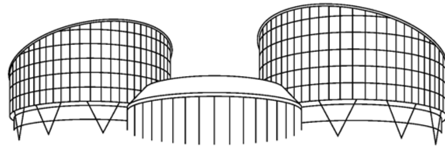

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF M.C. AND A.C. v. ROMANIA

(Application no. 12060/12)

JUDGMENT

STRASBOURG

12 April 2016

FINAL

12/07/2016

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of M.C. and A.C. v. Romania,

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

András Sajó, *President,*
Vincent A. De Gaetano,
Nona Tsotsoria,
Krzysztof Wojtyczek,
Egidijus Kūris,
Iulia Antoanella Motoc,
Gabriele Kucsko-Stadlmayer, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 1 March 2016,

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

PROCEDURE

1. The case originated in an application (no. 12060/12) 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, M.C. and A.C. ("the applicants"), on 6 February 2012. The President of the Section acceded to the applicants' request not to have their names disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicants were represented by Mrs R.I. Ionescu, a lawyer practising in Bucharest. The Romanian Government ("the Government") were represented by their Agent, Ms C. Brumar, of the Ministry of Foreign Affairs.

3. The applicants alleged, in particular, that the investigations into their allegations of ill-treatment motivated by discrimination against LGBTI (Lesbian, Gay, Bisexual, Transgender and Intersex) persons had not been effective.

4. On 30 January 2013 the application was communicated to the Government.

5. The applicants and the Government each filed written observations. In addition, third party comments were received from the Fédération internationale des ligues des droits de l'Homme (FIDH), the European arm of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), the Advice on Individual Rights in Europe Centre (AIRE Centre) – all represented by ILGA – and the Association for the Defence of Human Rights in Romania, Helsinki Committee (APADOR-CH), which had all been granted leave by the President to make written submissions to the Court (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1978 and 1986 respectively and live in Bucharest and Curtea de Argeş respectively.

A. The incidents as described by the applicants

7. On 3 June 2006 the applicants participated in the annual gay march in Bucharest. It was organised by ACCEPT, a non-governmental organisation whose goal is to provide information and to assist the LGBTI community. The march was given police protection. Several individuals who had actively expressed their disapproval over the gay march were stopped by the police, their pictures taken and their identity papers checked and noted.

8. At around 7 pm, at the end of the march, the applicants and four other participants left the area using the routes and means of transport recommended by the authorities in the guidelines prepared by the organisers for march participants. As recommended in the same leaflet, they wore no distinctive clothing or badges that would identify them as having participated in the march.

9. After boarding a metro train, they were attacked by a group of six young men and a woman wearing hooded sweatshirts. The attackers approached the victims directly and started punching them and kicking their heads and faces. They also swung from the metal bars above their heads, kicking their victims. During the attack they kept on shouting: "You poofs go to the Netherlands!" (*Poponarilor, duceţi-vă în Olanda!*)

10. The victims were pushed into a corner of the carriage. One of them tried to protect the others with his body, but the second applicant remained exposed and suffered several blows.

11. The attack lasted for about two minutes. On their way out of the carriage, the attackers punched the first applicant again in the face.

12. The other passengers withdrew to the opposite side of the carriage during the attack. Among them was a photographer, Z.E., who had also been at the march. The victims asked him to take pictures of the incident, which he did. As a consequence, the attackers hit him as well.

B. The medical examinations

13. The same evening, accompanied by a representative of ACCEPT, the victims went to the Mina Minovici National Forensic Institute and to Bagdasar Emergency Hospital for medical consultations.

14. The forensic medical certificate stated that the first applicant had bruises which could have been produced by blows from a hard object; they did not require "days of medical care".

15. The second applicant was diagnosed with multiple contusions (related to the incidents), minor cranio-cerebral trauma, contusion on the left shoulder and the left side of his face, and bruises. No bone damage was found. The forensic medical certificate concluded that the applicant needed one to two days of medical care.

C. The criminal investigation

16. Later that night of 3 to 4 June 2006 the victims, including the applicants, and a representative of ACCEPT went to Bucharest Police Station no. 25. They filed a criminal complaint against the attackers and stated that the assault was based on the victims' sexual orientation. They reiterated not having worn any visible signs that could have given away the fact that they were returning from the gay march. They argued that the attackers had identified them at the march (as they had not worn masks) and followed them afterwards, with the intention of harming them. They informed the police about the offensive remarks made during the attack.

17. According to the applicants, the police agents were surprised when they realised that the applicants and the other victims, although gay, were affluent individuals with regular jobs and positions of responsibility. They tried to dissuade them from pursuing their complaint, warning them that they would have to confront their aggressors in court.

18. On 5 June 2006 the applicants' representative submitted to the police several pictures of the attack taken by Z.E. In some of the pictures the attackers' faces were visible, as their hoods were down. The photographer gave statements and was able to identify one of the perpetrators.

19. The first applicant was also shown pictures taken by the police during the march. She was able to identify two of the individuals from their photos. The police had the suspects' names and addresses on record.

20. The victims gave statements to the police.

21. On 8 June 2006 the police received copies of fifteen police reports drawn up on the day of the march concerning administrative fines imposed on counter-demonstrators.

22. Due to a reorganisation within the police force, the case file was moved from one police station to another, and on 4 April 2007 it was registered at the Metro Police Station.

23. As it appeared that nothing was happening in the case, the applicants sought information on the progress of the investigation by means of letters sent by ACCEPT on 25 September 2006, 28 March 2007 and 20 July 2011. On 19 March 2007 they also complained to the Ministry of Internal Affairs about the lack of an effective investigation in the case, but to no avail.

24. On 27 April 2007 they were informed that, following the reorganisation within the police force, their file had finally been logged by the Metro Police Station. The letter also informed the applicants that the investigation was ongoing and steps were being taken to identify the culprits.

25. On the same day, the police submitted a request to the Romanian Intelligence Service (the “SRI”) to confirm whether R.S.A. – an intelligence officer who had been identified among the attackers – had been on an official mission that night. On 24 May 2007 the Intelligence Service asked for clarification concerning the nature of the request. It was not until September 2007 that the police were able to obtain a statement from R.S.A., who declared that he had been off duty that day and offered information on one other person in the group of attackers. The actions undertaken by the police to identify the other individuals remained without success.

26. The Metro Police received, on 12 June 2007, a list of forty five names and identification numbers of persons who had been fined by the police during the gay march.

27. As one of the suspects was believed to be a Steaua football club supporter, the investigators attended twenty-nine football matches between 16 September 2007 and 13 December 2009 in an attempt to identify him. On 12 February, 14 May, 4 August and 7 December 2010 and 10 March 2011 the investigators tried to identify the suspects at metro stations. On eight occasions between 12 June 2007 and 6 July 2011, the investigators successfully asked the prosecutor to extend the deadline for completing the investigation.

28. On 10 June 2011 the police stated their view that the investigation should come to an end and asked the prosecutor’s office not to institute criminal proceedings in the case. The police gave the following explanation for their request:

> “... the investigation was rendered difficult by the fact that the file arrived at the Metro Police Station ... almost one year after the incidents, and the police agents ... who had been in charge of the case until September 2006 could not continue the investigation as the Intelligence Service had refused to cooperate and allow their agent – who was the only identified eye-witness to the events – to be interviewed; it is to be noted that the police lost their motivation to use the information for the purposes of finding the truth in this case, of identifying and bringing to justice those responsible. In addition, to a certain extent the victims lost their interest in how their complaint was being dealt with (they did not ... adduce the medical certificates ... which had been obtained at the request of the police ... on 27 October 2009 when it was noted that none of the victims had needed more than two days of medical care). It is observed that all the evidence-gathering methods for this type of crime have been exhausted and, given the lapse of time from the date when the complaints were lodged, the validity and relevance of the evidence gathered ... [have decreased], leaving the investigation into the identity of the culprits without an outcome. At the same time, it is observed that ... the criminal acts had become time-barred, removing criminal responsibility from the culprits.

29. On 9 August 2011, in response to a request from the applicants for information, the Metro Police informed them that their intention was to not institute a criminal prosecution (*neînceperea urmăririi penale*) as the alleged crimes had become statute-barred (*s-a împlinit prescripţia specială*). The police explained that the investigation had been rendered more difficult by the fact that the file had not arrived at the Metro Police office until a year after the events. Moreover, all the actions undertaken by police in order to identify the alleged culprits had failed.

30. On 4 October 2011 the prosecutor's office attached to the Bucharest District Court of the Fourth Precinct endorsed the police proposal and decided to terminate the investigation. The decision was sent to the first applicant's home on 27 February 2012.

31. On 19 March 2012 the applicants lodged a complaint with the Prosecutor-in-Chief against the decision of 4 October 2011. They argued that the prosecutor should have investigated the more serious crime of organising a criminal group (*asocierea pentru savârşirea de infracţiuni*), which had not yet become time-barred. They also complained that the investigators had failed to pursue their allegation that the attack had been motivated by their sexual orientation.

The prosecutor-in-chief dismissed their objections on 18 June 2012.

32. The applicants reiterated their objections against both the decisions delivered by the prosecutors in two separate complaints lodged with the Bucharest District Court.

33. On 9 August 2012 the District Court dismissed the complaint lodged by the applicants against the prosecutor's decision of 4 October 2011. The court made the following observation:

> "It is true that the authorities were apparently not sufficiently diligent in carrying out within a reasonable time an effective investigation capable of identifying and punishing those responsible for the criminal acts (the long periods of police inactivity, the transfer of files, the lack of cooperation from some authorities are all duly noted). On the other hand, this situation – although not imputable to the [applicants] – cannot prevent the application of the statute of limitation of criminal responsibility."

34. On 12 November 2012 the District Court dismissed the complaint lodged against the prosecutor's decision of 18 June 2012 as a mere reiteration of that already dealt with by the court in its decision of 9 August 2012.

35. Throughout the proceedings the applicants repeatedly sought access to the prosecution file. It was partially granted on 9 May 2012 and the applicants gained full access to the file once their objections had been lodged with the courts.

II. RELEVANT LAW AND PRACTICE

A. Domestic law and practice

36. According to Article 250 of the Code of Criminal Procedure (CCP), an accused person may not acquaint him or herself with the prosecution file until the end of the criminal prosecution. It follows from the provisions regulating criminal investigation and prosecution that before that date, the content of the criminal file is not public (see *Căşuneanu v. Romania*, no. 22018/10, § 38, 16 April 2013).

37. The relevant Article of the CCP read as follows:

Article 173

> “The counsel for the victim, the civil party and the party with civil liability has the right to formulate requests and adduce written statements. Counsel has the right to attend when the following investigative acts are taking place: hearing evidence from the party he represents, on-site investigations, searches, post-mortems, extensions of pre-trial detention; when other investigative acts are taking place, he can attend if the investigative body allows.”

38. The new Code of Criminal Procedure (NCCP), applicable since February 2014, regulates explicitly the right of the victim or his or her counsel to have access to the prosecution file and to be present when any procedural act (with few exceptions) takes place (Articles 81, 93 and 94 of the NCCP).

39. The relevant provisions of the Criminal Code, applicable at the time of the incident, prohibiting violence in various forms, depending on the gravity of the injuries inflicted on the victims may be found in *Ciorcan and Others v. Romania* (nos. 29414/09 and 44841/09, § 73, 27 January 2015). In addition, Article 323 prohibited association with the aim of committing crimes in the following terms:

Article 323

> “(1) An act of association, or initiating association for the purpose of committing crimes (...), and joining and offering support of any kind to such an association, shall be punishable by three to fifteen years’ imprisonment; the punishment shall not be harsher than that provided by law for the crime for the purposes of which the association was constituted.
>
> (2) If an act of association is followed by the commission of a crime, the punishment shall consist of the sentence for that crime combined with the sentence provided in paragraph (1).”

40. Since 11 August 2006, Article 317 of the Criminal Code prohibits incitement to hate crimes in the following terms:

Article 317 Incitement to discrimination

> "Incitement to hatred on grounds of race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion, political opinion, convictions, wealth, social origin, age, disability, illness, or HIV infection/AIDS is punishable by imprisonment for 6 months to 3 years or by a fine."

Prior to that date, and at the time of the incident, sexual orientation was not included among the proscribed grounds for discrimination. Incitement to hate crimes is currently prohibited by Article 369 of the new Criminal Code.

41. Since October 2006, Article 247 of the Criminal Code, which concerns abuse in the exercise of authority against the rights of the person, mentions sexual orientation as a proscribed basis for the denial of services; the crime is punishable by imprisonment of between 6 months and 5 years. This was not mentioned in the previous wording of that Article. Article 297 of the new Criminal Code also imposes sanctions for abuses in the exercise of authority such as "the deed of the civil servant who, during the exercise of work-related tasks, limits a person's exercise of a right or creates a situation of inferiority on grounds of ... gender [or] sexual orientation ..., which is punishable with imprisonment of between two and seven years, and prohibition of occupying a public position". In addition, the new Code maintained in Article 77 the aggravating circumstance regulated in Article 75 of the old Code, in cases of deeds perpetrated with discriminatory intent, including criminal motivation based on sexual orientation.

42. The Anti-discrimination Act (Government Ordinance no. 137/2000 on combating and punishing all forms of discrimination) reinforces the right of any individual to receive equal treatment before courts and other judicial organs and to benefit without discrimination from the protection of the State against violence or ill-treatment perpetrated by another individual or group of persons (Article 1 § 2 (b)).

Article 2 § 7 describes victimisation as "any adverse treatment ensuing from a complaint or a legal action brought concerning a breach of the principle of equal treatment and non-discrimination". Victimisation constitutes a misdemeanour (*contravenţie*), unless classified as an offence by the criminal law. The denial of public services – administrative or judicial – on grounds of discrimination constitutes a misdemeanour (Article 10 (a)), unless classified as an offence by the criminal law.

43. Any individual who considers himself a victim of discrimination can lodge a complaint either with the National Council against Discrimination (*Consiliul Naţional pentru Combaterea Discriminării,* C.N.C.D.) – within one year of the date when the alleged act occurred – or directly with the civil courts – within three years of the same date (Articles 20 and 27 respectively). The Ordinance applies to private individuals, companies and public institutions alike (Article 3).

44. On 28 March 2012 the C.N.C.D. adopted Decision no. 108. The complaint in question had been brought by a private individual who had

claimed that the police had refused to assist him or to hear his complaint against individuals who ill-treated him on the grounds of his sexual orientation. The C.N.C.D. considered that it lacked the power to examine acts falling outside the scope of a misdemeanour (*contravenţie*) and to examine acts of police departments which were to be dealt with internally. It also reiterated that its powers were to establish the existence of discrimination and, possibly, to impose administrative sanctions (*sancţiuni contravenţionale*).

B. Relevant Council of Europe texts

45. On 31 March 2010 the Committee of Ministers of the Council of Europe adopted the text of Recommendation CM/Rec(2010)5 to member States on measures to combat discrimination on grounds of sexual orientation or gender identity.

46. The Commissioner for Human Rights of the Council of Europe conducted a study examining discrimination on grounds of sexual orientation and gender identity in Europe (a second edition of the study was published in September 2011). The study makes a general assessment of public opinion and of the protection afforded by States to homosexual persons across Europe. It contains relevant data on discriminatory attitudes and practices and on the legislative measures in place in European States, including Romania, in the matter. Relevant excerpts relating to the situation in Romania read as follows (footnotes omitted):

European studies

"Regarding opinions on the question "How would you personally feel about having a homosexual as a neighbour?" a 2008 report concluded that for the European Union member states "the average European is largely comfortable with the idea of having a homosexual person as a neighbour". However, there are large differences between countries, with respondents in Sweden (9.5), the Netherlands and Denmark (9.3) being the most comfortable with this idea (see Map 1.1) on a 10-point "comfort scale". Respondents in Romania (4.8), Bulgaria (5.3), Latvia (5.5) and Lithuania (6.1) are less comfortable. Other studies measuring attitudes and "social distance" found similar patterns.

As for the question whether a homosexual person should hold the highest political office in the country, it was found in 2008 that people in Sweden, Denmark and the Netherlands were the most positive while people in Bulgaria, Cyprus and Romania were the most negative. The question was repeated in 2009 and the most negative answers were found in Bulgaria, Romania and Turkey."

Protection: violence and asylum

"There is a growing amount of evidence demonstrating that a significant number of LGBTI persons in Council of Europe member states experience physical violence, harassment or assault because of their real or perceived sexual orientation and gender identity. Such violence may take different forms but is often driven by deep hatred,

intolerance, disapproval or rejection of the sexual orientation or gender identity of the person. A commonly used term in this regard is “hate crime” or “hate-motivated violence”, which may be fuelled by speech and public expressions which spread, incite, promote or justify hatred, discrimination or hostility towards LGBT people. Such speech can be expressed by fellow citizens, but also by political and religious leaders or other opinion makers, whether circulated by the press or the Internet. Sometimes state actors are involved in violence or harassment against LGBT persons, and in some instances family members. ...

The incitement of hatred, violence or discrimination on grounds of sexual orientation is considered as a criminal offence in only 18 member states (Andorra, Belgium, Croatia, Denmark, Estonia, France, Iceland, Ireland, Lithuania, Monaco, the Netherlands, Norway, Portugal, Romania, Slovenia, Spain, Sweden and the United Kingdom). Similarly, homophobic intent is accepted as an aggravating factor in common crimes in only 15 member states: Andorra, Belgium, Croatia, Denmark, France, Greece, Lithuania, the Netherlands, Norway, Portugal, Romania, Slovenia, Spain, Sweden and the United Kingdom.”

A pilot project in nine European countries (Denmark, France, Germany, Ireland, Latvia, Portugal, Romania, Sweden and the United Kingdom) has been set up to focus on how the police handle hate crime cases. The project has developed a toolkit for handling hate crimes, including a database for reporting, a website with information about hate crime, training material for police and information material for LGBT people.”

Participation: freedoms of assembly, expression and association

“Since 2004 in at least 12 member states there have been cases of bans and/or administrative impediments on Pride events or other large public cultural LGBT events (Bulgaria, Estonia, Latvia, Lithuania, Moldova, Poland, Romania, the Russian Federation, Serbia, Turkey, Ukraine and “the former Yugoslav Republic of Macedonia”). ...

Bans of Pride parades and other LGBT cultural events have since 2004 occurred in a handful of member states, notably the Pride parades in Latvia (in 2005 and 2006), Lithuania (in 2007 and 2008), in Romania (in 2005) and in “the former Yugoslav Republic of Macedonia” (in 2007, when an LGBT event in Skopje was denied authorisation). ...

Counter-demonstrations as a reaction to Pride parades are not uncommon in member states and may be held by religious communities, nationalist or extreme right-wing groups. While most of these counter-demonstrations are carried out within the limits of the right to freedom of assembly, others take the form of organised attacks on participants in Pride parades, resulting in clashes and incidents. This has been the case in at least 15 member states since 2004 (Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Italy, Latvia, Moldova, Poland, Romania, the Russian Federation, Serbia, Sweden and Ukraine). Sometimes counter-reactions have had a wider reach and have been promoted and sustained by political or religious figures. European institutions, including the Commissioner for Human Rights, have expressed concern for violence and limitations on the right to freedom of assembly of LGBT persons. Violent clashes seriously hamper the possibility for LGBT persons to peacefully demonstrate for their human rights and contribute to fostering hostility and prejudices. The OSCE has developed a set of guidelines to provide guidance to states on how to respect the freedom of assembly. The guidelines contain a principle of non-discrimination on the part of the authorities in guaranteeing the exercise of the

right to freedom of assembly, including on the ground of sexual orientation, while they do not make mention of gender identity."

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3, 8 AND 14 OF THE CONVENTION AND OF ARTICLE 1 OF PROTOCOL NO. 12 TO THE CONVENTION

47. The applicants complained under Articles 3, 6, 8 and 14 of the Convention and under Article 1 of Protocol No. 12 to the Convention about the failure to investigate adequately their criminal complaints concerning acts of violence motivated by hatred against homosexuals, and more generally about the lack of adequate legislative and other measures to combat hate crimes directed against the LGBTI minority. They further complained that, when conducting the investigation, the authorities did not take into account the fact that the offences against them were motivated by their sexual orientation. They therefore failed to meet the procedural obligations enshrined in the above Articles.

48. The Court is the master of the characterisation to be given in law to the facts of the case and does not consider itself bound by the characterisation given by an applicant or a government (see, among the most recent authorities, *Gherghina v. Romania* (dec.) [GC], no. 42219/07, § 59, 18 September 2015). Therefore, when communicating these complaints, it considered that they would be more appropriately examined under Articles 3, 8 and 14 of the Convention and 1 of Protocol No. 12 to the Convention (which Protocol became applicable as regards Romania on 1 November 2006), which read as follows:

Article 3 (prohibition of torture)

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

Article 8 (right to respect for private and family life)

"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 (prohibition of discrimination)

> “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.”

Article 1 of Protocol No. 12 (General prohibition of discrimination)

> “1. The enjoyment of any right set forth by law 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.
>
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

A. Admissibility

1. Preliminary objections

49. The Government raised two preliminary objections concerning the exhaustion of domestic remedies and the six-month time-limit for lodging the application with the Court.

(a) Non-exhaustion of domestic remedies

(i) The parties’ submissions

(α) The Government

50. The Government argued that the applicants had failed to exhaust the domestic remedies for the alleged discrimination as regards both the motives behind the incident and the allegedly racist attitudes of the investigators. They enumerated all the domestic laws dealing with discrimination and argued that the applicants should have lodged a complaint with the C.N.C.D. A favourable decision from the Council would have allowed them to seek damages before the domestic courts.

51. Moreover, they argued that the applicants could have relied on Decree no. 31/1954 taken in conjunction with Articles 998-999 of the former Civil Code in force at the relevant date to seek redress for an alleged infringement of their non-pecuniary rights. They made reference to the domestic case-law presented in *Man and Others v. Romania*, no. 39273/07 (case communicated on 4 October 2012 to the respondent Government).

52. They further contended that the applicants should have lodged criminal complaints against the investigators both for protracting the investigations and for the alleged discrimination against the applicants.

(β) The applicants

53. The applicants pointed out that the Government had done no more than refer to the legislation in place rather than providing any relevant case-law citations to support the alleged effectiveness of the remedies invoked.

54. They further contended that the objection raised pertained exclusively to the complaint of discrimination and not to the case as a whole.

55. They considered that they had done everything that could reasonably have been expected of them to exhaust the domestic remedies: they had raised all their complaints at the domestic level and pursued the chosen avenues until their conclusion. They contended that as victims of hate crimes, they have to rely exclusively on a criminal investigation, the authorities being the only ones having the means to hold the culprits accountable for their deeds. For this reason, the only effective domestic remedy is a criminal investigation carried out in a timely manner and capable of identifying and holding accountable the culprits. None of the remedies indicated by the Government was therefore effective. Moreover, in so far as the alleged discrimination in the investigation was concerned, those remedies could only be used at the end of the investigation itself, when it would be known to the applicants who was responsible for each investigative measure. They reiterated that access to the criminal file was denied them for six years (until 2012). To start fresh proceedings before the civil courts or the C.N.C.D. at that point would have been ineffective because of the long period of time that had elapsed from the date of the events.

56. Lastly, they point out that the C.N.C.D. would not be able to deal with criminal offences such as the ones perpetrated in the instant case, as the police and prosecutor's office are the only authorities with power in that sphere. The Council has also declared any alleged discrimination perpetrated within the police to be outside the scope of its activity. They made reference to the C.N.C.D.'s decision no. 108 of 28 March 2012 (paragraph 44 above).

(ii) The Court's assessment

(α) General principles

57. The Court reiterates that it is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It should not take on the role of the Contracting States, whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected at a

domestic level. The rule of exhaustion of domestic remedies is based on the assumption – reflected in Article 13 of the Convention, with which it has a close affinity – that there is an effective remedy available in respect of the alleged violation. The rule is therefore an indispensable part of the functioning of this system of protection (see *Akdivar and Others v. Turkey*, 16 September 1996, § 65, Reports 1996-IV; *Gherghina*, cited above, § 83; *Mocanu and Others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, § 220, ECHR 2014 (extracts); and *Vučković and Others v. Serbia* (preliminary objection) [GC], no. 17153/11 and 29 other cases, § 69, 25 March 2014).

58. The obligation to exhaust domestic remedies therefore requires an applicant to make normal use of the remedies which are available and sufficient in respect of his or her Convention grievances. The existence of the remedies in question must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Akdivar and Others*, cited above, § 66; *Gherghina (dec.)* [GC], cited above, § 85; and *Vučković and Others*, cited above, § 71).

59. However, the Court has also frequently underlined the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism (see *Akdivar and Others*, cited above, § 69; *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 286, ECHR 2012 (extracts); *Vučković and Others*, cited above, § 76; and *Gherghina (dec.)* [GC], cited above, § 87).

60. As regards the burden of proof, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time. Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *McFarlane v. Ireland* [GC], no. 31333/06, §§ 117 and 120, 10 September 2010; *Vučković and Others*, cited above, § 77; and *Gherghina(dec.)* [GC], cited above, § 88).

(β) Application of these principles to the case

61. Turning to the facts of the present case, the Court notes that whilst the Government's objection refers primarily to the complaint of discrimination, it also touches upon the allegations of lack of an effective investigation. The Court will examine the arguments accordingly. It notes that the applicants lodged a criminal complaint with the domestic courts in which they raised both the issue of ill-treatment and the issue of discrimination. When properly conducted, the criminal investigation constitutes an effective domestic remedy for these complaints: violence such as that suffered by the applicants is punishable by the domestic criminal law, the legal classification thereof being dependant on the

concrete circumstances of the case and the severity of the injuries inflicted on the victims (see paragraph 39 above). All elements of the file, including allegations of racist motives for the crimes, should also be taken into account by the investigators. The applicants had no reason to doubt the effectiveness of this remedy.

62. Furthermore, the C.N.C.D. considers that it lacks jurisdiction to deal with both aspects of the applicants' complaint of discrimination: the first – violence – as it is a criminal offence and the second, police attitude – which should be dealt with internally by the police hierarchy (see paragraph 44 above). The applicant could only appeal to the C.N.C.D. once the identity of the perpetrators was established and they therefore had to wait for the criminal proceedings to end before they could start any proceedings before the Council. As the investigation ended without any establishment of responsibility concerning both the initial attack and the manner in which the investigation had been conducted, in practice, this remedy was not available to the applicants.

63. In the Court's view, failure to establish the identity of the attackers renders any civil law remedy futile in so far as the allegations of discrimination are concerned. As for the remaining remedies, the Government failed to demonstrate their effectiveness in the case.

64. For these reasons, the Court is satisfied that the applicants availed themselves of the remedies which were available and sufficient for the purpose of this application. It therefore dismisses the Government's preliminary objection.

(b) Six month rule

(i) The parties' submissions

(α) The Government

65. The Government argued that the applicants had waited too long to bring their application to the Court, and in particular that they must have been aware of the ineffectiveness of the criminal investigation long before they petitioned the public prosecutor on 19 March 2012. It was due to their own negligence that they had failed to act more expeditiously (they refer to *Bayram and Yıldırım v. Turkey* (dec.), no. 38587/97, ECHR 2002-III). More precisely, the alleged failure of the judicial authorities to act must have become gradually apparent by 2007, when the applicants had been informed that their case file had been logged by the Metro Police Station. They had failed to take any steps after that date to find out about the development of the investigation, even though it would have been in their interest to seek information, in particular since their initial complaint had been filed against unidentified persons.

66. The onus had therefore been on the applicants to ensure that the claims were raised before both the relevant domestic authorities and the Court with sufficient expedition to ensure that they could be properly and fairly resolved. However, the applicants had waited until 9 August 2011 when, without referring to any new developments, they had merely contacted the authorities, with the effect of prodding them into some belated activity after a lull of almost four years.

(β) The Applicants

67. The applicants contested the Government's position and their allegations of lack of interest in the domestic proceedings. They reiterated that they had lodged the criminal complaint on the same day as they had been subjected to the ill-treatment, had produced most of the evidence in the case, and had identified two individuals in the group of attackers, one of them also by name (paragraph 19 above). The authorities had opened the investigations and had kept the file open all this time; the last investigative action had been recorded on 10 March 2011.

68. The applicants argued that they had had no reason to doubt the effectiveness of the remedy. They pointed out that criminal investigations in Romania took a long time as a general rule. Furthermore, there had been no regular communication between the authorities and the victims: the latter had given testimony at the beginning of the investigation and had then been informed at the end about the outcome, but had had no access to the prosecution file until the end of the proceedings. They reiterated that they did not get access to the file until 9 May 2012.

(ii) The Court's assessment

(α) General principles

69. The Court reiterates that, as a rule, the six-month period runs from the date of the final decision in the process of exhaustion of 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 cognisance of that act or its effect on or prejudice to the applicant (see, among other authorities, *Mocanu and Others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, § 259, ECHR 2014 (extracts)). Article 35 § 1 cannot be interpreted in a manner which would require an applicant to bring his complaint before the Court before his position in connection with the matter has been finally settled at the domestic level, otherwise the principle of subsidiarity would be breached. Where an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate for the purposes of Article 35 § 1 to take the start of the six-month period as the date when the

applicant first became or ought to have become aware of those circumstances (see idem, § 260 and *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 157, ECHR 2009).

70. In cases of a “continuing situation”, the period starts to run afresh each day and it is in general only when that situation ends that the six-month period actually starts to run. However, not all continuing situations are the same. Where time is of the essence in resolving the issues in a case, the burden is on the applicant to ensure that his or her claims are raised before the Court with the necessary expedition to ensure that they may be properly, and fairly, resolved (see *Varnava and Others*, cited above, § 160). This is particularly true with respect to complaints relating to any obligation under the Convention to investigate certain events. As the passage of time leads to the deterioration of evidence, time has an effect not only on the fulfilment of the State’s obligation to investigate but also on the meaningfulness and effectiveness of the Court’s own examination of the case. An applicant has to become active once it is clear that no effective investigation will be provided, in other words once it becomes apparent that the respondent State will not fulfil its obligation under the Convention (see *Mocanu and Others*, cited above, §§ 261-262 with further references).

71. The Court has already held that, in cases concerning an investigation into ill-treatment, as in those concerning an investigation into the suspicious death of a relative, applicants are expected to take steps to keep track of the investigation’s progress, or lack thereof, and to lodge their applications with due expedition once they are, or should have become, aware of the lack of any effective criminal investigation (see *Bayram and Yıldırım v. Turkey* (dec.), no. 38587/97, ECHR 2002-III).

72. In line with the principle of subsidiarity, it is best for the facts of cases to be investigated and issues to be resolved, in so far as possible, at domestic level. It is in the interests of the applicant, and the efficacy of the Convention system, that the domestic authorities, who are best placed to do so, act to put right any alleged breaches of the Convention (see *Varnava and Others*, cited above, § 164).

73. It follows that the obligation of diligence incumbent on an applicant contains two distinct but closely linked aspects: on the one hand, the applicant must contact the domestic authorities promptly concerning progress in the investigation – which implies the need to apply to them with diligence, since any delay risks compromising the effectiveness of the investigation – and, on the other, he must lodge the application promptly with the Court as soon as he becomes aware or should have become aware that the investigation is not effective (see *Mocanu and Others*, cited above, § 264 with further references).

(β) Application of those principles to the case

74. Turning to the facts of the present case, the Court notes that the applicants acted promptly in informing the authorities about the alleged crimes, lodging their criminal complaint within hours of the incident (see paragraph 16 above and, in contrast, *Vartic v. Romania* (dec.), no. 27631/12, § 48, 52 and 53 6 May 2014, and *Manukyan v. Georgia* (dec.), no. 53073/07, § 33, 9 October 2012). In the following days, they presented to the authorities all the evidential materials in their possession which could have contributed to the identification of the perpetrators and to the correct classification of the crimes allegedly committed.

75. The investigation ran its course and on 4 October 2011 the prosecutor decided not to start a criminal prosecution in the case. This decision was neither triggered nor influenced in any manner by the applicants' activity (or lack thereof) during the investigation, specifically their requests for information, the latest being that on 9 August 2011 (see paragraph 29 above).

76. The applicants used the remedies at their disposal and contested the prosecutor's decision. Their objection led to a re-examination of that decision, first by the prosecutor in chief and then by the courts. Any of these instances possessed the power to quash the prosecutor's decision and to send the case back for re-examination. The mere fact that the decision was upheld at all levels does not, as such, deprive the remedy of its effectiveness (see, in contrast, *Bayram and Yıldırımi*, cited above; *Mehmet Yaman v. Turkey*, no. 36812/07, §§ 43-49, 24 February 2015; and *Tekpetek v. Turkey* (dec.), no. 40314/08, § 40, 25 November 2014).

77. As a criminal investigation by the police is normally an effective means to address allegations of ill-treatment and discrimination, it was normal for the applicants to have put their trust in the system and to have waited for the end of the investigations before lodging their complaint with the Court. Notwithstanding this, the Court will examine whether the applicants observed their duty to keep themselves abreast of the investigations.

78. The Court notes that while the file moved between various police stations, the applicants made inquiries about the progress of the case. It is true that once the jurisdiction was finally attributed to the Metro Police Station, there was a period of apparent inactivity on the part of the applicants. However, no negative consequences should be inferred from this attitude in so far as the investigation phase of criminal proceedings – being neither public nor adversarial – requires little input from the victims once they have given their statements and presented all the relevant elements in their possession (see paragraphs 36 and 37 above). It is normal for the investigators, police or prosecutor, not to have contact with the parties until the end of the investigation; it is also expected that the authorities act of their own motion (see *Mocanu and Others*, cited above, § 321; *Georgescu*

v. Romania (dec.), no. 4867/03, § 25, 22 October 2013; *Bucureşteanu v. Romania*, no. 20558/04, § 42, 16 April 2013; and, *mutatis mutandis, Poede v. Romania*, no. 40549/11, §§ 56-57, 15 September 2015).

79. The applicants could not be considered to have lost interest in their case as they eventually sought fresh information as to its progress, inquired about the case and got answers (see paragraph 29 above). Moreover, it was in their interest to await the outcome of the investigation before taking any other action (for instance seeking compensation for the damage suffered as a result of ill-treatment or discrimination) in order to know the identity of the culprits (see *Varnava and Others*, cited above, § 164).

80. It follows that, for the purposes of Article 35 of the Convention, the six-month period starts running from the date of the final decision in the case, that is to say from 9 August 2012 (see paragraph 33 above). Consequently, in lodging their application with the Court on 6 February 2012, the applicants observed the six-month time-limit in the case.

The Government's objection should therefore be dismissed.

2. Other reasons for inadmissibility

81. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

82. The applicants argued that their ill-treatment attained the threshold of severity necessary to come within the sphere of Article 3. They repeated the details of the attack and contended that both the way the attack had been carried out and the reason why they had been targeted caused them feelings of distress, anxiety and debasement. They had had to undergo group therapy for several weeks to recover from the attacks.

83. They furthermore contended that a separate issue arose under Article 8 of the Convention as, at the relevant time, the criminal law did not adequately address hate crimes and the law enforcement authorities did not give enough attention to such crimes (notably paragraphs 40 and 41 above). They reiterated that homosexuals are amongst the three most discriminated-against groups in Romania.

84. As for the manner in which the investigation had been carried out, the applicants pointed out that the authorities had themselves acknowledged that they had been hampered by the fact that the file had not arrived at the

Metro Police Station until almost one year after the events. Moreover, they objected to the manner in which the situation of the witness R.S.A. had been handled by the investigators who had failed to clarify the contradictions between his statements and the remaining evidence. He had also been considered as a sole witness even though he had been accompanied at the time by his girlfriend and both of them belonged to the group which had attacked the applicants and although Z.E. had also been an eye-witness and gave statements to the police in this capacity.

85. The applicants further asserted that the investigation had lasted too long, and that its length could not be justified in so far as the facts under investigation had not been very complex. They reiterated that the prosecutor had taken ten months to decide which police station was competent to deal with the case. They further pointed out that the main investigative steps had been carried out over relatively short periods of time: 3 to 26 June 2006, 27 April to 12 June 2007 and October 2009, the remaining periods being unaccounted for.

86. They also complained that, since the prosecution file had remained secret, they had not had the chance to contest the actions carried out until after the prosecutor had issued a decision in the case. At that point, the statute of limitation had come into effect and they had had no opportunity to ask that the investigations be continued under a different legal classification of the crimes committed. For example, they had suggested that if the prosecutor had examined the facts under the provisions of Article 323 of the Criminal Code, which prohibits association with the aim of committing crimes (see paragraph 39 above), the statute of limitations would not have been activated. They further reiterated that they had not had full access to the prosecution file until the autumn of 2012.

87. The applicants also argued that the authorities had failed to take into account the sensitive nature of the case, in particular the seriousness of the attack, the acts perpetrated by the groups of counter-demonstrators, and R.S.A.'s role in the incidents.

88. They further contended that the respondent State did not treat hate crimes with seriousness sufficient to generate effective deterrence against such acts. This created a general feeling of vulnerability in the individuals and groups exposed to hate crime and discrimination. They reiterated that homosexuals are one of the three most discriminated-against groups in Romania. They made reference to the Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity commissioned by the Fundamental Rights Agency in respect of Romania. They also pointed to findings by the US State Department according to which investigations into complaints of alleged hate crimes are usually terminated due to length of proceedings, with the perpetrators remaining unidentified or not having the legal capacity to stand trial (e.g. children,

drunks, mentally challenged). According to the same analysis extremist journalism is considered to be an expression of free speech.

(b) The Government

89. The Government contended that the applicants had failed to produce sufficient evidence to overturn the findings of the domestic courts, which should therefore not be called into question. They considered that the complaint was of a "fourth instance" nature and that the Court should be sensitive to the subsidiary nature of its role and refrain from reassessing the case on the merits.

90. Even assuming that the claim raised were arguable, they asserted that the investigation had been effective and thorough and had strived to find the truth. They reiterated that the applicants themselves had seemed uninterested for a long period of time as they had not sought information about the progress of the case. They further pointed that, despite the applicants' allegations to the contrary, the identity of the perpetrators had not been known to the investigators. Moreover, the Government claimed, the applicants themselves had made conflicting statements during the investigation.

91. The authorities had been diligent in the investigation: they had obtained the names and photos of those who had been fined during the gay march and had heard testimony from witnesses. On 9 May 2012 they had also allowed the applicants' representative access to the prosecution file.

92. The Government acknowledged that the authorities had had an additional duty to take all reasonable steps to establish whether or not hatred or prejudice regarding different sexual orientation might have played a role in the events. They considered that the elements of the file could not lead to the conclusion that the incident had had the character of a hate crime. Nor had the authorities displayed any unwillingness or resistance to initiating a criminal investigation. Moreover, it did not appear that they had discouraged the applicants from pursuing their complaint.

93. The Government also argued that there was no reason for the Court to examine the complaint raised under Article 8 of the Convention since, in their view, the essence of the applicants' complaint fell within the scope of the procedural obligations under Article 3.

94. For the same reasons, they also argued that the Court should not undertake a separate examination of the complaint raised under Article 14 of the Convention and under Article 1 of Protocol No. 12 to the Convention. They also reiterated that the applicants had had at their disposal an effective remedy to complain about discrimination in the form of the Anti-discrimination Act.

95. Based on the facts of the case, the Government contended that the evidence pointed to the conclusion that the incidents had constituted an

isolated occurrence. The burden of proof therefore remained with the applicants, who had failed to prove that they had been discriminated against.

96. Lastly, they pointed out that the complaint raised under Article 1 of Protocol No. 12 to the Convention was identical to the complaint raised under Article 14.

(c) Third parties

(i) APADOR-CH

97. The APADOR-CH explained that, following the filing of a criminal complaint under Articles 221-222 of the CCP, the investigating body may carry out preliminary investigations (*acte premergătoare*) under Article 224 of the CCP. This phase of criminal proceedings was intended to constitute a mere preliminary verification and was therefore not regulated in detail by the CCP. The rights and obligations of the participants in criminal proceedings were usually referred to in relation to the criminal investigation, which was opened by means of a formal decision subsequent to the preliminary investigation stage. This situation created a 'grey area' as regards the preliminary investigation, with a lack of clarity as to the rights and duties of the parties involved in this phase.

98. The APADOR-CH further contended that, because of the requirement that special prescription periods be observed, the effectiveness of the investigations and trial depended directly on the expeditiousness of the authorities involved and argued that it was for the prosecutor to ensure that the investigations were carried out in a timely manner and that the investigating bodies (that is to say, the police) played an active role in the matter.

99. The APADOR-CH further pointed out that, from their own experience, it appeared that criminal investigations could be stalled for years, especially in sensitive cases such as those involving violence and death caused by State agents. In such cases there reigned a general culture of impunity as regards police officers who abuse their position and of discrimination towards the victims of crimes based on their ethnic origins, sexual orientation, or beliefs. According to the APADOR-CH, the practice of the investigating bodies was to keep the file open and carry out limited verification procedures, while not formally instituting criminal investigations. At some point, a formal decision not to start criminal investigations would be issued by the prosecutor and notified to the victim. Until that moment, which might not occur until several years after the alleged crime, the victim had no access to the file.

100. The APADOR-CH asserted that the duration of the criminal proceedings was especially important in cases of battery, bodily harm and aggravated bodily harm, where the prescription periods were rather short, varying from three to ten years. However, from the official statistics

provided by the Superior Council of Magistrates and the Prosecutor's Office attached to the High Court of Cassation and Justice, it appeared that only a very small percentage of such cases were terminated because of the prescription period (0.1% of the total cases solved by the prosecutor in 2011 and 2012). The APADOR-CH concluded that the victims of such crimes should expect that their complaint would be solved after a lengthier time (especially the more sensitive cases), but still within the prescription period.

(ii) ILGA

101. ILGA submitted several reports by international instances revealing a general climate of hostility towards LGBTI individuals in Europe. It pointed out that in the respondent State, the level of discrimination on grounds of sexual orientation was the fifth highest in the European Union.

102. ILGA further pointed out that both the Court in its relevant case law and the Committee of Ministers in their recommendation recognised the necessity of introducing criminal laws in order to protect individuals from treatment contrary to Article 3 and the discriminatory motives behind such attacks. A failure to protect LGBTI individuals from violent attacks or to properly investigate allegations of hate crime and bring the perpetrators to justice threatened, in its view, not only the rights of the victims but also the rights of the LGBTI community as a whole, as they would fear becoming victims of violent homophobic crimes. It referred to *Modinos v. Cyprus*, 22 April 1993, Series A no. 259.

103. ILGA stressed that merely passing laws prohibiting discriminatory offences, or increasing the punishment for them, was not sufficient to protect LGBTI individuals from attack, as evidenced by the many documented hate crimes that had occurred in countries where such crimes were specifically prohibited. In order to satisfy the requirements of the Convention in this area, the States must ensure genuine protection through effective investigation and prosecution. The obligation to investigate effectively was of particular relevance where treatment contrary to Article 3 of the Convention was a hate crime motivated by prejudice, including prejudice based on sexual orientation or gender identity. A failure to ensure that a prohibition was effective in practice would send out the message that the discrimination in question was not taken seriously and could even suggest tacit approval of the actions of the perpetrators because of a prejudice shared by the investigating authorities.

104. ILGA called for adequate training for all law enforcement agencies in the field of LGBTI rights and hate crimes, arguing that a failure to provide such training should be regarded by the Court as a failure to provide adequate protection against hate crime. In this connection, reference was made to *Opuz v. Turkey*, no. 33401/02, §§ 192-198, ECHR 2009.

2. *The Court's assessment*

(a) Scope of the case

105. The Court considers that the authorities' duty to prevent hatred-motivated violence on the part of private individuals and to investigate the existence of any possible discriminatory motive behind the act of violence can fall under the positive obligations enshrined in Articles 3 and 8 of the Convention, but may also be seen as forming part of the authorities' positive responsibilities under Article 14 of the Convention to secure the fundamental values protected by Articles 3 and 8 without discrimination. Owing to the interplay of the above provisions, issues such as those in the present case may indeed fall to be examined under one of these two provisions only – with no separate issue arising under any of the others – or may require simultaneous examination under several of these Articles. This is a question to be decided in each case in the light of its facts and the nature of the allegations made (see *Ciorcan and Others v. Romania*, nos. 29414/09 and 44841/09, § 158, 27 January 2015; *Identoba and Others v. Georgia*, no. 73235/12, §§ 63 and 64, 12 May 2015; *Bekos and Koutropoulos v. Greece*, no. 15250/02, § 70, ECHR 2005-XIII (extracts); *B.S. v. Spain*, no. 47159/08, §§ 59-63, 24 July 2012; and compare with *Begheluri and Others v. Georgia*, no. 28490/02, §§ 171-79, 7 October 2014).

106. In the particular circumstances of the present case, in view of the applicants' allegations that the violence perpetrated against them had homophobic overtones which had been completely overlooked by the authorities in the investigation, the Court finds that the most appropriate way to proceed would be to subject the applicants' complaints to a simultaneous dual examination under Articles 3 and 8 taken in conjunction with Article 14 of the Convention (see *Identoba and Others*, cited above, § 64) and if need be, of Article 1 of Protocol No. 12 to the Convention.

(b) General principles

107. The Court reiterates at the outset that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim (see, for example, *Bouyid v. Belgium* [GC], no. 23380/09, § 86, ECHR 2015; *M. and M. v. Croatia*, no. 10161/13, § 131, 3 September 2015; *A. v. the United Kingdom*, 23 September 1998, § 20, *Reports of Judgments and Decisions* 1998-VI; and *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 30, Series A no. 247-C).

108. Treatment has been held by the Court to be "degrading" – and thus to fall within the scope of the prohibition set out in Article 3 of the

Convention – if it causes in its victim feelings of fear, anguish and inferiority (see, for example, *Ireland v. the United Kingdom*, 18 January 1978, § 167, Series A no. 25, and *Stanev v. Bulgaria* [GC], no. 36760/06, § 203, ECHR 2012), if it humiliates or debases an individual (humiliation in the victim's own eyes, see *Raninen v. Finland*, 16 December 1997, § 32, *Reports* 1997-VIII, and/or in other people's eyes, see *Gutsanovi v. Bulgaria*, no. 34529/10, § 136, ECHR 2013 (extracts)), whether or not that was the aim (see *Labita v. Italy [GC]*, no. 26772/95, § 120, ECHR 2000-IV), if it breaks the person's physical or moral resistance or drives him or her to act against his or her will or conscience (see *Jalloh v. Germany* [GC], no. 54810/00, § 68, ECHR 2006-IX), or if it shows a lack of respect for, or diminishes, human dignity (see *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, §§ 118 and 138, 17 July 2014).

109. The obligation of the High Contracting Parties under Article 1 of the Convention to secure for everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals (see *M.C. v. Bulgaria*, no. 39272/98, § 149, ECHR 2003-XII, confirmed more recently in *O'Keeffe v. Ireland* [GC], no. 35810/09, § 144, ECHR 2014 (extracts)).

110. Furthermore, the absence of any direct State responsibility for acts of violence of such severity as to engage Article 3 of the Convention does not absolve the State from all obligations under this provision. In such cases, Article 3 requires that the authorities conduct an effective official investigation into the alleged ill-treatment, even if such treatment has been inflicted by private individuals (see *M.C.*, cited above, § 151; *C.A.S. and C.S. v. Romania*, no. 26692/05, § 69, 20 March 2012; and *Denis Vasilyev v. Russia*, no. 32704/04, §§ 98-99, 17 December 2009).

111. Even though the scope of the State's positive obligations might differ between cases where treatment contrary to Article 3 has been inflicted through the involvement of State agents and cases where violence has been inflicted by private individuals, the requirements regarding an official investigation are similar. For the investigation to be regarded as "effective", it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation as to the results to be achieved but as to the means to be employed. The authorities must have taken the steps reasonably available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard, and a requirement of promptness and reasonable expedition is implicit in this context. In cases under Article 3 of the

Convention where the effectiveness of the official investigation has been at issue, the Court has often assessed whether the authorities reacted promptly to the complaints at the relevant time. Consideration has been given to the opening of investigations, delays in taking statements and the length of time taken for the preliminary investigation (see *Bouyid*, cited above, §§ 119-123; *Mocanu and Others*, cited above, § 322; *Identoba and Others*, cited above, § 66; *Begheluri and Others,* cited above, § 99; *Denis Vasilyev*, cited above, § 100 with further references; and *Stoica v. Romania*, no. 42722/02, § 67, 4 March 2008). A prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. Tolerance by the authorities towards such acts cannot but undermine public confidence in the principle of lawfulness and the State's maintenance of the rule of law (see *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, no. 71156/01, § 97, 3 May 2007).

112. Moreover, when the official investigation has led to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the requirements of Article 3 of the Convention. In this respect the Court has already held that the protection mechanisms available under domestic law should operate in practice in a manner that allows for the examination of the merits of a particular case within a reasonable time (see, for example, *W. v. Slovenia*, no. 24125/06, § 65, 23 January 2014).

113. When investigating violent incidents, such as ill-treatment, State authorities have a duty to take all reasonable steps to uncover any possible discriminatory motives, which the Court concedes is a difficult task. The respondent State's obligation to investigate possible discriminatory motives for a violent act is an obligation to use its best endeavours to do so, and is not absolute. The authorities must do whatever is reasonable in the circumstances to collect and secure the evidence, to explore all practical means of discovering the truth, and to deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence induced by, for instance, racial or religious intolerance, or violence motivated by gender-based discrimination (see *Nachova and Others v. Bulgaria [GC]*, nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII; *Members of the Gldani Congregation of Jehovah's Witnesses and Others*, §§ 138-42, cited above; and *Mudric v. the Republic of Moldova*, no. 74839/10, §§ 60-64, 16 July 2013, recently reiterated in *Identoba and Others*, cited above, § 67). Treating violence and brutality arising from discriminatory attitudes on an equal footing with violence occurring in cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A

failure to make a distinction in the way situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (see, for instance, *Begheluri and Others*, cited above, § 173).

114. Furthermore, positive obligations on the part of a State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against serious acts, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection (see, notably, *Söderman v. Sweden* [GC], no. 5786/08, § 81, ECHR 2013; *C.A.S. and C.S.*, § 71 and *M.C.*, § 150, judgments cited above; and, *mutatis mutandis*, *O'Keeffe*, § 144 and *Identoba and Others*¸ §§ 72-73 and 94, judgments cited above).

115. The Court reiterates that it has not excluded the possibility that the State's positive obligation under Article 8 to safeguard an individual's physical integrity may extend to questions relating to the effectiveness of a criminal investigation (see *C.A.S. and C.S.*, § 72, and *M.C.*, § 152, judgments cited above).

(c) Application of these principles to the present case

(i) Threshold of severity

116. In so far as the applicants complained that the authorities had failed to conduct an effective investigation into their allegations that the violence perpetrated against them had had homophobic overtones, the Court notes that the applicants were attacked on their way home from a gay march. The march itself had been accompanied by counter-demonstrations which, despite the police protection afforded to the participants, ended in several individuals being fined for disturbing the event (see paragraphs 21 and 26 above). The applicants were attacked by a group of individuals who, the applicants believed, had observed them during the march and then followed them into the metro. The attackers came straight at them and abused them both physically and verbally (see paragraph 9 above). Both applicants sustained injuries (see paragraphs 14 and 15 above) and underwent group therapy to deal with the psychological trauma suffered (see paragraph 82 above). They described the feelings of distress, anxiety and debasement that they suffered because of the attack.

117. The Court considers that the aim of the physical and verbal abuse was probably to frighten the applicants so that they would desist from their public expression of support for the LGBTI community (see *Identoba and*

Others, cited above, § 70). The applicants' feelings of emotional distress must have been exacerbated by the fact that, although they followed to the letter the instructions issued by the organisers of the march in order to avoid becoming victims of aggression (see paragraph 8 above) and had no distinctive marks on them, they were attacked because of their participation in the gay march and thus because they were exercising rights guaranteed by the Convention.

118. Bearing in mind the reports referred to in paragraphs 46 and 101, above, the Court acknowledges that the LGBTI community in the respondent State finds itself in a precarious situation, being subject to negative attitudes towards its members.

119. In light of the foregoing, the Court concludes that the treatment, convincingly described by the applicants, to which they were subjected and which was directed at their identity and must necessarily have aroused in them feelings of fear, anguish and insecurity (compare with *Identoba and Others*, cited above, § 71, and *Begheluri and Others*, cited above, §§ 108 and 117) was not compatible with respect for their human dignity and reached the requisite threshold of severity to fall within the ambit of Article 3 taken in conjunction with Article 14 of the Convention.

(ii) Effectiveness of the investigation

120. The Court reiterates that the applicants had lodged a criminal complaint on the night of the incidents and within days had presented all the evidence at their disposal, which – in their view – rendered possible the identification of some of the members of the group of attackers (see paragraphs 16, 18 and 19 above). However, no significant steps were taken in the investigation for a period of almost a year, from June 2006 – the date on which the criminal complaint was lodged – to April 2007, the date on which the file was finally allocated to the Metro Police Station. Even at the time when the investigation was officially closed by the prosecutor, more than five years after the initial criminal complaint, the police had not established the identity of the culprits (see paragraph 30 above). Furthermore, the Court cannot ignore that during the investigation there were significant periods of inactivity on the part of the authorities. The whole process lasted until 9 August 2012, that is to say a total period of more than six years, a passage of time which is liable not only to undermine an investigation, but also to compromise definitively its chances of being ever completed (see paragraph 111 above).

121. The Court is prepared to accept that the investigation may not have been easy, given the significant number of persons involved in the counter-demonstration and the steps required to identify them; moreover the organisational changes within the police force had added to the difficulties in resolving the case. Organisational changes and restructuring, however, do not suspend the State's obligations under the Convention. Moreover, the

Court observes several shortcomings in the investigation, some of them acknowledged by the national authorities themselves (see, notably, paragraphs 28 and 33 above). In particular it is to be noted that throughout the investigation the police did no more than hear evidence from one witness, R.A.S., as well as attending 29 football matches and making random checks at the metro stations on five occasions (see paragraphs 25 and 27 above). It does not appear that they made use in any significant way of the evidence adduced by the applicants, specifically statements, photographs and the identification of some individuals in the group of attackers (see paragraphs 18 and 19 above). The Court in particular notes that, even though the applicants had identified some of the attackers, the domestic authorities (see paragraph 28 above) and the Government in their pleadings before the Court (see paragraph 90 above) have continued to assert the impossibility of conducting an investigation in the present case due to the failure to identify the perpetrators of the violence (see *Members of the Gldani Congregation of Jehovah's Witnesses and Others*, cited above, § 118). Moreover, the Court cannot accept that the investigative actions undertaken by the domestic authorities could be deemed appropriate steps towards identifying and punishing those responsible for the incident, in particular as these measures took place such a long time after the initial events.

122. Furthermore, it is to be noted that at no point did the authorities initiate criminal inquiries against the alleged culprits (*urmărirea penală*). The Court has already held that failure to open criminal inquiries – albeit when ill-treatment was inflicted by State agents – may compromise the validity of the evidence collected during the preliminary stages of investigation (see *Poede*, cited above, § 60 with further references). The Court sees no reason to find otherwise in the circumstances of the present case, where the ill-treatment was perpetrated by private individuals but the investigation fell under the State's positive obligations in respect of Article 3.

123. The Court observes that, in protracting the investigation, the domestic authorities had also allowed the statute of limitation to come into play (see *Members of the Gldani Congregation of Jehovah's Witnesses and Others*, cited above, § 119). They refused to examine the facts under any other Articles of the Criminal Code despite the applicants' express request to that effect, which remained unanswered (see paragraph 31 above). The Court notes that the applicants' request was not without merits, as there might have been other provisions of the Criminal Code which could have better described the crimes investigated (see paragraph 39 above).

124. More importantly on this point, the Court considers that the authorities did not take reasonable steps with the aim of examining the role played by possible homophobic motives behind the attack. The necessity of conducting a meaningful inquiry into the possibility of discrimination

motivating the attack was indispensable given the hostility against the LGBTI community in the respondent State (see paragraph 46 above) and in the light of the applicants' submissions that hate speech, that was clearly homophobic, had been uttered by the assailants during the incident. The authorities should have done so – despite the fact that incitement to hate speech was not punishable at the time when the incidents occurred (see paragraph 40 above) – as the crimes could have been assigned a legal classification that would have allowed the proper administration of justice. The Court considers that without such a rigorous approach from the law-enforcement authorities, prejudice-motivated crimes would inevitably be treated on an equal footing with cases involving no such overtones, and the resultant indifference would be tantamount to official acquiescence to, or even connivance with, hate crimes (see *Identoba and Others*, cited above, § 77; and, *mutatis mutandis*, *Ciorcan and others*, cited above, § 167). Moreover, without a meaningful investigation, it would be difficult for the respondent State to implement measures aimed at improving the policing of similar peaceful demonstrations in the future, thus undermining public confidence in the State's anti-discrimination policy (see *Identoba and Others*, cited above, § 80 *in fine*).

125. The foregoing considerations are sufficient to enable the Court to conclude that the investigations into the allegations of ill-treatment were ineffective as they lasted too long, were marred by serious shortcomings, and failed to take into account possible discriminatory motives.

There has accordingly been a violation of Article 3 (procedural limb) of the Convention read together with Article 14 of the Convention on this point.

126. This conclusion means that the Court need not examine the remainder of this complaint – raised under Articles 3 and 14 of the Convention – namely that the police intentionally protracted the investigations for homophobic motives and the allegations made under Articles 8 of the Convention and 1 of Protocol No. 12 to the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

127. The applicants complained that, as they had been victims of aggression in relation to their participation in a peaceful assembly, by failing to conduct effective investigations the State had breached its positive obligations under Article 11 of the Convention, taken alone or together with Article 14. They further complained that they had had no effective remedy at their disposal to complain either about the fact that the crimes against them had been motivated by their sexual orientation, or that the criminal investigation had lasted too long and had been inefficient, thus hindering their access to civil redress. The complaints were communicated to the

respondent Government under Articles 11, 13 and 14, which read as follows:

Article 11 (freedom of assembly and association)

> “1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

Article 13 (right to an effective remedy)

> “Everyone whose rights and freedoms as set forth in [the] 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.”

128. The parties presented observations on these points.

129. Having regard to the facts of the case, the submissions of the parties and its findings relating to Articles 3 and 14 of the Convention (see paragraph 125 above), the Court finds that these complaints are likewise admissible but considers that it has examined the main legal questions raised in the present application and that there is thus no need to give a separate ruling on the merits of the remaining complaints (see, for a most recent authority, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014, with further references).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

130. 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

131. The applicants claimed 15,000 euros (EUR) each in respect of non-pecuniary damage.

132. The Government argued that the amounts sought were excessive and that, in any case, the finding of a violation should constitute sufficient redress for the non-pecuniary damage allegedly suffered.

133. The Court considers that the violations found in the present case must have caused the applicants suffering and frustration which cannot be compensated for by the mere finding of a violation. Therefore, having regard to its previous case-law and making its assessment on an equitable basis, the Court awards EUR 7,000 to each applicant in respect of non-pecuniary damage.

B. Costs and expenses

134. The applicants also claimed jointly the following amounts for the costs and expenses incurred:

- EUR 50.36 for costs and expenses during the domestic proceedings, specifically court fees and forensic examination fees;
- EUR 116.66 for costs and expenses during the Court proceedings, specifically the cost of their postal communications with the Court;
- EUR 3,696 in fees for legal counselling for the preparation of two sets of observations in the proceedings before the Court.

They submitted the respective invoices.

135. The Government contested the validity of the claim. They argued that the invoices were illegible and did not allow any causal link with the current proceedings to be established. Moreover, they argued that the lawyers' fee was exorbitant and overestimated.

136. 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 have been 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 jointly the sum of EUR 3,863.02 covering costs under all heads.

C. Default interest

137. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, unanimously, that there has been a violation of Articles 3 and 14 of the Convention read together in so far as the complaint concerns the investigation into the allegations of ill-treatment;

3. *Holds*, by six votes to one, that there is no need to examine the remaining complaints;

4. *Holds*, unanimously,

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 7,000 (seven thousand euros) to each applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iii) EUR 3,863.02 (three thousand eight hundred and sixty three euros and two cents) jointly, plus any tax that may be chargeable to the applicants, 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, by six votes to one, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 12 April 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

András Sajó
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Wojtyczek;

(b) partly dissenting opinion of Judge Kūris.

A.S.
F.A.

CONCURRING OPINION OF JUDGE WOJTYCZEK

I agree with the outcome in the instant case; however, I should like to introduce certain nuances to the reasoning.

The difficulty of the case stems from the failure by the domestic authorities to establish the relevant factual circumstances. In such situations the Court must exercise particular caution in assessing the facts. Given the uncertainty as to the detailed course of events, it is especially difficult to establish the effects of the ill-treatment on the applicants (see paragraph 119). This should have been investigated by the domestic authorities. All the Court can state is that the applicants have an arguable claim under Article 3, which triggers the obligation to carry out an effective investigation. Furthermore, there is no doubt that the Romanian authorities did indeed fail to conduct an adequate investigation.

The judgment links the need to conduct a meaningful inquiry into the possibility of discrimination motiving the attack with the hostility prevailing against the LGBTI community in the respondent State (see paragraph 124). I am not persuaded by this argument. It may give the impression that the Court's approach in discrimination cases can vary from State to State. Whatever the general situation in a specific country, if Article 3 is applicable then the national authorities have a duty to establish all of the circumstances which are relevant for criminal liability, including the motives of the perpetrators.

PARTLY DISSENTING OPINION OF JUDGE KŪRIS

1. I voted against point 3 of the operative part of the judgment. I disagree with the majority that the allegations other than those under Articles 3 and 14 (in so far as the complaint concerned the investigation into the allegations of ill-treatment) did not need to be examined. The issues raised by the applicant under Articles 8, 11 and 13, taken separately or in conjunction with Article 14, should not have been summarily dismissed. At least some of them merited thorough scrutiny. Only one aspect of the alleged violation of Articles 3 and 14 was examined in the present case, while the alleged violation of Article 11 was not examined at all. By way of comparison, in *Identoba v. Georgia* (no. 73235/12, § 106, 12 May 2015), the Court found that "the ... applicants' complaints under Article 8, made either separately or in conjunction with Articles 13 and 14 of the Convention, as well as the specific repetition of their grievance about the ineffectiveness of the criminal investigation under Article 13" "merely [reiterate] the issues already thoroughly examined under the *lex specialis* – Articles 3 and 11, both read in conjunction with Article 14". Based on this consideration, the Court declared that part of the application "manifestly ill-founded" and rejected it pursuant to Article 35 §§ 3 and 4 of the Convention. One could say that the "reiteration" of certain complaints already examined under other heads does not at all, by itself, permit the conclusion that they are "ill-founded", let alone "manifestly" so. But this issue pertains to that case and not to the present one. However, in the present case the majority limited itself to a mere statement that "the Court need not examine the remainder of [the] complaint", but did not declare that part of the application "manifestly ill-founded".

2. In my opinion, had that part of the application been examined, it is more likely than not that a violation would have been found in respect of at least some of the complaints under Articles 8, 11 and 13, taken separately or in conjunction with Article 14. And such a finding would have had a bearing on the amount of compensation for non-pecuniary damage awarded to the applicants.

Alternatively, when the Court concludes that there is "no need to examine" some part of the application, as in this case, these complaints cannot simply be disregarded, especially in the light of the unambiguous requirement of Article 45 § 1. I regret to observe that overly laconic reasons for the rejection of "remainders of complaints" have become a long-standing practice of the Court, not only in cases where the need for such rejection is self-evident but also in cases where it would merit more explicit consideration. I believe that the present case clearly belongs to the latter category.

3. Having voted against point 3, I could not but vote against point 5 of the operative part of the judgment too.