



HUMAN  
RIGHTS  
WATCH

# SHATTERED DREAMS

Impact of Spain's Housing Crisis on Vulnerable Groups



# **Shattered Dreams**

**Impact of Spain's Housing Crisis on Vulnerable Groups**

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Printed in the United States of America

ISBN: 978-1-62313-1388

Cover design by Rafael Jimenez

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MAY 2014

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|   |           |
|---|-----------|
| <b>Glossary</b> .....                                 | <b>1</b>  |
| <b>Summary</b> .....                                  | <b>3</b>  |
| <b>Recommendations</b> .....                          | <b>9</b>  |
| To the Government of Spain.....                       | 9         |
| To the European Commission of the European Union..... | 10        |
| To the Council of Europe .....                        | 11        |
| To the United Nations .....                           | 11        |
| <b>Methodology</b> .....                              | <b>12</b> |
| <b>I. Background: A Crisis Foretold</b> .....         | <b>14</b> |
| Lack of Affordable Housing .....                      | 19        |
| Insufficient Investment in Social Housing .....       | 21        |
| The Role of Civil Society.....                        | 23        |
| Mediation Services .....                              | 25        |
| The Role of the European Union .....                  | 26        |
| <b>II. Particularly Vulnerable Groups</b> .....       | <b>29</b> |
| Immigrants .....                                      | 29        |
| Single Parent Heads of Household .....                | 32        |
| Women with Abusive or Hostile Ex-partners .....       | 34        |
| Insecure Housing.....                                 | 39        |
| Children .....  | 41        |
| <b>III. State and Bank Responses</b> .....            | <b>44</b> |
| Limited Protection against Eviction .....             | 44        |
| Challenging Foreclosures in Court.....                | 48        |
| Affordable Housing.....                               | 50        |
| Accountability .....                                  | 54        |

|  |           |
|--|-----------|
| <b>IV. Mortgage Debt and Debt Relief .....</b>                                     | <b>58</b> |
| Impact of Debt.....  | 60        |
| Towards Debt Relief.....   | 62        |
| Datio in Solutum .....   | 65        |
| Spanish Insolvency Law .....   | 68        |
| <b>V. Human Rights Standards and Norms.....</b>                                    | <b>70</b> |
| Right to Housing under International Law.....                                      | 70        |
| International Norms on Evictions .....   | 72        |
| Affordable Housing.....  | 73        |
| International Obligation to Ensure Redress .....                                   | 75        |
| Human Rights Obligations, Over-indebtedness, and Personal Insolvency Regimes ..... | 76        |
| <b>Acknowledgments.....</b>  | <b>81</b> |

# Glossary

## **Insolvency regime**

A process by which an economic actor who is unable to repay debts owed to creditors takes action to resolve the debt, usually involving partial repayment, including through asset liquidation, and in some instances debt discharge after a certain period of time.

## **Chain mortgages**

A practice in which a string of people, often strangers, are linked together as guarantors for each other's mortgage loans.

## **Crossed mortgages (*avales cruzados*)**

A practice in which two individuals or sets of individuals serve as guarantors for each other's mortgage loans.

## ***Datio in solutum (dación en pago)***

A procedure in which borrowers who cannot repay their mortgage loans are released in full from the underlying debt by handing their mortgaged property over to the lender.

## **Debt discharge**

The cancellation or forgiveness of a debt.

## **Debt relief**

The reorganization of debt so as to provide the indebted party with a measure of relief, either fully or partially, from a debt burden. Debt relief can take a number of forms such as reducing the outstanding principal amount (either partly or fully) and lowering the interest rate on loans due.

## **Debt restructuring**

A practice that involves restructuring the terms of an existing loan in order to extend the repayment period. It may involve a delay in the due date(s) of required payments or reducing payment amounts by extending the payment period and increasing the number of payments.

**Default interest rates**

The interest rate charged to a borrower when payments on a mortgage are overdue. This higher rate is applied to outstanding balances in arrears in addition to the regular interest charges for the debt.

**Social rent (*alquiler social*)**

Affordable rent set at a particular percentage of an individual or family's income (commonly 30 percent or less).

**Wage garnishment**

The removal of a set fraction of an individual's income for the purposes of debt repayment. In Spain this is achieved through the acquisition of a court order in favor of the creditor.

## Summary

Hopeful home purchases during Spain's economic boom have turned into a nightmare of foreclosures, evictions, and over-indebtedness amid the economic crisis.

Many, Spaniards and immigrants alike, bought over-priced homes during Spain's housing bubble, when the economy was booming, jobs were plentiful, and mortgages were all too easy. Rents in Spain's small rental market were high, and what seemed like a rational choice to purchase was made to appear even more attractive as real estate agencies and banks aggressively marketed mortgages of 100 percent or more of the cost of a property and "facilitated" loan requirements and guarantors.

The situation today is quite different. In 2007, the housing bubble burst, the economy collapsed, and almost five million people—nearly 26 percent of the economically active population—are officially registered as unemployed. Many tens of thousands of people have been evicted or face foreclosure and eviction due to defaults on their mortgage payments. Many are left with heavy debts even after their homes are repossessed.

This report focuses on the disparate impact of the mortgage crisis on particularly vulnerable groups, including immigrants, women heads of household, women victims of domestic abuse (including economic abuse by their intimate partners), and children. It also addresses the situation of those who have become over-indebted due to home purchases and have no realistic pathway towards discharging their debt.

Immigrants were among the first groups affected by the mortgage crisis and appear to be disproportionately represented among those who have faced foreclosure and eviction. Many of those interviewed during the research for this report said they were caught up in so-called crossed mortgages, in which two buyers guaranteed each other's loans, and chain mortgages, in which the banks linked together a string of people, often strangers, guaranteeing each other's mortgages. In these scenarios, one person defaulting on their mortgage can produce a chain reaction, affecting all others because of their liability as guarantors.

Real estate agencies and credit intermediaries appear to have played a critical role in capturing clients for banks. Eduardo Cachago, a 44-year-old Ecuadoran, explained that



representatives of a real estate intermediary would come regularly to the construction site where he worked to promote “deals” with banks for buying a home. “They knew at 10 o’clock we stopped working for 15 minutes, and they’d come and pester us,” he said. Hilda M., also an Ecuadoran who has been living in Spain for 15 years, said her real estate agent “did everything,” including finding a stranger to serve as guarantor for a €1,200 (US\$1,650) fee.

Women heads of household also appear to be differentially affected by the mortgage crisis due to relatively greater income instability, on average lower wages, and greater child care responsibilities. Women tied by their mortgages to abusive or hostile former partners face particular challenges. While government measures temporarily protect survivors of domestic violence from eviction, there are no provisions to solve the problems women face in negotiating with banks for debt restructuring, relief, or cancellation when their former partner or husband, who shares the mortgage, refuses to cooperate. In some cases, this non-cooperation may amount to economic violence, a form of domestic violence in which an intimate or former partner exercises control over decision-making, use of, and access to economic resources, creating a situation of powerlessness and dependency.

While the long-term impact of the mortgage crisis on children in Spain is not yet known, the cases documented in this report provide a worrying picture of the emotional toll on children living in households facing foreclosure, eviction, and over-indebtedness. It can affect their overall well-being and development, leading to problems at school and in social settings.

The lack of meaningful personal insolvency procedures, in light of the debt burden imposed by Spain’s mortgage crisis on many individuals and families, is another key concern. The World Bank and other institutions have noted problems with Spain’s personal insolvency laws. In effect, they can trap individuals in a cycle of debt with no real prospect of discharging it. Most troubling are those that have had their homes foreclosed and have been evicted, but are saddled with housing debt that they cannot discharge and have no reasonable expectation of being able to repay. All of the people we interviewed had seen their homes repossessed by banks under a court procedure that awards properties for a percentage, set by law, of the appraised value of the property at the time the mortgage was taken out. The mortgage holder remains liable for the difference between that amount and the outstanding mortgage debt. Unless individuals had the benefit of free legal aid, they also incur significant procedural costs. The result is that

many people who have defaulted on their mortgages carry significant debt even after they have lost their homes.

Most of the people we spoke with who are living with mortgage debt have given up trying to pay it off, saying they are simply unable to do so given their meager incomes. The debt nonetheless has direct consequences on their everyday lives and decisions and on their families. As in many other countries, debtors in Spain are registered on credit agency debtors' lists, making it difficult, if not impossible, to sign apartment leases, buy anything on credit, or even acquire a mobile phone contract. They are more likely to work on the black market, and are unable to generate a living income for themselves or their families by pursuing entrepreneurial ideas because they cannot access credit. Their physical and mental health may deteriorate. They may become alienated from friends and family, either because they owe them money, or simply cannot afford to face social interactions.

\* \* \*

Today's social crisis in Spain around mortgage foreclosures, evictions, and debt is set against the backdrop of a decades-long history of government policies promoting home ownership at the expense of other forms of accessible housing. At 85 percent, Spain has one of the highest rate of home ownership in the EU and, at 11 percent, among the smallest stock of private rental housing. At the same time, only 2 percent of the total housing stock is devoted to social, or subsidized, rental housing. The lack of affordable rental housing, especially in major cities like Madrid and Barcelona, helped convince many to buy. "It was so easy to buy, and rents were high and [apartments] hard to come by," is how Norma del Pilar Llano Oyos, who bought her apartment in 2005, put it.

It was "easy to buy" in large part due to irresponsible borrowing and lending practices. However, the Spanish national human rights institution, the *Defensor del Pueblo*, has extensively analyzed the mortgage crisis and its consequences. It has concluded that "the responsibility for lack of payment of mortgage debt cannot be transferred exclusively to the debtor.... If the debtor signed a mortgage contract it was not only in the exercise of a will to take on debt, but also because the housing market and conditions of access to loans were the most lax in history."

The government of Prime Minister Mariano Rajoy has taken steps to address the mortgage crisis. Two Royal Decree-Laws, in March and November 2012, and a parliamentary law in May 2013 have implemented measures to protect temporarily certain groups against evictions; amend legal proceedings to ensure the right to contest unfair contractual obligations; and provide guidelines for debt relief and, in some circumstances, debt cancellation. The November 2012 decree created a Social Housing Fund, stocked by just under 6,000 properties banks have voluntarily turned over, to offer evicted families places to live at affordable rents.

However, the criteria for benefitting from these measures are narrowly drawn, excluding many needy families and individuals. Some of the criteria are arbitrary and do not comport with international law. For example, a two-parent household with a child 3 years or younger can benefit from the moratorium on evictions, while the two-parent family with a child 4 years or older living next door cannot. Human Rights Watch believes that the government could and should have taken more robust and inclusive measures. With respect to evictions, for example, we note that two Spanish banks told Human Rights Watch they themselves had adopted broader criteria, which suggests clear room for improved government response.

Legal reform in May 2013 to allow judges to determine whether a mortgage contract contained unfair clauses that “constitute the basis for the foreclosure” or “determined the payable amount” came only after the Court of Justice of the European Union ruled, in March of that year, that the inability to allege unfair contractual terms violated EU consumer protection regulations. The reform created a short—30 day—window of time for homeowners with open foreclosure proceedings to appeal to the courts to assess whether their mortgage contracts contained unfair terms.

The government has yet to reform Spain’s insolvency laws to create an accessible, fair, and efficient mechanism for over-indebted individuals to discharge their debt.

Roughly one hundred banks have signed onto the government’s voluntary Code of Good Practices, adopted in March 2012, “for the viable restructuring of mortgage debt on primary residence.” The code obligates all participating banks to propose financial restructuring and even debt cancellation in certain tightly prescribed cases. Banks can and do renegotiate

mortgage loans outside the strict parameters established in the code, but the narrow criteria appear to have created unnecessary obstacles for those attempting such renegotiations.

\* \* \*

International law guarantees the right to housing as part of the right to an adequate standard of living. The right to adequate housing does not include a right to own property, or to retain ownership under any circumstances. It does, however, impose on states obligations to ensure policies and legislation are in place to progressively realize the right to adequate housing—for all segments of society—as expeditiously as possible. Civil and political rights, including the right to non-discrimination and the right to an effective remedy, are important guarantors of the full enjoyment of the right to housing.

The United Nations Committee on Economic, Social and Cultural Rights (CESCR) has defined the right to adequate housing as “the right to live somewhere in security, peace and dignity.” The Committee has identified affordability as one important component of the right to adequate housing, meaning states should take all possible steps to provide access to suitable housing within the economic reach of different segments of society. There is also a growing consensus among human rights experts that evictions, whether “forced” under the terms of international law or carried out in accordance with the law, should be a last resort because of the deeply negative impact not only on the right to housing but also on a wide range of basic human rights.

In Spain, indebtedness is particularly problematic in the context of the housing crisis for a number of reasons. For example, the government had obligations to ensure those living in Spain could secure access to housing, for themselves and family, but it was state policies on housing which in part contributed to the acquisition of unsustainable levels of mortgage debt by many. These included government policies that placed a primacy on home ownership to the detriment of ensuring access to other forms of affordable housing, and the minimal oversight and a failure to act against, at best, questionable business practices on the part of those offering to secure mortgage loans. Second, Spain has inadequate personal insolvency laws that perpetually saddle people with massive debts they cannot repay or discharge, leading to situations of chronic debt.

International human rights law is largely silent on issues of private debt. However, the Council of Europe—a human rights institution of which Spain is a member—has expressed concern about the impact of over-indebtedness for individuals and their families, including children, on the enjoyment of basic rights such as the rights to education, healthcare, and food. A recent World Bank study emphasized the need for fair and efficient personal insolvency regimes to alleviate the suffering of debtors and their families as well as the social and economic impact of over-indebtedness.

Spain is not the only European country to face a housing crisis or, indeed, a recession. But the scale of the mortgage crisis, the social trauma around foreclosures and evictions, as well as the lack of effective remedies, accountability, and fair pathways to debt relief create a particularly acute situation.

The *Defensor del Pueblo*, the Spanish ombuds institute, has repeatedly called on the Spanish government to take exceptional measures to address immediate needs and implement long-term reforms. In a January 2012 report, the *Defensor* remarked:

There are moments in which measures must be adopted in a timely fashion, whether because the seriousness of the situation so requires or because, having learned the way to avoid an undesirable or potentially dangerous consequence, there is a need to regulate the system to foresee similar problems and contribute to alleviating their consequences.

Civil society in Spain has led the struggle on these issues. In particular, the Platform of Mortgage Victims (*Plataforma de Afectados por la Hipoteca*, PAH), a unique, nation-wide grassroots movement that frames its activism in human rights terms, has mobilized thousands of people and fundamentally shifted the public debate about mortgage debt.

Human Rights Watch calls on the Spanish government to adopt measures to help a broader range of individuals and families avoid evictions, secure affordable housing, and ensure access to fair debt restructuring, relief, and cancellation. We also call on the Spanish government to develop clearer policies and mechanisms to assist women heads of household and women tied through their mortgages to abusive or hostile former partner.

# Recommendations

## To the Government of Spain

- Ratify the 1996 Revised European Social Charter to further advance recognition of and respect for the right to adequate housing.
- Ratify the 1995 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.

### *On addressing personal debt in a manner that has the least negative impact on human rights:*

- Create a simple and affordable procedure for discharge of personal debt within a reasonable period of time upon completion of certain requisites, taking into account best practices in other countries.
- Consider introducing a formal *datio in solutum* formula for home mortgages, so that if the borrower is unable to pay and has to surrender the property to the bank, it constitutes full payment of the outstanding debt.

### *On effective remedy:*

- Reopen the period of time for people with ongoing foreclosure proceedings to submit claims of unfair terms in their mortgage contracts for the purposes of judicial review.
- Promote standardized instructions within the judiciary to provide guidelines to judges in assessing unfair contractual terms.

### *On mediation:*

- Create binding obligations on all lending institutions to engage in good faith mediation with debtors before recourse to judicial proceedings towards foreclosure.
- Promote the establishment, including through provision of central state funding, of independent mediation services in all autonomous communities and major cities of Spain.

### *On evictions:*

- Immediately adopt a Royal Decree-Law to broaden the criteria for eligibility to benefit from the moratorium on evictions, including by, at a minimum:

- Ensuring that all families with children (understood in accordance with international law as all individuals under the age of 18) are eligible for the moratorium.
- Eliminating the clause establishing the maximum mortgage amount in relation to the size of the city or town.
- Extend the existing moratorium on evictions for those facing foreclosure, scheduled to lapse in 2015, for a reasonable period of time, taking into consideration the general economic outlook and the situation of relevant debtors.

*On affordable housing:*

- Render more flexible the criteria for benefitting from the Fund for Social Housing to ensure maximum coverage and increase the number of properties in the Fund.
- Ensure that the intergovernmental commission established to coordinate and oversee the Fund carefully monitors the way in which all participating banks assess requests, designate properties, and allocate housing. The commission should publish its findings and recommendations to banks on a periodic basis.
- Encourage banks to allow families, especially those with children or other members with particular needs, and women headed households, to remain in their homes upon repossession by the bank paying a rent commensurate with their income, for a reasonable period of time.

*On women:*

- Amend national domestic violence laws to ensure that economic harm is included in the definition of domestic violence.
- Develop specific guidelines for banks and mediation services to address situations in which women are facing economic harm within the meaning of domestic violence.

## **To the European Commission of the European Union**

- Develop country specific recommendations to Spain with respect to foreclosures, evictions, and debt relief and debt cancellation.
- Monitor correct transposition into national law of the EU directive on credit agreements relating to residential property.

## To the Council of Europe

- The Commissioner for Human Rights should continue to assess the situation in Spain, with specific reference to the impact of foreclosures, evictions, and debt on particularly vulnerable groups, including immigrants, women heads of household, women victims of economic abuse, and children.
- The Committee of Ministers should carry out an assessment of Spain's (and other member states') implementation of its recommendation on legal solutions to debt problems (CM/Rec(2007)8).

## To the United Nations

- The special rapporteur on the right to adequate housing should provide analysis and guidance to the Spanish government, including through an official country visit, on appropriate measures to address the mortgage crisis, including gender-specific aspects.
- The special rapporteur on the rights of migrants should visit Spain to examine the particular ways in which the economic crisis has affected migrant communities, including with respect to the right to adequate housing.
- The independent expert on the effects of foreign debt and the special rapporteur on extreme poverty and human rights should consider examining the intersection of over-indebtedness and the enjoyment of human rights, such as the right to an adequate standard of living, including the right to adequate housing, and identifying areas for government action and priorities.



## Methodology

This report is based on research in Spain during 4 trips between February and October 2013. We interviewed 44 people—32 women and 12 men—who were facing, or had faced, foreclosure and repossession of their homes due to defaulting on their mortgages. We interviewed 20 Spaniards, 12 Ecuadorans, 3 nationals of Colombia, Peru, and the Dominican Republic each, and 1 national of Chile, Mali, and Senegal each.

All interviews were conducted in and around Madrid and Barcelona, Spain's two largest cities, and where data show these are among the areas with the greatest number of foreclosure proceedings.

The research focused on the mortgage crisis, and resulting evictions and debt. Human Rights Watch notes, however, that evictions for failure to pay rent are also a growing phenomenon in Spain.

Where noted, we have used a pseudonym followed by an initial to protect the identity of interviewees upon request. All interviewees were informed of the purpose of the interview and that their testimony might be used publicly. No incentives were offered or provided to persons interviewed. All interviews were conducted individually and in private, except in one instance where three individuals were interviewed individually but in each other's presence, with their consent.

We also interviewed civil society actors, including the Platform for Mortgage Victims, Cáritas, National Coordinator of Ecuadorans in Spain, the European Anti Poverty Network, Provivienda, Housing Rights Watch-FEANTSA (European Federation of National Organisations working with the Homeless), member organizations of the Taula d'entitats del Tercer Sector Social de Catalunya, and ClinHab, a legal clinic consultation service at the University of Barcelona's law school. We also met with economists and lawyers representing individuals facing foreclosure and eviction. In Barcelona, we spoke with Jaume Fornt, director of the Agència de l'Habitatge of the Catalonia regional government; Silvia Grau, director of Ofideute, the Catalan government's mediation service; and Toni Algaba, coordinator of Ofideute. In Madrid, we spoke with Borja Carabante, deputy advisor on transportation, infrastructure, and housing of the Madrid regional government housing

agency (Instituto de la Vivienda de Madrid, IVIMA); and Estrella Sánchez González, director of patrimony of the Madrid municipal housing agency (Empresa Municipal de la Vivienda y Suelo (EMVS)). We also interviewed Mauricio Valiente, a parliamentarian in the Madrid regional parliament, and Anselmo Menéndez, deputy director of the General Directorate of Architecture, Housing, and Land in the Ministry of Public Works. Finally, at the Spanish ombuds institute *Defensor del Pueblo*, we met with Francisco Fernández Marugán, deputy ombudsperson; Francisco Vírseda Barca, chief of staff to the deputy; and Loreto Feltrer Rambaud, technical director of the Economics division.

In early February 2014, Human Rights Watch emailed and mailed letters of inquiry to 11 Spanish banks. As of March 20, 2014, Bankia, BBVA, CaixaBank, Citibank España, NCG Banco S.A. (Novagalicia), Sabadell, and Santander had replied. As of the same date, Bankinter, CatalunyaCaixa, IberCaja and Kutxabank had not replied.

## I. Background: A Crisis Foretold

Following a visit to Spain in late 2006, then United Nations special rapporteur on the right to adequate housing Miloon Kothari said presciently that while the rate of mortgage defaults was low at the time, “more people will experience payment problems in the future, which could affect their right to adequate housing.”<sup>1</sup> Rapporteur Kothari expressed concern about speculation in the real estate market and inflated housing prices, noting that prices in Madrid and Barcelona had increased by over 100 percent between 1997 and 2007.<sup>2</sup>

The OECD had already noted in late 2005 that housing prices were overvalued in Spain, and the European Commission warned in early 2006 against overvaluation in the real estate market and the high level of mortgage debt in Spain, urging that banks exercise “more caution” in granting mortgage loans.<sup>3</sup>

This was the beginning of the end of a ten-year period of dynamic economic growth in Spain, largely driven by a construction boom. According to most analyses, Spain experienced a housing bubble between 1997 and 2007. Over the course of a decade, Spain built more houses than the number of new-builds in France, Germany, and the United Kingdom combined, and real estate and construction constituted as much as 43 percent of the nation’s GDP.<sup>4</sup>

According to data published in May 2013 by the national statistics institute INE, in 2011 almost 3.5 million residences—or 13.7 percent of the total housing stock—stood empty, largely due to over-construction.<sup>5</sup>

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<sup>1</sup> Report of the special rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari: Spain, UN Doc. A/HRC/7/16/Add.2, February 7, 2008, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/Go8/105/31/PDF/Go810531.pdf?OpenElement> (accessed February 3, 2013), para. 15.

<sup>2</sup> *Ibid.*, para. 14.

<sup>3</sup> OECD, Economics Newsletter, Economics Department, December 2005, Issue 4, <http://www.oecd.org/eco/35914714.pdf> (accessed July 22, 2013); “Bruselas pide ‘cautela’ a la hora de conceder hipotecas por la sobrevaloración de la vivienda,” *EFE*, March 27, 2006, <http://www.elmundo.es/mundodinero/2006/03/27/economia/1143470709.html> (accessed July 22, 2013).

<sup>4</sup> Nick Paumgarten, “The Hangover: The euro zone’s fourth-largest economy has become its biggest liability,” *The New Yorker*, February 25, 2013. On file with Human Rights Watch.

<sup>5</sup> Jorge Murcia, “El 13,7% de las viviendas españolas estaban vacías en 2011,” *Abc.es*, May 10, 2013, <http://www.abc.es/economia/20130418/rc-viviendas-espanolas-estaban-vacias-201304181248.html> (accessed August 1, 2013).

During the boom years, Spain's mortgage market increased exponentially. Economic well-being, a small and expensive rental market, a decades-long history of government policies promoting home ownership at the expense of other forms of tenure, and aggressive lending by banks encouraged many, including immigrants, to buy instead of rent. Most mortgages were subject to variable interest rates and were often offered for 100 percent, or even more, of the purchasing price of the property.

The economic recession and massive unemployment—26 percent in February 2014—mean more and more people have been unable to meet their mortgage payments.<sup>6</sup> Traditionally, Spain has had a low mortgage delinquency rate and it remains low compared to other countries in crisis such as Ireland and Greece.<sup>7</sup> In 2006, the overall default rate on mortgages was 0.3 percent; it was estimated at over 5 percent in the third quarter of 2013.<sup>8</sup> Many tens of thousands of people have faced or are currently facing foreclosure on their homes. Only recently has the Bank of Spain begun to publish disaggregated statistics on foreclosures and evictions.

Experts like Toni Algaba, coordinator of Ofideute, the Barcelona regional government's mediation service for people having difficulties servicing their mortgage debt or facing foreclosure, say immigrants were among the first affected by the mortgage and foreclosure

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<sup>6</sup> National Institute of Statistics (Instituto Nacional de Estadística, INE), Survey of Active Population, Third Trimester 2013, <http://www.ine.es/daco/daco42/daco4211/epao313.pdf> (accessed November 14, 2013). This statistic translates into 5,904,700 people. The Ministry of Employment reported a lower number for individuals registered as unemployed: 4,811,383 in October 2013, <http://es.feelmadrid.com/evolucion-paro-espana.html> (accessed November 14, 2013).

<sup>7</sup> According to the Central Bank of Ireland, over 12.6 percent of mortgages were in arrears in the fourth quarter of 2013. Eoin Burke-Kennedy, "Sharp increase in debt write-down deals," *The Irish Times*, March 20, 2014, <http://www.irishtimes.com/business/personal-finance/sharp-increase-in-debt-write-down-deals-1.1730844> (accessed March 20, 2014). The rate for mortgage defaults in Greece was 19.1 percent in 2012, up from 4.9 percent in 2006. Marcus Bensasson, "Greece Plans Foreclosures to Meet Bailout Demands," September 23, 2013, *Bloomberg News*, <http://www.businessweek.com/news/2013-09-22/greece-needing-to-meet-bailout-plans-foreclosures-mortgages> (accessed March 20, 2014). The overall mortgage default rate in the United States was 6.39 percent in the fourth quarter of 2013. Conor Dougherty, "US Mortgage Delinquency Rate Approaches Prerecession Level," *The Wall Street Journal*, February 20, 2014, <http://online.wsj.com/article/BT-CO-20140220-711403.html> (accessed March 22, 2014).

<sup>8</sup> Report of the special rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothori: Spain, UN Doc. A/HRC/7/16/Add.2, February 7, 2008, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/Go8/105/31/PDF/Go810531.pdf?OpenElement> (accessed February 3, 2013), para. 15; Sharon Smyth and Charles Penty, "Spanish Defaults Surge as Banks Forced to Come Clean," *Bloomberg*, December 18, 2013, <http://www.bloomberg.com/news/2013-12-17/spanish-defaults-surge-as-banks-forced-to-come-clean-mortgages.html> (accessed March 24, 2014). A government document dated November 2012 set the default rate in 2007 at 0.72 percent and 3.38 percent currently. Ministry of Economy, "Informe de la Comisión de control sobre el cumplimiento del Código de buenas prácticas para la reestructuración viable de las deudas con garantía hipotecaria sobre la vivienda habitual," November 2012, [http://www.mineco.gob.es/stfls/mineco/prensa/ficheros/noticias/2012/121123\\_Informe\\_Comision\\_Seguimiento\\_Codigo\\_buenas\\_practicas.pdf](http://www.mineco.gob.es/stfls/mineco/prensa/ficheros/noticias/2012/121123_Informe_Comision_Seguimiento_Codigo_buenas_practicas.pdf) (accessed September 6, 2013).

crisis. While this report is focused on particularly vulnerable groups, including immigrants, it is important to note that progressively larger swaths of the population are affected amid the deepening economic crisis, including professionals who took out what seemed perfectly reasonable mortgages they are now unable to pay after years of unemployment.

Until very recently, the only available data on foreclosures and evictions were from the General Council of the Judicial Branch (*Consejo General del Poder Judicial*, CGPJ) on the total number of court cases brought by banks against mortgage defaulters, which included all types of property, not only homes. These figures do not reflect so-called extrajudicial foreclosures, validated by notary publics, in which individuals sign over the property to the bank without involvement of the courts on the basis of an agreement between the bank and the mortgage holder.

On the basis of CGPJ data, the grass-roots housing rights organization Platform for Mortgage Victims (discussed below) says banks initiated 349,438 foreclosure proceedings between 2007-2011, and courts ordered repossession and eviction in 166,716 proceedings between 2008-2011.<sup>9</sup>

In April 2013, the College of Property Registrars published statistics indicating that, nationwide in 2012, banks had initiated 49,175 foreclosure proceedings on primary residences (the beginning of the procedure) and that in 30,034 cases the court had awarded the property to the bank (the end of the procedure, so relating to cases filed with the courts prior to 2012).<sup>10</sup>

In May 2013, the Bank of Spain published its own figures for the first time. These data were updated in January 2014, when the Bank of Spain also provided data on the first half of 2013, suggesting an increase in repossessions by banks. For 2012, the Bank of Spain reported 39,051 repossessions of primary residences. In the first half of 2013, 28,170 primary residences were repossessed.<sup>11</sup>

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<sup>9</sup> Ada Colau and Adrià Alemany, *Vidas Hipotecadas* (Barcelona: Angle Editorial, 2012), p. 228 and p. 231.

<sup>10</sup> Colegio de Registradores de España, "Panorama registral. Impagos hipotecarios de vivienda 2012," April 2013. On file with Human Rights Watch. The total number of foreclosure proceedings initiated in 2012 was 65,778, which includes also second homes; the total number of court decisions awarding the property to the bank was 38,976, which includes also second homes.

<sup>11</sup> Nota informativa sobre los procesos de ejecución hipotecaria sobre viviendas. Datos revisados de 2012 y primer semestre de 2013, January 28, 2014,

Many observers argue that irresponsible lending contributed to the current crisis in Spain (as well as in other EU countries). Indeed, a recently adopted EU directive to better regulate the mortgage market is based on the analysis that “the financial crisis has shown that irresponsible behavior by market participants can undermine the foundations of the financial system, leading to ... potentially severe social and economic consequences.”<sup>12</sup>

The Spanish national human rights institution, the *Defensor del Pueblo*, has extensively analyzed the mortgage crisis and its consequences. It has concluded that:

the responsibility for lack of payment of mortgage debt cannot be transferred exclusively to the debtor.... If the debtor signed a mortgage contract it was not only in the exercise of a will to take on debt, but also because the housing market and conditions of access to loans were the most lax in history.”<sup>13</sup>

The *Defensor* rejected arguments that the primary responsibility falls on the borrower for taking on loans beyond their repayment capacity.

This approach puts the consumer ... on the same level as the mortgage professional. But it is the professional who knows the market and its risks. Mortgage credit constitutes the main source of income for Spanish banks ... it is also the bank that drafts the content of mortgage contracts. It is the bank that should evaluate the client’s ability to take on debt and refrain from offering loans beyond that capacity.<sup>14</sup>

The EU directive attempts to address some of the problems the *Defensor del Pueblo*, among others, have identified with respect to mortgage lending practices in Spain during the boom economic years, including the failure to conduct rigorous creditworthiness

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[http://www.bde.es/f/webbde/GAP/Secciones/SalaPrensa/NotasInformativas/Briefing\\_notes/es/notabe%2028-01-2014.pdf](http://www.bde.es/f/webbde/GAP/Secciones/SalaPrensa/NotasInformativas/Briefing_notes/es/notabe%2028-01-2014.pdf) (accessed March 26, 2014).

<sup>12</sup> Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No. 1093/2010, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32014L0017> (accessed April 20, 2013), recital 3.

<sup>13</sup> Defensor del Pueblo, “Crisis económica y deudores hipotecarios: actuaciones y propuestas del Defensor del Pueblo,” January 2012, [http://www.defensordelpueblo.es/es/Documentacion/Publicaciones/monografico/Documentacion/Crisis\\_Hipotecas\\_2012.pdf](http://www.defensordelpueblo.es/es/Documentacion/Publicaciones/monografico/Documentacion/Crisis_Hipotecas_2012.pdf) (accessed July 5, 2013), p. 82.

<sup>14</sup> *Ibid.*, p. 98.

assessments. These include, but are not limited to, the failure of lending institutions to provide full and clear information, lack of regulation and accountability of credit intermediaries, linking mortgages to other financial products (tying practices), lack of independence of property valuation services, and the use of foreign currency loans.<sup>15</sup>

Particular features of Spanish mortgages have been the subject of legal challenges and government reform. One such feature was the floor interest rate clause (*cláusula suelo*) inserted into many mortgages that ensured interest rates could not fall below a certain level even if the Euribor did.<sup>16</sup>

In May 2013, Spain's Supreme Court declared null and void the "floor interest rate" clauses in mortgages provided by three banks (BBVA, Cajas Rurales Unidas, and NCG). To be legitimate, the Court said, this stipulation must be "comprehensible" and "transparent," and ordered the three banks to remove them from the specific mortgages involved in the case. The Supreme Court rejected retroactive application of its ruling on payments already made under such clauses on the grounds this could cause "serious disruption with significant consequences for the public economic order."<sup>17</sup>

Exorbitant default interest rates were also common. Toni Algaba, coordinator of the Catalan regional government's mediation service Ofideute, in Barcelona, said 20-24 percent default interest rates were common; "I've seen up to 35 percent," he told us.<sup>18</sup> Olga Florez Muñoz showed us the mortgage for the apartment her sister and brother-in-law bought in 2006 providing for 22.5 percent default interest rate.<sup>19</sup> Courts in different parts of the country have annulled mortgage contracts with default interest rates of 19 percent, 20.5 percent, 21.7 percent, and 25 percent.<sup>20</sup> Law 1/2013, enacted in May 2013, capped default interest rates at three times the legal rate of interest (*interés legal del dinero*).<sup>21</sup>

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<sup>15</sup> Ibid.; EU Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property.

<sup>16</sup> Euribor is the reference interest rate for Euro-denominated loans.

<sup>17</sup> Spain Supreme Court, Civil Section, Sentence No. 241/2013, May 9, 2013, para. 293 (k).

<sup>18</sup> Human Rights Watch interview with Toni Algaba, coordinator, Ofideute, Barcelona, July 5, 2013.

<sup>19</sup> Human Rights Watch interview with Olga Florez Muñoz, Madrid, May 24, 2013. Mortgage contract on file with Human Rights Watch.

<sup>20</sup> "Anulan una nueva hipoteca porque el banco abusó en el cobro de los intereses de demora," *EFE*, April 8, 2013, <http://www.elmundo.es/elmundo/2013/04/08/suivienda/1365433784.html> (accessed July 31, 2013); "La Audiencia de Baleares anula los intereses de demora de hasta el 25% de varias hipotecas," *EFE*, May 2, 2013, [http://cincodias.com/cincodias/2013/05/02/economia/1367513748\\_412246.html](http://cincodias.com/cincodias/2013/05/02/economia/1367513748_412246.html) (accessed July 31, 2013).

<sup>21</sup> The legal rate of interest is the highest rate of interest that can be legally charged on any type of debt. Ley 1/2013, de 14 de mayo, de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social,

## Lack of Affordable Housing

States have obligations under international human rights law to ensure affordability of housing especially in times of economic contraction. State measures designed to ensure affordability include provision of housing subsidies, appropriate affordable financing for housing, and protection against unreasonable rents.<sup>22</sup> However, Spain's mortgage and social crisis around evictions and debt is set against the backdrop of a decades-long history of government policies promoting home ownership to the detriment of ensuring an appropriate and affordable stock of rental housing and sufficient investment in rental public housing.

International rights bodies have repeatedly expressed concern over Spain's dearth of social housing. In its 2004 review of Spain's compliance with the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the monitoring Committee expressed concerns about the lack of social housing and recommended remedial action "to improve the conditions of housing and provide more housing units, housing facilities, credits and subsidies to low-income families and disadvantaged and marginalized groups."<sup>23</sup> The Committee reiterated this recommendation in 2012, calling on the central government to "work in coordination with the autonomous communities to invest more resources in increasing the social housing stock in order to meet demand."<sup>24</sup> In 2008, the then special rapporteur on adequate housing noted that the Spanish authorities themselves recognized that "insufficient supply of rental and subsidized housing is a major problem in Spain" and called on the government to address the "urgent need to increase the availability of rental housing."<sup>25</sup>

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published in the Boletín Oficial del Estado, Number 116, on May 15, 2013, Chapter II, article 3 (2). The 2014 legal rate of interest is 4 percent.

<sup>22</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4, The right to adequate housing (Art. 11 (1)), UN Doc. E/1992/23, December 12, 1991, <http://www1.umn.edu/humanrts/gencomm/epcomm4.htm> (accessed July 15, 2013), paras 8 and 11 and Guiding Principles on Extreme Poverty and Human Rights, UN Doc. A/HRC/21/39, <http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIIntroduction.aspx> (accessed July 15, 2013), para 80 (f).

<sup>23</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights: Spain, June 7, 2004, UN Doc. E/C.12/1/Add.99, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1%2fAdd.99&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1%2fAdd.99&Lang=en) (accessed May 14, 2014).

<sup>24</sup> UN Committee on Economic, Social, and Cultural Rights, Concluding Observations: Spain, June 6, 2012, UN Doc. E/C.12/ESP/CO/5, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fESP%2fCO%2f5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fESP%2fCO%2f5&Lang=en) (accessed January 10, 2013), para. 21.

<sup>25</sup> Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, Mission to Spain. 7 February 2008. UN Doc.: A/HRC/7/16/Add.2, paragraphs 20 and 101. He suggested that availability of rental housing could be increased "through building more affordable rental housing, a more intensive use of vacant buildings, but also through consolidation of a publicly managed stock of rental housing targeted at meeting the



Spain has one of the highest rates of home ownership in the European Union: as high as 85 percent of all homes are owned, and only 11 percent rented on the free market.<sup>26</sup> Among Western European countries, only Ireland (79 and 12.3 percent, respectively), Portugal (75 and 18 percent, respectively), and Greece (74 and 20 percent, respectively) come close. In neighboring France, home ownership stands at 57 percent, with 22 percent renting on the free market; in Germany, only 42 percent own their homes, and 53 percent are renters.<sup>27</sup> The former UN special rapporteur on adequate housing warned Spain after his visit in 2006 that the primacy the government gave in its housing policy to home ownership was having impacts on the realization of the right to adequate housing.<sup>28</sup> He noted that government “policies introduced in the last decades ... have strongly encouraged the ownership model both in public and private housing sectors through tax deductions and other means” and “had led to a situation where other tenancy regimes, such as rental for lower income sectors, were not sufficiently promoted.”<sup>29</sup>

Various analysts have pointed to state interventions in the rental market and fiscal incentives as factors that have contributed to this situation. Rental laws of 1946 and 1964 are credited with making the rental market unattractive, while efforts through reforms in 1985 and 1994, which included liberalizing rents and eliminating obligatory extension of leases, did not have the intended effect of stimulating growth in the rental market. Indeed, rents increased and the rental stock continued to decline.<sup>30</sup>

In 2009, the International Monetary Fund called Spain’s rental market “underdeveloped” and concluded that “the absence of a rental market exacerbates house price swings because it eliminates a cushioning reservoir of home use.” The IMF noted that “generous income tax deductions for mortgage payments ... lower the user cost of house ownership.”<sup>31</sup>

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demands of the low-income population and guaranteeing security of tenure for tenants.”(para. 101). See also citation to ‘Housing Policies as Instruments of Urban Regeneration’, Spain’s report to the 17th meeting of the Ministers of Housing of the European Union, prepared for the 16-17 October 2006 meeting in Barcelona, p. 259.

<sup>26</sup> CECODHAS Housing Europe’s Observatory, “Housing Europe Review 2012 : The nuts and bolts of European social housing systems,” Spain country profile, p. 75

<sup>27</sup> Ibid.

<sup>28</sup> Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, Mission to Spain. 7 February 2008. UN Doc.: A/HRC/7/16/Add.2, paragraph 90.

<sup>29</sup> Ibid. para 92.

<sup>30</sup> “Políticas e instrumentos en materia de vivienda,” in *La vivienda en España en el siglo XXI: Diagnóstico del modelo residencial y propuestas para otra política de vivienda* (Madrid: Cáritas and Fundación Foessa, 2013), p. 161.

<sup>31</sup> Spain: Selected Issues, IMF Country Report No. 09/129, April 2009, <http://www.imf.org/external/pubs/ft/scr/2009/cro9129.pdf> (accessed July 31, 2013), p. 11. Spain stands out within Europe

The European Commission recommended to Spain that it “ensure less tax-induced bias towards indebtedness and home-ownership” in its Memorandum of Understanding on Financial Sector Policy Conditionality in July 2012.<sup>32</sup>

The government argues it has taken recent steps designed to liberalize the rental market and encourage renting over home ownership. As of January 1, 2013, new home buyers can no longer deduct their mortgage payments for tax purposes, in keeping with the European Commission’s recommendation that it reduce tax incentives for home ownership. In June 2013, the government enacted a new rental law (*Ley de Medidas de Flexibilización y Fomento del Mercado del Alquiler y Viviendas*).<sup>33</sup> The law decreases the minimum lease period from five to three years; decreases the automatic renewal of a lease (in the absence of specific stipulations in the lease) from three years to one year; and frees up negotiations over the monthly rent (previously tied to the Consumer Price Index). Owners can now initiate civil eviction proceedings after one month’s default in rent. The European Anti Poverty Network and the Federation of Associations assisting the Homeless, among others, have criticized the new rental law for sacrificing tenant’s rights in the name of liberalizing the rental market.<sup>34</sup>

### *Insufficient Investment in Social Housing*

Spain has a highly decentralized governance system, with 17 autonomous communities (regions) and the 2 autonomous cities of Ceuta and Melilla enjoying significant competencies in all areas. The central government is responsible for implementing multi-year national housing plans to fully guarantee the right to adequate housing, including through the provision of subsidized, public housing (social housing), and is obligated under the Constitution to promote the equal exercise of rights within the territory. Autonomous communities have direct competency for implementing these plans at the regional level, using a combination of centrally-allocated funds and local budgetary allocations.

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for its emphasis on indirect public spending on housing through tax deductions, for example on first home purchases, and other fiscal incentives. While in the rest of the EU 75 percent of public spending on housing is through direct investment and 25 percent through indirect means, this ration is inverted in Spain: only 30 percent through direct investment and 70 percent through indirect fiscal means. “Políticas e instrumentos en materia de vivienda,” p. 166.

<sup>32</sup> Spain: Memorandum of Understanding on Financial Sector Policy Conditionality, July 20, 2012, <http://www.abc.es/gestordocumental/uploads/economia/bruselas-memorando.pdf> (accessed October 5, 2013).

<sup>33</sup> Miriam Calavia, “New rental law: the key elements for tenant and rentor,” *CincoDías.com*, June 5, 2013, [http://cincodias.com/cincodias/2013/06/05/economia/1370415645\\_920169.html](http://cincodias.com/cincodias/2013/06/05/economia/1370415645_920169.html) (accessed July 25, 2013).

<sup>34</sup> FN 34: European Anti Poverty Network (EAPN Spain), “EAPN-ES Proposal for a Position Paper on Housing of the Third Sector Platform,” June 2013, p.13. On file with Human Rights Watch.

Municipalities also have their own social housing programs. This means that in housing, as in many other areas, there are significant disparities among, and even within, autonomous communities in terms of investment, size, and quality of their social housing stock.

Overall, Spain's investment in social housing (0.79 percent of GDP) is far below the average (2 percent of GDP) among the 15 countries that comprised the EU before the 2004 enlargement.<sup>35</sup> Only 2 percent of the total housing stock (rented and owned) is devoted to social housing, far lower than other European countries (France: 17 percent; Netherlands: 35 percent; UK: 21 percent).<sup>36</sup> The central state budget for housing policy was progressively reduced over the past five years, from €1.3 billion in 2008 to €766million in 2013.<sup>37</sup> At this writing, the proposed 2014 budget would be €799.6 million.<sup>38</sup>

The 2013-2016 State Housing Plan provides for increased focus on subsidies for rental housing for low income families, and a move away from incentivizing home purchases. The plan envisions giving priority for rental subsidies, upon parity of need, to families who have been evicted (among other groups).<sup>39</sup> According to the definition used in the Plan, only those who meet the narrowly-drawn criteria laid out in a March 2012 decree on urgent measures to protect mortgage debtors without resources qualify for subsidies (discussed below).

According to a study by Spain's national human rights ombudsperson, the *Defensor del Pueblo*, as of March 2013, there were over 250,000 social housing units in Spain.<sup>40</sup> This figure is inexact as different autonomous communities have different definitions, and not

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<sup>35</sup> The EU-15 comprised Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom.

<sup>36</sup> Dilek Tosun, *Housing Needs in Europe*, CECODHAS Housing Europe Research Briefing, Year 6/Number 1, May 2013, [http://issuu.com/cecodhas/docs/cecodhas\\_observatory\\_briefing\\_housi/1#](http://issuu.com/cecodhas/docs/cecodhas_observatory_briefing_housi/1#) (accessed May 14, 2014), p. 8, 14, and 18.

<sup>37</sup> Esteban Chiqui, "Presupuestos 2013: ¿En qué gasta España?," *lainformacion.com*, September 28, 2012, [http://graficos.lainformacion.com/politica/presupuesto-estatal/presupuestos-2013-en-que-gasta-espana\\_W4M1nXSkqtuMQkDRSSpBR6](http://graficos.lainformacion.com/politica/presupuesto-estatal/presupuestos-2013-en-que-gasta-espana_W4M1nXSkqtuMQkDRSSpBR6) (accessed September 3, 2013). At the time of writing, the Euro was worth US\$1.39.

<sup>38</sup> "Las pensiones subirán el próximo año el mínimo previsto en la reforma, un 0,25%," *20minutos.es*, September 30, 2013, <http://www.20minutos.es/noticia/1933106/0/presupuestos-generales-2014/subida-pensiones/minimo-previsto-reforma/> (accessed December 5, 2013).

<sup>39</sup> Real Decreto 233/2013, de 5 de abril, por el que se regula el Plan Estatal de fomento del alquiler de viviendas, la rehabilitación edificatoria, y la regeneración y renovación urbanas, 2013-2016, <http://www.boe.es/boe/dias/2013/04/10/pdfs/BOE-A-2013-3780.pdf> (accessed February 14, 2014), articles 10 and 12. Families with a combined income of no more than three times the IPREM and a rental contract may apply to receive subsidies equal to 40 percent of the monthly rent or up to €2,400 per year. Annex I of the Plan lists the groups that should be given priority.

<sup>40</sup> Defensor del Pueblo, "Estudio sobre Viviendas Protegidas Vacías," March 2013, [http://www.defensordelpueblo.es/es/Documentacion/Publicaciones/monografico/Documentacion/Estudio\\_Viviendas\\_Prot egidas\\_Vacias.pdf](http://www.defensordelpueblo.es/es/Documentacion/Publicaciones/monografico/Documentacion/Estudio_Viviendas_Prot egidas_Vacias.pdf) (accessed June 28, 2013), p. 29.

all provided complete information in response to the ombudsperson's request for data. Based on the information the *Defensor del Pueblo* was able to gather, 332,529 people were at the time of the report signed up for social housing and awaiting assignment of a home; whereas, some 13,500 units were empty, of which the *Defensor del Pueblo* estimated almost 9,800 could have been considered immediately available.<sup>41</sup>

Each autonomous community develops and implements its own housing policy, financed in part with funds from the central government and in part with local funds; Madrid and Catalonia have the largest social housing stocks in Spain. Overall, central government transfers of funds to autonomous communities have been reduced progressively over the past several years. The budget for such transfers was cut in 2013 by 12 percent, and cut by 13.6 percent in the 2014 budget.<sup>42</sup>

Jaume Fornt, director of the Agència de l'Habitatge of the Catalonia regional government, said Catalonia was implementing its own housing plan, entirely financed by the Catalan government.<sup>43</sup> Borja Carabante, deputy advisor on transportation, infrastructure, and housing at the Madrid regional government housing agency (*Instituto de la Vivienda de Madrid, IVIMA*), said in June 2013 there were 23,000 social housing units in the Madrid autonomous community, down from highs in years past of around 80,000. He estimated that roughly 5,000 people meeting the eligibility requirements were at that time on the waiting list.<sup>44</sup>

## The Role of Civil Society

Civil society groups detected and responded to the mortgage crisis early on. The most visible and active group is the Platform for Mortgage Victims (*Plataforma de Afectados por la Hipoteca, PAH*). The PAH was founded in 2009 by members of the Observatori DESC in Barcelona, a social and economic rights organization, to mobilize people to defend themselves and others against home foreclosures and evictions as the housing bubble burst.

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<sup>41</sup> Ibid., p. 30.

<sup>42</sup> "El ABC de los Presupuestos Generales de 2014, September 30, 2013, <http://www.finanzas.com/noticias/20130930/presupuestos-generales-2014-2495297.html> (accessed January 10, 2013).

<sup>43</sup> Human Rights Watch interview with Jaume Fornt, director of the Agència de l'Habitatge, Barcelona, July 2, 2013.

<sup>44</sup> Human Rights Watch interview with Borja Carabante, deputy advisor on transportation, infrastructure, and housing of the Madrid regional government housing agency (*Instituto de la Vivienda de Madrid, IVIMA*), Madrid, June 25, 2013.

A grass-roots movement, the PAH provides legal advice and support in negotiating with banks, but it also organizes protests to stop evictions, bank occupations, and collective actions to occupy empty apartments and buildings. As of March 2014, the PAH said it had stopped 1,011 evictions and “relocated” 1,049 people to empty premises.<sup>45</sup>

In 2012, the association collected over 1.4 million signatures (well over the half million required) in support of a Popular Legislative Initiative (*Iniciativa Legislativa Popular*, ILP). The ILP sought to, among other measures, standardize the use of *datio in solutum*—whereby bank repossession relieves the mortgage holder of all obligations relating to the mortgage loan—and ensure affordable housing for the dispossessed.

After parliament—where Prime Minister Mariano Rajoy’s Popular Party has an absolute majority—agreed to examine the Platform’s ILP, the group began organizing “*escraches*,” or unmaskings: protests in front of or near the homes and offices of Popular Party parliamentarians to press them to support the bill. Popular Party leaders and elected officials responded by calling the campaign “pure Nazism” and “fascist or communist totalitarianism.” Central government representative in Madrid Cristina Cifuentes suggested that PAH co-founder and spokesperson Ada Colau supported groups associated with the Armed Basque separatist group ETA. As discussed further below, the Popular Party ultimately adopted its own law on debt forgiveness.

The Ecuadoran community, hit hard by the mortgage crisis, also began organizing in 2008/2009. Aida Quinatoa, the president of the National Coordinator of Ecuadorans in Spain (*Coordinadora Nacional de Ecuatorianos en España*, CONADEE), explained that the association became involved when it realized how many Ecuadorans were facing foreclosure and evictions. Aida herself, and some 50 other plaintiffs, are part of a class action suit alleging systematic fraud against a real estate agency through which she signed a mortgage. “I thought [at the time] it was just me, then I saw there were many,” she said. “We convened 30, and 300 came. We convened 300, and 3,000 came.”<sup>46</sup>

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<sup>45</sup> Plataforma de Afectados por la Hipoteca (PAH), accessed March 26, 2014, <http://afectadosporlahipoteca.com>.

<sup>46</sup> Human Rights Watch interview with Aida Quinatoa, Madrid, April 18, 2013.

## Mediation Services

Most people facing difficulty paying down their mortgage, and even more so those facing foreclosure, attempt to negotiate with the bank. Civil society groups such as the PAH and Cáritas, and, increasingly, the governments of Spain's 17 autonomous communities, have stepped in to help support individuals in these situations. We heard numerous accounts from interviewees indicating that the advice and accompaniment of others, as well as concerted public pressure in the case of the PAH, has helped advance their negotiations with the creditor.

Cáritas, the Catholic Church's charity organization, provides mediation services in numerous dioceses, including Madrid and Barcelona. In some cases, Cáritas assumes the cost of monthly mortgage payments on the basis of interest-free loans, with the understanding that individuals will pay back the money as they can. Since 2012, the Spanish Bar Association has established Mortgage Mediation Offices in 35 cities across Spain, offering free legal advice and assistance in negotiating with lending institutions.

Several autonomous governments, including Catalonia, Andalusia, Basque Country, and Navarra, offer free mediation services to help mortgage defaulters negotiate solutions with banks. Whereas the PAH advocates that everyone ask for *datio in solutum*, these other mediation services are more inclined to try to negotiate debt restructuring. At least in the case of the Catalonia autonomous community government (*Generalitat*), the mediation services provided by Ofideute are available only to those who have not yet been foreclosed.<sup>47</sup> In May 2012, CaixaBank signed an agreement with Ofideute obligating it to accept the office's mediation before resorting to legal action against individuals in mortgage arrears.<sup>48</sup>

These services are entirely financed by autonomous governments; the central state has not created a similar service or provided budgetary support for services at the regional level. Debt counseling services, either directly through state offices or state-approved and funded associations, are common in Western European countries.<sup>49</sup>

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<sup>47</sup> Human Rights Watch interview with Silvia Grau, director, Ofideute, Barcelona, July 5, 2013.

<sup>48</sup> "Mediación para evitar desahucios," Generalitat press release, May 3, 2012, <http://www10.gencat.cat/gencat/AppJava/es/actualitat2/2012/20503mediaciperevitardesonaments.jsp> (accessed March 25, 2014).

<sup>49</sup> London Economics, Study on means to protect consumers in financial difficulty, Chapter 3.

## The Role of the European Union

European Union institutions have played strikingly different roles in the Spanish mortgage crisis. As discussed below, the Court of Justice of the European Union issued a fundamental ruling in March 2013 on the inequity of foreclosure proceedings in Spain, prompting a crucial, if belated, reform. The European Parliament called on EU member states in June 2013 to find alternative solutions to evictions and to prevent evicted families from having to keep up payments to the lending institution.

The European Commission and the Council of the European Union, however, have been largely silent on the mortgage crisis in Spain. In reply to a parliamentary question from three European Parliament members in May 2013, Commissioner for Economic and Monetary Affairs and the Euro Olli Rehn explained that housing policy and debt resettlement procedures are primarily the competence of national authorities. Rehn said the Commission has and will continue to give “special prominence” to housing issues in country specific recommendations on national economic programs.<sup>50</sup>

In fact, country specific recommendations to Spain in 2012 and 2013 have included only minimal references to housing issues. In its 2012 country-specific recommendations, the Council of the European Union encouraged Spain to remove tax incentives for home ownership to encourage growth in the rental market (Spain would later do so), and in 2013 noted that “efforts to create a larger and more efficient rental market ... are still at an early stage.”<sup>51</sup> With respect to personal debt, the 2013 recommendations noted only that “further efforts are necessary in the context of high private indebtedness.”<sup>52</sup>

In June 2013, the Commission expressed concern about a decree in Andalusia authorizing the regional government to take over properties, under certain conditions, from lending institutions to allow particularly vulnerable families facing eviction to remain.<sup>53</sup>

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<sup>50</sup> Question for written answer to the Commission, Rule 117, Raúl Romeva i Rueda (Verts/ALE), Marije Cornelissen (Verts/ALE), Karima Delli (Verts/ALE), March 6, 2013, and Answer given by Mr. Rehn on behalf of the Commission, May 7, 2013, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2013-002647+0+DOC+XML+Vo//EN> (accessed September 6, 2013).

<sup>51</sup> Council of the European Union Recommendation on Spain’s 2013 national reform programme and delivering a Council opinion on Spain’s stability programme for 2012-2016, <http://register.consilium.europa.eu/pdf/en/13/st10/st10656-reo1.en13.pdf> (accessed November 14, 2013), para. 15.

<sup>52</sup> *Ibid.*, para. 10.

<sup>53</sup> The decree stipulates that the measure can only be applied in cases in which the family meets a number of requirements, including proof of a decline in living standards since the mortgage was signed and a net monthly income of less than €1,597,

Commission spokesperson Simon O'Connor said the decree "raised risks as to the fulfilment of the objectives" of the EU's aid package to Spain.<sup>54</sup> In a letter reported by the media, the Commission said the measure created uncertainty in the housing market and could have a negative impact on investment, "going further than a balanced approach that should reconcile the necessary protection of the most vulnerable families with the need to preserve financial stability."<sup>55</sup>

Spain has thus far avoided a full readjustment program of the type applied to Greece, Ireland, and Portugal. It did, however, secure a €100 billion rescue loan for Spain's crippled financial sector from the EU in June 2012. The loan, subject to conditions related to banking sector reform, was designed to inject capital into the weakest banks. The government had already nationalized four banks, Bankia, Catalunya Banc, Banco de Valencia, and Novagalicia Banco, that threatened to collapse under lending losses.

In keeping with one of the conditions of the EU bail-out, Spain created the Company for the Management of Assets proceeding from Restructuring of the Banking System (*Sociedad de Gestión de Activos procedentes de la Reestructuración Bancaria*, SAREB) to function as a "bad bank": it takes over toxic assets, including real estate properties, from banks with a view to selling them for a profit within 15 years. In March 2013, PAH organized the occupation of a residential apartment building owned by SAREB in Girona, near Barcelona. SAREB secured a court-ordered eviction scheduled for mid-October 2013, temporarily halted at the last minute when the European Court of Human Rights requested authorities not to enforce the eviction for at least two weeks, pending its assessment of a complaint filed by three of the sixteen families (including 21 children) living in the building.<sup>56</sup> The European court lifted the suspension on November 5, 2013, and police forces carried out the eviction on December 13, 2013. The Catalan housing agency Agència de l'Habitatge said at the time that five families had been relocated to social housing, the agency was

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and the autonomous government will pay the bank per year 2 percent of the value of the property, for the maximum of three years the measure can be applied in any single case.

<sup>54</sup> Dillon Clancy, "Commission cautions Spain about anti-eviction decrees," *New Europe*, June 25, 2013, <http://www.neurope.eu/article/commission-cautions-spain-about-anti-eviction-decrees> (accessed July 2, 2013).

<sup>55</sup> Lourdes Lucio, Claudi Pérez Sevilla, "Bruselas pide explicaciones a España por la ley andaluza antidesahucios," *El País*, June 24, 2013, [http://ccaa.elpais.com/ccaa/2013/06/24/andalucia/1372082975\\_621680.html](http://ccaa.elpais.com/ccaa/2013/06/24/andalucia/1372082975_621680.html) (accessed July 2, 2013).

<sup>56</sup> *Ceesay Ceesay and Others v. Spain*, 62688/13. The case was declared inadmissible on February 6, 2014. Email communication from the European Court of Human Rights. On file with Human Rights; "Estrasburgo paraliza parcialmente el desalojo de un edificio del banco malo del Gobierno," *EFE*, October 16, 2013, <http://www.elmundo.es/elmundo/2013/10/16/barcelona/1381908110.html> (accessed December 3, 2013).



looking for suitable housing for two other families with particular needs, and one family rejected the offer.<sup>57</sup> The European Court of Human Rights ultimately declared the application unfounded.

At the same time, the Commission proposed in 2011 a new EU directive on “credit agreements relating to residential property” to ensure minimum standards across the EU with respect to fair lending practices. The directive, finally adopted in February 2014, aims to guarantee more responsible, transparent, and efficient mortgage credit markets.<sup>58</sup>

In a 2011 document examining national measures and potential best practices for avoiding foreclosures upon mortgage payment default, the Commission made a plea for “common sense and humanity” by lenders, authorities, and the courts during foreclosure proceedings. The paper recommends that:

the full economic and social situation of the defaulting borrower ... be taken into account, and the implications of a given repossession ... carefully assessed.... For example, losing the family home after having lost one’s job has intolerable social and human implications for both borrowers and their families. In these critical times our society must put the human dimension at its very heart.<sup>59</sup>

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<sup>57</sup> Agència de l’Habitatge said the other seven families did not meet the minimum requirements for eligibility for social housing because they had not been previously evicted or were deemed to have sufficient income. Marta Rodríguez, “Los Mossos desalojan el bloque ocupado de Salt,” *El País*, December 13, 2013, [http://ccaa.elpais.com/ccaa/2013/12/13/catalunya/1386926056\\_229117.html](http://ccaa.elpais.com/ccaa/2013/12/13/catalunya/1386926056_229117.html) (accessed March 24, 2014).

<sup>58</sup> <http://eur-lex.europa.eu/legal-content/EN/ALL/;jsessionid=G1CoTwnGHDxQLGN9gM8yRDGMXrv7YrQjps1PGHwbGjH42JWnZcpl!1843280618?uri=CELEX:32014L0017> (accessed March 24, 2014).

<sup>59</sup> European Commission staff working paper, “National measures and practices to avoid foreclosure procedures for residential mortgage loans.” Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property, March 31, 2011, [http://ec.europa.eu/internal\\_market/finances-retail/docs/credit/mortgage/sec\\_2011\\_357\\_en.pdf](http://ec.europa.eu/internal_market/finances-retail/docs/credit/mortgage/sec_2011_357_en.pdf) (accessed November 14, 2013), p. 11.

## II. Particularly Vulnerable Groups

This chapter focuses on the impact of the mortgage crisis on particularly vulnerable groups: immigrants, single parent households, the vast majority of which in Spain are headed by women, women victims of economic abuse, and children. Our research examined the exposure of these groups to a disproportionate impact of the irresponsible lending and borrowing that characterized the economic boom years, and the subsequent—and continuing—wave of foreclosures and evictions. We acknowledge that many in Spain, across different socio-economic segments of the population, have been affected, and that we do not address the situation of other groups with their own specific vulnerabilities, such as the elderly or the disabled.

### Immigrants

In roughly the same ten-year period of rapid economic growth in Spain (1997-2007), the country's immigrant population increased more than sixfold, from under one million in 2000 to 5.6 million—out of a total population of 46.7 million—in 2009.<sup>60</sup> Many immigrant men were employed in the booming construction sector and were among the first to lose their jobs with the onset of the crisis. Many immigrant women found jobs as domestic workers and caretakers in homes, as more Spanish women entered the labor market; they too would quickly lose their jobs in the recession.

Immigrants were among the first groups affected by the mortgage crisis. They also appear to be disproportionately affected, with the PAH estimating that they represent one-third of those who have faced foreclosure and eviction, well out of proportion to their 12 percent share of the overall population.<sup>61</sup>

Real estate agencies appear to have played a critical role in capturing clients for banks. Eduardo Cachago, a 44-year-old Ecuadoran, explained that representatives of a real estate intermediary would come regularly to the construction site where he worked to promote

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<sup>60</sup> Tom Worden, "Spain sees sixfold increase in immigrants over decade," *The Guardian*, February 8, 2010, <http://www.theguardian.com/world/2010/feb/08/spain-sixfold-increase-immigrants> (accessed April 30, 2014).

<sup>61</sup> Ada Colau and Adrià Alemany, *Vidas Hipotecadas* (Barcelona: Angle Editorial, 2012), p. 237.

“deals” with banks for buying a home. “They knew at 10 o’clock we stopped working for 15 minutes, and they’d come and pester us,” he said.<sup>62</sup>

That day I gave them the names of some friends, and they called them [the friends] to ask them to be my guarantors. I just did it to get rid of them, people from town hall were coming for an inspection and I didn’t want problems. I wasn’t even thinking about buying a house. They [the real estate agents] did everything.<sup>63</sup>

María F., a 39-year-old Ecuadoran, said real estate agencies came to Barajas airport, where she worked in security, to “offer all sorts of things” and leave their cards.<sup>64</sup>

Lamine Numké, a 34-year-old Malian, said he had gone to a real estate agency to find a rental apartment.

But they told me that the only ones they had cost €900 or €1,000 per month, and that I would have to pay three months deposit, and that it would be better if I bought a house.... I wouldn’t have to pay anything, they’d help me with the bank.... I didn’t even talk to the bank until the day I signed the mortgage. The agency did everything.<sup>65</sup>

Indeed, most immigrants we interviewed pointed to high rents in cities like Madrid and Barcelona as one of the principal reasons for taking out a mortgage. Norma del Pilar Llano Oyos bought her apartment in 2005, when “it was so easy to buy, and rents were high and [apartments] hard to find.”<sup>66</sup>

Others spoke of needing to ensure a proper home for their children. When Blanca Sangucho Chicaiza bought her apartment in 2003, she, her then-husband, and their young daughter were sharing an apartment with 15 other people. They had immigrated to Spain

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<sup>62</sup> Human Rights Watch interview with Eduardo Cachago, Madrid, April 18, 2013.

<sup>63</sup> Ibid.

<sup>64</sup> Human Rights Watch interview with María F., Collado Villalba (outside Madrid), May 22, 2013.

<sup>65</sup> Human Rights Watch interview with Lamine Numké, Madrid, May 23, 2013.

<sup>66</sup> Human Rights Watch interview with Norma del Pilar Llano Oyos, Madrid, May 21, 2013.

from Ecuador in part to seek treatment for their daughter's kidney problems.<sup>67</sup> Luzmila M. was employed as a live-in domestic worker but wanted to have her own place and work only days to bring her infant daughter from Ecuador. "Rents were really high. I told myself it was better to buy and not throw money down a black hole."<sup>68</sup>

Whether these agencies aggressively pursued clients or were approached by individuals seeking to purchase homes, some of those we interviewed described practices by intermediaries such as falsifying income, finding strangers to serve as guarantors on mortgages for a fee, and knitting together chain mortgages in which home buyers served as guarantors for one another, all to facilitate the banks extending mortgages to people who would otherwise not be eligible.<sup>69</sup>

Dionisio Moreno, the lawyer who represented a mortgage debtor in a case that prompted a ruling from the Court of Justice of the European Union (see below) explained that such "crossed guarantees" (*avales cruzados*) and chain mortgages were generally signed on the same day to avoid each signer's debt being detected by the Bank of Spain's debt database for risk assessment (Central de Información de Riesgos del Banco de España, CIRBE).<sup>70</sup> All creditors must register debts of over €6,000 with CIRBE, so someone with a significant mortgage debt signing as guarantor for another person's mortgage would raise red flags in the system. In their 2012 book, *Mortgaged Lives (Vidas Hipotecadas)*, PAH founding members Ada Colau and Adrià Alemany point to chain mortgages as one of the bad banking practices that "proliferated during the apex of the [housing] bubble."<sup>71</sup>

Hilda M., an Ecuadoran who has been living in Spain for 15 years, said her real estate agent "did everything," including finding a stranger to serve as guarantor for a €1,200 fee.<sup>72</sup>

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<sup>67</sup> Human Rights Watch interview with Blanca Sangucho Chicaisa, Barcelona, July 3, 2013.

<sup>68</sup> Human Rights Watch interview with Luzmila M., Madrid, May 23, 2013.

<sup>69</sup> Real estate agencies used such practices also with Spanish clients. Alicia Haro Pérez, a 40-year-old Catalan, said a friend of hers who worked at a real estate agency arranged "everything" so she and her then-boyfriend, who was unemployed at the time, could obtain a 120 percent mortgage in 2005. "They falsified a salary for him. The bank said not to worry. They knew everything." Human Rights Watch interview with Alicia Haro Pérez, Tàrraga, October 9, 2013.

<sup>70</sup> Human Rights Watch interview with Dionisio Moreno, Barcelona, July 2, 2013.

<sup>71</sup> Ada Colau and Adrià Alemany, *Vidas Hipotecadas* (Barcelona: Angle Editorial, 2012), p. 67.

<sup>72</sup> Human Rights Watch interview with Hilda M., Madrid, May 24, 2013.

Luzmila M., a 41-year-old Ecuadoran woman wanted to buy an apartment so she could bring her then infant daughter over from Ecuador. After the bank told her she needed guarantors, she approached the now defunct *Central Hipotecaria del Inmigrante*, an intermediary that specialized in facilitating mortgage loans for immigrants:

They said such nice things, that I shouldn't worry, that they would find me guarantors. They said I should be the guarantor for a couple, and that another couple would be the guarantor for me. It was only later that I realized that they put the man as 50 percent co-owner of my apartment, and that I also figured as 30 percent co-owner of the other apartment.... They didn't read the whole contract before I signed. The other man was there too, I didn't know him at all. He signed, and disappeared.<sup>73</sup>

Norma del Pilar Llano Oyos, a 37-year-old Ecuadoran, bought her apartment with her partner in 2005 using the same agency as Luzmila M.: "I didn't have papers then, but my partner did. The real estate agent told me, 'don't worry, we'll find someone.' They listed a man as co-owner, and two guarantors we didn't know either."<sup>74</sup>

## Single Parent Heads of Household

Women also appear to be differentially affected by the mortgage crisis due to relatively greater income instability, on average lower wages, and greater responsibilities with respect to child care.<sup>75</sup>

In Spain, almost 90 percent of single parent households are headed by women.<sup>76</sup> Human Rights Watch spoke with 14 single women with children under the age of 18. Of the 12 men we interviewed, only one was divorced with custody of his children. The rest were either

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<sup>73</sup> Human Rights Watch interview with Luzmila M., Madrid, May 23, 2013.

<sup>74</sup> Human Rights Watch interview with Norma del Pilar Llano Oyos, Madrid, May 21, 2013.

<sup>75</sup> Women in Spain are more likely than men to have temporary (fixed term) contracts and to work part-time (26 percent of women compared to 7 percent of men in 2013). See "Gender Gaps in Spain: Policies and Outcomes over the Last Three Decades," Nezih Guner, Ezgi Kaya, and Virginia Sánchez-Marcos, Barcelona GSE Working Paper Series, Working Paper No. 751, January 2014, [http://research.barcelonagse.eu/tmp/working\\_papers/751.pdf](http://research.barcelonagse.eu/tmp/working_papers/751.pdf) (accessed April 28, 2014). According to a 2013 European Commission publication, women in Spain earned on average 16.2 percent less than men per hour. This is the unadjusted gender pay gap. The Barcelona GSE study calculated a 20 percent adjusted gender pay gap (controlling for worker and job characteristics and selection).

<sup>76</sup> Fundación Adecco, II Informe Fundación Adecco, "Mujer con Responsabilidades Familiares no compartidas y empleo," 2012, [http://www.fundacionadecco.es/\\_data/SalaPrensa/Estudios/pdf/299.pdf](http://www.fundacionadecco.es/_data/SalaPrensa/Estudios/pdf/299.pdf) (accessed April 24, 2014).

married, or single without children or with adult children. All of the women heads of household emphasized their responsibilities as caregivers in stark terms. Luzmila M. said her mortgage ordeal has affected her so much that she is living only for her daughter. “I don’t care if I die, but there’s no one else to take care of her.”<sup>77</sup>

Many, like Luisa P., Daniela Melo, and María F., are desperate to find work but are constrained by their childcare responsibilities. Luisa P. has a six-year-old son with diabetes; though she secured debt cancellation from her bank and an offer to relocate to another apartment for low rent, when we spoke she was still trying to convince the bank that she needs to stay in her neighborhood to keep her son in his school. He needs regular insulin shots, and his school is one with a nurse who can attend to him. “If there’s no nurse, I would have to go give him the shots, and then I couldn’t work,” she explained.<sup>78</sup> A very low percentage of schools in the Madrid region have an on-premise nurse, making it unlikely she would find such a school upon relocation.

Daniela Melo, a 32-year-old from the Dominican Republic who has been living in Spain since 1999, is in a similar situation, eager to find work but juggling care by herself for three young sons. She has found so far only night jobs, when she must be with her children. She too is trying to get the bank to help her stay in her neighborhood, where she has a support network, and to avoid additional expenses for transportation to keep her children in their current schools.<sup>79</sup> And María F., a 39-year-old single mother of three boys, says she goes regularly to a *Cáritas* employment service to look for a cleaning job, but “most want live-ins, and what would I do with my children?”<sup>80</sup>

Successive UN experts on housing rights have rightly focused on women’s right to adequate housing as central to ensuring their security, health, livelihood, and autonomy. Former UN special rapporteur on adequate housing Miloon Kothari stressed that certain groups of women, including victims of domestic violence, and widowed, elderly, divorced, or separated women, face particular obstacles to the enjoyment of their right to housing, due to multiple layers of discrimination, relative impoverishment, and lack of access to

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<sup>77</sup> Human Rights Watch interview with Luzmila M., Madrid, May 23, 2013.

<sup>78</sup> Human Rights Watch interview with Luisa P. (pseudonym), Madrid, May 24, 2013.

<sup>79</sup> Human Rights Watch interview with Daniela Melo, Madrid, June 27, 2013.

<sup>80</sup> Human Rights Watch interview with María F., Collado Villalba (outside Madrid), May 22, 2013.

social and economic resources.<sup>81</sup> Kothari also pointed out that evictions can cause for women “not just ... loss of home, but also livelihoods, relationships and support systems, breakdown of kinship ties, physical and psychological trauma and even increased morbidity and mortality.”<sup>82</sup>

Former UN special rapporteur on adequate housing Raquel Rolnik has noted that gendered roles help determine the different ways women and men experience housing, and insisted that a focus on women’s right to adequate housing should not reinforce traditional views identifying women predominately as homemakers but rather aims to understand their needs in order to ensure that women “enjoy adequate housing on the basis of equality” as well as “greater autonomy for women in all areas of their lives, and not less....”<sup>83</sup>

Adopting a gender perspective in law and policy requires taking into consideration the way gendered roles determine responsibilities and choices. In keeping with former special rapporteur Rolnik’s call to work towards greater autonomy for women in all areas of their lives, with respect to housing in Spain this means government and bank policy should take into consideration the particular challenges women face, including childcare responsibilities.

## Women with Abusive or Hostile Ex-partners

Women survivors of domestic violence and those dealing with hostile former partners are particularly disadvantaged. Government measures, discussed below, temporarily protect survivors of domestic violence from eviction. There are no provisions, however, to address the problems women face in negotiating with banks for debt restructuring, relief, or cancellation when their former partner or husband, who shares the mortgage, is obstructionist or uncooperative. If the mortgage is in both names, both parties have to agree on any debt restructuring or *datio in solutum*. Debt upon foreclosure and repossession is individual, so women in these cases can negotiate independently with the bank for debt forgiveness. In the best of cases, this may alleviate or cancel the debt

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<sup>81</sup> Women and adequate housing, Report by the special rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination, Miloon Kothari, UN Doc. E/CN.4/2006/118, February 27, 2006, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/Go6/111/66/PDF/Go611166.pdf?OpenElement> (accessed July 20, 2013), paras. 30-31.

<sup>82</sup> *Ibid.*, para. 66.

<sup>83</sup> Report by the special rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, UN Doc. A/HR/C/19/53, December 26, 2011, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/175/76/PDF/G1117576.pdf?OpenElement>, (accessed July 20, 2013), para. 4.

burden, but the immediate concern for the women we spoke with is ensuring an appropriate and safe home for themselves and their children.

In some cases, the behavior of former partners and husbands may be tantamount to economic abuse, an aspect of violence against women. While there is no standard definition of economic abuse, it is generally understood to include situations in which an intimate partner exercises control over financial decision-making and the use of and access to economic necessities.<sup>84</sup>

Toni Algaba, the coordinator at Catalonia’s mediation service Ofideute, explained, “We see a lot of cases of divorce ... we try to negotiate with both of them ourselves, but if they can’t agree we can alert social services so they can engage in family mediation, but that’s only on a voluntary basis.” If no agreement can be reached, the only option, Toni explained, is foreclosure “and then we try to resolve the housing needs of the woman and children.”<sup>85</sup>

The government included victims of domestic violence as beneficiaries of both Royal Decree-Laws on debt restructuring (discussed below) and on suspension of evictions, and Human Rights Watch spoke with several women who had benefitted from these provisions. Yet, we also met several women who faced what could be characterized as “economic abuse” at the hands of former partners and husbands, effectively preventing them from resolving their housing and debt problems.

Mónica Guerrero Exposito is a 32-year-old mother of an 11-year-old girl and 4-year-old boy by two different men. She suffered an abusive relationship with both of them and her first husband was convicted under Spain’s domestic violence legislation. She began having trouble paying her mortgage after she separated from her second husband. She said she told the bank that her estranged husband refused to help with the payments, but instead of lowering the monthly rate, the bank revised the interest rate and the rate went up. “They told me to relax,” she said.<sup>86</sup> Subsequently the bank agreed to restructure the debt, and then to

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<sup>84</sup> Adams, A. E.; Sullivan, C. M.; Bybee, D.; Greeson, M. R. (2008). "Development of the Scale of Economic Abuse". *Violence Against Women* 14 (5): 563–588. UNICEF has described economic abuse as including “acts such as the denial of funds, refusal to contribute financially, denial of food and basic needs, and controlling access to health care, employment, etc.,” UNICEF Innocenti Research Centre, *Domestic Violence against Women and Girls*, Digest No. 6 at 2, available at <http://www.unicef-irc.org/publications/pdf/digest6e.pdf> (accessed April 30, 2014).

<sup>85</sup> Human Rights Watch interview with Toni Algaba, coordinator, Ofideute, Barcelona, July 5, 2013.

<sup>86</sup> Human Rights Watch interview with Mónica Guerrero Exposito, Barcelona, July 4, 2013.



buy the house from her, but only with her ex-husband's approval, which he refuses. Mónica told us she feared that her former partner, the father of her second child, was obstructing negotiations with the bank because he wanted her to be evicted so he could get custody of their young son. She explained, "I stopped paying the mortgage, yes, but never water and gas. It takes nothing for my son to get bronchitis. It's my obligation to take care of my kids ... and then they threaten to take away your children. I took care of my [older] daughter by myself for ten years, and now I'm a bad mother because they're taking my house away?"<sup>87</sup>

Mónica doesn't meet the requirements of the government decrees requiring banks to restructure debt and suspend evictions because of the size of the town where she bought her apartment, and because of her ex-husband's income (of which she receives no part). She cannot benefit as a victim of domestic violence because the conviction is against her first husband and not the man who signed with her the mortgage. Although she has reported her second husband's threatening and insulting messages to the police, she does not want to file an official complaint "because of what I went through the last time, and because I'm scared, honestly."<sup>88</sup>

Irena González, 46 years old, told Human Rights Watch she had no idea things were so bad with her mortgage until she saw the foreclosure notice stuck to her front door. She is separated from her husband, who is under a court order to stay at a certain distance from her due to a conviction for domestic abuse. She said he never told her he was not keeping up with the mortgage payments; they don't have direct contact and only communicate through social services who supervise the hand-over of the younger two of their three children (aged 13 and 9).<sup>89</sup> Irena was able to avoid the eviction, scheduled for November 2012, thanks to the Royal Decree-Law imposing a moratorium on evictions for victims of domestic violence. She is still struggling, however, to negotiate with the bank to get debt forgiveness.

Montse F., a 33-year-old hair stylist in Barcelona, said she only realized she had a mortgage when she divorced her abusive husband in 2010. He had mortgaged their apartment, which they had bought outright in 2002 with their savings, without her informed consent. "I signed the papers without knowing what it was ... he exploited that I

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<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Human Rights Watch interview with Irena González, Madrid, May 23, 2013.

was destroyed as a person, but my signature is there, I can't do anything," she told us.<sup>90</sup> Montse has custody of their two daughters, aged 16 and 11, and struggles every month to pay her share of the monthly mortgage (€300).

Of all my bills, the apartment is the priority, because it's the roof over my children's heads. I worry every day about it [but] I won't let him see me go under ... I'm a survivor. I'm not going to think all day about what I went through. I am remaking my life.<sup>91</sup>

Her ex-husband has been under successive restraining orders because of the history of abuse, but lives 30 meters away; she has filed in the courts repeatedly over his failure to pay alimony. He does pay his half of the mortgage payments, however, and refuses to negotiate with Montse or the bank, insisting the apartment is his.

In 2005, Alicia Haro Pérez, 40 years old, signed a €200,000 mortgage with her then-boyfriend, with her parents as guarantors. The following year they had twins but when they separated in 2008, Alicia was granted custody. Alicia has been unemployed since 2010 and received virtually no child support from her former boyfriend. He has paid her three months of child support since 2009, and the courts collected the child support from his unemployment benefits for another three months. She has filed a suit against him for €15,000 in unpaid child support. Alicia stopped paying her mortgage in January 2011. Her bank is willing to repossess the apartment and cancel the debt (*datio in solutum*), allowing her to live there paying an *alquiler social*. But her former boyfriend must agree, and he refuses. "He wants the bank to throw me out of the house so he can get the kids. He wants to see me on the streets. He told me he would sign if I gave him the kids."<sup>92</sup>

Economic abuse is a recognized element of domestic violence. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence—commonly referred to as the Istanbul Convention, after the city where it was opened for signature—defines domestic violence as “all acts of physical, sexual, psychological or *economic violence* that occur within the family or domestic unit or between former or current

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<sup>90</sup> Human Rights Watch interview with Montse F., Barcelona, October 7, 2013.

<sup>91</sup> Ibid.

<sup>92</sup> Human Rights Watch interview with Alicia Haro Pérez, Tàrrega, October 9, 2013.

spouses or partners.”<sup>93</sup> Economic violence, which the Istanbul Convention links to psychological violence, is understood to involve control over decision-making, use of and access to economic resources, creating a situation of powerlessness and dependency.<sup>94</sup>

With respect to prevention, the Convention requires state parties to promote the economic empowerment of women towards the overall goals of increasing women’s agency and reducing their vulnerability to violence.<sup>95</sup> Support for victims of domestic violence should include services to help them work towards economic independence and financial security.<sup>96</sup>

The European Court of Human Rights has also explicitly recognized that domestic violence includes economic abuse and therefore governments’ obligations under the European Convention on Human Rights (ECHR) to prevent and respond to domestic violence should include protective measures against such abuse.<sup>97</sup> The Court was critical of the Moldovan legal system which it said failed “to realise, or to explain to the law-enforcement authorities, the specific nature of domestic violence, which does not always result in physical injury.”<sup>98</sup>

Spain ratified the Istanbul Convention in April 2014. Spain’s 2004 domestic violence law does not include economic violence, and any possible legal action to resolve economic disputes such as those described above would be handled by ordinary courts rather than the specialized courts created to handle cases of domestic violence unless they are associated with a formal complaint of domestic violence. While the government-imposed moratorium on evictions benefits victims of domestic violence—within the meaning of the 2004 law, so excluding economic violence—there are no comparable measures, or

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<sup>93</sup> Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, opened for signature on May 11, 2011, <http://www.conventions.coe.int/Treaty/EN/Treaties/Html/210.htm> (accessed July 17, 2013), article 3(b). Emphasis added.

<sup>94</sup> Adams, A. E.; Sullivan, C. M.; Bybee, D.; Greeson, M. R. (2008). "Development of the Scale of Economic Abuse," *Violence Against Women* 14 (5): 563–588.

<sup>95</sup> *Ibid.*, article 12 (6) read in conjunction with paragraph 90 of the Explanatory Report, <http://www.conventions.coe.int/Treaty/EN/Reports/Html/210.htm> (accessed December 12, 2013).

<sup>96</sup> *Ibid.*, article 18 (3) read in conjunction with paragraph 118 of the Explanatory Report.

<sup>97</sup> *TM and CM v Moldova*, Application no. 26608/11, Judgment January 28, 2014, para .47: “The prosecutor’s position that no criminal investigation could be initiated unless the injuries caused to the victim were of a certain degree of severity ... also raises questions regarding the efficiency of the protective measures, given the many types of domestic violence, not all of which result in physical injury, such as psychological or economic abuse.”

<sup>98</sup> *Ibid.* para. 59.

self-imposed banking industry guidelines, to ensure appropriate policies to help women victims of economic abuse as they attempt to negotiate over their mortgages.<sup>99</sup>

## Insecure Housing

Foreclosures have led to people living in “insecure housing,” as defined in the European Typology of Homelessness and Housing Exclusion (ETHOS), developed by the European Federation of National Organisations working with the Homeless. Insecure housing includes situations in which individuals face eviction, but also in which they are forced to live with relatives or friends, sublet rooms in apartments, and squat in unoccupied buildings.<sup>100</sup>

Human Rights Watch interviewed people living, or who had lived, in insecure housing as a result of evictions. Olga, a 45-year-old Colombian, and two of her three daughters (aged 24 and 6) have been renting one small room in an apartment since they were evicted in 2009. She pays €300, roughly 70 percent of her welfare subsistence of €426 per month. Diao Mamadou, a 40-year-old Senegalese man, felt compelled to send his twins to live in Senegal when he lost his house; he and his wife rented a room in an apartment.<sup>101</sup> Daniela Melo lived for a year in one room in an apartment with her three sons.<sup>102</sup>

Three people we interviewed are squatting in previously unoccupied buildings, while three other people had “reclaimed” the apartments from which they had been evicted (including Diao Mamadou). Others had gone through a period of instability before resolving their housing needs. Human Rights Watch heard of instances of child abuse by co-inhabitants in shared rental housing, but was not able to independently document such cases.

None of those interviewed by Human Rights Watch had experienced a period of homelessness. Available government statistics do not indicate a demonstrable increase in homelessness in Spain.

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<sup>99</sup> For a discussion of economic abuse, see Fiona Macdonald, *Spotlight on Economic Abuse: A literature and policy review*, Good Shepherd Youth & Family Service and Kildonan UnitingCare, September 2012, [http://www.goodshepvic.org.au/Assets/Files/Spotlight\\_on\\_Economic\\_Abuse\\_LitPolicyReview.pdf](http://www.goodshepvic.org.au/Assets/Files/Spotlight_on_Economic_Abuse_LitPolicyReview.pdf) (accessed December 12, 2013). The paper notes that, “Consumer protection is a crucial area of regulation for women experiencing economic abuse because it affects the forms economic abuse takes, women’s ability to stop abuse, their ability to manage financially on leaving a relationship and their options for re-establishing financial security and wellbeing.” p. 48.

<sup>100</sup> ETHOS is available at <http://www.feantsa.org/spip.php?article120> (accessed August 1, 2013). See also “La vivienda en España en el siglo XXI. Diagnóstico del modelo residencial y propuestas para otra política de vivienda,” Colección Estudios, FOESSA, 2013; EAPN Spain, “Position Paper,” June 2013, p.23..

<sup>101</sup> Human Rights Watch interview with Diao Mamadou, Granollers (outside Barcelona), July 4, 2013.

<sup>102</sup> Human Rights Watch interview with Daniela Melo, Madrid, June 27, 2013.

The national statistical institute INE estimated in 2005 there were 21,900 homeless people in Spain; the 2012 survey estimated 22,938.<sup>103</sup> This figure reflects only the number of people who went to shelters and soup kitchens for the homeless. Twelve percent of those surveyed said they ended up homeless following an eviction; the data do not clarify whether from rental or owned property.

Nongovernmental sources are critical of the way in which the Spanish government collects data on homelessness and point to higher numbers. Analysts agree that the pathway to homelessness is complex and that evictions following bank repossessions do not normally lead directly to people living on the street.<sup>104</sup>

However, Tusti Gutiérrez, the director of social programs for housing for Cáritas Madrid, noted that many of the families that end up living in social housing managed by Cáritas began the downwards spiral when they lost their homes for failure to keep up mortgage payments, and then subsequently were evicted also from rental housing due to inability to keep up monthly rent payments.<sup>105</sup>

One of the reasons cited for why evictees do not end up living rough on the streets or using shelters is the so-called Mediterranean cushion—strong social ties through networks of family and friends that activate to provide temporary, or even long-term, solutions in crises.<sup>106</sup>

While immigrants may also enjoy strong community ties, they are at a disadvantage in these situations, especially if they have not been in the country for long or if the entire family is affected by the crisis. Amanda, a 60-year-old Peruvian with Spanish citizenship, explained, “If they come evict me tomorrow, I’ll end up on the street because I have nowhere to go. My daughter’s house is full, my nephew rents out a room.”<sup>107</sup> Amanda’s daughter has three children, one of whom has a serious disability, and is herself facing eviction. Amanda’s son was already evicted and returned to Peru.<sup>108</sup>

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<sup>103</sup> INE, “Encuesta a las personas sin hogar 2012,” press release, December 21, 2012, <http://www.ine.es/prensa/np761.pdf> (accessed April 30, 2014).

<sup>104</sup> Human Rights Watch interview with Tusti Gutiérrez, director of social programs for housing, Cáritas Madrid, Madrid, June 25, 2013; Human Rights Watch round-table discussion with representatives of the European Anti Poverty Network, Cáritas Spain, the Federation of Entities in Support of the Homeless (fePS), Rais Foundation, and Provivienda, Madrid, June 26, 2013; Human Rights Watch round-table discussion with representatives of the housing working group of the Tercer Sector, a platform of 32 federations and large organizations in Barcelona, Barcelona, July 1, 2013.

<sup>105</sup> Human Rights Watch interview with Tusti Gutiérrez, director of social programs for housing, Cáritas Madrid, Madrid, June 25, 2013.

<sup>106</sup> Not everyone is able or willing to rely on these networks, however. Alfonso Díez Pequeño, 49 years old, is an independent contractor who had not had a job in a year when we spoke in May 2013. He was trying to negotiate with the bank to ward off legal action to foreclose on his apartment; he had not paid the mortgage since October 2012. Desperate to keep his home, he felt he had nowhere else to go: “I don’t have my parents [anymore], my three brothers have families. I don’t have anywhere to go. I don’t want to be a burden.” Human Rights Watch interview with Alfonso Díez Pequeño, Collado Villalba (outside Madrid), May 22, 2013.

<sup>107</sup> Human Rights Watch interview with Amanda Reyes Gamboa, Madrid, May 23, 2013.

<sup>108</sup> *Ibid.*

## Children

Save the Children Spain estimates that 82 percent of families affected by evictions have children in the household. This experience, the organization has said, “can have a devastating impact on the lives of children and seriously affect their fundamental rights to education, health, and protection.”<sup>109</sup>

In October 2013, Council of Europe Commissioner for Human Rights Nils Muižnieks expressed concern over the “considerable impact of evictions on the enjoyment by children of their human rights.” Having visited Spain in June 2013, Muižnieks noted that evictions generate “high levels of stress and seriously disrupt children’s lives, especially their education and health ... usually result in worse housing conditions ... [and] have often led to the social exclusion of evicted persons, including children.”<sup>110</sup>

Many of those interviewed by Human Rights Watch expressed concern over the psychological impact on their children. Daniela Melo, a single mother of three, who was evicted in May 2011 for defaulting on her mortgage payments, said her oldest son, now 14 years old, started having trouble at school when they faced foreclosure and eviction. “He knew everything ... the school recommended he see a psychologist.”<sup>111</sup> She also went into therapy and took prescription medicine:

I felt like I was in a black hole. But I have to have the strength to keep going. I have three kids, I don’t have the luxury of being depressed. I took medicine for six months to help me sleep and for headaches. Now I don’t want to take anything, I want to stay focused for my children.<sup>112</sup>

Ana M., 54 years old, spent ten months living with relatives in Andalusia after she and her daughter were evicted. She began taking anti-depressants and seeing a psychologist. On

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<sup>109</sup> Save the Children Spain, “Muchos anuncios, pocos avances. Informe de evaluación del cumplimiento de la AGENDA DE LA INFANCIA 2012- 2015: un año después de las elecciones generales,” [http://www.savethechildren.es/docs/Ficheros/623/Muchos anuncios pocos avances vOK.pdf](http://www.savethechildren.es/docs/Ficheros/623/Muchos%20anuncios%20pocos%20avances%20VOK.pdf) (consultado el 7 abril de 2014) p.6.

<sup>110</sup> Report by Commissioner for Human Rights of the Council of Europe following his visit to Spain from 3 to 7 June 2013, October 9, 2013, CommDH (2013)18, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2389885&SecMod e=1&DocId=2077824&Usage=2> (accessed October 10, 2013), para. 28.

<sup>111</sup> Human Rights Watch interview with Daniela Melo, Madrid, June 27, 2013.

<sup>112</sup> Ibid.

her daughter's birthday, “she told me that the best present would be to return to her school outside Barcelona. I realized I hadn’t been thinking about her.”<sup>113</sup>

Eva María Perancho, 31 years old, said her main goal was making sure her two children, aged 6 and 4, didn’t have to live through an eviction:

My daughter dreamed that the police came and took our home away. It seems crazy, but children talk about this at school. Young as they are, they watch the news. Even her teacher asked us about it.<sup>114</sup>

As discussed in-depth below, many families remain saddled with significant debt following repossession by the banks. The immediate and long-term impact on children living in overly-indebted families is deeply worrying. Parents we interviewed, including single mothers scraping by, stressed that they did everything possible to provide for their children’s basic needs. Many also received welfare assistance from the state. It is clear, however, from the testimonies that children suffer the emotional toll of living in households facing extreme financial stress. This can affect their overall well-being and development, leading to problems at school and in social settings.

In extreme cases, there is an immediate impact on children. María F., a single mother of three, was still living in her apartment when we met in May 2013. It had been auctioned and awarded to the bank in the preceding month. “My oldest son [11 years old] is not well, he can’t concentrate, he’s worried about what’s going to happen,” she said. María F.’s husband left not long after they signed the mortgage in 2006; she lost her job in 2009 and has had severe economic difficulties ever since. They had not had gas or electricity for months in the apartment when we spoke because she cannot afford to pay off the debt to the utility companies. “We use candles, the children do their homework, and we go to bed early,” she explained.<sup>115</sup>

The Convention on the Rights of the Child requires that states take appropriate measures to assist parents and others responsible for children to secure a standard of living

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<sup>113</sup> Human Rights Watch interview with Ana M., Granollers (outside Barcelona), July 4, 2013.

<sup>114</sup> Human Rights Watch interview with Eva María Perancho and Alfonso Ugal, Barcelona, October 8, 2013.

<sup>115</sup> Human Rights Watch interview with María F., Collado Villalba (outside Madrid), May 22, 2015.

adequate for their full development and, in case of need, “provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”<sup>116</sup> The Committee on the Rights of the Child has previously expressed concern when a country provided insufficient assistance to families “to prevent the circumstances related to evictions of families with children from their places of residence by court order, which often further deteriorates the living conditions of children and their families.”<sup>117</sup>

In an in-depth study on responses to over-indebtedness, the World Bank remarked that “the children of distressed debtors ... are especially deserving of compassion and relief,” noting further that the impacts on these children can manifest themselves “later in life in the form of poor socialization due to social exclusion, as well as unconstructive attitudes toward financial responsibility, paying taxes, and productive engagement.”<sup>118</sup>

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<sup>116</sup> Convention on the Rights of the Child, article 27(3).

<sup>117</sup> UN Committee on the Rights of the Child, Concluding Observations: Latvia, UN Doc. CRC/C/LVA/CO/2 (2006), para. 48.

<sup>118</sup> The World Bank, Insolvency and Creditor/Debtor Regimes Task Force, Working Group on the Treatment of Insolvency of Natural Persons, Report on the Treatment of The Insolvency of Natural Persons, 2013, [http://siteresources.worldbank.org/INTGILD/Resources/WBInsolvencyOfNaturalPersonsReport\\_01\\_11\\_13.pdf](http://siteresources.worldbank.org/INTGILD/Resources/WBInsolvencyOfNaturalPersonsReport_01_11_13.pdf), (accessed March 21, 2014), para. 75.



### **III. State and Bank Responses**

The government of Prime Minister Mariano Rajoy has taken steps to address the mortgage crisis. Two Royal Decree-Laws, in March and November 2012 respectively, and a parliamentary law in May 2013 have implemented measures to protect temporarily certain groups against evictions and encourage banks to help provide affordable housing; amend legal proceedings to ensure the right to contest unfair contractual obligations; and provide guidelines for debt relief and, in some circumstances, debt cancellation.

However, the criteria for benefitting from these various measures are narrowly drawn. Some of the criteria are arbitrary and do not comport with international law. In this chapter, we analyze the steps the government has taken with respect to evictions, court procedures for challenging foreclosures, ensuring accountability, and providing affordable housing. In the following chapter, we address the situation of over-indebted individuals and families as a result of the mortgage crisis as well as state response. In both chapters, we also reflect on the answers from seven out of eleven major Spanish banks we sought information from in letters of inquiry.

#### **Limited Protection against Eviction**

In November 2012, and in response to significant public pressure and following two suicides within one month related to evictions, the government adopted a Royal Decree-Law imposing a two-year moratorium on evictions for certain categories of families considered especially vulnerable. Only those who meet one of the following profiles can benefit:

- “Numerous family” as prescribed by law (three children);
- A one-parent family with two children;
- A two-parent family with a child three years or younger;
- A family unit with a member with a disability certified at 33 percent, a dependency situation, or illness that prevents him or her from working;
- A family unit in which the mortgage debtor is unemployed and has exhausted unemployment benefits;

- A family unit in which there are one or more persons related to the debtor or his or her spouse who are disabled, in a dependent situation, gravely ill, or otherwise incapacitated, either temporarily or permanently, and unable to work; or
- A family unit which includes a victim of domestic violence who resides in the home.<sup>119</sup>

Any such family unit is only eligible if they also meet all the following requirements:

- The combined earnings of the family unit are no greater than €1,597 per month;
- The family unit has experienced, in the four years preceding the request to benefit from the moratorium, a significant change in its economic circumstances;
- The monthly mortgage payment amounts to over 50 percent of the combined net earnings of all members of the family unit; and
- The mortgage in question was acquired for the purposes of purchasing the home in which the family unit resides and debtor(s) does/do not own other properties.<sup>120</sup>

The latter criterion excludes individuals and families who took out mortgages on their habitual residence to finance home improvements or the family business.

The May 2013 law broadened these criteria slightly to provide protection against evictions for families including persons with disabilities or serious illnesses, and created the possibility for those already benefiting from the moratorium to extend its life for a further six months.<sup>121</sup> Default interest rates continue to accrue during the period of moratorium.

Many analysts, including Spain's national human rights institution, *Defensor del Pueblo*, have criticized these criteria as arbitrary and too narrow to provide effective protection

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<sup>119</sup> Real Decreto-ley 27/2012, de 15 noviembre, de medidas urgentes para reforzar la protección a los deudores hipotecarios, Boletín Oficial del Estado, No. 276, 16 November 2012, article 1 (2).

<sup>120</sup> Ibid., article 1 (3).

<sup>121</sup> Whereas the November 2012 decree established the maximum combined family income as three times the IPREM (currently €532.41 /month), Law 1/2013 increased this maximum for four times the IPREM in family units including persons with disabilities, and five times the IPREM in cases where the debtor suffers from brain paralysis, mental illness or mental incapacity with a recognized disability of or greater than 33 percent, in cases where the debtor has a recognized physical disability of or greater than 65 percent, and in cases where the debtor or his or her caretaker has a serious illness that prevents him or her from gainful employment.

against eviction.<sup>122</sup> The European Anti Poverty Network (EAPN) and the Federation of associations assisting the homeless (*Federación de entidades de apoyo a las personas sin hogar*, FePsh), in a June 2013 position paper on the right to housing, said the May 2013 law persisted in committing “unnecessary errors” such as narrowly defining those eligible for the moratorium.<sup>123</sup>

Human Rights Watch interviewed a number of people facing eviction who do not qualify for the moratorium. Luzmila M., for example, the single mother of a 13-year-old girl, is not eligible because she only has one child, who is over three years of age.<sup>124</sup>

Given the continuing economic crisis, the two-year period may prove insufficient. The World Bank, in an in-depth study on insolvency regimes, noted the use of moratoria to assist homeowners in retaining possession of their homes in the post-2007 economic downturn. The study argued that moratoria are more likely to succeed “where they are in place for as long as the relevant debtors are affected by the crisis.”<sup>125</sup>

The government measures to suspend temporarily evictions for certain categories of people raise serious questions about equitableness. The measures rightly identify certain particularly vulnerable categories of people, including people with disabilities and victims of domestic violence. However, some criteria for benefitting from the moratorium do not comport with international human rights law. The criteria related to protection against eviction depending on the number and age of children in the household unjustifiably distinguish between children on the basis of age, number of siblings, and whether the household is one-parent or two-parent. A two-parent household with a child 3 years or younger, for example, can benefit from the moratorium, while the two-parent family with a child 4 years or older living next door cannot. The government has not adequately explained this distinction. Under international law, all persons under the age of 18 are considered children, entitled to the rights and protections laid out in the Convention on the Rights of the Child, including the right to shelter. Human Rights Watch believes that the

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<sup>122</sup> Defensor del Pueblo, “Estudio sobre Crisis Económica e Insolvencia Personal: actuaciones y propuestas del Defensor del Pueblo. Actualización a octubre de 2013,” October 2013, [http://www.defensordelpueblo.es/es/Documentacion/Publicaciones/monografico/Documentacion/Crisis\\_economica\\_e\\_insolventia\\_personal.pdf](http://www.defensordelpueblo.es/es/Documentacion/Publicaciones/monografico/Documentacion/Crisis_economica_e_insolventia_personal.pdf) (accessed November 15, 2013), p.16.

<sup>123</sup> FN 123: ...quoted in EAPN Spain, “Position Paper,” June 2013, p.11.

<sup>124</sup> Human Rights Watch interview with Luzmila M., Madrid, May 23, 2013.

<sup>125</sup> The World Bank, Report on the Treatment of The Insolvency of Natural Persons, para. 337.

government could and should have adopted more inclusive criteria that better reflected its human rights responsibilities.

At least two major Spanish banks assert that they themselves have adopted more generous criteria than that set by the government. In its reply to our letter of inquiry, BBVA said it created in January 2013 a Committee for the Protection of the Mortgage Debtor to analyze cases in which there exist “**any circumstances of risk of social exclusion not covered by the law.**”<sup>126</sup> Among the criteria BBVA cites as different or in addition to the ones established in the government moratorium are the presence of any child under the age of sixteen and the presence of any person over the age of 65. BBVA also said it does not apply any of the economic criteria laid out in the government moratorium.<sup>127</sup>

Santander stated in its letter that it “decided to suspend evictions of any mortgage debtor from his principal residence, irrespective of whether the debtor met or not the circumstances required for special vulnerability.”<sup>128</sup>

A number of autonomous regional governments have also taken steps. The autonomous government of Andalusia adopted in April 2013 a decree allowing it to seize homes owned by banks for a maximum period of three years to ensure that families living in those homes will not be evicted.<sup>129</sup> This measure can only be applied in cases in which the family meets a number of requirements, including proof of a decline in living standards since the mortgage was signed and a net monthly income of less than €1,597, and the autonomous government will pay the bank per year 2 percent of the value of the property.<sup>130</sup> The decree also empowers the autonomous government to impose fines of up to €9,000 on banks and

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<sup>126</sup> Memo from Antoni Ballabriga, Global Head of Corporate Responsibility & Reputation, BBVA, February 29, 2014, p. 7. Emphasis in original.

<sup>127</sup> *Ibid.*, p. 7 and Annex II, p. 17.

<sup>128</sup> Email from Federico Gómez, Global Head of Sustainability, Santander, February 25, 2014.

<sup>129</sup> Lourdes Lucio, “Andalucía expropiará viviendas a los bancos para impedir los desahucios,” *El País*, April 9, 2013, [http://ccaa.elpais.com/ccaa/2013/04/09/andalucia/1365505930\\_353114.html](http://ccaa.elpais.com/ccaa/2013/04/09/andalucia/1365505930_353114.html) (accessed April 9, 2013).

<sup>130</sup> The law sets the maximum monthly income at three times the Public Income Index for Multiple Purposes (*Indicador Público de Renta de Efectos Múltiples, IPREM*), which has been fixed at €532.51 since 2010. The IPREM is used as the reference index for the determination of need with respect to public assistance measures. Minimum wage in 2014 was set at €645.30, the same as in 2013. Real Decreto 1046/2013, de 27 de diciembre, por el que se fija el salario mínimo interprofesional para 2014. <http://www.boe.es/boe/dias/2013/12/30/pdfs/BOE-A-2013-13764.pdf> (accessed April 30, 2014). According to the National Statistics Institute INE, median monthly income in 2011 was €1,607.27 (the most frequent monthly income was €1291.66. “El sueldo anual más frecuente en España apenas supera los 15.500 euros,” *EFE*, June 28, 2013, <http://www.elconfidencial.com/economia/2013/06/28/el-sueldo-anual-mas-frecuente-en-espana-apeenas-supera-los-15000-euros-123935> (accessed February 14, 2014).

their affiliates if they fail to put foreclosed properties on the rental market. In June 2013, the autonomous government of Navarra adopted a similar law.

The central government subsequently filed cases against both measures with the Constitutional Court, which has suspended their implementation while it examines the cases.<sup>131</sup> In October 2013, the Andalusian government adopted an identical law to replace the decree; the central government appealed the law to the Constitutional Court, which suspended implementation of the law in January 2014. At this writing, the Constitutional Court had not ruled definitively on any of the appeals.

## Challenging Foreclosures in Court

Until very recently, homeowners who had signed mortgage contracts with unfair stipulations had virtually no recourse against foreclosure. The Code of Civil Procedures (*Ley de Enjuiciamiento Civil*, LEC) established that the only defense against foreclosure was having paid in full the debt, an error in the calculation of the debt, or “the existence of another guarantee or mortgage ... registered before the security which is the subject of the proceedings, together with the corresponding registration certificate.”<sup>132</sup> There was no way to allege unfair clauses.

In March 2013, the Court of Justice of the European Union (EUCJ) ruled that these limitations violated EU consumer protection regulations.<sup>133</sup> The case concerned Mohamed Aziz, a Moroccan citizen who in 2007 signed a 33-year mortgage for €138,000 with CatalunyaCaixa. The mortgage included the standard right of the bank to reclaim the entire debt for failure to pay any part of the principal or interest, and provided for an annual default interest rate of 18.75 percent. In March 2009, CatalunyaCaixa initiated foreclosure proceedings after almost a year in which Aziz had stopped paying, seeking recovery of €139,764.76 in principal and

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<sup>131</sup> María Fabra, “El Constitucional admite el recurso del Gobierno contra el decreto antidesahucios,” *El País*, July 11, 2013, [http://politica.elpais.com/politica/2013/07/11/actualidad/1373544067\\_870065.html](http://politica.elpais.com/politica/2013/07/11/actualidad/1373544067_870065.html) (accessed July 16, 2013); “El Constitucional suspende la ley andaluza que permitía expropiar viviendas,” *diariojuridico.com*, January 17, 2014, <http://www.diariojuridico.com/actualidad/noticias/el-constitucional-suspende-la-ley-andaluza-que-permitia-expropiar-viviendas.html> (accessed February 17, 2014); “El Tribunal constitucional tumba el plan antidesahucios de Navarra,” *abc.es*, November 12, 2013, <http://www.abc.es/economia/20131112/abci-constitucional-navarra-desahucios-201311121830.html> (accessed April 28, 2014).

<sup>132</sup> Code of Civil Procedures (*Ley de Enjuiciamiento Civil*, LEC), article 695 (1).

<sup>133</sup> Judgment of the Court (First Chamber), *Mohamed Aziz v. Caixa d’Estalvis de Catalunya, Tarragona i Manresa (CatalunyaCaixa)*, Case C-415-11, March 14, 2013, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=135024&pageIndex=0&doclang=en&mode=lst&dir=&cc=first&part=1&cid=3571718> (accessed April 20, 2013).

accrued interest, plus €41, 902.21 in interest and costs. The court in Martorell, in Catalonia, foreclosed on the house, which was auctioned and awarded to the bank at 50 percent of its value in July 2010. Aziz and his family were evicted in January 2011.

The EUCJ found that the inability of the competent court to assess whether the contract included unfair clauses made it “impossible or excessively difficult” for consumers to enjoy the protections guaranteed by the 1993 EU Directive on unfair terms in consumer contracts.<sup>134</sup> The Spanish judge that referred the case to the EUCJ would, in May 2013, annul three clauses of the mortgage, including the 18.75 percent default interest rate and the right of the bank to call in the totality of the loan (a 33-year contract) in the event of default within a limited period of time (*vencimiento anticipado* or acceleration clause).<sup>135</sup>

In response to the EUCJ ruling, the Spanish government reformed the procedure in May 2013 to allow judges to examine whether the mortgage contract contained any unfair clauses that “constitute the basis for the foreclosure” or “determined the payable amount.”<sup>136</sup> The explanatory notes clarify that the court may do so *ex officio* (on its own initiative) or at the request of one of the parties. If the court determines that the contract contained one or more unfair clauses, it may rule that the foreclosure cannot proceed, or that the foreclosure may proceed without application of the fraudulent stipulations.<sup>137</sup>

The May 2013 law created a window of 30 days for homeowners with open foreclosure proceedings to appeal to the courts to assess whether their mortgage contracts contained unfair terms.<sup>138</sup> In response, the PAH created an “emergency kit” of guidelines and documents to help people file the necessary paperwork, and held special training sessions to inform people about the terms of the reform and provide legal guidance.<sup>139</sup> Lawyers in Madrid and

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<sup>134</sup> Judgment of the Court, Mohamed Aziz v. *Caixa d'Estalvis de Catalunya, Tarragona i, Manresa*, para. 63; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31993L0013&model=guichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31993L0013&model=guichett) (accessed April 20, 2013).

<sup>135</sup> Jesús García, “El juez declara abusiva la hipoteca del ‘caso Aziz,’” *El País*, May 3, 2012, [http://ccaa.elpais.com/ccaa/2013/05/02/catalunya/1367520137\\_907887.html](http://ccaa.elpais.com/ccaa/2013/05/02/catalunya/1367520137_907887.html) (accessed May 3, 2013).

<sup>136</sup> Law 1/2013 of 14 May on measures to strengthen the protection of mortgage debtors, restructuring of debt and social rent, Chapter III, article 7 (14) (1) (4) modifying article 695 of the LEC.

<sup>137</sup> *Ibid.*, Chapter III, section (7) 3.

<sup>138</sup> *Ibid.*, First Transitory Clause.

<sup>139</sup> The “emergency kit” can be viewed online at <http://afectadosporlahipoteca.com/documentos-utiles/#kit-emergencia> (accessed August 1, 2013).

Barcelona told Human Rights Watch that relatively few people took advantage of the window of opportunity, blaming the failure of the government to sufficiently publicize the reform.<sup>140</sup>

In August 2013, the Socialist Party filed a motion against this and other articles of the May 2013 law with the Constitutional Court; the Court ruled the motion admissible in late September 2013, but at this writing had not yet reached a ruling.<sup>141</sup>

## Affordable Housing

Civil society actors like the PAH have long argued that banks should make repossessed, empty housing available at an affordable price to those who have been evicted. PAH members and activists routinely try to negotiate such an arrangement—commonly called *alquiler social*, or “social rent”, including to allow people to remain in their own apartments following foreclosure and repossession.

Indeed, there are general calls from many quarters for banks to be obligated to make empty properties available for low-income rental housing.<sup>142</sup> This is one of the proposals from the Tercer Sector, a platform of non-profit organizations and charities in Catalonia.<sup>143</sup> Jaume Fornt, the director of the Catalanian government’s housing agency, noted that the solution to the lack of social housing is not construction of new units, but rather “taking advantage of empty housing in the hands of the bank.”<sup>144</sup>

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<sup>140</sup> Human Rights Watch interviews with Rafael Mayoral, Madrid, June 26, 2013; Javier Rubio, Madrid, June 25, 2013; Eva Correidora, Barcelona, June 28, 2013; and Dionisio Moreno, Barcelona, July 2, 2013.

<sup>141</sup> “El TC admite a trámite el recurso del PSOE contra la Ley Antidesahucios del Gobierno,” September 30, 2013, *legaltoday.com*, <http://www.legaltoday.com/actualidad/noticias/el-tc-admite-a-tramite-el-recurso-del-psoe-contra-la-ley-antidesahucios-del-gobierno> (accessed May 14, 2014).

<sup>142</sup> Not limited to properties held by banks, but in November 2013 the UN Special Rapporteurs on adequate housing, and on extreme poverty and human rights, and the Independent Expert on the effects of foreign debt on the full enjoyment of all human rights jointly wrote to the government of Spain noting how in the economic crisis those living in poverty were experiencing particularly severe impacts on the right to adequate housing, “despite the fact that there are many physically available empty dwellings in Spain”. See AL Housing (2000-9) Poverty (1998-11) Debt (2000-9) ESP 5/2013, available at [https://spdb.ohchr.org/hrdb/24th/public\\_-\\_AL\\_Spain\\_15.11.13\\_%285.2013%29.pdf](https://spdb.ohchr.org/hrdb/24th/public_-_AL_Spain_15.11.13_%285.2013%29.pdf) (accessed April 30, 2014). The joint communication sought a response to information received concerning “the current and potential impact of the economic crisis and the austerity measures deployed to address it, in particular the effects the enjoyment of the human rights to adequate housing and to an adequate standard of living, especially for people living in poverty in Spain.”

<sup>143</sup> Tercer Sector, “Un parque de vivienda de alquiler social. Una asignatura pendiente en Cataluña,” *Dossiers del Tercer Sector*, no. 24, March 2013.

<sup>144</sup> Human Rights Watch interview with Jaume Fornt, director of the Agència de l’Habitatge, Barcelona, July 2, 2013.

In November 2012, the government created a “Social Housing Fund” (*Fondo Social de Vivienda, FSV*) of bank-owned properties for people who had been evicted from their primary residence as a result of mortgage default. Only those meeting the narrow requirements for the moratorium on evictions established in the same decree could benefit.<sup>145</sup> Law 1/2013, in May 2013, consolidated this mandate and stipulated that the criteria for accessing the Fund could be revisited and broadened six months after the law entered into effect. As this report was going to print, the commission charged with monitoring the fund announced new eligibility criteria. Importantly, all families with children may now be eligible. Individuals and families who do not meet the stipulated criteria may now apply for housing through the fund if supported by reports from social services.<sup>146</sup>

The FSV was created in January 2013 with roughly 6,000 units provided by 33 different banks; the Fund is managed by the banks themselves. The minimum rent is set at €150 per month, while the maximum is €400 per month. Individuals can only benefit through the Fund regarding properties owned by the same bank that evicted them. In 2013, the first year of its existence, the Fund received 1,537 requests and awarded 780 homes.<sup>147</sup> Explaining these low numbers, Carme Trilla, of Càritas Barcelona, said, “It’s not that the Fund is not necessary, it’s that it was poorly conceived, [and] set up terribly.”<sup>148</sup> Observers such as Trilla, the PAH, and others point to the restrictive criteria, the poor quality of the units banks have made available to the Fund, and the fact that in many instances, taking advantage of the offer means relocating far from a family’s habitual neighborhood and social networks.

Human Rights Watch spoke with a number of people who were living in bank-owned apartments or had reached an agreement for *alquiler social* but had not yet been assigned an apartment. None had achieved this by going through the Fund, rather they negotiated directly with the bank. Several of those waiting for an apartment with *alquiler social* said the bank refused to show them the apartment before they signed the contract.

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<sup>145</sup> Real Decreto-ley 27/2012, de 15 noviembre, de medidas urgentes para reforzar la protección a los deudores hipotecarios, Boletín Oficial del Estado, No. 276, 16 November 2012, disposición adicional única.

<sup>146</sup> “El Fondo Social de Viviendas se amplía a jubilados que hubieran asumido la deuda de sus hijos,” *20minutos.es*, May 12, 2014, <http://www.20minutos.es/noticia/2136133/0/fondo-social-viviendas/requisitos/ampliados/> (accessed May 13, 2014).

<sup>147</sup> *Ibid.*

<sup>148</sup> Human Rights Watch interview with Carme Trilla, Barcelona, July 1, 2013.



In our letter of inquiry to eleven banks in Spain we asked about the criteria they applied in determining whether and where to grant *alquiler social*. None of the seven banks that replied provided a detailed answer to this question, but all said they do offer such arrangements, and most provided figures. BBVA, which has provided the FSV with 894 properties, said it also has *alquiler social* agreements with 300 families and is planning to give a further 500 properties over to non-profit organizations to manage as low-rent properties. BBVA stressed in its reply that it has been, since the creation of the Fund, among those who have “most pushed for ... a greater flexibility in the criteria for access to the homes, with the objective of letting in the greatest number of beneficiaries possible.”<sup>149</sup>

Bankia has made available 1,000 properties to the FSV, with 90 of these adjudicated in 2013. In addition, in 210 cases Bankia has granted *alquiler social* in the family’s repossessed home.<sup>150</sup> Sabadell, which has made available 260 properties to the FSV, said 3,637 families are currently living in Sabadell properties paying *alquiler social*, though it was unclear how many of these were allowed to remain in their repossessed homes and how many were relocated.<sup>151</sup> Santander said that in addition to the 590 properties given to the FSV, the bank offers “low-rent housing contracts on principal residences owned by the bank to certain groups who find themselves in circumstances of special vulnerability” under the terms of the Code of Good Practices, without specifying how many.<sup>152</sup>

NCG Banco S.A., commonly known as Novagalicia, reported offering 23 low-rent contracts in 2013.<sup>153</sup>

In its reply, CaixaBank described its Decentralized Solidarity Rent (*Alquiler Solidario Descentralizado*) program providing low-rent contracts to people who “in cases of foreclosure or *datio in solutum* of their principal residence, and given their situation of social exclusion, cannot pay a standard rent.” The program has facilitated such contracts for 1,787 homes since it began in 2012.<sup>154</sup> Finally, Citi stated in its reply that “in extreme

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<sup>149</sup> Memo from Antoni Ballabriga, Global Head of Corporate Responsibility & Reputation, BBVA, February 29, 2014.

<sup>150</sup> Letter from José Sevilla, General Director of the Presidency, Bankia, February 19, 2014.

<sup>151</sup> Letter from Xavier Aspachs Alegre, Mortgage Resolution Director, Sabadell, February 28, 2014.

<sup>152</sup> Email from Federico Gómez, Global Head of Sustainability, Santander, February 25, 2014.

<sup>153</sup> Letter from Fernando Filgueiras, Institutional Relations, March 19, 2014

<sup>154</sup> Letter from Àngel Pes Guixa, Deputy General Director of Corporate Social Responsibility and Reputation, CaixaBank, February 27, 2014.

cases, where Citi was able to prove a delicate customer situation, we allowed the family to stay in the property for a social rent.”<sup>155</sup>

Banks have provided little information as to the criteria and process followed in determining whether and where to grant *alquiler social*. However, the experience of people Human Rights Watch interviewed raises concerns that the process fails to afford those seeking *alquiler social* a reasonable opportunity of putting their case to the bank. Furthermore it’s not clear to what extent, if at all, the process requires the bank to consider the impact of the determination on the customer’s human rights that are pertinent to the families’, including where applicable children’s, personal security and well-being. Procedural safeguards for determining applications for *alquiler social* should at a minimum help to ensure that a fair balance is to be struck between respecting the rights of the individual in need of housing, and the proprietary and financial interests of the bank as holders of the housing units.

Hilda M., a 38-year-old single mother of five, finally got *alquiler social* from her bank in November 2012, after her story made the news and twelve people guaranteed her rent. The contract with the bank is only for one year, though renewable.

Luisa P., a 32-year-old single mother, has asked her bank for debt forgiveness and *alquiler social*. She is desperate to remain in her neighborhood so her 6-year-old son with diabetes can remain in the same school where the on-premises nurse can give him insulin shots during school hours. “If he’s in a school without a nurse, I have to go give him the shots, so I wouldn’t be able to work ... [or] I’d have to pay for transportation if we lived far away.”<sup>156</sup> Her son’s father left her in 2007, a year after they signed the mortgage. In 2013, only approximately 3.5 percent of schools in the Madrid region had a nurse.<sup>157</sup>

Daniela, a 32-year-old unemployed single mother of three, left her repossessed apartment just before she was to be evicted in spring 2012 to avoid additional trauma for her children. Her bank subsequently offered her an apartment with an *alquiler social* of €250 per month,

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<sup>155</sup> Letter from Julio Carlavilla, Public Affairs Officer, Citi in Spain, February 19, 2014.

<sup>156</sup> Human Rights Watch interview with Luisa P. (pseudonym), Madrid, May 24, 2013.

<sup>157</sup> “ Cuando la elección de un colegio que nos guste para nuestros hijos es imposible,” *20minutos.es*, April 26, 2013, <http://blogs.20minutos.es/madrereciente/2013/04/26/cuando-la-eleccion-de-un-colegio-que-nos-guste-para-nuestros-hijos-es-practicamente-imposible/> (accessed March 24, 2014).

but in another area of Madrid. Daniela believes that it is in the best interest of her children to keep them in the school they currently attend because of the psychological impact of the stress around the eviction. On recommendation of the school, her older son began seeing a psychologist. So if they move to another area of the city, she said she would have to spend extra money every month on transportation so her older children can continue attending their current school. Daniela also pointed out that in her current situation she can rely—as so many low-income women heads of household must do—on neighbors for help with childcare when she works, something she is not guaranteed if she moves. She fears she would end up spending more money on childcare and transportation than the €400 she currently spends on rent in the neighborhood.<sup>158</sup>

Adopting a gender perspective in law and policy requires taking into consideration the way gendered roles determine responsibilities and choices. Women like Luisa P. and Daniela face particular challenges, including greater childcare responsibilities, which affect the exercise of their right to adequate housing as well as their ability to secure their livelihood and autonomy. In keeping with the calls of UN special rapporteurs on the right to adequate housing, government and bank policy should take into consideration explicitly these particular challenges. None of the responses from banks to our letter of inquiry provided sufficient information to discern whether these institutions have specific policies in this spirit.

## Accountability

In 2010, PAH lawyers helped over 50 plaintiffs—most of them Ecuadorans—file a lawsuit against Enrique Caño, the owner of the *Central Hipotecaria del Inmigrante*, for fraud. The case is still in the investigative phase, though the prosecutor (*fiscal*) assigned to the case filed on February 6, 2014, for the case to be closed. At this writing, the investigative judge had not yet decided on the prosecutor’s motion or the plaintiff’s appeal against it.<sup>159</sup> When he testified in January 2012, Caño acknowledged that a number of banks paid him a commission for bringing in mortgage clients and said that the banks were aware of the “chain mortgages” he organized among these clients.<sup>160</sup>

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<sup>158</sup> Ibid.

<sup>159</sup> Human Rights Watch telephone interview with Rafael Mayoral, PAH lawyer, Madrid, March 25, 2014.

<sup>160</sup> Human Rights Watch with Rafael Mayoral, PAH lawyer, Madrid, April 16, 2013; Roxana Cazco, “España: Ex propietario de una inmobiliaria reconoció que recibía comisiones de los bancos,” *El Comercio*, January 18, 2012, [http://www.elcomercio.com/mundo/ecuatorianos-en-el-mundo/Imputado-reconocio-recibia-comisiones-bancos\\_o\\_629937123.html](http://www.elcomercio.com/mundo/ecuatorianos-en-el-mundo/Imputado-reconocio-recibia-comisiones-bancos_o_629937123.html) (accessed April 20, 2013).

To our knowledge, the judiciary has not taken any *ex officio* action to investigate and prosecute alleged fraudulent practices by financial institutions and real estate agencies. On October 31, 2013, the PAH filed a suit with the Antifraud section of the National Court (*Audiencia Nacional*), Spain's highest criminal jurisdiction, against Union de Créditos Inmobiliarios (UCI).<sup>161</sup> UCI is a financial intermediary specialized in mortgages created by Santander and PNB Paribas.<sup>162</sup> The suit, filed on behalf of 21 mortgage debtors, names 19 directors and staff of UCI, Santander, and PNB Paribas; it alleges that UCI engaged in fraud when it collaborated with real estate agencies to target immigrants, among others with few resources, without conducting diligent risk assessment and without providing clear information about the mortgage terms.<sup>163</sup> In March 2014, the PAH added 40 plaintiffs to the complaint, and lodged a separate complaint against Credifimo, owned by CaixaBank, with another 40 plaintiffs. At this writing, there had been no developments in the case.<sup>164</sup>

Neither the central government nor parliament has conducted any in-depth inquiry into banking practices with respect to mortgages, or into the role of intermediaries such as real estate agencies. A subcommittee created in 2011 within the Committee on Housing in the lower house of parliament was dissolved (and the housing committee eliminated) with the November 2011 elections and the new legislature. In April 2012, the Committee on Economy and Competitiveness in the lower house of parliament created an 11-member subcommittee on “transparency of information about financial and mortgage products.” The subcommittee adopted a nine-page report in November 2013 with recommendations largely limited to suggestions to lending institutions about how to better inform clients about the terms of loans. The report emphasizes that any future legislative reforms must take into account “fundamental principles” of Spanish law: individual responsibility, the presumption of the validity of consent, and, the “cornerstone” of Spain's legal system, the principle of *pacta sunt servanda*. This latter refers to the absolute obligation to fulfill contracts.<sup>165</sup>

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<sup>161</sup> Pedro Águeda, “Anticorrupción estudia una denuncia contra Botín por sus hipotecas de alto riesgo,” *eldiario.es*, November 20, 2013, [http://www.eldiario.es/politica/Anticorrupcion-estudia-denuncia-Botin-hipotecas\\_o\\_198781107.html](http://www.eldiario.es/politica/Anticorrupcion-estudia-denuncia-Botin-hipotecas_o_198781107.html) (accessed February 14, 2014).

<sup>162</sup> Union de Créditos Inmobiliarios (UCI) website, accessed May 14, 2014, <http://www.uci.pt/produtos/infonr.asp?pc=nada&>.

<sup>163</sup> “Denuncia por la Comercialización de Hipotecas Basura (subprime) en España Ante la Audiencia Nacional, contra Unión de Créditos Inmobiliarios (UCI), y las entidades matrices y colaboradoras (Banco Santander, BNP Paribas, Valtecnic)” executive summary, October 31, 2013. On file with Human Rights Watch.

<sup>164</sup> Human Rights Watch telephone interview with Rafael Mayoral, PAH lawyer, Madrid, March 25, 2014.

<sup>165</sup> Informe de la subcomisión sobre la transparencia en la información de los productos financieros e hipotecarios de las entidades de crédito, November 2013, <http://www.legaltoday.com/files/File/pdfs/INFORME.pdf> (accessed December 9, 2013), para. 4.

Some regional parliaments, including in Catalonia, Extremadura, and Galicia, have instituted commissions of inquiry on regional banks; at this writing they were all either ongoing or had not published final conclusions. In a July 2013 hearing of the Catalanian parliament's commission of inquiry, the former director of CatalunyaCaixa acknowledged "mistakes" in granting mortgages. He added that if the government had taken measures to limit mortgage lending in the years before the crisis hit, it would have been like "someone going to a party and asking everyone to stop drinking."<sup>166</sup>

In January 2013, Luis Solórzano Verdugo, an Ecuadoran national legally residing in Spain, filed a complaint against Spain with the European Court of Human Rights. He alleges that the procedures for foreclosures and evictions at that time violated his rights to a fair trial, to privacy and family life, to an effective remedy, and to freedom from discrimination. At this writing, the Court had not yet ruled on the admissibility of the complaint.<sup>167</sup>

Criticism that the Bank of Spain, the national central bank and supervisor of the banking system, had failed to rein in irresponsible lending practices during the boom years was accentuated in January 2013 when a critical internal report by the bank's own inspectors was leaked to the press. The report charged that the influence of the powerful banking industry has weakened the central bank's oversight and sanction role, going so far as to say that "the normal reaction to indications of crime is to look the other way."<sup>168</sup> Spain's national human rights institution, *Defensor del Pueblo*, has faulted the Bank of Spain's complaints office for failing to live up to its role in protecting consumers from banking misconduct, "rarely getting to the bottom of complaints ... since it generally considers issues unrelated to the solvency of credit institutions to be outside its mandate."<sup>169</sup>

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<sup>166</sup> "El ex director de CatalunyaCaixa admite que concedió hipotecas que ningún otro banco quería," *EFE*, July 8, 2013, <http://www.20minutos.es/noticia/1865971/0/catalunya/caixa/hipotecas-parlament/> (accessed December 10, 2013).

<sup>167</sup> Application 6421/13, registered with the European Court of Human Rights on January 24, 2013. Email communication from the Court, March 24, 2014. On file with Human Rights Watch.

<sup>168</sup> Iñigo de Barrón, "Los inspectores acusan al Banco de España de alterar sus conclusiones," *El País*, January 7, 2013, [http://economia.elpais.com/economia/2013/01/06/actualidad/1357509251\\_871941.html](http://economia.elpais.com/economia/2013/01/06/actualidad/1357509251_871941.html) (accessed February 6, 2014); Tobias Buck, "Bank of Spain rejects audit allegations," *Financial Times*, January 10, 2013, <http://www.ft.com/intl/cms/s/0/1c89626a-5b4e-11e2-8ccc-00144feab49a.html#axzz2sFhGcuxU> (accessed February 6, 2014).

<sup>169</sup> Defensor del Pueblo, "Crisis económica y deudores hipotecarios: actuaciones y propuestas del Defensor del Pueblo," January 2012, [http://www.defensordelpueblo.es/es/Documentacion/Publicaciones/monografico/Documentacion/Crisis\\_Hipotecas\\_2012.pdf](http://www.defensordelpueblo.es/es/Documentacion/Publicaciones/monografico/Documentacion/Crisis_Hipotecas_2012.pdf) (accessed July 5, 2013), p. 34.

In a letter of inquiry to eleven banks in Spain, Human Rights Watch asked for information about any internal investigations into lending practices. Of the seven banks that replied, only four responded to this question. BBVA stated in its detailed memo:

BBVA is aware that during **2005 and 2006** there were on occasion credit policies in the granting of mortgages that did not meet in all cases our goal to protect the interests of our clients. For this reason, **since 2007**, the bank has implemented a series of **corrective measures** in its policies with respect to the concession of mortgage loans for home purchases.<sup>170</sup>

These measures included, among others, the review and cessation of dealings with “poor quality” real estate agencies and a permanent internal audit of credit activities.

CaixaBank said the “general conclusions” of its internal auditing process “have not revealed the granting of mortgages with inadequate criteria.”<sup>171</sup> Bankia stated only that it has made its mortgage lending policies more strict with respect to, for example, the assessment of an individual’s real repayment capacity.<sup>172</sup> Santander asserted in its reply that it “has applied in the past and continues to apply a strong risk management and risk control framework.”<sup>173</sup> Neither Bankia nor Santander answered the specific issue of whether they had conducted any internal investigations.

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<sup>170</sup> Memo from Antoni Ballabriga, Global Head of Corporate Responsibility & Reputation, BBVA, February 29, 2014, p. 15. Emphasis in original.

<sup>171</sup> Letter from Àngel Pes Guixa, Deputy General Director of Corporate Social Responsibility and Reputation, CaixaBank, February 27, 2014.

<sup>172</sup> Letter from José Sevilla, General Director of the Presidency, Bankia, February 19, 2014.

<sup>173</sup> Email from Federico Gómez, Global Head of Sustainability, Santander, February 25, 2014.

## IV. Mortgage Debt and Debt Relief

Legislative measures taken in 2012 and 2013 also provide guidelines for debt relief and, in some circumstances, debt cancellation. However, this reform has not led to Spain adopting insolvency laws that create an accessible, fair, and efficient mechanism for over-indebted individuals to discharge their debt. This chapter focuses on the impact of mortgage debt on individuals, the lack of an effective debt adjustment system in Spain, and the links between both these problems and Spain's human rights obligations.

A significant majority of people who have lost their homes, including many interviewed in the course of this research, carry substantial debt that they acquired to secure adequate housing in a context in which, affordable rental or social housing was scarce, homeownership was actively promoted, and financial institutions engaged in irresponsible lending. However, the mortgage debt crisis in Spain is further exacerbated by a lack of pathways to discharge mortgage debt, for example through an accessible personal insolvency procedure. Crippling mortgage debt affects individuals and families who obtained mortgages and whose financial situation has deteriorated in the economic crisis as well as those who acquired mortgages under unfair terms or through irresponsible lending by the banks.

The severe mortgage debt overhang arises because, in part, the guarantee for a mortgage in Spain is not the property itself, but rather the creditor's current and future income and assets.

Although some individuals may be able to settle their debt through foreclosure, other individuals who were foreclosed may still have onerous debts with no real way to repay them and no option to declare insolvency.

Once the courts have ordered foreclosure, the property is auctioned. In the vast majority of cases, no private buyers make bids and the courts award the property to the bank for a certain percentage of the appraised value of the property at the time of purchase. If the value of the property awarded to the lending bank upon repossession, or the sale price if sold to a third party, is less than the total debt to the financial institution, the mortgage holder remains liable for the difference.

The value of the debt for the mortgage holder following foreclosure and auction is calculated on the basis of the value of the outstanding mortgage debt minus the amount awarded to the bank. Thus, if a mortgage holder owes the bank €180,000, and the courts awarded the apartment to the bank for a value of €70,000, the mortgage holder will still owe €110,000. In cases where the individual did not have free legal aid, which removes the onus of procedural costs, the debt amount can rise significantly as such costs can run into many tens of thousands of Euro.

The courts award properties to the bank based on a percentage, established by law, of the appraised value of the property at the time the mortgage was taken out. The current market value of the property, in these cases, is not relevant; it is not an issue of negative equity.

Until July 2011, the percentage value awarded the bank was 50 percent, such that a property valued at €100,000 at the time the mortgage was taken out would be awarded to the bank at the value of €50,000. That percentage was increased in July 2011 to 60 percent, and in May 2013 to 70 percent. Thus, a property valued at €100,000 at the time of purchase auctioned today will be awarded to the bank for €70,000.

Mercedes Nube, a 53-year-old Ecuadoran with two sons aged 18 and 13, ran into trouble paying her mortgage after her husband left her in 2006. She managed to keep up with payments through October 2007 when she stopped. “The bank kept sending me letters, and I kept going to tell them I couldn’t pay. Then they told me they would take me to court,” she explained. The apartment was eventually repossessed; a court document dated January 18, 2012 calculated her debt at €234,146 in principal and accrued interest, plus €32,475 in legal costs. The apartment was awarded to the bank at the value of €162,420, leaving Mercedes with roughly €104,000 in debt.<sup>174</sup>

Most of the people we spoke with who are living with mortgage debt have given up trying to pay it off, saying they are simply unable to do so given their meager incomes. They cannot declare insolvency and are attempting to negotiate with the banks either debt cancellation in exchange for the property (*datio in solutum*)—possible only before the property has been put up for sale—or debt forgiveness after they have definitively lost the property.

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<sup>174</sup> Human Rights Watch interview with Mercedes Nube (pseudonym), Collado Villalba, May 22, 2013.



## Impact of Debt

Significant mortgage debt has direct consequences for any debtor in their everyday lives and decisions. In Spain, as elsewhere, debtors are registered on credit agency debtors' lists accessible to retailers, real estate agencies, and landlords. Being on the list makes it difficult if not impossible to sign apartment leases, buy anything on credit, even acquire a mobile phone contract. "You're forced to live in semi-clandestinity," one activist said.<sup>175</sup> Over-indebtedness can contribute to or exacerbate a state of poverty, which has been described in human rights terms as involving "sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights."<sup>176</sup>

Indeed, governments who were called upon to defend in human rights terms the existence of personal insolvency systems that provided for the cancellation of debts in whole or in part, did so by noting they serve a rehabilitative purpose both financially and socially, preventing individuals becoming unnecessarily and permanently dependent on the social welfare system, preventing unnecessary suffering for the individual concerned, but also "a loss of production, an increased need for care and treatment, and an expansion of the grey sector of the economy."<sup>177</sup>

The exclusion of those with mortgage debts from regular financial and social forums and activities was reflected in the experiences of those Human Rights Watch interviewed. Xavier R., 49 years old, explained that he looked high and low for a rental unit when he, his wife, and three children were facing eviction, but "because we were on the debtors' list, the agencies said no. We finally found something with help from Cáritas."<sup>178</sup> Desiré had to move with her husband and two young children to her sister's small apartment until she too got help—and the three month's deposit—from Cáritas that allowed her to rent their own apartment.<sup>179</sup>

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<sup>175</sup> Human Rights Watch interview with Óscar Chaves Hernández, Federación Regional de Asociaciones Vecinales de Madrid (FRAVM), Madrid, May 20, 2013.

<sup>176</sup> Committee on Economic, Social and Cultural Rights, Poverty and the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2001/10, May 10, 2001, para. 8, <http://www2.ohchr.org/english/bodies/cescr/docs/statements/E.C.12.2001.10Poverty-2001.pdf> (accessed April 24, 2014).

<sup>177</sup> European Court of Human Rights, *Bäck v. Finland*, judgment of October 20, 2004, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61929#{\"itemid\":\[\"001-61929\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61929#{\) (accessed April 30, 2014), paras. 25-36.

<sup>178</sup> Human Rights Watch interview with Xavier R., Granollers (outside Barcelona), July 4, 2013.

<sup>179</sup> Human Rights Watch interview with Desiré Ortiz, Barcelona, July 4, 2013.

Several with serious debt also told Human Rights Watch that they feared that any money they earned from employment could be subject to a court order to garnish their wages to service their debt, and then they would not be able to use their wages to meet other basic needs. In fact, in Spain, following a reform in 2011, only income in excess of €962 per month, or €1,347 per month if the debtor has dependents, may be subjected to garnishment if the debt that is owed, is on a mortgage for one's primary residence.<sup>180</sup> Most of the people we interviewed in the course of this research were living on unemployment pay or state assistance, earning far too little to be subject to any wage garnishing. However, it was clear from the fears relayed to Human Rights Watch that those struggling with debt may not be fully aware of safeguards against unfair garnishment, and also that the threat alone of this action, even if it could not be realized, served as a disincentive to find legal, regular employment.

For example, Hilda M., a 38-year-old unemployed single mother of five, said she wanted to work in the black market to avoid her salary being touched.<sup>181</sup> Anna Olives Lloret, 34 years old, said, "I don't care if I have to work the rest of my life in the black market.... I care more about my health than anything they [the bank] can do to me."<sup>182</sup>

Over-indebtedness can have a deleterious effect on physical and mental health, and individuals living with such debt may become alienated from friends and family, either because they owe them money, or simply cannot afford or face social interactions.

Santiago R., a 51-year-old professional who earned a good living before losing his job, eloquently described the impact on his life of his debt, which he calculates at over €155,000 taking into account €113,000 mortgage debt, unpaid property taxes and condo fees, and loans from friends:

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<sup>180</sup> Real Decreto-ley 8/2011, de 1 de Julio, de medidas de apoyo a los deudores hipotecarios, de control del gasto público y cancelación de deudas de empresas y autónomos contraídas por las entidades locales, de fomento de la actividad empresarial e impulso de la rehabilitación y de simplificación administrativa, Chapter I, article 1, <http://www.boe.es/boe/dias/2011/07/07/pdfs/BOE-A-2011-11641.pdf> (accessed July 5, 2013). The Royal Decree-Law stipulates that only income in excess of 150 percent of the minimum wage can be subjected to garnishment, with this amount increasing per dependent.

<sup>181</sup> Human Rights Watch interview with Hilda M. (pseudonym), Madrid, May 24, 2013.

<sup>182</sup> Human Rights Watch interview with Anna Olives Lloret, Tàrraga, October 9, 2013.

I can't go to the dentist to fix my teeth, my glasses aren't right anymore but I can't afford to fix the prescription, I haven't bought new clothes for five years. I can't fix things if they break, like the dishwasher or my car. And I can't tell you the creative inventions I come up with for food. I make precise calculations with electricity and I ration the water. I've distanced myself from my friends. I don't accept invitations to eat at someone's house because I don't have the money to take a little something, and I can't afford to go out. I can't go visit my home village because I would have to go out with friends, treat them to a round of drinks. I go out only to take walks, otherwise I'm shut in.<sup>183</sup>

## Towards Debt Relief

The government has taken some steps towards reducing the debt burden on mortgage holders, both for those struggling to keep up payments and for those who have seen their homes repossessed due to default payments and nonetheless remain liable for significant amounts of money. However, these measures remain largely at the discretion of lending institutions. And the government has not yet reformed its insolvency law to create a fair and accessible pathway for climbing out of over-indebtedness and starting anew.

A March 2012 Royal Decree-Law created a voluntary "Code of Good Practices for the viable restructuring of mortgage debt on primary residence." The code requires all banks that formally adhere to it to propose financial restructuring and even debt cancellation in certain tightly prescribed cases. The May 2013 law broadened somewhat the eligibility criteria.

Under the code as revised in May 2013, compliant banks are required to take these steps only when debtors meet *all* of the following requirements:

- The combined family income is less than €1,597 per month (three times the IPREM (the reference index for the determination of need with respect to public assistance measures));
- The family unit does not possess any other goods able to satisfy the debt;
- The mortgage-related debt is attached to the family unit's sole property and was awarded for its purchase; and

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<sup>183</sup> Human Rights Watch interview with Santiago R., Barcelona, October 8, 2013.

- The family unit has no other assets or guarantees, or if there are guarantors, the monthly mortgage payment amounts to over 50 percent of their net earnings and they do not possess any other assets able to satisfy the debt.

The Code of Good Practices also links eligibility to benefit from these measures to the amount of the purchasing price in relation to the size of the town or city in which the property is located.<sup>184</sup>

As of January 2014, 97 financial institutions had signed on to the code.<sup>185</sup> According to Economy Minister Luis de Guindos, as of the end of September 2013, financial institutions received 9,861 requests to benefit from the code's provisions. Of the 7,631 requests that had been resolved, 4,749 had been rejected (62 percent); 1,684 were resolved with some kind of debt restructuring, 611 were addressed through *datio in solutum*, and debt forgiveness (*quita*) was granted in six cases.<sup>186</sup> According to data published by the Ministry of Economy in March 2014, 3,849 cases were resolved in the last trimester of 2013. Of these, 1,529 were rejected. Some form of debt restructuring was agreed in 1,227 cases, while *datio in solutum* was agreed in 397 cases. No debt forgiveness was agreed.<sup>187</sup>

The fact that any kind of debt forgiveness was granted in only six cases reflects how difficult this is to achieve. Carme Trilla of Cáritas Barcelona, said their mediation service was only able to secure any kind of debt forgiveness in two out of approximately 450 cases handled.<sup>188</sup>

Banks can and do renegotiate mortgage loans outside the strict parameters established in the code. For example, BBVA indicated in its reply to our letter that it had agreed to partial

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<sup>184</sup> Código de Buenas Prácticas para la reestructuración viable de las deudas con garantía hipotecaria sobre la vivienda habitual, Annex, Real Decreto-ley 6/2012, de 9 de marzo, de medidas urgentes de protección de deudores hipotecarios sin recursos, <http://www.boe.es/boe/dias/2012/03/10/pdfs/BOE-A-2012-3394.pdf> (accessed February 3, 2013), revised by Ley 1/2013, de 14 de mayo, de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social, published in the Boletín Oficial del Estado, Number 116, on May 15, 2013. For example, in cities of one million or more inhabitants, the maximum purchasing price is set at €200,000.

<sup>185</sup> Resolución de 10 de enero de 2014, de la Secretaría de Estado de Economía y Apoyo a la Empresa, por la que se publica la lista de entidades que han comunicado su adhesión al Código de Buenas Prácticas para la reestructuración viable de las deudas con garantía hipotecaria sobre la vivienda habitual, Boletín Oficial del Estado, Número 20, Sec. III, página 4318, January 23, 2014, <http://www.boe.es/boe/dias/2014/01/23/pdfs/BOE-A-2014-686.pdf> (accessed February 18, 2014).

<sup>186</sup> "El Gobierno posibilita 600 daciones en pago y evita más de 1,500 desahucios, según De Guindos," *idealista.com*, November 27, 2013, <http://www.idealista.com/news/archivo/2013/11/27/0693525-el-gobierno-posibilita-600-daciones-en-pago-y-evita-mas-de-1-500-desahucios-segun-de-guindos> (accessed December 12, 2013). At the time, 581 requests had been withdrawn.

<sup>187</sup> Álvaro Romero, "La banca rechaza al 40% de familias que piden acogerse al código antidesahucios," *El País*, April 15, 2014, [http://economia.elpais.com/economia/2014/04/15/actualidad/1397561940\\_591117.html](http://economia.elpais.com/economia/2014/04/15/actualidad/1397561940_591117.html) (accessed April 28, 2014).

<sup>188</sup> Human Rights Watch interview with Carme Trilla, Cáritas Barcelona, July 1, 2013.

debt forgiveness in 1,661 cases as of January 31, 2014, since the beginning of the economic crisis. This suggests that government policy need not have drawn the criteria so narrowly, and that in doing so, it may have done a disservice to those in debt by unnecessarily creating obstacles for those attempting to negotiate with their lending institution.

From the beginning, the PAH, the consumer Group ADICAE (*Asociación de Usuarios de Bancos, Cajas y Seguros*), and opposition parties criticized the limited reach of the Code of Good Practices.<sup>189</sup> The PAH noted that banks, with which they were already negotiating, began claiming they couldn't continue because the individuals concerned didn't fit the criteria established in the code.<sup>190</sup> Mónica Guerrero Exposito, for example, told us her bank refused to even discuss *datio in solutum* because she didn't meet the requirement relating to amount of mortgage in relation to size of town.<sup>191</sup> She explained she was a victim of domestic violence (by a previous husband not involved in the mortgage in question), and she said they told her "that's not our problem."<sup>192</sup>

Silvia Grau, the director of Ofideute, Catalonia's mediation service, said "the criteria in the Royal Decree-Law [which established the voluntary Code of Good Practices] do not match the profile of the average person affected by the mortgage crisis ... autonomous communities have to use the state norm coming from Madrid; we would broaden the criteria if we could to include more people."<sup>193</sup>

A May 2013 reform increased to 70 percent the amount of the value of the property awarded to the bank upon repossession, thereby decreasing the overall debt. The reform also stipulates that banks forgive outstanding debt if the individual repays 80 percent of the loan within five years, or 65 percent of the loan within ten years, and capped the

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<sup>189</sup> "PAH sobre el Código del Gobierno: No están haciendo nada de nuevo," *público.es*, March 10, 2012, <http://www.publico.es/dinero/425484/pah-sobre-el-codigo-del-gobierno-no-estan-haciendo-nada-nuevo> (accessed April 10, 2013); ADICAE, "Inseguridad jurídica y desigualdad ante la ley en el Código de buenas prácticas hipotecarias: cómo mantener los privilegios de la banca y aparentar derechos," March 10, 2012, <http://usuariosdebancaseguros.adicae.net/?articulo=744> (accessed April 10, 2013); "El PSOE propone obligar a los bancos ofrecer hipotecas con el piso como única garantía," *Europapress*, March 13, 2012, <http://www.elmundo.es/elmundo/2012/03/13/suvienda/1331664071.html> (accessed April 12, 2013).

<sup>190</sup> Diego Sanz Paratcha, "El Código de buenas prácticas del Gobierno queda en papel mojado," *Diagonalperiódico.net*, June 11, 2012, <https://www.diagonalperiodico.net/global/codigo-buenas-practicas-del-gobierno-queda-papel-mojado.html> (accessed May 14, 2014).

<sup>191</sup> Human Rights Watch interview with Mónica Guerrero Exposito, Barcelona, July 4, 2013.

<sup>192</sup> *Ibid.*

<sup>193</sup> Human Rights Watch interview with Silvia Grau, director, Ofideute, Barcelona, July 5, 2013.

default interest rate during this period.<sup>194</sup> Though a positive step, this measure is unlikely to help heavily-indebted individuals who have virtually no possibility to meet this repayment schedule. And the law specifies that if these conditions are not met, “the creditor may reclaim the entirety of what is owed.”<sup>195</sup>

Commenting on the law, the European Central Bank (ECB) said Spain needed “a set of broader measures to address the underlying causes” of the mortgage crisis, including a regulatory framework that provides incentives to all parties to reach agreement on appropriate and reasonable debt restructuring. The ECB stressed that “foreclosure should be the last resort. Lenders should be interested in avoiding foreclosure, which is more costly and generally produces less income than voluntary sales, if the mortgage holder continues to comply with all or part of his [or her] obligations.”<sup>196</sup>

### *Datio in Solutum*

It has long been possible for mortgages to include a “*datio in solutum*” clause. *Datio in solutum* is the legal term for the procedure by which repossession by the bank of the mortgaged property cancels all debt. Essentially, this means the property itself is the guarantee for the loan (mortgage), such that the full debt is discharged if the bank takes possession of the property against which the mortgage was taken.

The May 2013 law makes it obligatory for banks adhering to the Code of Good Practices to grant *datio in solutum* to debtors who, meeting the strict requirements for eligibility, after twelve months of trying to meet the conditions of a restructured debt are still unable to pay. In these cases, the debtors may ask to remain in the property for up to two years, paying an annual rent equal to three percent of the total debt at the time *datio in solutum* was granted.

The PAH advocates for incorporating this procedure—known in Spanish as *dación en pago*—in Spanish law applicable to all mortgages. This was a key provision of the Popular Legislative Initiative the PAH tabled in late 2012 in the Spanish Parliament, which also called for retroactive application to alleviate the debt burdens of individuals whose homes

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<sup>194</sup> Law 1/2013, chapter III, section 7 (5) (2). The reform also stipulates that the outstanding debt may only accrue the legal lending rate.

<sup>195</sup> Ibid.

<sup>196</sup> Dictamen del Banco Central Europeo de 22 mayo de 2013 sobre protección de los deudores hipotecarios (CON/2013/33), [https://www.ecb.int/ecb/legal/pdf/es\\_con\\_2013\\_33\\_f\\_sign.pdf](https://www.ecb.int/ecb/legal/pdf/es_con_2013_33_f_sign.pdf) (accessed October 16, 2013).

had already been repossessed. The Popular Party, which enjoys an absolute majority in parliament, surprisingly accepted to examine the initiative in February 2013, but then adopted the more limited reform described above.

Thanks also to pressure by the PAH, some heavily-indebted mortgage holders successfully negotiated *datio in solutum* directly with banks even before the May reform. According to data published by the Bank of Spain in January 2014, banks agreed to *datio in solutum* in 15,174 cases in 2012, and in 8, 856 cases in the first six months of 2013.<sup>197</sup> The table below sets out the information provided to Human Rights Watch by six of the seven banks who responded to our letter of inquiry. The figures are not comparable, due to differing time frames and because the size of the banks’ mortgage portfolios vary.

| Bank           | No. of <i>Datio in Solutum</i> | Year or Time Frame |
|----------------|--------------------------------|--------------------|
| Bankia         | 4,946                          | 2012-2013          |
| BBVA           | 9,782                          | Since 2009         |
| CaixaBank      | 6,546                          | 2013               |
| Citi           | Over 660                       | Since 2009         |
| NCG Banco S.A. | 262                            | 2013               |
| Sabadell       | 2,335                          | 2013               |

Santander explained in its letter that “In our opinion, *datio in solutum* cannot be considered the best solution for the debtor because it entails that the creditor becomes the owner of the house and debtor has to find another place where to live.”<sup>198</sup>

Indebtedness caused by mortgage default in Spain has attracted international attention. In June 2012, the UN Committee on Economic, Social, and Cultural Rights said it was “deeply concerned” about the situation and the fact that banks are not obligated to accept property in lieu of payment. The Committee recommended that Spain amend its laws “to

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<sup>197</sup> Nota informativa sobre los procesos de ejecución hipotecaria sobre viviendas. Datos revisados de 2012 y primer semestre de 2013, January 28, 2014, [http://www.bde.es/f/webbde/GAP/Secciones/SalaPrensa/NotasInformativas/Briefing\\_notes/es/notabe%2028-01-2014.pdf](http://www.bde.es/f/webbde/GAP/Secciones/SalaPrensa/NotasInformativas/Briefing_notes/es/notabe%2028-01-2014.pdf) (accessed March 26, 2014). These were out of a total of 39,051 repossessions in 2012, and 28,170 repossessions in the first six months of 2013. All data refers to primary residence.

<sup>198</sup> Email from Federico Gómez, Global Head of Sustainability, Santander, February 25, 2014.

give borrowers the possibility of surrendering their homes in settlement of their mortgage rather than leaving this option solely to the banks' discretion."<sup>199</sup>

In what was largely seen as an endorsement of *datio in solutum*, the European Parliament adopted a nonbinding resolution in June 2013 calling on EU Member States to “prevent evicted households being forced to keep up their mortgage payments” and to “take action in response to the social hardship caused to those ... who are being evicted and deprived of their homes.”<sup>200</sup> Council of Europe Commissioner Muižnieks noted with concern in October 2013 that the legislative framework in Spain “puts a disproportionate burden on indebted households.”<sup>201</sup>

According to a study commissioned by the European Commission and published in December 2012, no EU country has a strong application of *datio in solutum* prescribed by law.<sup>202</sup> However, the study identified what it defined as best practices in a number of countries with respect to mortgage debt discharge (cancellation), including France where an “excessive debt commission” can order a bank to take the sale or auction value of a property as full settlement and the Netherlands where immediate discharge is possible when a debtor is unable to pay a “significant contribution.”<sup>203</sup>

Ensuring that *datio in solutum* is a genuine option could help tens of thousands of people on the cusp or in the midst of foreclosure avoid crippling mortgage debt upon the loss of their home. However, a fair personal insolvency regime is necessary to help address the situation of individuals and families living in over-indebtedness as a result of past foreclosures that have left them owing mortgage debts they cannot service.

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<sup>199</sup> UN Committee on Economic, Social, and Cultural Rights, Concluding Observations: Spain, UN Doc. E/C.12/ESP/CO/5, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fESP%2fCO%2f5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fESP%2fCO%2f5&Lang=en) (accessed January 10, 2013), para. 21.

<sup>200</sup> European Parliament resolution of 11 June 2013 on social housing in the European Union (2012/2293(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0246&language=EN&ring=A7-2013-0155> (accessed April 30, 2014), article 11.

<sup>201</sup> Report by Commissioner for Human Rights of the Council of Europe following his visit to Spain from 3 to 7 June 2013, October 9, 2013, CommDH(2013)18, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2389885&SecMod e=1&DocId=2077824&Usage=2> (accessed October 10, 2013), para. 27.

<sup>202</sup> London Economics, “Study on means to protect consumers in financial difficulty: Personal bankruptcy, *datio in solutum* of mortgages, and restrictions on debt collection abusive practices,” December 2012, [http://ec.europa.eu/internal\\_market/finservices-retail/docs/fsug/papers/debt\\_solutions\\_report\\_en.pdf](http://ec.europa.eu/internal_market/finservices-retail/docs/fsug/papers/debt_solutions_report_en.pdf) (accessed September 10, 2013), p. 106.

<sup>203</sup> *Ibid.*, pp. 118-120; and p. 200.



### *Spanish Insolvency Law*

Spanish insolvency law is ill-designed to help individuals with mortgage debt, or indeed any kind of personal debt. The *Ley Concursal*, Spain's insolvency law, is primarily conceived for entrepreneurial activities, and only serves to block foreclosure if the mortgage debt is linked to a professional activity.

In fact, very few people file for personal insolvency in Spain. According to the National Statistics Institute, only 953 individuals without businesses filed for insolvency in 2011, compared to 77,854 proceedings filed by those with businesses.<sup>204</sup> There are few incentives to filing personal insolvency, as debts that are not paid by the end of the procedure remain active.<sup>205</sup>

Spain is not unique in Europe. A February 2013 International Monetary Fund (IMF) working paper concluded that “the insolvency framework in a number of European countries is weak and inefficient.”<sup>206</sup> Many countries, including Ireland—largely in response to the mortgage crisis there—have introduced or reformed personal insolvency laws in recent years. Spain has reformed its *Ley Concursal* a number of times, most recently in March 2014, but it remains designed for corporate and self-employed individuals whose debt is tied to business, rather than over-indebted individuals.

The *Defensor del Pueblo*, the Spanish ombuds institute, has criticized Spain's lack of a “fresh start” insolvency framework, saying the recent reforms create a costly procedure with limited benefits for over-indebted individuals.<sup>207</sup> Without further reforms, the *Defensor* has said, the majority of people who have gone bankrupt “will have to live ... the rest of their lives paying off their creditors; this lack of socioeconomic future ... and

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<sup>204</sup> Cited in London Economics, “Study on means to protect consumers in financial difficulty: Personal bankruptcy, ratio in solutium of mortgages, and restrictions on debt collection abusive practices,” December 2012, [http://ec.europa.eu/internal\\_market/finservices-retail/docs/fsug/papers/debt\\_solutions\\_report\\_en.pdf](http://ec.europa.eu/internal_market/finservices-retail/docs/fsug/papers/debt_solutions_report_en.pdf) (accessed September 10, 2013), p. 93.

<sup>205</sup> *Ibid.*

<sup>206</sup> Yan Liu and Christoph B. Rosenberg, “Dealing with Private Debt Distress in the Wake of the European Financial Crisis: A Review of the Economics and Legal Toolbox,” International Monetary Fund Working Paper, February 2013, <http://www.imf.org/external/pubs/cat/longres.aspx?sk=40326.0> (accessed September 7, 2013), p. 7.

<sup>207</sup> Defensor del Pueblo, “Estudio sobre Crisis Económica e Insolvencia Personal: actuaciones y propuestas del Defensor del Pueblo. Actualización a octubre de 2013,” October 2013, [http://www.defensordelpueblo.es/es/Documentacion/Publicaciones/monografico/Documentacion/Crisis\\_economica\\_e\\_in\\_solvencia\\_personal.pdf](http://www.defensordelpueblo.es/es/Documentacion/Publicaciones/monografico/Documentacion/Crisis_economica_e_in_solvencia_personal.pdf) (accessed November 15, 2013), p. 17.

the lack of possibilities for recovery, can lead to undesirable situations such as the black market.”<sup>208</sup>

Efficient and fair personal insolvency laws are particularly important if, as in Spain, the property is not the only guarantee for the loan. Advocates of the “fresh start” approach often point to the United States of America as model. A minority of states in the United States have what are called ‘nonrecourse mortgages’, where the bank may only seize the property in case of default. The majority of states have variations on what are called full recourse mortgages, similar to Spain, under which the bank may go after income and other assets to repay the defaulted mortgage. However, federal bankruptcy laws apply to everyone. Broadly speaking, US bankruptcy laws provide for debt cancellation within a limited number of years following a good faith effort to repay at least a part of the debt.

It is worth noting that the US Supreme Court, in 1934, defined the fresh start approach as benefitting “honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.”<sup>209</sup> While some debts, such as child support payments, cannot be discharged under US personal bankruptcy laws, credit card debt, mortgage debt, and even gambling debts can be discharged under the procedure. Debtors must demonstrate good faith throughout the procedure, but are not required to demonstrate deception, misconduct or fraud on the part of the creditor.

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<sup>208</sup> *Ibid.*, p. 29.

<sup>209</sup> US Supreme Court, *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S. Ct. 695, 699, 78 L. Ed. 1230 (1934).

## V. Human Rights Standards and Norms

### Right to Housing under International Law

Under international human rights law, the right to adequate housing is a key component to the right to an adequate standard of living—essential to and intimately linked to the enjoyment of the plethora of fundamental rights deriving from the inherent dignity of every person.<sup>210</sup> The right to adequate housing is recognized in the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child. Spain has ratified all of these binding legal treaties.<sup>211</sup>

The UN Committee on Economic, Social and Cultural Rights (CESCR), entrusted with enforcement of compliance with the ICESCR, interprets the right to adequate housing as “the right to live somewhere in security, peace and dignity.”<sup>212</sup>

The right to adequate housing does not include a right to own property, or to retain ownership under any circumstances. It does, however, impose on states obligations to ensure policies and legislation are in place to progressively realize the right to adequate housing—for all segments of society—as expeditiously as possible. Civil and political rights, including the right to non-discrimination and the right to an effective remedy, are important guarantors of the right to housing.

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<sup>210</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976, article 11(1) establishing “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.” Spain ratified the ICESCR on April 27, 1977.

<sup>211</sup> ICESCR, article 11(1); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969, article 5(e)(iii); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted December 18, 1979, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force September 3, 1981, (article 13(2)(H)); Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, article 27(3). Spain acceded to ICERD on September 13, 1968, and ratified CEDAW on January 5, 1984, and CRD on December 6, 1990.

<sup>212</sup> CESCR, General Comment No. 4, The right to adequate housing (Art. 11 (1)), UN Doc. E/1992/23, December 12, 1991, <http://www1.umn.edu/humanrts/gencomm/epcomm4.htm> (accessed May 14, 2014), para. 7.

International anti-discrimination norms require states to undertake measures to eliminate all forms of discrimination based on race, ethnicity, nationality, and sex, among other grounds. This obligation includes the duty to collect adequate data on disparate impact of national or local policies and legislation and to take appropriate measures to ensure that the situation of specific groups, including women and minorities, are adequately taken into account and addressed.

The revised European Social Charter has a stand-alone provision on the right to housing. Article 31 obligates states to take measures to promote access to housing of an adequate standard; prevent and reduce homelessness with a view to its gradual elimination; and make the price of housing accessible to those without adequate resources.<sup>213</sup> Although it ratified the 1961 European Social Charter, Spain has yet to ratify the revised 1996 Charter, or the 1995 protocol allowing for collective complaints.

Economic and social rights are subject to progressive realization, in recognition of the fact that states require sufficient resources and time to respect, protect, and fulfil these rights. The CESCR has stressed, however, that the Covenant imposes an obligation to “move as expeditiously and effectively as possible towards that goal.”<sup>214</sup> The Committee has further stressed that periods of economic crisis may not serve as an excuse for inaction:

[T]he obligations under the Covenant continue to apply and are perhaps even more pertinent during times of economic contraction. It would thus appear to the Committee that a general decline in living and housing conditions, directly attributable to policy and legislative decisions by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.<sup>215</sup>

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<sup>213</sup> European Social Charter (revised), May 3, 1996, <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm> (accessed, July 5, 2013), article 31.

<sup>214</sup> CESCR, General Comment No. 3, The nature of States parties' obligations U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003), <http://www1.umn.edu/humanrts/gencomm/epcomm3.htm> (accessed July 15, 2013), para. 9.

<sup>215</sup> CESCR, General Comment No. 4, para. 11.

Regardless of national devolution of competencies, under international law, the primary responsibility for implementing rights obligations, including housing rights, rests with national governments.

## International Norms on Evictions

International human rights law makes a distinction between forced evictions—considered a serious violation of international law—and evictions carried out by force in accordance with the law and in conformity with provisions of international human rights treaties.<sup>216</sup> Definitions of forced evictions vary, but key components include the forcible physical removal from homes or land, the unlawfulness of the eviction, the lack of legal protection or effective remedies for those affected, and the failure to provide alternative appropriate housing or compensation.

Evictions following mortgage default and bank repossession should not constitute human rights violations if carried out in accordance with the law, and as long as those affected have been able to challenge effectively the eviction and were given appropriate notice. In practice, tens of thousands of evictions in Spain, including many evictions of vulnerable groups documented in this report, have been carried out under a legal procedure that did not guarantee homeowners a meaningful right to contest the contractual terms of the defaulted loan—the cause for the eviction itself. This, combined with irresponsible lending practices, suggest that Spain failed to provide sufficient protection, in law and in practice, against evictions.

In this context, it is worth noting that the UN Basic Principles and Guidelines on Development-Based Evictions and Displacement calls on states to:

take specific measures to avoid and/or eliminate underlying causes of forced evictions, such as speculation in land and real estate. States should review the operation and regulation of the housing and tenancy markets

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<sup>216</sup> See CESCR General Comment No. 7, Forced Evictions, and the right to adequate housing, <http://www1.umn.edu/humanrts/gencomm/escgencom7.htm> (accessed July 5, 2013), para. 3; UN Basic Principles and Guidelines on Development-Based Evictions and Displacement, para. 4.

and, when necessary, intervene to ensure that market forces do not increase the vulnerability of low-income and other marginalized groups....<sup>217</sup>

Whether or not certain evictions due to mortgage default can be categorized as forced evictions under the terms of international law, the Council of Europe and the European Parliament have recommended that states pursue policies to avoid forcible removal from homes in keeping with their obligations to ensure the right to adequate housing.

The European Committee of Social Rights, the Council of Europe body that monitors compliance with the European Social Charter, has defined forced evictions as “the deprivation of housing which a person occupied due to insolvency or wrongful occupation” and argued that necessary legal protections in these cases include an obligation to consult with affected parties “in order to find alternative solutions to eviction.”<sup>218</sup> The European Parliament adopted in June 2013 a resolution on social housing urging measures in response to the increase in evictions and properties seized by banks in several EU countries, and calling on member states to “strive to offer alternative solutions to evictions.”<sup>219</sup>

## Affordable Housing

The CESCR identifies affordability as a key aspect of the right to adequate housing.<sup>220</sup> The Committee has encouraged states to employ a variety of housing policies such that “measures being taken are sufficient to realize the right for every individual in the shortest possible time in accordance with the maximum of available resources.”<sup>221</sup>

States’ obligations to ensure the right to adequate housing impose a duty to take all possible steps to provide access to suitable housing within the economic reach of

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<sup>217</sup> UN Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex I of the report of the special rapporteur on adequate housing as a component of the right to an adequate standard of living, UN Doc. A/HRC/4/18, February 5, 2007, [http://www.ohchr.org/Documents/Issues/Housing/Guidelines\\_en.pdf](http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf) (accessed July 12, 2013), para. 30.

<sup>218</sup> European Committee of Social Rights, Conclusions 2003 (Sweden), [http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/State/Sweden2003\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/State/Sweden2003_en.pdf) (accessed October 31, 2013), p. 89.

<sup>219</sup> European Parliament resolution of 11 June 2013 on social housing in the European Union (2012/2293(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0246&language=EN&ring=A7-2013-0155> (accessed July 4, 2013), articles 1 and 12.

<sup>220</sup> CESCR, General Comment no. 4, The right to adequate housing (Art. 11(1)), UN Doc. E/1992/23, December 12, 1991, <http://www1.umn.edu/humanrts/gencomm/epcomm4.htm> (accessed May 14, 2014), para. 8. The Committee identified six other key components: legal security of tenure; availability of services, materials, facilities and infrastructure; habitability; accessibility; location; and cultural adequacy.

<sup>221</sup> *Ibid.*, para. 14.

different segments of society. This means, in the words of the former UN special rapporteur on adequate housing, Raquel Rolnik, promoting “a mixture of tenure systems ... in order to shield the housing sector from economic and financial shocks.”<sup>222</sup>

Following this logic, Rolnik recently encouraged States to take “prompt measures to increase the availability of adequate housing options, particularly for those most affected by sub-prime and predatory mortgage lending. States should prioritize funding and construction of public housing and the promotion of housing assistance in order to address the impact of the economic and financial crises on the most vulnerable.”<sup>223</sup> To this end, she recommended increasing expenditure, rather than cutting budgets, on social housing.<sup>224</sup>

In a December 2012 opinion, the European Economic and Social Committee, a consultative body of the European Union, argued that social housing can serve both a preventive and corrective function with respect to market failures to meet all housing needs.<sup>225</sup> The Committee warned:

If budgetary constraints or excessively restrictive interpretation of the definition of people who are disadvantaged or of socially less advantaged groups mean that a Member State’s social housing supply is no longer able to meet the real needs of its citizens, as stipulated by its international commitments on the right to housing, universal access to decent and affordable housing will only be achievable through major public authority intervention in the private market.<sup>226</sup>

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<sup>222</sup> Special rapporteur on the right to adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context, Raquel Rolnik, *The Right to Adequate Housing*, note by the Secretary-General, August 10, 2012, UN Doc. A/67/286, para 71(h), <http://www.ohchr.org/Documents/Issues/Housing/A-67-286.pdf> (accessed July 15, 2013).

<sup>223</sup> *Ibid.*, para. 71(m).

<sup>224</sup> *Ibid.*, paras. 71(n) and (o).

<sup>225</sup> Opinion of the European Economic and Social Committee on ‘Issues with defining social housing a service of general economic interest’ (own-initiative opinion), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:044:0053:0058:EN:PDF> (accessed August 1, 2013).

<sup>226</sup> *Ibid.*, article 5.5.

## International Obligation to Ensure Redress

The CESCR has stressed that the Covenant norms “must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.”<sup>227</sup>

The UN special rapporteur on extreme poverty, Magdalena Sepúlveda, reminded states in 2011 of their obligation under international human rights law to protect individuals from rights violations by third parties, including banking and financial sector entities.<sup>228</sup> States should ensure “adequate means of redress for those adversely affected by the actions taken by financial sector institutions, and adopt regulations that discourage harmful practices by providing accountability mechanisms that penalize risky behaviours and prosecute perpetrators.”<sup>229</sup>

Private enterprises, including banks, also have human rights responsibilities. In 2008—subsequent to when many of the lending practices described in this report occurred—the UN Human Rights Council endorsed the “Protect, Respect and Remedy” framework, which explicitly recognized a corporate responsibility to respect all human rights, and, in 2011, it approved the “Guiding Principles on Business and Human Rights,” which offered guidelines specifying some of the steps businesses should follow in order to implement their responsibilities.<sup>230</sup> As laid out in those documents, businesses should have policies and procedures in place to ensure that human rights are respected and not abused, to avoid complicity in abuses, to undertake adequate due diligence to identify and effectively mitigate human right problems, and to adequately respond in cases where problems arise.

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<sup>227</sup> CESCR, General Comment No. 9, The domestic application of the Covenant, UN Doc. E/C.12/1998/24, December 3, 1998, <http://www.escr-net.org/docs/i/425230> (accessed July 4, 2013), article 2.

<sup>228</sup> Report of the Independent Expert on the question of human rights and extreme poverty, Ms. María Magdalena Sepúlveda Carmona on the human rights based approach to recovery from the global economic and financial crisis, with a focus on those living in poverty, UN Doc. A/HRC/17/34, March 17, 2011, <http://daccess-ods.un.org/TMP/3125557.30342865.html> (accessed May 3, 2013), para. 83.

<sup>229</sup> *Ibid.*, para. 84.

<sup>230</sup> UN Human Rights Council, Resolution 8/7, “Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises,” June 18, 2008; and Human Rights Council, Resolution A/HRC/17/L.17/Rev.1, “Human rights and transnational corporations and other business enterprises,” June 16, 2011.



## Human Rights Obligations, Over-indebtedness, and Personal Insolvency Regimes

International human rights law is largely silent on issues relating to personal debt. The one clear rule, in the International Covenant on Civil and Political Rights (ICCPR), is that “No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.”<sup>231</sup>

Yet, as consumer credit has become more and more a central feature of modern economies, there is increasing attention to the interplay between over-indebtedness and the ability to enjoy fundamental human rights such as the right to an adequate standard of living (including adequate food and housing) and the right to health (both because of impact on health and ability to pay for healthcare) as well as other rights.<sup>232</sup> The situation of individuals who incur debt they cannot afford to service as a result of the acquisition of a home, in other words mortgage debt, deserves particular scrutiny. For example, governments, mindful of their obligations to fulfil the right to an adequate standard of living including affordable housing as well as other human rights obligations, should assess whether or not their policies, or gaps in their policies, are contributing to the acquisition of such debt.<sup>233</sup>

Laws and policies that address the rights and obligations of creditors and debtors, including through debt relief options such as personal insolvency regimes, also need to be assessed with reference to human rights obligations. While governments have a wide margin to pursue a variety of social, fiscal, and economic policies they also have obligations to ensure that public policies take into account the social, economic, and structural obstacles to enjoyment and exercise of human rights faced by vulnerable population groups. They also need to ensure that in balancing the interests and rights of different stakeholders, including the public interest, an undue hardship is not imposed on particular parties on the enjoyment of specific rights that might constitute an unlawful interference.

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<sup>231</sup> International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976., article 11. Spain ratified the ICCPR on April 27, 1977.

<sup>232</sup> For an in-depth discussion, see Chrystin Ondersma, “Human Rights Framework for Debt Relief,” February 2014, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2390788](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2390788) (accessed March 21, 2014).

<sup>233</sup> The same would be true, for example, of those who face extreme debt due to credit received to meet the cost of securing necessary healthcare.

While not endorsing or carving out an obligation on states with respect to adopting laws on debt adjustment, the European Court of Human Rights has, as far back as 2004, positively acknowledged that “a legislative framework for permitting the adjustment of private individuals’ debts on certain conditions has been put in place” in a number of states parties to the ECHR and that “debt-adjustment legislation clearly serves legitimate social and economic policies.” It also recognized that states were responding to an “urgent and compelling public interest in affording debtors the possibility of seeking a debt adjustment in certain circumscribed situations.”<sup>234</sup>

The European Court’s 2004 assessment made on the scope of government obligations in balancing the rights of creditors against the public interest in creating mechanisms to allow individuals to adjust their debt burden is also instructive. The Court was called upon to examine Finland’s (at the time new) insolvency law against the claim of a creditor who had alleged the law created an unjust and disproportionate infringement on his propriety rights as a creditor.<sup>235</sup>

The Finnish government, joined by the governments of The Netherlands, Norway, Sweden, and the United Kingdom, intervening as third parties, all defended such insolvency laws on the grounds they served a necessary and legitimate public interest and pointed to similar legislation in their own jurisdictions. The Finnish government told the Court:

[T]he large number of debt-adjustment cases at the relevant time had largely resulted from the unfavourable economic climate of the 1990s and the increase in borrowing by households and companies in previous years. The extensive marketing of credits, favourable economic developments and the general expectations of economic growth had encouraged some households to take out loans without sufficient guarantees of being able to pay them, and the credit institutions had not been sufficiently interested in

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<sup>234</sup> European Court of Human Rights, *Bäck v. Finland*, judgment of October 20, 2004, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61929#{\"itemid\":\[\"001-61929\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61929#{\) (accessed April 30, 2014), paras. 59-60.

<sup>235</sup> Protocol 1 of the European Convention on Human Rights stipulates that “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest...” Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S 262, entered into force May 18, 1954, article 1.

verifying the solvency of debtors. A sudden and strong increase in unemployment, a reduction in the net income of households, a significant rise in interest levels and a strong decrease in house prices had created strong social and political pressure to establish a system under which unreasonable debt burdens on private individuals could be resolved.<sup>236</sup>

The goal of the insolvency framework, the government explained, was to prevent “the negative effects of insolvency on society as a whole, such as social exclusion, health and social problems and an expanding grey sector of the economy.”<sup>237</sup> The government further argued that the insolvency framework had led to “less need for the unfruitful use of the court system and enforcement authorities. The need for social assistance was also reduced.”<sup>238</sup>

The Court upheld the government legislation taking the view not only that the debt adjustment legislation “clearly serves legitimate social and economic policies” but significantly that the application of the legislation in the specific case had respected procedural guarantees and had not placed an excessive burden on the applicant.<sup>239</sup> The Court also noted that the creditor had accepted the risk of financial loss, and that retroactive application of the insolvency legislation to a contract agreed upon before it was in force was warranted.<sup>240</sup>

The Council of Europe Committee of Ministers adopted in 2007 a recommendation to its 47 member states, including Spain, on legal solutions to debt problems. The recommendation asserted that over-indebtedness has become a widespread problem, “which frequently leads to social and health problems and social exclusion of families and may put children’s basic needs at risk.”<sup>241</sup> The recommendation outlined a series of steps member states should undertake to prevent over-indebtedness, alleviate the consequences of debt

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<sup>236</sup> European Court of Human Rights, *Bäck v. Finland*, para. 46.

<sup>237</sup> *Ibid.*, para. 45.

<sup>238</sup> *Ibid.*, para. 46.

<sup>239</sup> *Ibid.*, paras. 53, 60, and 62-70.

<sup>240</sup> *Ibid.*, paras. 62 and 68. On retroactivity, the Court said “in remedial social legislation and in particular in the field of debt adjustment ... it must be open to the legislature to take measures affecting the further execution of previously concluded contracts in order to attain the aim of the policy adopted. Furthermore, other Council of Europe member states such as Norway and Sweden have introduced legislation allowing for the adjustment of debts contracted prior to its entry into force. *Ibid.*, para. 68.

<sup>241</sup> Recommendation of the Council of Europe Committee of Ministers to member states on legal solutions to debt problems, Council of Europe CM/Rec (2007)8, <https://wcd.coe.int/ViewDoc.jsp?id=1155927> (accessed October 28, 2013), paragraph 5.

recovery to avoid social exclusion, and provide mechanisms for the rehabilitation of over-indebted individuals and families “with due regard to their human dignity.”<sup>242</sup>

In the explanatory notes attached to the recommendation, the Council of Europe stressed the long-term consequences of over-indebtedness to individuals, families, and society as a whole.

Over-indebtedness may have a strongly adverse impact on the development of children.... It may not only reduce the capacity of adult members of the family to re-engage in an income-generating activity but, inter alia, can also prevent or substantially limit the same capacity for their children.... This is not only detrimental to the individuals and families concerned, but also to society as a whole as it suffers evident financial loss. That is why one of the paramount objectives of rehabilitation should be social and financial inclusion of over-indebted individuals and families.<sup>243</sup>

Towards this end, the recommendation calls on states to allow “partial or total discharge of debts ... where other measures have proved ineffective, with a view to providing them [individuals and families] with a new opportunity for engaging in economic and social activities.”<sup>244</sup> The Council of Europe further recommended a broad definition of over-indebtedness, the use of out-of-court procedures, and avoiding “good faith tests” on debtors because it is impossible to define good faith. Council of Europe recommendations are not legally-binding.

The attitude of both organs of the Council of Europe is also in keeping with the World Bank’s arguments in favor of personal insolvency regimes to the benefit of individuals and societies as a whole. In an in-depth study on insolvency regimes issued in 2013, the World Bank notes the deleterious impact of over-indebtedness on individuals, including “serious psychic, and ultimately physical problems” due to high levels of stress and anxiety, and

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<sup>242</sup> Explanatory Memorandum to the Recommendation of the Council of ministers to member states on legal solutions to personal debt, [https://wcd.coe.int/ViewDoc.jsp?Ref=CM\(2007\)78&Language=lanEnglish&Ver=add1&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2007)78&Language=lanEnglish&Ver=add1&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864) (accessed October 28, 2013), para. 19.

<sup>243</sup> Ibid, paras. 28 and 36.

<sup>244</sup> Recommendation of the Council of Ministers to member states on legal solutions to debt problems, Council of Europe CM/Rec (2007)8, para. 4(h).

asserted that “policymakers around the world have concluded that relieving the long-term pain and suffering of these debtors is a worthy goal in and of itself.”<sup>245</sup> The study also notes the societal costs of over-indebtedness including the consumption of social benefits and chronic health problems that impose a burden on healthcare systems.<sup>246</sup>

Acknowledging concerns about destabilizing mortgage credit markets, the World Bank notes that systems have been developed to balance these concerns against the interests of mortgage debtors “especially in light of the negative effects of mass mortgage foreclosure activity in depressing home values in times of systemic crisis.” This involves creditors accepting “the reality of the distressed state of debtors ... and ... the payment capacity that debtors can realistically have to offer.”<sup>247</sup> The World Bank defines a properly functioning insolvency regime as one that, on the basis of some entry requirements, provides relatively quick relief only to those “whose means are expected to be overwhelmed by their debt servicing obligations for some extended period of time”—in other words, the over-indebted—allowing these individuals who would constitute a “limited percentage of all debtors” to recover their capacity for self-support.<sup>248</sup>

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<sup>245</sup> The World Bank, Report on the Treatment of The Insolvency of Natural Persons, paras. 71-73.

<sup>246</sup> *Ibid.*, para. 100.

<sup>247</sup> *Ibid.*, para. 448.

<sup>248</sup> *Ibid.*, para. 39.

## Acknowledgments

This report was researched and written by Judith Sunderland, senior researcher in the Europe and Central Asia Division of Human Rights Watch. Hugh Williamson, director of the Europe and Central Asia Division, edited the report. Arvind Ganesan, director of the Business and Human Rights Program, Liesl Gertholtz, director of the Women's Rights Division, and Alice Farmer, researcher in the Children's Rights Division, reviewed the report. Veronika Szente Goldston, advocacy director in the Europe and Central Asia Division, reviewed the report and contributed to the recommendations. Aisling Reidy, senior legal advisor, provided legal review, and Tom Porteous, deputy program director, provided program review.

Adrian Klocke, consultant in the Europe and Central Asia Division, contributed with background research and analysis. Annkatrin Tritschoks, associate in the Europe and Central Asia Division, provided production assistance. This report was prepared for publication by Grace Choi, publications director, and Fitzroy Hepkins, administrative manager.

Human Rights Watch would like to thank the committed activists of the Platform for Mortgage Victims for sharing their knowledge, analysis, and passion. In particular, we thank Rafael Mayoral, Remedios Galbert, Eva Correidora, and Ada Colau. Guillem Fernández of Housing Rights Watch-FEANTSA, Óscar Vicente Pérez of the Regional Federation of Neighborhood Associations of Madrid (Federación Regional de Asociaciones Vecinales de Madrid), Aida Quinatoa of CONADEE, Sonia Olea of Cáritas, and Maria Naredo all deserve our gratitude for their help. We also thank Toni Algaba for generously agreeing to review an early draft of the report.

Finally, we would like to thank the women and men who agreed to speak with us openly, sometimes in the homes they were about to lose, about their experience and its impact on their lives and those of their loved ones.



Banks have moved to foreclose on over 500,000 properties in Spain since the economic crisis began in 2007, saddling families with significant mortgage debt even after repossession. Spain's social crisis around evictions and debt is set against the backdrop of decades-long government policies promoting home ownership at the expense of ensuring an appropriate and affordable stock of rental housing and sufficient investment in rental public housing. This, combined with weak oversight that allowed dubious lending practices by financial institutions and intermediaries, lead to untenable housing debt particularly among vulnerable groups. The government has taken some steps to address the crisis, including a two-year moratorium on evictions for certain families and measures toward debt relief, but narrowly-drawn eligibility criteria exclude many in need.

*Shattered Dreams*, based on interviews with women and men who have experienced or were facing eviction, civil society organizations, and government officials, documents the failings in Spanish policies that lacked effective preventative steps ahead of the mortgage crisis or measures to sufficiently remedy and ameliorate its impact on vulnerable groups, including immigrants, women heads of household, women victims of economic abuse (a form of domestic violence), and children. The lack of an accessible personal insolvency regime in Spain leaves the over-indebted with no real prospect of discharging their housing debt.

The report calls on Spanish authorities to adopt measures to help a broader range of individuals and families avoid evictions, secure affordable housing, and ensure access to fair debt restructuring, relief, and cancellation. We also call on the Spanish government to develop clearer policies and mechanisms to assist women heads of household and women tied through their mortgages to abusive or hostile former partners.

*(above) A woman sits next to her luggage during her eviction in Madrid, Spain, November 5, 2013. Her eviction was subsequently postponed for two months with the help of the Platform of Mortgage Victims.*

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*(front cover) A woman picks up her clothes from her room after receiving an eviction notice in Terrassa, Spain, October 19, 2012.*

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*The New York Times.*