I. STATEMENT OF VIOLATIONS OF THE CONVENTION AND PROTOCOLS AND OF RELEVANT ARGUMENTS

4.1 The Applicants respectfully submit that there have been violations of their rights under Article 3, Article 6 paragraph 1, Article 8, Article 1 of Protocol 1, Article 13 read in conjunction with Article 3, Article 8, Article 1 Protocol 1, and Article 14 taken in conjunction with Article 3, Article 8 and Article 1 Protocol 1, arising out of the matters set out above.

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4.2 Article 3 Prohibition of Inhuman and Degrading Treatment

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

4.4 The Applicants will expand in turn on the following key submissions evidencing a breach of Article 3:

- During and following the pogrom the Applicants and their families have been exposed to mob violence resulting in the destruction of their property and belongings. It caused them anguish, fear and distress which amounts to inhuman and degrading treatment.

- With respect to the incident at issue, in spite of the existence of abundant evidence to identify all perpetrators, Village Council representatives and police officers included, the authorities have failed to proceed with a prompt, comprehensive and ultimately effective official investigation capable of leading to the identification and punishment of those responsible.

- The racial discrimination by the public authorities, to which the Applicants and their families have been publicly subjected and their living conditions following the pogrom constitute an interference with their human dignity which amounts to degrading treatment.[1].

4.5 Together with their families, the Applicants were illegally expelled from their property following the decision of the Village Council to expel all Roma (including the Applicants) from the village.[2]

4.6 Respondent State is directly responsible for what happened to the Applicants. For the purposes of showing that Respondent bears a direct responsibility, the Applicants would like to refer to the paragraphs 2.4-2.10 of the application and reiterate that Village Council and police officials are State agents for the purposed of Article 3.[3]

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[1] See annex No. 78: witness statements.
[2] See para. 2.9-2.10 of the present application.
[3] According to the Law on Self-Governance in Ukraine (art. 10 para. 1) and Constitution of Ukraine (art. 141), Village Councils are bodies of local self-governance, which officially represent interests of the citizens and take decisions.

4.7 Expulsion caused them fear, anguish and distress, and exposed them to great mental suffering, which amounts to inhuman and degrading treatment. In Ireland v United Kingdom treatment was found to be 'inhuman' because it was applied for hours and caused "at least intense … mental suffering" and also 'degrading' because it was "such as to arouse in [its victims] feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or mortal resistance." Moreover, the Court ascertained in Ireland v. United Kingdom[4] and the Greek Case[5] that article 3 of the ECHR also covered the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault."[6]

4.8 In assessing an act for violation of Article 3, the Court may have regard to "whether its object is to humiliate and debase the person concerned and whether as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3"[7] or whether it drives the victim to act against his will or conscience. Nevertheless, a positive intention to humiliate or debase is not a prerequisite for a finding of a violation of Article 3. It is sufficient if the victim is humiliated in his or her own eyes.[8]

4.9 The Applicants and their families were asked to leave the village immediately and no assistance was provided to them afterwards; they had no other solution than to leave immediately and took nothing with them, which caused them suffering. In Selcuk and Asker v. Turkey,[9] the applicants claimed a breach of Article 3 based on the destruction of their homes and their eviction from their village. The Court in this case noted that the destruction of the applicants' homes and their property was "premeditated and carried out contemptuously and without respect for the feelings of the applicants. They were taken unprepared; they had to stand by and watch the burning of their homes."[10] The Court found the destruction of the applicants' homes to have caused suffering of sufficient severity for the acts to be categorized as inhuman treatment within the meaning of Article 3.

4.10 When Applicants returned home several days after the pogrom they found their homes, documents and valuables destroyed or stolen by a mob of people, including the police officers, following the decision of the Village Council representatives. According to the ECtHR case law the deliberate destruction of homes with official complicity is a violation of Article 3. In Mentes and Others v. Turkey[11], the Commission concluded that the burning of Applicants' homes constituted "an act of violence and deliberate destruction in utter disregard of the safety and welfare of the applicants and their children who were left without shelter and assistance and in circumstances that cause them anguish and suffering."[12] In particular, it noted the "traumatic circumstances in which the applicants were prevented from saving their personal belongings and the dire personal situation in which they subsequently found themselves, being deprived of their

[4] Ireland v United Kingdom, Series A, No. 25.
[5] The Greek Case, Nos. 3321-3/67, 3344/67,5.11.69, (1969) 12 Yearbook 1.
[6] Report of 5 November 1969, Yearbook XII; the Greek case (1969), p. 461.
[7] Raninen v. Finland, No. 20972/92, 16.12.97, (1998) 26 EHRR 563, para. 55.
[8] Tyrer v. UK, Series A, No. 26, 25.4.78, (1970-80) 2 EHRR 1, para. 23, Smith and Grady v. UK, Nos. 33985/96 and 33986/96, 27.9.99, (2000) 29 EHRR 493 para.120.
[9] Selcuk and Asker v. Turkey, 12/1997/796/998-999.
[10] Ibid, para. 77.
[11] Mentes and Others v. Turkey, 58/1996/677/867.
[12] Ibid, para. 76.

own homes in their village and the livelihood which they had been able to derive from their gardens and fields."[13] It thus concluded that the applicants had been subjected to inhuman and degrading treatment within the meaning of Article 3.

4.11 In the cases of Selcuk and Asker v. Turkey[14] and Bilgin v. Turkey[15] the destruction of personal property was found to cause suffering of sufficient severity to be categorized as inhuman treatment

4.12 No precautions were taken to secure the safety of the Applicants and their property; on the contrary, the police officers according to witness statements and official documents were involved in the destruction of the Applicants' houses, valuables and documents. Before the pogrom actually started the Head of the local police department and the Head of the Village Council were visiting Applicants' houses and advising them to leave as soon as possible. When the pogrom actually started the mob of the villagers was escorted by the police officers who were present throughout the whole incident and did not take any actions to stop the mob.[16]

4.13 After the destruction of their houses, the Applicants could no longer enjoy the use of their homes and their valuables and had to live in very poor conditions. In case of Moldovan and Others v Romania the Roma applicants had their homes and personal property destroyed by a mob, including police officers. For many years after the destruction of their homes the applicants were forced to live in hen-houses and cellars. Thus, the ECtHR found that the applicants' conditions and the racial discrimination to which they were publicly subjected constituted an interference with their human dignity, which in the special circumstances of this case, amounted to 'degrading treatment' within the meaning of article 3 of the Convention. The Court specifically pointed out that the applicants' living conditions in the last few years combined with the length of the period during which the applicants have had to live in such conditions and the general attitude of the authorities must have caused them considerable mental suffering thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement. [17]

4.14 Positive Obligations of the State

4.15 Article 3 is primarily aimed at preventing States from subjecting individuals within their jurisdiction to mistreatment; a negative obligation. However, when read in conjunction with the obligation in Article 1 to "secure to everyone within their jurisdiction" the rights laid down in the Convention, it requires States to take adequate steps to prevent individuals from suffering treatment that would violate Article 3 at the hands of private individuals; a positive obligation.

[13] Ibid.
[14] Selcuk and Asker v. Turkey, 12/1997/796/998-999.
[15] Bilgin v. Turkey, application No. 23819/94, Judgment of 16 November, 2000.
[16] See witness statements Annex Nos. 29-52
[17] Moldovan and Others v. Romania, App. Nos. 41138/98,64320/01, para. 110.

4.16 The Applicants also rely on the positive obligations on the State to take those steps that could reasonable be expected of them to avoid a real and immediate risk of ill-treatment contrary to Article 3 of which they knew or ought to have had knowledge.

4.17 Regarding the "positive obligation" of the State to prevent and suppress acts of community violence committed by private individuals, the Applicants rely on the following jurisprudence:

4.18 Article 3 of the Convention, read in conjunction with Article 1, requires States not merely to refrain from torture or inhuman or degrading treatment or punishment, but also to "secure" this right by providing protection against ill-treatment by private persons.

4.19 In Costello-Roberts v. United Kingdom, the Court held "that the responsibility of a State is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligation under Article 1 to secure those rights and freedoms in its domestic law to everyone within its jurisdiction."[18]

4.20 In A v. United Kingdom, the Court stated that Articles 1 and 3 of the European Convention required "States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals."[19]

4.21 The Applicants submit that the Respondent State failed in its obligation to investigate and prosecute the public officials responsible. The pogrom happened at the decision of, and with the direct support and acquiescence of the local public officials, including police officers, who are state agents for the purposes of Article 3 of the European Convention.

4.22 In the Judgment of Assenov and Others v. Bulgaria, the European Court stated that "where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in the breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms in [the] Convention', requires by implication that there should be an effective official investigation. This obligation ... should be capable of leading to the identification and punishment of those responsible..... If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance..., would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity."[20]

4.23 In Mahmut Kaya v. Turkey, the European Court laid down the obligations of the States as follows: first, the States have an obligation to take every reasonable step in order to prevent a real and immediate threat to life and the integrity of a person when the actions could be

[18] Costello-Roberts v. United Kingdom, 19 EHRR 112 (1993), para. 26; see also, mutatis mutandis, Young, James and Webster v. the United Kingdom, Judgment of 13 August 1981, Series A No. 44, p. 20, para. 49 and A v. United Kingdom, Judgment of 23 September 1998, para. 22.
[19] A v. United Kingdom, Judgment of 23 September 1998, para. 22.
[20] Assenov and Others v. Bulgaria, (90/1997/874/1086), Judgment of 28 October 1998, para. 102.

perpetrated by a person or group of persons with the consent or acquiescence of public authorities; second, Sates have an obligation to provide an effective remedy, including a proper and effective investigation, with regard to actions committed by non-public State actors undertaken with the consent or acquiescence of public authorities. [21]

4.24 The Applicants respectfully submit that the jurisprudence of the United Nations Committee Against Torture (UNCAT) is also relevant in the context of this case and ask that the Court consider its findings in the light of the case-law related to the Convention Against Torture presented below.

4.25 The UNCAT examined a similar case, in which inhabitants of the Bozova Glavica settlement (Yugoslavia) were forced to abandon their houses in haste given the risk of severe personal and material harm, their settlements and homes were completely destroyed, basic necessities were also destroyed. Not only did the forced displacement prevent them from returning to their original settlement, but many members of the group were forced to live poorly, without jobs or fixed places of abode. The UNCAT concluded that "the burning and destruction of houses constitute in the circumstances acts of cruel, inhuman or degrading treatment."[22] In this case public officials (police) although they had been informed of the immediate risk that the complainants were facing and had been present at the scene of the events did not take any appropriate steps in order to protect the complainants, thus implying "acquiescence" in the sense of Article 16 of the Convention, which reads as follows: "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment."[23]

4.26 The UNCAT was of the opinion "that a criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who might have been involved therein. In the present case, the Committee notes that despite the participation of at least several hundred non-Roma in the events of 15 April 1995 and the presence of number of police officers both at the time and at the scene of those events, no person, nor any member of the police forces has been tried by the courts of the State Party. In these circumstances, the Committee is of the view that the investigation conducted by the authorities of the State Party did not satisfy the requirements of article 12 of the Convention."[24] Article 12 of the UN Convention against Torture states "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committee in any territory under its jurisdiction."[25]

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[21] Mahmun Kaya v. Turkey, appl. No. 22535/93, judgment of 28 March 2000.
[22] Hajrizi Dzemail et al. v. Yugoslavia, Communication N 161/2000, UN DOC CAT/C/29/D/D/161, 2000
[23] See UN Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment, http://www.hrweb.org/legal/cat.html.
[24] Ibid, para. 9.4.
[25] See UN Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment, http://www.hrweb.org/legal/cat.html.

4.27 In Encarnación Blanco Abad v. Spain, the UNCAT observed that, "under article 12 of the Convention, the authorities have the obligation to proceed to an investigation ex officio, wherever there are reasonable grounds to believe that acts of torture or ill-treatment have been committed and whatever the origin of the suspicion."[26] The Committee also found that "a criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who might have been involved therein."[27]

4.28 In another case, Henri Unai Parot v. Spain, the UNCAT noted that the "Convention does not require the formal submission of a complaint of torture. It is sufficient for torture only to have been alleged by the victim for the state to be under an obligation promptly and impartially to examine the allegation." "[E]ven if [the] attempts to engage available domestic remedies may not have complied with procedural formalities prescribed by law, they left no doubt as to Mr. Parot's wish to have the allegations investigated."[28].

4.29 With regard to the positive obligations of States to prevent and suppress acts of violence committed by private individuals, the Applicants would like to refer to General Comment 20 of the UN Human Rights Committee (UNHRC) on article 7 of the International Covenant on Civil and Political Rights according to which this provision covers acts that are committed by private individuals, which implies a duty for States to take appropriate measures to protect everyone against such acts.[29] The Applicants also refer to the United Nations Code of Conduct for Law Enforcement Officials[30], the Basic Principles on the Use of Force and Firearms by law enforcement officials[31] and the Council's of Europe Framework for Protection of National Minorities[32], which have provisions with a similar purpose

4.30 In this respect, the UNCAT has frequently reiterated its concerns about "inaction by police and law-enforcement officials, who fail to provide adequate protection against racially motivated attacks when such groups have been threatened."[33] Such inaction constitutes a violation of article 16, paragraph 1 of the Convention which reads as follows: "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or

[26] Committee Against Torture, Communication No. 59/1996, Encarnación Blanco Abad v. Spain, 14/05/98. CAT/C/20/D/59/1996, para 8.2.
[27] Ibid, para. 8.8.
[28] Committee against Torture, Communication No. 6/1990, Henri Unai Parot v. Spain, U.N. Doc. A/50/44 at 62 (1995), para. 10.4 and para 6.1.
[29] Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), para.2.
[30] Code of Conduct for Law Enforcement Officials adopted by General Assembly Resolution 34/169 of 17 December, 1979.
[31] Basic Principles on the Use of Force and Firearms by law enforcement officials, adopted by 8th UN Congress on Prevention of of Crime and Treatment of Offenders , Havana, Cuba, 27 August to 7 September 1990.
[32] Council's of Europe Framework for Protection of National Minorities, adopted on the 1st of February 1995 in Strasbourg.
[33] Concluding observations on the initial report of Slovakia, CAT A/56/44 (2001), para. 104; see also concluding observations on the second periodic report of the Czech Republic, CAT, A/56/44 (2001), para. 113 and concluding observations on the second periodic report of Georgia, CAT, A/56/44 (2001), para. 81.

other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment."

4.31 The attack on the Applicants in Petrivka was motivated by racial discrimination. The decisions of the Village Council of 8 and 9 September 2002 contain anti-Romani statements which were publicly stated at the mass meeting.[34] It is submitted that this discrimination constitutes degrading treatment under Article 3.

4.32 In the case of Moldovan and Others v Romania, the Court found that, in the special circumstances of the case, the Romani applicants' very poor conditions [35] over a period of ten years and the racial discrimination to which they were publicly subjected (by the way in which their grievances were dealt with by the various authorities) amounted to an interference with their human dignity, which constituted degrading treatment.[36]

4.33 In addition, "the remarks concerning the applicant's honesty and way of life made by some authorities dealing with the applicant's grievances … appear to be, in the absence of any substantiation on behalf of those authorities, purely discriminatory."[37] In this connection, the Court reiterates that discrimination based on race can of itself amount to degrading treatment within the meaning of Article 3 of the Convention.[38]

4.34 Further, treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others. Such remarks should therefore be taken into account as an aggravating factor in the examination of an applicant's complaint under the Article 3 of the Convention.[39]

4.35 Finally, the ECtHR found that authorities' discriminatory remarks should be taken into account as an aggravating factor when examining the Article 3.[40]

4.36 In the case of Hajtizi Dzemali et al. v. Yugoslavia the UN Committee against Torture specifically stated that all the inhabitants who were violently displaced belong to the Romani ethnic group which is known to be especially vulnerable in many parts of Europe. In view of this, States must afford them greater protection.[41]

4.37 It is clear that pogrom in Petrivka was directed against Roma and only Roma, as documented in the minutes of the extraordinary sessions of the Petrivka Village Council. Witness statements confirm that state authorities, including the head of the local police and the head of

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[34] See annex Nos. 27-28.
[35] Having had their homes and property destroyed by non-Roma villagers, the applicants lived in severely overcrowded and unsanitary environments, which had a detriment effect on their health and well-being.
[36] Moldovan and Others v. Romania, App. Nos. 41138/98 and 64320/01, July 12, 2005, para. 111.
[37] Ibid, para. 110.
[38] East African Asians v the United Kingdom, Commission report, 14 December 1973, DR 78, p5 at p 62
[39] Moldovan and Others v. Romania, App. Nos. 41138/98 and 64320/01, July 12, 2005, paragraph 111.
[40] Moldovan and Others v. Romania, App. Nos. 41138/98 and 64320/01, July 12, 2005; Gergely, Kalanyos v Romania, App. Nos. 57885/00 and 57884/00, December 9/2003.
[41] Hajrizi Dzemail et al. v. Yugoslavia, Communication N 161/2000, UN DOC CAT/C/29/D/D/161, 2000.

the local administration, were well aware of the fact when, how and where the pogrom was going to happen, but did not take any actions to prevent it. On the contrary, the officials were advising Roma to escape the village as soon as possible, because "they (state officials, one of them being Chief of the local police department) can't do anything to safeguard them and protect their rights."[42]

4.38 In view of the facts as well as the above-cited jurisprudence, the Applicants submit that together with their families they suffered inhuman and degrading treatment and punishment in violation of Article 3 of the Convention.

4.39 **Article 6, paragraph 1**

4.40 Article 6(1) reads as follows: "In the determination of his civil rights and obligations …. Everyone is entitled to a fair and public hearing within a reasonable time by independent and impartial tribunal established by law."

4.41 Under Ukrainian law and practice (article 28 of the Criminal Procedure Code of the Ukraine)[43] the authorities' failure to carry out an adequate criminal investigation has deprived the Applicants of their right to file a civil action for damages against the state with respect to the misconduct of the officials and police officers concerned. This failure has deprived the Applicants of such a determination of their civil rights in order to establish liability and recover damages.

4.42 For Article 6 to apply there must be a dispute at the national level between two private persons or between the applicant and the state, the outcome of which is determinative of the applicants' civil rights and obligations. Thus, the applicant must have an arguable claim to put before a national tribunal on a matter arising under national law, the decision concerning which will be determinative of her civil rights and obligations.[44] Consequently, if a person injured by a crime seeks damages from the perpetrator, her civil rights are thereby determined, so this article applies.

4.43 In the Golder case, the Court held that "Article 6 para. 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal." [45] The Court stated that the principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally recognized fundamental principles of law; the same being true of the principle of international law which forbids the denial of justice.[46] "Article 6 para. 1 should thus be read in the light of these principles. In this way, Article 6 embodies the 'right to court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. "To this, stated Court, are added the guarantees laid down

[42] See annexes Nos. 32, 79: witness statements of Ivan G. Burlya of 12 June 2004 and Ivan Tsinya of 11 June 2004
[43] See annex No. 53.
[44] See P. van Dijk, G.J.H. Van Hoof , Theory and Practice of the European Convention on Human Rights (1998) , pp. 394-406, and D.J. Harris , O.Boyle, C. Warbrick , Law of the European Convention on human Rights (1995) , pp. 174, 186-187.
[45] See Golder v. the UK 21/2/1975.
[46] Ibid, para. 35.

by Article 6, para.1 as regards both the organization and composition of the court, and the conduct of proceedings."[47]

The Court further stated that this "right to a court", of which the right to access is an aspect, may be relied on by anyone with a colorable argument that an interference with the exercise of his civil rights is unlawful and complains that that she has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6 para.1.[48] Furthermore, the Court stated that it must also be established whether "the degree of access afforded under the national law was sufficient to secure the individual's right to a court, having regard to the rule of law in a democratic society."[49]

4.44 Moreover, the Court stated Article 6 also applies on the basis that civil rights and obligations are being determined when the victim of crime joins a criminal prosecution as a civil party claiming compensation for injury caused by crime.[50]

4.45 In the case of Tomasi v France, the Court stated that filing of a complaint and the joining of subsequent criminal proceedings will give rise to a civil right, providing the outcome of the criminal proceedings is decisive of the civil party's allegations as to damage suffered. [51]

4.46 In Aksoy v. Turkey, the Court directly confirmed that a civil claim for compensation against a state constitutes a civil right for the purposes of Article 6 (1).[52]

4.47 As the Court has pointed out in Moldovan and Others v. Romania, the provision of Article 6(1) undoubtedly applies to a civil claim for compensation in cases where State agents were allegedly involved in treatment contrary to Article 3, including the destruction of homes and property.[53] Moreover, the requirement of access to court must be entrenched not only in law, but also in practice, failing which the remedy lacks the requisite accessibility and effectiveness.[54] This is particularly true for the right of access to courts in view of the prominent place held in a democratic society by the right to a fair hearing.

4.48 In the present cas, none of the Applicants have received any compensation as no one was prosecuted and found guilty by a court. Moreover, according to the Criminal Procedure Code of Ukraine, suspension of the criminal investigation cannot be appealed either to a court or to the highest Prosecutor. There is not a single provision in Ukrainian legislation which allows for this kind of action. This is especially striking compared to the fact that initiation of the investigation, refusal to initiate an investigation and closure of the investigation can be appealed to a court according to Article 236 of the Criminal Procedure Code. It means that the Applicants are left without any legal opportunity to challenge the actions of the Prosecutor in their case, which also

[47] Ibid, para. 36.
[48] See the Le Compte, Van Leuven, and De Meyere judgment of 23 June 1981, Series A No. 43, p. 20, para. 44 in fine, and the Sporrong and Lonnroth judgment of 23 September 1982, Series A No. 52, p.30, para. 81.
[49] Ibid, p.16-18, paras. 34-35.
[50] See e.g. Helmers v Sweden A 212 (1991).
[51] Tomasi v. France (1992) 15 E.H.R.R. 1 (para 121)
[52] Aksoy v. Turkey, No. 21987/93,18.12.96, (1997) 23 EHRR 553.
[53] Moldovan and Others v. Romania, Judgment of 12 July 2005, appl. No. 41138/98, 64320/01, para.118
[54] Akdivar and Others v. Turkey, p.1210& 66.

has rendered impossible an action for civil damages. According to Article 28 of the Criminal Procedure Code of Ukraine such an action can be constituted after the prosecution transmits a criminal case to court for a consideration on the merits, and should be examined alongside the criminal case. The result of the Applicants trying to press their claims in the civil courts in 2005 was that they were recommended by the civil jurisdiction to refer the case to the Administrative Court (paragraph 2.66 above). So, whilst it is true that, in theory, Applicants were not precluded from filing a civil claim for damages in civil courts, in practice no one has been prosecuted and the criminal case has not been transmitted to the court, consequently there was no one whom the civil courts could regard as officially responsible for damages arising out of the criminal activity.

4.49 When assessing an alleged violation of Article 6(1), the Court should bear in mind the insecurity and vulnerability of the Applicants' position and the fact that they became dependent on the authorities in respect of their basic needs after the events. Having been precluded from filing claims for civil damages and obtaining just compensation, Applicants could not afford buying new property or renovating their old one and subsequently had to live in substandard housing conditions and could not provide decent living conditions for their children and other family members.

4.50 The Applicants submit that the failure of the authorities to carry out an adequate criminal investigation and refusal to initiate criminal proceedings against individuals, including agents of the state, denied them access to a court for a civil action in damages against the state regarding the misconduct of the state officials in violation of Article 6(1) of the Convention.

4.51. **Violations of Article 8**

4.52 Article 8 of the Convention sets forth the following guarantees: "Everyone has the right to respect for his private and family life, his home and his correspondence.

4.53 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 democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

4.54 The Applicants respectfully submit that the facts of the case disclose a clear-cut violation of Article 8 of the Convention, both its negative (non-interference with the right to private life and home) and positive obligations (by failing to provide adequate protective measures against unlawful interference). The respondent State violated Article 8 of the Convention by deliberately directing the destruction of the homes through the actions of the Village Council and police officers.[55] It was the decision of the Petrivka Village Council that gave legal cover to the eviction and made it possible, and encouraged the mob to take action. It is already well-settled case-law that there shall be no interference by a public authority with the exercise of this right except in accordance with the law and as necessary in democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of

[55] See supra, paras. 2.9.-2.36.

disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4.55 In addition to the wholly negative obligation of non-interference already referred to there is an obligation of the authorities to take steps to make sure that the enjoyment of the right is not interfered with by other private persons. The principle was set out by the Court in X and Y v. Netherlands when it said: "Article 8 does not merely compel the state to abstain from interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life…. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."[56]

4.56 The Court noted that in some cases it is possible for there to be interference with the enjoyment of one's individual rights by the activities of another individual. It has been argued by states that conduct of this kind cannot implicate the state. The Court has rejected this contention. The matter of what kinds of interferences with Article 8(1) rights might be justified under Article 8(2) is independent of the question of what rights are protected by Article 8(1). In Airey v. Ireland the Court said that there "may be positive obligations inherent in an effective respect for private or family life."[57]

4.57 In view of the facts of the case, Applicants respectfully submit that the community violence at issue discloses an unequivocal violation of their rights to respect for their home and their private and family lives. The pogrom happened with the direct involvement and connivance of public officials, including police officers, and as such agents of the State. Therefore, the Ukrainian authorities themselves have breached the letter and the spirit of Article 8 by failing to adequately conduct a thorough and comprehensive investigation or provide adequate and comprehensive legal redress.

4.58 Home

4.59 Article 8's protection encompasses each of the following rights: "the right of access,[58] the right of occupation[59] and the right not to be expelled or evicted."[60] Indeed, in the case of Cyprus v. Turkey the Commission specifically stated the following:

4.60 "The Commission considers that the evictions of Greek Cypriots from houses, including their own homes, which are imputable to Turkey under the Convention, amount to interference with rights guaranteed under Article 8 paragraph 1 of the Convention, namely the right of these persons to respect for their home, and /or their right to respect for private life."[61]

[56] X and Y v. Netherlands, A 91 para 23 (1985), see also e.g., Johnston v Ireland A112 para. 55 (1986).
[57] A 32 para. 32 (1979).
[58] Wiggins v United Kingdom, No. 7456/76, 13 D and R 40 (1978) .
[59] Ibid.
[60] Cyprus v. Turkey , 4 EHRR 482 (1976).
[61] Ibid, para. 209.

4.61 The core concept underlying the right to respect for home is sanctuary against intrusion by public authorities. In addition, Article 8, read in conjunction with Article 1, obliges States to facilitate the right to live in the home, rather then merely to protect it as a possession or property right. In the Cyprus v. Turkey case the Commission considered that "the prevention of physical possibility of the return of the Greek Cypriots refugees to their homes in the north of Cyprus amounts to an infringement." [62] Respect for home involves more then the integrity of home life, what is at stake is the physical security of a person's living quarters and possessions. It includes the ability (facilitated by the state) to live freely in the home and enjoy it, not merely as a property right.

4.62 Following the incident, having been hounded from their village and homes, the Applicants had to live and some of them still live in crowded and improper conditions - cellars, hen-houses, stables, etc - and frequently changed address, moving in with their friends or family in extremely overcrowded conditions. It is clear from the disclosed facts that state authorities bear direct responsibility not only for deliberate destruction of their property and valuable belongings, but also for the Applicants' subsequent living conditions. None of the Applicants have to date returned to their village.

4.63 Private life

4.64 Turning to a notion of private life, the Convention organs have in a number of cases held that the concept of "private life" for the purposes of Article 8 (1) includes the physical and moral integrity of a person.[63] Furthermore, the notion of private life is one which tends to overlap with other interests protected under Article 8 – family life, home and correspondence. In Mentes and Others v. Turkey, the Commission found that the deliberate destruction of the Applicants' homes and possessions by the State security forces cut across the entire personal sphere protected by Article 8 - family life, private life and home - and it was not necessary to distinguish them.[64]

4.65 The Applicants respectfully submit that they were living in and settled in Petrivka village and in every respect considered the houses they were living in their "homes" in the sense of Article 8. Their homes, in addition to possessions, were deliberately and violently destroyed during the pogrom that occurred on September 9, 2002. There can be no doubt that that these acts constituted grave and unjustified interferences with the Applicants' rights to respect for their private and family lives and homes- and , indeed, in the most flagrant way possible.

4.66 Thus the Respondent State was under duty first of all to protect Applicants from the interference with their right to home and private life and secondly adequately to respond to the incident by conducting a comprehensive and thorough investigation and providing comprehensive redress for the violations alleged. The State has clearly failed in both respects, and must therefore be held responsible.

4.67 **Violations of Article 1 of Protocol 1**

[62] Ibid, para. 208, see also Howard v. United Kingdom, No. 10825/84, 52 D and R 198 (1987).
[63] See, e.g., X and Y v. Netherlands, A-91 (1985), para. 22.
[64] Mentes and Others v. Turkey, appl. No. 23186/94, Judgment of 28 November 1997.

4.68 Article 1 of Protocol 1 reads:

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

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

4.71 The Applicants respectfully submit that on the night of 9 September, at the instigation of the decision of the Village Council, their houses, belongings, valuable goods and documents were deliberately destroyed by the mob of non-Roma, accompanied by police officers. The Respondent State was directly responsible for the violation of Article 1 Protocol 1 of the European Convention because officials (represented by the Head of the Village Council and Deputies of the Village Council) ordered the expulsion and the police officials (represented by the Head of Petrivka police department) on the night of the pogrom accompanied the mob and actively participated in it, including in the destruction and plunder of property. Moreover, the Respondent State failed to protect the Applicants from the village mob and to provide a comprehensive and adequate redress for the damage that they have suffered.

4.72 Therefore, the Applicants submit that the Respondent State has clearly violated both negative and positive obligations inherent in Article 1 Protocol 1.

4.73 The Strasbourg organs have many times elaborated on the content and the nature of possessions:

4.74 The concept of possessions in Article 1(1) must not be understood in the strict technical – juridical meaning of the word. Instead, as also appears from its French counterpart - “biens” – the concept is to be interpreted expansively. The Strasbourg authorities have made clear that the notion of “possessions” has an autonomous meaning which is not limited to ownership of physical goods. Many rights or interests other than ownership represent an economic value and thus constitute assets for the purpose of Article 1.

4.75 The Court and the Commission have in a number of cases delineated the nature of possessions. Thus, they have held that a wide variety of interests other than ownership implicate Article 1.[65] Moreover, it is similarly well-settled that even measures short of the outright taking of property may affect the right to peaceful enjoyment of possessions.[66]

4.76 Some of the Applicants alleged that police took part in the destruction and plunder. Even if they did not, the Applicants respectfully submit that in certain circumstances, the State may be

[65] See. e.g. Van Marle judgment of 26 June 1986, A.101.
[66] See, e.g. Papamichalopoulos v. Greece, judgment of 24 June 1993, A.260-B, p.20 (as a result of occupation by military authorities, technical owners of the property could not dispose of it in any way, failure of the domestic authorities to remedy the situation amounted to de facto expropriation in a manner incompatible with right to peaceful enjoyment of possessions.

under an obligation to intervene in order to regulate the actions of private individuals. In Whiteside v United Kingdom, the applicant complained that she was being harassed in her home by a former boyfriend. The Commission noted that the harassment had become so "distressing and persistent" that it had reached a level at which it arguably interfered, inter alia, with the applicant's enjoyment of her home. The Commission concluded that the responsibility of the State was engaged and that it was "under a positive obligation" to secure the applicants' rights by providing adequate protection against this type of deliberate persecution.[67]

4.77 In Onerylidiz v Turkey the Court held that "although the essential object of many provisions of the Convention is to protect the individual against the arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect of the rights concerned…. The Court reiterates the key importance of the right enshrined in Article 1 Protocol 1 and considers that real and effective exercise of that right does not depend merely on the State's duty not to interfere, but may require positive measures of protection. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has struck between the general interests of the community and the interests of the individual, the search for which is inherent throughout the Convention. The obligation will inevitably arise, inter alia, where there is a direct link between the measures which an Applicant may legitimately expect from the authorities and his enjoyment."[68]

4.78 The Court has also held in a number of cases that the fair balance is unlikely to be met if there have been excessive delays by the authorities, for example, in providing, a remedy or paying compensation[69] or if otherwise the duration of interference with an applicants' right is excessive.

4.79 In Dogan and other v. Turkey, the Court found that Article 1 Protocol 1 had been violated as a result of the inability of the of the applicants to return to their village over a period of more than 10 years, following their expulsion in 1994 as a result of clashes between the PKK and the security forces. The applicants had been living elsewhere in extreme poverty and had not received any compensation or alternative housing or employment. The Court held that the authorities had the primary duty and responsibility to establish conditions, as well as provide the means, which allow the applicants to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country.[70] In the inter-state case of Cyprus v Turkey[71], there was found to be a continuing violation of Article 1 Protocol 1 due to the denial to Greek-Cypriot property owners of their access to, and control, use and enjoyment of their property and the absence of any compensation.

4.80 In view of the above, the Applicants respectfully submit that the facts of the case disclose an overwhelming violation of their right to peaceful enjoyment of their possessions. Their homes and furniture and other household and personal possessions/belongings were stolen or

[67] Whiteside v UK, App. No. 20357/92; 76- A(E)/B D.R.80.
[68] Oneryildiz v. Turkey (2004) 39 E.H.R.R. 12, paras. 143-146.
[69] See, e.g. Almeida Garrett v Portugal, Nos. 29813/96 and 30229/96, 11.1.00, (2002) 34 EHRR 23.
[70] Nos. 8803-8811/02, 8813/02 and 8815-8819/02, 29.6.04. At the time of this judgment there were 1500 similar cases from south-east turkey concerning the right to return registered at the Court (see European Court press release, 29.6.04).
[71] No. 25781/94. 10.5.01 (2002) 35 EHRR 30.

completely destroyed in the pogrom (evidence above in paras. 2.9-2.36 of the present application) and following the incident to date the Respondent State has continuously failed to provide the Applicants with any legal redress. For this, it must be held responsible.

Article 13 Right to an Effective Remedy

4.81 The Applicants will expand in turn on the following submissions under Article 13 of the Convention:

a) The authorities' failure to effectively prosecute a crime against those responsible for the Applicants' inhuman or degrading treatment, constitutes a separate and independent violation of the Applicants' right to an effective remedy before a national authority – and as such a violation of Article 13 read in conjunction with Articles 3, 6 (1) and 8.

b) The Ukrainian criminal legislation contains no specific provisions punishing racially motivated acts, or indeed any other felony, as separate criminal offences, nor does it have explicit penalty-enhancement provisions relating to racially motivated crime; thus making it impossible to provide adequate redress in cases of a violation of Articles 3, 6(1), 8 of the Convention read in conjunction with Article 14.

c) Existing though inadequate racially motivated crime provisions contained in the Ukrainian Criminal Procedure Code have not been applied by the authorities in the instant case, which of itself amounts to a separate violation of Article 13 read in conjunction with Articles 3, 6(1), 8 taken together with Article 14.

4.82 Article 13 provides:

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

4.84 The Applicants respectfully submit that following the incident at issue they have been denied an effective and comprehensive remedy for ill-treatment and the destruction of their homes and possessions: even though there was strong evidence that suggested police and other officials' involvement, there was never a comprehensive investigation or a formal criminal indictment issued against any officials.

4.85 The Court recently held that Article 13 "guarantees the availability at the domestic level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order." The effect of this article is thus to require the provisions of a domestic remedy to allow the competent national authorities both to deal with the substance of the relevant complaint and to grant appropriate relief".[72] The Court

[72] Assenov and Others v .Bulgaria, (90/1997/874/1086), Judgment of 28 October 1998, para 117; Kaya v. Turkey, (158/1996/777/978), Judgment of 19 February 1998, Aksoy v. Turkey (100/1995/606/694), Judgment of 18 December 1996, para. 95).

has elaborated further on the precise contours of the "effective remedies" to be afforded at the domestic level, stating that whenever "an individual has an arguable claim that he has been tortured by the agents of the State, the notion of an effective remedy entails, in addition to the payment of compensation, where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedures."[73]

4.86 In the case of Mentes and Others v. Turkey, the Court again reiterated that Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The Court stated that "the remedy must be effective in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State."[74] In Mentes, the applicants claimed they had been denied an effective remedy by which to challenge the destruction of their home and possessions purposely destroyed by agents of State. The Court held that the provision of Article 13 imposes "without prejudice to any other remedy available under the domestic system, an obligation on the respondent State to carry out a thorough and effective investigation of allegations brought to its attention of deliberate destruction by its agents o f the homes and possessions of individuals."[75] The Court stated that where an individual has an arguable claim that his/her home and possessions were purposely destroyed, the notion of effective remedy calls for a thorough and effective investigative mechanism which leads to the prosecution and punishment of all those responsible. The Court in Mentes found that since the respondent State in that case failed to provide an effective and thorough mechanism; such facts indeed disclosed a violation of Article 13.

4.87 In Selcuk and Asker v. Turkey, the Court stated that "where an individual has an arguable claim that his or her home and possessions have been destroyed by the agents of the State, the notion of an effective remedy entails, in addition to the payment of compensation where appropriate and without prejudice to any other remedy available in the domestic system, an obligation on the respondent State to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure."[76]

4.88 Furthermore, in the case of Selcuk , the Court found it particularly striking that even though the applicants had clearly identified and named the officer who was involved in burning and destroying their homes, there was never an independent, effective and thorough investigative mechanism that lead to the prosecution and punishment of all those responsible for what had occurred. Apart from applicants' statements, the Court found that no attempt was made to establish the truth through questioning of other villagers who might have witnessed the events under consideration.[77]

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[73] Aksoy v. Turkey, para. 98.
[74] See case of Mentes and others v. Turkey, 58/1996/677/867.
[75] Ibid, para. 89.
[76] Selcuk and Asker v. Turkey, 12/1997/796/998-999, para. 96.
[77] Ibid.

4.89 For the purpose of demonstrating that the Ukrainian authorities have failed to carry out a thorough and effective investigation of the incident giving rise to this application, the Applicants refer to paragraph 2.39-2.58 above.

4.90 Further, the Court specifically stated that the scope of Article 13 will vary depending upon the nature of the Convention complaint. Where a person's home has been destroyed by state agents, the Court has held that the notion of an "effective remedy" under Article 13 requires "a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure."[78]

4.91 It follows from the facts of the case no effective investigation has taken place up until now.

4.92 Article 13 can require states to provide a remedy for the actions of private individuals. When the claim under Article 13 relates to the failure of the state to discharge a positive obligation to regulate the conduct of individuals, Article 13 can impose an additional obligation on the state to investigate the conduct of these individuals. According to the well-established case law of the Cour, where a right with as fundamental an importance as the right to life or the prohibition against torture, inhuman and degrading treatment is at stake, Article 13 requires in addition to the payment of compensation where appropriate, a thorough and effective investigation, capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure.[79]. There should be available to the victim or the victim's family a mechanism for establishing any liability of state officials or bodies for acts or omissions involving the breach of their rights under the Convention. Furthermore, in the case of a breach of Article 3 of the Convention, which ranks as one of the most fundamental provisions of the Convention, compensation for non-pecuniary damage flowing from the breach should in principle be part of the range of available remedies.[80]

4.93 With the same effect the Applicants were denied an effective remedy in respect of their rights under Article 8 and Article 1 Protocol 1 of the Convention. As it has been already argued above, positive obligations inherent in Article 8 and Article 1 Protocol 1 require the state to take affirmative actions to safeguard the right to private life and peaceful enjoyment of possessions. It includes investigation of the possible breaches of the above-mentioned rights and adequate compensation should the breaches prove to be unlawful.

4.94 Applicants respectfully submit that the State has denied them an effective remedy both by failing to conduct an effective investigation and providing compensation. Almost eight years following the pogrom, the Applicants' case has neither been properly investigated, nor have they been awarded damages. Applicants have been also denied an effective remedy to realize and protect their right of access to court inherent in Article 6 of the Convention; by failing to

[78] See, e.g., Aksoy v. Turkey ,No. 21987/93, 18.12.96 (1997) 23 EHRR 553 para 98. See also Aydin .v Turkey, No. 23178/94, 28.6.97 (1998) 25 EHRR 251 para.103.
[79] Kaya v. Turkey, judgment of 19 February 1998, Reports 1998-I, pp 330-31 & 107.
[80] D.P. & J.C. v. UK 2003, 36 E.H.R.R 14 para. 135.

prosecute and punish those responsible for the events of 9 September 2002, state authorities precluded Applicants from filing claims for damages and obtaining them.

4.95 Current Ukrainian laws are not sufficient to protect against or punish acts of racial discrimination. This failure has been noted by international observers for many years. The absence of any comprehensive anti-discrimination law in Ukraine makes it virtually impossible for victims of discrimination in Ukraine to use legal means to secure justice. Furthermore, even in areas where some legal provisions and mechanisms do exist, government authorities and the judicial system continue to be unable or unwilling to utilize them to bring about meaningful change for Roma in Ukraine. The Applicants will expand more on this submission below (arguing Article 14 violation).

4.96 Therefore, Applicants respectfully submit that Article 13 has been violated by failing to provide an effective remedy to safeguard the rights enshrined in Article 6(1), Article 8 and Article 1 Protocol 1 of the Convention.

Article 14

4.97 Article 14 reads as follows: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground, such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

4.98 The Commission has noted that a "special importance should be attached to the discrimination based on race."[81] One of the relevant factors in considering the reasons for a difference in treatment is whether or not there is a common standard amongst Council of Europe States.

4.99 The Court's case law on Article 14 establishes that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations.[82] Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat, but as a source of its enrichment.[83] When investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events.[84] Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of

[81] East African Asians v UK, Nos. 4403/70-4419/70, 4434/70, 4443/70, 4476/70-4478/70, 4486/70, 4501/70 and 4526/70-4530/70, 14.12.73, (1981) 3 EHRR 76, para. 207.
[82] Wills v United Kingdom, No. 36042/97, & 48, ECHR 2002.
[83] Nachova v. Bulgaria (GC), Nos. 43577/98 and 43579/98, & 145, ECHR 2005
[84] Ibid, para. 160.

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

4.100 In the present case, the Applicants submit that despite the overwhelming information available to the authorities that the pogrom was racially motivated, there is no evidence whatsoever that they carried out any examination into this question.

4.101 Applicants would like to stress in particular that according to the Court's case law, discrimination on grounds of race can never be justified under Article 14. Indeed, in East African Asians v United Kingdom[85] the Commission considered that race discrimination could in itself constitute degrading treatment contrary to Article 3. In Cyprus v Turkey, Turkey was found to violate Arts 2, 3, 5 and 8 alone and in conjunction with Article 14 in so far as less favorable treatment was directed entirely at the Greek Cypriot community resident in the Turkish republic of Northern Cyprus.[86]

4.102 In Nachova v. Bulgaria, the Court considered that in cases where the authorities have not pursued lines of inquiry that were clearly warranted in their investigation into acts of violence by State agents and disregarded evidence of possible discrimination, the Court may, when examining complaints under Article 14 of the Convention, draw negative inferences or shift the burden of proof to the respondent Government.[87]

4.103 In Moldovan and Others v. Romania, the Court found that the Romanian authorities had acted contrary to Art.14, taken together with Articles 6 and 8, in the way they dealt with proceedings concerning the consequences of anti-Roma riots. In particular, the Court considered that the applicants' Roma ethnicity was decisive for the length and result of proceedings.[88]

4.104 Applicants respectfully submit that their claim of racial discrimination should be evaluated within this context of well-documented and repeated failure by the Ukrainian authorities to remedy instances of anti-Roma violence and to provide redress for discrimination.

4.105 In the Draft Concluding Observations of the Committee on the Elimination of Racial Discrimination, the Committee urged the Government of Ukraine to further intensify its human rights trainings for police and to facilitate the reporting of cases of police abuse of Roma, effectively investigate complaints and bring those found guilty of such acts to justice, provide adequate protection and compensation to victims, and include in its next report detailed information on the number and nature of the cases brought, convictions obtained and sentences imposed, and the protection and remedies provided to victims of such acts.[89]

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[85] East African Asians v United Kingdom, App. Nos. 4403/70 et al; (1973) 3 E.H.R.R. 76.
[86] Cyprus v. Turkey, App. No. 25781/94, Judgment of 10 May 2001.
[87] Nachova v. Bulgaria, App. Nos. 43577/98 and 43579/98, Judgment of 26 February 2004.
[88] Moldovan v. Romania, App. Nos. 41138/98, 64320/01, Judgment of 12 July 2005.
[89] CERD, sixty-ninth session, 31July – 18 August 2006, Consideration of the reports submitted by states parties under Article 9 of the Convention. http://www.errc.org/db/02/E0/m000002E0.pdf.

4.106 In the Concluding Observations of the Committee on Economic, Cultural and Social Rights, the Committee recommended that Ukraine consider adopting comprehensive anti-discrimination legislation and amending its Criminal Code to include provisions on racially-motivated crimes, train judges, public prosecutors and the police on the strict application of such provisions, and include in its next report detailed information, on an annual basis, on the number and nature of reported incidents of racial discrimination and violence, the criminal proceedings initiated and sanctions imposed on perpetrators, and on protection and assistance provided to witnesses and victims.[90] In the Consideration of Reports submitted by States Parties: Ukraine the Committee expressed concern in respect of reports about police abuse and denial of effective protection against acts of discrimination and violence committed against ethnic and religious minorities, especially Roma, the reluctance of the police to investigate properly such incidents and the tendency to prosecute and sentence perpetrators of such acts under lenient criminal law provisions of "hooliganism".[91]

4.107 In its second report on Ukraine, the European Commission Against Racism and Intolerance ("ECRI") urged the Ukrainian authorities to address manifestations of unlawful behavior on the part of law enforcement officials generally, and to take measures to ensure that the police react promptly and effectively to all crimes, including those committed against Roma, and to ensure that the racist element of such offences is duly taken into account. In its third report on Ukraine ECRI further observed that attempts to find a common understanding between Roma organizations and the Ministry of Interior, the Office of the Prosecutor and law enforcement officials have reportedly yielded few results. ECRI has also received reports according to which Roma do not receive an adequate response from the police when they are victims of crime. ECRI was also concerned that the institutional response to alleged instances of illegal behavior on the part of law enforcement officials is often inadequate.[92]

4.108 However, the situation has not changed considerably, because in its third report on Ukraine, ECRI again urged the Ukrainian authorities to investigate any allegations of police misconduct towards members of the Roma community and that any officers found guilty of such conduct be punished. ECRI also recommended that the authorities ensure that a channel of communication remains open between Roma organizations and all relevant actors in the criminal justice system in order to address the problems faced by members of Roma community in their relationship with the police and other law enforcement officers. It also recommends that the measures mentioned above be taken to reduce instances of police misconduct.[93]

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[90] Committee on Social, Cultural and Political Rights, 39th session, 5-23 November, E/C.12/UKR/CO/5 http://www.errc.org/db/02/8C/m0000028C.pdf.

[91] UN Committee on Economic, Social and Cultural Rights , Consideration of Reports submitted by States parties under articles 16 and 17 of the Covenant : concluding observations of the Committee on Economic, Social and Cultural Rights:Ukraine 4 January 2008 E/C.12 UKR /CO/5 available at http://www.unhcr.org/refworld/docid/478632472.html.

[92] European Commission against Racism and Intolerance, Second report on Ukraine adopted on 14 December 2001, paras. 43 & 58, http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_02/02_CbC_eng/02-cbc-ukraine-eng.pdf.

[93] European Commission against Racism and Intolerance, Third report on Ukraine, adopted on 29 June 2007, para. 77, http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/UKR-CbC-III-2008-4-ENG.pdf.

4.109 Moreover, in the U.S. Department of State Human Rights Report 2009: Ukraine, it is stated that incitement to ethnic or religious hatred is a criminal offence under Article 161 of the Criminal Code of Ukraine, however, human rights organizations said the requirement to prove actual intent (including proof of premeditation and intent to incite hatred), made its legal application difficult. Police and prosecutors generally prosecute racially motivated crimes under legal provisions dealing with hooliganism or related offences (like in the case Applicants are herby submitting to the European Court of Human Rights). No official statistics are available on the number of racially motivated crimes; however the Diversity Initiative monitoring Group, which is a coalition of international and local NGOs headed by the IOM mission in Kyiv, reported 26 attacks involving 35 victims during 2009. According to the Diversity Initiative, police initiated 11 criminal cases of hooliganism out of 17 cases that the monitoring group reported to officials. Prosecutors initiated only five criminal cases based on Article 161 of the Criminal Code, of which two were forwarded to a Court. According to the State Judicial Administration, in the first six months of 2009, one person was found guilty of violating Article 161, compared with three in 2008 and one in 2007. On February 6, the Ministry of Internal Affairs and Prosecutor General's Office issued joint instructions urging law enforcement personnel to use a new form designed to register hate-motivated crimes and to create a register of hate crimes. However, observers maintained that the form was not used in practice and that statistics on the frequency of hate crimes remained difficult to find. Human rights groups noted that police remained reluctant to recognize ethnic- and race- based crimes and often described incidents as hooliganism.[94]

4.110 Therefore, it is clear that Article 161 is rarely implemented in practice and in the absence of an anti-discrimination law as such, victims of the racially motivated crimes are left without an effective legal tool to combat discrimination. This in itself constitutes violation of Article 13 of the Convention.

4.111 In the recent European Exchange summary on hate crimes in Ukraine, it is stressed that many Ukrainian human rights NGOs and international organizations have deplored the lack of an anti-discrimination law, the urgent need for adoption of this law and to train members of law-enforcement authorities on conducting investigations in cases where hate crime motives are suspected. [95]

4.112 In Moldovan and Others v. Romania,[96] the Court specifically stated that the attacks were directed against the applicants because of their Roma origin. At the time the Court was not competent ratione temporis to examine under the Convention the actual burning of the applicants' houses and the killing of their relatives. However, the judgment makes clear that these facts constitute a violation of Article 14 of the Convention.

4.113 Based on the Court's jurisprudence, well-settled case law and the facts of this case, the Applicants submit that their rights set forth in Article 3, Article 6 (1), Article 8, Article 13 and

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[94] US Department of State, Diplomacy in Action: 2009 Country Reports on Human Rights Practices, March 11, 2010, http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136063.htm.

[95] Hate crime in Ukraine, summary, European Exchange, p.8 http://www.european-exchange.org/fileadmin/user_upload/Hate_Crime_EVZ/Hate_Crime_Ukraine_2010_EN.pdf.

[96] Moldovan and Others v. Romania, judgment of 12 July 2005, para. 139.

Article 1 Protocol 1 have been violated because of their Roma origin. It follows from the clear statements, contained in the 4th and 5th decisions of the extraordinary sessions of the Petrivka Village Council, that it was the Roma origin of the Applicants that has been decisive and main factor in the Village Council's resolution to expel them from the village and subsequently to destroy their homes and belongings. The resolution was realized in practice with the direct support and connivance of police officers and local officials. The wording of the Village Council resolutions leaves no doubt as to why Applicants were unlawfully and arbitrarily expelled from their homes and prevented from coming back.

II. STATEMENT RELATIVE TO ARTICLE 35(1) OF THE CONVENTION

5.1 Article 35 of the Convention articulates the admissibility criteria for an application to the Court sating that Court may only deal with such a matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law. Strasbourg jurisprudence has further made it clear that the local remedies rule requires the exhaustion of remedies which are available, effective and sufficient. The existence of remedies in practice must be sufficiently certain not only in theory, but in practice, failing which they will lack the requisite accessibility and effectiveness. The Applicants respectfully submit that they were not afforded available, effective and sufficient remedies, and assuming that these remedies did exist, that they have exhausted all domestic remedies by pursuing every legal channel available to them.

5.2 Moreover, if there are a number of possible domestic remedies, an Applicant will not required to have exhausted all of them, or even to have utilized more than one if they would not achieve anything more.[97] The Court has held that an Applicant cannot be criticized for not having had recourse to legal remedies which would have been directed essentially to the same end and would in any case not have offered better chances of success.[98]

5.3 It is clear from the facts of the case that Applicants went far beyond what the principle of exhaustion normally requires. They have tried every possible legal remedy available in the legal system of the Ukraine and none of them have offered even the slightest prospect of success, let alone compensation for all the wrong that has been done to them and restitution.

5.4 Applicants assert that the letter from the Odessa Oblast Prosecutor dated 13 July 2009 and stating that the investigation has been suspended due to a lack of evidence should be regarded as a final decision for the purpose of examining admissibility. The decision itself was taken on the 2 of March 2009, but the Applicants' lawyer got to know about this decision only on the 13 of July 2009. According to the Court's case-law, the application can be lodged within six months of the Applicants' or Applicants' lawyer's date of knowledge of the incident or decision.[99]

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[97] Bosphorus Hava Yollari Turizm Ve Ticaret As v. Ireland, No. 45036/98dec. 13.9.01; Moreira Barbosa v. Portugal, No. 65681/01, dec. 29.4.04.
[98] A v. France No. 14838/89, Series A, No. 277-B, 23.11.93, (1994) 17 EHRR 462, para 32.
[99] X v. UK No. 7379/76, dec. 10.12.76, 8 DR 211; Scotts of Greenock Ltd v UK, No. 9599/81, dec. 11.3.85, 42 DR 33

5.5 ERRC filed a pre-application letter on the 11th of January 2010 and was grated an extension of the application deadline until 1st of April 2010. Therefore, this application is being submitted to the European Court of Human Rights within the six-month time limit from the date of the final decision.

III. STATEMENT OF THE OBJECTIVE OF THE APPLICATION

6.1 The objective of the application is to find the Ukrainian Government in breach of Article 3, Article 6 (1), Article 8, Article 1 Protocol 1, Article 13 read in conjunction with Article 3, Article 8, Article 1 Protocol 1, and Article 14 taken in conjunction with Article 3, Article 8, Article 1 Protocol 1.

6.2 Pursuant to Article 41 of the European Convention of Human Rights the Applicants ask the Court to award them pecuniary as well as non-pecuniary damages as stated in paragraphs 2.18.-2.36 of the present application. The detailed calculations and supporting documents (evidence) will be presented in the due course of the proceedings.

IV. STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS

7.1 No complaint has been submitted under any other international procedure of investigation or settlement.