Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2505/2014*, **

Communication submitted by: M.L. (not represented by counsel)
Alleged victim: The author
State party: Croatia
Date of communication: 27 November 2013 (initial submission)
Document references: Decision taken pursuant to rule 92 of the Committee’s rules of procedure, transmitted to the State party on 15 December 2014 (not issued in document form)
Date of adoption of decision: 8 November 2019
Subject matter: Access to remedy for destruction of property
Procedural issues: Admissibility – exhaustion of domestic remedies; admissibility – manifestly ill-founded; admissibility – ratione materiae; admissibility – ratione temporis
Substantive issues: Arbitrary and/or unlawful interference; effective remedy; fair trial
Articles of the Covenant: 2 (1) and (3) (a), 5 (1), 14 (1) read in conjunction with 2 (1), and 17 read alone and in conjunction with 2 (1) and 5 (1)
Articles of the Optional Protocol: 1, 2, 3 and 5 (2) (b)

1. The author of the communication, dated 27 November 2013, is M.L., a national of Croatia. He claims that by destroying his property in 1992 during the Croatian war of independence and subsequently failing to compensate him, the State party violated his rights under articles 2 (1) and (3) (a), 5 (1), 14 (1) read in conjunction with 2 (1), and 17 read alone and in conjunction with 2 (1) and 5 (1), of the Covenant. The Optional Protocol entered into force for the State party on 12 January 1996. The author is not represented by counsel.

* Adopted by the Committee at its 127th session (14 October–8 November 2019).
** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany and Hélène Tigroudja.
The facts as submitted by the author

2.1 The author is an ethnic Serb and resides in Serbia. Generations of his family lived in the region of Dalmatia, in Croatia. The author owned a house in Jezera, located on the island of Murter, in Croatia. The author used the house for commercial purposes. It consisted of four luxuriously equipped and furnished apartment units that were rented to tourists. The author also personally used the house during long weekends and holidays.

2.2 During the Croatian war of independence in the 1990s, pursuant to the direct instructions of high-ranking government officials, the State party’s authorities deliberately destroyed many buildings in Dalmatia that were owned by ethnic Serbs.1 In total, more than 30,000 homes and other structures were destroyed by blasting and arson. During a two-year period, over 1,000 houses owned by ethnic minorities in the immediate vicinity of Šibenik were destroyed by blasting or arson. These acts served as a method of ethnic cleansing, as the State party assumed that the homeowners affected would not return to its territory.

2.3 During the war, the author lived in Bosnia and Herzegovina, and then moved to Serbia. On 2 August 1992, the author’s property in Jezera was destroyed by mine blasting. At that time, no combat actions were occurring on or near the island of Murter. The author had done nothing to provoke the destruction of his property. Because the author lived abroad during the war, he could not have contributed to inter-ethnic tensions in Croatia. Nor did he suffer ill-treatment as an ethnic minority in Croatia. The Commission for War Damage Inspection and Assessment of the City of Šibenik, an ad hoc body created by the State party, conducted a survey and determined that the author’s house had sustained the maximum level of damage (classified as damage level VI). The Commission’s three members were qualified specialists in civil engineering and were therefore able to assess the damage to the property. However, the State party’s authorities classified the property damage as war damage and did not compensate the author for the loss.

2.4 The author is entitled to indemnification for the property under article 2 (1) (a) of Annex G (Private Property and Acquired Rights) of the Agreement on Succession Issues, which Croatia incorporated into domestic law on 2 June 2004. According to this provision, rights to movable and immovable property located in a successor State of the former Yugoslavia must be recognized and protected by the successor State. This provision applies to property rights acquired on or before 31 December 1990, irrespective of the nationality, citizenship, residence or domicile of the property owner. The provision further states: “Persons unable to realize such rights shall be entitled to compensation in accordance with civil and international legal norms.”

2.5 In addition, the author is entitled to compensation under the Law on Temporary Takeover and Administration of Specified Property, of 1995.2 Under this law, the State party acquired temporary control of abandoned or unused property whose owners had left Croatia after 17 August 1990. The State party was obligated to return the property in sound condition to its owner, or, if restitution was not possible, to compensate the owner.

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1 The author cites an interview with Nikola Visković published in the Feral Tribune daily newspaper in Split on 27 May 2005.
2 The author cites art. 2 of National Papers No. 73/95 (27 September 1995) as stating: “As of the date of entering into force of this Law, property located in the previously occupied and now liberated territory of the Republic of Croatia which is abandoned and not personally used by its owners is placed under temporary administration of the Republic of Croatia and put to use in accordance with this Law. As of the date of entering into force of this Law, property located in the territory of the Republic of Croatia which is in the ownership of persons who left the Republic of Croatia after 17 August 1990 or are in the occupied region of the Republic of Croatia and who are on the territory of the ‘Federal Republic of Yugoslavia (Serbia and Montenegro)’ or in the occupied territory of the Republic of Bosnia and Herzegovina and who do not personally use such property since the day of abandoning is placed under temporary administration of the Republic of Croatia and put to use in accordance with this Law. As of the date of entering into force of this Law, property located in the territory of the Republic of Croatia which is in the ownership of the citizens of the ‘Federal Republic of Yugoslavia (Serbia and Montenegro)’ who do not personally use such property is placed under temporary administration of the Republic of Croatia and put to use in accordance with this Law.” (This 1995 law was repealed in 1998.)
2.6 On 3 May 2004, the author submitted a request for damages through an out-of-court settlement to the Office of the Attorney General in Zagreb. The Office rejected the request, on an unspecified date.

2.7 On 31 December 2001, the author had filed a request for “establishing the right to reconstruction and allocation of a subsidy for equipping [his] family house damaged in war”. On 29 October 2004, that request was denied by the State Administration Office (Department for Spatial Development, Environmental Protection, Construction and Property Affairs, Reconstruction Unit), in Šibensko-Kninska County. On 12 November 2004, the author appealed the negative decision of the State Administration Office before the Ministry of the Sea, Tourism, Transport and Development (Directorate for Reconstruction of Family Houses), in Zagreb. On 21 November 2006, the Ministry denied his appeal. On 29 December 2006, the author filed an administrative claim against the decision of the Ministry before the High Administrative Court of Croatia. In a letter dated 1 February 2013, the High Administrative Court notified the author that it had rejected his claim on 9 June 2010, on the ground that he did not have an authorized proxy to receive documents in Croatia.

2.8 The author did not contest the decision of the High Administrative Court before the Constitutional Court, because it would be an ineffective remedy. The Constitutional Court does not protect, inter alia, violations of the rights to property, a fair trial, an effective remedy, and non-discrimination. In cases involving compensation for property damage, the Constitutional Court has not ruled in favour of any homeowner, though it has examined tens of thousands of cases involving claims for compensation for destroyed homes. The Constitutional Court discriminates against ethnic minorities in order to maintain the status quo. It has failed to provide redress for acts of ethnic cleansing, and has failed to implement the judgments of the European Court of Human Rights on applications Nos. 22344/02 and 9056/02.

The complaint

3.1 The author submits that the State party violated his rights under article 2 (3) (a) of the Covenant by denying his application for compensation for the value of his property, which the State party’s authorities intentionally destroyed in 1992. The State party is required to compensate the author, pursuant to the Law on Temporary Takeover and Management of Specific Property and to article 2 (1) (a) of Annex G (Private Property and Acquired Rights) of the Agreement on Succession Issues. The State party classified the property damage as putative war damage to avoid its obligation to pay compensation. The State party has rendered it impossible to obtain an effective legal remedy.

3.2 The State party also violated the author’s right to access information, by withholding the contents of the survey conducted by the Commission for War Damage Inspection and Assessment. This survey demonstrates that the author’s property sustained the most severe level of damage. The State party withheld the survey in order to prevent or frustrate the author’s compensation claim.

3.3 In addition, the State party violated the author’s rights under article 14 (1) read in conjunction with article 2 (1) of the Covenant, by denying him equal protection of the law due to his minority ethnicity. The High Administrative Court discriminated against the author by denying his request for the right to reconstruction and compensation on the ground that he did not have an address in Croatia, or an authorized proxy in Croatia, for the service of documents. In determining the applicable rules concerning the service of notices, the High Administrative Court incorrectly invoked article 146 (1) of the Law on Civil Procedure, which does not apply to administrative disputes. The High Administrative Court should have applied the Law on Administrative Disputes, which contains provisions on the service of notices. Because the High Administrative Court did not do so, its decision on the

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3 The author states that this classification of damages was made under the Law of the Republic of Croatia on the Determination of War Damage (Official Gazette “Narodne novine” No. 61 (19 November 1991), and under the Instructions of the Ministry of Finance of the Republic of Croatia for the Implementation of the Law on Determination of War Damages (Official Gazette “Narodne novine” No. 54 (7 June 1993)).
author’s request was irregular. The Court’s decision to arbitrarily derogate from the Law on Administrative Disputes was made on 10 December 2007, during a meeting of the judges of that Court. The address requirement was a particularly outrageous method of preventing access to justice. With each new regulation, the State party increasingly restricts the rights of ethnic minorities to a fair hearing and access to justice. Because the High Administrative Court based its decision on the author’s request on procedural grounds, it did not examine the merits of his claim.

3.4 The State party also violated the author’s rights under articles 2 (1), 5 (1), and 17 read alone and in conjunction with 2 (1) and 5 (1), of the Covenant, by preventing him from obtaining protection under civil laws.

State party’s observations on admissibility and the merits

4.1 In its observations dated 29 May 2015, the State party considers that the communication is inadmissible under articles 2, 3 and 5 of the Optional Protocol.

4.2 The communication is inadmissible ratione temporis with respect to actions taken by the State party’s authorities before the entry into force of the Optional Protocol for the State party.

4.3 The author’s claim concerning the right to access public documents and information is inadmissible ratione materiae, because the Covenant does not guarantee those rights. The author’s claim under article 17 is also inadmissible ratione materiae because the author has not claimed a violation of his personal freedoms or privacy.

4.4 The communication is also inadmissible because the author has not exhausted domestic remedies. The author has not lodged a constitutional complaint against the decision of the High Administrative Court dated 9 June 2010. Under article 129 of the Constitution, and articles 62 and 64 of the Constitutional Act on the Constitutional Court, any individual may lodge a complaint before the Constitutional Court to raise alleged violations of their constitutional rights by government bodies or legal persons with public authority. The Constitution of the Republic of Croatia guarantees the right of access to courts, legal remedies, and information; and the rights to equality before the courts and to non-discrimination. The author has not substantiated his claims that the Court is biased. The author’s references to the judgments of the European Court of Human Rights on applications Nos. 22344/02 and 9056/02 do not support his claim that the constitutional complaint is an ineffective remedy, because the Constitutional Court had no opportunity to decide on those matters.

4.5 In addition, the author failed to exhaust domestic remedies with respect to his claim of a violation of the right to access public documents and public information. The Law on the Right to Access Information, which entered into force on 6 November 2003, was in force during the relevant period. It allowed all citizens to request information from government bodies, and to appeal a denial of the request. The communication does not imply that the author submitted such a request. Moreover, it does not appear that the author requested access to relevant documents during the proceedings relating to his application for reconstruction. Even if he did request access to the relevant documents, he has not shown that the request was denied, and that he filed an appeal against the denial to the Ministry of the Sea, Tourism, Transport and Development, a claim to an administrative court, or a constitutional complaint.

4.6 Finally, the communication is insufficiently substantiated, as it does not contain sufficient information to allow the State party to consider and respond to it. The author has alleged violations in general terms, without concretely describing the actions that constituted the alleged violations. The author has not specified which government bodies allegedly violated his rights to inspect public documents and access public information. Moreover, while the author has linked his claims to alleged ethnic discrimination, he has not concretely explained how the actions of the State party’s authorities resulted from discrimination. He has presented no facts or evidence implying that the High Administrative Court or the Constitutional Court have interpreted domestic law differently in cases involving individuals who are not of Serbian ethnicity. The author is also using his
communication as a fourth-instance appeal; this is not permitted under the Optional Protocol to the Covenant.

4.7 The communication is without merit. In its decision of 9 June 2010, the High Administrative Court dismissed the complaint in accordance with article 146 (1) of the Civil Proceedings Act because the author resided abroad and had failed to appoint an attorney to receive documents. This decision complied with an interpretative decision adopted at a meeting of the judges of the High Administrative Court on 10 December 2007. Until November 2010, the Court took this same position in all cases involving plaintiffs who resided abroad and who had failed to appoint attorneys to receive documents in Croatia. Thus, the decision of the High Administrative Court was not affected by the author’s nationality. The author’s claims under articles 14 (1) and 17 are therefore baseless. As of November 2010, the Court’s practice changed due to a ruling of the Constitutional Court which found that the dismissal of cases in such circumstances disproportionately restricted access to a court and a fair trial. Thus, in retrial proceedings, plaintiffs have been able to have the High Administrative Court reassess the grounds of their complaints and the lawfulness of the disputed decisions. The State party provides a copy of a decision in which the Constitutional Court determined that the constitutional right of a national of Bosnia and Herzegovina to access a court and benefit from a fair trial had been denied when the High Administrative Court had deemed that he was required to have an attorney present in Croatia for the service of documents. The decision of the Constitutional Court is dated 3 November 2010. In contrast, the author of the present communication has not filed a constitutional complaint to challenge the High Administrative Court’s decision of 9 June 2010. The author would have sound grounds to expect a positive outcome, based on the aforementioned change in practice of the Constitutional Court. The author’s failure to utilize this domestic remedy should not be interpreted to the detriment of the State party.

Author’s comments on the State party’s observations on admissibility and the merits

5. In comments dated 17 October 2015, the author states that he has nothing to add, but emphasizes that he considers Croatia to be his homeland, as he was born and raised there. Out of respect and appreciation for the country, he invested a large amount of money in constructing a 545-square-metre house on the island of Murter in 1986. The State party recognizes the damage that was done to this property in 1992. Records of the damage are kept in a police station in either Tisno or Šibenik. All usable parts of the house, including roof tiles, roof structures, windows, doors and the furniture were disassembled before the house was destroyed. There was no combat on the island of Murter during the war. As a retired professor and scientist, the author does not have the financial means to hire lawyers in either Serbia or Croatia. The author is willing to enter into an agreement and compromise with the State party.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter has not been examined and is not currently being examined under another procedure of international investigation or settlement.

6.3 The Committee takes note of the State party’s argument that the communication is inadmissible ratione temporis. The Committee observes that when acceding to the Optional Protocol, the State party made the following declaration: “The Republic of Croatia interprets article 1 of this Protocol as giving the Committee the competence to receive and consider communications from individuals subject to the jurisdiction of the Republic of Croatia who claim to be victims of a violation by the Republic of any rights set forth in the Covenant which results either from acts, omissions or events occurring after the date on which the Protocol entered into force for the Republic of Croatia.” The Committee notes that the author’s property was destroyed in 1992, before the Optional Protocol entered into
force for the State party on 12 January 1996. Thus, while the Committee is concerned by the author’s allegations concerning the discriminatory motives behind the destruction of his property, it is barred ratione temporis from examining claims surrounding this act in 1992. These claims are therefore inadmissible under article 1 of the Optional Protocol. On the other hand, the Committee notes the author’s claim under article 14 (1) read in conjunction with article 2 (1) of the Covenant and his implied claim under article 26 of the Covenant, that his application for reconstruction and compensation for the damaged property was unfairly denied. The Committee observes that Croatian law established the possibility to obtain, under certain circumstances, reconstruction and compensation for damaged property, and that the author initiated such proceedings several years after the entry into force of the Optional Protocol. Accordingly, the Committee considers that it is not precluded ratione temporis from examining that aspect of the communication.

6.4 To the extent that the author claims that the State party violated his rights under the Covenant by destroying his property and failing to compensate him for the loss, the Committee recalls that the Covenant does not protect the right to property, or establish an autonomous right to compensation. Regarding the author’s claims under articles 2 (1) and (3) (a) and 5 (1) of the Covenant, the Committee recalls that articles 2 and 5 set forth general obligations for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol. Accordingly, the Committee declares these claims inadmissible ratione materiae, pursuant to article 3 of the Optional Protocol.

6.5 The Committee notes the State party’s position that the author did not exhaust domestic remedies, as required under article 5 (2) (b) of the Optional Protocol, with respect to his claim that he was wrongly denied access to public information. The Committee notes the author’s claim that he was unable to access the results of the survey carried out by the Commission for War Damage Inspection and Assessment. However, the Committee notes the State party’s uncontested observation that during the reconstruction request proceedings, the author did not file a request to access the survey under the Law on the Right to Access Information. Accordingly, the Committee considers that this claim is inadmissible under article 5 (2) (b) of the Optional Protocol.

6.6 The Committee further notes the State party’s argument that the author did not exhaust domestic remedies because he did not lodge a complaint before the Constitutional Court against the decision of the High Administrative Court dated 9 June 2010. This decision concerned the author’s application for compensation and the right to reconstruction of the property. The Committee also notes the author’s claim that a complaint to the Constitutional Court is an ineffective remedy, because the Constitutional Court has rejected all requests for compensation for property and does not protect the rights to, inter alia, a fair hearing and an effective remedy. The Committee recalls its jurisprudence indicating that although there is no obligation to exhaust domestic remedies if they have no chance of being successful, authors of communications must exercise due diligence in the pursuit of available remedies, and that mere doubts or assumptions about their effectiveness do not absolve the authors from exhausting them. The Committee also recalls its jurisprudence that when the highest domestic court has ruled on the matter in dispute in a manner eliminating any prospect that a remedy before domestic courts may succeed, authors are not obliged to exhaust domestic remedies for the purposes of the Optional Protocol.

6 See, inter alia, Wackenheim v. France (CCPR/C/75/D/854/1999), para. 6.5; and Kh.B. v. Kyrgyzstan (CCPR/C/120/D/2163/2012), para. 10.4.
7 See, inter alia, V.S. v. New Zealand (CCPR/C/115/D/2072/2011), para. 6.3; García Perea v. Spain (CCPR/C/95/D/1511/2006), para. 6.2; and Vargay v. Canada (CCPR/C/96/D/1639/2007), para. 7.3.
6.7 In examining whether the Constitutional Court would represent an effective remedy to contest the procedural decision of the High Administrative Court based on the author’s lack of an address in Croatia for the service of documents, the Committee notes the State party’s information that domestic law permits individuals to submit complaints to the Constitutional Court concerning, inter alia, decisions by government bodies that allegedly violated the individual’s human rights as guaranteed by the Constitution. The Committee notes that the Constitution of Croatia protects the right to a fair determination of rights and obligations before a legally established, independent and impartial court; and the right of all persons to equality before the law.\(^9\) The Committee also notes the State party’s uncontested information that as of November 2010, the practice of the Constitutional Court changed due to its ruling in 2010 on the 2008 High Administrative Court decision, finding it unconstitutional to dismiss cases on the ground that no individual had been designated to receive court documents in Croatia. The Committee notes the State party’s information that in its 2010 ruling, the Constitutional Court considered that this ground for dismissal violated the guarantee of access to a court and to a fair trial. The Committee observes that due to the Court’s change in practice following the 2010 ruling, the author would have had a reason to expect a positive outcome if he had challenged the decision of the High Administrative Court before the Constitutional Court. In the light of this information, the Committee considers that the information the author provided does not suffice to establish that the remedy of a complaint before the Constitutional Court to challenge the decision of the High Administrative Court had no chance of being successful. Accordingly, the Committee considers that the author’s claim under articles 14 (1) read in conjunction with article 2 of the Covenant, and his implied claim under article 26 of the Covenant, are inadmissible under article 5 (2) (b) of the Optional Protocol.

6.8 The Committee also notes the State party’s argument that the communication is inadmissible because it is insufficiently substantiated. The Committee considers that the author has not provided sufficient information to substantiate his claims under article 17 read alone and in conjunction with articles 2 (1) and 5 (1) of the Covenant, and finds these claims inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under articles 1, 2, 3 and 5 (2) (b) of the Optional Protocol;

(b) That the present decision shall be transmitted to the State party and to the author.

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\(^9\) See the Constitution of the Republic of Croatia, arts. 14 and 29.