



Montenegro

Permanent Mission of Montenegro to the
United Nations Office and other International Organizations
in Geneva

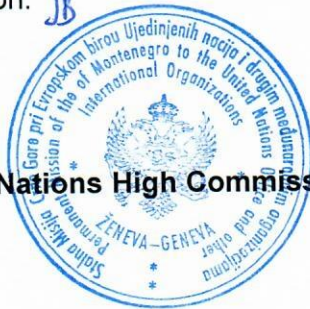
No. OHCHR/ 88-3

The Permanent Mission of Montenegro to the United Nations Office and other International Organizations in Geneva presents its compliments to the Office of the United Nations High Commissioner for Human Rights – Special Procedure Branch, and with reference to Joint communication from Special Procedures (sent by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the Right of everyone to the enjoyment of the highest standard of physical and mental health and the Special Rapporteur on the right to privacy), ref. No. AL MNE 1/2020, dated 8 May 2020, has the honor to submit the responses of the Government of Montenegro contained in the letter of the Minister of Foreign Affairs of Montenegro H.E. Prof. Dr. Srđan Darmanović.

The Permanent Mission of Montenegro to the United Nations Office and other International Organizations in Geneva avails itself of this opportunity to renew to the Office of the United Nations High Commissioner for Human Rights - Special Procedure Branch the assurances of its highest consideration. JB

Geneva, 6 August 2020

Office of the United Nations High Commissioner for Human Rights- Special Procedure
Branch
GENEVA





Montenegro
Ministry of Foreign Affairs
Minister

No. 09/05-12-5/79-20

Podgorica, 16 July 2020

Dear Mr. Kaye, Mr. Pūras and Mr. Cannataci,

I would like to thank you for your letter of 8 May 2020 in which you have expressed your interest in the matter and sought information in relation to the publication of names of the persons who were imposed a measure of self-isolation due to the risk of Covid-19 infection.

Allow me to take this opportunity to stress that Montenegro remains strongly committed to protection of for human rights and fundamental freedoms, as well as to implementation of its obligations arising from the international legal instruments to which Montenegro is a party. Furthermore, as a candidate country for EU membership, we are undertaking continuous activities to implement reforms and adopt international standards aiming to further develop our democratic society. Let me reiterate that Montenegro is committed to further improve its cooperation with UN human rights bodies and mechanisms, implement recommendations, as well as to continuously promote respect for human rights and their protection, at the national and global level.

When it comes to the global challenge of facing the Covid-19 pandemic and its consequences, I would like to highlight that Montenegro had achieved such results in the first epidemic wave that demonstrate a responsible approach of the authorities, as well as of our citizens, along with the efficiency of our health system. In addition, thanks to the joint efforts of all the actors, Montenegro was the first country in the world without coronavirus infections for forty days. Unfortunately, the pandemic has returned; today, we are facing a higher degree of the disease, so we currently have more persons infected than we did in the previous two months. In this demanding second wave, the Government has acted responsibly in treating the cases, with a view to protecting the citizens' health, as well as to mitigate the economic consequences caused by the pandemic.

Dear special rapporteurs,

I wish to inform you that we have carefully examined your statements and comments, and that your address has given us the opportunity to reaffirm our readiness for cooperation and the commitment of Montenegro to remain a credible partner. Therefore, the Ministry of Foreign Affairs has consulted the competent institutions with the aim of obtaining detailed information, which form an integral part of this letter.

With regard to the statements from your letter of 8 May 2020, the following relevant information are provided below:

- information with regard to questions 1, 2 and 3.

The provision of Article 40 of the Constitution of Montenegro proclaims, in a general manner, one of the most important rights in all modern democratic societies – the right to respect for private and family life. This right is then further elaborated and specified through provisions of Articles 41-43 of the Constitution, which, in this exact order, provide for the right to inviolability of home, confidentiality of correspondence, as well as for personal data protection.

When it comes to the legal basis for adoption of the decision to publish the names of persons who were imposed the measure of self-isolation in Montenegro, it is necessary to point to provisions of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention), which is, pursuant to Article 9 of the Constitution of Montenegro, given that it has a status of a ratified and published international agreement, an integral part of the internal legal order, having supremacy over the national legislation and applying directly when it regulates relations differently than the national legislation. The provisions of the aforementioned Article 8 of the Convention provide for protection of the right to respect for private and family life, home and correspondence, while Article 8, paragraph 2 of the Convention provides for certain exceptions, i.e., the possibility for this right to be restricted under certain conditions and in the interests of national security, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

In order to assess whether the aforementioned interference by the state with the rights guaranteed by the provisions of Article 8 of the Convention, first and foremost with the right to protection of data on personal name and address, was in agreement with provisions of Article 8, paragraph 2 of the Convention, we would like to recollect that the European Court of Human Rights in Strasbourg has established a standard of application of the so-called *three-part test* through its jurisprudence, based on which it is established whether the interference:

- *was provided for by law;*
- *pursued a legitimate aim;*
- *was necessary in a democratic society, i.e., whether the interference in the specific case was proportionate to the legitimate aim pursued.*

Given the fact that the first two elements in the above three-part test are undoubtedly satisfied (the interference was provided for by law – in the specific case in accordance with relevant provisions of the Law on Protection of Population from Infectious Diseases and Article 10, paragraph 2 of the Law on Personal Data Protection, as well as with the legitimate aim of protection of health, prescribed by Article 8, paragraph 2 of the Convention), in this specific case it is relevant to assess whether the interference was necessary in a democratic society, i.e., if the interference in the form of publication of the list of persons in self-isolation was *proportionate to the legitimate aim pursued.*

In deciding whether Article 8 of the Convention was violated in a certain case, the European Court of Human Rights allows the states to exercise what is known as *discretionary right*, and the same applies to Articles 9, 10, and 11 of the Convention. The notion was first introduced in consideration of the case of *Handyside v. the United Kingdom* (1976) and grants the states a certain margin of appreciation in deciding whether a restriction was necessary given the circumstances existing in the state, the issue at stake and its historical development.

In the context of the pandemic declared by the World Health Organization (hereinafter: WHO), and in accordance with all the recommendations of the WHO and the assessment of the situation in our country, Montenegro adopted a number of measures to combat the epidemic in its territory. In a general lack of adequate and accurate data and information on the new virus, Montenegro was guided by its characteristics that were proven without any doubt: an unprecedented ease of transmission, which implies an extremely high potential for rapid spread of the disease among the population, and the severe consequences to the respiratory system of those infected, which can eventually lead to *death of such persons.*

Therefore, in a situation where the spread of the epidemic potentially jeopardized the crucial right of every citizen – the right to life – the National Coordination Body for Infectious Diseases of Montenegro (hereinafter: NCB) made a decision to publish the names of persons who were issued a decision on mandatory self-isolation, doing so only after it was established that some persons who were imposed such a measure upon their arrival to Montenegro from abroad left their homes, exposing all of their contacts and the entire state of Montenegro to a high level of risk. We wish to remind you that this decision was only made after several warnings by the NCB and the Government of Montenegro about the severity of the situation and the necessity to observe all the measures, especially those on self-isolation, which have, regardless of that, continued to be violated by a certain number of citizens.

Along with a number of other measures adopted across the country, and several public warnings sent by the Government of Montenegro, the imposition of the measure of self-isolation is a *less restrictive reaction by the state*, which, unfortunately, failed to provide adequate results as the citizens continued to violate the imposed measure of self-isolation, jeopardizing their own and the fundamental right of every individual – the right to life, while causing irreparable damage to the overall fight against this infectious disease, which managed to disrupt public health and health systems of even the most developed countries in Europe and the world.

We therefore believe that this decision was **proportionate and effective**, and that it contributed to awareness-raising among all the citizens, especially those in self-isolation, of the importance of respect for the measures imposed on them. Additionally, the personal names and addresses of the citizens in self-isolation were published with due care not to publish more data than was necessary. This position is confirmed by the view of the Agency for Personal Data Protection and Free Access to Information, expressed in its Act No. 01-11-2261-2/20 of 21 March 2020, which preceded the adoption of the decision in question, in which the Agency conveyed its opinion that publication of personal names and addresses of persons placed in self-isolation on the basis of a decision by the Sanitary Inspectorate *is not contrary to the Law on Personal Data Protection*.

Finally, to support the statement that such interference by the state was *proportionate to the legitimate aim*, we provide the segments of the Joint Statement on the right to data protection in the context of the COVID-19 pandemic by Alessandra Pierucci, Chair of the Committee of Convention 108 and Jean-Philippe Walter, Data Protection Commissioner of the Council of Europe, who have indicated that in the effort of curbing the number of new contaminations, governments have had to resort to extraordinary measures. Furthermore, they stress that *data protection can in no manner be an obstacle to saving lives and that the applicable principles always allow for a balancing of the interests at stake*. Finally, what is particularly important and relevant for this specific case, the above statement also says: *The use of aggregate location information to signal gatherings infringing confinement requirements or to indicate movements of persons traveling away from a severely touched area would thus not be prevented by data protection requirements*.

We wish to indicate that the above clarifications and views correspond to the obligations assumed by the state of Montenegro through ratification of the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Through the analysis of satisfying the requirements of the so-called *three-part test* established through the jurisprudence and standards of the European Court of Human Rights in Strasbourg we have adequately responded to the requirements provided by Article 17 of the International Covenant on Civil and Political Rights on protection of the right to privacy, as the conditions required for restrictions to this right (legitimate aim, legality, necessity and

proportionality) fully coincide with the conditions prescribed by provisions of Article 8, paragraph 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Thus, in the conditions of declared pandemic, amidst an extreme danger that threatened every citizen of Montenegro individually and society as a whole, i.e., the vital interests of the state of Montenegro, given the fact that every citizen and the health system of our country was and still is facing a virus that can eventually lead to death, we believe that the decision to publish the list of persons who were imposed the measure of self-isolation was absolutely *necessary in a democratic society, i.e., proportionate to the legitimate aim of protection of health* in the context of provisions of Article 8, paragraph 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

- Information with regard to questions 4 and 6.

When it comes to the measures undertaken to prevent the stigmatization of those infected with Covid-19, we wish to indicate that a lot of attention was paid in publishing the identity of persons in self-isolation to publish only the names and addresses of such persons without any further personal data, which, on the one hand, satisfied the requirement of *proportionality* of the measure, and on the other hand reduced the number of people who could potentially link the identity of a person to the published data to a minimum (relatives, acquaintances, neighbors). Furthermore, the National Coordination Body for Infectious Diseases and the Government of Montenegro have continuously publicly stressed (via press-releases, press conferences) that the measure of publication of the list of persons in self-isolation was preventive in nature and aimed at protection of health and entire society from the infectious disease whose characteristics and scope still remain widely unknown to the world. In this manner, due to severity of the situation and the extent of threat to the public health, concrete action was taken to eliminate or significantly reduce the need of any citizen or social group for activities or actions that could result in stigmatization of persons in self-isolation whose names were published.

In addition, the public was continuously informed that the data were published for preventive reasons and with a clear aim, with continuous appeals not to abuse or spread such data (first and last names and addresses) for any reason or in any context that could imply the stigmatization of those persons.

- Information with regard to question 5.

When it comes to the measures undertaken to inform the persons in self-isolation about the decision to publish their names, we indicate that the aforementioned decision was preceded by several warnings by the NCB and the Government of Montenegro about the severity of the

situation and the necessity to observe all the measures, especially those on self-isolation, which have, regardless of that, continued to be violated by a certain number of citizens. Each of these warnings was followed by statements that NCB and the Government would, if the measures and recommendations are not observed, be forced to introduce more restrictive measures. The measure of publishing the names and addresses of persons in self-isolation can, after all, be regarded as such a measure.

- Information with regard to question 7.

Finally, when it comes to the measures undertaken to ensure that effective damages are available to those whose right to privacy was violated, including the termination of current violations, we indicate that this question contains suggestive statements and that the very formulation of the question relies on the presumption that findings have already been made on something that should be examined before a court or other competent state authority.

Given the provisions and the context of Article 8, paragraph 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 17 of the International Covenant on Civil and Political Rights, which prescribe the cases and conditions in which the interference with the private life of persons could be considered *justified*, we find this interference by the state of Montenegro to be *fully in line with the law; with the legitimate aim of protection of public health; and necessary in a democratic society; i.e., that in this specific case it was proportionate to the legitimate aim pursued*. Any citizen who disagrees with the above view have at their disposal the possibility to initiate a civil case. It is only then that the national courts, as the only relevant and competent state authorities, would establish whether the interference with the right to privacy was justified (in the context of Article 8, paragraph 2 of the Convention), which would have a decisive effect on the right to damages of such persons.

Dear special rapporteurs,

Given the above, allow me to reiterate once again that Montenegro remains committed to active cooperation with you on all matters within your mandates, as well as on any other issues of relevance for the respect for human rights.

I hope that the aforementioned information responds to the queries from your letter, but let me use this opportunity to stress that the Government of Montenegro and the Ministry of Foreign Affairs remain open for any further interest you may have in this case or any other matter from the scope of your mandates.

Additionally, I wish to reiterate once again the importance paid by the Government of Montenegro to cooperation with the system of Special Procedures, taking into account their

recommendations as guidelines for building a society based on the principles of respect for and promotion of human rights and freedoms for everyone.

Please accept the assurances of my highest consideration.

Prof. Dr. Srdan Darmanović



David Kaye

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,

Dainius Pūras

Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,

Joseph Cannataci

Special Rapporteur on the right to privacy

Geneva