

**Third meeting of the Special Commission on the Recognition and Enforcement of
Foreign Judgments – November 2017**

Document	Preliminary Document <input checked="" type="checkbox"/> Procedural Document <input type="checkbox"/> Information Document <input type="checkbox"/>	No 8 of November 2017
Title	Note on the possible exclusion of privacy matters from the Convention as reflected in Article 2(1)(k) of the February 2017 draft Convention	
Author	Cara North, with the assistance of the Permanent Bureau	
Agenda item		
Mandate(s)		
Objective	To facilitate discussions on the possible exclusion of privacy matters from the scope of the Convention as reflected in Article 2(1)(k) of the February 2017 draft Convention	
Action to be taken	For Approval <input type="checkbox"/> For Decision <input type="checkbox"/> For Information <input checked="" type="checkbox"/>	
Annexes	Annex: The concept of “privacy” – some points of comparison	
Related documents		

I. Introduction¹

1. During the second meeting of the Special Commission on the Judgments Project in February 2017, a proposal was made to exclude privacy matters from the scope of the future Convention by adding the words “and privacy” to Article 2(1)(k) of the February 2017 draft Convention, which presently excludes defamation from its scope.²

2. The proponents of the proposal explained that there is a distinction between the violation of privacy rights and defamation; the former relates to the dissemination of truthful information, whereas the latter concerns the dissemination of some falsehood.³ The rationale for this proposal was to avoid controversial questions related to balancing an individuals’ right to privacy with the public interest.⁴ It was emphasised that it would be desirable to broaden the category of excluded matters beyond that of defamation.

3. Some delegations, including the proponents, raised concerns about the broad definition of the term “privacy”, and whether it would be desirable to extend the non-application of the Convention to a subject matter that may be regarded as undefined and uncertain.⁵ It was suggested that if privacy matters were to be excluded from the Convention, boundaries would need to be included in the Explanatory Report to the Convention to inform the scope of that exclusion.⁶ Having discussed the proposal, the Special Commission decided to proceed on the basis that the words “and privacy” should be added in square brackets to Article 2(1)(k), reflecting the need for further discussion at the November 2017 meeting of the Special Commission.⁷

4. This note is intended to facilitate that discussion by:

- (i) identifying challenges in defining the concept of privacy;
- (ii) identifying a number of categories of cases which could fall within the definition of privacy in order to gauge the parameters of privacy claims; and
- (iii) providing some suggested options for further discussion with a view to providing greater clarity about the scope of any intended “privacy” exclusion.

5. Finally, to inform the discussion at the November 2017 meeting of the Special Commission, a brief and basic overview of the concept of “privacy” as it is defined and applied in a select number of jurisdictions, namely Brazil, Canada, the People’s Republic of China, the EU, Israel and the United States of America has been included as **Annex**.

6. At the outset, it should be noted that this paper is intended to distil some points for further discussion and reflection, to assist in focusing the further discussion on the possible exclusion of privacy matters at the November 2017 Special Commission. It is not intended to provide a comprehensive global overview of the voluminous material and literature available on this complex and rapidly developing area of law.

¹ This Note was kindly prepared by Cara North, Associate at Lipman Karas LLP and Consultant to the Hague Conference on Private International Law, with the assistance of the Permanent Bureau.

² This proposal came from the European Union (“EU”) delegation. See Work. Doc. No 100 of February 2017 “Proposal of the delegation of the European Union” (Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017)) (hereinafter, “Work. Doc. No 100 from the EU”). Originally, the EU proposed an exclusion for “non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation” from scope. The EU delegation noted that only excluding defamation from the scope would mean that certain countries would not be able to balance the freedom of expression and the right to privacy. The wording of the proposal was then reformulated to “defamation and privacy”. See Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017) (hereinafter, “Minutes of the February 2017 SC”), Minutes No 2 of the February 2017 SC, para. 52 and Minutes No 9 of the February 2017 SC, para. 7.

³ Minutes No 9 of the February 2017 SC, para. 9.

⁴ *Ibid.*

⁵ *Ibid.*, paras 12-23.

⁶ *Ibid.*, para. 13. See also, Minutes No 2 of the February 2017 SC, para. 64.

⁷ Minutes No 9 of the February 2017 SC, para. 23. See also, *Aide memoire* of the Chair of the Special Commission of February 2017, para. 14.

II. Challenges in defining privacy

7. That defining privacy is a notoriously difficult task has been widely and readily noted by academics, judges and government law reform commissions around the world.⁸ One obvious difficulty in defining the concept of privacy at a global level is that what is considered “private”, or what should be kept private, differs between jurisdictions and is constantly evolving. In many jurisdictions, the concept of a right to privacy is considered a fundamental right and is often seen as a basic human right reflected in a country’s constitutional framework.⁹ It is therefore often heavily influenced by historical, cultural and political values. While in others, the right is largely protected by tort or other existing causes of action,¹⁰ if at all.

8. An added complication is that the right to privacy is not generally considered absolute, and in many jurisdictions it is balanced against, and only guaranteed to the extent that it is not prevailed over by, countervailing rights and interests.¹¹ Such interests include public interest (e.g., state security, public safety and public order), freedom of expression or other conflicting rights held by others.¹² For that reason, most jurisdictions have deliberately sought not to define clearly and exhaustively the concept of privacy; rather, they have encapsulated that right in broad terms so as to allow the law to evolve over time.¹³ This is further illustrated by the lack of definition of the exclusion from scope of “privacy” from the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (the “Rome II Regulation”).¹⁴ The Explanatory Memorandum to the Commission Proposal for the Rome II Regulation does not provide an explanation of what is meant by “privacy” under the Rome II Regulation.¹⁵

9. A further difficulty in deriving a workable definition of privacy is the rapid rate at which

⁸ To list just a few examples: R. Gellman, “Does Privacy Law Work?” in P. E. Agre and M. Rotenberg (eds.), *Technology and Privacy: The New Landscape*, Cambridge (MA), MIT Press, 1998, p. 193 who said: “Lawyers, judges, philosophers, and scholars have attempted to define the scope and meaning of privacy, and it would be unfair to suggest that they have failed. It would be kinder to say that they have all produced different answers.” In Australia, the New South Wales Law Reform Commission cautioned in its May 2007 Consultation Paper 1, *Invasion of Privacy*, at para. 6.8 that: “If a broad statutory cause of action along the lines of European models were to be introduced in New South Wales, the primary obstacle would be the lack of certainty that it would generate. Legislation providing only for a bald statement of the ability to bring an action for invasion of privacy or private life would make it extremely difficult to know when, and how, conduct would give rise to liability. The difficulty would be pronounced particularly if, as is likely, no satisfactory definition of privacy could be found for inclusion in legislation.” See also, J. McCarthy, *The Rights of Publicity and Privacy*, 2nd ed., 2005, para. 5.59; D.J. Solove, “A Taxonomy of Privacy”, *University of Pennsylvania Law Review*, Vol. 154 (3) 2006, at p. 479.

⁹ As illustrated in the recent landmark unanimous ruling of the Indian Supreme Court recognising a right to privacy in India as forming part of the fundamental right to life and liberty enshrined in the country’s constitution. *Justice K. S. Puttaswamy (Retd.) and Anr. v. Union of India & Ors*, Writ Petition (Civil) No 494 of 2012, para. 134. See also, M. Abrams, “Privacy, Security and Economic Growth in an Emerging Digital Economy”, Paper presented at Privacy Symposium, Institute of Law, Chinese Academy of Social Sciences, 7 June 2006, p. 18, in which Abrams provides: “Privacy law is culturally based. Privacy is considered a fundamental human right in Europe, highly regarded with pragmatic interest in the United States, and is only beginning to emerge as a topic in Asia. What works in one country or region doesn’t always work in the other” as referred to in the Australian Law Reform Commission Report “For Your Information: Australian Privacy Law and Practice (ALRC Report 108)”, published on 12 August 2008, p. 145, available at the following address: < <https://www.alrc.gov.au/publications/report-108> > (last consulted on 26 October 2017).

¹⁰ See for example the United States, New Zealand and Australia as dealt with further below and in the Annex.

¹¹ See K. Lachmayer and N. Witzleb, “The Challenge to Privacy from ever increasing State Surveillance: A Comparative Perspective”, *University of New South Wales Law Journal*, Vol. 37(2) 2014, pp. 750-751. *Ibid.*, pp. 752-773.

¹² See, for example some of the jurisdictions discussed in the Annex. As concerns international and regional instruments see for example, Art. 17 of the *International Covenant on Civil and Political Rights* of 16 December 1966; Art. 11 of the *American Convention on Human Rights* (Pact of San Jose); and Art. 8 of the *European Convention on Human Rights* of 1950 (“ECHR”).

¹³ Which is the source of the proposal of the EU to exclude privacy from the scope of the future Convention: see Minutes No 2 of the February 2017 SC, para. 59. The Rome II Regulation excludes from its scope “non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.”

¹⁴ Commission of the European Communities, *Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (“Rome II”)*, commentary on Art. 6, available at the following address: < <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2003:0427:FIN> > (last consulted on 26 October 2017).

this area of law is developing in response to extraordinary advances in information, communication and surveillance technologies. Today, mass data collection of ordinary citizens is carried out on an unprecedented scale. Virtually every communication and transaction that makes use of digital media, and every move of digital device users, is recorded.¹⁶ Computers are capable of storing, transmitting, and analysing data like never before and organisations, both public and private, are capable of drawing on multiple sources to construct, interpret and administer information about our interests, personal lives, contacts, etc.¹⁷

10. Sophisticated electronic devices are no longer exclusively available to specialist technicians, they are now a basic tool used by ordinary people globally in almost all aspects of their lives, with the most frequently used, and most widely available electronic devices being designed to facilitate, and even encourage, the sharing of personal information with others.¹⁸

11. With the ever-increasing advancements in technology, the internet, digital and social media, and the global attention on data surveillance, there is now more than ever a greater focus on what constitutes the right to privacy and how to enforce it, as well as the principles to which it is intrinsically linked, such as democracy, the rule of law and the protection of human rights.¹⁹

III. The concept of privacy - some types of privacy claims

12. An overview of the concept of privacy across a select number of different jurisdictions around the world (see the Annex) suggests that there are some categories of claims that could be considered to fall within the broad umbrella of “privacy claims”. These are (i) disclosure or publication of private information; (ii) certain types of breach of confidence claims; (iii) intrusion, surveillance and harassment; (iv) personality rights; and (v) certain types of data protection claims.

Disclosure or publication of private information

13. The publication of private information is one of the more obvious concerns of privacy law; it is also an area in which there is great variation globally. This is in large part because of the disparity (as noted above) in the interpretation of what is considered “private” and because it is a key area in which the right to privacy is considered as against other rights and interests, such as the public’s interest in being informed and the right to freedom of expression.

14. Relevant considerations in the balancing process, which differ in terms of weight across jurisdictions, include:

- a) the characteristics of the claimant (*e.g.*, a public figure or ordinary person);
- b) the existence of a pre-existing relationship;
- c) the nature of the activity in which the claimant was engaged;
- d) whether the activity occurred in a private or public place;
- e) the nature and purpose of the intrusion;
- f) the absence of actual or implied consent;
- g) whether the information was already in the public domain;
- h) the effect on the claimant; and
- i) the subsequent use of the information.

15. The examples that follow illustrate the way in which courts in different jurisdictions have weighed up the various interests of the parties by reference to some of the considerations

¹⁶ See N. Witzleb *et al.* (eds), *Emerging Challenges in Privacy Law – Comparative Perspectives*, Cambridge, Cambridge University Press, 2014, p. 2.

¹⁷ F.L. Street, M.P. Grant, S.S. Gardiner, *Law of the Internet*, Michie, 2012.

¹⁸ Australian Government – Australian Law Reform Commission, *Executive Summary – Introduction to the ALRC’s Privacy Inquiry*, dated 12 August 2008, available at the following address < <http://www.alrc.gov.au/publications/Executive%20Summary/introduction-alrc%E2%80%99s-privacy-inquiry> > (last consulted on 26 October 2017).

¹⁹ See D. Cole, “Preserving Privacy in a Digital Age: Lessons of Comparative Constitutionalism”, in F. Davis, N. McGarrity and G. Williams (eds), *Surveillance, Counter-Terrorism and Comparative Constitutionalism*, New York, Routledge, 2014, p. 96.

identified above.

Competing rights and interests

16. In a decision of 20 February 2001 (the RER C case)²⁰, the Cour de cassation of France considered photos of a victim of the Paris metro bomb attack that had been published in the press without her permission. The Court held that even though the article was of public interest, the photos were intended to shock rather than inform. In such circumstances, this was not enough to override the claimant's right to dignity, which had been violated by the publication of her image in the press. A further example is seen in the more recent case heard before the French Cour de cassation, which concerned a TV movie and online video which retraced a police enquiry into a murder case day by day and the broadcaster then invited viewers to comment online on the innocence or guilt of the suspect. In that case, the claimant had been a suspect in a similar case to that shown in the program but was ultimately acquitted. The French Cour de cassation held that the movie and the videos were not a documentary but a work of fiction, and that the producer did not make it sufficiently clear which elements of the story were entirely fictional and which were based on reality. The Cour de cassation held that the inclusion of facts relating to the private life of this individual violated the claimant's right to respect of his private life even if these facts were already publicly known.²¹ In its judgment, the Cour de cassation restated the principle that: "[T]he right to a private life...and the right to freedom of expression [...] have the same normative value [...] [and] it is for the court to strike a balance between those rights and, where appropriate, to give preference to the solution that protects the most legitimate interest."²²

17. In the United States case of *Bonome v. Kaysen*²³ the Court held that freedom of expression prevailed over the right to privacy, when the published information was a matter of legitimate public concern. The case involved the publication of a memoir detailing, among other things, an intimate relationship between the author and her then boyfriend. The Court found in favour of the defendant, holding the defendant's first amendment right to publish truthful information which is the subject of legitimate public concern outweighed the plaintiff's right against unreasonable, substantial, or serious interference with his privacy.²⁴ The key issue in this case was whether the highly intimate details of the author and her then boyfriend's lives were matters of "legitimate public concern" or merely interfering with the plaintiff's privacy.²⁵ The court concluded the details of their relationship were included to develop and explore themes related to matters of public concern and the author had a right to disclose the private information under the First Amendment.²⁶ The extent of the authority to make public private facts is not unlimited.²⁷ The court balances the right to free speech against the general right to privacy. A plaintiff can prevail on a tort claim for invasion of privacy "when the publicity ceases to be giving information to which the public is entitled and becomes a morbid and sensational prying into private lives for its own sake."²⁸ Drawing the line between inviolable private information and matters of legitimate public concern is a difficult task and United States courts are cautious when deciding exactly what matters are sufficiently relevant to a subject of legitimate public interest to be privileged.²⁹

18. By contrast, in Israel, in *Ploni v. Plonit*³⁰ the Supreme Court considered a case concerning the balance between the right to free speech and freedom to create, as against the right to

²⁰ Cour de Cassation, Civ. 1, 20 February 2001.

²¹ Cour de Cassation, Civ. 1, 30 September 2015, 14-16.273.

²² *Ibid.*

²³ 17 Mass. L. Rptr. 695, 2004 WL 1194731 (Mass. Super. Ct. 2004).

²⁴ *Id.*

²⁵ Courts have been generous to publishers in determining that private information relates to issues of legitimate public concern.

²⁶ *Bonome v. Kaysen* is the only instance in which a Massachusetts court (state or federal) made the determination that reasonable minds could not differ as to the newsworthiness of a particular publication at the motion to dismiss stage. See *Peckham v. New England Newspapers, Inc.*, 865 F. Supp. 2d 127, 131 (D.Mass., 2012) (court declined to rule whether a published news article reporting a car accident with a picture of the plaintiff taken at the scene was a matter of legitimate public concern at the motion to dismiss stage).

²⁷ *Peckham*, 865 F. Supp. 2d at 127.

²⁸ *Id.* at 131 (quoting Restatement (SECOND) of Torts §652D cmt h (1977)).

²⁹ *Id.* at 132 (citing *Bonome*, 2004 WL 1194731, at *3).

³⁰ Civil Appeal 8954/11 (in Hebrew).

privacy and good name. The case involved the publication of a book that was marketed as a fictional novel detailing a romance between a man and a woman; in fact, the book contained intimate information about a real individual, including such things as a description of her appearance, body, likes and dislikes, character and weaknesses. The court ordered an injunction prohibiting publication of the book. The court also indicated that freedom of expression and the right to privacy are equally important constitutional rights that must be weighed carefully against one another. If, in a particular case, the violation of freedom of expression is severe and the violation of privacy is minor and moderate, then the protection of freedom of expression would generally take precedence, and vice versa.³¹

Public figures

19. A key area in which the consideration of the right to freedom of expression and the right to privacy take centre stage is in relation to the right to privacy of public figures, and in this area different countries have again adopted different approaches. That is particularly so where for such persons the public, and therefore the media, tend to take interest in matters that would otherwise be considered relatively trivial, but particularly intrusive.³² A further difficulty may arise when a distinction is drawn between those who were born to publicity, those who have had it thrust upon them, those who have sought it and those whose professional success depends upon public opinion. Some jurisdictions, such as the United States, afford public figures less privacy, irrespective of whether or not the individual has chosen a life in the public eye.³³ While in Europe, in the 2004 decision of *Von Hannover v. Germany*³⁴ the European Court of Human Rights ("ECtHR") held that "anyone, even if they are known to the general public, must be able to enjoy a 'legitimate expectation' of protection and respect for private life",³⁵ having regard to the protections under German law and the German court's rejection of the plaintiffs case partly because she was a "figure of contemporary society par excellence".³⁶ The ECtHR later dismissed a further application by the same applicant after the German courts had adapted their jurisprudence following the first judgment.³⁷

Activities in a public place

20. As concerns consideration of where the activities were carried out, in the United States, the courts have generally tended to favour the approach that activities that have taken place in public spaces are capable of disclosure. In *Shulman v. Group W Productions Inc.*,³⁸ the California Supreme Court drew a distinction between the liability for filming the claimant in a public place following the immediate aftermath of a serious road accident, and in the helicopter that transported her to a hospital. The Court held that the claimant enjoyed an objectively reasonable expectation to privacy in the helicopter but not at the scene of the accident, which was in a public place.

21. By contrast, in Europe, the ECtHR ruled in *Peck v. the United Kingdom*³⁹ that the United

³¹ *Ibid.*, para. 161.

³² As noted by the English Court of Appeal in *Associated Newspaper Limited v. His Royal Highness the Prince of Wales* [2006] EWCA Civ 1776, para. 70.

³³ For example, in the Supreme Court of Georgia's decision in *Macon Telegraph Publishing Co. v. Tatum* 263 Ga. 678 (1993) a woman unsuccessfully sued a newspaper for invasion of privacy for having identified her and the street she lived on in an article reporting on a break-in and shooting. As reported in the article, the woman was the victim of the break-in and had shot the intruder in self-defence. The court found that the woman "who committed a homicide, however justified, lost her right to keep her name private. When she shot [the intruder] she became the object of a legitimate public interest and the newspaper had the right under the Federal and State constitutions to accurately report the facts regarding the incident, including her name." In coming to this conclusion the court referred to the fact that: "The U.S. Supreme Court has held that the First Amendment prohibits imposing damages on a newspaper that publishes the name of a rape victim obtained from a police report. *Florida Star v. B. J. F.*, 491 U.S. 524, 541 (109 SC 2603, 105 LE2d 443) (1989); see also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (95 SC 1029, 43 *679 LE2d 328) (1975) (holding that a state may not impose sanctions for the publication of a rape victim's name obtained from court records open to public inspection)."

³⁴ *Von Hannover v. Germany*, No 59320/00 [2004] ECHR 294, [2005] 40 EHRR 1.

³⁵ *Ibid.*, para. 69.

³⁶ See more detailed description of *Von Hannover v. Germany* at the Annex, para. 4.

³⁷ *Op. cit.*, note 34, Nos 40660/08 and 60641/08, 7 February 2012.

³⁸ *Turnbull v. American Broadcasting Cos.*, 2004 WL 2924590 (C.D.Cal.,2004); *Shulman v. Group W Productions Inc.*, 18 Cal 4th 200 (1998).

³⁹ No 44647/98 [2003] EHRR 287.

Kingdom violated Articles 8 and 13 of the ECHR by not providing an adequate legal remedy to prevent the publication of CCTV footage of Mr Peck's suicide attempt, which occurred in a public place. The ECtHR held that there is a "zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'."⁴⁰ The ECtHR also appears to suggest that a further important consideration is from the perspective of the subject, whether it was foreseeable that the privacy of their actions in a public place would be respected.⁴¹

22. Similarly, in Canada the Supreme Court held in *Aubry v. Editions Vice Versa*⁴² that an identifiable individual's privacy interests outweighed a magazine's right to freedom of expression under the Quebec Charter of Human Rights and Freedoms (after the magazine published a photograph of an identifiable individual, then aged 17, sitting on a public sidewalk), on the grounds that the magazine had not demonstrated sufficient public interest in the photograph. The Court held that while the photographer was entitled to take photos in public places, this did not extend to the publication of pictures where consent is not first obtained. The majority found that the right to one's own image forms part of the right to privacy under section 5 of the Quebec Charter,⁴³ and that if the "purpose of the right to privacy is to protect a sphere of individual autonomy, it must include the ability to control the use made of one's image".⁴⁴ The Court did, however, draw a distinction where the person captured in a photograph has acquired a certain notoriety, such as artists and politicians⁴⁵ or where that person appears in an incidental manner (*e.g.*, a crowd at a sporting event or demonstration).⁴⁶

23. As can be seen from the above, this is an area of privacy that is particularly fact-sensitive and is closely tied to the weight that jurisdictions afford to other fundamental rights and interests, particularly the legitimate interest of the public to know.

Breaches of confidence

24. Breaches of confidence have been classified as a violation of a privacy right in certain cases and not in others.⁴⁷ In a few common law jurisdictions, claims concerning the right to privacy have developed through claims for breach of confidence. Traditionally, a breach of confidence would arise where "confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others."⁴⁸

25. The traditional claim for breach of confidence required the information in question to have the necessary quality of confidence about it, the information needed to have been imparted in circumstances importing an obligation of confidence and the use of the information needed to have been unauthorised.⁴⁹ For information to be considered confidential, "the information must not be public property and public knowledge, not generally accessible such that, in all the circumstances, it cannot be regarded as confidential."⁵⁰

26. In certain jurisdictions, such as England, breach of confidence developed into a much more expansive body of law, demonstrating an overlap with the right to privacy in other jurisdictions. In *Campbell v. MGN*⁵¹ the House of Lords held that "duty of confidence" has developed into a duty arising from the "misuse of private information, which "affords respect

⁴⁰ *Ibid.*, para. 57.

⁴¹ *Ibid.*, para. 62.

⁴² [1998] 1 S.C.R 591.

⁴³ *Ibid.*, para. 51 per L'Heureux-Dubé, Gonthier, Cory, Iacobucci and Bastarache JJ.

⁴⁴ *Ibid.*, para. 52.

⁴⁵ *Ibid.*, para. 58.

⁴⁶ *Ibid.*, para. 59.

⁴⁷ Numerous commentators have also recognised that the law on breach of confidence can protect privacy interests. See for example, T. Aplin *et al.* (eds), *Gurry on Breach of Confidence – The Protection of Confidential Information*, 2nd ed., Oxford, Oxford University Press, 2012, "Categories of Confidential Information" at para. 6.25, note 158.

⁴⁸ *Attorney General v. Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, p. 281.

⁴⁹ M. Jones *et al.* (eds), *Clerk & Lindsell on Torts*, 21th ed., Sweet & Maxwell, 2014, "The Action for Breach of Personal Confidence/Privacy", para. 27-01.

⁵⁰ *Ibid.*, para. 27-09.

⁵¹ [2004] UKHL 22.

for one aspect of an individual's privacy" (misuse of private information about them), whilst recognising that there are other ways in which an individual's privacy can be invaded which the tort does not cover, for example strip searching the individual.⁵² Similarly, in *HRH Prince of Wales v. Associated Newspapers Ltd*⁵³ Lord Phillips held:⁵⁴

"The English court has been concerned to develop a law of privacy that provides protection of the rights to 'private and family life, his home and his correspondence' recognised by Article 8 of the [ECHR]. To this end the courts have extended the law of confidentiality so as to protect Article 8 rights in circumstances which do not involve a breach of a confidential relationship."

27. In slightly later decisions, the courts have drawn a distinction between, on the one hand, breaches of confidence (*i.e.*, the unauthorised disclosure of confidential information obtained through a confidential relationship) and, on the other, the protection of personal information in its own right. In *OBG v Allen*⁵⁵ Lord Nicholls held that:⁵⁶

"[a]s the law has developed, breach of confidence, or misuse of confidential information, now covers two distinct causes of action, protecting two different interests: privacy, and secret ('confidential') information. It is important to keep these two distinct. In some instances information may qualify for protection both on grounds of privacy and confidentiality. In other instances information may be in the public domain, and not qualify for protection as confidential, and yet qualify for protection on the grounds of privacy. Privacy can be invaded by further publication of information or photographs already disclosed to the public. Conversely, and obviously, a trade secret may be protected as confidential information even though no question of personal privacy is involved."

28. Similarly, in a more recent decision of the English Court of Appeal in *Vidal-Hall & Ors v. Google Inc.*,⁵⁷ Lord Dyson MR commented: "there are now two separate and distinct causes of action: an action for breach of confidence; and one for misuse of private information."⁵⁸

29. In New Zealand, in the 2004 decision of *Hosking v. Runting*,⁵⁹ the Court of Appeal recognised a common law tort of breach of privacy that is separate and distinct from the tort of breach of confidence. Although the court dismissed the claim on the merits, the majority judgment confirmed the existence of a privacy tort in New Zealand dealing with the wrongful publication of private facts to address publicity that is "truly humiliating and distressful or otherwise harmful to the individual concerned".⁶⁰ The elements of the tort were described as (i) the existence of facts in respect of which there is a reasonable expectation of privacy; and (ii) the publicity given to those private facts must be considered highly offensive to an objective reasonable person.⁶¹

30. By contrast, in Australia, a common law tort for the invasion of privacy has not yet developed. In the High Court decision in *Australian Broadcasting Corporation v. Lenah Game Meats*⁶² Gleeson CJ appeared to be suggesting that the equitable cause of action for breach of

⁵² *Ibid.*, paras 14-15.

⁵³ *Op. cit.*, note 32.

⁵⁴ *Ibid.*, para. 26; see also, *Douglas v. Hello!* [2001] QB 967, 1011, para. 165 (CA) per Keene LJ: "breach of confidence is a developing area of law, the boundaries of which are not immutable but may change to reflect changes in society, technology and business practice."; *Mosley v. News Group Newspapers Ltd* [2008] EMLR 20 at para. 7.

⁵⁵ [2007] UKHL 21.

⁵⁶ *Ibid.*, para. 255. See also *Walsh v. Shanahan* [2013] EWCA Civ 411 per Rimer LJ at para 55: "The tort for which Mr Walsh sued was, as Lord Nicholls of Birkenhead explained in *Campbell v. Mirror Group Newspapers Ltd*, paragraph 14, one which had firmly shaken off the limiting constraint of the need for an initial confidential relationship and was 'better encapsulated now as misuse of private information'."

⁵⁷ [2015] EWCA Civ 311.

⁵⁸ *Ibid.*, para. 21. See also *PJS v. News Group Newspapers Ltd* [2016] UKSC 26.

⁵⁹ [2003] 3 NZLR 385.

⁶⁰ *Ibid.*, para. 126.

⁶¹ *Ibid.*, para. 117.

⁶² [2001] 208 CLR 199. In this case, the respondent company operated a brush tail possum processing facility. A surreptitiously and unlawfully obtained film of activities occurring at the respondent's facility had been supplied to the appellant, who proposed to broadcast footage from the film in one of its current

confidence may be the most suitable cause of action for protecting the disclosure of private information. Gleeson CJ observed that, “equity may impose obligations of confidentiality even though there is no imparting of information in circumstances of trust and confidence. And the principle of good faith upon which *equity* acts to protect information imparted in confidence may also be invoked to ‘restrain the publication of confidential information improperly or surreptitiously obtained’. The nature of the information must be such that it is capable of being regarded as confidential.”⁶³ He went further to provide that if the relevant activities in that case were private, then the case would be adequately protected by the law of confidence.⁶⁴ His Honour took the view that the “law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy”,⁶⁵ but that “the lack of precision of the concept of privacy is a reason for caution in declaring a new tort of the kind for which the respondent contends.”⁶⁶ No Australian appellate court has confirmed the existence of a privacy tort, and a number of subsequent judgments have tended to suggest that it is unlikely in the foreseeable future.⁶⁷

31. From an overview of these three jurisdictions, while there seems to be a distinction being drawn between privacy and breach of confidence claims, there appears nonetheless to be some overlap between these two areas of law. As a consequence, consideration will need to be given to the wording of the definition of privacy, to ensure that those breach of confidence claims that are intended to be excluded are captured.

Intrusion, surveillance and harassment

32. In some jurisdictions, surveillance and harassment can form part of privacy claims. For example, in Israel the Protection of Privacy Law (“PPL”) includes such things as civil claims for “wiretapping a person, where such wiretapping is prohibited by law;” “photographing a person while he / she is in the private domain” and “spying on or trailing a person in a manner which is likely to harass him/her; or any other harassment”.⁶⁸

33. Similarly, as concerns surveillance, in the United States, some provinces of Canada⁶⁹ and New Zealand, privacy laws recognise a tort for intrusions into one’s private life. In the United States, the tort of intrusion covers such things as unlawful searches, phone-tapping, long-lens photography and video surveillance. The intrusion tort in the United States is not concerned with the subsequent use of the personal information, but rather the manner in which the

affairs programmes. The respondents applied to the Supreme Court of Tasmania for an interlocutory injunction. This was refused by Underwood J, but on appeal was granted by a majority of the Full Court. The Australian Broadcasting Corporation’s appeal was allowed to the High Court.

⁶³ *Ibid.*, para. 34 citing *Hellewell v. The Chief Constable of Derbyshire* [1995] 1 WLR 805 and *Commonwealth v. John Fairfax & Sons Ltd* [1980] 147 CLR 39.

⁶⁴ *Ibid.*, para. 39. However, his Honour held that the information was neither secret, nor confidential, nor relevantly private and therefore it was not necessary to determine whether, and in what circumstances, a corporation may invoke privacy: para. 43.

⁶⁵ *Ibid.*, para. 40.

⁶⁶ *Ibid.*, para. 41. Gummow and Hayne JJ, with whom Gaudron J agreed, also held that the “better course [...] is to look to the development and adaptation of recognised forms of action to meet new situations and circumstances.” at para. 110. Callinan J observed that “the time is ripe for consideration whether a tort of invasion of privacy should be recognised in this country” at para. 335. While Kirby J preferred to postpone the question of the existence of an actionable wrong of invasion of privacy to another day: at para. 189. Thus, as noted by the New Zealand Court of Appeal in *Hosking v Runting* [2005] 1 NZLR 1, para. 59, the “High Court of Australia has not ruled out the possibility of a common law tort of privacy, nor has it embraced it with open arms.”

⁶⁷ Two subsequent lower Australian court cases have affirmed a privacy tort (*Grosse v. Purvis* [2003] QDC 151 and *Jane Doe v. Australian Broadcasting Corporation* [2007] VCC 281). However, these two cases have not received approval by the Supreme Court of Victoria, the Supreme Court of New South Wales, the Supreme Court of South Australia and the Federal Court. See, *Giller v. Procopets* [2008] VSCA 236, paras 447-452; *Milne v. Haynes* [2005] NSWSC 1107; *Moore-McQuillan v. Work Cover Corporation* [2007] SASC 13; and *Kalaba v. Commonwealth of Australia* [2004] FCA 763. See Australia Law Reform Commission Report No 123, “Serious Invasions of Privacy in the Digital Era”, June 2014, pp. 53-55.

⁶⁸ Section 2(1)-(3) of the PPL, No 5741-1981, unofficial translation is available at the following address: < <http://www.justice.gov.il/En/Units/ILITA/Documents/ProtectionofPrivacyLaw57411981unofficialtranslation.pdf> > (last consulted on 26 October 2017).

⁶⁹ See, *Infra*, para. 24 of the Annex.

information was obtained.⁷⁰ It also generally does not apply to acts occurring in public places.⁷¹

34. In Canada, the tort of intrusion upon seclusion was recognised by the Ontario Court of Appeal in *Jones v. Tsige*.⁷² The case concerned a defendant using her workplace computer to access and examine personal information of a co-worker, Ms Jones, over a period of four years.

35. In New Zealand in 2012, having regard to the intrusion upon seclusion tort in the United States and Canada, in the High Court in Christchurch Whata J concluded that a tort of intrusion upon seclusion should form part of the law of New Zealand. The case concerned a woman who sued her boyfriend's flatmate for hiding a video camera in the bathroom, and recording images of her while she showered. Prior to that ruling, the law in New Zealand only recognised claims where the private information obtained was either made public or was at risk of being made public, in a way that a reasonable person would consider highly offensive.⁷³

36. Finally, in a 2017 decision of the Grand Chamber of the ECtHR in the case of *Bărbulescu v. Romania*,⁷⁴ it was held that an employee's right to private life had been breached by an employer's monitoring of instant messaging accounts of the employee which led to the employee's dismissal for breach of the employer's IT policy. The Court had regard to the domestic court's balancing of the employee's right to respect for his private life and correspondence, and the employer's right to take measures to ensure the smooth running of its business.⁷⁵

37. This is once again, an area of privacy law which is both expansive and evolving. Consideration will need to be given to the desirability of including such claims within any possible privacy exclusion. Should the Special Commission consider this desirable, careful consideration will need to be given to the framing of these types of claims.

Personality rights

38. Personality rights has been broadly defined to include such rights as "the rights to life, physical integrity, bodily freedom, reputation, dignity, privacy, identity (including name and image), and feelings (sentiments d'affection)".⁷⁶

39. In some jurisdictions, some personality rights are considered to fall within the broad umbrella of privacy rights,⁷⁷ while in others they are considered to be intellectual property

⁷⁰ Accompanying commentary to the US Restatement of the Law Second, Torts: American Law Institute, *Restatement of the Law Second, Torts*, 1977, § 652B.

⁷¹ E.A. Meltz, "No Harm, No Foul? 'Attempted' Invasion of Privacy and the Tort of Intrusion upon Seclusion", *Fordham Law Review*, Vol. 83 (6) 2015, pp. 3431 and 3433.

⁷² 2012 ONCA 32.

⁷³ *C v. Holland* [2012] NZHC 2155; [2012] 3 NZLR 672.

⁷⁴ No 61496/08, [2017] ECHR.

⁷⁵ *Ibid.*, para. 121. The Court held that the domestic court had failed to consider: (i) "whether the employee has been notified of the possibility that the employer might take measures to monitor correspondence and other communications, and of the implementation of such measures"; (ii) "the extent of the monitoring by the employer and the degree of intrusion into the employee's privacy"; (iii) "whether the employer has provided legitimate reasons to justify monitoring the communications and accessing their actual content"; (iv) "whether it would have been possible to establish a monitoring system based on less intrusive methods and measures than directly accessing the content of the employee's communications"; (v) "the consequences of the monitoring for the employee subjected to it [...] and the use made by the employer of the results of the monitoring operation, in particular whether the results were used to achieve the declared aim of the measure"; (vi) "whether the employee had been provided with adequate safeguards, especially when the employer's monitoring operations were of an intrusive nature. Such safeguards should in particular ensure that the employer cannot access the actual content of the communications concerned unless the employee has been notified in advance of that eventuality."

⁷⁶ J. Neethling, "Personality rights: a comparative overview", *Comparative International Law Journal South Africa*, Vol. 38, 2005, pp. 210, 215.

⁷⁷ See Section 2(6) of the PPL of Israel (*op. cit.*, note 68) that defines an infringement of privacy, *inter alia*, as "using a person's name, appellation, picture or voice for profit". See also Section 36(5) of the Civil Code of Quebec which provides that the invasion of privacy of a person includes "appropriating or using his [a person's] name, image, likeness or voice for a purpose other than the legitimate information of the public." See also Art. 110 of the General Rules on the Civil Law of the People's Republic of China: "A natural person is entitled to the right of life, right to body, right to health, right of name, right to one's own image, right to reputation, right to honor, right to privacy, autonomy in marriage and other rights."

rights,⁷⁸ and in still others they exist as standalone rights or a concept broader than the right to privacy.⁷⁹

40. The potential inclusion of some personality rights within the scope of the term “privacy” without more may lead to a much broader exclusion, at least in some jurisdictions, than appears to have been envisaged by the proposal. The implications of this will be discussed further below.

41. In this regard, it should be noted that an express reference to personality rights in an earlier version of the proposal was ultimately not included in square brackets in the draft Convention.⁸⁰

Data protection in the civil or commercial context

42. There is a further question to be considered: whether the right to privacy includes data protection violations. Data protection would only fall within the purview of privacy law claims under the Convention if the violation arises in the context of civil or commercial matters (*i.e.*, not claims against or brought by a public authority in relation to the exercise of its public powers or duties),⁸¹ and the data relates to privacy rights as opposed to other rights.

43. While in many jurisdictions data protection is a regulatory issue, in some jurisdictions data protection violations can be the subject of civil claims. To take one jurisdiction as an example, the European Data Protection Directive⁸² has been implemented in the United Kingdom under the *Data Protection Act 1998*. Under sections 10-12 of that Act, individuals have certain rights to prevent the processing of data relating to them. Section 13 of the Act provides that individuals may claim compensation for damage suffered as a consequence of infringement of any of the requirements under the Act.⁸³

⁷⁸ In Australia, for example, there is no basic right to personality or publicity; rather, any such rights are protected by acts concerning intellectual property (such as, the *Trade Marks Act 1995* (Cth), *The Copyright Act 1968* (Cth), *the Trade Practices Act 1974* (Cth)) and common law causes of action such as the tort of passing off, defamation and unjust enrichment: A. Slater, “Personality Rights in Australia”, *Communications Law Bulletin*, Vol. 20(1) 2001, p. 12. See also, J. Swee Gaik Ng, “Protecting a Sports Celebrity’s Goodwill in Personality in Australia”, *Sports Law eJournal*, 2008, p. 1.

⁷⁹ See for example Art. 2(1) of the German Constitution: “Everyone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.” See also Sections 823(1) and 826 of the Civil Code of Germany: “A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this” and “A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage”. This has been said to include such rights as “the right to one’s image, the right to one’s name, and the right to oppose publication of private facts”, B. Sloot (van der), “Privacy as Personality Right: Why the ECtHR’s Focus on Ulterior Interests Might Prove Indispensable in the Age of ‘Big Data’”, *Utrecht Journal of International and European Law*, Vol. 31 (80) 2015, pp. 25 and 26.

⁸⁰ Minutes No 9 of the February 2017 SC, paras 7 and 10.

⁸¹ See the draft Convention on Judgments of February 2017, Art. 1(1) (available on the Hague Conference website at < www.hcch.net > under the “Judgments Section” and “Special Commission”); see also, F. J. Garcimartín Alférez, G. Saumier, “Preliminary Explanatory Report on the draft Convention on Judgments”, Prel. Doc. No 7 of October 2017 for the attention of the Third Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017), paras 23-25 (available on the Hague Conference website at < www.hcch.net > under the “Judgments Section” and “Special Commission”).

⁸² Directive No 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

⁸³ From May 2018, the General Data Protection Regulation (Regulation (EU) No 2016/679 of the European Parliament and of the Council of 27 April 2016 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 (“GDPR”) will apply in all EU Member States. The GDPR provides a combination of public and private enforcement that blends public fines with private damages. It defines personal data under Art. 4(1) as “any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”. Art. 4(7)-(8) provides that a “controller” and “processor” include a natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data, or processes data on behalf of a controller. Moreover, Art. 82 of GDPR provides: (i) individuals with a right to compensation against both controllers and processors for

44. Moreover, the view that such data protection claims are included, in some jurisdictions, within the umbrella of privacy claims is illustrated by the often close connection between matters of personal privacy and the protection of personal data as demonstrated in a number of cases.⁸⁴

45. Thus, consideration will need to be given to whether the exclusion of “privacy” from the Convention should include civil claims concerning the protection of personal data brought against data controllers under data protection legislation.

IV. Some options for further reflection and discussion

46. There are three main options as to how to proceed, which were identified during the February 2017 Special Commission. These are (i) to *exclude all* privacy claims from the scope of the future Convention; (ii) to *include all* privacy claims within the scope of the future Convention; (iii) to *exclude some* of the claims that fall within the definition of privacy claims.

47. Inserting a reference to “privacy” without more would leave it to the court addressed to determine the meaning of privacy. Given the breadth of the term in different jurisdictions, it seems likely that different conceptions of the term will be adopted and it is difficult to know how a court addressed would begin to develop an autonomous definition of “privacy” for the future Convention without further assistance.

48. It seems likely that some courts would read the term narrowly with the result that judgments that were not intended to circulate under the Convention would be enforced. Conversely, it also seems likely that other courts would adopt a broad approach to the scope of the exclusion with the result that judgments expected to circulate under the Convention would not be enforced.

49. In order to avoid variability in the operation of the Convention, and a resulting lack of predictability for parties and their advisors, the Special Commission may wish to consider working through each type of claim that is understood at least in some systems of law as a claim concerning “privacy” and forming a view as to whether judgments in that field are intended to be excluded from the scope of the future Convention.

50. A review of each of the four broad categories of claims discussed above will enable the Special Commission to focus on which of these categories raise the concerns about broader policy factors (*e.g.*, balancing privacy rights with other fundamental rights) that were a key factor in the proposal.

51. The Special Commission may therefore wish to consider defining the privacy exclusion such that it excludes one or more of the following types of privacy claims –

- (i) claims to prevent disclosure of information relating to the private life of an individual or claims for the compensation of an individual for the consequences of an unauthorised disclosure of private information, including breach of confidence claims arising out of such violations of privacy;
- (ii) claims for the unauthorised intrusion into one’s personal life (*i.e.*, by means of surveillance or otherwise), regardless of the subsequent use of the material obtained;
- (iii) claims concerning personality rights or compensation for the violation of personality rights; and
- (iv) claims concerning the protection of personal data.

52. If there is to be a privacy-related exclusion from scope, the most desirable option would appear to be the exclusion of one or more precisely defined categories of privacy claims. As noted above, there are three ways in which to provide more clarity about the exclusion of

infringement of the GDPR for material or non-material damage suffered; and (ii) processors’ liability under the regulation extends to the damage caused by processing where they have not complied with obligations specifically directed to processors or where they have acted outside or contrary to the lawful instructions of the controller.

⁸⁴ See for example, *Copland v. United Kingdom* (No 62717/00), [2007] IP & T 600, (2007).

certain privacy claims, *i.e.*:

- (i) to include the words “and privacy” in Article 2(1)(k) and seek to define the meaning of the term within the Explanatory Report by setting out categories of judgments which are intended to fall within the definition of “privacy”;
- (ii) to include some draft language in Article 2(1)(k) which seeks to clarify the judgments to which the Convention will not apply; or
- (iii) a combination of these two options.

53. A further matter that requires consideration is whether the exclusion of privacy matters should cover both natural and legal persons.⁸⁵ In this regard, it is noted that the exclusion of defamation from the scope of the future Convention has been extended to both natural and legal persons.⁸⁶

V. Concluding remark

54. It is hoped that this paper will contribute to facilitating and further focusing the discussion at the November 2017 meeting of the Special Commission.

⁸⁵ See Work. Doc No 100 from the EU which proposes that the exclusion applies to both natural and legal persons. In this regard, a decision of note is the recent case of Court of Justice of the EU (“CJEU”) in *Bolagsupplysningen OÜ and Ingrid Iisjan v. Svensk Handel AB*, Judgment of the 17 October 2017, C-194/16, EU:C:2017:766, concerning the interpretation of Art. 7(2) Brussels I *bis* in circumstances where a legal person allegedly had its personality rights infringed. Art. 7(2) provides that in matters relating to tort, delict or quasi-delict, a person domiciled in a Member State may be sued in another Member State in the courts of the place where the harmful event occurred or may occur. The CJEU held that: (i) “a legal person claiming that its personality rights have been infringed by the publication of incorrect information concerning it on the internet and by a failure to remove comments relating to that person can bring an action for rectification of that information, removal of those comments and compensation in respect of all the damage sustained before the courts of the Member State in which its centre of interests is located. When the relevant legal person carries out the main part of its activities in a different Member State from the one in which its registered office is located, that person may sue the alleged perpetrator of the injury in that other Member State by virtue of it being where the damage occurred.” (para. 44; see also, paras 41 and 42); and (ii) “a person who alleges that his personality rights have been infringed by the publication of incorrect information concerning him on the internet and by the failure to remove comments relating to him cannot bring an action for rectification of that information and removal of those comments before the courts of each Member State in which the information published on the internet is or was accessible.” (para. 49).

⁸⁶ See F. J. Garcimartín Alférez, G. Saumier (*op. cit.* note 81), para 48.

ANNEX

The concept of “privacy” – some points of comparison

1. This annex provides a brief overview of the development and status of privacy laws in a few jurisdictions around the world.¹

Brazil

2. In Brazil, the right to privacy is a broad concept that covers many different situations. These rights are protected by the Constitution as a fundamental right, as well as by a number of federal laws, including international agreements internalised by the Brazilian legal system. The Constitution of Brazil enumerates three different kinds of privacy rights:² those relating to privacy in general, those relating to the domicile and those relating to communications.³ Privacy law in Brazil includes some international agreements as follows: The International Covenant on Civil and Political Rights explicitly mentions privacy,⁴ whereas the American Convention on Human Rights guarantees the protection of honour and dignity.⁵ A violation of privacy generates a right to compensation, and the courts may take measures to prevent or terminate violations. Some breaches of privacy are also criminal offences.⁶

3. The provisions of the Constitution and the other instruments are reflected in the Civil Code. It provides:

“Article 20. Unless authorized or necessary for the administration of justice or for the maintenance of public order, the dissemination of writings, the transmission of a word, or the publication, exhibition or use of a person’s image may be prohibited, at his request and without prejudice to any compensation, if the act affect his honor, good name or respectability, or if it is intended for commercial purposes.

Single paragraph. In the case of being dead or absent, the spouse, the ascendants or the descendants are legitimate parties to apply for this protection.

¹ The author and the Permanent Bureau are grateful to Attorney General’s Office of Brazil, Department of Justice of Canada, Department of Treaty and Law of the Ministry of Foreign Affairs of the People’s Republic of China, the European Union, Ministry of Justice of Israel and United States Department of State for kindly providing assistance in the preparation of this Annex.

² “Privacy” is distinct from “private life” in the Brazilian legal system: whilst the former concerns the intimate sphere of a person, the latter means the freedom to live one’s life according to one’s wishes.

³ Art. 5 provides “All persons are equal before the law, without any distinction whatsoever, guaranteeing to Brazilians and foreigners residing in Brazil the inviolability of the right to life, to liberty, to equality, to security and to property, in the following terms: [...] X – the privacy, private life, honor and image of persons are inviolable, being assured the right to compensation for material or moral damages resulting from their violation; XI - the house is inviolable asylum of the individual, nobody in it can enter without the consent of the resident, except in case of flagrante delicto or disaster, or to provide relief, or, during the day, by judicial determination; XII - the secrecy of correspondence and telegraphic communications, data and telephone communications is inviolable, except in the latter case, by judicial order, in the cases and in the form established by law for criminal investigation or criminal procedure.”

⁴ Internalised by Decree 592 of 1992. Art. 17: “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation. 2. Everyone has the right to the protection of the law against such interference of attacks.” Note also the obligations of States, Art. 2: “[...] 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. 3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity [...].”

⁵ Pact of San José, approved in Brazil by Decree 678 of 1992. Art. 11: “1. Everyone has the right to have his honor respected and his dignity recognized. 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. 3. Everyone has the right to the protection of the law against such interference or such offenses.”

⁶ For instance: Slander (Art. 138 of the Criminal Code), defamation (Art. 139 of the Criminal Code), injuria (Art. 140 of the Criminal Code), and certain “cybercrimes” (Law 12.737/2012, “Carolina Dieckmann Act”).

Article 21. The private life of the natural person is inviolable, and the judge, at the request of the interested party, shall take the necessary measures to prevent or terminate the act contrary to this norm.”

4. These provisions are understood to protect not only image and information, but also the data of a person.⁷ A violation of the law by voluntary action or omission, negligence or recklessness or by manifestly exceeding the limits of a right constitutes an unlawful act⁸ for which the perpetrator is liable.

5. The Brazilian Supreme Court has confirmed that freedom of speech and privacy must be balanced, and has held that compensation for a violation of privacy is only granted if abuse is demonstrated. For example, in 2005 a Brazilian court awarded compensation to an actress when a TV network used images of her that exposed her and her child’s intimate life in a comedy programme.⁹ Similarly in 2012 a Brazilian court of appeal ordered the removal of a video as well as payment of compensation by YouTube and Google for airing a sex video of a model and her boyfriend recorded on a public beach that was published on YouTube.¹⁰

6. The Brazilian Internet Civil Rights Framework¹¹ also includes provisions on the protection of internet privacy.¹² A claim can be brought if the data was collected in Brazil and if at least one of the terminals was in Brazil. If a legal entity headquartered outside Brazil spread the information, it is liable if it offers services to the Brazilian public or at least one member of its economic group has an office in Brazil.¹³

Canada

7. Like in other federal legal systems, privacy rights across Canada vary. However, an individual’s right to privacy has received statutory protection in four common law provinces in Canada.¹⁴ In these four provinces, an individual has a valid cause of action against any person who violates his or her right to privacy even if no real damages can be proven. The four statutes also enumerate various facts which, when put in evidence, create a *prima facie* presumption that the tort was committed, such as eavesdropping or the unauthorised use of another person’s documents. They do not, however, provide a definition of privacy; rather, they leave

⁷ Further provisions for the protection of data and information are: Art. 43 of the Consumer’s Protection Code (Federal Law 8.078/1990) concerning the retention of a consumer’s personal information in a supplier’s registry, database or other source; Art. 31 of the Access to Information Act (Federal Law 12.527/2011) concerning the personal information relating to privacy, honor and the image of a person held by public bodies; Positive Credit Registry Law (Law 12.41/2011) concerning the collection of credit information; Brazilian Telecommunications Law (Law 9.472/1997) granting privacy rights to consumers in relation to telecommunication services; Bank Secrecy Law (Complementary Law 105/2011) concerning the financial data held by financial institutions and similar entities.

⁸ Arts 186 and 187 of the Civil Code: “Article 186. A person who, by voluntary action or omission, negligence or recklessness, violates law and causes harm to another, even if exclusively moral, commits an unlawful act. Article 187. The owner of a right which, in exercising it, manifestly exceeds the limits imposed by its economic or social purpose, by good faith or by good customs, also commits an unlawful act.”

⁹ State Court of Rio de Janeiro, Agravo (Appeal) 2005.002.19245.

¹⁰ State Court of São Paulo, Agravo de Instrumento (Appeal) 488.184-4/3, Apelação (Appeal) 556.090.4/4-00.

¹¹ Federal Law 12.965/2014. Internet privacy is included in the fundamental right of privacy as provided by the Constitution of Brazil.

¹² Art. 7 and 11 of the Brazilian Internet Civil Rights Framework provide: Art. 7 - “Access to the internet is essential to the exercise of citizenship, and the user is guaranteed the following rights: I - inviolability of privacy and private life, its protection and compensation for material or moral damage resulting from its violation”; Art. 11 - “In any operation of collection, storage, retention and treating of personal data or communications data by connection providers and internet applications providers where, at least, one of these acts takes place in the national territory, the Brazilian law must be mandatorily respected, including in regard the rights to privacy, to protection of personal data, and to secrecy of private communications and logs.”

¹³ Art. 11 (1) and (2) of the Brazilian Internet Civil Rights Framework: “Paragraph 1. The provisions of the caput apply to data collected in the national territory and to the content of communications, if at least one of the terminals is in Brazil. Paragraph 2. The provisions of the caput apply even if the activities are performed by a legal entity headquartered abroad, if it offers service to the Brazilian public, or at least one member of the same economic group has an establishment in Brazil.”

¹⁴ British Columbia: *Privacy Act*, R.S.B.C. 1996 c. 373; Saskatchewan: *Privacy Act*, R.S.S. 1978, c. P-24; Manitoba: *Privacy Act*, R.S.M. 1987 c.P125; Newfoundland and Labrador: *Privacy Act*, R.S.N. 1990, c.P-22.

that issue to be developed by the courts on a case-by-case basis.

8. In January 2012, the Ontario Court of Appeal in *Jones v. Tsige*,¹⁵ recognised the existence, in the Province of Ontario, of a "tort of intrusion upon seclusion" which it categorised as a subset of the tort of invasion of privacy:¹⁶

"One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person."

9. That case concerned a bank employee who had repeatedly accessed and examined the confidential banking records of her husband's ex-wife without permission. The employee was found liable, despite there being no public disclosure of the relevant information.

10. In January 2016, the Ontario Superior Court of Justice recognised another subset of the tort of invasion of privacy when it awarded damages for the tort of publicly disclosing embarrassing private facts about an individual.¹⁷ In that case, the victim sued the defendant for breach of confidence and intentional infliction of mental distress, and notwithstanding finding in the plaintiff's favour on those claims, Stinson J also held that the defendant was liable to the plaintiff for the new tort of "public disclosure of private facts". The wrong in that case related to the public disclosure of private information rather than the unauthorised access to that private information. Stinson J held that liability to another for invasion of privacy will exist where the matter publicised or the act of the publication would be (i) highly offensive to a reasonable person; and (ii) is not of legitimate concern to the public.

11. The right to privacy has also been enshrined under section 5 of the *Quebec Charter of Human Rights and Freedom*, R.S.Q., c. C-12, which provides for a civil cause of action for moral and material prejudice with such an action being subject to civil law principles of recovery.¹⁸ The right is also guaranteed under sections 3 and 35 to 37 of the *Civil Code of Quebec*. Sections 35 and 36 of the Civil Code provide:¹⁹

"35. Every person has a right to the respect of his reputation and privacy. No one may invade the privacy of a person without the consent of the person unless authorized by law.

36. The following acts, in particular, may be considered as invasions of the privacy of a person: 1) entering or taking anything in his dwelling; 2) intentionally intercepting or using his private communications; 3) appropriating or using his image or voice while he is in private premises; 4) keeping his private life under observation by any means; 5) using his name, image, likeness or voice for a purpose other than the legitimate information of the public; 6) using his correspondence, manuscripts or other personal documents."

12. Section 5 of the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 guarantees the right to privacy in the Province and gives rise to a civil cause of action for moral and material prejudice; such an action is subject to the civil law principles of recovery.²⁰

The People's Republic of China

13. The legal protection of privacy in the People's Republic of China is scattered in a number of laws, regulations, judicial interpretations and others rules.²¹

14. The Constitution of the People's Republic of China provides the basic rights and freedoms for individuals, including the right to dignity, the freedom of person, the right of reputation,

¹⁵ *Op. cit.*, note 72.

¹⁶ *Ibid.*, para. 70. In Nova Scotia, Courts have also recognised that they can award damages for the tort of invasion of privacy or "intrusion upon seclusion": *Doucette v. Nova Scotia*, 2016 NSSC 25, para. 172.

¹⁷ *Jane Doe 464533 v. D. (Jane Doe)* 2016 ONSC 541.

¹⁸ *Aubry v. Éditions Vice-Versa (op. cit., note 42)*.

¹⁹ These rights can be exercised against both the private and the public sectors.

²⁰ *Aubry v. Éditions Vice-Versa (op. cit., note 42)*.

²¹ Y. Chen, "Privacy and Freedom of Information in China – Review through the Lens of Government Accountability", *European Data Protection Law Review*, Vol. 1 (4) 2015, pp. 265, 266-267.

and the freedom of privacy of correspondence.²² This basic right applies except in cases where, to meet the needs of State security or of criminal investigation, public security or procuratorial organs are permitted to censor correspondence in accordance with the procedures prescribed by law.

15. In China, an individual's right to privacy has been confirmed by several laws as a kind of personality right.²³ Both the General Rules of Civil Law (2017)²⁴ and Tort Liability Law (2009)²⁵ expressly recognise the right to privacy. It is said that the right to privacy is related to the protection of private life of a natural person which includes private information, private activities and private space.²⁶ However, while the right to privacy is afforded under these laws, no specific definition of the right to privacy has been provided. The definition and scope of the right is therefore left to the courts for determination. Pursuant to the provisions of the Supreme People's Court of P.R.C, "private life" may have a rather extensive meaning.²⁷ As set out in the provisions, "private life" can be understood as protection against outside interferences in the personal sphere²⁸ and includes information which is irrelevant to public interests and interests of others and which the holder is unwilling to disclose, like biological features, body, health, financial condition, family and social relations, communication, personal history, etc.²⁹ For instance, in a case of internet shaming, a Chinese people's court imposed fines on the defendant and internet providers for failing to remove the information that enabled the plaintiff to be tracked down and harassed.³⁰ Nevertheless, the exact scope of the right to privacy in the People's Republic of China remains unclear, and there is no clear demarcation between the right to know and the right to privacy. It is to note that even some public information can also

²² Art. 40 of the Constitution of the People's Republic of China.

²³ It is to note that the protection of privacy is also provided by criminal law that sanctions the illegal sale or provision of personal data. Art. 253(a) of the Criminal Code of the People's Republic of China: "Where any staff member of a state organ or an entity in such a field as finance, telecommunications, transportation, education or medical treatment, in violation of the state provisions, sells or illegally provides personal information on citizens, which is obtained during the organ's or entity's performance of duties or provision of services, to others shall, if the circumstances are serious, be sentenced to fixed-term imprisonment not more than three years or criminal detention, and/or be fined. Whoever illegally obtains the aforesaid information by stealing or any other means shall, if the circumstances are serious, be punished under the preceding paragraph. Where any entity commits either of the crimes as described in the preceding two paragraphs, it shall be fined, and the direct liable person in charge and other directly liable persons shall be punished under the applicable paragraph."

²⁴ Art. 110(1).

²⁵ Art. 2(2): "Tort liability shall be assumed according to this Law for any infringement of civil rights. For the purpose of this Law, "civil rights and interests" refer to personal and property rights, including, inter alia, the right to life, right to health, right of name, right of reputation, right of honor, right to one's own image, right to privacy, autonomy in marriage, guardianship, ownership, usufruct, security interest in property, copyright, patent, right to exclusive use of trademarks, right of discovery, equity interest and right of inheritance."

²⁶ Y. Chen (*op. cit.*, note 21 of the Annex), p. 266.

²⁷ See for instance the Interpretation of the Supreme People's Court on Certain Issues concerning Determination of Liability for Compensation for Spiritual Damage Arising from Civil Torts:

Art. 1 "Where a natural person files an action with a people's court claiming compensation for mental distress due to illegal infringement of any of the following rights of personality, the people's court shall accept the action in accordance with the law: [...]; (2) rights to the name of a person, right to image, rights to reputation, or right of honor; or (3) right of personal dignity or right of personal freedom. When there is violation of social public interests or social morality causing infringement of a person's privacy or any other interest in personality, and the victim files a tort action with a people's court claiming compensation for mental distress, the people's court shall accept the case in accordance with the law."

Art. 3: "When a close relative of a deceased natural person files an action with a people's court claiming compensation for mental distress due to any of the following acts of infringement, the people's court shall accept the action in accordance with the law: (1) infringement of the name, image, reputation, or honor of the deceased by insulting, libeling, disparaging, vilifying, or by any other means contrary to the social public interests or social morality; (2) infringement of the privacy of the deceased person by illegal disclosure or use of the privacy of the deceased person or any other means contrary to the social public interests or social morality; and [...]."

²⁸ As opposed to the right to personal information, which includes the active rights to access and correct information, and which covers all information that can identify an individual; Y. Chen (*op. cit.*, note 21 of the Annex), p. 267.

²⁹ *Ibid.*, pp. 266-267.

³⁰ *Wang Fei v. Zhang Leyi, Daqi.com and Tianya.com*: After the plaintiff's wife had committed suicide due to an extramarital affair of the plaintiff, the defendant, a friend of the plaintiff's late wife started an internet shaming campaign that lead to the plaintiff being tracked down and harassed.

be considered private matters, such as criminal records.³¹

16. A more established long-standing right in China is the right to reputation, which is commonly associated by courts and individuals with “privacy”.³² Since 1988, the Supreme People’s Court has considered any form of disclosure of private information as a potential infringement of the right to reputation.³³ In the case of *Qi Yuling v. Chen Xiaoqi*, where the defendant had stolen the plaintiff’s identity in order to apply for higher education, the Supreme People’s Court ruled that the plaintiff’s constitutional rights to education, name, identity and reputation were violated.³⁴

European law

17. In European law, the concept of privacy refers to the protection of the private life of a person. Both the ECHR and the EU Charter of Fundamental Rights (the “Charter”) expressly recognise the right to privacy.³⁵ Article 8 of the ECHR states that “everyone has the right to respect for his private and family life, his home, and his correspondence”. Privacy is thus connected with matters that relate to the protection of an individual’s “personal space” being private,³⁶ such as “private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection against misuse of private communications, protection from disclosure of information given or received by the individual confidentially”.³⁷ However, it should be noted that Article 8 of the ECHR also concerns matters other than violations of privacy. It should also be noted that this right is limited under Article 8(2) of the ECHR which provides that:

“[t]here shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

18. Both the ECtHR and the CJEU tend to give the term “private life” a rather expansive definition.³⁸ However, the right to private life under Article 8 is often balanced against other rights under the ECHR, such as the Article 10 right to freedom of expression. In this regard, the ECtHR has made some important decisions reflecting the delicate balance between the right to privacy and other rights and interests to be found in the ECHR.

19. For example in the 2004 decision of *Von Hannover v. Germany*³⁹ the ECtHR held that

³¹ Art. 12 of the Provisions of the Supreme People’s Court on Certain Issues Concerning the Application of Law in the Hearing of Cases of Civil Disputes over the Use of Information Networks to Infringe upon Personal Rights and Interests 2014: “Where a network user or a network service provider causes harm to a natural person by using the Internet to make public the natural person’s genetic information, medical records, health examination data, criminal records, home address, personal activities or other personal privacy and personal information, [...] the network user or network service provider shall bear tort liabilities, except under any of the following circumstances [...]” (emphasis added).

³² P. Hert (de) and V. Papakonstantinou, *The data protection regime in China – In-Depth Analysis*, Document requested by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament, 2015, p. 18.

³³ *Ibid.*, pp. 17-18. See also Y. Chen (*op. cit.*, note 21 of the Annex), p. 266.

³⁴ It should be noted that at the time when the judgement was delivered (in 2001), constitutional rights were not justifiable on the basis of civil liability. The Supreme People’s Court withdrew its opinion, stating that it was no longer applicable, a few years later.

³⁵ B. Hess, *The Protection of Privacy in the Case Law of the CJEU*, in B. Hess and C.M. Mariottini (eds), *Protecting Privacy in Private International and Procedural Law and by Data Protection: European and American Developments*, Baden-Baden, Nomos, 2015, p. 83.

³⁶ *Ibid.*, p. 83; see also, Kuner, “An International Legal Framework for Data Protection: Issues and Prospects”, *Computer & Security Review*, Vol. 25, 2009, pp. 307-317, available at the following address: < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443802 > (last consulted on 26 October 2017).

³⁷ Parliamentary Assembly of the Council of Europe, *Declaration on mass communication media and Human Rights*, Resolution 428 (1970), para. C. 16.

³⁸ J. Kokott and C. Sobotta, “The Distinction between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR”, *International Data Privacy Law*, 2013, pp. 222, 223.

³⁹ *Op. cit.*, note 34.

protections under German law of the right to private life for public figures were not sufficiently stringent. The case concerned the publication in a German newspaper of photographs taken of Princess Caroline von Hannover and her children in a restaurant garden and other public places. The German Federal Constitutional court considered that the protection of the private life of a public figure did not require that the publication of photos be limited to photographs showing that person engaged in their official duties. Rather the German newspaper was entitled to publish pictures of public figures engaged in activities in public, as the public had a legitimate interest in knowing how public figures behave in public places. However, it is also important to consider the circumstances in which the photos are taken (e.g., secretly or in protected environments).⁴⁰ On application to the ECtHR, it was held that in balancing the right to privacy against the right to freedom of expression, the decisive factor was the contribution the photos made to a debate of general interest. The ECtHR held that the photos made no such contribution. In coming to its determination, the ECtHR held that the protection afforded under Article 8 of the ECHR extends to aspects relating to a person's identity such as a person's name or picture and includes a person's "*physical and psychological*" integrity.⁴¹ The Court also noted that "increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce personal data".⁴² While in *Axel Springer v. Germany*,⁴³ another decision of the Grand Chamber, it was held that a German actor should not have been granted an injunction against a newspaper preventing the publication of photographs about the actor's arrest for possession of cocaine.

20. These judgments, which reflect the fine balance between the right to privacy and the right to freedom of expression, are used as guidance in national courts when they interpret the ECHR. However, under the ECHR, these rights have been afforded what in Europe has been called a "margin of appreciation" with which to enforce the right to privacy.⁴⁴ For that reason, the right to privacy has been interpreted differently across Europe.

21. In France for example, the right to privacy is guaranteed by the general principles of civil liability as set forth in Article 9 of the Civil Code.⁴⁵ The first sentence of Article 9 of the Civil Code state that "everyone has the right to respect for his or her private life". The mere statement of a violation of privacy gives in principle right to compensation without needing to prove a fault and a causal link pursuant to Article 1250 of the Civil Code. The second sentence of Article 9 provides that the courts can make interlocutory orders directing that whatever steps may be necessary can be taken to put a stop to violation of the right to privacy. France is one of the more protective legal systems when it comes to the right to privacy, and the right has been applied in an expansive manner to cover acts in both private and public places. For example, in the 2001 *Nikon case*⁴⁶ the French Cour de cassation ruled that a worker's right to respect for his private life includes the right to secrecy of correspondence in the workplace during work hours.⁴⁷ However, the Chambre social of the Cour de cassation has refined its interpretation, so that the e-mails or text messages sent or received by an employee using the computer or cell phone provided by the employer for work purposes are presumed to be of a professional nature unless they are identified or marked as personal. Therefore, where the messages do not have a distinctive sign, the employer is authorized to open them without the presence of the employee and the proof so obtained is lawful in the meaning of Article 9 of the CCcivil code.⁴⁸

22. Moreover, consistent with the approach under the ECHR, French law also recognises a right to freedom of expression under Article 11 of the Declaration of the Rights of Man and of Citizens. In a similar vein to other jurisdictions, when weighing up these competing rights, courts will have regard to the public interest debate, notoriety of the claimant and their

⁴⁰ BVerfG 1 BvR 653/96, 15 December 1999.

⁴¹ *Op. cit.*, note 34, para. 50.

⁴² *Ibid.*, para. 70.

⁴³ *Axel Springer v. Germany* (No 39954/08) [2012] ECHR 227, (2012) 55 EHRR 6 (GC).

⁴⁴ S. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Strasbourg, Council of Europe Publishing, 2000, p. 5.

⁴⁵ Introduced by the Law of 17 July 1970.

⁴⁶ Cour de Cassation, Chambre sociale, 2 October 2001, No 99-42.942.

⁴⁷ This landmark decision in France followed the decision of the ECtHR in *Niemietz v. Germany* (No 13710/88) [1992] ECHR 80, in which it was held that the right to private life includes activities of a professional or business nature.

⁴⁸ Cour de Cassation, Chambre sociale, 18 October 2011, No 10-26.782.

behaviour, the way the information has been obtained and its factual accuracy and the content, form and consequence of the publication of the information. The civil law protection of privacy is guaranteed by general tort law and requires proof of misconduct, damages and a causal link between the two.⁴⁹ The damages awarded in the context of civil claims depends on the extent of the harm suffered by the claimant and can take many different monetary and non-monetary forms.

23. In the landmark 2003 case of *Godard*⁵⁰ the French Cour de cassation held that neither right takes precedence over the other and that the judge must balance the interests of each party on a case-by-case basis to find a solution that protects the most legitimate interest. In its judgment dated 30 September 2015, the Cour de cassation restated this principle: “[T]he right to a private life...and the right to freedom of expression [...] have the same normative value [...] [and] it is for the court to strike a balance between those rights and, where appropriate, to give preference to the solution that protects the most legitimate interest.”⁵¹ In doing so, the judge must consider whether the information is: trivial or significant; already in the public domain; and, most importantly, whether the information is “legitimate,” *i.e.*, the public have a right to know about it. In practice, French judges have interpreted the public interest criterion narrowly and therefore the right to privacy generally trumps freedom of expression.

24. In England, traditionally, and as recently as in the 1990s, the courts did not recognise a right to privacy. In the 1991 decision in *Kaye v. Robertson*⁵² the English Court of Appeal held that “[...] in English law there is no right to privacy, and accordingly there is no right of action for breach of a person’s privacy.”⁵³ The right to privacy was then developed by expanding the doctrine of breach of confidence and by the introduction of the Human Rights Act 1998, which incorporated the provisions of the ECHR into English law. Under section 6 of the Human Rights Act, it is unlawful for a public authority to act in a way that is incompatible with a Convention right. Claims regarding the disclosure of private information are now brought in England under the law of misuse or wrongful dissemination of private information and involve a mixture of private law and human rights.⁵⁴ It should be noted, however, that like the ECHR, the Human Rights Act requires the court to balance the right to privacy with other fundamental rights, such as the right to freedom of expression. This is illustrated in the 2004 decision of the House of Lords in *Campbell v. MGN Ltd*⁵⁵ in which Lord Hope for the majority held:⁵⁶

⁴⁹ R. Errera, “On the origins and content of Article 9 of the Civil Code on the Right to Privacy”, *Privacy in an open society*, Franco-British Lawyers Society, London, 22-23 September 2011, available at the following address: < http://www.rogererrera.fr/liberte_expression/docs/Article_9.pdf > (last consulted on 26 October 2017).

⁵⁰ Cour de Cassation, Chambre Civile 1, 9 July 2003. In this case, a supplement of the national newspaper “Le Figaro” published a four part series chronicling the disappearance of a doctor, his second wife and their two children. Two other children from the wife’s first marriage applied to the court of Caen, claiming that the author’s references to their family situation in the first edition violated their right to a private life. The court agreed and placed an injunction on the publication of the three remaining parts. On appeal, the Cour de cassation upheld this decision and considered the “legitimate” need to inform the public, adding that the writer’s job was not to inform but to entertain. The court did not consider the author as a journalist in this respect and so she was under a greater obligation to respect the right to a private life.

⁵¹ *Op. cit.*, note 21.

⁵² [1991] FSR 62. The case concerned the actor Gorden Kaye, who, following an accident, was suffering from a brain injury and was hospitalised. Journalists gained access to his room and sought to publish photographs and an interview with him in a tabloid newspaper. The Court of Appeal recognised that all the court could offer was an injunction under the law of malicious falsehood prohibiting the newspaper from implying that Kaye had consented to the photographs and the interview as there was no general right to privacy under English law.

⁵³ *Ibid.*, per Glidewell LJ, p. 66. Similarly, Bingham LJ held: “[t]he case...highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens”, p. 70.

⁵⁴ K. Hughes and N.M. Richards, “The Atlantic Divide on Privacy and Free Speech”, in A.T. Kenyon, *Comparative Defamation and Privacy Law*, Cambridge, Cambridge University Press, 2016, p. 176.

⁵⁵ *Op. cit.*, note 47. This case concerned photographs published in the Daily Mirror, a publication of MGN, of a well-known English model, leaving a rehabilitation clinic, following public denials that she was a recovering drug addict. The claimant brought a claim for breach of confidence, engaging section 6 of the Human Rights Act. The House of Lords held that MGN were liable and that her right to privacy outweighed the right to freedom of expression.

⁵⁶ *Ibid.* In doing so, Lord Hope relied upon the decision of Lord Woolf in *A v. B Inc* [2003] QB 195 at para. 11(ix) and (x) that “[a] duty of confidence will arise whenever a party subject to the duty is in a situation

"[i]f there is an intrusion in a situation where a person can reasonably expect his privacy to be respected, that intrusion will be capable of giving rise to liability unless the intrusion can be justified... [A] duty of confidence arises when confidential information comes to the knowledge of a person where he has notice that the information is confidential."

25. As a consequence, the English approach appears to be fact-sensitive. For now, the courts have indicated that the reasonable expectation of the right to privacy is broad and dependent upon all of the circumstances of the case. The courts are required to have regard to "the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher."⁵⁷

26. As can be seen from these two examples, the development and recognition of the right to privacy varies in Europe, but is heavily dependent upon a balancing of the right to privacy and other fundamental rights encapsulated in the ECHR, which is a question of judgment and applied differently in different jurisdictions.

Israel

27. In Israel, the right to privacy is a fundamental right. Article 7 of the Basic Law: Human Dignity and Liberty, a quasi-constitutional law of the country provides:

"(a) All persons have the right to privacy and to intimacy (b) There shall be no entry into the private premises of a person who has not consented thereto (c) No search shall be conducted on the private premises of a person, nor in the body or personal effects (d) There shall be no violation of the confidentiality of conversation, or of the writings or records of a person."⁵⁸

28. The privacy right is, like other constitutional rights in Israel, qualified by a "limitation clause" in Article 8 of the Basic Law, which requires that any law infringing upon the right to privacy must benefit the values of the State of Israel, be for a proper purpose, and not violate the right to a greater extent than is required. The Israeli Supreme Court has developed various tests to assess whether the purported violation complies with the limitation clause.

29. The right to privacy is also protected under the PPL.⁵⁹ Chapter I of the PPL lays down the framework for actionable civil torts (and in some cases, criminal offenses) for the invasion of privacy.⁶⁰ In the PPL, infringements of privacy that could be the subject of a civil judgment might relate to the following matters:⁶¹

- spying on or trailing a person in a manner likely to harass him/her, or any other harassment;
- wiretapping a person, where such wiretapping is prohibited by law;
- photographing a person while he/she is in the private domain;
- publishing a person's photograph under such circumstances that the publication is likely to cause humiliation;
- publishing a person's photograph showing that person's injury at the time the injury is sustained, where such injury is caused by a sudden occurrence, to the extent that the person can be identified and the publication is likely to embarrass him/her (subject to certain exceptions);

where he either knows or ought to know that the other person can reasonably expect his privacy to be protected."

⁵⁷ *Murray v. Big Pictures (UK) Ltd* [2008] 3 WLR 1360, para. 36.

⁵⁸ Basic Law: Human Dignity and Liberty, unofficial translation (later amendments are not reflected) is available at the following address: < http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm > (last consulted on 26 October 2017).

⁵⁹ Protection of Privacy Law (*op. cit.*, para. 32). The Act applies to privacy-related subject matters, including civil and criminal responsibilities, and administrative regulations are promulgated under the PPL.

⁶⁰ Section 1 of the PPL provides: "No person shall infringe the privacy of another without his consent."

⁶¹ Section 2 of the PPL. This is non-exhaustive list and unofficial translation of the types of privacy claims in Israel.

- copying or using, without permission from the addressee or writer, the contents of a letter or any other writing (including an electronic message) not intended for publication, unless the writing is of historical value or fifteen years have passed since the time of writing.
- using a person's name, appellation, picture or voice for profit;
- infringing a duty of secrecy laid down by law in respect of a person's private affairs;
- infringing a duty of secrecy laid down by express or implicit agreement in respect of a person's private affairs;
- using, or passing on to a third party, information on a person's private affairs other than for the purpose for which it was given;
- publishing or delivering anything obtained in violation of paragraphs (1) to (8) or (10);
- publishing any matter relating to a person's personal life, including his/her sexual history, state of health or conduct in the private domain."

30. Some notable cases that illustrate the manner in which this provision is applied are as follows. In *I.D.I. Insurance Company Ltd. v. Ministry of Justice (the Israeli Law Information and Technology Authority – the Registrar of Databases)*⁶² the court issued an injunction prohibiting an insurance company from using the information it possessed about a person, which it had obtained by virtue of holding an attachment order on that person's assets, for the purpose of appraising that person's insurability. The case highlighted the "purpose limitation", according to which data collected for one purpose may not be used for another purpose. *New Workers' General Federation v. the Kalansawa Municipality*⁶³ was a case involving an employer's collection of biometric information of an employee without the employee's consent, which the court held was in violation of the employee's right to privacy.

31. Finally, in *Ploni v. Plonit*⁶⁴ the Supreme Court of Israel considered a case concerning the balance between the right to free speech and freedom to create and the right to privacy and good name. The case involved the publication of a book that was marketed as a fictional novel detailing a romance between a man and woman, but in fact contained intimate information about an individual, including such things as a description of her appearance, body, likes and dislikes, character and weaknesses. The court ordered an injunction prohibiting publication of the book, finding that the power of freedom of expression will not weigh more heavily than an individual's right to privacy unless there is only a slight or moderate infringement of an individual's privacy rights.⁶⁵

32. Judgments with respect to such privacy violations might come in the form of orders to pay monetary damages, damages without the need to prove injury, punitive damages (in certain limited cases) and/or injunctions.

United States of America

33. In the United States, the right to privacy is not explicitly mentioned in the United States Constitution, but the concept of privacy is recognised in the First,⁶⁶ Third,⁶⁷ Fourth,⁶⁸ Fifth,⁶⁹ Ninth⁷⁰ and Fourteenth Amendments,⁷¹ with the Fourth Amendment providing the right to be secure in their persons, houses and papers.⁷²

34. Moreover, the right to privacy enjoys varying measures of protection in tort law in almost

⁶² Administrative Petition (Tel Aviv District) 24867-02-11.

⁶³ Collective Dispute Appeal 7541-04-14.

⁶⁴ Civil Appeal 8954/11.

⁶⁵ *Ibid.*, para. 161.

⁶⁶ First amendment protects privacy of beliefs.

⁶⁷ Third amendment protects privacy of the home against its use for housing soldiers.

⁶⁸ Fourth amendment protects privacy against unreasonable searches.

⁶⁹ Fifth amendment protects the privacy of personal information by protecting against self-incrimination.

⁷⁰ Ninth amendment has been interpreted as justification for broadly reading the Bill of Rights to protect privacy in ways not specifically provided in the first eight amendments.

⁷¹ Fourteenth amendment's liberty clause has been broadly interpreted as guaranteeing a right of privacy in certain affairs. Specifically, marriage, child rearing, procreation, and termination of medical treatment.

⁷² "Fourth Amendment: Search and Seizure" in K.R. Thomas and L.M. Eig (eds), *The Constitution of the United States of America – Analysis and Interpretation*, Centennial Edition, Interim Edition: Analysis of cases decided by the Supreme Court of the United States to July 1, 2014, Washington, U.S. Government Printing Office, 2014, p. 1369, available at the following address: < <https://www.gpo.gov/fdsys/pkg/GPO-CONAN-REV-2014/pdf/GPO-CONAN-REV-2014-10-5.pdf> > (last consulted on 26 October 2017).

all US states.⁷³ The right to privacy in the United States finds its origins in Warren and Brandeis' 1890 Harvard Law Review article "The Right to Privacy", in which it was submitted that a right to privacy could be inferred from existing common law cases and principles.⁷⁴ Following the publication of this article, there were a number of state decisions recognising the right to privacy. This culminated in the publication of a 1960 article *Privacy*,⁷⁵ which surveyed American case law and found that the United States recognised four categories of the privacy torts that were ultimately incorporated in the *Second Restatement of the Law, Torts*,⁷⁶ which provides the following as categories of privacy torts:⁷⁷

- "1 One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person;
- 2 One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy;
- 3 One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public;
- 4 One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."

35. These categories have been considered to be overly broad and it has been suggested that they cover matters outside the realm of a privacy tort in the United States. In particular, the fourth category of rights – publicity which places a person in the public eye in a false light – appears to sit more closely with a claim for defamation.⁷⁸ The other three categories of torts, however, *i.e.*, intrusion, right to personality and the public disclosure of private facts that would be highly offensive to a reasonable person and not of legitimate public concern, are considered more in line with privacy torts.

36. The intrusion tort is primarily concerned with the manner in which the private information is obtained, as opposed to its subsequent use.⁷⁹ This includes such methods as phone-tapping, video surveillance, photography and unlawful searches. The success of a claim depends on such things as the location of the infringement and means of the infringement. In *Dietemann v. Time Inc.*,⁸⁰ the United States Court of Appeals for the Ninth Circuit held that under California law actionable intrusions can occur in the "precincts of another's home or office."⁸¹ However, this

⁷³ See, H. Delany and E. Carolan, "Privacy Torts: A comparative review", in *The Right to Privacy*, Ireland, Round Hall Press, 2008, p. 94.

⁷⁴ S.D. Warren and L. D. Brandeis, "The Right to Privacy", *Harvard Law Review*, Vol. 4 (5) 1890, p. 193.

⁷⁵ W.L. Prosser, "Privacy", *California Law Review*, Vol. 48 (3) 1960, p. 383.

⁷⁶ The *Restatements of the Law* are expositions on the law on specific subjects (based on court decisions) published by the American Law Institute.

⁷⁷ *Restatement of the Law, 2nd, Torts 1977* (US) §§ 652B, 652C, 652D, 652E.

⁷⁸ H. Delany and E. Carolan (*op. cit.*, note 73 of the Annex), p. 94.

⁷⁹ This tort has been codified in section 1708.8(b) of the California Civil Code, which has been in force since 1998, has been amended in 2015 and provides for liability where the defendant "attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal or familial activity, through the use of any device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used."

⁸⁰ 449F.2d 245 (1971). A case concerning the liability of two journalists from Time Magazine posing as doctors in order to enter the home of a retired veteran who was using clay, minerals and herbs to heal people. The journalists used a hidden tape recorder to record their conversation with the plaintiff and took pictures with a hidden camera. The Court found in favour of Dietemann on the basis that "his den" is an "expected place of solitude" and "the First Amendment gives the media no right to break the law with impunity, even if legitimate news is being pursued".

⁸¹ *Ibid.*, p. 249. See further, Allan E. Wilton, "The Invasion of Privacy by Intrusion: Dietemann v. Time, Inc.", *Loyola of Los Angeles Law Review*, Vol. 6 (1) 1973, p. 200. Similarly, in *Sanders v. American Broadcasting Co.*, 20 Cal 4th 907 (1999), the Supreme Court considered the liability of a reporter that went undercover in a company as a psychic telephone advisor and videotaped interactions with an employee of the

does not extend to intrusion where the relevant action occurred in a public place.⁸² The courts have also had regard to the relative culpability of the defendant's conduct and the extent of the plaintiff's knowledge.⁸³

37. As concerns the tort of the disclosure of private information, the hurdle for such a claim is relatively high. Put simply, the disclosure of private information will only be deemed to have occurred where the information is distributed to the public at large, as opposed to a select portion of the population and the information must be private in the sense of being publicly "unknown" before it was publicly disseminated. For that reason, information which is part of the public record is not considered private information. Moreover, the disclosure of information concerning activities occurring in public places is generally not considered to be a disclosure of private information; this is regardless of the personal nature of the material disclosed.⁸⁴ Public figures are generally afforded a low level of protection regardless of whether the person voluntarily sought a life in the public eye.⁸⁵

38. The appropriation of name or likeness (also known in the United States and other jurisdictions as the right of publicity), category two above, refers to the violation of a common law right where the defendant has used the plaintiff's identity to the defendant's advantage, commercially or otherwise, without consent and that use or appropriation has resulted in damage.⁸⁶ However, what is required is more than the mere incidental commercial use of a person's name or photograph, it must be a "meaningful or purposeful" commercial use of the name or photograph.⁸⁷ A person's name or photograph must be used in a way that takes advantage of his reputation, prestige, or other value associated with him, for purposes of publicity.⁸⁸ Moreover, it has been held that there must be more than "merely suggesting certain characteristics of the plaintiff, without literally using his or her name, portrait or picture". Otherwise this is not actionable.⁸⁹

39. The privacy torts, however, are required to be balanced against the constitutionally entrenched right to free press which is guaranteed under the First Amendment to the Constitution. The approach adopted by courts is to measure the tortious interest of preventing emotional harm against the overriding constitutional freedom of the press to ensure that "the debate on public issues should be uninhibited, robust, and wide-open".⁹⁰

company, who sued the reporter and her employer for invasion of privacy. The California Court of Appeal held that "*Privacy, for the purposes of the intrusion tort, is not a binary, all-or-nothing characteristic...The mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone*" (para. 70).

⁸² *Shulman v. Group W Productions Inc.* (*op. cit.*, note 38).

⁸³ See for example *Detorsa v. American Broadcast Co In* 121 F 3d 460 (1997).

⁸⁴ H. Delany and E. Carolan (*op. cit.*, note 73 of the Annex), p. 101.

⁸⁵ *Ibid.*

⁸⁶ *Abdul-Jabbar v. GMC*, 85 F.3d 407 (9th Cir. Cal. 1996).

⁸⁷ *Moglen v. Varsity Pajamas, Inc.*, 13 A.D.2d 114 (N.Y. App. Div. 1st Dept 1961).

⁸⁸ *Id.*

⁸⁹ *Wojtowicz v. Delacorte Press*, 43 N.Y.2d 858, 374 N.E.2d 129, 403 N.Y.S.2d 218 and *Allen v. National Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985).

⁹⁰ *New York Times v. Sullivan* 376, US 254, (1964) p. 376. This was a defamation case rather than a privacy case, but its central principles have been said to apply to privacy torts: see for example, K. Hughes and N.M. Richards (*op. cit.*, note 54 of the Annex), p. 171.