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Statement by Professor Joe Cannataci

SPECIAL RAPPORTEUR ON THE RIGHT TO PRIVACY

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Mister President, Distinguished Representatives, Observers, Ladies and Gentlemen,

It has been a privilege to serve as the first Rapporteur of this mandate. The ongoing pandemic has highlighted the significance of privacy as a human right during these challenging times. It is against this backdrop that I am honoured to present my fifth, and last Annual Report to the United Nations General Assembly.

Because of time constraints, a lot of important issues covered in my 2020 report on **the privacy impacts of the COVID 19 health emergency** cannot be discussed in detail.

In order to make sure that it was ready for translation, my report was written by July with the benefit of only four months of evidence about the pandemic ...and even today, seven months down the line, we don't have sufficient evidence for the impact of all measures to be fully known and adequately assessed. So today's report can only be of an interim nature. I do hope, however, to be able to issue an update about the same subject in 2021, with the benefit of more evidence.

But we do know that human rights, including the right to privacy, have been severely and adversely affected by the pandemic.

For time reasons therefore, today I'm addressing just two key aspects – data and technology used in fighting the pandemic. However, this is not out of a lack of concern for the many, and varied privacy effects upon communities around the world.

Mister President,

The fight against the virus has seen individuals' data become a key tool for governments, scientists and others - including corporations.

Public health emergencies have always provided a legitimate basis for the processing of data. And while contact-tracing, for example, is privacy-intrusive, it can be classified as a necessary public health measure.

But what is of concern, are reports of personal and health data combined with technology, being used to exert control over citizens, *possibly to little public health effect*. And which even if legal, are questionable as to their necessity and proportionality.

Surveillance and contact tracing have taken various forms: manual and technological; anonymous, identified and in some places publicised, as well as consensual and non-consensual.

We know that some governments and tech companies have expanded traditional manual contact-tracing with technology to track individuals who have tested positive for Covid-19, and their contacts.

We know the data generated has resulted in comprehensive profiles of patients and their contacts.

And, we also know there are various, varied, and unequal interests in such data.

However, there is sufficient guidance available for any country collecting data as part of their COVID 19 response, which enables its use to be demonstrably lawful, necessary and proportionate in a democratic society. The WHO and others provide guidance in this area. At the regional level, but with significant

international influence, the GDPR<sup>1</sup> and Convention 108+<sup>2</sup> recognise health data as a ‘special category of data’ requiring protection.

And last year I had the honour of presenting to the General Assembly, my Recommendation on the processing of health related data, including for public health reasons.

Mister President,

Moving now to the use of technology in pandemic responses: privacy engineering has not featured as highly as it should – particularly when the trust of citizens determines their adoption of the technology.

The main privacy risk lies in the employment of non-consensual methods such as those using Hybrid surveillance - which can be used for other purposes.

Technology driven contact-tracing has become, in some places around the world, disturbingly close to incessant and omni-present surveillance. Such surveillance is not the panacea for the COVID-19 pandemic.

This point has been driven home by those countries effective in countering COVID-19 by using conventional contact-tracing without smartphone APPS, geo-location or other technologies.

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<sup>1</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1, art 9(1)

<sup>2</sup> Council of Europe Convention 108: Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data 1981, ETS 108, art 6

A privacy-intrusive measure, especially an easily abused one such as technological surveillance, has to be demonstrably lawful, necessary and proportionate.

An example of a promising practice that embeds privacy in design, is DP-3T (Decentralised Privacy-Preserving Proximity Tracing), an open-source protocol, for Bluetooth-based tracking where an individual phone's contact logs are only stored locally. An aspect which appears critical to voluntary adoption.

An objective assessment of COVID 19 public health measures entails assessing if other methods would have avoided the deaths to the same extent as the privacy-intrusive strategies deployed.

This 'test' would determine whether the measure is necessary and proportionate in a democratic society and thus permissible under international privacy law.

Mister President,

At the time of writing, it was too early to assess definitively whether all States' COVID-19 related measures were necessary or proportionate.

Over the next twelve months, the evidence required to properly assess States' COVID-19 measures, will become available and will reveal those that actually meet the tests of proportionality and necessity.

In the remaining time, I would like to acknowledge the contributions of all to my mandate since 2015. There are too many people, organisations and States to name individually, but it would not have been possible or as productive without you. My sincere thanks and I look forward to our dialogue.

Lastly, I wish you good health throughout the coming months.

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