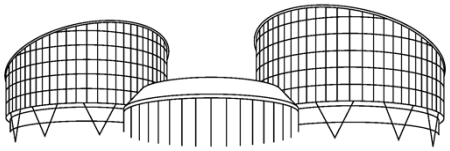

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

PREMIÈRE SECTION

AFFAIRE PETRELLA c. ITALIE

(Requête n° 24340/07)

ARRÊT

Art 6 § 1 (civil) • Accès à un tribunal • Durée des investigations préliminaires ayant empêché le requérant de se constituer partie civile dans une procédure pénale et de demander réparation du préjudice civil • Action classée sans suite en raison de la prescription de l'infraction avant l'audience préliminaire à partir de laquelle la partie lésée peut se constituer partie civile • Comportement fautif des autorités • Art 6 applicable, le requérant ayant exercé au moins l'un des droits et facultés expressément reconnus par la loi interne • Plainte visant à faire valoir le droit de caractère civil à la protection de sa réputation • Introduction d'une action aux mêmes fins en responsabilité civile devant la juridiction civile ne pouvant être exigée
Art 6 § 1 (civil) • Délai raisonnable • Durée excessive de la procédure civile
Art 13 (+ Art 6) • Absence de recours interne effectif quant à la durée de la procédure

STRASBOURG

18 mars 2021

Cet arrêt deviendra définitif dans les conditions définies à l'article 44 § 2 de la Convention. Il peut subir des retouches de forme.

En l'affaire Petrella c. Italie,

La Cour européenne des droits de l'homme (première section), siégeant en une Chambre composée de :

Ksenija Turković, *présidente,*
Krzysztof Wojtyczek,
Linos-Alexandre Sicilianos,
Pere Pastor Vilanova,
Péter Paczolay,
Gilberto Felici,
Raffaele Sabato, *juges,*

et de Renata Degener, *greffière de section*,

Vu :

la requête susmentionnée (n° 24340/07) dirigée contre la République italienne et dont un ressortissant de cet État, M. Vincenzo Petrella (« le requérant »), a saisi la Cour en vertu de l'article 34 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (« la Convention ») le 1er juin 2007,

la décision de porter à la connaissance du gouvernement italien (« le Gouvernement ») la requête,

les observations des parties,

Après en avoir délibéré en chambre du conseil le 2 février 2021,

Rend l'arrêt que voici, adopté à cette date :

INTRODUCTION

1. La présente affaire concerne la durée des investigations préliminaires menées dans le cadre de la procédure engagée par le requérant, l'absence d'un recours effectif permettant à ce dernier, en tant que partie lésée, de se plaindre à cet égard et le classement sans suite de la plainte de l'intéressé en raison de la prescription. Le requérant allègue une violation des articles 6 § 1, 8, 13 et 14 de la Convention.

EN FAIT

2. Le requérant est né en 1951 et réside à Caserte. Il a été représenté par Me A. Imparato, avocat.

3. Le Gouvernement a été représenté par son ancien agent, Mme E. Spatafora.

4. Le requérant est avocat. À l'époque des faits, il était également président d'une équipe de football, la *« Casertana »*.

5. Le 22 juillet 2001, le journal « *Corriere di Caserta* » publia, en première page, un article intitulé « Trou de mille milliards "signé" Petrella & Co. ». L'article, accompagné d'une photographie du requérant, contenait le passage suivant : « L'administration sanitaire locale et la région

saignées à blanc en six ans**.** Chiffres à neuf zéros pour les honoraires du président de la Casertana, Petrella, alors que le juge (*pretore*)[1] était [X], numéro deux de la société, qui a fait exécuter 6 066 saisies-arrêts, enrichissant ainsi ses amis avocats. (...). Six ans de saignées dans le budget de la santé publique pratiquées par des juges et des avocats (comme par hasard Petrella et [X], aujourd'hui président et vice-président de la Casertana), [qui] auront des répercussions pendant des décennies ». Les 23, 24 et 25 juillet 2001, le *« Corriere di Caserta »* publia d'autres articles ayant un contenu semblable à celui du 22 juillet.

6. Estimant que les articles parus dans le *« Corriere di Caserta »* avaient porté atteinte à son honneur et à sa réputation, le requérant porta plainte le 28 juillet 2001 pour diffamation aggravée par voie de presse (*diffamazione a mezzo stampa*) contre leur auteur et le directeur de ce journal ainsi que contre le président et l'administrateur délégué de la société d'édition. Dans sa plainte, déposée devant le procureur de Santa Maria Capua Vetere, le requérant précisait qu'il entendait se constituer partie civile dans la procédure et demander dix milliards de lires italiennes (ITL), soit cinq millions d'euros (EUR), de dommages-intérêts. En outre, il indiquait souhaiter être informé d'un éventuel classement de sa plainte.

7. Le 10 septembre 2001, l'affaire fut déférée au parquet du tribunal de Salerne, compétent *ratione loci* pour en connaître.

8. Par une décision du 9 novembre 2006, communiquée au requérant le 2 décembre 2006, le procureur demanda le classement sans suite de la plainte de l'intéressé en raison de la prescription de l'infraction pénale dénoncée.

9. Par une décision du 17 janvier 2007, le juge des investigations préliminaires de Salerne classa la procédure sans suite, faisant ainsi droit à la demande du parquet.

LE CADRE JURIDIQUE ET LA PRATIQUE INTERNES PERTINENTS

10. Le droit et la pratique internes pertinents concernant la loi n° 89 de 2001 (« la loi Pinto ») se trouvent décrits dans les arrêts *Cocchiarella c. Italie* ([GC], n° 64886/01, §§ 23‑31, CEDH 2006-V) et *Arnoldi c. Italie* (n° 35637/04, §§ 15-19, 7 décembre 2017).

11. Selon l'article 79 du code de procédure pénale (CPP), la partie lésée ne peut se constituer partie civile qu'à compter de l'audience préliminaire, celle-ci constituant le moment de la procédure où le juge est appelé à décider si l'accusé doit être renvoyé en jugement (voir, pour plus de détails sur le statut de la partie lésée en droit italien, *Arnoldi*, précité, §§ 15-18).

[1] Dans le corps de l'article, il est précisé qu'il s'agit d'un ancien juge non professionnel (« *ex vice pretore onorario* »).

12. L'article 55, alinéa 1, l. a) du décret-loi n° 83 du 22 juin 2012 (ultérieurement converti en loi, sans modification sur le point exposé ci-après, par la loi n° 134 du 7 août 2012) a introduit à l'article 2 de la loi Pinto un alinéa 2 *bis*, qui prévoit, notamment, que la durée du procès pénal doit être calculée à partir du moment où la personne lésée est admise au procès en tant que partie civile. En estimant ledit alinéa compatible avec l'article 6 § 1 de la Convention, par son arrêt n° 249 déposé le 25 novembre 2020, la Cour constitutionnelle a déclaré manifestement mal fondée la question de constitutionnalité portée à son attention.

13. Selon l'article 127 des dispositions d'implémentation (*disposizioni di attuazione*) du CPP, le greffe du parquet doit transmettre chaque semaine au procureur général près la cour d'appel la liste des enquêtes pour lesquelles le parquet n'a pas engagé de poursuites pénales ou n'a pas demandé le classement sans suite des accusations.

14. Les articles 405 et 406 du CPP prévoient des délais pour l'accomplissement des actes d'investigation par le parquet. Une fois que les délais prévus pour l'engagement des poursuites pénales ou le dépôt d'une demande de classement sans suite des accusations sont échus, d'après l'article 413 du CPP, il est loisible à la personne lésée (*persona offesa*) de demander au procureur général près la cour d'appel de procéder à l'évocation de l'enquête au sens de l'article 412 du CPP.

15. L'article 412 du CPP, en vigueur à l'époque des faits, disposait ce qui suit en ses parties pertinentes en l'espèce :

Article 412 - Évocation d'enquêtes préliminaires à défaut de poursuites pénales

« 1. Le procureur général près la cour d'appel procède, par décret motivé, à l'évocation des enquêtes préliminaires lorsque le procureur n'engage pas les poursuites pénales ou ne demande pas le classement sans suite dans le délai fixé par la loi ou prorogé par le juge. (...)

2. (...) »

16. L'article 413 du CPP est libellé comme suit :

Article 413 – Demande de la personne faisant l'objet d'investigations préliminaires ou de la personne lésée

« 1. La personne faisant l'objet d'investigations préliminaires ou la personne lésée peut demander au procureur général de procéder à l'évocation de l'enquête conformément à l'article 412 § 1 du CPP.

2. Après avoir évoqué l'enquête, le procureur général mène les enquêtes préliminaires nécessaires et formule ses demandes [demande de classement sans suite ou engagement des poursuites pénales] dans un délai de trente jours à partir de la date de la demande d'évocation introduite conformément aux termes du premier paragraphe. »

17. Le Conseil supérieur de la magistrature (CSM) a été saisi le 27 mars 2007 d'une demande portant sur la validité et l'interprétation de sa

précédente délibération du 16 juillet 1997 concernant la réglementation de l'évocation des enquêtes préliminaires pour lesquelles les délais étaient échus. Par une décision du 12 septembre 2007 (« Pouvoir d'évocation du procureur général près la cour d'appel »), le CSM a tout d'abord rappelé qu'il avait mené une enquête sur les approches et les différentes pratiques adoptées par les parquets généraux et en avait conclu que le droit interne ne prévoyait aucun pouvoir discrétionnaire du procureur général en matière d'évocation. À la lumière de ces éléments, tout en précisant qu'il était « conscient du fait qu'il était impossible pour les parquets généraux de réussir à évoquer toutes les enquêtes préliminaires pour lesquelles les délais étaient déjà échus et, ensuite, à mener à terme lesdites enquêtes dans le bref délai de trente jours à partir de la décision d'évoquer l'affaire », le CSM a noté que sa délibération de 1997 avait indiqué une solution pratique à la question concernant les critères à retenir pour la sélection des affaires à évoquer et qu'elle visait à « apporter une solution raisonnable à une situation qui, autrement, pourrait devenir insoutenable étant donné que les parquets généraux n'[avaient] pas la possibilité matérielle d'évoquer toutes les enquêtes préliminaires pour lesquelles les délais [étaient] échus ». En effet, en 1997, le CSM avait limité l'évocation obligatoire aux seules affaires où, une fois les délais échus, le procureur ne pouvait pas demander le classement sans suite ou engager les poursuites pénales car d'autres actes d'enquête étaient nécessaires.

EN DROIT

I. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 6 § 1 DE LA CONVENTION

18. Le requérant se plaint que la durée de la procédure pénale ait été excessive et que, en décidant le classement sans suite de sa plainte pénale en raison de la prescription, les autorités internes l'aient empêché d'accéder à un tribunal. Il invoque l'article 6 § 1 de la Convention, qui est ainsi libellé :

> « Toute personne a droit à ce que sa cause soit entendue équitablement (...) et dans un délai raisonnable, par un tribunal (...), qui décidera (...) des contestations sur ses droits et obligations de caractère civil (...) »

19. Le Gouvernement admet que l'affaire porte principalement sur « l'inaction du parquet qui aurait entraîné la prescription et empêché l'accès à un tribunal » mais conteste la thèse soutenue par le requérant.

A. Sur la recevabilité

1. Sur l'applicabilité de l'article 6 de la Convention

20. Le Gouvernement soutient que les griefs du requérant sont incompatibles *ratione materiae* et qu'ils doivent donc être rejetés. Il indique en particulier ce qui suit : la procédure pénale s'est achevée par un classement sans suite, et ce sans que l'inculpé ait été renvoyé en jugement ; par conséquent, le requérant n'a jamais eu la qualité de partie dans la procédure et il n'a jamais pu demander de dédommagement ; compte tenu du fait qu'en droit italien le principe de la prééminence du pénal sur le civil n'est pas reconnu et qu'il était loisible au requérant d'entamer une procédure civile pour obtenir un dédommagement, la procédure pénale n'était pas « directement » déterminante pour le droit de caractère civil de l'intéressé ; ainsi, contrairement à ce qui prévalait dans l'affaire *Perez c. France* ([GC], n° 47287/99, CEDH 2004-I), le volet civil n'était pas étroitement lié au déroulement de la procédure pénale.

21. Le requérant argue que l'article 6 de la Convention trouve à s'appliquer en l'espèce.

22. La Cour rappelle que, selon sa jurisprudence, la Convention ne reconnaît pas, en soi, le droit de faire poursuivre ou condamner pénalement des tiers. Pour entrer dans le champ de la Convention, ce droit doit impérativement aller de pair avec l'exercice par la victime de son droit d'intenter l'action, par nature civile, offerte par le droit interne, ne serait-ce qu'en vue d'obtenir une réparation symbolique ou la protection d'un droit de caractère civil, à l'instar par exemple du droit de jouir d'une « bonne réputation ». Dès lors, l'article 6 § 1 de la Convention s'applique aux procédures relatives aux plaintes avec constitution de partie civile dès l'acte de constitution de partie civile, à moins que la victime ait renoncé de manière non équivoque à l'exercice de son droit à réparation (*Perez*, précité, §§ 66-71, et *Gorou c. Grèce* (n° 2) [GC], n° 12686/03, §§ 24−25, 20 mars 2009). De plus, la Cour a considéré cette disposition comme applicable à la partie lésée qui ne s'était pas constituée partie civile, dès lors qu'en droit italien, même avant l'audience préliminaire, où une telle constitution peut être présentée, la victime de l'infraction peut exercer les droits et les facultés expressément reconnus par la loi (*Sottani c. Italie* (déc.), n° 26775/02, CEDH 2005-III (extraits), *Patrono, Cascini et Stefanelli c. Italie*, n° 10180/04, §§ 31-32, 20 avril 2006, et *Arnoldi*, précité, §§ 25-44).

23. En l'espèce, la Cour constate que la plainte du requérant visait à faire valoir un droit de caractère civil – à savoir le droit à la protection de sa réputation –, dont l'intéressé pouvait, de manière défendable, se prétendre titulaire. Par ailleurs, dans sa plainte, le requérant avait affirmé qu'il entendait se constituer partie civile dans la procédure pénale et réclamer cinq millions EUR de dommages-intérêts. Il avait également expressément

demandé à être prévenu d'un éventuel classement de l'affaire (paragraphe 6 ci-dessus). Par conséquent, le requérant a exercé, au moins, l'un des droits et facultés reconnus par le droit interne à la partie lésée (*Arnoldi*, précité, § 41). Compte tenu des arguments avancés par le Gouvernement et des conclusions retenues par elle dans les affaires susmentionnées, la Cour rejette l'exception soulevée par le Gouvernement. L'article 6 § 1 de la Convention est ainsi applicable à la présente espèce.

2. Sur l'épuisement des voies de recours internes

a) Quant à la demande d'évocation

24. Le Gouvernement excipe du non-épuisement des voies de recours internes. Selon lui, eu égard au fait que les articles 405 et 406 du CPP prévoient des délais pour l'accomplissement des actes d'investigation, le requérant aurait pu se prévaloir de l'inaction du parquet, tout d'abord en sollicitant le parquet lui-même et ensuite en demandant, sur le fondement des articles 412 et 413 du CPP, au procureur général près la cour d'appel de procéder à l'évocation de l'enquête. À cet égard, la Cour constate que, dans ses premières observations, le Gouvernement a seulement mentionné un arrêt de la Cour de cassation (n° 19833 de 2009) et que, ultérieurement, dans ses observations complémentaires, il a fait référence à : a) une décision du 6 décembre 2011 du procureur général près la cour d'appel de Brescia, par laquelle ledit procureur avait rejeté une demande d´évocation car le procureur en charge de l'affaire avait entretemps clos les investigations préliminaires ; et b) la décision du CSM du 12 septembre 2007 concernant le pouvoir d'évocation du procureur général près la cour d'appel.

25. Le requérant estime que les voies indiquées par le Gouvernement ne sont pas effectives, pour les motifs suivants : tout d'abord, les autorités n'avaient pas besoin d'être sollicitées pour être mises au courant des retards du parquet car, selon l'article 127 des dispositions de mise en oeuvre du CPP, le greffe du parquet devait transmettre chaque semaine au procureur général près la cour d'appel la liste des enquêtes pour lesquelles le parquet n'avait pas engagé de poursuites pénales ou n'avait pas demandé le classement sans suite des accusations ; en outre, la personne lésée n'avait aucune possibilité de contraindre le parquet à poursuivre l'enquête ; enfin, il ne jouissait d'aucun « droit » effectif, fondé sur une base légale claire et accessible, de formuler une demande d'évocation ni d'aucun droit de contester le rejet éventuel d'une telle demande.

26. La Cour rappelle que, aux termes de l'article 35 § 1 de la Convention, elle ne peut être saisie qu'après l'épuisement des voies de recours internes. Tout requérant doit avoir donné aux juridictions internes l'occasion de redresser les violations alléguées contre les Hautes Parties contractantes. Cette règle se fonde sur l'hypothèse, objet de l'article 13 de la Convention – avec laquelle elle présente d'étroites affinités –, que l'ordre

interne doit offrir un recours effectif quant à la violation alléguée. Les dispositions de l'article 35 § 1 ne prescrivent toutefois l'épuisement que des seuls recours à la fois relatifs aux violations incriminées, disponibles et adéquats. Ces recours doivent exister à un degré suffisant de certitude, non seulement en théorie, mais aussi en pratique, sans quoi leur manquent l'effectivité et l'accessibilité voulues.

27. En ce qui concerne la charge de la preuve, la Cour rappelle qu'il incombe au Gouvernement excipant du non-épuisement de la convaincre que le recours était effectif et disponible tant en théorie qu'en pratique à l'époque des faits (voir, parmi beaucoup d'autres, *McFarlane c. Irlande* [GC], n° 31333/06, § 107, 10 septembre 2010, *Vučković et autres c. Serbie* (exception préliminaire) [GC], n°s 17153/11 et 29 autres, § 77, 25 mars 2014, et *Magyar Kétfarkú Kutya Párt c. Hongrie* [GC], n° 201/17, § 52, 20 janvier 2020). La base de la voie de recours doit donc être claire en droit interne (*Scavuzzo-Hager et autres c. Suisse* (déc.), n° 41773/98, 30 novembre 2004, et *Ceylan c. Turquie* (déc.), n° 26065/06, 17 mars 2015). La disponibilité du recours invoqué, y compris sa portée et son champ d'application, doit être exposée avec clarté et confirmée ou complétée par la pratique ou la jurisprudence (*Gherghina c. Roumanie* (déc.) [GC] n° 42219/07, § 88, 9 juillet 2015, *McFarlane*, précité, §§ 117 et 120, et *Mikolajová c. Slovaquie*, n° 4479/03, § 34, 18 janvier 2011). Celle-ci doit en principe être bien établie et antérieure à la date d'introduction de la requête (*Gherghina*, décision précitée, § 88), sauf exceptions justifiées par les circonstances d'une affaire.

28. Pour ce qui est du remède, évoqué par le Gouvernement, prévu par l'article 413 du CPP (paragraphe 16 ci-dessus), la Cour rappelle qu'elle a considéré, à plusieurs reprises, qu'un recours hiérarchique n'est pas un recours effectif dès lors, qu'en règle générale, il ne confère pas à son auteur un droit personnel à obtenir de l'État l'exercice de ses pouvoirs de surveillance (*Sürmeli c. Allemagne* [GC], n° 75529/01, § 109, CEDH 2006-VII). Elle est parvenue à cette même conclusion dans le cas où la procédure engagée ne prévoit pas la participation du requérant, mais uniquement le droit de celui-ci à être informé de l'issue de la procédure même (*Jevremović c. Serbie*, n° 3150/05, § 72, 17 juillet 2007). Enfin, elle a affirmé que, en l'absence de droit d'appel, un recours hiérarchique ne saurait avoir un effet significatif aux fins de l'accélération de la procédure dans son ensemble (*Lukenda c. Slovénie*, n° 23032/02, § 63, CEDH 2005-X).

29. En l'espèce, la Cour relève que le Gouvernement n'a pas démontré, à la lumière des critères rappelés au paragraphe 28 ci-dessus, que le recours hiérarchique était, tant en théorie qu'en pratique à l'époque des faits, à même d'entraîner une accélération des investigations préliminaires. En particulier, le Gouvernement n'a pas réussi à établir que ce remède reconnaissait à la partie lésée un véritable droit personnel à obtenir de l'État

l'exercice de ses pouvoirs de surveillance, à participer à la procédure, à être informé de son issue et à exercer un droit d'appel contre la décision de refus d'évoquer l'enquête. En effet, l'arrêt de la Cour de cassation n° 19833 de 2009 rappelle seulement que le procureur général a le pouvoir d'évoquer l'enquête en vertu de l'article 412 du CPP et affirme que le non-respect des délais prévus par l'article 405 du CPP (paragraphe 14 ci-dessus) n'entraîne pas une forclusion pour le procureur à engager les poursuites pénales. Par ailleurs, le Gouvernement ne fournit pas des éléments concluants démontrant l'effectivité de ce remède en pratique. Au contraire, la décision du CSM citée par le Gouvernement tendrait à démontrer l'inverse, car elle reconnaît ouvertement « qu'il [est] impossible pour les parquets généraux de réussir à évoquer toutes les enquêtes préliminaires pour lesquelles les délais [sont] déjà échus » et que « les parquets généraux n'[ont] pas la possibilité matérielle d'évoquer toutes les enquêtes préliminaires pour lesquelles les délais [sont] échus ». Ce constat ne saurait être remis en cause au seul motif qu'à une seule occasion, le procureur général près la cour d'appel de Brescia a rejeté une demande d'évocation en raison du fait que l'enquête avait été entretemps close par le procureur de première instance.

30. Par conséquent, la Cour rejette cette exception.

b) Quant à la voie de recours devant le juge civil

31. Dans ses observations complémentaires et sur la satisfaction équitable, le Gouvernement soutient également que le requérant aurait pu saisir les juridictions civiles aux fins de la protection de ses droits.

32. La Cour rappelle que, aux termes de l'article 55 de son règlement, si la Partie contractante défenderesse entend soulever une exception d'irrecevabilité, elle doit le faire, pour autant que la nature de l'exception et les circonstances le permettent, dans ses observations écrites ou orales sur la recevabilité de la requête (*N.C. c. Italie* [GC], n° 24952/94, § 44, CEDH 2002-X). La Cour souligne qu'une exception d'irrecevabilité doit être soulevée par le Gouvernement de manière explicite et qu'il ne lui incombe pas de la déduire des arguments avancés par celui-ci (voir, *mutatis mutandis, Navalnyy c. Russie* [GC], nos 29580/12 et 4 autres, §§ 60-61, 15 novembre 2018, où le gouvernement défendeur n'avait fait que dire, incidemment, en se penchant sur le fond d'un grief, que le requérant n'avait pas contesté les mesures litigieuses dans le cadre des procédures internes, et *Liblik et autres c. Estonie*, nos 173/15 et 5 autres, § 114, 28 mai 2019, où le gouvernement défendeur avait indiqué d'autres voies de recours qui étaient offertes aux requérants mais n'avait pas soulevé d'exception de non-épuisement des voies de recours internes). S'il en était autrement, la Cour viendrait à enfreindre le principe d'égalité des armes (voir, *mutatis mutandis*, *Radomilja et autres c. Croatie* [GC], nos 37685/10 et 22768/12, § 123, 20 mars 2018).

33. La Cour observe, à ce titre, que le Gouvernement a formellement soulevé cette exception, pour la première fois, dans ses observations complémentaires, et non pas dans ses observations initiales sur la recevabilité et sur le fond de l'affaire dans la partie dédiée aux exceptions de non-épuisement des voies de recours internes. Elle relève, par ailleurs, que le Gouvernement n'a fourni aucune explication à cet atermoiement, et elle constate qu'il n'existait aucune circonstance exceptionnelle de nature à l'exonérer de son obligation de soulever cette exception en temps utile. La Cour ne saurait non plus considérer comme une exception formelle de non-épuisement des voies de recours la simple référence faite par le Gouvernement, dans ses premières observations, à la possibilité pour le requérant de faire usage de la voie civile. En effet, cet élément a été soulevé exclusivement dans le cadre de l'exception concernant la compétence *ratione materiae* (paragraphe 20 ci-dessus) ; or le Gouvernement n'en a tiré aucune exception d'irrecevabilité pour défaut d'épuisement des voies de recours internes dans la partie correspondante de ce document. Dès lors, la Cour conclut que le Gouvernement est forclos, quant à ce deuxième volet, à exciper du non-épuisement des voies de recours internes (*Khlaifia et autres c. Italie* [GC], n° 16483/12, §§ 52 et 53, 15 décembre 2016).

34. La Cour rappelle, enfin, que dans l'affaire *Arnoldi* (précitée, § 42, et voir le paragraphe 53 ci-dessous), elle a établi que la question concernant l'existence d'autres voies aptes à protéger le droit de caractère civil est à examiner sous l'angle de la proportionnalité des restrictions du droit d'accès à un tribunal, et non pas sous celui de la recevabilité.

35. Partant, elle rejette également cette exception.

36. Constatant que la requête n'est pas manifestement mal fondée ni irrecevable pour un autre motif visé à l'article 35 de la Convention, la Cour la déclare recevable.

B. Sur le fond

1. Sur la violation alléguée de l'article 6 § 1 de la Convention à raison de la durée de la procédure

37. Le requérant soutient que la durée de la procédure a été excessive.

38. Le Gouvernement n'a pas estimé utile de présenter des observations sur le fond au motif que, selon lui, l'article 6 § 1 n'est, en tout état de cause, pas applicable en l'espèce.

39. La Cour souligne que la période à considérer dans le cadre d'une procédure pénale sous l'angle du « délai raisonnable » de l'article 6 § 1 débute, pour la personne qui se prétend lésée par une infraction, au moment où celle-ci exerce l'un des droits et facultés qui lui sont expressément reconnus par la loi (*Arnoldi*, précité, § 48).

40. En outre, la Cour rappelle que la durée raisonnable d'une procédure doit s'apprécier suivant les circonstances de la cause et à l'aide des critères

suivants : la complexité de l'affaire, le comportement du requérant, celui des autorités compétentes, et l'enjeu du litige pour l'intéressé (*Frydlender c. France* [GC], nº 30979/96, § 43, CEDH 2000-VII).

41. En l'espèce, la Cour constate que la période à prendre en compte a commencé le 28 juillet 2001, date du dépôt de la plainte du requérant, pour s'achever le 17 janvier 2007, date de la décision de classement sans suite adoptée par le juge des investigations préliminaires de Salerne. Cette période a donc duré cinq ans et six mois environ pour la seule phase des investigations préliminaires.

42. De plus, la Cour constate que, selon les documents fournis par les parties, pendant la période susmentionnée, aucune activité d'enquête n'a eu lieu, et que l'affaire n'était pas spécialement complexe. Enfin, elle constate que le Gouvernement n'a pas fourni d'arguments à même de justifier des investigations préliminaires d'une telle durée.

43. Ces éléments suffisent à la Cour pour conclure que, en l'espèce, la durée de la procédure litigieuse a été excessive et qu'elle n'a pas répondu à l'exigence du « délai raisonnable ». Partant, il y a eu violation de l'article 6 § 1 de la Convention.

2. Sur la violation alléguée de l'article 6 § 1 de la Convention à raison d'un défaut d'accès à un tribunal

44. Le requérant se plaint également d'une violation de l'article 6 § 1 de la Convention à raison d'un défaut d'accès à un tribunal. En effet, la décision de classer l'affaire sans suite pour cause de prescription de l'action pénale était due, à son avis, à l'inaction du parquet, ce qui l'aurait empêché de se constituer partie civile et d'obtenir la protection de ses droits de caractère civil et l'examen de sa demande de dédommagement. Enfin, le fait de l'obliger à introduire par la suite une action devant les juridictions civiles aurait pu se révéler inutilement stérile et coûteux, notamment en cas d'insolvabilité ultérieure de la partie adverse.

45. Le Gouvernement n'a pas estimé utile, une nouvelle fois, de présenter d'observations sur le fond au motif que, selon lui, l'article 6 § 1 n'est, en tout état de cause, pas applicable en l'espèce.

46. La Cour estime que le grief concernant le défaut d'accès au tribunal pose une question distincte par rapport à celle de la durée de la procédure et par conséquent, conformément à l'approche suivie dans les arrêts *Atanasova c. Bulgarie* (nº 72001/01, §§ 47 et 57, 2 octobre 2008) et *Tonchev c. Bulgarie* (nº 18527/02, §§ 49 et 53, 19 novembre 2009), elle va l'examiner séparément.

47. La Cour rappelle que toute personne dispose du droit à ce qu'un tribunal connaisse de ses contestations relatives à ses droits et obligations de caractère civil. C'est ainsi que l'article 6 § 1 de la Convention consacre le « droit à un tribunal », dont le droit d'accès, à savoir le droit de saisir le tribunal en matière civile, ne constitue qu'un aspect (*Prince Hans-Adam II*

de Liechtenstein c. Allemagne [GC], nº 42527/98, § 43, CEDH 2001-VIII, et *Cudak c. Lituanie* [GC], nº 15869/02, § 54, 23 mars 2010).

48. La Cour précise toutefois que ce droit n'est pas absolu : il se prête à des limitations implicitement admises, car il commande, de par sa nature même, une réglementation par l'État. Les États contractants jouissent en la matière d'une certaine marge d'appréciation. Il appartient cependant à la Cour de statuer en dernier ressort sur le respect des exigences de la Convention ; la Cour doit se convaincre ainsi que les limitations mises en œuvre ne restreignent pas l'accès offert à l'individu d'une manière ou à un point tels que ce droit s'en trouve atteint dans sa substance même. En outre, pareille limitation ne se concilie avec l'article 6 § 1 de la Convention que si elle tend à un but légitime et s'il existe un rapport raisonnable de proportionnalité entre les moyens employés et le but visé (*Waite et Kennedy c. Allemagne* [GC], nº 26083/94, § 59, CEDH 1999-I). En effet, le droit d'accès à un tribunal se trouve atteint lorsque sa réglementation cesse de servir les buts de la sécurité juridique et de la bonne administration de la justice et constitue une sorte de barrière qui empêche le justiciable de voir son litige tranché au fond par la juridiction compétente (*Tsalkitzis c. Grèce*, nº 11801/04, § 44, 16 novembre 2006). Dans l'affaire *Zubac c. Croatie* ([GC], nº 40160/12, §§ 90 et 95, 5 avril 2018), la Cour a rappelé que lorsqu'une erreur procédurale empêche le requérant d'accéder à un tribunal, elle a habituellement tendance à faire peser la charge sur celui qui a commis cette erreur. Elle a ajouté, dans cette même affaire, qu'une restriction à l'accès à un tribunal est disproportionnée quand l'irrecevabilité d'un recours résulte de l'imputation au requérant d'une faute dont celui-ci n'est objectivement pas responsable.

49. La Cour rappelle que, dans des affaires où était en cause l'absence d'examen au fond de constitutions de partie civile à raison de l'irrecevabilité des plaintes pénales auxquelles elles étaient jointes, elle a attaché de l'importance à l'accessibilité et à l'effectivité des autres voies judiciaires ouvertes aux intéressés pour faire valoir leurs prétentions, notamment des actions disponibles devant les juridictions civiles (*Forum Maritime S.A. c. Roumanie*, nºs 63610/00 et 38692/5, § 91, 4 octobre 2007). Dans les cas où elle a considéré que les requérants disposaient effectivement de pareils recours, elle a alors conclu à l'absence de violation du droit d'accès à un tribunal (*Assenov et autres c. Bulgarie*, nº 24760/94, § 112*, Recueil des arrêts et décisions* 1998–VIII, *Ernst et autres c. Belgique*, nº 33400/96, §§ 53-55, 15 juillet 2003, *Moldovan et autres c. Roumanie* (nº 2), nº 41138/98 et 64320/01, §§ 119-122, 12 juillet 2005, *Lacerda Gouveia et autres c. Portugal*, nº 11868/07, § 80, 1er mars 2011, et *Nicolae Virgiliu Tănase c. Roumanie* [GC], nº 41720/13, § 198, 25 juin 2019).

50. En particulier, la Cour n'a pas conclu à la violation de l'article 6 de la Convention dans le cas où les poursuites pénales n'avaient pas été menées ou avaient été abandonnées en raison du fait : qu'aucune infraction pénale

n'avait été constatée (*Georgi Georgiev c. Bulgarie* (déc.), nº 34137/03, 11 janvier 2011, *Assenov et autres*, précité, §§ 22-23, *Moldovan et autres*, précité, §§ 36-37, *Forum Maritime S.A.*, précité, § 30, et *Manolea et autres c. Roumanie* (déc.), nº 58162/14, § 23, 15 septembre 2020), ou que la procédure pénale s'était achevée en application d'un accord de « plaider coupable » (*Nikolov c. Bulgarie* (V) (déc.), nº 39672/03, 28 septembre 2010) ou d'un privilège de juridiction (*Ernst et autres*, précité, § 49) ou en raison du décès de l'accusé (*Manolea et autres*, précité, § 23). Il en est allé de même pour les affaires où le requérant avait déjà saisi, en parallèle, le juge civil et obtenu un examen sur le fond avant l'abandon des poursuites (*S.O.S. racisme – Touche pas à mon pote c. Belgique* (déc.) nº 26341/11, §§ 30-34, 12 janvier 2016, et, *mutatis mutandis*, *Borobar et autres c. Roumanie*, nº 5663/04, §§ 59-60, 29 janvier 2013).

51. En revanche, dans d'autres d'affaires, la Cour a conclu à la violation de l'article 6 de la Convention lorsque la clôture des poursuites pénales et le défaut d'examen de l'action civile étaient dus à des circonstances attribuables principalement aux autorités judiciaires, notamment à des retards excessifs de procédure ayant entraîné la prescription de l'infraction pénale (*Anagnostopoulos c. Grèce*, nº 54589/00, §§ 31-32, 3 avril 2003, *Tonchev,* précité, §§ 50-53, *Gousis c. Grèce*, nº 8863/03, §§ 34-35, 29 mars 2007, *Atanasova*, précité, §§ 35-47, *Dinchev c. Bulgarie*, nº 23057/03, §§ 40-52, 22 janvier 2009, *Boris Stojanovski c. l'ex-République yougoslave de Macédoine*, nº 41916/04, §§ 56-57, 6 mai 2010, *Rokas c. Grèce*, nº 55081/09, §§ 22-24, 22 septembre 2015, et *Korkolis c. Grèce*, nº 63300/09, §§ 21-25, 15 janvier 2015 ; voir, *a contrario*, *Lacerda Gouveia et autres*, précité, § 77, *Dimitras c. Grèce*, nº 11946/11, § 47, 19 avril 2018 et *Nicolae Virgiliu Tănase,* précité, §§ 196-202 et 207-214 où la Cour a constaté l'absence de responsabilité des autorités dans le déroulement de la procédure pénale, concluant ainsi à la non-violation de l'article 6 sous l'angle du droit d'accès à un tribunal et de la durée de la procédure).

52. En l'espèce, la Cour constate que le requérant avait fait usage des droits et facultés qui lui étaient ouverts en droit interne dans le cadre de la procédure pénale et qui lui auraient permis, au moment de l'audience préliminaire, de demander réparation du préjudice civil dont il se disait victime. En l'occurrence, c'est exclusivement en raison du retard avec lequel les autorités de poursuite ont traité le dossier et de la prescription de l'infraction dénoncée que le requérant n'a pas pu présenter sa demande de dédommagement (paragraphe 11 ci-dessus) et que, par conséquent, il n'a pas pu voir statuer sur cette demande dans le cadre de la procédure pénale (*Atanasova*, précité, § 45, et *Dragomir c. Croatie* [comité], nº 43045/08, § 48, 14 juin 2016).

53. La Cour en conclut, à l'instar de ce qu'elle a jugé dans les affaires citées au paragraphe 51 ci-dessus, que ce comportement fautif des autorités a eu pour conséquence de priver le requérant de voir ses prétentions de

caractère civil tranchées dans le cadre de la procédure qu'il avait choisi de poursuivre et qui était mise à sa disposition par l'ordre juridique interne. En effet, l'on ne saurait exiger d'un justiciable qu'il introduise une action aux mêmes fins en responsabilité civile devant la juridiction civile après le constat de prescription de l'action pénale en raison de la faute de la juridiction pénale (voir, *mutatis mutandis*, *Anagnostopoulos*, précité, § 32). À cet égard, la Cour relève, en particulier, que l'engagement d'une telle action impliquerait probablement la nécessité de rassembler de nouveau des preuves, que le requérant aurait désormais la charge de produire, et que l'établissement de l'éventuelle responsabilité civile pourrait s'avérer extrêmement difficile autant de temps après les faits (*Atanasova*, précité, § 46).

54. Partant, il y a eu violation de l'article 6 § 1 de la Convention.

II. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 13 DE LA CONVENTION À RAISON D'UNE ABSENCE DE RECOURS EFFECTIF PERMETTANT DE SE PLAINDRE DE LA DURÉE DE LA PROCÉDURE

55. Le requérant se plaint d'une absence d'effectivité du recours fondé sur la « loi Pinto », en avançant notamment pour motif que, en raison de la jurisprudence bien établie de la Cour de cassation, la partie lésée qui ne s'est pas constituée partie civile ne peut pas introduire ce recours. Il invoque l'article 13 de la Convention, ainsi libellé :

> « Toute personne dont les droits et libertés reconnus dans la (...) Convention ont été violés, a droit à l'octroi d'un recours effectif devant une instance nationale, alors même que la violation aurait été commise par des personnes agissant dans l'exercice de leurs fonctions officielles. »

A. Thèses des parties

56. Le Gouvernement considère que le grief tiré de l'article 13 doit être déclaré incompatible *ratione materiae* avec les dispositions de la Convention au motif que, selon lui, l'article 6 § 1 n'est pas applicable en l'espèce. Il ne se prononce pas quant au fond du grief.

57. Le requérant estime que, en raison de la jurisprudence bien établie de la Cour de cassation, il ne pouvait pas introduire le recours « Pinto » parce qu'il n'avait pas pu se constituer partie civile.

B. Appréciation de la Cour

1. Sur la recevabilité

58. La Cour rappelle que l'article 13 de la Convention garantit l'existence en droit interne d'un recours permettant de se prévaloir des

droits et libertés de la Convention tels qu'ils y sont consacrés. Cette disposition a donc pour conséquence d'exiger un recours interne habilitant à examiner le contenu d'un « grief défendable » fondé sur la Convention et à en offrir le redressement approprié (*De Souza Ribeiro c. France* [GC], n° 22689/07, § 78, 13 décembre 2012).

59. En l'espèce, la Cour vient de conclure que l'article 6 § 1 était applicable (paragraphes 22-23 ci-dessus) et elle a constaté la violation de cette disposition notamment à raison de la durée excessive de la procédure (paragraphes 39-43 ci-dessus). Il s'ensuit que le requérant disposait d'un grief défendable sous l'angle de l'article 6 § 1, et que l'article 13 de la Convention trouve à s'appliquer en l'espèce.

60. Constatant que ce grief n'est pas manifestement mal fondé au sens de l'article 35 § 3 a) de la Convention et qu'il ne se heurte à aucun autre motif d'irrecevabilité, la Cour le déclare recevable.

2. Sur le fond

61. La Cour observe que les principes qui se dégagent de l'article 2 alinéa 2 *bis* de la loi n° 89 de 2001 et de la jurisprudence interne consolidée en la matière confirment l'inapplicabilité du recours « Pinto » à la partie lésée qui n'a pas pu se constituer partie civile dans une procédure pénale (paragraphes 10 et 12 ci-dessus).

62. Ainsi, la Cour estime qu'il y a eu violation de l'article 13 de la Convention à raison de l'absence en droit interne d'un recours permettant au requérant d'obtenir la sanction de son droit à voir sa cause entendue dans un délai raisonnable, au sens de l'article 6 § 1 de la Convention (voir, *mutatis mutandis*, *Xenos c. Grèce*, n° 45225/09, § 44, 13 juillet 2017, et *Cipolletta c. Italie*, n° 38259/09, § 49, 11 janvier 2018).

III. SUR LES AUTRES VIOLATIONS ALLÉGUÉES DE LA CONVENTION

63. Enfin, le requérant invoque également, à l'appui de ses allégations, l'article 8 de la Convention et l'article 6 de la Convention combiné avec l'article 14 de la Convention.

64. La Cour considère que ces griefs sont absorbés par les griefs tirés des articles 6 et 13 de la Convention et elle estime qu'il n'est pas nécessaire de les examiner séparément.

IV. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

65. Aux termes de l'article 41 de la Convention :

> « Si la Cour déclare qu'il y a eu violation de la Convention ou de ses Protocoles, et si le droit interne de la Haute Partie contractante ne permet d'effacer

qu'imparfaitement les conséquences de cette violation, la Cour accorde à la partie lésée, s'il y a lieu, une satisfaction équitable. »

A. Dommage

66. Le requérant demande 500 000 euros (EUR) au titre du dommage moral qu'il dit avoir subi.

67. Le Gouvernement conteste cette prétention et considère la somme réclamée excessive.

68. La Cour estime qu'il y a lieu d'octroyer au requérant 5 200 EUR pour dommage moral, plus tout montant pouvant être dû sur cette somme à titre d'impôt.

B. Frais et dépens

69. Le requérant sollicite 27 727,20 EUR au titre des frais et dépens qu'il a engagés aux fins de la procédure menée devant la Cour.

70. Le Gouvernement conteste cette prétention et considère la somme réclamée excessive.

71. Selon la jurisprudence de la Cour, un requérant ne peut obtenir le remboursement de ses frais et dépens que dans la mesure où se trouvent établis leur réalité, leur nécessité et le caractère raisonnable de leur taux. En l'espèce, compte tenu des documents dont elle dispose et des critères susmentionnés, la Cour juge raisonnable d'allouer au requérant la somme de 2 000 EUR pour la procédure menée devant elle, plus tout montant pouvant être dû sur cette somme par l'intéressé à titre d'impôt.

C. Intérêts moratoires

72. La Cour juge approprié de calquer le taux des intérêts moratoires sur le taux d'intérêt de la facilité de prêt marginal de la Banque centrale européenne majoré de trois points de pourcentage.

PAR CES MOTIFS, LA COUR,

1. *Déclare*, à l'unanimité, la requête recevable ;

2. *Dit*, à l'unanimité, qu'il y a eu violation de l'article 6 § 1 de la Convention à raison de la durée de la procédure ;

3. *Dit*, par cinq voix contre deux qu'il y a eu violation de l'article 6 § 1 de la Convention à raison d'une atteinte au droit d'accès du requérant à un tribunal ;

4. *Dit*, l'unanimité, qu'il y a eu violation de l'article 13 de la Convention ;

5. *Dit*, l'unanimité, qu'il n'y a pas lieu d'examiner séparément les griefs formulés sur le terrain de l'article 8 de la Convention et de l'article 6 § 1 de la Convention combiné avec l'article 14 de la Convention ;

6. *Dit* à l'unanimité,
   a) que l'État défendeur doit verser au requérant, dans un délai de trois mois à compter de la date à laquelle l'arrêt sera devenu définitif conformément à l'article 44 § 2 de la Convention, les sommes suivantes :
      i. 5 200 EUR (cinq mille deux cents euros), plus tout montant pouvant être dû sur cette somme à titre d'impôt, pour dommage moral,
      ii. 2 000 EUR (deux mille euros), plus tout montant pouvant être dû sur cette somme par le requérant à titre d'impôt, pour frais et dépens,
   b) qu'à compter de l'expiration dudit délai et jusqu'au versement, ces montants seront à majorer d'un intérêt simple à un taux égal à celui de la facilité de prêt marginal de la Banque centrale européenne applicable pendant cette période, augmenté de trois points de pourcentage ;

7. *Rejette* à l'unanimité, la demande de satisfaction équitable pour le surplus.

Fait en français, puis communiqué par écrit le 18 mars 2021, en application de l'article 77 §§ 2 et 3 du règlement.

Renata Degener Greffière	Ksenija Turković Présidente

Au présent arrêt se trouve joint, conformément aux articles 45 § 2 de la Convention et 74 § 2 du règlement, l'exposé des opinions séparées suivantes :

– opinion en partie dissidente du juge Wojtyczek ;
– opinion en partie dissidente du juge Sabato.

K.T.U.
R.D.

OPINION EN PARTIE DISSIDENTE DU JUGE WOJTYCZEK

1. Je ne partage pas l'avis de la majorité selon lequel il y a eu violation de l'article 6 § 1 de la Convention à raison d'une atteinte au droit d'accès du requérant à un tribunal. Sur cette question, je suis d'accord avec les principaux arguments exposés, avec brio, par le juge Sabato.

2. Dans la présente opinion, je souhaite ajouter très brièvement les points suivants. Si j'ai voté en faveur d'un constat de violation de l'article 6 § 1 de la Convention à raison de la durée de la procédure, je l'ai fait avec beaucoup d'hésitations. Dans la plupart des affaires dans lesquelles la Cour a déclaré l'article 6 applicable aux prétentions de droit civil qui avaient été soulevées dans une procédure pénale, l'accès au juge civil était fermé de *iure* ou *de facto* pendant la durée de la procédure pénale. Dans un tel cas de figure, les retards dans la procédure pénale retardent l'obtention de l'arrêt de fond sur la question civile. Or, comme l'explique le juge Sabato, en droit italien, l'accès au juge civil est ouvert pendant la procédure pénale.

3. La majorité présente son principal argument en faveur de la violation de l'article 6 § 1 à raison d'une atteinte au droit d'accès à un tribunal de la manière suivante (paragraphe 53 de l'arrêt) :

> En effet, l'on ne saurait exiger d'un justiciable qu'il introduise une action aux mêmes fins en responsabilité civile devant la juridiction civile après le constat de prescription de l'action pénale en raison de la faute de la juridiction pénale (voir, *mutatis mutandis*, *Anagnostopoulos*, précité, § 32). À cet égard, la Cour relève, en particulier, que l'engagement d'une telle action impliquerait probablement la nécessité de rassembler de nouveau des preuves, que le requérant aurait désormais la charge de produire, et que l'établissement de l'éventuelle responsabilité civile pourrait s'avérer extrêmement difficile autant de temps après les faits (*Atanasova*, précité, § 46).

Je ne vois pas pourquoi on ne saurait exiger d'un justiciable qu'il introduise une action en responsabilité civile devant la juridiction civile après le constat de prescription de l'action pénale. Je note par ailleurs, que la présente affaire concerne la protection de la réputation. En général, les litiges civils concernant la réputation ne sont pas particulièrement compliqués factuellement. De plus, dans beaucoup de systèmes juridiques, la charge de prouver la véracité des allégations affectant les droits de la personnalité incombe au défendeur. Dans la présente affaire, rassembler les preuves et établir la responsabilité civile n'apparaît pas comme une tâche particulièrement difficile pour le demandeur. L'approche de la majorité, qui consiste à mettre en exergue les difficultés habituelles à plaider dans une affaire civile, semble remettre en cause l'idée même de procès civil fondé sur le principe *actori incumbit onus probandi* et sur l'égalité des armes entre les parties.

4. Je note par ailleurs que la présente affaire concerne non seulement la protection de la réputation mais aussi la liberté d'expression de la partie adverse. La majorité encourage implicitement l'accès à la justice pénale comme voie privilégiée, car plus facile, pour assurer la protection du droit civil à la réputation. Une telle approche n'est pas sans poser de problèmes.

PARTLY DISSENTING OPINION OF JUDGE SABATO

I. INTRODUCTION

1. With some hesitations (which I will explain in part V of this opinion) I voted with the majority in finding a violation of Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") because of the excessive length of the proceedings in the present case (*Petrella*[1]). I also concurred in finding a violation of Article 13. I was, on the contrary, unable to agree to the finding by the majority of a violation of the same provision of Article 6 § 1 on account of an alleged infringement of the applicant's right of access to a court.

2. I believe that this latter finding by the majority introduces a development which departs from the previous prevailing case-law of the Court, as validated by the Grand Chamber. Moreover, I consider this development to be not only – respectfully – incorrect, but also dangerous, since it brings about a confusion of concepts and errors in the perception of Convention guarantees that – as is well known – are counterproductive and even fatal for an effective protection of rights and liberties under the Convention (see part VI below).

3. This opinion seeks, therefore, to highlight the serious questions concerning the application of the Convention that the majority's approach raises (see conclusions in part VII below).

II. THE RELATIONSHIP BETWEEN THE PROTECTION OF THE RIGHT OF ACCESS TO A COURT AND THE PROTECTION OF THE RIGHT TO A REASONABLE LENGTH OF PROCEEDINGS

A. The *Golder* concepts

4. As is widely known, Article 6 of the Convention does not explicitly guarantee a right of access to a court. The enunciation of such a right to institute proceedings before courts in civil matters (and only in civil matters) derives from the Court's interpretation of Article 6: in the leading judgment of *Golder v. the United Kingdom* (21 February 1975, § 28, Series A no. 18), the Court held:

> "... Article 6 para. 1 does not state a right of access to the courts or tribunals in express terms [but rather] rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the Court to ascertain, by means of interpretation, whether access to the courts constitutes one factor or aspect of this [single] right".

[1] For reasons of readability, I will refer to cases, after the first citation, with the first words of their title only, omitting expressions like "cited above".

5. The reasoning in *Golder* is complex, including consideration of basic principles of interpretation of treaties, extending over paragraphs 29-36 of the judgment.

6. In so far as the present case is concerned, it may suffice to recall that in *Golder* (§ 36) the Court concluded:

> "... Article 6 para. 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para. 1 as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing."

It may be important to emphasise that the Court left open the issue as to

> "whether and to what extent Article 6 para. 1 further require[d] a decision on the very substance of the dispute."

7. The relationship between the several components of the all-encompassing "right to a fair hearing" (to which the Court also refers as a broad "right to a court") is clearly depicted in paragraph 35 of *Golder*: the Convention "first protect[s] that which alone makes it in fact possible to benefit from ... guarantees, that is, access to a court"[2]; then "afford[s] to parties in a pending lawsuit" some "procedural guarantees" which the Article "describe[s] in detail". What is most relevant, is that "[t]he fair, public and expeditious characteristics of judicial proceedings", i.e., the detailed procedural guarantees for all parties to pending proceedings enunciated explicitly in Article 6, "are of no value at all if there are no judicial proceedings", i.e., if the right of access is not afforded to the claimant.

8. I consider that the Court should always be mindful of such a brilliant construction which, in my opinion, does not lend itself to misunderstanding, nor – to my knowledge – has it ever been reconsidered by the Court. Furthermore, the right of access to a court has become very well known and a subject of reflection by scholarly work, domestic judiciaries and human rights agencies. A successful handbook on access to justice in Europe (whose component of access to a court is very relevant) has been jointly prepared by the European Union Agency for Fundamental Rights (FRA) and the Council of Europe together with the Registry of the Court[3]; a number of courses on access to justice – again having access to a court as a core element – are successfully offered to European legal professionals by

[2] Throughout this opinion, any emphasis – when used – is my own.

[3] The handbook is downloadable at https://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice and https://www.echr.coe.int/documents/handbook_access_justice_eng.pdf .

the HELP programme of the Council of Europe[4]. In sum, access to a court is an important legacy from *Golder*.

9. In *Petrella* I fear that the majority became oblivious to the *Golder* concepts: based on *Golder*, within the wider right to a fair hearing (or "to a court"), the Court has established a clear ranking of protections. First, the Court must verify that the component "right of access to a court" has been respected; if "there are no judicial proceedings" (the right of access is defined synonymically as a right to have a claim "brought before a court or tribunal" or as a right "to institute proceedings before courts in civil matters"), respect for the component related to "procedural guarantees", which the Article "describe[s] in detail" (and which cover, among other aspects, "[t]he ... expeditious characteristics of judicial proceedings"), need not be assessed. If, on the contrary, access has been ensured, then procedural details must be verified by the Court, as the guarantees are "afforded to parties in a pending lawsuit", while they "are of no value at all if there are no judicial proceedings".

10. The right of access to a court is applicable only to the determination of a victim's civil rights and obligations (in fact, the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently: it must be indissociable from the victim's exercise of a right to bring civil proceedings in domestic law (see *Perez v. France* [GC], no. 47287/99, § 70, 12 February 2004)); moreover, the component rights of the procedural guarantees are different between the civil and criminal law areas; the right to a reasonable timeframe applies, however, to both civil and criminal proceedings.

B. The conflict between Commission and Court in *Matos e Silva* and the "common basis" for their positions

11. After the *Golder* case-law became established (and this took place remarkably through *Ashingdane v. the United Kingdom*, 28 May 1985, §§ 57 *et seq.*, Series A no. 93, where no violation of the right of access was found), a decade elapsed before the Court was called upon to decide on the specific topic under scrutiny in the present case: can the Court, at the same time, find a denial of access to a court and an excessive length of proceedings? The question is dealt with through different approaches, but they have – as I will try to show – a common basis: just like European languages offer a remarkable series of proverbs emphasising the impossibility of obtaining simultaneously incompatible results of human actions[5], almost with no exception (*Petrella* might be, if it becomes final,

[4] See https://www.coe.int/en/web/help/about-help.

[5] Thus "you can't have your cake and eat it", in English and several other languages, whereas French refers to getting money from selling butter, and keeping the butter; not to mention the Italian with its reference to the wine barrel ... Global popular wisdom

one out of three) the answer by the Court is that violations for a denial of access to a court and for an excessive length of proceedings cannot coexist.

12. In *Matos e Silva, Lda., and Others v. Portugal* (16 September 1996, Reports 1996-IV) the Commission had been confronted with complaints simultaneously proposed on the "grounds of a lack of effective access to a tribunal" and "on the grounds of the length of proceedings" (§ 68 of the Commission's Opinion, Report of 21 February 1995); in addition, a complaint under Article 13 had been made. Proceedings had been stayed for years before the Portuguese Supreme Administrative Court, since the administrative file had been requested from the Government, but no transmission had taken place.

13. The Commission found that "a hindrance in fact [might] contravene the Convention just as much as an impediment in law", and that the obstacle at issue was a "major hindrance to the effective exercise of the applicants' ... right of access to a court" (§§ 80-83 of the Opinion). Having found a violation of the right of access ("[i]n the light of ... the conclusion set out in paragraph 83 above ..."), the Commission considered that it [was] not necessary to examine, in addition, the applicants' complaint relating to the length of the proceedings at issue" and concluded that "no separate question [arose] ... in relation to the length of proceedings" (§§ 88-89 of the Opinion).

14. When the case reached the Chamber, the Court took a different position, somehow going back to the *Golder* concepts (see above in this opinion, § II.A): it was not the right of access to a court that had been infringed, but the right to a reasonable length of proceedings:

> "64. In the Court's view, no question of hindering access to a tribunal arises where a litigant, represented by a lawyer, freely brings proceedings in a court, makes his submissions to it and lodges such appeals against its decisions as he considers appropriate. As the Government rightly pointed out, Matos e Silva have used the remedies available under Portuguese law. The fact that the proceedings are taking a long time does not concern access to a tribunal. The difficulties encountered thus relate to conduct of proceedings, not to access.
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> In short, there has been no violation of Article 13 or, in this regard, of Article 6 para. 1, the requirements of the former being moreover less strict than, and here absorbed by, those of the latter."

15. As I have already said, what in my view matters most is the common basis for both the Commission's and the Court's approaches: simultaneous violations on both grounds – access and length – are not possible. To repeat the Court's formulation in *Matos e Silva*: "The fact that the proceedings are taking a long time does not concern access to a tribunal. The difficulties encountered ... relate to conduct of proceedings, not to access". Of course, the Commission had taken the opposite position, but what is crucial is that for both bodies no co-existence of violations was possible.

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expresses truths based on common sense.

16. For the purpose of this opinion (i.e., to illustrate the fact that the majority in *Petrella* have unexpectedly been unfaithful to the Court's well established case-law, and have followed erratic precedents), I do not need to take a clear-cut position on the Court's opposition to the Commission in *Matos e Silva*, although I find that the Court's position is, in the abstract, preferable. However, I can accept that it may occur that, in specific circumstances, proceedings are so severely hindered that their ongoing conduct is only theoretical and illusory. I would therefore accept that in rare cases the Commission's approach may be appropriate. But even adopting this flexible point of view, the conceptual incompatibility – mentioned by *Golder* – of finding simultaneous violations on both grounds – access and length – should, in my opinion, be respected. Failure to respect this would, as I will seek to show, bring about confusion and jeopardise the protection of human rights.

C. *Anagnostopoulos* follows the Commission, but does not contradict the *Golder*/*Matos e Silva* common basis

17. The common basis establishing the above-mentioned conceptual incompatibility has indeed been respected in the development of the Court's case-law, even when the Commission's approach was revived a few years later in a judgment concerning Greece on which – in my opinion, incorrectly – the majority's view heavily relies: in *Anagnostopoulos v. Greece* (no. 54589/00, 3 April 2003) a claim for civil damages in the context of criminal proceedings had not come to adjudication, since the belated summoning of the accused by an investigating judge had caused the offence to become time-barred. In this context, the Court held that the delay had deprived the applicant of the right of access to a court. It is important to note that the Court took due account of a country-specific feature (to which I shall refer several times – see, e.g., paragraphs 46, 52, 61, and 109 of the present opinion), namely that the Greek criminal courts were obliged to rule on compensation, within the limited amount provided by law, as claimed by the applicant, without being able, in case of conviction, to refer the civil action to the civil courts (see §§ 19, 27 and 31-32 of *Anagnostopoulos*).

18. The majority in *Petrella* rely on *Anagnostopoulos* in one of their arguments (see paragraph 51 of *Petrella*, which is under part B.2 concerning access to a court, after B.1 where a violation for the length of proceedings is found). Such argument appears to me to be developed as if *Anagnostopoulos* were a precedent for simultaneous violations on both grounds – access and length. But this is not the case, since *Anagnostopoulos* only reiterates the Commission's approach in *Matos e Silva* by finding a violation of access to a court resulting from a severe hindrance in fact, considered in the context of the country-specific obligation for criminal courts to adjudicate symbolic civil claims in case of conviction. There is no

hint in *Anagnostopoulos* of possible simultaneous violations on the grounds of access and length. In this sense, *Anagnostopoulos*, despite having a different approach, does not contradict *Golder*, as explained above, or the common position in *Matos e Silva*: if there is no violation of the right of access, there may be a violation of the right to a reasonable length, while it is not possible that, if there is a violation of the right of access, there may also be a violation of the right to a reasonable length: *plus includit minus*.

19. One should also recall that Judges Lorenzen and Vajić appended a dissenting opinion to the *Anagnostopoulos* judgment. They stated their preference for the Court's (and not the Commission's) approach in *Matos e Silva* and – this is very relevant for my consideration of *Petrella* – invoked for the first time a possible intervention by the Grand Chamber, should *Matos e Silva* be disavowed (an invocation that, *mutatis mutandis*, applies also in *Petrella* – see my conclusion under VII below):

> "The fact that the time-barring of the criminal proceedings resulted from a lengthy judicial investigation including a period of inaction of more than four years cannot lead to any other conclusion. ... [T]he Court has constantly reaffirmed in its case-law that even very lengthy periods of inaction in judicial proceedings cannot be equated with a lack of effective access to a court. In *Matos e Silva, Lda., and Others v. Portugal*, 16 September 1996, the Court – going against the Opinion of the Commission – declared categorically: '... The fact that the proceedings are taking a long time does not concern access to a tribunal. The difficulties encountered ... relate to conduct of proceedings, not to access' (§ 64). On the basis of this conclusion, other cases similar to the present case have been treated as relating to a problem of length of proceedings, and not to a question of access to a court (see the very recent judgment in *Textile Traders Limited v. Portugal*, 27 February 2003). This case-law can of course be modified but, in our opinion, such modification would be the responsibility of a Grand Chamber".[6]

20. Moreover, the dissenting judges accepted – and again, this serves the purpose of the present opinion – a common ground with the majority in the view that breaches of the Convention protections of access to a court and of a reasonable length of proceedings are alternative findings.

D. Two erratic precedents opposing both *Matos e Silva* and *Anagnostopoulos* (and one additional precedent to go with them)

21. The *Matos e Silva* concepts have been consistently affirmed by the Court up to now; but occasionally, especially in some cases concerning Greece, the *Anagnostopoulos* approach has been adopted.

22. Only in two cases concerning Bulgaria – closely linked to each other, as to both time of delivery and similarity of reasoning – can one trace simultaneous findings of violations of the right of access and of a

[6] Again for the sake of readability, starting from this point in the text and throughout this opinion, quotes of passages originally only in French are translated. The translations are my own.

reasonable length of proceedings. In my analysis which follows, these precedents have been attributed no precedential value as regards the aspect under scrutiny; they have substantially remained and should remain *sub salice* and *sub silentio*, especially since the time when the Grand Chamber – as I will mention – dealt with the issue.

23. Although there were clear indications, as I will show, that these precedents should have been considered *per incuriam*, unfortunately the majority in *Petrella* (paragraph 46) have rediscovered them. I therefore feel obliged to quickly comment on both, together with a third case indirectly related to them, in order to emphasise their erraticism.

1. Atanasova

24. In *Atanasova v. Bulgaria* (no. 72001/01, §§ 35-47, 2 October 2008), the Court draws a distinction with respect to *Matos e Silva* and another case in its wake. In finding a violation of the right of access, *Atanasova* follows *Anagnostopoulos*, by way of citing it and also citing *Gousis v. Greece* (no. 8863/03, §§ 34-35, 29 March 2007), the latter being – in so far as relevant here – a replication of the former (both Greek cases, obviously, not involving simultaneous violations).

25. Continuing the examination of the complaints, however, and without any mention of possible authorities, *Atanasova* also comes to find a violation of the right to the reasonable length of proceedings (§ 57).

26. Thus *Atanasova*, not sitting well with precedent, started a defective strand of case-law, albeit very limited in terms of the number of cases (two cases: the same *Atanasova* plus *Tonchev*, cited below), which, in my view, should be relegated among those without real precedential value. *Petrella* will instead revive this strand.

2. Dinchev

27. *Dinchev v. Bulgaria* (no. 23057/03, 16 December 2008) was decided when *Atanasova* was not yet final; understandably, *Dinchev* does not mention *Atanasova*. However, some of the reasoning in *Dinchev* (§§ 37-52) is closely dependent on the language of *Atanasova* (§§ 35-47), of which it is often a literal translation. What is missing, compared to *Atanasova*, is a simultaneous finding of a violation for an excessive length of proceedings.

28. Thus *Dinchev* is fully consistent with *Anagnostopoulos* and, like the latter, cannot be ascribed – notwithstanding the unfortunate finding to the contrary of the majority in *Petrella* (paragraph 51, where *Dinchev* is cited) – to the strand of case-law inaugurated by *Atanasova* (however, *Dinchev* is not cited in *Petrella*, § 46).

29. I am referring to *Dinchev* in connection with *Atanasova* because it is, in my view, necessary to underline its ambivalent nature: it replicates *Atanasova* in part, but without really following it.

3. Tonchev

30. After a few months, the judgment in *Atanasova* having become final in the meantime, in *Tonchev v. Bulgaria* (no. 18527/02, §§ 49 and 53, 19 November 2009) the Court for the second time found simultaneous violations.

31. *Tonchev* (§ 51) cites *Anagnostopoulos*, *Atanasova* and *Dinchev* in an undifferentiated manner to support the finding of a violation of a right of access to a court (only *Atanasova* being, however, an appropriate precedent, in my view, once a violation for a lack of reasonable length of proceedings had already been found (§ 49)).

32. In this respect, it is important to note the peculiar order of examination of complaints in *Tonchev*: first, length of proceedings; second, access to a court. This order seems to have inspired the majority in *Petrella*. An order inspired by logic (and by *Golder*: first, access to a court; then, and only if no violation of access exists, length of proceedings), in my opinion, would have been preferable.

33. Thus *Tonchev* is the second (and last, before *Petrella*) erratic occurrence in the Court's case-law in which the two violations are found.

E. The majority choose erraticism: a choice that cannot be shared

34. The majority in *Petrella* seem to feel safe building on *Atanasova* and *Tonchev* only (see paragraph 46 of *Petrella*) to assert – as if this was well-established case-law – that access to a court is a separate issue from the length of proceedings; thus, simultaneous findings of violations are, in their view, possible.

35. As I have tried to show, the majority's construction in *Petrella* concerning the possibility of a double violation on the mere foundations of *Atanasova* and *Tonchev* is, in reality, built on quicksand. It is an approach based on erraticism that I cannot share.

36. I could add more here, based on the Grand Chamber's judgment in *Nicolae Virgiliu Tănase v. Romania* (no. 41720/13 [GC], 25 June 2019): this judgment, in my view, disavows *Atanasova* and *Tonchev*. Since I will comment on this aspect when addressing the other passage of the *Petrella* reasoning with which I cannot agree (concerning the way in which the majority restates the "two-avenue" test, to be dealt with below in part III of this opinion), I take the liberty here of just referring to what follows.

III. THE "TWO-AVENUE" TEST

A. The "two-avenue" test in its traditional formulation, specifically for access to a court (*ex ante*)

37. What I will describe here as the "two-avenue" test is an important tool in managing the concept of access to a court, as developed by the Court's case-law. The concept is common to other areas of the Court's case-law concerning fairness of proceedings, on which there is no need to dwell (but see, e.g., III.G. below).

38. In my view this test, in its basic formulation, requires that, if there were two avenues of proceedings, both available and effective, when determining whether there is an Article 6 issue the Court must have regard to all the proceedings open to the applicant. Where the right of access is concerned, the test shows an obvious specific feature and, therefore, a different approach is needed as compared to the same test when addressing fairness issues: the Court does not need to assess whether the measures taken during the chosen proceedings weakened the applicant's position globally, also with reference to the separate proceedings which were not chosen (this being needed for fairness issues – an *ex post* assessment): it needs only to assess whether, at the moment in which one course of action was chosen, the other was accessible and effective (an *ex ante* assessment).

39. In paragraph 49 of the judgment, the majority in the Chamber in *Petrella* refer to the traditional formula of the test, when addressing the issue of access to a court in the presence of a civil avenue, in addition to the lodging of a civil-party claim in criminal proceedings. In fact, they point out:

> " ... that in cases where no consideration had been given to the merits of civil party claims ..., [the Court] has attached importance to the accessibility and effectiveness of other judicial avenues open to the interested parties by which to submit their claims, in particular actions available before civil courts ... [; and] in cases where it has considered that the applicants did have such remedies, it has then found that there was no violation of the right of access to a court ..."

B. The *ex post* exceptions to the "two-avenue" test introduced by the majority

40. However, in the subsequent paragraphs 50 and 51 of the judgment the majority have unexpectedly elaborated on the "two-avenue" test. I am unable to agree with this elaboration, since – as I will try to demonstrate – it introduces concepts that – in my view – are extraneous to the "two-avenue" test formulation as it emerges, in the area of access to a court, from the Court's established case-law, having been validated by the Grand Chamber. Moreover, in a similar vein to what I was obliged to note concerning the

issue of simultaneous violations, the majority's approach is based on an analysis of case-law about which I regret to have to raise doubts.

41. Turning now to the details of the majority's approach, they have construed the existing case-law as meaning that the "two-avenue test" would apply only (paragraph 50):

> "where criminal proceedings had not been conducted or had been discontinued on the basis that: no criminal offence had been found ..., or that the criminal proceedings had been concluded under a plea-bargaining agreement ... or under an exemption from ordinary jurisdiction ... or because of the death of the accused ... The same was true of cases where the applicant had already referred the matter to the civil court and obtained a review on the merits before the criminal proceedings were discontinued ..."

42. According to the majority, the "two-avenue test" would not apply (paragraph 51)

> "where the discontinuance of criminal proceedings and the failure to consider the civil-party claim were due to circumstances mainly attributable to the judicial authorities, in particular excessive procedural delays causing the prosecution to become time-barred (see *Anagnostopoulos v. Greece*, no. 54589/00, §§ 31-32, 3 April 2003; *Tonchev,* cited above, §§ 50-53; *Gousis v. Greece*, no. 8863/03, §§ 34-35, 29 March 2007; *Atanasova,* cited above, §§ 35-47; *Dinchev v. Bulgaria*, no. 23057/03, §§ 40-52, 22 January 2009; *Boris Stojanovski v. "Former Yugoslav Republic of Macedonia"*, no. 41916/04, §§ 56-57, 6 May 2010; *Rokas v. Greece*, no. 55081/09, §§ 22-24, 22 September 2015; and *Korkolis v. Greece*, no. 63300/09, §§ 21-25, 15 January 2015; see, *a contrario*[7], *Lacerda Gouveia and Others*, cited above, § 77; *Dimitras v. Greece*, no. 11946/11, § 47, 19 April 2018; and *Nicolae Virgiliu Tănase*, cited above, §§ 196-202 and 207-214, where the Court found that the authorities had no responsibility for the conduct of the criminal proceedings, thus concluding that Article 6 had not been violated in terms of the right of access to a court and the length of the proceedings)."

43. In short, the majority appear to show an intention to "export" into the "two-avenue" test, as developed by the Court for the purpose of assessing the *ex ante* availability of an alternative avenue of access to a court, certain *ex post* evaluation criteria, which may be suited to the area of fairness of proceedings (where a global approach is necessary) but – in my view – are not applicable to access. As is evident from the above language, the majority also seem to derive their elaboration – which is indeed original and with some basis in the same erratic case-law I mentioned already under part II – from extensive case-law.

C. Is there really case-law supporting the majority's approach (other than *Atanasova* and three other precedents "descending" from it*)*?

44. Since I am, much to my regret, unable to agree with the reading of the Court's case-law on this aspect as provided by the majority, which I do

[7] The relevance of the citations following the *a contrario* indication in this passage will be commented upon in paragraphs 56-65 of this opinion.

respectfully find incorrect, I will have to engage in some analysis of the citations in paragraph 51 of *Petrella* (which has been reproduced in paragraph 42 of this opinion, in an English translation). Although the language of paragraph 51 of *Petrella* (just like the previous paragraph 50) is not really clear (for example reference is made, in general, to the finding of violations of Article 6 in the cases cited, but no specification is provided as to the type of violations), the position of paragraphs 50 and 51 after paragraph 49 (on which see paragraphs 71-87 of this opinion), as well as the consequences drawn in paragraphs 52 and following, make it evident that the majority believe that the case-law referred to in paragraph 51 supports the view that the "two-avenue" test, in its traditional *ex ante* formula, is not applicable "*when the discontinuance of criminal proceedings and the failure to consider the civil-party claim were due to circumstances mainly attributable to the judicial authorities, in particular excessive procedural delays causing the prosecution to become time-barred*" (an *ex post* assessment).

45. In my reading, on the contrary, the alleged precedents listed in paragraph 51 of *Petrella* do not in general support this approach of the majority. Some of the cases listed are *Anagnostopoulos*-like cases, in which, as I mentioned above, the Court held – in some contrast to the line of case-law based on *Matos e Silva* – that due to the length of the proceedings the very essence of access to a court had been hindered (without ever, at the same time, with the sole exceptions of *Atanasova* and *Tonchev*, finding a simultaneous violation of the right to a reasonable length of proceedings). Never, in the cases cited in paragraph 51, is the "two-avenue" test discussed, nor is its applicability excluded because of assumed "circumstances mainly attributable to the judicial authorities, in particular excessive procedural delays causing the prosecution to become time-barred" (paragraph 51 of the majority's reasoning). Having said this in general, a closer look at each citation is needed.

1. Anagnostopoulos

46. This precedent (on which I have already commented under II.C above) contains (in § 30) an indirect reference to the existence of a parallel avenue of redress before the civil court. However, the reason for the Court to focus only on the civil-party claim in the criminal proceedings in *Anagnostopoulos* is well explained in paragraphs 31-32 of that judgment, i.e., the fact that Greek law allowed a direct avenue before criminal court for small, symbolic civil claims (up to GRD 15,000, equivalent to EUR 44), criminal courts being obliged to determine them in case of conviction, not being allowed – as they would have otherwise been – to refer them to civil courts (see §§ 17, 52, 61, and 109 of this opinion).

47. In this specific case, therefore, the need to verify the existence of a parallel avenue before civil courts could be by-passed, since a civil party

had a legitimate expectation that his or her claim would be determined, whether favourably or unfavourably, and it is all too obvious that consequently no discussion of the "two-avenue" test is provided in the judgment. The avenue chosen had to be construed as a civil avenue, albeit before a criminal court, while the "two-avenue" test only applies when civil-party claims are brought before criminal courts which have no obligation to determine them, being able to refer them to the civil courts (*Anagnostopoulos*, § 32):

> "... the applicant had lodged a claim for compensation in the amount of GRD 15,000, which constitutes a sum that the criminal courts examine in all cases without being obliged to refer the matter to the civil courts. The applicant therefore had a legitimate expectation that the courts would rule on this claim, whether favourably or unfavourably".

2. Gousis*,* Rokas *and* Korkolis

48. *Gousis*, as mentioned before, relies on *Anagnostopoulos*, citing it in its paragraph 34, although there is no express mention that also in this case the criminal courts were bound to rule on a small civil claim. The same can be said for *Rokas* (§ 23) and *Korkolis* (§ 22).

49. Be that as it may, the reasoning of these three Greek cases offers no support for the exceptional formulation of the "two-avenue" test as suggested in *Petrella*.

3. Atanasova

50. On the contrary, the majority's approach appears very close to paragraphs 44-46 of *Atanasova*, which can therefore be considered, in my view, a material precedent (although, as I said already and will better argue, a very weak one).

51. In *Atanasova* (on which I already provided some comment under II.D) the Court considered that, although a civil avenue was available, nonetheless the fact of requiring the applicant to start a new civil case ten years after the event and eight years after the initiation of the criminal proceedings would have amounted to an excessive burden:

> "44. However, in a number of cases the Court has found a violation of Article 6 when the discontinuance of criminal proceedings and the failure to consider the civil-party claim were due to circumstances attributable to the judicial authorities, in particular excessive procedural delays causing the prosecution to become time-barred (see *Anagnostopoulos v. Greece*, no 54589/00, §§ 31-32, 3 April 2003, and *Gousis v. Greece*, no 8863/03, § § 34-35, March 29, 2007).
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> 45. In the Court's opinion, the present case must be distinguished from the cases of *Matos e Silva, Lda., and Others* and *Buonfardieci* (both cited above), in which the applicants' actions were still pending before a domestic court and the principle of their examination by the courts was not in issue. By contrast in the present case, the applicant's civil action could not be examined due to the termination of the criminal proceedings on the grounds that the prosecution had become time-barred. However,

> the applicant had made use of the possibility available to her under domestic law to be joined as a civil party to the criminal proceedings and to seek compensation for the damage caused by the accident of which she had been the victim. She therefore had a legitimate expectation that the courts would rule on this compensation claim, whether favourably or unfavourably. It was only the delay with which the prosecuting authorities dealt with the case that ultimately led to the prosecution becoming time-barred and, consequently, made it impossible for the applicant to have her compensation claim decided in the criminal proceedings.
>
> 46. The Court therefore considers that the present case raises a separate issue with regard to the right of access to a court. In line with its conclusion in the *Anagnostopoulos* judgment, the Court finds that when the domestic legal system offers a remedy to litigants, such as the filing of a criminal complaint together with a civil-party claim, the State has the obligation to ensure that they enjoy the fundamental guarantees of Article 6. The applicant cannot be required, in circumstances such as those of the present case, to wait until the criminal liability of the perpetrator of the offence of which she was the victim becomes time-barred, through the fault of the judicial authorities, before introducing, eight years after joining the proceedings as a civil party and more than ten years after the event, a new action in the civil courts to seek compensation for the damage sustained (see *Anagnostopoulos*, cited above, § 32). The Court notes in particular that the bringing of such an action would entail the need to gather the evidence afresh, for which the applicant would henceforth be responsible, and that to establish the possible liability of the driver could prove to be extremely difficult such a long time after the event."

52. We shall see that even this final part of paragraph 46 of *Atanasova* has (inappropriately in my view) inspired *Petrella*. Having thus recognised that *Atanasova* offers a basis for the majority's approach in *Petrella*, even though – without specific reasoning being offered – the same *Atanasova* exports *Anagnostopoulos* outside of its boundaries (marked, as I tried to show, by the peculiar Greek system obliging criminal courts to examine small civil claims, for which no referral to civil courts was possible – see §§ 17, 46, 52, 61 and 109 of this opinion), one should examine whether *Atanasova* has been successful in subsequent case-law. This analysis will be useful also for the purpose of exploring the success of *Atanasova* as to the finding of simultaneous violations (see paragraph 36 of this opinion).

4. Tonchev*,* Dinchev *and* Boris Stojanovski

53. *Tonchev*, also quoting *Dinchev* (the close relationship of both with *Atanasova* has already been a subject of my remarks – see II.D), shows that they are the second and third precedents that replicate the *Atanasova* approach to derogate from the traditional "two-avenue" test. Thus for example, in *Tonchev*, we have the following language:

> "51. On this point the Court observes that in the recent cases of *Atanasova* and *Dinchev* it had to deal with situations which were essentially identical to those of the present case. In those two cases the applicants' civil-party claims brought in the context of criminal proceedings had not been examined due to the discontinuance of those criminal proceedings following the expiry of the relevant limitation periods. In both cases the Court found, by reference to *Anagnostopoulos v. Greece* (no. 54589/00,

> 3 April 2003), that the applicants had not enjoyed effective access to a court and that this could not be cured by the possibility of bringing fresh claims in the civil courts (see *Atanasova v. Bulgaria*, no. 72001/01, 2 October 2008, and *Dinchev*, cited above)."

54. *Atanasova* is thus cited and relied upon by these two judgments and also, later, by *Boris Stojanovski* (§ 56).

D. *Tănase v. Atanasova*: similar sounds, opposite meanings, just like "descending" and "dissenting"

55. Therefore, according to my review so far of the authorities on which paragraph 51 of the majority's reasoning builds its innovative conception of the "two-avenue" test, only *Atanasova* and three precedents "descending" from it are material; this is not the case, as I mentioned, for the Greek cases, which have their own different rationale, which does not conflict with the "two-avenue" test in its traditional form.

56. But paragraph 51, *in fine,* of *Petrella* has more: *acer in fundo.* The paragraph offers three more references to case-law, peculiarly preceded by the locution *a contrario. A contrario* references have been widely studied by scholars: especially when concerning case-law, they require special caution, since judges must frame the reasoning of other judges regarding their unexpressed intentions, on the assumption that the explicit affirmation of a rule or a principle under certain circumstances (considering the text, the context, the object and the purpose of the previous judgment) excludes the application of that rule or principle in other circumstances.

57. The *a contrario* references in paragraph 51 of *Petrella* concern three authorities, one of them very recent and of the Grand Chamber*, Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, 25 June 2019. Given the framework of Article 43 § 2 of the Convention, such citation *a contrario* is not without peculiarities. I will therefore, at this point of my opinion, have to discuss the text, the context, and some other aspects of this Grand Chamber judgment in so far as the "two-avenue" test is concerned: my consideration will be that this Grand Chamber precedent is not susceptible of an *a contrario* construction as stated in *Petrella*, since it clearly disavows, albeit implicitly, *Atanasova* and the three other "descending" authorities mentioned above. I will also briefly mention the other two *a contrario* references. This will bring me to a conclusion very similar to the one I voiced in respect of the issue of simultaneous violations: also concerning the "two-avenue" test, *Atanasova* (and "descending" case-law) cannot be considered as having precedential value today; *Tănase* is "dissenting", not "descending", from *Atanasova*.

58. In *Tănase* the Grand Chamber, in my view, clearly seeks to provide a restatement of its case-law as to the "two-avenue" test, among several other issues which are to be dealt with in this important judgment (the main

aspect being whether Article 3 in its procedural limb is applicable to non-State ill-treatment, if inflicted unintentionally). Based also on extensive research, as the relevant materials reveal, the Grand Chamber was called upon to examine not only the implications of the "two-avenue" test in its pure form in the area of access to a court, but also the relevance of other possible tests regarding civil-party claims not examined on the merits.

59. In particular, the Court had before it, very clearly, the *Atanasova* test. Since under *Atanasova*, in the event that the applicants' civil-party claims in the context of criminal proceedings had not been examined due to the discontinuance of those criminal proceedings following the expiry of the relevant limitation periods attributable to the authorities' conduct, the Court could find that the applicants had not enjoyed effective access to a court, even if the possibility of bringing claims in the civil courts was available at the time of the civil-party joinder to the criminal proceedings, and was still available at the moment of discontinuance, the Grand Chamber had to decide whether, if the traditional "two-avenue test" was applicable, the *Atanasova* assessment of diligence should be used first. The dilemma is clear. According to *Atanasova*, the test should concern:

(i) the diligence of the authorities in handling the criminal proceedings and their omissions/negligence; then, only in the absence of such omissions/negligence,

(ii) the availability of other avenues through which the victim could claim compensation.

Under the traditional "two-avenue test", only assessment (ii) would be relevant.

60. That being said as to the context, the text of the judgment reveals that the issue of the two avenues had clearly been raised by the parties: the applicant clearly refers in his position to *Atanasova*, submitting that, "[s]ince the authorities had been responsible for the failure to examine his civil claim, this had amounted to a breach of his right of access to justice"; the Government instead make clear reference to the pure "two-avenue" test (see the parties' submissions in *Tănase* §§ 190-91).

61. If the question was whether "responsibility" for the failure to examine the claim was traceable to the authorities, I cannot but consider that *Atanasova* is implicitly, but clearly referred to. What is the Grand Chamber's reply?

62. The Grand Chamber, for its part (§ 196), has before it the fact that:

> "the ... authorities discontinued the criminal proceedings against both J.C.P. and D.I. on the grounds, respectively, that not all the elements of an offence had been met and that the limitation period for criminal liability had taken effect. As a result, the civil claim joined to the criminal proceedings was not examined by any criminal court."

But, not surprisingly in my view, the Grand Chamber – as a premise to adopting the "two-avenue" test in its traditional format – does not consider at all whether there were "responsibilities" on the part of the authorities

(especially as to the length of the proceedings leading to the time-barring which had caused the criminal proceedings against D.I. to be discontinued); rather, it limits itself to reviewing the lawfulness and non-arbitrariness of discontinuance under domestic law, especially concerning a possible "obligation" to examine the civil claim even after discontinuance (and here one can see a clear reference, *mutatis mutandis*, to the *Anagnostopoulos* scheme):

> "197. None of the parties have argued or submitted evidence suggesting that when the proceedings against J.C.P. and D.I. ended, the criminal courts were under an obligation to examine the applicant's civil claim despite their decision to discontinue the criminal proceedings. Moreover, given the available evidence, the Court considers that it was not arbitrary or manifestly unreasonable for the domestic authorities to decide to discontinue the criminal proceedings instituted against J.C.P. and D.I., for the reasons mentioned above (see paragraph 196)."

At this point of the reasoning, the Grand Chamber restates and endorses the classical "two-avenue" test. This is for me an element of the utmost importance in assessing the relationship (of incompatibility) between *Tănase* and *Atanasova.* Citations in this passage (and omitted citations *sub silentio*) are also crucial:

> "198. In this context, it may be noted that in cases where civil-party claims made in the context of criminal proceedings have not been examined by reason of the termination of those proceedings, the Court has had regard to the availability of other channels through which the applicants could vindicate their civil rights. In cases where the applicants had at their disposal accessible and effective avenues for their civil claims, it found that their right of access to a court had not been infringed (see *Assenov and Others*, cited above, § 112; *Ernst and Others v. Belgium*, no. 33400/96, §§ 54-55, 15 July 2003; *Moldovan and Others v. Romania (no. 2)*, nos. 41138/98 and 64320/01, §§ 119-22, ECHR 2005-VII (extracts); *Forum Maritime S.A. v. Romania*, nos. 63610/00 and 38692/05, § 91, 4 October 2007; *Borobar and Others v. Romania*, no. 5663/04, § 56, 29 January 2013; and *Association of the Victims of S.C. Rompetrol S.A. and S.C. Geomin S.A. [System] and Others v. Romania*, no. 24133/03, § 65, 25 June 2013)."

63. An immediate remark can address the fact that – had the Grand Chamber wanted to endorse the *Atanasova* concepts – step (i) of the relevant test referred to in paragraph 59 above would be developed at this point of the reasoning (i.e., assessing the diligence of the authorities in handling the criminal proceedings and their omissions/negligence). But – not surprisingly, in my view – the Grand Chamber develops a different analysis, clearly inspired by the classical "two-avenue test", going straight to step (ii).

64. The majority in *Petrella* (paragraph 51), probably in order to address this aspect, and also to justify their reference to *Tănase* as consistent with *Atanasova* (albeit *Tănase* does not cite *Atanasova*! – on this, see below) in an *a contrario* relationship between the two, juxtapose the citation of paragraphs 196-202 of *Tănase* with that of its paragraphs 207-14 and submit that the Grand Chamber

> "found that the authorities had no responsibility for the conduct of the criminal proceedings, thus concluding that Article 6 had not been violated in terms of the right of access to a court and the length of the proceedings".

In other words, if I understand it correctly, the argument of the majority in *Petrella* to read *Tănase* as an *a contrario* confirmation of *Atanasova* is as follows: since no responsibility was to be found on the part of the authorities (I presume, in the area of the reasonable time requirement, to which the citation of §§ 207-14 refers), there was no need for the Grand Chamber to explicitly deal with step (i) referred to above in paragraph 59 of this opinion.

65. This is, in my view, with all due respect to the majority, an incorrect use of the *a contrario* argument: I mentioned before the need for caution in the *a contrario* exercise of considering text, context, and all other circumstances in order to draw from a proposition that was accepted the intention to reject a contrary proposition; fallacies are always lurking in such instances. In my view the point is as follows: is it reasonable to say that, although no violations were found in the conduct of proceedings in the specific case, the Grand Chamber would have applied step (i) of the test, had violations been found (concerning the length of proceedings)? This is the question to be asked, in my view, since the *a contrario* argument must essentially be based on common sense; otherwise, by supporting the idea that *Tănase* "descends" from *Atanasova*, one runs the risks incurred by the a *contrario* etymologists in favour of *lucus a non lucendo*. Common sense, in my view, rather supports the consideration that *Tănase "*dissents" from *Atanasova.* Similar sounds, opposite meanings. This can be said even of the titles of these cases in relation to their content.

66. An aspect which is, in my view, very relevant is the order in which the questions were examined in *Tănase.* While – as I mentioned – *Tonchev* (improving the *Atanasova* reasoning, which follows the opposite order) logically has the duration of proceedings (with respect to which the omissions/negligence of the authorities are found) examined before coming to rule on the aspect of access to a court, the Grand Chamber in *Tănase* disposes of the issue of access before dealing with a possible violation concerning the length of proceedings. This is a strong indication that, contrary to what the majority in *Petrella* suggest, the logic followed was that of the classical "two-avenue" test. Of course, I accept that the order of examination of questions is not decisive: language can be inverted, without logic being subverted. But in that case an elementary principle of clarity would have required the Grand Chamber, according to a well-established practice, at least to include some language – when dealing with the "two-avenue" issue – to the effect that the relevant finding was linked to (and dependent on) the subsequent finding of a lack of responsibility on the part of the authorities. I can even concede that such language could be substituted by some implicit way of referring to the underlying argument:

but then, would we not need to find at least a cross-reference? I could not find any textual element supporting the *Petrella* reading of the judgment by the Grand Chamber. Under these circumstances, the minimum text analysis requirements to build an *a contrario* argument do not appear to be met: in *Tănase* the assessment of length is made subsequently, and therefore also independently, with respect to the assessment relating to a violation of the right of access to a court.

67. Another aspect of text analysis concerns citations. The Court's activity is based on precedents; relevant resources are invested to make the Court's case-law accessible and clear; case-law analysis is provided to the public by the same Court.

68. Against this background, although *Atanasova*-based arguments were certainly present in the materials before the Grand Chamber and – as I showed (see paragraph 60 of this opinion) – they appear in the parties' submissions as referred to in *Tănase*, what can reasonably be the meaning of the fact that *Atanasova* was never cited by the Grand Chamber? Is it reasonable to believe that a citation was omitted without this implying some disapproval? A mere effect of inadvertence? By a Grand Chamber? I would rather consider that a reasonable reader would draw the conclusion that *Tănase* disavowed *Atanasova*, by relegating that line of case-law *sub silentio.*

69. Incidentally, it may be worth mentioning that *Tonchev* was cited by *Tănase* (§ 128) but ... on an aspect that has nothing to do with the topic I am discussing here. Again incidentally, *Anagnostopoulos* was never explicitly cited by *Tănase*, although I have shown that it was taken into account (see paragraph 62 of this opinion).

E. *Tănase* is solidly grounded in its own precedents: a comparison of citations

70. The deliberate omission of citations – aimed at overruling previous case-law deemed *per incuriam* – especially in a Grand Chamber judgment is – as I have tried to explain so far – an eloquent element (*silens loquitur*) for the interpretation of case-law. But even more eloquent are citations that are positively included in the judgment, as they belong both to the text and to the context. The allegedly *a contrario* standing of *Tănase* with respect to *Atanasova* should be tested against the results of such additional analysis; it is therefore necessary for me to devote some reflections to the precedents on which *Tănase* is grounded, since the discussion will also allow me to note, with regret, that the majority in *Petrella* neglected a similar exercise (or, at least, no signs are visible, although some citations are common) and thus missed the opportunity to frame *Tănase* correctly as supporting the traditional "two-avenue" test.

71. I will limit my task to an analysis of the authorities cited both by *Tănase* (in § 198, which must have been closely considered by the majority, since this paragraph belongs to those cited in paragraph 51 of *Petrella*) and by *Petrella* at the same time (although somewhat tending towards different purposes). Of course, it should be clear that *Petrella* contains some additional citations on which, given their lesser importance with respect to *Tănase*, I will not dwell.

72. One remark is obvious and repetitive, based on what has already been noted: the classical "two-avenue" test is based by *Tănase* on precedents which – with one irrelevant exception – do not include *Atanasova*-like cases, nor *Anagnostopoulos*-like cases. The question is why these two kinds of precedents are, on the contrary, listed in *Petrella* (paragraph 51), without any explanation being given for their omission from *Tănase*, other than restating the *Atanasova* test and mentioning *Tănase* as a precedent *a contrario*, rather than an authority contradicting the majority's point.

1. No responsibility of the authorities

73. The above analysis can start with a group of cases, cited in *Tănase*, which the majority in *Petrella* seek to present as cases in which no responsibilities were attributable to the authorities (the citation appears in paragraph 50 of *Petrella*, where *Tănase* is not mentioned). One should have a closer look.

(a) ***Assenov and Others, Moldovan and Others (no. 2)*** **and** ***Forum Maritime S.A.***

74. A subgroup within the above precedents (*Assenov and Others*, *Moldovan and Others (no. 2),* and *Forum Maritime S.A*.), according to the majority in *Petrella* (paragraph 50 of the judgment), supposedly includes cases in which a lack of responsibility on the part of the authorities was due to the non-existence of an offence.

75. This remark by the majority raises serious doubts as to its pertinence. What is the relationship between the category of lack of responsibility of the authorities and the same authorities' finding that there was no offence? How would this be relevant if a reasonable time issue is at stake or, still less, if the Court finds that there was no effective investigation into the offence? While these questions remain unanswered, a mere reading of these precedents shows rather that responsibilities existed (and violations were found) and that nonetheless the classical "two-avenue" test is deemed applicable. Thus, these precedents appear to me to be rightly cited in *Tănase* to support, as I have tried to demonstrate, a position that is opposite to that of *Petrella*.

76. In particular, in *Assenov* several violations were found, thus showing negligence/omissions on the part of the authorities (among others, violations

of Article 3 for failure to carry out an effective official investigation into allegations of ill-treatment, and of Article 5 § 3 of the Convention in that the applicant was not tried within a reasonable time or released pending trial). The Court also finds (*Assenov*, § 112) that "since [the applicant] did not attempt to bring civil proceedings ... it cannot be said that he was denied access to a court ...". While is understandable that *Tănase* relies on this precedent, I frankly cannot understand how it can be used to support the majority's approach in *Petrella* (in addition, the passages of *Assenov* cited in *Petrella* are not the crucial ones I have recalled above, but they refer – as I mentioned – to domestic findings as to the non-existence of an offence).

77. Likewise, in *Moldovan (no. 2)* violations are found of Articles 8, 3, and 14, as well as of Article 6 § 1 of the Convention on account of the length of the proceedings, whereas no violation of Article 6 § 1 is found by reason of a denial of access to a court. Again, negligence or omissions could be attributed to the authorities and the Court concludes (*Moldovan (no. 2)*, § 121) that, since the applicants had brought successful actions against some persons, they "c[ould] not claim an additional right to a separate civil action" against others. While this is a rather case-specific application of the "two-avenue test", in general the formulation of the test fully supports *Tănase* and certainly not the majority's approach in *Petrella* (which again refers to the lack of an offence and cites passages that seem irrelevant to me).

78. In *Forum Maritime S.A*. (§§ 91-94), again, the claim concerning a lack of access to a court is rejected as manifestly ill-founded on the basis of the traditional two-avenue test, while violations are found of Article 6 § 1 both on account of the breach of the right to an independent and impartial tribunal in the criminal proceedings in which a civil-party claim had been made, and on account of the restrictions on the right of access to the prosecution file. Additionally, there is a finding of a violation of Article 6 § 1 on account of the length of the commercial proceedings. Again, the majority in *Petrella* rely on an immaterial citation of this judgment, which fully supports *Tănase.*

(b) *Ernst and Others*

79. *Ernst and Others* is, according to the majority in *Petrella* (see paragraph 50 of the judgment), in a subgroup of its own: here the majority see a justification for the application of a classical "two-avenue test" in the fact that the authorities bore no responsibility for the termination, due to an exemption from ordinary jurisdiction. On my reading, this judgment shows on the contrary that – in a very peculiar context – the exemption from jurisdiction enjoyed by only one of the applicant's opponents was but one aspect of the facts, while there were findings of violations of Articles 8 and 10 (and not of Article 6 on grounds of access to a court). The relevant passage of the judgment (*Ernst*, §§ 54-55) shows, in my view, that a quite

traditional "two-avenue" test (as would later appear in *Tănase*) was held to be applicable (with some adaptation to the peculiarity of the case, and – what matters even more – without any lack of responsibility of the authorities being considered):

> "... the Court attaches importance to the fact that, in Belgian law, the lodging of a civil-party claim before the investigating judge is but one of the methods of bringing a civil action and that the victims in principle have other avenues by which to assert their civil rights ... [so that,] ... in so far as their complaint was directed against persons other than judges or prosecutors, they could have brought a civil action against these persons before the civil court ... [and even against a judge or prosecutor] ... in exceptional cases. ... Whilst the applicants did not attempt a civil action against individuals, they did, on the other hand, at the same time as being joined as civil parties to the criminal proceedings, bring ... an action for damages against the Belgian State before the civil court on the basis of the same facts ... [T]he facts show that the inadmissibility of the applicants' civil-party claim and the dropping of their criminal complaint ... did not result in depriving them of any action for compensation."

2. Parallel civil claim

80. The majority in *Petrella* have also considered that the application of the classical "two-avenue" test was justified, and that no violation of the right of access to a court could be found, where "the applicant had already lodged a parallel claim before the civil court and had obtained a determination on the merits before the criminal proceedings were discontinued" (paragraph 50 of *Petrella*, *in fine*). The authorities cited include one precedent on which I will not dwell (since *Tănase* does not rely on it), and another precedent which is instead cited in *Tănase*. Surprisingly, however, the second precedent is cited in *Petrella* with the signal *mutatis mutandis*. I am referring to *Borobar and Others*.

81. *Borobar* is very interesting, although it is unclear to me why it should be associated, even *mutatis mutandis*, with the different case where "the applicant had already lodged a parallel claim before the civil court and had obtained a determination on the merits before the criminal proceedings were discontinued".

82. *Borobar* has much more: it is therefore unfortunate, in my view, that the majority in *Petrella* missed the opportunity to discuss this case in detail, even if only to distinguish it; instead, they decided to relegate it behind a *mutatis mutandis*.

83. The Court dealt there with the case of three applicants, one of whom had availed herself of a remedy before the civil court before joining criminal proceedings as a civil party; the other two applicants had only been joined as civil parties in the criminal proceedings, with no previous civil actions. The Court therefore continued with the analysis of the complaint concerning the right of access to a court only in respect of the first applicant (*Borobar*, §§ 59-62), since:

> "having regard to the subsidiary character of the Convention mechanism, the Court consider[ed] that the second and third applicants should have brought a separate new action before the civil courts and that it [was] not for the Court to speculate on the outcome of such an action. ..."

84. Thus in *Borobar* the Court (in my view coherently with what was later to be stated in *Tănase*) affirmed the existence of an obligation to use the civil avenue after discontinuance of the criminal proceedings, before an applicant could bring a complaint under the Convention concerning the right of access to a court.

85. The language used clarifies that this obligation, to be complied with if a lack of access to court is to be verified, exists independently of the fact that a violation of Article 6 § 1 may be found because of an excessive duration of criminal proceedings leading to discontinuance (eight years).

86. It can easily be considered that, from the viewpoint relevant to *Petrella*, the position of the first applicant (on which the majority seem to focus) is not really material; it is also important to note that her previous claim before the civil court (which had been brought one year before the civil-party claim in the criminal court, and had been finally dismissed four years later, while the criminal proceedings were still pending – *Borobar*, § 59) was held by the Court to be an "effective remedy in respect of the applicant's civil claims" (*Borobar*, § 72), such that no violation of the right of access to a court was found.

87. Consequently, in my view, reflecting on *Borobar* helps to understand why *Tănase* would clearly refer to remedies existing at the time when the civil-party claim is lodged in criminal proceedings (*ex ante*), without finding relevant the situation at the time when the criminal proceedings are discontinued (*ex post*) to assess the availability and effectiveness of access to a court in two-avenue situations. I have already mentioned this aspect and I will return to it later (see, for example, paragraphs 38, 91 and 97 *et seq.* of this opinion).

3. A precedent sub silentio*:* Association of the Victims

88. I have already mentioned that I will not analyse the precedents that are referred to in *Petrella*, as they are not relevant for the exercise I propose. There is, on the contrary, one authority on which *Tănase* relies, which the majority in *Petrella* pass over in silence. I am referring to the case of *Association of the Victims of the S.C. Rompetrol S.A. and S.C. Geomin S.A. System and Others v. Romania.*

89. In *Association of the Victims* the Court found a violation for the excessive length of the criminal proceedings which the applicant association had joined as a civil-party (§§ 74-80). Therefore, there was for sure some responsibility of the authorities, in a way very similar to *Petrella*. None of the criteria that the majority in *Petrella* seek to develop were applicable to excuse the Court from a parallel finding of a violation of the right of access

to a court. Yet, the claim relating to access to a court was dealt with before and independently from that concerning the duration of proceedings; and no violation was found.

90. Again similarly to what would be material in *Petrella*, it was the prosecutor's inaction which led to the time-barring of the proceedings (see *Association of the Victims*, § 64, where the Court also noted that in Romanian law, when the court is seised of a civil-party claim, it can decide to examine the civil action irrespective of the discontinuance of the criminal charge, citing *a contrario Atanasova* and *Anagnostopoulos* – see, e.g., paragraphs 17, 46, 52, 61 and 109 of the present opinion).

91. In this context, the *Association of the Victims* judgment (§§ 65-67) is very clear in providing a further basis on which to consider that the availability of two avenues is something to be evaluated at the time when the claim is brought (*ex ante*), so that the relevant assessment is in principle independent of the authorities' subsequent behaviour, which may only become relevant for other aspects related to the conduct of proceedings:

> "65. The Court also notes that in other cases where the failure to examine a civil-party claim on account of the inadmissibility or the termination of the criminal proceedings in the context of which it had been brought was at issue, it took into account the existence of other avenues open to the applicants by which to assert their claims. In the cases where the applicants had accessible and effective remedies, it concluded that there had been no violation of the right of access to a court (see *Ernst and Others v. Belgium*, no 33400/96, §§ 53-55, 15 July 2003, and *Forum Maritime SA v. Romania*, nos. 63610/00 and 38692/05, §§ 91-93, 4 October 2007).
>
> 66. In the present case, the relevant domestic law allowed the applicant to bring a claim for compensation in the civil courts since the very occurrence of the facts, criminal conviction not being a condition *sine qua non* for a civil claim for compensation. Indeed, he had the choice between bringing a civil action before civil courts and being joined as a civil party within the framework of his criminal complaint. However, the applicant did not take any action before the civil courts. He chose of his own free will, when the separate civil action was already time-barred (see paragraph 41 above), to become a civil party in the context of his criminal complaint, an avenue which is probably simpler and less expensive, but thus incurring the risk that the authorities seised might not be able to examine his civil action.
>
> 67. In the circumstances of the case, the Court considers that the failure to examine the applicant's civil action in the context of his criminal complaint did not affect the very substance of his right of access to a court. It follows that this complaint is manifestly ill-founded and must be rejected under Article 35 §§ 3 (a) and 4 of the Convention."

92. Thus, *Association of the Victims* – relied upon by *Tănase* – shows, coherently with all the other results of the above analysis of citations, the rationale of the Grand Chamber's determination as to the "two-avenue" test – a rationale which has not been perceived by the majority in *Petrella*. As for their omitting to refer to *Association of the Victims*, notwithstanding the fact that a relevant Grand Chamber judgment had relied on it as to the very topic at issue, I cannot speculate on finding in this a possible practical

application of Wittgenstein's seventh proposition. What is for sure is that the *Association of the Victims* judgment would have offered food for thought in dealing with *Petrella* differently, just as it had inspired *Tănase*.

93. To conclude my exercise in comparative analysis of citations, I consider that the fact that *Tănase* cites *Association of the Victims*, *Borobar* and a series of other relevant authorities which were perceived differently by the *Petrella* majority (whereas *Association of the Victims* was not even cited) is an important element of the text and the context of the Grand Chamber's judgment that should have led the same majority to adjudicate otherwise. Surprisingly, also, the precedents in which *Tănase* is – in my view – solidly grounded are cited by the majority in *Petrella* in paragraphs (49 and 50) that are set apart from the paragraph (51) dedicated to reviving the *Atanasova* approach (and in 51, as I have said already, *Tănase* is cited *a contrario*). In my view, the manner in which the majority choose to refer to *Tănase a contrario*, rather than to recognise it as an authority disavowing *Atanasova*, creates even more confusion when one considers that the majority in *Petrella* (still in paragraph 51) combine within the *a contrario* reference two additional citations of cases – *Lacerda Gouveia* and *Dimitras* – in which the Court, in very specific contexts, had not found violations of the right of access to a court and had not explicitly examined the "two-avenue" test. I regret to have to note that this way of citing the Court's precedents, in addition to depriving of importance the precedents upon which a Grand Chamber judgment was based, has in turn deprived the majority in *Petrella* of the opportunity to comment on whether the authorities validated by the Grand Chamber were consistent with the approach chosen in favour of the *Atanasova* concepts. In my humble view, they were not.

F. Restatement in *Tănase* of the traditional *ex ante* "two-avenue" test

94. It then seems correct to me to say that *Tănase* disavowed *Atanasova* and the non-numerous precedents descending from the latter by relegating them *sub silentio*. I have tried to provide textual and contextual clues to that effect, as well as some additional consideration of circumstances. The main points have been, however, (i) clear textual incompatibility of the "two-avenue" test as adopted in *Tănase* with the *Atanasova*-like arguments present in the case (in particular, the "two-avenue" test having been applied in its traditional formula, and the order of examination of the issues contrary to the *Tonchev-Petrella* order); (ii) lack of *Atanasova*-like citations; (iii) presence of citations of authorities contrary to *Atanasova*; (iv) contexts of the latter authorities clearly inspired by the classical "two-avenue" test. Finding – with all due respect – flaws in the different reading of precedents by the majority in *Petrella* has reinforced my considerations.

95. It remains for me to emphasise an additional clue supporting the above idea, parallel to the textual incompatibility of principles. I am referring to the conceptual incompatibility with *Atanasova* of the classic "two-avenue" test as restated by the Grand Chamber in *Tănase*. The concept I wish to underline is that the Grand Chamber in *Tănase* (§ 199) explicitly refers to the need to consider the existence of an alternate civil avenue not at the time of the discontinuance of the criminal avenue, but at the time (often a much earlier moment, if lengthy proceedings are involved) when the applicant decides to use the penal route:

> "197. None of the parties have argued or submitted evidence suggesting that when the proceedings against J.C.P. and D.I. ended, the criminal courts were under an obligation to examine the applicant's civil claim despite their decision to discontinue the criminal proceedings. Moreover, given the available evidence, the Court considers that it was not arbitrary or manifestly unreasonable for the domestic authorities to decide to discontinue the criminal proceedings instituted against J.C.P. and D.I., for the reasons mentioned above ...
>
> 199. In the present case, at the time when the applicant joined the criminal proceedings as a civil party, he could have brought separate civil proceedings against J.C.P. and D.I. instead. While the available evidence and the Government's explanations indicate that such proceedings might have been stayed pending the outcome of the criminal proceedings, the Court notes that no evidence was provided by the parties to suggest that the applicant could not have obtained a determination of the merits of his civil claims on the conclusion of the criminal proceedings."

96. Therefore, the classical *ex ante* "two-avenue test" is restated by the Grand Chamber (§ 197), including: (i) the review as to whether there was an obligation of the criminal courts to dispose of the civil claim or whether a referral to the civil courts would have been possible (the *Anagnostopoulos* exception – see, e.g., §§ 17, 46, 52, 61 and 109 of the present opinion – is here evident, as is the reliance on § 64 of *Association of Victims*, forgotten in *Petrella*); (ii) the review of mere lawfulness and non-arbitrariness of the criminal discontinuance (without any interference at all with the issue of length, which entails an *ex post* assessment and is examined separately).

97. I consider that the *Tănase* restatement of the classical rule, through the reference to the availability (and effectivity) of an alternate avenue at the starting point of the claim (*ex ante*), and not at the end of its treatment by the criminal authorities (*ex post*), shows a clear conceptual incompatibility with an *Atanasova* approach. The irrelevance of the length of the proceedings – which is a separate issue, as I mentioned, since *Matos e Silva* was decided – is confirmed by the fact that under the *Tănase* restatement (§ 199) even a possible stay of the civil proceedings, while the criminal proceedings are pending, is not a problem impacting on access, but maybe on length.

98. To complete the picture resulting from *Tănase*, it should be added that the Grand Chamber –while adopting an *ex ante* approach to evaluate the availability of the civil avenue – clarifies the existence of a supplementary

step of the test, evidently to be applied if the *ex ante* approach reveals that no alternative civil avenue existed at the starting point of the civil-party claim.

This step is mentioned in *Tănase* as an *obiter*, *ad abundantiam* criterion, since in the case at issue the *ex ante* standard was sufficient:

> "200. Moreover, the discontinuation of the criminal proceedings against J.C.P. and D.I. did not bar the applicant from lodging a separate civil action against them with a civil court once he became aware of the final judgments of the criminal courts upholding the public prosecutor's offices' decision to discontinue the criminal proceedings. Furthermore, as explained by the Government (see paragraphs 95-96 above), it would have been possible for the applicant to argue that the limitation period for bringing a separate civil claim did not run during the pendency of the criminal proceedings with civil claims. Therefore, such an action was not necessarily destined to fail."

99. Thus, if no alternative civil avenue exists *ex ante*, nevertheless access to a court is not prevented if, even though the civil proceedings might have been stayed during the criminal proceedings, the Court is not satisfied that bringing a civil action after the stay would have led "necessarily" to a failure in the final determination by the civil courts. Here one finds a further argument, in my view, to state a total conceptual incompatibility with the *Atanasova-Petrella* approach. Issues of negligence/omissions are to be dealt with – in the classical *Matos e Silva* scheme – as procedural flaws and/or an unreasonable length of proceedings under Article 6; only in this area does an *ex post* approach regain its significance.

G. Follow-up to *Tănase*

100. It may be not without meaning – and in my opinion it is very meaningful – that the way in which *Tănase* has been followed up by the Court has confirmed the approach of the Grand Chamber as to the "two-avenue" test.

101. The relevant follow-up can be traced to the very day of the delivery of the Grand Chamber judgment, when Judge Kūris appended to it a partly dissenting opinion. I do not need to dwell on this opinion, except for remarking that in it my distinguished colleague sharply criticises the findings of no violation of Article 6 § 1, both as to the right of access to a court and the right to a reasonable length of proceedings, and clearly summarises (see paragraph 84 of his opinion) the (main) rationale on which the majority in the Grand Chamber had considered that access to court had been available:

> "at the time when the applicant joined the criminal proceedings as a civil party, he could instead have brought separate civil proceedings against the two private individuals (whom he challenged in the criminal proceedings ...)"

102. This is, in my view, one additional confirmation of what the Grand Chamber stated in *Tănase* when dealing with the "two-avenue test": something very clear (such that one of the judges felt the need to manifest his dissent) and very far from what the majority in *Petrella* have perceived.

103. In order to further reflect on the distance that the majority in the Chamber in *Petrella* have created from the case-law validated by the Grand Chamber, it may also be worth noting that some indirect additional confirmation of the *Tănase* principles related to the "two-avenue test" recently came from two judgments which were not yet final at the time of the deliberations in *Petrella*. The judgments are *Mihail Mihăilescu v. Romania,* no. 3795/15, and *Victor Laurenţiu Marin v. Romania*, no. 75614/14, both of 12 January 2021.

104. The contexts of these cases are very different from those in *Petrella* and *Tănase*, as the cases of 12 January 2021 both concern fairness of proceedings (where – as I mentioned – space for *ex post* assessments is open). Also, there is no explicit consideration of the right of access to a court, although some language comes very close to this concept. In one case only is there a complaint concerning the length of proceedings, but it is examined under the head of Article 2 positive obligations. In one case only had the applicant filed a civil action. The discontinuance of criminal proceedings had been based by the authorities on different factors, but the statute of limitations was relevant (see *Mihăilescu*, § 86).

105. That having been said, I will confine myself to quoting some language from *Mihăilescu* (where – as I mentioned – there was also a discontinuance because of statutory limitations), underlining however that paragraphs 80-84 of *Mihăilescu* are parallel to paragraphs 137-41 of *Marin*. One may notice that *Tănase* is cited and that a "two-avenue" test is applied, with a somehow different approach suited to the fairness issues (rather than access to a court). What appears important to me is that the Court reiterates that, when determining whether there was an Article 6 issue (here, in general, of fairness), "the Court will have regard to all the proceedings open to the applicant", and "will assess whether the measures taken during the [criminal proceedings] weakened the applicant's position concerning his civil claim to such an extent that all subsequent stages of these proceedings or separate civil proceedings would have been rendered unfair from the outset". Notwithstanding the differences, the *Tănase* principles are reiterated.

IV. THE DIFFERENT FINDING THAT WOULD HAVE BEEN APPROPRIATE

106. Turning now to the correct finding that, in my opinion, the Court should have made in determining the applicant's complaint concerning access to a court in the present case, my considerations in part II of this

opinion, addressing the relationship between the protection of the right of access to court and the protection of the right to a reasonable length of proceedings, lead me to say that the majority should have chosen between the *Matos e Silva* approach and the *Anagnostopoulos* approach, should the latter still be feasible after *Tănase*.

107. In the present case, it is undisputed that there was no real civil claim, the filing of which in the domestic system was allowed at the later stage of the preliminary hearing, to be held only if the prosecution decided to press charges (see paragraph 11 of the judgment); however, according to some country-specific case-law of the Court, since in the domestic law some procedural rights are granted to the party filing a criminal complaint even before the joinder of a civil claim in the criminal proceedings, some space for applicability of Article 6 § 1 as to the right to a reasonable length of proceedings has been recognised (see *Arnoldi v. Italy*, no. 35637/04, §§ 25-44, 7 December 2017 and additional case-law cited in paragraph 22 of the judgment). I will later explain that I have some hesitations as to the *Arnoldi* case-law, although I voted with the majority in finding a violation of the right to a reasonable length of proceedings.

108. What matters at this point is that, for the first time in *Petrella*, the majority have extended the *Arnoldi* concept, granting protection against an excessive length of proceedings to complainants who have only filed complaints with the police or the prosecutor, to the right of access to a court. I am unable to agree on that point. Even conceding at this stage that one can equate the position of the person filing a criminal complaint with that of a civil party in criminal proceedings (but I will explain my general hesitations about this), in the area of access to a court this would not be material, since the majority should have used the specific test, validated by the Grand Chamber in *Tănase,* imposing on them a need to determine whether the criminal courts (in our case, not seised in reality, since the complaint still lay with the prosecutor's office, albeit that a judge ultimately agreed on the discontinuance – see paragraph 9 of the judgment) were under an obligation to examine the applicant's civil claim without being able to refer the case to a civil court.

109. The test would have given the result that no evidence has been provided that, in the domestic system, criminal courts were under such an obligation at the stage of the filing of a criminal complaint and of preliminary police investigations. Indeed, the national system of relationships between civil and criminal proceedings is based on Articles 75 and 651 *et seq.* of the Code of Criminal Procedure (the "CCP"), stating the principle of autonomy and separation; a civil action for damages is always possible and the civil judge has all necessary powers also to assess elements of tort that would constitute a criminal offence, with the only exception – pursuant to Article 75 – being where the civil action is proposed after a civil-party claim has already been made in the criminal proceedings or a

first instance criminal sentence has been rendered; in such cases, a stay of the civil action is imposed until the forthcoming *res judicata*. Criminal courts are never obliged to finally determine civil-party claims and can always refer them to civil courts, even if liability is found (Article 539 CCP); in the event of discontinuance, liability for the purpose of the determination of a civil action is ascertained only if the proceedings are not at first instance, and again referral to civil courts is possible for a final determination of the claim (Articles 539 and 578 CCP). Because of the above, whether – as I prefer – the majority had endorsed the *Matos e Silva* approach, or rather the *Anagnostopoulos* approach (if left open by *Tănase*), they should have considered that no possible breach of the right of access to a court could be found.

110. As a further step, in applying the *Tănase* criteria, given the available evidence and the domestic statute of limitations, the majority should have considered that it was not arbitrary or manifestly unreasonable for the national authorities to decide to discontinue the criminal proceedings.

111. For the reasons I have tried to explain in part III of this opinion, the majority should then have come to the application of the traditional *ex ante* "two-avenue" test, as restated by *Tănase* (§ 199). In my view, they should have considered that the test would produce a totally negative outcome, since the *ex ante* point in time to be referred to in order to assess whether there was a second avenue that was effective and available is the "the time when the applicant joined the criminal proceedings as a civil party". There was no civil party claim in the present case.

112. Even conceding that the *Arnoldi* principle could be applied (on which, as I said, I am unable to agree), it is undisputed that at the time when the applicant filed his criminal complaint, he could have brought a civil action, which would not have been stayed under the applicable domestic law. Borrowing language from *Association of the Victims*, as validated by *Tănase*, the Court should have considered that the applicant chose of his own free will to file a criminal complaint, an avenue which was probably simpler and less expensive, but incurring the risk that the authorities seised would not be able to examine his civil action. Therefore, the *ex ante* "two-avenue" test would have led at any rate to the rejection of the complaint; something that the majority – incorrectly in my view, with all due respect – explicitly denied in paragraph 52 of the judgment, using an *ex post* criterion of defective behaviour by the authorities which, as I have tried to show, does not belong (or no longer belongs) to the Court's case-law.

113. I have clarified that a supplementary step of the test is supposed to be applied if the *ex ante* approach reveals that no alternative civil avenue existed at the starting point of the civil-party claim. This was not the case in the present circumstances.

114. I would nonetheless refer to this supplementary *ex post* test, which requires the Court – under *Tănase* (§ 200) – to verify whether bringing a civil action after the stay imposed by the pending criminal proceedings would "necessarily" have been destined to fail. This step is very relevant in the majority's perspective, since they considered – as I have criticised at some length – that the traditional "two-avenue" test was not applicable and that the duration of the criminal investigations jeopardised the civil claim expectations of the applicant, thus equating such duration with a substantive stay which – as I said – is not in reality imposed under domestic law (on this, see also the interesting considerations by Judge Wojtyczek in his separate opinion in the present case, which I share).

115. The majority, although not recognising *Tănase* (§ 200) as authoritative and citing rather *Anagnostopoulos*, *mutatis mutandis*, in paragraph 53 of the judgment, did look in substance at whether there would be a prospect for the applicant to bring a civil action after the discontinuance of criminal charges. This is the passage of the majority's reasoning on which I am obliged to voice my strongest dissent. They ununderstandably introduce considerations as to the difficulties in collecting evidence, which would be the applicant's responsibility in a civil trial and with the passage of time that evidence might become dispersed. In doing so, they cite – once more – *Atanasova*, concerning personal injuries derived from a road accident (see paragraph 51 of this opinion). However, in *Petrella*, we have an alleged defamation case, by way of the publication of an article in a newspaper: a copy of the newspaper has even been produced before this Court (see paragraph 5 of the judgment); data on the circulation of newspapers are officially accessible; the different, limited evidential needs in defamation cases with respect to *Atanasova* are well emphasised by Judge Wojtyczek in his separate opinion in the present case (§ 3), with which I agree.

116. I would just additionally remark that the majority have also regrettably applied an ordinary standard of evidence to assess the alleged difficulties in starting a civil action after discontinuance. The correct standard would have implied for the majority a need to verify whether bringing a civil action after the end of the criminal investigations would have "necessarily" been destined to fail (*Tănase*, § 200). No such evidence has been provided.

117. The failure to examine the applicant's civil action in the context of his criminal complaint did not, in my view, affect the very substance of his right of access to a court. It follows that the relevant complaint should have been considered by the Court manifestly ill-founded and rejected.

V. THE COUNTRY-SPECIFIC CASE-LAW CONCERNING THE POSITION OF VICTIMS FILING COMPLAINTS WITH PROSECUTORS/POLICE AS TO THE RIGHT TO A REASONABLE LENGTH OF PROCEEDINGS BECOMES MORE PROBLEMATIC IF EXTENDED TO ACCESS TO A COURT

118. I voted with the majority, albeit with some hesitations, in finding a violation of the right to a reasonable length of proceedings. My hesitations were linked to the fact that precedents concerning the respondent State, being rather country-specific, equate the filing of a complaint with prosecutors (or the police) with a civil-party claim (see *Arnoldi*, §§ 36-41, and the further authorities cited therein). I felt bound to adhere to these precedents, although I am aware that they do not sit well with case-law concerning other countries with similar features (see, for example, *Association of the Victims*, § 64, where the Court understandably considered that a prosecutor could not determine a civil claim).

119. The problems posed by the above country-specific case-law now risk acquiring a greater magnitude – should the *Petrella* judgment become final – owing to the fact that the majority, for the first time, have extended the application of the *Arnoldi* "flexible" standard also to the area of access to a court, an aspect on which – as I have already mentioned – I dissent.

120. In the present instance there is no real civil claim (see paragraph 107 of this opinion), since the domestic system only allows the bringing of such a claim at a stage that was not reached in the present case because of the discontinuance of proceedings. Can the same country-specific approach that has recognised some space for the applicability of Article 6 § 1 as to the right to a reasonable length of proceedings be *ipso facto* extended to the right of access to a court, even if there is no genuine civil claim? There may be serious objections to such an extension. Firstly, the right of access to a court relates only to civil rights, which cannot reasonably be understood as having been asserted before the prosecutor and/or the police, to whom a criminal complaint is submitted (although some intention to bring a civil action might be manifested – see paragraph 23 of the judgment). Secondly, and more importantly, since the Convention does not confer any right, as such, to have third parties prosecuted or sentenced for a criminal offence (see *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], § 218, 14 April 2015), and although the question of the applicability of Article 6 § 1 cannot depend on the recognition of the formal status of a "party" in domestic law, I consider that – having regard to the right of access to a court – such a right must be indissociable from the victim's exercise of a right to bring civil proceedings in domestic law (see paragraph 10 of this opinion). Therefore, I believe that the majority have gone too far in equating the report of an alleged crime to the police or prosecutors – i.e., the authorities with whom criminal complaints are filed – with an attempt to bring civil proceedings,

with the result that discontinuance would imply a denial of the right of access to a (civil) court. Thirdly, the "two-avenue" test precludes the possibility that, by this means, reporting a crime may ever become equivalent to bringing a lawsuit before a civil court, since the operation of a parallel civil avenue will always prevent a finding of a violation of the right of access.

121. Affirming that filing a report of an alleged crime with the police or prosecutors is equivalent to bringing a civil lawsuit for the purposes of the right of access to a court under Article 6 § 1 of the Convention would have especially paradoxical consequences for those countries in which domestic law leaves the bringing of charges to the discretion of the prosecutor and no court – not even potentially – is involved in such assessment.

122. Should the present judgment not become final, as it is hoped, this aspect, too, could be reconsidered.

123. I may add that, again feeling bound by the *Arnoldi* case-law, I also voted with the majority in finding a violation of Article 13. I wish to clarify that such a finding on my part is of course limited to the fact that the domestic system does not open the national compensatory scheme for an excessive length of proceedings to civil party-like situations under *Arnoldi*. In no way am I able to agree that a domestic remedy is necessary to complain about an alleged breach of the right of access to a court which, in my view, is non-existent in the present case.

VI. THE DANGERS THAT THE MAJORITY'S APPROACH ENTAILS FOR THE FUTURE AND THE NEED FOR RECONSIDERATION

124. The confusion that the majority's judgment creates, with due respect, between access to remedies for civil claims and problems related to the duration of proceedings (both civil and criminal) is not without consequences for future applicants and Contracting States. As I have mentioned, the right to an effective remedy is also involved.

125. Concerning the problems related to an excessive length of proceedings, the Court, both through its case-law and the voice of its Presidents, in a genuine vision of subsidiarity, constantly encourages Contracting States to the Convention to establish effective domestic remedies to deal with the length of proceedings. For example, in *Scordino v. Italy (no. 1)* (no. 36813/97, [GC] § 183, 29 March 2006) the Court held:

> "The best solution in absolute terms is indisputably, as in many spheres, prevention. The Court ... has stated on many occasions that Article 6 paragraph 1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet ... the obligation to hear cases within a reasonable time. Where the judicial system is deficient in this respect, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations

> in respect of the same set of proceedings and does not merely repair the breach *a posteriori*, as does a compensatory remedy ..."

126. Although an expeditory approach is to be preferred, the Court has accepted that States can also choose to introduce only a compensatory remedy, without that remedy being generally regarded as ineffective.

127. The member States of the Council of Europe have themselves adopted an extensive toolkit "in order to promote and assist fulfilment of their obligations under the European Convention on Human Rights", emphasising that the implementation of domestic remedies "should permit a reduction in the Court's workload as a result, on the one hand, of a decrease in the number of cases reaching it and, on the other, of the fact that the detailed treatment of cases at national level would facilitate their later examination by the Court"[8]. The Committee of Ministers has, in particular, dealt with the topic of remedies in the area of duration of proceedings in Recommendation CM/Rec(2010)3 "on effective remedies for excessive length of proceedings", which was accompanied by a guide to good practice[9].

128. Remedies for an excessive length of proceedings, of both an expeditory and a compensatory nature, have become widespread in several European systems. The Court has consequently had to examine, in its case-law, several aspects of these systems.

129. What is the relationship between such domestic remedies, designed to enforce subsidiarity in the area of length of trials, and possible breaches of the right of access to a court? The answer can be found in *Arnoldi v. Italy*, § 54, where the Court has already

> "note[d] that [a domestic compensatory remedy] constitutes an effective remedy for complaining about the length of the procedure and not, from the point of view of Article 6, of the lack of access to a court nor ... of the consequences arising from such a lack of access."

130. As a consequence, in the same judgment (§ 55; see also §§ 12-14), the Court stated that the six-month period laid down by Article 35 § 1 started running from the discontinuance of the criminal proceedings for the purposes of a complaint regarding a possible denial of access to a court; whereas – since the compensatory remedy was in principle effective with respect to a complaint concerning the length of the proceedings – in so far as that different complaint was concerned, it started when the domestic decision dismissing the compensation claim became final.

131. Thus, it is evident that – until the majority in *Petrella* decided to rediscover *Atanasova* – applicants could choose to follow different lines of action: lodging a compensatory remedy domestically and then, in case of dismissal, applying to the Court, in order to complain about the length of

[8] Council of Europe, Guide to good practice in respect of domestic remedies (adopted by the Committee of Ministers on 18 September 2013), p. 5.
[9] See, for references, ibid., pp. 9, 15, and 39.

proceedings; or applying directly to Strasbourg for a lack of access to a court, given that in principle there were no domestic remedies effective for that purpose; or also applying to the Court in order to bring both complaints, whether or not the applicant previously acted domestically, with some risk of inadmissibility of at least one complaint in such a case. Be that as it may, before *Petrella* applicants could rely on some certainties: they could expect that in some most serious cases the Court would follow *Anagnostopoulos* (today, within the limits set by *Tănase*) and find a violation of the right of access to a court and, in that event, no separate issue arose under the viewpoint of duration; otherwise, in most cases they could decide to bring the case successfully – under the traditional *Matos e Silva* approach – only with respect to the length of proceedings, after exhausting domestic compensatory remedies if available.

132. The risk for the future, if the majority's view in *Petrella* becomes the final word in this case, is linked to the unfortunate choice by the majority in holding that the right of access to a court and the right to a reasonable length of proceedings can be violated at the same time and on account of the same negligence/omissions. This will entail the paradoxical outcome that applicants will have to apply to the Court, in principle, twice: once in six (in the near future, four) months from the discontinuance of criminal proceedings, in respect of the right of access to a court; and again in six (four) months from the final decision on the domestic compensatory remedy, as regards the length of the proceedings.

133. One could then kiss goodbye, in this area, to the need to promote a detailed handling of cases at national level, with regard for subsidiarity, and to prevent an excessive workload for the Court. Governments would run the risk of double (national and international) redress, based on the same facts.

134. But those that I have just described are not the only dangers which I anticipate, should the majority's approach become final. The further confusion deriving from the refusal by the majority to be faithful to a more traditional approach to the "two-avenue test", as stated by the Grand Chamber in *Tănase*, and from the consequent exhumation of *Atanasova* also in this respect, will oblige applicants to assess, before applying to the Court, whether the discontinuance of the proceedings was consequent to some "responsibility" of the authorities (and in that case they would not be obliged to initiate a separate civil claim) or it was not (or the responsibility was not so serious – and in that case they would be obliged to start the different civil avenue). Would this be in the interest of protecting human rights? Would the Contracting States be facilitated in their task of ensuring domestic protection of those rights?

135. I do not believe that the majority's approach serves the purpose of interpreting and applying the Convention in a simple, clear and foreseeable way; it rather creates problems for the applicants and Governments that may even become insurmountable.

VII. CONCLUSION

136. I was unable to share the majority's consideration of this case concerning their understanding of the content and the protection of the right of access to a court.

137. Supposedly, the majority's approach, whereby they recognise, at the same time and in respect of the same facts, both a violation of the right of access to a court and of the right to a reasonable duration of proceedings under Article 6 of the Convention, affords a wider protection of human rights. In reality, in my view, it brings confusion and creates complications, obliging applicants and Governments to make complex assessments before lodging an application or mounting their defences, and also diminishes the overall efficiency of domestic compensatory schemes for an excessive duration of proceedings.

138. In writing this opinion, I have tried to highlight the serious questions concerning the application of the Convention that the majority's approach raises. What is the relationship between the protection of the right of access to a court and the protection of procedural rights, in particular the right to a reasonable duration of proceedings? What is the relevance of parallel avenues to guarantee access to a court in order to determine a civil claim? What are the precise steps of a possible test in this area? Are negligence/omissions by the authorities relevant? Can the position of a victim complaining to the prosecutor and/or police be deemed equivalent to that of a civil-party claimant?

139. In asking these questions, the reader of the *Petrella* judgment will perhaps also wonder about the Court's fidelity to its case-law. For these reasons, it is to be hoped that the majority's view is not the final word in this case. After the *Golder* legacy, the *Matos e Silva* confrontation between the Commission and the Court, and the *Tănase* restatement of case-law, the need is felt for a further clarification of the content and protection of the right of access to a court.