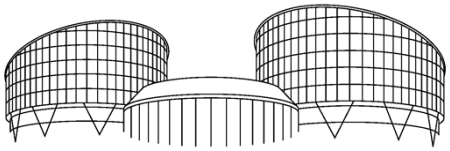

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF ZĂICESCU AND FĂLTICINEANU v. ROMANIA

(Application no. 42917/16)

JUDGMENT

Art 8 (+ Art 14) • Private life • Discrimination • Acquittal of two high-ranking military officials previously convicted of crimes connected with the Holocaust, in extraordinary appeal proceedings not disclosed to the applicants, as Holocaust victims, or to the public • Results and surrounding context of proceedings capable of having a sufficient impact on applicants' sense of identity and self-worth • Emotional suffering reaching the "certain level" or the "threshold of severity" required • Art 8 (+ Art 14) applicable • Principles developed in case-law involving anti-Semitic statements or Holocaust denial applicable in the present case • Significance of international-law background and of common international or domestic legal standards of European States • Retrials concerned a matter of utmost public interest • Retention of files relating to initial convictions and retrial proceedings kept by the secret services • Initial refusal to allow applicants access to the files without reasonable justification • Failure to bring acquittals to the public's attention or make judgments accessible and findings and reasoning of acquittal decisions, could have legitimately provoked in the applicants feelings of humiliation and vulnerability and caused them psychological trauma • Failure to adduce relevant and sufficient reasons for actions leading to revision of historical convictions, in absence of new evidence, by reinterpreting historically established facts and denying the responsibility of State officials for the Holocaust, contrary to international law principles • Authorities' actions excessive and could not be justified as "necessary in a democratic society"
Art 34 • Victim • Not necessary to establish a direct connection between acts committed by the two military officials and the applicants, as crimes at issue directed against a whole group of people and given applicants' personal fate • Applicants could claim to have personally suffered from an emotional distress when they found out about the reopening of the criminal proceedings and acquittals • Applicants could be seen as having personal interest in proceedings aimed at establishing the responsibility of high-ranking members of the military of the Holocaust in Romania

Prepared by the Registry. Does not bind the Court.

STRASBOURG

23 April 2024

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Zăicescu and Fălticineanu v. Romania,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Gabriele Kucsko-Stadlmayer*, President*,
Tim Eicke,
Faris Vehabović,
Yonko Grozev,
Armen Harutyunyan,
Ana Maria Guerra Martins,
Sebastian Răduleţu*, judges*,
and Andrea Tamietti, *Section Registrar,*

Having regard to:

the application (no. 42917/16) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Romanian nationals, Mr Leonard Zăicescu ("the first applicant") and Ms Ana Fălticineanu ("the second applicant"), on 14 July 2016;

the decision to give notice of the application to the Romanian Government ("the Government");

the decision to grant the application priority under Rule 41 of the Rules of Court;

the parties' observations;

Having deliberated in private on 7 November 2023 and 12 March 2024,

Delivers the following judgment, which was adopted on the latter date:

INTRODUCTION

1. The applicants alleged that their rights under Articles 3, 6 § 1, 8 and 14 of the Convention and Article 1 of Protocol No. 12 to the Convention had been breached owing to the acquittal of two military officials previously convicted for crimes connected with the Holocaust, in proceedings that had not been disclosed to them, as victims of the Holocaust, or to the public.

THE FACTS

2. The applicants were born in 1927 and 1929 respectively and live in Bucharest. They were represented by Ms G. Iorgulescu, executive director of the Centre for Legal Resources ("the CLR"), a Romanian non-governmental organisation based in Bucharest.

3. The Government were represented by their Agent, most recently Ms S.M. Teodoroiu, of the Ministry of Foreign Affairs.

4. The facts of the case may be summarised as follows.

I. HISTORICAL BACKGROUND AND THE WAR CRIMES TRIALS AFTER THE SECOND WORLD WAR IN ROMANIA

5. In September 1940, Romanian Prime Minister Ion Antonescu entered into an alliance with a Romanian extreme-right political movement with an anti-Semitic agenda that included enacting anti-Semitic legislation that led, *inter alia*, to the expropriation of property belonging to Romanians of Jewish ethnic origin and the internal displacement of the Jewish population. On 22 June 1941, by the decision of Prime Minister Antonescu, Romania entered the Second World War on the side of Germany, to free its territories from their occupation by the Soviet Union in June 1940 stemming from the Molotov-Ribbentrop Pact concluded in 1939. This decision was followed by deportations of Jews to Transnistria (a region outside the borders of Romania, but under the administration of the Romanian Government between 1941-1944) and three pogroms, involving mass violence against Jewish communities. The most important one took place in Iași (a city in the region of Moldova, in north-eastern Romania) at the end of June/beginning of July 1941, and resulted in the killing of more than 13,000 Jews, including children.

6. According to his statement, the first applicant, who was fourteen in June 1941 and lived in Iași, is a survivor of the Iași pogrom. He witnessed the killings of his father, uncle, grandfather and best friend. He was then taken from his home in Iași and put on a "death train" in a car with 140 people and was placed in the Jewish ghetto of the town of Podul Iloaiei (in the north of the Moldova region). He was released several months later and returned home orphaned. According to a report issued by the International Commission on the Holocaust in Romania (see paragraph 19 below), the purpose of the Iași pogrom was to clean the city of Jews: many of them were killed on the streets of the city on 28 and 29 June 1941, others were forcibly loaded onto freight cars with planks hammered over the windows and travelled several days in unimaginable conditions. Many died and others were gravely affected by heat and a lack of air, water, food and medical attention. Those trains arrived at their destinations – the ghettos of Podul Iloaiei and Călăraşi – with only one fifth of their passengers alive and were subsequently dubbed "death trains".

7. According to the second applicant, who was eleven years old in 1941, she was taken from her home in Cernăuți (a city in Northern Bukovina – a region with a strong Jewish community which was part of Romania between 1918-1940 and 1941-1944) and placed in a ghetto awaiting deportation to the concentration camps in Transnistria. There she had limited access to food, endured poor hygienic conditions, suffered frostbite to her feet and was forced to wear the yellow star of David on her clothes. After one year in the ghetto, she escaped deportation by hiding in the house of relatives for three

years, living in fear, without leaving the house and without access to education.

8. In 1945, after the signing of an armistice agreement acknowledging Romania's defeat in the Second World War (see paragraph 32 below) and after the Communist Party entered the government in Romania, two People's Tribunals (*Tribunalele Poporului*) were established under Law no. 312/1945 on the prosecution and sanctioning of those guilty of bringing the country to disaster and of war crimes ("Law no. 312/1945", see paragraph 33 below). The tribunals tried as war criminals the people responsible, *inter alia,* for the massacres of the Jewish population. Evidence was gathered and examined in respect of around 2,700 cases concerning almost 4,000 suspected war criminals, by a commission whose members were appointed by royal decree at the proposal of the Minister of Justice (an office held by the Communist Party), and which included both laymen and military prosecutors. In about half of the cases examined, the commission found sufficient evidence to send the suspects to trial. Under these proceedings, former Prime Minister Antonescu was sentenced to death on 17 May 1946 and executed one month later. The activity of these special tribunals ended in June 1946, although some of the sentences were not pronounced until later.

9. At the end of the 1940s and in early 1950s, a new set of trials of war criminals took place before the ordinary courts, on the basis of the newly adopted Law no. 291/1947 on the prosecution and sanctioning of those guilty of war crimes or crimes against peace and humanity ("Law no. 291/1947"), as amended by Decree no. 207/1948 on the prosecution of war criminals (see paragraph 33 below).

10. Within this context, in July 1951, R.D. (a lieutenant-colonel and the former head of the Second Section of the Romanian Army General Staff – *Marele Stat Major*) and G.P. (a lieutenant-colonel and former head of office of the Second Section, under the direct command of R.D.) were charged with war crimes. The indictment, prepared by a prosecutor of the War Crimes Department of the Prosecutor's Office of the Bucharest Court of Appeal, stated that "the Second Section of the General Staff [had been] transformed into an instrument to put in practice – directly or through its subordinates – all the political and racial extermination measures initiated by the German and Romanian fascist leaders". It furthermore mentioned that the two accused had cooperated with the leaders of the Special Intelligence Service (the Romanian secret services, which reported directly to former Prime Minister Antonescu and to the Romanian Army General Headquarters – *Marele Cartier General*) in the carrying out of the Iași pogrom and that they had both participated directly in the organisation and carrying out of deportations of Jews from Bessarabia, Bukovina and Moldova.

11. By a judgment of 15 August 1953, the Bucharest County Court convicted R.D. and G.P. of war crimes and crimes against humanity on the basis of Law no. 291/1947 (see paragraph 33 below), for having jointly: 1) ill-treated prisoners; 2) cooperated with the Special Intelligence Service in the enactment of the pogrom that had taken place in Iași in June 1941; and 3) participated directly in the organisation and carrying out of deportations of Jews from Bessarabia and Bukovina. The reasoning of the judgment, delivered by a panel of the criminal section of the court – composed of one judge and two popular assessors (laymen elected by the local authorities for a four-year term) and with the participation of the prosecutor – was based on witness testimony and documents signed by the two accused, found in the file prepared by the commission attached to the People's Tribunals (see paragraph 8 above). These documents included correspondence sent by R.D. to his subordinate, G.P. (who was located in Iași) discussing practical arrangements in view of the deportation of Jews from this town, correspondence from the Second Section of the General Staff to G.P. who was overseeing the deportation of Jews on the field in various areas of Bessarabia, Bukovina (including the city of Cernăuți) and Moldova, and other correspondence in which G.P. was sending his superiors intelligence gathered in the field (for example, information about security breaches in the Podul Iloaiei ghetto). R.D. argued in his own defence that the measures taken against Jews in Iași had been ordered and executed directly by the German troops and that he had had no involvement. G.P. argued that he had merely executed orders that he received from R.D. to find out how the transport of Jews was being carried out. After summarising and evaluating the evidence both in favour and against the accused, the court found that all the facts, as described in the indictment (see paragraph 10 above), had been fully proved. R.D. and G.P. were sentenced to fifteen and ten years of imprisonment with hard labour, respectively, and total confiscation of assets. The judgment became final on 26 May 1954 when an appeal lodged by the defendants was dismissed by the Supreme Court of Justice.

12. In 1955 Law no. 291/1947 was repealed by a parliamentary decree that put an end to the prosecution and trial of war criminals ("Decree no. 421/1955", see paragraph 34 below). Pursuant to this decree, the remaining unserved sentences received by people convicted on the basis of the above-mentioned Law, including R.D. and G.P., were pardoned. As a result, R.D. and G.P. were released from prison. G.P. died soon after.

13. In 1956 the President of the Supreme Court lodged of his own motion an extraordinary appeal (*recurs în supraveghere*) against both judgments of 1953 and 1954 (see paragraph 11 above) in so far as they concerned R.D. By a preliminary judgment of 5 March 1956, the appeal was allowed and the two judgments were quashed – but only in relation to R.D., given that G.P. had died in the meantime. As a result, the case was sent for

retrial in order to clarify the legal classification of the facts and the jurisdiction of the military courts to hear cases concerning war crimes.

14. By a judgment of 24 January 1957, the Bucharest Military County Court undertook a fresh examination of the case and changed the legal classification of the acts committed by R.D. into the crime of engaging in intense activity against the working class and the revolutionary movement (*activitate intensă contra clasei muncitoare și a mișcării revoluționare*) under Article 193[1] § 1 of the Criminal Code (see paragraph 35 below) because the people who had been arrested and placed in ghettos and concentration camps at his orders had been members of the working class. R.D. was found guilty of this crime and he was sentenced to five years' imprisonment and total confiscation of assets. The sentence was deemed to fall under the terms of the pardon decree (see paragraph 12 above). R.D. stated in his own defence that he had had no knowledge or involvement in any actions against the Jewish population. The judgment was adopted by a panel composed of one military judge and two popular assessors (see paragraph 11 above) – of which one was a member of the military. A military prosecutor was present throughout the proceedings. The reasoning that the court gave for its decision was as follows:

> "Even before the start of the war, the defendant prepared a series of measures meant to ensure the safety of the rear of the fighting troops (*siguranța spatelui trupelor*). Once the war started the defendant, R.D., in cooperation with the SSI [Special Intelligence Service], ordered the arrest of people acting in the revolutionary movement, the Communist Party. To this end, he contributed to the creation of ghettos (*ghetouri*) and concentration camps (*lagăre*) for Jews and to the placement of communists in concentration camps.
>
> The defendant had ordered his subordinates to investigate suspects and to clean the rear of the fighting troops of elements that were considered dangerous to the safety of the troops.
>
> The defendant has personally ordered the placement in concentration camps of a large number of Jews ...
>
> The defendant admitted only partially to the accusations against him, but all of them are proved by statements from witnesses ... and by the documents in the file ...
>
> It could not be established with certainty whether the defendant R.D. had made any contribution in the organisation of the massacres of Jews in Iași, these [massacres] having been a diversion created by the German and Romanian authorities in order to distract attention from the defeats that they had taken on the anti-Soviet front. ...
>
> The tribunal finds it proven that the defendant R.D. was the head of the Second Section of Intelligence and Counterintelligence of the [Romanian Army] General Staff and subsequently of the first echelon of the Romanian Army General Headquarters from February 1941 onwards.
>
> It also finds it proven that the defendant, together with other State authorities (the Special Intelligence Service), took a series of measures against communists and those considered a danger to the safety of the troops and the advancement of the war. Thus, between June 1940 and June 1941 he ordered the placement in concentration camps of

a high number of Jews and the investigation and indictment of people suspected of having communist or Soviet affiliations between June 1940 and June 1941. ...”

II. RETRIALS AFTER THE FALL OF THE COMMUNIST REGIME

15. After the fall of the Communist regime, between 1990 and 2000, several extraordinary appeals (*recurs în anulare* – see paragraph 37 below) were lodged by the Prosecutor General seeking the acquittal of those convicted of war crimes (see paragraph 30 below).

16. Within this context, on 30 March 1998 and 10 May 1999, following extraordinary appeals lodged by the Prosecutor General (who argued that the acts for which R.D. and G.P. had been convicted had not contained the elements of a crime since the two men had no involvement in any measures against the Jewish population), the Supreme Court of Justice quashed the judgments of 1953, 1954 (see paragraph 11 above) and 1957 (see paragraph 14 above), reopened the proceedings and acquitted R.D. and G.P. On the basis of the same documents and witness statements as those previously examined by the courts, the court found in a judgment of 30 March 1998 that – as regards the deportation of Jews – R.D. had merely complied with orders received from higher-ranking officials of the Romanian Army General Headquarters by forwarding those orders in the field. The court deemed that those orders had been based on lists (of names) compiled by the Romanian Special Intelligence Service and by the gendarmerie and that it had been German troops who had actually carried them out. In respect of a separate appeal lodged by the Prosecutor General at the request of G.P.’s successors, the same court found on 10 May 1999 that the Second Section of the Romanian Army General Staff – in which G.P. had exercised his functions – had had no involvement either in the Iași massacre or in the deportations and placement of Jews in ghettos (a witness statement mentioning that those activities had been organised and carried out solely by German troops). Accordingly, in both cases – noting the absence of any evidence showing their direct involvement – the court considered that the two defendants had simply carried out their military duties and that their actions could not be considered crimes under the legal framework applicable at the time of their conviction. The confiscation measures were lifted in respect of both defendants.

17. According to the wording of the above-mentioned judgments, the proceedings were held in public in the presence of *ex officio* legal representatives on behalf of the defendants who were both deceased and of the prosecutor. It can be seen from the documents in the file that the case files of the proceedings of 1953 and 1957 were kept by the secret services and were sent to the court for the purpose of the retrials. The Government submitted that, following the conclusion of the two extraordinary appeals above, the respective judicial case files were placed in the archives of the

secret services. In 2004 the same case files were sent for storage at the CNSAS (the National Council for the Study of the Archives of the *Securitate* – the Communist-era secret police).

III. THE REPORT OF THE INTERNATIONAL COMMISSION ON THE HOLOCAUST IN ROMANIA

18. On 22 October 2003, at the initiative of the President of Romania – in the first official admission after the end of the Communist regime that the Romanian authorities had played a role in the Holocaust – the International Commission on the Holocaust in Romania ("the ICHR") was established as an independent research body conceived with the aim of researching the facts and determining the truth about the Holocaust in Romania during the Second World War. In addition to its chairman, Holocaust survivor Elie Wiesel, the Commission included experts in history and social sciences, survivors of the Holocaust, and representatives of national and international Jewish and Roma non-governmental organisations and of the Office of the Romanian President.

19. The final report of the Commission ("the ICHR report") – an extensive document of 416 pages – was published in November 2004, both online and in print. Its findings were based on the study of historic documents and on testimony gathered by the members of the Commission. At the launching of the report the President of Romania made a public statement recognising, for the first time at such high level, that the Holocaust had been made possible in Romania by the complicity of high-rank State authorities such as the secret services, the army and the police and of those who had implemented – sometimes to an excessive degree – the orders of Prime Minister Antonescu. The President also noted that during the Romanian Holocaust thousands of Jews had been killed in Romania and around 120,000 had been deported to Transnistria, of whom several tens of thousands had died; moreover, legislation had been adopted excluding Jews from schools and universities, bar associations, theatres or the army, Jewish property had been confiscated and Jewish men subjected to forced labor.

20. The ICHR report mentioned that the pogrom against the Jews of Iași (see paragraph 5 *in fine* above) was carried out under express orders from Prime Minister Antonescu that the city be cleansed of all Jews. The Second Section of the Romanian Army General Staff and the Special Intelligence Service laid the groundwork for the Iași pogrom and supplied the pretext for punishing the city's Jewish population, while German army units stationed in the city assisted the Romanian authorities.

21. Under the heading "Contemporary conclusions and recommendations" the ICHR report mentioned:

Reversing the rehabilitation of war criminals
(*Anularea reabilitării criminalilor de război*)

"Since the fall of communism in Romania, we have witnessed the acquittal of various war criminals who had been directly responsible for the crimes of the Holocaust. These include, for example, the well-known war criminals [R.D.] and [G.P.], whose acquittal was recently ordered by the Supreme Court. The government of Romania must take every measure available to it to annul their acquittal and, in any case, should forcefully, unequivocally, and publicly condemn these war criminals (and others like them) for their crimes.

...

The Commission concludes, along with the vast majority of bona fide researchers in this field, that the Romanian authorities bear the main responsibility for both planning, as well as for the implementation of the Holocaust. This includes deportation to Transnistria and the systematic extermination of the majority of Jews from Bessarabia and Bucovina, as well as from other areas of Romania; mass killing of Romanian and local Jews in Transnistria; the massive executions of the Jews in the Iași pogrom; the systematic discrimination and degradation to which they were all subjected during the Antonescu administration, including the expropriation of goods, dismissal from jobs, forced evacuation from rural areas and concentration in county capitals and in camps, as well as the massive use of male Jews to forced labor under the same administration. The Jews were subjected to degradation for the simple reason that they were Jews, they lost the protection of the state and became its victims.

...

When Romania made alliance with Nazi Germany in the war against the Jews, the Antonescu regime started from already existent pre-Nazi Romanian anti-Semitic and fascist ideologies in order to initiate and implement the Holocaust in Romania.

The Romanian State used the army, gendarmes, policemen, civil servants, journalists, writers, students, mayors, public and private institutions, as well as industrial and commercial enterprises with the purpose of diminishing and destroying the Jews under its administration. The orders were issued in Bucharest, not in Berlin.

When the Antonescu government decided to stop the extermination of the Jews, it ceased. The change in policy towards the Jews began in October 1942, before the defeat at Stalingrad, and the deportations ended definitively in March-April 1943. They were followed by negotiations about the repatriation of the deported Jews that helped survive at least 292,000 Romanian Jews.

Of all the allies of Nazi Germany, Romania bears the responsibility for the greatest contribution to the extermination of the Jews, outside of Germany itself. The massacres committed in Iași, Odessa, Bogdanovca, Dumanovca and Peciora are among the most hideous crimes committed against the Jews during the Holocaust. Romania committed genocide against Jews, and the survival of some Jews in certain parts of the country does not change this reality.

Seen from the perspective of the facts summarized in this report of the Commission, the efforts to rehabilitate those who committed these crimes are all the more aberrant and worrying. Nowhere in Europe is a person who committed mass crimes like Ion Antonescu, Hitler's loyal ally until the last moment, publicly honored as a national hero. Official communist historiography has often tried to mitigate or deny outright the responsibility for the murder of the Jews, throwing the entire blame on the Germans and downgraded elements of the Romanian society.

> In post-communist Romania, political and cultural elites often prefer to ignore and sometimes encourage propaganda pro-Antonescu, a fact that opened the door to the explicit denial of the Holocaust and the rehabilitation of some convicted war criminals. Few voices rose publicly against this trend."

IV. THE CONFERENCE HELD BY THE INSHR-EW

22. In 2005, by government decision, the "Elie Wiesel" National Institute for the Study of the Holocaust in Romania ("the INSHR-EW") was created as a public institution functioning under the Ministry of Culture and Religious Cults; financed from the State budget, the main object of its activities was the identification, collection, archiving and publication of documents related to the Holocaust, the solving of scientific problems, and the development and implementation of educational programmes regarding this historical phenomenon.

23. On 26 January 2016 the INSHR-EW held a public conference entitled "Crimes of war in times of peace: the acquittal of Holocaust perpetrators by the Romanian post-communist judiciary". On this occasion, extensive research conducted in the archives of the CNSAS (see paragraph 17 above) was presented by a historian (an editor at *Sfera Politicii* magazine – see paragraph 67 below), who supported his presentation with copies of the judgments of 30 March 1998 and 10 May 1999 (see paragraph 16 above). The applicants attended the conference, having been invited in their capacity as Holocaust survivors by the INSHR-EW.

V. ATTEMPTS BY THE APPLICANTS TO OBTAIN COPIES OF THE AQCUITTAL FILES

24. On 18 February 2016, the applicants, represented by the CLR (see paragraph 2 above), lodged with the High Court of Cassation and Justice (the former Supreme Court of Justice – hereinafter "the High Court") a request for copies of the files concerning the trials that had ended with the judgments of 30 March 1998 and 10 May 1999 (see paragraph 16 above). In the event that the files were not held by the High Court, the applicants requested to be informed where they had been archived. On 9 and 22 March 2016 the High Court replied that the files in question had been sent to two military units in Bucharest and that no copies or other information were available.

25. In the meantime, on 3 March 2016 the applicants, again represented by the CLR, lodged a request with the CNSAS (see paragraph 17 above) to be granted access to and copies of the above-mentioned files. In a written reply of 29 March 2016, which followed a telephone conversation with the applicants' representative on 17 March 2016, the CNSAS noted that the relevant legal framework provided for only two possible scenarios under

which the applicants could be granted such access: (i) on the basis of Government Emergency Ordinance no. 24/2008 on access to personal files and the exposure of the *Securitate* (see paragraph 39 below) in the event that the requested files contained information gathered by the former *Securitate* regarding the applicants or (ii) pursuant to Law no. 221/2009 on politically-driven convictions and assimilated administrative measures (see paragraph 41 below) in case the requested files consisted of judgments, indictments, prison files, or reports concerning the applicants or the confiscation of their assets. The CNSAS advised that if the applicants' situation did not fall under the above two scenarios, they could seek to be accredited as researchers.

26. On 31 March 2016, the applicants' representative was informed by a CNSAS representative that she should address her request to the INSHR-EW, which had obtained a copy of the files in question for research purposes.

27. On 15 May 2016 the applicants' representative brought a judicial action seeking that the High Court be ordered to grant them access to the files or to provide them with information regarding the location of these files in order to be able to prepare their application to the Court. They argued that the refusal to grant them access to the files in question amounted to a breach of their rights, as guaranteed by Article 34 of the Convention. Moreover, the information given about the military units to where the files had been sent (see paragraph 24 above) was not sufficient to allow them to identify those units. They based their action on the provisions of the Civil Code governing the compulsory enforcement of obligations, Articles 20 § 2 and 21 of the Constitution (which provided, respectively, that international conventions took precedence over national law and stipulated that all citizens had the right of access to the courts) and on Article 34 of the Convention arguing that, in the absence of access to the files in question, their right to petition the Court would be breached.

28. By a final judgment of 14 March 2018, the Bucharest Court of Appeal dismissed the action as unfounded, holding that the reply of the High Court to the applicants' request (see paragraph 24 above) had been in accordance with the law.

29. In the meantime, following a request lodged by the applicants with the INSHR-EW, that they be permitted to consult the files in question and that copies of those files be delivered to them, on 23 May 2016 electronic copies of the files at issue were delivered to the applicants' representative by the INSHR-EW.

30. On 23 September 2019 the CLR lodged a request for information with the prosecutor's office attached to the High Court in order to find out how many extraordinary appeals had been lodged by the Prosecutor General seeking the acquittal of those convicted for war crimes on the basis of Law no. 312/1945 (see paragraph 33 below). They also requested copies of

the judgments delivered in respect of these appeals. In its reply of 1 October 2019, the prosecutor's office noted three extraordinary appeals that had been allowed by the High Court: one appeal concerning a group of journalists – allowed in 1995; one concerning two leaders of a historical political party that had been in opposition to the Communist Party – allowed in 1998; and one concerning the Minister of Finance of the Antonescu Government – allowed in 2000. The applicants' representative was informed that copies of judgments adopted in respect of extraordinary appeals could be obtained only from the High Court.

31. On 23 September 2019 the CLR lodged a request with the High Court that it be provided with a copy of the judgment adopted in respect of a request for the revision of the conviction of A.G., the governor of Transnistria between 1941 and 1944, who had been convicted of war crimes on the basis of Law no. 312/1945 in the same proceedings as those concerning former Prime Minister Antonescu (see paragraph 8 above). The request was granted, and a copy of the judgment was delivered to the applicants. In that judgment, adopted on 6 May 2008, the High Court had rejected an application for a revision of the conviction judgment lodged by A.G.'s relatives, deeming that the facts on which the application had been based were not new and did not change the factual situation as established by the conviction judgment, so as to call for its revision.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LEGAL FRAMEWORK AND PRACTICE

A. Relevant criminal law

32. On 12 September 1944 an armistice agreement was signed between the Governments of the United States of America, the United Kingdom, and the Union of Soviet Socialist Republics (acting in the interest of the United Nations) and the Government of Romania; the agreement recognised Romania's defeat in the Second World War and its engagement to continue the war on the side of the Allied Powers against Germany and Hungary. Under this agreement Romania undertook to end all relations with Germany and to enter the war on the side of the Allied Powers against Germany. It also agreed to release all persons held in confinement on account of their racial origin, to dissolve all fascist organisations and to repeal all discriminatory legislation and restrictions imposed thereunder. Furthermore, Romania undertook to apprehend and send to trial all persons accused of war crimes.

33. In the enforcement of the above agreement, Law no. 312/1945 on the prosecution and sanctioning of those guilty of bringing the country to disaster and of war crimes ("Law no. 312/1945") provided for the creation

of People's Tribunals and set forth the rules of procedure regarding the prosecution and trial of war criminals. It also provided for the death penalty for those guilty of war crimes and mentioned that their prosecution and trial could be pursued only until 1 September 1945. On 15 August 1947, following an analysis of the activity of the People's Tribunals, the new Law no. 291/1947 on the prosecution and sanctioning of those guilty of war crimes or crimes against peace and humanity ("Law no. 291/1947") was enacted. Its provisions were mostly similar with those of Law no. 312/1945, except for the abrogation of the death penalty for such crimes. Law no. 291/1947 was subsequently amended by Decree no. 207/1948, the most important change being the annulment of the statutory time-limits.

34. Decree no. 421 of 24 September 1955 repealed Law no. 291/1947 and annulled the remaining unserved parts of the sentences of those convicted of war crimes on the basis of Laws nos. 312/1945 and 291/1947.

35. Article 193^1 was inserted into the Criminal Code in 1954 or 1955, was never published and was applied retroactively. According to the Government's submissions, it provided, in the relevant part, as follows:

Article 193^1 – Activity against the working class

> "1. Intense activity against the working class or the revolutionary movement exerted [by a person] in a position of responsibility in the State apparatus or in a secret service, during the bourgeois regime – shall be punished by life imprisonment with hard labour *(inchisoare grea)* and total confiscation of property."

36. Since 1960 the Criminal Code has included provisions punishing crimes against peace and humanity.

37. Under Articles 409-413 of the Code of Criminal Procedure, as in force at the relevant time, an extraordinary appeal (*recurs în anulare*) could be lodged by the Prosecutor General of its own motion or at the request of the Minister of Justice against any final judgment at any point in time. The court examining the appeal had the power to decide whether or not to summon the parties. These provisions, which had first been introduced during the dictatorship of King Charles II and had been maintained during the Communist regime, were finally repealed in December 2004.

B. Provisions concerning access to files held by the CNSAS

38. According to its statute, as adopted by decision no. 2 of 18 December 2008, the CNSAS (see paragraph 17 above) is a public institution that administers and stores the archives of the *Securitate*. Access to the archives may be gained in the manner described below.

39. By way of access to one's personal file: under Article 1 of Government Emergency Ordinance no. 24/2008 on access to one's personal file and the disclosure [*deconspirarea* – that is to say the exposure to public scrutiny] of the *Securitate*, any Romanian citizen or foreign citizen who

after 1945 held Romanian citizenship, and any citizen of a member State of the North Atlantic Treaty Organization or of a member State of the European Union, has the right of access to his or her own *Securitate* file, as well as other documents and information concerning himself/herself stored at the CNSAS.

40. By way of a request to be allowed to undertake research, pursuant to Article 39 of the regulations governing the functioning and the organisation of the CNSAS, which reads as follows in its relevant parts:

> "(1) In order to establish the historical truth about the Communist dictatorship, the CNSAS ... issues accreditation to researchers [both] outside and within the CNSAS on the basis of a request that states the research topic, the nature of the research (whether historical, political, psychological, or sociological) and its end result (book, article, conference) and provides [such researchers] with documents and information on the structure, methods and activities of the *Securitate*.
>
> (2) Accredited researchers may [acquire] access to files/documents from the archive of the CNSAS on the basis of [lodging] a request. Its content must mention the nature of the research (historical, political, psychological, or sociological study), as well as the [purpose] (for example, article, study, bachelor's thesis, doctoral thesis)."

41. And lastly, by way of requests lodged by courts within the context of proceedings conducted on the basis of Article 4 of Law no. 221/2009 on politically driven convictions and assimilated administrative measures ("Law no. 221/2009"), as in force at the relevant time: on the basis of those provisions, those who had been criminally convicted between 6 March 1945 and 22 December 1989 for certain crimes could request the courts to establish the political nature of their conviction. Within the context of such proceedings the courts were authorised to request from the CNSAS any documents necessary for such a trial.

C. Legal framework concerning politically driven convictions

42. Pursuant to Law no. 221/2009 (see paragraph 41 above), all final convictions adopted between 6 March 1945 and 22 December 1989 for any crimes committed with the purpose to oppose the totalitarian regime before or after 6 March 1945 were considered politically motivated convictions. The law further provided that the political character of these convictions was to be established by the courts and, if established, the effects of the conviction judgments were to be removed. As of 2009, under Article 7 of the same law, it is no longer possible for people convicted of certain crimes – namely, (i) crimes against humanity, (ii) carrying out activities promoting racist and xenophobic ideas, concepts or doctrines, (iii) promoting hatred or violence motivated by ethnic, racial, religious reasons, or by the alleged superiority of some races and inferiority of others, (iv) promoting anti-Semitism, or (v) inciting xenophobia – to seek the removal of the effects of their sentences, as such convictions are not deemed to have been politically motivated.

D. Legal framework and domestic practice concerning the prohibition of fascist, racist or xenophobic organisations and symbols and of the glorification of persons guilty of crimes against peace and humanity

43. On 28 March 2002 entered into force Government Emergency Ordinance no. 31/2002 on the prohibition of fascist, racist or xenophobic organisations and symbols and of the glorification of persons guilty of crimes against peace and humanity. In the form adopted at the time in question, it provided for the first time that the act of promoting, in public, the glorification of persons guilty of crimes against peace and humanity, and the act of promoting (in public or in any other manner) fascist, racist or xenophobic ideas were crimes punishable by imprisonment of between six months and five years and by the deprivation of certain rights (Article 5). It also provided for the first time a punishment of imprisonment of between six months and five years and the deprivation of certain rights for the crime of contesting or denying, in public, the Holocaust or the effects thereof (Article 6). The Romanian Parliament approved the ordinance by adopting Law no. 107/2006 (with certain modifications, such as changing the definition of the Holocaust to "the systematic persecution (supported by the State) and the annihilation of European Jews by Nazi Germany and its allies and collaborators during 1933-1945" and inserting a reference to the deportation and annihilation of Roma people during the Second World War). Subsequently, Law no. 217/2015 changed the definition of the Holocaust to "the systematic persecution and annihilation of Jews and Romani people, supported by the authorities and institutions of the Romanian State within the territories that it administered between 1940 and 1944". The first and only criminal conviction on the basis of these provisions occurred in 2021, when a former colonel of the Romanian secret services was sentenced to a suspended prison sentence of one year and one month for three articles that he had written between 2013 and 2017 in which he had denied the existence of the Holocaust. On 31 March 2022 the Bucharest Court of Appeal allowed an appeal lodged by the defendant and quashed the sentence, ruling that it was not necessary and that a warning not to commit further crimes of the same nature was sufficient.

E. Law no. 544/2001 on access to public information

44. Under Law no. 544/2001 on access to public information ("Law no. 544/2001"), any person may request access to information concerning the activity of a public authority and to personal data pertaining to him or her that is held by public authorities. Where such a request is refused, that person may (should he or she be able to prove a legitimate interest) lodge a request that the administrative courts order the respective

public authority to grant that person access to the information in question. Under Law no. 544/2001, public institutions are obliged to make available to the public a list of the public information falling within the scope of that law which they hold. On the website of the CNSAS (see paragraph 17 above), the list of such public information is as follows: agendas of CNSAS board meetings; final decisions adopted by the CNSAS or the courts on requests for access to files; declarations of wealth and interests made by CNSAS employees; employment opportunities and staff movements; information about budget and expenses; and the agenda of the president of the CNSAS.

F. Other relevant legal provisions

45. The principle that special legal provisions have priority over general legal provisions is set forth by Article 15 of Law no. 24/2000 on the legislative technique for the adoption of legislation. The same principle was reiterated by the High Court of Cassation and Justice in an interpretative decision no. 28 of 10 May 2021. The court held that, according to the principles of law, the general law is applied in respect of any matter and in respect of all cases, except in respect of cases where the legislature has established a special and exceptional regime, adopting special regulations that have priority over common law. The special nature of such regulations derives from the very purpose of their adoption – that is to say the legislature intended to depart from the general norm by means of extraordinary provisions that are to be strictly interpreted and applied.

II. INTERNATIONAL LAW

A. International material concerning anti-Semitism and Holocaust denial

46. In its second report on Romania adopted on 22 June 2001 the European Commission against Racism and Intolerance ("ECRI"), noted that certain sections of the press in Romania still published articles with anti-Semitic overtones and that although legislation existed to combat the phenomenon of hate speech and to regulate the media in that field, such legislation had rarely if ever been applied. The report also noted that legislative provisions already in place to combat manifestations of xenophobia (such as incitement to hatred, racist political discourse, discrimination on the part of civil servants or discrimination in other fields of life) had likewise rarely been used. Moreover, anti-Semitic and anti-minority-group rhetoric had been used in the run-up to the parliamentary elections of November 2000, and those elections had seen a worrying rise in votes for an extremist party resulting in an increase in the

Parliamentary representation of that party. In its fourth report on Romania adopted on 19 March 2014, ECRI noted with concern that the Holocaust continued to be denied in public, regularly, by eminent figures (such as senators and university professors) without any legal action being taken. In addition, ECRI reported that in 2010 Romania's National Bank issued a commemorative coin depicting a religious leader and former Prime Minister between 1938-1939, under whose government approximately 225,000 Jews were stripped of their Romanian citizenship. When urged to withdraw the coin by many organisations, the bank refused, supported by the Orthodox Church. In the same period, during a talk show on national television, a well-known journalist praised and defined the founder of the Romanian historic extreme-right movement (see paragraph 5 above) as "the most honest and honourable Romanian politician from the interwar period". ECRI considered that this statement with racist and antisemitic implications and its sanction (a reprimand of the television channel) was an example of fostering the cult of persons who have committed criminal offences against peace and humanity or who have promoted fascist, racist or xenophobic ideas by using propaganda. In its fifth report on Romania adopted on 3 April 2019, ECRI continued to report that inflammatory discourse against the Jewish community was present in Romania. It appeared mostly on anonymous platforms, nationalist websites or social networks and mainly involved displays of a classic racist, antisemitic nature or of conspiracy theories, including materials glorifying the Romanian historic extreme-right movement. Similarly, a book openly denying the Holocaust was launched in 2016 at a well-known bookstore in Bucharest. ECRI expressed its regret that the authorities did not intervene when another similar book was launched in May 2017, despite the prosecutor's and mayor's offices being informed of the event before it took place.

47. The International Holocaust Remembrance Alliance ("IHRA") is an international organisation created in 1998 that unites governments and experts with the purpose of strengthening, advancing and promoting Holocaust education, research and remembrance. The European Union ("EU") is a permanent international partner, alongside twenty-five EU member States, including Romania, that have become IHRA member countries. The working definitions of anti-Semitism or of Holocaust denial drafted by the IHRA are accepted by various international and European bodies and organisations, including the EU institutions. The IHRA member countries adopted the working definition of Holocaust denial and distortion, by consensus, at the IHRA's Plenary meeting in Toronto on 10 October 2013. This working definition, developed by IHRA experts in cooperation with the governmental representatives for use as a practical working tool, reads as follows in its relevant parts:

> "Holocaust denial is discourse and propaganda that deny the historical reality and the extent of the extermination of the Jews by the Nazis and their accomplices during World War II, known as the Holocaust or the Shoah. Holocaust denial refers specifically to any attempt to claim that the Holocaust/Shoah did not take place. ...
>
> Holocaust denial may include publicly denying or calling into doubt the use of principal mechanisms of destruction (such as gas chambers, mass shooting, starvation and torture) or the intentionality of the genocide of the Jewish people. ...
>
> Holocaust denial in its various forms is an expression of anti-Semitism. The attempt to deny the genocide of the Jews is an effort to exonerate National Socialism and anti-Semitism from guilt or responsibility in the genocide of the Jewish people. ..."

Distortion of the Holocaust refers, *inter alia*, to:

> "Intentional efforts to excuse or minimize the impact of the Holocaust or its principal elements, including collaborators and allies of Nazi Germany;
>
> ...
>
> Attempts to blur the responsibility for the establishment of concentration and death camps devised and operated by Nazi Germany by putting blame on other nations or ethnic groups."

According to the IHRA, contemporary examples of anti-Semitism in public life include also:

> "Denying the fact, scope, mechanisms (e.g. gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust)."

48. On 6 December 2018, the Council of the European Union unanimously adopted a declaration on the fight against anti-Semitism and the development of a common security approach to better protecting Jewish communities and institutions in Europe. In the declaration, the Council of the European Union "invites the Member States to adopt and implement a holistic strategy to prevent and fight all forms of antisemitism as part of their strategies on preventing racism, xenophobia, radicalisation and violent extremism." In December 2020, the Council of the European Union reaffirmed the commitment made in the 2018 Declaration.

49. The European Union Fundamental Rights Agency 2018 Survey on discrimination, hate crime and anti-Semitism in the EU member states found that nine out of 10 European Jews felt that anti-Semitism had increased over the past five years; 34% avoided visiting Jewish events or sites because they did not feel safe; 38% had considered emigrating because they did not feel safe as Jews in Europe; while 70% considered that efforts by member States to combat anti-Semitism were not effective.

50. In a resolution adopted by the United Nations ("UN") General Assembly in January 2022, Holocaust denial was condemned without any reservation and all UN member States were urged to condemn it, in line with previous UN resolutions of 2005 and 2007. The resolution provides a

definition of Holocaust denial and distortion that is based on the IHRA working definition (see paragraph 47 above).

B. Relevant international material on the punishment of war crimes and crimes against humanity

51. The relevant part of Article 6 of the Charter of the International Military Tribunal (1945) reads as follows:

> "The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
>
> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> ...
>
> (b) *War crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, ...;
>
> (c) *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

52. Resolution 95 (I) of the UN General Assembly on the Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal (1946) reads as follows:

> *"The General Assembly,*
>
> *Recognize* the obligation laid upon it by Article 13, paragraph 1, sub-paragraph (a), of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;
>
> *Takes note* of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;
>
> *Therefore,*
>
> *Affirms* the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal;

Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal."

53. In 1950 the International Law Commission adopted the following seven Nuremberg Principles of International Law recognised in the Charter and the Judgment of the Nuremberg Tribunal:

"Principle I: Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.

Principle II: The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III: The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV: The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V: Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI: The crimes hereinafter set out are punishable as crimes under international law:

...

(b) *War crimes*: Violations of the laws or customs of war which include, but are not limited to, murder, ill treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) *Crimes against humanity*: Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII: Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law."

54. The Geneva Conventions of 1949 for the Protection of Victims of Armed Conflicts legally defined what constitutes grave breaches of international humanitarian law such as wilful killing, torture or inhuman treatment, unlawful deportation or transfer, and established that these grave breaches were regarded as war crimes and that States could exercise universal jurisdiction over war criminals. The relevant provisions may be found in *Marguš v. Croatia* ([GC], no. 4455/10, §§ 36-41, ECHR 2014

(extracts)). Romania ratified the Conventions in 1954 and became a member of the UN on 14 December 1955.

55. The UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted on 26 November 1968 and ratified by Romania on 29 July 1969, provides that no statutory limitation shall apply to war crimes and crimes against humanity as defined in the Charter of the International Military Tribunal of Nuremberg.

56. The "Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity" adopted by the UN General Assembly resolution 3074 (XXVIII) of 3 December 1973 state**,** *inter alia*, as follows:

> "8. States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity."

57. The Statute of the International Criminal Court ("the Rome Statute") adopted by the UN Diplomatic Conference of Plenipotentiaries on 17 July 1998, stipulates in its preamble "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and provides that the International Criminal Court – complementary to national jurisdiction – has jurisdiction in respect of the following crimes: genocide, crimes against humanity, war crimes and the crime of aggression. The Rome Statute was ratified by Romania on 11 April 2002. Article 7 § 1 of the Rome Statute reads as follows in its relevant parts:

> "For the purpose of this Statute, crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
>
> (b) Extermination;
>
> (c) Enslavement;
>
> (d) Deportation or forcible transfer of population;
>
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
>
> (f) Torture;
>
> ...
>
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; ..."

58. In 2005 the International Committee of the Red Cross ("ICRC") presented to the 26th International Conference of the Red Cross and Red Crescent a Study on Customary International Humanitarian Law (J.-M. Henckaerts and L. Doswald-Beck (eds.), Customary International Humanitarian Law, 2 Volumes, Cambridge University Press & ICRC, 2005). This Study contains a list of customary rules of international humanitarian law; the relevant rules read as follows:

Rule 158 – Prosecution of war crimes

"States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects."

C. Relevant international material on the defence of pursuing an order of a superior

59. According to ICRC's Study on Customary International Humanitarian Law (see paragraph 58 above), the rule that the fact that an order was issued by a superior does not constitute a defence was first set forth by the Charters of the International Military Tribunals at Nuremberg and at Tokyo. It was restated by the Rome Statute (see paragraph 57 above), by the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, by the Statute of the Special Court for Sierra Leone, and by UNTAET Regulation No. 2000/15 for East Timor. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (see paragraph 62 below) and the Inter-American Convention on the Forced Disappearance of Persons also state that the fact that orders were issued by a superior cannot constitute a defence. Several military manuals and the legislation of many States (for example, Germany, Switzerland, the United States, Luxembourg, Netherlands, Poland and Slovenia) provide that the fact that an act was ordered by a superior does not amount to a defence if the perpetrator knew or should have known that the execution of the ordered act was unlawful. Other military manuals and national legislation exclude this defence in situations where the act in question was manifestly unlawful without mentioning a particular mental element (for example, France, Spain, Albania, Israel and Canada).

60. More specifically, the ICRC's Study on Customary International Humanitarian Law lays down the following rules:

Rule 154 – Obedience to superior orders

"Every combatant has a duty to disobey a manifestly unlawful order."

Rule 155 – Defence of Superior Orders

"Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act ordered."

61. The Charter of the International Military Tribunal for Germany (Nuremberg) concluded between the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics on 8 August 1945, acting in the interests of all the United Nations, provides as follows:

Article 8

"The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

62. Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly on 10 December 1984, stipulates that "An order from a superior officer or a public authority may not be invoked as a justification of torture". Romania acceded to this Convention on 18 December 1990 and has been bound by it since then.

63. The Rome Statute (see paragraph 57 above) also includes the following provisions:

Article 33

"1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."

D. International material on victims of crime

64. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly as resolution 40/34 of 29 November 1985 defines victims of crime as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of

criminal laws operative within member States, including those laws proscribing criminal abuse of power". It provides for the victims' right to access to justice and fair treatment; the relevant parts of the Declaration read as follows:

> "4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.
>
> 5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.
>
> 6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
>
> (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;
>
> (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
>
> (c) Providing proper assistance to victims throughout the legal process; ..."

III. OTHER RELEVANT MATERIAL

65. Relevant international law and practice concerning the jurisdiction *ratione temporis* of international courts is described in *Blečić v. Croatia* ([GC], no. 59532/00, §§ 45-48, ECHR 2006-III).

66. In an article published in *Dilema Veche* (a Romanian national weekly magazine that covers culture, social topics, and politics) on 12 May 2010 entitled "Antonescu's praise and the rehabilitation of war criminals" written by William Totok – a German writer and journalist, and a co-signatory of the ICHR report (see paragraph 19 above) – it is noted that in 1997 the General Prosecutor of Romania publicly announced the reopening of the criminal proceedings in respect of six ministers of the Antonescu government. The trial was cancelled following international protests. However, in 1998 an undersecretary of state in the Antonescu government, T.P.G., was acquitted of war crimes; a year later former Prime Minister I.G. was acquitted (during his term of office the Romanian "racial laws" had been adopted) and in 2000 the Minister of Finance in the Antonescu government was acquitted. The article also stated the following:

> "The coming to power of a Christian-Democratic president and a governing coalition formed mostly by [long-established] parties raised new hopes among those who wished, through a change of power, for the rehabilitation of Antonescu. When asked about the procedure for the rehabilitation of several ministers of the Antonescu government – initiated by the General Prosecutor [of Romania] – President Emil

> Constantinescu declared that certain 'erroneous legal decisions' had been adopted at the time [after the Second World War]. Among those affected by these decisions had also been "great intellectual personalities", such as philosophy professor I.P., who had belonged to the Antonescu government only 'for a short period of time'. The then President Constantinescu was of the opinion that it would not be a question of exonerating those who had been convicted because of 'manifestations of the totalitarian state'. Worried by these ambiguous statements of the president, two American congressmen, Smith and D'Amato, expressed again their opinion ... in a letter addressed to Constantinescu, drawing attention to the fact that the rehabilitation would render doubtful Romania's efforts to achieve integration in the European and Atlantic structures. The letter caused a wave of negative reactions from some government politicians and some intellectuals. In the end, the Romanian authorities gave in to international pressure: on 22 November 1997, the General Prosecutor informed the public that of the eight dignitaries scheduled for rehabilitation, only the undersecretary of state from the Ministry of Economy would have his sentence reviewed."

67. In its July-October 2014 issue, *Sfera Politicii* (see paragraph 23 above), a political science magazine published at irregular intervals (five issues were published in 2014), published (on page 222) an article commenting on the acquittal of R.D. and its political implications. Full copies of the judgments delivered in respect of R.D. in 1953, 1957 and 1998 were published in the article. According to the description on their website, the scope of the above-mentioned magazine – which is edited by a foundation and has an editorial board of university professors and researchers from Romania and abroad – is to supply specialised analysis and synopses to politicians, students, political science analysts and specialists, representatives of the media, and civil society.

68. On 31 March 2021 the Official Journal of Romania published a statement issued by the Romanian Chamber of Deputies entitled "Statement no. 1/2021 regarding anti-Semitic acts in Romania and attempts to rehabilitate war criminals". The members of the Chamber expressed their concern about the increase in the number of anti-Semitic acts in Romania, about the continued attempts to rehabilitate former Prime Minister Antonescu and other war criminals, and the recent anti-Semitic attack directed against a Jewish theatre, its director and its staff and requested the executive and the judiciary to take all necessary measures to combat anti-Semitism.

69. Since 2010 several common graves have been discovered near the town of Iași. An investigation opened by the Iași military prosecutor's office and finished in 2014 concluded that the bodies found in the graves belonged to Jews who had been killed by the Romanian army in June 1941. The case was closed as the perpetrators had already been convicted of those murders in 1948. A fresh investigation opened in respect of the discovery of another common grave in 2019 is currently pending before the same prosecutor's office.

70. According to information posted on the website of the United States Holocaust Memorial Museum, "many different types of German units

perpetrated mass shootings in the territories seized from Soviet forces. ... In many places, they relied upon the manpower of local auxiliary units working with the SS and police. These auxiliary units were made up of local civilian, military, and police officials. In addition, forces of Romania, Germany's ally, carried out mass shootings of Jews in territory they seized and controlled." Researchers from the Holocaust Memorial Museum have stated that the post-war trials carried out by the Allied powers and by the nations occupied by the Nazi Germany or by those countries that collaborated with the Germans in the persecution of civilian populations, including Jews (such as Czechoslovakia, France, Hungary, Poland, Romania and the Soviet Union), have helped uncover much of the early knowledge of the Nazi crimes and set an important legal precedent leading to widespread agreement that States have a duty to protect civilians from atrocities and to punish those who commit them.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3 AND 14 OF THE CONVENTION

71. Relying on Article 3 of the Convention taken alone and in conjunction with Article 14, the applicants complained that the proceedings in respect of the revision of the convictions for war crimes and participation in the Holocaust of R.D. and G.P. and the failure to inform them of those proceedings had breached their right – as victims of the Holocaust – to an effective investigation into acts of ethnically motivated inhuman or degrading treatment committed against them.

The relevant provisions read as follows:

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] 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."

A. The parties' submissions

1. The Government

72. The Government raised several preliminary objections. They argued that the Court lacked jurisdiction *ratione temporis* to examine the present

complaint, that the applicants lacked victim status and they had not complied with the six-month time-limit.

(a) Objection of lack of jurisdiction *ratione temporis*

73. Firstly, the Government referred to the Court's case-law when determining the *ratione temporis* applicability of the procedural obligation to conduct an effective investigation arising out of Articles 2 and 3 of the Convention. More specifically, they referred to the principles set forth in the case of *Šilih v. Slovenia* ([GC], no. 71463/01, §§ 159-63, 9 April 2009) and subsequently applied in cases brought against Romania in which the events of December 1989 had been at issue (see, for example, *Agache and Others v. Romania*, no. 2712/02, §§ 70-73, 20 October 2009), where the Court considered that, in order for this procedural obligation to be applicable, it had to be established that a significant proportion of the procedural steps had been or ought to have been implemented following ratification of the Convention by the country concerned and that the "genuine connection" test should be passed. The Government further quoted the case of *Janowiec and Others v. Russia* ([GC], nos. 55508/07 and 29520/09, §§ 128-51, ECHR 2013), where the Court had clarified that such a connection was primarily defined by the temporal proximity between the triggering event and the critical date, which could be separated only by a reasonably short lapse of time that should not normally exceed ten years.

74. Taking into account these principles and the fact that no new investigation had taken place after the entry into force of the Convention and no new evidence had been put forward or examined in the acquittal proceedings, the Government argued that the passing of more than fifty years from the triggering events until the post-Communist extraordinary appeals had exceeded by far a reasonable critical date to be taken into account; the procedural limb of Article 3 had therefore to be applied and the Court thus lacked jurisdiction *ratione temporis* to examine this complaint.

(b) Objection of lack of victim status

75. The Government further submitted that the applicants did not have victim status before the Court since they had been victims of specific stages of the Holocaust in Romania that had not been the same as those in which R.D. and G.P. had initially been found to have taken part in. More specifically, in the last conviction judgment of 1957, the courts had found no proof of R.D.'s participation in the Iași pogrom (see paragraph 14 above), while G.P. had been convicted by the judgment of 1953 only of preparing and overseeing the deportation of Jews (see paragraph 11 above). Since the first applicant had been a victim of the Iași pogrom and the second applicant had not been deported (see paragraphs 6 and 7 above), they could not claim to have victim status before the Court in respect of their

complaints with regard to the acquittals of R.D. and G.P. In addition, the Government noted that R.D. had not been acquitted in 1998 of war crimes but of the crime of engaging in intense activity against the working class and the revolutionary movement, which was (at the time of the acquittal) considered to constitute a political crime. In any event, he had served part of his sentence for war crimes and had then received a pardon in 1955 (see paragraph 12 above). Hence, the applicants could not be considered under the Convention to have victim status in respect of R.D.'s acquittal.

(c) Objection that the application was lodged out of time

76. Lastly, the Government alleged that the applicants had not complied with the six-month time-limit in respect of their complaints under the Convention. They submitted that the applicants could have found out about the acquittal of R.D. and G.P. from the ICHR report, which had included a specific reference to this acquittal (see paragraph 21 above). This report had been available to the public and received extensive media attention, starting with its publication in 2004 (see paragraph 19 above). In support of this allegation, the Government mentioned that the ICHR report was available on the website of INSHR-EW and that the second applicant is a member of the Federation of Jewish Communities of Romania, an organisation that had taken part in the work of the International Commission on the Holocaust in Romania (see paragraph 18 above). They also referred to two historical research articles written in English in 2014 and 2015 and cited on the website of INSHR-EW and one other article published in 2014 in a Romanian political science magazine that commented on the acquittals (see paragraph 67 above). Therefore, on the basis of all the above, the Government considered that the acquittal of R.D. and G.P. had been a matter known to the public and that the six-month time-limit for the complaint raised by the applicants had started to run between 2004 and 2015. As the present application was introduced on 14 July 2016, this complaint had been lodged out of time.

2. The applicants

(a) As to the Court's competence *ratione temporis*

77. The applicants submitted that the two military officials had been convicted initially of what constituted war crimes according to the standards of international criminal law that had emerged after the Second World War. Therefore, in accordance with the Nuremberg Tribunal rules, the victims had not joined the proceedings. Nevertheless, those proceedings had been public and had brought some level of "closure" to the victims. Subsequently, the reopening of those proceedings had taken place in 1998 and 1999, after Romania had ratified the Convention, and those proceedings should have been conducted in accordance with the procedural requirements

contained in Article 3 of the Convention. The applicants stated that their complaints concerned these two new sets of proceedings, which had been initiated by the authorities (solely on their own initiative) and which had been conducted in secret, without the participation of victims such as the applicants being allowed; in the absence of any new evidence, these proceedings had led to the acquittal of perpetrators of war and Holocaust crimes. The applicants submitted that these proceedings should be considered as the triggering events in the current case and hence the Court had jurisdiction *ratione temporis* to examine their complaint.

(b) As to the applicants' victim status

78. As regards their victim status under the Convention, the applicants submitted that they were Jews and had been victims of the Holocaust in Romania, and that R.D. and G.P. had been convicted in 1957 and 1953 respectively of crimes against Jews, on the basis of extensive evidence. The change of legal classification of R.D.'s crimes under other legal provisions did not change the nature and substance of the acts proved to have actually been committed. In addition, historical sources cited in the ICHR report (see paragraphs 19 and 20 above), and also referred to by the Government, mentioned the major role played by R.D. and G.P. in the preparation of the Iași pogrom and in the Romanian Holocaust. The applicants concluded that, in view of the above-noted considerations, they had been direct victims of the actions of R.D. and G.P., of their subsequent acquittal and of the authorities' efforts to keep that acquittal secret.

(c) As to whether the application was lodged out of time

79. The applicants further contested the arguments raised by the Government as regards the compliance with the six-month time-limit (see paragraph 76 above) and submitted that the Romanian authorities had never officially made public or assumed responsibility in public for the acquittal of the two former war criminals. The Government had demonstrated to the Court that the files concerning the acquittals in dispute had been stored in the archives of the Romanian Intelligence Service and subsequently in the archives of the CNSAS (see paragraph 17 above). However, this information had not been available to the public. Even after their transfer to the CNSAS, the existence of the files in question had not been known to the public, and their discovery had been accidental.

80. The applicants maintained that the Government had failed to prove their allegations concerning the media attention and the availability of the 2004 ICHR report to the public and specifically to them. The report in question was a lengthy document; it was available only online, and made a brief mention of the acquittal of R.D. and G.P. but without including any proof, such as copies of the relevant judgments or noting the precise dates of

the respective acquittals (see paragraphs 19-21 above). The applicants alleged that the issue of the acquittal of war criminals responsible for the Holocaust in Romania had never been the object of public debate and that the Government had not provided any example of articles published or discussions held in the national media or of public statements made by public officials on this subject. The applicants contended that they were not researchers or historians and should not be considered to be under an obligation to stay abreast of every reference made in every piece of research published on the topic of the Holocaust, just in case people convicted of crimes committed against them were acquitted. The publications mentioned by the Government (see paragraphs 67 and 76 above) were not known to the general public and were not affiliated to any mass media outlets. Moreover, even after the disclosure to the public made by private persons during the conference of 2016 mentioned in paragraph 23 above, the authorities had refused to grant them access to the files or to copies of the judgments concerning the acquittal proceedings (see paragraphs 24-28 above).

81. Accordingly, the applicants submitted that they had found out about the existence and the reasoning of the acquittal decisions only when copies of those decisions had been presented and discussed publicly at the conference of 26 January 2016 (see paragraph 23 above). Therefore, they argued that the six-month time-limit should start to run from this date.

B. The Court's assessment

82. In the case of *Janowiec and Others* (cited above, §§ 145-48) the Court found – with regard to the procedural obligation to investigate deaths or ill-treatment that had occurred prior to the entry into force of the Convention in respect of the respondent State ("the critical date") – that, in essence, its temporal jurisdiction was strictly limited to procedural acts that had been or ought to have been implemented after the entry into force of the Convention in respect of the respondent State, and that the above-mentioned procedural obligation was subject to the existence of a "genuine connection" between the event giving rise to the procedural obligation under Articles 2 and 3 and the entry into force of the Convention. It added that for such a connection to be established, two criteria had to be satisfied: (i) the period of time between the triggering event and the entry into force of the Convention had to have been reasonably short (a lapse of time that should not normally exceed ten years) and (ii) a major part of the investigation or the most important procedural steps had to have been carried out, or ought to have been carried out, after the entry into force of the Convention.

83. The Court also accepted that there might be extraordinary situations that did not satisfy the "genuine connection" standard, as outlined above, but where the need to ensure the real and effective protection of the guarantees and the underlying values of the Convention would constitute a

sufficient basis for recognising the existence of a connection. It thus considered that the required connection might be found to exist if the triggering event had been of a larger dimension than an ordinary criminal offence and had amounted to the negation of the very foundations of the Convention. This would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments. However, the Court held that the above-noted approach, also referred to as "the Convention values clause" could not be applied to events that had occurred prior to the adoption of the Convention on 4 November 1950, for it had been only then that the Convention had begun its existence as an international human rights treaty. Hence, a Contracting Party could not be held responsible under the Convention for not investigating even the most serious crimes under international law if those crimes had predated the Convention (ibid., §§ 149-51).

84. Turning to the facts of the present case, the Court notes at the outset that the applicants submitted that they had been victims of ill-treatment in 1941 within the context of the Romanian Holocaust. The Convention was adopted and began its existence as an international human rights treaty on 4 November 1950. Romania ratified the Convention on 20 June 1994.

85. The Court further notes that on 15 August 1953, G.P. was convicted for cooperating in the enactment of the Iaşi massacre (see paragraph 11 above) and the first applicant is a survivor of the Iaşi massacre, during which his family was killed and he was put on one of the "death trains" that transported the Jews out of Iaşi (in the region of Moldova – see paragraph 6 above). On the same date G.P. was also convicted of participating directly in the organisation and enactment of deportations of Jews from Bessarabia and Bukovina (see paragraph 11 above) and the second applicant was taken from her home in the city of Cernăuți (in the region of Bukovina) and placed in a ghetto for the purpose of deportation (see paragraph 7 above). As regards R.D., the Court observes that on 24 January 1957 he was convicted of contributing to the creation of ghettos and concentration camps and of ordering the placement in concentration camps of a large number of Jews (see paragraph 14 above). Both applicants submitted that they were Jews who had been taken from their homes in Moldova and Bukovina and had been placed in ghettos with a view to their subsequent deportation to concentration camps (see paragraphs 6 and 7 above) in the same period as that during which G.P. and R.D. had held their military positions (see paragraphs 10 and 14 above). The Government did not deny the applicants' status as Jews and as victims of the Holocaust. More specifically, they did not contest the applicant's submissions (set out above) regarding their home towns and their placement in ghettos at the time in question.

86. More than forty years later, by means of an extraordinary appeal initiated solely at the authorities' discretion, the above-mentioned

proceedings were reopened in 1998 and 1999, the judgments of 1953 and 1957 were quashed and G.P. and R.D. were acquitted (see paragraph 16 above).

87. Taking into account the above-noted sequence of events, the Court considers that the events that gave rise to the court proceedings of 1953-1957 and 1998-1999 were the Iași pogrom and the placement in ghettos of a large number of Jews including the applicants.

88. The Court had already held in respect of Article 2 that the requirements of this Article go beyond the stage of the official investigation and persist throughout proceedings in the national courts, which must as a whole satisfy the requirements of the positive obligation to protect lives through the law and that, while there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow life-endangering offences or grave attacks on physical and moral integrity to go unpunished (see *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, § 156, 26 May 2020). The above principles are also applicable in respect of complaints under Article 3, such as the one raised in the present case, in the light of the converging principles of the procedural obligations deriving from Articles 2 and 3 of the Convention, principles which are well-established (see *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, §§ 314-18, ECHR 2014 (extracts)). Therefore, the Court considers that the applicants' complaint concerns in fact the State's alleged failure to comply with its procedural obligation to conduct an effective investigation into acts of racially-motivated inhuman or degrading treatment and falls to be examined under the procedural limb of Article 3 of the Convention taken in conjunction with Article 14.

89. Bearing in mind that the events giving rise to the procedural obligation in the present case (see paragraphs 84 and 85 above) had occurred prior to the entry into force of the Convention in respect of Romania, the Court will start by examining the fulfilment of the two criteria necessary to establish the existence of a "genuine connection" between those events and the entry into force of the Convention (see the case-law quoted in paragraph 82 above).

90. As regards the first criterion, the Court notes that the events constituting the alleged interference which might otherwise have triggered the authorities' obligation to investigate took place in 1941 – that is, more than fifty years before the critical date of the entry into force of the Convention in respect of Romania – namely 20 June 1994 (see paragraph 84 *in fine* above). This period of time is too long in absolute terms for a genuine connection to be established between the triggering events and the entry into force of the Convention in respect of Romania (compare *Janowiec and Others,* cited above, § 157). Moreover, R.D. and G.P. had been convicted with final effect (see paragraphs 11 and 14 above), served their

sentences before the pardon of all such sentences in 1955 (see paragraph 12 above) and died (see paragraphs 12 and 17 above) before the entry into force of the Convention in respect of Romania. In view of the above, the Court considers that the State's obligation to conduct an effective investigation and punish those responsible under Article 3 had already been fulfilled before such entry into force. Taking into account that R.D. and G.P. were no longer alive at the time of the reopening of the proceedings and their acquittal in 1998 and 1999, achieving the purpose of the Article 3 positive obligation was already beyond the reach of the authorities at that time.

91. As regards the second criterion, the Court considers that the most important procedural steps that were undertaken in the case (such as the investigation and final conviction of G.P. and R.D.) took place between 1945 and 1957 (see paragraphs 8-14 above) – more than thirty years before the entry into force of the Convention in respect of Romania ("the critical date"). As regards the period following the entry into force of the Convention, although a reopening of the proceedings took place, the Court cannot identify any real investigative steps, the proceedings of 1998 and 1999 merely constituting a reinterpretation of the evidence in the respective case files (see paragraph 16 above). Moreover, no relevant piece of evidence or substantive item of information concerning the actions of which G.P. and R.D. were convicted has come to light in the period since the critical date. This finding was also affirmed by the parties' submissions (see paragraphs 74 and 77 above). The Court has already found that a re-evaluation of evidence, a departure from previous findings or a decision regarding the classification of investigative material cannot amount to the "significant proportion of the procedural steps" that is required for establishing a "genuine connection" for the purposes of the procedural obligation under Article 2 of the Convention (see *Janowiec and Others*, cited above, § 159). The present case raises the question whether a retrial, even without any new evidence being available, could be regarded as a procedural step so significant as to establish a "genuine connection". In any event, the Court does not have to decide on this criterion, since the two criteria for establishing a "genuine connection" are cumulative.

92. In view of the above, the Court concludes that one of the criteria for establishing the existence of a "genuine connection" has not been fulfilled in the present case (see paragraph 90 above). Furthermore, even if the events that might have triggered the obligation to investigate under Article 3 of the Convention were undoubtedly of a larger dimension than an ordinary criminal offence and had amounted to the negation of the very foundations of the Convention, they took place in 1941, that is, nine years before the Convention came into existence. Consequently, there is no room for applying the "Convention values" clause and thus for derogating from the "genuine connection" requirement (see the case-law quoted in paragraph 83 above).

93. Having regard to the above considerations, the Court finds that this complaint is incompatible *ratione temporis* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

94. In the light of the conclusion it had reached above, the Court considers that it is not necessary to examine the remaining preliminary objections raised by the Government (see paragraphs 75 and 76 above; see also, *mutatis mutandis*, *Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 117, 9 July 2015).

II. ALLEGED VIOLATION OF ARTICLES 8 AND 14 OF THE CONVENTION

95. Relying on Article 8, the applicants complained that by secretly instituting extraordinary appeal proceedings aimed at the acquittal of the historically and judicially established perpetrators of crimes against Jews and by denying them (that is to say the applicants) access to the proceedings and the files concerning those proceedings, their right to private life and psychological integrity as survivors of the Holocaust had been breached by the Romanian authorities.

96. The applicants also complained that the acquittals and their lack of access to the files had constituted a breach of their rights under Article 14 taken together with Article 8 because the authorities had failed to take into account the anti-Semitic nature of the crimes and to show due diligence in involving the victims of such crimes in the proceedings. This attitude had constituted discrimination against the applicants on ethnic grounds.

97. The Court considers that the above complaints fall to be examined under Article 8 taken in conjunction with Article 14 of the Convention. The relevant provisions read as follows:

Article 8

"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."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] 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."

A. Admissibility

1. As regards victim status

98. The Government alleged that the applicants lacked victim status. They relied on the arguments summarised in paragraph 75 above. The applicants maintained their position as exposed in paragraph 78 above. The applicants also submitted that, from the moment they found out about the acquittals and the authorities' conduct that surrounded these acquittals, they have suffered feelings of humiliation, psychological pain and trauma, the acknowledgment of their suffering during the Holocaust being reconsidered and invalidated. In their opinion, the acquittal of historical perpetrators of crimes in connection with the Holocaust encouraged anti-Semitism and those who deny Holocaust and, hence, affected their private life and psychological integrity. They further submitted that the acquittal of people convicted of crimes against Jews in connection with the Holocaust had had a general impact on all members of the community of Jewish survivors of the Romanian Holocaust, who could be seen as constituting a (heterogeneous) social group, according to the Court's case-law (the applicants quote, in this respect, *Lewit v. Austria*, no. 4782/18, § 46, 10 October 2019).

99. The Court reiterates that in order to be able to lodge an application in accordance with Article 34 of the Convention, an individual must be able to claim to be a victim of a violation of the rights set forth in the Convention. To claim to be a victim of such a violation, a person must be directly affected by the impugned measure. Consequently, the existence of a victim who was personally affected by an alleged violation of a Convention right is indispensable for putting the protection mechanism of the Convention into motion, although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings (see *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, §§ 50 and 51, ECHR 2012). The notion of "victim" is interpreted autonomously and irrespective of domestic rules such as those concerning interest in or capacity to take action, even though the Court should have regard to the fact that an applicant was a party to the domestic proceedings (ibid., § 52).

100. Turning to the present case, the Court observes that the complaint lodged by the applicants concerns the reopening of criminal proceedings that re-examined the responsibility of high-ranking military officials for the Holocaust and the lack of access to those proceedings for the applicants or the public. The issue raised in the Government's objection is that it cannot be established without any doubt whether or not the applicants were direct victims of the crimes for which R.D. and G.P. were found guilty in the proceedings that were conducted in 1953 and 1957; hence, the Government argue, they cannot claim to have victim status in respect of the reopening of those proceedings.

101. The Court notes that the Government did not deny the applicants' status as Jews and as victims of the Holocaust. More specifically, they did not contest the applicants' submissions regarding their home towns and their placement in ghettos at the material time (see paragraph 75 above). Therefore, although the applicants were not deported to Transnistria, they nevertheless went through the first phase of the deportation process – namely the transportation in inhuman conditions (the first applicant) and the placement in ghettos with a view to subsequent deportation (both applicants). Accordingly, the Court considers that for the purpose of the Article 8 complaint it is not necessary to establish a direct connection between the acts committed by G.P. and R.D. and the applicants, given that the crimes at issue are by their nature directed against a whole group of people and having regard to the applicants' personal fate set out above. Therefore, the Court accepts that the applicants, who are Jews and Holocaust survivors, can claim to have personally suffered from an emotional distress when they found out about the reopening of the criminal proceedings and the acquittals of G.P. and R.D.

102. As regards the Government's argument that R.D. had not been acquitted of war crimes but of a different crime (see paragraph 75 above), the Court notes that the acquittal of 1998 concerned the acts of contributing to the creation of ghettos and concentration camps and the placement of Jews in concentration camps. The legal qualification given by law to these crimes does not affect the nature of the facts, as established by the courts. The Government also claimed that the applicants could not claim to have victim status because R.D. had been convicted for a political crime and that he had served part of his sentence for war crimes and had then received a pardon in 1955 (see paragraph 75 above). In this respect, the Court notes that the Government submitted no proof that the political nature of R.D.'s conviction had been established by the domestic courts (see paragraph 16 above) as required by the law applicable at the time of the acquittal (see paragraph 42 above). As regards the pardon (see paragraph 12 above), it had affected only the execution of the sentence and not the conviction itself, hence the Court does not see how this pardon could influence the applicants' status as victims under the Convention.

103. Moreover, the Court notes that in its case-law concerning applicants who felt offended by remarks referring in general to the ethnic group to which they belonged, it had found that an applicant could be considered a victim of the alleged violations, even though he was not directly and personally targeted by the remarks in question (see *Aksu*, §§ 53 and 54 and *Lewit*, § 86, both cited above). Turning to the present case, the Court considers that similar considerations may be applied and the applicants could be seen as having a personal interest in proceedings aimed at establishing the responsibility of high-ranking members of the military for the Holocaust in Romania – of which it had not been contested that the applicants had been victims. The fact

that the applicants were not parties to the domestic proceedings, unlike the situation in the case-law mentioned above, is not decisive in the present case where this aspect – the lack of involvement in the proceedings – is precisely one of the complaints raised by the applicants.

104. In view of the above and given the need to apply the criteria governing victim status in a manner that is not rigid and inflexible (see the case-law quoted in paragraph 99 above), the Court accepts that the applicants can claim to be victims of the alleged violation within the meaning of Article 34 of the Convention. It therefore rejects the Government's preliminary objection that the applicants lacked victim status.

105. Having reached the above conclusion and considering that the acquittal proceedings and the applicants becoming aware of their result took place at a time when the Convention was in force in Romania (see paragraphs 16 above and 126 below), the Court considers that no question concerning its jurisdiction *ratione temporis* arises in respect of the complaint under Articles 8 and 14 of the Convention.

2. Applicability of Articles 8 and 14 of the Convention

(a) The parties' submissions

106. The Government submitted that in 1953 and 1957 R.D. and G.P. had been convicted not only of ethnically motivated war crimes against Jews but also of other crimes, such as unjust prosecution of communists. Hence, the post-communist retrials may be regarded as concerning ethnically motivated crimes only with respect to G.P.'s participation in the deportation of Jewish population from Bukovina to Transnistria. Having in mind that other possible victims, such as the communist activists that may have also been concerned by the retrials, have been treated similarly as the applicants, the Government argued that there was no proof that the applicants have been treated differently based on their ethnic origin. The Government also submitted that there was no evidence in the domestic courts files to support a claim of discrimination against the applicants on the ground of their ethnic origin in the proceedings of 1998 and 1999. On the basis of these arguments, they concluded that Article 8 taken together with Article 14 was not applicable in the present case.

107. The applicants submitted that they had been directly affected by the acquittal of R.D. and G.P. and the secret manner in which this acquittal had taken place. They argued that the authorities' conduct demonstrated disrespect and lack of consideration towards Holocaust survivors and constituted an attempt to re-write historical facts bordering on Holocaust denial. This situation affected the applicants' private life and psychological integrity, causing them extreme emotional suffering. In addition, referring to the case of *Lewit* (cited above, § 46), the applicants submitted that survivors of the Holocaust have previously been considered an (heterogenous) social

group by the Court. Therefore, the acquittal of persons convicted of crimes connected with the Holocaust, undisclosed to the public, and the authorities' refusal to provide them with access to the case files had affected their private life and discriminated against them as members of this group.

(b) The Court's assessment

(i) Applicability of Article 8

108. The Court notes that the applicants in the present case complained about the actions of the State, more specifically the authorities' decision to reopen the proceedings, acquit State officials previously convicted of crimes connected with the Holocaust and the authorities' failure to inform the public and the applicants about those decisions and to grant them access to the files concerning the proceedings in question. The assessment of whether or not a private-life issue under Article 8 of the Convention is raised in such a case is a point that comes under the Court's jurisdiction *ratione materiae* and falls to be examined as an admissibility issue (see, *mutatis mutandis*, *Denisov v. Ukraine* [GC], no. 76639/11, §§ 92-93, 25 September 2018).

(α) General principles

109. "Private life" within the meaning of Article 8 § 1 of the Convention is a broad term not susceptible to exhaustive definition. It is settled that it covers a person's moral integrity, and that it may encompass a person's zone of interaction with others, even in a public context (see *Behar and Gutman v. Bulgaria*, no. 29335/13, § 54, 16 February 2021). It can therefore embrace multiple aspects of the person's physical and social identity. Article 8 protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see *Denisov*, cited above, § 95).

110. The Court's general approach to the applicability of Article 8 in cases in which the assertion is that someone's "private life" has been negatively affected by a statement or an act is that in such cases the effects of the statement or act must rise above a "threshold of severity" (see *Denisov,* cited above, §§ 112-14). This approach has been applied in cases raising very different issues where the Court has found that, for Article 8 to come into play, either (i) there must be convincing evidence that an alleged failure on the part of the State (for example, to provide members of Roma minority with access to safe drinking water – see *Hudorovič and Others v. Slovenia*, nos. 24816/14 and 25140/14, §§ 115 and 157, 10 March 2020) effectively eroded the applicants' core rights under that provision, or (ii) the attack on a person must attain a certain level of seriousness and be made in a manner causing prejudice to the personal enjoyment of the right to respect for one's private life (for example, in a case concerning homophobic statements – see *Beizaras and Levickas v. Lithuania*, no. 41288/15, § 109,

14 January 2020). The assessment of this minimum level in such cases is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance in question and its physical or mental effects on the individual's health or quality of life while the impugned measure has to seriously affect the applicant's private life. In that regard the Court reiterates that the threshold of severity occupies an important place in cases where the existence of a private-life issue is examined according to the consequence-based approach and that an intrinsic feature of this approach is that convincing evidence showing that the threshold of severity was attained has to be submitted by the applicant (see *Denisov*, cited above, §§ 111, 113 and 114).

111. The Court has previously held that a public speech by a politician denying that the mass killing of Armenians by the Ottoman Empire amounted to genocide affected the right of Armenians to respect for their ancestors' dignity and their right to respect for their identity and that both ethnic identity and the reputation of ancestors were rights protected under the "private life" heading of Article 8 (see *Perinçek v. Switzerland* [GC], no. 27510/08, § 227, ECHR 2015 (extracts)).

112. The Court has also held that negative stereotyping of a group, when it reaches a certain level, is capable of impacting that group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group (see the above-cited cases of *Aksu,* §§ 58-61, where an applicant of Roma origin felt offended by certain passages of a book which focused on the Roma community, and *Lewit*, § 46, where the applicant complained about the State's failure to protect him against defamatory statements, in an article, about former Mauthausen prisoners, who, as survivors of the Holocaust, were seen as constituting a (heterogeneous) social group). It can be seen from the Court's reasoning in the above-mentioned cases that the question of whether someone's "private life" has been negatively affected by a statement or an act can only be answered on the basis of the entirety of the circumstances of the specific case.

113. Lastly, in the case of *Behar and Gutman* (cited above, § 67) the Court went on to define certain relevant factors for deciding whether a public statement about a social or ethnic group has affected the "private life" of its members within the meaning of Article 8 of the Convention. Those factors included (but were not necessary limited to) the following: (a) the characteristics of the group (for instance its size, its degree of homogeneity, its particular vulnerability or history of stigmatisation, and its position *vis-à-vis* society as a whole), (b) the precise content of the negative statements regarding the group (in particular, the degree to which they could convey a negative stereotype about the group as a whole, and the specific content of that stereotype), and (c) the form and context in which the statements were made, their reach (which may depend on where and how

they have been made), the position and status of their author, and the extent to which they could be considered to have affected a core aspect of the group's identity and dignity. It cannot be said that one of those factors invariably takes precedence; it is the interplay of all of them that leads to the ultimate conclusion on whether the "certain level" required under *Aksu* (cited above, § 58) and the "threshold of severity" required under *Denisov* (cited above, §§ 112-14) has been reached, and on whether Article 8 is thus applicable. The overall context of each case – in particular the social and political climate prevalent at the time when the statements were made – may also be an important consideration.

(β) Application of these principles to the present case

114. The Court notes that the question in this case is whether the reopening of criminal proceedings, the acquittal of persons previously convicted with final effect of crimes connected with the Holocaust in Romania and the authorities' failure to inform the public and the applicants about those decisions and to grant them access to the files concerning those proceedings can be seen as affecting the "private life" of the applicants, Romanian Jewish survivors of the Holocaust to the point of triggering the application of Article 8 of the Convention in relation to them.

115. The Court reiterates that the applicants submitted that they are Jews who were taken from their homes in the regions of Moldova and Bukovina and placed in ghettos with a view to their subsequent deportation to concentration camps and that the first applicant also submitted that he was a survivor of the Iași pogrom (see paragraphs 6 and 7 above).

116. The Government did not deny the applicants' status as Jews and as victims of the Holocaust (see paragraphs 75 above and 135 below).

117. The Court has already considered survivors of the Holocaust as constituting a (heterogenous) social group whose individual members may be impacted by negative stereotyping of that group (see the case-law quoted in paragraph 112 above). It has also held that a public speech by a politician denying a historically established mass killing of members of an ethnic group affected the right to respect for private life of the members of the group in question (see the case-law quoted in paragraph 111 above). Furthermore, the Court has previously considered as regards Holocaust denial, that even if it was dressed up as impartial historical research, it must invariably be seen as connoting an anti-democratic ideology and anti-Semitism and must thus be regarded as particularly upsetting for the persons concerned (see *Perinçek,* cited above, § 253, and the cases cited therein).

118. The present case does not concern the expression in public of opinions denying the existence of the Holocaust or of the negative stereotyping of survivors of the Holocaust, nevertheless the Court finds that the principles developed in the above-mentioned cases (see

paragraphs 109-113 above) may also be used as reference in the present case. That being so, the Court also notes the uniqueness of this case in which it had already established that the applicants have suffered from an emotional distress when they found out about the reopening of the criminal proceedings and the acquittals of G.P. and R.D. (see paragraph 101 above). This finding also clearly distinguishes the present case from the case of *L.Z. v. Slovakia* ((dec.), no. 27753/06, §§ 74 and 75, 27 September 2011), where the Court held that the applicant's arguments were mainly oriented towards the general problem of the promotion of fascism and its potential consequences for society. The proceedings in the present case (which led to the acquittal of high-ranking military officials convicted for crimes connected with the Holocaust) and the authorities' behaviour in respect of these proceedings (the failure to inform the public about the initiation of the extraordinary appeals, the retention of the case files by the secret services and the initial refusal to allow the applicants access to those files) have been perceived by the applicants, once they learned about them, as constituting a denial of the occurrence of the Holocaust in Romania and of the historical truth about it and revived in them the trauma of the Holocaust, of which they were direct victims. In respect of this point, the Court further notes that the acquittals occurred at a time that was marked by the questioning of the Romanian authorities' role in the Holocaust in Romania and by the honouring of war criminals by some members of the political class (see paragraphs 21 and 46 above). Furthermore, at the time when the applicants found out about the acquittals anti-Semitic incidents were occurring in Romania, and they continue to occur today (see paragraphs 46 and 68 above).

119. In view of all these factors and in the light of the conclusion regarding the applicants' victim status (see paragraph 104 above) the Court accepts that the result of the proceedings of 1998 and 1999, which examined the role of high-ranking military officials in events of an extremely sensitive nature such as the Holocaust, and the context surrounding these proceedings was capable of having a sufficient impact on the applicants' sense of identity and self-worth as Jews and survivors of the Holocaust in Romania as to have produced in them emotional suffering that reached the "certain level" (see *Aksu,* cited above, § 58) or the "threshold of severity" required (see *Denisov,* cited above, §§ 112-14). Article 8 of the Convention is therefore applicable in the present case.

(ii) Applicability of Article 14

120. Article 14 of the Convention has no independent existence, and only applies if the facts at issue fall within the ambit of one or more of the substantive provisions of the Convention or its Protocols (see, among many other authorities, *Konstantin Markin v. Russia* [GC], no. 30078/06, § 124, ECHR 2012 (extracts)). Since, as determined above, the facts of the present

case fall within the ambit of Article 8 of the Convention, Article 14 is applicable, and the complaint will hence also be examined in its light.

3. Compliance with the six-month time-limit

121. The Government alleged that the applicants had not complied with the six-month time-limit. They relied on the arguments summarised in paragraph 76 above. The applicants maintained their position as exposed in paragraphs 79-81 above.

122. The Court reiterates that the six-month time-limit provided by Article 35 § 1 of the Convention has a number of aims. Its primary purpose is to maintain legal certainty by ensuring that cases raising issues under the Convention are examined within a reasonable time, and to prevent the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time. As a rule, the six-month period runs from the date of the final decision in the process of exhausting domestic remedies. Where it is clear from the outset, however, that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of the applicant gaining knowledge of that act or its effect on or prejudice to the applicant (see *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, §§ 258-59, ECHR 2014 (extracts)).

123. Turning to the current case, the Court firstly notes that the proceedings and the two judgments in question concerned historical events involving the Holocaust, events which affected an important number of people in Romania and hence, were of public interest (see paragraph 19 above). Within this context, the Court notes that it is not in dispute that the applicants had not been parties to the acquittal proceedings (see paragraphs 15-17 above) and no proof has been submitted by the Government to attest to the fact that the applicants, as direct victims of the events in question, or the public were informed by the authorities of the initiation of the proceedings by the Prosecutor General.

124. The Court also notes that the case files of the acquittal proceedings have not been accessible to the public, having been stored firstly in the archives of the secret services and subsequently with the CNSAS, to which only specific categories of people had access (see paragraphs 38-41 above). In addition, the applicants' requests for access to those case files were initially denied both by the court who had delivered the acquittal judgments as well as by the institution where the files in question were stored at that moment (see paragraphs 24-25 above). Accordingly, even though the acquittal judgments include on their front page the statement that they were delivered in public hearings (see paragraph 17 above), this indication alone does not allow the Court to conclude that the public had been informed by the authorities about these proceedings. This finding is also supported by the Government's submission that the applicants could have found out

about the acquittal proceedings as early as 2004, once the ICHR report had been published (see paragraph 76 above).

125. As regards the Government's allegations that the ICHR report of 2004 had received extensive media attention, the Court notes that the examples given in support of this statement concern only a few online publications available on the INSHR-EW website and one article published in 2014 in an issue of a specialised magazine regarding whose circulation or distribution figures no information has been provided (see paragraph 76 above). No evidence has been submitted as to the alleged coverage by national media channels accessible to the large public.

126. In view of the above, the Court considers that the first disclosure of credible and verifiable information to the public (information that included exact dates of the acquittals and copies of the judgments) was on the occasion of the INSHR-EW conference (see paragraph 23 above). Therefore, it accepts the applicants' statement that the moment at which they were able to find out about the acquittal judgments and become acquainted with their content was on the occasion of the above-mentioned conference held on 26 January 2016 (see paragraphs 23 and 81 above). They introduced their application on 14 July 2016. It follows that the Government's objection of non-compliance with the six-month time-limit is unfounded and must therefore be dismissed.

4. Non-exhaustion of domestic remedies

127. As regards the part of the complaint concerning the applicants' lack of access to the acquittal files held in the archives of the CNSAS, the Government argued that the applicants could have requested the administrative courts (on the basis of Law no. 544/2001 on access to public information – see paragraph 44 above) that the CNSAS grant them physical access to the case files or provide them with certified copies of the documents in question.

128. The applicants submitted that, given the fact that the procedure for accessing files archived at the CNSAS was regulated through special legal provisions, such a request would not have had any basis in domestic law and could not be considered to constitute an effective remedy.

129. The Court indeed observes that the procedure for gaining access to the files stored by the CNSAS is strictly provided by its statute (see paragraphs 38-41 above) and the applicants did not fulfil the conditions required for such access – as they were informed by the CNSAS itself (see paragraph 25 above). According to a well-established principle of law, general law – such as the Law no. 544/2001 mentioned by the Government – does not apply in the presence of special provisions regarding the same matters (see paragraph 45 above). Moreover, the Government did not submit any example of court decisions ordering the CNSAS to grant access to files in situations similar to that of the applicants.

130. In view of the above, the Court considers the Government's objection of non-exhaustion of domestic remedies to be unfounded and dismisses it.

5. Conclusion regarding the admissibility of the complaint

131. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

132. The applicants submitted that the acquittal of the two military men who had previously been convicted of crimes connected with the Holocaust amounted to a denial of the Holocaust and ran counter to the fundamental values under Articles 8 and 14 of the Convention. They alleged that when they had discovered by accident (see paragraph 23 above) that the authorities had rehabilitated G.P. and R.D. they had suffered feelings of humiliation, vulnerability, helplessness, psychological pain and trauma. They felt that the persecution and trauma they had been subjected to during the Holocaust had been revised and denied by the authorities. The secret reopening of proceedings concerning the Holocaust through an extraordinary remedy that had been solely at the authorities' discretion, the subsequent acquittals in the absence of any new evidence and the intentional failure to inform the victims had constituted gross violations of the applicants' right to private life and psychological integrity as survivors of the Holocaust; it had also constituted discrimination against them on grounds of their ethnic origin.

133. The applicants further argued that given their right to respect for their private life – as guaranteed by Article 8 – they had had the right to be informed of the Prosecutor General's initiative to request the reopening of the proceedings with the purpose of acquitting R.D. and G.P. and also to be informed of the result of those proceedings. Such information had been of great importance to their private life, to their personal history, to their experience of the Holocaust and of the subsequent war crimes trials of the 1950s, to their processing of the psychological trauma that they had suffered regarding the events of June 1941 and to their simply knowing the truth about their past.

134. The applicants complained that the judicial case files concerning the retrials contained information which was of great importance for their private life and which was also of public interest. Referring to the case of *Karsai v. Hungary* (no. 5380/07, § 35, 1 December 2009) the applicants

contended that the Court had already held, within the context of a public debate about the creation of a statue commemorating a former prime minister who had had anti-Semitic convictions, that a debate concerning the efforts of a country, which had episodes of totalitarianism in its history, to come to terms with its past was of the utmost public interest. However, notwithstanding the utmost public interest in the retrials in the present case, they had, in the applicants' view, been kept secret by the State authorities. The refusal of the High Court of Cassation and Justice to adopt an active role in ensuring the applicants' access to the case files had demonstrated the authorities' bad faith and their wish to hide the information from the applicants and the public. In the applicants' opinion, this failure to inform had had no reasonable justification.

(b) The Government

135. The Government accepted that the acquittals had generated public controversy that had had an impact on the applicants as survivors of the Holocaust who had not necessarily been versed in the law. However, they submitted that that controversy had been generated also by the many amendments (some of them secret) made to the relevant legislation after the Second World War and during the Communist regime and by the fact that the several stages of the prosecution and trial of war criminals had been impaired (at least at the level of public perception) by the political changes of those times and by the fact that most of the officials involved in the war crimes trials carried out in the 1950s had been neither career judges or prosecutors nor even legal practitioners. Therefore, the controversies that may have disturbed survivors of the Holocaust (who had still been bearing the memories of those terrible events) may have also been caused by the above-mentioned inadequacies, combined with the standards that had prevailed in those days in respect of the conduct of criminal proceedings.

136. The Government also submitted that the applicants had obtained copies of the files in question and had not claimed that those copies had not been complete or that documents were missing.

137. Lastly, the Government contended that there was no factual element or wording in the judgments of 1998 and 1999 to indicate that discrimination had taken place on ethnic grounds. The mere fact that certain crimes of which the two military men had been found guilty had been examined at the time in question as having an ethnic component could not automatically lead to the conclusion that the retrial proceedings had been discriminatory on ethnic grounds. The ethnic nature of the crime did not automatically imply bias on the part of the judges examining the case.

2. The Court's assessment

(a) General principles

138. The Court reiterates that while the essential object of Article 8 of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition to this primary negative undertaking be positive obligations inherent in an effective respect for private or family life and the home. A State's responsibility may be engaged because of acts that have sufficiently direct repercussions on the rights guaranteed by the Convention. In determining whether this responsibility is effectively engaged, regard must be had to the subsequent behaviour of that State (see *Moldovan and Others v. Romania (no. 2)*, nos. 41138/98 and 64320/01, § 95, ECHR 2005-VII (extracts), and *Paketova and Others v. Bulgaria*, nos. 17808/19 and 36972/19, §§ 148-49, 4 October 2022).

139. Whatever analytical approach is adopted – positive duty or interference – the applicable principles regarding justification under Article 8 § 2 are broadly similar. In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. In both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. The margin of appreciation left to the authorities will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights. This is the case in particular for Article 8 rights, which are rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community (see, among many other authorities, *Paketova and Others,* cited above, § 150).

140. The Court's task is not to substitute itself for the relevant domestic authorities in determining the most appropriate methods for protecting individuals from attacks on their personal integrity, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation. The "necessary in a democratic society" requirement under Article 8 § 2 raises a question of procedure as well as of substance (ibid., § 151). An interference will be considered "necessary in a democratic society" in respect of a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued. While it is for the national authorities to make the initial assessment of necessity, the final evaluation of whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention (see, among other authorities*, A.-M.V. v. Finland*, no. 53251/13, § 81, 23 March 2017).

141. Concerning the notions of "private life" and personal autonomy, including ethnic identity, within the meaning of Article 8 of the Convention, the Court refers to the general principles set out in cases concerning public statements of an anti-Semitic nature from the point of view of Jewish applicants complaining that their private life has been negatively affected by the statements in question. Accordingly, in the case of *Lewit* (cited above, § 82), while reiterating that under both the State's positive and negative obligations under Article 8 regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole and in both contexts the State enjoys a certain margin of appreciation, the Court went on to find that the domestic courts failed to conduct the mentioned balancing exercise and had therefore failed to comply with their procedural obligation under Article 8 of the Convention. In a most recent case, the Court held that such statements that negatively stereotype a minority ethnic group, provided that they reach a certain level of severity, could be seen as affecting the private life of the group's individual members and that there was therefore a positive obligation to afford them redress with respect to those statements (see *Behar and Gutman*, cited above, § 99). The Court considered in that case that, by refusing to grant the applicants redress in respect of the discriminatory anti-Semitic statements, the domestic authorities had failed to respond adequately to discrimination on account of the applicants' ethnic origin and to comply with their positive obligation to secure respect for the applicants' private life, in breach of Article 8 of the Convention read in conjunction with Article 14 (ibid., § 106).

142. As regards Article 14 of the Convention, the Court reiterates that discrimination on account of one's actual or perceived ethnicity constitutes a form of racial discrimination that is a particularly invidious kind of discrimination 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, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment (see *Timishev v. Russia,* nos. 55762/00 and 55974/00, § 56, ECHR 2005-XII). The authorities' responsibilities under Article 14 to secure respect without discrimination for a fundamental value may also come into play when possible racist attitudes resulting in the stigmatisation of the person concerned are at issue in the context of Article 8. It is even more so when the said attitudes are displayed not by private individuals but by State agents (see *Muhammad v. Spain*, no. 34085/17, § 67, 18 October 2022).

143. The Court has also accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms,

discriminates against a group (see, for example, *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 154, 4 May 2001).

(b) Application of those principles in the present case

144. Turning to the circumstances of the present case, the Court notes that the applicants stated that they had felt humiliated and traumatised because of the revision of historically and judicially established facts that, in their opinion, had amounted to a denial of the ethnically motivated violence of which they had been victims during the Holocaust.

145. The Government accepted that the acquittal of people convicted of crimes connected with the Holocaust may have generated public controversy and may have disturbed survivors of the Holocaust such as the applicants. They however argued that the controversies had in fact been caused by the politics of the historical times in question and that the acquittals had been necessary in order to correct procedural unfairness.

146. The Court firstly notes that, following an internationally imposed obligation, in 1945 the Romanian authorities have created a commission that had gathered evidence in respect of alleged war crimes (see paragraph 8 above). Several years later in 1951, starting from the evidence gathered by that commission, a prosecutor of the Prosecutor's office attached to the Bucharest Court of Appeal prepared an indictment (see paragraph 10 above) on the basis of which ordinary courts – established in accordance with the law of the time – convicted R.D. and G.P. of crimes connected with the Holocaust (see paragraphs 11 and 14 above). Even assuming, as the Government alleged (see paragraph 135 above), that the commission may not have been composed of officers of the court or people with legal training, the Court observes that the two military men in question in the present case have been investigated, charged and tried by officers of the court (prosecutor and criminal and military courts) pursuant to the applicable law at the relevant time and not by the People's Tribunals.

147. The Court further notes that, after the final judgments of 1953 and 1957 (respectively (i) finding G.P. guilty of cooperating in the enactment of the Iași pogrom and of directly organising and carrying out deportations of Jews from Bessarabia and Bukovina and (ii) finding R.D. guilty of ordering the placement in concentration camps of a high number of Jews) the Prosecutor General of Romania made use of an extraordinary appeal in the 1990s the use of which was solely at his discretion and, in the absence of R.D. and G.P. (who were deceased, see paragraphs 12 and 17 above), requested the courts to reopen the criminal proceedings and to acquit the two military men of the above-mentioned crimes without giving any relevant reasons for such a request (see paragraphs 16 above and 148-150 below).

148. Referring to the same evidence as that underlying the convictions of 1953 and 1957, the Supreme Court of Justice firstly acquitted R.D.,

considering that he had merely complied with orders received from higher-ranking officials (see paragraph 16 above). In respect of this point the Court takes note that, under the rules of customary international humanitarian law, the fact that an act was ordered by a superior does not amount to a defence within the context of war crimes (a principle set forth since 1945 notably in the Charters of the International Military Tribunals at Nuremberg and Tokyo and later in the Rome Statute of the International Criminal Court – see paragraphs 59-63 above). Subsequently, the Supreme Court of Justice also acquitted G.P., finding that the Second Section of the Romanian Army General Staff (where he carried out his functions) had had no involvement in the Iași pogrom or the deportation and placement of Jews in ghettos (see paragraph 16 above). This finding contradicted the reasoning of the Supreme Court of Justice in respect of the previous acquittal of R.D., who had been G.P.'s direct superior and whose involvement in the placement of Jews in ghettos and concentration camps – as well as the involvement of the Second Section, which he had headed – had been justified by his defence of having simply followed orders issued by a superior. Moreover, the Court observes that the findings reached by the Supreme Court of Justice in the proceedings leading to the acquittal of G.P. and R.D. also contradicted the statements that the defendants had given before the courts in the initial proceedings of 1953, when R.D. had argued that he had had no involvement in any measures against the Jews, while G.P. had argued that he had merely carried out orders given to him by R.D. (see paragraph 11 above).

149. The Court considers that the findings of the Supreme Court of Justice that led to the acquittals of 1998 and 1999 – namely, that the German troops alone had been involved in the Iași pogrom and in the placement of Romanian Jews in ghettos and their subsequent deportation – also contradict both the written evidence still contained in the initial conviction files (see paragraph 11 above) and the court's own findings that the placement of Jews in ghettos with a view to their subsequent deportation had been based on lists of names compiled by the Romanian Special Intelligence Service and by the gendarmerie (see paragraph 16 above). In concluding that the Iași pogrom and the placement of Romanian Jews in ghettos and their subsequent deportation had been organised and carried out solely by the Germans, the court also overlooked the historical background as reflected by the anti-Semitic measures taken by the Romanian Government itself at the time (see paragraph 5 above).

150. Furthermore, when examining the reasoning of the acquittal decisions of 1998 and 1999 within the context of the internationally accepted definition of Holocaust denial and distortion (see paragraph 47 above), the Court observes that the findings of the Supreme Court of Justice (namely, that only German troops had carried out on the territory of Romania actions against Jews and that R.D. had only followed orders issued by a superior) may objectively be seen as excuses or efforts to blur

responsibility and put blame on another nation for the Holocaust contrary to well established historical facts – all elements of Holocaust denial and distortion.

151. On this point, the Court recalls its extensive case-law in cases concerning the freedom of expression in connection with public statements denying the Holocaust or other statements relating to Nazi crimes, as well as statements or publications denigrating an ethnic group or the reputation of ancestors. A summary of this case-law may be found in the cases of *Perinçek* (cited above, §§ 200-225) and *Pastörs v. Germany* (no. 55225/14, § 36-38, 3 October 2019). In these cases, the Court held that in the light of their historical role and experience, States that have experienced Nazi horrors may be regarded as having a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis (see *Pastörs,* cited above, § 48; *Perinçek,* cited above, §§ 242-243; and *Nix v. Germany* (dec.), no. 35285/16, 13 March 2018). On the basis of this reasoning, the Court concluded in the above-mentioned cases that statements (that had been understood by the domestic courts as constituting denial of the extent of the mass extermination of Jews, as reported by historians) had affected the dignity of the Jews to the point that they justified a criminal-law response; hence, the sentence of eight months' imprisonment (suspended on probation) received by the author of the statements in question had not exceeded the authorities' margin of appreciation (see *Pastörs,* cited above, § 48). Although the above-noted cases involving anti-Semitic statements or the denial of the Holocaust brought into play the balancing exercise that needs to be carried out between the competing Convention rights of private persons, *a fortiori*, the Court considers that those principles are also applicable in the present case, where the alleged discriminatory acts were performed by State authorities.

152. As regards the international context surrounding the initial convictions and the subsequent acquittals, the Court notes that under the international agreement signed in 1945 (see paragraph 32 above), Romania was obliged to put an end to all Fascist organisations on its territory, to repeal discriminatory legislation and measures and to apprehend and send to court those accused of war crimes. A duty to apprehend, prosecute and send to court those suspected of war crimes and crimes against humanity – that are amongst the gravest crimes in international law – existed and still exists under international law in general; that duty arises from various international documents (see paragraphs 51-57 above) and from the rules of customary international humanitarian law (see paragraph 58 above). On this point the Court reiterates that it has previously held that when it considers the object and purpose of the Convention provisions, it also takes into account the international-law background to the legal question before it; the common international or domestic legal standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the

scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty (see, *mutatis mutandis*, *Opuz v. Turkey*, no. 33401/02, § 184, 9 June 2009).

153. As regards the alleged failure to inform the public or the applicants of the initiation of the extraordinary appeals and of the acquittals, the Court notes (as have the applicants – see paragraph 134 above) that the retrials undeniably concerned a matter of utmost public interest – namely responsibility for the Holocaust; accordingly, the general public and therefore also the applicants (as survivors of the Holocaust) should have been made aware of the proceedings and their outcome. Moreover, international principles that already existed at the time of the retrials mention that victims of crime must be informed of the fact that proceedings have been initiated and of the progress of their cases, and must have access to justice and to proper assistance (see paragraph 64 above). Nevertheless, the Court notes that no proof has been submitted that any public announcement was made or public debate occurred about the proceedings in question until the INSHR-EW conference of 2016 (see paragraphs 23 and 123-126 above). Furthermore, the files relating to the initial convictions of 1953 and 1957 and the files relating to the retrial proceedings have been kept by the secret services even after the fall of the Communist regime and subsequently by the CNSAS (see paragraph 17 above), with restrictive conditions being imposed on the possibility of outside access (see paragraphs 38-41 above). Moreover, the applicants' first attempts to access the said files were rebuffed by the relevant authorities without any reasonable justification being provided (see paragraphs 24-28 above). It is true, as the Government has noted, that the applicants were eventually granted access to the files; however, that happened only after earlier unsuccessful attempts on the part of the applicants. Moreover, no official public explanation or debate ever took place about the lodging of the request to reopen the proceedings by the Prosecutor General in the absence of any relevant reasons, or in respect of the subsequent acquittals.

154. In conclusion, the Court finds that the authorities have never officially brought to the attention of the public the acquittals (see paragraphs 123-126 above). The applicants found out about them by accident, many years after they had taken place. Furthermore, the judgments given as a result of the retrials in 1998 and 1999 were not accessible to the public and the applicants had initially been refused access to those judgments. The Court considers that these elements, coupled with the findings and the reasoning offered by the Supreme Court of Justice for its acquittal decisions (see paragraphs 148-150 above), could have legitimately provoked in the applicants feelings of humiliation and vulnerability and caused them psychological trauma.

155. The foregoing considerations are sufficient to enable the Court to conclude that, in the light of the case as a whole, the domestic authorities

failed to adduce relevant and sufficient reasons for their actions that led to the revision of historical convictions for crimes connected with the Holocaust in the absence of new evidence and by reinterpreting historically established facts and denying the responsibility of State officials for the Holocaust (in contradiction with principles of international law). Therefore, the authorities' actions were excessive and cannot be justified as "necessary in a democratic society".

156. There has accordingly been a violation of Article 8 of the Convention read in conjunction with Article 14.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

157. Lastly, the applicants complained that the authorities' refusal to grant them access to the files concerning the extraordinary appeal proceedings had breached their right of access to a court within the meaning of Article 6 § 1 of the Convention. They further complained that the above-noted attitude of the authorities had also constituted discrimination on the grounds of their ethnic origin, in breach of the guarantees set forth by Article 1 of Protocol No. 12 to the Convention.

158. The Court considers that, in the light of all the material in its possession and in so far as the matters complained of are within its competence, these complaints either do not meet the admissibility criteria set out in Articles 34 and 35 of the Convention or do not disclose any appearance of a violation of the rights and freedoms enshrined in the Convention or the Protocols thereto. They should therefore be declared inadmissible.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

159. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

160. The applicants did not request any compensation in respect of pecuniary or non-pecuniary damage. They contended that the issue in this case was a matter of principle and that no financial compensation could correlate to the mental harm, humiliation and psychological suffering endured as result of the State's actions. Under these circumstances, the Court considers that there is no call to award any sum in respect of damage.

B. Costs and expenses

161. The applicants claimed a total of 8,500 euros (EUR) as follows: EUR 316 for mailing costs incurred in respect of proceedings before the domestic authorities and before the Court, supported by relevant invoices, and EUR 2,711 in legal representation fees incurred during the domestic proceedings and before the Court, supported by copies of legal-representation contracts and invoices specifying "legal assistance" in respect of the domestic proceedings and "drafting ECHR application" and "representation before the institution receiving the application" in respect of the proceedings before the Court. They also claimed EUR 5,473 for expenses incurred by the CLR when representing the applicants before the domestic authorities and before the Court.

162. The Government submitted that the claim was excessive and unsubstantiated because the legal representation contracts did not specify exactly what type of work had been carried out by the lawyer.

163. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 8,500 covering costs under all heads, plus any tax that may be chargeable to the applicants.

FOR THESE REASONS, THE COURT,

1. *Declares*, by a majority, the complaint under Article 8 in conjunction with Article 14 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds*, unanimously, that there has been a violation of Article 8 in conjunction with Article 14 of the Convention;

3. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicants EUR 8,500 (eight thousand and five hundred euros), plus any tax that may be chargeable to the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a

rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 23 April 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti Registrar	Gabriele Kucsko-Stadlmayer President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Răduleţu joined by Judges Vehabović and Guerra Martins is annexed to this judgment.

G.K.S.
A.N.T.

PARTLY DISSENTING OPINION OF JUDGE RĂDULEŢU JOINED BY JUDGES VEHABOVIĆ AND GUERRA MARTINS

1. While I voted for the finding of a violation of Article 8 in conjunction with Article 14 of the Convention, I cannot agree with the majority when they sustain that the Court does not have jurisdiction *ratione temporis* to analyse the complaint under Article 3. In my opinion, the Court does have such jurisdiction essentially because the facts challenged in the application, namely the reopening of the trials and the subsequent acquittals of the perpetrators, took place in 1998 and 1999, several years *after* the Convention entered into force in respect of Romania (20 June 1994). I cannot speculate as to whether the Court would have found a violation of Article 3 had it assessed such claim on the merits. What I wish to emphasise here is merely that the Court should have affirmed its temporal jurisdiction on this issue.

2. In this context, contrary to the majority's view, I consider that the Court's findings in *Janowiec and Others v. Russia* ([GC], nos. 55508/07 and 29520/09, ECHR 2013) are not relevant to the case at hand. The two tests that the Court developed or clarified in that case – the "genuine connection" test and the "Convention values" test – are not suitable here. Several arguments can be put forward in this regard.

3. In *Janowiec and Others*, the triggering event was a war crime perpetrated by the Soviet secret services in 1940 against Polish prisoners of war. No criminal trial of the perpetrators of that large-scale crime was ever subsequently held either before or after the date of the entry into force of the Convention ("the critical date") in respect of the Russian Federation. Some criminal investigations did take place after 1990, but they were discontinued suddenly in 2004. In addition, the applicants in that case were only the victims' relatives.

In the present case, however, the situation is clearly different. Crimes against humanity and war crimes were perpetrated against the Jewish community, mainly in 1941 and 1942, by the Romanian military and civil authorities (including a pogrom in Iași in June and July 1941, where more than 13,000 Jewish people died, and the placement of the Jewish population in ghettos awaiting deportation to Transnistria). The two applicants, unlike in *Janowiec*, are survivors of those egregious crimes, not just relatives of the victims. They are now 97 and 95 years old.

4. Unlike the former Soviet Union in *Janowiec*, the Romanian State recognised, to a certain extent, its implication in those crimes in September 1944 and then conducted genuine criminal investigations that established the criminal liability of the main perpetrators. In this context, several important trials took place from 1945 onwards. The former Prime Minister, Ion Antonescu, together with some of his ministers and the civil governor of Transnistria, were convicted and executed in 1946 for

various crimes, including those perpetrated against the Jewish population in Moldova and Transnistria. As part of this *transitional justice* effort, two of the military leaders involved in the aforementioned events – R.D. and G.P. – were tried between 1953 and 1957, found guilty in substance of those crimes and sentenced to prison terms. Thus, unlike the former Soviet Union in *Janowiec*, the Romanian State not only recognised the crimes and its implication through its agents, but also investigated, prosecuted, tried and convicted the individual perpetrators within a reasonable period of time, after the Second World War. In conclusion, from the perspective of the victims, justice was done at that time, their right to the truth was respected and the State fulfilled its procedural obligations in that regard, as they emanated from national and international law.

5. It follows that, when Romania ratified the Convention on 20 June 1994, those crimes had already long been investigated and the perpetrators tried. Final criminal judgments delivered by national courts between 1953 and 1957 were applicable at the critical date (20 June 1994), thus securing the principle of legal certainty.

6. Unlike in *Janowiec*, the applicants in the present case did not challenge any aspect of the 1953-57 judgments or any other action or inaction of the national authorities occurring prior to the date of ratification of the Convention. On the contrary, their application focused exclusively on the retrial and subsequent acquittal of R.D. and G.P. by the Supreme Court of Justice in 1998 and 1999, several years after the Convention entered into force in respect of Romania. The applicants specifically complained of the reopening of the proceedings after the critical date, their outcomes, and the fact that they had been kept secret. Thus, the acts complained of under Article 3 took place entirely *after* the critical date, not before it. Prior to 20 June 1994 the Romanian State had taken all the measures required under national and international law: it had tried, convicted and punished the two individual perpetrators.

7. For all these reasons, I think that the *Janowiec* judgment cannot be applied and, consequently, the two tests developed or clarified therein cannot be used in the case in issue. It seems quite clear that the Court has temporal jurisdiction in the present case, since the reopening of the trials and the subsequent acquittals took place entirely after the critical date. In this context, the date of the war crimes and crimes against humanity is irrelevant since, at the critical date (20 June 1994), the Romanian State had fulfilled all its relevant procedural positive obligations under national and international law. Furthermore, as mentioned above, the two applicants focused exclusively on the two acquittals of 1998 and 1999. In this context, the Court should have found that it had jurisdiction *ratione temporis* to examine the complaints raised by the applicants under Article 3 taken alone and in conjunction with Article 14 of the Convention.