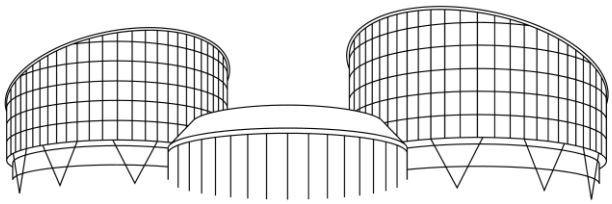

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

# CASE OF LASKA AND LIKA v. ALBANIA

*(Applications nos. 12315/04 and 17605/04)*

JUDGMENT

STRASBOURG

20 April 2010

**FINAL**

*20/07/2010*

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of Laska and Lika v. Albania,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Nicolas Bratza, *President*,
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
Päivi Hirvelä,
Ledi Bianku,
Nebojša Vučinić, *judges*,
and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 12 January 2010 and on 23 March 2010,

Delivers the following judgment, which was adopted on the last-mentioned date:

# PROCEDURE

1. The case originated in two applications (nos. 12315/04 and 17605/04) against the Republic of Albania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Albanian nationals, Mr Vladimir Laska and Mr Artur Lika ("the applicants"), on 8 March 2004.

2. The applicants were represented by Mr A. Dobrushi of the European Roma Rights Centre and were later co-represented by the Albanian Helsinki Committee. The Albanian Government ("the Government") were represented by their then Agent, Ms S. Meneri, and, following the submission of their comments on the applicants' claim for just satisfaction, by their Agent, Mrs E. Hajro.

3. The applicants complained under Article 3 of the Convention that they were subjected to ill-treatment during police questioning in order to force them to confess to the alleged offences. They also relied on Article 6 § 1 of the Convention to complain about the unfairness of the proceedings.

4. On 10 October 2007 the Vice-President of the Section to which the case was allocated decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it was decided to examine the merits of the applications at the same time as their admissibility.

5. The applicants and the Government each submitted further written observations (Rule 59 § 1).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were both born in 1980 and are currently serving prison sentences in Burrel Prison, Albania.

### A. The applicants' arrest

7. On 31 March 2001, at dawn, three persons wearing blue and white balaclavas robbed a minibus on the line between Tirana and Kukës. The aggressors were armed with two Kalashnikovs and a knife. Having taken the passengers' money and jewellery, they left the scene without causing casualties.

8. Some hours after the event, the police searched houses near the scene of the crime, including that of Mr Lika ("the second applicant"), where he was having lunch with his father, his brother, B.L., and his friend, Mr Laska ("the first applicant").

9. The police officers conducted the said search in the absence of the applicants' lawyer.

10. According to the police report of the search, the police found in the pocket of the first applicant's jacket two white T-shirts and a blue cloth, made into balaclavas. Moreover, near the house they found some grenades, but failed to find the stolen goods or the weapons that had been in the possession of the aggressors.

11. The applicants, B.L, and the father were escorted to the police station for questioning. The first applicant requested, but was refused, the presence of his lawyer (H.B). He disputed having had in his possession a balaclava or other form of mask and accused the police of manipulating the evidence.

12. On the same day, the police officers in charge of the investigation proceeded to the identification of persons and items by the victims of the robbery, pursuant to Articles 171 and 172 of the Code of Criminal Procedure ("CCP"). The applicants' lawyer was not present.

13. As to the identification of persons, the applicants and B.L., wearing blue and white home-made balaclavas, and two other persons, wearing black balaclavas, were put in a row in the same room in order to be identified. Notwithstanding the fact that the police changed the position of the persons in the room, the victims consistently identified the persons wearing blue and white balaclavas as the aggressors, that is to say the applicants and B.L..

14. As to the identification of objects, the victims were asked to identify the balaclavas used by the aggressors, choosing among two black

balaclavas, two white balaclavas and a blue one. The victims identified the white and blue balaclavas as those worn by the aggressors.

15. At 9.30 p.m. on the same day the applicants and B.L. were arrested on suspicion of armed robbery. They were questioned by the police in the absence of a lawyer, notwithstanding the fact that B.L. was a minor at the time and that the applicants had explicitly requested a lawyer to be present. The first applicant accepted that he had in his possession a white T-shirt, transformed by F.N, a police officer in charge of the investigations, into a home-made balaclava. The second applicant stated that the white T-shirt which had been found in the possession of the first applicant was not his.

16. On 2 April 2001 the applicants and B.L. were charged with one count of armed robbery and one count of illegal possession of arms. On the same day they were questioned by the prosecutor. The first applicant asked to be represented by H.B. The second applicant sought to be defended by counsel.

### B. Criminal proceedings against the applicants

17. On 29 June 2001 the General Prosecutor's Office (GPO) requested to inspect the criminal investigation file in respect of the second applicant. On 10 September 2001 the GPO consented to the case being committed to trial.

18. On 11 September 2001, the prosecutor committed the applicants and B.L. to trial on charges of armed robbery and illegal possession of weapons.

19. During the hearing of 26 November 2001 before the Puke District Court, ("the District Court"), the applicants contested the charges against them and requested the domestic court to declare null and void the identification carried out by the police of persons and objects, as it had been in breach of the relevant provisions of the CCP. Moreover, they accused the police officers in charge of the investigation of manipulating the evidence against them: the applicants therefore requested the court to summon the police officers as witnesses and to produce at the trial the items considered by the police to be balaclavas, but which were, in their view, simple T-shirts. The applicants requested the domestic court to exclude the illegal evidence against them. As to the charge of illegal possession of arms, the applicants maintained that the investigation had failed to find the weapons used by the offenders during the robbery and it had not been proved that the grenades found had been in their possession. Both applicants were represented by the same counsel, P.Gj.

20. On 24 May 2002 the District Court dismissed the applicants' request to summon the police officers as witnesses, without giving reasons. Notwithstanding the fact that the court noticed certain irregularities during the investigation stage (such as the absence of a lawyer during the applicants' questioning and during the identification of persons and objects), the court found the applicants guilty of armed robbery on the basis of the

eyewitnesses' identification of the applicants as the offenders. Moreover, the court found the applicants guilty of illegal possession of two Kalashnikovs and B.L guilty of possession of a knife. No weapons having been found, the applicants' conviction was based on eyewitness statements. The court sentenced the applicants to thirteen years' imprisonment and B.L. to five years' imprisonment. The applicants were ordered to serve their sentences in a high-security prison.

21. On 29 May 2002 the applicants appealed to the Shkoder Court of Appeal, ("the Court of Appeal"), on the grounds that the District Court's judgment was the result of unfair proceedings. They argued that the identification had been conducted in flagrant breach of Articles 171-175 of the CCP as they had worn the same balaclavas during the identification parade. Their lawyers' request about the nullity of the acts concerning identification had been rejected by the trial court. They also stated that none of the material evidence (balaclavas), as requested by themselves, had been produced at the trial proceedings. Moreover, the authorities had failed to find the money and the weapons that had been used in the robbery.

22. On 9 September 2002, the Court of Appeal upheld the District Court's judgment.

23. On 7 October 2002 the applicants appealed to the Supreme Court. They relied on the same grounds of appeal as before the Court of Appeal. They also alleged that both of them had been represented by the same counsel before the lower courts, at a time when there were inconsistencies in their testimonies given during the criminal investigation.

24. On 26 December 2002 the Supreme Court declared the appeal inadmissible as its grounds fell outside the scope of Article 432 of the CCP.

25. On an unspecified date the first applicant lodged a complaint with the Constitutional Court about the unfairness of the proceedings. He relied on the same grounds as raised before the Court of Appeal and the Supreme Court.

26. On 17 September 2004 the Constitutional Court, sitting as a bench of three judges, declared the complaint inadmissible. It held that the applicant's complaints did not raise any fair trial issues, but mainly concerned the assessment of evidence, which was the function of the lower courts.

### C. Allegation of ill-treatment at the hands of the police

27. The applicants alleged that they had been ill-treated by F.N. and other police officers during police questioning. They alleged that they had been tied up with ropes, beaten and hosed with cold water during the interrogations.

28. At the hearings of 26 November 2001 before the District Court, the applicants alleged that they had been ill-treated by the police officers in charge of the investigation, in that the latter had attempted to force them to

confess to the robbery and to reveal the location of the stolen goods and the arms used. B.L and the applicants gave the same description of the alleged ill-treatment.

29. On 24 May 2002 the District Court rejected the applicants' requests on the ground that they had been submitted outside the six-month time-limit. No legal basis was mentioned in the judgment.

## II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

### A. Relevant domestic law and practice

#### *1. Code of Criminal Procedure*

30. The Albanian Code of Criminal Procedure ("CCP") in its relevant parts reads as follows:

**Article 171: Identification of persons**

1. When the need arises to conduct the identification of a person, the proceeding authority invites the person who must do the identification to describe the person (to be identified), relating all the signs he/she remembers and that person is asked whether he/she has been previously summoned to do the identification and about other circumstances, which may contribute to the accuracy of the identification.

2. Actions provided for by paragraph 1 and statements made by the person who does the identification are entered in the records.

3. Non-compliance with the provisions of paragraphs 1 and 2 is a cause for the invalidity of the identification.

**Article 172: Performing identification**

1. The proceeding authority, after taking away the person who will do the identification, ensures the presence of at least two persons, looking as alike as possible, to the person to be identified. It invites the latter to choose his/her place in relation to others, taking care to be portrayed, as much as possible, in the same circumstances under which he/she would have been seen by the person called to do the identification. After the person who will do the identification appears, the court asks the latter whether he/she knows anyone among those presented for identification, and if yes, to point out the person he/she knows and to specify whether he/she is sure.

2. When there are reasons to believe that the person called to do the identification may be afraid or influenced by the presence of the person to be identified, the proceeding authority orders the act to be performed without the latter seeing the former.

3. The records must describe how the identification was performed. Failure to do so invalidates the identification. The proceeding authority may order, for records purposes, that the performance of the identification be photographed or filmed.

**Article 173: Identification of items**

1. When the identification of material evidence or other items relevant to the criminal offence must be performed, the proceeding authority acts in compliance with the rules for identification of persons to the extent that they are applicable.

2. After finding, when possible, at least two similar items to the one to be identified, the proceeding authority asks the person called to identify whether he/she recognises any of them and, if the answer is yes, invites him/her to state which of them he/she recognised and to specify whether he/she is sure.

3. The records must describe how the identification was performed. Failure to do so invalidates the identification.

**Article 175: Identification of or by several persons**

1. When several persons are called to do the identification of the same person or item, the proceeding authority performs it one by one separately, prohibiting any communication between the one who has done the identification and those who will do it subsequently.

2. When a person must identify several persons or items, the proceeding authority orders the person or item to be identified to be placed among different persons or items.

3. The provisions of Articles 171, 172 and 173 of the CCP are applicable.

**Article 205: Search of premises**

1. The defendant, when present, and the person in possession of the premises subject to the search, is handed a copy of the search order, informing them of the right to request the presence of a person they rely on.

2. When the persons stipulated in paragraph 1 are absent, a copy of the order is handed over to a relative, neighbour or to a colleague.

3. The proceeding authority may search the persons present when it judges that they may conceal material evidence or items relating to the criminal offence. It may order that the persons present may not leave prior to the conclusion of the search and may use force to retain those who leave.

**Article 256: The questioning of the arrested or the detained**

The prosecutor questions the arrested or the detained person in the presence of the chosen or appointed lawyer. He shall notify the arrested or the detained person of the facts for which he is being prosecuted and of the reasons for the interrogation, making

known the information available about the charge and, when the investigation would not be impaired, even the sources.

**Article 380: Evidence used by the court**

In taking a decision the court shall not make use of evidence other than that obtained or confirmed during the trial.

31. Articles 449–461 of the CCP govern the application for review of a final judgment. According to Article 451, the accused or the prosecutor may file a request for review in accordance with the limited grounds of review found in Article 450. The request is submitted to the Supreme Court which may decide to reject or accept it (Article 453).

**Supreme Court Joint Benches' judgment no. 6 of 11 October 2002**

32. In an effort to harmonise the legal practice, the Supreme Court Joint Benches examined the institution of judicial review in its judgment no. 6 of 11 October 2002. The relevant parts of the judgment read:

"(...) It is acknowledged that the review of final judgments is an extraordinary remedy, the only one, that has been envisaged by the lawmaker in the CCP in order to put right any judicial mistakes (in respect of final court judgments).

The trial that occurs, as a result of the review [proceedings], is not limited to a mere review (in the strictest sense of the word) of the previous trial. In its conclusion, the court, having examined the facts, circumstances and evidence submitted by the parties, taken together and in concert with the evidence, circumstances and facts administered and examined during the previous trial, can reach a different outcome, going as far as delivering a judgment in total contradiction to the previous one. (...)

This is the reason why the lawmaker allowed for a review in strictly defined instances, which have been explicitly laid down in a special provision of the CCP, notably in Article 450 (...). According to this provision, the review can be sought by the parties only if there exists one of the requirements explicitly provided therein."

## B. Relevant international law

### *1. Recommendation No. R (2000) 2 of the Committee of Ministers of the Council of Europe to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights*

33. On 19 January 2000, at the 694th meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe adopted Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights:

"The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe, Considering that the aim of the Council of Europe is to bring about a closer union between its members;

Having regard to the Convention for the protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention");

Noting that under Article 46 of the Convention on Human Rights and Fundamental Freedoms ("the Convention") the Contracting Parties have accepted the obligation to abide by the final judgment of the European Court of Human Rights ("the Court") in any case to which they are parties and that the Committee of Ministers shall supervise its execution;

Bearing in mind that in certain circumstances the above-mentioned obligation may entail the adoption of measures, other than just satisfaction awarded by the Court in accordance with Article 41 of the Convention and/or general measures, which ensure that the injured party is put, as far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention (*restitutio in integrum)*;

Noting that it is for the competent authorities of the respondent State to decide what measures are most appropriate to achieve *restitutio in integrum*, taking into account the means available under the national legal system;

Bearing in mind, however, that the practice of the Committee of Ministers in supervising the execution of the Court's judgments shows that in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum;*

I. Invites, in the light of these considerations the Contracting Parties to ensure that there exist at national level adequate possibilities to achieve, as far as possible, *restitutio in integrum*;

II. Encourages the Contracting Parties, in particular, to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where:

(i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and

(ii) the judgment of the Court leads to the conclusion that

(a) the impugned domestic decision is on the merits contrary to the Convention, or

(b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of."

34. The explanatory memorandum on Recommendation R (2000) 2 provides, in so far as relevant, that:

"...

Paragraph 1 sets out the basic principle behind the recommendation that all victims of violations of the Convention should be entitled, as far as possible, to an effective *restitutio in integrum*. The Contracting Parties should, accordingly, review their legal systems with a view to ensuring that the necessary possibilities exist.

..."

*2. Obligations on States under general international law*

35. Article 35 of the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts (adopted by the General Assembly at its 53rd session (2001), and reproduced in *Official Records of the General Assembly*, 56th Session, Supplement No. 10 (A/56/10)) is worded as follows:

**Article 35: Restitution**

"A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(*a*) is not materially impossible;

(*b*) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."

# THE LAW

36. The applicants complained under Article 3 of the Convention that they were subjected to ill-treatment during police questioning in order to force them to confess to the alleged offences.

Article 3 of the Convention reads as follows:

""No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

37. They also complained about the unfairness of the proceedings against them under Article 6 § 1 of the Convention.

Article 6 § 1 of the Convention, in so far as relevant, reads:

""In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

## I. JOINDER OF THE APPLICATIONS

38. Given that the two applications concern the same facts, complaints and domestic courts' proceedings, the Court decides that they should be joined pursuant to Rule 42 § 1 of the Rules of Court.

## II. ADMISSIBILITY OF THE COMPLAINTS

### A. The complaint about the alleged ill-treatment by police officers

39. The Government submitted that the applicants had not reported their allegations about ill-treatment to the authorities during the criminal investigation. Nor had they voiced this complaint in their appeals to the Court of Appeal or the Supreme Court.

40. The applicants maintained that, in the circumstances of the case, a mere reference to non-exhaustion cannot absolve the Government from its obligations under the Convention or be invoked as a credible argument before this Court.

41. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before the Court to use first the remedies provided by the national legal system (see *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24). The complaints should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (see *Cardot v. France*, 19 March 1991, § 34, Series A no. 200).

42. The Court observes that on 24 May 2002 the District Court rejected the applicants' complaint about the alleged ill-treatment as being time-barred. It transpires from the case file that the applicants did not appeal against that decision. Nor did they raise this complaint, at least in substance, in their appeals to the Court of Appeal and the Supreme Court. The Court concludes that the applicants failed to exhaust domestic remedies offered by the domestic legal system. It therefore rejects the applicants' complaint in accordance with Article 35 §§ 1 and 4 of the Convention.

## B. The complaint about the unfairness of proceedings

### *1. Non-exhaustion of domestic remedies*

#### a. As regards the second applicant's failure to lodge a constitutional appeal

43. The Government submitted that the second applicant had not appealed to the Constitutional Court in relation to his complaint concerning the unfairness of the proceedings. They requested the Court to declare his complaint inadmissible for non-exhaustion of domestic remedies.

44. The second applicant submitted that there was no reasonable prospect of success before the Constitutional Court given the fact that the first applicant's appeal had been dismissed.

45. The Court observes that under Article 35 normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see *Aksoy v. Turkey*, 18 December 1996, § 51, *Reports of Judgments and Decisions* 1996-VI). An applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case-law or any other suitable evidence, that an available remedy which he or she has not used was bound to fail (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 156, ECHR 2003-VI).

46. The Court notes that the first applicant lodged a complaint with the Constitutional Court. He relied on the same grounds of appeal as lodged with the Court of Appeal and the Supreme Court by both applicants. The first applicant's complaint was declared inadmissible by the Constitutional Court (see paragraphs 25–26 above).

47. Having regard to the fate of the first applicant's appeal to the Constitutional Court, the Court considers that any appeal filed by the second applicant with the Constitutional Court, who would have relied on the same grounds of appeals as raised by the first applicant, would have had little or virtually no reasonable prospects of success. The complaint of the second applicant cannot therefore be rejected for failure to lodge it with the Constitutional Court within the meaning of Article 35 § 1 of the Convention.

48. The Court therefore dismisses the Government's objection.

#### b. As regards the possibility for the applicants to seek a review of their final judgment

49. In their further comments on the applicants' observations, the Government submitted a GPO's letter of 16 April 2008 stating that

"following verifications of the [applicants'] criminal investigation file, procedural irregularities were observed in the conduct of some investigative actions." The Government contended that the applicants should be required to seek a review of their final judgment in accordance with Article 450 of the CCP, in the light of the prosecutor's letter.

50. The Court reiterates that an application for retrial or similar extraordinary remedies cannot, as a general rule, be taken into account for the purposes of applying Article 35 § 1 of the Convention (see also, *Williams v. the United Kingdom* (dec.), no. 32567/06, 17 February 2009).

51. The Court notes that the review of a final court judgment pursuant to Article 450 of the CCP constitutes an extraordinary remedy (see paragraph 32 above). In these circumstances, the Court considers that the applicants are not required to exhaust this remedy.

52. Were the Government's submission to be interpreted to the effect that the applicants lacked "victim" status, the Court observes that a decision or measure favourable to an applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (see, for example, *Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, p. 32, §§ 69 et seq; and *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI). In the present case, the Government did not submit any declaration to acknowledge any breach of the Convention. Nor is the authorities' letter of 16 April 2008, for the reasons mentioned in the preceding paragraphs, capable of affording the necessary and required redress.

53. The Court therefore dismisses the Government's objection.

#### c. Conclusion

54. The Court considers that the applicants' complaints under Article 6 of the Convention raise questions of fact and law which are sufficiently serious that their determination should depend on an examination of the merits. No other grounds for declaring them inadmissible have been established. The Court therefore declares them admissible. In accordance with its decision to apply Article 29 § 3 of the Convention (see paragraph 4 above), the Court will immediately consider the merits of these complaints.

## III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

### A. The parties' submissions

55. The applicants reiterated their position that the procedure followed by the domestic courts constituted a denial of their right to a fair trial. They

stated that the refusal of the courts to produce the evidence, on the basis of which they were convicted (balaclavas), was in breach of the domestic provisions. They also contested the regularity of the identification procedure that was used by the domestic authorities.

56. The Government submitted that the identification procedure had been conducted in accordance with the procedures prescribed by the law and that the domestic courts had properly assessed all evidence.

## B. The Court's assessment

### *1. The general principles applicable in this case*

57. As a general rule it is for the national courts to assess the evidence before them as well as the relevance of the evidence which the accused seeks to adduce. The Court must however determine whether the proceedings considered as a whole, including the way in which evidence was taken, were fair as required by Article 6 § 1 of the Convention (see *Balliu v. Albania*, no. 74727/01, § 42, 16 June 2005).

58. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence (see *Jasper v. the United Kingdom* [GC], no. 27052/95, § 51, 16 February 2000).

59. The right to an adversarial trial means in principle the opportunity for the parties to a criminal trial to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the courts' decision (see *Vermeulen v. Belgium*, 20 February 1996, § 33, *Reports of Judgments and Decisions* 1996-I).

60. The principle of equality of arms requires "a fair balance between the parties", each party must be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see *Batsanina v. Russia*, no. 3932/02, § 22, 26 May 2009).

61. In addition to being specifically mentioned in Article 6 § 2 of the Convention, a person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her forms part of the general notion of a fair hearing under Article 6 § 1 (see *Phillips v. the United Kingdom*, no. 41087/98, § 40, ECHR 2001-VII).

62. Even if the primary purpose of Article 6, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings (see *Imbrioscia v. Switzerland*, 24 November 1993, § 36, Series A no. 275). In order for the right to a fair

trial to remain sufficiently "practical and effective" Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right (see *Salduz v. Turkey* [GC], no. 36391/02, §§ 50 and 55, 27 November 2008).

*2. Application of the above principles in the present case*

63. In the instant case, the applicants complained that the way in which the identification parade had taken place was unfair. They further alleged that the domestic courts never acceded to their requests to have the material evidence (balaclavas) examined at the public hearings in their cases. The Court will consider in turn the two grounds of complaint before it.

64. The Court observes that the applicants were found guilty essentially on the strength of eyewitnesses' submissions obtained during the identification parade. It notes that the eyewitnesses' evidence resulting from the identification was the key evidence supporting the prosecution's case against the applicants.

65. The Albanian CCP clearly regulates the organisation of an identification parade. The Court will examine whether the manner in which the identification parade in the applicants' case was conducted was in accordance with Article 6 fairness requirements.

66. In the first place, the applicants and B. L were required to stand in the line-up wearing white and blue balaclavas, similar in colour to those worn by the authors of the crime. The other two persons in the line-up wore black balaclavas, in stark contrast to the white and blue balaclavas worn by the applicants and B.L who were accused of committing the offence. The change of position of the persons in the line-up did not result in any different outcome for the applicants, as they were consistently required to wear the same colour (white and blue) balaclavas (see paragraph 13 above). The Court finds that the identification parade was tantamount to an open invitation to witnesses to point the finger of guilt at both applicants and B.L. as the perpetrators of the crime.

67. Moreover, the identification parade was held in the absence of the applicants' lawyers. It does not transpire from the case file that the applicants waived of their own free will, either expressly or tacitly, the entitlement to legal assistance at the time of the identification parade (see, by contrast, *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2000).

68. The Court notes in this connection that even though the District Court accepted that there had been irregularities at the investigation stage, in convicting the applicants it relied on the positive identification of the applicants made by eyewitnesses at the identification parade. However, neither the assistance provided subsequently by a lawyer nor the adversarial

nature of ensuing proceedings could cure the defects which had occurred during the criminal investigation (see *Salduz*, cited above, § 58).

69. There was no independent oversight of the fairness of the procedure or opportunity to protest against the blatant irregularities. The Court finds that the manifest disregard of the rights of the defence at this stage irretrievably prejudiced the fairness of the subsequent criminal trial.

70. Finally, the Court notes that it has not been explained why the applicants' requests to have the balaclavas used during the identification parade produced before the court were refused. While it is true that the right to disclosure of relevant evidence is not absolute, the Court must scrutinise the decision-making procedure to ensure that, as far as possible, the procedure complied with the requirements to provide adversarial proceedings, equality of arms and incorporated adequate safeguards to protect the interest of the accused (see *Jasper*, cited above, §§ 52-53).

71. The Court considers that in the circumstances of the applicants' case, fairness demanded that they be enabled to argue that the balaclavas they were required to wear at the identification parade, which constituted the decisive evidence for the applicants' conviction, were entirely different from those worn by the robbers. However, they were denied an opportunity at the trial to redress the irregularities which occurred at the identification parade. In this connection, the Government did not invoke any public interest grounds for withholding such evidence, and no such grounds are apparent from the domestic proceedings.

72. In conclusion, having regard to the above findings, the Court concludes that the proceedings in question did not satisfy the requirements of a fair trial. There has accordingly been a violation of Article 6 § 1 in the present case.

## IV. APPLICATIONS OF ARTICLES 46 AND 41 OF THE CONVENTION

### A. Article 46 of the Convention

73. Article 46 provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

74. In the instant case, the Court found that the applicants' right to a fair trial had been seriously breached by the domestic authorities. The Court observes that when an applicant has been convicted in breach of his rights as guaranteed by Article 6 of the Convention, he should, as far as possible,

be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be trial *de novo* or the reopening of the proceedings, if requested (see *Caka v. Albania*, no. 44023/02, § 122, 8 December 2009; *Salduz*, cited above, § 72; *Xheraj v. Albania*, no. 37959/02, § 82, 29 July 2008; *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV).

75. The Court accordingly considers that, in the instant case, a retrial or the reopening of the case, if requested by the applicant, represents in principle an appropriate way of redressing the violation. This is in keeping with the guidelines of the Committee of Ministers, which in Recommendation No. R (2000) 2 called on the States Parties to the Convention to introduce mechanisms for re-examining the case and reopening the proceedings at domestic level, finding that such measures represented "the most efficient, if not the only, means of achieving *restitution in* integrum" (see paragraph 33 above). This also reflects the principles of international law whereby a State responsible for a wrongful act is under an obligation to make restitution, consisting in restoring the situation which existed before the wrongful act was committed (Article 35 of the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts – see paragraph 35 above, and, *mutatis mutandis*, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [GC], no. 32772/02, §§ 85-86, ECHR 2009-...).

76. The Court notes that the respondent State's criminal legal system does not provide for the possibility of re-examining cases, including reopening of domestic proceedings, in the event of this Court's finding of a serious violation of an applicant's right to a fair trial. It is not for the Court to indicate how such a possibility is to be secured and what form it is to take. The respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its obligation to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded (see *Piersack v. Belgium* (Article 50), 26 October 1984, § 12, Series A no. 85), provided that such means are compatible with the conclusions set out in the Court's judgment and with the rights of the defence (see *Lyons and Others v. the United Kingdom* (dec.), no. 15227/03, ECHR 2003-IX).

77. Nevertheless, the Court considers that it is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicants' situation from being adequately redressed (see, amongst other authorities, *Karanović v. Bosnia and Herzegovina*, no. 39462/03, § 28, 20 November 2007) or introduce a new remedy that would enable the applicants to have the situation repaired. Moreover, the Contracting States are under a duty to organise their judicial systems in such a way that their courts can meet the requirements of the Convention. This principle also

applies to the reopening of proceedings and the re-examination of the applicants' case (see, *mutatis mutandis, Verein gegen Tierfabriken Schweiz (VgT)* (no. 2), cited above, § 97.)

### B. Article 41 of the Convention

78. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

79. The applicants sought payment of 12,000 euros (EUR) each in respect of the pecuniary damage they had sustained. This was based on a calculation of lost earnings in accordance with the minimum wage in Albania. They sought EUR 20,000 each in respect of non-pecuniary damage.

80. The Government requested the Court to reject the applicants' claim for just satisfaction.

### A. Damage

81. As to the pecuniary damage allegedly caused, the Court reiterates that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention (see, among others, *Dybeku v. Albania*, no. 41153/06, § 65, 18 December 2007).

82. The Court, having regard to its findings concerning the applicant's complaints under Article 6 § 1, considers that no causal link has been established between the damage alleged and the violations it has found. The Court cannot speculate as to what the outcome of the criminal proceedings against the applicant might have been if the violation of the Convention had not occurred (see *Polufakin and Chernyshev v. Russia*, no. 30997/02, § 216, 25 September 2008). Therefore, the Court finds it inappropriate to award the applicants compensation for the alleged pecuniary damage.

83. As regards the claim for non-pecuniary damage, ruling on an equitable basis, the Court awards each applicant EUR 4,800, plus any tax that may be chargeable on these amounts.

### B. Costs and expenses

84. The applicants did not submit a claim for costs and expenses. Accordingly, the Court considers that there is no call to award them any sum on that account.

### C. Default interest

85. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;

2. *Declares* the applicants' complaint under Article 3 of the Convention inadmissible and the remainder of the application admissible;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay each applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,800 (four thousand eight hundred euros) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicants' claim for just satisfaction;

Done in English, and notified in writing on 20 April 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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| Fatoş Aracı | Nicolas Bratza |
| Deputy Registrar | President |