

DECISION ON THE MERITS

22 June 2010

Centre on Housing Rights and Evictions (COHRE) v. Croatia

Complaint No. 52/2008

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter (“the Committee”), during its 243rd session attended by:

Mrs Polonca KONČAR, President
Messrs Andrzej SWIATKOWSKI, Vice-President
 Colm O’CINNEIDE, Vice-President
 Jean-Michel BELORGEY, General Rapporteur
Mrs Monika SCHLACHTER
 Birgitta NYSTRÖM
 Lyudmila HARUTYUNYAN
Messrs Rüçhan IŞIK
 Petros STANGOS
 Alexandru ATHANASIU
 Luis JIMENA QUESADA
Mrs Jarna PETMAN

Assisted by Mr Henrik Kristensen, Deputy Executive Secretary

Having deliberated on 16 March, 27 April and 22 June 2010,

On the basis of the report presented by Mr Colm O’CINNEIDE

Delivers the following decision adopted on this last date:

PROCEDURE

1. The complaint lodged by the Centre on Housing Rights and Evictions (hereafter referred to as COHRE) was registered on 8 September 2008. The European Committee of Social Rights ("the Committee") declared the complaint admissible on 30 March 2009.
2. Pursuant to Article 7§§1 and 2 of the Protocol providing for a system of collective complaints ("the Protocol") and the Committee's decision on the admissibility of the complaint, the Executive Secretary communicated the text of the admissibility decision on 7 April 2009 to the Croatian Government ("the Government"), the complainant organisation, the states party to the Protocol, the states that have ratified the Revised Charter and made a declaration under Article D§2 and to the international organisations of employers and trade unions referred to in paragraph 2 of Article 27 of the 1961 Charter, i.e. the European Trade Union Confederation (ETUC), Business Europe (formerly UNICE) and the International Organisation of Employers (IOE).
3. In accordance with Rule 31§1 of the Committee's Rules, the Committee fixed a deadline of 29 May 2009 for the presentation of the Government's written submissions on the merits which was extended to 26 June 2009. The submission was registered on 26 June 2009.
4. Pursuant to Rule 31§2, the President set 7 September 2009 as the deadline for the complainant to present its response to the Government's submissions. The response was registered on 3 September 2009.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

5. COHRE requests the Committee to find Croatia in violation of Article 16 of the Charter alone or as interpreted in light of the non-discrimination clause of the Preamble to the Charter, on the basis that the lack of an effective remedy for the loss of special occupancy rights by ethnic Serbs and other minorities constitutes a continuing violation of housing rights and therefore of the right of families to enjoy social, legal and economic protection. In particular, COHRE claims that the failure to provide adequate restitution or compensation to ethnic Serbs who were arbitrarily expelled from their homes during the period of the conflict in the former Yugoslavia constitutes an on-going denial of the right of families to enjoy protection of their housing rights free from discrimination, and that by virtue of the principle of restorative justice, persons subject to this alleged denial of rights should benefit from appropriate restitutionary measures.

B- The Government

6. The Government maintains that the issues raised by the complainant organisation fall outside of the temporal jurisdiction of the Committee, as they concern matters which took place before Croatia ratified the European Social Charter on 1 March 2003. The Government also asserts that Article 16 of the Charter is a social right which cannot be interpreted in a way so as to guarantee the right to ownership or to enjoy property rights, or the right of compensation for deprivation or limitation of ownership or property rights, or the right to a specific home. Alternatively, it maintains that the housing programme for former holders of occupancy rights, which aims at providing lasting solutions to displacement situations for those returnees who wish to come back to Croatia, is in line with the requirements of Article 16 of the Charter.

RELEVANT DOMESTIC AND INTERNATIONAL LAW

A - DOMESTIC LAW AND CONTEXT

7. According to the Government, before independence there were 366,182 households in Croatia under the regime of social ownership. Social ownership primarily had the character of lease in classical civil law. The tenants had the right to use the flat to satisfy their housing needs but did not have the right to sell the flat or their occupancy rights. In addition, the flat or occupancy rights could not be the subject of inheritance. Legislation protected tenants from arbitrary cancellation of their protected tenancies under the social ownership regime, by providing that flat providers could only seek a termination of a protected tenancy by filing a lawsuit with the competent court. Article 99 and 102a of the Housing Act set out the possible grounds for cancellation.

The Housing Act (Official Gazette, nos. 51/85 and 42/86, 22/92 and 70/93), in particular, the following articles:

Article 99

The occupancy rights may be terminated when the tenant and the members of his or her family household living together with him or her cease to use the flat for an uninterrupted period longer than six months.

The cancellation of occupancy rights according to the provisions of paragraph 1 of this Article cannot be imposed on a person who does not use the flat because he or she is undergoing treatment, performing military duty or for other justified reasons.

It shall be considered that the flat has not been used continuously even when the tenant only occasionally visits the flat, when the entire flat is given to sub-tenants or when the entire flat is used by a person who is not a member of the family household of the tenant.

Article 100

Notwithstanding the provisions of Article 99, paragraphs 1 and 3 of this Act, occupancy rights may not be cancelled if the tenant is temporarily employed abroad or in another location in the country or when he or she is abroad for schooling, specialisation, giving artistic performances, organising exhibitions and similar reasons.

The tenant is obliged to inform the provider of the flat within 30 days of the occurrence of the circumstances from paragraph 1 of this Article.

In the case from paragraph 1 of this Article, the provider of the flat shall decide on the manner of use of the flat in line with its own self-management general act or general act, and the rights and obligations regarding use of that flat shall be regulated by a contract concluded between the provider of the flat and the user.

Article 102a

Occupancy rights shall be cancelled for those who take part or have taken part in hostile activity against the Republic of Croatia. The owner of the flat, after a court decision on cancellation of the contract on use of the flat, shall decide to give the flat in question to members of the family household or other appropriate living accommodation.

8. The conflict in the former Yugoslavia created a massive displacement of population. During the war, on the basis of Article 99 of the Housing Act, proceedings for cancellation of occupancy rights were instituted against persons with specially-protected tenancies under the social ownership system who did not remain in occupation of their flats, where such persons could not provide a suitable legal justification for their absence.

9. In contrast, persons who remained in occupation of their socially owned flats during the conflict were granted the right in certain circumstances to acquire legal ownership of their flats. The Specially Protected Tenancies (Sale to Occupier) Act (Official Gazette no. 27/1991), which entered into force on 19 June 1991, entitled the holder of a specially protected tenancy of a socially-owned flat to purchase it from the provider of the flat under favourable conditions. Section 4 (2) provided that a written request for purchase (the first request) had to be made within one year of the date of the Act's entry into force (this time-limit was by subsequent amendments to the Act extended until 31 December 1995), and a further request for the actual conclusion of the purchase contract (the second request) within two years following the first request.

10. After the war, in 1995 the Act on the Lease of Flats in the Liberated Territory (OG 73/95) was adopted. This Act ended occupancy rights *ex lege* for all previous holders, regardless of their ethnic origin, who did not return to their deserted flats within ninety days from the day that Act came into force.

The Act on the Lease of Flats in the Liberated Territory, Official Gazette, no. 73/95, the following articles:

Article 2

Occupancy rights for flats from Article 1 of this Act shall be cancelled *ex lege* if the holder of occupancy rights abandons the flat or does not use it for longer than 90 days from the day this Act comes into force.

If the remaining members of the family household of the holder of occupancy rights are in the flat, the leaser as established by this Act shall decide whether to lease them the flat or some other appropriate flat.

11. Occupancy rights under the social ownership regime definitively ceased to exist with the adoption of the Act on Lease of Flats of 5 November 1996.

Act on the Lease of Flats, Official Gazette 91/96

Article 30

(1) On the day this Act comes into force, the occupancy rights of persons who attained those rights according to regulations which were valid up until this Act came into force shall cease.

(3) As an exception, the rights and obligations of lessees from the provisions of paragraphs 1 and 2 of this Article may not be attained by persons who are in the course of proceedings for cancellation or termination of their occupancy rights.

Article 31

(1) The owner of the flat and the person from Article 30 who meets the conditions of a lessee shall conclude, pursuant to the provisions of this Act, a contract on permanent lease of the flat, in that the lessee has the right to reach an agreement on protected tenancy rent for that period.

(2) A lessee shall not have the right to protected tenancy rent who:

- performs commercial activities in part of the flat,
- owns a habitable house or flat,
- did not make use of the flat, with the members of his or her family household, for longer than 6 months before this Act comes into force, without the consent of the owner of the flat.

12. To facilitate the process of return of refugees and resettlement, in 1996 the Act on Areas of Special State Concern (hereinafter described as the "ASSC") came into force, which aimed to reconstruct the areas most affected by the conflict and to create conditions for the sustainable return of displaced elements of the population as soon as possible. This Act prescribed several models of provision of housing by the State:

The Act on Areas of Special State Concern, Official Gazette, no. 26/03 – consolidated text, 42/05, 90/05, in particular, the following articles:

II. INCENTIVES FOR SETTLING AND DEVELOPMENT OF AREAS OF SPECIAL STATE CONCERN

1. ALLOCATION OF HOUSES, FLATS, CONSTRUCTION LAND AND CONSTRUCTION MATERIALS

Article 7

(1) The Republic of Croatia shall encourage the return and stay of the population who lived in the areas of special state concern before the Homeland War and the settlement of citizens of the Republic of Croatia of all occupations and professions who are able to contribute to the economic and social development of the areas of special state concern.

(2) The return and stay and settlement of population in the areas of special state concern shall be encouraged by provision of housing in one of the following ways:

- the leasing of family houses or flats in state ownership;
- the leasing of damaged family houses in state ownership and the provision of construction material;
- the allocation of construction land in state ownership and construction materials for construction of housing blocks with several housing units; the decision on the manner of construction and financing of these structures shall be rendered by the Ministry;
- the allocation of construction land in state ownership and construction materials for construction of families houses, or
- the allocation of construction material for repair, reconstruction, or construction of a family house or flat.

13. Since 2002, the “Former Holders of Occupancy Rights” (hereinafter the FHORs) who were displaced from the ASSC received priority in the provision of accommodation through the lease of state-owned flats on the basis of the following ordinance:

Ordinance on the order of priority for provision of housing in the areas of special state concern, Official Gazette, no. 116/02

Article 1

This Ordinance establishes the order of priority for provision of housing for applicants who meet the conditions for provision of housing pursuant to the Act on Areas of Special State Concern (hereinafter: the Act – Official Gazette, nos. 44/96, 57/96, 124/97, 73/00, 87/00, 94/01 and 88/02).

Article 2

Applicants for provision of housing from Article 1 of this Ordinance are persons accommodated in settlements for displaced persons and other organised accommodation or persons who are returning to their previous residence or who are settling in the areas of special state concern, also including users of flats on which occupancy rights have been cancelled pursuant to the Act on the Lease of Flats in the Liberated Territory (Official Gazette, no. 73/95).

14. As regards the areas outside the ASSC, the Government established a legal framework for resolution of the housing provision for returnees who were former holders of occupancy rights, through the following legislation:

Conclusion on the manner of provision of housing for returnees who do not own a house or flat, and who lived in socially owned flats (former holders of occupancy rights) in the areas of the Republic of Croatia which are outside the areas of special state concern, Official Gazette, no. 100/2003:

1. In line with the basic principles of the Programme for Return and Care of Displaced Persons, Refugees and Resettled Persons (Official Gazette, no. 92/98), related to the inalienable right to return to the Republic of Croatia of persons who for various reasons left their home and who may be deemed to be refugees according to the definition of the Geneva Convention of 1951, and other valid instruments of the United Nations, in order to realise the conditions for return and permanent accommodation of persons who do not own a flat or house, and who lived in flats in social ownership in the areas which are outside the areas of special state concern, housing shall be provided for these persons (hereinafter: returnees).

2. Pursuant to point 1 of this Conclusion, housing shall be provided for returnees who wish to return and live permanently in the Republic of Croatia, regardless of whether or not they are currently in the Republic of Croatia, under the condition that they do not own or co-own a family house or flat in the Republic of Croatia or in the area of the states arising from the break-up of the former SFRY, or they have not sold, gifted or in any other way disposed of one after 8 October 1991, or they have not attained the status of protected lessee.

3. Flats for provision of housing of returnees pursuant to this Conclusion shall be provided as a rule by construction of flats according to the Act on Subsidised Residential Construction (Official Gazette, no. 109/2001)

4. Provision of housing shall be undertaken in that returnees shall be provided with, according to their capacity and choice:

- the lease of a flat in state ownership, which according to its capacity, the state will primarily purchase in instalments, pursuant to the Act on Subsidised Residential Construction, except in the areas in which the construction of these flats is not certain and where the possibility exists of purchasing a used flat, or
- purchase of flat in line with the Act on Subsidised Residential Construction, with the possibility of payment in long-term instalments under favourable conditions.

5. The housing of returnees shall be provided primarily in those areas of the Republic of Croatia (municipalities and towns) where those persons previously had permanent residence, that is, where they used a socially-owned flat. If this is not possible, appropriate housing shall be provided in other areas of the Republic of Croatia, in line with the availability of habitable housing.

Government Conclusion of 9 December 2004, Official Gazette, no. 179/04

1. The deadline for filing applications for provision of housing is hereby extended for returnees who are not owners of a house or flat, and who lived in socially-owned flats (former holders of occupancy rights) in areas of the Republic of Croatia outside the areas of special state concern, which the Government of the Republic of Croatia, by its conclusion of 12 June 2003, set for 31 December 2004 (Official Gazette, no. 100/2003). The deadline for filing applications by returnees for provision of housing is 30 June 2005.

Government Conclusion of 30 June 2005, Official Gazette, no. 79/2005

1. The deadline for filing applications for provision of housing is hereby extended for returnees who are not owners of a house or flat, and who lived in socially owned flats (former holders of occupancy rights) in areas of the Republic of Croatia outside the areas of special state concern, which the Government of the Republic of Croatia by its conclusion of 9 December 2004, set for 30 June 2005 (Official Gazette, no. 179/2004). The deadline for filing applications by returnees for provision of housing is 30 September 2005.

Decision on the implementation of provision of housing for returnees – former holders of occupancy rights on flats outside the areas of special state concern, Official Gazette, no. 63/2008

I

This Decision establishes the manner of provision of housing for returnees who do not own a house or flat or have not sold, gifted or in any other way disposed of one or have not attained the legal position of protected lessee, and who lived in flats in social ownership (former holders of occupancy rights) in the areas of the Republic of Croatia which are outside the areas of special state concern.

II

Flats in the areas of the Republic of Croatia which are outside the areas of special state concern for the provision of housing for returnees from point I of this Decision shall be provided:

- by the organised construction of flats, provided that the price of the construction is not higher than the standard price of flats applied for construction of flats according to the Act on Subsidised Residential Construction (Official Gazette, nos. 109/2001, 82/2004 and 76/2007),
- purchase of flats on the market
- moving into state owned flats
- construction of flats for lease according to the public-private partnership model, or by agreeing long-term tenure (25 to 30 years).

B – INTERNATIONAL STANDARDS AND RELEVANT TREATY INSTRUMENTS

15. The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia (SFRY) was signed in Vienna on 29 June 2001 by the then recognised successor states of the former Yugoslavia, including Croatia, and came into force on 2 June 2004. It contains provisions relating to property and occupancy rights, primarily set out in Annex G of the Agreement:

AGREEMENT ON SUCCESSION ISSUES

Article 7

This Agreement, together with any subsequent agreements called for in implementation of the Annexes to this Agreement, finally settles the mutual rights and obligations of the successor States in respect of succession issues covered by this Agreement. The fact that it does not deal with certain other non-succession matters is without prejudice to the rights and obligations of the States parties to this Agreement in relation to those other matters.

Article 8

Each successor State, on the basis of reciprocity, shall take the necessary measures in accordance with its internal law to ensure that the provisions of this Agreement are recognised and effective in its courts, administrative tribunals and agencies, and that the other successor States and their nationals have access to those courts, tribunals and agencies to secure the implementation of this Agreement.

Article 9

This Agreement shall be implemented by the successor States in good faith in conformity with the Charter of the United Nations and in accordance with international law.

Annex G
Private Property and Acquired Rights*Article 1*

Private property and acquired rights of citizens and other legal persons of the SFRY shall be protected by successor States in accordance with the provisions of this Annex.

Article 2

(1)(a) The rights to movable and immovable property located in a successor State and to which citizens or other legal persons of the SFRY were entitled on 31 December 1990 shall be recognised, and protected and restored by that State in accordance with established standards and norms of international law and irrespective of the nationality, citizenship, residence or domicile of those persons. This shall include persons who, after 31 December 1990, acquired the citizenship of or established domicile or residence in a State other than a successor State. Persons unable to realize such rights shall be entitled to compensation in accordance with civil and international legal norms.

(b) Any purported transfer of rights to movable or immovable property made after 31 December 1990 and concluded under duress or contrary to sub-paragraph (a) of this Article shall be null and void.

Article 4

The successor States shall take such action as may be required by general principles of law and otherwise appropriate to ensure the effective application of the principles set out in this Annex, such as concluding bilateral agreements and notifying their courts and other competent authorities.

Article 5

Nothing in the foregoing provisions of this Annex shall derogate from the provisions of bilateral agreements concluded on the same matter between successor States which, in particular areas, may be conclusive as between those States.

Article 6

Domestic legislation of each successor State concerning dwelling rights (“stanarsko pravo/ stanovanjska pravica/ stanarsko pravo”) shall be applied equally to persons who were citizens of the SFRY and who had such rights, without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 7

All natural and legal persons from each successor State shall, on the basis of reciprocity, have the same right of access to the courts, administrative tribunals and agencies, of that State and of the other successor States for the purpose of realising the protection of their rights.

Article 8

The foregoing provisions of this Annex are without prejudice to any guarantees of non-discrimination related to private property and acquired rights that exist in the domestic legislation of the successor States.

16. At the Regional Ministerial Conference on Refugee Returns in Sarajevo in January 2005, the Governments of Bosnia and Herzegovina, Croatia, and Serbia and Montenegro issued the Sarajevo Declaration on Refugee Return, the key provisions of which are as follows:

Regional Ministerial Conference on Refugee Returns Sarajevo, January 2005

DECLARATION

We, the ministers responsible for refugees and internally displaced persons in Bosnia and Herzegovina, Croatia, and Serbia and Montenegro, met today in Sarajevo to identify our individual and joint activities that should be undertaken in the forthcoming period with the assistance of the international community in order to ensure a just and durable solution to refugee and IDP situation in our countries;

We have agreed as follows:

1. Pursuant to our country programmes, we are committed to solving the remaining population displacement by the end of 2006, to facilitating returns or local integration of refugees and internally displaced persons in our countries, depending on their individual decisions, without any discrimination, and providing assistance and support to refugees and internally displaced persons in cooperation with UNHCR, the EU and OSCE;
2. Access to all rights and entitlements, including the right to accommodation, shall be ensured in a fair and transparent manner, while all social, legal, procedural or any other requirement for the implementation of the above-said shall be met in the spirit of the present Declaration.

3. Without prejudice to the precedence of the right to return, refugees who have chosen not to return will be assisted by their new host countries to locally integrate in accordance with their national legislation.

4. UNHCR, as well as the EU and OSCE are invited to assist our governments in the return process and local integration and to raise financial and other support and assistance from the international community;

5. Upon return or local integration, all refugees shall enjoy the same rights and shall have the same responsibilities as all other citizens, without any discrimination;

6. The above mentioned principles and goals shall serve as a basis for the development of individual action plans ("Road Map") in our countries, including a comprehensive list of all the tasks that must be undertaken and each country shall bear the individual responsibility for the implementation. Those individual plans of activities shall be unified in a joint implementation matrix;

17. On 11 August 2005 the United Nations Sub-Commission on the Promotion and Protection of Human Rights endorsed the Principles on Housing and Property Restitution for Refugees and Displaced Persons, known as the Pinheiro Principles¹. These principles provide specific policy guidance regarding how to ensure the right to housing and property restitution in practice. They provide a consolidated text relating to the legal, policy, procedural, institutional and technical implementation mechanisms for housing and property restitution².

18. Principle 21 of the Pinheiro Principles establishes that all refugees and displaced persons have the right to full and effective compensation, monetary or in kind, as an integral component of the restitution process. States shall, in order to comply with the principle of restorative justice, ensure that the remedy of compensation is only used when the remedy of restitution is not factually possible. They should ensure that restitution is only deemed factually impossible in exceptional circumstances, namely when housing, land and/or property is destroyed or when it no longer exists, as determined by an independent, impartial tribunal. In some situations, a combination of compensation and restitution may be the most appropriate remedy and form of restorative justice. Principle 21 of the Pinheiro Principles establishes that all refugees and displaced persons have the right to full and effective compensation, monetary or in kind, as an integral component of the restitution process.

19. In its Recommendation of 28 January 2010 (REC 1901 (2010)),³ 'Solving property issues of refugees and displaced persons', the Parliamentary Assembly of the Council of Europe recommended to the Committee of Ministers that it instructs the relevant body of the Council of Europe to undertake a study that would examine existing standards and practice related to redress for the loss of access and rights to housing, land and property in favour of refugees and IDPs in European post-conflict

¹ Principles on Housing and Property Restitution for Refugees and Displaced Persons ("Pinheiro Principles"), United Nations Doc. E/CN.4/Sub.2/2005/17.

² Handbook on Housing and Property Restitution for Refugees and Displaced Persons: implementing the 'Pinheiro Principles', March 2007

³<http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/EREC1901.htm>

20. settings, and the procedures and mechanism with which such redress is sought and implemented, with a view to providing the basis for detailed guidelines which would focus, inter alia, on the modalities of providing redress for the loss of occupancy and tenancy rights. In this Recommendation the Parliamentary Assembly commented as follows:

“...for both refugees and internally displaced persons (IDPs), the loss of homes and land presents a serious obstacle to achieving durable solutions in post-conflict situations and to restoring justice. Legal remedies against such loss are an essential component for restoring the rule of law in post-conflict situations. Such remedies, including the relevant redress and the mechanisms and procedures through which such redress is sought and implemented, are directly linked to stability, reconciliation, and transitional justice and are therefore indispensable elements for any constructive peace-building strategy.”

21. In the document (Doc. 12106 of 8 January 2010¹) on Solving property issues of refugees and displaced persons the *rapporteur* for the Committee on Migration, Refugees and Population of the Parliamentary Assembly of the Council of Europe, Mr Jørgen Poulsen, concludes that administrative restitution of some 20,000 private homes claimed by ethnic Serb owners has now been largely completed, despite initial extensive delays in the implementation of this process. However, Mr Poulsen also comments that the process of providing housing care to Serb returnees whose socially owned apartments were confiscated during the conflict has been slow, with some 6,400 families still awaiting resolution of their claims. Many potential claimants for housing care in urban areas may have missed a 2005 claims deadline. This group of displaced persons, the FHORs, are the principal group affected by the issues at stake in this complaint.

22. Mr Jørgen Poulsen also notes that “contrary to the practice in the rest of the region, no legal remedies have been offered for the estimated 30,000 Serb households stripped of occupancy/tenancy rights to socially owned apartments after fleeing during the conflict. Instead, those who are willing to return and do not have access to property elsewhere have been offered housing assistance.”

THE LAW

Article 16 – The right of the family to social, legal and economic protection

With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means.

Preamble (Extract)

.....
Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin;

¹<http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12106.htm>

Preliminary remarks as to the *ratione temporis* issue

23. The Committee refers to the case-law of the European Court of Human Rights on the issue of *ratione temporis*, which has established clear principles which the Committee considers are suitable for application in interpreting the Social Charter. In particular, the Committee refers to the judgments of the Grand Chamber of the European Court of Human Rights in the cases of *Blečić v. Croatia* (Application N. 59532/00, Strasbourg, Judgement of 8 March 2006) and *Šilih v. Slovenia* (Application No. 71463/01, Strasbourg, Judgment of 9 April 2009). In the latter judgment, the Grand Chamber of the European Court of Human Rights commented as follows:

146. The problem of determining the limits of its jurisdiction *ratione temporis* in situations where the facts relied on in the application fell partly within and partly outside the relevant period has been most exhaustively addressed by the Court in the case of *Blečić v. Croatia*...In that case the Court confirmed that its temporal jurisdiction was to be determined in relation to the facts constitutive of the alleged interference (§ 77). In so doing, it endorsed the time of interference principle as a crucial criterion for assessing the Court's temporal jurisdiction. It found in this respect that “[i]n order to establish the Court's temporal jurisdiction it is ... essential to identify, in each specific case, the exact time of the alleged interference. In doing so the Court must take into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated” (§ 82). The Court also indicated that if the interference fell outside the Court's jurisdiction, the subsequent failure of remedies aimed at redressing that interference could not bring it within the Court's temporal jurisdiction (§ 77).

24. The Grand Chamber of the European Court of Human Rights in *Šilih* at § 106-118 also made reference to Article 28 of the Vienna Convention of 1969 on the Law of Treaties, Articles 13 and 14 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (adopted by the International Law Commission on 9 August 2001), and other relevant international law and practice, including the jurisprudence of other international courts and committees charged with interpreting international treaty instruments. The Committee considers that this material is also of assistance in considering the issue of *ratione temporis* and in delineating the limits of its temporal jurisdiction.

25. The Committee also considers that the special nature of the rights at issue can be relevant in assessing whether a situation can be said to be ongoing, as accepted by the Grand Chamber of the European Court of Human Rights in *Šilih* (§ 147). In this context, the nature of the protection conferred by Article 16 of the Charter, the right at issue, is relevant, in particular its focus on securing effective and continuing protection of family life.

26. Turning to the application of these principles to the issues at stake in the present complaint, the Committee recalls that, in its decision on admissibility, it held that the heart of the complaint concerned alleged violations of the Charter which has continuing and persistent effects at the time it was lodged, which post-dated the ratification by Croatia of the Charter in 2003.

27. The Committee further observes that certain of the factual issues at stake, such as the cancellation of occupancy rights which have allegedly disproportionately affected ethnic Serb communities in Croatia and have allegedly deprived them in a discriminatory manner of the possibility of purchasing their flats under favourable conditions, occurred in the mid -1990s, i.e. the date before the Charter entered into force in respect of Croatia. As such, in line with the approach adopted by the Grand Chamber of the European Court of Human Rights in *Blečić* and *Šilih*, the Committee considers that these alleged specific violations fall outside of its temporal jurisdiction.

28. The Committee nevertheless reiterates that in the decision on the admissibility it held that the core issues at stake in this complaint concern allegations in respect of an ongoing factual situation (i.e. the alleged failure to provide redress to families who continue to be affected by the loss of formerly protected housing rights) which may have originated in the events which occurred in the mid-1990s but which continues in effect up to and beyond the time the complaint was lodged i.e. within the period that postdates the ratification of the Charter. The Committee takes the view that the situation of alleged breach continues and it may even be progressively compounded if sufficient measures are not taken to put an end to it (*Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Complaint No. 30/2005, decision on the merits of 6 December 2006, §193). Consequently, the Committee considers that it is competent *ratione temporis* to consider all the facts raised in this complaint. In so concluding, the Committee has taken into account the special nature of the right to social, legal and family protection set out in Article 16, with its focus on ensuring concrete and effective protection for families.

ALLEGED VIOLATION OF ARTICLE 16 OF THE CHARTER

A. Submissions of the parties

a. The complainant organisation

29. COHRE submits that Croatia is in violation of Article 16 of the Charter alone or as interpreted in light of the Preamble on the alleged basis that the lack of an effective remedy for the loss of special occupancy rights by ethnic Serbs and other minorities constitutes a continuing violation of the right of families to enjoy social, legal and economic protection. In particular, COHRE asserts that the programme of housing care currently being implemented by the Government of Croatia does not address the core issue of the discriminatory cancellation of occupancy rights in the mid 1990s, the resulting inability of those who were displaced to purchase one's home under preferential conditions, or the right to the remedy of restorative justice, including restitution, that should be available to return the displaced families to the situation they would otherwise be in if the alleged violations of the Social Charter had not occurred.

30. Moreover, COHRE contends that the 'housing care' scheme which was adopted by the Government in 2002 in response to criticism on Croatia's record on issues relating to the FHORs and the return of displaced persons, is unsatisfactory as it lacks a human rights basis and therefore does not provide a substantive solution to the continuing housing problems faced by ethnic Serbs.

31. COHRE further contends that housing care programme is implemented at a slow pace by the Croatian Government and in practice targets for the provision of housing are repeatedly missed. This is allegedly due, among other factors, to the fact that the conditions imposed on FHORs make it difficult for them to return to their homes. COHRE maintains that by November 2007 there were approximately 3,000 families still awaiting housing. COHRE also refers to a report produced by Human Rights Watch (entitled 'Croatia: A Decade of Disappointment'), according to which the FHORs are accorded the lowest priority for receiving alternative housing after other groups that are almost exclusively ethnic Croat.

32. COHRE also refers to the Pinheiro Principles which emphasise the continuing importance of recognising the illegitimacy of forced evictions and which recommend that the Governments demonstrably prioritise the right to restitution as a distinct right and as the preferred remedy for displacement. Regarding the issue of occupancy rights holders, the Pinheiro Principles require that States should, to the maximum extent possible, ensure that such persons are able to return to and repossess and use their housing, land and property in a similar manner to those possessing formal ownership rights.

33. On issues relating to discrimination, COHRE claims that the Government has failed to prove the absence of discrimination in the difference in treatment that was accorded to ethnic Serbs and ethnic Croats and it fails to remedy recognisable indirect discrimination.

34. According to COHRE, the evidence indicates that ethnic Serbs were disproportionately impacted by the cancellation of occupancy rights. It further asserts that even if the law providing for cancellation of occupancy rights was free on its face of discrimination on an ethnic basis, it was applied in an arbitrary and discriminatory manner. The housing programme currently being implemented by the Government does not address the issue of those who lost occupancy rights on account of ethnic discrimination and the resulting inability to purchase one's home under preferential conditions, nor the right to the remedy of restorative justice, including restitution. According to COHRE there is an overwhelming documentation demonstrating the significant disparate impact on ethnic Serbs in particular of Croatia's law and policies regarding occupancy rights holders, which it argues constitute prima facie evidence of, at a minimum, indirect discrimination, with clear signs of direct discrimination in some cases.

35. COHRE further asserts that the state is under obligation to collect data on the particular group which is or could be discriminated against, the responsibility which becomes even more important in the context of a civil war on ethnic lines.

36. COHRE maintains that the discrimination examined in the present case was and is intentional.

b. The respondent Government

37. The Government submits that, under its housing programme for displaced persons, it has provided an adequate and feasible legal and political framework for the realisation of the rights of former holders of occupancy rights. The general conditions for realising the right to housing are based upon the principle that all returnees, who wish to return and live permanently in the Republic of Croatia, are provided with housing, regardless whether they are currently outside or within the Republic of Croatia, under the condition that they do not own or co-own a habitable house or flat in the Republic of Croatia, or that they have not sold, gifted or in any other way disposed of one since 8 October 1991, or that they have not attained the legal status of protected lessee.

38. The Government further contends that the housing programme for former holders of occupancy rights, alongside with other programmes of reconstruction of houses, should be seen as part of the complex process of return of refugees and internally displaced persons in Croatia. According to the Government, notwithstanding the fact that the occupancy rights were cancelled in court proceedings which were conducted in line with the requirements of rule of law and the right to fair trial, it has taken the view that displaced FHORs should be given the possibility to obtain a house on return to Croatia. To this end, in the post-war period, Croatia has invested significant economic resources from the state budget (38 billion kunas (€ 5 billion) to restore the war-affected areas and enable the return and reintegration of the displaced population. The Government also emphasises that it is committed to providing housing for accomplishing all the points of the housing care mandate set up by the OSCE and its international partners not with a purpose to satisfy the demands of the international community but in light of its own conviction that this is the way towards its democratic, stable future and progress towards a peaceful inter-ethnic cohabitation.

39. During the process of return, the Government enacted legal provisions governing the provision of housing both in the ASSC and in the areas which remained under the Croatian control during the war.

40. As regards the ASSC areas, the Act on the Areas of State Special Concern, adopted in 1996, prescribed different models of housing provision by the State, including the leasing of family houses or flats in state ownership to returning FHORs. FHORs had priority in provision of accommodation by the lease of state-owned flats from the end of 2002, pursuant to the Ordinance on the order of priority for provision of housing in the areas of special state concern. The time-limit of the full implementation of these housing programmes has been shortened to the year 2009 from the original plan of 2011: according to the Government, this attests to the fact that it wishes to show its determination to resolve the question of refugees as soon as possible.

41. According to Government's figures, on the date of its submissions on the merits of this complaint, a total of 8,943 applications in the ASSC areas for housing have been filed by FHORs, of which 7,022 have been positively resolved. Most applications were filed by members of the Serb ethnic minority. About 5,300 FHORs and their families are now housed in state-owned flats, of which the majority are ethnic Serb returnees.

42. The Government states that all beneficiaries of housing provision in the ASSC who are leasing state property have been provided with housing by the State at the exceptionally favourable rate ("protected rent") of 2,61 kunas (about € 0,35) per square meter. Taking into account the fact that the average size of the flats given to the beneficiaries is 51,97 m², the users of these flats pay monthly rent of 135,64 kunas (about € 18,42). Moreover, all beneficiaries who are leasing state property are able to buy the flat or house in which they are housed under very favourable conditions.

43. As regards the provision of housing to returnees outside the ASSC area, in June 2003 the Government established a legal framework for resolution of their housing provision by adopting a *Conclusion* on the manner of provision of housing for returnees who do not own a house or flat, and who originally lived in socially owned flats (FHORs) in the areas of the Republic of Croatia which are outside the ASSC areas, which set the deadline for housing care application by 31 October 2004. This deadline was later extended to 30 September 2005.

44. By the *Decision on the implementation of provision of housing for returnees – former holders of occupancy rights on flats outside the areas of special state concern* of 2008, the manner of implementation of the resettlement programme was amended, with the Government now taking steps to obtain flats through purchase on the property market. The flats are given to the users under a 'protected lease' arrangement.

45. At the end of 2003, the filing of applications for housing began in Croatia for provision of housing for former holders of occupancy rights, with was accompanied by a media campaign to publicise this process. The campaign was then continued abroad. The media campaign abroad intensified from October 2004 in Serbia and Montenegro and Bosnia and Herzegovina, where a large number of refugees live who are potential beneficiaries of the programme. The media campaign and the collection of applications abroad were organised by the competent Ministry in co-operation with the UNHCR, with whom a Memorandum on Co-operation was signed in May 2004.

46. In June 2008 the Ministry signed a contract with two NGOs in Serbia who provide legal aid and assistance to refugees wishing to file an application. The co-operation with these two NGOs succeeded in locating and helping more than 400 applicants in Serbia to complete their applications. The Government asserts that help was sought from NGOs as the official institutions of the Government of Serbia did not provide the level of assistance requested in contacting and helping applicants living in Serbia, and as a result a large number of applications were incomplete.

47. The Government deems that the measures it has taken to remedy the situation and provide redress are in conformity with Article 16 of the Charter, as they take into account the needs of families in establishing and implementing the relevant housing policies, in particular through giving consideration to ensuring the availability of flats of a suitable size and the provision of special benefits for families.

48. As regards the argument of COHRE that the measures taken within the framework of the housing programme cannot be considered as restitution and/or compensation to which ethnic Serbs should be legally entitled as of right, the Government replies that questions relating to the right of return to precisely defined home on which members of the Serb ethnic minority had occupancy rights, or to financial compensation for the loss of these flats, are beyond the scope of Article 16.

49. Thus the Government maintains that the measures it has taken to remedy the situation and provide redress are in conformity with Article 16 of the Charter, insofar as this Article is applicable to the issues at stake. Moreover, the Government also asserts that according to the margin of appreciation enjoyed by each state under the Social Charter, Croatia was entitled to choose measures by which it would effectively ensure housing for former holders of occupancy rights.

50. As to the argument of discriminatory treatment made by COHRE that the status of protected lessee granted under the housing programme is much less favourable than the status enjoyed by FHORs who were not displaced, the Government maintains that protected lessees are guaranteed the permanent lease of the house or flat in question, for which they pay protected rent, at about € 20 per month. The Act on the lease of flats ensures a high standard of protection of protected lessees against cancellation of the lease contract and offers appropriate protection of the right to a home, within the meaning of Article 8 of the Convention, to persons who have the status of protected lessee.

51. Regarding other issues relating to the alleged discrimination, the Government contends that the loss of occupancy rights in Croatia was founded on the law and conducted in each specific case according to a procedure established by law, and was therefore lawful and free of discrimination on an ethnic basis. The Government also argues that other ethnic groups were affected by the loss of occupancy rights, whereas many ethnic Serbs were not affected by the loss of these rights, in particular those that lived in Government controlled areas during the conflict. The Government also maintains that the conflict had a negative effect on the entire population and the important historical facts relating to the conflict as well as the question of individual responsibility are being established by ongoing judicial determination by the International Criminal Tribunal for the Former Yugoslavia and the International Court of Justice.

52. The Government further states that since the ethnic background of persons who lost their occupancy rights was not determined at the time, it cannot be established how many proceedings involved only members of the Serb ethnic minority.

B - Assessment of the Committee

53. The Committee considers that COHRE has put forward four sets of allegations that the measures taken with a view to providing effective remedy and redress are not sufficient. *Firstly*, to qualify for housing care, the applicants must express a desire to return to Croatia, which is alleged to constitute an unjustified limitation on the right of displaced families to obtain redress. *Secondly*, the housing and security of tenure provided to returning families by the Government under the housing care programmes cannot be considered to constitute the full restitution and/or compensation to which displaced families should be entitled to by right. *Thirdly*, the implementation of housing care programmes is not adequate, on the basis that housing provided under the programme is of inadequate standard, the processing of applications is subject to long delays, and considerable uncertainty exists as to when housing will be made available to displaced families. *Fourthly*, the implementation of the housing programme discriminates against ethnic Serbs, who constitute the bulk of the displaced families.

Applicability and scope of Article 16

54. The Committee has constantly interpreted the right to economic, legal and social protection of family life provided for in Article 16 as guaranteeing the right to adequate housing for families, which encompasses secure tenure supported by law. This right in its turn permits the exercise of many other rights - both civil and political as well as economic, social and cultural (European Roma Rights Centre (ERRC) v. Greece, Complaint No. 15/2003, decision on the merits of 8 December 2004, § 24).

55. The Committee also considers that the effective enjoyment of certain fundamental rights, such as the right of families to economic, social and legal protection recognised in Article 16, may require positive intervention by the state which must take the legal and practical measures which are necessary and adequate to the goal of the effective guarantee of the right in question (European Roma Rights Centre (ERRC) v. Bulgaria, Complaint No 31/2006, decision on the merits of 18 October 2006, § 35).

56. Therefore, the Committee considers that if families are displaced and deprived of their right to housing based upon security of tenure, a state is required under Article 16 to take the legal and practical measures necessary to ensure that these families receive an alternative housing based on an adequate security of tenure.

57. The Committee recognises that families are not the only group of persons affected by the issues at stake in this collective complaint. However, families constitute a very significant and sizable sub-set of the wider group of displaced persons affected, and therefore Article 16 of the Charter is applicable to the facts of the instant complaint.

58. Thus, the Committee considers that the adoption of legal and practical measures by the Government is necessary to ensure that these families receive effective and meaningful protection required by this Article.

59. Therefore, the Committee maintains that to adjudicate on the issue at stake it must examine whether the Government has taken appropriate legal and practical measures to discharge positive obligations under Article 16 and to provide appropriate social, legal and economic protection for families who were deprived of their dwellings in Croatia in the 1990s.

60. In considering what positive measures the Government is obliged to implement in respect of the affected families under the provisions of Article 16, the Committee is charged with interpreting the scope of the relevant obligations which states have accepted under the Social Charter: it cannot comment on the obligations which Croatia may have accepted in ratifying other international treaties, including the Sarajevo Declaration of 2005, the Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia (SFRY) 2001 and the European Convention on Human Rights (ECHR). However, the Committee considers that Article 16 must be interpreted in the light of relevant international treaties that serve as inspiration, and notes that no element of this Decision should be interpreted as limiting the scope of obligations under other international instruments to which the Government of Croatia may be subject.

61. The Committee also considers that Article 16 does not directly concern a specific right to ownership of a specific piece of property, nor a right to enjoy property such as analogous to that contained in Article 1 of the First Protocol of the ECHR. Article 16 does not therefore require a state to provide full and complete restitution for the unjustified deprivation of property rights. Nevertheless, Article 16 guarantees an entitlement to housing as a necessary element of the fabric of social, legal and economic protection that is required to ensure the meaningful enjoyment of family life, which could, in certain cases, encompass elements of the right of property.

62. The Committee acknowledges that families living both inside and outside of Croatia who were displaced and lost security of tenure as a result of the conflict in the former Yugoslavia continue to be negatively affected by the consequences of this loss. Nonetheless, the Committee recognises that many of the families concerned may have put down roots in other states and do not intend to return to Croatia. Therefore, the Committee considers that Article 16 of the Charter imposes obligations upon the Government of Croatia in respect of those families who have expressed their clear wish to return to Croatia, or those for whom the lack of an effective and meaningful offer of housing and other forms of economic, legal or social protection has constituted an obstacle to return. In contrast, families who choose not to return to Croatia fall outside the material scope of application of Article 16, as the responsibility of the Government of Croatia to provide economic, legal and social protection cannot be considered to be engaged in respect of families who choose to reside permanently in another jurisdiction.

63. The Committee therefore considers that the Government of Croatia is under a positive obligation by virtue of Article 16 to take appropriate steps to provide housing and security of tenure, to displaced families who lost housing rights and have expressed a clear desire to return to Croatia, or who have been discouraged from returning due to a lack of housing and other forms of protection.

64. States enjoy discretion in determining the steps to be taken to ensure compliance with the Charter as regards housing, in particular concerning the balance to be struck between the general interest and the interest of a specific group. It is not the task of the Committee to substitute itself in determining the policy best adapted to the situation (*European Roma Rights Centre (ERRC) v. Bulgaria*, Complaint No 31/2006, decision on the merits of 18 October 2006, § 35).

65. Nonetheless, the Committee recalls that “when the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact their choices will have for groups with heightened vulnerabilities” (*Autism-Europe v. France*, Complaint N° 13/2002, decision on the merits of 4 November 2003, § 53). Therefore, the measures undertaken by the

Government of Croatia to provide appropriate housing to displaced families must conform to these criteria in order to comply with Article 16. In particular, the vulnerability of displaced families who wish to return to Croatia must be taken into account.

66. The Committee has also recalls that in order to satisfy Article 16, states must promote the provision of an adequate supply of housing for families, take the needs of families into account in housing policies and ensure that existing housing be of an adequate standard and size considering the composition of the family in question, and include essential services (such as heating and electricity).

67. Furthermore, the obligation to promote and provide housing extends to ensuring enjoyment of security of tenure, which is necessary to ensure the meaningful enjoyment of family life in a stable environment. The Committee recalls that this obligation extends to ensuring protection against unlawful eviction (European Roma Rights Centre (ERRC) v. Greece, Complaint No. 15/2003, decision on the merits of 8 December 2004, § 24). By analogy, the Committee considers that the Government of Croatia is under an obligation to ensure that displaced families provided with housing also enjoy sufficient security of tenure.

Assessment of the situation

68. The housing programme currently being implemented by the Government constitutes the primary mechanism through which the Government aims to discharge its obligations to displaced families. In order to assess the adequacy of this programme and its compatibility with Article 16 of the Charter, the Committee considers the allegations of insufficiency directed against this programme laid out above by COHRE in sequential order.

- (i) *Displaced families who do not wish to return are not eligible for the housing programme.*

69. COHRE argues that the requirement that applicants must express a desire to return to Croatia before they can benefit from the housing programme being implemented by the Government of Croatia constitutes an unjustified limitation on the right of displaced families to obtain effective protection.

70. However, as previously stated (see § 61), the Committee considers that the positive obligation under Article 16 to provide social, legal and economic protection to families in need is confined in the circumstances of this complaint to displaced families who have returned or indicated their wish to return to Croatia, or who would return to Croatia but for a lack of housing and other forms of protection for family life.

71. Therefore, those persons who do not wish to return to Croatia do not fall within the personal scope of Article 16.

(ii) The redress provided does not take the form of a legal entitlement of restitution or compensation as of right

72. The complainant organisation argues that the housing provided to returning families by the Government under the housing care programmes cannot be considered to constitute the full restitution and/or compensation to which displaced persons should be entitled to by right. In this respect, the complainant organisation argues that the status of a 'protected lessee' which is granted to returning families under the housing programme, as well as the conditions under which the housing allocated to these families may be purchased outright, are less favourable than the tenure and purchase conditions that were enjoyed by holders of occupancy rights who were not displaced.

73. The Committee holds that returning families are not conferred, in the meaning of the Charter, with a right to restitution of their dwellings or lost occupancy rights, nor can they claim, on the basis of the Charter, compensation for that loss as of right or entitlement to acquire property rights to which they may have been entitled had they not been displaced.

74. Therefore, COHRE's allegation does not fall within the material scope of Article 16.

(iii) implementation of housing care programmes and adequacy of housing provided

75. Turning to the adequacy of the measures currently being implemented by the Government under its housing programme for displaced persons, the complainant organisation alleges that implementation of housing care programmes is not adequate, as it is extremely slow and processing of applications has been subject to long delays, and also because the housing provided is not adequate.

76. In respect of the adequacy of the housing and tenure provided to families who have returned or wish to return to Croatia, the Committee holds that the complainant organisation has not produced sufficient evidence to establish that the quality of housing provided under the housing programme does not fulfil Article 16.

77. In this respect, the Committee notes from the UNHCR 'non-paper' on remaining obstacles to return and reintegration in Croatia (November 2008)¹ that one of the remaining problems to the refugee return is the fact that housing care applications are processed at a slow pace and the slow implementation undermines the overall credibility of the housing care programme. In its study on Sustainability of Minority Return in Croatia of 2007,² the UNHCR underlines that crucial material conditions of sustainable refugee return relate, among others, to the ongoing difficulties in resolving property issues.

78. According to the UNHCR (October 2009)³, some progress has been made towards implementing the housing programme with greater effectiveness. UNHCR estimate that there are still 62,011 refugees from Croatia living in Serbia: however, this number includes those who are also registered as returnees in Croatia. Registered minority returns to Croatia amount to 132,322 persons. As regards the housing care programme, the total number of family requests made under the housing provision programmes has amounted to 13,695, of which 8,888 have been positively decided, 2,276 were refused and the rest are pending a decision. 6,772 housing units have been allocated and there are 2,680 pending allocation. The targets for the programme set in 2007 and 2008 have been met at a rate of 95,5%. The UNHCR estimates that the number of housing units needed in 2010 and beyond is 2,500 housing units, which includes a carry-over from the 2009 benchmark.

79. According to the European Commission's progress report on Croatia of 2009⁴ a number of obstacles to sustainable return of Serb refugees remain, with the major one being the lack of available housing, particularly for FHORs. Nevertheless, the Commission has indicated that it considers that implementation of the Government's housing care programmes within and outside the Areas of Special State Concern for former tenancy rights holders who wish to return to Croatia has progressed well over the past year.

80. The Committee also notes from the OSCE's Status Report on Mandate-related Developments⁵ and Activities of 26 March 2009 that the Government of Croatia has invested effort into giving effect to its housing provision programmes. Although some benchmarks (2008) which were set out in the framework of the Government

¹http://www.unhcr.hr/eng/images/stories/news/refugee%20protection/docs/return_reintegration/Non-Paper16Nov08.pdf

² http://www.unhcr.hr/eng/images/stories/news/publication/docs/minority_return.pdf

³ Material presented by the UNHCR representative at the round table on the social rights of refugees, asylum seekers and internally displaced persons. Council of Europe, 7 December 2009

⁴ http://www.ipex.eu/ipex/cms/home/Documents/doc_SEC20091333FIN

⁵ Enclosure No 16 of the Government's written submissions on the merits

Action Plan for the implementation of the housing provision programme have not been fully met, and for the year 2010, some outstanding cases will remain unresolved, the efforts have continued.

81. On the basis of this information and that provided by the parties and the above mentioned sources, the Committee must assess whether the following three criteria must be met to satisfy the requirements of Article 16 have been given effect in the implementation of the housing programme: (i) a reasonable timeframe; (ii) a measurable progress and (iii) a financing consistent with the maximum use of available resources. The programme should also have taken into account the heightened vulnerabilities of many displaced families to comply with Article 16. (*Autism-Europe v. France*, Complaint No. 13/2002, decision on the merits of 4 November 2003, § 53),

82. As regards whether there is a *measurable progress*, it would seem to the Committee that the first years of implementation of the housing programme were marked with insufficient effort, but subsequently measurable progress has been made.

83. Regarding *the maximum use of available resources*, the Committee has no evidence that would indicate that the financing allocated for this purpose is not adequate, given the discretion that states enjoy in the allocation of financial resources.

84. However, the Committee notes that the slow pace of the housing programme, and the lack of clarity as to when housing would be provided under it, would appear not to reflect the needs of displaced families who wish to return to Croatia. An extensive period of time has elapsed since the housing programme was launched in 2003. In addition, displaced families who expressed their wish to return and applied for housing programme have been obliged to remain without security of tenure for an unreasonably long period of time due to the slow processing of applications. These factors taken together have ensured that for many displaced families who wish to return to Croatia, the absence of effective and timely offer of housing has for a long period of time constituted a serious obstacle to return.

85. As a consequence, the Committee considers that the housing programme has not been implemented within a *reasonable timeframe*.

(iv) the implementation of the housing programme also discriminates against ethnic Serbs, who constitute the bulk of the displaced families

86. COHRE claims that the Government has failed to prove the absence of discrimination against ethnic Serbs in how it determined issues related to occupancy rights and displacement.

87. As previously stated (see § 26), the Committee observes that certain of the factual issues at stake related to discrimination, such as the cancellation of occupancy rights which allegedly affected ethnic Serb communities in Croatia in a discriminatory manner, occurred in the mid -1990s, i.e. the date before the Charter entered into force in respect of Croatia, and therefore fall outside of its temporal jurisdiction.

88. However, the Committee considers that the delays and uncertainty associated with implementation of the housing programme since 2003 have failed to accommodate the heightened vulnerability of displaced families, who constitute a distinctive group who suffer particular disadvantage. This has also constituted a failure to accommodate the situation of ethnic Serb families in particular, who comprise the bulk of the families affected by non-satisfaction of their housing needs, and who constitute a particularly vulnerable group on account of their ethnicity.

89. In this respect, it notes the comments of the *rapporteur* for the Committee on Migration, Refugees and Population of the Parliamentary Assembly of the Council of Europe, Mr Jørgen Poulsen, to the effect that:

While concerns remain regarding durable solutions for many of the 300,000 ethnic Serbs displaced during the conflict, Croatia has largely reintegrated some 260,000 ethnic Croat internally displaced persons and integrated up to 120,000 Bosnian Croat refugees. Ethnic Croats were generally able to repossess both socially owned apartments and private homes in areas of Croatia they had fled during the conflict. Likewise, Bosnian Croats were able to participate in Bosnian restitution programs for socially owned apartments and private property without impediment.

90. As a consequence, the Committee holds that the failure to take into account the heightened vulnerabilities of many displaced families, and of ethnic Serb families in particular, constitutes a violation of Article 16 read in the light of the non-discrimination clause of the Preamble

CONCLUSION

For these reasons, the Committee concludes:

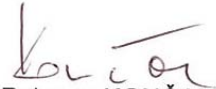
- by 9 votes to 5 that the following do not fall within the scope of Article 16:
 - persons who do not wish to return to Croatia
 - the question of restitution of or compensation for the loss of dwellings or occupancy rights;

- unanimously that there is a violation of Article 16 read in light of the non discrimination clause of the Preamble on the ground of a failure to implement the housing programme within a reasonable timeframe;

- unanimously that there is a violation of Article 16 read in light of the non discrimination clause of the Preamble on account of a failure to take into account the heightened vulnerabilities of many displaced families, and of ethnic Serb families in particular.



Colm O'CONNOR
Rapporteur



Polonca KONČAR
President



Henrik KRISTENSEN
Deputy Executive Secretary

In accordance with Rule 30 of the Committee's Rules, a dissenting opinion of Mr Colm O'CONNOR, joined by Mrs Jarna PETMAN, and a dissenting opinion of Mr Luis JIMENA QUESADA, joined by Mr Petros STANGOS and Mrs Ludmila Harutyunyan, are appended to this decision

Dissenting opinion of Mr Colm O'CONNOR, joined by Mrs Jarna PETMAN

We fully concur with the findings of non-conformity made by the Committee in this complaint.

However, the majority of the Committee has concluded that Article 16 of the Charter only imposes obligations upon the Government of Croatia in respect of those families who have expressed their clear wish to return to Croatia, or those for whom the lack of an effective and meaningful offer of housing and other forms of economic, legal or social protection has constituted an obstacle to return. In addition, the majority consider that Article 16 cannot be interpreted as imposing an obligation on states to provide restitution or other forms of compensation to families who have been displaced: the obligations of the Croatian Government are confined to including these families within its special housing programme and ensuring this programme is implemented in an effective and timely manner. These conclusions appear to us to be flawed.

In the first place, it is not clear why the majority of the Committee considers that state responsibility under Article 16 is only engaged for families residing outside of Croatia who indicate a clear wish to return to Croatia or who have been discouraged from returning. It appears to us that if state responsibility is engaged in the first place for families who were displaced and consequently lost housing and occupancy rights, it must extend to all families who continue to experience the ongoing consequences of displacement, not just those who have formally indicated a desire to return. It seems to us that displaced families who choose to integrate within their host countries should not by reason of that fact alone lose the protection they would otherwise have under the Charter.

It is also difficult to see how any clear or useful distinction can be drawn in practice between families who chose to remain living outside of Croatia, and those who would return but for the absence of sufficient protection. From the evidence presented by both COHRE and the Government of Croatia in this complaint, it would appear that differentiating between these two categories of families would appear to be almost impossible, not least because the numbers involved are so uncertain. It is also unclear from the evidence presented how many families would choose to indicate a clear desire to return to Croatia if this entitled them to a tangible and definite form of redress for the displacement which they have suffered, as distinct from inclusion in a housing programme which has suffered from slow and uncertain implementation.

Secondly, we disagree with the view of the majority of the Committee's decision that the Charter does not require the payment of compensation to displaced families who continue to suffer the consequences of the deprivation of their right to legal, social and economic protection under Article 16. In tandem with other bodies charged with interpreting treaty instruments which guarantee fundamental rights, the Committee has emphasised that individuals and groups who have been denied the enjoyment of their rights should be entitled to effective and substantive redress. However, in our view, inclusion in the housing programme cannot constitute such an effective remedy, as the potential class of beneficiaries of this programme remains limited

and entitlement to redress is not automatic but rather depends on the availability of housing and the slow implementation of the programme. The provision of an effective remedy for displaced families who are subject to an ongoing deprivation of their right to protection under Article 16 of the Charter must include the payment of appropriate compensation and/or the adoption of other concrete measures to provide more tangible redress to the families involved.

We consider that our conclusions are in line with an emerging consensus in international law on the need for effective remedies to be provided to displaced persons. In this context, we note that Principle 21 of the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons of 2005 (‘Pinheiro Principles’) states that all refugees and displaced persons have the right to full and effective compensation, monetary or in kind, as an integral component of the restitution process.

We also note that the United Nations Human Rights Committee in its decision in *Vojnovic v Croatia*, UN Doc CCPR/C/95/D/1510/2006 (28 April 2009) found Croatia to be under an obligation to provide “an effective remedy, including adequate compensation” to a family who had suffered from a wartime termination of their occupancy rights as a result of fleeing from their apartment following death threats, which the Committee held gave rise to violations of the rights to a fair trial, protection from arbitrary interference with the home and non-discrimination under the International Covenant on Civil and Political Rights.

We recognise that what will constitute appropriate redress may differ according to the current circumstances of displaced families. In addition, as a social rights instrument, the Charter does not protect property rights as such and thus does not require full restitution or full compensation equivalent to the current market value of the former dwelling places of the displaced families.

However, effective redress for the deprivation of the right to legal, social and economic protection under Article 16 must at a minimum require the provision of compensation or an equivalent form of guaranteed redress proportionate to the deprivation of security of tenure and social, legal and economic protection suffered by the families in question. We also consider that such redress must be available both to those displaced persons who wish to return to Croatia and also to those who do not intend to return but rather wish to integrate in their host countries.

We are supported in our views by the Recommendation of the Parliamentary Assembly of the Council of Europe dated 28 January 2010 (REC 1901 (2010)), ‘Solving property issues of refugees and displaced persons’, which states that:

‘...for both refugees and internally displaced persons (IDPs), the loss of homes and land presents a serious obstacle to achieving durable solutions in post-conflict situations and to restoring justice. Legal remedies against such loss are an essential component for restoring the rule of law in post-conflict situations. Such remedies, including the relevant redress and the

mechanisms and procedures through which such redress is sought and implemented, are directly linked to stability, reconciliation, and transitional justice and are therefore indispensable elements for any constructive peace-building strategy.'

Similarly, the Representative of the Secretary-General of the United Nations on the Human Rights of Internally Displaced Persons, Walter Kälin, noted in a address on 24 June 2009 to the Committee on Migration, Refugees and Population of the Parliamentary Assembly of the Council of Europe that the failure to provide redress for the loss of tenancy rights is a factor "hindering IDPs in their efforts to resume their lives and remaining a serious source of grievance and a trigger-point for future conflict."

In addition, in the paper, *Remaining Obstacles to Return and Reintegration in Croatia*, the United Nations refugee agency UNHCR has called for the development of a fair and pragmatic mechanism of redress which will provide adequate financial support for those who lost their occupancy rights during the conflict in the former Yugoslavia but who do not intend to return to Croatia and reside there permanently, intending instead to integrate in their host countries.

Dissenting Opinion of Mr. Luis JIMENA QUESADA joined by Mrs. Lyudmilla HARUTYUNYAN and Mr Petros STANGOS
(French only)

1. J'ai partagé l'avis majoritaire des membres du Comité en ce qui concerne la violation de l'article 16 de la Charte sociale (aussi bien en raison de l'absence d'échéance raisonnable dans la mise en œuvre des programmes, qu'au motif de la non prise en compte des vulnérabilités accrues de nombreuses familles déplacées et de familles de souche serbe en particulier), ainsi que l'exclusion du champ d'application de la Charte des personnes qui ne souhaitent pas revenir en Croatie. Cependant, je ne suis pas en mesure de souscrire à la conclusion majoritaire selon laquelle la question de la restitution des biens ou droits spoliés ou de leur indemnisation n'entrerait pas dans le champ d'application de la Charte.

2. En particulier, ma dissidence porte sur les paragraphes 60 et 72 de la décision sur le bien-fondé et, par conséquent, sur ladite conclusion majoritaire relative à la question de la restitution et l'indemnisation des bien ou droits spoliés.

3. En effet, le Comité se réfère au paragraphe 60 de la décision à l'article 16 de la Charte en connexion avec l'article 1 du Protocole n° 1 additionnel à la Convention européenne des droits de l'homme (« la Convention ») pour en écarter un parallélisme qu'à mon avis ne découle ni de la jurisprudence de la Cour européenne des droits de l'homme (« la Cour ») ni de celle établie par le Comité dans le cadre de réclamations récentes.

4. En même temps, le paragraphe 60 s'avère en quelque sorte contradictoire, dans la mesure où la majorité du Comité reconnaît que la jouissance effective de la vie familiale « peut, dans certains cas, englober certains éléments du droit de propriété ». Il me semble que cette affirmation est correcte, de même que celle selon laquelle (toujours au paragraphe 60) « l'article 16 n'exige donc pas d'un État qu'il accorde la pleine et entière restitution des droits de propriété dont les titulaires été indûment privés ».

5. Or, l'aspect problématique du raisonnement du Comité consiste à avoir tiré, de la non existence d'un droit à la pleine et entière restitution, la conséquence de l'exclusion de toute indemnisation. Ainsi, au paragraphe 72 de la décision le Comité dit que les familles rapatriées ne peuvent prétendre, « sur le fondement de la Charte, à une indemnisation pour ladite perte ou à un droit d'acquérir des droits de propriété qu'elles auraient possédé s'elles n'avaient pas été déplacés ». Et ceci est repris dans la conclusion majoritaire faisant l'objet de la présente opinion dissidente.

6. À mon sens, il est très difficile d'expliquer que l'article 16 peut « englober certains éléments du droit de propriété » et, au contraire, de soutenir que l'indemnisation (qui est l'élément essentiel et inhérent à toute privation de propriété) n'en constitue pas l'un de ces éléments.

7. Quant à la Cour, elle a établi le parallélisme entre le respect du domicile et de la vie familiale (article 8 de la Convention) et le droit à une indemnisation dans des affaires relatives aux conditions de logement (par exemple, *Larkos c. Chypre* [GC]

n° 29515/95, 18 février 1999). Le Comité a, quant à lui, rappelé l'analogie entre l'article 8 de la Convention et l'article 16 de la Charte (par exemple, *Conclusions 2006*, Observation interprétative de l'article 16, pp. 13-14).

8. En plus, d'une part, il est vrai que la Cour a déclaré que l'article 1 du Protocole n° 1 ne garantit pas dans tous les cas le droit à une réparation intégrale, et qu'une indemnisation inférieure à une réparation totale peut s'imposer dans le contexte d'un changement de régime politique et économique (entre autres, *Broniowski c. Pologne* [GC], § 182, 22 juin 2004; *Kopecký c. Slovaquie* [GC], n° 44912/98, § 35, 28 septembre 2004; ou *Von Maltzan et autres c. Allemagne* (déc.) [GC] n°s 71916/01, 71917/01 et 10260/02, §§ 77 et 111-112, 2 mars 2005, en ce qui concerne l'adoption des lois dans « le contexte unique de la réunification allemande »).

9. Mais, d'autre part, la Cour a également dit que, sans le versement d'une somme raisonnablement en rapport avec la valeur du bien (en prenant même en considération la valeur marchande du bien en question), une privation de propriété constitue normalement une atteinte excessive (par exemple, *Scordino c. Italie* (n° 1) [GC], n° 36813/97 §§ 95 et 101, 29 mars 2006).

10. Quant au Comité, il a aussi récemment établi ce parallélisme entre l'article 16 (avec l'article 31) de la Charte et l'article 1 du Protocole n° 1 (*FEANTSA c. France*, Réclamation n° 53/2008, décision sur le bien-fondé du 8 septembre 2009, §§ 34-35).

11. Dans ces circonstances, même si le conflit en ex-Yougoslavie pourrait justifier l'établissement d'un dispositif visant à réguler les rapports de propriété en Croatie et dont l'impact économique sur l'ensemble du pays serait considérable, je considère que les familles déplacées ayant exprimé leur souhait de revenir en Croatie ont dû supporter une charge disproportionnée et excessive du fait de ne se voir accorder aucune indemnisation pour la privation ou la restitution des biens à un niveau inférieur à la valeur marchande. Partant, les raisons « d'utilité publique » poursuivies par les programmes d'aide au logement ne préservent pas un juste équilibre entre les intérêts en présence si on exclut du champ d'application de la Charte la question de la restitution des biens ou droits spoliés ou de leur indemnisation, d'autant plus que - paradoxalement - le Comité lui-même a estimé que « la non prise en compte des vulnérabilités accrues de nombreuses familles déplacées et de familles de souche serbe en particulier, constitue une violation de l'article 16 à la lumière de la clause de non discrimination du Préambule » (paragraphe 89).

12. En d'autres termes, ce constat de discrimination peut difficilement justifier d'une façon objective et raisonnable l'exclusion de toute indemnisation au regard de la protection offerte par l'article 16 de la Charte. Par ailleurs, le critère soutenu par la majorité du Comité écartant le parallélisme entre l'article 16 de la Charte et l'article 1 du Protocole n° 1 à la Convention nuit à l'indivisibilité de tous les droits fondamentaux : s'il est évident que la propriété est appelée à jouer une fonction sociale et, de ce fait, elle peut être soumise à des restrictions pour raisons d'utilité

publique, il n'en reste pas moins que ces limitations doivent respecter un rapport de proportionnalité avec le but poursuivi. Or, dans le cas présent, la motivation de ces restrictions est difficilement acceptable à la lumière dudit constat de discrimination par le Comité.

13. En revanche, le droit de propriété, à côté de son volet civil et politique ayant justifié son inclusion dans la Convention européenne (par le biais du Protocole n° 1), présente également et avant tout un incontestable caractère social et économique. Dans ce contexte, l'article 16 ne garantit pas seulement la protection juridique (maintien dans les lieux) de la famille, mais également sa protection sociale et économique, y compris la possibilité d'une indemnisation.

14. Enfin, même si le Comité ne dispose pas d'une clause analogue à celle (à caractère transversal) de l'article 41 de la Convention, le droit à une indemnisation ne devrait pas être exclu du champ d'application de certaines dispositions substantielles de la Charte sociale, afin de mieux permettre les États défendeurs ainsi que, éventuellement, leurs juridictions nationales, d'exécuter les décisions du Comité et, par ce biais, de mieux s'acquitter des obligations juridiques imposées par la Charte.

15. Eu égard aux considérations qui précèdent, j'estime que le Comité aurait du conclure à l'inclusion dans le champ d'application de la Charte de la question de la restitution des biens ou droits spoliés ou de leur indemnisation, ainsi qu'à violation de l'article 16 se fondant sur ce motif.