Comments of the Albanian authorities

on the Report by Nils Muižnieks
Commissioner for Human Rights of the Council of Europe

The Albanian authorities would like to thank Commissioner for Human Rights of the Council of Europe, Nils Muižnieks, for the valuable Report and reassure for the serious commitment of the Albanian authorities in implementing his recommendations.

Albanian institutions responsible for safeguarding and implementing human rights standards have made the following comments to the Report of Commissioner Muižnieks:

- **Paragraph 1**
  The role of the Minister of Justice in the disciplinary proceedings against judges has been subject to adjudication by the Constitutional Court, which, by decision No. 11/2004, stated that the conduct of inspections by the Ministry of Justice and initiation of disciplinary proceedings do not infringe articles 7 and 145 of the Constitution of the Republic of Albania. In its rationale, the Constitutional Court emphasizes that similar solutions are also encountered in other countries such as Italy, Germany, Greece etc., thus, representing an argument to conclude that the solution made in the Albanian legislation does not prejudice the constitutional principles of the division and balance of powers and independence of the courts and judges. In these cases, the Minister of Justice is a HCJ member simply introducing the issue with no the right to vote.

  The Progress Report of the European Commission of 2013 stresses: “The competence for initiation and termination of a disciplinary procedure is still an exclusive power of the Ministry of Justice, which is contrary to the EU standards”.
  The Ministry of Justice will therefore propose the necessary legislative amendments in compliance with these recommendations.

  The Ministry of Justice has asked for the assistance of Venice Commission and EURALIUS IV Mission in respect of reforms in the justice system.

- **Paragraph 1,** the High Council of Justice (HCJ) considers the findings of Commissioner for Human Rights as very valuable. These findings should be reflected on possible amendments to the Law No. 8811, date 17.05.2001, "On the organization and functioning of the HCJ", hence, giving appropriate priority to this situation, which was also raised in the Progress Report of European Commission, stating that "... The power to open and close a disciplinary procedure is still the exclusive competence of the Minister of Justice, which goes against EU standards ... ". Furthermore, the role of the Minister of Justice in the Council does not comply with the standards established by Opinion no. 10 of the CCJE (Consultative Council of European Judges) and Council of Europe Recommendation CM/Rec(2010)12. For this reason, the HCJ solicits that the competence for initiating disciplinary proceedings against judges

should not be an exclusive competence of the Minister of Justice. To our opinion, this should also be a competence of the Deputy Chairman of the HCJ, to whom the current law gives the right to deliver the request and the materials for disciplinary proceedings to the Ministry of Justice. In addition, five other members of the Council, as well as the Chairman of the High Court, should have the competence to initiate disciplinary proceedings against judges.

- **Paragraph 13** Various strategic documents and laws with regard to the justice system have been adopted in the recent years, especially in the framework of fulfilling the obligations stipulated from Albania's EU Stabilization Association Process. The most important development was the adoption in 2011, by the Council of Ministers of Albania, of a comprehensive Justice Reform Strategy 2001-2013 and the accompanying action plan.

  The Crosscutting Strategy of Justice and its Action Plan were approved by the Decision of the Council of Ministers, in July 2011.
  The Ministry of Justice will draft the New Crosscutting Strategy of Justice and its Action Plan for the period 2014-2017.

- **Paragraph 16** of the Report reflects the fact that the Ministry of Justice has submitted a request to the Venice Commission to be provided with an opinion on the legislative reforms concerning the Law nr.8577, dated 10.02.2000 "On the organization and functioning of the Constitutional Court of the Republic of Albania," with a view to improving the activity of this Court.

  The Constitutional Court, as a crucial component for the functioning of the rule of law and the justice system in Albania, could not be kept apart from the reforming processes and ongoing improvements. Hence, this interaction with Venice Commission, having a specialized expertise in the constitutional field, would qualitatively improve the amendment of the organic law of the Constitutional Court.

- **Paragraph 28.** The HCJ considers as an important finding of the Commissioner in the last sentence of this paragraph, with regards to the lack of a specified voting procedures in the Constitution, when it comes to the election of the HCJ members by the Parliament.

- **Paragraph 29**, HCJ is of the opinion that in the sentence next before last, the wording "evaluation of judges" leaves room for misunderstanding, thus confusing it with the process of professional and ethical evaluation of judges. It therefore proposes to replace it with the wording "the process of appointment and promotion of judges."
  The appointment procedure of the judges has recently witnessed a considerable progress, as also reflected in the last Progress Report of the European Commission. Such progress has been possible thanks to the recently adopted criteria (decision no 294/3, September 2012) to increase the transparency and objectivity of the decision making process for the election of each member of the Council. The defined criteria such as the i) duty competences; ii) long service/experience in senior positions of judges; family conditions, contribute to

an objective decision and a fair selection to fill the vacancies of the Court seats. It is worth mentioning that the selection criteria procedures have been drafted with the assistance of the Mission Euralius III.

- **Paragraph 31,** the HJC informs that the total number of judges at the time of the preparation of these comments, December 16, 2013 is 234 judges of the Courts of First Instance and the Courts of Appeal.

- **Paragraph 32,** As a result of previously improper operation of the HCJ, until July 2012, there have been only 16 professional and ethical evaluations for judges. Currently, the HCJ is prioritizing such evaluation.

- In addition to the information that the Commissioner has received, we would like to emphasize that the total number of judges evaluated until December 16, by the High Council of Justice is 234 judges of the Courts of First Instance and the Courts of Appeal. It is expected that within December 2013, the HCJ Inspectorate will submit to the HCJ for review and approval the last draft acts for the evaluation of judges for the period of time 2005-2006, thus allowing for the first time in Albania the completion of a round of professional and ethical evaluation of judges. Also, in December 16, 2013, the Council opened the way to the Inspectorate to start collecting all necessary documentation for the implementation of the evaluation process of the judges, for the following three years, specifically for the period of time 2007-2009.
  A program "On defining the courts and the judges that will be subject to professional and ethical evaluation for the period of time 2007-2009, during the year 2014" was approved on 16.12.2013 by the decision no. 413, which constitutes the beginning of the second round of the professional and ethical evaluation of judges. This second round of evaluation will be conducted under the new evaluation system, adopted in 2010, which is presented simplified in its structure.
  HCJ assesses that the system of professional and ethical evaluation of judges is an objective indicator of the performance of the judges. However, considering the dynamic needs, it acknowledges the need to improve the system.
  HJC estimates that, in any case, the rules and the eventual improvement of the evaluation system should be a HCJ self-regulated matter. This issue is closely related to the independence of the judicial system, because it gives a direct impact on the judges' professional career.

- **Paragraph 36**, The HCJ welcomes the assistance of the Venice Commission and its involvement in the legislative amendments, within the framework of the justice system reform. The HCJ is convinced that the valuable expertise and the opinions of the Venice Commission would guarantee the compliance of the Albanian legislation with European standards.

- **Paragraph 34.** It should be clarified in this paragraph that the Minister of Justice is not involved in the decision on the transfer of judges. His role is limited only to the rights conferred by law as a member of the High Council of Justice. In this process the Minister of Justice has only the voting right.
  Within the general framework of the balance of powers, the role of the Minister of Justice is crucial when it comes to his involvement in the disciplinary

proceedings, as already mentioned above. The Minister of Justice does not participate in the voting process, in cases where he has already initiated disciplinary proceedings.

- **Paragraph 35.** Pursuant to article 147 of the Constitution of the Republic of Albania and article 3 of the Law No. 8811/2001 "On organization and functioning of the High Council of Justice", as amended, the HCJ consists of 9 members elected from the National Judicial Conference. The National Judicial Conference is the meeting of all judges of the first instance courts, judges of appellate courts and judges of the Supreme Court of the Republic of Albania. Accordingly, the majority of the members of High Council of Justice (9 members) come from the judiciary.

- **Paragraph 41.** In December 2013 the courts where ICMIS system was not installed such as the District Courts of Përmet and Kukës provided the necessary hardware infrastructure for the initial implementation of ICMIS system. The latest version of ICMIS application is already installed in all courts. Within February 2014 the Ministry of Justice will coordinate the initial installation of the system as well as the training for the administrative staff and judicial panel, in order to start the registration and electronic processing of judicial cases.
  The final ICMIS version is already installed in the First Instance Court for Serious Crimes and the registration of cases to ICMIS System has already began. The Ministry of Justice will ensure an additional training for the full use capacity of the system, especially for judges.

- **Paragraphs 50-57 -** The issue of non-enforcement of final decisions (administrative and judicial) has been subject to continuous monitoring by the Committee of Ministers since the judgment of the ECHR "Qufaj v. Albania" had been delivered. To this end, the authorities have undertaken a series of reforms that have aimed at increasing the efficiency of the enforcement service. Thus, we highlight the reforms reported in the Committee of Ministers: Action Plan on the Driza group of cases, likewise the Cross- Cutting strategy for resolving property issues.
  The Committee of Ministers has extensively addressed this issue in light of the violations found in several judgments of the ECHR for Albania by the adoption of the first Memorandum for classification of 11 judgments on property cases in the so-called group Driza, highlighting systematic violations occurred due to structural problems. A second Memorandum on the Action Plan on Driza cases has been adopted and it offers an analysis of the problem of non-enforcement of final decisions that recognize, restitute and/or compensate former property owners. The action plan on the pilot judgment "Manushaqe Puto" is foreseen to be implemented by June 2014 as the last deadline set in the pilot's decision.

  In the DH- Meeting of the Committee of Ministers of CoE held in December 2013, the Albanian delegation expressed its commitment and determination to solving this problem. Accordingly a working group in inter – ministerial level was set up by Prime Minister Order no.241, dated 14.12.2013 which has the

mandate of drafting an action plan for the implementation of the pilot judgment "Manushaqe Puto". The working group has started its work on 31 December 2013 and it is expected to conclude an Action Plan duly by January 31, 2014. This action plan which will be presented at the next meeting of the Committee of Ministers to be held in March 2014 is expected to provide a concrete plan with strategic measures (budgetary, structural, legal). Its aim is to create an efficient mechanism of solutions for the execution of all final decisions (administrative/ judicial) in order to recognize, restitute or compensate the property to the former owners. The action plan is expected to address all the issues that have hindered the successful execution of these final decisions, dealing with the implementation of the Law "On restitution and compensation", registration of real estate, increasing the efficiency of bailiff service, creation and distribution of the compensation fund (in kind, financial or other) under fair, transparent procedures, setting realistic deadlines conform to the European Convention on Human Rights. The implementation of the action plan will be continuously monitored by the Committee of Ministers, in order to increase the guarantee of its implementation by the Albanian authorities in the due time.

- **Paragraph 61.** Currently, the law No. 49/2012 on functioning of administrative courts began to be implemented by the respective courts as the administrative courts started to operate on 4 November 2013 (6 administrative first instance courts and 1 administrative appellate court). The operation of these courts will facilitate the workload of judges. The Ministry of Justice has adopted measures to provide the staffing of courts, taking into account the criteria stipulated in Law No. 109/2013 "On judicial administration in the Republic of Albania" and the bylaws for its implementation. The 2014 budget has foreseen the increase of the number of judicial administration personnel with 94 employees.

- ***Paragraph 70*** From 2011, the Constitutional Court has ruled several declarative decisions regarding the excessively lengthy judicial proceedings as the result of non-conducting the trial within reasonable time (*decision nr.47/2011, appellant Orik Shyti; decision nr.12/2012, appellant Adelina Koliqi, etc.*). Due to some deficiencies in its organic law, through these decisions, the Constitutional Court has failed to impose sanctions on ordinary courts aiming at accelerating the proceedings, redress the right, or even grant any kind of pecuniary compensation. As a consequence, these decisions, being declarative by their nature, lack the effectiveness in the context of article 13 of ECHR. Therefore, the amendments to the organic law of the Constitutional Court would be indispensable, in order to make its activity more efficient, not only with regard to granting any pecuniary compensation to the individuals, but also to accelerating the proceedings.

- **Paragraphs 74-76** Concerning all judgments cited in the paragraphs 74, 76 of the report, the European Court found that the most suitable form of addressing their violations was in principle the trial *de novo* or reopening of judicial proceedings in implementation of the requirements for a fair trial under article 6 of the Convention. Domestic legal system currently has resolved a legal vacuum in the Criminal Procedure Code (CP) in its Article 450. Constitutional

Court[1] established so far the creation of a legal remedy for the reopening of the proceedings for review of final criminal decisions whenever the ECHR has found violations that make the trial unfair. Therefore the Constitutional court decision recognized the jurisdiction of the High Court to consider such requests, based on the direct effect of the judgments of the European Court of Human Rights. In this regard the ECHR judgments have the same legal effect as the Constitution, prevailing over the laws applicable, including the legal provisions in the Code of Criminal Procedure. To make its interpretation more concrete the Constitutional Court identified the ECHR judgments in terms of Article 450.1 of the CCP which states: "1. Review may be required: a) when the facts of the underlying decision disagree with those **of another final decision**." implying that the final decisions must include even the ECHR judgments. Therefore the amendment of Article 450 of the CCP needs to clarify the inclusion of the ECHR judgment in the meaning of a final decision as defined in paragraph 1 of this Article. However, the amendment of this article does not tackle the onward practice of reviewing final court decisions which are found to be unfair by the ECHR judgment. This practice is already established and is highly effective since the Constitutional Court decision cited above took effect.

Thus, pursuant to the decision of the Constitutional Court, the High Court has consolidated its practice for admission of requests for review of a final criminal decision of a similar nature in all judgments cited in the report. Review procedures are carried based on Article 450 of the CPC. Along with their request for review, the applicants are entitled to ask the High Court or the Retrying Court for the suspension of the conviction decision under article 454 of the CPC. Also, the applicants during the retrying procedures automatically vest the status of the defendant according to the provisions of Article 263.4 of the CPC.

- **Paragraph 86** In order to meet the obligation and ensure full access to justice, the Minister of Justice and the Minister of Finances approved the amendments to the "Joint Instruction No. 5668 dated 20. 11. 2013 "On an amendment to Instruction No. 13, dated 12.02.2009 "On determination of service fee for acts and services of judicial administration of the Ministry of Justice, State Bailiff Service, Prosecutor's Office, Notary Office and Immovable Property Registration Office". This amendment also complies with the expected standards for an EU candidate member state.

[1] Constitutional Court with its decision no.20, dated 1.06.2011 came to a reasoned decision regarding the applicants ' request Xheraj arguing that:

" ..... Interpretation made by the Criminal Chamber of the Supreme Court in the decision no. 1042, dated 9.07.2010 is wrong and is contrary to Sections 122 and 124 of the Constitution and Article 46 of the ECHR. Constitutional Court argues that if we are in the case of legislative vacuum, or when legal provisions conflict with the provisions of the Convention, the judges of each level directly implement the decisions of the ECHR. For this reason, according to the Constitutional Court, Supreme Court is bound to avoid illegal consequences that have come from the annulment of the innocence decision for Citizen Arben Xheraj.

.... This obligation belongs to the Supreme Court because of its special powers to review similar requests of this nature, but also in terms of unifying jurisprudence. In addition this court , in accordance with article 1 of the Code of Criminal Procedure, should not be confined only to the provisions of this code, but directly apply the Constitution and the ECHR .

..... Furthermore, the Court considers that the terms of the review institute cannot be claimed that the decisions referred to in Article 450/1/a, are only those given by the courts of the Republic of Albania, since Article 10 of the Code of Criminal procedure explicitly obliges the courts to enforce the provisions of international agreements to which the Republic of Albania is a party . "

The judicial fees are reduced to the extent of 37.5% - 50%. These fees are reduced to the level of the year 2009 as their unjustified increase after 2009 was deemed a serious obstacle for the access of citizens to justice.

- **Paragraph 96.** The Ministry of Justice has drafted the anti-corruption package, including amendments to some laws as on the Criminal Procedure Code and the Law No. 10192, dated 03.12.2009 "On the prevention and fight against organized crime and trafficking through preventive measures against property" (Anti-Mafia Law), to reflect the constitutional amendments on the immunity of judges and inclusion of corruption-related criminal offences, seizing the properties of their perpetrators or of their relatives after having examined the derivation of those properties. These amendments aim at strengthening the anti - corruption mechanisms in the judiciary. These amendments are expected to be approved by the Albanian Parliament.
  Since October 2013 the Minister of Justice has requested to the High Council of Justice the initiation of disciplinary proceeding for 5 judges who had violated the legal procedures, by proposing the adoption of an extreme disciplinary measure. Four of these disciplinary proceedings are initiated as a result of the inspection of HCJ inspectorate and only in 1 case it has started as a result of the inspection of the Ministry of Justice. On 16.12.2013 the High Council of Justice decided on the suspension of a judge suspected to be involved in corruptive acts until the court sentenced a final court decision on the charge raised against him. Currently, the case is under investigation.
  Furthermore, the Ministry of Justice has a new electronic portal "*Stop corruption in justice*". 11 complaints against corruption were delegated to the General Prosecutor's Office in order to be handled. 2 complaints for hiding of property were filed with the High Inspectorate of Property Declaration and Inspection and a large number of denouncements for corruption were addressed to the relevant ministries.

- **Paragraph 97.** The issue of the increase of salaries of judges is addressed by the amendments to Law on judicial power No. 9877/2008, approved in April 2013 by virtue of Law No. 114/2013. This law entered into force on 1 January 2014.

  The salary for a first instance judge is increased by 20 per cent plus the service seniority. The salary for the Appellate Court judge is increased by about 7% plus the service seniority.

- **Paragraph 100.** The independence of judicial power is guaranteed by the independence of the High Council of Justice. The High Council of Justice mostly consists of judges (members), President of the Republic, President of the Supreme Court, Minister of Justice, 3 members elected by the Parliament. By this constitutional formula, the possibility of interventions or influence to violate the independence of judiciary and judges is strictly excluded. In each case, the decision making belongs to the High Council of Justice, most of whom consisting of judges.
  The Minister of Justice does not participate in the voting process in cases of disciplinary proceedings he has initiated.

- ***Paragraph 106,*** According to the Court's opinion, as it has been mentioned in its decision nr.7, dated 27.02.2013, it belongs to the judge to evaluate on the basis of clear evidence of economic impossibility presented by the plaintiff, and assess, referring to the civil procedural legislation and respective legal regulations, whether it is the case to exempt the plaintiff from the payment of court fees. Therefore, in the framework of civil procedural legislation and the law "On the legal aid" judges have the obligation to apply the exemption of plaintiff from the payment of court fees in cases when the exemption conditions are met.

  According to the Constitution, the decisions of the Constitutional Court have general binding force and are final. So, in order to raise the awareness and educate the judiciary with the implementation of Constitutional Court decisions, the latter should pay special attention to this specific problem, i.e. the right of effective access of individuals with economic constraints to the court, considering it as an essential constitutional guarantee to be further elaborated in joint activities with the Supreme Court.

- ***Paragraph 112***: **Informing detainees on their rights:**, to this end it has been drafted a document containing all rights that the law recognises to all these persons.
  This written document has been conceived in the form of a declaration which is given to the persons deprived of their liberty. After reading, the detainee signs it in two copies. One copy is given to the detainee, while the other to the responsible personnel in the security rooms.
  Regulations and procedures to inform arrested / detained persons of their rights are defined in Order no.562, dated on 16/06.2011 "On the approval and the implementation of the Declaration to inform and recognize the legal rights of the arrested/detained persons in the security room premises".

- ***Paragraph 115***: **The efforts of Albanian authorities to pursue vigorously their efforts to combat all forms of ill-treatment by the Police:** Ministry of Interior has emphasized that the law enforcement is closely connected to the respect of the human rights and any police officer who violates or infringes human rights will be disciplinarily punished and prosecuted.
  To this purpose, there have been taken measures for the preparation and implementation of various documents in the local police structures:

a. The Orders, Rogatory letters, note verbal, descriptions, generalizations, circulars, etc., in order to improve treatment and the respect/assuring the human rights for the persons accompanied, arrested and detained at the State Police premises.

b. The adoption of Standards procedures of the police work on various aspects of the police activity related to the fulfilment of the obligations for development, for securing and creating opportunities to the fulfilment of these rights in practice.

- ***Paragraph 116***: The need for continuous training of law enforcement officers on how to treat persons deprived of liberty: In the annual training programs of State Police are planned training for the employees of the local police structures

and mainly for the general patrol service, concerning to the recognition and respect of human rights during accompaniment, detention and arrest.
In cooperation with short-term expert of PAMECA III Mission on February 2012 it has been carried out the training of 45 senior police employees in the local structures of the police.
The subject of the training was the acknowledgement of the legal and sub legal acts that sanction the rights of the persons accompanied, arrested or detained and their implementation in the daily practice by the police officers. These employees have been certified as "trainers" who will conduct the training of other the police custody officers.
In April 2012 it has been drafted the learning program and the respective training curricula "On the acknowledgement and respect of the rights of the persons deprived of freedom in the Police premises".
Based on this program it has been conducted a training with the local structures of police (directorates and police commissariats) from 21-30.05.2012, training about 650 high level police officers (first level of management and implementing level). The duration of the training for each group of 20 employees was 2 days. The learning program of this specialised training has the following subject:
During the period June-July 2012 it has been conducted the obligatory training for the police staff of public order, investigation department and prevention of crimes and for the traffic police of local units of police, regarding the acknowledgement and implementation in practice for the accompaniment of persons, the legal cases of accompaniment, their treatment and the rights of this category of persons according to the Law "On State Police". About 2600 police officers benefitted from this training.

- ***Paragraph 117:*** **On the lack of psychologists in police station**: Currently the psychological help is provided and it is functioning at the regional police directorates. The staff provides services for structures of the district police headquarters and police stations.
  For remote police stations such service is realized in partnership with educational institutions of respective districts.

- ***Paragraph 119:*** **On drafting and adoption of rules and standard operating procedures for the treatment of arrested / detained persons:** to this end it has previously been approved by the Order no. 64, date 25.01.2010, the respective Manual about the safety rules and treatment of persons arrested/detained at the police station. Currently, this manual has been repealed and it has been replaced by a new one, drafted in collaboration with Mission III PAMECA. The reviewed manual presents a wider range of rights of persons arrested/detained, as well as new rules and procedures dealing with personal control/physical, finely and intimate control, the control performance/medical examination immediately after the mass arrest/detention, within 12 hours.

  The new manual entered into force by the Order no. 763, dated 27.09.2011, of the Director General of Police, "On the adoption of the Rules of Procedures Standard Treatments Security Manual for detained person in Rooms Security, in Police Units".

This manual is made known to the police personnel who deals directly with the treatment of this category of persons, and other police staff as well, in the future will be organized and conducted for other training about this aim.

- ***Paragraph 120:*** **Measures for the prevention of maltreatment, identification and tracking of such cases:** For the prevention of maltreatment, identification and tracking of such cases, there have been planned and carried out periodic inspections as well as the sudden inspections by the police departments and the Directorate of Professional Standards.

  Similarly, inspections are carried out by the Internal Audit Service, Institution of the Ombudsman, the Albanian Helsinki Committee, Albanian Rehabilitation Centre for Trauma, European Institute of Tirana, police medical personnel, prosecutors, judicial district prosecutors, etc.

  Likewise lawyers of arrested/detained can have meetings with their clients at any time

- ***Paragraph 138:*** **On the systematic medical examination:** In the Standard Rules and Procedures Manual approved by the Order No. 763 dated 27.09.2011 of the General Director of the State Police, on the relevant part related to the Treatment and Safety of the arrested/detained persons at the Police Units it has been defined that:

- Every arrested/detained person shall be subject to a medical check-up if they have signs of violence or ill-treatment by a doctor prior to their placement in a custody cell. If such cases are identified, a procès-verbal is done and forwarded to the prosecutor office authorities, police leaders and, Interior Control Service for further actions.
- To the arrested/detained persons is offered sanitary service during their stay in these premises according to the needs and in special cases, such examinations are performed at the medical district centers.

- ***Paragraph 150:*** **On the complaints procedures:** In the State Police it has been established a system for the identification, presentation and elaboration of complaints/requests by those persons deprived of their liberty.
  To this purpose, it has been prepared and implemented the General Director's Order no. 371, dated 08.08. 2012, "On the establishment and rendering operative of "The Registry for the identification, treatment and solving the complaints/requests of those persons deprived of their liberty, at the premises of State Police, as well as standard working procedures for the realization of this right.""

- ***Paragraph 164:*** **Establishing an independent complaints mechanism covering all law enforcement officials:** The arrested/detained persons have the right to present complaints/requests also to the Interior Control Service as an independent Institution from the State Police.
  This structure is at the dependence of the Ministry of Interior and has the attributions of judicial police to carry out procedural actions against those police employees who abuse the rights or ill-treat these persons.

A new law is being drafted aiming at improving this service with regard to the treatment and review of claims. New technical opportunities are foreseen to be in place for acquiring on-line complaint at service website by any citizen against unethical behavior and generally all violations perpetrated by employees of State Police.