

## Working Paper on Telecommunications Surveillance

*31<sup>st</sup> meeting, 26/27 March 2002, Auckland (New Zealand)*

In the last months many democratic societies have adopted new powers to intercept communications in order to prevent cyber-crime and obstruct terrorism. The Working Group recognizes that appropriate counter-measures have to be taken. However it also stresses that these measures must be of proportionate nature. In this context the Working Group recalls that it has stressed on several previous occasions the importance of the protection of privacy and personal correspondence against arbitrary intrusions as a human right (Common Statement on Cryptography of 12 September 1997, Paris). National and international law should state unequivocally that the process of communicating (e.g. via electronic mail) is also protected by the secrecy of telecommunications and correspondence.

Although these principles do not prevent governments to take measures to combat cyber-crime and terrorism it should be remembered that e.g. the European Court of Human Rights has constantly stressed that states do not enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. Any such law allowing for secret surveillance poses the danger of undermining or even destroying democracy on the ground of defending it. "...States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate."<sup>1</sup> Adequate and effective guarantees against abuse are essential. This has been further illustrated by the [Working Group's Common Position on Public Accountability in relation to Interception of Private Communications](#) (15 April 1998, Hong Kong<sup>2</sup>).

More recently, the European Parliament too has recalled the jurisprudence of the European Court of Human Rights under which any interference with and interception of communications must be necessary and proportionate; it is not sufficient that the interference is merely useful or desirable.

The Working Group supports the following proposals made by the European Parliament in the resolution on the existence of a global system for the interception of private and commercial communications (ECHELON<sup>3</sup>) and calls for their worldwide implementation:

- States should aspire to a common level of protection with regard to intelligence operations and, to that end, to draw up a Code of Conduct which guarantees that the activities of intelligence services are carried out in a manner consistent with fundamental rights, in particular with the protection of privacy, and provide for a mechanism of international accountability concerning cross-border surveillance;

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<sup>1</sup> ECHR, Case of Klass and others, Decision of 18 November 1977, Series A no. 28, p.23

<sup>2</sup> In this Common Position the Working Group stressed the need for mechanisms to re-assure the public that interception powers are being used lawfully, appropriately and proportionately.

<sup>3</sup> A5-0264/2001(2001/2098(INI))

- States should inform their citizens about the possibility that their international communications may, under certain circumstances, be intercepted; this information should be accompanied by practical assistance in designing and implementing comprehensive protection measures, including the security of information technology;
- An effective and active policy for security in the information society should be developed and implemented, increasing the awareness of all users of modern communications systems of the need to protect confidential information;
- User-friendly open-source encryption software should be promoted, developed and manufactured, as this is the only way of guaranteeing that no backdoors are built into programmes;
- Public agencies should systematically encrypt e-mails, so that ultimately encryption becomes the norm;
- An international conference on the protection of privacy against telecommunications surveillance should be held in order to provide non-governmental organizations with a forum for discussion of the cross-border and international aspects of the problem and coordination of areas of activity and action.

The Working Group stresses that these proposals have not lost their validity after the terrorist attacks of September 11, 2001.