



REPUBBLICA DI SAN MARINO
SEGRETARIA DI STATO PER GLI AFFARI ESTERI

San Marino, 24 February 2006

Ref. No. 1599/BB/68/AA/38

Dear Secretary-General,

I have the honour to refer to your letter dated 21 November 2005 and transmit hereby the reply by the Government of the Republic of San Marino to your inquiry under Article 52 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Please, accept my sincere apologies for the delay of this reply which was due to mere bureaucratic reasons.

I take this opportunity to renew to you the assurances of my highest consideration and esteem.

THE SECRETARY OF STATE

Fabio Berardi

A handwritten signature in cursive script, appearing to read 'Fabio Berardi'.

H.E.
Terry Davis
Secretary-General
of the Council of Europe
STRASBOURG

REPLY BY THE GOVERNMENT OF THE REPUBLIC OF SAN MARINO TO THE REQUEST FOR AN EXPLANATION OF THE SECRETARY GENERAL OF THE COUNCIL OF EUROPE DATED 21 NOVEMBER 2005, UNDER ARTICLE 52 OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS.

Under the Declaration on the Citizens' Rights and Fundamental Principles of San Marino Constitutional Order, the Republic of San Marino "recognises, guarantees and enforces the rights and fundamental freedoms set forth by the European Convention for the Protection of Human Rights and Fundamental Freedoms" (Article 1, paragraph 3). All domestic ordinary legislation, even subsequent, must conform to the Convention, the latter having the constitutional rank.

Right to life, prohibition of torture, right to freedom and security, right to a fair trial, right to respect for private and family life, right to an effective remedy, and freedom of movement are ensured to all individuals subject to the jurisdiction of the Republic and fully protected by the domestic legal system.

San Marino is a party to multilateral legal instruments of paramount importance in the field of human rights: first of all, at a European level, the above-mentioned Convention for the Protection of Human Rights and Fundamental Freedoms and all its additional protocols (including its Protocol 14), as well as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and its two protocols. Such instruments are fully implemented, with the San Marino Authorities fairly and actively cooperating with the relevant treaty-based bodies.

Other relevant international conventions drafted and implemented under the aegis of the United Nations, to which San Marino is a party, include: the International Covenant on Civil and Political Rights, acceded to in 1985 and the recently ratified Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

In the multilateral fora where San Marino participates, the Representatives of the Republic reiterated on several occasions the importance attached to the protection of human rights, which are universal, indivisible and interdependent.

Respect for and protection of the fundamental rights of any human being can never and in no way be limited or impaired, neither when a State is compelled to take special measures under exceptional circumstances or to address situations of serious danger. Security must not impinge on respect for civil and political rights and vice versa. In countering the unprecedented threat of terrorism, Governments have a duty to react with vigour and determination, using all weapons that are available within, but not beyond, their legal arsenals.

1) Explanation of the manner in which the internal law ensures that acts by officials of foreign agencies within the jurisdiction are subject to adequate control.

It is worth noting that human rights protection is ensured in San Marino by criminal provisions, punishing all behaviours amounting to violations of such rights.

The provisions of the Criminal Code apply both to San Marino nationals and foreign or stateless people perpetrating offences on the territory of the State (under Article 5 below).

The protection of the rights referred to in the Criminal Code applies to all people - with no distinction - who suffer an offence on the territory of the State.

In summary, San Marino internal law ensures that acts committed within its jurisdiction by, but not only, officials of foreign agencies are subject to adequate control under Articles 5 and 6 of the Criminal Code.

*Article 5 of the Criminal Code
Offence committed in the Republic*

Anyone who, including foreigners or stateless people, commits an offence on the territory of the State, excluding the exceptions under relevant international Conventions, shall be subject to the provisions of this Code.

For the purposes of the criminal law, the territory of the State includes the territory of the Republic, San Marino ships and aircraft, wherever located except when subject to a foreign territorial law.

The offence shall be deemed to have been committed on the territory of the State when the offender has committed criminal acts thereon, or when the event occurred thereon.

*Article 6
Offences committed abroad*

The provisions of this Code shall apply to anyone committing outside the territory of the State any of the felonies under Articles 170 [delivery of a national to a foreign State], 185 [libel], 196 [extortion], 284 [civil war], 285 [armed riot], 324 [attack on San Marino territorial integrity and freedom], 325 [treason], 326 [intelligence with a foreign State against San Marino integrity and freedom], 328 [espionage], 329 [disclosure of

political secrecy], 331 [disloyalty to the State interests], 332 [destruction of documents concerning the Republic's political interests], 333 [activity of San Marino nationals abroad against the repute of the Republic], 334 [hostile acts against a foreign State], 337 [attack on the constitution of the Republic or its government system], 338 [defamation of the Republic and its emblems], 339 [conspiracy], 341 [attack on the Captains Regent], 342 [attack on the honour of the Captains Regent], 343 [felonies against the life, integrity or freedom of people vested with public powers], 344 [attack on the honour of people vested with public powers], 346 [attack on public powers], 347 [attack on the liberty of public powers], 400 [counterfeiting, alteration and abuse of public seals], 401 [forged coins, stamps and credit titles], 403 [making, holding, buying and selling of counterfeiting tools or materials], 405 [counterfeiting of public stamps].

The provisions of this Code shall equally apply to anyone committing the felonies under Articles 167 [reduction to slavery], 168 [trade and trafficking in slaves], 244 [illegal manufacturing, trade and prescription of narcotics] and 268 [trafficking for prostitution purposes]; the felonies referred to Article 237 [public disaster] and 239 [disaster hazard], if perpetrated by means of hijacking of aircraft having as first destination the territory of the State or leaving therefrom; any other offence for which international conventions or treaties require the Republic to suppress facts committed abroad.

San Marino law shall equally apply to anyone committing, outside the territory of the State, to the detriment of a San Marino national, a felony punishable by terms of at least second-degree imprisonment.

2) Explanation of the manner in which the internal law ensures that adequate safeguards exist to prevent unacknowledged deprivation of liberty of any person within the jurisdiction, whether such deprivation of liberty is linked to an action or an omission directly attributable to the High Contracting Country or whether that Party has aided or assisted the agents of another State in conduct amounting to such deprivation of liberty, including aid or assistance in the transportation by aircraft or otherwise of persons so deprived of their liberty.

The unacknowledged deprivation of liberty (e.g. arbitrary arrest and failure to release from prison, arbitrary treatment against detainees and arbitrary house search) is covered and punished under Articles 351, 352 and 353 of the Criminal Code respectively.

In all cases, the Criminal Code criminalizes kidnapping – under its Art. 169 – and reduction to slavery – under its Art. 167.

Notably, all crimes referred to above are prosecutable *ex officio*, which means there is no requirement for the victim to bring a charge. This is certainly of significance. The possibility to initiate criminal proceedings in the presence of a *notitia criminis* (report of a serious offence) ensures that any unacknowledged deprivation of liberty is established and punished accordingly, even if the victim of such unacknowledged deprivation of liberty has not brought or has been unable to lay a charge.

In all cases, under Art. 93 of the Code of Criminal Procedure (as reworded with Law No. 20/2000) the records of any arrest or stop performed by law enforcement officers must be reported to the Law Commissioner within 48 hours, the latter having to validate or invalidate the measure within 96 hours. Therefore, controls on the lawfulness of arrests and stops are prompt. A further control is also the requirement that the arrest or stop record be notified to the counsel - either chosen by the defendant or appointed by the court – under Art. 93, par. 1 of the Code of Criminal Procedure.

Article 351 of the Criminal Code

Arbitrary arrest and failure to release from prison

Any public official who arbitrarily performs an arrest or fails to release from prison shall be punished by terms of second-degree imprisonment and fourth-degree disqualification from public offices.

Article 352 of the Criminal Code
Arbitrary treatment against detainees

Anyone who, having the custody of an arrested person, a detainee or a person subject to other security measures, subjects such persons to unlawful strict treatment shall be punished by terms of first-degree imprisonment and third-degree disqualification from public offices.

Imprisonment shall be increased to the second degree if the fact results in any of the events referred to in Article 156 [aggravating events] and to the third-degree if the fact causes death.

Article 353 of the Criminal Code
Arbitrary house search

Any public official who, abusing his powers, enters or stays in a private house or abode or in business or working premises shall be punished by terms of first-degree imprisonment and third-degree disqualification from public offices.

Article 167
Reduction to slavery

Anyone who reduces to or holds a person in slavery shall be punished by terms of fifth-degree imprisonment and fourth-degree disqualification.

Article 169
Kidnapping

Anyone who abducts, holds or in any way deprives a person of his liberty shall be punished by terms of second-degree imprisonment.

If the kidnapper spontaneously releases or leaves the person in a safe place before attaining his purpose, first-degree punishment shall apply.

3) Explanation of the manner in which the internal law provides an adequate response to any alleged infringements of Convention rights of individuals within the jurisdiction, notably in the context of deprivation of liberty, resulting from the conduct of officials of foreign agencies. In particular, explanation of the availability of effective investigations that are prompt, independent and capable of leading to the identification and sanctioning of those responsible for any illegal acts, including those responsible for aiding or assisting in the commission of such acts, and the payment of adequate compensation to victims;

Any person whose rights have been violated can seize the criminal court to prosecute the offender. It is worth noting that the judicial authority has the obligation to institute the criminal action even in the absence of a complaint as soon as it formally receives a *notitia criminis*, except for those cases expressly envisaged by the law where a complaint by the injured party is a precondition. Art. 2 of the Code of Criminal Procedure stipulates that "the criminal action is essentially based on public law, though in some instances it requires a complaint by the injured party to be instituted." The criminal action is conducted *ex officio* by the Law Commissioner by means of an investigation to find out the truth.

The criminal process is regulated by the law and includes all acts aimed at making a jurisdictional decision on the basis of a *notitia criminis*. Basically, it consists of the investigation and public hearing, followed by either the conviction or absolution of the defendant. Criminal jurisdiction, that is the power to settle, by reasoned decision, the conflict between the state's punitive law during the trial and the defendant's right to freedom under the criminal rule, is vested in the ordinary judicial authority.

The investigations conducted by the Law Commissioner performing the criminal investigation functions consist of the diligent and scrupulous search started by the Investigating Judge upon receipt of a *notitia criminis*, in order to establish the offender (Art. 20 of the Code of Criminal Procedure). The accused shall be interrogated as soon as possible and, in any case, within 24 hours from imprisonment (Art. 125 of the Code of Criminal Procedure). The interrogation shall be conducted in the presence of an advocate of his choosing or of a public defender.

As for procedural guarantees of the right to defence, Art. 13 of Law No. 86 of 11 December 1974, stipulates that, "with regard to all acts performed by the Judge, the advocates of the parties are entitled during appraisals:

- 1) to receive formal notification of the appointment and questions and to submit observations and further questions by the date fixed for the starting of appraisals;
- 2) to appoint, contextually, an expert of their choosing who is entitled to assist to appraisals and submit oral deductions to the expert appointed *ex officio*;
- 3) to be present whenever the official expert conducts appraisals before the judge or is heard for clarifications.

The advocates of the parties have furthermore the right to be present during interviews and confrontations involving the defendant, to attend experiments, judicial accesses, search of people, things and premises. In such case, the judge shall notify the advocates the time and place fixed for these acts by any means and at least 24 hours in advance". Article 229 of the Code of Criminal Procedure, as amended by Law No. 9 of 2 February 1994, punishes by terms of nullity any procedural acts performed in violation of the above-illustrated rights. The defendant has also the right, at any stage of the proceedings in the first instance, to obtain the examination of witnesses on his behalf and of any evidence that could serve to his defence or mitigate his punishment (Article 134 of the Code of Criminal Procedure).

Having collected all evidence, if the Investigating Judge concludes that such evidence does not provide legal ground for arraignment, he shall transmit the affair to the *Procuratore del Fisco* (prosecutorial authority) for an opinion. If also the latter is of the same opinion, the Investigating Judge shall order the dismissal of the case (Article 135 of the Code of Criminal Procedure). On the contrary, the Investigating Judge shall serve a summons indicating the nature and cause of the charge and informing the defendant of the right to have legal assistance of his own choosing or, failing this, to have legal assistance assigned to him/her. The defendant shall have at least 30 days from the notification of the summons to appear in court (Article 175 of the Code of Criminal Procedure).

At the preliminary stage, the Investigating Judge may adopt precautionary measures involving deprivation of liberty. The provisions concerning preventive detention set forth in the Code of Criminal Procedure were significantly amended by Law No. 9 of 2 February 1994. Article 14 of such Law establishes that measures involving deprivation of liberty include preventive detention either in prison or treatment facility, home arrest, the obligation or prohibition to stay on the territory of the Republic or part of it, the prohibition to expatriate. Nobody can be subject to coercive measures in the absence of adequate evidence leading to believe that the defendant is responsible for the facts for

which he is being prosecuted and that such facts constitute a crime punishable by terms of any of these measures. Penalties involving deprivation of liberty are ordered by the judge only if he deems there is a risk of withholding of evidence, or defendant's escape, or that the defendant may harm the community. The penalty least affecting the accused and his family shall be applied, provided that it proves to be effective. In any case, the measure must be proportionate to the offence and the corresponding penalty or security measure that would be applicable, taking also into account the possibility for the accused to be released on probation. Such elements must be assessed by the judge in the course of the proceedings.

With regard to preventive detention, Article 15 of the above-mentioned Law provides that such measure can be ordered in the following cases:

- 1) if the crime for which an action is brought is punishable by terms of first-degree imprisonment and if there is a risk of withholding of evidence, misprision of felony, or escape from prosecution;
- 2) if the crime for which an action is brought is punishable by terms of at least second-degree imprisonment and whenever any other measure has proved to be inadequate.

The defendant has the right to legal assistance on bail when the reasons which have determined the arrest have ceased to exist. Article 17 of Law No. 9/1994 grants the person deprived of his liberty the right to appeal to the Judge of Criminal Appeal.

With reference to the above, measures of personal coercion (including notably arrest), under Art. 53 of the Code of Criminal Procedure, may be adopted in the presence of *fumus delicti*, that is adequate evidence to believe that a person is liable for the facts for which proceedings have been initiated and to establish that such facts amount to an offence for which the law provides for the adoption of the measure, as well as in the presence of *periculum in mora*, that is withholding of evidence or escape of the defendant, or in the presence of urgent needs to protect the community. All these requirements are in line with Art. 5 par. 1.c) of the European Convention on Human Rights.

Personal coercion measures may be appealed against (Art. 56 of the Code of Criminal Procedure) before the Judge of Criminal Appeal within 10 days from notification or execution, in compliance with Art. 5 par. 4 of the Convention.

As from 1 January 2002 none of the circumstances or situations referred to in the request for information of the Secretary-General have ever occurred domestically and therefore no such cases have ever been dealt with by San Marino courts.