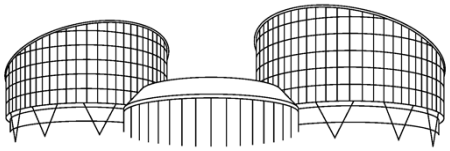

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF NICOLAE VIRGILIU TĂNASE v. ROMANIA

(Application no. 41720/13)

JUDGMENT

STRASBOURG

25 June 2019

This judgment is final but it may be subject to editorial revision.

In the case of Nicolae Virgiliu Tănase v. Romania,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President,*
Angelika Nußberger,
Linos-Alexandre Sicilianos,
Robert Spano,
Işıl Karakaş,
Ganna Yudkivska,
Nebojša Vučinić,
Kristina Pardalos,
Vincent A. De Gaetano,
Paul Lemmens, *judges,*
Krzysztof Wojtyczek, ad hoc *judge,*
Egidijus Kūris,
Yonko Grozev,
Armen Harutyunyan,
Gabriele Kucsko-Stadlmayer,
Marko Bošnjak,
Tim Eicke, *judges,*

and Søren Prebensen, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 15 November 2017, 12 July 2018 and 27 March 2019,

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

PROCEDURE

1. The case originated in an application (no. 41720/13) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Romanian national, Mr Nicolae Virgiliu Tănase ("the applicant"), on 21 June 2013.

2. The applicant was represented by Mr D.I. Tănase, a lawyer practising in Ploieşti. The Romanian Government ("the Government") were represented by their Agent, Ms C. Brumar, of the Ministry of Foreign Affairs.

3. Relying on Articles 3, 6 § 1 and 13 of the Convention the applicant alleged that the investigation carried out by the domestic authorities into the circumstances of his car accident was inadequate and excessively lengthy. He also alleged that the domestic authorities had failed to adequately safeguard his right to a court and to an effective remedy with regard to his claims. Moreover, they had failed to adequately safeguard his right to have his claims examined within a reasonable time. Finally, he alleged inhuman

and degrading treatment suffered by reason of the manner in which the authorities had handled the aforementioned investigation.

4. The application was initially allocated to the Third Section of the Court, and subsequently to its Fourth Section (Rule 52 § 1 of the Rules of Court).

5. On 17 April 2014 the application was communicated to the Government. On 2 June 2015 the Government were invited to submit further written observations.

6. Ms Iulia Motoc, the judge elected in respect of Romania, withdrew from the case (Rule 28 § 3 of the Rules of Court). The President appointed Mr Krzysztof Wojtyczek to sit as an *ad hoc* judge (Rule 29 § 1).

7. On 4 April 2017 a Chamber of the Fourth Section decided to give notice to the parties of its intention to relinquish jurisdiction of the case in favour of the Grand Chamber. On 18 May 2017 the aforementioned Chamber confirmed its intention to relinquish jurisdiction in favour of the Grand Chamber, having regard to the fact that none of the parties objected to the relinquishment of the case (Article 30 of the Convention and Rule 72 §§ 1 and 4).

8. The composition of the Grand Chamber was determined in accordance with Article 26 §§ 4 and 5 of the Convention and Rule 24. At the final deliberations, Armen Harutyunyan, substitute judge, replaced Helena Jäderblom, who was unable to take part in the further consideration of the case (Rule 24 § 3).

9. The applicant and the Government each filed written observations.

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 15 November 2017.

There appeared before the Court:

(a) *for the Government*
Ms C. Brumar, of the Ministry of Foreign Affairs, *Agent*,
Ms M. Luduşan, magistrate seconded to the Government's Agent Department, *Counsel*,
Mr L. Bleoca, Minister-Counsellor, Deputy Permanent Representative, Permanent Delegation of Romania to the Council of Europe, *Adviser*,

(b) *for the applicant*
Mr D.I. Tănase, *Counsel*.

The Court heard addresses by Ms Brumar, Ms Luduşan and Mr Tănase. Ms Brumar and Mr Tănase subsequently replied to questions put by judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicant was born in 1943 and lives in Ploieşti.

A. The background to the case

12. At around 8.40 p.m. on 3 December 2004 the applicant, who at the time was a judge serving with the Dâmbovița County Court, was involved in a car accident. Throughout the domestic proceedings and in his application to the Court, he alleged, *inter alia*, that a third party – a certain D.I. – had crashed his car into the back of the applicant's car. As a result of this impact, the applicant's car had been shunted into the back of a stationary military lorry, of which the driver was a certain J.C.P.

13. Following the collision with the applicant's car, D.I.'s car bounced off the applicant's car and collided with another car which had been driving on the oncoming lane (hereinafter "the fourth driver"). The fourth driver was never the subject of any investigation.

B. Criminal proceedings concerning the accident

1. First stage of the investigation

(a) The conduct of the investigation

14. On the same date, on 3 December 2004, the Ploieşti Police Department (hereinafter "the Police Department") initiated, of its own motion, a criminal investigation into the circumstances of the accident. The Police Department's investigation was supervised by the Prosecutor's Office attached to the Ploieşti District Court (hereinafter "the District Court Prosecutor's Office").

15. The Police Department carried out an on-site investigation. According to the minutes of the report drawn up on the on-site investigation it took measurements and photographs, produced a detailed description of the site of the accident, identified the drivers involved in the incident and had medical personnel collect blood samples from all three drivers in order to establish the level of alcohol in their blood. Also, it asked the Ploieşti Forensic Service (hereinafter "the Forensic Service") to produce toxicology reports in respect of the alcohol levels found in the drivers' blood. In addition, it took statements from some of the passengers of the vehicles involved in the incident.

16. Between 4 December 2004 and 6 September 2005 the Police Department took statements from the remaining passengers of the vehicles involved in the accident, as well as from the applicant, D.I., and J.C.P. and

asked the Forensic Service to produce a forensic expert report on the medical care needed by the applicant following the accident.

17. The toxicology reports – produced on 6 December 2004 – concluded that only the applicant had alcohol in his blood that night.

18. The forensic expert report on the medical care needed by the applicant following the accident – produced on 27 June 2005 – noted that the applicant had been committed to hospital three times by 6 May 2005. He was diagnosed, *inter alia*, with polytrauma, post-traumatic mesentery rupture, and fractured and/or displaced bones and body parts. He had undergone three surgical operations, including one involving the removal of part of his intestines, and had required a lower tracheotomy because of respiratory complications. The report further noted that the applicant's physical examination by the forensic expert had disclosed a diminished power of compression in his right hand and reduced amplitude in the abduction movement of his right arm. The report concluded that the applicant had suffered injuries that could have been caused on 3 December 2004 by collision with or compression by hard objects or surfaces following a car accident. The injuries required between 200 and 250 days of medical care and their severity had endangered the applicant's life. The presence of any disability was to be assessed after the end of the recovery treatment.

19. On 22 June 2005 the applicant joined the proceedings as a civil party, claiming pecuniary and non-pecuniary damages.

20. On 2 August 2005 the District Court Prosecutor's Office declined jurisdiction in favour of the Prosecutor's Office attached to the Ploieşti Court of Appeal (hereinafter "the Court of Appeal Prosecutor's Office") on account of the applicant's status as a judge. The latter Prosecutor's Office instituted criminal proceedings *in rem* on 6 September 2005 because the accident had caused the applicant severe injuries, giving rise to the offence of involuntary serious bodily harm.

21. Between 7 and 24 October 2005 the Court of Appeal Prosecutor's Office took statements from several of the witnesses to the accident, including the fourth driver, and heard evidence from the applicant. Also, it instructed the applicant to submit, by 31 October 2005, his views on the technical expert report which he had requested, and the names of further witnesses he had asked to be heard.

22. On 28 October 2005 the applicant's lawyer asked the Court of Appeal Prosecutor's Office to postpone the deadline set for the applicant, *inter alia*, because he was unable to consult the applicant or submit evidence to the file on account of the latter's serious medical condition.

(b) The prosecutor's office's decisions to discontinue the proceedings

23. On 5 December 2005 the Court of Appeal Prosecutor's Office discontinued the criminal proceedings brought against D.I. and J.C.P. and the criminal investigation concerning the applicant. It held that J.C.P. had

parked the lorry correctly. Also, the applicant was responsible for causing the accident because he had been driving under the influence of alcohol and had failed to adapt his speed to the traffic conditions. However, the elements of an offence had not been met in his case because the alcohol level found in his blood had been below the legal threshold of 0.8‰.

24. The applicant challenged the decision before the Prosecutor General attached to the Court of Appeal Prosecutor's Office (hereinafter "the Prosecutor General"). He argued, *inter alia*, that the prosecutor's office had failed to produce a technical expert report and had ignored or misinterpreted the available evidence, whether intentionally or not.

25. On 3 January 2006 the Prosecutor General dismissed the applicant's challenge. He reiterated the findings of the prosecutor's office. In addition, he held that the applicant had not applied the brakes of his car before the impact with the lorry. He added that no technical expert report was necessary, considering that the evidence already obtained was conclusive.

2. First round of court proceedings

26. The applicant appealed against the decisions of 5 December 2005 and 3 January 2006 before the Ploieşti Court of Appeal (hereinafter "the Court of Appeal"). He reiterated the arguments which he had put forward to the Prosecutor General. In addition, he argued that the investigators had ignored his request for evidence to be included in the file which could have allowed him to prove that his blood samples had been collected unlawfully or under suspicious circumstances.

27. On 17 April 2006 the Court of Appeal declared itself without jurisdiction and referred the case to the Ploieşti District Court (hereinafter "the District Court") on the grounds that the applicant had retired from his post as judge. After the District Court took over the case it adjourned the proceedings five times between 13 June and 6 October 2006 on procedural grounds, and in order to have time to examine the case.

28. On 13 October 2006 the District Court dismissed the applicant's appeal against the prosecutor's office's decisions. It held that the applicant had been responsible for the accident. He had failed to adapt his speed to the traffic conditions in order to avoid potential danger.

29. Upon an appeal on points of fact and of law (*recurs*) by the applicant, the Prahova County Court on 18 December 2006 quashed that judgment and ordered the District Court Prosecutor's Office to reopen the criminal proceedings instituted against D.I. and J.C.P. It also ordered the prosecutor's office to produce a technical expert report that would clarify the circumstances of the accident. The available evidence attested that brake marks caused by the applicant's car had been found and the witness statements on whether the lorry had been correctly parked were contradictory. Furthermore, a forensic expert report was needed with regard to the alcohol level in the applicant's blood.

3. Second stage of the investigation

(a) The conduct of the investigation

30. On 3 April 2007 the Forensic Service produced a psychiatric forensic expert report concerning the applicant. The report concluded that the applicant had suffered from a post-traumatic stress disorder which could have been aggravated by any state of conflict. The applicant's psychological suffering might also have been exacerbated by the repeated surgical interventions, but could not be medically quantified. Prior to the accident the applicant had not been registered as a patient with psychological problems. There was a clear connection between the chronic post-traumatic stress and all the conflict situations he was experiencing.

31. On 10 April 2007 the Forensic Service produced a forensic expert report concerning the applicant's blood. It concluded that there had been some irregularities in the collection of his blood samples. Among other things, it appeared that the second blood sample had been collected at a time when the applicant was in fact no longer present in the hospital's stabilisation room. The report also noted the applicant's argument that there had been an excessive use of disinfectants at the time when the samples were collected and that this could have altered the reading of the alcohol level found in his blood. The experts stated that, if the methodology used to collect the blood samples had not been observed, the result of the alcohol test might have been affected.

32. On 16 May 2007 the District Court Prosecutor's Office reopened the criminal proceedings instituted against D.I. and J.C.P. and referred the case back to the Police Department for the investigative measures ordered by the court. Subsequently, from 7 June to 22 November 2007, the applicant asked the Police Department and the prosecutor's office for additional evidence to be included in the file, including a technical expert report concerning the circumstances of the accident and new forensic expert reports on his blood alcohol level and the dynamics of the accident. In addition, he complained repeatedly about the delays in the investigation.

33. On 3 October 2007, following the Police Department's request of 14 August 2007 for a forensic expert report concerning the alcohol in the applicant's blood, the Mina Minovici Forensic Institute (hereinafter "the Forensic Institute") informed the Police Department that the substances used when the biological samples had been collected from the applicant could not explain the presence of alcohol in his blood.

34. On 20 December 2007 an expert assigned by the Police Department on 9 September 2007 produced a technical expert report on the causes of the accident. After having examined the available evidence, the expert concluded that J.C.P. could have prevented the accident if he had complied with the traffic regulations concerning vehicles stopping on public roads at night. Moreover, the first impact had been that between the applicant's car

and the lorry, after which D.I. had crashed into the applicant's car. Furthermore, D.I. had complied with the traffic regulations and the speed limits, and had kept a safe distance from the car in front of him. He concluded that the applicant and D.I. could not have avoided the accident.

35. The private experts chosen by the applicant and by D.I. to participate in the activities of the expert appointed by the Police Department, leading to the report of 20 December 2007 submitted comments on that report. The expert chosen by the applicant concluded that the applicant's car had crashed into the lorry after having been hit by D.I.'s car, and that D.I. could have avoided the accident if he had kept a proper lookout and a sufficient distance from the car in front of him.

36. Between 22 and 25 January 2008 the Police Department heard evidence from J.C.P. and two of the witnesses to the accident. It dismissed the applicant's request for a re-enactment of the circumstances of the accident on the grounds that such a re-enactment could be made only on a theoretical level, by producing a technical expert report which would determine the circumstances in which the traffic accident had taken place. Also, it dismissed the applicant's requests for a new forensic expert report on his blood alcohol level and for a new technical expert report on the grounds that the Forensic Institute and the expert had dealt with the objectives set. On 4 February 2008 it recommended discontinuing the criminal proceedings.

37. On 18 August 2008 the District Court Prosecutor's Office dismissed the Police Department's recommendation. It held that the available evidence was contradictory and insufficient to clarify the circumstances of the case. It therefore ordered the Police Department to instruct the Forensic Institute to produce a forensic expert report on the applicant's alcohol level. The prosecutor's office also asked the Police Department to mandate the Bucharest Inter-County Laboratory for Criminological Reports (hereinafter "Laboratory for Criminological Reports") to produce a technical expert report on the circumstances of the accident. Furthermore, depending on the outcome of the forensic expert report, the Police Department was also instructed to produce a second version of the technical expert report assessing whether the accident could have been avoided given the applicant's alcohol level at the time of the accident.

38. On 19 February 2009, in response to the Police Department's 21 October 2008 request for a forensic expert report, the Forensic Institute informed the Police Department that – given the contradictory and incomplete evidence – there were serious doubts as to whether the blood collected and examined belonged to the applicant.

39. On 30 March 2009 the Police Department dismissed the applicant's request for a new forensic expert report to be produced with regard to his blood alcohol level on the grounds, *inter alia*, that a new report would not be necessary or conclusive for the case. On the same date the Police

Department asked the Laboratory for Criminological Reports to produce the technical expert report ordered by the prosecutor's office.

40. Following a challenge by the applicant against the Police Department's decision of 30 March 2009, the District Court Prosecutor's Office informed the applicant on 30 April 2009 that the criminal investigation file had been sent to the Laboratory for Criminological Reports and that in the absence of the file his challenge could not be examined within the legal time-limit. The applicant's subsequent complaint of 8 May 2009 against the notification of 30 April 2009 was dismissed by the Prosecutor's Office attached to the Ploieşti County Court on 16 June 2009 as inadmissible.

41. On 21 April 2009 the Laboratory for Criminological Reports informed the Police Department that, in the light of their extreme workload and the small number of experts available, the technical criminological report in respect of the applicant's case could not be produced before 2011.

42. Nevertheless, on 29 September 2010 the Laboratory for Criminological Reports produced the aforementioned report. It concluded, *inter alia*, that given the speed needed to avoid an impact with the lorry, the applicant could not have avoided it. It could not be established whether D.I. could have avoided hitting the applicant's car, or whether J.C.P. could have prevented the accident, nor was it possible to establish the manner and the order in which the applicant's car and D.I.'s car had collided. It estimated that the applicant's and D.I's cars had probably collided after the applicant's car had hit the lorry.

43. On 6 January 2011, having noted that the case-file had been returned by the Laboratory for Criminological Reports, the applicant reminded the District Court Prosecutor's Office of his challenge against the Police Department's decision of 30 March 2009.

44. On 28 January 2011 the Police Department dismissed a request by the applicant for a new technical expert report to be produced by a court-appointed expert on the grounds that the report of 29 September 2010 had clarified as far as possible the circumstances of the accident. The applicant's challenge against the Police Department's decision was dismissed by the District Court Prosecutor's Office on 3 March 2011.

(b) The prosecutor's office's decisions to discontinue the proceedings

45. On 21 February 2011 the District Court Prosecutor's Office discontinued the criminal proceedings against D.I. and J.C.P. on the grounds that not all the elements of an offence had been established. It held that J.C.P. had parked the lorry correctly. Neither the applicant nor D.I. had adapted their speed to the road conditions. However, the technical expert report of 29 September 2010 had been unable to establish with any certainty whether D.I. could have avoided the accident. Furthermore, according to the

forensic expert report of 27 June 2005, the applicant's injuries had been caused mainly by his car's head-on impact with the lorry.

46. On 23 March 2011 the higher-level prosecutor of the District Court Prosecutor's Office dismissed the applicant's challenge against the decision of 21 February 2011. It held that according to the available evidence the said decision had been lawful. The only blame for the accident that could be established with certainty was that of the applicant. He had been driving his car too fast at night.

4. Second round of court proceedings

47. On 30 March 2011 the applicant appealed to the District Court against the District Court Prosecutor's Office's decision of 21 February 2011. He argued, *inter alia*, that the prosecutor's office's decision had relied only on part of the evidence on file. Also, he criticised the expert report of 29 September 2010.

48. Shortly afterwards, the applicant requested the High Court of Cassation and Justice to transfer the case to another court, on the basis of legitimate suspicion regarding the judges of the District Court. The High Court of Cassation and Justice granted the applicant's request on 21 June 2011, noting the positions of the parties and the fact that the applicant had lodged criminal complaints against the judges and prosecutors from Ploieşti (see paragraph 62 below). It transferred the case to the Bucharest District Court.

49. On 30 September 2011 the Bucharest District Court dismissed the applicant's objections against the expert report of 29 September 2010 and confirmed the prosecutor's office's decision in so far as it discontinued the criminal proceedings against J.C.P. According to the available evidence, the lorry had been legally parked by J.C.P., the applicant first hit the lorry and then his car was hit by D.I.

50. Concerning the criminal proceedings against D.I., the court considered that D.I. had not discharged his lawful duty to drive preventively. The decision to discontinue the proceedings against D.I. was contradictory, considering that the same decision acknowledged that D.I. had breached his legal duty. Also, the conclusion of the expert report of 20 December 2007 that D.I. could not have avoided the accident was at odds with the provisions of the relevant domestic legislation concerning preventive driving.

51. However, in the absence of evidence on file clarifying the existence or non-existence of a causal link between D.I.'s action and the applicant's injuries, the court could not retain the case for examination. Consequently, it quashed the decision in so far as it had ordered the discontinuation of the proceedings against D.I. and ordered the prosecutor's office to produce a new forensic expert report determining the possible existence of a direct connection between D.I.'s actions and the applicant's injuries. It took the

view that this new forensic expert report should be able to establish whether the applicant's injuries had been produced by the impact between his car and the lorry or by the impact between D.I.'s car and the applicant's car or by a combination of the two events.

52. The District Court noted that the statute of limitations for criminal liability was close to becoming applicable. However, it considered that it could not retain the case for examination and indict D.I. because, in the absence of the requested evidence, the existence of all the elements of an offence could not be established beyond any doubt.

53. D.I.'s appeal on points of fact and of law against this judgment was dismissed as inadmissible by the Bucharest Court of Appeal on 16 January 2012.

5. Third stage of the investigation

(a) The conduct of the investigation

54. On 5 April 2012 the District Court Prosecutor's Office reopened the criminal proceedings against D.I. On 6 April 2012, it asked the Forensic Service to produce the forensic expert report requested by the court. The Forensic Service produced the said report on 11 April 2012 and concluded, *inter alia*, that a very short period of time had elapsed between the two impacts. It could not be established on the basis of the applicant's injuries which of the two events had been the cause. A combination of the two impacts was possible.

55. On 25 April 2012 the applicant asked the Court of Appeal Prosecutor's Office to take over the case on the grounds that the case was complex and the proceedings had been lengthy. The Prosecutor General granted his request on 26 April 2012 on the ground that there was a risk that the statutory limitation period would expire.

56. On 28 May 2012 the Court of Appeal Prosecutor's Office dismissed the applicant's respective requests of 12 April and 18 May 2012 for a simulation of the accident to be carried out and for a new forensic expert report to be produced by the Forensic Institute. It held that – in the light of the conclusions of the available reports – the evidence requested by the applicant was neither relevant nor necessary for the case.

(b) The prosecutor's office's decisions to discontinue the proceedings

57. On 30 May 2012 the Court of Appeal Prosecutor's Office discontinued the criminal proceedings against D.I. on the grounds that not all the elements of an offence had been established. The forensic expert report of 11 April 2012 could not establish how many of the medical-care days needed by the applicant had been the result of the self-inflicted injuries or of the injuries caused by D.I., or whether the latter's actions had generated any need at all for medical-care days. Consequently, there was

doubt regarding the causal link between D.I.'s actions and the applicant's injuries, and this doubt worked in D.I.'s favour.

58. On 18 June 2012 the Prosecutor General dismissed the applicant's challenge against this decision. He held that the statute of limitations had taken effect on 3 June 2012 and that the investigation in the case therefore could not be continued.

6. Third round of court proceedings

59. On 18 July 2012 the applicant asked the District Court to quash the Prosecutor General's decision of 18 June 2012 and to retain the case for examination. He argued, *inter alia*, that the statute of limitations had not taken effect. Also, the prosecutor's office had breached his right to defence by dismissing his request for a review of the expert report dated 11 April 2012 by the Forensic Institute.

60. By final judgment of 21 December 2012 the District Court dismissed the applicant's appeal and upheld the decision of the Prosecutor General. The court held that according to the relevant criminal law provisions, including the provision concerning the more lenient criminal law, the statute of limitations in respect of D.I.'s offence had taken effect on 3 June 2012.

61. The applicant's appeal on points of fact and of law against the judgment was dismissed as inadmissible by the Court of Appeal on 7 March 2013 on the grounds that the judgment of the District Court was not amenable to appeal. However, the Court of Appeal referred to the Constitutional Court a constitutional challenge by the applicant to the relevant legal provisions concerning appeals against prosecutor's office's decisions. The latter court dismissed the constitutional challenge as unfounded on 24 September 2013.

C. Complaints brought by the applicant against investigators and judges dealing with his cases

62. Between 19 November 2008 and 30 September 2011 the applicant submitted several challenges and several criminal and disciplinary complaints to the relevant hierarchical or supervisory authorities, including the Superior Council of Magistrates, against many of the investigating and judicial authorities involved in the investigation and examination of the cases concerning him. His complaints included allegations of bias, of handling his cases in an abusive and unlawful manner and of favouring D.I. and J.C.P.

63. With one exception (see paragraph 48 above), the applicant's complaints either were dismissed by the competent authorities on the grounds that no unlawful acts had been committed or in some cases appear to remain pending. In some decisions relating to the applicant's complaints, such as a decision delivered by the Prosecutor's Office attached to the High

Court of Cassation and Justice on 10 September 2009 and a decision delivered by the Prosecutor General on 25 October 2011, the competent authorities indicated that the applicant was motivated by a subjective dissatisfaction with the outcome of the investigation, or even by a desire to take revenge on the investigators.

D. Civil proceedings brought by the applicant

64. On 28 November 2006 the applicant brought proceedings before the Dâmbovița County Court against his car insurance company seeking a judgment ordering the insurance company to comply with its contractual obligation to compensate him for the total loss of the insured vehicle and to pay him non-pecuniary damages for the psychological suffering incurred following the insurance company's allegedly unjustified refusal to comply with its contractual obligation. The applicant also brought proceedings against the company from which he was leasing his car in order to make the judgment binding on that company. On 16 September 2010 the court ordered that D.I. and J.C.P. be joined as third parties to the proceedings.

65. Eventually, on 27 November 2013, the Dâmbovița County Court dismissed the proceedings initiated by the applicant against the insurance and lease companies on the grounds that the applicant had failed to pay the required judicial stamp duty.

II. RELEVANT DOMESTIC LAW

66. The former Romanian Code of Criminal Procedure, which was in force at the material time (until 31 January 2014), provided that the object of a civil action was to hold the defendant civilly liable for damage caused by an act which was the subject matter of the criminal proceedings. A civil action could be joined to the criminal proceedings by the lodging of a civil-party claim (Article 14). The injured party could lodge such a claim either during the criminal proceedings or before the trial court, up until the day the indictment was read out in court (Article 15). If an injured party had not joined criminal proceedings as a civil party, he or she could initiate separate proceedings before the civil courts for damages caused as a result of the offence. Civil proceedings had to be stayed pending the final judgment of the criminal courts. An injured party who had joined criminal proceedings as a civil party could initiate separate civil proceedings if the criminal proceedings had been stayed. If the criminal proceedings were re-opened, the civil proceedings opened before the civil courts had to be stayed. An injured party who had initiated civil proceedings could abandon those proceedings and lodge a request (for joining a civil claim to the criminal proceedings) with the investigating authorities or the trial court if the indictment had been made or the trial was resumed after the stay. The

civil proceedings could not be abandoned once the civil court had delivered judgment, even if it was not yet a final one (Article 19). An injured party who had joined the criminal proceedings as a civil party could initiate civil proceedings, if the criminal court, by a final judgment, had left the civil action unexamined (Article 20). The final judgment of the criminal court was *res judicata* for the civil court which was called to examine the civil action in so far as it concerned the existence of the act, the person who had committed it and that person's guilt. By contrast, the final judgment of the civil court was not *res judicata* for the investigating authorities and the criminal court in so far as it concerned the existence of a criminal act, the person who had committed it and that person's guilt (Article 21).

67. The former Romanian Code of Civil Procedure, in force until 14 February 2013, provided that a civil court could suspend the proceedings when criminal proceedings had been instituted for an offence which could have a decisive influence on the judgment that had to be delivered, and that the suspension had to remain in force pending a final judgment in the case which had triggered the suspension (Article 244). The court suspended the civil proceedings by an interlocutory judgment amenable to appeal, which could be lodged as long as the proceedings were suspended (Article 244[1]).

68. The former Romanian Civil Code, in force until 1 October 2011, provided that any person who was responsible for causing damage to another would be liable to make reparation for it regardless of whether the damage was caused through his or her own actions, through his or her failure to act or through his or her negligence (Articles 998 and 999).

69. Legislative Decree no. 167/1958 on the statute of limitations, in force until 1 October 2011, provided that the right to lodge an action having a pecuniary scope was time-barred unless it was exercised within three years (Articles 1 and 3). The time-limit for lodging a claim for compensation for the damage suffered as a result of an unlawful act started to run from the moment the person became, or should have become, aware of the damage and knew who had caused it (Article 8). However, the time-limit was interrupted by the lodging of a court action (Article 16). A new term of the statute of limitations started to run after its interruption (Article 17).

70. The new Romanian Civil Code, in force since 1 October 2011, provides that a person with discernment is liable for all damage caused by his actions or inactions and is bound to make full reparation (Article 1349). With regard to the existence of the damage or of the guilt of the perpetrator of the unlawful act, the civil court is not bound by the provisions of criminal law or by the final judgment of acquittal or of closing the criminal trial (Article 1365). The right to lodge an action, including one with a pecuniary scope, is time-barred if not exercised within three years, unless the law provides otherwise (Articles 2500, 2501 and 2517). The time-limit for lodging a claim for compensation for the damage suffered as a result of an

unlawful act starts to run from the moment the person becomes, or should become, aware of the damage and knows who caused it (Article 2528). The time-limit can be interrupted by the lodging of a court action or of a civil-party claim during the criminal proceedings instituted, or before the court, up to the moment when the court starts the judicial examination of the case (Article 2537). If the time-bar is interrupted by the lodging of a civil-party claim, the interruption remains valid until the order to close or suspend the criminal proceedings or the decision of the court to suspend the proceedings is notified, or until the criminal court has delivered a final judgment (Article 2541).

THE LAW

I. SCOPE OF THE CASE AND CHARACTERISATION OF THE COMPLAINTS

A. The parties' submissions

71. The applicant alleged in his application to the Court that following the accident he had suffered serious bodily harm entailing danger to his life. He also alleged that the investigation into the circumstances of the accident had been unreasonably long. Also, the domestic courts had reviewed only his appeals against the prosecutor's offices' decisions, none of them determining the merits of his case. The authorities' main concern had been to hide and distort the truth, rather than to clarify the circumstances of the accident. He had not been allowed to adduce relevant evidence to the file, several abuses had been committed by the authorities and the offenders had been aided by them. In his opinion all of the aforementioned elements amounted to humiliation and inhuman and degrading treatment. He had felt hurt by this treatment, considering also the fact that he was a person suffering from a serious disability following the accident. Finally, the statutory limitation of the criminal liability had come into effect during the criminal investigation proceedings, as intended by the domestic authorities.

72. In his subsequent written observations to the Court, the applicant referred, *inter alia*, to the fact that J.C.P. was a State agent. He was a civil employee of a military unit and at the time of the accident he had been carrying out an official mission entrusted to him by the military unit on behalf of the Romanian State.

73. The Government submitted that in his initial application to the Court and in his subsequent written submissions before the Chamber, the applicant had not alleged any failure on the part of the State to adopt sufficient legal rules and measures to regulate motor vehicle traffic on public roads. Nor had he mentioned any aspect falling within the scope of Article 8 of the Convention.

74. The Government pointed out that in the aforementioned initial application the applicant had complained that the manner in which the domestic authorities had investigated the traffic accident of which he had been a victim amounted to inhuman and degrading treatment. However, in circumstances such as those of the instant case, Article 3 was not applicable under its substantive limb, as the manner in which the authorities had handled the investigation had been sufficiently covered by the procedural obligations enshrined *inter alia* in that article.

75. In his subsequent written submissions before the Chamber, the applicant had expressly stated that his application to the Court concerned abuses committed by State agents when investigating the circumstances of the accident and his inability to bring those agents to justice, and not the injuries he had suffered as a result of D.I.'s actions. He had also stated that he was not complaining of any breach of Article 2 of the Convention. In addition, the letters submitted by the applicant clearly showed that he had not intended to complain about an alleged breach of Article 3 under its procedural limb.

76. The Government considered that the Court had to take into account the applicant's free will and limit the scope of the present case to the complaints set out in his application form and in his subsequent submissions, without changing that scope.

77. They also argued that the applicant had never complained to the Court that the State was responsible for J.C.P.'s conduct on the basis of his status as a State agent. Also, the criminal proceedings against J.C.P. had ended on 30 September 2011 – more than six months before the applicant lodged his application before the Court – and the domestic courts had irrevocably established that J.C.P. was not responsible for the accident (see paragraph 49 above). Furthermore, there had been no evidence in the file of the State's responsibility for the accident. The Court could not duplicate the efforts of the competent authorities and independently establish the circumstances of the accident or identify the persons responsible for it.

78. The Government acknowledged that J.C.P. was an employee of the military unit and that at the time of the accident he had been exercising his professional duties. However, J.C.P. was a civil employee of the said unit, and under the relevant domestic law the military unit could have been held civilly liable for the accident only if the relevant authorities had found J.C.P. responsible for the accident. Since J.C.P. had had no responsibility for the traffic accident the substantive limbs of Articles 2 and 3 of the Convention were not applicable in the instant case.

79. Moreover, the Government considered that J.C.P.'s classification as a State agent was irrelevant to the outcome of the instant case because the applicant had not argued that J.C.P.'s status had been an element influencing the domestic investigation. Furthermore, the domestic

investigation had been carried out by civilian prosecutors with no ties to J.C.P. or the military unit employing him.

B. The Court's assessment

80. The Court notes from the outset that the complaints formulated by the applicant (see paragraph 71 above) are twofold. On the one hand they concerned the alleged length and ineffectiveness of the criminal investigation and the alleged impossibility to obtain a decision on the merits of his civil claim following the road-traffic accident in which he had been involved. On the other hand, they concerned the treatment which the applicant had suffered by reason of the manner in which the authorities had handled the investigation into the circumstances of the accident.

81. The applicant's complaints may thus be grouped into two distinct categories: firstly, his complaints relating to the conduct of the criminal investigation, and secondly, the ones relating to his treatment by the authorities involved in the investigation. In respect of both categories of complaints, in his initial application the applicant relied explicitly and broadly on Articles 3, 6 and 13 of the Convention.

82. The Court notes that, in respect of both categories of complaints, the Government argued that they partly fell outside the scope of the case to be examined by the Court (see paragraphs 73-76 and 78-79 above). It must therefore determine the scope and the characterisation to be given in law to each category of the applicant's complaints.

83. In this connection, the Court reiterates that a complaint consists of two elements: factual allegations and legal arguments. By virtue of the *jura novit curia* principle the Court is not bound by the legal grounds adduced by the applicant under the Convention and the Protocols thereto and has the power to decide on the characterisation to be given in law to the facts of a complaint by examining it under Articles or provisions of the Convention that are different from those relied upon by the applicant (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018).

84. As regards the applicant's first category of complaints, that relating to the conduct of the criminal investigation, the Court notes that they do not include an allegation of intentional acts or suspicious circumstances. Nor did the applicant attribute the incident to a failure on the part of the State authorities to adopt sufficient legal rules and measures to regulate motor vehicle traffic on public roads to ensure the safety of road users. Neither did he claim that the State was responsible for J.C.P.'s conduct because he was a civil employee of a military unit and therefore a State agent.

85. With regard to this category of complaints, the applicant referred to the serious consequences of the road accident for his physical integrity. He filed evidence attesting that the aforementioned consequences had been

considered life-threatening and to be the result of negligent actions. His initial application did not rely on Article 2. His subsequent written submissions before the Chamber still included certain affirmations which might be taken as meaning that he was not complaining under Article 2 of the Convention. Other remarks might be interpreted as an acknowledgement that he was also not complaining under the procedural limb of Article 3. However, in his second observations before the Chamber, he made some further statements and remarks which suggest otherwise.

86. In view of the above, the Court considers that the applicant's first category of complaints concerns his procedural rights and/or the procedural obligations incumbent on State authorities in the context of negligent actions resulting in very serious physical or life-threatening consequences. Moreover, given the specific context of the case, the Court considers that such procedural rights and corresponding State obligations may, under certain circumstances, be enshrined not only in Articles 3, 6 § 1 and 13, to which the applicant referred, but also in Articles 2 and 8 of the Convention. Although he did not expressly invoke the latter two provisions, the Court, having regard to the factual basis of his complaints (see paragraph 71 above), finds it appropriate to examine the present case also from the angle of Articles 2 and 8.

87. Consequently, the Court takes the view that it should examine the applicant's complaints relating to the conduct of the criminal investigation from the angle of the procedural rights and corresponding obligations enshrined in each of the above-mentioned provisions. It also considers that it should take the opportunity offered by the present case to elucidate the scope of the procedural guarantees embodied in each of these provisions in the area under review.

88. With regard to the applicant's second category of complaints, the Court notes that this category concerns his allegations of having been subjected to humiliation and ill-treatment by the authorities involved in the investigation.

89. Given the specific nature of the applicant's allegation in this regard, the Court is unable to accept the Government's argument that this complaint could be sufficiently addressed by examining it in the above-mentioned context of the respondent State's procedural obligations (see, for example, *Kurt v. Turkey*, 25 May 1998, §§ 130-34, *Reports of Judgments and Decisions* 1998-III; *Çakıcı v. Turkey* [GC], no. 23657/94, § 98, ECHR 1999-IV; and *Taş v. Turkey*, no. 24396/94, §§ 77-80, 14 November 2000). Consequently, the Court takes the view that the complaint relating to the applicant's treatment by the authorities involved in the investigation warrants a separate examination, to be carried out under the substantive limb of Article 3 of the Convention.

90. In the light of the foregoing considerations, the Court will proceed to examine, first, the applicant's complaints relating to the conduct of the

criminal investigation, and subsequently the complaint about his treatment by the authorities involved in the investigation.

II. COMPLAINTS RELATING TO THE CONDUCT OF THE CRIMINAL INVESTIGATION

91. The applicant complained about the length and ineffectiveness of the criminal investigation and the alleged impossibility to obtain a decision on the merits of his civil claim following the road-traffic accident in which he had been involved. As already stated above (see paragraphs 86-87), the Court will examine these complaints from the angle of Articles 2, 3, 6 § 1, 8, and 13 of the Convention, which, in their relevant parts, read as follows:

Article 2

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

..."

Article 3

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

Article 6

"1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing within a reasonable time by an independent and impartial tribunal established by law...

..."

Article 8

"1. Everyone has the right to respect for his private life ...

..."

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. As regards the alleged violation of Articles 2, 3 and 8 of the Convention

92. The applicant complained that the criminal investigation had been excessively lengthy and ineffective.

1. Admissibility

(a) Exhaustion of domestic remedies

(i) The parties' submissions

(α) The Government

93. The Government submitted that the applicant had failed to exhaust the available domestic remedies as required by Article 35 §§ 1 and 4 of the Convention, not only in respect of his grievances under Article 2 but also those under Articles 3 and 8. More specifically, they argued that the applicant should have brought civil proceedings before the civil courts against the driver whom he considered responsible for the accident.

94. Relying on the relevant domestic law and on examples of domestic courts' practice, the Government explained that victims of an offence could join the criminal proceedings as a civil party. Alternatively, victims who had not joined the criminal proceedings as a civil party could bring separate civil proceedings seeking compensation for the damage suffered. In such situations the civil proceedings had to, or could, be suspended pending a final judgment by the criminal courts. While the suspension of the civil proceedings was optional for the civil court pending an indictment, it became mandatory once an indictment was issued.

95. Save in certain exceptional circumstances, where an indictment had been brought, the criminal courts were bound to examine civil claims joined to the criminal proceedings, irrespective of whether the defendant was convicted or acquitted. In the said exceptional circumstances, the victim could in any event bring separate civil proceedings. Moreover, by analogy, the victim could bring separate civil proceedings against the alleged perpetrator even where the prosecutor's office had issued a decision of non-indictment on the grounds of the statute of limitation.

96. The relevant judicial practice generally interpreted the criminal proceedings with civil claims brought by a victim of an offence as amounting to a court action which would interrupt the running of the three-year statutory time-limit for civil proceedings. Consequently, the said statutory time-limit had started to run from the moment the criminal proceedings ended. The aforementioned interpretation was expressly reflected in the amendments made to the civil rules in force in Romania after 1 October 2011.

97. In the case both of civil claims joined to criminal proceedings and separate civil proceedings, the responsibility for presenting evidence lay on the victim. Evidence added to the case file during the criminal proceedings could be used during separate civil proceedings brought before a civil court, but this did not limit the victim's and the civil domestic courts' ability to add other evidence to the file.

98. Under the Court's case-law, civil proceedings brought by the applicant against D.I. in order to obtain compensation for the possible

damage suffered by him after the conclusion of the criminal proceedings would have been an effective avenue of redress even if it had been used years after the accident. The Government considered that it would not be excessive to ask the applicant to exhaust the civil remedy in question eight years after the accident, given the complexity of the domestic criminal proceedings, the absence of any long periods of inactivity by the relevant authorities and the fact that the applicant could have used before the civil courts the evidence added to the criminal file and the Bucharest District Court's conclusion in the judgment of 30 September 2011 concerning D.I.'s responsibility for the accident.

99. Finally, the Government explained that the civil proceedings brought by the applicant on 28 November 2006 had been based on an insurance contract and had not concerned the injuries which he had suffered after the accident.

(β) The applicant

100. The applicant argued that by joining the criminal proceedings instituted in respect of the circumstances of the accident as a civil party, he had exhausted the available domestic remedies and was thus not required to initiate separate civil compensation proceedings against the person responsible for the accident. In addition, since the issue of liability had not been clarified by the criminal investigation, it was doubtful that he would have been able to initiate a civil action, let alone obtain compensation for the damage suffered. As the identity of the culprit had remained unknown the legal conditions for bringing civil compensation proceedings had not been met. Also, bringing separate civil proceedings against the State would not have constituted a means of ensuring the effectiveness of the investigation. Moreover, by lodging complaints against the investigators and their decisions, he had used all the procedural means available to prevent a breach of his Convention rights, but without any practical results. Furthermore, there was no remedy that he could have used in respect of the length of proceedings.

101. The applicant submitted that none of the domestic case-law invoked by the Government bore any relation to his case. In all the cases cited the criminal investigation and indictment stage had been completed before the statutory time-bar for criminal liability had taken effect. Moreover, in terms of the relationship between criminal guilt and a civil action, the applicant referred to a decision taken by a domestic court, which had held that in the circumstances of a road-traffic accident resulting in physical injuries, guilt was established by the investigating authorities, not by the victim.

102. The applicant contended that he had exhausted the civil remedies available to him by bringing civil proceedings against the insurance and the leasing companies on account of the total destruction of his car. Initially, the

domestic courts had found in his favour, but during the appellate proceedings they had come to the conclusion that the civil action which he had initiated was based not on a criminal offence but rather on a commercial contract. Consequently, the courts had ordered the applicant to pay a large amount in judicial fees as a precondition for the examination of his civil case. His requests for reconsideration of the order to pay judicial fees were dismissed. His claims had been dismissed because he was unable to pay the fees. The applicant acknowledged that the civil proceedings which he had brought against the insurance company covering his car had resulted from the commercial contract concluded with the said company, not from the criminal case, as neither the insurance company nor the lease company were parties to the criminal proceedings. However, D.I. and J.C.P. had intervened as third parties in the civil proceedings.

(ii) The Court's assessment

103. The Court notes that the Government's objection concerning the applicant's failure to exhaust the available domestic remedies is closely linked to the substance of his complaints relating to the conduct of the criminal investigation, whether this is to be considered under Article 2, 3 or 8 of the Convention following the discussion below. It concerns the options open to him in terms of domestic avenues capable of clarifying the circumstances of the case, holding those responsible accountable and covering the damage he had suffered as a result of the accident. Moreover, its examination is dependent on the determination of the scope of the respondent State's procedural obligations in the instant case.

104. Consequently, the Court decides to join the objection to the merits of the said complaints, provided that they are not inadmissible on any other grounds.

(b) Applicability of Articles 2, 3 and 8

(i) The parties' submissions

105. Relying on a review of the Court's case-law, the Government argued that Article 2, under its procedural limb, was not applicable in the instant case given the absence of death, of sufficiently serious injuries suffered by the applicant, of circumstances and consequences which could be classified as clearly life-threatening, of exceptional circumstances involving the behaviour of State agents, of a continuous threat to the applicant's life, or of intent to kill. They further argued that Article 3, under its procedural limb, was also inapplicable given the absence of ill-treatment and of intent to hurt the applicant. The Government also denied that the applicant's complaint had touched on any aspect falling within the scope of the protection afforded by Article 8.

106. They submitted that after the completion of the post-accident recovery treatment, the applicant had not requested a new forensic expert report to assess any possible disability, as was indicated in the forensic expert report of 27 June 2005. Moreover, he had failed to submit any recent medical document which could have attested to any effects currently suffered by him following the accident.

107. The Government acknowledged that according to the information provided by the Child Protection and Social Assistance Agency within the Prahova County Council, the applicant was registered as a person with a severe disability requiring a personal assistant on the basis of a certificate issued by the Prahova Commission for the Assessment of Adult Persons with Disabilities on 26 January 2006. The Government also acknowledged that a medical note produced by the applicant's general practitioner on 19 January 2006 – which was one of the documents available in the file on which the applicant's classification as a person with disabilities was founded – stated that he had a permanent tracheal cannula, and suffered from reduced mobility in the articulation of his right shoulder (serious after-effects of his fractured shoulder), from diminished compression strength in his right hand, and from a walking disorder (serious after-effects of his fractured left hip).

108. However, the above-mentioned certificate issued by the Prahova Commission for the Assessment of Adult Persons with Disabilities on 26 January 2006 stated certain illness codes for the applicant which corresponded to, respectively, asthma, status asthmaticus and malignant tumour of the larynx. Moreover, the serious after-effects concerning the applicant's fractured limbs had not been taken into account by the said certificate and the available medical documents had not established a causal link between the accident and the applicant's tracheotomy.

109. The applicant, relying on the Court's case-law, the available evidence, the nature of his injuries and his current condition, argued that Articles 2 and 3 of the Convention were applicable to his case. He further maintained that the guarantees embodied in Article 8 had been breached.

110. He submitted that prior to the accident his health had been good and that he had led a normal life without any medical restrictions. However, his health had been seriously affected after the accident, and he had had to undergo multiple surgeries and been left with psychological trauma. The displaced fractures of his limbs continued to cause problems and a portion of his intestines and his trachea had been removed.

(ii) The Court's assessment

(α) Elements concerning the applicant's situation to be taken into account for the assessment of the case

111. In the instant case, the Court notes that the applicant was involved in a car accident which, according to the expert opinion of 27 June 2005

(see paragraph 18 above), endangered his life. His car was caught between two other vehicles, one of them driving the other one being parked. As a result, the applicant suffered serious internal injuries and fractures of his limbs and bones as well as serious treatment complications which required 200 to 250 days of medical care. Subsequently, he appears to have been left with long-term serious physical and psychological after-effects, including a disability.

112. In this regard the Court cannot accept the Government's submissions that the physical after-effects suffered by the applicant, including part of his reduced mobility, were not the result of the accident. The Court notes that the available medical documents in fact show that following the accident the applicant suffered polytrauma, post-traumatic mesentery rupture, and fractured and/or displaced bones and body parts. As a result he had undergone several surgeries, including surgery involving the removal of part of his intestines, and had required a lower tracheotomy because of respiratory complications which seem to have appeared during his hospitalisations, even if the applicant may already have had a malignant tumour of the larynx and asthma before the accident. The power of compression in his right hand was diminished and the amplitude in the abduction movement of his right arm was reduced. Moreover, the Court notes that the applicant was suffering from post-traumatic stress disorder. The accident was thus the precursor of at least some of the long-term health problems suffered by the applicant after 3 December 2004, and therefore they were directly, or at the very least indirectly, connected to the accident.

113. The Court notes that the applicant's accident happened at night, on a public road and involved two other drivers. It was clear from the outset that the cumulative factual elements which eventually led to the unfortunate consequences described above were either pure chance or the consequence of negligent conduct. The applicant never argued during the domestic investigation or in his initial application to the Court that the other two drivers had acted intentionally or that their acts had specifically targeted him (see paragraph 84 above). Although in his subsequent written submissions to the Court the applicant seemed to suggest that the accident had in fact been caused intentionally or that it happened in suspicious circumstances (see paragraph 155 below), there is no evidence in the file which could substantiate his allegation. On the contrary, the investigation initiated by the authorities into the circumstances of the accident concerned an involuntary offence.

114. The Court notes that the authorities appear to have considered the possibility that the applicant was himself partly responsible for the accident because he had failed to drive preventively. However, the questions whether the applicant had been fully or at least partly responsible for the major injuries he suffered and whether he had been driving under the influence of alcohol were not elucidated by the investigation.

(β) Article 3

– *General principles*

115. The Court notes that Article 3, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals (see *A. v. the United Kingdom*, 23 September 1998, § 22, *Reports* 1998-VI, and *Z. and Others v. the United Kingdom* [GC], no. 29392/95, §§ 73-75, ECHR 2001-V). This general requirement involves a procedural obligation. In cases of allegations of medical negligence the obligations under Article 3 incumbent on the authorities have been interpreted as in principle not requiring the provision of a criminal-law remedy (see *V.C. v. Slovakia*, no. 18968/07, §§ 125-26, ECHR 2011 (extracts); *N.B. v. Slovakia*, no. 29518/10, § 84, 12 June 2012; *I.G. and Others v. Slovakia*, no. 15966/04, § 129, 13 November 2012; and *Dvořáček v. Czech Republic*, no. 12927/13, § 111, 6 November 2014). By contrast, where an individual makes an "arguable claim" or a "credible assertion" that he has suffered treatment infringing Article 3 at the hands of, *inter alia*, the police or other similar authorities, the aforementioned provisions require by implication that there should be an effective official investigation of a criminal nature. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice (see *Assenov and Others v. Bulgaria*, no. 24760/94, § 102, 28 October 1998, *Reports* 1998-VIII; *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV; *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 186, ECHR 2012; *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 317, ECHR 2014 (extracts); *Bouyid v. Belgium* [GC], no. 23380/09, § 116, ECHR 2015). Even in the absence of a formal complaint, once the matter has come to the attention of the authorities, this gives rise *ipso facto* to an obligation under that Article that the State carries out an effective investigation (see *Gorgiev v. the former Yugoslav Republic of Macedonia*, no. 26984/05, § 64, 19 April 2012; *El-Masri*, cited above, § 186).

116. In its examination of whether a person has been "subjected to ... treatment" that is "inhuman or degrading" within the meaning of Article 3, the Court's general approach has been to emphasise that the treatment must attain a minimum level of severity if it is to fall within the scope of this provision. The assessment of that level is relative and depends on all the circumstances of the case, principally the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of

health of the victim (see *Muršić v. Croatia* [GC], no. 7334/13, § 97, 20 October 2016; *Paposhvili v. Belgium* [GC], no. 41738/10, § 174, 13 December 2016; and *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 159, 15 December 2016).

117. In order to determine whether the threshold of severity has been reached, the Court may also take other factors into consideration, in particular: the purpose for which the ill-treatment was inflicted, together with the intention or motivation behind it, although the absence of an intention to humiliate or debase the victim cannot conclusively rule out a finding of a violation of Article 3; the context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions; and whether the victim was in a vulnerable situation (see *Khlaifia and Others*, cited above, § 160, with further references).

118. Subjecting a person to ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of those characteristics, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition set forth in Article 3. It may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others (see *Bouyid*, cited above, § 87, with further references).

119. With respect to treatment inflicted by private individuals, the Court has repeatedly found that Article 3 is applicable in cases involving deliberate ill-treatment, such as rape, sexual abuse or violence, including family violence or injuries sustained in a fight, which involves behaviour capable of inducing feelings of humiliation and degradation in the victim (see, among other authorities, *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII; *Beganović v. Croatia*, no. 46423/06, 25 June 2009; *Biser Kostov v. Bulgaria*, no. 32662/06, 10 January 2012; *Muta v. Ukraine*, no. 37246/06, § 58, 31 July 2012; *Dimitar Shopov v. Bulgaria*, no. 17253/07, 16 April 2013; *S.Z. v. Bulgaria*, no. 29263/12, 3 March 2015; *Y. v. Slovenia*, no. 41107/10, ECHR 2015 (extracts); *M. and M. v. Croatia*, no. 10161/13, ECHR 2015 (extracts); and *Sakir v. Greece*, no. 48475/09, 24 March 2016).

120. A different approach was adopted in *Kraulaidis v. Lithuania* (no. 76805/11, § 57, 8 November 2016) which related, like here, to a traffic accident. The Court "note[d] at the outset that as a result of the accident the applicant had been severely injured and had lost the ability to walk. Thus, [it concluded,] the situation attain[ed] the threshold necessary to fall within the scope of Article 3 of the Convention". In a similar vein, in *Mažukna v. Lithuania* (no. 72092/12, § 81, 11 April 2017), the Court observed that, as a result of an accident at work, the applicant had suffered injuries to his face

and chest, which had caused disfigurement and impaired his ability to make facial expressions and the injury was medically assessed as irreparable and a serious health impairment; "[a]ccordingly, ... the situation attain[ed] the threshold necessary to fall within the scope of Article 3 of the Convention". A common characteristic of the reasoning stated in both aforementioned judgments is their sole focus on the nature and degree of the injuries sustained. Article 3 was thus treated as applicable in situations which did not involve any intentional act against the victim.

121. However, the Court considers that the approach to assessing whether a person has been subjected to ill-treatment attaining the minimum level of severity, as described in paragraphs 116-118 above, established through a number of successive Grand Chamber judgments, remains the correct one also in respect of treatment inflicted by private individuals. As can be seen from these passages, it involves taking into account an array of factors, each of which is capable of carrying significant weight. All these factors presuppose that the treatment to which the victim was "subjected" was the consequence of an intentional act.

– *Application of the general principles in the instant case*

122. The Court notes that it is beyond dispute that the severity of suffering, physical or mental, attributable to a particular measure or event has been a significant consideration in many of the cases where the Court has ruled Article 3 applicable, and that the absence of any intention to harm, humiliate or debase a person cannot conclusively rule out a finding of a violation of Article 3.

123. However, in the Court's view, in line with the approach confirmed above (see paragraph 121), bodily injuries and physical and mental suffering experienced by an individual following an accident which is merely the result of chance or negligent conduct cannot be considered as the consequence of "treatment" to which that individual has been "subjected" within the meaning of Article 3. Indeed, as already indicated in paragraphs 116-118 such treatment is in essence, albeit not exclusively, characterised by an intention to harm, humiliate or debase an individual, by a display of disrespect for or diminution of his or her human dignity, or by the creation of feelings of fear, anguish or inferiority capable of breaking his or her moral and physical resistance. No such elements feature in the applicant's case.

124. It follows that the part of the applicant's complaints under Article 3 relating to the conduct of the investigation is incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 35 §§ 3 (a) and 4.

(χ) Article 8

– *General principles*

125. The Court reiterates that the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities. However, this provision does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there are positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see, among other authorities, *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91, and *Söderman v. Sweden* [GC], no. 5786/08, § 78, ECHR 2013).

126. The concept of "private life" is a broad term not susceptible to exhaustive definition (see *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I; *Bărbulescu v. Romania* [GC], no. 61496/08, § 70, 5 September 2017 (extracts); and *Denisov v. Ukraine* [GC], no. 76639/11, § 95, 25 September 2018), which covers also the physical and psychological integrity of a person (see *X and Y*, cited above, § 22, and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, § 76, 27 June 2017). Moreover, a person's body concerns an intimate aspect of private life (see *Y.F. v. Turkey*, no. 24209/94, § 33, ECHR 2003-IX).

127. Regarding the protection of the physical and psychological integrity of an individual from other persons, the Court has held that the authorities' positive obligations – in some cases under Article 8 taken alone or in conjunction with Article 3 – may include a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals (see *Söderman*, cited above, § 80, and the references therein). In certain instances, as in cases of rape and sexual abuse of children, where fundamental values and essential aspects of private life have been at stake, the States' positive obligation has been found to encompass ensuring that efficient criminal-law provisions are in place and been extended to the effectiveness of a criminal investigation; in certain less serious instances the availability of a civil remedy has been deemed sufficient (for examples, *Söderman*, cited above, §§ 81-85). In the area of medical care the Court has held that, whilst the right to health is not as such among the rights guaranteed under the Convention or its protocols, a positive obligation under Article 8 (parallel to the one under Article 2) is, firstly, to have in place regulations compelling both public and private hospitals to adopt appropriate measures for the protection of their patients' physical integrity and, secondly, to provide victims of medical negligence access to proceedings in which they can, if appropriate, obtain

compensation for damage (see *Vasileva v. Bulgaria*, no. 23796/10, § 63, 17 March 2016, and *Jurica v. Croatia*, no. 30376/13, § 84, 2 May 2017).

128. However, the Court emphasises that not every act or measure of a private individual which adversely affects the physical and psychological integrity of another will interfere with the right to respect for private life guaranteed by Article 8 (see *Costello-Roberts v. the United Kingdom*, 25 March 1993, Series A no. 247-C; *Bensaid*, cited above; § 46, and *Tonchev v. Bulgaria*, no. 18527/02, 19 November 2009). It reiterates that a severity threshold is necessary for the applicability of Article 8 in such a situation (see *Denisov*, § 114, cited above). Moreover, there is nothing in the Court's established case-law which suggests that the scope of private life extends to activities which are of an essentially public nature (see *Friend and Others v. the United Kingdom* (dec.), no. 16072/06, § 42, 24 November 2009).

– *Application of the general principles in the instant case*

129. The Court notes that there can be no doubt that the applicant was seriously injured as a result of the traffic accident. The question arises whether such personal injury raises an issue relating to the applicant's private life within the meaning of Article 8.

130. In this regard, the Court notes, first, that the applicant's injuries resulted from his having voluntarily engaged in an activity – driving a motor vehicle on a public road – which was essentially an activity that took place in public (see, *mutatis mutandis*, *Friend and Others*, cited above, § 43; compare *Peck v. the United Kingdom*, no. 44647/98, § 62, ECHR 2003-I). It is true that by its very nature, this activity involved a risk that serious personal harm might occur in the event of an accident (see, *mutatis mutandis*, *Vilnes and Others v. Norway*, nos. 52806/09 and 22703/10, §§ 222 and 239, 5 December 2013). However, that risk was minimised by traffic regulations aimed at ensuring road safety for all road users, including through the proper separation of vehicles on the road. Secondly, the accident did not occur as the result of an act of violence intended to cause harm to the applicant's physical and psychological integrity. Nor could it be assimilated to any of the other types of situations where the Court has previously found the State's positive obligation to protect physical and psychological integrity engaged (see paragraph 127 above).

131. Against this background, the Court does not discern any particular aspect of human interaction or contact which could attract the application of Article 8 of the Convention in this case.

132. It follows that the applicant's complaint under Article 8 relating to the conduct of the investigation is incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 35 §§ 3 (a) and 4.

(δ) Article 2

– *Introduction*

133. The Court notes at the outset that the present case concerns an alleged act of negligence within the context of a road-traffic accident in which the applicant was injured. In light of the applicant's arguments, the Court is called upon to determine whether the facts of the instant case fall under the procedural limb of Article 2. It will first set out the general principles guiding the applicability of Article 2, in particular to accidents and negligent conduct, and subsequently assess the application of those principles to the instant case.

– *General principles*

134. The Court reiterates that the first sentence of Article 2, which ranks as one of the most fundamental provisions in the Convention and also enshrines one of the basic values of the democratic societies making up the Council of Europe, requires the State not only to refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports* 1998-III; *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 48, ECHR 2002-I, and *Fernandes de Oliveira v. Portugal* [GC], no. 78103/14, § 104, 31 January 2019).

135. This substantive positive obligation entails a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 89, ECHR 2004-XII; *Budayeva and Others v. Russia*, nos. 15339/02 and 4 others, § 129, ECHR 2008 (extracts); *Kolyadenko and Others v. Russia*, nos. 17423/05 and 5 others, § 157, 28 February 2012, and *Fernandes de Oliveira*, cited above, §§ 103 and 105-07). It applies in the context of any activity, whether public or not, in which the right to life may be at stake (*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 130, ECHR 2014, and *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, § 165, 19 December 2017). It also requires the State to make regulations compelling institutions, whether private or public, to adopt appropriate measures for the protection of people´s lives (see, in the context of the use of force by State agents, *McCann and Others v. the United Kingdom*, 27 September 1995, § 151, Series A no. 324; *Makaratzis v. Greece* [GC], no. 50385/99, §§ 58, 59 and 62, ECHR 2004-XI; *Perişan and Others v. Turkey*, no. 12336/03, § 85, 20 May 2010; in the context of health care, *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 130; *Lambert and Others v. France* [GC], no. 46043/14, § 140, ECHR 2015 (extracts); *Lopes de Sousa Fernandez*, cited above, § 166, and *Fernandes de Oliveira,* cited above, § 105; in the context of

industrial activities, *Öneryıldız*, cited above, §§ 71 and 90, and *Kolyadenko and Others*, § 158). In this context, the absence of any direct State responsibility for the death of an individual or for placing his life in danger does not exclude the applicability of Article 2 (see *Cavit Tınarlıoğlu v. Turkey*, no. 3648/04, § 61, 2 February 2016). The Court would stress that in the context of road traffic, these duties of the domestic authorities entail the obligation to have in place an appropriate set of preventive measures geared to ensuring public safety and minimising the number of road accidents.

136. Secondly, there is a further substantive positive obligation to take preventive operational measures to protect an identified individual from another individual (see *Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports* 1998-VIII) or, in particular circumstances, from himself (see *Renolde v. France*, no. 5608/05, § 81, ECHR 2008 (extracts); *Haas v. Switzerland*, no. 31322/07, § 54, ECHR 2011, and *Fernandes de Oliveira,* cited above, §§ 103 and 108-15). The Court has held that such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every alleged risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. In order to engage this positive obligation, it must be established that the authorities knew or ought to have known at the time, of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (*Osman*, cited above, §§ 115-16; *Öneryıldız*, cited above, §§ 74 and 101; *Bone v. France* (dec.), no. 69869/01, 1 March 2005; *Cavit Tınarlıoğlu*, cited above, §§ 91-92, and *Fernandes de Oliveira*, cited above, § 109). The Court considers that this obligation may in certain circumstances include the provision of emergency medical treatment in the event of a life-threatening accident.

137. Thirdly, the Court reiterates that the State's duty to safeguard the right to life must be considered to involve not only these substantive positive obligations, but also, in the event of death, the procedural positive obligation to have in place an effective independent judicial system. Such system may vary according to circumstances (see paragraph 158 below). It should, however, be capable of promptly establishing the facts, holding accountable those at fault and providing appropriate redress to the victim (compare *Calvelli and Ciglio*, cited above, § 49; *Vo v. France* [GC], no. 53924/00, § 89, ECHR 2004-VIII; *Šilih v. Slovenia* [GC], no. 71463/01, §§ 155 and 192, 9 April 2009; and *Lopes de Sousa Fernandes*, cited above, § 214).

138. This procedural obligation is not dependent on whether the State is ultimately found to be responsible for the death under its substantive limb, but constitutes a separate and autonomous duty (see *Šilih*, cited above, §§ 156 and 159). It entails an obligation to carry out an effective official investigation when individuals have been killed as the result of the use of force, but may extend to accidents where an individual has been killed. In this context, the Court has found Article 2 to be equally applicable in the context of accidents, notably road-traffic accidents, where the direct victim died (see, for example, *Anna Todorova v. Bulgaria*, no. 23302/03, 24 May 2011; *Prynda v. Ukraine*, no. 10904/05, 31 July 2012; and *Fatih Çakır and Merve Nisa Çakır v. Turkey*, no. 54558/11, § 41, 5 June 2018).

139. The Court has, under certain circumstances, also found this procedural obligation under Article 2 to be engaged in cases of incidents where the person whose right to life was allegedly breached did not die. In such cases the Court considered it relevant that the victim had sustained life-threatening injuries (see *Igor Shevchenko v. Ukraine*, no. 22737/04, 12 January 2012; and *Kotelnikov v. Russia*, no. 45104/05, 12 July 2016, both in the context of road-traffic accidents).

140. It further emerges from the Court's case-law that, where the victim was not killed but survived and where he or she does not allege any intent to kill, the criteria for a complaint to be examined under this aspect of Article 2 are, firstly, whether the person was the victim of an activity, whether public or private, which by its very nature put his or her life at real and imminent risk and, secondly, whether he or she has suffered injuries that appear life-threatening as they occur. Other factors, such as whether escaping death was purely fortuitous (compare and contrast *Makaratzis*, cited above, §§ 54-55, in the context of non-fatal shootings by police officers in a hot-pursuit operation, and *Krivova v. Ukraine*, no. 25732/05, § 45, 9 November 2010) or whether the victim was infected with a potentially fatal disease (see *G.N. and Others v. Italy*, no. 43134/05, 1 December 2009, in the context of an infection with hepatitis C by blood transfusions) may also come into play. The Court's assessment depends on the circumstances. While there is no general rule, it appears that if the activity involved by its very nature is dangerous and puts a person's life at real and imminent risk, like the use of life-threatening violence, the level of injuries sustained may not be decisive and, in the absence of injuries, a complaint in such cases may still fall to be examined under Article 2 (see *R.R. and Others v. Hungary*, no. 19400/11, § 32, 4 December 2012, where exclusion from a witness protection scheme entailed exposure to life-threatening vengeance from the mafia; *Kolyadenko and Others*, cited above, § 155, in the context of natural disasters).

141. The Court has found this positive procedural obligation to arise under Article 2 in regard to a number of different kinds of activities, such as, for example, in the health-care sector, be it public or private, as regards

the acts and omissions of health professionals (see *Calvelli and Ciglio*, cited above; *Vo*, cited above; and *Lopes de Sousa Fernandes*, cited above); in respect of the management of dangerous activities resulting in industrial or environmental disasters (see *Öneryıldız*, cited above, and *Budayeva and Others*, cited above); as well as in respect of ensuring safety on board a ship (*Leray and Others v. France* (dec.), no. 44617/98, 16 January 2001), on trains (see *Kalender v. Turkey*, no. 4314/02, 15 December 2009), on a construction site (see *Pereira Henriques v. Luxembourg*, no. 60255/00, 9 May 2006, and *Cevrioğlu v. Turkey*, no. 69546/12, 4 October 2016), during professional deep-sea diving operations (see *Vilnes and Others*, cited above), at a playground (see *Koceski v. the former Yugoslav Republic of Macedonia* (dec.), no. 41107/07, 22 October 2013) or at a school (see *Ilbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, no. 19986/06, 10 April 2012). The above list is not exhaustive (see *Ciechońska v. Poland*, no. 19776/04, § 63, 14 June 2011; *Ilbeyi Kemaloğlu and Meriye Kemaloğlu*, cited above, § 35; *Banel v. Lithuania*, no. 14326/11, § 65, 18 June 2013; and *R.Š. v. Latvia*, no. 44154/14, § 79, 8 March 2018).

142. Where the real and imminent risk of death stemming from the nature of an activity is not evident, the level of the injuries sustained by the applicant takes on greater prominence. In such cases a complaint falls only to be examined under Article 2 where the level of the injuries was such that the victim's life was put in serious danger (see *Krivova*, cited above, § 45; *Igor Shevchenko*, cited above, § 42; *Cavit Tınarlıoğlu*, cited above, § 68; and *Kotelnikov*, cited above, § 97).

143. In determining, in this context, whether the injuries in question have been of a life-threatening nature, the Court has repeatedly relied on their seriousness and after-effects (see *Krivova*, cited above, § 45; *Igor Shevchenko*, cited above, § 43; *Cavit Tınarlıoğlu*, cited above, § 68; and *Kotelnikov*, cited above, § 98). In doing so, it has deemed sufficiently serious to bring the Article 2 protection into play injuries such as severe damage to the central nervous system; severe head and spinal injuries; serious lower and upper body damage, requiring emergency and/or long-term medical treatment; as well as after-effects involving coma, long-term severe disabilities and/or incapacitation; complete loss of personal autonomy (compare and contrast *Krivova*, cited above; *Igor Shevchenko*, cited above; *Cavit Tınarlıoğlu*, cited above; and *Kotelnikov*, cited above). Whilst the list is not exhaustive and the assessment may depend on the circumstances of each case, it must be shown that there was a causal link between the incident or event in question and the injuries sustained.

144. On this basis, the Court considers that in the context of accidents and alleged negligent conduct, Article 2 is applicable if the activity involved was dangerous by its very nature and put the life of the applicant at real and imminent risk (see paragraphs 140-141 above) or if the injuries the

applicant had suffered were seriously life-threatening (see paragraphs 142-143 above). In such situations, the procedural obligation to carry out an effective official investigation applies. The less evident the immediacy and reality of the risk stemming from the nature of the activity are, the more significant the requirement as to the level of the injuries suffered by the applicant becomes. This is particularly the case where a high-risk private activity is regulated by a detailed legislative and administrative framework whose adequacy and sufficiency for the reduction of the risk for life is beyond doubt or not contested.

145. Admittedly, there may be situations where it is not clear at the moment of the event or incident whether the victim's life is at real and imminent risk or whether the injuries sustained are seriously life-threatening. In this respect, the Court considers it would be sufficient, for Article 2 to apply, that the risk appears real and imminent or the injuries appear life-threatening when they occur. As with Article 3 of the Convention as stated in paragraph 115 above, once such a matter has come to the attention of the authorities, this imposes on the State *ipso facto* an obligation under Article 2 to carry out an effective investigation (see, *mutatis mutandis*, *Ergi v. Turkey*, 28 July 1998, § 82, *Reports* 1998-IV, and *McKerr v. the United Kingdom*, no. 28883/95, § 111, ECHR 2001-III). This obligation continues to apply as long as it has not been established that the risk for life was not real and imminent or that the injuries were clearly not seriously life-threatening. What kind of investigation would achieve this purpose is a question going to the merits and will be examined in detail below (see paragraph 164).

– *Application of the general principles in the instant case*

146. The Court notes that at the time of the incident the applicant was involved in an activity potentially liable to result in serious threats to a person's life. It also notes that, over the years, driving has become a strictly regulated activity and considerable efforts have been made to improve road-traffic safety. Moreover, road safety depends on many factors, including the quality of the roads and the training provided to prospective drivers.

147. Given the extent of the regulations in place and the prevalence of this activity in daily life, the Court acknowledges that driving can nowadays be seen by many as an activity that ordinarily is not particularly dangerous. However, it does not lose sight of the fact that this may be dependent, among other things, on the quality of law enforcement in this area. Indeed, notwithstanding the efforts made, the reality remains that road-traffic incidents, including car accidents, do happen and can result in serious physical injury and even loss of life.

148. Irrespective of whether driving can be viewed as a particularly dangerous activity or not, the Court notes that where the risk stemming from

the nature of the activity is less evident, the level of the injuries sustained by the applicant takes on greater prominence (see paragraph 142 above).

149. In the applicant's case, his involvement in the above-mentioned activity resulted in him being severely injured. Even though his injuries did not ultimately lead to his actual death, the forensic expert deemed them sufficiently severe to endanger his life. His injuries required emergency and long-term medical treatment and repeated hospitalisations and had left him with long-term psychological and physical after-effects. Having regard to the state of the evidence, the Court sees no reason to doubt that in the circumstances of applicant's case, at the time of the accident, there was an arguable claim that his injuries were sufficiently severe to amount to a serious danger to his life.

150. In the light of the above, in particular the life-threatening injuries sustained by the applicant, the Court concludes that Article 2 is applicable.

(ε) Conclusion

151. Against this background, in so far as the Articles 3 and 8 of the Convention are invoked, the Court considers the part of the applicant's complaints relating to the conduct of the investigation incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 35 §§ 3 (a) and 4 (see paragraphs 124 and 132 above).

152. However, the Court considers that the Government's objection concerning the applicability of Article 2 of the Convention to this part of the applicant's complaints must be dismissed.

153. The Court will therefore continue to examine this part of the complaints exclusively under the procedural limb of Article 2 of the Convention.

154. The Court considers that this part of the complaints is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) The parties' submissions

155. The applicant, relying on the Court's case-law and the available evidence, contended that the domestic authorities had not discharged their duty to carry out an effective and prompt investigation as required by the procedural limb of Article 2. They had ignored relevant or considered unnecessary evidence and had repeatedly tried to discontinue the criminal proceedings by delivering decisions which were subsequently quashed. The need for an effective and prompt investigation had been even more important in the particular circumstances of his case because of the involvement of a State agent in the accident and because at the time of the

accident the applicant was a judge who had been actively involved in criminal cases and there was a risk of intentional acts being directed against him.

156. The Government submitted that the criminal investigation carried out by the authorities in the instant case had been effective. The authorities had initiated a prompt criminal investigation into the circumstances of the accident, had remained active, and had made efforts to clarify as far as possible the circumstances of the case. The length of the proceedings and the fact that D.I.'s criminal liability had become time-barred had been the consequences of the complexity of the case and of the significant amount of evidence the authorities had had to take into account, and not of the authorities' inaction or of any fraudulent connivance between the investigators and the suspects.

(b) The Court's assessment

(i) General principles

157. The Court recalls that, in the event of death or life-threatening physical injury, the State's duty to safeguard the right to life must be considered to also involve having in place an effective independent judicial system capable of promptly establishing the facts, holding accountable those at fault and providing appropriate redress to the victim (see paragraphs 137 and 139 above).

158. The form of investigation required by this obligation varies according to the nature of the interference with the right to life. Article 2 may, and under certain circumstances must, include recourse to the criminal law (see, among other authorities, *Calvelli and Ciglio*, cited above, § 51; *Vo*, cited above, § 90; and *Šilih*, cited above, § 194). For instance, where death has been caused intentionally, a criminal investigation is generally necessary (see, *inter alia*, *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 170, 14 April 2015); the same is true when life has intentionally been put at risk.

159. In cases concerning unintentional infliction of death and/or lives being put at risk unintentionally, the Court reiterates that the requirement to have in place an effective judicial system will be satisfied if the legal system affords victims (or their next-of-kin) a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any responsibility to be established and any appropriate civil redress to be obtained. Where agents of the State or members of certain professions are involved, disciplinary measures may also be envisaged (see, among others, *Calvelli and Ciglio*, cited above, § 51; *Vo*, cited above, § 90; *Šilih*, cited above, § 194; *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 132; and *Lopes de Sousa Fernandes*, cited above, § 137).

160. The Court reiterates further that – although the Convention does not guarantee as such a right to have criminal proceedings instituted against third parties – even in cases of non-intentional interferences with the right to life or physical integrity there may be exceptional circumstances where an effective criminal investigation is necessary to satisfy the procedural obligation imposed by Article 2. Such circumstances can be present, for example, where a life was lost or put at risk because of the conduct of a public authority which goes beyond an error of judgment or carelessness, or where a life was lost in suspicious circumstances or because of the alleged voluntary and reckless disregard by a private individual of his or her legal duties under the relevant legislation (see, among other authorities, in the context of dangerous industrial activities, *Öneryıldız*, cited above, § 71; in the context of road-traffic accidents in which lives were lost in suspicious circumstances, *Al Fayed v. France* (dec.), no. 38501/02, § 73, 27 September 2007; in the context of denial of health care, *Asiye Genc v. Turkey*, no. 24109/07, § 73, 27 January 2015; in the context of military activities, *Oruk v. Turkey*, no. 33647/04, §§ 56-65, 4 February 2014; and *Railean v. Moldova*, no. 23401/04, § 28, 5 January 2010; and in the context of a traffic accident caused by an individual's voluntary and reckless disregard of his or her legal duties in relation to transportation of dangerous goods, *Sinim v. Turkey*, no. 9441/10, § 63, 6 June 2017).

161. In the event of death the Court has held that where it is not clearly established from the outset that the death has resulted from an accident or another unintentional act, and where the hypothesis of unlawful killing is at least arguable on the facts, the Convention requires that an investigation attaining the minimum threshold of effectiveness be conducted in order to shed light on the circumstances of the death. The fact that the investigation ultimately accepts the hypothesis of an accident has no bearing on this issue, since the obligation to investigate is specifically intended to refute or confirm one or other hypothesis (see *Mustafa Tunç and Fecire Tunç*, cited above, § 133). In such circumstances, the obligation of an effective official investigation exists even where the presumed perpetrator is not a State agent (ibid., § 171). In the Court's view, the above ought to apply also in cases involving life-threatening injuries.

162. In regard to death or life-threatening injury caused in road-traffic incidents, the Court considers that, as soon as they become aware of the incident, the authorities must make all reasonable efforts given the practical realities of investigation work, including by having in place the necessary resources, to ensure that on-site and other relevant evidence is collected promptly and with sufficient thoroughness to secure the evidence and to eliminate or minimise any risk of omissions that may later undermine the possibilities of establishing liability and of holding the person(s) responsible accountable. This responsibility lies with the authorities and cannot, as said above, be left to the initiative of the victim or his or her next-of-kin (see,

mutatis mutandis, *McKerr*, cited above, § 111). The obligation to collect evidence ought to apply at least until such time as the nature of any liability is clarified and the authorities are satisfied that there are no grounds for conducting or continuing a criminal investigation.

163. The Court considers that, once it has been established by the initial investigation that death or a life-threatening injury has not been inflicted intentionally, the logical consequence of the two forms of procedural approaches described in paragraphs 159 and 160-161 above is to regard the civil remedy as sufficient, and this regardless of whether the person presumed responsible for the incident is a private party or a State agent.

164. In a situation where a criminal investigation is required (see paragraphs 158 and 160-161 above), the kind of investigation that will achieve the purposes of securing the effective implementation of the domestic laws which protect the right to life and holding the responsible persons accountable may vary according to the circumstances. However, whatever mode of investigation is employed, the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the direct victim or his or her next-of-kin, either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see, *mutatis mutandis*, *McKerr*, cited above, § 111).

165. In order to be 'effective' as this expression is to be understood in the context of Article 2 of the Convention, an investigation must firstly be adequate (see *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 324, ECHR 2007-II). That is, it must be capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible (see *Mustafa Tunç and Fecire Tunç*, cited above, § 172; and *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 233, 30 March 2016).

166. The investigation must also be thorough, which means that the authorities must take all reasonable steps available to them to secure the evidence concerning the incident, always make a serious attempt to find out what happened and not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions (see *Mocanu and Others*, cited above, § 325; see also, under Article 3 of the Convention, *El-Masri*, cited above, § 183; *Bouyid*, cited above, § 123).

167. It should further be emphasised that even where there may be obstacles or difficulties preventing progress in an investigation, a prompt response by the authorities is vital for public safety and in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in, or tolerance of, unlawful acts. The proceedings must also be completed within a reasonable time (see *Šilih*, cited above, § 195; and *Lopes de Sousa Fernandes*, cited above, § 218).

168. Also, is generally necessary that the domestic system set up to determine the cause of death or serious physical injury be independent. This means not only a lack of hierarchical or institutional connection but also a practical independence implying that all persons tasked with conducting an assessment in the proceedings for determining the cause of death or physical injury enjoy formal and de facto independence from those implicated in the events (see *Bajić v. Croatia*, no. 41108/10, § 90, 13 November 2012; and *Lopes de Sousa Fernandes*, cited above, § 217).

169. In a case such as the present one, where various legal remedies, civil as well as criminal, are available, the Court will consider whether the remedies taken together as provided for in law and applied in practice, could be said to have constituted legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim. The choice of means for ensuring the positive obligations under Article 2 is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues for ensuring Convention rights, and even if the State has failed to apply one particular measure provided for by domestic law, it may still have fulfilled its positive duty by other means (see *Ciechońska*, cited above, § 65; *Ilbeyi Kemaloğlu and Meriye Kemaloğlu*, cited above, § 37; and *Lopes de Sousa Fernandes*, cited above, § 216).

170. The said obligations will not however be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice (see *Calvelli and Ciglio*, cited above, § 53; *Šilih*, cited above, § 195; and *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 132). It is not an obligation of result but of means only (see *Šilih*, cited above, § 193, and *Lopes de Sousa Fernandes*, cited above, § 221). Thus the mere fact that the proceedings have ended unfavourably for the victim (or the next-of-kin) does not in itself mean that the respondent State has failed in its positive obligations under Article 2 of the Convention (see *Besen v. Turkey* (dec.), no. 48915/09, § 38, 19 June 2012; and *Lopes de Sousa Fernandes*, cited above, § 221).

171. Finally, the Court reiterates that compliance with the procedural requirement of Article 2 is assessed on the basis of several essential parameters, including those mentioned above (see paragraphs 166-168). These elements are inter-related and each of them, taken separately, does not amount to an end in itself, as is the case in respect of the requirements for a fair trial under Article 6. They are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed. It is in relation to this purpose of an effective investigation that any issues, including that of promptness and reasonable expediency, must be assessed (see, in particular with respect to the independence of the investigation, *Mustafa Tunç and Fecire Tunç*, cited above, § 225).

(ii) The application of the general principles in the instant case

172. The Court has already indicated the specific circumstances of the applicant's case to be taken into consideration for its assessment (see paragraph 113 above). In circumstances of life-threatening injuries inflicted unintentionally the procedural obligation imposed by Article 2 only requires that the legal system affords the applicant a remedy in the civil courts, not that a criminal investigation be opened into the circumstances of the accident (see paragraph 163 above). This, however, does not prevent domestic law from providing recourse to a criminal investigation in such circumstances (see paragraph 169 above).

173. The Court must therefore look at the procedures that were available to the applicant with a view to establishing D.I.'s and J.C.P.'s personal liability for his injuries in the present case.

174. At the outset, the Court deems irrelevant the civil proceedings brought by the applicant on 28 November 2006 against the insurance company and later the lease company (see paragraphs 64-65 above), because these proceedings concerned the alleged liability of these companies for non-fulfilment of their obligations under contracts concluded with him and not the tort liability of D.I. or J.C.P. as a result of the actions or omissions of the latter.

175. It further notes that according to the Government, the applicant had had access to several domestic remedies in order to seek redress for the damage he had suffered as a result of his accident. They submitted that he would quite clearly have been able to become a party to either civil or criminal proceedings, and that either would, at least in theory, have provided him with an appropriate avenue of redress in order to obtain compensation for the damage suffered. He had chosen to join his civil claim to the criminal proceedings opened by the authorities into the circumstances of the accident.

176. As to the question whether the applicant ought, in order to satisfy the condition of exhaustion of domestic remedies, to have brought separate civil proceedings rather than joining the criminal proceedings, the Court notes, first of all, that the choice to join the criminal proceedings opened by the authorities as a civil party does not appear unreasonable. Nor was it regarded as such by the domestic authorities, who considered, for a substantial period of time, that there were grounds for a criminal investigation in the case. Secondly, the remedy pursued by the applicant afforded a joint examination of criminal responsibility and civil liability arising from the same culpable conduct, thus facilitating the overall procedural protection of the rights at stake. The introduction of the civil claim in the criminal proceedings may well have been preferable for the applicant because, even if he bore the burden of proving that his claim was well-founded, the investigating authorities were also under an obligation to gather evidence, including evidence found at the site of the accident. The

expert opinions requested by the investigating bodies and the other evidence collected by them in the criminal proceedings could have been used by the applicant in any civil proceedings and would probably have been essential for the determination of his civil claim. Accordingly, the Court does not perceive any reason to consider that the applicant acted inappropriately when choosing to pursue his case under the Code of Criminal Procedure (see *Elena Cojocaru v. Romania*, no. 74114/12, § 122, 22 March 2016).

177. Having regard to the domestic authorities' repeated attempts to clarify the circumstances of the accident, the Court considers that the applicant could reasonably have expected the aforementioned criminal proceedings to address his grievances. In these circumstances, the fact that the applicant did not lodge a separate civil action against D.I. and J.C.P. cannot be held against him when assessing whether he had exhausted domestic remedies. In this connection it may be reiterated that in the event of there being a number of domestic remedies which an individual can pursue, that person is entitled to choose, for the purpose of fulfilling the requirement of exhaustion of domestic remedies, a remedy which addresses his or her essential grievance. In other words, when one remedy has been pursued, the use of another remedy which has essentially the same objective is not required (see *Aquilina v. Malta* [GC], no. 25642/94, § 39, ECHR 1999-III; *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 40, 19 February 2009; *Micallef v. Malta* [GC], no. 17056/06, § 58, ECHR 2009; and *Şerife Yiğit v. Turkey* [GC], no. 3976/05, § 50, 2 November 2010).

178. In the light of the above considerations, the Court holds that the Government's objection on grounds of non-exhaustion of domestic remedies must be dismissed.

179. As to the question whether in the concrete circumstances the criminal proceedings satisfied the State's obligation under Article 2 of providing an effective judicial system (see *Byrzykowski v. Poland*, no. 11562/05, §§ 106-07, 27 June 2006), the Court notes that, if deemed effective, such proceedings were by themselves capable of meeting that obligation (see *Šilih*, cited above, § 202; *Zavoloka v. Latvia*, no. 58447/00, §§ 36 and 39, 7 July 2009; *Anna Todorova*, cited above, § 75; *Sıdıka İmren v. Turkey*, no. 47384/11, § 58, 13 September 2016; and *Lopes de Sousa Fernandes*, cited above, § 232).

180. In this regard, the Court observes that immediately after the accident the Ploieşti Police Department instigated, of its own motion, a criminal investigation into the circumstances of the accident and collected evidence, including measurements, blood samples and photographic and medical documents, capable of clarifying the circumstances in which it occurred.

181. In addition, the investigating authorities identified all the drivers involved in the accident, including the applicant, and took oral evidence from them and from witnesses who were familiar with the event. As soon as

his medical condition permitted, the applicant was actively involved in the proceedings. Both during the investigation and the judicial review stages he had access to the case-file, was able to challenge the independence and impartiality of the relevant authorities, as well as the acts and measures implemented by them, and to ask for additional evidence to be included in the file. He was able to appeal against the public prosecutor's office's decisions. The fact that some of his requests for additional evidence and some of his challenges were dismissed or that the Court of Cassation eventually allowed one of his requests for his case to be transferred on grounds of legitimate suspicion does not indicate that the investigating authorities and the domestic courts were unwilling to establish the circumstances of the accident and the liability of those involved or that they actually lacked the requisite independence.

182. Furthermore, given the available evidence, notwithstanding the findings of the Forensic Service of 10 April 2007 concerning the irregularities in the collection of the applicant's blood samples (see paragraph 31 above), the Court does not find sufficient grounds to conclude that the investigation or collection of evidence was ultimately insufficiently thorough. The domestic authorities' decision to discontinue the proceedings was not taken hastily or arbitrarily, and followed years of investigative work which resulted in the accumulation of a large body of evidence, including forensic and technical elements. That evidence addressed questions raised within the framework of the criminal proceedings, including matters regarding the conduct of the drivers involved and the causes of the accident.

183. The Court notes that the authorities dismissed some of the applicant's requests for collection of evidence although he considered them relevant to the case. However, the domestic authorities must be allowed some discretion in deciding which evidence is relevant to the investigation.

184. The proceedings concerning the circumstances of the accident lasted over eight years. It is true that there were some delays in the proceedings. However, given the reasons for some of these delays (which are to be examined under Article 6 § 1 - see paragraphs 210-214 below), they cannot be said to have affected the effectiveness of the investigation.

185. The Court reiterates that Article 2 does not guarantee the right to obtain a criminal conviction against a third party (see paragraph 160 above). Therefore it considers that, in the absence of any apparent lack of thoroughness in the authorities' examination of the circumstances surrounding the applicant's accident, their decision not to prosecute does not suffice to find the respondent State liable under its procedural obligation arising from Article 2 of the Convention.

186. Having regard to the overall assessment of the criminal investigation, the Court concludes that it cannot be said that the legal system as applied in the present case failed to adequately deal with the applicant's case. Therefore, it finds no violation of Article 2 of the Convention.

B. As regards the alleged violation of Article 6 § 1 of the Convention

1. Right of access to a court

187. The applicant complained that it had been impossible to obtain a decision on the merits of his civil claim following the road-traffic accident in which he had been involved.

(a) Admissibility

188. The Court notes that neither party disputed the applicability of Article 6 § 1 under its civil limb and it sees no reason to hold otherwise. The applicant's claim for damages based on an offence allegedly committed by one of the drivers involved in the accident was a claim based on his civil rights. Article 6 § 1 is, for that reason, applicable to the dispute relating to those rights (see, among many others, *Assenov and Others*, cited above, § 110; *Balogh v. Hungary*, no. 47940/99, § 72, 20 July 2004; and *Kamenova v. Bulgaria*, no. 62784/09, § 41, 12 July 2018). The Court would add that the question whether Article 6 § 1 under its civil limb was applicable during the criminal proceedings which the applicant specifically joined as a civil party is a separate one, which will be examined below (see paragraph 207).

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

(b) Merits

(i) The parties' submissions

190. The applicant argued that the domestic authorities had failed to examine on the merits the criminal responsibility of the drivers involved, and that because of the final outcome of the criminal proceedings, his civil claim joined to the criminal proceedings had not been examined. Since 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. Moreover, according to the Court's case-law the domestic authorities had had a duty to make sure that he enjoyed the basic guarantees set out in Article 6 § 1 of the Convention and to create the conditions for solving the civil-party claim brought by him.

191. The Government submitted that the domestic courts could not examine civil claims during appeal proceedings lodged by victims against a prosecutor's office's decision to discontinue criminal proceedings. This, however, did not limit the possibility for a victim to exercise his or her right of access to a court by bringing separate civil proceedings adequately protecting his or her Article 6 rights.

(ii) The Court's assessment

(α) General principles

192. 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 *Naït-Liman v. Switzerland* [GC], no. 51357/07, § 113, 15 March 2018).

193. The Court is of the opinion that there is a difference between the right to an effective investigation under Article 2 of the Convention and the right of access to a court under Article 6 § 1 of the Convention. The former right is derived from a positive obligation arising from the substantive obligation to prevent interferences with a person's life or physical integrity while the latter right provides access to a mechanism for the determination of disputes arising out of, for example an incident entailing an interference with a person's life or personal integrity, and is thus aimed at providing the victim with an avenue for reparation, regardless of any State obligation to prevent the said interferences.

194. The Court further reiterates that, while the Convention does not confer any right, as such, to have third parties prosecuted or sentenced for a criminal offence (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), 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).

195. 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 *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93; *Al-Dulimi and Montana Management Inc.*,

cited above, § 129; *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 89, 29 November 2016; *Naït-Liman*, cited above, §§ 114-15, and *Zubac v. Croatia* [GC], no. 40160/12, § 78, 5 April 2018).

(β) The application of the general principles in the instant case

196. In the instant case, the Court notes that the applicant lodged a civil-party claim in the context of the criminal proceedings instituted by the domestic authorities against J.C.P. and D.I. after the car accident. However, the said 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.

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).

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. 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.

2. Reasonable time

203. The applicant complained that the investigation into the circumstances of the accident had been unreasonably long.

(a) Admissibility

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

(b) Merits

(i) The parties' submissions

205. The applicant submitted that the domestic authorities had failed to comply with their duty of carrying out the investigation, which he had joined as a civil party, within a reasonable time.

206. The Government submitted that having regard to the time when the applicant had joined the criminal proceedings as a civil party and to the final judgment of the Ploieşti District Court, the overall length of the proceedings had been seven years and six months. Moreover, they reiterated that the case had been complex and that the authorities had expended significant efforts in order to clarify all the circumstances of the case.

(ii) The Court's assessment

207. The Court recalls that civil-party proceedings come within the scope of Article 6 § 1 under its civil head unless they are brought for purely punitive purposes (see *Perez*, cited above, §§ 70-71; *Gorou (no. 2)*, cited above, § 24; and *Association of the Victims of S.C. Rompetrol S.A. and S.C. Geomin S.A. and Others*, cited above, § 74). Article 6 § 1 applies

to the proceedings involving a civil-party claim from the moment the victim has joined as a civil party (see *Perez*, cited above, § 66; and *Gorou (no. 2)*, cited above, § 25), even during the preliminary investigation stage taken on its own (see *Perez*, cited above, § 66; and *Codarcea v. Romania*, no. 31675/04, § 78, 2 June 2009). In the present case, the applicant's civil-party claim was aimed at obtaining reparation for the damage sustained as a result of the offence allegedly committed by J.C.P. and D.I. Article 6 § 1 under its civil head therefore applied to the criminal proceedings joined by the applicant.

208. The Court notes that it is not disputed by the parties that the applicant joined the criminal investigation conducted by the domestic authorities as a civil party on 22 June 2005. It also notes that the said proceedings ended with the judgment of the Ploieşti Court of Appeal of 7 March 2013. Hence, the length of the proceedings in dispute was seven years, eight months and twelve days. These proceedings comprised three rounds, each time at two levels of jurisdiction.

209. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the particular case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities, and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

210. The Court observes that the criminal investigation opened into the circumstances of the applicant's accident was of considerable factual complexity and involved several possibilities that the investigators had to explore. It also notes that the procedural complexity of the case increased because of the repeated forensic and technical expert reports needed in order to clarify the circumstances of the accident.

211. The Court further notes that, even though the applicant was assisted by legal counsel during the initial stages of the criminal investigation, he was unavailable to the investigators on account of his medical condition, that he repeatedly challenged the investigators and the judges involved in the examination of his case, that he asked for transfers of his case, that he requested several expert and technical reports, challenging the conclusions of the latter, and that he lodged an appeal on points of fact and of law against a final judgment which was not amenable to appeal. While the applicant cannot be held responsible for his medical condition and for taking full advantage of certain remedies available to him under domestic law, the national authorities cannot be held accountable either for the resulting increase in the length of the proceedings (see *Sürmeli v. Germany* [GC], no. 75529/01, § 131, ECHR 2006-VII).

212. The Court also observes that the domestic authorities did not remain inactive during the proceedings and that they constantly took steps,

collected evidence and made significant efforts to clarify the circumstances of the case.

213. Whilst the authorities may be deemed responsible for certain procedural defects which caused delays in the proceedings (see paragraphs 29, 37 and 50-52 above) given the complexity of the case and the fact that the authorities remained active throughout, the Court considers that in the particular circumstances of the instant case, it cannot be said that they failed in their duty to examine the case expeditiously. This is even more so, considering that the claim for compensation was related to damage which the applicant had sustained from a car accident. The relevant proceedings therefore did not belong to any category of proceedings that by their nature called for special diligence, such as custody of children, civil status and capacity, or labour disputes (see *Sürmeli*, cited above, § 133).

214. Therefore, having regard to the proceedings as a whole, there has been no violation of the "reasonable time" requirement enshrined in Article 6 § 1 of the Convention in the instant case.

C. As regards the alleged violation of Article 13 of the Convention taken in conjunction with Article 2

(a) The parties' submissions

215. The Government contended that having regard to the Court's case-law concerning Romania and the domestic judicial system available to the applicant at the time of the impugned events, he had had access to an effective remedy within the meaning of Article 13 of the Convention for the determination of his complaints.

216. The applicant submitted that because of the manner in which the authorities had carried out the investigation, their repeated procedural errors and the length of the proceedings, he had not had access to an effective remedy for his complaints within the meaning of Article 13 of the Convention.

(b) The Court's assessment

217. The Court notes that Article 13 of the Convention guarantees the availability at the national level of a remedy by which to complain of a breach of the Convention rights and freedoms. Therefore, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision, there must be a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief (see, for example, *Soering v. the United Kingdom*, 7 July 1989, § 120, Series A no. 161; and *De Tommaso v. Italy* [GC], no. 43395/09, § 179, 23 February 2017).

218. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention, but the remedy must in any event be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the State. In certain circumstances, the aggregate of remedies provided for under domestic law may satisfy the requirements of Article 13 (see, among other authorities, *De Tommaso*, cited above, § 179). However, Article 13 requires that a remedy be available in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention (ibid., § 180).

219. The Court first notes that it declared admissible the applicant's complaint under Article 2 of the Convention. Even though, for the reasons given above, it did not find a violation of this provision, it nevertheless considered that the complaint raised by the applicant thereunder raised serious questions of fact and law requiring examination on the merits. The Court therefore considers that the applicant had an arguable complaint concerning that Article for the purposes of Article 13 of the Convention (see, *mutatis mutandis*, *Sürmeli*, cited above, § 102; and *Khlaifia and Others*, cited above, § 269).

220. The question therefore arises whether the applicant had an effective remedy under domestic law by which to complain of the breach of his rights under Article 2 of the Convention. The Court notes, however, that the applicant's complaint under Article 13 does not concern any other issue than that of the ineffectiveness of the criminal investigation, an issue which the Court has examined already under Article 2. In the light of that examination, it does not consider it necessary to examine the complaint also under Article 13.

III. COMPLAINT RELATING TO THE TREATMENT OF THE APPLICANT BY THE AUTHORITIES INVOLVED IN THE INVESTIGATION

221. The applicant complained that the treatment to which he had been subjected by reason of the manner in which the authorities had handled the investigation had amounted to inhuman and degrading treatment. As already stated above (see paragraphs 88-89), the Court will examine this complaint under the substantive head of Article 3 of the Convention. The provisions of this article are described above (see paragraph 91).

A. The parties' submissions

222. Distinguishing the instant case from other cases raising similar complaints, the Government argued that Article 3 under its substantive head was not applicable to this part of the applicant's complaints. They

considered that unlike in other cases which also involved exceptional circumstances, in the instant case the domestic authorities had carried out an investigation and included all the relevant evidence in the case-file. Also, the applicant did not prove that the feelings induced to him by the allegedly lengthy and ineffective investigation met the threshold of severity required for the application of Article 3 of the Convention.

223. The applicant submitted that the manner in which the authorities had handled the investigation of his case and dealt with the complaints brought by him against the said investigators, the repeated abuses committed against him by the authorities by dismissing his complaints and requests for evidence, the outcome and the length of the investigation, the fact that he had been suspected of drinking and driving and had been considered solely responsible for the accident from the start of the investigation, as well as the fact that his complaints had been seen as simple acts of revenge against the investigators, had caused him psychological suffering and feelings of anguish and humiliation. His repeated complaints lodged with the relevant authorities had underlined his feeling of being confronted with an organised system, involving police officers and prosecutors, antagonistic to him – for reasons which had also concerned his past opposition to Romania's former communist regime – and controlled by the highest authorities. His suspicions about the authorities' direct intent to commit abuses against him had been confirmed by the Court of Cassation, which had allowed his request for the case to be transferred from the Ploieşti District Court to a different district court in another part of the country.

224. The investigators in his case had committed a number of abusive acts against him, including distortion of evidence and psychological violence, aimed at pressuring him to abandon his complaints and refrain from using the remedies available to him. This had aroused strong feelings of fear in him.

B. The Court's assessment

225. The Court notes from the outset that the Government raised a preliminary objection and argued that this complaint was incompatible *ratione materiae* with the provisions of the Convention (see paragraph 222 above).

226. The Court further notes that in some previous cases it has taken into account the manner in which the national authorities handled an investigation in order to examine whether their conduct constituted inhuman or degrading treatment in breach of the substantive limb of Article 3.

227. This case-law seems to have developed mainly in respect of the relatives of disappeared persons (see, among other authorities, *Kurt*, cited above, §§ 130-34; *Çakıcı*, cited above, § 98; and *Taş*, cited above,

§§ 77-80). The Court reiterates that the phenomenon of disappearances imposes a particular burden on the relatives of missing persons, who are kept in ignorance of the fate of their loved ones and suffer the anguish of uncertainty (see *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 200, ECHR 2009).

228. The Court further notes that in such cases, a variety of factors are taken into account by the Court in its assessment of whether the manner in which the investigation was handled amounted in itself to treatment contrary to Article 3 for the relatives of the victims. Relevant elements include the closeness of the family tie, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court has emphasised, however, that the essence of such breach does not necessarily lie in the fact of the disappearance of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention (see *Çakıcı*, cited above, § 98). In finding that the authorities' conduct disclosed a level of severity which raised an issue under and breached Article 3, the Court gave weight for instance to the authorities' indifference and callousness in dealing with the applicants' concerns and the acute anguish and uncertainty which the applicants had suffered as a result and continued to suffer (see *Taş*, cited above, § 79).

229. The Court also notes that it has applied the principles laid down in the cases mentioned above in some exceptional situations outside the context of disappearance (see, in the context of detention and deportation of an unaccompanied minor asylum seeker, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, ECHR 2006-XI; in the context of allegations of sexual abuse of a child in the family environment, *M.P. and Others v. Bulgaria*, no. 22457/08, 15 November 2011; with respect to the conditions in which the bodies of deceased relatives had been stored during the identification process, *Sabanchiyeva and Others v. Russia*, no. 38450/05, ECHR 2013 (extracts); in the context of lack of adequate medical care in detention followed by death and a flawed domestic investigation, *Salakhov and Islyamova v. Ukraine*, no. 28005/08, 14 March 2013; and in the context of emotional suffering caused to a relative by removal of tissue from a deceased's body without the relative's knowledge or consent, *Elberte v. Latvia*, no. 61243/08, ECHR 2015).

230. The Court observes, however, that the applicant's case does not fall within any of the circumstances examined in the above-mentioned case-law.

231. In the light of the facts of the case and of all the evidence in its possession, the Court does not discern in the applicant's situation any appearance of a violation of Article 3 of the Convention. It follows that this complaint is manifestly ill-founded and must be dismissed in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Joins*, unanimously, the Government's objection of non-exhaustion of domestic remedies raised in respect of the complaints concerning the conduct of the criminal investigation to the merits and dismisses it;

2. *Declares*, by a majority, the complaint concerning the procedural limb of Article 3 of the Convention inadmissible;

3. *Declares*, by a majority, the complaint concerning Article 8 of the Convention inadmissible;

4. *Declares*, by a majority, the complaint concerning Article 2 of the Convention admissible;

5. *Holds*, by thirteen votes to four that there has been no violation of Article 2 of the Convention;

6. *Declares*, unanimously, the complaints concerning Article 6 § 1 of the Convention admissible;

7. *Holds*, by sixteen votes to one that there has been no violation of Article 6 § 1 of the Convention with regard to the complaint concerning the right of access to a court;

8. *Holds*, by ten votes to seven, that there has been no violation of Article 6 § 1 of the Convention with regard to the complaint concerning the length of the criminal investigation;

9. *Holds*, unanimously, that there is no need to examine separately the complaint under Article 13 taken in conjunction with Article 2 of the Convention;

10. *Declares*, unanimously, the complaint concerning the substantive limb of Article 3 of the Convention inadmissible.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 June 2019.

Søren Prebensen	Guido Raimondi
Deputy to the Registrar	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) Joint partly dissenting opinion of Judges Raimondi, Sicilianos, Karakas, Vučinić and Harutyunyan;
(b) Partly dissenting opinion of Judge De Gaetano, joined by Judge Vučinić;
(c) Partly dissenting opinion of Judge Kūris;
(d) Partly dissenting opinion of Judge Grozev.

G.R.
S.C.P.

JOINT PARTLY DISSENTING OPINION OF JUDGES RAIMONDI, SICILIANOS, KARAKAS, VUČINIĆ AND HARUTYUNYAN

(Translation)

1. To our great regret, we cannot subscribe to the majority opinion that in the present case there was no breach of the "reasonable time" requirement set out in Article 6 § 1 of the Convention.

2. It is important first of all to note that under the Court's established case-law, Article 6 § 1 imposes on the Contracting States the duty to organise their legal systems in such a way that their courts can meet each of the requirements of that provision, including the obligation to hear cases within a reasonable time (see *Sürmeli v. Germany* [GC], no. 75529/01, § 129, ECHR 2006-VII).

3. As pointed out in the judgment, the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the particular case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities, and what was at stake for the applicant in the dispute of the case (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

4. As regards the first of the above criteria, we do not consider that the case was particularly complex. Of course, the proceedings may have been complicated by the many forensic and technical expert reports deemed necessary to elucidate the circumstances of the accident. Without wishing to question the necessity and relevance of all those reports, it cannot be overlooked that the proceedings in issue concerned a road-traffic accident involving three vehicles, which is a fairly common occurrence.

5. As regards the applicant's conduct, it is true that the applicant's state of health meant that he was unavailable to the investigators during the first phase of the criminal investigation. Moreover, he challenged the investigators and judges responsible for assessing his case, applied for the transfer of the latter, requested the preparation of expert and technical reports and lodged appeals on points of law and fact. However, he cannot be blamed for his state of health, which was directly linked to the accident, or criticised for having taken full advantage of legal remedies provided under domestic law.

6. We would further point out that even though the Court is not in a position to analyse the juridical quality of the case-law of the domestic courts, since the remittal of cases for re-examination is usually ordered as a result of errors committed by lower courts, the repetition of such orders within one set of proceedings discloses a serious deficiency in the judicial system. Such a deficiency is attributable to the authorities and not to the

applicants (see *Matica v. Romania*, no. 19567/02, § 24, 2 November 2006; *Borobar and Others*, cited above, § 82; and *Stoilkovska v. the Former Yugoslav Republic of Macedonia*, no. 29784/07, § 57, 18 July 2013).

7. In the instant case, the proceedings concerning the circumstances of the applicant's accident were reopened several times by both the prosecuting authorities and the national courts on account of factual and procedural errors and the inadequacy of the evidence gathered. After the first decision by the domestic courts to reopen the proceedings, the investigating authorities took over four years to gather the requisite evidence and to satisfy themselves that the case was ready for reconsideration by a court. Those procedural delays were a decisive factor in the statute-barring of D.I.'s criminal responsibility.

8. The majority would appear to be minimising the factors relating to the authorities' conduct when they say that "the claim for compensation was related to damage which the applicant had sustained from a car accident; the relevant proceedings therefore did not belong to any category of proceedings that by their nature called for special diligence, such as custody of children, civil status and capacity, or labour disputes" (see paragraph 213 of the judgment). It should, however, be emphasised that the "damage" in question did not boil down to the material damage to the vehicle, for example. It should be remembered that the applicant was seriously injured, that he had to spend over two hundred days in hospital and that he is still today suffering from the after-effects of the accident.

9. This prompts us to stress the importance of the fourth criterion mentioned above, that is to say what was at stake for the applicant. Indeed, we observe that although that criterion was mentioned in the judgment in connection with the applicable general principles (see paragraph 209 of the judgment), it was subsequently overlooked in the section on the application of those principles to the instant case. In the light of the very serious consequences which the accident had for the applicant, we consider it obvious that the issue at stake in the dispute stemming from that accident was of enormous importance to him.

10. In view of all these factors, we consider it unreasonable for the national authorities to have taken seven years and eight months to reach a final judicial decision in this case. We therefore hold that the impugned proceedings were of a length that breached the "reasonable length" requirement and that there was a violation of Article 6 § 1 of the Convention.

PARTLY DISSENTING OPINION OF JUDGE DE GAETANO, JOINED BY JUDGE VUČINIĆ

1. I regret that I cannot share the views of the majority in respect of operative points five and eight of the judgment. In my view there has also been in this case a violation of Article 2 and of Article 6 § 1 with regard to the complaint concerning the length of the criminal investigation.

2. In the instant case it is uncontested that, having learned of the applicant's accident, the authorities instituted criminal proceedings and undertook a number of measures aimed at discharging their positive obligation under Article 2 of the Convention to provide "an effective official investigation" (see § 144 of the judgment). The applicant also initiated, in due course, a separate set of civil proceedings before the civil courts against the insurance company with which his car was insured, seeking damages for the loss of his car and for the psychological suffering caused by the allegedly unjustified refusal of the insurance company to compensate him for the damage. A number of investigative actions, including an on-the-spot investigation of the events, questioning, and various scientific and technical examinations were conducted in the months and years following the accident. While it is true that the fact that the authorities are unable to establish any criminal liability on the part of the drivers involved does not necessarily render an investigation ineffective, in the instant case what is crucial is that the accident and the applicant's injuries occurred on 3 December 2004, whereas the final court judgment was not delivered by the criminal court until 21 December 2012 – an *iter lamentabilis* of more than eight years.

3. Despite the substantial number of investigative measures undertaken, the investigation was repeatedly criticised by the national authorities themselves for its lack of efficiency. It is beyond clear, therefore, that the reasons for the repeated reopening of the criminal proceedings were imputable to the State authorities.

4. Moreover, although the domestic criminal courts considered that a technical expert report was of importance for the case *de quo*, the first such report was not produced until 2008. When the investigating authorities declared the first technical expert report inadequate, it was only in 2010 that a second such report was produced by the Bucharest Inter-County Laboratory for Criminological Reports (see § 42).

5. The applicant took an active part in the proceedings. The fact that he requested additional evidence and repeatedly challenged the prosecutor's decisions before the higher-ranking prosecutor and even before the domestic

courts does not appear unreasonable or excessive given that it was all too clear that the investigation was at best shambolic. Moreover, the applicant cannot be held responsible for the fact that the length of the proceedings was determined in part by the shortage of experts in the aforementioned laboratory. In my view the applicant's behaviour did not contribute significantly to the length of the proceedings – he was only trying to put the investigation back on track every time he saw it being derailed.

6. In the light of the manner in which the case was investigated and the length of the criminal investigation, it is my considered view that the authorities failed to show the requisite diligence in dealing with the case, as required by Article 2 of the Convention.

7. For the same reasons as outlined above, I come to the conclusion that there has also been a violation of Article 6 § 1 of the Convention because the proceedings did not satisfy the "reasonable time" requirement. The applicant's case – the dynamics of the accident – was not *per se* of a particularly complex nature. It was progressively rendered complicated and complex because of the various shortcomings of the authorities, until it virtually got out of hand.

8. Finally, I had until now assumed – wrongly perhaps – that I had a reasonably good command of the English language. I was therefore stumped to read in § 145 that personal injuries can be qualified or described as "seriously life-threatening". If an injury is life-threatening, it must be serious. I still have to come across, in the field of criminal law or of the civil law of tort or delict, a "non-serious life-threatening" injury.

PARTLY DISSENTING OPINION OF JUDGE KŪRIS

1. I cannot follow the majority view that the applicant's complaint concerning the procedural limb of Article 3 of the Convention is inadmissible. Owing to the fact that the majority opted to examine the applicant's complaint not under Article 3 but under Article 2, a violation of that Article or, in the alternative, Article 6 § 1 regarding at least one the complaints had to be found.

2. There are quite a few points on which I disagree with the majority in the present case. I shall deal with several of them. But before I address the specific issues relating to the applicability of Article 3 under its procedural limb to situations comparable to that examined in the present case, as well as issues pertaining to the findings under Article 6 § 1, I feel that I need to explain myself at some length.

I

3. I admit that my voting against point 2 of the operative part, declaring the applicant's complaint concerning the procedural limb of Article 3 inadmissible, may not look very consistent, given that at the same time I voted with the majority on points 4 and 6, declaring the applicant's complaints under Articles 2 and 6 § 1 admissible. There are two reasons for such an impression, both of which are valid, in my opinion.

Firstly, either one or the other: either a complaint must be examined under Article 2, or Article 3, but not under both these Articles (unless there are particular specificities which call for such an exception, but this does not seem to be so in the present case).

Secondly, only one of the following can hold: either a complaint falls under the procedural limb of Article 2 – or Article 3 – and its examination on the merits can potentially result in a finding of either a violation or no violation of the respective Article, or it falls under Article 6 § 1.

As to the first (apparent) inconsistency, perhaps it would have been more consistent to vote for the admissibility of the applicant's complaint under Article 3 only, and not also under Article 2, or, conversely, for the admissibility of the complaint under Article 3, but not under Article 2, because either there has been an arguable claim that the ill-treatment complained of has reached the threshold of severity, where the right to life, enshrined in Article 2, has been infringed, or the arguability of the claim pertained "only" to some "lesser" level of ill-treatment (however cynical it may ring) prohibited by Article 3.

As to the second (apparent) inconsistency, it equally might have been more consistent, if, having voted for the admissibility of the applicant's complaint under Article 3, or, in the alternative, Article 2, I had voted against the admissibility of the complaints under Article 6 § 1. This is because, given that Article 6 § 1 deals essentially with the procedural rights,

the complaints under this Article have been assessed, in the Court's long-standing practice, as being subsumed by the complaints (which concerned the same facts) lodged under the procedural limb of Article 3, or Article 2, or, for that matter, other Articles, because these other Articles, including Articles 2 and 3, while enshrining certain substantive rights, simultaneously encompass a procedural limb. The relevant case-law, which illustrates this practice as being dominant, is abundant. Here are but a few of the superabundance of examples. As regards Articles 2 and 6, one can look at: *Öneryildiz v. Turkey* ([GC], no. 48939/99, 30 November 2004); *Varnava and Others v. Turkey* ([GC], nos. 16064/90 and 8 others, 18 September 2009); *Giuliani and Gaggio v. Italy* ([GC], no. 23458/02, 24 March 2011); *Enukidze and Girgvliani v. Georgia* (no. 25091/07, 26 April 2011); *Mladenović v. Serbia* (no. 1099/08, 22 May 2012); *Elena Apostol and Others v. Romania* (nos. 24093/14 and 16 others, 23 February 2016); and *Ecaterina Mirea and Others v. Romania* (nos. 43626/13 and 69 others, 12 April 2016). As regards Articles 3 and 6, see: *Muradova v. Azerbaijan* (no. 22684/05, 2 April 2009); *Kazantsev v. Russia* (no. 14880/05, 3 April 2012); *Aleksakhin v. Ukraine* (no. 31939/06, 19 July 2012); *Aleksandr Nikonenko v. Ukraine* (no. 54755/08, 14 November 2013); and *Romanescu v.* Romania (no. 78375/11, 16 May 2017).

However, the above afterthought is *ex post*. You live and learn.

4. My first preference was that the applicant's situation had to be examined under Article 3 (as he had requested, but not only for that reason) and that it was this Article which was applicable to it.

To make it clear from the outset, by asserting the applicability of Article 3 I am thinking about its procedural rather than its substantive limb. As regards the latter, I have had no qualms about casting my vote with the majority in favour of finding the complaint manifestly ill-founded. I would just note in passing that I cannot fathom the (dis)order in the sequence of points of the operative part. In it, the declaration concerning the applicant's complaint under the procedural limb of Article 3 comes under point 2, the one relating to the substantive limb of the same Article appears under point 10, and points 3 to 9 deal – in precisely this order – with Articles 8, 2, 6 § 1, and 13, the latter taken in conjunction with Article 2. Of course, this is a mere technicality, which does not bear in any way on the legal result achieved in the case. Still, the random sequence noted here crowns, in its own right, and symbolises an equally striking discombobulation in the majority's analysis and reasoning, which led to the findings in this case, in particular the finding that Article 3 is not applicable under its procedural limb.

As regards the complaint concerning the procedural limb of Article 3, it was specifically this complaint which was at the core of the applicant's initial submissions to the Court, as well as his later observations.

5. Had a full-rate examination on the merits of the complaint concerning the procedural limb of Article 3 been undertaken by the Grand Chamber, it might have resulted in the finding of either a violation or no violation of Article 3. Now it would be too late to speculate on which of the two outcomes, both of which were possible in theory, would have been given preference. Owing to the fact that that examination was not undertaken, I am now not in a position to conclude as to whether I myself would have supported one outcome or the other (but based on the facts of the case as they have been presented, my heart leans, *a priori* and instinctively, to the finding of a violation). Depending on that (alas, now only hypothetical) finding on the merits, the complaints under Article 6 § 1 could then be examined or left unexamined. They could, or even should, have been examined had *no violation* been found of Article 3 under its procedural limb (which also could, at least in theory, be a plausible result, provided it was properly justified), because, in principle, a procedural violation of Article 6 § 1 could nevertheless have taken place if Article 3 under its procedural limb had not been violated, and this would have rendered Article 6 § 1 complaints worthy of a separate examination. However, a finding of a *violation* of Article 3 would have allowed the Court to dispense with the examination of the complaints under Article 6 § 1, because, very much in line with the Court's case-law (see paragraph 3 above), the alleged (essentially) procedural violation of Article 6 § 1 would have been absorbed by that of Article 3. In the latter event, had not one but two violations of Article 3 been found, more or less corresponding to the applicant's two complaints under Article 6 § 1, that is to say, those concerning his right of access to a court and those concerning the length of the proceedings, each of the latter could be assessed as being absorbed by the respective complaint under Article 3 under its procedural limb.

6. However, the majority have not found Article 3 to have been violated under its procedural limb. Technically, they have not even entered into the examination of the complaint concerning the procedural limb of Article 3, but prevented such examination by declaring that complaint incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 §§ 3 (a) and 4.

7. This conclusion is too far-reaching, too categorical, too rigid and too devil-may-care. May I be allowed not to wrap my words in velvet: this conclusion – and, accordingly, the present judgment – is a large and resolute stride away from protecting human rights.

8. For in the present case the complaint concerning the procedural limb of Article 3 was declared inadmissible precisely because of the *type* to which it has been assigned: it concerns *bodily injuries or other suffering negligently inflicted on the alleged victim by private individuals*. The full description of the said type, which varies to some extent throughout the text of the judgment and which I have shortened for the sake of convenience, is

provided in paragraph 123 of the judgment and reads "bodily injuries and physical and mental suffering experienced by an individual following an accident which is merely the result of chance or negligent conduct"; the reference to "private individuals", which is omitted in paragraph 123, is taken from paragraph 121 (see also paragraph 30 below on the inclusion of the aspect relating to the private and family life of an individual).

As such, the assignment in question is not a wrong one. However, concluding that a complaint *of this particular type* is, no matter what, incompatible *ratione materiae* with the provisions of the Convention goes very much further than the finding that *this particular complaint submitted by this particular applicant in the particular circumstances of this particular case* is inadmissible, for example, because it has been lodged out of time or is manifestly ill-founded, unsubstantiated, or the applicant cannot claim to be a victim, or the like. Declaring *this* applicant's complaint, which concerns bodily injuries allegedly negligently inflicted on him by a private individual (maybe even more than one), inadmissible because of the incompatibility *ratione materiae* with the provisions of the Convention of complaints *of this type* effectively means that Article 3 has not been and in principle could not have been violated under its procedural limb in the applicant's situation, because the complaints of this type and Article 3, figuratively speaking, pass by each other. These two realities never meet. If Article 3 under its procedural limb cannot be violated in principle, there is no need to waste time and other resources searching for a possible violation, which is nowhere to be found. As the old saying goes, there is not much point in looking for a black cat in a dark room, especially when that cat is not there. And nonetheless, as we shall see (in paragraphs 41-73 below), the majority have devoted as many as ten paragraphs of the judgment (115-124) to not only trying to substantiate that the black cat is not present in the dark room, but also trying to conceal the fact that the cat is not so black, that the room is not so dark, and that that cat once was in that room for quite a while and even hunted for mice, until the majority banished the hapless creature from the premises for good and locked the door.

However, once the Court has proclaimed that the cat is incompatible with the room, from then on it is incompatible, even if it once was perfectly compatible.

Roma locuta est, causa finita.

9. Accordingly, *all* future complaints focused on bodily injuries negligently inflicted on the alleged victims by private individuals will have to be considered as overshooting the mark. This will be *a priori*, that is to say, based solely on the assignment of the complaints in question to the said particular type. And if such complaints do not fall to be examined under any of the other Articles, in particular Articles 2, 6 § 1 or 8 (for which there may be an array of valid reasons), they will have to be rejected out of hand, even if the evidence – and the gut feeling that injustice has been done (which, of

course, is not as a substitute for, but as an additive to the evidence) – will be there that the impugned infliction of bodily injuries had not been properly addressed by the domestic authorities to the detriment of the applicants.

Will such rejection be conducive to the protection of human rights under the Convention? Is the Pope a Buddhist?

10. The majority's conclusion that the complaints of this particular type – bodily injuries negligently inflicted on the alleged victims by private individuals – are incompatible *ratione materiae* with the provisions of the Convention is intended to be perceived as having been inferred from the Court's case-law in comparable cases. Indeed, one would not be able say that this conclusion does not rely on *any* case-law: on the contrary, the citations are ample – and they are analysed. What is *not* made noticeable in the majority's analysis is that while it gives colossal prominence to one part of the Court's case-law, it also effectively disregards, or even renounces the other part. This will be further addressed later on (see paragraphs 41-73 below). For now, let us just note that in order to reach their fundamental, most radical and far-reaching conclusion (see paragraph 44 below), the majority claim to have distinguished between one – presumably bigger – part of the case-law, which they have labelled as "correct" (see paragraph 121 of the judgment), and another – presumably smaller – part which, consequently (because *expression unius est exclusio alterius*), must be considered as "incorrect" (see paragraph 120). *A propos*, one of the synonyms for "incorrect" is "untrustworthy". Another one is "unsound".

11. As such, the intention, or aspiration, to draw a distinction between the presumably different or even diverging outcomes reached in the Court's cases does not give rise to any objection. The Grand Chamber's clarification of what the Convention, as interpreted in the Court's case-law, says on a given matter is always welcome.

What, however, *gives* rise to an objection, and a principled one, is that the distinction in question, so enthusiastically embraced and highlighted by the majority, rejects as "incorrect" certain case-law lines which followed on from earlier case-law, but deliberately passes over that earlier case-law in silence, whatever its merits or faults. It also passes over in silence some case-law which is too "inconvenient" to be cited, if the said fundamental conclusion is to be perceived as tenable. What is more, the distinction between the two parts of the Court's case-law is drawn on the basis of comparing the two comparators, which in fact cannot serve as comparators in relation to each other: the majority have compared the Court's judgments adopted in cases involving *intentional public acts* (against an individual) with those adopted in cases *involving unintentional private acts*. *Intentional public acts*, on the one hand, and *unintentional private acts*, on the other, are dealt with as the only two categories into which the whole variety of the relevant case-law can be divided, and which are the be-all and end-all. But where in this comparison are *unintentional public acts*? They have

mysteriously disappeared (on this see paragraphs 48-57 below, where the resourceful method of "photoshopping" one of them out of the picture is exhibited). Each of the two comparators thus chosen (one of them "fine-tuned" by reducing the category of *public acts* to its sub-category of *public intentional* acts) has two defining elements (*intentional* + *public* and *unintentional* + *private*, respectively), but none of the elements of one comparator match either of the elements of the other. It is not rocket science to appreciate that pounds must not be compared with gallons, and square meters with linear meters. Well, as we see, sometimes they are – but they should never be.

Whenever the Grand Chamber endeavours (in the instant case "succumbs to temptation" would be more apt) to depart from part of its existing case-law as "incorrect", it should measure twice, thrice, fourfold. It should itself choose a methodology which would allow for inferences of this kind not only in the sense that it would serve to substantiate the Grand Chamber's final say on the matter, but also in that it would be *coherent as a methodology*. There may also be a number of other requirements, but the one mentioned here is a *conditio sine qua non* for not disqualifying the Grand Chamber's own conclusions – not as regards their legally binding character (because whatever the Grand Chamber rules cannot be overruled, except by the Grand Chamber itself), but as regards their falsifiability and reliability. As it transpires, the methodology of drawing, in the instant case, a distinction between "correct" and "incorrect" case-law is not the sharpest knife in the Court's drawer. To put it plainly, it itself is not "correct". This is unfortunate. I shall come back to this issue in due course. Now I have to return to the ventilation of the options of sustaining the applicant's Convention rights, which were still available even after Article 3 was found inapplicable under its procedural limb to the situation under examination.

12. Once the applicant's complaint concerning the procedural limb of Article 3 was rejected as incompatible *ratione materiae* with the provisions of the Convention, the other meaningful examination still remaining on the table was that of his two complaints under Article 6 § 1. However, no violation was found on any of the two counts: neither as regards the applicant's right of access to a court, nor in connection with the length of the proceedings. These issues are addressed in paragraphs 83-91 below, where I argue that on at least one of the counts, that is, the length of the proceedings, a violation of Article 6 § 1 *had* to be found; but I am inclined to hold that a violation of the said Article *could* also be found on the other count.

13. What does that leave us with? The complaints under Articles 2 and 13, the latter in conjunction with Article 2.

The complaint concerning Article 2 under its procedural limb, which was not the applicant's real complaint (see paragraphs 27 and 35 below), *has been* declared admissible (the words "procedural limb" do not show up in

point 4 of the operative part). On this matter, I concur with the majority. The Court's doctrine pertaining to the applicability of Article 2, as elaborated in the present judgment, although complex and multi-layered, does not appear to be inconsistent in essence; despite the fact that I have some hesitations as to its certain formulations, owing to space and time constraints I shall not devote to these issues more than a paragraph of this opinion, especially as my chief concern is not how the majority have reasoned on the applicability of Article 2, but how it has attempted to substantiate its opinion regarding the inapplicability of Article 3.

On the matter of applicability of Article 2, once Article 3 has been declared inapplicable in the present case (even if I disagree with the reasoning on which this declaration is based), I have only one caveat: the applicability of Article 2 *to certain situations* does not, in and of itself, refute the possibility that, where the severity of the violence negligently inflicted on the alleged victim by a private person does not reach the threshold of Article 2 and does not trigger the State's respective positive obligations under Article 2 (compare paragraphs 137 and 139), the situation in question, depending on the circumstances of the case, can still be examined under Article 3. Or rather *could*, had this case not produced the doctrine of unreserved inapplicability of that Article (under its procedural limb).

14. Where I am not prepared to agree with the majority regarding this complaint is the view that there has been no violation of Article 2. I have already mentioned that my preference was that the applicant's situation should be examined under Article 3 (under its procedural limb), not Article 2 (see paragraph 4 above; see also paragraph 78 below). However, in view of the refining, in the present judgment, of the threat to the applicant's life, as a criterion triggering the applicability of Article 2, which I am not against in principle (and having voted for the applicability of Article 2), I do not find any merit in finding that Article 2 has not been violated.

No violation of Article 3 under its procedural limb (moreover, its outright inapplicability). No violation of Article 6 § 1. Now no violation of Article 2... Isn't that rather too much?

To put it simply, whichever Article is invoked by the applicant (by himself or at the prompting of the Court), for the Court everything is fine. Virtually everything. Except that it is as plain as a pikestaff that *by no means everything* was fine in the proceedings under examination, which concerned a situation in which there was a real risk to the applicant's life, and which had been ongoing, with long unjustified pauses, until it had become time-barred.

15. Be that as it may, I accept the finding that there is no need to examine separately the applicant's complaint under Article 13 taken in conjunction with Article 2, because that complaint "does not concern any other issue than that of the ineffectiveness of the criminal investigation, an

issue which the Court has examined already under Article 2" (see paragraph 220 and point 9 of the operative part).

"There is no need to examine" is a term of art, which has been employed throughout hundreds, maybe thousands of the Court's judgments. This is an irritating phrase, and is in fact rather disrespectful to the applicants, especially when the dismissal of a complaint by means of this formula is not accompanied by a proper explanation (which, alas, is often the case). Still, this phrase does not necessarily convey what these words literally mean.

Truth to tell, in the present case there *might* have been a need to examine the applicant's complaint under Article 13, but no prospect of any tangible result, given the majority's finding as regards the procedural limb of Article 2.

16. I could sum up the above self-explanation by stating that, had the applicant's complaint concerning the procedural limb of Article 3 been declared admissible and had a violation of that provision been found, I would have agreed to the complaint concerning the procedural limb of Article 2 being declared inadmissible ("either one or the other").

I would also have agreed that, in addition to the applicant's complaint under Article 13 taken in conjunction with Article 3 (not 2 in such an event), there is no need to examine separately his two complaints under Article 6 § 1. Had that violation not been found, an examination of the complaints under Article 6 § 1 would have had to be undertaken, most likely leading to a finding of the violation of that provision as regards at least one of these complaints, but possibly both of them.

However, owing to the fact that Article 3 has been found inapplicable under its procedural limb to the applicant's situation, I opted for the next available possibility and then the next one which would have been friendlier to the imperative of justice. I want to believe that that underlying imperative bounds the Court no less than the Articles of the Convention and especially their overly formalistic interpretation and application.

17. Before I address some of the above-discussed issues in greater detail, I have a general consideration to share.

II

18. The Court is a "master of the characterisation to be given in law to the facts of the case" and is not "bound by the characterisation given by an applicant [or] a Government". This maxim, which can (in a different wording) be traced back to *Powell and Rayner v. the United Kingdom* (no. 9310/81, § 29, 21 February 1990) and which was recently consolidated in *Radomilja and Others v. Croatia* ([GC], no. 37685/10, § 126, 20 March 2018), has been repeated in the Court's case-law (including paragraph 83 of the present judgment) so often (sometimes together with its sibling-adage *jura novit curia*), that it is perhaps never objected to by the parties, whenever the Court reclassifies the applicants' complaints and examines

them from the perspective, which is sometimes very different from that from which they were perceived by the applicants themselves. For the Court, reclassification of complaints has become a common practice. That is how it is. That has been so, that is so, and that will be so, like it or not.

Which does not mean that it should always be so.

19. In the instant case the Grand Chamber found it useful, or maybe even indispensable, for the reclassification of the applicant's complaints to be performed in two dimensions.

20. Firstly, it classified the applicant's complaints in their entirety as "twofold", that is to say as focusing on two central subjects: (i) "the alleged length and ineffectiveness of the criminal investigation and the alleged impossibility to obtain a decision on the merits of his civil claim following the road-traffic accident in which he had been involved", or "the conduct of the criminal investigation"; and (ii) "the treatment which the applicant had suffered by reason of the manner in which the authorities had handled the investigation into the circumstances of the accident", or "his treatment by the authorities involved in the investigation" (see paragraphs 80 and 81). Accordingly, the complaints, as read by the Grand Chamber, were grouped into two categories.

21. This grouping is complicated and a bit artificial. Maybe not even a bit. Some might say that it is complicated *because* it is artificial. The examination of the one and only complaint attributed to the second category takes up only eleven paragraphs (221-31): the latter cover not only the Court's assessment of the situation under examination, but also the introductory remarks, the presentation of the parties' submissions and the Court's conclusion that this complaint is manifestly ill-founded. This is a small fragment, compared to the 130 paragraphs (91-220) dealing with the complaints of the first category. The majority admit that "[i]n respect of *both* categories of complaints, in his initial application the applicant relied explicitly and broadly on Articles 3, 6 and 13" (see paragraph 81; emphasis added). Despite this admittance of inter-relatedness of the complaints, it is concluded that "the complaint relating to the applicant's treatment by the authorities involved in the investigation [that is, the second category of complaints] warrants a separate examination, to be carried out under the substantive limb of Article 3" (see paragraph 89). When the time came for its "separate examination", the complaint under the substantive limb of Article 3 was duly rejected as manifestly ill-founded.

22. This rejection, however, could have been effected at a much earlier stage, to wit, when the applicability of Article 3 was examined. For the majority, virtually nothing would have changed in essence: one complaint under Article 3 (procedural limb) would have been rejected as incompatible *ratione materiae* with the provisions of the Convention, and the other (substantive limb) as manifestly ill-founded. Perhaps then what is now

point 10 of the operative part would have naturally come after point 2. That's it.

23. The issue of the categorisation of the applicant's complaints therefore seems not even to merit a mention. On the other hand, it demonstrates, albeit indirectly, that in the present case the majority have resorted to complicating things. If the applicant's initial and even his later submissions could be seen as confusing – to a certain extent – in terms of the structure of his complaints, the majority, in their turn, while attempting at disentanglement of knots, has knit up some new ones.

This takes us to the second dimension of the reclassification of the applicant's complaints.

24. As already mentioned (see paragraph 21 above), it is admitted that "[i]n respect of *both* categories of complaints, in his initial application the applicant relied explicitly and broadly on Articles 3, 6 and 13". It is also rightly stated that "[the applicant's] initial application did not rely on Article 2" and that "[h]is subsequent written submissions before the Chamber still included certain affirmations which might be taken as meaning that he was not complaining under Article 2" (see paragraph 85).

But that is not all. It is also stipulated that the applicant's "[o]ther remarks might be interpreted as an acknowledgement that he was also not complaining under the procedural limb of Article 3", but "in his second observations before the Chamber, he made some further statements and remarks which suggest otherwise" (ibid.).

The readership is left guessing as to whether the applicant complained under Article 3 under its procedural limb or not, or rather whether the Court itself has interpreted the applicant's complaint as having been submitted under the procedural limb of Article 3 or not. In my reading of the applicant's submissions, he *did* complain under Article 3 under its procedural limb. What is more, that was the very gist of his application. What *is* clear is that the applicant did not *explicitly* complain under Article 2. At no point did he himself invoke Article 2. He started doing this only after prompting from the Court. Nor is there any doubt that he invoked Articles 6 and 13.

25. Having stated the lack of clarity as regards the applicant's complaints under Articles 2 and 3, the majority have invoked Article 2 *propriu moto*. So be it.

26. Much more thought-provoking (especially in view of how this is reflected in the operative part of the judgment; see paragraphs 36-40 below) is that they have also invoked Article 8.

27. Where have these invocations come from? From more general considerations unrelated to the manner in which the applicant himself structured his complaints. In paragraph 86 (emphasis added), it is stated that

> "... given the specific context of the case, the Court considers that such procedural rights and corresponding State obligations [that is to say, the applicant's procedural

> rights and the procedural obligations incumbent on State authorities in the context of negligent actions resulting in very serious physical or life-threatening consequences] *may, under certain circumstances*, be enshrined not only in Articles 3, 6 § 1 and 13, to which the applicant referred, but also in Articles 2 and 8 ... Although he did not expressly invoke the latter two provisions, the Court, having regard to the factual basis of his complaints ... finds it appropriate to examine the present case also from the angle of Articles 2 and 8."

28. The above-cited paragraph bears witness to the fact that the Court has not only endeavoured to put the applicant's complaints in the context of *various* provisions of the Convention which "may, under certain circumstances", be relevant (hence, may be not relevant under certain other circumstances) to situations comparable, in whatever respects, to that of the applicant, but has made the *first* step towards a formal reclassification of the applicant's complaints as falling under Article(s) 2 and 8, which were not the Articles invoked by the applicant himself.

29. However, the first step towards possible formal reclassification is *not yet a reclassification*. Reclassification of complaints means that the Court not merely surmises, but *finds* that the complaints in question fall not under the Article(s) invoked by the applicant, but under some other Article (or several other Articles). By reclassifying a complaint, the Court itself invokes *as applicable* that other Article (or several other Articles) *for* the applicant. The invocation of an appropriate Article (Articles) by the Court thus is not a mere hypothesis: it is an *authoritative recognition* of applicability of *that specific* Article (Articles) instead of that (those) invoked by the applicant. At a time when there is not yet any such authoritative recognition, the Court is only guesstimating: maybe that (those) other Article (Articles) is (are) applicable and maybe not. To regard a guesstimate, that is to say, an assumption, as a definitive statement, in other words, a conclusion or an inference, would not become any court. Consequently, when reclassifying a complaint, the Court has always employed the formula (or some of its varieties) "the Court *considers* that the applicant's complaint *falls to be examined* under Article X" (emphasis added). In the Court's case-law, every reclassification thus has always been *explicit* and *final* in the sense that once the complaint is reclassified, the applicability of the respective Article is deemed *already established*. This has always been part of the Court's *jurisprudence constante*.

In the instant case, likewise, at the stage of the "determination of the scope of the case and characterisation of the complaints" – for such is the entitlement of the judgment's sub-section, which includes paragraph 86, where the assumption regarding the *possible* applicability of certain Articles to the complaints of the "first category" is made, and which precedes the sub-sections designed for dealing with the admissibility of the complaints, – it *yet remained to be determined*, whether the applicant's complaints fell to be examined under Articles 3, 6 § 1 and 13, all invoked by the applicant, or Article 2 or Article 8, both invoked by the Court itself, or maybe not one but

several of them. Hence, if it were established that the complaints in question fell to be examined under Articles 2 or 8, they could – or even had to – be reclassified as falling to be examined under them; however, if it were established that they fell outside the scope of Articles 2 or 8, they could not be reclassified as falling under these Articles. That determination had to be based on scrutiny of the applicability of these Articles to the applicant's situation, that is to say, their juxtaposition to the "certain circumstances" of the case, or the "factual basis of [the applicant's] complaints". The possible reclassification of the applicant's complaints thus was dependent on the outcome of the said scrutiny: at this stage, it had yet to be seen whether Articles 2 and 8, not invoked by the Applicant, but also Articles 3, 6 § 1 and 13, invoked by him, were or were not applicable. The Court thus has taken the path where, in the first place and for all methodological and practical purposes, the comprehensive Convention framework, which would include both the Articles invoked by the applicant and those not invoked by him but the applicability of which has been preconceived, or guesstimated, had to be presented, and only then did it have to be ascertained under which of the Articles interpreted by the Court the applicants complaints fell. If they fell to be examined under Articles 2 or 8, not invoked by the applicant, that would have been a basis for the formal reclassification of the complaints under one or both of these Articles. If not, then not. It would be bizarre, even preposterous for the Court first to formally reclassify the complaints as falling under an Article not invoked by the applicant, and then to conclude that they do not fall to be examined under that Article. It would run counter the very purport of complaint-reclassification and to the Court's *jurisprudence constante*. It would be *jurisprudence bizarre*.

Still, as we shall see (in paragraphs 36-40 below), what is bizarre, at times, is made part of jurisprudential reality.

30. But let us come back to the majority's resolve to "examine the present case *also* from the angle of Articles 2 and 8", in addition to Articles 3, 6 § 1 and 13 (see paragraph 86; emphasis added). This expansion of the list of Articles, at this stage deemed hypothetically applicable to the applicant's situation, signifies that the Grand Chamber has undertaken a *grand interpretative theory* of some sort – a comprehensive doctrinal narrative. This grand doctrine is not only designed to tackle the applicant's complaints in the instant case: it is meant to be instrumental in tackling *all the imaginable situations* in which negligent actions have resulted in an individual's loss of life, life-threatening or other very serious consequences, as well as bodily injuries and physical and mental suffering, or even interference in an individual's private or family life (the latter in view of the fact that the grand doctrine involves also issues related to the application of Article 8) experienced by him or her following an accident which was merely the result of chance or negligent conduct (compare paragraph 8 above).

The ambition to develop a grand doctrine may deserve commendation. On the other hand, it is a risky enterprise. As we shall see later on, the grand doctrine projected in the present case has gaps which are not insignificant at all. What is more, some of the gaps have been deliberately built into the doctrine. The grand doctrine produced in the present case, however, simulates gaplessness. At the same time this doctrine attempts to cloak its gaps by providing references to the Court's existing case-law in such a bountiful manner, where the quantity of references is geared to camouflaging the irrelevance of some of them in the sense that they are (mis-)placed in an incorrect context. Furthermore, one part of the case-law which would have been relevant is omitted outright, in addition to (and as a consequence of) the fact that yet other part of the case-law is given greater prominence than it merits. All this amounts to selective representation, misrepresentation and underrepresentation.

31. As a matter of principle, I doubt that such a gapless, super-coherent grand doctrine, bringing together into one whole various aspects of as many as at least four Articles (2, 3, 6 and 8) and designed to tackle the most diverse situations, some of which would be only distantly related (or even appear unrelated) to that of the applicant, is possible, let alone could be developed in this particular case.

It is not that grand doctrines are not at all possible (or desirable). On the contrary, they are both possible and desirable (which does not mean that even the neatest of them must be embraced without reservations). I only think that there are more than enough serious reasons not to place too much trust in the doctrines deliberately made look "grand", but laid down by *courts* in a *particular* case, because they all are inevitably crafted by compromising on the statements to be included or excluded, then on the various wordings, and, in the end, by voting (sometimes entailing a very narrow margin). This caution may be lesser (but not unnecessary or unjustified) when abstract review of norms (for example, constitutional review of legislation or, in a similar vein, abstract interpretation of constitutional provisions) is exercised, but it is very advisable when the grand doctrine is elaborated in the context of the examination of the concrete situation of a concrete person, because there the grand doctrine in construction tends, consciously or not, to be tailored according to the parameters of that situation. The pretention to design such a super-coherent doctrine is a self-deception. For it can always be anticipated that life will present the Court with unforeseen situations, which the grand doctrine has not encountered.

The court-generated general doctrine therefore has to be prudent and fair. It must not pretend to have no gaps. Which means, *a fortiori*, that it must not camouflage those which it in fact has (because every doctrine has gaps). Which, in its turn, means that the material on which the doctrine is based must not be underrepresented, misrepresented or otherwise manipulated.

The doctrine should contain caveats and provisos, and not insignificant ones.

But with these caveats and provisos it will hardly look so neat, or so "grand".

32. Last but not least, it is not the grand (or the not so grand) doctrines which the courts are called to develop in the first place, when they are applied to by individuals asking for their particular cases to be examined and decided (which is much less par for the course for courts exercising abstract review of norms, such as constitutional courts). Whatever judicial doctrines may be developed in the course of that examination, and which naturally accompany that examination, they "only" rationalise and motivate the courts' decisions, while the *raison d'être* of the courts remains deciding on the subject matters presented to them in the concrete applications. By underlining this I am by no means attempting to belittle the significance and value of judicial doctrines. That value is unquestionable. I only mean that first things should come first, and this should also apply to courts. Applicants apply to them in order to have *their* cases decided, not in order to be provided with grand narratives. Narratives may be there, and inevitably will be there, but the decision on the concrete subject matter presented to a court must be *tailored* to the request in the sense that it must be *commensurate* with it.

Can it be that a court – any court – can ever forget this most trivial reminder?

However unlikely it might seem, yes, some can.

33. As to the grand doctrine developed in the instant case, time will tell. Time always brings in something unforeseen.

III

34. It already did, right away, and in a very peculiar way.

Although, as it is convincingly asserted, the applicant "did not expressly invoke the ... provisions" of Articles 2 and 8 (see paragraph 27 above), the operative part of the judgment contains points where the Court has decided on the admissibility of the applicant's *complaints* specifically under these two Articles: points 3 and 4. They warrant a closer look. The second of them is problematic indeed. As we shall see, "problematic" could be an understatement.

35. The applicant's complaint under Article 2 was declared admissible under point 4 of the operative part. This resulted from the Court's own addition to the applicant's initial complaints, as reclassified by the Court. The complaint was communicated to the applicant (and the Government) *also* under Article 2. Being prompted by the Court's question from which one could see that the Court was contemplating that the applicant's key complaint possibly fell to be examined under Article 2, the applicant found arguments (how convincing the latter are is another matter) to support *the*

Court's (tentative) approach that Article 2 was not only applicable to his situation, but that that Article had potentially been violated. For the applicant, providing those arguments should presumably not have presented any great difficulties, given that he argued from the very outset that following the accident he had suffered serious bodily harm "*entailing danger to his life*", and that the accident in question had not been properly investigated by the authorities, which "amounted to humiliation and inhuman and degrading treatment", particularly hurtful, "considering also the fact that he was a person *suffering from a serious disability following the accident*" (see paragraph 71; emphasis added). What initially were the applicant's "explicit and broad" complaints under Articles 3, 6 and 13, have thus become *his* complaints under Articles 2, 3, 6 (its § 1) and 13.

The applicant's later submissions, prompted by the Court, pertaining to Article 2 may thus be seen as a fully-fledged complaint under that Article, albeit a belated one. The Court, having at first hypothetically raised, in its correspondence with the applicant and the Government, the question of the applicability of Article 2, has completed and formalised the reclassification of "this part of the complaint" as falling to be examined not under Article 3, but under Article 2 (both under their procedural limb), by dismissing the Government's objection concerning the applicability of Article 2 and holding that it would examine "this part of the complaint exclusively under the procedural limb of Article 2" (see paragraphs 153 and 154).

The inclusion of point 4 in the operative part is therefore not unjustified.

36. Things are quite different with point 3 of the operative part. I must admit that I am extremely uncomfortable about writing this. This point is "instant karma" for the majority's ambition to present the above-discussed grand doctrine.

Under point 3 of the operative part the "*complaint* concerning Article 8" was declared inadmissible (emphasis added).

What complaint?

Whose complaint?

Where is that complaint?

I voted against this point. I have tremendous difficulties in comprehending what it conveys. I know for sure that I am not the only one, but this is no consolation at all.

For *there was no complaint under Article 8 in this case.* Never ever. *The applicant did not complain under Article 8*. In order to point up this fallacy on the part of the majority in a fashion commensurate with its bigness, the usual inanimate italics would not suffice: what would be required would be also to use capitals, underlining, bold characters and large fonts, and some garish colour, all together. But let it ride.

The majority itself have acknowledged that *there was no such complaint* (see paragraph 27 above). However, as it appears, being engaged in building up the grand doctrine, they effectively detached themselves from the actual

controversy which was presented to the Court, and substituted themselves for the applicant in presenting one more complaint "of the applicant" – alas, to his detriment.

37. Whereas the complaint under Article 2 may be interpreted (with a fairly high degree of plausibility) as having already been *implicitly* present in (and thus attributed to) the applicant's initial submissions to the Court, even if it surfaced *explicitly* only in his later submissions (compare paragraph 35 above), the same cannot be said about the "complaint" under Article 8, as dealt with by the majority in the instant case. The applicant himself seems to have given little thought to Article 8 – even after being prompted by the Court. To wit, having been asked by the latter whether Article 8 was applicable to his situation and, if so, whether there has been a "failure on the part of the authorities of the respondent State to comply with their duty to maintain and apply in practice an adequate legal framework affording protection against acts by other individuals for the purposes of this provision" (see, *mutatis mutandis, Söderman v. Sweden* [GC], no. 5786/08, §§ 80-85, ECHR 2013), the applicant only responded:

> "I consider that Article 8 of the Convention was violated because, as we have shown and we have proved, the criminal investigation started as a result of the traffic accident of 3.12.2004 has not been efficient." (Observations of 4 August 2017, p. 21)"

That is it.

Even without assessing the merits of this response, it is evident that that single sentence wrung out of the applicant by the Court itself is too little to qualify as a "complaint". It might be said in jest that the applicant was not seduced by the Court's allure. His response was virtually: "okay, if the Court thinks so, I do not object to Article 8 also being applicable – let's say it has been violated".

Many would have done the same had they been in his shoes.

38. Moreover, *no act of reclassification of any "part of the complaint" as falling to be examined under Article 8 has ever taken place in any form*. Nowhere in the whole judgment. On the contrary, the Court has stated that it "does not discern any particular aspect of human interaction or contact which could attract the application of Article 8 ... in this case" (see paragraph 131). It thus has rejected *its own hypothesis* of applicability of Article 8.

And yet the majority have declared "the complaint concerning Article 8" inadmissible.

This is *jurisprudence bizarre* indeed.

39. During the deliberations in any case the most diverse proposals may be and are voiced and drafted. Some are accepted. Many are not accepted, and for good reason. The secrecy of the deliberations (and, by extension, of the drafting of the judgment) also protects the freedom of the judges (of any court) to utter something injudicious, ill-advised, preposterous, even loony, because good ideas come into being only when the bad ones are rejected.

Rationality, at times, prevails over irrationality only after long consideration. What matters is that in the end reason should prevail. Whatever proposals may be voiced or drafted during the deliberations in a case, the final judgment must be free of blunders.

40. I confess that I sincerely expected that point 3, which is, in my firmest belief, absolutely incomprehensible (and unfair to the applicant, who, as is obvious, never presented a "complaint", which the Court rejected), in the end would not appear in the judgment. But there it is. I am not able to explain what this instance of the Court's masterliness as to "the characterisation to be given in law to the facts of the case" signifies and where it may lead.

It is comfortless to write about these matters. It is uncomfortable even to think about them.

IV

41. The durable product of the present case, that is to say, the grand doctrine designed to tackle all situations in which negligent actions have resulted in the individual's loss of life, life-threatening or other very serious consequences, as well as bodily injuries and physical and mental suffering, or even interference in an individual's private or family life experienced by him or her following an accident which was merely the result of chance or negligent conduct (compare paragraphs 8 and 30 above), *does* contain some provisos and caveats. Not too many, but some. Many of its parts may look quite neat. This applies in particular to the part dealing with the States' positive obligations (both substantive and procedural) under Article 2 and, accordingly, the applicability of that Article (but please note my reservation in paragraph 13 above *in fine*).

42. The stumbling block, however, is the procedural limb of Article 3. On this issue, the doctrine's ostensible neatness has been achieved by means of resourceful "adjustment" or even deliberate suppression of some important elements, including relevant case-law. In paragraph 10 above I mentioned "disregard" and "renunciation", and this is exactly what is there.

Let us address that chapter in greater detail.

43. The majority have recapitulated the Court's Article 3 case-law in the following way (I abridge):

(a) Article 3 requires measures to be taken which would ensure that individuals are not subjected to ill-treatment, including that "administered" by private individuals. This requirement involves a procedural obligation, although not necessarily the provision of a criminal-law remedy. However, where an "arguable claim" ("credible assertion") is made that a person has suffered treatment infringing Article 3 at the hands of the police or other similar authorities, an effective official investigation of a criminal nature should be conducted (see paragraph 115).

(b) For the treatment to be assessed as inhuman or degrading, it must attain a minimum level of severity. That assessment depends on the circumstances of the case, which "principally" include: the duration of the treatment; its physical or mental effects; and, in some cases, the victim's sex, age and state of health. Other factors which also may be taken into consideration are: the purpose for which the ill-treatment was inflicted; the intention or motivation behind it; the context in which it was inflicted; and whether the victim was in a vulnerable situation (see paragraphs 116 and 117).

(c) The absence of an intention to humiliate or debase the victim cannot conclusively rule out a finding of a violation of Article 3 (see paragraph 117).

(d) Ill-treatment that attains a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. But even in the absence of those characteristics, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing the person's human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition set forth in Article 3. It may suffice that the victim is humiliated in his own eyes, even if not in the eyes of others (paragraph 118).

(e) Article 3 is applicable in cases involving deliberate ill-treatment of persons by private individuals (rape, sexual abuse or violence, family violence or injuries sustained in a fight, which involves behaviour capable of inducing feelings of humiliation and degradation in the victim (paragraph 119).

(f) Only in two cases (because the majority have decided that only two are worth mentioning, that is, being singled out from their greater number; see paragraph 56 below), which related to a traffic accident and an accident at work, but did not involve any intentional act by a private person against the victim, the situation under examination was assessed as attaining the threshold of Article 3, owing to the nature and degree of the injuries sustained (paragraph 120).

44. The majority have generalised this recapitulation by stating that "the approach to assessing whether a person has been subjected to ill-treatment attaining the minimum level of severity, as described *in paragraphs 116-18 ... remains* the correct one *also* in respect of treatment inflicted by private individuals", because "it involves taking into account an *array* of factors, each of which is capable of carrying significant weight" and which "presuppose that the treatment to which the victim was 'subjected' was the consequence of an *intentional* act" (paragraph 121; emphasis added).

45. Applying this generalisation in the present case, the majority have concluded that "the part of the applicant's complaints under Article 3

relating to the conduct of the investigation is incompatible *ratione materiae* with the provisions of the Convention" (paragraph 124), because:

(a) in line with the approach confirmed in paragraph 121 (see paragraph 44 above), "bodily injuries and physical and mental suffering experienced by an individual following an accident which is merely the result of chance or negligent conduct *cannot be considered as the consequence of 'treatment' to which that individual has been 'subjected' within the meaning of Article 3*" (paragraph 123; emphasis added);

(b) "[s]uch treatment is in essence, albeit not exclusively, characterised by an intention to harm, humiliate or debase an individual, by a display of disrespect for or diminution of his or her human dignity, or by the creation of feelings of fear, anguish or inferiority capable of breaking his or her moral and physical resistance", that is to say, "elements [which do not] 'feature in the applicant's case'" (ibid.);

(c) the incompatibility *ratione materiae* with the provisions of the Convention of "the part of the applicant's complaints under Article 3 relating to the conduct of the investigation" "follows" from the above notwithstanding that "the severity of suffering, physical or mental, attributable to a particular measure or event has been a significant consideration in many of the cases where the Court has ruled Article 3 applicable" and that "the absence of any intention to harm, humiliate or debase a person cannot conclusively rule out a finding of a violation of Article 3" (paragraphs 122 and 123), and also notwithstanding the "albeit not exclusively" clause explicitly mentioned in paragraph 123 (see (b) above).

46. Hocus-pocus – and the possibility that the "elements" which indeed "feature in the applicant's case" may be covered not by the rule, but by the exception (that the absence of intention does not conclusively rule out the applicability of Article 3 under its procedural limb), which would allow (and, as will be shown, has allowed in the past; see paragraphs 57-68 below) for the application of the procedural limb of Article 3, becomes completely irrelevant. The judgment mentions that exception several times over – even in paragraphs 122 and 123, from which the conclusion as to the inapplicability of Article 3 is drawn.

So what? For as from now on that exception is but an empty phrase.

The rule with an exception thus, as if by the wave of a magic wand, has been transformed into a rigid rule without exceptions, and not only for the purposes of the present case, but also for the purposes of all cases of this type.

47. Still, the majority's generalisation (see paragraph 44 above) looks neat, at a first glance.

However, something is missing.

48. Firstly, it must be noted that when formulating their overwhelming generalisation (see paragraph 44 above) the majority have referred to paragraphs 116-18 of the judgment. Truth to tell, these paragraphs deal *not with the ill-treatment of individuals by (other) private individuals*, that is to say, *private acts*, but *with the ill-treatment inflicted on individuals by the authorities*, that is to say, *public acts*. It has already been noted that the two comparators do not match, as none of the elements of one comparator matches any of the elements of the other (see paragraph 11 above). In fact, they *could* have matched, had no "fine-tuning" been resorted to as regards one of the comparators (that is, had *public acts* not been reduced to *public intentional acts* only), or, if I may elaborate on the metaphor of comparing square meters with linear meters (ibid.), had it not been pretended that square meters, just like linear meters, do not have a second dimension. But they do.

49. Such a pretence, alas, has been undertaken in the present case. The *public acts* referred to have been read by the majority, for the purpose of the above-mentioned generalisation, as if they all were *only intentional acts* and none of them was *unintentional*. The logic employed was that if an act was unintentional, it could not attain the requisite severity threshold for the application of Article 3 under its procedural limb ("the approach to assessing whether a person has been subjected to ill-treatment attaining the minimum level of severity, as described *in paragraphs 116-18*"; see paragraph 44 above; emphasis added). Hence, if that Article was nevertheless applied, the corresponding act has somehow (how?) amounted to being intentional, even if it was not.

Out of sight, out of mind.

The majority generalise (without a single exception) that "the minimum level of severity, as described *in paragraphs 116-18* ... involves taking into account an *array* of factors, each of which is capable of carrying significant weight", and that "*[a]ll these factors* presuppose that the treatment to which the victim was 'subjected' was the consequence of an *intentional* act" (paragraph 121; see paragraph 44 above; emphasis added). Which – let us put it bluntly – is a roundabout way of saying that *in all the cases referred to in paragraphs 116-18* the treatment to which the victim was "subjected" was the consequence of an *intentional* act.

In reality, however, some (even many) of the acts in the cases referred to *were unintentional*.

50. Despite that, the generalisation has been drawn that, given that in the Court's case-law Article 3 under its procedural limb has been applied by far only to *public acts* (although, as mentioned above, this was not so; on this see paragraphs 57-68), which, for that purpose, all have been *intentional* (because, as it appears, in the perception of the majority, unintentional acts in principle, however paradoxical that may sound, cannot trigger the applicability of Article 3, because they do not attain the minimum level of

severity as a determining criterion; see paragraph 49 above and paragraph 69 below; but compare paragraph 70 below), the procedural limb of that Article is applicable to *private acts* on the same condition: they also must be *intentional*, not negligent. The meek caveat that "the absence of an intention to humiliate or debase the victim cannot conclusively rule out a finding of a violation of Article 3" (paragraph 116) or the "albeit not exclusively" clause (paragraph 123) do not in fact change the picture, because they are immediately neutralised by the conclusion that "the treatment to which the victim was 'subjected' was the consequence of an *intentional* act" (paragraph 121) and by the conclusion that "the part of the applicant's complaints under Article 3 relating to the conduct of the investigation is incompatible *ratione materiae* with the provisions of the Convention" (paragraph 124; see paragraphs 45-46 above and paragraph 52 below).

51. From the methodological perspective, the cost of this "adjustment" is that the two comparators chosen for the purposes of the grand doctrine (but apparently no less for the purpose of disqualifying the present applicant's complaint under the procedural limb of Article 3) simply do not match. And they do not match precisely because one of the elements (*negligence*) of one comparator (*public acts*), which in fact *is* present in the Court's case-law nominally referred to by the majority, has been *deliberately disregarded*, as if public acts, for some unexplained – and unexplainable – reason, cannot be unintentional (see paragraphs 45-46 and 48-50 above). Accordingly, anything in that case-law pertaining to the *negligent* public acts has been *rendered* insignificant or even non-existent. This undermines the validity of the seemingly neat comparison made.

52. The costs of achieving the ostensible neatness of the grand doctrine are thus not solely methodological. They also pertain, to no small extent, to the re-interpretation, or rather misinterpretation, of part of the Court's case-law.

For instance, in paragraph 116 references are made to *Muršić v. Croatia* ([GC], no. 7334/13, 20 October 2016) or *Paposhvili v. Belgium* ([GC], no. 41738/10, 13 December 2016). In *Paposhvili* the Court held that "there would have been a violation of Article 3 ... if the applicant had been removed to Georgia without the Belgian authorities having assessed, in accordance with that provision, the risk faced by him ... concerning his state of health and the existence of appropriate treatment in Georgia" (point 1 of the operative part). Hardly anyone would even think of asserting that the Belgian authorities, had they decided to remove the applicant to Georgia – the very removal thus undoubtedly being an intentional act – without having assessed the above-mentioned risks, would have acted with "an intention to harm, humiliate or debase an individual, by a display of disrespect for or diminution of his ... human dignity, or by the creation of feelings of fear, anguish or inferiority capable of breaking his ... moral and physical

resistance" (compare paragraphs 43 and 45 above). Indeed, the exposure of that applicant to the stated unassessed risks, which might or might not have materialised, would have been an instance of ill-treatment, but *not* of *deliberate* ill-treatment. As to *Muršić*, the Court's leading case on the conditions of detention, it also involves *unintentional* ill-treatment – like the great majority of cases concerning conditions of detention, in which violations of Article 3 have been found, in particular under its procedural limb.

Until the advent of the present judgment with its grand doctrine, such complaints as in *Paposhvili* or *Muršić* (but also in a great number of other cases) fell to be examined under Article 3 – also under its procedural limb, where the authorities failed to honour their procedural obligation to properly examine the allegations of ill-treatment. It was not determinative whether the ill-treatment inflicted on an individual was intentional or unintentional. This was so, and hardly anyone would doubt that this will continue to be so in future.

The method of "fine-tuning" the public acts comparator and the grand doctrine built thereby fail to make any inferences from this. The reminder in paragraphs 122 and 123 (see paragraph 45 above) that, in order to fall to be examined under the procedural limb of Article 3, the ill-treatment must be "characterised by an intention to harm, humiliate or debase an individual, by a display of disrespect for or diminution of his or her human dignity, or by the creation of feelings of fear, anguish or inferiority capable of breaking his or her moral and physical resistance"; however "*not exclusively*" (emphasis added) seems to carry no weight. Nor does the reminder that "the absence of any intention to harm, humiliate or debase a person *cannot conclusively rule out* a finding of a violation of Article 3" (ibid.; emphasis added; see paragraph 50 above).

53. Grand doctrine or no grand doctrine, in cases where serious bodily injuries or other serious suffering have been inflicted on individuals unintentionally by public acts Article 3 was and still is applicable under its procedural limb.

However (and by way of summing up on the first missing element which disfigures the ostensible neatness of the part of the grand doctrine devoted to the applicability of Article 3 under its procedural limb), it is nowhere explained in the judgment, *why, from now on, Article 3 is applicable to unintentional public acts, but not unintentional private acts*. Why and where does the grand doctrine hide *unintentional private acts*, as dealt in the Court's case-law up to now, would be a rhetorical question. The only argument which seems to emerge as an answer to this question is that the grand doctrine does not hide unintentional private acts at all, because it was always the situation in the Court's case-law that Article 3 applied only to intentional public acts.

54. But this was *not* always the situation.

Which allows for some thoughts as to what "correctness" is and also what its opposite is.

For instance, how "correct" is the conclusion that in all the cases referred to in paragraphs 116-18 of the judgment "the treatment to which the victim was 'subjected' was the consequence of an *intentional* act" (paragraph 121; emphasis added; see paragraphs 44, 49 and 50 above)? In no way can such a generalised inference be drawn either from these paragraphs or from the other case-law cited in the judgment, or even from the relationship between what is *normally understood* as "treatment" or "being subjected" and what is *normally understood* as "intention", this understanding never having been deviated from, let alone objected to in the Court's case-law (on this see paragraph 63 below.

Accordingly, the latter conclusion is not an inference from the Court's case-law. It is a *novelty*. Any attempt to prove that such an inference follows from the Court's case-law is untenable.

55. As mentioned above, the majority have generalised (in paragraph 121; see paragraph 44 above) the view that the approach adopted in cases concerning ill-treatment of individuals by the authorities (cited in paragraphs 116-18), "*remains* the *correct* one *also* in respect of treatment inflicted by *private individuals*" (emphasis added).

Yet it is not clear how something that has originated in and been drawn from the case-law concerning ill-treatment of individuals *by the authorities* could in principle "remain" valid with respect to ill-treatment by (other) private individuals. What was there that could "remain"? Nothing, because what did not exist cannot "remain". The word "remains" serves as a veil: it has been used with a view to creating an impression of the strength of the reasoning, and doing that by obscuring the existing case-law, which, however, is not so straightforward as it has been depicted in the above-mentioned generalisation.

Even if one might have such an impression, it would be plainly wrong. What is said to have "remained" has in fact been *introduced* – here and now.

It would have been fair, had the majority stated that *from now on* the approach adopted in the cases concerning ill-treatment of individuals by the authorities must be adopted *also* in the future cases concerning the treatment inflicted on individuals by (other) private individuals.

56. The above-discussed disregard of *unintentional public acts*, as dealt with in the Court's case-law, has allowed the majority to conclude that, owing to the fact that the above-mentioned intent-related elements "do not 'feature in the applicant's case'", Article 3 is not applicable under its procedural limb to the applicant's situation (see paragraphs 45 and 46 above). To apply it allegedly would have amounted to going against the ostensible mainstream of the Court's case-law, which, as the majority try to show, has in principle always been quite straightforward on the matter of

intent or its absence. In order to show that that case-law has always been straightforward on this matter, a distinction has been drawn between the "correct" and the presumably "incorrect" case-law (see paragraphs 10 and 11 above). This distinction has been geared to creating an impression that Article 3 has always been applied under its procedural limb solely in cases involving intentional ill-treatment of individuals *by whomever*, and that the only exceptions to this general practice were the two cases indicated in paragraph 120 of the judgment, namely *Kraulaidis v. Lithuania*, (no. 76805/11, 8 November 2016) and *Mažukna v. Lithuania* (no. 72092/12, 11 April 2017). Under an extremely rare move (from the viewpoint of the phraseology employed) on the part of the Grand Chamber, the latter has departed from the two judgments, which have now been virtually disqualified as "incorrect" (but not from other similar ones, or at least not explicitly).

57. The above-described trick with the unintentional public acts, where the latter have been renounced as non-significant or even non-existent ("[a]ll these factors presuppose that the treatment to which the victim was 'subjected' was the consequence of an intentional act"; see paragraphs 44, 49 and 54 above), is not the only method of "adjustment" of the Court's case-law to the needs of the grand doctrine, employed in the present case. Another one is *disregarding the case-law, where Article 3 under its procedural limb was applied to negligent private acts*.

58. As has been shown, the reference to paragraphs 116-18 has been highly instrumental in the crucial generalisation made in paragraph 121 of the judgment (see paragraphs 44, 48 and 55 above). In addition to the "fine-tuning" of one of the comparators (*public acts*) dealt with in paragraphs 116-18 (see paragraphs 11 and 48 above), the majority have ingeniously omitted one paragraph of its recapitulation of the Court's case-law, namely paragraph 119. That paragraph deals *with ill-treatment of individuals by private individuals*, even if "deliberate". For the purposes of crystallising the comparators, which would then, as foundation blocks, be used in building up the above-indicated blanket generalisation, paragraph 119 seems to be irrelevant.

It should not be though. Treating the paragraph in question as irrelevant is a gap in the grand theory discussed here, a gap which is not admitted but rather disguised.

59. What is even more striking is that the judgment disregards the fact that – what a manoeuvre! – the Court's case-law on Article 3 under its procedural limb has also been applied in cases involving *unintentional private acts*. There *is* such case-law, and passing over it in silence raises questions.

60. Some of the judgments which are pertinent in this regard are cited in the judgment, but not where the citation would have been most relevant. To mention but one of a larger number of cases, the judgment adopted in

Gorgiev v. the former Yugoslav Republic of Macedonia, no. 26984/05, 19 April 2012) is duly cited in paragraph 115 (in the context of the general considerations regarding the States' obligation under Article 3 to carry out an effective investigation *ipso facto*, "once the matter has come to the attention of the authorities"). That judgment, however, is *not* cited in the "key" paragraphs from 116 to 118. More's the pity. That instructive case dealt with a situation in which the applicant, while serving a prison sentence and having to look after livestock held at that prison (as ordered by the prison authorities), had sustained injuries from a non-castrated bull. The applicant complained, *inter alia*, that the prison authorities had failed to protect his personal security, his physical and moral integrity, despite the fact that they had been alerted about the bull's aggressiveness. The Government argued that no responsibility could be attributed to the State, not only because the prison governor had not been alerted to the bull's aggressiveness (they thus contradicted the applicant's submissions) and there had been no information that the bull had been aggressive, but also because the bull's behaviour had been unpredictable, owing to which the authorities should not have had the impossible burden of preventing every claimed risk from materialising. Of course, all this pertained to the substantive limb of Article 3; no violation was found on that account. However, the applicant complained also under the procedural limb of Article 3. He maintained that the domestic courts, by dismissing his claims, had failed to establish whether the State had undertaken all necessary measures to avoid damage from occurring. As regards this complaint, the Court found a violation on account of the State's failure to carry out "an effective official investigation" into the applicant's allegations. The Court held, *inter alia*, that although the applicant's "civil action against the State and the prison seeking non-pecuniary damages for the injuries suffered from the bull ... was capable, in principle, of providing a fact-finding forum with the power to attribute responsibility for acts or omissions involving the breach of the applicant's rights under Article 3 ... [t]he compensation proceedings ... ended with no decision on the merits, since the domestic courts found that the State and the prison did not own the bull, and accordingly lacked the required capacity to be sued" (§ 63).

In *Gorgiev* the "actions", which had resulted in the bodily injuries sustained by the applicant, were clearly *negligent*, and they were attributed to a *private person* – an economic unit, which operated as a separate legal entity within the prison and which had been the owner of the bull. The fact that the applicant was, at the time, a prisoner, and accordingly under the care and responsibility of the authorities *was not determinative* for the purposes of the applicability of Article 3 under its procedural limb: the Court explicitly stated that this fact only made the State's duty to investigate "*more* apparent" (§ 64; emphasis added).

In order to eliminate any speculation that the above-mentioned bull-owning economic unit could have been considered as "an agent of the State" and that it could have been this quality which triggered the applicability of Article 3 under its procedural limb, the Court did not subscribe to this view. On the contrary, it noted that "the duty of the national authorities to carry out 'an effective official investigation' capable of establishing the facts and identifying and punishing those responsible [as] a positive obligation cannot be considered in principle to be limited solely to cases of ill-treatment by State agents".

61. Like *Muršić* and *Paposhvili* (both cited above) with regard to unintentional public acts, *Gorgiev* (cited above) also does not support the conclusion that Article 3 under its procedural limb has always been applied only in cases involving intentional acts, because in *Gorgiev* the act had been *unintentional* and committed by a *private person*.

62. *Gorgiev* (cited above) also does not support the majority's conclusion that "bodily injuries and physical and mental suffering experienced by an individual following an accident which is merely the result of chance or negligent conduct cannot be considered as the consequence of 'treatment' to which that individual has been 'subjected' within the meaning of Article 3" (paragraph 123; see paragraph 44 above). The injuries sustained by Mr Gorgiev clearly had been, in the terminology of the present judgment, "merely the result of chance or negligent conduct" – the very bad "chance" of the bull's "interaction" (even if "non-human") or "contact" (compare paragraph 38 above) with the applicant and the negligent conduct of the respective economic entity, which had owned the bull but had not taken the necessary and reasonable precautions. If the negligent conduct of a bull-owning economic entity, which until the incident in question was perhaps not even aware of the applicant's existence, could be considered as "treatment", to which that person had been "subjected", why then not the actions of a party to a traffic accident? If, pursuant to the majority's reasoning in the present case, the negligent conduct dealt with in *Gorgiev*, had not been "treatment" within the meaning of Article 3, *what,* then, *had it been*? And if the applicant had not been "subjected" within the meaning of that Article to whatever that conduct – which had not been a "treatment" – might have been, *how could have he been recognised as a victim* of that uncategorisable conduct?

63. The online *Oxford dictionary* (but also, as it appears, many other dictionaries of the English language) defines the noun "treatment" (insofar it is relevant to the present case) as "the manner in which someone behaves or deals with someone or something", and the verb "to subject" as "to cause or force someone or something to undergo (a particular experience or form of treatment, typically an unwelcome or unpleasant one)". In these definitions, no distinction is made between intention and the absence of it, which would allow one to say – as the majority have done – that "treatment", that is,

behaviour, can be only intentional, or that being "subjected" can be only when the experience is *caused* by a deliberate act.

In theory, it might have been that the drafters of the Convention deliberately decided to provide the words employed in Article 3 with some new meaning, although they had some universally accepted, uncontested meaning, as defined in the dictionaries. Only, alas, there are no traces that the drafters did that in relation to the words "treatment" and "to subject", as used in that Article.

It would have been helpful if the majority had provided at least some support for their most innovative approach to what was the "real" meaning of the words "treatment" and "to subject", as used in Article 3, for that "real" meaning now appears to be in opposition to the universally accepted meaning of these words, which so far was also accepted in the Court's language. If, as is often underlined by the Court in its case-law, certain concepts used in the Convention are autonomous (with which stance I cannot but agree in principle), where should one set the limits on that autonomy? Can the Court push these limits as far as it likes? Are there any canons of interpretation to be honoured, especially when an allegedly autonomous meaning of a word is discovered after decades of its routine interpretation, which perfectly followed its universally accepted meaning, as defined in dictionaries? Can there be any merit in moving from the accepted clarity of legal terms to their relative indeterminacy and thus causing a rift between legal and pedestrian language, where once all was harmony?

64. The ingenuity of the majority's attempts to prove that the Court's case-law has always been straightforward in the sense that Article 3 under its procedural limb has never been applied in cases involving unintentional private acts, save the two "black sheep", *Kraulaidis* and *Mažukna* (both cited above), is not limited to suppressing judgments like *Gorgiev* (cited above). The two cases, portrayed as going against the ostensible (or rather pretended) mainstream, have also been misrepresented.

65. *Kraulaidis* (cited above), like the present case, involved a traffic accident. In that case as many as five judges (including myself) expressed, in their concurring opinions, their ambivalence as regards the development of the Court's case-law involving bodily injuries negligently inflicted on the alleged victim by (other) private individuals, which possibly signified the "drift into the trivialisation of Article 3 rights" (compare paragraph 81 below). *Mažukna* (cited above) involved an accident at work and followed the steps of *Kraulaidis*. *Kraulaidis* relied, in part, on *O'Keeffe v. Ireland* ([GC], no. 35810/09, 28 January 2014), which, as is known, involved an intentional act by a private individual, but also, most importantly and very directly, on *Muta v. Ukraine*, no. 37246/06, 31 July 2012.

The movement towards a broader interpretation of Article 3 thus – and contrary to the impression which the majority have attempted to create – did not start with *Kraulaidis* or *Mažukna*, in 2016 and 2017 respectively, to

which the majority have limited their analysis. It was a gradual process, one of the stages of which was landmarked in 2012 by *Gorgiev* (cited above) and *Muta*, adopted few months after *Gorgiev*. Of these two cases (not the only ones where Article 3 under its procedural limb has been applied to unintentional private acts) *Muta* nevertheless deserves special attention, owing to the fact that the judgment in *Kraulaidis* was directly based on the judgment in that case.

66. Interestingly – and suspiciously – enough, *Muta is* referred to in the present judgment, but, like *Gorgiev* (both cited above), not where it would have been most relevant (*O'Keeffe*, cited above, is not mentioned at all). In the whole judgment there is but one single reference to *Muta*, but even that one is tricky. That reference is provided (among others) in paragraph 119, which the majority have omitted from their reference to the Court's case-law, on the basis of which the above-discussed generalisation (see paragraph 58 above) has been built up, but not in paragraph 120, where it would belong and where the two now disqualified cases, *Kraulaidis* and *Mažukna* (both cited above), which directly follow *Muta*, are mentioned. Still, it is not paragraph 119, but paragraph 120, which deals with the harm inflicted on individuals *negligently* by (other) private individuals, whereas paragraph 119 is meant to deal with "*deliberate*" ill-treatment by private individuals.

However, *Muta* did not involve a "deliberate" private act. It involved a *negligent private act*!

67. *Muta* (cited above) involved stone-throwing between kids. The perpetrator's *intent* to inflict bodily injuries on the victim was never established (§ 64). The Court noted that "as a result of the violent actions of a private individual, ... the applicant sustained grievous bodily harm, lost the sight in his left eye and became disabled", and consequently, "the treatment to which he was subjected reached the threshold of severity necessary to fall within the scope of Article 3" (§ 58). The criterion for triggering the applicability of Article 3 under its procedural limb was "the nature and degree of the injuries sustained", that is to say, the *level of severity*. A violation of Article 3 was found on account of the protraction of the criminal proceedings, which finally became time-barred (as later in *Kraulaidis* and *Mažukna*, both cited above). In *Muta*, the Court had not examined the complaint under Article 6 – the examination under Article 3 sufficed.

68. To sum up, *Muta* is not only *underrepresented* (or ignored) in the present judgment: it is *misrepresented*.

69. There is one more point to be highlighted, which also pertains to the methodology on which the grand doctrine has been built.

In paragraph 121 of the judgment, where the so-called "correct" approach has been approved, it is stated that, "*[a]s can be seen from these passages* [that is, paragraphs 116-18], [that approach] involves taking into

account an *array* of factors, each of which is capable of carrying significant weight" (emphasis added). The "array of factors" appears to boil down to a set of tools which help determine whether *the* criterion which triggers the applicability of Article 3 under its procedural limb is met: the *minimum level of severity*, which "usually involves actual bodily injury or intense physical or mental suffering" (paragraph 118). There is nothing new here. That criterion, which is laid down in the said "passages" dealing with the ill-treatment of individuals by the authorities and not by (other) private individuals, is *the same* as "the nature and degree of the injuries sustained", so critically singled out in paragraph 120 dealing with the unintentional ill-treatment of individuals by (other) private individuals.

The grand doctrine as developed in the present judgment is critical of *Kraulaidis* and *Mažukna* (and most likely would have been critical of *Gorgiev* and *Muta*, all cited above, had the analysis of the latter two cases not been completely suppressed), because in these cases the threshold of severity was reached solely on the basis of the nature and degree of the injuries – the "sole focus on the nature and degree of the injuries sustained" (paragraph 120). From this criticism it appears that the nature and degree of the injuries sustained is not sufficient for triggering the applicability of Article 3 under its procedural limb, as this factor alone would not mean that the requisite threshold of severity is met. It follows that, in order to trigger the applicability of Article 3, this factor ("the nature and degree of the injuries sustained") must be *complemented* by some other factors, whatever they may be.

The key word is: *complemented*.

70. So what are the *other* factors, of which, according to the majority, there is an "array" and which presumably must be taken into consideration to *complement* the nature and degree of the injuries sustained, so that the requisite threshold of severity is reached?

They are: the duration of the treatment; its physical or mental effects; the sex, age and state of health of the victim ("in some cases"); as well as the purpose for which the ill-treatment was inflicted, together with the intention or motivation behind it; the context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions; and whether the victim was in a vulnerable situation (paragraphs 116-17).

At the same time it is noted that even the absence of "actual bodily injury or intense physical or mental suffering" may not prevent the treatment from falling within the prohibition set forth in Article 3 (paragraph 118) and that "the absence of an intention to humiliate or debase the victim cannot conclusively rule out a finding of a violation of Article 3" (paragraph 117).

Which means that the above-listed "other" factors, of which there is an "array", are *not complementary*, but *alternative* to the nature and degree of the injuries sustained (and to each other).

The inconsistency of the method applied here (or at least its verbal expression) is thus more than obvious.

71. Be that as it may, whenever a different criterion, or diverging standard, is applied (to whatever), it must be justifiable – and justified. Keeping quiet and pretending that uncomfortable questions do not arise does not prevent them from arising. An unjustified diverging standard is nothing less than what is popularly known as a double standard – with all the negative connotations surrounding this expression.

In the instant case the question is: *why were the nature and degree of the injuries sustained* (in some judgments the word used is "endured") *a sufficient factor for meeting the level of severity criterion and thus triggering the applicability of Article 3 under its procedural limb in so many cases involving unintentional acts by public authorities, but are not acceptable as a sufficient factor in cases involving unintentional acts by private individuals?*

See, for example (among numerous authorities), *Esmukhambetov and Others v. Russia* (no. 23445/05, §§ 190-91, 29 March 2011; involving an indiscriminate bombing); *R.R. v. Poland* (no. 27617/04, §§ 159-62, 26 May 2011; involving inability to obtain genetic testing during pregnancy); *P. and S. v. Poland* (no. 57375/08, §§ 167-69, 30 October 2012; involving failure to protect the applicant from harassment when seeking an abortion); *Grimailovs v. Latvia* (no. 6087/03, §§ 162, 25 June 2013; involving a disabled prisoner). And so on, and so forth.

The grand doctrine provides no answer to the above question; indeed, it does not even admit that it arises.

72. But there is more. The grand doctrine as developed in the present judgment is not only silent itself on these matters: *it has silenced the existing case-law*.

73. The three issues discussed above – the ingenious "adjustment" of the comparator of public acts, as chosen by the majority; the under- and misrepresentation of the Court's case-law, where Article 3 has been applied to the ill-treatment of the individuals by (other) private individuals; and the inconsistency in the application of the level-of-severity criterion to public and private acts – undermine the plausibility of the grand doctrine of the present judgment.

V

74. In the previous chapter I argued the unsustainability of the majority's methodology, on which it based its doctrine, in particular the overwhelming generalisation to the effect that Article 3 under its procedural limb is *never* applicable to situations involving bodily injuries or other suffering negligently inflicted on individuals by (other) private individuals. The question, however, remains, whether a similar radical conclusion could be inferred on the basis of some impeccable methodology.

75. From the perspective of the doctrine of the applicability of Article 2 (under both limbs), as developed in the present judgment, in such cases as *Muta*, *Kraulaidis* or *Mažukna* (all cited above) Article 2 could be applied (even if one may have reservations to this effect, as I definitely do). That doctrine would have meant that the respective complaints fell to be examined under the procedural limb of that Article. While the feeling of ambivalence as regards the development of the Court's case-law on bodily injuries negligently inflicted on the alleged victim by private persons, as testified by the separate opinions in *Kraulaidis* (cited above) was accumulating among some of the Court's judges (which was a fairly protracted process), some cases of this type, which had already been communicated to the respondent Governments under Article 3, were re-communicated to them either under Article 8, or (more pertinently to the instant case) under Article 2 (thus hinting at the prospective formal reclassification of the respective complaints). A telling example (a landmark for that period of critical reflection) was *Kotelnikov v. Russia* (no. 45104/05, 12 July 2016).

76. In *Kotelnikov* (cited above) the applicant had been injured in a traffic accident. The application was submitted to the Court in 2005, in 2011 it was communicated to the Government under Article 3; however, in March 2015 it was re-communicated under Articles 2 and 8. In 2016 the Court found a violation of Article 2 under its procedural limb. The respondent Government argued that the case should be examined under Article 3, as the applicant had not lost his life, but the Court disagreed, referring to its judgments in *Igor Shevchenko v. Ukraine* (no. 22737/04, 12 January 2012; which also involved the applicant having been hit by a car) and *Krivova v. Ukraine* (no. 25732/05, 9 November 2010; which involved the applicant's under-age daughter having been accidentally injured by other students in a cinema).

77. Why, then, was *Kraulaidis* (cited above) not re-communicated under the procedural – if, obviously, not the substantive – limb of Article 2?

It differed from *Kotelnikov* and the cases on which the latter relied (all cited above) in several critical respects. Mr Kotelnikov invoked both the substantive and the procedural limbs of Article 2, alleging that the traffic accident had been a deliberate attempt to kill or seriously injure him (substantive limb), and that there had been various defects in the investigative process, where the prosecutor, instead of trying to obtain a conviction, had acted as the alleged perpetrator's advocate, and the judge had done everything to protect the defendant (procedural limb; on this see the latter part of this paragraph). Ms Krivova and Mr Shevchenko likewise relied on Article 2. Furthermore, in *Igor Shevchenko* the respondent Government argued that Article 2 was inapplicable *ratione materiae*, but the applicant explicitly disagreed, alleging that his severe injuries (such as coma and complete paralysis) made that provision applicable. On the contrary,

Mr Kraulaidis did not invoke Article 2 and did not make any submissions that his life had been in danger.

As to the risk to the applicants' life, Mr Kotelnikov needed several neurosurgical operations, had started to suffer from repeated epileptic fits, developed brain cysts, endured periods of complete disability and lost the ability to work. The domestic courts had concluded that he had sustained life-threatening injuries. Ms Krivova's under-age daughter had been in a coma for two months, had become permanently disabled and was legally incapacitated. Mr Shevchenko had sustained a head injury, spinal cord haematoma and many other injuries. He had been in a coma for three years, remained completely paralysed, and was legally incapacitated. On the other hand, while Mr Kraulaidis had lost the use of his legs and become disabled, none of the medical experts who examined him had found that his life had been in danger, nor had he argued so himself in the domestic proceedings or before the Court. Besides, he fully retained his mental abilities and his legal capacity, as well as some ability to work and to take care of himself.

In addition, in *Kotelnikov* and *Krivova* those responsible for the accident had had certain official links to the public authorities. Mr Kotelnikov was hit by a car driven by a police officer. Although the latter had been acting in his private capacity, there were subsequent allegations that his connections within the police had been the main reason for the ineffectiveness of the investigation. Ms Krivova's daughter had been injured during a school visit to a cinema owned by a municipal company. While the accident had been directly caused by other students, domestic courts found the cinema's management guilty of negligence and abuse of authority due to their failure to control the students and prevent the accident. In *Kotelnikov* there was also a strong suspicion that the driver of the car had hit the applicant deliberately, as there had previously been a conflict between them. Although the domestic courts did not pronounce his actions intentional, they nonetheless observed that the driver could have avoided the collision but had failed to do so. Unlike any the above cases, Mr Kraulaidis had been hit by a car driven by an individual without any official links to the public authorities and there had been no suspicion or domestic-court findings indicating that the driver may have acted deliberately with regard to the applicant.

78. The present case, being a traffic accident case, may be seen as much more akin to *Kotelnikov* rather than *Kraulaidis* (both cited above). Although, as already mentioned (see paragraphs 4 and 14 above), my preference would have been for Article 3, and not Article 2, to be applied under its procedural limb to the instant applicant's situation, based on the doctrine of the applicability of Article 2, as developed in this case, with the prominence it gives to the real threat to the applicant's life, the examination of the present case (as, for example, in *Kotelnikov*) under Article 2 is not

completely unacceptable. It depends on where one draws the line between the States' positive procedural obligations under Articles 2 and 3.

79. However, it is not only the doctrine of the applicability of Article 2, but also that of the applicability of Article 3 under its procedural limb that presents guidelines for future cases. According to the latter, as already mentioned not once, cases involving bodily injuries or other suffering negligently inflicted on individuals by (other) private individuals cannot fall to be examined under Article 3, because henceforth such complaints are considered to be incompatible *ratione materiae* with the provisions of the Convention.

80. My question is as follows: under which Article do such cases fall to be examined?

Article 2? Definitely not all such cases, because obviously not every instance of bodily harm is life-threatening. If the "drift into the trivialisation of Article 3 rights" (see paragraph 65 above; compare paragraph 81 below) is to be suspended, it would hardly be a good idea to start a drift into the trivialisation of Article 2 rights.

Article 8? Also not all cases. Article 8 had already been largely trivialised by such judgments as that adopted in *Erményi v. Hungary* (no. 22254/14, 22 November 2016). It took the Court some effort (and some time) to stop that trend (see *Denisov v. Ukraine*, [GC], no. 76639/11, 25 September 2018). A new leap in that direction would be dubious.

Article 13? Not anymore, because that Article, unlike Kipling's cat, does not "walk by himself". Owing to the present judgment, in cases belonging to the category under discussion here Article 3 is no longer its companion. We are back at square one.

If we are to progress anywhere from square one, the only Article which is left to consider is Article 6, in particular its § 1. But what if the criminal investigation was so protracted that the case did not even reach a court, or, when it reached the court, the latter performed its duties in an impeccable manner by pointing out the defects of the criminal investigation and remitting the case to the investigative authorities, with whom the case became time-barred?

Perhaps one could accept, especially given that Article 3 is held to be no longer applicable to the situations discussed here, that Article 6 § 1 can be applicable to them on account of access to a court. In many instances that is indeed the case; see, for example, *Dragomir v. Romania*, ([Committee], no. 43045/08, 14 June 2016). Still the question may be asked: what if there *was* access to a court, the reasonable time requirements *were* observed, the procedural rights of the victim *were* guaranteed, but *as a whole* the process was not thorough or effective, certain important procedural steps *were omitted*, and in the end the investigation became *time-barred*? Would such a process fall, for the purposes of the applicability of Article 6 § 1, under the notion of "access to a court"? Could the notion of "access to a court" be

interpreted extensively as encompassing also "access to an effective investigation"?

In *Muta*, *Kraulaidis* or *Mažukna* (all cited above) it was held that that was not the case, but now – why not?

However, if the standards for the investigation's compliance with Article 6 § 1 requirements had been the same as those applied in the instant case, I fear that the applicants in *these* cases would have lost in Strasbourg – just like Mr Tănase in the present case. Which brings me to my last point of disagreement with the majority.

But before I turn to that matter, I have to make one more comment.

81. Every stick has two ends. I repeat what I wrote in my separate opinion in *Kraulaidis* (cited above):

> "... if none of these Articles [i.e. Articles 3 and 6 § 1] had been interpreted extensively, that would mean that there is a gap in the Convention, which would allow, in certain circumstances, for a conflict or dispute between private parties (in particular, pertaining to negligence, but maybe not only to it) to be subject to a deliberately inefficient investigation or even not investigated at all, and still to be excluded from the ambit of this Court's scrutiny. This would amount to recognising that the Convention comprises a corresponding gap ...
>
> However, when we look at the Convention as a whole, and not only at Article 3, ... are we sure that it was meant to comprise this particular gap? If so, who would benefit from it and who would lose out?
>
> The alleged trivialisation of Article 3 may be the lesser possible evil."

82. This is now outdated. The "drift into the trivialisation of Article 3 rights" (see paragraph 65 above; compare paragraph 81 above) has been suspended. The "special stigma" of Article 3 has been restored and reinforced.

VI

83. The majority have not been convinced by any of the applicant's complaints under Article 6 § 1. No violation of that Article has been found. I shall not spare too many lines on these matters.

84. The first of these complaints concerned the right of access to a court. The applicant asserted that because of the final outcome of the criminal proceedings, which the domestic authorities had failed to conduct properly, his civil claim joined to the criminal proceedings had not been examined. The majority, inspired by the Government's submissions, considered that 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); that although such proceedings might have been stayed pending the outcome of the criminal proceedings, no evidence was provided 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; as well as that the discontinuation of the criminal proceedings against the two individuals in

question did not bar the applicant from lodging a separate civil action against them with a civil court once he had become aware of the final judgments of the criminal courts upholding the public prosecutor's offices' decision to discontinue the criminal proceedings, which "was not necessarily destined to fail", because 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". The majority was satisfied that these considerations proved that the applicant had not been denied access to a court for the determination of his civil rights (paragraphs 199-201).

85. In my view, there is little to be satisfied with. On the contrary, such satisfaction amounts to the Court taking sides, where one party, the respondent State, is absolved from any responsibility for insufficient diligence in conducting the criminal proceedings until they became time-barred, which resulted in the civil claim brought in these proceedings also being unexamined, while the other party, the applicant, had to keep the hand on the pulse and, having become aware of the final judgments of the criminal courts upholding the public prosecutor's offices' decision to discontinue the criminal proceedings, to initiate separate civil proceedings. In other words, the applicant had to use not one but two of the existing remedies (both intended for the same purpose) – the second one only owing to the fact that the first one was obstructed by the authorities.

86. As to the second of the applicant's complaints under Article 6 § 1, which concerned the length of the proceedings, the majority have reasoned that "[w]hilst the authorities [might] be deemed responsible for certain procedural defects which caused delays in the proceedings, ... given the complexity of the case and the fact that the authorities remained active throughout, ... in the particular circumstances of the instant case, it [could not] be said that they failed in their duty to examine the case expeditiously". For the majority, the proceedings as a whole thus did not breach the "reasonable time requirement" (paragraphs 213 and 214).

87. The readership may query whether the concrete "procedural defects which caused delays in the proceedings", to which the majority refer, were indeed equiponderated by the authorities being "active throughout". This query is even more pertinent, given that the list of five "procedural defects" indicated by the Court is not at all short: five should be too high a number of flaws for holding that in overall the proceedings were satisfactory. The five paragraphs, which are referred to by the majority and in which the above-criticised "procedural defects" are described, are: 29, 39 and 50-52. This list is selective, as some pertinent paragraphs are omitted, namely paragraphs 31, 40, 41, 42, 54 and 55 in particular, to name some but not all the relevant ones.

88. I shall not proceed to give many concrete details. Some of the relevant circumstances are dealt with in the other judges' separate opinions, dissenting on this particular matter.

For the sake of illustration only, let me remind you that on 21 April 2009 the Laboratory of Criminological Reports informed the Police Department that the technical criminological report in respect of the applicant's case could not be produced until 2011, that is to say, even later than in twenty months, and that that report was nevertheless produced on 29 September 2010, that is to say within eighteen months (see paragraphs 41 and 42). With all sympathy to the authorities faced with the "extreme workload and the small number of experts available" (paragraph 41), these periods should have been assessed more critically than they were in the present case.

The mix-up with the blood alcohol level, the finding of which had been erroneously attributed to the applicant, from whom it had proved impossible to collect, was never clarified (see especially paragraphs 31, 33 and 38). This also warranted a more critical assessment by the Court, not a blithe utterance, as if by the way, that "notwithstanding the findings ... concerning the irregularities in the collection of the applicant's blood samples ... the Court [did] not find sufficient grounds to conclude that the investigation or collection of evidence was ultimately insufficiently thorough" (see paragraph 180). In this manner, one could justify virtually any flaw in any investigation.

I believe that it is obvious from these paragraphs (as well as others, not specifically addressed here) (including those referred to by the majority) that *protraction was there, it was unjustified, and it was not imputable to the applicant*.

89. Had these other paragraphs been included in the list of "procedural defects" (which they undoubtedly ought to have been) and had sufficient heed been paid to the facts set out in them, the overall positive assessment of the criminal proceedings would most certainly have been negative. It is positive only in the eye of the beholder. However, it is not only the beholder who has compiled the list of "procedural defects" who has an eye. Others have too. In my eye the proceedings, whatever the complexity of the case and the authorities' being "active throughout", have been flawed.

90. Whereas the applicant's complaint concerning the procedural limb of Article 3 was rejected outright, those under Article 6 § 1 were examined very unevenly. In the dissenting opinion of Judges Yudkivska, Vehabović and myself, attached to the judgment in *Radomilja and Others v. Croatia* (cited above), we wrote:

> "In order to come to a correct and just outcome, judges should look at the facts of the case (as well as the applicable law) through a magnifying glass – but it should not be so that each of their eyes uses its own magnifying glass, only for one to be pink and the other grimy."

91. Regrettably, the above yearning applies also to the majority's findings as regards the applicant's complaints under Article 6 § 1 in the present case.

VII

92. In so far as it is relevant to the present case, the rationale of the extensive interpretation of Article 3 under its procedural limb so far has been as follows.

Although no procedural obligations of States are mentioned in the text of Article 3 itself, the obligation to "conduct an effective investigation" was affirmed as implicitly present in that Article. In the first place, this has been done in cases involving intentional injuries inflicted on individuals by State agents (for example, police brutality). Then this obligation was gradually extended to intentional injuries inflicted on individuals by (other) private individuals. There cannot be much controversy here, because intentional cruelty (by whomever) is an affront to public order and morality, and from the victim's perspective in most cases it does not make much difference whether the injuries in question were inflicted on them by public or by private acts. Article 3 has been interpreted so as also to cover unintentional public acts. Indeed, with regard to the latter, the States' positive obligations differ little from those pertaining to intentional public acts.

As regards unintentional acts inflicted on individuals by (other) private individuals, the question now has been raised as to the reasons why the States' procedural obligation to "conduct an effective investigation" under Article 3 should extend to also cover these acts. The underlying logic of the Court's answer to this question so far has been that the States have this obligation owing to the *seriousness of the suffering* of an individual: they must "conduct an effective investigation" of all actions (by whomever) which bring about *grave* consequences. Under this logic, the purpose of the impugned action, which encompasses the intent to inflict harm, could and even should be taken into consideration (as well as many other circumstances of the case), although this factor *per se* is *not determinative* for the States' positive procedural obligation under Article 3. It is the gravity of the consequences which matters most.

Not anymore.

93. In paragraph 7 above I already called this judgment a large and resolute stride away from protecting human rights.

I would like to hope that some day there will be a move in the opposite direction.

Not soon. Not an easy one.

For it is quick and easy to hole the protective wall known as the Convention. It is much slower, and much more difficult, to brick it up.

PARTLY DISSENTING OPINION OF JUDGE GROZEV

While I fully agree with the general principles developed by the Grand Chamber in the present case, I was unable to follow the majority in its conclusion that, with respect to his Article 2 complaint, the applicant was not required to file a separate civil action with the civil courts. In my view the applicant's failure to file a separate civil action was a failure to exhaust the available domestic remedies and for this reason I voted for declaring the applicant's complaint under Article 2 of the Convention inadmissible.

Admittedly, the case raises a difficult issue of conflict between two principles in the Court's case law. The first one is the well-established principle that the Convention does not guarantee a right to have criminal proceedings instituted against third parties generally, and more particularly, States Parties are not obliged to provide a criminal remedy in case of loss of life or life-threatening injuries resulting from negligent actions (see, among many other authorities, *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I; *Šilih v. Slovenia* [GC], no. 71463/01, § 194, 9 April 2009). The second principle relates to the requirement to exhaust the available and effective domestic remedies. The Court has held, again on many occasions, that where there are different remedies which an individual can pursue, that person is entitled to choose which one to pursue (see *Micallefv. Malta* [GC], no. 17056/06, § 58, ECHR 2009; and *Şerife Yiğit v. Turkey* [GC], no. 3976/05, § 50, 2 November 2010).

The manner in which the majority has interpreted and applied those two principles in the present case, however, leads to a result which I find unsatisfactory. Not necessarily for the case at hand, as in any event the conclusion is that there was no-violation of Article 2, but more generally, for the interpretation and application of the Convention. The majority has reached the conclusion that the applicant was not required to file a separate civil action by reasoning that the criminal investigation which he pursued, attempted to clarify the circumstances of the accident. Thus the majority held that "the applicant could reasonably have expected the aforementioned criminal proceedings to address his grievances" (see paragraph 177 of the judgment). My concern with this line of reasoning is that it follows faithfully one of the principles, namely the right of an applicant to choose between available alternative remedies, without sufficiently taking into account the other. This approach comes at the expense of the principle that States Parties have a choice between providing a criminal or a civil remedy in cases of negligent actions resulting in or creating a risk for loss of life. My concern is that by giving an applicant the full freedom to pursue his grievances through a criminal remedy, the Court is undermining the States

Parties' ability to manage their justice system and use the available resources as they consider best.

The question then is whether it is possible to find a more balanced approach, a middle ground better reconciling those two principles. I believe there is, and the way to do so is actually already spelled out in those principles as they have been laid out by the Court in the present judgment. It requires a more detailed look into the ongoing domestic proceedings and dividing and separating the different stages of the proceedings. This detailed analysis and "dissection" of domestic proceedings might feel somewhat uncomfortable for an international court, but would still be sufficiently clear and unproblematic to allow for its general application.

The principles I have referred to were developed by the Court in its earlier case law, and were systematically elaborated in paragraphs 158 to 163 of the present judgment. The Court held that "[i]n cases concerning unintentional infliction of death and/or lives being put at risk unintentionally ... the requirement to have in place an effective judicial system will be satisfied if the legal system affords victims (or their next-of-kin) a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any responsibility to be established and any appropriate civil redress to be obtained". With respect to road-traffic incidents in particular, the Court held that as soon as the authorities become aware of the incident, they "must make all reasonable efforts given the practical realities of investigation work, including by having in place the necessary resources, to ensure that on-site and other relevant evidence is collected promptly and with sufficient thoroughness to secure the evidence and to eliminate or minimise any risk of omissions that may later undermine the possibilities of establishing liability and of holding the person(s) responsible accountable. The obligation to collect evidence ought to apply at least until such time as the nature of any liability is clarified and the authorities are satisfied that there are no grounds for conducting or continuing a criminal investigation" (see paragraph 162 of the main judgment). And the Court has concluded in paragraph 163 that "once it has been established by the initial investigation that the life-threatening physical injury has not been inflicted intentionally, the logical consequence ... is to regard the civil remedy as sufficient and this regardless of whether the person presumed responsible for the incident is a private party or a State agent."

Turning to the facts of the case at hand, it is important to note that immediately after the traffic accident, the police carried out an on-site investigation, took measurements and photographs, produced a detailed description of the site of the accident, identified the drivers involved in the

incident and collected blood samples. It also took statements from some of the passengers of the vehicles involved in the incident, and within the next two days took statements from the remaining passengers and the drivers of the vehicles involved in the accident. It requested and later received forensic expert reports (see paragraphs 15-18). Thus one could clearly draw the conclusion that the domestic authorities met their obligation "to ensure that on-site and other relevant evidence is collected promptly and with sufficient thoroughness to secure the evidence and to eliminate or minimise any risk of omissions that may later undermine the possibilities of establishing liability". Subsequent forensic reports and additional questioning of the witnesses excluded any doubts that "the life-threatening physical injury has not been inflicted intentionally". It is further important to note that this process was completed within one year, with the prosecutorial decision of 5 December 2005 (see paragraph 23).

Following the logic of the principles developed in paragraphs 158-163 of the present judgment, already at this point, one year after the accident, the respondent Government had met its procedural obligations under Article 2. It had collected all the relevant evidence and established that the accident had not been the result of intentional actions. It had also established that the accident did not belong to the very rare category of cases in which the negligent actions were of such gravity and had such serious consequences in terms of loss of life that criminal prosecution was still required (see *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII; and for a more general description of the case law paragraph 160 of the present judgment).

The subsequent seven and more years of investigations and appeals in the present case were no longer about collecting new evidence but about the manner in which the collected evidence was to be interpreted. The applicant's subsequent requests concerned new expert opinions and his appeals sought to establish whether the evidence would allow the conclusion that one of the other drivers has acted negligently and whether this could have constituted a crime under national law. While this additional period of seven years was part of the same domestic criminal proceedings, it does not need to be included for the purposes of the Court's analysis under Article 2. They are the result of a deliberate choice by the applicant to pursue the criminal remedy, rather than file a separate civil action before the civil courts.

For the applicant, a separate civil action before the civil courts was a remedy which would have "addressed his essential grievances" (see *Micallef*, cited above, § 58). The legitimate grievance which the applicant had under the Convention concerned access to a procedure in which liability for the injuries which he had sustained could be established and damages

awarded. One could legitimately argue that a separate civil action was better suited to resolving the applicant's grievance under the Convention, as it would have addressed and decided it with a final, binding judgment. Instead, the procedure engaged by the applicant had a different primary purpose, namely the establishment of criminal liability, and as a result it focused on this primary purpose and never properly addressed the applicant's Convention claim. Indeed, with its present approach of absolving the applicant from his obligation to file a separate civil action, the Court is giving precedence to criminal remedies over civil ones. In addition to the above-mentioned concern that the Court might be unjustifiably limiting national legal systems in managing their resources and deciding when and for what behaviour to employ criminal liability, there is also another concern: namely, that the Court might be helping to "criminalise" a field of law which might well be better dealt with by means of tools other than criminal proceedings with their focus on individual criminal responsibility and punishment, enhanced procedural safeguards and high standard of proof.

In conclusion, as the national authorities did indeed honour their initial obligation to collect the relevant evidence, and the applicant had a clear possibility under national law to file a separate civil action for damages, this was an effective remedy which could have addressed his essential grievance, and the applicant should have availed himself of it.