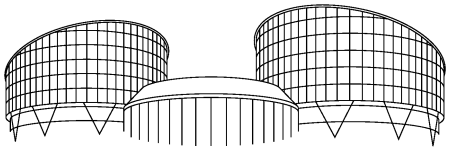

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF ELENA APOSTOL AND OTHERS v. ROMANIA

(Applications nos. 24093/14 and 16 other applications)
(See list appended)

JUDGMENT

This version was rectified on 22 March and 6 June 2016
under Rule 81 of the Rules of Court

STRASBOURG

23 February 2016

FINAL

23/05/2016

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

In the case of Elena Apostol and others v. Romania,

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

András Sajó, *President,*
Vincent A. De Gaetano,
Nona Tsotsoria,
Paulo Pinto de Albuquerque,
Krzysztof Wojtyczek,
Egidijus Kūris,
Gabriele Kucsko-Stadlmayer, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 26 January 2016,

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

PROCEDURE

1. The case originated in seventeen applications (nos. 24093/14, 24104/14, 24106/14, 24108/14, 24113/14, 24119/14, 24121/14 24124/14, 24127/14, 24149/14, 24159/14, 24160/14, 24170/14, 24185/14, 24214/14, 45779/14 and 45780/14) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by seventeen Romanian nationals. Their names and other details, as well as the date of lodging of each application, are specified in the appended table.

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

3. In so far as Ms Iulia Antoanella Motoc, the judge elected in respect of Romania, withdrew from sitting in the case (Rule 28 § 3 of the Rules of Court), the President decided to appoint Mr Krzysztof Wojtyczek to sit as an *ad hoc* judge (Rule 29).

4. The applicants alleged, in particular, that there had been no effective investigation into the violent suppression of anti-government demonstrations in December 1989 in which their relatives had been killed.

5. On 10 October 2014 and 10 February 2015 these complaints were communicated to the Government and the remaining complaints were declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

6. The parties submitted written observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

7. The facts of the case, as submitted by the parties, are similar to those in *Association "21 December 1989" and Others v. Romania* (nos. 33810/07 and 18817/08, §§ 12-41, 24 May 2011). They have the same historical context and relate to the same domestic criminal proceedings. They can be summarised as follows:

8. On 17 December 1989, following demonstrations against the Government and on the orders of President Nicolae Ceauşescu, military operations were conducted in Timișoara and, over the following days, in other towns, including Bucharest, Reșița and Braşov. These operations caused many civilian deaths and casualties.

According to a document of 5 June 2008, issued by the military prosecutor's office at the High Court of Cassation and Justice, "more than 1,200 people died, more than 5,000 people were injured and several thousand people were unlawfully deprived of their liberty and subjected to ill treatment", in Bucharest, Timişoara, Reşiţa, Buzău, Constanţa, Craiova, Brăila, Oradea, Cluj, Braşov, Târgu Mureş, Sibiu and other towns in Romania. In addition, it appears from Ministry of Defence documents, declassified by Government decision no. 94/2010 of 10 February 2010, that thousands of servicemen, equipped with combat tanks and other armed vehicles, were deployed in Bucharest and other cities. During the period of 17 to 30 December 1989 they used considerable quantities of ammunition against the demonstrators.

B. Criminal proceedings

9. The applicants are people whose relatives were shot and killed in the events which took place between 17 and 30 December in Bucharest, except for the applicant in application no. 45779/14, whose husband was killed in Reșița and the applicant in application no. 24127/14, whose son was killed in Braşov.

10. In 1990, military prosecutors in Bucharest, Timişoara, Oradea, Constanţa, Craiova, Bacău, Târgu Mureş and Cluj opened investigations into the use of force and the unlawful deprivation of liberty of the participants in demonstrations in the final days of December 1989. To date, the main criminal investigation into the use of violence, particularly against civilian demonstrators, both prior to and following the overthrow of Nicolae Ceauşescu, has been contained in file no. 97/P/1990 (current

number 11/P/2014). The most important procedural steps undertaken between 1990 and 2009 were summarised in *Association "21 December 1989" and Others* (cited above, §§ 12-41). Subsequent developments are described below.

11. On 18 October 2010 the military prosecutor's office at the High Court of Cassation and Justice decided not to institute criminal proceedings with regard to the acts committed by the military, finding that the applicants' complaints were partly statute-barred and partly ill-founded. The investigation into crimes committed by civilians, members of the Patriotic Guards, militia members and prison staff was severed from the case file and jurisdiction was relinquished in favour of the prosecuting authorities at the High Court of Cassation and Justice.

12. On 15 April 2011 the chief prosecutor at the military prosecutor's office set aside the decision of 18 October 2010 on the grounds that the investigation had not yet been finalised and that not all the victims and perpetrators had been identified.

13. On 18 April 2011 the military prosecutor's office relinquished jurisdiction in favour of the prosecutor's office at the High Court of Cassation and Justice on the grounds that the investigation concerned both civilians and military personnel.

14. On 9 March 2012 – after classified material in the criminal investigation file had been opened to the public in 2010 – the case was re-registered with a view to an investigation in the light of the newly available information.

15. In February 2014, after the entry into force of the new Code of Criminal Procedure, jurisdiction was again relinquished in favour of the military prosecuting authorities and the file was registered under the domestic case file no. 11/P/2014.

16. By an ordinance of 14 October 2015, the prosecuting authorities at the High Court of Cassation and Justice discontinued the proceedings in relation to case file no. 11/P/2014. The parties have not submitted any information on whether there was an appeal against that decision.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant domestic law

17. The Court's judgments in *Association "21 December 1989" and Others* (cited above, §§ 95-107) and *Mocanu and Others v. Romania* ([GC], nos. 10865/09, 45886/07 and 32431/08, §§ 193-196, 17 September 2014) describe in detail the relevant domestic law and practice in relation to the criminal proceedings in connection with the events of December 1989 and respectively to the statutory limitation of criminal liability.

18. The relevant legislative enactments concerning the independence and impartiality of military prosecutors are the following.

(1) Law no. 303 of 28 June 2004 on the status of judges and prosecutors, in force as of 16 September 2005

19. Article 105 specifies that the provisions of the above Law apply equally to civilian and military judges and prosecutors.

Article 3 provides that prosecutors enjoy stability of employment and are independent, by virtue of the law. Article 75 of the Law provides that the High Council of the Judiciary has the right and the obligation to defend all prosecutors and judges against any act which might affect their independence or impartiality or that might raise any suspicions in that regard. Judges and prosecutors who consider that their independence or impartiality has been affected in any way by acts which interfere with their professional activity can ask the High Council of the Judiciary to take the necessary measures, in accordance with the law.

Pursuant to Articles 31 and 32 of the Law, military prosecutors and judges are appointed by the State President, on a proposal by the High Council of the Judiciary, after obtaining the assent of the Ministry of Defence. Every aspect of the appointment, transfer and promotion of military prosecutors and judges is covered by a joint regulation of the High Council of the Judiciary and the Ministry of Defence.

Article 98 § 2 of the Law states that proceedings entailing any possibility of disciplinary action against military prosecutors and judges can only be pursued in accordance with the provisions of the Law. In accordance with Article 101, disciplinary measures are applied by the High Council of the Judiciary.

Article 65 states that prosecutors and judges can only be dismissed in accordance with the general conditions laid down in the Law.

(2) Law no. 304 of 28 June 2004 on the organisation of the judicial system, in force as of 24 September 2004

20. Chapter I of Law no 304/2004 provides that the military court system is part of the Romanian judicial system. Articles 51 to 56 of the Law list the military courts and describe their structure and powers, whilst Articles 98 to 102 detail the structure and functioning of the military prosecutors' offices.

(3) Joint regulation of 6 February 2014 on the appointment of military judges and prosecutors; transfer from civilian to military courts or prosecutor's offices; granting of military ranks and promotion of military judges and prosecutors, in force as of 29 April 2014

21. Chapter I of the joint regulation provides that the High Council of the Judiciary is in charge of appointing military prosecutors and judges. Article 3 states that the assent from the Ministry of Defence is to be granted on the basis of a medical examination of the appointee, including a physical training assessment and a psychological evaluation.

(4) New Code of Criminal Procedure, in force as of 1 February 2014

22. Article 56 § 4 of the new Code of Criminal Procedure states that it is mandatory for military prosecutors to investigate crimes committed by military officers.

23. Article 339 § 4 states that an appeal against ordinances discontinuing proceedings can be made within twenty days of the date they are communicated.

B. Decision by the Committee of Ministers of the Council of Europe

24. The last decision concerning the execution of the judgment in the case of *Association "21 December 1989" and Others* (cited above), adopted by the Committee of Ministers on June 2014 at the 1201st meeting of the Ministers' Deputies, invited the Romanian authorities to respond to the criticism made by the Court in its judgment concerning the impugned investigation. The relevant parts of the decision are worded as follows:

"The Deputies

1. noted that, in these cases, the European Court found that certain aspects of the national legislation governing the status of the military magistrates cast doubt on the institutional and hierarchical independence of military prosecutors, when the persons under investigation belong to the armed forces or to other military forces;

2. invited the Romanian authorities to carry out rapidly a thorough assessment of the consequences to be drawn from these findings, as regards the general and individual measures in these cases, and to keep the Committee of Ministers informed of the conclusions and of the measures that might be defined and adopted in the light of this assessment;

3. invited, moreover, the authorities to present an assessment of the general measures that might be necessary to ensure that, in the future, bodies holding information on facts that are the subject of such investigations, co-operate fully with the investigators; ..."

THE LAW

I. JOINDER OF THE CASES

25. The Court notes that the applications concern the same factual circumstances and raise similar legal issues. Consequently, it considers it appropriate to join the applications, in accordance with Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

26. The applicants complained that the criminal investigation opened by the authorities in 1990 into the events of December 1989 had been ineffective. They alleged that the respondent State had failed to comply with the procedural requirements of Article 2 of the Convention, which reads as follows:

> "1. Everyone's right to life shall be protected by law. ..."

A. Admissibility

27. The Court notes that the applications are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds, bearing also in mind the Court's findings with respect to its *ratione temporis* jurisdiction in the cases of *Association "21 December 1989" and Others* (cited above, §§ 116- 118) and, *mutatis mutandis*, *Mocanu and Others* (cited above §§ 207-211). They must therefore be declared admissible.

B. Merits

1. The parties' submissions

28. The applicants emphasised that twenty-six years after the death of their relatives, the related criminal investigation had still not identified those responsible and sent them for trial. They submitted that the duration of the investigation had been excessive and that the authorities had not complied with the requirements set forth in the Court's case-law on Article 2 of the Convention.

29. The Government admitted that the investigation had been particularly long.

30. However, with regard to the issue of the independence and impartiality of the military prosecutors, the Government contended that the system of military courts was provided with sufficient guarantees for

independence and impartiality, as well as safeguards against outside pressure. Law no. 304/2004 on the organisation of the judicial system stated that the military courts and military prosecutors' offices were part of the general judicial system and were organised and functioned according to the same rules and regulations as their civilian counterparts. Similarly, Law no. 303/2004 on the status of judges and prosecutors also referred to military judges and prosecutors and provided that the High Council of the Judiciary had the right and obligation to defend judges and prosecutors from any act of interference which might affect their independence and impartiality. The Government further submitted that the High Council of the Judiciary was the competent body to recommend military prosecutors for appointment by the State President, relying exclusively on their professional expertise. They contended that the need for assent from the Ministry of Defence, which was a prerequisite for the appointment of military judges and prosecutors, referred only to medical, physical and psychological assessments of candidates. They added that military prosecutors' salaries were paid from the budget of the Ministry of Defence, but that the Ministry acted merely as a manager of the military courts' budget. The Government contended that it could not be concluded from such considerations that military prosecutors and judges were in a relationship of direct or indirect subordination within the military hierarchy. Moreover, military prosecutors could only be dismissed in accordance with the general conditions laid down in the statute of magistrates, and the High Council of the Judiciary was the only body in a position to apply any disciplinary sanctions. The Government further submitted that in the context of the penal reform carried out in the last few years, the principle of the specialisation of judges and prosecutors was deemed to be crucial for ensuring fair and rapid proceedings, and that therefore, in accordance with the new Code of Criminal Procedure, military prosecutors were in charge of all investigations of crimes committed by military personnel.

2. The Court's assessment

31. The Court reiterates its well-established principles concerning the procedural obligations imposed by Article 2, which were summarised in its judgments in the cases of *Association "21 December 1989" and Others* (cited above, §§ 133-135); *Mocanu and Others* (cited above § 317-325); and *Mustafa Tunç and Fecire Tunç v. Turkey* ([GC] no. 24014/05, § 171-181, 14 April 2015).

32. According to these principles, the procedural obligation imposed by Article 2 requires an effective investigation to be conducted where the use of force, particularly by State agents, has resulted in the loss of human life. This involves the carrying out of a thorough, impartial and careful examination of the circumstances surrounding the killings, which is capable of leading to the identification and punishment of those responsible. This is

not an obligation of results to be achieved, but of means to be employed. The authorities must have taken reasonable steps to secure the evidence concerning the incident. A requirement of promptness and reasonable expedition is implicit in this context. Equally, it is necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events, which means not only a lack of hierarchical or institutional connection, but also practical independence. Furthermore, a prompt response by the authorities is essential in maintaining public confidence in their adherence to the rule of law. For the same reasons, 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 (see *Association "21 December 1989" and Others*, cited above, § 133-135).

33. The Court further observes that in order to establish whether a "tribunal" can be considered "independent", regard must be had, *inter alia*, to the manner of appointment of its members and their term of office; the existence of guarantees against outside pressures; and the question whether the body presents an appearance of independence. As to "impartiality", there are two aspects to this requirement. Firstly, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint – that is, it must offer sufficient guarantees to exclude any legitimate doubt in that respect (see *Findlay v. the United Kingdom*, 25 February 1997, § 73, *Reports of Judgments and Decisions* 1997-I, and *Mustafa Tunç and Fecire Tunç*, cited above, § 221).

34. The Court takes note of the Government's submissions that the independence and impartiality of military prosecutors is currently fully guaranteed by the relevant legislation, as successively amended since 2004. It observes that the applicable laws have put in place transparent mechanisms for the appointment of military prosecutors, as well as for the stability of their employment, and that they are bound by the same professional obligations and entitled to similar protection against outside interference as their civilian counterparts. The Court is thus satisfied that the amendments in question appear to provide sufficient safeguards in respect of the statutory independence of military prosecutors.

35. Nevertheless, the Court reiterates that the issue of independence must also be examined *in concreto* in relation to the prosecutors in charge of an investigation, in order to check for potential ties to the persons likely to be investigated and for evidence of bias (see *Mustafa Tunç and Fecire Tunç*, cited above, § 237).

36. In this connection, the Court cannot ignore the fact that starting from 1990, and lasting at least until 2004, when the above-mentioned amendments were initiated, the investigations into the events of December 1989 were conducted by military prosecutors who, according to the legislation in force at the time, were in a relationship of subordination within the military hierarchy.

37. Furthermore, the Court refers to the conclusion it drew in the case of *Association "21 December 1989" and Others* (cited above, §§ 136-145), where the finding of a violation of Article 2 of the Convention in its procedural aspect was based on several other shortcomings of the investigations, rather than the issue of the independence and impartiality of the military prosecutors. These included the excessive length of the investigations and long periods of inactivity; the lack of involvement of the victims' relatives in the proceedings; and the lack of information to the public about the progress of the investigations. The Court notes that the same shortcomings are discernible in the present cases.

38. Therefore, the Court sees no reason to depart from its findings in *Association "21 December 1989" and Others* (cited above), and holds that there has been a violation of Article 2 of the Convention under its procedural limb.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 AND ARTICLE 13 OF THE CONVENTION CONCERNING THE LENGTH OF PROCEEDINGS AND THE LACK OF AN EFFECTIVE REMEDY

39. The applicants relied on Article 6 § 1 of the Convention to complain about the length of the criminal investigations into the events of December 1989, and on Article 13 to complain of the lack of an effective remedy in respect of the determination of their claims.

Article 6 § 1 and Article 13 of the Convention read as follows, in so far as relevant:

Article 6 § 1

"In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

Article 13

"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."

40. Having regard to its finding of a violation under the procedural limb of Article 2 of the Convention (see paragraph 37 above), the Court considers that it has examined the main legal questions raised in the present application and that there is no need to give a separate ruling on the remaining complaints (see, among other authorities, *Association "21 December 1989" and Others*, cited above, § 181).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. Article 41 of the Convention provides:

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

A. Damage

42. Each of the applicants claimed 100,000 euros (EUR) in respect of non-pecuniary damage.

43. The Government submitted that the claims were excessive.

44. The Court observes that it has found a procedural violation of Article 2 of the Convention on account of the absence of an effective investigation into the events of December 1989 in which the applicants' relatives were shot and killed.

45. Having regard to all the circumstances of the present case, the Court accepts that the applicants must have suffered non-pecuniary damage which cannot be compensated solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards each of the applicants EUR 15,000, in respect of non-pecuniary damage, plus any tax that may be chargeable to them.

B. Costs and expenses

46. The applicants did not submit a claim for costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, to join the applications;

2. *Declares*, by a majority, the complaints under the procedural limb of Article 2 of the Convention admissible;

3. *Holds*, by six votes to one, that there has been a violation of Article 2 of the Convention, under its procedural limb;

4. *Holds*, unanimously, that it is not necessary to examine the admissibility and merits of the complaints under Article 6 § 1 and Article 13 of the Convention;

5. *Holds*, by six votes to one,
(a) that the respondent State is to pay to each of the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
(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;

Done in English, and notified in writing on 23 February 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	András Sajó
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wojtyczek is annexed to this judgment.

A.S.
F.A.

APPENDIX

No	Application No	Lodged on	Applicant Date of birth Place of residence
1.	24093/14	21/03/2014	**Elena APOSTOL** 12/09/1949 Măgurele
2.	24104/14	21/03/2014	**Maria BARA** 17/07/1947 Bucharest
3.	24106/14	21/03/2014	**Stan BURCIOAICA** 01/03/1954 Bucharest
4.	24108/14	21/03/2014	**Elena Liliana BUTNARU** (married **CIOBANU**)[1] 21/12/1982 Bucharest
5.	24113/14	21/03/2014	**Antoaneta DIMULESCU** 02/07/1952 Bucharest
6.	24119/14	21/03/2014	**Maria ENACHE** 20/11/1946 Bucharest
7.	24121/14	21/03/2014	**Traian CILIBEANU** 01/05/1941 Bucuresti
8.	24124/14	21/03/2014	**Dumitra IANCU** 10/04/1953 Bucharest
9.	24127/14	21/03/2014	**Florica IVAN** 05/05/1948 Bucharest
10.	24149/14	21/03/2014	**Petra GHEORGHE** 02/01/1951[2] Bucharest
11.	24159/14	21/03/2014	**Liliana Olga GRECU** 04/09/1945 Bucuresti

1. Rectified on 6 June 2016 ; the text was “Elena Liliana BUTNARU”
2. Rectified on 22 March 2016 ; the text was “02/01/1952”

No	Application No	Lodged on	Applicant Date of birth Place of residence
12.	24160/14	21/03/2014	**Ștefan Jenică KOPICUC** 10/12/1977 Bucharest
13.	24170/14	21/03/2014	**Anica KOPICUC** 17/09/1948 Bucharest
14.	24185/14	21/03/2014	**Constanța LACHE** 02/06/1950 Bucharest
15.	24214/14	21/03/2014	**Elena MĂNESCU** 12/12/1935 Bucharest
16.	45779/14	30/05/2014	**Gabriela-Simina BÎRBORĂ**[3] 25/09/1962 Reșița
17.	45780/14	30/05/2014	**Anca Ioana VLASIN** 05/01/1985 Bucharest

3. Rectified on 22 March 2016 ; the text was “Gabriela Simina BIRBORĂ”

DISSENTING OPINION OF JUDGE WOJTYCZEK

1. I expressed my opinion on the temporal scope of the application of the Convention in my separate opinions appended to the judgments in the cases of *Janowiec and Others v. Russia* [GC] (nos. 55508/07 and 29520/09, 21 October 2013) and *Mocanu and Others v. Romania* ([GC], nos. 10865/09, 45886/07 and 32431/08, 17 September 2014). In these two separate opinions I explained in detail why, in my view, the Convention does not impose on High Contracting Parties the obligation to investigate events which pre-dated the entry into force of that instrument in respect of individual States. I maintain my position on this legal issue.

2. The events, which the applicants said had not been properly investigated, had taken place before the entry into force of the Convention in respect of Romania. The obligation to investigate events pre-dating the entry into force of the Convention was established by the judgment in the case of *Šilih v. Slovenia* [GC] (no. 71463/01, 9 April 2009). Before that date the High Contracting Parties could not have expected to have to answer under the Convention for not properly investigating events which had taken place prior to the entry into force of that instrument in respect of them.

3. Finding a violation of the Convention is tantamount to attributing to a State the international responsibility for non-compliance with a treaty obligation. In my own assessment, the conditions for holding Romania responsible for a violation of the obligations stemming from the Convention were not met in the instant case.