systems.* The compensation payments and substitute properties offered to **former owners** do not take into account the actual market value of the property. To solve this, regulations must be adopted to determine methods for assessing the value of substitute property. For instance, a recent law amendment in Slovakia entitled former owners to substitute property only within the same area of the former property. Similarly, **tenants** evicted following the return of property to former owners must also be entitled to fair and adequate compensation.[3]

5. *Conflict of interests.* In some surveyed countries, an inherent of interest exists for entities handling the restitution claims, since they are also the present owners of the property (e.g., **Romania, Croatia**). Conflict of interest issues may also arise when the government does not fund a national restitution program and the municipalities are required to fund compensation payments from their own budgets, leaving them with little incentive to render favourable rulings (e.g., **Poland**).

[3]ECHR Case of Padalevicius v. Lithuania, Application No. 12278/03, Judgment, 7 July 2009, Final on 7 October 2009, page 17

This report highlights some national solutions for overcoming problems related to property restitution, which may be helpful to other countries as well.

Overcoming citizenship / residency requirements

Many national laws prohibit the return of property to non-citizens or non-residents and in effect do not offer them with any form of redress. In some cases non-citizens may not even hope to acquire citizenship due to dual citizenship restrictions. After petitions were filed with the national constitutional courts, some laws were amended to allow other forms of redress for non-citizens as well. **The Czech Republic**, for example, enacted a compensation program for foreign nationals. In **Croatia**, the law was amended in 2002 to allow foreign citizens to file compensation claims, provided such foreigners were citizens of a country party to a bilateral agreement with Croatia.[4] **Slovakian** legislation was also amended to include a wide scope of eligible persons for compensation. **Serbia** also recently allowed for a wider scope of eligibility, with the adoption of the *Law on Rehabilitation* in 5 December 2011. A simple and practical way therefore to overcome non-citizenship or non-residency restrictions, instead of changing the laws on dual citizenship, is the provision of compensation payments.

Overcoming inadequate and ineffective compensation

Compensation payments must be directly enforceable, calculated according to the actual market value of the property and executed within a reasonable amount of time. Instead of leaving it to the responsible authority's discretion, the manner to calculate compensation amounts must be addressed via detailed regulations, specifying the mechanisms for determining the value of the property and time frame for executing payments. For example, the European Court required **Slovakia** to take systemic measures to rectify problems found in its compensation system. As a result of the ruling, Slovakia introduced mechanisms for alleviating the speculative nature of providing substitute property or compensations, and set requirement for providing substitute property only within the same area of the original

[4] In 2010 this condition was deemed unconstitutional by the Croatian Constitutional Court –see chapter on Croatia.

land, as well as calculations for compensation for land in garden areas, and restricting lease prices below the market value of the property.[5]

Overcoming economic problems

Some countries finance the compensation payments and restitution costs by offering former owners governmental bonds or substitute properties. It must be stressed, however, that such methods of compensation **must withstand the test of the European Court**, namely, that they constitute fair compensation. The allotment of shares is not always deemed adequate compensation. For example, the European Court ruled in the case of **Romania** that, since the shares were not listed on any regulated market and the shareholders were unable to trade the shares that such method did constitute effective compensation. Another solution for financing restitution is offering substitute lands keeping in mind however that the property must be of the same or related value of the original property.[6]

Overcoming overly complex legislation

The matter of property restitution and compensation is technically and legally complex. Frequent policy changes result in many subsequent amendments, leaving the individual claimant perplexed, and requiring costly intermediaries, legal services and court proceedings. The **Romanian** system exemplifies this. **In Croatia**, many applications filed with the European Court by tenants and former owners are based on a misunderstanding of their entitlements granted under Croatian law. Overly complex legislation invariably leads to inconsistent implementation of the law, and unequal treatment to applicants. Some possible solutions may be a *consolidation of the legal framework*, incorporating former laws, including all types of immovable properties (agricultural, residential, state-owned, privately owned, etc.). A *clear interpretation of the law* should be provided by the Constitutional or Supreme courts thus eliminating different implementation by the lower

[5] B&S Legal Law Firm, Law News, http://www.bslegal-lawyers.com/

[6] Case of Urbarska Obec Trencianske Biskupice v. Slovakia, Application No. 74258/01, Judgment, 27 November 2007

courts.[7] Moreover, entities responsible for handling restitution and compensation claims must be subjected to *clear regulations*, regular supervision and audits, and work according to binding, streamlined procedures. It is therefore highly important to follow up the enactment of laws providing entitlements with the *adoption of binding regulations* stating clear and detailed procedures on eligibility, necessary documentation, etc. This will facilitate a quick ruling by the responsible authority, and the applicants understanding of his or her rights.

Rule of law issues

This report discusses both problems *specific* to restitution and compensation and *general* rule-of-law deficiencies hindering the process, including violations of the right to a fair trial, unreasonable length of proceedings, and quashing of final judicial decisions. In ruling on applications concerning restitution and compensation, the European Court finds violations on these rights as well. While restitution claims offer only a glimpse into these issues, they should be addressed in a broad and comprehensive level in the respective countries.

Complementing and differing standards of the European Court vs. Guidelines and Best Practices

The *Guidelines and Best Practices*[8] provide criteria for the restitution and compensation process, as does the European Court via its rulings on private restitution process. While the *Guidelines and Best Practices* determine that actual return of property to former owners is the preferred option, the European Court allows the Member States to decide upon the method of redress, as long as it constitutes adequate compensation and does not infringe on the right to a peaceful enjoyment of possessions.[9]

[7] European Parliament Study on Private Properties issues Following the Change of Political Regime in Former Socialist or Communist Countries: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia, 2010, page 114

[8] "Guidelines and Best Practices for the Restitution and Compensation of Immovable (Real) Property Confiscated or Otherwise Wrongfully Seized by the Nazis, Fascists and Their Collaborators, during the Holocaust (Shoah) Era between 1933-1945, Including the Period of World War II"

[9] Case of Varga v. Slovakia, Application No. 36931/08, Judgment, 10 July 2012

Both mechanisms demand fair, adequate compensation to be given within a reasonable time. Both demand clear procedures. *The Guidelines and Best Practices* call for the protection of "good faith occupants"[10], whereas the European Court generally demands that a fair balance be achieved between the rights of the tenants/current owners and the former owners. Points of difference between them generally stem from the European Court's position of maintaining a "wide margin" for the countries to determine the scope of the restitution and compensation system. In this vein, while the *Guidelines and Best Practices* call upon the countries to overcome citizenship and residence requirements, the European Court does not provide the protection of the right to property when the applicants do not fulfil all the conditions required by the national state. (National constitutional courts, however, have deemed unconstitutional and in effect overturned some citizenship and residency requirements).

EUROPEAN INSTITUTIONS

The process of enacting legislation pertaining to property restitution in former communist countries Europe was spurred on by moral and political motivation rather than any adherence to International or Pan-European legal standards. [11] *The main rational was to re-establish democratic values, notably the rule of law and the protection of private property. Furthermore, the time period when the property seizures occurred was before the general acceptance of international human rights law. It is important to distinguish between two sets of regional legal systems relevant to the matter of property restitution - the European Union and the Council of Europe. As will be explained below, the European Union's institutions, conventions and standards are more relevant to countries wishing to accede to the Union (potential candidate countries or candidate countries) while the Council of Europe's institutions and conventions, particularly the European Court of Human Rights, plays a more significant and ongoing role with respect to property restitution within its Member States. When finding a violation the European Court may institute a "Pilot*

[10] Ibid, Section (i).
[11] "Jewish Property Restitution in the Czech Republic", Robert Hochstein, 19 B.C. International & Comp. L. Rev. 423 (1996), page 436

Procedure Judgment", obligating the respondent state rectify the breach of rights in a comprehensive manner by amending its laws or administrative procedures.

EUROPEAN UNION

At the outset, it should be noted that European Union law does not formally regulate the matter of property restitution further to the change of political regime in former communist countries, and it is therefore not a clear obligation under the EU laws and conventions.[12]

The Treaty on the Functioning of the European Union, in Article 345[13], states:

> "The Treaties shall in no way prejudice the rule in Member States governing the system of property ownership".

The European Court of Justice interpreted this article as leaving the matter of property to be handled by the country itself. While the Members States are entitled to establish their own procedures and systems with respect to property ownership, the Court ruled however that such systems must adhere to the rule of non-discrimination.[14] However, the court's interpretation predates the former communist states' accession to the EU in 1990s and until today[15] and as such can be argued that this position did not envisage the need for former communist countries to address property restitution issues.

In 1995, the European Parliament adopted a resolution urging Central and Eastern Europe countries to act quickly to resolve property restitution matters.[16] Nevertheless, in 2009 the European Parliament maintained the European Court of Justice's above position in the specific context of restitution of property confiscated under the Communist regime, and

[12] Speech of Head of EU Delegation to Serbia H.E Ambassador Vincent Degert, Conference on property Restitution, Belgrade, Serbian Parliament, 15 June 2011, available at: http://www.europa.rs/en/

[13] This article previously appeared as Article 295 in the Treaty Establishing the European Community.

[14] The European Court of Justice in the case 182/83, Robert Fearon and Company Ltd v. The Irish Land Commission, judgment of 6 November 1984, [1984] ECR 3677, as discussed in the European Parliament Study on Private properties issues following the regional conflict in Bosnia and Herzegovina, Croatia and Kosovo, page 31, *available at*: http://www.europarl.europa.eu/

[15] For a discussion on the interpretation of Article 345, see: the European Parliament study on Private properties issues following the regional conflict in Bosnia and Herzegovina, Croatia and Kosovo

[16] European Parliament Resolution of 14 December 1995 on the return of plundered property to Jewish communities. There have been other European Parliament resolutions on movable property, which will not be discussed in this report.

stated that "property restitution is a matter of national competence"[17]. Article 17 of *The European Charter of Human Rights*, which entered into binding legal status on 1 December 2009 further to the ratification of the Lisbon Treaty, determines:

> "1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
> 2. Intellectual property shall be protected."[18]

Since the adoption of the EU Charter as a legally binding document, the European Court of Justice's original interpretation as mentioned above has also been adopted on issues related to property restitution. The European Commission's 2010 *Report on the Application of the EU Charter of Fundamental Rights*[19] states as follows:

> "It is therefore for Member States to determine the scope of property restitution and the choice of the conditions under which they agree to restore the property rights of former owners that were subject to expropriation decisions prior to the accession to the European Union."

In light of the above, property restitution is not strictly within the *explicit* mandate of the European Union. **It is nevertheless relevant for candidate countries and potential candidate countries as part of the EU criteria for membership**.[20] During the pre-accession

[17] European Parliament resolution of 22 April 2009 on the deliberations of the Committee on Petitions during the year 2008 (2008/2301(INI).

[18] The "legal explanations" section of the law states that the article is based on Article 1 of Protocol No. 1 of Council of Europe's Convention on Human Rights and Fundamental Freedoms:" the meaning and scope of the right are the same as those of the right guaranteed by the ECHR and the limitations may not exceed those provided for there".

[19] The European Commission's 2010 *Report on the Application of the EU Charter of Fundamental Rights*, pages 37-38

[20] Croatia gained accession status in 2011. Candidate countries are: Iceland, The Former Yugoslav Republic of Macedonia, Turkey and, most recently, Serbia in March 2012. Potential candidate countries: Albania, Bosnia and Herzegovina, Kosovo. Croatia and Serbia are covered extensively herein.

process a candidate country's legal system is examined to verify its adherence to EU standards[21]. Before and during the accession discussions the EU may provide certain conditions and benchmarks for the country to fulfil in this regard. Therefore while the EU will not interfere with the method of property restitution, it will examine whether the national restitution procedures adhere to the rule of law principles (right to a free trial, non-discrimination, etc.). Given that one of the EU's objectives are the establishment of a "highly competitive social market economy"[22], restitution issues are also examined in the context of the free movement of capital; whether the acceding country's properties have a clear status, including mechanisms for settling property disputes and conflicting claims, legal certainty of property ownership for facilitating transactions between potential investors or any EU citizens[23]; and, in general, that the property restitution mechanisms do not hinder the functioning of the country's land market.

It is important to note that a restitution system that was completed *before* the accession to the EU may not be examined or reopened by the EU's treaties after accession. Furthermore, as explained during the Czech Republic accession process, "Even where restitution procedures are still pending, accession would not have the consequence of reopening the deadline for restitution."[24] It is therefore apparent that the role of the EU is more relevant for either candidate countries or potential candidate countries, during pre-accession talks and monitoring process of the European Commission. While it continues to monitor the issue in its country reports, it nevertheless has less leverage influencing the process of restitution after accession.[25] By way of contrast, the **Council of Europe's** institutions have been more successful in exerting some pressure on its member states to amend and enhance their restitution and compensation systems. It is important to note that the

[21] EU membership criteria are promulgated in the Copenhagen European Council in June 1993.
[22] Article 3, para. 3 Treaty of the European Union, as discussed in the EP study of regional conflict, page 45
[23] Speech of Head of EU Delegation to Serbia H.E Ambassador Vincent Degert, Conference on property Restitution, Belgrade, Serbian Parliament, 15 June 2011, available at: http://www.europa.rs/en/
[24] European Parliament, Directorate-General for Research, Legal Opinion on the Benes Decrees and the accession of the Czech Republic to the European Union, 10-2002, page 17
[25] European Parliament Study on Private Properties issues Following the Change of Political Regime in Former Socialist or Communist Countries, 2010, page 31

European Court of Human Rights (the "European Court") is the Judicial Court of the Council of Europe, and not part of the European Union institutions. Nevertheless, during the pre-accession process the European Union institutions have often emphasised the importance of complying with the European Court decisions[26]. As will be elaborated on below, when ruling on claims related to property restitution, the European Court touches on issues that are also relevant to the EU accession (e.g., clear status of property rights, rule of law - right to a fair trial, length of proceedings).

COUNCIL OF EUROPE

As a requirement of membership with the Council of Europe, a country must first ratify *the European Convention on Human Rights and Fundamental Freedoms*, including its fourteen Protocols ("The European Convention")[27]. In 1998, with the entry into force of Protocol No. 11, the European Court of Human Rights became the judicial entity mandated with supervising member states' compliance with the European Convention. Any person or group of persons from the member states are entitled to file applications before the European Court against any member state[28]. Following such an application, the Court can state by a reasoned judgment that there was a violation by the State of one or more of the human rights provided for in the Convention.[29] The European Court's judgment is binding on the member states[30], and imposes a legal obligation on the respondent state to amend the violation. The Council of Europe's Committee of Ministers is responsible for supervising the respondent state's execution of the Court's judgment, as well as implementing any general measures deemed necessary, and amending laws or procedures.[31]

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[26] Ibid.

[27] Council of Europe Treaty, Rome, 4.XI.1950. Text amended by the provisions of Protocol No. 14 (CETS No. 194) as from the date of its entry into force on 1 June 2010. *Available At*: Http://Conventions.Coe.Int/Treaty/En/Treaties/Word/005.Doc

[28] The Council of Europe has 47 member states (including all 27 members of the European Union).

[29] See Supra note 26, page 20

[30] Article 46(1) of Protocol No. 11 of the European Convention: "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

[31] "Beyond the Bug River: New approaches to redress by the ECHR", by Phillip Leach, European Human Rights Law Review [2005] EHRLR 148). The author states that the European Court has been exceptionally more active, going beyond mere declaratory relief and compensation in the area of restitution of property, in ordering the state to further actions apart from compensating the claimant.

The following articles for the European Convention are relevant for filing claims with the European Court:

Article 14 – *Prohibition of discrimination*

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 34 – *Individual applications*

"The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Ratione temporis

Before ruling on the application's substantive arguments, the Court must first rule on the admissibility of the claim, including whether it involves an event that occurred prior to the ratification of the Convention by the respondent state[32]. If the application is based on an event occurring prior to ratification, the Court declares it inadmissible on the grounds of *ratione temporis*. In other words, before delving into the merits of the application, whether the country violated the applicant's right to property, the Court must first determine *when* the relevant event occurred[33]. If such event transpired before ratification, then the Court is not competent to rule on whether there has been a violation of the right to property. The European Court declared the inadmissibility of many applications related to restitution of properties expropriated or nationalised during communism or the Second World War, since such events occurred before the respective respondent country's ratification of Protocol

[32] Other grounds for inadmissibility include the need to first exhaust all remedies in the national level.
[33] The "event" of seizure or expropriation has been deemed by the Court as "an instantaneous act" and does not produce a continuing situation of deprivation of a right.

No. 1.[34] Only if the event in question has been deemed to occur after the respondent country's ratification of Protocol No. 1, will the European Court deem the application admissible and go on to rule on its merits. In some instances, the European Court does however rule on matters related to the return of and compensation for property taken during communism or the Second World War. If the respondent country has established a system for the return or compensation of such properties, then the "event" is not deemed the historical confiscation or expropriation but rather the date of the enactment of the law or the judicial decision.

The European Court has consistently held that Article 1 does not require the member states to restore property confiscated prior to the European Convention's ratification, nor does it impose any restrictions on the method, scope or conditions for the return of property to former owners. Therefore, the member states are not obligated to enact laws on the restitution of property seized under the Nazi or Communist era. However, upon enactment of legislation providing either full or partial restitution or compensation, then such new legislation constitutes a new property right, protected under Article 1. Consequently, the respondent country will, in fact, be liable before the European Court for any violations of this new property right. Most former communist countries have either enacted legislation or established procedures related to property restitution. The European Court has subsequently declared its competence to rule on applications related to properties expropriated **before** ratification of the European convention, under the following circumstances specified in the European Parliament's 2010 *Study on Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo*[35]:

> "(1) The property title was nullified by judicial decisions rendered **after** entry into force of the Convention;
>
> (2) The restitution proceedings ended with a judgment **after** entry into force of the Convention;

[34] European Parliament Study on Private properties issues following the regional conflict in Bosnia and Herzegovina, Croatia and Kosovo, page 22, *available at*: http://www.europarl.europa.eu/
[35] See Supra note 34, page 23

(3) An executive order relating to the restitution judgement was issued **after** entry into force of Protocol No. 1; or

(4) a new expropriation of already restored possessions took place".

In other words, the European Court is competent to render judgments the country's compliance, implementation and execution of its own laws, procedures, judicial or administrative decisions related to property restitution enacted **after** the ratification of the Convention.[36] In such cases, the date of rendering the decision or enacting the law is deemed the "event"[37], as opposed to the date of the historical confiscation/expropriation.

In some cases the Court is also competent to rule on restitution or compensation systems established **before** ratification of the convention, provided such legislation remained in force after ratification of Protocol No. 1.[38]

Accordingly, the Court may rule in applications related to the determination of the interests of new and former owners of the property, as well as competing claims among the tenants and the former owners.[39]

Scope of the Right to Property

Having established that the relevant "event" transpired (or continued) after ratification of the Convention, the European Court must decide whether the claim raises a right to property protected under Article 1 of Protocol No. 1[40]:

[36] ECHR case of Kopeky v. Slovakia, Application No. 44912/98, Judgment, 28 September 2004, 9

[37] Deciding what constitutes the determining "event" is complex. A confiscation or expropriation is deemed "an instantaneous event", while judicial decisions and laws may be deemed otherwise. The circumstances of the case should be examined as a whole, and whether they conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1. See Broniowski v. Poland, Application No. 31443/96, section 125.

[38] Ibid.

[39] European Parliament Study on Private Properties issues Following the Change of Political Regime in Former Socialist or Communist Countries: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia, page 82

[40] Protocol No. 1 to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Paris, 20.III.1952.

> "Every natural or legal person is entitled to the peaceful enjoyment 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 the 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 has ruled that the right to property as formulated in Article 1 contains three distinct rules:

(1) The principle of the peaceful enjoyment of one's property;

(2) Deprivation of one's possessions is subject it to certain conditions;

(3) Recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest.

Furthermore, the European Court has stated that: "the rules are not, however, unconnected: the second and third rules are concerned with particular instances of interference with the right to the peaceful enjoyment of possessions and are therefore to be construed in the light of the principle laid down in the first rule"[41]. The scope of the right to property within the meaning of Article 1 places not only a *negative right* for the country to not interfere in the enjoyment of one's possessions, but **also places a positive obligation on the country to take the necessary measure to protect the right to property**, especially when involving seeking his rights from state authorities but also when involving litigation between private individuals. This means, in particular, that States are obligated to provide judicial mechanisms for effectively settling property disputes and to ensure their adherence to the rights protected in the Convention.[42]

[41] See Case of Vistins Perepjolkins v. Latvia, Application No.71243/01 Judgment (Merits), 25 October 2012, which cited: ,Scordino v. Italy (no. 1) [GC], no. 36813/97, section 78, ECHR 2006-V, and Kozacıoğlu v. Turkey [GC], Application No. 2334/03, section 48, 19 February 2009

[42] Case of Sierpinski v. Poland, Application No. 38016/07,Judgment, 3 November 2009, section 68 (cited among others, Broniowski v. Poland [GC], Application No. 31443/96, section 143, ECHR 2004-V; Blumberga v. Latvia, Application No. 70930/01, section 65, 14 October 2008).

The Court must first ascertain if the property in question is a "possession" belonging to the claimant within the meaning of Article 1. Thereafter, the Court will examine whether the country has interfered with the applicant's peaceful enjoyment of such possession. The Court, moreover, examines any deprivation of property is justified under the rules of Article 1. An expropriation measure must fulfil three basic conditions: it must be carried out in accordance with the law, excluding any arbitrary action taken by national authorities, must be “in the public interest”, and must strike a fair balance between the owner's rights and the interests of the community.

Possession

As stated above, the claimant must prove he or she has a possession within the meaning of Article 1, either an "**existing possession**" (i.e. has already gained ownership rights) or a "**legitimate expectation**" of obtaining effective enjoyment of a property right. Claims having sufficient basis in national law (e.g., case-law of the domestic courts; final court judgment in favour of the applicants[43]) were considered "legitimate expectations", or when the applicant reasonably believed he could have been able to prove to the courts that the conditions for entitlement were met. An administrative decision in favour of the applicant for the return of ownership title also constituted a legitimate expectation justifying the protection of Article 1. Conversely, a mere "hope for the future recognition of a right to property" which has been to date impossible to exercise, does not constitute a possession. A right to live in a certain property not owned by the applicant (i.e., tenancy rights) is also not deemed by the Court as a possession. Moreover, a legitimate expectation does not exist when the applicant does not fulfil one of the conditions set in the national laws, such citizenship or residency requirements[44]. In light of the above, it can be said that the Convention does not grant additional property rights, but only protects the implementation and execution of rights already granted by the national state.

[43] Ibid, 25
[44] The matter of citizenship and residency requirements will be further elaborated on below in page 20. .

Compensation vs. Restitution *in rem*

The Court has repeatedly maintained that deprivation of property must be redressed with fair compensation, reasonably related to the value of the property. The Court however recognizes that in some circumstances a public interest may call for the compensation of less that the full market value. Therefore, Article 1 has not been interpreted as guaranteeing **full** compensation in all cases, and the Court may justify the provision of payments that do not reflect the full market value of the property.[45]

A significant disproportion between the compensation and the value of the land are considered comparable to a complete lack of compensation, indicating to the Court that a fair balance has *not* been struck between the public interest and the rights of the individual.

It is apparent therefore that the Court considers unreasonably low compensation payments as comparable to total lack of compensation, which is only justified in "very exceptional circumstances". [46]

The European Court declared that compensation for the loss of property must be paid within a reasonable time.[47] In this vein, the Court does not interfere in cases when in the name of public interest other forms of redress are given instead of a return of property, such as a substitute property or compensation. Such forms of redress, if indeed reflecting the value of the original property, are not considered as infringing on the rights granted under Article 6.1 of the Conventions.[48]

Citizenship and residency conditions

As explained above, Article 1 provides a *qualified* right to property and, accordingly, the state may call for certain conditions that interfere with the right to property. Such interference is allowed if it is, cumulatively: (1) prescribed by law, (2) is in the public interest, and (3) is necessary in a democratic society.

[45] ECHR Case of Padalevicius v. Lithuania, Application No. 12278/03, Judgment, 7 July 2009, Final on 7 October 2009,

[46] Case of Urbarska Obec Trencianske Biskupice v. Slovakia, Application No. 74258/01, Judgment, 27 November 2007

[47] Case of Igariene and Petrauskiene v. Lithuania, Application No. 26892/05, Judgment of 21 July 2009, final on 21 October 2009.

[48] Case of Varga vs. Slovakia, Application No. 36931/08, Judgment, 10 July 2012, section 39

As explained above, while national legislation providing the return of confiscated property is deemed by the Court as a property right protected by Article 1, the Member States nevertheless still maintain their to exclude certain categories of former owners from the entitlement to a return of property. Therefore, in many cases when the applicants had been excluded by national laws from entitlement to a return of property on account citizenship or residency requirements, the European Court has ruled they did not have either a "possession" or a "legitimate expectation" to receive a possession, and were thus not granted the protection of Article 1.[49] Any arguments that such conditions are in breach of the right to non-discrimination granted in Article 14 of the Convention were not accepted by the Court, since the right of non-discrimination may only be combined with another existing right. It is important to note that while the European Court does not interfere when the country restricts restitution or compensation on the grounds of citizenship or residency, the *Guidelines and Best Practices*[50] endorsed by 43 countries (including those surveyed in the report), called on the countries to find ways to overcome citizenship and residency requirements. As will be presented herein, some countries have offered solutions such as compensation payments instead of return of property to non-residents (e.g., Czech Republic, Slovakia and, more recently, in Croatia.)[51]

Tenants vs. Former Owners

In general, the country enjoys a "margin of appreciation" in determining conditions for restitution. The European Court examines if such conditions adhere to the principle of proportionality, and represent a fair balance between private and public interest. The national authorities are deemed to be in a better position, rather than the Court, to assess what is a "public interest" justifying an interference with property rights. The Court does not assess whether the national legislation is "the best solution", but only makes sure it is

[49] For example, case of Jantner v. Slovakia, no. 39050/97, judgment of 4 March 2003, final on 9 July 2003
[50] Guidelines and Best Practices for the Restitution and Compensation of Immovable (Real) Property Confiscated or Otherwise Wrongfully Seized by the Nazis, Fascists and Their Collaborators, during the Holocaust (Shoah) Era between 1933-1945, Including the Period of World War II
[51] See Croatia, on Overcoming citizenship requirements, page 28. While the Constitutional court in Croatia in 2010, the legislation has not yet been enacted.

within the bounds of the country's permitted margin of appreciation.[52] In this sense the Court only assesses whether the respondent state created a fair balance between the general interest and the individual's right to property.
Both former owners and new tenants apply to the European Court with applications claiming a violation to their right to property.

With respect to tenants, the Court examines if nullifying their rights subsequent to a return of property rights to the former owners was done in accordance with domestic law. Moreover, in certain cases regarding tenants' right the Court may decide that the deprivation of property suffered by the tenant served the general interest of society, i.e., restoration of confiscated property to former owners[53]. The Court has stated that:

> "the Court, mindful of the importance of the legitimate aims pursued by the Restitution Law and the particular difficulties involved in regulating the restitution of nationalised property after decades of totalitarian rule, would not regard as disproportionate every imbalance between the relevant public interest and the Restitution Law's effects on the particular individual concerned. A certain "threshold" of hardship must have been crossed for the Court to find a breach of the applicant's Article 1 Protocol No. 1 rights"[54]

The Court may be prompted however to find a crossing of this "threshold" when the tenant is unable to purchase alternative accommodation and is left in an uncertain financial situation, and thus may declare a violation of the tenant's rights[55]. The crux of the Court's decision lies in establishing a *fair* balance between the rights of former owners and tenants.

[52] ECHR Case of Padalevicius v. Lithuania, Application No. 12278/03, Judgment, 7 July 2009, Final on 7 October 200, page 15
[53] Ibid.
[54] See *Velikovi and Others*, cited in Case of Padalevicius v. Lithuania, Application No. 12278/03, Judgment, 7 July 2009, Final on 7 October 2009, page 18.
[55] See Supra note 53

Other violations apart from the right to property

As will be shown below, many violations found in property restitution applications stem from broader systemic problems in the respondent countries, such that they only highlight far reaching rule of law problems in a specific country, such as violations to the right to a free trial, length of proceedings, and non-implementation of final decisions. The national restitution and compensation proceedings point to breaches of Article 6 of the Convention (e.g., excessive delays, breach of the access to court, retroactive implementation of laws breach of principle of legal certainty). [56]

With respect to property restitution proceedings the Court has stated that although such may be complex, legally and factually, that did not merit in and of itself unreasonably lengthy court and administrative proceedings. [57]

European Court Rulings and Findings

While the European Court provides data and statistics on the number of application concerning property issues in general, there are no official statistics available on the subset issue of applications on property lost during the communist regime and the Second World War.[58] However, some issues have been prevalent across some member states with respect to the return of property, and the following are recurring themes when comparing the judgments on the matter of property restitution[59].

Non-enforcement of final judicial decisions

Some respondent states have failed to enforce final judicial decisions, at the national level, ordering the restitution *in rem*, substitute property or compensation. A country's non-enforcement of decisions awarding property rights is considered by the Court as violation of

[56] For example, Case of Varga v. Slovakia, Application No. 36931/08, Judgment, 10 July 2012

[57] The Court has also stated in the context of property restitution applications, that "the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute" see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, section 43, ECHR 2000-VII)."

[58] European Parliament Study on Private properties issues following the change of political regime in former socialist or communist countries Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia, 2010, page 23

[59] Ibid, page 10

the right to property.[60] Any argument on the government's part that the non-enforcement was due to a lack of funds was not accepted by the Court[61]

Failure of domestic authorities to provide compensation entitled by domestic law

Some respondent states do not pay the compensation entitled to the applicants' under national law for the expropriation during the communist regime of properties, nor do they determine the amount owed.[62]

Special protected tenancy deemed as a deprivation of property

The European Court ruled that providing special tenancy rights to persons occupying apartments that had already been restored to former owners by final court decisions, was in violation of former owners right to freely enjoy their possessions.[63] For example, the Court ruled against **Poland** in a "Pilot Judgment Procedure"[64] that rent control legislation and measures to control the eviction of tenants were in violation of Article 1 of Protocol No. 1[65]

Quashing of final judicial decisions and failure by the courts to respect the final character of judgments

Findings of the country's quashing of final judicial judgments were also prevalent among the surveyed countries. For example, the Court found that an administrative authority in **Slovakia** had reopened and annulled a decision granting ownership rights, in violation of Article 1.[66]

[60] Ibid, page 27
[61] Ibid, page 27
[62] See Supra note 58, page 29
[63] See Supra note 58, page 28
[64] The Pilot Judgment Procedure is used by the Court in order to rectify structural or specific problems in the respondent state affecting many pending applications and potential claimants.
[65] See: "European Court closes pilot judgment procedure in Polish "rent-control" cases, following introduction of compensation scheme", European Court of Human Rights, Press Release issue by the Registrar of the Court, No. 284, 31 March 2011
[66] Case of Valova, Slezak and Slezak v. Slovakia, Application No. 44925/98, Judgment, 15 February 2005

CROATIA

The Act on Restitution of and Compensation for Property Confiscated during the Yugoslav Communist Regime of 1997[67] *provides for compensation for certain types of private property, including: unused construction land; agricultural land, forests and forested land; and residential and business buildings, or apartments and business facilities. While private property confiscated prior to May 1945 is not explicitly mentioned by the law, the Government has insisted that the law also covers property confiscated 1941-1945, based on a Constitutional Court decision.*

Noteworthy issues pertaining to Croatia's property restitution and compensation system are the following:

Scope of law does not cover property taken during WWII

Private property confiscated prior to May 1945 is not explicitly mentioned by the law. The Government insists however that the law does cover property confiscated during 1941-1945. Furthermore, the Government has proposed to establish a foundation to specifically handle claims for the return of property seized during the Holocaust, as well as provide social welfare, education and commemoration of the Holocaust. Such foundation, however, has not been established to date.[68]

Non-uniform application of law

Claims for the return of property are distributed to a county public administrative office, depending on the property's location. A large number of complaints and appeals on administrative decisions have been submitted to the Administrative Court or Ministry of Justice. The Administrative Court has ruled on the cases, provided necessary clarification of administrative and legal rules and procedures. Subsequent to the many appeals, the judges

[67] Law passed in 11 October 1996, last amended in 2002. Amended by laws: 39/99, 42/99, 92/99, 43/00, 131/00, 27/01, 34/01, 65/01, 118/01, 80/02, 81/02

[68] Remarks by Douglas Davidson, US Special Envoy for Holocaust Issues , Bureau of European and Eurasian Affairs to the Board Meeting of the Conference on Jewish Material Claims Against Germany, 10 July 2012, *available at*: http://www.state.gov/p/eur/rls/rm/2012/194849.htm

of the Administrative courts have stated that, in many aspects, the Compensation law suffers from vagueness, resulting in different decisions regarding similar property claims by different county administration offices. This vagueness of the law, coupled with a lack of procedures for filing claims or grounds for rulings has led to a non-uniform and inconsistent implementation by the various offices. For example, there is no procedure specifying which documents are required for filing a claim or clear rules on the eligibility of claimants.[69]

The Administrative judges have subsequently proposed amendments to the law of compensation.[70] A European Parliament report has also proposed the enactment of regulations for the administrative offices, which would likely result in more uniform application of the law, as well as a reduction of the number of appeals to the administrative courts or the Ministry of Justice.[71]

Conflict of interest

As stated above, each administrative office is responsible for ruling on claims within its own territory**.** However in some cases the public administration office itself is the current owner of the property in question. This situation presents an inherent conflict of interest, as the present owners are also the persons responsible for ruling on the properties in question, and on this basis have at least an interest (if not a practice) of deliberately delaying the process[72]. As the European Parliament study points out, however, this situation cannot be reversed since the majority of cases have already been settled.[73]

Croatia's experience may nevertheless shed light on other countries' restitution systems also suffering from the same inherent conflict of interest (e.g., Romania) that have not yet completed their restitution process and still have time to rectify the situation.

[69] European Parliament Study on Private properties issues following the change of political regime in former socialist or communist countries Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia, 2010, page 88

[70] See Supra note 64, page 93.

[71] See Supra note 64, page 94

[72] See Supra note 64, page 93. This inherent conflict of interest has been pointed out in the "2007 Report on the Work of the Public Prosecutor's Offices" as discussed in the European Parliament study.

[73] See Supra note 64. The study noted in page 89: "The average of concluded claims is 71% for all of the counties which are taken into account in this data set. "

Ownership right provided to tenants, compensation given to former owners – in state owned property

Croatian law also entitles former owners with the right to restitution **only** to nationalised flats in which there are no tenancy rights. In all other cases, wherein such tenancy rights do exist, former owner are only entitled to compensation (in cash or securities), and the current owner may gain ownership rights and purchase the property at a favourable, lower than market rate. It is important to emphasise this law pertains to **state owned** apartments, but not privately owned apartments.

The lack of understanding of this distinction and confusion on the applicability of a certain law to specific cases causes ongoing conflicts between former owners and current tenants. Many applications filed with the European Court were deemed inadmissible, since they stemmed from this misunderstanding of Croatian domestic law, of tenant applicants demanding ownership rights to *privately* owned apartments, and former owner applicants demanding restitution for *state owned* apartments which had tenancy rights.

Excessive length of proceedings

In 2007 the Croatian Public Prosecutor's Office[74] pointed to the "slow pace of the administrative procedure and the problem of incorrect or missing information." The Public Prosecutor further noted that these issues were connected to an "intentional slowing of procedure which stemmed for a conflict of interest, as well as the "low priority placed on the restitution and compensation process by the counties." Moreover, The European Court found a breach in the right to hold proceedings within a reasonable time (Article 6.1 of the Convention).The Court called for a "global assessment" regarding the length of proceedings[75], and noted that most delays were caused by successive postponements which revealed in the Court's view a deficiency in the procedural system.

Overcoming citizenship requirements

After a Constitutional Court judgment declared the unconstitutionality of certain provisions of the *Compensation Law of 1997*, an amendment was passed in 2002 providing foreign citizens eligibility to file compensation claims, provided this matter was also arranged in international treaties between Croatia and another country of which claimants were citizens.[76] However, this was overturned in 2010 by a Supreme Court ruling that a foreign national who is neither a Croatian citizen *nor a citizen of a country party to a bilateral agreement with Croatia*, could also be entitled to a return of property or compensation payments for property nationalized under the Communist regime.[77]

[74]See Supra note 64, "2007 Report on the Work of the Public Prosecutor's Offices", as discussed in the European Parliament study.
[75] ECHR Case of Smoje v. Croatia, Application No. 28074/03, Judgment, 11 January 2007, section 45.
[76] As elaborated in the European Parliament Study of 2010, page 86: "there are three types of claimants eligible for compensation according to the amended law: 1) Former owners (private persons) and their legal successors where the provisions of the Inheritance Law apply;2) Foreign legal and private persons if the compensation has been regulated through state bilateral agreements;3) Legal persons can be compensated only if they demonstrate a continuous legal presence on the territory of the Republic of Croatia."
[77] See Supra note 64

The Croatian government has voiced its intention to pass an amendment which would allow non-citizens to file property claims. Nevertheless, such amendment has not been enacted to date.[78]

Missing documentation

Croatia's Public Prosecutor noted that missing documentation is a major obstacle in receiving restitution and compensation for property. Many claims have been denied on the basis of missing documentation, but at the same time claimants were unable to obtain the necessary documents from the state institutions themselves.[79]

Inadequate compensation

As explained above, many former owners are entitled only to compensation, but such payments are capped at 3,700,00 kuna (510,344 EUR). The compensation is given in government bonds disbursed twice a year and may be used for purchasing bonds or shares from the Croatian Privatisation Fund or for purchasing property owned by the Republic of Croatia.[80] Given these conditions, it cannot be said that adequate compensation is granted, as larger claims are compensated with smaller portion of the actual value of their claim.

Moreover, The European Court found that a recurring problem has been that the authorities in Croatia have failed to execute payments to applicants entitled to compensation by domestic law. The Court also pointed to the lack of an effective remedy under Croatian law that would entitle applicants to obtain an official decision determining the exact amount of compensation.[81]

[78] Remarks by Douglas Davidson, US Special Envoy for Holocaust Issues , Bureau of European and Eurasian Affairs to the Board Meeting of the Conference on Jewish Material Claims Against Germany, 10 July 2012, *available at*: http://www.state.gov/p/eur/rls/rm/2012/194849.htm

[79] See Supra note 64, "2007 Report on the Work of the Public Prosecutor's Offices", as discussed in the European Parliament study, page 93

[80] See Supra note 64, page 87

[81] See Supra note 64, page 30

Communal Properties

In the Report on Minority Rights in the Western Balkan[82], it was noted that the return of communal property to religious groups had been implemented an unequal fashion:

> "Property restitution to religious communities whose land and buildings had been nationalized by the Yugoslav communist regime has progressed much more slowly in the case of Serb Orthodox and Jewish communities than with property of the Roman Catholic Church."

Furthermore, *See WJRO's report on outstanding issues related to Jewish communal properties.*

CZECH REPUBLIC

Noteworthy issues pertaining to the Czech Republic's property restitution/ compensation system are the following:

Excluded groups of claimants

Four categories of restitution claimants were created subsequent to a procession of property expropriations in Czechoslovakia: (1) Jewish victims of Nazi persecution; (2) expelled Sudeten Germans, (3) Czech citizens impacted by nationalisation and (4) expatriates.[83]

Sudeten German filed claims to the Czech Constitutional Court, arguing the Czech restitution system was discriminatory, as it allegedly differentiated between groups of claimants on the basis of nationality. This matter was brought before the Czech constitutional court, which declared the Benes Decrees were necessary for the protection of human rights. Furthermore, during the accession process to the EU, a legal opinion on the Benes Decrees of the European Parliament concluded that:

[82] "Minority Rights in the Western Balkans", Policy department External Policies, Study requested by the European Parliament's Subcommittee on Human Rights, July 2008, Page 17

[83] "The Contemporary Right to Property Restitution in the Context of Transitional Justice", by Rhodri C. Williams, May 2007, page 79

> "The Czech system of restitution, although in some respects discriminatory as held by the UN Human Rights Committee, does not raise an issue under EU-Law"[84]

A study by the International Center for Transitional Justice noted the "contradictions" and "arbitrariness" in Czech restitution", namely:

> "(…) while expatriates are excluded for failure to return, Sudeten Germans are excluded despite their stated intent to return and care for their property. Jewish victims of Nazi confiscations are provided restitution by the Czech state while Sudeten German victims of Czech confiscations are not. And among those whose property was expropriated by the communists, victims of generally applicable nationalization policies are entitled to redress, while victims of individualized punitive confiscations generally are not."[85]

<u>High transaction costs</u>

While Czech law allows for the restitution of properties, the actual process requires claimants to overcome substantial difficulties, the most significant of which are bearing high transaction costs related to the return of property; information asymmetry; problems with the physical identification and physical access to parcels/plots. [86]

<u>Return of religious communal properties</u>

In 1994, an agreement between the Jewish community and the Government determined the return of communal property, excluding those: (1) that had already been privatised; (2) properties municipalities and regions, which would remain in their ownership. Therefore municipalities were not required by law to return communal property. However, urged by the Prime Minister Klaus, many municipalities did in fact return properties owned by them, and by 1997 less than half of the properties claimed by the Jewish Community were returned to

[84] European Parliament, Directorate-General for Research, Legal Opinion on the Benes Decrees and the accession of the Czech Republic to the European Union, 10-2002

[85] "The Contemporary Right to Property Restitution in the Context of Transitional Justice", by Rhodri C. Williams, May 2007

[86] Roundtable: Property Restitution/Compensation, General Measures to Comply with the European Court's Judgments, Presentation prepared by Mr. Tomas Doucha, the Czech Republic, page 9

individual Jewish Communities [87]. In a presentation during the "Council of Europe Roundtable Property Restitution/Compensation, General Measures to comply with the European Court's Judgments"[88], it was noted that the restitution of property belonging to churches, religious orders and congregations has not been settled, and that, according to Czech land law, transfer of such property requires first the resolution of restitution matters. On 14 July 2012, With respect to the remaining properties not yet returned, the Czech parliament adopted a law proposal for distributing $3.7 billion among 17 religious denominations as compensation for property nationalized during the communist regime.[89] However, it remains unclear whether this law will also cover the prior period of the seizures to Jewish communal property. [90]

Overcoming citizenship requirements

The original restitution laws restricted the return of property to both non-residents and non-citizens. In 1994, the constitutional court abolished the residency requirements, but maintained the citizenship requirement. In 2002, as a solution for non-citizen claimants, the Government transferred 300 million CZK (750,000 USD) to the Holocaust Victims Foundation. One third of the fund served as a compensation program for non-citizens who were not qualified to file claims for the return or compensation of their former property under the restitution laws.[91]

Violations of a right to fair trial

With respect to applications concerning the return of property, the European Court ruled that the Czech Republic had violated Article 6 of the European Convention on Human

[87] Memo submitted by Dr, Tomas Kraus, Executive Director Federation of Jewish Communities July 2012

[88] See Supra note 82, page 4

[89] http://forward.com/articles/159425/czech-jews-hope-to-get-back-property/#ixzz22wJJjWd4

[90] Green Paper on the Immovable Property Review Conference 2012, Czech Republic, correspondence from Monika Vlacilova, Ministry of Finance, 28 August 2012; and "PM Promises PM promises that church property return law will keep to post-1948, in the Prague Daily Monitor, 4 September 2012

[91] The remainder of the foundation's fund was deemed as partial compensation for communal property owned by the state and thus could not be physically returned, as explained in Memo submitted by Dr, Tomas Kraus, Executive Director Federation of Jewish Communities July 2012

Rights, as it "denied a public hearing before an independent and impartial tribunal"[92]. The Court further ruled in 2012 that the proceedings concerning restitution violated the right to a fair trial and was in breach of Article 6 of the Convention.[93]

Inadequate compensation to tenants

In *Pincová and Pinc v. the Czech Republic* [94], the European Court found a violation of Article 1 of Protocol No. 1 (the right to property), due to the failure to provide evicted tenants with due compensation after having been evicted further to the return of the property to owners. The Court noted that while the return of property was in the public interest, nevertheless, there must be a balance between such public interest and the fundamental rights of the tenants and that compensation paid to tenants must be "reasonably related to its market value, as determined at the time of the expropriation" must be paid to tenants whose property has been taken must be paid[95]. In this respect, the Court also ruled that the compensation was inadequate, in that it failed to take into account the applicants' personal and social situation, did not award any non-pecuniary damages, and did not include reimbursement of the costs incurred for maintaining the property over the years.

Excessive length of proceedings

In applications to the European Court related to property restitution complained of the prolonged proceedings, the Court noted that while restitution process may indeed be complex, this however did not warrant such lengthy proceedings. The Court pointed out that the importance of the matter to the applicants also should be factored and requires domestic courts "to act with particular diligence". The Court therefore concluded that the length of the proceedings was excessive and in breach of “reasonable time” requirement stipulated in Article 6 .1 of the European Convention on Human Rights.[96]

[92] Grand Chamber of the European Court of Human Rights, Judgment in Application no. 33071/96, Malhous v. The Czech Republic (2001).
[93] Case of Kinsky v. The Czech Republic, application no. 42856/06, Judgment on 9 February 2012
[94] Pincová and Pinc v. the Czech Republic, Application No. 36548, Judgment of 5 November 2002. See also, Zvolský and Zvolská v. the Czech Republic, Application No. 46129/99, Judgment of 12 November 2002.
[95] See Supra note 90.
[96] Becvar and Becvarová v. the Czech Republic, Application No.58358/00, Judgment 14 December 2004.

HUNGARY

Hungary passed Act XXV of 1991 entitled persons who had property seized after 1949 the right to partial compensation. Act XXIV of 1992 provided partial compensation for property seized during 1939 – 1949. Under both acts Hungarian citizens were eligible for compensation, paid in vouchers.

The following are noteworthy issues pertaining to Hungary's property restitution and compensation system:

Very limited possibilities for restitution in rem

Hungary's legislation does not allow for the actual return of immovable properties to former owners. The law was challenged at the Constitutional Court, in which the ruling maintained that all matters of compensation were at the State's discretion[97]:

> "Equity is the only legal ground for partial compensation: the State has no obligation to grant any and no one is entitled to any. Compensation is left to the state's discretion."

In this aspect, Hungary's legislation does not comply with the *Guidelines and Best Practices document of 2010*[98]. Its laws do not provide the possibility for a return of property, whereas the Guidelines specify restitution *in rem* as the preferred option[99].

Inadequate compensation

The method of compensation payments, according to the 1991 and 1992 Acts, is by way of compensation notes or agricultural vouchers. A compensation note is a limited transferable

[97] Constitutional Court Decision No. 21/1990, as discussed in the "Council of Europe, Round Table: Property Restitution/Compensation: General Measures to Comply With the European Court's Judgments", Presentation by Mr. Gabor Czepek, Hungary

[98] "Guidelines and Best Practices for the Restitution and Compensation of Immovable (Real) Property Confiscated or Otherwise Wrongfully Seized by the Nazis, Fascists and Their Collaborators, during the Holocaust (Shoah) Era between 1933-1945, Including the Period of World War II"

[99] Ibid, Section h

bearer security which represents the nominal value of a claimed property[100]. The overall amount of compensation is partial, and was granted only to the most serious damages[101].

In this aspect as well, Hungary's system does not comply with the *Guidelines and Best Practices* which demand "genuinely fair and adequate compensation". Furthermore, while it appears that the European Court did not render judgments regarding Hungary's compensation system, it has demanded of other respondent countries, for example Slovakia, to award compensation to former owners "in an amount which bears a reasonable relation to the market value of the property at the date of transfer."[102] Otherwise, it would constitute a breach of the right to property (Article 1 of Protocol No. 1). It is important to emphasise that failure to award *adequate* compensation within a *reasonable time* has been deemed by the European Court as a breach of the right to property.

Unreasonable length of proceedings

In some applications involving property compensation and return of confiscated property, the European Court also found a violation on account of unreasonable length of proceedings (Article 6.1 of the European Convention).[103]

Communal properties

See WJRO's report on outstanding issues related to Jewish communal properties.

[100] Council of Europe, Round Table: Property Restitution/Compensation: General Measures to Comply With the European Court's Judgments, Presentation by Mr. Gabor Czepek, Hungary
[101] See Supra note 96
102 Case of Urbarska Obec Trencianske Biskupice v. Slovakia, Application No. 74258/01, Judgment, 27 November 2007
[103] Kantor v. Hungary Judgment, Application No. 458/03, 22 November 2005; Timar v. Hungary, Application No. 36186/97, 25 February 2003

LATVIA

After regaining independence in 1991, Latvia enacted several laws 1991-1992 dealing with the restitution of private property confiscated beginning in the 1940. The laws provide for the return of property to owners or their heirs, regardless of current citizenship or residence. The first stages of restitution included the rural areas, thereafter further laws were enacted in 1997 and 1998 for the completion of the land reform.

Restitution *in rem* vs. compensation

Both in rural and residential areas, restitution is not provided in certain cases. With respect to rural lands and residential areas restitution *in rem* is not provided in certain cases, wherein they are provided either compensation vouchers or substitute property. The main difference regards the area of the proposed substitute property – while in rural areas, the substitute land is within the territory of Latvia, in residential areas the substitute land must be within the same city as the original property.[104]

Inadequate compensation

In the case of *Vistins v. Latvia*[105], the European Court ruled that the amount paid by the government as compensation was extremely disproportionate to the official value of the land. Thus, the compensation received by one of the applicants amounted to "less than one thousandth of the cadastral value of his land". The Court determined therefore that such amounts were unreasonably low and "almost tantamount to a complete lack of compensation". As the total absence of compensation is only justified by the Court in exceptional circumstances, which did not exist in the present case, this was deemed a violation of Article 1 of Protocol.

Communal property

[104] Roundtable: Property Restitution/Compensation, General Measures to Comply with the European Court's Judgments, Presentation prepared by Ms Laila Medina, Latvia

[105] Although *Vistins v. Latvia* concerns an expropriation of land that occurred in 1995, nevertheless, the following principles are relevant for the purposes herein, as the Court dealt with the issue in the broader scope of the denationalization process in Latvia.

Further to the *Law of 1992 on the Restitution of Property to Religious Organizations*, the government returned twenty communal properties, from over 200 properties identified as belonging to the Jewish community. The Prime Minister has recently declared his support for the return of communal property, but no resolution have been passed to date[106]

LITHUANIA

Noteworthy issues pertaining to Lithuania's property restitution and compensation system are the following:

Excessive length of legal proceedings; delays in executing property rights

the European Court ruled in several judgments[107] that proceedings in Lithuanian courts had been excessively long (violating the right to a hearing within a reasonable time stipulated under Article 6.1 of the Convention), stemming in part from the lower courts' failure to duly consider all relevant circumstances of the claim. The Court also ruled there had been delays in executing property rights, thus violating the right to property under Article 1 of Protocol No. 1 of the Convention.[108] It is important to emphasise, then, that excessive delays are not only a breach of procedural rights but also constitute a violation of the *substantive* right to property.

The European Court held that such length of proceeding failed to strike a fair balance between the general interest in securing the property for public needs and the applicants' personal interest in the peaceful enjoyment of their possessions. Besides court proceedings, the Court also declared that compensation payments on account of deprivation of property must also be paid within a reasonable time.

[106] Remarks by Douglas Davidson, US Special Envoy for Holocaust Issues , Bureau of European and Eurasian Affairs to the Board Meeting of the Conference on Jewish Material Claims Against Germany, 10 July 2012, available at: http://www.state.gov/p/eur/rls/rm/2012/194849.htm

[107] ECHR Case of Padalevicius v. Lithuania, Application No. 12278/03, Judgment, 7 July 2009, Final on 7 October 2009; Igariene and Petrauskiene v. Lithuania, Application No. 26892/05, Judgment, 21 July 2009, final on 21 October 2009

[108] ECHR Case Aleksa v. Lithuania, Application No. 27576/05, Judgment of 21 July 2009

Non-enforcement of judgments – failure to execute domestic judgments

The European Court ruled[109] that the Lithuanian authorities had failed to execute measures necessary to comply with a judgment, pertaining to compensation for property and had therefore, in effect, deprived the applicant of the *right to a fair trial* and prevented the execution of compensation payments to which she was entitled, and therefore was in breach of the *right to property*.

Illegibility of non-citizens to restitution or compensation

According to *the Law on Restoration of the Rights of Ownership of Citizens to Existing Real Property of 1997, as amended in 2002,* only former property owners who are Lithuanian resident citizens may file claims for return of property. If the property cannot be returned then they are entitled to compensation in the form of shares in State owned companies.

It is important to note that while the European Court does not interfere in cases when the country restricts the restitution on certain grounds, nevertheless, the *Guidelines and Best Practices*[110], endorsed by Lithuania, calls on the countries to find ways to overcome citizenship and residency requirements. As mentioned herein, some countries have indeed found solutions, such as **offering compensation payments instead of return of property to non-residents** (e.g., Czech Republic, Slovakia and, more recently, in Croatia.)[111]

Communal properties

Law on Compensation for the Real Property of Jewish Communities Property adopted in June 2011 establishes a foundation for supporting Jewish education, and religious and cultural institutions and projects. The "Good Will Compensation Foundation" will handle compensation claims for Jewish communal property seized during the Holocaust. The government will transfer to the foundation 128 M litas (app. US$ 50 M) over a ten year

[109] ECHR Case of Jasieniene v. Lithuania, no. 41510/98, judgment of 6 March 2003, final on 6 June 2003

[110] Guidelines and Best Practices for the Restitution and Compensation of Immovable (Real) Property Confiscated or Otherwise Wrongfully Seized by the Nazis, Fascists and Their Collaborators, during the Holocaust (Shoah) Era between 1933-1945, Including the Period of World War II"

[111] See Croatia, on Overcoming citizenship requirements, page 28. While the Constitutional court in Croatia in 2010, legislation has not yet been enacted.

period. The first funds received by the foundation (3 million litas, app. US $1M) were already distributed to Holocaust survivors.[112]

POLAND

There were 3,000 Jewish communities living in Poland before World War II, amounting to 3.5 million people, app. 7-10% of the general Polish population and the largest Jewish population in Europe.[113] At least 300,000 real-estate properties were owned by Jewish persons, including 10,000 synagogues and houses of worship and about 1,056 Jewish cemeteries.[114] The amount of the dispossessed property is estimated to be approximately 35 billion USD, according to the Organization of Property Owners in Poland. There are about 89,000 outstanding claims, about 17% of which were filed by Jews. The total cost of restitution and compensation would amount to an estimated at between 11 - 47 billion dollars.[115] Over the past decade the Polish Government had made several commitments toward the US, the Israeli Government and the Jewish communities to promote proposals and adopt laws regulating private property restitution. However, despite having prepared more than 12 draft laws on the matter[116], Poland has not enacted specific laws on property restitution pertaining to properties expropriated from private owners during 1939 -1962. In response to the President's veto of a law proposal in 1999 on private property restitution, it was stated by Polish officials that Poland could not afford to start restitution with claims reaching about 70 Billion USD, and that litigation in the common courts would therefore be

[112] Remarks by Douglas Davidson, US Special Envoy for Holocaust Issues , Bureau of European and Eurasian Affairs to the Board Meeting of the Conference on Jewish Material Claims Against Germany, 10 July 2012, *available at*: http://www.state.gov/p/eur/rls/rm/2012/194849.htm

[113] Etta Prince-Gibson, *Give It Back*, The Jerusalem Report, 26 Apr. 2010, Monika Krawczyk, *Restitution of Jewish Assets in Poland – Legal Aspects*, Justice No.28, Summer 2001.

[114] *Roadblocks to Jewish Restitution: Poland's Unsettled Property,* Max Minckler & Sylwia Mitura, Monika Krawczyk, *Restitution of Jewish Assets in Poland – Legal Aspects*, Justice No.28, Summer 2001.

[115] Etta Prince-Gibson, *Give It Back*, The Jerusalem Report, 26 Apr. 2010.

[116] *Ghosts of the Past, Op-ed: Israel, US must ensure that Poland compensates Jews over Property seized by Nazis, published in Ynet News on 27 August 2012*

most appropriate. In 2008, another legislative initiative was rejected. The proposal to enact the "Re-Privatization Act 2008", which would entitle 15-20% reimbursement for properties expropriated between 1939 and 1962. These reimbursements would have been issued as government "coupons" redeemable either for real-estate held by the State Treasury or for government bonds redeemable after 20 years.[117] *In 2011, the Polish government suggested a law amendment to the Jewish communal property restitution process*[118]*, placing it under the court system rather than public committees.*[119] *This proposal was also rejected, and public committees are still the entities responsible for the process.*

Main issues pertaining to Poland's property restitution and compensation system are the following:

<u>No specific laws on private property restitution</u>

Apart from certain laws on specific areas (see below), Poland has not enacted specific laws pertaining to private properties seized between 1939 and 1962 and has maintained that this matter should be dealt with via litigation in the common courts. It should be noted that, according to the civil system, any successful property claim, rare as such may be, must be funded by the local municipalities.[120] It must be emphasised, in this context, that the *Guidelines and Best Practices*[121], endorsed by Poland, calls on the countries to enact **specific** laws and mechanisms to provide restitution or compensation.

[117] *Roadblocks to Jewish Restitution: Poland's Unsettled Property,* Max Minckler & Sylwia Mitura

[118] Roman Frister, Haaretz.com, 13 Feb. 2012, *at* http://www.haaretz.com/misc/article-print-page/poland-s-jews-slam-dec, the Global News Service of the Jewish People, 13 Feb. 2012, *at* http://www.jta.org/news/article-print/2012/02/13/3091642/jewish-groups

[119] Rafal Kiepuszewski, 26 March 2012, *at* http://ampoleagle.com/warsaw-suspends-restitution-for-polish-jews.

[120] Remarks by Douglas Davidson, US Special Envoy for Holocaust Issues , Bureau of European and Eurasian Affairs to the Board Meeting of the Conference on Jewish Material Claims Against Germany, 10 July 2012, *available at*: http://www.state.gov/p/eur/rls/rm/2012/194849.htm

[121] Guidelines and Best Practices for the Restitution and Compensation of Immovable (Real) Property Confiscated or Otherwise Wrongfully Seized by the Nazis, Fascists and Their Collaborators, during the Holocaust (Shoah) Era between 1933-1945, Including the Period of World War II"

Complex civil and administrative proceedings; Narrow grounds for granting compensation

Given the lack of specific laws and procedures, property claims are handled by civil and administrative proceedings. A claim must first be submitted to the administrative entity. Polish law does not provide redress for wrongs committed in connection with the lands expropriations, but does allow persons whose property was expropriated to file administrative proceedings claiming that the expropriation of property was executed in violation of the law and should thus be declared null and void. In such cases they would be entitled to compensation – under sections 156 and 160 of the Administrative Procedure Code.[122] Accordingly, the administrative body may review individual claims and rule that a certain property was taken under a breach of the law. However, such cases are not very common, since most properties were confiscated pursuant to a legally issued - albeit unjust –law.[123] Upon receiving such administrative ruling, a lawsuit may then be filed with the civil courts. In other words, only claims on property declared by the administrative authority to have been seized in breach of a law can be filed with the courts .[124]

[122] Code of Administrative Procedure of 1960. Article 156 determines that state administrative bodies may decided that administrative decisions such as expropriation, are null and void under specified circumstances.
Article 160 provides that anyone who suffers damage as a result of an administrative decision that may be declared null and void may bring an action in damages for actual harm done: "…A person who has suffered a loss on account of the issuing of a decision in a manner contrary to article 156(1) or on account of the annulment of such a decision shall have a claim for compensation for actual loss, unless he has been responsible for the circumstances mentioned in this provision…."
As discussed in the ECHR – Case of Potocka and Others v. Poland, Application No. 33776/96 of 4 October 2001. Final Decision of 27 march 2002, ECHR - Case of J.S. and A.S. v. Poland, Application No. 40732/98 of 24 May 2005. Final decision on 12 October 2005, ECHR – Case of Bennich-Zalewski v. Poland, Application No. 59857/00 of 22 April 2008. Final decision on 22 July 2008.

[123] Most former owners lost title of their properties due to the "Post-German and Deserted Properties Decree", under which any property not recovered by the original owners as of 1 Sept. 1939, within 10 years of the year 1945, passed to the state. This law is no longer in force, but the state still gains title to properties in virtue of its provisions. The Supreme Court affirmed this presumption in 1987. *See* Monika Krawczyk, *Restitution of Jewish Assets in Poland – Legal Aspects*, Justice No.28, Summer 2001.

[124] Monika Krawczyk, *Restitution of Jewish Assets in Poland – Legal Aspects*, Justice No.28, Summer 2001. Additionally, in the event the former owner is deceased Polish courts have sole jurisdiction to declare the property's legal successors (Articles 1102, 1008 of the Civil Procedure Code). As the claim must include a death certificate, and given the destruction of archives and insufficient documentation in concentration camps, there are technical problems in obtaining evidence proving the date of death. In such cases where the date of death cannot be definitively proven, and the deceased has no living spouse or children, then the date of the death will be declared as 09.05.1946 and the state is declared the successor.

Moreover, with respect to this system, the European Court noted in a judgment on an application regarding a return of title of ownership:

> "Due to several major administrative reforms which had been implemented in Poland during the past fifty years, the courts have been required to determine the authority responsible for taking over the competencies of bodies which had existed previously. The interpretation of provisions of relevant laws introducing the administrative reforms has constantly changed, which has led to **varying judicial rulings by different domestic courts on the same legal question** (…). As a result, the case-law at the domestic level, including the Supreme Court judgments and resolutions, has often been contradictory. "[125]

The Guidelines and Best Practices[126] under Section D specify that the restitution and compensation process must be "accessible, transparent, simple, expeditious, non-discriminatory…" In light of the above description the process cannot be considered expeditious, simple nor providing legal certainty.

Properties regulated under special conditions

While Poland has not enacted specific laws on the entire area constituting present day Poland, it has dealt with some specific areas.

1. Properties beyond Poland's present borders ("Bug River areas")

Poland's borders changed drastically during and after World War II. After the outbreak of the war Poland was divided between the Germany and the Soviet Union. After the war one third of pre-war Poland became part of Belarus, Lithuania or the Ukraine, while large sections of today's Poland was German territory before the war. Later, the communist regime took over properties that had been expropriated by the Nazis and nationalized many other properties. After the collapse of the Communist regime Poland sold many of these properties to private hands.[127]

[125] Case of Sierpinski v. Poland, Application No. *38016/07,Judgment,* 3 November 2009, section 68
[126] See Supra note 121.
[127] Etta Prince-Gibson, *Give It Back*, The Jerusalem Report, 26 April 2010.

Under the framework of the *Republican Agreements* Poland was obligated to compensate persons who were forced to abandon the territories beyond the Bug River.[128] The agreements stipulated that Poland must return the value of the abandoned properties to persons evacuated under certain circumstances. This obligation was then ratified and incorporated into Poland's domestic law.

The Act of 2003 determined a right to compensation to "Bug River" claimants via an auction bidding procedure, and a right to "off-set against the price of State property or the fee for perpetual use of such property and the price of buildings, other premises or dwellings situated therein."[129] It was further stated that "Offsetting of the value of property abandoned beyond the present borders of the State, as referred to in the preceding subsection, shall be effected up to a value equal to 15% of the value of that property; the sum offset may not exceed 50,000 Polish Zlotys."[130]

In 2004 an application was filed before the Polish Constitutional Court challenging the constitutionality of several provisions, including the above-mentioned provisions. Subsequent to the European Court's rulings, Poland has been urged to deal specifically with the "Bug River" areas.[131] With respect to the Bug River areas, the Court ruled that Poland had continuously failed to implement the compensation entitled by law, and was therefore in violation of Article 1 of Protocol No. 1 of the Convention. As this ruling was relevant for 80,000 similar cases and claimants, the Court established for the first time a Pilot-Judgment Procedure which called for the adoption of measures and remedies for addressing the systemic failures found in the Polish compensation system[132]. As a result of the Pilot

[128] ECHR – Case of Broniowski v. Poland ("the Bug River Case"), Application No. 31443/96 of 22 June 2004.

[129] Section 3(1) of the December 2003 Act

[130] Section 3(2) of the December 2003 Act.

[131] The December 2003 Act, entered into force on 30 January 2004, provided compensation granted via an auction bidding procedure. [131] ECHR – Case of Broniowski v. Poland ("the Bug River Case"), Application no. 31443/96 of 22 June 2004.

[132] Pilot –Judgment Procedure, Application No. 50425/99 by E.G. against Poland and 175 other Bug River applications, 23 September 2008, *available at* http://www.menschenrechte.ac.at/orig/08_5/E.G.pdf. For information on the Pilot Judgment Procedure, in general, See: "The Pilot Judgment Procedure", European Court of Human Rights, Information note issued by the Registrar.

Judgment, the Polish Government reached a settlement with the applicants.[133] Furthermore, the Government enacted a law in 2005 entitling Bug River claimants to compensation at 20% of the property's original value. [134]

2. Warsaw properties

Properties in Warsaw are regulated separately from the rest of Polish territories, by the *Warsaw Properties Decree of 1945*[135]. The Municipality of Warsaw obtained ownership of the lands in 21 November 1945, but the Decree entitled former owners to claim ownership titles to buildings, and perpetual rights of long-term establishments (99 years). As of 2001, hundreds of claims were still pending or rejected unlawfully. As is the case with other municipalities, the Warsaw municipality is required to fund any successful claims. Given the high costs, a bill for providing partial compensation for property nationalized in Warsaw only is being considered, but has not been enacted to date.[136]

3. Properties of the Russian Federation Army

The *Law on properties taken over by the State Treasury from the Army of the Russian Federation* was enacted in 1994 and provided repatriated persons with priority in acquiring such properties.[137]

Therefore, while Poland has continued to reject the enactment of specific laws and procedures on private properties – the above-mentioned areas are exceptions to the rule.

[133] *The Right to Property under the European Convention on Human Rights* – A guide to the implementation of the European Convention on Human Rights and its Protocols, 34. Published by the Directorate General of Human Rights and Legal Affairs of the Council of Europe

[134] "Bug River Cases Resolved", European Court of Human Rights, Press Release issues by the Registrar, 12 December 2007

[135] The Act is still in force to date. Monika Krawczyk, *Restitution of Jewish Assets in Poland – Legal Aspects*, Justice No.28, Summer 2001.

[136] Remarks by Douglas Davidson, US Special Envoy for Holocaust Issues , Bureau of European and Eurasian Affairs to the Board Meeting of the Conference on Jewish Material Claims Against Germany, 10 July 2012, *available at*: http://www.state.gov/p/eur/rls/rm/2012/194849.htm

[137] Sections 4 and 16 of the Law of 10 June 1994 on the Administration of real Property Taken Over by the State Treasury from the Army of the Russian Federation.

Destroyed land registries

Land registries in many areas were destroyed during the Second World War. It may be therefore difficult to prove historical land ownership[138]. Moreover, during WWII, many fictitious real-estate transactions had been executed, in order to avoid the antisemitic property laws, further complicating the tracing of ownership rights.[139]

Protected social housing

Poland has maintained protected social housing programs and Jewish persons formerly owned many of these properties. Articles 172 and 222 (1) are the main provisions in the Civil Code regulating this matter[140]. The tenants are therefore protected by law, and it is a sensitive legal situation. In applications filed to the European Court on this issue, it found that "restrictions on property use related to the provisions of housing, such as rent control legislation affecting the landlords, and measures to control the eviction of tenants, amounted to a control of use of property in breach of Article 1 of Protocol No. 1."[141] As the restrictive housing legislation affected an estimated 100,000 property owners (and 24 similar cases pending with the Court), the European Court issued a Pilot Judgment Procedure, as a result of which a compensation system was provided under Act of 2008, under which landlords may receive compensation for violations of their property rights. [142]

[138] *E.g.,* ECHR - Case of J.S. and A.S. v. Poland, Application No. 40732/98 of 24 May 2005. Final decision on 12 October 2005, Piotr Kadlcik, President of the Union of Jewish Religious Communities in Poland, In *Roadblocks to Jewish Restitution: Poland's Unsettled Property,* Max Minckler & Sylwia Mitura, Etta Prince-Gibson, *Give It Back*, The Jerusalem Report, 26 Apr. 2010.

[139] Information from a meeting with Mrs. Lili Haber on 31 July 2012.

[140] Art. 172: (1) "Everyone in possession of property although he is not the owner shall acquire title thereto if he has been in continuous and independent possession thereof for twenty years, save where he came into such possession in bad faith. (2) After thirty years, persons in possession of property shall acquire title thereto even if they came into possession thereof in bad faith.". Art. 222(1): "An owner may demand from a person who factually has control of a thing to release that thing to him, unless that person has a right (remedy) effective with respect to the owner, to control the thing.", as discussed in ECHR- Case of Zwierzynski v. Poland, Application No. 34049/96, 19 June 2001, final decision 19 Sept. 2001 and in Monika Krawczyk, *Restitution of Jewish Assets in Poland – Legal Aspects*, Justice No.28, Summer 2001.

[141] *The Right to Property under the European Convention on Human Rights*, A Guide to the Implementation of the European Convention on Human Rights and its Protocols, Human rights Handbooks, No. 10, page 35

[142] See: "European Court closes pilot judgment procedure in Polish "rent-control" cases, following introduction of compensation scheme", European Court of Human Rights, Press Release issue by the Registrar of the Court, No. 284, 31 March 2011

Communal Properties

Jewish community property claims are processed by a government commission. [143]

Today, there are about 9 Jewish communities in Poland.[144] The time limit for submitting applications expired in 2002[145]. Approximately 5,544 claims for communal property restitution were filed between 1997 and 2002. Of the claims filed, 2,270 claims received a ruling; of which 50% were successful (either received restitution/compensation, or awarded a ruling recognizing the validity of the claim in full or in part).[146]

According to the US Special Envoy for Holocaust Issues, as of July 2012[147]:

> "To date, the Commission has received more than 5504 claims, of which 2213 have been fully or partially settled. The Jewish community has received or will receive 27,104,671 Polish Zlotys (PLN), which is approximately $7,980,000, in financial compensation for seized communal property. In addition, the Jewish community has been granted damages in the amount of PLN 33,540,137.49 about $9,900,000."

Current state of communal properties

Many Jewish cemeteries were first destroyed by the Nazis and then by the locals. Many cemeteries were destroyed, built upon and designated for other purposes (parks, roads, buildings), and others are in bad condition and require maintenance.

Polish law stipulates that the owners of the property are required to maintain and preserve it, otherwise the authorities may fine the owners for the maintenance costs[148]. However, some properties of the Jewish communities are in bad condition and would require

[143] There was a law proposal to transfer the processing of such claims to courts but this has not been done to date.

[144] Information from a meeting with Mrs. Lili Haber, on 31 July 2012.

[145] *Roadblocks to Jewish Restitution: Poland's Unsettled Property,* Max Minckler & Sylwia Mitura

[146] As verified in a phone conversation on 23 August 2012, with Ambassador David Peleg Director of the WJRO.

[147] Remarks by Douglas Davidson, US Special Envoy for Holocaust Issues , Bureau of European and Eurasian Affairs to the Board Meeting of the Conference on Jewish Material Claims Against Germany, 10 July 2012, *available at*: http://www.state.gov/p/eur/rls/rm/2012/194849.htm

[148] Etta Prince-Gibson, *Give It Back*, The Jerusalem Report, 26 Apr. 2010.

extensive work, especially cemeteries[149]. Approximately 1,500 cemeteries were returned to the Jewish communities. An estimated 1,100 cemeteries are completely destroyed, and only 100 cemeteries have more than 100 grave stones. While Polish authorities have expressed willingness to return such cemeteries to the Jewish communities, they have nevertheless demanded that the community bear the costs of maintenance and renovation, which in most cases are too heavy for the communities[150]. In this regard, it is important to mention the rehabilitation program "Tikun" in which prisoners engage in maintenance and preservation work of Jewish cemeteries.[151] It may be suggested that such programs would be expanded to other areas in Poland, to ensure the preservation and maintenance of cemeteries.

Historical registration requirement

The Law on the Relationship between the State and Jewish Communities of 1997[152] establishes the conditions for the return of communal property. The application may be filed either by specific communities or by the Union of Jewish Communities. If a claim is successful, then remedies include return of ownership title, restitution in kind, or compensation.[153] An application must include evidence proving that the title of the property belonged to a pre-war registered Jewish community (or other registered religious legal persons). In other words, **only properties historically registered in the name of the Jewish community were eligible for restitution**. However, in many cases properties used for communal purposes and were donated by private persons or other associations (and, accordingly, registered under their names). These properties were not eligible for restitution. Note that this differs in relation to properties located:

[149] Monika Krawczyk, *Restitution of Jewish Assets in Poland – Legal Aspects*, Justice No.28, Summer 2001.
[150] Meeting on 31 July 2012 with Mrs. Lili Haber, chairperson of the Association of Polish Olim in Israel. Etta Prince-Gibson, *Give It Back*, The Jerusalem Report, 26 Apr. 2010, Monika Krawczyk, *Restitution of Jewish Assets in Poland – Legal Aspects*, Justice No.28, Summer 2001.
[151] Meeting on 31 July with Mrs. Lili Haber, chairperson of the Association of Polish Aliya in Israel. *See*, "Tikkun – Restoration", http://fodz.pl/?d=5&id=95&l=en
[152] The Law on the Relationship Between the State and Jewish Communities of 1997 in the Republic of Poland of 20 February 1997, entered into force on 9 May 1997, as discussed in Etta Prince-Gibson, *Give It Back*, The Jerusalem Report, 26 Apr. 2010.
[153] Monika Krawczyk, *Restitution of Jewish Assets in Poland – Legal Aspects*, Justice No.28, Summer 2001.

Areas within the territory of pre-war Poland as of 1 September 1939, include the restitution of Jewish cemeteries, synagogues, community headquarters and "buildings serving religious, educational and social-aid purposes" (schools, orphanages and hospitals), registered under a registered community.

Former German territories[154] included cemeteries, synagogues and headquarters of the pre-war registered communities which are also official seats of today's communities, under the condition that the applicant intends to reinstate the property's religious, educational or social-aid function.

Communal properties located on the *Vilna – Lvov belt* are not subject to restitution, since such territories became part of Lithuania, Belarus and Ukraine.

Furthermore, *See WJRO's report on outstanding issues related to Jewish communal properties.*

ROMANIA

Properties belonging to Jewish persons were first expropriated in the 1940s through specific racial laws enacted by the extreme-right regime, and then by the Communist regime in 1948-50 through general nationalisation laws. Jewish people who had returned from the concentration camps, or remained as tenants/managers in their former properties, had lost their properties once again through the general nationalisation laws. Claims were submitted by Jewish persons who either "(1) did not manage to claim their properties before 1948, or (2) had their property nationalised during 1948-50; or (3) had donated or sold their property by the state and emigrated between 1950-1989"[155]

[154] Incorporated in Poland in 1945 on the basis of the Jalta treaty.
[155] See Supra note 153.

A European Parliament Study in 2010 on "Private Properties Issues Following the Change of Political regime in Former Socialist or Communist Countries"[156] pointed to many difficulties in Romania's property restitution and compensation system, and highlighted some of its underlying causes, including:[157]

(1) The intensive and widespread extent of confiscation, in comparison to other neighbouring countries, the extent of properties confiscated in Romania was more "intensive and widespread";

(2) weak state mechanisms for executing the restitution/compensation;

(3) a "lack of unitary political vision and piece-meal approach in developing the legal framework", which resulted in a highly complex legislative system, overlapping rights and non-unitary implementation.[158]

The implementation of the restitution and compensation policies is handled by various governance entities, which have conflicting interests: the entities responsible for responding to the claims currently own the properties in question, giving them little incentive to proceed in an expeditious manner[159].

The following are the main problems pertaining to Romania's property restitution and compensation system:

<u>Overlapping rights / conflicting claims</u>

While the laws enacted during the 1990s entitled former owners to restitution *in rem* with respect to certain lands, at the same time those same plots had been subject to general privatization. This led to overlapping rights and "an avalanche of law suits" filed with the Romanian courts[160]. Additional laws were subsequently enacted to address the matter of overlapping rights which, in turn, led to further problematic implementation and many more claims before the courts.

[156] European Parliament Study, 2010 on "Private Properties Issues Following the Change of Political regime in Former Socialist or Communist Countries", pages 99-100
[157] See Supra note 153.
[158] See Supra note 153, page 96
[159] See Supra note 153, page 106
[160] See Supra note 153, page 102

Similarly, while Law 112/1995 had allowed current tenants to purchase the buildings they lived in and former owners to receive compensation, Law 10/2001, on the other hand, entitled former owners to restitution *in rem*, and granted tenants a five-year renting contract and a ceiling rent price. Since many properties had already been purchased by tenants per law 112/1995, former owners filed claims before the courts to challenge the tenants' new ownership title. Claims regarding conflicting rights resulted in mixed decisions, as the courts did not rule in a uniform manner in this matter.[161] This issue was subsequently addressed by Law 1/2009, which promulgated that properties purchased by tenants in accordance with law 112/1995 were protected and could not be returned to former owners. Former owners would only be entitled to compensation.

Highly complex law system

The legal system is highly complex in a number of levels. Firstly, the restitution process may be undertaken **both** through the administrative system in accordance with *specific* restitution laws, and the judicial system according to *civil* laws. Additionally, there are separate laws and institutional entities for different types of properties – agricultural cooperatives, state farms, residential properties, creating three administrative mechanisms and a judicial authority, resulting in a ineffective system and non-uniform decisions. [162]Lastly, the frequent policy changes necessitate enacting new legislation, which only leads to an ever-increasing level of complexity and non-uniform implementation of the laws.

Non-uniform application of the law

The Romanian system's non-uniform application of the law is apparent both on the level of procedure and substantial remedies, as well as in the implementation by the local authorities and the courts' rulings.

The European Court has pointed to the inconsistent practices of the Romanian courts in applying both administrative and judicial mechanisms for property restitution. Some Romanian courts accept claims based both on civil and specific grounds, however:

[161] See Supra note 153, page 105-106
[162] See Supra note 153, page 101

> "not all courts and not even all panels within one court have the same practice. Some of them accept and others reject claims based on the Civil Code."[163]

Non-uniformity is also apparent with respect to claims of Jewish persons, which may be submitted by Jewish persons who either "(1) did not manage to claim their properties before 1948, or (2) had their property nationalised during 1948-50; or (3) had donated or sold their property by the state and emigrated between 1950-1989".[164] In such instances the courts have also ruled with mixed results.[165]

Delays in rulings by administrative authorities

There are massive delays in ruling by the administrative authorities.[166] Romanian laws provide **no time-limits** for resolving restitution claims, and **no sanctions** against authorities for failing to respond to claims. As stated in the European Parliament report:

> "the lack of deadlines for responding to claims by the Central Committee has […] basically shut down all access for rightful owners to courts of law".

That is to say, since there are no time limits, the former owners have no grounds for applying to the courts with respect to long delays in pending claims. A conflict of interest may also be an underlying cause, since central authorities responsible for ruling on the claims are also the current owners of the properties in question. It is therefore not surprising that local authorities performed better overall than central authorities that have ownership over claimed properties.[167]

[163] See Supra note 153, page 110
[164] See Supra note 153, page 100
[165] Note in this context that "there is no systematic data about the number of claims for property restitution or court cases involving former owners of Jewish or German origin, because ethnicity is not recorded in these situations and no independent and reliable study was made on this sensitive matter." See Supra note 153, page 100
[166] See Supra note 153, page 109
[167] "It is also noticeable that local authorities performed better overall (56% of claims have been processed) than the central authorities that have ownership over claimed properties (only 33% of claims have been processed). ", See Supra note 153, 108

It is important to mention in this regard that Section D of the *Guidelines and Best Practices*[168], endorsed by Romania, determines that the restitution process must be "accessible, transparent, simple, expeditious, non-discriminatory, inter alia by encouraging solutions to overcome citizenship and residency requirements, and uniform throughout any given country. In light of the above description, Romania is an example of a highly complex, slow, and non-uniform restitution and compensation system.

Ineffective compensation

In some cases former owners are entitled to compensation via shares in the *Proprietatea Fund*. However, contrary to the provisions of the Fund's Constitutive Act of 2005, its shares were not listed on any regulated market and the shareholders were therefore unable to trade. The European Court has ruled that the Fund *"does not function at present in a way that may effectively provide compensation to the applicants"*. In 2007 the Romanian Government attempted to correct this by allowing the shares' sale on the unregulated market. As it was still difficult to assess the value of the Fund's securities., the European Court maintained its position that

> "…compensation by securities to Proprietatea Fund does not yet represent effective compensation because their market value cannot be established."[169]

Moreover, decisions by the state authority to grant compensation are not directly enforceable. After receiving a favourable decision, the claimant is required then to file a law suit with the courts to oblige the authority to carry out its own decision. Such a procedure cannot be considered expeditious or simple.

Recently, the Romanian Government suspended compensation payments pursuant to Emergency Ordinance Decree No. 62/2010. On 15 March 2012 the Government passed Emergency Decree No. 4/2012 according to which provision of compensation titles,

[168] Guidelines and Best Practices for the Restitution and Compensation of Immovable (Real) Property Confiscated or Otherwise Wrongfully Seized by the Nazis, Fascists and Their Collaborators, during the Holocaust (Shoah) Era between 1933-1945, Including the Period of World War II"

[169] See Supra note 153, page 112-113

conversion titles and property evaluation procedures were suspended for a period of 6 months[170]. The 2010 European Study pointed to important statistics on the Romanian restitution and compensation system. With respect to agricultural lands**,** by the end of the 1990s approximately 77% of the property titles had been issued, covering about 85% of the area claimed. Furthermore, in 2005 10.2 million ha and 98.8% of the property titles had been issued, covering 96% of the claimed area. Nevertheless:

> "while the restitution of farming land and forests seems to have come to an end, both in terms of number of titles and area involved, it is likely that the flow of court cases generated by this process will continue to haunt the authorities for a while yet."[171]

There are many delays at the local authority level with respect to non-agricultural properties - approximately 45% of the claims are pending at local level (estimated at 40,000 files[172]). Only a quarter of the properties have been returned in kind.

<u>European Court Rulings</u>

Romania is one of the countries with the highest number of applications to the European Court and number of judgments finding a violation of property rights. It also has the largest number of applications pending before the Court.[173] The European Court has stated Romania's compensation mechanisms are ineffective, in part due to the authorities' failure to determine a final amount of compensation. Additionally, 100 judgments against Romania concerned the sale of apartments nationalised under the communist regime to third parties without providing compensation to the former owners[174]. Given Romania's inadequate

[170] Legal Memorandum regarding restitution of properties that have been taken under state control in Romania during the communist period", prepared in 2012 by V.M.C Legal Consulting, Bucharest.
[171] See Supra note 153, page 107
[172] See Supra note 170
[173] See Supra note 153, page 24
[174] See Supra note 153, page 28

response to the European Court's sanctions, the Court applied a "Pilot-Judgment Procedure"[175] enabling it to address similar applications pertaining to property rights.[176]

SERBIA

Many laws pertaining to the confiscation and nationalization of properties were enacted during 1941 to 1968. During World War II the German Army confiscated the Jewish community's property, and some properties were returned to the Jewish community by the liberation movements. The Jewish community's property was again taken in the larger scale nationalisation of the 1950s and 1960s [177]. In 2000 Serbia moved towards democratization. The European Union first urged Serbia in 2004 to adopt and implement legislation on property issues.[178] Serbia passed a long-awaited law on restitution and compensation in 2011, one of the requirements for EU candidacy status.

The *Law of Restitution of Property and Compensation* was enacted in 6 October 2011[179], and the main issues arising from the law are the following:

Scope does not yet cover Holocaust victims' properties

The law covers properties confiscated after 9 March 1945. While Article 5 of the law states a separate law will be enacted for the "Elimination of the consequences of property confiscation from the Holocaust victims and other victims of fascism on the territory of the

[175] For information on the Pilot Judgment Procedure in general, see: "The Pilot Judgment Procedure", European Court of Human Rights, Information note issued by the Registrar.
[176] See Supra note 153, page 113
[177] "European Parliament Study on Private properties issues following the change of political regime in former socialist or communist countries - Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia", 2010, page 122
[178] Decision No. 2004/520/EC, as discussed in ibid.
[179] The Law on Property Restitution and Compensation, Law No. 72/2011, English translation available at: http://www.mfa.gov.tr/site_media/html/restitution-law.pdf

Republic of Serbia who have no living legal inheritors",[180] such law however has not been enacted to date.

Most properties belonging to Jewish persons were confiscated in 1941 and 1942, during which other residents moved into those properties which were then nationalized during the communist regime. Such residents are now filing claims for restitution of those properties. This situation will require the enactment of additional laws to settle any conflicting claims. In this context, Dr. Ruben Fuks, President of the Federation of Jewish Communities, has urged to adopt an amendment to the present law "which would require claimants to present documents demonstrating how they arrived at the ownership of these properties".[181]

Very limited possibilities for restitution *in rem*

Article 18 of the *Law of Restitution of Property and Compensation* specifies an extensive list of exceptions to restitution *in rem*, including[182]:

1. Buildings used by government entities, including local;

2. Any property used for the provision of health care or education services, for cultural purposes, scientific purposes, and other prescribed purposes;

3. Property belonging to companies which are planned to be privatized, as well as property belonging to companies which are going through insolvency;

4. Property used by the parliament, the president and the government for representative purposes;

5. Property used for foreign consular or diplomatic representatives, foreign military or commercial representatives;

6. Property which has already been sold in the process of privatization and all property still held by state-owned enterprises;

[180] Article 5 of The Law on Property Restitution and Compensation

[181] *Property Restitution Often Beset by Obstacles*, by By Lily Lynch for Southeast European Times in Belgrade 10 July 2012, *available at*: http://setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2012/07/10/feature-01

[182] Analysis of the law according to Mr. Djurdje Ninkovic, former Minister of Justice and legal expert, in "Djurdje Ninkovic – The Law of Restitution in Serbia", *available at:* http://www.ebritic.com/?p=183744.

7. General clause allowing an exemption "*in all other cases anticipated by this Law.*" [183]

Properties which are subject to restitution *in rem* include: "some unused lands, cafes, restaurants and shops (which have not previously been sold by the Government or local authorities) and flats where previous owners already live."[184]Note also Article 20, which specifies that all contracts for land leasing entered into within one year from the date of the law, entitles the tenants to remain in the property for or up to 20 years and 40 years in certain cases. Moreover, the privatization process started in the 1990s and was completed by 2009. It included the privatization of many enterprises and the sale of their nationalized properties.[185] However, as specified above, privatized property is exempt from

[183]*Law of Restitution of Property and Compensation*, Article 18: "Exceptions to Natural Restitution - The right of ownership of real properties shall not be returned if the properties have the following purpose and/or status on the date of entry into force of Law:
1) Real properties exclusively in public ownership under the Constitution and Law;
2) Official buildings and business premises used for carrying out legally determined competencies of state authorities, authorities of the Autonomous Province, authorities of a local self-government unit and authorities of the territorial self-government;
3) Real properties used for carrying out activities of institutions in the field of health, education, culture and science or other public institutions, which are public services established by public property holders, whose restitution would considerably hinder operation and functioning of the services;
4) Real properties which make an inseparable and integral part of networks, structures, devices or other facilities used for performing core activities of public enterprises, companies established by public property holders, as well as by their subsidiaries, in the field of energy, telecommunications, transportation, water management and activities of public utilities;
5) Real properties whose restitution would considerably hinder economic, i.e. technological sustainability and operability in performance of core activities of the entity undergoing privatization which has not been privatised, as well as an entity sold in bankruptcy proceedings as a legal entity, which the real properties belong to;
6) Real properties aimed at official entertainment purposes of the National Assembly, President of the Republic of Serbia and the Prime Minister;
7) Real properties in the ownership of the Republic of Serbia used for accommodating foreign diplomatic and consular representatives, military and trade representatives and parties representing diplomatic and consular missions;
8) The royal complex in Dedinje, whose status is regulated by a special law, as well as other state-owned cultural real properties of special importance;
9) Real properties sold and/or acquired in the privatisation process as the property or capital of the entity undergoing privatisation, in accordance with the law regulating the privatisation process;
10) Real properties sold in bankruptcy proceedings of state or socially majority-owned enterprises, as well as real properties representing state or socially majority-owned property of bankruptcy debtors which have been sold in bankruptcy proceedings as legal entities;
11) In other cases determined by the Law.
Nationalised enterprises shall not be returned."

[184] Analysis of the law by Mr. Djurdje Ninkovic, former Minister of Justice and legal expert, in "Djurdje Ninkovic – The Law of Restitution in Serbia", available at: http://www.ebritic.com/?p=183744.

[185] See Supra note 177, page 121

restitution.[186]It should be noted, in this regard, that according to the *Guidelines and Best Practices*[187], restitution *in rem* is the preferred option, and compensation should only be provided in cases when return of the property is not possible.

Inadequate compensation

Given the above restrictions to restitution *in rem*, compensation is the most viable remedy. *The Law of Restitution of Property and Compensation* allows for up to a maximum compensation of €500,000 for each claim,[188] but first adjusting the nominal amount of compensation in any individual case and calculating it in proportion to **€ 2 billion cap of all compensation claims,** to be paid within 18 years. However, the Serbian tax administration estimated the total value of nationalised property at **€ 102 - 220 billion**[189]. Compensation payments, therefore, may amount to a meagre few percent of the nominal value specified in the law[190], especially since compensation will be used in most cases.

It should be noted in this regard that not only do the *Guidelines and Best Practices* require the countries to pay fair compensation in lieu of restitution, but the European Court has also ruled that an extreme disproportion between the value of the land and the compensation payment is comparable to a *total lack* of compensation, which may constitute an infringement of the right to property.[191]

[186] See Supra note 177. The Law on Privatization first published in 2001 had determined that "5% of the privatization price would be allocated to a fund for compensation of the former owners of nationalized property. By the end of 2008, when most of the privatizations were done, the fund had reached about 52-53 million. Other sources point to 90 million Euros."

[187] Guidelines and Best Practices for the Restitution and Compensation of Immovable (Real) Property Confiscated or Otherwise Wrongfully Seized by the Nazis, Fascists and Their Collaborators, during the Holocaust (Shoah) Era between 1933-1945, Including the Period of World War II"

[188] Article 31

[189] European Parliament Study, 2010 on "Private Properties Issues Following the Change of Political Regime in Former Socialist or Communist Countries", 119

[190] As explained by Djurdje Ninkovic in an article available at: http://www.ebritic.com/?p=183744: "For example, if the Tax Office declares that the total value of all the claims for compensation for property which is exempt from being returned is EUR 50 billion, then EUR2 billion is 4% of the total amount claimed (EUR 50 billion) and so the maximum compensation would be 4% of EUR 500,000, which is just EUR 20,000. Out of this compensation, 10% would be paid within 3 years (EUR 2,000) and the rest over a period of fifteen years being EUR 1,200 per year. It is self evident, that once inflation is factored in over this period of time, the compensation will be virtually worthless. "

[191] Case of Vistins Perepjolkins v. Latvia, Application No.71243/01 Judgment (Merits), 25 October 2012.

Exclusion of restitution to occupying forces - challenged by constitutional court

Article 5 of the *Law of Restitution of Property and Compensation* restricts the entitlement to restitution from persons who belonged to "the occupation forces which operated on the territory of the Republic of Serbia during World War II, and his or her inheritors."[192] The Hungarian minority in Serbia alleged this clause was discriminatory towards Hungarians. The Hungarian government urged Serbia to amend the law, calling it a threat to Serbia's accession bid to the European Union. Serbia adopted the *Law on Rehabilitation on 5 December 2011*, which stipulates that only persons who had committed war crimes would be excluded from the right to property restitution.

Implementation problems

Restitution or compensation claims may be submitted for to the Agency of Restitution from 1 March 2012 and until 2014. However, the full implementation of the *Law of Restitution of Property and Compensation* is only expected after the adoption of regulations on some key issues. Moreover, proving land ownership may be difficult since Serbia's land registries "are either not up to date or completely lacking in some parts of the territory".[193] As stated in a European Commission Opinion on Serbia's application for membership in 2011[194]:

> "A long awaited law on restitution as well as a new law on public property were adopted. Transparent and non discriminatory implementation of both laws has to be ensured and further measures taken to fully establish legal clarity over property rights. The Commission will monitor the implementation and application of these laws."

[192] Article 5
[193] See Supra note 177, page 124
[194] European Commission Opinion on Serbia's application for membership of the European Union, of 12 October 2011, *available at*: http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/sr_rapport_2011_en.pdf

In the context of implementation problems, and prior to the adoption of the 2011 law, the European Commission also stated[195]:

> "Some progress was observed in adopting new legislation in line with the *acquis*. However, preparation and implementation of the laws are sometimes slow and uneven. Also, legal enforcement is weak due to technical and personnel shortcomings in the courts and administrative bodies. Inconsistent implementation of laws and very lengthy procedures, which frequently exceed the deadlines set by law, hinder investment.
>
> Overall, weaknesses in the rule of law and prevalent corruption continued to limit legal predictability and undermined trust in the legal system among economic operators, in particular as regards effective enforcement of property rights."

Communal Properties Law

The *Law on Restitution of Property to Churches and Religious Communities* still provides only for the restitution of property confiscated in 1945 or later. The European Commission against Racism and Intolerance stated as follows in its latest report on Serbia[196]:

> "ECRI recommends that the Serbian authorities amend the Law on the Restitution of Property to Churches and Religious Communities to ensure that property confiscated before 1945 is restituted. Furthermore, ECRI strongly urges the Serbian authorities to ensure that the restitution of property is conducted satisfactorily and without discrimination."

[195] European Commission's 2010 Progress Report on Serbia, 9 November 2010, pg. 26-27. (Emphasis added). *Available at*: http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/sr_rapport_2010_en.pdf

[196] ECRI Report on Serbia of 23 March 2011, page 13, *available at*: http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Serbia/SRB-CbC-IV-2011-021-ENG.pdf

SLOVAKIA

The following are noteworthy issues pertaining to Slovakia's property restitution and compensation system:

Ownership given to tenants, compensation to former owners

With respect to agricultural and forest lands, Slovakian legislation has provided a stronger protection for current users of the lands as opposed to former owners.

The Land Ownership Act 1991 ("Law of 1991") entitled former owners to recover full possession of the property after expiry of the compulsory lease to the tenants, and only provided the current tenants a right to extend the lease for 10 years, after which the land would be returned to the owners. This however was changed by Act No. 64 of 1997 ("Law of 1997"), wherein priority was given to the current tenants in certain circumstances and the owners were only entitled to either compensation or substitute property. Moreover, the former owners were obliged to rent the land at lower than market value rates. The Court ruled the former owners' right of property had been violated and that these problems were systemic to all landowners whose property was subject to *the Law of 1997*. In *Urbarska v. Slovakia*[197], the European Court reiterated that the public interest of providing legal certainty to new owners (i.e., former tenants) must be balanced with giving former owners fair compensation. Furthermore, the Court would not interfere with respect to the *method* used for redressing former owners (such as providing alternative lands or compensation), unless such alternate method constituted an infringement of the rights granted under the Conventions. As it was noted there had been several applications of the same nature laid before the Court, it called for systemic measures to be taken at the national level to rectify the situation, namely:

> "Firstly, the respondent State should remove all obstacles to the letting of land in allotment gardens on rental terms **which take account of the actual value of the land** and current market conditions in the area concerned.

[197] Case of Urbarska Obec Trencianske Biskupice v. Slovakia, Application No. 74258/01, Judgment, 27 November 2007, Final on 2 June 2008

> Secondly, the respondent State should **remove all obstacles to the award of compensation** for the transfer of ownership of such land in an amount which bears a reasonable relation to the market value of the property at the date of transfer."[198]

In other words, the Court does not demand restitution *in rem* be provided to former owners, and maintains the country's freedom to decide on the method of redressing the historical expropriations**.** The Court does, however, insist that a fair balance exist between the former owners and the tenants; namely, that any rental payments owed or substitute property or compensation awarded be fair and related to market value.

Further to the ruling, Slovakia amended the Land Ownership law in March 1, 2011, entitling former owners another substitute property only within the same cadastral area, in which his original land is located**.** If assigning such substitute land is not possible, compensation shall be paid. The aim of the amendment is to eliminate speculative assignments of substitute lands out of the territory of the relevant cadastral area.

Furthermore Act No. 64/1997 Coll. On Use of Land in Garden Areas and on Settlement of Ownership to Them will be amended as of April 1, 2011. The amendment changes the calculation of annual rent for the use of the land, calculation of monetary compensation for land in garden area and defines the nature of a substitute land for land in garden area. Further, the amendment cancels the restrictions to lease land in garden area under price and conditions applicable on the relevant market, and restrictions to transfer ownership of such under market price applicable on the date of transfer".[199]

<u>Retroactive application of new amendment</u>

The case of *Rosival and Others v. Slovakia*[200] concerned a retroactive application of a law amendment that resulted in the applicants receiving less hectares of property (250 out of

[198] See Supra note 197, section 150
[199] http://www.bslegal-lawyers.com/
[200] Case of Rosival and Others v. Slovakia. Application No. 17684/02, Judgment, 13 February 2007

1500). The applicants' proceedings were reopened in anticipation of an amendment of 1992 to the *Land Ownership Law of 1991*. The Court ruled these proceedings, which would have likely resulted in more hectares if not for the 1992, was deemed a legitimate expectation by the applicants and thus the claim thus constituted a "possession", protected by article 1. The European Court ruled that a retroactive application was an infringement on the right to property.[201]

Quashing of final judgments

In *Valova, Slezak and Slezak v. Slovakia* [202], after a favourable decision for restitution was rendered by the Land Office and the applicants had been givne title of ownership, the administrative authority later decided to reopen the proceedings and annul the decision. The Court held that this was in violation of the right to property.

Non-citizens also eligible for compensation

Pursuant to a recent law amendment, Slovakian law now also entitles not only Slovak citizens but also Hungarians for compensation. Prior to this, applications were filed with the European Court, which ruled that applicants who did not fulfil the conditions required by law (namely, citizenship requirements) did not have a "legitimate expectation" and were thus not protected by the right to property envisaged in Article 1. The fact that the Slovak legislation limited the number of eligible applicants did not in and of itself infringe on a right to property; only the implementation of existing provisions by the Slovak authorities may be ruled on by the European Court.[203]

Impartial land records registries

According to Mr. Igor Rintel, President of the Jewish Communities in Slovakia, the Land Registry Offices hold many records of property with so called “unknown owners”, indicating

[201] Ibid. Summary of the Judgment also discussed in the "Round-Table: Property Restitution /Compensation General measures to comply with the European Court's Judgments Presentation prepared by Ms Marica Pirošíková, the Slovak Republic

[202] Case of Valova, Slezak and Slezak v. Slovakia, Application No. 44925/98, Judgment, 15 February 2005

[203] For an elaboration on what constitutes a "legitimate expectation" giving rise to the protection of the court, see the chapter on EU law.

either the name of the owner without any further contact information or no name at all. Such property cannot be returned, unless the owner or eligible heirs themselves will reclaim their ownership rights on the basis of relevant documents.[204]

References

General

- *Post-Communist Restitution and the Rule of Law*, Csongor Kuti, Budapest New York: Central European University Press, 2009;
- *Perpetual Transitions: The Europeanization of Property Restitution Problems in South-Eastern Europe*, Laura Stefan, 1 October 2011;
- *The Contemporary Right to Property Restitution in the Context of Transitional Justice*, Rhodri C. Williams for the International Center for Transitional Justice, May 2007;
- *Guidelines and Best Practices for the Restitution and Compensation of Immovable (Real) Property Confiscated or Otherwise Wrongfully Seized by the Nazis, Fascists and Their Collaborators, during the Holocaust (Shoah) Era between 1933-1945, Including the Period of World War II;*
- *Remarks to the Board Meeting of the Conference on Jewish Material Claims Against Germany,* by Douglas Davidson, US Special Envoy for Holocaust Issues , Bureau of European and Eurasian Affairs, 10 July 2012, *available at*: http://www.state.gov/p/eur/rls/rm/2012/194849.htm
- Lost and Regained? Restitution as a Remedy for Human Rights, Violations in the Context of International Law, *Antoine Buyse,* 2008, Max-Planck-Institute

European Union

- European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01, available at: http://www.unhcr.org/refworld/docid/476258d32.html;
- European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), available at: http://www.unhcr.org/refworld/docid/3ae6b3b70.html;
- European Parliament Resolution of 14 December 1995 on the return of plundered property to Jewish communities;

[204] Letter from Mr. Igor Rintel, President of the Jewish Communities in Slovakia , 25 July 2012

- Report on the Application of the EU Charter of Fundamental Rights, European Commission, Justice Department, 2010, available at: http://ec.europa.eu/justice/fundamental-rights/files/annual_report_2010_en.pdf

Council of Europe

- Protocol No. 1 of The Convention for the Protection of Human Rights and Fundamental Freedoms;
- Protocol No. 11 of The Convention for the Protection of Human Rights and Fundamental Freedoms;
- *The Right to Property under the European Convention on Human Rights*, A Guide to the Implementation of the European Convention on Human Rights and its Protocols, Human rights Handbooks, No. 10;
- *The Concept of Possessions*, European Court of Human Rights, Key case-law issues, updated on 23 January, 2007;
- "Nationality and the Protection of Property under the European Convention on Human Rights", Ursula Kriebaum; in International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner, 649-666, 2008, Koninklijke Brill N.V, available at: http://www.univie.ac.at/intlaw/kriebaum/pub_uk_14.pdf
- "Beyond the Bug River: New Approaches to Redress by the ECHR", 2005, Phillip Leach**;**
- "Case-law of the European Court of Human Rights: summary of selected judgments and decisions on property restitution/compensation", Council of Europe, Department For the Execution of Judgments of The European Court of Human Rights, 10 February 2011

Croatia

- European Parliament Study of 2010 on "Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo";
- "Minority Rights in the Western Balkans", Policy department External Policies, Study requested by the European Parliament's Subcommittee on Human Rights, July 2008;
- ECHR Case of TRGO v. Croatia, Application No. 35298/04, Judgment, 11 June 2009;
- ECHR Case of Smoje v. Croatia, Application No. 28074/03, Judgment, 11 January 2007;

Czech Republic

- Council of Europe Roundtable: Property Restitution/Compensation, General Measures to Comply with the European Court's Judgments, Presentation prepared by Mr. Tomas Doucha, the Czech Republic;

- European Parliament Legal Opinion on the Benes-Decrees and the Accession of the Czech Republic to the European Union, Directorate-General for Research; September/October 2002

- "Jewish Property Restitution in the Czech Republic", Robert Hochstein, 19 B.C. International & Comp. L. Rev. 423 (1996);

- "Constitutional Guarantees Of Freedom Of Faith And Positions Of Churches In The Czech Republic", by Doc. JUDr., Václav MEZRICKÝ, Secretary General of the Constitutional Court of the Czech Republic, in Legal Aspect of Religious Freedom conference papers, The Government of the Republic of Slovenia for Religious Communities, page 52- 62;

- Case of Kinsky v. The Czech Republic, Application no. 42856/06, Judgment on 9 February 2012

- Letter by Dr. Tomas Kraus, Executive Director of the Federation of Jewish Communities. Czech Republic, 1 August, 2012

Hungary

- ECHR Case of Kantor v. Hungary, Application No. 458/03, Judgment, 22 November 2005;

- ECHR Case of Timar v. Hungary, Application No. 36186/97, Judgment, 25 February 2003;

- Council of Europe Roundtable: Property Restitution/Compensation, General Measures to Comply with the European Court's Judgments, Presentation prepared by Mr. Gabor Czepek, Hungary;

Latvia

- Council of Europe Roundtable: Property Restitution/Compensation, General Measures to Comply with the European Court's Judgments, Presentation prepared by Ms Laila Medina, Latvia;

- ECHR Case of Vistins and Perpepjolkins v. Latvia, Application No. 71243/01, Judgment, 8 March 2011; Presentation by Ms. Laila Medina, Latvia, 17 February 2011;

Lithuania

- Council of Europe Roundtable: Property Restitution/Compensation, General Measures to Comply with the European Court's Judgments;

- ECHR Case of Padalevicius v. Lithuania, Application No. 12278/03, Judgment, 7 July 2009, Final on 7 October 2009.

Poland

- ECHR Case of Broniowski V. Poland, Application No. 31443/96, Judgment, 28 September 2005.

- ECHR Case of Sierpinski v. Poland, Application No. *38016/07,*Judgment*,* 3 November 2009.

- ECHR Case of Henryk Pikielny and Others v. Poland, 3524/05, sitting on 18 September 2012.

- Pilot Judgment Procedure, Application No. 50425/99, against Poland and 175 other BUG River applications, sitting on 23 September 2008;

- Council of Europe Roundtable: Property Restitution/Compensation, General Measures to Comply with the European Court's Judgments, Presentations prepared by Mr Tomasz Kuchenbeker, Poland, 17 February 2011; presentation by Piotr Stycze, Deputy Minister of Infrastructure;

Romania

- "Legal Memorandum regarding restitution of properties that have been taken under state control in Romania during the communist period", prepared in 2012 by V.M.C Legal Consulting, Bucharest Marian Varban, Valentina Topor Varban, Adriana Antal, Roxana Paunescu, Stefan Virban, Adelina Androne, Nicoleta Petrescu;

- European Parliament Study on Private Properties issues Following the Change of Political Regime in Former Socialist or Communist Countries: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia, 2010, pages 96-115;

- ECHR Case of Maria Atanasiu and Others v. Romania, Applications Nos. 30767/05 and 33800/06, Judgment, 12 October 2010;

- ECHR Case of Tudor Tudor V. Romania, Application No. 21911/03, Judgment, 24 March 2009, final on 24 June 2009.

- Council of Europe Roundtable: Property Restitution/Compensation, General Measures to Comply with the European Court's Judgments, Presentation by Romania

Slovakia

- ECHR Case of Urbarska Obec Trencianske Biskupice v. Slovakia, Application No. 74258/01, Judgment, 27 November 2007, Final on 2 June 2008.
- Case of Varga v. Slovakia, Application No. 36931/08, Judgment, 10 July 2012.
- Case of Jantner v. Slovakia, no. 39050/97, judgment of 4 March 2003, final on 9 July 2003.
- ECHR Case of Kopeky v. Slovakia, Application No. 44912/98, Judgment, 28 September 2004;
- Council of Europe Roundtable: Property Restitution/Compensation, General Measures to Comply with the European Court's Judgments, Presentation prepared by Ms Marica Pirošíková, the Slovak Republic.
- Letter from Mr. Igor Rintel, President of the Jewish Communities in Slovakia , 25 July 2012

Serbia

- European Parliament Study on Private Properties issues Following the Change of Political Regime in Former Socialist or Communist Countries: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia, 2010, pages 116-125;
- European Union Key Findings of the Opinion on Serbia, Memo/11/693, 12 October 2011;
- The European Commission against Racism and Intolerance Report on Serbia of 23 March 2011, page 13, *available at*: http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Serbia/SRB-CbC-IV-2011-021-ENG.pdf;
- "Djurdje Ninkovic – The Law of Restitution in Serbia", available at: http://www.ebritic.com/?p=183744;