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REPORT BY THE COMMISSIONER FOR HUMAN RIGHTS MR THOMAS HAMMARBERG ON HIS VISIT TO THE REPUBLIC OF SAN MARINO

23 - 25 January 2008

For the attention of the Committee of Ministers and the Parliamentary Assembly

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1. Introduction

1. The Commissioner for human rights of the Council of Europe, Mr. Thomas Hammarberg carried out an assessment visit to the Republic of San Marino from 23 to 25 January 2008. The visit was part of an ongoing process of regular country missions by the Commissioner to all member states of the Council of Europe to assess their effective implementation of human rights standards¹. He was accompanied by the Deputy to the Director of his Office, Mr. Alexandre Guessel and by one of his advisors, Miss Anne-Laure Duval.

2. During the course of his visit, the Commissioner had a solemn audience with their Excellencies the Captains Regent, Mr. Mirco Tomassoni and Mr. Alberto Selva. He also held meetings with the Minister for Foreign and Political Affairs, Mr. Fiorenzo Stolfi, the Minister for Internal Affairs, Mrs. Valeria Ciavatta, the Minister of Justice, Mr. Ivan Foschi and with the Minister of Labour Mr. Pier Marino Mularoni. The Commissioner also held discussions with parliamentarians, members of the judiciary as well as with members of civil society. To corroborate these official meetings, the Commissioner visited institutions and sites of human rights relevance, such as: the San Marino Cappuccini prison, the office of the headquarters of the police, of the gendarmerie and of the state border police and a facility provided for disabled people.

3. The Commissioner wishes to express his gratitude to the Ministry of Foreign Affairs for an excellent cooperation in the preparation of his visit and for its constant support throughout the visit. He extends his appreciation to all the people he met during his visit for their open and constructive attitude and for sharing their views on human rights with him.

4. The main purpose of this visit was to gain a greater understanding of the human rights situation, to identify the difficulties encountered and their root causes as well as opportunities to improve the protection of human rights. This report is mainly based on the information acquired during the course of the visit but also refers to reports prepared by monitoring mechanisms of leading international organisations. It reflects what the Commissioner deems to be priorities for the protection and promotion of human rights in San Marino. These priorities include, *inter alia*: the ratification of certain international documents, the establishment of an Ombudsman institution as well as the adoption of domestic legislation relating to discrimination.

2. The structural protection of human rights

2.1 Status of international human rights standards

5. The Republic of San Marino acceded to the Council of Europe on 16 November 1988 and ratified the European Convention on Human Rights (ECHR) on 22 March 1989. The ECHR is directly enforceable by the single national court and is used as a reference to motivate decisions at the national level. The Republic of San Marino has ratified most international human rights documents save a few exceptions. These include the Council of Europe Social Charter (revised) and the Optional Protocol to the Convention Against Torture (OPCAT). The latter has been neither signed nor ratified. The Social Charter (revised) was signed on 18 October 2001 and its ratification seems to be under serious consideration according to the authorities met during the Commissioner's visit.

6. The Republic of San Marino may encounter difficulties in reporting to the various international bodies due to its size and thus the limited number of people available to work on such matters. This being taken into account, it is of significant importance to ratify human rights instruments in order to demonstrate commitment to genuine implementation of human rights and ensure a climate of cooperation on these important matters. The Commissioner thus urges the authorities to carry out an in depth analysis of the international human rights documents that should be ratified as a matter of priority.

7. With regard to the Optional Protocol to the United Nations Convention Against Torture, despite the fact that San Marino has not received complaints alleging the use of torture, it is important to have a national mechanism in place for the prevention of torture and the inspection of detention centres. As the Commissioner underlined during his visit, the authorities merely need to define an existing mechanism, the introduction of a new institution to carry out this function is not required.

8. The Commissioner was informed by the authorities that serious consideration is given to the accession to the Group of States against Corruption of the Council of Europe (GRECO) in order to reinforce credibility and the fight against money laundering. The Commissioner strongly encourages the adherence to this partial agreement.

9. The Commissioner wishes to highlight the fact that the Republic of San Marino has signed the United Nations Convention on the Rights of People with Disabilities on 30 March 2007 as well as its protocol and ratified it on 29 January 2008. The Commissioner appreciates this speedy signature and ratification as people with disabilities constitute one of the most vulnerable strata of society.

2.2 The Judiciary

10. The judicial system of San Marino remains partially entrusted to foreign professionals. This stems from both historical and social reasons. The authorities explained that the traditional approach of selecting non-nationals (i.e. Italians) was justified by the will to ensure a complete independence of members of the judiciary.

11. The rules of procedure securing access to justice appear to be respected. Indeed, the presence of a lawyer is mandatory from the moment of arrest, there are interpreters accredited to the court in cases where it is necessary. The visit of the Cappuccini prison showed satisfactory living conditions and the inmates confirmed this observation. Social assistance is provided for the rehabilitation of prisoners. The person responsible for the Centre for Social Service for Adults Serving Sentences can also serve as a medium between the prisoners and the Ministry of Justice in cases of requests and complaints.

12. Legal professionals identified one problem in the criminal procedural rules, that of the gathering of evidence. They explained that the code dates back to the nineteenth century and has not evolved at the same pace as society and is thus somewhat outdated. One of the lacunas in the law is the lack of rules for the tapping of telephone lines. The Commissioner thus hopes that this legislative gap will be considered in the ongoing process of the reform of the Criminal Procedure Code.

13. A separate justice system for minors is lacking. This could represent a concrete problem as, according to government statistics, youth crimes have been on the increase in the past few years. The Commissioner encourages the planned adoption of a law which would raise the age of criminal liability for minors from 12 to 14 and offer separate procedures for minors above 14. He notes with approval the existing practice of using alternatives to deprivation of liberty for young offenders.

14. There have been sporadic complaints with regard to the length of proceedings in the past but this issue seems to have been resolved thanks to the increase in the number of professionals working in the judicial sector. The Minister of Justice also informed the Commissioner that reducing the length of the procedures is being an objective considered in the reform of the Criminal Procedure Code.

2.3 Complaints bodies and human rights structures

15. An important factor in the overall strengthening of human rights protection in any country is the existence of an Ombudsman or of some other type of national human rights defence structure. There is no uniform model in this area throughout Europe. Each country is at liberty to choose the modalities of such an institution. It would appear that the Captains Regent play the role of the Ombudsman in the Republic of San Marino. Indeed, any individual can voice to them a complaint about the actions (or lack thereof) of any given administrative service. After receiving the complaint, the Captains Regent then address the issue, for a possible redress, to the branch of the administration that has been the subject of the complaint.

16. Although such a mechanism represents a means for the identification of human rights concerns, entrusting the heads of State with the functions of an Ombudsman may entail a conflict of interest. As a matter of fact, the Paris Principles² regarding national human rights institutions provide that such institutions should "afford all necessary guarantees to ensure the pluralist representation of the social forces". This is why it is generally deemed that the highest state representatives, by virtue of their functions, may find it difficult to criticize administrative services which fall under their responsibility, even if their role in so doing is to a large extent perfunctory or honorary.

17. In addition, the Captains Regent remain in office merely for six months. Due to their short term in office and their other functions, the long term identification of human rights concerns, including effective means for promoting human rights and dealing with complaints emanating from individuals, appears difficult. Indeed, these tasks, by their very nature can only be carried out over a certain length of time. The term of office of an Ombudsman should be sufficient (ideally five or six years) to enable him to engage in long term activities and strategies. A certain institutional maturity and permanence ensures

a coherent cooperation and inter-action among national authorities, as well as with international bodies. The Commissioner thus deems that another form of Ombudsmanship should be considered. The San Marino authorities assured him that such consideration is under way. This is welcomed by the Commissioner as a true Ombudsman to which are vested the competence and authority of promoting and protecting human rights, should appear to act in a manner which is independent from other authorities.

3. Freedom of expression

18. The main area of concern regarding freedom of expression relates to the planned sentences to be inflicted on journalists when disclosing pre-trial information. A draft law which is due to come before Parliament contains provisions whereby a journalist can be imprisoned for disclosing information regarding pre-trial investigations. Journalists complained that this sentence may be too harsh. The Minister of Justice informed the Commissioner that the proposed provision was indeed too severe. As a result, the punishment for such behaviour would be limited to a fine. Even if this represents a progress in comparison with the previous bill, the sanction should not result in abusive recourse to unreasonably large amounts of money, which can also lead to hinder freedom of expression.

19. In any state respecting the rule of law, it is essential that secrecy in criminal proceedings is respected. This is important in order to secure the safety and privacy of an individual under investigation. The disclosure of information during the investigative period can be detrimental to a person. According to members of civil society, this observation is of particular relevance in a small state such as San Marino where news may travel rapidly. While it is the right of journalists to obtain information and to make that information public, it is also their duty to show decorum and professionalism when reporting news concerning criminal proceedings. This is in several countries protected through a professional code of ethics.

4. Non-discrimination and equal opportunities

20. Prior to the Commissioner's visit, a number of international monitoring mechanisms had shown some concern as to the trans-border workers, who were not afforded the same opportunities as workers residing in San Marino. San Marino was criticised for not allowing non resident foreigners to obtain long-term contracts on an equal footing with residents in San Marino and for discriminating against them with regard to unemployment benefits. The authorities informed the Commissioner that the situation has improved and the benefits and contracts are being harmonised regardless of the fact that an individual is a resident or a non resident foreigner.

21. There is no general domestic provision against all forms of discrimination in San Marino. There is also a loophole in the law as incitement to hatred and racism are not punished under national criminal law. The Commissioner took note of the fact that there is an Equal Opportunity Commission which can resort to the "Collegio Garante delle costituzionalità delle norme" (Board of Guarantors for the constitutionality of norms), an organ that checks the constitutionality of laws. Its specific aim is to promote and protect vulnerable groups. While the Commission represents a safeguard against discrimination, it is not sufficient. There should be a comprehensive law on anti-discrimination.

22. The Commissioner understands that such a law is in the pipeline. He was informed that a commission has been entrusted with the task of reviewing domestic law in its entirety in order to ascertain the areas for which the law does not provide protection against discrimination. The Commissioner encourages this undertaking and recommends the authorities to adopt legislation steered at the protection of all individuals against all forms of discrimination. While San Marino has traditionally been a homogenous society, statistics today show that there is an increase in mixed marriages which leads to the diversification of society thus understanding the need of legislation punishing all forms of discrimination.

5. Vulnerable groups in society

5.1 Women

23. Women under the law enjoy the same rights as men. There are no complaints of economic discrimination in pay or working conditions. However, there is no special entity in the government in charge of ensuring the rights of women. It is important for women to have a platform at high level to monitor the situation of women comprehensively, to advise on the impact on women of policies and to help formulate new policies with a the idea of mainstreaming a gender-based approach³.

24. Although violence against women is reported to be uncommon, the Commissioner noted that the two prisoners incarcerated at the time of his visit were guilty of domestic violence and sexual assault. This mere fact demonstrates that the Sanmarinese society is not sheltered from problems of violence against women. The problem has not been overlooked by the authorities. Indeed, the Commissioner appreciates that the Republic of San Marino is referred to as a model in the framework of the campaign of the Council of Europe to stop violence against women.

25. San Marino is currently running a campaign called "Basta!" to prevent and put an end to violence against women. A taskforce has been set up, bringing together members of the police force as well as social workers to assemble data. Training courses are also organised to familiarise staff with appropriate approaches to deal with women seeking help and assistance. Finally, a 24 hours hotline has been established allowing women to voice complaints if needed. The Commissioner encourages these initiatives and their further development.

26. The Republic of San Marino has however failed until now to introduce specific provisions relating to violence against women and spousal rape. Indeed, Art. 155 of the Criminal Code punishes "anyone physically or mentally injuring someone else". It is important to have special legislation defining domestic violence because it is a painful phenomenon wrapped around by uncertainty due to the lack of its visibility. It is thus essential to have clear legislation detailing all types of situations in order to engrain mentalities with the fact that it is wrong. The same line of thinking applies to spousal rape, which is not specifically highlighted in Art.171 of the Criminal Code referring to sexual freedom. The Commissioner was informed that aggravating circumstances are to be included in this provision and thus encourages their speedy adoption.

27. Women in San Marino are faced with a problem with regard to one aspect of reproductive rights. Under articles 153 and 154 of the Criminal Code, abortion is criminalised except if performed to save the life of the pregnant woman. The consequence has been that women who wanted to terminate an unwanted pregnancy for any other reason (including, for instance, if the foetus is having a severe anomaly or if the pregnancy is the result of a rape) have had to go abroad for such

treatment. The fact that such a step is regarded as criminal can put individual women into difficult circumstances, not least if there are any medical complication after a performed abortion.

5.2 Children

28. The inequalities regarding naturalisation of children that were highlighted by international monitoring mechanisms have been resolved. During the discussions held with the authorities, the Commissioner was informed that the procedural obstacles to obtaining naturalisation have since been removed from the law specifically in relation to children with only one parent who was a national of San Marino.

29. The main area of concern of the Commissioner with regard to children is the lack of a criminal domestic law prohibiting corporal punishment in all environments. The Criminal Code only refers to the "abuse of power of correction". This criminal provision is couched in terms that are too vague to encompass all the situations in which a child can be subject to physical violence. It does not specifically provide for violence in the home environment where violence may be most likely to occur. This legislation also implies that there could be situations where "reasonable" corporal punishment could take place. The Commissioner suggests that there needs to be an explicit law in order to prevent any kind of assault on a child.

30. To corroborate legislation punishing any kind of corporal punishment, complaint mechanisms that are easily accessible should be set up. The Commissioner proposes that a hotline project be established for children similar to the one existing for women with adequately trained staff to answer the phone.

5.3 People with disabilities

31. The Commissioner wishes to highlight the positive steps taken by San Marino with regard to people with disabilities. There are twelve laws that aim at the integration of children in schools and at the introduction of adults in the labour market, which have helped overcome social stigma attached to people with disabilities. In addition, as mentioned above, not only has the Republic of San Marino signed and ratified the United Nations Convention on People with Disabilities but the institution visited by the Commissioner was a true testimony to the dedication and importance attached to the care provided for people with disabilities.

32. The Commissioner visited an institute for people with disabilities: "Il colore del grano". This institute was set up for day care and residency for children and adults suffering from intellectual and physical disabilities. The environment was truly accommodated to the needs of the patients. All the technical equipment such as therapeutic bathing facilities, exercise rooms and activities were provided for. The positive physical environment was corroborated by quality technical aid and services. Educators and social workers worked hand in hand to provide the best assistance possible to these people with disabilities. The head of the institute informed the Commissioner of the positive relationship entertained with the Minister of Health. Such an institute should be replicated in other European states.

33. The Commissioner however notes a legislative lacuna for people with mental disabilities. The Republic of San Marino does not provide a legal framework for involuntary confinement. Legal provisions regulating such cases should be shaped up in order to follow a standard procedure and avoid the risk of arbitrariness.

5.4 Retired persons

34. The Minister of Labour informed the Commissioner about the sophisticated pension system that ensures that individuals are not subject to double taxation thanks to an agreement between the Republic of San Marino and Italy. The mechanism was described as an excellent cooperation, which functions automatically. The minimum pension level in 2008 was 923 euros per month paid for 13 months. The amount is indexed every year matched with the cost of living. If pensioners live alone they benefit from 1044 euros per month and they are entitled to 1250 euros per month if they suffer from an illness. The health care system is completely free.

Summary of Recommendations

1. Ratify the European Social Charter (revised) as well as the Optional Protocol to Convention Against Torture.
2. Proceed to the reform of the Criminal Procedure Code to ensure that there are adequate rules for the gathering of evidence.
3. Proceed to the planned adoption of a law that would raise the age of criminal liability for minors from 12 to 14.
4. Continue efforts undertaken for the establishment of a national Ombudsman.
5. Ensure progress towards the adoption of a general law on anti-discrimination.
6. Consider the setting up of a complaint mechanism for children who feel that their rights have been abused.
7. Establish procedural rules for involuntary confinement of persons with mental disabilities.

¹ See the Commissioner's mandate – Art. 3(e) of the Committee of Ministers Resolution (99) on the Council of Europe Commissioner for Human Rights.

² Set of principles guiding the work and structure of national institutions. These guidelines were endorsed by the UN Commission on Human Rights in 1992 and adopted by the UN General Assembly in December 1993.

³ General Recommendation n°6 (seventh session 1988) Convention on the Elimination of Discrimination Against Women.