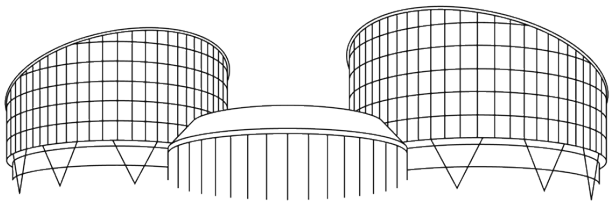

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF AUSTRIANU v. ROMANIA

(Application no. 16117/02)

JUDGMENT

The version was rectified on 15 May 2013
under Rule 81 of the Rules of the Court

STRASBOURG

12 February 2013

FINAL

12/05/2013

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

In the case of Austrianu v. Romania,

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

Josep Casadevall, *President,*
Alvina Gyulumyan,
Ján Šikuta,
Luis López Guerra,
Nona Tsotsoria,
Kristina Pardalos,
Johannes Silvis, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 22 January 2013,

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

PROCEDURE

1. The case originated in an application (no. 16117/02) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Romanian national, Mr Eugeniu Costel Austrianu ("the applicant"), on 2 April 2002.

2. The applicant, who had been granted legal aid, was represented by Mrs D. O. Hatneanu[1] and Mrs R. Stăncescu-Cojocaru, lawyers practising in Bucharest. He was also assisted by APADOR-CH (the Association for the Defence of Human Rights in Romania – the Helsinki Committee), a non-governmental organisation based in Bucharest. The Romanian Government ("the Government") were represented by their Agent, Mr Răzvan-Horaţiu Radu.

3. As Mr Corneliu Bîrsan, the judge elected in respect of Romania, had withdrawn from the case (Rule 28 of the Rules of Court), the President of the Chamber appointed Mrs Kristina Pardalos to sit as *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1 of the Rules of Court).

4. The applicant alleged that he had been subjected to ill-treatment in violation of Article 3 of the Convention and that the authorities had not carried out a prompt and effective investigation of that incident. Relying on Article 6 § 1 of the Convention he claimed that three final decisions rendered by domestic courts had not been enforced. Under Article 8 he claimed that the prison authorities opened two letters addressed to him by the Court. He alleged that the confiscation of his religious audio tapes and cassette tape player by the prison authorities had infringed his freedom of religion guaranteed by Article 9 of the Convention. Relying on Article 14 in

[1] Rectified on 15 May 2013: the text was: "Hătneanu"

conjunction with Article 9 of the Convention he contended that he had been treated as a member of the Orthodox faith even though he had informed the prison authorities that he was a Baptist.

5. On 26 March 2008 the President of the Third Section decided to communicate the complaints raised by the applicant under Articles 3, 6 § 1, 8 and 9, taken alone and in connection with Article 14. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

6. On 3 September 2009 the President of the Third Chamber decided to ask for additional observations from the parties concerning the admissibility and merits of the application.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1964 and lives in Lereşti.

8. On 5 November 1992 the applicant was arrested by the police on suspicion of having murdered his father.

9. By a judgment delivered by the Argeş County Court on 24 September 1993, he was convicted of murder and sentenced to twenty-seven years' imprisonment.

10. He served his sentence mainly in Colibaşi Prison.

11. On 14 December 2005 he was released from prison.

A. The incident of 9 December 1998

1. The alleged ill-treatment to which the applicant was subjected by prison guard S.N.

12. On 3 December 1998 prison guards S.N. and L.D. carried out a search in the applicant's cell following his self-intoxication with medicines.

13. As stated in the prosecutor's decision of 29 June 1999, on 9 December 1998 the applicant claimed that certain personal objects had been stolen. Prison guards S.N. and L.D went into his cell. The applicant accused them of stealing four boxes of coffee during the search. As he became aggressive, prison guard S.N. immobilised and repeatedly hit him with a truncheon in order to calm him down. However, instead of calming down he became more aggressive, so he was handcuffed and taken to cell no. 57. This version of events was not contested by the applicant.

14. On the same day, prison guard S.N. drafted a report stating that he had been forced to use a truncheon against the applicant because of his aggressive behaviour.

15. On 17 December 1998 the applicant was examined by a doctor at the Argeş Forensic Laboratory. The forensic report drafted after the examination stated that the applicant had been hit with a hard object, probably on 9 December 1998, causing him injuries that needed eight or nine days of medical treatment. It noted the existence of an ecchymosed yellow-purplish zone on his hip and his left thigh, as well as a one-centimetre-long scratch on his left fist. As a result of the aggression, his tympanum was broken.

2. Investigation into the alleged ill-treatment

16. On 23 December 1998 the applicant filed a criminal complaint concerning the incident with the Bucharest Military Prosecutor's Office (*Parchetul Militar Bucureşti*).

17. The chief doctor of Colibaşi prison gave a statement on 13 January 1999. He stated that the applicant had been involved in the incident of 9 December 1998 because of his mental illness. The applicant and S.N. were questioned on 19 January 1999.

18. On 14 June 1999 a criminal investigation was initiated against prison guard S.N. for abusive behaviour.

19. Two of the applicant's co-detainees were heard by the investigating prosecutor. They stated that the applicant had been repeatedly hit by prison guard S. N. Two other prison guards stated that the use of force by their colleague S.N. had been brought on by the applicant's violent behaviour.

20. In his written statement, S.N. admitted that he had used the truncheon with excessive force to calm the applicant down, without previously trying to use other means.

21. On 29 June 1999 the military prosecutor decided to discontinue the investigation against prison guard S.N. and ordered him to pay an administrative fine amounting to one million Romanian lei ("RON"), equivalent to 30 United States Dollars ("USD"). The decision referred to the applicant's medical condition and noted that agent S.N. had used the truncheon with excessive force and broken the applicant's tympanum. However, taking into account the specificity of S.N.'s activity as a prison guard and the need to solve difficult situations in prison, it found that the acts committed by S.N. could not be classified as an offence.

22. According to the applicant, the military prosecutor's decision was never communicated to him. Although the Government contended that the decision was communicated to the applicant they did not submit any evidence in this respect.

23. As the applicant did not receive any reply from the military prosecutor, on 23 February 2000 he sent a letter to the chief military prosecutor making reference to the incident of 9 December 1998 and asking for a criminal investigation against prison guard S.N. It appears from the file that the applicant did not receive any reply to this letter.

B. The applicant's state of health

24. When the applicant was arrested in 1992, he was diagnosed with unstable personality disorder.

25. The expert report drafted by Argeş Forensic Laboratory on 9 November 1995 concluded that the applicant suffered from polymorphic psychopathy and loss of discernment. It recommended the applicant's hospitalisation in a psychiatric establishment, in accordance with Article 114 of the Criminal Code. Based on the conclusions of that report, the applicant was granted a suspension of the execution of his punishment for the period between 28 February and 8 August 1996.

26. Another expert report drafted by the same forensic laboratory on 24 July 1997 stated that the applicant suffered from the same disease – polymorphic psychopathy – and concluded that he needed to be under the supervision of a psychiatric unit belonging to the prison sanitary network.

27. Four months later an expert report drafted by the Bucharest Forensic Institute concluded that the applicant suffered from sociopathy, and that he could be treated in the prison medical network.

28. Two other reports, drafted on 17 September and 20 November 1998, stated that the applicant suffered from paranoid schizophrenia and recommended his admission to a specialised psychiatric unit in the prison network for supervision and treatment.

29. A new expert report, drafted on 5 April 1999, recommended his hospitalisation in Poiana Mare psychiatric hospital. Consequently, the applicant lodged a request for a stay of execution of his prison sentence. On 11 May 1999 his request was dismissed by the Argeş County Court on the ground that the report had not stated that the applicant's medical condition could not be treated in the prison hospital.

30. Two subsequent reports, drafted on 14 March 2001 and 26 March 2002 respectively, stated that the applicant had been diagnosed with pyloric stenosis (a complication of a duodenal ulcer, characterised by the stricture of the pyloric canal and manifested by vomiting after each meal) and dyspeptic ulcer syndrome (ulcer syndrome characterised by epigastric pains and burning sensations). They recommended the medical treatment offered by the prison hospitals.

31. A report prepared by the hospital of Colibaşi prison on 21 May 2004 stated that the applicant had served a large part of his prison sentence in the prison's hospital. Moreover, from the analysis of the documents submitted

by the Government it appears that the applicant was hospitalised in the Bucharest prison hospital:

- between 16 November and 4 December 1992, on the ground that he suffered from a personality disorder;
- between 1 November and 2 December 1997, for examination by a psychiatric doctor because he was refusing to eat;
- between 20 March and 7 April 1998, for treatment of his polymorphic psychopathy;
- between 16 and 24 April 1998, for refusing to eat and for treatment of his polymorphic psychopathy;
- between 19 August and 19 October 1999 because he had been diagnosed with Gausser syndrome;
- between 6 July and 10 July 2000 because he was in a coma and had a high fever;
- between 29 March and 17 April 2002 and between 19 July and 7 August 2002, for treatment of his polymorphic psychopathy;
- between 29 June and 7 July 2004 for treatment of his duodenal ulcer, polymorphic psychopathy and lumbar discopathy;
- and between 21 October and 2 November 2005, for obesity and insufficiency of peripheral circulation.

32. Furthermore, in 2000 the applicant was hospitalised three times in the Colibaşi prison hospital for treatment of his chronic gastric ulcer. In 2002 he was again hospitalised in the same hospital for treatment of his pyloric stenosis.

33. The applicant refused to eat on seven occasions.

C. The practice of religion in Colibaşi Prison

34. According to the information submitted by the applicant, he was of Baptist confession. While in detention, he had attended a Baptist seminar at the "Source of Light-Europe" Institute.

35. On 29 November 2002 P.G., the general manager of the national civil assistance centre for prisons "Hope for the Future" (*Speranţa pentru viitor*), addressed a letter to the Colibaşi prison authorities stating that the applicant had been monitored by their advice and social reintegration service. The manager expressed his concern about the confiscation by the prison authorities of a small radio-cassette player awarded to the applicant for good results obtained while attending the "Christian moral education" programme.

36. By a letter dated 24 December 2002 the prison management informed the applicant that according to the applicable law prisoners only had the right to have battery-operated radios and television sets. They added that, on request, he could listen to his audio cassettes on the cassette player belonging to the prison's cultural and education department.

D. Censorship of the applicant's correspondence with the Court and alleged lack of access to documents

37. On 20 November 2002 the applicant informed the Registry of the Court that he had sent two letters for which he had not received any acknowledgement of receipt. He expressed suspicion that the prison staff were obstructing his right of recourse to the Court. He specified that one of the letters contained photocopies of the decisions rendered by the Supreme Court of Justice and the criminal complaints filed against the prison authorities.

38. On 22 January 2004 the applicant asked the prison authorities to provide him with photocopies of the documents requested by the Court. He enclosed the letters sent by the Court's Registry on 1 and 9 December 2003.

E. Enforcement of final decisions concerning the applicant

1. Decision of 22 April 1997

39. In 1996 the applicant had been sentenced to three months' imprisonment for a minor offence. For the same offence he had been ordered to pay a fine of RON 100,000 (equivalent to USD 3). As he had executed both punishments he lodged a request for the return of the sum paid as a fine.

40. By a final decision of 22 April 1997, the Câmpulung District Court allowed his request and ordered the return of the money.

41. According to the applicant, on 4 June 2003 he lodged a request for the enforcement of the decision of 22 April 1997.

2. Decision of 8 February 2001

42. By a decision of 8 February 2001 the Argeş District Court pronounced the divorce of the applicant and his wife and awarded custody of their two minor children to the paternal grandmother. It also ordered the mother to pay a monthly sum towards the children's maintenance.

43. The applicant alleged that on 12 February 2004 he had lodged a criminal complaint against his former wife for failure to pay the monthly allowance, but had received no reply from the authorities. He also complained about the passivity of the authorities in enforcing that decision.

3. Decision of 10 December 2001

44. On 3 January 2000 the applicant lodged a civil action for the partition of the inheritance left by his father. By a decision of 10 December 2001 the Câmpulung District Court allowed his action in part, allocating him a house and other movable assets.

45. The applicant lodged a request for the enforcement of the decision. By a letter dated 28 March 2003, the bailiff M. informed him that he had to pay the enforcement fees. According to information supplied by the Government, the applicant had submitted a new request for the enforcement of the decision in January 2006. The enforcement had subsequently been finalised in June 2006.

II. RELEVANT DOMESTIC LAW AND PRACTICE

46. The relevant provisions of the Code of Criminal Procedure and of the police and military prosecutor statutes are set out in *Barbu Anghelescu v. Romania* (no. 46430/99, § 40, 5 October 2004) and *Dumitru Popescu v.* Romania *(no. 1)*, (no. 49234/99, §§ 43-46, 26 April 2007). In paragraphs 43-45 of the judgment in *Dumitru Popescu (no. 1)* there is a description of the development of the law concerning complaints against decisions of the prosecutor (Article 278 of the Code of Criminal Procedure and Article 278[1] introduced by Law no. 281/24 of June 2003 applicable from 1 January 2004, "Law no. 281/2003").

47. Government Emergency Ordinance no. 56 of 27 June 2003 ("Ordinance no. 56/2003") regarding certain rights of convicted persons states, in Article 3, that convicted persons have the right to bring legal proceedings before the court of first instance concerning the measures taken by the prison authorities to implement their rights.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

A. Allegation of ill-treatment of the applicant on 9 December 1998 and absence of an effective investigation

48. The applicant complained about the ill-treatment to which he was subjected by prison guard S.N. on 9 December 1998 and the alleged ineffectiveness of the ensuing investigation.

He relied on Article 3 of the Convention, which reads as follows:

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

1. Admissibility

(a) The parties' submissions

49. The Government considered that the applicant had not exhausted domestic remedies in so far as he had not contested the prosecutor's decision of 29 June 1999. Furthermore, the Government pointed out that in lodging his application on 2 April 2002, the applicant had not complied with the six-month time-limit from the date of the prosecutor's decision of 29 June 1999.

50. The applicant contended that at the relevant time there was no effective remedy and therefore compliance with the six-month rule should be analysed with regard to the moment when he had become aware of the ineffectiveness of the remedy. He also submitted that no negligence on his part could be identified in the present case since after his hearing by the military prosecutor on 19 January 1999 he had lodged petitions with the General Prosecutor and the Minister of Justice reiterating the facts of his case. Moreover, as no decision had been communicated to him after the said hearing, he had not been able to complain to the courts about the way in which the investigation was carried out. Besides, he had been in prison at the time of the events and had consequently had limited access to legal and procedural information and specialised legal counsel.

(b) The Court's assessment

51. In respect of the Government's objection of non-compliance with the six-month time-limit, the Court notes that the Government did not submit evidence that the prosecutor's decision of 29 June 1999 was communicated to the applicant. The latter could thus not be considered negligent for lodging his application with the Court only on 2 April 2002 (see *Georgescu v. Romania*, no. 25230/03, § 80-82, 13 May 2008, and *Hüseyin Karakaş v. Turkey (no. 2)*, no. 69988/01, 22 June 2006).

52. It is true that the applicant did little to keep abreast of the course of the investigation. However, it is not unreasonable for the applicant to have believed that the investigation into his allegations of ill-treatment was taking a long time and was still on-going. Therefore the applicant cannot be considered to have been negligent.

53. Lastly, the Court considers it reasonable to assume that the applicant preferred to wait for the outcome of the domestic proceedings before lodging his complaint with the Court, in particular in so far as the outcome might have had a bearing on the Court's examination of the allegations of ill-treatment.

54. As to the Government's plea of non-exhaustion, the Court notes that the complaint to the courts about the prosecutor's decision became an effective remedy according to the Convention's standards on 1 July 2004, when Law no. 281/2003 amending the right of access to court became

applicable (see *Dumitru Popescu (no.1)*, cited above, §§ 43-45). However, the six-year lapse of time between the date when the alleged ill-treatment occurred and the date when the appeal became possible renders the remedy ineffective in this particular case (see *Dumitru Popescu (no. 1)*, cited above, § 56).

55. For all these reasons, the Court dismisses the Government's preliminary objections.

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

2. Merits

(a) The parties' submissions

56. The applicant contended that the violence to which he had been subjected by prison guard S.N. amounted to ill-treatment prohibited by Article 3 of the Convention. He pointed out that he had been examined by a doctor only a few days after the incident. He further contested the number of days indicated by the forensic report as necessary for his recovery, claiming that he had needed between eighty and ninety days of medical treatment. He emphasised that the ill-treatment was inflicted by a state agent acting in his official capacity and therefore engaged the State's responsibility.

57. In respect of the lack of an effective investigation the applicant claimed that after his questioning by a military prosecutor on 19 January 1999 no other steps had been taken. He contended that except for his statement and the medical report issued on 17 December 1998, the authorities had not gathered any other evidence.

58. Referring to *Bursuc v. Romania*, (no. 42066/98, 12 October 2004), he stressed that the Court had already found that an investigation conducted by a military prosecutor did not meet the standard of independence required by the Convention.

59. The Government did not contest the existence of the injuries caused by prison guard S.N., but they argued that his reaction had been triggered by the applicant's insults and aggressive behaviour. They also admitted that the prison officer's intervention using the truncheon was excessive. However, the national authorities had concluded that the violence used against the applicant had not attained the gravity of a crime. Moreover, the prison guard had been punished with an administrative fine.

60. As to the investigation conducted by the authorities, the Government submitted that it had been effective and thorough. Regarding the independence of the military prosecutor who conducted the investigation, they submitted that the witnesses had been heard by the Piatra Neamţ criminal investigation department. They also argued that the applicant had

not been awarded damages for the ill-treatment because he had not lodged a civil action for damages.

(b) The Court's assessment

(i) Concerning the alleged ill-treatment

61. The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV).

62. Notwithstanding its subsidiary role in assessing evidence, the Court reiterates that where allegations are made under Article 3 of the Convention, the Court must apply a particularly thorough scrutiny even if certain domestic proceedings and investigations have already taken place (see *Cobzaru v. Romania*, no. 48254/99, § 65, 26 July 2007).

63. In the present case the Court notes that the applicant has been able to produce sufficiently strong evidence supporting the fact that he was subjected to the use of force by a police officer. In particular, the applicant produced a medical certificate delivered a few days after the incident attesting that he had incurred injuries. He filed a criminal complaint against the police officer whom he accused of having hit him first, but the proceedings had been discontinued on the ground that his acts could not be classified as an offence.

64. The Court further notes that there had been an official admission of violence against the applicant. In this connection, the Court observes that the prison guard explained his conduct as an attempt to calm down the applicant but he admitted that his intervention was excessive. Even the military prosecutor who decided to discontinue the investigation held that prison guard S.N. had used the truncheon with excessive force and broken the applicant's tympanum (see § 21).

65. In the light of the above and on the basis of all the material placed before it, the Court considers that the injuries inflicted on the applicant by the prison guard were sufficiently serious to amount to ill-treatment within the scope of Article 3. Accordingly, there has been a violation of Article 3 of the Convention under its substantive head.

(ii) Concerning the alleged inadequacy of the investigation

66. In cases of wilful ill-treatment by State agents in breach of Article 3, the Court has repeatedly found that two measures are necessary to provide

sufficient redress. Firstly, the State authorities must have conducted a thorough and effective investigation capable of leading to the identification and punishment of those responsible (see, *inter alia*, *Krastanov v. Bulgaria*, no. 50222/99, § 48, 30 September 2004; *Çamdereli v. Turkey*, no. 28433/02, §§ 28-29, 17 July 2008; and *Vladimir Romanov v. Russia*, no. 41461/02, §§ 79 and 81, 24 July 2008). Secondly, an award of compensation to the applicant is required where appropriate (see *Vladimir Romanov*, cited above, § 79).

67. In determining whether the national authorities carried out a thorough and effective investigation against those responsible, in compliance with the requirements of its case-law, the Court has previously taken into account several criteria. Firstly, important factors for an effective investigation, viewed as a gauge of the authorities' determination to identify and prosecute those responsible, are its promptness (see, *inter alia*, *Selmouni v. France* [GC], no. 25803/94, §§ 78-79, ECHR 1999-V, and *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, § 59, 20 December 2007) and its expedition (see *Dedovskiy and Others v. Russia*, no. 7178/03, § 89, 15 May 2008). In addition, the outcome of the investigations and of the ensuing criminal proceedings, including the sanction imposed and the disciplinary measures taken have been considered decisive.

68. The Court notes in the present case that criminal investigations against the prison guard S.N. were opened five months after the applicant's questioning on 19 January 1999 (see paragraph 18 above). It further notes that the prosecutor decided to discontinue the investigation after two weeks.

69. In the Court's opinion, the issue is consequently not so much whether there was an investigation, since the parties did not dispute that there had been one, but whether it was conducted diligently, whether the authorities were determined to identify and punish those responsible and, accordingly, whether the investigation was "effective".

70. From the outset, the Court notes that the military prosecutor was called upon to investigate acts of ill-treatment allegedly committed by a prison guard. The Court has already established in similar circumstances that the applicable law at the material time made the hierarchical and institutional independence of the military prosecutor doubtful (see *Barbu Anghelescu,* cited above, §§ 40-30 and 70, 5 October 2004; *Dumitru Popescu (no. 1),* cited above, §§ 74-78; and *Melinte v. Romania*, no. 43247/02, §§ 23-30, 9 November 2006).

71. These doubts are reflected in the present case by the way the investigation was conducted.

72. The Court points out that both the prison authorities and the military prosecutor were informed of the applicant's psychiatric history from the time of his arrest. Even assuming that the applicant's injuries were inflicted by the prison guard because of the applicant's behaviour and mental

problems, as the prosecutor concluded, the Court cannot but notice that far from exonerating the authorities from any responsibility in the case, this fact shows their negligence.

73. The Court further observes that although the military prosecutor held that S.N. had used his truncheon against the applicant with excessive force, he was sanctioned with a very modest fine. The Court reiterates in this connection that it is not its task to rule on the degree of individual guilt (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 116, ECHR 2004-XII, and *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII), or to determine the appropriate sentence of an offender, those being matters falling within the exclusive jurisdiction of the national criminal courts. However, under Article 19 of the Convention and in accordance with the principle that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective, the Court has to ensure that a State's obligation to protect the rights of those under its jurisdiction is adequately discharged (see *Nikolova and Velichkova*, cited above, § 61, with further references). It follows that while the Court acknowledges the role of the national courts in the choice of appropriate sanctions for ill-treatment by State agents, it must retain its supervisory function and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed, especially when the case is not in the hands of an impartial tribunal.

74. The Court does not overlook the fact that the military prosecutor, in determining S.N.'s sanction, took into consideration a number of mitigating circumstances. Nevertheless, imposing a fine of USD 30, cannot be considered an adequate response to a breach of Article 3, even seen in the context of the sentencing practice in the respondent State. Such punishment, which is manifestly disproportionate to a breach of one of the core rights of the Convention, does not have the necessary deterrent effect in order to prevent further violations of the prohibition of ill-treatment in future difficult situations.

75. Having regard to the above-mentioned deficiencies identified in the investigation, the Court also concludes that the State authorities failed to conduct a proper investigation into the applicant's allegations of ill-treatment. Accordingly, there has also been a violation of Article 3 of the Convention under its procedural head.

B. Complaint concerning the lack of adequate medical treatment

76. Relying on the same article of the Convention, the applicant complained of an alleged lack of adequate medical treatment for his health problems.

1. Admissibility

(a) The parties' submissions

77. The Government submitted that the applicant had not exhausted domestic remedies, as he had not lodged any complaint against the prison staff for lack of adequate medical treatment, based on Article 267 of the Criminal Code concerning inhuman treatment and torture, or on Ordinance no. 56/2003 after its entry into force.

78. The applicant contested the effectiveness of the remedies indicated by the Government. He contended that Ordinance no. 56/2003 had entered into force only on 27 June 2003, while his application had been lodged with the Court on 2 April 2002 and concerned the lack of adequate medical treatment from 1992 onwards.

(b) The Court's assessment

79. At the outset, the Court reiterates that the only remedies which Article 35 of the Convention requires to be used are those that relate to the breaches alleged and at the same time are available and sufficient. In order for the exhaustion rule to come into operation, the effective remedy must exist at the date when the application is lodged with the Court.

80. In the case of *Petrea v. Romania*, (no. 4792/03, 29 April 2008), the Court concluded that before the entry into force of Ordinance no. 56/2003, on 27 June 2003, there was no effective remedy for situations such as the one complained of by the applicant. However, since that date, persons in the applicant's situation have had an effective remedy to complain about the alleged lack of medical treatment.

81. The Court therefore considers that after the entry into force of Ordinance no. 56/2003, the applicant should have lodged a complaint with the domestic courts about the alleged lack of medical treatment. It follows that the part of the complaint concerning the alleged lack of medical treatment after 27 June 2003 should be rejected for non-exhaustion of domestic remedies.

82. As to the period before the entry into force of Ordinance no. 56/2003, between December 1992 and June 2003, the Government's preliminary objection of non-exhaustion of domestic remedies cannot be accepted.

The Court also notes that the applicant's complaint about the lack of adequate medical treatment in prison between December 1992 and June 2003 is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) The parties' submissions

83. The Government contended that the applicant had been given adequate medical treatment while in prison. He had been subjected periodically to psychiatric examination and whenever necessary he had received treatment at specialist hospitals. They added that the applicant had contributed to the aggravation of his medical condition by refusing medical assistance and food on many occasions, as well as voluntarily ingesting medicines.

84. The applicant complained that the medical care provided to him within the penitentiary system had been inadequate and that his health had deteriorated accordingly. He also maintained that the Argeş County Court had arbitrarily dismissed his request for a stay of execution of his prison sentence on medical grounds.

(b) The Court's assessment

85. The Court reiterates that Article 3 imposes a positive obligation on the State to ensure that a person is detained in conditions which are compatible with respect for his human dignity and that given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance (see *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI, and *Rivière v. France*, no. 33834/03, § 62, 11 July 2006). Hence, a lack of appropriate medical care and, more generally, the detention in inappropriate conditions of a person who is ill may in principle amount to treatment contrary to Article 3 (see, for example, *İlhan v. Turkey* [GC], no. 22277/93, § 87, ECHR 2000-VII).

86. Although Article 3 of the Convention cannot be construed as laying down a general obligation to release detainees or place them in a civil hospital, even if they are suffering from an illness which is particularly difficult to treat (see *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002-IX), it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty.

87. In the present case the question arises whether the applicant's alleged lack of adequate medical treatment attained a sufficient level of severity to fall within the scope of Article 3 of the Convention.

88. The evidence available to the Court shows that the applicant was examined by the prison's doctors on a regular basis and sent to prison hospitals for further examinations when considered necessary. The applicant's claims to the contrary seem unsubstantiated in the light of his medical record adduced in the case by the Government and uncontested by the applicant. The Court also notes that the applicant's medical record contains doctors' prescriptions issued during his detention, which proves

that the prison authorities generally responded adequately to his medical treatment requirements.

89. The Court recalls that on the question of whether a severely ill person should remain in detention, it is precluded from substituting the domestic courts' assessment of the situation with its own, especially when the domestic authorities have generally discharged their obligation to protect the applicant's physical integrity, notably by providing appropriate medical care. In the instant case, the Argeş County Court granted a stay of execution of his sentence between 28 February and 8 August 1996. On 11 May 1999 the same court refused the applicant's request for a stay of execution of his sentence, taking the view that the care provided by the prison's hospital was appropriate to his state of health.

90. The Court further notes that the applicant served an important part of his prison sentence in the hospitals of Bucharest and Colibaşi prisons.

91. In the light of the evidence before it, the Court is of the view that the national authorities fulfilled their obligation to protect the applicant's physical well-being by monitoring his state of health carefully, assessing the seriousness of his health problems and providing him with the appropriate medical care.

92. Therefore, in the light of the foregoing considerations the Court finds that there has been no violation of Article 3 of the Convention concerning the alleged lack of adequate medical treatment in prison.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

93. Relying on Article 8 of the Convention, the applicant complained that the State authorities had interfered with his right to respect for his correspondence on account of the fact that the two letters sent by the Court on 1 and 9 December 2003 respectively were delivered to him in xerox copies and opened.

Article 8 of the Convention reads as follows:

> "1. Everyone has the right to respect for ... his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. The parties' submissions

94. The Government raised a preliminary objection of non-exhaustion of domestic remedies, in so far as the applicant had not complained to the authorities about the alleged breach of his privacy rights. They relied mainly on Article 195 of the Criminal Code and Ordinance no. 56/2003.

95. The applicant contested the availability of the effective domestic remedies mentioned by the Government. In respect of the remedy offered by Ordinance no. 56/2003, he contended that it was unreasonable to expect a person diagnosed with polymorphic psychopathy and schizophrenia and without legal education to use a remedy offered by an ordinance that entered into force only five months before the events, without being informed of that option by the prison authorities.

2. The Court's assessment

96. The Court has already had the opportunity to examine a similar objection raised by the Government in the *Petrea* case, cited above. It concluded that after the entry into force of Ordinance no. 56/2003, on 27 June 2003, persons in the applicant's situation did have an effective remedy to complain about the alleged interference with their correspondence and family life (see *Petrea*, cited above, §§ 35-36, and *Dimakos v. Romania*, no. 10675/03, §§ 54-56, 6 July 2010).

97. It observes that the two letters were allegedly opened in December 2003, five months after the entry into force of Ordinance no. 56/2003, and there is no evidence in the file that the applicant lodged a complaint with the domestic courts about the alleged interference with his rights.

It follows that this complaint should be rejected for non-exhaustion of domestic remedies.

III. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

98. The applicant complained about the confiscation of his religious tapes and cassette tape player, which according to him amounted to an infringement of his freedom of religion as guaranteed by Article 9 of the Convention.

Article 9 of the Convention reads as follows:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

1. The parties' submissions

99. The applicant submitted that the confiscation of his cassette player had infringed his right to manifest his Baptist religious beliefs. He further contended that listening to religious cassettes without a personal cassette

player would have been impossible as the Colibaşi prison had no cultural-educational facility with a functioning cassette player.

100. The applicant maintained that the interference with his freedom of religion was in breach of the second paragraph of Article 9 of the Convention, and that the order mentioned by the Government to justify the confiscation could not be considered as an accessible and foreseeable law.

101. The Government submitted that the confiscation by the prison authorities of the cassette player the applicant received from the national civil assistance centre for prisons could not be considered as an infringement of his freedom of religion as he could have continued his religious instruction by correspondence and by attending the activities organised by the prison. Furthermore, they pointed out that the prison authorities had confiscated only the cassette player and not the applicant's cassettes or religious books as the applicant alleged. They added that the applicant could have listened to his religious cassettes on the cassette player in the prison's education and cultural department.

102. In the alternative, the Government submitted that the said interference was in compliance with the second paragraph of Article 9 of the Convention. They maintained that the interference was provided for by Order no. 1220/C issued by the Ministry of Justice on 13 June 2001 ("Order no. 1220/C"), according to which detainees were not allowed to have a radio or a cassette player in their possession. They further submitted that the order had been brought to the attention of the detainees. They concluded that the measure was justified and helped to guarantee order and security in prison, and that similar measures were found in the prison systems of other member States of the Council of Europe.

2. The Court's assessment

103. The Court notes that Article 9 of the Convention lists the various forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance. At the same time, it does not protect every act motivated or inspired by a religion or belief (see, *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 78, ECHR 2005-XI).

104. In the circumstances of the present case, assuming that the confiscation of the cassette constitutes an interference with the applicant's rights under Article 9 and taking into account the margin of appreciation left to the States in guaranteeing the rights protected under Article 9, the Court considers that the confiscation of the cassette was not such as to completely prevent him from manifesting his religion.

105. The Court notes that the Government contended that the prison authorities had offered the applicant the use of the cassette player in the education and cultural department of the prison to listen to his religious cassettes. The Court further notes that although the applicant contested the existence of a cultural-educational facility in prison it appears that he did

not raise any complaint in this respect with the prison's authorities. Moreover, he had been allowed to attend religious seminars, and the fact that he could read religious books in his cell was never contested.

106. Taking the above-mentioned considerations into account, the Court considers that restricting the list of items prisoners could have in their cells by excluding items (such as cassette players) which are not essential for manifesting religion is a proportionate response to the necessity to protect the rights and freedoms of others and to maintain security in prison (see *Kovaļkovs v. Latvia* (dec.), no. 35021/05, § 68, 31 January 2012).

107. Therefore, in the light of the foregoing considerations and of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 9 OF THE CONVENTION

108. The applicant complained that he was subjected to discrimination with regard to his freedom of religion because the state authorities constantly treated him as if he were of the Orthodox faith.

The Article 14 of the Convention reads as follows:

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

1. The parties' submissions

109. The applicant contended that he had been treated as a member of the Orthodox faith even though he had clearly informed the prison authorities that he was a Baptist.

110. The Government submitted that there was no difference of treatment between Baptist and Orthodox detainees. They maintained that despite the fact that most of the detainees were of the Orthodox faith, detainees professing other beliefs were not ignored and had the possibility to exercise their religion in prison. The applicant, for example, had had the benefit of religious assistance offered by the Baptist cult. He had attended programmes organised by "The good news" Bible School and received many parcels containing religious books and leaflets from them.

2. The Court's assessment

111. The Court has consistently held that Article 14 prohibits a discriminatory difference in treatment between persons in analogous or relevantly similar positions without a legitimate aim or in the absence of a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Larkos v. Cyprus* [GC], no. 29515/95, § 29, ECHR 1999-I, and *Stec and Others v. the United Kingdom* [GC], no. 65731/01, § 51, ECHR 2006-...).

112. In the present case the Court considers that the applicant has failed to provide a single concrete example of his having been treated in a discriminatory manner compared with detainees of the Orthodox faith, and dismisses his allegations as wholly unsubstantiated.

113. Therefore, in the light of the foregoing considerations and of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

114. The applicant complained under Article 6 § 1 of the Convention about the non-enforcement of three final decisions, given on 22 April 1997, 8 February 2001, and 10 December 2001 respectively.

Article 6 of the Convention reads as follows:

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

(a) Decision of 22 April 1997

115. The Government requested the dismissal of the applicant's claim of non-enforcement concerning this decision as manifestly ill-founded. They relied on the applicant's passivity in obtaining the enforcement of the decision. In this respect they contended that the applicant lodged a request for the enforcement of the decision of 22 April only six years after the delivery of the decision. Moreover, he lodged his request with an authority which was not competent to return the sum.

116. The applicant maintained that as the debtor was the State, responsibility for enforcing the decision lay with the State. He referred to the judgment delivered by the Court in *Sacaleanu v. Romania*, (no. 73970/01, 6 September 2005) and submitted that he had requested the enforcement.

117. The Court notes from the outset the almost negligible size of the pecuniary loss which prompted the applicant to bring this complaint to the Court. The applicant's complaint concerns the failure to pay a sum equivalent to less than USD 3 awarded to him by a domestic court. Even assuming that the applicant had suffered a significant disadvantage the Court concludes that the non-enforcement was mainly attributable to the applicant's passivity.

118. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

(b) Decision of 8 February 2001

119. The Government argued that the applicant could not be considered a victim of the non-enforcement of this decision on two grounds. Firstly, the applicant's children had come of age, as they were born on 6 September 1987 and 7 October 1988 respectively. Secondly, they contended that custody of the children had been granted to their paternal grandmother and not to him. In the alternative, the Government requested the dismissal of the applicant's claim as manifestly ill-founded. They averred that the applicant's debtor was a private individual and that the applicant had not submitted any documents proving that he had requested the enforcement of the decision. Moreover, the Government submitted that according to the information received from the Câmpulung District Court, no criminal complaint against the applicant's former wife for non-payment of child support had ever been registered.

120. The applicant submitted that the rigid interpretation of the notion of legal representative in his case would be unjust, especially considering that his loss of his parental rights amounted to a violation of Article 8 of the Convention.

121. The Court notes that by the decision of 8 February 2001 the Argeş District Court granted custody of the applicant's two minor children to the applicant's mother. By the same decision his former wife was ordered to pay a monthly sum in child support. The Court further notes that as the custody of the applicant's children was granted to their paternal grandmother, she alone was in a position to complain about the non-payment of the child support.

Therefore, the Court concludes that the applicant cannot claim to be a victim of a violation of his right under the Article 6 § 1 of the Convention as required by Article 34 of the Convention.

(c) Decision of 10 December 2001

122. As regards the decision of 10 December 2001 concerning the sharing of the assets inherited by the applicant from his father, the Government submitted that the debtor was a private individual and that the applicant had lodged a request for forced enforcement only on

16 January 2006. The decision was finally enforced in June 2006 and the Government attributed the delay to the applicant's passivity.

123. The applicant maintained that he had asked a bailiff to ensure the enforcement of the said decision. He explained that the enforcement had not been finalised sooner because he had been unable to pay the enforcement fees charged by the bailiff.

124. In this case, the Court notes that the dispute was between two private parties. It is for each State to equip itself with legal instruments which are adequate and sufficient to ensure the fulfilment of positive obligations imposed upon the State. The Court's only task is to examine whether the measures applied by the authorities in the present case were adequate and sufficient (see *Ruianu v. Romania*, no. 34647/97, § 66, 17 June 2003). In cases such as the present one, which necessitate actions by a debtor who is a private person, the State, as the depository of public authority, has to act diligently in order to assist a creditor with the execution of a judgment (see *Fociac v. Romania*, no. 2577/02, § 70, 3 February 2005).

125. The Court notes that an enforcement file was opened by the enforcement officer in respect of the said judgment in March 2003. The applicant was informed of the existence of the enforcement file and was invited to pay the enforcement fee (see § 45). He did not pay the fee and on 16 January 2006 he lodged another request, paying the enforcement fee that time. The Court further observes that after the submission of the second enforcement request the decision of 10 December 2001 was enforced within a matter of months, namely in June 2006.

126. Moreover, the Court notes that the delay in the enforcement was caused only by the passivity of the applicant and there is no evidence in the file to suggest that the domestic authorities failed to discharge their obligation to assist the applicant with the enforcement.

127. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

128. 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

129. The applicant claimed 2,455,000 euros (EUR) in respect of non-pecuniary damage.

130. The Government considered that the request for non-pecuniary compensation was excessive and that the conclusion of a violation of the Convention Articles would suffice to compensate for the non-pecuniary damage allegedly incurred.

131. The Court has found the authorities of the respondent State to be in breach of Article 3 on account of the ill-treatment inflicted on the applicant by State agents and on account of the authorities' failure to investigate the applicant's allegations. In these circumstances, it considers that the applicant's suffering and frustration cannot be compensated for by a mere finding of a violation. Having regard to its previous case-law in respect of Article 3 and making its assessment on an equitable basis, the Court awards him EUR 10,000.

B. Costs and expenses

132. The applicant also claimed EUR 1,524 for the costs and expenses incurred before the Court, to be paid directly to his counsel as follows:

(i) EUR 1,224 for his lawyer's fees;

(ii) EUR 300 for technical support and various correspondence offered by the Romanian Helsinki Committee.

133. The Government did not dispute the number of hours spent by the applicant's representatives, given the complexity of the case. However, they considered that the lawyers' hourly rate was excessive, and referred in this respect to a number of cases where the Court had granted fees based on hourly rates of EUR 40-50. Lastly, they submitted that the amount of EUR 300 requested by the Helsinki Committee was not supported by any proof.

134. 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).

135. 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 dealt with and the substantial input of the lawyers, the Court awards the applicant the requested amount, as follows: EUR 1,224 to his lawyers and EUR 300 to the Romanian Helsinki Committee, to be paid separately to a bank account indicated by each of the applicant's representatives.

C. Default interest

136. 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 UNANIMOUSLY

1. *Declares* all the complaints under Article 3 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 3 of the Convention under its substantive limb concerning the incident of 9 December 1998;

3. *Holds* that there has been a violation of Article 3 of the Convention under its procedural limb concerning the incident of 9 December 1998;

4. *Holds* that there has been no violation of Article 3 of the Convention concerning the alleged lack of adequate medical treatment;

5. *Holds*

(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 the respondent State's national currency at the rate applicable on the date of settlement:

(i) EUR 10,000 (ten thousand euros) to the applicant, plus any tax that may be chargeable on that amount, in respect of non-pecuniary damage;

(ii) EUR 1,524 (one thousand five hundred and twenty-four euros), plus any tax that may be chargeable to the applicant on that amount, in respect of costs and expenses, to be paid into a bank account indicated by each representative as follows:

(α) EUR 1,224 (one thousand two hundred and twenty-four euros) to the lawyers; and

(β) EUR 300 (three hundred euros) to the Romanian Helsinki Committee;

(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 applicant's claim for just satisfaction.

Done in English, and notified in writing on 12 February 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President