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COMMISSION EUROPEENNE POUR LA DEMOCRATIE PAR LE DROIT

(COMMISSION DE VENISE)

AVIS *AMICUS CURIAE* SUR LA LOI RELATIVE A LA LEGALISATION, A L'URBANISME ET A L'INTEGRATION DES CONSTRUCTIONS SAUVAGES DE LA REPUBLIQUE D'ALBANIE

Sur la base des commentaires de

M. Marc FISCHBACH (member suppléant, Luxembourg)
Mme Angelika NUSSBERGER (member suppléant, Allemagne)
M. Jan VELAERS (membre, Belgique)

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I. Introduction

1. Dans une lettre datée du 4 avril 2007, M. Gjergji Sauli, Président de la Cour constitutionnelle d'Albanie, a demandé à la Commission de Venise de donner un avis amicus curiae à la Cour dans le cadre du contrôle par celle-ci de la constitutionnalité de la loi n° 9482 du 3 avril 2006 sur la légalisation, l'urbanisme et l'intégration des constructions sauvages (ci-après « la loi »). Ce texte prévoit notamment la mutation de la propriété de terrains où des constructions sauvages ont été réalisées des propriétaires d'origine aux possesseurs des constructions par le biais de l'Etat. La constitutionnalité de la loi est contestée par une association de propriétaires d'origine.

2. M. Marc Fischbach (Luxembourg), Mme Angelika Nussberger (Allemagne) et M. Jan Velaers (Belgique) ont été désignés comme membres rapporteurs et ont remis leurs observations sur la loi. Celles-ci sont annexées au présent avis. A sa 71e réunion plénière, les 1er-2 juin, la Commission de Venise a examiné ces observations et les membres rapporteurs ont été autorisés à élaborer, avec l'aide du Secrétariat, un avis consolidé sur la base des observations et de la discussion.

3. Le présent avis comprend les conclusions principales et les questions de la Commission. Pour plus de détails, il est fait renvoi aux observations individuelles en annexe. Comme il s'agit d'un avis amicus curiae destiné à la Cour constitutionnelle d'Albanie, la Commission ne souhaite pas prendre définitivement position sur la constitutionnalité de la loi, mais donner à la Cour des éléments d'appréciation sur la compatibilité de la loi avec la Convention européenne des droits de l'homme et des points de droit constitutionnel comparé afin de faciliter l'examen du texte de loi au regard de la Constitution albanaise.

II. Examen de la loi

4. Ci-après, la loi est essentiellement examinée sous l'angle des critères précisés par la jurisprudence de la Cour européenne des droits de l'homme au titre de l'article 1er du Protocole n° 1 à la Convention du même nom. En vertu de cet article :

> *« Toute personne physique ou morale a droit au respect de ses biens. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et dans les conditions prévues par la loi et les principes généraux du droit international.*
> *Les dispositions précédentes ne portent pas atteinte au droit que possèdent les Etats de mettre en vigueur les lois qu'ils jugent nécessaires pour réglementer l'usage des biens conformément à l'intérêt général ou pour assurer le paiement des impôts ou d'autres contributions ou des amendes. »*

5. Dans ce contexte, il convient aussi de se référer à la situation constitutionnelle d'autres pays démocratiques et à la jurisprudence de leurs cours constitutionnelle et suprême.

6. Bien que la loi n'emploie pas le terme d' « expropriation », pas plus qu'elle ne prévoit de procédure formelle d'expropriation, il est clair que celle-ci doit être qualifiée de « privation de sa propriété » au sens où cette expression est employée dans la seconde phrase du premier paragraphe de l'article 1er du Protocole. Pour déterminer s'il y a eu une telle « privation de propriété », on ne peut se limiter à se demander s'il y a eu une expropriation formelle. Celle-ci peut être déduite de la disposition qui figure à l'article 15 de la loi en vertu de laquelle ceux qui ont été auparavant inscrits dans le registre foncier et indemnisés en raison de l'enregistrement des possesseurs de bâtiments sauvages, sont *de facto* et *de jure* expropriés.

- ***Respect du principe de légalité***

7. La première exigence de l'article 1er du Protocole n° 1, qui est, selon la Cour la plus importante, est que toute ingérence des pouvoirs publics dans la jouissance pacifique de biens doit être légale. La seconde phrase du premier paragraphe autorise la privation de propriété « dans les conditions prévues par la loi ». Ce principe de légalité présuppose que les dispositions en vigueur en droit interne sont suffisamment accessibles, précises et d'une application prévisible. Les requérants ne semblent pas contester qu'il en va ainsi des dispositions de la loi.

8. Le principe de légalité exige aussi que la loi elle-même soit régulière dans l'ordre juridique albanais et en particulier qu'elle soit conforme à la Constitution. Il appartient à la Cour constitutionnelle d'examiner la conformité du droit interne avec la Constitution albanaise et notamment son article 41 sur la propriété. Dans ce contexte, elle devra dire si cet article implique que les expropriations doivent être réalisées par le biais d'une procédure d'expropriation formelle. On peut renvoyer à un arrêt rendu le 10 avril 2003 par la Cour constitutionnelle turque[1] dans une affaire qui ressemble partiellement à celle-ci et qui est évoquée au paragraphe 17 des observations de M. Velaers jointes en annexe.

- ***Le principe de l'intérêt public***

a) Expropriations dans l'intérêt d'un tiers

9. Toute ingérence dans la jouissance d'un droit ou d'une liberté reconnus par la Convention doit poursuivre un but légitime. Une mesure qui prive une personne de son bien doit, en principe comme en réalité, le faire « dans l'intérêt public ».

10. Le seul fait que dans la présente affaire, l'Etat ne conserve pas la propriété des lots bâtis expropriés, mais qu'il la transfère aux possesseurs des constructions sauvages ne fait pas en soi obstacle au critère d'être dans l'intérêt public. Selon la jurisprudence de la Cour européenne des droits de l'homme, la réquisition d'une propriété dans le cadre de mesures sociales, économiques et autres légitimes, peut être dans l'intérêt public même si la collectivité dans son ensemble n'exploite pas la propriété enlevée ou n'en jouit pas directement.[2] Cela correspond aussi à la jurisprudence de la Cour constitutionnelle allemande et de la Cour suprême des Etats-Unis. [3] Toutefois, la Cour constitutionnelle allemande craint, dans de tels cas, un danger accru d'abus elle autorise les expropriations dans l'intérêt de particuliers uniquement si des tâches visant le bien public sont assignées par la loi aux bénéficiaires privés et si elle est convaincue que ces tâches seront réalisées dans la pratique. Toutefois, cette approche est particulièrement restrictive.

11. De plus, aujourd'hui, beaucoup de dispositions légales spéciales permettent de recourir à une procédure d'expropriation au bénéfice d'une personne privée. Ainsi, au Luxembourg, une loi spéciale a permis l'expropriation de terrains au bénéfice de l'exploitant d'un système de distribution dans le secteur du gaz et de l'électricité. Au cas où une personne privée refuse de céder un droit de passage à travers sa propriété, la loi prévoit une mutation obligatoire. Le nouveau texte, qui concerne le marché de l'électricité du 24 juillet 2000 et qui s'inspire d'une directive communautaire (Directive 2003/54/CE du Parlement européen et du Conseil du 26 juin 2003 concernant la réglementation commune du marché intérieur de l'électricité)

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1 Publié au Journal officiel du 4 novembre 2003. Voir aussi l'évocation de cette décision dans l'arrêt de la Cour européenne des droits de l'homme *Börekçioğulları (Çökmez) et autres c. Turquie*, arrêt du 19 octobre 2006, §§ 28-29.

2 CEDH, *James et autres c. Royaume Uni*, arrêt du 21 février 1986, §§ 40-42, 45, cité au par. 19 des observations de Jan Velaers.

3 Pour les références, voir les observations en annexe d'Angelika Nussberger.

autorise aussi la mutation forcée d'un droit de passage et des petites parcelles nécessaires à l'aménagement du réseau.[4]

12. Un autre domaine où la mutation forcée de propriété à une personne privée est assez courante dans beaucoup de pays européens est le remembrement de terres agricoles. C'est une opération administrative qui vise à l'amélioration de l'agriculture en remplaçant des parcelles éparpillées par de grandes surfaces qui permettent une exploitation plus efficace. Ce remembrement est un moyen d'améliorer les conditions de travail des exploitants agricoles. De cette manière, un exploitant peut perdre la propriété d'une parcelle en échange d'un autre lopin de terre. Il arrive que certains exploitants doivent céder un terrain contre leur volonté ou qu'ils obtiennent en échange un terrain moins grand ou une parcelle de moins bonne qualité. Bien que la mutation de propriété se fasse d'une personne privée à une autre, le remembrement et la réaffectation des parcelles est dans l'intérêt de tout le milieu des exploitants et d'une mise en valeur plus efficace des terres. C'est pourquoi, l'opération est considérée comme étant dans l'intérêt public.

b) L'intérêt public

13. La Cour européenne des droits de l'homme reconnaît aux Etats une large marge d'appréciation dans la définition de la notion d'intérêt public. Elle renvoie à l'appréciation du parlement national sauf en cas d'absence manifeste de toute base raisonnable. En fin de compte, cependant, l'objectif ultime à poursuivre est la justice sociale. La jurisprudence de la Cour[5] considère la réforme de l'emphytéose ou toute "législation destinée à assurer davantage de justice sociale dans le domaine du logement" comme poursuivant un but légitime et elle note que pour les sociétés modernes, le logement de la population est un besoin primordial qui ne saurait être régulé entièrement par le jeu des forces du marché.

14. Dans le cas de la présente loi, on ne peut guère, semble-t-il, douter que des motifs de justice sociale requéraient une intervention de l'Etat. La situation du logement en Albanie est en général considérée comme l'une des principaux problèmes auxquels le pays est confronté. Il y a eu un fort exode rural et 20 à 30% de la population de Tirana vivraient dans des quartiers aménagés de façon irrégulière ou informelle. Les mesures visant à donner accès au logement à une grande partie de la population peuvent être considérées comme poursuivant un but légitime. Dans la décision relative à Immobiliare Saffi[6], la Cour a reconnu que les dispositions législatives qui portaient sur une pénurie chronique de logements et qui étaient destinées à éviter des tensions sociales et des troubles de l'ordre public obéissaient à un but légitime dans l'intérêt général. De plus, quand elle était saisie de questions de propriété en Europe centrale et orientale, elle a estimé que les autorités nationales étaient confrontées à une tâche particulièrement difficile et qu'elles bénéficiaient d'une marge d'appréciation très large[7].

15. On peut donc supposer qu'il y a des raisons d'intérêt public qui peuvent légitimer l'expropriation des anciens propriétaires. Il semblerait difficile de nier l'existence de tels motifs eu égard à la marge d'appréciation très large que laisse la Convention européenne des droits de l'homme. La Cour constitutionnelle d'Albanie est mieux placée que la Commission de Venise pour juger si tel est aussi le cas par rapport à la définition de l'intérêt public retenue à l'article 41 de la Constitution.

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4 Pour plus d'exemples de transferts à des opérateurs privés, voir les observations en annexe de Marc Fischbach.

5 CEDH, *James et autres c; Royaume Uni*, § 47.

6 *Immobiliare Saffi c. Italie*, arrêt du 28 juillet 1999, § 48.

7 *Radanović c. Croatie*, arrêt du 21 décembre 2006, § 49.

c) Rechercher un juste équilibre entre les différents intérêts

16. Pour être conforme à l'article 1er du Protocole n° 1, la mesure privant une personne de son bien doit non seulement poursuivre un but légitime "dans l'intérêt public", mais, dans le souci de respecter le principe de proportionnalité, il faut aussi trouver un "juste équilibre" entre les exigences de l'intérêt général et les impératifs des droits fondamentaux de l'individu. Les situations de ce type supposent une répartition équitable du fardeau social et financier. Celui-ci ne peut être à la charge d'un groupe social particulier ou d'une personne donnée, quelle que soit l'importance des intérêts de l'autre groupe ou de la collectivité dans son ensemble.

17. En l'espèce, on pourrait soutenir que la solution retenue dans la loi ne trouve pas un juste équilibre, car les anciens propriétaires, qui n'ont violé aucune loi sont placés après les intérêts de ceux qui ont réalisé des constructions sauvages. Dans un pays plus développé ayant une tradition de respect de la prééminence du droit, une telle solution serait difficile à accepter.

18. Toutefois, une approche différente pourrait se justifier dans le cas de l'Albanie. L'ampleur même du problème, indiqué ci-dessus, révèle une situation qui n'est pas comparable à celle de l'Europe occidentale. Il est aussi difficile d'imaginer qu'une telle situation ait pu se produire sans une certaine tolérance de la part des autorités. La Cour européenne des droits de l'homme a estimé que les logements sauvages peuvent, s'ils ont été tolérés par les autorités, être considérés comme des biens au sens de l'article 1er du Protocole n° 1.[8] De plus, il convient de ne pas oublier qu'en Europe du Sud-Est, des organisations internationales comme la Commission économique des Nations Unies pour l'Europe[9] ont recommandé une politique visant à la régularisation des installations informelles et sauvages, car elles la considèrent comme nécessaire et légitime.

19. Le fait que les constructeurs aient agi en toute illégalité n'empêche pas nécessairement que leurs intérêts soient pris en considération et que l'on tranche en leur faveur. La Cour constitutionnelle d'Albanie est mieux placée que la Commission de Venise pour dire si la loi peut être considérée comme établissant dans tous les cas un juste équilibre entre des intérêts concurrents. Plusieurs facteurs peuvent être pertinents dans ce contexte, notamment la portée très large de la loi, qui n'est pas limitée aux biens affectés au logement à titre privé, et le fait que selon son libellé, la loi n'empêche pas des investisseurs ou des personnes morales de figurer parmi les bénéficiaires. Elle ne distingue pas non plus entre ceux qui ont réalisé des constructions sauvages il y a longtemps et ceux qui ne l'ont fait que récemment.

o *Indemnisation*

20. En vertu de l'article 1er du Protocole n° 1 et de l'article 41 de la Constitution albanaise, une indemnisation doit être versée en cas d'expropriation. Il est clair que les conditions d'indemnisation sont pertinentes pour l'évaluation si la législation contestée respecte ou non un juste équilibre entre les divers intérêts en jeu et notamment si elle n'impose pas un fardeau disproportionné aux requérants. La Constitution albanaise impose une indemnisation équitable. La Cour européenne des droits de l'homme accepte que l'indemnisation soit inférieure à la valeur réelle du marché si cela est justifié par des considérations de justice sociale. Une réforme radicale du système politique et économique du pays ou l'état des finances publiques peuvent justifier des limites strictes de l'indemnisation. [10] Là encore, la Cour reconnaît au parlement une large marge d'appréciation en matière de détermination du montant de l'indemnisation.

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8 CEDH, *Öneryildiz c. Turquie*, arrêt du 30 novembre 2004, §§ 127-129.

9 Voir les observations de Marc Fischbach en annexe.

10 CEDH, *Broniowski c. Pologne*, arrêt du 22 juin, §§ 175, 183 et 184 ; CEDH, *Strain et autres c. Roumanie*, arrêt du 21 juillet 2005, § 51.

21. La loi ne comprend pas de règles sur le montant de l'indemnisation due aux propriétaires d'origine. A cet égard, c'est la loi n° 9235 du 29 juillet 2004 sur la restitution et l'indemnisation de biens qui semble applicable, d'autant plus que l'article 15.5 fait partiellement référence à ce texte. Elle prévoit la création d'une Comité d'Etat et de commissions locales chargés de la restitution et de l'indemnisation des biens. A des fins d'évaluation, les commissions locales créent des groupes d'experts. Cette méthodologie semble *a priori* être dans les limites de la large marge de manœuvre laissée aux Etats, mais la Commission de Venise ne dispose pas d'informations sur le fonctionnement de ce mécanisme. Là encore, la Cour constitutionnelle d'Albanie est mieux placée pour juger s'il est probable que cette procédure conduise à un résultat qui assure un juste équilibre entre les différents intérêts.

- ***Voies de recours***

22. Les requérants qui contestent la loi devant la Cour constitutionnelle, allèguent qu'elle viole le droit d'accès à un tribunal garanti par l'article 42 de la Constitution. Il devrait être possible, en se fondant sur cet article, de contester devant une juridiction indépendante et impartiale prévue par la loi la décision de légalisation, qui implique la mutation de propriété et la décision d'indemnisation. Dans le paragraphe 5, plus spécifique, de l'article 41 cependant, cette possibilité de contester la décision semble limitée aux "différends liés au montant de l'indemnisation". Il faut que la Cour constitutionnelle clarifie les rapports entre ces deux dispositions constitutionnelles.

23. Bien que l'article 1er du Protocole n° 1 ne comporte pas explicitement de disposition analogue, la prééminence du droit est l'un des principes primordiaux de la Convention, si bien que la Cour européenne des droits de l'homme a souligné à diverses occasions[11] qu'en principe, une mesure qui porte atteinte à la jouissance pacifique d'un bien ne peut être légitime en l'absence d'une procédure contradictoire qui soit conforme au principe d'égalité des armes et qui permette de contester la mesure prise et de présenter des arguments concernant le montant de l'indemnisation. Ces garanties procédurales sont théoriquement nécessaires pour assurer que le fonctionnement du système et son effet sur les droits de propriété de la personne ne sont ni arbitraires ni imprévisibles, mais qu'ils permettent de trouver dans chaque cas un juste équilibre entre les exigences de "l'intérêt public" et les impératifs de la protection des droits personnels. Cependant, la Cour a aussi estimé que dans le cadre d'un dispositif général d'achat de biens par les locataires, il était légal de ne pas prévoir la possibilité d'un examen indépendant des différents cas une fois qu'il avait été établi que le bien faisait partie de la catégorie établie par la loi. [12]

24. L'article 26 de la loi prévoit le règlement des différends sur les "droits du sujet", mais cite uniquement les différends "concernant le degré de propriété de l'objet et/ou la participation de tiers qui revendiquent des droits sur le lot construit qui doit être légalisé". On ne sait pas bien si les autres différends, par ex. en l'espèce, la justification ou la proportionnalité de l'expropriation ou le montant et le versement de l'indemnisation sont ainsi exclus de la possibilité d'un contrôle judiciaire. La loi sur la restitution et l'indemnisation de biens permet d'interjeter appel contre les décisions de la Commission locale auprès du Comité d'Etat de la restitution et de l'indemnisation. Un droit de recours devant un tribunal pourrait toutefois découler d'autres textes de loi. Il appartient à la Cour constitutionnelle de juger s'il y a un droit de recours conforme aux exigences de la Constitution albanaise.

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[11] CEDH, *Hentrich c. France*, arrêt du 22 septembre 1994, §§ 42, 45 et 49 ; CEDH, Immobilare *Saffi c. Italie*, § 54 ; CEDH, Edwards c. Malte, arrêt du 24 octobre 2006, § 71.

[12] CEDH, *James et autres c. Royaume Uni*, § 68.

III. Conclusions

25. La loi soulève des questions de compatibilité avec l'article 1er du Protocole n° 1 à la Convention européenne des droits de l'homme et avec la Constitution albanaise. En ce qui concerne la compatibilité avec le Protocole n° 1, la jurisprudence de la Cour reconnaît une large marge d'appréciation dans ce domaine et en général la loi semble rester dans ces limites. Elle est notamment conforme (sous réserve de compatibilité avec la Constitution albanaise) avec le principe de légalité et poursuit un objectif d'intérêt public. Le fait que la mutation de propriété se fasse au bénéfice d'une personne privée ne fait pas obstacle à l'existence d'un intérêt public. Pour la Commission de Venise, qui n'est partie à aucune procédure contradictoire, il n'est pas possible de dire si la loi établit dans tous les cas un juste équilibre entre les différents intérêts. Les règles d'indemnisation semblent *a priori* compatibles avec les exigences de la Convention européenne, mais il faudrait davantage d'informations sur ce point. Les règles de recours applicables ne sont pas suffisamment claires pour permettre à la Commission de prendre position.

26. En tout état de cause, il appartient à la Cour constitutionnelle d'Albanie de donner, sur la base de la Constitution, une évaluation autorisée de la loi. Alors que la Convention européenne laisse aux Etats une large marge d'appréciation dans ce domaine, les exigences peuvent être plus strictes sur le plan interne et la Constitution albanaise peut en particulier être plus sévère en ce qui concerne le principe de légalité, le niveau d'indemnisation et les voies de recours requises.

Appendix 1

Comments by Mr Marc FISCHBACH (Substitute member, Luxembourg)

Factual background

The fall of communism and the process of democratic transition and economic transformation created a series of socio-economic problems in the countries of Eastern and South Eastern Europe.

Severe economic and social problems lead to a very difficult financial and public budget situation.

Shrinking public resources made it very difficult to implement adequate housing policies : the result was insufficient investment in social housing, urban planning and infrastructure development.

During the past two decades, there has been a standstill of state-led housing construction and a decline of urbanisation. Furthermore, the emergence of a private housing market was hampered by outdated and inefficient land information or registration systems (cadastre).

A massive rural exodus and migration to urban areas taking place during the last 15 years triggered the emergence of informal and illegal settlements mainly at the fringes of urban areas. According to some estimates, the urban population in Albania is supposed to have risen from 35.75% in 1989 to 42.3% in 1995 and turns around 54% in 2003.[13] An estimated 20 to 30 percent of Tirana's current residents are reported to live in such settlements[14].

The phenomenon of informal settlements lead to a very chaotic urban development resulting in inadequate access to basic services and facilities, vulnerability to forced eviction, informal and insecure land tenure and a neglect of housing maintenance.

Furthermore the multiplication of these informal settlements hampered the establishment of a functioning housing market and economic development in general.

Reforms granting a form of legal ownership to the settlers and establishing tenure security are therefore considered an urgent priority. They will stimulate investment in housing maintenance and production and favour an efficient housing market.

The objective of the law n° 9482 of 03.04.2006 on legalisation, urban planning and integration of unauthorised buildings is to initiate these reforms.

The national Association “Ownership with Justice” has lodged an application with the Constitutional Court of Albania for the abrogation of the above-mentioned law.

The applicant claims that the law n° 9482 does not satisfy the criteria of Article 1 of the Additional Protocol n° 1 of the European Convention of the Human Rights.

Thus the law would :

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[13] Council of Europe Development Bank, “Housing in South Eastern Europe solving a puzzle of challenges.”

[14] Interim Poverty Reduction Strategy Paper, May 3, 2000, prepared for the International Monetary Fund by the Government of Albania.

- abrogate the right of property not in the public interest but for a private benefit;

- take property from the owners without compensation;

- establish a legal valuation method which produces a compensation not in line with market prices;

- legalise or regularise legal actions defined as criminal acts in the Criminal Code.

By virtue of the disputed law, many legal owners will definitely be deprived of land and building sites.

In effect, the new legislation will legalise illegal settlements and the legal owners will not be in a position to recover the possession of their land and evict the occupants.

According to Article 1 (P1-1) of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms ("Article 1"), the deprivation of property can only be justified by the public interest :

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

Normally, a transfer of property from one private person to another takes place for a private benefit and the parties to such an operation do not act "in the public interest".

1. The question arises whether the Albanian law n° 9482 passes the "public interest" test provided for by Article 1.

a) Deprivation of property for private housing needs without the community having a direct use or enjoyment of the expropriated property

According to the applicant, the beneficiary of an expropriation cannot be another private person whose housing needs are a personal matter and not a matter of public interest.

In many legislations of the EU, only a public administration may initiate the expropriation procedure. According to the French legislation, this may only be the State, a municipality, a territorial collectivity ("collectivité territoriale"), a public organism and exceptionally, a private person but only in case this person is in charge of a public service mission or acts in view of the public interest. Normally the expropriator is also the beneficiary of the expropriation. Exceptionally, private persons may also become the beneficiaries of this procedure.

According to the Luxembourg legislation, an expropriation can only be pursued by the State, the municipalities, a public organism, or a private person in case his private interest is at the same time of public interest.[15]

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[15] The wording in French of article 2 of the Luxembourg law of March 15,1979 is the following: « L'expropriation pour cause d'utilité publique ... peut s'opérer à la demande de particuliers mais seulement si l'intérêt privé de la partie demanderesse est en même temps d'intérêt public ».

This wording does not require that the private person is in charge of a public service mission or subject to public service obligations.

Nowadays, many special legal provisions allow for the use of an expropriation procedure for the benefit of a private person.

In Luxembourg, a special law has authorised the possibility of the expropriation of land for the benefit of a distribution system operator in the gas or electricity sector. In case a private person is unwilling to transfer a right of way through his property, a compulsory transfer is provided for by the law.

The new law relating to the electricity market of July 24, 2000 based on the EU directive (Directive 2003/54/EC of the European Parliament and of the Council of June 26, 2003 concerning common rules for the internal market in electricity) also provides for a compulsory transfer of a right of way and of small parcels of land necessary for the construction of the grid.

It is evident that these provisions are not only in the interest of the private electricity company but also in the interest of the community because the construction of an electricity grid necessary for the supply of electricity to the households is also in the public interest.

This public interest results explicitly from legal provisions imposing public service obligations to the electricity transportation company. According to article 3 of the Directive-2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal electricity market :

> *"…. Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency and climate protection."*

The European Court of Human Rights ("The Court") has recognized the public interest of "zonal expropriations" for the purposes of town planning "to carry out a complete redevelopment of a densely-populated district". The Court granted the Contracting States a wide margin of appreciation in the area of development of large cites (Sporrong and Lönnroth, 69.) and regards it as established that the implementation of a town-planning policy satisfies the requirements of general interest (Elia S.r.l.,77).

Recently the Court confirmed this view that expropriation in view of the development of social housing is not an infringement of Article 1 of the Protocol n°1 (Motais de Narbonne, 21.) even if later on private persons and not the community at large will make use of the expropriated property.

I would like to give an example taken from the Luxembourg legislation of a private person not entrusted with a public service nor subject to public service obligations, but who nevertheless is entitled to make use of the expropriation procedure for his own benefit.

An agreement between the Grand-Duchy of Luxembourg and Sotel, société coopérative, concluded in 11 April 1927 legally ratified by Parliament in which the Government has committed itself to declare of public interest and to authorise the construction of electric lines built in order to insure the energy supply of the industrial steel production sites of Arbed. Sotel is the electricity supplier and transmission grid operator of the steel company. As steel production was by far the largest industry sector and employer in Luxembourg (up to 25.000 workers in a country of 350.000 inhabitants) the energy supply of the private steel company was considered of public interest as the closure of a production unit because of difficulties in the supply of energy would have caused severe social hardships.

The declaration of public interest to which the Government committed itself to proceed through an "arrêté grand-ducal" made it possible for Sotel to resort to the expropriation procedure in case a private owner refuses to sell a parcel of land for the construction of the pylons of an electric line or to grant a right of way.

Another example of a compulsory transfer of property to a private person is the legislation relating to land consolidation or regrouping ("Remembrement" in French).

It is an administrative operation with the aim of improving land cultivation by replacing scattered parcels of land by larger surfaces allowing for a more efficient exploitation. This land consolidation is a way of improving the working conditions of farmers. Thus a farmer may lose ownership of a parcel in exchange of another piece of land. Some farmers may finally have to give up a parcel of land against their will, or get in exchange a smaller surface or land of lesser quality.

Although the transfer of ownership is from one private person to another, land consolidation and reallocation is undertaken in the interest of the whole community of farmers in favour of a more efficient exploitation of the land. Therefore the whole operation is described as being in the public interest.

This example is very instructive as it allows for a compulsory transfer of ownership from one private person to another for purely economic considerations related to a limited number of cultivators.

We may conclude that an expropriation of land in the exclusive interest of private persons not entrusted with a public service mission or with the implementation of public service obligations does not necessarily exclude the public interest of the expropriation.

The following principle emerges from the Court's case-law, notably its James decision : "So the compulsory transfer of property form one individual to another may, depending on the circumstances, constitute a legitimate means for promoting the public interest." … "No common principle can be identified in the constitutions, legislation and case law of the Contracting States that would warrant understanding that the notion of public interest as outlawing compulsory transfer between private parties." (James, 40.)

According to the case law of the Court, the expression "pour cause d'utilité publique" is not to be interpreted in a narrow sense. The Court gives to this concept an "autonomous" meaning covering a wider scope that also includes "expropriation measures taken in implementation of policies calculated to enhance social justice".

"A taking of property effected in pursuance of legitimate social, economic or other policies may be "in the public interest" even if the community at large has no direct use or enjoyment of the property taken." (James, 45.)

The deprivation of property from one person in order to transfer it to another is not necessarily a violation of Article 1 of the Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

b) Whether the aim of the disputed legislation is a legitimate one

The law under review addresses severe socio-economic problems related to the development of housing and the promotion of a free housing market.

The Court's attitude is to respect the legislature's judgement as to what is in the public interest, unless that judgement be "manifestly without reasonable foundation".

The settled case law of the Court (James, 47) considered leasehold reform legislation or any "legislation aimed at securing greater social justice in the sphere of peoples homes" as pursuing a legitimate aim and noted that modern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces.

Many international legal instruments stress the importance of housing rights and of policies striving for the improvement of living conditions.

The Council of Europe's Revised Social Charter recognizes housing as a fundamental social right. According to Article 31 of the Revised Charter :

> **"***Article 31 – The right to housing*
>
> *With a view to ensuring the effective exercise of the right to housing, the parties undertake to take the measures designed.*
>
> *1. to promote access to housing of an adequate standard;*
> *to prevet and reduce homelessness with a view to its gradual eliminations;*
>
> *3. to make the price of the housing accessible to those without adequate resources."*

The EU's Charter of Fundamental Rights referred to housing in the following terms : *" In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance".* (article 17.1 et 34.3)

The pursuance of a social policy in favour of the housing of the population is unanimously considered a legitimate aim.

The problems the Albanian legislature addresses through the law under review are severe.

The United Nations Economic Commission for Europe has established reports on Country profiles relating to the housing sector and has published a report on Albania.

> This report points out that *"Albania is currently facing a high level of informal and illegal housing development due to he large flow of rural inhabitants to urban areas. Local authorities and several NGOs are currently trying to regularize a chaotic urbanization process and legalize selected informal settlements" . …*

The report mentioned that the Albanian Parliament enacted a law on Urban Planning in order to deal with the problem of illegal settlements. Article 75 of this law states that arbitrary land occupation for every type of building has to be solved by the immediate demolition of the building at the expense of the violator.

The authorities were afraid that the strict application of this law and the implementation of enforcement measures against the illegal occupants would trigger a social revolt of the inhabitants of illegal settlements.

The housing situation in Albania is certainly one of the most complex and challenging problems facing the country. The assessment of the Albanian legislature according to which this situation is of public concern cannot be seriously disputed.

The Court recognized that legislative provisions dealing with chronic housing shortage and designed to avoid social tension and troubles to public order have a legitimate aim in the general interest (Immobiliare Saffi, 48.)

In conclusion, there are strong arguments in favour of assuming that law n°9482 has been enacted for purposes of public benefit and its objective is undoubtedly a legitimate one.

c) The means chosen by the authorities to achieve the aim must be appropriate and not disproportionate

In the James case, the Court has stated that a measure depriving a person of his property must be appropriate for achieving its aim (James, 50).

The Court did interpret the Article 1 (P1-1) as not establishing a test of strict necessity and considered that even if an alternative means were available, this would not render the reform legislation unjustified.

The principle is that the measure adopted by the legislature must be appropriate for achieving its aim and not be disproportionate thereto. It has therefore to be examined if the severity and urgency of the socio-economic problems that the measure should address justifies the deprivation of property of the concerned private persons.

The recommendations of the above-mentioned report on Albania published by the United Nations Economic Commission For Europe invite the Albanian authorities to look for ways allowing for legalisation of the illegal settlements:

> *"New ways to legalize informal and illegal settlements need to be found to solve this acute housing problem. The current Law on Urban Planning is too strong to be applied in practice and a new amendment to this Law should provide new solutions, considering the de facto situation prevailing in various parts of the country".*

The Vienna Declaration on informal settlements in South Eastern Europe signed in Vienna on 28th September 2004[16] emphasised regularisation efforts :

> *"A sustainable urban management requires that informal settlements be integrated in the social or economic, spatial/physical and legal framework, particularly at the local level. Successful regularisation efforts contribute to long-term economic growth as well as to social equity, cohesion and stability."*

It is also mentioned in this declaration, that the legalisation of informal settlements is considered a key factor in the preparation for accession to the EU.

There exists in the countries of South-Eastern Europe a general consensus that a policy striving towards regularisation of informal and illegal settlements and integration in a legally well organized urban structure is adequate and necessary.

In conclusion, there are strong arguments in favour of assuming that the legalisation programme adopted by the Albanian legislature is appropriate for achieving its aim and not disproportionate thereto.

2. Questions relating to the valuation methodology of the expropriated land

[16] The Vienna Declaration was signed by the Governments of Albania, "the former Yugoslav Republic of Macedonia", Serbia and Montenegro at a high level conference organized by the Stability Pact for South Eastern Europe/Housing and Urban Initiative.

2.1. Grand principle

Compensation terms are material to the assessment whether a fair balance has been struck between the demands of the general interest and the requirements of the protection of the individuals' fundamental rights and notably whether or not a disproportionate burden has been imposed on the persons who have been deprived of his possessions.

As a matter of principle, the availability and amount of compensation are material considerations. Compensation must be reasonably related to the value of taken property when it was taken: compensation must be fair and just, real, effective and prompt.

The deprivation in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances (Lithgow, 120).

In the James case, the Court has concluded that the taking of property without payment of an amount reasonably related to its value would normally constitute such a disproportion (James, 54.)

The Court grants to the legislature a wide margin of appreciation in this domain. It will normally respect the legislature's judgement regarding compensation unless that judgement is manifestly without reasonable foundation.

2.2. The contested legal provisions

In Article 15 of the Law n° 9482 under review there is a reference to Article 11 (Forms of Compensation) of the law n° 9235

The expropriated subject has the choice between various forms of compensation. If the request is objectively not possible, the Local Commission for Restitution and Compensation of Property may reject the request through a reasoned decision and offers another form of compensation.

The expropriated subject is entitled to submit an appeal to the State Committee for Restitution and Compensation of Property and thereafter he may still refer the matter to court.

The Local Commission for Restitution and Compensation of Property establishes an expert group for the valuation of property. The value of the property is assessed on the basis of the market value according to a methodology proposed by the State Committee of Restitution and Compensation of Property and approved by a decision of the assembly. The different elements of this methodology are not examined in this paper as no presentation thereof has been included in the file.

The applicant criticises the law for determining sale prices unilaterally imposed by the State without regard to supply and demand mechanisms of the free market.

In various cases, the Court has stated general principles governing the valuation of expropriated property in the context of socio-economic reforms.

These principles are the following:

a) A common compensation formula

In the Lithgrow case (Lithgrow, 143) the Court ruled that a nationalisation is a measure of general economic nature in regard to which the State must be allowed a wide margin of appreciation.

It cannot be denied that the regularisation of informal settlements is a large-scale measure with considerable socio-economic effects and that it has undoubtedly the same importance as the nationalisation plan implemented in the United Kingdom in the seventies. Thus we may conclude that the margin of appreciation available to Albania should also be a wide one.

The methodology of valuation of the assets may be subject to many criticisms. The deprived owners may argue that the methodology does not take account of all relevant factors having an influence on the valuation and that the compensation granted to the deprived owners does not reflect fair market value.

In examining this issue, account has to be taken that the valuation method has to be of general application (Lithgow,139 and 143.). In the context of expropriation legislation of large sweep, the implementation of a valuation methodology generally applicable to all the persons concerned has been approved by the Court.

The compensation terms have to be fixed in advance. The Court observed in the Lithgow case that this is in the interest of legal certainty. Furthermore the Court held that a subsequent assessment of the compensation on an ad hoc basis would be impracticable and give rise to very long delays, which may finally lead to a serious breach of Article 1 according to the recent case-law of the Court (Akkus, Aslangiray, Motais de Narbonne).

In implementing a large-scale programme of economic and social reform concerning a very large number of deprived persons, the State is not in a position to take account of all the various circumstances of each and every land owner (James, 68).

The Court concluded in the James case that equal treatment of all the owners is not an unreasonable valuation method and that it may lead to a fair allocation of compensation (Lithgow, 149.).

Nevertheless, in another case (Lallement, 24), the Court has held that each individual situation has to be examined in concreto, and in particular, specific elements of the expropriated property has to be taken into consideration especially so in case of land used for agricultural production. The Court ruled that compensation has also to taken account of the special loss suffered by the deprived cultivator making use of the land as a means of agricultural production.

A fair balance has to be struck between the interests of the deprived owners and the efforts the State has to undertake in order to establish fair compensation terms.

Thus it may be possible for the State to refine the general categories of expropriated land and to establish a more detailed price scale taking into account the most common factors influencing valuation of the expropriated land.

b) Reference to market value

The Court accepts that “legitimate objectives of public interest such as pursued in measures of economic reform or measures designed to achieve greater social justice may call for less than reimbursement of the full market value” (James, 54.).

According to a classic definition of fair market value, it is the price at which property is transferred between a willing buyer and a willing seller considering all the relevant facts and not acting under undue pressure to sell or buy. It is important to point out to the relativity of fair market value : any valuation is subject to a number of circumstances. Only part of these elements may be easily checked, others are subject to different interpretations and some of them may be considered as irrelevant by other interested buyers.

A comparison with the sale prices of neighbouring properties may not necessarily determine a fair market value.

It cannot be disputed that the present socio-economic problems in Albania and the difficult housing situation that has prompted the legislation under review has a significant impact on the present level of land prices. The multiple difficulties Albania encountered in establishing a normally functioning housing market have a distorting effect on the land prices.

The measures the Government is due to take in order to address this difficult situation will also have an effect on the sale prices.

In conclusion, it seems to be nearly impossible for the Albanian State to set a fair market value on real estate in the absence of such a functioning free market. The reference to a market value is very problematical.

c) Reference to analogous private sales

In the Lithgow case, the applicants argued that the valuation of the nationalised companies did not reflect the price that would have been fetched in a takeover bid by another company. The Court took the view that there is no warrant for holding that the applicants' compensation should have been aligned on the price that might have been offered in such a takeover bid.

Thus the Court considers that a fair and just compensation does not necessarily have to be aligned on the price in sale by private treaty between a willing seller and a willing buyer.

d) Most favourable valuation method

According to the Court, the fact that the most favourable valuation method has not be chosen, cannot be considered a breach of Article 1 (James, 172.).

The applicant may also argue that the chosen method does not sufficiently take account of future developments leading to an increase in the value.

In this context, account has to be taken, that appraising future increases is always guesswork.

Appendix 2

Comments by Ms Angelika NUSSBERGER
(Substitute member, Germany)

I. Background of the case

The Constitutional Court of Albania has to decide on the constitutionality of the Law No. 9482 "On Legalization, Urban Planning and Integration of Unauthorized Buildings." It has asked the Venice Commission for an Amicus Curiae Opinion on the legal problems arising in the context of this constitutional dispute.

The object of the Law No. 9482 is the legalization of objects built illegally in certain urban areas and the transfer of property of the parcel of construction where the unauthorized buildings have been built (cf. Article 1 of the Law No. 9482) from those registered in the immovable property registers to the owners of the illegal buildings (Art. 15 of the Law No. 9482). An "owner of an illegal building" is considered to be a "natural or legal person who has carried out himself or has been investor of the unauthorized building and who proves that he/she freely possesses or uses it and the construction parcel, regardless of whether s/he has ownership over them registered with the Immovable Property Registration Office" (cf. Art. 3 g of the Law No. 9482). The private subject formerly registered in the immovable property registers is entitled to remuneration in kind or cash (Art. 15.2 of the Law No. 9482). The compensation is calculated in accordance with the law "On Property Restitution and Compensation" (Art. 15.5 of the Law No. 9482)

A list of "natural or juridical subjects entitled to remuneration" is submitted to the Council of Ministers by the Immovable Property Registration Office. A decision on the remuneration of the owners has to be made within 30 days. They have to be compensated within three months (Art. 15.3 and 15.4 of the Law No. 9482).

The Law No. 9482 is applicable to all "objects build without authorization before the date of entry into force of this law, regardless of whether their function is housing, economic activity, or other social or cultural purposes, if these have been built by and are possessed by individuals or by legal persons" (Art. 2.1 of the Law No. 9482).

The constitutionality of this regulation is challenged on the basis of Art. 4, 17, 18 and 41 of the Constitution of Albania.

II. Relevant Articles of the Constitution of Albania

The relevant articles read as follows:

Article 4

1. The law constitutes the basis and the boundaries of the activity of the state.
2. The Constitution is the highest law in the Republic of Albania.
3. The provisions of the Constitution are directly applicable, except when the Constitution provides otherwise.

Article 17

1. Limitations of the rights and freedoms provided for in this Constitution may be established only by law, in the public interest or for the protection of the rights of others. A limitation shall be in proportion to the situation that has dictated it.
2. 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.

Article 18

1. All are equal before the law.
2. No one may be unjustly discriminated against for reasons such as gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic condition, education, social status, or parentage.
3. No one may be discriminated against for the reasons mentioned in paragraph 2 without a reasonable and objective justification.

Article 41

1. The right of private property is guaranteed.
2. Property may be acquired by gift, inheritance, purchase, or any other classical means provided by the Civil Code.
3. The law may provide for expropriations or limitations in the exercise of a property right only in the public interest.
4. Expropriations or limitations of a property right that amount to expropriation are permitted only against fair compensation.
5. In the case of disagreements related to the amount of compensation, a complaint may be filed in court.

The wording of Article 17.2 of the Albanian Constitution makes it necessary to consider the relevant legal questions on the basis of the limitations to Article 1 of the First Protocol to the European Convention of Human Rights. Other legal regulations (especially the jurisprudence of the German Constitutional Court) will also be taken into account in the amicus curiae opinion.

III. Basic legal questions

The basic legal questions arising out of the case are the following:

1. Can the transfer of property of one person to another one for the latter's private benefit be "in the public interest"?
2. Which conditions have to be met in the case of expropriations for the benefit of private persons?
3. What requirements does the compensation payment have to meet in this case?
4. Which sort of legal protection has to be guaranteed in this case?

IV. Analysis of the legal questions

1) Preliminary observation

The word "expropriation" is not used in the Law No. 9482. But it can be inferred from the regulation contained in Article 15 of the Law No. 9482 that those formerly registered in the

Register of Immovable Property and compensated because of the registration of the owners of the illegal buildings are de facto and de iure expropriated.[17]

2) Admissibility of the compulsory transfer of property of one private party to another one

It can be said that, as a rule, expropriation of private property is deemed to be a human rights violation unless it is "in the public interest" and subject to special conditions. The term "in the public interest" or for the "public benefit" or similar terms are used in many national constitutions[18] as well as in international human rights documents.[19] But neither the expression "in the public interest" nor "for the common good" has to be interpreted in a very narrow sense outlawing expropriations for the benefit of private persons.

Thus, the European Court of Human Rights clearly states in its judgement *James and others v. The United Kingdom*:

> "The Court agrees with the applicants that a deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be "in the public interest". Nonetheless, the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest. In this connection, even where the texts in force employ expressions like "for the public use", no common principle can be identified in the constitutions, legislation and case-law of the Contracting States that would warrant understanding the notion of public interest as outlawing compulsory transfer between private parties."[20]

The same approach is taken by the German Constitutional Court in its judgment "Boxberg".

> "If the expropriation for the purpose defined by the Basic Law and sufficiently concretized by the legislator is necessary, it is … not decisive, if it is for the benefit of a private person or a public administration."[21]

The U.S. Supreme Court also states that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid. … But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."[22]

Furthermore, there is consensus that the expression "in the public interest" does not restrict expropriations to those cases in which the public has a direct benefit.

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17 Cf. *Jahn and others v. Germany*, para. 63 et seq.

18 "Public purpose" (Art. 16 Constitution of Belgium, Art. 62 II Constitution of Portugal), "public weal" (Art. 73 I Constitution of Denmark), "common good" (Art. 43 II Constitution of Ireland), „public needs" (§ 15 Constitution of Finland), "public interest" (Art. 14 I Constitution of the Netherlands, Art. 16 Constitution of Luxembourg), "pressing public interest" (§ 18 I Constitution of Sweden), „public necessity" (Art. 17 Declaration of the Human Rights of 1789, France), "public benefit" (Art. 17 II Constitution of Greece), "common interest" (Art. 42 III Constitution of Italy), "public utility or social interest" (Art. 33 III Constitution of Spain); "in cases and in the manner described by the law" (Art. 5 Basic law on the general rights of nationals in the kingdoms and States represented in the Reich's Congress of 1867, Austria); Otto *Depenheuer*, in: Tettinger/Stern, Europäische Grundrechte-Charta, München 2006, p. 447.

19 "Public interests" (Art. 1 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms), "public need" (Art. 14 African Charter on Human and Peoples' Rights), "public utility or social interest" (Art. 21 II American Convention on Human Rights).

20 Cf. *James and other v. The United Kingdom*, para. 40.

21 Decision of the Constitutional Court of Germany (24.3.1987), NJW 1987, p. 1251.

22 U.S. Supreme Court, *Hawaii Housing Authroity v. Midkiff*, 467 U.S. 229 (1984).

Thus the European Court of Human Rights states:

> "Neither can it be read into the English expression "in the public interest" that the transferred property should be put into use for the general public or that the community generally, or even a substantial proportion of it, should directly benefit from the taking."[23]

It is deemed to be sufficient that the public indirectly profits from the expropriation:

> "The taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being "in the public interest". In particular, the fairness of a system of law governing the contractual or property rights of private parties is a matter of public concern and therefore legislative measures intended to bring about such fairness are capable of being "in the public interest", even if they involve the compulsory transfer of property from one individual to another."[24]

In the case of the indirect benefit of the public good the German Constitutional Court sees an "enhanced danger of misuse to the detriment of the weaker ones".[25] Therefore it expects the legislator to clearly define by law "for which projects under which conditions and for which purposes an expropriation can be admissible."[26]

The approach taken by the Albanian Law in question compulsorily transferring property from one private owner to another private owner can therefore not be seen to be incompatible with generally accepted standards as such.

3) Preconditions for expropriations for the benefit of private persons

The most important and controversial aspect is, however, which conditions have to be met in order to consider an expropriation for the benefit of private persons to be "in the public interest".

The European Court of Human Rights sees it as a necessary precondition that the expropriation legislation pursues a legitimate aim and that the means chosen to achieve the aim are proportional.

a) Legitimate aim

It is important to note that the European Court of Human Rights is reluctant to define concretely what might be a legitimate aim justifying an expropriation as being "in the public interest". In the context the Court considers the national legislator to understand the society's needs better and refers to the doctrine of the "margin of appreciation". Still, it explains that the policy aim of the national legislator must not be "manifestly without reasonable foundation".[27]

The Court considers measures to even out social injustices to be generally justified by a "legitimate aim".

> "Eliminating what are judged to be social injustices is an example of the functions of a democratic legislature. More especially, modern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces. The margin of appreciation is wide enough to cover legislation aimed at securing greater social justice in the sphere of people's homes, even where such legislation interferes with existing contractual

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23 *James and others v. The United Kingdom*, para. 41.

24 *James and others v. The United Kingdom*, para. 41.

25 Decision of the Constitutional Court of Germany (24.3.1987), NJW 1987, p. 1253.

26 Decision of the Constitutional Court of Germany (24.3.1987), NJW 1987, p. 1253.

27 *James and others v. The United Kingdom*, para. 46.

> relations between private parties and confers no direct benefit on the State or the community at large."[28]

But it is clearly emphasised that "social justice" has to be the ultimate aim. Therefore the Court bases its judgment in the case *James and others v. The United Kingdom* on the "moral entitlement" of the beneficiaries. It accepts that the legislator's "belief in the existence of social injustice" is not manifestly unreasonable.

The same can be said for the U.S. Supreme Court in the decision Hawaii Housing Authority v. Midkiff, as the expropriation legislation was meant to reduce the perceived social and economic evils of a land oligopoly.

The German Constitutional Court is still more demanding. It does not accept general aims of social redistribution policy, but allows expropriations for the benefit of private persons only under two narrow conditions: First, the private beneficiary must be assigned tasks for the public good on the basis of a law. Second, it must be secured that these tasks will be fulfilled in practice.[29] This view is also shared in the scientific literature both in relation to the interpretation of the German Grundgesetz[30] and in relation to the Charter of Fundamental Rights of the European Union[31]. But this view seems to be especially restrictive.

It is doubtful if the Albanian Law No. 9482 meets the requirement of "pursuing a legitimate aim" as it is understood by the European Court of Human Rights. The beneficiaries of the Law "On Legalization, Urban Planning and Integration of Unauthorized Buildings**"** are those having illegally acquired the possession of construction sites. Contrary to the beneficiaries in the case "James and other v. The United Kingdom" they cannot claim to have any "moral entitlement". It is also very doubtful if the law enhances "social justice" as it takes away property from the legal owners and transfers it those having acquired the possession of the relevant pieces of land illegally. The basic aim achieved might be legal certainty. But the Law No. 9482 seems to achieve this aim without having regard to social justice or moral entitlements. But this aspect might also be judged differently on the basis of the factual situation in Albania.

b) Proportionality

Furthermore according to the jurisprudence of the European Court of Human Rights as well as to the jurisprudence in the majority of the European legal systems the means chosen have to be proportional to the aim sought. There must be a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The persons concerned must not have to bear "an individual and excessive burden."[32]

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28 *James and others v. The United Kingdom*, para. 47.

29 Decision of the Constitutional Court of Germany (24.3.1987), NJW 1987, p. 1253.

30 Otto *Depenheuer*, in: v. Mangoldt/Klein (Hrsg.), Kommentar zum Grundgesetz Bd. I Art. 1-19, München 2005, Art. 14 Rdn. 428-430; Hans-Jürgen *Papier*, in Maunz-Dürig Grundgesetz Kommentar, Bd. II Art. 6-16a, 48. Lfg. 2006, Art. 14 Rdn. 577-588; Joachim *Wieland*, in: Horst Dreier (Hrsg.), Grundgesetz Kommentar, Bd. I Art. 1-19, Tübingen 1996 Rdn. 95; Rudolf *Wendt*, in: Michael Sachs (Hrsg.), Grundgesetz Kommentar, München 1996 Art. 14 Rdn. 161, 162

31 Cf. *Depenheuer*, in: Peter J. Tettinger/Klaus Stern (Hrsg.), Europäische Grundrechte-Charta, München 2006, Art. 17 Rdn. 65-57.

32 *James and others v. The United Kingdom*, para. 50.

It is also doubtful if this criterion is met in the case of the Albanian Law No. 9482 as those having violated the law are rewarded, whereas the interests of the legal owners are sacrificed. Even if the property rights of the former owners were seen to be "windfall profits" as a consequence of the reprivatisation law, they are based on a legal act passed by the democratically elected body (The Law on Restitution and Compensation of Property No. 9235. dated 29.7.2004), whereas there was never any legal basis to justify the investments of the illegal owners.

Furthermore, it is important to stress that the persons benefiting from the law are not necessarily the needy ones. The law defines an "owner of an illegal building" as a "natural or legal person who has carried out himself or has been investor of the unauthorized building and who proves that he/she freely possesses or uses it and the construction parcel, regardless of whether s/he has ownership over them registered with the Immovable Property Registration Office" (cf. Art. 3 g of the Law No. 9482). That means that even investors and legal persons will profit from the law. There is also not differentiation between those having illegally acquired property many years ago and those having illegally acquired property while the new law was discussed in Parliament. It might also be possible that one illegal owner gets more that one plot of land on the basis of the law. Furthermore the law applies regardless of whether the function of the illegally acquired property is "housing, economic activity, or other social or cultural purposes".

Thus is seems highly probable that there is not only a redistribution from those who are better off to the most needy ones, but also in the inverse sense. All these aspects have to be taken into account when discussing the issue of proportionality.

4) Compensation payments

The Albanian Law No. 9482 provides for compensation payments. In this context it refers to the Law "On Property Restitution and Compensation."

According to the case law of the European Court of Human Rights, a right to full compensation does not have to be guaranteed under all circumstances.

> *"Legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value."*[33]

Here, once again, it is doubtful if the Albanian Law No. 9482 meets the required standards. As it is not obvious that it is designed to achieve greater social justice, it does not seem to be acceptable to compensate the expropriations in the same way as in the case of reprivatisations after expropriations during the communist regimes.

5) Legal Protection

Article 26 of the Law No. 9482 provides for the settlement of disputes on the "rights of the subject", but explicitly enumerates only disputes "concerning the property ratio on the object and/or on the inclusion of other people who claim rights on the construction parcel to be legalized". It is not clear if other disputes, e.g. regarding the justification or the proportionality of the expropriation in the concrete case or the amount and payment of the compensation in the concrete case are thus excluded from judicial review.

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33 *James and others v. The United Kingdom*, para. 54.

In the cases of expropriations the European Court of Human Rights does not require judicial review going into the details and reasonableness of each concrete transfer of property if a standardized approach can avoid uncertainty, litigation, expenses and delays.[34] Furthermore, according to the Court Article 6.1 ECHR "does not require that there be a national court with competence to invalidate or override national law".[35] But as far as a "civil right" in the meaning of Article 6 ECHR is concerned, access to court must be guaranteed. That is especially true for the amount of compensation.

On the basis of the text of Law No. 9482 it is not clear if these requirements are met.

V. Summary

The results of the legal analysis can be summarized as follows:

1. The compulsory transfer of property of one person to another person can be in the "public interest" and thus justified under certain conditions.
2. Expropriations of private individuals for the benefit of other private individuals are only justified if a legitimate aim is pursued and the measure taken is proportional. The elimination of social injustices can be a legitimate aim. It is doubtful if the Albanian Law No. 9482 on "Legalization, Urban Planning and Integration of Unauthorized Buildings" helps to mitigate social injustices insofar as it promotes a redistribution of property from legal to illegal owners. It is also doubtful if it is proportional. But this has to be judged on the basis of the social background in Albania that is not clear enough from the material available for the amicus curiae opinion.
3. In the case of measures designed to achieve greater social justice, it is not necessary to guarantee a right to full compensation under all circumstances. But it is hardly perceivable that a standardized compensation payment below the market value is compatible with legal standards in Europe, if expropriation measures favour illegal owners.

It can be justifiable not to allow for judicial review going into the details of every single case of expropriation if there are a large number of clone cases; it is sufficient to check if the conditions set by the legislation are met. But as far as a "civil right" in the meaning of Article 6 ECHR is concerned, access to court must be guaranteed.

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34 *James and others v. The United Kingdom*, para. 68.

35 *James and others v. The United Kingdom*, para. 81.

Appendix 3

Comments by Mr Jan VELAERS (Member, Belgium)

1. The law nr. 9482, "On legalization, urban planning and integration of constructions without authorization" of 3 April 2006, aims at finding a solution to the problem that was created, on the one hand, by the illegal occupation by a considerable number of peasants and highlanders, during the last 15 years, of grounds in the area of Tirana and of other larger cities of Albania and on the other hand, by the building on these grounds of constructions for habitation or for other economic, social or cultural purposes, without the authorization of the respective state authorities and with violation of several urbanistic provisions.

The solution the law proposes is that, under certain procedural and substantial conditions, the illegal occupation of the grounds and the illegal building of the constructions can be legalized and that the property of the building sites can be transfered to the persons that have occupied them.

The law raises different questions as to its compliance with the right of the private owners to peaceful enjoyment of their possessions, as guaranteed in article 1 of the First additional protocol of the European Convention on Human Rights and in article 17 of the Albanian Constitution.

In this opinion these questions will be examined in the light of the jurisprudence of the European Court on Human Rights on article 1 of the First additional Protocol which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

In the first part of this opinion, the general principles of this jurisprudence will be examined. In the second part the different allegations presented by the appellants before the Constitutional Court of the Republic of Albania, will examined in the light of the principles described in the first part of the opinion.

I. General Principles on the protection of property, derived from the jurisprudence of the European Court on Human Rights from article 1 of the First additional protocol to the European Convention on Human Rights and Fundamental Freedoms.

A. Deprivation of possessions: article 1, paragraph 1, second sentence of the First additional protocol

2. Article 1 of Protocol No. 1 comprises three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not, however, "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of

property and should therefore be construed in the light of the general principle enunciated in the first rule.[36]

3. Although the measure provided for by the Albanian Law does not amount to a formal "expropriation" pursued in compliance with the general legislation on expropriation, it is clear that it has to be qualified as a "deprivation of possessions" within the meaning of the second sentence of the first paragraph of Article 1 of the First Additional Protocol. In order to determine whether there has been such a "deprivation of possessions" one must not confine oneself to examining whether there has been a formal expropriation. The loss of the ability to dispose of the land in issue, entail sufficiently serious consequences for the applicants de facto to have been "deprived of possessions".[37]

B. The principle of legality

4. The first and according to the European Court most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorizes a deprivation of possessions only "subject to the conditions provided for by law", and the second paragraph recognizes that States have the right to control the use of property by enforcing "laws". Moreover, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention.[38]

5. The principle of lawfulness presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application.[39] Moreover, the law upon which deprivation is based should be in accordance with the internal law of the Contracting State, including the relevant provisions of the Constitution.[40] The power of the European Court to review compliance with domestic law is, however, limited.[41] The domestic Constitutional Court is of course in a better position to interpret the dispositions of the Constitution. For that reason the Commission of Venice will also have to take a reserved position on the issue of the interpretation of the relevant articles of the Albanian Constitution.

6. The reference in the second sentence of paragraph 1 of article 1 of the First protocol to "the general principles of international law" means that those principles are incorporated into that article. According to the European Court on Human Rights these principles were however

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36 ECHR, Sporrong and Lönnroth, judgment of 23 September 1982, § 61; ECHR, *James and others v. U.K.*, judgment of 21 February 1986, § 37; ECHR, *Lithgow and others v. U.K.*, judgment of 8 July 1986, § 106; ECHR, *Mellacher and others v. Austria*, judgment of 19 December 1989, § 42; ECHR, *Holy Monasteries v. Greece*, judgment of 9 December 1994, § 56; ECHR, *Malama v. Greece*, judgment of 1 March 2001, § 41; ECHR, Wittek v. Germany, judgment of 12 December 2002, § 41;ECHR*, Hutten-Czapska v. Poland*, judgment of 22 February 2005, § 142; ECHR, *Jahn and others v. Germany* (GC), judgment of 30 June 2005, § 78; ECHR, *Edwards v. Malta*, judgment of 24 October 2006, § 57.

37 See on the *de facto* expropriation, among others, ECHR, *Sporrong and Lönroth v. Sweden*, 23 September 1982, § 63; ECHR, *Papamichalopoulos and others v. Greece*, 24 June 1993, §§ 41-45; ECHR, *Carbonara and Ventura v. Italy*, 30 May 2000, § 60; ECHR, *Belvedere Alberghiera S.r.l. v. Italy*, 30 August 2000,

38 ECHR, *Amuur v. France*, judgment of 25 June 1996, § 50; ECHR, *The Former King of Greece and others v. Greece*, judgment of 25 October 2000, § 79; ECHR*, Malama v. Greece*, judgment of 1 March 2001, § 43; ECHR, *Hutten-Czapska v. Poland*, judgment of 22 February 2005, § 146; ECHR, *Jahn and others v. Germany* (GC), judgment of 30 June 2005, § 81.

39 See, *mutatis mutandis*, ECHR, *Broniowski v. Poland*, (GC) judgment of 22 June 2004, § 147; ECHR, *Malone v. U.K.,* judgment of 2 August 1984, § 66-68; ECHR, *James and others v. U.K.*, judgment of 21 February 1986, § 67; ECHR, *Lithgow and others v. U.K.*, judgment of 8 July 1986, § 110; ECHR, *Hentrich v. France*, judgment of 22 September 1994, § 42; ECHR, *Saliba v. Malta*, 8 November 2005, § 37**;** ECHR, *Edwards v. Malta*, judgment of 24 October 2006, § 60.

40 ECHR, *The Former King of Greece and others v. Greece*, judgment of 25 October 2000, § 82

41 ECHR, *Hakansson and Sturesson v. Sweden*, judgment of 21 February 1990, § 47.

specifically developed for the benefit to non-nationals. So they are not applicable to a taking by a State of the property of its own nationals.[42]

C. The "public interest-principle"

7. Any interference with the enjoyment of a right or freedom recognized by the Convention must pursue a legitimate aim. A measure depriving a person of his property has to pursue, in principle as well as on the facts, a legitimate aim "in the public interest".[43] The notion of "public interest" is necessarily extensive. In particular, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures of deprivation of property. The Court, finding it natural that the legislature should enjoy a margin of appreciation in implementing social and economic policies, will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation[44]

D. The principle of proportionality: the "fair balance"-test

8. Not only must an interference with the right of property pursue, on the facts as well as in principle, a "legitimate aim" in the "general interest", there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized by any measure depriving a person of his possessions The European Court on Human Rights considers that a measure must be both appropriate for achieving its aim and not disproportionate thereto. That requirement is expressed by the notion of a "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole. In each case involving an alleged violation of that Article the Court must therefore ascertain whether by reason of the State's interference the person concerned had to bear a disproportionate and excessive burden.[45]

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42 ECHR, *James and others v. U.K.*, judgment of 21 February 1986, § 58-59, 61; ECHR, *Lithgow and others v. U.K.*, judgment of 8 July 1986, § 113.

43 ECHR, *Lithgow and others v. U.K.*, judgment of 8 July 1986, § 120; The principle of a "fair balance" inherent in Article 1 of Protocol No. 1 itself presupposes the existence of a general interest of the community. ECHR, *Hutten-Czapska v. Poland*, judgment of 22 February 2005, § 146.

44 See ECHR, *James and others v. U.K.*, judgment of 21 February 1986, § 46; ECHR, *The Former King of Greece and others v. Greece*, judgment of 25 October 2000, § 87; ECHR, *Malama v. Greece*, judgment of 1 March 2001, § 46; ECHR, *Zvolský and Zvolská v. the Czech Republic*, 12 November 2002, § 67 in fine; ECHR, *Edwards v. Malta*, judgment of 24 October 2006, § 64. The same applies necessarily, if not *a fortiori*, to such radical changes as those occurring at the time of German reunification, when the system changed to a market economy. ECHR, Jahn and others, judgment of 22 January 2004, § 80; ECHR, *Jahn and others v. Germany* (GC), judgment of 30 June 2005, § 91.

45 ECHR, Sporrong and Lönnroth, judgment of 23 September 1982, § 69 and § 73; ECHR, *James and others v. U.K.,* judgment of 21 February 1986, § 50; ECHR, *Lithgow and others v. U.K.*, judgment of 8 July 1986, § 120; ECHR, *Mellacher and others v. Austria*, judgment of 19 December 1989, § 48; ECHR, *The Holy Monasteries v. Greece*, judgment of 9 December 1994, § 70; ECHR, *Spadea and Scalabrino v. Italy*, judgment of 28 September 1995, § 33; ECHR, *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, § 38; ECHR, *The Former King of Greece and others v. Greece*, judgment of 25 October 2000, § 89; ECHR, *Malama v. Greece,* judgment of 1 March 2001, § 48; ECHR, *Wittek v. Germany*, judgment of 12 December 2002, §§ 53-54; ECHR, Jahn and others v. Germany, judgment of 22 January 2004, § 82; ECHR, Schirmer v. Poland, judgment of 21 September 2004, § 35; ECHR, *Hutten-Czapska v. Poland*, judgment of 22 February 2005, § 150; ECHR, *Strain and others v. Romania*, judgment of 21 July 2005, § 51; ECHR, *Edwards v. Malta*, judgment of 24 October 2006, § 69.

9. In determining whether the requirement of proportionality is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.[46] Nevertheless, the Court does not abdicate its power of review and must determine whether the requisite balance was maintained in a manner consonant with the applicants' right to "the peaceful enjoyment of [their] possessions", within the meaning of the first sentence of Article 1 of Protocol No. 1.[47]

E. The principle of compensation

10. Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants.[48] In this connection, the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference, and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances.[49]

11. Applicants must have the possibility of proving their alleged damage and, if successful, of receiving the relevant compensation.[50] They may not be prevented from asserting before the domestic courts their right to compensation in full for the loss of their property.[51] Compensation for the loss sustained by the applicant can only constitute adequate reparation where it also takes into account the damage arising from the length of the deprivation. It must moreover be paid within a reasonable time.[52]

12. Article 1 (P1-1) does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.[53] A radical reform of a country's political and economic system, or the state of the country's finances, may justify stringent limitations on compensation.[54].

13. Furthermore, the European Court's power of review is limited to ascertaining whether the choice of compensation terms falls outside the State's wide margin of appreciation in this domain.[55] Because of their direct knowledge of their society and its needs and resources, the

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46 ECHR, *Chassagnou and Others v. France* [GC], 29 April 1994.

47 See ECHR, *Zvolský and Zvolská v. the Czech Republic* 12 November 2002, **§ 69;** ECHR, *Jahn and others v. Germany* (GC), judgment of 30 June 2005, § 93.

48 See the the above-mentioned ECHR, Sporrong and Lönnroth, judgment of 23 September 1982, §§ 69 and 73.

49 See ECHR, *The Holy Monasteries v. Greece*, judgment of 9 December 1994, §§ 70-71; ECHR, *Papachelas v. Greece*, judgment of 25 March 1999, § 49.

50 See ECHR, *Tsomtsos and others v. Greece*, judgment of 24 October 1996, § 42;

51 ECHR, *Papachelas v. Greece*, judgment of 25 March 1999, § 54.

52 ECHR, *Guillemin v. France*, judgment of 22 January 1997, § 54.

53 ECHR, *James and others v. U.K.*, judgment of 21 February 1986, § 54; ECHR, *Lithgow and others v. U.K.,* judgment of 8 July 1986, § 121; See ECHR, *The Holy Monasteries v. Greece*, judgment of 9 December 1994, §§ 70-71; ECHR, *Papachelas v. Greece*, judgment of 25 March 1999, § 49; ECHR*, Börekçiogullari and others v. Turkey*, judgment of 19 October 2006, § 36.

54 ECHR, *Broniowski v. Poland*, judgment of 22 June 2004, §§ 175, 183 and 184; ECHR, *Strain and others v. Romania*, judgment of 21 July 2005, § 51.

55 ECHR, *James and others v. U.K.*, judgment of 21 February 1986, § 54; ECHR, *Lithgow and others v. U.K.,* judgment of 8 July 1986, § 121.

national authorities are in principle better placed than the international judge to appreciate what measures are appropriate in this area and consequently the margin of appreciation available to them should be a wide one. It would, in the Court's view, be artificial in this respect to divorce the decision as to the compensation terms from the actual decision to deprive private persons of their possessions, since the factors influencing the latter will of necessity also influence the former. Accordingly, the Court's power of review is limited to ascertaining whether the decisions regarding compensation fall outside the State's wide margin of appreciation; it will respect the legislature's judgment in this connection unless that judgment was manifestly without reasonable foundation.[56]

II. The Albanian Law "on legalizing, urban planning and integration of unauthorized buildings"

14. The Albanian law "on legalizing, urban planning and integration of unauthorized buildings" implies that private owners will be "deprived of [their] possessions", within the meaning of the second sentence of Article 1 (P1-1). It must, therefore be examined whether the interference complained of can be justified under that provision.

A. The principle of legality

15. The interference by the Albanian authorities in the peaceful enjoyment of the possessions is based on the law on "legalizing, urban planning and integration of unauthorized buildings". It thus can be considered as being « lawful ». The applicants do not seem to dispute that the applicable provisions of this law are sufficiently accessible, precise and foreseeable in their application

16. However, according to the applicants, this Albanian law does not comply with the Albanian Constitution, more specifically with article 41 of the Constitution. This article reads as follows:

> Article 41:
> 1. The right of private property is guaranteed.
> 2. Property may be acquired by gift, inheritance, purchase, or any other classical means provided by the Civil Code.
> 3. The law may provide for expropriations or limitations in the exercise of a property right only in the public interest.
> 4. Expropriations or limitations of a property right that amount to expropriation are permitted only against fair compensation.
> 5. In the case of disagreements related to the amount of compensation, a complaint may be filed in court.

The question raises whether the transfer of property provided for in the law "on legalizing, urban planning and integration of unauthorized buildings", can be considered as an "expropriation" in the meaning of article 41 of the Constitution, although it is not the result of a formal expropriation procedure. It belongs to the Albanian Constitutional Court to review the compliance of the domestic law with article 41 of the Albanian Constitution and more specifically to interpret the concept "expropriation" in this article.

17. In this context reference can be made to a judgment rendered by the Turkish Constitutional Court on 10 April 2003[57] in a, be it only partly, analogous case. In this judgment the Court unanimously declared section 38 of Law No. 2942 unconstitutional and a nullity. It gave the following grounds in particular:

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[56] ECHR, *Lithgow and others v. U.K.,* judgment of 8 July 1986, § 122; ECHR, *Papachelas v. Greece*, judgment of 25 March 1999, § 49; ECHR, *Hutten-Czapska v. Poland*, judgment of 22 February 2005, § 148.

[57] Published in the Official Gazette on 4 November 2003, See also the reference to this judgment in ECHR, *Börekçiogullari (Cokmez) and others v. Turkey*, judgment of 19 Oktober 2006, §§ 28-29.

> "... Expropriation, as provided for in Article 46 of the Constitution ... is a restriction of the right of property in exchange for fair prior compensation...
>
> Expropriation ... is a constitutional restriction of the right of property within the meaning of Article 35 of the Constitution. The administrative authorities may not restrict that right unlawfully in breach of the relevant legislation and the principles of expropriation. According to the provision complained of, when twenty years have passed since a *de facto* occupation, effected without going through a formal expropriation procedure ..., that unlawful act produces all the effects of a lawful expropriation and may give rise to registration of the property in the land registers in the name of the administrative authorities. However, *de facto* occupation is not provided for in the Constitution. To accept that an owner's right to bring an action lapses and that the property must be transferred to the administrative authorities twenty years after the occupation, without any consideration being given, would be contrary to the right of property and would impair the very substance of that right.
>
> For those reasons, that rule is contrary to Articles 13, 35 and 46 of the Constitution.
>
> ... Authorising the State or public legal entities to deprive private individuals arbitrarily of their right of property and their right to compensation is contrary to the principle of the rule of law.
>
> Moreover, a State governed by the rule of law must respect the universal principles of law in its acts. One of the general principles of law is the 'timeless' nature of the right of property, in other words it is not limited in time. The fact that over a period of twenty years the owners of an immovable property, their successors in title or their heirs have not enjoyed the rights in respect of that property that the Civil Code and the Code of Obligations confer on them, may be regarded as the lack of a *de facto* link with that right; it does not mean, however, that the *de jure* link has disappeared. A State governed by the rule of law must respect acquired rights in its acts...
>
> Furthermore, the European Court of Human Rights has held in numerous cases that deprivation of possessions without expropriation infringes the right of property, as guaranteed by Article 1 of Protocol No. 1. In the cases of *Papamichalopoulos v. Greece* (No. 14556/89), *Carbonara and Ventura v. Italy* (No. 24638/94) and *Belvedere Alberghiera S.R.L. v. Italy* (No. 31524/96), *de facto* occupation by the Greek navy and Italian local authorities was held to be contrary to the right of property.
>
> In the light of the above considerations, the provision complained of must be declared null and void, being contrary to Articles 2, 13, 35 and 46 of the Constitution."

The Albanian Constitutional Court is in principle better placed to appreciate whether the notion of "expropriation" in article 41 of the Albanian Constitution implies that an expropriation can only be effected going through a formal expropriation procedure.

B. The "public interest-principle"

18. The question raises whether the Albanian law permitting the deprivation of private persons of their property, pursues a legitimate aim "in the public interest". The applicants before the Constitutional Court dispute that the deprivation of property, provided for in the Albanian Law, meets with this condition, as it aims at the transfer of the property to other private persons.

19. Both article 1, paragraph 1, second sentence, of the First Additional Protocol to the ECHR and article 41 of the Albanian Constitution submit the expropriation to the condition that it pursues a "public interest". As far as the notion "public interest" is used in article 41 of the Albanian Constitution, it will be up to the Albanian Constitutional to interpret this notion. As far as the notion is used in article 1, of the First Additional protocol, the European Court on Human Rights took a very clear stance on the above mentioned question in its judgment in the case of

James and others v. the United Kingdom.[58] The relevant passages of this judgment read as follows:

> "40. The Court agrees with the applicants that a deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be "in the public interest". Nonetheless, the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest. In this connection, even where the texts in force employ expressions like "for the public use", no common principle can be identified in the constitutions, legislation and case-law of the Contracting States that would warrant understanding the notion of public interest as outlawing compulsory transfer between private parties. The same may be said of certain other democratic countries; thus, the applicants and the Government cited in argument a judgment of the Supreme Court of the United States of America, which concerned State legislation in Hawaii compulsorily transferring title in real property from lessors to lessees in order to reduce the concentration of land ownership (Hawaii Housing Authority v. Midkiff 104 S.Ct.2321 [1984]).
> 41. Neither can it be read into the English expression "in the public interest" that the transferred property should be put into use for the general public or that the community generally, or even a substantial proportion of it, should directly benefit from the taking. The taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being "in the public interest". In particular, the fairness of a system of law governing the contractual or property rights of private parties is a matter of public concern and therefore legislative measures intended to bring about such fairness are capable of being "in the public interest", even if they involve the compulsory transfer of property from one individual to another.
> 42. The expression "pour cause d'utilité publique" used in the French text of Article 1 (P1-1) may indeed be read as having the narrow sense argued by the applicants, as is shown by the domestic law of some, but not all, of the Contracting States where the expression or its equivalent is found in the context of expropriation of property. That, however, is not decisive, as many Convention concepts have been recognised in the Court's case-law as having an "autonomous" meaning. Moreover, the words "utilité publique" are also capable of bearing a wider meaning, covering expropriation measures taken in implementation of policies calculated to enhance social justice.
> 45. For these reasons, the Court comes to the same conclusion as the Commission: a taking of property effected in pursuance of legitimate social, economic or other policies may be "in the public interest", even if the community at large has no direct use or enjoyment of the property taken. The leasehold reform legislation is not therefore ipso facto an infringement of Article 1 (P1-1) on this ground. Accordingly, it is necessary to inquire whether in other respects the legislation satisfied the "public interest" test and the remaining requirements laid down in the second sentence of Article 1 (P1-1)."

20. More in general, the European Court has frequently underlined that the notion of "public" or "general" interest is necessarily extensive. In the judgment of 24 October 2006, in the case of Edwards v. Malta[59], the Court stated:

> "In particular, spheres such as housing of the population, which modern societies consider a prime social need and which plays a central role in the welfare and economic policies of Contracting States, may often call for some form of regulation by the State. In that sphere decisions as to whether, and if so when, it may fully be left to the play of free market forces or whether it should be subject to State control, as well as the choice of measures for securing the housing needs of the community and of the timing for their implementation, necessarily involve consideration of complex social, economic and political issues (*Hutten-Czapska*, cited above, §§ 165-166, and *Ghigo v. Malta*, No. 31122/05, § 56, 26 September 2006).
> 66. Finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, the Court has on many occasions declared

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[58] ECHR, *James and others v. U.K.*, judgment of 21 February 1986, §§ 40-42.

[59] ECHR, *Edwards v. Malta*, judgment of 24 October 2006, § 65-67; See also ECHR, *Mellacher and others v. Austria*, judgment of 19 December 1989, § 45; ECHR, *Spadea and Scalabrino v. Italy*, judgment of 28 September 1995, § 28; ECHR, *Immobilare Saffi v. Italy* (GC), judgment of 28 July 1999, [GC], § 46; ECHR, *Schirmer v. Poland*, judgment of 21 September 2004, § 34.

> that it will respect the legislature's judgment as to what is in the "public" or "general" interest unless that judgment is manifestly without reasonable foundation (see *Immobiliare Saffi v. Italy*, [GC], No. 22774/93, § 49, ECHR 1999-V, *mutatis mutandis*, *Broniowski*, cited above, § 149, and *Fleri Soler and Camilleri v.Malta*, No. 35349/05, § 65, 26 September 2006).
> 67. In the present case, the Court can accept the Government's argument that the requisition and the rent control were aimed at ensuring the just distribution and use of housing resources in a country where land available for construction could not meet the demand. These measures, implemented with a view to securing the social protection of tenants (see, *mutatis mutandis*, *Hutten-Czapska*, cited above, § 178, and *Ghigo*, cited above, § 58), were also aimed at preventing homelessness, as well as at protecting the dignity of poorly off tenants (see paragraphs 43 and 47 above). "

21. In this context, it has to beard in mind that the building of illegal constructions in breach of the domestic town-planning regulations, when tolerated by the State authorities, could give rise, under certain circumstances, to proprietary interests that are of a sufficient nature and that are sufficiently recognized to constitute a substantive interest and hence a "possession" within the meaning of the rule laid down in the first sentence of Article 1 of Protocol No 1.[60] In seeking a solution to the conflict of interests between the original owners and the new occupiers, whose illegal constructions have sometimes been tolerated for many years by the authorities, the Albanian State has a large margin of appreciation. In a, be it only partly, analogous case, the European Court stated[61]:

> "1. The Court recognizes that the Croatian authorities faced an exceptionally difficult task in having to balance the rights of owners against those of temporary occupants in the context of the return of refugees and displaced persons, as this involved dealing with socially sensitive issues. Those authorities had, on the one hand, to secure the protection of the property rights of the former and, on the other, to respect the social rights of the latter, both of them often being socially vulnerable individuals. The Court therefore accepts that a wide margin of appreciation should be accorded to the respondent State. However, the exercise of the State's discretion cannot entail consequences which are at variance with Convention standards (see *Broniowski v. Poland* [GC], No. 31443/96, § 182, ECHR 2004-V)."

22. In balancing the rights of the owners and the social interest of the occupiers, the State can take in consideration the social problems, the tensions and the disturbance of public order that would be the result of the eviction of large groups of socially vulnerable persons. In an, again only partially analogous case, the European Court on Human Rights stated[62]:

> "2. Like the Commission, the Court recognizes that the simultaneous eviction of a large number of tenants would undoubtedly have led to considerable social tension and jeopardized public order. It follows that the impugned legislation had a legitimate aim in the general interest, as required by the second paragraph of Article 1."

C. The principle of proportionality (the "fair-balance"-test) and the principle of compensation

23. In order to be in compliance with article 1 of the First additional protocol, not only must the measure depriving a person of his property pursue a legitimate aim "in the public interest", a "fair balance" must also be struck between the demands of this public interest and the requirements of the protection of the individual's fundamental rights. The situation calls for a fair distribution of the social and financial burden involved. This burden cannot be placed on a particular social group or a private individual alone, irrespective of how important the interests

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[60]E ECHR, *Öneryildiz v. Turkey*, judgment of 30 November 2004, §§ 29 to 34.

[61] ECHR, *Radanovic v. Croatia*, judgment of 21 December 2006, § 49.

[62] ECHR, *Immobilare Saffi v. Italy* (GC), judgment of 28 July 1999.

of the other group or the community as a whole may be.[63] As it was stated above, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants.

24. As to the right of compensation of the private persons whose properties will be "legalized according to this law and registered in the register of immovable property", Article 15, paragraphs 2 tot 5 of the Law No 9482 on "Legalization, urban planning and integration of unauthorized buildings" state:

> "2. In case the legalized construction parcel is already registered in the immovable property registers in the name of private subject, upon registration of the legalization permit the private subject becomes entitled to remuneration in kind or cash.
> 3. For all the cases referred to in section 2 of this article, the Immovable Property Registration Office submits to the Council of Ministers every three months a list of natural of juridical subjects entitled to remuneration according to this law, including the data on every owner and respecting surfaces. The first timeline of submitting such list to the Council of Ministers is 1 December 2006.
> 4. Within 30 days from the date of submission of the list by the Central Office of Immovable Property Registration makes a decision on the remuneration of owners and respective surfaces. The commissions of property restitution in districts shall compensate the subjects within 3 months in compliance with the decision of the Council of Ministers.
> 5. For the effect of calculating the surface subject to compensation, the commission of property restitution and compensation treats the property as a building site in compliance with the methodology on valuation of the immovable property to be compensated and the property to be used for compensation, according to Law 9235, dated 29.7.2004 "On Property Restitution and Compensation," amended."

25. As to the valuation of property, Article 13 of the Law No 9235 "on restitution and compensation of property", determines:

> "1. For the valuation of property that will be compensated, the Local Commission for Restitution and Compensation of Property establishes an expert group. The commission appoints as experts experienced and specially qualified persons in the fields of law, economics and engineering that is related to the process of restitution and compensation of property.
> 2. The value of the property that is compensated according to this law is calculated based on the market value in accordance with the methodology proposed by the State Committee for Restitution and Compensation of Property and approved by a decision of the Assembly.
> 3. In carrying out its activities, no member of the state bodies for the process of restitution and compensation of property or of the expert group shall be subject to any conflict of interest defined in the Code of Administrative Procedure."

D. Principle of proportionnality

26. By allowing a compensation for the loss of their property, the Law aims to strike fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. It is not clear to me if on the basis of article 15, is a full compensation. If not, the Albanian Constitutional Court will have to examin whether legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.[64]

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[63] ECHR, *Radanovic v. Croatia*, judgment of 21 December 2006, § 49. See *mutatis mutandis*, ECHR, *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, § 69; ECHR, *Hutten-Czapska v. Poland*, judgment of 22 February 2005; See also ECHR, Sporrong and Lönnroth, judgment of 23 September 1982, § 69.

[64] See supra nr. 12.

27. The applicants challenge the law before the Albanian Constitutional Court, "as it denies the right of access to the court in cases of conflicts." Article 42.1. of the Albanian Constitution provides:

> "1. The liberty, property, and rights recognized in the Constitution and by law may not be infringed without due process.
> 2. Everyone, to protect his constitutional and legal rights, freedoms, and interests, or in the case of charges against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law."

In accordance with this Article it should be possible to challenge the decision of the legalization, implying the transfer of the property, and the decision on the remuneration, before an independent and impartial court specified by law. In the more specific paragraph 5 of article 41 of the Constitution however, this possibility to challenge the decision seems to be limited to "disagreements related to the amount of compensation". The relationship between these two constitutional provisions shall have to be elucidated by the Albanian Constitutional Court.

28. Although Article 1 of the First additional protocol to the European Convention on Human Rights does not explicitly hold an analogous provision, the rule of law being one of the paramount principles of the Convention, the European Court on Human Rights has on different occasions[65] emphasized that in principle, a measure interfering with the peaceful enjoyment of property cannot be legitimate in the absence of adversarial proceedings that comply with the principle of equality of arms enabling challenging of the measure taken and presenting arguments on the issue of the underestimation of the compensation offered. These procedural guarantees are, in principle, necessary to ensure that the operation of the system and its impact on the individual's property rights are neither arbitrary nor unforeseeable, but strike a fair balance, in each individual case, between the demands of the "public interest" and the requirements of the protection of the individual's rights.

29. Nevertheless, it appears from the jurisprudence of the European Court on Human Rights, that the condition to provide for a system whereby the individual can seek an independent consideration, in any particular case, of either the justification for enfranchisement or the principles on which the compensation is calculated, in certain circumstances does not have to be fulfilled. In its judgment in the case of James and others v. the United Kingdom, the European Court on Human Rights, stated:

> "Such a system may have been possible, and indeed a proposal to this effect was made during the debates on the draft legislation. However, Parliament chose instead to lay down broad and general categories within which the right of enfranchisement was to arise. The reason for this choice, according to the Government, was to avoid the uncertainty, litigation, expense and delay that would inevitably be caused for both tenants and landlords under a scheme of individual examination of each of many thousands of cases. Expropriation legislation of wide sweep, in particular if it implements a programme of social and economic reform, is hardly capable of doing entire justice in the diverse circumstances of the very large number of different individuals concerned. It is in the first place for Parliament to assess the advantages and disadvantages involved in the various legislative alternatives available. In view of the fact that the legislation was estimated to be likely to affect 98 to 99 per cent of the one and a quarter million dwelling houses held on long leases in England and Wales the system chosen by Parliament cannot in itself be dismissed as irrational or inappropriate."[66]

30. Even if similar exceptional circumstances would exist in Albania, they could not be able to justify the absence of procedural guarantees, as the articles 41.5 and 42.2. of the Albanian

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65 ECHR, *Hentrich v. France*, judgment of 22 September 1994, § 42, 45 and 49; ECHR, *Immobilare Saffi v. Italy (*GC), judgment of 28 July 1999, § 54 ECHR, *Edwards v. Malta*, judgment of 24 October 2006, § 71.

66 ECHR, *James and others v. U.K.,* judgment of 21 February 1986, § 68.

Constitution do not seem to admit exceptions on the right to a fair and public trial. In this context Article 53 of the European Convention has to be remembered, which states: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."

31 The allegations of the applicants before the Constitutional Court also relate to Article 4 of the Constitution, which states:

> "1. The law constitutes the basis and the boundaries of the activity of the state.
> 2. The Constitution is the highest law in the Republic of Albania.
> 3. The provisions of the Constitution are directly applicable, except when the Constitution provides otherwise."

It is not clear to me on which grounds and to what extent the Law No. 9482, "On legalization, urban planning and integration of constructions without authorization" could be considered violating this Article. The applicants underline that the Law "considers as legal those actions which have been foreseen as criminal acts by articles 199 and 200 of the Criminal Code and are criminally convictable."

The legislature which has the prerogative to penalize certain actions, also has the prerogative to depenalise these actions and to legalize actions taken at a time when they were forbidden. The law legalising illegal actions of the past, will of course have to be in compliance with the prohibition of discrimination. This implies that there has to be an objective and reasonable justification for the differential treatment, having regard to its aim and effects and that there also has to be a reasonable proportionality between the means employed and the aim sought to be realized.[67] As to this justification, and more specifically, as to the legitimate aim and the principle of proportionality, reference can be made to the considerations developed above on the justification of the measure under consideration, in the light of Article 1, of the First Additional Protocol.

[67] ECHR, Belgian Linguistic case, 23 July 1968, p. 34