



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

## SECOND SECTION

### **CASE OF FABBRI AND OTHERS v. SAN MARINO**

*(Applications nos. 6319/21 and 3 Others)*

### JUDGMENT

*This version was rectified on 30 January 2023  
under Rule 81 of the Rules of Court.*

Art 6 § 1 (civil) • Access to court • Inability of applicants, injured parties to criminal proceedings, to have their civil claims determined as entitled to by law, as a result of judicial authorities' total inactivity which led to prosecution being time-barred

STRASBOURG

18 October 2022

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER  
WHICH DELIVERED JUDGMENT IN THE CASE ON  
24/09/2024**

*This judgment may be subject to editorial revision.*



**In the case of Fabbri and Others v. San Marino,**

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

Jon Fridrik Kjølbro, *President*,

Carlo Ranzoni,

Branko Lubarda,

Pauliine Koskelo,

Jovan Ilievski,

Gilberto Felici,

Diana Sârcu, *Judges*,

and Hasan Bakırcı, *Section Registrar*,

Having regard to:

the applications (nos. 345/21, 6319/21, 6321/21 and 9227/21) against the Republic of San Marino lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by three San Marinese nationals, Mr Mario Foschi, Mr Stellino Fabbri and Mr Andrea Forcellini and one Italian national Ms Angelina Marro (“the applicants”), on the various dates indicated in the appended table;

the decision to give notice to the San Marinese Government (“the Government”) of the applications;

the decision of the Government of Italy not to make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention);

the parties’ observations;

Having deliberated in private on 13 September 2022,

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

## INTRODUCTION

1. The applications concern the discontinuation of criminal proceedings against third parties because the investigations became time-barred as a result of the authorities’ inaction. Thus, the applicants’ (who were parties to the proceedings as injured parties) complained under Article 6 that they could not have their civil claims determined during the criminal proceedings, as entitled to by law.

## THE FACTS

2. The applicants were born in 1942, 1955, 1973 and 2003 respectively and live in San Marino. The fourth applicant, who was a minor at the time of lodging the application, was represented by his mother. All the applicants were legally represented by lawyers practising in Italy or San Marino, according to the attached table.

3. The Government were represented by their then Agent, Mr L. Daniele.

4. The facts of the case may be summarised as follows.

#### THE CIRCUMSTANCES OF THE CASE

##### **A. Application no. 345/21 - Mr Foschi**

5. On 21 August 2014 Mr Foschi (“the first applicant”) lodged a complaint with the Italian police (accompanied by documentary evidence) against MKT (a Bulgarian national) in relation to fraud and misappropriation of funds (354,370 euros (EUR)). He also appointed an Italian lawyer M.G.

6. According to the Italian investigation, to which the first applicant participated, the money transfers from the first applicant to MKT (who for several years had done business together in relation to the sale of cars destined for Bulgaria) and his wife, which were allegedly intended to be used for the purchase of property in Bulgaria, had been made by the first applicant voluntarily and for the purposes of purchasing vehicles not property. While it appeared that EUR 100,000 had indeed been transferred to MKT, there were not sufficient elements to sustain the charges. According to the Italian police the issue was one of a civil nature whereby the injured party (the first applicant) was to seek damage for the losses incurred in the ambit of the commercial activity he undertook with MKT. In any event, the money transfers occurred in the most part from San Marino to other States, therefore, the alleged crime occurred outside of the jurisdiction of Italy.

7. Thus, on 30 June 2015, the file was transferred to the San Marino authorities who on 8 July 2015 opened criminal investigation file no. 420/2015. However, the investigating judge assigned to the case did not take any steps.

8. On 7 May 2019 the Acting Chief Justice of San Marino invited the parties to make submissions (within two weeks) concerning the non-observance of the time-limits for the investigation. The decree was notified to Mr Foschi, as complainant, personally (in *mani proprie*), on 4 July 2019.

9. On 3 February 2020 the Acting Chief Justice of San Marino assigned a new investigating judge.

10. On 4 March 2020 the new investigating judge noted that the crime had become time-barred as no investigative act ensued after the opening of the file.

11. The Prosecutor agreed and was in favour of discontinuation (*archiviazione*) without prejudice to any future civil claims which could be lodged by an injured party.

12. On 10 March 2020 the investigating judge declared the charge discontinued because it had become time-barred (Article 52 *et seq.* of the Criminal Code). The decree was notified to Mr Foschi, personally (in *mani proprie*), on 22 April 2020.

13. On 21 October 2020 Mr Foschi, mandated a lawyer, R.F., to act on his behalf (*procura speciale*) and indicated the latter's office as an address for service (*eletto domicilio*) in relation to these criminal proceedings, and at the same time withdrew the mandate of all prior lawyers previously appointed.

**B. Application nos. 6319/21 and 6321/21 - Mr Fabbri and Ms Marro**

14. On 13 and 14 April 2016 Mr Fabbri and Ms Marro (the second and third applicants, respectively) lodged a complaint with the San Marino tribunals against N. (a national of Bosnia and Herzegovina) for personal injury. They expressed their intention of joining the eventual proceedings as a civil party and asked to be informed if proceedings were to be discontinued. They also nominated lawyers to legally represent them and indicated the latter's office as an address for service (*eletto domicilio*). As a result, criminal investigation file no. 210/RNR/2016 was opened. The investigating judge assigned to the case did not take any steps.

15. On 28 May 2019 the Acting Chief Justice of San Marino invited the parties to make submissions (within two weeks) concerning the non-observance of the time-limits for the investigation.

16. On 16 November 2020 a newly assigned investigating judge declared the charge discontinued because it had become time-barred (Article 52 *et seq.* of the Criminal Code, particularly Article 54). He informed the Prosecutor accordingly, noting that in the absence of his objection the decree would take effect. He also noted that it appeared from the casefile that no investigative measures had been undertaken throughout the entire time and that N. had not even been notified of the investigation. Thus, even assuming it was not time-barred, no criminal proceedings could ensue in the absence of any evidence having been collected (Article 135 of the Code of Criminal Procedure).

17. On 20 November 2020 the Prosecutor agreed to discontinue the case.

**C. Application no. 9227/21 – Mr Forcellini**

18. In 2015 proceedings for defamation were initiated by C. (a teacher) against Mr Forcellini's (the fourth applicant) parents, them having written a letter of complaint concerning her actions and omissions during a trip abroad, *inter alia*, for her failure to protect their son from bullying.

19. By a judgment of 6 March 2018 the trial judge found the parents guilty, and sent the file to the investigating judge to consider whether it was necessary to investigate third persons in relation to the incident. As a result, on 28 March 2018 criminal investigation file no. 178/RNR/2018 was opened against V. and D. for private violence and persecution against the fourth applicant (a minor). A request, on behalf of the fourth applicant, to join the

proceedings as a civil party was submitted. The investigating judge assigned to the case did not take any steps.

20. On 25 November 2020 a newly assigned investigating judge archived the case in accordance with Article 135 of the Code of Criminal Procedure noting that his hands were tied given that the charge had become time-barred (Article 52 *et seq.* of the Criminal Code, particularly Article 54). He further noted that in the absence of any investigative acts having been undertaken no elements had been collected substantiating an indictment. He informed the Prosecutor accordingly, noting that in the absence of his objection the decree would take effect.

21. On 27 November 2020 the Prosecutor expressed his agreement.

## RELEVANT LEGAL FRAMEWORK

22. The relevant Articles of Law no. 93/2008 concerning criminal procedural rules, in so far as relevant, read as follows:

### Article 3

“(1) Except in the cases mentioned in Article 5 below [secret or urgent investigations], the investigating judge carries out all the investigating activity in general, as well as that related to the collection of evidence and particularly its acquisition (*formazione*), while safeguarding the rights of the accused and the prerogatives of the Attorney General (*Procuratore del Fisco*) as well as the rights of private parties as protected by criminal law.

(...)

(3) Save for judicial acts covered by banking secrecy according to law ..., the injured party (*parte lesa*) who has duly constituted himself or herself as a party to the proceedings has the right to receive, upon request, a copy of the acts of the proceedings and to submit in any phase of the proceedings memorials, submissions or documentation; he or she can request to take part, possibly only through his or her defence counsel or expert (*perito*), during the investigations, to any on site examination (*accessi*), searches and or other expert examination (*perizie*). The investigating judge to whom the request is made must give reasons for the decision. The investigating judge shall deny the authorisation in case the request of the injured party, who has duly constituted him or herself as a party to the proceedings, represents a serious breach of the right of defence of the accused as well as if it is in contrast with fundamental requirements of confidentiality of the investigations or (...)

(4) The injured party is obliged to participate in confrontations with the accused set by the investigating judge.

(5) The above is without prejudice to the obligation of the judicial police to undertake investigations of their own motion, in accordance with the law, save any contrary instruction by the investigating judge, who must be informed immediately of the notice of the crimes and any further elements useful to the investigation.”

**Article 4**

“(1) Within thirty days of the crime report ..., save for the exceptions mentioned in Article 5 below, the investigating judge must personally inform the accused and the Attorney General of the legal and factual elements of the crime in respect of which proceedings are being carried out ...”

**Article 6**

“(1) The investigating judge, in line with the principle that proceedings shall be heard in a reasonable time (...) shall ensure the quick completion of the investigation and therefore the publication of the proceedings including the decision to commit the individual and appoint an oral hearing, or alternatively to archive the charges under Article 135 of the Code of Criminal Procedure, in the shortest time possible.

(2) In any event either of these decisions must be made within the peremptory time-limit (...).

(3) Once the time-limits expire the proceedings must be considered published, irrespective of any such decision by the investigating judge.

(4) The case-file is then transferred to the Registry of the Chief Justice, who shall verify the state of the proceedings, and after hearing the parties and the opinion of the Attorney General, if the latter agrees, the former shall assign the case to him or herself and order its discontinuation. If, however, he or she considers that it was impossible to abide by the time-limit due to a fortuitous event or force majeure, he or she may give an extension of thirty days. No further extensions are allowed (...).

(5) The Chief Justice shall immediately inform the Commission for Justice Affairs and the ordinary Judicial Council of the delay which occurred and the consequent decisions.

(6) Such a delay may give rise to civil responsibility on the part of the investigating judge if the conditions laid down in Article 9 of the Constitutional law of 30 October 2003 no. 114 are also fulfilled”.

23. The relevant Article of the Criminal Code reads as follows:

**Article 54**

“An offence is time-barred:

(2) within three years if it is punished by imprisonment of the second degree, by prohibition of the third or fourth degree, by a fine...”

24. The relevant Articles of the Code of Criminal Procedure (1878 and later updates), in so far as relevant, read as follows:

**Article 1**

“Every crime gives rise to a criminal action. A civil action also arises when the crime causes damage, physical or moral, to the passive subject of the crime [the victim] and the civil action may be pursued by anyone having an interest in obtaining damage for the harm caused.”

**Article 3**

“A civil action can be instituted separately, *via* civil proceedings, in which case it is regulated by the norms of civil procedure, or contemporaneously with the criminal action. In the latter case the claim for damage is registered in the criminal proceedings, and the deciding [trial] judge will decide on the matter as established in Chapter XXI of this Code.”

**Article 4**

“The victim who chooses to seek damage during criminal proceedings, has no other right other than appearing during the trial so to call witnesses and submit evidence which he or she considers could prove the responsibility of the accused. He or she has no right to have knowledge of the investigative acts undertaken before the proceedings are published [ie. the decision to commit or not for trial].”

**Article 5**

“The fact that a crime has become time-barred does not impede the exercise of the civil action, unless the latter is also time-barred.”

**Article 7**

“During criminal proceedings, a civil action is exercised by means of a signed (...) declaration expressing one’s intention to constitute him or herself as a civil party.

The declaration must be notified to the accused (*prevenuto*) and the Attorney General, and must be filed, together with the documents related to notification of the other parties, in the Registry of the Tribunal, not later than the day of the publication of the proceedings.

In summary proceedings the declaration may be submitted even on the day established under Article 175 (1) for the first hearing (*trattazione della procedura*) but before the indictment (*contestazione del reato al pervenuto*)”

**Article 8**

“Once the *Commissario della Legge* [investigating or trial judge] receives a request by a party to join proceedings as a civil party, he or she shall by decision admit the civil party to join the proceedings.

Such decision gives the civil party the right to be served with the communication of the acts of the proceedings after its publication, as well as the right to appoint a lawyer who can make written submissions on his or her behalf...”

**Article 11**

“In such cases, the criminal proceedings suspend the civil proceedings, as long as the determination of the latter necessarily depends on the establishment of the material facts.”

**Article 12**

“Once the criminal proceedings are over, the civil proceedings can be resumed as long as the accused has been found guilty, or has been acquitted because the facts of the case do not amount to a crime.”

**Article 135 (prior to 2022)**

“(1) Having heard all relevant witnesses and undertaken all acts necessary for establishing the truth concerning the case, the investigating judge shall, if he or she considers that the evidence collected does not offer sufficient legal grounds to prosecute the accused, order that the case be discontinued (*archiviato*). The decree ordering the discontinuation of proceedings must immediately be notified to the Attorney General, the accused, the injured party, the civil party duly constituted, the complainant and the Chief Justice.

(2) Such a decree may be appealed before the Judge of Criminal Appeals (...) by any of the persons notified within thirty days of notification (...).”

**Article 163**

“The conviction judgment also determines the reimbursement of damages, if requested by the person offended or harmed by the crime. If the convicted person is responsible for the damage suffered, the judgment shall make a finding in favor of the injured or damaged party and determines the amount.

Where this is not possible due to the lack of suitable elements for evaluating the whole damage, the Judge can liquidate a provisional award, deferring any further assessment to the competent civil judge.

The same judgment determines the legal and judicial costs to be paid by the accused.”

**Article 175**

“Within thirty days from the lodging of the criminal complaint the [investigating] judge (*Commissario della legge*) must fix a first hearing for the summary proceedings, with the possibility of carrying out summary investigations in the meantime.

If urgent objective investigations are necessary, the judge shall provide accordingly, and the above-mentioned term shall start to run on the completion of such investigations. The witnesses shall be summoned to appear for questioning on specified dates.

The accused shall also be summoned by means of a committal decree setting out the facts imputed to him or her (...)

The committal decree is to be notified to the Attorney General to enable his or her intervention at the trial.

Once the committal decree is issued the proceedings are deemed published. (...).”

## THE LAW

### I. JOINDER OF THE APPLICATIONS

25. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

## II. PRELIMINARY REMARKS

26. In view of the confusion in the applicants' observations which refer to the excessive length of the criminal proceedings in connection with Article 6 of the Convention and the right of access to court under Article 13 of the Convention, as well as the right to an effective remedy, the Court finds it pertinent to point out that the scope of the case is limited to the complaint communicated to the respondent Government under Article 6 § 1 (access to court), as explicitly formulated in the application forms lodged by the applicants.

## III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

27. The applicants complained that they did not have access to court to determine their civil claims as a result of the inaction of the authorities which led to the discontinuation of the criminal proceedings, contrary to that provided in Article 6 § 1 of the Convention, which reads as follows:

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

### A. Admissibility

#### 1. *Applicability of Article 6*

##### (a) **The parties' submissions**

##### (i) *The Government's submissions*

28. The Government submitted that Article 6 § 1 in its civil head was not applicable.

(α) In relation to applications nos. 345/21, 6319/21 and 6321/21

29. The Government submitted that under Article 7 of the San Marino Code of Criminal Procedure, an injured party can submit his intention to join the proceedings as a civil party at any time during the investigation up to the first hearing of the trial. Thus, the legal framework was different to that examined by the Court in *Arnoldi v. Italy* (no. 35637/04, §§ 36-41, 7 December 2017) where the applicant in that case had no possibility to do so. As a result of that impossibility, in *Arnoldi* the Court had had to proceed to examine which rights could be exercised by injured parties who could not have requested to be civil parties – but that was not necessary in the present case. In the Government's view, the fact that the applicants in the present case could have requested to be civil parties, but the first, second and third applicants, had not done so, meant “most likely” that they had not wished their civil rights to be determined in the criminal proceedings and had only sought the prosecution of the perpetrators.

30. Without prejudice to the above, the Government submitted that under San Marino law, injured parties were also guaranteed a set of rights, which, according to the Court's case-law, if exercised would put them into a position equal to that of civil parties. These included, appointing an attorney, submitting evidence and briefs, as well as appealing the discontinuation decision. While it was undeniable that the applicants had a concrete interest to obtain compensation (given the offences at issue), the first and second applicants had not exercised any such rights, contrary to the third applicant. In particular, the Government argued that the first and second applicants had failed to appoint an attorney, submit evidence or briefs (supporting their claim – in particular in respect of the first applicant whose complaint had been considered poor by the Italian authorities – and urging the performance of further investigations), or appeal against the decree discontinuing the case, despite the law giving them the possibility to exercise such rights. In the Government's view the invoked provision was therefore inapplicable to the proceedings complained of by the first and second applicants who had not in any way expressed their will to have their civil claims decided.

31. Conversely, the third applicant had appointed an attorney, urged the adoption of measures by the investigating judge and supplied documents in support of her claim. Nevertheless, the Government cast doubt about her willingness to have her civil claims determined in the absence of a request to join the case as a civil party (in line with the argument at paragraph 29 above).

(β) In relation to application no. 9227/21

32. In respect of the fourth applicant, the Government noted that his mother had submitted a request to join the proceedings as a civil party while exercising her parental authority. However, she had done so on her own, contrary to domestic law which required both parents to act jointly. Thus, her request had to be considered null and void. It followed that Article 6 could not apply.

*(ii) The applicants' submissions*

33. The applicants submitted that Article 6 was applicable since in the San Marino legal system a request to join proceedings as a civil party can be filed during the preliminary investigation phase up to the first hearing of the trial, but the injured party can exercise - regardless of his or her status as a civil party - the rights and powers, provided by law, to injured parties.

34. The first, second and third applicants had expressed their intention to join the proceedings as a civil party and make claims for damages and they had filed a request to be informed in the event of the proceedings being archived. Thus, the three of them had exercised at least one of the rights afforded to injured parties within the domestic system. In respect of the fourth applicant a request had been lodged to join the proceedings as a civil party.

**(b) The Court's assessment***(i) General principles*

35. The Convention does not confer any right, as such, to have third parties prosecuted or sentenced for a criminal offence. To fall within the scope of the Convention such right must be indissociable from the victim's exercise of a right to bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right such as the right to a "good reputation" (see *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I, and *Gorou v. Greece (no. 2)* [GC], no. 12686/03, § 24, 20 March 2009). Therefore, Article 6 applies to proceedings involving civil-party complaints from the moment the complainant is joined as a civil party, unless he or she has waived the right to reparation in an unequivocal manner (ibid. § 25, and *Florin Ionescu v. Romania*, no. 24916/05, § 55, 24 May 2011), even during the preliminary investigation stage taken on its own (see *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 207, 25 June 2019).

36. However, in cases where at the stage of the preliminary investigation there was no possibility to join the proceedings as a civil party in accordance with domestic law, but nevertheless injured parties could exercise rights and powers expressly afforded to them by law, and had actually done so, the Court concluded that the civil limb of Article 6 § 1 of the Convention was applicable to the criminal proceedings in which the applicants participated as an injured party but not as a civil party (see *Sottani v. Italy* (dec.), no. 26775/02, ECHR 2005-III (extracts), *Patrono, Cascini and Stefanelli v. Italy* no. 10180/04, §§ 31-33, 20 April 2006, *Arnoldi*, cited above, §§ 25-44, and more recently, *Petrella v. Italy*, no. 24340/07, § 23, 18 March 2021). It follows that the legislation of the State concerned is not without importance.

*(ii) Application of the general principles to the present case*

37. It is not disputed that a claim for damage arising from the offences of which the applicants considered they were victims is a claim based on civil rights (see, *mutatis mutandis*, *Nicolae Virgiliu Tănase*, cited above, § 188; see also Article 1 of the Code of Criminal Procedure at paragraph 24 above). It remains to be determined whether Article 6 § 1 in its civil limb applied in the proceedings at issue in the present case (ibid.), bearing in mind that the applicability of Article 6 cannot depend on the recognition of the formal status of "party" by national law (see *Arnoldi*, cited above, § 28, and *S.W. v. the United Kingdom*, no. 87/18, § 78, 22 June 2021).

38. As to whether the applicants intended to obtain the protection of their civil right or obtain compensatory redress in the context of the criminal proceedings, and whether the proceedings were decisive of those rights (see *Arnoldi*, cited above, § 30), the Court makes the following considerations.

39. The Court acknowledges the difference between the San Marino and the Italian legal system, in particular the fact that, in San Marino, unlike in Italy, the applicants could have been admitted to the proceedings as civil parties at pre-trial stage. Indeed, in San Marino, an injured party may lodge a request to be admitted as a civil party during the investigation stage, or following the decision to commit an accused for trial, as long as it is lodged before the indictment (the first hearing of the trial). A decision on the matter may be taken by the investigating judge and, if no such decision is taken, it must eventually be taken by the trial judge at the first hearing (see Articles 7 and 8 of the Code of Criminal Procedure, at paragraph 24 above).

40. In the present applications, the time-limit for lodging such a request had not yet elapsed when the investigations were discontinued because they had become time-barred, thus no fault can be attributed to the applicants. The Court further notes that, even had such a request been lodged (as in the case of the fourth applicant) a decision on the matter would not necessarily have been taken in the pre-trial stage. Thus, an injured party has no certainty of being admitted as a civil party at any time prior to the trial stage – which, in the case of the charges being discontinued, may never see the light of day. In these circumstances, whether the applicants were civil parties to the proceedings cannot be taken to be decisive for the applicability of the provision. It is appropriate, therefore, to ascertain whether the applicants had shown their willingness to join the proceedings as a civil party, either by lodging a request to that effect or by exercising any rights and powers attributed to them, as injured parties, by domestic law (see the general principles set out at paragraph 36 above).

41. The Court notes that under domestic law an injured party, who has duly constituted himself or herself as a party to the proceedings, has the right to receive, upon request, a copy of the acts of the proceedings and to submit memorials, submissions or documentation; as well as to request to take part, *via* their legal counsel, in the investigations and call witnesses (see Article 4 of the Code of Criminal Procedure, supplemented by Article 3 of Law no. 93/2008 enacted subsequently, at paragraphs 24 and 22 above).

42. The Court observes that, in their submissions, the applicants made no distinction as to the position of the first, second and third applicants, nor did they specifically clarify their positions by indicating relevant passages in the submitted documentation, despite a specific question on the matter set by the Court. However, in respect of the first applicant, at the observation stage, an unsigned document was submitted, resembling a complaint, addressed to the Tribunal of Forli, Italy, done in San Marino and dated 13 August 2014, whereby the first applicant appointed a certain M.M., a San Marino lawyer to act in his interest, and through which he expressed his will to join the proceedings as a civil party.

(α) Application no. 345/21

43. The Court considers that the unsigned document – submitted only at the observation stage of the proceedings and relied on by the first applicant – purporting to be his complaint to the Italian authorities, dated 13 August 2014 (as opposed to the relevant 21 August 2014, date of the complaint according to all the other official documents) whereby the first applicant appointed a certain M.M., a San Marino lawyer to act in his interest (contrary to that apparent from other official documents referring to an Italian lawyer M.G., or the notifications received in *mano propria*, in the absence of a lawyer), and through which he expressed his will to join the proceedings as a civil party, is of dubious authenticity and is considered to be of no evidentiary relevance.

44. Furthermore, from the legible material provided to the Court, it does not transpire that the first applicant has taken any active steps in the proceedings, ever since they were transferred to San Marino by the Italian Police. The appointment of a lawyer to act on his behalf and indicating an address for service, which occurred subsequent to the decision to discontinue the charges (see paragraph 13 above) cannot, in the Court's view, be considered as a useful exercise of his rights as an injured party.

45. Thus, the Court considers that the first applicant has not unequivocally expressed his will to have his civil claims determined in the criminal proceedings in San Marino, nor, as a consequence, would those proceedings have been decisive in determining his civil rights.

46. The Government's objection is therefore upheld.

(β) The remaining applications (nos. 6319/21, 6321/21 and 9227/21)

47. The Court further observes that, from the documents provided, it appears that the second and third applicants appointed a lawyer, indicated their intention of eventually joining the proceedings as a civil party and asked to be informed of any decision to discontinue the investigation – which would have allowed them to exercise their right to appeal from that decision (compare, *Petrella*, cited above, § 23). As admitted by the Government (see paragraph 31 above) the third applicant also urged the adoption of measures by the investigating judge and supplied documents in support of her claim. It follows that the second and third applicants have exercised the rights they had available as injured parties under the San Marino domestic system, which in substance do not differ from the rights of a civil party.

48. In respect of the fourth applicant, the Court notes that a request to join the proceedings as a civil party had been lodged (see paragraph 19 above). It was not decided upon because the investigative judge took no action whatsoever and it was impossible for the trial judge to decide on the request, since the proceedings never reached that stage. It follows that, the responsibility of the failure to be admitted as a civil party cannot be attributed

to the injured party who clearly showed the necessary willingness to join the proceedings as a civil party.

49. The Government further argued that the request had not been lodged in accordance with the domestic law, it was therefore to be considered null. However, the Court reiterates that it is primarily for the domestic courts to interpret and apply domestic law. In the present case, the investigating judge having failed to decide on the matter (without any fault of the injured party), it is not for the Court to do so.

50. In these circumstances the Court considers, in respect of the second, third, and fourth applicants, that there is no reason to question their will to pursue their civil claims and that the outcome of the criminal investigation would have been decisive for the determination of the civil rights at issue in those proceedings (see also the considerations made at paragraph 66 below, and, for example, *Arnoldi*, cited above, § 40, and *Alexandrescu and Others v. Romania*, nos. 56842/08 and 7 others, § 22, 24 November 2015).

51. The Government's objection in respect of applications nos. 6319/21, 6321/21 and 9227/21 is therefore dismissed.

## 2. *Exhaustion of domestic remedies*

### (a) **The parties' submissions**

52. The Government submitted that the applicants had not exhausted domestic remedies in so far as they had failed to appeal against the decree ordering the discontinuation of the case (Article 135 (4) [*recte* (2)] of the Code of Criminal Procedure).

53. The applicants accepted that Section 7 (1) of the law of 17 June 2008, amending Article 135 of the Code of Criminal Procedure, provided that an order that the case be discontinued may be appealed by *inter alia* the injured party, within thirty days of its notification. However, they considered that this appeal could not be effective in their case, as the Judge of Criminal Appeals could only confirm the expiry of the term as found by the new investigating judge assigned to the files. The injured party had no possibility of forcing the investigating judge to continue the investigation once the deadline set by law for the conclusion of the preliminary investigation phase had expired, thus the applicants had had no further avenues to seek.

### (b) **The Court's assessment**

54. In accordance with Article 35 § 1 of the Convention, the Court may only deal with an issue after all domestic remedies have been exhausted. The purpose of this rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). However, the rule of exhaustion of domestic remedies requires an applicant to have normal

recourse to remedies within the national legal system which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. There is no obligation to have recourse to remedies which are inadequate or ineffective (see *Micallef v. Malta* [GC], no. 17056/06, § 55, ECHR 2009). The only remedies which need to be exhausted are effective remedies that have a prospect of success (see *Carmelina Micallef v. Malta*, no. 23264/18, § 28, 28 October 2021).

55. The Court observes that, in the present cases, there is no dispute about the fact that the legal time-limit for the investigation had come to an end and that the offences complained of had thus become time-barred, over and above the fact that no evidence had been collected in the meantime. In consequence, the Court considers that any such appeal had no prospects of success (compare and contrast, albeit in the context of an assessment under Article 13, *Diamante and Pelliccioni v. San Marino*, no. 32250/08, §§ 194 and 199, 27 September 2011, where the proceedings had been discontinued because, following the examination of evidence, the judge had found that the prerequisites of the offence had not existed (§ 124)). It follows that the applicants were not obliged to pursue this avenue.

56. The Government's objection is therefore dismissed.

### 3. Conclusion

57. The Court notes that applications nos. 6319/21, 6321/21 and 9227/21 are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

58. The same cannot be said of application no. 345/21, which, in view of the considerations made at paragraphs 43-46 above, must be declared incompatible *ratione materiae* with the provisions of the Convention and, as such, inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention.

## B. Merits

### 1. The parties' submissions

59. The applicants complained that the excessive delay in the investigation had led to the criminal charges becoming time-barred. As a consequence, they had been deprived of their right to access to court to determine their civil claims, in line with the Court's case-law. They noted that the latter provided that once the internal legal system allowed the interested party to protect a held right in a criminal court this should be guaranteed even in the event that it was also possible to use another route allowed by the system. Therefore, in the present case, the fact that the applicants could have

protected their position before a civil judge, was no justification for the inert behaviour of the San Marino authorities.

60. The Government limited their arguments to the situation of the third and fourth applicants.

61. They distinguished the case from *Anagnostopoulos v. Greece*, (no. 54589/00, §§ 31-32, 3 April 2003) where the Court had found a violation of the right to access to court because the criminal charges had been discontinued and therefore the civil claims could not be decided – despite the possibility of subsequently lodging civil proceedings. They noted that, in that case, according to the Greek legal system, the criminal court had been obliged to determine the civil claims submitted by the applicant in that case. Conversely, in San Marino the judge in the criminal proceedings had no obligation to determine the civil claims.

62. In the Government's view, the fact that the avenue chosen by the applicants had resulted in a discontinuation of the proceedings did not impinge on their possibility to lodge a claim for civil damage before the civil courts – thus they still had access to a court. The Government further considered that the Chamber judgments in *Anagnostopoulos* (cited above), *Dinchev v. Bulgaria* (no. 23057/03, 22 January 2009) and *Petrella* (cited above) where the Court had found violations despite the possibility of bringing separate civil claims, were in contrast with the findings in the Grand Chamber judgment of *Nicolae Virgiliu Tănase* (cited above, §§ 199-201).

## 2. The Court's assessment

### (a) General principles

63. The Court reiterates that the right to a fair hearing must be construed in the light of the rule of law, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights. Everyone has the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, Article 6 § 1 embodies the “right to a court”, of which the right of access, that is, the right to institute proceedings before courts in civil matters, is one particular aspect (see, among other authorities, *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18; *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 126, 21 June 2016; and *Nait-Liman v. Switzerland* [GC], no. 51357/07, § 113, 15 March 2018).

64. While the Convention does not confer any right, as such, to have third parties prosecuted or sentenced for a criminal offence (see *Perez*, cited above, § 70, and *Gorou*, cited above, § 24), domestic law can provide for a right for the victim of the offence to claim reparation for the damage caused by that offence by means of civil-party proceedings, that is by allowing the victim to join criminal proceedings as a civil party. This is one possible way of

providing for a civil action for reparation of the damage (see *Perez*, cited above, § 62).

65. The right of access to a court is not absolute but may be subject to limitations; these are permitted by implication since the right of access, by its very nature, calls for regulation by the State, which enjoys a certain margin of appreciation in this regard (see *Golder*, cited above, § 38). That being stated, those limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired. In addition, such limitations will not be compatible with Article 6 § 1 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 89, 29 November 2016; *Nait-Liman*, cited above, §§ 114-15, and *Zubac v. Croatia* [GC], no. 40160/12, § 78, 5 April 2018).

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

66. In light of the Government's first argument that, unlike in the case of *Anagnostopoulos*, in San Marino, "the judge in the criminal proceedings had no obligation to determine the civil claims", the Court finds it opportune to clarify that according to domestic law (see Articles 3 and 163 of the Code of Criminal Procedure at paragraph 24 above), if a claim for damage has been made, the trial judge has the obligation to decide on the civil responsibility of the accused, if found guilty. What the trial judge might not be able to do is to liquidate the damage, if it is considered that such an award requires a more in-depth assessment following further submissions. In such case, the trial judge would have to send the civil claim for quantification before another ordinary court (see Article 163 (2) of the Code of Criminal Procedure at paragraph 24 above). However, the referral to another court of this latter step, only if necessary, does not detract from the function of the trial judge in the criminal proceedings to decide both on the guilt of the accused and the latter's civil responsibility in respect of the damage suffered, and therefore on the applicants' civil rights. There is therefore no doubt that such an avenue was provided as per domestic law for the determination of their civil claims.

67. As to the Government's second and main argument, the Court notes that it is true 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 several cases where the applicants had 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 *Nicolae Virgiliu Tănase*, cited above, §§ 198-202 and 207-214, as well as the case-law cited at § 198 of that judgment).

68. Nevertheless, it is also true that in certain cases, mainly prior to the Grand Chamber judgment in *Nicolae Virgiliu Tănase* (cited above), the Court found a violation of the right of access to court where proceedings were discontinued without there being an adjudication of the civil claim, despite the possibility for the applicants to bring separate civil proceedings subsequently (see, for example, *Anagnostopoulos and Dinchev*, both cited above, *Gousis v. Greece*, no. 8863/03, §§ 30-35, 29 March 2007, *Atanasova v. Bulgaria*, no. 72001/01, §§ 40-47, 2 October 2008, *Tonchev v. Bulgaria*, no. 18527/02, §§ 50-53, 19 November 2009, and *Boris Stojanovski v. the former Yugoslav Republic of Macedonia*, no. 41916/04, §§ 56-57, 6 May 2010).

69. According to the Court, as explained in the *Petrella* judgment, which post-dated the Grand Chamber judgment in *Nicolae Virgiliu Tănase* (cited above) the latter situation came to be in cases where the discontinuance of criminal proceedings and the failure to consider the civil-party claims were due to circumstances mainly attributable to the judicial authorities, in particular excessive procedural delays causing the prosecution to become time-barred (see *Petrella*, cited above, §§ 51-54). Indeed, in *Petrella*, the Court considered that in *Nicolae Virgiliu Tănase*, cited above, the Grand Chamber had found no failures on the part of the State during the criminal proceedings, which had been discontinued, leading to the finding (*concluant ainsi*) of no violation of Article 6 under the notions of access to court, and length of proceedings (see *Petrella*, cited above, § 51).

70. Turning to the present case, the Court observes that it is not disputed that the criminal investigations, in the cases at hand, had been discontinued as a result of the total inactivity of the investigating judge. It follows that the failure to consider the applicants' civil-party claims was due to circumstances solely attributable to the judicial authorities, causing the prosecution to become time-barred. In consequence, the second, third and fourth applicants were denied the possibility of having their civil claims determined *via* the avenue which they chose to pursue, and which had been put at their disposal in the domestic legal order. During such time they could not have instituted separate civil proceedings (see Article 11 and 12 of the Code of Criminal Procedure at paragraph 24 above).

71. In the Court's view, in such extreme circumstances which are entirely attributable to the judicial authorities, because of their total inactivity, it cannot be expected of the applicants to pursue a separate civil action, even more so given that such an action would probably require the collection of any, or new, evidence, at the hands of the applicants, and that the determination of civil responsibility would likely be difficult to prove given the trespass of time (see, *inter alia*, *mutatis mutandis*, *Petrella*, cited above, § 53 and the case-law cited therein).

72. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 6 § 1 (access to court) in respect of application nos. 6319/21, 6321/21 and 9227/21.

#### IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

##### **A. Damage**

73. The second applicant, Mr Fabbri, claimed 30,000 euros (EUR) in respect of pecuniary damage and EUR 10,000 in respect of non-pecuniary damage, as well as EUR 1,700 in taxes. The third applicant, Ms Marro, claimed EUR 30,000 and EUR 15,000 under each head respectively, as well as EUR 1,700 in taxes and Mr Forcellini claimed EUR 30,000 under each head and EUR 5,100 in taxes.

74. The Government submitted that there was no causal link between the violation found and the pecuniary damage claimed, as there was no guarantee that the relevant persons would have been held liable for any damage. In any event the pecuniary and non-pecuniary damage claimed was excessive, unjustified and unsubstantiated.

75. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects those claims. However, it awards the applicants EUR 4,000, each, in respect of non-pecuniary damage, plus any tax that may be chargeable.

##### **B. Costs and expenses**

76. The second and third applicants each claimed EUR 3,914.65 for costs incurred in the domestic proceedings and EUR 3,090 for the proceedings before the Court, and the fourth applicant claimed EUR 3,013.40 for the costs and expenses incurred before the domestic courts and EUR 3,090 for those incurred before the Court.

77. The Government submitted that the claims connected to the domestic proceedings were not to be entertained and that any other costs were claimed without proof that they had actually been paid.

78. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, as well as the repetitive nature of the observations filed by the same legal firm, the Court considers it reasonable to award the sum of EUR 1,000 each to the second, third and fourth applicants for the proceedings before the Court, plus any tax that may be chargeable to these applicants. It rejects the claim for costs incurred in the domestic proceedings, which moreover appear to be still unpaid various years after the

invoices have been issued, as the Court cannot speculate on the outcome of the proceedings and whether, had they been successful, the applicants would have recovered their costs.

## FOR THESE REASONS, THE COURT

1. *Decides*, unanimously, to join the applications;
2. *Declares*, by a majority, the applications nos. 6319/21, 6321/21 and 9227/21 admissible, and unanimously the remainder of the applications (no. 345/21) inadmissible;<sup>1</sup>
3. *Holds*, by four votes to three, that there has been a violation of Article 6 § 1 of the Convention in respect of the applications nos. 6319/21, 6321/21 and 9227/21;
4. *Holds*, by four votes to three,
  - (a) that the respondent State is to pay the second, third and fourth applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
    - (i) EUR 4,000 (four thousand euros), each, plus any tax that may be chargeable, in respect of non-pecuniary damage;
    - (ii) EUR 1,000 (one thousand euros), each, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

---

<sup>1</sup> Rectified on 30 January 2023: the text was “2. *Declares*, by six votes to one, the applications nos. 6319/21, 6321/21 and 9227/21 admissible, and the remainder of the applications (no. 345/21) inadmissible;”

Done in English, and notified in writing on 18 October 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı  
Registrar

Jon Fridrik Kjølbro  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) Partly dissenting opinion of Judge Koskelo;
- (b) Joint dissenting opinion of Judges Kjølbro, Ranzoni and Koskelo.

J.F.K.  
H.B.

## APPENDIX

List of cases:

| No. | Application no.<br>Case name<br>Introduction date    | Applicants' name<br>Year of birth<br>Place of residence<br>Nationality | Representative's name<br>Location                     |
|-----|------------------------------------------------------|------------------------------------------------------------------------|-------------------------------------------------------|
| 1.  | 345/21<br>Foschi v. San Marino<br>15/12/2020         | <b>Mario FOSCHI</b><br>1942<br>Domagnano<br>San Marinense              | Rossano FABBRI<br>Borgo Maggiore (SMR)                |
| 2.  | 6319/21<br>Fabbri v. San Marino<br>15/01/2021        | <b>Stellino FABBRI</b><br>1955<br>Acquaviva<br>San Marinense           | Rossano FABBRI<br>Borgo Maggiore (SMR)                |
| 3.  | 6321/21<br>Marro v. San Marino<br>15/01/2021         | <b>Angelina MARRO</b><br>1973<br>San Giovanni (RSM)<br>Italian         | Marino Federico<br>FATTORI<br>Borgo Maggiore<br>(SMR) |
| 4.  | 9227/21<br>Forcellini v. San<br>Marino<br>02/02/2021 | <b>Andrea FORCELLINI</b><br>2003<br>Fiorentino<br>San Marinense        | Rossano FABBRI<br>Borgo Maggiore (SMR)                |

## PARTLY DISSENTING OPINION OF JUDGE KOSKELO

1. In this case, I have dissented both on the issue of admissibility, which concerns the applicability of Article 6 § 1 in the present circumstances, and on the merits, which concern the finding of a violation of the right of access to a court under Article 6 § 1. In both respects, my dissent is limited to the complaints brought by the second, third and fourth applicants (applications nos. 6319/21, 6321/21 and 9227/21). As far as the first applicant (application no. 345/21) is concerned, I agree that the complaint is inadmissible, and thus incapable of giving rise to any finding of a violation of Article 6 § 1.

2. While the main issue in regard to the consequences and the coherence of the Court’s case-law is that of access to a court, on which I refer to the joint dissent submitted by myself together with Judges Kjølbro and Ranzoni, there is a close connection between that issue and the question of the applicability of the civil limb of Article 6 § 1 in circumstances such as those in the present case. That is why I have chosen also to vote against the conclusion reached by the majority in respect of the question of admissibility.

3. According to the Court’s established case-law, the key requirement for the applicability of the civil limb of Article 6 § 1 – apart from the existence of a “dispute” which concerns “civil rights”, neither of which concepts are at issue here – is that the proceedings in question must be *decisive for the determination of the civil rights in question*. Indeed, the essence of civil proceedings is to provide access to a court. As the Court stated in *Golder v. the United Kingdom* (21 February 1975, Series A no. 18), the principle whereby a civil claim must be capable of being submitted to a judge for determination ranks as one of the universally recognised fundamental principles of law.

4. The present case illustrates the paradox that arises from holding that a *criminal investigation* is capable of engaging the applicability of the civil limb of Article 6 § 1, whereas such an investigation, in itself, can never fulfil the basic function of civil proceedings, namely the determination of a dispute concerning civil rights. Where a civil party is joined to criminal proceedings, and even if such joinder is acknowledged at the investigation stage of those proceedings (as in San Marino), the actual determination of the civil claim will not occur unless and until that claim is submitted before a court and adjudicated.

5. In the present judgment, however, the majority assert that “the outcome of the criminal investigation” would have been decisive for the determination of the civil rights in question (see paragraph 50 of the judgment). This statement is wholly unqualified and takes no account of the fact that the investigation yielded no results and produced no findings whatsoever, in terms of neither the factual nor the legal grounds pertaining to the alleged civil rights. The suspects are still presumed innocent, but the existence of this

legal principle does not amount to a “determination” of any specific civil claims.

6. While it is true that the Court has held that Article 6 applies to criminal proceedings involving civil-party claims from the time when the complainant is joined as a civil party (unless there has been a valid waiver of the right), the fact remains that the leading cases cited in this respect (*Perez v. France* [GC], no. 47287/99, ECHR 2004-I, and *Gorou v. Greece (no. 2)* [GC], no. 12686/03, 20 March 2009) did not concern situations where the criminal investigation had produced no findings at all. In *Perez*, the criminal proceedings were discontinued based on the ruling by the investigating judge that there was no case to answer, on the ground that there was insufficient evidence that anyone had committed the alleged offence (see paragraph 13 of that judgment). The complaint raised under Article 6 § 1 concerned the subsequent appeal proceedings by which the applicant had attempted to challenge that ruling. In *Gorou*, there had been an acquittal by the criminal court, and the complaint under Article 6 § 1 again related to the subsequent appeal proceedings. Thus, neither *Perez* nor *Gorou* was concerned with criminal complaints which remained without action and results.

7. By contrast, situations where a criminal complaint has been lodged but the investigation is subsequently discontinued without reaching any findings of fact or law relating to the alleged offence can hardly be assimilated with circumstances such as those in the above Grand Chamber rulings. A more differentiated approach would be called for when assessing the conditions under which criminal proceedings may be considered to involve a determination of the civil rights of the alleged injured party and thus engage the application of the civil limb of Article 6 § 1. A blanket assimilation of a criminal complaint and wish for compensation (or for subsequent civil party status) with the actual lodging of a specific civil claim in this context seems very difficult to justify, especially in association with the kind of consequences that we address in the joint dissenting opinion on the merits of the present case. It would not be reasonable to leave the domestic authorities without the means of avoiding such adverse consequences which, *inter alia*, are liable to harm the interests of those victims of serious crime who most depend on the possibility of having their civil claims determined through criminal proceedings. As the present complaints fell into the category where no findings had been yielded by the criminal investigation, I have voted against the admissibility of the three applications in question as a signal for the need to adopt a more differentiated assessment.

JOINT DISSENTING OPINION OF JUDGES KJØLBRO,  
RANZONI AND KOSKELO

1. We have regrettably not been able to agree with the majority on their conclusion according to which there has been a violation, in respect of the second, third and fourth applicants, of their right under Article 6 to have access to a court.

2. The said applicants lodged criminal complaints and indicated that they would participate in the criminal proceedings as civil parties with a view to obtaining compensation for the damage caused to them by the alleged offences, namely bodily harm and threats (in respect of the second and third applicants) and failure to protect a minor from bullying (in respect of the fourth applicant). More specifically, the second and third applicants did not actually submit a request to join the proceedings to assert a civil claim but only indicated an intention of becoming civil parties at a later stage. As to the fourth applicant, a minor, it seems to have been in dispute whether such a request was validly lodged. The criminal investigations in question did not yield any results and no criminal charges were brought. Instead, the alleged offences became time-barred under criminal law. The civil claims, by contrast, were not time-barred and could still have been pursued separately. In essence, the issue is whether under such circumstances the failure of the criminal investigation, which resulted in the extinction of criminal liability, can be considered to entail a violation of the applicants' right of access to a court under the civil limb of Article 6.

3. Contrary to the majority, we consider that there has been no violation of the right of access to a court. We have reached this conclusion for a number of reasons which will be explained below.

4. Firstly, we would point out that the Grand Chamber of the Court has quite recently addressed the issue in the case of *Nicolae Virgiliu Tănase v. Romania* ([GC], no. 41720/13, 25 June 2019), reaching the conclusion that the right of access to a court had not been violated. In that case the applicant had lodged a civil-party claim in the context of the criminal proceedings. Those proceedings were, however, discontinued, *inter alia* on the grounds that the limitation period for criminal liability had expired. As a result, the civil claim joined to the criminal proceedings had not been examined by any criminal court (see paragraph 196 of that judgment).

5. When assessing this situation from the point of view of the right of access to a court, the Court stated the following (*ibid.*, §§ 198-202):

“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 *Asenov 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. and Others v. Romania*, no. 24133/03, § 65, 25 June 2013).

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.

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.

201. In the light of the foregoing considerations it cannot be said that the applicant was denied access to court for a determination of his civil rights.

202. It follows that there has been no violation of Article 6 § 1 of the Convention in this regard.”

6. Thus, it was not very long ago that the Grand Chamber confirmed that the failure of the “avenue of criminal proceedings” for the pursuit of a civil claim could not be construed as a denial of access to a court where the “avenue of civil proceedings” was available to the applicant. In the present case, the latter avenue was and remained open to the applicants even after the alleged criminal offences became time-barred.

7. In the present case, nonetheless, the majority deviate from the position adopted by the Grand Chamber. They do so by invoking the “total inactivity of the investigating judge”, which meant that “the failure to consider the applicants’ civil-party claims was due to circumstances solely attributable to the judicial authorities, causing the prosecution to become time-barred” (see paragraph 70). In this regard, the majority rely on the Chamber judgment in *Petrella v. Italy* (no. 24340/07, 18 March 2021). While that judgment is final, its departure from the line confirmed by the Grand Chamber in *Nicolae Virgiliu Tănase* (cited above) cannot in our view be regarded as settled case-law, especially as it appears that all relevant considerations were not taken into account (see further below). In this context, we also note the thorough analysis of the case-law contained in the dissenting opinion by Judge Sabato attached to the Chamber judgment in *Petrella*.

8. In our view, it is necessary to assess more closely the pertinence, and the implications, of the distinction based on “inactivity” in the criminal

investigation for the purposes of the right of access to a court as regards civil claims. We would like to emphasise the following points in particular.

9. Firstly, the possibility of joining criminal proceedings as a civil party in order to pursue compensation claims is not as such a right guaranteed under the Convention. It is a right subject to domestic law. Such a right exists in many jurisdictions, and it constitutes an important advantage for victims of crime. There is no doubt that such an advantage is of particularly high value for vulnerable victims of serious crime. The circumstances of the present case do not, however, belong to the latter kind of category, nor was there an actual joinder of specific claims (see paragraph 2 above).

10. Secondly, the Convention imposes a positive obligation on States to conduct criminal investigations in limited sets of circumstances only, namely in the context of the procedural obligations arising under the substantive provisions protecting the core rights, in particular Articles 2, 3 and 4 of the Convention as well as some of the most serious violations of personal integrity under Article 8. In this respect, it is also to be borne in mind that duties of investigation arising under those substantive provisions are wider than the specific duties to conduct criminal investigations (see, for instance, *Nicolae Virgiliu Tănase*, cited above, §§ 157-159; *Cestaro v. Italy*; no. 6884/11, §§ 204-209, 7 April 2015; *Rantsev v. Cyprus and Russia*, no. 25965/04, § 285, ECHR 2010 (extracts); and *Söderman v. Sweden* [GC], no. 5786/08, §§ 81-85, ECHR 2013). All this is fully in line with the need to allow the Contracting States the necessary and reasonable margins of appreciation when it comes to determining their policies and priorities in the deployment and operation of the criminal justice system.

11. What the approach taken by the majority does, however, is to create a mechanism by which, in any circumstances where domestic law permits the alleged victim to join criminal proceedings as a civil party, any failure to conduct a criminal investigation permitting an examination of the civil claim by the criminal court would automatically give rise to a violation of Article 6 on the grounds of non-fulfillment of the civil party's access to a court. This would occur quite regardless of the limitations and thresholds of seriousness which govern the Convention-based duties to carry out criminal investigations, and also regardless of the availability of the possibility of pursuing the civil claim in separate civil proceedings. Thus, indirectly, the line adopted by the majority would produce a general positive obligation, arising under Article 6, to carry out criminal investigations for the purpose of enforcing civil claims. As the present judgment demonstrates, each violation in this respect would carry a considerable cost to the public purse in terms of the award in respect of non-pecuniary damage (in the present case 4,000 euros for each applicant).

12. In our view, such a position is not acceptable as a matter of principle. Nor do the majority offer any real justification for it.

13. Thirdly, there is a high risk that the interpretation adopted by the majority may, in reality, become counter-productive precisely in regard to those victims of crime who most heavily depend on the possibility of pursuing their civil claims in connection with criminal proceedings against the perpetrators. This is so because practically all criminal justice systems operate under more or less severe constraints in terms of the resources available to them. This problem will not disappear just by virtue of this Court's findings of violations. By contrast, increasing the pressure to spend scarce resources on cases which otherwise would not be given priority, but would require action for the avoidance of the costly violations now programmed into the system, risks diverting further resources away from the investigation of more serious forms of crime, at the expense of most vulnerable victims.

14. Furthermore, the indirect imperative to pursue criminal proceedings arising from the majority's position (see paragraph 11 above) is not only inconsistent with the limited positive obligations existing under the substantive Convention provisions but also out of line with certain other Convention principles, notably those developed in the context of Article 10, where the Court's case-law requires restraint in the use of criminal proceedings against members of the press, in particular, and more generally in defamation cases. It is therefore striking to note, for instance, that the Chamber judgment in *Petrella v. Italy* (cited above) concerned precisely criminal proceedings engaged by an applicant against the press. In that case, the applicant was awarded 5,200 euros for the failure of the domestic authorities to pursue, within the penal statute of limitations, criminal proceedings against a journalist, the managing director of the newspaper in question as well as managers of the publishing house.

15. Last but not least, the line taken by the majority not only risks becoming counter-productive with a view to the need to combat serious crime but will also cause moral hazards and risks of abuse. On the one hand, it is notorious that there are certain types of crime, or alleged crime, which the police are not in practice able to investigate effectively. On the other hand, it is easy to submit a criminal complaint, join the proceedings with a civil claim and keep waiting. The fact that the passage of time would automatically create an entitlement to compensation for non-pecuniary damage, on the grounds that the failure of the criminal complaint to produce timely results is construed as amounting to a denial of access to a court, creates evident potential for abuse. The important advantage of having civil claims joined to criminal proceedings should not be spoiled by planting into the system, through ill-considered Convention demands, obvious moral hazards and false incentives.

16. For the reasons indicated above, we do not consider that it is justified for the Court to deviate from the position confirmed by the Grand Chamber in *Nicolae Virgiliu Tănase* (cited above). We acknowledge, of course, that

the lack of action by the investigating authorities is a problem that calls for attention. However, the position adopted by the majority in the present case, inspired by that taken by another Chamber majority in *Petrella*, cannot in our view be the right cure for that problem.