IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 19841/06

BETWEEN:

Leonas Iono Bagdonavicius and Others

Applicants

- and -

Russia

Respondent

- and -

Minority Rights Group International

European Roma Rights Centre

Interveners

SUBMISSIONS ON BEHALF OF THE INTERVENERS

I. Introduction

1. These Submissions are made by Minority Rights Group International ("MRG") and the European Roma Rights Centre ("ERRC") (jointly, the "Interveners") in relation to *Bagdonavicius and others v. Russia* (Application No. 19841/06), pursuant to leave granted by the President of the Court by letter dated 25 February 2014, in accordance with Rule 44(3) of the Rules of Court. A short statement about each of the Interveners, and detailing their experience and interest in this matter, is set out in the Annex to these Submissions.
2. *Bagdonavicius and others v. Russia* raises critical issues in relation to permissible restrictions on the rights of minority groups in general and Roma in particular under the European Convention on Human Rights (the "Convention"). This intervention addresses the following issues:

   a. The crisis of forced evictions of Roma in Europe. The interveners would like to draw the Court's attention to the fact that forced evictions are not stand-alone incidents but rather reflect the extreme level of social exclusion of Roma and impact upon the full array of rights;
   b. The Court's interpretation of Article 8 in this area, which is already well-developed. However, further specificity from the Court is needed to ensure that States comply with their obligations;
   c. The applicability of Article 1 of Protocol 1 to the forced eviction of Roma, on which further Court guidance is needed;
   d. The applicability of Article 14 (taken with Article 8) to the forced eviction of Roma, on which further Court guidance is similarly needed.

II. The crisis of forced evictions of Roma in Europe

3. Roma face an acute crisis in relation to extreme levels of social exclusion, of which forced evictions are only a symptom (albeit often reaching the severity of the demolition of their homes). Access to housing is one of seven 'thematic priorities' on which the ERRC focuses, and yet forced evictions make up approximately half of its current litigation work. The ERRC is contacted on a weekly basis about forced evictions. This is a Europe-wide problem that affects Roma in a given State Party regardless of the status of victims as citizens, legal migrants or persons rendered stateless through the succession of states or other reasons. Here are a few examples:

   - In France, the ERRC, along with another NGO, the Ligue des droits de l'homme, carries out a census of forced evictions of Roma. In 2011, the census found that 8,455 Roma had been forcibly evicted from their homes. In 2012, the number was 9,404. In 2013, this more than doubled to 21,537.[1] The trend seems to be getting worse: in the first quarter of 2014 (i.e. during the winter months), 3,428 Roma were evicted from their homes in France (compared with 3,007 during the same period in 2013 and 2,153 during the same period of 2012). As a

[1] More information can be found at http://www.errc.org/article/forced-evictions-of-roma-double-in-france-as-authorities-pursue-failed-expensive-policy/4242 (as well as a full report available at http://www.errc.org/cms/upload/file/france-detailed-report-14-january-2014.pdf).

general rule, no social assessment is done of those being evicted, no social support is provided and, crucially, there is no alternative accommodation offered. Although it is of course not the Court's place to consider the state of execution of its own judgments, the ERRC has noted with some frustration that the Court's judgment in *Winterstein v France*[2], albeit final, has had no impact on the situation there;

- In 2013, the ERRC counted 14 forced evictions affecting hundreds of Roma in Milan (Italy) alone. Although the Italian courts have declared national 'state of emergency' legislation allowing for demolitions of Romani settlements without notice unlawful, the authorities in Milan continue now (in 2014) to demolish homes without respecting the basic safeguards required under domestic administrative law or the Court's case law;[3]
- In Romania, the ERRC is aware of a number of recent forced evictions or threats of eviction. Local authorities often demolish houses for lack of building permits, claiming that this does not constitute an eviction (Cluj 2010 and 2013, Baia Mare 2012 and 2013, Eforie Sud, 2013). According to Romanian law, authorities may demolish informal housing without notice or prior judicial proceedings (as required by *Winterstein*)[4]. Local authorities also often neglect their legal obligation to maintain and repair housing leased to the Roma and subsequently rely on safety concerns as an excuse to evict them (Iasi 2013, Bucharest 2013). Authorities have either failed to provide alternative accommodation or have tended to provide inadequate housing at the periphery of the city, often in environmentally hazardous places (Baia Mare 2012, Cluj 2010, Tulcea 2006, Miercurea Ciuc, 2004);
- In recent years, a new worrying phenomenon related to the practice of forced evictions has emerged in Slovakia. This is in the context of the movement 'Zobuďme sa!'[5] (Let's Wake Up!), which was set up in 2011 and has collected the signatures of 402 mayors of Slovak towns and villages. It aspires to provide coordination of the demolition of Romani settlements in their municipalities defined as illegal waste dumps by the movement. In the description section of the movement's website it is clearly stated: *"For us, illegal settlements in the outskirts of towns are just 'black' [i.e. illegal] waste dumps and illegal constructions whose owners violate valid laws and the constitutionally guaranteed right to protection of property. Gentlemen, state officials, do not therefore expect anything else but that we will involve cleaning machinery and bulldozers in the process, if you finally will not wake up!"*[6] According to ERRC monitoring, approximately 250 Roma have been evicted since 2011 in three evictions linked to the movement;
- According to a report by FIDH and Anti-Discrimination Centre Memorial, the "*forced eviction of Roma in Russia has become a general trend in the context of growing economic interests, widespread corruption, police violence and arbitrary or nonexistent national measures to protect vulnerable groups. The absence of national policies on the resolution of the housing problems of Roma, strongly recommended by a number of international bodies, and the*

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[2] Application No. 27013/07, judgment of 17 October 2013

[3] For more information on the current situation, the Court will find various press releases on the ERRC's website, including at http://www.errc.org/article/milan-authorities-continue-evicting-roma/4254.

[4] *Supra*, note 2

[5] http://www.zobudmesa.sk/

[6] http://www.zobudmesa.sk/o-nas/

absence of effective remedies at national and local level reduce, both in the short and long term, the chances for fair solution"[7].

4. The Court has already recognised that "*as a result of their turbulent history and constant uprooting, the Roma have become a specific type of disadvantaged and vulnerable minority. They therefore require special protection. Their vulnerable position means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases*".[8] In particular in relation to education, the Court has found that "*the misplacement of Roma children in special schools has a long history across Europe*".[9] The interveners believe that similarly strong statements in relation to forced evictions, going beyond what the Court has already found in *Yordanova v Bulgaria* (in which the Court explicitly stated that "*socially vulnerable groups, regardless of the ethnic origin of their members, may need assistance in order to be able effectively to enjoy the same rights as the majority population*", and "*an obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 of the Convention in exceptional cases*"[10]) and *Winterstein v France*[11], are now appropriate. In the following sections, the interveners suggest how to frame that language.

III.Further developing Article 8 case law

5. The Court's case law on Article 8 in the context of evictions of Roma is now well developed. In particular, the Court's judgments in *Yordanova v Bulgaria*[12] and *Winterstein v France*[13] have brought considerable clarity to this area. The interveners strongly welcome the Court's findings that all eviction decisions must be proportionate in order to be in accordance with Article 8(2) of the Convention.[14]
6. The Court's approach is in line with other international standards, particularly those of the UN Human Rights Committee. In *Naidenova and others v. Bulgaria*[15], the Committee considered the case of an impending eviction and demolition of a long-standing Roma community's homes. The Committee confirmed that that the houses in the community were "homes" within the meaning of Article 17 of the International Covenant on Civil and Political Rights ('ICCPR'), which protects the right to home, family and private life, irrespective of the fact that the authors of the communication were not the lawful owners of the plot of land on which these houses had been constructed. The Committee further stated that the eviction order, if enforced, would result in the authors losing their homes which would amount to an interference with their right to home life.

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[7] "Forced Evictions and the Right to Housing of Roma in Russia", FIDH and Memorial Report, October 2008, available at http://www.osce.org/odihr/33805?download=true, p 42
[8] *Horvath and Kiss v Hungary*, Application no 11146/11, judgment of 29 January 2013, para 102.
[9] *Ibid*, para 115
[10] *Yordanova and others v Bulgaria*, Application No. 25466/06, judgment of 24 April 2012, paras 129 and 130
[11] *Supra,* note 2
[12] *Supra*, note 10
[13] *Supra,* note 2
[14] *Ibid,* para 159
[15] *Naidenova et others v Bulgaria*, UN Human Rights Committee, communication 2073/2011

The Committee recalled that under Article 17 ICCPR it is necessary for any interference with the home not only to be lawful, but also not to be arbitrary. According to the Human Rights Committee's General Comment No. 16, the concept of arbitrariness in Article 17 of the Covenant is intended to guarantee that even interference provided by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. Similarly, in *Georgopulus v Greece*[16], the Committee concluded that the demolition of the authors' shed and the prevention of construction of a new home in a Roma settlement amounted to, *inter alia,* violations of Articles 17, 23 and 27 read alone and in conjunction with Article 2(3), regarding the lack of an effective remedy.[17]

7. In its General Comment No. 4, the UN Committee on Economic, Social and Cultural Rights ("CESCR") stated that: *"Instances of forced eviction are* prima facie *incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law*."[18] The African Commission on Human and Peoples' Rights clearly stated in the *Endorois* decision that forced evictions by their very nature cannot be deemed to satisfy the test set out in Article 14 of the African Charter on Human and Peoples' Rights of 'being in accordance with the law'.[19] The African Commission declared that 'in accordance with the law' requires both national and international law,[20] and requires consultation and compensation.[21] "*In terms of consultation the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded*."[22] The interveners are of the view that the vulnerability of Roma in Europe makes this statement equally valid in respect of Roma.
8. Likewise, the United Nations Commission on Human Rights has found that forced evictions are gross violations of human rights, and in particular the right to adequate housing.[23] In addition, General Comment No. 7 of the UN CESCR requires States Parties, prior to carrying out any evictions, to explore all feasible alternatives in consultation with affected persons, with a view to avoiding, or at least minimising, the need to use force.[24] It defines forced evictions as "*the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection*"[25] It recognises that "*ethnic and other*

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[16] UN Human Rights Committee, Communication 1799/2008, 14 September 2010
[17] See also *Chiti v Zambia* (UN Human Rights Committee, Communication 1303/2004, 28 August 2012), in which the Committee concluded that the author's illegal eviction and the destruction of the family's personal belongings was held to have a significant effect on family life and therefore amounted to a violation of Articles 17 and 23 in conjunction with Article 2(3) ICCPR.
[18] United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 4, *The Right to Adequate Housing*, (Sixth session, 1991) (E/1992/23), para 18.
[19] *Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Communication 276/2003, para 218.
[20] *Ibid,* para 219.
[21] *Ibid,* para 255.
[22] *Ibid,* para 226.
[23] See United Nations Commission on Human Rights, Resolution 1993/77, (1993) (E/C.4/RES/1993/77); United Nations Commission on Human Rights, Resolution 2004/28, (2004) (E/C.4/RES/2004/28)
[24] United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 7, *Forced evictions and the Right to Adequate Housing*, (Sixteenth session, 1997) (E/1998/22), para 14.
[25] *Ibid*, para 3

minorities… all suffer disproportionately from the practice of forced eviction…. The non-discrimination provisions of articles 2.2 and 3 of the Covenant impose an additional obligation upon Governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved."[26] Further, "*whereas some evictions may be justifiable, such as in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause, it is incumbent upon the relevant authorities to ensure that they are carried out in a manner warranted by a law which is compatible with the Covenant and that all the legal recourses and remedies are available to those affected*."[27]

9. Paragraph 15 of the General Comment sets out the standards that apply to forced evictions: "*Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.*"
10. In the interveners' view, the following principles, if made explicit in the Court's case law, would solidify the convergence between existing case law on Article 8 and the relevant international standards:

- **Decision process.** In order for the 'processus décisionnel ayant débouché sur des mesures d'ingérence'[28] to be just and to respect the rights of minority groups facing forced evictions, it must include, at a minimum: genuine consultation with the community; adequate and reasonable notice for those affected, in a language they can understand; information on the proposed evictions and, where applicable, on the alternative purpose for which the land or housing is to be used; and the presence of identified public officials at any eviction or demolition;
- **Alternative accommodation.** The Court has already stated that "*de nombreux textes internationaux ou adoptés dans le cadre du Conseil de l'Europe insistent sur la nécessité, en cas d'expulsions forcées de Roms et gens du voyage, de leur fournir un relogement, sauf en cas de force majeure*"[29]. Given that Roma are a particularly vulnerable group, evictions of Roma, the interveners believe, will violate international standards (including Article 8) if

[26] *Ibid*, para 10
[27] *Ibid*, para 11
[28] *Winterstein*, *supra* note 2, para 148
[29] *Ibid,* para 159

appropriate alternative accommodation, agreed by those being evicted in line with the principles set out above (notably consultation well in advance), is not provided.

- **Nationality and residence status of those being evicted.** The interveners note that in the Court's previous case law,[30] it has dealt with forced evictions of Roma who have the nationality of the State in which they are residing. That factor has never been essential to the Court's reasoning, however. In line with the international standards set out above, the interveners are of the view that the case law on forced evictions of Roma, notably the recent *Winterstein* judgment, applies regardless of the nationality or residence status of those being evicted. It is important for the Court to clarify this.
- **Remedies.** The interveners recall that the loss of one's home is a particularly serious breach of Article 8.[31] Indeed, it is a loss which implies a host of other Convention rights, including the right to education (Article 2 of Protocol No 1) in cases involving families with children: children who are homeless are likely to experience serious obstacles to the development of their personality and potentially irreversible interruptions to their education, with negative, lifelong repercussions. The Court has already found that eviction "measures must be enforced in a manner which ensures that the individual's right to his or her home is properly considered and protected", and did not fault an applicant for complaining to the Court before exhausting the domestic legal procedure when he was evicted and his home sold before the end of the proceedings.[32] The logic of this judgment, in line with the standards set out above, demands that in cases of forced evictions of particularly vulnerable minorities, the authorities must provide accessible remedies, legal aid, sufficient time and notice, and, where appropriate, other forms of assistance. Furthermore, those remedies must have automatic suspensive effect in order to be effective. The authorities who are responsible for the eviction must satisfy themselves that those concerned are aware of their right to a remedy and are in a position to exercise it.

IV. The right to property under Article 1 of Protocol No 1

11. The right to property is enshrined in Article 1 of Protocol No 1 of the Convention. It is a longstanding principle of Court jurisprudence that Article 1 of Protocol No 1 covers three principles, namely: (1) enjoyment of possessions; (2) the qualified prohibition on deprivation of property; and (3) qualified State control of the use of property.[33] However, the Court has reiterated at the same time that these three principles should not be viewed as isolated but rather as forming one concept of property protection: the enjoyment of possessions is guaranteed, but this guarantee is not without limits. In particular,, the second and third principles covered by Article 1 of Protocol 1 have to respect the principle of proportionality.[34] That is, any interference with the right to property has to satisfy three ground rules: it must be in accordance with the

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[30] See, e.g., *Yordanova v Bulgaria, supra* note 10; *Winterstein v France, supra* note 2
[31] *Rousk v Sweden*, Application No. 27183/04, judgment of 25 July 2013, para 137
[32] *Ibid*
[33] See, e.g., *Sporrong and Lönnroth v Sweden*, Application No 7151/75, 7152/75, judgment of 23 September 1982, para 61.
[34] *Beyeler v Italy*, Application No. 33202/96, judgment of 5 January 2000

law[35], pursue a legitimate aim[36] and strike a fair balance between the individual right to property and interest of the general public[37].

12. In its General Comment No. 7, the UN CESCR stated that "*forced eviction and house demolition as a punitive measure are also inconsistent with the norms of the Covenant. Likewise, the Committee takes note of the obligations enshrined in the Geneva Convention of 1949 and Protocols thereto of 1977 concerning prohibitions on the displacement of the civilian population and the destruction of private property as these relate to the practice of forced eviction. State Parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding or at least minimizing, the need to use force. Legal remedies or procedures should be provided to those who are affected by eviction orders. States Parties shall also see to it that all the individual concerned have a right to adequate compensation for any property, both personal and real, which is affected*."[38]
13. According to Article 14 of the African Charter of Human and Peoples' Rights: *"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."* The test laid out in Article 14 of the Charter is *conjunctive*. That is, in order for an encroachment not to be in violation of Article 14 it must be proven that the encroachment was in the interest of the public need/general interest of the community *and* was carried out in accordance with appropriate laws.[39] The requirement that any encroachment on property rights be in accordance with the "appropriate laws" incorporates both domestic and relevant international laws.[40]
14. As stated above at paragraph 7, the African Commission on Human and Peoples' Rights has also found that forced evictions by their very nature cannot be deemed to be 'in accordance with the law' under Article 14.[41] The 'law' in this sense refers to both national and international law,[42] and requires consultation and compensation.[43] In reaching this conclusion, the African Commission relied on the Court's case of *Akdivar and Others v Turkey,* where the Grand Chamber concluded that forced evictions and destruction of applicant' houses amounted to a serious interference with the rights protected under Article 8 and Article 1 Protocol 1[44].
15. Furthermore, the legal status of a house should not, on its own, be determinative of whether it constitutes a possession for the purposes of Article 1 of Protocol No 1, and thus whether it falls under its protection. In *Öneryıldız v. Turkey* the Court held that in relation to an unauthorised house built on state land "…the applicant's proprietary interest in his dwelling was of a sufficient nature and sufficiently recognized to constitute a substantive interest and hence a "possession"

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[35] *Saliba v Malta*, Application No. 20287/10, judgment of 22 January 2013, para. 37
[36] *Beyler v Italy*, *supra* note 34, para 111
[37] *Valkov v Bulgaria*, Applications Nos. 2033/04, 19125/04, 19745/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05, and 2041/05, judgment of 25 October 2011
[38] *Supra*, note 24, paras 12-13
[39] *Endorois*, *supra* note 19, para 211.
[40] *Ibid*, para 219.
[41] *Ibid*, para 218.
[42] *Ibid,* para 219.
[43] *Ibid,* para 255.
[44] *Akdivar v Turkey*, Application No 21893/93, judgment of 16 September 1996, paras 85-88

within the meaning of the rule laid down in the first sentence of Article 1 of Protocol No. 1, which provision is therefore applicable to this aspect of the complaint."[45] The Court then proceeded to find violation of Article 1 Protocol 1. Further, in *Doğan and Others v Turkey*, which concerned applicants who had been unable to demonstrate registered title of lands from which they had been forcibly evicted, the Court observed that: *"[T]he notion 'possessions' (in French: biens) in Article 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as possessions' for the purposes of this provision."*[46].

V. The Right to Freedom from Discrimination in Relation to Housing

16. UN CESCR General Comment No 7 on the right to adequate housing imposes an obligation upon Governments to ensure that, *"where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved."*[47]
17. The Council of Europe Commissioner for Human Rights has stated that Articles E and 31 of the revised European Social Charter 1996[48] - which protect the right to non-discrimination and the right to housing - will be violated "*when the state, in evicting persons or destroying their property appears to single out an ethnic group for more severe treatment than persons generally*."[49] Similarly, the Commissioner has stated "*Articles 8 and 14 of the ECHR will be violated when the state fails to provide adequate remedies for unlawful destruction of their homes (whether by private individuals or by agents of the state) to members of a particular ethnic group*."[50]
18. European Union legislation (such as Council Directive 2000/43/EC of 29 June 2000 – the "Racial Equality Directive" – implementing the principle of equal treatment between persons irrespective of racial or ethnic origin), prohibits discrimination on grounds of racial or ethnic origin including in relation to housing. Article 2 explicitly included under its definition of indirect discrimination the possibility of objectively justifying the treatment, but made no such justification possible under its definition of direct discrimination. Only positive action measures can justify direct race discrimination in relation to housing (Article 5).
19. The UN Human Rights Committee has found in a number of cases that illegal eviction, destruction of a family's belongings and termination of property rights violate Articles 17 and 23

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[45] *Oneryildiz v Turkey*, Application No. 48939/99; judgment of 30 November 2004, para. 129
[46] *Doğan and Others v Turkey*, ECtHR Judgment of 29 June 2004, Application Nos 8803-8811/02, 8813/02 and 8815-8819/02, para 138.
[47] *Supra*, note 24, para 10
[48] Article E states "The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status"; whilst Article 31 provides "With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:1) to promote access to housing of an adequate standard; 2) to prevent and reduce homelessness with a view to its gradual elimination; and 3) to make the price of housing accessible to those without adequate resources."
[49] Recommendation of the Commissioner for Human Rights on the implementation of the right to housing, Strasbourg, 30 June 2009, CommDH(2009)5; https://wcd.coe.int/ViewDoc.jsp?id=1463737, para 4.2
[50] *Ibid*.

of the ICCPR, which protect the rights to respect for privacy, home and family life, in conjunction with Article 2 ICCPR, which provides for non-discrimination.[51]

20. Jurisprudence of the European Committee of Social Rights has established that "*since Roma continue to be among the most disadvantages population groups in Europe, national housing policies should seek to address their specific problems as a matter of emergency, and in a non-discriminatory way... Member states should promote and protect the right to adequate housing for all, as well as ensure equal access to adequate housing for Roma through appropriate, proactive policies, particularly in the area of affordable housing...".*[52]
21. Under Article 14 of the Convention, any discrimination based on race, national or social origin, or association with a national minority by any public authority is prohibited. Article 14 complements the other substantive provisions provided within the Convention and therefore has effect solely in relation to the enjoyment of those rights and freedoms. The facts must therefore fall within the ambit of one or more of these rights – here, Article 8.
22. According to the Court's established case law, "*a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.*"[53]
23. In *Vojnovic v Croatia*[54], the UN Human Rights Committee considered the state's termination of a Croatian Serb's specially protected tenancy (Serbs being a minority in Croatia). Stating that the concept of arbitrariness is intended to guarantee that interference provided for by law should be in accordance with the provisions, aims and objectives of the ICCPR and be reasonable in the circumstances[55], and noting that the author and his family's departure from the tenancy was due to discrimination, it found a violation of Articles 17 and 2(1) ICCPR.
24. The scope of a Contracting Party's margin of appreciation in this sphere will vary according to the circumstances, the subject matter and the background.[56] In the case of the Roma, the Court has held in *Orsus v Croatia*[57], "*as a result of their history, the Roma have become a specific type of disadvantaged group and vulnerable minority (..) They therefore require special protection*".
25. The burden of proof on the Government in proving an objective and reasonable justification is especially high in relation to racial discrimination, which is a "*particularly invidious kind of discrimination.*[58] Direct and explicit racial discrimination by State authorities is considered

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[51] See for example, *Vojnovic v Croatia,* UN Human Rights Committee, Communication 1510/2006, 30 March 2009

[52] *ERRC v France*, Complaint no 51/2008, 19 October 2009, para 23, as established in Recommendation (2005)4 of the Committee of Ministers to member states on improving the housing conditions of Roma and Travellers in Europe

[53] *Abdulaziz, Cabales and Balkandali v United Kingdom*, Application Nos. 9214/80, 9474/81, 28 May 1985, para 72.

[54] *Supra*, note 51

[55] *Ibid,* paras 8.5 and 8.7

[56] *Andrejeva v. Latvia* [GC], Application No. 55707/00, 18 February 2009, para 82

[57] *Orsus and Others v Croatia*, Application No 15799/03, 16 March 2010, para 147

[58] *Chapman v UK,* Application No. 27238/95*,* 18 January 2001*,* para176 (citing *Nachova and Others v. Bulgaria* [Grand Chamber], Application Nos.. 43577/98, 43579/98, 6 July 2005, para145); *Timishev v. Russia*, para 56; affirmed in *Sejdic & Finci v Bosnia and Herzegovina,* para 43

amongst the most egregious types of discrimination, the prohibition of which is widely accepted as customary international law and even *jus cogens*.[59]

26. Therefore, a Respondent Government will bear a very heavy burden when seeking to establish an objective and reasonable justification for direct, racial and ethnic discrimination against a community which, it is well-established, requires special protection. Indeed, in the interveners' view, when public authorities have explicitly treated a racial group such as Roma differently in relation to housing, it will be impossible to justify such discrimination unless it is based on positive measures.

27. The case law of this Court shows that difference in treatment based directly on race or ethnicity is not capable of justification and amounts to direct discrimination. As previously established by the Court, *"... no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures*" (*Timishev v Russia)*[60].

28. This was reaffirmed in the Grand Chamber's judgment in *D.H. and others v Czech Republic*[61] and later in *Sejdic & Finci v Bosnia and Herzegovina.*[62]

29. The Court has specifically applied these principles in practice, finding a violation of Articles 8 and 14 where destruction of Roma property was motivated by the applicants' Roma origin.[63] "*The applicants' Roma ethnicity appears to have been decisive for the length and the result of the domestic proceedings... repeated discriminatory remarks made by the authorities... determin[ed] the applicants' rights under Article 8, when rejecting claims for goods or furnishings, and their blank refusal.. to award non-pecuniary damages for the destruction of the family homes... the decision to reduce the non-pecuniary damages was motivated by remarks related directly to the applicants' ethnic specificity*."[64] As the Government had provided no justification for this difference in treatment, the Court found a violation of Articles 14, 8 and 6.

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[59] See e.g. International Court of Justice Namibia Case 1971, para 17; Dissenting Opinion of Judge Tanaka in the South West Africa Cases (Second Phase), ICJ Reports (1966), para 298; Advisory Opinion 18/2003 of the Inter-American Court of Human Rights, declaring non-discrimination a principle of *jus cogens,* because the entire legal structure of public order rests on it; Christopher McCrudden*, International and European Norms Regarding National Legal Remedies for Racial Inequality* 251, in DISCRIMINATION AND HUMAN RIGHTS: THE CASE OF RACISM (Ed. Sandra Fredman 2001).

[60] *Timishev v. Russia,* Application Nos. 55762/00 and 55974/00, 13 December 2005, para 58.

[61] *D.H. and others v. Czech Republic*, Application No. 57325/00, 13 November 2000, para 176.

[62] *Sejdic & Finci v Bosnia and Herzegovina,* Application Nos 27996/06 and 34826/06 [GC], 22 December 2009

[63] *Moldovan and Others v Romania*, Application Nos 41138/98 and 64320/01; 12 July 2005

[64] *Ibid*, paras 139-140