Common response of Austria, Liechtenstein, Slovenia and Switzerland to the OHCHR request regarding „The right to privacy in the digital age“ (dated 26 February 2014)

Issue 5: “Any other information on the protection and promotion of the right to privacy in the context of domestic and extraterritorial surveillance and/or interception of digital communications and collection of personal data”

The mandate given by General Assembly resolution 68/167 to the UN High Commissioner for Human Rights to submit a report on the right to privacy in the digital age provides an important and timely opportunity to submit legal and policy considerations that will help the international community to make much-needed progress. **In this context, Austria, Liechtenstein, Slovenia and Switzerland would like to jointly highlight the following aspects**:

During the last years, international media outlets have reported extensively about far-reaching practices involving domestic and extraterritorial surveillance, interception of digital communications and the collection of personal data, including on a mass scale and without any showing of need or probable cause. These revelations have raised serious concerns among governments, civil society, the private sector and the public at large regarding the legal and policy implications of these practices. The concerns expressed relate primarily to the right to privacy, though other fundamental rights (such as the right to freedom of expression and the right to non-discrimination) are also at stake, as are other norms of international law. Austria, Liechtenstein, Slovenia and Switzerland therefore fully support UN General Assembly Resolution 68/167, which calls upon States to “respect and protect the right to privacy, including in the context of digital communication” and suggest a number of concrete measures for this purpose.

Respecting and protecting the right to privacy in the digital age is a formidable long-term challenge. In this context, the upcoming report by the UN High Commissioner for Human Rights can provide crucial views and recommendations. Such guidance is particularly necessary as there is currently very limited material to draw from at the inter-governmental level, and jurisprudence on the core issues at hand is either not existent or not publicly available, not least due to the secret nature of relevant activities. Going forward, an open discussion on the concrete legal and policy parameters of the right to privacy in the digital age will be necessary and has indeed started, as evidenced by the expert seminar held in Geneva on 24-25 February 2014.

(1) Understanding the right to privacy

GA Resolution 68/167 refers to the right to privacy as the right "according to which no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, and the right to the protection of the law against such interference, as set out in article 12 of the Universal Declaration of Human Rights and article 17 of the International Covenant on Civil and Political Rights". The right to privacy clearly applies to activities both in the physical environment as well as in the digital sphere. Interferences with the right to privacy or the sanctity of correspondence are only lawful to the extent that they are provided by law, justified in the public interest or for the protection of the fundamental rights of others and proportionate. It is immaterial for this proportionality test whether or not a person subject to surveillance, interception or data collection may be aware of the existence of such measures. Some States, however, tend to apply a very narrow interpretation of the scope of the right to privacy, and/or an overly broad interpretation of legitimate limitations. The High Commissioner's report should therefore pay great attention to these important aspects and should focus on what forms of interference are "arbitrary".

(2) Extraterritorial surveillance, interception and data collection

GA Resolution 68/167 specifically refers to the extraterritorial dimension of interferences with the right to privacy. The nature of modern communication technology is such that even seemingly local communications – their content as well as related metadata – can be accessed from elsewhere in the world. In today's digital age, the right to privacy is, broadly speaking, under greater threat from abroad than from within a State. This is *inter alia* due to the fact that States typically apply more stringent restrictions to domestic surveillance, interception and data collection, and that States generally simply collect more data abroad, especially in a national security context. This raises the crucial question of whether and to what extent States are obliged by article 17 ICCPR to respect and protect the right to privacy in the context of extraterritorial surveillance, interception and data collection. During the negotiations leading to the adoption of GA Resolution 68/167, States informally advanced different views in this regard. Austria, Liechtenstein, Slovenia and Switzerland therefore hope that the High Commissioner's report will provide guidance on this crucial question. Such guidance should take into account the following:

- The Human Rights Committee has already recognized that there are situations in which the obligations under the ICCPR apply extraterritorially. General Comment No. 31 on the nature of the general legal obligation imposed on States Parties to the Covenant stated that States Parties "must respect and ensure the rights laid down in

the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. […] This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained."

- This principle also applies, *mutatis mutandis*, to the actions of a State Party whereby it interferes extraterritorially with the right to privacy of a person. In such situations, the protected value associated with that person, namely his or her privacy, is indeed under the effective control of that State. While the General Comment No. 31 was clearly formulated against the background of past cases involving various degrees of physical control by a State Party over a person outside its territory, the underlying logic of the principle stated therein makes it applicable to situations of <u>partial</u> control, i.e. control over certain aspects of a person's human rights.
- In other words, the extraterritoriality of States Parties' human rights obligations is not categorical. A State Party is subject to some human rights obligations even in situations in which it does not exercise full physical control over an individual and the entire corpus of human rights. If it exercises effective control over the ability of the individual to enjoy that right, then the obligation applies extraterritorially.

(3) The role of the Human Rights Committee

As outlined above, the right to privacy in the digital era raises important issues regarding the interpretation of the ICCPR. Austria, Liechtenstein, Slovenia and Switzerland would therefore support any efforts by the Human Rights Committee to pronounce itself on related matters, in particular by updating its relevant General Comments (GC), primarily GC no. 16, further also GC no. 31. Most importantly, the Human Rights Committee should work to translate the concepts and principles of effective control in the physical world into a standard of virtual control over the right to privacy and its related rights in the digital world.

(4) The role of Special Procedure mandate holders

Austria, Liechtenstein, Slovenia and Switzerland are convinced that those Special Rapporteurs whose mandates are concerned with the right to privacy and the issue of national security practices (such as the UN Special Rapporteurs on the right to freedom of opinion and expression, and on human rights and fundamental freedoms while countering terrorism) should be encouraged to come together for a joint initiative and issue for example guidelines clarifying the legal regimes, and develop best practices on ensuring respect for the right to privacy in the

digital age. In full support of Human Rights Council (HRC) Decision A/HRC/25/L.12 convening a panel discussion on the promotion and protection of the rights to privacy in the digital age in the context of domestic and extraterritorial surveillance and/or the interception of digital communications and the collection of personal data, including on a mass scale at the 27th Session of the HRC, the contributions of Special Rapporteurs will be very important to inform and further this important debate.

9 April 2014