European Court of Human Rights
Council of Europe
Strasbourg, France

Application No. 62954/00 **Vasile TANASE and 23 others vs. Romania**

APPLICANTS' SUBMISSION AS TO THE MERITS OF APPLICATION 62954/00

October 25, 2005

I. The Parties:

A. The applicants: Vasile Tanase, Constantin Catalan, Victor Paul, Ion Rupita, Paul Catalan, Nicoale Ion, Sidef Niculae, Petre Panciu, Stoica Raducanu, Emilian Niculae, Calin Ion, Alexandru Nicolae, Dumitru Catalan, Ion Nicolae, Gheorghe Staicu, Arestita Ion, Stefan Catalan, Claudia Florea, Iarca Mitea, Marin Catalan, Ion Catalan, Ion Ion, Lucian Niculae

Nationality: Romanian nationals of Roma origins.

Occupation: mechanics/construction workers

Dates of birth: The other applicants are: Constantin Catalan (the second applicant), born in 1936; Victor Păun (the third applicant), born in 1952; Ion Rupiţă (the fourth applicant), born in 1957; Paul Catalan (the fifth applicant); Nicolae Ion (the sixth applicant), born in 1974; Sidef Niculae (the seventh applicant), born in 1966; Petre Panciu (the eighth applicant), born in 1940; Stoica Răducanu (the ninth applicant), born in 1952; Emilian Niculae (the tenth applicant), born in 1963; Călin Ion (the eleventh applicant), born in 1928; Alexandru Nicolae (the twelfth applicant), born in 1941; Dumitru Catalan (the thirteenth applicant), born in 1957; Ion Nicolae (the fourteenth applicant), born in 1956; Gheorghe Staicu (the fifteenth applicant), born in 1949; Arestiţa Ion (the sixteenth applicant), born in 1942; Ştefan Catalan (the seventeenth applicant), born in 1963; Botonică Dumitru (the eighteenth applicant), born in 1980; and Claudia Florea (the nineteenth applicant), born in 1973.

The following applicants filed the application on behalf of their deceased parents or spouses respectively: Elena Tanase, born in 1968 represents Vasile Tanase; Gheorghe Dumitru, represents Iarca Mitea (the twentieth applicant); Grecu Catalan, born in 1969 represents Marin Catalan deceased in 2000 (the twenty-first applicant); Irina Catalan, born in 1980 represents Ion Catalan, deceased in 2001 (the twenty-second applicant); Tudor Ion, born in 1971 represents Ion Ion, deceased in 2001, (the twenty-third applicant); Ioana Constantin, born in 1938, represents Lucian Niculae, deceased in 2000 (the twenty-fourth applicant).

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B. THE HIGH CONTRACTING PARTY:

Romania

II. STATEMENT OF THE FACTS:

Pre-1994 violations of the Convention

On April 6, 1991, a Roma villager of Bolintin Deal, Ion Tudor, stabbed and killed a non-Roma villager, Cristian Melinite, during a brawl.[1] Tudor was arrested on the night of 6/7th April by local police, two hours after the offence was committed. He is currently serving 19 years in prison.[2]

At 10 a.m. on 7 April 1991, the morning after Tudor's arrest, the siren at the town's public cultural centre and bells at the Orthodox Church summoned an estimated two thousand inhabitants from Bolintin Deal and the neighboring village of Mihai Voda to the town square.[3] It would have been necessary for someone with official authority to have permitted access to the buildings and the sirens.[4] An organized mob proceeded to burn twenty-two homes belonging to Roma residents of the town encouraged by officers who had arrested Tudor, the father of the deceased boy, the Mayor of Bolintin Deal, Obiala Mircea, and other local authority figures, including the priest, Father Mugurel.[5] The mob "moved through the village in a single swath … carrying burning sticks and shouting."[6] According to findings of fact made in Romanian proceedings, the mob shouted, "Roma should be

[1] Affidavit of Emilian Niculae at para. 3; Exhibit 1A.
[2] *Ibid.* at para. 4.
[3] *Ibid*. at para. 5. Istvan Heller (1998) *Lynching is not a crime: mob violence against Roma in post-Ceauşescu Romania* (Budapest: European Roma Rights Centre).
[4] Affidavit of Emilian Niculae at para. 5; Exhibit 1A.
[5] *Ibid.* at para. 7.
[6] Isabel Fonseca *, Bury Me Standing: The Gypsies and Their Journey*, (New York: Knopf, 1995) at 151-152.

driven out of the community" and "Let's set them on fire!"[7] Approximately thirteen police were present with the villagers but they made no attempt to stop the arson, vandalism and destruction or to offer protection to or to guarantee the safety of the Roma community members.[8] By the time the destruction was over, the villagers, accompanied by the mayor, priest and other town authorities including police officers, had set fire to 22 homes and otherwise destroyed 5 homes, all of which belonged to Roma persons.[9]

The Applicants' statements, taken in 1991, detail the systematic terror that the two hundred and sixty eight innocent Roma endured at the hands of two thousand enraged villagers as they were chased out of town. The villagers threw stones at retreating Roma. They smashed the windows of Roma homes with farming tools and axes, unlawfully entering and then looting the houses or breaking Roma belongings. They splashed gasoline on the walls of Roma homes. Before setting homes afire, some with the inhabitants still inside, the villagers were methodical in carrying out the devastation; the town electrician, Cornel Petre, clipped the roof cables so that an electrical fire would not spread to the homes of non-Roma villagers. In total twenty-two homes, along with personal belongings, were burned and another five destroyed. Three cars were also burned.[10]

According to the declarations of the victims provided in subsequent domestic proceedings, the Roma of Bolintin Deal, they were forced to flee, on foot, by horse and buggy, and in cars, most without any provisions or possessions. From a distance, they watched their homes burning and everything for which they had worked being stolen or laid to waste. Victor Paun, like most of the Applicants, fled with his wife and five children to the surrounding forests. Paul Catalan tried to put out the fire of a neighbor's home but was told to leave because the villagers were on their way. Some villagers warned Marin Catalan and Gheorghe Staicu and his family that other villagers were coming to kill them. Ion Catalan hid in his yard while villagers attacked his home.[11]

As a result of the 7 April 1991 pogrom, the entire Roma community of Bolintin Deal, representing thirty-five families, was driven from their homes and forced to camp in the woods surrounding the village or to live with relatives in other towns. On 5 May 1991, the villagers of Bolintin Deal held an assembly and decided that they would prevent the Roma from coming back.

One month after the initial attack -- on 7 May 1991-- thirty-four Roma community members attempted to reoccupy a house belonging to one of the Roma of Bolintin Deal. They tried to negotiate with the villagers, and they spoke to the Mayor, Obiala Mircea, about their possible return.

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[7] See Indictment dated 17 October 1996 attached to Submissions of the Romanian Government concerning the admissibility and merits of the application; Exhibit 6

[8] Affidavit of Emilian Niculae at para. 7; Exhibit 1A

[9] *Ibid.* at para. 8.

[10] See Witness Statements, Schedule 7 of the Romanian Submission on Admissibility. *See also*, Istvan Heller (1998) *Lynching is not a crime: mob violence against Roma in post-Ceauşescu Romania* (Budapest: European Roma Rights Centre).

[11] Applicant Declarations, Exhibit 1N. The Applicants' declarations are bring translated and will be sent under separate cover. The copy the Applicants possess is a duplicate of poor quality received from materials sent by Romania at the admissibility stage of proceedings. The Applicants have requested clear copies from the relevant Romanian courts.

Village officials again used the town bells and sirens to summon approximately two thousand non-Roma villagers to the town square and four additional Roma homes were burned, including the one which the Roma were attempting to reoccupy. An even larger crowd of non-Roma villagers gathered and proceeded to burn the house (while the Roma were still inside). Again, police officers stood by watching the attack. Eventually, police officers took the Roma families who had fled the burning house, piled them into a windowless van, drove them towards Bucharest, and left them on the side of the road.[12]

The exiled Roma have not been able to reclaim their damaged properties or freely dispose of those properties or homes.[13] They are the Applicants in this case.

The Applicants hereby submit the following facts which demonstrate the losses they each suffered on 7 April 1991 and 7 May 1991[14] and which have never been acknowledged or compensated:

Vasile Tanase declared that he lost a brick house with four rooms. His destroyed possessions included a henhouse and pigsty, furnishings, electronics, clothing and house wares.[15]

Constantin Catalan, as a leader in the Roma community, warned Roma villagers including Victor Paun to leave Bolintin Deal in order to escape from the violence on 7 April 1991. He attempted to negotiate with the mayor of Bolintin Deal to facilitate his community's return to the village on 7 May 1991 but on that date the Roma were met by an angry mob and further violence. Constantin Catalan made a claim at trial on behalf of three families of his children for possessions including thirty quilts and double pillows, clothing, furniture, electronics, a horse and buggy and 70,000 L in cash. His home was burnt down. He subsequently sold his property and made a civil claim for 50 million L in damages.

Victor Paun lived in Bolintin Deal for 36 years. On 7 April 1991, unaware of the crime that happened the night before, Paun was eating a meal when Constantin Catalan came to tell him, his wife and five children to flee to the surrounding forest. He heard the siren and bells in the village, and saw the houses burning. He did not take anything from his house. When he returned to Bolintin Deal on 7 May, he found that his home had not been burnt down but that all the goods inside had been destroyed and the windows had broken. His home was subsequently destroyed on 7 May. Paun lost his six-room home, furniture, electronics, household effects, clothing, foodstuff and 59,000 L in cash. He claimed civil damages of 350 million L and declared that the total value of goods and property destroyed was 801,150 L.

Ion Rupita declared that he heard that people had gathered in the centre of the village at 11 am on 7 April 1991 and that they wanted to set fire to Roma houses for the murder that had occurred the night before. He escaped with his wife and children, only to find out later that his house had been burned

[12] Affidavit of Emilian Niculae at paras. 11-14; Exhibit 1A.
[13] *Ibid.* at par. 15
[14] *supra,* note 1.
[15] *supra,* note 1.

along with others. He attempted to return with the others on 7 May 1991 but was chased away. He sold the remnants of his house to the heirs of the old owner for 80,000 L and sought civil damages for 250 million L.

Paul Catalan attempted to put out the fire set to a neighbor's house after waking at 11:30 a.m. on 7 April 1991. He was told that the villagers were on their way and so, without taking any belongings, he fled to the forest where he saw the mob set fire to Roma homes. Along with his elderly mother, wife, and three young children, Catalan estimates that he lost 494,000 L worth of goods. His home was burnt down on 7 May 1991.

Nicolae Ion declared that he, his wife and seven children lost a home with eight rooms purchased nine years previously for 100,000 L, a sale registered with the Town Hall. Ion claimed that the total value of goods lost was 500,000 L and sought 150 million L in civil damages.

Sidef Niculae woke on the morning of 7 April 1991 to the sound of sirens at 11:30 and found out that village people were setting fire to Roma houses. He left in a car with his wife and two children and went to the neighboring village (Tintava) from where he saw houses burning. According to the eyewitness testimony of Valentin Soare, his home was burned.

Petre Panciu lost a home and belongings to the fire set by the villagers and Panciu was rendered internally displaced by the pogroms.

Stoica Raducanu was at home on 7 April 1991, heard the siren and saw people gathering at the centre of the village. He was told that people intended to set fire to Roma houses and saw the mob coming towards his home. He left on foot with his wife and children and saw smoke rising behind him. He returned with the others on 7 May 1991 to reclaim his property but was driven away by the mob which came to attack his father's home. He witnessed the Priest, Father Mugurel, the Mayor and a teacher incite others to commit acts of violence. His three-room home and personal effects were destroyed by fire on 7 May 1991. Although he did not know the precise value of his home, he sold the property to someone from Bucharest who rebuilt it. He sought civil damages of 10 million L.

Calin Ion lost his house and personal effects and was rendered internally displaced by the pogroms.

Alexandru Nicolae declared losses of personal effects totaling 6 million. Nicolae's house was burnt down. The land where house stood before being burned was sold for 105,000 L. Nicolae sought 20 million L in civil damages.

Dumitru Catalan declared that his losses included a four-room house, furniture, appliances, house wares, domestic animals, clothing, food stock, 35,000 L in cash. Catalan claimed that losses totaled 400,000 L.

Ion Nicolae was from Mihai Voda. He declared that he, his wife, and three young children lost a three-room house with a barn and the land surrounding it. The value of the house and land was

approximately 225,000 L. His personal effects were also pillaged or stolen during the attacks including appliances, electronics, house wares, clothing, jewelry, construction materials, wheat and corn stocks, and 91,000 L in cash.[16]

Gheorghe Staicu declared that on 7 April 1991 between 10 and 11 a.m., he was warned by a neighbor that villagers were coming to kill him and that he should flee. He saw people run towards the centre of the village. He left with his entire family on a horse and buggy, abandoning his car. They saw houses burning. He and his family stayed for two days at the house of his wife's aunt. On 4 or 5 May, he returned to tow away his car, which had been overturned, the windshield broken. On 7 May, he accompanied Roma villagers to the house of Ion Catalan and was chased away with the others. His four-room brick home, bought twenty years earlier for 70,000 L but worth an estimated 275,000 was burned, goods destroyed and the windows and doors smashed. He lost household effects including electronics, clothing, house wares, food stuffs, 35,000 L in cash and sixty grams of gold. He claimed that his total loss was 506,550 L.[17]

Arestita Ion lost home and personal property and was rendered internally displaced by the pogroms.

Stefan Catalan lived in Mihai Voda. The mayor came to his house on 7 April 1991 saying that all Roma had to leave. He learned from a neighbor that Roma houses were being set afire in Bolintin Deal. He escaped with his family in a horse and buggy but he did not know what happened subsequently. He declared that, despite being unclear on the extent of his losses, he sold what was left of his destroyed house for 66,000 L.[18]

Botonică Dumitru lost personal effects and was rendered internally displaced by the pogroms.

Claudia Florea lost personal effects and was rendered internally displaced by the pogroms.

Iarca Mitea lost her house and claimed 50 million L in civil damages. She lost furniture, house wares, clothing, 23,000 L in cash and 25,000 L in local accounts.

Marin Catalan left his home with his family on 7 April 1991. He returned to the village on 7 May 1991 but was chased away. His house was destroyed by fire. He declared his six room renovated home was worth approximately 450,000 L. He lost electronics, house wares, jewelry, and other effects exceeding 50,000 L in value as well as 18,000 L in cash. He claimed 250 million L in civil damages.[19]

Ion Catalan lived in Bolintin Deal. He hid in the yard on 7 April 1991 while persons attacked the house. He saw that windows and doors were smashed with axes and stones. He returned to Bolintin Deal to discuss the possibility of return with the Mayor and agreed that representatives of the village

[16] Affidavit of Emilian Niculae at para. 31; Exhibit 1J.
[17] *Ibid.* at para. 32; Exhibit 1R.
[18] *Ibid.* at para. 32; Exhibit 1K
[19] *Ibid.* at para. 34; Exhibit 1M

population should decide. The sirens started ringing; he fled, and later found out that villagers, urged by the mayor, set fire to his home and three other homes. He later sold his four room home for 220,000 L after renovations.[20]

Ion Ion, along with his wife and six children, lost his home and household effects to fire on 7 May 1991. He originally bought his home for 35,000 L.

Lucian Niculae lost his home to fire. Personal effects lost included furniture, electronics, appliances, clothing, house wares, farm animals, farm tools, foodstuff, identity, house and car papers, 150 grams of gold and 73,000 L in cash.[21]

Emilian Niculae was the owner of a five-room home in Bolintin Deal which was insured for 30,000 Lei, although the value of the home was significantly greater. He lost all household contents including furniture, kitchenware and clothing, including a television set, 65 gold coins, a book collection of a approximately 800 volumes, 10 years of research and interview materials in respect of a book he was undertaking to write, paintings, 180,000 Lei in cash, various farm animals including three pigs, 100 birds (chickens and turkeys), two horses (with a wagon), approximately 200 square meters of land which he shared with my mother, brother and sister.[22]

Emilian Niculae's affidavit is attached to this submission.

Continuing violations post-1994

The Roma community of Bolintin Deal was physically, socially and culturally destroyed by the 1991 pogroms, and the Applicants continue to suffer to this day. On 20 June 1994 Romania ratified the Convention but the Applicants' abysmal living conditions have not improved. Many are scattered and internally displaced throughout Romania; some have left the country. The non-Roma villagers of Bolintin Deal have continued to deny the Applicants access to the town.[23] Many of the Applicants have been unable to rebuild their homes and live in appalling conditions, as do many of those who sold their houses. For example after 1991, Emilian Niculae's 18 member family was crowded into three small rooms. In 1994, in these overcrowded conditions, four year old Fanel Tanase died of pneumonia; sixty-five year old Florea Niculae died of pneumonia in 1996.[24]

Every member of the community suffered economic losses and most adults were separated from their jobs and left without means to earn a living. Absent legal documentation attesting to their real residence and without forthcoming public assistance, many of the Applicants cannot find work or benefit from access to social services which worsen their destitution. Beginning in 1991 and onwards, eleven members of the exiled Roma community—Constantin Catalan, Victor Paun, Nicolae

[20] *Ibid.* at para. 35; Exhibit 1N.
[21] *Ibid.* at para. 36; Exhibit O.
[22] *Ibid*. at para.21; Exhibit 1A.
[23] *Ibid.* at paras. 42-44.
[24] *Ibid.* at para. 40.

Ion, Sidef Nicolae, Dumitru Catalan, Staicu Gheorghe, Nicolae Alexandru, Iarca Mitea, Marin Catalan, Dumitru Alexandru, and Catalan Ion—sold what remained of their possessions and property, but they did so under duress. Though they are forbidden to return to Bolintin Deal, the Mayor, Obiala Mircea, contacted these individuals with offers to purchase their property. He and his associated officials collected a handling fee for administering these sales and thus profited from the Applicants' misfortune.[25] The impoverished Applicants were for all intents and purposes forced to acquiesce to the sales.

Unable to return to their villages and too poor to take up residence elsewhere, many of the Applicants have been left with little choice but to live illegally in the homes of family and friends. In Romania, an individual or family without legal domicile is ineligible for State Party programs or services including education, health care, work registration or social assistance. As a result, Roma children from Bolintin Deal who attended school regularly in 1991 were forced to quit school and have never returned.[26]

The Applicants' repeated requests for State Party aid have gone unanswered. There is no evidence that the destroyed houses were ever rebuilt. In a letter dated 5 August, 1998, Constantin Catalan acknowledges that he and the Applicants have received some support from the authorities but that it has been inadequate to lift them out of abject poverty; he himself has had to borrow money to buy his new house "and [owes] great interest for today, without having something with which to secure food for my children every day."[27] Recent letters sent by the Applicants to Romanian officials pleading for assistance attest to the ongoing hardships they face as a result of the incidents in 1991. According to a letter dated 12 May 2005, sent by Constantin Catalan to the President of Romania, the Applicants, "including elderly people and many minor children, as well as pregnant women" have lived in "misery" and "homelessness" in a "precarious" economic situation since they lost their "life's work" in 1991.[28]

On 17 May 2005, Catalan sent another letter to the Undersecretary of State Illie Dinca. In it, he describes how he and the other Applicants are living "three to four families in one home" and are "feeding ourselves from one day to the next." "We do not have the basics of a decent life," he writes, "we are sleeping on the floor and on wooden beds having been forced for fifteen years to suffer only because of the fact that we are Roma." "[Why] should our children suffer and live in poverty and without a home," he asks, "because of the [crimes committed by other people?]"[29]

Virtually all of the Applicants live or have lived without a legal domicile due to their exile from Bolintin Deal. Indeed, it is almost impossible to provide a fixed address for some of the Applicants because of the chronic homelessness that they suffer. Many have suffered police raids on their

[25] *Ibid.* at para. 45-46 ; interview with Elena Piroi; Exhibit 1B.
[26] Affidavit of Emilian Niculae at paras. 41; Exhibit 1A.
[27] Letter from Constantin Catalan to Nicolae Gheorghe, Presidential Counsellor, Madalin Voicu, Deputy, Valeriu Stoica, Justice Minister, Viorel Lis, Mayor of Bucharest, Radu Vasile, Prime Minister, Paun Nicolae, President of the Roma Party, 5 August 1998; Exhibit 8.
[28] Letter from Costantin Catalan to the President of Romania, 12 May 2005; Exhibit 8
[29] Letter from Constantin Catalan to the Undersecretary of State Illie Dinca, 17 May 2005; Exhibit 8.

makeshift homes without any explanation [30] Emilian Niculae, for example, was arrested twice for questioning in connection with his efforts to obtain legal redress for the Bolintin Deal pogrom. On 21 March 1995, his home was raided without a warrant on the pretext of "illegal domicile" and Niculae was arrested and assaulted while in custody. Police removed papers relevant to Niculae's work on the case during the raid on his home. Niculae obtained a medical certificate documenting his injuries and filed a complaint but no investigation was ever carried out because officials claimed that there was insufficient evidence. On other occasions local authorities attempted to intimidate Niculae telling him that he "should be afraid" for his personal safety and that he should stop the investigations and the court cases.[31] On March 1, 2000, Niculae's brother Tanase Vasile, also a victim in the Bolintin Deal pogroms was murdered, allegedly by a police informer, though there has been no conviction for this crime. In April 2001, Emelian Niculae was threatened by Romanian security officials for bringing this case to the European Court of Human Rights and forced to seek exile in Canada as a Convention Refugee.[32]

Since 1991, the Roma culture and way of life has been under attack and strain. Heirlooms and cultural artifacts were lost to the fires and plundering in Bolintin Deal. Coins and jewels intended for wedding ceremonies were destroyed or stolen.[33] Traditional customs were interrupted and in some cases cannot be carried on as a result of continuing fear amongst the community. Many of the former community members have died. According to Constantin Catalan, not "one of these persons who died could not be buried according to the Christian tradition. We did not have anything to buy coffins with."[34] The expelled families have been unable to tend to family graves in Bolintin Deal and cannot bury their dead alongside family members in burial plots which they own.[35]

Procedural History

No investigations were commenced until after the second pogrom, in May 1991 when some community members, including Emilian Niculae, Dumitru Alexandru, Scarlat German, Tanase Vasile and Iarca Mitea, filed complaints with the district prosecutor against public officials and private individuals associated with the attacks. Five years elapsed between the initial complaint and the laying of charges.

On 17 October, 1996, thirteen private individuals were indicted in Bolintin Deal District Court for unlawful entry to a person's home, destruction of property, and of associating with the view to committing crimes under Articles 192 section 1, 217 section 4 and 323 sections 2 and 3 of the Romanian Criminal Code. Neither the police officers nor any State Party figures, including the Mayor of Bolintin Deal, were ever charged in connection with the attacks that they had instigated,

[30] Affidavit of Emilian Niculae at paras. 50-51; Exhibit 1A.
[31] *Ibid* at paras. 56-68; Exhibit 1A.
[32] *Ibid* at paras. 68-70.
[33] See Declarations of Applicants; Exhibits 1C-Q
[34] Letter from Constantin Catalan to Nicolae Gheorghe, Presidential Counsellor, Madalin Voicu, Deputy, Valeriu Stoica, Justice Minister, Viorel Lis, Mayor of Bucharest, Radu Vasile, Prime Minister, Paun Nicolae, President of the Roma Party, 5 August 1998.; Exhibit 8
[35] Affidavit of Emilian Niculae at para. 44; Exhibit 1A.

encouraged, and condoned.[36] Though few of the victims named the mayor and the priest of Bolintin Deal as the primary perpetrators of the violence on 7 April and 7 May 1991, a number of the accused persons made explicit reference to their participation.

Seeking compensation for their destroyed property, the Applicants joined the proceedings as civil parties. The Applicants based their claims on an expert report of 1994 and on the inflation rate, as established by the National Commission for Statistics. The expert report seemingly neither accounted for inflation nor evaluated the movable property lost by the Applicants.

Delays plagued the trial process. Extensions were sought on 11 December, 1996 and 15 January 1997.On 27 January 1997 the Supreme Court of Justice transferred the case for examination to Bucharest District Court. The transfer was confirmed on 19 February 1997. On 7 April 1997, the accused applied for and received an extension in order to retain a defence lawyer for the civil portion of the trial. On 20 October 1997, the trial was postponed until December because one of the accused, Dinu Vasile, was working abroad. By 30 March 1998 he had still not returned to Romania, prompting further postponement. During these lengthy proceedings into events stretching back to 1991, several of the claimants died.

At no time during the public hearings nor during the investigation did the authorities or the court ever provide any meaningful opportunity for the Applicants to participate or to testify to the injustice that they had suffered. Instead, the Applicants were systematically marginalized. Apart from initiating the investigation, providing declarations at the investigatory stage and submitting documents requested by the Court on the value of their property, the Applicants had no role in a trial ostensibly held to address their complaints, and crimes committed *against* them.[36] During public hearings, judges, beginning at the Bolintin Vale district court, referred to the complainants as "tigani," a pejorative term for gypsies.[37] Beginning in 1995, the Applicants were effectively excluded from the proceedings; Emilian Niculae, the authorized representative of the community, stopped receiving notices related to the case. Despite his frequent communications with the Court from a new address, the Court continued to send notices to Bolintin Deal.[38]

On May 18, 1998, the District Court convicted thirteen villagers of unlawful entry and destruction of property, sentenced them to three to six months' suspended imprisonment and reduced their punishment on the grounds that "provocation led to shared responsibility on the part of both the victims and the perpetrators" [39] According to the Court, "the accused persons tried spontaneously to find a solution to the deed committed by that gypsy"[40] so that the gathering of villagers did not constitute the crime of associating with the view to committing crimes under Article 323 sections 1 and 2.

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[36] Affidavit of Emilian Niculae at para. 16; Exhibit 1A
[36] *Ibid* at para. 19.
[37] *Ibid* at para. 18.
[38] *Ibid* at para. 20.
[39] *Decision as to the Admissibility of Tanase and Others v. Romania*, (Application no. 62954/00) Judgment of 19 May 2005 at page 5.
[40] *Ibid.*

The Court invoked the same rationale of 'provocation' to reduce by half the award of related civil damages. In determining compensation, the Court did not take into account the inflation rate and relied solely on the 1994 expert report without conducting any further investigation.

The Applicants appealed this judgment to the County Court. On the case's civil aspects, they requested a new expert report to evaluate immovable property and further testimony and expert evaluation on movable property. The Court dismissed the appeal on 4 January 1999 and upheld the earlier judgment, ruling that the Applicants had not proven that they had incurred greater damage than established by the District Court. The Court disallowed the Applicant's proposal for a method of inflation evaluation "since it was arbitrarily chosen and did not represent an uncontested expert report."[41] For the rate of inflation, the Applicants relied on information from the National Commission of Statistics. The Court also found that the criminal charges had become time barred.

The Applicants appealed to the Bucharest Court of Appeal. They argued that the mitigating circumstances of provocation were unfounded insofar as the civil claims were concerned. In addition, they asserted that the District Court had a duty to actively determine the damages that they had suffered and that the sale of some plots of land did not qualify as adequate reparation for damages sustained during the events of April-May 1991. In terms of the criminal case, the Applicants requested an investigation into the conduct of the Mayor and the Priest, implicated in the testimonies of the accused, in order to determine their involvement in the 1991 pogroms.

The Court of Appeal rejected both the civil and criminal appeals. It affirmed the lower Court's findings on rate of inflation and on mitigating circumstances and provocation based on the evidentiary record. The Court of Appeal ruled that the Court had no power to order a new expert report as this was entirely the responsibility of the Applicants during the initial trial. Finally, according to the Court, victims have no right under law to appeal against the criminal aspect of a court decision.

Expulsion from Bucharest

On April 14, 2002, many of the exiles from Bolintin Deal were expelled from the city of Bucharest for incurring unpaid fines for having carts on the streets. They were subsequently transported back to Bolintin Deal by Bucharest authorities. Mr Cristian Popescu, an official with Bucharest's 6th District Mayor's Office, stated prior to the expulsion that, "Carts are not allowed in Bucharest. If they (Roma) return, I will burn their carts and make salami from their dogs."[42]

These discriminatory statements are unfortunately characteristic of racist attitudes prevalent in Romanian public life. For example, Major Alexandru Măreaţă of the Giurgiu County Police, who would have had responsibility for investigating the consequences of violent incidents that occurred in

[41] *Ibid* at page 6.
[42] European Roma Rights Centre, (2002) "Roma Expelled from Romanian Capital" online: http://www.errc.org/cikk.php?cikk=931.

the county in the 1990s, told a representative from the European Roma Rights Centre that "[t]hese bear-dancing Roma from Bolintin Deal did not work … Whether those who set the houses on fire will be punished or not is a very complex question. The majority population has the right to certain self-defence."[43]

Now, by barring the Bolintin Deal exiles from Bucharest, Romania has left them with no place to go. Police even set up checkpoints to stop them from returning. Such actions by the State condones the mistreatment of the Roma people and demonstrates that Romania has remained impervious to the plight of its most vulnerable citizens.

III – A CLIMATE OF DISCRIMINATION AND VIOLENCE

The Applicants' story is shared by many Roma in the country. In fact, for the Roma people who formerly resided in Bolintin Deal, the 1991 pogrom was one episode in a long history of ill-treatment against Roma people throughout Romania.[44] The estimated 2.5 million Roma living in Romania face discrimination in every aspect of public life. Romania's accession to the European Convention has not demonstrably improved the lives of the Applicants and other Roma denizens. Since 1994, Roma in Romania have been excluded from housing, jobs and schools, and have been subjected to mob violence on the basis of their ethnicity.[45]

The current living conditions that the Applicants are subjected to are indicative of the Romanian State Party's policies of segregated housing, forced evictions, and refusals to rent or sell to Roma.[46] This discrimination in turn translates to inequities in access to basic services including waste removal, water and electricity.[47]

There have been numerous instances of this type of "ghetto-ization" of Roma peoples. On March 1, 2001, for example, the Mayor of Barlad announced a plan to remove the Roma inhabitants from the town and establish separate quarters for them on the outskirts of town.[48] The purpose was to remove the Roma from their current place, "where they do not live in a civilized manner," and where they "commit illegal acts. Similarly, in September, 2004 the newly elected mayor of Piatra Neamt announced his intention to relocate Roma living in the town to an area near a garbage pit and a shooting range.[49]

In addition to discrimination in housing, Romanian authorities routinely deny Roma children access to non-Roma schools. As a result, most Roma children are forced to attend schools with inferior

[43] Istvan Haller, "Lynching is not a crime: mob violence against Roma in post-Ceausescu Romania," European Roma Rights Centre; Exhibit 4.

[44] Affidavit of Constantin Cojocariu at 7; Exhibit 2
[45] See, Affidavit of Constantin Cojocariu at 2; Exhibit 2
[46] "State of Impunity: Human Rights Abuse of Roma in Romania," European Roma Rights Center; Exhibit 6.
[47] *Ibid.*
[48] Affidavit of Constantin Cojocariu at 6 ; Exhibit 2
[49] Affidavit of Constantin Cojocariu at 6 ; Exhibit 2

facilities and instructors.[50] This directly contravenes Romania's own Constitution, which provides for a right to equal education for all persons,[51] as well as its obligations under international law.[52]

The non-Roma majority is unapologetic about the plight of the Roma.[53] In fact, the Roma are often blamed for the country's present predicament and the ongoing problems it faces. In the aftermath of the 1989 revolution, latent anti-Roma sentiment came to the fore. Rumors abounded that Communist-era dictator Nicolae Ceausescu was himself a Roma, and that the Roma were responsible for the election of his unpopular successor, Ion Iliescu.[54]

Most Romanian newspaper articles concerning Roma persons use pejorative language, often referring to them using the inflammatory term "gypsy."[55] Public displays of hatred and contempt for Roma are visible and notorious. The Union of European Football Associations (UEFA) has been forced to cancel international matches in Romania due to racist incidents including a recent match during which fans unveiled a 40-metre high banners proclaiming "Jews and [gypsies] out of Romania," as well as large portraits of Hitler and war-time members of Romania's fascist party.[56]

It did not take long following the revolution for anti-Roma sentiment to translate into overt and frequent acts of violence. The first post-revolution attacks against the Roma occurred in late 1989 when villagers in Covasna County killed two Roma and destroyed two houses.[57] A wave of attacks between 1990-1993 followed: beatings, murders, and house burnings were the *modus operandi* of the anti-Roma mobs.[58] Indeed, since 1990 there have been over 30 such conflicts in which Roma have been either driven from their homes and/or injured, sometimes fatally.[59] Those responsible for these attacks are rarely punished by State authorities or condemned by the general public.[60] Anti-Roma sentiment is so pervasive in Romania that even egregious and overt acts of violence against the Roma community are tolerated. This Court's recent ruling in *Moldovan*, which required Romania to

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[50] Affidavit of Constantin Cojocariu at 7; Exhibit 2 See also "State of Impunity: Human Rights Abuse of Roma in Romania," European Roma Rights Center; Exhibit 6
[51] See Article 32 of the Constitution of Romania (Right to education), which states "the right to education is provided for by the compulsory general education…"
[52] See Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2 1990, Article 28 states "State Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity…"
[53] See, Affidavit of Constantin Cojocariu at 5; Exhibit 2
[54] Istvan Haller, "Lynching is not a crime: mob violence against Roma in post-Ceausescu Romania," European Roma Rights Centre; Exhibit 4
[55] Affidavit of Constantin Cojocariu at 2; Exhibit 2
[56] Affidavit of Constantin Cojocariu at 5; Exhibit 2
[57] Istvan Haller, "Lynching is not a crime: mob violence against Roma in post-Ceausescu Romania," European Roma Rights Centre; Exhibit 4
[58] *Ibid*; Center for Documentation and Information on Minorities in Europe - Southeast Europe (CEDIME-SE), "Roma of Romania," at 25-26; Exhibit 3 See European Roma Rights Center, "Sudden Rage at Dawn: Violence Against Roma in Romania" (September 1996) at 12-19; Exhibit 1
[59] Center for Documentation and Information on on Minorities in Europe - Southeast Europe (CEDIME-SE), "Minorities in Southeast Europe: Roma of Romania" at 22; Exhibit 3
[60] Affidavit of Constantin Cojocariu at 3 ; Exhibit 2

compensate the Roma victims of a 1993 pogrom for ongoing post-1994 breaches of the Convention relating to that attack was met with a public backlash.[61]

Far from offering protection to victims of anti-Roma violence and discrimination, the State Party has sent a clear message that segregation and continued discrimination against the Roma is in the interest of the Romanian state.[62] As the European Roma Rights Centre has documented, non-prosecution is the norm in these types of cases.[65] Where prosecutions are undertaken, they are often haphazard and lacking in substance. Even where prosecutors do not decide to prematurely cancel proceedings, final remedies, if granted, are typically minimal in light of the severity of the crimes involved. This stems in large part from the way in which Romanian authorities tend to vilify Roma communities as criminal.[63] As documented in 1993 by the International Helsinki Federation for Human Rights (IHF), Romanian authorities often characterize groups of Roma as "criminals," thus ensuring that issues surrounding attacks on Roma communities become a debate about crimes committed by Roma.[64] Because criminal prosecutions are tied to civil claims for damages,[65] Roma victims' post-1994 Convention rights are breached by an ongoing lack of remedies even where the attack itself occurred pre-1994.

This climate of impunity is fuelled by the fact that the perpetrators of such acts are often the police or other state authorities themselves. The police and state authorities have actively participated in violence against vulnerable Roma communities. It is not unusual for police to use the alleged wrongdoing of a single Romanian citizen as a pretext for a massive raid on Roma villages or neighborhoods. [66] Such raids often result in mass detention and flagrant police brutality, which often extends to women and children. [67]

Romania acknowledged ongoing violence and discrimination against Roma peoples in 2000 and committed to stopping the abuses. The State Party introduced an Ordinance on Preventing and Punishing All Forms of Discrimination and also became a signatory to Protocol 12 to the European Convention, which establishes a general prohibition of discrimination.[68] Despite these steps, however, discrimination against Roma persons in the housing, education, judicial, police, health care, and employment sectors persists.[69] The continuing denial of justice in cases of violent attacks against Roma peoples illustrates the lengths to which Romania must still go if it is to live up to its nominal claims of non-discrimination.

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[61] Affidavit of Constantin Cojocariu at 5; Exhibit 2
[62] Affidavit of Constantin Cojocariu at 2; Exhibit 2
[65] European Roma Rights Center, "State of Impunity: Human Rights Abuse of Roma in Romania,"; Exhibit 6
[63] *Ibid.*
[64] Center for Documentation and Information on Minorities in Europe - Southeast Europe (CEDIME-SE), "Minorities in Southeast Europe: Roma of Romania" at 23; Exhibit 3
[65] See Romanian Civil Code Article 1003.
[66] Affidavit of Constantin Cojocariu at 4; Exhibit 2
[67] *Ibid.*
[68] For discussion of these two actions, see European Roma Rights Center , "State of Impunity: Human Rights Abuse of Roma in Romania,"; Exhibit 6
[69] *Ibid*.

This disparity between legislation that existed through 1999 and actual practice in Romania was highlighted in the 1999 Shadow Report on Romania prepared by the Strasbourg Ombudspersons for National Minorities.[70] It noted that:

> in Romania there is a significant difference between the value of some provisions and the fact that they are not enforced in practice. This difference is highlighted by the proliferation of hate speech and by the discrimination of Roma in the labour market. The distance between legislation and practice is due to the weakness of the rule of law.[71]

Unfortunately, given Romania's record of discrimination and violence against the Roma, the pogrom at Bolintin Deal and continuing denial of justice is not unusual. What is striking about this case, as the facts indicate, is the level of state involvement in the initial attacks, and the state complicity—at almost every level and branch of State Party—in the attempted justification of the initial pogroms. In short, Romanian officials have denied Applicants an effective remedy for the suffering they have endured for 14 years.

III – STATEMENT OF ALLEGED VIOLATIONS OF THE CONVENTION AND OF THE RELEVANT ARGUMENTS:

A. VIOLATIONS OF ARTICLE 3:

Article 3 reads as follows: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Romanian authorities violated Article 3 by failing to undertake an adequate investigation of the culprits of the 1991 pogrom, particularly state agents including the mayor Mircea Obiala, the thirteen police present during the first pogrom who either participated in or failed to intervene in order to prevent the violence directed against the Roma and the destruction of their homes, and other authority figures including Father Mugurel. State officials, therefore, bore direct responsibility for the pogroms, and for failing to restore the Applicants to their previous living conditions. Furthermore, we respectfully submit that the State Party of Romania has violated article 3 by failing to provide an effective remedy for the Applicants' homelessness resulting from the pogrom, and by compelling the Applicants to live in appalling conditions which amount to inhuman treatment.

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[70] See Gabriel Andreescu, "Romania: Shadow Report" (Oct. 1999) – Strasbourg Ombudspersons for National Minorities, Exhibit 5

[71] *Ibid* at pg. 7.

Case Law

(a) Torture, Inhuman and / or Degrading Treatment:

Article 3 of the Convention protects—in absolute terms—respect for the dignity and physical integrity of all human beings.[72] As identified by Article 15, it is a non-derogable right. In *Ahmed v. Austria*, the Court held that like Article 2, Article 3's protection of human dignity enshrines one of the basic values of the democratic societies that make up the Council of Europe and must be strictly interpreted:

> The Court further reiterates that Article 3, which enshrines one of the fundamental values of democratic, prohibits in absolute terms torture or inhuman or degrading treatment or punishment, *irrespective of the victim's conduct*. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation[73] (emphasis added).

In *Ireland v. United Kingdom*,[74] the Court enumerated the categories of ill-treatment enshrined in Article 3. "Inhuman Treatment" is defined as "treatment that causes intense physical and mental suffering," while "Degrading Treatment" includes "treatment that arouses in the victim a feeling of fear, anguish and inferiority capable of humiliating and debasing the victim and possibly breaking his or her physical and moral resistance."

Ill-treatment that reaches a minimum level of severity amounts to a violation of Article 3. The test for the minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.[75] Ill-treatment also "covers at least such treatment as deliberately causes severe suffering, which, in the particular situation, is unjustifiable."[76] The Court has insisted that "even in the most difficult circumstances, such as the fight against organized terrorism and crime, the Convention prohibits, in absolute terms torture or inhuman degrading treatment or punishment."[77]

Degrading treatment, within the meaning of Article 3, is not limited to physical assault, but includes acts of a serious nature which interfere with the dignity of a person. In *Selcuk and Asker v. Turkey*, where Turkish security forces had burned down the home of the applicants in their presence, the Court held that because of "the manner in which the applicants' homes were destroyed and their

[72] See, for example, *Labita v. Italy* [GC], no 26772/95, para. 119, ECHR 2000-IV.
[73] *Ahmed v. Austria* (1996), 24 E.H.R.R. 278 at para. 40 [internal citations omitted].
[74] *Ireland v. United Kingdom* (1978), 2 E.H.R.R. 1.
[75] See *Costello-Roberts v. The United Kingdom*, 25 March 1993, p. 59, Section 30; *Dougoz v. Greece*, 6 March 2001, p. 7, Section 44.
[76] *Greek* case, Comm Rep (1969) 12 ECHR, Yearbook 1 at 186.
[77] *Askoy v. Turkey,* Judgment (1996) 23 EHRR 553 at para. 62

personal circumstances, it is clear that they must have caused suffering of sufficient severity for the acts…to be categorized as inhuman treatment within the meaning of Article. 3."[78]

Similarly, in *Ayder and others v. Turkey,* the Court observed:

> [T]hat the applicants' homes and possessions were burned before the eyes of some of the applicants as well as of members of their families. The destruction of their property deprived the applicants and their families of shelter and … obliged them to leave the place where they had been living and to build up new lives elsewhere.[79]

In *Ayder*, the actions of security forces were deemed unjustifiable, notwithstanding the victims' alleged terrorist involvement. There, the destruction of the victims' homes was sufficient to trigger the application of Article 3. In the analogous case of *Mentes and Others v. Turkey*, the Court considered the "traumatic circumstances" caused by "the deliberate destruction" of the applicants homes, but also the lack of "assistance" that the victims received following these events.[80]

In addition, discriminatory treatment may in itself amount to degrading treatment. In the *East African Asians case*, the Commission held that "a special importance should be attached to discrimination based on race; that publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity…"[81] In that case the Commission found that there had been degrading treatment in violation of Article 3 because of the application of immigration legislation which prevented British passport holders in East Africa from obtaining rights of residence in the United Kingdom.

In *Moldovan and Others v. Romania*, the Court found that "discriminatory remarks made by "authorities dealing with the applicant's grievances" were "an aggravating factor in the examination of the applicants' complaint under Article 3 of the Convention."[82] *Moldovan* like the case at bar, involved pre-1994 mass violence in Romania targeting Roma people. The Court in *Moldovan* found a violation of Article 3 because of Romania's cruel and debasing treatment of the affected community, post-1994.

Treatment can be degrading even where there is no intention by the State to cause humiliation or debasement.[83] In determining whether a particular form of treatment is "degrading", the Court will take note of whether the purpose of the treatment was to humiliate and debase the person concerned; the Court, however, will also "have regard to whether … as far as the consequences are concerned [the treatment] adversely affected […the victim's] personality in a manner incompatible with

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[78] *Selcuk and Asker v. Turkey* (1998), 26 E.H.R.R. 477.
[79] *Ayder et al. v. Turkey* (Application no. 23656/94), Judgment 8 January 2004, at para. 109.
[80] *Mentes v. Turkey*, (1998) 26 E.H.R.R. 595 at para. 76.
[81] *East African Asians case* (1981) 3 E.H.R.R. 76 at para. 54.
[82] *Moldovan and Others v. Romania*, Nos. 41138/98 and 64320/01, 12.07.05 at para. 111.
[83] *Ibid.*

Article 3."[84] Article 3, may be violated if the victim has suffered or has been placed at risk of suffering serious consequences because of the way in which he or she has been treated.

In addition, "[outward] signs of physical force on an individual deprived of his liberty," however slight, have been found to evince inhuman and degrading treatment of sufficient gravity under Article 3.[85] In the case of *Tomasi v. France,* independent medical reports attested to the blows and injuries sustained by a prisoner while imprisoned. According to the Court where there is evidence of injuries acquired during detention, the authorities must provide a plausible explanation of how these injuries occurred.[86] The Court emphasizes that "limits" should not be placed in respect of the "physical integrity of individuals" to permit institutionalized violence particularly as detained persons are in a vulnerable position as wards of the state.[87] The Court has recently affirmed that, "[in] respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3."[88]

As in *Moldovan*, the Court has held that state officials will be held liable not only for the initial act, but also for anguish that the Applicants are forced to endure over a prolonged period of time.[89] In *Kurt v. Turkey,* the Court faulted State Officials for their "complacency" in the face of the applicant's "distress" caused by her son's disappearance at the hands of authorities.[90] The Court emphasized the "continuing" nature of the harm in finding a violation.

(b) Positive obligations of the State

The State must not only refrain from subjecting its citizens to torture and inhuman and degrading treatment – it must also take positive steps to ensure that violations are not committed. According to *A. v. United Kingdom*, the State must "take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals."[91] The State may also be liable under Article 3 for the unlawful acts of private individuals through its "acquiescence or connivance." On facts that are strikingly similar to this case, the *Moldovan* Court held:

> The acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention.[92]

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[84] *Yankov v. Bulgaria*, Judgment of 11 December 2003, p. 105, Section 1.
[85] *Tomasi v. France,* Judgment of 27 August 1992, 12850/87 [1992] ECHR 53 at para. 113**.**
[86] *Salman v. Turkey* [GC], no. 21986/93, para. 100, ECHR 2000-VII.
[87] *Tomasi v. France, supra*. at para. 115. See also *Mehmet Emin Yuksel v. Turkey*, (App. 40154/98) Judgment of 20 July 2004.
[88] *Balogh v. Hungary,* (Application no. 47940/99*)*, Judgment of 20 July 2004 at para. 45.
[89] *Kurt v. Turkey* (Judgment of 25 May 1998), 27 E.H.R.R. 373 at para. 133.
[90] *Ibid* at para. 134.
[91] *A. v. United Kingdom, supra* at para. 22.
[92] *Moldovan and Others v. Romania*, *supra* at para. 94.

Furthermore, in *Moldovan* this Court found that a "State may also be held responsible even where its agents are acting *ultra vires* or contrary to instructions."[93] The Court will look to the subsequent behaviour of the State to determine whether its responsibility is effectively engaged.[94] In *Moldovan*, Romanian villagers and State officials expelled the Roma population from their village, killing three Roma and destroying all Roma property. Though the events occurred before Romanian Ratification of the Convention, the Court cited the continuing effects of the community violence against the Roma – poor living conditions – as well as the "repercussions of the acts of State agents on the applicant's rights" in finding a violation of the Convention.[95]

Other European legal instruments reinforce the Court's juridical findings that State agents have positive obligations in terms of human rights protection beyond mere observance of human rights by State actors. In its Declaration on the Police, the Council of Europe affirms that "[a] police officer shall fulfill the duties the law imposes upon him by protecting his fellow citizens and the community against violent, predatory and other harmful acts, as defined by law" (Article 1). Article 6 (2) of the Council of Europe's Framework Convention for the Protection of National Minorities states: "The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity."

Additional international jurisprudence has also established that States have a duty to stop or to preclude private action that may violate human rights, even when the State or its agents bear no imputable responsibility for that action. In *Velásquez Rodriguez v. Honduras*[96] the Inter-American Court of Human Rights found that

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention. … [T]he violation can be established even if the identity of the individual perpetrator is unknown."[97]

Under these standards, States and State officials must act with due diligence in order to prevent human rights violations and responsibility attaches to the failure to do so. Once human rights violations have occurred, the State has a duty to respond to these violations as required by the Convention.

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[93] *Ibid.* This is a discussion in context of Article 3 and Article 8 but should be equally relevant to both.
[94] *Ibid* at para. 95; *Ilascu and Others v. Moldova and Russia*, no. 48787/99 at paras. 317, 382, 384-85.
[95] *Moldovan and Others v. Romania*, *supra* at para. 104. [Mention that *Moldovan* appears to discuss this obligation in the context of an Article 8 violation but that it would apply equally to an Article 3 violation]
[96] Judgment of 29 July I988; for the text of the judgment see 28 ILM (1989), 291.
[97] Ibid., paras. 172-173

Application to the Case at Bar

At the admissibility phase, Romania argued that it bore no responsibility for the Applicants' living conditions. Romania's responsibility for the living conditions the Applicants subsequent to its ratification of the Convention is engaged for the following reasons: i) The mayor and police refused to halt the violence and actively participated in driving the Roma of Bolintin Deal from the community; ii) public officials refused the Roma community's attempts to return to what remained of their homes; iii) the mayor facilitated and may have profited from the sale of Roma lands to non-Roma persons – thus erasing the Roma presence in the town; and iv) public officials have ignored the community's calls for assistance and by its acts and omissions, intentionally rendering the previously stable Roma community homeless and destitute. (Source: Response of State Party of Romania, Re: Admissibility)

By any estimation, the Roma of Bolintin Deal were humiliated and debased and incurred intense physical and mental suffering both as a result of the 1991 incidents, and the continuing harm associated with Romania's ongoing refusal to provide adequate compensation. State officials stood idly by on two occasions while Romanian villagers expelled the Applicants' from their village and burned their homes, and then did virtually nothing to help the displaced community. Without adequate State Party aid, the Roma of Bolintin Deal were scattered across Romania and rendered internally displaced people. They left behind their belongings. Many lived without legal domicile status.[98] To this day, many of these Roma lack basic life necessities, and find themselves sleeping on floors or facing eviction from makeshift homes.[99] Without official addresses, the Roma of Bolintin Deal have been unable to access social services. Every member of the community has suffered economic losses and most adults have been separated from their jobs and left without means of earning a living. Driven from their homes, the Roma children of Bolintin Deal have suffered interruptions to their education.[100] When they have attempted to return to their former homes, the Applicants and their families have beaten and abused.

The way in which State authorities handled the grievances of the Applicants evinces an attitude of racial discrimination to which the Applicants were publicly subjected. State officials – judges – referred to Roma pejoratively.[101] During and after the course of the investigations, the exiles from Bolintin Deal were harassed and their accommodations raided on the pretext of "illegal domicile." Police told Emilian Niculae in particular, the Applicant's representative, to stop seeking justice for the events of 1991.[102]

Furthermore, though 11 people subsequently sold their property, there is no evidence that any of the homes destroyed in 1991 were ever rebuilt. There is no evidence in this case that the majority of

[98] Affidavit of Emilian Niculae at para. 41; Exhibit 1a.
[99] See letters of members of the Roma community from Bolintin Deal requesting assistance from the government (2005); Exhibit 8
[100] *Ibid*.
[101] *Decision as to the Admissibility of Tanase and Others v. Romania*, (Application no. 62954/00) Judgment of 19 May 2005 at page 5; Affadavit of Emilian Niculae at para. 18.
[102] Affidavit of Emilian Niculae at paras. 52-71; Exhibit 1a;

Applicants were ever able to sell their land or that they ever received any compensation for their losses. For those Applicants who did sell their land, it is unclear from the record whether the proceeds from the sale were adequate to help them find appropriate housing, though there are indications that the mayor himself profited from the sale of property formerly owned by Roma to non-Roma persons.[103] What is clear is that at no time did the State Party of Romania make any effort to assist the dispersed community from Bolintin Deal or offer any particular assistance.[104]

(c) The duty to carry out an effective investigation:

Article 3 also imposes on states a positive obligation to carry out an effective official investigation into an allegation of serious ill-treatment, which is capable of leading to the identification and punishment of those responsible.[105] The Court in *Costello-Roberts v. United Kingdom* held "that the responsibility of a State is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligation under Article 1 to secure those rights and freedoms in its domestic law to everyone within its jurisdiction."[106] The specific requirements of the right articulated in Article 3, together with the general duty of State Parties found in Article 1 to ensure that all rights and freedoms contained within the Convention are maintained and enforced, results in a positive duty on the State to investigate adequately all allegations of inhumane or degrading treatment.[107] In *Assenov v. Bulgaria*, this Court observed that:

> [I]n these circumstances, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms in [the] Convention", requires by implication that there should be an effective official investigation. This obligation [...] should be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.[108]

An effective investigation is one that is capable of leading to the identification and punishment of those responsible for the violations.[109] As the Court stated in *Aktas v. Turkey,* "whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention.

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[103] *Ibid* at para. 48
[104] *Ibid.* at para. 54.
[105] *Assenov and others v. Bulgaria*, (1999) 28 E.H.R.R. 652 at para. 26.
[106] *Costello-Roberts v. United Kingdom*, 19 EHRR 112 (1993), para. 26; see also, *Young, James* and *Webster v. the United Kingdom*, Judgment of 13 August 1981, Series A no. 44, p. 20, para. 49 and *A v. United Kingdom*, Judgment of 23 September 1998, para. 22.
[107] *Indelicato v. Italy* (2002) 35 E.H.R.R. 40, para. 36; *Labita v. Italy*, (Unreported, April 6, 2000, ECHR) (Application no. 26772/95*)* para 132-135; *Donnelly et al. v. United Kingdom* 4 D. & R. 78.
[108] *Assenov*, 28 E.H.R.R. 652 (1999), para 102.
[109] *Egmez v. Cyprus* (2002) 34 E.H.R.R. 29, para 65; *Assenov*, supra, para 102

They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigatory procedures."[110] An effective investigation requires that the investigating authorities be independent and impartial.[111] The onus is on the State to prove that its investigation complied with the requirements under the law.

In evaluating the content and quality of an investigation, the Court must satisfy itself that there has not been unreasonable delay and that the investigation has concluded as expeditiously as possible. For,

> while there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating the use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.[112]

An investigation must also be transparent. "[A] sufficient element of public scrutiny of the investigation or its results" is required to ensure "accountability in practice as well as in theory."[113] Accordingly, the State must take "all reasonable steps" in order "to secure evidence concerning the incident, including 'eyewitness testimony and forensic evidence'"[114]

The failure to conduct prompt, effective investigations capable of holding the perpetrators responsible gives rise to a violation of Article 3, even where there in no finding of an underlying violation.[115] Thus, the State's failure to carry out an effective investigation into allegations of inhuman and degrading treatment can constitute an independent violation of Article 3.

Application to the Case at Bar

Romania's investigation in this case fails the standard of an effective investigation because: i) the authorities did not begin an investigation of their own initiative, but waited for the Applicants to lodge a complaint; ii) the investigations were "selective" as not all persons involved in the incident, particularly the mayor, were properly investigated; and iii) the investigation was neither independent nor impartial.

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[110] *Aktas*,*v. Turkey,* (2004) 38. E.H.R.R. 18, at para. 299
[111] *Ibid* at para. 301.
[112] *McKerr v. the United Kingdom*, no. 28883/95, para. 114, ECHR 2001-III. This development of the definition of "effective investigation occurs in the context of an Article 2 violation.
[113] *Tanrıkulu v. Turkey* [GC], no. 23763/94, at para. 109, ECHR 1999-IV, and *Salman v. Turkey* [GC], no. 21986/93, at para.106, ECHR 2000-VII. Again, this arises in the context of an effective investigation into an Article 2 violation but would apply equally to an investigation into an Article 3 violation.
[114] *Tanrıkulu, supra*. at para. 109.
[115] See generally, *Assenov*, supra; *Labita*, supra; *Veznedaroglu v. Turkey* (2001) 33 E.H.R.R. 59, *Indelicato*, supra.

The conduct of Romanian officials post-Ratification, specifically their failure to carry out an effective investigation and to provide assistance to improve the resulting inhuman and degrading living conditions of the Roma, constitutes a violation of Article 3.

State officials were implicated in and thus bear responsibility for the pogroms. Shockingly, authorities did not discharge their public policing duties but instead waited for Applicants to lodge complaints.[116] The Applicants brought the incident to the attention of the Public Prosecutor in 1991 but it was five years before any charges were laid. When charges were finally brought, 13 non-State actors were indicted out of a mob of thousands that included State officials.

Several people against whom complaints were lodged were never investigated. There is no evidence in this case that the mayor of Bolintin Deal was ever investigated. Additionally, Applicants are concerned that the officials in charge of the investigation were involved in the pogrom and could not, therefore, be considered impartial.

The State did not take all reasonable steps to secure evidence of the damages suffered by the Applicants, particularly during the trial proceedings. Indeed, the Court ignored the inflation rate in making an evaluation of what the Applicants had lost, despite their submission of a reasonable inflation rate based on the National Commission for Statistics.[117] The Court also appears not to have seriously considered the amount of damages allegedly owed to the Applicants, relying instead on an expert report from 1994.[118]

The investigation and trial appear to have lacked transparency. The Court did not inform Emilian Niculae, the Applicants' representative, of case developments, but instead sent notifications to Bolintin Deal where, as the Court would have known, none of the Applicants lived. During the course of the investigations, police raided the 'illegal domiciles' of the Applicants, harassing and threatening them to drop their legal action and activism. The police harassment inflicted on Emilian Niculae also demonstrates a serious lack of transparency on the part of State officials and calls into question every aspect of the investigation. The trial judges who first heard the case also compromised their impartiality by using pejorative terms for Roma.[119] In fact, based on the State Party's own account – a record that is entirely in the possession of the respondent State – it is apparent that Romania failed to conduct an adequate investigation.

Police also treated Emilian Niculae in a particularly inhumane and degrading way when he was taken into custody on 21 March 1995. Niculae sustained injuries and there is no indication that the way in which he was treated was necessary. Police who arrested Niculae never produced a warrant and assaulted him without any reason. Niculae obtained a medical certificate documenting his injuries,

[116] Affidavit of Emilian Niculae at para. 16.
[117] *Decision as to the Admissibility of Tanase and Others v. Romania*, (Application no. 62954/00) Judgment of 19 May 2005 at page 4-6
[118] *Ibid* at page 6.
[119] *Ibid* at page 5.

lodged a complaint, and sent a letter to Amnesty International's Ivan Fisher. The investigation into Niculae's ill-treatment on 21 March 1995 was non-existent and no explanation was ever given.[120]

The onus rests on the State to prove that it has carried out an effective investigation into an allegation of ill treatment. None of the documents or arguments that Romania has advanced in its defence to this point have even attempted to discharge this burden of proof.

Conclusions

The Applicants respectfully submit that the respondent State is guilty of violating Article 3 of the Convention. Since 1994, Romanian authorities have failed to remedy the consequences of the violent incidents of 1991. Furthermore, the State Party has failed to ensure that the Applicants received adequate redress, forcing them to live in conditions that amount to inhuman and degrading treatment. Finally, Romanian authorities have failed to conduct an effective investigation leading to the identification and punishment of those responsible, including state officials. Finally, State Party officials abused Emelian Niculae in 1995 and then refused to conduct an investigation into the incident.

As discussed above, the Court's past jurisprudence clearly indicates that the failure to remedy the destruction of homes and property, and the attendant social consequences, including ongoing homelessness and lack of access to basic social services amount to a violation of article 3 of the Convention.

The facts of the case indicate that state officials were complicit in and failed to prevent the incidents of violence in 1991. Since 1994, however Romania's ongoing failure to guarantee a safe return of the Roma to Bolintin Deal or an adequate alternative constitutes a clear violation of Article 3. Applicants have presented uncontroverted evidence of the involvement of state agents and Romania's consistent failure to meet its positive obligations to ensure that the violations were adequately redressed, through compensation, the rebuilding of homes and a return to communities. Romania's failure to carry out an adequate investigation, as revealed by selective prosecutions and the delay and bias in initiating procedures, simply magnifies the harm.

B. VIOLATIONS OF Article 1, Protocol I

Article 1 of Protocol I reads:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

[120] Affidavit of Emilian Niculae at paras. 56-64; Exhibit 1a.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

With regard to Article 1 of Protocol I, the Applicants respectfully submit that their entitlement to the peaceful enjoyment of their possessions and property has been denied through the continuous, unjustified deprivation of their homes and the contents therein. Neither the initial 1991 pogroms, nor the continued obstacles to the Applicants' access to their homes is in the "public interest." These deprivations were not mandated by law and were not part of any attempt to regulate property or secure tax payments. Rather, they are the result of municipally-sanctioned collective violence and continued prejudice against the Applicants.

Case Law

Article 1, Protocol I "guarantees in substance the right of property."[121] Case law on this article indicates that the two paragraphs of the provision encompass three distinct issues. The first sentence of the first paragraph articulates the general principle of the peaceful enjoyment of property. The second rule, contained in the second sentence of the first paragraph, outlines the conditions under which a person may be validly deprived of his or her possessions. Finally, the second paragraph includes an acknowledgment that the use of property is subject to State regulation in the general interest.[122] Pursuant to these rules, the deprivation of property, which falls under the first paragraph, has been distinguished from the control of property, which is encompassed in the second paragraph. The concept of general interest thus has application under both paragraphs of the provision.

In *AGOSI v. United Kingdom*, this Court noted that these rules should not be interpreted independently from one another:

> the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.[123]

The property rights protected under this Article include the right to dispose of one's property.[124]

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[121] *Holy Monasteries v. Greece*, Judgment of 9 December 1994, Series A, No. 301-A; (1995 20 EHRR 1, para. 56 of the judgment.)
[122] See, e.g., *Holy Monasteries v. Greece*, Judgment of 9 December 1994, Series A, No. 301-A; (1995 20 EHRR 1, para. 56 of the judgment; and *Carbonara and Ventura v. Italy* (App. 24638/94), Judgment of 30 May 2000, para. 58 of the judgment.
[123] *AGOSI* v. *United Kingdom*, Judgment of 24 October 1986, Series A, No. 108; (1987) 9 EHRR 1, para. 48 of judgment.
[124] Ibid. at para. 63 of the judgment, which reads: "Indeed, the right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property."

Positive Obligations

Under this article, the State has a positive obligation to protect its citizens from unlawful interference with property. In *Gustafsson*, the applicant argued that the State was in violation of Article 1, Protocol I for failing to protect him from a union boycott that he argued forced him to eventually close his restaurant, thus preventing his peaceful enjoyment of his property.[125] Although this Court found that the circumstances of the case, which "concerned exclusively relationships of a contractual nature between private individuals", did not give rise to a positive duty, it noted that "the State may be responsible under Article 1 for interferences with peaceful enjoyment of possessions resulting from transactions between private individuals."[126]

"Possessions"

In a number of cases, the Court and the Commission have outlined the nature of "possessions." They have held that a wide variety of interests beyond ownership will implicate Article 1, Protocol I.[127] In addition, it is well-settled that measures short of the outright taking of property affect the right of peaceful enjoyment of possessions.[128]

Rather than relying on the notion of property as articulated in particular domestic systems, this Court has reserved for itself the right to make this determination in its Article 1, Protocol I interpretation. In doing so, the Court has adopted a robust notion of property, including movable and immovable property, rights granted under public law and immaterial rights.[129] Accordingly, this Court has embraced the notion of property conveyed by the French term "biens", which extends beyond the ownership of physical goods, rather than a cramped meaning conveyed by the English term "property."

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[125] *Gustafsson v. Swededn* (App. 15573/89), Judgment of 25 April 1996; (1996) 22 EHRR 409.
[126] Ibid., Para. 60 of the judgment.
[127] See, e.g., *Van Marle*, judgment of 26 June 1986, A. 101, 8543/79;8674/79;8675/79;..., para. 41 of the judgment (applicants' "goodwill" through building up a clientele was held to constitute an "asset and, hence, a possession within the meaning of Article1"); *Mellacher*, Report of 11/07/1988, Paras. 184-186 (Court noted that "certain contractual rights of economic value may be assimilated to property rights within the meaning of Article 1 of Protocol No. 1; here the right to use property by concluding tenancy contracts in relation to is covered by Article 1).
[128] See, e.g., *Papamchialopoulous v. Greece*, Judgment of 24 June 1993, A. 260-B, p. 20 (the applicants' properties were occupied by military authorities and as a result, they could not dispose of them in any way; this Court held that the domestic authorities' failure to remedy these circumstances amounted to a *de facto* expropriation incompatible with the right to peaceful enjoyment of possessions) *Phocase Case*, Judgment of 23 April 1996, Reports 1996-II, Vol. 7, p. 542 (this Court held that an urban development scheme that precluded development of the applicant's property without compensation for over 16 years interfered with his right to peaceful enjoyment of possessions)
[129] In *Gasus Dosier- und Fördertechnik GmbH v.the Netherlands* 306 Eur. Ct. H.R. (ser. A) at 46, Feb. 23, 1995, para. 53 of the judgment, the Court noted that "the concept of 'possessions' (in French: biens) in Article 1 of Protocol No. 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions' for the purposes of this provision."

Deprivation of Property

Where it is argued that there is a continuing deprivation of property in the absence of a formal transfer of ownership, this Court has stated that it will:

> [L]ook behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are "practical and effective" it has to be ascertained whether that situation amounted to a *de facto* expropriation.[130]

In order to be considered a permissible deprivation of property, the measure providing for the deprivation must accord with conditions outlined in national law, the general principles of international law must be respected, and the deprivation must be in the public interest.

In *Loizidou v. Turkey*, the applicants suffered from a total and continuous denial of access to property and did not receive compensation. There, the Court found a violation of Article 1, Protocol I because the applicants were unable to exercise their property rights, there was no compelling public interest shown by the defendant state, and no compensation was paid.[131]

Application to the Case at Bar

At the admissibility stage, Romania argued that that in so far as the destruction of property occurred before the ratification of the Convention by Romania, it did not constitute a violation of the Convention.[132] This Court disagreed and allowed the Applicants to proceed to the merits on this issue. The Applicants now contend that the State Party is responsible for the ongoing breach of its obligations under the Convention, namely a failure to provide an effective civil remedy for the destruction of the property as well as for failing to ensure that the Applicants could re-access their property. As this Court held in the *Case of Vasilescu v. Romania*, which dealt with the pre-1994 illegal seizure of the applicant's property (valuable coins), although "Romania had not recognized Court's jurisdiction until 20 June 1994… the applicant's complaint related to a continuing situation which still obtained, and the Supreme Court of Justice's judgment dated from after 20 June 1994."[133] In that case, "the loss of all ability to dispose of the property in issue, taken together with failure of attempts made so far to have situation remedied had entailed sufficiently serious consequences for it to be held that there had been a *de facto* confiscation"

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[130] *Sporrong and Lonnroth* v. *Sweden*, Judgment of 23 September 1982, Series A, No. 52; (1983) 5 EHRR 35, para. 63 of the judgment.
[131] *Loizidou v. Turkey* (App. 15318/89), Judgment of 18 December 1996; (1996) 23 EHRR 513, para. 60 – 64 of the judgement.
[132] Submissions of the Romanian concerning the admissibility and merits of the application; Exhibit 7
[133] (App. No. 27053/95), 22/05/1998 Reports 1998-III.

[and therefore a violation of Article 1, Protocol I].[134] The same reasoning should be applied in the present case in light of the State's failure to provide an effective remedy and the Applicants' ongoing inability to access, use, or otherwise enjoy their property.

In this case the Applicants' inability to return to their homes has also denied them the opportunity to dispose of their property. Eleven members of the exiled community have now sold what remained of their possessions and property, but they have done so under extreme duress. Although the Mayor of Bolintin Deal, Obiala Mircea, has contributed to conditions that make it impossible for the Applicants' to return to Bolintin Deal, the Mayor has contacted certain Applicants with offers to purchase their property. He and his associated officials collect a handling fee for administering these sales, which were already well below market value.[135] Some impoverished Applicants have had little choice but to acquiesce to the sales.

Because the present case involves the destruction of the Applicants' homes, the contents therein, and the ongoing obstacles to their ability to access these homes, this matter plainly engages the Applicants' entitlement to the peaceful enjoyment of "possessions" under Article 1, Protocol I. The deliberate destruction of homes by security forces has been interpreted by this Court as a clear interference with complainants' possessions.[136] Applicants submit that the ongoing deprivation they have suffered and the State Party's persistent failure to remedy losses since 1994 constitutes a violation of Article 1, Protocol 1.

Moreover, this Court has interpreted the inability to access one's home as extending beyond a freedom of movement issue to engage Article 1 of Protocol I. In *Loizidu*, the complainant argued that the State's refusal to allow her access to property "has gradually, over the last sixteen years, affected the right of the applicant as a property owner and in particular her right to a peaceful enjoyment of her possessions…"[137] Accepting this argument, the Court noted that the applicant's complaint could not be characterized as being "limited to the right to freedom of movement", but must be viewed as engaging Article 1, Protocol I.[138]

The continuing deprivation at issue in the present case also fails to meet any of the above-referenced conditions. As this Court has noted, any taking that is in violation of domestic law will amount to a breach of Article 1, Protocol I.[139] Romania has at no time attempted to justify the actions of municipal officials and private citizens in the continuing denial of access to property as conforming with national laws.

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[134] *Ibid*.
[135] Affidavit of Emilian Niculae at para 46-47; Exhibit 1a and interview with Elena Piroi; *Sudden Rage at Dawn*; Exhibit 1b.
[136] *Akdivar* v. *Turkey* (App. 21893/93), Judgment of 16 September 1996; (1997) 23 EHRR 143 at para. 88 of the judgement, the Court noted that the "The Court is of the opinion that there can be no doubt that the deliberate burning of the applicants' homes and their contents constitutes at the same time a serious interference with the right to respect for their family lives and homes and with the peaceful enjoyment of their possessions."
[137] *Loizidou v. Turkey* (App. 15318/89), Judgment of 18 December 1996; (1996) 23 EHRR 513, para. 60 of the judgement.
[138] Ibid., para. 61 of the judgment.
[139] *Iatrdis* v. *Greece* (App. 31107/96), Judgment of 25 March 1999; (2000) 30 EHRR 97.

Conclusion:

The Applicants submit that the ongoing deprivation of their possessions and inability to access their property since 1994 constitutes a violation of Article 1, Protocol I. Romania's persistent failure to remedy these losses since 1994 places it in breach of the Convention's protections. This Court has held that States have a positive obligation to protect citizens from ongoing interference with their property. Significantly, sales of land enforced by a State agent, the mayor of Bolintin Deal, were coercive and did not adequately compensate the Applicants for their losses. The State continues to breach Article 1, Protocol I by failing to ensure that the Applicants can re-access their property. Applicants further submit that the ongoing deprivation and the persistent failure to remedy losses since 1994 constitute a violation of Article 1, Protocol 1.

D. VIOLATIONS OF Article 8:

Article 8 of the Convention sets forth the following guarantees:

> Everyone has the right to respect for his private and family life, his home and his correspondence…There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The violent attack on the community of Bolintin Deal and the Applicants' continued inability to return to their homes because of threats of violence all amount to clear violations of their rights to respect for their home, private and family lives.

Romania has a positive obligation to remedy the Applicants' expulsion from their homes and their lack of a permanent home, particularly in light of the State's complicity in the destruction of the Applicants' homes through the participation of public officials in the 1991 pogrom. By failing to meet its positive obligation, the State Party has violated the Applicants' right to respect for private life and home. The State Party also has a duty to ensure that family ties are protected. By failing to secure access to Bolintin Deal and to family burial grounds, the State Party has violated the Applicants' right to respect for family life and home.

Case Law

Home

Although circumstances in which a person's property is destroyed, taken away, or its use restricted are normally addressed under Article 1, Protocol I, if the property at issue is a person's home, Article 8 is also engaged.

This Court's jurisprudence has given a broad interpretation to the term "home". The *Camenzind* case[140] defined a single room in which the Applicant lived as a home, as did the *Buckley* case[141] which assigned the designation to a number of caravans the applicant had placed on her land without planning permission. In the present case, it is clear that the houses owned by the Applicants in Bolintin Deal that were destroyed or severely damaged constituted "homes."

Where, as here, the Applicants establish that the premises in question are homes, the primary protection granted by the Convention are rights of access,[142] occupation,[143] and a right not to be expelled or evicted from such homes.[144] In a number of Turkish cases, this Court held that the burning of houses by security forces constituted grave violations of both Article 8 and Protocol I, Article 1.[145]

In *Cyprus v. Turkey*, the Court noted that:

> [T]he evictions of Greek Cypriots from houses, including their own homes, which are imputable to Turkey under the Convention, amount to an interference with rights guaranteed under Article 8 paragraph 1 of the Convention, namely the right of these persons to respect for their home, and/or their right to respect for private life.[146]

The interests engaged by the protection of the home of Article 8 (1) also include peaceful enjoyment of residence therein. There is a positive obligation upon the state to uphold this guarantee. Accordingly, in *Lopez Ostra*, the Spain's failure to protect the applicant's right to respect of his home from smells, noise, and pollution fumes caused by a nearby waste treatment site amounted to a violation of Article 8.[147] Although the Spanish authorities were not directly responsible for the emissions, they were nevertheless accountable because the local municipality had permitted and subsidised the plant's construction on its land.[148] Thus, where a State's non-intervention results in a failure to secure respect for the rights protected by the Article, this will amount to a breach of Article 8 even where the interference was not caused directly by the State.

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[140] *Case of Camenzind v. Switzerland* (App. 21353/93), Judgment of 16 December 1997.
[141] *Case of Buckley v. The United Kingdom* (App. 20348/92) Judgment of 25 September 1996.

[143] *Wiggins v. United Kingdom*, No. 7456/76, 13 DR 40 (1978).
[144] *Ibid.*
[145] *Cyprus v. Turkey* (App. Nos. 6780/74 and 6950/75, 4 EHRR 482 (1976) at 519-520; *Cyprus v.Turkey* (App. No. 8007/77, 72 D.R. 5, 41-43 (1983).
[145] *Akdivar and Others v. Turkey*, Judgment of 16 September 1996, Reports 1996-IV; *Mentes and Others v. Turkey*, Judgment of 28 November 1997, Reports 1997-VIII; *Selcuk and Asker v. Turkey*, Judgment of 24 April 1998, Reports 1998-II; *Aksoy v. Turkey*, Judgment of 18 December 1996, Reports 1996-VI; *Dulas v. Turkey*, Judgment of 20 January 2001, (App. No. 25801/94); *Bilgin v. Turkey*, Judgment of 26 November 2000, (App. No. 23819/94).
[146] Ibid., para. 209.
[147] *Lopez Ostra v. Spain*, Judgment of 9 December 1994, Series A. no 303-C.
[148] Ibid., at paras. 44-58 of the judgment.

In *Loizidou v. Turkey*, this Court found that the displacement of people from their homes and the prevention of their re-access amounted to a violation of Article 8 and Article 1, Protocol I. [149]

This reasoning was confirmed in *Cyprus v. Turkey* where the Court held that the refusal of authorities in northern Cyprus to allow displaced Greek Cypriots to return to their homes constituted a continuing violation by Turkey of Article 8.[150] *Cyprus v. Turkey* thus set an important standard for refugees' rights to their homes as established by the Court's holding that the mere prospect of a bi-zonal Cyprus could not justify the restriction of the right to return to one's home.[151] In the Court's judgment, perpetual homelessness constituted a continuing violation of the refugees' rights under Article 8. Significantly, the Court also noted that the "multitude of adverse circumstances" that the refugees faced by "being compelled to live in a hostile environment in which it is hardly possible to lead a normal private and family life... constitute[d] factors" that further aggravated the interferences with their rights under Article 8.[152]

Private Life

It is well-settled that the concept of "private life" should be broadly interpreted. In *Bensaid v. United Kingdom*, this Court noted that the term "private life" is "not susceptible to exhaustive definition", but will include elements of the personal sphere including" gender identification, name and sexual orientation and sexual life."[153] This Court has held that the concept of "private life" for the purposes of Article 8 (1) includes the physical and moral integrity of a person.[154] An important aspect of this moral integrity is a person's mental health.

Significantly for this case, the notion of private life has been interpreted as overlapping with the other rights and interests protected under Article 8(1), namely, family life, home and correspondence. In *Mentes and Others v. Turkey*, the Commission found that the deliberate destruction of the applicants' homes and possessions by State security forces encompassed the entire personal sphere protected by Article 8 – family life, private life, and home – making it unnecessary to distinguish them.[155]

Family Life

The right to respect for family life, as guaranteed by Article 8(1), is based on the important principle of protecting the integrity of the family. In cases involving custody disputes, this Court has held that States parties have a positive obligation to ensure that family ties can be protected

[149] *Loizidou v. Turkey*, Judgment of 18 December 1996, *Reports* 1996-VI at paras. 60-66 of judgment
[150] *Cyprus v. Turkey* (App. 25781/94), Judgment of 10 May 2001, para. 175 of the judgment.
[151] *Ibid*. at paras. 173-174 of the judgment.
[152] Ibid., para. 296 of the judgment.
[153] *Bensaid v. United Kingdom* (App. 44599/98), Judgment of 6 February 2001; (2001) 33 EHRR 205, para. 47 of the judgment.
[154] See, e.g., *X and Y v. Netherlands*, A-91 (1985), para. 22.
[155] *Mentes and Others v. Turkey*, *supra*.

and the private lives of the family respected. "According to the principles set out by the Court in its case law, where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed."[156]

This Court and the Commission generally consider the family to include a husband and wife, and their dependent children.[157] Relationships between brothers and sisters as well as those between parents and children are also covered.[158] In some contexts, relationships with grandparents may also be protected under Article 8(1).[159] In a friendly settlement on an application against the United Kingdom, the relationship at issue was that of uncle and nephew.[160] There, the Commission found that the local authority's denial of an uncle's access to see his nephew without any procedure for judicial recourse violated Article 8. The relationships among the Applicants include siblings, spouses, parents and children of multiple generations and therefore fit within the definition of "family" under Article 8 of the Convention.

Positive Obligations

The wording of Article 8(1) differs from the wording of Articles 2 through 7 in its reference to a right of "respect" for private and family life, home, and correspondence. The notion of respect has been applied by the Commission and this Court in a way that gives effect to the evolutionary nature of concepts of privacy and family life.[161] To this end, the case law indicates that the sources of infringement of Article 8 are not limited to State agencies, but may also include violators that are independent of the State.

In a series of cases, this Court considered the positive obligations that emanate from the term "respect" in Article 8(1).[162] The Court noted that in order to determine whether a positive obligation exists "regard must be had to the fair balance that has to be struck between the general interests of the community and the interests of the individual…"[163]

In *X and Y v. The Netherlands*, this Court further noted that:

> [A]lthough the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to

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[156] *Kroon et al. v. The Netherlands* (1995) 19 EHRR 263, para. 32 of the judgment; *Keegan v. Ireland* (A/290) (1994) 18 EHRR 342, para. 50 of the judgment.
[157] *B. v. United Kingdom*, Judgment of 8 July 1987, Series A, No. 121; (1988) 10 EHRR 87, para. 60 of the judgment.
[158] *Johnston and others v. Ireland*, Judgment of 18 December 1986, Series A, No. 112; (1987) 9 EHRR 203, para. 25 of the judgment.
[159] See *Vermiere v. Belgium*, Judgment of 29 November 1991, Series A, No. 214-C; (1993) 15 EHRR 488.
[160] *Boyle v. United Kingdom*, Judgment of 28 February 1994, Series A, No. 282-B; (1995) 19 EHRR 179.
[161] See, for the Court's consideration of illegitimacy in *Marckx v. Belgium*, Judgment of 13 June 1979, Series A, No. 31; (1979-80) 2 EHRR 330.
[162] See *The Rees Case*, 2/1985/88/135; *The Powell and Rayner Case*, 3/1989/163/219; *The Cossey Case*, 16/1989/176/232; *B. v. France*, 57/1990/248/319; *Lopez Ostra v. Spain*, 41/1993/436/515.
[163] Judgement of 27 September 1990, Cossey, A. 184, p. 15.

> refrain from such interference; in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life.[164]

It is clear then that Article 8 extends beyond non-interference to create positive obligations on States parties to ensure respect for home and family and private life even in the realm of interpersonal relations.

In the present case, it is not necessary that the Applicants prove that municipal officials were acting *intra vires* or according to authoritative instructions. Rather, as this Court has noted, State responsibility may be engaged even where state agents are acting *ultra vires* or contrary to instructions.[165]

Furthermore, this Court has stated that "these obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."[166] This Court's Article 8 jurisprudence estops Romania from arguing that it did not have any obligations toward the Applicants regarding the conduct of private citizens who participated in the attack and the continued deprivations of their right to respect for private and family life, and their homes.

The positive obligations that may arise for a State party under Article 8(1) are engaged where there is a direct and immediate link between the measures sought by an applicant and his or her private life.[167] The Applicants submit that in light of the participation of State agents in the destruction of their community's homes, the Romanian State owes a positive obligation to restore a respect for their private lives.

In determining whether a State party has a positive obligation, "regard must be had to the fair balance that has to be struck between the general interests of the community and the interests of the individual…"[168] In the present case, Romania has proffered no countervailing public interest that would serve to counter-balance the interests of the individual Applicants in their right to respect for their private and family lives, and homes.

Regardless of the analytical framework adopted in the present case – positive duty or interference – "the applicable principles regarding justification under Article 8 (2) are broadly similar."[169] In both cases, the State party will enjoy a certain margin of appreciation in ensuring compliance

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[164] *X and Y v. Netherlands*, Series A, No. 91, para. 23 of the judgment.
[165] *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 64, at para. 159 of the judgment; reaffirmed in the *Case of Moldovan and Others v. Romania* (Apps. nos. 41138/98 and 64320/01), Judgment of 12 July 2005, para. 94 of the judgment.
[166] *X and Y v. Netherlands*, Series A, No. 91, para. 23 of the judgment; reaffirmed in the *Case of Moldovan and Others v. Romania* (Apps. nos. 41138/98 and 64320/01), Judgment of 12 July 2005, para. 93 of the judgment.
[167] *Botta v. Italy*, Judgment of 24 February 1998, Report of Judgments and Decision 1998-I.
[168] *Cossey v. the United Kingdom*, Series A at 184 (App. No. 10843/84), Judgement of 27/09/1990, at para. 37
[169] *Moldovan and Others v. Romania* (Apps. nos. 41138/98 and 64320/01), Judgment of 12 July 2005, para. 97 of the judgment.

with the Convention. Throughout its assessment, the Court will analyse whether a fair balance was struck between the competing interests of the individual and the greater community.[170] Here again, the lack of any countervailing public interest mitigates any arguments Romania may make regarding the acceptable margin of appreciation in ensuring compliance.

Moreover, the duty of States parties to ensure a domestic legal order that protects the essential features of family and private life as well as home and correspondence may mean that where domestic law fails to do so, the State is in violation of Article 8(1), irrespective of the limitations in Article 8(2).[171] And where the authorities fail to put a stop to ostensibly private breaches of the Applicants' rights, the State also becomes liable for the living conditions under which the applicants are forced to endure as a result of their rights deprivation. In *Moldovan*, the Court stated that:

> [T]he Applicants' living conditions in the last ten years, in particular the severely overcrowded and unsanitary environment and its detrimental effect on the applicants' health and well-being, combined with the length of period during which the applicants have had to live in such conditions and the general attitude of the authorities, must have caused them considerable mental suffering, thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement.[172]

Application to the Case at Bar

The State Party's failure to assist this community and its complicity in their displacement violates the State's promises to take measures to ensure decent living standards for its citizens and to give special protection and assistance to children and youth.[173]

Home

Romania has violated the Applicants' right of access, right of occupation, and rights against eviction. The actions of municipal officials in inciting mob violence, which led to the destruction of the Applicants' homes and the expulsion of the Applicants from Bolintin Deal, deprived the Applicants of peaceful enjoyment of their homes. This deprivation continues to the present day because of the Applicants' inability to return to their homes. Although the Applicants have made attempts to gain access to their homes, these attempts have been met with violence and threats of

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[170] *Ibid.*
[171] See *Marckx v. Belgium*, Judgment of 13 June 1979, Series A, No. 31; (1979-80) 2 EHRR 330, para. 31 of the judgment, where in addressing differential treatment on the basis of a child's legitimacy, the Court noted that respect for family life implies "the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family… A law that fails to satisfy this requirement violates paragraph 1 of Article 8 (art. 8-1) without there being any call to examine it under paragraph 2 (art. 8-2)."
[172] *Ibid.* at para. 110.
[173] Constitution of Romania, Exhibit 11.

further violence.[174] Those Applicants whose homes were not destroyed were forced to sell at 'firesale' prices.[175]

As a result of Romania's action, the vast majority of the Applicants have lived in a perpetual state of homelessness since 1991. Their continuing homelessness constitutes an ongoing violation of Article 8. As the Court held in *Moldovan*, "having regard to the direct repercussions of the acts of State agents on the applicants' rights, the Court considers that the State Party's responsibility is engaged as regards the applicants' subsequent living conditions."[176]

Virtually all of the Applicants live without legal domicile and many have endured police raids on their makeshift homes.[177] These raids force the Roma victims to once again flee and take refuge from their homes.[178] It is not uncommon for 3-4 of the former residents of Bolintin Deal to be living in a single makeshift home, with many of them forced to sleep on the floor.[179] After 1991, the 18 members of Emilian Niculae's extended family were crowded in into three small rooms. In 1994, in these overcrowded conditions, four-year-old Tanse Fanel died of pneumonia. Sixty-five-year-old Niculae Florea also died of pneumonia in 1996.[180]

Family

As a result of the Applicants' ongoing homelessness, the Applicants' family life has been thrown into disarray. The Applicants' children live in poverty and have been deprived of their basic rights to education. Because families without legal domicile are denied basic services, including education, the Roma children (formerly) of Bolintin Deal were unable to attend school for many years.[181]

None of the former residents of Bolintin Deal who have since died "could be buried according to the Christian tradition. We did not have anything to buy coffins with."[182] In light of their continued denial of access to Bolintin Deal, the Applicants have been unable to tend to family graves and cannot bury their dead alongside family members in the tombs that they own.[183]

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[174] Affidavit of Emilian Niculae at paras. 43-47; Exhibit 1.
[175] *Ibid.* at 47; interview with Elena Piroi.
[176] *Moldovan*, *supra* at para. 104.
[177] Affidavit of Emilian Niculae at para. 51; Exhibit 1A.
[178] *Ibid*.
[179] Letter from Constantin Catalan to Undersecretary of State Ilie Dinca, dated 17 May 2005; Appendix *.
[180] Affidavit of Emilian Niculae at para 40; Exhibit 1A
[181] *Ibid*. at para. 44.
[182] Letter from Constantin Catalan to Nicolae Gheorghe, Presidential Counsellor, Madalin Voicu, Deputy, Valeriu Stoica, Justice Minister, Viorel Lis, Mayor of Bucharest, Radu Vasile, Prime Minister, Paun Nicolae, President of the Roma Party, 5 August 1998; Exhibit 7
[183] Affidavit of Emilian Niculae at para. 47; Exhibit 1A.

Conclusions

In failing to adequately investigate, prosecute, or provide legal redress for these violations since the time of its ratification of the Convention, Romania has breached Article 8. Romania has a positive obligation to remedy the Applicants' expulsion from their homes and their lack of a permanent home, particularly in light of its complicity in the destruction of the applicants' homes through the participation of public officials in the original pogroms. By failing to meet this obligation since joining the Convention, the State Party has violated the Applicants' right to respect for private life and home. To the extent that the Applicants are unable to return to their former properties, to visit their families' grave sites, and continue to endure mental and emotional suffering as a result, the Romanian State Party is in breach of its Article 8 obligations.

E. VIOLATIONS OF Article 6(1):

Article 6(1) reads as follows [relevant section]**:**

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

On admissibility, Romania contended unsuccessfully that there was no unreasonable delay in domestic judicial proceedings and that the Romanian courts were within their purview to suspend criminal sentences for mob violence on the grounds of "provocation" and reduce civil sanctions because the plaintiffs were deemed to have contributed to delays.[184]

The Applicants respectfully submit that Romania's interpretation fails to account for the purpose of Article 6, but rather condones collective violence and inappropriately blames the victims for the State Party's failure to ensure civil damages commensurate with the grave abuses suffered by the Applicants.

Furthermore, the Applicants submit that the State Party violated article 6(1) by failing to facilitate proper access to the court proceedings, as evidenced by the continued delivery of court notices to Bolintin Deal despite the fact that the Applicants were no longer living there.

The Applicants further submit that domestic legal proceedings were not impartial, as demonstrated, *inter alia*, by the use of pejorative language with respect to the Roma ethnic group.

Finally, Romania's failure to investigate and charge public officials for their role in these attacks, has deprived the Applicants of the opportunity to hold state officials accountable and to recover damages against an entity both liable at law and capable of providing meaningful monetary relief.

[184] Submissions of the Romanian Government concerning the admissibility and merits of the application

Under Romanian law, a civil action relating to the same facts as a criminal action cannot proceed until a final judgment has been rendered in the criminal proceeding. In addition, the decision of the criminal proceeding is binding on the civil court. As per Civil Code Article 1003, all civil defendants must be sued in the same proceeding and are to be held jointly liable. For the purposes of this Article, the Applicants submit that the criminal and civil proceedings regarding the violence in Bolintin Deal should be considered as one action for all Article 6(1) determinations.[185]

Case Law

The Right of Access to the Courts

As established in *Golder*, Article 6(1) is concerned not only with the manner in which legal proceedings are conducted, but also access to courts more generally. In concluding that the right of access to the courts "constitutes an element which is inherent in the right stated by Article 6 para. 1,"[186] the Court noted that "the principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally recognized fundamental principles of law…"[187] This right of access was bolstered in *Airey v. Ireland* where the Court found that the applicant's Article 6(1) rights had been violated because of the prohibitive cost involved with obtaining a judicial separation.[188] In this sense, Article 6(1) extends beyond formal barriers to access to general deprivations of an effective right of access to the court.[189]

Proceedings covered by Article 6(1)

Per the wording of Article 6(1), the right to a fair hearing in the domestic courts of a State applies both to criminal and civil proceedings. The Court has consistently emphasised that its role is to consider whether the proceedings as a whole were fair.[190]

Although Article 6 refers specifically to a fair hearing, it applies not only to the hearing itself but also to the stages which precede and follow it. In *Imbroscia v. Switzerland*, the Court held that Article 6 applies to the pre-trial stage of investigations carried out by police.[191]

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[185] See *Torri v. Italy*, 1 July 1997 where this Court regarded civil and criminal proceedings as one action for the purpose of determining Article 6(1) rights.
[186] *Case of Golder v. United Kingdom*, 4451/70, 21/02/1975, Series A, No. 18, para. 36 of the judgment.
[187] Ibid., para. 35 of the judgment.
[188] *Case of Airey v. Ireland*, 6289/73, Series A, No. 32.
[189] Ibid, see e.g. para. 24 where the Court stated: "The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."
[190] *Khan v. United Kingdom.*, No. 35394/97, 12.5.00, paras. 34 and 38.
[191] *Imbroscia v. Switzerland*, 17 E.H.R.R. 441.

Impartiality

The case law indicates that for the purposes of Article 6 para. 1, the impartiality of a tribunal, whether composed of judges or jurors, can be determined in two ways. As this Court noted in the *Persack Case*:

> "A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect."[192]

1) The Subjective Test

Under the subjective test, the question is whether it can be shown on the facts that a member of the court "acted with bias" against the applicant.[193] A real or personal bias by a judge or jury against the applicants will constitute a violation of Article 6.

2) The Objective Test

The objective approach requires the Court to ascertain whether the tribunal offered guarantees sufficient to exclude any legitimate doubt of impartiality.[194] Under this test, the Court must determine whether an applicant's fear of bias can be objectively justified based either on structure or appearance.[195] The objective test requires a determination of whether, "apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality."[196] The standard for this test requires that where there is a "legitimate reason to fear a lack of impartiality" regarding a judge, he or she must withdraw.[197]

The use of pejorative and racist language by decision-makers during a trial has been found by this Court to amount to a violation of Article 6(1). In the *Sander* case, a jury member passed a note to the judge of the Crown Court alleging that two other juries had been making openly racist jokes and remarks about the defendant who was Asian and fearing that he would be convicted based on such prejudice.[198] Rather than dismissing the jury, the Crown Court judge gave them one night to consider whether they could decide the case without prejudice. He received a letter from all the jurors as a group along with an individual letter, refuting the allegation of racism and claiming that the trial could continue without bias. In finding a violation of Article 6(1), this Court reasoned that, viewed objectively, the judge's redirection to the jury was inadequate

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[192] *Case of Piersack v. Belgium*, 8692/79, Series A, No. 53, at para. 30 of the judgment.
[193] *Hauschildt v. Denmark* (1989), 12 E.H.R.R. 266.
[194] *Pullar v. U.K.*, No. 22399/93, 11.1.95 at para. 36; *Piersack v. Belgium*, No. 8692/79, 21.9.82 at para. 39.
[195] *Salaman v. United Kingdom*, (App. 43505/98), admissibility decision of 15 June 2000.
[196] *Case of Hauschildt v. Denmark* (Appl. 10486/83) Judgment of 24 May 1989 at para. 48.
[197] *Ibid.*
[198] *Sander v. U.K.* (App. 44129/96), Judgment of 9 May 2000; (2001) 31 EHRR 1003

because it was unlikely anyone would admit to racism, nor that such racism could be changed overnight.[199]

Sander highlighted the importance of eliminating racist and prejudicial thinking from judicial decision-making. Significantly, this Court has noted "this to be a very serious matter given that, in today's multicultural European societies, the eradication of racism has become a common priority goal for all Contracting States."[200]

Judgment in a Reasonable Time

Article 6(1) provides for a "fair and public hearing within a reasonable time." This provision is essential for the administration of "justice without delays which might jeopardize its effectiveness and credibility."[201] This Court has repeatedly stated that backlogs in judicial proceedings will not excuse unreasonable delays.[202]

As noted in the *Zimmerman and Steiner* case, "the reasonableness of the length of proceedings coming within the scope of Article 6 § 1 (art. 6-1) must be assessed in each case according to the particular circumstances."[203] The determination of a "reasonable time" according to the circumstances of each case will centre on, *inter alia*, the complexity of the issues raised by the case, the conduct of the applicants and competent authorities, and what was at stake for the applicants. Within this analysis, "only delays attributable to the State may justify a finding of a failure to comply with the 'reasonable time' requirement."[204]

Reasons

Article 6 also requires that the national court give reasons for its judgment. A court is not obliged to give a detailed answer to every argument put forward by a litigant. However, if a submission was fundamental to the outcome of the case (if accepted by the court), then the court must specifically deal with it in its judgment.[205]

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[199] Ibid., at paras. 29-30.
[200] Ibid., para. 23.
[201] *Bottazzi v. Italy* (App. 34884/97), Judgment of 28 July 1999, para. 22 of the judgment.
[202] See e.g. *Hentrich v. France*, judgment of 22 September 1994, Series A, No. 296-A; (1994) 18 EHRR 440, para. 61 of the judgment.
[203] *Zimmermand and Steiner* v. *Switzerland*, 13 July 1983 (No. 66), 6 EHRR 17, para. 24.
[204] Ibid.
[205] *Hiro Balani v. Spain*, 19 E.H.R.R. 565; *Helle v. Finland* (1997), 26 E.H.R.R. 159.

Application to the Case at Bar

Right of Access to the Courts

The case law establishes that Article 6(1) is concerned not only with the manner in which legal proceedings are conducted, but also access to the courts. In the present case, the continuous mailing of notice to the Applicants' former residences in Bolintin Deal despite the fact that the proceedings concerned the destruction of those very same residences openly flouted the Applicants' right to access to the courts and to follow their own proceedings.[206]

Impartiality

The Applicants submit that in the present case that under both the subjective and objective tests the criminal and civil proceedings were biased in light of the use of pejorative language.

1) The Subjective Test

In the present case, the District Court's repeated use of the pejorative term "gypsy" ("*tigani*" in Romanian) by itself is sufficient to establish that the judge subjectively held racially discriminatory views against the Roma community, which precluded him from rendering an impartial decision. In outlining the facts of the case, the District Court stated:

> As a consequence of a Gypsy murdering… a [non-Roma] inhabitant… more than two thousand persons…gathered together. Spontaneously, they … agreed to chase the Gypsies out of the village and to destroy and burn their possessions…
>
> On 7 May 1991, still troubled by the event, following the return of the chased Gypsies… the indicted persons set on fire four other houses belonging to the Gypsies.[207]

Moreover, in justifying its reliance on the mitigating circumstances in determining the sentences, the Court stated that it:

> acknowledges… the applicability of Article 73 (b), the crimes having been committed due to the disturbance created by the fact that one of the victims had murdered another person, [and consequently] the accused persons tried spontaneously to find a solution of the deed committed by that Gypsy.[208]

This same language was used by the Bucharest County Court in considering the Applicants' appeals in its decision of 4 January 1999, and by the Bucharest Court of Appeal, in its final decision of 27

[206] Affidavit of Emilian Niculae at para. 22; Exhibit 1A
[207] as stated in *Tanase and Others v. Romania*, Judgment 19 May, 2005 (App. 62954/00), p. 64.
[208] *Ibid.*

May 1999.[209] The use of derogatory language by judicial decision-makers is sufficient evidence for a finding of unacceptable bias.

Furthermore the concept that a community can or should be held accountable for misdeeds by one of its members, or that misdeeds by an individual are capable of justifying retaliatory action against the community at large, are themselves hallmarks of racist thinking and bias.

2) The Objective Test

In light of this Court's previous holding that the use of racist language by decision-makers can amount to a violation of Article 6(1), the repeated use of the racial epithet "tigani" constitutes an objectively justifiable fear of bias.

It should also be noted also that as a State party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[210] Romania has a duty under Article 6 to:

> assure to everyone within their jurisdiction effective protection and remedies through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered a result of such discrimination.[211]

In addition, per its Article 5 obligations:

> States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone to equal treatment before the tribunals and all other organs administering justice.[212]

Because of the clear institutional bias against the Applicants, Romania has failed to provide effective protection or remedies for the initial attacks, it has violated its obligations under ICERD and, since 1994, the State Party has repeatedly flouted its Article 6 obligations under this Convention.

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[209] *Ibid.*
[210] Date of ratification: 15/10/1970.
[211] International Convention on the Elimination of All Forms of Discrimination International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969.
[212] Ibid., Art. 5(a).

Judgment in a Reasonable Time

The Applicants respectfully submit that the relevant period for consideration of delay begins in April 1991, when the Applicants first registered their criminal complaint with the Bolintin Deal prosecutor, and ends in May 1998 when the Bucharest Court of Appeal rendered its final judgment. As this Court has noted, criminal proceedings will be taken into account in calculating the relevant period where the result of such proceedings is capable of affecting the outcome of the civil dispute before the ordinary courts, as is the case in Romania.[213] Viewed in its entirety, the Applicants' seven-year wait for inadequate judicial proceedings violated their right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal" as guaranteed by Article 6(1).

A. Complexity of the Case

Applicants disagree with suggestions made by Romania at the admissibility stage that the case was unduly complex. The State Party in this case had the benefit of the fact that the Applicants willingly made themselves available to provide statements by initiating a complaint only a few weeks after the 1991 incidents.[214] The number of litigants alone is insufficient to sustain the assertion that a case is overly complex. Moreover, the Applicants' forced migration to various locations is not indicative of a case's legal complexity. The State Party concedes that by June of 1994, it had collected over 260 statements. It does not explain why it needed an additional two years to lay charges. In its totality, more than five years elapsed between the pogroms and charges being filed against 13 individuals on 17 October 1996. Applicants submit that the delay was excessive.

Beyond the initial delay, the criminal charges laid against the 13 defendants were not legally complex, novel or controversial. In fact, such charges have sadly been all-too-common in Romania. The defendants were charged with unlawful entry, destruction of property, and assembly for the purpose of committing a crime. Beyond the number of parties, the State Party failed to articulate how the facts rendered these crimes particularly challenging for the courts. For example, the valuation of real estate is not a complex task. Courts are regularly required to assess and evaluate such facts. In this case, 20 residential pieces of land within close proximity to one another required valuation. Over the course of 3 years, such a task is not unduly burdensome or complex. This Court has found that a "not particularly complex" set of proceedings was excessive after six and a half years of consideration.[215] In this case, the proceedings extended over a period of seven years.

When a case requires expedient action the Court has held that complexity alone does not relieve a State of its Article 6(1) obligations. In *Obermeir* v. *Austria,* this Court held that despite the case's complexity, nine years was excessively long to reach a final judgment.[216] In the instant case, the

[213] *Rezette v. Luxembourg*, 13 July 2004, App. no. 73983/01, para. 32.
[214] Affidavit of Emilian Niculae at para. 16; Exhibit 1.
[215] *Neves e Silva* v. *Portugal,* 27 April 1989, Series A, (No. 153), 13 EHRR 536.
[216] 28 June 1990 (No. 179), 13 EHRR 290, para.72

Applicants faced and continue to face extremely dire conditions. They required, but never received, immediate compensation for the loss of their property and homes to begin rebuilding their lives and to ensure proper health and education for themselves and their family members.

Finally, the charges could only be described as 'controversial,' and thus requiring more time and sensitivity by the Romanian courts, in the context of the racism directed against Roma communities in Romania. This climate made it politically unpopular to prosecute non-Roma citizens for acts of violence against Roma communities. Applicants note that a controversy derived from State Party-sponsored racism does not relieve a State Party of its duty to charge and prosecute individuals believed to be responsible for the burning of twenty-two families' homes and the expulsion of an entire community. Rather, every State party to the Convention has a legal obligation to prosecute responsible persons.

B. Authorities' Conduct

The Applicants recognize that the Court will find a violation of Article 6(1) only when the delay primarily results from conduct by the State Party authorities.[217] But while long periods of inaction indicate a contracting State's failure to comply with this provision, superficial acts alone fail to relieve a State of its responsibility to ensure that its citizens have access to expedient justice within the judicial system. To the contrary, this Court has found that an over-abundance of judicial activity may also result in excessive delay.[218] Moreover, this Court has clearly articulated that States parties have a "duty to organize their legal system in such a way that their courts can meet each of its requirements."[219]

There is no dispute that in the period between 1991 and 1994, the State Party acquired significant quantities of information regarding the events that took place in Bolintin Deal in 1991. The failure to take expedient action is *prima facie* evidence that the State Party stalled the proceedings to avoid a timely prosecution of the defendants. The Romanian judiciary would have been well aware of statutory limitations for criminal acts under Article 122 of the Romanian Criminal Code. The State Party's failure to ensure timely investigation and prosecution allowed the statute of limitation periods to expire resulting in the suspended sentence of 13 individuals, who would otherwise have been subject to criminal penalty. Because civil proceedings are linked to criminal proceedings regarding the same subject matter, the State Party's inaction prejudiced judgment in the applicants' civil suit against those criminal defendants who Romanian officials elected to charge.

[217] *H.* v. *United Kingdom,* 8 July 1987 (No. 120B), 10 EHRR 958, *H.* v. *France,* 24 October 1989 (No. 162), 12 EHRR 74, para.55.
[218] See decision of 29 March 1990, Series A, (No. 150), 12 EHRR 247.
[219] *Bunkate v. the Netherlands* (judgment of 26 May 1993, Series A no. 248-B), para. 23 of the judgment.

C. Applicants' Conduct

Only unreasonable delay caused by the State is subject to scrutiny under the Convention, not actions by the applicants.[220] Here, the unreasonable delay was a direct result of State Party inaction. As set out by this Court in *Union Alimentaria Sanders, S.A. v. Spain*,[221] in assessing whether an applicant was responsible for a delay:

> [T]he Court considers that the person concerned is required only to show diligence in carrying out the procedural steps relating to him, to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings.[222]

Notwithstanding the State Party's insinuations, there is no evidence in the record of intentional delay on the part of the Applicants. To the contrary, the State Party's own account of domestic proceedings demonstrates the unfortunate burden placed on Applicants who were forced to move periodically throughout the course of the litigation. In the aftermath of the violence, the Applicants made detailed statements regarding the events of 7 April 1991 and 7 May 1991. Despite the fact that the community was expelled from Bolintin Deal and was dispersed throughout the country, the Applicants made diligent attempts to participate in proceedings. The Applicants faced the additional challenge that most official notices were sent to the mayor of Bolintin Deal, rather than to Applicants, because their official legal domicile was Bolintin Deal. The hard reality is that Applicants' homes had been destroyed and they were no longer resident in the village.[223]

The State Party cites the homelessness and transitory nature of Applicants' domicile as supposed proof that legal delays were the fault of the victims. In so doing, the State Party exposes its own failure to provide adequate notice of legal proceedings and reveals the perverse reality that notices were sent to an alleged perpetrator (the mayor of Bolintin Deal) who bears at least partial responsibility for the fact that the Roma of Bolintin Deal were not present to receive notice of their case. As this Court noted in its recent *Moldovan* decision, which addressed similar delay complaints due to the Romanian State Party's inadequacy, "while the Court is aware of the difficulty of organizing proceedings with more than thirty defendants and civil parties… the delays were rather due to the various errors committed by the domestic courts."[224] The Applicants respectfully submit that the similar delay in the present case was a result of State Party failures, rather than any actions or inaction on the part of the Applicants.

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[220] *Zimmerman and Steiner* v. *Switzerland*, supra.
[221] 7 July 1989 (No. 157), 12 EHRR 24
[222] *Union,* at para. 35, citing, *Martina Moreira* v. *Portugal,* 26 October 1988 (No. 143), 13 E.H.R.R. 517, para. 46; *Guincho* v. *Portugal,*28 June 1984 (No. 81), 7 E.H.R.R. 223, para. 34
[223] Affidavit of Emilian Niculae at para. 20; Notice sent to Emilian Niculae at incorrect address; Exhibit 1A
[224] *Moldovan and Others v. Romania*, Judgment No. 2 of 12 July 2005, Nos. 41138/98 and 64320/01, at para. 129 of the judgment.

D. The Stakes for the Applicants

The final factor in assessing reasonable delay is what is at stake for the applicants.[225] In cases of extreme importance to the litigants, which have a "particular quality of irreversibility," the Court has held that State Parties "are under a duty to exercise exceptional diligence since...there is always the danger than any procedural delay will result in the de facto determination of the issue submitted to the court before it has held its hearing."[226] For example, the Court found that Denmark owed its citizen a duty of diligence in a claim for compensation for contracting HIV as a result of State negligence. seeking compensation because he had contracted HIV as a result of negligent State action.[227] Similar duties attach when familial relations are at stake.[228] When faced with such dire circumstances, the Court has found that a backlog does not excuse a violation of 6(1).[229]

The Applicants were the victims of a violent attack involving as many as two thousand villagers. Their homes and personal property were destroyed and they were forced to flee from their communities to live in the wilderness or in the crowded homes of relatives. The Roma community of Bolintin Deal suffered as a whole, facing poverty, discrimination, lack of education, and health problems. The desperate situation of the applicants demanded that they receive a timely remedy.

Balancing all of the factors, the Applicants urge the Court to conclude that the State Party violated their Article 6 (1) right to timely proceedings.

Other Art. 6(1) Procedural Rights

Applicants further submit that the State Party has violated Article 6(1) by denying their request for reassessment of the damage to their property and a new valuation.

In *Golder v. United Kingdom,*[230] the Court held that Article 6(1) includes the right to invoke procedures whenever one faces the loss of his or her civil rights. This right is subject to two conditions. First, the right must be at least arguably acknowledged under domestic law.[231] Second, the procedure sought must be legally determinative of this right.[232] Here, the Applicants satisfy both conditions.

The domestic legal rights at stake for the Applicants included the right to a fair hearing before an impartial decision-maker, and the granting of appropriate damages if the Court finds that the

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[225] *Portington v. Greece,* (App. 28523/95), 23 September 1998; *H v. United Kingdom* (8 July 1987), and *Pogorzelec v. Poland* (17 July 2001).
[226] *H* v. *United Kingdom,* Judgment of 8 July 1987, Series A, No. 120; (1988) 10 EHRR 95, para. 85.
[227] *A and others* v. *Denmark* (App. 20826/92), Judgement of 8 February 1996; (1996) 22 EHRR 458
[228] *H* v. *United Kingdom,* Judgment of 8 July 1987, Series A, No. 120; (1988) 10 EHRR 95; *Bock* v. *Germany,* 29 March 1989 (No.150), 12 EHRR 247; *Paulsen-Medalen* v. *Sweden,* 19 February 1998, Reports, 1998-I 131, 23 EHRR 260.
[229] *Hentrich* v. *France,* Judgment of 22 September 1994, Series A, No. 296-A; (1994) 18 EHRR 440, para. 61.
[230] 7 May 1974 (No. 18), 1 EHRR 524
[231] *Masson & Van Zon* v. *The Netherlands,* 28 September 1995 (No. 327A), 22 EHRR 491, para. 44.
[232] *Fayed* v. *United Kingdom,*21 September 1994 (No 294B), 18 EHRR 393.

Applicants suffered a wrong. The valuation of the Applicants' property was critical because it was legally determinative of their right to compensation for the violence committed against the community. The Applicants note that the Court approaches evidentiary questions by assessing the fairness of the proceedings as a whole, including evidentiary issues.[233] Thus the Court's observation that it "agrees with the Commission that as regards litigation involving opposing private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case- including his evidence- under conditions that do not place him at a substantial disadvantage *vis-a-vis* his opponent."[234]

The Applicants assert that viewing the proceedings as a whole, the Court's failure to allow a reassessment of the damage to their property and a new valuation of their real property violated their right to justice. In its unsuccessful submission or admissibility, the State Party contends that the Applicants failed to apply to have their property re-evaluated at the appropriate time in the proceedings. In response, the Applicants maintain that the Romanian court, knowing the desperate conditions facing the applicants, sent notices to destinations where they would certainly not reach the Applicants, and it knew fully well that Applicants had limited access to legal counsel. Under these circumstances, the interests of justice dictate that the domestic Court should have applied evidentiary rules leniently, or at the very least notified the applicants of the appropriate methods to comply with court procedures, so as to ensure that the applicants had a reasonable opportunity to submit all of their relevant evidence. By relying on a host of technicalities to bar the admissibility of their evidence, such as disqualifying the Applicants' expert witness ruling that the Applicants used an improper inflation rate, and refusing to toll the limitations period, the Court for whose failings the State Party is answerable effectively denied Applicants their right to a fair trial and to receive adequate compensation for their injury.

Reasons

In the present case, the Romanian Court's acceptance of a provocation argument in both the criminal proceedings and for mitigating damages in the civil suit at the very least violates the Applicants' implied right to have a reasoned decision.[235] The Court's failure to render a fair decision also damaged Applicants' rights to a civil remedy,[236] and provides objective evidence of the judge's bias and partiality in the Applicants' civil proceedings.

On 18 May 1998, the Bucharest District Court convicted the thirteen indicted individuals of unlawful entry to a persons home and destruction of property, under Articles 192 § 2 and 217 § 4 of

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[233] *Van Mechelen and Others* v. *Netherlands,* 23 April 1997, 25 EHRR 647.
[234] *Dombo Beheer BV* v. *Netherlands,* 27 October 1993, Series A, No. 274-A; (1994) 18 EHHR 213, para. 33.
[235] *Van de Hurk* v. *Netherlands,* Judgment of 19 April 1994, Series A, No. 288; (1994) 18 EHRR 481 para. 61. See also, *Ruiz-Torija* v. *Spain,* Judgment 9 December 1994, Series A, No. 303-A; (1994) 19 EHRR 553; and *Hiro Balani* v. *Spain,* Judgment 9 December 1994, Series A, No. 303-B; (1994) 19 EHRR 566.
[236] *Ait-Mouhous* v. *France,* 28 October 1998, Reports, 1998-III 3214 (recognizing that an individual may have an interest in a third party's criminal case because of the potential for compensation)

the Criminal Code. It granted them a six months suspended sentence. [237] Not only were suspended sentences completely at odds with the degree of violence perpetrated, the District Court's mitigation of the sentences under Article 73(b) of the Criminal Code in light of what it considered to be serious provocative acts by the victims illustrates the utter lack of fairness in the hearings. Significantly, in a final decision of 27 May 1999, the Bucharest Court of Appeal dismissed the Applicants' appeal, holding that the assessment by the courts of first instance of the damage and attribution of mitigating circumstances to the perpetrators were well founded on the evidence adduced in the case.[238]

This acceptance of a provocation rationale by the Romanian Courts is as shocking as it is offensive. There is no dispute that the Court in this case i) found, despite acknowledging the role of sirens and bells, that the destruction of Roma homes was a 'spontaneous' event, ii) reduced the sentence of defendants because the crimes had been "provoked" such that not a single defendant served jail time for the attack, and, iii) "decreased by half the value of damages, since the perpetrators had the excuse of provocation, namely a common culpability of the victims and those who had caused the damage."[239]

Provocation requires an assessment of facts capable of exonerating the actions of an individual defendant or mitigating the penalty applicable to the commission of criminal acts. It may, for example, reduce a murder charge to manslaughter for a crime committed in the heat of passion. In the domestic criminal proceedings, to which the Applicants' civil claim was attached, the judge accepted the defence of provocation, which on its face belies legal reasoning. Article 73 of the Romanian Criminal Code clearly states, "The following constitute mitigating circumstances: … the commission of an offence in a state of agitation or emotion *caused by the victim,* by violence, a serious violation of human dignity or by another serious unlawful act." (Emphasis added). The Criminal Code specifically indicates that the *victim* must be the *source* of the agitation or emotion.

Here, the Court applied the provocation rationale to an act of mob violence, invoking Art. 73 to partially excuse the acts of the defendants because of the murder of Melinite on April 6, 1991.[240] Melinite's killer, Ion Tudor, had already been arrested for the crime.[241]

The non-Roma population of Bolintin Deal then proceeded to exact collective punishment on the Roma population. The entire Roma community was subject to retaliatory violence for the crime of an individual already in custody. Indeed, part of that violent reprisal was meted out a month later when the Roma of Bolintin Deal attempted to return to the village. According to the Romanian court's logic, not only can the act of an individual create sufficient "provocation" to justify mob violence against entire community, but that "provocation" can still persist 30 days later (a state of

[237] *Tanase and Others v. Romania*, Judgment 19 May 2005 (App. 62954/00).
[238] *Ibid.*
[239] Submission of the Romanian Government concerning the admissibility and merits of the application; Exhibit 7.
[240] See *Tanase and Others v. Romania*, Judgment 19 May, 2005 (App. 62954/00).
[241] *Ibid.*

affairs that would seem to accept endless retaliation) or be triggered by the very act of returning to one's home.
In other circumstances, collective reprisals of this nature constitute a war crime and are flatly prohibited by Common Article 3 of the Geneva Conventions and Additional Protocol II of the Geneva Conventions.[242]

The Applicants invoke the war crimes prohibition against collective reprisals to illustrate the universality of the offense and to demonstrate its status as customary law. By accepting "provocation" as a mitigating factor for 13 individuals who were not involved in the original incident and relying on that finding to halve the damages, the Court flouted international legal norms and committed an egregious legal error. Amazingly, Romania now asks this Court to find that its domestic processes satisfied the fair trial standards of Article 6.

Conclusion:

The Applicants respectfully submit that the delay in criminal and joint civil proceedings in this case as well as the apparent bias in the actual proceedings constitutes a violation of their Article 6 entitlement to a "fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Specifically, the delivery of judicial notices and warrants to the Applicants' former residences in Bolintin Deal despite the State's knowledge that the Applicants had been forcibly exiled from these homes undermined their right to effectively access the courts.

The State's delay in deciding this matter domestically for a period of seven years is unreasonable in light of the manageable complexity of the matter, the authorities' conduct, the Applicants' conduct, and the stakes for the Applicants. When the judicial proceedings did actually get underway, it is clear from the judges' personal conduct and use of discriminatory language that the Applicants were denied an impartial hearing on both a subjective and objective basis. Finally, the courts' application of a provocation rationale in this matter deprived the Applicants of an effective remedy and provides evidence of the unreasonableness of these decisions and the bias of the judiciary at the district and appellate levels.

F. VIOLATIONS OF Article 13:

Article 13 provides:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

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[242] *See* Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. Article 4 of the statute for the International Criminal Tribunal for Rwanda states that the tribunal has the power to prosecute violations that include "4(b), collective punishment."

The applicants respectfully submit that, following the 1991 pogrom and after Romania's ratification of the European Convention on Human Rights, the State has failed to provide them with an adequate remedy for inhuman treatment, the deprivation of property, and the violation of the right to family life. The lack of an effective remedy is attributed to unfair domestic legal procedure in the criminal and civil cases, including a failure to investigate responsible state officials, to provide an impartial trial, and to ensure that adequate compensation was provided for the losses suffered by the claimants. As a result of the incomplete and delayed criminal proceedings, the Applicants were barred from making further submissions regarding the lack of investigation of state officials. They have also been prevented from instituting recovery proceedings against these officials.

Article 13 requires an effective remedy for the determination of the claim, as well as the means for redress:

> Article 13 requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress. Thus Article 13 must be interpreted as guaranteeing an "effective remedy before a national authority" to everyone who claims that his rights and freedoms under the Convention have been violated. [243]

To find a violation of Article 13, it is not necessary for the Court to find a violation of a substantive Convention right. Article 13 has been interpreted as guaranteeing the availability of a domestic remedy procedure for any *alleged* violation of a Convention right.[244] For example, even if the Court find no breach of the right guaranteed by Article 8, the Court can still find that the national law failed to provide a means for an effective remedy within the meaning of Article 13.[245] The purpose of article 13 has thus been seen by this Court as the requirement to provide a possibility for redress under domestic law that is as robust as possible. This Court has explicitly stated that restrictions in the interpretation of the entitlements created under article 13 must be kept to a minimum, precisely so as to ensure that domestic legal systems are as responsive as possible to allegations of human rights violations in the domestic context.[246] This may include the provision of secondary procedures to examine primary procedures where the latter are flawed.[247] This comprehensive approach seems to be an inherent part of what is considered to be "effective" under this article.

This Court has also made a number of important specifications as to what an effective remedy requires. An effective remedy will depend on the context and on the nature of the alleged violation. It also includes the requirement that both the applicants and their relatives have

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[243] *Klass v. Germany* (1978), 2 E.H.R.R. 214 at para. 64.
[244] *Ibid*.
[245] *Ibid*. at para. 65.
[246] *Kudla v. Poland* (2002), 35 E.H.R.R. 11 at para 152.[*Kudla*]
[247] For example, there must be a domestic remedy for the unreasonably delay of ordinary courts. (*Kudla)*

appropriate access to the proceedings, In cases of grave violations such as torture or ill-treatment,[248] the remedy cannot be undermined by the acts and omissions of state authorities.[249] Furthermore, the remedy must be available in codes of procedure, but must also be "'effective' in practice as well as law."[250]

This Court has also specified that, due to their severity, alleged violations of Articles 3 and 8 require an effective investigation that is capable of bringing justice to the accused. In the context of an alleged violation of Article 3, as noted above, an effective remedy will require, in addition to compensation provided to the victims, a "thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure".[251] In this context, this Court has specified that Article 13 implicitly encompasses the requirement of a "prompt and impartial" investigation, as specified in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[252] In the context of an alleged violation of Article 8 as a result of the destruction of homes and personal property by state agents, the Court has noted that: "The provision imposes, without prejudice to any other remedy available under the domestic system, an obligation on the respondent State to carry out a thorough and effective investigation of allegations brought to its attention of deliberate destruction by its agents of the homes and possessions of individuals."[253]

The State will have breached its Article 13 obligations where it fails to provide an adequate remedy for undue delays in domestic criminal proceedings.[254]

Application to the Case at Bar

The Applicants respectfully submit that Romania has failed to discharge its obligations to provide an effective remedy to their claims for continuing violations of the Convention. The Romanian State first failed to conduct an effective criminal investigation, and the proceedings in the criminal case were undermined by delay and bias. Not only is this a violation of Article 13, but these flawed proceedings also undermined the chance of the claimants to obtain full compensation in the civil part of their claim. Due to the nature of Romanian domestic law, in which the possibility of obtaining civil compensation depends upon the outcome of criminal proceedings, the Applicants were effectively prevented from obtaining compensation for the ongoing deprivation of property from state agents, despite evidence that they actively encouraged

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[248] *Assenov v. Bulgaria* (1999), 28 E.H.R.R. 652 at para. 117. *Aydin v. Turkey* (1998) 25 E.H.R.R. 251 at para 103. [*Aydin*]
[249] *Aksoy v. Turkey* (1997), 23 E.H.R.R. 553 at para 95, *Aydin*, at para. 103, *Mentes v. Turkey* (1998), 26 E.H.R.R. 595 at para. 89 [*Mentes*]
[250] Keenan v. United Kingdom (2001), 33 E.H.R.R. 38 at para. 122.
[251] *Aydin,* at para 103.
[252] *Ibid.*
[253] *Mentes,* at para. 89.
[254] See *Kudla*, *supra.*

and participated in the 1991 pogrom. Furthermore, the flawed nature of the proceedings in the civil case undermined the scope of redress available to the claimants under domestic law.

On the criminal aspects of the case, domestic courts delayed the case unreasonably, as a result of which the Applicants were barred from pursuing an appeal for a further criminal investigation of state officials under domestic law. Once the statutory limitation was applied by the Court, the Applicants had no further possibility of obtaining redress. With respect to the civil aspects of the case, the domestic courts failed to ensure that the Applicants had appropriate access to proceedings, failed to notify them of proceedings at an appropriate address, and failed to provide assistance with an expert evaluation to an obviously vulnerable group with few resources. Finding that the onus was on the Applicants to bring forth a report, both the Bucharest County Court and the Court of Appeal unreasonably refused to take any further measures that might have allowed it to reach a proper assessment of damages. Consequently, compensation awards were significantly reduced.

The process the Applicants endured under Romanian compromised their right to a remedy for ongoing violations as a direct result of the State's own procedural failures with respect to the initial investigation of the 1991 pogrom, and subsequent proceedings. (See argument on article 6) In view of this fact, and in view of the seriousness of the alleged violations, the Applicants urge the Court to recognize that the legal recourse provided by Romania was neither sufficiently comprehensive, nor effective in practice.

G. VIOLATIONS of Article 14:

Article 14 states:

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

The Applicants suffered as they did because precisely because they are Roma. The Applicants' Roma ethnicity was the sole reason why they were attacked on 7 April 1991. Their ethnicity is why the police refused to undertake proper investigations; their ethnicity is why they could not get a fair trial at any level of court in any jurisdiction in Romania; and their ethnicity is why they continue to suffer 14 years after they were driven out of their homes.

Case Law

Article 14 expressly prohibits discrimination on any ground. The grounds in the Convention include "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth", as well as other analogous grounds of discrimination. The purpose of the Court' inquiry under Article 14 is "to establish whether or not

racism [or another prohibited ground under Article 14] was a causal factor" for the deficient investigations and biased court proceedings.[255] A person is considered to have suffered discrimination if:

> 1) he or she has been treated differently from people in a similar situation (on a prohibited ground); and
>
> 2) there is no reasonable and objective justification for the difference in treatment.[256]

If an applicant establishes that there has been differential treatment, then the state must prove that the difference in treatment had a "reasonable and objective justification." The test that the Court applies is twofold: that the difference in treatment pursued a legitimate aim, and that the measure was proportionate to that aim. Although the state is allowed a slim margin of appreciation in assessing the proportionality of a measure, the Court has found that discrimination on particular grounds, such as race and nationality will have to be justified by "very weighty reasons."[257]

In the *East African Asians case*, the Court held that:

> [A] special importance should be attached to discrimination based on race; that publicly to single out a group of persons for different treatment on the basis of race might in certain circumstances constitute a special form of affront to human dignity; and that differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question.[258]

More recently, the Court reiterated its repugnance towards race-based discrimination, and particular racist violence:

> Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment.[259]

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[255] *Nachova and others v. Bulgaria*, Judgment of 26 February 2004, No. 43577/98 at para. 145.
[256] Belgian Linguistic Case, 1 E.H.R.R. 252
[257] *Gaygusuz v. Austria* (1997), 23 E.H.R.R. 364 at para. 42; *East African Asians v. U.K.* (1981) 3 E.H.R.R. 76 at para. 207.
[258] *East African Asians case* (1981) 3 E.H.R.R. 76 at para. 54.
[259] *Nachova and others v. Bulgaria*, Judgment of 26 February 2004, No. 43577/98 at para. 145.

Application to the Case at Bar

The Applicants have claims under Article 3, 6(1), 8, and 13 of the Convention, and under Article 1, Protocol I because they are Roma. The initial attacks, the inadequate investigations, the biased court proceedings, and the Applicants' ongoing suffering are the result of anti-Roma xenophobia and institutionalized discrimination. As one of the Applicants aptly noted, "We do not have the basic necessities of a decent life, we are sleeping on the floor and wooden beds, and we have been forced to suffer for 15 years only because of the fact that we are Roma."[260]

Racially-motivated Attacks

The Applicants' claims under the above-mentioned Articles, read in conjunction with Article 14, provide *prima facie* evidence of discrimination. No non-Roma residents were forced from their homes in Bolintin Deal and no non-Roma residents were barred from returning to the village. The cause of the attack reflects the gravitas of racially-motivated mob violence: the Roma inhabitants of Bolintin Deal were attacked and expelled because of the alleged wrongdoing of a man whose only connection to the Applicants was that they shared the same ethnicity.[261] The attacks were undertaken with the sole purpose of inflicting fear and harm on the Roma residents of Bolintin Deal: the attackers could be heard yelling "Roma should be driven out!" and "let's set them on fire."[262] The attackers, moreover, were methodical in limiting their devastation to Roma villagers and Roma property. The town electrician, Cornel Petre, clipped the roof cables so that an electrical fire would not spread the homes of non-Roma villagers.[263]

Ineffective Investigations

The ineffective investigations following the 1991 attacks were also discriminatory in nature. Even if state authorities are found not to have contributed to the initial attacks, their failure to undertake meaningful investigations or condemn the attackers constitutes an Article 14 violation. In another decision involving mob violence against Roma people the Court in *Nachova and others v. Bulgaria* held that:

> State authorities have the…duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are

[260] Letter from Constantin Catalan to Undersecretary of State Ilie Dinca, dated 17 May 2005; Exhibit 8.
[261] *Ibid*; Exhibit 8.
[262] See Schedule 7 of Romania's Admissibility Decision – Indictment dated 17 October 1996.
[263] See Witness Statements, Schedule 7 of the Romanian Submission on Admissibility. See also, Istvan Heller (1998) *Lynching is not a crime: mob violence against Roma in post-Ceauşescu Romania* (Budapest: European Roma Rights Centre).

> particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention.[264]

Far from holding the guilty parties accountable and compensating the victims, the state authorities systematically hindered the Applicants' attempts to seek redress. When some of the Applicants attempted to re-occupy their home a month after the pogrom, they were yet again chased out of the village and the home was set ablaze. Police refused to intervene on behalf of the Roma, and instead piled them into a windowless van and drove them to a road near Bucharest.[265] The officers' failure to intervene on behalf of the Applicants or their property can only be explained by the fact that anti-Roma mob violence is tolerated by state authorities.

The Applicants' homelessness and ongoing suffering has is a product of worse as a result of continued state discrimination. Virtually all of the Applicants live without legal domicile and many have suffered police raids on their makeshift home and without any reason given other than "to fight crime."[266]

Anti-Roma Judicial Bias

The judicial proceedings were similarly replete with racial invective and the implicit understanding that violence inflicted against Roma was justifiable. The judges' repeated use of racist language, as well as their reliance on harmful anti-Roma stereotypes tainted the domestic proceedings, and denied the Applicants a fair process in Romania's courts.

As noted in our discussion under Article 6, the Court employs both a subjective and objective test to determine whether a judge is impartial and independent. The Romanian judges in this case fail on both tests. The lower court judge's repeated use of the derogatory term "tzigane" (or "tigani") shows that the judge was personally biased against the Applicants. This bias was further exhibited in the interpretation of the defiance of provocation used in the criminal and civil proceedings.

This Court should reject the State Party's assertion that the term "tigani" is acceptable in Romanian society in some contexts. The Court must assess bias from the standpoint of the Applicants. The State Party concedes that the words "tigani" and "tzigane" have racial and derogatory connotations. In addition, the State Party is well aware, and has already been reminded by the Council of Europe, that "many members of the Roma community refuse to be called "Gypsies" ("ţigani") because of the name's pejorative associations with the period of bondage." [267]

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[264] *Nachova and others v. Bulgaria*, Judgment of 26 February 2004, No. 43577/98.
[265] Affidavit of Emilian Niculae at para. 14; Exhibit 1.See Affidavit of Emilian Niculae at paras. 10-14.
[266] Affidavit of Emilian Niculae at paras. 20-24, 29, 33.
[267] Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities,

Given Romania's record of systemic discrimination against the Roma, the use of a racially-loaded term gives rise to an objectively justifiable fear of bias. The discrimination suffered by the Applicants is part of a pattern and practice of discrimination against Roman people in Romania.

A finding that Romania violated Article 14 would be consistent with the Court's previous jurisprudence. In the Court's recent decision in *Moldovan*, observed that "the applicants' Roma ethnicity appears to have been decisive for the length and the result of the domestic proceedings…"[268]

Ongoing Racism

The Applicants' suffering continues because they are Roma. Although the Romanian state is directly responsible for the plight of the Applicants, the State Party has made no attempt to restore normalcy to their lives. Instead, police often conduct raids into their makeshift homes on the pretext that they are living without legal domicile. These raids force the Applicants to once again take flight from their new homes. The police often burn or destroy their identification papers in the process. Wherever the Applicants go, they are branded as exiles and prejudged as criminals. [269]

Conclusions

The State in this case, ignored the pleas of people who had been subjected to mob violence simply because they belonged to the same ethnic group as an individual accused of a crime. The Court must ask itself if the State would have reacted as it did—that is, by doing little to nothing—if innocent non-Roma Romanians, for no legitimate reason, had been terrorized and lost everything, and forcibly sent away from their homes. Through its actions and inactions, the Romanian state sends a dangerous and abhorrent message to its non-Roma citizens: that ill-treatment of innocent Roma people is acceptable. The State Party's acceptance of ethnic violence reflects and reinforces the lowly position that Roma people occupy throughout Romania.

V- REQUEST FOR JUST SATISFACTION PURSUANT TO ARTICLE 41

For reasons discussed below, the Applicants respectfully request the opportunity to submit a more detailed claim for just satisfaction under separate cover.

Since receiving the Court's decision on admissibility, the Applicants ability to assemble relevant evidence has been hampered by Romania's refusal to disclose relevant documentation case. Set out in

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Opinion on Romania, adopted on 6 April 2001 at para. 21 [http://www.humanrights.coe.int/minorities/Eng/FrameworkConvention/AdvisoryCommittee/Opinions/Romania.htm].
[268] *Moldovan*, *supra* at para. 139.
[269] Affidavit of Emilian Niculae at paras. 50-51; Exhibit 1A.

the Applicants' request for information,[270] much of the relevant documentation relating to losses is in the possession of Romanian officials. To address the asymmetry of information in this matter, the Applicants expect to file a request for a hearing under Rule AI of the Annex to the Rules of Court. The Applicants have also requested that the Court appoint an expert evaluator to measure the losses associated with this case and conduct his or her own investigation into records in Romania's possession. The Applicants have yet to receive a response from the State Party to this proposal.

The Applicants respectfully submit that in order to provide the Court with submissions based on a reliable evidentiary foundation they require disclosure from the State Party of all relevant evidence in the State Party's possession including but not limited to evidence as to real estate values in the area of the Applicants former domicile at all material times, the replacement value of the types of personal property lost by the Applicants and the actual inflation rates and/or interest rates from the date of the Applicants' losses to the present. In the absences of such disclosure, valuation of the Applicants' damages must be undertaken on equitable principles.

The Applicants further submit that it is within the equitable jurisdiction of this Honourable Court to appoint an expert valuator to conduct an inquiry as to damages and to provide an objective report to the Court as to his or her findings. The cost of such valuation should be borne by the State Party whose acts and omissions caused the original loss and whose neglect or refusal to provide information in its possession coupled with the Applicants' lack of resources and lack of access to pertinent information (for which the State Party is both directly and indirectly responsible) make it impractical for the Applicants to undertake the task on their own behalf. Valuation of the damages suffered by the Applicants (including loss of property) should therefore be left to such an expert valuator.

In the absence of the necessary disclosure on the part of the State Party, and pending the Court's response to the request to appoint an independent valuator, the Applicants' request for just satisfaction is organized as follows:

Pecuniary Damages

Values of Homes Destroyed

With respect to the value of the homes destroyed, the Applicants expect to submit a partial list of prices declared to have been paid by some of the Applicants for their homes at the time of purchase, accompanied by the respective year of purchase. The same exhibit indicates the amount that some of the Applicants received for the sale of their home subsequent to the 1991 events, according to their own declarations as well as official receipts. As the factual record of this case indicates, an expert report on the value of lost properties was produced in 1994 in the context of domestic proceedings. That report is not as yet available to the Applicants, as the State Party has hitherto failed to provide disclosure of this document. However, it is also evident from the factual record that in subsequent decisions, Romanian courts refused to order a reappraisal of property values for the purposes of the civil claim,

[270] See Letter of Noah Novogrodsky dated September 30, 2005, Exhibit 10

arguing that this was the responsibility of the Applicants. Given their lack of resources (exacerbated by the very acts and omissions that underlie the present proceedings), and the uncontroverted fact that most of them did not receive adequate notice of court proceedings (see above) as well as the reality that the community was scattered both within and outside of Romania as a result of the pogroms, the Applicants have since 1994 been unable to obtain a further expert report on their property.

It was, and remains, the responsibility of the State to conduct an expert evaluation of the losses. The Applicants are prepared to accept the findings of a mutually acceptable expert evaluator and to subtract the sums that were paid to individual Applicants from an eventual award.

In the alternative, the Applicants respectfully request that the Court award compensation based upon considerations of equity. In past cases where the houses of citizens have been destroyed with the involvement of state officials, and where no conclusive evidence of property values exists, the Court has applied "principles of equity" to award pecuniary damages, recognizing that there has been a loss.[271]

Value of Moveable Goods Destroyed

With respect to the value of moveable household goods destroyed, the Applicants would welcome the opportunity to provide to an independent expert evaluator with all the facts in their possession relating to their losses so as to allow for an objective valuation of the appropriate quantum for full restitution. The domestic courts provided no compensation for moveable goods and there would be no offset against any award in this category.

In the alternative, the Applicants respectfully request that the Court invoke equitable principles to compensate the Applicants for the ongoing deprivation of their moveable goods. In past cases, this Court has been prepared to recognize the existence and value of household goods where homes were burned and destroyed, based upon equitable considerations. In *Orhan v. Turkey*, for example, the Court noted that, because the evidentiary record clearly indicated that the applicants had no time to take their possessions with them before fleeing their homes, that it would assume that these goods existed.[272] In *Selcuk and Asker v. Turkey*, the Court recognized that where homes are burned down and applicants are forced to flee their dwelling place, it was assumed that some measure of goods were destroyed, which are to be assessed according to the "principles of equity."[273]

Value of Cost of Alternative Accommodation

There is ample evidence in this case that as a result of the expulsion from their homes, the Applicants have, since June 1994, incurred substantial expenses through the costs of borrowing money and the

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[271] *Orhan v. Turkey*, (2002) App. No. 25656/94, Eur. Ct. HR (June 18, 2002), at para 424; *Selcuk and Asker v. Turkey* (1998), 26 E.H.R.R. 477 at paras. 106-108; *Mentes v. Turkey* (Art. 50) (1998) 26 E.H.R.R. CD1.
[272] *Ibid.* at para. 423.
[273] *Ibid.* at para. 110.

payment of interest in order to secure alternative accommodation.[274] Additionally, many of the claimants have been unable to secure a permanent job and income as a result of their expulsion from Bolintin Deal.[275] The Applicants welcome the opportunity to present all facts in their possession to an expert evaluator which together with facts known only to the Romanian authorities, would allow for an objective valuation of the appropriate quantum for ban restitution. This evidence will include evidence that municipal authorities attempted to destroy the home of Constantin Catalan in Bucharest, without due process. Such proof will demonstrate the "additional costs" borne by the Applicants as a result of expulsion from their historic homes.

In the alternative, the Applicants note that in *Orhan v. Turkey*, the Court recognized the existence of pecuniary damages for the cost of alternative accommodation based upon principles of equity, and the Applicants respectfully submit that the Court should take the same approach here.

Non-Pecuniary Damages

Non-pecuniary damages are a discretionary award based on the Court's application of equitable principles. This Court has awarded non-pecuniary damages *inter alia* for claims of psychological harm, frustration, distress and a sense of being treated unjustly. Non-pecuniary damages are awarded in circumstances where the violations claimed are serious. This Court has identified violations of Articles 3, 8, 13 and Article 1, Protocol 1 as sufficiently serious to give rise to significant non-pecuniary damages.[276] The Court has also awarded non-pecuniary damages for procedural delays where the resolution of court proceedings was crucial to the ability of the applicant to improve his or her living conditions and live in dignity.[277] In *Akdivar v. Turkey* and *Mentes v. Turkey* applicants were awarded 8000 GBP for non-pecuniary damages related to the State Party's violation of article 8 and article 1, Protocol 1. In *Aydin*, the Applicant received 25,000 GBP for the psychological trauma of torture at the hands of state agents.

Here, the Applicants have endured psychological, physical and emotional harm as a result of the State Party's ongoing failure to conduct a full and effective investigation into the 1991 pogrom, to award appropriate compensation for the goods lost and to provide the appropriate remedial support for applicants. The trauma of the initial incidents in which the Applicants were chased from their homes, was magnified by the ongoing frustration and humiliation of the delayed and partial legal proceedings. To the extent proceedings occurred, the Applicants were demeaned by the judges' discriminatory language and by the collective attribution of responsibility for their own suffering through the application of the "provocation" defence.

The Applicants invite and expect an evaluator to address these injuries.

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[274] See letter of complaint from Constantin Catalan on 8 May 1998.
[275] *Ibid.*
[276] *Aksoy v. Turkey* (1997), 23 E.H.R.R. 553 at para. 113; *Aydin v. Turkey* (1998) 25 E.H.R.R. 251 at para. 131; *Selcuk and Asker,* at para. 118; *Akdivar v. Turkey* (1997), 23 E.H.R.R. 143, at para. 37; *Moldovan*, supra at para. 151.
[277] *X v. France* (1992), 14 E.H.R.R. 483 at para. 51, 54.

COSTS:

To date, the Applicants have incurred the following costs associated with this case:

Preparation time for Romanian counsel to file application, 50 hours x 50 EUR/hr	E2500
Preparation time for University of Toronto students (admissibility), 200 hours x 50 EUR/hr	E10000
Preparation time for N. Novogrodsky (admissibility), 40 hours x 200 EUR/hr	E8000
Preparation time for University of Toronto students (merits), 200 hours x 50 EUR/hr	E10000
Preparation time for N. Novogrodsky (merits), 45 hours x 200 EUR/hr	E9000
Preparation time for M. Freiman (merits), 15 hours x 500 EUR/hr	E7500
Preparation Time for J. Sirivar (merits) 30 hours x 150 EUR/hr	E4500
Translation of documents: $1500.27 CAD @ 1 CAD = 0.707599 EUR	E1061

NON-MONETARY RELIEF:

The Applicants seek non-monetary relief in the form of a guaranteed right of return to Bolintin Deal, preservation of the community's cemetery, the incorporation of community members into programs designed to remedy longstanding discrimination and acknowledgment of the destruction of the Roma Community of Bolintin Deal.

VI – REQUEST FOR A HEARING PURSUANT TO ARTICLE 59

The Applicants respectfully request a hearing on the merits. The Applicants request for a hearing under Rule AI of the Annex to the Rules of Court, submitted under separate cover, will provide details of the kinds of information in the possession of the State Party that the Applicants require to measure the losses adequately.

All of which is respectfully submitted of behalf of the Applicants,

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