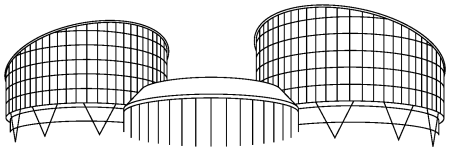

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF MELNICHUK AND OTHERS v. ROMANIA

(Applications nos. 35279/10 and 34782/10)

JUDGMENT

STRASBOURG

5 May 2015

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

In the case of Melnichuk and Others v. Romania,

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

Josep Casadevall, *President,*
Luis López Guerra,
Ján Šikuta,
Kristina Pardalos,
Johannes Silvis,
Valeriu Griţco,
Iulia Antoanella Motoc, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*

Having deliberated in private on 14 April 2015,

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

PROCEDURE

1. The case originated in two applications (nos. 35279/10 and 34782/10) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four Ukrainian nationals, Mr Rostislav Ivanovich Melnichuk and Ms Alla Rostislavovna Lyana, who lodged application no. 35279/10 on 12 June 2010, and by Ms Sofiya Filipovna Demchuk and Mr Valeriy Valentinovich Shpartak, who lodged application no. 34782/10 on 7 June 2010 ("the applicants").

2. The Romanian Government ("the Government") were represented by their Agent, Ms C. Brumar, of the Ministry of Foreign Affairs.

3. The applicants alleged, in particular, the lack of an effective investigation into the direct firing by Romanian soldiers on a column of cars belonging to Soviet citizens early on the morning of 24 December 1989, an incident which resulted in the death of a close relative of the first two applicants and the severe injury of the third and fourth applicant.

4. On 12 June and 8 October 2012 the complaints concerning the alleged lack of effective investigation into these events were communicated to the Government. On the same dates the Ukrainian Government were informed of their right to intervene in the proceedings in accordance with Article 36 § 1 of the Convention and Rule 44 § 1 b, but they did not communicate any wish to avail themselves of this right. On 12 June 2012 the remainder of the application no. 35279/10 was declared inadmissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first two applicants were born in 1939 and 1964 respectively. They are father and daughter. The last two applicants, who are husband and wife, were born in 1951 and 1946 respectively. All the four applicants live in Rivne, Ukraine.

1. Death by gunshot of the close relative of the first two applicants and injuries suffered by the third and fourth applicants

6. Early on the morning of 24 December 1989, the first applicant and his wife, Ms Nadejda Stepanovna Melnichuk, who was the mother of the second applicant – at that time both citizens of the Union of Soviet Socialist Republics ("USSR") – were driving through southern Romania, heading home after a trip to the Socialist Federal Republic of Yugoslavia, together with the third and fourth applicants. They were driving in a column of five cars which were transporting fifteen Soviet citizens in total.

7. At the same time, a Romanian army unit from Craiova had been notified by an unidentified person from the Border Police of Drobeta Turnu Severin that a column of foreign cars was driving from Drobeta Turnu Severin towards Craiova. At the time of the events, the former President Ceauşescu had just been toppled and there were allegedly persistent news reports that terrorists were trying to reinstate the regime.

8. Suspecting that the foreign cars belonged to the so-called terrorists, a team of soldiers was dispatched by Colonel C. – the commander of the army unit of Craiova, who later became general and commander-in-chief of the Romanian Army – to block the road in the nearby of the village of Brădeşti, on the viaduct named *Valea rea*. The unit was led by Lieutenant Colonel S. The road was blocked by two armoured vans, between which only a single car could pass.

9. The column of cars reached the blockade, followed by a local bus. The soldiers asked the passengers several times, in Romanian, to get out of the cars and surrender. As the tourists did not understand what was happening, they did not get out of the cars. During the domestic inquiry, the applicants and the other persons in the cars submitted that the shooting had started without any prior warning. The passengers in the cars started screaming in Russian that they were Soviet tourists. The applicants and the other persons travelling in the column tried to turn back the cars. After a brief pause, the soldiers started shooting again. The first applicant's wife was shot in the head and the passenger sitting behind her – namely the third applicant – was wounded by bullets, as was the fourth applicant.

10. Those who were not wounded started to run away from the cars and tried to hide by the side of the road. At that moment a third round of shooting started. One of the five cars caught fire. Then the shooting stopped and the soldiers approached the cars. The first applicant tried to explain that they were tourists.

11. Several bullets also hit the local bus and wounded a passenger who was going to his workplace in Craiova.

12. After a while, the first applicant and his wife, together with the third and fourth applicants, were taken to a nearby hospital. The first applicant submits that he was called a terrorist by the Romanian soldiers, who pushed him around.

13. Ms Melnichuk was operated on the same day but fell into a coma. On 9 January 1990 she was transferred to a hospital in Bucharest, where she eventually died on 8 February 1990. The medical certificate issued in respect of her death stated that it had been caused by wounds inflicted by gunfire.

14. The second applicant travelled to Bucharest to bring back her mother's body.

15. On 9 January 1990 the third applicant, who had been wounded in her spine, was transferred to a hospital in Moscow, due to her serious medical condition. She never recovered completely and is recognised as a disabled person. From a forensic report dated 6 February 1990, it appears that the third applicant needed 25-30 days of medical care.

16. The fourth applicant, who was shot in his left shoulder, was able to leave hospital and go back home to Rivne on 29 December 1989. From a forensic report dated 6 February 1990, it appears that the fourth applicant needed 8-10 days of medical care.

17. From the investigation carried out by the Romanian authorities it appears that on this occasion two persons died – the first two applicants' close relative and B.M.K – and seven persons from the car column were wounded, namely the last two applicants, N.G.S., I.A.L., A.C., S.F.D. and S.K.

2. Criminal investigation into these events

(a) First decision not to institute criminal proceedings quashed by the military section of the prosecutor's office at the Supreme Court of Justice

18. On 28 December 1989 the USSR citizens involved in the above-mentioned events, including the third and fourth applicants, addressed a complaint to the consular authorities of the USSR Embassy in the Socialist Federal Republic of Yugoslavia. A complaint was also brought on behalf of the first applicant and his wife, who were still hospitalised in Romania and could not personally sign it.

19. The military prosecutor's office in Craiova opened a criminal investigation with file no. 211/P/1990.

20. It appears from documents submitted by the respondent Government that during 1990 several investigative measures were instituted. Some of the victims, including the first applicant and some witnesses were questioned by the investigative authorities between 28 December 1989 and 12 February 1990.

21. The officer who gave the order to open fire wrote a report on the events which was included in the file.

22. On 20 February 1990, the USSR Embassy in Bucharest addressed an inquiry to the Romanian authorities concerning the progress of the investigations.

23. On 27 February 1990, Colonel C. – the commander of the military unit of Craiova, who had given the order for the army intervention at Brădeşti – was questioned as a witness with regard to these events. He stated that, following the phone call received from the Border Police of Drobeta Turnu Severin concerning the column of cars heading towards Craiova, he had supposed (*"am bănuit"*) that they were terrorists and had ordered them to be stopped before they reach Craiova.

24. Medical certificates were handed over to the investigation authorities in respect of the wounds inflicted on the tourists. A technical report was drawn up evaluating the damage to the cars involved in the incident.

25. Statements were taken from the military staff involved in the incident, namely the army unit which had dispatched the team of soldiers to Brădeşti.

26. Between 11 and 26 April 1990, with the assistance of the USSR Embassy, all the victims were interviewed in their country by a Soviet prosecutor and their statements were handed over to the Romanian authorities on 16 May 1990.

27. On this occasion, all the victims requested civil compensation for the damaged suffered in the incident.

28. On 22 August 1990, additional investigative measures were ordered by a military prosecutor, but it appears that none was taken.

29. By a decision of 14 August 1991, the prosecutor decided not to institute criminal proceedings on the grounds that the shooting had taken place as the result of fortuitous circumstances: the soldiers had been led to believe that the tourists were terrorists, so that when the tourists failed to respond to the order to get out of the cars and surrender, they had given the soldiers an impression of imminent danger.

30. The above-mentioned decision was automatically subject to review by the relevant Section of the military section of the prosecutor's office at the Supreme Court of Justice (*Secţia Parchetelor Militare*, "SPM"). On 28 September 1992, the SPM requested additional investigative measures.

31. On 11 April 1994, the military prosecutor's office in Craiova asked SPM for guidance in conducting the impugned investigations.

32. In a decision of 30 May 1994, the SPM quashed the 1991 decision not to institute criminal proceedings. In so ruling, the prosecutor found that there had been no justification for the order to open fire, taking into account that the tourists were not armed and had not presented any immediate danger. It was emphasised that the second round of shooting had taken place when the cars were stationary and the passengers were trying to hide in the immediate surroundings environment. He considered that the order to shoot had constituted a criminal act and that any fear that the soldiers might have experienced could not have amounted to a circumstance capable of removing criminal liability. It was therefore ordered to institute criminal proceedings against Lieutenant Colonel S. for aggravated murder.

33. The file was sent back to the military prosecutor's office in Craiova on 22 June 1994.

(b) The investigation conducted after June 1994 in respect of Lieutenant Colonel S., who was promoted to Colonel

34. On 29 June 1994, the military prosecutor's office wrote to the commander of the army unit of Craiova asking him to ensure that Lieutenant Colonel S. would be present for questioning on 5 July 1994, and to hand over his last three appraisal reports.

35. Colonel S. failed to appear before the military prosecutor on 5 July 1994. The appraisal reports had been sent to the military prosecutor's office. They showed that S. had been upgraded to colonel.

36. On 13 January 1997, the Military Prosecutor's Office in Craiova found that it was not competent to decide the case and referred it to the military prosecutor's office at the Military Court (*Tribunalul Militar Teritorial*).

37. On 31 March 1997, the military prosecutor's office wrote again to the commander of the army unit of Craiova reminding him of his previous letter of 29 June 1994 and asking him to ensure that officer S. be present for questioning on 7 April 1997.

38. On 7 April 1997, Colonel S. was formally notified of the criminal charge brought against him and gave a statement before the military prosecutor. He stated that he had not initially ordered the shooting but that it had been a spontaneous reaction by another soldier. He also stated that he had joined in the first round of firing, that he had personally spent 14 cartridges and that he had subsequently ordered the second round of firing.

39. It appears also from the case file that in 1997 Colonel S. underwent a psychiatric evaluation. A medical report was delivered in this respect on 28 May 1997 stating that Colonel S. had a normal representation of the consequences of his acts.

40. After considering a complaint lodged by Colonel S., by a decision of 12 August 1998 the military section of the prosecutor's office at the Supreme Court of Justice ordered the partial annulment of the decision of 13 January 1997. It was considered that the criminal investigation should not have been limited to Colonel S., as other persons might also have been involved. The prosecutor indicated that the criminal investigation needed to elucidate all the circumstances of the events and, on the basis of the results thus obtained, criminal proceedings should be initiated against all relevant persons. It was therefore ordered that the criminal investigation should be *in rem*. It was further indicated that the decision should be communicated to all interested parties.

41. The decision was communicated to Colonel S, but not to the victims.

(c) The status of the criminal investigation after August 1998; joinder to the main investigation into the military events of December 1989 in Romania

42. Following the decision of 12 August 1998, it appears from the case file submitted by the responding Government that no investigative measures were taken between September 1998 and December 2004.

43. On 13 January 2005, the military prosecutor's office at the Military Court ordered the discontinuation of the criminal investigation on the grounds that the criminal liability was time-barred.

44. On 2 September 2005, A.C. and K.C., two of the victims of the shooting of 24 December 1989, lodged a complaint against the decision of 13 January 2005 with the higher prosecutor.

45. By a decision of 4 April 2007, the military section of the prosecutor's office at the High Court of Cassation and Justice quashed the decision of 13 January 2005, indicating that – given the fact that in 1994 criminal proceedings had been instituted against Colonel S. and several procedural acts had been taken in connection therewith – the running of the statutory time-limit had been interrupted and criminal liability was therefore not time-barred. It was also decided that the investigation file should be joined to the main criminal investigation file concerning the December 1989 events, namely case file no. 97/P/1990. Lastly, it decided that the criminal charges previously brought against Colonel S. should be resumed and that investigations continue in this respect.

(d) Developments in the investigation related to case no. 97/P/1990

46. According to the facts established by the Court in the case of the *Association "21 December 1989" and Others v. Romania* (nos. 33810/07 and 18817/08, §§ 34-41, 24 May 2011), several criminal investigations into the fatal crackdown on the demonstrations of December 1989, which had initially been conducted separately, were joined to the investigation that was the subject matter of case no. 97/P/1990. In this case, by a previous decision of 7 December 2004, the military prosecutor's office had ordered the

indictment of 102 persons, principally officers from the Army, police and *Securitate* forces – including some high-ranking ones – for murder (Articles 174-176 of the Criminal Code), genocide (Article 357 of the Criminal Code), inhuman treatment (Article 358 of the Criminal Code), attempts to commit those acts, complicity and instigation in the commission of the above acts and participation in them, acts committed "during the period from 21 to 30 December 1989". Sixteen civilians, including a former President of Romania and a former Head of the Romanian Intelligence Service, had been also charged.

47. A letter of 22 May 2009 from the military prosecuting authorities indicates that 126 decisions to discontinue proceedings, issued in the separate investigations, were set aside and the relevant files joined to case no. 97/P/1990. After the initial decisions to discontinue proceedings had been set aside, investigations concerning several hundred victims who had been killed or injured during the period from 21 to 30 December 1989 in various areas of the country were also joined to case no. 97/P/1990.

48. In a previous letter of 5 June 2008, the head prosecutor of the military prosecutor's office at the High Court of Cassation and Justice indicated that during the period from 2005 to 2007, 6,370 persons had been questioned in case no. 97/P/1990. In addition, 1,100 ballistics reports had been prepared, more than 10,000 investigative measures had been instituted and 1,000 on-site inquiries had been conducted. He also stated that "among the reasons for the delay [in the investigation], mention should be made of the repetitive measures... concerning the transfer of the case from one prosecutor to another..., the fact that the prosecutors did not promptly inform the injured parties about the decisions to discontinue proceedings... and the fact that the investigation had been reopened several years after the persons concerned had filed their complaints...; the lack of cooperation on the part of the institutions involved in the crackdown of December 1989..., the extreme complexity of the investigation... given that the necessary investigative measures had not been conducted immediately after the impugned homicides and ill-treatment...".

The above-cited letter mentioned another reason for the delay, namely decision no. 610/2007 of the Constitutional Court of 16 July 2007, which withdrew jurisdiction to conduct investigations in case no. 97/P/1990 from the military prosecuting authorities at the High Court of Cassation and Justice and transferred it to the civil prosecutors, that is, to the prosecutor's office at the High Court of Cassation and Justice. In the opinion of the head of the military prosecutor's office, as stated in the above-cited letter of 5 June 2008, the transfer of the case was sufficient to cause new delays in the proceedings, given the significant volume of the case file, the complexity of the case and the time that had elapsed since the events under investigation.

49. By a decision of 15 January 2008, the military prosecuting authorities at the High Court of Cassation and Justice decided to sever the investigation concerning the sixteen civilian defendants (including a former President of Romania and a former Head of the Romanian Intelligence Service) from the investigation involving military personnel, and to relinquish its jurisdiction in favour of the prosecutor's office at the High Court of Cassation and Justice.

50. According to a press release issued on 10 February 2009 by the Public Information Office at the High Council of the Judiciary, the President of the Council intended to ask the Judicial Inspection Board to identify the reasons which had prevented the criminal investigation from being conducted rapidly.

(e) Latest developments concerning the applicants in the present case

51. In August 2008, the applicants petitioned the Ministry of Foreign Affairs of Ukraine and the General Prosecutor Office in order to get information about the investigation. Their petition remained unanswered.

52. Two subsequent decisions of 18 October 2010 and 15 April 2011 mentioned by the Government, but not submitted to the Court, were delivered by the Romanian authorities. These decisions were not communicated to the applicants.

53. According to the Government, on 18 October 2010 the military prosecutor in charge of the investigation decided to discontinue the proceedings in respect of the events that had taken place on 24 December 1989 in Brădeşti. On 15 April 2011, the aforementioned decision was also quashed and a new case was registered with the prosecutor's office at the High Court of Cassation and Justice under no. 706/P/2011.

54 According to the information submitted by the Government, the investigations are still pending.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. The relevant domestic law

55. The relevant domestic legislation concerning criminal investigations is quoted in the judgment *Association "21 December 1989" and Others* (cited above, §§ 95-100).

56. Other relevant domestic legislation concerning statutory limitation of criminal liability is described in the judgment *Mocanu and Others v. Romania* ([GC], nos. 10865/09, 45886/07 and 32431/08, §§ 193-196, ECHR 2014 (extracts)).

B. The decision by the Committee of Ministers

57. In the last decision concerning the status of the execution of the judgment in the case of the *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 – the Romanian authorities were invited to respond to the criticism made by the Court in its judgment concerning the impugned investigation. The relevant parts 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. THE JOINDER OF THE CASES

58. The Court notes that the applications registered under the numbers 35279/10 and 34782/10 arise from similar factual circumstances and raise similar legal issues. Consequently, it considers it appropriate to join these applications (see also *Pastor and Ţiclete v. Romania*, nos. 30911/06 and 40967/06, § 40, 19 April 2011).

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

59. The applicants alleged that the respondent State had failed in its obligations under the procedural aspect of Article 2 of the Convention. They alleged that those provisions required the State to conduct an effective, impartial and thorough investigation capable of leading to the identification and punishment of those responsible for the army operation, in the course of which Ms Melnichuk – the first applicant's wife and the second applicant's

mother – was killed by gunfire, and the third and fourth applicants were severely injured by bullets.

60. The last two applicants also complained, under Articles 3 and 6, that they had been subjected to torture and inhuman treatment on 24 December 1989, having been shot and severely injured by the soldiers who wrongly called them terrorists, and that no one had been held to account for this.

61. The Court reiterates that, since it is master of the characterisation to be given in law to the facts of the case, it does not consider itself bound by the characterisation given by an applicant or a government. A complaint is characterised by the matters alleged in it and not merely by the legal grounds or arguments relied on (see *Berktay v. Turkey*, no. 22493/93, § 167, 1 March 2001, and *Eugenia Lazăr v. Romania*, no. 32146/05, § 60, 16 February 2010).

62. Having regard to the facts of the present case, and following the example of the cases of *Şandru and Others v. Romania* (no. 22465/03, §§ 51-54, 8 December 2009) and *Pastor and Ţiclete*, (cited above, § 43) the Court considers that the present case must be examined solely under the procedural head of Article 2 (see also *İlhan v. Turkey* [GC], no. 22277/93, § 75, ECHR 2000-VII, and *Makaratzis v. Greece* [GC], no. 50385/99, §§ 49-55, ECHR 2004-XI).

The relevant parts of Article 2 provide:

Article 2

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally..."

A. Admissibility

1. The parties' submissions

63. The Government raised two combined preliminary objections. On the one hand they contested the Court's competence *ratione temporis* to examine the applications under the procedural head of Article 2 of the Convention and, on the other hand, they argued that the applications had been lodged out of time, as the applicants had lacked diligence both before the domestic authorities and the Court.

64. The Government pointed out that the issues of the Court's jurisdiction *ratione temporis* and of the applicants' compliance with the six-month rule were interrelated in such a way that the lack of diligence displayed by the applicants led to the removal of the temporal jurisdiction of the Court in this particular case.

65. According to the Government, the last step undertaken by the applicants with regard to the domestic investigations dated from 15 May 1990. They argued that, after that moment, the applicants had not

lodged any petition before the consular services of the USSR Embassy in Bucharest, or after 1992 before the Ukrainian authorities, in order to ascertain the progress made in the criminal proceedings carried out in Romania in respect of the events of 24 December 1989.

66. While the Government accept that the Convention does not guarantee a right to diplomatic protection, they consider that the applicants should have clearly indicated to their consular authorities their intention to enquire into the investigations in Romania. Not only would the consular authorities have facilitated their access to the internal case file and its outcome, but the applicants would thereby have shown diligence and active involvement.

67. In addition, they had failed to lodge any petition with the Romanian investigative authorities, as two other injured parties in the case-file, namely A.C. and K.C., had done on 12 September 2005.

68. Moreover, the applicants had waited too long, namely until 2010, before lodging an application before the Court. Their passive attitude could not be explained by the state of ignorance and uncertainty specific to cases of disappearances.

69. Because of the applicants' passive conduct, the Government considers that the authorities' failure to investigate cannot be regarded as a "continuing situation". This failure occurred before 20 June 1994, the date of the entry into force of the Convention with regard to Romania. Therefore, the autonomous procedural obligation to carry out an effective investigation in line with the requirements of Article 2 did not come into existence until 20 June 1994. The mere fact that a domestic inquiry exists on account of political, legal or ethical considerations relevant at the national level does not attract an international responsibility on the part of the State.

70. The applicants stated that they disagreed with the Government and that they considered that their applications met the requirements of the Convention.

71. The Court will examine separately the two preliminary objections, starting with its jurisdiction *ratione temporis* (*Mocanu and Others*, cited above, §§ 205-211 and §§ 257-283).

2. The Court's jurisdiction ratione temporis

72. In *Janowiec and Others v. Russia* ([GC], nos. 55508/07 and 29520/09, §§ 128-151, 21 October 2013), the Court found, in essence, that its temporal jurisdiction was strictly limited to procedural acts which were or ought to have been implemented after the entry into force of the Convention in respect of the respondent State, and that it was contingent on the existence of a genuine connection between the event giving rise to the procedural obligation under Articles 2 and the entry into force of the Convention (see also *Mocanu and Others*, cited above, §§ 205-210).

73. In the instant case, as in the case of the *Association "21 December 1989" and Others* (cited above, §§ 114-118), the Court observes that the criminal proceedings relating to the death of the first and second applicants' relative and the injury of the third and fourth applicants, which were instituted on 28 December 1989, continued beyond 20 June 1994, the date of the entry into force of the Convention in respect of Romania. At that date, they were still pending before the Military Prosecutor's Office.

74. It should thus be noted that four and a half years elapsed between the triggering event and the Convention's entry into force in respect of Romania, on 20 June 1994. This period of time is relatively short. It is less than ten years and less than the time periods in issue in similar cases examined by the Court (see *Şandru and Others*, cited above, §§ 55-59; *Paçacı and Others v. Turkey*, no. 3064/07, §§ 63-66, 8 November 2011; and *Jularić v. Croatia*, no. 20106/06, §§ 45-51, 20 January 2011). The Court also notes that the majority of the proceedings took place and the most important procedural measures were carried out after that date (see § 34 and following paragraphs, above).

75. Consequently, the Court finds that it has jurisdiction *ratione temporis* to examine the complaints raised by the applicants under the procedural aspect of Article 2 of the Convention, in so far as those complaints relate to the criminal investigation conducted in the present case after the entry into force of the Convention in respect of Romania.

3. Compliance with the six-month rule

(a) General principles

76. The Court reiterates that general principles with regard to the application of the six-month time-limit provided for by Article 35 § 1 of the Convention were recently settled afresh in the Grand Chamber judgment *Mocanu and Others* (cited above, §§ 258-269).

77. It observes that Article 35 § 1 cannot be interpreted in a manner which would require an applicant to lodge his complaint with the Court before his position in connection with the matter has been finally settled at the domestic level, otherwise the principle of subsidiarity would be breached. Where an applicant avails himself of an apparently existing remedy and only later becomes aware of circumstances which render the remedy ineffective, it may be appropriate for the purposes of Article 35 § 1 to take as the starting point of the six-month period the date on which the applicant first became or ought to have become aware of those circumstances (see *Paul and Audrey Edwards v. the United Kingdom* (dec.), no. 46477/99, 4 June 2001, and *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 136, ECHR 2012).

78. In cases of a "continuing situation", the period starts to run afresh each day and it is in general only when that situation ends that the

six-month period actually starts to run (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 159, ECHR-2009, and *Sabri Güneş*, cited above, § 54). However, not all continuing situations are the same. Where time is of the essence in resolving the issues in a case, there is a burden on the applicant to ensure that his or her claims are raised before the Court with the necessary expedition to ensure that they may be properly, and fairly, resolved (see *Varnava and Others*, cited above, § 160). This is particularly true with respect to complaints relating to an obligation under the Convention to investigate certain events. As the passage of time leads to the deterioration of evidence, time has an effect not only on the fulfilment of the State's obligation to investigate but also on the meaningfulness and effectiveness of the Court's own examination of the case. An applicant has to become active once it is clear that no effective investigation will be provided, in other words once it becomes apparent that the respondent State will not fulfil its obligation under the Convention (see *Chiragov and Others v. Armenia* (dec.) [GC], no. 13216/05, § 136, 14 December 2011, and *Sargsyan v. Azerbaijan* (dec.) [GC], no. 40167/06, § 135, 14 December 2011, both referring to *Varnava and Others*, cited above, § 161).

79. The Court has already held that, in cases concerning an investigation into ill-treatment – as in those concerning an investigation into the suspicious death of a relative – applicants are expected to take steps to keep track of the investigation's progress, or lack thereof, and to lodge their applications with due expedition once they are, or should have become, aware of the lack of any effective criminal investigation (see the decisions in *Bulut and Yavuz*, cited above; *Bayram and Yıldırım,* cited above; *Frandes v. Romania* (dec.), no. 35802/05, 17 May 2011, §§ 18-23; and *Atallah v. France* (dec.), no. 51987/07, 30 August 2011).

80. It follows that the obligation of diligence incumbent on applicants contains two distinct but closely linked aspects: on the one hand, the applicants must contact the domestic authorities promptly concerning progress in the investigation – which implies the need to address the enquiry to them with diligence, since any delay risks compromising the effectiveness of the investigation – and, on the other, they must lodge their application promptly with the Court as soon as they become aware or should have become aware that the investigation is not effective (see *Nasirkhayeva v. Russia* (dec.), no. 1721/07, 31 May 2011; *Akhvlediani and Others v. Georgia* (dec.), no. 22026/10, §§ 23-29, 9 April 2013; and *Gusar v. Moldova* (dec.), no. 37204/02, §§ 14-17, 30 April 2013).

81. That being so, the Court reiterates that the first aspect of the duty of diligence – that is, the obligation to contact the domestic authorities promptly – must be assessed in the light of the circumstances of the case. Not every delay affects the admissibility of the application where the

applicant was in a particularly vulnerable situation, having regard to the complexity of the case and the nature of the alleged human rights violations at stake, and where it was reasonable for the applicant to wait for developments that could have resolved crucial factual or legal issues (see *El-Masri*, cited above, § 142).

82. With regard to the second aspect of this duty of diligence – that is, the duty incumbent on the applicant to lodge an application with the Court as soon as he realises, or ought to have realised, that the investigation is not effective – the Court has stated that the issue of identifying the exact point in time at which this stage occurs necessarily depends on the circumstances of the case and that it is difficult to determine it with precision (decision in the case of *Nasirkhayeva*, cited above).

83. Thus, the Court has rejected as out of time applications where there had been an excessive or unexplained delay on the part of applicants once they had, or ought to have, become aware that no investigation had been instigated or that the investigation had lapsed into inaction or become ineffective and, in any of those eventualities, there was no immediate, realistic prospect of an effective investigation taking place in future (see, *inter alia*, *Narin v. Turkey*, cited above, § 51; *Aydinlar and Others v. Turkey* (dec.), no. 3575/05, 9 March 2010; and the decision in *Frandes*, cited above, §§ 18-23).

84. The Court has held, however, that as long as there is some meaningful contact between relatives and authorities concerning complaints and requests for information, or some indication, or realistic possibility, of progress in investigative measures, considerations of undue delay by the applicants will not generally arise (see *Varnava and Others*, cited above, § 165).

(b) Application of the above principles to the present case

85. The Court notes that the alleged attack on the applicants by the Romanian Army forces took place on 24 December 1989. Shortly afterwards, on 28 December 1989, the applicants lodged a criminal complaint with their consular authorities that was brought before the prosecutor in the military section of the competent military prosecutor's office (see paragraphs 18-19 above). Therefore the applicants cannot be reproached with inactivity prior to lodging a criminal complaint at the domestic level. A criminal investigation was opened shortly afterwards.

86. On 7 and 20 June 2010, more than twenty years after the events, while the investigation was still pending, the applicants lodged their applications with the Strasbourg Court (see also *Mocanu and Others*, cited above, § 270, in which the applicant lodged his application eighteen years after the events).

87. The Court notes that from 1994 to 1998 a number of investigative steps had been taken (see paragraphs 34 to 41 above). On 7 April 2007, the

applicants' complaints had been added to investigation case file no. 97/P/1990, which related to numerous victims of the events of December 1990 (see paragraph 45 above). Previously, by a decision of 7 December 2004 the military section of the prosecutor's office had ordered the indictment of 102 persons, principally officers, some of whom were of high rank, from the Army, police and *Securitate* forces, for murder and inhuman treatment committed "during the period from 21 to 30 December 1989". This decision was related to several hundred victims in total, who had been killed or injured during the period from 21 to 30 December 1989 in various areas of the country (see paragraphs 46-47, above). The investigation was thus carried out in entirely exceptional circumstances (*Mocanu and Others*, cited above, § 278).

88. Having regard to the progress made with the investigation subsequent to 1994, and to its scope and its complexity – which are accepted by the Government – the Court considers that after lodging their complaint with the competent domestic authorities, the applicants could legitimately have believed that the investigation would be effective and could reasonably have awaited its outcome so long as there was a realistic possibility that the investigative measures were moving forward (see, *mutatis mutandis*, *Palić v. Bosnia and Herzegovina*, no. 4704/04, § 52, 15 February 2011, and *Mocanu and Others*, cited above, § 280).

89. The Court can only conclude, having regard to the exceptional circumstances in issue, that the applicants were in a situation in which it was not unreasonable for them to await developments that could have resolved crucial factual or legal issues (see *Mocanu and Others*, cited above, § 275, and by contrast, the decision in *Akhvlediani and Others*, cited above, § 27).

90. In the light of the foregoing, the Court considers that the applications have not been lodged out of time. The Government's objection must therefore be dismissed.

4. Conclusion with regard to the admissibility

91. The Court notes that these complaints 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. They must therefore be declared admissible.

B. Merits

92. The first two applicants emphasised that, twenty-four years after their close relative had been killed by gunfire, the associated criminal investigation had still not identified and sent for trial those who were responsible. The last two applicants maintained that they had not obtained any redress for the injuries suffered in the same circumstances as those

denounced by the first two applicants. They considered the duration of the investigation to be excessive and argued that the authorities had not complied with the requirements set out in the Court's case-law on the Article 2 of the Convention.

93. The Government considered that, given the leading judgments delivered by the Court in the case of the *Association "21 December 1989" and Others* (cited above), it was clear that every similar case which satisfies the admissibility criteria could raise a problem under the procedural limb of Article 2 of the Convention. However, the Court should note that, following that judgment, the Government had undertaken steps to redress the situation in line with the action plan submitted to the Committee of Ministers on 24 July 2012. In such circumstances, the allegations made by the applicants should only be considered from a purely historical standpoint.

94. The Court reiterates the relevant principles concerning the procedural obligation imposed by Article 2, together with its findings in the case of the *Association "21 December 1989" and Others* (cited above, §§ 133-154) which relate to the same criminal proceedings as those involved in the present case.

95. It points out that in view of its jurisdiction *ratione temporis*, it can take into consideration only the period after 20 June 1994, the date on which the Convention entered into force in respect of Romania.

96. It further notes that in 1994 the case was pending before the Military Prosecutor's Office. In this connection, the Court notes – as it also did in the case of *Association "21 December 1989" and Others* (cited above, § 137) and *Şandru and Others v. Romania* (no. 22465/03, § 74, 8 December 2009) – that the investigations had been entrusted to military prosecutors who, like the majority of the accused – including serving high-ranking army officers – were in a relationship of subordination within the military hierarchy.

97. In addition, the shortcomings in the investigation had on several occasions been noted by the domestic authorities themselves. The subsequent investigation, however, did not remedy the shortcomings in question.

98. As to the obligation to involve the victim's relatives in the procedure, the Court observes that no justification has been put forward with regard to the total lack of information provided to the applicants about the investigation, especially from 2011 to date (see *Association "21 December 1989" and Others*, cited above, §§ 140-141).

99. As it has been already stated in the case of the *Association "21 December 1989" and Others* (cited above, § 142), the Court does not underestimate the undeniable complexity of the present case, which is also intended to establish those responsible for the entire armed crack-down which occurred in the closing days of December 1989 in several locations in Romania. It considers, however, this cannot by itself justify either the length of the investigation or the manner in which it was conducted over a very

lengthy period, without the applicants or the public being informed of its progress.

100. The Court further notes that three years after the judgment in the case of the *Association "21 December 1989" and Others* (cited above) became final, the shortcomings identified by the Court still did not seem to have been remedied. Moreover, in the decision concerning the status of the execution of this judgment, adopted by the Committee of Ministers on June 2014 at the 1201st meeting of the Ministers' Deputies, the Romanian authorities were invited to respond to the criticism made by the Court in its judgment concerning the impugned investigation. As at today's date, the execution of the judgment is still pending before the Committee of Ministers.

101. In the light of the foregoing, the Court considers that the applicants did not have the benefit of an effective investigation as required by Article 2 of the Convention.

102. There has, accordingly, been a violation of Article 2 of the Convention under its procedural head.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

103. Lastly, the third and fourth applicants (application no. 34782/10) complained under Article 2 of Protocol No. 4 to the Convention that on 24 December 1989 their freedom of movement was unlawfully restricted. They also claim a violation of Articles 1 and 17 of the Convention.

104. Having carefully considered the applicants' submissions in the light of all the evidential materials in its possession, the Court finds that, in so far as the matters complained of are within its competence, they do not disclose any appearance of a violation of the guarantees set out in Articles 1, 17 and 2 of Protocol No. 4 to the Convention.

105. It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

106. 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

1. Damage alleged by Mr Rostislav Ivanovich Melnichuk and Ms Alla Rostislavovna Lyana

107. The applicants claimed 500,000 euros (EUR) in respect of pecuniary damage, representing the costs incurred in connection with the funeral of Ms Melnichuk, the cost of the applicants' personal health care, and the cost of repairing their damaged car and replacing personal items present in the car at the moment of the armed attack that took place on 24 December 1989.

108. They also claimed 3,000,000 EUR in respect of non-pecuniary damage.

2. Damage alleged by Ms Sofiya Filipovna Demchuk and Mr Valeriy Valentinovich Shpartak

109. The applicants claimed 3,055,000 euros (EUR) in respect of pecuniary damage, representing the costs already incurred in connection with their health care, together with the estimated costs of their future health care, and the costs incurred through the damage to their car.

110. They also claimed 2,500,000 EUR in respect of non-pecuniary damage.

3. Government's submissions

111. The Government considered the applicants' claims in respect of non-pecuniary damage to be excessive and argued that the claims in respect of pecuniary damage exceed the ambit of the procedural limb of Article 2 and should be dismissed.

4. The Court's assessment

112. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

113. The Court has found a procedural violation of Article 2 of the Convention on account of the absence of an effective investigation into the death of the first applicant's wife and second applicant's mother and into the severe injury of the third and fourth applicants.

114. On the basis of the evidence before it, in particular the fact that the investigation is still pending despite its judgment in the case of the *Association "21 December 1989" and Others* (cited above), the Court considers that the violation of the procedural limb of Article 2 has caused the applicants substantial non-pecuniary damage such as distress and frustration. Ruling on an equitable basis, it awards each of the applicants EUR 15,000 under that head.

B. Costs and expenses

115. The applicants did not make a claim under this head.

C. Default interest

116. 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, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the remainder of the application no. 35279/10 admissible;

3. *Declares* the complaints concerning the procedural limb of the Article 2 admissible and the remainder of the application no. 34782/10 inadmissible;

4. *Holds* that there has been a violation of the procedural aspect of Article 2 of the Convention in respect to all four applicants;

5. *Holds*
   (a) that the respondent State is to pay 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;
   (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;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 5 May 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli	Josep Casadevall
Deputy Registrar	President