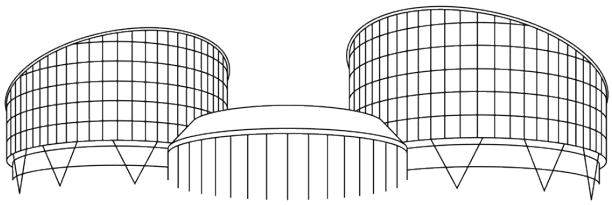

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECTION III

CASE OF CARABULEA v. ROMANIA

(Application no. 45661/99)

JUDGMENT

STRASBOURG

13 July 2010

FINAL

13/10/2010

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

In the case of Carabulea v. Romania,

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

Josep Casadevall, *President,*
Elisabet Fura,
Corneliu Bîrsan,
Alvina Gyulumyan,
Egbert Myjer,
Ineta Ziemele,
Ann Power, *judges,*

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 22 June 2010,

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

PROCEDURE

1. The case originated in an application (no. 45661/99) against Romania lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Romanian national, Viorel Carabulea ("the applicant"), on 2 September 1998.

2. The applicant, who had been granted legal aid, was represented successively by the European Roma Rights Centre, an association based in Budapest, and by Ms M. Macovei, Ms A. Dăgăliţă and Ms N. Popescu, lawyers practising in Bucharest. The Romanian Government ("the Government") were represented successively by their Agents, Mrs R. Rizoiu, and Mr R.-H. Radu, from the Ministry of Foreign Affairs.

3. The applicant alleged that his brother had been ill-treated by police officers in police custody and had died as a result, that the police had failed to provide adequate medical treatment to his brother, that the authorities had failed to carry out an effective investigation, that he did not have an effective remedy and that there had been discrimination on the basis of his brother's Roma ethnicity.

He relied on Articles 2, 3, 6, 13 and 14 of the Convention.

4. The case was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). By a decision of 21 September 2004, the Court declared the application admissible. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). The case was assigned to the newly composed Third Section (Rule 52 § 1).

5. The applicant and the Government each filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant, Viorel Carabulea, is a Romanian national, who was born in 1963. He lives in Bucharest.

7. On 3 May 1996 his brother, Gabriel Carabulea, aged 27, died in police custody in Bucharest following his arrest on suspicion of robbery. The ensuing investigations conducted by the prosecution authorities ended with the conclusion that Gabriel Carabulea died of natural causes, against a background of pre-existing ailments.

8. The applicant contested that conclusion. In a written statement submitted to his lawyer on 27 September 1998 he indicated that before his brother's arrest, he had been living with him and his family – his brother's wife Nela and their baby daughter. His brother had been in good health. His wife Nela was suffering from tuberculosis, which had prompted Gabriel to have an X-ray, the results of which had confirmed his good health.

A. Gabriel Carabulea's arrest and subsequent death

9. On 21 March 1996 Bucharest Police Station no. 9 circulated a notice to all police stations in Bucharest for the arrest of Gabriel Carabulea, who was known to the police, and described as “author of several crimes of robbery”. The notice contained Mr Carabulea's nickname, his home address and his full identity, including his parents' names. At the time, no formal charge existed against him.

10. On 13 April 1996 Mr Carabulea was apprehended by three police officers from Bucharest Police Station no. 14. They alleged that while on patrol in a police car, they saw Mr Carabulea driving a car and they gave chase. A few minutes later, allegedly, they witnessed a minor accident between his car and another car. They claim that Mr Carabulea jumped out of his car and ran towards some nearby apartment buildings and that they ran after him and effected an arrest. They then took him to Police Station no. 14, where an investigation was started for the offence of driving a car without a valid licence plate. According to the police incident report and a witness statement given by the other driver, no physical injuries or damage to property were sustained as a result of the accident.

11. The applicant submits that on 13 April 1996, Nela received a telephone call from Police Station no. 14, informing her that her husband had been arrested and that she could bring him clothes and food. The applicant and Nela went to see Gabriel at around lunchtime. He was in good health, did not complain of any ill-treatment and his clothes were in good condition, being neither torn nor creased. Gabriel told them that he was going to be transferred to Police Station no. 9 and asked the applicant to take care of his wife and daughter. The applicant went home, while Nela stayed with Gabriel until around 4 p.m., when he was transferred to Police Station no. 9.

12. According to a police report dated 13 April 1996, Mr Carabulea was taken to Police Station no. 9 for questioning in connection with an alleged robbery that had been committed on 20 March 1996. There, he was informed that he was "guilty of aiding and abetting robbery and of the possession of counterfeit foreign currency" and that he would be "detained for the next 24 hours". The report was signed by a police officer and an officially appointed lawyer, A.M., but not by Mr Carabulea.

13. Still on the same day, 13 April 1996, Mr Carabulea was officially charged with the aforesaid robbery. In a written statement made before the prosecutor he allegedly admitted the offence when questioned about the charge. This statement was submitted by the Government.

14. An arrest warrant valid for a period of 24 hours was issued by I.P., the police officer in charge of the lock-up. The warrant did not specify the time at which the 24-hour period commenced, contrary to the legal requirements.

15. On entering the lock-up at Police Station no. 9, Mr Carabulea was subjected to a body search. He was not examined by a doctor. The Government's evidence is that Mr Carabulea was in good health on entering the police lock-up.

16. On 14 April 1996 he was brought before the prosecutor V.L., who issued a detention order valid for five days.

17. According to the applicant, on 15 April 1996 Mr Carabulea's wife went to Police Station no. 9 to take food to her husband. She allegedly bribed Captain U. with some cigarettes in order to be allowed to give her husband the food and to talk to him for a few minutes in the presence of Captain U. She noticed that Gabriel was helped to Captain U.'s office by two policemen, as he had difficulty walking. After this short visit, Nela told the applicant that Gabriel "was looking bad", but that she had not dared to ask her husband what had happened, owing to Captain U.'s presence.

18. The Government's account, based on two statements, by one of Mr Carabulea's fellow detainees and by police officer I.P, is that on the morning of 16 April 1996, while taking his shower, Mr Carabulea felt sick. He was taken to the kitchen for fresh air and then he was given a massage. Half an hour later, Mr Carabulea complained again that he was feeling

unwell and was taken to the police dispensary, where a medical assistant observed "an altered general health condition, pain when breathing and physical weakness".

19. At a time unknown, Mr Carabulea was taken to the Ministry of the Interior Hospital, where a doctor found that his systolic blood pressure was 5 mmHG and his pulse rate was 100 bpm. A diagnosis of "respiratory viral infection with altered general health condition" and, allegedly, a "normal thorax image" was made. Admission to Jilava Penitentiary Hospital was directed.

20. Mr Carabulea was taken back to the police lock-up, where he remained until 1.20 p.m. He was then brought before the public prosecutor and another warrant authorising his pre-trial detention for up to 25 days was issued.

21. At 5 p.m. Mr Carabulea was admitted to Jilava Penitentiary Hospital, where, according to the medical file, a diagnosis of "deteriorated general state, with sharp pain in the thorax, epigastric pain, and dyspnoea on minimal effort" was made. As he was also found to have paroxysmal tachycardia (sudden increased heart rate), it was decided to transfer him to St John's Emergency Hospital.

22. At around 8 p.m. he was transferred to St John's Emergency Hospital, where an initial diagnosis of a massive upper gastrointestinal haemorrhage was made. According to the medical records, Mr Carabulea was in a deep state of "shock", his blood pressure was 5 and his pulse was 100. The applicant was admitted to the Emergency Ward of the Cardiology Section in a state of shock, with cyanotic and cold extremities, repeated vomiting with drops of blood ("coffee-ground" type), and intense pains in the epigastric region. Surgical consultation was required. The doctors described the history of the disease as follows. "After the patient's *anamnesis*, it appears that the shock occurred in the morning, but no probable cause was indicated:- ingestion of toxic substances, drugs, foreign bodies or trauma". Further examination based on "clinical and paraclinical information supported by cardiological examination" ruled out the initial diagnosis of massive upper gastrointestinal haemorrhage, and the patient was found to have suffered a pulmonary thromboembolism. He was, therefore, transferred to Fundeni Hospital, which specialised in cardiology, at an unspecified time during the night of 16 to 17 April.

23. Early the next morning (17 April) at Fundeni Hospital the initial diagnosis was "syncope of undetermined cause, pulmonary thromboembolism, paroxysmal tachycardia" (right heart deficiency) and "a haematoma beneath the capsule of the liver". He was noted to be in a state of shock and, having regard to the seriousness of his condition, constant medical supervision was advised.

24. Mr Carabulea remained at that hospital, under constant police supervision, in a ward in which he was the only patient. All medical examinations took place in the presence of a police officer.

25. The applicant states that on 16 April, at around 10 a.m., he and his cousin, Constantin Gheorghe, together with Nela went to see Gabriel at the police station, but were told that he was no longer there, as he had been taken to Jilava Penitentiary Hospital. They went to the said hospital where they were told that Gabriel was not there either. They then returned to Police Station no. 9 but the police officer on duty did not give them any further information and so they went home. That evening, their neighbours Tudor and Mariana told them a cousin of theirs, Mara, who was a cleaning lady at Fundeni Hospital, had telephoned them because she had seen Gabriel, who had been taken to that Hospital and placed in the Intensive Care Unit. The applicant, Constantin Gheorghe and Nela went to Fundeni. At the hospital reception they were told that Gabriel was there but that it was not possible to see him as he was under police supervision.

26. In an unsigned examination note in the medical file, allegedly drawn up on 16 or 17 April 1996, it is recorded that Mr Carabulea "explained in a moment of lucidity" that on 13 April 1996 he had been involved in a car accident. The note further records "cranial, thoracic and abdominal trauma which he [had] neglected", and that "since 14 April he [had] had slight pains in the upper area of the abdomen, a dry cough and dyspnoea".

A computerised tomography performed the same day disclosed a haemorrhage beneath the capsule of the liver.

27. On 17 April 1996, whilst in the Intensive Care Unit of the hospital, Mr Carabulea was interrogated by the prosecutor M.P. According to the documents submitted by the Government, Mr Carabulea withdrew his previous statement made on 13 April 1996 in which, allegedly, he had admitted the offence.

28. Mr Carabulea remained in Fundeni Hospital.

29. The applicant alleges that after Gabriel's admission to Fundeni Hospital, his wife, the applicant himself, his cousin Constantin Gheorghe and his friend Dumitru Dinu tried to visit him every day. On each occasion they were refused admission by the authorities on the ground that Mr Carabulea was under arrest. However, they did manage to see him, briefly, at times and were able to glean certain information from him.

30. For instance, on 17 April 1996, they made an attempt to see Gabriel, but the policeman inside the ward did not let them enter as the patient was under arrest and warned them that, for his sake, they should not come any more. No doctor was available to advise them as to Gabriel's condition but some medical assistants told them that it was "serious". It was not until the following day, after long negotiations with the police officer on guard, that Nela was eventually allowed to see her husband for a few minutes. After the visit, Nela came out of the ward crying and told the applicant, Constantin

Gheorghe and Dumitru Dinu that Gabriel's condition looked very bad but that she was unable to obtain any information from him because of the presence of the police officer. Some days later, Nela and Dumitru Dinu succeeded in entering Gabriel's ward for a few minutes. When they came out, they told the applicant and Constantin Gheorghe that Gabriel had told them that the police had suspended him from a cupboard, by using handcuffs, and had then congratulated him for having beaten the world record for hanging. He had also been rolled up in a wet carpet and beaten. On another occasion, Dumitru Dinu managed to see Gabriel through the door to the ward, which was slightly open. The applicant and Constantin Gheorghe, who were a few metres away, heard Gabriel calling out to Dumitru Dinu: "They've killed me, I'm a wreck!" (*M-au omorât, m-au nenorocit*). The applicant, Nela, Constantin Gheorghe and Dumitru Dinu went to the hospital every day to try to see Gabriel. Throughout this period, the medical staff refused to talk to them. On one occasion, when asked about the diagnosis, a doctor told them that the doctors did not know what the diagnosis was.

31. Mr Carabulea died in hospital on the morning of 3 May 1996.

32. The hospital notified the Prosecutor's Office of his death, reporting that the patient's death was caused by "recurrent pulmonary thromboembolism (on 17 April, 24 April and 3 May), severe pulmonary hypertension, thoracic and abdominal trauma as a result of a car accident of 13 April 1996, right heart insufficiency, thrombophlebitis in the left leg and irreversible cardio-respiratory block".

33. The applicant submits that Mr Carabulea's family were not formally notified of his death but learned of it on 3 May 1996 when they went to the hospital to visit him. They were told at reception that Mr Carabulea had died and they were sent to the hospital mortuary.

There, they saw Gabriel's body and noticed that he had bruising in a number of areas, including the ribs and stomach, one thigh and also in the genital area. They wanted to take his body home but were told that it was not possible and they were directed to come back on Monday 5 May.

34. According to an on-site report of I.C., Military Prosecutor, and dated 3 May 1996, Mr Carabulea's death was the result of a car accident which had taken place on 13 April 1996. The report stated that the corpse showed no external signs of injury and no symptoms of any internal lesions and that, whilst in the hospital, the patient had not referred to any alleged assault by the police officers at the place of detention. The report records that interviews were held with certain doctors, that no relatives of the victim were present at the time and that no other data was available. Despite the legal requirements, none of the doctors allegedly interviewed had countersigned the report.

35. A death certificate issued the same day records “acute cardio-respiratory insufficiency” as the immediate cause of death and “bronchopneumonia” as the proximate cause of death.

36. An autopsy ordered by the prosecutor on the date of death was carried out on 4 May 1996 by Dr P.P. of the Forensic Medicine Institute in Bucharest. The victim's family were not informed about the autopsy.

37. On Monday 5 May 1996 Mr Carabulea's family returned to Fundeni Hospital but were told that the corpse had been transferred to the morgue at the Forensic Medicine Institute, where an autopsy had already been performed. The family was allowed to take the body for burial. Before the burial, they took some pictures of the lower right side of the body.

38. Two copy pictures that were submitted to the Court show bruises and haematoma on the victim's right hand, upper right thigh, right iliac crest and on the right side of the genital area.

39. On 7 May 1996 the Bucharest Institute of Phthisiology issued a medical certificate stating that Mr Carabulea had been examined at its clinic one year earlier, in May 1995, and that there was no indication of any pathology associated with his pulmonary condition.

40. A provisional autopsy report dated 10 May 1996 and signed by Dr. P.P. stated that Mr Carabulea's death had been “non-violent and was the result of acute cardio-respiratory insufficiency following pulmonary thromboembolism, with widespread areas of pulmonary infarction against a background of pre-existing chronic diseases, myocardial sclerosis, and aggressive chronic hepatitis with progression towards cirrhosis. The violence bruise observed is more than 3-4 days old and could have been produced by the impact of a hard object, but did not cause death.”

No X-ray of the thorax had been performed during the autopsy.

41. The final autopsy report was produced by Dr P.P. on 30 July 1996.

Its findings based on a forensic examination of the corpse, noted an ecchymosis “as a result of violence on the right iliac crest” which had no causal link with the death, a fracture of three ribs “R3-R5 along the mid-clavicular line, 100 ml of serous-sanguineous fluid in the right pleural cavity”, and “black blood” in the lungs. The report was silent as to the source of bleeding. Genitalia and veins were reported as being “normal”.

Its conclusion was drafted in identical terms to those used in the provisional report of 10 May 1996.

B. The criminal investigation into Mr Carabulea's death

42. On 8 May 1996 Mr Carabulea's wife filed a complaint with the Military Prosecutor's Office in Bucharest, claiming that her husband, who had been in sound physical condition when he had entered police custody, had died as a result of beatings by police officers U. and B. (Police Station no. 9). She requested a murder investigation to be opened and she attached

to her complaint the medical certificate which had been issued the previous year in May 1995 and which had certified that her husband's pulmonary and pleural condition had been good.

43. The same day, Captain U. compiled two separate reports on the circumstances of the arrest and detention of Mr Carabulea. He stated that when Mr Carabulea had undressed for the body search preceding entry to the lock-up, there had been no signs of injury on his body. He denied having used any physical pressure while interrogating Mr Carabulea. He also mentioned that on 16 April 1996 Nela Carabulea had arrived at the police station with a package for her husband and requested to see him but had been refused.

44. Also the same day, police officer AM.M. from Police Station no. 9 filed a report indicating that he had been on duty on the day Mr Carabulea had been brought to the station and that he had not heard any noises or screams coming from the cell in which Mr Carabulea had been detained.

45. On 8 May 1996 the officer in charge of the lock-up, I.P., addressed a written report to his superiors, in which he indicated that on 13 April 1996 Mr Carabulea had been brought to the lock-up at the police station and that when he had undressed for the body search preceding entry, there had been no signs of injury on his body. According to him, on 16 April 1996 Mr Carabulea and two other suspects had been examined by a medical assistant, who had recommended that an X-ray examination be carried out on Mr Carabulea. He stated that an X-ray had been taken at the Ministry of the Interior Hospital and that the doctor there had ordered that Mr Carabulea be treated as an in-patient at Jilava Penitentiary Hospital.

46. On 9 May 1996 Mr S.S., a lawyer acting on behalf of Mr Carabulea's family, filed another complaint with the Military Prosecutor's Office requesting the investigation of Captain U. for physical assault causing death. The complaint alleged that the inhuman treatment to which the victim had been subjected had been inflicted for the purpose of obtaining a confession to the offence with which he had been charged and that during the victim's stay in hospital, both his family and the lawyer himself had been hindered in their efforts to contact him. The lawyer also complained that all medical documents concerning Mr Carabulea had been sealed and sent to the Forensic Medicine Institute and that the family had not been given access to them.

47. The military prosecutor S.C. was placed in charge of the investigation.

48. On 9 May 1996 police officer G.B., who served under the orders of Captain U., took statements from N.B. and E.B., who had been placed in the same police lock-up as Mr Carabulea. They were in custody at the time their statements were taken. They declared in almost identical terms that they had never heard Mr Carabulea complain of ill-treatment by the police.

49. On 17 May 1996 the military prosecutor took statements from F.F. and M.T., two police officers working at Jilava Penitentiary Hospital who had guarded Mr Carabulea during his transfer to St John's Hospital and subsequently to Fundeni Hospital. They stated in identical terms that during the transfer, the victim, who had stomach aches, had been lying down, but had not spoken to them. They had been present during all the medical examinations of Mr Carabulea and had not heard him complain to the doctors about an assault while in police custody.

50. On 14 August 1996 police officers U., I.P. and G.B. made statements to the prosecutor regarding Mr Carabulea's detention and death.

Captain U.'s statement largely corresponded to his reports of 8 May 1996 (paragraph 43 above).

I.P. reported that he had taken part in the body search of Mr Carabulea and that he had not seen any signs of violence on Mr Carabulea's body. He further explained that as Mr Carabulea had not felt well in the morning of 16 April 1996 while in the shower room, he had taken him to the medical assistant at the police station and then to the Ministry of the Interior Hospital, where he had been examined and sent to Jilava Penitentiary Hospital. Before taking him to Jilava Penitentiary Hospital, I.P. had gone to the prosecutor's office for the 2nd district, where a 30-day warrant had been issued.

G.B. stated that between 13 and 15 April 1996 he had been on leave.

51. On 20 August 1996 the military prosecutor decided not to open a criminal investigation in respect of police officers I.P. and G.B. He concluded that Mr Carabulea's death had been non-violent and was due to organic diseases which had developed progressively and which led to a deterioration in his general state of health following a car accident on 13 April 1996, during which he had suffered thoracic, abdominal and cranial contusions.

52. On 21 January 1997 the Romanian Helsinki Committee sent a letter to the Military Section of the Procurator-General's Office requesting a new investigation. It pointed out, in particular, that Mr Carabulea had never complained of any pain before being taken into police custody, that the bruising in the genital area could not have been caused by a car accident, and that M.I., Mr Carabulea's alleged co-accused on the robbery charge and the driver of the car which had allegedly been involved in a collision on 13 April, had never been questioned.

53. On 12 February 1997 the prosecutor-in-chief D.V., from the Military Section of the Procurator-General's Office, quashed the decision of 20 August 1996 on the basis of insufficient reasons. He sent the case file back to the prosecutor in charge for further preliminary inquiries in respect of the alleged assault by the police officers, with the following instructions: that a statement was to be taken from the victim's wife; that the report concerning the alleged car accident on 13 April 1996 was to be examined;

that all the police officers who had taken part in the victim's arrest on 13 April 1996 and everyone present during his interrogation, including the prosecutor V.L. and the officially appointed lawyer, A.M., were to be questioned; that the various pieces of information concerning the interrogation of both Mr Carabulea and his co-accused were to be examined and assessed; that the prosecutor M.P. and the officially appointed lawyer P.P. were to be interrogated with a view to explaining why on 17 April 1996 Mr Carabulea had withdrawn his earlier statements and whether any physical pressure had been exerted on him during the first interrogations. He further instructed that a supplementary forensic report be produced with a view to determining whether the fracture of the ribs and the bruising in the genital area were the result of any alleged assault.

54. On 19 February 1997 the case was registered at the Military Section of the Procurator-General's Office and a new prosecutor, I.I., was assigned.

In a report dated 3 March 1997 I.I. indicated that following an article published in the newspaper *Cotidianul* on 24 February 1997, he had invited Mrs Nela Carabulea, the victim's wife, to come to the prosecutor's office. During this meeting it was agreed that she would return at a later date, with her lawyer, in order to consult the file relating to her husband's death so as to enable her to submit any objections to the way in which the investigation had been carried out.

55. The Government claimed that after that meeting, Mrs Carabulea had refused to go to see the prosecutor. They produced two summonses dated 6 May 1997 and 30 June 1997 informing Mrs Carabulea that her failure to appear before the prosecutor would lead to the discontinuance of the proceedings, and to which Mrs Carabulea had allegedly failed to respond. They also submitted four alleged acknowledgments of receipt of various summonses which had been addressed to Mrs Carabulea, none of which containing her signature.

56. The applicant submitted in reply that Mrs Carabulea had not received any of these summonses. He stated that the prosecutor had met Mrs Carabulea on 3 March 1997 but had not asked her any questions.

57. On 25 August 1997 the prosecutor-in-chief, D.V., submitted a written request to the Bucharest Police Department for a copy of the file concerning the alleged car accident of 13 April 1996 and for information regarding the medical report prepared when Mr Carabulea had been taken into the police lock-up.

58. On 5 September 1997 the Bucharest Police responded that the file on the car accident was at the prosecutor's office for the 4th district. They further indicated that, according to Instruction no. 410/1974 issued by the Ministry of the Interior, any sign of physical violence noted during the body search had to be notified to the doctor in charge of the lock-up, who would advise whether the detainee should be admitted to the lock-up and would make preparations for a thorough medical examination, and that in any

event, all detainees had to be medically examined within 24 hours of incarceration.

59. On 12 September 1997 the military prosecutor again requested the medical report that had been drawn up when Mr Carabulea's had been taken into police custody.

On 13 November 1997 Bucharest Police Station no. 9 indicated that Mr Carabulea's medical file had been sent to Jilava Penitentiary Hospital. It appears from this medical file that the first entries were made on 16 April 1996, shortly before Mr Carabulea's transfer to Jilava Penitentiary Hospital. The file did not contain any mention of an X-ray that had, allegedly, been performed.

60. In late 1997 the military prosecutor received the investigation file concerning the alleged car incident on 13 April 1996. It appears from this file that on the said date Mr Carabulea had been charged only with the offence of driving a car without a valid licence plate. The file contains no mention of any collision with or of any damage to any other vehicle or of any injury to any person.

61. On 7 January 1998 the military prosecutor I.I. ordered the preparation of a forensic medical report on the body of the deceased by experts from the Bucharest Forensic Medicine Institute. The experts were asked to express an opinion on the cause of death and to say whether, in their view, the measures taken by the medical staff who had treated Gabriel Carabulea had been correct and appropriate having regard to his condition. They were further asked to advise on whether any signs of injury were evident in the genital area of the deceased and, if so, on the nature of such injury and on the duration of time that would have been required for its healing. A colour photograph showing bruising in the area of the victim's genitalia which had been submitted by the family was attached to the order.

62. On 17 February 1998, in response to the request of the public prosecutor, Dr P.P., who had performed the autopsy on 4 May 1996, (see paragraph 36) produced his second forensic report, in which he reiterated his previous findings. In addition, he stated that the broken ribs “had no vital character” and that the fracture of the mid-clavicular line “could have been produced *post mortem”*, during the cardiac resuscitation that was, apparently, carried out at Fundeni Hospital. Moreover, in his opinion, the bruising in the genital area as indicated on the photograph had also been produced *post mortem*, such bruising being a very common occurrence in his experience.

63. On 4 March 1998 the military prosecutor decided, in the light of the additional forensic report, not to open criminal investigations into the allegations both of physical assault resulting in the death of the victim and of an inadequate investigation by Captain U. and G.B. His decision, which was far briefer in its rationale than the decision of 20 August 1996 (see paragraph 51), concluded that Mr Carabulea's death was due to “a

cardiopathy of a person with pre-existent visceral pathology" and had not constituted a criminal act.

C. Medical opinions on Mr Carabulea's death submitted by the parties

1. Expert reports submitted by the Government

64. The Government submitted two expert opinions by forensic pathologists, the first by Professor Dr Dan Dermengiu, from the "Mina Minovici" Forensic Medicine Institute in Bucharest, dated 20 June 2001, and the second by Professor Dr Derrick Pounder, a British forensic expert, dated 19 November 2004.

65. In his report, Professor Dermengiu explained that a pulmonary thromboembolism was a sudden biological event which appeared without any symptoms. He noted that Mr Carabulea had had a child who had died at the age of 1 year and 8 months because of a thrombosis of the inferior vena cava, owing to a congenital anomaly of the venous system, and he concluded that it was, therefore, reasonable to suppose that Mr Carabulea had presented similar anomalies of the venous system which had predisposed him to the development of a thrombosis. The report stressed that the alleged traffic accident had not caused any external or internal lesions and that there was no causal link whatsoever between the alleged traffic accident and the appearance of pulmonary thromboembolism and of the thrombophlebitis of the left limb, the first manifestation of which was evidenced on 3 May 1996.

66. Professor Pounder's report described the history of Mr Carabulea's treatment and subsequent death, as recorded in the medical records that had been presented to him, which he described as "poorly kept". He noted that when Mr Carabulea had arrived at the Ministry of Interior Polyclinic, he was in serious ill-health and had been vomiting blood and that by the time he was transferred to St John's Hospital, at 8 p.m., he was in a generalised life-threatening condition requiring admission to the intensive care unit with the intention of addressing, immediately, the problem of saving his life. Life-saving measures having been taken, Mr Carabulea was then transferred to Fundeni Hospital on 17 April with a diagnosis of pulmonary thromboembolism. A computerised tomography performed there disclosed a lesion on the surface of the liver, while an ultrasound examination revealed some emboli in the small peripheral arteries of the lung. As a result of these findings, the doctors had been faced with the following dilemma: if the medical treatment required to limit the normal clotting mechanism of the blood (the emboli) was to be administered, then this ran the risk of exacerbating the liver haemorrhage which, as a consequence, might in itself have become life-threatening. Therefore, the doctors had administered the

anti-coagulant with caution in order to prevent further haemorrhage around the liver. On 24 April Mr Carabulea had developed a second severe episode of pulmonary thromboembolism for which he had received emergency treatment and had been successfully resuscitated. His recovery was slow and the physicians had planned a phlebography but before this investigation could be performed, Mr Carabulea suffered a third episode of pulmonary thromboembolism and died at 7.25 a.m. on 3 May.

67. Dr Pounder found that the unequivocal cause of death was pulmonary thromboembolism as a consequence of blunt-force trauma. Assuming that Mr Carabulea had been involved in an alleged road traffic collision on 13 April, Dr Pounder found that it was more likely than not that the liver injury sustained on that occasion had led to his death. Dr Pounder also considered that Mr Carabulea had been at high risk of death from pulmonary thromboembolism, even with the best of medical treatment, "given his initial presentation with shock and the subsequent recurrence of the pulmonary thromboembolism".

68. Dr Pounder stated that the yellow bruise at the front of the right hip mentioned in the autopsy report could have originated in a number of causes, including the wearing of a seatbelt during a car accident. Having regard to the medical records indicating that resuscitation had been attempted, Dr Pounder considered that the three fractured ribs identified at the autopsy had almost certainly been produced during attempts at resuscitation around the time of death.

69. Concerning the autopsy report in general, Dr Pounder acknowledged that there were serious omissions and severe inadequacies in the *post mortem* autopsy as identified also by Dr Szentmariay in his report (see below paragraphs 70 to 74). Dr Pounder found the autopsy report deficient in several aspects, both general and specific. It did not meet "normally accepted standards within Europe"; it originated from an institute belonging to the Romanian State; it should have been produced expeditiously; it lacked thoroughness and was too brief; it contained a number of serious omissions, such as the failure to document the state of the veins in the legs, the presence or absence of thrombus within them and the failure to give an account of the weight of a number of organs. The autopsy report had declared the death to be due to natural causes despite the likelihood that the trauma on the surface of the liver was a precipitant of the pulmonary thromboembolism. Dr Pounder also deplored the fact that the additional opinion obtained from the Forensic Medicine Institute "had not taken the opportunity to acknowledge and correct the errors" contained in the earlier autopsy report.

2. Expert reports submitted by the applicant

70. The applicant submitted two expert opinions, one dated 29 August 2001 by Dr I. Szentmariay, a forensic pathologist practising at

the Institute of Forensic Medicine at Semmelweis University in Budapest (Hungary), and the other dated 10 March 2005 by Professor Sidsel Rogde, from the Institute of Forensic Medicine in Oslo (Norway). Their opinions were based on the Romanian prosecuting authorities' file on Mr Carabulea, including all the medical documents, the autopsy report and some of the prosecutors' decisions.

71. According to Dr Szentmariay, the medical file submitted lacked proper and adequate information, such as laboratory data, routine medical data, including the circumstances surrounding Mr Carabulea's death, the drugs administered throughout his stay in hospital, their dosage and application. Having regard to the low probability (1 in 50,000) of a patient of Mr Carabulea's age developing a fatal pulmonary thromboembolism, even after a minor uncomplicated surgery, the development of such an embolism required a very thorough clinical analysis of many laboratory tests and other data. However, crucial information was missing from the medical file which, thereby, prevented any genuine appraisal of the case.

72. Dr Szentmariay also commented upon a number of inconsistencies in the medical documents on file. In the first place, he noted the change of diagnosis from respiratory (pulmonary) viral infection, made at Jilava Hospital, to "upper gastrointestinal haemorrhage", made at St John's Hospital, and later to pulmonary thromboembolism, although no explanation had been provided for such changes. Furthermore, the diagnosis of pulmonary thromboembolism which had been made at St John's Hospital, at Fundeni Hospital and later referred to in the autopsy report contained no explanation of how this diagnosis had been reached since no blood clot (embolus) was ever mentioned as having been found. He also noted that it was not until 23 April that *Heparin*, "the immediate cornerstone treatment for pulmonary thromboembolism", was administered, despite the fact that the diagnosis of pulmonary thromboembolism had been made one week earlier. As to the "thrombophlebitis of the lower limbs" mentioned as one of the causes of death in the Notice issued by Fundeni Hospital on 3 May 1996, Dr Szentmariay stated that "thrombophlebitis of the lower limbs" was not a deadly disease and would not "at all" predispose a patient to thromboembolism. He found no numerical data available to quantify the severity of the pulmonary hypertension mentioned in the said Notice and he expressed the view that the "thoracic and abdominal trauma caused by the car crash" was an insufficient explanation of cause of death since no specific diagnosis had been made and there was no indication of any organs having been affected or of the kind of injuries that were allegedly sustained in the accident.

He further noted that in Fundeni Hospital a diagnosis of haemorrhage around the liver was made. Since such diagnosis "always raises the strong possibility of blunt abdominal trauma in the near past" Dr Szentmariay was astonished that no other reference or observation was made in respect of this

diagnosis. In his view, such a diagnosis would normally be followed very carefully "because of the potential of sudden blood loss, hepatic rupture and many other potentially life-threatening complications". He pointed out that the scrotal lesion which could be seen on the pictures taken by the family was not described in the autopsy report although this should have formed part of the external body description. He further found the description in the autopsy report of the fracture of the ribs to be deficient since it provided no information as to the age of the fracture or as to whether it was on the right or left side, both of these elements being important in determining the causal mechanism of the rib fracture (resuscitation procedures or otherwise).

73. With reference to the statement made by Dr Dermengiu that Mr Carabulea might have had anomalies of the venous system, Dr Szentmariay pointed out that the autopsy indicated that the venous system of the victim was normal. He further stressed that the isolated vena cava developmental anomaly which had caused the death of Mr Carabulea's child was a very rare condition and that the heredity rate of such a disease was in the region of 1-2%; moreover**,** none of the medical records, including the autopsy report, had ever indicated that the victim had thrombophlebitis.

74. Dr Szentmariay also stated that it was "professionally incomprehensible why it took more than 100 days to complete the autopsy report" since the generally accepted time was 3 to 4 weeks.

In short, he described the forensic autopsy report as "basically professionally useless, loaded with scant and incomplete descriptions and with medically erroneous conclusions". As a consequence, he declared himself "unable to reasonably exclude the possibility of significant trauma contributing to the death".

Finally, he pointed out that in similar cases he would have suggested a reautopsy of the deceased, "but in this case, it is highly unlikely that similar action will yield useful information, depending on the technique of conservation of the body".

75. The applicant's second expert, Professor Rogde, noted at the outset that the re-examination of the corpse should not have been done by the same pathologist as the one who had given the primary opinion. He further found the descriptions in the autopsy reports to be sparse and lacking in many aspects. He deplored the fact that photographs had not been taken *post mortem*, which would have been very helpful in determining whether there were bruises on the corpse or simply *post mortem* lividity, and he expressed the opinion that the pre-existing diseases of the victim described in the autopsy reports had probably not been of any importance concerning the death. He also confirmed that the cause of death was most probably pulmonary thromboembolism whose precipitating event could have been serious trauma. However, noting that the source of the embolism had not been found "and [was] probably not searched for", he concluded that,

having regard to the poor quality and brevity of the autopsy reports, it was not possible to determine the reason for the thrombosis.

3. Materials submitted by the applicant in support of his assertions

76. On 27 September 1998 Dumitru Dinu, a friend of the victim, and Constantin Gheorghe, the victim's cousin, submitted written statements to the applicant's lawyer concerning the circumstances surrounding Mr Carabulea's death.

(a) Dumitru Dinu's Statement

77. Dumitru Dinu stated that he had managed on one occasion to persuade the police officer to allow him to enter the ward with the victim's wife in order to help Gabriel to change his clothes. Whispering, Gabriel had complained that he had been brutally assaulted by the police who had suspended him from a locker with his hands tied behind his back and had beaten him while he was so hanging. When he refused to admit to the charge of robbery, he had been rolled in a carpet, jumped upon, and beaten with sticks. Gabriel had identified Captain U. as the chief of the police officers who had ill-treated him. The supervising police officer had terminated the meeting when he realised that they were talking about Gabriel's detention. As Dumitru Dinu and Gabriel's wife were leaving the ward, a medical assistant told them that a doctor wanted to talk to them. They went to see the doctor who informed them that Gabriel had very little chance of survival and that he was living on a drip. She told them that Gabriel had blood in his lungs and liver and a swollen heart and that his kidneys were blocked. Dumitru Dinu stated that he had returned to the hospital to see Gabriel for a second time. As the police officer had not allowed him to enter the room, he had forced the door open and asked Gabriel whether he was all right. He heard him shout back “They killed me! Don't leave me here, take me out of here otherwise I'll die!” The applicant, Nela Carabulea and Constantin Gheorghe were also present and heard these cries. Before the burial, Dumitru Dinu, who had brought along the photographer who took the only pictures of Gabriel's body, saw various injuries on the body, including, bruising around the stomach area and on the deceased's face, legs and genitals.

(b) Constantin Gheorghe's Statement

78. In his statement, Constantin Gheorghe confirmed that Gabriel had been kept in a ward under constant police surveillance. Although he did not see Gabriel during his stay in the hospital, he accompanied Nela Carabulea and Dumitru Dinu and he heard Gabriel call out “They killed me!” He witnessed Nela Carabulea and Dumitru Dinu come out of Gabriel's ward and tell him how Gabriel had complained that he had been tortured by the

police under Captain U.'s command. He saw Gabriel's body after he had died. There were bruises on the legs and face, under the chin and on the genitals.

II. RELEVANT INTERNATIONAL LAW AND DOCUMENTS

A. Recommendation 1159 (1991) of the Parliamentary Assembly of the Council of Europe on the Harmonisation of Autopsy Rules

"1. The Assembly considers it a necessary practice for autopsies to be carried out in all Council of Europe member states to establish the cause of death for medico-legal or other reasons or to establish the identity of the deceased.

2. As the mobility of the population increases throughout Europe and throughout the world, the adoption of uniform guidelines on the way autopsies are to be carried out and on the way autopsy reports are to be established becomes imperative.

3. This is especially so in the case of mass disasters, whether natural or not, where there may be several hundreds of victims of numerous nationalities.

4. Moreover, it is believed that autopsies should be carried out in all cases of suspicious death or where there are doubts as to the cause and that, if done systematically, they may more easily bring to light illegal executions and murders perpetrated by authoritarian regimes.

5. Internationally recognised and applied autopsy rules would therefore contribute to the fight to protect human rights, especially such human rights as the prohibition of torture and of ill-treatment, and the right to life. Here, the Assembly welcomes the fact that the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has been ratified by twenty out of the twenty-five Council of Europe member states.

6. The Assembly therefore recommends that the Committee of Ministers:

i. promote the adoption of harmonised and internationally recognised rules on the way autopsies are to be carried out and the adoption of a standardised model protocol for autopsies;

ii. support the proposal that states world-wide formally accept and implement the obligation to carry out autopsies in all cases of suspicious death;

iii. invite the member states to apply the Interpol guidelines on disaster victim identification;

iv. invite those Council of Europe member states which have not yet done so to ratify the Council of Europe Agreement on the Transfer of Corpses;

v. invite the five Council of Europe member states which have not yet done so to ratify the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;

vi. draw up international rules to facilitate the formalities proposed in sub-paragraphs 6.i, ii, iii, iv and v from the administrative (transport, crossing of borders, police, etc.) or legal points of view."

B. The United Nations Model Autopsy Protocol

79. The "Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions" adopted by the United Nations in 1991 includes a Model Autopsy Protocol aimed at providing authoritative guidelines for the conduct of autopsies by public prosecutors and medical personnel. In the introduction, it notes that an abridged examination or report is never appropriate in potentially controversial cases and that both a systematic and comprehensive examination and report are required to prevent the omission or loss of important details: "It is of the utmost importance that an autopsy performed following a controversial death be thorough in scope. The documentation and recording of those findings should be equally thorough so as to permit meaningful use of the autopsy results."

80. In part 2(c), it states that adequate photographs are crucial for thorough documentation of autopsy findings. Photographs should be comprehensive in scope and must confirm the presence of all demonstrable signs of injury or disease commented upon in the autopsy report.

III. RELEVANT INTERNATIONAL REPORTS ON ROMANIA

A. Report by Sir Nigel Rodley, Special Rapporteur on the Question of Torture, Submitted Pursuant to the United Nations Commission on Human Rights Resolution no. 1999/32

81. Following a visit to Romania, the Special Rapporteur in his report of 23 November 1999, found that there were persistent cases of police abuse aimed at extracting confessions from a suspect and that there was evidence to support the allegations that the Roma were more likely to be victims of police abuse than others. He further criticised as ineffective the system of investigation in which the military prosecutors had the exclusive authority to investigate, thus leading to the perception that the military prosecutors lacked independence and impartiality. He also noted that he had received numerous reports alleging that medical certificates were frequently falsified

to cover-up ill-treatment by police and stressed that in most cases the investigations resulted in decisions not to prosecute.

In spite of a request to the Romanian authorities, the Special Rapporteur did not receive any statistics on the number of complaints filed and prosecutions brought under Articles 266 (Abusive behaviour), 267 (Abusive investigation) and 267(1) (Torture) of the Criminal Code.

Referring to the case of Gabriel Carabulea, the Special Rapporteur indicated that he had been informed by the military prosecutor that there was no reason to reopen the case but that the military prosecutor was prepared to review the facts once again. Noting that the lawyers for the victim had filed a complaint before the Court, the Special Rapporteur determined that he was not in a position to reach a conclusion on the merits of the case. However, he considered that the case raised serious concerns about the effectiveness of the investigation of torture on the part of police officials and was consistent with other reports that he had received.

B. Report of 19 February 1998 by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) on Romania

82. In its report, the CPT indicated that a considerable number of detainees interviewed at the police lock-up cells and prisons visited by its delegation alleged that they had been physically ill-treated by the police. The following types of ill-treatment were constantly alleged: slaps, punches, kicks, blows with a truncheon (the victim sometimes being rolled up in a carpet or some similar covering). Some of the persons interviewed complained of beatings of the soles of the feet, which were apparently inflicted while the victim was on his knees on a chair or suspended from a solid bar in a position known as "spit-roaster". These allegations related to the moment when the suspects were apprehended and to later stages of the interrogation by the police. The CPT delegation noted that when a prosecutor was asked how he would act in the presence of a suspect alleging ill-treatment by the police, he answered: "*The police are my colleagues. I would regard this allegation as a lie coming from a recidivist...*"

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

83. At the admissibility stage, the Government had objected that the applicant had not exhausted domestic remedies in respect of his allegation

that he had been denied effective access to a court, as required by Article 35 of the Convention. They had contended in particular that despite the prosecutor's decision not to indict the police officers allegedly responsible for the ill-treatment, the applicant could have brought a civil action under the Civil Code.

In its decision on admissibility of 21 September 2004, the Court found that this question was inextricably linked to the merits of the complaint under Article 6 of the Convention, and, in order to avoid prejudging the merits of that complaint, decided to examine both questions together. Therefore, the Court will examine the Government's preliminary objection at the same time as the merits of the complaint raised under Article 6 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

84. The applicant complained that his brother had died as a result of intentional police mistreatment, that the failure of the police to provide adequate medical care for the victim following his arrest had resulted in his brother's death and that the authorities had failed to carry out a prompt, impartial and effective official investigation to determine the cause of the death. He relied on Article 2 of the Convention, which provides :

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. The parties' submissions

1. The Government

85. The Government submitted that the applicant's brother was not in perfect health when taken into police custody on 13 April 1996, as was clear from the Notice addressed by the hospital to the prosecutor on 3 May 1996. The cause of death was non-violent and had related to pre-existing diseases suffered by the applicant's brother.

They further contended that there was no medical evidence of any relationship between the pulmonary thromboembolism and any possible trauma caused by the car accident or by the alleged violence inflicted by the police. Moreover, thromboembolism could occur in the absence of any external cause or of any apparent symptoms, and sometimes sudden death could occur without any prior signs.

86. They further pointed out that there was no evidence of ill-treatment on the part of the police serious enough to lead to the thrombosis that had caused Mr Carabulea's death, and that in any event, the allegation that his death had resulted from trauma caused by police brutality had not been proved beyond "all reasonable doubt".

87. The Government noted that the only evidence sustaining the thesis of police abuse was the extrajudicial testimonies of three persons, one of whom, the victim's wife, Nela Carabulea, had constantly refused to give any information to the military prosecutor.

88. The Government contended that the fracture along the mid-clavicular line had been caused by the resuscitation process, that the bruise on the right iliac crest had most probably been caused by an accidental trauma occurring during the period spent in hospital, and that the scrotum lesions had been caused, as explained by the second forensic report, by a normal *post mortem* drying process. As to the fact that both the provisional and the final autopsy reports had been produced by the same doctor, the Government pointed out that such a procedure had been required by the Forensic Medicine Institute. The Government agreed that the diagnosis of bronchopneumonia indicated in the Death Certificate issued on 4 May 1996 and the mention of the car accident of 13 April 1996 could have given rise to legitimate concerns about the real cause of death. While they found regrettable the inconsistencies between the various medical documents, they considered that the references in the death certificate issued on 4 May 1996 should not be regarded as established proof of the cause of death, as only the autopsy report determined the real cause of death.

89. The Government also denied that the authorities had failed to provide the applicant's brother with adequate medical care. During his stay in police custody, the victim's health had gradually deteriorated, leading to the situation on 16 April, when he had been taken to a number of hospitals where he received adequate medical treatment, including tomography and cardiac catheterisation, as was confirmed by the supplementary forensic report of 17 February 1998.

90. The Government considered that the fact that the applicant's brother had not been examined by a doctor within the first 24 hours of detention was not relevant given that the cause of death, thromboembolism, had occurred on 16 April 1996.

91. The Government submitted that there had been a prompt, impartial and effective investigation into the victim's death. The investigation had

lasted only three months and had ended on 20 August 1996, when the prosecutor had issued a decision not to indict. It was only because of the allegations by the applicant and by an NGO that the prosecutor had decided to reopen the proceedings. The new investigation had ended on 4 March 1998 with the prosecutor's decision not to indict.

92. The Government also contended that the investigation had been effective and impartial. The prosecutor had relied entirely on the conclusions of the forensic expert. Since the applicant had not pointed to any clear evidence to support the idea that the expert had had an interest in infringing the law and hiding the truth, this reliance on the conclusions of the forensic expert should not raise doubts concerning the efficiency of the whole investigation. It was true that the victim's relatives had not been questioned but the prosecutor had not been aware that they had seen the victim while in hospital and that, therefore, they had relevant information. Moreover, the prosecutor had repeatedly asked the victim's wife, Nela Carabulea, to come to his office, but she had refused to do so.

2. The applicant

93. The applicant submitted in reply that his brother had shown no signs of physical violence at the time of his arrest and that he had been in good health. In particular, he had had no history of lung complaints, as confirmed by the Phthisiology Institute, which had examined him in 1995. The disease from which his brother's child had died at the age of 20 months had no connection with his brother's condition or with the injuries that had led to his death, since the autopsy had found that his veins were normal. The applicant also pointed out that in the expert opinion submitted by the Government, the Head of the Bucharest Forensic Medicine Institute had confirmed that the traffic accident had not caused any external or internal lesions.

94. The applicant contended that his brother had suffered injuries during his stay in the police lock-up between 13 and 15 April 1996, as was clear from the objective findings of the doctors who had examined him at that time. These findings included massive upper gastrointestinal haemorrhage, epigastric pain, “coffee ground” vomiting, a deep state of shock, a “very recent trauma”, perihepatic haematoma, post-traumatic right heart disease, blood in the pleural cavity, etc. Even though some diagnoses had later been changed to pulmonary thromboembolism, this still left completely unexplained findings, such as, “coffee ground” vomiting or perihepatic haematoma, which indicated a strong probability of trauma. Some of the changes in diagnosis had resulted from “paraclinical information” but no explanation had been given as to what this expression meant. As the only persons present at the medical examinations, other than the doctors, were the police officers who had been constantly guarding his brother during his stay in the hospital, it follows that they were the only witnesses who could

have submitted such "paraclinical" information; therefore, this information could not be considered reliable.

95. The applicant further alleged that the three fractured ribs noted in the autopsy report were consistent with the thoracic pain recorded in the medical documents. However, the autopsy report had failed to provide any explanation or to describe the surrounding areas. The explanations provided later had been varied and contradictory, referring to the car accident and the resuscitation process, even though the Fundeni medical observation sheet recorded that the cardiac arrest was non-resuscitable, meaning that no resuscitating procedure took place. The right hip trauma had also been left unexplained, although, according to the forensic report of 10 May 1996 (see paragraph 40**)** it was more than 3-4 days old and could have been caused by the impact of a hard object. The scrotal bruising had been given a belated and unsatisfactory explanation, namely, a *post mortem* occurrence, despite the finding by the forensic pathologist that the corpse had "no external signs of putrefaction".

96. The applicant stressed that his brother's medical file contained no indication of thromboembolism, as neither the doctors who examined his brother nor the forensic pathologist had ever found a blood clot which could have produced such a disorder.

97. The applicant considered that the autopsy had been fundamentally defective and that the forensic pathologist had disregarded some basic requirements of the profession as defined both at international level (United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted by the United Nations in 1991) and at domestic level. The main organs of the corpse (save for the liver) had not been weighed, the full skeletal system had not been described, the ecchymoses and fractures found had not been described, the diagnosis reached had been left unexplained and no toxicological analyses had been carried out. Moreover, no photographs had been taken, although this was crucial for thorough documentation of autopsy findings.

98. The applicant concluded that the Government had failed to provide any plausible or satisfactory explanation for the death of his brother, a healthy 27-year-old, in police custody. He referred in this regard to the Court's case-law (*Tanli v. Turkey*, no. 26129/95, ECHR 2001-III, and *Salman v. Turkey* [GC], no. 21986/93, ECHR 2000-VII).

99. The applicant further contended that the whole range of traumatic lesions found on his brother's body had been consistent with his brother's allegations – made to members of his family while he was in hospital – of torture and other physical violence during his time in police custody. He alleged that the beating techniques described by his brother, as well as the high frequency of ill-treatment in police custody, had been confirmed by the findings of the Committee for the Prevention of Torture (CPT) in its report

on Romania published on 19 February 1998 following a 1995 visit (see "Relevant international reports" above).

100. The applicant further claimed that the authorities had failed to provide his brother with adequate medical care following his arrest and that this had resulted in his death in breach of Article 2. He pointed out that the first medical examination had taken place 72 hours after his arrest, in violation of Romanian law, which required all detainees to undergo a medical examination within the first 24 hours of detention, irrespective of their state of health or symptoms. By the time his brother was examined, he was in a state of shock, with blood pressure of 5 and a pulse of 100 bpm. Despite the deterioration in his condition, he had been moved between five different hospitals within one day. Furthermore, prior to receiving any medical treatment at 5 p.m. in Jilava Penitentiary Hospital, he had been brought before the public prosecutor, thereby delaying, unduly, necessary medical treatment for more than three hours. The applicant stated that, contrary to the Government's allegations, there had been no need to take his brother to the prosecutor's office immediately after his medical examination at the Ministry of the Interior Hospital in Jilava, as a detention order was not and could not be necessary in order to admit his brother to hospital. Despite his condition, on 16 April 1996 his brother had been transported between the various locations in a police car without any medical assistance in terms of qualified personnel or medical equipment.

101. The applicant submitted that the differences between the diagnoses issued at each of the medical units indicated their failure – whether intentional or not – to properly and completely identify his brother's illnesses and to provide him with urgent and adequate treatment. The police officers' presence throughout the medical examinations and during the consultations between Mr Carabulea and his treating doctors had prevented his brother from revealing the causes of his symptoms and had thus obstructed the taking of a full and complete history. This, in turn, had clearly contributed to the making of incorrect and/or incomplete diagnoses.

102. The applicant also complained that both the police officers and the medical staff had kept his brother's family away from him and that the medical staff had avoided any discussion and had refused to inform the family about his brother's state of health.

103. The applicant alleged that the domestic authorities had failed to carry out an effective, prompt and impartial investigation. The prosecutor had had a duty to investigate his brother's death of his own motion, irrespective of the criminal complaint lodged by the family.

104. The applicant submitted that the prosecutor had failed to check all the discrepancies in the medical documents, to examine why the applicant's brother had felt sick at the lock-up, to question the medical staff in the institutions to which his brother had been taken, to identify the reasons why his brother had been taken to five hospitals and – even more damaging

given his medical condition – to the police lock-up and to the prosecutor's office before receiving necessary medical treatment. In his on-site report of 3 May 1996 the prosecutor had recorded false medical information about the absence of any external lesions. He had failed to inform the family of his brother's death. Furthermore, he had failed to question relevant witnesses, including all of the police officers who had guarded his brother while in the hospitals, the family members, the persons who had talked to him before his death, the driver of the vehicle with which, allegedly, his brother's car had collided on 13 April 1996 and all persons with whom his brother had come into contact since his arrest, including police officers, prosecutors and lawyers.

The applicant submitted that the investigation had not been prompt as it had started in May 1996 and had not ended until March 1998.

105. He further alleged that the investigation lacked impartiality. The forensic experts whose reports were relied upon were closely linked to the police, the prosecutors and the executive branch in general. According to Decree no. 446/1966, in force at the time of the events in question, local councils were obliged to bear the expenses and the transport costs of forensic doctors and all instructions issued by the Ministry of Health on forensic activities and services had to receive the prior approval of the Ministry of the Interior, Ministry of Justice and the Procurator-General's Office. The police, the prosecutors and the forensic experts saw each other as State agents and colleagues. Generally speaking, investigators and the courts could only resort to the services of forensic experts who were working for State forensic institutes.

106. Relying on the *Hugh Jordan v. United Kingdom* judgment (no. 24746/94, ECHR 2001-III, annex to the *McKerr* judgment), the applicant also claimed that the military prosecutors lacked independence.

In the present case, not only had the investigating military prosecutor lacked independence from the police officers because of his institutional association and connection with them, but he had also failed, as a matter of practice, to demonstrate his independence. The applicant submitted that by virtue of Law no. 54/1993 on the Organisation of Military Courts and Prosecutor's Offices, military prosecutors had military grades and enjoyed all the privileges of military officers. Their promotion was in accordance with the military system. Military prosecutors were accountable for violations of military disciplinary rules. Their salaries were paid by the Ministry of Defence and were higher than those paid to civilian prosecutors. As serving officers, they were subject to promotion or demotion by the Ministry of Defence, which, in addition, was empowered to end the judicial career of a military prosecutor.

The police force, at the time of the events in question, had also been a military body and, as members of the military family, military prosecutors often displayed solidarity with their colleagues. Moreover, the police

assisted military prosecutors in investigations concerning themselves. The applicant claimed that such a system of investigation raised doubts as to the independence and impartiality of the prosecutors and, in this regard, he referred to the report by Sir Nigel Rodley, Special Rapporteur of the United Nations Commission on Human Rights on the Question of Torture (see paragraph 81 above).

B. The Court's assessment

1. The death of Gabriel Carabulea

(a) General principles

107. Article 2 of the Convention, which safeguards the right to life, ranks as one of the most fundamental provisions in the Convention. Together with Article 3, it enshrines one of the basic values of the democratic societies making up the Council of Europe. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 146-47, Series A no. 324; *Salman v. Turkey* [GC], cited above, § 97; and *Velikova v. Bulgaria*, no. 41488/98, ECHR 2000-VI).

108. In the light of the importance of the protection afforded by Article 2, the Court must subject complaints about deprivation of life to the most careful scrutiny, taking into consideration all relevant circumstances.

Persons in custody are in a particularly vulnerable position and the authorities are under an obligation to account for their treatment. Consequently, where an individual is taken into police custody in good health but later dies, it is incumbent on the State to provide a plausible explanation of the events leading to his death (see, *mutatis mutandis*, *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V, and *Salman* and *Velikova*, cited above).

109. In assessing evidence, the Court adopts the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25). However, such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing

explanation (see, among many other authorities, *Anguelova v. Bulgaria*, no. 38361/97, §§ 109-11, ECHR 2002-IV).

(b) Application of those principles to the present case

110. The Court observes that Gabriel Carabulea died at the age of 27 having been taken into police custody on 13 April 1996 and that there was no indication that he was injured or was suffering from any health problems at that time (see paragraphs 10, 11 and 15 above).

111. The Court finds that a medical examination of Mr Carabulea prior to his admission into custody would have been appropriate. This is particularly so having regard to the fact that some of the military prosecutors involved in the investigation into his death alleged that he had sustained injuries immediately prior to his arrest in an alleged traffic accident on 13 April (see paragraphs 34 and 51 above). Indeed, this was cited as the cause of death in the report issued by the hospital on 3 May 1996 (see paragraph 32 above). Such an examination could have provided clarification regarding the possibility that any third party might have contributed to the applicant's condition. In the circumstances, the Court finds it unacceptable that Mr Carabulea was not medically examined before being taken into custody.

112. Furthermore, in cases of this kind, the medical examination of an arrested person prior to being placed in police custody is important for other reasons. It would not only ensure that the person is fit to be questioned in police custody but would also enable a respondent Government to discharge the burden of providing a plausible explanation for any injuries found. In this connection, the Court affirms that a medical examination, together with the right of access to a lawyer and the right to inform a third party of the fact of detention, constitute fundamental safeguards against the ill-treatment of detained persons which should apply from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned (apprehension, arrest, etc. – see the 2nd General Report of the European Committee for Prevention of Torture, CPT/Inf/E (2002) 1 - Rev. 2006, § 36).

The Court observes that at the time of the events in question, Romanian legislation was in line with these CPT standards; the failure to carry out a medical examination of Mr Carabulea at the commencement of his detention was, therefore, unlawful.

113. Accordingly, in view of the respondent State's failure to conduct such an examination before placing the applicant in detention, the Government cannot rely on that same failure in their defence and claim that the injuries in question pre-dated the applicant's detention in police custody.

114. In any event, one of the expert reports submitted by the Government concluded that the alleged traffic accident had not caused any

external or internal injuries and that there was no causal link between the traffic accident and the appearance of pulmonary thrombophlebitis (see paragraph 65 above). The other report, assuming that a traffic accident had occurred, referred to that said accident as only a possible contributory cause (see paragraph 67 above). In the light of these reports, the Court does not consider that there is any evidence that Mr Carabulea's death was related to the alleged traffic accident and indeed the Government do not maintain this in their observations.

115. In these circumstances, it is therefore incumbent upon the Government to provide a plausible explanation of Mr Carabulea's death.

116. The Government's explanation is that Mr Carabulea's death was the result of an embolism due to a pre-existing chronic disease.

117. The Court observes, however, that the evidence in the file does not support the contention that Mr Carabulea was suffering from chronic disease or that he had an abnormality of the venous system at the time of his admission into custody.

118. Both expert reports submitted by the Government conclude that Mr Carabulea's death was the result of an embolism. The 2001 report considered that the embolism was due to an anomaly of the venous system. However, the 2004 report clearly stated that the embolism was the result of a "blunt force trauma". On the assumption that Mr Carabulea had been involved in a traffic accident prior to his arrest, the 2004 report stated that the liver injury sustained on that occasion had led to his death. The Court would recall at this stage that the investigation file concerning the alleged traffic accident relates only to a charge of driving without a valid licence plate and contains no reference to any collision or to any damage or injury suffered or sustained by any person (paragraph 60 above).

119. All of the autopsy reports and all of the expert reports found an ecchymosis "as a result of violence" on the right iliac crest and all confirmed a fracture of three ribs. The expert reports submitted by the Government also found a haematoma on the liver as a result of a "blunt force trauma". The medical records confirm that Mr Carabulea's condition upon arrival at the hospital on 16 April was critical, that he was in a state of shock, that he was suffering intense pain and that he was vomiting blood (paragraph 22 above). The photographs taken by the family disclosed bruising around the genitalia and on the right leg.

120. No convincing explanation has been provided that would account for Mr Carabulea's critical state upon his arrival at the hospital on 16 April 1996 or for the injuries found on his body. There is no document supporting the allegation that the bruising around the genitalia had occurred *post mortem*. No explanation at all was provided by the Government either for the bruises on his leg or for the liver injury which, according to its own expert report, had more likely than not led to his death.

121. Having regard to the above, the Court finds that it has not been established that Gabriel Carabulea died as a result of an embolism due to pre-existing diseases. On the contrary, it accepts that his death was the result of blunt force trauma sustained after his arrest.

122. In addition, the Court observes from the records on file that Mr Carabulea had begun to feel unwell at the latest on 16 April, if not before (paragraphs 18 and 26 above). Not only was there a failure to have him examined by a doctor upon his arrest on 13 April, but he was not taken to a doctor until the morning of 16 April 1996. By that time, he was in an "altered general-health condition" and in a "state of shock" as found by both the medical assistant at the police dispensary and the doctor from the Ministry of Interior Hospital.

123. On the morning of 16 April the doctor from the Ministry of the Interior Hospital directed that Mr Carabulea be hospitalised for immediate treatment at the Jilava Penitentiary Hospital. Notwithstanding that advice and Mr Carabulea's serious condition, he was not taken by the police officers to the said hospital until 5 p.m. Instead, he was taken back to the police lock-up and afterwards he was taken from there on to the prosecutor.

It was only in the early hours of 17 April that Mr Carabulea was hospitalised in Fundeni Hospital, where he was placed in the intensive care unit. Notwithstanding his critically ill condition, a prosecutor was allowed in to interrogate him later that day. No explanation has been provided by the Government as to why there was any necessity to interrogate him in such circumstances and whilst in intensive care.

124. The Court regards as significant the expert opinion of Dr Pounder submitted by the Government, according to which Mr Carabulea's state of shock upon his arrival at Fundeni Hospital was decisive in his subsequent death.

125. The Court also notes with grave concern and finds it entirely unacceptable that notwithstanding his critical condition, all of Mr Carabulea's medical examinations and consultations were performed in the presence of the police. It notes with equal concern that, despite Mr Carabulea's very obvious and serious condition, no meaningful contact with his family members was permitted at any time nor was any member of his family advised or permitted to consult with his treating doctors.

126. In the light of all the relevant circumstances, the Court finds that the authorities have not only failed to provide timely medical care to Mr Carabulea, but they have also failed to provide any plausible or satisfactory explanation for his death, a then healthy 27-year-old man who was in police custody.

It finds therefore that there has been a violation of Article 2 of the Convention, under its substantive limb.

2. The alleged inadequacy of the investigation

(a) General principles

127. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The investigation must be, *inter alia*, thorough, impartial and careful (see *McCann and Others*, cited above, §§ 161-63; *Kaya v. Turkey*, 19 February 1998, § 105, *Reports of Judgments and Decisions* 1998-I; and *Çakıcı v. Turkey* [GC], no. 23657/94, § 86, ECHR 1999-IV).

128. The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (see, for example, *mutatis mutandis*, *İlhan v. Turkey* [GC], no. 22277/93, § 63, ECHR 2000-VII).

129. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see, for example, *Güleç v. Turkey*, §§ 81-82, *Reports* 1998-IV, and *Oğur v. Turkey* [GC], no. 21594/93, §§ 91-92, ECHR 1999-III). This means not only a lack of hierarchical or institutional connection but also a practical independence (see, for example, *Ergi v. Turkey*, 28 July 1998, §§ 83-84, *Reports of Judgments and Decisions* 1998-IV, where the public prosecutor investigating the death of a girl during an alleged clash showed a lack of independence by reason of his heavy reliance on the information provided by the gendarmes implicated in the incident).

130. The investigation must also be effective in the sense that it is capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken all reasonable steps to obtain all available evidence concerning the incident, including, *inter alia,* eyewitness testimony, forensic evidence and, where appropriate, an autopsy report, which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (see, for example, concerning autopsies, *Salman*, cited above, § 106; concerning witnesses, *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 109, ECHR 1999-IV; concerning forensic evidence, *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000).

Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.

131. There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Güleç*, cited above, § 82, where the father of the victim was not informed of the decisions not to prosecute; *Oğur*, cited above, § 92, where the family of the victim had no access to the investigation and court documents; and *Gül*, cited above, § 93; for a full summary of the relevant case-law see *McKerr v. the United Kingdom*, no. 28883/95, §§ 111-15, ECHR 2001-III).

(b) Application of those principles to the present case

132. Turning to the circumstances of the present case, the Court, in the light of the above principles, finds that a procedural obligation arose under Article 2 of the Convention to investigate the circumstances of the death of the applicant's brother (see *Slimani v. France*, cited above, §§ 29-34). It considers that the criminal investigation into the death of Mr Carabulea revealed serious inconsistencies and deficiencies.

133. The military prosecutor I.C. who drew up the on-site report on 3 May attributed Mr Carabulea's death to a car accident and ordered an autopsy without informing the victim's family who were, in fact, at the hospital morgue on that day.

134. Despite the allegations of the family formulated on 8 May 1996 to the effect that Mr Carabulea had died as a result of violence by police officers, neither the provisional autopsy report of 10 May nor the final report of 30 July sought to address, consider or answer any of these allegations.

135. The Court observes that the autopsy examination was of critical importance in determining the facts surrounding Mr Carabulea's death. The difficulties in establishing the facts derive in large part from the failings in the *post mortem* medical examination, failings underlined by the expert reports submitted by both parties. Such failings include the absence of forensic photographs of the body and of a *post mortem* X-ray of the thorax, the brevity of the report and the large number of errors and omissions contained therein. The incomplete descriptions of the various findings, including of the embolism, as well as the lack of histopathological examination of the injuries and marks on the body, hindered an accurate analysis of the dating and origin of those marks.

136. Although a new military prosecutor, S.C., was placed in charge of the investigation on 8 May, he did not take any steps to obtain answers from the forensic pathologist by way of response to the allegations of ill-treatment that had been made. He confined himself to taking written statements which were all in similar terms from the various police officers involved in Mr Carabulea's interrogation and in his transfer to the hospital. He failed to take statements from the victim's wife, who had filed the complaint against the police officers, and from the deceased's other family members and friends, who had heard Mr Carabulea complain of ill-treatment. Furthermore, he failed to take the opportunity to acknowledge and correct errors in the autopsy or to suggest a second autopsy. He also failed to test the veracity of the allegation that Mr Carabulea had been involved in a car accident on 13 April and had sustained injuries as a result thereof.

137. The Court notes that all the above deficiencies were acknowledged by the prosecutor-in-chief D.V., who overturned S.C.'s decision not to press charges and sent the case back for further preliminary inquiries, with numerous and precise instructions as to what evidence should be obtained and what circumstances should be established (see paragraph 53 above).

However, the new prosecutor, I.I., who was assigned to the case on 19 February 1997, not only failed to address the issues raised by his superior, D.V., as shown by the decision of 4 March 1998, but also unduly delayed the investigation and did not order a new forensic examination until a year later, on 7 January 1998. He made no attempt to interview new witnesses or the police officers who had given almost identical written statements to the military prosecutor S.C.

In short, the conclusion in the decision of 4 March 1998 that Mr Carabulea had died of “heart disease” as a result of “pre-existent visceral pathology” was strikingly terse and limited to the findings of the new forensic report of 17 February 1998.

138. In the light of these considerations, the Court concludes that the authorities failed to carry out an effective investigation into the circumstances surrounding Mr Carabulea's death.

It accordingly finds that there has also been a violation of Article 2 of the Convention in this respect.

III. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

139. The applicant complained under Article 3 of the Convention that his brother had been subjected to torture and inhuman and degrading treatment during his time in police custody from his arrest on 13 April 1996 until his admission to hospital on 16 April 1996. He further complained that he had been subjected to inhuman and degrading treatment during his confinement in hospital from 16 April to 3 May 1996, when, in great pain

and in need of care and support, he was deprived of all contact with his family while police officers were posted permanently in his ward. As his death had been caused by serious and severe injuries, the treatment he had been subjected to amounted to torture. The applicant further claimed that his brother had been tortured for the purpose of compelling him to confess to certain crimes.

In addition, he claimed that the Romanian authorities had failed to satisfy their obligation to carry out a prompt, impartial and effective investigation into the allegations that the victim had been subjected to torture and other forms of ill-treatment while in police custody.

Article 3 reads as follows:

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

1. The parties' submissions

140. The Government submitted that the investigation to establish the cause of death had ruled out the possibility of any police violence. As for the allegation of a lack of an efficient investigation, they submitted that the reasoning set out above under Article 2 held true for Article 3.

141. The Government denied any wilful intention to separate the victim from his family during his stay in hospital, and pointed out that, since the victim was under arrest, visits had had to be approved by the investigating authority and recorded in the prison file. No such request for a visit had been made in the case of Mr Carabulea. Therefore, the authorities had lawfully refused his family members permission to visit.

142. The applicant alleged that the range of traumatic injuries found on the victim's body and mentioned above under Article 2, as well as the Government's failure to provide a credible explanation for the victim's death, proved that his brother had been subjected to physical violence while in police custody and that the ill-treatment perpetrated upon him had clearly amounted to torture.

143. The applicant further alleged that the permanent presence of the police in the victim's hospital ward, despite his great pain, and the absence of free contact with his family at a time when he had needed their care and support amounted to inhuman and degrading treatment. The applicant disputed the Government's argument that no official request for a visit had been made. He submitted that the oral requests by the family members and friends who had gone to Fundeni Hospital to see the victim should have been regarded as official requests.

2. The Court's assessment

144. The Court reiterates 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

level depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, § 162, Series A no. 25).

145. Where a person is injured while in detention or otherwise under the control of the police, any such injury will give rise to a strong presumption that the person was subjected to ill-treatment (see *Bursuc v. Romania*, no. 42066/98, § 80, 12 October 2004). The Court also points out that where an individual, when taken into police custody, is in good health, but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention (see *Tomasi v. France*, judgment of 27 August 1992, §§ 108-11, Series A no. 241-A, and *Selmouni v. France* [GC], cited above, § 87).

146. Turning to the circumstances of the present case, the Court has already found that the Government have not provided any plausible explanation for the injuries found on Mr Carabulea's body (see paragraphs 110 to 121 and 126 above).

147. The Court shall further determine the form of ill-treatment inflicted on the applicant. In doing so, the Court must have regard to the distinction, embodied in Article 3, between the notion of torture and that of inhuman or degrading treatment. It appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering. The Court has previously had before it cases in which it has found that there has been treatment which could only be described as torture (see *Aksoy v. Turkey*, judgment of 18 December 1996, § 64, *Reports* 1996-VI; *Aydın v. Turkey*, judgment of 25 September 1997, §§ 83-84 and 86, *Reports* 1997-VI; *Selmouni v. France* [GC], cited above; *Dikme v. Turkey*, no. 20869/92, §§ 94-96, ECHR 2000-VIII, and, among recent authorities, *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 116, ECHR 2004-IV (extracts)). The acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, and which in Article 1 defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating (see *Salman*, cited above, § 114; and *Dikme*, cited above, §§ 94-95).

148. In the present case there is no doubt that the ill-treatment perpetrated upon Mr Carabulea was particularly cruel and severe since it resulted in his death. The Court further observes that the pain and suffering

which he endured appears to have been inflicted upon him intentionally with the aim of extracting from him a confession to having committed the offence in respect of which he was a suspect (paragraphs 10, 12, 13 and 27 above).

Furthermore, the Court considers that the authorities' refusal to allow the family members to be with Mr Carabulea prior to his death in the hospital together with their refusal to provide them with any information concerning his condition (see paragraphs 36 and 77 to 78 above) was egregiously unfair and excessively cruel in all the prevailing circumstances.

149. In these circumstances, the Court concludes that, taken as a whole, the treatment to which Mr Carabulea was subjected amounted to torture within the meaning of Article 3 of the Convention.

150. Accordingly, there has been a violation of Article 3.

151. As to the alleged inadequacy of the investigation, the Court refers to its findings in paragraphs 132 to 137 above and to its conclusion contained in paragraph 138. It finds, on the same grounds, that there has also been a violation of Article 3 in this regard.

IV. ALLEGED VIOLATION OF ARTICLES 6 § 1 AND 13 OF THE CONVENTION

152. The applicant maintained that the investigation conducted by the authorities was insufficient to meet the Convention standards. In this respect, he invoked Article 6 § 1 of the Convention, which provides, in so far as relevant:

> "In the determination of his civil rights and obligations..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

He also relied on Article 13 of the Convention, which provides:

> "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."

153. The Government contended that Mr Carabulea's death had been adequately investigated and that therefore the Romanian legal system had not failed to afford the applicant an effective remedy.

A. Article 6 § 1 of the Convention

154. The Court observes that the applicant's grievance under Article 6 § 1 of the Convention is inextricably bound up with his more general complaint concerning the manner in which the investigating authorities treated his complaint that his brother had been mistreated by the police officers and the repercussions which this had on his access to effective remedies. It accordingly finds it appropriate to examine this

complaint in relation to the more general obligation on States under Article 13 to provide an effective remedy in respect of violations of the Convention (see, among other authorities, *Kaya v. Turkey*, cited above, § 105).

155. The Court therefore finds it unnecessary to determine whether there has been a violation of Article 6 § 1.

B. Article 13 of the Convention

1. The parties' submissions

156. The Government submitted that the prosecutor had conducted an effective investigation into the circumstances of Mr Carabulea's death and contended that the victim's relatives had also had the possibility of initiating a civil claim for compensation before a civil court.

Despite the prosecutor's decision not to indict the police officers accused of the ill-treatment of his brother, the applicant could have brought a civil action under Articles 999 and 1000 of the Civil Code against them if they were shown to have caused damage for which they could be held liable. The Government also alleged that Article 22 of the Code of Criminal Procedure was not an obstacle preventing the applicant from bringing such a civil action.

157. The Government stressed that Romanian law distinguished between criminal and civil liability and pointed out that whereas carelessness or negligence could give rise to civil liability, liability under the criminal law concerned only the most serious forms of fault. Contrary to this situation, civil liability could be incurred even in the case of the least significant fault. The Government submitted some examples of domestic case-law where, despite an acquittal by a criminal court, the civil courts had examined civil liability having regard to the damage sustained, the liability of the person who had caused it and the causal link between these elements.

158. Invoking the *Salman v. Turkey* judgment cited above, the applicant alleged that the Romanian authorities had failed to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the loss of his brother's life and that he had thus been denied access to any other available remedies, including a claim for compensation.

159. The applicant claimed that under Romanian law a victim could only in limited circumstances pursue a claim for civil damages in a separate lawsuit from the criminal trial and that in his case, in the absence of a decision ordering the opening of a criminal investigation or the indictment of the persons accused, he had had no possibility of bringing his civil claim before a court.

160. He stated that filing a civil action in accordance with Articles 998-99 and 1000 § 3 of the Civil Code would not have been an accessible or

effective remedy. The decision not to indict the police officers had been based on Article 10 (a) (facts not existing) and (b) (facts not punishable under the criminal law) of the Code of Criminal Procedure and had stated explicitly that the victim's death had resulted from natural and non-violent causes and that no one could be held responsible. As the police officers had been found innocent on the legal ground that the facts "did not exist", there had been no facts capable of giving rise to civil damages.

161. The applicant alleged that the domestic case-law put forward by the Government was irrelevant. Unlike the instant case in which the prosecutor had considered that "the facts did not exist", the cases submitted by the Government were cases in which the requisite "facts" had been confirmed in the decisions not to indict the police officers and the individuals against whom a claim could be made had been identified.

162. The applicant stressed that the Government had admitted in their observations in the case of *Notar v. Romania* (no. 42860/98, decision of 13 November 2003) that the issue of civil liability could only be raised where the facts existed. He indicated that this was also the opinion of various specialists in criminal procedural law and referred to the "Treatise on Criminal Procedural Law" by N. Volonciu, Professor at the Bucharest Faculty of Law.

163. Finally, the applicant submitted that the Court's findings in the cases of *Hamer v. France* (7 August 1996, *Reports* 1996-III) and *Assenov and Others v. Bulgaria* [GC] (28 October 1998, *Reports* 1998-VIII) did not apply in the instant case. Romanian law differed from French law and in the instant case the applicant had had no opportunity to seek damages during a trial since the decision not to indict the police officers had precluded any trial. Contrary to the Bulgarian legal system, where a Law on State Responsibility for Damage afforded a right to sue the police in the civil courts following alleged ill-treatment, the Romanian legal system contained no such legislative provision.

2. The Court's assessment

164. The Court reiterates that Article 13 of the Convention guarantees the availability, at the national level, of a remedy to enforce the substance of Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision.

165. However, the scope of the State's obligation under Article 13 varies depending on the nature of the applicant's complaint, and in certain situations the Convention requires a particular remedy to be provided. Thus, in cases of suspicious death or ill-treatment, given the fundamental

importance of the rights protected by Articles 2 and 3, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the acts of ill-treatment (see *Anguelova v. Bulgaria*, no. 38361/97, §§ 161-162, ECHR 2002-IV; *Assenov and Others v. Bulgaria*, cited above, §§ 114 et seq.; and *Süheyla Aydın v. Turkey*, no. 25660/94, § 208, 24 May 2005).

The Court further reiterates that the requirements of Article 13 are broader than a Contracting State's obligation under Article 2 to conduct an effective investigation (see *Orhan v. Turkey*, no. 25656/94, § 384, 18 June 2002; and *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, § 183, 24 February 2005).

166. On the basis of the evidence adduced in the present case, the Court has found that the State authorities were responsible for Mr Carabulea's death while in police custody. The applicant's complaints to the domestic authorities in this regard were based on the same evidence and were therefore "arguable" for the purposes of Article 13 (see *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 52, Series A no. 131). The authorities thus had an obligation to carry out an effective investigation into his allegations against the police officers.

For the reasons set out above (see paragraphs 132-138 above) no effective criminal investigation can be considered to have been carried out in accordance with Article 13 (see *mutatis mutandis, Buldan v. Turkey,* no. 28298/95, § 105, 20 April 2004; *Tanrıkulu v. Turkey*, cited above, § 119, and *Tekdağ*, no. 27699/95, § 98, 15 January 2004).

Moreover, the Court has already found in similar cases that any other remedies, including a claim for damages, are theoretical and illusory, and not capable of affording redress to the applicant (*Cobzaru v. Romania*, no. 48254/99, § 83, 26 July 2007, and *Rupa v. Romania* (no. 1), no. 58478/00, §§ 189-91, 16 December 2008).

The Government have not put forward any additional fact or argument capable of persuading it to reach a different conclusion in the present case.

167. The Court finds that the applicant has been denied an effective remedy in respect of the death of his brother and has thereby been denied access to any other available remedies at his disposal, including a claim for compensation.

Consequently, it dismisses the Government's preliminary objection and concludes that there has been a violation of Article 13 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLES 2, 3 AND 13 OF THE CONVENTION

168. The applicant complained that his brother's death in custody, the ill-treatment to which he had been subjected and the refusal of the military prosecution authorities to open an investigation in respect of the police officers responsible had been due, in part, to his Roma ethnicity and had therefore been inconsistent with the requirement of non-discrimination set forth in Article 14, taken together with Articles 2, 3, and 13 of the Convention.

However, in view of its previous findings (see paragraphs 126, 138, 149-150 and 167 above), the Court considers that it is not necessary to examine this complaint separately.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

169. 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. Pecuniary damage

170. The applicant claimed the sum of EUR 3,030 for himself and on behalf of his brother's minor child, Mihaela-Denisa Carabulea, in respect of the cost of his brother's burial and of the material support for his brother's minor daughter. The applicant submitted that at the time of his death, Gabriel Carabulea had a three-month-old daughter, who was now being brought up in the applicant's house. The applicant had also provided material support to his brother's widow for raising the child.

171. The Government regarded these claims as unfounded. They pointed out that the applicant was not alone in looking after the deceased's daughter as her mother (the deceased's widow) also lived in the same flat. Consequently, the applicant did not have any rights separate from those of the mother.

172. The Court reiterates that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention, and that this may, in an appropriate case, include compensation in respect of loss of earnings. Having regard to its above conclusions, it finds that there is a direct causal link between the violation of Article 2 in so far as the applicant complains about the death of his brother and the loss by his brother's daughter of the financial support which he provided (see,

among other authorities, *Çakıcı v. Turkey* [GC], cited above, and *Imakayeva v. Russia*, no. 7615/02, § 213, ECHR 2006-XIII (extracts)).

173. Considering the applicant's submissions and the principles summarised above, the Court awards the applicant the requested amount.

B. Non-pecuniary damage

174. The applicant claimed EUR 100,000 in respect of non-pecuniary damage for himself and on behalf of his brother's minor child, Mihaela-Denisa Carabulea.

175. The Government requested the Court to dismiss the applicant's claim since it was unjustifiably high.

176. The Court finds that the applicant undoubtedly suffered damage as a result of the violations found by the Court and may be regarded as an "injured party" for the purposes of Article 41. Having regard to the particularly grave circumstances of the present case and the nature of the multiple violations found, it awards him EUR 10,000 in respect of the non-pecuniary damage sustained by him. With regard to the non-pecuniary damage suffered by the applicant's brother's minor child, the Court awards EUR 35,000 to the said minor to be held in trust for her until she reaches the age of majority, the said trust being administered until then in accordance with the provisions of domestic law (see, *mutatis mutandis*, *Çelikbilek v. Turkey*, no. 27693/95, §§ 118-19, 31 May 2005; *Çakıcı v. Turkey* [GC], cited above, § 127).

C. Costs and expenses

177. The applicant claimed a further EUR 16,362 for legal costs and expenses incurred during the proceedings before the Court and related to his representation by Ms M. Macovei until March 2005, and submitted an itemised schedule of these costs.

178. The Government did not dispute the details of the calculations submitted by the applicant, given the complexity of the case, but contended that the sum claimed was excessive.

179. The Court reiterates that in order for costs and expenses to be reimbursed under Article 41, it must be established that they were actually and necessarily incurred and were reasonable as to quantum (see, for example, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 62, ECHR 1999-VIII, and *Boicenco v. Moldova*, no. 41088/05, § 176, 11 July 2006). In accordance with Rule 60 § 2 of the Rules of Court, itemised particulars of all claims must be submitted, failing which the Court may reject the claim in whole or in part.

180. Finally, the Court notes that it is its standard practice to rule that awards in relation to costs and expenses are to be paid directly into the applicant's representatives' accounts (see, for example, *Toğcu v. Turkey*, no.

27601/95, § 162, 31 May 2005; *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 175, ECHR 2005-VII; and *Imakayeva*, cited above).

181. In the present case, having regard to the above criteria, to the itemised list submitted by the applicant and to the number and complexity of issues of fact and law dealt with and the substantial input of the representative, the Court awards the applicant the amount of EUR 15,000, less the sum of EUR 660 received in legal aid from the Council of Europe, plus any tax that may be chargeable thereon to the applicant, to be paid into the representative's bank account as identified by her.

D. Default interest

182. The Court considers it appropriate that the default interest 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. *Dismisses* unanimously the Government's preliminary objection;

2. *Holds* unanimously that there has been a violation of Article 2 of the Convention under both its substantive and procedural limbs;

3. *Holds* unanimously that there has been a violation of Article 3 of the Convention under both its substantive and procedural limbs;

4. *Holds* unanimously that it is unnecessary to determine whether there has been a violation of Article 6 of the Convention;

5. *Holds* unanimously that there has been a violation of Article 13 of the Convention on account of the lack of effective remedies in respect of the death of the applicant's brother at the hands of the police;

6. *Holds* by four votes to three that it is unnecessary to determine whether there has been a violation of Article 14 of the Convention in conjunction with Articles 2, 3 and 13 of the Convention;

7. *Holds* unanimously

(a) that the respondent State is to pay, 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 Romanian lei (RON) at the rate applicable at the date of settlement:

(i) in respect of pecuniary damage: EUR 3,030 (three thousand and thirty euros), plus any tax that may be chargeable, to the applicant;

(ii) in respect of non-pecuniary damage:

- EUR 10,000 (ten thousand euros) plus any tax that may be chargeable, to the applicant and
- EUR 35,000 (thirty five thousand euros) plus any tax that may be chargeable, to the applicant's brother's minor child, to be held in trust for her, until she reaches the age of majority, the said trust being administered until then in accordance with the provisions of domestic law;

(iii) in respect of costs and expenses: EUR 15,000 (fifteen thousand euros), less EUR 660 (six hundred and sixty euros) granted by way of legal aid, plus any tax that may be chargeable to the applicant, to be paid into the representative's bank account as indicated by her;

(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;

8. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 July 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
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) partly joint dissenting opinion of Judges Gyulumyan and Power;

(b) partly dissenting opinion of Judge Ziemele.

J.C.M.
S.Q.

PARTLY JOINT DISSENTING OPINION OF JUDGES GYULUMYAN AND POWER

1. We agree with the majority's findings in relation to violations of Articles 2, 3 and 13 in this case. However, we cannot agree that it is unnecessary to examine the applicant's complaint in relation to Article 14 taken together with Articles 2 and 3 of the Convention. The applicant's brother was a 27 year Roma who entered police custody in perfect health, suffered appallingly as a result of police brutality and died under police surveillance without the comfort or the presence of his next of kin. The applicant claims that his brother's Roma ethnicity was a factor in the ill-treatment and death and that the failure to open an investigation in respect of the police officers responsible for his death was inconsistent with the requirement of non-discrimination as set forth in Article 14 taken together with Articles 2 and 3.

2. We take the view that having regard to the particular circumstances of this case, the authorities were under a positive obligation to investigate whether racist motives were behind the ill-treatment and death to which Gabriel Carabulea was subjected. Their failure to conduct such an investigation leads us to conclude that there has been a procedural violation of Article 14 in conjunction with Articles 2 and 3 of the Convention.

3. Two distinct considerations inform our view. Firstly, we are cognisant of the abundant evidence of an internationally recognised problem of discrimination against Roma within Romania. Taken alone, that should have triggered an obligation on the part of the authorities to open an investigation in respect of the police officers responsible for the death of this young Roma. Additionally, we are mindful of the difficulties which the applicant faces in proving that discrimination based on his brother's ethnicity was a factor in the events that transpired. Consequently, we consider that where a state is the subject of persistent criticism from international quarters for the manner in which it treats an ethnic minority, justice may require that the burden shifts to such a state to show that discrimination formed no part of the events in respect of which complaints are made. In other words, as part of its overall obligation to respond to and investigate claims of discrimination against Roma in custody, the Romanian state ought to be in a position to answer the applicant's allegations by reference to relevant and reliable information which shows that members of the Roma community who enter police custody are treated no differently than other members of Romanian society. Their failure to discharge that burden in this case gives rise, in our view, to an issue under Article 14 in conjunction with Articles 2 and 3 of the Convention.

International Recognition of Discrimination Against Roma in Romania

4. There can be little doubt but that the respondent state is aware of repeated international expressions of concern about discrimination of Roma in Romania. There exist numerous and well documented international reports from a variety of bodies raising concerns about the repeated failure of the Romanian authorities to remedy instances of anti-Roma violence and to provide redress for discrimination.[1]

5. For example, the Reports and Observations of the Committee on the Elimination of Racial Discrimination that monitors the implementation of the United Nations Convention on the Elimination of All Forms of Racial Discrimination expressed particular concern about the situation of Roma in Romania. Additionally, the European Commission against Racism and Intolerance (ECRI) of the Council of Europe released its first report on Romania in 1999 and found that violent acts were publicly committed against members of various minority groups, particularly Roma/Gypsies. That Commission appealed for an intensification of training in the administration of justice targeting, in particular, teachers in military and police academies. In its subsequent reports of 2001 and 2005 the ECRI noted that serious problems persisted throughout the country as regards police attitudes and behaviour towards members of the Roma community. More specifically, it deplored that cases of police violence against members of the Roma community continued to occur and had led to serious and sometimes lethal injuries and it advocated an independent and investigative mechanism to inquire into police abuses. Whilst, admittedly, its 2005 report noted a decrease in the level of police violence against members of the Roma community it nevertheless stressed that the Roma community continued to be discriminated against in all areas.

6. In addition to concerns expressed at international level, the Court has previously noted awareness of the problem of discrimination against Roma at domestic level. In *Cobzaru v. Romania* (no. 48254/99, § 97, 26 July 2007), for example, the Court observed that the numerous anti-Roma incidents which often involved State agents following the fall of the communist regime in 1990 were known to the public at large as they were regularly covered by the media. It also observed that other documented evidence of repeated failure by the authorities to remedy instances of such violence was known at domestic level.

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[1] See, for example**,** Reports and Observations of the Committee that monitors the implementation of the United Nations Convention on the Elimination of All Forms of Racial Discrimination. See, in particular, its Concluding Observations on Romania of the Committee on the Elimination of Racial Discrimination of 22 September 1995. See also Concluding Observations on Romania of the Committee on the Elimination of Racial Discrimination of 19 August 1999; See also Report by Sir Nigel Rodley, Special Rapporteur on the Question of Torture, Submitted Pursuant to the United Nations Commission on Human Rights Resolution no. 1999/32; see also Reports by the European Commission against Racism and Intolerance (ECRI) of the Council of Europe.

7. Furthermore, there are repeated references in this Court's judgments and the respondent Government has, indeed, admitted to the fact of law enforcement agents having inflicted injuries on Roma, participated in acts of racially motivated violence and destruction, uttered racial verbal abuse, and failed to conduct meaningful investigations into these incidents (see, among others, *Stoica v. Romania,* no. 42722/02, §§ 80, 81 and 132, 4 March 2008; *Gergely v. Romania*, no. 57885/00, §§ 16 and 25, 26 April 2007; *Cobzaru*, cited above, § 101; and *Moldovan and Others* (no. 2), no. 1138/98 and 4320/01, § 140, 2 July 2005).

8. Having regard to the information contained in international reports, the awareness of the problem at domestic level and the Court's previous findings in its case law, we consider that, in the circumstances of the present case the authorities had a duty to establish whether discrimination based on Roma ethnicity played any role in the events leading to the applicant's brother's death. Indeed, we note that in *Cobzaru* (cited above, § 98) the failure on the part of the prosecutors to verify whether the policemen who inflicted violence had been involved in previous similar incidents or whether they had been accused previously of displaying anti-Roma sentiment together with the state's failure to advance any justification for this omission was an important factor to which the Court had regard in finding a violation of Article 14. It is difficult to see why the same approach was not followed in this case and the majority's reluctance so to do is regretted.

The Shifting Burden of Proof and Discrimination Against Roma

9. Discrimination on account of a person's ethnic origin is a form of racial discrimination and is a particularly invidious kind which, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 145, ECHR 2005-VII; and *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 56, ECHR 2005-XII)). That people of Roma ethnicity constitute a particularly vulnerable minority has already been noted by the Court which held that special consideration should be given to their needs both in the relevant regulatory framework and in reaching decisions in particular cases (see *Chapman v. the United Kingdom* [GC], no. 27238/95, § 96, ECHR 2001-I; and *Connors v. the United Kingdom*, no. 66746/01, § 84, 27 May 2004).

10. Absent evidence of actual verbal racist abuse, a person in the position of the applicant is in an almost impossible situation in proving that discrimination based on his brother's ethnicity was a factor in the events that transpired. In the normal course of events it is incumbent upon the one who alleges to prove. However, the Court has previously recognised that

Convention proceedings do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (see *Aktaş v. Turkey* (extracts), no. 24351/94, § 272, ECHR 2003-V). Where fundamental human rights are at issue the Court has not hesitated to develop its evidentiary law in order to assist it in its search for truth, establishing, where necessary, a shift in the burden of proof from the applicant onto the Government (see *Tomasi v. France*, 27 August 1992, §§ 108-111, Series A no. 241-A). In our view, such a shift is appropriate in the circumstances of this case precisely because it is the authorities and not the applicant who can access the relevant information which could verify or rebut the applicant's allegations that discrimination base on his brother's Roma ethnicity played a part in the treatment to which he was subjected whilst in police custody. Information concerning complaints about the ill-treatment and/or death of persons in custody, and, in particular, of Roma in custody, is wholly or substantially within the knowledge and control of the Romanian authorities.

11. On 4 September 2009, the respondent state was requested to provide the Court with information on the number of allegations made concerning police violence inflicted upon persons in custody and on the number of deaths in police custody that occurred from 1990 to that date. It was further asked to specify what proportion, if any, of the relevant data related, specifically, to members of the Roma community. On 30 October 2009 the Government informed the Court that the Romanian authorities kept no statistical data either on the number of complaints received concerning police violence upon persons in custody or on the number of deaths of detainees that had occurred in police custody for the said period. The respondent state submitted that, therefore, no statistical data was available on the number of such complaints relating, specifically, to members of the Roma community.

12. In earlier case law, the Court has held that statistics could not, in themselves, disclose a practice which could be classified as discriminatory (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 154, ECHR 2001-III (extracts)). However, in more recent cases on the question of discrimination the Court has relied extensively on statistics produced by the parties to establish a difference in treatment between two groups (men and women) in similar situations (see *Hoogendijk v. the Netherlands* (dec.), no. 58461/00, 6 January 2005 and *Zarb Adami v. Malta*, no. 17209/02, §§ 77-78, ECHR 2006-VIII). For example, in *Opuz v. Turkey* (no. 33401/02, § 198, ECHR 2009-...), the Court found that the applicant, relying on unchallenged statistical information, had been able to show the existence of a *prima facie* indication of a discriminatory pattern with reference to domestic violence, in so far as it affected mainly women. Consequently, in our view, while general statistics alone would not necessarily lead the Court to conclude that a substantive violation of Article 14 had occurred in a

particular case, they may be indicative of a discriminatory pattern sufficient to give rise to an obligation to investigate complaints of discrimination.

13. As noted above, the respondent state indicated that it was unable to provide any relevant, realistic and centralised statistical data on the information sought by the Court concerning violence, including deaths, inflicted by police officers upon persons in custody, and specifically upon members of the Roma community. Relying on the personal rights of the Roma and the domestic data protection legal provisions as justification for their inability to furnish the requisite information, they further claimed that even if the Roma were to indicate their ethnicity when making complaints, there would be a disproportionate burden on the state in collating such information.

14. We find that such a response gives rise to an issue under Article 14. Firstly, it is wholly inadequate in the light of the international expressions of concern about discrimination against Roma in Romania and, in particular, in the light of calls for an independent and investigative mechanism to inquire into police abuses.[1] Furthermore, it is in contradiction of the Romanian authorities' undertaking to provide adequate means of legal protection in cases of direct or indirect discrimination and to allow such discrimination to be established by any means, including, on the basis of statistical evidence.[2] In this regard we are mindful of what the European Commission on the Situation of Roma has described as "a significant misconception among researchers, as well as policy makers and government officials, to the effect that collecting data on Roma, and other ethnic minorities, violates data protection laws and would therefore not be legal". It also notes that in its data protection rules, the EU has consistently affirmed that such rules apply to personal data only and not to aggregate data about groups or data disaggregated by ethnicity or other criteria.[3]

15. Insofar as the collating of such information would impose a disproportionate burden on the respondent state, we take the view that the fundamental right to freedom from racial discrimination, as with every other Convention right, is neither theoretical nor illusory. For this right to be real and effective, a victim claiming racial discrimination in conjunction with Articles 2 and 3 must be in a position to test his or her claim by reference to objective impersonal data,[4] such as, the kind of information requested of the Government in this case. In our view, it is significant that the European Roma Rights Centre has been among the most consistent advocates of

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[1] See, for example, the ECRI Report of 22 June 2001.

[2] See Articles 2, 4, 5 and 6 of the *United Nations International Convention on the Elimination of All Forms of Racial Discrimination* which was ratified by Romania in 1970.

[3] See the Report by the European Commission on the Situation of Roma in an Enlarged European Union (2004) and, particular, paragraph 3 of the chapter entitled "Policy Changes".

[4] The European Union Council Directive 2000/43/EC explicitly included, in its paragraph 15, statistics among the possible means of establishing discrimination.

collecting ethnic data for the purposes of fighting racism and discrimination and for drafting viable equality programmes.[1]

16. The Romanian authorities' failure to collate and to furnish any indication of the number of Roma who complained of ill-treatment or who died while in police custody suggests a failure to heed let alone to respond to international expressions of concern. Such a failure, in our view, gives rise to an issue under Article 14 in conjunction with Articles 2 and 3 of the Convention. More specifically, the state's failure to open an investigation in respect of the police officers responsible for Gabriel Carabulea's death, against the background of widespread awareness of the problem of discrimination against Roma in Romania (§§ 5-8 above), was inconsistent with the requirement of non-discrimination as set forth in Article 14 taken together with Articles 2 and 3.

[1] See publication entitled “Ethnic Statistics” by Dimitrina Petrova and published by European Roma Rights Centre, 21 July 2004.

PARTLY DISSENTING OPINION OF JUDGE ZIEMELE

1. I voted against the finding of the majority that it is not necessary to determine whether there has been a violation of Article 14 of the Convention in conjunction with Articles 2, 3 and 13.

2. It is to be recalled that in the case of *Nachova and Others v. Bulgaria* (nos. 43577/98 and 43579/98, 26 February 2004), the Chamber established a fundamental principle which was subsequently confirmed by the Grand Chamber as concerns the obligation to investigate possible racist motives behind acts of violence by State agents. Thus the principle reads: "... [W]hen investigating violent incidents and, in particular, deaths at the hands of State agents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention. Admittedly, proving racial motivation will often be extremely difficult in practice. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute" (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII).

3. The applicant in the present case alleged that the extreme brutality with which the victim had been treated was partly due to his Roma origin. The Chamber indeed found a violation of Articles 2 (in both aspects, substantive and procedural) and 3. As to the latter, the Court concluded that the victim had been subjected to torture. The circumstances in which the young and healthy 27-year-old man died at the hands of State authorities, as established by the Court (see paragraphs 111-125), are particularly grave. In the circumstances of the *Nachova* case, the Grand Chamber noted at least two reasons for the obligation to investigate possible racist motives to arise: the alleged racist language and the highly disproportionate use of force. It is true that in the case at hand there is no information about any racist language used by the police officers. It is, however, so obvious that the force used and the absolute lack of investigation into an evidently suspicious death were absolutely disproportionate to the circumstances of the case involving a young Roma man who had allegedly committed a robbery.

4. Furthermore, the Court cannot ignore the fact that various international bodies have underlined the problem of police abuse with respect to the Roma community in Romania and that two international

bodies have specifically mentioned the case of the victim as such an example of Roma abuse (Report by Sir Nigel Rodley, Special Rapporteur on the Question of Torture, submitted to the United Nations Commission on Human Rights, Resolution no. 1999/32; Amnesty International report on Romania, 2002). I also note that the case file contains a response by the Romanian Government to the Court's specific questions on statistical data in which the Government could not provide any such data concerning investigations into violence by police officers against persons of Roma origin. The Government argued that to collect such information would be against the laws on data protection. Noting that racially motivated violence is a problem in the country, certainly at the time of the events in the case at hand, the Government's reply in itself is inconsistent with their obligations to fight against racism under both the European Convention on Human Rights and the United Nations standards.

5. I believe that the Court has been very clear about the special duty to unmask racist motives behind the actions of State agents. In the *Nachova* case it explained very clearly that it was a duty apart and that failing to comply with it or treating racist violence on an equal footing with other violence would be turning a blind eye to the particularly destructive character of racism. The Court further stated that this obligation was part of Article 2, but also part of Article 14. I therefore regret the decision of the majority, despite the applicant's complaints concerning possible racist motives behind the events leading to the death of Gabriel Carabulea, not to examine these allegations or the compliance by Romania with its duty to investigate such motives in the circumstances of the case. I believe that this decision goes against the Court's own case-law.