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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

AMICUS CURIAE BRIEF

ON

THE *NON ULTRA PETITA* RULE IN CRIMINAL CASES

FOR THE CONSTITUTIONAL COURT

OF GEORGIA

Adopted by the Venice Commission
At its 103rd Plenary Session
(Venice, 19-20 June 2015)

on the basis of comments by

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I. INTRODUCTION

1. On 1st April 2015, the Constitutional Court of Georgia requested the Venice Commission to provide an *amicus curiae* brief regarding three pending criminal cases.

2. Each of the three criminal cases have been referred to the Constitutional Court by the Supreme Court of Georgia and deal with a situation in which the Supreme Court is considering going beyond the scope of the complaint submitted to it in order to rectify what the Court considers to be a substantial wrong. For each of the following questions, the Supreme Court is questioning the constitutionality of Articles 306.4 and 297(z) of the Criminal Procedure Code (see below, hereinafter, the "CPC"):

(1) Case n°1: *"…a party in question does not appeal against their conviction, but asks for his/her sentence to be reduced. Yet, the Supreme Court believes that a person under sentence is innocent, since the totality of evidence presented does not suffice to prove beyond a reasonable doubt that he/she committed a crime. Thus, act committed by this person does not have to be regarded as a crime, as it is not substantiated by the evidence provided."*

(2) Case n°2: *"…the Supreme Court considers that, based on a decision of the court of first instance, an accused person was tried twice for the same offence. When this case originally was appealed before the court of appeal, a person affected asked only for the alteration of the imposed penalty; yet the court of appeal, not to allow their punishment for the same criminal offence twice, quashed the verdict and found the accused innocent, even though he/she did not appeal for acquittal. This decision was further appealed to the Supreme Court by the prosecution on the basis that the court of appeal went beyond the scope of complaint and thus violated the requirements of law. The Supreme Court, when ascertained the legality of the decision of the court of appeal, found that the provision of CPC, which prevents the court of appeal going beyond the complaint in question, contradicts the Constitution of Georgia ("the Constitution").*"

(3) Case n°3: *"…the accused was found guilty by the court of first instance despite the fact that, subsequent to the commission of the offence, the provision had been made by the law that decriminalized the prescribed offence. The court of appeal did not change the verdict, albeit discharged the accused from the respective penalty. The decision of the court of appeal was further appealed to the Supreme Court by the accused. However, the accused did not complain about the offence in question. The Supreme Court considers that disputed provision of the CPC unconstitutionally prevents the Supreme Court going beyond the above-mentioned complaint."*

3. The Supreme Court considers that Articles 306.4 and 297(z) of the CPC do not allow judicial organs to apply the constitutional principles of the protection against double jeopardy, *in dubio pro reo*, *nullum crimen sine lege* and *lex mitior* on its behalf (*sua sponte/ ex proprio motu*). It therefore considers that the provisions in question are not in compliance with Articles 40.3, 42.4 and 42.5 of the Constitution of Georgia (see below). Article 85.3 of the Constitution provides that legal proceedings shall be exercised on the basis of equality of the parties and the adversarial nature of proceedings, a principle that is repeated by Article 9.1 of the CPC. The Supreme Court considers that, in certain cases, it ought to be possible to depart from this principle in order to protect a person's constitutional rights and freedoms.

4. In its request for an *amicus curiae* brief, the Georgian Constitutional Court raised the following questions:

- What are the international or national human rights standards with regard to the scope of review by a higher court? In which circumstances may courts be entitled to go

beyond the appeal in question and decide on the issues that are not indicated in the complaint?

- What are the international or national standards of application of the principles of protection against double jeopardy (right not to be tried or punished twice), *in dubio pro reo* (defendant may not be convicted by the court when doubts about his or her guilt remain), *nullum crimen sine lege* (there exists no crime and no punishment without a pre-existing penal law) and *lex mitior* (the application of the more lenient criminal law)? Do these principles authorise or even oblige a court of law, in case of no formal demand by an appellant or an accused, to uphold those principles on its own behalf (*sua sponte*)?

5. Ms Cleveland, Messrs Knežević and Nicolatos acted as rapporteurs for this *amicus curiae* brief.

6. This *amicus curiae* brief was drafted on the basis of comments by the rapporteurs and adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015).

II. GENERAL REMARKS

7. The Georgian Constitutional Court provided the Venice Commission with the following extracts of the Constitution of Georgia:

> *Article 40.3 An order committing an accused for trial, bill of indictment, and verdict of guilty shall be based only on incontrovertible evidence. Any suspicion that cannot be proved as prescribed by law shall be solved in favour of the accused.*
>
> *Article 42.4 No one shall be tried twice for the same offence.*
>
> *Article 42.5 No one shall be held responsible for an action that did not constitute an offence at the time it was committed. No law shall have retroactive force unless it reduces or abrogates responsibility.*

And extracts of the CPC of Georgia:

> *Article 9. Equality of the parties and adversarial proceedings*
> *1. Once criminal prosecution is commenced criminal procedures shall be exercised on the basis of equality of parties and the adversarial nature of the proceedings.*
>
> *Article 297. Hearing before the court of appeal*
> *z. A case appealed before the court of appeal is heard within the scope of its claim and counter-claim.*
>
> *Article 306. Hearing before the court of cassation*
> *4. A case appealed before the court of cassation is heard within the scope of its claim and counter-claim.*

8. The current CPC was adopted in 2009 and came into force on 1st October 2010, replacing the CPC of 1998. Articles 297(z) and 306(4) which the Georgian Supreme Court understands to prevent judges from going beyond the scope of the claim/counter-claim are new provisions that did not appear in the CPC of 1998. On the contrary, Article 15.6 of the CPC of 1998 provided that "*the court is not bound by the statements of the parties*".

9. In this *amicus curiae* brief, the Venice Commission will address the questions put to it by the Constitutional Court of Georgia, providing comparative law elements and applicable European and international standards. The Venice Commission's role is neither to address the specific

cases pending nor to assess the constitutionality of domestic provisions. This is the national court's role. The Constitutional Court of Georgia's decision in the specific cases and its interpretation of the Constitution are binding on all national institutions, from the administrative to the judicial and legislative branches and all are obliged to respect and adhere to them.

10. The Venice Commission will therefore not take a position on whether the provisions of the CPC are constitutional or not, this is for the Constitutional Court of Georgia to examine and decide.

III. REPLIES TO THE QUESTIONS

A. Question 1

11. The first question of the Constitutional Court of Georgia relates to *"the international or national human rights standards with regard to the scope of review by a higher court"* and *"the circumstances in which courts may be entitled to go beyond the appeal in question and decide on the issues that are not indicated in the complaint".* The Venice Commission will address these matters on the basis of comparative material that it was able to gather. This analysis is not, and should not be considered exhaustive.

12. In the judicial systems of most states, there are three levels of review: the lower courts (first instance), followed by the courts of appeal (second instance) and, finally, the supreme courts (third (final) instance). Each level, or instance, has its own, specific jurisdiction. Many states also have a constitutional court that is usually separate from the three instances or "common courts".

13. The courts of first and second instance generally decide on the merits of the case, while the courts of third instance generally review the legality of the decisions of lower instance courts. The first instance courts may be limited by territory, subject, the amount of money involved in the claim or the sentence that can be imposed. The second instance courts are usually appellate jurisdictions that deal with appeals against decisions of first instance courts and usually have the power to review judgments, if deemed illegal and/or unsubstantiated. The third instance courts will often be a supreme court, a court of last instance, which deals with appeals on points of law against decisions by the courts of second instance and other cases that come within its jurisdiction. Such courts of last instance generally deal with legal questions only and do not re-examine evidence, but they may refer a case back to a lower instance court if re-examination or renewal of evidence is necessary.

14. In a number of European states, the competence of the appellate courts is limited by the *non ultra petita* rule (*Ne eat iudex ultra petita partium aut breviter ne ultra petita*), which provides that a court is only competent to review a case within the limits of the questions of law or fact which have been raised by the parties to a dispute. The *non ultra petita* rule bars the examination of the non-appealed parts of the judgment, but it does not prevent the appellate court from giving a different legal construction to the facts of the case. This rule flows from the principle of the free disposition of the parties (principle of "party disposition"), which is a common feature in continental European legal systems. This rule also aims to ensure the efficiency of justice, by reducing unnecessary loss of time and costs for the litigants and the judicial system.

15. Many European codes or rules of criminal procedure contain provisions or provisos, such as the ones found in the extracts of the CPC of Georgia, which prevent the courts of appeal (Article 297(z)) and the Court of cassation/Supreme Court (Article 306) from going beyond the scope of the complaint. Such provisions or provisos exist, among others, in Austria[1], Bosnia

[1] Article 290.1 of the Austrian Code of Criminal Procedure.

and Herzegovina[2], Cyprus[3], England and Wales[4], Germany[5], Hungary[6], Italy[7], Latvia[8], Norway,[9] Montenegro[10], Poland[11], Serbia[12], Turkey[13] and in Ukraine[14]. In other states however, the Supreme Court is not bound by the reasons of the request, court judgment or court ruling, see for instance Estonia [15]. In the Russian Federation, Article 389.19.1 says that, in an appellate review, the court of appeal *"is not bound by the reasons of the brief of appeal"* and *"is entitled to examine the proceedings* [before the first-instance court] *in all parts"*. Article 389.19. 2 goes so far as to provide that the court of appeal may examine the conviction against all co-defendants, where only one of them has brought an appeal.

16. Outside Europe, in Chile, Article 360 of the Criminal Procedure Code provides that the reviewing tribunal not go beyond the allegations of the parties (non ultra petita).16 However, in Colombia, there is no rule under criminal proceedings that prohibits ultra petita judgments in favour of the applicant. Since the 1970s, the Supreme Court of Colombia has consistently held that the fundamental due process rights of the applicant could be applied ex officio. This concerns four rights: nullum crimen sine lege, legality of jurisdiction, full respect for the forms of each trial and the application of the most favourable law, even if this law entered into force after the relevant act under investigation was committed.17

17. Colombian procedural rules thus allow for ultra petita review in order to protect constitutional rights. Article 216 of the Code of Criminal Procedure, adopted in 2000, provided that the Supreme Court, in cassation proceedings, could annul ex officio a judgment which is clearly contrary to fundamental rights18. The new Code of 200419 maintains this possibility, although does so less explicitly. The Constitutional Court, however, has gone further, holding that, in cassation proceedings, a court has the duty of annulling ex officio a judgment that manifestly violates fundamental constitutional rights20, thus reiterating a precedent of 199621.

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[2] Article 306 of the Criminal Procedure Code of Bosnia and Herzegovina.
[3] See Section 144 of the Law on Criminal Procedure.
[4] Rule 68.3 of the Criminal Procedure Rules require the appellant to identify each of the grounds of appeal on which he relies. Section 2 of the Criminal Appeal Act 1968 entitles the Court of Appeal to allow an appeal if they think a conviction is unsafe.
[5] § 327 (on appeals) and § 352 (on cassation) of the German Code of Criminal Procedure (StPO).
[6] Section 423.4 of Act XIX of 1998 on Criminal Proceedings.
[7] Article 597.1 and Article 609 of the Italian Code of Criminal Procedure.
[8] Section 562 of the Criminal Procedure Code.
[9] Based on the Constitution and the European Convention on Human Rights.
[10] Article 398 Code of criminal procedure of Montenegro.
[11] Articles 433 of the Criminal Procedure Code (see also Articles 439, 440 and 455).
[12] Article 451 of the Criminal Procedure Code of Serbia.
[13] Article 301 CPC.
[14] Article 404.1 (appellate) and 433.2 (cassation) of the Code of Criminal Procedure of Ukraine.
[15] § 14(1) of the Constitutional Review Court Procedure Act (2002).
[16] Article 360 of the Criminal Procedure Code provides for exceptions that are, however, not relevant for this *amicus* brief. Nevertheless, a High Court is entitled to ask the Constitutional Court to review this general legal rule according to the Constitution, which means that the *non ultra petita* rule may, in some cases, not be applied if its effect is not compatible with the constitutional principle of a fair trial.
[17] Supreme Court of Justice, Judgment of June 20, 1972, Gazettes 2352/2357. Case of the extralegal or constitutional annulments.
[18] Code of Criminal Procedure (Law 600 of 2000), Article 216. Limitation of cassation. In principle, the Court may not take into account causes of cassation different from those that have been explicitly alleged by the plaintiff. But with respect to the grounds provided for in the third paragraph of Article 220, the Court must declare them *ex officio*. It can also annul the judgment when it is ostensible that it violates fundamental rights.
[19] Code of Criminal Procedure (Law 906 of 2004). Article 184. Admission. (…) In principle, the Court may not take into account different grounds than those alleged by the plaintiff. However, taking into account the purposes of the cassation appeal, the basis thereof, the position of the plaintiff within the process and the nature of the dispute, it must overcome the shortcomings of the lawsuit in order to decide on the merits.
[20] Colombian Constitutional Court, Judgment C-880 of 2014.
[21] Colombian Constitutional Court, Judgement C-657 of 1996.The Supreme Court *ex officio* must strike down the criminal judgment whenever it manifestly violates fundamental rights.

18. Most ex officio annulments are uncontroversial, such as quashing a judgment in order to protect the principle of the application of the most favourable law to the applicant22. But a decision of the Supreme Court to annul ex officio a conviction in order to protect the fundamental guarantee of due motivation of sentences23 sparked public debate until the Constitutional Court upheld the ruling24.

19. The doctrine of the Colombian Supreme Court - supported consistently since the 1970s and supported by the Constitutional Court - has prompted second instance tribunals to review first instance judgments, which are contrary to due process or other fundamental rights, even on grounds that were not raised by the applicant.

20. In South Africa, although the higher courts have the inherent power to review the proceedings of lower courts, this power must be exercised sparingly[25] and it ordinarily may not be invoked to correct a mistake made by a party nor to rectify a failure of the prosecution to lead certain evidence i.e. call or adduce evidence (but see the exceptions below). This is also the general rule followed in Canada[26] and in the United States of America (hereinafter, the "U.S.").

21. *"The ultra petita (or as it is sometimes called, the ex, or extra, petita) rule precludes that an international tribunal or equivalent body should deal with matters that are not the subject of the complaint brought before it…"27.* This statement by Judge Sir Gerald Fitzmaurice in a dissenting opinion in the European Court of Human Rights' Case of Guzzardi v. Italy (1980), not only provides an explanation of the *ultra petita* rule, but also draws attention to the fact that it is a rule that is generally followed by European[28] and international courts and tribunals[29].

22. Some States that provide for the *non ultra petita* rule, however, set out specific exceptions to it in their codes or rules of criminal procedure. These exceptions refer to cases where the higher interests of justice should prevail over legal provisions.

23. In Italy, for example, the court has the power and, indeed, the duty to raise *ex officio,* at any stage and level of the proceedings, instances where: evidence was illegally acquired[30]; *ne bis in idem*[31]; the absence of the defendant or of his or her lawyer when his or her presence was mandatory; the lack of jurisdiction[32] and if the facts of the case did not occur, or the defendant did not commit them, or they do not constitute a criminal offence or are not considered an offence.[33] In Turkey, the Court of cassation has the obligation, in addition, of pointing out in its decision, other irregularities that it has discovered during its cassation examination, that were not raised in the cassation request[34]. Article 289 CPC of Turkey also provides a list of situations

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[22] Supreme Court of Justice. Judgment of August 19, 2004. No. 21302, which struck down a judgment that violated the principle of favorability (retroactive application of heavier prison sentence).
[23] Supreme Court of Justice, Criminal Chamber. Judgement of May 22, 2003. No. 20756.
[24] Constitutional Court, Judgment T-001 of 2004.
[25] The right to review is protected by Section 35.3.o of the Bill of Rights, Chapter 2 of the Constitution of the Republic of South Africa. There are two types of different forms of review: (1) enacted by statute (Superior Courts Act and Criminal Procedure Act) and (2) regulated by the common law and entrenched in Section 173 of the Constitution.
[26] § 9.05 (reference to s. 686 of the Criminal Code on substantial wrong or miscarriage of justice) and §9.7 of the Criminal Procedure Code of Canada.
[27] *Case of Guzzardi v. Italy,* (application no. 7367/76, Judgment, 6 November 1980, paragraph 4, Dissenting opinion of Judge Sir Gerald Fitzmaurice.
[28] European Court of Human Rights: *Case of Foti and Others v. Italy,* application nos. 7604/76; 7719/76; 7781/77; 7913/77, paragraph 44; Court of Justice of the European Union: Case C-310/97, *Commission v. AssiDöman Kraft Products AB et al*., 1999, ECR I-05363; Joined Cases 46/59 and 47/59, *Meroni v. High Authority*, 1962, ECR 411; Case 37/71, *Jamet v. Commission*, 1972, ECR, 483.
[29] *Arrest Warrant of 11 April 2000 case*, 2002, paragraph 43; *Minquiers and Ecrehos case*, 1953, 47, 53; *Asylum Case*, 1950, I.C.J. 299; *Corfu Channel (Merits) Case*, 1949, see dissenting opinion of Judge *ad hoc* Ečer.
[30] Article 191.2 CCP.
[31] Article 649.2 CCP.
[32] Article 179 CPP.
[33] Article 129 CCP.
[34] Article 302(3)).

in which the Court of cassation is not bound by what is written in the cassation request and shall make an *ex officio* examination where:

- the composition of the first instance court is in breach of the legislation;
- the first instance judge, who gave the verdict, does not have the right to sit as judge in the case;
- the first instance court is not the competent court to deal with the case;
- the hearing before the first instance court was held without the participation of those who were obliged to be present during the hearing;
- the reasoning of the first instance court's decision does not include points prescribed by Article 230 of the CPC;
- the defence rights are limited to the crucial points, which could affect the outcome of the case before the first instance court;
- the evidence is obtained illegally.

24. Montenegro and Serbia have a similar procedure to the one in Italy and Turkey, in which the second instance court is bound by the issues raised in the complaint, but has the power to intervene, *ex officio*, where there have been substantive violations of the criminal procedure[35], notably, to the detriment of the defendant. This includes the question of whether the act for which the accused is prosecuted actually constitutes an offence.[36] In Cyprus, the Supreme Court may only go beyond the grounds set by the appeal if, on the hearing of the appeal, it is of the opinion that a substantial miscarriage of justice has occurred.[37] In Germany, the courts have disregarded limitations of a complaint if these limitations prevented the reviewing court from arriving at a correct sentence.[38]

25. In Ukraine, the Code of Criminal Procedure sets out that the second instance court may go beyond the scope of the complaint, if this does not aggravate the situation of the accused[39]. The Court of Cassation is similarly restricted, but may go beyond the scope of the complaint for the same reason as the second instance court.[40]

26. In the U.S., there are several doctrines that could be considered analogous to an exception to the *non ultra petita* principle, including doctrines relating to violations of the Sixth Amendment constitutional right to effective assistance of counsel and doctrines relating to review for miscarriage of justice of *habeas corpus* claims that otherwise would be barred from review by procedural default.[41] Federal courts always can, and indeed must, raise jurisdictional objections to a criminal case *sua sponte* if the parties have not done so, since the court cannot act in the absence of jurisdiction. Jurisdictional objections can therefore result in the reversal of a conviction *sua sponte* by an appellate court.

27. However, the closest doctrine in the U.S. criminal law to an exception to the *non ultra petita* principle appears to involve the power of federal appellate courts to review both civil and criminal cases for "plain error". For instance, in the early case of Wiborg v. United States (1896), the Supreme Court examined the criminal conviction of three co-defendants – a ship captain and two ship mates – for transporting arms to support an insurrection in Cuba.

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[35] See Article 386(1) of the Code of Criminal Procedure of Montenegro; Article 451 of the Criminal Procedure Code of Serbia.

[36] See Article 387 of the Code of Criminal Procedure; Article 489 of the Criminal Procedure Code of Serbia.

[37] However, an irregularity in the course of the proceedings will not justify a departure, on appeal, from the provisions of Section 144 of the Criminal Procedure Law, Cap. 155, unless the nature of the irregularity is such as to go to the root of the conviction, resulting in an altogether unwarranted verdict: (See: *Eraklides v. the Police* (1970) 2 CLR, 1).

[38] e.g. OLG Bamberg, Judgment of 25 June 2013, Az. 3 Ss 36/13; OLG Hamm, Decision of 2 February 2012 – Az.III-3 RVs 4/12.

[39] Article 404.2.

[40] Article 433.2.

[41] In federal *habeas corpus* proceedings, the miscarriage of justice exception to the procedural default rules that ordinarily bar a criminal defendant from raising an objection to their conviction or sentence if they were not preserved in prior *habeas* proceedings, applies where the defendant demonstrates that *"failure to consider the claims will result in a fundamental miscarriage of justice."*

At trial, the defendants raised a number of objections, but none to the overall sufficiency of the evidence to convict them. The Supreme Court nevertheless concluded that it could consider the question, stating that if a plain error was committed in a matter so absolutely vital to defendants, it felt it was at liberty to correct it. The Supreme Court upheld the conviction of the captain, but rejected the convictions of the two ship mates.[42] Later, in United States v. Atkinson (1936), the Court observed that "*In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings*".[43]

28. This plain-error rule has now been codified in Rule 52 of the Federal Rules of Criminal Procedure. Rule 24(a) of the Rules of the Supreme Court of the United States also codifies the plain error rule. The modern U.S. Supreme Court has interpreted the plain error rule as requiring a party to demonstrate that an error meets all the criteria of a four-part test: (1) there must be an "error", the party cannot have intentionally waived the claim below; (2) the error must be "clear" or "obvious"; (3) it must affect the defendant's "substantial rights"; and (4) it must "seriously affect the fairness, integrity or public reputation of judicial proceedings"[44]. Application of the plain error rule by the courts is discretionary and occurs on a fact-specific, case-by-case- basis. Courts have emphasised that it is the rare case in which the plain error rule will be applicable, but it has been recognised as appropriate, among other contexts, to reverse cases if a conviction is based on insufficient evidence, on grounds of actual innocence, etc. so long as the four prongs of the plain error test are satisfied.

29. In South Africa, in law and practice, a higher court hearing an appeal from a lower court is always entitled – and is even considered obliged – to review the soundness of the accused's conviction on any grounds, not solely on those raised by the accused[45]. The supremacy clause of the South African Constitution provides that the Constitution is the supreme law of the land and that any law or conduct inconsistent with it is invalid.[46] This means that the court may, and in some circumstances, is obliged to raise constitutional issues of its own accord. In order to do so, the constitutional question must clearly arise from the facts of the case.[47]

30. On the European level, in the Case of Foti and Others v. Italy (1982), in which the applicants did not assert that the criminal proceedings against them were being unduly prolonged, the European Court of Human Rights has held that the international system of protection established by the ECHR functions on the basis of applications either by governments or by individuals alleging violations. This system does not enable the Court to take up a matter irrespective of how it came to know about it, to seize on facts that have not been adduced by the applicant and to examine whether they are compatible with the ECHR. However, it went on to say that: *"The institutions set up under the Convention **nonetheless** do have jurisdiction to review in the light of the entirety of the Convention's requirements circumstances complained of by an applicant. In the performance of their task, the Convention institutions are, notably, free to attribute to the facts of the case, as found to be established on the evidence before them, a characterisation in law different from that given by the applicant or, if need be, to view the facts in a different manner; furthermore, they have to take account not only of the original application but also of the additional documents intended to complete the latter by eliminating initial omissions or obscurities".*[48]

[42] *Wiborg v. U.S*., 163 U.S. 632, 659 (1896).
[43] *United States v. Atkinson*, 297 U.S. 157, 160 (1936).
[44] *United States v. Olano*, 507 U.S. 725, 732-36 (1993).
[45] There are two categories of review proceedings, the first is enacted by statute and regulated by the Superior Courts Act (10 of 2013, sections 21-22) and the Criminal Procedure Act (51 of 1977). The second is regulated by the common law and is entrenched in Section 173 of the Constitution of South Africa.
[46] Section 2 of the Constitution of the Republic of South Africa.
[47] *Director of Public Prosecutions of Transvaal v. Minister of Justice and Constitutional Development*, paragraphs 35-36.
[48] *Case of Foti and Others v. Italy,* application nos. 7604/76; 7719/76; 7781/77; 7913/77), paragraph 44.

31. On the international level, there is a relevant ruling of the International Criminal Tribunal for Rwanda's Appeals Chamber in the case of Juvénal Kajelijeli v. The Prosecutor (23 May 2005), in which the Appeals Chamber, *sua sponte/ ex proprio motu,* found that under the circumstances of this case, in view of the serious violations of the Accused's fundamental rights during his arrest and detention in Benin and the UNDF from 5 June 1998 to 6 April 1999, and considering his entitlement to an effective remedy for those violations under the Tribunal's law and jurisprudence and Article 2(3)(a) of the ICCPR, the accused's two life sentences and fifteen year sentence, as imposed by the Trial Chamber, were to be set aside and converted into a single sentence consisting of a fixed term of imprisonment of 45 years. Pursuant to Rule 101(D) of the Rules, the accused was also to receive credit for time already served in detention as of 5 June 1998. The Appeals Chamber noted that the appellant had failed to raise the issue before the Trial Chamber, but considered that this did not bar the Appeals Chamber from considering the issue *proprio motu.*[49]

32. These examples show that procedural requirements that a defendant or their counsel must raise an issue or object to a trial court's ruling, should not prevent a reviewing court from deciding, on its own motion, in rare and exceptionally serious cases, whether an accused person's fundamental human rights have been violated. The rule of thumb for this type of intervention should therefore be that the appellate court should not address errors of fact or law allegedly made by a lower court, unless these infringe on fundamental rights.

B. Question 2

33. The questions raised by the Constitutional Court of Georgia in its request for this *amicus curiae* brief relate primarily to fundamental guarantees that fall under the defence rights provided by the right to a fair trial. When a person is held accountable for a criminal offence, which may lead to that person's conviction and, possibly, to his or her deprivation of liberty, the state must ensure that the person is given a fair trial.

34. The fundamental principles raised in this request, notably the presumption of innocence (and *in dubio pro reo*), the protection against double jeopardy (*ne bis in idem)* and *nullum crimen sine lege* and *lex mitior* are enshrined in the constitutions of states and in international human rights instruments.

35. For instance, the right to a fair trial - and notably the presumption of innocence – is contained in most states' constitutions either directly or implicitly (including in Georgia (Article 40.1)). These states include Albania (Article 30), Andorra (Article 10), Armenia (Article 21), Austria (ECHR is directly applicable constitutional law), Azerbaijan (Article 63.I), Chile (Article 19.3), Croatia (Article 31.2), Cyprus (Articles 11, 12.4), Czech Republic (Article 40.1 and 40.2, Charter of Human Rights and Fundamental Freedoms, which is part of the constitutional order of the country)[50], Estonia (Article 22), Georgia (Article 40.1), Greece (Article 6), Iceland (Article 70), Ireland (Article 38), Italy (Article 13), Kazakhstan (Article 77.6), Kosovo (Article 31.5), Kyrgyzstan (Article 26.2), Liechtenstein (Article 32), Lithuania (Article 31), Malta (Article 39), Moldova (Article 21), Montenegro (Article 25), Netherlands (Article 15), Norway (Article 96), Slovenia (Article 27), Spain (Article 24.2), Madagascar (Article 13), Morocco (Article 23), Poland (Article 42.3), Russian Federation (Article 49.2), South Africa (Section 35.3.h), Switzerland (Articles 29-31, 32.1), Ukraine (Article 62) and the U.S (implicit)[51].

36. Another principle, the protection against double jeopardy, *ne bis in idem*, is also contained in the constitutions of many states in and outside Europe (including Georgia (Article 42.4)) e.g. in Albania (Article 34 of the Constitution), Austria (ECHR is directly applicable constitutional

[49] *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A, Judgment (May 23, 2005), paragraphs 208-209 and footnote 426 and paragraphs 324-325.
[50] http://www.usoud.cz/en/charter-of-fundamental-rights-and-freedoms/
[51] The presumption of innocence is not cited explicitly in the Constitution, however is held to follow from the Fifth, Sixth and Fourteenth Amendments, see *Coffin v. United States*, 156 U.S. 432 (1895) and *In re Winship*, 397 U.S. 358 (1970).

law), Cyprus (Article 12.2); Croatia (Article 31.2), Czech Republic (Article 40.5, Charter of Human Rights and Fundamental Freedoms), Germany (Article 103.3), Japan (Article 39), Republic of Korea (Article 13), Kosovo (Article 34), Lithuania (Article 31), Montenegro (Article 25), Slovenia (Article 31), South Africa (Section 35.3.m) and the U.S. (Amendment V).

37. The constitutions of many states, in and outside Europe, also contain provisions that refer to the principle *nullum crimen sine lege,* which is accepted in modern democratic states as a basic requirement of legality. This includes Georgia (Article 42.5) e.g. Albania (Article 29), Austria (ECHR is directly applicable constitutional law), Chile (Article 19.3), Croatia (Article 31.1), Cyprus (Article 12.1), Finland (Section 8), Germany (Article 103.2), Greece (Article 7), Iceland (Article 69), Italy (Article 25), Republic of Korea (Article 13), Montenegro (Article 33), Netherlands (Article 16), Norway (Article 97), Poland (Article 42.1), Slovakia (Article 50.6), Slovenia (Article 28) and South Africa (Section 35.3.l).

38. In accordance with the hierarchy of norms, where the *non ultra petita* rule exists in the criminal procedure code or equivalent law, the provision generally is interpreted in line with the constitution and, as such, will not stand in the way of letting courts intervene in rare cases, where serious breaches could occur. If this were not the case, the rule would be considered unconstitutional and struck down.

39. This approach interprets the law to be in line or consistent with the Constitution through what has been called "consistent interpretation" e.g. in Germany, this is called "*Verfassungskonforme Interpretation*" (interpretation in conformity with the Constitution).[52] In the U.S., consistency between statutes and the Constitution is accomplished by applying constitutionally-based interpretative canons, according to which interpretations of statutes that would render a statute unconstitutional, should be avoided.[53] In England and Wales, where there is no written constitution, but where subordinate legislation must comply with the terms of the enabling Act of Parliament, will be invalid if it exceeds the powers which the Act confers or if a mandatory statutory procedure was not followed in making it or if it conflicts with rights granted by other primary legislation or the European Convention on Human Rights. For South Africa, see the reference to the supremacy clause above, for Question 1.

40. This also applies on the international level, where clashes between constitutional law and international law have been reduced on the basis of the "consistent interpretation" approach of reconciling state constitutions with international law. [54]

41. Accordingly, the right to a fair trial, the protection against double jeopardy and the principle *nullum crimen sine lege* are considered constitutional principles in many states and are therefore binding on all courts (and authorities), regardless of whether or not they were raised by a party or counsel before a court of law.

42. Should these fundamental principles not be contained in the constitution, then state parties to regional and international instruments that cover them will, nevertheless, be bound by them. They are also likely to have acquired the status of customary international law and therefore constitute an obligation on the international community to abide by them.

43. For example, the right to a fair trial is contained in Article 10 of the Universal Declaration on Human Rights, which was then taken up by the International Covenant on Civil and Political Rights (ICCPR) in its Articles 14 and 16. The former protects the right to a fair trial in general, including specific fundamental guarantees, such as the presumption of innocence (Article 14.2) and the prohibition on double jeopardy (Article 14.5). Article 14 accordingly requires States

[52] § 352(1) and (2) of the German Code of Criminal Procedure (StPO).
[53] See The Rehnquist Court's Canons of Statutory Construction, http://www.ncsl.org/documents/lsss/2013PDS/Rehnquist_Court_Canons_citations.pdf ; See also "Codified Canons and the Common Law of Interpretation", by Jacob Scott, http://georgetownlawjournal.org/files/pdf/98-2/Scott.PDF
[54] See Supremacy Lost: international law meets domestic constitutional law (Article), by Anne Peters, Vienna Online Journal on International Constitutional Law, Vol. 3, pp. 170-198, 2009.

parties to assure fair criminal trials, with rights to adequate review, and imposes obligations in this regard that are independent of a state's domestic law.

44. The Human Rights Committee, which monitors implementation of the ICCPR by its State parties, has found that entering a general reservation to the right to a fair trial would be incompatible with the object and purpose of the ICCPR. Thus, the Human Rights Committee's General Comment No. 32 (2007), states that: *"Article 14 contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law. While they should report on how these guarantees are interpreted in relation to their respective legal systems, the Committee notes that it cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees."* Deviating from the right to a fair trial, including the presumption of innocence, is prohibited at all times.[55] While certain reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would be incompatible with the object and purpose of the ICCPR.[56] This provides an additional safeguard for the protection of this right.

45. On the regional level, the right to a fair trial is covered by Articles 5-7 of the European Convention on Human Rights (ECHR), more particularly Article 6, which guarantees this right, protects the principle of the rule of law on which a democratic state is built and protects the important role of the judiciary in the administration of justice.[57] It guarantees the procedural rights of parties to civil proceedings (Article 6.1) as well as those of the defendant in criminal proceedings (Article 6.1, 6.2 (presumption of innocence), 6.3 (*inter alia*, legal assistance)). The right to a fair trial is also covered by Articles 2 and 4 of Protocol No. 7 to the ECHR, by Article 47 of the Charter of Fundamental Rights of the European Union, by Articles 3, 7 and 26 of the African Charter on Human and Peoples' Rights and by Articles 3 and 8-10 of the American Convention on Human Rights.

46. The issue of legal representation, that falls under the defence rights in Article 6.3.c ECHR, can also have a marked effect on the right to a fair trial. Where legal representation is compulsory, but turns out to be ineffective, the established case law of the European Court of Human Rights is that a state cannot normally be held responsible for the actions or decisions of an accused person's lawyer[58], because the conduct of the defence is essentially a matter between the defendant and his or her counsel (whether appointed under a legal aid scheme or financed privately)[59].

47. However, notwithstanding this, the European Court of Human Rights has held that – under certain circumstances – the applicant's defence rights could be compromised if counsel, appointed under a legal aid scheme or - in certain circumstances - a privately paid lawyer, manifestly failed to do his or her job correctly. Such a situation arose in the case of Güveç v. Turkey, where the applicant was a minor and the Court held that *"…in case of a manifest failure by counsel appointed under the legal aid scheme to provide effective representation, Article 6 § 3 (c) of the Convention requires the national authorities to intervene".*[60] It went on to say that *"…the Court considers that the applicant's young age, the seriousness of the offences with which he was charged, the seemingly contradictory allegations levelled against him by the police and a prosecution witness…, the manifest failure of his lawyer to represent him properly and, finally, his many absences from the hearings, should have led the trial court to consider that the applicant urgently required adequate legal representation.* ***Indeed, an accused is entitled to have a lawyer assigned***

[55] General comment No. 29 (2001), paragraph 11.
[56] General comment No. 24 (1994), paragraph 8.
[57] See p. 7, Protecting the right to a fair trial under the European Convention on Human Rights, D. Vitkauskas and G. Dikov.
[58] See Stanford v. the United Kingdom, 23 February 1994, § 28, Series A no. 282-A.
[59] See *Czekalla v. Portugal*, no. 38830/97, § 60, ECHR 2002-VIII; see also *Bogumil v. Portugal*, no. 35228/03, § 46, 7 October 2008.
[60] *Güveç v. Turkey*, 2009, application no. 70337/01, paragraph 130.

***by the court of its own motion "when the interests of justice so require**" (see Vaudevelle v. France, no 35683/97, § 59, ECHR 2001-I)."*[61]

48. Another principle raised by the request is the protection against double jeopardy (*ne bis in idem*), which has been established as an individual right under international human rights instruments, such as the ICCPR (Article 14.7).[62] This principle has also been included in Article 4 of Protocol No. 7 ECHR, which imposes a prohibition against (second) trial or punishment for the same offence, on the same facts, against the same offender. This complies with the maxim *ne bis in idem* which create *res judicata* or "issue estoppel" with respect to criminal cases already tried and decided.

49. Under the ECHR, previous uncertainty with regard to this principle was removed with the Judgment of the Grand Chamber of the European Court of Human Rights in the case of Sergey Zolotukhin v. Russia,[63] which held as follows: *"82. Accordingly, the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same."*

50. The principle of *nullum crimen sine lege* is also contained in Article 7 ECHR and in Article 15 of the ICCPR, which prohibit sentencing without a legal basis (national or international) and provide that no heavier penalty shall be imposed than the one applicable at the time the crime was committed. This also means that criminal laws must be sufficiently clear to allow an individual to be able to ascertain which actions constitute a criminal offence. This principle is also enshrined in Article 9 of the American Convention on Human Rights, Article 7.2 of the African Charter and Article 22 of the Rome Statute of the International Criminal Court.

51. With respect to the application of the principle of *nullum crimen sine lege*, the European Court of Human Rights in the case of S.W. v. the United Kingdom stated that the principle of legality, *" … should be construed and applied … in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment."*[64] It is further stated that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy, but it must be clearly defined. It follows that this decision may also be applied in respect of the principle of *nullum crimen sine lege.*

52. As regards the principle of *lex mitior* in criminal law, according to which a person is to benefit from the lighter or more lenient penalty, where a change in that law has occurred, is found in Article 15.1 ICCPR, Article 9 American Convention on Human Rights, Article 24.2 Rome Statute and in Article 49 of the Charter of Fundamental Rights of the European Union.

53. Although Article 7 ECHR is silent on *lex mitior*, the Grand Chamber of the European Court of Human Rights acknowledged the principle in the Case of Scoppola v. Italy (No. 2)[65] as one of the guarantees of the principle of legality in European human rights law. It based this new approach on the changing conditions and emerging consensus in the States parties around this principle[66] and it affirmed *"...that Article 7 § 1 of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is*

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[61] *Ibid*., paragraph 131. The Human Rights Committee has taken a similar approach to the right to counsel under Article 14(3)(d) the ICCPR, concluding that *"measures must be taken to ensure that such counsel, once assigned, provides effective representation in the interest of justice."* Communication No. 253/1987, *Kelly v Jamaica*. Accordingly, a State party can be held responsible for errors made by defence counsel when it *"was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice."* Communication No. 536/1993, *Perera v. Australia*.

[62] See p. 102, The transnational *ne bis in idem* principle in the EU Mutual recognition and equivalent protection of human rights by John A.E. Vervaele, Utrecht Law Review, Volume 1, Issue 2 (December 2005).

[63] *Case of Sergey Zolotukhin v. Russia* , application no. 14939/03 (2009).

[64] See paragraph 34.

[65] *Case of Scoppola v. Italy (No. 2)*, 2009, application no.10249/03.

[66] Ibid., paragraph 104.

embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant."[67]

54. States parties to these international and regional instruments are obligated to ensure that these principles are respected. As this *amicus* brief demonstrates, whether a court of law may, or rather should, as a result, intervene *sua sponte* to uphold these principles, may be deduced from state practice on this matter, which shows that, for a number of these principles, the court should indeed do so.

55. In the UK, for example, such a situation is likely to arise in terms of whether a criminal defendant has been treated in breach of his or her ECHR rights contrary to the Human Rights Act of 1998. Section 6 of the Human Rights Act makes it unlawful for a public authority to act incompatibly with ECHR rights. The court is defined, for these purposes, as a "public authority", which is required to ensure that ECHR rights are upheld - regardless of the position taken by the parties.

56. Examples of courts intervening *sua sponte* to protect fundamental constitutional principles have been provided by a couple of states. For instance, in South Africa, the court itself (*sua sponte*) raised the issue of double jeopardy in the case of S. v. Basson,[68] in which the Constitutional Court issued directions before a preliminary hearing, for the parties to file written submissions on whether the respondent stood in jeopardy at the trial. This was done to assist the Court in determining if it was in the interests of justice, as tested against Section 35.3.m of the Constitution, to grant leave to appeal.

57. Another example, this time regarding the principle of *nullum crimen sine lege*, is provided by the U.S., where situations involving conduct that was the basis for the conviction is later decriminalised retroactively arguably would fall under the miscarriage of justice exception in *habeas corpus* proceedings explained above (see under Question 1).

58. In Davis v. United States[69], for example, the Supreme Court addressed a case in which the defendant argued on *habeas* that a later change in the law through judicial interpretation after his conviction rendered his conviction invalid. The Court observed that "*If this contention is well taken, then Davis' conviction and punishment are for an act that the law does not make criminal."* There can be no room for doubt that such a circumstance "*inherently results in a complete miscarriage of justice and present(s) exceptional circumstances that justify collateral relief..."* Although the party in this case raised the issue to the reviewing court and the case involved *habeas* rather than direct appellate review – it is nevertheless relevant, because it shows that some questions should always be subject to judicial reconsideration[70].

59. Based on the exceptions to the *non ultra petita* rule, provided under Question 1 above, and the examples of state practice on the matter provided to the Venice Commission, it seems clear that for most states, a court of law is allowed to uphold, *sua sponte,* the fundamental principles raised in this *amicus curiae* brief and, for some states, it is even an obligation. However, it is also clear that such an intervention must be exercised sparingly

[67] Ibid., paragraph 109.
[68] [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) – 249.
[69] 417 U.S. 333, 346-47 (1974).
[70] Cf. Silber v. U.S., 370 U.S. 717 (1962) *(sua sponte* reversal of conviction based on plain error). "[*Davis*] holds that collateral relief under §2255 is available when opinions released after a person's conviction show that he is in prison for an act that the law does not make criminal." Ryan v. US, 645 F.3d 913 (7th Cir 2011). See also Bousley v. U.S., 523 U.S. 614 (1998) (guilty plea to what later judicial interpretation holds not to be a crime can provide basis for collateral relief).

and in very specific circumstances, namely, errors of fact or law allegedly made by a lower court should not be addressed unless these infringe fundamental principles.

IV. CONCLUSION

60. The *non ultra petita* rule sets out that a court is only competent to review a case within the limits of the questions of law or fact which have been raised by the parties to a dispute. It also aims to ensure the efficiency of justice, by reducing unnecessary loss of time and costs for the litigants and the judicial system. Such procedural requirements do not, *per se*, offend human rights protection.

61. The *non ultra petita* rule is a common feature in European legal systems and beyond. In the criminal law field, this rule is also found in states that otherwise follow the inquisitorial principle with respect to the scope of the jurisdiction for appellate courts to review judgments on appeal or cassation.

62. States that provide for the *non ultra petita* rule in their criminal procedure codes or rules often also provide for specific exceptions to this rule in the same code or rules. These exceptions refer to cases where the higher interests of justice should prevail. If such exceptions are not explicitly referred to by the law, they may be introduced through case law in order to protect fundamental rights enshrined in constitutions and international human rights law.

63. Based on the exceptions to the *non ultra petita* rule and the examples of state practice on the matter provided to the Venice Commission, it seems clear that for most states, a court of law is allowed to uphold, *sua sponte,* the fundamental principles raised in this *amicus curiae* brief and, for some states, it is even an obligation for courts to do so. It is, however, also clear that such an intervention must be exercised sparingly and in very specific circumstances, namely, errors of fact or law allegedly made by a lower court should not be addressed unless these infringe fundamental principles.