

**Mandates of 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 attainable standard of physical and mental health and the Special Rapporteur on the right to privacy**

REFERENCE:  
AL MNE 1/2020

8 May 2020

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and Special Rapporteur on the right to privacy, pursuant to Human Rights Council resolutions 34/18, 42/16 and 37/2.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **publication of names of persons who have been ordered to self-isolate due to the risk of COVID-19 infection**.

We confirm receipt of a letter by your Excellency's Government, dated 6 April 2020, addressed to the Special Rapporteur on the right to privacy and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, providing information on, and legal justification for, the measures implemented.

According to the information received:

Since late February 2020, the authorities of Montenegro have taken various measures to contain the spread of the COVID-19 virus in the country. Most, if not all these measures are based on the 2018 Law on the Protection of the Population against Communicable Diseases. On 21 March, the Government decided to publish the identity and address of individuals who had been required to self-isolate. Prior approval for the publication of names was given by the Agency for Personal Data Protection and the Free Access to Information of Montenegro. The relevant provision relied on in the Personal Data Protection Law provides that processing of personal data can be done without the consent of the data subject if necessary, inter alia, "for the protection of the life and health of an individual who is not in the position to give his consent personally" (Article 10, para. 2, no. 2).

According to the authorities, the decision was taken because individuals had violated orders of self-isolation, despite repeated appeals to the public that they comply with the orders. In public statements, the authorities affirmed that the publication of the names was done to enable citizens to protect themselves from the spread of the virus. Specifically, it had stated that names were published to let every citizen know which one of his neighbors and co-citizens may threaten their

safety by indiscipline. The corresponding legal justification adopted by the Government is that the right to privacy, enshrined in international treaties and in article 40 of the Constitution of Montenegro, is not absolute. The Government has thus relied on the protection of the rights to life and health of individuals as a basis for publishing the names. In its assessment of the proportionality of the measure, the Government has referred to the seriousness of the threat of the COVID-19 pandemic, combined with the lack of less restrictive means available to it to prevent violations of the orders of self-isolation.

The identity of those required to self-isolate is published on the public website of the Government. Since late April, however, the access to the government website has reportedly been restricted. A separate website of unknown origins was created shortly after the Government started publishing the names online. This website, which publishes information based on the Government's information, remains active. It allows people to type in their address to find out how far they live from someone in self-isolation.

Prior to the decision by the authorities to publish the names, the identities of individuals allegedly infected with COVID-19 had been revealed on social media. These individuals suffered threats, abuse and harassment online.

Without prejudice to the facts of the case, and while recognising the legal justification provided to us in the letter of 6 April, we express concern at the decision by your Excellency's Government to publish the names of individuals ordered to self-isolate, which appears to constitute a violation of the right to privacy and the right to health. In this regard, we remind your Excellency's Government of its obligations under article 17 of the International Covenant on Civil and Political Rights (ICCPR) and under article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), both succeeded to by Montenegro 23 October 2006.

The right to privacy in article 17 of the ICCPR protects everyone from arbitrary or unlawful interferences with their privacy. It affords particularly strong protection in relation to health data. In order to be permissible, restrictions to the right of privacy must pursue a legitimate aim, be done in accordance with the law, and be necessary and proportionate. We respectfully draw to your attention that international guidance on best practices for privacy respectful management of health-related data, including in relation to public health requirements, was released in October 2019 ([A/74/277](#)).

In this regard, we express concern as to the stated legal basis for publishing the names. While we do not pretend or aim to comprehensively interpret the relevant domestic legal provisions cited by your Excellency's Government, we note that the wording of article 10 (2) no. 2 of the Personal Data Protection Law does not seem to provide adequate justification to depart from the requirement under article 10 (1) of the same provision, namely that consent must be obtained from the individuals concerned.

Moreover, we express concern that the State does not seem to have adequately justified that the measure is suitable to achieve its stated purpose and that less restrictive means were not available. While recognising that the COVID-19 pandemic presents unprecedented challenges for many societies, it remains paramount that States comply with their burden of proof to demonstrate that less restrictive means were unavailable to the State. We note that while the State has provided information that more restrictive measures were available to it, namely the restriction of movements for all citizens, it has not justified why less restrictive means would not be suitable to achieve the stated purpose of protecting the life and health of the population.

The right to health protected by article 12 of the ICESCR is inclusive and dependent on other rights, including the rights to privacy and access to information. While it includes the right to seek, receive and impart information concerning health issues, it cannot impair the right to have personal health data treated with confidentiality (Committee on Economic, Social and Cultural Rights, General Comment 14, E/C.12/2000/4, para 12.b). All health facilities, goods and services must be designed to, *inter alia*, respect confidentiality (para 12.c).

We are further concerned that not only the right to privacy and confidentiality of personal health data may have been violated, but also the informed consent of concerned individuals. Informed consent is integral to the right to health and protects the right of the patient to be involved in health care decision-making. It also assigns associated duties and obligations to health-care providers and the State. Public health measures should always strive for voluntary participation to be fully effective and minimize compromising the rights to privacy and self-determination of the person. Any potential limitations of informed consent must be substantiated by scientific evidence and implemented with participation, transparency and accountability on the principles of gradualism and proportionality (A/64/272, para 31). These elements do not seem to have been applied in this case.

Lastly, we express concern at the apparent stigmatisation of persons ordered to self-isolate. We note, in particular, that the justification for the implementation of the measure could be interpreted as referring to people required to self-isolate as threats to safety. In this regard, we reiterate the positive duty of the State to ensure the rights of everyone within their jurisdiction without distinction of any kind, and the specific obligations to prohibit and counter threats against individuals, as well as incitement to discrimination, violence and hostility.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide an assessment of the legal basis under domestic law for publishing the names and areas of residence of persons required to self-isolate due to a risk of COVID-19 infection.
3. Please provide information on the assessment made as to the necessity and proportionality of the measure. In particular, please provide information on the extent to which the measure is suitable to prevent the spread of the virus, what lesser restrictive measures have been considered and why these were not suitable to achieve the same purpose.
4. Please provide information on the measures taken to prevent the stigmatisation of those infected with COVID-19 virus (including for example anti-stigma sensitization or campaigns), and the measures taken to prevent threat against those individuals whose identities have been published by your Excellency's Government and by others.
5. Please explain the measures taken to include the views and opinions of those infected with COVID-19 in the decision finally taken to reveal their identities and the manner in which such decision was informed to them prior to its implementation.
5. Please advise whether the practice of publishing names by your Excellency's Government ceased on 28 April 2020. Please provide information on what measures are taken to prevent the dissemination by private actors of personal data of individuals ordered to self-isolate.
6. Please provide information on the measures taken to ensure that effective remedies are ensured to those whose rights to privacy have been violated, including the cessation of any ongoing violation.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye

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

Dainius Puras

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

Joseph Cannataci

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## **Annex**

### **Reference to international human rights law**

With reference to the abovementioned allegations, we refer to the obligations of your Excellency's Government under the International Covenant on Civil and Political Rights (ICCPR), succeeded to by Montenegro on 23 October 2006 and the European Convention on Human Rights (ECHR), ratified by Montenegro on 3 March 2004.

Article 2 (1) of the ICCPR provides for the general duty of the State to respect and ensure the rights under the Covenant without distinction of any kind. This entails a negative obligation on the part of the State to refrain from interfering with the rights enshrined in the Covenant outside the permissible limitations explicitly allowed for. It also entails a positive obligation to exercise due diligence to prevent and to protect persons from abuse committed by private actors (General Comment No. 31 on "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" CCPR/C/21/Rev.1/Add. 13, paras. 6 – 8).

Article 17 of the ICCPR states that "1. No one shall be subjected to arbitrary or unlawful interference with his privacy" and that "2. Everyone has the right to the protection of the law against such interference or attacks."

In its practice, the Human Rights Committee has highlighted that the scope of the right to privacy is broad. It encompasses "the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone" (*Coeriel et al v. the Netherlands*, no. 453/1991, para 10.2). In a leading case on the obligations arising from article 8, the European Court of Human Rights (ECtHR) held that "[t]he mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8 [...] The subsequent use of the stored information has no bearing on that finding [...] However, in determining whether the personal information retained by the authorities involves any ... private-life [aspect] ..., the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained". (*S. and Marper v the United Kingdom* [GC], para 67). Moreover, both the Human Rights Committee and the ECtHR have, for example, indicated that in certain circumstances, the disclosure of a person's health status might constitute a violation of the right to privacy (See e.g. Human Rights Committee, Concluding Observations on Malawi CCPR/MWI/CO/1/Add.1 and ECtHR, *Z. v. Finland* (no. 22009/93).

The prohibition on "arbitrary or unlawful" interference under the ICCPR entails a requirement, first, that the interference must be provided by law. The requirement of legality entails that a norm, to be "provided by law", must be "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction [of the right to privacy] on those charged with its execution" (Human Rights

Committee, General comment No. 34: Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, para. 25).

Moreover, the Human Rights Committee has highlighted that reasonable in the particular circumstances (Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation adopted on 8 April 1988, para. 4). In its case law, the Committee legitimate objective, such as for the protection of public health a requirement of necessity and proportionality (D.T. et al v. Canada, No 2081/2011, para. 7.7). This entails that “[w]hen a State party invokes a legitimate ground for restriction ..., it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the [right] and the threat” (General comment No. 34: Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, para 35).

The requirement of proportionality entails that “[r]estrictions must not be overbroad. ... restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected... The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law” (General comment No. 34: Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, para. 34)

The State has the burden of proof to demonstrate that any restriction with the right to privacy adopted is compatible with the conditions for permissible limitations under the Covenant.

We would like to further refer to Your Excellency’s obligations under article 12 (right to health) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which Montenegro succeeded to on 23 October 2006. The Committee on Economic, Social and Cultural Rights in its General Comment No. 14 (E/C.12/2000/4) establishes that the right to health is an inclusive right (para. 11) closely linked to and dependent on other rights, including the rights to privacy and access to information (para 3). The right to health encompasses the right to request, receive and disseminate information and ideas about health-related issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality (para 12.b.iv). The Committee also establishes acceptability as an essential component of the right to health and indicates that health services must be respectful of medical ethics and must be designed to respect confidentiality and improve the health status of those concerned (para 12.c).