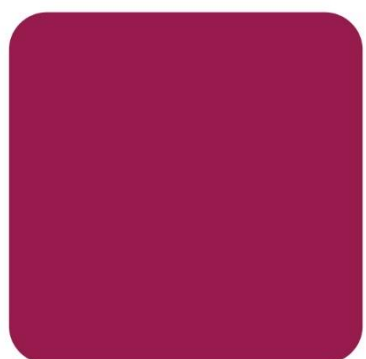
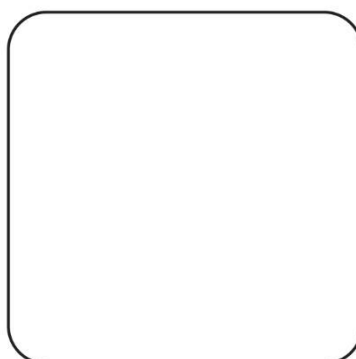
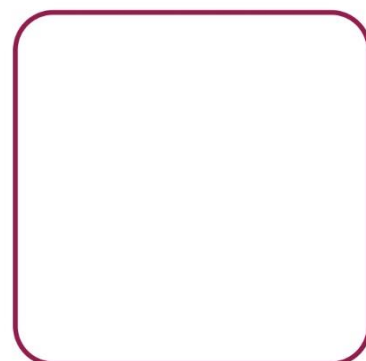
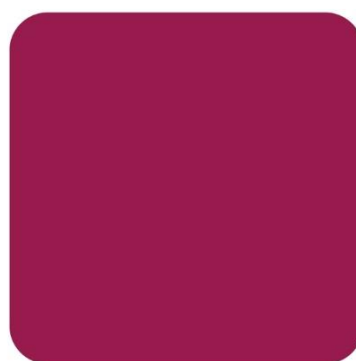
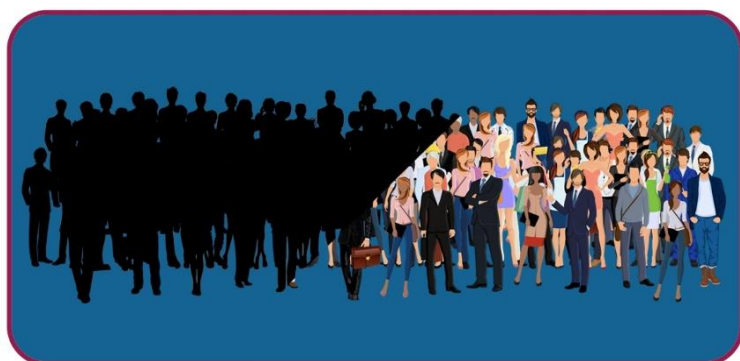


MONITORING FREEDOM OF EXPRESSION AND RIGHT TO PRIVACY DURING COVID-19 OUTBREAK



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Monitoring Freedom of Expression & Right to Privacy during COVID-19 Outbreak

March - June 2020

**Human Rights Action
July 2020**

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1 Introduction

On 17 March 2020, Montenegro, a country of approximately 620,000 inhabitants,¹ was the last one in Europe to register its first case of coronavirus². It was also the first European state to declare a “corona free” status on 25 May 2020.³ By 24 May, Montenegro had a total of 324 confirmed cases and nine related deaths.⁴ All in all, Montenegro, as a relatively small country, with 18 deaths per 1.000.000 citizens to date, has the 122nd highest case numbers in the world in terms of Covid 19.⁵ If all available and comparable information is taken into account, it is noticeable that, from one side, in the first wave of the coronavirus, Montenegro did not have many “imported” cases⁶ and that, from another, the Montenegrin authorities have done a fair job in protecting citizens and stopping the spread of the virus.

Nevertheless, some of the decisions passed by the Government disproportionately restricted the human rights of the people living in Montenegro.

Even before the public announcement of the first case, speculation grew about the actual number of infected individuals and the actions undertaken by the Montenegrin Government to prevent the spread of the virus. In the first wave of coronavirus, the Government took repressive steps to penalise “misinformation” about the virus. At the same time, aiming at protecting life and health, the authorities violated the right to privacy of thousands of citizens by publishing the names and addresses of those who were subject to mandatory self-isolation decisions.

1.1 Restrictions on freedom of expression

In the 21st century, at a time when information can travel from one end of the planet to the other within a second, we have seen an increasing spread of misinformation and rumour across the globe. Following the outbreak of the coronavirus pandemic, Governments have adopted measures to tackle what they have perceived as a “fake news” pandemic on a similar scale.⁷ In some circumstances, it is the states and public authorities who have actually promoted the spread

¹ MONSTAT, “Population estimates on 1 January”, available at: <https://www.monstat.org/cg/page.php?id=273&pageid=48>

² RT: Montenegro Is Europe’s Last Remaining Coronavirus-free Country, (13 March 2020), available at: <https://www.rtmagazine.com/disorders-diseases/infectious-diseases/other-infections/montenegro-coronavirus-free-europe/>

³ REUTERS: Montenegro becomes Europe's first coronavirus-free state, PM says, (25 May 2020), available at: <https://www.reuters.com/article/us-health-coronavirus-montenegro/montenegro-becomes-europes-first-coronavirus-free-state-pm-says-idUSKBN2311NV>

⁴ Government of Montenegro: Montenegro is free of COVID – 19 patients (24 May 2020), available at: <http://www.gov.me/en/News/224671/Montenegro-is-free-of-COVID-19-patients.html>

⁵ WORLDMETERS: Reported Cases and Deaths by Country, Territory, or Conveyance, available at: <https://www.worldometers.info/coronavirus/#countries>

⁶ According to the press conference held on 7 April 2020 by Institute of Public Health, Montenegro had 25 clusters (imported cases of Covid-19 infection). Antena M: „Mugoša: A very difficult period follows, we have 25 clusters“, available at: <https://www.antenam.net/koronavirus/154654-mugosa-slijedi-veoma-tezak-period-imamo-25-klastera>

⁷ Axios: Coronavirus is being used to suppress press freedoms globally, (31 March 2020), available at: https://www.axios.com/coronavirus-press-freedom-e11cd2d3-c1c3-4b67-b985-102c882a223d.html?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosmediatrends&stream=top

of misinformation.⁸ Common conspiracy theories have included allegations that the 5G network is to blame for the spread of Covid-19,⁹ that the virus is treated by drinking bleach and other disinfectants,¹⁰ and that certain gatherings or events are to blame for public health emergencies in some jurisdictions.¹¹ Misinformation, half-truth and unverified news have become prevalent across the globe, so Montenegro could not be immune to it either.

Every Government has a duty and an interest in promoting accurate and reliable information, while correcting harmful false allegations when they arise, in order to protect the personal integrity and trust of citizens in the work of state authorities and to help protect life, health, order, peace and security. Nonetheless, any measures that are adopted to tackle misinformation should not violate the fundamental right to freedom of expression. In other words, responses should be lawful, necessary and proportionate.

Montenegro, a country that is trying to present itself as a democratic state, has taken steps during this pandemic that have seriously undermined the rights to privacy and freedom of expression.

From the beginning of March until the end of May 2020, criminal proceedings have been initiated against five individuals for "Causing Panic and Disorder", a criminal offence under Art. 398 of Criminal Code of Montenegro criminalising spreading of false news that has caused panic or violated public order or disturbed operation of public bodies. According to the state prosecutors in these cases, four of these individuals allegedly caused panic due to posts they made on social media speculating on the extent to which individuals had been infected with Covid-19. Another case has been recorded of a prisoner who was accused of causing panic among police officers, and making it difficult to implement the decision of a state body, after he had said that he suspected he was infected with the coronavirus.

The four cases involving posts that were made on social media are examined in detail in this report. On 11 March 2020, M.B. was arrested because he published unverified information on his personal Facebook page that thirteen people had been infected with the coronavirus.¹² This statement contradicted the official statistics of the Government that there were no infected people in Montenegro at this time. On 23 March, a Russian citizen living in Montenegro, A.G., was arrested after posting on her Instagram profile inaccurate information that 1,000 people were infected in Montenegro, that six people had died, and that staff of the *Avala* Hotel were

⁸ European commission: Coronavirus: EU strengthens action to tackle disinformation, "*Foreign actors and certain third countries, in particular Russia and China, have engaged in targeted influence operations and disinformation campaigns in the EU, its neighbourhood, and globally,*" (10 June 2020), available at: <https://www.dw.com/en/eu-says-china-russia-behind-coronavirus-disinformation-campaigns/a-53762806>

⁹ BBC: Coronavirus: 5G and microchip conspiracies around the world, (27 June 2020), available at: <https://www.bbc.com/news/53191523>

¹⁰ BBC: Coronavirus: The human cost of virus misinformation, (27 May 2020), available at: <https://www.bbc.com/news/stories-52731624>

¹¹ The Guardian: Coronavirus conspiracy theories targeting Muslims spread in India, Attacks and boycotts escalate amid false claims that Muslim group to blame for epidemic, (13 April 2020), available at: <https://www.theguardian.com/world/2020/apr/13/coronavirus-conspiracy-theories-targeting-muslims-spread-in-india>

¹² Vijesti: Milivoje Brkovic, arrested for spreading false news about the coronavirus, (12 March 2020) available at: <https://www.vijesti.me/vijesti/crna-hronika/425176/uhapsen-milivoje-brkovic-zbog-sirenja-laznih-vijesti-o-koronavirusu>

hospitalised.¹³ Only a few days later, on 26 March, S.O. was arrested because she posted a comment on Instagram, implying that a person had died in Bijelo Polje's General Hospital as a result of coronavirus.¹⁴ Finally, on 9 April, R.R. was arrested because he shared a news article on Facebook that was originally published on a foreign website that stated that the President of Montenegro, Milo Đukanović, was infected with the coronavirus.¹⁵ Detailed case studies can be found in the section entitled "Freedom of Expression: Criminal Measures for 'Causing Panic and Disorder'" (Section 2).

Aside from these cases involving social media publications that are explained in more detail below, there has been one case where the offence of "Causing Panic and Disorder" has been relied on to punish an individual for statements made in an offline context. The case concerned P.Č., an individual who told police officers that he suspected that he had the virus while he was being taken to prison to serve the prison sentence. According to the indictment, by giving false information that he had come in contact with an infected person, he had caused panic among the officers detaining him and significantly hindered the implementation of the decision of a state body. The latter conclusion was reached on the basis that he had to be tested for coronavirus before being taken away, which postponed the implementation of the court decision on his detention by about eight hours¹⁶.

1.2 Misuse of Personal Data

Alongside this concerning trend of authorities to penalise protected speech, the Government has also adopted an extraordinary measure that significantly infringed the right to privacy of thousands of individuals. While trying to contain the spread of the virus, on 21 March the Government decided to publish the names of over 2,000 people¹⁷ who were subject to a measure of mandatory self-isolation. This action provoked different reactions from the public, and was accompanied by substantial disagreement regarding its legality, legitimacy, justification, and

¹³ Vijesti: Arrested Russian: She wrote on the social network that Montenegro is expecting a scenario like in Italy?, (23 March 2020), available at: <https://www.vijesti.me/vijesti/crna-hronika/426812/uhapsena-ruskinja-na-drustvenoj-mrezi-napisala-da-crnu-goru-ocekuje-scenario-kao-u-italiji>

¹⁴ KODEX.ME: Woman in Bijelo Polje arrested for causing panic and disorder, (26 March 2020) available at: <https://kodex.me/clanak/205566/uhapsena-bjelopoljka-zbog-izazivanja-panike-i-nereda>

¹⁵ VIJESTI: Rakočević arrested: He shared the tabloid news on Facebook that Đukanović was infected with coronavirus, (9 April 2020), available at: <https://www.vijesti.me/vijesti/crna-hronika/429511/rakocevicu-odredeno-zadržavanje-na-fejsbuku-podijelio-vijest-da-je-đukanovic-zarazen-koronavirusom>

¹⁶ AntenaM: Arrests for causing panic: During his imprisonment, he claimed to have symptoms of coronavirus, 22 March 2020, available at: <https://www.antenam.net/koronavirus/152666-hapsenja-zbog-sirenja-panike-tokom-sprovođenja-u-zatvor-tvrdio-da-ima-simptome-koronavirusa>

¹⁷ According to the site "europeanwesternbalkans" (available at: <https://europeanwesternbalkans.com/2020/03/25/revealing-identity-of-persons-in-self-isolation-in-montenegro-unconstitutional-experts-claim/>), on 24 March over 1800 names and addresses of persons were published during the first 3 days after publication of initial list on 21 March. If taken into account that after this date the Government regularly updated the list, by mid-April, the number of published names had to exceed the figure of 2000. According to ZDNet article "Coronavirus: This tiny country is posting the names and locations of quarantined citizens" of 27 March, 2020, the names of nearly 6,000 people have been made available online, 27 March 2020, available at: <https://www.zdnet.com/article/coronavirus-this-tiny-country-is-posting-the-names-and-locations-of-quarantined-citizens/>

necessity¹⁸. It is notable that the Constitution of Montenegro¹⁹ does not permit any restriction of the right to privacy. Nonetheless, it is obvious that the Government did not establish a clear legal basis for the action and did not indicate what mechanism could be used to challenge the decision. For example, all other measures proposed by the National Coordination Body had been adopted by the Minister of Health,²⁰ while this decision was only posted on the Government's website.²¹ Moreover, such a course of action promoted vigilantism, encouraging people to monitor, surveil and take action against their neighbours who were included on this list. This measure violated the right to privacy, as is detailed in this report under the section "Violations of the Right to Privacy" (Section 3).

Shortly after the list of persons was published on the website of the Government of Montenegro, the application "*crnagorakorona.com*" appeared on the internet.²² The application was created to collect personal data of citizens, whose identities (names, surnames, and addresses) were published on the website of the Government of Montenegro due to being issued with decisions on mandatory self-isolation. This application allowed citizens, who installed it on their phone, to locate the individuals who have been issued a decision on self-isolation. The app also had the option to include geolocation, which allowed the app administrators to see the movement of the person who installed the app. NGO Centre for Civic Education (CCE) submitted complaints²³ to the Supreme State Prosecutor's Office, the Police Directorate, the Agency for Personal Data Protection and Free Access to Information, and the Protector of Human Rights and Freedoms calling upon them to take *ex officio* actions and measures to combat further use of this application.

Another scandal happened on 22 March, the day following the Government's publication, when another list of over 300 people in self-isolation appeared on social media.²⁴ In addition to names

¹⁸ CCE: The state should protect citizens without jeopardizing anyone's Human Rights, (21 March 2020) available at: <http://cgo-cce.org/en/2020/03/21/drzava-da-stiti-gradane-ne-ugrozavajuci-nicija-ljudska-prava/#.XvuXA0UzaM8>

HRA: GOVERNMENT TO STOP PUBLISHING PERSONAL DATA OF CITIZENS IN ISOLATION (23 March 2020) available at: <http://www.hraction.org/2020/03/23/government-to-stop-publishing-personal-data-of-citizens-in-isolation/?lang=en>

POBJEDA: Civic Alliance submitted an initiative to assess the constitutionality of the National Coordination Body decision, (23 March 2020), available at: https://www.pobjeda.me/clanak/gradanska-alijansa-podnijela-inicijativu-za-ocjenu-ustavnosti-odluke-nkt-a?preview_mode=true

¹⁹ Constitution of Montenegro, *Official Gazette of Montenegro*, no. br. 1/2007 and 38/2013 - Amendments I-XVI, available at: <https://www.paragraf.me/propisi-crnegore/ustav-crne-gore.html>

²⁰ List of published regulations adopted to prevent the spread of Covid-19 (coronavirus), (*Lista objavljenih propisa donesenih za sprječavanje širenja Covid-19 (koronavirusa)*), available at: <http://www.katalogpropisa.me/biblioteka/biblioteka-covid-19/>

²¹ National Coordination Body for Communicable Diseases begins to disclose identity of persons in self-isolation: protecting health and life of citizens is our highest priority, (21 March 2020) statement available at: <http://www.gov.me/en/News/223144/National-Coordination-Body-for-Communicable-Diseases-begins-to-disclose-identity-of-persons-in-self-isolation-protecting-health.html>

²² The application is no longer available on the Internet, while the website of the application is still active, available at: <https://crnagorakorona.com/home>

²³ CCE press release: "Remove crnagorakorona.com web application and prosecute its developers", 26 March 2020, available at: http://cgo-cce.org/en/2020/03/26/ukloniti-web-aplikaciju-crnagorakorona-com-i-procesuirati-njene-kreatore/#.XvIb_igzZPY.

²⁴ PCNEN: "The Government denies, citizen Babović says that it is rudeness" (22 March 2020), available at: <https://www.pcnen.com/portal/2020/03/22/vlada-negira-gradanin-babovic-kaze-da-je-to-bezobrazluk/> PCNEN shared a link to facebook user profile Dragan Babovic who shared partial list on his Facebook page on 22 March, available at: <https://www.facebook.com/photo.php?fbid=10158115625247566&set=pcb.10158115625847566&type=3&theater>

and surnames, this list included the Unique Personal Identity Numbers, ID card numbers, and mobile phone numbers of those individuals.²⁵ Some media claimed that that list had been published on the Government's website before the other official list, but that it had been withdrawn shortly after publication.²⁶ At first, the media reported that the list was published by mistake on the Government's website.²⁷ The Government denied this allegation on their Twitter account and claimed it had never owned such a list.²⁸ They called on the competent authorities to investigate the circumstances of this case and invited the media to contact the Government Relations Service before publishing such news. On 30 April, HRA has sent a request to access information in order to find out whether the Basic State Prosecutor's Office had launched an investigation into this case. On 12 May, the HRA received the information that the investigation was ongoing, but there had not been any public announcement to date on the progress of the investigation on behalf of the State Prosecutor's Office.

The third massive breach into personal data took place on 3 April, when an employee at the Institute of Public Health shared a list of over 60 names of people infected with the coronavirus via the Viber messaging app.²⁹ This document also contained the ID numbers and dates of birth of the infected individuals. On the same day, the Montenegrin Government reprimanded the staff member on their Twitter account, saying:

*"This violates basic human rights! We call on the relevant state institutions to urgently investigate the source of this list and identify those who distributed this information."*³⁰

On 7 April, in relation to the above case, an individual was arrested and taken to the Basic State Prosecutor in Podgorica for questioning.³¹ According to the information available to the Basic State Prosecutor, the defendant, as a state servant, was in charge of sharing data on COVID-19 patients via the "IDO" system. They forwarded this data via the Viber application to other persons, who, although being his colleagues, were not authorised to have that information. Criminal proceedings have been initiated against the individual for the commission of the criminal offence of "Unauthorized Collection and Usage of Personal Data" under Article 176 of the Criminal Code

²⁵ Belgian weekly Le Vif: "Montenegro has published the names and addresses of people suspected of being ill", (8 April 2020), available at: <http://www.hracion.org/2020/04/08/korona-virus-crna-gora-objavila-imeni-i-adrese-ljudi-za-koje-postoji-sumnja-da-su-bolesni/>; original article available at: https://www.levif.be/actualite/europe/coronavirus-le-montenegro-balance-les-noms-et-adresses-des-personnes-suspectees-d-etre-malades/article-normal-1274153.html?fbclid=IwAR0_2EzfZTk6lpMW6rgHXJT_w3LXinGZ7zeUpOAeYZm3-ck1QiqkNOt-Vlw&cookie_check=1586332821

²⁶ On 22 March, daily Vijesti, published the article stating: „The list was published on the Government's website about half an hour before midnight, and at first, the list contained the identification numbers, telephone numbers and addresses of the citizens to whom the measure was determined, but then the list had been withdrawn.“ This article is no longer available. A screenshot of controversial article is available on the Government's Twitter account: <https://twitter.com/VladaCG/status/1241683082333347840/photo/1>

²⁷ Since the article, stating that Government had published the list with names and ID numbers, was deleted, a screenshot of controversial article is available on Governments Twitter account: <https://twitter.com/VladaCG/status/1241683082333347840/photo/1>

²⁸ Montenegro Government Twitter post (22 March 2020) available at: <https://twitter.com/VladaCG/status/1241683082333347840>

²⁹ CDM: A list of coronavirus patients has leaked; Raonić: The police should urgently conduct an investigation, (3 April 2020), available at: <https://www.cdm.me/drustvo/procurio-spisak-oboljelih-od-koronavirusa-raonic-policija-hitno-da-sprovede-istragu/>

³⁰ Montenegro Government Twitter post (3 April 2020) available at: <https://twitter.com/VladaCG/status/1246040385664811009>

³¹ RFEL: Arrest due to the list of infected people in Podgorica, (9 April 2020) available at: <https://www.slobodnaevropa.org/a/spiskovi-problemi-crna-gora/30544289.html>

of Montenegro. He was remanded in 30-day custody by a decision of the Investigating Judge of the Basic Court in Podgorica, but this decision was overruled by the Extrajudicial Panel of the Basic Court in Podgorica roughly three weeks later. The Indictment Bill has come into force, and a trial date should be announced soon.

2 Freedom of Expression

2.1 Criminal Offence “Causing Panic and Disorder”

Since the Covid-19 outbreak, a concerning number of cases have emerged where law enforcement has relied on Article 398 of the Criminal Code of Montenegro which criminalises spreading “false news,” to arrest, detain, and institute criminal proceedings against individuals for postings they had made on social media. This is a concerning trend as not only do these cases constitute violations of the right to freedom of expression, the law itself is fundamentally incompatible with international standards protecting the right to freedom of expression.

Article 398 of the Montenegrin Criminal Code³² prescribes "Causing Panic and Disorder" as a criminal offense.

This provision states that:

- (1) *Whoever causes panic by disclosing or disseminating false news or allegations or seriously disrupts public law and order or thwarts or hampers to a significant extent the enforcement of decisions and measures of state authorities or organisations exercising public powers, shall be punished by a fine or a prison sentence for a term not exceeding one year.*
- (2) *Where the offence set forth in paragraph 1 of this Article is committed using the media or other means of public information or similar means or at a public meeting, the perpetrator shall be punished by a prison sentence for a term not exceeding three years.*

Contrary to international standards and Montenegro's obligations to respect international law, this provision represents a repressive weapon in the hands of authorities to suppress freedom of expression.

In January 2020, Human Rights Action (HRA) submitted the Initiative for Constitutional Review of the criminal offence of "Causing Panic and Disorder,"³³ which claimed that the provision was not in accordance with the Constitution. It described how the law was imprecise, allowing for arbitrary interpretations of the terms "fake news" and "panic," and that it provided for a penalty of imprisonment for up to three years, which disproportionately restricted freedom of expression. Furthermore, it was argued that the offence was just another form of "Criminal Defamation," which was abolished in 2011.

³² Criminal Code of Montenegro, ("Official Gazette of Republic of Montenegro ", no. 70/2003, 13/2004, correction 47/2006 and "Official Gazette of Montenegro", no. 40/2008, 25/2010, 32/2011, 64/2011 – other law, 40/2013, 56/2013 – correction, 14/2015, 42/2015, 58/2015 – other law, 44/2017, 49/2018 and 3/2020)

³³ Press release about Initiative for Constitutional Review of the criminal offence of "Causing Panic and Disorder", (24 January 2020), available at: <http://www.hraction.org/2020/01/24/initiative-for-constitutional-review-of-criminal-offense-causing-panic-and-disorder-criminalizing-false-news/?lang=en>.

This crime had existed on the statute books before the coronavirus pandemic. However, between the time the law was enacted in 2003 and January 2020, only a handful of people had been accused of committing the crime. Furthermore, proceedings had primarily been instituted against individuals who had shared false reports of bombs being planted in private places. Since the adoption of the controversial "Law on freedom of religion or belief and legal status of religious communities"³⁴ the number of criminal proceedings being brought under the offence grew, because it served as a perfect weapon to suppress speech that was not aligned with the state agenda.

In just a few months, the number of criminal charges has multiplied, which inevitably must have led to intimidation and insecurity of citizens about their freedom to express their personal views, opinions, or suspicions in public because of the danger of being arrested, detained, or threatened with long-term imprisonment.

According to Article 398 of the Criminal Code of Montenegro, the criminal offence of "Causing Panic and Disorder" is predicated on the consequences that flow from a particular form of speech (i.e. panic, disorder, or thwarting or hampering to a significant extent the enforcement of decisions and measures of state authorities or organizations exercising public powers). In other words, these consequences have to be demonstrated before an individual can be found guilty of the offence under the law. These consequences are subjective in nature and could be interpreted differently depending on the person reading the provision. This leaves the provision open to abuse.

Nonetheless, even where proceedings are brought, the authorities have failed to demonstrate any evidence supporting even a subjective interpretation of these consequential actions. The cases implicating free speech, presented in this report under Section 2.2 do not involve any facts sufficiently demonstrating that "panic" was directly caused by these statements. The state authorities, therefore, used the construction "could have caused a panic" to make their case, which is not an element of the offence of "Causing Panic and Disorder" under the Criminal Code. Accordingly, these cases do not disclose any evidence that any offence had even been committed under Montenegrin law.

Moreover, the provision itself is incompatible with international human rights standards on the right to freedom of expression. For example, evidence that this provision is imprecise and, as such, not compatible with the international standards on legality, can be found in the arbitrary actions of the police, prosecutors, and investigating judges who have acted in the cases detailed in this report. Further detail on how criminal offence is incompatible with international law can be found in the section below.

2.2 Criminal Measures for "Causing Panic and Disorder" – Case Studies

The four cases that have occurred in relation to the internet posting are considered in turn below.

2.2a Case: M.B.

Timeline

11 March 2020: Mr. B. shared a post on Facebook in which he alleged that thirteen people in Montenegro were infected with coronavirus;

³⁴ Law on freedom of religion or belief and legal status of religious communities in montenegro (Zakon o slobodi vjeroispovijesti ili uvjerenja i pravnom statusu vjerskih zajednica u Crnoj Gori), *Montenegro Official Gazette no. 74/2019*, (30 December 2019).

11 March 2020: Police officers met Mr. B. and handed him a summons to report to the police station;

11 March 2020: Mr. B. came to the police station and gave a statement to the police about the incident;

12 March 2020: Mr. B. was taken to the Basic State Prosecutor (BSP), who ordered that he be detained for up to 72 hours due to the existence of “grounds for suspicion” that he committed the criminal offence of "Causing Panic and Disorder" under Article 398 of the Criminal Code of Montenegro;

12 March 2020: The Investigating Judge of the Basic Court in Podgorica issued a search warrant for the purpose of finding and confiscating the object(s) that were used to commit the act of "Causing Panic and Disorder;”

13 March 2020: The Investigating Judge of the Basic Court in Podgorica issued a decision ordering for Mr. B. to be remanded in custody for up to 30 days;

13 March 2020: Mr. B.'s defence attorney filed an appeal against the custody order;

18 March 2020: The Extrajudicial Panel of the Basic Court in Podgorica accepted the appeal and terminated Mr. B.'s detention.

Background to the case

M.B. is a member of the Serb minority in Montenegro, who became relatively well known to the Montenegrin public for recording and broadcasting police actions against citizens after the adoption of the Law on Freedom of Religion or Belief and the Legal Status of Religious Communities in December 2019. Mr. B. is a member of the Podgorica Capital City Board of the “United Montenegro” political party.

On 11 March 2020, Mr. B. wrote the following post on his Facebook page:

"I have information that thirteen people in Montenegro have been infected with the corona virus. Once again, it is shown that our institutions do not do their job and do not react in a timely manner. I wish our fellow citizens a speedy recovery! "

The post is still available on the page and has 941 likes, 94 comments and has been shared 15 times.

The comments posted below the controversial post were aimed at expressing concern that certain religious gatherings may be prohibited, and people's desire to return to the streets and protest the “Law on Freedom of Religion or Belief and Legal Status of Religious Communities.” A few comments referred to Montenegro’s lack of testing for coronavirus.

Legal proceedings

In the afternoon, following Mr. B.'s post, police officers came to the place where he was celebrating the baptism of his cousin. The police officers handed him a summons to come to the police station. After receiving the summons, Mr. B. left on his own accord to make a statement to the police. In his statement, Mr. B. acknowledged that he published a post in which he alleged thirteen people in Montenegro were infected with coronavirus. He pointed out that he had read this information on social media and that he shared it with his users for the common good. He also said that he had read

this information on the profile of a private person, and that on that day he had also seen photos of empty shelves in stores. Mr. B. stated that he did not want to endanger the peace in Montenegro in any way, but that he shared the information with the desire to contribute as a humanitarian to make Montenegro a better country and to help people prevent the spread of the virus.

When asked by the police officer from which device he published the news, he answered that he did it via an application on his mobile phone, but that he lost the phone on the same day. Mr. B. objected to the way in which the police delivered the summons to him. The summons stated that Mr. B. had to report to the police station immediately, and he pointed out that he had done so because he had been threatened that he would otherwise be detained.

On 12 March, around 12:45am, the BSP issued a decision ordering the detention of Mr. B. for up to 72 hours. In the explanation of the decision, the prosecutor reasoned that there was a "well-founded suspicion" that Mr. B. had committed the criminal offence of "Causing Panic and Disorder." The prosecutor further stated in the explanation that Mr. B. was also subject to a preliminary investigation for the criminal offence of "Calling for Resistance" under Article 378 of the Criminal Code of Montenegro. The prosecutor pointed out that both of these acts ("Calling for Resistance" and "Causing Panic and Disorder") were committed only a month and a half apart, both were directed against state bodies and public order and peace, and both acts made it difficult to implement decisions and measures of state bodies. In light of this, he considered that these were "special circumstances" that indicated that the suspect, Mr. B., could repeat the crime if set free and that the detention of up to 72 hours was, therefore, justified.

On 12 March, the Investigating Judge of the Basic Court in Podgorica issued an order to search Mr. B.'s premises, with the aim of finding and confiscating the object by which the criminal offence of "Causing Panic and Disorder" was committed. The court made this decision based on the proposal of the BSP, in particular their assessment of the likelihood that the search would find traces of a criminal offence and items important to the criminal proceedings.

On 13 March, the Investigating Judge of the Basic Court in Podgorica, under the suggestion of the BSP, and after hearing Mr. B., issued a decision pursuant to which Mr. B. was remanded in custody for up to 30 days. The court issued a decision in accordance with Article 448 of the Criminal Procedure Code of Montenegro (danger of repeating a crime). Like the BSP, the Investigating Judge pointed out that Mr. B. was under investigation on suspicion that he had also committed the criminal offence of "Calling for Resistance," and that both acts were committed within a short period of time, were aimed at disturbing public order and peace, and in their entirety they significantly hindered the implementation of decisions and measures of the competent state authorities. According to the court, these represented "special circumstances" that indicated that the suspect could repeat the crime if freed. The court concluded that custody was justified and necessary, and that the purpose behind depriving him of his liberty could not be achieved by another less restrictive measure.

On 13 March, Mr. B.'s defence attorney filed an appeal against the custody decision. The attorney disputed the findings of the Investigating Judge and pointed out that the charges against the defendant required disruption to public order and peace, and that the conduct of which he was accused had to produce certain consequences, i.e. panic among citizens (feelings of fear and dissatisfaction, revolt or disapproval of citizens towards some decisions of state bodies or serious disturbance of public order and peace). The attorney argued that it could not be concluded from the case file that such consequences had occurred. The attorney further stated that the explanation of the decision did not provide any evidence at all as to whether there was panic or serious disturbance of public order and peace and, if so, what were the consequences. In relation to the court's findings that the suspect was being investigated for another criminal offence, and that this is an additional

reason for his detention, the attorney pointed out that this violated the presumption of innocence, particularly since the language of the court implied that Mr. B. had in fact committed the other criminal offence for which he was under investigation. The attorney also noted that the two offences were very different in nature.

On 18 March, the Extrajudicial Panel of the Basic Court in Podgorica issued a decision ordering for Mr. B.'s release. Acknowledging the submissions made on appeal, the Panel found that the Investigating Judge had not acted properly when he ordered for Mr. B. to be held in custody. In its explanation, the Extrajudicial Panel pointed out that neither the BSP nor the Investigating Judge demonstrated how there was a well-founded suspicion that Mr. B. committed the crime he was charged with. The Extrajudicial Panel pointed out that the BSP and the Investigating Judge referred in their reasoning to the criminal complaint filed by the police, ignoring the fact that the suspect in his defence denied that he had committed the crime and that he had no "intent to cause any panic or disorder." They also could not see from the decision on custody what the consequences of Mr. B.'s act had been and on what grounds there was for finding a suspicion that the suspect's actions caused panic. In its reasoning, the court stated that a person should only be ordered into custody if there is a reasonable suspicion that the person had committed a criminal offence, and that this reasonable suspicion must be explained both in the motion for custody and in the decision of the judge ordering custody. The Extrajudicial Panel noted that mere suspicion "is not a sufficient reason for ordering detention, but a significantly higher degree is required", i.e. that there is a 'reasonable suspicion' that the person has committed the act, but also other legal conditions that make custody necessary. The Extrajudicial Panel described the criminal offence of "Causing Panic and Disorder" as follows:

"The act of committing a criminal offence is the disclosing or disseminating of false news or allegations, i.e. that what is contained in those news and allegations does not correspond to the objective reality. By disclosing or disseminating false news and allegations, this criminal act is committed only when a certain consequence follows, the consequence is alternatively set in causing panic, which is a sudden disturbance of citizens of greater intensity caused by fear after being presented or after the spread of false news or allegations, and this panic often leads to citizens taking actions that disturb public order and peace. Another possible consequence is a serious disturbance of public order and peace, which means causing disturbances to the normal course of social life - endangering people and property, creating difficulties in traffic or in performing communal activities, obstructing the work of state bodies and other organisations exercising public authority. Public order and peace should be more seriously endangered, which is assessed by the extent of the occurrence and intensity of the threat. Finally, this act will exist when the presentation or transmission of untrue allegations has thwarted or significantly hindered the implementation of decisions and measures of state bodies and organisations exercising public authority. The implementation of these measures was thwarted when they could not be implemented, it was significantly hindered when their implementation was accompanied by great difficulties."

The Extrajudicial Panel did not see enough grounds to order the detention of Mr. B. for posting controversial information. In reaching this finding, they took into account the comments below Mr. B.'s post. The Extrajudicial Panel concluded that they could not see how the post could cause panic among the citizens or how public order and peace could be endangered, nor could they find that the post resulted in frustrations or significantly hindered the implementation of measures and decisions of state bodies. The Extrajudicial Panel concluded that in the comments people were more concerned about the survival of religious gatherings than about coronavirus, which could not be considered "panic" in terms of the criminal offence of "Causing Panic and Disorder."

They also pointed out that Mr. B. was not a public figure, whose announcements would be available to a large number of citizens and whose written or spoken word would have a special meaning or weight due to his reputation or some other circumstances. They also took into account the fact that Mr. B.'s post could only be seen by people who entered his profile, and that to the average citizen of Montenegro who does not know Mr. B., his announcement could not be of special significance. They also highlighted the fact that the post was shared by 15 other people, without any of them being prosecuted for "passing" information. They accepted the arguments of the defence attorney and pointed out that, when making the decision on custody, the Investigating Judge took into account the fact that Mr. B. was subject to an ongoing investigation for another criminal act in such a way that rudely denied the "presumption of innocence" as one of the most important constitutional guarantees of every individual.

In the end, the Extrajudicial Panel took into account the content of the impugned post, as well as the current situation in the country and in the world regarding coronavirus. They reasoned that everyone should be personally careful when publishing any unverified information that could cause panic. They concluded that, should someone be found guilty of the crime in question, it is certainly to be expected that the reaction of state bodies and courts will be adequate in terms of rigorous punishment of perpetrators.

The indictment bill has yet to come into force.

2.2b Case: A.G.

Timeline

22 March 2020: Ms. G. posted on her Instagram profile(s) that a number of people had been infected and died of coronavirus in Montenegro;

22 March 2020: The police located and arrested Ms. G. due to the existence of "grounds for suspicion" that she committed the criminal offence of "Causing Panic and Disorder" under Article 398 of the Criminal Code of Montenegro;

23 March 2020: The Basic State Prosecutor (BSP) in Kotor issued a decision ordering that Ms. G. be held in custody for up to 72 hours because of the danger of her repeating the criminal offence;

23 March 2020: The BSP made a request to the Investigating Judge of the Basic Court in Kotor for Ms. G. to be remanded in custody for up to 30 days;

23 March 2020: The Investigating Judge of the Basic Court in Kotor issued a decision rejecting the request and, instead, imposed a supervision measure prohibiting Ms. G. from leaving her home;

23 May 2020: The supervision measure prohibiting Ms. G. from leaving her home expired, and Ms. G. was no longer subject to the measure.

Background to the case

Ms. G. is a Russian citizen residing in Tivat, Montenegro. According to media reports, on 22 March 2020, she posted on her Instagram profile that about 1,000 people in Montenegro had contracted the coronavirus, that six had died from the virus, and that Montenegro was expecting a coronavirus crisis

like that seen in Italy. In addition, she stated in the post that the staff of the Avala Hotel were infected with the coronavirus and that they were hospitalised.

Legal proceedings

On the same day that the post was published, Ms. G. was located by the police and questioned. After questioning, the police communicated with the Basic State Prosecutor (BSP) in Kotor about Ms. G.'s case.

On 23 March, shortly after midnight, the BSP in Kotor ordered the detention of Ms. G. for up to 72 hours due to the existence of "reasonable suspicion" that she committed the criminal offence of "Causing Panic and Disorder" under Article 398 of the Criminal Code of Montenegro. In the custody decision, the BSP stated that the reason for ordering detention was the danger that the suspect would repeat the crime if she were free, and that there was a well-founded suspicion that she committed the crime based on the criminal report, attachments to the report, and the fact that the suspect admitted to posting on social media. Explaining the "danger of repeating the crime," the BSP stated that this case was a specific criminal offence committed at a time of extremely high risk of spreading a serious infectious disease, namely Covid19. Furthermore, the suspect had addressed her fellow citizens who are in Montenegro in order to draw their attention to the information in the post, even though it was generally known to be incorrect. They also took into account that she used several profiles on social media. These were all found to be circumstances that clearly indicated that she would repeat the crime if she was released.

On 23 March, the Investigating Judge of the Basic Court in Kotor considered the BSP's submission that Ms. G. should be held in custody for up to 30 days. The Investigating Judge rejected this proposal of the BSP as "unfounded." Nonetheless, the Investigating Judge placed Ms. G. under a supervision measure pursuant to Article 166(2)(1) of the Criminal Code, which prohibited her from leaving her dwelling. Regarding the duration of the measure, the Investigating Judge determined that it would last as long as there was a need for it, and at the latest until the verdict in her case becomes final. The Investigating Judge went on to say that the necessity of the measure would be checked every 2 months.

After inspecting the documentation available to him, and on the basis of the statement given by Ms. G. before the court, the Investigating Judge concluded that there was a grounded suspicion that the suspect had committed the criminal offence she was charged with. Nevertheless, he was of the view that detention was the strictest measure available in the present case and it was not necessary under the circumstances. It could, therefore, be replaced by a measure prohibiting Ms. G. from leaving her apartment. The Investigating Judge found that this measure would also ensure that the defendant did not repeat the crime. The Investigating Judge stated that this case concerned a specific criminal offence committed at a time of extremely high risk of spreading a serious infectious disease, so it was necessary to act in the direction of both special and general prevention. In light of the fact that the supervision measure could ensure that the suspect would not repeat the crime, and the fact that Ms. G. is a mother of a minor child and that the father of the child is abroad, the court decided not to order that she be remanded in custody.

According to the latest information we received from Ms. G.'s attorney, the supervision measure expired on 23 May 2020, two months after its imposition, because the court did not issue a new decision for the extension of the measure.

The lawyer informed us that the investigation is still underway, and that no indictment bill has been filed.

2.2c Case: S.O.

Timeline

26 March 2020: Ms. O. posted a comment on an Instagram page about the death of a patient at Bijelo Polje hospital;

26 March 2020: The police interviewed Ms. O. and, after the interview, Basic State Prosecutor (BSP) in Bijelo Polje, ordered that she be detained for up to 72 hours due to the existence of “grounds for suspicion” that she committed the crime of "Causing Panic and Disorder" under Article 398 of the Montenegrin Criminal Code;

26 March 2020: Ms. O.’s defence attorney appealed the decision on her detention to the Investigating Judge of the Bijelo Polje Basic Court;

26 March 2020: The Investigating Judge of the Bijelo Polje Basic Court rejected the appeal as “ill-founded;”

27 March 2020: The Investigating Judge of the Basic Court in Bijelo Polje ordered for Ms. O. to be remanded in custody for up to 30 days;

27 March 2020: Ms. O.’s defence attorney submitted an appeal of the Investigating Judge’s custody order and asked for her release;

27 March 2020: The Bijelo Polje Basic Court rejected an appeal of the Investigating Judge’s custody order;

30 March 2020: Ms. O.’s defence attorney submitted to the Investigating Judge a request to abrogate the custody order;

1 April 2020: The Investigating Judge of the Bijelo Polje Basic Court rejected the request for abrogation as “ill-founded;”

2 April 2020: The Basic State Prosecutor formally submitted an indictment against Ms. O.;

2 April 2020: The Extrajudicial Panel of the Bijelo Polje Basic Court extended Ms. O.’s detention for a further 30 days;

3 April 2020: Ms. O.’s defence attorney submitted an appeal to the Extrajudicial Panel of the Bijelo Polje Basic Court challenging the rejection of the abrogation and he requested that Ms. O. be released. The appeal was rejected on the same day as “ill-founded;”

3 April 2020: Ms. O.’s defence attorney submitted an appeal to the Bijelo Polje High Court of the decision of 2 April 2020 prolonging her detention for a further 30 days;

9 April 2020: The Bijelo Polje High Court upheld the appeal of the extension, and sent the case back to the Basic Court for reconsideration;

9 April 2020: The Extrajudicial Panel of the Bijelo Polje Basic Court terminated Ms. O.’s detention, and she was released from custody;

30 June 2020: The first court session is expected in the proceedings against Ms. O. before the Bijelo Polje Basic court.

Background to the case

Ms. O. is a 27-year-old accountant from Bijelo Polje. On 26 March 2020, she posted a comment on the social network Instagram. The comment was published under a post that was originally published by the "Podgorički Vremeplov" (Podgorica Time Machine) Instagram account.

"Podgorički Vremeplov" posts interesting photos, videos and stories concerning Montenegro. Their page has about 300,000 followers. The administrators of the account sometimes post private messages that users send to them for wider publication, for example if a user has lost or found something valuable. These posts are usually shared in the form of a "screenshot."

On 26 March, the "Podgorički Vremeplov" account published a post about the number of individuals infected with Covid-19 in Montenegro. After this post was published, Ms. O. messaged the account administrators and asked if they could publish a message she had sent to them. The administrators refused and suggested that she could post it as a comment below their post. Ms. O. then posted the following comment on the "Podgorički vremeplov" page below their post on Covid-19 infections:

"Yesterday, a man at the Hospital in Bijelo Polje called the doctors with cold flu symptoms. As a responsible citizen at this time of Corona, he went to the hospital with a suspicion that he was suffering from it. Some doctors said it was Corona, others that it was the common flu after all. Today, that same man passed away this morning at the age of 54. We are neither ready for what awaits us, nor do we have staff and doctors who have enough knowledge. Please publish this so that the whole country knows what and with whom we are dealing. I do not want to spread panic, but it is important to warn people, especially everyone in Montenegro."

The comment had 90 "likes" within half an hour, after which Ms. O. had removed the post.

On 26 March, the General Hospital in Bijelo Polje filed a criminal complaint on the basis of which the police came to Ms. O.'s house and took her to the Police station for an interview. On the same day, the General Hospital gave an official announcement on her case, which stated:³⁵

"In order to provide true information on the occasion of speculations that appeared in the public about the patient S.C. (1966) who was admitted to the Bijelo Polje General Hospital in the early morning yesterday and died in the late evening, we would like to give the following information: Yesterday, in the early morning hours, patient S.C. was admitted to the emergency room. S.C. who was from Bijelo Polje, came with respiratory obstructions. After the primary treatment by the Emergency doctor, he was sent to the Emergency Department for further processing and diagnosis. Based on the patient's assessment of their condition and high suspicion of Coronavirus, the patient underwent an epidemiological triage survey and all protective measures were taken for transport to the Department of Infectious Diseases, which is provided for patients with suspected Covid-19. A medical team consisting of an anaesthesiologist, an internal medicine specialist, a resuscitator and a nurse was formed as soon as possible. The patient was swabbed and the epidemiologist was informed. A swab was sent to the Institute of Public Health for analysis, and intensive therapy started, as the patient's condition worsened he was placed on mechanical ventilation. In this situation, all measures of personal protection of doctors and medical staff were taken, all necessary medical equipment was used to monitor basic life

³⁵ This post has been dated 27 March 2020 by the hospital, but news websites had shared this announcement publicly on 26 March 2020.

functions. During the night, there was a sudden deterioration of the condition, which, despite all the efforts of the doctors on duty, led to the death of the patient. In the meantime, the result of the test for Coronavirus arrived, it was negative and indicated that the failure of life functions occurred due to Acute Respiratory Distress, in terms of cessation of respiratory functions. We would also like to mention that as part of our legal obligation, we offered to the patient's relatives that we perform an autopsy on the deceased, which the relatives refused.

In an environment where the state and the health care system are fighting the Coronavirus epidemic, it is utterly irresponsible to spread panic by spreading false news, which further upsets citizens, and creates a false image of healthcare workers doing their jobs honestly and responsibly."

Legal proceedings

On 26 March 2020, after receiving information about Ms. O.'s post on Instagram, the police summoned her for an interview in order to gather further information from her. After the interview, the police contacted the Basic State Prosecutor (BSP) to inform him of their findings. The BSP then ordered that Ms. O. be detained for up to 72 hours pursuant to Article 267 of the Criminal Procedure Code (CPC).

The order stated that "by posting the comment on the social network [site], the suspect caused panic among the citizens, including thousands of people who are followers of the 'Podgoricki vremeplov' page." In their explanation of the decision on detention, the BSP said the reason for the detention was the "danger of repetition of the criminal offence." The BSP elaborated that the suspect was a long-term user of the social network site and that the disputed comment was available to a large number of users who could interpret it in different ways. Furthermore, they stated that there were "special circumstances" that indicated the danger of Ms. O. repeating the crime, but did not explain what those "special circumstances" were. Ms. O.'s lawyer appealed this decision, but the appeal was rejected.

The next day, 27 March, the Investigating Judge of the Bijelo Polje Basic Court issued a decision ordering that Ms. O. be held in custody for up to 30 days, due to the danger that "she could continue to make announcements that would cause citizens to feel panic." On 27 March, the Bijelo Polje Basic Court rejected an appeal against this decision on the basis that the appeal was "ill-founded."

After the appeal had been rejected, on 30 March, Ms. O.'s lawyer addressed the Investigating Judge with a request for Ms. O.'s detention to be abrogated. He submitted that the reasons for remanding Ms. O. in custody were not clear, nor was it clear what the "special circumstances" were that indicated there was a danger of the offence being recommitted. This request was rejected on 1 April. In rejecting this submission, the Investigating Judge set out the sequence of events leading to Ms. O.'s arrest and pointed out that her comment had been made available to a large number of citizens. The Investigating Judge indicated that this was confirmed by the defendant herself, and that users of the social media site could interpret this announcement in different ways. In the explanation of "special circumstances," the Investigating Judge noted that the comment could "be understood in different ways, and even provoke panic, i.e. feelings of dissatisfaction, revolt or disapproval of the National Co-ordination Body's Orders for taking temporary measures to prevent the entering into the country, suppression and prevention of the transmission of the new coronavirus."

On 31 March, the BSP heard from a witness, Mr. M.V. who was responsible for public relations (PR) at the Hospital. In his testimony, Mr. V. pointed out that after learning about the comments on the social media site Instagram, he contacted the doctor on duty at the hospital to gather enough information to make a public statement. He pointed out that he did it to calm the panic and prevent

the spread of this “false news.” He explained that the people employed in the hospital were under stress and that the comment was not based on true facts. He also stated that the comment had caused public distrust in the health system. He pointed out that Ms. O.'s comment caused panic among doctors who asked him to take action in response to the “malicious comment.” He explained that all the doctors in the hospital worked selflessly and in accordance with the Government instructions, and that the criminal report submitted by the Hospital was a reaction not only in the case of Ms. O. but also for all other cases that may arise in the future. He pointed out that the fact that this information was shared on social media not only affected the reputation of one or two doctors, but the entire health system. He, therefore, considered it necessary to press for criminal charges in these cases so that such comments would not become a common practice.

According to Article 448(2) of the Criminal Procedure Code, in summary proceedings a defendant can only be held in custody up to the completion of investigation and the submission of an Indictment Bill, at which point a three-judge panel must order a further period of detention. On 2 April, after the BSP submitted the indictment against Ms. O., the Extrajudicial Panel of Bijelo Polje Basic Court extended Ms. O.'s detention for a further 30 days. The detention was supposed to last from 2 April 2020 to 1 May 2020. This extension was requested by the BSP, who had submitted that there was still a danger of the criminal offence being repeated. The Extrajudicial Panel agreed with the BSP's submission and pointed out that the posting of the comment on the social media site, on a page which had a large number of followers, meant that the comment was available to a large number of users in a short period of time. They went on to reiterate that the comment could be interpreted in different ways and could have a serious impact in terms of causing panic among the citizens to whom it was available, especially in light of the fact that a Covid-19 epidemic was officially declared in Montenegro and there was sensitivity around the health situation in the country. The Extrajudicial Panel pointed out that there were still “special circumstances” indicating that the defendant could repeat the offence and that these were sufficient reasons to justify the further extension of her detention.

On 3 April, Ms. O.'s lawyer filed an appeal to the Bijelo Polje High Court against this extension of Ms. O.'s detention. On 9 April, Bijelo Polje High Court reversed the decision of the Extrajudicial Panel and ordered the Panel to bring a new decision. On the same day, the Extrajudicial Panel of the Basic Court handed down a decision terminating Ms. O.'s detention. The Basic Court, guided by the reasons of the High Court on appeal, and the fact that it was not possible to predict how long it would take for proceedings to progress due to the pandemic, found that there were insufficient reasons for extending the detention.

The Indictment Bill in this case has come into effect, and criminal proceeding will start on 30 June, when the first court session is scheduled. Since Ms. O.'s lawyer was her *ex officio* defence attorney, he was released from duty once her detention came to an end.

2.2d Case: R.R.

Timeline

9 April 2020: Mr. R. shared an article from Serbian news website “Alo.rs ” on his Facebook page and posted a comment saying that the President of Montenegro, Milo Djukanovic, was infected with Covid-19;

9 April 2020: Police officers came to Mr. R.'s home, handed him a warrant for questioning, and took him to the Bijelo Polje police station;

9 April 2020: After questioning, the police contacted the Basic State Prosecutor (BSP) in Bijelo Polje. The BSP stated, over the phone, that Mr. R.'s actions did not constitute a crime. Mr. R. was released;

9 April 2020: An hour after his release, police officers arrested Mr. R. near his home without a warrant and took him to the Bijelo Polje Police Station for questioning;

9 April 2020: After the questioning, the police took Mr. R. to another prosecutor. After a hearing, this prosecutor ordered for Mr. R. to be detained for up to 72 hours due to the "existence of grounds for suspicion" that he committed the crime of "Causing Panic and Disorder" under Article 398 of the Montenegrin Criminal Code;

9 April 2020: Mr. R.'s defence attorney appealed the detention order to the Investigating Judge of the Bijelo Polje Basic Court;

9 April 2020: The Investigating Judge of the Basic Court in Bijelo Polje rejected the defence attorney's appeal as "ill-founded;"

10 April 2020: BSP filed a motion to the Investigating Judge of the Basic Court in Bijelo Polje, requesting that they order a 30-day detention against Mr. R.;

10 April 2020: The Investigating Judge of the Basic Court in Bijelo Polje rejected the prosecutor's motion as "ill-founded" and ordered the release of Mr. R.;

21 April 2020: BSP filed an indictment against Mr. R.;

26 May 2020: The first court session was held in the proceedings against Mr. R.

Background to the case

Radovan R. is a student and a political activist. He is the president of the Youth Network of the political party Democratic Front (DF) in Bijelo Polje. He has two profiles on the social media site Facebook. On one of them he has 5,000 "friends,"³⁶ and on the other 3,500 "friends," as well as a total of about 1,000 "followers"³⁷ across both profiles.³⁸ Mr. R. publishes political propaganda material on his personal profile, shares pictures from religious gatherings, and actively uses Facebook to call for respect for the rights of the Serbian minority in Montenegro. On 9 April, around 12:30am, Mr. R. shared a news story from the Serbian news website "Alo.rs" on one of his Facebook profiles.

He copied a link to the article, and a part of the text which read:

"Milo Đukanović infected with the corona virus. In a difficult condition, he asked for help from Russia and France! The President of Montenegro, Milo Đukanović, has contracted the coronavirus and has a severe clinical record of the disease. Milo has been suffering from coronavirus for two days and is in a very serious condition, but the Montenegrin state leadership has decided to cover

³⁶ A Facebook "friend" is when one user requests to be "friends" with another user on the social media site. When this request is accepted, both users automatically follow the other user, meaning that they can see each other's posts on their News Feed.

³⁷ A Facebook "follower" is a user who unilaterally subscribes to another user's account, meaning that the "follower" can see posts on their News Feed that the other account makes public.

³⁸ i.e. 1,000 accounts follow either one or both of his accounts.

up this information. Milo does not appear in the media, and official statements on his behalf are sent from the cabinet as if everything is fine."

Mr. R. has not yet removed the post in question from his Facebook profile. As of 19 June, the post has 92 likes, 21 comments, and it has been shared 9 times.

Comments posted by other Facebook users below the post say: "Don't worry, nothing will happen to him, there will be no thunder in the nettles" and "we're not that lucky" "Are you kidding?" The original article on the internet site "Alo.rs" is also still available at: <https://www.alo.rs/vesti/region/korona-milo-virus-zarazen/302795/vest>

The Montenegrin authorities did not attempt in any way to deny news about the President's health, whether inaccurate or not, and they have not initiated any proceedings against the "Alo.rs" website.

Legal proceedings

After the Police received information that Mr. R. published a post on his Facebook profile on April 9, they came to Mr. R.'s home in the early hours of the morning. They handed him a warrant for questioning, after which he accompanied the police to the police station.

At the station, Mr. R. gave a statement to Police Inspector Brano Šćekić. In his statement he said that, shortly after midnight, he read a story on "Alo.rs" that stated that the President of Montenegro was infected with Covid-19. He indicated that he copy-pasted the original text from the news story into a post that he published on his Facebook profile, which was accompanied by a link that directed to a site where the entire text could be found. Mr. R. went on to say that he was quite active on his Facebook profile, that he posts various forms of posts on a daily basis, and that he published the text in question with the intention of finding out whether this information was true and not with the intention of provoking "something else."

After taking the statement, Police Inspector Šćekić contacted the Basic State Prosecutor (BSP) in Bijelo Polje, Ms. Tanja Nišavić, about the case. The BSP told the Police Inspector over the phone that the actions of Mr. R. did not appear to constitute a crime and she ordered for his release. An hour after Mr. R. was released from the police station, police officers met him on the street near his house and arrested him without a warrant.

According to Mr. R., he was questioned on that occasion by another Police Inspector, Kemal Ljuca. Mr. R. did not provide us with the statement he gave during the second hearing with the Police Inspector, since he doesn't have it, but he informed us that after the conversation, Police Inspector Ljuca contacted another prosecutor, Mr. Slaven Smolović, who ordered that the police bring Mr. R. to the BSP office in Bijelo Polje to give another statement.

After taking the statement, the BSP issued a decision to detain Mr. R. for up to 72 hours due to the "existence of grounds for suspicion" that Mr. R. committed the criminal offence of "Causing Panic and Disorder" under the Article 398 of the Criminal Code of Montenegro. In the decision for detention, the BSP stated that it acted upon a criminal complaint filed by the Police Directorate. According to the explanation of the BSP, Mr. R. had posted allegations on his Facebook profile saying "Milo Đukanovic infected with coronavirus," which caused panic among thousands of citizens and people who are Mr. R.'s friends and companions on Facebook, while he "was aware of his act and desired its commission" (i.e. he knew that his act was forbidden by law, and still he wanted to commit the crime). The BSP further said that there was a reasonable suspicion that Mr. R. committed a criminal offence of "Causing Panic and Disorder." Furthermore, he observed that the defendant had been an active

user of social media for many years and that his post could be seen by a large number of citizens, which is why it could be interpreted in different ways, and that "special circumstances" suggested that he would repeat the crime if he was released. The BSP did not elaborate on what the different forms of interpretation for the post were, nor did he explain what the "special circumstances" were that suggested that Mr. R. would repeat the crime.

On 9 April, Mr. R.'s defence attorney filed an appeal against the detention order, claiming that the criminal procedure had not been followed, and requested that the challenged decision be reversed and for the defendant to be released.

A few hours later on the same day, 9 April, the Investigating Judge of Bijelo Polje Basic Court rejected the defence attorney's appeal, arguing that the decision was made in accordance with Article 267 of the Criminal Procedure Code (the provision that establishes that prosecutors have the right to hold a suspect in detention). Just like the prosecutor, the Investigating Judge pointed out that Mr. R. had been an active user of Facebook for many years. He also noted that he had two profiles, one of which had 3,000 and the other 5,000 "friends," and that he had about 1,000 "followers" in total. He also found that the post in question had 55 likes from the moment it was published until that morning, and that the post was available to a large number of users who could interpret it in different ways. He held that these factors demonstrated that there were "special circumstances" indicating that the suspect could repeat the crime if released.

The next day, 10 April, the BSP requested that the Investigating Judge of the Basic Court order for Mr. R. to be held in custody due to "the danger of repeating the crime." On the same day, the Investigating judge rejected this motion as "ill-founded." In the explanation, the Investigating Judge took into consideration Mr. R.'s defence that he was not the author of the text in question and that he only shared the post on his Facebook profile. In the decision, the Investigating Judge considered the suspect's health condition, as well as the fact that custody was defined as an "exceptional measure to ensure the presence of the accused and if it was necessary for a peaceful conduct of procedure and should be ordered only in cases prescribed by law and only if the same purpose could not be achieved by another measure." The Investigating Judge decided to reject the prosecutor's motion to order custody, considering that it was not necessary in the specific case.

Given the submission by the BSP that the suspect could repeat the crime while free, the Investigating Judge pointed out that "there was not a sufficient degree of real danger, as well as no special circumstances indicating that the suspect could repeat the crime if he was released, given that he had not been convicted before." The Investigating judge explained that the real danger of repeating the crime was assessed on the basis of the previous life of the suspect, and that the previous non-conviction for the same crime indicates that there is no such danger.

On 21 April, the BSP submitted an indictment against Mr. R., to the Basic Court in Bijelo Polje which stated:

"On 9 April, 00.30 o'clock, in Bijelo Polje, Radovan R. spread fake news from a Facebook profile under the username Radovan R. by publishing an article entitled 'Milo Đukanović infected with the corona virus' with the following content: 'In a serious condition, asked for help from Russia and France! The President of Montenegro, Milo Đukanović, has contracted the coronavirus and has a severe clinical record of the disease. Milo has been suffering from coronavirus for two days and is in a very serious condition, but the Montenegrin state leadership has decided to cover up this information. Milo does not appear in the media, and official statements on his behalf are sent from the cabinet as if everything is fine.' And thus caused panic by spreading such false news, while he was aware of his actions and its prohibition and wanted its execution, thus committing

the crime of ‘Causing Panic and Disorder’ under Article 398 paragraph 2 in conjunction with paragraph 1 of the Criminal Code of Montenegro.”

The first court session in the criminal proceedings against the accused Mr. R. was held on 26 May, the trial is still ongoing. The second session was held on June, and the next one is secluded for 21. July.

2.3 Violations of the Right to Freedom of Expression

2.3.1 An overview of international standards

All the cases set out above involve law enforcement measures being taken against social media users pursuant to Article 398 of the Criminal Code of Montenegro, which provides for the criminal offence of “Causing Panic and Disorder.”

Each case has involved the arrest and pre-trial detention of an individual, as well as the ongoing threat of prosecution and conviction against them, for something that they have published online. Such measures amount to an interference with the right to freedom of expression³⁹ as guaranteed by Article 10 of the European Convention on Human Rights (ECHR)⁴⁰ and Article 19 of the International Covenant on Civil and Political Rights (ICCPR).⁴¹ Montenegro is a party to both of these treaties.

It is a well-established principle of international law that the right to freedom of expression is one of the essential foundations of any free and democratic society,⁴² and that it is one of the basic conditions for each individual’s self-fulfilment.⁴³ The right is necessary for the realisation of transparency and accountability, and it is essential for the promotion and protection of human rights.⁴⁴

International human rights law also recognises that the right “is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.”⁴⁵ Furthermore, false statements benefit from protection under the right. In *Salov v. Ukraine*, the European Court of Human Rights stated that “Article 10 of the [ECHR] as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention.”⁴⁶

³⁹ See ECtHR, *Akçam v. Turkey*, Application no. 27520/07 (25 January 2012); ECtHR, *Dilipak v. Turkey*, Application no. 29680/05 (15 September 2015).

⁴⁰ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 10.

⁴¹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 19.

⁴² ECtHR, *The Sunday Times (No 2) v. United Kingdom*, Application no. 13166/87 (26 November 1991), par. 71; UN Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, UN Doc. CCPR/C/GC/34, par. 2.

⁴³ ECtHR, *Karácsony and Others v. Hungary*, Application nos. 42461/13 and 44357/13 (17 May 2016), par. 132; UN Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, UN Doc. CCPR/C/GC/34, par. 2.

⁴⁴ UN Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, UN Doc. CCPR/C/GC/34, par. 3.

⁴⁵ ECtHR, *The Sunday Times (No 2) v. United Kingdom*, Application no. 13166/87 (26 November 1991), par. 50.

⁴⁶ ECtHR, *Salov v. Ukraine*, Application no. 65518/01 (6 September 2005), par. 113.

Freedom of expression, including when it is exercised online, is of crucial importance during an international health emergency like the global Covid-19 pandemic. This was highlighted recently by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (UNSR), David Kaye, who has observed that freedom of expression goes “hand-in-glove” with public health.⁴⁷ In his recent report to the UN Human Rights Council, he observed that “in the face of a global pandemic, the free flow of information, unhindered by threats and intimidation and penalties, protects life and health and enables and promotes critical social, economic, political and other policy discussions and decision-making.”⁴⁸

According to international law, a measure that interferes with the right to freedom of expression, such as the measures outlined in the examples above, will only be justified if they are “provided by law,” pursue a “legitimate aim,” and are “necessary” and “proportionate.” As was highlighted by the UNSR in his recent report, these principles “apply across the board; they are not simply discarded in the context of efforts to address the public health threat of COVID-19.”⁴⁹

In the examples set out in the cases above, even if the authorities were pursuing the “legitimate aim” of protecting public order or health when adopting the measures under Article 398 of the Criminal Code of Montenegro, such measures violated the right to freedom of expression because they were not “provided by law” and they failed to meet the strict tests of “necessity” and “proportionality.”

2.3.2 Provided by law

Although the measures in these cases were adopted pursuant to Article 398 of the Criminal Code of Montenegro, this provision itself does not meet the “quality of law” required by Article 10 ECHR and Article 19 ICCPR.

The European Court of Human Rights has consistently stated that, aside from having a legal basis in domestic law, a measure restricting freedom of expression must be made pursuant to a law that is accessible to the person concerned and foreseeable as to its effects.⁵⁰ The Court has elaborated on the concept of “foreseeability” by stating that “a norm cannot be regarded as a ‘law’ within the meaning of [Article 10(2) ECHR] unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”⁵¹ Furthermore, the Court has stated that a law must also be compatible with the “rule of law,” meaning that “there must be adequate safeguards in domestic law against arbitrary interferences by public authorities.”⁵²

⁴⁷ UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (UNSR), *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression: Disease pandemics and the freedom of opinion and expression*, UN Doc. A/HRC/44/49, 23 April 2020, par. 10.

⁴⁸ *Id.*, par. 6.

⁴⁹ *Id.*, par. 16. See also, *Id.*, par. 10. (“These principles do not simply evaporate in the face of a contagion.”)

⁵⁰ See, for example, ECtHR, *VgT Verein gegen Tierfabriken v. Switzerland*, Application no. 24699/94 (28 September 2001), par. 52; ECtHR, *Rotaru v. Romania*, Application no. 28341/95 (4 May 2000), par. 52; ECtHR, *Gawęda v. Poland*, Application no. 26229/95 (14 March 2002), par. 39; and ECtHR, *Maestri v. Italy*, Application no. 39748/98 (17 February 2004), par. 30.

⁵¹ ECtHR, *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, Application no. 38433/09 (7 June 2012), par. 141.

⁵² ECtHR, *Magyar Kétfarkú Kutya Párt v. Hungary*, Application no. 201/17 (20 January 2020), par. 93.

Article 398 of the Criminal Code of Montenegro does not meet this standard of “lawfulness.” The scope of the law is vague and the meaning of some of its terms are nebulous, preventing individuals from regulating their actions so as to avoid violating the law. For instance, terms such as “panic” and “false news” do not have clear definitions and could be open to abuse by those responsible for enforcing the provision. The lack of clarity in the law is highlighted by some of the cases mentioned above. For example, in the case of Mr. R., two state prosecutors came to diametrically opposed views as to whether a crime may have been committed under Article 398 of the Criminal Code on the basis of the same set of facts.⁵³ Such vagueness confers undue discretion on authorities, enabling them to violate individual rights while disingenuously claiming adherence to the law.⁵⁴

Moreover, international special mandates have stated that general prohibitions on the dissemination of information based on “vague and ambiguous ideas, including ‘false news’ or ‘non-objective information’ are incompatible with human rights law and should be abolished.”⁵⁵ As was recently highlighted by the UNSR, “[v]ague prohibitions of disinformation effectively empower Government officials with the ability to determine the truthfulness or falsity of content in the public and political domain.”⁵⁶ “False news” provisions similar to those contained under Article 398 of the Criminal Code of Montenegro have been found to be unconstitutional by courts in Canada,⁵⁷ Zambia,⁵⁸ Zimbabwe,⁵⁹ and South Korea.⁶⁰

2.3.3 Necessity and proportionality

A measure that interferes with the right to freedom of expression will only be justified if it is “necessary” in a democratic society and “proportionate” to the legitimate aim being pursued. These principles require that, where a State invokes a “legitimate aim” such as protecting public order or health, they must demonstrate in a “specific and individualized fashion the precise nature of the

⁵³ The Supreme Court of India, *Shreya Singhal v. Union of India*, Writ Petition No. 167 of 2012 (24 March 2015), par. 82 (“If judicially trained minds can come to diametrically opposite conclusions on the same set of facts it is obvious that expressions such as ‘grossly offensive’ or ‘menacing’ are so vague that there is no manageable standard by which a person can be said to have committed an offence or not to have committed an offence.”)

⁵⁴ UNSR, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression: Disease pandemics and the freedom of opinion and expression*, UN Doc. A/HRC/44/49, 23 April 2020, par. 14.

⁵⁵ UNSR, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda*, UN Doc. FOM.GAL/3/17 (3 March 2017), par. 2(a).

⁵⁶ UNSR, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression: Disease pandemics and the freedom of opinion and expression*, UN Doc. A/HRC/44/49, 23 April 2020, par. 49.

⁵⁷ The Supreme Court of Canada, *R. v. Zundel*, [1992] 2 SCR 731.

⁵⁸ High Court of Zambia, *Chipenzi v. The People*, Case no. HPR/03/2014.

⁵⁹ The Supreme Court of Zimbabwe, *Chavunduka v. Minister of Home Affairs*, 2000 (1) ZLR 552; The Supreme Court of Zimbabwe, *Chimanikire v. Attorney General of Zimbabwe*, Judgment No SC 14/2013, Application No SC 247/09.

⁶⁰ Constitutional Court of Korea, *Criminal Penalty on False Communication*, 22-2(B) KCCR 684, 2008 Hun-Ba 157, 2009 Hun-Ba 88(Consolidated) (28 December 2010) reprinted in Constitutional Court of Korea ‘Constitutional Court Decisions’ (Seoul, Republic of Korea, 2011).

threat.”⁶¹ Furthermore, they must establish a “direct and immediate connection between the expression and the threat.”⁶²

In the circumstances of the cases above, there have been no relevant reasons for adopting the measures taken against the defendants in those cases. For instance, no evidence was presented of public disorder or threat to public health in response to any of the individuals’ publications. Furthermore, the individuals themselves were social media users who did not hold significant positions of influence over the public. Posts that are made on social media websites, such as Facebook and Instagram, particularly those made by private individuals, are not treated with the same authority and level of seriousness by users as official announcements or journalistic output. This was recognised by the European Court of Human Rights in *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, where it was stated that “regard must be had to the specificities of the style of communication on certain Internet portals. For the Court, the expressions used in the comments, albeit belonging to a low register of style, are common in communication on many Internet portals – a consideration that reduces the impact that can be attributed to those expressions.”⁶³ The measures that were adopted in the cases detailed above fail to meet the test of “necessity” in light of the limited impact of the impugned statements.

Furthermore, the criminal measures adopted in these cases cannot be deemed to be “proportionate” to any legitimate aim being pursued. It is an established principle of international law that a restriction on the right to freedom of expression must be the “least intrusive instrument among those which might achieve the desired result.”⁶⁴ It is not evident how the purpose behind Article 398 of the Criminal Code of Montenegro could not be adequately achieved through civil law penalties rather than criminal law penalties.

Moreover, there are less restrictive means of tackling misinformation than penalising individuals for publishing false or misleading statements. The UNSR has urged States to adopt “an approach to address the problem of misinformation that fosters public correction of rumours and the calling out of harmful chicanery and that avoids driving such misinformation into places where conspiracy theories defeat rigorous scientific assessments and public health warnings – one rooted in legal frameworks that promote the sharing of reliable information.”⁶⁵ In other words, the UNSR states that in many cases the spreading of false rumours or allegations can be adequately remedied and tackled through careful and public correction of misinformation.⁶⁶ In fact, criminalising information relating to the pandemic may have the opposite effect of promoting reliable and truthful information. Instead it can create distrust in institutional information, delay access to reliable information and have a chilling effect on freedom of expression.⁶⁷

⁶¹ UN Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, UN Doc. CCPR/C/GC/34, par. 35.

⁶² *Id.*

⁶³ ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, Application no. 22947/13 (2 February 2016), par. 77.

⁶⁴ UN Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, UN Doc. CCPR/C/GC/34, par. 35

⁶⁵ UNSR, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression: Disease pandemics and the freedom of opinion and expression*, UN Doc. A/HRC/44/49, 23 April 2020, par. 6.

⁶⁶ *Id.*, par. 47.

⁶⁷ Freedom of Expression Monitors of the United Nations, the Organization for Security and Cooperation in Europe and the Inter-American Commission for Human Rights, “COVID-19: Governments must promote and protect access to and free flow of information during pandemic – international experts,” 19 March 2020.

The World Health Organisation has also recommended, in the context of managing epidemics, that the Government response to misinformation should be aimed at correction not penalty. It has recommended an approach which involves “listen[ing] to such misinformation and correct[ing] examples of it in appropriate ways without delay.”⁶⁸ This approach has not been adopted in these cases, where the authorities have favoured a disproportionate application of criminal law against the individuals concerned.⁶⁹

Additionally, depriving an individual of their liberty and pursuing criminal charges against them are particularly disproportionate restrictions on the right to freedom of expression in these cases. The European Court of Human Rights has stated that the imposition of a penalty of imprisonment against an individual for expressing themselves will only be compatible with Article 10 ECHR in “exceptional circumstances,” where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.⁷⁰ The UNSR has stated that “[i]n the case of offences such as... publishing or broadcasting “false” or “alarmist” information, prison terms are both reprehensible and out of proportion to the harm suffered by the victim. In all such cases, imprisonment as punishment for the peaceful expression of an opinion constitutes a serious violation of human rights.”⁷¹

In the cases outlined in this report, all the individuals were detained for a period of time and faced the threat of imprisonment. These were clearly disproportionate measures and there were no “exceptional circumstances” justifying such a response. It must also be noted that these individuals were held in detention during the Covid-19 pandemic, which adds to the disproportionality of such measures. As has been stated by the World Health Organisation; “people deprived of their liberty, and those living or working in enclosed environments in their close proximity, are likely to be more vulnerable to ... COVID-19 ... than the general population.”⁷²

Even setting aside the detention measures adopted in these cases, the penalisation of the relevant statements itself amounts to a disproportionate restriction on the right to freedom of expression. The European Court of Human Rights has stated that “the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available.”⁷³ As noted above, the authorities in these cases have failed to exercise such restraint, and have attempted to penalise the individuals concerned instead of pursuing less restrictive means of managing misinformation during the pandemic.⁷⁴

In light of the above, the HRA believes that these cases amount to serious violations of the right to freedom of expression under Article 10 ECHR and Article 19 ICCPR, and that all charges should be

⁶⁸ World Health Organization (WHO), *Managing Epidemics: Key Facts about Major Deadly Diseases* (Geneva, 2018), p.34.

⁶⁹ It is noteworthy that in the case of Sanja O., where public correction was given to the impugned statement, criminal proceedings were still pursued.

⁷⁰ ECHR, *Cumpana and Mazare v. Romania*, Application No. 33348/96 92004 (17 December 2004), para 115.

⁷¹ UNSR, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, par. 205.

⁷² WHO, “*Preventing COVID-19 outbreak in prisons: a challenging but essential task for authorities*,” 23 March 2020.

⁷³ ECtHR, *Castells v. Spain*, Application no. 11798/85 (23 April 1992), par. 46.

⁷⁴ UNSR, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression: Disease pandemics and the freedom of opinion and expression*, UN Doc. A/HRC/44/49, 23 April 2020, par. 42. (“[P]enalization of disinformation is disproportionate since it fails to achieve its goal of tamping down information while instead deterring individuals from sharing what could be valuable information.”)

dropped against the individuals concerned. Furthermore, the HRA believes that Article 398 of the Criminal Code of Montenegro is incompatible with the right to freedom of expression under international law and should, therefore, be repealed.

3 Right to Privacy

3.1 The Publication of Names and Addresses of Individuals Subject to Self-Isolation

On 22 March 2020, the National Coordination Body for Communicable Diseases (NCB), founded by the Government of Montenegro,⁷⁵ decided to publish online a list of forenames, surnames and addresses of persons who were ordered into obligatory 14-day self-isolation due to their COVID-19 risk. These decisions were made on the basis that these individuals had travelled into Montenegro from another country. The first list, published on 21 March 2020, consisted of more than 1000 names.⁷⁶ A few days later, it consisted of at least 1800 names.⁷⁷ By 20 April 2020, around the time when the website was taken down, no names were deleted from the list and only new names were added. This brought the total number of published names to over 2000. Some sources claim the list contained more than 6000 names.⁷⁸

Although the decision to start publishing names on the Government's website came into force on 21 March, the NCB was founded only on 30 March.⁷⁹ This information provoked a negative reaction from the public.⁸⁰ The HRA has tried to receive the official information on the exact number of published names but both the Ministry of Health and Agency for Personal Data Protection and Free Access to Information (the Agency) have denied those requests, stating that they are not in possession of this information.

The Government adopted this measure after receiving an Opinion from the Agency,⁸¹ which supported the measure. The Agency reasoned that publishing the names and addresses of persons in self-isolation was not contrary to the Personal Data Protection Law of Montenegro.

⁷⁵ Government of Montenegro: National Coordination Body and Coordination Body for Prevention and Eradication of Communicable Diseases are not the same, (14 April 2020) available at: <http://www.gov.me/en/News/223776/National-Coordination-Body-and-Coordination-Body-for-Prevention-and-Eradication-of-Communicable-Diseases-are-not-the-same.html>

⁷⁶ CDM: List of people who are in self-isolation: Protecting the health and lives of citizens is a priority, (21 March 2020), available at: <https://m.cdm.me/drustvo/spisak-osoba-koje-su-u-samoizolaciji-zastita-zdravlja-i-zivota-gradana-prioritet/>

⁷⁷ EUROPEANWESTERNBALKANS : Revealing identity of persons in self-isolation in Montenegro unconstitutional, experts claim, (25 March 2020) <https://europeanwesternbalkans.com/2020/03/25/revealing-identity-of-persons-in-self-isolation-in-montenegro-unconstitutional-experts-claim/>

⁷⁸ ZDNET: Coronavirus: This tiny country is posting the names and locations of quarantined citizens, (27 March 2020), available at: <https://www.zdnet.com/article/coronavirus-this-tiny-country-is-posting-the-names-and-locations-of-quarantined-citizens/>

⁷⁹ Decision on the formation of a National Coordinating Body for Communicable Diseases, "Odluka o osnivanju", no. 8-501/20-129/421 dated 30 March 2020

⁸⁰ VIJESTI: They worked under a "firm" that did not exist (16 April 2020) available at: <https://www.vijesti.me/vijesti/drustvo/430507/radili-pod-firmom-koja-nije-postojala>

⁸¹ Montenegro Agency For Personal Data Protection And Free Access To Information, opinion, available at: <http://www.gov.me/ResourceManager/FileDownload.aspx?rId=401605&rType=2>

The Government never enacted a written decision on this measure outlining the legal basis for it. Instead, the Government published the following statement on its web site:⁸²

“The National Coordination Body for Communicable Diseases has decided tonight, with the approval of the Agency for Personal Data Protection and Free Access to Information, to begin to disclose the names of persons who have been prescribed mandatory 14-day self-isolation decisions.

The decision was made after it was established that some persons – who were subject to this measure upon their arrival in Montenegro – were leaving their homes, thus exposing everyone who come into contact with them and the whole of Montenegro to a high degree of risk.

As nowhere in the world can security forces control every citizen who should be in self-isolation at any time, and given that every person who leaves self-isolation poses a danger to their family and the whole community, it was decided to disclose the names of persons in self-isolation.

The only alternative to this solution was to ban the movement of all citizens. The National Coordination Body assessed that this measure should not be introduced, since the experience of some countries in the region shows that declaring a state of emergency and banning movement in certain parts of the day does not guarantee respect for self-isolation at a time when movement is not prohibited.

The National Coordination Body, with full awareness that this Decision can be viewed from various aspects, decided unanimously with the firm conviction of all members that protecting the lives and health of citizens is our primary duty, obligation and highest priority.

The National Coordination Body appeals to all citizens not to offend the vast majority of responsible citizens who zealously respect self-isolation with a single word or act, but to give them all assistance and support, respecting social distance and other recommendations of the Public Health Institute. They are the best examples of responsibility because they can stop the spread of this epidemic and therefore deserve the high respect and support of all of us.”

Before the above statement was published and the website was made available, the following tweet was published by the Government:

“National coordination body for communicable diseases will start publication of the identity of persons in self-isolation tonight: let every citizen know which one of his neighbours and co-citizens threatens their safety by indiscipline.”

As outlined below, HRA believes this measure to be against international standards on the right to privacy and data protection.

3.2 Violations of the Right to Privacy

3.2.1 Right to privacy under constitution of Montenegro

In the Article 40 “The right to privacy” Montenegrin Constitution proclaims:

Everyone has the right to respect for his private and family life.

⁸² National Coordination Body for Communicable Diseases begins to disclose identity of persons in self-isolation: protecting health and life of citizens is our highest priority, statement available at: <http://www.gov.me/en/News/223144/National-Coordination-Body-for-Communicable-Diseases-begins-to-disclose-identity-of-persons-in-self-isolation-protecting-health.html>

In the Article 43 “Personal data,” the Constitution states:

The protection of personal data shall be guaranteed.

It is prohibited to use data beyond purpose for which they have been collected.

Everyone has the right of insight into data collected on his/her person and to the court protection in case of abuse.

According to Article 24 of the Constitution, the rights and freedoms guaranteed by the Constitution *may be restricted only by the law, within the scope permitted by the Constitution and to such an extent which is necessary to meet the purpose for which the limitation is allowed, in an open and democratic society. Limitations shall not be introduced for other purposes except for those for which they have been prescribed.*

Therefore, the Montenegrin Constitution does not, in fact, prescribe grounds for restrictions of the right to privacy with regard to personal data by any one of its Articles. Any restrictions, even if they correspond to the legitimate aims prescribed by the European Convention on Human Rights more generally, should be considered unconstitutional.

None of the listed Articles in any way leave space for restricting the right to privacy in the manner how Montenegrin Government did it.

3.2.2 An overview of international standards

Without prejudice to the position above, this report shall consider the incompatibility of the measures in relation to international human rights law. It is a fundamental principle of international human rights law that nobody should be subjected to arbitrary or unlawful interferences with their privacy. This principle is enshrined in Article 17 of the International Covenant on Civil and Political Rights (ICCPR),⁸³ as well as Article 8 of the European Convention on Human Rights (ECHR).⁸⁴ Montenegro is a party to both of these treaties.

The right to privacy is a broad term that should not be read restrictively.⁸⁵ It includes the right to establish and develop relationships with other human beings,⁸⁶ as well as the protection of an individual’s right to live privately and away from unwanted attention.⁸⁷ Furthermore, given its fundamental importance to a person’s enjoyment of their right to privacy, States are also under an obligation to protect individuals’ personal data. The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (hereinafter “Convention 108”) sets out the principles required to protect the right to data protection.⁸⁸ Montenegro has ratified Convention 108.

⁸³ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 17.

⁸⁴ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 8.

⁸⁵ European Court of Human Rights (ECtHR), *Amann v. Switzerland*, Application no. 27798/95 (16 February 2000), par. 65.

⁸⁶ *Id.*

⁸⁷ ECtHR, *Smirnova v. Russia*, Applications nos. 46133/99 and 48183/99 (24 October 2003), par. 95.

⁸⁸ See Council of Europe, *Modernised Convention for the Protection of Individuals with Regard to the Processing of Personal Data (Convention 108+)*, 128th session of the Committee of Ministers, Elsinore, 18 May 2018.

The European Court of Human Rights has consistently stated that “where there has been compilation of data on a particular individual, processing or use of personal data or publication of the material concerned in a manner or degree beyond that normally foreseeable, private life considerations arise.”⁸⁹ The UN Human Rights Council has stated that there is an obligation on States to protect individuals against violations and abuses of the right to privacy “through the unlawful or arbitrary collection, processing, retention or use of personal data.”⁹⁰ An individual’s name and address fall within the definition of “personal data” under the Convention 108.⁹¹

Although names, surnames and residential addresses are not in themselves sensitive personal data,⁹² combining them in lists related to their Covid-19 status or risk transforms this data into particularly private health data. As health is “the most important fundament of everybody’s life,”⁹³ health-related data is treated as a highly sensitive category of personal data under human rights law.⁹⁴ Article 6 of Convention 108, for example, provides that health-related data enjoys a higher level of protection due to, among other things, “the risk of discrimination which may occur with their processing.”⁹⁵ Similarly, the GDPR gives higher protection to “data concerning health,” as the use of such sensitive data may have significant adverse impacts for data subjects.⁹⁶ The European Court of Human Rights has similarly stated that the right to privacy applies especially when it comes to protecting the confidentiality of data relating to viruses, since disclosure of such information can have detrimental effects on the private and family life of the individual and his or her social and professional situations, including exposure to stigma and possible exclusion from the community.⁹⁷

The European Data Protection Board has stated that “data concerning health” under the GDPR must be given a wide interpretation and, in recent guidelines, has clarified that it would include “[i]nformation that becomes health data by cross-referencing with other data thus revealing the state of health or health risks” and “[i]nformation that becomes health data because of its usage in a specific context (such as information regarding a recent trip to or presence in a region affected with COVID-

⁸⁹ See ECtHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, Application no. 931/13 (27 June 2017), par. 136; ECtHR, *Uzun v. Germany*, Application no. 35623/05 (2 December 2010), par. 44-46; See also ECtHR, *Rotaru v. Romania*, Application no. 28341/95 (4 May 2000), par. 43-44; ECtHR, *P.G. and J.H. v. the United Kingdom*, Application no. 44787/98 (25 December 2001), par. 57; ECtHR, *Amann v. Switzerland*, Application no. 27798/95 (16 February 2000), par. 65-67; and ECtHR, *M.N. and Others v. San Marino*, Application no. 28005/12 (7 July 2015), par. 52-53.

⁹⁰ UN Human Rights Council, *Resolution adopted by the Human Rights Council on 23 March 2017: The Right to Privacy in the Digital Age*, UN Doc. A/HRC/RES/34/7, par. 5(f).

⁹¹ See Convention 108+, Article 2(a).

⁹² See EU Parliament, *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR)*, Recitals 51, 52, 53, 54.

⁹³ UN Special Rapporteur on the Right to Privacy, *Annual Report of the Special Rapporteur on the Right to Privacy to UN Human Rights Council*, 27 February 2019, UN Doc. A/HRC/40/63, par. 112.

⁹⁴ *Id.*, par. 140.

⁹⁵ Convention 108+, Explanatory Report, par. 55. See also, Committee of Ministers of the Council of Europe, *Recommendation CM/Rec(2019)2 of the Committee of Ministers to member States on the protection of health-related data*, adopted by the Committee of Ministers on 27 March 2019 at the 1342nd meeting of the Ministers' Deputies.

⁹⁶ See EU Parliament, *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR)*, Articles 4(15), 9 and Recital 53.

⁹⁷ See, for example, ECtHR, *Z v. Finland*, Application no. 22009/93 (25 February 1997); and ECtHR, *Mockute v. Lithuania*, Application no. 66490/09 (27 May 2018).

19 processed by a medical professional to make a diagnosis).⁹⁸ The publication of an individual's self-isolation due to their suspected risk of having Covid-19 must fall within the definition of health-related data.

Accordingly, the collection, processing and publication of individuals' names, addresses, as well as information implying their suspected Covid-19 status or risk, was a clear interference with their right to privacy. For such an interference to be justified under international human rights law, it must have been: i) provided by law and not arbitrary, ii) for a purpose that was necessary in a democratic society, iii) for the purpose of "national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others," and iv) proportionate to the threat or risk being managed.⁹⁹

3.2.3 Legality, necessity and proportionality

Although the publication may have been for the purpose of protecting public health,¹⁰⁰ it did not meet the principles of legality, necessity and proportionality required to be compatible with the right to privacy under international human rights law.

First, the publication of the names and addresses of those who were subject to self-isolation was not "in accordance with the law." For an interference to be "in accordance with the law" under Article 8 ECHR, it must not only be in compliance with national law, but the national law itself must be clear, foreseeable and adequately accessible.¹⁰¹ Furthermore, there needs to be adequate safeguards in the national law to ensure that an individual's Article 8 ECHR rights are respected.

In this case, the Agency relied on provisions of the Law on Personal Data Protection of Montenegro and the Law on Health Care to justify the decision to publish the relevant data. However, these provisions lack the clarity and precision that would give individuals "an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to" such an extreme measure for protecting public health.¹⁰² Furthermore, there were no adequate guarantees that the published data were efficiently protected against misuse and abuse.¹⁰³

Second, the publication was not "necessary in a democratic society." To assess whether a measure is "necessary in a democratic society," the European Court of Human Rights has looked at whether the reasons adduced to justify the measure were relevant and sufficient and whether the measure was

⁹⁸ See European Data Protection Board, *Guidelines 03/2020 on the processing of data concerning health for the purpose of scientific research in the context of the COVID-19 outbreak*, adopted on 21 April 2020, par. 8 [emphasis added].

⁹⁹ See UN Special Rapporteur on the Right to Privacy, *Annual Report of the Special Rapporteur on the Right to Privacy to UN Human Rights Council*, 27 February 2019, UN Doc. A/HRC/40/63, par. 16 and 18. See also UN Human Rights Council, *Resolution adopted by the Human Rights Council on 23 March 2017: The Right to Privacy in the Digital Age*, UN Doc. A/HRC/RES/34/7.

¹⁰⁰ Note that the Committee of Ministers has a restricted set of legitimate bases for processing health-related data, including for reasons of public health, provided appropriate safeguards are enshrined in law and the processing is necessary for the purpose. See Committee of Ministers of the Council of Europe, *Recommendation CM/Rec(2019)2 of the Committee of Ministers to member States on the protection of health-related data*, adopted by the Committee of Ministers on 27 March 2019 at the 1342nd meeting of the Ministers' Deputies, par. 5(a).

¹⁰¹ ECtHR, *Silver and others v. the United Kingdom*, Application no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 (25 March 1983), par. 87.

¹⁰² ECtHR, *Fernández Martínez v. Spain*, Application no. 56030/07 (12 June 2014), par. 117.

¹⁰³ See ECtHR, *S. and Marper v. the United Kingdom*, Applications nos. 30562/04 and 30566/04 (4 December 2008), par. 103.

proportionate to the legitimate aims pursued.¹⁰⁴ In particular, it will look at whether it is possible to achieve the aims pursued by less restrictive means.¹⁰⁵ According to the NCB, the measure was adopted to ensure that individuals respect self-isolation decisions. Yet, by the time the list was published, only five criminal charges had been filed for violating self-isolation.¹⁰⁶ By 3 June, the number was only 51, while app. 2000 others respected the order.¹⁰⁷

Furthermore, the aim could have been achieved through less restrictive means than through the worldwide publication of the names and addresses of individuals suspected of being a Covid-19 risk. For example, it could have been achieved through the sharing of the information with police services or community hubs that could monitor compliance with Covid-19 related measures by phone calls or visitations or electronic monitoring, by increasing the penalties for breaching a self-isolation decision, or by placing those who are subject to a self-isolation decision into supervised accommodation for the duration of their self-isolation.

The disproportionate nature of the measure can be demonstrated by the fact that it violated a number of important data protection principles. According to Convention 108, read alongside the Committee of Ministers of the Council of Europe Recommendation on the protection of health-related data, health-related data must be processed in a transparent, lawful and fair manner. In this context, there is an obligation on the data controller to inform a data subject about the processing of personal data and provide specific information about the processing in an intelligible and easily accessible manner using clear and plain language.¹⁰⁸ The collection, storage, and publication of the data in this case was not accompanied by a privacy policy or any other notice that satisfied this data protection principle.

¹⁰⁴ ECtHR, *Z v. Finland*, Application no. 22009/93 (25 February 1997), par. 94.

¹⁰⁵ ECtHR, *Roman Zakharov v. Russia*, Application no. 47143/06 (4 December 2015), par. 260. Committee of Ministers of the Council of Europe, *Recommendation CM/Rec(2019)2 of the Committee of Ministers to member States on the protection of health-related data*, adopted by the Committee of Ministers on 27 March 2019 at the 1342nd meeting of the Ministers' Deputies, par. 4.1(e) ("data must be adequate, relevant and not excessive in relation to the purposes for which they are processed").

¹⁰⁶ Number derived from the Direction of the Police Twitter account, available at: <https://twitter.com/policijacg?lang=en>

¹⁰⁷ Information derived from Direction of the Police on 17 April 2020, stated that in period from 14 March to 22 March there were 7 criminal charges filed for violating self-isolation, and in period from 14 March 2020 to 3 June 2020 there were 51 criminal charges filed.

¹⁰⁸ The European Data Protection Board in its Statement on the processing of personal data in the context of the COVID-19 outbreak, adopted on 19 March 2020, highlighted the following: "data subjects should receive transparent information on the processing activities that are being carried out and their main features, including the retention period for collected data and the purposes of the processing. The information provided should be easily accessible and provided in clear and plain language. It is important to adopt adequate security measures and confidentiality policies ensuring that personal data are not disclosed to unauthorised parties." European Data Protection Board, *Statement on the processing of personal data in the context of the COVID-19 outbreak*, available at: https://edpb.europa.eu/our-work-tools/our-documents/other/statement-processing-personal-data-context-covid-19-outbreak_en. See also UN Human Rights Committee, *CCPR 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 at the Thirty-second Session of the Human Rights Committee on 8 April 1988, par. 10 ("In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files").

Furthermore, under Convention 108, the data must be accurate and, if necessary, kept up to date.¹⁰⁹ In this case, following the disclosure of the data on the website, a number of individuals have come forward to claim that the list contained inaccuracies.¹¹⁰ Accordingly, the NCB has failed to comply with this data protection principle.

The Council of Europe data protection principles also place an obligation on data controllers to “carry out, before commencing the processing and at regular intervals, an assessment of the potential impact of the foreseen processing of data in terms of data protection and respect for privacy, including of the measures aimed at mitigating the risk.”¹¹¹ There is no permitted exception to this obligation, even on grounds of protecting public safety or the rights and freedoms of others.¹¹² At no point was a Data Protection Impact Assessment, Human Rights Impact Assessment or any equivalent assessment carried out on the proposal to publish the data in this case. Instead, the NCB relied on a 3-page Opinion of the Agency to justify their decision to take this measure. This Opinion did not attempt to consider the potential impact of publishing this sensitive data on the data subjects, nor did it set out measures for mitigating risk.

The Committee of Ministers has also stated that, when processing health-related data, data controllers should establish “[a]ppropriate security measures, taking into consideration the latest technological developments, the sensitive nature of health-related data and the assessment of potential risks.”¹¹³ These measures should be established to “prevent risks such as accidental or unauthorized access to personal data, or its destruction, loss, use, unavailability, inaccessibility, modification or disclosure.” Furthermore, the measures should guard against the “risks that processing of the data may present for the interests, rights and fundamental freedoms of the data

¹⁰⁹ Convention 108+, Article 5(d). See also Committee of Ministers of the Council of Europe, *Recommendation CM/Rec(2019)2 of the Committee of Ministers to member States on the protection of health-related data*, adopted by the Committee of Ministers on 27 March 2019 at the 1342nd meeting of the Ministers' Deputies, par. 4.1(e).

¹¹⁰ One of the comments under RTCG post “The publication of the identities of persons in self-isolation has begun”, states: “Wrong dates !!!! Wrong dates are listed because I arrived with a group of people on 16 March. If they are already publishing, they should be precise!” (22 March 2020) available at: <http://www.rtcg.me/koronavirus/crnagora/273212/pocelo-objavljivanje-identiteta-osoba-u-samoizolaciji.html>

¹¹¹ Committee of Ministers of the Council of Europe, *Recommendation CM/Rec(2019)2 of the Committee of Ministers to member States on the protection of health-related data*, adopted by the Committee of Ministers on 27 March 2019 at the 1342nd meeting of the Ministers' Deputies, par. 4.2. There is a similar provision under the GDPR which requires a data controller to carry out a Data Protection Impact Assessment where the processing of personal data is likely to result in a high risk to the rights and freedoms of natural persons. See GDPR, Article 35.

¹¹² Convention 108+, Article 11(1).

¹¹³ Committee of Ministers of the Council of Europe, *Recommendation CM/Rec(2019)2 of the Committee of Ministers to member States on the protection of health-related data*, adopted by the Committee of Ministers on 27 March 2019 at the 1342nd meeting of the Ministers' Deputies, par. 4.1(f). See also Convention 108+, Explanatory Report, 62. On 30 March 2020, the Chair of the Committee of Convention 108 and the Data Protection Commissioner of the Council of Europe released a joint statement that said “the publication of sensitive data (such as the health-related data) of specific individuals should be avoided and it is recommended that the processing of such data is only done, if *additional technical and organisational measures* that are complementing those applied to non-sensitive data are put in place.” [emphasis added] See Council of Europe, *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*, available at: <https://www.coe.int/en/web/data-protection/statement-by-alessandra-pierucci-and-jean-philippe-walter>.

subject, notably a risk of discrimination.”¹¹⁴ There is also no permitted exception to this obligation to adopt security measures, even on grounds of protecting public safety or protecting the rights and freedoms of others.¹¹⁵

The Committee of Ministers has stated that “[h]ealth-related data can only be communicated to an authorised recipient who is subject to the rules of confidentiality incumbent upon a health-care professional, or to equivalent rules of confidentiality, unless other appropriate safeguards are provided for by law.”¹¹⁶ The European Court of Human Rights has stated that Article 8 ECHR requires that States provide “practical and effective protection to exclude any possibility of unauthorised access” to medical data from occurring.¹¹⁷ In this case, the names, addresses, and health-related data of thousands of individuals have been communicated to anyone who accesses the relevant website and there are no appropriate safeguards in place to prevent the risk of unauthorised access or unwarranted repurposing of that data.¹¹⁸ Furthermore, those who have access to the website are not subject to any rules of confidentiality. This has reportedly led to this data being used for the “*crnagorakorona*” app.

The UN Human Rights Committee has said that “[e]ffective measures have to be taken by States to ensure that information concerning a person’s private life does not reach the hands of persons who are not authorised by law to receive, process and use it, and is never used for purposes incompatible with the [ICCPR].”¹¹⁹ The UN Special Rapporteur has warned about the interest various actors have in health-related data, and how such actors might use this data for other purposes.¹²⁰ He has observed that medical data is of “high value” for purposes such as social security, labour and business, and stakeholders such as insurance companies and employers have an interest in health-related data. The Committee of Ministers has explicitly stated that, except in a very limited set of circumstances where appropriate safeguards are in place, insurers and employers cannot be regarded as recipients authorised to have access to health-related data. In this case, not only are there no measures against unauthorised access to and processing of the relevant data, *anyone* could access the data published on the website and the data subjects had lost complete control of this data.

¹¹⁴ Convention 108+, Article 6(2).

¹¹⁵ Convention 108+, Article 11(1).

¹¹⁶ The Law on Personal Data Protection of Montenegro clearly prescribes in Article 13, paragraph 3 that any data pertaining to the “detection, prevention, or diagnosis of a subject’s illness or the administration of medical treatment to them”, can only be processed “if the processing is conducted by a health worker or other professional under duty of confidentiality”.

¹¹⁷ ECtHR, *I v. Finland*, Application no. 20511/03 (17 October 2008), par. 47.

¹¹⁸ The Committee of Ministers have stated that “[d]ata controllers and their processors who are not health professionals should only process health-related data in accordance with rules of confidentiality and security measures that ensure a level of protection equivalent to the one imposed on health professionals.” A “health professional” is defined as someone “recognised as such by law practising in the health-care and social welfare sectors, and who are bound by a confidentiality obligation and involved in providing health care.” See Committee of Ministers of the Council of Europe, *Recommendation CM/Rec(2019)2 of the Committee of Ministers to member States on the protection of health-related data*, adopted by the Committee of Ministers on 27 March 2019 at the 1342nd meeting of the Ministers’ Deputies, par. 3 and 4.4.

¹¹⁹ UN Human Rights Committee, *CCPR 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 at the Thirty-second Session of the Human Rights Committee on 8 April 1988, par. 10.

¹²⁰ The right to data protection includes a “purpose binding principle. The UN Special Rapporteur on the Right to Privacy has described this as a requiring that “secondary use of personal data may only be undertaken for a purpose compatible with the primary purpose.” See UN Special Rapporteur on the Right to Privacy, *Annual Report of the Special Rapporteur on the Right to Privacy to UN Human Rights Council*, 27 February 2019, UN Doc. A/HRC/40/63, par. 124. Under the GDPR, this is referred to the “purpose limitation” principle. See GDPR, Article 5(1)(b). See also Convention 108+, Article 5(4)(b).

Furthermore, the publication of the data raises particular risks around exposing individuals to stigma, potential violence, hate speech and discrimination. The explanatory report to Convention 108 acknowledges that “the disclosure of data covered by professional confidentiality, or which may result in financial, reputational, or physical harm or humiliation, could be deemed to constitute a ‘serious’ interference.”¹²¹ The Government of Montenegro should have been aware of these particular risks to the interests, rights and freedoms of those whose data was being published since, among other things, the individuals who were identified online as being the first confirmed cases of coronavirus were reported to have been targeted with hate speech on the basis of their ethnicities and religious beliefs.¹²² There were no appropriate measures in place to prevent and guard against such risks for those who were included in the published list of individuals subject to self-isolation.

Additionally, by publishing health-related data online, which should have been subject to strict confidentiality, the NCB did not promote public health, they undermined it. The European Court of Human Rights has highlighted that “respecting the confidentiality of health data is crucial not only for the protection of a patient’s privacy but also for the maintenance of that person’s confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from seeking appropriate treatment, thereby endangering their own health and, in the case of transmissible diseases, that of the community.”¹²³ The measure adopted in this case undermined the much-needed trust in confidentiality of personal data especially regarding medical status. This could result in people who are experiencing the symptoms of the virus avoiding medical assistance for fear that their identity would be disclosed in a similar way.

In light of the above, the HRA maintains that the collection, processing and publication of the names, addresses, and information disclosing the suspected Covid-19 risk of individuals in Montenegro was in violation of the right to privacy under Article 8 ECHR and Article 17 ICCPR. HRA recommends that the Law on Personal Data Protection of Montenegro be applied and, where relevant, revised in conformity with the international standards protecting the right to privacy and data protection to ensure that such measures are not adopted in the future.

¹²¹ Convention 108+, Explanatory Report, par. 64.

¹²² Balkan Insight, *Montenegrin Coronavirus Patients’ Identities Exposed Online*, (18 March 2020), available at: <https://balkaninsight.com/2020/03/18/montenegrin-coronavirus-patients-identities-exposed-online/>.

¹²³ See, for example, ECtHR, *Biriuk v. Lithuania*, Application no. 23373/03 (25 February 2009), par. 43.

4 Concluding Recommendations

This report makes the following recommendations in relation to the abovementioned matters of freedom of expression on social networks and privacy rights in relation to personal data:

- During this international health crisis, Montenegro must promote and protect all human rights, including the rights to privacy and freedom of expression, to the standard set by international human rights law. This means that any extraordinary measures restricting such rights for public health purposes should meet the requirements of legality, necessity and proportionality, and be non-discriminatory. Accordingly, Montenegro should consider less restrictive measures to meet the legitimate aims pursued, including the protection of public health;
- Emergency powers, if they were to be adopted, should be time-bound, regularly reviewed, and only exercised on a temporary basis with the aim to restore a state of normalcy as soon as possible;
- Article 398 of the Criminal Code of Montenegro is incompatible with the right to freedom of expression under international law, and should be abolished/repealed without delay;
- All ongoing criminal proceedings that have been taken against individuals pursuant to Article 398 of the Criminal Code of Montenegro should be dismissed immediately, and no criminal charges or offences should be pursued, or criminal records maintained, against individuals under this provision;
- Montenegro should promote accurate and reliable information, and adopt measures of careful and public correction in response to misinformation online, during the pandemic instead of penalising those who have published or otherwise spread false information;
- Montenegro should display restraint when resorting to criminal penalties in matters involving freedom of expression, and detention should only be used in the most exceptional of circumstances concerning hate speech or incitement to violence;
- Montenegro should take into account that individuals publishing statements on social media cannot be held to the same standard as media outlets or official communication channels, particularly in light of the limited impact of social media comments;
- Montenegro should not make available to the public the names, addresses and other personal data of individuals who are suspected of having Covid-19 or being at risk of spreading Covid-19;
- Montenegro should revise the Law on Personal Data Protection in conformity with international standards on the right to privacy and data protection, as well as the Constitution of Montenegro which does not appear to permit any restrictions on the right to privacy;
- Montenegro should enforce and apply Convention 108+ in relation to all processing of personal data related to the pandemic, whether carried out by public or private entities, particularly those provisions relating to the processing of special categories of data.