

СТАЈНА МИСИЈА СРБИЈЕ И ЦРНЕ ГОРЕ
ПРИ САВЕТУ ЕВРОПЕ
PERMANENT MISSION OF SERBIA AND MONTENEGRO
TO THE COUNCIL OF EUROPE

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No 311/05

Strasbourg, February 21st, 2006

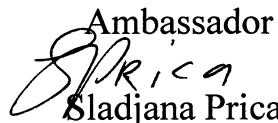
Dear Mr. Secretary General,

With reference to your letter dated 21 November 2005, concerning the effective implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms by member states, I would like to convey to you the reply of Mr. Draskovic, Minister of Foreign Affairs of Serbia and Montenegro.

We are fully aware of the importance to comply with our obligations under the European Convention on Human Rights. It is our obligation and our interest to assure that the Convention is fully and effectively implemented in Serbia and Montenegro as a whole.

We remain at your disposal for any further assistance and eventual information.

Yours sincerely,

Ambassador

Sladjana Prica

Mr. Terry DAVIS
Secretary General
Council of Europe

SERBIA AND MONTENEGRO
MINISTER OF FOREIGN AFFAIRS

Belgrade, 20 February 2006

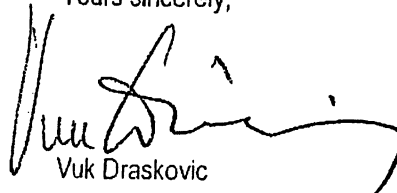
Dear Secretary-General,

In thanking you for your letter of 21 November 2005, I am enclosing herewith the information on the manner of the implementation of the European Convention on Human Rights in the internal law of Serbia and Montenegro.

I also take this opportunity to express the readiness of my country once again to ensure all legal means to implement both the European Convention on Human Rights and all other Conventions of the Council of Europe to which Serbia and Montenegro is a Party. However, I am deeply concerned over the failure to implement this Convention, as well as the European Convention for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment in the territory of Kosovo and Metohija. I recall that, on ratifying the Convention, Serbia and Montenegro made no territorial reserve and that it therefore insists on a consistent implementation of that Convention on its entire territory, including Kosovo and Metohija.

As you know, Serbia and Montenegro does not carry out sovereign authority in Kosovo and Metohija and is therefore unable to provide relevant replies with regard to the situation in this Province. In view of the fact that prison and detention institutions have been established in Kosovo and Metohija to which the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment has no access, the information as to possible violations of human rights and fundamental freedoms is unavailable. Therefore, I expect that, as in the past, you will continue to work on ensuring the implementation of these two instruments also on the territory of Kosovo and Metohija for which I personally thank you very much.

Yours sincerely,



Vuk Draskovic

Mr. Terry Davis
Secretary General
Council of Europe
Strasbourg

SERBIA AND MONTENEGRO

EXPLANATION OF THE MANNER IN WHICH INTERNAL LAW ENSURES THE EFFECTIVE IMPLEMENTATION OF THE PROVISIONS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

In its Article 132, the Criminal Code of the Republic of Serbia (*Official Journal of the Republic of Serbia*, No. 85/05), provides for the criminal offence of illegal arrest. Under this Article a person who unlawfully arrests, keeps in detention or unlawfully deprives of liberty, or restricts the freedom of movement of, another person in some other way will be punished with up to 3 years in prison. If the offence has been committed by an official person by way of misuse of his/her position or official capacity, he/she will be punished with 6 months to 5 years in prison. If an unlawful arrest lasts longer than 30 days or if it has been carried out in a cruel way or if the unlawfully arrested person has had his/her health seriously damaged or if other serious consequences have occurred the perpetrator will be punished with 1 to 8 years in prison. If, due to the offence, the unlawfully arrested person has died, the perpetrator will be punished with 2 to 12 years in prison. The Code also provides for the punishment in the event of an attempt to commit the offence.

The Compensation Procedure for the person unlawfully deprived of freedom by an official is regulated by the Code on Criminal Procedure (*Official Gazette of the FRY*, No. 70/01 and the *Official Journal of the Republic of Serbia*, Nos. 58/04 and 115/05). In Article 5, paragraph 1, subparagraph 9 of this Code, it is specified that an arrested person must be informed forthwith in his mother tongue of the reasons for his/her arrest and of his/her right to request compensation for unlawful arrest. In its paragraph 3, this Article also prescribes that an arrested person has the right to institute legal proceedings for an urgent examination of the lawfulness of his/her arrest by an investigating magistrate who will release him/her in the event of an unlawful arrest.

The provisions of the Code on Criminal Procedure on the compensation procedure for persons unlawfully arrested are contained in Chapter XXXIV, Articles 556-564.

Article 560 provides for the right to compensation of a person who was arrested, but had no criminal proceedings instituted against, had the proceedings suspended by a legally-valid decision or was acquitted by a legally-valid decision or had the charges overruled. A person who has been unlawfully arrested or kept in detention for a longer period of time through the mistake or unlawful conduct of an organ of government is entitled to the same right.

Article 557 provides for the expiration of the right to compensation 3 years from the day on which the decision acquitting a person or the decision suspending the criminal proceedings became effective. Prior to filing a compensation complaint, a person entitled to such compensation addresses the Ministry of Justice for the purpose of reaching an agreement on the existence of damage and defining the type and amount of compensation.

Article 558 specifies that, provided the compensation request of the injured party is not accepted by the Ministry of Justice or the Ministry does not bring a decision within 3 months, that party may file a complaint to the competent Court for compensation. If only a partial agreement has been reached, the injured person may file a complaint for the compensation of the remaining part of the claim. A compensation claim is made against the Republic of Serbia.

Article 561 specifies that, in the event of the reporting of a case of an unlawful arrest of a person in the media and the ensuing damage of the reputation of that person, the court will at his/her request publish

a statement in the media on a decision from which it transpires that he/she was unlawfully arrested. The unlawfully arrested person may submitted to the competent court even if a request for the compensation of damage has not been made within 6 months from the taking of the decision.

Article 564 specifies that a person who had his/her employment terminated because of an unlawful arrest will have the period out of work recognized as period of service as if he/she had been at work during the unlawful arrest.

The rights of foreign citizens, including members of foreign missions, during their stay in Serbia and Montenegro have been regulated by domestic laws and the provisions of international conventions ratified by Serbia and Montenegro.

An official of an international organization will have the legal status of the organization he/she works for. Thus the General Agreement on Privileges and Immunities of the Council of Europe (Article 9) and its Protocol provide for the enjoyment of the following privileges and immunities by the representatives at the Committee of Ministers:

- immunity from personal arrest or detention;
- immunity from seizure of personal baggage;
- immunity from legal process of every kind in respect of words spoken or written and all acts done by them in their official capacity;
- inviolability for all papers and documents;
- the right to use codes and to receive papers or correspondence by courier or in sealed bags;
- Exemption in respect of themselves and their spouses from immigration restrictions or aliens' registration in the State which they are visiting or through which they are passing in the exercise of their functions;
- The same facilities in respect of currency or exchange restrictions as are accorded to representatives of comparable rank of diplomatic missions.
- The same immunities and facilities in respect of their personal baggage as are accorded to members of comparable rank of diplomatic missions.

The said privileges and immunities are accorded for reasons clarified in the provisions of Article 11 of the General Agreement:

"...[I]n order to safeguard the independent exercise of their functions in connection with the Committee of Ministers. Consequently, a member not only has the right, but is under a duty to waive the immunity of its representative in any case where, in the opinion of the member, the immunity would impede the course of justice, and where it can be waived without prejudice to the purpose for which the immunity is accorded".

Other officials of the Council of Europe do not enjoy full diplomatic immunity but only the privileges and facilities specified in the provisions of Article 18 of the General Agreement:

- immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity and within the limit of their authority;
- exemption from taxation on the salaries and emoluments paid to them by the Council of Europe;
- immunity, together with their spouses and relatives dependent on them, from immigration restrictions and aliens' registration;
- the same privileges in respect of exchange facilities as are accorded to officials of comparable rank forming part of diplomatic missions to the government concerned;

- together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys;
- the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question, and to re-export the same free of duty to their country of domicile.

In line with the provisions of Article 2 of the Protocol to the General Agreement, the said category of officials is not exempted from arrest and prosecution when found committing, attempting to commit or just having committed an offence. In such cases, the rules of domestic criminal legislation are applied to these officials, i.e. the Criminal Code (*Official Gazette of the Republic of Montenegro*, No. 70/2003) and the Code on Criminal Procedure (*Official Gazette of the Republic of Montenegro*, No. 71/2003).

Thus Art. 1 of the Code on Criminal Procedure:

" This Code shall provide for the rules aimed at having no innocent person be convicted and at having the perpetrator of a criminal offence be pronounced a criminal sanction under the conditions set forth in the Criminal Code and on the basis of a procedure conducted in accordance with law".

Article 2 of the same Code reads:

"The perpetrator of a criminal offence may have a criminal sanction pronounced only by the competent court in a process initiated and conducted under this Code;

"Prior to a legally valid decision of the court, the accused may be limited in his/her freedom and other rights only under the conditions prescribed by this Code."

Article 3, paragraph 1, of the Code reads:

"Everyone shall be considered innocent until proven guilty by a legally valid decision of the Court".

Furthermore, Article 3, paragraph 3, of the Code says:

"The suspicion of the existence of a fact that characterizes a criminal offence or on which depends the implementation of a provision of a criminal law shall be decided by the Court in the manner more favourable for the accused".

The rights of the accused are stipulated by the provisions of Article 4 of the said Code:

" The suspect must be informed, already at the first interrogation, of the criminal offence he/she is charged with and of the grounds of the suspicion against him/her; the accused must be provided an opportunity to declare himself/herself on all the facts and evidence he/she is charged with and to present all the facts and evidence in his/her favour; the suspect, i.e. the accused, shall not be obliged either to defend himself/herself or to answer the questions posed".

The rights of an arrested person are specified by the provisions of Article 5 of the Code:

"An arrested person must be informed forthwith and in his mother tongue or in the language he/she understands of the reasons for his/her arrest and advised at the same time that he/she is not obliged to say anything and that he/she is entitled to a defence counsel of his/her own choosing and may request that his/her next of kin be advised of his/her arrest; a person arrested without a court decision must be brought to the competent investigating magistrate forthwith except in cases provided for by this Code".

The restriction of movement of the accused is resorted to as a measure of providing the presence of the accused at the criminal proceedings aimed at conducting the proceedings unimpeded. This measure is pronounced by the decision of the investigating magistrate at the proposal of the state prosecutor.

The reasons for detention of a person are stipulated by the provisions of Article 148 of the said Code. Thus a person is detained if:

- "...he/she is hiding or if his/her identity cannot be established or if there exist other circumstances indicating that a person may take to flight;
- "...there are indications that he/she will destroy, hide, alter or falsify the evidence or traces of a criminal offence or if special circumstances indicate that he/she will obstruct the proceedings by influencing witnesses, accomplices or harbourers;
- "...special circumstances indicate that he/she will commit a criminal offence again or that he/she will commit the criminal offence he/she threatens to commit;
- "...criminal offences are involved punishable with ten or over ten years in prison or with a more severe penalty if so warranted by the special circumstances of the commission of the offence;
- "... the accused, duly summoned, evidently refuses to attend the main hearing".

Also, Article 148 goes on to say in its paragraph 2:

"Detention shall be determined against the accused sentenced by a judgment of a first-instance Court to five or over five years in prison provided the accused is not already in detention, which is justified for reasons of special circumstances of the commission of the offence".

Considering that the request is focused on the implementation of the Convention in the part related to the protection of the body of personal rights and freedoms which figure at the same time as guaranteed rights, it is pointed out that those rights and freedoms enjoy the criminal legal protection by the provision in the Criminal Code of the criminal offences which, as the object of protection, have exactly the rights and freedoms prescribed in Article 2, 3, 4, 5, 6, 8 and 13 of the Convention and Article 2 of Protocol 4 to the Convention.

- The acts of foreign agencies in combating terrorism are regulated by the Law on the National Security Agency (*Official Gazette of the Republic of Montenegro*, No. 287/05). The Agency is also charged with the task of "collecting data on the activities of organizations, groups and individuals directed towards committing domestic and international terrorism, organized crime and the most serious criminal offences against mankind and international law" (Article 6, paragraph 3 of the Law);
- In addition to the above mentioned, the Criminal Code of the Republic of Montenegro (*Official Gazette of the Republic of Montenegro*, No. 70/2003) provides for the following criminal offence: unlawful arrest (Article 162)¹; violation of the freedom of movement and settlement

¹ Unlawful arrest

Article 162

- (1) He/she who unlawfully arrests, keeps in detention or unlawfully deprives or restricts the freedom of movement of another person in some other way shall be punished with up to 1 year in prison.
- (2) If the offence under paragraph 1 of this Article is committed by an official person by way of misuse of his/her position or official capacity, he/she shall be punished with 6 months to 5 years in prison.
- (3) If an unlawful arrest lasts longer than 30 days or if it has been carried out in a cruel way or if the unlawfully arrested person has had his/her health seriously damaged or if other serious consequences have occurred, the perpetrator shall be punished with 1 to 8 years in prison.
- (4) If, due to the offence under paragraphs 1 and 3 of this Article, the unlawfully arrested person has died, the perpetrator shall be punished with 2 to 12 years in prison.

(Article 163)²; abduction (Article 164)³; coercion (Article 165)⁴; extraction of statement (Article 166)⁵; mistreatment and torture (Article 167)⁷; threat to security (Article 168)⁸; infringement of the inviolability of the home (Article 169)⁹; and unlawful search (Article 170)¹⁰.

(5) An attempt to commit the offence under paragraph 2 of this Article shall be punishable.

² Violation of freedom of movement and settlement

Article 16

(1) He/she who unlawfully deprives or restricts the freedom of movement or settlement to a citizen of Montenegro in the territory of Serbia and Montenegro shall be fined or punished with up to 1 year in prison.

(2) If the offence under paragraph 2 of this Article is committed by an official person in performing his/her duty, he/she shall be punished with up to 3 years in prison.

³ Abduction

Article 164

(1) He/she who by threat, trick or in some other way takes or keeps another person in an intent to extract from him/her or from a third person money or some other material gain or to compel him/her to commit, omit to commit or suffer an act shall be punished with 2 to 10 years in prison.

(2) He/she who, for the purpose of realizing the goal of abduction, threatens to kill or inflict heavy bodily harm to an abducted person shall be punished with 2 to 12 years in prison.

(3) If an abducted person has been kept longer than ten days or if it has been treated in a cruel way or if it has had his/her health seriously damaged or if other serious consequences have occurred or if the offence under paragraph 1 of this Article has been committed against a minor, the perpetrator shall be punished with 2 to 12 years in prison.

(4) If, due to the offence under paragraphs 1, 2 and 3 of this Article, the abducted person has died or if the offence has been committed by more than 1 person in an organized way, the perpetrator shall be punished with 5 to 15 years in prison.

⁴ Coercion

Article 165

(1) He/she who by force or threat coerces another person to commit, omit to commit or suffer an act shall be punished with 6 months to 3 years in prison.

(2) He/she who commits the offence under paragraph 1 of this Article in a cruel way or by a threat to kill or commit heavy bodily harm or abduction shall be punished with 6 months to 5 years in prison.

(3) If, due to the offence under paragraphs 1 and 2 of this Article, heavy bodily harm or other serious consequences have occurred, the perpetrator shall be punished with 1 to 8 years in prison.

(4) If, due to the offence under paragraphs 1 and 2 of this Article the coerced person has died or if the offence has been committed by more than 1 person in an organized way, the perpetrator shall be punished with 2 to 12 years in prison.

⁵ Extraction of statement

Article 166

(1) An official person who in performing his/her duty uses force or threat of force or another illicit means or illicit manner in an intent to extract a statement or another utterance from the accused, a witness, a forensic expert or another person shall be punished with 3 months to 5 years in prison.

(2) If the extraction of statement has been followed by serious violence or if, due to the extraction of statement, specially serious consequences have occurred for the accused in the criminal proceeding, the perpetrator shall be punished with 2 to 10 years in prison.

- The Ministry of Justice of the Republic of Montenegro has no information that any official of the Republic of Montenegro participated in the arrest of any person under the influence of foreign agencies and that the arrest was not in accordance with the positive laws and regulations.

" Abuse and Torture

Article 167

- (1) He/she who abuses another persons or treats him/her in a manner which is offensive to human dignity shall be punished with 1 year in prison.
- (2) He/she who causes great suffering to another person aimed at obtaining from him/her or a third person information or confession or at intimidating him/her or a third person or at putting pressure on them or does that for other reasons based on any form of discrimination shall be punished with up to 3 years in prison.
- (3) If the offence under paragraphs 1 and 2 of this Article is committed by an official person in performing his/her duty, he/she will be punished for the offence under paragraph 1 with up to 3 years in prison and for the offence under paragraph 2 with 1 to 5 years in prison.

7 Threat to security

Article 168

- (1) He/she who threatens the security of a person by threat to the life or body of that person or his/her kin shall be fined or punished with up to 1 year in prison.
- (2) He/she who commits the offence under paragraph 1 of this Article against more than one person or if the offence alarms the citizens or causes other serious consequences, he/she shall be punished with 3 months to 3 years in prison.

8 Inviolability of home

Article 169

- (1) He/she who breaks into the home or closed premises of another person or does not leave the home and premises at the request of an authorized person shall be fined or punished with up to 1 year in prison.
- (2) If the offence under paragraph 1 of this Article is committed by an official person in performing his/her duty, he/she shall be punished with up to 3 years in prison.
- (3) An attempt to commit the offence under paragraph 2 of this Article shall be punishable.

" Unlawful search

Article 170

An official person who, in performing his/her duty, carries out an unlawful search of home, premises or a person shall be punished with up to 3 years in prison.