



FIGHTING MISINFORMATION AND DEFENDING FREE EXPRESSION DURING COVID-19: RECOMMENDATIONS FOR STATES



Access Now defends and extends the digital rights of users at risk around the world. By combining direct technical support, comprehensive policy engagement, global advocacy, grassroots grantmaking, and convenings such as RightsCon, we fight for human rights in the digital age.

Fighting misinformation and defending free expression during COVID-19: recommendations for states

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I. EXECUTIVE SUMMARY

Access Now is committed to protecting human rights and to contributing to governments' responses to the coronavirus (COVID-19) pandemic. These responses must promote public health, prevent discrimination, and ensure access to reliable and timely information; defend unrestricted access to an open, affordable, and secure internet; ensure the enjoyment of freedom of expression and of opinion; and protect privacy and personal data.

International and national laws recognize that extraordinary circumstances require extraordinary measures. This means that certain fundamental rights, including the right to freedom of expression and opinion and the right to seek and impart information, may be restricted to address the current health crisis as long as governments apply basic democratic principles and a series of safeguards, and the interference is lawful, limited in time, and not arbitrary. Governments, companies, NGOs, and individuals alike have a responsibility to do their part to mitigate the consequences of the COVID-19 health crisis and to show solidarity and respect for each other.

In this paper, we provide recommendations for protecting freedom of expression and opinion and the right to impart and receive information to enable governments to fight the COVID-19 health crisis in a rights-respecting manner. There will be an aftermath to the COVID-19 outbreak and the measures governments put in place right now will determine what it will look like. The recommendations outlined below will help ensure that the rule of law, and the rights to freedom of expression and opinion, as well as the right to receive and to impart information, are protected throughout this crisis and in the future. Under no circumstances should any government allow people's fundamental rights to fall victim to this pandemic.

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II. INTRODUCTION

The outbreak of the COVID-19 health crisis in China in late 2019, and its subsequent expansion to most countries around the world, has led to a public health crisis taking place on a global scale. As soon as the outbreak was made public, governments around the world began to take measures to contain the spread of the virus and save lives.

In February 2020, the World Health Organization described the rapid growth of COVID-19-related misinformation as an “infodemic.” An infodemic is defined as “an overabundance of information, some accurate and some not, that makes it hard for people to find trustworthy sources or reliable guidance when they need it.”¹ Information and communications technologies play a key role in educating the general public and exchanging essential information between governments, the scientific community, and members of the press. The principles of openness and interconnection that are at the core of the internet allowed for it to be a key tool to exercise the fundamental right to access and impart information. This right is especially important in times of uncertainty caused by public emergencies.

Misinformation and disinformation are not unique to the COVID-19 health crisis, and for better or worse, online platforms as well as state actors have been battling both phenomena for a long time. In the context of an unprecedented health crisis, however, misinformation and disinformation about the pandemic pose a serious risk to public health as well as public action.² In this paper and in our policy and advocacy work, we adopt the definition of these terms proposed by the international human rights monitoring bodies,³ reflected below. In addition, we discuss state-sponsored propaganda.

Disinformation consists of statements which are known or reasonably should be known to be false. It misleads the population, and as a side effect it interferes with the public’s right to know and the right of individuals to seek, receive, and impart information.

Misinformation is false information, but the person who is disseminating it believes it to be true.

¹ World Health Organization. *Novel Coronavirus (2019-nCoV) Situation Report-13*, 2020.
<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports>

² Brennen, Simon, Howard & Nielsen. *Types, Sources, and Claims of COVID-19 Misinformation*, 2020.
<https://reutersinstitute.politics.ox.ac.uk/types-sources-and-claims-covid-19-misinformation>

³ See The United Nations (UN), the Organization for Security and Co-operation in Europe (OSCE), the Organization of American States (OAS) the African Commission on Human and Peoples’ Rights (ACHPR). *Joint Declaration on Freedom of Expression and Fake News, Disinformation and Propaganda*, 2017.
<https://www.osce.org/fom/302796?download=true>

State-sponsored propaganda amounts to statements which demonstrate a reckless disregard for verifiable information.

In publishing this policy paper, we have two goals. First, we aim to demonstrate how hasty and shortsighted solutions to disinformation and misinformation endanger human rights. Inadequate access to information and broad criminalization of speech can contribute to the worsening of the ongoing health crisis. Second, we hope to shed light on how disinformation and misinformation have helped to foment hate speech against vulnerable groups, reinforcing stereotypes and social stigmas against those perceived to be in close contact with the virus. By using practical examples and identifying promising practices, we aim to support policy makers and assist them in efforts to comply with international human rights standards when they develop measures to address disinformation and misinformation during the COVID-19 crisis.

POLICY-MAKING IN TIME OF CRISIS:

What rules to respect when the exceptional becomes the norm?

In times of a global pandemic such as COVID-19, governments can assume special powers to introduce extraordinary measures to prevent and mitigate the health crisis, subject to international human rights law and additional domestic constitutional standards.⁴

What are the applicable norms?

Extraordinary powers and measures are strictly defined as specific forms of legal orders by national constitutions and legal regimes, and accepted in international and regional human rights law, including Article 4 of the International Covenant on Civil and Political Rights,⁵ Article 15 of the European Convention on Human Rights, and Article 27 of the American Convention on Human Rights.⁶

⁴ United Nations. Office of the High Commissioner on Human Rights. *COVID-19: States should not abuse emergency measures to suppress human rights*, 2020.

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722&LangID=E>;

Michele Bachelet. *Coronavirus: Human rights need to be front and centre in response*, 2020.

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx>; and

Council of Europe. *We must respect human rights and stand united against the coronavirus pandemic*, 2020.

<https://www.coe.int/en/web/commissioner/-/we-must-respect-human-rights-and-stand-united-against-the-coronavirus-pandemic>.

⁵ *International Covenant on Civil and Political Rights*, 1966.

<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁶ European Court of Human Rights. *Guide on Article 15 of the European Convention on Human Rights*, 2019.

https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf

When and how can states use extraordinary powers?

These norms allow states the possibility of derogating, in exceptional circumstances and in a limited and supervised manner, from their obligations to guarantee certain rights and freedoms. The law defines the circumstances in which it is valid for a state to derogate from their obligations, limits the measures they may take in the course of any derogation, protects certain fundamental rights from any derogation, and finally sets out the procedural requirements that states must follow.

There are certain rights that do not allow for any derogation, such as the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery, and the rule of “no punishment without law.”

What are the specific limitations of freedom of expression and freedom of information?

Even under normal circumstances, freedom of expression and freedom of opinion are not absolute rights. There are very strict requirements on how freedom of expression and of information can be restricted (legality, necessity and proportionality, legitimacy). In emergency situations, states can derogate from their obligation in relation to freedom of expression and of information following the general rules. States must justify this by meeting two essential conditions: the situation must amount to a public emergency that threatens the life of the nation, and the state must have officially proclaimed a state of emergency and notified other countries through the Secretary General of the United Nations.

How to apply extraordinary measures and what are the limits of these powers?

A special legal order such as a declaration of a state of emergency or danger is not an extra-legal situation; the rule of law continues to apply and there should be scope and time limitations.⁷ Issuing a legal order does not make lawful every measure undertaken pursuant to it.

Special legal orders and measures should be written and broadcast, and disseminated broadly in appropriate languages and forums. They must have a sunset clause; indefinite term measures are not acceptable. Potential extension could be considered if necessary, but extraordinary measures must be limited in their severity, duration, and geographic scope. Governments and authorities must take every measure to restore regular rules as soon as possible at the end of a special legal order.

Fundamental human rights continue to apply in special legal orders or periods of emergency. Rights can only be restricted when necessary to prevent and mitigate the risks caused by the crisis, and restrictive measures must not go beyond the extent strictly required by and strictly proportionate to the exigencies of the circumstances.

⁷ Hungarian Civil Liberties Union. *Unlimited power is not the panacea*, 2020. <https://hclu.hu/en/articles/unlimited-power-is-not-the-panacea>

III. INADEQUATE ACCESS TO INFORMATION

Information is crucial to power and control and there is an inherent imbalance between individuals and the state or large private entities. The purpose of the right to freedom of information is to counter the particular power imbalance between the state and the people. The public's right to information has three components: to seek, receive, and impart information.

Emergencies require the government to make rapid decisions and there is a legitimate argument for the government to have greater discretion in these decisions than under normal circumstances. While mistakes are understandable in the high-pressure and ever-changing environment of the pandemic, it is necessary for governments to recognize errors and adapt quickly. Ultimately, governments and state authorities are responsible for making good decisions that promote public health and align with the principles of good governance.

The stakes couldn't be any higher: the decisions taken will determine life or death, and not just for COVID-19 patients but as we build the future of our societies. Transparency is one of the cornerstones of good governance, and maintaining if not increasing the scrutiny of those in power is necessary for accountability.⁸ Openness about information, measures taken, and policies is not a hindrance to an effective COVID-19 response. On the contrary, it is the foundation of trust in public authorities which is essential in tackling the spread of the disease. Objective information is necessary for evaluating existing responses, identifying possible gaps, and measuring their impact.

Good decisions and informed choices — for the public and decision-makers alike — require timely access to accurate information. In this respect, it is important to recognize the importance of open data policies and standards that can provide a community, and those in other impacted communities, with the information to evaluate the models that are used to develop policies, manage resources, and evaluate their impact. This would add to collaborative work that can increase efficiency⁹ and accountability in government responses. After all, good policy, especially policy related to health, is based on good science. And science benefits from an open and collaborative approach.

⁸ Julia Keseru. *Are we asking the right questions? The role of transparency during COVID19*, 2020. <https://medium.com/@jkeserue/are-we-asking-the-right-questions-the-role-of-transparency-during-covid19-7810ffd89730>

⁹ Azeem Azhar. *Democracy, trust and the virus*, 2020. <https://www.exponentialview.co/p/-democracy-trust-and-the-virus>

Governments are obliged to provide adequate access to accurate information as prescribed by international human rights law.¹⁰ Such access includes the right to seek, impart, and receive information, including information concerning health.¹¹ Indeed, during an ongoing health crisis, education and access to information concerning the health of the community, such as methods for preventing and controlling infection, lie at the core of the human right to health.¹² Accordingly, international experts have underscored the urgency of governments fulfilling their international human rights obligations to promote and protect access to and free flow of information during the COVID-19 pandemic.¹³

Unfortunately, measures that interfere with or undermine this right appear to have spread across the globe as quickly as the virus, in both democracies to dictatorships.¹⁴ Authorities in several countries have moved first to censor information about COVID-19¹⁵ rather than allow scientists to publicize and debate the extent or severity of the outbreak.

In some cases, authoritarian governments are taking advantage of the COVID-19 health crisis to reinforce state-sponsored propaganda and to cement their powers by further undermining any existing or remaining constitutional checks and balances.¹⁶ In times of national emergencies, some state actors promote “self-serving propaganda”¹⁷ that opens serious threats to independent media and journalists who are objectively reporting about the health crisis.

¹⁰ Having said that, the right to freedom of information applies to everyone, everywhere, and may only be restricted by governments in narrow circumstances. See Universal Declaration of Human Rights, (Art. 19); International Covenant on Civil and Political Rights, (Arts. 2, 19(2) and 25); CCPR General Comment No. 34: *Article 19 Freedom of Opinion and Expression*, paras. 11 - 12, 15, 18-19, 30,41, 43, and 46.; CCPR General Comment No. 31: *Nature of the general legal obligation imposed on States Parties to the Covenant*; CCPR General Comment No. 16: *The right to privacy, family, home and correspondence, and protection of honour and reputation* (Art. 17).

¹¹ CESCR General Comment No. 14: *The Right to the Highest Attainable Standard of Health* (Art. 12), para. 12 (b).

¹² *Ibid.*, para 44.

¹³ United Nations. Office of the High Commissioner for Human Rights. *COVID-19: Governments must promote and protect access to and free flow of information during pandemic - International experts*, 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25729&LangID=E>

¹⁴ Adam Foldes. *Right to information: A matter of life and death during the COVID-19 crisis*, 2020. <https://voices.transparency.org/right-to-information-a-matter-of-life-and-death-during-the-covid-19-crisis-d98e6422a174>

¹⁵ Chris Buckley. *Chinese Doctor, Silenced After Warning of Outbreak, Dies From Coronavirus*. The New York Times, 2020. <https://www.nytimes.com/2020/02/06/world/asia/chinese-doctor-Li-Wenliang-coronavirus.html>

¹⁶ Eva Simon, Jonathan Day. *A free media is vital to help navigate the coronavirus crisis*. New Europe, 2020. <https://www.neweurope.eu/article/a-free-media-is-vital-to-help-navigate-the-coronavirus-crisis/>

¹⁷ Kenneth Roth. *How Authoritarians Are Exploiting the COVID-19 Crisis to Grab Power*, Human Rights Watch, 2020. <https://www.hrw.org/news/2020/04/03/how-authoritarians-are-exploiting-covid-19-crisis-grab-power>

Examples of government propaganda, censorship, and restriction of access to information

Asia - Pacific

China: According to a report by Citizen Lab,¹⁸ from the very beginning of the outbreak, Chinese authorities have blocked COVID-19-related content on social media and the messaging service WeChat.

North America

US: The United States placed an information gatekeeper, Vice President Mike Pence, in strict control of public messaging.¹⁹ The White House is reportedly working with pro-Trump social media influencers²⁰ to defend the president's response²¹ to the pandemic and blame his political opponents for the failures of his administration.

Russia

In Russia, medical professionals have expressed serious concerns²² over whether the official public health information released by the government during the pandemic fully corresponds to the reality on the ground. In response, local and federal authorities have tried to control public messaging by preventing doctors and heads of medical institutions from speaking to the media²³ and suggesting that those who raise awareness about the lack of preparation by the Russian healthcare system for a pandemic should be investigated.²⁴

¹⁸ Ruan, Knockel, Crete-Nishihata. *Censored Contagion: How Information on the Coronavirus is Managed on Chinese Social Media*. Citizen Lab, 2020.

<https://citizenlab.ca/2020/03/censored-contagion-how-information-on-the-coronavirus-is-managed-on-chinese-social-media/>

¹⁹ Shear & Haberman. *Pence Will Control All Coronavirus Messaging From Health Officials*. The New York Times, 2020. <https://www.nytimes.com/2020/02/27/us/politics/us-coronavirus-pence.html>

²⁰ Suebsaeng & Banco. *White House Privately Backchannels Its Coronavirus Messaging to Conservative Social-Media Influencers*. The Daily Beast, 2020.

<https://www.thedailybeast.com/trump-white-house-privately-backchannels-its-coronavirus-messaging-to-conservative-social-media-influencers>

²¹ Christian Paz. *All the President's Lies About the Coronavirus*. The Atlantic, 2020.

<https://www.theatlantic.com/politics/archive/2020/04/trumps-lies-about-coronavirus/608647/>

²² Greenberg & Fomina. *Russia says it has hardly any coronavirus cases. Doctors say otherwise*. Coda Story, 2020.

<https://www.codastory.com/waronscience/russia-coronavirus-mistrust/>

²³ Lyudmila Savitskaya. *In Pskov, doctors were forbidden to communicate with the press without coordination with officials*, 2020. <https://www.severreal.org/a/30525110.html>

²⁴ Irina Titova. *Doctors in Russia are accusing the government of covering up its coronavirus outbreak and denying them protective equipment*. Business Insider, 2020.

<https://www.businessinsider.com/coronavirus-russia-doctors-say-government-is-covering-up-cases-2020-3>

Africa

Kenya: In Kenya, as the number of confirmed cases increased, so did the government's attempts to control access to information. Authorities established a dusk-to-dawn curfew, and two hours before the curfew was scheduled to start, law enforcement officers in Mombasa were filmed harassing and using physical force against journalists and others. To date, there have been reports of at least two extrajudicial killings by law enforcement in their attempt to enforce the curfew, one of a 13-year-old boy and another of a motorbike driver.²⁵

Eritrea: Dubbed the “North Korea of Africa,”²⁶ Eritrea is one of the most censored and surveilled countries in the world.²⁷ The government routinely monitors communication channels including social media platforms.²⁸ During the COVID-19 pandemic, the government introduced a 21-day lockdown, and according to sources that spoke to Access Now, relatives in the diaspora who call to check in on their families avoid discussing the government's response to the pandemic, as they fear phone conversations are being monitored, and the discussion could put their families at risk.

Europe

Hungary: Despite public pressure, Hungarian authorities initially did not make information about the geographical spread of COVID-19 infections publicly available,²⁹ claiming that the information was sensitive, and thereby making it hard to find out where the disease was spreading. Once the government COVID-19 task force announced that they would disclose more information at the end of March 2020, health information was briefly available that revealed the sensitive data of individuals (due to the low official number of cases and the media reporting on some high-profile patients).³⁰

²⁵ Duncan Moore. *Fury in Kenya over police brutality amid coronavirus curfew*, 2020. <https://www.aljazeera.com/news/2020/04/fury-kenya-police-brutality-coronavirus-curfew-200402125719150.html>

²⁶ Martin Plaut. *What peace will mean for Eritrea – Africa's 'North Korea'*, 2018.

<https://theconversation.com/what-peace-will-mean-for-eritrea-africas-north-korea-100063>

²⁷ Ibid.

²⁸ Plaut, M. (2019). *Understanding Eritrea: inside Africa's most repressive state*. London: Hurst & Company.

²⁹ Vlagyislav Makszimov. *Hungarian authorities decline to disclose location of new COVID-19 cases*. Euractiv, 2020. <https://www.euractiv.com/section/coronavirus/news/hungarian-authorities-decline-to-disclose-location-of-new-covid-19-cases/>

³⁰ Hungarian Civil Liberties Union. *Jogsértő listát közzölt az állam a koronavírus áldozatairól*, 2020. <https://tasz.hu/cikkek/jogserto-listat-kozolt-az-allam-a-koronavirus-aldozatairol>

Latin America

Brazil: The government of Brazil has introduced an executive decree that releases government officials from the obligation to respond to Freedom of Information (FOI) requests. Additionally, public officials have to be physically present in the office when dealing with submitted requests. These measures will be in force at least until the end of 2020.³¹ Even though the decree indicates that requests regarding the COVID-19 pandemic should be prioritized, there is no information on response times, no clear description of COVID-19-related issues that are included, and no details about the workings of the rule and the exceptions during the crisis.³²

Venezuela: In Venezuela, the government detained at least 18 people who used social networks to denounce the inefficiency of the government response to the COVID-19 situation, according to the organization Espacio Público.³³

Promising practices

South Korea: Taking action based on previous experience with the 2003 SARS epidemic, the Korea Centers for Disease Control & Prevention (KCDC) provided transparent, critical, and objective information to the public from the very beginning of the pandemic outbreak.³⁴ The data about the spread of COVID-19 are regularly updated and easily accessible via the KCDC's official website. South Korea has in place specific legislation, the Infectious Diseases and Prevention Control Act.³⁵ The law stipulates that the responsible ministry has to disclose all necessary information to citizens for preventing infectious disease, such as movement paths, transportation means, medical treatment institutions, and so on.³⁶ Some consider the South Korean approach “a democratic response to coronavirus.”³⁷ However, it must be noted that the government has also been tracking and posting online detailed location data of people

³¹ Toby McIntosh. *Governments Delaying Access to Information Because of Pandemic*, 2020. <https://eyeonglobaltransparency.net/2020/03/25/governments-delaying-access-to-information-because-of-pandemic/>.

³² Transparencia Brasil. *Nota conjunta: só venceremos a pandemia com transparência*, 2020. <https://www.transparencia.org.br/blog/nota-conjunta-so-venceremos-a-pandemia-com-transparencia/>

³³ Espacio Público. *Marzo: cuarentena informativa en Venezuela*, 2020. <http://espaciopublico.org/marzo-cuarentena-informativa-en-venezuela/>

³⁴ For more information about regular press releases and information policy in South Korea, please see the Korea Centers for Disease and Control Prevention. <https://www.cdc.go.kr/board/board.es?mid=a30402000000&bid=0030>

³⁵ Korea Legislation Research Institute. *Infectious Disease Control and Prevention Act* (amended in 2020). https://elaw.klri.re.kr/kor_service/lawView.do?hseq=40184&lang=ENG

³⁶ Seokim Lee, *Fighting COVID-19: Legal Powers and Risks*, 2020. <https://verfassungsblog.de/fighting-covid-19-legal-powers-and-risks-south-korea/>

³⁷ Eun A Jo, *A Democratic Response to Coronavirus: Lessons From South Korea*, 2020. <https://thediplomat.com/2020/03/a-democratic-response-to-coronavirus-lessons-from-south-korea/>

confirmed and suspected to be infected by the virus, which is a highly privacy intrusive practice that violates international human rights law.³⁸

RECOMMENDATIONS

Be transparent

Making reliable and timely information available in transparent and accessible formats³⁹ saves lives. This is the government's foremost obligation during times of public health crisis. Governments should:

- Publish detailed statistics on the number of newly infected patients and those who recovered, including information on the geographical areas impacted by the spread of the COVID-19 virus, and provide both scientific and easy-to-understand explanations of the testing protocol and the methodology of the data being presented;
- Follow data protection and privacy legal standards in the use of such statistics;⁴⁰
- Hold regular briefings by public and responsible health officials, presented in an easily understandable and compassionate manner, and ensure the access of the media to official and public information;
- Provide accurate, regular updates on access to health care services, including information about current or future disruptions of those services;
- Communicate information in all spoken languages, including minority and sign languages, and take into consideration digital literacy, and other barriers;
- Maintain the functioning of transparency and freedom of information laws; and
- Prioritize the disclosure of information related to the emergency, both through responses to FOI requests and proactive disclosure.

Do not hide or manipulate information

Citizens, the press, and the scientific community all over the world rely on relevant and accurate information about the unfolding of pandemics to gain knowledge and inform their actions.

³⁸ Access Now. *Recommendations on privacy and data protection in the fight against COVID-19*, 2020. <https://www.accessnow.org/covid19-data-protection/>

³⁹ United Nations. Office of the High Commissioner for Human Rights. *COVID-19: Governments must promote and protect access to and free flow of information during pandemic - International experts*. Op.cit.

⁴⁰ Access Now. *Recommendations on privacy and data protection in the fight against COVID-19*, 2020. <https://www.accessnow.org/covid19-data-protection/>

**Protect
journalists and
their work**

Emergency situations must not serve as an excuse to harm journalism and undermine free expression. Journalism — including citizen journalism — plays a key role in holding governments authorities and companies accountable in times of crisis.

IV. DISPROPORTIONATE CRIMINAL MEASURES TO COMBAT COVID-19 MISINFORMATION

The flood of information related to the COVID-19 pandemic presents a challenge in itself. In addition to accurate information there is disinformation and misinformation about possible cures or remedies for the COVID-19 virus, the origin of the disease, the details of particular cases, the efficacy of government policies, and much more. Often, internet users share misleading or inaccurate information inadvertently, out of concern for their loved ones. In some cases, bad actors do so to exploit societal fears and sow discord, to interfere with responses to the ongoing health crisis or to profit from the crisis.⁴¹

The global health crisis has prompted some governments to take hasty action in pursuit of an effective response to the spread of misinformation and disinformation on the internet and via traditional media. Yet history has shown that hastily crafted legal or policy measures presented as a silver-bullet solution to a national emergency can create an environment of legal uncertainty and enable ongoing human rights abuses.⁴² While governments' concerns about national safety are legitimate, any adopted measures for dealing with misinformation must be proportionate and necessary, and meet a legitimate aim.

Unfortunately, disproportionate measures to criminalize speech or other harmful approaches appear to be spreading along with the virus. Indeed, we are seeing broadly formulated laws to address COVID-19-related “false news” or “propaganda” serve as a justification to suppress legitimate discourse.⁴³ Multiple examples from across the world show states leveraging criminal-law measures to target journalists or healthcare workers who have sought to share

⁴¹ The Atlantic Council's Digital Forensic Research Lab. *South Africa-based Facebook groups stoked coronavirus fears to sell face masks*, 2020. <https://medium.com/dfrlab/south-africa-based-facebook-groups-stoked-coronavirus-fears-to-sell-face-masks-1212f9846cb>

⁴² See, for example: Amnesty International. *Upturned Lives: The Disproportionate Impact of France's State of Emergency*, 2016. Amnesty International. *Dangerously Disproportionate: The Ever Expanding Security State of Europe*, 2017. American Civil Liberties Union (ACLU). *Surveillance under the Patriot Act*, 2012.

⁴³ See, for example: Amnesty International. *Singapore: Social media companies forced to cooperate with abusive fake news law*, 2020. <https://www.amnesty.org/en/latest/news/2020/02/singapore-social-media-abusive-fake-news-law/>

important information or criticize governments for their lack of adequate response to the COVID-19 crisis.

Typically, when individuals share misinformation, there is no malicious intent. This is not to say that there is no potential harm to society. However, unless posting or sharing misinformation is directly connected to inciting hatred or violence, no one should be penalized for it.⁴⁴ That does not mean that governments are powerless in the face of misinformation. In the words of David Kaye, the UN Special Rapporteur on freedom of expression and opinion, the absence of restrictions does not mean the absence of action.⁴⁵ As suggested by the Human Rights Council Resolution 16/18,⁴⁶ states can take effective steps to combat misinformation through robust public messaging, education, and outreach, including through making regular public service announcements at the national and local levels.

Examples of disproportionate legal measures criminalizing the spread of COVID-19-related misinformation

Latin America

Argentina: Two people were detained for spreading false information online, through the broad interpretation of a provision in the criminal code that punishes the incitement of public fear with a prison term of up to six years.⁴⁷

Bolivia: The president of Bolivia issued a decree establishing that those who incite disobedience of government measures to fight COVID-19, “misinform,” or “cause uncertainty” in the population will be prosecuted for crimes against public health.⁴⁸

⁴⁴ Lewis Sanders. *Is criminalizing fake news the way forward?* Deutsche Welle, 2016. <https://www.dw.com/en/is-criminalizing-fake-news-the-way-forward/a-36768028>

⁴⁵ United Nations General Assembly. *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, 2019. A/74/486. https://www.ohchr.org/Documents/Issues/Opinion/A_74_486.pdf

⁴⁶ United Nations. Human Rights Council. *Resolution 16/18. Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief*, 2011. <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/RES/16/18&Lang=E>

⁴⁷ Canal 9 noticias (Chile). *Influencer argentino es detenido por difundir información falsa sobre covid-19*, 2020. <https://www.canal9.cl/programas/noticias/2020/03/31/influencer-argentino-es-detenido-por-difundir-informacion-falsa-de-covid-19.shtml>

⁴⁸ Human Rights Watch. *Bolivia: decreto sobre COVID-19 amenaza la libertad de expresión*, 2020. <https://www.hrw.org/es/news/2020/04/07/bolivia-decreto-sobre-covid-19-amenaza-la-libertad-de-expresion>

Russia

Russia: Russia has passed legislation⁵⁷ in response to COVID-19 that imposes up to three years in jail for “threatening people’s lives and safety” with false information and up to five years for “distributing deliberately false information of public significance” if it leads to death or “other grave consequences.”

Middle East and North Africa

Tunisia: On March 12, 2020, members of the Tunisian Parliament proposed a bill to combat disinformation during the COVID-19 crisis, on the pretext of countering “fake news” and controlling the flow of information on social media platforms that could impact “national security and stability.” The draft legislation blurred the line between defamation and misinformation, contained vague and broad definitions of the terms, and imposed harsh penalties and steep fees for violating its provisions. Public backlash subsequently forced its withdrawal.⁵⁸

Promising practices

The civil society organization ARTICLE 19 has developed a threshold test to distinguish speech acts that amount to incitement to hatred, the so-called Rabat Plan of Action, endorsed by the UN High Commissioner for Human Rights.⁵⁹ The purpose of this six-part test is to assist judicial authorities in defining restrictions on freedom of expression to identify cases when a speech act can amount to incitement to hatred and may be punished by criminal law. During the COVID-19 global health crisis, such a tool gains even more relevance and states should fully implement and follow its guidance. Public authorities can also implement programs that align with human rights and increase access to accurate information, working in cooperation with international organizations and private actors. For instance, the World Health Organization has created a website with a list of COVID-19 myths spreading online, as a measure to help counter them and provide accurate information that can save lives.⁶⁰

⁵⁷ The Moscow Times. *Russians Risk Fines, Jail Time for Dodging Coronavirus Quarantine*, 2020. <https://www.themoscowtimes.com/2020/04/01/russians-risk-fines-jail-time-for-dodging-coronavirus-quarantine-a69818>

⁵⁸ Samaro & Sayadi. *Tunisia’s Parliament on COVID-19: an initiative to fight disinformation or an opportunity to violate fundamental rights?* Access Now, 2020. <https://www.accessnow.org/tunisias-parliament-on-covid-19-an-initiative-to-fight-disinformation-or-an-opportunity-to-violate-fundamental-rights/>

⁵⁹ United Nations. Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred, 2012. https://www.article19.org/data/files/Rabat_Plan_of_Action_OFFICIAL.pdf

⁶⁰ World Health Organization. Coronavirus disease (COVID-19) advice for the public: Myth busters, 2020. <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/myth-busters>

RECOMMENDATIONS

Do not use criminal law for speech acts

The use of criminal law to punish speech acts should be **the last resort and strictly limited**. Criminal law is not an appropriate tool to fight misinformation at scale and it creates a dangerous space for human rights abuse in the form of state-sponsored intimidation and unjustified prosecution of critical voices.

- **Limit use of criminal law to cases of incitement to violence and hatred**, as prescribed by Article 20 (2) of the International Covenant on Civil and Political Rights⁶¹ and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.⁶²
- **Do not adopt highly restrictive legal measures** to combat misinformation surrounding the COVID-19 pandemic.
- **Apply and interpret criminal provisions that punish specific types of conduct against public order restrictively**. Some countries prohibit actions that intentionally cause panic, such as bomb threats. Governments should not use such provisions to suppress legitimate speech.

Protect people who speak up

Ensure and strengthen whistleblower protections. Public authorities and institutions must protect those who report or expose the harms, abuses, and serious wrongdoing that can arise during a pandemic.

⁶¹ Op.cit.

⁶² *International Convention on the Elimination of All Forms of Racial Discrimination*, 1966. https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4

V. THE RISE OF HATE SPEECH AGAINST CERTAIN GROUPS

Those responding to this crisis must fight the virus, not the people. Since the pandemic broke out, there have been reports of increased racist and xenophobic, including Islamophobic,⁶³ acts worldwide. This has included online hate speech and stigmatization targeting people of particular ethnic backgrounds⁶⁴ and those presumed to be infected or in contact with people who are ill with the virus.⁶⁵ The rise of harmful stereotypes that can reinforce social stigma not only harms the victims but may ultimately support ongoing transmission of the virus and weaken the world’s ability to respond to and eradicate the virus.⁶⁶

The World Health Organization defines social stigma in the context of a health crisis as “the negative association between a person or group of people who share certain characteristics and a specific disease.” During the outbreak of this pandemic, certain groups have faced negative stereotyping, labeling, and discrimination because of their direct or indirect link to the virus.⁶⁷ Social stigmatization can reinforce the social isolation and silencing of certain groups in a society and consequently create the environment in which the virus is more likely to spread.⁶⁸

There is no universally accepted definition of “hate speech” at the international level. The inherent vagueness of the term and the lack of general agreement about what expression amounts to hate speech opens the space for governments to restrict legitimate expression, such as journalistic reporting or criticism of public authorities. At the same time, online platforms and state actors cite the ambiguity of hate speech to explain lack of proportional response to potentially harmful content that may incite violence and hatred against

⁶³ Billy Perrigo. *It Was Already Dangerous to Be Muslim in India. Then Came the Coronavirus*. Time, 2020. <https://time.com/5815264/coronavirus-india-islamophobia-coronajihad/>

⁶⁴ Nosheen Iqbal. ‘They yelled Coronavirus’ – East Asian attack victim speaks of fear. The Guardian, 2020. <https://www.theguardian.com/world/2020/feb/16/they-yelled-coronavirus-first-british-attack-victim-east-asian-man>

⁶⁵ Farah Stockman. *What It’s Like to Come Home to the Stigma of Coronavirus*. The New York Times, 2020. <https://www.nytimes.com/2020/03/04/us/stigma-coronavirus.html>

⁶⁶ Regional Risk Communication and Community Engagement Working Group. *COVID-19: How to include marginalized and vulnerable people in risk communication and community engagement*, 2020. https://reliefweb.int/sites/reliefweb.int/files/resources/COVID-19_CommunityEngagement_130320.pdf

⁶⁷ IFRC, UNICEF, WHO. *A guide to preventing and addressing social stigma associated with covid-19*, 2020. [https://www.unicef.org/media/65931/file/Social%20stigma%20associated%20with%20the%20coronavirus%20disease%202019%20\(COVID-19\).pdf](https://www.unicef.org/media/65931/file/Social%20stigma%20associated%20with%20the%20coronavirus%20disease%202019%20(COVID-19).pdf)

⁶⁸ Ibid.

vulnerable groups.⁶⁹ Based on the work of the UN Special Rapporteur for freedom of expression and opinion, any legitimate restriction of hate speech needs to reconcile the protection of open debate in a democratic society and the personal autonomy of individuals.

⁷⁰ Hateful expression that targets members of vulnerable groups can lead to social stigma, reinforce racial stereotypes, and encourage discriminatory treatment against them.⁷¹ While not every form of hate speech falls outside the margins of protected speech, the potential collective harm such expression can cause may still be significant for its targets, especially during the time of global crisis. In an uncertain environment, the stigmatization fueled by misinformation and disinformation could deepen discrimination against individuals who are perceived as linked to the virus.

It is particularly problematic when well-known public figures, officials, and political leaders adopt discriminatory rhetoric and use racist stereotyping in their public statements. In March 2020, during a speech from the White House, US President Donald Trump referred to COVID-19 as a “foreign virus.” Based on the data provided by the Atlantic Council’s Digital Forensic Lab (DFRLab), in the aftermath of Trump’s statement, the use of this term spiked on Twitter and in news articles. Similarly, when Trump retweeted a statement that described COVID-19 as the “China virus,” the phrase was tweeted 24,049 times.⁷²

Examples of reported hate speech cases against certain groups in relation to the COVID-19 health crisis

Asia - Pacific

India: When dozens of positive cases were confirmed among participants at a conference organized by a Muslim missionary group in Delhi, it sparked a wave of Islamophobic attacks that spread on social media using the hashtag #CoronaJihad. People shared videos falsely claiming to show members of the missionary group spitting on police and these posts quickly went viral, exacerbating the risks in an already dangerous atmosphere for Muslims in the country.⁷³

⁶⁹ United Nations General Assembly. *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*. Op. cit.

⁷⁰ United Nations General Assembly. *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, 2012. A/67/357. <https://undocs.org/en/A/67/357>

⁷¹ United Nations. Office of the High Commissioner on Human Rights. *States should take action against COVID-19-related expressions of xenophobia, says UN expert*. 2020. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25739&LangID=E>

⁷² Atlantic Council’s Digital Forensic Lab. *U.S. politicians exploit coronavirus fears with anti-Chinese dog whistles*, 2020. <https://medium.com/dfrlab/u-s-politicians-exploit-coronavirus-fears-with-anti-chinese-dog-whistles-ff61c9d7e458>

⁷³ Sameer Yasir and Billy Perrigo. ‘Hate Is Being Preached Openly Against Us.’ *After Delhi Riots, Muslims in India Fear What’s Next*. Time, 2020. <https://time.com/5794354/delhi-riots-muslims-india/>

Europe

Austria: In the region of Styria, the Anti-Discrimination Office reported that on the state-sponsored app BanHate⁷⁴ developed for tracking online hate speech, there was an increase of reports of content that blamed refugees for spreading the COVID-19 virus.⁷⁵

Italy: The wave of xenophobia and hate speech against the Chinese community across the country, also referred to as Sinophobia, has reportedly intensified since the start of the pandemic. In February, the mayor of the northern town of Solto Collina, Maurizio Esti, posted on his Facebook profile the following statement: “These f***ing Chinese, they eat everything. Bats, snakes, dogs and insects, they should be the only people to die in this epidemic.”⁷⁶

North America

US: The Stop AAPI HATE reporting forum has recorded more than 1,100 instances of anti-Asian harassment, online and off, since it was set up in late March 2020.⁷⁷

Promising practices

The city of Barcelona launched an anti-racism social media campaign using the hashtag #StopRacism (#StopRacisme in Catalan). The campaign officially started on March 21, 2020, which is the International Day for Elimination of Racial Discrimination. It highlights six activists who, in the context of the COVID-19 health crisis, shared their views on how racism and xenophobia have escalated.⁷⁸

⁷⁴ Ban Hate initiative, 2020. <https://www.banhate.com/>

⁷⁵ EU Fundamental Rights Agency. *Corona Pandemic in the EU - Fundamental Rights Implications*, 2020. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-1_en.pdf

⁷⁶ Yuebai Liu. *Coronavirus prompts 'hysterical, shameful' Sinophobia in Italy*. Al Jazeera, 2020. <https://www.aljazeera.com/news/2020/02/coronavirus-prompts-hysterical-shameful-sinophobia-italy-200218071444233.html>

⁷⁷ Asian Pacific Policy and Planning Council, Chinese for Affirmative Action. *STOP AAPI HATE Receives over 1,100 Incident Reports of Verbal Harassment, Shunning and Physical Assault in Two Weeks*, 2020. http://www.asianpacificpolicyandplanningcouncil.org/wp-content/uploads/Press_Release_4_3_20.pdf

⁷⁸ UNESCO. *#StopRacism: Barcelona's anti-racism campaign in midst of #Covid19*, 2020. <https://en.unesco.org/news/stopracism-barcelonas-anti-racism-campaign-midst-covid19>

| RECOMMENDATIONS | |
|--|---|
| Define prohibited conduct narrowly and do not criminalize speech acts | Strictly define prohibited conduct in the context of the COVID-19 health crisis in the law and ensure these definitions respect international human rights law standards. As we recommend above, refrain from criminalizing speech acts, except in the gravest situations, such as incitement to hostility, discrimination, and violence. ⁷⁹ |
| Ensure hate speech laws are necessary and proportionate | Make sure that any new or existing legislation for addressing hate speech meets the requirements of proportionality, necessity, and legality. Especially during a global health crisis, robust public participation and adherence to the rule of law must be the priority for every government. |
| Do not shift the responsibility to online platforms | Do not assign additional responsibility to online platforms for combating online hate speech or disinformation and misinformation in the context of the COVID-19 health crisis that goes beyond legitimate legal restrictions available to states, which bear the primary duty for protecting the human rights of online users. |
| Do not use racist terminology | Do not link the COVID-19 virus to any nationality, ethnicity, or specific location. In particular, public officials should refrain from using terms such as “Chinese virus,” “Wuhan virus,” or “Kung flu.” During this health crisis it is politicians who have become “the most effective trolls.” ⁸⁰ |
| Facilitate accurate and responsible journalism | National media regulators can help guide the media with detailed recommendations for journalists and media professionals on how to report accurately and responsibly about the COVID-19 health crisis. ⁸¹ Inaccurate and potentially discriminatory reporting can fuel more misinformation and thus foster intolerance and discrimination against certain groups. |

⁷⁹ United Nations. Office of the High Commissioner on Human Rights. *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, 2012. <https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/RabatPlanOfAction.aspx>

⁸⁰ Hanna Kozłowska. *How anti-Chinese sentiment is spreading on social media*. Quartz, 2020. <https://qz.com/1823608/how-anti-china-sentiment-is-spreading-on-social-media/>

⁸¹ For further details, see: ARTICLE19. *Viral Lies: Misinformation and the Coronavirus*, 2020. <https://www.article19.org/wp-content/uploads/2020/03/Coronavirus-briefing.pdf>

VI. CONCLUSION

In this paper we have highlighted the potential harm that the spread of disinformation and misinformation can cause. It has the power to reinforce existing divisions and to inspire unjustified fears and panic within societies. During the COVID-19 health crisis, disinformation and misinformation has been leveraged in online hate speech against certain groups and has significantly contributed to the rhetoric of social stigma. As the examples above illustrate, many countries have resorted to state-sponsored disinformation and propaganda to enhance their own political agenda. “Official disinformation”⁸² promoted by heads of state threatens fundamental rights, democracy, and the rule of law.

Inadequate access to objective data about the COVID-19 pandemic creates space for the misleading and inaccurate information that some governments abuse to further their political objectives and push through oppressive measures, while deepening social stigmatization of vulnerable groups based on myths and fabricated stories. Meanwhile, hastily crafted responses to disinformation and misinformation, especially those based in the over-broad criminalization of speech, can serve to suppress objective journalism and scientific information, either intentionally or as a by-product of a flawed approach. To protect public health and the health of our democracies moving forward, governments must align approaches for addressing disinformation and misinformation with international human rights obligations and bulwark the rule of law.



Access Now defends and extends the digital rights of users at risk around the world. By combining direct technical support, comprehensive policy engagement, global advocacy, grassroots grantmaking, and convenings such as RightsCon, we fight for human rights in the digital age.

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⁸² David Kaye. *Trump’s War on Truth is Bad for Your Health*, 2020.
<https://medium.com/@dkisaway/trumps-war-on-truth-is-bad-for-your-health-527b0c3c28bd>