The Place and Application of International Law in the Albanian Legal System

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1 Introduction

This chapter aims to explore and analyse the place of international law in the Albanian legal system and its application by Albanian courts. First, the chapter addresses the status of international law under the 1998 Albanian Constitution and its interaction with other sources of law within the Albanian legal system. Subsequently, a number of important domestic cases are analysed so as to illustrate the approach taken by Albanian courts towards international law. The chapter focuses on issues concerning the place and application of human rights, European law, and international criminal law and related mechanisms in the Albanian legal system.

2 The Place of International Law in the Albanian Legal System

The place of international law in the Albanian legal system is regulated in some detail by the Albanian Constitution,[1] the supreme law of the land.[2] Article 5 of the Constitution stipulates that 'the Republic of Albania applies international law that is

[1] Constitution of the Republic of Albania (The Constitution), Law No. 8417, 21 October 1998, as modified by Law No. 9675, 13 January 2007 and by Law No. 9904, 21 April 2008.

[2] Article 4 of the Constitution.

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binding upon it'.[3] Albanian scholars have debated the exact scope of the term 'international law'. Some of them have opted for a narrow interpretation of the provision, claiming that it should be read in conjunction with other provisions regulating the incorporation of treaties in internal legislation. Others have opposed this view. They state correctly that the term 'international law' does not refer only to such treaties that may be in force between Albania and other subjects of international law, but must also include other sources of international law such as customary international law and general principles of law.[4] While at first sight, Article 5 appears to have only declaratory effects, it in fact functions as a singular and necessary link between two legal systems: international law (and Albania as a subject of it) on the one hand, and Albania's internal legislation (and international law when it becomes an integral part of it) on the other. Based on the *pacta sunt servanda* principle, this provision is the basis upon which international law enjoys a special status in Albania's internal legislation.

Part seven of the Constitution deals specifically with normative acts and international agreements. Under Article 116(1), ratified international agreements are listed immediately after the Constitution and below laws.[5] Although not explicitly mentioned in the text of the Constitution, scholars have always maintained that such an order of precedence constitutes a formal hierarchy of the sources of law in Albanian legislation for two main reasons.[6] First, Article 4 establishes the undisputed position of the Constitution as the supreme law of the land. Secondly, according to Article 122(2) 'an international agreement that has been ratified by law has superiority over laws of the country that are not compatible with it'.

It must be noted, however, that Article 116 mentions only 'ratified international agreements', whereas Article 122(2) grants hierarchical status only to those international agreements 'ratified by law'. This may raise doubts as to whether the framers of the Constitution intentionally added the qualifier 'by law' in Article 122 (2) or whether the omission in Article 116 was simply a drafting error. Such doubts are further reinforced by the Law on the Conclusion of Treaties and International Agreements, which in Article 2(b) stipulates that ratification means the 'act by which the Parliament *or* the President of the Republic gives the final approval to a

[3] Article 5 of the Constitution.

[4] See, Omari and Anastasi (2010), pp. 55–56 (quoting Zaganjori 2004, pp. 26–34).

[5] Article 16(1) stipulates: the normative acts that are effective in the territory of the Republic of Albania are:

a) the Constitution;
b) ratified international agreements;
c) the laws;
d) normative acts of the Council of Ministers (these are acts having the force of law, and are issued by the Government only during emergencies or times of crises. The Parliament, which should be convened within five days if it is not in session, must be promptly notified of such normative acts. Normative acts become void and lose effect retroactively if the Parliament fails to approve them within 45 days of their date of issuance).

[6] Omari and Anastasi (2010), p. 47.

treaty signed on behalf of the Republic of Albania'.[7] The article indicates two institutions authorised to ratify international agreements, by way of law or decree respectively. The answer to this doubt lies not in the framers' intention but is, in fact, simply technical.

Although still in force, the Law on the Conclusion of Treaties and International Agreements is not based on the current Constitution, but on the previous temporary constitutional arrangement under the Law on the Main Constitutional Provisions.[8] Article 28(10) of these previous constitutional provisions provided that the President of the Republic could also, in addition to the Parliament, ratify or denounce international treaties; the power being limited to only those which did not fall under the competence of the Parliament. However, such a prerogative has now been removed from the President's competences. Under the current Constitution, the President may only 'conclude' international agreements.[9] Therefore, it may be implied that, for the purposes of Albanian domestic legislation, 'ratification of an international agreement' means the act by which *only* the Parliament gives the final approval to a treaty signed on behalf of the Republic of Albania.[10]

In line with other European Constitutions,[11] the Albanian Constitution provides that ratification is mandatory for political treaties, such as those involving territory, peace, alliances, the military, freedoms and liberties, participation in international organisations or those involving the financial contribution of the state.[12] However, the list is not exhaustive, since the Parliament still retains discretionary power to ratify other international agreements which do not involve the abovementioned topics, but are still considered important enough to require decision-making by the Parliament.[13]

The process of ratification by the Parliament is done by law, and serves a double purpose. First, it vests the treaty with the force and solemnity of an act approved by the representatives of the people. Second, it directly incorporates it into internal legislation. A ratified international agreement becomes part of the domestic legal system after its publication in the Official Gazette.[14] It is implemented directly,

[7] Law No. 8371, 9 July 1998.

[8] Law No. 7491, 29 April 1991.

[9] Article 92(h) of the Constitution.

[10] This is not to be confused with the meaning of 'ratification' as an international act, which is usually done by the President through the signing of the instruments of ratification.

[11] Italian Constitution, Article 80; French Constitution, Article 53. Spanish Constitution, Section 93.

[12] Article 121(1).

[13] Article 121(2). As for international agreements of lesser importance or those having a technical nature (such as visa exemptions or the equivalence of driving licenses) which are not subject to ratification, Article 17 of Law No. 8371 of 9 July 1998 on the Conclusion of Treaties and International Agreements provides that they must only be 'approved' by the Council of Ministers. In any case, the Prime Minister has the duty to notify the Parliament whenever the Council of Ministers signs an international agreement that is not ratified by law.

[14] Article 122(1).

except for cases when it is not self-executing and its implementation requires passing new legislation.[15] As mentioned earlier, ratified international agreements are—owing to the *pacta sunt servanda* principle basis of Article 5 of the Constitution—hierarchically superior to other internal legislation and take precedence in the case of conflict.[16]

A further question raised and which is considered problematic is the status of other sources of international law, such as customary international law *vis-à-vis* conflicting internal legislation. Would Article 122(2) of the Constitution be applicable *mutatis mutandis* to also include customary international law obligations? This issue is not merely theoretical, as there are huge practical implications with regard to the application of customary international law rules by domestic Albanian courts.[17] Admittedly, a strictly textual interpretation of Article 122(2) does not support an assertion that customary international law or general principles of law are not only part of the Albanian legal system, but also prevail over domestic law. Moreover, the unique property of customary international law as a set of non-codified rules could hardly be reconciled with the requirement of formal 'publication in the Official Gazette'. Nevertheless, such a narrow interpretation of Article 122(2) would be ill-construed and ill-advised. It would place Albania in an awkward position, considering that 'all national legal systems … accept customary international law as an integral part of national law'.[18] Likewise, Albania's international legal responsibility for violations of customary international law and general principles of international law can and actually has been engaged.[19] Finally, such a restrictive interpretation would also run against the wording and scope of Article 5 of the Constitution, which clearly provides for the application of international law (and not only conventional obligations) that is binding upon Albania. Unless there are exceptional grounds for arguing the applicability of the persistent objector doctrine, and only with regard to specific rules of customary international law, there is no justifiable reason why Article 5 of the Constitution should not also include customary international law and general principles of law.

[15] Ibid.

[16] Article 122(2).

[17] Let us simply recall that a majority of topics of public international law, such as state immunity or the law of armed conflict, are largely governed by long standing rules having the status of customary international law.

[18] Denza (2010), pp. 411–441 at p. 424. See also, International Court of Justice, *Corfu Channel* (*United Kingdom of Great Britain and Northern Ireland v. Albania*), ICJ Reports 1949, especially p. 22.

[19] International Law Commission, Articles on State Responsibility, annex to General Assembly Resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4 (2001), Article 4: 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, *judicial* or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State' (emphasis added).

3 The Application of International Law in the Albanian Legal System

The Albanian Constitutional Court (ACC or Constitutional Court) and the Albanian High Court, the highest courts in Albania, have dealt with cases involving the application of international law in Albanian domestic law. By analysing a number of relevant cases, we shall illustrate the relationship and interaction between Albanian domestic law and international legal obligations undertaken by Albania over the last 22 years, since the fall of the communist regime in 1991. Although the Albanian Constitutional Court is not formally part of the Albanian judiciary, under the Constitution it has been invested with a leading role in determining the compatibility of Albanian laws with international legal agreements to which Albania is a party. Thus, according to Article 131, the Constitutional Court has jurisdiction to decide, among other matters, on questions relating to: (1) the compatibility of laws with the Constitution or with ratified international agreements[20]; (2) the compatibility of international agreements with the Constitution, prior to their ratification[21]; and (3) complaints from individuals regarding the violation of their constitutional rights to due process of law, after all legal means for the protection of those rights have been exhausted.[22]

3.1 The Compatibility of Albanian Laws with Ratified International Agreements

No cases have been filed thus far seizing the Constitutional Court with questions relating to (potential) conflicts between national laws and ratified international agreements. Taking into consideration the lack of any objective data or statistics, one may only speculate as to the reasons behind the lack of case law on this issue. This situation may well relate to the limited place given to the study of international law in the training of national judges and prosecutors[23]; the paucity of publications

[20] Article 131(a).

[21] Article 131(b).

[22] Article 131(i).

[23] The School of Magistrates only last year included international law as a subject of the preliminary phase for admission to the school (excluding it, however, from the core topics in the second phase). However, there is an ongoing trend of raising awareness of international law, at least during the continuing education of judges, especially through short-term training events and seminars conducted by international organisations. The National Bar Association does not include questions of international law in the bar exam. While general international law is given limited attention, law schools offer extensive training and education with regard to the European Convention of Human Rights and the jurisprudence of its court.

featuring important international agreements ratified by Albania in the Albanian language[24]; or simply no serious conflict has been identified so far in legal practice.

Some Albanian constitutional scholars have gone as far as to question the authority of the Constitutional Court to pronounce on potential conflicts between laws and ratified international treaties. They argue that in the case that national judges encounter any such conflict, they should simply apply the superior norm, i.e. the international treaty, since the issue pertains to normal judicial interpretation, and not to the ambit of the Constitutional Court's jurisdiction.[25] They further claim that only if the national law conflicts with the European Convention of Human Rights (ECHR), should the judge instead refer the case to the Constitutional Court. They justify this difference of treatment with the 'constitutional status' that the ECHR enjoys on the basis of Article 17 of the Constitution. Dealing with impermissible limitations of rights and freedoms accorded by the Constitution, paragraph 2 of Article 17 provides that:

> These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights.

What Article 17(2) provides is the actual 'reference' but not 'incorporation' of parts of the ECHR into the Albanian Constitution. Its purpose is to impose an absolute prohibition so that certain fundamental rights cannot, even in situations of war or public emergency, be derogated from. In this sense, the provision of Article 17(2) mentioning the 'limitations provided for in the ECHR' is a *renvoi* to Article 15(2) of the ECHR which reads:

> No derogation from article 2 [*right to life*], except in respect of deaths resulting from lawful acts of war, or from articles 3 [*prohibition of torture*], 4 (paragraph 1) [*prohibition of slavery*] and 7 [*no punishment without law*] shall be made under this provision (emphasis added).

Thus, Article 17(2) of the Constitution in effect provides a second layer of protection from torture, slavery, punishment without law, or arbitrary deprivation of life. The result of this reference is that, for the purpose of Albanian legislation, these parts of the ECHR also *become* an integral part of the Constitution. Therefore, when the Constitutional Court is asked to pronounce with regard to challenges to a law which allegedly exceeds the limitations imposed by Article 15(2) of the ECHR, the Court will act on the basis of its jurisdiction to decide on the 'compatibility of the law with the Albanian Constitution'. On the contrary, if the law conflicts with other parts of the ECHR, it may still be brought before the Constitutional Court, but this time on the basis of the Court's jurisdiction to decide on the 'compatibility of

[24] The issue is particularly striking concerning the prior practice of the Centre for the Publication of Official Acts to only publish the text of the ratification of an international treaty, but not the text of the treaty in Albanian. This has prompted the Office of the Ombudsman to recommend to the Parliament that the text of the treaty be attached to the ratification law, and has urged the competent authorities to translate and publish the remaining 'stock' of unpublished treaties. See http://www.avokatipopullit.gov.al/Raporte/RV12008.pdf. Accessed 16 August 2013.

[25] Omari and Anastasi (2010), p. 60.

laws with international agreements'.[26] The wording of Article 131 of the Constitution is clear in providing that the Constitutional Court may decide on the compatibility of the laws not only with the Constitution, but *also* with 'international agreements, as provided in Article 122'.

3.2 Compatibility of International Agreements with the Constitution

Article 131(b) of the Constitution provides that the Constitutional Court is competent to decide 'on the compatibility of international agreements with the Constitution before their ratification'. The choice to allow this constitutional review of international treaties is beneficial from both a theoretical and practical perspective. Theoretically, this upholds the hierarchy of the sources of law under Article 116 of the Constitution. The state is thus free to conclude any international agreement and to undertake any kind of international law obligations, as long as they do not come into conflict with the Constitution. This does not necessarily mean that the Constitution is considered as standing above international law. The wording of Article 5 of the Constitution which affirms that 'the Republic of Albania applies international law that is binding upon it' displays a fairly deferential stance towards international law. Through this provision Albania recognises its international legal obligations *vis-à-vis* the international community of states, while at the same time reaffirming its sovereignty in deciding *how* it incorporates such obligations within its own domestic legal system. The practical aspect of this approach involves avoiding a situation of conflict between the Constitution and an international obligation which could result in violation of the *pacta sunt servanda* principle.

The Constitutional Court has been asked twice to pronounce with regard to the compatibility of international agreements with the Constitution prior to their ratification. The first case was heard in 2002, when the Council of Ministers asked the Court whether the Statute of the International Criminal Court (ICC) was compatible with the Constitution.[27] While on that occasion the Court found no obstacle in clearing the way for the ratification of the ICC Statute by the Albanian Parliament, in the second case the issue was more complex. The Constitutional Court had to decide on the constitutionality of an agreement between Albania and Greece concerning the delimitation of their respective continental shelf areas and other maritime zones to which they are entitled under international law (Maritime Delimitation Agreement).[28] In its judgment, the Constitutional Court found that

[26] In practice this might not be necessary, as most of the rights and liberties provided in the ECHR are already explicitly included into the Albanian Constitution. As a consequence, any violation of a Constitutional fundamental right or liberty may potentially also be a violation of the ECHR.

[27] Constitutional Court, Judgment No. 186, 23 September 2002.

[28] Constitutional Court, Judgment No. 15, 15 April 2010.

the agreement: (1) was negotiated without the conferral of full powers by the President of the Republic; (2) that, contrary to its title, the agreement in fact delimited internal and territorial waters; (3) that it disregarded basic rules of international law on maritime delimitation in order to reach a fair and equitable result; and that (4) it failed to recognise certain islands as constituting *special circumstances* for the purpose of maritime delimitation. As a result, the Court struck down the agreement as unconstitutional. Although the decision of the Constitutional Court might have been controversial from a political perspective, it did not entail any breach of international obligations by the Albanian state, since such an agreement would need to be ratified by the Albanian Parliament so as to enter into force.

4 The Impact of the European Court of Human Rights in the Albanian Legal System

It is almost impossible to find any judgment of the Constitutional Court where the case law of the European Court of Human Rights (ECtHR) has not been cited at least once. Indeed, all Albanian courts, and the Constitutional Court in particular, have in the past decade given considerable attention to the ECtHR's case law. An attentive observer would note that even the structure of some of the Constitutional Court's judgments follows that of the ECtHR, with long citations of applicable law first, followed by the parties' submissions, and finally with the Court's assessment. Most of the time, the proceedings before the Constitutional Court have served as an effective filter before lodging an application with the ECtHR.

4.1 The Right to a Fair Trial: Xheraj v. Albania

The re-examination or reopening of criminal proceedings following a judgment of the ECtHR finding that the ECHR has been violated is certainly not a novel issue among member states of the Council of Europe.[29] Since 2000, the Council of Ministers of the Council of Europe has issued a recommendation to member states urging them:

> to ensure that there exist at national level adequate possibilities to achieve, as far as possible, *restitutio in integrum* ... in particular, to examine their national legal systems

[29] See 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)10 rev, available at www.coe.int/t/dghl/monitoring/execution/Documents//Reopening_en.asp. Accessed 16 August 2013.

with a view to ensuring that there exist adequate possibilities of re-examination of the case.[30]

By 2006, a majority of 34 member states provided for the possibility of reopening criminal proceedings.[31] In seven states, reopening was still considered as impossible or unclear.[32] Albania was one of them. In 2008, Albania introduced new legislation to allow for the reopening of civil cases following a judgment of the ECtHR.[33] The reopening of criminal cases remains impossible, at least according to the Code of Criminal Procedure. While the Albanian government has been working on a draft amendment to the Code of Criminal Procedure for this purpose,[34] the Albanian Constitutional Court and the High Court seem to have already accepted this possibility. After the *Barberá, Messegué and Jarabo* case,[35] the *Xheraj* case officially became the second time[36] a Constitutional Court had ever directed other courts to reopen criminal proceedings following a judgment of the ECtHR, despite the absence of such a provision in the Code of Criminal Procedure.[37]

The facts of the case can be summarised as follows: accused of murder, Mr. Xheraj was found guilty by the Durrës District Court in 1996 and sentenced to life imprisonment. On appeal, Xheraj's sentence was reduced to 20 years of imprisonment. In 1997, his conviction became *res judicata* after the High Court confirmed the Appeals Court's judgment. A year later, on 14 December 1998, the Durrës District Court accepted a request from Xheraj to reopen proceedings. In the light of new evidence, the District Court then dropped all charges and acquitted Xheraj. As the prosecution failed to lodge any appeal within the proscribed limit of

[30] Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, 19 January 2000.

[31] Steering Committee for Human Rights, Follow-up sheets on the implementation of the five recommendations, CDDH(2006)008 Addendum I, 7 April 2006, p. 4.

[32] Ibid, p. 5.

[33] Article 494(2)(ë) Code of Civil Procedure, added to by Law No. 10052, dated 29.12.2008.

[34] Communication from Albania concerning the case of Xheraj against Albania (Application No. 37959/02), DH-DH-DD(2013)700E, 19 June 2013, available at https://wcd.coe.int/ViewDoc.jsp?Ref=DH-DD%282013%29700&Language=lanEnglish&Site=CM. Accessed 16 August 2013.

[35] Spanish Constitutional Court (1991) Case No. 254/91, Boletín de Jurisprudencia Constitutional 129, p. 86.

[36] With the exception of the *Van Mechelen* case (*Van Mechelen and Others v. The Netherlands*, 55/1996/674/861-864, 23 April 1997), whereby in view of the impossibility of reopening criminal proceedings under Dutch law, it was the Minister of Justice who first ordered the applicants' provisional release and subsequently waived the remainder of their sentences.

[37] However, the Spanish Constitutional Court did not base its decision on the direct applicability of the ECtHR judgment, but rather on a derived violation of the Spanish Constitution. See Hartwig (2005), pp. 869–894 at p. 882.

10 days, the judgment of acquittal became *res judicata* on 24 December 1998. On 9 October 1999, the prosecution filed and obtained a request for leave to appeal out of time. Following the new proceedings in the District and Appeals Court, the judgment of acquittal was again confirmed. The prosecution thus appealed to the High Court, which in turn sent the case back to the Appeals Court for retrial. On 18 December 2000, the Appeals Court re-confirmed its judgment of acquittal. The prosecution lodged another appeal with the High Court. On 20 June 2001, the High Court accepted the prosecution's appeal and quashed the judgment of acquittal, therefore confirming the previous guilty verdict of 20 years of imprisonment. As this judgment was final, Xheraj lodged an application with the Constitutional Court claiming violation of his constitutional right to a fair trial. After the ACC rejected his claim, he subsequently lodged an application with the ECtHR which, in turn, found an infringement of the principle of legal certainty, and consequently a violation of Article 6(1) of the Convention.[38] While the ECtHR did not order any non-pecuniary remedies in its *dispositif*, it still considered:

> that the most appropriate form of redress for this continuing situation would be for the applicant's final acquittal of 14 December 1998 to be confirmed by the authorities and his conviction in breach of the Convention to be erased with effect from that date.[39]

Based on this passage, Xheraj seized the ACC again, seeking the annulment of the High Court's judgment of 20 June 2001 and the enforcement of the ECtHR's judgment. In his application, he claimed the existence of a legal vacuum in Albanian legislation, since Albanian courts did not consider the ECtHR's judgments as directly enforceable. In its decision of 9 March 2010, while rejecting Xheraj's application, the Constitutional Court noted that as Article 46 ECHR obliges states to abide by the ECtHR's final judgments, they [the states] were under an obligation to take all necessary measures to ensure the effective implementation of such judgments. The ACC stressed the importance of reopening criminal proceedings in implementing the ECtHR's judgments as a possible tool towards achieving an effective *restitutio in integrum* of the infringed right protected by the Convention.[40] It deplored the fact that the legislature had not yet amended the Code of Criminal Procedure with a provision similar to Article 494(2)(ë) of the Code of Civil Procedure, but added that the High Court, as the authority responsible for the breach of the Convention, must find a solution to the issue; even by way of analogy to the Code of Civil Procedure if it so deemed necessary.[41]

Xheraj then turned to the High Court, which on 9 July 2010 rejected his request to reopen proceedings, arguing that Article 450 of the Code of Criminal Procedure did not foresee final judgments of the ECtHR *per se* as grounds for reopening

[38] *Case of Xheraj v. Albania*, Application No. 37959/02, Judgment, 1 December 2008, para 61.
[39] Ibid, para 82.
[40] Constitutional Court, Decision of Inadmissibility No. 22/10, 9 March 2010, p. 6, para 4.
[41] Ibid, p. 5.

proceedings.[42] While paragraph 1(a) of Article 450 provided that reopening of proceedings may be accepted when the facts on the merits are contradicted by another final judgment, this was—according to the High Court—not the case here, since the ECtHR's judgment could only serve as circumstantial evidence for constitutional proceedings, but not as a basis for reopening criminal proceedings. Xheraj did not agree and reverted back to the Constitutional Court. On this occasion, the ACC made plain its disagreement with the High Court. The Constitutional Court first stated that:

> With regard to fundamental human rights, the ECtHR enjoys, in our legal system, an exclusive competence. This competence has been accepted by our internal legal system by virtue of Articles 17(2)[43] and 122 of the Constitution, which mandate that the ECtHR's judgments be directly implemented . . . The Parliament is under an obligation to take such measures as to ensure compliance with the ECHR's dispositions. If it fails to do so, domestic courts must remedy this legal vacuum, and directly apply the ECtHR's judgments in accordance with Articles 122 of the Constitution and Articles 19 and 46 of the ECHR.[44]

Indeed, Article 122 of the Constitution provides for the direct application of the ECHR in the Albanian legal system. In addition, according to Article 46(1) of the ECHR, member states 'undertake to abide by the final judgment of the Court in any case to which they are parties'. It should be noted, however, that the remedies of the ECtHR are binding only when they are phrased in a mandatory manner and included in the *dispositif*.[45] In *Xheraj*, the ECtHR *ordered* the payment of pecuniary damages, but only *recommended* that confirming the judgment of acquittal would be 'the most appropriate form of redress'.[46] This is because states enjoy a certain margin of appreciation as to how to enforce the obligation present in Article 46 of the Convention.[47] The ECtHR itself has already noted that 'the Convention does not give it jurisdiction to direct a state to open a new trial or to quash a conviction' and

[42] Article 450 of the Code of Criminal Procedure envisions only four cases when reopening of proceedings is possible, namely when:

a) the facts on the merits conflict with those of another judgment which is final;
b) the judgment was based in a civil proceedings judgment, which has later been quashed;
c) new evidence has arisen, which if considered separately or in conjunction with any other previously tendered evidence, indicates that the judgment was wrongly decided upon.
d) it has been proved that the judgment was tainted by falsified evidence or any other facts constituting a crime.

[43] As mentioned above, it is doubtful whether Article 17(2) of the Constitution is actually relevant in this discussion. Moreover, the right of legal certainty under Article 6 of the ECHR is certainly not included in the list of absolute rights protected by Article 17(2) of the Constitution and Article 15(2) of the ECHR.

[44] Constitutional Court, Judgment No. 20/11, 1 June 2011, pp. 6–7.

[45] Helfer (2008), pp. 125–159 at p. 147, footnote 131.

[46] *Case of Xheraj v. Albania*, Application No. 37959/02, Judgment, 1 December 2008, para 61.

[47] Explanatory Memorandum on the Committee of Ministers' Recommendation No. R(2000)2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, para 1.

that 'it cannot find a state to be in breach of the Convention on account of its failure to take either of these courses of action when faced with the execution of one of its judgments'.[48] Thus, contrary to the Constitutional Court's assertion, domestic courts are not obliged to act, and are not to be blamed if no legal remedy is available in their legal system to enforce the ECtHR's judgments.[49]

It should be noted that the ACC has only annulment powers.[50] The court can only strike down a law as unconstitutional, but it cannot declare it unconstitutional because it does not include a right or a liberty protected by the Constitution. For that reason, the ACC could not act like the Italian Constitutional Court, which only 2 months before had struck down Article 630 of the Italian Code of Criminal Procedure in the part where it did not provide other grounds for reopening criminal proceedings, 'when that is necessary ... to conform to a final judgment of the ECtHR'.[51] This is probably why the ACC decided to interpret Article 450(1)(a) of the Code of Criminal Procedure as widely as possible, so as to include the ECtHR's judgments. This was done by relying on Article 122 of the Constitution and Article 10 of the Code of Criminal Procedure (which deals with relationships with foreign authorities) in rejecting the High Court's interpretation that the ECtHR's judgments could not be equivalent to those of Albanian courts. Thus, according to the Constitutional Court's interpretation, the 'final judgments' referred to by Article 450(1)(a) do not only include judgments from Albanian courts, but also foreign ones (and thus those of the ECtHR). Finally, the Constitutional Court warned the High Court that:

> If the [Constitutional] Court has established that certain Constitutional rights have been infringed, as it did in its judgment No. 22, dated 09.03.2010, this fact cannot be further reviewed by anyone, especially the High Court, which is obliged to guarantee the correct application of the substantial and procedural criminal law from all courts, in accordance with the Constitution and the judgments of the Constitutional Court. Accordingly, in case of a conflict between two different judgments of the Constitutional and the High Court, there is only one solution, which is the quashing of the High Court's judgment by the Constitutional Court.[52]

However, the Constitutional Court did not deal with a crucial element of Article 450(1)(a) of the Code of Criminal Procedure, which clearly provides that a reopening of proceedings may by granted only when '*the facts* on the merits conflict with *those* of another judgment which is final'. Even accepting that an ECtHR judgment may be considered 'another judgment which has become final' for the purposes of Article 450(1)(a), it is still hard to accept that an ECtHR judgment is

[48] *Lyons et al. v. The United Kingdom*, Application No. 15227/03, Decision on Admissibility, 8 July 2003, p. 9.

[49] Hartwig (2005), pp. 869–894 at p. 886.

[50] Article 132(1) of the Constitution.

[51] Italian Constitutional Court, Judgment No. 113, 4 April 2001, available at www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2011&numero=113. Accessed 16 August 2013.

[52] Constitutional Court, Judgment No. 20/11, 1 June 2011, p. 11.

decided on other 'facts' which contradict a previous judgment. The ECtHR is certainly not a trier of *new* facts and does not decide on the guilt or innocence of a defendant, but only reviews the judgments of domestic courts *vis-à-vis* the rights and liberties guaranteed by the Convention. This approach is further confirmed by the well-established jurisprudence of Italian courts, which have always agreed that Article 630 of the Italian Code of Criminal Procedure—a *verbatim* of Article 450 of the Albanian Code of Criminal Procedure—is not applicable to ECtHR judgments.[53] It appears that the High Court was correct when it first denied the applicability of Article 450(1)(a) of the Code of Criminal Procedure to final judgments of the ECtHR.[54] Finally though, it had to succumb to the decision of the Constitutional Court.[55]

The eagerness of Albanian courts to follow the ECtHR's jurisprudence and their commitment to human rights issues is understandable. However, this cannot be achieved at the expense of sacrificing other important constitutional principles, namely the rule of law and the separation of powers. True, after the ECtHR's judgment in the Xheraj case, Albania might have been in a continuing breach of the Convention, but it is not for the judiciary to remedy to this legal vacuum by implicitly assuming competences which the Constitution attributes exclusively to the legislative branch.

5 Jurisdictional Immunities for International Organisations: The *Chemonics* Case

This case concerned an employment dispute between an individual and a company claiming immunity before Albanian courts.[56] The defendant, *Chemonics International Inc*., was the Albanian branch of *Chemonics International Inc*., an homonymous company based in Delaware, USA, which had won a contract with USAID, a US government agency, regarding the implementation of a project concerning the reform of the public administration in Albania. The plaintiff, a former employee of *Chemonics*, brought a civil suit before the Tirana District Court seeking compensation for unlawful dismissal. *Chemonics* challenged the jurisdiction of the Tirana District Court, claiming that on the basis of an international agreement between the

[53] Italian Constitutional Court, Judgment No. 113, 4 April 2001 (agreeing with the Bologna Court of Appeals which had denied the interpretation that an ECtHR judgment could be used as valid grounds for the applicability of one of the cases envisioned in Article 630 of the Code of Criminal Procedure).

[54] Although it should have probably followed another reasoning, i.e. the 'contradictory facts' requirement of Article 450(1)(a).

[55] Supreme Court, Judgment No. 52102-01226-00-2011, 7 March 2012.

[56] Albanian Supreme Court, Judgment No. 8 (United Chambers), 10 June 2011 (*Chemonics* Judgment).

Albanian and US Governments, it enjoyed immunity from civil liability before Albanian courts.

In 1992, the Albanian and the US Governments had entered into a bilateral economic agreement concerning US economic, technical and related assistance to Albania.[57] The agreement purported to set forth a

> framework concerning economic, technical and related assistance which, based on a request by the Government of the Republic of Albania, may be provided by the Government of the United States of America, subject to the applicable laws and regulations of the United States of America.[58]

It consisted of four articles, two of which provided for extensive privileges and immunities for different categories of US employees and contractors. *Chemonics* relied on paragraph 3(d) of the agreement, which provided that:

> In order to assure the maximum benefits to the people of the Republic of Albania from the assistance to be furnished hereunder and except as may be agreed by the two governments: . . .
> (d) Individuals, *public or private organizations*, and employees of public or private organizations, *under contract with or financed* by the Government of the United States of America, who are present in the Republic of Albania to perform work in connection with this agreement, shall be *immune from all civil liability directly related to the performance of such work* (emphasis added).

Ratione personae, the provision accorded immunity to virtually everyone,[59] as long as one was (1) present on Albanian territory and (2) had a contract with or was financed by the US Government to perform work in connection with the agreement. And since the agreement did not define what kind of *work*, it could well include any kind of 'economic, technical and related assistance' to the Albanian Government. *Ratione materiae*, it limited the immunity to all civil liability, but only if the activity was directly related to the performance of work connected to the agreement.

In its decision on jurisdiction, the Tirana District Court accepted that the defendant was included in the category of subjects listed in paragraph 3(d). However, it held that disputes arising from an employment dispute between *Chemonics* and one of its employees did not fall into the category of activities directly related to the performance of work connected to the agreement. Moreover, the District Court observed that in the employment contract itself the parties had specifically provided for the Tirana District Court's jurisdiction in case of disputes which could not be settled amicably.

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[57] Economic Bilateral Agreement Between the Government of the Republic of Albania and the Government of the United States of America, 10 June 1992, Treaties and Other International Acts Series 12456.

[58] Ibid, p. 3.

[59] The agreement included both juridical persons (public or private organisations) and individuals (individuals and employees of public or private organisations).

Chemonics appealed the decision before the High Court. Considering the complexity of the issue, the Civil Law Chamber of the High Court referred the case to the United Chambers (the full court), asking the following questions:

- Do Albanian courts retain jurisdiction with regard to disputes between Albanian citizens and other subjects which enjoy immunity from Albanian jurisdiction (by virtue of the UN Convention on the Privileges and Immunities of Specialised Agencies or bilateral agreements between Albania and foreign states) if such disputes are employment related?
- If an employment contract between the abovementioned subjects provides for the jurisdiction of Albanian courts, would this be considered a voluntary waiver in accordance with Article 39(a) of the Code of Civil Procedure?[60]

With regard to the first question, the Court refused to set a general precedent on upholding or setting aside jurisdictional immunities in employment issues. Instead, it decided to be cautious and to limit its answer only with regard to employment issues arising in the application of the US–Albanian agreement. On the merits, the Court noted that the defendant was in charge of implementing the Millennium Challenge Corporation II programme, a project financed entirely by USAID. It thus concluded that, as a contractor of USAID in Albania, *Chemonics* was, according to Article 3(d) of the agreement, immune from all civil liability directly related to the performance of that project.[61]

The Court then turned to the question of whether the granting of immunity would infringe the fundamental right of access to court under Article 42(2) of the Constitution and Article 6(1) ECHR. Applying the *Ashingdane test*,[62] the Court quickly found that:

> On the basis of the scope of the agreement and its legitimate aim, [we] find no unreasonable relation of proportionality between this limitation and the aim sought. Accordingly . . . the Albanian state did not overstep the margin of appreciation in limiting the right of access to court. [63]

The Court stated that the conclusion was also consistent with the ECtHR's jurisprudence which had previously held that:

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[60] Article 39 of the Code of Civil Procedure stipulates that:

Members of Consular and Diplomatic Missions accredited in the Republic of Albania shall not be subject to Albanian courts, except when:

a) they voluntarily accept (such jurisdiction)
b) there exist the cases and conditions provided by the Vienna Convention on Diplomatic Relations.

[61] Ibid, paras 12.1–12.2.

[62] *Case of Ashingdane v United Kingdom*, Application No. 8225/78, Judgment, 28 May 1985.

[63] *Chemonics* Judgment, paras 13–14.

> some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.[64]

Accordingly, the Court upheld *Chemonics*' absolute immunity in civil cases, even employment related ones.[65]

With regard to the second question, the Court noted that, according to Article 32 (2) of the Vienna Convention on Diplomatic Relations, subjects who enjoy immunity from jurisdiction may waive their immunity. Although the US–Albanian agreement had not provided for such a possibility, this did not mean that a waiver was not possible. Indeed, the parties had waived their immunity by expressly mentioning the jurisdiction of Albanian courts in the employment contract. The Court also dismissed the claim that the 'waiver' was invalid because in view of Article 7(3) of the Labour Code, all 'Arrangements on jurisdiction are valid only if they are concluded after the dispute has arisen'. According to the Court, such a provision was inapplicable in this case, as it related to a waiver of jurisdiction and not an agreement on changing it.[66] Thus, the waiver had been valid.

The Court's opinion was split. While the judges who appended a dissenting opinion agreed with the majority on the first question but dissented on the second one (which was decisive for the case),[67] the judges who appended a concurring opinion agreed with the second question (and therefore the outcome) but strongly dissented on the first question.[68] An important aspect which deserves more scrutiny

[64] Ibid, para 14(1), (quoting *Case of McElhinney v. Ireland*, Application No. 31253/96, Judgment, 21 November 2001, para 37; *Case of Manoilescu and Dobrescu v. Romania and Russia*, Application No. 60861/00, Judgment, 3 March 2005, para 80; *Case of Treska v. Albania and Italy*, Application No. 26937/04, Judgment, 26 June 2006; *Case of Vrioni et al., v. Albania and Italy*, Application Nos. 35720/04 and 42832/06, Judgment, para 46).

[65] Ibid, para 16.

[66] Ibid, paras 18–25.

[67] The judges who appended a dissenting opinion maintained that the waiver should have been explicit and that Article 7(3) of the Labour Code was plain in prohibiting agreements on jurisdictions concluded before the arising of a dispute (pp. 10–12). They maintained that the whole purpose of Article 7(3) was to protect subjects who enjoy immunity from forgoing their rights before a dispute had arisen.

[68] The judges appending the concurring opinion noted that paragraph 3(e) of the agreement, which concerned the category of employees of the US Government, envisioned an absolute type of immunity, both civil and criminal, comparable to that of diplomatic agents. By contrast, the type of immunity which paragraph 3(d) envisioned was limited to civil liability, and only if such liability was *directly* related to the project covered by the agreement. Because of its nature, the employment contract did not fall into the category of those activities protected by paragraph 3(d) of the agreement. Any different interpretation would, therefore, render the term 'directly connected' moot and transform that provision into a *de facto* absolute immunity for all civil liabilities, irrespective of the nature of the activity. Secondly, the concurring opinion claimed that absolute immunity for employment disputes would also violate Article 6(1) ECHR, considering that such a limitation to the right of access to court would not be proportional to the aim sought. It then referred to the (then) most recent judgments of the ECtHR, which in the cases *Cudak v. Lithuania* (Application No. 15869/02, Judgment, 23 March 2010) and *Vilho Eskelinen et al. v. Finland*

is defining the type of immunity under discussion, whether it is treaty-based or customary-law based. The unique facts of the *Chemonics* case would, at a minimum, cast some doubt on whether state immunity is applicable. After all, *Chemonics* was not an integral part of the US government or part of its property.[69] Moreover, when dealing with state immunity, it is generally the state concerned which invokes its sovereign immunity. In this case, neither the US Government nor the US diplomatic mission in Albania, which according to paragraph 1 of the US–Albanian agreement was the competent authority to carry out and discharge the responsibilities arising under it, invoked immunity on behalf of *Chemonics*.

Although formally relying on the *Ashingdane* test, the Court failed to explain the reason why the granting of immunity for employment disputes to a private contractor would serve a legitimate aim? And if so, how was it proportionate to the absolute limitation of the right of access to court? Admittedly, the ECtHR has in the past accepted the doctrine of state immunity as sufficient, in principle, to counterbalance the limitation of the right of access to court.[70] However, this is valid only with regard to cases relating to tort claims against states, for acts considered *acta iure imperii*. The ECtHR has found that states cannot invoke immunity concerning employment disputes, except for cases listed in paragraph 2 of Article 11 of the UN Convention on Jurisdictional Immunities of the State.[71] Although not yet in force, on several occasions the ECtHR has emphasised that Article 11 of the UN Convention on the Immunities of the State has achieved the status of customary international law.[72] As Albania has not formally objected to the rule, it may be asserted that Article 11 of this convention also applies to Albania as a matter of

(Application No. 63235/00, Judgment, 19 April 2007) had excluded employment disputes from the doctrine of state immunity, therefore showing that 'absolute immunity does not exist anymore, that it should be assessed on a case by case basis and that the right of access to court should be given priority'.

[69] See for example, United Nations Convention on Jurisdictional Immunities of States and Their Property (Adopted by the General Assembly of the United Nations on 2 December 2004. Not yet in force), A/59/49, Article 1: 'The present Convention applies to the immunity of a State and its property from the jurisdiction of the courts of another State'.

[70] See for example, in addition to the case law cited in note 64 above, *Case of Al-Adsani v. UK*, Application No. 35763/97, Judgment, 21 November 2001, para 56: 'It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1'.

[71] See *Case of Wallishauser v. Austria*, Application No. 156/04, Judgment, 19 November 2012; *Case of Sabeh El Leil v. France*, Application No. 34869/05, 29 June 2011; *Case of Cudak v. Lithuania* Application No. 15869/02, Judgment, 23 March 2010.

[72] *Case of Wallishauser v. Austria, supra* at note 71, para 60; *Sabeh El Leil v. France*, *supra* at note 71, para 54.

customary international law. In other words, even the US Government itself could not have successfully invoked state immunity if, for example, the case had concerned a contractual employment dispute between a local employee and the US embassy in Tirana.

Likewise, if one were to consider *Chemonics*' immunity as detached from state immunity and based on treaty law, in analogy to that of international organisations, such broadly-construed immunity would still fail to pass the proportionality criterion of the *Ashingdane* test. In the landmark cases *Waite and Kennedy v. Germany*[73] and *Beer and Reagan v. Germany*,[74] the ECtHR was asked to pronounce with regard to the compatibility of jurisdictional immunities of international organisations *vis-à-vis* the rights protected under the Convention. Although both cases were decided in the affirmative, the Court warned that 'a *material factor* . . . is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention'.[75] This passage sparked a debate amongst authors as to whether *a material factor* implied a pre-condition to the granting of immunity or whether it was simply one element to take into consideration.[76] Recently, the Court had the opportunity to clarify this dilemma, holding that the absence of alternative remedies could not be considered '*ipso facto* constitutive of a violation of the rights of access to court'.[77] Yet, the facts of the *Chemonics* case were substantively different. *Chemonics* was certainly not an international organisation. It was simply a private organisation that was eligible to functional immunity with regard to the performance of its contract with USAID. While the granting of such functional immunity may certainly serve a legitimate aim, it still remains highly disproportionate to a complete restriction of the right to access to court for employment disputes.[78]

The concurring opinion in the *Chemonics* case seems to be more correct and faithful to the ECtHR's case law. Although the majority opinion ultimately accepted the waiver doctrine, it was clear that upholding such immunity was tantamount to a complete infringement of the essence of the right of access to court.

[73] Application No. 26083/94, Judgment, 18 February 1999.

[74] Application No. 28934/95, Judgment, 18 February 1999.

[75] *Waite and Kennedy*, para 68.

[76] Brabandere (2010), pp. 79–119 at pp. 94–95; see also, Ryngaert (2010), pp. 121–148 at pp. 134–135 (accepting that the Court did not make it a 'strict prerequisite').

[77] *Stichting Mothers of Srebrenica and Others v. The Netherlands*, Application no. 65542/12, Decision, 11 June 2013, para 164.

[78] Moreover, is it highly doubtful whether employment disputes can be correctly categorised as 'civil liabilities directly related to the performance of its work'.

6 The Stabilisation and Association Agreement (SAA) and the Application of EU Law in Albania

Albania aspires to become a member of the European Union (EU).[79] The Stabilisation and Association Agreement (SAA) between Albania and the EU was signed on 12 June 2006 and entered into force on 1 April 2009.[80] This international agreement is directly applicable under Article 122(1) of the Constitution.[81] Public support for EU accession in Albania is probably the highest among the Western Balkan countries which are in the process of joining the EU.[82] The integration process has been a protracted one, as with most of the Western Balkan countries.[83] A number of legal reforms have been undertaken in the meantime in order to harmonise Albanian laws with EU law and to implement the EU *acquis*, as agreed under Title VI of the SAA, entitled Approximation of Laws, Law Enforcement and Competition Rules. As part of these efforts Albania has established the Albanian Competition Authority.[84] Albania submitted its application for EU membership on 28 April 2009, but progress since then has been quite slow.

The EU has set a number of key priorities which concern the following areas: the proper functioning of the Parliament; adopting reinforced majority laws; appointment procedures and appointments for key institutions; electoral reform; the conduct of elections; public administration reform; the rule of law and judicial reform; fighting corruption; fighting organised crime; addressing property issues; reinforcing human rights and implementing anti-discrimination policies; improving the treatment of detainees and applying recommendations of the Ombudsman.[85] The October 2012 EU Commission Report examines Albania's ability to take on the obligations of membership, i.e. the *acquis*, as expressed in the Treaties, secondary legislation and policies of the Union, including Albania's administrative

[79] For more information, visit http://ec.europa.eu/enlargement/potential-candidate-countries/albania/eu_albania_relations_en.htm. Accessed 16 August 2013.

[80] For the full text of the SAA, visit http://ec.europa.eu/enlargement/pdf/albania/st08164.06_en.pdf. Accessed 16 August 2013.

[81] See *inter alia* Zaganjori et al. (2011), p. 66.

[82] Namely, Bosnia and Herzegovina, Kosovo, Macedonia (FYROM), Montenegro and Serbia. Slovenia joined the EU on 1 May 2004 and Croatia joined on 1 July 2013.

[83] See *inter alia* Bogdani (2007); Zahariadis (2007).

[84] See Law No. 9121, On Competition Protection, 28 July 2003. The mission of the Competition Authority is the protection of free and effective competition in the market through the implementation of legislation on competition. For more information, visit http://www.caa.gov.al. Accessed 16 August 2013.

[85] See Albania 2012 Progress Report, COM (2012) 600 final, 10 October 2012, available at http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/al_rapport_2012_en.pdf. Accessed 16 August 2013. For the full text of the key priorities, see Commission Opinion on Albania's application for membership of the European Union, COM (2010) 680, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0680:FIN:EN:PDF. Accessed 16 August 2013.

capacity to implement the *acquis*. The analysis contained in the report is structured according to the list of the 33 *acquis* chapters. The EU Commission's assessment covers the progress achieved during the reporting period, and summarises Albania's overall level of preparedness. On the whole, while Albania has made considerable progress in several areas, a lot still remains to be done.

Obviously, joining the EU raises a number of issues concerning the sharing of sovereignty, the application of the SAA and related mutual legal obligations, and solving potential conflicts of law.[86] A number of problematic legal issues have already been encountered in the practice of other states and the relevant solutions are reflected in the Albanian Constitution of 1998. Under Article 123 of the Constitution, Albania may delegate to international organisations state powers for specific issues on the basis of international agreements. Such agreements need to be ratified by a majority of all the members of the Parliament, or if the Parliament so decides, through a referendum. Thus, the delegation of certain powers by Albania to EU institutions could occur through such an agreement. With regard to the place of EU law in the Albanian domestic legal system, reference needs to be made to Article 122(3) of the Constitution, which provides that norms issued by an international organisation have priority, in case of conflict, over the law of the country when the direct application of the norms issued by the organisation is expressly contemplated in the agreement ratified by Albania for participation therein. This position is generally in line with the Treaty on the Functioning of the European Union (TFEU), which empowers EU institutions to adopt regulations, directives, decisions, recommendations and opinions aimed at the progressive integration of Member States' economic and political systems and the establishment of a single market based on the free movement of goods, people, money and services.[87] This also complies with the case law of the European Court of Justice.[88] On the basis of Article 288 of the TFEU, EU regulations would be directly applicable in Albania, whereas EU directives would eventually need to be transposed into the Albanian legal system by means of specific laws.[89] EU regulations, directives and decisions would take precedence over national law and would be legally binding on national authorities, whereas EU recommendations and opinions would have no such binding force.

[86] See *inter alia* Zaganjori et al. (2011), pp. 59–64, 66–71.

[87] Article 288, Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, also available at http://eur-lex.europa.eu/en/treaties/new-2-47.htm. Accessed 16 August 2013. According to this article, a regulation shall have general application and shall be binding in its entirety and directly applicable in all Member States.

[88] See *inter alia* Case 26/62 *Van Gend en Loos v Nederlandse Belastingen* [1963]; Case 6/64 *Costa v ENEL* [1964] ECR 585; Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; Case 106/77 *Amministrazione delle Finanze v Simmenthal SpA* [1978] ECR 629; *Macarthys v Smith* [1979] 3 All ER 325; Case C-213/89 *R (Factortame Ltd) v SS for Transport* [1990] ECR I-2433.

[89] For a detailed discussion of EU laws, see Craig and de Búrca (2011). Also visit http://ec.europa.eu/eu_law/introduction/treaty_en.htm. Accessed 16 August 2013.

After the entry into force of the SAA in April 2009, the Constitutional Court has made direct reference to EU laws. In a case before the Constitutional Court, the complainant claimed among others that a decision by the Albanian Council of Ministers had to be annulled as it was incompatible with the Constitution and international agreements, referring specifically to the SAA.[90] According to the complainant, the decision favoured a private enterprise with a dominant position in the market for products which had similar use and created similar problems concerning environmental pollution. The Constitutional Court found that on the basis of the SAA, the right of the state to intervene in the regulation of exercise of economic freedom was restricted by Article 33(2) of the SAA, which provides that:

> From the date of entry into force of this Agreement no new quantitative restriction on imports or exports or measure having equivalent effect shall be introduced, nor shall those existing be made more restrictive, in trade between the Community and Albania.

Given the fact that the decision by the Council of Ministers allowed only the selling of diesel product D2 produced in Albania, as well as the selling of diesel product D1 produced in Albania under more favourable conditions than that imported from abroad, the Constitutional Court decided that this decision was in violation of Articles 33(2) and 42 of the SAA.[91]

Another relevant case was decided on by the Constitutional Court in March 2010. The complainant, namely the Professional Association of Economists, claimed that the law on legal auditing and the organisation of the profession of registered auditors and chartered accountants was in violation of EU law, since it created a monopoly situation through the Institute of Authorised Auditors (*Instituti i Ekspertëve Kontabël të Autorizuar*), interfered with independence in the exercise of the profession of auditors, and discriminated against foreign auditors.[92] For these reasons, this law had to be struck down as unconstitutional.[93] The Constitutional Court pointed out that under EU law the profession of auditing was regulated under Directive 2006/43/EC, which had to be implemented by EU countries by 2008.[94] The Constitutional Court emphasised that there was no case of monopoly, since Law No. 10091 did not impede any person from obtaining the licence of an auditor, but simply regulated the manner in which such a licence could be gained and its ongoing supervision. In addition, in the Court's view, the Institute of Authorised Auditors was a professional, non-profit organisation, entrusted by the state with duties of supervision over the profession of legal auditing, in order for the latter to

[90] Decision No. 24, 24 July 2009, available at http://www.gjk.gov.al. Accessed 16 August 2013.

[91] Article 42 of the SAA prohibits prohibitions or restrictions which constitute a means of arbitrary discrimination or a disguised restriction on trade between the Parties.

[92] Law No. 10091, Për auditimin ligjor, organizimin e profesionit të ekspertëve kontabël të regjistruar dhe të kontabilistit të miratuar, 5 March 2009.

[93] Decision No. 3, 5 February 2010, available at http://www.gjk.gov.al. Accessed 16 August 2013.

[94] Directive 2006/43/EC of the European Parliament, and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC.

provide quality services to the public. Referring to Article 32 of Directive 2006/43/EC, the Constitutional Court held that this law did not violate the principle of independence from state interference in the exercise of the profession, since the participation of public authorities in checking the activity of auditors served the public interest and could not be seen as interference in the free exercise of economic activity. Finally, in addressing the claim of discrimination against foreign auditors, the Constitutional Court stated that establishing certain criteria for foreign citizens who wanted to exercise this function in Albania did not necessarily entail discrimination. According to the Court, they had to demonstrate a sufficient knowledge concerning domestic commercial or fiscal legislation in order to provide a good service to the public in general and their clients in particular. The Court concluded that this single legal requirement concerning the exercise of the profession of auditor not only did not impede foreign citizens from working as auditors, but, on the contrary, could be considered as one of the most liberal legal systems because of the minimum criteria established by the lawmaker for this purpose.

7 International Criminal Law and Mechanisms in the Albanian Legal System

This section deals with the incorporation of international criminal law in the Albanian legal system and Albania's legal obligations in this field of international law.

7.1 The Applicable Legal Framework

Albania has signed and ratified a number of international instruments in the field of international criminal law and was among the original signatories to the Statute of the International Criminal Court (ICC), which it finally ratified on 31 January 2003.[95] On 2 August 2006, Albania acceded to the Agreement on the Privileges and Immunities (APIC) of the ICC. While Albania has not yet signed an agreement on the enforcement of sentences with the ICC, it has already done so with regard to the International Criminal Tribunal for the former Yugoslavia (ICTY). The agreement of 19 September 2008 allows for persons convicted by the ICTY to serve their

[95] In its Resolution 1300 (2002), the Parliamentary Assembly of the Council of Europe called on Albania (and a number of other member states of the Council of Europe) to ratify the ICC Statute (para 14(i)(b)). Moreover, in the same resolution the Parliamentary Assembly called on all member and observer states of the Council of Europe not to enter into any bilateral exemption agreements which would compromise or limit in any manner their co-operation with the court in the investigation and prosecution of crimes within its jurisdiction (para 14(iii)(c)).

sentences in Albanian prisons.[96] To this date no ICTY convicts have been transferred to Albania, despite its proximity to these persons' home countries. In deciding about the state where a convicted person will be transferred to serve his sentence, particular attention is given by the Tribunal to the proximity of the proposed state to the convicted person's relatives.[97] Mr. Haradin Bala, a Kosovar Albanian convicted by the ICTY, was transferred to France to serve his sentence in May 2008. At the time when the Presidency and the Registry of the ICTY made that decision, there was no agreement between Albania and the Tribunal. It is of course hard to say whether Mr. Bala would have been transferred to Albania if the agreement had been adopted beforehand.

Some changes were made to Albanian substantive and procedural criminal law in order to bring it into conformity with the ICTY and ICC Statutes. Thus, Articles 73,[98] 74[99] and 75[100] of the Albanian Criminal Code now criminalise respectively: genocide, crimes against humanity and war crimes. The definitions of these crimes follow to some extent those contained in the ICTY Statute. However, the definitions of these crimes under the Albanian Criminal Code are far from the detailed provisions of the ICC Statute.

At the EU Foreign Ministers' meeting of 30 September 2002, the Council of the European Community adopted Conclusions on the International Criminal Court, which introduced the 'EU Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United

[96] Agreement between the United Nations and the Republic of Albania on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia, 19 September 2008. Available at http://www.icty.org/x/file/Legal%20Library/Member_States_Cooperation/enforcement_agreement_albania_19_09_08_en.pdf. Accessed 16 August 2013.

[97] Practice Direction on the Procedure for the International Tribunal's Designation of the State in Which a Convicted Person is to Serve His/Her Sentence of Imprisonment, 1 September 2009 (IT/137/Rev. 1), par. 5. The relevant part reads: 'Particular consideration shall be given to the proximity [of the State] to the convicted person's relations.' Available at http://www.icty.org/sections/LegalLibrary/PracticeDirections. Accessed 16 August 2013.

[98] Article 73 provides: 'The execution of a premeditated plan aiming at the total or partial destruction of a national, ethnic, racial or religious group or directed towards its members, and combined with the following acts: intentionally killing a group's members, serious physical and psychological harm, placement in difficult living conditions which cause physical destruction, applying birth-preventing measures, as well as the obligatory transfer of children from one group to another, is sentenced with no less than 10 years of imprisonment, or with life imprisonment.'

[99] Article 74 provides: 'Homicide, extermination, use as slaves, deportation and exile, or any kind of torture or other human violence that is committed with a pre-meditated concrete plan against a civilian population group for political, ideological, racial, ethnic or religious motives are all punishable by no less than 15 years in jail or by life imprisonment.'

[100] Article 75 provides: 'Acts committed by different people in war time such as murder, maltreatment or deportation for slave labour, as well as any other inhuman exploitation to the detriment of the civilian population in an occupied territory, the killing or maltreatment of war prisoners, the killing of hostages, the destruction of private or public property, and the destruction of towns, commons or villages, which are not ordained by military necessity, are sentenced with no less than 15 years of imprisonment, or life imprisonment.'

States Regarding the Conditions to Surrender of Persons to the Court'. Albania has entered into an agreement with the US about the non-surrender by Albania of US citizens to the ICC.[101] This agreement could unnecessarily complicate Albania's efforts to integrate into the EU. By entering into this agreement, it appears that Albania has assumed competing legal obligations under the ICC Statute and this agreement. The EU Commission has called on Albania to align its position with the EU's.[102]

In terms of procedure and state co-operation, the Law on Jurisdictional Relations with Foreign Authorities in Criminal Matters,[103] provides for supplemental procedures when dealing with incoming and outgoing requests of inter-judicial co-operation. Article 3 states that its provisions also cover cases of proceedings that fall under the jurisdiction of international criminal courts whose jurisdiction Albania has accepted. This law provides for various forms of co-operation including extradition, transmission of letters rogatory, transfer of criminal proceedings, transfer of sentenced persons, and recognition and execution of foreign court decisions. The Ministry of Justice is designated as the central authority in terms of ensuring necessary co-operation with international criminal courts and tribunals.

7.2 The Compatibility of the Rome Statute with the Albanian Constitution

Before the ratification of the Rome Statute, the Albanian Constitutional Court was asked by the Albanian Council of Ministers for an opinion about the compatibility of the ICC Statute with the Albanian Constitution. The decision of the ACC of 23 September 2002 discusses a number of important issues, including the application of the principle of complementarity and the legal regime applicable in Albania regarding international immunities for persons accused of crimes set out in the ICC Statute.[104] The Constitutional Court noted that the activity of the ICC is complementary with national criminal jurisdictions in exercising the prosecution of natural persons responsible for grave crimes that are an affront to the whole international community and that can endanger the peace, security, and well-being of humankind. Further, in considering the issue of ICC jurisdiction *vis-à-vis* the constitutional concepts of sovereignty the ACC clarified that the complementary function of the ICC towards domestic judicial criminal jurisdiction, or *even the incorporation of the provisions of the Statute in the domestic legal order are not in contradiction with the Constitution or more concretely with Article 135, where the organs*

[101] Law No. 9081 of 19 June 2003.

[102] See Albania 2012 Progress Report, COM (2012) 600 final, 10 October 2012, p. 23.

[103] Law No. 10193, dated 3.12.2009.

[104] See Decision No. 186 of the Albanian Constitutional Court (ACC) of 23 September 2002, available at www.gjk.gov.al. Accessed 16 August 2013.

of judicial power in Albania created by law are strictly defined (emphasis added), and where the establishment of extraordinary courts is categorically prohibited. The ACC held that, from the content of the Statute itself, it becomes clear that here we are not speaking about a national organ or an extraordinary court. According to the ACC, the ICC in its nature is a legal judicial institution, created with the free will of the sovereign state parties to the Statute, the provisions of which are based on the principle of respecting human rights and freedoms.

While the ICC Statute is annexed to Law No. 8984 of 23 December 2002, which ratifies Albania's participation in the ICC Statute, the issue of the effect within Albanian law of the Elements of Crimes could be subject to different legal interpretations. Some guidance in this regard can be provided by Article 122 of the Albanian Constitution.[105]

Hence, by reading jointly all three paragraphs of Article 122, it can be concluded that the Elements of Crimes would also be applicable within the Albanian legal system. According to Decision No. 186 of the ACC, Law No. 8984 of 23 December 2002 ratifying the Statute, and the Albanian Constitution, Article 122, paragraphs 1, 2 and 3, it does not appear necessary to undertake any legislative reform, as the respective articles of the ICC Statute would be directly applicable within the Albanian legal system.[106]

Both the principle of *nullum crimen sine lege* (no crime without law) and that of *nulla poena sine lege* (no punishment without law), as components of the principle of legality, are applicable under Albanian criminal law, enshrined under Articles 2 and 3 of the Albanian Criminal Code respectively. In its Decision No. 186, the ACC stated:

> In particular, the Constitutional Court notices that the basic principles for the protection of fundamental human rights and freedoms also sanctioned and guaranteed by the Constitution of the Republic of Albania, such as: presumption of innocence; *nullum crimen sine lege* and *nullum poena sine lege*; the prohibition of retroactive power [of criminal law]; the right to be defended by legal counsel; the independence of the judges; appearance before the court before arrest or the right to appeal a decision, are also guaranteed by the Statute.

[105] Article 122 reads:

1. Any international agreement that has been ratified constitutes part of the internal juridical system after it is published in the Official Gazette of the Republic of Albania. It is implemented directly, except for cases when it is not self-executing and its implementation requires issuance of a law. The amendment, supplementing and repeal of laws approved by the majority of all members of the Assembly, for the effect of ratifying an international agreement, are done with the same majority.
2. An international agreement that has been ratified by law has superiority over laws of the country that are not compatible with it.
3. The norms issued by an international organisation have superiority, in case of conflict, over the laws of the country if the agreement ratified by the Republic of Albania for its participation in the organisation expressly contemplates their direct applicability.

[106] This is also the view expressed by Albania during the Review Conference of the Rome Statute in 2010. See document RC/ST/CP/M.2, 1 June 2010.

On the issue of universal jurisdiction for internationally recognised crimes, it must be said that Article 7(a) of the Albanian Criminal Code extends the jurisdiction of Albanian courts for crimes against humanity, war crimes, genocide, torture and terrorism committed outside Albanian territory, also to foreign citizens who are present on Albanian territory and whose extradition has not been sought.

The issue of the legal regime applicable in Albania regarding international immunities for persons accused of the crimes set out in the ICC Statute was addressed by the ACC in Decision No. 186, Part II, entitled 'Immunity in the Criminal Process'. The ACC stated that:

> The [ICC] Statute does not contradict or sidestep constitutional provisions relating to the immunity of a head of state and a number of other subjects regarding the immunity of these subjects belonging to national jurisdiction. This cannot impede an international organ such as the ICC in exercising its jurisdiction over persons of this category who have committed the crimes foreseen under the Rome Statute.

Criminalisation of the crime of aggression under Albanian criminal law, although this term is not explicitly employed, can be found in the Albanian Criminal Code under Chapter V, entitled 'Crimes against the Independence and Constitutional Order', Section I, entitled 'Crimes against Independence and Integrity', Articles 211 and 212. Article 211, entitled 'Provocation of War', reads: 'The carrying out of actions aimed at provoking war or putting the Republic of Albania at risk of intervention from foreign powers is punishable by not less than 15 years' imprisonment.' Article 212, entitled 'Conspiracy of an Armed Attack', reads: 'Conspiracy with powers or foreign states to cause an armed attack against the territory of the Republic of Albania is punishable by imprisonment from 10 to 15 years.' Further, Articles 217 and 218 of the Albanian Criminal Code criminalise respectively the receiving of rewards for crimes foreseen under Section I of Chapter V, and placement in the service of foreign states for committing acts against the independence or integrity of the Republic of Albania.

8 Concluding Remarks

The Albanian Constitution of 1998 regulates in quite some detail the interaction between international law and other sources of law, as well as the hierarchy among them within the Albanian legal system. Moreover, it also ensures that decisions adopted by international organisations to which Albania is a party are given direct effect in the Albanian legal order, in accordance with the relevant international agreements entered into between Albania and such international organisations. In providing that Albania applies international law that is binding upon it, Article 5 of the Constitution includes not only international treaties, but also customary international law and general principles of international law. Such an understanding follows Article 38 of the Statute of the International Court of Justice, which is regarded as providing a general list of sources of international law.

The case law of the Constitutional Court and the High Court have shed light on the applicability of international law in the Albanian legal system and have helped resolve certain conflicts of laws. Through a limited number of cases, these courts have shown that by and large they are capable of interpreting correctly the application of Albania's international legal obligations in the domestic legal system. Occasionally, this has entailed going as far as practically legislating in order to fill the gaps and to ensure that Albania complies with its international legal obligations, especially those enshrined under the ECHR, which also have a constitutional status in Albania. Notably, with regard to the issue of jurisdictional immunities, the High Court seems to have erroneously upheld, in principle, a foreign company's absolute immunity in civil cases, even in employment related disputes.

European law has a special place in the Albanian legal system in view of the SAA and Albania's aim of joining the EU in the near future. Since the entry into force of the SAA in April 2009, Albanian courts have started referring to EU laws directly, although strictly speaking they are not directly applicable until Albania joins the EU. The Albanian domestic legal framework provides a sufficient basis, albeit not entirely up-to-date, for the investigation and prosecution of the serious crimes criminalised under the ICC Statute and customary international law. For that reason, in terms of the principle of complementarity, it would be unlikely that the ICC could find Albania unable to genuinely investigate and prosecute crimes within the Court's jurisdiction. With regard to a bilateral agreement between the ICC and Albania concerning the enforcement of sentences rendered by the ICC, it remains to be seen whether Albania will eventually negotiate such an agreement with the ICC in the future.

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