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AMICUS BRIEF SUBMISSION

ON REOPENING OF CRIMINAL PROCEEDINGS FOLLOWING A EUROPEAN COURT OF HUMAN RIGHTS FINDING OF BREACH OF FAIR TRIAL GUARANTEES IN THE CASE OF LASKA AND LIKA v ALBANIA

(Applications no. 12315/04 and 17605/04)

Open Society Foundation for Albania (OSFA) and Albanian Helsinki Committee trying to help Albanian Supreme Court in examination of the request of applicants Lika and Laska for review of their final decision Request No. V-110, dated on 19.11.2010, are introducing this legal opinion about the legal possibilities that the Albanian legal system provides for the reopening of concluded criminal proceedings, after the finding by the ECHR of violations of fair trial foreseen in Article 6 § 1 of the European Convention of Human Rights.

By its decision dated 20 April 2010, the European Court of Human Rights (hereinafter "the Court") found Albania in violation of Article 6 § 1 of the Convention regarding the unlawful collection and assessment of crucial evidence (consisting of eye-witnesses depositions) that was relied upon by the domestic courts in order to find the applicants guilty. In paragraphs 73-77 of its judgment, the Court considered that the Albanian authorities should adopt all necessary measures in order to rectify the violations and provide redress for the breach of the applicants' rights, pursuant to Article 46 of the Convention. More specifically, the Court stated that:

> " In the instant case, the Court found that the applicants' right to a fair trial had been seriously breached by the domestic authorities … [paragraph 75] [the Court therefore] considers that, in the instant case, a retrial or the reopening of the case, if requested by the applicant represents in principle an appropriate way of redressing the violation. This is in keeping with the guidelines of the Committee of Ministers, which in Recommendation No. R (2000) 2 called on the States Parties to the Convention to introduce mechanisms for re-examining the case and reopening the proceedings at the domestic level, finding that such measures represented "the most efficient, if not the only, means of achieving *restitution in integrum*"[1].

As noted by the Court, the Albanian criminal legal system does not explicitly provide for a possibility of re-examination of cases, including the reopening of domestic proceedings, in the event of the Court's finding of a serious violation of an applicant's right to a fair trial. According to the provisions of Article 450 of the Albanian Criminal Procedure Code (hereinafter CrPC), a request for review of a final judgment might be entertained only when:

[1] *Lika and Laska v. Albania,* op. Cit., paragraphs 74-75.

a) the facts of the grounds of the sentence do not comply with those of another final sentence;
b) the sentence is relied upon another civil court decision, which after has been revoked;
c) after the sentence new evidence have appeared or have been found out, which solely or along with those ones evaluated, prove that the sentenced is guilty;
d) it is proved that the conviction is rendered as a result of falsification of acts of the trial or of another fact provided by law as a criminal offence.

The provisions of Article 450 of the Criminal Procedure Code (hereinafter CrPC) do not explicitly envisage (though neither do they exclude it *expressis verbis*) the possibility of reopening domestic proceedings following a judgment adopted by the Court. This is for example the case under Article 494, point "ë" of the Civil Procedure Code (CPC) or Article 42, point "ç" of the Law no. 10193, dated 03.12.2009 "On the jurisdictional relations with foreign authorities in criminal matters" for the purpose of extradition. Moreover, adopting a legislative amendment to the CrPC providing for the reopening of proceeding, as required by Article 46 of the Convention and the Court's judgment (and in analogy with the corresponding provision of the CPC) is currently impossible due to the political stalemate between the two major parties in Parliament. This situation has impeded the adoption of important draft laws that require a qualified majority of the votes of the members of Parliament, including the new Codes.

The impossibility of swift implementation of the Court's judgment in the instant case is contrary to the jurisprudence of the Court and calls for the adoption of measures by the Albanian judicial system in order to fill in the vacuum caused by the non-existence of relevant legislation. In its judgment in the case of *Vermeire v. Belgium*, the Court held that: "… The freedom of choice allowed to a State as to the means of fulfilling its obligation under Article 53 (art. 53) cannot allow it to suspend the application of the Convention while waiting for such a reform to be completed [...]"[2] Similarly, it should be noted that according to Recommendation Rec(2004)5 of the Committee of Ministers to member states *On the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights,* such verification might also take place "…within the framework of court proceedings brought by individuals with legal standing to act or even by state organs, persons or bodies not directly affected (for example before the Constitutional Court)"[3]. Moreover, the authors of the present submission cannot but highlight the groundbreaking decision by the Albanian Constitutional Court regarding the constitutionality of the death penalty, where despite the absence of a clear legal provision to the effect that the imposition of the death penalty was illegal as well as the non-ratification by Albania of the relevant Protocol to the Convention, the Constitutional Court declared that the death penalty was contrary to the Albanian Constitution and not only urged the legislative branch of the state to take the necessary measures to formally abolish it, it also declared it non-applicable pending the adoption of such

[2] Appl. no. 12849/87, paragraph 26.
[3] At paragraph 28.

legislation.[4] The authors consider that the interpretative approach adopted by the Constitutional Court in that case should be adopted by the Court hearing Mrs. Laska and Lika request for reopening of the proceedings.

As a result of the obligations incumbent on a state under Article 46 of the Convention as well as the principle set out in *Vermeire* judgment, the Albanian Supreme Court should explore any and all avenues available in the Albanian legal order in order to ensure that that the fair trial rights of Mrs. Laska and Lika are realized in practice in accordance with the relevant legal principles. In this context, we consider that the Albanian legal system offers several options which can be used cumulatively.

I

The implementation of the European Convention of Human Rights and of the Albanian Constitution in addition to the gaps of Albanian normative system

According to Articles 116 and 122 paragraph 1 of the Albanian Constitution, the European Convention supersedes ordinary legislation and is directly enforceable by Albanian courts. The similarities in the formulation of the various human rights and freedoms laid down in both the European Convention and the Albanian Constitution constitutes further evidence of the close resemblance these two texts bear. In addition, Article 17 paragraph 2 of the Constitution expressly determines the status of limitations on the rights provided by the Convention and provides that the right to a fair trial cannot be subjected to restrictions other than those set by the Convention and arising from the Court's jurisprudence.

It is true that Article 6 § 1 of the Convention does not provide for the reopening of judicial proceedings that have been concluded at the domestic level with the delivery of a final decision; Albanian courts cannot arguably therefore premise the reopening of criminal proceedings on this article. On the other hand however, when confronted with a legal vacuum, Albanian courts are under the obligation flowing under Article 46 of the Convention to provide a legal remedy with a view to reviewing final decisions, thus making possible the execution/enforcement of Court decisions and the realization in practice of the rights, in consonance with the Court's jurisprudence. It is therefore submitted that the principle that courts may not refuse to administer justice solely due to the absence of a relevant legal provision should be given a broader meaning, and should also be extended to encompass the reviewing of final decisions, following a finding by the Court of a violation of the right to a fair trial. This obligation directly derives from the Convention and serves as a basis to create an appropriate legal remedy to respond to the problematic situation. It should also be noted that the Albanian State does not dispute the necessity of amending the Albanian Criminal Procedure Code in order

[4] See Decision No. 65, 10/12/1999.

to allow for the re-opening of the proceedings following a judgment of the Court to that effect – indeed it has informed the Committee of Ministers that it plans on introducing the necessary legislative amendment by early 2012[5].

The individual rights and freedoms, as well as restrictions of the rights and freedoms, contained in the Albanian Constitution and the European Convention are analogous; indeed, it appears that any violation of the European Convention will also constitute a violation of the Albanian Constitution. Consequently, redress for violations of the Convention at the same time entails correction of violations of the Constitution. Following the Court's judgment in the case of *Barbera et al. v. Spain*[6] and despite the non-existence of a domestic law to that effect, the Spanish Constitutional Court decided to review the final domestic decision that constituted *res judicata,* arguing that leaving in force a judicial decision tainted by serious procedural violations was in conflict with the domestic constitutional order.[7] Similarly, both the Court (in two 2004 judgments in the cases of *Maestri v. Italy* and *Asanidze v. Georgia*) and the Council of Ministers (in its Recommendation No. 6/2004 *On the improvement of domestic remedies*) opined that states are under an obligation to amend their domestic legislation, in order to prevent future violations of the Convention and to execute judgments delivered by the Court. In cases of absence of pertinent legislation, amendment of the domestic law implies the institution by the courts of a judicial remedy. To illustrate the point, recently, following the Court's judgment in the case of *Brusco c. France* (appl. no. 1466/07, judgment of 14 October 2010) where the non-access to a lawyer during the first hours of detention and the requirement for the defendant to take an oath before testifying were held to constitute violations of Article 6, the Plenary Assembly of the French Supreme Court decided to give immediate effect to the Court's judgment regarding the immediate access to a lawyer although the relevant legislation had not been amended. Echoing the Spanish Constittutional Court's dicta in *Barbera et al v. Spain,* the Plenary considered that

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[5] See the Albanian Government's Action Plans submitted to the CoM regarding the cases of *Berhani v Albania,* appl. no. 847/05, available at http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/Info_cases/Albanie/DD(2011)314.pdf paragraph 8, *Caka v. Albania*, appl. no. 44023/02 available at http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/Info_cases/Albanie/DD(2011)313.pdf , paragraph 7 and *Xheraj v. Albania,* appl. no. 37959/02, available at http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/Info_cases/Albanie/DD(2011)131rev.pdf paragraph 15. In all three submissions, the Albanian Government made an identical assertion to the effect that: "The Albanian authorities have taken initiative to amend the Criminal Procedure Code so as to foresee that ECtHR judgments finding violations constitutes a legal ground for reviewing domestic courts' final decisions. Albanian Ministry of Justice is the authority in charge for drafting such amendment. Further, Albanian Council of Ministers must adopt this amendment *(by the last quarter of 2011)*. Thereafter, the amendments shall be approved to the National Assembly to become law."

[6] Appl. no. 10590/83.

[7] See Council of Europe Committee of Ministers document entitled *Examples of requests for the reopening of proceedings in order to give effect to decisions by the European Court of Human Rights and the Committee of Ministers*, Ref.H(99)10rev., available at http://www.coe.int/t/dghl/monitoring/execution/Documents//Reopening_en.asp page 3.

"les Etats adhérents à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales sont tenus de respecter les décisions de la Cour européenne des droits de l'homme, sans attendre d'être attaqués devant elle ni d'avoir modifié leur législation"[8].

Article 44 of the Albanian Constitution provides that: "Everyone has the right to be rehabilitated and / or indemnified in compliance with the law if he has been because of unlawful act, action or failure to act of the state organs." Since the organs of public power are obligated to respect human rights and fundamental freedoms, as well as to contribute to their realization (Article 15 paragraph 2 of the Constitution), and since the law constitutes the basis and boundaries of activity of the state (Article 4 of the Constitution), judicial errors that are in violation of these rights cannot remain in force in a democratic constitutional order and therefore the principle *res judicata* does not obtain.

Under Article 5 of the Constitution, the Albanian state applies international law which is obligatory for it. In this context, the Vienna Convention regarding the observance, application and interpretation of international treaties (including the ECHR) obliges member countries to implement them conscientiously, providing in Article 27 that: "A party may not use the provisions of domestic law as justification for his inability to implement a treaty." In this sense, the courts must respect the norms of the International Covenant on Civil and Political Rights, which is part of the Albanian normative system (Albania acceded to the ICCPR by virtue of Law no. 7510, dated 08.08.1991). Article 14 paragraph 1 section 6 of the Covenant lays down that a final criminal decision may be reviewed if any new circumstances or newly discovered facts conclusively prove that there has been a miscarriage of justice. Indeed the Covenant does not formally oblige state parties to enact provisions for the review of final criminal decisions, but it provides an important element that can constitutes a cause for review of a decision: **a new circumstance** along with the **newly discovered circumstance**, distinguishing between facts occurring **prior to the final decision making** (as Article 450/c of CrPC and Article 494/a of CPC foresee) and facts that occurred **after it**. A new circumstance established *a posteriori* and that proves the judicial error is no doubt a finding of a violation of the Convention by the Court (see section IV of this opinion).

II

Application of Article 494/ë of Civil Procedure Code (CPC) by analogy to criminal proceedings

Should it be accepted that the judge cannot reject a claim invoking lack of a pertinent legislative provision then he is obliged to overcome or to fill in the legal vacuum. This can be

[8] French Supreme Court Press Release, 15 April 2011, available in French at http://www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/589_15_19792.html

accomplished by adopting an analogical interpretation of the law, in accordance with the principle of subsidiary enforcement of the law. In the instant case, the sphere where this principle is applied is the judicial process that, by its nature, presents similar characteristics in both the civil and criminal fields. In both cases, the purpose of the judicial process is to safeguard individual rights, in accordance with the relevant legislation. In the context of civil proceedings and regarding the issue of review of final decisions, Article 494/ë of CPC lays down the conditions under which it can effect. The analogy is a close one because it is the same procedural issue that is at stake – namely the review of final decisions. Application of Article 494/ë of the CPC by analogy in criminal proceedings aims at extending the right that individuals in the civil process enjoy to the criminal process and cannot be considered as a threat to public order and justice. On the contrary, justice requires that the violations identified by the Court be addressed and that no decision contrary to the constitutional order be allowed to stand. The principle of *res iudicata* is not absolute in the sense that it cannot take precedence over or be equated with the maxim *fiat iustitia pereat mundus*. If that were the case, then Court decisions would be deprived of any real effect, thereby rendering the remedy illusory and the rights of individuals mere proclamations on paper.

According to the principle of analogical interpretation therefore, the failure of a domestic court, following a finding by the Court of violation of fair trial guarantees, to review a final decision, violates the principle of equality before the law and the courts. Individuals cannot be discriminated against in the enjoyment of the rights solely on the basis of the nature (civil / criminal) of their legal action. Should the review of final decision that produces *res iudicata* effect be available in respect of civil proceedings, where often interests of third parties who have not had a chance of taking part in the proceedings in order to safeguard their rights are affected, it is imperative to provide the same recourse in criminal cases where the individual rights and interests at stake are considerably more significant.

III

Interpretation of the Constitutional Court practice

A practical way of circumventing the non-provision by Article 450 of CrPC of a possibility of reviewing a final criminal decision following a Court finding of a violation of the right to a fair trial lies in following the jurisprudence of the Constitutional Court regarding the control of judicial matters under Article 131 paragraph “f” of the Constitution. For many years, the Constitutional Court has been exercising constitutional control over final judicial decisions adopted by the Supreme Court, at times holding that cases should be remitted for retrial.

According to Article 135 of the Constitution, the judicial power is exercised by the Supreme Court, the Appeal Courts and the district courts. Although the Constitutional Court is also a judicial body, it reviews cases in terms of constitutional principles and in accordance with

specific criteria; as a result it is not considered to be a part of the ordinary judicial system. Thus the Constitutional Court is not a fourth instance court in judicial proceedings and, consequently, the decisions of ordinary courts take their final form within the ordinary judicial system (at the first instance level when there in not a complaint, at the appellate level on the appeal or in the Supreme Court after a recourse, as applicable). The extraordinary jurisdiction of the Constitutional Court is set out in article 131 paragraph "f" of the Constitution that provides for the exhaustion of all available ordinary legal remedies before filing a constitutional complaint. In several decisions the Constitutional Court has clearly stated that its task: "... is not to solve a concrete question, but to identify issues of constitutional nature ... " and that it "can assess the way of interpreting and applying the law, issues that, in principle, fall within the jurisdiction of the courts of the ordinary judicial system, in cases where the constitutional rights of individual for a fair trial are breached" because: "... control exercised by this court ... is a subsidiary control"[9]. In an early decision, the Constitutional Court clearly stated that: "... those court cases introduced by individuals alleging violations of their rights after the court decision has taken final form and when there are no more legal means and ways to protect these rights, can be subjected to examination before the Constitutional Court." In this way the Constitutional Court established itself in the position of a judicial body, with the mandate of reviewing final criminal decisions.

The quashing of final decisions by the Constitutional Court is another confirmation of the effectiveness in practice of constitutional recourse requesting review of a final decision on grounds of violation of the right to a fair trial. The Supreme Court has judged many such cases after the remittal of the case by the Constitutional Court. If the Constitutional Court may constitutionally review the final decisions of ordinary courts on the basis of the principles of the Constitution and the jurisprudence of the European Convention of Human Rights (which in the terms of human rights are almost identical), the Supreme Court equally should not be legally prevented from reviewing the merit of the case. Constitutional principles and jurisprudence of Strasbourg Court are equally valid and binding for the Supreme Court. If the Supreme Court reviews final criminal decisions after the Constitutional Court decision, then it must review such decisions also following a Court decision. Constitutional practice has created a legal remedy for this purpose; it just remains for the Supreme Court to exercise it. It is neither efficient nor justified from a human rights standpoint, for individuals who have secured a positive judgment from the Court, to then turn first to the Constitutional Court and only after that for the issue to be remitted to the Supreme Court for review. Moreover, only the ordinary courts have the power to conclusively decide on the review issue. In this regard, the German Constitutional Court, quashing the Naumburg Regional Supreme Court, which argued that Court decisions are binding only on the then Federal Republic of Germany as a subject of public international law and not for the courts, decided that the Court judgments are equally binding on German courts.

[9] Decision no.16, dated on 16.04.2010, paragraph 1, Decision no.36, dated on 10.11.2010.

With its decision No 21 dated 29.4.2010, the Constitutional Court quashed decision No. 14, dated 03.10.2008, of the Criminal College of the Supreme Court as unconstitutional and remitted the case for review to the Supreme Court. The Constitutional Court held that: "The claim of the applicant to be present at the hearing session of the Court ... is linked with ... the possibility that the parties should be given in order to respect the right to retrial ... "(paragraph 21). The case concerned a trial *in absentia* and the right of the convicted defendant to request a re-trial after his extradition following a final guilty verdict. The possibility of a re-trial in that case was explicitly provided by the European Convention on Extradition and, in light of the absence of domestic legislation at the time,[10] an issue arose regarding the implementation of international agreements that under Article 122 of the Constitution enjoy superior legal status. The Constitutional Court seized the opportunity and not only considered that the possibility of creating a legal remedy (in the absence of pertinent legislation) for the review of final criminal decisions can be drawn from a set of norms of international agreements to which Albania is a member (and therefore also from the Court's jurisprudence), but also that "... examination of the existence or not of legal grounds for review of the decision ... [and] ... the interpretation of constitutional concept of direct implementation of international agreements ... is in the assessment of Criminal College of Supreme Court ... " (paragraphs 21-22). Lower courts such as the Supreme Court subsequently adopted this approach and order the reopening of final criminal proceedings where a violation of the right to free trial has subsequently been ascertained.[11]

Another reason for providing for the review of final decisions can be identified when the Constitutional Court strikes down a law or a legal provision that has served as the legal basis of a previous domestic court decision. Although not foreseen under Article 450 of the CrPC, its review effect is provided for in Law No. 8577/10.01.2000 "On organisation and functioning of the Constitutional Court of the Republic of Albania", article 76/2-a of which provides for the retroactive effect of a Constitutional Court decision in relation "to a criminal conviction even while it is in force, if it relates to the implementation of the repealed law or normative act". In these cases, the Supreme Court has both the legal mandate as well as the obligation to review the final criminal decision, as giving retroactive effect to the decision of the Constitutional Court cannot be accomplished except through the criminal decision's review. The conclusion is that the review of such decisions cannot be exclusively premised on Article 450 of CrPC but rather on legislation in its entirety and in its constructive interpretation. By its nature, a finding of violation of the right to a fair trial by the Court has retroactive effect, because it affects decisions issued by national bodies; this effect however must be transmitted through a domestic legal remedy that may be provided by an act, a decision of the Constitutional Court or a decision (based on an

[10] Law No. 10193/03.12.2009 "On the jurisdictional relations with foreign authorities in criminal matters" which provides that the person under extradition has: "the right of review of judicial decision granted to him" was enacted at a later date than decision No. 14/03.12.2008 of the Criminal College was issued

[11] According to the decision no. 812, of the Criminal College of the Supreme Court dated on 17.09.2010.

interpretative construction) of the Supreme Court. It is submitted that when the law is silent, courts should take action.

IV

Interpretation of paragraph "c" of Article 450 of the CCP

Adopting an alternative interpretation of paragraph "c" of Article 450 of the CrPC and more specifically of the terms "have appeared" and "evidence" might constitute another way of filling in the legal vacuum. This paragraph provides for a review of a final decision: *c) when after the sentence has appeared or has been found out which solely or along with those ones prove that the sentenced is not guilty."* Aware of the meaning accorded to the term "new evidence" in the Albanian legal theory and practice, only new facts and not laws / decisions can qualify as "new evidence", we have placed this option last. Moreover, the prevailing interpretation of the provision stipulates that these facts must have existed before the delivery of the final decision, but they were not and could not be known.

However, a different reading of this provision is possible. Article 450 refers to evidence that "has appeared" or "has been discovered". These phrases do not carry the same meaning: evidence that "has appeared" means that it existed prior to the decision but was discovered later, and the emergence of new evidence usually means a fact that occurred after the decision. This change of meaning is based on the interpretive rule that the law does not use synonyms but each term has specific legal meaning. If that is the case, then it remains to ascertain whether a Court decision can constitute new evidence or a new fact.

Legal theory and practice concur that an act or a decision can be considered as a legal fact or evidence depending on the context of the case. An individual act of implementation can constitute a legal fact that might give rise to, modify or conclude legal relationships. It is clear that such acts may be used as evidence. This is especially so when judicial decisions are binding on other courts, i.e. when a final criminal decision is admitted as irrefutable evidence or fact in civil proceedings and vice versa. In this sense, the Court decisions constitute new evidence or a judicial fact, which **has emerged after the final decision** of the Albanian criminal court. Indeed, even the Court has considered that at least in certain cases a new judicial decision might constitute a "new fact"[12].

[12] See *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], appl. no. 32772/02, judgment of 30 June 2009, paragraph **Error! Main Document Only.**: "However, it cannot be said that the powers assigned to the Committee of Ministers by Article 46 are being encroached on where the Court has to deal with relevant new information in the context of a fresh application. Furthermore, in the instant case the Committee of Ministers, by adopting Resolution ResDH(2003)125, ended its supervision of the execution of the Court's judgment of 28 June 2001, although it had not taken into account the Federal Court's judgment of 29 April 2002 refusing the applicant

Should this interpretation be valid, then article 450/c of CrPC is applicable in the instant case. This interpretation agrees with Article 14 paragraph 6 of the International Covenant on Civil and Political Rights that also foresees the review of final criminal decisions: "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed … on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice..". As under article 122 of the Albanian Constitution, the Covenant has superior legal status, it should either be applied directly or the interpretation of Article 450 paragraph c of the CrCP by the Supreme Court should be in compliance with its rules and spirit.

Instances of such an interpretation are not lacking in the practice of Member States to the Convention. Thus, the decision of the European Commission of Human Rights (as it then was before the entry into force of Protocol 11 in 1998) in the case of *Samakova v. Slovakia* was considered by the respondent Government as a "new fact" (Report 15/01/1997). Similarly, the review of Damish domestic court findings of the violation of the Convention in the case of *Jersild v. Denmark* (GC, no 15890/89, judgment of 23/09/1994) was done in conformity with Article 441 of the Danish CrPC that provided for the review of final decisions in cases of "special circumstances indicating that evidence was not properly evaluated." In the case *Kerojârvi v. Finland* (no. 17506/90, judgment of 19/07/1995) the review procedure was based on an expansive interpretation of Chapter 31, Section 1 of the Finnish Code of Judicial Procedure that provided for review due to "manifestly unfair application of the law". Interesting is the solution that was given to the issue of *Van Mechelen and Others v. the Netherlands* (nos. 21363/93, 21364/93, 21427/93 and 22056/93, judgment of 23/04/1997); the domestic legislation did not provide for the review of a domestic decision. Nevertheless, the Minister of Justice ordered the release of the applicants from prison and the striking out of the reference to their conviction from their penal record. These examples show that the high courts of these states, in the absence of direct provisions to review domestic decisions following Court judgments, have overcome the situation through constructive interpretation of existing provisions[13].

More recently, when interpreting domestic law regarding the review of final criminal decisions, the Supreme Court of Estonia with its decision 3-1-3-13-03, dated 06.01.2004 stated that: "The Supreme Court *en banc* is thought that even a broad interpretation of the causes for review and correction of judicial errors, as provided in the Appeal Code of Criminal and Cassation Procedure Court, does not allow a retrial of the criminal case after the decision of the European Court of Human Rights." And further, by applying directly the Convention, it stated

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association's application to reopen the proceedings, since the Government had not informed it of that judgment. **From that standpoint also, the refusal in issue constitutes a new fact. If the Court were unable to examine it, it would escape all scrutiny under the Convention**." Emphasis added.

[13] All the examples mentioned in this paragraph are available at the Council of Europe Committee of Ministers document entitled *Examples of requests for the reopening of proceedings in order to give effect to decisions by the European Court of Human Rights and the Committee of Ministers,* Ref.H(99)10rev., op. cit.

that:" ... the reopening of the proceedings would be justified only in case of a continuing and substantive violation and only if it would restore the legal status of the person. Need to reopen the judicial proceedings must overcome legal certainty and possible violations of the rights of other persons in the retrial of the case. Moreover, a prerequisite for review of a decision entered into force is that should not be other effective means to repair the violation".

It should also be noted in this respect that both the Albanian State and the General Prosecutor's Office seem to espouse the above mentioned interpretative approach to Article 450 CrCP. As noted in paragraph 49 of the judgment, both entities[14] consider that the applicants could file a request for the reopening of the criminal proceedings in accordance with the provisions of Article 450 CrCP[15]. The Albanian Government would reiterate their argument to that end in their submission in the *Shkalla v. Albania* case.[16] More importantly, in their 7 June 2011 submission to the Committee of Ministers, the Albanian Government approvingly referred to the recent Constitutional Court judgment No. 20, dated 1 June 2011 that related to the possibility of reopening proceedings following the Court's judgment in the Xheraj case. According to the Constitutional Court, "…that subject to article 450/1/a is considered not only the decisions given by domestic courts of Republic of Albania, but also decisions of foreign international courts, according to article 10 of Criminal Procedural Code which explicitly imposes the court to implement the provisions of international treaties where Republic of Albania is member party"[17]. The Committee of Ministers expressed its satisfaction over this development that provides the claimants with a legal basis to request the reopening of the proceedings, pending the relevant legislative amendment[18].

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[14] Under Albanian law, courts can take into consideration undertakings made by state institutions. In the case of Florian Mece, decision of the Criminal College of the Supreme Court no. 812, dated 17.9.2010, the court based its decision on the following two points: a) the undertaking of the Ministry of Justice according to Law no. 10193, dated 03.12.2009 "On jurisdictional relation with foreign authorities in criminal cases" and b) that granting the request was not explicitly prohibited by law. Both elements are present in the instant case: thus both the Albanian Government and the Prosecutor's Office have expressed their belief that the reopening of the proceedings is not illegal and article 450 of the Criminal Procedural Code can be construed to that effect.

[15] Paragraph 49 of the judgment reads as follows: ". In their further comments on the applicants' observations, the Government submitted a GPO's letter of 16 April 2008 stating that "following verifications of the [applicants'] criminal investigation file, procedural irregularities were observed in the conduct of some investigative actions." The Government contended that the applicants should be required to seek a review of their final judgment in accordance with Article 450 of the CCP, in the light of the prosecutor's letter."

[16] No. 26866/05, judgment of 10 May 2011, paragraph 55.

[17] Action plan / action report - Communication from Albania concerning the case of Laska and Lika against Albania (Application No. 12315/04) , DH-DD(2011)434rev, date 7 June 2011, available at https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1856839&SecMode=1&DocId=1748336&Usage=2, paragraph 19.

[18] Decision by the Council of Europe's Committee of Ministers, 1115th meeting, 8 June 2011, available at https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM/Del/Dec%282011%291115/1&Language=lanFrench&Ver=original&Site=DG4&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679

Whereas the Court rejected these arguments in both cases, it is interesting to examine the reasons for doing so. It should be noted at the outset that the Court did not consider that there was something in the wording or the purpose served by the article that rendered it ineffective in the circumstances of the case; rather it considered that Article 450 CrCP lays down a remedy that is of an extraordinary nature and hence the applicant is not required under Article 35 of the Convention to exhaust it before filing his / her application with the Court[19]. In other words, the Court rejected the Government's argument by invoking its procedural rules that your Court is not under any obligation to embrace and adopt, though it does need to be mentioned that an element that the Court took into consideration was the rationale of the Supreme Court Joint Benches judgment no. 6 of 11 October 2002, where the latter held that an application under Article 450 CrCP constituted an "extraordinary remedy".

In light of the above, the claimants consider that there are no conceptual or legal obstacles in either the Albanian legal order of the Court's jurisprudence preventing your Court from holding that following a judgment by the European Court ascertaining a violation of the right to a fair trial protected under Article 6, the applicant has the right to file an application under Article 450 CrCP in order to have the tainted criminal proceeding reopened and his case heard *de novo.* In this respect, the claimants note that the Court has been willing to accept that even a judicial practice that at first glance does not seem to constitute an effective remedy, it may, with the passage of time and the accumulation of a substantive body of jurisprudence, ultimately be considered an effective one that needs in principle to be exhausted[20].

Perhaps more importantly for present purposes, the Court considered in an earlier case that even that, given the importance of the issue at stake (namely abortion) for the Irish society and the fact that the domestic legislative framework, including the Irish Constitution, placed

[19] See e.g. the *Laska* judgment, paragraphs 50 - 51: "The Court reiterates that an application for retrial or similar extraordinary remedies cannot, as a general rule, be taken into account for the purposes of applying Article 35 § 1 of the Convention (see also, *Williams v. the United Kingdom* (dec.), no. 32567/06, 17 February 2009) […] The Court notes that the review of a final court judgment pursuant to Article 450 of the CCP constitutes an extraordinary remedy (see paragraph **Error! Reference source not found.** and above). In these circumstances, the Court considers that the applicants are not required to exhaust this remedy."

[20] See Gorou v. Greece (no. 2) [GC], appl. no**.** 12686/03, judgment of 20 March 2009, paragraphs 32 and 34: "In this connection, the Court reiterates that it has always attached a certain importance to judicial practice in the context of Article 6 § 1. Thus, in its case-law on equality of arms, it has often taken judicial practice into account in examining the compatibility of domestic law with Article 6 § 1. It did so in particular in its *Reinhardt and Slimane-Kaïd v. France* judgment (31 March 1998, § 106, *Reports of Judgments and Decisions* 1998-II), where it took the view that the practice of sending notes to the court in deliberations could remedy the parties' inability to respond to the advocate-general's submissions, provided the latter informed the parties' lawyers of the tenor of his submissions before the day of the hearing […] Having regard to the foregoing, the Court considers that it would be more faithful to the reality of the domestic legal order to take into consideration the practice in question and to accept that the applicant's request to the public prosecutor was a logical part of her challenge to the judgment in which her claim for compensation as a civil party had been rejected. In other words, her request to the public prosecutor at the Court of Cassation was made in the same context and pursued the same aim as her previous application to be joined to the proceedings as a civil party."

emphasis on the rights of the foetus and circumscribed the cases where abortion could be procured, the Court considered that since there was nothing in the wording of the relevant Constitution article that would deprive her action of any prospect of success, the applicant should have filed a constitutional complaint, regardless of the fact that indeed, domestic jurisprudence and legal doctrine and tradition made it hardly likely that her action would be successful[21].

Your Court should also take into consideration the fact that, given the political stalemate in Albania, it is unlikely that the relevant amendments to the CrPC will be introduced within a short period of time. At the same time, the number of cases pending before the Committee of Ministers and raising similar issues with the ones in the present submission is increasing. Thus in addition to the Laska / Lika case, there are currently four such cases before the Committee (*Xheraj v. Albania*, no. 37959/02, *Caka v. Albania*, no. 44023/02, *Berhani v. Albania* no. 847/05 and *Shkalla v. Albania*, no. 26866/05) while more cases might be added in the future. Any delay therefore in introducing the relevant amendments will have an adverse impact on an increasing number of individuals (thus for example the applicants in the cases of *Caka* and *Berhani* are still serving their sentences while the applicants in the cases of *Xheraj* and *Laska and Lika* will not be able to for example obtain a clean criminal record in order to be able to search for employment in order to reintegrate into society) and might lead the Committee to take measures against Albania, such as for example the issuing of a strongly worded recommendation, as it already has done in the case of Turkey.[22]

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Summarizing, the authors of the present submission consider that the review of final criminal decisions following a finding of violation of the Convention does not destabilize the judicial system and legal order. Such a review does not have an automatic effect but effectively remits the case to the domestic court for a fresh consideration of the degree and nature of the violation. Just as not every procedural violation entails a review of the decision issued in connection with criminal proceedings, similarly not every finding of a violation by the Court can

[21] *D. v. Ireland* (decision), appl. no. 26499/02, paragraphs 92 and 102: "The Court finds that, if the question of whether Article 40.3.3 excluded an abortion in the case of a fatal fetal abnormality was novel, it was, nevertheless, an arguable one with sufficient chances of success to allow the initial burden on the Government to be considered satisfied. Accordingly, on 25 January 2002 a legal constitutional remedy was in principle available to the applicant to obtain declaratory and mandatory orders with a view to obtaining a lawful abortion in Ireland […] In sum, the Court finds that there was a constitutional remedy in principle available to the applicant but that some uncertainty attached to three relevant matters arising from the novelty of the substantive issue and the procedural imperatives of the applicant's position - the chances of success, the timing of the proceedings and the guarantees of the confidentiality of the applicant's identity."

[22] See Interim Resolution CM/ResDH(2007)150 on the execution of the judgment of the European Court of Human Rights Hulki Güneş against Turkey, available at https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM/ResDH(2007)150&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

and should lead to quashing of a final decision sentencing or acquitting the defendant or lead to a mitigation of his / her sentence.

It is to be recalled that the Supreme Court ‘s Selection College may entertain a request for review only in relation to:

a) those violations that are of a nature to raise serious doubts regarding the equitable nature and the well-foundedness of the decision and
b) those violations that have very onerous consequences to the complainant and cannot be redressed solely through monetary compensation.

Thus for example a finding by the Court of a violation of Article 6 § 1 of Convention on grounds of excessive length of proceedings does not cast doubts on the merits of the decision, whereas a finding of violation regarding fair trial issues such as the lack of judicial protection or equality of arms, should lead to the review of the process, whose outcome will depend on the concrete circumstances of the case.

In the instant case of *Laska and Lika vs. Albania*, the violations ascertained by the European Court of Human Rights in the proceedings against them are of a serious nature; the applicants’ guilt and resulting conviction were predominantly based on evidence gathered in an unlawful way and in flagrant violation of the relevant CrPC provisions. The above constitute a serious reason for the review of the final decisions issued against them.

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