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Comment

on Albania's Draft Amendments to Legislation Concerning Juvenile Justice

1. SCOPE OF REVIEW

This is not a comprehensive review, but rather a comment on the package of draft amendments to the legislation of the Republic of Albania concerning juvenile justice. The analysis intends to assess the compliance of the draft legislation with international standards pertaining to the right to a fair trial and to propose recommendations considering both the relevant international standards and other countries' best practices. The comment incorporates the proposals made by the OSCE Presence in Albania on the basis of the preliminary comment.

2. INTRODUCTION

While juveniles shall be afforded the full panoply of fair trial safeguards required for adult criminal defendants, it is not sufficient to ensure that the law provides juveniles with the same range of protections. The complexity of the objectives of the juvenile justice system which tries to reconcile two apparently conflicting aims – the need to punish for the offending behavior and to attend to the juvenile offenders' individual welfare needs – makes the fundamental problem of striking fair balance between punishment and rehabilitation far more pronounced than in adult cases. Excessive emphasis on the overall legitimate objective to provide protection carries the risk of denial of due process rights to juveniles. Shifting the emphasis entirely to rehabilitation at the expense of other aims of criminal justice gives the state virtually unrestrained powers to act on behalf of the juvenile (*parens patriae* – the state's role substituting and superseding the parents). This is likely to result in a conclusion that the juvenile no longer needs the formal protections of due process – ultimately distorting the true meaning of justice. While endeavoring to base the

juvenile justice system upon the "best interest of the child" principle, the legislator should avoid the extreme of creating a paternalistic model where the young people's fundamental human rights are not respected.

This review analyzes the package of draft legislation concerning juvenile justice based on the following two essential criteria: (a) the impact in terms of furthering the objectives of the juvenile justice system as a whole; and (b) the implications for the juveniles' right to a fair trial. This combined approach intends to safeguard against automatic projection of fair trial guarantees on cases involving juvenile offenders and to ensure context-relevance.

3. SUMMARY OF RECOMMENDATIONS

3.1 Status of juvenile delinquents. Adjudication of delinquency. It is recommended that the law include a provision defining the *de facto* existing adjudication of delinquency and its consequences, and expressly prohibiting the use of a juvenile delinquency record in subsequent criminal proceedings. The law should extend to alleged juvenile delinquents the same range of procedural protections as afforded the defendants in criminal proceedings.

3.2 Safeguards against unlawful detention. It is recommended that Article 238 of the Code of Criminal Procedure be amended to include clear and specific criteria which may warrant the selection of pretrial detention as a measure to secure the defendant's appearance at trial. Alternatives to detention such as parental supervision should be introduced and promoted.

3.3 *Alternative procedures.* It is recommended that the Code of Criminal Procedure expressly exclude juveniles from those who may be tried according to the “direct trial” procedure. The “accelerated trial” procedure can be used for minor cases involving juveniles, however, it is recommended that stronger safeguards are introduced to ensure fair trial.

3.4 *Trials in absentia.* It is recommended that the law expressly prohibit trials *in absentia* when the defendant is a juvenile.

3.5 *Admissibility of evidence.* It is recommended that the Code of Criminal Procedure provide for a clear and specific procedure to determine the admissibility of evidence.

3.6 *Records.* It is recommended that the Code of Criminal Procedure expressly provide that juvenile conviction records shall not be used in adult proceedings involving the same offender. It is also advisable that the law provide for a clear and specific set of criteria to determine whether the juvenile record may be expunged (i.e. canceled out or destroyed completely).

3.7 *Justice for child victims and witnesses.* It is recommended that greater consideration be given to the safeguards of justice for child victims and witnesses. In particular, it is recommended that the offense of sexual intercourse between a parent and a child, or a legal guardian and the ward, be removed from the list of crimes prosecutable only by the victim’s complaint. It is also recommended that written or audio/videotaped statements by child witnesses be permitted as evidence where the child is a threatened witness and the alleged offense is a grave one.

3.8 *Diversionsary options.* It is recommended that the Albanian policymaker in the long-term prospect of juvenile justice reform consider gradual introduction of prosecutorial

discretion and diversionary measures. Should Albania in the future opt for the introduction of diversionary measures, it would be of utmost importance to ensure that any legislative action be preceded by a maximum thorough impact assessment.

4. ISSUES WHICH REQUIRE PARTICULAR ATTENTION

4.1 Status of juvenile delinquents. Adjudication of delinquency. Albania's Criminal Code makes a provision that juveniles below the age of criminal responsibility may still stand trial and be placed in an educational institution if the court decides so.¹ A similar disposition may be imposed on young persons who have been exempted from punishment.² Thus, *de facto* Albania's extant legislation allows for adjudication of delinquency and for juvenile disposition (institutional placement) as an alternative to a criminal sanction. The status of alleged juvenile delinquents, however, remains unclear. While Albania's Code of Criminal Procedure enumerates the rights of the defendant in criminal proceedings, the legislation is silent on the rights afforded to juveniles who have to stand trial without being presented with criminal charges. If a juvenile delinquent's status in terms of enjoyment by him/her of due process rights is the same as that of a criminal defendant, the law should expressly provide for it.

The consequences of being adjudicated as a juvenile delinquent are not clear either. In particular, can delinquency records be used in subsequent proceedings involving the same juvenile before or after he/she reaches the age of majority?

¹ Criminal Code of the Republic of Albania (1995), Article 46.

² *Id.*

It is recommended that the law include a provision defining the adjudication of delinquency and its consequences, and expressly prohibiting the use of a juvenile delinquency record in subsequent criminal proceedings.

4.2 Safeguards against unlawful deprivation of liberty. It is welcome that the Albanian legislation provides for an elaborated system of safeguards to ensure that individuals are not unlawfully deprived of their liberty. However, as far as the detention for educational or therapeutic purposes is concerned, there is still room for improvement. In particular, the Criminal Code provides that the court may decide to impose placement in an educational institution on juveniles “*who are excluded from punishment or, because of their age, do not bear criminal responsibility.*”³ The legislator intended to introduce adequate procedural safeguards against unjustified detention in an educational institution by providing for mandatory periodic review of the institutional placement,⁴ which is highly welcome. However, the fact that court may order detention of a juvenile below the age of criminal responsibility raises concerns with regard to the adequacy of the available safeguards, since it remains unclear from the relevant law whether or not such juvenile would be afforded the same rights as criminal defendants.

The U.N. Rules for the Protection of Juveniles Deprived of Their Liberty define the deprivation of liberty as “*any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to*

³ *Id.* NB: throughout the text of the comments quotations, regardless of their length, are not indented (except for the Annex A – Best Practices), given in *italics* and enclosed in quotation marks.

⁴ *Id.*

leave at will, by order of any judicial, administrative or other public authority."⁵

Placement of a juvenile by court in an educational institution would therefore amount to deprivation of liberty in the light of the applicable international standards, and **the individuals concerned must be afforded adequate procedural safeguards regardless of whether they have been presented criminal charges or have to stand trial as alleged juvenile delinquents.**

Finally, although this latter point is certainly beyond the scope of the analysis as it concerns fair trial standards, the lack of alternatives to institutional placement for adjudicated juvenile delinquents below the age of criminal responsibility presents a serious concern. **It is therefore advisable to introduce alternative dispositions such as community supervision, parental supervision, after hours home detention or the like.**

4.3 Detention pending trial. The draft legislation in question makes a highly welcomed effort to create alternatives to pretrial detention for juveniles by providing for placement in an educational setting as an option to secure the juvenile's appearance at trial.⁶ The law does not, however, provide for clear and unambiguous requirements that have to be met to justify pretrial detention.⁷ This vagueness and lack of specificity create the danger of arbitrary application of the law. **It is recommended that Article 238 of the Code of Criminal Procedure be amended to include clear and specific criteria which may warrant the selection of pretrial detention as a measure to secure the defendant's appearance at trial.**

⁵ United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, Rule 11(b).

⁶ Draft amendments to the Code of Criminal Procedure, Articles 232 (f) and 239 (a).

⁷ Code of Criminal Procedure of the Republic of Albania (1995), Article 238.

It should also be borne in mind that placement in an educational setting amounts to deprivation of liberty in the light of the relevant international standards⁸ and should therefore be avoided to the extent possible.⁹ **Alternatives to detention such as parental supervision should be introduced and promoted.**

4.4 Alternative procedures. The Code of Criminal Procedure has provision for “direct trial” which is a variety of an accelerated criminal procedure applied when the accused has been caught in *flagrante delicto* and the facts are not in dispute.¹⁰ The court may proceed with the direct trial also when the accused confesses to the criminal offense in question.

While, on the one hand, the direct trial procedure facilitates speedy disposition of the case, thus benefiting the defendant and society at large, on the other hand, the administration of such procedure requires stronger safeguards against possible abuse. It is welcome that the Code of Criminal Procedure provides for an option to postpone the hearing of the case for a period of three days if the accused requests additional time for the preparation of his or her defense. It is questionable, however, whether direct trial procedure should extend to juvenile offenders (or other categories of especially vulnerable defendants), in particular, in

⁸ See United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, Rule 11(b) (“*The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority*”).

⁹ See Convention on the Rights of the Child, Article 37 (b) (“*The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time*”); see also United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Rule 13 (1) (“*Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time*”).

¹⁰ See Code of Criminal Procedure, Article 400.

the light of the fact that the confession of the accused may be sufficient to justify the direct trial procedure. The need to devise the criminal procedure with due regard for the special vulnerability of juvenile defendant is reflected in the ICCPR¹¹ provision that “[i]n the case of juvenile persons, the procedure shall be such as will take account of their age.”¹²

It is recommended that the Code of Criminal Procedure expressly exclude juveniles from those who may be tried according to the direct trial procedure.

The second type of accelerated criminal procedure, the so-called “accelerated trial,”¹³ is initiated at the defendant’s request with the consent of the prosecutor and leads to the disposal of the case on the basis of evidence thus far accumulated. Where a sentence is pronounced, the penalty is reduced by one-third. The accelerated trial is thus essentially similar to the Italian procedure of *Giudizio abbreviato*. While it is possible that juvenile defendants are tried according to the accelerated trial procedure, it is still **recommended that procedural safeguards to secure fair trial be improved**. This would, for example, include ensuring that the decision on whether or not to request accelerated trial be taken only upon consultation with the defense counsel and with the juvenile’s full understanding of the implications of such decision.

4.5 Procedural guarantees of the right to defend oneself in person or through legal counsel. Trials in absentia. It is welcomed that Albania’s legislation accounts for the juvenile defendants’ status as especially vulnerable by providing, for instance, for

¹¹ Acceded to by Albania on 4 January 1992.

¹² International Covenant on Civil and Political Rights, Article 14(4).

¹³ See Code of Criminal Procedure, Article 403.

mandatory appointment of counsel in juvenile cases as an additional guarantee of the right to defense.¹⁴ There remain, however, gaps in the criminal procedural legislation which need to be addressed in order to provide juveniles with full range of opportunities to exercise their right to defense. Albania's Code of Criminal Procedure allows for trials *in absentia* in certain, limited cases, including when the defendant consents to being absent from the trial and represented by his or her defense counsel, as well as the cases of defendant's absconding.¹⁵ However, considering juveniles' status as especially vulnerable defendants, **it is recommended that the law expressly prohibit trials *in absentia* when the defendant is a juvenile.**

4.6 Admissibility of evidence. The Code of Criminal Procedure provides that evidence obtained in violation of the law shall be excluded.¹⁶ However, the law does not provide for a procedural mechanism to determine the admissibility of evidence. This undermines the status of the defendant in criminal proceedings in general, and in the case of juvenile defendants it presents an even more serious concern because of the juveniles' special vulnerability. In particular, lack of a procedure to determine the admissibility of evidence is likely to negate the intended effect of additional evidentiary provisions applicable to juveniles (e.g. prohibition on the use of juvenile criminal record in adult proceedings, exclusion of the admission of guilt as a condition of being diverted from the criminal justice process in case conditional diversionary measures are introduced, and the like).

¹⁴ *Id.*, Article 49 (2).

¹⁵ *Id.*, Article 352.

¹⁶ *Id.*, Article 151 (4).

It is recommended that the Code of Criminal Procedure provide for a clear and specific procedure to determine the admissibility of evidence.

4.7 Records. It is not entirely clear from the proposed draft if juvenile conviction records that have not been expunged can only be used in subsequent proceedings before the juvenile offender reaches the age of majority, or they can also be used in subsequent adult proceedings.¹⁷

It is recommended that the law expressly provide that such records shall not be used in adult proceedings involving the same offender, which will be consistent with the international standards.¹⁸ It is also advisable that the law provide for a clear and specific set of criteria to determine whether the juvenile record should be expunged, as the proposed amendments language is rather vague and leaves room for arbitrary application of the law.¹⁹

4.7 Justice for child victims and witnesses. While the package of legislative amendments introduces significant improvements with regard to the situation of juvenile defendants, relatively little attention is being given to the plight of child victims and witnesses of crime.

¹⁷ Amendments to the Code of Criminal Procedure, Article 9, amends Article 283 [should read Article 483 – *Author's note*] of the Code.

¹⁸ United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Rule 21 (“Records”).

¹⁹ *See supra* Amendments to the Code of Criminal Procedure, article 9.

It is welcome that the Code of Criminal Procedure lists the necessity to protect vulnerable witnesses as a condition which may justify *in camera* trial.²⁰ It is equally welcome that a minor witness may be questioned by the presiding judge with the assistance of the child's family member or educator, rather than by prosecutor or defense lawyer.²¹ This effectively lessens intimidation and is very important in cases when the defendant conducts his or her own defense, as it prevents him or her from directly questioning the witness.

It is, however, recommended that additional amendments be introduced to improve the protection of and the safeguards of justice for child witnesses and victims. In particular, currently Albania's criminal procedure allows for limited introduction of witness statements from the pretrial proceedings as evidence at the trial stage (e.g. in the case of foreign residents when they cannot appear in court).²² **It is recommended that written or audio/videotaped statements by child witnesses be permitted as evidence, subject to the condition that the child is a threatened witness and the alleged offense is a grave one. It is also recommended that the Code of Criminal Procedure²³ be amended to remove from the list of crimes prosecutable only by the victim's complaint the offense of sexual intercourse between a parent and a child, or a legal guardian and the ward.**²⁴

²⁰ Code of Criminal Procedure, Article 340.

²¹ *Id.*, Article 365.

²² *Id.*, Article 369.

²³ *Id.*, Article 284.

²⁴ Criminal Code, Article 106.

4.8 Diversionary Options. Albania's current legal framework does not allow for the diversion²⁵ of juvenile offenders from the criminal justice system due to the lack of prosecutorial discretionary powers not to institute proceedings or to abet the case.²⁶

Limited prosecutorial discretion can be a powerful tool helping reduce delays and the backlog of cases pending in courts, thus promoting the right to a prompt appearance before a judge and to trial within reasonable time.²⁷ Introduction of diversionary measures may also be further warranted by the growth of organized crime giving rise to the alarming practice of instrumental use of juveniles in criminal activities.

Against this background of positive potential of broader prosecutorial discretion creating the possibilities to divert juvenile offenders, however, there exists an inherent risk of triggering discriminatory and/or corrupt practices if discretionary powers are not exercised properly. The legislator needs to be aware of this in order to design effective legislative mechanisms to prevent possible abuse. With such mechanisms in place, a broader scope of discretion at all stages of criminal proceedings involving juvenile offenders will contribute to ensuring consistency with the international standards, in particular, the Convention on the Rights of the Child.²⁸

²⁵ Diversion from the criminal justice system allows to deal with juvenile offenders without resorting to formal trial. Diversionary measures may range from mere non-intervention to conditional diversion, i.e. suspension of the prosecution of a charge on a condition; if the latter is met, the charges are dismissed.

²⁶ See Code of Criminal Procedure, Articles 90-291.

²⁷ Expediency of proceedings, while undoubtedly important in adult cases, gains paramount importance in cases involving juvenile defendants. As indicated in the Commentary to Rule 20 ("Avoidance of unnecessary delay") to the U.N. Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), "[a]s time passes, the juvenile will find it increasingly difficult, if not impossible, to relate the procedure and disposition to the offense, both intellectually and psychologically."

²⁸ Ratified by Albania on 27 February 1992. Article 40 of the Convention provides that "*the States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in*

Countries which choose to introduce limited prosecutorial discretion need to ensure that **systems of review and appeal to permit scrutiny of decisions** are in place as recommended by the commentary to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules").²⁹

Introduction of conditional diversionary measures also requires providing for **safeguards against possible encroachments on the right to a presumption of innocence and the privilege against self-incrimination**. Thus, the admission of guilt made by the juvenile as a condition of being dealt with by a diversionary measure should not be admissible against him or her in any subsequent proceedings. Other essential safeguards include obtaining the juvenile's full and free consent to the proposed diversionary measure as a prerequisite to its application,³⁰ as well as ensuring the juvenile's access to legal aid to prevent undue pressure on and intimidation of the juvenile in the diversion process.

It is recommended that the Albanian policymakers in the long-term prospect of juvenile justice reform consider gradual introduction of prosecutorial discretion and diversionary measures. Should Albania in the future opt for the introduction of diversionary measures, it would be of utmost importance to ensure that any legislative action be preceded by a maximum thorough impact assessment, taking into account all relevant factors.

particular ...[w]henver appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected."

²⁹ See Commentary to Rule 6 ("Scope of discretion"), United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

³⁰ See United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Rule 11 (3) ("Diversion").