

**Response to the Request for Input concerning thematic report on new technologies and their impact on the promotion and protection of human rights in the context of assemblies, including peaceful protests.**

**Special Rapporteur on the right to privacy, Professor Joseph A. Cannataci**

Information has been sought of the following aspects of the promotion and protection of human rights in the context of peaceful protests**:**

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**Background:**

1. The Human Rights Council has adopted resolutions highlighting the interdependent and mutually reinforcing relationship between democracy and human rights.[[1]](#footnote-1)
2. One of the most significant challenges that twenty-first century information societies face is reconciling the societal benefits offered by new information and communications technologies with the protection of fundamental rights such as the right to privacy and the right to peaceful assembly.
3. New technologies have the potential to assist States to respect, protect and fulfil their human rights obligations, boost freedom of expression, facilitate global debate and foster democratic participation. [[2]](#footnote-2)
4. By dramatically improving access to information and real-time communication, innovations in communications technology can be used also to increasingly, and pervasively, undermine human rights, in particular the right to privacy and the right to peaceful assembly and of association. To the extent that now, in 2019, a major concern is how communications technology can have a chilling effect upon freedom of expression, of association and of peaceful assembly.

**Democracy and the Right to Peaceful Assembly and the Right to Privacy**

1. Liberties and freedoms are the cornerstone of democracies. The right to freedom of peaceful assembly is an essential freedom and moreover, particularly essential for human rights defenders. It enables them to voice their opinions, rally popular support and activate positive social change.
2. Privacy, as a necessary precondition for the protection of fundamental values including liberty, dignity, equality, and freedom from government intrusion, is also an essential ingredient for democratic societies.
3. Privacy is a form of freedom built into social structures, and privacy advocacy is part of the broader political struggle for equality, citizenship rights and democracy.
4. The Human Rights Council has recognised privacy as an enabling right essential to the right to dignity and the free and unhindered development of one’s personality.[[3]](#footnote-3)
5. Privacy is a human right that enables the enjoyment of other human rights; without privacy, individual enjoyment of the right of association, the rights to freedom of expression and information, the right to practice one’s religious beliefs and most importantly, the freedom to develop as fully rounded person, would be seriously impaired.
6. Further, by enabling personal choice, association and expression, and by protecting civil and socio-economic freedoms and equality, privacy can help secure the legitimate political rights of individuals to participate in democracies fully and without hindrance.[[4]](#footnote-4)
7. I stress, infringements upon privacy can produce harms that extend beyond the individual to impact society as a whole. Constraining the development of individuals, and consequently of society and vibrant democracies. The loss of confidence of individuals to share ideas and to assemble, undermines societies and democracy. In this context, technological tools such as encryption, are critical to protect digital communications and thereby the enjoyment of human rights.
8. The report of the UN Secretary-General, presented to the Human Rights Council in Geneva, on 19th September 2019 makes it clear that the right to peaceful assembly and association is a vital ingredient of democracies and needs to be actively protected and promoted.
9. The report also documents alleged reprisals against those seeking to defend human rights, and body of evidence assembled in the report, points to growing self-censorship by victims and civil society actors who decide not to engage with the United Nations, out of fear for their safety or in contexts where human rights work is criminalized or publicly vilified. The report also raises the continued trend in the use of national security arguments and counter-terrorism strategies such as surveillance by States as justification to rebut criticisms of the undermining of human rights.

**The mandate of the Special Rapporteur on the right to privacy**

1. The position of UN Special Rapporteur on the right to privacy, was established in 2015 primarily in response to the challenges arising in the digital era to the right to privacy. I have the honour of holding the position of inaugural Special Rapporteur on the right to privacy, with my mandate extended for a further three years in 2018 to 2021.
2. My work has addressed the impacts of digital technologies on the right to privacy in a wide variety of areas including security and surveillance, gender, Big Data – Open Data, health related data, and corporations use of personal data.
3. The human rights challenges arising from new technologies are diverse, particularly in the area of privacy.
4. In my annual reports to the Human Rights Council and the General Assembly, the issues arising from new and emerging technologies have been documented along with the recommended approach for ensuring the protection of human rights while capturing the beneficial uses of these technologies.[[5]](#footnote-5)
5. In this particular regard, I mention the draft legal instrument for government led surveillance, and the recommendations on achieving equity in enjoyment of the right to privacy without discrimination based on gender including sexual orientation, gender identity and expression.
6. The draft ‘International Legal Instrument on Government Led Surveillance’ outlined the key standards and mechanisms for mitigating risks of unlawful, disproportionate and unnecessary intrusions upon the lives of ordinary citizens and subsequent chilling effects upon participation in democratic activities. This report and the draft legal instrument were presented to the General Assembly in October 2017.[[6]](#footnote-6)
7. The work on ‘privacy and gender’ reported to the Human Rights Council in March of this year, established that digital technologies have enormous effect upon privacy by amplifying the experiences of the non-digital world. While governments around the world including in western democracies, prior to the digital era, have filmed and recorded participants in protests, monitoring and reprisals are enabled now by new technologies with infinitely far greater reach, durability, and impact than previously.
8. A restriction in accessing one human right such as the right of assembly, results in the loss of enjoyment of other human rights including the right to privacy. Research we have undertaken shows that this is most keenly felt by those ‘furthest behind’ that is, vulnerable and marginalised individuals and communities. For example, research undertaken for the ‘Privacy: A Gender Perspective’ report identified that transgender individuals are most at risk of repeated infringements of multiple human rights starting with privacy.
9. In relation to the matters posed for feedback, I have not observed any country introduce laws, policies and programs that have been developed to promote the right to peaceful assembly. While these may exist, regretfully, I have to say my observations are to the contrary.
10. For example, the introduction in Australia of the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* is broadly considered to be a poorly conceived national security measure equally as likely to endanger security as not due to concerns about the possible introduction of vulnerabilities to the cybersecurity of all devices, the weakening of encryption and the undermining of human rights. This Act is reported to being used to undermine freedom of speech in Australia and potentially therefore, freedom of assembly and association.[[7]](#footnote-7)
11. During my mandate, I have reported to the General Assembly and the Human Rights Council that a serious obstacle to privacy is posed by the vacuum in international law in surveillance and privacy in cyberspace. This is especially germane to the question of the right to peaceful assembly.
12. It is not only the lack of substantive rules which are an obstacle to privacy promotion and protection, but also one of adequate mechanisms.[[8]](#footnote-8) To address this, my approach was to develop with relevant stakeholders and experts, a draft legal instrument for Government led surveillance. This was done to achieve two main purposes:

i. provide the Member States with a set of principles and model provisions that could be integrated into their national legislation embodying and enforcing the highest principles of human rights law and especially privacy, when it comes to surveillance;

ii. provide Member States with a number of options to be considered to help plug the gaps and fill the vacuum in international law and particularly those relating to privacy and surveillance in cyberspace.

1. I have been conscious that while the need for such a legal instrument is clear, the best vehicle to achieve these purposes is yet to be determined. But I am convinced that such an instrument is critical to protect human rights such as the right to peaceful assembly, of association and of privacy.
2. The privacy concerns felt by citizens seeking to protest actions of governments as to the use of such technologies to identify them and potentially undertake reprisals, is illustrated by the increasing use of stratagems such as blocking of surveillance cameras and the use of masks worn to civic assemblies including those recently in Hong Kong.
3. The disruption of networks and shutting down of internet and telecommunication services has become a disturbing trend in the context of elections and public protests, often under the pretext of preventing the spread of hate speech, disinformation, public disorder and national security.[[9]](#footnote-9)
4. I also note that the recent consultation in Kenya with the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association raised the importance of privacy.
5. Most particularly, the final communique of this consultation sets out how government surveillance and insufficient privacy and data protection are playing a key role in violations of the right to peaceful assembly and of association.
6. The Communique sets out how the right to peaceful assembly is undermined by vague and overly-broad laws and regulations mis-applied to selectively prosecute or persecute activists and control online and offline activities. Such harassment is typically predicated upon breaches of the privacy of individuals and uses digital technology for these purposes.
7. The Communique states violations are facilitated by a complex collaboration between government, the private sector and foreign governments with violations exacerbated by the availability and use of new forms of technology, including artificial intelligence, CCTV, and facial recognition programs. It further describes how Governments and private companies have increased exponentially, their data collection through, for example, mandatory SIM card registration, demand for users’ data from telecom companies, and other forms of intensive collection of biodata information.
8. This personal data is said to have been misused by security and law enforcement agencies, telecom companies and other business entities without adequate judicial and/or parliamentary oversight and accountability.
9. I agree with the Communique’s conclusion that the existing legal framework is inadequate to deal with the proliferation of surveillance technology and data collection, and regulators, lawyers and judiciaries are not equipped to fully understand and protect against the human rights implications, and reiterate the need for an international draft legal instrument for Government led surveillance.

**Chilling effects upon the participation of citizens in public life**

1. As identified in the ‘Privacy: A Gender Perspective’ report I provided to the Human Rights Council this year, and in the consultation with the Special Rapporteur on the right to peaceful assembly and of association, women and those of diverse gender are disproportionally affected by Governments using sponsored trolls/bots to discredit and harass activists and political opponents, as well as by cyberstalking, online sexual harassment, inappropriate use of personal information, and promotion or normalization of violence against them.
2. The submissions provided to the ‘Privacy: A Gender perspective’ report recount the effects of interference with the means to communicate electronically and the use of monitoring and surveillance upon women and young girls amongst others. This interference is having a chilling effect upon their participation in civic life.[[10]](#footnote-10)
3. The findings are corroborated by the Communique of the consultation with the Special Rapporteur on the right to peaceful assembly and association mentioned above, which describes how there is a withdrawal from the public sphere. For sexual minorities, the “safe haven” for communication and association provided by the online world, has been eroded as increasing lack of anonymity and online privacy have made these spaces unsafe.
4. I note that the Communique states that laws offer inadequate protection and law enforcement authorities often ignore or dismiss complaints, frequently due to discrimination or lack of training and capacities.
5. As noted in the ‘Privacy: A Gender Perspective’ report, content regulation policies of network platforms, including social media platforms, were described in the Communique to be vague and are not applied uniformly.
6. I also am very aware that civil society organisations are concerned about what data companies share with state actors. I stress the importance of civil society and non-governmental organisations to the development and maintenance of societies where human rights are nurtured and respected.
7. I note the actions proposed in this Communique include taking joint actions to build mutual understanding and ongoing dialogue amongst relevant stakeholders; engaging in international advocacy, and strengthening protective mechanisms, including litigation and legal aid, amongst other actions.
8. I recommend in addition to these actions, the need for an international set of standards for surveillance as outlined above, and the implementation by the corporate sector, of the ‘UN Guiding Principles on Business and Human Rights’ to avoid infringing on the human rights of all persons affected by their practices.
9. As State and non-State actors upgrade their technological capacity, new challenges will continue to arise for human rights as the lives of individuals become increasingly subject to multiple and interconnected forms of monitoring, surveillance and analysis leading to predictive modelling for national security, law enforcement and commercial purposes.
10. The risks arising from any constraint upon the enjoyment of the fundamental human rights to privacy and peaceful assembly, can be reduced and mitigated:
	1. if assessed against the standards of lawfulness, proportionality and necessity prior to implementation, and
	2. if the effects produced by this constraint, are monitored also by an independent oversight or review mechanism to assess lawful compliance with the agreed terms of the constraint and the continued need for such a constraint.
11. The indivisible, interdependent and interrelated nature of human rights, requires a holistic and inclusive approach to effectively address human rights challenges arising from new and emerging digital technologies.
1. Eg Resolutions 19/36 and 28/14 on “Human rights, democracy and the rule of law” at http://www.un.org/en/sections/issues-depth/democracy/index.html#DHR [↑](#footnote-ref-1)
2. Office of the High Commissioner of Human Rights, 2014, A/HRC/27/37, June 2014. This report examined both positive and negative impacts of communications technology upon assembly and human rights, and provides an excellent and relevant coverage of many issues still germane in 2019. [↑](#footnote-ref-2)
3. UN Human Rights Council 34th Session, A/HRC/34/L.7/ Rev.1, Agenda Item 3 Protection of all Human Rights Civil, Political Economic, Social and Cultural Rights including the Right to Development, 22 March 2017. [↑](#footnote-ref-3)
4. Lever, A., Privacy Rights and Democracy: A Contradiction in Terms? Contemporary Political Theory 5. 2006, 142-162 [↑](#footnote-ref-4)
5. The annual reports of the Special Rapporteur on the right to privacy can be found at https://www.ohchr.org/EN/Issues/Privacy/SR/Pages/AnnualReports.aspx [↑](#footnote-ref-5)
6. Report to the General Assembly October 2017 A/72/43103 and supporting documents. [↑](#footnote-ref-6)
7. Reclaim the Net, July 2018 at https://reclaimthenet.org/australia-anti-encryption-spy-journalists/ [↑](#footnote-ref-7)
8. Report of the Special Rapporteur on the Right to Privacy to the Human Rights Council, March 2017. [↑](#footnote-ref-8)
9. Final communique: digital space and the protection of freedoms of association and peaceful assembly in Africa consultative meeting with UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Clément Voulé in Kenya, 21-22 February, 2019 http://www.icnl.org/programs/africa/Final%20Communique%20UN%20Consultation%20Africa.pdf [↑](#footnote-ref-9)
10. Annual Report Special Rapporteur on the right to privacy to UN Human Rights Council March 2019, Annexure 2 Privacy: A Gender Perspective’ https://www.ohchr.org/EN/Issues/Privacy/SR/Pages/AnnualReports.aspx [↑](#footnote-ref-10)