European Court of Human Rights
Council of Europe
Strasbourg, France

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

WRITTEN COMMENTS OF THE APPLICANTS TO THE GOVERNMENT OF ROMANIA'S SUBMISSION AS TO ADMISSIBILITY OF APPLICATION 62954/00.

30 July 2004

1. Introduction

1.1. These written comments are submitted on behalf of the applicants ("Applicants") by the International Human Rights Clinic of the University of Toronto Faculty of Law, as the authorized representative, in response to the written statement of the Government of Romania ("Government") submitted on April 15, 2004. Appendix 1, Attached Letter of Section Registrar S. Dollé, dated July 12, 2004.

1.2. This case stems from a 1991 pogrom against the Roma community of Bolintin Deal, Romania. In April and May 1991, an organized mob, encouraged by the Mayor and police officers, burned twenty-two homes and physically assaulted or threatened several dozen Roma citizens of the town. The entire Roma community of Bolintin Deal, which had lived in the village for several generations, was forced to flee. In the years that followed, and specifically since Romania became a party to the European Court of Human Rights on June 20, 1994, the Roma community of Bolintin Deal has been prevented from returning, community members have been subjected to degrading, unhealthy and dangerous conditions, they have been compelled to sell their remaining possessions at below-market prices and they have been denied fair legal process. In 1995 and 2001, Emilian Niculae, a Roma activist pressing for community claims, was beaten, his life threatened and he was forced into exile. Today, there is virtually no Roma presence in Bolintin Deal. The Roma section of the town cemetery is unattended, Roma families are denied the right to bury their dead alongside their relatives and the Roma families of Bolintin Deal are separated in death, as they are in life. Having exhausted their domestic remedies, Vasile Tanase and 23 others complained to the European Court of Human Rights (the "Court") that Romania had violated multiple articles of the European Convention on Human Rights ("the Convention").

1.3. On December 9, 2003, this Court rendered a partial admissibility decision, ruling that certain of Applicants' claims were inadmissible on grounds of *ratione temporis*. All remaining claims were communicated to the Government of Romania for its observations. Specifically, the Court requested comment on "the applicants' complaints with regard to the duration of the proceedings before the domestic courts, the fairness of the proceedings, the violation of the applicants' rights to respect for private and family life and homes, as well as the inhuman and degrading treatment they suffered after the incidents perpetrated against them, the breach of their property rights and the discrimination based on ethnic origins, to the extent that the complaints relate to a period subsequent to June 20, 1994."

1.4. The legal question at this stage of proceedings is whether Applicants have raised admissible questions of law and fact relating to violations of the Convention since June 20, 1994.

1.5. In response to this Court's Partial Admissibility decision of December 9, 2003, the Government of Romania's has asserted that: 1) the conditions suffered by Applicants after Romania's ratification of the Convention do not reach the minimum degree of gravity necessary to constitute a violation of Article 3 of the Convention, and that post-1991 living conditions are not the responsibly of state officials because Romanian authorities were not responsible for the underlying events; 2) there has been no Article 8 violation because "only private individuals were involved in the events that occurred on April 7 and May 7, 1991"; 3) Romania has not discriminated against Applicants on the basis of their ethnicity because Government officials conducted an effective investigation into the Bolintin Deal pogroms, the legal failings associated with the criminal and civil redress for the pogroms were the fault of Applicants, the Court was entitled to find mitigating circumstances in the criminal case because the non-Roma community of Bolintin Deal was "provoked," and the Court acted within its authority by reducing the damages it found in this case; 4) Notwithstanding multi-year delays and the eventual result that only suspended criminal sentences were imposed for the pogrom and inadequate damages awarded, Romania provided acceptable legal redress in this case because the case was complex, Applicants failed to conform with Romanian procedural requirements, and the case was resolved in a reasonable time; 5) Neither the extinguishment of Applicants' claims in the courts of Romania, nor the sale of Applicants' real property and possessions (even if the sales occurred under duress and the threat of future violence) qualify as a deprivation of property within the meaning of Article 1 of Protocol No. 1.

1.6 Applicants' response will address each of the above objections raised by the Government of Romania as well as issues raised this Court's Partial Admissibility Decision.

2. Facts

2.1 On April 6, 1991, a Roma villager of Bolintin Deal, Ion Tudor, killed a non-Roma villager, Melinite, during a brawl. Appendix 2, Affidavit of Emilian Niculae, ¶ 3.

2.2 Tudor was arrested on the night of April 6/7th by local police. App. 2, ¶ 4.

2.3. On the morning after Tudor's arrest, the siren at the town's public cultural centre and bells at the Orthodox church summoned the villagers to the town square. Encouraged by the officers who had arrested Tudor, and the mayor of Bolintin Deal, Obiala Mircea, an organized mob proceeded to burn 22 homes belonging to Roma residents of the town. Police officers made no attempt to stop the arson, vandalism and destruction. App. 2, ¶ 5-9.

2.4 The Roma community of Bolintin Deal was driven from their homes and forced to live in the woods or with relatives in other towns. A month later, some community members attempted to return to one of the houses of Bolintin Deal. Village officials again used the town bells and sirens to summon non-Roma villagers to the town square and four additional Roma homes were burned. Police officers took the Roma families who had fled

the burning houses, piled them in a van and drove them to a road near Bucharest. App. 2, ¶ 10 – 14.

2.5 After the second pogrom, some community members filed complaints with the district prosecutor against public officials and private individuals associated with the attacks. More than five years later, thirteen private individuals were charged. App. 2, ¶ 16 -18.

2.6 During public hearings, judges, beginning at the Bolintin Vale district court, referred to the complainants as "tigani," a pejorative term for gypsies. App. 2, ¶ 18.

2.7 Beginning in 1995, 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. App. 2, ¶ 19.

2.8 Since June 20, 1994, the date Romania ratified the Convention, Applicants have endured abysmal living conditions. Many of the applicants have been unable to rebuild their homes and continue to live in appalling conditions, as do many of those who sold their houses under duress. Virtually all of the applicants live without a legal domicile and many have suffered police raids on their makeshift homes. App. 2, ¶ 20 – 24, 29, 33.

2.9 The expelled families have been unable to tend to family graves in Bolintin Deal and cannot bury their dead alongside family members. App. 2, ¶ 26.

2.10 On May 18, 1998, a Romanian 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 their offences had been provoked. The Court invoked the same rationale to reduce by half the award of related civil damages. On January 4, 1999, the Bucharest Departmental Court dismissed the applicants' appeal.

2.11 Emilian Niculae was arrested twice for questioning in connection with his efforts to obtain legal redress for the Bolintin Deal pogrom. App. 2, ¶ 34 – 46. 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. App. 2, ¶ 50-52.

3. The living conditions to which the Roma applicants were subjected and the failure to investigate responsible parties constitutes a violation of Articles 3 for which the Government of Romania bears at least partial responsibility.

3.1 As an initial matter, the Applicants note that the respondent Government does not seriously contest the fact that the living conditions of the Applicants following the 1991 pogrom and in some cases continuing to the present constitute inhuman and degrading treatment. The Government's principal reaction is that these offences were committed in 1991 and are therefore outside the temporal jurisdiction of the Court. The Government's defense to the claim that Applicants' denial of housing constitutes inhuman or degrading treatment is three-fold. The Government contends i) that it is not responsible for the pogrom that resulted in the homeless state of the Applicants, ii) that prior to the events of

April and May 1991, Applicants' living conditions were "poor, lacking the elements that are necessary to satisfy basic living requirements," and, iii) that the money obtained by 11 of the Applicants (but not the other 13) for selling what was left of their land following the April and May 1991 attacks sufficed to lift them out of poverty and degrading conditions.

3.2 Whether state agents were involved in the 1991 pogroms is a factual issue to be determined in considering the merits of the case, not at the admissibility stage. Applicants have emphasized throughout their documentation that the Mayor of Bolintin Deal was an organizer of the mob violence on April 7, 1991, and again on May 7, 1991. App. 2, ¶ 7. The Government's own account of the facts acknowledges that the town sirens were activated to call villagers on April 7, 1991. Observations of Romania, April 15, 2004. The bells and sirens used to summon townspeople to carry out acts of mob violence did not sound themselves; they were employed or sanctioned by Bolintin Deal officials. App. 2, ¶ 5. Uniformed police actively participated in the house burnings on April 7, 1991. The following month, they drove Roma villagers out of town in police vans. App. 2, ¶ 14.

3.3 Romania's assertion that the April 7, 1991, and May 7, 1991, pogroms were spontaneous events involving no Government officials is a blatant misrepresentation of the facts in this case. (The fact that Romania's courts credited this version of events is irrelevant to this Court's consideration of admissible facts and circumstances.) Applicants contend that the respondent Government's responsibility for their living conditions 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, App. 2, ¶ 28, 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.

3.4 This Court has consistently held that where entire communities are terrorized, forced to watch as their homes are burned and rendered homeless amid threats and abuse, while competent authorities fail to provide assistance or protection, the state violates the prohibition against inhuman treatment within the meaning of Article 3. See, *inter alia*, *Ayder et al. v. Turkey* (Application no. 23656/94), Judgment 8 January 2004, para 111; *Selçuk and Asker v. Turkey* (1998) 26 E.H.R.R. 477, para 77-78; *Akdivar v Turkey* (1997) 23 E.H.R.R. 143; *Mentes v.Turkey*, (1998) 26 E.H.R.R. 595. Had the Bolintin Deal pogroms occurred after June 20, 1994, there is no doubt that Romania would be responsible for Article 3 violations.

3.5 Applicants submit that Romania's failure to remedy the 1991 pogrom and to sanction degrading and inhuman treatment post-ratification constitutes an independent violation of Article 3. The record in this case is clear that without homes, Roma families lived and continue to live in squalor, they are unable to find or afford safe housing and they are degraded by substandard living conditions. These conditions persisted well beyond June 20, 1994, and they are the reasonably foreseeable consequence of the Government's acts and omissions. As this Court has stressed, degrading treatment must attain a minimum level of severity but that levels of degradation are relative; the relevant test depends on all the circumstances of the case, including the duration of the treatment, its physical and mental

effects, and, in some cases, the sex, age and health of the victims. See *Costello-Roberts v. The United Kingdom*, 25 March 1993, p. 59, Section 30; *Dougoz v. Greece*, 6 March 2001, p. 7, Section 44.

3.6 The condition of Roma people before they were burned out of their homes in April 1991 has no bearing on whether Romania has violated Article 3 since 1994. To the extent that the Government concedes that the pre-1991 conditions were "poor, lacking the elements that are necessary to satisfy basic living requirements" – conditions that might have qualified as a violation of Article 3 had Romania been a party to the Convention at the time – it's difficult to understand how, after two episodes of mob violence and three years of neglect, the condition of the ex-residents of Bolintin Deal would not qualify as an Article 3 violation.

3.7 According to the Government's own submission, at least 25 homes were burned during the April 7, 1991, and May 7, 1991, pogroms. The Government's response to the claim that it has violated Article 3 by failing to assist a community in need and by perpetuating degrading and inhumane conditions, is that 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 that the majority of Applicants in this case 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 below whether the proceeds from the sale were adequate to help them find appropriate housing. What is clear, however, is that at no time did the Government of Romania make any effort to assist the dispersed community from Bolintin Deal or offer any particular assistance. App. 2, ¶ 24.

3.8 The Roma of Bolintin Deal were scattered across Romania and rendered internally displaced people. Many lived illegally. App. 2, ¶ 22. Every member of the community suffered economic losses and most adults were separated from their jobs and left without means to earn a living. Driven from their homes, the Roma children of Bolintin Deal suffered interruptions to their education. App. 2, ¶ 23. The Government's failure to assist this community and its complicity in their displacement violates Articles 43(1) and 45 of the Romanian Constitution which require the state to take measures to ensure decent living standards for its citizens and to give special protection and assistance to children and youth. Appendix 3, Constitution of Romania.

3.9 As Romania acknowledges, in the aftermath of the mob violence in Bolintin Deal, Romania was required to carry out an effective investigation which would lead to the identification of the perpetrators. 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. *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. 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, as with that under Article 2, 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. *Assenov*, 28 E.H.R.R. 652 (1999), para 102.

3.10 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. See generally, *Assenov*, supra; *Labita*, supra; *Veznedaroglu v. Turkey* (2001) 33 E.H.R.R. 59, *Indelicato*, supra.

3.11 Romania claims that it satisfied its positive Article 3 obligations by conducting an investigation and charging 13 non-state actors out of a mob of hundreds or thousands. The facts in this case suggest otherwise.

3.12 An effective investigation is one that is capable of leading to the identification and punishment of those responsible for the violations. *Egmez v. Cyprus* (2002) 34 E.H.R.R. 29, para 65; *Assenov*, supra, para 102. As the Court stated in *Aktas v. Turkey*, (2004) 38. E.H.R.R. 18, para. 299; "[W]hatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. 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." An effective investigation requires the investigating authorities to be independent and impartial. *Aktas*, *supra* para. 301.

3.13 Here, Applicants contend that authorities did not discharge their public policing duties but instead waited for Applicants to lodge complaints. App. 2, ¶16. Several people against whom complaints were lodged were never investigated. The mayor of Bolintin Deal, for one, does not appear to have been investigated. Without context, the Government's list of individuals questioned or who gave statements, means little. Additionally, Applicants are concerned that the officials in charge of the investigation were involved in the pogrom and could not, therefore, be considered impartial. Based on the Government's account – a record that is entirely in the possession of the respondent State – it is impossible to determine the scope of the investigation. The Government acknowledges that investigators questioned some individuals and that others gave statements in the period from 1994 to 1996 but offers no information on the crucial issue of whether investigators examined the continuing effects of the 1991 atrocities or if members of Bolintin Deal were refused in their attempt to return to the village. Lastly, the Government's cursory record of the investigation does little to address Applicants' complaint that the investigation was plagued by delays and was not commenced in a timely fashion.

3.14 Serious questions of fact remain as to Romania's investigation of the Bolintin Deal pogroms. Without addressing the merits, this Court cannot determine whether Romania has

discharged its Article 3 obligation to investigate claims relating to degrading and inhuman treatment.

4. The Government's acts of commission and omission as manifested by its failure to restore private homes and its refusal to facilitate access to cemeteries violates Article 8.

4.1 The Government elects to respond to the Article 8 claim in this case by insisting that it has no positive right to provide individual housing for each Applicant.

4.2 Article 8 of the Convention speaks to privacy and family life and respect for the home. The full text reads as follows:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is 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.

4.3 As to housing, the Government relies on the largely tangential case of *Velosa Barreto v. Portugal*, *Velosa,* Judgment of 26 October 1995, Series A, case number 40/1994/487/569. There the Court noted that Article 8 "may also give rise to positive obligations, particularly the obligation to ensure respect for private and family life even in the sphere of interpersonal relations" but found on the facts of that case that the Applicant could not maintain an action premised on Article 8 for claims arising from his unsuccessful effort to secure a judgment in the courts of Portugal for the termination of a lease. *Barreto,* para 23, citing *X and Y v. the Netherlands* judgment of 26 March 1985, Series A no. 91, para. 23.

4.4 *Barreto* is readily distinguishable from the violent uprooting of an entire community, the destruction of their homes and the refusal of authorities to allow them to return. The better analogy is to *Botta v. Italy*, Judgment of 24 February 1998, Reports of Judgments and Decision 1998-I, p. 422, §§ 33-34, where the court recognized that the objective of Article 8 is not only to ensure that the state abstains for interfering with individual rights but that the state also satisfies positive obligations inherent in respect for private life. A state has obligations of this type where there is a direct and immediate link between the measures sought by an applicant and the latter's private life. Applicants submit that, in this context, the state that was complicit in the destruction of a community's homes owes a positive obligation to restore the private lives of community members once safeguarded by those very houses.

4.5 Likewise, the involvement of state authorities and their failure to stop the 1991 pogroms violates Article 27 of Romania's constitution, a provision that was again violated during the post-ratification 1995 raid on Emilian Niculae's replacement home in Bragadiru. App. 2, ¶¶38-43.

4.6 Article 8 also recognizes the value of family life and the human right to develop close and natural family connections. In cases deriving from custody disputes, this Court has held that the State owes a positive duty to ensure that family ties can be protected 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." *Kroon et al. v. The Netherlands* (1995) 19 E.H.R.R. 263, para. 32; *Keegan v. Ireland* (A/290) (1994) 18 E.H.R.R. 342, para 50. The relationships among Applicants include siblings, spouses, parents and children of multiple generations and are clearly within the meaning of "family" for the purposes of the Convention. Elsewhere, the Court has held that less closely bonded ties satisfy the meaning of family under Article 8 including situations where marital relationships have broken down or children are born out of wedlock. *See, e.g., Elsholz v. Germany* (2002) 34 E.H.R.R. 58, para. 43; *Keegan* supra, para. 44.

4.7 Here, the razing of homes and the community's inability to return to Bolintin Deal has scattered families. The destruction of legal domiciles has deprived those Applicants who have been unable to secure alternative housing of their eligibility to receive government assistance or services. App. 2, ¶ 23. To the extent that Roma people are stereotyped and vilified as transitory, this Roma community has suffered the negative effects of those attitudes through no fault of its own.

4.8 Equally troubling, the Roma of Bolintin Deal have been separated from the graveyard where their relatives are interred. Community members who have died since 1991 cannot be buried with their loved ones in pre-purchased burial plots. When Niculae Floarea died in 1996, she was buried 25 km away because her family feared reprisals if they attempted to bury her in their Bolintin Deal cemetery family plot. App. 2, ¶ 26.

4.9 Applicants submit that that the Government's consistent refusal to remedy the loss of private homes, to respect family ties, or to ensure access to burial grounds constitutes a continuing violation of Article 8.

5. Applicants have suffered systematic discrimination in their attempt to find a peaceful place to live, in their efforts to maintain their culture and in their dealing with the Romanian legal system, all in violation of Article 14.

5.1 Romania answers concerns that it has discriminated against Applicants on the basis of their ethnicity by asserting that state agents have not discriminated against Applicants with respect to living conditions and that delays in Court proceedings were reasonable and caused by Applicants (Plaintiffs) themselves, not the state.

5.2 Without imputing a motive to the respondent State, Applicants' Article 3 and 8 claims, in conjunction with Article 14, provide very real 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 their village. The inadequate legal investigation following the 1991 attacks is discriminatory in nature; the delays associated with the domestic legal proceeds are a question of fact to be resolved when this Court considers the merits of the case.

5.3 Indeed, in a decision that could have been written for this case, 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 particularly destructive of fundamental rights … On the basis of the above the Court finds that the authorities failed in their duty under Article 14 of the Convention, taken together with Article 2, to take all possible steps to establish whether or not discriminatory attitudes may have played a role in events ... The Court considers, furthermore, that the domestic authorities' failure to discharge that duty should have an incidence on its approach in the present case in the examination of the allegation of a "substantive" violation of Article 14 [...]. *Nachova and Others v. Bulgaria,* Judgment of 26 February 2004, No. 43577/98.

The Government cites the *Nachova* decision too but for the wrong proposition. The question isn't whether state agents perpetrated violence; the question is whether the investigation was truncated because of racist or discriminatory motives. Moreover, *Nachova* shifts the burden to the Government to show that it did not act in a discriminatory fashion, a question that will also bear on the Article 3 and Article 8 claims in this case.

5.4 The facts in this matter provide evidence that the discrimination suffered by Applicants extends beyond the claims of degrading treatment and the right to privacy and maintenance of family life. In Applicants' dealings with the Romanian legal system, they suffered discrimination based on their ethnic origin in combination with Article 14 of the Convention. The discrimination against Applicants is evidenced by the derogatory terms used by judges to describe them and by the structure of the legal proceedings which resulted in the reduction of damages. (For further elaboration, see section 6 below).

5.5 The Court employs both a subjective and objective test to determine whether a judge is impartial or independent. This applies to both civil and criminal cases.

a. The Subjective Test

i) The subjective test requires the applicants to establish that a judge "acted with bias against them." *Hauschildt v. Denmark,* [1993] A.C. 646. Such facts must show that the judge was personally biased against the applicants.

ii) In the present case, the judge's repeated use of the derogatory word "tzigane" (or "tigani") is alone sufficient to establish that the judge held subjective racially discriminatory views against the Roma community which made it impossible for him to render an impartial judicial decision. App. 2. ¶ 18. This bias was further exhibited in the interpretation of the defence of provocation used in the criminal and civil proceedings.

b. The Objective Test

i) Under the objective test, the Court must determine whether an applicant's fear of a judge's impartiality can be objectively justified, looking to either structure or appearance. *Salaman v. United Kingdom,* (App. 43505/98), admissibility decision of 15 June 2000. The Appellate Chamber stated the following in regards to the objective test for impartiality:

> "[A]ny judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw...This implies that...the standpoint of the accused is important but not decisive. What is decisive is whether the fear can be held objectively justified." *Hauschildt v. Denmark,* [1993] A.C. 646.
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> In *Sander v. United Kingdom*, (App. 34129/96), Judgment of 9 May 2000; (2001) EHRR 1003, the Court found a judge's failure to adequately address racial comments by a jury member to violate the objective impartiality standard under Article 6(1).

5.6 The Applicants were objectively justified in their belief that the Romanian courts lacked impartiality because of the judge's use of the word "tzigane." The Government describes various circumstances when use of the word "tzigane" is acceptable in Romanian society. Applicants urge the Court to dismiss this evidence as irrelevant. The Court has clearly stated that it objectively assesses impartiality within the context of a judicial proceeding from the standpoint of the applicant. In its response, the Government conceded that "tzigane" has racial and derogatory connotations. Thus, the appropriate question is whether Applicants, participating in proceedings before Romanian domestic courts, would be objectively justified in doubting the judge's lack of impartiality in evaluating a racially motivated violent crime when the judge used the term "tzigane."

5.7 Throughout the civil proceedings too, the judge repeatedly referred to Applicants as "tzigane." In judicial proceedings, a judge should be held to a high standard and take great care to maintain the appearance of impartiality and freedom from bias, regardless of whether a term is acceptable to some persons in some contexts. The failure to meet those standards by referring to a party pejoratively raises objective doubts about the judge's impartiality.

5.8 The discrimination suffered by Applicants is part of a well-documented pattern and practice of discrimination against Roma people in Romania. The most recent Council of Europe report on Romania of notes that:

> The Roma/Gypsy community in Romania is particularly vulnerable to discrimination and disadvantage in many fields of life, as outlined elsewhere in this report. It is also the object of continued prejudice and racism on the part of the majority community, despite the fact that the violent clashes which took place in the 1990s seem to have died down. Stereotypes concerning the Roma/Gypsy community persist and are reflected in societal attitudes, the presentation of issues concerning this community by the media, and in the positions adopted by some politicians and political parties (see "Climate of opinion" under "Issues of particular concern" below). There is a tendency to blame the Roma/Gypsy community for its own problems and for the problems

> of society as a whole, and to perceive this community as a risk for and even a threat to society against which repressive measures should be taken. Such attitudes are manifested in overt discrimination in many fields of life, notably education, employment and access to public places such as bars and restaurants. Council of Europe CRI (2002) 5 *Second Report on Romania*, Adopted on 22 June 2001 and made public on 23 April 2002.

5.9 The discrimination detailed in the Council of Europe report is reflected in other reputable reports, including the 2003 U.S. Department of State Country condition reports for Romania which states that "The Roma population continued to be subject to societal discrimination," Romania – Country Reports on Human Rights Practices – 2003, Released by the Bureau of Democracy, Human Rights and Labor, U.S. Department of State, February 25, 2004, and the European Roma Rights Center's *State of Impunity: Human Rights Abuses of Roma in Romania*, September 2001, which describes how the Romanian legal system has failed to provide redress for the harms suffered in the pogroms of the early 1990s.

5.10 Discrimination is the unequal treatment of persons for improper or unlawful reasons. Here, Applicants have proferred facts that demonstrate discrimination in conjunction with other violations and as an independent harm. At a minimum, Applicants' assertions raise a question of fact that cannot be decided at the admissibility stage.

6. Applicants were denied access to a fair hearing before an impartial tribunal with respect to their civil and criminal claims in violation of Article 6.

6.1 The Government argues that Article 6 has not been violated because, from its perspective, there was no unreasonable delay and Romanian courts were within their right to suspend criminal sentences for brutal acts of mob violence on the grounds of "provocation" and reduce civil sanctions because the plaintiffs were deemed to have contributed to delays.

6.2 Respectfully, the Government's position negates the purpose of Article 6, it condones collective punishment and it blames the victims for its failure to award civil damages commensurate with the grave abuses suffered by Applicants.

6.3 The primary purpose of Article 6 (1) is to ensure that judicial proceedings are fair. Noting that a trial may comply with the strict terms of the Convention, and still be unfair, the Court has held that it assesses a hearing's fairness within the context of the proceedings as a whole. *Kostovski* v. *Netherlands,* 20 November 1989, Series A, No. 166; (1990) 12 EHRR 434. In respect to the Romanian proceedings presently at issue before the Court, Applicants note that under Romanian law a civil action relating to the same facts as a criminal action may not proceed until a final judgment of the criminal proceedings has been made. CPC Article 19. Furthermore, the decision of the criminal proceeding is binding on the civil court and under Romanian law, all civil defendants must be sued in the same proceeding and are held to be jointly liable. Civil Code Article 1003. Therefore, the criminal and civil proceedings regarding the violence in Bolintin Deal should be considered as one action for all Article 6(1) determinations. See *Torri* v. *Italy,* 1 July 1997, (Court regarded civil and criminal proceedings as one action for the purpose of determining Article 6(1) rights). Additionally, Romania's failure to investigate and charge public officials for their misconduct

deprived Applicants of an opportunity to hold state officials liable and to claim damages against an entity capable of providing meaningful monetary relief.

6.4 Contrary to the Government's position, Applicants submit that this Court is not limited by *ratione temporis* in its determinations under Article 6(1). This Court's previous Article 6(1) jurisprudence instructs the Court to consider the period prior to the State's ratification of the Convention. See *Foti and others* v. *Italy*, 10 December 1982, Series A no. 56, para. 53; *Yagci and Sargin* v. *Turkey,* (App. 16419/90; 16426/90), 8 June 1995; *Academy Trading Ltd and Others* v. *Greece,* (App. 30342/96), 26 May 1997; *Philis (No. 2)* v. *Greece,* (App. 19773/92), 27 June 1997; *Loukanov* v. *Bulgaria* (1997); and *Proszak* v. *Poland,* (App. 25086/94), 16 December 1997. In these cases, the Court held that it would assess the then state of proceedings at the time of ratification, rather than considering the proceedings as if they had simply just begun. For example, in *Yagci and Sargin, ibid,* at para. 40, the Court stated, "...when examining the complaints relating to Articles 5 para 3 and 6 para. 1 ... of the Convention, it will take account of the state of proceedings at the time when the above-mentioned declaration was deposited." Nothing in this Court's partial admissibility decision in this matter suggests the Chamber intends to vary the practice.

6.5 Applicants respectfully suggest that the relevant time period for consideration by this Court begins in April 1991, when Applicants first registered their criminal complaint with the prosecutor in Bolintin Deal, and ends in May 1998, when the Bucharest Court of Appeal rendered its final judgment. Viewed in its entirely, Applicants submit that a seven-year wait for justice violated their right to a "fair and public hearing within a reasonable time by an independent an impartial tribunal" guaranteed under Article 6 (1) of the Convention.

6.6 Was the length of the civil procedure conducted in accordance with the "reasonable time" provision of Article 6(1) of the Convention? Applicants agree with the Government that the determination of the "reasonable time" provision under Article 6(1) of the Convention requires an investigation into 1) the complexity of the case, 2) the conduct of the applicants, 3) the conduct of the relevant authorities, and 4) what was at stake for the applicants. *Zimmerman and Steiner* v. *Switzerland*, 13 July 1983 (No. 66), 6 EHRR 17, para. 24. Each factor of the standard is discussed below in turn.

a. Complexity of the Case

i) Applicants disagree that the case was unduly complex. The number of litigants alone is insufficient to sustain the assertion that a case is overly complex. Nor does the fact that the applicants' forced migration to various locations indicate a case's legal complexity. On the contrary, the Government had the benefit of the fact that Applicants willingly made themselves available to provide statements by initiating a complaint only a few weeks after the 1991 incidents. App. 2, ¶ 16. The Government concedes that by June of 1994, it had collected over 260 statements (although, significantly, it does not disclose how many of those statements were produced by investigators and how many were taken at the insistence of Applicants, nor does it explain why it needed two years after the first 260 statements were collected to lay charges). The math is simple: more than five years elapsed between the pogrom and the charges filed against 13 individuals on 17 October 1996. Applicants submit that the delay was excessive.

ii) Furthermore, the criminal charges laid against the 13 defendants were not legally novel, complex, or controversial. Sadly, the charges were all-too-common because similar acts of violence against Roma communities occurred throughout Romania in the years surrounding the 1991 incident in Bolintin Deal. The Romanian judicial system should have been well versed in the law relating to acts of mob violence facilitated by Government officials.

iii) The criminal charges were also not overly complex. The prosecutor charged the defendants with crimes of unlawful entry, destruction of property, and assembly for the purpose of committing a crime. Other than the number of parties, the Government fails 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 required to assess and evaluate such facts every day. 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. In comparison, the Court has found that a "not particularly complex" set of proceedings was excessive after six and a half years of consideration. *Neves e Silva* v. *Portugal,* 27 April 1989, Series A, (No. 153), 13 EHRR 536. In this case, the proceedings extended over a period of seven years.

iv) When a case requires expedient action the Court has held that complexity alone does not relieve a State of its Article 6(1) obligations. See *Obermeir* v. *Austria,* 28 June 1990 (No. 179), 13 EHRR 290, para.72, in which the Court found despite the case's complexity, nine years was excessively long to reach a final judgment. In the instant case, 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.

v) 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 government-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

i) Applicants recognize that the Court will find a violation of Article 6(1) only when the delay primarily results from conduct by the Government authorities. *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. 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, the Court has found that an over abundance of judicial activity may also result in excessive delay. See decision of 29 March 1990, Series A, (No. 150), 12 EHRR 247.

ii) There is no dispute that in the period between 1991 and 1994, the Government 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 Government 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 Government'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 Government's inaction prejudiced judgment in the applicants' civil suit against those criminal defendants who Romanian officials elected to charge.

c. Applicants' Conduct

i) Only unreasonable delay caused by the State is subject to scrutiny under the Convention, not actions by the applicants. *Zimmerman and Steiner* v. *Switzerland*, supra. Here, the unreasonable delay was a direct cause of government inaction. The Court applies the test set out in *Union Alimentaria Sanders, S.A. v. Spain,* 7 July 1989 (No. 157), 12 EHRR 24, to assess claims that the applicant is responsible for delays:

> [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. *Union,* at para. 35, citing, *Martina Moreira* v. *Portugal,* 26 October 1988 (No. 143), 13 EHRR 517, para. 46; *Guincho* v. *Portugal,*28 June 1984 (No. 81), 7 EHRR 223, para. 34.

ii) Notwithstanding the Government's insinuations, there is no evidence in the record of intentional delay on the part of Applicants. To the contrary, the Government'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, Applicants, led by Emilian Niculae, who had just graduated from high school, initiated both criminal and civil proceedings, initially without the assistance of legal counsel. App. 2, ¶¶ 16-18. 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, Applicants made diligent attempts to participate in proceedings. 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 Bolitin Deal. The hard reality is that Applicants' homes had been destroyed and they were not longer resident in the village. App. 2, ¶ 20; Appendix 4, Notice sent to Emelian Niculae at incorrect address. The Government

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 Government 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 weren't present to receive notice of their case.

d. The Stakes for the Applicants

i) Finally, reasonable delay is assessed within the context of what is at stake for the applicants. *Portington v. Greece,* (App. 28523/95), 23 September 1998; *H v. United Kingdom* (8 July 1987), and *Pogorzelec v. Poland* (17 July 2001). In cases of extreme importance to the litigants and 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." *H* v. *United Kingdom,* Judgment of 8 July 1987, Series A, No. 120; (1988) 10 EHRR 95, para. 85. For example, the Court found that Denmark owed its citizen a duty of diligence for an individual seeking compensation because he had contracted HIV as a result of negligent State action. *A and others* v. *Denmark* (App. 20826/92), Judgement of 8 February 1996; (1996) 22 EHRR 458. Similar duties attach when familial relations are at stake. *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. When faced with such dire circumstances, the Court has found that a backlog does not excuse a violation of 6(1). *Hentrich* v. *France,* Judgment of 22 September 1994, Series A, No. 296-A; (1994) 18 EHRR 440, para. 61.

ii) Applicants were the victims of a violent attack involving as many as two thousand villagers. Their homes and personal property were destroyed and Applicants 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, Applicants urge the Court to conclude that the Government violated their Article 6 (1) right to timely proceedings.

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

6.8 In *Golder v. United Kingdom,* 7 May 1974 (No. 18), 1 EHRR 524, the Court held that Article 6(1) includes the applicants' right to invoke procedures whenever they face a loss of their civil rights. This right is subject to two conditions. First, the right must be at least arguably acknowledged under domestic law. *Masson & Van Zon* v. *The Netherlands,* 28 September 1995 (No. 327A), 22 EHRR 491, para. 44. Second, the procedure sought must be legally determinative of this right. *Fayed* v. *United Kingdom,*21 September 1994 (No 294B), 18 EHRR 393. Here, Applicants meet both conditions.

6.9 The domestic law rights at stake for the applicants included the right to a fair hearing before an impartial juror, and the granting of appropriate damages if the Court finds that the applicants suffered a wrong. The valuation of Applicants' property was critical because it was legally determinative of their right to compensation for the violence committed against the community. Applicants note that the Court approaches evidentiary questions by assessing the fairness of the proceedings as a whole, including evidentiary issues. *Van Mechelen and Others* v. *Netherlands,* 23 April 1997, 25 EHRR 647. 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." *Dombo Beheer BV* v. *Netherlands,* 27 October 1993, Series A, No. 274-A; (1994) 18 EHHR 213, para. 33.

6.10 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. The Government contends that the applicants failed to apply to have their property re-evaluated at the appropriate time in the proceedings. In response, Applicants maintain that the Romanian court knew the desperate conditions facing the applicants, it sent notices to places they were certain <u>not</u> to reach 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 lenient evidentiary submission rules, or at the very least notified the applicants of the appropriate methods to comply with court procedures, 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 entry of their evidence, such as disqualifying the applicants' expert witness insisting that the applicants used an improper inflation rate and refusing to toll the limitations period, the Court effectively denied Applicants their right to a fair trial and to receive adequate compensation for their injury.

6.11 Finally, the domestic Court's adoption of the excuse of provocation, an assessment that infected both its civil and criminal analysis, 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." Observations of Romania, April 15, 2004.

6.12 Provocation is an assessment of facts that can serve to exonerate an individual defendant or explain the circumstances leading 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 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:.. b) 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.

6.13 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. App. 2, ¶ 3. But Melinite's killer, Ion Tudor, had already been arrested for the crime. App. 2, ¶ 3. He was arrested by the same authorities who only later summoned the non-Roma population to act against the Roma population of the town. App. 2, ¶¶ 4-8.

6.14 The non-Roma population of Bolintin Deal then proceeded to exact collective punishment from the Roma population. The entire Roma community was sanctioned for the crime an individual already in custody. Indeed, part of that punishment 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, provocation can still occur 30 days later (a state of affairs that would seem to accept endless retaliation) or the very act of returning to their homes was a form of provocation.

6.15 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. *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."

6.16 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 invoking "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.

6.17 Applicants suggest that, at a minimum, the provocation rationale violates Applicants' implied right to receive a reasoned decision. *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. The Court's failure to render a fair decision also damaged Applicants' rights to a civil remedy, *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), and provides objective evidence of the judge's bias and partiality in Applicants' civil proceedings.

7. The extinguishment of Applicants' legal claims and the Government of Romania's failure to provide adequate compensation for the Applicants' losses violates Additional Protocol 1, Article 1.

7.1 The Government alleges that no violation of Additional Protocol 1, Article 1 occurred in this case because the Court rendered an acceptable decision and the applicants did not enjoy legitimate expectations of recovery for a pre-ratification incident.

7.2 The Government's view is plainly informed by the Romanian court's conclusion that "With regard to the personal property…the court did not grant any compensation, since its existence and destruction have not been proven." Observations of Romania, April 15, 2004.

7.3 In reply, Applicants submit that if this Court examines the fairness of the Romanian legal proceedings pursuant to Article 6, then it will necessarily examine the question of whether Applicants' have suffered an interruption to the peaceful enjoyment of their possessions.

7.4 This case involves Romania's continuing failure to remedy the destruction of all of Applicants' worldly possessions. Possessions in this context means two things: The ordinary meaning of possessions refers to Applicants' worldly goods, most of which were destroyed in the incident the Government argues cannot be examined by this Court. But the specialized meaning refers to the civil claim, to the property interest in a damages award that was resolved against Applicants in an unfair manner, long after Romania ratified the Convention. This allegation should be read both independently and in connection with the claims relating to Articles 3, 6, 8 and 14. And while not originally pled as such, this grievance also articulates a violation of Article 13, the right to an effective remedy. Because this Court has the power, *sua sponte*, to consider all claims it deems appropriate, whether specifically raised by the applicant or not, *Guzzardi v. Italy* (6 November 1980), Applicants invite the Court to examine the reduction in their civil relief as a violation of their right to an effective remedy.

8. Conclusion

8.1 Two very different versions of facts and law have been submitted to this Court. Applicants' description of this case details a host of admissible post-ratification abuses alleging violations of Article 3, 6, 8, 14 and Additional Protocol 1, Article 1. These alleged violations overlap but the thrust is the same; Applicants are entitled to a determination on the merits of their claims that they have suffered degrading treatment, a deprivation of their right to privacy and discrimination, and been denied a fair hearing and an effective remedy. Applicants' complaint in not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and should be declared admissible at the earliest possible date.

8.2 On facts that were strikingly similar to the issue in this case, the Court in MOLDOVAN and 13 others and Octavian ROSTAŞ and 9 others v. Romania (Admissibility Decision of 3 June 2003), held that the applicants' post-ratification Article 3, Article 6, Article 8 and Article 14 claims were admissible. There too, the applicants were survivors of a pre-ratification anti-Roma pogrom, they had been referred to in a derogatory fashion by Romanian judges and their legal claims had been repeatedly delayed. In finding the Moldovan claim admissible, the Court gave notice pursuant to Rule 54 § 3(b). The Court should apply the same result in the instant case.

Respectfully submitted,

THE UNIVERSITY OF TORONTO INTERNATIONAL HUMAN RIGHTS CLINIC
for TANASE and others

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Noah Benjamin Novogrodsky
Director