Mandate of the Special Rapporteur on the right to privacy

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(Please use this reference in your reply)

16 September 2025

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the right to privacy, pursuant to Human Rights Council resolution 55/3.

In this connection, I would like to bring to the attention of your Excellency's Government my concern regarding the Draft Law on the *Agencija za nacionalnu bezbjednost* (ANB) (henceforth: the Draft Law), which your Excellency's Government adopted on 23 June 2025, and has been discussed in Parliament, but as I understand, has now been withdrawn from the Parliamentary procedure until further notice. I am particularly concerned by Articles 13, 15 and 18 of the Draft Law, which appear to give the ANB a broad range of powers relating to the collection and monitoring of information from legal and state entities, and individuals, as such without adequate judicial oversight, which may contravene Montenegro's obligations under international human rights law.

I recall that in previous communications, Special Procedures mandate holders have expressed concern regarding privacy related matters in Montenegro, including the public disclosure of personal information.[1] I thank your Excellency's Government for its continued engagement with Special Procedures mandate holders.

I take note of the 29 July amendments to the Draft Law proposed by the Government which contain some judicial safeguards and oversight, either by the courts or independent supervisory bodies. Despite these amendments, I assess that several gaps still exist, and further revisions are required to protect the right to privacy.

General Framework of International Law

I underline that the right to privacy protects individuals against arbitrary or unlawful interference with their privacy, family and correspondence, as enshrined in article 12 of the Universal Declaration of Human Rights (UDHR) and article 17 of the International Covenant on Civil and Political Rights (ICCPR), which Montenegro ratified in 2006. Article 17 of the Covenant enshrines the right to privacy, protecting individuals from arbitrary or unlawful interference with their personal life, family, home, and correspondence, as well as from attacks on their honour and reputation. "Unlawful" means that no interference may take place except in cases envisaged by the law which must comply with provisions, aims and objectives of the ICCPR.

Any limitation to the right to privacy enshrined in article 17 of the ICCPR must be provided for by law, be accessible to the public, and be clear and precise so that an individual can consult the law and determine who is authorised to carry out data collection and in what circumstances. Moreover, any limitations to this right must be

[1] See MNE 1/2020.

necessary to achieve a legitimate aim, as well as proportionate to the aim and the least intrusive option available.[2]

National Security Agencies

I recognise that intelligence and national security services play a vital role in protecting the national security of states. The effectiveness of these services and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing. To ensure both, it is crucial to adopt a robust legislative framework that includes effective oversight, accountability and safeguards to protect privacy, as well as clear regulations on the use of investigative techniques.

In general, all actions taken by intelligence services that infringe on human rights and fundamental freedoms must:

i) be provided for in laws that are accessible to the public and that are in conformity with international human rights standards;

ii) be strictly necessary for the fulfilment of the legitimate security aim and legal mandate of the intelligence services;

iii) be proportionate to that legitimate objective, and thus ensure that intelligence services select measures that are least restrictive of human rights and minimise the adverse effects of these measures on the rights of individuals, including individuals who are not suspected of any wrongdoing;

iv) not violate international law, including international human rights law, international humanitarian law and international refugee law;

v) be subject to a well-defined and comprehensive system for authorising, monitoring and overseeing the implementation of any measure that curtails human rights;

vi) ensure that persons whose rights may have been violated by the intelligence services can lodge complaints with an independent institution and seek effective remedies.[3]

In relation to oversight and accountability mechanisms for intelligence activities, different forms of oversight have advantages and disadvantages. It is advisable to combine several mechanisms, including avenues completely independent of the intelligence services and the executive branch, to ensure the separation of powers[4] and the effectiveness of remedies for human rights violations.

I consider that it is absolutely necessary, in the context of intelligence gathering, to ensure that three levels of human rights protection are established through: (i) a court order authorising intelligence gathering, (ii) an independent oversight mechanism,

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2 A/HRC/27/37, para. 23
3 A/HRC/14/46.
4 Ibid, para. 13

(iii) a *post facto* notification to the persons concerned once the surveillance has been concluded, provided that it no longer poses a risk to the ongoing investigation.[5] This level of judicial safeguards is absent from the Draft Law as it currently stands.

I also emphasize the obligation to provide an effective remedy to individuals for human rights violations in accordance with international law. Any person who believes that his or her rights, including the right to privacy, have been violated through unlawful or arbitrary surveillance should be able to seek an effective remedy before a court or other independent, effective oversight institution, in a position to provide an effective remedy, such as an ombudsman, human rights commissioner or national human rights institution.[6]

The Draft Law

I commend your Excellency's Government for underlining, in Draft Law Article 1, the importance of respecting human rights in the performance of national security tasks. I also compliment the drafters who underline that the undertakings of the ANB must be within the bounds of legality (Article 6), and that the ANB shall exercise its mandate according to the principles of proportionality (Article 10). However, I remain concerned by the draft law as some provisions may violate the right to privacy.

Public Consultation

I am concerned that the Government has not yet engaged in a public consultation process in preparing the Draft Law which would include civil society organisations at the various stages of the legislative process including the committee stage. Public participation, grounded in a legal basis, at every step of the legislative process, is a fundamental tenant of democratic governance.[7] Article 25(a) of the ICCPR provides that every citizen shall have the right to "take part in the conduct of public affairs, directly or through freely chosen representatives". I also underline the Council of Europe's Guidelines for Civil Participation in Political Decision Making, which provide that civil participation includes creating spaces which allow for "a substantive exchange of information and opinions which informs the decision-making process so that public needs are met," which includes the participation of "individuals, directly or via NGOs and/or representatives of civil society".[8]

Article 13

I am particularly concerned with the powers given to the ANB in Article 13 of the Draft Law. Under this provision, the ANB could access data from the written and electronic records of state bodies, state administration bodies, local self-governments, legal entities, and other entities who maintain such records, *without a court order*. The

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5 Amicus Brief, European Court of Human Rights, Mikolaj Pietrzak v. Poland and Dominika Bychawska-Siniarska et al. v. Poland, Application Nos. 72038/17 and 25237/18; **Oral submission** by the UN Special Rapporteur on the protection and promotion of human rights while countering terrorism, 202.

6 A/HRC/34/61, para. 35, and practice 6, in A/HRC/14/46; See also https://www.ohchr.org/sites/default/files/documents/issues/terrorism/sr/statements/2024-2-26-gctf-oversight-accountability-sr-ct-remarks.pdf.

7 A/HRC/30/26, at paras. 10 & 40.

8 Council of Europe's Guidelines for Civil Participation in Political Decision Making, at para. 5 (Participation Guidelines).

Draft Law explicitly authorizes the ANB to request such information without adequate judicial oversight. Bodies are obliged to comply with such requests. This creates a high risk of a breach of privacy rights protected by both international human rights law, and European human rights law.

The current Law on National Security Agency (henceforth: 2014 ANB Law), allows for the ANB to gain access to databases held by legal entities, including banks and NGOs, without judicial authorization. In its assessment of the ANB's powers under Article 8 of the ANB Law 2014, the UN Human Rights Committee observed in March 2025, concern about "the inadequacy of existing privacy safeguards in the Law on the National Security Agency, noting that Article 8 of this law allows access to databased held by legal persons, including banks and non-governmental organizations, without court authorization."[9] The Committee recommended that "The State party should (…) expedite the adoption the draft amending the Law on the National Security Agency, ensuring it contains legal and procedural safeguards to prevent the misuse of surveillance powers in full compliance with the Covenant and international standards." Article 13 of the Draft Law mirrors the lack of court authorization from Article 8, which does not respect the Committee's recommendation.

Further, Article 8(2) of the European Convention on Human Rights (ECHR) guarantees that "there shall be no interference by a public authority with the exercise of [Article 8(1)] in the interest of national security". The European Court on Human Rights (ECtHR) has also ruled that "domestic procedural safeguards" must be in place,[10] and that any decision to intrude on the rights outlined in Article 8 requires oversight by an independent and impartial body.[11]

Additionally, Article 13 of the Draft Law appears to remove some protections which are present in the ANB 2014 Law. For example, while the 2014 ANB Law requires that records of data access include the official identification numbers of agents who were authorized to access the data, the Draft Law offers no such safeguard. Thus, rather than strengthening pre-existing privacy protections, the Draft Law bypasses such mechanisms and creates the possibility that any unidentified ANB agent could have access to private personal data from citizens, including *inter alia* banking data and medical records. Further, I am concerned that the Draft Law appears to lack clear procedural standards. For example, individuals and entities which are targeted by the ANB have limited legal channels to contest what they believe is an unauthorized request to access to data by the ANB. There also appears to be no proper mechanism to contest a possible intrusion before it takes place.

Further, the Draft Law neglects to put forward a required standard of proof such as a "reasonable suspicion," before an ANB agent makes the decision to request access to an individual or an entity's data. The ECtHR has ruled that in assessing a state's respect for Article 8, the Court "must be capable of verifying the existence of a reasonable suspicion against the person concerned" to justify a privacy breach.[12] The Court also ruled that an intrusion must meet the requirements of "necessity in a

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9 CCPR/C/MNE/CO/2, at para. 41.
10 S. AND MARPER v. THE UNITED KINGDOM, (Applications Nos. 30562/04 and 30566/04) at para. 103.
11 CASE OF GRANDE ORIENTE D'ITALIA v. ITALY, (Application No. 29550/17) at para. 47.
12 CASE OF ROMAN ZAKHAROV v. RUSSIA, (application No. 47143/06), at para. 260.

democratic society," requiring a proportionality assessment for the data collection.[13] While the general principle of proportionality is mentioned, but not outlined, in Article 10 of the Draft Law, this proportionality assessment is completely absent from the language of Article 13.

Finally, information suggests that despite the amendments, Article 13 of the Draft Law would extend ANB officer powers which appear broader than powers of other state authorities, such as police and prosecutors. The ECtHR has warned that executive intrusion power carries a high risk of arbitrariness, and by consequence should be restrained by judicial safeguards.[14] Arbitrariness "is not confined to procedural arbitrariness but extends to the reasonableness of the interference with the person's rights under Article 17 and its compatibility with the purposes, aims and objectives of the Covenant".[15]

Articles 15 and 18

I welcome the inclusion of the requirement of a court order for the covert collection of data pertaining to traffic and unsuccessful communication data, and international telecommunications connections. I also take note of the recent amendments requiring a court order pertaining to the review of information-communication systems of state bodies, local self-government bodies and local government bodies and legal entities exercising public authority in Article 15. However, I remain concerned about the lack of independent judicial oversight for the collection of location data in electronic communications related to specific users, in Article 15 of the Draft Law.

Where an individual or a legal entity is the subject of legitimate suspicion by intelligence agencies, surveillance measures can be applied, including interception and monitoring of communications. However, such measures must be limited to specific cases, be authorised by a national law which is clear and accessible to the public, and that meets the requirements of the ICCPR and be based on a court order that ensures the legality of the interference.[16] In addition, it is essential that there are strong and verifiable grounds to justify suspicion of a specific threat, such as the planning of an attack.[17]

Further, I am concerned that the Draft Law reduces existing legal safeguards related to surveillance, monitoring, and electronic searches performed in public spaces. While Article 11 of the 2014 ANB Law requires the authorization through a court order for these activities, it appears that under Article 18 of the Draft Law, these activities can be undertaken based on an order issued by the Director of National Security. This, again, raises the possibility of arbitrariness by the executive, without the necessary pre-surveillance judicial oversight as is required by international law.

Information provided suggests that, in citing the ECtHR and specifically Article 8 of the ECHR, the Montenegrin Constitutional Court ruled in 2014 that an

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13 Ibid.
14 CASE OF KLASS AND OTHERS v. GERMANY (application No. 5029/71), at paras. 42-49.
15 CCPR/C/59/D/558/1993, at para. 11.4.
16 A/HRC/13/37, para. 13.
17 A/HRC/10/3, para. 27.

initiative undertaken by the police which involved the collection of data pertaining to telecommunications (addresses, times, call durations) were in contravention of the right to privacy. While the data collected in that case pertained to phone listings from telecommunications companies, the Constitutional Court noted that location data fell within the ambit of its decision and required judicial supervision. Thus, it appears the Draft Law, despite the recent amendments, still falls short of the requirements for judicial authorization necessary to properly safeguard the right to privacy. Judicial authorization should be included for all data collection activities.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I 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 observations.

2. Please detail if and how the Government plans to engage in a publicly accessible consultation exercise when moving forward with an updated version of the Draft Bill.

3. Please indicate how Articles 13, 15 and 18 of the Draft Bill comply with the Human Rights Committee's recommendation to guarantee proper judicial authorization before commencing intelligence data collection.

4. Please clarify how Articles 13, 15 and 18 abide by the internationally recognized requirement to adhere to procedural standards to prevent the misuse of surveillance powers, notably as it pertains to the ability to contest an intrusion before it takes place, and the apparent lack of standard of proof required for ANB agents to obtain information.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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

Ana Brian Nougrères
Special Rapporteur on the right to privacy