



# PROCEDURAL RIGHTS OF PERSONS DEPRIVED OF LIBERTY IN NON-CRIMINAL PROCEEDINGS: EUROPEAN STANDARDS AND THEIR APPLICATION DURING THE COVID-19 PANDEMIC

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DURING THE COVID-19 PANDEMIC

Prepared by:  
Kanstantsin Dzehtsiarou and Filippo Fontanelli

Council of Europe

Procedural rights of persons deprived of liberty in non-criminal proceedings: European standards and their application during the COVID-19 pandemic

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All other correspondence concerning this document should be addressed to the Human Rights National Implementation Unit, Avenue de l'Europe  
F-67075, Strasbourg Cedex, France,  
Tel. +33 (0)3 88 41 20 00  
E-mail: Horizontal.Facility@coe.int

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## INTRODUCTION AND STRUCTURE OF THE REPORT

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This report assesses whether Montenegro authorities, in the first semester of the COVID-19 pandemic – and in particular in the period between March and September 2020, have been compliant with the EU and international rule of law, in the context of adopting or implementing measures relating to administrative detention (that is, detention not ordered in relation to criminal responsibility<sup>1</sup>). The report mainly focuses on the state of EU law and the case law of the ECHR effective in August 2020, and refers mostly to domestic measures adopted before September 2020. All references, unless otherwise noted, are current as of September 2020.

This operation requires setting out the test of compliance with the relevant standards of protection under the law of the ECHR, EU law and international law at large. The analysis then proceeds to applying these tests with the measures effectively adopted by Montenegro. With respect to EU law, this analysis is carried out in the abstract, as Montenegro is not currently a EU Member State. It must be noted, however, that protection of fundamental rights is among the benchmarks used to assess Montenegro's progress towards EU membership. Compliance with fundamental rights standards, in other words, is not only an aspect relating to the EU law *acquis* (i.e., whether its law is in line with EU law on day one) but also a general condition for accession to the EU.<sup>2</sup> In this framework, the report includes a reference to the standards of protection contained in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)<sup>3</sup> and the ILC Articles on the expulsion of aliens.<sup>4</sup>

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1 For this reason, the analysis will not address detention measures in connection with extradition requests or European Arrest Warrants procedures.

2 European Commission, Montenegro 2020 Report, Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 6 October 2020, SWD(2020) 353 final, see Chapter 2.2 'Rule of law and fundamental rights.'

3 Montenegro has not ratified this convention.

4 International Law Commission, Expulsion of aliens Texts and titles of the draft articles adopted by the Drafting Committee on second reading, 30 May 2014, UN Doc. A/CN.4/L.832.

The Report is structured as follows. After the executive summary and some introductory remarks, the report starts by discussing the EU standards of human rights protection relevant to detention of irregular immigrants (**section 3**). Then it unpacks the test developed by the ECtHR to determine whether deprivation of liberty is compliant with Article 5 ECHR. The same section of the report considers the relevant case law of the ECtHR against Montenegro (**section 4**). **Section 5** commences with a survey of domestic measures that are capable of engaging these protection standards. This Section also offers an assessment of these measures in light of the applicable standards, and highlights where appropriate areas in which domestic authorities are invited to pay specific attention.

The collection of information and data has been somewhat complicated by the circumstances, and we are not able to guarantee that all relevant measures have been scrutinised. More importantly, we have lacked first-hand access to evaluate the effective implementation of the restrictive measures. We have been able to collect accounts regarding the implementation of Montenegro's measures during several interviews, facilitated by the office of the Council of Europe.<sup>5</sup> These interviews have proved helpful, even if we could not always vet the accuracy or comprehensiveness of the information gathered. The data collection occurred at a difficult time and at a time of national elections, and it has not been possible to interview governmental officers (in particular from the KBT).

Finally, **Section 6** of this report describes the key lines of discussion during the presentation of the draft of this report, which took place by videoconference in October 2021.

The findings of this report, therefore, might be incomplete. However, we made a particular effort to present abstract tests of compliance that could be applied also to measures that are not addressed in this report, and that public authorities and interested groups and individuals could consider, to gauge the lawfulness of any detention measure.

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5 The interview sessions were organised and facilitated by the staff of the Council of Europe office in Podgorica. The list of interviewees is as follows: Ms Dušica Merdović, Ms Aleksandra Vukcevic, NGO Civic Alliance, interview of 5 October 2020; Mr Sasha Cadjenovic and Mr Slobodan Rascanin, UNHRC, interview of 5 October 2020; Mr Spiro Pavicevic, judge at the Basic court Kotor, email interview of 16 October 2020; Ms Tamara Pavicevic, adviser to the administrative court, interview of 6 November 2020.



# 1. EXECUTIVE SUMMARY

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1. EU human rights standards are limited in their application, in the sense that the EU can only enforce human rights when its Member States act as the agents of the Union. For that reason, only immigration and requests for international protection which are devolved to the EU level are considered in this report. EU law provides a detailed set of requirements that the Member States have to comply with in dealing with irregular migrants.
2. The Court of Justice of the EU ('**CJEU**') defined detention as isolation from the rest of the population in a particular place. According to the European Court of Human Rights ('**ECtHR**'), the question of whether or not a person is in detention depends on various factors, including the type, duration, effects and manner of implementation of the measure. Depending on their overall intensity, measures adopted during the COVID-19 pandemic can fall within the notion of detention. For example, unsupervised lockdown or self-isolation would not be considered deprivation of liberty while strict supervised quarantine would.
3. The authorities of Montenegro did not derogate from the European Convention on Human Rights ('**ECHR**' or '**Convention**'). Therefore, all articles of the Convention were applicable during the COVID-19 pandemic. However, the ECtHR would certainly take the pandemic into account when considering individual cases. In such cases, the scope of margin of appreciation of the respondent state will be broader than normal, and the public interests pursued by a State to fight the pandemic might weigh against the enjoyment of individual rights and freedoms.
4. Although the ECtHR would allow broad margin of appreciation to the States, this margin is not unlimited. Moreover, the circumstances of the pandemic would not be able to absolve the States from certain obligations related to right to liberty and security.
5. All forms of deprivation of liberty should be lawful, that is, provided by the law. Moreover, the laws according to which the person is arrested should be clear, certain, foreseeable, accessible and non-arbitrary. Otherwise, the ECtHR will find a violation of Article 5 ECHR. The COVID-19 pandemic cannot spare from the obligation to provide for deprivation of liberty only through

lawful measures.

6. The case law of the ECtHR relevant to deprivation of liberty for preventing of spreading of infectious disease is very limited. It is plausible to suggest that such deprivation is possible to prevent COVID-19 from spreading, but it should be justified and necessary just the same. Moreover, persons deprived of their liberty for this purpose should be released immediately after the reason for deprivation ceases to exist.
7. The ECtHR established that arbitrary or automatic detention of illegal migrants would violate the Convention. The conditions of detention should be appropriate. Moreover, the circumstances of the pandemic would not be able to change this rule significantly. The Court will perhaps allow more flexibility in detaining illegal immigrants and allows longer terms for determination of their applications due to the difficulties associated with lockdowns and the possible suspension of asylum proceedings.
8. Illegal immigrants and persons detained to prevent infectious diseases continue to enjoy all other rights enshrined in the Convention. Articles 3, 6, 8 and 14 are particularly relevant in the context of the COVID-19 pandemic.
9. The report considered the case law of the ECtHR against Montenegro, finding that there is only a handful of cases concerning Article 5 ECHR. There are no specific cases relating to non-criminal detention brought to the ECtHR against Montenegro.
10. COVID-19-related measures in Montenegro were not always adopted in strict compliance with the requirements of the rule of law. As it has been stated, the requirement of legality of the emergency measures cannot be completely overlooked during the de facto state of emergency.
11. Although the conditions of the places for quarantine are difficult to assess, the authorities must ensure that quarantine facilities are of a sufficient size and have sufficient facilities to permit physical activity and a range of other activities, including for recreation.
12. It is important that both laws of general application and individual orders can be reviewed by the appropriate courts (constitutional or administrative). This review must be effective and timely, especially in the most urgent cases. The difficulties faced by the judiciary are noted, but they should not serve as a blanket excuse to deny an effective remedy.
13. The authorities should ensure that the conditions of detention of mentally ill persons are not inhuman or degrading. This is especially important during the pandemic because issues such as overcrowding and lack of hygiene might facilitate spreading of the virus. The hospital must be regularly visited by the governmental and non-governmental organisations in order to ensure that the conditions are appropriate.
14. Generally, the legal and practical aspects of the detention of foreigners comply with European standards. All procedures should be followed by the authorities in good faith, in accordance with the regulations and taking the human rights standards in consideration. Such practices as “silent extraditions” should not be used.
15. With specific regard to applicants for international protection, the pat-

terns reveal that most foreigners seeking protection are just crossing Montenegro while in transit to other States. There is, therefore, no problem of overcrowding and no significant stress to the capacity of the quarantine and shelter facilities, also due to the closure of borders to inwards migrants.

16. The practice relating to ordering quarantine rather than self-isolation for certain categories (including people entering from foreign countries) has been questioned and sometimes followed questionable criteria. It is important that measures of different restrictiveness are apportioned commensurably to different levels of risk.



## 2. COVID-19 AND ADMINISTRATIVE DETENTION

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The report addresses a delicate and current topic. Detention measures, by definition, restrict individual rights and freedoms and, therefore, require justification and careful assessment. Detainees, moreover, are a vulnerable population. On the one hand, they are likely to be particularly exposed to the risk of contagion of infectious diseases like the coronavirus, which spreads in densely populated environments. On the other hand, measures to reduce that risk might interfere further with the individuals' rights – for instance if family visits and communal activities are reduced.

The implications of a pandemic relating to an infectious disease increase the range of detention measures that are frequently ordered. In particular, coercive measures of quarantine and self-isolation can amount to detention for the purpose of human rights compliance. The UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('**UN SPT**'), upon the request of the National Preventive Mechanism ('**NPM**') of the UK, has confirmed at the outset of the pandemic that 'any place where a person is held in quarantine and from which they are not free to leave is a place of deprivation of liberty for the purposes of the [Optional Protocol to the Convention against Torture] and so falls within the visiting mandate of an NPM'.<sup>6</sup> The Organisation for the Security and Collaboration in Europe published guidelines related to the visitations of places of detention.<sup>7</sup>

The specific conditions of detention during the pandemic have been addressed by specific guidelines. The Council of Europe's Committee for the Prevention of Torture ('**CPT**') issued dedicated principles,<sup>8</sup> which apply to 'immigration detention

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6 UN SPT, Advice of the Subcommittee on Prevention of Torture to the National Preventive Mechanism of the United Kingdom of Great Britain and Northern Ireland regarding compulsory quarantine for Coronavirus, adopted at its 40th session (10 to 14 February 2020), para. 2.

7 Guidance. Monitoring Places of Detention through the COVID-19 Pandemic. <https://www.osce.org/files/f/documents/7/5/453543.pdf>.

8 Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic, 20 March 2020, document. CPT/Inf(2020)13.

centres, psychiatric hospitals ... as well as in various newly-established facilities/zones where persons are placed in quarantine.’

Likewise, the EASO<sup>9</sup> published a report on ‘COVID-19 emergency measures in asylum and reception systems, which also focuses on the measures of detention of applicants for international protection.’<sup>10</sup>

The International Commission of Jurists has published a briefing paper addressing the challenges that the pandemic has created for the implementation of the human rights of migrants and refugees in the EU.<sup>11</sup>

The UN SPT has published an advice relating to the treatment of detained persons during the pandemic,<sup>12</sup> stressing the two overarching principle of “do not harm” and “equivalence of care.” The advice points out that

it is essential that State authorities take full account of all the rights of person deprived of liberty and their families and detention and healthcare staff when taking measures to combat the pandemic.<sup>13</sup>

The present report does not aim to summarise all guidance and principles that were released since the pandemic started. The core aim of the report is to consider the existing EU and ECHR law standards concerning detention of persons for the prevention of the spreading of infectious diseases and of persons to prevent their effecting an unauthorised entry into the country or of persons against whom action is being taken with a view to deportation or extradition. Such standards are then applied to the COVID-19 pandemic specifically in Montenegro, limitedly to the State measures that we have reviewed. These standards are equally applicable to any other measure that might have escaped our attention, or that was adopted and implemented after this report was written (Summer/Autumn 2020).

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9 European Asylum Support Office, an agency of the European Union.

10 EASO, COVID-19 emergency measures in asylum and reception systems, PUBLIC – Issue no. 2, 15 July 2020.

11 International Commission of Jurists, The impact of COVID-19 related measures on human rights of migrants and refugees in the EU, Briefing paper, 26 June 2020.

12 UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic, 25 March 2020, available at <https://www.ohchr.org/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic2020.pdf>.

13 Ibid., para. 3.

### 3. EU LAW STANDARDS RELATED TO ADMINISTRATIVE DETENTION

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**E**U law does not and cannot require Member States to comply with human rights tout court. Human rights protection is a matter on which Member States have not conferred legislative competence upon the Union. However, the Union has made commitments to comply with human rights protection, and this commitment extends to Member States when they implement EU law.<sup>14</sup>

Therefore, domestic measures falling outside the application of EU law are not subject to review of legality under it, not even with respect to human rights standards. Conversely, when Member States act as agents of the Union, they are bound to comply with its law, including secondary acts like Directives and Regulations and primary acts, and in particular the Charter of Fundamental Rights of the EU (the '**Charter**').

Much of the measures that States have taken to counter the COVID-19 pandemic would not fall under the scope of application of EU law. In particular, health and security are competences that are reserved to the Member States. Conversely, matters relating to **immigration and requests for international protection** are devolved to the EU level. In regulating these matters, and in carrying out executive action, Member States must follow EU law, and to do so in compliance with the standards of human rights protection set in the Charter.

Accordingly, the report will focus on the action of Montenegro's authorities in these fields. After setting out the relevant sources (**sections A and B**), it provides an account of some salient judgments that might shed light on their interpretation (**section C**).

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14 Filippo Fontanelli, 'National Measures and the Application of the EU Charter of Fundamental Rights—Does curia.eu Know iura.eu?' (2014) 14.2 Human Rights Law Review 231-265.

## **A. The Charter of Fundamental Rights**

Directly relevant to the topic of detention are:

- Article 1 (human dignity);
- Article 4 (including protection against degrading treatment and punishment);
- Article 6 (right to liberty and security)
- Article 7 (respect for private and family life)
- Article 47 (right to an effective remedy and fair trial)

Insofar as these rights correspond to those protected under the European Convention on Human Rights ('**ECHR**' or '**Convention**'), the Charter provides that 'the meaning and scope of those rights shall be the same as those laid down by the said Convention' (Article 52.3 EU Charter), without prejudice to the possibility of EU law establishing a higher level of protection.

## **B. Applicable secondary law**

As explained above, the relevant sources relate exclusively to the treatment of migrants and the procedures applicable to individuals applying for international protection and their families. Of specific interest are Directive 2013/33<sup>15</sup> on the reception of applicants for international protection and Directive 2008/115 on the return of illegally staying third-country nationals.<sup>16</sup>

Essentially, these measures of secondary EU law prescribe certain standards of treatment for foreigners who are likely to require or need the intervention of public authorities, either because they apply for international protection or because they have received an order of expulsion on grounds of illegal stay. In both circumstances, the possibility of detention exists, subject to specific conditions.

These conditions are designed to satisfy the standards set in the ECHR too. In particular, the various preconditions for ordering detention and the minimum conditions of detentions provided by the EU Directives, apart from the Charter, are per se compatible with the ECHR:

As regards the guarantee enshrined in the first limb of Article 5(1)(f) of the ECHR, in accordance with which no one is to be deprived of his liberty, except in the case of the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country, as interpreted by the Euro-

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15 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection OJ L 180, 29.6.2013, p. 96–116.

16 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348, 24.12.2008, p. 98–107.



pean Court of Human Rights, it should be noted that that guarantee does not preclude necessary detention measures being taken against third-country nationals who have made an application for international protection, provided that such a measure is lawful and implemented in accordance with the objective of protecting the individual from arbitrariness ....

As is apparent from the reasoning set out in connection with the examination of the validity, in the light of Article 52(1) of the Charter, of the first subparagraph of Article 8(3)(a) and (b) of Directive 2013/33, that provision, whose scope is strictly circumscribed, satisfies those requirements.<sup>17</sup>

## **1. Treatment of applicants for international protection**

First, individuals cannot be detained for the sole reason that they have applied or wish to apply for international protection.<sup>18</sup> Detention can be ordered only after an ‘individual assessment of each case’ and ‘if other less coercive alternative measures cannot be applied effectively.’<sup>19</sup>

There is a closed list of grounds in which detention can be considered. Detention might be necessary to determine the applicant’s identity, the elements on which his application is based, or the right to enter the territory; in connection to a return procedure under Directive 2008/115 when it appears that the application has a dilatory goal; for reasons of national security and public order.<sup>20</sup> In any event, the grounds for detention shall be defined in national law.

Applicants enjoy several guarantees that their detention must be necessary and proportionate.<sup>21</sup> Detention cannot be longer than is necessary for its intended purpose, must be ordered in writing, and the order must state the reasons for it. In case of detention ordered by administrative authorities, the applicant must be able to trigger ‘speedy judicial review’ of its lawfulness.<sup>22</sup> Applicants must be provided information about the detention in a language that they understand, and must have access to free legal assistance and representation if necessary.

Moreover, the conditions of detention are laid out in the Directive, to protect detainees from fundamental rights violations.<sup>23</sup> First, applicants for international protection must be placed in specialised facilities, separately from ordinary prisoners and, to the extent possible, separately from other non-EU nationals who have not lodged an application for protection. In other words, the special nature of their detention should be reflected in their conditions, and they should not be merged with the wider prison population. In particular, detainees should be able to receive the visits of the UNHCR (United National High Commissioner for Refugees) person-

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17 Case C-18/16, K., Judgment of 14 September 2017, ECLI:EU:C:2017:680, para. 52-53.

18 Article 8.1, Directive 2013/33.

19 Article 8.2, Directive 2013/33.

20 Article 8.3, Directive 2013/33.

21 These are listed in Article 9, Directive 2013/33.

22 Article 9.3, Directive 2013/33.

23 Article 10, Directive 2013/33.

nel, or of organisations working on its behalf, and receive visits by family members and legal advisers. Vulnerable persons and minors are entitled to special care and differential treatment (e.g., with due care to their health condition or the best interests of the minor).<sup>24</sup> Female applicants must be accommodated separately from male applicants, besides their family members.

## **2. The 'return' Directive (ending of the illegal stay of third-country nationals) and the international law standard**

The general principles under general international law relating to the detention of aliens for the purpose of expulsion are contained in Draft Article 19 of the document on the expulsion of aliens prepared by the International Law Commission of the United Nations. While this document has no binding force, it largely reflects and codifies existing customary norms. Moreover, EU secondary law (see below) has observed the principles of Article 19, which is therefore worth quoting in full:

### **Detention of an alien for the purpose of expulsion**

1. (a) The detention of an alien for the purpose of expulsion shall not be arbitrary nor punitive in nature.

(b) An alien detained for the purpose of expulsion shall, save in exceptional circumstances, be separated from persons sentenced to penalties involving deprivation of liberty.

2. (a) The duration of the detention shall be limited to such period of time as is reasonably necessary for the expulsion to be carried out. All detention of excessive duration is prohibited.

(b) The extension of the duration of the detention may be decided upon only by a court or, subject to judicial review, by another competent authority.

3. (a) The detention of an alien subject to expulsion shall be reviewed at regular intervals on the basis of specific criteria established by law.

(b) Subject to paragraph 2, detention for the purpose of expulsion shall end when the expulsion cannot be carried out, except where the reasons are attributable to the alien concerned.

These principles emphasise the specific nature of detention in the framework of the process of expulsion. The three main features that it must satisfy are: the distinction from detention for criminal liability, its proportionality and its amenability to judicial review.

The EU has regulated the process of expulsion in Directive 2008/115 keeping these principles into account.<sup>25</sup> Under this instrument, State authorities can order deten-

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<sup>24</sup> Article 11, Directive 2013/33.

<sup>25</sup> See Return Handbook.

tion pending the implementation of return proceedings, if there is a risk that the individual absconds, hampers or avoids return. There is, therefore, a requirement of necessity and proportionality, as well as a guarantee that individuals in detention 'should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law.'<sup>26</sup> The order of detention must be issued by administrative or judicial authorities, and must state the reasons. The individual must be able to seek review of the order by a judge.

Importantly, domestic law must provide for a maximum period of detention not exceeding six months.<sup>27</sup> This period can only be extended, for no longer than twelve further months, if the individual does not cooperate or there are delays in the acquisition of documents from abroad.

With respect to the conditions of detention, the Directive 2008/115 contains safeguards similar to those laid down in Directive 2013/33, discussed above.

### **C. Relevant decisions**

In 2009, the Court of Justice of the EU ('**CJEU**') confirmed that the period of detention for the purpose of expulsion, which cannot be excessively long, must include the time of detention during which the removal decision is suspended because the individual has lodged an asylum application, and the authorities have not transferred the applicants.<sup>28</sup>

With respect to the detention of applicants for international protection, the Court has confirmed that Directive 2013/33 strikes a balance between the various interests at stake, in light with the applicable international standards.<sup>29</sup>

In May 2020, the CJEU confirmed the meaning of 'detention' (in relation to applicants for international protection, but the notion applies also to individuals awaiting expulsion):

The concept extends to any confinement of an applicant for international protection by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.

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<sup>26</sup> Recital 17, Directive 2008/115.

<sup>27</sup> Article 14.4, Directive 2008/115.

<sup>28</sup> Case C-357/09 PPU, *Kadzoev*, Judgment of 30 November 2009, ECLI:EU:C:2009:741.

<sup>29</sup> Case C-18/16, K, Judgment of 14 September 2017, ECLI:EU:C:2017:680, para. 46: 'the Court has also held that the grounds for detention provided for in the first subparagraph of Article 8(3)(a) to (c) of Directive 2013/33 are based on the Recommendation of the Committee of Ministers of the Council of Europe on measures of detention of asylum seekers of 16 April 2003 and on the United Nations High Commissioner for Refugees' (UNHCR) Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers of 26 February 1999, from which it is clear, in the version adopted in 2012, that, first, detention may be used only exceptionally and that, secondly, detention is to be used only as a last resort, when it is determined to be necessary, reasonable and proportionate to a legitimate purpose (see, to that effect, judgment of 15 February 2016, N., C 601/15 PPU, EU:C:2016:84, paragraph 63)'

... detention assumes a deprivation, and not a mere restriction, of freedom of movement, which is characterised by the fact that the person concerned is isolated from the rest of the population in a particular place.<sup>30</sup>

Indeed, the CJEU has often clarified that the regimes applicable to individuals waiting expulsion and to applicants for international protection can coexist, as the same individuals can fit the two categories. In particular, it is not uncommon that, while waiting for the removal or return order to be implemented, foreigners apply for international protection, possibly during a period of pre-expulsion detention. In those circumstances, therefore, the grounds for detention applicable under Directive 2008/115 might also apply to justify detention under the Directive 2013/33. Moreover, the lodging of an application for international protection entitles the applicant to delay the implementation of the removal order, until the application is considered.

Accordingly, the reasons on which the national authorities based their view that Mr N's individual conduct represents a serious threat to public policy, public security or national security, within the meaning of Article 11(2) of Directive 2008/115, *are also capable of justifying detention on grounds relating to the protection of national security or public order, within the meaning of point (e) of the first subparagraph of Article 8(3) of Directive 2013/33*. It is none the less necessary to verify that the principle of proportionality was strictly observed when such detention was ordered and that those reasons continue to be valid.

The fact that Mr N., after being issued with an order to leave the Netherlands and with a ten-year entry ban, made a fresh application for international protection is not an obstacle to the adoption under point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 of a measure ordering his detention. *Such detention does not deprive an applicant for international protection of the right to remain in the Member State under Article 9(1) of Directive 2013/32, for the sole purpose of the international protection procedure*, until the determining authority has taken a decision at first instance on his application for international protection.<sup>31</sup>

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30 Joined Cases C 924/19 PPU and C 925/19 PPU, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, Judgment of 14 May 2020, ECLI:EU:C:2020:367, para. 216-217.

31 Case C-601/15 PPU, *N.*, Judgment of 15 February 2016, ECLI:EU:C:2016:84, para. 73-74, emphasis added.

## 4. THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS APPLICABLE TO DETENTION IN NON-CRIMINAL PROCEEDINGS

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Situations of de facto emergency can engage the norms of the ECHR and the case law of the ECtHR in two ways. First, the Contracting Parties to the Convention can derogate from it under Article 15. Second, a factual state of emergency can influence the Court's interpretation of Article 5. Since the authorities of Montenegro have not derogated from the Convention, the former scenario is only briefly touched upon, below (**section A**). The legality of the actions of the authorities of Montenegro must be determined in light of the construction of Article 5, which is analysed more fully. First, the notion of margin of appreciation is explained (**section B**), which can affect the determination of compliance. Second, the application of the relevant norms of the Convention is offered, in light of their construction by the ECtHR (**section C**). **Section D** provides a survey of the relevant ECtHR cases against Montenegro.

### ***A. The discipline of derogations in time of emergency under Article 15 ECHR***

Article 15 ECHR provides that '[i]n time of war or other public emergency threatening the life of the nation'<sup>32</sup> the Contracting Parties to the Convention may derogate from the obligations under the Convention. It is undeniable that the COVID-19 crisis can fit the definition of a public emergency. However, while a Contracting Party can derogate from the Convention, it does not have an obligation to do so. Therefore, the authorities of Montenegro could choose not to resort to derogation, possibly because they considered that their actions have not interfered with human rights more than it is normally allowed by the ECtHR.

Even if Montenegro derogated from the ECHR, the effects of such derogation would not be significant. The ECtHR has no case law relevant to health emergencies and only considered the impact of Article 15 on military emergencies.<sup>33</sup> For instance, if a

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<sup>32</sup> Article 15 ECHR.

<sup>33</sup> They include armed conflicts, terrorist activities etc.

person is arrested on a suspicion of committing a crime then she should be brought promptly before a judge.<sup>34</sup> In this case, Article 15 might be of some assistance for the States as it can legalise the extension of the time limit between the actual arrest and the moment when the arrested person is brought before a judge.<sup>35</sup> However, the difference here will be calculated in hours and days, not months or years. Article 15 might broaden the scope of margin of appreciation of the State in these cases, but this margin will not be unlimited and it will be under the supervision of the ECtHR.<sup>36</sup>

The concept of margin of appreciation is important in understanding the extent of lawful interference in human rights including the rights under Article 5 ECHR.

## **B. The scope of the margin of appreciation**

Contracting Parties enjoy a certain margin of appreciation in their compliance with the Convention, besides (and irrespective of) the possibility to formally derogate in case of emergency. This section seeks to define this margin and discuss its scope. The extent of this margin determines what can be done by the States in a situation of emergency. The margin of appreciation is a useful tool of interpretation of the ECHR, which provides States with some ownership of the Convention rights and empowers them to implement their societal preferences in solving complex dilemmas. However, the vague scope of the margin of appreciation appears to permit overly broad judicial discretion in the assessment of State responsibility,<sup>37</sup> which is reflected in a case law that lacks predictability.<sup>38</sup> Conversely, States can argue that their measures falls into the margin in many cases, including related to Article 5 ECHR.<sup>39</sup>

There are no clear boundaries of the margin and this fact is accepted by many Convention commentators. Bakircioglu argues that '[a]n over-subjective and unprincipled application of discretion might not only dilute the concept of legal certainty, but also undermine the delicate structure of the European Convention system, the existence of which is dependent upon the wilful cooperation of Member States.'<sup>40</sup>

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34 Article 5-3.

35 Compare the judgments: in *Brannigan and McBride v. the United Kingdom*, 26 May 1993, Series A no. 258-B where Article 15 was triggered with *Brogan and Others v. the United Kingdom*, 29 November 1988, Series A no. 145-B.

36 See, for example *Bayatyan v. Armenia* [GC], application no. 23459/03, ECHR 2011, para. 121.

37 See, *Z. v. Finland*, Dissenting Opinion of Judge De Meyer. O. Bakircioglu, 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases', *German Law Journal*, 8 (2007), 711, 712; Gross and Ní Aoláin, 'From Discretion to Scrutiny', 627; Lester, 'Universality Versus Subsidiarity: A Reply', 75-6; R.S. Macdonald, 'The Margin of Appreciation' in R. Macdonald, F. Matscher and H. Petzold (eds), *The European System for the Protection of Human Rights*, (Kluwer Law International, 1993), p. 85.

38 Greer, for instance, argues that '... no simple formula can describe how it [margin of appreciation] works... [I]n spite of mountain of jurisprudence, its most striking characteristic remains its casuistic, uneven, and largely unpredictable nature'. S. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, (Council of Europe Publishing, 2000), p. 5. See also, Brauch, 'The Margin of Appreciation', 121. M.W. Janis, R.S. Kay and A.W. Bradley, *European Human Rights Law: Text and Materials* (Oxford University Press, 2008), p. 255.

39 See, for example *D.L. v. Bulgaria*, application no. 7472/14, 19 May 2016, para. 77.

40 Bakircioglu, 'The Application of the Margin of Appreciation', 712.

The principal objection to the margin of appreciation is that it introduces an unwarranted subjective element into the interpretation of various provisions of the ECHR.<sup>41</sup> Higgins argues that the margin of appreciation is 'increasingly difficult to control and objectionable as a viable legal concept'.<sup>42</sup> MacDonald maintains that it is not clear how the Court uses the doctrine: '[b]eing concerned with the appropriate scope of review, the margin is not susceptible to definition in the abstract, as it is, by its very nature, context dependent'.<sup>43</sup>

The need for clear standards and criteria is also emphasised by Gross and Ní Aoláin along the following lines:

In resorting to the margin of appreciation doctrine the Court has frequently been satisfied with making a laconic mention of the doctrine without further explanation of the way it was applied to the particular circumstances of the case at hand. In yet other cases the doctrine has not even been mentioned or discussed explicitly, but is rather implicit in the Court's analysis and judicial reasoning.<sup>44</sup>

Therefore, one can argue that this lack of clear boundaries allows the Court to take into account unpredictable circumstances. During the COVID-19 pandemic, this flexibility would give the States some flexibility in accommodating the measures that are strictly necessary in the circumstances. However, as the subsequent sections of this report will show, the margin of appreciation is not applicable to every component of the test used to determine compliance with Article 5. For instance, all types and forms of deprivation of liberty should be legal, in other words every type of deprivation should have a basis in the national law. These laws can be emergency laws adopted in reaction to the pandemic but the states do not have discretion in deciding what is legal and what is not. Therefore, although the boundaries of the margin are flexible, it cannot justify clear breaches of the Convention.

The Convention does not include a definition for margin of appreciation. O'Donnell argues that '[w]hile difficult to define, the margin of appreciation refers to the latitude allowed to the Member States in their observance of the Convention'.<sup>45</sup> Ostrovsky is of the view that the margin of appreciation is a way to distinguish matters that can be decided at the local level from matters that are so fundamental that they should be decided regardless of cultural variations. In other words, the doctrine allows human rights norms 'to take on a local flavour'.<sup>46</sup> Yourow defines

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41 N. Lavender, 'The Problem of the Margin of Appreciation', *European Human Rights Law Review*, (1997), 380, 380.

42 R. Higgins, 'Derogations under Human Rights Treaties', *British Yearbook of International Law*, 48 (1978), 281, 315.

43 Macdonald, *The Margin of Appreciation*, p. 85.

44 Gross and Ní Aoláin, 'From Discretion to Scrutiny', 635.

45 T.A. O'Donnell, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights', *Human Rights Quarterly*, 4 (1982), 474, 475

46 A.A. Ostrovsky, 'What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals', *Hanse Law Review*, (2005), 47, 47-8.

the margin of appreciation in the following terms:

The national margin of appreciation or discretion can be defined in the European Human Rights Convention context as the freedom to act; manoeuvring, breathing or elbow room; or the latitude of deference or error which the Strasbourg organs will allow national legislation, executive, administrative and judicial bodies before it is prepared a national derogation from the Convention, or restriction, or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention's substantive guarantees ...<sup>47</sup>

While the margin of appreciation might lack a precise scope, the Court has tried to explain how it operates. In *S. and Marper v. the United Kingdom* the Court has listed those criteria which it takes into account in assessing the width of the margin:

The breadth of this margin [of appreciation] varies and depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted. Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider.<sup>48</sup>

According to *S. and Marper v. the United Kingdom*, the breadth of the margin of appreciation depends on: i) the nature of the Convention right; ii) its importance; iii) the nature of the interference; iv) the object of interference; and v) European consensus.

This short primer on the margin of appreciation is necessary to demonstrate how the acts of the Contracting Parties can be reviewed for compliance with Article 5 of the Convention, in the next section.

### **C. The test of compliance with Article 5 ECHR**

This section's aim is to unpack the test under Article 5 developed by the ECtHR. This test helps to determine whether deprivation of liberty is compliant with Article 5 ECHR. The special focus here is on detention of persons for the prevention of the spreading of infectious diseases or to prevent their effecting an unauthorised entry into the country or of persons against whom action is being taken with a view to deportation or extradition.

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<sup>47</sup> Yourow, *The Margin of Appreciation Doctrine*, p. 13.

<sup>48</sup> *S. and Marper v. the United Kingdom*, Application No 30562/04 and 30566/04, Judgment of 4 December 2008, para. 102.



## 1. The material scope (what does 'deprivation of liberty' mean?)

In the context of the pandemic, it is important to define what deprivation of liberty means. Some measures such as quarantine or unsupervised lockdown can fall short of deprivation of liberty and only constitute a restriction of liberty, against which there is no protection under Article 5 of the Convention. Restrictions of liberty can raise the questions under the Convention under Article 2 of Protocol 4. Although Montenegro ratified Protocol 4 and its provisions are applicable,<sup>49</sup> it falls outside the scope of the present report and it will not be dealt with in any detail. It is important to distinguish between deprivation and restriction of liberty because the legal regimes under Article 5 and Article 2 of Protocol 4 are significantly different. In brief, States are allowed a much broader margin of appreciation under Article 2 of Protocol 4.

Deprivation of liberty is an autonomous concept, which means that the Court is not restricted to the classification provided by the national law. Instead, it conducts a functional analysis of this phenomenon to arrive at a construction that is specific to the Convention. In other words, if domestic law does not consider a particular restriction to amount to deprivation, the ECtHR might come to a different conclusion.<sup>50</sup>

The Court does not have a set list of criteria that would provide a certain answer to the question whether a particular situation constitutes deprivation of liberty. The Court takes into account 'a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question'<sup>51</sup> Moreover, the purpose of deprivation or restriction is not decisive for the qualification of a particular measure. For instance, deprivation of liberty for the purposes of protection of victim is considered deprivation just the same.<sup>52</sup>

In other words, while there might be good reasons to justify a detention measure, these do not matter for its characterisation as detention, only for its lawfulness. For instance, the consent of the individual to the detention measures does not negate the fact that the measure is a deprivation of liberty (nor does it always justify it):

The right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention, especially when that person is legally incapable of consenting to, or disagreeing with, the proposed action.<sup>53</sup>

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49 On 6 June 2006, Protocol 4 entered into force in relation to Montenegro.

50 See, for example, *Khlaifia and Others v. Italy* [GC], no. 16483/12, 15 December 2016, para. 71; *Creangă v. Romania* [GC], no. 29226/03, 23 February 2012, para. 92.

51 Guide on Article 5 of the European Convention on Human Rights, 8. *De Tommaso v. Italy* [GC], no. 43395/09, 23 February 2017, para. 80.

52 *Khlaifia and Others v. Italy* [GC], no. 16483/12, 15 December 2016, para. 71

53 Guide on Article 5 of the European Convention on Human Rights, 9. See also, *Stanev v. Bulgaria* [GC], no. 36760/06, ECHR 2012, para. 119.

The factors that are usually considered by the Court to determine whether a measure amounts to deprivation of liberty are the following:

- The possibility to leave the restricted area
- The degree of supervision and control over the person's movement
- The extent of isolation and availability of social contacts.

The following factors are relevant to deciding the question of whether there was deprivation of liberty in relation to holding foreigners in airport transit zones and reception centres for the identification and registration of migrants:

- the applicants' individual situation and their choices;
- the applicable legal regime of the respective country and its purpose;
- the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events;
- the nature and degree of the actual restrictions imposed on or experienced by the applicants.<sup>54</sup>

Therefore, there is no simple answer as to what constitutes deprivation of liberty. Placing a person in a cell under a very strict regime will clearly be considered deprivation of liberty; however, in the case of pandemic some of the restrictive measures might fall short of that characterisation. The judgment in case of *Austin v. the United Kingdom* can illustrate the difference. In this case, the London police used a measure known as 'kettling'.<sup>55</sup> The Court decided that 'kettling' does not amount to deprivation of liberty for the following reasons:

the Court must also take into account the 'type' and 'manner of implementation' of the measure in question... the context in which the measure was imposed is significant. It is important to note ... that the measure was imposed to isolate and contain a large crowd, in volatile and dangerous conditions... the police decided to make use of a measure of containment to control the crowd rather than having resort to more robust methods, which might have given rise to a greater risk of injury to people within the crowd... [I]n the circumstances the imposition of an absolute cordon was the least intrusive and most effective means to be applied. Indeed, the applicants did not contend that, when the cordon was first imposed, those within it were immediately deprived of their liberty. [T]he police kept the situation constantly under close review, but where substantially the same dangerous conditions which necessitated the imposition of the cordon ... continued to exist ... the Court does not consider that those within the cordon can be said to have been deprived of their liberty within the meaning of Article 5 § 1... The Court emphasises that the above conclusion, that there was no deprivation of liberty, is based on the specific and exceptional facts of this case... Had it not re-

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54 Guide on Article 5 of the European Convention on Human Rights, 8. See also, *Z.A. and Others v. Russia* [GC], no. 61411/15 and 3 others, 21 November 2019, para. 138; *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, 21 November 2019, para. 217.

55 Kettling means that during a public protest or demonstration some of the participants are contained within a police cordon for up to seven hours.

mained necessary for the police to impose and maintain the cordon in order to prevent serious injury or damage, the 'type' of the measure would have been different, and its coercive and restrictive nature might have been sufficient to bring it within Article 5.<sup>56</sup>

Although this approach of the Court is open to criticism,<sup>57</sup> it seems that the Court takes into account the difficulties that the Contracting Parties face in dealing with complex and potentially dangerous situations. So, one can argue that only the most severe measures will fall within the scope of Article 5 ECHR. However, the conclusion of the nature of restrictions can be made only when all circumstances are taken into account. These considerations allowed Greene to conclude as follows:

one cannot simply look at a measure in isolation and decide on that basis whether it constitutes a deprivation or restriction of liberty; a whole range of contextual factors must be taken into account. For instance, if a curfew for a certain period of time is found to constitute a restriction, rather than a deprivation, of liberty, this does not necessarily mean that this will be the same outcome for a curfew of an identical period but accompanied by additional restrictions, for example electronic tagging, or more lax procedural safeguards. The regime as a whole must be looked at.<sup>58</sup>

## 2. The test of lawfulness under Article 5 ECHR

After the Court is satisfied that the State measures fall within the ambit of Article 5, it would review their legality. Here, legality means that any restriction must be imposed in accordance with the national law and procedure. This formal requirement, however, might not be sufficient; the Court requires national law to possess certain qualities:

1. *Legal certainty*. The national law needs to set the conditions of deprivation of liberty clearly and explicitly. This is especially relevant in case of restrictions related to the fight to COVID-19. In *Del Río Prada v. Spain* the Court ruled that

'The 'quality of the law' implies that where a national law authorises a deprivation of liberty, it must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness. The standard of 'lawfulness' set by the Convention requires that all law be sufficiently precise to allow the person – if need be, with appropri-

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56 *Austin and Others v. the United Kingdom* [GC], nos. 39692/09 and 2 others, ECHR 2012, para. 65-68.

57 D Mead, *The Right to Protest Contained by Strasbourg: An Analysis of Austin v. UK & The Constitutional Pluralist Issues it Throws Up*. Available at <https://strasbourgothers.com/2012/04/17/the-right-to-protest-contained-by-strasbourg-an-analysis-of-austin-v-uk-the-constitutional-pluralist-issues-it-throws-up/>; R Wastell, *Kettling: Can a public interest motive justify a deprivation of liberty or not?* <https://ukhumanrightsblog.com/2012/04/02/kettling-can-a-public-interest-motive-justify-a-deprivation-of-liberty-or-not-robert-wastell/>.

58 A Greene, *Emergency Powers in a Time of Pandemic* (Bristol University Press, 2020), 39.

ate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Where deprivation of liberty is concerned, it is essential that the domestic law define clearly the conditions for detention.<sup>59</sup> In the context of the COVID-19 pandemic it means that newly adopted legal regulations should include an indication of how long the deprivation of liberty should take place. This indication might not be precise (14 days) but should include a set of criteria (until symptoms are not detectable). Moreover, it is crucial that the conditions of detention are appropriate for this type of detention. For instance, if a person is detained to prevent spreading of disease she should have access to medical treatment and the conditions should indeed prevent spreading infectious disease. Moreover, when the reason for detention does not exist any longer a person should be immediately released.<sup>60</sup> Moreover, legal certainty also implies that there is an effective remedy by which the person can contest the ‘lawfulness’ and ‘length’ of his continuing detention.<sup>61</sup> The law should be interpreted consistently and clearly by the national authorities. This is especially important when there is a major number of emergency legislation. It has been pointed out that ‘[p]rovisions which are interpreted in an inconsistent and mutually exclusive manner by the domestic authorities will, too, fall short of the ‘quality of law’ standard required under the Convention.’<sup>62</sup>

2. *Lack of arbitrariness.* The Court explained that the Convention prohibits arbitrariness in decision-making in this area. In other words, ‘[c]ompliance with national law is not ... sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of ‘arbitrariness’ in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.’<sup>63</sup> There is no clear definition of arbitrariness, but the Court has indicated in certain cases that the order of detention is arbitrary. ‘The Court has indicated that arbitrariness may arise where there has been an element of bad faith or deception on the part of the authorities; where the order to detain and the execution of the detention did not genuinely conform to the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 §1; where there was no connection between the ground of permitted deprivation of liberty relied on and the place and conditions of detention; and where there was no relationship of proportionality between the ground of detention relied on and the detention in question.’<sup>64</sup>

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59 *Del Río Prada v. Spain* [GC], no. 42750/09, ECHR 2013, para. 125.

60 *Enhorn v. Sweden*, no. 56529/00, ECHR 2005-I, para. 44.

61 *J.N. v. the United Kingdom*, no. 37289/12, 19 May 2016, para. 77.

62 Guide on Article 5 of the European Convention on Human Rights, 9. *Nasrullojev v. Russia*, no. 656/06, 11 October 2007, para. 77.

63 *Creangă v. Romania* [GC], no. 29226/03, 23 February 2012, para. 84.

64 Guide on Article 5 of the European Convention on Human Rights, 13.

Profiling and random quarantining of people might also fall within the definition of arbitrariness. Complete absence of reasons for detention is also an indication of arbitrary detention. Moreover, if less intrusive measures than detention are available, the authorities must consider them.<sup>65</sup> Although most of these requirements were developed in cases of pre-trial detentions the core principles are also applicable to cases of detention for prevention of spreading of infectious diseases or detention of foreigners which are the core aims of this report.

That a State faces an emergency will not spare with the requirement of legality of every measure that orders detention. It must be noted, if only to complete the analysis in the abstract, that the possibility to invoke a derogation under Article 15 would not relieve State from their duty to observe the legality requirement. Even in the case of derogation, the measures before the Court are either legal or not. The measure can be introduced as a part of an emergency package, but it should be lawful just the same. The judgment in *Alparslan Altan v. Turkey* suggests that the emergency situation does not justify an overly broad interpretation of the national law.<sup>66</sup> In this case, the Constitutional Court Judge was arrested in suspicion of his connection with the coup d'état. According to the national law, such an arrest could be made only when if the individual were caught *in flagrante delicto*<sup>67</sup> as, in such a case, the judge could not benefit from functional and personal immunities. However, the allegation to be connected to a coup d'état does not qualify normally as responsibility for commission of a crime *in flagrante*. The ECtHR agreed with the applicant that the national courts' extensive interpretation of the term '*in flagrante delicto*' contravened legal certainty and was manifestly unreasonable.<sup>68</sup> The Court found a violation of Article 5, and stated that Article 15 cannot excuse it implicitly:

the legislation applicable in his case... and the provisions governing the status of judges at the Constitutional Court, was not amended during the state of emergency. Instead, the measures complained of in the present case were taken on the basis of legislation which was in force prior to and indeed after the declaration of the state of emergency, and which, moreover, is still applicable.<sup>69</sup>

This means that the measure adopted by the State needs to be legal, irrespective of derogation under Article 15. New restrictions can be introduced through emergency legislation, but they need to be accessible and issued according to a proper procedure.

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65 *Ambruszkiewicz v. Poland*, no. 38797/03, 4 May 2006, para. 32.

66 *Alparslan Altan v. Turkey*, no. 12778/17, 16 April 2019.

67 The concept of *in flagrante delicto* is linked to the discovery of an offence while or immediately after it is committed. *Ibid*, para. 111.

68 *Ibid*, para. 115.

69 *Ibid*, para. 117.

### **3. In particular: the prevention of the spreading of infectious diseases and measures relating to persons of unsound mind, alcoholics or drug addicts or vagrants**

#### *a. Detention of persons for the prevention of the spreading of infectious diseases*

A State could introduce legislation authorising the detention of individuals during the pandemic. If these measures are challenged, the Court will consider if such detention would comply with other requirements of Article 5. The most relevant subsection of Article 5 in the context of a health emergency is Article 5-1(e) ECHR which allows the Contracting Parties to the Convention to detain persons ‘for the prevention of the spreading of infectious diseases, persons of unsound mind, alcoholics or drug addicts or vagrants’.<sup>70</sup> The case law under this Article was very scarce until the COVID-19 pandemic, and the only relevant judgment deals with the spreading of HIV,<sup>71</sup> a virus that behaves very differently from the coronavirus.<sup>72</sup>

What is known about Article 5-1(e) is that the Court will establish whether the disease in question is dangerous for public health or safety, and determine the risk of it spreading.<sup>73</sup> Undoubtedly, both conditions are easily met by the coronavirus. Accordingly, measures introduced to contain the pandemic of COVID-19 are likely to clear this test. The Court will then consider the aim of detention, namely whether detention ‘is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest’.<sup>74</sup> The answer to this question is not straightforward, and might depend on the circumstances and the severity of restrictions.

Clearly, as soon as the pandemic is over any detention under Article 5-1(e) will be illegal, regardless of whether Article 15 is invoked or not. This is so because both Article 15 and Article 5-1(e) provide for a similar requirement, i.e., that the State measures should be strictly connected with the necessities of the health emergency. There is no legal ground to say that the measures that are legal during the pandemic will continue to be legal when it is over.

Greene has suggested that the pandemic might be used by the Court to justify a broad interpretation of Article 5-1(e). He points out that:

If Article 5.1(e) permits the detention of healthy people to prevent the spread of infectious disease, this will be the only class of deprivation authorised by Article 5 that is not based on the specific category of a person or their prior conduct ... This is not a mere technical consideration; it constitutes a fundamental dispute as to the scope of state power permissible under Article 5.1(e): a restrictive, narrow understanding of Article 5.1(e) limited only to in-

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70 Article 5-1(e) ECHR.

71 *Enhorn v. Sweden*, no. 56529/00, ECHR 2005-I.

72 HIV has a significantly different mechanism of transmission from that of COVID-19.

73 *Enhorn v. Sweden*, no. 56529/00, ECHR 2005-I., para. 44.

74 *Ibid.*

ected persons or persons who may be infected (with necessary safeguards regarding the burden of proof required to fall under this category); or an infinitely more expansive conception of Article 5.1(e) authorising the deprivation of liberty of everybody within a state's jurisdiction and with no burden of proof whatsoever required.<sup>75</sup>

Such broad interpretation of Article 5-1(e) is plausible from the text of the Convention<sup>76</sup> and the ECtHR might have to clarify this issue. It is likely that the Court would apply a broader vision of the Convention. Here the aim of the deprivation of liberty is in tension with the rights of the detainees. The burden of proving that the former prevails, and that therefore the detention is necessary, lies with the State. The Council of Europe has made the following suggestions as to the standards that the measures falling under Article 5-1(e) should observe:

Article 5.1(e) specifies that the prevention of the spreading of infectious diseases is one of the grounds for which a person may be deprived of his or her liberty. Before resorting to such measures states are expected to control the existence of a relevant legal basis and consider whether measures amounting to deprivation of liberty are strictly necessary against any less stringent alternatives. The length of compulsory confinement and the way it is enforced in practice are relevant in this context.<sup>77</sup>

The Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has issued specific guidelines on how to adapt the fundamental rights guarantees to the COVID-19 pandemic. In particular:

4) Any restrictive measure taken vis-à-vis persons deprived of their liberty to prevent the spread of COVID-19 should have a legal basis and be necessary, proportionate, respectful of human dignity and restricted in time. Persons deprived of their liberty should receive comprehensive information, in a language they understand, about any such measures.<sup>78</sup>

Moreover, it is recommended that, in case of detention for sanitary reasons (isolation or quarantine): 'the person concerned should be provided with meaningful human contact every day.'<sup>79</sup>

#### *b. Detention of persons of unsound mind, alcoholics, drug addicts and vagrants*

The COVID-19 pandemic mostly has led to the adoption of measures related to the spreading of infectious diseases, including those entailing the detention or restrict-

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<sup>75</sup> Greene, Derogating from the European Convention on Human Rights, cit., 7.

<sup>76</sup> See, Hickman, T., Dixon, E. and Jones, R. Coronavirus and Civil Liberties in the UK. Available here: [https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/#\\_edn4](https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/#_edn4), para. 57 and 63.

<sup>77</sup> Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis. A toolkit for member states, 6. Available at <https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>.

<sup>78</sup> CoE, CPT, Statement of principles cit., principle 4.

<sup>79</sup> Ibid., principle 8.

ed liberty of individuals that could spread the disease. However, some restrictions are possible that could affect other vulnerable categories mentioned in Article 5-1(e), namely persons of unsound mind, alcoholics, drug addicts and vagrants.

The Court's case law related to the detention of persons of unsound mind is the most developed among these groups. In the case of *Winterwerp v. the Netherlands*, the Court has developed a test of lawful detention in these circumstances:

except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'. The very nature of what has to be established before the competent national authority - that is, a true mental disorder - calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder.<sup>80</sup>

The COVID-19 pandemic could have some impact on the scale of detention of people of unsound mind. The measures of quarantine could exacerbate mental illnesses, and justify the State ordering detention of mentally ill people in accordance with the *Winterwerp* criteria listed above. While detention can be justified during the COVID-19, a number of issues might be relevant:

1. Conditions of detention need to be appropriate. Unlike Article 3, the condition of detention required by Article 5 should not be inhuman to entail a breach – they merely need to be inadequate. In other words, if persons of unsound mind are detained, they should be provided with competent help. Although the authorities have some margin of appreciation in deciding what conditions are appropriate in each individual case, the Court stated on a number of occasions that such detention should be effected in 'a hospital, clinic, or other appropriate institution authorised for the detention of such persons'.<sup>81</sup> States can detain people of unsound mind for a short period of time in unspecialised detention centres, but this should be done temporarily.<sup>82</sup> During the pandemic, State authorities might enjoy more leeway in ensuring that the conditions of detention are appropriate and that the safety of the public and the applicants is properly ensured. However, any flexibility will be strictly compared against the actual demands of the pandemic. The existence of a widespread risk to public health, per se, cannot act as a justification for excessively long detention of people of unsound mind, and/or justify inappropriate conditions.
2. Another aspect of Article 5-1(e) that could be affected by the COVID-19 pandemic is the requirement that detention is authorised by the court in a reasoned judgment. Although access to court do not only concern people of unsound mind, the fact that this category is vulnerable makes this

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80 *Winterwerp v. the Netherlands*, 24 October 1979, Series A no. 33, para 39.

81 See, Guide on Article 5 of the European Convention on Human Rights, 13; *Ashingdane v. the United Kingdom*, 28 May 1985, Series A no. 93, para 44.

82 *Pankiewicz v. Poland*, no. 34151/04, 12 February 2008, para 44-45.



right particularly important. The Court has stated that ‘it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation.’<sup>83</sup> The COVID-19 pandemic caused many courts to restrict access. The ECtHR will allow some margin of appreciation to the States but the authorities need to show that they tried to ensure access to court as much as possible especially in cases of vulnerable applicants.

The Court’s case law is much sparser when it comes to detention of alcoholics, drug addicts and vagrants. The Court only had a handful of cases where these issues were under scrutiny.<sup>84</sup> It is not impossible that there will be applications from these categories of people submitted to the ECtHR. For instance, some COVID-19 related measures could try to prevent homeless people from sleeping rough on the streets. However, these measures might be more akin to detention for the prevention of spreading of infectious diseases, particularly if they are strict enough to fall within the ambit of Article 5.

#### **4. In particular: detention of illegal migrants and persons awaiting removal**

The COVID-19 emergency can have implications on how the Contracting Parties to the Convention treat illegal migrants and those arrested with the view of deportation and extradition.

Article 5-1(f) contains two distinct limbs: first, detention to prevent unauthorised entry into country and second, detention with a view to deportation or extradition.

##### *a. Detention to prevent unauthorised entry into country*

The Court’s case law has not looked into the first limb of Article 5-1(f) as much as it has into the second. Arguably, the leading case invoking on this issue is the Grand Chamber case of *Saadi v. the United Kingdom*.<sup>85</sup> In this case, the applicant fled Iraq and arrived to the UK where he was arrested pending his asylum application. The Court has established the following standards regarding this form of detention:

1. The authorities must avoid arbitrariness. In *Saadi*, the Court pointed out that ‘[t]o avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that ‘the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country’; and the length of the detention should not exceed that reasonably required

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83 *M.S. v. Croatia* (no. 2), no. 75450/12, 19 February 2015, para 152.

84 See for instance, *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, Series A no. 12; *Witold Litwa v. Poland*, no. 26629/95, ECHR 2000-III.

85 *Saadi v. the United Kingdom* [GC], no. 13229/03, ECHR 2008.

for the purpose pursued.<sup>86</sup> However, the Court did not require that detention be absolutely necessary. In *Saadi*, the applicant was placed in detention while his application was considered, and was released immediately after his application was rejected. The Court stated that 'given the difficult administrative problems with which the United Kingdom was confronted during the period in question, with increasingly high numbers of asylum-seekers, it was not incompatible with Article 5 § 1 (f) of the Convention to detain the applicant for seven days in suitable conditions to enable his claim to asylum to be processed speedily. Moreover, regard must be had to the fact that the provision of a more efficient system of determining large numbers of asylum claims rendered unnecessary recourse to a broader and more extensive use of detention powers.'<sup>87</sup>

2. Automatic detention must be avoided. Although the Court takes into account the difficult situation that some countries face regarding the influx of illegal immigrants, it still requires some individualised approach to the applicants' situation. The Court expressed 'its reservations as to the Government's good faith in applying an across-the-board detention policy (save for specific vulnerable categories) and the by-passing of the voluntary departure procedure.'<sup>88</sup>
3. The facilities of detention should be adequate. For instances, children should not be kept in a facility for adults.<sup>89</sup>

It is difficult to anticipate how the COVID-19 pandemic will impact the interpretation of this limb of Article 5. The Court will perhaps allow more flexibility in detaining illegal immigrants and allows longer terms for determination of their applications due to the difficulties associated with lockdowns and the possible suspension of asylum proceedings. However, the general requirements of non-arbitrariness, individual approach and adequate facilities will generally continue to apply.

#### *b. Detention with a view to deportation or extradition*

The Court has developed some more detailed standards in relation to the second limb of Article 5-1(f), namely detention with a view to deportation and extradition. This section outlines the key requirements for this type of detention:

1. Prevention of arbitrariness. This form of detention must also be administered in non-arbitrary fashion. Moreover, there should be procedural safeguards in place preventing arbitrariness.<sup>90</sup>

In its assessment of whether domestic law provides sufficient procedural safeguards against arbitrariness, the Court may take into account the existence or absence of time-limits for detention as well as the availability of a ju-

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<sup>86</sup> *Ibid*, para. 74.

<sup>87</sup> *Ibid*, para. 80.

<sup>88</sup> *Mahamed Jama v. Malta*, no. 10290/13, 26 November 2015, para. 146.

<sup>89</sup> See, *Kanagaratnam and Others v. Belgium*, no. 15297/09, 13 December 2011.

<sup>90</sup> *Kim v. Russia*, no. 44260/13, 17 July 2014, para. 53.

dicial remedy. However, Article 5 § 1(f) does not require States to establish a maximum period of detention pending deportation or automatic judicial review of immigration detention. The case-law demonstrates that compliance with time-limits under domestic law or the existence of automatic judicial review will not in themselves guarantee that a system of immigration detention complies with the requirements of Article 5 § 1(f) of the Convention.<sup>91</sup>

2. Legality and good faith. As with other types of deprivation of liberty, measures falling under the second limb of Article 5-1(f) should be set in the law and comply with national regulations. The Court also stated that ‘to avoid being branded as arbitrary, detention under Article 5 § 1 (f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government.’<sup>92</sup> For instance, deportation should not be a covert extradition.<sup>93</sup>
3. Necessary or proportionate duration. The deprivation of liberty under this limb is justified only while the extradition or deportation procedure is pending.<sup>94</sup>
4. Adequate conditions. For example, detention of a minor is only possible if the conditions are appropriate and no other measure can achieve the same aim of deportation or extradition.

Again, the states will perhaps be granted wider margin of appreciation in the circumstances of the pandemic. However, the key demands of legality and prevention of arbitrariness will be unaffected by the COVID-19 pandemic.

## ***D. Analysis of Articles 2, 3, 6, 8 and 14 and implications on the detention of individuals protected under Articles 5-1e and 5-1f.***

This section briefly considers how the COVID-19 pandemic and the measures designed to reduce its consequences can affect other Convention rights enjoyed by of the categories of people mentioned in Articles 5-1(e) and 5-1(f), in particular those guaranteed under Articles 2, 3, 6 and 14.

### **1. Non-derogable rights (Articles 2 and 3)**

These rights are called non-derogable because they cannot be derogated from under Article 15 of the Convention. The scope of these rights includes negative,<sup>95</sup> positive<sup>96</sup> and procedural<sup>97</sup> obligations. While the obligation of the authorities not

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91 Guide on Article 5 of the European Convention on Human Rights, 29.

92 *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009, para. 164.

93 *Bozano v. France*, 18 December 1986, Series A no. 111.

94 See, *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009, para. 164.

95 Prohibition of killing by the state agents. See, *McCann and Others v. the United Kingdom*, 27 September 1995, Series A no. 324.

96 Prevention and protection of potential victims. See, *Osman v. the United Kingdom*, 28 October 1998, Reports of Judgments and Decisions 1998-VIII.

97 Obligation to investigate suspicious deaths. See, *Trubnikov v. Russia*, no. 49790/99, 5 July 2005.

to kill or torture people remains intact by the pandemic, COVID-19 might affect the latter two types of obligations. It was stated by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) stated that '[f]undamental safeguards against the ill-treatment of persons in the custody of law enforcement officials (access to a lawyer, access to a doctor, notification of custody) must be fully respected in all circumstances and at all times'.<sup>98</sup>

Positive obligations prescribe the State to take all possible measures to protect life and prevent ill-treatment, including from third parties. The State enjoys some margin of appreciation in fulfilling these obligations. The COVID-19 pandemic might force States to reallocate certain resources and the Court will have to take this into account when dealing with alleged failures by the States to protect life. These obligations are not absolute and they often depend on the specific circumstances of the case.<sup>99</sup> However, the authorities are required to ensure the adequate level of health care especially in closed institutions.<sup>100</sup> The CPT has published a relevant set of principles related to persons deprived of their liberty:

As regards the provision of health care, special attention will be required to the specific needs of detained persons with particular regard to vulnerable groups and/or at-risk groups, such as older persons and persons with pre-existing medical conditions. This includes, inter alia, screening for COVID-19 and pathways to intensive care as required. Further, detained persons should receive additional psychological support from staff at this time.<sup>101</sup>

Procedural obligations mean that the State has to arrange a prompt and independent investigation of suspicious deaths or ill-treatment occurred in detention. The circumstances of the COVID-19 pandemic might interfere with what the Court normally considers as prompt investigation. Justifiable delays in inquiries can be to some extent explained by the circumstances of the pandemic. Nonetheless, excessive delays, unjustified re-allocation of resources will still trigger a violation of the Convention.

The ECtHR has not yet dealt a lot with the COVID-19 related cases. The reason for this is that an applicant needs to exhaust domestic remedies before applying to the ECtHR.<sup>102</sup> In the current situation, exhaustion of domestic remedies can take a considerable amount of time. However, in some cases, this period can be significantly shortened. For instance, in extradition cases the Court considers whether the applicant will be under risk of inhuman and degrading treatment in the receiving State. Although the requirement to exhaust domestic remedies in extradition cases is the same as in any other cases, the crucial difference here is that the applicants might argue that they will be under risk of inhuman treatment in the future, namely in the receiving country upon extradition. So, cases which have already been pending at

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98 CoE, CPT, Statement of principles cit.

99 See *Budayeva and Others v. Russia*, nos. 15339/02 and 4 others, ECHR 2008.

100 *Khudobin v. Russia*, no. 59896/00, 26 October 2006.

101 CoE, CPT, Statement of principles cit.

102 See *Le Mailloux v. France*, no. 18108/20, 5 November 2020.

the national level for some time, even before the COVID-19 crisis, might include references to COVID-19 now if the sanitary condition of the destination country are dire.

One may argue that the risk of COVID-19 infection may reach the necessary level of severity and that the Court should stay an extradition. There is a reported case of *Hafeez v. the UK* in which the applicant is under the threat of being extradited to the US. The case has not been decided yet, but it was communicated to the government of the UK. In this case,<sup>103</sup> the ECtHR asked the UK government: 'Having particular regard to the ongoing Covid-19 pandemic, if the applicant were to be extradited would there be a real risk of a breach of Article 3 of the Convention on account of the conditions of detention he would face on arrival?'. In this case, if the Court finds that there is a risk of breaching of Article 3 (prohibition of inhuman treatment) due to the COVID-19 pandemic, the extradition should be stayed. Although this case might not result in finding a violation, it is an important signal to the States that the Court will be looking into the situation and that the risk of infection can be considered in the context of Article 3. In cases like *Hafeez*, the Court only assesses the risk of infection.

## 2. Article 6

The COVID-19 pandemic can possibly influence the Court's analysis of Article 6, which provide for the right to a fair trial.<sup>104</sup> There is however hardly any case law dealing with Article 6 in conjunction with Article 15. Article 6 violations rarely happen overnight. The Court often considers whether the proceedings as a whole can be seen as fair.<sup>105</sup> That means that some defects tainting the initial stages of the proceedings can be remedied at a later one. The COVID-19 crisis might delay some proceedings which can fall under the right to be tried within a reasonable time. However, the Court will take the circumstances of the pandemic into account when considering alleged violations of the length of proceedings. McBride points out that:

In many instances, the impact will be limited to delay and, should the crisis endure for just a matter of months there is unlikely to be a consequent breach of the right to trial within a reasonable time. Even if the disruption is longer, the external nature of its cause will mean that it will not be attributable to the States affected so long as they have taken all possible steps open to them to mitigate its effect (cf. the situation considered in *Khlebik v. Ukraine*, no. 2945/16, 25 July 2017 resulting from inability to access crucial documents for proceedings on account of part of a State's territory no longer being under its control and also that in *Agga v. Greece* (No. 1), no. 37439/97, 25 January 2000, where there was a failure to take measures to deal with the effects of a strike by lawyers).

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<sup>103</sup> *Hafeez v the United Kingdom*, App. No. 14198/20.

<sup>104</sup> Article 6 ECHR.

<sup>105</sup> See, for example, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, 13 September 2016, para. 257.

The ECtHR itself for the first time in its history changed its time-limits allowed for the submission of the applications and memoranda by the parties<sup>106</sup> and of course, the Court will take into account the circumstances of the pandemic when considering the reasonableness of the length of proceedings.

It is important to note that persons mentioned in Articles 5-1(e) and 5-1(f) ECHR cannot be deprived of their Article 6 rights. It is therefore important to ensure that the applicants have access to court, that the proceedings by videolink are done in compliance of the standards, and that the applicants can be properly represented in domestic courts. This is particularly important when the proceedings refer to the circumstances of detention or its lawfulness under domestic or international standards.

### 3. Article 8

Article 8 ECHR lays down the right to private and family life. This is a qualified right, that can be legally restricted by the authorities, if the interference is proportionate to its legitimate aim. The Court uses the test of proportionality to decide whether the interference complies with the Convention or not.

The test of proportionality consists of five stages and the following discussion will analyse how the COVID-19 pandemic can influence the Court's interpretation of each stage. First, the Court considers whether there is an interference with the rights enshrined in the Convention. It has been argued that there are plenty of aspects of qualified rights that are affected by the measures aimed to stop the pandemic.<sup>107</sup> It suffice to offer just a couple of examples. Development of various contact-tracing web applications by the State authorities<sup>108</sup> might be considered as an interference with the right to privacy, however whether this interference is justified is to be determined on the further stages of the test of proportionality. The COVID-19 pandemic cannot change the conclusion of the Court that there was an interference with the right to privacy. Detained persons also enjoy the right to privacy, compatibly with the circumstances, therefore the State must observe their Article 8 rights.

Next, the Court considers the legality of a particular measure. This measure needs to be at least plausibly permissible under national law and must be provided for in domestic legislation. The emergency situation itself cannot preclude the illegality of a measure. Certain measures can be introduced by the emergency legislation

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106 A Press Release by the ECtHR is available here: <http://hudoc.echr.coe.int/eng-press?i=003-6666795-8866184>

107 See, K Dzehtsiarou, COVID-19 and the European Convention on Human Rights, Strasbourgblog, <https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/>; J McBride, An Analysis of Covid-19 Responses and ECHR Requirements, ECHRblog, <http://echrblog.blogspot.com/2020/03/an-analysis-of-covid-19-responses-and.html>.

108 See, I Siatitsa and I Kouvakas, Indiscriminate Covid-19 location tracking (Part I): Necessary in a democratic society?, Strasbourgblog, <https://strasbourgobservers.com/2020/05/04/indiscriminate-covid-19-location-tracking-part-i-necessary-in-a-democratic-society/>.

but they need to be adopted properly. The Court has developed rules that govern the quality of laws<sup>109</sup> according to which the restrictions can be provided only by accessible and relatively clear legislation.

The next step of the proportionality test is that the measures should have a legitimate aim. The Court has been quite deferential in its assessment of a legitimate aim. It finds a violation of the Convention at this stage only when no logical aim can be connected to the measure at issue.<sup>110</sup> In the context of the COVID-19 pandemic it will be relatively easy for the Contracting Parties to argue that they in pursue a legitimate aim; protection of public health is recognised as one of the legitimate aims that can justify the restriction of the rights enshrined in the Convention.<sup>111</sup> The presence of emergency is crucial here. The seriousness of legitimate aim will be tested against the scale of the emergency. So, when public health is at stake the Court will give the State a significant margin of appreciation in introducing the measures that aim to protect public health. However, this margin is not unlimited and the logical connection between the measures and the legitimate aim is checked by the Court on the two final stages of proportionality.

The COVID-19 emergency will make a significant impact on the Court's reasoning on the last two stages of the proportionality test, namely necessity and proportionality *stricto sensu*. At the stage of necessity,<sup>112</sup> the Court considers the extent to which the measure was appropriately connected to the aim pursued, and not unduly restrictive. At this stage, the Court will examine whether alternative less intrusive solutions were available to the State that are equally effective in achieving the intended result. For instance, in the context of collecting and storing of personal data, the Court stated that

the indiscriminate and open-ended collection of criminal record data is unlikely to comply with the requirements of Article 8 in the absence of clear and detailed statutory regulations clarifying the safeguards applicable and setting out the rules governing, inter alia, the circumstances in which data can be collected, the duration of their storage, the use to which they can be put and the circumstances in which they may be destroyed.<sup>113</sup>

Collection and storage of personal medical information can be an issue during the COVID-19 pandemic. Moreover, compulsory testing can be considered as interference but it is quite possible that the Court will accept that it is proportionate. The Court will consider the manner in which this testing is conducted.<sup>114</sup>

The COVID-19 pandemic can indeed influence the scope of the margin of appre-

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109 See, *Roman Zakharov v. Russia* [GC], no. 47143/06, ECHR 2015.

110 See, for example *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, 20 June 2017; *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, ECHR 2012.

111 See sections 2 of Articles 8-11 ECHR.

112 Here the Court considers whether the measure under review was necessary in a democratic society.

113 *M.M. v. the United Kingdom*, no. 24029/07, 13 November 2012, para. 199.

114 See, *Jalloh v. Germany* [GC], no. 54810/00, ECHR 2006-IX.

ciation here. The Court will consider the challenges that the Contracting Parties face during the pandemic. In the analysis of proportionality a broad scope of circumstances can influence the analysis of the Court. So, the severity of the crisis will influence the Court's decision of what was necessary in a democratic society. The margin of appreciation will be understandably broad. The necessity stage allows the Court to take the severity of the circumstances of the COVID-19 pandemic into account when analysing the appropriateness of the state actions. When the circumstances become less severe, the level of interference will have to be reduced too to be necessary.

The final stage of the test of proportionality is proportionality *stricto sensu* or a balancing exercise. At this stage of the test, the Court compares the competing interests, i.e. the rights that are being restricted and values and policy interests that are prioritised by the State. For instance, it could check whether the right to freedom of expression is more important in a particular case than the right to privacy.<sup>115</sup> The Court can also compare if the State struck the right balance between private and public interests.<sup>116</sup> This part of the proportionality discussion will be particularly difficult in the circumstances of health emergencies. States will be again given quite a broad margin of appreciation to decide how to compromise between competing rights and interests. There are hard choices to make, in the management of public health, privacy, freedom of expression and public order. Of course, the Court will find a breach when for example a State focuses excessively on the public health, disregarding all intrusions upon other fundamental rights. For example, if a State develops a contact-tracing app, forces everyone to use it and makes some of its information public, the resulting restrictions on some of the Convention rights might be deemed disproportionate to the intended benefits.

#### 4. Article 14

Arguably, the COVID-19 emergency should not have a significant impact on how the ECtHR interprets the ECHR when it comes to prohibition of discrimination under Article 14 of the Convention . Article 14 does not prohibit discrimination at large, but only discrimination relating to the enjoyment of the rights and freedoms of the Convention (for instance, the right to liberty under Article 5).

The ECtHR has developed a discrimination test. The Court first establishes whether there was differential treatment, identifying two comparable persons or groups of persons and ascertaining whether they are treated differently in comparable situations. In *Konstantin Markin v. Russia*, for instance the Court established that the difference in treatment existed when male military personnel could not be granted a parental leave while female staff could get a parental leave.<sup>117</sup> However, establishing a difference in treatment does not necessarily mean that such treatment is

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<sup>115</sup> See, for example, *Von Hannover v. Germany*, no. 59320/00, ECHR 2004-VI.

<sup>116</sup> See, for example, *Osmanoğlu and Kocabaş v. Switzerland*, no. 29086/12, 10 January 2017.

<sup>117</sup> *Konstantin Markin v. Russia* [GC], no. 30078/06, ECHR 2012.



discriminatory. Such treatment is discriminatory if it is devoid of ‘an objective and reasonable justification.’<sup>118</sup>

In order to establish whether there was an objective and reasonable justification the Court uses some sort of curtailed proportionality test similar to the one discussed in the previous section. The court will consider whether there is a legitimate aim in difference in treatment and, if so, the Court will assess the proportionality of such treatment to the established aim.

In the context of the COVID-19 pandemic some forms of difference in treatment can be justified by the aim of protecting of public health. This aim is legitimate but the State will need to review the measures constantly. In somewhat different but comparable context, it was argued:

Finally, the aims indicated by the Governments to justify differential treatment may be considered legitimate only if certain safeguards are put in place, and it is the Court’s task to examine whether such safeguards exist at each stage of the implementation of the measures and whether they are effective. For example, the temporary placement of children in a separate class on the ground that they lacked adequate command of the language of instruction in school is not, as such, automatically contrary to Article 14 of the Convention. Indeed, in certain circumstances such placement may pursue the legitimate aim of adapting the education system to the specific needs of the children. However, when such a measure disproportionately or even exclusively affects members of a specific ethnic group, then appropriate safeguards have to be put in place.<sup>119</sup>

During the pandemic, some reasonable difference in treatment can be justified but it needs to be constantly reviewed and as soon as the threat to public health reduces, the measures should be removed.

Even if there is a legitimate aim, the difference in treatment needs to be proportionate. Here, the margin of appreciation is quite wide especially in extraordinary situations. However, this margin is not unlimited. This is so, especially when the difference in treatment is based on the so-called ‘suspicious grounds’, such as gender, sexual orientation or ethnic origin. Here, the justification for difference of treatment needs to be particularly serious.<sup>120</sup> Therefore, quarantining of people coming from a particularly COVID-19 infected area might be justifiable under certain conditions, because it is done for the reasons of public health. Quarantining only men coming from this area will be discriminatory as it will not be justifiable because women can transmit COVID-19 as much as men.

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118 *Molla Sali v. Greece* [GC], no. 20452/14, 19 December 2018, para. 135.

119 Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, 18.

120 See, *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, ECHR 2007-IV; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, ECHR 2009.

## ***E. Summary of the relevant ECtHR cases against Montenegro***

The HUDOC search revealed that there were 40 judgments against Montenegro since Montenegro ratified the Convention. The majority of these judgments related to violations of Article 6 ECHR,<sup>121</sup> including on access to court<sup>122</sup> which might be an issue during the COVID-19 pandemic. However, these cases reveal a specific set of circumstances that are not relevant to the present report (for instance, failure of the Court of Appeal to consider the case of the applicant). Four of these cases related to Article 5 ECHR.<sup>123</sup> However, all these cases are relevant to detention in criminal proceedings that fall outside the subject area of this report although some parallels can be drawn. There are no specific cases relating to non-criminal detention. However, the following brief discussion considers cases against Montenegro that can be somewhat relevant to the report.

In *Bigović v. Montenegro*, the Court found that the applicant was detained in conditions contrary to Article 3 of the Convention. More relevant was that the Court found that the applicant's detention on remand fell foul of the lawfulness requirement of Article 5. The Court stated:

where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of 'lawfulness' set by the Convention. That standard requires that all law be sufficiently precise to allow the person – 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. The Court considers that, in the present case, the relevant legislation itself seems to be sufficiently clearly formulated. However, the lack of precision in detention orders in respect of the duration of extensions and the lack of consistency... as to whether the statutory time-limits for re-examination of the grounds for detention were mandatory or not made it unforeseeable in its application.<sup>124</sup>

In other words, the Court demanded that the law and practice of detention are clear and consistent. This would be particularly relevant in case of the COVID-19 pandemic, when the relevant rules change rapidly and the practice of public authorities implementing them can vary significantly.

In *Šaranović v. Montenegro* the Court emphasised that it is important that every single period of detention has some legal basis. In this case, there was a gap during which the applicant's detention was not based on a decision of a competent body.

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121 See, for example, *Barać and Others v. Montenegro*, no. 47974/06, 13 December 2011; *Tomić and Others v. Montenegro*, nos. 18650/09 and 9 others, 17 April 2012.

122 *Brajović and Others v. Montenegro*, no. 52529/12, 30 January 2018.

123 *Bigović v. Montenegro*, no. 48343/16, 19 March 2019; *Šaranović v. Montenegro*, no. 31775/16, 5 March 2019; *Mugoša v. Montenegro*, no. 76522/12, 21 June 2016, *Bulatović v. Montenegro*, no. 67320/10, 22 July 2014.

124 *Bigović v. Montenegro*, no. 48343/16, 19 March 2019, para. 190-191.

As a result, the ECtHR found a violation of Article 5 ECHR.<sup>125</sup>

In *Bulatović v. Montenegro*, the Court found a violation of Article 3 in relation to the overcrowding of detention facilities. The Court established that ‘the cell in which [the applicant] had been detained, and which had also contained closets, a sanitary facility and a dining table, had measured 25 m<sup>2</sup> and had housed fourteen detainees, sleeping on three-tier beds’.<sup>126</sup> In this case, the Court also considered whether the medical care available to prisoners was sufficient. The Court did not find a violation here, pointing out that the applicant did not have specific illnesses and he was examined regularly. On that basis, the Court concluded that even if there were some failures in medical treatment they did not reach the minimal level of severity.<sup>127</sup> The issues of overcrowding and provision of medical care are critical in the circumstances of the COVID-19 pandemic. This is not only relevant in prison but also in all other closed institutions, including mental hospitals, detention centres for illegal migrants and facilities in which individuals must spend quarantine periods. The case of *Randelović and Others v. Montenegro* is also potentially relevant to the subject matter of the present report. In this case a boat that departed Montenegro sank with the applicants’ relatives on board. The applicants argued that the authorities failed to investigate their relatives’ death promptly, hence alleging the violation of procedural limb of Article 2 of the Convention. The Court found a violation for the following reasons:

The Court ... observes that more than ten years and seven months after the new indictment was issued, and more than seventeen years and nine months after the impugned event, the criminal proceedings in question appear to still be pending at second instance... The Court reiterates that violations have also been found where a trial continued unduly. In that regard, the Court would stress that the passage of time inevitably erodes the amount and quality of evidence available and the appearance of a lack of diligence casts doubt on the good faith of the investigative efforts. Moreover, the very passage of time is definitely liable to compromise the chances of an investigation being completed. It also prolongs the ordeal for members of the family. The Court considers that in Article 2 cases concerning proceedings instituted to elucidate the circumstances of an individual’s death, lengthy proceedings are a strong indication that the proceedings were defective to the point of constituting a violation of the respondent State’s procedural obligations under the Convention, unless the State has provided highly convincing and plausible reasons to justify such a course of proceedings. Indeed, in the present case, the Court considers that the Government have failed to justify such lengthy proceedings...<sup>128</sup>

In the circumstances of the pandemic, prompt and independent investigation of deaths especially in closed institutions will ensure that Montenegro is not found in violation of the ECHR.

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125 *Šaranović v. Montenegro*, no. 31775/16, 5 March 2019, para. 71-77.

126 *Bulatović v. Montenegro*, no. 67320/10, 22 July 2014, para. 121.

127 *Ibid*, para 132-136.

128 *Randelović and Others v. Montenegro*, no. 66641/10, 19 September 2017, para 130.

In *Siništaj and Others v. Montenegro* the Court found a violation of a procedural obligation under Article 3 of the Convention.<sup>129</sup> The Court reiterated that ‘when an individual makes a credible assertion that he has suffered treatment at the hands of the police or other similar agents of the State that violates Article 3, it is the duty of the national authorities to carry out an effective official investigation’.<sup>130</sup> As with the procedural obligation under Article 2 of the Convention, this investigation needs to be independent and prompt. The Court established that national authorities were aware of the injuries suffered by the applicant but did not conduct a proper investigation. It was established that ‘[t]he only action undertaken ... was apparently the investigation of the Internal Police Control, which can be neither considered independent, given that it was done by the police themselves, nor thorough given that the ... applicant, his complaints and the injuries observed in respect of him were completely ignored’.<sup>131</sup> It is crucially important to investigate alleged acts of torture, inhuman and degrading treatment especially in closed institutions and especially during the pandemic.

It is at least conceivable that lack of protective equipment and medical care in closed institutions would engage both substantive and procedural obligations under Article 3 of the Convention, as detailed below.

There are no judgments of the ECtHR that are directly relevant to the subject matter of this report. However, some inferences can be drawn from the case law described. It is important that measures against COVID-19 are clear and the practice of their application is consistent, especially when these measures include detention. The condition of such detention should be adequate and appropriate medical care should be provided. Finally, every case of suspicious deaths or ill treatment should be promptly and effectively investigated.

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129 *Siništaj and Others v. Montenegro*, nos. 1451/10 and 2 others, 24 November 2015. See also, *Milić and Nikezić v. Montenegro*, nos. 54999/10 and 10609/11, 28 April 2015

130 *Siništaj and Others v. Montenegro*, nos. 1451/10 and 2 others, 24 November 2015, para. 143.

131 *Ibid*, para. 148.

## 5. MEASURES ADOPTED BY THE AUTHORITIES OF MONTENEGRO IN RESPONSE TO THE COVID-19 PANDEMIC

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This section of the report surveys the measures that have been adopted and implemented in Montenegro in response to the COVID-19 pandemic in the period March to September 2020, as well as those pre-existing measures that have been applied or could apply for the same purpose. An annex is provided with a chronological list the measures adopted ad hoc in 2020, with fuller references.<sup>132</sup>

This section of the report only surveys measures relating to coercive deprivation of liberty in Montenegro. Cases of voluntary deprivation of liberty such as voluntary admission to psychiatric hospitals and health institutions in cases of mental illnesses, drug or alcohol abuse, or admissions to care homes for elder or disabled persons are not covered by the report.

Deprivation of liberty in non-criminal proceedings is possible in following cases relevant to this report:

- a. Prevention of spreading of infectious diseases;
- b. Treatment of mentally ill persons;
- c. Treatment of illegal immigrants.

In Montenegro, only mental illnesses might be a basis for forced admission to hospitals in non-criminal proceedings. Drug or alcohol addicts might be detained by force only in criminal proceedings, while any other admission to hospitals or rehabilitation centres, with no criminal proceeding in course, can only be on a voluntary basis. The same principle is applicable to care homes for elder or disabled persons. As a result, there is not perfect correspondence between the circumstances listed in Article 5 ECHR and the measures in force in Montenegro.

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<sup>132</sup> This section largely relies on the report prepared by the local expert, Ms Ksenija Frankovic, to whom we are extremely grateful. All errors in the evaluation remain ours.

## **A. Prevention of spreading of infectious diseases**

This section will first describe the legal framework existing in Montenegro in relation to detention for prevention of spreading of infectious diseases and then it will briefly apply the standards that were discussed in sections 2 and 3 to the legal framework that exists in Montenegro.

### **1. Applicable laws**

- Constitution of Montenegro
- Law on protection of population from infectious diseases<sup>133</sup>
- Rule book on conditions and manner of organising and conduction of health monitoring and quarantine and the conditions that needs to be met for the quarantine premises<sup>134</sup>

#### *a. Constitution of Montenegro*

##### **Article 29 - Deprivation of liberty**

Everyone shall have the right to personal liberty.

Deprivation of liberty shall be permitted only for the reasons and in the procedure prescribed by the law.

Person deprived of liberty shall be notified immediately of the reasons for the arrest thereof, in own language or in the language he/she understands.

Concurrently, person deprived of liberty shall be informed that he/she is not obliged to give any statement.

At the request of the person deprived of his/her liberty, the authority shall immediately inform about the deprivation of liberty the person of own choosing of the person deprived of his/her liberty.

The person deprived of his/her liberty shall have the right to the defence counsel of his/her own choosing present at his interrogation.

Unlawful deprivation of liberty shall be punishable.

##### **Article 39 – Movement and residence**

Freedom of movement and residence shall be guaranteed, as well as the right to depart from Montenegro.

Freedom of movement, residence and departure from Montenegro may be restricted if required so for conducting the criminal procedure, prevention of contagious diseases spreading or for the security of Montenegro.

Movement and residence of foreigner citizens shall be regulated by the law.

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<sup>133</sup> Official Gazette of Montenegro 12/2018, 64/2020.

<sup>134</sup> Official Gazette of Montenegro 13/2020.

*b. Law on protection of population from infectious diseases  
(Official Gazette of Montenegro 12/2018, 64/2020)*

The Law was adopted in February 2018, and entered into force on March 3rd, 2020. The Law sets the grounds for protection of population from infectious diseases and for adopting and imposing measures for suppression and eradication of such diseases, implementation of epidemiological surveillance, the institution of competent entities for conducting of the measures, the manner of providing funds for conducting of the measures, supervision and enforcement of this law, as well as other issues of relevance for protection of population from infectious diseases.

The list of infectious diseases over which epidemiological surveillance is carried out and against which measures of prevention and control of infectious diseases are applied, at the proposal of the Institute of Public Health (**'Institute'**), is determined by the state administration body responsible for health affairs (**'Ministry of Health'**).

If an infectious disease occurs that is not listed in the List of Infectious Diseases, and which can significantly endanger the health of the population, the Government of Montenegro (**'Government'**), at the proposal of the Ministry, may decide to apply all or certain measures provided by the Law to protect the population from this disease, other measures for the protection of the population from infectious diseases required by the nature of that disease, as well as measures prescribed by international health and sanitary conventions and other international acts. These decisions must be published in the Official Gazette of Montenegro.

The proposal shall be made by the Ministry based on the opinion of the Institute and shall contain the name of the disease, measures for prevention and control of that disease, manner of their implementation and means necessary for implementation of those measures.

The Law defines quarantine as a measure that restricts freedom of movement and establishes mandatory medical examinations of healthy persons who have been or are suspected of having been in contact with persons who are ill or are suspected of suffering from "quarantine diseases", while quarantine diseases are defined as infectious diseases whose causative agents are transmitted by air and contact and which have a high mortality rate, i.e. which pose a great danger to the health of the population. Due to the risk created by "quarantine diseases", their occurrence or the suspicion of their occurrence entails quarantine and strict isolation measures.

Persons who have been or are suspected of having been in contact with persons suffering from quarantine diseases or with persons suspected of having suffered from quarantine diseases shall be placed in quarantine, as stated in Article 34 of the Law. The duration of quarantine is determined during the maximum incubation period of a certain infectious disease.

A person who, in accordance with the Law, is ordered to go in quarantine must abide by the order of the Ministry, under the threat of forced quarantine.

The quarantine measure is **implemented in facilities that meet the conditions for the implementation of that measure, and shall be determined by the Government**, at the proposal of the Ministry.

Companies, entrepreneurs and other legal entities, whose facilities have been determined for the needs of quarantine, are obliged to temporarily hand over their facility for use in order to prevent and suppress an infectious disease, or an epidemic of that infectious disease. For the use of their facilities, the owners of the facilities are entitled to a monetary compensation in the amount of actual costs, which is provided from the budget of Montenegro.

The Law, in Article 53, defines "emergency situation" as a situation (natural disasters and catastrophes, outbreaks of infectious diseases, new or insufficiently known infectious diseases and in case of suspicion of the use of a biological agent, etc.) when the risks and threats or consequences of disasters, emergencies and other dangers to the population environment and material goods, of such scope and intensity that their occurrence or consequences cannot be prevented or eliminated by regular action, and they can endanger human health and life and there is a danger of mass transmission of infectious diseases.

In case of emergencies, the following measures are implemented:

1. rapid epidemiological assessment in order to urgently take immediate measures to protect the population;
2. organising, planning and ensuring the implementation of measures for the prevention and control of infectious diseases;
3. epidemiological surveillance in an emergency situation, by introducing an early warning system;
4. transport, isolation and quarantine if there is an indication;
5. activation of the emergency communication system;
6. mandatory participation of health care institutions, legal entities, entrepreneurs and citizens in the suppression of risks to public health and the use of certain facilities, equipment and means of transport to prevent and suppress the transmission of infectious diseases, based on the order of the Ministry.

Epidemiological surveillance shall be carried out during the emergency situation. Epidemiological surveillance in an emergency situation is organised and conducted by the competent health institutions and the Institute, in cooperation with the Ministry.

The implementation of emergency measures is carried out in accordance with the Law governing protection and rescue and the Law on protection of population from infectious diseases.



During an emergency situation, as stated in Article 54 of the Law, the Ministry, at the proposal of the Institute, may order:

1. prohibition of gathering in public places;
2. restriction of movement of the population in the area affected by the emergency situation;
3. travel ban or restriction;
4. prohibition or restriction of trade in certain types of goods and products;
5. emergency vaccination;
6. other measures, according to epidemiological indications.

Article 9 of the Law provides that, in order to establish expert opinions on the preservation and improvement of health, prevention and detection of infectious diseases, treatment and health care, as well as on the improvement and development of the health service organization dealing with prevention, control, treatment of infectious diseases and patient support based on evidence and international recommendations, the Ministry, on the proposal of the Institute, forms the Commission for the Protection of the Population from Infectious Diseases (**'Commission'**).

The Commission considers the current epidemiological situation of infectious diseases in Montenegro based on the report of the Institute, the success of the implemented activities and gives conclusions and recommendations for improving the protection of the population from infectious diseases.

The Commission consists of doctors of medicine specialists (epidemiology, infectiology, microbiology, paediatrics, pneumophthisiology) and representatives of the Ministry and the state administration body responsible for agricultural affairs. Further, Article 10 of the Law prescribes that the Ministry, upon the proposal of the Institute, shall establish a Coordinating Body for the Prevention, Removal and Eradication of Infectious Diseases, which consists of medical specialists (epidemiologists, infectologists, microbiologists, pediatricians, neonatologists) and representatives of the Ministry and state administration bodies responsible for agricultural affairs.

This body is in charge of the following tasks:

1. eradication and maintenance of the status of a state free from polio;
2. removal of smallpox and rubella;
3. prevention of congenital rubella syndrome;
4. removal or eradication of infectious diseases from the List of Infectious Diseases.

The Coordinating Body for the Prevention, Removal and Eradication of Infectious Diseases consists of seven members and, if necessary, at the proposal of the Coordinating Body or the Institute, individual experts may be hired for the needs of removal and / or eradication of certain infectious diseases. The Pres-

ident of the Coordinating Body is a representative of the Ministry, responsible for health care.

The Law was amended on 2 July 2020, with entry into force on the same day, and was also published in the Official Gazette on that day. The amendments were made in the part of sanctions for violation of measures and the jurisdiction of the respective inspections for monitoring of application and obeying of the measures.<sup>135</sup>

*c. Rule book on conditions and manner of organising and conduction of health monitoring and quarantine and the conditions that needs to be met for the quarantine premises (Official Gazette of Montenegro 13/2020)*

Quarantine, in accordance with the Law, is organised for accommodating persons who were or are suspected of having been in contact with persons suffering from quarantine diseases or with persons suspected of having quarantine diseases. The purpose of the quarantine is to restrict freedom of movement of the individuals and monitor their health, by performing daily health examinations during the maximum incubation period of a certain infectious disease, or for the period during which the disease is contagious and there is a risk of spreading.

Medical examinations of persons placed in quarantine are performed by the medical team of the health institution of the primary level of health care, which is closest to the quarantine facility.

The transport of a person from the place where she/he was placed in quarantine to the facility intended for quarantine shall be provided by the health institution by ambulance or other appropriate means of transport, with personal protection measures applied.

The facility intended for quarantine should be in an easily accessible place and must meet sanitary-hygienic and epidemiological conditions.

The facility intended for quarantine should meet the following requirements:

1. It should be constructed of a material that must not adversely affect human health;
2. It should be protected from natural harmful influences of the environment, as well as other harmful influences from buildings from the immediate environment;
3. It must have at least two entrances, in order to avoid the intersection of so called clean and dirty roads;

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<sup>135</sup> Couple of laws were changed during outbreak of COVID – 19, but the procedures for adopting those changes were exactly the same as in pre COVID – 19 period. Since there was no state of emergency imposed, every piece of legislation that was adopted during COVID 19 outbreak was adopted in the usual procedure, with no exceptions. Regarding deprivation of liberty in criminal proceeding the outbreak of COVID 19 was a cause for adoption of the Law on amnesty in order to decrease the number of convicts in prisons.

4. It must be connected with roads;
5. It must be connected to the existing utility infrastructure networks or that the regular supply of the facility with electricity and healthy water for human use is otherwise enabled;
6. It must be connected to the telephone and internet network, as well as to the availability of radio and TV devices;
7. Conditions for the necessary and adequate air temperature in the premises must be met;
8. It must have natural and artificial lighting;
9. Natural or artificial ventilation must be provided, without a central system for air flow and conditioning (central air conditioning, ventilation system, etc.);
10. It must have dedicated containers with lids for the collection of solid waste materials, made of resistant and impermeable material, suitable for cleaning, washing and disinfection, as well as a hygienic way for the dispersion of liquid waste;
11. It must be connected to the existing sewerage network or to an impermeable septic tank of appropriate capacity;
12. At every tap point of water for human use intended for hand washing, there should be the necessary utensils and means for washing, drying and disinfecting hands.
13. It must have space for
  - reception of persons with sanitary pass;
  - stay of a person with a separate toilet;
  - stay of health workers with a separate sanitary facility;
  - isolation of persons with suspected occurrence of the disease until the organization of transport to the health institution for hospital treatment of persons suffering from infectious diseases;
  - stay of persons in charge of securing the facility, outside the premises for stay of persons under health supervision;
  - ambulance, with the necessary equipment and medicines;
  - handy kitchens with space for storage and packaging of used kitchen utensils and disposable utensils;
  - placement of protective equipment and disinfectants;
  - safe disposal of infectious waste;
  - accommodation of means, equipment and accessories for hygiene;
  - disposal of clean laundry;
  - sorting and disposal of dirty laundry;
  - daily activities and recreation - fenced yard.

## **2. General findings**

Before the outbreak of COVID–19 there had been no reported cases of quarantine diseases warranting the ordering of quarantine, self-isolation and the sourcing of facilities for quarantine.

For this reason, the *Rule book on conditions and manner of organising and conduction of health monitoring and quarantine and the conditions that needs to be met for the quarantine premises* was only adopted after the outbreak of COVID–19, on 12 March 2020.<sup>136</sup> The Rule book states that it enters into force on the day of publishing, which is an exception from the basic “*vacatio legis*” principle, provided in Article 46 of the Constitution of Montenegro, whereby laws and other regulations shall be published prior to coming into effect, and shall come into effect no sooner than the eighth day from the day of publication thereof. Exceptionally, when the reasons for such action exist and have been established in the adoption procedure, law and other regulation may come into effect no sooner than the date of publication thereof.

#### *a. Legality of NKT*

In the wake of the COVID-19 outbreak a body called National coordinating body (“**NKT**”) was established as the key body for COVID-19 fighting and prevention. The legal act establishing this body, assuming one was adopted, has not been available, and could not be found in the legal acts database of Official Gazette of Montenegro, or in any other legal source.

There was a public debate on the legality of NKT relating to all its aspect – establishment, responsibilities and jurisdiction, composition, and so on. Under the public pressure the Government published a note on the NKT on its web page.<sup>137</sup>

This note states that NKT was established by the decision of the Minister of Health, based on the current situation, the Article 15 of the Law on public administration,<sup>138</sup> and Article 56 of the Act on organisation of public administration.<sup>139</sup> However, as already stated, the decision on establishing the NKT is not available.

There were also allegations that NKT adopts politically-motivated decisions. These suspicions must be assessed bearing in mind the circumstances, as Montenegro was at the time preparing for parliamentary elections, which occurred on 30 August 2020.

The NKT has been constantly in session since its establishment.

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<sup>136</sup> Official Gazette of Montenegro 13/2020.

<sup>137</sup> <http://www.gov.me/vijesti/223775/NKT-nije-isto-sto-Koordinaciono-tijelo-za-prevenciju-i-iskorjenjivanje-zaraznih-bolesti.html>.

<sup>138</sup> Which says that execution of laws and other regulations includes conducting administrative procedures, passing and executing decisions and other individual acts, undertaking administrative activities, measures and administrative actions, monitoring their execution, giving explanations, issuing professional instructions and instructions for work and providing professional assistance.

<sup>139</sup> Which says that project groups, teams or other appropriate forms of work may be formed to perform tasks that require professional cooperation of civil servants from various internal organizational units. The project group, team or other form of work is formed by the Deputy Prime Minister, Minister, or the head of the administrative body; The act on the formation of a project group, team or other form of work determines the composition, jobs and deadlines in which the task will be performed, means and other working conditions; Civil servants from other ministries or administrative bodies may also be engaged in the project group, team or other form of work, with the consent of the Minister or the head of the administrative body; Experts from outside state administration bodies may also be engaged in the work of a project group, team or other form of work.

## *b. Legal certainty*

Since 13 March 2020 over 100 legal acts containing measures for prevention of spread of COVID – 19 were adopted,<sup>140</sup> most of them unrelated to the issue of detention in non-criminal proceedings.

The process of adopting the measures was not transparent for the public, in fact it was difficult to comprehend for legal professionals as well. The measures were announced as if they were adopted by NKT, while formally the procedure was different. The NKT suggested the measures to the Institute and the Institute proposed them to the Ministry of Health and eventually the Minister of Health adopted the measures. The measures entered into force on the day of publishing in the Official Gazette of Montenegro, with an apparent circumvention of the period of “*vacatio legis*” that, while possible under the Constitution, was not explained in any document. However, one must also bear in mind the fact that this is the situation with which Montenegro is dealing for the first time in its modern history, which might be one of the reasons for certain flaws in the regulatory process.

Moreover, some of the measures that were introduced are effectively emergency measures, even if a state of emergency was never declared officially. However, from the Law itself it is not clear whether there was an obligation to declare the emergency situation or – instead – the mere fact that the outbreak of infectious disease was obvious meant that the rules regarding emergency situations could apply. This is something that should be better defined for future situations as this was causing, and still is, many uncertainties.

Another issue is the fact that the measures were published in Official Gazette of Montenegro; this was confusing for non-legal professionals. The main challenge here was that the measures were not published as autonomous documents, but as changes and additions to previously adopted measures. To rectify potential confusion, the Government published the applicable measures on its website, which was updated daily, and was available to everyone.

In addition, every media in the country was constantly running articles and information on the measures so all the relevant information was available to everyone.<sup>141</sup>

In November 2020, the Deputy Ombudsperson of Montenegro pointed out that the conditions for quarantine or self-isolation are too vague.<sup>142</sup> In particular, she complained of some uneven implications of the regulation. Quarantine orders for people who were not infected (including citizens returning into the country) seemed to be disproportionately restrictive – and perhaps self-isolation should have been considered for them.

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<sup>140</sup> The list of the measures in chronological order is provided in separate document.

<sup>141</sup> [http://www.gov.me/naslovna/mjere\\_i\\_preporuke/](http://www.gov.me/naslovna/mjere_i_preporuke/).

<sup>142</sup> <https://balkaninsight.com/2020/11/13/montenegro-warned-that-imprecise-health-measures-endanger-human-rights/>.

### *c. Conditions of detention*

Before the COVID-19 outbreak no facility was ever used for quarantine in modern history. As already mentioned, only after the pandemic was declared worldwide, the Rule book on quarantine was adopted. The facilities that were designated as quarantine facilities were mainly hotels and tourist accommodation premises, as well as university dormitories and similar facilities. There is no information available on the conditions in the facilities used for quarantine, and whether the conditions set in the Rule book were met or not. However, what was widely discussed in the media and social networks is that the persons placed in the quarantine could not access an outdoor fenced yard, or be able to perform recreational activities. Actually, persons in quarantine were not allowed to leave the rooms in which they were placed. They were provided with food, beverages and access to medication and health care regularly, while they themselves were in charge of room hygiene (cleansing equipment was provided).

**Self-isolation at home was mandatory for persons travelling from certain countries and for persons that were in contact** with confirmed cases of COVID-19.

**Placement in quarantine was obligatory for persons travelling from certain countries. Also, persons that were caught violating self-isolation were placed in quarantine** and criminal charges were pressed against them for criminal acts defined in Article 287 and/or Article 302 of Criminal code of Montenegro (acting contrary to health measures for prevention of spread of disease and serious act against health). The quarantine measure, in these cases, is connected to criminal prosecution but should not be considered as a criminal sanction – its purpose remains to impose a condition of coercive detention for health reasons onto people who are unwilling to isolate voluntarily.

The list of the countries both for quarantine and self-isolation at home was determined in the measures and it was not fixed. Rather, it was changing as the situation with COVID-19 developed.

Persons that were ordered to self-isolate or placed in quarantine received an order from the sanitary inspector. The order was served as a form that was already printed and the information on the person that was placed in quarantine or self-isolation was filled in hand writing by the sanitary inspector. There is no information on possible challenges by the recipients of the forms or their specific content.

In the second pick of infection that started mid-June 2020, persons that were in contact with infected persons mainly have not received written orders to self-isolate, but only oral instructions from the epidemiologists from the Institute.

#### *d. Access to remedies*

At the time of writing, only one decision adopted during the COVID-19 outbreak was contested before the Constitutional Court of Montenegro, which is the decision on publishing of the information on the persons in self isolation at homes. The decision of the Constitutional Court *U-II broj 22/20* was adopted on 23 July 2020 and the court determined that the decision of publication was contrary to the Constitution and international law.

There have been some cases of challenge of detention measures (self-isolation or quarantine) before the national judges. The administration of the court proceedings has often been slowed down due to the pandemic, including due to the fact that some judges have fallen ill.

Formally, the order of self-isolation/detention originates from the Inspection department. Challenges are lodged with the Ministry of Health. If the Ministry upholds the decision, it is possible to seek judicial review before the administrative court. In practice, it is virtually impossible, especially in the circumstances prevailing during most of 2020, that a court decision is taken within the 14 days from the order of detention. In other words, the conclusion of the process of judicial review is unlikely to occur before the end of the period of quarantine/self-isolation. In principle, if the administrative court upholds the individual's complain the matter is remanded for consideration to the Ministry, which must decide taking into account the Court's decision.

It was very unlikely that the remedy could ever prove helpful: even when the challenge was meritorious, the decision would almost certainly come too late to matter. This problem was aggravated subsequently, when the obligation to remain in quarantine or self-isolation was reduced to 10 days. It must be noted that this clear interference with the right to a remedy is probably unavoidable, and that when the period was shortened the underlying problem (the detention) was reduced, at least in duration.

Quarantine periods must be served in a government-designated location, while self-isolation can be served at one's domicile. Quarantine can be ordered when somebody breaches the order of self-isolation. For instance, the punitive quarantine order can be challenged (before the Ministry) and then submitted for judicial review.<sup>143</sup>

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<sup>143</sup> During an interview with a judge, we learned about one such challenge, in which the applicant had invoked circumstantial justification for the breach of the self-isolation protocol.

## **B. Treatment of mentally ill persons**

### **1. Applicable laws**

- Law on non-litigation proceedings<sup>144</sup>
- Law on protection and exercise of the rights of mentally ill persons<sup>145</sup>

Mentally ill persons, in non-criminal cases, can be by force deprived of their liberty in the proceeding regulated by the Law on non-litigation proceedings.

In this procedure, the court decides on the involuntary placement of mentally ill persons in an appropriate psychiatric institution when due to the nature of the disease it is necessary for those persons to be restricted in freedom of movement or communication with the outside world, as well as on their release when the reasons for their placement cease. The procedure must be completed within eight days at the latest.

When mentally ill persons are placed in a psychiatric institution, the right to protection of their human dignity, physical and mental integrity must be ensured with respect for their personality, privacy, moral and other beliefs.

In cases in which a psychiatric institution receives mentally ill persons for treatment, without their consent or without a court decision, the institution is obliged to report it to the court in whose territory the institution is located within 48 hours. The application of a psychiatric institution must contain the decision of the psychiatrist on involuntary detention with the necessary documentation, in accordance with the law governing the protection and exercise of the rights of mentally ill persons. The report is not necessary if a mentally ill person is detained in a psychiatric institution based on a decision made in the procedure for deprivation of legal capacity or in criminal or misdemeanour proceedings.

The procedure is conducted *ex officio*, as soon as the court receives a report from a psychiatric institution or otherwise learns that a person has been forcibly detained in a psychiatric institution without consent. The person whose involuntary placement in a psychiatric institution is being decided must have a lawyer during the proceedings.

Individuals who are unable to afford a lawyer are entitled to free legal aid as persons of low financial status, in accordance with the law governing free legal aid. If the person does not hire a lawyer or meet the conditions for free legal aid, the court shall *ex officio* appoint a lawyer in the case from the list of lawyers submitted to the court by the Bar Association of Montenegro.

The court must hold a hearing in a psychiatric institution where a mentally ill per-

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144 Official Gazette of Montenegro 27/2006, 20/2015, 75/2018.

145 Official Gazette of Montenegro 32/2005, 27/2013.



son has been forcibly detained within three days from the day of receipt of the report or information on detention.

The court will hear the person whose involuntary placement is being decided if that person is able to understand the significance and legal consequences of participating in the proceedings, and if such participation is not harmful.

The court must examine all the circumstances relevant to the decision on involuntary placement of a mentally ill person, and in particular to obtain the findings and opinion of a psychiatrist who is not employed in the psychiatric institution where the person was forcibly detained, the justification for involuntary placement and regarding the ability of a mentally ill person to understand the significance and legal consequences of his or her participation in the proceedings.

The written finding and opinion shall be submitted by the expert psychiatrist to the court within three days after the personal examination of the mentally ill person. The costs of the expertise shall be paid from the court's funds.

When the court decides that a mentally ill person must be placed in a psychiatric institution, it will determine the time of involuntary placement, which cannot be longer than 30 days, counting from the day when the psychiatrist made the decision on involuntary detention. The court informs the guardianship authority about its decision. The psychiatric institution is obliged to submit to the court periodic reports on the health condition of the detained person.

A person placed in a psychiatric institution may be subjected to the necessary treatment measures, in accordance with the law governing the protection and exercise of the rights of mentally ill persons.

During placement in a psychiatric institution, a mentally ill person should be allowed to maintain contacts with the outside world, i.e. to receive visits, correspond and use the telephone.

If a psychiatric institution decides that a mentally ill person should remain in treatment after the expiration of the time specified in the court decision, such proposal must be submitted to the court seven days before the expiration of the time of involuntary placement determined by the court in previous proceedings. The duration of the extended accommodation may not exceed three months, and the duration of each further extension may not exceed six months.

The court may, before the expiration of the time set for placement in a psychiatric institution, at the proposal of the psychiatric institution, decide to release a mentally ill person from a psychiatric institution, if it finds that the person's health has improved to such an extent that the reasons for further placement have ceased.

Against the decision on placement in a psychiatric institution and discharge from this institution, an appeal may be lodged by the psychiatric institution, accommodated person, guardian, and/or temporary representative, lawyer, or any guardi-

anship authority, within three days from the day the decision was received. The appeal shall not stay the execution of the decision, unless the court decides otherwise for justified reasons.

To protect the privacy of the involved individuals, the decisions about their internment are not published, so it is difficult to comment on their content.

The first-instance court shall transmit the appeal with the files without delay to the second-instance court, which is obliged to make a decision within eight days from the day of receipt of the appeal. The deadline for deciding in the repeated procedure, according to the revoked decision of the second instance court, cannot be longer than eight days.

While the procedure provides ample access to remedies, it is fair to say that the overall proceeding is quite challenging for the officials involved. Almost always, lawyers are appointed *ex officio*, but not all lawyers would accept to act in these cases, as the visit to the patient at the hospital can be stressful.

Some problems have occurred in the practice, for instance when the hospital does not reach out to the court in 48 hours, and the initial detention – unchecked by the judiciary – is prolonged. In these cases, the person should be released after 48 hours, but commonly detention continues until the court is consulted and takes a decision. Uncertainty arises also with respect to the coordination between police forces and hospitals. Police can keep individuals if it is believed that they can be dangerous. This decision, however, is not subject to clear criteria, and is not immediately subject to review, and might give place to arbitrary cases of unwarranted detention by the police.

## **2. Special hospital Dobrota, Kotor**

In Montenegro, the only hospital in which mentally ill patients are placed is the Special hospital Dobrota, based in Kotor. This hospital is used not only for placement of mentally ill patients by orders of the court in non-criminal proceedings but also for the patients in criminal proceedings as well as the patients interned voluntarily. The constant problem this hospital is facing is overcrowding. There are reports that patients sleep on the floor on just mattresses as there are not enough beds available. There are also reports that some patients (known as “social patients”) should not be hosted there – the facility being reserved for the mentally ill – and they end up staying there just because they are unable or too poor to find another accommodation or hospitalisation. There are doubts about the general conditions of the facilities, besides overcrowding.<sup>146</sup>

The patients are very often heavily sedated, to protect the patients themselves and the staff of the hospital. The conditions in which the patients are held during co-

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<sup>146</sup> There have been two recent reports of the Ombudsman relating to the treatment of patients in Dobrota, although they mostly concerned the treatment of patients hospitalised in connection with criminal proceedings. See reports of 19 October 2018 and 5 December 2017.

ercive hospitalisation is not supervised by the court. It must be borne in mind that the hospital building and equipment are quite old, that typically there are twice as many patients as its capacity, and that the hospital serves also as a penitentiary institution for patient deprived of liberty in criminal proceedings as well. In light of the circumstances, the hospital's staff is doing a decent job.

These issues do not relate specially to the COVID-19 emergency. Of course, all issues pertaining to detention in the hospital might be critical as the general conditions deteriorate during the pandemic (e.g., the reduction of visits and of recreational activities, the isolation and distancing measures).

During the COVID-19 outbreak, there were no particular measures for mentally ill persons by force deprived of liberty other than common measures applicable to everyone else. Measures that the hospital itself applied were the restriction of movement outside the ward where the patient was placed, the ban of visits from family members and other persons. Moreover, new patients were placed in isolation after admittance and only after isolation they were placed in specific wards with other patients.

There was no specific legislation adopted during the COVID-19 outbreak regarding the position of mentally ill persons deprived of the liberty. It was not possible to obtain specific information on the number of patients detained against their will during the pandemic.

Ultimately, in 2020 there was also a drop in the number of the patients hospitalised during the pandemic. As a result, it is hard to identify a specific effect of the pandemic on the measures of detention at Dobrota.

## **C. Treatment of foreigners**

This section identifies the specific legal rules applicable to detention of illegal migrants in Montenegro. It will then analyse their compatibility with the European standards.

### **1. Applicable laws**

- Law on foreigners<sup>147</sup>
- Law on International and Temporary Protection of Foreigners, "Asylum Law" (As Amended in 2018)<sup>148</sup>
- Law on administrative proceeding
- Law on administrative dispute
- Shelter house rules<sup>149</sup>

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147 Official Gazette of Montenegro 12/2018.

148 <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5aa15c084> Official Gazette of Montenegro 3/2019.

149 Official Gazette of Montenegro 53/2018.

A distinction must be drawn between two categories of foreign individuals, which might in certain cases overlap: illegal migrants and applicants for international protection. In specific circumstances, both categories can incur in administrative detention at the centres for foreigners.

Until recently there was a single Centre for Reception of Foreigners Seeking International Protection in the country, located in Spuž, with a registration centre, with a capacity of approximately 130 people. Nearby, a reception centre in Konik has a capacity of 200 people, and was intended for hosting men only, unless overcrowding in other centres dictates otherwise. Since August 2020, a new facility was opened with a capacity of further 60 beds near the Albanian border, in Bozaj. Now single men are directed to Bozaj, and the pre-existing centres are for families and single women. At the time of writing (November 2020), it was reported that around 40 people, or more than half of the capacity, were hosted at Bozaj.

According to the representatives of various NGOs interviewed for this report, the conditions in the reception centres are generally satisfactory. There is internet, the possibility of visits and outdoor activities. Since March 2020 the reception centres adopted hygiene and disinfection measures to prevent the spread of COVID-19.

#### *a. Illegal migrants and detention related to expulsion*

A foreigner may be deprived of liberty for a maximum of 24 hours only if this is necessary to prevent their escape during the expulsion process and annulment of an approval of the 90-day stay in Montenegro or the procedure of annulment of a temporary postponement of the forced removal. A foreigner due to be forcibly removed may be detained for a maximum of 48 hours. During the forced removal procedure, a foreigner will be placed in a shelter but not for longer than 6 months. Upon receiving a detention order, the foreigner shall immediately be informed of the reasons for deprivation of liberty and may request that the diplomatic mission or consular representative of the state of which they are a national be notified of the deprivation of liberty, unless otherwise provided by an international agreement. The competent centre for social work and the diplomatic-consular mission of the state of which they are citizen shall be immediately notified of the deprivation of liberty of an unaccompanied minor foreigner.

An action may be filed against the decision on deprivation of liberty with the Administrative Court. The procedure before the Administrative Court is urgent.

A foreigner shall be released as soon as the reasons for deprivation of liberty and detention cease to exist, and no later than after the expiration of the term of 24 or 48 hours, unless actions are taken for the purpose of forced removal or a decision on accommodation in the shelter has been issued.

Foreigners who cannot be forcibly removed or cannot be secured by applying milder measures, will have their freedom of movement restricted by the police.

They will be ordered to reside in a shelter for foreigners (hereinafter: shelter), especially if there is a risk of avoiding the obligation to leave Montenegro, or if the foreigner prevents execution of forced removal and return.

Circumstances that indicate the existence of a risk of evasion of the obligation to leave Montenegro are that the foreigner:

1. has not left Montenegro within the time limit set by the decision;
2. entered Montenegro before the expiration of the ban on entry and residence;
3. does not possess or has destroyed an identity document;
4. used a forged or someone else's document;
5. stated that he would not fulfil the obligation to leave Montenegro;
6. does not have sufficient financial resources;
7. no accommodation is provided;
8. has been convicted of a criminal offense.

It is considered that the foreigner prevented the execution of the forced removal and return if:

1. they did not comply with the obligations determined by the decision on the application of milder measures;
2. they refused to provide personal data and documents required for forced removal or provided false data.

The police issues a decision on placement of a foreigner in a shelter. Accommodation in a shelter may last only for the time required for the forced removal and while the activities for forced removal are in progress, but for a maximum of six months.

An action against the decision on placement of a foreigner in a shelter may be filed with the Administrative Court, within five days from the day of delivery of the decision. The procedure before the Administrative Court is urgent.

Placement in a shelter can be shortened or extended for a maximum of 12 months, if the foreigner refuses to cooperate or is late in obtaining the necessary documents from another country.

The decision on shortening or extending the time of placement in the shelter referred shall be issued by the police. An action against the decision on shortening or extending the time of placement may be filed with the Administrative Court, within five days from the day of delivery of the decision. The procedure before the Administrative Court is urgent.

Foreigners are not allowed to leave the shelter without permission and must abide by the rules of stay in the shelter. Foreigners in a shelter have the right to health care in accordance with the regulations on health care.

Foreigners who consider to have been subjected to torture or other cruel, inhuman or degrading treatment or punishment by the staff or other detainees in the shelter may turn to the Protector of Human Rights and Freedoms.

The rules of stay and house rules in the shelter are prescribed by the Ministry of internal affairs.

A foreigner placed in a shelter may be ordered to undergo stricter police supervision if she/he:

1. leaves the shelter without approval or if there is a reasonable suspicion that they will try to leave the shelter;
2. physically assaults other foreigners, police officers or other employees of the shelter;
3. attempted self-harm;
4. behaves inappropriately, grossly insults and belittles other foreigners, police officers or other employees in the shelter, on any grounds;
5. prepares or makes items for attack, self-harm or escape from a shelter;
6. deals with the preparation of narcotic substances in the shelter;
7. intentionally damages clothing and other objects and means received for use in the shelter;
8. intentionally damages technical and other equipment in the shelter;
9. intentionally interferes with the operation of technical equipment (audio-visual and light) that is installed in the premises for physical and technical protection;
10. persistently refuses the orders of police officers and does not respect the valid legal regulations or in any other way grossly violates the rules of stay in the shelter.

Stricter police supervision includes restrictions on the freedom of movement of foreigner within the shelter and can be imposed for a maximum of seven days. The decision to order stricter police supervision can only be made by the police. Immediately after a decision to adopt stricter measures, the police transmits to the Ministry the files relating to stricter police supervision.

The Ministry shall, no later than the first following working day from the day of delivery, decide on the abolition or extension of the implementation of stricter police supervision. The decision of the Ministry shall be served on the alien who may file a lawsuit against that decision with the Administrative Court, within five days from the day of service. The procedure before the Administrative Court is urgent. The police shall terminate the implementation of stricter police supervision when the reasons for imposing it cease to exist.

Upon admission of a foreigner to the shelter, the foreigner is deprived of money, valuables, mobile phone, weapons, sharp objects (knives, razors, razors, scissors, needles), as well as objects for which there is a justified fear that could cause injury

or endanger life. A certificate shall be drawn up on the seizure of items, in the presence of a foreigner.

Upon completion of admission to the shelter, the foreigner is provided adequate clothing, which, if necessary, is provided by the shelter, bedding and personal hygiene items, and a certain amount of money from temporarily seized funds.

A foreigner may keep his clothes, shoes, bedding, personal hygiene items, glasses and orthopaedic aids for personal use. Items confiscated from a foreigner are kept in a special room of the Shelter. Cash and valuables are kept in a safe or other safe place. At the request of a foreigner, confiscated items may be handed over to a member of his family or relatives.

When accommodating a foreigner in the shelter, gender, age and citizenship are taken into account, so that foreigners of the same sex are accommodated in the same premises, minor foreigners older than 14 years of age together with a family member, and the family in a separate room. In exceptional situations, a foreigner may be accommodated separately, for health reasons, security reasons, and with the approval of the head of the Shelter, and in the case when he is ordered a measure of stricter police supervision.

After the reception and accommodation of a foreigner in the shelter, police officers discuss the manner and reasons for coming to Montenegro, acquaint him with the accommodation, rules of stay and house rules in the shelter, as well as the prescribed measures to ensure return. During the accommodation in the shelter, the foreigner will be provided with adequate contact with the family, closest relatives and the diplomatic and consular mission of the state that issued the foreigner with a foreign travel document with which the foreigner entered Montenegro, or in which the stateless person was born.

Foreigners in the shelter are provided food and beverage regularly, with nutritive value adjusted to their age or needs. Medical aid is also provided. Foreigners must be allowed to worship, as well as outdoor activities. Also, foreigner in shelters are granted an outdoor walk for at least two hours a day. Foreigners may receive post and may also have visits. The shelters are spacious enough to allow for health and safety protocols during the pandemic (i.e., distancing, isolation).

#### *b. Applicants for international protection*

Detention might also be warranted, in specific circumstances, when foreigners apply for **international protection**. The Montenegro is a so called transit country for migrants.<sup>150</sup> For the most part, migrants coming into the country do not remain in it. Those that decide to stay usually start the asylum seeking proceeding and are

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150 <https://reliefweb.int/sites/reliefweb.int/files/resources/Visit%20to%20Montenegro%20-%20Report%20of%20the%20Special%20Rapporteur%20on%20trafficking%20in%20persons%2C%20especially%20women%20and%20children%20%28A-HRC-44-45-Add.1%29.pdf>

not placed in custody and are not deprived of liberty.

The process of application for international protection in Montenegro consists of two steps: expression of intention (made to any police officer, typically at the border), and the formal application, processed by the Directorate for Migration within the Ministry of the Interior.

The facilities for foreigners described above are used both for hosting migrants and to hold foreigners in detention when warranted. As explained in the next section, shelters are also used for quarantine purposes, before releasing migrants – including applicants for international protection – into the country’s territory.

Applicants for international protection are not put into detention as such. However, it is possible that the application is lodged while the individual is already detained as an illegally staying foreigner, or that detention is ordered when the application is rejected, and the unsuccessful applicant has no lawful basis for staying in Montenegro. For as long as the application is not processed, the applicant cannot be considered an illegal migrant but safeguards might be adopted for individuals who are considered flight risks.

## **2. COVID-19 related developments**

During the pandemic, the entry of foreigners has been prohibited. Migration during this period has been, almost by definition, through irregular entry. Irregular migration dropped in 2020: 1,583 migrants were apprehended. Until July of 2020, only 394 requests for international protection were lodged.

In the wake of the COVID–19 outbreak there was no specific new legislation imposed, apart from the measures adopted in general. The visits to shelters were restricted, and all foreigners that were supposed to leave the shelter were tested for COVID–19 prior to release.

Normally shelters are available to host migrants but migrants can also decide to waive their right to stay there. If they issue a formal declaration that they will not require hospitality subsequently, they are free to leave the posts at the border and move freely in the country. Since the start of the pandemic, the protocol has changed: before they can circulate freely, all foreigners are put into compulsory quarantine (for 14 days) in the shelters, irrespective of whether they apply for international protection or not. Effectively, these measures are health-related measures comparable to those described above in section 5.A of this report – they are just enforced at the shelters when the foreigners come into the country. Most foreigners just leave the shelters, as they are allowed to do, at the end of the quarantine.

Illegally staying foreigners, after the quarantine, will be targeted for expulsion orders unless they apply for international protection.



There is some evidence that the outbreak of COVID-19, and the paralysis of all removal and extradition processes, could have increased the practice of “silent extraditions,” with possible repercussions on the practice of detaining foreigners. It must be borne in mind that, during the pandemic, the NKB has ordered the suspension of all cross-border traffic, including the process of expulsions and extraditions.<sup>151</sup> This situation has created the difficulty of balancing the necessity of detention (which cannot last longer than necessary to pursue specific goals) with the impossibility to carry out the activity for which the detention is instrumental.

“Silent extraditions” occur in the context of criminal proceedings for the extradition of individuals, handled in accordance with the Law on international legal aid in criminal proceedings. If the “receiving” State takes no step to carry out the extradition, the individual is detained up to the maximum period allowed under the law, after which they should be released. To prevent the release, local authorities might “transition” the detention’s motives to continue it: from permitting the extradition to illegal staying. In so doing, the effect of this practice is to circumvent the maximum length for the administrative detention linked to the extradition process, and at the same time disregard the compulsory requirements for detention for illegal stay.

For instance, in a case, the Montenegro’s ministry of justice adopted the decision ordering the extradition of an individual to the Russian Federation. The Russian Federation had 30 days to initiate the procedure of removal, but failed to do so. The individual then spent 8 months in detention, that is, the maximum time allowed by the Law on international legal aid in criminal proceedings. After 8 months, he had the right to be released from detention. However, as soon as he was released from detention, he was served a decision on placement in the shelter even though the conditions were not met. The aim of placement in the shelter was to prolong the extradition process covertly, resorting to the Law on foreigners. Upon challenge, the individual was released from the shelter, but his travel documents were seized.<sup>152</sup>

There are concerns that this practice has increased in the whole of Europe, in cases of extradition in which the states were not able to start the procedures in accordance with the Convention on extradition and respective laws due to outbreak of COVID-19, the procedure in accordance with the Law on foreigners is used.

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151 <https://www.globaldetentionproject.org/countries/europe/montenegro>.

152 During the interview with an adviser to the administrative court, we could verify the existence of a similar scenario relating to an Albanian individual, illegally residing in Montenegro and slated for extradition to Greece. Due to the suspension of all removal procedure, he was put in a foreign shelter pending extradition – the maximum period for detention in the shelter being six months.



## 6. WEBINAR ORGANIZOVAN RADI DAVANJA POVRATNIH INFORMACIJA

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The Council of Europe office organised a feedback session on the report prepared by the international experts. This webinar took place on 15 October 2021. The participants were provided with the text of the report and expressed their view on the state of human rights protection in the subject area during COVID times. The webinar was attended by the representatives of judiciary, office of the ombudsperson of Montenegro, civil society, university, the Montenegrin Agent before the European Court of Human Rights, and others.

After a short presentation of the report by the international consultants, the deputy Ombudsperson of Montenegro, Ms Snežana Armenko, explained that there were no massive human rights violations in the area of administrative detention during the COVID pandemic. She also emphasised that there were issues with clarity and consistency of application of the criteria for quarantining when such was prescribed by law. It was also highlighted that this lack of clear criteria in some cases led to arbitrariness and difference in treatment. Moreover, Ms Armenko highlighted that there was no effective remedy to appeal against quarantine. The courts were supposed to deal with the appeal no later than 45 days from the moment of submission. However, the length of quarantine was only 15 days (later 10 days) and it is very likely that the appeal would not be heard during quarantine. Ms Armenko also highlighted certain difficulties related to forced detention of people with mental health issues and deportation of undocumented migrants. Some of these issues had already been addressed in the previous sections of this report, and others have been reflected in its final text.

Subsequently, another representative of the Ombudsperson's office, Ms Mirjana Radovic, took the floor and pointed out that the deadline of 48 hours for the decision of detention of the mentally ill patient is problematic for the hospitals and courts. This is one of the reasons why the guarantees against forced hospitalisation are not always complied with. There is also very limited judicial control of the measures that take place within the mental institutions.

In turn, the agent of Montenegro before the European Court of Human Rights, Ms

Valentina Pavličić, highlighted that there is not enough case law of the European Court related to Article 5-1e of the Convention. She further pointed out that it is not clear whether detention to prevent contentious diseases should follow the standards developed in criminal procedures or in administrative procedures. She highlighted that at some point the state authorities started to publish the list of names of people who are supposed to quarantine and this might also raise the issues under Article 8 of the Convention.

Then the floor was passed to Ms Tamara Bulajić, adviser to Administrative Court of Montenegro. She highlighted that the legislation on quarantine in Montenegro lacked flexibility at times. She also explained the procedure that is used in relation to undocumented migrants. She pointed out that such migrants are accommodated in reception centres but in some cases their passports are taken away and they sign the obligation to notify the authorities about their whereabouts.

Then, Ms Aleksandra Vukašinović, chief of the Cabinet of the president of the Constitutional Court of Montenegro and contact person for the Superior Court Network of the European Court of Human Rights highlighted some relevant case law of the Constitutional Court of Montenegro, specifically related to detention of alcoholics. She also pointed out that the report can prove very useful for the practice of the Constitutional Court of Montenegro.

Finally, Mr Milan Radović of the NGO “Civic Alliance” gave useful explanation of how Montenegro treats undocumented migrants and highlighted that they do provide necessary legal aid to those people. Some of the points that Mr Radović made have indeed been taken into account during the drafting of this report, thanks to the meeting with his colleagues, which occurred during the research stage of the project.







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