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**Expert Opinion of the provisions of the draft
Law on Jurisdictional Relations with Foreign Authorities in Criminal
Matters in the Republic of Albania**

Expert Opinion prepared by
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1 Biography of author

Simon Regis, Government Lawyer, born in 1972 in London, United Kingdom

Called to the Bar of England & Wales in 1996.

Previously he was the Team Leader of the Project on International Co-operation in Criminal Matters in Ukraine (UPIC), under the TACIS UKRAINE ACTION PROGRAMME 2004; Deputy Head of the Judicial Co-operation Unit and Head of the UK Central Authority for Mutual Legal Assistance in Criminal Matters, Home Office; Mutual Legal Assistance Lawyer at HM Customs and Excise; Lawyer at the Central Confiscation Branch of the Crown Prosecution Service.

He has provided expertise for the Council of Europe for the following projects : CARDS/CARPO in South-Eastern Europe; MOLI-RU II; Support to Prosecutors' Network in South-Eastern Europe; Joint Programme on increased independence transparency and efficiency of the Judiciary in Moldova. He was the UK representative for the Council of Europe PC-OC Committee and represented the PC-OC in the negotiations for CETS 198. He has been a speaker and trainer for European Academy of Law; Organisation for Security and Co-operation in Europe (OSCE) and United Nations Office for Drugs and Crime (UNODC); he was an expert on Global Money Laundering Programme of UNODC drafting the report for the asset forfeiture module for their project on computer based training; he was the one of the UK European Judicial Network (EJN) Contact Points. He was one of the members of the Commonwealth Working Group on Asset Recovery. He has provided training on international co-operation to all types of officials both in the UK and overseas.

2 Introduction – Executive Summary

2.1 It should be stated at the outset that this draft Law is fairly comprehensive and contemporary, in that it takes into account provisions from the most recent Council of Europe Conventions in the field of international co-operation. There are however a number of issues that need to be addressed and they are explained in more detail below, but I will summarise the most important ones here.

- The removal of the ground of refusal for fiscal criminal offences as this is inconsistent with the declarations made by the Republic of Albania to the relevant Council of Europe conventions;
- Revising provisions regarding the translation of letter of requests sent from Albania to accord with the official language(s) of the requested state or other language(s) that they may accept;
- The insertion of provisions regarding the possibility of direct transmission of requests for mutual legal assistance;
- Amending provisions to include the execution of requests for the preservation of assets for future confiscation orders;
- Revision of certain conditions allowing for extradition (asylum and capital punishment);
- Consideration for the insertion of provisions on detention of individuals whose extradition has been requested.;
- The practical provision of speciality assurances by requesting states;
- Highlighting the need for the Chapter on recognition and enforcement of foreign criminal judgments to be able to also cover requests for the execution of confiscation orders;
- Creation of a new Chapter on the Transfer of Criminal Proceedings.

2.2 I have purposely sought not to comment extensively on what may be issues of translation unless in my view this has led to a misunderstanding of the text in English (which may not be reflected in the original text in Albanian language).

2.3 All the suggestions for new texts within the draft law are simply that. They are not to be read as perfect examples of how the relevant provisions should look, but are merely ideas as to appropriate wording that can and should be modified accordingly.

3 Chapter I –General Provisions

Article 3

3.1 This article defines the scope of application of the law. In my view Article 3.2 should be moved to a new "*Article 12 – Additional field of application*". The reason for suggesting this is because this law applies to all forms of international cooperation, however, Article 3.2 is specific to mutual legal assistance in criminal matters¹. It is entirely appropriate to have a general scope section at the beginning of the law and then to have additional paragraphs further defining the scope of application within the separate chapters. The new text suggestion is outlined below:

¹ See Article 1.3 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, CETS 182.

"The Ministry of Justice and the local judicial authorities shall admit and enforce requests of foreign judicial authorities:

1. In proceedings connected to criminal offences, which at the moment of submitting the request are under the jurisdiction of the judicial authorities of the requesting state;

2. In proceedings being under the jurisdiction of European Court of Human Rights or other international courts, the jurisdiction of which has been admitted by the Republic of Albania."

Article 5.4

3.2 In my view it is inappropriate to legislate that in the absence of a translation into the official language of the requested state, that a request should be translated into one of the official languages of the European Union. This would only be acceptable if that requested country had agreed to accept the request in that language. For requests to Council of Europe member states it is simple enough to check the reservations and declarations section of the relevant treaty to see what alternative languages a requested state may accept. Furthermore, as this is law that relates to international cooperation in criminal matters, it is entirely possible that request may have to be sent to jurisdictions outside of Europe where the official language(s) are none of those covered by the official languages of the European Union. The new text suggestion is outlined below:

*"4. The letter of request and the acts attached to it shall be submitted, signed and sealed, by the local judicial authorities, as well as accompanied by a translation into the official language of the country being addressed by the letter of request. **Where the requested state has indicated that it will accept requests and accompanying documentation in another language, then it is also permissible for the request of the local judicial authority to be submitted in that specified language....."***

The last sentence of Article 5.4 does not require amendment.

Articles 6.1 & 7.1

3.3. My observations in relation to these articles are similar to those made regarding Article 3 on the scope of application of the law. As this chapter is dealing with all requests, it is appropriate that the Ministry of Justice remains the focal point for transmission. However, given the developments in some areas of assistance e.g. direct transmission in the field of mutual legal assistance, it would make sense if in some of the later chapters of this law, additional methods for transmission of requests were outlined. This could be contained within a new "Article 13 – Transmission of Letters Rogatory". The new text suggestion for Articles 6.1 and 7.1 are outlined below:

"Article 6.1"

*1. The letter of request of local judicial authorities shall be transmitted to the foreign judicial authorities through the Ministry of Justice **unless alternative methods which are specified within the relevant Chapters of this law may apply.** In cases where the Ministry of Justice finds out that the letter of request does not meet the conditions of Article 5, it shall send it back to the local judicial authority for rectifying the drawbacks."*

“Article 7.1”

Where the Ministry of Justice has received the request directly from the foreign authority, they shall provide clearance to the letters of request for jurisdictional cooperation from the foreign judicial authorities. The letter of request shall subsequently be transmitted to the local judicial authority where the letter of request shall be enforced.

Article 8

3.4 I only have one comment to make on this article. At paragraph 8.1(d) there is a reference to fiscal criminal offences being a ground for refusal which is inconsistent the declarations that the Republic of Albania has made to both the Extradition and Mutual Assistance Conventions of the Council of Europe. In my view it should be removed from this article and Article 2.9 where it is included as a definition.

4 Chapter II – Letters Rogatory

New Article 12 – Additional field of application

4.1 As mentioned above at paragraph 3.1 a new Article 12 should be created outlining an additional field of application in relation to letters rogatory only. The new text suggestion is outlined below:

“In addition to the matters outlined in Article 3 of this law and for the purposes of this Chapter only, requests from foreign judicial authorities in administrative proceedings, where the decision made upon its completion may serve as a cause for instituting criminal proceedings shall be executed. This rule shall apply to the extent foreseen in international agreements obligatory for the Republic of Albania.”

Article 12 (original text)

4.2 My understanding is that this article deals exclusively with letters rogatory that are sent from the Republic of Albania and does not deal with requests sent to the Republic of Albania for execution². I am not clear on what a “*property related security measure*” is – see Article 12.3. This could relate to the request for search and seizure or equally the execution of provisional freezing orders to preserve property for the purpose of future confiscation (as both these types of mutual legal assistance are not specifically mentioned elsewhere in this Chapter).

New Article 13 - Transmission of Letters Rogatory

4.3 As mentioned at paragraph 3.3 above, a new Article 13 should be drafted dealing with the possibility of direct transmission of letters rogatory only. The new text suggestion is outlined below:

² If my understanding is incorrect, then Article 12.4 will have to be amended to include the telephone conferencing. The Republic of Albania has not made any reservations or declarations to CETS 182 indicating that they will not provide assistance to other states requesting evidence to be taken via telephone conferencing. The new text suggestion is outlined below: “*Types of letters rogatory are: 4. interrogation of defendant, witness or expert, be it even through telephone-conference or videoconference facilitated Interrogation hearings:*”

"In addition to the methods of transmitting letters of request as outlined in Articles 6 and 7 of this law and for the purposes of this Chapter only, letters rogatory may also be transmitted directly between local judicial authorities and foreign judicial authorities. Where this method of transmission is adopted, the Ministry of Justice will also be sent a copy of the request and the accompanying documents"

Article 13.1 (original text)

4.4 I do not understand the purpose of the last sentence of the paragraph (quoted below) or what it adds to the process, as the previous sentence in this article deals with transmission and execution of the letter rogatory.

"...Ministry of Justice shall, after consulting the Prosecution Office General, send the acts directly to the prosecutor being competent for enforcing the letter rogatory."

Article 18.2

4.5 In my view the title of the article is slightly misleading. This is not to do with speciality (which is a concept more associated with extradition than with mutual legal assistance). I also believe that it would be appropriate to amend the ending of the last sentence so that is consistent with the text in Article 16.3 dealing with legitimate reasons why an expert or witness could not leave the territory of Albania within 15 days after their presence was no longer required. The new text suggestion is outlined below:

*"Criminal prosecution shall be permitted in case the invited person, after being informed by a notification of a court that his presence is necessary anymore, has stayed in the territory of Republic of Albania longer than 15 days, despite the fact that he had the opportunity to leave. **This period does not include the period within which the invited person could not leave the territory of Republic of Albania due to legitimate documented reasons.** Criminal prosecution shall also be permitted where the invited person returns after leaving the territory of Republic of Albania, voluntarily."*

Article 20

4.6 In reviewing this article I have made the assumption that it automatically includes a request for a search of items that are then subsequently seized. However, in my view, it should be made clear in this article that it also includes requests to conduct searches and then to seize relevant items in relation to the facts of the request.

4.7 I also think that the insistence on a seizure decision having being pronounced in the requesting state is an inflexible requirement. Some jurisdictions cannot issue an order/decision for a search and seizure where the items are located outside of their jurisdiction e.g. United Kingdom. The new text suggestion is outlined below:

*"Upon the request of the foreign judicial authorities, the competent local judicial authority may decide **to permit a search of identified premises for the purposes of seizure of the attachable things being in the territory of Republic of Albania in connection with the facts as set out in the letter rogatory.** Appeal may be filed against this decision with the highest court within 10 days since the following day of notice. "*

Article 25

4.8 The only comment I have to make here is that there is no provision for attempting to recover expenses that have been incurred in the as a result of a request for evidence to be taken by videoconference³. A new paragraph 5 could be inserted. The new text suggestion is outlined below:

"In cases where the granting on international legal assistance by the local judicial authority involved the provision of a video-conference interrogation, the expenses incurred in whole or in part for in the execution of this request may be refunded in whole or in part unless the Ministry of Justice decides otherwise."

Article 26

4.9 This appears to deal with the preservation of evidence however I am not clear whether this would also include freezing orders to preserve property and assets for the satisfaction of a future confiscation order. This article may have to make a more explicit reference to the fact that it would also deal with requests for the preservation of property and assets The new text suggestion is outlined below:

*"Upon the request of the foreign judicial authorities and in accordance with the domestic legislation, the local judicial authority shall take preliminary measure for the maintenance of evidence, existing situation or protection of endangered legitimate interests. **Such measures will also include as appropriate the preservation of property and assets (both tangible and intangible) for the possible future satisfaction of a confiscation order made in the requesting state.**"*

5 Chapter III – Extradition

5.1 I had been provided with a redrafted version of this Chapter and my comments are based on analysing that redraft and not the original chapter contained within the main text. The revised text is shorter and more focused and in my view is an improvement on the original text. However, within the new revised text there does not appear to be any reference to the detention of the requested person pending either the transmission of the full extradition request or if the full request is sent at the beginning of the process, detention during the extradition proceedings. I am not sure whether this will be covered by provisions contained within the Albanian Criminal Procedure Code. If this is not the case then consideration should be given to inserting the detention provisions that were contained in the original draft law at Articles 38 and 40.

5.2 There are also no provisions relating to competing extradition requests, however I assume that the Albanian Ministry will revert to the provisions in Article 17 of the European Convention on Extradition 1957.

³ Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000/C 197/01 – Article 10.7. "The cost of establishing the video link, costs related to the servicing of the video link in the requested Member State, the remuneration of interpreters provided by it and allowances to witnesses and experts and their travelling expenses in the requested Member State shall be refunded by the requesting Member State to the requested Member State, unless the latter waives the refunding of all or some of these expenses."

Article 31

5.3 My only comment here is for specific reference to be made to the draft law. The new text suggestion is outlined below:

*"The handover of a suspect, defendant or convicted person to a foreign state shall be done in accordance with **this law, other applicable provisions** of Albanian legislation and international agreements, where the Republic of Albania is a party."*

Article 32

5.4 There are number of suggested text revisions for this article which in my opinion will make it more effective. Firstly, in relation to Article 32.1(a) the insertion of reference to criminal prosecution as a condition for extradition should be included, as the current draft does not have this reference included. Otherwise the impression is given that the extradition can only requested in cases where the requesting state is seeking a person for the service of a sentence.

5.5 Secondly, Article 32.1(d) needs minor amendment to stress that in cases where an request has been submitted in regards of a person who is has applied for asylum or who will be granted asylum, the request will be rejected.

5.6 The final revision refers to Article 32.1(f) on the death penalty. The original version was very unclear as to what it was expected to achieve. The new text suggestions are outlined below:

"In addition to the conditions provided for in the Criminal Code and Criminal Procedure Code, the extradition of a person to a foreign state shall be permitted if the following conditions are met:

a) For **the purposes of a criminal prosecution or** enforcing a final judicial decision to imprisonment punishment or for enforcing a coercive security measure of personal character involving deprivation of liberty;

d) Where the person, for whom extradition is being requested, is not in the process of being provided with asylum **or does not have an outstanding asylum application pending determination** in Albania, at the moment of submitting the extradition request;

f) Where the requesting state **gives an assurance that it will not impose or if it is imposed, it will not carry out the enforcement of capital punishment as a sentence upon conviction for the offences that form part of the request for extradition.**

Article 33

5.7 In my view this article should be deleted as what it seeks to express is already covered in Article 5.2 of the draft law.

Article 45

5.8 It is assumed that the Ministry of Justice will seek the relevant assurances outlined in Article 43 at the commencement of the extradition proceedings (where they are not included in the request) to ensure that there is no additional reason for delay where the Court orders that a person can be extradited. The new text suggestion is outlined below:

*"The Minister of Justice shall determine in the order disposing of the extradition of a foreign state the request for the observation of the speciality principle. To this effect **at the commencement of the proceedings for extradition and where such assurances have not already been provided**, the Minister of Justice requests from the requesting state:*"

Article 49.1

5.9 In my view there is one minor addition to be inserted in the text which is simply a reference back to Article 5.3. The new text suggestions are outlined below:

*"Where the criminal proceedings are conducted in the Republic of Albania against a person being in a foreign state or if a local court has imposed a punishment for the person being in a foreign state, Minister of Justice may submit a request for his extradition, based on the grounded request of Prosecutor General **which has been drafted in accordance with Article 5.3 of this law.**"*

6 Chapter IV – Recognition and Enforcement of Criminal Decisions of Foreign Courts

6.1 Rightly, this section focuses on enforcing criminal decisions that affect individuals directly. However, after reviewing the provisions it appears to reflect only the situation where person will be liable for imprisonment/deprivation of liberty or it is linked to the transfer of prisoners (which has its own provisions at Chapter 5). Most notably orders for confiscation of proceeds of crime e.g. tangible and intangible property and instrumentalities are important final decisions that requesting states may ask the Albanian authorities to enforce – and I am not clear how these would be enforced in the framework outlined in Chapter IV. Possibly, there are separate provisions relating to the enforcement of overseas confiscation orders in other Albanian laws, but if there are not, then consideration should be given to amending this Chapter of the law to provide for their enforcement and to enable protection of bona fide third parties who may also have an interest in the property subject to confiscation.

Article 61

6.2 In light of my observations above, the new text suggestion is outlined below:

"1. The foreign criminal decision shall be enforced only if the following requirements are met:

a. the decision is final and it has been rendered by the competent judicial authority of the sentencing state;

b. the criminal offence is foreseen as such even by the legislation of Republic of Albania;

2. In relevant cases, these additional requirements shall also apply:

- a. at the moment of submitting the request, at least six months imprisonment have remained to be served by the convicted person;*
- b. the convicted person has agreed to the enforcement;*
- c. the person being subject to the enforcement of a decision of a foreign court has not been convicted for that criminal offence in the Republic of Albania or he has been acquitted, and*
- d. the enforcement of the conviction decision shall, based on the legislation of the sentencing State and that of the Republic of Albania, be excluded due to prescription period.”*

Article 73

6.3 There appears to be an incorrect reference to Article 59 in paragraph 1 of this article. In fact it should refer to Article 63. Also in my view paragraph 2 of this article should be deleted as it is already provided for in Article 5.4 of this law.

Article 77

6.4 This has the same incorrect reference to Article 59 as mentioned in paragraph above. Again it should refer to Article 63.

7 Chapter VI – Transfer of Criminal Proceedings

7.1 Articles 81- 90 should be given a separate Chapter VI – Transfer of Criminal Proceedings. In my view they should not remain a part of the Chapter V on the Transfer of Convicted Persons as they are distinct areas of international cooperation.

Article 82.3

7.2 This paragraph should be deleted as it is already provided for in Article 5.4 of this law.

Article 84.2

7.3 I am not sure what this paragraph is trying to achieve.