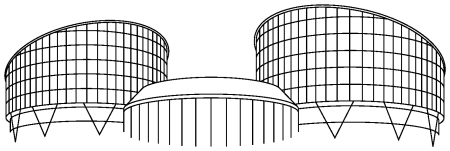

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF BINIŞAN v. ROMANIA

(Application no. 39438/05)

JUDGMENT

STRASBOURG

20 May 2014

FINAL

13/10/2014

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

In the case of Binişan v. Romania,

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

Josep Casadevall, *President,*
Alvina Gyulumyan,
Ján Šikuta,
Dragoljub Popović,
Luis López Guerra,
Kristina Pardalos,
Iulia Antoanella Motoc, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*

Having deliberated in private on 15 April 2014,

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

PROCEDURE

1. The case originated in an application (no. 39438/05) 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 Dan-Liviu Binişan ("the applicant"), on 24 October 2005.

2. The Romanian Government ("the Government") were represented by their Agent, Mrs C. Brumar, of the Ministry of Foreign Affairs. The applicant was granted leave to represent himself.

3. The applicant alleged that his life had been put at risk through the negligence of the staff of a State-run and owned company, which had led to him suffering an accident. He also complained that the State authorities had failed to investigate the accident effectively and also to punish those responsible for it.

4. On 24 May 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1974 and lives in Lugoj.

A. The accident of 20 September 2002

6. A private exporting company ("company E") had concluded a contract with the Lugoj Merchandise Subsidiary of the National Railway Company (*Staţia CFR Marfă Lugoj)* and another private company (company M). The contract provided that company E could use an industrial railway track for the five wagons put at its disposal by the National Railway Company in order to perform all the necessary operations, including customs inspections, for exporting its merchandise abroad.

7. On 20 September 2002, at about 9.30 a.m., S.V. went to Lugoj Railway Station with all the documents relating to the transportation of company E's merchandise, in order to have the station's stamp applied to them. When all the documents had been stamped, the manager of company E, together with S.V., went to the Lugoj Customs Office to ask for a customs inspector to carry out an inspection of the wagons and apply the required seals. The applicant was designated to carry out the customs inspection.

8. At about 1 p.m. the applicant went with the manager of company E and S.V. to Lugoj Railway Station. They firstly went to the station's cash desk, where the manager of company E paid the taxes relating to the transportation of the merchandise and asked to have the consignment note (CIM) stamped. According to the statements of the manager of company E, S.V., and the applicant, an employee of the National Railway Company, M.M., went with them in order to show them where the wagons were.

9. At 1.19 p.m., while he was on top of a wagon trying to apply the customs seals, the applicant was electrocuted. As a result of the accident, the applicant needed 138 days of medical care. He suffered burns to 70% of his body.

10. In most of the official documents regarding the accident, such as the report of the investigation commission of 16 October 2002, the decisions of the courts and the prosecutors, and a medical report drafted on 16 February 2004, it was stated that the applicant's life was at risk. For almost two months he was in a deep coma in a hospital in Hungary. Because of the severe burns he had serious breathing difficulties and had to undergo multiple skin grafts.

11. Following a decision by the National Pension Authority on 28 May 2004, the applicant was classed as permanently disabled.

B. Investigation into the accident

12. Two police officers attended at the scene of the accident and drafted a preliminary on-the spot report on the same day.

13. A special commission composed of experts from the Timişoara Labour Inspectorate, the Timişoara Regional Customs Department (*Direcţia*

Regională Interjudeţeană Timişoara) and the Timişoara Subsidiary of the National Railway Company was set up to investigate the accident. The commission started its investigation on 24 September 2002, four days after the accident.

14. According to the report drafted by the commission, which was completed on 16 October 2002, the accident had occurred because of the improper organisation of the procedure for inspecting the merchandise. It stated that there were several concurrent causes which had led to the applicant's accident.

15. The report stated that the receipt of the wagons by company E from the National Railway Company had not been effected in accordance with the framework agreement signed on 24 June 2002 by the Lugoj Railway Station and company M, or with the document entitled "*Declaraţie*" signed by company M, company E and the National Railway Company. According to a final decision of 25 January 2006, delivered in criminal proceedings, this last document was signed after the accident occurred, but the manager of the National Railway Company back-dated it (see paragraph 36 below).

16. The report also stated that health and safety regulations had not been observed and the applicant's employer had not ensured that he was properly trained for performing his duties on the railway tracks.

17. The report concluded that the following were responsible for the accident: (i) the manager of company E because he had not organised the customs inspection and had not complied with the above-mentioned agreement; (ii) the applicant because he had not complied with the rules for carrying out the inspection; (iii) the applicant's superior for not training him on the applicable safety regulations, and (iv) company E, also for not training its employees properly.

18. The Timişoara Regional Customs Department raised certain objections in respect of the report. It insisted that the report mention that the applicant had gone up onto the wagon only after M.M., an employee of the National Railway Company, had assured him that there was no danger of an accident (a reference to the statements of S.V. and the manager of company E, who had been present when the accident occurred).

19. It also pointed out that the applicant had undergone training on 3 June 2002.

20. Finally, it contended that an analysis of the documents and the statements of the witnesses present at the incident showed that the accident had occurred because the National Railway Company had not observed Order no. 26 of 11 January 2000, which set out the health and safety regulations for the rail transport industry.

C. Complaints against the fines imposed by the investigation commission

21. At the end of the investigation the special commission imposed administrative fines on company E and its manager for non-observance of the applicable health and safety regulations.

1. Complaint by Company E

22. Company E lodged a complaint seeking to have the fine cancelled, arguing that it had been under no legal obligation to train the applicant because he was not employed by them.

23. By a judgment of 16 September 2003 the Lugoj District Court allowed the complaint and held that the National Railway Company should be held liable for the accident. Its reasoning was as follows: "Demonstrating gross negligence, the representatives of the National Railway Company did not order the removal of the five freight wagons to the industrial track". The industrial track was not electrified. The court continued its reasoning by stating that since the National Railway Company had agreed to transport the merchandise by presenting the necessary documents to the customs authority, it had become responsible for the operation. In accordance with decision T1 concerning the application to Romanian territory of the common transit system for rail freight transport, the National Railway Company was required, among other obligations, to ensure appropriate conditions for a safe customs inspection. The court concluded that by leaving the five freight wagons on high voltage railway tracks without informing all the persons involved in the customs inspection, the National Railway Company had failed to fulfil that obligation.

2. The manager's complaint

24. The special commission also imposed a fine on the manager of company E on the ground that he had not taken the necessary steps to ensure the safety of the customs inspection, and that although he had accompanied the applicant to the railway station he had not made a written request for the removal of the freight wagons from the electrified railway track.

25. The manager lodged a complaint against the fine and, by a final judgment rendered on 29 September 2003, the Lugoj District Court allowed the complaint, holding that the manager had not been obliged to request the removal of the wagons from the electrified railway tracks. It also held that he could not have known that the tracks were electrified. Further, it stated that according to the framework agreement signed on 24 June 2002, the wagons should have been at track no. 20, which was located outside the railway station, and that employees of the National Railway Company should have moved the wagons from the railway station to track no. 20. It concluded that the employee of the National Railway Company who had

also been present at the customs inspection, M.M., had assured the applicant that he could perform his inspection even though the wagons were on an electrified track.

D. Criminal proceedings against the manager of company E

26. On 8 January 2003 the Timiș Labour Inspectorate asked the prosecutor's office to start a criminal investigation into whether the manager of company E could be held responsible for the accident. Accordingly, the prosecutor's office attached to the Lugoj District Court opened a preliminary investigation.

27. The applicant gave a statement before the prosecutor on 26 February 2003. He informed that he intended to claim compensation from the persons found responsible for the accident.

28. By a decision of 24 April 2003, the prosecutor decided not to initiate a criminal investigation on the ground that the accident had been caused through the applicant's own fault. That decision was upheld by the chief prosecutor on 31 July 2003.

29. The applicant lodged a complaint against that decision with the prosecutor's office attached to the Timiș County Court. He contended that the investigation body had not managed to clarify the circumstances under which the accident had occurred and therefore it was necessary to hold a confrontation between all the witnesses who had given contradictory statements, and that a reconstruction of the accident scene would be useful. As to the presence of M.M., the employee of the National Railway Company, at the scene of the accident, even the statements of her own colleagues were contradictory. The applicant further maintained that without M.M., who had accompanied them to track no. 7, he and the manager of company E would not have been able to find the wagons to be inspected. The applicant also claimed that the warning sign on the wagons to be inspected had not been there at the time of the accident but had been placed there after the accident. In this connection, he pointed out that such a sign could not be seen in the photographs taken by the police officers who had examined the scene immediately after the accident. The sign appeared only in the photographs taken by the Timiș Labour Inspectorate four days after the accident.

30. On 30 October 2003 the chief prosecutor dismissed the applicant's complaint as unfounded. He held that the applicant alone was responsible for the accident because he had mounted the wagon while it was connected to live electricity without paying heed to the warning sign on the wagon and the framework agreement signed by the National Railway Station and the beneficiary (company E). He dismissed the applicant's allegation that the warning sign had not been attached to the wagon on the day of the accident, stating that the sign could not be seen from the angle at which the

photographs had been taken on that day. He also dismissed the applicant's request to have the witnesses reheard on the ground that their statements were not relevant in so far as they could not make any difference to the final conclusion.

31. On 14 April 2004 the applicant lodged a complaint against that decision with the Lugoj District Court, alleging that the staff of the National Railway Company were responsible for the accident. By a judgment of 18 June 2004 the court allowed the complaint and sent the file back to the prosecutor's office for an expert report to be drafted and for it to be determined whether M.M., the employee of the National Railway Company who the applicant claimed had accompanied him to the freight train, bore any responsibility. The experts were to establish whether the railway tracks had been electrified when the applicant climbed onto the freight train on the day of accident.

32. On 27 September 2004 the Timiș County Court allowed an appeal on points of law lodged by the prosecutor's office and quashed the judgment of 18 June 2004 on the ground that on the basis of Article 278 (1) of the Code of Criminal Procedure, the first-instance court could not remit the case to the prosecutor's office for further investigation. Consequently, the file was sent back to the District Court for fresh examination.

33. On 21 January 2005 the Lugoj District Court dismissed the applicant's complaint and upheld the prosecutor's decision not to initiate a criminal investigation. It held that none of the National Railway Company's employees had been responsible for the applicant's accident. In this connection, it found that according to the statements given by M.M.'s colleagues, she had not accompanied the applicant, S.V. and the manager of company E to the freight train. It also stated, however, that the customs inspection should have been carried out at track no. 20 and not at track no. 7. It concluded that the applicant alone was responsible for the accident because he had not paid heed to the warning sign on the wagon and the framework agreement signed by the National Railway Station and company E.

E. Criminal proceedings initiated by the applicant against the manager of the National Railway Company

34. The applicant lodged a criminal complaint against the manager of the National Railway Company for forgery of a document called *"Declarație"*, submitted to the special commission while it was carrying out its investigation into the accident. The document was in fact an agreement signed by the National Railway Company, company E and company M stipulating that customs inspections of merchandise should be carried out only at track no. 20 (which was not electrified). The applicant stated that the manager had drafted it and asked the managers of the two other companies

to sign it immediately after the applicant's accident (on 21 September 2002), but had given 16 September 2002 as the date of signing.

35. After repeated decisions not to initiate criminal proceedings delivered on 28 September, 27 October and 17 December 2004, on 7 June 2005 the prosecutor's office attached to the Lugoj District Court indicted the manager of the National Railway Company for abuse of office, forgery and the use of forged documents, and sent his file to the Lugoj District Court.

36. By a judgment of 25 January 2006, the Lugoj District Court found the manager guilty as charged. It held that he had drafted the agreement in order to protect his company from liability for the applicant's accident. The subsequent appeal and appeal on points of law were dismissed as unfounded by the Timiș County Court and the Timișoara Court of Appeal on 17 April and 6 September 2006 respectively.

F. The applicant's request for judicial review of the criminal judgment of 21 January 2005

37. On 8 May 2006 the applicant lodged an application for judicial review of the criminal judgment rendered on 21 January 2005 by the Lugoj District Court. He claimed that there were new elements which could prove the guilt of the National Railway Company in respect of the events which had led to his accident. In this connection he relied on the final decision of the Lugoj District Court of 25 January 2006, by which the manager of the National Railway Company had been found guilty of the forgery of the document entitled "*Declarație*" which had been used as evidence in the criminal proceedings relating to the applicant's accident. He also applied for three new witnesses to be heard on the question of whether M.M. had been present when the accident occurred.

38. The applicant argued that that document had played a decisive role in the conclusions of the investigation commission, as well as in the decisions of the prosecutors and judges, as to liability for the accident.

39. The Lugoj District Court dismissed the application as inadmissible as it concerned a decision in which the court had not examined the merits of the case, and as unfounded because the new evidence referred to by the applicant did not *de facto* affect the facts established in the decision.

G. Civil proceedings instituted by the applicant

40. On 18 October 2005 the applicant brought a civil action before the Lugoj District Court seeking compensation in respect of pecuniary and non-pecuniary damage. He claimed damages from the National Railway Company and M.M on account of their negligence in the organisation of the

customs inspection. He stressed that because of the accident he had had to undergo expensive surgical interventions and had been classed as permanently disabled.

41. On 20 June 2006 the Lugoj District Court dismissed an objection of *res judicata* raised by the defendants. It held that the criminal decision of 21 January 2005 had not examined the civil liability of the defendants but only their criminal liability. The court noted that although the evidence concerning M.M.'s presence at the scene of the accident was not conclusive, the National Railway Company's employee should nevertheless be held liable because she had not fulfilled her professional duties. The court further noted that, according to one of M.M.'s colleagues who had occupied the same position as M.M., and to her job description ("*Fişa Postului*"), it had been M.M.'s duty to handle the customs documentation for the customs agent and also to supervise the shunting of the relevant wagons in the railway station. The court also found that under the applicable law on the application of the common transit system in Romania, the National Railway Company had been obliged to be actively involved in the customs inspection of the wagons. However, the company had observed its obligations superficially through its employees. Thus, by applying the stamp to the CIM, the company employee had convinced the applicant and the manager of company E that everything was ready for inspection.

The court partly allowed the applicant's action, held that both the applicant, the National Railway Company and M.M. were equally responsible for the accident, and ordered the defendant company and M.M. to pay half the damages claimed.

42. The defendant company appealed and the appeal was allowed by the Timiş County Court on 19 February 2008. It quashed the judgment of the first-instance court, holding that the *de facto* situation had already been established by a final decision of a criminal court, and had thus acquired the authority of *res judicata* before the civil courts.

43. On 26 January 2009 the Timişoara Court of Appeal dismissed an appeal on points of law lodged by the applicant.

II. RELEVANT DOMESTIC LAW

44. Order no. 26 of 11 January 2000 sets out the health and safety regulations for the rail transport industry. Article 3 provides that the regulations are compulsory and that they must be communicated to the interested persons by local labour inspectorates. They are not published in the Official Gazette.

45. Article 66 of the Order prohibits the inspection, application of seals or carrying out of any work on the upper parts of a wagon while the train is on electrified tracks.

46. Article 79 of the Order provides that all specified preventive steps must be taken when operations presenting a danger of electrocution are performed.

47. The CIM is a standardised document for the cross-border transport of cargo by rail, based on UN recommendations for uniform international rules and in use in the European Union (EU). CIM stands for *Convention Internationale concernant le transport des Marchandises par chemin de fer*, the French name for the Convention that governs its definitions and application.

48. The T1 procedure concerns the movement of non-EU goods when customs duties or other import taxes are involved.

49. According to Article 70 of the above-mentioned Convention, which sets out a common transit procedure, a railway company which accepts goods for carriage under cover of a CIM consignment note serving as a common transit declaration shall be the principal for that operation.

50. Criminal proceedings in Romania are regulated by the Code of Criminal Procedure and based on the principles of legality and officialness. Prosecution is mandatory when reasonable suspicion exists that a criminal offence subject to mandatory prosecution has been committed.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

51. Relying on Article 2 of the Convention, the applicant complained that his life had been endangered and that he had suffered serious burns which had resulted in him becoming permanently disabled, on account of an accident that had happened because the National Railway Company had not taken the necessary steps to ensure safe conditions for the customs inspection he had had to perform at Lugoj Railway Station. He further claimed that the authorities had not conducted an effective investigation in order to identify the persons liable for the accident. He also raised complaints under Articles 6 § 1 and 8 of the Convention concerning the same points.

52. The Court observes that the present case concerns the alleged responsibility of the State for negligent acts that were likely to result in the loss of the applicant's life. Although the applicant survived, the Court takes the view that – given the seriousness of the injuries he sustained and, in particular, that he was in a coma for two months – his life was at serious risk.

53. In the light of the above considerations and its case-law (see *Budayeva and Others v. Russia*, nos. 15339/02, 21166/02, 20058/02,

11673/02 and 15343/02, § 146, ECHR 2008 (extracts); *Yürekli v. Turkey*, no. 48913/99, 17 July 2008, *Petrov v. Bulgaria* (dec.), no. 19202/03, 8 September 2009; and, *mutatis mutandis*, *Makaratzis v. Greece* [GC], no. 50385/99, §§ 54-55, ECHR 2004-XI), the Court considers that the applicant's complaints fall to be examined under Article 2 of the Convention, which reads as follows:

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

A. Admissibility

1. The parties' submissions

54. The Government submitted that the applicant had failed to exhaust the available domestic remedies because he had not brought a civil claim for negligence against his employer, the customs agency, for failure to train him on railway-specific safety regulations. In this connection the Government contended that the accident had occurred only because, in the absence of proper training, the applicant had misunderstood or disregarded the various warning signs on the wagon he had been inspecting.

55. The applicant disputed the Government's arguments. He stated that he had introduced a civil action for compensation in respect of pecuniary and non-pecuniary damage against the National Railway Company and its employee, M.M. The applicant also submitted that he had joined a civil complaint to the criminal proceedings initiated against the manager of company E. The applicant also maintained that he had not lodged a civil action against his employer because he did not consider it as being liable for his accident.

2. The Court's assessment

56. The Court reiterates that in the event of there being a number of domestic remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance. In other words, when one remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *Jasinskis v. Latvia*, no. 45744/08, § 50, 21 December 2010).

57. Turning to the circumstances of the instant case, the Court observes that the applicant joined a civil claim to the criminal proceedings initiated against the manager of company E. In that claim he specified that he would expect compensation from whoever was found to be accountable for his accident (see paragraph 27 above). In this respect the Court notes that according to the Romanian law, prosecutors should perform an active role in criminal proceedings. Thus, pursuant to the principle of mandatory prosecution, in case that criminal proceedings were instituted in connection with an offence, they should find and punish the perpetrators of the offence

without being limited to the initial framework of the criminal proceedings. The Court notes that in the instant case although criminal proceedings were instituted against the manager of company E, such proceedings could have led to the conclusion that another party, such as the applicant's employer, could be held liable for the accident.

Furthermore, no domestic court had indicated to the applicant that he should lodge a civil complaint against his employer.

58. The Court also notes that on 18 October 2005 the applicant lodged a separate civil action for compensation in respect of pecuniary and non-pecuniary damage against the National Railway Company and its employee, M.M (see paragraph 40 above). The action was dismissed on the ground that the facts concerning the accident and the responsibility of the parties involved had already been established by the criminal courts. Therefore, the advantage to be gained by the applicant in instituting separate civil proceedings against his employer did not seem obvious, given the findings of the criminal court concerning the responsibility of the parties involved in the accident.

59. In the light of the above considerations, the Court is satisfied that the applicant has exhausted domestic remedies. The Government's objection must therefore be dismissed and the complaint declared admissible.

60. The Court thus finds that the applicant's 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

1. The parties' submissions

61. The applicant contested the Government's allegation that he had ignored the sign warning of the danger of electrocution when he had climbed onto the wagon, claiming that such sign did not exist at the time of the accident and had been attached only after the accident. In this connection, he maintained that in the photographs taken by the police officers who drafted the first report after the accident there was no warning sign. The applicant further contended that new photographs showing a new sticker with the warning sign "Danger of electrocution" had appeared in the accident file four days after the accident. The applicant also claimed that he had brought this aspect to the attention of the county chief prosecutor, who had dismissed his claim that that evidence was tainted, on the ground that the warning sign had not been visible from the angle from which the first photographs were taken on the day of the accident. The applicant considered it doubtful that the police officers who took the first photographs after the

accident would have omitted such an important piece of evidence if it had existed at the time.

62. The applicant disagreed with the Government's assertion that his employer had not trained him for performing his work. He pointed out that, as mentioned in the "Investigation Commission Report", his last training course at work had been on 3 June 2002, three months before the accident. The file included a copy of a document signed by the applicant and the person who had trained him, in support of this assertion. He further contended that he had submitted that document to the prosecutor and the courts but they had unjustifiably disregarded it.

63. The applicant also contested the Government's submission that M.M. had not had any professional obligation to supervise the safety of the customs inspection, pointing out that she had had such an obligation according to her job description. The applicant maintained that M.M. had been present and had assured him that he could perform his inspection duties on the wagons at track no. 7 as there was no danger. The applicant further considered that, even assuming that M.M. was not liable for his accident, the National Railway Company should be held liable for negligence. In this connection he contended that the person replacing the chief of the company (who had been on leave on the day of the accident) had been aware that he had come to the railway station in order to inspect the wagons. He claimed that on the day of the accident he had followed the usual procedure that he and his colleagues followed when they had to inspect wagons at the National Railway Company. Immediately he had arrived at the railway station he had gone to the chief's office in order to obtain information about the location of the wagons to be inspected and to ask for an employee to accompany him to the inspection site.

64. As regards the efficacy of the investigation into his accident, the applicant claimed that the special commission had started its investigation four days after the accident. This delay of four days had given the railway company time to interfere with the evidence and fabricate new tainted evidence. The applicant also claimed that the investigation authorities and the courts had not carefully examined the railway station's records or the documents relating to the wagons he had inspected.

65. The applicant further referred to "criminal manoeuvres" carried out by the manager of the National Railway Company in order to cover the gross negligence in complying with obligations which had led to his tragic accident. The document entitled "*Declarație*", which had been declared forged by a final decision of the domestic courts, had been repeatedly mentioned in most of the decisions delivered by the prosecutor as evidence against him even though he had contested its authenticity on many occasions.

66. The Government asked the Court to find the substantive limb of the complaint ill-founded, as an appropriate framework for preventing such

accidents was in place, in compliance with the State's positive obligations under Article 2.

67. The Government submitted that the communication between the applicant and the National Railway Company had concerned factual information on the whereabouts of the wagons, rather than an assurance that the inspection could be carried out while the wagons were at track no. 7.

68. They further contended that M.M. had no responsibility (according to her job description) for dealing with customs paperwork or ensuring that inspections were carried out safely.

69. The Government further submitted that the applicant should have been trained and specifically authorised by his employer to carry out his inspection duties.

70. As regards the procedural limb, the Government contended that the National Railway Company and its employees had been subjected to intense scrutiny in both the criminal and civil proceedings, and asked the Court to find, accordingly, that the State had diligently fulfilled its investigative obligations under Article 2 of the Convention.

2. The Court's assessment

(a) General principles

71. Article 2 ranks as one of the most fundamental provisions in the Convention. The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III).

72. The Court reiterates that whenever a State undertakes or organises dangerous activities, or authorises them, it must ensure through a system of rules and sufficient control that the risk is reduced to a reasonable minimum. If damage nevertheless arises, it will only amount to a breach of the State's positive obligations if it was due to insufficient regulations or insufficient control, but not if the damage was caused through the negligent conduct of an individual or the concatenation of unfortunate events (see, for comparison, *Kalender v. Turkey*, no. 4314/02, §§ 43-47, 15 December 2009). The Court also reiterates that a State's responsibility can be engaged on account of a failure to take preventive measures, provided that the authorities knew or ought to have known of the existence of a real and immediate risk to life.

73. Such positive obligation has been found to arise in a range of different contexts examined so far by the Court (see *Ciechońska v. Poland*, no. 19776/04, §§ 61-63, 14 June 2011). The Court has already held that this provision was applicable not only in the event of loss of life but also when in the circumstances there was a threat to physical integrity (see *Budayeva*

and Others, cited above). Thus for example, the State's duty to safeguard the right to life was considered in the context of a child's electrocution in a building serving as electrical transformer station (see *Iliya Petrov v. Bulgaria*, no. 19202/03, §§ 54-55, 24 April 2012).

74. In the Court's view, and having regard to its case-law, the State's duty to safeguard the right to life must also be considered to involve the taking of reasonable measures to ensure the safety of individuals in public places and, in the event of serious injury or death, having in place an effective independent judicial system securing the availability of legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim.

75. The Court reiterates that although the Convention does not as such guarantee a right to have criminal proceedings instituted against third parties, it has found on a number of occasions that the effective judicial system required by Article 2 may, and under certain circumstances must, include recourse to the criminal law (see, among other authorities, *Kılıç v. Turkey*, no. 22492/93, § 62, ECHR 2000-III, and *Mahmut Kaya v. Turkey*, no. 22535/93, § 85, ECHR 2000-III). However, if the infringement of the right to life or to personal integrity has not been caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. The form of investigation may vary according to the circumstances. In the sphere of negligence, a civil or disciplinary remedy may suffice (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I, and *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII).

(b) Application of the general principles in the present case

76. The Court notes that in the instant case the applicant did not argue that there was not a legislative and administrative framework set up by the State, or that such framework was defective in any general or systemic sense.

77. The applicant claimed that his accident had occurred because of the negligence of the National Railway Company, a fully State-run and State-owned company at the time.

78. The Court notes that, according to decision T1 concerning the application to Romanian territory of the common transit system for rail freight transport, the National Railway Company was required, among other obligations, to ensure appropriate conditions for a safe customs inspection (see paragraph 48 above).

79. The Court also notes that in the two final judgments, of 16 and 29 September 2003, the Lugoj District Court found that the representatives of the National Railway Company had shown gross negligence in not ordering the removal of the freight wagons to the non-electrified track for

the customs inspection. It also held that under the applicable regulations the National Railway Company was responsible for the safety of the customs inspection (see paragraphs 23 and 25 above).

80. The same District Court, in another set of proceedings – the criminal proceedings initiated by the applicant against the manager of the National Railway Company – held that the manager had back-dated the document entitled "*Declarație*" in order to avoid his company being held liable for the applicant's accident (see paragraph 36 above). In this regard, the Court considers that the manager took a considerable risk in submitting the forged document to the investigation commission and all the authorities investigating the accident. He would be unlikely to take such a risk if the National Railway Company did not have any responsibility as regards the conditions under which the customs inspection should have been performed.

81. As to the way in which the employees of the National Railway Company performed their duties on the day of the accident, the Court notes that the employee who was replacing the manager of the National Railway Company on that day had stamped the documentation presented by the manager of company E in connection with the wagons but he had not checked whether the wagons were on the right track (see paragraph 7 above). As regards M.M, the employee who, according to the final conclusions of the investigating authorities, had not been present at the accident scene, the Court notes that it was her professional duty under her job description ("*Fişa Postului*") to handle the transport documentation relating to customs officials. That M.M. and her employer were in charge of the wagons is also borne out by the CIM document, which had been accepted by the National Railway Company when it had applied its seal to the document (see paragraph 8 above). However, the Court notes that the domestic courts held that the applicant had been solely responsible for the accident in subsequent criminal and separate civil proceedings.

82. The Court notes that an issue of State responsibility under Article 2 of the Convention might arise in the event of inability on the part of the domestic legal system of a State to secure accountability for negligent acts endangering or resulting in loss of human life. The State's positive obligation under Article 2 also requires the setting up of an effective functioning legal system (see *Furdik v. Slovakia* (dec.), no. 42994/05, 2 December 2008).

83. Thus, the Court must examine whether the available legal remedies, taken together, as provided in law and applied in practice, can be said to have amounted to legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim.

84. Turning to the circumstances of the instant case, the Court notes that the Romanian authorities promptly opened an investigation into the events which led to the applicant's accident. However, it cannot overlook the fact

that the same District Court arrived at contradictory decisions in different sets of proceedings concerning the same accident.

85. Despite all the previous final decisions finding the National Railway Company responsible for the applicant's accident, the Lugoj District Court held in its criminal judgment of 21 January 2005 that only the applicant was responsible for the accident. It based its findings on two reasons.

86. The first was that the applicant had not taken into account the warning sign displayed on the wagon. In this regard, the Court notes that the applicant claimed before the domestic authorities and in his written submissions to the Court that the sign warning of the danger of electrocution was not present on the day of the accident but was placed there after his accident. This aspect was not clarified by the domestic authorities. The reply given by the chief prosecutor, according to which the sign had not been visible in the initial photographs because of the angle from which the photographs had been taken, does not appear satisfactory to the Court.

87. The second reason for finding the applicant solely responsible for the accident was that he had not observed the framework agreement signed by the National Railway Company or the document entitled "*Declarație*", and therefore he had carried out his inspection on track no. 7 instead of track no. 20. The Court observes that, as the applicant pointed out in his written submissions, his employer, the customs agency, had not signed the framework agreement and therefore could not be held liable for not observing it. It was an agreement between the beneficiary and the transporter and it did not concern the customs agency.

88. As regards the "*Declarație*", it has been established that it was signed only after the accident. The Court also notes that, despite the fact that in its final criminal judgment of 25 January 2006 the Lugoj District Court found that the manager of the National Railway Company had forged this document, which was used as evidence in the administrative and criminal proceedings, the criminal courts had dismissed the applicant's application for judicial review of the criminal judgment of 21 January 2005. The Court, however, considers that the forged document was important in establishing the role played by the National Railway Company in the accident. According to the forged document, signed after the accident occurred and back-dated, the customs inspection should have taken place at track no. 20 (not electrified) and not at track no. 7 (electrified).

89. The Court further notes that the Lugoj District Court did not manage to clarify the role played by M.M. in the applicant's accident. The applicant, S.V. and the manager of company E all stated that M.M. had accompanied them to the train and had assured the applicant that there was no danger of electrocution before he went up onto the wagon to apply the seals. However, the criminal court accepted M.M.'s version that she had been further down the track, which was based on statements given by some of her colleagues

who had not themselves witnessed the events. The Court also notes that in a final decision delivered in the administrative proceedings the same domestic court arrived at different conclusions when assessing the same evidence (see paragraph 25 above).

90. In the light of the foregoing considerations, the Court concludes that the domestic authorities did not display due diligence in protecting the applicant's right to life. Moreover, the legal system as a whole, faced with an arguable case of negligence causing almost lethal injuries, failed to provide an adequate response consonant with Romania's obligations under Article 2 of the Convention.

91. Accordingly, the Court holds that there has been a violation of Article 2 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

92. 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

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

94. The Government submitted that the amount sought was "grossly exaggerated".

95. The Court considers that the applicant suffered distress as a result of his accident. It therefore awards the applicant EUR 35,000 in respect of non-pecuniary damage.

B. Costs and expenses

96. The applicant also claimed EUR 252,430.52 for costs and expenses incurred in Hungary, Germany, Romania and the United States of America.

97. The Government contended that the applicant should have submitted a detailed breakdown of the expenses and a medical report in order to facilitate the assessment of the medical procedures he had undergone and the attendant expenses.

98. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its

possession and the above criteria, the Court considers it reasonable to award the sum of EUR 10,000.

C. Default interest

99. 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. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 2 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 35,000 (thirty-five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 20 May 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli	Josep Casadevall
Deputy Registrar	President